

# SUPREME COURT COPY

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SUPREME COURT OF THE STATE OF CALIFORNIA **SUPREME COURT FILED**

OCT - 5 2007

PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff and Respondent, )  
 )  
 v. )  
 )  
 VERONICA UTILIA GONZALES, )  
 )  
 Defendant and Appellant. )  
 \_\_\_\_\_ )

S072316 **Frederick K. Ohlrich Clerk**  
 )  
 ) (San Diego County  
 ) Number SCD 114421)

## APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Honorable Michael D. Wellington, Trial Judge

### APPELLANT'S OPENING BRIEF

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## TABLE OF AUTHORITIES (continued)

### TABLE OF CONTENTS

|   | <b>Page</b> |
|---|-------------|
| WORD COUNT CERTIFICATION (Rule 8.630 (b)(2))  | 1           |
| STATEMENT OF THE CASE   | 1           |
| STATEMENT OF THE FACTS  | 4           |
| A.    Guilt Phase Evidence  | 4           |
| 1.    Introduction  | 4           |
| 2.    Expert Testimony Regarding Battered Spouse Syndrome   | 11          |
| 3.    Veronica Gonzales' Childhood  | 19          |
| 4.    Ivan and Veronica Gonzales Meet, Marry, and Raise a Family  | 27          |
| 5.    Genny Rojas Comes to Live with Ivan and Veronica Gonzales   | 45          |
| 6.    Ivan Gonzales Begins to Abuse Genny Rojas   | 50          |
| 7.    The Death of Genny Rojas  | 56          |
| a.    Events Leading up to the Death of Genny Rojas   | 56          |
| b.    Events Immediately After Genny Rojas' Death   | 65          |
| b.    Expert Testimony About the Death  | 72          |
| 8.    Veronica Gonzales' Statements to the Police   | 85          |
| a.    The July 22, 1995 Interview   | 85          |
| b.    The July 24, 1995 Interview   | 101         |
| c.    Veronica Gonzales' Comments at Trial Regarding Her Statements to the Police and to Expert Witnesses | 116         |

## TABLE OF CONTENTS (continued)

|   | Page |
|---|------|
| d. The Effects of Methamphetamine   | 119  |
| e. Other Expert Testimony about Veronica Gonzales' Statements to the Police         | 121  |
| 9. The Various Statements of Ivan Gonzales, Jr.                                     | 125  |
| a. Procedural Background  | 125  |
| b. The July 22, 1995 Police Interview of Ivan Gonzales, Jr.                         | 129  |
| b. The July 23, 1995 Police Interview of Ivan Gonzales, Jr.                         | 131  |
| c. Statements to Social Worker, Approximately July 24, 1995                         | 133  |
| d. The July 26, 1995 Police Interview of Ivan Gonzales, Jr.                         | 134  |
| e. The October 25, 1995 Police Interview of Ivan Gonzales, Jr.                      | 138  |
| f. The November 8, 1995 Preliminary Examination Testimony by Ivan Gonzales, Jr.     | 142  |
| g. Problems of Suggestivity and Contamination in Interviews of Children             | 146  |
| 10. Events Subsequent to the Arrest and Veronica Gonzales' Statements to the Police | 155  |
| a. Police Investigation   | 155  |
| b. Veronica Gonzales' Post-Arrest Developments                                      | 157  |
| c. Expert Testimony about Veronica Gonzales   | 158  |
| B. Penalty Phase Evidence   | 172  |

## TABLE OF CONTENTS (continued)

|  | Page |
|--|------|
| 1. Evidence in Aggravation   | 172  |
| 2. Evidence in Mitigation  | 172  |
| a. Veronica Gonzales' Behavior While Incarcerated in the San Diego County Jail and Her Post-Arrest Contacts with Her Children  | 172  |
| b. The Impact of a Death Sentence on the Mental Health of Veronica Gonzales' Children  | 178  |
| c. Friends and Family Members Comments about Veronica Gonzales   | 180  |
| 3. The Prosecutor Used a Distorted Form of "Victim Impact" Evidence, Brought out in Cross-Examination, to Unfairly Denigrate Defense Witnesses Who Were Relatives of the Victim  | 183  |
| 1. THROUGH A VARIETY OF INSTANCES OF PROSECUTORIAL MISCONDUCT, IMPROPERLY ADMITTED EVIDENCE, AND MISUSE OF OTHERWISE PROPER EVIDENCE, THE PROSECUTOR FALSELY INSINUATED THAT VERONICA GONZALES AND HER SEPARATELY TRIED CO-DEFENDANT AGREED THAT EACH WOULD BLAME THE OTHER FOR THE CRIME CHARGED AGAINST THEM   | 185  |
| A. Introduction  | 185  |
| B. Factual and Procedural Background   | 190  |
| C. The Prosecutor Committed Intentional Misconduct in Questioning Veronica Gonzales about Any Hearsay Knowledge She Might Have of Ivan Gonzales' Defense, and in Strongly Insinuating Facts He Knew Were Untrue, Continuing After the Trial Court Repeatedly Sustained Defense Objections, and the Trial Court Then Erred in Failing to Grant a Mistrial or Any Other Meaningful Relief, All Resulting in Irreparable Prejudice to Veronica Gonzales | 229  |

## TABLE OF CONTENTS (continued)

|  | <b>Page</b> |
|--|-------------|
| D. The Harm from the Improper Questions Regarding the Defense Used by Ivan Gonzales Was Seriously Exacerbated by Additional Misconduct and by Erroneous Trial Court Rulings Allowing the Prosecutor to Elicit Evidence that Two Experts Reached Different Conclusions as to Whether Ivan Gonzales Was a Battered Spouse  | 252         |
| E. A Series of Errors Occurred in Ordering Veronica Gonzales to Submit to Interviews By Prosecution Experts, and in Allowing Dr. Mills to Present What Amounted to Improper Profile Evidence   | 275         |
| 1. It was Error to Order Veronica Gonzales to Submit to Any Interviews By Prosecution Experts  | 275         |
| 2. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to an Interview by a Prosecution Expert, It Was Improper to Order Her to Submit to Interviews by More than One Such Expert, to Instruct the Jury That Adverse Inferences Could Be Drawn as a Result of Veronica Gonzales' Refusal to Submit to One of Those Interviews, and to Preclude Veronica Gonzales from Explaining Her Reasons for the Refusal | 286         |
| 3. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to Interviews by Prosecution Experts, It Was Improper to Permit Dr. Mills to Be One of Those Experts, Over Defense Objection  | 291         |
| 4. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to an Interview by Dr. Mills, It Was Error to Allow Dr. Mills to Testify to What Amounted to Improper Profile Evidence and Tell the Jury What to Believe, Using the Guise of Expert Testimony   | 294         |

**TABLE OF CONTENTS (continued)**

|   | <b>Page</b> |
|---|-------------|
| F. The Trial Court Erred in Precluding the Defense from Eliciting Evidence Regarding Statements Against Interest Made by Ivan Gonzales, Especially Since the Statements Were Also Offered for Legitimate Non-Hearsay Purposes   | 308         |
| G. The Errors Set Forth Above, Either Alone or in Combination, Must be Deemed Prejudicial   | 315         |
| II. THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO USE VERONICA GONZALES' HISTORY OF BEING ABUSED AS A CHILD AS PROOF THAT SHE WAS MORE LIKELY THAN IVAN GONZALES TO HAVE PERPETRATED THE ABUSE AGAINST GENNY ROJAS, AND COMPOUNDED THE ERROR BY DISALLOWING PROPER DEFENSE IMPEACHMENT  | 318         |
| A. Factual and Procedural Background  | 318         |
| B. It Was Improper to Allow the Prosecution to Use Evidence that Veronica Gonzales Was A Victim of Physical and Sexual Abuse as a Child in Order to Prove that It Was More Likely That She, Rather than Ivan Gonzales, Was Responsible for the Injuries to Genny Rojas  | 331         |
| C. Once the Court Did Decide to Allow the Prosecution to Use Evidence that Veronica Gonzales Was A Victim of Physical and Sexual Abuse as a Child in Order to Prove that It Was More Likely That She, Rather than Ivan Gonzales, Was Responsible for the Injuries to Genny Rojas, It Was Improper to Preclude the Defense from Eliciting Evidence that Ivan Gonzales Also Suffered Abuse as a Child | 337         |
| III. THE JURY INSTRUCTIONS ON THE REQUIRED MENTAL STATES FOR THE TORTURE/MURDER THEORY OF FIRST DEGREE MURDER, THE MAYHEM FELONY/MURDER THEORY OF FIRST DEGREE MURDER, AND THE RELATED SPECIAL CIRCUMSTANCES WERE INCOMPREHENSIBLE  | 345         |

## TABLE OF CONTENTS (continued)

|  | Page |
|--|------|
| IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TORTURE/MURDER THEORY OF FIRST DEGREE MURDER, OR THE MAYHEM FELONY/MURDER THEORY OF FIRST DEGREE MURDER, OR TO SUPPORT THE TORTURE/ MURDER OR MAYHEM/MURDER SPECIAL CIRCUMSTANCES | 369  |
| A. First Degree Felony-Murder (Mayhem)   | 369  |
| B. First Degree Torture Murder   | 375  |
| C. Mayhem Special Circumstance   | 384  |
| D. Torture Special Circumstance  | 384  |
| E. Aid and Abet Theories   | 388  |
| F. Conclusion  | 389  |
| V. EVEN IF GUILT AND THE REQUISITE MENTAL STATES WERE PROVED, ANY CONVICTION FOR MURDER BASED ON FELONY-MURDER VIOLATED THE MERGER PRINCIPLE OF <i>PEOPLE V. IRELAND</i> (1969) 70 CAL.2D 522                                      | 390  |
| VI. INDIVIDUALLY AND/OR COLLECTIVELY, THE ERRORS THAT OCCURRED DURING THE GUILT PHASE TRIAL WERE PREJUDICIAL   | 406  |
| A. Introduction  | 406  |
| B. The Evidence of Guilt Was So Weak That the Present Case Must be Seen as Extremely Close   | 407  |
| C. Other General Principles of Law Indicate That Errors in the Present Case Were Likely to Be Prejudicial  | 410  |
| D. All Instances In Which This Court Finds Guilt Phase Error, But Finds the Error Harmless When Considered Individually, Must Also Be Assessed Together to Determine Whether Their Cumulative Impact Was Prejudicial               | 413  |
| INTRODUCTION TO PENALTY PHASE ARGUMENTS  | 416  |

**TABLE OF CONTENTS (continued)**

|   | <b>Page</b> |
|---|-------------|
| VII. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE MARY ROJAS ABOUT IRRELEVANT MATTERS THAT SERVED ONLY TO DENIGRATE THE RELATIVES OF VERONICA GONZALES, AND THE PROSECUTOR EXACERBATED THE ERROR IN HIS ARGUMENT TO THE JURY | 422         |
| A. Introduction   | 422         |
| B. Evidence Admitted Erroneously  | 423         |
| C. Improper Prosecution Argument  | 432         |
| D. Conclusions Regarding the Errors   | 442         |
| VIII. THE TRIAL COURT IMPROPERLY PRECLUDED DEFENSE COUNSEL FROM REFERRING TO WELL KNOWN CASES THAT WERE MORE EGREGIOUS, BUT DID NOT RESULT IN A DEATH SENTENCE, WHILE ALLOWING THE PROSECUTOR TO EFFECTIVELY STATE THIS WAS THE WORST CASE        | 445         |
| IX. A VARIETY OF ADDITIONAL ERRORS AND FLAWS IN THE CALIFORNIA CAPITAL SENTENCING PROCEDURES ALSO MANDATE REVERSAL OF THE DEATH JUDGMENT  | 456         |
| X. GUILT PHASE ERRORS THAT DO NOT REQUIRE REVERSAL OF THE CONVICTIONS MUST ALSO BE CONSIDERED IN THE PENALTY PHASE; ANY SUBSTANTIAL ERROR AT THE PENALTY PHASE MUST BE DEEMED PREJUDICIAL   | 465         |
| A. Errors That Were Harmless in the Guilt Phase Might Still Adversely Impact the Penalty Determination  | 465         |
| B. Any Substantial Error Requires Reversal of the Penalty Verdict   | 467         |
| C. The Present Penalty Trial Must Be Considered Unusually Close, So No Error That Impacted the Penalty Determination Can Be Deemed Harmless   | 474         |
| CONCLUSION  | 477         |

## TABLE OF AUTHORITIES (continued)

|   |  |
|---|--|
| <i>Albritton v. Superior Court</i> (1990) 225 CAL.APP.3D 961  | 284                                    |
| <i>Andres v. United States</i> , 333 U.S. 740   | 473                                    |
| <i>Apprendi v. New Jersey</i> (2000) 530 U.S. 466   | 367, 456                               |
| <i>Arceves v. Superior Court (People)</i> (1996) 51 Cal.App.4th 584   | 292                                    |
| <i>Arizona v. Fulminante</i> (1991) 499 U.S. 279  | 464                                    |
| <i>Auto Equity Sales, Inc. v. Superior Court</i> (1962) 57 Cal.2d 450   | 399                                    |
| <i>Ballard v. Superior Court</i> (1966) 64 Cal.2d 159.  | 283                                    |
| <i>Beck v. Alabama</i> (1980) 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392<br>307, 312, 337, 344, 368, 389, 405, 415, 443, 455, 462 |  |
| <i>Blakely v. Washington</i> (2004) 542 U.S. 296  | 456                                    |
| <i>Bruton v. United States</i> (1968) 391 U.S. 123  | 108, 246-248                           |
| <i>Bryson v. Alabama</i> (5th Cir. 1981) 634 F.2d 862   | 307, 337, 343, 405, 443, 455, 462, 463 |
| <i>Bush v. Gore</i> (2000) 531 U.S. 98  | 460                                    |
| <i>Cabana v. Bullock</i> (1986) 474 U.S. 376, 88 L.Ed.2d 704, 106 S.Ct. 689   | 405                                    |
| <i>Caldwell v. Mississippi</i> (1985) 472 U.S. 320, 86 L.Ed.2d 231, 105 S.Ct. 2633  | 474                                    |
| <i>Chambers v. Mississippi</i> (1973) 410 U.S. 284  | 271, 343                               |
| <i>Chapman v. California</i> (1967) 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 82<br>240, 244-245, 316, 337, 406, 473                    |  |
| <i>County of Sacramento v. Hickman</i> (1967) 66 Cal.2d 841   | 394                                    |
| <i>Covarrubias v. Superior Court</i> (1998) 60 Cal.App.4th 1168   | 461                                    |
| <i>Cunningham v. California</i> (2007) 549 U.S. ___, 127 S.Ct. 856, 166 L.Ed.2d 856   | 456                                    |
| <i>Davis v. Alaska</i> (1974) 415 U.S. 308  | 271                                    |
| <i>Delaware v. Van Arsdall</i> (1986) 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431  | 316                                    |
| <i>Dickson v. Sullivan</i> (9th Cir. 1988) 849 F.2d 403   | 462                                    |
| <i>Douglas v. Alabama</i> (1965) 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074  | 240-243, 245                           |
| <i>Enmund v. Florida</i> (1982) 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368   | 385                                    |
| <i>Estelle v. McGuire</i> (1991) 502 U.S. 62  | 307, 337, 343, 405, 443, 455, 462, 463 |

## TABLE OF AUTHORITIES (continued)

| Cases   | Page     |
|---|----------|
| <i>Estelle v. Williams</i> (1976) 425 U.S. 501                                | 461      |
| <i>Frazier v. Cupp, supra</i> , 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420   | 244      |
| <i>Furman v. Georgia</i> (1972) 408 U.S. 238                                  | 458      |
| <i>Furman v. Georgia</i> (1972) 408 U.S. 238, 33 L.Ed.2d 346, 92 S.Ct. 2726   | 385, 458 |
| <i>Gallaher v. Superior Court</i> (1980) 103 Cal.App.3d 666                   | 271      |
| <i>Gardner v. Florida</i> (1977) 430 U.S. 349                                 | 441      |
| <i>Green v. Georgia</i> (1979) 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 2150     | 343      |
| <i>Gregg v. Georgia</i> (1976) 428 U.S. 153                                   | 459      |
| <i>Grimshaw v. Ford Motor Company</i> (1981) 119 Cal.App.3d 757               | 259      |
| <i>Harmelin v. Michigan</i> (1991) 501 U.S. 957                               | 459      |
| <i>Hawk v. Superior Court</i> (1974) 42 Cal.App.3d 108                        | 237      |
| <i>Herring v. New York</i> (1975) 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 | 450      |
| <i>Herring v. New York</i> (1975) 422 U.S. 853, 45 L.Ed.2d 593, 95 S.Ct. 2550 | 455      |
| <i>Holt v. United States</i> , 94 F.2d 90                                     | 247      |
| <i>Hopt v. People of Utah</i> (1883) 110 U.S. 574, 28 L.Ed. 262, 45 S.Ct. 202 | 247      |
| <i>Hovey v. Superior Court</i> (1980) 28 Cal.3d 1                             | 461      |
| <i>Hyatt v. Sierra Boat Co.</i> (1978) 79 Cal.App.3d 325                      | 202, 255 |
| <i>In re Carmaleta B.</i> (1978) 21 Cal.3d 482, 496                           | 451      |
| <i>In re Littlefield</i> (1993) 5 Cal.4th 122                                 | 284      |
| <i>In re Martin</i> (1987) 44 Cal.3d 1  | 410      |
| <i>In re Nourn</i> (2006) 145 Cal.App.4th 820                                 | 281      |
| <i>In re Rodriguez</i> (1981) 119 Cal.App.4th 457                             | 299      |
| <i>In re Spencer</i> (1965) 63 Cal.2d 400                                     | 277-280  |
| <i>In re Weber</i> (1974) 11 Cal.3d 703                                       | 341-342  |
| <i>In re Winship</i> (1970) 397 U.S. 358                                      | 367, 456 |
| <i>Jackson v. Virginia</i> (1979) 443 U.S. 307                                | 389      |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>   | <b>Page</b>                            |
|--|--|
| <i>Jeffries v. Wood</i> (9th Cir. 1997) 114 F.3d 1484                              | 462                                    |
| <i>Jennings v. Superior Court</i> (1972) 66 Cal.2d 867                             | 272                                    |
| <i>Joe Z. v. Superior Court</i> , 3 Cal.3d 797                                     | 280                                    |
| <i>Kirby v. United States</i> , 174 U.S. 47  | 242                                    |
| <i>Kolaric v. Kaufman</i> (1968) 261 Cal.App.2d 20                                 | 250                                    |
| <i>Lankford v. Idaho</i> (1991) 500 U.S. 110                                       | 307                                    |
| <i>Lockett v. Ohio</i> (1978) 438 U.S. 586   | 459, 473                               |
| <i>Marino v. Vasquez</i> (9th Cir. 1987) 812 F.2d 499                              | 462                                    |
| <i>Massie v. State</i> (Okla. Crim. 1976) 553 P.2d 186                             | 403                                    |
| <i>Maynard v. Cartwright</i> (1988) 486 U.S. 356, 100 L.Ed.2d 675, 56 S.Ct. 1853   | 461                                    |
| <i>McGuire v. Superior Court</i> , 274 Cal.App.2d 583,                             | 277                                    |
| <i>McKinney v. Rees</i> (9 <sup>th</sup> Cir. 1993) 993 F.2d 1378                  | 307, 337, 343, 405, 443, 455, 462, 463 |
| <i>Michelson v. United States</i> (1948) 335 U.S. 469, 93 L.Ed. 168, 69 S.Ct. 213] | 334                                    |
| <i>Miller v. Angliker</i> (2nd Cir. 1988) 848 F.2d 1312                            | 343                                    |
| <i>Mills v. Maryland</i> (1988) 486 U.S. 367                                       | 473                                    |
| <i>Mills v. Maryland</i> (1988) 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860      | 459                                    |
| <i>Mora v. United States</i> , 190 F.2d 749  | 247                                    |
| <i>Morgan v. Illinois</i> (1992) 504 U.S. 719                                      | 307, 337, 343, 405, 443, 455           |
| <i>Motes v. United States</i> , 178 U.S. 458                                       | 242                                    |
| <i>Murphy v. Florida</i> (1975) 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031        | 462                                    |
| <i>Parker v. Dugger</i> (1991) 498 U.S. 308  | 414, 462                               |
| <i>Payne v. Tennessee</i> (1991) 501 U.S. 808, 115 L.Ed.2d 720, 111 S.Ct. 2597     | 429                                    |
| <i>People v Lee</i> (1990) 220 Cal.App.3d 320                                      | 375                                    |
| <i>People v. Adams</i> (1939) 14 Cal.2d 154  | 411                                    |
| <i>People v. Aguilar</i> (1997) 58 Cal.App.4 <sup>th</sup> 1196                    | 363                                    |
| <i>People v. Alcalu</i> (1992) 4 Cal.4th 742                                       | 300                                    |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>   | <b>Page</b>        |
|--|--------------------|
| <i>People v. Anderson</i> (1965) 63 Cal.2d 351                 | 373, 375, 383      |
| <i>People v. Anderson</i> (1978) 20 Cal.3d 647                 | 409                |
| <i>People v. Aranda</i> (1965) 63 Cal.2d 518                   | 108, 246, 247      |
| <i>People v. Armbruster</i> (1985) 163 Cal.App.3d 660          | 283                |
| <i>People v. Atkins</i> (1975) 53 Cal.App.3d 348, 358          | 397                |
| <i>People v. Avila</i> (2006) 38 Cal.4 <sup>th</sup> 491       | 310                |
| <i>People v. Bain</i> (1971) 5 Cal.3d 839                      | 454                |
| <i>People v. Baqleh</i> (2002) 100 Cal.App.4 <sup>th</sup> 478 | 285                |
| <i>People v. Bell</i> (1989) 49 Cal.3d 502                     | 239, 257, 258      |
| <i>People v. Bell</i> (2004) 118 Cal.App.4 <sup>th</sup> 249   | 275                |
| <i>People v. Belmontes</i> (1983) 34 Cal.3d 335                | 451                |
| <i>People v. Bender</i> (1945) 27 Cal.2d 164                   | 380                |
| <i>People v. Black</i> (2005) 35 Cal. 4 <sup>th</sup> 1238     | 457                |
| <i>People v. Blackington</i> (1985) 167 Cal.App.3d 1216        | 244-245            |
| <i>People v. Bledsoe</i> (1984) 36 Cal.3d 236                  | 281                |
| <i>People v. Blodgett</i> (1956) 46 Cal.2d 114                 | 249                |
| <i>People v. Bonin</i> (1988) 46 Cal.3 659                     | 239                |
| <i>People v. Boyette</i> (2002) 29 Cal.4 <sup>th</sup> 381     | 203, 255           |
| <i>People v. Briggs</i> (1962) 58 Cal.2d 385                   | 409                |
| <i>People v. Brown</i> (1958) 49 Cal.2d 577                    | 260                |
| <i>People v. Brown</i> (1988) 46 Cal.3d 432                    | 470-471            |
| <i>People v. Brown</i> (2003) 31 Cal.4 <sup>th</sup> 518       | 309                |
| <i>People v. Buffum</i> (1953) 40 Cal.2d 709                   | 414                |
| <i>People v. Burton</i> (1961) 55 Cal.2d 328                   | 272                |
| <i>People v. Burton</i> (1971) 6 Cal.3d 375                    | 395, 398- 400, 402 |
| <i>People v. Campbell</i> (1987) 193 Cal.App.3d 1653           | 373-374            |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>  | <b>Page</b>            |
|---|------------------------|
| <i>People v. Cardenas</i> (1982) 31 Cal.3d 897                    | 410, 413               |
| <i>People v. Castaneda</i> (1997) 55 Cal.App.4 <sup>th</sup> 1067 | 302                    |
| <i>People v. Castillo</i> (1935) 5 Cal.App.2d 194                 | 202, 255               |
| <i>People v. Chatman</i> (2006) 38 Cal.4 <sup>th</sup> 344        | 300                    |
| <i>People v. Cheary</i> (1957) 48 Cal.2d 301                      | 370                    |
| <i>People v. Coefield</i> (1951) 37 Cal.2d 865                    | 370                    |
| <i>People v. Coleman</i> (1975) 13 Cal.3d 867                     | 292                    |
| <i>People v. Coleman</i> (1985) 38 Cal.3d 69                      | 257, 259-260, 268      |
| <i>People v. Collins</i> (1968) 68 Cal.2d 319                     | 410                    |
| <i>People v. Combes</i> (1961) 56 Cal.2d 135                      | 277                    |
| <i>People v. Cooper</i> (1991) 53 Cal.3d 771                      | 411                    |
| <i>People v. Cox</i> (1991) 53 Cal.3d 618                         | 463                    |
| <i>People v. Craig</i> (1957) 49 Cal.2d 313                       | 370                    |
| <i>People v. Crooms</i> (1944) 66 Cal.App.2d 491                  | 370                    |
| <i>People v. Cruz</i> (1978) 83 Cal.App.3d 308                    | 414                    |
| <i>People v. Danis</i> (1973) 31 Cal.App.3d 782                   | 275-277, 279, 280, 284 |
| <i>People v. Davenport</i> (1985) 41 Cal.3d 247                   | 385-387, 469           |
| <i>People v. Davis</i> (1984) 161 Cal.App.3d 796.                 | 451                    |
| <i>People v. De Larco</i> (1983) 142 Cal.App.3d 294,              | 271, 274               |
| <i>People v. Derello</i> (1989) 211 Cal.App.3d 414, 426           | 303                    |
| <i>People v. Dotson</i> (1956) 46 Cal.2d 891                      | 271                    |
| <i>People v. Duran</i> (1976) 16 Cal.3d 282                       | 414                    |
| <i>People v. Dyer</i> (1988) 45 Cal.3d 26                         | 262                    |
| <i>People v. Earp</i> (1999) 20 Cal.4 <sup>th</sup> 826           | 245                    |
| <i>People v. Edgar</i> , 34 Cal.App. 459                          | 453                    |
| <i>People v. Edwards</i> (1991) 54 Cal.3d 787                     | 429-435                |

**TABLE OF AUTHORITIES (continued)**

| <b>Cases</b>  | <b>Page</b>               |
|---|---------------------------|
| <i>People v. Evans</i> (1952) 39 Cal.2d 242                                   | 239                       |
| <i>People v. Ewing</i> (1977) 72 Cal.App.3d 714                               | 333                       |
| <i>People v. Fierro</i> (1991) 1 Cal.4th 173                                  | 450                       |
| <i>People v. Figueroa</i> (1986) 41 Cal.3d 714                                | 405                       |
| <i>People v. Frierson</i> (1979) 25 Cal.3d 142                                | 458                       |
| <i>People v. Fusaro</i> (1971) 18 Cal.App.3d 877                              | 258                       |
| <i>People v. Gardeley</i> (1996) 14 Cal.4 <sup>th</sup> 605                   | 202, 235, 255             |
| <i>People v. Garner</i> (1989) 207 Cal.App.3d 935                             | 309                       |
| <i>People v. Ghent</i> (1987) 43 Cal.3d 739                                   | 441                       |
| <i>People v. Gonzales</i> (1967) 66 Cal.2d 482                                | 409, 472                  |
| <i>People v. Gordon</i> (1990) 50 Cal.3d 1223                                 | 309                       |
| <i>People v. Grant</i> (1988) 45 Cal.3d 829                                   | 447                       |
| <i>People v. Green</i> (1979) 27 Cal.3d 1                                     | 311, 314 352, 404         |
| <i>People v. Grider</i> (1910) 13 Cal.App.703                                 | 249                       |
| <i>People v. Guzman</i> (1975) 47 Cal.App.3d 380                              | 449                       |
| <i>People v. Hamilton</i> (1963) 60 Cal.2d 105                                | 466, 468                  |
| <i>People v. Henderson</i> (1977) 19 Cal.3d 86                                | 404                       |
| <i>People v. Hernandez</i> (1977) 70 Cal.App.3d 271                           | 306                       |
| <i>People v. Hernandez</i> (1997) 55 Cal.App.4 <sup>th</sup> 225              | 302                       |
| <i>People v. Heslen</i> (Cal. 1945) 163 P.2d 21 modified (1946) 27 Cal.2d 520 | 377-386                   |
| <i>People v. Hickman</i> (1981) 127 Cal.App.3d 365                            | 472                       |
| <i>People v. Hill</i> (1998) 17 Cal.4 <sup>th</sup> 800                       | 413                       |
| <i>People v. Hines</i> (1964) 61 Cal.2d 164                                   | 469                       |
| <i>People v. Hogan</i> (1982) 31 Cal.3d 815, 847                              | 336                       |
| <i>People v. Ireland</i> (1969) 70 Cal.2d 522                                 | 390-395, 397-400, 402-403 |
| <i>People v. Jackson</i> (1971) 18 Cal.App.3d 504                             | 333                       |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>   | <b>Page</b>   |
|--|---------------|
| <i>People v. Jackson</i> (1980) 28 Cal.3d 264                    | 458           |
| <i>People v. Jackson</i> (1989) 49 Cal.3d 1170                   | 310           |
| <i>People v. Jackson</i> (1991) 235 Cal.App.3d 1670              | 308-313       |
| <i>People v. James</i> (1987) 196 Cal.App.3d 272                 | 362           |
| <i>People v. Jaramillo</i> (1979) 98 Cal.App.3d 830              | 398           |
| <i>People v. Johnson</i> (1974) 39 Cal.App.3d 749                | 308           |
| <i>People v. Johnson</i> (1978) 77 Cal.App.3d 866                | 240           |
| <i>People v. Kelly</i> (1976) 17 Cal.3d 24                       | 305, 307      |
| <i>People v. Kipp</i> (2001) 26 Cal.4 <sup>th</sup> 1100         | 463           |
| <i>People v. Kirkes</i> (1952) 39 Cal.2d 719                     | 453-454       |
| <i>People v. Lara</i> (2001) 86 Cal.App.4 <sup>th</sup> 139      | 451           |
| <i>People v. Lavergne</i> (1971) 4 Cal.3d 735                    | 273           |
| <i>People v. Lo Cigno</i> (1961) 193 Cal.App.2d 360              | 244-245       |
| <i>People v. Long</i> (1945) 70 Cal.App.2d 470                   | 370           |
| <i>People v. Love</i> (1961) 56 Cal.2d 720                       | 448           |
| <i>People v. Mardian</i> (1975) 47 Cal.App.3d 16                 | 273           |
| <i>People v. Marshall</i> (1996) 13 Cal.4 <sup>th</sup> 799      | 449-450       |
| <i>People v. Martinez</i> (1992) 10 Cal.App.4 <sup>th</sup> 1001 | 301, 303      |
| <i>People v. Mattison</i> (1971) <i>supra</i> , 4 Cal.3d 177     | 379, 395      |
| <i>People v. Mayfield</i> (1972) 23 Cal.App.3d 236               | 270, 272      |
| <i>People v. McAlpin</i> (1991) 53 Cal.3d 1289                   | 305           |
| <i>People v. McDonald</i> (1984) 37 Cal.3d 351                   | 270, 315, 414 |
| <i>People v. McWilliams</i> (1948) 87 Cal.App.2d 550             | 370           |
| <i>People v. Misquez</i> (1957) 152 Cal.App.2d 471               | 378           |
| <i>People v. Modesto</i> (1963) 59 Cal.2d 722                    | 260           |
| <i>People v. Montiel</i> (1985) 39 Cal.3d 910                    | 257           |

**TABLE OF AUTHORITIES (continued)**

| <b>Cases</b>  | <b>Page</b>            |
|---|------------------------|
| <i>People v. Montiel</i> (1993) 5 Cal.4 <sup>th</sup> 877       | 257, 268               |
| <i>People v. Mullings</i> (1890) 83 Cal. 138                    | 248                    |
| <i>People v. Murphy</i> (1963) 59 Cal.2d 818, 829               | 272, 274               |
| <i>People v. Northrop</i> (1982) 132 Cal.App.3d 1027            | 396-404                |
| <i>People v. Nunes</i> (1920) 47 Cal.App. 346                   | 370                    |
| <i>People v. Palmer</i> (1984) 154 Cal.App.3d 79                | 449                    |
| <i>People v. Perez</i> (1962) 58 Cal.2d 229                     | 239, 245               |
| <i>People v. Phillips</i> (1966) 64 Cal.2d 574                  | 392                    |
| <i>People v. Pigage</i> (2003) 112 Cal.App.4 <sup>th</sup> 1359 | 237                    |
| <i>People v. Pitts</i> (1990) 223 Cal.App.3d 606                | 240-241                |
| <i>People v. Price</i> (1965) 63 Cal.2d 370                     | 278                    |
| <i>People v. Price</i> (1991) 1 Cal.4 <sup>th</sup> 324         | 245                    |
| <i>People v. Pride</i> (1992) 3 Cal.4 <sup>th</sup> 195         | 446-447, 449-450       |
| <i>People v. Prince</i> (2007) 40 Cal. 4 <sup>th</sup> 1179     | 435, 457               |
| <i>People v. Reeder</i> (1978) 82 Cal.App.3d 543                | 271                    |
| <i>People v. Reyes</i> (1974) 12 Cal.3d 486                     | 260, 266-267           |
| <i>People v. Rich</i> (1988) 45 Cal.3d 1036                     | 257                    |
| <i>People v. Robbie</i> (2001) 92 Cal.App.4 <sup>th</sup> 1075  | 304-306                |
| <i>People v. Robertson</i> (1982) 33 Cal.3d 21                  | 469, 472               |
| <i>People v. Robinson</i> (2005) 37 Cal.4 <sup>th</sup> 592     | 435                    |
| <i>People v. Rodrigues</i> (1994) 8 Cal.4 <sup>th</sup> 1060    | 262                    |
| <i>People v. Rodriguez</i> (1986) 42 Cal.3d 730                 | 316                    |
| <i>People v. Rucker</i> (1980) 26 Cal.3d 368                    | 410                    |
| <i>People v. Schmeck</i> (2005) 37 Cal.4 <sup>th</sup> 240      | 456                    |
| <i>People v. Sears</i> (1965) 62 Cal.2d 737                     | 349, 369               |
| <i>People v. Sears</i> (1970) 2 Cal.3d 180                      | 371-372, 374, 391, 393 |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>   | <b>Page</b>             |
|--|-------------------------|
| <i>People v. Seden</i> (1974) 10 Cal.3d 703                                      | 367                     |
| <i>People v. Sergill</i> (1982) 138 Cal.App.3d 34                                | 299, 307                |
| <i>People v. Shipe</i> (1975) 49 Cal.App.3d 343                                  | 240-244                 |
| <i>People v. Shockley</i> (1978) 79 Cal.App.3d 669                               | 394-396, 401, 404       |
| <i>People v. Shoemaker</i> (1982) 135 Cal.App.3d 442                             | 270                     |
| <i>People v. Sloan</i> (1963) 223 Cal.App.2d 96                                  | 239                     |
| <i>People v. Smith</i> (1984) 35 Cal.3d 798                                      | 401-404                 |
| <i>People v. Spencer</i> (1963) 60 Cal.2d 64                                     | 277, 278, 279, 280, 284 |
| <i>People v. St. Martin</i> (1970) 1 Cal.3d 524                                  | 367                     |
| <i>People v. Stanley</i> (1984) 36 Cal.3d 253                                    | 281                     |
| <i>People v. Steger</i> (1976) 16 Cal.3d 539                                     | 375, 377-380, 382       |
| <i>People v. Strong</i> , 114 Cal.App. 522,                                      | 277                     |
| <i>People v. Superior Court (Barrett)</i> (2000) 80 Cal.App.4 <sup>th</sup> 1305 | 292                     |
| <i>People v. Talbot</i> (1966) 64 Cal.2d 691                                     | 392                     |
| <i>People v. Taylor</i> (1970) 11 Cal.App.3d 57                                  | 395                     |
| <i>People v. Taylor</i> (1980) 112 Cal.App.3d 348,                               | 271                     |
| <i>People v. Taylor</i> (1982) 31 Cal.3d 488                                     | 409                     |
| <i>People v. Terry</i> (1964) 61 Cal.2d 137                                      | 472                     |
| <i>People v. Terry</i> (1970) 2 Cal.3d 362,                                      | 335                     |
| <i>People v. Thompson</i> (1980) 27 Cal.3d 303                                   | 412                     |
| <i>People v. Tolbert</i> (1969) 70 Cal.2d 790                                    | 374                     |
| <i>People v. Travis</i> (1954) 129 Cal.App.2d 29                                 | 448                     |
| <i>People v. Tubby</i> (1949) 34 Cal.2d 72                                       | 377, 386                |
| <i>People v. Turville</i> (1959) 51 Cal.2d 620                                   | 379                     |
| <i>People v. Tyren</i> , 179 Cal. 575  | 271                     |
| <i>People v. Vindiola</i> (1979) 96 Cal.App.3d 370                               | 414                     |

## TABLE OF AUTHORITIES (continued)

| <b>Cases</b>  | <b>Page</b>                |
|---|----------------------------|
| <i>People v. Wagner</i> (1975) 13 Cal.3d 612  | 239-240                    |
| <i>People v. Waidla</i> (2000) 22 Cal.4th 690   | 461                        |
| <i>People v. Walkey</i> (1986) 177 Cal.App.3d 268                                     | 320, 331-336, 381-383      |
| <i>People v. Warren</i> (1988) 45 Cal.3d 471  | 239, 245                   |
| <i>People v. Washington</i> (1965) 62 Cal.2d 777                                      | 390, 392, 395, 403         |
| <i>People v. Washington</i> (1969) 71 Cal.2d 1061                                     | 260                        |
| <i>People v. Watson</i> (1956) 46 Cal.2d 818  | 272, 337, 406              |
| <i>People v. Wells</i> (1893) 100 Cal. 459  | 249, 252                   |
| <i>People v. Westek</i> , 31 Cal.2d 469   | 271                        |
| <i>People v. Wheeler</i> (2003) 105 Cal.App.4 <sup>th</sup> 1423                      | 340-342                    |
| <i>People v. Wickersham</i> (1982) 32 Cal.3d 307                                      | 367                        |
| <i>People v. Wiley</i> (1976) 18 Cal.3d 162   | 380, 382                   |
| <i>People v. Williams</i> (1960) 187 Cal.App.2d 355                                   | 266-267                    |
| <i>People v. Williams</i> (1971) 22 Cal. App.3d 34                                    | 414                        |
| <i>People v. Williamson</i> (1977) 71 Cal.App.3d 206                                  | 449                        |
| <i>People v. Wilson</i> (1969) 1 Cal.3d 431   | 391, 393-394, 397-400, 402 |
| <i>People v. Woodard</i> (1979) 23 Cal.3d 329   | 410                        |
| <i>People v. Woodson</i> (1964) 231 Cal.App.2d 10                                     | 448                        |
| <i>People v. Wright</i> (1892) 93 Cal. 564  | 370                        |
| <i>People v. Zerillo</i> (1950) 36 Cal.2d 222   | 414                        |
| <i>Pointer v. Texas</i> (1965) 380 U.S. 400   | 247, 337, 343              |
| <i>Proffitt v. Florida</i> (1976) 428 U.S. 242  | 459                        |
| <i>Pulley v. Harris</i> (1984) 465 U.S. 37,   | 450                        |
| <i>Ring v. Arizona</i> (2002) 536 U.S. 584, 122 S.Ct. 1428                            | 456                        |
| <i>Rowe v. Such</i> (1901) 134 Cal. 573   | 202, 255                   |
| <i>Satterwhite v. Texas</i> (1988) 486 U.S. 249, 258, 100 L.Ed.2d 284, 108 S.Ct. 1792 | 472                        |

## TABLE OF AUTHORITIES (continued)

| Cases   | Page                                   |
|---|--|
| <i>Slochow v. Board of Higher Education</i> , 350 U.S. 551  | 242                                    |
| <i>Spencer v. Texas</i> (1967) 385 U.S. 554   | 307, 337, 343, 405, 443, 455, 462, 463 |
| <i>State v. Maulc</i> (1983) 35 Wash.App. 287, 667 P.2d 96,   | 334                                    |
| <i>Taylor v. Illinois</i> (1988) 484 U.S. 400   | 307                                    |
| <i>Throckmorton v. Holt</i> , 180 U.S. 552  | 247                                    |
| <i>Trop v. Dulles</i> (1958) 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630   | 460                                    |
| <i>U.S. v. Beltran-Rios</i> (9th Cir. 1989) 878 F.2d 1208   | 306                                    |
| <i>U.S. v. McDonald</i> (10th Cir. 1991) 933 F.2d 1519  | 305                                    |
| <i>United States v. Gaudin</i> (1995) 515 U.S. 506  | 367                                    |
| <i>United States v. Hernandez-Cuartas</i> (11th Cir. 1983) 717 F.2d 552   | 306                                    |
| <i>United States v. Maloney</i> , 262 F.2d 535 (C.A.2d Cir. 1959)   | 242                                    |
| <i>United States v. McKoy</i> (9th Cir. 1985) 771 F.2d 1207   | 453                                    |
| <i>Washington v. Texas</i> (1967) 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019   | 307, 343                               |
| <i>Wealot v. Armontrout</i> (8th Cir. 1992) 948 F.2d 497  | 343                                    |
| <i>Weinberger v. Rossi</i> (1982) 456 U.S. 25   | 464                                    |
| <i>Williams v. Taylor</i> (2000) 529 U.S. 362   | 413                                    |
| <i>Woodson v. North Carolina</i> (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978<br>307, 312, 337, 344, 368, 389, 405, 415, 443, 448, 455, 462, 463, 473 | 473                                    |
| <i>Zant v. Stephens</i> , 462 U.S. 862  | 473                                    |

## TABLE OF AUTHORITIES (continued)

| <b>California Statutory Provisions</b>  | <b>Page</b>                       |
|---|-----------------------------------|
| Code of Civil Procedure Section 223   | 461                               |
| Evidence Code section 352<br>224, 259-260, 261, 262, 268-269, 271, 294, 295, 298, 307, 324, 328, 333, 427 |                                   |
| Evidence Code Section 355   | 259                               |
| Evidence Code section 402   | 320, 326                          |
| Evidence Code section 702   | 297                               |
| Evidence Code Section 720   | 306                               |
| Evidence Code section 721   | 266                               |
| Evidence Code section 801   | 297                               |
| Evidence Code section 1101  | 281                               |
| Evidence Code section 1112  | 282                               |
| Evidence Code section 1230  | 308, 340                          |
| Evidence Code Sections 1102   | 319                               |
| Evidence Code Sections 1103   | 319                               |
| Evidence Code Sections 1108   | 319                               |
| Evidence Code Sections 1109   | 319                               |
| Penal Code section 29   | 319                               |
| Penal Code section 187  | 331                               |
| Penal Code section 189  | 346, 347, 349, 369, 377, 378, 387 |
| Penal Code section 190.2  | 346-349, 387                      |
| Penal Code section 190.3  | 428-429, 457, 459-460             |
| Penal Code Section 190.4  | 348                               |
| Penal Code section 203  | 347, 369, 370                     |
| Penal Code section 206  | 346, 352, 361, 363                |
| Penal Code section 2-45   | 403                               |

## TABLE OF AUTHORITIES (continued)

| <b>California Statutory Provisions</b> | <b>Page</b>                 |
|--|-----------------------------|
| Penal Code section 273a                | 331, 394, 396, 398, 401-403 |
| Penal Code section 288                 | 239                         |
| Penal Code section 347                 | 395                         |
| Penal Code section 1027                | 279, 284                    |
| Penal Code section 1054                | 284, 285                    |
| Penal Code section 1054.3              | 283, 285                    |
| Penal Code section 1054.5              | 283-284                     |
| Penal Code section 1054-1054.9         | 283                         |
| Penal Code section 1112                | 282, 283                    |
| Penal Code section 1181                | 229                         |
| Penal Code section 1368                | 285                         |

| <b>Constitutional Provisions</b>                            | <b>Page</b>   |
|---|---|
| California Constitution, Article I, Section 17              | 458   |
| California Constitution, Article I, Section 28              | 282   |
| United States Constitution, Article VI, section 1, clause 2 | 464   |
| United States Constitution, Eighth Amendment                | 293, 307, 312, 315, 337, 343, 348, 367, 389, 405,<br>415, 424, 443, 444, 454, 456, 458-462, 473                             |
| United States Constitution, Fifth Amendment                 | 267, 269, 289, 291, 293, 303, 307, 313, 315, 337,<br>343, 367, 405, 414, 443, 444, 454, 456, 458-462, 473                   |
| United States Constitution, Fourteenth Amendment            | 244, 267, 269, 271, 286, 289, 291, 293, 303, 307, 312-313,<br>315-316, 343, 367, 405, 414, 443, 444, 454, 456, 458-462, 473 |
| United States Constitution, Sixth Amendment                 | 169, 244, 267, 271, 286, 289, 293, 303, 307, 313, 316, 337, 343, 367, 405, 414., 459-462                                    |

## TABLE OF AUTHORITIES (continued)

| <b>Federal Treaties</b>  | <b>Page</b>             |
|--|-------------------------|
| American Declaration of the Rights and Duties of Man, Articles 1, 2, and 6 | 464                     |
| International Covenant on Civil and Political Rights, Articles 6 and 14    | 464                     |
| <br>   |                         |
| <b>Instructions</b>  | <b>Page</b>             |
| CALJIC 2.82  | 255                     |
| CALJIC 3.31.5  | 354                     |
| CALJIC 3.31  | 353, 356                |
| CALJIC 8.10  | 354                     |
| CALJIC 8.11  | 354                     |
| CALJIC 8.21  | 355                     |
| CALJIC 8.24  | 357, 359, 362, 375, 385 |
| CALJIC 8.27  | 357, 388                |
| CALJIC 8.30  | 357                     |
| CALJIC 8.31  | 357                     |
| CALJIC 8.32  | 358                     |
| CALJIC 8.34  | 360, 388                |
| CALJIC 8.70  | 360                     |
| CALJIC 8.71  | 360                     |
| CALJIC 8.81.17   | 351, 364                |
| CALJIC 8.81.18   | 366, 385                |
| CALJIC 8.88  | 470                     |
| CALJIC 9.30  | 356                     |
| CALJIC 9.90  | 361, 362                |

## TABLE OF AUTHORITIES (continued)

| <b>Treatises</b>                          | <b>Page</b> |
|---|-------------|
| McCormick on Evidence (4th ed. 1992) § 14 | 202, 255    |

  

| <b>Dictionaries</b>                    | <b>Page</b> |
|--|-------------|
| Webster's New Internat. Dict. (2d Ed.) | 386         |

  

| <b>Law Review Articles</b>   | <b>Page</b> |
|--|-------------|
| Note (1964) 78 Harv.L.Rev. 426   | 412         |
| Shatz & Rivkind, "The California Death Penalty Scheme: Requiem for <i>Furman</i> ?"<br>(1997) 72 NYU L.Rev. 1283 | 458         |

  

| <b>Legislative History</b> | <b>Page</b> |
|----------------------------|-------------|
| Stats. 1965, ch. 299, § 2  | 340         |

**SUPREME COURT OF THE STATE OF CALIFORNIA**

PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff and Respondent, ) S072316  
 )  
 v. ) (San Diego County  
 ) Number SCD 114421)  
 VERONICA UTILIA GONZALES, )  
 )  
 Defendant and Appellant. )  
 \_\_\_\_\_ )

**APPELLANT'S OPENING BRIEF**

**WORD COUNT CERTIFICATION (Rule 8.630  
(b)(2))**

Pursuant to California Rules of Court, Rule 36 (b)(1)(B) and (b)(2), counsel for Veronica Gonzales hereby certifies that this opening brief contains 135,300 words. Because this exceeds the 92,500 word limit specified in Rule 8.630 (b)(1)(A), an application for permission to file an oversize brief is being sought pursuant to Rule 8.630 (b)(5)

**STATEMENT OF THE CASE**

On December 11, 1995, Information number SCD 114421 was filed in the San Diego County Superior Court charging Veronica Utilia Gonzales and Ivan Joe Gonzalez with one count of murder of Genny Rojas, occurring on July 21, 1995. The Information also alleged a special circumstance of intentional murder involving the infliction of torture, within the meaning of

Penal Code section 190.2 (a)(18). (CT 1:44-45.)<sup>1</sup>

Ms. Gonzales was arraigned on this Information on December 12, 1995. Deputy Public Defender Michael Popkins appeared as counsel, having been previously appointed in the Municipal Court. Ms. Gonzales entered a plea of not guilty and denied the special circumstance allegation. (CT 18:3840, 3849.) On March 6, 1996, Deputy Public Defender Susan Clemens joined Mr. Popkins as co-counsel. (CT 18:3851.)

Also on March 9, 1996, the case was assigned to Judge Michael D. Wellington, for all purposes. (CT 18:3851.)

Over the next year, a wide variety of motions were filed and heard. Among these were a motion to sever the cases of the two defendants, a motion to dismiss pursuant to Penal Code section 995, a motion to suppress evidence pursuant to Penal Code section 1538.5, a motion to suppress statements made to the police by Ms. Gonzales, various discovery motions, various motions pertaining to evidentiary issues expected to arise at trial, and various other motions. (See list of motions at CT 6:1049-1051.)<sup>2</sup>

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1. Throughout this brief, references to the record on appeal in the present case will be abbreviated as follows: References to the 36 volume Clerk's Transcript on Appeal will be designated by "CT" followed by the volume number and page number, separated by a colon. References to the 2 volume Preliminary Examination Transcript will be designated "PE" followed by the volume number and page number, separated by a colon. References to the 95 volume Reporter's Transcript on Appeal will be designated RT followed by the volume number and page number, separated by a colon.

2. The various motions and hearings that are relevant to issues raised in this brief will be described in more detail, with full citations to the record, in the argument portion of this brief.

On February 27, 1997, the trial court granted the defense motion to sever the cases of the two defendants. (CT 18:3922-3923.)

On December 11, 1997, an amended Information was filed against Veronica Gonzales, adding a second special circumstance allegation of murder in the commission of mayhem, within the meaning of Penal Code section 190.2 (a)(17). (CT 10:2120-2121.)

On February 2, 1998, after the trial of Ivan Gonzalez had resulted in a conviction and a sentence of death, the trial for Veronica Gonzales began with a series of hearings on in limine motions. (CT 18:3940-3941; see also CT 18:3942-3947.) Jury selection began on February 6, 1998 and concluded on February 26, 1998. (CT 18:3948-3972.)

The evidentiary portion of the guilt trial commenced March 11, 1998 and continued until jury deliberations began on April 23, 1998. (CT 18:3979-4046.)

On May 4, 1998, after eight court days of deliberations, the jury returned a verdict finding Ms. Gonzales guilty of murder in the first degree. Both special circumstance allegations were found to be true. (CT 16:3518-3527; 18:4046-4060.)

The penalty trial began with motions on May 5, 1998, and with evidence on May 13, 1998. (CT 18:4061-4076.) Jury deliberations began on May 18, 1998 and a verdict of death was returned on May 20, 1998. (CT 18:4075-4079.) On July 20, 1998, the court denied appellant's automatic motion for modification of the verdict and her motion for a new trial (Penal Code section 1181), and imposed a judgment of death. (CT 18:4082-4084.)

This appeal is from a final judgment, and is automatic.

## STATEMENT OF THE FACTS

### A. Guilt Phase Evidence

#### 1. Introduction

The underlying factual setting of the present case is deceptively simple.<sup>3</sup> Veronica and Ivan Gonzales were husband and wife. Veronica Gonzales gave birth to 6 children by the time she was just over 24 years old. Ivan Gonzales worked as a trash collector for some years, but then became unemployed for several years and the large family lived in a two-bedroom apartment, supported by welfare funds. In early 1995, Genny Rojas, the four-year old daughter of Veronica Gonzales' sister, came to live with the family. Approximately six months later, Genny Rojas died after being badly scalded in a bathtub. Prior to her death, she had been subjected to other serious physical abuse over a period of weeks or months.

Ivan and Veronica Gonzales were both promptly charged with the murder of Genny Rojas. While the defense never contended that any other person was involved in the events that led to the death of Genny Rojas, the evidence was weak and conflicting regarding whether it was Ivan Gonzales or Veronica Gonzales, or both, who caused the injuries to Genny Rojas.

At the time of the death, the oldest child of Ivan and Veronica Gonzales was 8 years old. None of the Gonzales children testified at trial. The

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3. . . No citations to the record are included in this broad introductory summary. Full citations to the record will be included in the detained summary of the evidence that follows.

oldest child, Ivan Gonzales, Jr., testified at the preliminary examination. However, he was ruled unavailable as a witness at trial after the court quashed his subpoena due to the danger of psychological trauma that could result if he was forced to testify about the events leading to the death of Genny Rojas. Ivan, Jr.'s preliminary examination testimony, as well as several statements he made to the police and a video-taped interview of him by counsel, were all offered by the defense and received in evidence. These various statements greatly contradicted one another and were also highly ambiguous in attributing acts to his "parents", when he may well have meant one or the other parent, but not both.<sup>4</sup>

The main prosecution evidence consisted of videotape recordings of two lengthy interviews of Veronica Gonzales by the police within the first couple of days after the death of Genny Rojas. In those interviews, Ms. Gonzales made greatly conflicting statements, first denying any wrongdoing by either parent, but later admitting some wrongdoing by herself and some by her husband. Ivan Gonzales did not testify at trial, and no statement made by him was ever admitted. Veronica Gonzales did testify at trial, offering a detailed history of the physical and sexual abuse she suffered as a child, followed by marriage to Ivan when she was merely sixteen years old.

Veronica Gonzales described Ivan Gonzales as extremely controlling, to the point that he rarely allowed her to leave the apartment without him and

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4. Notably, Veronica Gonzales was not permitted to have any contact with her oldest son any time after her arrest for the murder of Genny Rojas. Her attorneys were only able to question Ivan, Jr. during the preliminary examination and at one other highly structured interview.

rarely allowed the children to play outside of the small apartment. Over the course of their marriage he became more physically abusive and more sexually demanding. He was often frustrated that the children occupied so much of his wife's time that it cut into the time available for the couple to engage in sexual activities. He used methamphetamine with increasing frequency, and insisted that Veronica do the same so she could stay awake for sexual activities after growing tired from her child care responsibilities. Eventually he became physically abusive toward Genny Rojas. In a classic illustration of the symptoms of Battered Woman's Syndrome (hereafter "BWS"), Veronica Gonzales often tried to leave her husband, but found herself with no realistic alternative and repeatedly returned to him promptly, when he promised to behave better.

Thus, although she feared her husband, Veronica Gonzales also loved him, greatly depended on him, and did not know how she could manage on her own with six young children. Highly respected defense expert witnesses corroborated the impact the BWS had on her.

In her testimony at the trial, Veronica Gonzales placed the blame for the abuse of Genny Rojas squarely on Ivan Gonzales. She explained her failures to take meaningful action to protect Genny from Ivan, for reasons fully consistent with the impact of BWS. She explained that when she initially talked to the police after the death of Genny Rojas, she was exhausted from lack of sleep, under the influence of methamphetamine, traumatized by what had happened to Genny, worried about what would become of her own six children, and still afraid to say anything to the police that might displease her husband. Afraid to trust the authorities, she initially maintained that she and

her husband were both innocent of wrongdoing. Over time, and especially during the second interview two days later, she realized her statements were not believable and began to make some incriminating statements, but was still confused about how to deal with the conflict between her instinctive need to protect the father of her children and the need to protect herself. She began making contradictory statements, sometimes placing blame on Ivan, and sometimes falsely placing blame on herself in order to protect Ivan, or to at least look like she was not abandoning him entirely.

In contrast to the trial testimony and prior contradictory statements made by Veronica Gonzales, the jury was not permitted to hear any statements made by Ivan Gonzales. Ivan did not testify at Veronica's trial. Although his statements to the police included admissions against his own interests and matters that supported Veronica Gonzales' claims, those prior statements were found too unreliable to be used in Veronica Gonzales' defense. In contrast, they had been deemed reliable enough for the prosecution to use to obtain the conviction and death sentence against Ivan Gonzales.

Aside from the testimony of Veronica Gonzales at trial, and the prior statements made by her and her 8-year-old son, the prosecution case consisted of circumstantial evidence establishing that the injuries to Genny Rojas were not the product of accident. Such evidence, however, shed no meaningful light on whether the responsibility for those injuries rested with Ivan or with Veronica or both. The contradictory statements that the jury heard established that Veronica Gonzales must have lied on some occasions, but left no clear answer as to which statements were lies and which were the truth.

As will be shown, the prosecution benefited from a number of erroneous and unfair rulings (and occasional self-help) in order to fill in the gap in the case against Veronica Gonzales. The prosecutor seized on speculative bits of meaningless evidence in order to leave the jury with the unwarranted impression that Ivan and Veronica Gonzales had jointly decided to each blame the other for Genny Rojas' death. Moreover, the jury was made aware of the fact that Ivan Gonzales had been found guilty and was sentenced to death. The prosecution was permitted to bring out the fact that Ivan Gonzales had also explored a battered spouse defense. Indeed, while he abandoned that defense without ever offering it at trial, the jury was left with the false impression that he did offer such a defense and that it was unsuccessful. Furthermore, the prosecution was allowed to elicit evidence of the fact that Ivan Gonzales had been interviewed by two different experts, one of whom concluded he was a battered spouse and one of whom concluded he was not. This conflict in the experts who examined Ivan Gonzales was used by the prosecution to cast doubt on the credibility of Veronica Gonzales' expert witnesses, even though the prosecution's own experts agreed that Veronica Gonzales' was a battered wife. Moreover, the defense was not permitted to present specific evidence of the flaws in the logic of the expert who had concluded Ivan Gonzales was a battered spouse.

The BWS evidence offered by Veronica Gonzales was not offered as a direct defense to the charge of murder.<sup>5</sup> Instead, it was offered to explain

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5. That is, this was not like the more common use of BWS evidence in cases where the woman is charged with murdering her husband, and  
(Continued on next page.)

behavior that otherwise may have supported an inference of guilt. The evidence was offered to explain why she remained with her husband after he began physically abusing Genny Rojas, why she failed to take adequate measures to protect Genny from her husband, and why she continued to attempt to protect her husband after they were both arrested.<sup>6</sup>

Nonetheless, after the prosecutor convinced the trial court that the BWS evidence was analogous to a mental state defense, the court ordered Veronica Gonzales to undergo psychological evaluations by prosecution experts. The prosecutor promptly chose the same expert it had used to examine Ivan Gonzales. The defense felt it was unfair for the prosecution to have the benefit of an expert who had examined both Ivan and Veronica Gonzales, while the defense was left with experts who never had any access to Ivan Gonzales. As a result, Veronica Gonzales refused to be interviewed by that expert. She did cooperate in an interview and full psychological examination by another prosecution expert, but the jury was still informed of the one refusal and was permitted to make adverse inferences as a result of that refusal. To make matters worse, Veronica Gonzales was not permitted to explain during her testimony why she had refused to cooperate with the one prosecution expert.

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(Continued from last page.)

BWS is used to support a defense that admits the killing, but contends it was committed in self-defense.

6. Thus, Veronica Gonzales did not admit taking part in the killing and then tender a mental state defense. Instead, she contended that it was Ivan Gonzales, and not herself, who was responsible for the killing.

The prosecution expert witness was also permitted to give what amounted to improper profile evidence. He did not testify that Veronica Gonzales was malingering, but instead was permitted to testify that she fit the profile of a person who was malingering. The prosecution was also permitted to use Veronica Gonzales' own history of child abuse against her, arguing that she was more likely to have been the one to abuse Genny because of her own exposure to such abuse when she was a child.<sup>7</sup>

As a result of the various evidentiary errors, Veronica Gonzales was unfairly convicted of murder in the first degree, and was found to have committed that murder under special circumstances which were not adequately supported by the evidence. In order to properly convey the prejudicial impact of the various evidentiary errors, it will be necessary to demonstrate how close the case and uncertain was, both in regard to who did what and what was their mental state. To do that, a detailed statement of the facts will be set forth in a chronological fashion, to best illustrate how the relationship between Veronica and Ivan Gonzales evolved into one in which Ivan Gonzales committed atrocious acts while Veronica Gonzales remained at his side despite being repulsed by his behavior. This will frequently require a mixing of evidence presented by the prosecution and by the defense, but the source of each aspect of the evidence will always be clearly identified.

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7. Indeed, the prosecutor was permitted to go even further during the penalty phase, cross-examining relatives of Veronica Gonzales in a manner clearly calculated to denigrate her entire family, in order to imply to the jury that her own children would be better off if she was executed.

## 2. Expert Testimony Regarding Battered Spouse Syndrome

Cynthia Lynn Bernee testified as a defense expert witness on BWS.<sup>8</sup> She was a licensed marriage and family therapist who worked part-time for the County of San Diego, doing mental health assessments and evaluations. She also had a private practice and did training and consultation work for the law enforcement academy. Her area of expertise was domestic violence, sexual assault, and child abuse. Most of her case consultation work had been for the prosecution.<sup>9</sup> She had worked with battered women and with batterers. (RT 64:7239-7243.)

Ms. Bernee explained that 90-95% of batterers were males. Batterers abused their partners in order to maintain power and control in the relationship. Generally, such relationships started out as loving and caring. Over time, control issues would become more entrenched. Eventually, the batterer

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8. Although testimony about BWS did not occur until the defense case and the prosecution rebuttal case, it is appropriate to begin the summary of the evidence with this crucial background information. This information provides an essential context for the factual summary that follows.

However, it is also important to keep in mind that the BWS evidence in the present case was not introduced for the more common purpose of providing a defense, such as in a case where a battered woman eventually kills her batterer and claims self-defense. Instead, in the present case, Veronica Gonzales contended throughout the trial that she did not commit the acts that led to the death of Genny Rojas. The BWS evidence was offered to explain to the jury why Ms. Gonzales remained in the relationship with Ivan Gonzales, and why she failed to take action to protect Genny Rojas from Ivan Gonzales.

9. In prior cases, she had even been hired to work for the very prosecutor who was prosecuting Veronica Gonzales. (RT 64:7280.)

would cross the line from power, control, intimidation, or verbal and psychological tactics, into physical abuse. Batterers used coercion and threats to intimidate, and would develop subtle means of conveying anger to their partner, even in a crowded room. Other means of intimidation included emotional abuse and blaming the victim for the predicament in which she found herself. Actual physical abuse almost always occurred in a private setting. (RT 64:7245-7252.)

Ms. Bernée explained the typical cycle of violence. During the first phase, tension builds, typically in response to some form of stress, such as economic stress or childcare stress. However, the stress factors are often simply an excuse to act violently. The victim attempts to decrease the tension, sometimes with success. But eventually the demands of the batterer increase and tension escalates. The victim is then likely to withdraw emotionally. The batterer senses that and gets angrier. Tension and demands increase further. (RT 64:7253-7255, 7259.)

The second phase was the explosive or acute incident phase. It might consist of a range of incidents, from a simple slap to sexual violence or a full-fledged beating. (RT 64:7255, 7258.) This is typically be followed by the third phase, known as the remorse or honeymoon phase. The batterer might apologize and assure the victim it would not happen again. There could be traumatic bonding between the pair. This is a time when the relationship is as good as it will ever be. (RT 64:7256-7257.)

Thus, in such relationships, the violence is not necessarily constant. Instead, it could be sporadic. In some relationships, one violent episode is all it takes to let the victim know that there is always a threat of further vio-

lence. For example, a man may hold a loaded gun to a woman's head once and say he will kill her if she ever behaves a certain way again. He may never have to hit her again, but that can still be very coercive. In sum, a batterer may not actually use violence if he is able to maintain control without it. (RT 64:7258, 7300, 7328.)

Ms. Bernee explained that BWS was typically marked by signs and symptoms including maladaptive coping techniques, learned helplessness, and stress response. Examples of maladaptive coping were minimization and/or denial of the abuse. Drugs and/or alcohol were also frequently used as a means of coping. Battered women often experience nightmares, eating disturbances, sleeping disturbances, or hypervigilance. (RT 64:7260-7261.)

Battered women frequently act to protect the batterer. They will lie for him and commit crimes for him. Such behavior was comparable to reactions that can occur in prisoners of war or hostages, where identification with the captor becomes a means of survival. Taking on the captor's perception was a means of reducing the likelihood of one's own death. The victim in a battered spouse relationship might even accept responsibility for any aspect of the relationship that was not working well. Low self-esteem was a typical trait of abuse victims. (RT 64:7262-7264.)

An example of learned helplessness is an attitude such as believing that no matter what one does, it will not stop the abuse. Victims may call the police and find that does not help their situation. A battered wife may give up trying to stop the abuse. She would feel isolated and be unaware of resources that might be available to provide assistance. (RT 64:7264-7266.)

Ms. Bernee explained further that BWS was not a psychiatric diagnosis, but was a widely accepted syndrome. It is not a disease or defect or illness. Rather, it is a predictable and normal response to an abnormal abusive situation. It is similar to the Stockholm Syndrome, which can develop in as little as 3-4 days. (RT 64:7266-7267.)

With no outside intervention, the abuse in such relationships would be likely to increase over time in frequency and intensity. The tension-building stage could become shorter. The remorse stage could become so short that it would be almost non-existent. (RT 64:7268.) Even when the physical abuse was awful, humiliating, degrading, and horrendous, the psychological and emotional abuse could be worse. (RT 64:7301.)

There could be many reasons why a woman in such a relationship would not just leave. Reasons could include financial dependency, lack of education, and the lack of support systems away from the batterer. Some victims hold religious beliefs that preclude divorce. Victims might stay in the relationship because they are afraid of what will happen if they leave. Indeed, studies have shown that women in such relationships are in greater physical danger when they try to leave the relationship than when they simply stay in it. Other reasons victims stay in such relationships are that the batterer may be the father of her children. For both social and economic reasons, it is always more difficult for a woman with young children to leave a battering relationship. She may still love the batterer and believe or hope he will change. It is very common for victims in such relationships to project in public that everything in the relationship is fine. (RT 64:7269-7270, 7276.)

Sometimes a woman in such a relationship might even fight back, but she would still be considered a battered woman. Victims might fight back during the explosive stage, or even initiate abuse by slapping or hitting the batterer. Such acts might be done to give an illusion of control – choosing the time for the inevitable violence to happen. In some instances a victim, who knows her batterer will not miss his regular 8 PM Wednesday bowling, will act provocatively at 6 PM. But even in relationships where the woman fights back or initiates violence, it is generally not a situation of equal strength or mutual combat. The abuser still retains the ultimate power and control. (RT 64:7272.)

Typically, both parties in battering relationships hold very traditional views in regard to marriage and the role of the wife in a marriage. For some victims, a family history of child abuse, sexual abuse, or domestic violence can increase susceptibility to engage in a domestic violence relationship. Indeed, a very high percentage of batterers have seen domestic violence or been physically or sexually abused in their own childhood. (RT 64:7272.) Growing up in a climate of domestic violence or abuse can be a very important factor in leading a person to become a batterer. People learn how to interact with others and deal with feelings from their family of origin. Violence is generally a learned behavior. (RT 64:7290.)

When children are exposed to domestic violence, males are more likely to become abusers and females are more likely to become victims. However, women can be violent and can kill children. Also, a man and a

woman can co-exist in a mutually violent relationship, but such relations are very rare.<sup>10</sup> (RT 64:7291-7294, 7327.)

In order to protect the abuser, the victim might lie to others and deny they are being abused. Battered women can appear to be very calm and controlled. They may experience emotional numbing, distancing themselves from the emotions that are occurring. In other instances, they can be hysterical and out-of-control. This depends on their individual stress response. (RT 64:7274.)

Women in such relationships often come to believe the batterer is omnipotent – that he will always know what is happening, and will always be able to impact her life, no matter what the circumstances might be. Even when the man is in jail, the woman can be fearful that something could happen. (RT 64:7275-7276.)

Despite such fears, a woman in such a relationship might still engage in a sexual affair outside the relationship. Such an affair could be quite nurturing and/or exciting, no matter how temporary. A battered woman might seek such a relationship to gain attention or affection from someone who cares for her. (RT 64:7276.) If a battered woman engages in sex with another man, there is a risk she will be harmed. If she does that and tells her abuser about it, that can be a very volatile situation. If a battered woman went so far as to tell her batterer she was pregnant by another man, that would be risky.

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10. A mutually violent relationship would be two people with explosive violence and no hierarchy about power and control. In determining if one or the other is battered, you look to see who has the power, who is powerless, who is controlling, who is afraid of whom, who is afraid for their life, who is afraid to leave because they might get killed. (RT 64:7297.)

However, in a particular relationship, it may be less risky than leaving. (RT 64:7303-7304.) Thus, engaging in an affair is not necessarily inconsistent with suffering from BWS. (RT 64:7329-7330.)

Ms. Bernee conceded that not every woman who is hit by a man suffers from BWS. In assessing whether a particular woman was a battered woman, Ms. Bernee considers body language, history, and symptoms. (RT 64:7277.)

On cross-examination by the prosecutor, Ms. Bernee conceded that sometimes mental health experts can be fooled by a patient or can simply reach a wrong conclusion. Sometimes criminal defendants exaggerate. (RT 64:7286.)

Dr. Kenneth Ryan, a clinical psychologist with a specialty in psychotherapy, also testified as a defense expert on BWS. In his work, he had met with 1,000 to 1,500 battered women and about 1,000 men who were batterers. Most of his work involved therapy for couples. (RT 73:9206-9214.)

Dr. Ryan explained that the most basic symptom of BWS was low self-esteem, typically developed as a result of parental attitudes. Women suffering from the syndrome fear rejection, abandonment, and death. They believe they need to have someone else in their life. (RT 73:9216-9217.)

If the batterer does not succeed in making a satisfying impression on the woman, he will go after the children, threatening to kill them to gain control over the woman. Battered women tend to be hyper-vigilant and attentive to the man, and are likely to view the man as omnipotent. Battered women tend to distort what is happening to them, denying what is right in front of them. That is why when police are called to a scene of domestic violence, the

woman often says that nothing happened. Such women will lie and misrepresent in order to protect themselves or the children from the man. (RT 73:9218-9219.)

Sufferers from the syndrome experience hopelessness and helplessness. They become depressed and apathetic, not caring any longer what happens. They tend to have an idealized sense of love, minimizing the pain and hurt. They think of their man as a knight in shining armor who will protect them. (RT 73:9220-9221.) In reality, the man will use violence to achieve control. He will press, restrict, and isolate the woman more and more, but will occasionally give her just enough to keep her from leaving. (RT 73:9222.) The woman will often end up believing it is her own fault she is being hit. She will believe she must be doing something wrong to cause the batterer to behave as he does. (RT 73:9287.)

Batterers tend to be paranoid and will become very upset if another man simply walks up to the woman and says hello. It is not uncommon for such men to even be jealous of the children, since they compete with him for the attention of the woman. Often such men did not have a good life as children, and will not let their own children have a good life. (RT 73:9223-9224.)

The batterer's greatest fear is that the woman will leave. However, if he believes that is happening he may react irrationally and increase the level of punishment. As the man perceives the woman's self-worth as decreasing, he will attempt to isolate her more. (RT 73:9224-9225.)

Sometimes a woman suffering from the syndrome will attempt to break away from the man, but she typically returns to the relationship be-

cause of her fear of being alone or abandoned. The batterer seeks to isolate her so she will not get contrary ideas in her head. Over time, the woman reacts by becoming less logical and less rational. (RT 73:9225.)

### **3. Veronica Gonzales' Childhood**

Veronica Gonzales was born in Corona, California on June 21, 1969.<sup>11</sup> Her parents were Utilia Ortiz and Severano Lopez. However, her father (Lopez) died when Veronica was a baby. Before Veronica was a year old, her mother married another man, Isais Ortiz. When Veronica was 5 or 6 years old, her step-father began touching her inappropriately. He would touch her chest and sit her on his lap, rubbing her bottom on his penis. This made Veronica uncomfortable, sad, scared, and nervous. Her step-father told her it was like the love from a father to a daughter, but it still didn't feel right to Veronica. He knew he could get what he wanted from her, and touched and fondled her more and more. Despite this, the young Veronica still felt that her step-father was there for her when her own mother was not. As she got older he would take her places and buy her things and put his hands under her clothes. Eventually, he started to touch her vagina. He would kiss her and get angry when she did not kiss him back. (RT 65:7342-7343.)

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11. When details about Veronica Gonzales' life are set forth without attributing the information to a particular witness, the source will be Veronica Gonzales' own direct testimony. Other evidence corroborating the various aspects of her testimony will also be set forth with attribution to the witness.

Her step-father began to show her his penis and rub it on her vagina. He touched her more when her mother was not home. He would want her to touch him and to put his penis in her mouth. He would get angry when she did not do what he wanted. She “wouldn’t swallow,” but instead would throw up. This caused him to get angry and hit her. He began to take Veronica into his bedroom while he had sex with her mother. He would have her watch them and then later he would want her to do the same things. She let him do what he wanted. He said if she did not, he would tell her mother, who would no longer love her or listen to her. (RT 65:7344.)

When he began to put his penis into her vagina, she would scream because it hurt. This made him mad. This occurred when Veronica’s mother was either at work, or was home but passed out from drinking. When Veronica was 9 or 10 years old, her step-father sodomized her. (RT 65:7346; 67:8177.)

It seemed to Veronica that her mother was never around. She did not think her mother ever wanted her. She believed her mother pushed her toward her step-father. Her mother hit her often, pulled her hair, slapped her, punched her, and kicked her. Her mother hit her with hangers, fly swatters, and tree branches. Veronica felt she would do anything to win her mother’s love, but her mother often left her with her step-father. When she was around, her mother yelled at Veronica and would not listen to her. (RT 65:7347-7348.)

Veronica’s mother also abused Veronica’s two older sisters, Anita and Mary. Their mother would come home angry and start hitting them. Sometimes she would take the sisters outside, spread newspapers around

them, and light the papers on fire, forcing them to stand near the flames. Other times, she forced Veronica to kneel in the backyard, face the sun, and hold bricks in her hands.<sup>12</sup> (RT 65:7348-7349, 7351; 67:7788.)

Anita also recalled being punished in this manner. The girls had to stand on the wall and hold bricks. If they turned their faces, they had to stay there longer. If they put their hands down, they would be hit with a belt. (RT 72:9108-9109.) Anita recalled another time when her mother hit the girls with a crowbar. On other occasions, she made the girls hold out their hands while she held a lighter under them. (RT 72:9109-9111.) When Veronica was 10 or 11 years old, Anita (who was 6 years older) moved out of the house. Around the same time, Mary, who was 5 years older than Veronica, also moved out of the house. (RT 65:7351-7352.)

Victor Negrette, who later married Veronica's sister, Anita, recalled visits to the family home in the years before he and Anita were married. He attended Anita's 15<sup>th</sup> birthday party and met Veronica, who was then 8 or 9 years old. He recalled the mother, Tillie, being very abusive toward Veronica, with the abuse worsening when Veronica became a teenager. Tillie yelled at Veronica, hit her with a closed fist, and pulled and yanked her hair. Once when Veronica was in the 7<sup>th</sup> grade and Tillie was drinking and was upset, she hit Veronica between the right eye and ear. Veronica was crying, upset, and tried to protect herself by covering her face. On other occasions, Victor saw Tillie push Veronica to the ground, or whip her with a belt. He

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12. However, Veronica noted that she was never burned with hot water, nor was she ever put in a closet or a box or tied up or hung from a closet rod. (RT 65:7353.)

had also witnessed Tillie punch and slap Anita in his presence, even after he and Anita were married. (RT 72:9004-9012, 9055.)

Victor recalled that Tillie was drinking all the time. Once he saw Tillie grab and twist Veronica's hair and Veronica asked, "Why, mom?" Tillie responded in both Spanish and English, calling Veronica a fucking bitch. Tillie often used such language toward Veronica, in an angry tone. (RT 72:9012-9014.)

Victor also recalled Anita and Veronica's step-father, Isais Ortiz. He seemed nice to Veronica when Victor was present, although he was always drunk and argued a lot with Tillie. Sometimes Veronica did not want to be with her step-father, and Victor did not know why. He did recall one incident when he heard yelling, went to see what was happening, and saw Ortiz grabbing Veronica by the hair and hitting her with a closed fist. Victor had to pull Ortiz away from Veronica. Victor asked why he was hitting her, but Ortiz just looked at him and lowered his head. (RT 72:9017-9019.)

According to Victor, Ortiz drank beer and/or hard liquor every night. Victor never saw him sober. Tillie also drank heavily, but there were some occasions when Victor saw her sober. (RT 72:9021-9022.) Sometimes when Tillie and Isais had both been drinking heavily, Victor saw food splattered on the walls and ceramic dolls that had been broken. (RT 72:9056.)

Veronica's relationship with her step-father changed when she began menstruating, around age 12. Her step-father was afraid she might get pregnant, and was angry that he could not continue to do the things he wanted. He still touched her and fondled her, but he no longer put his penis in her

vagina. He would not let her be around other people, and told her she was his. He began to hit and beat her more frequently. (RT 65:7345-7346.)

As Veronica entered her early teen years, her step-father would not let her talk to anyone on the phone or go out with anyone, especially boys. If she was not at school or at home, her step-father would go to other houses looking for her. (RT 65:7354, 7358.)

When she went to school she found herself unable to keep her mind on school work. She started drinking alcohol when she was 12 or 13 years old. Her mother and step-father drank all the time. To Veronica, alcohol was like medicine. It was easier to numb herself with alcohol than to face the things she had to deal with in her daily life. (RT 65:7354.)

When she was 14, Veronica ran for Cinco de Mayo Queen at her school. She came in second and was very happy when she attended the dance with a classmate, David Martinez. However, when she arrived home around midnight, her step-father was waiting for her, drunk and angry. He grabbed her by the hair and beat her, pulling her in the house where he slapped and kicked and punched her. He ripped off her nice clothes. Her mother was standing there and did nothing to interfere, until she was left naked. Her mother then told her step-father to stop and he did. Veronica ran to her room. (RT 65:7355-7357.)

Later that night, her step-father came into her room and pulled a knife, acting as though he was going to stab her. She moved and he stabbed her pillow. He told her that if she was not his, she could not be anybody's. (RT 65:7358.)

When Veronica turned 15, her step-father gave her a Quincenaras party, similar to a Sweet Sixteen party, or a coming-out party. She was happy about that. He told her he was doing that in return for her remaining quiet about the improper things he had done to her. Her escort was Michael Reyes Aguilar. However, after the party, she again found herself fighting with her step-father a lot, and being neglected more than ever by her mother. She eventually ran away from home and was gone for four days. After that, she was sent to live with her mother's sister, Laura Ward, in Happy Camp, Oregon. She was happy there, being with a loving family. After a month, she returned home because her mother was ill. (RT 65:7361-7364.)

Veronica did not do well in school, and the last grade she completed was the 11<sup>th</sup> grade. (RT 65:7359-7360.) After she returned home from Oregon, she started going to cosmetology school through a Regional Occupational Program. She became friends with two other cosmetology students, Myra Flores and Shirley Leon. Shirley talked to Veronica about her own alcohol and abuse problems, and Veronica shared information about her past. Shirley understood what Veronica had been through and told her she should tell her mother what her step-father had done to her. Veronica was reluctant at first, but finally did tell her mother, while her step-father and Shirley were both in the room. (RT 65:7364-7367.)

Veronica's step-father denied her accusations and told her mother that if she believed Veronica, he would leave. Veronica's mother did not want her step-father to leave, so she told Veronica to leave the home. Veronica retrieved a few of her personal items and left, feeling that she was kicked out of the home. (RT 65:7367-7368.)

Shirley Leon corroborated Veronica's description of these events. She and Veronica had become friends at Cosmetology School. Ms. Leon was invited to many family events. Veronica's mother was usually drinking and abusive when Ms. Leon saw her. Veronica told Ms. Leon about the molestations by her step-father and the lack of support from her mother. Ms. Leon vividly recalled being present when Veronica confronted her mother and step-father about the molestations. (RT 69:8310-8315, 8321-8327.)

Tillie initially told Ms. Leon she believed Veronica, and that Veronica's sister, Mary, had made similar accusations about her step-father. Ms. Leon told Tillie she had to do something about it, but Tillie did not respond. Subsequently, Ms. Leon took Veronica and Mary to Dependency Court and they all gave statements to social workers. (RT 69:8325-8328.)

Victor Negrette, the husband of Veronica's sister, Anita, recalled hearing from his wife that there had been sexual molestation in the family home. Around the time that Veronica moved out of the home and went to live with her other sister, Mary, Tillie came to Anita and Victor's home crying and upset. Tillie said something about not believing Veronica. (RT 72:9024-9025.)

Because Veronica was not old enough to live on her own when she moved in with her sister, she had to go to Dependency Court. She told the Court about the abuse she had suffered in the home of her mother and step-father. Her sister, Mary, also told the Court about the abuse in the family home. Mary was made Veronica's guardian, and Veronica was allowed to live with Mary, but Veronica's step-father was never prosecuted for the abuse. Veronica's mother was angered at her daughters and threatened them.

Veronica was still 15 at the time she moved in with Mary. (RT 65:7373-7376.)

Myra Garcia also corroborated events Veronica had described. Even before she and Veronica went to Cosmetology School together, Ms. Garcia had been a supervisor where Veronica's sister, Anita, and her mother, Tillie, used to work. At that time, Ms. Garcia and Tillie became friends and visited in each other's home. Tillie was a heavy drinker. Ms. Garcia recalled times when Veronica, only 9, 10, or 11 years old, would get home from school and Tillie would ask what had taken so long. She would grab Veronica by the hair and call her a bitch and a whore. Ms. Garcia told Tillie to stop, and even interceded when she slapped Veronica, but Tillie just said Myra did not understand. (RT 69:8358-8362.)

Ms. Garcia recalled attending Veronica's Quincenara party. She noticed then that when Veronica's step-father danced with Veronica, he pushed himself really tight against her. Veronica pushed backwards, trying to lean away from him. In the early days at Cosmetology School, when Veronica was still living at home, Ms. Garcia saw Veronica at times with a black eye or a bruise. She asked Veronica what happened, but Veronica simply responded that nothing had happened. Once, Veronica confided in Ms. Garcia about the molestations she suffered at the hand of her step-father. (RT 69:8362-8366.)

#### **4. Ivan and Veronica Gonzales Meet, Marry, and Raise a Family**

Just before she turned 15, Veronica met Ivan Gonzales, who was a college student. Ivan often visited his cousin, Rosemarie Price, who was a friend of Veronica's and lived down the street. Ivan lived in Chula Vista, but started coming to Corona more frequently, visiting almost every weekend. Veronica started going for rides in his car, and then they started dating. He was nice to her and she felt that she loved him. (RT 65:7377-7380, 75:9727-9730.)

Veronica was still dating Ivan Gonzales when she moved in with her sister, Mary. Before long, Ivan also moved into the home. He simply arrived on a rainy day with all his belongings in his car. Veronica had no idea in advance he was planning to move in with her, and she had not even thought about whether she wanted him to live with her until he arrived. She did let him stay, and subsequently decided she did like him living with her. She and Ivan talked a lot, and he was the first friend aside from Shirley Leon that she told about her past abuse. Ivan and Veronica began a sexual relationship when she was 16, and she soon became pregnant. (RT 65:7379-7381; 67:7805-7806.) They were married when Veronica was 16 and Ivan was 19. (RT 7442.)

Veronica's friend from Cosmetology School, Myra Garcia, recalled not liking Ivan from the first time she met him. She quickly saw a change in Veronica. Veronica would come to Ms. Garcia's home and run up to the door just to say hello, while Ivan waited in the car. Ms. Garcia invited her to

get Ivan and come inside, but Veronica just looked at him and said she had to go. Then she ran back to the car. (RT 69:8367.)

Around this time, Ivan started coming to Veronica's cosmetology classes to check on her. He became angry and jealous that she had her own booth, with regular male and female clients. Veronica could not concentrate on work when he was present. (RT 65:7381-7382.) Veronica soon dropped out of cosmetology school and just stayed home. Ivan did not allow her to go anywhere. Echoing the words of her step-father, Ivan told Veronica she was "his." They moved out of Mary's home and lived in a motel room.<sup>13</sup> Even while she was pregnant, Ivan started to hit her in the back, pull her hair, and hit her in the stomach. (RT 65:7381-7383.)

Veronica's cousin, Rosie Centeno, recalled seeing her and Ivan together at a family reunion in 1986. They seemed in a hurry to leave. Veronica wore sunglasses and a lot of makeup to cover a black eye. Her hair was feathered to cover her face. Veronica was wearing a shirt and sweater on a hot day, and Rosie kept telling her to take the sweater off. Finally, Veronica showed Rosie a big dark purple bruise on her arm and said she wore the sweater so others would not see the bruise. She said Ivan had hurt her a number of times, but she was scared and could not consider calling the police. (RT 69:8376-8380.)

At other family reunions, Ivan always wanted Veronica to hurry up and leave early. Ms. Centeno felt Veronica was scared around Ivan and

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13. During the next several years, they lived at various times with Ivan's parents, and with Ivan's sister, Patti Andrade. (RT 67:7847.) Eventually, as will be seen, they started a household of their own.

would not stay and talk to her. Veronica would just say she had to go. Ms. Centeno also recalled occasions she visited Veronica at home and Ivan seemed to be mad at her. (RT 69:8381-8382.)

At the age of 17-1/2, Veronica gave birth to her first child, Ivan, Jr. Ten months later, she gave birth to her second child, Michael. Just over a year later, Vanessa was born. Thus, by the age of 19, she had three small children to care for. She then went 26 months without having a child, but that was followed by three more in a 31 month period, giving her six children under seven years old, by the time she was 24. (RT 65:7340-7342.)

Victor Negrette, the husband of Veronica's sister, Anita, recalled that Ivan seemed like a decent person when he first started seeing Veronica. He dressed well and behaved nicely. (RT 72:9023-9024.) After a year or so, he changed and became very jealous. After the couple had their second son, Ivan seemed to get upset with Veronica for no reason. When Victor and Anita visited, Veronica could not be outside if any other man, who Ivan did not know, was present. Ivan would get very upset and tell Veronica to come inside. She did not argue with him. She just did whatever he said. (RT 72:9027-9028.)

Veronica's sister, Anita, had similar memories. Ivan did not talk much, but would give Veronica a look and Veronica knew what it meant. Anita visited Veronica once or twice a month and often saw bruises on her sister. Veronica would say she had bumped herself. (RT 72:9129.)

In late 1988, when Vanessa was a baby, Veronica and Ivan Gonzales lived with Veronica's cousin, Angela Dominguez, in Corona, for about two weeks. One day Angela came home and found Veronica looking scared. She

said she and Ivan had been fighting. Angela looked around and discovered a hole in the wall in the living room. Ivan did not seem upset. Angela saw bruises on Veronica's right arm. She never saw any bruises on Ivan. She also recalled that she had seen Ivan spank the children hard, but had never seen Veronica discipline the children or be mean to Ivan. Sometimes Veronica seemed happy and other times she seemed sad. Angela believed Veronica was afraid of Ivan. Angela had no contact with her cousin after 1988. (RT 71:8678-8686.)

Another incident that happened when Vanessa was still a baby involved the two boys, Ivan, Jr. and Michael, playing in a Sesame Street playhouse. Ivan Gonzales got angry at the boys and kicked their playhouse. Part of the playhouse hit Michael on the left side of his face, on the eyebrow. Veronica took the boy to the hospital, even though Ivan had said not to do that. The boy needed stitches. Veronica told hospital personnel and her sister, Mary, that the boy had fallen. She lied because she was afraid of what her husband would do to her or her son. (RT 65:7423-7424.)

During Veronica's years with Ivan Gonzales, the abuse never stopped. Over time, Ivan got increasingly aggressive, hitting her more often and yelling at her. At first he was careful to hit her in places where the bruises would not be visible. He would grab her and slam her head against the wall. He hit her with boots and belts and even used a pair of pliers on her. Veronica recalled a specific incident after the birth of Vanessa, where she tried to leave Ivan. She was staying at her mother's home and Ivan came to the house and called her outside. At first she would not go outside, but he kept blowing the horn and calling her. Veronica's relationship with her mother was not very

good at the time either, so she finally went outside and got in the car, expecting Ivan to hit her. However, Ivan said he missed her and the kids. He promised he would change and not hit her anymore. But then he started yelling and Veronica's mother came outside. Ivan got angry and told her to hug him before he did something. She complied. He then took a pair of needle-nosed pliers and pinched her nipple, hurting her so badly she fell against his chest. He demanded she tell her mother to go back inside. She told her mother everything was okay, and she returned home with Ivan. (RT 65:7385-7387.)

During the course of their marriage, Veronica tried to leave Ivan about 10 times. Sometimes he threatened to kill her, telling her if she would not be his, she could not be anybody's. He threatened to hurt the children. He said if she left him, she would not get all six of the kids, and he would take them one at a time and hurt them. Sometimes he hit or kicked the kids for no reason. He would pick them up by the hair or hit them hard, with the back of his hand. He began beating up Veronica as though he were fighting with a man, giving her black eyes on six different occasions. He also gave her swollen lips and nosebleeds. He scratched and punched her face. If anybody saw her and asked about the marks on her face, she would say that she hit herself or fell or was hit by a door. Most of the time she was not permitted to go outside, and when she did, she hid the marks with make-up. (RT 65:7388-7390.)

Other things Ivan did to her included kicking her hard while holding her by the hair. Sometimes he would head-butt her. He bit her and hit her with the back of his hand or with his elbow. He snapped at her with the end

of a belt or even with the buckle. He hit her in the arms, legs, back, and face. (RT 65:7402-7405.)

Ivan also abused her emotionally, telling her that her own mother did not love her and that he was the only person who wanted her. He threatened to use a knife on her to the point where nobody would recognize her. (RT 65:7390-7391.)

At the beginning of their life together, Veronica believed she and Ivan had a good sexual relationship. However, as he started abusing her physically, he also became more aggressive during sex. Sometimes he would force himself on her, against her will. Sometimes he played pornographic movies and would mimic whatever the persons in the movie were doing. Their relationship changed from making love to rough sex. He tied her up and used a dildo. He would beat her and then have sex with her while she was bleeding and crying. (RT 65:7391-7392.)

In order to have sex with her with all the children in the home, Ivan would lock them in their bedroom or he would lock himself and Veronica in a bedroom. Sometimes they would have sex in the bathroom, and Ivan would turn on the shower and let the water run. (RT 65:7392-7393.)

While Veronica was 19 or 20, when she had 3 very young children, she had an affair with Gene Luna, Jr., a co-worker of Ivan's. Ivan often brought Gene to the home after work and the three of them would talk and drink and use drugs together. Although Gene was only 16, he listened to what Veronica had to say and they grew closer. Gene told Veronica she should not put up with abuse from Ivan. She felt Gene was there for her, comforting her and telling her things she had not heard from Ivan in a long

time. He told her she was pretty. On one occasion, Ivan, Veronica, Gene, and Gene's sister had a Halloween party together. Everyone was drinking and using crystal meth. Around 4:30 AM, Ivan and Veronica left to put their kids to bed, because Ivan had to work the next morning. After Ivan had gone to work, Gene came over. Although she had not been expecting him, she let him in the apartment and they ended up having sexual intercourse. Veronica felt bad about the affair and was scared. (RT 65:7440-7444.)

Gene Luna, Jr. testified about these same events, as a prosecution witness. He recalled becoming friends with Ivan Gonzales at work and going to Ivan's house a couple times a week after work. He remembered attending a Halloween party with Ivan and Veronica, where they all used alcohol and methamphetamine. Veronica commented that Luna looked good in the coat he was wearing. According to Luna, Veronica suggested to him that he should come over to her apartment after Ivan left for work, to do another line of methamphetamine.<sup>14</sup> Luna saw Ivan leave for work at 4:30 AM and then did go to the apartment. He and Veronica talked and did a line of methamphetamine. As he was leaving, she grabbed him around the waist and said, "Don't go." He remained. Soon they were kissing and then engaged in intercourse in the living room. He left by 5:30 AM. (RT 75:9654-9667.)

Luna noted, however, that Ivan was very jealous even before anything had happened between Luna and Veronica. Ivan was very possessive, watch-

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14. However, it was stipulated that Luna had testified in two prior Ivan Gonzales trials, and in neither instance did he claim that Veronica Gonzales invited him over to the apartment prior to their first act of sexual intercourse. (RT 78:10298-10299.)

ing Veronica all the time. Ivan tried to be around Veronica as much as possible and got mad if she talked to any other males. Luna also acknowledged that before the incident in which he and Veronica engaged in sexual intercourse, there had been a couple of occasions when he came over and knocked on the door, and Veronica said from inside that she could not let him in because Ivan was not home. (RT 75:9684, 9688; 9715, 9721.)

Luna also noted that there was an incident shortly before the first time he and Veronica had sexual intercourse, in which he came over to the apartment, walked in, and surprised Ivan and Veronica in the middle of an altercation where Ivan had Veronica pinned against a wall. She was trying to get away. Luna was surprised when he realized they were not playing. They ended up on the ground and Luna separated them. Ivan was upset, but Luna helped Veronica because he was concerned Ivan might hurt her. Later the same evening, Luna saw Ivan hit his son, Michael, and send the boy to his room. Luna stuck around until he believed Ivan had calmed down. (RT 75:9704-9708.) Luna noted that in his experience with Ivan and Veronica, the only times Veronica ever got mad were when Ivan did something to make her mad. (RT 75:9712.)

Luna told Veronica that if Ivan hit her or the kids, she should call his name. He lived nearby and would leave his window open. Luna was concerned Ivan would beat Veronica or the children. After seeing the fight, Luna stayed up until 2 or 3 AM, just in case Veronica called his name. (RT 75:9709-9710.)

Soon afterward, Luna and Veronica began their sexual relationship. He noted that the relationship involved more than sex. Veronica told Luna

that nobody had ever before protected her the way he did, and that it made her feel special. He and Veronica spent a lot of time together and shared a lot of feelings. (RT 75:9709-9710.)

Sometime in the next few months, Ivan and Veronica were kicked out of their apartment after Ivan broke the windows. They moved to a motel room and then moved in with Gene Luna's sister, Jessica. During this period, Veronica and Gene had their second and last incident of sexual intercourse.<sup>15</sup> Veronica became pregnant and was not certain whether the father was Ivan or Gene. She told Gene about the pregnancy and he was happy. When Ivan came home from work, she told him she was pregnant and that she did not know whether he or Gene was the father. Gene was in the room when she told Ivan. Veronica had already packed her belongings in the car because she planned to leave, expecting Ivan to get angry and beat her. Veronica was afraid to tell Ivan about the baby, but she did so because she believed that Ivan would be so upset with her that he would finally let her leave and not try to get her to return. (RT 65:7444-7448.)

When Veronica told Ivan about the pregnancy, he was angry, but restrained himself. Veronica asked Gene and Jessica to drive her to her mother's house. Ivan started banging on the car window, asking Veronica to stay. Veronica did not stay, but instead had Gene take her and the three children to her mother's. They stayed at her mother's for about 10 days, but Ivan

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15. Luna's recollection of their second act of intercourse was that it occurred in Veronica's apartment while Ivan was at work, a couple weeks to a month after the first incident. Luna was under the influence of alcohol and went to Veronica's apartment early in the morning. (RT 75:9668.)

kept calling and coming over, saying he needed Veronica and would change. Ivan was still living with Gene and Jessica, and finally Veronica went there to see how Ivan was doing. He said he loved her and wanted to be with her. He said they would move to San Diego and he would treat the coming baby as his own. Veronica wanted to believe him and wanted to keep her marriage, so she returned to Ivan. She felt her only other choice at that time was to live with her mother, but that was also not an acceptable long-term option. When she gave birth to the new child (Anthony), Ivan signed the birth certificate as the father, even though Veronica never had blood tests to determine who was the actual father. (RT 65:7447-7450; 69:8258.)

Veronica never sought medical treatment when Ivan injured her. She was afraid that if she did, the police would be called. She was afraid of having to explain what had happened to her, and she was afraid of what Ivan would do in response. She did not believe the police would do anything to help her, as they had done nothing about her step-father after she had reported what he had done to her. She even began to believe it was her own fault that her husband beat her. (RT 65:7393.)

Veronica conceded there were some occasions when she hit Ivan back, especially when other people were present. There were occasions when they were living with other family members and she would hit back when he hit her. Sometimes she punched him or even threw kitchen items at him. Once, Ivan came home angry about something somebody had said to him. He was also high on crystal meth. He took Veronica to their room and started beating her and pulling her hair. He said he had tried to obtain drugs, but the supplier would not give them to him on credit. He wanted Veronica

to get drugs for him. They came out of the bedroom and a neighbor was present. Veronica threw something at Ivan that cracked, but did not injure him. (RT 65:7394-7396.)

On some occasions, Veronica hit Ivan on his chin or arm or chest, using her closed fist. Eventually she learned not to do that, as he would respond by hitting her until he wore himself out. (RT 65:7397.)

During the middle part of their years together, Ivan worked as a driver for a trash collection company. Sometimes after work friends would drop Ivan off and stay for a little while. Once, Veronica hit Ivan in front of Gene Luna, Sr., whose wife was a cousin of Veronica's mother. (RT 65:7398.) She hit him in the chin with her fist after he had been hitting, slapping, kicking, and punching her in their bedroom. She hit him because she was tired of what he had been doing to her and she knew he would not hit her back in front of Gene Luna. (RT 67:7841-7843.)

Gene Luna, Sr. testified about this same event as a prosecution witness. He recalled knowing Ivan at work and socializing at the Gonzales home after work, two or three times a week. Once he was there with his son and his brother, drinking on the balcony. Ivan went inside. Soon afterward, Luna went inside and saw Veronica strike Ivan in the mouth. Luna thought Veronica seemed mad, but Ivan did not seem upset. Ivan walked back outside with Luna and said he and Veronica had been arguing. (RT 75:9763-9767.) However, Luna acknowledged that he knew Ivan was jealous of Veronica and that there was tension between them. Ivan would get upset if Veronica talked to any of the men who were visiting, such as Luna's son. (RT

75:9774-9775, 9783.) Luna also noted that at work, Ivan lifted heavy trash cans, so he must have been very strong. (RT 75:9780.)

Daily life for Veronica fell into a pattern of Ivan going off to work, coming home late, eating, beating her, having sex with her, and going to sleep without ever showering. Veronica felt dirty and unloved, as though she was nobody. Ivan was often aggressive, pumped up on crystal meth. Sometimes when she tried to leave him, he would threaten to kill himself. Once he climbed up a phone pole and threatened to jump. The police were called and Ivan was taken in for a mental health evaluation.<sup>16</sup> Other times he would hit his head against something. (RT 65:7399-7400, 66:7531-7532.)

In the home, Ivan expected his wife to do whatever he said. When they were outside the home together, Ivan insisted that Veronica walk with her head down and not talk to anybody. He also rarely allowed her to go out of the home alone. She was not permitted to get the mail or do the laundry herself. (RT 65:7431.) When Ivan was gone from the home, he often took one or two of the children with him in order to be sure that Veronica would remain at home and not try to leave him while he was gone. (RT 65:7438.)

Ruben Aguilar, a cousin of Veronica's, recalled first being introduced to Ivan Gonzales sometime between 1990 and 1992. Ruben had known Veronica all his life. Growing up, Veronica had been a jolly person, the life of the party. All the kids liked being around her. But when she was with Ivan, he acted very possessive and looked intimidating. When Ruben arrived and

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16. Veronica's cousin, Rosie Centeno, corroborated the pole incident, recalling Veronica describe it to her when it occurred. (RT 69:8383.)

went toward Veronica to give her a hug, Ivan looked at her as if saying she better not allow that. She didn't allow it, causing Ruben to feel slighted. Ivan seemed totally in control of Veronica. During the visit, Ivan took her back and forth in and out of the room. Veronica did not talk to Ruben very much that day, and he knew it was because of Ivan's jealous nature. (RT 71:8697-8701.)

Victor Negrette, the husband of Veronica's sister, Anita, recalled that over the years that Ivan and Veronica were together, Ivan became increasingly possessive. Like Ruben Aguilar, Victor recalled occasions when he gave Veronica a hug and Ivan got upset and gave her a rude look. If Veronica did the laundry, Ivan would ask what took her so long. Victor heard Ivan yelling at Veronica, using foul language and calling her names. Afterward, she would look upset. Victor recalled seeing bruises on Veronica. Once, he and Anita came to pick up Veronica after she and Ivan had a fight. Veronica had called, upset and crying. When they picked her up, her face was red and her arm was bruised. Victor recalled about three different occasions when he was present when Veronica was leaving Ivan. Each time, she had all of the children with her. The children would smile and seem happy to be leaving. On a few occasions, Victor saw Ivan hit his children. Once he saw Ivan kick Ivan, Jr. hard on the buttocks. Once he saw him throw a toy at Michael and hit him in the head. (RT 72:9029-9035, 9083-9084.)

Victor asked Ivan why he treated his kids that way. Ivan just looked at Victor and then put his head down. In contrast, Veronica appeared to be a loving mother. Victor never saw her hit the children. Whenever he saw Veronica, she had one child in her arms and another hanging onto her leg. (RT

72:9036-9037.) Veronica's sister, Anita, had similar memories of children always being around Veronica. Ivan did not seem to like anybody being that close to Veronica, and would tell the children to get away from her. (RT 72:9138.)

Anita also recalled that after the Gonzaleses had been married a number of years and had moved to Chula Vista, she could not even talk to her sister without Ivan being nearby. (RT 72:9132.)

Ivan did once allow Veronica to visit a woman next door and drink beer with her, as long as no men were present and Ivan could see Veronica through a window. (RT 66:7450.) The neighbor, Martha Halog, recalled the incident. She remembered Veronica saying that the only way she could come to Martha's house was if there were no men present. Veronica stayed about 2-1/2 hours, but went back to her own apartment occasionally to give Ivan a beer. Martha's ex-son-in-law came over and Veronica immediately said she had to leave. Instead, Martha asked the ex-son-in-law to leave, and then Veronica stayed. (RT 71:8750-8751, 8761.)

Martha also heard Ivan and Veronica arguing. She heard Ivan cussing, calling Veronica a fucking bitch and a pig. Martha also remembered occasions when she saw Veronica with bruises, once on her neck and once on her leg. (RT 71:8756, 8763-8764.) However, she also recalled occasions when she saw Ivan and Veronica together hugging, being affectionate, and looking like lovebirds. (RT 71:8802.)

After the birth of their sixth child, Veronica made an appointment with a doctor and had a tubal ligation. She did not tell Ivan in advance because she believed he just wanted to keep her pregnant all the time – fat and

ugly. When he found out what she had done, he was very mad. (RT 65:7406-7407.)

Ivan and Veronica used marijuana and crystal meth together. She had used marijuana in junior high school, but did not use crystal meth until she was with Ivan. At first, Ivan used crystal meth mainly when he worked, because he started early in the day and worked late. He started getting more and more of it and bringing it home for Veronica to use also. He wanted her to use it so she could keep up with him. He wanted her to still be awake for sex after feeding and bathing the children and putting them to bed. (RT 65:7407-7411.)

Year-by-year, Ivan and Veronica increased the use of methamphetamine. By 1994 and 1995 they were very heavy users. Ivan had not worked since 1990 or 1991, and the family was living on AFDC payments. On the first of the month, when the AFDC check arrived, they would buy three \$20 bags of meth. One bag would last them 1-1/2 or 2 days, but then they would use less and stretch the 3 bags to last 10 days. Nobody would give them credit that early in the month, as it was too long until the next AFDC check. They would have to borrow money from Ivan's parents in order to buy more drugs. Towards the end of the month, they could obtain drugs on credit, since the AFDC check would arrive soon. Also, the grocery would allow them to buy food on credit. Sometimes Ivan bought groceries on credit and traded them for drugs. (RT 65:7412-7413.)

Bassan Kalasho worked at the Hilltop Liquor Store at 1419 Hilltop Drive, across the street from the apartment where Ivan and Veronica Gonzales lived in Chula Vista. (RT 58:6364.) Veronica and Ivan Gonzales were

customers of the store from around 1989 or 1990 until the time of Genny Rojas' death. Kalasho allowed them to make purchases on credit, and they paid their account on the first of every month when Veronica Gonzales came to the store to cash her welfare check. Kalasho could not recall ever seeing Veronica Gonzales in the store alone. However, she was required to come in each month and sign her welfare check in front of Kalasho before he would cash it. (RT 58:6365-6366, 6375.) Ivan Gonzales came in the store daily, to buy groceries, such as soda pop or cereal. In contrast, Kalasho only saw Veronica Gonzales when she came in to cash her check. (RT 58:6366, 6373-6374.)

When the Gonzales account was paid off on the first of each month, it was usually around \$70-80, although sometimes it was over \$100. They always paid the bill on time, except for one month when they were late. At the time of Genny Rojas' death, the Gonzales account was less than \$20. (RT 58:6370-6374.)

During the years that Ivan and Veronica increased their drug use, Veronica felt increasingly tired and stressed. She could no longer deal with caring for six children. Her mind was just not focused any longer. Their home became dirtier and dirtier, as she could not keep up with cleaning. The children all had lice in their hair, apparently catching it from the children of Ivan's sister. Since Veronica could not leave the home to do laundry, the lice problem persisted until she was finally permitted to go to a doctor for medication. Veronica had to do what laundry she could do in the bath tub, sometimes with soap, and sometimes not, when they could not afford the soap. (RT 65:7455-7457.) All six children lived in one bedroom, sleeping in bed-

ding piled on the floor. (RT 65:7459.) Veronica was concerned about raising the children in such filthy conditions, but when she discussed it with Ivan he just got angry. He was more concerned with his own wants than with Veronica or the children. (RT 65:7460.)

Alcohol made Ivan angry and physically abusive, but meth made him sexually active, wanting to have sex all the time. He did not care where they were or who was present. He was more aggressive, but would get frustrated because it took him longer to complete a sexual act when he was on meth. Also, Ivan's heightened sexual desires caused the children to get on his nerves more often, when he would want them out of the way so the couple could have sex. He would hit and scold the children. He just wanted to be alone with Veronica. (RT 65:7414.)

Veronica also disciplined the children occasionally, spanking their behind or hitting their hands. She denied ever hitting them with a metal pole, but acknowledged using a small belt to spank the older boys. Sometimes she also used a hairbrush to spank them. She used such discipline mainly when the older boys were being too rough with the younger children. She did not have to use physical force on the children very often because Ivan hit them so much. When Ivan was angry, she would tell the children to go to their room. Sometimes they did not want to go, and she would discipline them. (RT 65:7431-7437.) Veronica acknowledged she was not always a good mother, but she maintained that she did love her children very much, and missed them while she was in jail awaiting trial. (RT 65:7439.)

Even when Ivan was not using drugs, he was abusive toward the children. He would lock them in their room, hit them, pull their hair, slap them,

or even kick them. They would all get together and go to a corner or run to Veronica. Ivan would curse them and say he did not want them, and that they were in the way. (RT 65:7414-7415.) Ivan also punched and kicked walls, and put his head through walls when he was angry. (RT 65:7458; 67:8095.)

Veronica believed the best way for her to deal with Ivan was to give him what he wanted, in order to calm him down. She would hug the children and tell them she loved them. At first she tried to stop Ivan from abusing the children, but her interference just made him angrier. He would give her a look that she interpreted as meaning she should get out of the way or things would get even worse. Ivan would hit the children with his hand, a belt, or a plastic bat, and would throw shoes at them. (RT 65:7416.)

On one occasion when Ivan was drunk and angry, he slapped Veronica and she ran outside and got in the car with her sister, Anita. Ivan punched out the four side windows of the car, using one punch per window. The police came and took him into custody until he became sober. Victor Negrette was also present and recalled Ivan being upset and punching out the windows of the car. Ivan was in a rage and was growling. (RT 66:7531; 72:9037, 9053-9054, 9079.)

Whether Ivan was sober or under the influence of drugs or alcohol, he behaved differently when other people were around than when the family was alone at home. When others were around, he was quieter and did not show his anger. (RT 65:7430.)

Ivan usually tried to prevent Veronica from calling or visiting her family. When they did visit, Ivan would get angry, fearing that Veronica was

telling them how he treated her. However, when they needed money, he would allow Veronica to contact her family. (RT 66:7533, 7539.)

Raymond Aguilar (a brother of Ruben Aguilar) testified about visiting his cousin, Veronica. He remembered her as a very cheerful, shy, and loving girl when she was younger. He recalled that the first time he met Ivan Gonzales in 1982 or 1983, he tried to shake Ivan's hand; but Ivan simply gave him a dirty look. In 1993, he was driving by Ivan and Veronica's house and saw them and other relatives outside. He stopped and greeted Veronica with an embrace. Ivan came running up while Raymond was talking to his cousin. Raymond soon noticed Veronica's head jerk back and he realized Ivan was standing next to her pulling on her long hair to let her know it was time to end the conversation. (RT 69:8350-8356; 71:8698.)

#### **5. Genny Rojas Comes to Live with Ivan and Veronica Gonzales**

In 1994, Veronica's sister Mary went into a detoxification program and her 6 children were sent to live with Veronica's parents. Mary had been using drugs and her husband, Pete, was incarcerated for child molestation. A social worker for the Riverside County court came to talk to Veronica, asking if the report she had made years earlier about her step-father was true. Veronica's mother had warned her that she needed to deny the earlier report, so that Mary's children could be kept together in the family, giving Mary a

chance to get them all back eventually.<sup>17</sup> Veronica complied and told the social worker that she had lied when she accused her step-father of molesting her. Although Veronica was concerned that Mary's children might be abused in the parents' home, she felt it was more important to keep the family together. Also, she believed the social workers would check up on the children. (RT 66:7544-7547; 67:7786; 72:9041-9042, 9087.)

During the time Veronica's mother was caring for all 6 of Mary's children, Veronica's other sister, Anita, and Anita's husband, Victor Negrette, wanted to help her out. They took Mary's youngest child, Genny Rojas, into their house for 3-4 months. Genny was a sweet girl, but was not very disciplined. If they told her to pick up her clothes, or to do something, she would not do it and would not even respond. In a store, if the Negrettes would not buy Genny something she wanted, Genny would throw herself on the floor and make a scene. Victor concluded that Genny needed professional help. He and Anita were not financially able to get Genny the help she needed, so they returned her to Tillie, who still had all of Mary's other children. That was late in 1994. (RT 72:9041-9043, 9086; 9134-9135.) Victor's wife, Anita, recalled having some misgivings about the children being in the care of her mother, but she knew that if the children ended up in a foster home it would be more difficult for Mary to ever regain custody. (RT 72:9144.)

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17. Mary did eventually succeed in regaining custody of her children. (RT 72:9100.)

In January 1995, Veronica's mother called and said she was having heart problems and could not handle caring for all of Mary's children. She asked Veronica to care for Mary's youngest daughter, Genny, for a while. Genny was 3-1/2-to-4 years old. Veronica felt sorry for her mother and agreed, but when she discussed it with Ivan, he said nothing in response. However, Veronica's mother then said she would send them \$100 per month for Genny's care, and Ivan agreed to bring Genny into the household. (RT 66:7545-7546.) Veronica's neighbor, Martha Halog, recalled that Veronica seemed very happy when she told her that her niece was coming to live with her. (RT 56:5912-5913; 71:8768.)

At the end of January, 1995, Genny came to the Gonzales home. Money was tight for the Gonzales family, and they faced a threat of losing their AFDC funds because Ivan did not want to participate in an employment program. A cutoff was threatened in August 1995, when the family would reach five years of receiving AFDC payments. The family had been receiving about \$1,300-\$1,500 per month in AFDC and food stamp payments, but rent had gone from \$550 to \$650 per month, and groceries cost about \$500 per month. Ivan and Veronica were also spending about \$200 per month for drugs. Thus, the family income was depleted every month on basic expenses, plus the drugs being used by Ivan and Veronica. (RT 66:7545-7551; 67:8098-8105; 69:8244-8257; 76:9940-9947, 9963-9966; see Defense Exhibits LL, MM, and NN.)

The promised \$100 per month from Veronica's mother to cover Genny's expenses did not materialize. They did receive \$100 when Genny first arrived, but after that they received only \$50 in April and \$20 or \$25 on

one other occasion. This made Ivan really angry. Sometimes the family ran out of food. They would borrow food from neighbors or relatives, or get some from the store. Veronica pleaded with Ivan to get a job, but he responded that she just wanted to be able to go out while he was away at work. However, no matter how short they were on money, they felt they needed to keep buying drugs to help them cope with their problems. (RT 66:7553-7560.)

During the time that Genny was living with Ivan and Veronica, the only visits they had from members of Veronica's family were in January and April, 1995. In January, her sister Anita Negrette, and Anita's husband Victor, visited, along with her cousin, Ruben Aguilar. In April, Veronica's mother and step-father visited. (RT 69:8235-8236.) Ruben recalled the early 1995 visit as the last time he ever saw Genny Rojas. Genny seemed like a normal child at that time, playing with the other kids and spending time in Veronica's arms. He felt Veronica and Genny related to each other as a mother and daughter would. Veronica responded to Genny with love. Genny looked healthy. During that same visit, there was an occasion when Ruben heard Ivan hitting one of his children in another room, with the door closed. (RT 71:8703-8708.)

Ruben also recalled an incident during that visit when Veronica and her sister, Anita, went to a grocery store. When they were not back within 20 minutes, Ivan got highly upset and started to cuss. Ruben thought he seemed unusually upset over a minor matter. (RT 71:8723-8724.) Victor Negrette thought Ivan's reaction was odd, believing the length of time that Veronica

and Anita had been gone was not unusual. Ivan got nervous and kept looking out the window and at the clock. (RT 72:9052-9053.)

Victor Negrette recalled a visit to Veronica's in January or February, 1995. Genny seemed happy then and was playing with Veronica's other children. Victor asked Genny if she wanted to come back to live with him and Anita, but Genny said no, and added that she loved her Tia Veronica. Genny seemed healthy at the time and had all her hair, appearing the same as when she had left the Negrette home. (RT 72:9044-9045.) Veronica's sister, Anita, had similar memories of Genny's attitude during that visit. (RT 72:9136-9137.)

Victor also noticed that at the time of this visit, the Gonzales home appeared clean. He had visited them previously when they lived in an upstairs apartment in the same complex, and that apartment had also appeared to be clean. However, in both apartments, Victor noticed holes in the walls. (RT 72:9050-9051.)

Cyndi Casarrubias lived in the same apartment complex as Ivan and Veronica Gonzales. She lived there from January through July, 1995, about the same time period that Genny Rojas was living with the Gonzales family. She recalled a time around early July 1995 when she saw Veronica Gonzales with three large dark purple bruises, one on each thigh and the third one on a calf. Veronica was standing 2-3 feet outside the door to her apartment at the time. In a 7 month period, Ms. Casarrubias had only seen Veronica Gonzales two other times – once picking up her daughter at school and once in the courtyard in front of her apartment. (RT 71:8858-8866.)

Christina Robles, another neighbor in the apartment complex, also recalled seeing Veronica only rarely, but on three such occasions she noticed bruises on her arms or legs. She especially remembered a very big bruise on Veronica's leg. (RT 72:8978-8983.)

#### **6. Ivan Gonzales Begins to Abuse Genny Rojas**

When Genny first came to live with the Gonzales family, Ivan treated her no better or worse than one of his own children. On occasions he spanked her, yelled at her, kicked her in the behind, shoved her against a wall or hit her with a plastic bat. Veronica conceded she also spanked Genny on occasion, but did not use the other punishments that Ivan used. (RT 66:7563-7564.)

The relationship between Ivan and Genny took a serious turn for the worse one day in late April, 1995, when Veronica was washing dishes or clothes in the kitchen and the kids were running back and forth playing with water. Ivan was in the living room, smoking marijuana and watching television. Veronica suddenly heard Ivan cussing and yelling at Genny, while telling the other kids to get out of the way. Veronica heard him say, "Look what you fucking did. Look what you fucking did. You spilled my herbs." She heard Ivan screaming at Genny he was going to get her. She saw Ivan go to the closet and get stretchy black electrician's tape. Anthony ran to Veronica and called for her. Veronica went to the bathroom, but Ivan told her to get out of the way. She saw Genny in the bathtub with her head under water. She was trying to pull herself out, but her hands were tied. Veronica grabbed her

If the child's hands had been free to move, they would have also been burned if she was trying to get out of the water. There were no burns on Genny's hands or arms, indicating she was held in a manner that prevented her from using her arms. (RT 56:5957.) The burns Genny suffered could have occurred in 1-2 seconds in water at 156 degrees, if the victim had been an adult. At 148 degrees, it would have taken 2-3 seconds. At 140 degrees, it would have taken 3-5 seconds to cause such burns. At 135 degrees, it would have taken 6-15 seconds. (RT 56:5958, 6014, 6062.) He agreed that a child would have thinner skin that would burn more quickly than an adult's skin. However, he did not know the magnitude of the difference. (RT 56:6014.) Thus, he was unable to say how quickly a small child such as Genny would have received the burns she received.

Skin had been worn away from outer parts of the ears, probably by forceful rubbing over a short period or a significant amount of pressure over a longer period.<sup>39</sup> (RT 56:5919, 5932.) An abrasion on the nose was also the result of a scrape or pressure. A tight band extending around the head and across the bridge of the nose could have caused the injuries to the ears and nose. (RT 56:5933-5934.)

Dr. Eisele also noted a subdural hematoma in the front of Genny's brain. That was a life-threatening injury for a four year old. It could have resulted from a blow to the head or a fall, but it was more likely that it resulted

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39. However, if the burn to the ear area had occurred prior to the application of pressure, less pressure would have been needed because the skin would have already been injured and therefore more susceptible to becoming raw from rubbing. (RT 56:6001-6002.)

from violent shaking, causing the brain to move within the skull.<sup>40</sup> That injury would have caused bleeding in the enclosed area that held the brain, which would have caused squeezing of the brain. That injury occurred at least several hours before Genny's death. He described this hematoma as small, only 0.2 millimeters thick.<sup>41</sup> (RT 56:5924-5926, 5980-5981.) There was also a subarachnoid hemorrhage on the left side of her brain, caused by an impact to the head with enough force to cause unconsciousness. That injury was at least weeks old at the time of Genny's death, and may have been months old.<sup>42</sup> (RT 56:5927-5928.) The combination of the hematoma and subarachnoid hemorrhage could have contributed to more rapid unconsciousness after the scalding injury that preceded Genny's death. (RT 56:6009-6010.)

There were bruises around each of Genny's eyes ("black eyes"), caused by blows to the eyes or by rubbing. These injuries occurred within a

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40. If the hematoma had been caused by a blow to the head, Dr. Eisele would have expected to see an injury inside the scalp. He saw no such injury. Therefore, violent shaking was the most likely explanation. Such shaking could occur when trying to arouse someone who was unconscious, although Dr. Eisele believed it would have been unreasonable to shake someone that hard in an attempt to arouse them. (RT 56:6020-6021.) However, a child Genny's size would have weak neck muscles and a relatively heavy head, so shaking would be more likely to cause a hematoma than in a larger person. Lax neck muscles during unconsciousness would make it easier for such an injury to occur. (RT 56:6022.)

41. Pressure on the brain from this hematoma could have contributed to bringing on rigor mortis a little sooner than would otherwise have been expected. (RT 56:5983-5984.)

42. Indeed, the injury could have been years old, possibly going back as far as the time of her birth. (RT 56:6026-6027.)

few days prior to the time of death. There were also petechiae, or pinpoint hemorrhages, in the white of the right eye, that could have resulted from strangulation.<sup>43</sup> (RT 56:5929-5931.) There was also a small scraped area around her left eye, and other abrasions and scrapes all over her face. (RT 56:5932.) Bruises on the right side of the cheek and chin occurred within several days of the time of death. They could have been caused by a punch from a fist. It would not have required tremendous force, but more than a playful slap. (RT 56:5933, 6012.)

A grid-like injury on the right cheek, with six linear components, resulted from a thermal burn that could have been caused by contact with a hot blow dryer. A similar injury on the left cheek was more recent, occurring within hours of the time of death. Curve marks, if they came from a straight grid pattern, indicated some movement by Genny, but not simply pulling away. (RT 56:5934-5936.) Both cheeks also exhibited punctuate or circular marks that could have been caused by being struck with the bristles of a brush. (RT 56:5936.) More grid-patterned burn marks, similar to those on the cheeks, were seen on the left shoulder and upper back areas.<sup>44</sup> (RT 56:5950-5951.)

There was a torn area inside Genny Rojas' lower lip, extending to the area between the lip and gum. This injury appeared to have occurred several

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43. However, Dr. Eisele noted that strangulation would typically cause petechiae in both eyes. (RT 56:6015-60176.)

44. Forensic odontologist Norman Sperber used dental impression material to take impressions of these grid-like markings and concluded they precisely matched the grooves in a blow dryer recovered from the Gonzales apartment. (RT 58:6455-6475.)

days before death, and could have been due to repeated injuries to the same location over a period of time. It could have been caused by something pushing the lip against the lower teeth, or the lip could have been pushed down from outside, or grabbed and pulled down. (RT 56:5936-5937.) This injury could have occurred after death. (RT 56:6031.)

There was a scar across the back of the neck, extending up and toward the left ear. The injury was consistent with long term pressure around the neck, possibly caused by a ligature around the neck while she was still able to support herself with her feet.<sup>45</sup> That injury was at least a week old, and could have been 2 or 3 weeks old. A similar injury under the chin could have been caused by such a ligature slipping upward, under the chin. (RT 56:5938-5941.)

Dr. Eisele also observed linear ulcerated injuries around biceps and elbows which appeared to be the type of injuries the doctor would expect to result from being handcuffed. It was a pressure injury, preventing circulation and causing the skin to die. There was more erosion than Dr. Eisele had ever observed in other cases, but he still believed it was consistent with the use of handcuffs.<sup>46</sup> (RT 56:5941-5945.) Scarring inside the wrist and a defect on

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45. The fact that she had such injuries around her neck, but survived, indicated that whatever was around her neck was not tight enough to cut off the blood supply to the brain, but was left on for a long period of time. (RT 56:5998.)

46. People's Exhibit #14 was a pair of handcuffs that could have caused the injuries. The owner of the nearby Hilltop Liquor Store, recalled that Ivan Gonzales had once bought such handcuffs at his store. (RT 58:6371, 6379.) Forensic odontologist Norman Sperber also concluded that  
(Continued on next page.)

the outside of the wrist were also consistent with handcuffs, but could have been caused instead by a cord or cloth wrapped around the wrists. (RT 56:5946-5947.) There were also pressure injuries on the backs of her ankles, several days to a couple of weeks old. (RT 56:5955-5956.)

There were also bruises on the inside front of the thighs. They occurred within 2-3 days before death. They appeared to be from pressure, such as from someone grabbing her legs and pressing very hard with their fingertips. Marks indicated the hands had grabbed her legs more than once, or were repositioned. (RT 56:5954-5955.)

Dr. Eisele noted lymphoid atrophy and severe thymic atrophy in Genny Rojas' spleen and lymph nodes. This was abnormal for a child her age and could have been caused by prolonged stress, illness, or injury. She also had a shrunken thymus gland, indicating she had been ill or under stress for some period of time. That could also have been caused by the low grade chronic infection in the area of the burn on her head. (RT 56:5958-5962.)

In Dr. Eisele's opinion, the number of injuries to Genny, over the period during which they were apparently inflicted, were not just unusual, but were unique. (RT 56:5963.)

Dr. Kenneth Feldman was a pediatrician employed by the Children's University Medical Group of the Children's Hospital and Medical Center in Seattle, Washington. He was personally involved in 50-200 evaluations of

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(Continued from last page.)

lesions on Genny Rojas' arms came from the handcuffs found in the Gonzales apartment. (RT 58:6477-6480.)

child abuse incidents every year, including incidents that involved burning. (RT 59:6548, 6553.)

According to Dr. Feldman, water at 140 degrees would cause deep second degree burns to an adult in 6-8 seconds. Children have thinner skins than adults, so at higher temperatures they will burn in 1/4 to 1/3 of the time it would take to burn an adult. At temperatures lower than the mid-130's, the difference would be minimal. Dr. Feldman noted that the hot water heater that serviced the Gonzales apartment was set to allow a water temperature hotter than he considered safe, increasing the chance that a burn would occur. (RT 59:6560-6561, 6632-6633.) Dr. Feldman also noted that the natural response to a painful stimulus would be to withdraw from it. (RT 59:6562.)

The doctor reviewed photos of the burn extending from Genny's trunk to her feet and believed they resulted from an immersion burn. A burn on the right side of her breastbone, apparently from a drop of water that splashed, meant that the water must have been very hot, in the range of 140-150 degrees. Since the burn went higher on Genny's front than her back, she was apparently leaning or arched forward a little bit when it occurred. Unburned areas on the left side of her back indicated that she was squashed down hard enough to form folds of skin. Her knees were completely burned, indicating she was not able to raise them out of the water. The doctor surmised that the water must have been 7-8 inches deep. To account for the unburned areas, or sparing, Genny must have been held down or otherwise restrained. The burn on Genny's head appeared to be from a separate injury. (RT 59:6564-6571.)

The doctor believed the depth of Genny's burn would have required an immersion for close to 10 seconds in water in the 140-150 degree range. He believed she must have been jammed in the water quite hard, with downward pressure on her shoulders and legs that prevented her from moving. Whoever restrained her must have realized she was experiencing pain. The doctor would have expected her to try to use her arms to get out of the water, but the lack of burns on her hands and arms indicated she was unable to do that.<sup>47</sup> If the tub had been half full of water at 101 degrees and then the faucet was turned on at 150 degrees and she remained sitting in the tub, it would have become too painful for her to continue to just sit there.<sup>48</sup> Even if she did sit still until the water reached 125 degrees, it would have taken another 2 minutes of sitting quite still to get that degree of burn and still have the spared areas.<sup>49</sup> (RT 59:6572-6576, 6640.)

Dr. Feldman believed that if burns such as Genny's had been treated promptly, she would have had a 90% chance of survival, although she would have had a variety of problems, including permanent scarring. It was likely that the actual cause of death was shock. Fluid oozing out of the body into the burned areas removed fluid from the blood vessels, leaving less blood to

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47. However, the doctor agreed that if Genny had her hands on the sides of the tub trying to extricate herself, that would explain the lack of burns to the hands. (RT 59:6612.)

48. Somewhere around 108 degrees, a person would likely realize the water was hot and it would be best to get out of the tub. (RT 59:6610.)

49. However, if the tub initially had 2-1/2 to 3 inches of water at 101 degrees, and then water started coming out of the faucet at the hottest, the water in the tub could reach 130 or 135 degrees fairly quickly. (RT 59:6616.)

circulate. While children can resist going into shock longer than adults can, they have less reserve once they do go into shock. Thus, death can follow rapidly after shock occurs. Early signs of shock, within an hour after the injury, would include anxiety, cool, pale skin in the unburned areas, and a racing heartbeat. The 90% survival rate applied only if treatment was begun before shock had developed. Shock would have set in within one-to-six hours after the injury occurred, and once it did, it may have been too late to save Genny. Delay in seeking emergency care is not uncommon, but can also be associated with abusive injury, whether inflicted intentionally or not. The delay does not necessarily reflect the intent with which the injury occurred. (RT 59:6577-6581, 6622-6623, 6634-6635.) Although the doctor believed it was unlikely, he conceded it was possible that Genny died within an hour after the burns occurred.<sup>50</sup> (RT 59:6652.)

Based on Genny's height and weight and the type of burn, the doctor believed she would have been entirely conscious at the outset, as symptoms of shock developed. Once her blood pressure began to fall, she would have lost consciousness. However, if she was screaming in the hot water, and someone punched her in the face, that could have caused unconsciousness. Also, swelling from the hematoma would have eventually caused unconsciousness. Such factors could also act together to cause unconsciousness.

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50. Defense expert witness Dr. Robert Bucklin believed it was reasonably likely that Genny died within an hour after receiving the burn. If there had been a longer period before death, he would have expected to find fluid in her lungs, but none was found. (RT 62:6992-6993.) If she had lived several hours, he would have expected to find other tissue changes which had not occurred. (RT 62:7006.)

Furthermore, whatever blow caused Genny's black eyes could have caused unconsciousness. (RT 59:6581-6582, 6626-6627, 6651.)

In regard to the burn on Genny's head, the doctor believed it resulted from flowing liquid. He believed it was unlikely that the burn could have been caused by a faucet in a bathtub or by pulling a pot of spaghetti off the stove and dumping it over her back. However, he conceded that it could have occurred if Genny was face down in the tub and picked her head up while water was pouring down from the faucet. Such a burn would have initially been very painful. If someone held Genny's head under a hot faucet in an inappropriate effort to get rid of head lice, that could have caused the burns on the back of her head, but there would have been fighting and movement. Treatment for such a burn would have included skin grafting, which was also a painful process. (RT 59:6583-6589, 6604, 6641.)

Dr. Feldman also reviewed Dr. Eisele's autopsy report and photos of Genny's brain. (RT 59:6590.) The force required to produce the subdural hematoma usually involved an adult shaking a child as hard as he possibly could, and then also striking the head against something during the shaking process. Blunt force does not cause subdural bleeding unless it sets the head in motion. It requires the force of the head accelerating or decelerating.<sup>51</sup> The doctor did not believe that a person trying to arouse an unconscious

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51. If you pushed a child's head hard enough to produce the hole in the bedroom wall, shown in People's Exhibit #58, you would still not get a subdural hemorrhage. Furthermore, Dr. Feldman would have expected an impact against the wall that left a hole in the wall to cause some galeal hemorrhage. There was none in this case. Thus, an impact against the wall was not likely the cause of the subdural hematoma. (RT 59:6619-6620.)

child by shaking would think that the violent shaking needed to produce a subdural hematoma could have done anything good for the child. (RT 59:6593-6595, 6619.)

Dr. Feldman noted the evidence of subarachnoid bleeding that was likely at least weeks old and could have even gone back to time of birth. Thus, that injury could have occurred before Genny was in the Gonzales home. Some premature infants will have subarachnoid hemorrhage. (RT 59:6595-6596, 6649-6650.)

Dr. Feldman believed the blow dryer found in the Gonzales apartment would have produced a temperature sufficient to cause the grid-like burn marks on Genny's skin. (RT 59:6597.) The tearing of Genny's lip from her gum required a downward shearing force such as a powerful blow. The doctor had never seen such an injury result from the application of CPR. The totality of Genny's injuries was consistent with child abuse. Some of it had to be very intentional, such as the application of the hair dryer. The main scald burn on her legs and torso showed evidence of restraint in hot water. It was more difficult to discern intent in regard to some of the other areas. The scalp injuries had obviously been present a long time, and neglected in their care. (RT 59:6598-6602.)

Dr. Feldman described how family stress could lead to incidents of child abuse, such as burning. Something as simple as a child crying, when added to existing stress, could be "the straw that broke the camel's back." Incidents of child abuse could range from accidental, unintended abuse to intentional sadistic abuse, with stress-related triggered abuse in the middle of

that range.<sup>52</sup> A severe financial downturn in a lower economic family can have a triggering effect and lead to stress-related burning. Dr. Feldman also noted it is not uncommon for burn injuries to occur as a result of misguided punishment to end a child's fussiness or some other unwanted behavior. (RT 59:6628-6633, 6636.)

## **8. Veronica Gonzales' Statements to the Police<sup>53</sup>**

### **a. The July 22, 1995 Interview**

Sometime after police had arrived at the scene and found Genny Rojas dead on the night of July 21, 1995, Officer Collum was instructed to transport Veronica Gonzales to the police station. (RT 57:607.) At 6:25 the next morning, Chula Vista Detectives Larry Davis and Richard Powers began interviewing her. The interview was videotaped and lasted 3 hours. The

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52. Even the initial aspects of the bathtub scalding could have resulted from a stress-triggered event. However, Dr. Feldman believed that to maintain that for 10 seconds, in spite of the likely reaction of the child, went beyond a reaction to simple frustration. (RT 59:6647-6648.)

53. Inconsistencies and falsehoods in the statements given by Ms. Gonzales to the police comprised the major portion of the prosecution evidence to support the contention that Veronica Gonzales, in addition to Ivan Gonzales, was responsible for the death of Genny Rojas. Providing exculpatory explanations for inconsistencies and falsehoods was the major goal of the defense evidence supporting the contention that Ivan Gonzales alone bore responsibility for the death. Thus, it is necessary to summarize these statements in considerable detail in order to fully understand the strengths and the weaknesses of the case against Ms. Gonzales and of the defense.

entire videotape was played for the jury.<sup>54</sup> (RT 59:6527-6530, 6533-6534, 6538, 6544.)

Det. Davis began with several questions about Ms. Gonzales' background and family. (CT 13:2933-2936.) He then noted that they had already "spoke to the kids" and had an idea about what had occurred the night before, but they wanted to hear her description of the events. (CT 13:2936.) The detective then asked what had happened to Genny. Veronica Gonzales explained how she had taken over the care of her sister's daughter and then explained that Genny had arrived with a lot of head lice which was "eating up her head." She also noted that Genny had also burned her hair. As she started to explain that she had put Genny in the bathtub, the officer interrupted and told Veronica Gonzales he was going to advise her of her *Miranda* rights. (CT 13:2937.) Ms. Gonzales then asked if she was being arrested and the officer informed her she had been arrested.<sup>55</sup> (CT 13:2937-2938.)

After the detective advised her of her rights, she responded that she understood her rights and then added, "I know I should maybe don't say anything until you talk to your lawyer (unintelligible) you know. I ... I ... I don't have nothing to hide right now you know, uh, I don't ... I'm so con-

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54. A transcript of the videotape was received as People's Exhibit #80 and appears in the record at CT 13:2931- 3032.

55. Although never made clear in the trial testimony, Officer Col-lum had testified in a pretrial hearing on a motion to suppress statements that soon after he arrived at the police station with Ms. Gonzales after midnight on July 21-22, another officer had called and instructed him to place her under arrest. He did so and placed her in a holding cell. (RT 26:2648-2649.)

fused. I don't understand." (CT 13:2939.) She then said she did understand what the detective had read, and then she started asking questions about the status of her six children. (CT 13:2939-2940.)

The detective then covered in more detail the events that had brought Genny Rojas to the Gonzales home. (CT 13:2940-2943.) Ms. Gonzales noted that Genny had a habit of picking at her various sores and cuts. (CT 13:2943-2944.) Although Ms. Gonzales rambled a lot, she soon began describing the events on the day of Genny's death. (CT 13:2944-2945.) She explained that she had been preparing beans and chicken for dinner while Genny was in the bathtub. The other kids were playing and yelling, the television was on, and a room air conditioner was running, so it was difficult to hear anything. (CT 13:2945.) She referred to a trip her husband made to the store to get bread and milk. Since she was busy preparing dinner, some time elapsed before she checked on Genny again. She could not understand how the water had gotten so hot so quickly. (CT 13:2945.)

She believed Genny had started her bath around 7:30 PM, before Unsolved Mysteries came on the television at 8 PM. (CT 13:2945-2946.) She stated she had prepared the water for Genny's bath, but that sometimes the kids would turn the knob that controlled the temperature of the water. (CT 13:2946.) The other children were running around the apartment playing, and the oldest boy was apparently playing in the living room with Ms. Gonzales' blow dryer. (CT 13:2947-2948.)

In a statement that was not responsive to any question, Ms. Gonzales said that her husband helped her out a lot. He was a very nice man and they had a very good relationship. They had been married 10 years, had 6 kids,

and she loved him very much. He was a good father. (CT 13:2948.) He would have peeked in the bathroom to check on Genny while she was in the bath, but he would not have gone inside the room for fear that he would be accused of molestation.<sup>56</sup> (CT 13:2949.)

Ms. Gonzales believed that 45 minutes, or at most an hour, could have passed from the time she put Genny in the bathtub until the time she found her unconscious in the tub. "Unsolved Mysteries" was still playing on television when she took Genny out of the tub. (CT 13:2950.) She then panicked, got Ivan, and had him attempt to administer CPR to Genny. She also tried to put some alcohol on Genny's body. She ran to Patty's to call the ambulance. Ivan carried Genny to Patty's house. Genny seemed to be asleep. (CT 13:2951.)

Detective Davis realized that Ms. Gonzales was talking "way too fast" (CT 13:2951, line 24) and interrupted to note it was tough to talk about these things. (CT 13:2951.) Ms. Gonzales responded: "... I can't even remember, my tears now, and crying like that I'm being scared because everybody coming down on me and you know. It's, I mean it's like what happened. Do you figure out and explain to me. Show me you know what happened." (CT 13:2952.)

Detective Davis asked what it was that made Veronica Gonzales return to the bathroom. She responded it was because she had not heard Genny. Then she went into the bathroom and found Genny floating in the

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56. In a very disjointed fashion, Ms. Gonzales explained that Genny's father had been put in jail for molesting her. (CT 13:2949.)

tub, laying on her back with her head under the water. (CT 13:2952-2953.) Ms. Gonzales explained that Genny was naked in the tub, and the shirt she wore when the police arrived at the scene had been put on her by Ivan Gonzales, after Genny had been taken out of the tub. (CT 13:2953.)

Ms. Gonzales believed the water was warm, but not hot, when she removed Genny from the tub. She started blowing on Genny with a fan. She also gently slapped Genny's face, trying to awaken her. (RT 13:2954-2955.) There was no response from Genny and Ms. Gonzales grew more frightened. She took Genny out of the bathroom and set her by the bedroom. (CT 13:2955.)

Detective Davis again tried to slow Ms. Gonzales down, and encouraged her to relax. (CT 13:2956.) Ms. Gonzales made a comment about going to sleep and also noted she was worried because "there's so many bricks get thrown at us what am I going to do." Detective Davis suggested she take a deep breath and a glass of water. (CT 13:2957.) Ms. Gonzales asked if she could be with her children, but Detective Davis assured her they were in a safe place. (CT 13:2957.) Ms. Gonzales noted that her kids were with her all the time – so much that she did not have a babysitter. She typically did not let the kids go outside, fearing they would be kidnapped. Instead, they stayed in the apartment, playing with the Game Boy and Nintendo and using the VCR. (CT 13:2957-2958.)

The detective urged her to concentrate and take her time. Ms. Gonzales then asked if they could tell her what was going to happen to them at this point. (CT 13:2958.) The detective insisted he was still at an early stage of his investigation, but conceded he did have some concerns about Genny

and wanted to understand what had happened. Returning to the events of the preceding day, Ms. Gonzales noted that her husband had attempted CPR and water came out of Genny's mouth. They got scared and tried to understand what had happened. It was Ivan who carried Genny over to the neighbor's apartment. (CT 13:2959.)

Detective Davis then changed the subject, noting that he had talked to the Gonzales children about getting in trouble and getting disciplined. (CT 13:2960-2961.) He asked what kinds of things Ivan, Jr. did that got him in trouble. Ms. Gonzales said he was jealous and sometimes he hit the smaller children. As punishment, Ms. Gonzales would slap him on the butt with an open hand or sometimes a belt. (CT 13:2961.) She did not hit her children hard enough to leave any marks. (CT 13:2962.) Both she and her husband would administer discipline when it was needed. (CT 13:2962.) She said her next oldest son, Michael, had a bad temper and would sometimes pick up an object and throw it at someone. He would strike out without thinking about it, and Ms. Gonzales tried to get him to think about what would happen when he behaved that way. (CT 13:2962-2963.) Ms. Gonzales continued on regarding her other children. (CT 13:2964.)

Detective Davis then asked what Genny did to get in trouble. Ms. Gonzales responded that Genny was a good girl who did not talk very much. She had to hit her just a couple times, for soiling her clothes instead of using the bathroom. Once she had diarrhea while wearing only shorts without underwear. Ms. Gonzales spanked her for that, but not hard. (CT 13:2965.) Genny also picked at sores. She would get a cut and pick at it, so it stayed

scarred and did not heal. Ms. Gonzales would slap Genny's hand and tell her not to do that. (CT 13:2966.)

Detective Davis noted that when he saw Genny the night before, he noticed she had lost a lot of hair. Ms. Gonzales explained that Genny had bugs in her hair, apparently referring to head lice. She said Genny's mother had once shaved Genny's hair because of the lice. Ms. Gonzales also noted that once Genny got on top of the stove and messed with a pot, burning the top of her head. Afterward, Ms. Gonzales cut Genny's hair short and put on medicine that stung. (CT 13:2966-2967.)

That incident occurred a month or a month-and-a-half earlier, and involved a pot of spaghetti or beans in hot water. (CT 13:2968.) Genny had not been taken to a doctor because they had no health insurance. Ms. Gonzales consulted a book on emergency care and put cold cloths on Genny's head. It had been healing slowly, but some hair had peeled off. Ms. Gonzales tried putting peroxide on the burned area, to help close the wounds. She used a small amount of alcohol when the scab got dirty. (CT 13:2968-2969.)

Ms Gonzales explained there were only 2 bedrooms in the apartment. The kids slept in one room and nobody slept in the other, because Ms. Gonzales and her husband usually slept in the living room. Eventually, they made Genny stay in their bedroom because she was picking her sores and rubbing her head. (CT 13:2969-2970.) Genny normally slept in the other room with all the other kids, but after the head burn Ms. Gonzales was concerned that the other kids would push Genny or throw things at her. When Genny slept in the separate bedroom, she slept on a blanket behind the door

because there was no bed in that room. Usually nobody slept in that room because that was where all the clothes were kept. (CT 13:2970.)

Detective Davis then suggested a short break, as he had to go to the bathroom. Ms. Gonzales again expressed concerns about what would happen to her. The officer stated that he was unsure what had occurred in the home and why it had occurred. He repeated that Genny's hair looked strange and he needed to understand how that occurred. He conceded she had explained that, but he had more areas to cover. (CT 13:2971-2973.) Ms. Gonzales asked to talk to her husband, but the detective said she could not. (CT 13:2973.)

After the break, the interview resumed. The detective asked about the lines and circular marks on the sides of Genny's face, but Ms. Gonzales responded she had not noticed those marks. The detective said it looked like something hot had been pressed against Genny's cheeks and burned them, but Ms. Gonzales expressed total puzzlement as to how that could have occurred. (CT 13:2974-2975.)

The discussion next turned back to the sores on Genny's head and Ms. Gonzales explained that when Genny's head itched, she would rub it on the wall in the bedroom and leave stains on the wall. (CT 13:2975-2976.) Ms. Gonzales would tell Genny not to do that and would put peroxide on the sores. She would also slap Genny's hand. She also said that her husband would spank Genny, but then she added that he never saw him hit "em." (RT 13:2976.) However, she also said that when Ivan spanked Genny, "he has a heavier hand than me." She added that Ivan would yell at Genny, but she had never seen him torture her "or anything like that ..." (CT 13:2977.)

Ms. Gonzales then referred to a box in the closet in the bedroom. It was a sturdy wood box used for blankets. She sometimes had Genny lie down in the closet, but not in the box. She said, "... Genny had nothing to do with that box." (CT 13:2978-2979.) The closet had 2 sliding doors and they would both be all the way to one side when Genny was in the closet. Ivan would put her in the closet when she rubbed her head on the furniture. (RT 13:2979.) She was put in the closet "just to scare her, ... so she could think. ... But ... there was no torture ..." (RT 13:2980.) She would just sleep in the closet. (RT 13:2980.)

The detective said there were other marks on Genny he wanted to ask about. Ms. Gonzales responded that there were a lot of scars already there when Genny came to live with the Gonzales family. The detective said he was referring to fresh scars around her arms. Ms. Gonzales said she did not know what caused them. (CT 13:2981.)

Detective Davis changed his methods at that point and stated, "Okay. Veronica. It's time to get down to the bottom line." (CT 13:2982.) He said he knew she was frightened, but she was not telling the whole story. He claimed he had talked to her children and they had told him things she had not. He said he knew she had done other things to get Genny to stop scratching her head. He claimed he understood her concerns. She responded with an explanation about cutting a figure-8 from the pant leg of her own shorts that she would use to tie Genny's hands so she could not pick at her head. She did not tie it tight, and Genny was able to get out of it. (CT 13:2982-2984.) She maintained she did not use anything other than the cloth to put Genny's hands together. (CT 13: 2984.)

Ms. Gonzales then digressed to another incident in which Genny had diarrhea and did not want to take a bath. They made her lie down in the empty bathtub. She explained:

“And she did lay in the bathtub, but not, I mean, not a long time. It was just to see you know, if she’s gonna go in there you know, show her. You know, kind of like show her you know, get her a little scared and show her. No, don’t do that. Not frighten. ‘Cause she’s not my little girl. I can’t you know, you know like hit her, tort (sic) - no. Just to show her ugly butt.” (CT 13:2985.)

Ms. Gonzales explained further that she told Genny if she was going to do that she would have to lie in the tub. Genny had the runs for a week or two, but then that problem ended. Ms. Gonzales maintained Genny never had her hands tied while she was in the tub. Then she conceded she may have put the figure-8 cloth on Genny, loosely, while she was in the tub, so she would not pick at her sores. (CT 13:2986.)

Ms. Gonzales asked if her children had said anything different. Det. Davis said there was no reason for Ms. Gonzales to lie to him because the children had told the truth. (CT 13:2986.) The detective asked again if Genny was ever put in the bathtub with her hands tied, and Ms. Gonzales acknowledged that she had done that once when Genny had diarrhea, in order to keep her from touching it. Genny had been “running like water” but would not sit on the toilet, so she had been placed in the tub with running water for a little while. (CT 13:2987-2988.)

Det. Davis asked about the handcuffs that had been found in the apartment. Ms. Gonzales expressed embarrassment and said they were just for watching dirty movies. It was a private matter between her and her hus-

band, and they were never used on Genny. She noted the kids had seen the handcuffs and wanted to play with them, but she repeated she had never put them on Genny. She said she had never seen Ivan put them on Genny, but then she added that she was not watching Ivan 24 hours a day. (CT 13:2989.) She acknowledged Ivan would get mad at Genny and would punish her, but she had never seen him use the handcuffs on Genny. (CT 13:2989.)

Det. Davis returned to the events of the preceding evening, squarely telling Ms. Gonzales that her version of what had occurred was not what actually happened. He said finding Genny the way she had described was impossible. He wanted to give her another opportunity to tell the truth. He conceded he did not know if she was trying to protect herself, or to protect Ivan. He claimed that the medical evidence was absolute, and that any lie would backfire. She either had to tell the truth and match the medical evidence, or he would know she was lying. (CT 13:2990-2991.)

Det. Davis appeared to sympathize with the dilemma Genny had presented, noting that he had kids of his own, and kids have bad habits. If you tried a belt and it didn't work, "You go on to the next step. You try something different." (CT 13:2992.) He agreed that rubbing the sores on her head was not good for Genny, and he understood the need to correct such behavior. (CT 13:2992-2993.) He acknowledged he had seen the other kids and they were healthy and had no bruises. He conceded Genny had problems the other kids did not have, and that it was important to stop Genny from hurting herself. (CT 13:2993.)

Ms. Gonzales responded that she was "always holding a brush." (CT 13:2993-2994.) She insisted she was not harsh or abusive and would not in-

flict torture, but would hit Genny with the brush or put her in the tub. Det. Davis referred to the bruises all over Genny and insisted it had been more than just hitting. He noted that Genny's body was burned. Ms. Gonzales responded, "It was burned wasn't it?" Det. Davis agreed "It was burned." Ms. Gonzales noted "It was bad." (CT 13:2994.) The detective asked how she thought Genny had been burned and she insisted she did not know. (CT 13:2994-2995.)

Ms. Gonzales agreed it must have happened in the bathtub, but she maintained, "I did not do that." (CT 13:2995.) The detective reiterated that the description of events she had given before was impossible. Ms. Gonzales conceded she knew Genny was burned, but she did not put hot water on her. She was also sure Genny would not have done that herself. She noted Genny was in the tub 40 minutes and the other kids were in and out. She knew the water was hot, but did not know how it happened. (CT 13:2995.)

Det. Davis said he was not saying she did it, but he believed she knew how it happened and who did it. He noted there were only two people in the house who would have been able to do it. He did not believe it could have been the kids or Genny herself. (CT 13:2996.) That led to the following interchange:

|           |   |
|-----------|---|
| “DAVIS:   | That leaves who?  |
| GONZALES: | Ivan.   |
| DAVIS:    | It's you or Ivan.   |
| GONZALES: | Ivan. Oh I see. So you're thinking if I don't know, maybe he did it.” (CT 13:2996.) |

Det. Davis asked Ms. Gonzales to again describe how she found Genny in the tub, insisting the injuries were inconsistent with the earlier description. (CT 13:2997-2998.) Ms. Gonzales continued to insist she had no idea how Genny was burned. Det. Davis then said flatly that either Ms. Gonzales or her husband put Genny into water that was boiling hot, and held her there. Ms. Gonzales agreed that was what must have happened. (CT 13:2998-2999.) Det. Davis told her to "Quit BS-ing." (CT 13:3000.) He insisted it was either her or her husband, and she responded, "I did not put her in that water and hold her deliberately. Hell no I didn't do that shit." (CT 13:3000.) Ms. Gonzales started to make references to the other kids, but the officer insisted they were all locked in their room. Ms. Gonzales adamantly insisted that the kids were not locked in their room until after she got Genny from the tub and went to Patty's next door. (CT 13:3000-3001.)

Det. Davis changed the topic and asked about the abrasions on Genny's neck. Ms. Gonzales insisted she did not know what had caused them, although she had noticed them for at least a few days prior to Genny's death. (CT 13:3001-3003.)

The interview turned back to the burns in the bathtub, with Ms. Gonzales continuing to insist she did not cause them and the detective continuing to insist they could not have been caused by Genny herself or by the other kids. The officer was certain that someone not only put Genny into very hot water, but also physically prevented her from getting out of the tub. That had to be either Ms. Gonzales or her husband. (CT 13:3003-3005.)

The officer insisted that if Ms. Gonzales did not do it, Ivan must have. She responded that she did not think Ivan would do that. The officer insisted

that if Ivan did it, she must know he did it. The officer similarly insisted that either she or Ivan held something very hot to Genny's cheeks. (VT 13:3006-3007.) Ms. Gonzales conceded the blow dryer caused those burns, but maintained she did not burn her, and she did not know who did. The officer squarely accused her of lying. (CT 13:3007-3008.)

The discussion continued to go in circles, with Ms. Gonzales insisting she did not do it and did not believe Ivan would have done it, while the officer insisted one of them did it and she must know who. At the same time, the officer repeatedly assured her he did not think anyone intended to harm Genny. Rather, he believed that were just trying to correct her inappropriate behavior, and matters had gotten out of hand. (CT 13:3008-3011.)

Finally, Ms. Gonzales began to ponder aloud whether Ivan might have caused the burns, but not realized that the water was so hot. She asked Det. Davis if he thought that was possible. He responded that he knew Genny was held down. Ms. Gonzales then asked again if she could talk to her husband, and Det. Davis flatly said, "No." (CT 13:3011-3012.) Ms. Gonzales then stated, "I know I didn't hold her down." (CT 13:3012.) Soon, she said, "But what pisses me off is if I didn't fuckin' do it and someone, you say it was hot, someone had to hold her, that's right. It only means one god-damn person." (CT 13:3012.)

Next, the officer reminded her he would also be talking to Ivan. He expected to get to the same point with Ivan – that it was either him or Veronica. The officer asked her what she thought Ivan would then say. Ms. Gonzales was quite sure Ivan would not say she did it, because she did not do it

and because if Ivan did do it, she believed he would be man enough to say he did it. (CT 13:3013.)

The officer changed the subject again, asking about the hook that was over the box in the closet. Ms. Gonzales responded that the hook was used to dry her underclothes. The officer noted there was blood in the box and asked if Genny had been put in there. Ms. Gonzales responded that Genny sometimes climbed in the box, but was not put into the box. (CT 13:3014.) The discussion was then sidetracked by a prolonged discussion of how long it had been since Genny burned her head, and when Genny had slept in the closet. (CT 13:3014-3016.)

The officer asked if Ms. Gonzales or her husband had ever put Genny on the hook and she insisted they had not done that. Det. Davis suggested another short break, and Ms. Gonzales responded, "And so much has happened today confusing you know and scary and shocking." (CT 13:3017.) She added, "And I see you guys getting mad you know. I see that." (CT 13:3017.) Det. Davis said it was not that. Rather, he was just frustrated. (CT 13:3017-3018.) Ms. Gonzales responded that she was feeling a lot of pressure. The detective said he was pausing to go use the restroom. Ms. Gonzales asked if she could also use a restroom, but the detective responded that they were almost done and she should just wait for now. (CT 13:3018.)

When the interview resumed, the detective started with some explanation about the interview being videotaped. (CT 13:3019-3020.) Then Ms. Gonzales noted she was scared and confused, thinking about what happened to her niece and worrying about her own kids and her husband. She said a lot of things were going through her mind, and she asked if Ivan would have

done it or could have done it. But she continued to insist she had not seen Ivan cause the injuries or burns to Genny's face. (CT 13:3020.) She explained further that she had been in the kitchen and could not see what was happening in the bathroom. (CT 13:3020-3021.) She again insisted the other kids were not locked in their room until after Genny had been taken out of the tub, and the kids were told to stay put while they took Genny to call for help. (CT 13:3021.) Ivan locked the door while Ms. Gonzales was getting water out of Genny, and Ms. Gonzales returned and unlocked the door after the ambulance had arrived. (CT 13:3021-3022.)

Det. Davis returned to the earlier burn on Genny's head. Ms. Gonzales explained that Genny had not climbed on the stove, but had grabbed at a pot that was on the stove. Ms. Gonzales realized it was a serious injury and called a hot line and followed their instructions. But when she called her mother about Medi-Cal for Genny, her mother said there was none. (CT 13:3022-3024.) She conceded that the person she talked to on the phone did say Genny should be taken to a doctor, but Ms. Gonzales thought the injuries were looking better after her initial efforts to treat them with cold water and a cloth. (CT 13:3024-3025.) She acknowledged she should have taken Genny to a doctor. (CT 13:3025.)

At this point, Ms. Gonzales stated, "I know you got me confused. And I know ... I don't know ... I mean I don't even know what to say anymore. I don't even know my own name right now." (CT 13:3025.) The officer offered to answer her questions, and she asked if he had an idea what was going to happen. He responded he was going to talk to Ivan. He asked if she wanted him to come back and tell her what Ivan had to say. She said that

was fine, or they could get her and Ivan together and talk to both of them. Det. Davis responded that was not the way they did it. Ms. Gonzales reiterated that she was totally confused. (CT 13:3086.)

As the interview drew to a close, Ms. Gonzales expressed concerns about information being given to the media about her children. (CT 13:3027-3028.) She talked about how important her kids were to her. (CT 13:3028.) The officer then gave her some information about jail and when she would appear in court. (CT 13:3028-3029.) There was a little more discussion about the status of her children (CT 13:3029-3031.) The interview then concluded.<sup>57</sup> (CT 13 3031-3032.)

**b. The July 24, 1995 Interview**

Two days later, on July 24, 1995, Det. Davis (along with Det. Rich Powers) conducted another 3 hour videotaped interview of Veronica Gon-

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57. Det. Powers did not believe that Veronica Gonzales displayed any objective symptoms of being under the influence of methamphetamine during the July 22 interview. (RT 59:6667-6668.) He did not believe her speech was rapid, although he acknowledged it was slower when he interviewed her again two days later. (RT 59:6669.) In sharp contrast, **during** the July 22 interview, Det. Davis stated on tape that he realized Ms. Gonzales was talking "way too fast," and he had to repeatedly interrupt her to slow her down. (CT 13:2951, 2956, 2958.)

Det. Powers did not believe her speech was slurred, although he acknowledged that she mumbled. He did not necessarily disagree with the opinion of Officer Reber that Ms. Gonzales was under the influence of methamphetamine at 11:00 PM on July 21, but even if she had been, she could have been coming down by the time of the interview 7-1/2 hours later. (RT 59:6669-6670.)

zales, starting at 7:00 PM.<sup>58</sup> (RT 59:6528-6529; CT 14:3035.) The detective started by explaining they had talked to a lot of people and heard a lot of different versions of events, and still had a lot of questions. (CT 14:3035.) The detective advised Ms. Gonzales of her *Miranda* rights. Ms. Gonzales indicated she did not know if she wanted to talk to the officer again. The detective continued to explain why he wanted to talk some more. (CT 14:3036.) Ms. Gonzales responded that she had nothing to say to anybody and was expecting to go to court soon and have an attorney appointed. (CT 14:3037.) The detective noted she would not be able to talk to an attorney before going to court unless she could retain one herself. (CT 14:3037.)

Ms. Gonzales then asked if they had talked to Ivan. Det. Davis confirmed they had, and she asked how he was doing. They said he was doing well, and that he had asked them to tell her he loved her and missed her and would see her in court tomorrow. (CT 14:3037.) Ms. Gonzales asked whether Ivan had an attorney with him, and they responded he would not get an attorney until the same time she did. (CT 14:3039.) The officers next assured her that her kids were doing fine and were all together. (CT 14:3039-3040.)

Without further inquiring whether Ms. Gonzales did or did not want to discuss the charged crime with the officers, Det. Davis simply said they needed to talk to her more about what had occurred Friday, the day Genny died. They asked her to start from the time they woke up that day. (CT

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58. Once again, the tape recording was played for the jury and written transcripts were provided to each juror. (RT 59:6530-6531,6534,6537-6538,6544.)

14:3040.) She responded that she and Ivan slept in the living room and she did not recall when they awakened, but it could have been 8 or 9 or 10:00. (CT 13:3040-3041.) The kids were still asleep in their room. Genny had slept in the other bedroom. (CT 14: 3041.)

She was unsure what she did first when she woke up, but thought she probably woke Genny. As she expressed concerns about responding when she was unsure of the answer, and was afraid what would happen if she later remembered things differently, Det. Davis said as long as she told the truth there was no cause for concern, since the truth did not change. Ms. Gonzales responded that she knew they were good parents, not bad people, and that what happened was an accident and was not done purposely. (CT 14:3042.) Finally, Det. Davis noted she had mentioned an attorney, and he asked whether she wanted to talk to the officers or not. She responded, "I'm just confused. I am confused." Then she said she would talk. (CT 14:3042.)

She explained she had never been through this, and felt it looked bad if she wanted to talk to an attorney first, that it would seem like she had something to hide. As she continued to express uncertainty, the officers simply said they wanted to talk to her, but it was a decision she would have to make. Ms. Gonzales then noted she had been told the papers were saying harsh things, and she wondered where they were getting their information. (CT 14:3043.)

After further conversation regarding how the press received its information (CT 14:3043-3046), Det. Davis again asked whether Ms. Gonzales wanted to talk to the officers. She responded, "I think I'd like to talk to an attorney. Is that what Ivan said? Did Ivan talk?" (CT 14:3046.) Det. Davis

responded simply, "Ivan talked to us." (CT 14:3046.) Ms. Gonzales then said, "Okay, I'll talk to you. Do I have to answer all the questions? Can I wait for some?" (CT 14:3046.) Rather than explaining she could refuse to answer at any time, Det. Davis responded, "See you're confusing me Veronica. You're saying one thing and you're changing right." (CT 14:3046.) Ms. Gonzales asked again if she would have to answer all questions, even ones about which she was confused, and this time the officer responded that she could answer what she wanted and stop at any time. (CT 14:3046.) She then said she would talk to the officers, and Det. Davis advised her of her rights once more. She said she understood and would answer the questions that she could answer. (CT 14:3047.)

Det. Davis returned to questioning Ms. Gonzales about everything she did on the day Genny died, starting from the time she woke up. She now believed that was 8 or 9:00. She and Ivan started the day by watching something on television and picking things up, until all the kids were awake, by 10 or 10:30. Then the kids watched TV or played around the house, while Ivan and Veronica Gonzales played cards or chess. Around 11:00, she gave all the kids cereal or egg sandwiches for breakfast. Around noon, they had soup for lunch. (CT 14:3047-3050.)

During the afternoon, the kids were playing or fighting. Genny was probably playing with the smaller kids, or else was in the bedroom. Ms. Gonzales did not recall anything unusual happening during the afternoon, except that Alex and Genny were feverish and could not hold down their food. Genny threw up once, just a little bit, around 1:00. Alex threw up more than once. (CT 14:3051-3053.)

As the afternoon progressed, everybody watched The Lion King on videotape. At some point Genny took a nap for 15-20 minutes, and at another point Ms. Gonzales put peroxide or rubbing alcohol on the top of Genny's head, because she was picking at the sores. Ms. Gonzales and her husband spent some time sitting around the kitchen table laughing and talking about how much they loved each other. She told him some day she was going to kidnap him and have him to herself, instead of being with all the kids. The only time they had by themselves was while the kids were playing. (CT 14:3053-3060.)

After watching The Lion King, the kids watched Mask, a videotape borrowed from a neighbor. By the time Mask was over, it was 5 or 6:00 and they watched the news. Around 7:00, Ms. Gonzales starting making dinner, by boiling water for beans while Ivan cleaned the beans. Sometime between then and 7:30, she put Genny in the bathtub. Usually Genny would bathe with the other girls, but tonight she bathed separately because of the sores on her head. Ms. Gonzales checked the tub water then and it was warm. Sometimes Genny would pull on the plug and let some water out, then turn on the shower and add water, so the level was always up and down. The tub was filled to a medium level when she put Genny in and turned off the water. (CT 14:3060-3064.)

Ms. Gonzales believed Ivan was still cleaning the beans when she put Genny in the bathtub. Then she was back and forth between the kitchen and checking on Genny every 15-20 minutes, and checking regularly on the other kids. She washed dishes to use for dinner. She and Ivan sat down and

smoked a cigarette. She put the beans in the hot water and started to cook the chicken. (CT 14:3064-3070.)

At some point Ivan went to the store and returned in a matter of 5 minutes. Ms. Gonzales thought it was about 20-30 minutes from the last time she checked on Genny to the time when she found her injured, after Ivan returned from the store. On the way to check Genny that last time, she took her blow dryer from the kids because they had turned it on and it was getting hot. She put the blow dryer on the dresser in her room and then she saw that the water level in the tub was higher. She could see steam and could feel the heat of the water, and she burned her hand when she put it in the water. Genny was face-up, but her face was under water. She pulled her out and started slapping her to wake her up, perhaps slapping a bit too hard. She called for Ivan. (CT 14:3070-3076.)

“Unsolved Mysteries” was still on the television when she pulled Genny out of the tub, so it could not have been later than 8:30. She continued trying to awaken Genny and had Ivan bring a fan. By that time she had taken Genny to the master bedroom. One of them got alcohol and put it on Genny, and then they blew on her. Ivan tried CPR and some water came out of Genny, so they thought they were helping her. She held the alcohol where Genny could smell it, hoping that would wake her up. (CT 14:3076-3080.)

Meanwhile, Ivan had told the other kids to stay in their room, and he put a shirt around the door to keep the door closed. After 5-10 minutes, Genny was not reacting, so they went to knock on Patty’s door where they could use a phone to call an ambulance. Ivan brought Genny to Patty’s place and laid her on the floor. Someone else tried CPR. Ms. Gonzales could see

Genny's skin peeling and she became afraid and in shock. (CT 14:3080-3083.)

Det. Davis started asking about the other injuries visible on Genny, and Ms. Gonzales gave responses much like she had in the earlier interview. (CT 14:3083-3087.) Returning to the bathtub incident, Det. Davis confronted Ms. Gonzales with the inconsistency between the position in which she claimed she had found Genny and the location of the burns that Genny had suffered in the tub. The officer would not accept her claim that she did not know how else it could have happened. (CT 14:87-3088.)

Finally, Det. Davis started asking Ms. Gonzales what she thought Ivan had told the officers. She said she didn't know, then asked if he had said she did it. The officer responded that Ivan had said he was not going to take the blame for something she did. The officer also claimed Ivan had said he had been concerned about the way Ms. Gonzales disciplined Genny, and had told her he did not like what she was doing. He said he was not going to take the blame for the burns on Genny's face or head or body.<sup>59</sup> (CT 14:3088-3089.)

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59. The evidence admitted at trial in the present case contains no indication whether Ivan Gonzales actually made the statements the officer conveyed to Ms. Gonzales, or whether the officer was deceiving Ms. Gonzales as an interview tactic. The record on appeal does contain a copy of an interview of Ivan Gonzales conducted by the officers on July 22, 1995. (CT 3:446-540.) In that interview, he made no statements similar to what Det. Davis described in this interview of Veronica Gonzales. Instead, he said things such as he had put Genny in the tub, was supposed to check her in 10 minutes, forgot to do so, and then heard screaming. He believed she had tried to turn the water off, but had mistakenly turned it the wrong way. (See CT 3:457, 493.) At a point in the interview when the detectives seemed to be  
(Continued on next page.)

Ms. Gonzales professed strong disbelief that Ivan would say such things. Det. Davis pressed on and Ms. Gonzales seemed to accept the claim that Ivan had said such things, but she strongly maintained that she was not responsible for Genny's injuries. The officer claimed that Ivan's explanation sounded more credible because he had explained how Genny's injuries occurred, while Ms. Gonzales was unable to explain that. Ms. Gonzales first asked why Ivan would explain detail by detail and then blame it on her. If he knew what happened in such detail, how could the officers know Ivan was not the one who was responsible. Det. Davis simply responded, "What I have Veronica is I have him telling me how the injuries occurred." (CT 14:3089-3090.)

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(Continued from last page.)

pressing Ivan to say that he did not like the way his wife disciplined Genny, Ivan gave evasive and incomplete responses. (CT 3:531-537.)

The record in the present case does not indicate that Ivan Gonzales gave any more statements to the police after the one on July 22, 1995. However, the transcript of the July 22, 1995 statement appears in the Clerk's Transcript immediately before transcripts of Veronica Gonzales' July 22 and July 24, 1995 statements. (See CT 3:541-4:652, and CT 4:653-796.) This is in a portion of the Clerk's Transcript which, chronologically, came well before the two cases were severed for trial. Indeed, the transcripts of the one Ivan Gonzales interview and the Veronica Gonzales interviews appear in the Clerk's Transcript as exhibits attached to a motion for severance that was based on statements made by each defendant that would be inadmissible in a trial for the other defendant. (*People v. Aranda* (1965) 63 Cal.3d 518; *Bruton v. United States* (1957) 352 U.S. 232.) (See CT 3:418-445.) Thus, the only apparent reason for the lack of a transcript of a second Ivan Gonzales police interview is that there was no second interview. If there had been such an interview at which he made statements similar to those described by the officers, that surely would have been included in the motion to sever.

Ms. Gonzales continued to profess disbelief. Det. Davis simply responded that both Ivan and Veronica Gonzales were there and should know what happened. Ms. Gonzales responded that she did not see what happened. They went back and forth in this manner. (CT 14:3090-3092.) Det. Davis finally said that the bottom line was if he did not do it, she did, and if she did not do it, then he did. Whoever did not do it knows the other person did do it, but only Ivan was saying the other person did it. (CT 14:3092.)

Despite the absence of logic in what the officer was telling her, his ploy had its desired impact.<sup>60</sup> Ms. Gonzales stated, "Ivan, he would hit her too. He would discipline her too." (CT 14:3092.) She then added, "He has a heavier hand than me. He does. So I uh, I don't believe he's doing this. I do not believe this. I swear." (CT 14:3092.) Det. Davis responded that he still had a hard time believing she did not know what happened.<sup>61</sup> Ms. Gonzales responded that she knew she did not hold Genny on the water, so, "I can put that on him maybe." (CT 14:3093.)

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60. That is, the detective might have reason to be confident that Ms. Gonzales was not totally forthcoming, but he had no basis to know whether she was guilty or whether she was trying to protect her husband. Similarly, even if it actually had been true that Ivan was accusing his wife, the detective had no way of knowing whether that was the truth, or whether Ivan was lying to protect himself. Thus, the tactic was not designed to ferret out the truth, but instead to push Ms. Gonzales into placing blame on Ivan whether that was true or not.

61. This claim was also lacking in logic. If Ivan had been entirely responsible for the injuries to Genny, and Ms. Gonzales had not been in the room at the time, then she would not have known how the injuries occurred. At most, she would have had strong reason to believe Ivan was responsible, but it is not surprising she would have had difficulty accepting such a truth about the father of her 6 children, and sharing it with the authorities.

Det. Davis finally conceded he did not know if Ivan was telling the truth. Nonetheless, he was the only one telling the detective what had happened. Ms. Gonzales responded, "And did he also tell you that he was in there a couple of times in the bathtub while she was there? Spanked her and told her to take a bath?" (CT 14:3093.) She then added, "But I'm saying I don't want to put it on him because I didn't see him do it." (CT 14:3093.)

Next, Ms. Gonzales noted that the blow dryer was in the bedroom and she turned it on to blow air on Genny. "Maybe I put 'em too close. I'm not sure." (CT 14:3094.) She was also trying to wake Genny up with the blow dryer. The detective continued to say that all he had so far was Ivan telling him what had happened, and now it was her turn. She responded with statements such as, "Oh God" and "I do not believe this." (CT 14:3095.) Then she said she heard Ivan yell a couple times while Genny was in the shower. She repeated that she had put Genny in the tub, and she had found Genny later laying down in the tub. She said Ivan spanked Genny because he wanted her to hurry up so the other kids could bathe. Ms. Gonzales was washing dishes when she heard that. (CT 14:3096-3097.)

Ms. Gonzales also said that Ivan was yelling at the other kids. Contrary to her earlier statements that Ivan did not want to go in the bathroom while Genny was in the tub, Ms. Gonzales now said he did go in the bathroom. (CT 14:3097.) Ivan went back and forth between the bathroom and the kitchen. It was after she heard Ivan yelling at Genny to hurry up that Ivan left to go to the store. (CT 14:3097-3099.)

At this point, Ms. Gonzales started asking again just what Ivan had said about the events, apparently still not disbelieving that Ivan was blaming

her. The officers avoided direct answers to most of her questions, but did repeat that Ivan was blaming her for hurting Genny. When Ms. Gonzales asked why Ivan would do this, the officer responded, "Sounds like he is trying to protect himself to me." (CT 14:3099-3100.) Ms. Gonzales then said that Ivan had punched Genny a couple of times that she knew about. (CT 14:3101.)

Ms. Gonzales returned to the point where she took Genny out of the bathtub, and recounted the ensuing events much as she had earlier. She again maintained she had used the blow dryer to blow air on Genny while Ivan went to get the fan, and had not touched Genny with the blow dryer. She said Ivan might have touched the blow dryer to Genny's face at one point, but then she said maybe she had touched Genny with the blow dryer. (CT 14:3101-3104.) Ms. Gonzales acknowledged that at one point her older son had gotten some rubbing alcohol from a neighbor, but it was just a little bit that she had left. When Ivan went to the store, he bought some more rubbing alcohol. (CT 14:3104-3106.)

When the officer started asking again about the marks on Genny's arms, claiming that Ivan had blamed Veronica for them, Ms. Gonzales started talking about a pair of handcuffs Ivan bought at the liquor store, that she originally thought were just for her and Ivan to put on each other. Ivan put the handcuffs on Genny, with her arms behind her back, to stop her from picking at her sores. This happened a couple of times, including one night when Genny slept while wearing the handcuffs. Ivan wanted to use the handcuffs because Genny would get her hands out of the cloth figure-8 that Ms. Gonzales tried to use on Genny to keep her from picking her sores.

Also, she once put the handcuffs on Genny to keep her from messing with her hair when it finally started growing again. (CT 14:3106-3114.)

The discussion continued for some time, regarding when and for how long the cloth or the handcuffs were used on Genny. (CT 14:3114-3118.) Then the discussion turned to the box in the bedroom closet. She now acknowledged that Ivan put Genny in the box for punishment. One time Genny was tied to the hook above the box, while standing on the box. When Ms. Gonzales was vague about who did that, the officer responded by asking her what she thought Ivan said. Ms. Gonzales explained that they did that because Genny had cut or scraped her head on the side of the box. They wanted her to stand on the box so she would not have her head in contact with it, and they tied her hands to the hook so she could stand on the box without falling. Ms. Gonzales acknowledged that she saw the marks on Genny's wrists after she was untied from the hook. Once Genny was left tied to the hook overnight, and the by the next morning a shirt had become wrapped around her neck, causing the marks on her neck. (CT 14:3118-3129.)

Det. Davis steered the interrogation to the burns on Genny's head. He said Ivan had claimed he did not know how that happened. Ms. Gonzales agreed Ivan was not home when it happened; he was picking Vanessa up from school. Genny burned her head on a hot pot on the stove. She tried to climb up to reach it. She pulled the pot and got burned and swollen and almost passed out. Ms. Gonzales thought that happened around March of 1995. (CT 14:3129-3131.) Det. Davis did not think that made any sense, and started asking whether they had poured hot water on Genny's head in order to get rid of her head lice. (CT 14:3131-3133.)

Returning to the pot that Ms. Gonzales maintained caused the burn to Genny's head, she said she had been making beans in the pot. She explained again the efforts she made to treat the burns. (CT 14:3133-3135.) Det. Davis then interrupted to ask for phone numbers for Veronica's sisters and mother. (CT 14:3135-3136.)

Next, Det. Davis asked for more details on the manner in which Ivan disciplined the children. Ms. Gonzales responded that he hit all of the children with a belt. He would hit Genny on her back and on her arms. Genny would get punished when she wiped blood on the floor or when she used clothes to cover up where she had pooped. She would also be punished for saying bad words. She conceded she also used a belt on the kids sometimes, but Ivan had a heavier hand. (CT 14:3136-3140.)

Det. Powers asked Ms. Gonzales to return once more to the manner in which Genny was burned in the bathtub on the night she died. He still did not believe it could have happened the way Ms. Gonzales had described. Ms. Gonzales responded that they had said someone must have held Genny down in the tub. It was not her, and Ivan was strong, so she thought it must have been him. (CT 14:3140.) However, she acknowledged she did not see him hold Genny in the tub. She only knew that he went in the bathroom to yell at Genny to hurry and finish. She heard the sound of splashing water, but she also had the water on in the kitchen. Although she was not sure just when she heard it, she believed she heard Genny say, "Please don't drown me." (CT 14:3141-3142.)

Reverting to her ambivalence about incriminating the father of her six children, Ms. Gonzales stated, "But he did pin it on me. He's willing to do

that me why shouldn't I say the truth?" (CT 14:3142.) The detectives encouraged her to tell the truth and she again said she heard Genny say, in a soft voice, "Please don't drown me," but she was unsure whether she heard that the day Genny died, or the day before that. (CT 14:3142-3143.) The detectives questioned her lack of certainty, and she responded she was sure it was Friday, the day Genny died. This happened before he went to the store. She then heard Ivan say in response, "You don't tell me what to do." (CT 14:3143.)

The detectives pressed for more details and Ms. Gonzales responded, "It's just so hard. This is really hard." (CT 14:3144.) Then she went on, saying it was just after this that Ivan went to the store. She was not sure how long after she heard Genny she went to check on her, but believed it was about 15 minutes. When she did check on Genny again, that was when she saw her skin peeling off. The officers asked questions that assumed Genny was seated in the tub, and Ms. Gonzales seemed to accept this as correct. She said the water was up to Genny's waist and was lukewarm. There was more water in the tub than when Ms. Gonzales had originally put Genny in the tub. (CT 14:3145-3146.)

At this point, Ms. Gonzales stated, "I don't know who he is I don't know .. cooked Genny." (CT 14:3146.) Det. Powers acknowledged this must be difficult and Ms. Gonzales responded, "He is my husband and I love him with all my heart." (CT 14:3146.)

The interview then turned to whether Ms. Gonzales believed her son, Ivan, Jr., had been in a position to see anything. (CT 14:3146-3148.) Next, Ms. Gonzales conceded that when she went to Patty's apartment, where

there would be a phone to call for help, she told Patty to call an ambulance, but not the police. She wanted medical help and did not believe the police could help. (CT 14:3148-3149.) Then the detectives told her that they had talked to Ivan, Jr., and believed he had been lying about some things. Ms. Gonzales thought he might have done that because he was scared. She denied saying anything to Ivan, Jr. that would have caused him to hide anything from the police. (CT 14:3149-3150.)

The officers soon returned to questions about how Genny was burned in the bathtub. Ms. Gonzales said that Ivan did not say anything to her about that after it happened. (CT 14:3152.) Returning to Genny's position in the tub when Ms. Gonzales found her, she surmised that Genny was sliding down, but she agreed with the officers that her face and head were not under water; the water level was up to Genny's breasts. Ms. Gonzales continued to say that Genny was not conscious when she found her. (CT 14:3153-3155.)

After a series of questions from Ms. Gonzales regarding what was likely to happen to her, the interview concluded.<sup>62</sup> (CT 14:3155-3159.)

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62. Det. Davis, one of the officers who interviewed both Veronica and Ivan Gonzales, recalled that Veronica Gonzales was emotional at times during both interviews. In contrast, Ivan Gonzales displayed no emotion at all. (RT 59:6662-6663.)

**c. Veronica Gonzales' Comments at Trial Regarding Her Statements to the Police and to Expert Witnesses**

At trial, Veronica Gonzales readily acknowledged she had lied to the police in her two interviews after Genny's death. She was afraid of Ivan and could not believe what had happened to Genny. She did not know where her own six children were or where Ivan was. She did not know what to say. She was shocked and confused, unable to think straight. She was still under the influence of the crystal meth she had ingested. She was trying to think of everything Ivan had told her to say, and she did not want to tell the police Ivan was responsible for what happened to Genny. She knew Genny was dead and that Ivan was responsible, but she was afraid the police would blame her and that Ivan would be released and get the other children. (RT 66:7706-7707; 67:7753.)

Ms. Gonzales acknowledged that by the second interview, she was no longer under the influence of methamphetamine and she had a clearer understanding of what the police were saying to her, but still could not think for herself. She had been so dependent on Ivan Gonzales for so long that she was used to him telling her how to think. She remembered that when the police asked about Ivan hitting her, she was looking down at her own legs to see if any bruises were visible. She did not want to tell the police about things Ivan had done to her. She did not focus on the possibility that Ivan might be released because she failed to say anything. Instead, her thoughts were focused on her children and on the fact the officers had told her she

was facing 25 years to life in prison. She found it all overwhelming. (RT 66:7708-7710; 67:7738.)

She also explained that during part of the time she and Ivan were at Patti's apartment when the police had first arrived, she and Ivan were alone in Patti's bedroom, with police watching from outside the door. Ivan told her then that she should tell the police that her sister Mary, and Mary's husband Pete, were bad to their children and had their children taken away from them. (RT 67:7763-7764.)

Veronica Gonzales explained further that when she talked to the police she was trying to remember what Ivan had told her to say. He had urged her to take the focus off of him so he would not get blamed for what happened to Genny. At the same time, Veronica was afraid because the police sounded like she was getting blamed for what happened. This brought to mind the times Ivan had said that if she ever reported what he was doing to Genny, the police would blame her for it. In some instances, she was just trying to tell the police the first thing that popped into her mind. Sometimes she just made up things to say to the police. When the police told her that Ivan was blaming her, she had conflicting reactions. Part of her wanted to tell the police what actually happened, and part of her was holding back, still afraid to talk to the police. As a result, in some instances she did try to tell the truth and in other instances she held back or lied. (RT 67:7881-7884; 69:8233.)

In some instances when she was trying to comply with Ivan's desire to take the focus off of him, she would say "we" did this or that when it was really Ivan who did it. She went back and forth between blaming Ivan for

some things, and sharing the blame for other things.<sup>63</sup> She wanted to tell the truth, but was still afraid of Ivan and felt a need to protect him by not blaming him for everything. She was also concerned about herself and her children. Her compromise solution at the time was to tell some truth without directly blaming Ivan alone. Sometimes, when she remembered something specific that Ivan had told her, she repeated that. Sometimes she combined the truth with things that Ivan wanted her to say, or with statements he had made in the past. Sometimes she did not remember what she was supposed to say, and just made up something. Sometimes she lied because she did not want to tell the officers that she and Ivan had been using illegal drugs. (RT 67:7920-7927, 7930, 68:7993-7994: 68:8049; 69:8234-8235.) Another problem was that windows in the apartment were covered, so Veronica could not see outside. In several instances, she did not know what time a particular event had occurred, and she just made her best guess. (RT 69:8227.)

Even after the police made clear their belief that it was either her or Ivan, she still did not want to get cornered into blaming Ivan. (RT 69:8218.) At the same time, she continued to deny things she knew she did not do. (RT 69:8219.)

Veronica explained that when she told the police she loved Ivan, that was only because she was used to saying that. At the time of trial, she did not love Ivan. She knew he had killed Genny and left her to face a murder charge. (RT 69:8211-8212.) At times, she was not even sure whether Ivan

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63. However, she stressed that she always said it was just Ivan who held Genny down in the water. (RT 69:8235.)

had deliberately killed Genny, or there had just been an accident. She did not want to put the blame on Ivan and find out later it had been an accident. (RT 69:8219-8222.) Indeed, even at the time of her trial, she was uncertain whether Ivan had acted deliberately. (RT 69:8223.) She knew she had seen Ivan holding Genny down in the water, but she did not know if Ivan knew how hot the water was. (RT 69:8224.)

One of the things that Ivan had told Veronica was that Genny had drowned. Veronica believed that at the outset, so that was what she told the police. Later she understood that Genny had not drowned, but had been burned. (RT 68:8065-8066.)

Veronica acknowledged that at the outset she was not even truthful with experts hired by her own attorneys. She was used to keeping everything inside herself, and it took some time until she felt comfortable talking about personal matters. Eventually she recognized they really were trying to help her, and then she started being more open and was willing to tell them everything she could. (RT 68:8052-8053.)

Veronica admitted telling social worker Karen Oetken, after her arrest, that she did not use drugs. She lied because she was ashamed of using drugs and was afraid of losing her children. (RT 69:8270-8271; 70:8488.)

#### **d. The Effects of Methamphetamine**

It was stipulated during the trial that at about 12:30 AM on July 22, 1995, blood was drawn from both Veronica and Ivan Gonzales. The blood was tested by a qualified lab and it was determined that Veronica Gonzales

had 143 nanograms per milliliter of methamphetamine in her blood. Ivan Gonzales had 84 nanograms per milliliter of methamphetamine in his blood. (RT 72:8936.)

Terrence McGee testified as a defense expert witness specializing in drug addiction medicine. He explained that a person snorting meth would feel some effect within 30 seconds, but full-blown symptomology would take one to a couple of minutes to appear. Dr. McGee noted that police officers described Veronica Gonzales during the period soon after the death of Genny Rojas as having symptoms such as speaking rapidly, broken sentences, trouble understanding, rubbing eyes, inability to sit still, fingers and toes in constant movement, dry mouth, constantly wanting water, pupils dilated between 6.5 to 8 millimeters, and pulse at 126 beats per minute. These were classic symptoms of use of methamphetamine or cocaine or other central nervous system stimulants. (RT 72:8937, 8947.)

According to Dr. McGee, whatever the level of methamphetamine in Veronica's blood at 12:30 AM, it must have been higher at 7-8:00 PM the preceding night. How much higher was impossible to say. A person under the influence of methamphetamine could appear calm and unemotional, or agitated and "ampy," or brooding and introspective. (RT 72:8948-8950.) Methamphetamine has a disinhibiting impact, so the common thread is that a person under the influence can seem very different than when sober. (RT 72:8951-8952.)

Long-term use can lead to tolerance, so that larger doses are needed to produce the same impact. Use of methamphetamine can affect a male's sexual performance, making it more difficult to achieve an erection or to reach

an orgasm. (RT 72:8950.) Methamphetamine affects the part of the brain believed to contain common sense or good reasoning. It inhibits the ability to control primitive feelings, such as anger, rage, jealousy, or overt sexuality. It makes people feel warm, so they remove their clothes. (RT 72:8953.)

The influence of methamphetamine could affect one's ability to relate events that occurred while under the influence. The events are recalled, but from the perspective of being under the influence. (RT 72:8954-8955.)

A person who tends to be violent can get violent more easily under methamphetamine, but a person who does not tend to get violent will not necessarily become violent just because of methamphetamine. The more methamphetamine in your system, the more likely it will lead to irrational behavior. However, according to Dr. McGee, there is not a big difference between one person with 85 nanograms of methamphetamine per milliliter in their blood, versus another person with 143 nanograms. (RT 72:8956-8957.) Repetitive methamphetamine use combined with lack of sleep for a 2-3 day period can be toxically psychotic, producing an even greater impact on judgment and insight. (RT 72:8974-8975.)

**e. Other Expert Testimony about Veronica Gonzales' Statements to the Police**

Dr. Kenneth Ryan, a defense expert witness on BWS, was aware of the inconsistent statements that Veronica Gonzales had made to police and other persons. Nonetheless, he remained comfortable relying on what Veronica Gonzales had told him during their sessions together. He had reviewed the videotapes of the police interviews and saw nothing inconsistent with his

own conclusion that Veronica Gonzales suffered from BWS. Sometimes during the police interviews, she displayed a lack of emotion, but such a flat affect was not unusual considering her circumstances. She was concentrating so heavily on the thinking process that emotions get pushed away. Women who suffer from BWS will often lie to protect themselves, their children, or even the batterer. They seek to protect the status quo, no matter how negative it may be. They lie to protect the batterer, and may even accept over-responsibility for the actions of the batterer. (RT 73:9273-9277, 9285.)

Dr. Ryan believed Veronica did feel responsible for what happened to Genny because she realized she should have left Ivan. In some of her statements to the police she said “we” did something that Ivan did, in order to diffuse the blame on Ivan, and to demonstrate to Ivan that she was still being loyal to him. She knew that being in custody, arrested for murder, was a serious situation, but she still felt the need to show loyalty to Ivan. (RT 73:9289-9293.)

The fact that some of her statements incriminated Ivan and other statements did not was probably the product of fatigue, due to being interviewed in the middle of the night. Sometimes she would try to protect her husband and sometimes she would be so tired and stressed she would revert back to other issues. Also, a battered woman might take responsibility for certain levels of seriousness, but not for higher levels of seriousness. The situation in which Veronica Gonzales found herself was highly complex and emotional. (RT 73:9391-9393.)

Cynthia Bernee, another defense expert on BWS, noted that when Veronica Gonzales had talked to her about using a stretchy tie on Genny Ro-

jas's hands, she sometimes referred to that as cuffing the child, even though she was talking about the tie and not handcuffs. (RT 74:9449.) Ms. Bernee noted that even though Veronica Gonzales used the word "cuff" in describing what she put on Genny, she also consistently denied ever putting handcuffs on the girl. (RT 74:9480.)

Ms. Bernee also noted that when she viewed the videotapes of the police interviews, she noticed agitation, increased movement, and lack of eye contact with the officers, particularly in the first interview. After qualifying as an expert in working with drug abusers, she expressed the opinion that Veronica appeared to be under the influence during the interview.<sup>64</sup> She was frightened and confused, probably from the trauma of the event and the drug use. There were times she was very upset and times she was detached. Ms. Bernee believed she was in shock, traumatized, and still under the influence of drugs. (RT 74:9459-9463.) Even in the second interview, shock, trauma, and confusion persisted. (RT 74:9492.)

Ms. Bernee did not recall the police asking Veronica Gonzales anything about domestic abuse. Veronica referred to Ivan during the police interviews as disciplining her. That was unusual terminology for an adult

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64. A **prosecution** expert, Dr. Nancy Kaser-Boyd, also agreed that Veronica Gonzales appeared to be under the influence of methamphetamine during the first police interview, and still showed some signs of it during the second interview. She added that a heavy methamphetamine user could still feel the effects of the drug 3-4 days or more after last using the drug. (RT 78:10274, 10276.)

woman, but not for a battered woman.<sup>65</sup> The officers responded she did not need to talk about that if she did not want to discuss it. A battered woman would interpret that as meaning the police did not want to hear about it. Ms. Bernee did not believe Veronica had any trust in those two officers, so it did not surprise her that Veronica would not come out and state she was being physically abused. (RT 74:9463-9465.)

Ms. Bernee was disappointed and concerned that in 4-1/2 hours of interviews, no officer asked Veronica about domestic abuse.<sup>66</sup> There were points where she told them they were nice or she could trust them. Ms. Bernee believed that was just Veronica saying what she thought would please Ivan, thinking someday he would hear this. (RT 74:9465-9466.)

Like Dr. Ryan, Ms. Bernee was not troubled by the fact that during the police interviews, Veronica accepted over-responsibility for some things Ivan did, but indicated at other times that Ivan was responsible for some of his actions. As time goes by, a woman in her circumstances might well reveal the truth in bits and pieces. (RT 74:9475-9477.)

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65. Prosecution expert Dr. Nancy Kaser-Boyd agreed that it would be unusual for a woman who was not battered to speak in terms of being disciplined by her husband. (RT 78:10277.)

66. Prosecution expert Dr. Nancy Kaser-Boyd agreed that battered women being interviewed by police officers often would give clues about their status as battered women. If the officer picks up on such clues, the whole story may come out. Here, the officers failed to react to the clues. (RT 78:10281.)

## 9. The Various Statements of Ivan Gonzales, Jr.

### a. Procedural Background

Prior to trial, the prosecution issued subpoenas for Ivan Gonzales, Jr. and Michael Gonzales, the two oldest children of Ivan and Veronica Gonzales. On February 4, 1997, an attorney representing both of the children filed a motion to quash the subpoenas and to declare the children unavailable as witnesses. The motion contended Ivan, Jr. suffered from post-traumatic stress syndrome as a result of being in the home during the events that led to the death of Genny Rojas. Therapy that the children had undergone was described, along with predictions of the setbacks that would be likely if they were forced to testify against their parents in a trial seeking the death of their parents. (CT 7:1500-1531.)

On February 5, 1997, a hearing was held on the Motion to Quash. Dr. Charles Marsh, a practicing psychiatrist specializing in working with children and adolescents, explained that he had diagnosed Ivan, Jr. as suffering from chronic post-traumatic stress syndrome. He was concerned that having to testify again would cause a reoccurrence and would interfere with the natural flow of the therapy process.<sup>67</sup> (RT 22:1885, 1895-1897.) Edna Lyons, a marriage and family counselor who had conducted 41 counseling sessions with Ivan, Jr., reached a similar conclusion. (RT 22:1999, 2001, 2006.)

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67. In the middle of Dr. Marsh's testimony, counsel for Veronica Gonzales announced that they were joining the motion to quash, in order to spare the children from the trauma of testifying. (RT 22:1904.)

Importantly, she noted that after 41 sessions with Ivan, Jr., she was still not clear regarding just what he had observed prior to the death of his cousin. (RT 22:2066-2067.)

Following the hearing, the trial court granted the motion to quash and declared both Ivan, Jr. and Michael Gonzales unavailable as witnesses. This was based on the judge's conclusion that they would suffer substantial trauma if they were required to testify. (RT 25:2582-2590.)

Even before the motion to quash had been filed, on January 31, 1997, the prosecutor anticipated such a motion and filed his own motion seeking admissibility of preliminary examination testimony by Ivan Gonzales, Jr., as former testimony. (CT 1364-1376.) On February 21, 1997, after the motion to quash had been filed, counsel for Veronica Gonzales filed a response to the prosecutor's motion, arguing against the use of the boy's preliminary examination testimony. That motion argued that such use of former testimony would amount to a conditional examination, precluded in capital cases by Penal Code section 1335 (a). (CT 9:1905-1919; see also CT 1:5-10, 41-42; PH RT 1:12-13.) The defense also argued it did not have a similar motive and interest when Ivan, Jr. was cross-examined at the preliminary examination, as it would have at trial. Further, it was argued that Proposition 115 had changed the nature of preliminary examinations, so that older cases upholding use of such former testimony should be re-examined. The defense did not yet have full discovery at the time of the preliminary examination, and it had been denied any access to the children in order to seek interviews of them. (CT 9:1905-1919.)

At an argument regarding whether Ivan, Jr.'s former testimony would be admissible if he was unavailable at trial, the trial court conceded that significant psychological evidence pertaining to the boy was not made known to the defense until later, but that evidence could be presented to the jury through the testimony of expert witnesses and did not require cross-examination of the boy. (RT 29:3214.)

The defense responded that if it had access to the notes by the boy's therapist before the preliminary examination, he would have been cross-examined about matters in those notes. At the time of the preliminary examination, the defense had not yet received reports that were received later and demonstrated that before the preliminary examination, Ivan, Jr. had already been diagnosed as suffering from post-traumatic stress syndrome. Symptoms of the syndrome included hallucinations, nightmares, depression, and psychoses, all matters that would have been very important to deal with in cross-examination. Ivan, Jr. had been interviewed by the police several times prior to his preliminary examination testimony and had given inconsistent responses each time. Also, at the preliminary examination itself, he made important statements he had never made at the prior interviews. Thus, it would have been very important to cross-examine him about dreams, nightmares, and possible hallucinations. (RT 29:3217-3223.)

The defense also noted that at the preliminary examination, Ivan, Jr. testified that he never told lies, then conceded that sometimes he had lied to get out of trouble, when he was younger. Therapy notes that were not provided until after the preliminary examination included references to the fact that even before the preliminary examination, the boy's foster mother re-

ported that he had recently been telling lies. Had that been known, he would have been confronted with those claims and would have been asked to reconcile that with his own testimony that he never lied except when he was younger. (RT 29:3226-3227.)

Nonetheless, the trial court ruled that the preliminary examination testimony would be admissible as former testimony, and that the videotape taken of Ivan, Jr.'s former testimony could be shown to the jury. (RT 29:3246-3253.) Subsequently, the prosecutor apparently changed his tactics and decided that he would not seek to introduce any of the boy's prior statements during the prosecution case-in-chief.<sup>68</sup> (RT 54:5663.) The defense soon announced it would seek the introduction of the videotape of Ivan, Jr.'s prior testimony, and would also seek to introduce some prior inconsistent statements made by him. (RT 51:5363, 54:5742.)

A lengthy debate followed, regarding just which statements by Ivan, Jr. would be admissible as prior inconsistent statements, after his videotaped former testimony was introduced. The major area of concern was whether inconsistent statements made after the preliminary examination testimony could be admitted under the prior inconsistent statement exception; in other words, would the statements have to be prior to the time the former testimony was given, or merely prior to the time the former testimony was received in evidence at the trial. If the latter, the defense believed it was unfair

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68. Apparently by this time, the prosecution had received pretrial discovery showing that defense expert witnesses had relied on portions of Ivan, Jr.'s prior statements in reaching their conclusions. Thus, the prosecutor had reason to believe the defense would have to seek the introduction of the boy's prior statements during its case. (See RT 51:5362.)

that they were never given an opportunity to confront Ivan, Jr. in regard to such statements made after the preliminary examination. (RT 61:6816-6890.) Eventually, this dispute was resolved when both sides reached agreement on a cutoff date of November 30, 1995 (22 days after the preliminary examination testimony) after which statements made by Ivan, Jr. would be considered inadmissible. (RT 61:6890-6891; 63:7101.)

**b. The July 22, 1995 Police Interview of Ivan Gonzales, Jr.**

During the testimony of defense expert witness Dr. Michael Paul Maloney, a licensed psychologist and marriage, family, and child counselor, a videotape of the July 22, 1995 police interview of Ivan Gonzales, Jr. was received in evidence. The tape was played for the jury in its entirety. (RT 62:7039, 7086-7088; see also Defense Exhibit K, the videotape, and Defense Exhibit L at CT 15:3351-3381, the transcript of that videotape.)

At the outset of the interview, Ivan, Jr. noted that he was awake, and had never stayed up so late before, except for one occasion when he was unable to sleep and was up all night. Initially he said he was a little bit tired, but soon after he said he was not tired. He also stated that his date of birth was December 11, 1986, making him 8 years and seven months old. (CT 15:3352-3353.)

When the detective started to ask Ivan, Jr. about his little cousin, Genny, the boy responded that Genny had drowned. The officer asked how that happened, and the boy explained that Genny had been taking a bath and got burned. Ivan, Jr. was in the kids' bedroom when that happened. (CT

15:3356.) He explained that all the kids slept in that bedroom, except that sometimes Genny slept in the other bedroom, in blankets on the floor. (CT 15:3357.)

Ivan, Jr. said that both his mother and his father were in the living room watching television while Genny was in the bathtub. His mother filled the tub with water for Genny's bath. Ivan, Jr. believed his mother made the water warm, and that Genny later made it hot. (CT 15:3359-3360.) Ivan, Jr. did not actually see Genny in the bathtub, but he claimed he put his hand in the tub when his parents took Genny to another apartment, and the water felt too hot at that time. (CT 15:3361.) Ivan, Jr. told the detective he had not heard Genny scream or cry for help at all, or make any noise. (CT 15:3362, 3364.)

After some more general discussion of the manner in which Ivan and Veronica Gonzales disciplined the children, the detective intimated he was not satisfied with the responses Ivan, Jr. had given so far, and he spoke very strongly of the importance of telling the truth. (CT 15:3369-3370.) After that, Ivan, Jr. reiterated that he and his brothers and sisters were locked in their room while Genny was in the bathtub. He repeated that he did not hear Genny make any noises, but then said he did hear a little peeping sound, as though Genny was saying, "Ow." He heard that sound 4 or 5 times. Ivan, Jr.'s brother started crying and his father told them to stay in the bedroom. Ivan, Jr. thought that Genny was drowning, or that the water was too hot. (CT 15:3371-3373.)

Once Genny was taken to the other apartment, Ivan, Jr.'s father told the kids she was not breathing and had drowned. The boy acknowledged that

earlier he had told the police that he had been the person who let the water out of the tub, but he admitted that was untrue and he had said that because he was afraid he would get in trouble. The detective then assured him that he had talked to both of his parents, that they had told him everything, and that there was no reason for him to hold anything back. (CT 15:3374-3375.)

Now Ivan, Jr. said that he saw the water in the tub going down. When asked again if he touched the water, he said this time that his Dad had told him the water was hot. (CT 15:3375-3376.) The detective then started asking about what Ivan, Jr. had to eat the preceding day, and he said that he did not have dinner the night before because his mother was going to make dinner when she saw Genny laying in the water. (CT 15:3378.) Soon afterward, the detective ended the interview. (CT 15:3380.)

**b. The July 23, 1995 Police Interview of Ivan Gonzales, Jr.**

Also during the testimony of defense expert witness Dr. Michael Paul Maloney, an audiotape of a 3:45 PM, July 23, 1995 police interview of Ivan Gonzales, Jr. was received in evidence. The tape was played for the jury in its entirety. (RT 62:7089-7091; see also Defense Exhibit M, the audiotape, and Defense Exhibit N at CT 15:3300-3318, the transcript of that audiotape.)

Apparently having no qualms about blatantly lying to an 8-year old, Detective Davis started the conversation by saying:

“... what I wanted to tell you Ivan is that I spoke to your mom and dad, and I talked to them about this stuff that’s been going on, okay? And your mom and dad told me the truth, okay. And,

um, they're, you know, upset about what happened and they also want to make sure that you know, that they, they want you to tell me the truth, okay?" (CT 15:3301.)

The officer then started asking about Ivan, Jr.'s mother's hair dryer. The boy said that his brothers and sisters played with it, pointing it at each other, and that they put it on high and it gets very hot. However, nobody was playing with it the day Genny died. (CT 15:3302-3303.) Responding to other questions, Ivan Jr. said that the baseball bat in the apartment was only used for playing baseball. (CT 15:3304.)

The officer asked about blood on the walls in the parents' bedroom, but the boy insisted he never entered that room, except one time when music was playing and they danced in that room. (CT 15:3304-3305.) The officer then started asking what had caused the earlier injuries to Genny's head. The boy responded that Genny often scratched at her head and would then get blood on the walls, but he knew nothing about anything spilling on her head, or any other burn to her head. (CT 15:3306-3308.) He never saw his mother or his father do anything to Genny's hands to stop her from scratching her head. (CT 15:3309.)

The detective returned to questions about Genny's bath just before she died. Ivan, Jr. said he could only see her head when she was in the bathtub. He then gave some conflicting responses about whether it was his mother or his father who put Genny in the bathtub. He then explained Genny had two baths that day. The first was in the afternoon and he was present when his mother put Genny in the bathtub. The second bath was at night and the boy's father put Genny in the tub that time. (CT 15:3311-3312.) Later,

the children discovered they were locked in the bedroom. Then, Ivan, Jr.'s dad opened the door and begged them to stay in their room. The door was locked again, but after two minutes it was unlocked and the children went outside and saw their mother at a neighbor's apartment. (CT 15:3312-3314.) Their dad told them Genny could not breathe, and their mom told them Genny had drowned. (CT 15:3315.) After some questions about where Genny slept, the officer ended the interview. (CT 3316-3318.)

**c. Statements to Social Worker, Approximately July 24, 1995**

Karen Oetken, the San Diego County Social Worker who handled Ivan Gonzales, Jr., had received training in interviewing child witnesses. She knew that leading questions were to be avoided, but she was not familiar with the concept of contamination as a problem in interviews of child witnesses. When she interviewed children, it was not her practice to preserve the interview on audio or video tape. She interviewed Ivan, Jr. soon after she was assigned to his case on July 24, 1995. She knew this was a serious matter and did not know whether Ivan, Jr. had already been interviewed by police. (RT 69:8390-8405.)

Ms. Oetken did understand that the presence of a family member could influence what a child would say, even if just by body language or gestures. She also understood that when siblings were interviewed together, they were more likely to try to protect their parents. Also, one child might simply repeat what another had said. When she interviewed Ivan, Jr., it was just the two of them in the room. (RT 69:8406-8409.)

Ivan, Jr. told her that his cousin Genny could not breathe and had drowned. His mother had found her. Ms. Oetken believed it was the mother who told the boy that Genny had drowned. The boy had heard Genny say, "Ow." He believed his father was watching television and had not heard Genny cry. Ms. Oetken asked the boy about discipline in the family, and he noted he was afraid of his father, but not his mother. He had a bruise on his right shoulder, but said it was from falling and hitting a curb while chasing a ball. (RT 69:8413-8419.)

**d. The July 26, 1995 Police Interview of Ivan Gonzales, Jr.**

The officers returned for a third interview three days later, on July 26, 1995. This interview was also taped and was played for the jury during the testimony of defense expert witness Dr. Michael Paul Maloney. (RT 63:7092-7093; see also Defense Exhibit O, the tape, and Defense Exhibit P at CT 15:3319-3350, the transcript of that tape.)

After asking a few questions about Ivan, Jr.'s foster home, the detective informed him he knew he had not been telling the truth, and that he was afraid he would get in trouble if he told the truth. Continuing his practice of lying to the 8-year-old Ivan, Jr. while paradoxically trying to explain it was never okay to lie, the detective said:

"Well, I want you to know that I spoke to both your mom and dad. I spoke to Michael and Vanessa [brother and sister], and they've told me the truth. Now it's your turn. Alright? You're, like I said, your mom and dad have already told me the truth, and they've said that it's okay for you to tell the truth. And you might be afraid that

if you tell me the truth that you're [sic] mom and dad might get in trouble? Okay? I understand you might have the fear. Is that true? Okay. But you're [sic] not going to help anybody by telling me, continue to tell me lies. Okay? 'Cause your mom and dad told me the whole story. So, if you tell me lies, I'm going to know it. Okay. And I told you to talk to you before about telling the truth and the difference between the truth and a lie. And is it okay to tell a lie? No. Is it ever okay to tell lies? No. Is it okay to tell lies to protect somebody else? No. Okay. So, we're here today, and you're not going to tell me any more lies. Right?" (CT 15:3321-3322.)

Ivan, Jr. responded, "Right." (CT 15:3322.)

The detective asked if anybody had told Ivan, Jr. not to tell what happened, and he said, "No." He asked when Ivan, Jr. last saw Genny, and the boy responded he saw her playing in the bathtub, through the hole where the doorknob had been removed. He did not see anybody else in the bathroom with Genny at that time. (CT 15:3322-3324.) The officer then started asking about the events that occurred the day Genny died, starting from when everybody got up in the morning. Describing the day's events of meals, watching television, and playing, the boy said Genny never came out of the parents' bedroom that day. Ivan's mother even took food into the bedroom to feed Genny, although on other days Genny ate in the kitchen with the rest of the family. The boy thought Genny spent so much time in the parents' bedroom because she liked it in there. (CT 15:3324-3326.)

He again said it was his mother who ran the water for Genny's bath, while he was in the bedroom playing with the other kids. (CT 15:3327.) At one point, his brother Anthony became thirsty, but could not leave the bed-

room because it was locked. Their father came to the door and told them to stay in the room. Later, he let them go outside and told them Genny could not breathe. (CT 15:3327-3328.) He repeated what he had said before about hearing Genny say "Ow," 4 or 5 times, and not hearing her say anything else while she was in the bathtub. (CT.15:3328.)

Ivan, Jr. again said that this was Genny's second bath of the day. After Genny had said "Ow" several times, the boy's mother went to see what was wrong. (CT 15:3328-3329.) The boy thought Genny needed help and tried to go to her himself, but the bedroom door was still locked. (CT 15:3330-3331.) The officer asked if he had heard his mother yelling and screaming and he said, "No." The officer then maintained he must be lying, because his brother and sister said they heard their mother screaming. Ivan, Jr. said they might have heard that because they were by the door and he was not. (CT 15:3332-3333.)

The detective insisted the boy was lying and that he would not have had to be by the door to hear his mom screaming. He asked why the boy was lying, and Ivan, Jr. said he was scared. The officer repeated that he would know when the boy was lying, so he should not even try. The boy then acknowledged that after he heard Genny say "Ow" several times, he heard his mom scream loudly. (CT 15:3333-3334.) That was when their dad came to the door and told the kids to stay in the bedroom. Afterward, he let them out of the room and said Genny couldn't breathe. Ivan, Jr. did not see Genny at that point. (CT 15:3334.) Ivan, Jr. did not look in the bathroom. He went outside. His mother was holding his baby brother, Alex, and said Genny had drowned. (CT 15:3335.)

The officer then returned to the subject of how the children were punished when they misbehaved. He insisted Ivan, Jr. had been lying to him, leaving things out, because his mom and dad, and Michael and Vanessa, had told him everything, and had told him the truth. This time, he did not want the boy to leave anything out. The boy then responded that sometimes when he misbehaved, his mom and dad would spank him in the butt with a belt. That happened about twice a week. Once, his mom spanked them with a metal rod that was used to keep the window from being opened from the outside. (CT 15:3336-3337.) Once his mom hit him with a broom. Sometimes his dad hit them in the butt with a plastic bat. (CT 15:3338-3339.)

Ivan, Jr. explained that Genny would get punished for picking at her sores and for rubbing her head on the walls and getting blood on the walls. His parents would spank Genny with their hands, or sometimes with the plastic bat or a belt. (CT 15:3339-3340.) Genny normally slept in his parents' bedroom, sometimes inside the closet. He denied she slept anywhere else, and the interview was then interrupted so he could use the bathroom. (CT 15:3340.)

After the bathroom break, the officer told him that others had said that sometimes Genny slept in the bathtub, with no water in the tub. Ivan, Jr. responded that sometimes Genny would fall asleep in the bathtub and just sleep there overnight. (CT 15:3341.) He maintained he never saw handcuffs on Genny, although there were occasions when rope or clothing was tied around Genny's wrists to keep her from picking at her itchy sores. When asked how many times that occurred, he said "I think about 35 or 36." (CT 15:3341-3343.)

The officer brought up the box in the closet in the parents' bedroom. The boy was not aware of Genny ever being put in the box, or being hung from the hook in the closet. (CT 15:3344-3345.) He also maintained he did not know what had caused Genny's head to look the way it did. (CT 15:3345-3346.) He did recall occasions when his mother put rubbing alcohol on the sores on Genny's head, when she had scratched them and made them bleed. (CT 15:3346-3347.) He recalled that they ran out of rubbing alcohol on the day Genny died, and his mother sent him to borrow some from a neighbor. (CT 15:3347.) He said Genny had bruises on her because she was always bumping into things. (CT 15:3348.)

In closing the interview, the officer asked leading questions suggesting he believed Ivan, Jr. was afraid his parents would punish him if they knew he talked to the officers. The boy responded that he believed the police would punish him if he failed to tell them the truth. The officer asked if his parents had told him not to talk to the police. He responded that they had only told him not to talk to strangers. A moment later, the interview ended. (CT 15:3349-3350.)

**e. The October 25, 1995 Police Interview of Ivan Gonzales, Jr.**

Ivan, Jr. was not interviewed again until three months later, on October 25, 1995. This time, a deputy district attorney joined the detective. This interview was also videotaped and was played for the jury during the testimony of defense expert witness Dr. Michael Paul Maloney. (RT 63:7094-

7096; see also Defense Exhibit Q, the videotape, and Defense Exhibit R at CT 15:3268-3299, the transcript of that tape.)

The officer and prosecutor started the interview by joking with Ivan, Jr. about his brothers and sisters. Next they asked about his foster home and how he was doing in school. (CT 15:3368-3373.) They said a hidden camera was videotaping the interview. (CT 15:3273-3274.)

The interview turned to Genny, and Ivan, Jr. promptly responded that sometimes Genny would defecate while in the bathtub. His mom and dad would drain the water and then make Genny pick it up and eat it. He saw that happen twice. (CT 15:3275-3276.) He followed this by claiming that Genny only ate food two or three times during the whole time she stayed with Ivan, Jr.'s family. When asked why that occurred, Ivan, Jr. responded that his "mom and dad wanted to get rid of one of us, and I thought Genny was gonna be the first one." (CT 15:3276.)

He went on to explain that seven kids were too many, because they did not have enough money. Whenever they did have money, the parents used it on cocaine or marijuana instead of food. He thought Genny was going to die because his parents had been torturing her, by hitting her and by getting her skin and cutting it off with a knife.<sup>69</sup> (CT 15:3277-3278.) Both his mom and his dad did this, saying they wanted to get rid of her. (CT 15:3278.)

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69. Of all the different injuries on Genny that were described by the medical witnesses, **none** were described as being the product of skin cut off with a knife.

Ivan, Jr. reiterated his earlier statements about tying Genny's hands to keep her from scratching her sores. This time, however, he said Genny's head was always bleeding because his mom and dad were hitting her and ripping her hair off – grabbing it with their hands and pulling it. (CT 15:3279-3280.) The deputy district attorney sought to clarify whether it was his mother or his father who did this, but Ivan, Jr. insisted it was both of them. (CT 15:3280.) When this happened, Genny would cry and scream. The prosecutor asked what his parents did when Genny screamed. Ivan, Jr. responded: "Hit her. Punch her. Rip her skin off. Her hair, uh. Throw her – throw her in the bathtub . . . and get the knife and cut **all** her skin off." (CT 15:3280-3281; emphasis added.)

Ivan, Jr. went on to refer to Genny's death as "the murder." He said when his mom and dad told him Genny had drowned, he knew that was untrue because they were trying to kill her. He knew that because they had been torturing her, cutting her skin off, and beating her to death. (CT 15:3281.) He knew the water in the bathtub was hot the night Genny died because his dad told him that. He claimed he always felt the water after they filled the tub for Genny, and it was always hot. He claimed that the day Genny died, he had seen both of his parents put the water in the tub and then put Genny in the water. Genny kicked and tried to hit both of them, trying to save her own life. His parents kept hitting her and she was already weak from getting no food and from always being beaten to death. (CT 15:3282.)

Ivan, Jr. claimed Genny was wearing one of his dad's undershirts when he saw her in the bathtub. Altering his claims, he then said that the door was closed when Genny was in the bathtub, and the way he knew both

parents put her in the tub that night was because that was how they always put her in the tub. (CT 15:3283.) Soon he went back to saying that he saw Genny in the tub through the hole in the doorknob. Genny was sitting in the hot water with his dad's shirt on. She started crying and screaming. Then they closed the door and did something. (CT 15:3285.)

Ivan, Jr. explained again about being sent by his mother to borrow rubbing alcohol from a neighbor. (CT 15:3286.) When he returned, Genny was in the children's bedroom wearing the big shirt. His mom said "Look, guys, look," and then poured alcohol on Genny while the child screamed. At that time, Genny's feet looked like her head had looked, with scabs and scars and the skin cut off. (CT 15:3286.) Genny was standing up when his mom poured the alcohol on her. But then he said that the use of the alcohol on Genny the night she died occurred before her bath. (CT 15:3287.)

Ivan, Jr. then said that one night they had gone to bed and Genny had hair and no scars. The next morning when they awoke, "she barely had hair and all the scars and stuff." (CT 15:3287-3288.) The prosecutor asked him about the closet in his parents' bedroom and, for the first time, he said that his mom and dad tied Genny up and hung her from a red metal thing that was hammered in the closet. (CT 15:3288.) He saw both parents tie her there. (CT 15:3288-3289.) The ropes on her arms caused scars and bleeding. He again maintained that the way Genny lost her hair was his mom and dad pulled it off. (CT 15:3290.)

Now Ivan, Jr. claimed that when any of the children misbehaved, both his mom and his dad would hit them as hard as they could with a gray metal thing. (CT 15:3290-3291.) He also said that his sister, Vanessa, was mean to

Genny and would throw a hard ball at her. When asked why, he claimed that his mom and dad would tell the kids to throw the hard ball at Genny, and if someone refused, his parents would throw the ball at whoever refused. Ivan, Jr. would throw the ball at Genny, but would intentionally miss. He believed his parents wanted the kids to do this so Genny would bleed and have scars. His mom and dad would cover the scars when relatives visited. (CT 15:3291-3293.)

The discussion turned to the manner in which the door to the children's room was locked from the outside. (CT 15:3294-3295.) Next there was further discussion about Genny getting no food when she was hungry, but the boy claimed he would sneak her some food when his parents were asleep. (CT 15:3296-3297.) After some discussion about the fact the boy would soon be going to court, the interview ended. (CT 15:3297-3299.)

**f. The November 8, 1995 Preliminary Examination  
Testimony by Ivan Gonzales, Jr.**

On November 8, 1995, Ivan Gonzales, Jr. was called as a witness against his parents by the same deputy district attorney who had participated in the October 25, 1995 interview. The preliminary examination testimony was videotaped and that videotape was played for the jury during the direct examination of defense expert witness Dr. Michael Paul Maloney. (RT 63:7096-7100, 7106; see also Defense Exhibits S and T, the videotapes, and Defense Exhibit U, the transcript of that tape; see also CT 223-313, the portion of the preliminary examination transcript containing the testimony of Ivan, Jr.)

Ivan, Jr. testified that after his cousin Genny came to live with his family, he and his brothers and sisters slept on the floor in one bedroom while Genny slept on the floor in the closet in his parents' bedroom, or in the bathtub.<sup>70</sup> The door to the children's' bedroom had no doorknob, so he could see through the hole. The door did have a sliding lock and was sometimes locked from the outside. (PH RT 2:228-230.)

When the children were disciplined, his mom or dad would hit them with a hand or a belt or a metal bar or a yellow plastic baseball bat. They could be hit anywhere on their bodies. His mom and dad would never let any friends come into the house to play with the kids. Ivan, Jr. was fed lunch almost every day, and dinner on some days. Whenever he took a bath, he ran the water himself. It was never so hot that he burned himself. His parents gave baths to his one-year old brother and never burned him. (PH RT 2:231-235.)

The last time he saw Genny, she was taking a bath. She was sitting in the tub, but it had no water. He and all his brothers and sisters were locked in their bedroom, but he could see Genny through the hole in the door. He only looked through the hole once that night. His mom and dad were in the bathroom with her. They put hot water in the tub and Genny screamed and cried. That made Ivan, Jr.'s youngest brother and sister cry. Ivan, Jr. felt sad. At one point he heard his mother scream. He was let out of the bedroom after Genny died. His father told him she had died. (PH RT 2:235-239, 267-274.)

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70. Veronica explained that they originally had old beds, but the beds broke and they could not afford to replace them. (RT 69:8236.)

On cross-examination at the preliminary examination, Ivan, Jr. inconsistently said that on the one occasion when he looked through the hole and saw Genny in the tub, he did not see his mom or dad in the bathroom, just Genny. He could only see her head. However, he also said that she was wearing his dad's brown T-shirt. He did not see his dad put water in the tub. On other nights, he had seen his parents in the bathroom with Genny, putting her in the tub and putting in hot water. He would see some of her hairs come out and go down the drain. Water from the spout went directly on her head. Ivan, Jr. could tell it was hot because he saw steam. Ivan, Jr. saw that many times. Genny would scream and his dad would hold her head down. His mother was helping, and would do what his dad wanted her to do. (PH RT 2:284-287, 293, 311-312.)

On direct examination by the prosecutor, Ivan, Jr. explained that Genny lost her hair when his mom had burned her and then pulled her hair. Both his mom and his dad pulled Genny's hair out, on many occasions. (However, Ivan, Jr. also testified that he remembered seeing his dad pull Genny's hair out, but did not remember seeing his mom do that.) Genny would scratch her head and rub it on the wall. When his parent's saw her do that, they hit her with a belt, all over her body. Genny did not eat meals with the rest of the family. She ate in the parents' bedroom, and then only a couple of times. Ivan, Jr. would give Genny food when she was locked in the parents' bedroom, calling out for food, while his parents slept.<sup>71</sup> When they

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71. He did not explain how he could enter the bedroom when it was locked.

woke up and saw that Genny had food, they would hit the kids. (PH RT 2:241-242, 302.)

Ivan, Jr. had looked in the closet in his parents' bedroom and had seen Genny sleeping there. Many times, he saw her hands tied with rope, with her inner wrists touching, but there was only one occasion when he saw her in the closet with her hands tied. He claimed that Genny never had bathroom accidents. He also described occasions when his parents made the kids throw a hard ball at Genny, and would hit the kids if they refused. Ivan, Jr. did not want to hurt Genny, so he threw crooked and intentionally missed her. (PH RT 2:243-245, 292.)

Ivan, Jr. had seen Genny in the bathtub with the water hot on prior occasions. When she slept in the bathtub, sometimes there was water in the tub and sometimes not. When she was sleeping in the tub, her hands and feet were tied. Both his mom and his dad put her in the tub and did not say why. When she slept in the closet, she slept in a box. He had seen her in the box once, and her hands were tied. Sometimes her hands were tied over the hanging rod in the closet and her feet were not even touching the ground. Many times his parents put rubbing alcohol on the scabs on Genny's head. (PH RT 2:246-254.)

Ivan, Jr. described his parents as both being in charge of the household, but when they disagreed it was usually his mother who got her way. He explained that was because she was the girl, and girls always get what they want when they disagree with boys. Sometimes he feared his father, when his father was going to hit him. He was afraid of his father even while he was testifying, but he was not afraid of his mother. He loved both of his par-

ents. It was his father who had removed the doorknob from the bedroom door, and had installed the sliding lock. (PH RT 2:261-265.)

On cross-examination, however, Ivan, Jr. said he believed his mom was afraid of his dad. His dad was stronger and would hit his mom when they got into fights. That would make his mom cry. (PH RT 2:288-291.)

**g. Problems of Suggestivity and Contamination in Interviews of Children**

Veronica Gonzales heard the various taped interviews of Ivan, Jr. in court and could not explain all of the things her son said. She believed he was confused. (RT 66:7713-7714.)

Defense expert witness Dr. Michael Paul Maloney had done many assessments of children believed to have been abused, and of adults suspected to be abusers of children. (RT 62:7044.) He explained factors that were important to consider when interviewing a child. (RT 62:7054-7056.) To properly interview a child, it was important to ask open-ended questions and let the child do most of the talking. It was especially important to not raise the child's expectations as to what the interviewer expected to hear, or wanted to hear. It was also important to seek clarification in a way that did not influence the response. If the child gave inconsistent responses, it was important to confront that fact, and ask for an explanation of the inconsistencies. (RT 62:7060-7062.)

Questions that contained the answers should be avoided. Even a small degree of suggestivity could have a very significant impact on the child's responses. Usually, a child's first report about an incident was the least con-

taminated and the most important. It was important to have as much information as possible about every interview of the child that occurred in order to know what prior suggestions may have influenced a later response. (RT 62:7068-7085.)

Dr. Maloney observed and listened to the audio and video tapes of the 4 interviews of Ivan Gonzales, Jr., and the videotape of his preliminary examination testimony. (RT 62:7086, 7090, 63:7092, 7094, 7096.) Dr. Maloney noted that the goal of a police officer is to recreate what happened at a crime scene by putting together information from a variety of sources. The kind of interview that accomplishes their purpose is very different from the ideal child interview. (RT 70:8520.)

Starting with the first interview, the doctor noted that the officer began by developing some rapport with the boy, and some information was provided during that phase of the interview. The officer challenged the boy, directly telling him when he did not believe the boy was telling the truth. That may seem fine from an officer's point of view, but it puts a strong demand on such a young boy. A child may conclude the officer is not hearing what he wants to hear. The child may believe he is doing something wrong and may feel pressured to give different responses. Here, the officer asked a lot of direct questions that carried a great potential for contamination. (RT 70:8521-8522.)

In other words, by telling the child what he believes is true, the officer may have affected the report he received in response. Here, Ivan, Jr. did eventually change some parts of his story, but he also continued to have a difficult time giving a systematic description of what he actually saw, or the

conditions under which he made his observations. For example, at one point he said he was the one who let the water out of the tub, even though that does not appear to be what happened. (RT 70:8523.)

In the second police interview, the officer had his own obvious conception of what had occurred. He again asked very direct questions. He used compound questions that could have been confusing for the boy, who said very little in response. The officer claimed he had already talked to Ivan's parents and knew they told him the truth. That would indicate to a child that the officer was demanding to be told what he already knew to be the case. Ivan may not have been able to tell the officer what he obviously wanted to hear. The pressure was especially troublesome when direct questions implied the answer the officer wanted to hear. By setting up a situation in which the minor can easily acquiesce, or just say, "yes," the officer can bias what the boy might say in the future. (RT 70:8524-8528.)

The third police interview on July 26, 1995, was a continuation of the second, with the officer again telling Ivan, Jr. that he was not being truthful, and that the officer knew the boy was afraid. Making the pressure even stronger, the officer said he knew the boy's brother and sister, Michael and Vanessa, had told him the truth. While this kind of pressure may commonly be an effective tool when interviewing a criminal defendant, it was not an appropriate means of gaining an accurate report from a child witness. (RT 70:8529-8530.)

The third interview featured much repetitive questioning, and halfway through, the officer asked forcefully why Ivan, Jr. was lying to him. Ivan was consistent on some points throughout the first 3 interviews, but inconsis-

tent on others. Nonetheless, the officer said nothing to confront the inconsistencies. The boy appeared generally alert throughout the third interview, but there was a point where he looked very tired. Dr. Maloney reiterated the methods to utilize in a proper interview of a child – start with open-ended questions, facilitate, clarify, and confront inconsistencies. The officer used none of these techniques. (RT 70:8531-8535.)

The fourth interview on October 25, 1995, was very different. There was a fair amount of rapport building, as Deputy District Attorney Aragon was introduced into the questioning process, but there was no reference at the outset to whether the boy was lying or being truthful. That did not happen until the end, when they told the boy everything he had been telling them was the truth. The report given by the boy in the 4<sup>th</sup> interview was very different from his earlier reports. However, Dr. Maloney believed there were a number of points where confrontation would have been appropriate. While the interviewers challenged the boy early in the interview when he said little, they did not confront him when he made some fairly remarkable new statements. Instead, they just accepted them as fact. For example, Ivan, Jr. claimed he saw Genny cut up with a knife. Since other evidence did not support that claim, it should have been challenged. (RT 70:8535-8538.)

Dr. Maloney noted that in the preliminary examination testimony on November 8, 1995, the boy said nothing about cutting off skin. The boy responded quickly to questions, as though he knew what to expect. (RT 70:8539-8541.)

Edna Lyons became a licensed marriage, family, and child counselor in November 1997. Her educational background consisted of a B.A. degree

in History and a Master of Science degree in counseling. She was employed by the YMCA Family Stress Center and also did adoption recruitment for the YMCA Youth and Family Services Center. (RT 64:7142.)

Ms. Lyons began counseling Ivan Gonzales, Jr. August 24, 1995, seeing him once a week. (RT 64:7144-7145, 7179.) Before she began counseling the boy, had received a social study about him, prepared by Karen Oetken. Ms. Lyons could not recall what other information she might have reviewed, and was not sure if the social study had included police reports about Genny Rojas' death. She was aware of the fact that Ivan, Jr. had given taped statements to the police, but she never asked for or received copies of those tapes. The purpose of her counseling sessions with the boy was to help him deal with what had happened in his home and what was happening in his life. That included the events regarding Genny Rojas. However, Ms. Lyons did not consider her work to constitute a forensic practice. (RT 64:7154-7158.)

The first time Ivan, Jr. talked about the treatment of Genny Rojas by his parents was on October 10, 1995. (RT 64:7145.) He said then that his parents hit Genny, and that when Genny pooped in the bathtub, they put the poop in her mouth. Ms. Lyons could not recall whether the boy said that spontaneously, rather than in response to questions. Her notes gave no indication of the circumstances in which the statement occurred. Typically she would have let him just talk and would not have asked questions. Even when he talked about events pertaining to Genny, Ms. Lyons would not ask him

how he obtained that information.<sup>72</sup> Furthermore, whenever the boy used the word “they” in describing events, Ms. Lyons made no effort to determine whether he was referring to his mother or his father or both. (RT 64:7170-7174.)

Although Ms. Lyons was aware of potential problems such as contamination or suggestivity, she did nothing to control those problems. For example, she never advised Ivan, Jr.’s foster mother to be cautious during conversations with the boy. She never asked the foster mother to caution the boy about conversations he might have with other people.<sup>73</sup> (RT 64:7175.)

On October 31, 1995, Ivan, Jr. talked to Ms. Lyons about his upcoming testimony at the preliminary examination. He said he was worried about seeing his parents. He said they had hit him in the past. He was concerned that if he told the truth, they would shout that he was lying. However, he did

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72. Thus, even putting aside the problem of faulty recollection, there was no way to know which statements Ivan, Jr. made to Ms Lyons were the product of his personal observations, and which were based on statements made to the boy by others.

73. Apparently recognizing some of the potential problems, the trial court soon interrupted the testimony and cautioned the jury that they were hearing about statements that were not tape recorded and could not be replayed. These statements were being admitted only for the limited purpose of helping the jury determine the credibility of other statements that had been on audio and video tapes. Notably, the trial court did not expressly state that the untaped statements were not being admitted for the truth of the matter, so it is not at all clear how the jurors would interpret the admonition they did receive. (RT 64:7176-7177.)

feel safe because he knew there would be police officers in the courtroom.<sup>74</sup> Apparently, the boy did not spontaneously express the fact that he was worried. Instead, Ms. Lyons showed him a chart with different words that described different feelings. When she asked him to pick the word that described how he felt about going to court, he pointed to the word, "worry." He also pointed to the words "shy" and "embarrassed."<sup>75</sup> (RT 64:7177-7181, 7193, 7221.) Ms. Lyons conceded it was not at all unusual for an 8-year-old to fear going to court. (RT 64:7224.)

Ms. Lyons knew that the boy was going to testify against his parents, and she understood that giving inaccurate testimony could affect the therapeutic process. Nonetheless, she did not consider it important to determine whether the source of his worry was lying in court. She did not see it as her responsibility to determine whether he was being consistent, or was changing his version of what had occurred. She did believe that the court appearance was an important event in his life. (RT 64:7187-7192.)

Ivan, Jr. also told Ms. Lyons that his mother and father had been receiving \$1,300 per month, but they were spending their money on drugs rather than food. Ms. Lyons probably knew the parents had been on welfare, but she did not even think about the fact that the boy's knowledge of the precise family income might have indicated he had been given information

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74. Ms. Lyons acknowledged that she may have reinforced for Ivan, Jr. the belief that there would be people in the courtroom looking out for him, making sure he was not hurt by anybody. (RT 64:7225.)

75. Ms. Lyons' chart also contained the words "fear" and "afraid," but Ivan, Jr. did not select either of those words. (RT 64:7234.)

about the family circumstances from somebody else. (RT 64:7199-7201.) She never asked Ivan, Jr. whether he had discussed the events pertaining to Genny with anybody else. (RT 64:7208.)

The counseling sessions with Ms. Lyons had begun two years before she became licensed. (RT 64:7142-7143.) Because she was not licensed, she worked under the supervision of Dr. Carolyn Jacobs. Ms. Lyons had received no training in forensic interviewing, and she was not familiar with any research regarding interviewing children. She took notes during her therapy sessions with the boy, but they did not include everything he discussed. She did not tape any of her sessions with the boy, and did not believe taping was necessary even when a child in therapy was discussing a suspected crime. She believed she was familiar with the concepts of contamination and suggestivity in regard to interviews of children, but conceded she did not consider herself an expert in that area and had trouble explaining those concepts to others. (RT 64:7144-7149, 7179, 7182.)

Between August 24 and November 30, 1995, Ms. Lyons' supervising counselor, Dr. Carolyn Jacobs, was never present during the sessions with Ivan, Jr. Instead, her role was limited to reviewing the trainee's casework to see that she was on the right track. Dr. Jacobs never reviewed with Ms. Lyons the types of questions that should be asked. (RT 64:7159-7160.)

Dr. Maloney had also reviewed the therapy notes made by Edna Lyons regarding her sessions with Ivan, Jr., and Ms. Lyons' testimony about those sessions. The doctor saw several different potential explanations for the changes in the information the boy provided. One possibility is that the boy's early reports were inaccurate because he was trying to protect his par-

ents, and his later reports were more accurate. A second possibility was that the boy was traumatized at the outset and could not or would not talk about what really happened, but talked more as he became more comfortable after the passage of some time. A third possible explanation was that his later statements were the product of influence and contamination. Dr. Maloney saw no basis for eliminating any of those hypotheses, or for favoring one over the others. (RT 70:8546-8549.)

Dr. Maloney explained further that Ms. Lyons' testimony was limited to summarizing her notes, with little independent recall of her conversations with the boy. He noted that Ms. Lyons' function was to provide support for the boy, not to obtain forensic information. Her techniques, such as play therapy, may have been useful for therapy, but they were not designed for assessment and carried a great risk of over-interpretation of behavior. Such techniques have not been shown to be reliable or valid for the purpose of assessment. The doctor saw no attempt by Ms. Lyons to control contamination, although he did not fault her for that since such control was not typically part of the role of a therapist. (RT 70:8549-8552.)

Dr. Maloney also reviewed the notes and testimony of Karen Oetken. She was also not doing an assessment of the boy, and the doctor saw nothing noteworthy in her contacts with Ivan, Jr. In conclusion, the doctor believed he had seen nothing to indicate that a true forensic interview of Ivan, Jr. had ever occurred. (RT 70:8556-8560.)

Dr. Maloney noted that when a child has discussed the same subject with a number of different people, it can become difficult for the child to distinguish between what he really experienced and what he has simply talked

about so much. (RT 70:8575.) Finally, the doctor noted that the manner in which Ivan, Jr. usually lumped his mother and father together in his answers was atypical and seemed almost artificial. However, the doctor was unable to suggest what might have caused that. (RT 70:8563-8564.)

## **10. Events Subsequent to the Arrest and Veronica Gonzales' Statements to the Police**

### **a. Police Investigation**

When Ivan Gonzales was processed at the police station after his arrest, officers found 4 screws, a metal doorjamb, and a leather strap in his pockets. (RT 57:6292-6293.)

Late on July 22, 1995, police technician Rodrigo Viesca returned to the Gonzales apartment and conducted temperature tests on the bathtub. He determined that the water coming out of the tub tap was able to sustain a temperature of 156 degrees, which was reached after 45 seconds. The bathtub faucet had a single knob that turned to the right for cold water and to the left for hot water. It took 5 minutes to fill the tub (using only hot water) to a height of 2-1/2 inches, during which the water from the faucet fell to 148 degrees and the water in the tub was at 140 degrees. After 10 minutes, the faucet water was still at 148 degrees and the tub was filled to 5-1/2 inches, still at 140 degrees. After 15 minutes, the temperatures were the same and the

water was 8-1/2 inches high.<sup>76</sup> During this process, the bathroom became quite steamy and uncomfortable. (RT 57:6160-6167 6228-6229, 6242.)

Viesca also checked the hot water heater for the apartment and saw that it was set between “hot” and “very hot”.<sup>77</sup> “Very hot” was the hottest setting available. (RT 57:6226-6228.)

Brian Kennedy was a sergeant with the Sacramento County Sheriff’s Office and also worked as a private consultant in crime scene reconstruction through bloodstain pattern analysis. He studied the blood spatters on the walls of the Gonzales apartment. He described areas in the apartment where blood on a wall had flowed downward, and other areas where it appeared blood had been transferred to the wall when a bloody object had come into contact with the wall. Some of these areas appeared to have been caused by contact with bloody fingers or parts of a bloody hand. Other areas showed a transfer pattern consistent with the condition of Genny Rojas’ head. A hole in a wall also had curvature consistent with something the size of a soccer ball or basketball, and could have been caused by some force putting Genny

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76. Somewhat inconsistently, District Attorney Investigator Dana Gassaway testified that it took only 4.5 minutes to fill the tub to a height of 4 inches, 7 minutes to fill it to 6 inches, 9.5 minutes to fill it to 8 inches, 12 minutes to fill it to 10 inches, and 13.5 minutes to fill it to the overflow point of 11 inches. (RT 60:6755-6756.)

77. However, according to District Attorney Investigator Dana Gassaway, the hot water heater was set to “hot” when it was checked on July 25, 1995.) (RT 60:6766.)

Rojas' head through the wall.<sup>78</sup> That hole was not consistent with a punch by a fist.<sup>79</sup> (RT 58:6382-6394.)

Kennedy noted that most of the blood on the walls was in areas that were no more than 38 inches above the floor. (RT 58:6397.) Blood stains in the area of the closet, the box in the closet, and the clothes bar with the hook were consistent with Genny Rojas hanging from her neck, with her head at the level of the hook, her neck at the bottom of the hook, and her head rubbing against the clothes bar, on more than one occasion. (RT 58:6402-6409.) However, if Genny's hands were tied and she was standing straight up on the box, her head could have been even with the clothes bar, rather than hanging or being suspended from it. (RT 58:6416-6419.) Indeed, he did not believe that she could have been hanging by the neck from the hook; rather, it was more likely she was restricted by or suspended from the hook. (RT 58:6446.)

#### **b. Veronica Gonzales' Post-Arrest Developments**

Following their arrests, Ivan Gonzales made efforts to maintain communications with his wife. He wrote letters to her. Also, they were regularly

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78. Kennedy conceded his report did not refer to the possibility the hole was caused by a child's head, and he had never said that until he was asked during his trial testimony. He also agreed that if the child was standing behind the door facing the wall, and the door was opened in a forceful manner, pushing the child into the wall, that could have caused the hole. (RT 58:6426-6427.)

79. Kennedy conceded he was not saying it was impossible for the hole to have been caused by a fist punched through the wall, but the indentation was more consistent with something round rather than square and irregular like a fist. (RT 58:6442.)

taken to Juvenile Court in the same van in order to attend hearings regarding their children. He told Ms. Gonzales he loved her and that she should stick to the story he had told her to use. As of the time of trial, the couple's youngest four children were in the custody of Ivan's parents.<sup>80</sup> (RT 66:7716-7718.) Numerous letters sent from Ivan Gonzales to Veronica Gonzales were received in evidence as Defense Exhibit II. (RT 66:7723-7724.)

In one of his letters, Ivan Gonzales expressed his displeasure with one of his wife's trial attorneys, Michael Popkins. Ivan believed Mr. Popkins was working with the prosecution. He gave his wife instructions on how to make a motion to have Mr. Popkins removed as her counsel. Veronica saw this as a continuing effort by Ivan to control her. (RT 66:7727-7729; 69:8273-8274.) In that same letter, he accused Mr. Popkins of wanting Veronica to point the finger at Ivan. However, he ended the letter with a drawing of a finger pointing at a face. The face was labeled "Me." Just above the face and pointing finger, Ivan wrote: "P.S. If it comes down to it:" (RT 67:7861-7864; Defense Exhibit KK.)

### **c. Expert Testimony about Veronica Gonzales**

Defense expert Dr. Kenneth Ryan evaluated Veronica Gonzales and determined that she suffered from BWS. He relied partly on testing, but

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80. Despite her concerns about Ivan, Veronica Gonzales initially supported the idea of having Ivan's parents care for the children. She wanted all 6 children to stay together and had nowhere else to send them. (RT 69:8271.) When she was interviewed by a social worker, she said Ivan had a good childhood and the kind of parents everyone would want. (RT 70:8456.)

more heavily on Veronica herself. He saw her many times, spending 45 hours with her over a 2-1/2 year period. He would just let her talk while he listened. He did administer some standard tests, mostly because attorneys like him to do that. (RT 73:9227-9230.)

Dr. Ryan concluded that Veronica Gonzales was not psychotic or crazy. However, she suffered from Post-Traumatic Stress Disorder, showing tremendous anxiety and experiencing sleep disorders and depression. He recalled that the first time he saw Veronica Gonzales, she seemed extremely nervous and was rocking. She said she had been taken to court in the same van with Ivan that day (September 17, 1995). She was visibly shaken by that experience. Ivan had told her he was buffing out, lifting weights, and getting stronger. What she heard was how much harder he could hit her. (RT 73:9230, 9240-9241.)

Two-and-a-half years after that first meeting, with Ivan already convicted of the murder of Genny Rojas, Veronica was finally beginning to accept the fact that Ivan could no longer harm her or their children. She had become less nervous and was more able to talk comfortably about Ivan. (RT 73:9242-9243.)

Dr. Ryan was not troubled by the lack of medical records to corroborate Veronica's description of her life with Ivan Gonzales. Battered women tended to hide their injuries. They would just endure the abuse and not seek medical treatment. (RT 73:9254-9255.) Dr. Ryan was also not dissuaded by the fact that Veronica Gonzales told Ivan about having an affair with another man. Many women who suffer from BWS will accept attention from just about anybody willing to give it to them. They are starved for attention. If

the person giving attention also wants a sexual relationship, the woman may give that in order to receive the attention. (RT 73:9258-9259.)

Dr. Ryan believed that when Veronica told Ivan she might be pregnant by another man, that was such an affront to his maleness that she hoped he would tell her to get out, and he would never want to see her again. That would finally end the relationship. On the other hand, it was not inconsistent to also come back to Ivan after leaving for a week or two. Veronica learned that during her time away from Ivan, he had first become friends with Gene Luna, Jr., but then had a major fight with Luna and was badly beaten.<sup>81</sup> Veronica felt pity for Ivan and shame and guilt for having had the affair. She was also feeling very lonely. (RT 73:9259-9260.)

Dr. Ryan explained that 75% of battered women came from homes that had violence in them. The fact that Veronica Gonzales was abused and molested as a child made it more likely that she was a battered woman. Women from such backgrounds are less likely to be shocked by violence or to immediately leave a battering husband. (RT 73:9382-9384.)

Dr. Ryan also noted that it was not at all surprising that Veronica Gonzales would not be accurate in recalling every detail of many events that had occurred over a 26 year period. She possessed a great deal of information, but it takes time to unravel it. (RT 73:9279-9281.)

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81. Luna testified about this fight. He and Ivan were talking when Ivan got mad and took a swing at Luna, nicking his chin. They were both under the influence of alcohol. Luna defended himself and hit Ivan back, causing Ivan to fall to the ground. (RT 75:9672-9673.)

Dr. Ryan explained that Veronica Gonzales' failure to protect the children from Ivan Gonzales was not at all inconsistent with BWS. Women suffering from BWS often realize that if they help the child, the batterer will just do more damage to both her and the child. Such women also distort the input and fail to perceive the actual danger. Their problem-solving abilities are reduced by the domestic violence. It is understandable that they may fail to seek medical treatment for a child injured by the batterer. They fear that a doctor will contact Child Protective Services, and that the child will be taken away. They fear they will be blamed for the injuries the child has suffered. (RT 73:9282-9284.)

Defense expert Cynthia Bernee also concluded that Veronica Gonzales suffered from BWS. (RT 73:9401-9403.) Ms. Bernee believed Veronica Gonzales used drugs and alcohol as a coping mechanism. She believed Veronica initially minimized the abuse and was in denial, particularly during the police interviews. (RT 73:9405.)

Veronica was afraid of Ivan Gonzales. She was afraid to stay with him and she was afraid to leave him. However, when she stayed, she knew what to expect, while she did not know what she would encounter if she really left him. It was a normal part of BWS for the woman to leave the batterer. In fact, on the average the woman leaves 4-6 times before a final ending of the relationship. (RT 73:9406-9407.)

Ms. Bernee noted that batterers often fear abandonment and feel like they would be losing everything if the battering victim left. Suicidal gestures by batterers are common. Other reactions by batterers to a potential end of the relationship include becoming fearful and threatening to kill the woman

or the children or themselves or the woman's parents or whoever else is around. Such threats are a means of controlling or manipulating the woman, and getting her to stay in the relationship. Without necessarily understanding his own motivations, the batterer could truly feel that he wanted the woman to return. (RT 73:9408.)

In the present case, when Veronica would leave and move in with her mother or her sister, Ivan would come over and very politely ask her to return. That was consistent with a batterer wanting to look good to other family members. When Ivan told Veronica things would be better, she wanted to believe that and was also afraid to oppose him even when other family members were present and offering support. She still feared what would happen if she did not return to him. (RT 73:9409-9411.)

Battered women are commonly secretive about their plight and regularly lie to friends about the source of bruises. That is a result of shame, embarrassment, and learned helplessness. Here, the relationship with Ivan isolated Veronica from friends and family, and she perceived a lack of an effective support system from her family. (RT 73:9412-9415.)

Veronica Gonzales learned at a very early age that she had no control over her environment. She was used and abused physically and sexually, and when she verbalized her plight she was not believed by her own mother, who chose to remain with Veronica's abuser. Victims of childhood sexual abuse learn how to be victims in adulthood. Ivan used that against her, telling her she must have asked for the treatment she received from her step-father, and that there must have been something wrong with her. That reinforced her

low self-esteem, leaving her believing she deserved the way she was treated, and she was responsible for her own abuse. (RT 73:9421-9423.)

Indeed, battered women commonly feel such responsibility and believe that if they could be good enough, the abuse would stop. They try to please the batterer, but that is usually impossible. Accepting responsibility for the abuser's actions toward a third party, such as a child, is also consistent with BWS. It is part of the process of the woman identifying with the batterer. Battered women often want to protect the batterer, and do whatever they can to please him. (RT 73:9426-9427.)

Ms. Bernee acknowledged that Veronica Gonzales had admitted to her that there were occasions when she hit Ivan or threw things at him. Hitting the batterer or even instigating abuse was not inconsistent with BWS. Battered women are not always passive or weak, but may instead be active and creative in the relationship. They may use violent measures to protect themselves or their children, or to delay or sidestep abuse. They may use violence to express anger, or they may be aggressive in front of third parties because they know the batterer will not beat them in public. Instigation of violence may be used as a means of having some illusion of control in the relationship. While relationships featuring such violence by the woman are sometimes called mutual violence, that is a misnomer because there is usually a much smaller likelihood that the woman will hurt the man than vice versa. (RT 74:9433-9435.)

Ms. Bernee also noted that mutual displays of affection in public were not uncommon in battering relationships. To others, a batterer can seem like a nice guy who truly loves his wife and family. (RT 74:9443-9444.)

Veronica Gonzales testified that she was ordered by the judge to undergo evaluations by two prosecution experts, Dr. Mark Mills and Dr. Nancy Kaser-Boyd. She cooperated with Dr. Kaser-Boyd, but refused to meet with Dr. Mills on the advice of her attorneys. The court would not permit her to give any further explanation of her refusal to meet with Dr. Mills.<sup>82</sup> (RT 66:7715-7716.)

Dr. Mills testified as a prosecution expert. He explained that he was a psychiatrist who specialized in forensic psychiatry. He also had a law degree. He discussed the subject of Post-Traumatic Stress Disorder and also explained that malingering is a conscious attempt to deceive an evaluator, such as a jury, in order to avoid jail, a death sentence, or whatever was at stake. (RT 77:10024-10039, 10086.) In the present case, he reviewed thousands of pages of documents and videotapes of Veronica Gonzales' statements to the police, but he did not interview Veronica Gonzales. (RT 77:10040-10042.)

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82. In pre-trial motions, the defense had complained that it was unfair to allow the prosecutor to use Dr. Mills as a prosecution expert who would interview Veronica Gonzales. Dr. Mills had been a prosecution expert during Ivan Gonzales' separate trial and had interviewed Ivan pursuant to a court order. The defense believed that any evaluation of Veronica Gonzales by Dr. Mills would necessarily be colored by his interview and evaluation of Ivan Gonzales. Since the defense had no access to Ivan, they believed it was unfair to allow the prosecution to have an expert who had interviewed both Ivan and Veronica Gonzales, while the defense would be limited to experts who had interviewed only Veronica Gonzales. The defense also objected to Dr. Mills because he had no training in BWS. (See RT 41:3730-3732; 44:3990, 3994-3995; 51:5374, 5402; 76:9994.)

Dr. Mills was permitted to testify that Veronica Gonzales faced a potential death sentence. For most people, nothing was more precious than their own lives. In an effort to avoid a death sentence, the incentive to embellish or distort, conscious or unconscious, would be extremely high. (RT 77:10043.)

Dr. Mills explained in a surprisingly simplistic and illogical fashion that whenever there were glaring inconsistencies in a person's account of some event, there were only two possibilities: either the person was lying or the person has a severe memory problem due to a cause such as Alzheimer's disease or some other brain defect. (RT 77:10046.) He found it very significant that Veronica Gonzales had made various claims of being sexually and physically abused as a child. However, when she talked to a social worker in 1994 about the suitability of her mother and step-father as guardians of the children of her sister, Mary, she said there had been no abuse and that Mary had previously persuaded her to lie about abuse. Now she claims that her mother persuaded her to lie to the social worker in 1994. Dr. Mills seemed to find it important that this was a very significant event in Veronica Gonzales' past, but she had given three very different accounts of it. (RT 77:10046-10047.)

From that starting point, Dr. Mills believed he saw an important pattern: first, Veronica Gonzales blamed her sister, Mary, for putting thoughts in her head, then she blamed her mother for putting thoughts in her head, and now she is blaming Ivan Gonzales for putting thoughts in her head. (RT 77:10048.) Dr. Mills quickly moved into a discussion of the inconsistencies in Veronica Gonzales' explanations to the police in the first and second in-

interviews, and her testimony at the trial. (RT 77:10049-10050.) Apparently based on these inconsistencies, he expressed his opinion that there was insufficient evidence that Veronica Gonzales was suffering from Post-Traumatic Stress Disorder. He acknowledged there were problems reaching such a conclusion without ever having been able to interview Veronica Gonzales, and he expressed no opinion at all about BWS. (RT 77:10051.)

Indeed, on cross-examination by the defense, Dr. Mills admitted he did not consider himself an expert in BWS, although he realized it was a well-recognized and widely accepted condition in his profession. He acknowledged that an important aspect of BWS was that sufferers often hid the abuse. Falsehoods were part and parcel of the syndrome and it would be unusual for a woman to suffer from the syndrome and always tell the truth about it. He even recognized that sufferers might give some explanations that seem contrary to common sense or to their own well-being. He also recognized that persons who were abused as children were often not truthful about the abuse. (RT 77:10072-10078.)

Dr. Mills conceded there was substantial corroboration of Veronica Gonzales' claims that she had been abused as a child. His main point seemed to be that she had made enough inconsistent statements that he, as a forensic psychiatrist, would not want to rely on her statements in reaching any sort of conclusion. (RT 77:10080-10085, 10099.)

Dr. Kaser-Boyd also testified as a prosecution expert. She was a clinical psychologist who had a private practice and also worked as an assistant clinical professor at UCLA. Her specialties included forensic evaluation and

family violence. Unlike Dr. Mills, her area of expertise included BWS. (RT 78:10137-10142.)

The results of the psychological testing she administered convinced Dr. Kaser-Boyd that Veronica Gonzales had a personality disorder. She had traits of antisocial personality disorder that was in some ways borderline and in some ways narcissistic. She also had Post-Traumatic Stress Disorder, as a result of early child abuse. (RT 78:10148-10150.)

Dr. Kaser-Boyd interviewed Veronica Gonzales twice and also administered psychological tests in an effort to detect malingering. (RT 78:10144, 10147.) Veronica Gonzales testified that she told the truth when she talked to Dr. Kaser-Boyd. However, there were times when Dr. Kaser-Boyd did not let her finish answering a question, so the answers given seem incomplete. Sometimes she was given time to finish an answer, but did not do so. (RT 67:7787-7790.)

Dr. Kaser-Boyd discussed the phenomenon of abused children who do not acquire good emotional control and instead act toward their own children the same way their abusive parents acted toward them. Even battered women can be abusers of their own children. (RT 78:10150-10153.)

Like Dr. Mills, Dr. Kaser-Boyd was familiar with the fact that Veronica Gonzales had first claimed she had been abused as a child, then recanted those claims when she talked to a social worker in 1994, and then later blamed her mother for pressuring her to recant the original claims. Unlike Dr. Mills, Dr. Kaser-Boyd did not see this as necessarily demonstrating anything sinister. Dr. Kaser-Boyd understood people will lie to protect their parents or to keep their family together. She recognized that Veronica Gonzales

recanted her claims of child abuse so her sister's children could stay within the extended family. Dr. Kaser-Boyd had seen such things happen many times in dependency court. Dr. Kaser-Boyd understood that when you get an inconsistent history of reporting, you have to determine whether there is a good explanation for a recantation. (RT 78:10155-10157.)

Dr. Kaser-Boyd acknowledged that battered women often acted to protect their abusers. However, she did not believe that Veronica Gonzales' statements to the police fell into that category, because in some of the statements she did blame Ivan for wrongdoing. (RT 78:10179-10180.) Dr. Kaser-Boyd also found some inconsistencies in Veronica Gonzales' psychological test results, since Veronica seemed to rate herself as more helpless and out of control over her own life than was usually true of battered women. (RT 78:10188-10195.) She also found Veronica Gonzales to be guarded, giving fewer responses than was usually the case for battered women. (RT 78:10196-10197.) When Veronica's tests were scored by a computer, they indicated some exaggeration of symptoms. (RT 78:10200.)

In conclusion, Dr. Kaser-Boyd found it hard to formulate an opinion one way or the other, regarding whether Veronica Gonzales was a battered woman or suffered from BWS. Indications of exaggeration and inconsistent statements by Veronica made it difficult to reach an opinion. Veronica did have psychological and pathological issues, but Dr. Kaser-Boyd could not determine whether that was from child abuse or from being battered. (RT 78:10215-10216.) Dr. Kaser-Boyd did believe Veronica Gonzales had some kind of disorder. She agreed that a person with a personality disorder can still suffer from BWS. She also believed Veronica Gonzales suffered from

Post-Traumatic Stress Disorder that was complex. (RT 78:10282, 10284, 10295, 10298.)

On cross-examination, Dr. Kaser-Boyd made clear that Veronica Gonzales might well be a battered woman suffering from BWS. The doctor was simply unable to reach a conclusion. The doctor did not doubt that Veronica had been a victim of child abuse. The doctor also conceded that it was very surprising that Riverside County had never prosecuted Veronica's stepfather after the accusations she had made. The doctor conceded that such an experience could have caused Veronica to have great distrust and disincentive for going to the authorities with later problems. (RT 78:10223-10233.)

Dr. Kaser-Boyd also acknowledged that being incarcerated and awaiting trial are both stressful factors. Facing a death penalty trial is highly stressful. Being evaluated by an expert hired by the other side can also be stressful. (RT 78:10267.)

Dr. Kaser-Boyd also conceded that Veronica Gonzales needed clarification of the meaning of a lot of the words in the psychological tests. She needed explanations of about 1/3 of the questions. (RT 78:10239, 10244.) She also conceded that there were concerns that psychological tests were racially biased and not necessarily accurate when dealing with a Hispanic woman. Indeed, the standards were based on testing of 400 women in Colorado, only 8% of whom were Hispanic. (RT 78:10241-10242. 10246.)

Defense expert witness Thomas MacSpeiden, a clinical psychologist, administered an intelligence test and a reading test to Veronica Gonzales. Her IQ score was 88 overall, and her reading skills were at a beginning 8<sup>th</sup> grade level. He noted that many psychological tests required a reading level

of 8<sup>th</sup> grade or higher. Persons without sufficient reading skills would have difficulty completing the psychological tests used by Dr. Kaser-Boyd. Also, a subject who is comfortable with the examiner may feel free to ask the meaning of unfamiliar words, but a subject who is inhibited or who feels threatened will be reluctant to ask too many questions. (RT 79:10364, 10373-10377.)

Dr. MacSpeiden noted that in redoing parts of the psychological tests, Dr. Kaser-Boyd read the questions to Veronica Gonzales. That is not the standard way to administer such tests and could affect the result. Also, by re-asking only certain questions, she could have affected some test profiles and not others. In his view, if an examiner re-asked some questions and discovered that the subject had misunderstood them, then the examiner should re-read all of the questions. Dr. MacSpeiden saw "saw-tooth" patterns in Veronica Gonzales' results on the tests Dr. Kaser-Boyd relied on, and such a pattern indicates the results were invalid. A sawtooth pattern indicated random answering by the subject, and suggested confusion rather than malingering. Dr. MacSpeiden saw nothing to indicate malingering by Veronica Gonzales, and received quite the opposite impression. He thought she seemed to be trying to cooperate. (RT 79:10377-10383; 10427, 10443.)

Dr. MacSpeiden believed that Veronica Gonzales' reading level would have caused her to have difficulty on the MMPI test. Her limited intellect would have affected the number and content of her responses to other tests. He noted that Veronica Gonzales stated early in the testing that she was not a very good reader. After she had asked questions, she apologized for asking so many questions. She acknowledged having trouble with 1/3 of the

questions. That left Dr. MacSpeiden wondering how many other questions caused her difficulties. (RT 79:10384-10394.)

## **B. Penalty Phase Evidence**

### **1. Evidence in Aggravation**

The prosecution presented no new evidence in aggravation during the penalty trial. Instead, they relied only on the circumstances of the crime, shown during the guilt phase. (RT 88:11658-11659.)

### **2. Evidence in Mitigation**

#### **a. Veronica Gonzales' Behavior While Incarcerated in the San Diego County Jail and Her Post-Arrest Contacts with Her Children**

Correctional Deputy Sheriff Tracy Nelson worked in the housing unit where Veronica Gonzales was assigned in the Las Colinas Detention Facility. Veronica Gonzales was assigned to "A" Housing for protective custody.<sup>83</sup> Women confined in "A" housing often caused disciplinary problems, and the unit was marked by constant screaming, banging, and hollering. During two years that Deputy Nelson was assigned to the area where Veronica Gonzales was housed, she always treated Deputy Nelson and the other deputies with the utmost respect. Veronica Gonzales did not nag like nearly everybody else in "A" Housing. She had never had any rule violations, which Deputy Nelson found remarkable for someone who had been in

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83. All defendants with charges that involved child abuse were kept in protective custody. (RT 88:11688.)

the jail for so long. Indeed, Veronica Gonzales was probably the only inmate that Deputy Nelson knew who did not have any disciplinary violations. (RT 88:11677-11682.)

Deputy Nelson described Veronica Gonzales as a model inmate. She also noted she was present once when four of Veronica Gonzales' children came to visit her. They seemed very happy to see their mother, and Veronica was very loving and happy to see her children. When the deputy opened the door to let the children in, Veronica was down on her knees hugging them. During the visit the children were hanging all over their mother. It was evident that they loved and missed their mother. Veronica cried when the children left and they were reluctant to leave. On other occasions, Veronica seemed happy when she talked about her children. (RT 88:11683-11686.)

Piper Paulk was another correctional deputy who worked at Housing Unit "A" about 15 times over a two-year period. Veronica Gonzales always displayed good manners and a respectful attitude. She was a model inmate. The deputy witnessed two visits by Veronica Gonzales' children. They were happy to see her and she was happy to see them. When it was time to leave, the children were sad and their mother was crying. (RT 88:11695-11699.)

Deputy Warren Lubliner was another Correctional Deputy Sheriff who had been assigned to the Las Colinas facility, from early 1996 to early 1998. He had worked in "A" housing 3-4 days per week and had supervised Veronica Gonzales 40-50 times over two years. She was respectful, followed all instructions, and never gave the officer any problems. (RT 88:11723-11726.)

Sarah Hubbard was another Deputy Sheriff who had worked with Veronica Gonzales on about 50 different occasions. Veronica's behavior in jail had always been excellent. "A" Housing was a very difficult unit, as most of the inmates housed there had severe criminal and/or mental health problems and dealing with them was always difficult. In contrast, it was always a pleasure to deal with Veronica, who made the deputy's job easier. Veronica was a model inmate who was never disrespectful to any inmate. She often talked about her own children, and loved and missed them. (RT 89:11818-11822.)

Larry Jacobson was a protective services assistant for the San Diego County Department of Social Services. He monitored visits between jail inmates and their children. On September 17, 1996, he picked up four Gonzales children from their grandparents' home and took them to visit with Veronica Gonzales. The children were active but well-behaved during the 55 minute visit. It was apparent they loved their mother and that she was happy to see them. (RT 89:11823-11826.)

Ortensia Jauregui was another protective services assistant who had supervised visits between Veronica Gonzales and her children on a couple of occasions. When she picked up the children, they were excited and looked forward to seeing their mother. Veronica seemed very excited and appreciative when they visited, trying to embrace all of them, but only able to hold two at a time. She often picked up her children, hugged them, and told them she loved them. Jail rules precluded inmates from discussing their cases with their children, but once one of the children asked Veronica why she was in jail. She responded, "Mommy did something wrong. When you do some-

thing wrong, you have to pay.” Ms. Jauregui intervened at that point and changed the subject, but felt that Veronica had handled it appropriately. (RT 89:11828-11834.)

Yadira Franco was another protective services assistant who had supervised a visit between Veronica Gonzales and her children. The children were happy and active. Veronica was attentive and loving, focused on the children, and behaving appropriately. (RT 89:11835-11840.)

Kerin Schroeder was the supervising chaplain at the Las Colinas Woman’s Jail from 1995-1998. She knew Veronica Gonzales from her attendance at Bible Study classes. (RT 88:11704-11705.)

Ms. Schroeder recalled that her first personal meeting with Veronica Gonzales occurred after deputies called her at home on a weekend and asked her to come and talk to Veronica. Ms. Schroeder had mixed feelings because she was a grandmother herself, and she was familiar with the charges pending against Veronica Gonzales. Nonetheless, she did visit Veronica Gonzales within a couple hours after receiving the call from deputies. She then started seeing Veronica a couple of times a week for an hour or two each time. She counseled Veronica and encouraged her to be the best mother she could be under the circumstances. She found Veronica to have strong faith. She had observed Veronica offer encouragement to other female inmates who were depressed about their circumstances. (RT 88:11705-11707.)

Ms. Schroeder had seen Veronica with her children on 5-7 occasions. Once there were 4 children visiting and they all wanted to sit on Veronica’s lap. They could not touch her or hold her enough. Veronica hugged them and kissed them and told them she loved them. Veronica asked if the children

were behaving, brushing their teeth, and obeying their grandmother. (RT 88:11708-11709.)

In conclusion, Ms. Schroeder found Veronica Gonzales to be amazingly well-behaved in jail. Ms. Schroeder and Ms. Gonzales prayed together every time Ms. Schroeder visited. Veronica prayed for her children and asked Ms. Schroeder to pray for the children, the family, the sisters, and for Genny Rojas. Veronica attended Sunday services as often as she could and attended Bible study almost every Saturday. Ms. Schroeder had never observed Veronica behave inappropriately. She was always very loving and was trusted by inmates who did not even trust Ms. Schroeder, who was an employee of the Sheriff's Office. (RT 88:11712-11717.)

Ms. Schroeder remembered the first day she was called in to visit Veronica, who was like a puppy hovering in the corner of a room. Now, she had come to be "a beautiful rose that's in bloom." When Ms. Schroeder met Veronica, a month or two after her arrest, she was in despair, without direction. Now she had accepted Christ into her life and her character and attitudes had truly changed. Ms. Schroeder was fully aware of the charges against Veronica Gonzales, but they did nothing to change her high opinion of Veronica. (RT 88:11718-11721.)

Marjorie Farley was another chaplain at the Las Colinas facility. She knew Veronica Gonzales as a woman who had done well in church services and in Bible study, and who had shown love and concern for other inmates. (RT 88:11727-11742.)

Cindy Martinez was a chaplain assistant at the Las Colinas facility. She first met Veronica Gonzales at church services in September 1995. In

July 1997 she started having weekly counseling sessions with Veronica. Every other week, they met on a one-to-one basis. In Bible study, Veronica asked good questions and offered compassion to other inmates. She was very loving with other inmates and was seen by them as a mother- or sister-figure. She had told Ms. Martinez that she loved Genny Rojas, and they had prayed together for Genny. They also discussed Veronica's drug abuse problems. Veronica said Jesus had healed her. She never saw Veronica behave inappropriately. When they talked, most of Veronica's conversation was about concerns for her children. (RT 88:11728-11737.)

Carol Rainey also worked in the chaplain's office at Las Colinas. She had seen many inmates "discover" religion in jail, and recognized when there were definite signs that a true transformation had occurred. She had seen tremendous change in Veronica Gonzales. Veronica was simply not the same woman who she was when they first met. She was compassionate, resolved, and empathetic in helping other inmates. They had talked about Veronica's children and how much she loved them. Veronica had expressed remorse and was extremely sorry for the events that had occurred in her home. She believed Veronica wished she had been of a stronger mind at the time, and that she would have had the strength to leave the situation and seek help. Veronica had talked about her own feelings of responsibility for her failure to have that strength. (RT 88:11744-11755.)

**b. The Impact of a Death Sentence on the Mental Health of Veronica Gonzales' Children**

Edna Lyons was the treating therapist for Ivan Gonzales, Jr., Veronica's oldest son. Ivan, Jr. had been under her therapy and care for nearly three years when she testified at the penalty trial. Ivan Jr. suffered from chronic Post-Traumatic Stress Syndrome, and Ms. Lyons believed his symptoms would be exacerbated if his mother was executed, at least in the short run and probably also in the long run. (RT 89:11841-11842.)

As Ivan, Jr. developed cognitively and psychosocially, Ms. Lyons believed he would think more logically about everything that had happened in his parents' home, and that the execution of his mother would impact him greatly, in a life-long negative and severe manner. (RT 89:11842-11843.)

When Ivan Jr.'s Post Traumatic Stress Syndrome symptoms were triggered, he tended to shut down and avoid persons connected with the trauma he had experienced. This included his siblings. (RT 89: 11844.)

At his present age of 11, Ivan, Jr. was not capable of completely understanding the implications of a death sentence. Even a sentence of life without parole for his mother would be difficult for him, but the finality of a death sentence would preclude much reparative work that he could do with his mother. Ms. Lyons hoped that eventually the boy would be able to talk to his mother about what had occurred in the family home. She did not know if or when he would want to communicate with his mother, but she hoped they would eventually be able to connect and communicate. She hoped he would be better able to comprehend the trauma he had experienced. (RT 89:11843, 11845-11850.)

Ms. Lyons did not believe it was realistic to simply keep the boy unaware of the sentence that would be imposed on his mother. She believed he should be informed of what is happening, because he needed to be prepared for the reactions he might receive from other people who would learn of the sentence. Regardless of the original cause of his trauma, she believed a death sentence would cause him further trauma. He had already experienced the death of a close relative and another death would impact him greatly. She believed he should have the continuing opportunity to handle his relationship with his mother however he wanted. (RT 89:11852-11860.)

Ms. Lyons conceded that as Ivan, Jr. grew older, he could harbor a lot of anger toward his mother. However, abused children who had understandable anger toward a parent also still had love for that parent. A child's therapy must consider both of those feelings. She did not want to limit the boy's options, but the imposition of a death sentence on his mother would definitely limit those options. (RT 89:11863-11865.)

Gudrun Armentrout was a psychotherapist and a marriage, family, and child therapist employed at the Family Stress Center. Michael Gonzales, the next oldest child of Ivan and Veronica Gonzales, was ten years old and had been in therapy with Dr. Armentrout since 1995. Dr. Armentrout believed that a death sentence for Veronica Gonzales would add another difficult trauma to Michael's life. The impact would be negative, severe, life-long, and would hinder his development and recovery. If she were executed, he would lose any opportunity to access her as he grows up. (RT 89:11866-11871.)

Michael was doing well in therapy, but whenever he had thoughts about his parents or the death of his cousin he acted out aggressively. This caused problems in school and led to fights with his brother. As he aged, if he desired to form a more mature relationship with his mother, but she was not available, it would be very harmful for him. Also, her execution might further polarize the family and cut off Michael's access to his extended family. Michael understood what death meant, but he did not understand the ramifications of a death sentence as an adult would. As he grows up, the realization that his parents had been condemned to death would be very traumatic for him. (RT 89:11871-11873.)

**c. Friends and Family Members Comments about Veronica Gonzales**

Veronica's oldest sister, Anita Negrette, talked about how close they had always been and how close Veronica had been to Anita's four sons. She continued to visit Veronica in jail once a month and Veronica meant the world to her. She believed Veronica's children needed their mother. (RT 88:11760-11773.)

Anita's husband, Victor Negrette, loved Veronica Gonzales like a daughter or sister. He would be shattered if she was sentenced to death. His children had been close to her and would also be shattered. He thought it would be hardest on his wife, Anita, who had been closest to Veronica and loved her very much. (RT 89:11981-11985.)

Anita and Victor's son, Victor Negrette, Jr., was 17 at the time he testified. He remembered his Aunt Veronica from times when she babysat for

him and his brothers. He had spent time with his aunt and her children. He remembered his aunt as always cooking and always making sure the children were full before eating anything herself. He believed his aunt treated her own children well, and he remembered her as always having one child in her arms and another grabbing her leg. He could not recall his Aunt Veronica ever being mean to him, and felt she treated him like one of her own sons. If he lost her, it would be like losing part of himself. He wanted her to be able to help him raise his own children. (RT 88:11787-11795.)

Gabriel Negrette, another son of Veronica's sister, Anita, was 15 when he testified. He also remembered his Aunt Veronica as a babysitter when he was younger. He remembered staying at her home on weekends and being treated just like her own children. He remembered visiting his aunt's home when his cousin Genny lived there. Genny was playing with the other children and he saw Genny and Aunt Veronica hugging each other. His aunt was important to him, like his own mother. (RT 88:11796-11802.)

Veronica's sister, Mary Rojas, also testified in the penalty trial. Like Veronica, Mary was physically abused by her mother and sexually abused by her step-father. She recalled being 12 or 13 years old when her mother and step-father taught her to drink whiskey. After she was drunk, her step-father raped her while her mother was in the bedroom praying. Mary also recalled an incident in which she accidentally walked in on her step-father in bed with Veronica. (RT 89:11895-11902.)

Genny Rojas was Mary's sixth child. Since Genny's death, Mary had a seventh child, also named Genny. When Genny was still alive, Mary had drinking problems and her children were taken away twice, by court orders.

The first court order came after Mary's husband, Pete, molested their oldest daughter. Mary was separated from Pete and, at the time of Veronica's penalty trial, she had been sober for four years. (RT 89:11903-11905, 11910.)

The first time Mary's children were removed from her custody, they were placed in foster homes. Afterward, the children told her they had been divided up in different foster homes and did not like that. When they were removed from Mary's custody the second time because Mary had a drug problem, she did not want them to go to foster homes. She lied to the social worker and denied that she had been abused as a child. Afterward, the children were all sent to her mother's home. (RT 89:11905-11907.)

After Mary's children were taken away, she sought help for her drug problem. She lived at Victory Outreach for 8 months, and then lived at the Christ Extension Ministry.<sup>84</sup> She had not been concerned when her sister Veronica took over the care for Genny, because she believed Veronica was a good mother. Veronica had cared for her children in the past and they had never complained about their treatment. (RT 89:11907-11909.)

Mary loved Genny and missed her. Genny's death had been hard on her family. But her sister, Veronica, still meant a lot to her. Her children still talked to Veronica on the phone. Her family had been through a lot, and if her sister were executed, her children would be hurt once again. (RT 89:11913-11915.)

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84. Substance abuse counselors verified that Mary had completed the program at Christ Extension Ministries, had remained sober for four years, had regained custody of her children, and appeared to be an excellent mother, considering what she had been through. (RT 89:11971-11974.)

**3. The Prosecutor Used a Distorted Form of "Victim Impact" Evidence, Brought out in Cross-Examination, to Unfairly Denigrate Defense Witnesses Who Were Relatives of the Victim**

The prosecution presented no penalty phase case-in-chief, offered no rebuttal witnesses, and relied only of the circumstances of the crime as a factor in aggravation. (RT 88:11658-11659, 89:11992.) Nonetheless, noting that in the present case, the relatives of Veronica Gonzales were also the family of the victim, the prosecution cross-examined those witnesses to bring out an unconventional potpourri of distorted "victim impact" evidence, designed to unfairly offset testimony by Genny's mother and other relatives by denigrating their status as victims.

Veronica Gonzales' sister, Anita Negrette, noted that Genny also meant a lot to her. Genny's mother was Anita's other sister Mary. Anita had been to Genny's burial. Anita acknowledged that as of the time of her testimony in May 1998, there was still no headstone on Genny's grave. Anita acknowledged that the death of Genny Rojas had affected her own children, and that Mary's other children missed their sister. (RT 88:11776-11782.)

Mary Rojas, admitted she had not been a good mother to Genny, due to her drug problems. She did not have food for her children because she was spending her welfare money on drugs. (RT 89:11923-11924.) She acknowledged that by lying to the social worker, she made it possible for her own children to go live with the same parents who had abused her. (RT 89:11925.) Mary conceded she chose to give up her own children so she could use methamphetamines. (RT 89:11934.)

Mary had stated on direct examination that she was still paying off the expenses of Genny's burial and that once that was paid off, she intended to borrow money to buy a tombstone for Genny's grave. (RT 89:11912.) When the prosecutor asked her if she was aware of the fact the State had given her mother \$2,000 from the state crime victims' fund to pay for Genny's burial, Mary responded that she had heard that her mother got some money from the State, but Mary had seen none of it. She did not know what her mother had done with that money. When the prosecutor asked whether Mary herself had been given \$2,700 from the state crime victims' fund, Mary responded she had received nothing directly. The state had paid for counseling for her and her children, but the funds went directly to the counselors. (RT 89:11927-11929, 11958-11960.)

Mary conceded that she decided to name her newest child Genny even though the original Genny did not yet have a headstone. When the prosecutor asked why she did not at least wait until the original Genny had a headstone, an objection was sustained. (RT 89:11929.) Over strenuous defense relevance objections, the prosecutor was allowed to show the jury photographs of Genny's unmarked burial site. (RT 89:11935-11937, 11950; see also People's Exhibit 91 A-D.)

The prosecutor pressed Victor Negrette to explain why Genny Rojas was passed from relative to relative, and tried very hard to get Victor Negrette to agree that nobody wanted Genny. Victor insisted that he wanted her and loved her. He tried to help her, but was not knowledgeable enough or financially able to succeed. (RT 89:11986-11987.)

**I. THROUGH A VARIETY OF INSTANCES OF PROSECUTORIAL MISCONDUCT, IMPROPERLY ADMITTED EVIDENCE, AND MISUSE OF OTHERWISE PROPER EVIDENCE, THE PROSECUTOR FALSELY INSINUATED THAT VERONICA GONZALES AND HER SEPARATELY TRIED CO-DEFENDANT AGREED THAT EACH WOULD BLAME THE OTHER FOR THE CRIME CHARGED AGAINST THEM**

**A. Introduction**

The trial evidence tended to show that Genny Rojas did not die as a result of accident or her own actions in the bathtub. Instead, she died at the hands of another person, and the evidence tended to show that one or both of the adults in the Gonzales home was responsible. The defense never claimed otherwise, but contended that the responsible person was Ivan Gonzales. The evidence that Veronica Gonzales was responsible was quite sparse. If she was responsible, the evidence to prove the state of mind required for first degree murder, or for the torture or mayhem special circumstances, was non-existent.

Nonetheless, a jury found her guilty, found both special circumstances true, and determined that death was the appropriate punishment. In this argument, it will be shown that these results must be attributed to a series of improprieties committed by the prosecutor, intertwined with the effects of erroneous rulings by the trial court. A variety of errors occurred. Some would have been relatively minor standing alone while others were surprisingly serious in a trial with such important stakes. Most importantly, the syn-

ergistic impact of these separate errors eviscerated the defense. This made the subsequent verdicts understandable, despite their unfairness.

Ivan Gonzales loomed large in the life of Veronica Gonzales, controlling virtually every aspect of her entire adult life up until the moment of her arrest, and even trying to continue that control after her arrest. Yet he was virtually absent from the trial of Veronica Gonzales. He never testified, and was seen by the jury only once, brought into the courtroom for about ten seconds. That was simply so the jury could see what he looked like. They never heard him speak a word, in person or on tape. Thus, for the first time in her life, it appeared that Veronica Gonzales could be judged on her own, rather than as an extension of Ivan Gonzales.

However, the prosecutor seemed uncomfortable with the fact that Veronica Gonzales was finally in control of her own destiny as she offered her defense to the jury that would decide her fate. To prevent this, the prosecutor was determined to bring the absent Ivan Gonzales into the trial in some fashion, and to use him to overshadow Veronica Gonzales' defense, just as Ivan Gonzales had overshadowed her life. These efforts were successful.

It will be shown that the prosecutor essentially used Ivan Gonzales as the strongest witness against Veronica Gonzales, while preventing the defense from confronting this invisible witness in any meaningful way. The prosecutor had an apparent belief that Ivan and Veronica Gonzales had somehow conspired to blame each other for Genny Rojas' death, in a calculated effort to escape any punishment. The problem with this prosecution theory is that there was no evidence whatsoever to support it. It was a concoction based purely on speculation. Knowing he had no actual evidence to

support his theory, the prosecutor nonetheless put it in front of the jury in the form of a question that could not possibly have been asked in good faith.

The prosecutor asked Veronica Gonzales whether she knew that Ivan Gonzales had attempted to use the same Battered Spouse Syndrome defense that she was using. The prosecutor knew this was not true. He had personally prosecuted Ivan Gonzales and knew that Ivan never testified at his own trial, and never offered expert testimony regarding the syndrome. He knew only that Ivan may have explored such a defense prior to trial, but abandoned it before presenting any of it to his own jury. Furthermore, even if Ivan had relied on such a defense, the prosecutor must have known that any knowledge Veronica Gonzales might have had would have necessarily been based on hearsay.<sup>85</sup> The prosecutor knew it did not matter what answer Veronica Gonzales gave, or whether she answered the question at all. Merely to ask it in an obviously insinuating tone was enough to plant the speculative theory in the minds of the jurors.

Having accomplished this much, the prosecutor went further, determined to reveal to the jury that two different experts had interviewed Ivan Gonzales prior to his own trial and had reached conflicting conclusions regarding whether he was a battered spouse. This was offered in the guise of evidence tending to show that experts reaching conclusions about battered spouses were not to be trusted. Although the trial court recognized there was

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85. That is, Veronica was not present at Ivan's trial, so she could have no personal knowledge of any defense he might have presented. Any knowledge she might have had of his defense could have only been based on something she was told by somebody else.

very limited probative value in proving simply that different experts might reach different results, and that the potential for juror misuse of the information was high, the court nonetheless let the prosecutor make this point.

The court never seemed to realize that this was really a clever disguise for two other very important, but improper, prosecution goals. First, this information fed directly into the notion, already improperly planted, that Ivan and Veronica Gonzales had planned together to blame each other for the death of Genny Rojas. Second, by unfairly diminishing the significance of all psychological experts, the prosecutor could only gain. It did not matter whether the jury was impressed with the conclusions offered by the prosecution experts, as long as they were also unimpressed with the conclusions offered by the defense experts.

The prosecutor's goals were further enhanced when the trial court entered an unprecedented order that Veronica Gonzales undergo evaluation by a prosecution expert. Precedent supports such orders when a defendant contends that he or she had a mental state that provided a legal excuse to preclude criminal liability or to reduce the degree of guilt, but that was not what Veronica Gonzales offered. She did not admit participation in killing Genny Rojas and then claim her state of mind rendered her less culpable for her acts. Instead, she denied participation in the acts and simply offered evidence to explain why she failed to protect Genny Rojas and why she lied to the police soon after her arrest. If these are proper bases to require a defendant to submit to interviews by prosecution experts, then such interviews can be ordered in a wide variety of circumstances, totally eviscerating the federal constitutional privilege against self-incrimination.

Compounding the error in ordering such evaluations at all, the trial court unfairly acceded to the prosecutor's demand that Veronica Gonzales be examined by not one, but two prosecution experts, including one who was not qualified and who was tainted by the conclusions he had reached after interviewing Ivan Gonzales before his separate trial. The errors were compounded again when the prosecution was given the benefit of an instruction to the jury that they could make damning inferences because Veronica Gonzales had refused to comply with the order in full, even though she did comply in regard to one of the two prosecution experts. The error was further compounded when Veronica Gonzales was not allowed to tell the jury her reasons for the refusal. The error was compounded yet again when the doctor who was not an expert in BWS (hereafter "BWS"), and who never evaluated Veronica Gonzales, was allowed to testify anyway. As the defense had predicted, he gave little or no proper testimony, and instead gave what amounted to improper profile evidence. In other words, he never testified to any conclusion that Veronica Gonzales had falsified her defense; instead, he testified that she met the profile of a person presenting a contrived defense. Once again, this combined with the other improprieties to bring home the unfounded point that she had conspired with Ivan Gonzales to falsely blame each other and escape punishment.

As if all this was not bad enough, other rulings precluded the defense from meaningfully responding. The defense was not permitted to elicit any evidence of the fact that Ivan Gonzales had made statements to the police that incriminated him and tended to exonerate Veronica Gonzales. Even after the prosecutor planted an untrue idea of the defense Ivan Gonzales had of-

ferred at his own trial, Veronica Gonzales was not permitted to set the record straight. As already noted, even though Veronica Gonzales was penalized for refusing to be interviewed by one prosecution expert, she was not permitted to explain the reasons for her refusal. Furthermore, after the jury was improperly exposed to the fact that an expert hired by Ivan Gonzales had concluded that Ivan was a battered man, the defense was never permitted to show the flaws in the reasoning utilized by the expert who reached that conclusion. Thus, not only was the prosecution based on improper evidence, but the defense was not even permitted to respond to it in a meaningful fashion.

This argument will be long and complicated. The factual and procedural background will be detailed and lengthy. The arguments that will be presented could be broken down into a number of independent arguments, but if that were done much of their force would be lost. The prosecutor below succeeded in getting the trial court to consider these matters one-by-one in isolation, and that is what led to so many erroneous rulings. Indeed, even some rulings that may not have been erroneous in isolation compounded the unfair impact of other errors. By considering all of this in its full and proper context, the intertwined prejudicial impact can more effectively be appreciated.

## **B. Factual and Procedural Background**

On January 28, 1997, before either Ivan or Veronica Gonzales' separate trials had begun, counsel for Veronica Gonzales filed a motion seeking the admission of Ivan Gonzales' statements against interest, including his admission to the police that he had placed Genny Rojas in the bathtub,

turned on the warm water, planned to check on her in 10 minutes and forgot to do so, and then heard her screaming. (CT 6:1306-1310, 1311 *et seq.*)

The matter was argued on February 3, 1997. The trial judge commented that Ivan Gonzales' responses to the police appeared to be unreliable because he admitted putting Genny in the tub, but claimed no knowledge of how she got burned.<sup>86</sup> If he had put Genny in a hot tub, she would have screamed immediately. Because the judge saw Ivan Gonzales' admissions as unreliable, he did not believe they were admissible as admissions against interest. Defense counsel replied that Ivan made statements tending to exonerate Veronica Gonzales, such as stating she was never in the bathroom alone with Genny. That was clearly against Ivan's interest and should be considered reliable. The prosecutor responded that both defendants were simply saying they had nothing to do with the injuries to Genny Rojas, so their statements were not against their interest and were inherently unreliable. (RT 20:1654-1666.)

The court ruled that Ivan Gonzales' statements did not constitute statements against his own penal interest. The judge did not believe it was clear to Ivan at the time he spoke that he was making any admission. The Court noted that in considering this defense motion, it was assuming that Ivan Gonzales was not available as a witness for Veronica Gonzales. (RT 20:1672-1675.)

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86. The judge appears to have been inaccurate in his description of Ivan Gonzales' statements to the police. Ivan surmised that after he had left Genny in the tub, she must have turned the dial herself, making the water hotter. (See CT 3:457, 493.)

During Ivan Gonzales' separate trial, his defense considered the possibility of producing evidence that Ivan Gonzales was a battered spouse, suffering from Battered Spouse Syndrome. His defense hired a potential expert witness, Ricardo Weinstein, who evaluated Ivan Gonzales and concluded that he did suffer from Battered Spouse Syndrome. Dr. Weinstein's report was disclosed to the prosecution during the discovery process. The prosecution then obtained a court order requiring Ivan Gonzales to undergo an evaluation by a prosecution expert, Dr. Mark Mills. Dr. Mills concluded Ivan Gonzales was not suffering from Battered Spouse Syndrome. The Ivan Gonzales defense then decided not to produce such evidence or call Dr. Weinstein at all. Thus, Dr. Weinstein never testified. (RT 54:5737-5740; 71:8883-8890, 8896-8902.)

On January 12, 1998, after Ivan Gonzales had been convicted, but before Veronica Gonzales' trial had even begun, the prosecutor filed a motion seeking a court-ordered psychiatric examination of Ms. Gonzales. The prosecutor expected Ms. Gonzales to offer a diminished capacity defense at trial, putting her mental state in issue. The prosecutor relied on *People v. Danis* (1973) 31 Cal.App.3d 782. (CT 10:2043-2154.) The defense filed an opposition on January 21, 1998, contending that the fact that the defense expected to offer expert testimony on the subject of BWS did not expose Veronica Gonzales to a psychiatric evaluation by the prosecution. The expected defense evidence regarding BWS would not be offered as an excuse or justification for criminal conduct. Instead, the defense would be contending that Veronica Gonzales did not commit the acts that constituted the charged crime. The evidence pertaining to BWS would be offered only to explain her

behavior in regard to matters such as her failure to leave her abusive husband, her failure to take steps to protect Genny Rojas from Ivan Gonzales, and her false and inconsistent statements to the police soon after her arrest. The defense argued that any court-ordered evaluation would violate Veronica Gonzales' federal Fifth Amendment privilege against self-incrimination. (CT 11:2346-2355.)

Also on January 12, 1998, the defense filed a Motion to Reconsider and Admit Ivan Gonzales' Declarations Against Interest. The defense relied on the federal Fifth, Sixth, and Fourteenth Amendment rights to due process of law and to a fair opportunity to defend oneself at trial. The defense contended that during Ivan Gonzales' trial, the prosecution had introduced the very statements the Veronica Gonzales defense wanted to use, and the prosecutor had argued in that trial that Ivan Gonzales' statements were reliable and had the kernel of truth. Also, if there was ambiguity as to whether the statements were against Ivan Gonzales' interest, the defense argued that should go to weight, not to admissibility. (CT 10:2234-2270.) The prosecutor continued to oppose the defense motion. (CT 12:2710-2720.)

On January 21, 1998, the defense filed a motion seeking a continuance of the trial, noting that Ivan Gonzales had been sentenced to death on January 13, 1998 and Veronica Gonzales' trial was scheduled to begin on February 6, 1998.<sup>87</sup> The defense motion noted that after the sentencing, the

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87. Before Ivan Gonzales' trial had even begun, the trial court had stated there should be at least a month between the two trials, in order to give publicity a chance to dissipate. (RT 30:3311.) Later, the judge noted that trial dates for the two cases had been scheduled in a manner expected to allow a couple of months to pass between the verdict in the Ivan Gonzales trial and  
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prosecutor had been quoted in the media as saying this had been the most horrific case of child abuse San Diego had ever seen. The trial judge had been quoted on television saying, “[The death of Genny Rojas was the] ... most aggravated, continued torture of a single victim I have ever seen.” (CT 11:2360-2364.) The motion noted the prosecutor had chosen to speak in such a manner to the media even after the Veronica Gonzales defense had warned about the danger that such publicity would prejudice Veronica Gonzales. The defense sought a continuance of Veronica Gonzales’ trial until May 1, 1998. (CT 11:2365, 2375.) Two days later, the prosecutor filed an opposition to any continuance, noting the publicity died down after a day and none of it dealt with the culpability of Veronica Gonzales. (CT 12:2735 et seq.)

On February 2, 1998, argument was heard on the defense request for a continuance. After hearing argument, the judge denied any continuance. The court acknowledged there had been substantial publicity over a long period of time, but noted it would have been even worse except that the court had not allowed cameras in the courtroom during the Ivan Gonzales trial. The court also felt that publicity had not been sensational. (RT 41:3586-3625.)

Also on February 2, 1998, the Court tentatively ruled in favor of the prosecution on the issue of ordering an evaluation of Veronica Gonzales by a prosecution expert. The court concluded that BWS evidence would put Ms. Gonzales’ mental state in issue and thereby give the prosecution the right to

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the start of the Veronica Gonzales trial. That plan was thwarted when Ivan Gonzales’ penalty trial ended in a hung jury and a second penalty trial had to be scheduled. (RT 34:3418-3419.)

a court-ordered evaluation by its own expert. (CT 12:2777-2780.) The matter was argued further the same day. (RT 41:3710 *et seq.*) The prosecutor contended he would need to have at least three different expert witnesses evaluate Veronica Gonzales. At this point, the judge commented that his head hurt. (RT 41:3726-3727.)

Soon afterward, however, the judge ordered Veronica Gonzales to undergo examination by a prosecution expert, but the court deferred any decision on how many evaluations would be ordered. Defense attorney Michael Popkins expressed the concern that the prosecutor would seek to utilize Dr. Mark Mills to interview Ms. Gonzales. Dr. Mills had already interviewed Ivan Gonzales during his separate earlier proceedings and the defense feared that any interview of Veronica Gonzales by Dr. Mills would be colored by his earlier evaluation of Ivan Gonzales. The judge deferred any consideration of that concern. (RT 41:3730-3731.)

On February 3, 1998, the court and counsel discussed whether some questions in the planned juror questionnaire would give away the fact that Ivan Gonzales had already been convicted. The judge wondered how Veronica Gonzales would be harmed if her jury learned that Ivan had been convicted. Defense counsel Popkins responded that the Ivan Gonzales conviction was irrelevant information that the jury did not need to know, and that the defense had made a tactical decision he did not wish to explain in detail. The prosecutor, on the other hand, wanted to ask prospective jurors whether they knew that Ivan Gonzales had been sentenced to death. No decision was reached regarding how to handle this. (RT 42:3747-3748.)

Two days later, questionnaire language was finalized that would state that both Ivan and Veronica Gonzales were charged with the murder of Genny Rojas, that the cases were being handled separately, and this jury would only decide the charges against Veronica Gonzales. (RT 44:3973-3974.)

Also on February 5, 1998, the court and counsel discussed the timing of any prosecution evaluations of Veronica Gonzales. The defense wanted to defer any evaluation until after Veronica Gonzales testified. However, the judge believed the defense was committed to the use of BWS evidence. Also, the judge believed that if an evaluation was ordered and then Veronica Gonzales did not testify, the prosecution would not be able to utilize the fruits of any evaluation of her, so there would be no harm. The prosecutor then noted that he did, in fact, desire to use Dr. Mark Mills as his expert. The judge reviewed Mills' resume and determined he was a qualified expert, but the defense still objected that he had a conflict of interest in light of his previous interview of Ivan Gonzales and the conclusions he had reached after that interview. The defense also contended that if Veronica Gonzales was to be interviewed by a prosecution expert who had also interviewed Ivan Gonzales, then the only fair procedure would be a court-ordered evaluation of Ivan Gonzales by an expert working on behalf of Veronica Gonzales. The court deferred that issue for later. (RT 44:3985-3995.)

Also on February 5, 1998, further argument was heard on the defense efforts to utilize statements against interest made by Ivan Gonzales. The defense reiterated its argument that the statements being called unreliable were somehow reliable enough for the prosecutor to use in Ivan Gonzales' trial.

The trial court saw nothing new and again ruled the statements would not be admitted. (RT 44:3943-3951.)

On February 25, 1998, the potential approval of Dr. Mark Mills as the prosecution expert to evaluate Veronica Gonzales was discussed in court once again. This time the defense added the objection that Dr. Mills did not have any training or expertise in the area of BWS. The judge rejected that concern and again found Dr. Mills qualified. (RT 51:5371-5374.) The defense then reiterated its belief that the prosecution would have an unfair advantage if it could obtain an evaluation of Veronica Gonzales by an expert who had also interviewed Ivan Gonzales. The defense had never had the opportunity for such an interview. The prosecutor countered that by seeking a severance from Ivan Gonzales, the defense had waived any right it might have to a court-ordered evaluation of Ivan Gonzales. No authority was cited for this novel claim. (RT 51:5385, 5398, 5402.) Ultimately, the court ruled that it was reasonable for the prosecutor to have Veronica Gonzales evaluated separately by two different experts. The judge ordered Ms. Gonzales to undergo evaluations by both Dr. Mark Mills and Dr. Nancy Kaser-Boyd. The judge did indicate he might limit the testimony that Dr. Mills could give, such as by precluding him from utilizing any hearsay statements made by Ivan Gonzales as bases for any conclusions. (RT 51:5413-5415.)

On March 9, 1998, counsel for Veronica Gonzales raised a concern about the fact that the prosecution had added Dr. Ricardo Weinstein to its witness list. Dr. Weinstein was the expert who had evaluated Ivan Gonzales earlier and had concluded he was suffering from Battered Spouse Syndrome, but who had never testified in Ivan Gonzales' trial. Counsel for Veronica

Gonzales were concerned that Weinstein had the same advantage as Dr. Mills, in that he had previous access to Ivan Gonzales, while the defense experts had no such access. The prosecutor explained that he intended to call Dr. Weinstein to offer his opinion that Ivan Gonzales was a battered spouse, and to testify that different psychologists could differ greatly in reaching opinions whether a particular person was a battered spouse. The matter was deferred for a later discussion when the prosecutor promised he would not call Dr. Weinstein as a witness until the prosecution rebuttal phase of the trial. (RT 54:5737-5739.)

On March 11, 1998, both sides gave opening statements to the jury. Defense attorney Popkins told the jury that the evidence would show that Ivan Gonzales was the killer of Genny Rojas, and Veronica Gonzales was not guilty. However, the defense expected the prosecution to call as witnesses some friends of Ivan Gonzales who would testify that he was meek and humble and that it was Veronica Gonzales who controlled him. Counsel contended that the prosecutor would, effectively, be defending Ivan Gonzales during this trial.<sup>88</sup> (RT 55:5824.) The prosecutor was quite offended

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88. The actual words used by defense counsel were as follows:

“The prosecution, who have and will portray themselves as the self-righteous protectors of Genny Rojas, will actually spend a good deal of their time in this case defending his [sic] killer, Ivan Gonzales. We saw a little bit of that already. You saw a small portion of the letter that was read to you. I’ll get back to that letter a little later in my presentation.

You heard me correctly: he’ll actually spend time in this case bringing in some of his  
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by these comments.<sup>89</sup> He believed the defense had now opened the door to evidence about the outcome of Ivan Gonzales' trial. He wanted to inform the jury that he had not defended Ivan Gonzales, but instead had sought and won a death sentence against him. (RT 55:5896-5897.) The judge seemed to side with the prosecutor in concluding the defense remarks constituted an improper personal attack,<sup>90</sup> but the judge remained firm in his belief that the jury should still not be informed of the outcome of Ivan Gonzales' trial.

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cronies and some of his relatives to come in to try to portray Ivan Gonzales as a meek and humble man; that it was Mrs. Gonzales that controlled him.

I will tell you something you'll never see in this case: you'll never see Ivan Gonzales come in here and testify in this case; but you will see the prosecutor actually defend this man. I think you want to hear the truth about who killed Genny Rojas. I think you want to hear the truth how Genny Rojas was killed. I think you want to hear the truth, most importantly, why she was killed." (RT 55:5824.)

89. Interestingly, while the prosecutor was quite offended at defense counsel's remarks, he later proved them to be absolutely true. The prosecutor wanted to introduce evidence that Ivan Gonzales had a good upbringing, in contrast to the abuse Veronica Gonzales suffered as a child. The prosecutor believed this would prove it was Veronica, and not Ivan, who perpetrated the abuse against Genny Rojas. Outside the presence of the jury, in arguing in favor of the admissibility of such evidence, the prosecutor contended that the defense had attacked the character of Ivan Gonzales, so he had a right to defend it. (RT 74:9609-9610.)

90. However, after the defense pointed out how argumentative the prosecutor had been in his opening statement, the judge conceded he had agreed in advance to allow both sides to push the limits in their opening statements. (RT 55:6803.)

However, the judge concluded the prosecutor would be allowed to tell the jury that he or his office had charged both Ivan and Veronica Gonzales with murder with special circumstances. (RT 55:6791-6792, 6811-6813.)

On March 16, 1998, the defense noted it had filed a writ in the California Supreme Court seeking to preclude any court-ordered evaluation of Veronica Gonzales. In the event the writ was denied, the defense intended to refuse any examination by Dr. Mills, but did not expect to refuse any examination by Dr. Kaser-Boyd. (RT 58:6507, 6511-6512.) The following day, the court filed its order directing a psychological evaluation of Veronica Gonzales by Dr. Nancy Kaser-Boyd. (CT 13:2899.)

On March 20, 1998, there was a further discussion between the court and counsel regarding whether defense counsel could be present during Dr. Kaser-Boyd's interview of Veronica Gonzales. The judge ruled that if Dr. Kaser-Boyd did not want counsel to be present, then they could not attend. (RT 61:6894-6899.) The judge also indicated that any statements made by Veronica Gonzales during the interview in the absence of counsel would be inadmissible for the truth of the matter, and would be accompanied by a limiting instruction when related in front of the jury. (RT 61:6901-6903.)

In that same court session, the defense argued that since Veronica Gonzales was not refusing to be examined, but was only refusing to be interviewed by one particular doctor (Mills), the defense did not believe there was a basis for the prosecutor to bring out the Dr. Mills refusal, or for the jury to be told they could consider that refusal against Veronica Gonzales. However, the court disagreed and ruled that this did constitute a refusal that could be revealed to the jury. (RT 61:6905-6910.)

Also on March 20, 1998, the pending writ filed by the defense, seeking to preclude any prosecution interviews of Veronica Gonzales, was denied. Over the next two days, Veronica Gonzales was interviewed by Dr. Kaser-Boyd. (RT 63:7112.)

On March 26, 1998, Cynthia Lynn Bernee testified during the Veronica Gonzales guilt trial, as a defense expert witness on the subject of BWS. In cross-examining her, the prosecutor posed a hypothetical question:

“Let me give a hypothetical. Okay? Let’s say you’ve got a husband and a wife; and, both are involved in a crime; and, both claim that each individual is a battered spouse; and, let’s say, even, to throw into the hypothetical, that there’s experts that say the husband’s a battered spouse and the wife is a battered spouse. To even further complicate things, let’s say there would be prosecution experts to say that neither one of them is a battered spouse suffering from battered spouse syndrome. Are you with me on this hypothetical?”

A Yes.

Q What’s a jury suppose to do?” (RT 64:7288-7289.)

At this point the defense objected to the question on the ground that it was outside the expertise of the witness. The objection was sustained. (RT 64:7289.) The prosecutor then asked: “How would you expect a jury to evaluate a situation like that?” (RT 64:7289.) The defense objected on the same grounds, as well as on the ground that the question was argumentative. The court sustained the objection on both grounds, explaining that it was up to the jury to decide what to do in such circumstances. (RT 64:7289.)

At the next opportunity to discuss the matter outside the presence of the jury, defense attorney Michael Popkins noted that he was “horrified” that the prosecutor posed a hypothetical that referred to conflicting experts, each saying one spouse is battered and the other is not. Counsel noted it was not at all clear that any such evidence would be produced during the present trial. (RT 64:7314-7315.) Surprisingly, the prosecutor made no effort to represent that evidence supporting the hypothetical question would ever be produced. Instead, he argued

“... the questions that I was posing to the doctor as to what Mr. Popkins thinks had to do with Dr. Weinstein were **completely hypothetical and never had any factual basis**. I wasn’t talking about actual facts that existed in this case. And the jury’s free to accept any hypothetical.” (RT 64:7319-7320.)

The trial court apparently failed to recognize the error in the prosecutor’s argument.<sup>91</sup> The judge thought the questions so far merely sought to

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91. The prosecutor’s position was contrary to law:

“Generally, an expert may render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth.’ (1 McCormick on Evidence (4th ed. 1992) § 14, p. 58.) **Such a hypothetical question must be rooted in facts shown by the evidence, however.** (*Rowe v. Such* (1901) 134 Cal. 573, 576; *People v. Castillo* (1935) 5 Cal.App.2d 194, 197-198; accord, *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339; see CALJIC No. 2.82.)” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; emphasis added.)  
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convey the fact that different mental health professionals might reach different conclusions about the same individual. The judge added: "I can't see this record as giving the jury the impression that there is a mental health professional who has examined Ivan and has this conclusion." (RT 64:7322.)

On March 30, 1998, while Veronica Gonzales was testifying in her own behalf, she explained that she had been ordered by the judge to undergo evaluations by two prosecution experts, Dr. Mark Mills and Dr. Nancy Kaser-Boyd. She cooperated with Dr. Kaser-Boyd, but refused to meet with Dr. Mills on the advice of her attorneys. As she attempted to explain why her attorneys had given her such advice, the prosecutor interrupted and objected that the question called for speculation or a legal conclusion. The judge simply stated that was enough of an answer. The court would not permit her to give any further explanation of her refusal to meet with Dr. Mills. (RT 66:7715-7716.)

The next day, on March 31, 1998, the prosecutor conducted his cross-examination of Veronica Gonzales. During that cross-examination, he asked Ms. Gonzales about a letter that Ivan Gonzales had written to her in which he had made drawing of a finger pointing at a face. The face was labeled "Me." Just above the face and pointing finger, Ivan Gonzales had written:

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"Although the field of permissible hypothetical questions is broad, a party cannot use this method of questioning to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced." (*People v. Boyette* (2002) 29 Cal.4<sup>th</sup> 381, 449.)

“P.S. If it comes down to it:” (See RT 67:7861-7864; Defense Exhibit KK.) The prosecutor repeatedly asked Ms. Gonzales to explain what Ivan Gonzales meant by this drawing. Finally the prosecutor asked: “Well, you knew that Ivan Gonzales claimed he was a battered man, didn’t you?” Ms. Gonzales responded: “He never testified to that; no, I didn’t.” Unsatisfied, the prosecutor then asked, “He didn’t testify to it, but he claimed that, didn’t he?” (RT 67:7866-7867.)

At this point defense counsel objected, asserting that the question had been asked and answered. The Court sustained the objection “on the grounds that we shouldn’t go through with that line.” (RT 67:7867.) Undeterred, the prosecutor next asked, “Well, were you aware that was his defense?” (RT 67:7867.) Defense counsel objected to the relevance, and a sidebar discussion occurred outside the hearing of the jury. The Court noted that it saw a number of problems with the prosecutor’s questions. The Court reiterated that efforts had been made to stay away from what had occurred at Ivan Gonzales’ trial. Indeed, the only thing Ivan ever did at his trial was enter a plea of not guilty. Whatever Veronica Gonzales might know about what his attorneys decided to do did not have any evident relevance in the present trial. (RT 67:7867.)

The prosecutor simply reiterated his personal theory that Ivan Gonzales was telling his wife to point the finger at him, and that both of them were simply pointing the finger at each other. Without offering any explanation as to how Veronica Gonzales could possibly know what was in Ivan Gonzales’ mind unless it was based on hearsay, the prosecutor argued that any knowledge Veronica Gonzales might have about what Ivan Gonzales

claimed would constitute circumstantial evidence that they were pointing the finger at each other. The prosecutor offered no explanation as to how his conclusion could logically follow from his speculative premise. (RT 67:7867-7868.)

The judge agreed that Ivan Gonzales' letter to Veronica did seem to constitute a message to Veronica Gonzales that it was alright for her to point the finger at him. The judge saw no reason to go beyond that and get into anything Ivan might have said, or into whatever may have happened at Ivan's trial. (RT 67:7867-7869.)

Counsel for Veronica Gonzales noted that the prosecutor had implied that Ivan Gonzales had utilized the same kind of defense as Veronica, and that simply was not true. Instead, Ivan had not offered any expert testimony at his own trial. Ivan Gonzales never testified that Veronica Gonzales did anything. Taken as a whole, the prosecutor had created the false impression that the defense invented a bogus defense that had also been used at Ivan Gonzales' trial.

Defense counsel moved for a mistrial, arguing the prosecutor had asked an improper question implying things the jurors could not possibly erase from their minds. The prosecutor had injected irrelevant and inappropriate matters that greatly harmed the defense theory of the present case. In the alternative, if a mistrial was denied, counsel renewed his request to produce evidence of statements against interest that Ivan Gonzales had made, admitting he had been in the bathroom with Genny Rojas, in order to set the record straight regarding what Ivan Gonzales actually had said. (RT 67:7869-7871.)

The court denied the defense request for a mistrial. At this point, Veronica Gonzales had simply testified that Ivan did not testify that he was a battered man, and the court believed the matter should be left at that. The judge believed any further exploration of this area would be too messy. The judge noted that the reality of the matter, as indicated by responses on the juror questionnaires, was that 6 of the 12 jurors were already aware of the fact that Ivan Gonzales had been convicted. The judge believed the whole jury would be aware of this, but that it should not be confirmed or emphasized. (RT 67:7871-7872.)

The judge did not directly address the defense contentions that matters implied by the prosecutor's improper questions had seriously prejudiced the defense. The court stated it did not want to consider now whether any remedial measures should be taken, because the jury was waiting. The judge indicated he would consider options later, but he conceded that there did not appear to be any appropriate manner to set the record straight. Nonetheless, defense counsel asked for an admonition not to consider questions as evidence. The Court cautioned that would carry the risk of emphasizing what the prosecutor had said. Defense counsel noted he had already sought a mistrial and it had been denied. He believed the defense had been turned into a mockery, but there should be some effort to control the damage. (RT 67:7872-7874.) The judge then admonished the jury that questions were not evidence, and that when a question was asked and an objection was sustained, the jury should neither consider the question nor speculate as to what the answer might have been. (RT 67:7874-7875.)

Soon afterward, during a recess, the matter was discussed further. The judge noted he still did not think the defense should be allowed to use Ivan Gonzales' statements to the police. Instead, the judge suggested that on redirect exam, defense counsel should ask Veronica Gonzales if she knew whether Ivan Gonzales had ever pointed the finger at her. She could truthfully testify she was not aware of him doing that, and then the matter could be dropped. Defense counsel initially saw no additional benefit from that, as she had already said that Ivan Gonzales had not given any such testimony. But counsel argued that the prosecutor's questions had implied that Ivan Gonzales did claim that he was a battered husband and that Veronica Gonzales was responsible for the death of Genny Rojas. The prosecutor noted that in his statement to the police, Ivan Gonzales had said "we" put her in the tub, so he did put some blame on Veronica Gonzales. The judge did not want to solicit any false testimony from Veronica Gonzales, and defense counsel was concerned that the judge's earlier suggestion might open more doors for the prosecutor. But the defense was still concerned that the jury had been given a false impression by the prosecutor, and the defense still wanted to use Ivan Gonzales' statements. The judge declined to hear further argument about that, and the defense was left with no effective remedy for the false implication left by the prosecutor.<sup>92</sup> (RT 67:7909-7914.)

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92. Later in the trial, after the defense had rested, defense counsel reminded the court there had never been a final ruling on this defense request to elicit evidence of statements against interest made by Ivan Gonzales. The judge ruled that the prosecutor's questions to Veronica Gonzales about Ivan Gonzales' defense did not open the door to the use of Ivan Gonzales' statements to the police. The Court expressly noted it was denying the request on  
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On April 7, 1998, before the jury was present, the court asked counsel for both sides whether they wanted the jury to be told about the results of Ivan Gonzales' trial. The prosecution wanted the jury to be told, and the defense was apparently agreeable to that, as long as an appropriate limiting instruction was given. The court circulated proposed language, and both sides agreed to it. (RT 71:8785-8787.) After the jury entered the courtroom, the court explained to the jury that it realized some jurors were familiar with the results of Ivan Gonzales' trial. The Court advised the entire jury that Ivan Gonzales was convicted of first degree murder with special circumstances and was sentenced to death. The jurors were instructed they could consider that fact for the limited purpose of determining whether it caused any witness to be biased against either Veronica Gonzales or the prosecution, and for no other purpose. The jury was further instructed that Ivan Gonzales' conviction and sentence was logically and legally irrelevant to Veronica Gonzales' guilt or innocence. (RT 71:8787-8789; CT 14:3173.)

Later that day, after the jury had been excused, the court and counsel discussed the prosecutor's desire to cross-examine the defense BWS experts regarding the fact that there had been reports from two different psychologists evaluating Ivan Gonzales, and that one psychologist concluded Ivan was a battered spouse and the other concluded he was not. The prosecutor asserted that the fact that the trial court had granted the prosecution requests for orders requiring both Ivan Gonzales and Veronica Gonzales to submit to

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its merits, and not based on any question of timeliness. (RT 80:10533-10536.)

evaluations by prosecution experts demonstrated that the battered spouse defense was a mental state defense. The prosecutor further maintained that there could not be a battered spouse without there also being a batterer. The prosecutor wanted to elicit evidence about the conflicting evaluations of Ivan Gonzales for purposes regarding the reliability of psychology and psychiatry in the courtroom. (RT 71:8883-8885.)

The prosecutor explained further that two defense experts believed Veronica Gonzales was a battered woman. But another expert, who had not testified, had concluded that Ivan Gonzales was a battered man. This meant that expert apparently believed that Veronica Gonzales was a batterer. The prosecutor wanted to ask the present defense experts if they were aware of this seemingly inconsistent evidence. Ignoring the fact that the defense experts had no access to Ivan Gonzales and no way to make their own evaluation of him, the prosecutor argued this seeming inconsistency somehow undermined the defense experts. The prosecutor also believed this would make it necessary for jurors to reach their own conclusion regarding whether Veronica Gonzales was violent of her own free will, or counter-violent in reaction to Ivan Gonzales. (RT 71:8886-8890.)

The judge questioned whether this could be accomplished without leading to a full trial on Ivan Gonzales' mental state. If the prosecutor elicited the evidence he had outlined, the defense would want to respond by showing that the expert who had concluded Ivan Gonzales was a battered man had reached a flawed conclusion. The judge also questioned whether the experts would agree with the prosecutor's view of inconsistency, or whether they would conclude it was possible for a husband and wife to both be bat-

tered spouses. The prosecutor responded with his belief that his experts would say these are simply two mutually violent people. But then the prosecutor conceded he did not really know what the experts would say. His apparent ultimate argument, however, was that the best way to undermine the credibility of the defense experts was to ask if they were aware that a brother psychologist found Ivan Gonzales to be a battered man. Finally recognizing the serious hearsay problem this would create, the prosecutor contended he would call Dr. Weinstein as a rebuttal witness and would argue that there was no applicable privilege to preclude him from testifying about his examination of Ivan Gonzales, or if there was any privilege, then Veronica Gonzales would not have standing to assert it. (RT 71:8890-8896.)

Counsel for Veronica Gonzales responded, arguing there was no relevance in the conclusion that a different psychologist reached about a different person. If the prosecutor was allowed to do what he proposed here, then what would stop him from bringing in a parade of disagreeing experts from any number of unrelated trials, simply to undermine confidence in psychologists? Counsel also argued that there were hearsay problems, since Dr. Weinstein's conclusions about Ivan Gonzales were based on statements Ivan had made to the doctor. Counsel reminded the court that Ivan Gonzales' counsel had given the prosecutor Dr. Weinstein's report in anticipation of calling him, but then had never called him. Thus, Ivan Gonzales had not waived his privilege and Dr. Weinstein could not ethically testify about what Ivan Gonzales told him, absent a waiver from Ivan. Counsel pointed out that even though the prosecutor already had Dr. Weinstein's report during Ivan Gonzales' trial, the prosecutor could not have called Dr. Weinstein as a wit-

ness unless Ivan called him first. The trial court agreed that if a privilege existed, Dr. Weinstein would be obligated to claim it. (RT 71:8897-8901.)

Counsel for Veronica Gonzales continued, noting that the court had refused to allow Veronica's experts to testify to any statements made by Veronica until after she testified to those statements herself. Given that ruling, how could the court allow the prosecutor to have experts rely on statements by Ivan Gonzales without having Ivan first testify to those statements? The judge responded that nobody would be testifying about the content of statements made by Ivan Gonzales. Instead, defense experts would simply be asked whether they had read Dr. Weinstein's report. (RT 71:8902-8903.)

Defense counsel also reminded the court that Veronica Gonzales' experts had reached their conclusions about her before Ivan Gonzales had ever hired Dr. Weinstein. Counsel expressly relied on Evidence Code section 352, as well as his hearsay objection, asking how the defense could respond to the evidence proposed by the prosecutor. The prosecutor had been permitted to respond to Veronica Gonzales' BWS evidence by gaining a court order to have her evaluated by two prosecution experts. If the prosecutor were allowed to produce the evidence he sought, then the defense would want Ivan Gonzales evaluated by an expert for Veronica Gonzales, in order to testify to the flaws in Dr. Weinstein's conclusions about Ivan. But Ivan Gonzales would never consent to such an examination. (RT 71:8903-8907.)

The court tentatively concluded there was no privilege issue, because Ivan Gonzales had waived any privilege by turning Dr. Weinstein's report over to the prosecution. The prosecutor added that Ivan Gonzales also submitted to an evaluation by prosecution expert Dr. Mark Mills, which was a

further waiver of any privilege held by Ivan Gonzales. The discussion ended without resolution. (RT 71:8912-8916.)

The next day, the discussion resumed. The judge had reviewed cases cited by the prosecutor and found them not very helpful. He acknowledged there were cases that noted that sometimes hearsay is so incendiary that a limiting instruction could not be effective. The judge saw the real issue as depending on an Evidence Code section 352 analysis. The judge saw the prosecutor as having three points he hoped to make – that different experts had different opinions, that defense experts ignored the reports about Ivan Gonzales by Dr. Weinstein and Dr. Mills, and that Ivan Gonzales was not a battering husband. As for the first point – that different experts reached different opinions – the judge saw that as no big surprise to the court, counsel, or the jurors. As for the third point, that Ivan Gonzales was not a battering husband, the court did not believe it could be established by cross-examination alone. Instead, that point could only be made if Dr. Weinstein's report were somehow admitted on its merits. (RT 72:8920-8924.)

The court continued with its Evidence Code section 352 analysis. The court conceded that the proposed prosecution evidence carried a potential for confusion of the issues, since it was important for the present jury to stay focused on Veronica Gonzales, not on Ivan Gonzales. The judge also conceded there was a danger of an undue consumption of time, because the defense would have a legitimate interest in seeking to undercut the point the prosecutor desired to make. The judge also conceded there was potential prejudice to the defense, because there would be a very limited opportunity to address whether Ivan Gonzales actually was a battered man, through further exami-

nation of these witnesses. The judge also noted he would have to instruct the jury not to consider whether Ivan Gonzales was a battered man, but if he gave such an instruction, it would add to the difficulty he already faced in allowing the defense to rebut the proposition that the jury would be told to ignore. (RT 72:8924-8925.) Furthermore, the judge expressed considerable doubt whether a jury would be able to obey such a limiting instruction:

“It’s difficult for me to imagine in this scenario, that is, the D.A. cross-examining this expert with the substance of what Dr. Weinstein said in the context of this case, I’m having some real difficulty imagining the jury is going to really be able to follow the limiting instruction to comply with it.” (RT 72:8925-8926.)

Having set forth a compelling case in favor of Evidence Code section 352 preclusion, the judge nonetheless proposed what he saw as a middle ground. The judge suggested that the prosecutor ask the experts whether it was true that experts sometimes disagreed, and whether they were aware of two conflicting reports regarding Ivan Gonzales, and then drop it at that. This would give the prosecutor the benefit he was seeking without giving the jury any details. The judge believed this allowed the defense to come out even, because the jury would only learn that one expert thought Ivan Gonzales was a battered man and one thought he was not. The judge would then follow this with a limiting instruction telling the jury to consider this only in determining the reliability of expert opinion in general. Not surprisingly, the prosecutor stated he could live with that resolution of the matter. The defense, however, wished to debate the matter further. (RT 72:8926-8927.)

Later that day, defense counsel was allowed to respond to the court's proposal. Counsel agreed that the Evidence Code section 352 analysis was the key issue. But from the defense point of view, the prosecution had no need for the proposed evidence in order to make the point that experts sometimes disagreed. That point would be vividly made when the prosecution presented its two experts who would disagree with the defense experts regarding whether Veronica Gonzales suffered from BWS. Thus, the prosecution had no legitimate need to make that point again by the use of unfairly prejudicial evidence. Defense counsel continued to believe that the prosecution's desired evidence would consume a lot of extra trial time, because the defense would still have to mount a challenge against the report that concluded Ivan Gonzales was a battered man. The defense would be prejudiced by the lack of any opportunity to do its own full analysis of Ivan Gonzales, and would have a very difficult time meeting this evidence at all. There would be no ability to explore the factors upon which Dr. Weinstein reached his conclusion about Ivan Gonzales. Furthermore, as the judge conceded, it would be very difficult for the jury to follow a limiting instruction. (RT 72:9145-9147.)

Defense counsel concluded that the judge's proposal was no middle ground at all. Instead, it gave the prosecution everything it wanted – showing that experts disagreed, unfairly undermining the credibility of the defense experts, and leaving the jury with the strong implication that there was solid evidence that Ivan Gonzales was a battered husband. Counsel stressed that he was not in any way abandoning his argument that this evidence should not come in at all, but if it was to come in, he proposed a truer middle

ground. The experts should merely be asked whether they were aware of conflicting reports about Ivan Gonzales, without any reference to whether he was a battered man or not. (RT 72:9147-9148.)

Defense counsel also reiterated his belief that if the prosecutor was allowed to get in the existence of conflicting reports about Ivan Gonzales, that would necessarily open the door to the defense producing evidence regarding the basis of the report that concluded Ivan Gonzales was a battered man. For example, defense counsel noted that in his report, Dr. Weinstein described the events in a manner unsupported by the statements Ivan Gonzales had made. Counsel concluded that the evidence the prosecutor sought to elicit was not relevant to Veronica Gonzales' guilt or innocence and did not impeach the defense experts, since Dr. Weinstein's conclusions were based on completely different material. (RT 72:9151-9152.)

Veronica Gonzales' second counsel continued the defense argument. She emphasized that any conclusion that Ivan Gonzales is a battered spouse had to be based on hearsay. The Court responded that even if the prosecutor did not take the position that Ivan Gonzales was a battered spouse, the evidence the prosecutor sought to elicit was still relevant to show that different experts have different views on the issue of whether an individual is a battered spouse. Nonetheless, counsel maintained that the prosecutor was making a not-so-subtly shrouded effort to place in front of the jury the fact that somebody thinks Ivan Gonzales is a battered spouse. The trial court continued to see no problem with its proposed solution. Next, counsel argued it was unfair to ask defense experts how Dr. Weinstein's conclusion affects

their own opinions, since they have had no access to Weinstein's underlying notes and materials. (RT 72:9153-9160, 9164, 9168.)

The prosecutor responded that he definitely would not be contending that Ivan Gonzales was a battered man. He did not believe that himself, and never had believed that.<sup>93</sup> Instead, he believed this was simply a case of mutual violence. The prosecutor maintained that Ivan Gonzales was accused of being a batterer, so his mental state was at issue. The prosecutor's theory was that there was a "setup" between Ivan and Veronica Gonzales, whereby they would each point the finger at the other.<sup>94</sup> (RT 72:9169-9172.) Getting even further afield, the prosecutor argued:

"But the experts also are becoming more -  
- more than just experts in the field. They have  
become advocates. And I think that is important  
for a jury to know. And how do they know that?  
Based on all the evidence.

There's one guy out there who's a psy-  
chologist who's properly credentialed, and he  
says Ivan Gonzales is a battered man. And  
there's two other people here that the defense is  
going to put on, and they're going to say Veron-  
ica Gonzales is a battered woman. Let's leave it  
up to the jury." (RT 72:9172.)

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93. Apparently, the prosecutor saw nothing inconsistent in his desire to impeach defense experts by showing they failed to consider the conclusion expressed in a report which the prosecutor himself believed was totally wrong.

94. As usual, the prosecutor offered no probative evidence to back up his totally speculative belief.

Counsel for Veronica Gonzales added one more point: Ivan Gonzales' own attorneys decided not to use Dr. Weinstein's report in Ivan's trial, indicating they also recognized the flaws in Dr. Weinstein's conclusions. Unimpressed, the court replied that perhaps Ivan Gonzales' counsel was only concerned about the doors that might be opened if Dr. Weinstein testified. (RT 72:9173-9174.)

The judge then set forth a lengthy ruling. He agreed that Evidence Code section 352 would preclude the prosecutor from putting the substance of Dr. Weinstein's report before the jury. The present case boiled down to whether the jury would accept the BWS evidence to reasonably explain why Veronica Gonzales failed to intervene in the behavior she alleged Ivan Gonzales had displayed. The key point the prosecutor wanted to make was that this was not an exact science and that qualified experts could differ. In regard to assessing prejudice, the judge believed the key fact was that nobody was offering Dr. Weinstein's opinion. In fact, the judge did not even want the doctor's name to be mentioned at all. Both the prosecution and the defense were taking the position that Ivan Gonzales was not a battered man, and all the jury would hear is that experts disagree about that fact. In other words, the point that would be made is that it is **so common** that experts disagree, that they did so in regard to Ivan in this very case.<sup>95</sup> In other words, the judge believed all the jury would learn is the legitimate conclusion that

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95. This rationale contained a clear logical fallacy. The fact that experts happened to disagree in this very case simply constitutes a single anecdote, and tells us nothing whatsoever about how common such disagreements are.

different experts have different opinions, which undercuts the power of any single expert's opinion. Therefore, the judge saw no prejudice at all to the defense. (RT 72:9175-9178.)

The judge reiterated that he would allow only the inquiry whether the experts were aware that there were conflicting reports from experts as to whether Ivan Gonzales was a battered man. There would be no names, no details regarding conclusions, and no inquiry into underlying reasons. The jury would be instructed to consider this only on the question of the reliability of expert opinion in general, not on the issue of whether Ivan Gonzales was a battered man. Furthermore, the judge would expect the prosecutor to make clear in his argument to the jury that he did not believe that Ivan Gonzales was a battered man. Since the judge was not allowing this evidence for the substance of Dr. Weinstein's views, the judge did not see this as opening any doors for time-consuming defense responses. In other words, the prosecutor would not be arguing that Dr. Weinstein's report was accurate, so there was no basis for any evidence attacking the bases of Dr. Weinstein's conclusions. (RT 72:9178-9181.)

Counsel for Veronica Gonzales continued to see unfairness in the fact the defense experts never had any opportunity to interview Ivan Gonzales or any of the children. They would have preferred to interview everybody in the family before assessing a domestic violence situation. Counsel wanted the jury instructed that such a possibility was not made available to the defense experts. The judge responded instead that defense counsel could ask their own experts whether they would have wanted to interview Ivan Gonzales and the couple's children, and whether they were able to do that. However,

the judge did not want the jury to hear the reasons that neither Ivan Gonzales nor any of the children had been available for interviews. Counsel indicated that was okay as long as the prosecutor did nothing to imply the defense could have interviewed them. The prosecutor noted that he did want to elicit the fact that Ivan Gonzales did submit to an examination by Dr. Mills. (RT 72:9181-9184.)

Defense counsel noted she might want to ask her own experts about Dr. Weinstein's report on redirect examination. The judge made it clear that he would not allow any use of Dr. Weinstein's report to support admission of Ivan Gonzales' statements. If the reports of Dr. Weinstein or Dr. Mills were part of the basis of any defense expert's conclusions, that fact could be elicited, but not the statements made by Ivan Gonzales to the doctors. However, the judge would consider any further defense arguments about admission of Ivan Gonzales' statements if the defense believed that the prosecutor's cross-examination of Veronica Gonzales opened any new doors. (RT 72:9185-9187.)

The judge emphasized that all the defense experts could say about Dr. Weinstein's report was that they did or did not consider it. Defense counsel explained her experts would want to say that you have to look at the content of a report in order to decide it was appropriate to ignore it, but the judge responded he would not allow that. There would be no litigation at all of the merits of Dr. Weinstein's report. Counsel for Veronica Gonzales then suggested adding to the limiting instruction a statement that both sides agreed that the report finding that Ivan Gonzales was a battered man was not a valid report. The prosecutor refused to agree to that and preferred to leave that for

argument. The judge then suggested language to the effect that neither side was arguing that Ivan Gonzales was a battered man. The prosecutor found that suggestion acceptable. (RT 72:9189-9191.)

The following day, April 9, 1998, there was a further discussion of the limiting instruction that would be given. Counsel for Veronica Gonzales wanted something directed at Dr. Weinstein's report itself, since that was what would be referred to in the testimony the jury would hear. He proposed telling the jury that neither side would argue that the report was valid. The prosecutor rejected that suggestion, contending that the only significance of the report related to the reliability of expert opinion. The judge conceded that any argument the defense experts failed to consider something they should have considered would not be persuasive; the only relevance of the evidence would be that different experts have different opinions. The report was not being offered to show it was valid or invalid, so the instruction should just say the jury was not to consider it on its merits. Then the judge suggested adding to the admonition the statement that both sides would argue that Ivan Gonzales was not a battered man. The judge again stated that he expected the prosecutor to affirmatively argue that Ivan Gonzales was not a battered man; to merely fail to argue that he was a battered man would not be sufficient. The prosecutor then announced he would not ask the defense experts if they considered Dr. Weinstein's report. (RT 73:9193-9204.)

Later that day, in cross-examining defense expert witness Dr. Kenneth Ryan, the prosecutor elicited the witness' agreement with the statement that mental health experts can differ greatly in their opinions regarding the same individual. The prosecutor also obtained Dr. Ryan's acknowledgment that in

this very case, he was aware of the fact that experts had reached conflicting opinions about Ivan Gonzales – one that he was a battered man and one that he was not. Dr. Ryan also conceded he was familiar with the concept of confirmatory bias – a theory that that if an expert is hired for the purpose of determining whether Veronica Gonzales was a battered woman, he would have a bias in favor of reaching such a conclusion. (RT 73:9303-9305.)

The court then admonished the jury as follows:

“The doctor has testified to other opinions that he is aware of with regard to Ivan Gonzales. You are allowed to use that and consider that for only a limited purpose. You are allowed to consider it only for the limited purpose of considering the reliability of such expert testimony in this area in general. You are not to consider it on the question of whether Ivan Gonzales is or is not a battered person.

The -- I emphasize to you that you are to decide only Veronica Gonzales' issues in this case. It is her status, her case, that is before you. In this case, both sides will be arguing to you at the end of the case that Ivan Gonzales is not a battered man. So the reasons for your not considering it on that issue are obvious and, I think, clear to you.” (RT 73:9306-9307.)

Following this admonition, proceedings were recessed and there was a further discussion outside the presence of the jury. The defense made clear its continuing objection to the evidence the prosecutor had elicited. The court expressly agreed that the defense had fully preserved its objections without the need for objecting to the specific questions when the prosecutor asked them in front of the jury. Defense counsel noted that she also continued to request to be allowed to examine witnesses regarding the details of Dr.

Weinstein's report, including statements by Ivan Gonzales that formed the basis of Dr. Weinstein's opinions. The court again denied that request. (RT 73:9308.)

The next day, Dr. Weinstein's report came up again in a slightly different context. The prosecutor desired to present evidence from relatives and experts that Veronica Gonzales grew up in a violent and abusive home, while Ivan Gonzales had a good childhood and was, therefore, less likely to have directly committed the acts that resulted in Genny Rojas' death. Counsel for Veronica Gonzales noted that Dr. Weinstein's report contradicted the claim that Ivan had a good childhood. Dr. Weinstein's report indicated Ivan Gonzales had told him that he had been sodomized by his brother for many years, and had been sexually molested by an uncle. Ivan's only brother was Armando Gonzales, who was expected to be a witness in Veronica Gonzales' trial. The prosecutor responded that Dr. Weinstein's report was hearsay, and that even if the court precluded him from asking experts about the relationship between Veronica Gonzales' childhood and the likelihood she was the instigator of the violence against Genny Rojas, the prosecutor would argue that point anyway, based on what he perceived as reasonable inferences. The prosecutor suggested that the defense should simply ask Armando Gonzales about those accusations, and live with whatever answer he gave. (RT 74:9519-9527.)

The following week, on April 14, 1998, counsel for Veronica Gonzales reiterated a continuing objection to *any* testimony by Dr. Mills, arguing he was tainted by the fact he had interviewed Ivan Gonzales. Alternatively, if he was allowed to testify, the defense sought to preclude his expected claim

that he had reviewed thousands of cases and had never seen another one where there was such a divergence between statements to police and testimony as there was in the present case. The objection was based both on relevance and on Evidence Code section 352. Counsel argued that Dr. Mills would effectively be saying he is an expert, he reviewed the present record, and Veronica Gonzales is an unusually inconsistent witness. Counsel also objected to an expected effort by Dr. Mills to tell the jurors which parts of Veronica Gonzales' testimony they should believe. (RT 76:9994-9997.)

In response, the prosecutor argued that the defense had tried to show that Veronica Gonzales' lies to the police were consistent with BWS. He contended defense counsel had asked their own experts whether they found Veronica Gonzales to be credible. The prosecutor wanted to rebut all this by showing that the inconsistencies were evidence of malingering. The prosecutor expected Dr. Mills to say he had reviewed everything and concluded that no credible psychologist or forensic expert could ever base an opinion on what Veronica Gonzales had said. The prosecutor verified he did intend to elicit testimony that the doctor had not seen another case in thousands where the statements were as inconsistent as in the present case. (RT 76:997-9998.)

The judge expressed his belief that the proffered evidence straddled a fine line between saying what an expert should believe, versus saying what a jury should believe. The judge wanted any testimony along such lines to be phrased very carefully so as to stay on the former side of the line only. Defense counsel reiterated the claim that the entire line of questioning was irrelevant, or that any relevance was outweighed by the prejudicial impact, pursuant to Evidence Code section 352. Counsel also expected Dr. Mills to

make an analogy to a drowning man grasping at straws, and contended that was not a proper matter for expert testimony. (RT 76:9999-10002.)

The judge ruled that the testimony would be permitted, but he wanted the prosecutor to carefully instruct his witness not to tell the jurors what they should believe. Defense counsel then added a new objection to any recounting of specific inconsistencies. The judge saw such recounting as relevant but time-consuming and not very beneficial. The prosecutor argued he should be able to ask for some examples of inconsistencies and agreed to not elicit more than 10 such examples. (RT 76:10002-10005.)

Defense counsel continued to press her relevance and Evidence Code section 352 objections, noting that the other prosecution expert, Dr. Kaser-Boyd, could testify to her opinion whether Veronica Gonzales was a reliable historian. Dr. Kaser-Boyd had interviewed Veronica Gonzales, but Dr. Mills had not, so he really had nothing to add to what the jurors could conclude for themselves. Counsel saw the prosecution's planned examination of Dr. Mills as being nothing more than a preview of the prosecution closing argument, disguised as expert testimony. The judge responded simply that the testimony would be allowed, subject to objections if the descriptions of specific inconsistencies became too numerous. (RT 76:10006-10008.)

Veronica Gonzales' other defense attorney expressed another concern. He expected Dr. Mills to testify that defendants facing a potential death sentence had a great incentive to lie. Counsel was concerned that such testimony would cause Veronica Gonzales to be judged under different standards than other witnesses. It would also be tantamount to saying she is less credible because of the charges the prosecutor chose to file. The prosecutor prom-

ised to leave penalty out of the matter and refer only to the prospect of a murder trial. (RT 76:10012.)

The next day, defense counsel added a new objection to the impending testimony from Dr. Mark Mills. Referring to Evidence Code section 802, counsel argued the testimony Mills would give would not deal with subjects proper for expert opinion. Counsel expected Mills to pinpoint for the jury what were perceived as inconsistencies in Veronica Gonzales' testimony. However, the jurors had seen Veronica Gonzales' demeanor while testifying and were therefore in a **better** position than Dr. Mills to assess her credibility. Furthermore, the court had disallowed any evidence regarding an interview of Veronica Gonzales while under the influence of sodium amytal. The defense experts had seen the videotape of that interview and found it credible. Counsel was not certain whether Dr. Mills had viewed that videotape. (RT 77:10018-10019.)

The judge responded that one job of evaluators, such as Mills, was to consider the reliability of histories given by subjects. Thus, Dr. Mills did have expertise to offer. The judge summarily dismissed the other arguments made by defense counsel as going to weight, not admissibility. (RT 77:10021.)

Later that day, Dr. Mills testified. He noted he had not interviewed Veronica Gonzales. The judge interrupted and informed the jury that he had previously ordered Veronica Gonzales to submit to interviews by both Dr. Kaser-Boyd and Dr. Mills. Dr. Mills then went on to note that he was not able to evaluate Veronica Gonzales, but he did not know whether she had

refused the interview or her attorneys had refused for her. (RT 77:10040-10042.)

Dr. Mills then expressly acknowledged he was **not** offering a forensic opinion regarding the diagnosis of Veronica Gonzales. Instead, he was simply offering his opinion that the incentive for malingering in a case such as this was high. Defense counsel again objected on grounds of relevance and Evidence Code section 352, and the objections were again overruled. (RT 77:10042-10043.) Next, expressly violating the prosecutor's promise that penalty would not be mentioned, Dr. Mills explained that Veronica Gonzales faced a potential death sentence, and that "... for most of us, there's nothing more precious than our lives."<sup>96</sup> (RT 77:10043.) For that reason, the doctor believed that the incentive to embellish or distort, consciously or unconsciously, was very high. (RT 77:10043.)

Moving on to the specific examples of inconsistencies in Veronica Gonzales' statements and testimony, Dr. Mills made the claim that whenever there were glaring inconsistencies in a person's account of some event, there were only two possibilities: either the person was lying or the person has a severe memory problem due to a cause such as Alzheimer's disease or some other brain defect. (RT 77:10046.) He found it very significant that Veronica Gonzales had made various claims of being sexually and physically abused as a child. However, when she talked to a social worker in 1994 about the

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96. At the next recess, counsel pointed out the violation of the prosecutor's promise not to refer to penalty. The court agreed that the defense objection to such testimony had been adequately preserved without the need to object again in front of the jury. (RT 77:10053.)

suitability of her mother and step-father as guardians of the children of her sister, Mary, she said there had been no abuse and that Mary had previously persuaded her to lie about abuse. At trial, she claimed that her mother persuaded her to lie to the social worker in 1994. Dr. Mills stressed that this was a very significant event in Veronica Gonzales' past, but she had given three very different accounts of it.<sup>97</sup> (RT 77:10046-10047.)

Dr. Mills then emphasized that he was not trying to say which version was the truth. However, Dr. Mills believed he saw an important pattern: first, Veronica Gonzales blamed her sister, Mary, for putting thoughts in her head, then she blamed her mother for putting thoughts in her head, and now she is blaming Ivan Gonzales for putting thoughts in her head. (RT 77:10047-10048.) Dr. Mills then discussed other inconsistencies in Veronica Gonzales' explanations to the police in the first and second interviews, and her testimony at the trial. (RT 77:10049-10050.) Apparently based on these inconsistencies, he concluded there was insufficient evidence that Veronica Gonzales was suffering from Post-Traumatic Stress Disorder. He acknowledged there were problems reaching such a conclusion without ever having been able to interview Veronica Gonzales, and he expressed no opinion at all about BWS. (RT 77:10051.)

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97. The prosecution's own BWS expert, Dr. Kaser-Boyd, had a very different view of the significance of these inconsistencies. She recognized that many people would lie to protect their parents or to keep their family together. Here, it seemed the lie was being done so the children of Mary Rojas could stay within the extended family. She had seen such false statements many times in dependency court. (RT 78:10156.)

During a recess, it was noted that Dr. Mills had referred to the sodium amytal interview, which was not supposed to be mentioned in front of the jury, and to the potential death sentence, which was also not supposed to be mentioned. The court made clear its belief that defense objections had been adequately preserved without the need to repeat them in front of the jury. However, defense counsel remained concerned about what else Dr. Mills might slip in during cross-examination. She renewed her relevance and Evidence Code section 352 objections, and they were again overruled. (RT 77:10052-10056.)

On cross-examination, Dr. Mills readily acknowledged that he did not consider himself an expert on BWS, although he realized it was a well-recognized and widely accepted condition in his profession. He acknowledged that an important aspect of BWS was that sufferers often hid the abuse. Falsehoods were part and parcel of the syndrome and it would be unusual for a woman to suffer from the syndrome and always tell the truth about it. He even recognized that sufferers might give some explanations that seem contrary to common sense or to their own well-being. He also recognized that persons who were abused as children were often not truthful about the abuse. (RT 77:10072-10078.)

Dr. Mills conceded there was substantial corroboration of Veronica Gonzales' claims that she had been abused as a child. His main point appeared to be that she had made enough inconsistent statements that he, as a forensic psychiatrist, would not want to rely on her statements in reaching any sort of conclusion. (RT 77:10080-10085, 10099.)

After the guilt and penalty verdicts had been returned, Veronica Gonzales' Penal Code section 1181 Motion for a New Trial once again raised the issues regarding the denial of the use of Ivan Gonzales' statements against interest, allowing the prosecution to elicit the fact that there had been conflicting psychological reports regarding Ivan Gonzales, one indicating he was a battered man and one indicating he was not, ordering the defense to submit to psychological examinations by prosecution experts when no mental state defense was presented, and allowing the prosecution to comment on Veronica Gonzales' refusal to meet with Dr. Mills, when she had participated in an interview by a different prosecution expert. (CT 17:3776-3788.) The motion was denied in its entirety. (RT 93:12189-12193.)

**C. The Prosecutor Committed Intentional Misconduct in Questioning Veronica Gonzales about Any Hearsay Knowledge She Might Have of Ivan Gonzales' Defense, and in Strongly Insinuating Facts He Knew Were Untrue, Continuing After the Trial Court Repeatedly Sustained Defense Objections, and the Trial Court Then Erred in Failing to Grant a Mistrial or Any Other Meaningful Relief, All Resulting in Irreparable Prejudice to Veronica Gonzales**

As set forth in the Factual and Procedural Background in the proceeding section of this argument, when the prosecutor was apparently dissatisfied with Veronica Gonzales' responses about what Ivan Gonzales meant by a drawing he included in a letter to her, the prosecutor asked "Well, you knew that Ivan Gonzales claimed he was a battered man, didn't you?" Ms. Gonzales responded: "He never testified to that; no, I didn't." The prosecutor

next asked, "He didn't testify to it, but he claimed that, didn't he?" (RT 67:7866-7867.)

Defense counsel objected, asserting that the question had been asked and answered. The Court sustained the objection "on the grounds that we shouldn't go through with that line." (RT 67:7867.) Nonetheless, the prosecutor continued, "Well, were you aware that was his defense?" (RT 67:7867.) Defense counsel objected to the relevance, and a discussion occurred outside the hearing of the jury. The Court saw a number of problems with the prosecutor's questions, noting that efforts had been made to stay away from what had occurred at Ivan Gonzales' trial. The Court recalled that the only thing Ivan did at his trial was enter a plea of not guilty. Any knowledge Veronica Gonzales might have about what Ivan's attorneys decided to do did not have any evident relevance in the present trial. (RT 67:7867.)

There were a variety of improprieties in the questions the prosecutor asked. First of all, the initial series of questions regarding what Ivan Gonzales meant by some of his statements and drawings in a letter he had sent to Veronica Gonzales after both were in jail, as described above, were quite inappropriate. Whatever Ivan Gonzales meant was not relevant to Veronica Gonzales' guilt or innocence, and any response given by Veronica would necessarily be based on speculation or hearsay or a combination of both. While the defense chose not to object to these initial questions, it is not at all apparent how the highly experienced prosecutor could have believed they were proper.

Matters began to come to a head when the prosecutor tried to tell Veronica Gonzales what he believed the drawing meant. He asked, "Q Now,

when you look at both of these together, ma'am, isn't he saying, 'p.s., if it comes down to it, point the finger to me, and he got your meaning that you were going to be pointing the finger at him?'" (RT 67:7866.) This question also had multiple flaws. The letter was written after both had been arrested and there is no evidence whatsoever that Veronica Gonzales had ever encouraged or authorized Ivan Gonzales to write letters to her. Thus whatever thoughts Ivan Gonzales had or wanted to express to Veronica Gonzales were his own thoughts and were not in any way probative of Veronica Gonzales' state of mind. Second, not only were Ivan Gonzales' jailhouse thoughts irrelevant, but they also could not possibly have been matters of Veronica Gonzales' personal knowledge. Once again, the prosecutor was clearly calling for an answer that would have to be based on hearsay or speculation or both. Third, the question was compound. Fourth, it was argumentative,

Veronica Gonzales responded, "That's not the way it was." The prosecutor continued to argue with the witness: "That's not the way you see it, huh?" Ms. Gonzales repeated, "That's not the way it was. that's not the way he --" (RT 67:7866.) At this point defense counsel did object, saying that "the last question" was argumentative. The trial court sustained the objection. (RT 67:7866.) Thus, by this point the prosecutor must have been aware that the Court would no longer allow the improper line and manner of questioning.

The prosecutor evidently realized that he was at, or close to, his last opportunity to inject his own speculative theory into the questioning. He turned to a completely indefensible question, knowing it would have its desired impact no matter how it was answered, or even if it went unanswered.

He asked, "Well, you knew that Ivan Gonzales claimed he was a battered man, didn't you?" (RT 67:7866.)

There was no conceivable justification for asking this question, except to plant the prosecutor's personal, but unsupported, theory in the minds of the jurors. The manner in which the question was phrased, coming from the representative of the People, clearly conveyed to the jury that Ivan Gonzales had claimed he was a battered man. This would be inexcusable even if it were true, but in the present case, it was not true. The prosecutor knew that Ivan Gonzales had explored the possibility of such a defense and had hired Dr. Weinstein, who concluded Ivan Gonzales suffered from Battered Spouse Syndrome, but the prosecutor also knew that Ivan Gonzales abandoned that defense and did not pursue it at trial at all.

But even if the prosecutor had a good faith belief that Ivan Gonzales "claimed" he was a battered spouse, how is that information relevant to Veronica Gonzales' guilt or innocence? As the trial judge recognized repeatedly, it was very important to keep Veronica Gonzales' jury focused on the issue of her own guilt or innocence, and not sidetrack them into wondering about the absent co-defendant. Both sides and the judge knew this was essential to a fair trial, but the prosecutor apparently believed it was more important to smuggle in the theory he knew he could never prove, and obtain a conviction regardless of fairness.

If Veronica Gonzales had the knowledge that the prosecutor insinuated in his question, where would she have obtained that knowledge? She was not present when Ivan and his attorney decided to explore a Battered Spouse defense, or when they decided to retain Dr. Weinstein, or when Dr.

Weinstein interviewed Ivan Gonzales. Any knowledge she could have had would have been based on something her attorneys told her, or something she heard in court, or on seeing the report Dr. Weinstein wrote. Knowledge from any of these sources was clearly hearsay.<sup>98</sup>

In any event, Veronica Gonzales responded with the true answer: “He never testified to that; no, I didn’t.” (RT 67:7866.) Sensing one more opportunity, the prosecutor turned that honest answer into another damning insinuation: “He didn’t testify to it, but he claimed that, didn’t he?” (RT 67:7866-7867.)

Defense counsel objected, stating that the question had been asked and answered. The Court sustained the objection “on the grounds that we shouldn’t go through with that line.” (RT 67:7867.) The prosecutor, however, was determined to go through with that line despite the clear ruling from the trial court, asking next an even more outrageous question and insinuating information he knew to be false: “Well, were you aware that was his defense?” (RT 67:7867.) In fact, everyone (except the jurors) was aware that was not his defense – it was merely an option he had explored and rejected. Furthermore, the same problems of relevance, hearsay, and argumentativeness persisted.

Defense counsel objected to the relevance. The Court saw a number of problems with the prosecutor’s questions. The Court responded strongly:

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98. Indeed, the prosecutor was calling for an answer based on double hearsay. Dr. Weinstein never testified, so his report constituted hearsay. His conclusions, set forth in that report, were obviously based on statements made to him by Ivan Gonzales, and those statements constitute a second level of hearsay.

“There’s a thicket of issues that stand on this line of questioning. One is that we’ve tried to stay away from what happened at Ivan’s trial altogether, and this is asking about what happened at Ivan’s trial.

The second is Ivan, as far as I know, didn’t do anything but enter a plea of not guilty and deny the special circumstances. All the things that she might answer about are things his attorneys did, and I’m not so sure I see how relevant that is.” (RT 67:7867.)

Thus, the court recognized the prosecutor was at least stretching the truth, if not abandoning it altogether. The court recognized the absence of relevance. The court reiterated the danger of exploring what happened at Ivan’s trial, as opposed to concentrating on Veronica Gonzales’ guilt or innocence.

The prosecutor openly acknowledged that he believed the questions were justified because “It’s always been the People’s theory that both these people are just merely pointing the fingers at each other.” (RT 67:7868.) The problem with this theory is that it was unsupported by any evidence, and it had been pursued relentlessly even though the judge had sustained one defense objection after another, expressly stating the prosecutor should stay away from the line he was determined to pursue. When the trial court responded to the prosecutor’s theory by asking again about the relevance, the prosecutor contended that Ivan’s supposed claim that he was a battered husband was circumstantial evidence that Ivan and Veronica Gonzales were pointing the finger at each other. (RT 67:7868.) Once again, the flaws in the claimed logic of the prosecutor were numerous.

First of all, the letters from Ivan Gonzales were themselves clear hearsay, inadmissible for the truth of the matter, *i.e.*, that Ivan urged Veronica to point the finger at him. Thus, they did not even support the first portion of the prosecutor's "theory". The defense turned the letters over to the prosecution, during the discovery process, because they showed Ivan's continuing attempts to control Veronica and they were reviewed by defense experts and relied on in forming their opinions. (See CT 10:2155 *et seq*; RT 37:3502-3526; RT 41:3625-3637.) That made the letters relevant only as bases of expert opinion, but still inadmissible for the truth of the matter. As this Court has recognized, "... a witness' on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact. (Citations omitted.)" (*People v. Gardeley* (1996) 14 Cal.4<sup>th</sup> 605, 619.) The prosecutor's questions clearly, but erroneously, assumed the contents of the letters were usable for the truth of the matter as perceived by the prosecutor – establishing the fact that Ivan Gonzales invited his wife to point the finger at him.

Furthermore, the prosecutor knew only that Ivan Gonzales had sent a letter to Veronica Gonzales in which he indicated that if it was necessary for her defense, it was fine with him if she pointed the finger at him. The jury already knew that much also, as the letter was in evidence. But even putting aside the hearsay problems in regard to using the letter to show that Ivan Gonzales' urged his wife to point the finger at him, how did the letter prove anything about Veronica Gonzales' state of mind? As noted above, there was never any evidence that Veronica Gonzales encouraged or authorized Ivan Gonzales to write to her. All she did was receive his letters. Thus, there is no

evidence whatsoever to support the prosecutor's emotionally appealing theory that the spouses agreed to blame each other, so that each could escape conviction.

Moreover, aside from the fact that whatever the letter meant could only be attributed to Ivan, not to Veronica, it is not at all clear that the letter carried any nefarious meaning at all. Was Ivan telling Veronica to **falsely** point the finger at him to save herself? If so, that demonstrates Ivan's willingness to use perjury to avoid conviction, not Veronica's. But it is also quite possible that Ivan, aware of his own guilt, was simply letting his wife know that he would not take offense if she **truthfully** pointed the finger at him. In short, it is simply impossible to know what Ivan's state of mind was, and whatever it was, it had no evidentiary bearing on Veronica's state of mind.<sup>99</sup> The prosecution theory was complete speculation and was therefore not a legitimate justification for his improper insinuating questions.

Also, the prosecutor's last question was asked immediately after the court had sustained a defense objection and had stated, "... we shouldn't go

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99. This ambiguity does not negate the prejudicial impact. The prosecutor's apparent objective was to persuade the jury that both parents were so reprehensible that they not only each possessed the state of mind necessary to torture the victim, but also coldly conspired together afterward to escape punishment by blaming each other. Although there was no evidence to support this theory, the case was already very emotional simply by nature of the photographs of the terrible injuries suffered by the victim. Adding to that the prosecutor's unsupported theory of collusion strongly pushed the jurors toward an emotional verdict of guilt of first degree murder, plus special circumstances that required specific intent, plus a death sentence for a woman with no prior criminal history, all despite the absence of any evidence of Veronica Gonzales' actual state of mind, other than her own exculpatory testimony, strongly supported by expert opinion.

through with that line.” (RT 67:7867.) The prosecutor’s question clearly did go down that same line and was a blatant disregard of the court’s ruling. Even if the prosecutor believed the court was wrong and he had a proper basis for continuing down that forbidden line of questioning, it was his obligation to respect the ruling. “It is the imperative duty of an attorney to respectfully yield to the rulings of the court, whether right or wrong. (Citations omitted.)” (*Hawk v. Superior Court* (1974) 42 Cal.App.3d 108, 126; see also *People v. Pigage* (2003) 112 Cal.App.4<sup>th</sup> 1359, 1374.) ) If he felt he had a legitimate basis for persuading the judge to reconsider, he should have sought to do so outside the presence of the jury. Instead, he simply ignored the ruling and proceeded with another insinuating question to hammer home his speculative theory.

After hearing the prosecution theory that these questions were properly directed at showing that Ivan and Veronica Gonzales were pointing the finger at each other, the judge again sustained the defense objection and saw no legitimate reason to get into what happened at Ivan Gonzales’ trial. (RT 67:7868-7869.) Defense counsel promptly sought additional relief for the improper question, explaining:

“Counsel’s question implied that Ivan’s attorneys put on the same defense that we put on, which in fact is not true.

They did not put on an expert. Ivan never testified that Veronica did anything in the case; but it creates the impression in the jury that we have created a bogus defense that was also used unsuccessfully or, whether successfully or not, in Ivan’s trial by his lawyers. ...

All right. The problem is that information is out there right now and the jury are going to

start to wonder, "Well, gee, maybe Ivan is saying he's a battered person and Veronica isn't."

And I think at this point I'm asking for a mistrial, number one, . . . .

They're going to start thinking about Ivan doing the exact same type of case and, therefore, it takes away from our defense in a way that is inappropriate. Whether they did that defense or not is, is irrelevant and it's inappropriate.

And in fact, the fact is they didn't even do the defense we did. They did not put on the expert to say that he was a battered man. They did not put on Ivan to say he was a battered man or that Veronica did the killing. Everything was by implication. . . .

And now this jury is hearing that they put on the same defense; and it's, it's going to basically be used by this jury to realize that our defense is just something so I'm asking for a mistrial, number one. Number two, if the court is inclined to deny that mistrial, I'm reasking the court to allow me to go into Ivan's declarations against interest, which will set the record straight as to what Ivan actually did say as far as his involvement is concerned, so they have whole the picture.

. . . . He made certain statements in those, those interviews that, that he was the one who was in this with Genny when the tub was burning: "if she just told me it was hot, I would have taken her out."

. . . this jury has heard this thing now and they're going to start thinking, "Well, gee, this was a bogus defense, that the other guys did it, too, and they're just now coming up with it themselves." (RT 67:7869-7871.)

The trial court promptly denied the motion for mistrial. Ignoring the prosecutor's insinuations and focusing only on the actual responses that Veronica Gonzales had given, the court saw no harm because she had said only that Ivan did not testify that he was a battered man. The court believed

that Ivan did not testify that he was a battered man. The court believed the matter should be left at that, since **any further exploration of this area would be too messy**. The court believed many of the jurors were already aware of the fact that Ivan Gonzales had been convicted, but that it should not be confirmed or emphasized. (RT 67:7871-7872.)

The trial court erred in denying the defense motion for a mistrial. “It is misconduct ... for the prosecutor to imply facts not in evidence. (Citation omitted.)” (*People v. Sloan* (1963) 223 Cal.App.2d 96, 99.)

“ ‘ “The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct.” [Citation.]’ (*People v. Bell, supra*, 49 Cal.3d at p. 532.) “The rule is well established that the prosecuting attorney may not interrogate witnesses solely ‘for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might be given.’ [Citations.]” (*People v. Wagner* (1975) 13 Cal.3d 612, 619; see also, *People v. Bonin, supra*, 46 Cal.3d at p. 689 [intentionally eliciting inadmissible testimony]; *People v. Warren, supra*, 45 Cal.3d at pp. 480-481 [asking questions suggesting facts harmful to defendant without good faith belief in existence of said facts]; *People v. Perez, supra*, 58 Cal.2d at p. 241 [asking questions suggesting facts harmful to defendant without belief facts could be proved and purpose to prove them]; *People v. Evans, supra*, 39 Cal.2d at p. 251 [repeated asking of questions relative to objectionable and prejudicial matter involving appeals to passions and prejudices of jury; in § 288 prosecution, crime charged is sufficient to inflame mind of average person so there must be “rigorous insistence” upon observance of rules of admission of evidence and conduct of trial]; *People v. Johnson*

(1978) 77 Cal.App.3d 866, 873 [improper cross-examination of defendant to place inadmissible prejudicial evidence before jury]; *People v. Shipe* (1975) 49 Cal.App.3d 343, 349 [prosecutor “may not, under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony”].)

**Nor is the impropriety of such cross-examination cured by the fact that the questions elicit negative answers.** “By their very nature the questions suggested to the jurors that the prosecutor had a source of information unknown to them which corroborated the truth of the matters in question .... It is reasonable to assume that, in spite of [the] negative responses in the instant case, the jurors were led to believe that, in fact,” the insinuations of the questions were true. (*People v. Wagner, supra*, 13 Cal.3d at pp. 619-620.) In *Wagner*, it was held that instructions and admonitions did not cure the prejudicial effect of repeated insinuations regarding the defendant’s past conduct. (*id.*, at p. 621.)

In *People v. Shipe, supra*, 49 Cal.App.3d at pages 349-350, this court held that such conduct violated the defendant’s right of confrontation where the witness claimed his Fifth Amendment privilege and refused to answer questions, but through leading and suggestive questions the prosecutor created the almost irrefutable inference that defendant was guilty and the witness gave true statements to the authorities. Relying on *Douglas v. Alabama* (1965) 380 U.S. 415 [13 L.Ed.2d 934, 85 S.Ct. 1074], we determined that the *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 23-24 [17 L.Ed.2d 705, 710, 87 S.Ct. 824, 24 A.L.R.3d 1065]) standard was applicable. (*People v. Shipe, supra*, 49 Cal.3d at p. 355.)” (*People v. Pitts* (1990) 223 Cal.App.3d 606, 734-735; emphasis in original.)

In *People v. Shipe* (1975) 49 Cal.App.3d 343, cited several times in the preceding quotation from *Pitts*, the defendant, like Veronica Gonzales, was on trial for a murder for which separately tried co-defendants had already been convicted. In *Shipe* the earlier convictions resulted from guilty pleas, not a trial. The co-defendants were called as witnesses at the defendant's trial and were told they could not claim any privilege against self-incrimination, because they had pled guilty. Nonetheless, they refused to answer the prosecutor's questions about the crime. The prosecutor asked each of them a series of questions starting with "isn't it true that ..." followed by various statements about what the prosecutor believed had occurred, including acts the prosecutor believed had been committed by the defendant. The prosecutor also asked questions such as, "Is it not true that on the 18th of August that in an interview in the jail with you you told me that you told the police the truth about this matter?" (*Id.*, at p. 347.)

The Court of Appeal concluded that the prosecutor had improperly been able to, "under the guise of cross-examination, get before the jury what is tantamount to devastating direct testimony." (*Id.*, at p. 349.) The prosecutor also succeeded "through a series of blatantly leading questions, in creating the almost irrefutable inference that appellant was the one who viciously and brutally stabbed the decedent." (*Id.*, at p. 349.)

The Court in *Shipe* relied heavily on *Douglas v. Alabama* (1965) 380 U.S. 415, 13 L.Ed.2d 934, 85 S.Ct. 1074, in concluding this violated *Shipe*'s right to confront and cross-examine the witnesses against him. *Douglas* also involved an alleged accomplice who was called to the stand to testify against a defendant, and who refused to testify despite being told he had no valid

privilege against self-incrimination. The prosecutor then asked leading questions similar to those asked in *Shipe*, bringing out details of an apparent confession by the co-defendant. The High Court in *Douglas* explained:

“In the circumstances of this case, petitioner’s inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause. Loyd’s alleged statement that the petitioner fired the shotgun constituted the only direct evidence that he had done so; coupled with the description of the circumstances surrounding the shooting, this formed a crucial link in the proof both of petitioner’s act, and of the requisite intent to murder. Although the Solicitor’s reading of Loyd’s alleged statement, and Loyd’s refusals to answer, were not technically testimony, the Solicitor’s reading may well have been the equivalent in the jury’s mind of testimony that Loyd in fact made the statement; and Loyd’s reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. *Slochower v. Board of Higher Education*, 350 U.S. 551, 557-558; *United States v. Maloney*, 262 F.2d 535, 537 (C.A.2d Cir. 1959). Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to but not admitted by him. . . . *Motes v. United States*, 178 U.S. 458; cf. *Kirby v. United States*, 174 U.S. 47.” (*Douglas v. Alabama*, *supra*, 380 U.S. at pp. 419-420.)

In the present case, as in *Douglas*, the prosecutor’s questions “were not technically testimony,” but “may well have been the equivalent in the jury’s mind of testimony that” Ivan Gonzales had relied in his own trial on a

defense of being a battered spouse, further implying that Ivan Gonzales had placed the blame on Veronica Gonzales for the injuries to Genny Rojas. Since Ivan Gonzales was not a witness, these inferences could not be tested by cross-examination.

It was also noted in *Douglas* that

“This case cannot be characterized as one where the prejudice in the denial of the right of cross-examination constituted a mere minor lapse. The alleged statements clearly bore on a fundamental part of the State’s case against petitioner.” (*Douglas v. Alabama, supra*, 380 U.S. at pp. 420.)

Similarly here, the improper facts insinuated by the prosecutor’s questions cannot be deemed a minor lapse. In the absence of any other evidence of what Ivan Gonzales had to say about the crime, the insinuated facts were devastatingly prejudicial to the defense on the only real issue in the case – whether it was Ivan Gonzales or Veronica Gonzales, or both, who were responsible for the injuries to Genny Rojas. Furthermore, as will be detailed in later sections of this argument, these insinuations were combined with other erroneously received evidence to convey to the jury the prosecutor’s sensational, but speculative and otherwise unproven theory, that Ivan Gonzales and Veronica Gonzales had made an agreement to seek to escape punishment by pointing the finger at each other.<sup>100</sup>

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100. In *Shipe*, the prosecutor claimed he acted in good faith. In the present case, the prosecutor may have had an honest belief that Ivan and Veronica Gonzales had decided to point the finger at each other, but it was clearly based on speculation and no scenario is apparent in which the prosecutor could have believed in good faith that he would be able to prove his  
(Continued on next page.)

Improper prosecutorial insinuations were also discussed at some length in *People v. Blackington* (1985) 167 Cal.App.3d 1216. The Court of Appeal relied heavily on another leading case on this issue, *People v. Lo Cigno* (1961) 193 Cal.App.2d 360:

“The [*Lo Cigno*] court concluded: “These and many other questions of the district attorney implied the existence of facts which the People made no effort to prove and had no reason to believe could be proved. This was misconduct. It was improper to ask questions which clearly suggested the existence of facts which would have been harmful to defendant, in the absence of a good faith belief by the prosecutor that the questions would be answered in the affirmative,

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(Continued from last page.)

speculative theory. But even if it could be concluded that the prosecutor acted in good faith,

“The prosecutor’s good faith, or lack of it, is not controlling in determining whether a defendant has been deprived of the right of confrontation guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution. (*Frazier v. Cupp, supra*, 394 U.S. 731, 736 [22 L.Ed.2d 684, 691, 89 S.Ct. 1420, 1423].)” (*People v. Shipe, supra*, 49 Cal.App.3d 343, 351.)

Shipe also concluded that, because the error implicated federal constitutional confrontation rights, the applicable standard for assessing whether the error was prejudicial was the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Under that standard, the error was found prejudicial, despite a strong circumstantial case against the defendant. (*People v. Shipe, supra*, 49 Cal.App.3d 343, 355.) Here, in contrast, the evidence that it was Veronica Gonzales rather than Ivan Gonzales who was responsible for the injuries to Genny Rojas was inconclusive at best. Thus, as will be explained more fully in a later section of this argument, the error here must be deemed prejudicial.

or with a belief on his part that the facts could be proved, and a purpose to prove them, if their existence should be denied.’ (193 Cal.App.2d at p. 388.)” (*People v. Blackington, supra*, 167 Cal.App.3d at p. 1221; emphasis added.)

*Lo Cigno* was cited and applied by this Court in *People v. Perez* (1962) 58 Cal.2d 229, 241. The Court in *Blackington* concluded that *Perez, Lo Cigno*, and *Douglas v. Alabama* mandated a conclusion that Blackington “was by virtue of the prosecutor’s conduct deprived of his right to confront and cross-examine his accuser, Eldred.” (*People v. Blackington, supra*, 167 Cal.App.3d at pp. 1222-1224.) *Blackington* also applied the standard of *Chapman v. California, supra*, 386 U.S. at p. 24, in finding the error prejudicial.

This Court also recognized in *People v. Earp* (1999) 20 Cal.4<sup>th</sup> 826, that “a prosecutor commits misconduct by asking ‘a witness a question that implies a fact harmful to a defendant unless the prosecutor has reasonable grounds to anticipate an answer confirming the implied fact or is prepared to prove the fact by other means.’” (*People v. Price, supra*, 1 Cal.4<sup>th</sup> at p. 481.)” (*People v. Earp, supra*, 20 Cal.4<sup>th</sup> at pp. 859-860.) This Court added:

“For a prosecutor’s question implying facts harmful to the defendant to come within this form of misconduct, however, the question must put before the jury information that falls outside the evidence and that, but for the improper question, the jury would not have otherwise heard. (See *People v. Warren* (1988) 45 Cal.3d 471, 481 [describing the gist of the misconduct as implying in the question ‘facts [the prosecutor] could not prove’].)” (*People v. Earp, supra*, 20 Cal.4<sup>th</sup> at p. 860.)

That standard was clearly met in the present case, where the improper questions put before the jury information about a claimed defense which would not have otherwise been heard by the jurors.

In addition to the incurable nature of the misconduct arising from improperly implying facts not in evidence, the harm caused by the prosecutor's misconduct was also indistinguishable from that recognized by this Court as incurable in *People v. Aranda* (1965) 63 Cal.2d 518, and by the United States Supreme Court in *Bruton v. United States* (1968) 391 U.S. 123. These cases dealt with the propriety of trying two or more defendants jointly, when one or more of them had made out-of-court statements that would be admissible against the party who made the statement, but would constitute inadmissible hearsay against any other defendant. If the statement was an admission or confession that incriminated one or more defendants against whom the statement was inadmissible, there was a danger of unfair prejudice to such defendants. Prior to *Aranda*, courts had solved the problem by instructing the jury that the statement was being admitted only against the defendant who made it, and was not to be considered against any other defendant. However, concerns arose that it was unrealistic to expect juries to ignore such seemingly important evidence.

*Aranda* went on to conclude that when co-defendants sought a severance of trials on the ground that a statement would be introduced against one defendant that was inadmissible against the other, the statement must be redacted in a manner that did not incriminate the other defendant, or it must not be used against either defendant, or a severance must be granted. In *Bruton v. United States* (1968) 391 U.S. 123, a similar conclusion was

reached, based expressly on the federal Sixth Amendment right of an accused to confront and cross-examine the witnesses against him. *Bruton* concluded:

“... there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Compare *Hopt v. Utah, supra*; *Throckmorton v. Holt*, 180 U.S. 552, 567; *Mora v. United States*, 190 F.2d 749; *Holt v. United States*, 94 F.2d 90. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant, but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination. It was against such threats to a fair trial that the Confrontation Clause was directed. *Pointer v. Texas, supra*.” (*Bruton v. United States, supra*, 391 U.S. at pp. 135-136.)

What happened in the present case is even worse than the danger perceived in *Aranda* and *Bruton*. Here, the prosecutor effectively informed the jury that Ivan Gonzales had made out-of-court statements that tended to exonerate him, while incriminating the co-defendant whose fate was in this jury’s hands. This was at least as prejudicial to Veronica Gonzales as evidence of an out-of-court statement made by Ivan Gonzales that incriminated

both defendants. Moreover, what the prosecutor effectively told the jury in the present instance was not even true. Ivan Gonzales did not defend himself at trial with a claim that he was a battered spouse, yet the prosecutor clearly insinuated he did just that and the jury was never told that such an insinuation was simply untrue. Thus, the information imparted to the jury was completely unreliable. The defense was left with no effective means of overcoming the false insinuation. Furthermore, as noted in the quote for *Bruton* above, the potential consequences to the defendant are an important consideration, and here they were of the very highest, with Veronica Gonzales' life itself hanging in the balance.

The trial court took too narrow a view in considering only the fact that the answers given by Veronica Gonzales did not appear to be directly harmful to the defense. The court failed to consider the fact that the prosecutor had been totally successful in his use of an old ploy:

“In *People v. Mullings* [1890], 83 Cal. 138, [145-146] ... the judgment was reversed because certain improper questions were asked the defendant when a witness, and it was contended that no injury was done because they were answered in the negative, but the court said: ‘It is quite evident that the questions, and not the answers, were what the prosecution thought important. The purpose of the questions clearly was to keep persistently before the jury the assumption of damaging facts which could not be proven, and thus impress upon their minds the probability of the existence of the assumed facts upon which the questions were based. To say that such a course would not be prejudicial to defendant is to ignore human experience and the dictates of common sense.’” (*People v. Wells* (1893))

100 Cal. 459, 464; see also *People v. Blodgett* (1956) 46 Cal.2d 114, 118; emphasis added.)

*People v. Grider* (1910) 13 Cal.App.703, 712 explains how a court should assess such a prosecution ploy:

“Where an improper question is asked of a witness by a district attorney, the test whether it is misconduct is found in answer to the question: ‘What was the purpose of counsel in asking the question?’ **If it was to take an unfair advantage of the defendant by intimating to the jury something that was either not true or not capable of being proven in the manner attempted then it is error.** And if the district attorney knows when he asks the question that an objection to the question should or will be sustained, the error is not corrected because the objection is sustained. Where the prosecuting attorney asks a defendant questions which he knows to be wholly wrong, and where the questions are asked without expectation of answers, or where they are asked and withdrawn on objection, and the clear purpose is to prejudice the jury against the defendant in a vital manner by the *mere asking* of the questions, then a judgment against the defendant will be reversed, although objections to the questions were sustained, unless it appears that the questions could not have influenced the verdict. (*People v. Wells* (1893) 100 Cal. 459.)” (Italics in original; emphasis added.)

Another crucial consideration in the present case is that Veronica Gonzales was greatly prejudiced regardless of whether the jury accepted or rejected the conclusion that Ivan Gonzales actually might have been the battered spouse in the relationship. If any juror perceived the prosecutor’s insinuating question as indicating Ivan Gonzales was a battered spouse, then the entire thrust of Veronica Gonzales’ defense was severely weakened. On

the other hand, if any juror saw the prosecutor's insinuating question as indicating that Ivan Gonzales falsely raised the defense of being a battered spouse, then the prosecutor still accomplished his purpose of persuading jurors that both spouses were falsely blaming each other, even though the prosecutor failed to produce a shred of evidence that his speculative theory was actually true.

The court discouraged any further discussion of remedial measures because the jury was waiting, but **the judge acknowledged he doubted whether there was any appropriate way to set the record straight.** Defense counsel pressed for an admonition not to consider questions as evidence. (RT 67:7872-7873.) The court expressed willingness to do that, but added, "There is a risk that that will emphasize something, and I'll leave that for your good judgment." (RT 67:7873.) Thus, the Court expressly recognized the likelihood that an admonition would do more harm than good. That is a problematic reality that has long been recognized:

"A request for an admonition would have emphasized the significance of the question and the argument. ... If, as we believe to be probable, the improper conduct of the attorney created prejudice in the minds of the jurors we do not believe it could have been removed by an admonition that the jurors should not allow themselves to become prejudiced." (*Kolaric v. Kaufman* (1968) 261 Cal.App.2d 20, 28.)

Defense counsel explained he had already sought a mistrial and it had been denied. He believed the defense had been turned into a mockery, but there should be some effort to control the damage. (RT 67:7872-7874.) Thus, counsel recognized that an admonition was not a cure for the problem, and

that a mistrial was needed. However, since the mistrial had been denied, counsel felt compelled to seek an admonition even though it could make matters worse. Defense counsel was forced into this Hobson's choice as a direct result of the prosecutor's misconduct and the trial court's erroneous denial of a mistrial. Appellate relief is appropriate because it would make a mockery of the judicial system to leave the defense without any relief when it took every step it could below, while the prosecutor caused the problem and the trial court refused to deal with it adequately.

The judge then did admonish the jury that questions were not evidence, and that when a question was asked and an objection was sustained, the jury should neither consider the question nor speculate as to what the answer might have been. (RT 67:7874-7875.) However, as explained above, such an admonition could not have been sufficient to overcome the harm to the defense. Furthermore, as will be shown in subsequent sections of this argument, the prosecutor took full advantage of the harm he had caused to the defense, and exacerbated it even further.<sup>101</sup>

The end result was too prejudicial to be cured. The actions of the prosecutor in the present case are remarkably similar to those of a prosecutor described by this Court a century earlier:

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101. Later, during argument to the jury, the prosecutor also made sure that the jury understood his theory of the case despite the lack of evidentiary support. He argued:

“And this is what happens when you have severed trials. You saw the exhibit. You saw the finger pointing at ‘me.’ You get people pointing at each other, and that’s what’s happened here.” (RT 82:10650.)

“It is too much the habit of prosecuting officers to assume beforehand that a defendant is guilty, and then expect to have the established rules of evidence twisted, and all the features of a fair trial distorted, in order to secure a conviction. If a defendant cannot be fairly convicted, he should not be convicted at all; and to hold otherwise would be to provide ways and means for the conviction of the innocent.” (*People v. Wells* (1893) 100 Cal. 459, 465.)

**D. The Harm from the Improper Questions Regarding the Defense Used by Ivan Gonzales Was Seriously Exacerbated by Additional Misconduct and by Erroneous Trial Court Rulings Allowing the Prosecutor to Elicit Evidence that Two Experts Reached Different Conclusions as to Whether Ivan Gonzales Was a Battered Spouse**

In the previous subdivision of this argument, it was shown that the prosecutor committed serious misconduct when he asked insinuating questions about a defense allegedly used by Ivan Gonzales. That resulted in putting prejudicial facts before the jury, which could not have been shown by proper evidence. The trial court also erred in denying a mistrial despite the fact the court openly recognized that an admonition would not be an effective means of curing the harm. In this subdivision, it will be shown that the prosecutor further capitalized on the improper evidence he had placed before the jury by bringing out the fact that two different experts had examined Ivan Gonzales and reached conflicting conclusions regarding whether he was a battered spouse – one expert concluding he was and one concluding he was

not. This error occurred as the result of erroneous rulings by the trial court on evidentiary matters, and was enhanced by earlier improper questions.

The misconduct discussed in the previous subdivision was highly prejudicial in and of itself and should have resulted in a mistrial even absent the subsequent exacerbating errors. Also, the misconduct and erroneous rulings that will be discussed in the present subdivision resulted in serious prejudice and merit relief even without consideration of the earlier errors. However, the combined impact of these errors was many times more prejudicial than either aspect standing alone.

The combination allowed the prosecutor to complete his effort to put his entirely speculative theory before the jury, despite the lack of any proper evidence to support it. This undercut the entire thrust of the defense in a close case, and must be deemed prejudicial. Indeed, even if somehow the earlier admonition could have been effective when it occurred, any such effectiveness was completely undermined when the prosecutor was wrongly allowed to graphically remind the jury of the very evidence they were supposed to disregard.

As set forth in the Factual and Procedural Background earlier in this argument, Ivan Gonzales considered a battered spouse defense in his own trial. His defense hired Dr. Weinstein, who concluded Ivan Gonzales was a battered spouse, and Dr. Weinstein's report was supplied to the prosecution during the pretrial discovery process. However, Ivan Gonzales abandoned any pursuit of that defense, did not testify at his own trial, did not call Dr. Weinstein as a witness, and did not present any other evidence in support of a battered spouse claim. (RT 54:5737-5740; 71:8883-8890, 8896-8902.)

Apparently based on this considered, but abandoned defense, and on the prosecutor's personal interpretation of a letter written by Ivan Gonzales, the prosecutor concluded that Ivan and Veronica Gonzales had agreed to point the finger at each other in the hope they would both escape punishment. Having no legitimate way to actually prove that speculative theory, the prosecutor seemed nonetheless desperate to share it with the jury. In cross-examining defense expert witness Cynthia Bernee, the prosecutor posed a wholly improper hypothetical question:

“Let me give a hypothetical. Okay? Let's say you've got a husband and a wife; and, both are involved in a crime; and, both claim that each individual is a battered spouse; and, let's say, even, to throw into the hypothetical, that there's experts that say the husband's a battered spouse and the wife is a battered spouse. To even further complicate things, let's say there would be prosecution experts to say that neither one of them is a battered spouse suffering from battered spouse syndrome. Are you with me on this hypothetical?”

A Yes.

Q What's a jury suppose to do?” (RT 64:7288-7289.)

A defense objection (outside the scope of the witness' expertise) was sustained, but the unfazed prosecutor followed by asking, “How would you expect a jury to evaluate a situation like that?” (RT 64:7289.) Another defense objection was sustained, on the same grounds as well as being argumentative. (RT 64:7289.) The matter was soon discussed further outside the presence of the jury, and defense counsel noted it was not at all clear any such evidence could or would be presented to support that hypothetical. (RT

64:7314-7315.) The prosecutor failed to see any problem with that, responding:

“... the questions that I was posing to the doctor[,] as to what Mr. Popkins [defense counsel] thinks[,] had to do with Dr. Weinstein [and] were **completely hypothetical and never had any factual basis**. I wasn’t talking about actual facts that existed in this case. And the jury’s free to accept any hypothetical.” RT 64:7319-7320.)

The prosecutor was seriously mistaken in his belief he was free to pose any hypothetical he wished, regardless of whether he could produce evidence to support it:

“Generally, an expert may render opinion testimony on the basis of facts given ‘in a hypothetical question that asks the expert to assume their truth.’ (1 McCormick on Evidence (4th ed. 1992) § 14, p. 58.) **Such a hypothetical question must be rooted in facts shown by the evidence, however.** (*Rowe v. Such* (1901) 134 Cal. 573, 576; *People v. Castillo* (1935) 5 Cal.App.2d 194, 197-198; accord, *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 339; see CALJIC No. 2.82.)” (*People v. Gardeley* (1996) 14 Cal.4th 605, 618; emphasis added.)

Similarly:

“Although the field of permissible hypothetical questions is broad, a party cannot use this method of questioning to place before the jury facts divorced from the actual evidence and for which no evidence is ever introduced.” (*People v. Boyette* (2002) 29 Cal.4<sup>th</sup> 381, 449.)

The judge precluded any further relief for this outrageous prosecutorial misconduct, concluding that nothing in the record at this point would have given

the jury any reason to believe there was any actual mental health professional who had examined Ivan Gonzales and concluded he suffered from battered spouse syndrome. (RT 64:7322.)

One problem with the trial court's rationale was that it would eviscerate the rule that a hypothetical must have an evidentiary foundation. Furthermore, even if an evidentiary gap could somehow cure the misconduct, the prosecutor did not wait long to fill that gap, albeit with further misconduct. As detailed in the previous subdivision of this argument, the prosecutor followed this a few days later with his improper cross-examination of Veronica Gonzales, asking her insinuating questions that conveyed to the jury the untrue "fact" that Ivan Gonzales actually had relied on such a defense. When that occurred, the court again sustained defense objections, but again failed to provide any meaningful relief. The prosecutor, however, was still not satisfied. Before long, he sought to drive home to the jury his unsupported theory.<sup>102</sup>

In an apparent effort to head off further improper questions that would convey inadmissible facts to the jury, there was an advance discussion of the prosecutor's obvious desire to cross-examine the defense BWS experts re-

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102. Notably, the original ground of the defense objection – that it called for an opinion outside the expertise of the witness – was also correct. The witness being cross-examined, Cynthia Bernee, was a licensed marriage and family therapist. Her area of expertise was domestic violence, sexual assault, and child abuse. (RT 64:7239, 7241.) Even if the hypothetical posed by the prosecutor had been supported by evidence, it was certainly improper to ask the witness what a jury was supposed to do when the evidence was conflicting, or how she would expect a jury to evaluate a given situation. Once again, it is clear the prosecutor's goal was to infer improper facts and innuendo, rather than to elicit proper evidence.

garding the fact that there had been reports from two different psychologists evaluating Ivan Gonzales, and that one psychologist concluded Ivan was a battered spouse and the other concluded he was not. The prosecutor asserted he was merely seeking to show the jury that there had been conflicting evaluations of Ivan Gonzales in order to make the point that psychological evidence was unreliable. (RT 71:8883-8885.)

The prosecutor cited *People v. Montiel* (1993) 5 Cal.4<sup>th</sup> 877, 923, *People v. Rich* (1988) 45 Cal.3d 1036, and *People v. Bell* (1989) 49 Cal.3d 502. (RT 71:8887, 8892, 8905.) Subsequently, the judge also referred to *People v. Coleman* (1985) 38 Cal.3d 69, 92, as having some relevant language. (RT 71:8921.) None of these cases supports the prosecutor's position.

In *Montiel*, one expert had testified at the defendant's original trial. Years later, after this Court had reversed the penalty verdict (see *People v. Montiel* (1985) 39 Cal.3d 910), the penalty phase was retried and Montiel was again sentenced to death. At the retrial, a different defense expert testified and was questioned about statements Montiel himself had made to the earlier defense expert, who had testified at the original trial. This Court simply found there had been no violation of privilege in the use of the earlier defense evidence, and that it was proper to cross-examine an expert witness about such matters. The present case is quite different, involving the introduction of irrelevant evidence regarding the conclusions of a non-testifying expert about a different defendant, and involving unprecedented restrictions on defense efforts to meet the disputed evidence.

*People v. Rich, supra*, 45 Cal.3d at pp. 1085-1086, similarly involved psychiatric information about the defendant on trial which had been dis-

closed to the prosecution during the discovery process and which was later used by the prosecution against the defendant. This Court found no violation of the privilege against self-incrimination. Again, the decision provides no authority for the questioning desired by the prosecution in the present case.

In *People v. Bell* (1989) 49 Cal.3d 502, 531-534, a defense expert testified to his opinion that identification of the defendant by an eyewitness was unreliable. Police reports also indicated that an informant had seen the defendant in possession of a firearm the day before the shooting. Both sides had agreed that the informant would not be called as a witness. Nonetheless, in cross-examining the defense identification expert, the prosecutor asked if he had considered the police report indicating another person had seen the defendant in possession of a gun the day before the shooting. In that situation, this Court concluded the prosecutor committed clear misconduct because the expert's knowledge of the informant was not relevant to anything the expert discussed in his testimony. That is, the expert offered no opinion regarding the guilt or innocence of the defendant, only regarding the reliability of an identification.

Indeed, this Court in *Bell supra*, 49 Cal.3d at p. 532, cited the principle that "The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People v. Fusaro* (1971) 18 Cal.App.3d 877, 886.) Thus, *Bell* is strong authority **against** the People on the issue discussed earlier in this argument, regarding cross-examination of Veronica Gonzales about defenses purportedly utilized by Ivan Gonzales. *Bell* also cuts strongly against the position taken by the People on the present issue, since the fact that a non-witness formed the opinion that Ivan Gonzales was

a battered spouse was not relevant to the guilt or innocence of Veronica Gonzales, and was not an appropriate matter to refer to in cross-examination of the present defense expert.

The case the trial court believed was the most relevant authority was *People v. Coleman* (1985) 38 Cal.3d 69, 92. (See RT 71:8921.) Apparently the trial court concluded the following passage from *Coleman* permitted broad discretion to allow what the prosecutor wanted:

“In *Grimshaw v. Ford Motor Company* (1981) 119 Cal.App.3d 757, the Court of Appeal explained the current state of the law. ‘While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. (Citations omitted.) The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence. (Citation omitted.) Ordinarily, the use of a limiting instruction that matters on which an expert based his opinion are admitted only to show the basis of the opinion and not for the truth of the matter cures any hearsay problem involved, but in aggravated situations, where hearsay evidence is recited in detail, a limiting instruction may not remedy the problem. (Evid. Code, §§ 352, 355; (Citations omitted).)’ (119 Cal.App.3d at pp. 788-789.)” (*People v. Coleman, supra*, 38 Cal.3d at p. 92, cited by the trial court at RT 72:8921.)

However, *Coleman* also makes it clear that the trial court’s broad discretion must be tempered by fairness:

“Nevertheless, the trial court must exercise its discretion pursuant to Evidence Code section 352 in order to limit the evidence to its proper uses. The exercise of this discretion may require exclusion of portions of inadmissible hearsay which were not related to the expert opinion. (See *People v. Brown* (1958) 49 Cal.2d 577, 587 [320 P.2d 5] [testimony that declarant told physician that she ‘ “went to a residence south of the City” ’ should have been stricken since it was not a declaration upon which the doctor based his opinion that declarant had undergone an induced abortion].) Or it may be necessary to sever portions of the testimony in order to protect the rights of the defendant without totally destroying the value of the expert witness’ testimony. (See, *People v. Washington* (1969) 71 Cal.2d 1061, 1082 [cautionary dictum].) **In still other cases where the risk of improper use of the hearsay outweighs its probative value as a basis for the expert opinion it may be necessary to exclude the evidence altogether.** (See, *People v. Modesto* (1963) 59 Cal.2d 722, 732-733 [exclusion of tape recording of defense psychiatrist’s hypnotic interview with defendant would have been a proper exercise of discretion]; *People v. Reyes* (1974) 12 Cal.3d 486, 503-504 [trial court properly ruled that 20-year-old medical report pertaining to the psychiatric diagnosis of the victim was an extraneous issue which should not be the subject of questioning where it played only an insignificant role in medical experts’ conclusion that defendant suffered from diminished capacity].)” (*People v. Coleman, supra*, 38 Cal.3d at p. 92-93; emphasis added.)

As will be shown, it was this portion of *Coleman* that should have guided the trial court in ruling on the present issue.

The judge recognized that evidence elicited by the prosecution regarding conflicting reports pertaining to Ivan Gonzales would cause the defense

to want to show that the expert who concluded Ivan Gonzales was a battered spouse based that conclusion on a flawed analysis. This would lead to a time-consuming trial on Ivan Gonzales' mental state, distracting the jury from the issues actually pertaining to Veronica Gonzales. The judge also recognized the unfairness to the defense that would result from the impossibility of showing, through the witnesses who would actually testify, that Ivan Gonzales was **not** a battered man.<sup>103</sup> **Most importantly, the judge once again openly recognized that it was not realistic to expect the jury to obey a limiting instruction on this matter.** (RT 71:8890-8896, 8924-8926.)

“It’s difficult for me to imagine in this scenario, that is, the D.A. cross-examining this expert with the substance of what Dr. Weinstein said in the context of this case, I’m having some real difficulty imagining the jury is going to really be able to follow the limiting instruction to comply with it.” (RT 72:8925-8926.)

The trial court set forth an Evidence Code section 352 analysis, weighing probative value against prejudicial impact. The Court seemed to recognize the slight nature of the probative value of the proffered evidence. The prosecutor wanted to show that different experts could reach different

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103. Indeed, the defense soon noted that one aspect of the unfairness was that the defense experts had reached their conclusions about Veronica Gonzales before Ivan Gonzales ever hired Dr. Weinstein, explaining why they had not initially considered his report. As for why the Weinstein report, issued after they reached their conclusions, had not changed their conclusions, the defense did want to demonstrate the flaws in Dr. Weinstein’s analysis. To do so effectively, the defense would need to have their own experts interview Ivan Gonzales, as Dr. Weinstein had, but Ivan would never consent to such an interview. (RT 71:8903-8907.)

conclusions, but the judge recognized that was an obvious point to everyone. (RT 72:8920-8924.) Indeed, that point was vividly made by the fact that 2 prosecution experts in the present trial reached different conclusions about Veronica Gonzales than did two defense experts. Thus, the point had been clearly made and needed no elaboration. Certainly elaboration by evidence that was unfairly prejudicial to the defense should not have been admitted to make a cumulative point.

In any proper Evidence Code section 352 analysis, this should have been more than enough to preclude the prosecution effort. "Under Evidence Code section 352, the trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.)" (*People v. Rodrigues* (1994) 8 Cal.4<sup>th</sup> 1060, 1124.) In the present instance, no meaningful probative value had been shown, and the likelihood of prejudice, undue consumption of time, and confusion of the issues were all obvious to the trial court. The trial court additionally recognized the hearsay problem, if an expert testified to statements that Ivan Gonzales made to his defense expert. The court believed this problem would be avoided if the expert testified only to his conclusion, and not to the statements of Ivan Gonzales that supported that conclusion. Also, the court believed that even if the prosecution tried to call Dr. Weinstein as a witness, he would be obligated to claim any privilege that Ivan Gonzales might have in regard to statements made to his expert witness in the course of his own defense. (RT 71:8897-8903.)

The judge sought what he apparently considered a compromise that would avoid any undue consumption of time, but in reality it gave the prosecutor everything he wanted while precluding the defense from any meaningful response. The judge suggested that the prosecutor ask the experts whether experts sometimes disagreed, and whether they were aware of two conflicting reports regarding Ivan Gonzales. The judge proposed to allow that much, and no more. The judge explained this would give the prosecutor the benefit he was seeking without giving the jury any details. The judge believed this allowed the defense to come out even, because the jury would only learn that one expert thought Ivan Gonzales was a battered man and one thought he was not. The judge would then follow this with a limiting instruction telling the jury to consider this only in determining the reliability of expert opinion in general. The prosecutor readily accepted that resolution of the matter. (RT 72:8926-8927.)

This proposed resolution was quite unfair to the defense. While it would save time, it would do so only at the expense of leaving the jury with very incomplete information. The jury would have no basis whatsoever for determining how the information about conflicting expert reports should affect their assessment of the credibility of the various experts who testified for each side. All that would be accomplished would be a broad trashing of experts in general, with no specifics that the defense could rebut. This, of course, was precisely what the prosecution wanted. It made no difference what the jurors might think of the prosecution experts, as long as they distrusted the defense experts. That is, if the jury ended up deciding to set aside **all** of the expert testimony, then only the prosecution would gain while the

defense would be decimated. Furthermore, the court's proposed solution left the prosecutor with an evidentiary basis for arguing just that – that the jury should give no credence to any of the expert opinion.

In closing argument, the prosecutor fully exploited this improper evidence:

“You wonder why psychiatry and psychology have had such a bad name in the courtroom? I mean, you have in front of you, as some of your evidence, that two experts evaluated Ivan Gonzales and one thought he was a battered man and another didn't. Okay? I mean, that's how divergent that is.” (RT 83:10979.)

Another problem was that the fact that there were conflicting reports about Ivan Gonzales was admitted only under the guise that it was known to the defense experts. Any relevance was limited to impeaching the credibility of those experts for any consideration they did or did not give to the reports. In all other respects, the fact there were two reports reaching different conclusions about Ivan Gonzales was hearsay and was never admitted for the truth of the fact that there were conflicting reports. Nonetheless, the prosecutor used the evidence as if it had been admitted for the truth of the matter.<sup>104</sup>

In addition to giving the prosecutor everything he wanted on this point, while leaving the defense helpless to respond, the court's proposed solution also completed the prosecutor's construction of a theory of the case that carried compelling emotional appeal even though it lacked any eviden-

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104. Indeed, the judge's own reliance on the perceived need to point out that experts had disagreed in this very case was yet another example of the improper use of this information for the truth of the matter.

tiary basis. Combining this with the events discussed in the prior subdivision of this argument, the overall impact would leave the jury knowing that one expert (who was never subjected to cross-examination) had concluded that Ivan Gonzales was a battered spouse, serving the improper prosecution purpose of re-emphasizing the false insinuation that Ivan and Veronica Gonzales had conspired to point the finger at each other in order to escape any punishment. The defense expert witnesses would be “impeached” by a ghost who was never seen by the jury, and the defense would be expressly precluded from demonstrating the clear flaws in that impeachment. Finally, the judge would attempt to temper the damage with an admonition the judge had already agreed would be impossible for the jury to obey.

The defense tried to point out these problems. Counsel argued that the prosecutor had no need at all to bring in any reference to what another expert had concluded about Ivan Gonzales. The jury knew in the present case that testifying prosecution experts reached conclusions different from testifying defense experts. If disagreement among experts was truly all the prosecutor desired to show, there was no basis for adding a prejudicial reference to conclusions reached by unidentified experts in a different case. Counsel also argued it was unfair to allow the prosecutor to have his point made, while precluding the defense from making any showing that Dr. Weinstein’s conclusion was entitled to little or no weight because it was based on a flawed analysis. (RT 72:9145-9147.)

The defense reminded the court of other problems. They argued the prosecutor’s goal was really to sneak in the fact that somebody thinks Ivan Gonzales, and not Veronica Gonzales, was the battered spouse in the rela-

tionship. Any such conclusion was necessarily based on hearsay. Counsel believed it was unfair to ask defense experts how Dr. Weinstein's conclusion affected their own opinions, since they had no access to Weinstein's underlying notes and materials. (RT 72:9153-9160, 9164, 9168.)

The defense desire to show that Dr. Weinstein's conclusion was based on a flawed analysis, and the unfairness of letting the prosecution use the Weinstein conclusion to challenge the credibility of the defense experts, was strongly supported by this Court's opinion in *People v. Reyes* (1974) 12 Cal.3d 486, 503, cited by counsel for Veronica Gonzales at RT 72:9168. In *Reyes*, the main issue was whether a 20 year old psychiatric report qualified as a hospital business record for the purpose of the Evidence Code section 721 hearsay exception. This Court first quoted from *People v. Williams* (1960) 187 Cal.App.2d 355, 365:

“ ‘... In order for a record to be competent evidence under that section it must be a record of an act, condition or event; a conclusion is neither an act, condition or event; it may or may not be based upon conditions, acts or events observed by the person drawing the conclusion; it may or may not be founded upon sound reason; the person who has formed the conclusion recorded may or may not be qualified to form it and testify to it. Whether the conclusion is based upon observation of an act, condition or event or upon sound reason or whether the person forming it is qualified to form it and testify to it can only be established by the examination of that party under oath. ... It is true that some diagnoses are a statement of a fact or condition, for example, a diagnosis that a man has suffered a compound fracture of the femur is a record of what the person making the diagnosis has seen but this is not

true where the diagnosis is but the reasoning of the person making it arrived at from the consideration of many different factors.”

This Court then explained:

“A psychiatric diagnosis is especially susceptible to the reasoning of *Williams* because it is based upon the thought process of the psychiatrist expressing the conclusion. The People had no opportunity to cross-examine the psychiatrist who made the 20-year-old diagnosis to determine what factors led him to his conclusion and whether he was qualified to make it.” (*People v. Reyes, supra*, 12 Cal.3d 486, 503.)

The rationales set forth in *Williams* and *Reyes* are directly applicable here. Here, the People sought to impeach the credibility of defense experts by referring to the conclusions reached in the report of Dr. Weinstein. But Dr. Weinstein had merely expressed an opinion that “may or may not be founded upon sound reason ...” Dr. Weinstein “may or may not [have been] qualified to form it and testify to it.” These questions could only have been answered by examination of Dr. Weinstein under oath. The defense had no opportunity to cross-examine Dr. Weinstein to explore the factors that “led him to his conclusion and whether he was qualified to make it.” Thus, informing the jury about Dr. Weinstein’s conclusions and allowing the jury to use those conclusions to impeach the credibility of testifying defense experts was completely unfair, resulting in a deprivation of Veronica Gonzales’ federal Fifth, Sixth, and Fourteenth Amendment rights to due process of law, to a fundamentally fair trial, and to confront and cross-examine the witnesses against her.

The prosecutor made his own hypocrisy even clearer when he told the court he personally did not believe Ivan Gonzales was a battered spouse, and he never had believed that. (RT 72:9169-9172.) Thus, the prosecutor sought to impeach defense experts for discounting information that the prosecutor himself believed was devoid of merit.

Despite all the arguments made by defense counsel, the court stuck close to its proposed solution. Turning Evidence Code section 352 against the defense, the judge relied on that section to preclude anyone from going into the substance of Dr. Weinstein's report. The jury would learn only that experts had reached conflicting opinions about whether Ivan Gonzales was a battered spouse. The judge cited *People v. Montiel* (1993) 5 Cal.4<sup>th</sup> 877, 923 as the closest case, and believed it was fully consistent with *People v. Coleman* (1985) 38 Cal.3d 69, 92.<sup>105</sup> The judge recognized that it was already obvious that experts could disagree, but the judge saw something legitimate in pointing out they had done so in this very case. The judge expressly recognized that the impact would be to undercut the power of any individual expert's opinion, but the judge failed to see how this could prejudice the defense. (RT 72:9175-9178.)

The judge expressly disallowed any inquiry into the underlying reasons for Dr. Weinstein's conclusions, or any evidence attacking the bases of those conclusions. (RT 72:9178-9181.) The only thing defense experts

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105. Both *Montiel* and *Coleman* were discussed earlier in this section, at pp. 257 and 259-260. It was shown there that *Montiel* was quite unlike the present case and provides no support for the ruling below. It was also shown that *Coleman* actually supports the position of Veronica Gonzales.

would be allowed to say about Dr. Weinstein's report was that they did or did not consider it in reaching their own conclusions. (RT 72:9187-9189.) Defense counsel protested that their experts would want to testify that the content of another expert's report must be considered before deciding whether it was appropriate to ignore it, but the judge would not allow that, or any other litigation of the merits of Dr. Weinstein's report. (RT 72:9189.)

In making these rulings, the trial court abused its Evidence Code 352 discretion and left the defense at an unwarranted disadvantage. It was understandable that the court wanted to avoid protracted litigation over the merits of Dr. Weinstein's conclusions about Ivan Gonzales, but the proper way to do that was to foreclose any reference to the report or the fact it existed. Once the judge decided that he would let the jury learn that there had been another expert who reached a conclusion that Ivan Gonzales was a battered spouse, it was incumbent on the Court to allow the defense to make the logical rebuttal.

That is, if the prosecutor was to be allowed to show that experts had disagreed in this very case, under the guise of casting doubt on the credibility of defense experts, then the defense should have been permitted to demonstrate that it was the defense experts who reached conclusions that were solidly based, and the experts who disagreed were the ones whose credibility should be questioned. To preclude that logical response violated Veronica Gonzales' federal Fifth, Sixth and Fourteenth Amendment rights to present a defense, to confront and cross-examine the witnesses, to due process of law, and to fundamental fairness. "Evidence that is relevant to the prime theory of the defense cannot be excluded in wholesale fashion merely because the trial

would be simpler without it.” (*People v. McDonald* (1984) 37 Cal.3d 351, 372.)

Put differently, only the prosecutor would benefit from persuading the jury that all of the experts should be disregarded. It was crucial for the defense to return the focus to the true issue: whether the defense experts or the prosecution experts were more credible.<sup>106</sup> The defense was improperly left with no method to accomplish that legitimate goal. The trial court was seriously mistaken in claiming there was no prejudice to the defense from evidence that would reduce the credibility of all of the experts.

Since the defense desired to present evidence that was relevant and logical rebuttal, any trial court reliance on the desire to save time was an abuse of discretion and resulted in a denial of the federal Fifth and Fourteenth Amendment rights to due process of law:

“The right of a defendant to attack the credibility of her hearsay accuser is so fundamental that consumption of time is irrelevant where the evidence is not cumulative. ... Thus to deny defendant the right to adduce pertinent evidence that bears upon the credibility of a witness unseen by the jury and who had not been fully cross-examined ... was to deny her due process of the law.” (*People v. Mayfield* (1972) 23 Cal.App.3d 236, 243; see also *People v. Shoemaker* (1982) 135 Cal.App.3d 442, 450, fn. 5.)

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106. Even more precisely, the true issue was whether the defense experts were sufficiently credible, in light of all the evidence, including the substance and credibility of the prosecution expert testimony, to raise a reasonable doubt about the guilt of Veronica Gonzales.

“A defendant has a fundamental right to present evidence in his own behalf (*Davis v. Alaska* (1974) 415 U.S. 308).” (*People v. Taylor* (1980) 112 Cal.App.3d 348, 365.) Pursuant to the rationale set forth in *Davis*, the restrictions in the present case resulted in a denial of Veronica Gonzales’ federal Sixth and Fourteenth Amendment rights to confront and cross-examine the witnesses against her.

The evidence the defense wanted to elicit to reduce the impact of the prosecution evidence was certainly relevant and was essential in order to maintain the viability of the defense relied on by Veronica Gonzales. “Evidence Code section 352 must bow to the due process right of a defendant to a fair trial and to his right to present all relevant evidence of significant probative value to his defense. In *Chambers v. Mississippi* (1973) 410 U.S. 284, it was held that the exclusion of evidence, vital to a defendant’s defense, constituted a denial of a fair trial in violation of constitutional due-process requirements.” (*People v. Reeder* (1978) 82 Cal.App.3d 543, 553; see also *People v. De Larco* (1983) 142 Cal.App.3d 294, 305.)

“It is well established that the scope of proper cross-examination may extend to the whole transaction of which the witness has testified, or it may be employed to elicit any matter which may tend to overcome, qualify or explain the testimony given by a witness on his direct examination. (*People v. Westek*, 31 Cal.2d 469, 476; *People v. Tyren*, 179 Cal. 575, 580.)” (*People v. Dotson* (1956) 46 Cal.2d 891, 898; see also *Gallaher v. Superior Court* (1980) 103 Cal.App.3d 666, 671.)

Here, once the prosecution was permitted to elicit evidence that different experts had reached different conclusions about Ivan Gonzales, and that one

expert had found him to be a battered spouse, the defense was entitled to overcome, qualify, and explain that evidence, by revealing the weaknesses in the methods of the doctor who had concluded Ivan was a battered spouse.

If the trial court was concerned about the possibility that a defense response would cause confusion of the issues or mislead the jury, yet the Court still chose not to preclude the prosecution evidence in the first place, *Mayfield* also supplies the answer: "Should it appear to the court that any admissible evidence on this issue might mislead the jury, proper admonition and instructions could be given to clarify the purpose for which such evidence was to be received." (*Mayfield, supra*, 23 Cal.App.3d at p. 243.) The trial court should have also been guided by this Court's rationale in *Jennings v. Superior Court* (1972) 66 Cal.2d 867, 877:

" 'While the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or recollection of a witness (*People v. Burton* (1961) 55 Cal.2d 328, 343), yet wherever possible that examination "should be given wide latitude, particularly in cases involving 'a witness against a defendant in a criminal prosecution' " (*People v. Watson* (1956) 46 Cal.2d 818, 827).' (*People v. Murphy* (1963) *supra*, 59 Cal.2d 818, 830-831.)"

Separate from the unfair preclusion of a logical rebuttal, to allow the prosecutor to make the point that experts not only disagree, but they had done so in this very case, made the prosecution point seem too close to home and more meaningful than it really was. It left the prosecutor with evidence that other experts disagreed with the defense experts, while leaving the defense with no realistic way to rebut that fact. It also placed emphasis on the

fact that Ivan Gonzales did seriously explore a battered spouse defense. That fact was irrelevant to the legitimate issues in Veronica Gonzales' trial, but it dovetailed neatly with the earlier improper cross-examination of Veronica Gonzales (discussed in the preceding subdivision of this argument), giving emotional (but not evidentiary) credence to the prosecutor's speculative theory that Veronica and Ivan Gonzales had agreed to point the finger at each other in order to escape punishment.

The trial court's resolution of this matter violated another important principle: "Thus, the Sixth Amendment requires, at a minimum, that a prosecution witness' testimony be placed in proper perspective, ..." (*People v. Mardian* (1975) 47 Cal.App.3d 16, 40.) Here, the erroneous ruling - disallowing the proffered showing that the expert who had concluded Ivan Gonzales was a battered spouse had based his conclusion on incomplete and/or invalid information - precluded the defense was from putting into proper perspective the evidence that different experts reached different conclusions in this case.

Even if it could be fairly said that the trial court had discretion in regard to the admission of the prosecution evidence regarding conflicting reports, or the exclusion of the defense evidence that would have put Dr. Weinstein's conflicting report in a proper perspective, that discretion was abused:

"Indeed, discretion should favor the defendant in cases of doubt because in comparing prejudicial impact with probative value the balance 'is particularly delicate and critical where what is at stake is a criminal defendant's liberty.'  
(*People v. Lavergne* (1971) 4 Cal.3d 735, 744;

*People v. Murphy* (1963) 59 Cal.2d 818, 829.)”  
(*People v. De Larco, supra*, 142 Cal.App.3d at p.  
306.)

After the court had reached its decision, the prosecutor cross-examined defense expert witness Dr. Kenneth Ryan, eliciting the doctor’s agreement that mental health experts can differ greatly in their opinions regarding the same individual. The prosecutor also elicited Dr. Ryan’s acknowledgment that in this very case, experts had reached conflicting opinions about Ivan Gonzales – one that he was a battered man and one that he was not.<sup>107</sup> (RT 73:9303-9305.)

The court admonished the jury as follows:

“The doctor has testified to other opinions that he is aware of with regard to Ivan Gonzales. You are allowed to use that and consider that for only a limited purpose. You are allowed to consider it only for the limited purpose of considering the reliability of such expert testimony in this area in general. You are not to consider it on the question of whether Ivan Gonzales is or is not a battered person.

The -- I emphasize to you that you are to decide only Veronica Gonzales’ issues in this case. It is her status, her case, that is before you. In this case, both sides will be arguing to you at the end of the case that Ivan Gonzales is not a

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107. Appellant recognizes that many of the cases cited above refer to the defense right to cross-examine prosecution witnesses, while here, the contested evidence came from the mouth of a defense witness. However, the rationale upon which the cited cases rely applies equally when the prosecution is allowed to bring out improper harmful evidence on cross-examination of a defense witness, and the defense is not thereafter permitted to put that harmful evidence in a proper perspective.

battered man. So the reasons for your not considering it on that issue are obvious and, I think, clear to you.” (RT 73:9306-9307.)

Thus, the jurors were expressly told that they could use this new information to doubt the credibility of the defense experts, but they were not given sufficient information to put this evidence into a proper perspective, or to reach any intelligent conclusion as to just how much this should affect their credibility assessment. This left the jury with inadequate information to make a rational conclusion, but it played into the prosecutor’s improper desire to create an undefined emotional distrust of experts in general. How else was the jury to interpret this admonition, when the judge precluded the defense from offering any meaningful response to the information the prosecutor had brought forth? (See *People v. Bell* (2004) 118 Cal.App.4<sup>th</sup> 249, 255-256 regarding the dangers that arise when a jury is told that an inference is permitted, but the jury is not given sufficient information to know what to do with that fact.)

**E. A Series of Errors Occurred in Ordering Veronica Gonzales to Submit to Interviews By Prosecution Experts, and in Allowing Dr. Mills to Present What Amounted to Improper Profile Evidence**

**1. It was Error to Order Veronica Gonzales to Submit to Any Interviews By Prosecution Experts**

Relying on *People v. Danis* (1973) 31 Cal.App.3d 782, the prosecution sought an order requiring Veronica Gonzales to submit to an interview by a prosecution expert. The prosecutor reasoned that Ms. Gonzales would

be relying on a diminished capacity defense at trial, putting her mental state in issue. (CT 10:2043-2154.) The defense disagreed, contending it would not be relying on a diminished capacity defense, and that testimony about BWS would not be offered as an excuse or justification for criminal conduct. Instead, it would be offered to explain Veronica Gonzales' behavior, including her failure to leave her abusive husband, her failure to take steps to protect Genny Rojas from her husband, and her false and inconsistent statements to the police soon after her arrest.

In other words, Ms. Gonzales was not admitting that she committed criminal acts and claiming that the fact she suffered from BWS should excuse her from criminal liability. Instead, she was asserting that she had not committed the acts constituting the crime, and that they were instead committed by Ivan Gonzales. BWS evidence would merely be offered to explain the circumstantial evidence relied on by the prosecution to attempt to prove guilt, putting that evidence in a proper perspective.

Nonetheless, the trial court did order Veronica Gonzales to undergo examination by a prosecution expert. (RT 41:3730-3731.)

In *Danis*, the defendant was convicted of theft, a crime that required a specific intent to steal. A psychiatrist examined the defendant and concluded he suffered from alcoholism, antisocial personality disorder, and possibly schizophrenia. The psychiatrist was of the opinion that the defendant had a dramatic lack of a conscience and he doubted that the defendant could have formed the specific intent to permanently deprive the owner of the car of the possession of his vehicle. (*People v. Danis, supra*, 31 Cal.App.3d at pp. 784-785.)

After the defense expert had testified, the prosecution moved for an order to have the defendant examined by another expert. The motion was granted, although the expert was forbidden from testifying to any incriminating statement made by the defendant during the interview. The prosecution expert found the defendant to be in good contact with reality and concluded that he suffered from antisocial personality disorder, but was able to form the specific intent required for the crime of theft. (*Id.*, at p. 785.)

The Court of Appeal initially recognized the normal rule that:

“... while the order appointing the psychiatrist does not in itself violate defendant’s constitutional right against self-incrimination, he can, nevertheless, assert the privilege to remain silent, either by refusing to submit to the examination or to answer questions (*People v. Combes*, *supra*, pp. 149-150; *McGuire v. Superior Court*, 274 Cal.App.2d 583, 598; *People v. Strong*, 114 Cal.App. 522, 530).” (*People v. Danis*, *supra*, 31 Cal.App.3d at p. 785.)

The Court of Appeal then discussed this Court’s decision in *In re Spencer* (1965) 63 Cal.2d 400. *Spencer* arose in a very different context, but does provide useful background. *Spencer* was convicted of first degree murder and robbery. (*Id.*, at p. 403-404.)

The *Spencer* opinion addressed the propriety of allowing testimony at the guilt trial from a court-appointed psychiatrist who had examined *Spencer* in connection with his plea of not guilty by reason of insanity. That testimony incorporated incriminating statements that *Spencer* had made to the psychiatrist. The *Spencer* Court noted that in a previous appeal involving the same case, it had concluded that there was no violation of the privilege

against self-incrimination. (See *People v. Spencer* (1963) 60 Cal.2d 64, discussed in *In re Spencer, supra*, 63 Cal.2d at pp. 408-409.)

However, this Court in *Spencer* did find error in depriving Spencer of the presence of court-appointed counsel during the psychiatric interview at which statements were made that were used against Spencer at trial. (*Id.*, at pp. 409-410.) Because of that deprivation, the statements should not have been admitted at trial, but that error was found harmless. This Court went on to recognize that the purpose of a psychiatric examination of persons pleading not guilty by reason of insanity might well be thwarted if counsel were routinely present at such examinations. To avoid that problem, this Court outlined protections that must be afforded to such defendants when they submit to psychiatric examinations without the presence of counsel:

“Before submitting to an examination by court-appointed psychiatrists a defendant must be represented by counsel or intelligently and knowingly have waived that right. Defendant’s counsel must be informed as to the appointment of such psychiatrists. (See *People v. Price* (1965) ante, p. 370.) If, after submitting to an examination, a defendant does not specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should not be permitted to testify at the guilt trial. If defendant does specifically place his mental condition into issue at the guilt trial, then the court-appointed psychiatrist should be permitted to testify at the guilt trial, but the court should instruct the jurors that the psychiatrist’s testimony as to defendant’s incriminating statements should not be regarded as proof of the truth of the facts disclosed by such statements and that such evidence may be considered only for the limited purpose of show-

ing the information upon which the psychiatrist based his opinion. [Footnote omitted.]

In view of these rules, once a defendant, under the advice of counsel, submits to an examination by court-appointed psychiatrists, he is not constitutionally entitled to the presence of his counsel at the examination. If the defendant does not specifically place his mental condition into issue at the guilt trial, the exclusion of counsel at the examination cannot affect the guilt trial since the psychiatrist may not testify at that trial. If defendant does specifically place his mental condition into issue at the guilt trial, he can offer no valid complaint as to the testimony of the psychiatrist at that trial. After voluntarily submitting to the examination, defendant cannot properly preclude expert testimony on a subject that he has himself injected into the trial. Moreover, the limiting instruction furnishes further protection.” (*In re Spencer, supra*, 63 Cal.2d at pp. 412-413.)

Thus, *Spencer* does not deal directly with the present issue, although it offers a helpful framework for addressing the present issue and for applying the rationale of *Danis*. Notably, *Spencer* arose in the context of a plea of not guilty by reason of insanity. In that context, the legislature has expressly provided for the appointment of experts to examine the accused. (Penal Code section 1027.) Such experts are not employed by one side or the other, but are appointed by the court. Nonetheless, the *Spencer* Court did note:

“In alluding to defendant’s specifically placing his mental condition into issue, we do not refer merely to defendant’s plea of not guilty. We allude to the proffer at the guilt trial of such defenses as ‘diminished capacity’ or epilepsy. In such event the court-appointed psychiatrist may testify at the guilt trial as to defendant’s statements given at the psychiatric examination. If de-

fendant does not offer evidence of his mental condition at the penalty trial, the court-appointed psychiatrist may not, of course, testify at that trial.” (*In re Spencer, supra*, 63 Cal.2d at pp. 412, footnote 10.)

Turning back to *Danis*, that court cited the footnote just quoted from *Spencer* in support of the conclusion that Danis’ presentation of evidence in support of his diminished capacity defense placed his mental state in issue. This constituted a waiver of the privilege against self-incrimination “at least to the extent of foreclosing any objection to the testimony of a court-appointed psychiatrist relating to the diminished capacity issue.” (*People v. Danis, supra*, 31 Cal.App.3d at p. 786.)

The *Danis* Court was not troubled by the absence of statutory authority for granting a prosecutor’s motion to have the defendant examined by a court-appointed psychiatrist. “Trial courts have the inherent power to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of the truth (*Joe Z. v. Superior Court*, 3 Cal.3d 797, 801-802).” (*People v. Danis, supra*, 31 Cal.App.3d at p. 786.)

Superficially, it might appear that the rationale underlying *Danis* would apply in the present context. However, it is crucial to consider just what is meant by placing one’s mental state in issue, before allowing that concept to swallow up too much of the privilege against self-incrimination, or of any witness’ rights to privacy. As counsel argued to the court below, Veronica Gonzales did not place her mental state in issue in the way defendants do when they enter a plea of not guilty by reason of insanity, or when they rely on a defense of diminished capacity. (CT 11:2346-2355.) BWS

evidence was not offered as a defense in this case, in any way comparable to the way in which diminished capacity evidence can support an affirmative defense. It was not offered to negate a requisite mental state. Instead, the expert testimony in the present case was offered only to explain a concept that a jury would likely not understand without expert assistance – the phenomenon of a woman becoming so dependent on a man that she will tolerate behavior that many people believe would or should cause the woman to end the relationship immediately. (*In re Nourn* (2006) 145 Cal.App.4<sup>th</sup> 820, 832-833, 837.)

No authority has extended the *Spencer/Danis* rationale to such a context. In the absence of any such authority, it was error for the trial court to order Veronica Gonzales to submit to any examination by a prosecution expert. Here, Veronica Gonzales did not put in issue her mental state during an admitted crime; rather, she denied any participation in the crime and sought only to explain her behavior.

Indeed, if the defense utilized in the present case could be deemed analogous to putting one's mental state in issue, in the *Spencer/Danis* sense, the results could be very far-reaching. This impact should be considered carefully by this Court before accepting any such extension of the *Spencer/Danis* principles. For example, BWS (now called Intimate Partner Battering) evidence can be offered by prosecution experts to explain the behavior of victims in domestic assault cases. (See Evid. Code § 1107.) Similarly, Rape Trauma Syndrome evidence may be offered by the prosecution to explain the behavior of victims of sexual assaults. (*People v. Bledsoe* (1984) 36 Cal.3d 236; *People v. Stanley* (1984) 36 Cal.3d 253.) If the

*Spencer/Danis* principles are extended to the present case, then domestic and sexual assault *victims* would also be placing their mental state in issue. This would give the defense the right to require such victims to submit to psychiatric examinations by defense expert witnesses.

Even more problematic, if the *Spencer/Danis* principles are extended to the present case, then whenever an accused claims he did not have a specific intent that is an element of the charged crime, s/he would be placing mental state in issue. Similarly, whenever a defendant accused of rape claims the victim consented, and the victim contends she did not consent, the victim's mental state would be placed in issue. Thus, extension of the *Spencer/Danis* principles to the present case would lead to psychiatric examinations being sought and ordered in all of these circumstances.

In regard to any defense right to a psychiatric examination of the victim of a sexual assault, the legislature has made the determination that neither simple fairness nor the state constitutional right to truth-in-evidence is offended by a preclusion of such examinations **for the purpose of assessing the credibility of such victims**. In Penal Code section 1112, the legislature has provided:

“Notwithstanding the provisions of subdivision (d) of Section 28 of Article I of the California Constitution, the trial court shall not order any prosecuting witness, complaining witness, or any other witness, or victim in any sexual assault prosecution to submit to a psychiatric or psychological examination for the purpose of assessing his or her credibility.”

However, section 1112 does nothing to preclude psychiatric examinations of such victims when they are sought for purposes other than assessing credibil-

ity. Thus, if the *Spencer/Danis* principles are applied to the present case, then the legislature's desire to protect sexual assault victims from defense psychiatric examinations would be thwarted in any case in which it can be argued that the victim's mental state was placed in issue, such as by prosecution expert testimony regarding Rape Trauma Syndrome.

The validity of Penal Code section 1112 was upheld in *People v. Armbruster* (1985) 163 Cal.App.3d 660. Indeed, *Armbruster* recognized that a request for a mental examination of a witness was merely a means of seeking discovery of evidence that may or may not be relevant. (*Id.*, at p. 664.) The defense request for a psychiatric examination in *Armbruster* was based on this Court's decision in *Ballard v. Superior Court* (1966) 64 Cal.2d 159, 171-177, which also treated this as a matter of discovery. *Armbruster* recognized that *Ballard* merely provided a judicial rule of discovery in the absence of statutory provisions. (*People v. Armbruster, supra*, 163 Cal.App.3d at p. 664.)

By the time of the present trial, however, discovery in California was entirely controlled by statute. (Penal Code section 1054-1054.9) Pursuant to Penal Code section 1054.5, subd. (a), "No order requiring discovery shall be made in criminal cases except as provided in this chapter." Thus, discovery by the prosecution is limited to the matters set forth in Penal Code section 1054.3:

"The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons,

or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.”

Thus, while the defense was obliged to turn over reports prepared by defense experts who had examined Veronica Gonzales and who would be testifying at trial, and the results of mental examinations by such defense experts, the governing statute made no provision whatsoever for a prosecution entitlement to an examination of the defendant by its own expert. “In criminal proceedings, under the reciprocal discovery provisions of section 1054 *et seq.*, all court-ordered discovery is governed exclusively by – and is barred except as provided by – the discovery chapter newly enacted by Proposition 115. (§§ 1054, subd. (e), 1054.5, subd. (a).]” (*In re Littlefield* (1993) 5 Cal.4th 122, 129

Penal Code section 1054, subd. (e), provides: “no discovery shall occur in criminal cases except as provided by this chapter, other express statutory provisions, or as mandated by the Constitution of the United States.” This has been construed to mean that “other express statutory provisions” pertaining to discovery have survived the adoption of section 1054 *et seq.* (See *Albritton v. Superior Court* (1990) 225 Cal.App.3d 961, 962-963.) Thus, Penal Code section 1027, which was the basis of *Spencer*, still survives. No other comparable statutory provision covers the kind of examination at issue in *Danis*. Thus, it appears that *Danis* itself was abrogated by the adoption of the Reciprocal Discovery Law. (Compare *Baqleh* (2002) 100

Cal.App.4<sup>th</sup> 478, 485-492, recognizing the need for statutory authorization before the prosecution may obtain an order for its own expert to evaluate the mental status of a defendant facing Penal Code section 1368 competency proceedings.)

The only other exception to the limitation of discovery to matters provided by statute consists of matters that are “mandated by the Constitution of the United States.” (Penal Code section 1054, subd. (e).) No case has ever held that the United States Constitution mandates a prosecutorial right to a psychiatric examination of a defendant, even if that defendant puts his or her mental state in issue.

Thus, there was no authority whatsoever for the trial court order that Veronica Gonzales undergo an evaluation by a psychiatric expert. The defense below expressly argued that the proposed order was not authorized under Penal Code section 1054.3. (See CT 11:2348.) Because Veronica Gonzales was compelled to make statements to one prosecution expert (Dr. Kaser-Boyd) without any legal authorization, her federal Fifth and Fourteenth Amendment privilege against self-incrimination and due process rights were violated.

One other path that leads to the same result is to ask what was different about the defense used in the present case and any other defense offered by one accused of a crime. If a defendant charged with murder claims s/he committed the crime in self-defense, a prosecutor could still contend that state of mind has been placed in issue (if it was placed in issue by the present defense) and that a psychological examination might provide relevant evidence. Certainly the prosecution could not obtain an order for a psychiatric

examination of the accused in such a case. There was no greater basis for such an order in the present case.

In sum, for a variety of different reasons, the order compelling Veronica Gonzales to undergo examination by prosecution experts was unauthorized and invalid. The use of statements she made to Dr. Kaser-Boyd violated her federal Fifth and Fourteenth Amendment privilege against self-incrimination and right to a fair trial in accordance with due process of law. The preclusion of the presence of her counsel during the interview violated her federal Sixth and Fourteenth Amendment rights to due process and to the effective assistance of counsel. As will be seen, comment on her refusal to be interviewed by Dr. Mills violated additional rights.

**2. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to an Interview by a Prosecution Expert, It Was Improper to Order Her to Submit to Interviews by More than One Such Expert, to Instruct the Jury That Adverse Inferences Could Be Drawn as a Result of Veronica Gonzales' Refusal to Submit to One of Those Interviews, and to Preclude Veronica Gonzales from Explaining Her Reasons for the Refusal**

As soon as the trial court reached its decision that Veronica Gonzales would be ordered to undergo examination by a prosecution expert, the prosecutor contended he would need to have at least three different experts interview her. (RT 41:3726-3727.) Ultimately, the trial court ruled that the prosecution would be allowed to have Veronica Gonzales interviewed by two dif-

ferent experts, Dr. Mark Mills and Dr. Nancy Kaser-Boyd. (RT 51:5413-5415.)

The defense informed the court that Veronica Gonzales would refuse to be interviewed by Dr. Mills, but would cooperate with Dr. Kaser-Boyd. (RT 58:6507, 6511-6512.) The defense took the position that Veronica Gonzales was not refusing to be examined, but was only refusing to be interviewed by one particular doctor (Mills). As a result, the defense did not believe there was a basis for the prosecutor to bring out the refusal to submit to an interview by Dr. Mills. The defense also argued the jury should not be told they could consider the refusal against Veronica Gonzales. Nonetheless, the court ruled this did constitute a refusal and could be revealed to the jury. (RT 61:6905-6910.)

This ruling was erroneous. The prosecutor never offered any explanation for needing more than one expert to examine Veronica Gonzales. It is true that at one point he said he needed three such exams, and the court ultimately decided that two would be enough, but that does not change the fact that there was never any legitimate basis set forth for needing more than one. In retrospect, it is obvious that Dr. Mills had no expertise in BWS, explaining why the prosecution wanted an examination by Dr. Kaser-Boyd, who did have such expertise. The only apparent explanation for the prosecutor's added desire to have Veronica Gonzales ordered to submit to an additional examination by Dr. Mills was the prosecutor's desire to exploit the unfair aspects of Dr. Mills' testimony to which the defense had objected. Thus, even if there had been authority for ordering the examination by Dr. Kaser-

Boyd, there was no proper basis for ordering a second examination by Dr. Mills.

On March 30, 1998, during the direct examination of Veronica Gonzales, the following exchange occurred:

“Q Now, Mrs. Gonzales, has the court ordered you in this case to undergo two evaluations?”

A Yes, they have.

Q Do you know what I mean by a ‘court order’?”

A Yes.

Q Okay. And these two evaluations are by people hired by the prosecution; is that correct? Is that what you understand?

A Yes. Yes.

Q Okay. Do you know the names of these two people?

A Dr. Mills and Dr. Kaser-Boyd.

Q Now, have you already met with Dr. Kaser-Boyd?

A Yes, I have.

Q So you’ve -- you did go ahead and go forward with the evaluation; is that correct?

A Yes, I did.

Q What about Dr. Mills?

A No, I did not.

Q Okay. And why not?

A Because my attorneys advised me not to because he -- because he wasn’t --

Mr. Goldstein [prosecutor]: Objection. This is going to call for speculation or a legal conclusion.

The Court: That’s enough of the answer.

By Ms. Clemens [defense counsel]:

Q Okay. Do you know why

The court: The ‘yes’ can stand. But the reasons for the attorney’s discussion with her -- I will sustain the objection.

Ms. Clemens: Okay. Thank you, your honor.

By Ms. Clemens:

Q Mrs. Gonzales, then, I wanted to be clear of what your answer is because we were going to stop mid-sentence. Why did you refuse the interview with Dr. Mills?

The Court: I think she testified that her attorneys advised her.

By Ms. Clemens:

Q Is that your testimony?

Mr. Goldstein: She answered that question.

The Court: Well, is that correct? Did your attorneys advise you not to talk to Dr. Mills?

The Witness: Because -- not to --

Ms. Clemens: It's just "yes" or "no."

The Witness: Oh. Yes.

Ms. Clemens: Thank you, your honor.

The Court: All right." (RT 66:7715-7716.)

Thus, not only was Veronica Gonzales improperly ordered to submit to a second examination by Dr. Mills, but she was also prevented from explaining to the jury her reasons for refusing to be examined by Dr. Mills. Even if there was any basis for ordering the examination by Dr. Mills, and for commenting on the refusal to submit to that examination, federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law and to defend oneself mandated that she at least be given an opportunity to explain her refusal to submit to an examination by Dr. Mills. The trial court never explained the basis of its rulings, but the objections offered by the prosecutor do not withstand scrutiny.

Had Veronica Gonzales explained what her attorneys had advised her, she would not have been speculating, nor would she have been drawing a legal conclusion. We know she was present in court when her attorneys ex-

plained to the judge that they believed Dr. Mills was unqualified because he had no expertise in BWS, and that they believed he would have an unfair advantage because he had access to Ivan Gonzales and the defense experts did not. (RT 41:3730-3731; 44:3985-3995; 51:5371-5374; 51:5385, 5398, 5402.) Obviously counsel also discussed these reasons with their client, and undoubtedly they became her own reasons as well.<sup>108</sup> Regardless of whether the court agreed with the defense concerns, they were legitimately held and constituted a logical explanation that Veronica Gonzales should have been entitled to share with the jury.

Veronica Gonzales did submit to a two-day interview by Dr. Kaser-Boyd. (RT 63:7112.) When Dr. Mills testified at the trial, he noted he had not interviewed Veronica Gonzales. (RT 77:10040-10041.) The Judge then took judicial notice of the fact that he had “previously ordered the defendant to submit to an evaluation by both Dr. Mills and by Dr. Kaser-Boyd.” (RT 77:10041.) At the conclusion of the guilt trial, the jury was instructed as follows:

“As I have previously informed you, the defendant was ordered to submit to examinations by Dr. Nancy Kaser-Boyd and Dr. Mark Mills.

You have heard evidence that the defendant refused to submit to a psychiatric evaluation by Dr. Mark Mills.

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108. Any hearsay objection would have been no better. The relevance of the desired explanation was not based on the truth of the matter asserted – that Dr. Mills was unqualified or had an unfair advantage. It made no difference whether that was true, only that Veronica Gonzales and her attorneys believed it was true. That provided an alternative and non-incriminating explanation for her refusal to be interviewed by Dr. Mills.

The defendant's refusal to be examined by the prosecution's doctor may be considered by you when weighing the opinions of the defense experts in this case. The weight to which this factor is entitled is a matter for you to decide." (CT 16:3650.)

As explained in the preceding section of this argument, there was no authority for the trial court to order Veronica Gonzales to submit to any examination by prosecution experts. Since the unauthorized order made by the trial court violated Veronica Gonzales' federal fifth and Fourteenth Amendment privilege against self-incrimination and due process rights, commenting on her refusal to submit to one of those examinations also resulted in violations of those same rights.

**3. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to Interviews by Prosecution Experts, It Was Improper to Permit Dr. Mills to Be One of Those Experts, Over Defense Objection**

Soon after the trial court concluded that it would order Veronica Gonzales to undergo evaluation by a prosecution expert, defense counsel voiced concern about the possibility that the prosecutor would seek to have Dr. Mark Mills designated as that expert. Dr. Mills had already interviewed Ivan Gonzales during his earlier proceedings. The defense questioned his objectivity in assessing Veronica Gonzales, since he had already committed himself to a position in regard to Ivan Gonzales. (RT 41:3730-3731.)

Before long, the prosecutor confirmed that he did want Dr. Mills to be one of the experts who would interview Veronica Gonzales for the prosecu-

tion. The defense reiterated its objection, and added the fact that it would be unfair for the prosecution to have an expert who had been able to interview both Ivan Gonzales and Veronica Gonzales, unless Ivan Gonzales could also be required to undergo an examination by an expert employed by Veronica Gonzales. (RT 44:3990-3995.) The prosecutor subsequently argued the defense gave up any right it would have had to interview Ivan Gonzales when it sought severance of the cases against Ivan and Veronica Gonzales.<sup>109</sup> (RT 51:5385, 5398, 5402.) The defense added another basis to its objections to Dr. Mills. Counsel contended Dr. Mills was not an appropriate expert because he had no training or expertise in the area of BWS. The judge disagreed and found that Dr. Mills was qualified. (RT 51:5371-5374.)

Ultimately, the trial court ruled that the prosecution would be allowed to have Veronica Gonzales interviewed by two different experts, and that Dr. Mills could be one of them. (RT 51:5413-5415.) The defense informed the court that Veronica Gonzales would refuse to be interviewed by Dr. Mills, but would cooperate with Dr. Kaser-Boyd. (RT 58:6507, 6511-6512.)

As explained earlier, the prosecutor never offered any basis for needing Dr. Mills as an expert who would interview Veronica Gonzales. As dem-

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109. The prosecutor's position was completely unsupported by authority and would result in fundamental unfairness. The trial court agreed earlier that a joint trial would have been likely to result in the deprivation of a fair trial. The prosecution offered no explanation for his contention that the defense must give up some aspects of a fair trial in order to gain other aspects of a fair trial. [Compare *Arceves v. Superior Court (People)* (1996) 51 Cal.App.4<sup>th</sup> 584, 595; *People v. Superior Court (Barrett)* (2000) 80 Cal.App.4<sup>th</sup> 1305, 1320-1321; *People v. Coleman* (1975) 13 Cal.3d 867, 873-878, 885-886.]

onstrated by the subsequent events, which had been accurately predicted by the defense, Dr. Mills conceded he had no expertise in BWS – the state of mind that Veronica Gnzales had supposedly put in dispute. Moreover, Dr. Kaser-Boyd was able to fully cover the prosecution position in regard to the impact of BWS on the defense claims. Balanced against this total lack of prosecution need were very legitimate defense concerns that went to the heart of a fundamentally fair trial.

The jury's acceptance or rejection of Veronica Gonzales' BWS claims went to the essence of the defense. The danger was very real that a jury faced with conflicting experts would give more weight to the only expert who had interviewed both Veronica Gonzales and Ivan Gonzales. At the same time, there is no basis in law for giving Dr. Mills' testimony any greater weight because of his earlier opportunity to interview Ivan Gonzales. Thus, not only would the prosecution have had a distinct advantage, but it would also have been a wholly unwarranted and unfair advantage. The trial court ruling ordering Veronica Gonzales to submit to an examination by Dr. Mills was, under these circumstances, a violation of her federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law, and to present a defense, and would have also led to an unreliable verdict in violation of the federal Eighth Amendment. A fortiori, the ruling also constituted an abuse of discretion.

**4. Even if There Was a Proper Basis for Ordering Veronica Gonzales to Submit to an Interview by Dr. Mills, It Was Error to Allow Dr. Mills to Testify to What Amounted to Improper Profile Evidence and Tell the Jury What to Believe, Using the Guise of Expert Testimony**

After the court had ruled that the prosecution had the right to have Dr. Mills interview Veronica Gonzales, and after the defense had refused to allow that interview, the defense continued to object to any testimony at all by Dr. Mills. In the event he was to testify, the defense objected to specific types of testimony they expected him to give. One category included Dr. Mills' expected claim that he had reviewed thousands of cases and had never seen another one with such a divergence between statements to police and testimony, as in the present case. The objection was based both on relevance and on Evidence Code section 352. Counsel argued Dr. Mills would be telling the jury he is an expert, he had reviewed the present record, and Veronica Gonzales was an unusually inconsistent witness. Counsel also objected to an expected effort by Dr. Mills to tell the jurors which parts of Veronica Gonzales' testimony they should believe. (RT 76:9994-9997.)

The prosecutor wanted to show that Veronica Gonzales' inconsistencies were evidence of malingering. The prosecutor expected Dr. Mills to say he had reviewed everything and concluded no credible psychologist or forensic expert could base any opinion on what Veronica Gonzales had said. (RT 76:997-9998.)

The judge recognized Dr. Mills would be straddling a fine line between saying what an expert should believe, versus saying what a jury should believe. The judge wanted testimony phrased very carefully so as to stay on the former side of the line. Defense counsel continued to argue the entire line of questioning was irrelevant, or that any relevance was outweighed by the prejudicial impact, pursuant to Evidence Code section 352. (RT 76:9999-10002.)

The judge ruled that the testimony would be allowed, but the prosecutor was told to instruct his witness not to tell the jurors what they should believe. Defense counsel then added a new objection to recounting specific inconsistencies. The judge saw such recounting as relevant but time-consuming and not very beneficial. The prosecutor agreed to not elicit more than 10 examples of inconsistencies. (RT 76:10002-10005.)

Defense counsel argued further on her relevance and Evidence Code section 352 objections. Accurately predicting what was to come, she noted that the other prosecution expert, Dr. Kaser-Boyd, could certainly testify to her opinion whether Veronica Gonzales was a reliable historian. Dr. Kaser-Boyd had interviewed Veronica Gonzales, but Dr. Mills had not. Thus, Dr. Mills really had nothing to add to what the jurors could conclude for themselves. Indeed, the jury had seen Veronica Gonzales' demeanor while testifying, and Dr. Mills had not. This put the jurors in a better position than Dr. Mills to assess the credibility of Veronica Gonzales. Counsel also correctly anticipated the prosecution's planned examination of Dr. Mills would be nothing more than a preview of the prosecution closing argument, disguised as expert testimony. The judge nonetheless concluded the testimony would

be allowed, subject to objections if there were too many descriptions of specific inconsistencies. (RT 76:10006-10008, 77:10018-10019.) Other arguments made by defense counsel were summarily dismissed as going to weight, not admissibility. (RT 77:10021.)

Yet another expected problem with Dr. Mills testimony was accurately predicted. Defense counsel expected Dr. Mills to testify that defendants facing a potential death sentence had a great incentive to lie.<sup>110</sup> Counsel feared such testimony would cause Veronica Gonzales to be judged under different standards than other witnesses. Dr. Mills would effectively be saying she was less credible because of the charges the prosecutor chose to file. The prosecutor promised to leave penalty out of the matter, and to phrase such questions as being in regard to the prospect of a murder trial. (RT 76:10012.)

Notably, in all the arguments that had occurred over how many prosecution experts should be allowed to interview Veronica Gonzales, and whether Dr. Mills should be one of them, the prosecutor never gave a meaningful explanation why he needed more than one or why he needed to use Dr. Mills. He never explained what Dr. Mills could say, with or without interviewing Veronica Gonzales, that necessitated his appearance as a witness. As the defense argued, and as Dr. Mills eventually admitted, he had no expertise at all in the area of BWS. Dr. Kaser-Boyd did have such expertise,

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110. Counsel was undoubtedly familiar with the testimony Dr. Mills gave during Ivan Gonzales previous trial. That was the apparent basis of such expectations. Thus, the trial judge and prosecutor, who had served in those same roles at Ivan's trial, knew defense counsel predictions were likely to come true.

did interview Veronica Gonzales, and was fully able to express the prosecution point of view in regard to how the jury should treat the aspect of the defense case that was based on BWS. In view of all the legitimate concerns the defense had raised, and the prosecutor's failure to explain any legitimate need, the judge should have precluded the testimony of Dr. Mills even before it began.

Pursuant to Evidence Code section 801:

“If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:

(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and

(b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.”

Here, there was no showing at all that Dr. Mills had any expertise in the area of BWS, and no showing that Dr. Mills would have anything significant to say that was sufficiently beyond the common experience of the jurors or that would assist the jurors.

Similarly, Evidence Code section 702, subd. (a) provides:

“A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.”

Here, Dr. Mills’ testimony was supposed to relate to BWS, but he had no expertise in that area, by his own admission.

The judge did not preclude the testimony, however, and the actual testimony given by Dr. Mills went much as the defense had predicted. Despite the prosecutor’s assurance it would not happen, Dr. Mills soon told the jury that Veronica Gonzales faced a potential death sentence, giving her an unusually great incentive to lie. (RT 77:10043.) Demonstrating how little he had to legitimately contribute to the trial, he readily acknowledged he was not attempting to offer any opinion regarding the actual forensic diagnosis of Veronica Gonzales. Instead, his purpose was to explain that the incentive for malingering in a death penalty case was high. Despite the fact the jury hardly needed to be told this, especially in a context that penalized the defendant because of the charges the prosecutor had chosen, the judge again overruled relevance and Evidence Code section 352 objections. (RT 77:10042-10043.)

This was clear error. In most cases, any mention of penalty during the guilt phase of a trial would be highly inappropriate. While it may be true that the present jury was unavoidably aware of the potential penalty facing Veronica Gonzales, it was certainly highly prejudicial to have a forensic psychiatrist advise the jury that defendants facing death sentences are simply not to be believed. That could do nothing to promote a legitimate search for the

truth, and could only cause a jury to react negatively to Veronica Gonzales based on gross stereotyping or improper profiling, rather than on any individual assessment of her credibility.

As set forth more fully in the factual summary earlier in this argument, at pp. 326-327, Dr. Mills went on to attempt to make a mountain out of a molehill. He contended that glaring inconsistencies in one person's account of an event could be explained only as lying if it was not a product of Alzheimer's disease or another brain defect. (RT 77:10046.) Of course, this completely overlooks the fact that there may be other good explanations, such as innocent mis-recollection. As defense counsel had predicted, this is the sort of hyperbole that belongs in prosecution argument at the end of the trial, not in testimony from a so-called expert. It could not have been clearer to the jury that Dr. Mills was convinced Veronica Gonzales was a liar. This was not proper testimony from an expert witness. (See *In re Rodriguez* (1981) 119 Cal.App.4<sup>th</sup> 457, 468-469, and *People v. Sergill* (1982) 138 Cal.App.3d 34, 39, regarding the impropriety of expert testimony pertaining to the believability of a witness.)

Indeed, this Court recently reiterated a number of reasons for disallowing such testimony, simultaneously explaining why it can be unduly prejudicial:

“we have explained that there is a ‘judicial policy disfavoring attempts to impeach witnesses by means of psychiatric testimony. [Citations.] California courts have viewed such examinations with disfavor because “ ‘[a] psychiatrist’s testimony on the credibility of a witness may involve many dangers: the psychiatrist’s testimony may not be relevant; the techniques used and theories

advanced may not be generally accepted; the psychiatrist may not be in any better position to evaluate credibility than the juror; difficulties may arise in communication between the psychiatrist and the jury; too much reliance may be placed upon the testimony of the psychiatrist; partisan psychiatrists may cloud rather than clarify the issues; the testimony may be distracting, time-consuming and costly.' ” ’ ( *People v. Alcalá* (1992) 4 Cal.4th 742, 781; ...) ( *People v. Chatman* (2006) 38 Cal.4<sup>th</sup> 344, 375-376.)”

Dr. Mills moved even further into the area of prosecutorial argument when he contended that a good example of malingering by Veronica Gonzales could be found in her various inconsistent statements regarding whether she had been molested as a child. Indeed, even the prosecution’s own legitimate BWS expert recognized that there were very understandable explanations for these inconsistent statements. (RT 77:10046-10047, 78:10156.) Once again, Dr. Mills’ testimony was much more like a prosecutor arguing his one-sided view of the evidence, rather than a legitimate expert providing meaningful assistance to a jury.

Perhaps the greatest problem with Dr. Mills as an expert witness is that he openly acknowledged he was not expressing any opinion at all about BWS. Instead, he expressed his opinion that the inconsistencies in the statements that Veronica Gonzales had made at various times left **him** with insufficient evidence that Veronica Gonzales was suffering from Post-Traumatic Stress Disorder. (RT 77:10051.) While he may have had more expertise in that area, that was not the issue. He openly conceded he was no expert on BWS. (RT 77:10072.)

In sum, Dr. Mills failed to express an opinion that no legitimate expert could have reached a conclusion based on Veronica Gonzales' statements. That had been why the prosecution claimed they were putting him on the stand, but that was not what he actually testified. Instead, he simply said that he did not feel he could conclude that she suffered from a different syndrome that was not in issue. He did not even express an opinion that Veronica Gonzales was malingering. Instead, his testimony simply boiled down to a conclusion that because she was facing a death penalty – a context that would give anyone a great incentive to lie – and because there were many inconsistencies in various statements she had made over the years, she had the **characteristics** of a malingerer. In other words, he said no more than that she fit the profile of a malingerer.

Such use of profile evidence is highly improper:

“We believe the crime analyst’s testimony is also somewhat analogous to the inherently prejudicial ‘profile’ evidence which was held to be inadmissible for purposes of determining guilt or innocence in *People v. Martinez* (1992) 10 Cal.App.4th 1001. In *Martinez*, the trial court had allowed into evidence expert police officer testimony regarding how auto theft rings operate to show the defendant had knowledge he was driving a stolen car. The officers testified the defendant’s actions and the documents in his possession when arrested were similar to those of known auto thieves. (id., at pp. 1004-1006.) The Court of Appeal reversed, finding the thrust of the admitted evidence to show the defendant ‘fit’ a certain ‘profile’ constituted ‘improper expert evidence similar to the drug courier profile evidence’ (id., at pp. 1005-1006), which the federal courts have held to be inadmissible to prove guilt

because: ‘ “the admission of this evidence is **nothing more than the introduction of the investigative techniques of law enforcement officers.** Every defendant has a right to be tried based on the evidence against him or her, not on the techniques utilized by law enforcement officers in investigating criminal activity.” ’ (id., at p. 1006.)” (*People v. Hernandez* (1997) 55 Cal.App.4<sup>th</sup> 225, 242; emphasis added.)

Similarly here, Dr. Mills’ testimony amounted to no more than a discussion of the investigative techniques used by mental health experts, not a discussion of the actual evidence against Veronica Gonzales. Dr. Mills conceded he could express no opinion regarding the actual forensic diagnosis of Veronica Gonzales. He merely pointed to stereotypical concerns that might cause an expert to be especially careful, but the testimony of the defense experts showed they were fully aware of such concerns and were especially careful. Dr. Mills had nothing meaningful to say, but was allowed to portray himself as an expert in forensic psychiatry who did not believe Veronica Gonzales.

Similar sentiments were expressed in *People v. Castaneda* (1997) 55 Cal.App.4<sup>th</sup> 1067, 1071-1072:

“The prosecutor elicited the following testimony from Zuniga: ‘In my experience, dealing particularly in Northern San Diego County and especially in Vista and San Marcos where I’m presently assigned to investigate, the typical heroin dealer is usually Hispanic male adult. They are Mexican nationals. They are U.S. citizens. But in my opinion, that the tar heroin market in Northern San Diego County particularly in these two cities is controlled by Hispanics.’ (Italics added.)

... Zuniga's testimony was 'inherently prejudicial' and should have been excluded. (*People v. Martinez* (1992) 10 Cal.App.4th 1001, 1006.)

... every defendant has the right to be tried based on evidence tying him to the specific crime charged, and not on general facts accumulated by law enforcement regarding a particular criminal profile. (*People v. Martinez, supra*, 10 Cal.App.4th at p. 1006; see also *People v. Derello* (1989) 211 Cal.App.3d 414, 426.)" (Emphasis added.)

Again, the present context is analogous. General facts such as the penalty that Veronica Gonzales faced and the understandable falsehoods she had conveyed in the past to try to keep her sister's family together were converted into an expert psychiatric opinion that she should not be believed. The jury was invited to reach an easy and emotionally satisfying result in a difficult and complex case. Veronica Gonzales' federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law were thereby seriously undermined. Dr. Mills simply relied on factors that will always be present regardless of whether a particular defendant is telling the truth or lying – persons accused of serious crimes against children will always face the potential of severe punishment.<sup>111</sup> Fur-

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111. Put differently, since the mere possibility of perjury is always present when a defendant accused of a capital crime testifies, and the possibility therefore provides no assistance whatsoever in determining whether a particular defendant is lying, then the possibility is irrelevant to the disputed issue of whether the defendant is lying or testifying truthfully, and is equally irrelevant in the determination of which expert witness is most persuasive. Alternatively, even if that generic possibility of perjury retains some relevance, it is slight at best and necessarily outweighed by the very prejudicial  
(Continued on next page.)

thermore, as Dr. Mills himself had to concede, persons who suffer from BWS almost always tell some falsehoods along the way, to hide their unfortunate situation.

Another analogous case is *People v. Robbie* (2001) 92 Cal.App.4<sup>th</sup> 1075, 1081-1082, wherein a prosecutor called a witness to testify that various actions of the defendant during a purported rape were consistent with the actions of a rapist. There, the Court of Appeal explained:

“Defense counsel objected, arguing that expert testimony must be limited to general misconceptions about sex offenders, and that an expert cannot render an opinion as to whether a defendant committed the charged crimes. ...

... the court ... ruled Pagaling’s testimony admissible: ‘... I think [the prosecutor] understands that the expert cannot come in here and testify that [defendant] is the one who committed these crimes .... I think all he has indicated is that he intends to have this expert come in here and testify that the kinds of conduct that [defendant] may have engaged in, in this case, is the kind that a person can engage in consistent with the commission of such crimes.’ (Italics added.) The prosecutor then assured the court that he was offering Pagaling’s testimony only ‘to disabuse the jury of common misperceptions [sic] about conduct of a rapist.’ ...

The prosecutor offered Pagaling as an expert ‘in the area of the behaviors and conduct of persons who commit sexual assaults.’ ”

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(Continued from last page.)

impact of allowing an expert psychiatric witness to advise the jury whether a defendant should be believed.

Similarly here, Dr. Mills testimony boiled down to his opinion that certain factors present in this case were consistent with malingering. Dr. Mills was portrayed as an expert in determining when a person is malingering. He never offered his own opinion that Veronica Gonzales was, in fact, malingering. Instead, he only said that factors were present here that were consistent with malingering. *Robbie* went on to explain further:

“The decision of a trial court to admit expert testimony ‘will not be disturbed on appeal unless a manifest abuse of discretion is shown.’ ‘(*People v. McAlpin* (1991) 53 Cal.3d 1289, 1299, quoting *People v. Kelly* (1976) 17 Cal.3d 24, 39.) Because Pagaling’s testimony constituted improper profile evidence, we conclude that such an abuse occurred here.

A profile is a collection of conduct and characteristics commonly displayed by those who commit a certain crime. One court has described profile evidence as ‘a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity.’ (*U.S. v. McDonald* (10th Cir. 1991) 933 F.2d 1519, 1521.) ...

Here, Pagaling was never directly asked to opine whether defendant was a sex offender. Instead, the prosecutor incorporated Jane’s description of his conduct into hypothetical questions. In this context the expert responded that the behavior set out in the prosecutor’s questions was typical of a particular kind of criminal. In response to prosecution hypotheticals, Pagaling described defendant’s conduct as the ‘most prevalent type of behavior that I’ve seen with sex offenders.’ While never characterized as such, this was profile evidence.

Profile evidence is generally inadmissible to prove guilt. Drug courier profiles have been held to be “inherently prejudicial because of the potential they have for including innocent citizens as profiled drug couriers....” ( *U.S. v. Beltran-Rios* (9th Cir. 1989) 878 F.2d 1208, 1210, quoting *United States v. Hernandez-Cuartas* (11th Cir. 1983) 717 F.2d 552, 555.) ( *People v. Robbie, supra*, 92 Cal.App.4<sup>th</sup> at p. 1083-1084.)

Once again, the present case is highly analogous. Dr. Mills merely identified factors he saw as commonly displayed by malingerers. He never directly opined that Veronica Gonzales was a malingerer. Instead he essentially concluded that she fit the profile of a malingerer.

In sum, Dr. Mills’ testimony amounted to improper profile evidence. This was not an unexpected development. Instead, it is exactly what defense counsel predicted. Dr. Mills’ testimony never qualified as proper expert testimony:

“ ‘ “The decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of the inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.” [Citations.]’ ( *People v. Hernandez* (1977) 70 Cal.App.3d 271, 280.) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. (Evid. Code, § 720, subd. (a).) Whether a person qualifies as an expert in a particular case depends on the facts of that case and the witness’ qualifications. In considering whether a person qualifies

as an expert, the field of expertise must be carefully distinguished and limited. (*People v. Kelly* (1976) 17 Cal.3d 24, 39.)” (*People v. Sergill, supra*, 138 Cal.App.3d 34, 39.)

The ruling allowing this testimony violated Veronica Gonzales’ federal Fifth, Sixth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law, and to present a defense, and also led to an unreliable verdict in violation of the federal Eighth Amendment. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Taylor v. Illinois* (1988) 484 U.S. 400; *Lankford v. Idaho* (1991) 500 U.S. 110; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.) Further, by unfairly negating the impact of the defense experts, this improper evidence effectively deprived Veronica Gonzales of her right to present witnesses in his own behalf. (*Taylor v. Illinois* (1988) 484 U.S. 400; *Washington v. Texas* (1967) 388 U.S. 14, 19.) Clearly, the ruling also constituted an abuse of Evidence Code section 352 discretion, since there was little or no probative value and a great danger of unfair prejudice.

**F. The Trial Court Erred in Precluding the Defense from Eliciting Evidence Regarding Statements Against Interest Made by Ivan Gonzales, Especially Since the Statements Were Also Offered for Legitimate Non-Hearsay Purposes**

From the outset, well before Ivan or Veronica Gonzales' trials began, her counsel made known their desire to seek admission of statements made by Ivan Gonzales that were against his interest. These included his admission to the police that he had placed Genny Rojas in the bathtub, turned on the warm water, planned to check on her in 10 minutes and forgot to do so, and subsequently heard her screaming. (CT 6:1306-1310, 1311 *et seq.*) Initially, the trial court rejected these statements as unreliable because Ivan Gonzales admitted only that he put Genny Rojas in the bathtub, but he claimed he had no knowledge of how she was burned. (RT 20:1654.) That position was unsupported for several reasons.

First, a statement need not be a total confession to constitute a statement against interest. This clearly constituted an admission harmful to the interests of Ivan Gonzales, regardless of whether it arose in the context of a denial of ultimate guilt.

“ ‘The litmus test of determining the admissibility of the extrajudicial statement under section 1230 is whether the declarant should have realized or did realize *that the statement when made was distinctly against his penal interest* [citation].’ (*People v. Johnson* (1974) 39 Cal.App.3d 749, 761, italics in original.)” (*People v. Jackson* (1991) 235 Cal.App.3d 1670, 1685.)

Here, any admission by Ivan Gonzales that he was in the bathroom at or near the critical time when Genny Rojas was burned was distinctly against his interest. Similarly, any express or implied admission that Veronica Gonzales was not present at these crucial moments was also distinctly against his interest. While the judge may have questioned whether Ivan did realize that, he clearly should have realized that.

An analogous example of the principle that a statement need not be a confession in order to constitute an admission against interest is contained in *People v. Garner* (1989) 207 Cal.App.3d 935, 943. There, in finding that certain statements would qualify as declarations against interest, the Court explained:

“However, while assuredly not a confession of wrongdoing, certain of Johnson's statements did constitute potentially incriminatory admissions since they placed him at the scene of the killing at the very moment it occurred and in a car similar to the one described by the only prosecution witness.”

Similarly here, portions of Ivan Gonzales' statements placed him in the bathroom with Genny Rojas at crucial times and thereby constituted statements against interest regardless of the fact that he did not fully admit his culpability. (See also *People v. Gordon* (1990) 50 Cal.3d 1223, 1252, where the suspicious nature of conduct admitted by the declarant was found sufficient to satisfy the requirements of a statement against interest even though the elements that would make the declarant guilty of a crime were never admitted. See also *People v. Brown* (2003) 31 Cal.4<sup>th</sup> 518, 533-539.)

Second, the court was simply wrong in its statement that Ivan Gonzales claimed no knowledge of how Genny Rojas was burned. In fact, Ivan expressly surmised that after he had left Genny in the tub, she must have turned the dial herself, making the water hotter. (See CT 3:457, 493.) Indeed, to the extent this was not a credible explanation, it constitutes further incriminating evidence of a consciousness of guilt. (*People v. Avila* (2006) 38 Cal.4<sup>th</sup> 491, 568.)

Third, and most important, the judge's rationale was completely inconsistent with the prosecution theory of the case, and the very manner in which the prosecution obtained a first degree murder verdict against Veronica Gonzales. The prosecution theory was that Veronica Gonzales must have either participated in the murder of Genny Rojas, or else must have known that Ivan Gonzales murdered Genny Rojas. Under this theory, any statement made by Veronica Gonzales that was not consistent with one or the other of those two possibilities was necessarily a lie that demonstrated a consciousness of guilt. If that was, in fact, true for Veronica Gonzales, it was necessarily equally true for Ivan Gonzales. Thus, while the statements that Ivan made to the police must have been false, they nonetheless constituted highly probative evidence of his consciousness of guilt. In that respect, the statements were clearly against his interest.

Indeed, *People v. Jackson* (1989) 49 Cal.3d 1170, 1184-1187 provides a close analogy. There, this Court upheld the admission of statements by a defendant in which he denied commission of the charged offense. While the statements were denials rather than admissions, they were not admitted for the truth of the matter, but as circumstantial evidence of the fact that the

defendant did have a recall of the events. Since that was inconsistent with his trial defense of unconsciousness due to consumption of drugs, it constituted evidence of a consciousness of guilt.

Viewed in this manner, the statements did not even constitute hearsay, because their probative value turned only on whether the statements were made, not on whether they were true. (*People v. Green* (1979) 27 Cal.3d 1, 23.) Put differently, the prosecution position in the present case was that it was impossible to believe that Veronica Gonzales would have told the lies she did to protect Ivan Gonzales, and therefore must have been lying to protect herself. However, a stark example of the fact that Ivan Gonzales told comparable lies would have made it clear to the jury that they could not easily dismiss the possibility of one spouse putting themselves at great risk in order to protect the other.

Just as the prosecution desired to give the jury a real-world example of the principle that different experts could reach different results, so, too, the defense needed to provide an example of the way in which highly dependent spouses act when interviewed by the police about a serious crime. Indeed, the defense need for such an example was far greater than the People's. The People had irrefutable other evidence of the fact that experts could disagree, since they did disagree about whether Veronica Gonzales was a battered spouse. In contrast, the defense had no other evidence of the fact that dependent spouses would lie to protect the other, even if it meant putting themselves at great risk, except for the testimony from the very defense experts that the prosecution urged the jury to reject.

The People will undoubtedly argue on appeal that Veronica Gonzales' statements to the police, viewed as consciousness of guilt evidence, were so reliable that they constituted proof beyond a reasonable doubt of her guilt of first degree murder and of the truth of the torture and mayhem special circumstances. If they were reliable enough for that purpose, then Ivan Gonzales' statements to the police were also reliable enough to be heard by Veronica's jury. Similarly, if Ivan Gonzales' statements were unreliable evidence of his own guilt, then Veronica Gonzales was convicted and sentenced to death on the basis of equally unreliable evidence, in violation of her federal Eighth and Fourteenth Amendment rights to Due Process and to not be sentenced to death based on unreliable evidence. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

Defense counsel also noted that other statements made by Ivan Gonzales tended to exonerate Veronica Gonzales, such as his statement that she was never alone in the bathroom with Genny. (RT 20:1653.) Nonetheless, the court ruled that Ivan Gonzales' statements were not statements against his own penal interest. The judge found it was not clear to Ivan when he spoke that he was making any admission. The Court expressly stated it was assuming that Ivan Gonzales was not available as a witness for Veronica Gonzales. (RT 20:1672-1675.) This ruling was incorrect for the same reasons just set forth, and also because the factors set forth by the court are not requirements for admissibility of statements against interest. As noted above, whether it was actually clear to Ivan that he was making an admission

against his interest was not the sole test; if he should have known his statements were against interest, the hearsay exception is satisfied.<sup>112</sup> (*People v. Jackson, supra*, 235 Cal.App.3d at p. 1685.)

The defense renewed its effort after the completion of Ivan Gonzales' trial. The defense argued that during Ivan's trial, the prosecutor had introduced the very statements the defense wanted to use in Veronica's trial. The defense noted that in Ivan's trial, the prosecutor had argued these statements were reliable and had the kernel of truth. The defense noted that to the extent there was any dispute whether the statements actually were against Ivan's interest, that should go to weight, not admissibility. The defense expressly relied on the federal Fifth, Sixth, and Fourteenth Amendment rights to due process of law, to a fair trial, and to the right to defend oneself at trial. The trial court again ruled the statements inadmissible. (CT 10:2234-2270; RT 44:3943-3951.)

During Veronica Gonzales' trial, after the prosecutor asked Ms. Gonzales a series of questions regarding her supposed knowledge of the defense used by Ivan Gonzales during his trial, Veronica's defense counsel again renewed the request to produce evidence of statements against interest made

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112. That is, the evidence clearly showed that the crime was either committed by Ivan Gonzales or Veronica Gonzales or both of them. Any reasonable person in the position of Ivan Gonzales should have known that. Therefore, any statement by Ivan Gonzales that tends to prove that Veronica Gonzales did not commit the crime alone, because she was never in the bathroom alone with Genny, necessarily tends to prove that Ivan Gonzales was guilty, either alone or with Veronica Gonzales. Thus, even if he was not subjectively aware of the incriminating nature of his statement when he made it, he should have been, satisfying the prerequisite for admission of a statement against interest.

by Ivan Gonzales. The defense was especially interested in showing Ivan Gonzales had admitted he had been in the bathroom with Genny Rojas, **in order to set the record straight regarding what Ivan Gonzales actually had said.** (RT 67:7869-7871.) This was another **non-hearsay** purpose for admitting the statements. (*People v. Green, supra*, 27 Cal.3d at p. 23.) The defense point was not based on the truth of the content of the statements. Instead, the defense point was only that the statements were made – that the only statements ever made by Ivan Gonzales, either to the police or at his own trial, were quite inconsistent with the false impression the prosecutor had created, that Ivan Gonzales had utilized the same battered spouse defense that Veronica Gonzales was using.

In the ensuing discussion, the judge proposed an alternative to the use of Ivan Gonzales' statements, but after further discussion both sides and the court determined that the proposed alternative was not workable. The defense returned to its request to use statements made by Ivan Gonzales, but the court declined to consider that any further. (RT 67:7909-7914.)

The issue surfaced once again after the trial court allowed the prosecutor to question a defense expert about the fact that two different experts had reached conflicting opinions about whether Ivan Gonzales was a battered spouse. Defense counsel requested to be allowed to examine witnesses regarding the details of Dr. Weinstein's report, including statements by Ivan Gonzales that formed the basis of Dr. Weinstein's opinions that Ivan was a battered spouse. The court again denied that request. (RT 73:9308.)

Later in the trial, defense counsel noted there had never been a final ruling on the last defense request to elicit evidence of statements against in-

terest made by Ivan Gonzales. The judge ruled that the prosecutor's questions to Veronica Gonzales about Ivan Gonzales' defense did not open the door to the use of Ivan Gonzales' statements to the police. The Court made it clear it was denying the request on its merits, and not based on any question of timeliness. (RT 80:10533-10536.)

Thus, the series of rulings precluding the use of any of Ivan Gonzales' statements constituted error for at least two independent reasons. The statements did qualify as admissions against interest and were sufficiently reliable as consciousness of guilt evidence to be admissible under this hearsay exception. Alternatively, the statements were also offered for the non-hearsay purposes of showing consciousness of guilt and of setting the record straight after the prosecution had unfairly conveyed a completely false impression to the jury. Once again, the errors deprived Veronica Gonzales of her federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair trial in accordance with due process of law, to present a defense, to confront and cross-examine the witnesses against her, and to reliable fact-finding in a verdict used to support a sentence of death.

**G. The Errors Set Forth Above, Either Alone or in Combination, Must be Deemed Prejudicial**

“An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless.” (*People v. McDonald* (1984) 37 Cal.3d 351, 376.)

In regard to the restrictions on the defense ability to counter-act the evidence that two different experts had reached conflicting opinions regard-

ing Ivan Gonzales, and that one of the experts found that he was a battered spouse, the precluded evidence left the jury with a significantly different impression of the credibility of the various expert witnesses than would have been the case if the disputed evidence had been kept out, or if the defense had been permitted to offer logical evidence to reduce the impact of the evidence elicited by the prosecution. For this reason, the errors violated Veronica Gonzales' federal Sixth and Fourteenth Amendment rights to confront and cross-examine the witnesses, and to put on a defense. As a result, prejudice must be measured by the strict standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 89 L.Ed.2d 674, 106 S.Ct. 1431; *People v. Rodriguez* (1986) 42 Cal.3d 730, 750, fn. 2.)

Here, there is strong evidence that *either* Veronica or Ivan Gonzales, or both of them, were guilty. However, the proof that one of those theories was true and the others were not was closely balanced at best, and sparse or non-existent at worst. Also, even if Veronica Gonzales could be properly be found guilty in this case, the proof that she possessed the mental states necessary for first degree murder and for the special circumstances was even weaker. The prosecution case in favor of Veronica Gonzales' guilt rested entirely on the purported consciousness of guilt demonstrated by her initially untrue statements. Any inference of a consciousness of guilt was sharply dispelled by the defense expert testimony explaining that the untrue statements were an expected result of BWS. This was even partially corroborated by prosecution expert, Dr. Kaser-Boyd.

Unfortunately, the various errors set forth in this argument, separately and in combination, unfairly detracted from the persuasive force of the defense explanation of the untrue statements initially made by Veronica Gonzales. Thus, they went to the heart of the defense and were necessarily prejudicial under any standard.

## **II. THE TRIAL COURT ERRONEOUSLY ALLOWED THE PROSECUTOR TO USE VERONICA GONZALES' HISTORY OF BEING ABUSED AS A CHILD AS PROOF THAT SHE WAS MORE LIKELY THAN IVAN GONZALES TO HAVE PERPETRATED THE ABUSE AGAINST GENNY ROJAS, AND COMPOUNDED THE ERROR BY DISALLOWING PROPER DEFENSE IMPEACHMENT**

### **A. Factual and Procedural Background**

Before the trials of Ivan and Veronica Gonzales were severed from one another, counsel for Ivan Gonzales filed a Motion to Admit History and Expert Testimony Regarding Excessive Disciplinary Techniques Used in Co-Defendant's Family. (CT 37:8155-8162.) Ivan's counsel contended that styles of disciplining children are learned and passed on from generation to generation, and that Veronica Gonzales was raised in a home of excessive discipline, which may have even been child abuse. Counsel argued she then applied these learned styles in the manner in which she disciplined Genny Rojas, after Genny came to live with the Gonzales family. (RT 21:1830-1831.)

The Court initially questioned how proof of Veronica Gonzales' guilt did anything to negate Ivan Gonzales' guilt. Ivan's attorney then added that his evidence would show that among Mexican-American families the woman of the house traditionally disciplined the children. Interestingly, the

prosecutor argued against the admissibility of such evidence, contending it would potentially violate Penal Code section 29.<sup>113</sup> (RT 21:1840-1841.)

The trial court also saw this as character evidence, barred by Evidence Code section 1101.<sup>114</sup> The court believed this tended to prove propensity, not motive. (RT 21:1842-1843.) The judge excluded the evidence as irrelevant. (RT 21:1844-1847.)

Subsequently, counsel for Ivan Gonzales sought reconsideration of this ruling. The prosecutor argued that what happened to Veronica Gonzales 15 years earlier was too attenuated. He also claimed that evidence that Hispanic men were emotionally reserved would be racist. He saw no relevance

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113. Penal Code section 29 provides:

“In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact.”

114. The court apparently had in mind section 1101, subd. (a), which provides:

“Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.”

at all in the proffered evidence. (RT 28: 3056, 3085.) The judge concluded the issue was more complex than he originally thought, and that no ruling should be made until an Evidence Code section 402 hearing could be held. (RT 28:3097-3100.)

After the cases of Ivan and Veronica Gonzales had been severed for trial, the prosecutor suddenly took a very different view of such evidence. He expected the defense to bring in evidence of the abuse Veronica Gonzales suffered as a child as evidence consistent with the claim that she suffered from Battered Woman's Syndrome. If so, the prosecutor believed that would open the door to a prosecution expert testifying regarding Battering Parent's Syndrome. (RT 41:3702-3703.)

Later, the prosecutor took the position that the defense should not be permitted to present expert testimony regarding the impact of Veronica Gonzales' history of being abused as a child. Nonetheless, the court ruled such evidence would be admissible. The prosecutor then returned to his desire to counter with Battering Parent's Syndrome evidence. (RT 53:5561-5568.)

In a later hearing, the impact of *People v. Walkey* (1986) 177 Cal.App.3d 268 was discussed. Counsel for Veronica Gonzales argued that *Walkey* held that Battering Parent evidence was inadmissible, while the prosecutor contended that such evidence was allowed if the defense first brought up the subject of Veronica Gonzales' history of child abuse. (RT 54:5665-5672.) The judge indicated his view that the prosecutor could have an expert testify that the fact that Veronica Gonzales was abused as a child was not inconsistent with her becoming an abuser as an adult. (RT 54:5678-5679.)

The discussion turned to whether the prosecutor could ask about Battering Parent Syndrome while cross-examining a defense expert. Now the judge opined that it would be permissible for the prosecutor to bring out in cross-examination of a defense expert the fact that the childhood abuse suffered by Veronica Gonzales is not inconsistent with child abuse committed by her, and even that it is relatively common for abusers to have been abused themselves. However, the court believed it would be improper to try to get the defense expert to say that the prior abuse made it more likely that Veronica Gonzales was a current abuser. (RT 54:5685-5686.)

Defense counsel argued that this really amounted to improper profile evidence. The judge backed away from his previous position and became persuaded that the prosecutor should not be permitted to elicit evidence that it was common for abusers to have been abused themselves. Such evidence would imply a causal connection the judge was not prepared to endorse. (RT 54:5687-5690.)

Later, the prosecutor expressed a desire to elicit testimony from his expert witness, Dr. Nancy Kaser-Boyd, regarding abused children who turn into violent adults with poor rage control. He noted the defense had elicited evidence that victims of child abuse tend to become victims of domestic abuse, and he wanted to counter that with evidence that it could also cause a person to become an abuser. The prosecutor did not simply plan to introduce such evidence in the abstract. Instead, he wanted to elicit testimony that Veronica Gonzales was prone to inflict child abuse. (RT 74:9504-9507.)

Counsel for Veronica Gonzales stated she would not object to prosecution evidence that Veronica Gonzales' background was more consistent

with her being a batterer than with her being a battered woman. However, she noted there had been no defense expert testimony saying that Veronica Gonzales did not commit the charged crime. Counsel also noted that in the report Dr. Weinstein had prepared for the Ivan Gonzales defense, in which he concluded that Ivan was a battered spouse, he had noted that Ivan Gonzales had claimed he had been sexually molested by an uncle, and that he had been sodomized by his brother over a period of many years. Ivan's only brother, Armando Gonzales, was expected to be a prosecution witness. (RT 74:9515-9520.)

The prosecutor acknowledged he wanted to present testimony from members of Ivan's family that he had a good childhood. The prosecution expert would use such testimony to conclude that Ivan was less likely to have committed the charged crimes, even as an aider and abettor. Even if the judge would not allow such testimony from the expert, the prosecutor believed he could still argue that was a reasonable inference to draw from evidence of Ivan's good childhood. The prosecutor did not believe the defense could directly use Dr. Weinstein's report to prove that Ivan had been molested, since the report was hearsay. (RT 74:9526-9527.)

After further debate, the judge suggested that the evidence be limited to the point that being abused as a child is not inconsistent with becoming an abuser. The prosecutor rejected that suggestion, contending such testimony would have no teeth, and would mean nothing. (RT 74:9527-9539.)

The prosecutor then changed his position and stated he would not seek to introduce any direct propensity evidence, such as evidence that Veronica Gonzales' background made it more likely that she was a child abuser

herself. Instead, he would merely elicit expert testimony that children learn how to process rage by watching their parents, and that child abuse can set you up to be an abuser as well as a victim. (RT 74:9540-9541.)

The judge then summarized where he believed the matter stood. He believed the prosecutor wanted to provide expert testimony on two sequential points: 1) “that, in the abstract, children tend to model their parents and to learn how to manage rage from their parents;” and 2) “that in the abstract, the suffering of physical abuse as a child can set up a person to be an abuser in the same way or to the same extent it can set a person up to be a victim.” (RT 74:9543.) The judge did not expect the prosecutor to offer any expert opinion tying those principles to Veronica Gonzales. Instead, he would wait until argument to the jury and would then relate those principles to the rest of the evidence introduced in the case. The judge expected the prosecutor would not offer any propensity or profile evidence. (RT 74:9543.)

Counsel for Veronica Gonzales noted the defense did not introduce any evidence regarding rage management, so counsel believed any such prosecution evidence would be improper rebuttal. Counsel argued that there was no evidence regarding how Veronica Gonzales’ parents managed their rage; the evidence simply showed they were alcoholics who acted out. (RT 74:9549-9550.)

The judge again summarized what he believed was permissible. He did not expect the prosecutor to contend that someone with Veronica Gonzales’ background was likely to kill. Rather, he expected the prosecutor to contend that someone with this kind of background was no more likely to be a victim than an abuser. Put simply, some persons with such a background

would go one way and some would go the other. (RT 74:9555.) Defense counsel, however, reminded the court that the prosecutor had earlier said that such “consistency” evidence would have no teeth. (RT 74:9556; see RT 74:9539.) Instead, defense counsel believed the prosecutor intended to go further and point the finger at Veronica Gonzales, arguing that her background of abuse as a child helped prove that she was the one who killed Genny Rojas. Otherwise, the prosecutor should have been satisfied with the alternative the court had proposed earlier. (RT 74:9556.)

The judge responded that it was valid for the prosecutor to want to show that the alternatives were evenly balanced, rather than simply showing that one possibility did not exclude the other. Defense counsel argued that this was still profile evidence. The ultimate issue for the jury to resolve was who abused Genny Rojas, and defense counsel feared the prosecutor would use such evidence to claim that it was probably Veronica Gonzales. Defense counsel also argued there was an absence of evidence that Veronica Gonzales was stressed, or that she acted in a rage. (RT 74:9557-9562.)

Defense counsel also argued that in regard to getting into the references to child abuse suffered by Ivan Gonzales, as related in Dr. Weinstein’s report, if hearsay rules precluded the defense from using that, then fundamental fairness and Evidence Code section 352 should preclude the use of the evidence sought by the prosecutor. Counsel suggested as an alternative that the prosecutor should be restricted to asking the experts whether all people who are abused as children end up as victims or battered women. (RT 74:9576-9577.)

At this point, the trial court asked the prosecutor to clarify just what he expected his expert witnesses to say. (RT 74:9578.) The prosecutor responded:

“What I plan on doing, as I have said repeatedly, is offer generic testimony about the relationship between violence and being a victim or witness of violence as a child and the role modeling that occurs by seeing that type of violence. That, I will say these words again, that there’s, there’s this -- you learn the school of terror. You learn reaction from how, as a child, you saw families react to stress, that in a normal -- a normal person reacts to stress, let’s say a child crying or something like that, with annoyance. A person who has gone through tremendous experiences of violence may act with rage. And this becomes a reenactment type -- I’m spitting out what I’ve gotten from experts.” (RT 74:9579.)

The judge first viewed this as predictive evidence -- from a background of childhood abuse, violent rage as an adult is what follows. But the judge also viewed the prosecution offer as saying this was just one of multiple possibilities. (RT 74:9579-9580.) The prosecutor then added:

“I expect an abstract model about poor emotional control, poor stress management, reenactment when confronted with stress and that there is not a one-for-one relationship between the stress that one saw as a child and the stress that one reacts to or the way the reaction comes as an adult. I don’t, I don’t want to personally get into a battle of statistics and I don’t necessarily agree with the defense on this, but I don’t need to get into this now. If I need to get into a battle of statistics, I will.” (RT 74:9580.)

The prosecutor contended further that even if he did not put on any expert testimony in this area, the evidence already introduced would allow him to argue to the jury, "Gee, where do you think somebody learned this behavior, to do something like that to a kid?" (RT 74:9580-9581.) The judge agreed the prosecutor could do that, but he was still uncomfortable with a prosecution expert saying that a certain kind of background produces a certain kind of result. The prosecutor assured the court that his experts would merely say that this background could lead you one way as well as the other. Defense counsel suggested an Evidence Code section 402 hearing, so it would be clear what the experts would say. The court preferred to rely on the prosecution offer of proof, but he warned the prosecutor that if anything different was to be offered, the judge expected to hear about it in advance of actual testimony. The judge also stated he wanted nothing more done with this in argument beyond what he would be allowing in evidence. (RT 74:9580-9583.)

The judge explained his position in more detail:

"It's my view that it's reasonable for this jury to hear the battered woman's syndrome evidence as characterizing the defendant as a victim. In fact, I'll go further and say I'm not expecting much evidence countering the evidence of what happened to her as a child; so **I'm inclined to think it would be almost unreasonable for anybody not to see her as a victim.** That's going to be the defense view. The question is what the consequences of that are. And the battered woman syndrome evidence has drawn a line between her childhood abuse, her relationship with Ivan and how she behaves surrounding Genny. So I think the portrayal of her as a victim rather

than an abuser is squarely before the jury. And while I'm not willing to allow character evidence and propensity evidence to counteract that, I think it's proper rebuttal evidence for an expert to say that someone with experience as a victim of childhood abuse could become an abuser as well as a victim. And that's what I'm hearing the prosecutor say." (RT 74:9584-9585; emphasis added.)

The judge added that he did not want to hear an expert say that someone with such a background will be violent as an adult, just that violence is one of the possibilities. (RT 74:9587.)

Defense counsel next moved to preclude any evidence of the type of home that Ivan Gonzales grew up in, contending such evidence was not relevant. However, he did want to ask Armando Gonzales whether he had sodomized Ivan Gonzales when Ivan was a child. If Armando denied that, counsel wanted to ask him whether Ivan was lying if he said that to a psychologist. (RT 74:9593-9594.) In addition, defense counsel wanted to ask Dr. Mills whether Ivan Gonzales told him that he had been sodomized by Armando Gonzales. Counsel argued that hearsay by Ivan should not be a problem, because such a statement would come within the exception for declarations against societal interest. (RT 74:9604.)

Responding to the motion to preclude evidence of the favorable conditions in Ivan Gonzales' home during his childhood, the prosecutor contended that the defense had already raised Ivan's character as an issue. He saw the present issue as which spouse made the other bad. The prosecutor wanted to show that Ivan Gonzales was a nice guy before he met Veronica Gonzales. Defense evidence had claimed that 80% of batterers had been exposed to battering conduct previously, and the prosecutor wanted to show

that Ivan Gonzales was not violent until he met Veronica. (RT 74:9604-9607.)

The judge suggested asking each witness if Ivan Gonzales was ever battered during his childhood, get a negative response, and leave it at that without eliciting details. The judge also noted that the evidence already included a prior statement Veronica Gonzales made, saying that Ivan had an idyllic home life as a child. The judge saw no reason to muddy that up with details. He suggested Evidence Code section 352 could be used to preclude such details. (RT 74:9607-9609.)

Defense counsel argued that the statement Veronica Gonzales made to Karen Oetken about Ivan Gonzales' supposed idyllic childhood was made before she knew that Ivan had been sodomized by an uncle and by his brother. Also, the statement was made in the context of an interview by a social worker regarding whether the children of Ivan and Veronica should be put in the custody of Ivan's parents; since Veronica knew that was the only way to keep her children together, it was not surprising she would make such a remark. (RT 74:9611.)

Despite the concerns raised by both sides, the judge remained convinced that if the defense refrained from rebutting the statement Veronica Gonzales had made, then the prosecutor had all he needed and should be precluded from seeking more such proof. The court ruled, pursuant to Evidence Code section 352, that any further evidence pertaining to Ivan Gonzales' childhood home life was excluded. However, that did not exclude anything about his relationship with Veronica Gonzales. The judge also ruled

that the defense would not be permitted to ask Armando Gonzales if he had ever sodomized Ivan Gonzales. (RT 74:9613-9614.)

Subsequently, before the prosecutor elicited testimony from his expert, Dr. Kaser-Boyd, about the relationship between being abused as a child and being a batterer as an adult, defense counsel asked the court to reconsider whether such testimony should be allowed. She contended that when the matter was discussed earlier, the court's ruling allowing such evidence had been based on an incorrect assumption that the defense had already brought out such evidence. However, the judge responded that regardless of whether this line had been developed by the defense, it was proper rebuttal for the prosecutor to show that the kind of childhood background presented in the defense evidence about Veronica Gonzales did not lead inexorably in one direction or the other. The judge assured the defense that if the prosecution went too far in questioning its expert, the judge would stop them. (RT 77:10127-10132.)

Nonetheless, Dr. Kaser-Boyd's testimony did go further than the testimony the judge had agreed to allow. Instead of simply saying that suffering abuse as a child does not inexorably lead the victim in one direction or the other, she made it clear that such abuse would be expected to lead to violent behavior as an adult. She testified that Veronica Gonzales had Post-Traumatic Stress Disorder Complex, as a result of early child abuse. She explained that most children learn behavior by imitating a role model. Parents are strong role models. When children grow up and repeat behavior seen in their childhood home, that is called re-enactment. (RT 78:10150-10151.) She continued:

“If one has had a role model with poor emotional control who acted out frustration in emotionally uncontrolled ways, let’s say a parent who goes into a rage or a parent who is abusive in their actions, hits too hard, does things that make a child suffer, the child goes through terror, really, when they experience that. And the act of, or the experience of terror, we believe, causes changes in personality and it also causes changes in the developing brain.

Little people who feel terrified have more cortisol in their brains. They have often the frequent tapping of adrenalin and, over the long term, that damages parts of the brain that are required for good emotional control.” (RT 78:10151.)

Four days later, in his instructions to the jury, the judge did try to return to his original position, instructing the jury as follows:

“It’s important for you to understand the purpose for which certain evidence has been offered. The defense has offered defendant’s testimony that she did not commit the crimes for which she’s charged. They’ve also offered extensive evidence regarding the battered woman’s syndrome. The battered woman’s syndrome evidence is not offered to show that someone suffering from the battered woman’s syndrome could not or would not commit the crimes charged; rather, it is offered to prove a potentially innocent explanation for defendant’s failure to protect Genny and failure to provide medical care for her as well as to provide a context for defendant’s statements following Genny’s death.

Likewise, the People have offered evidence that a person’s childhood physical abuse could result in that person growing up to be either a victim or an abuser. This is not offered to show that someone abused as a child is more

likely to be an abuser as an adult; rather, it is offered to show that being a victim of physical abuse as a child is not inconsistent with commission of violent crimes as an adult. You must not consider this evidence for any purpose other than the purposes for which it was offered.” (RT 80:10362-10363.)

**B. It Was Improper to Allow the Prosecution to Use Evidence that Veronica Gonzales Was A Victim of Physical and Sexual Abuse as a Child in Order to Prove that It Was More Likely That She, Rather than Ivan Gonzales, Was Responsible for the Injuries to Genny Rojas**

*People v. Walkey* (1986) 177 Cal.App.3d 268 was discussed and referred to several times in the various hearings that eventually resulted in the ruling allowing the prosecution to elicit evidence to the effect that persons who are victims of childhood abuse often become abusers themselves when they become adults. *Walkey* is the only California authority to have fully considered the admissibility of such evidence for such a purpose.

In *Walkey*, the defendant was convicted of first degree murder and child endangerment. (Pen. Code sections 187, 273a, subd. (1).) Walkey and his wife had lived with another woman with whom Walkey was also intimate. Also living with the threesome was the two-year-old son of the other woman, Nathanel. Walkey was not Nathanel’s father, but did act in that role. On occasion he physically punished the boy. (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 271-272.)

On an occasion when the boy’s mother was out shopping, and Walkey and his wife were at home caring for the boy, the boy received a severe beat-

ing that resulted in his death. “The pathologist who performed the autopsy testified at trial Nathanel’s abdominal injuries were caused by a blow from a blunt object delivered with extreme force such that an average size female would not be able to inflict the injury.” (*Id.*, at p. 273.) A dentist who compared bite marks on the boy with the teeth of Walkey, Walkey’s wife, and the boy’s mother was confident that Walkey was the person who caused the marks. A physician testified that the boy was a battered child, and the number of bruises was inconsistent with accidental injuries. (*Id.*)

Walkey testified, denying that he ever struck the boy, claiming that he left the house for an hour-and-a-half, and that he returned to find the boy lying on his face at the bottom of a stairway. He also claimed he then bathed the boy and bit the boy on the arm after the boy bit him. He then laid the boy on a bed and when he returned 10 minutes later, the boy had vomited and was no longer breathing. (*Id.*)

One issue on appeal in *Walkey* was whether the trial court had erred in allowing medical testimony regarding “battering parent syndrome.” Referring to the testimony of the doctor who had concluded that the boy had been a battered child, the *Walkey* Court noted:

“He also explained to the jury the various factors constituting the profile of a child abuser, stating the most important single factor is ‘having been abused oneself in infancy or childhood.’ Other factors, he explained, were social isolation, unreasonable expectations of young children (including toilet training at a very early age), and stress.

After Walkey testified on direct examination, a juror sent the court a note asking whether

Walkey was an abused child. Walkey objected, under Evidence Code section 352, to the prosecution questioning him on this matter. The court overruled the objection, finding the probative value of this line of questioning outweighed its prejudicial effect.

The prosecutor was allowed to elicit from Walkey on cross-examination that when Walkey was a child, he was disciplined by being bitten and hit with a board. The prosecutor also asked Walkey whether he remembered telling Ellen Cosby that Walkey's stepfather used to take him out to the garage to beat him. Walkey denied telling this to Cosby. Following this testimony, the court refused Walkey's request to reopen the defense's case to have Walkey's stepfather testify he never took Walkey out to the garage to beat him. During closing argument, the prosecutor argued Walkey fit Dr. Chadwick's profile of a battering parent." (*Id.*, at p. 277.)

The Court of Appeal began its analysis by carefully distinguishing between battering parent syndrome and battered child syndrome:

"Battering parent syndrome represents a distinctly different concept from battered child syndrome. The latter has become an accepted medical diagnosis and expert testimony on the subject is admissible in child abuse prosecutions. (*People v. Jackson* (1971) 18 Cal.App.3d 504, 507.) An expert testifying as to the existence of the battered child syndrome expresses no opinion on a defendant's culpability; rather, such evidence is most often used by the prosecution to preclude an inference of accident. (See *People v. Ewing* (1977) 72 Cal.App.3d 714, 717.)" (*People v. Walkey, supra*, 177 Cal.App.3d at p. 278, fn. 7.)

An analogous distinction holds true in the present case. Like battered child syndrome, the Battered Woman's Syndrome evidence in the present case included no expression of any expert opinion on Veronica Gonzales' culpability, but was used by the defense only to provide an explanation for Veronica Gonzales' failure to better protect Genny Rojas from Ivan Gonzales, and to offset any inference that she intended to aid and abet Ivan in his abuse of Genny Rojas.

The Court of Appeal in *Walkey* found battering parent syndrome evidence to be inadmissible:

“ ‘Such evidence invites a jury to conclude that because the defendant has been identified by an expert with experience in child abuse cases as a member of a group having a higher incidence of child ... abuse, it is more likely the defendant committed the crime.’ (*State v. Maule* (1983) 35 Wash.App. 287 { [667 P.2d 96, 99].}) Thus, the nature and extent of the potential prejudice to a defendant generated by character evidence renders it inadmissible. (*Michelson v. United States* (1948) 335 U.S. 469, 475-476 [93 L.Ed. 168, 173-174, 69 S.Ct. 213].) We agree with those courts holding the prosecution may not introduce character evidence of a defendant to show the defendant has the characteristics of a typical battering parent.” (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 278-279.)

Similarly, here, when Dr. Kaser-Boyd testified in scientific detail how exposure to violence perpetrated against oneself while a child causes changes to one's personality and developing brain, and those changes tend to cause such persons to repeat the violent behavior against their own children, she made it unmistakably clear that the prosecution believed this made it more likely that

Veronica Gonzales, rather than Ivan Gonzales, was responsible for the violence against Genny Rojas. The Court in *Walkey* noted: “Although Dr. Chadwick never expressly concluded Walkey fit the profile, his testimony clearly implicated Walkey's character.” (*Id.*, at p. 279.) In the same manner here, while Dr. Kaser-Boyd did not expressly state that Veronica Gonzales learned violent behavior from her parents, her testimony clearly implicated Veronica Gonzales’ character.

It is true that *Walkey* also noted:

“The prosecution may not cross-examine the defendant as to specific matters in an attempt to prove bad character until and unless the defendant first puts in evidence of his good character. (*People v. Terry* (1970) 2 Cal.3d 362, 400.) Here, Walkey did not put his character in evidence.” (*People v. Walkey, supra*, 177 Cal.App.3d at p. 279.)

Although the People may try to contend that Veronica Gonzales had first put her good character in issue in the present case, that was simply not true. As her counsel carefully pointed out, proper rebuttal should have been limited to eliciting evidence that Veronica Gonzales’ background of being abused as a child was just as likely to make her a spouse abuser as a battered woman. Nothing in the defense evidence suggested that Veronica Gonzales’ background had any relationship to the likelihood that she would or would not abuse a child. (RT 9563.) Even the trial court expressly recognized that the defense evidence about Battered Woman’s Syndrome was not used to say Veronica Gonzales did not commit the present crime, but only to explain her failure to better protect Genny Rojas. (RT 74:9510.)

The prosecution rebuttal effort was without evidentiary support in other respects. Dr. Kaser-Boyd's testimony about the impact of a history of being abused as a child focused on rage management as an adult. But there was no evidence whatsoever to support a conclusion that Veronica Gonzales ever expressed inappropriate rage toward any child. The evidence was both compelling and undisputed that Veronica Gonzales had a loving relationship with all the children. She took all 6 of her children with her on each of the many occasions she separated from Ivan Gonzales. A number of witnesses described seeing Veronica Gonzales with children, always having one in her arms and another wrapped around a leg. No witness ever described her hitting a child or expressing any kind of rage toward a child.

The erroneous admission of battering parent syndrome evidence in *Walkey* was found to be harmless because of the very strong evidence that it was Walkey and not another person who intentionally inflicted the injuries that resulted in the death of the victim. (*People v. Walkey, supra*, 177 Cal.App.3d at p. 279-280.) In sharp contrast, in the present case there was solid evidence that it was Ivan Gonzales, and not Veronica Gonzales, who caused the injuries that resulted in the death of Genny Rojas. The suggestion improperly planted by the testimony elicited from Dr. Kaser-Boyd was probably the strongest evidence the prosecution had to place blame for Genny Rojas' death on Veronica Gonzales. In light of the closeness of the evidence, the harm could not have been eliminated by the limiting instruction given by the court after the jury had time to think for four days about the testimony of Dr. Kaser-Boyd. (See *People v. Hogan* (1982) 31 Cal.3d 815, 847, regarding the necessity for an admonition to be prompt in order to have

any hope of curing error.) In these circumstances, the error cannot be deemed harmless, even under the standard of review set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. Moreover, since the error deprived Veronica Gonzales of her federal Fifth, Sixth, and Eighth Amendment rights to a fair trial in accordance with due process of law, and to reliability in the evidence that supported a death verdict, the error should be measured under the stricter standard of *Chapman v. California* (1967) 386 U.S. 18, 24. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Pointer v. Texas* (1965) 380 U.S. 400, 405; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

**C. Once the Court Did Decide to Allow the Prosecution to Use Evidence that Veronica Gonzales Was A Victim of Physical and Sexual Abuse as a Child in Order to Prove that It Was More Likely That She, Rather than Ivan Gonzales, Was Responsible for the Injuries to Genny Rojas, It Was Improper to Preclude the Defense from Eliciting Evidence that Ivan Gonzales Also Suffered Abuse as a Child**

In the preceding section it was shown that it was improper for the trial court to allow the prosecution to elicit any expert testimony suggesting there was any relationship between a history of being abused as a child and the likelihood of becoming a child abuser. However, even if there was no error

in allowing such evidence, once it was allowed it was incumbent on the trial court to allow the defense to fairly respond to it with evidence that Ivan Gonzales, as well as Veronica Gonzales, had suffered abuse as a child. Similarly, if this Court agrees that it was error to allow the evidence discussed in the last section of this argument, then this additional error exacerbated the harm caused by the initial error.<sup>115</sup>

As recognized by the trial court, the jury had heard evidence of a statement that Veronica Gonzales made to social worker Karen Oetken regarding the fact that Ivan Gonzales had a good childhood. (RT 74:9609; see also RT 69:8271.) These statements were made in the context of an interview with a social worker after Ivan and Veronica Gonzales were both under arrest, and decisions were being made about where the six Gonzales children would be sent to live. Veronica Gonzales wanted her six children to remain together and had nowhere else to suggest sending them except for Ivan Gonzales' parents. (RT 69:8371.) In these circumstances, it would not be surprising that Veronica Gonzales would have assured that social worker that Ivan's parents would be good parents. Furthermore, this interview occurred long before Veronica Gonzales learned that Ivan Gonzales told his defense

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115. Of course, if it was error to allow the child abuse evidence to be used against Veronica Gonzales, then it would have also been error to allow the use of sexual abuse perpetrated on Ivan to prove he was more likely the abuse of Genny Rojas. But the point here is that the trial court *did* allow the child abuse evidence to be used against Veronica. That error was made even more prejudicial because of the inconsistent ruling that precluded the defense from eliciting comparable evidence regarding Ivan.

expert that he had been sexually abused over a period of years during his childhood by an uncle and by his brother.<sup>116</sup> (See RT 74:9611.)

Thus, the jury had received information pointing strongly in one direction, even though it was of questionable reliability. The defense possessed a good faith belief there was strong information pointing in a very different direction. If the prosecution was to be allowed to suggest a direct relationship between being a victim of childhood abuse and later becoming an abuser, simple fairness demanded that the defense be allowed to demonstrate that Veronica Gonzales was not the only adult in the Ivan and Veronica Gonzales household with such a background.

Nonetheless, the trial court squarely ruled that the defense would not be permitted to ask Armando Gonzales whether it was true that he had sodomized his brother Ivan over a period of years, when Ivan was younger. (RT 74:9613-9614.) In addition to having a good faith basis for asking Armando Gonzales such a question, the defense also should have been permitted to call Dr. Weinstein as a witness and to ask him about Ivan Gonzales' statements to him regarding the sexual abuse he suffered at the hands of his uncle and brother. The statements that Ivan Gonzales made to Dr. Weinstein fall squarely with the hearsay exception for statements against societal interest.

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116. In any event, even if Veronica Gonzales had known about the sodomy allegations prior to the time she talked to the social worker, the fact that Ivan may have been subjected to such abuse by a now-deceased uncle and/or by a brother who was no longer living in the home of the parents was not necessarily relevant to the issue of whether Ivan's mother and father would make good foster parents for the Gonzales children.

Evidence Code section 1230 provides in pertinent part:

“Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, ... created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.”

This exception was applied in *People v. Wheeler* (2003) 105 Cal.App.4<sup>th</sup> 1423. There, police investigating a homicide interviewed the defendant’s wife. She admitted that, shortly before the defendant killed the victim, she had told the defendant that she had committed adultery with the victim. At trial, the wife invoked spousal privilege, making her unavailable as a witness. Her statement, deemed relevant to show the defendant’s motive, was admitted under the social interest hearsay exception of Evidence Code section 1230.

The Court of Appeal analyzed that hearsay exception in some detail. The Court first explained the origin of the exception:

“California adopted the social interest exception in 1965 as an integral part of the original Evidence Code. (§ 1230; Stats. 1965, ch. 299, § 2.) The intent of the Law Revision Commission, which recommended legislative adoption of the new code, was to make the social interest exception ‘sufficiently broad’ to admit previously inadmissible statements about illegitimacy, pregnancy out of wedlock, and impotency (Citation omitted) ...” (*People v. Wheeler, supra*, 105 Cal.App.4<sup>th</sup> at p. 1427.)

The Court then recognized that an admission of adultery did not come directly within the categories of illegitimacy, pregnancy out of wedlock, or impotency. Nonetheless, the Court concluded, "A statement to one's spouse about adultery certainly runs no smaller risk, and arguably incurs a greater risk, of making the declarant an object of social disgrace than do any of the three statements the Law Revision Commission expressly intended the social interest exception to embrace." (*id.*, at p. 1427-1728.) Similarly, in the present case, Ivan Gonzales was a county jail inmate who faced the very real prospect of spending the rest of his life in prison. When someone in those circumstances admits being sodomized by an uncle and a brother over a period of years, he creates such a risk of making himself an object of ridicule or social disgrace among other inmates that no reasonable person in his position would have made such statements unless they were true.

*Wheeler* next discussed other cases that had construed the social interest hearsay exception. The Court explained:

"In the first case, *In re Weber* (1974) 11 Cal.3d 703, a prison inmate who testified the petitioner solicited him to offer a bribe later told another inmate his testimony was perjury. (*id.*, at pp. 711-712.) At a posttrial evidentiary hearing, the petitioner sought in vain to introduce the statement under the social interest exception after the inmate who heard the statement invoked the privilege against self-incrimination. (*id.*, at pp. 712-713.) On the rationale that an admission of perjury might both impair and improve one's social standing in the inmate community, the Supreme Court upheld the exclusion of the statement. (*id.*, at p. 722.) In the case at bar, on the other hand, nothing in the record suggests Gracie's statement about adultery could possibly

have improved her social standing with anyone.”  
(*People v. Wheeler, supra*, 105 Cal.App.4<sup>th</sup> at p.  
1428.)

In the present case, as in *Wheeler*, and unlike *Weber*, nothing suggests that Ivan Gonzales' admissions of being a victim of sodomy over a period of years could have possibly improved his social standing in the jail setting he lived in at the time of his statements.

*Wheeler* went on to find the statement at issue there was sufficiently trustworthy, even though made during a homicide investigation. Looking at the words that were spoken, the circumstances under which they were spoken, and the possible motivation of the declarant, the *Wheeler* Court found no apparent motive to lie about the adultery in a homicide investigation in which the wife was not a suspect. Similarly in the circumstances shown in the present case, even if Ivan Gonzales wanted to lie to the expert witness hired by his own defense, one would expect that claiming to have been a victim of repeated sodomy would be the last thing a county jail inmate would contrive.

Indeed, if Ivan Gonzales lied to his own expert, it could have only occurred in the hope that it would result in useful evidence for his trial. He must have realized that would result in public awareness of his claim of being sodomized, and that the brother he accused would hear this claim, along with both of his parents. Once again, if he was determined to lie there are many other lies he could have concocted that would not cause the social problems that such an accusation would cause, both among the jail inmates he lived with and among his relatives who attended the trial daily. Under

these circumstances there is no reason to conclude he would have discussed a childhood history of being sodomized unless it was true.

Thus, the present case should come within the social interest exception, or should at least be seen as so close that the policy rationales that support the social interest exception and many other hearsay exceptions were fully satisfied here. But as noted earlier, even if this hearsay exception is found inapplicable, there would have been no hearsay problem in asking Armando Gonzales directly whether he had sodomized his brother.

In these circumstances, in a capital case, the refusal to either recognize or fashion a hearsay exception and allow the defense to utilize reliable and crucial evidence was an abuse of discretion. It also resulted in a denial of Veronica Gonzales' federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fair trial in accordance with due process of law, to present a defense, to confront and cross-examine the witnesses against her, and to reliability in the fact-finding that supported a capital verdict. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *Green v. Georgia* (1979) 442 U.S. 95, 60 L.Ed.2d 738, 99 S.Ct. 2150; *Chambers v. Mississippi* (1973) 410 U.S. 284; *Pointer v. Texas* (1965) 380 U.S. 400, 405; *Wealot v. Armontrout* (8<sup>th</sup> Cir. 1992) 948 F.2d 497; *Estelle v. McGuire* (1991) 502 U.S. 62; *Washington v. Texas* (1967) 388 U.S. 14, 18-19, 87 S.Ct 1920, 1923, 18 L.Ed.2d 1019; *Miller v. Angliker* (2<sup>nd</sup> Cir. 1988) 848 F.2d 1312, 1323; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65

L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S.  
280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

### III. THE JURY INSTRUCTIONS ON THE REQUIRED MENTAL STATES FOR THE TORTURE/MURDER THEORY OF FIRST DEGREE MURDER, THE MAYHEM FELONY/MURDER THEORY OF FIRST DEGREE MURDER, AND THE RELATED SPECIAL CIRCUMSTANCES WERE INCOMPREHENSIBLE

#### A. Introduction

The jury was not instructed that they could find Veronica Gonzales guilty of murder in the first degree on the traditional theory of a willful, deliberate, and premeditated murder. The prosecutor conceded he could not prove such a theory. (RT 79:10311.) The only theories of first degree murder on which the jury was instructed were torture/murder and felony-murder, with mayhem as the underlying felony. (CT 16:3664-3666.) Complicating the mental state issues, the jury was also instructed on second degree felony murder, with torture as the underlying felony. (CT 16:3670.) Complicating the mental state elements even further, the jury was also instructed on first and second degree felony-murder on an aiding and abetting theory. (CT 16:3667, 3671.) In addition, the jury was instructed on the elements of the torture/murder and mayhem/murder special circumstances. (CT 16:3693-3694, 3696.) The jury found Veronica Gonzales guilty of first degree murder, but did not specify the theory on which they relied. However, the jury also found both special circumstances true, indicating they apparently found both torture/murder and mayhem/felony-murder theories of first degree murder proved beyond a reasonable doubt.

In this argument, it will be shown that the instructions explaining the elements of the requisite mental states and other elements needed to support

the mayhem or torture theories of first degree murder, or to support either the mayhem or the torture-murder special circumstances, were so complex and confusing that lay jurors could not possibly have understood the fine distinctions that were made.

### **B. Procedural Background**

Initially, the only special circumstance charged against Ivan and Veronica Gonzales was the torture/murder special circumstance.<sup>117</sup> As will be shown, the elements of that special circumstance included not only the infliction of extreme and prolonged pain, but also the intent to inflict such pain and the intent to kill. Apparently the inability of Ivan Gonzales' original jury to reach a unanimous penalty verdict was based on lingering doubts about his intent to kill Genny Rojas. (CT 10:2102, ll. 13-15.) To reduce the likelihood of any problem in proving intent to kill at Veronica Gonzales' trial, the

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117. Penal Code section 206 sets forth the crime of torture:

“Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose, inflicts great bodily injury ... upon the person of another, is guilty of torture.

The crime of torture does not require any proof that the victim suffered pain.”

Pursuant to Penal Code section 189, “All murder ... which is committed in the perpetration of, or attempt to perpetrate, ... any act punishable under Section 206 ... is murder of the first degree.”

Pursuant to Penal Code section 190.2(a)(18), a special circumstance exists when “The murder was intentional and involved the infliction of torture.”

prosecutor moved to amend the Information to add a mayhem/murder special circumstance, which did not require any intent to kill.<sup>118</sup> (CT 10:2120-2121.)

During discussions about guilt phase instructions, defense counsel raised a number of concerns about the torture and mayhem allegations. As discussions proceeded, it became apparent that even the highly experienced defense attorneys and prosecutors and judge found the various intent requirements difficult to understand. Defense counsel believed that the mayhem theory of felony-murder required proof of intent to maim, but it was not clear that the mayhem special circumstance had such a requirement. In contrast, the torture theory of first degree murder did not appear to have any intent requirement, but the torture special circumstance did require an intent to kill. Counsel was concerned that a juror could base first degree murder on a torture theory, without finding any intent element, and then find the mayhem special circumstance true, again without finding any intent element. He also argued that special circumstances are supposed to serve a narrowing func-

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118. Pursuant to Penal Code section 203, "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem."

Pursuant to Penal Code section 189, "All murder which is ... committed in the perpetration of, or attempt to perpetrate, ... mayhem, ... is murder of the first degree." Pursuant to Penal Code section 190.2(a)(17)(J), a special circumstance exists when "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, ... Mayhem in violation of Section 203."

tion, so the mayhem special circumstance should be more restrictive than the mayhem theory of felony-murder, not less restrictive. (RT 79:10309-10314.)

To avoid both of these problems, he argued that the mayhem special circumstance must also include the intent to maim element and a specific intent to kill element. He based his arguments on principles of federal equal protection and due process, as well as the federal Eighth Amendment need for reliability. Since the torture and mayhem allegations were based on the very same facts,<sup>119</sup> it was arbitrary and capricious to allow the jury to bypass any intent to kill element by relying on the mayhem theory. Counsel also found it unfair to have the same facts be simultaneously judged under two different standards of proof. The only solution he could see was to add a specific intent to kill element to the mayhem special circumstance, if it was based on a theory that Veronica Gonzales was the direct perpetrator.<sup>120</sup> (RT 79:10316-10334.)

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119. Eventually, the prosecutor expressed agreement that the two special circumstances were based on the same acts. (RT 80:10530-10531.)

120. The problem would be solved if guilt was based on an aid and abet theory, since that would have its own intent to kill element. (See Penal Code § 190.2, subd. (c):

“Every person, not the actual killer, who, **with the intent to kill**, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4.”)

The trial judge readily agreed that under the evidence as presented, it would be quite reasonable for the jury to find no proof of intent to kill. (RT 79:10327.) He also agreed that the mayhem special circumstance appeared to require fewer elements than the mayhem theory of felony-murder, even though a special circumstance should require more. (RT 79:10330.)

The prosecutor initially argued there was no problem because the narrowing function of special circumstances was satisfied if they merely narrowed the class of all first degree murders down to a smaller class of murders. (RT 79:10342.) He saw no difference between basing a felony-murder and special circumstance both on a mayhem theory, versus basing both on a burglary theory or a robbery theory or a rape theory or a kidnap theory. (RT 79:10342-10345.) Defense counsel pointed out that the various felonies the prosecutor listed had their own intent requirements, absent from mayhem. (RT 79:10345-10346.) As the discussion continued, even the prosecutor conceded he was uncomfortable with the fact that the mayhem special circumstance appeared to require fewer elements than mayhem as a theory of felony-murder. (RT 79:10350.)

The judge then noted that the intent to maim element was incorporated into mayhem felony murder by judicial decisions. (See *People v. Sears* (1965) 62 Cal.2d 737, 744-745.) He questioned whether that would mean it was incorporated into the mayhem special circumstances. Because the mayhem felony-murder language in Penal Code section 189 was almost identical to the mayhem special circumstance language in Penal Code section 190.2, subd. (a)(17)(J), the judge found it hard to conclude that the legislature intended a different meaning. The judge was also uncomfortable with the no-

tion of a special circumstance that required fewer elements than felony-murder. (RT 79:10352-10356, 80:10457-10459.)

The judge ultimately concluded that a specific intent element should be included in the instruction pertaining to the mayhem special circumstance. (RT 80:10471-10477.) The discussion then turned to what the element should be. The judge saw as one possibility a requirement of a specific intent to commit mayhem. Alternatively, he could list the various acts that would constitute mayhem and instruct on the need to find a specific intent to commit one of those acts. A third possibility was to limit the acts constituting mayhem to those shown by the present evidence. The judge believed that would be limited to a specific intent to disfigure. (RT 80:10477.) Defense counsel suggested the alternative of instructing on the need to find a specific intent to maim. (RT 80:10478-10479.)

The trial court expressed the concern that a jury would not know what “maim” actually meant, or that it was synonymous with mayhem. The judge noted that before going to law school, he would have thought “mayhem” simply meant a melee. (RT 80:10481.)

The discussion then turned to the intent requirement if the jury determined guilt on an aid and abet theory. Defense counsel believed that the actual perpetrator would have to have intent to commit mayhem, and the person who aids and abets would have to share that intent. The judge thought it would be sufficient if the person aiding had the intent to murder. The prosecutor believed that reckless endangerment would be sufficient. The judge countered that reckless endangerment was the minimum required to satisfy

United States Supreme Court cases, but he believed California law required more than that. (RT 80:10489-10494.)

As the discussion continued, the prosecutor persuaded the judge that the direct perpetrator must intend to commit mayhem, but an aider and abettor who is not a major participant needed only intent to kill. An aider and abettor who was a major participant only needed a mental state of reckless indifference. (RT 80:10496.) Defense counsel argued that it should not be easier to find the special circumstances true for an aider and abettor than it would be to find them true for a direct perpetrator. The judge disagreed, expressing the belief that it was always true that less was required to convict on an aid or abet theory. Both sides and the court were in agreement that the direct perpetrator must have specific intent to commit mayhem. (RT 80:10496-10504.)

The trial court then expressed the view that aiding and abetting applied only to the crime and not the special circumstance; if you were guilty of the crime on an aid and abet theory, then the special circumstance was simply another fact to prove. The judge concluded it would be sufficient to add language to the list of elements for the mayhem special circumstance, in CALJIC 8.81.17, saying that the perpetrator must have specific intent to commit mayhem. With that addition, the mayhem special circumstance would have an element absent from the torture special circumstance. Thus, the judge saw no need to add an intent to kill element to the mayhem special circumstance just because the torture special circumstance had such a requirement. He saw intent to kill as a necessary element only if the jury concluded Veronica Gonzales was not the direct perpetrator and was also not a

major participant. The prosecutor agreed with that assessment and defense counsel submitted the matter on the arguments he had already made. The judge ruled in accordance with the summary he had just given. (RT 80:10504-10515.)

Next, there was a discussion of the requirement of *People v. Green* (1980) 27 Cal.3d 1, 59-61, that the murder not be merely incidental to the felony used to support felony-murder. The prosecutor argued that *Green* applied only if there was an intent to kill. If there was no intent to kill, then all the concerns underlying the *Green* rule were already met. (RT 80:10517-10528.)

Defense counsel then argued that the jury should also be instructed on second degree felony-murder, with Penal Code section 206 torture as the felony. He believed the difference between 1<sup>st</sup> degree torture/murder and 2d degree felony/murder based on torture was that the second degree alternative would not require proof of premeditation or deliberation. The prosecutor disagreed. (RT 80:10536-10539.) He also noted that if the jurors were instructed on torture felony/murder and on mayhem felony/murder it would be confusing for them. The Court agreed with that, but added that it would be confusing for jurors even without instructing on torture felony/murder. The judge decided to think about that matter further. (RT 80:10540.)

**C. The Instructions Actually Given Regarding the Mental States Required for First Degree Murder and for the Charged Special Circumstances Were Incomprehensible**

After the long and confused discussion between the court and counsel regarding the various mental state requirements, it is not surprising that the instructions actually given were virtually incomprehensible to a lay juror.

Preliminarily, in the course of instructing on the need for the concurrence of an act and any required specific intent, the jury was told:

“The specific intent required for the mayhem murder special circumstance is the specific intent to commit mayhem. The specific -- and that will be included again as I give you the definitions for the special circumstances.

The specific intent required for the crimes of murder and the lesser crimes of torture and accessory after a felony as well as the torture murder special circumstance are included in the definitions of those crimes and the definition of the torture murder special circumstance, which I'll be getting to in just a few moments.” (CT 16:3654, RT 82:10644; CALJIC 3.31.)

Soon afterward, the jury was told requirements might differ if they concluded Veronica Gonzales was not the actual killer, but was instead guilty on an aid and abet theory. Whatever the actual differences might be was tantalizingly saved for later:

“In addition, if you find that the defendant was not the actual killer in the special circumstance of murder during the commission of a mayhem, there must exist a union or joint operation of act or conduct and either a certain specific intent or a certain mental state in the mind of the individual. Unless this specific intent or this

mental state exists and you find that the defendant is not the actual killer, the special circumstance murder during the commission of mayhem is not committed.

The actual specific intent or the mental states required in these crimes, special circumstance, is included in the special circumstances instruction set forth elsewhere in these instructions.” (CT 16:3656; RT 82:10645; CALJIC 3.31.5.)

In defining the crime of murder, the Court instructed the jury that one essential element was that “The killing was done with malice aforethought or occurred during the commission or attempted commission of mayhem.” (Emphasis added; CT 16:3662, RT 82:10649; CALJIC 8.10.) By inference, this told the jury that the torture theory of first degree murder required a finding of malice aforethought, but the mayhem theory did not have such a requirement. This was followed by the standard definition of “malice aforethought.” (CT 16:3663, RT 82:10649-10650; CALJIC 8.11.)

Notably, the instruction just quoted, defining the crime of murder, also instructed the jury on the concept of second degree felony murder, with mayhem as the felony. This aspect of the instruction was almost subliminal, since nothing about felony-murder was mentioned during this instruction. This instruction told the jury that if there was an unlawful killing of a human being during the commission of mayhem, that crime was murder. Subsequent instructions define the elements of first degree murder and, by inference, if the jury did not find the elements of first degree murder were proved, then an unlawful killing of a human being during the commission of mayhem would necessarily be second degree murder. However, it is unlikely the jury would have realized at this point that they were being offered such an

option. Indeed, a moment later the jury was expressly told, "There's two possible theories of first degree murder that will be presented to you. One is a felony murder theory based on the crime of mayhem ..." (RT 10650, ll. 11-13.) That would have surely left the jury believing that any felony-murder found with mayhem as the felony must be first degree felony-murder.

Next, the jury was told about the intent requirement for the mayhem theory of first degree murder:

"The unlawful killing of a human being, whether intentional, unintentional or accidental which occurs during the commission or attempted commission of the crime of mayhem, is murder of the first degree when the perpetrator had the specific intent to commit that crime, mayhem.

The specific intent to commit mayhem and the commission or attempted commission of such crime must be proved beyond a reasonable doubt." (CT 16:3664; RT 82:10650; CALJIC 8.21.)

This was followed immediately by a definition of the elements of the crime of mayhem:

"Every person who unlawfully and maliciously deprives a human being of a member of his or her body or disables, permanently disfigures or renders it useless or who cuts or disables the tongue or puts out an eye or splits the nose, ear or lip is guilty of the crime of mayhem.

In order to prove this crime, each of the following elements must be proved, and there are two elements. Number one, one person unlawfully and by means of physical force deprived a human being of a member of his or her body or disabled, permanently disfigured or rendered it useless and, two, the person who committed the

act causing the bodily harm did so maliciously. That is, with an unlawful intent to vex or annoy or injure another person.

It is not a defense that a disfigurement has been or may be medically alleviated.” (CT 16:3665; RT 82:10650-10651; CALJIC 9.30.)

Thus, the only intent required for the commission of the crime of mayhem was the intent to vex or annoy or injure. However, as noted above, the jury had previously been instructed that the mayhem special circumstance required proof of specific intent to commit the crime of mayhem. (CT 16:3654, RT 82:10644; CALJIC 3.31.) To a lay juror, this would sound quite circular. It would appear that the special circumstance required no more than the intent to vex or annoy or injure. What else would be meant by requiring an intent to commit a crime that is committed when there is simply an intent to vex or annoy or injure?

This was followed by a relatively complicated definition of the elements of first degree torture murder:

“Murder which is perpetrated by torture is the murder of the first degree. The essential elements of murder by torture are--and there's three of them--number one, one person murdered another person; Number two, the perpetrator committed the murder with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose; and, number three, the acts or actions taken by the perpetrator to inflict extreme and prolonged pain were the cause of the victim's death.

The crime of murder by torture does not require any proof that the perpetrator intended to kill his victim or any proof that the victim was aware of the pain or the suffering.

The word 'willful' as used in this instruction means intentional. The word 'deliberate' means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word 'premeditated' means considered beforehand." (RT 82:10651-10652; CT 16:3666; CALJIC 8.24.)

Next, an instruction on first degree murder on an aid-and-abet theory added more aspects to the myriad state-of-mind determinations facing the jury, all in a single sentence containing 94 words:

"If a human being is killed by any one of several persons engaged in the commission or attempted commission of the crime of mayhem, all persons who either directly and actively commit the act constituting the crime or who, with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the events, aid, promote, encourage or instigate by act or advice its commission, are guilty of murder in the first degree, whether the killing is intentional, unintentional or accidental." (RT 82:10652; CT 16:3667; CALJIC 8.27.)

This was followed by standard and brief definitions of basic second degree murder and second degree murder by a killing resulting from an unlawful act that is dangerous to life. (CT 16:3668-3669; RT 82:10652-10653; CALJIC 8.30, 8.31.) This was introduced by the statement that there were "three possible theories that will be offered to you for consideration of second degree murder. (RT 82:10652, ll. 22-23.) The third theory was second degree murder felony murder, with torture as the felony. Thus, the jury was told there were three theories of second degree murder, and second degree

felony murder with mayhem as the felony was expressly **not** included. This may indicate the earlier subliminal instruction on second degree felony murder based on mayhem did **not** mean the jury was allowed to choose such an option. But then, what did it mean? This will be discussed further in the next section of this argument.

The instruction on second degree felony-murder with torture as the felony was shorter and simpler than the earlier one on first degree murder by torture. The differences between first degree murder by torture and second degree murder by torture could not have been discerned by anybody without a law degree:

“And the third, the third theory of second degree murder is as follows, the unlawful killing of a human being, whether intentional, unintentional or accidental, which occurs during the commission or attempted commission of the crime of torture, is murder of the second degree when the perpetrator had the specific intent to commit that crime, torture.

The specific intent to commit torture and the commission or attempted commission of such a crime must be proved beyond a reasonable doubt.” (RT 82:10653; CT 16:3670; CALJIC 8.32.)

Thus, the jury was told that second degree torture murder required the specific intent to commit torture, but the killing itself could be intentional, unintentional, or even accidental. However, torture itself was not defined, so the jury was initially left to wonder what the specific intent to commit torture

entailed.<sup>121</sup> Also, the jury had already been instructed that murder perpetrated by torture is murder of the first degree. In that instruction, nothing was said about intending to commit torture, but the required elements did include “a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose...” (RT 82:10651-10652; CT 16:3666; CALJIC 8.24.) Is that something more, or something less, or is it exactly the same as the intent to commit torture required for second degree murder? Once again, how could lay jurors be expected to reach a rational decision whether to label this crime first degree torture murder or second degree torture murder?

The next instruction consisted of another very long sentence, containing 102 words. This instruction added additional aspects to the state-of-mind determinations, defining second-degree felony murder, committed by aiding and abetting:

“If a human being is killed by any, any one of several persons engaged in the commission or attempted commission of the crime of torture, a felony inherently dangerous to human life, all persons who either directly or actively commit the act constituting the crime or who with knowledge of the unlawful purpose of the perpetrator of the crime and with the intent or purpose of committing, encouraging or facilitating the commission of the crime, aid promote, encourage or instigate by act or advice its com-

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121. Eleven instructions later, the crime of torture was finally defined. (CT 16:3681.) That instruction will be discussed later in this argument.

mission, are guilty of murder in the second degree, whether the killing is intentional, unintentional or accidental.” (CT 16:3671, RT 82:10653-10654; CALJIC 8.34.)

Other than identifying the underlying felony, this instruction was nearly identical to the one given earlier pertaining to first degree mayhem murder. This could only further confuse the jury regarding the differences, if any, between first and second degree murder by aiding and abetting. Also, no instruction was given directly relating aiding and abetting to first degree torture murder, continuing to leave the jury in doubt regarding whether there was any meaningful difference between first and second degree torture murder.

The jury was next instructed on the need to determine whether a murder was of the first degree or the second degree. (CT 16:3672; RT 82:10654; CALJIC. 8.70.) This was followed by an instruction explaining that if the jury was convinced beyond a reasonable doubt that the defendant was guilty of murder, but also unanimously agreed there was a reasonable doubt whether it was murder of the first degree or the second degree, the defendant must receive the benefit of the doubt and a verdict of second degree murder. (CT 16:3673; RT 82:10654; CALJIC 8.71.) Of course, if the jurors simply failed to discern what the difference was between first degree murder and second degree murder, then one has to doubt whether they would have been willing to award a second degree murder verdict simply by default.

The jury was next given a series of instructions pertaining to manslaughter (CT 16L3674-3678; RT 82:10654-10656.) This was followed by informing the jurors they need not agree on a particular theory of first degree

murder. (CT 3679; RT 82:10656.) Next, they were told that duress was no defense to capital murder. (CT 16:3680; RT 82:10657.)

After all those instructions, the jury was finally given the definition of the crime of torture:

“Okay. Now, as I indicated to you, in addition to murder and manslaughter, there are a variety of other, what we call lesser related offenses that you may consider. And I’m going to define each of those one by one for you.

A lesser related crime is the crime of torture, in violation of penal code section 206. Every person who, with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion or for any sadistic purpose inflicts great bodily injury upon the person of another is guilty of the crime of torture, a violation of section 206 of the penal code.

When I say “great bodily injury” in this instruction, I mean a significant or substantial physical injury.

The crime of torture does not require any proof that the perpetrator intended to kill the other person or the person upon whom the injury was -- excuse me.

Let me say this again. The crime of torture does not require any proof that the perpetrator intended to kill the other person or that the person upon whom the injury was inflicted suffered any pain.

In order to prove this crime, each of the following elements must be proved, number one, a person inflicted great bodily injury upon the person of another; And, two, the person inflicting the injury did so with specific intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion or for any sadistic purpose.” (CT 16:3681; RT 82:10657-10658; CALJIC 9.90.)

The problem with this instruction is that it was introduced with the statement that torture was a lesser related crime, an alternative to the crimes of murder or manslaughter. In view of that, and the number instructions read to the jury between it and the earlier murder instructions, the jury would not be likely to conclude that this definition of torture also applied to the crime of second degree torture murder or first degree torture murder, or both of those crimes.

Furthermore, the earlier first degree torture murder instruction required proof of a “willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living human being ...” (RT 82:10651-10652; CT 16:3666; CALJIC 8.24.) The instruction defining the crime of torture required proof of “intent to cause cruel or extreme pain and suffering ...” (CT 16:3681; RT 82:10657-10658; CALJIC 9.90.) Would a jury know whether “extreme and prolonged pain” was the same thing as “cruel or extreme pain and suffering”? If they are not the same, how do they differ?<sup>122</sup> Is a “willful, deliberate and premeditated intent” to inflict such pain different from a mere “intent” to inflict pain? Since “willful” was defined earlier as “intentional,” that seems to add nothing to the word “intent.” “Deliberate” was said to require careful thought and weighing of considerations, but can one “intend” to inflict pain without such thought or consideration? “Premeditated” was defined as “considered beforehand.” Is that different from “delib-

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122. In *People v. James* (1987) 196 Cal.App.3d 272, 297, the Court of Appeal concluded, “the phrase ‘cruel pain and suffering’ encompasses the same meaning as the phrase ‘extreme and prolonged pain’ with the possible exception of the concept of time connoted in the word ‘prolonged.’” However, the present instructions did not inform the jury of this near interchangeability.

erate”? Would a juror know whether one can “intend” something without considering it beforehand?

*People v. Aguilar* (1997) 58 Cal.App.4<sup>th</sup> 1196, 1204-1205, concluded that the crime of torture was fully defined in Penal Code section 206, while the meaning of torture for the purpose of first degree torture-murder was not defined by statute and had been defined differently by judicial construction to add the element of an intent to inflict extreme and prolonged pain. *Aguilar* saw that as different from the Penal Code section 206 element of extreme pain or suffering. But how could the present jury have understood there was a difference, or what that difference meant? *Aguilar* concluded that Penal Code section 206 torture did not require proof of a “willful, deliberate and premeditated intent,” and instead required only the intent to inflict pain, which it presumably believed was something less. (*Id.*, at pp. 1205-1206.) Once again, how would the jury have understood this from the present instructions? *Aguilar* also concluded that the “cruel pain and suffering” required by section 206 was equivalent to extreme or severe pain. (*Id.* at p. 1201-1202.) Once again, how would a jury have understood this subtle distinction?

These questions became even more perplexing when the instructions moved on to define the elements of the special circumstances. First, the court defined the special circumstance of murder in the commission of mayhem:

“To find that the special circumstance in these instructions of murder in the commission of mayhem is true, it must be proved--there’s three elements here--one, the murder was committed while the defendant was engaged in or was an accomplice in the commission of mayhem; and,

two, the murder was committed in order to carry out or advance the commission of the crime of mayhem or facilitate the escape therefrom or to avoid detection--in other words, the special circumstance referred to in these instructions is not established if the mayhem was merely incidental to the commission of the murder--and three, the perpetrator has the specific intent to commit mayhem.

If you are satisfied beyond a reasonable doubt that the defendant actually killed a human being, you need not find that the defendant intended to kill in order to find the special circumstance to be true. However, if you find that the defendant was not the actual killer of a human being or if you're unable to decide whether the defendant was the actual killer or an aider and abetter, you cannot find the mayhem special circumstance to be true as to the defendant unless you're satisfied beyond a reasonable doubt that such defendant, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested or assisted any act of the commission of murder in the first degree or, with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of mayhem which resulted in the deaths of a human being.

A defendant acts with reckless indifference to human life when that defendant knows or is aware that her acts involve a grave risk of death to an innocent human being." (CT 16:3693-3694; RT 82:10667-10669; CALJIC 8.81.17.)

The first paragraph set forth three elements for the special circumstance. The first and third (murder in the commission of mayhem and specific intent to commit mayhem) appear identical to those elements for the crime of first degree murder on a mayhem felony-murder theory. As explained in the earlier

discussion of mayhem felony-murder, this left it unclear what must be intended in order to intend to commit mayhem.

The mayhem special circumstance added a third element – that the mayhem not be merely incidental to the crime of murder. The jury was given an alternative definition of the same concept: “the murder was committed in order to carry out or advance the commission of the crime of mayhem or facilitate the escape therefrom or to avoid detection.” But the next paragraph told the jury that if Veronica Gonzales was the actual killer, it was not necessary to find any intent to kill. It seems inevitable that lay jurors would be puzzled by the need to find that the murder was committed with a specific purpose in mind – to carry out or advance the mayhem – and yet the jury did not need to find there was any intent to kill.

Furthermore, the second sentence of the second paragraph is nearly incomprehensible. That single sentence contained 121 words. It told the jury that if Veronica Gonzales was **not** the actual killer, or they could not decide whether she was the actual killer, they could **not** find the special circumstance true, **unless** she acted with intent to kill **or** she was a major participant **and** acted with reckless indifference. Thus, the lengthy sentence contained a double negative, followed by an exception that could be satisfied in either of two ways, one of which required the coexistence of two different conditions.

This hopelessly complicated instruction was followed by a short and simple definition of an accomplice (CT 16:3695; RT 82:10669), and then a relatively short and uncomplicated description of the second special circumstance, torture-murder:

“To find that the special circumstance referred to in these instructions as murder involving infliction of torture is true, each of the following facts must be proved--there’s two elements--one, the murder was intentional; and, two, the defendant intended to inflict extreme cruel physical pain and suffering upon a human being, a living human being, for the purpose of revenge, extortion, persuasion, or for any sadistic purpose.

Awareness of pain by the deceased is not a necessary element of torture.” (CT 16:3696; RT 82:10669; CALJIC 8.81.18.)

This instruction added the element of intent to kill, which was expressly **not** required for finding first degree torture murder. However, the earlier element of “intent to inflict extreme and prolonged pain” had been changed to “intended to inflict extreme cruel physical pain and suffering...” Is pain and suffering something more than pain alone? Is “cruel pain” different from “prolonged” pain, which was required for first degree torture murder? Would a jury understand that “physical pain” was more limited than “pain”? Also, as discussed earlier in regard to the differences between the definition of the crime of torture and the crime of first degree torture murder, the question arises again whether “intent to inflict extreme and prolonged pain” is in some way different from a “willful, deliberate and premeditated intent to inflict extreme and prolonged pain...”

In sum, the jury had a wide variety of state-of-mind issues to resolve. Some of the instructions were simply too complicated to be understood at all. Some were similar to others in some ways, but also contained subtle distinctions, leaving the jury with no way to know whether something different

was meant. If something different was meant, the jury was given insufficient information to identify what the differences might be.

“ ‘ “It is settled that in criminal cases, even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” (*People v. St. Martin* (1970) 1 Cal.3d 524, 531 ...)’ ... (*People v. Sedeno* (1974) 10 Cal.3d 703, 715-716 ...)” (*People v. Wickershaw* (1982) 32 Cal.3d 307, 323-324.)

Here, the various required mental states were the key issue to be determined by the jurors and were necessarily “closely and openly connected with the facts of the case...” While the court did instruct on the mental state issues, it has been shown that those instructions were incomprehensible. The federal Fifth Amendment right to Due Process of law, and the Sixth Amendment right to trial by jury requires a jury determination of every fact necessary to support a conviction. (*United States v. Gaudin* (1995) 515 U.S. 506, 510; *In re Winship* (1970) 397 U.S. 358, 364; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 476-477.) Just as jurors cannot make such fact determinations when they are not instructed on the governing principles of law, neither can they make such fact determinations when they are given instructions they could not realistically comprehend. Similarly, the lack of comprehensible instructions on these key points resulted in the deprivation of the federal Eighth and Fourteenth Amendment rights to reliability in the fact-finding that underlies a sentence of death. (*Beck v. Alabama* (1980) 447 U.S. 625,

637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

It appears clear that the jury did not, in fact, understand these instructions. As will be shown in the following argument, the evidence was insufficient to prove most of the mental states that were required. Thus, a jury that understood these complex instructions would not have been able to return verdicts finding Veronica Gonzales guilty of first degree murder, and finding both special circumstances to be true.

**IV. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE TORTURE/MURDER THEORY OF FIRST DEGREE MURDER, OR THE MAYHEM FELONY/MURDER THEORY OF FIRST DEGREE MURDER, OR TO SUPPORT THE TORTURE/ MURDER OR MAYHEM/MURDER SPECIAL CIRCUMSTANCES**

**A. First Degree Felony-Murder (Mayhem)**

Felony-murder based on mayhem as the felony has rarely been discussed in published California cases. An important early discussion occurred in *People v. Sears* (1965) 62 Cal.2d 737, 744-745. In *Sears*, this Court established that conviction of first degree felony-murder on a mayhem theory required proof of specific intent to commit mayhem. In explaining its conclusion, this Court also made important statements, directly relevant to the present case, regarding what facts may or may not prove such an intent:

“Turning to defendant’s second contention, his objection to the instruction as to felony murder mayhem, we hold that in the absence of a showing that the defendant specifically intended to commit mayhem, the court should not have instructed on felony murder mayhem. Penal Code section 203 provides: ‘Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.’ Penal Code section 189 states, ‘All murder ... committed in the perpetration or attempt to perpetrate arson, rape, robbery, burglary, mayhem ... is murder of the first degree. ...’ (Italics added.)

The Legislature has decreed that any person who undertakes to commit any of the enumerated felonies will be guilty of first degree murder if such undertaking results in the loss of a human life. This dictate emanates from the extreme risk of harm inherent in the felonious conduct involved. Yet, in order to establish a defendant's guilt of first degree murder on the theory that he committed the killing during the perpetration of one of the enumerated felonies, the prosecution must prove that he harbored the specific intent to commit one of such enumerated felonies. (*People v. Craig* (1957) 49 Cal.2d 313, 318; *People v. Cheary* (1957) 48 Cal.2d 301, 310; *People v. Coe* (1951) 37 Cal.2d 865, 868-869.)

We recognize that some decisions have held that a specific intent to inflict the injuries proscribed in Penal Code section 203 does not constitute a requisite for a conviction of mayhem. In *People v. Nunes* (1920) 47 Cal.App. 346, 349, the defendant slugged the victim in the eye. The blow shattered the glasses that the victim wore at the time; a fragment pierced the eye causing a loss of sight. In *People v. Crooms* (1944) 66 Cal.App.2d 491, 499, the defendant threw lye on the victim. In neither case did the court require proof of a specific intent to maim; a malicious and unlawful commission of an aggressive act which resulted in an injury enumerated in section 203 sufficed. (See also *People v. McWilliams* (1948) 87 Cal.App.2d 550; *People v. Long* (1945) 70 Cal.App.2d 470].) These cases apparently rest upon an interpretation of *People v. Wright* (1892) 93 Cal. 564, 566-567, which held merely that premeditation need not be proven; the intent could be presumed from the act itself.

Even assuming the propriety of the above holdings, a distinction may be drawn between the showing of intent necessary to support a convic-

tion of felony murder mayhem and the showing of intent necessary to uphold a conviction of mayhem. Under the felony murder doctrine, the intent required for a conviction of murder is imported from the specific intent to commit the concomitant felony. In the above cases the courts, in order to sustain the convictions of mayhem, presumed the intent from the acts or types of injuries sustained. **But to presume an intent to maim from the act or type of injury inflicted, and then to transfer such 'presumed intent' to support a felony murder conviction is artificially to extend the fiction.** We cannot compound such fictions. The doctrine of felony murder, therefore, must be limited to those cases in which an intent to commit the felony can be shown from the evidence.

In the instant case the evidence discloses that defendant struck Elizabeth several times with a steel pipe; one of the blows resulted in a laceration of the lip; another, a laceration of the nose. **But such evidence does no more than indicate an indiscriminate attack; it does not support the premise that defendant specifically intended to maim his victim.** In the absence of such a showing of specific intent to commit mayhem, the court should not give the jury an instruction on felony murder mayhem." (*People v. Sears, supra*, 62 Cal.2d at pp. 744-745.)

Applying *Sears* to the present facts, whatever theory the jury relied on to conclude Veronica Gonzales directly committed or aided and abetted in the acts that resulted in the death of Genny Rojas, there is simply no evidence that she (or Ivan) specifically intended to maim. As horrible as the injuries suffered by Genny might be, we cannot simply rely on the injuries in-

flicted to conclude there was a specific intent to maim. Indeed, the evidence leaves a total vacuum as to what the state of mind of the perpetrator was.

Aside from a theory of accident, rejected by the prosecution experts, the likeliest explanation of the state of mind of the perpetrator would appear to be a tremendous loss of temper causing the person to blindly turn on the hot water in order to get the attention of a misbehaving child. That, of course, would come within the scope of an indiscriminate attack which, according to *Sears*, cannot support a finding of a specific intent to maim. A variety of other possible scenarios are not precluded by the evidence, but they are merely speculative and none are proved true beyond a reasonable doubt. Even putting aside that very large problem, the most likely of the possible scenarios also do not support a finding of a specific intent to maim the child. For example, if we accept Veronica Gonzales' claim that Ivan Gonzales had been systematically increasing the severity of his treatment toward Genny Rojas, and that he lost all perspective while pressured by mounting debts and publicly berated by one of his creditors, then we are left with no evidence that Veronica Gonzales shared the requisite intent to support her guilt on an aiding and abetting theory.

The evidence simply does not support a conclusion that Veronica Gonzales decided that Genny Rojas was so much a problem that she should have her skin burned off. Even the prosecutor recognized he had not proved beyond a reasonable doubt that there was a cold-blooded intent to kill, and a bathtub scalding was the method chosen to accomplish that goal. If the prosecutor believed that, he would have sought instructions on first degree murder based on a willful, deliberate, and premeditated intent to kill. But

under the circumstances shown by the evidence, what theory supports finding an intent to maim if there was insufficient evidence of intent to kill?

In sum, there is simply no feasible scenario in which Veronica Gonzales could have decided in advance that it would be a good idea to maim Genny Rojas by burning off her skin. If there is any such feasible scenario, it certainly was not proved beyond a reasonable doubt. If there was an intent to place Genny in scalding hot water, without thought as to what the long-term results might be, then there was no specific intent to maim.

Proof of specific intent to maim was also found lacking in *People v. Anderson* (1965) 63 Cal.2d 351. There, a 10 year old girl was found dead in her bedroom. She had been stabbed 41 times, over her entire body. One cut extended from her vagina to her rectum. Also, her tongue was cut. (*Id.*, at p. 356.) This Court again found an indiscriminate attack, insufficient to uphold a felony-murder verdict based on mayhem as the felony. (*Id.*, at pp. 358-359.)

Sufficient evidence of specific intent to maim was found in *People v. Campbell* (1987) 193 Cal.App.3d 1653.

“Here, the information charged, the jury was instructed, and the People argued that the alleged mayhem occurred by the tearing off of Pekny’s ear. The issue is whether Campbell specifically intended to tear off Pekny’s ear, or whether he merely intended to generally attack Pekny. To apply the felony-murder doctrine, the jury cannot infer the intent to maim merely because the ear was in fact partially severed. Rather, there must be other facts and circumstances which support an inference of intent to tear off the ear rather than to only indiscriminately attack. (*People v. Sears, supra*, 62 Cal.2d

at p. 745; see generally *People v. Tolbert* (1969) 70 Cal.2d 790, 801.)

Pekny sustained 25 superficial breaks in the skin of her cheek in front of her left ear, likely from the use of the screwdriver. Most of the serious injuries were on the right side of the face, including the torn ear, likely from the use of the brick. The attack was focused on Pekny's face and head. The facts indicate Campbell limited the amount of force he used with the screwdriver rather than stabbing with his full force, and limited the scope of the attack with the brick to the head and face, rather than randomly attacking Pekny's body. The controlled and directed nature of the attack supports an inference Campbell intended to disfigure Pekny's face, including her right ear. [Footnote omitted.] There was sufficient evidence to support the felony-murder instruction." (*People v. Campbell, supra*, 193 Cal.App.3d at pp. 1668-1669.)

*Campbell* contrasts sharply with the present case. There was nothing limited or controlled or directed or focused about what was done to Genny Rojas. Thus, the present circumstances again more closely resemble an indiscriminate attack, rather than demonstrating a specific intent to maim.

The prosecutor in his argument to the jury claimed that intent to maim was shown by the prior injury to Genny Rojas' head. Since that injury was also apparently caused by hot water, the prosecutor argued that both Veronica and Ivan Gonzales knew what hot water would do to a child's skin, so when she was put into hot water again, there must have been knowledge of what would happen. (RT 82:10697.) Assuming the prosecutor's conclusion reasonably follows from his premise, a problem remains. Simple knowledge of what result is likely is not sufficient to prove specific intent to maim. In *Sears*, described above, the defendant must have had a good idea of the

damage that could result from hitting the child victim several times in the head with a steel pipe. Similarly, in *Anderson*, the defendant must have had knowledge of the likely results of stabbing a 10 year-old girl 41 times over her entire body. Yet in neither of those cases was sufficient evidence of specific intent to maim found.

Instead of demonstrating a specific intent to maim, any knowledge in the present case of the likely results of placing a child in hot water comes within the description set forth in *People v Lee* (1990) 220 Cal.App.3d 320, 326: “While this evidence undoubtedly shows extreme indifference to [the victim’s] physical well-being, it does not show a controlled, directed, limited attack ... from which a jury could reasonably have inferred that defendant specifically intended to disable [the victim] permanently.” Here, the evidence is insufficient to prove a specific intent to maim. Therefore, here, the evidence is insufficient to sustain a conviction of first degree felony-murder, with mayhem as the underlying felony.

#### **B. First Degree Torture Murder**

The jury was instructed that a guilt verdict for first degree torture-murder required “a willful, deliberate and premeditated intent to inflict extreme and prolonged pain upon a living human being for the purpose of revenge, extortion, persuasion or any sadistic purpose ...” (RT 82:10651-10652; CT 16:3666; CALJIC 8.24.)

A definitive discussion of the elements of first degree torture-murder is contained in *People v. Steger* (1976) 16 Cal.3d 539. Because that case in-

volved the death of the female defendant's three-year old step-daughter, and because this Court found insufficient evidence in that case to support first degree torture-murder, it is an obvious and important starting point for the present discussion. The death of the victim in *Steger* was described concisely:

“Kristen died from head injuries. Viewed in the light most favorable to the People, the evidence discloses the fatal injury, a subdural hemorrhage covering almost the entire left half of the brain, was undoubtedly caused by trauma. The child's body was also covered from head to toe with cuts, bruises and other injuries, most of which could only have been caused by severe blows. Among the injuries were hemorrhaging of the liver, adrenal gland, intestines, and diaphragm; a laceration of the chin; and fractures of the left cheek bone and right forearm. Medical evidence revealed that most of the injuries were inflicted at different times in the last month of Kristen's life. Defendant failed to seek medical help for the injuries.” (*Id.*, at p. 543.)

Also like the present case, the defendant's own statements were the heart of the prosecution's evidence:

“Defendant's own statements provided much of the case against her. In testimony she admitted she was continually frustrated by her inability to control Kristen's behavior. The child would wet her pants, stick her tongue out, and generally disobey. To effect discipline, defendant beat Kristen on the buttocks with a belt and a shoe. The beatings were inflicted daily for the final week of the youngster's abbreviated life. Defendant admitted striking Kristen on the back and twice punching her in the arm, causing her to fall down and hit her head on the floor.

Defendant also told the police in a written statement that on the day before the death, she hit Kristen on the shoulder, knocking her down; she pushed her, banging her head against a wall; and she struck her on the side of the head. Moreover, she orally told an officer, "I want to make a full confession. I want you to know that I did it. I beat her." (*Id.*, at p 543.)

This Court started its discussion with a summary of its prior construction of the definition of torture:

"Three decades ago, this court strictly construed the definition of torture in section 189. In *People v. Heslen* (Cal. 1945) 163 P.2d 21, 27, modified (1946) 27 Cal.2d 520, we said: 'Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. That intent may be manifested by the nature of the acts and circumstances surrounding the homicide.'

This restrictive definition of torture was reemphasized in *People v. Tubby* (1949) 34 Cal.2d 72, 77: 'In determining whether the murder was perpetrated by means of torture the solution must rest upon whether the assailant's intent was to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death.'" (*People v. Steger, supra*, 16 Cal.3d at pp. 543-544.)

This Court went on to note that some Courts of Appeal had inferred the presence of the requisite specific intent almost entirely from the severity

of the nature of the injuries inflicted. As an example, this Court noted, "the court in *People v. Misquez* (1957) *supra*, 152 Cal.App.2d 471, 480, reasoned, 'The brutal and revolting manner in which defendant mistreated the child leads inevitably to the conclusion that he intended to cause cruel pain and suffering.'" (*People v. Steger, supra*, 16 Cal.3d at p. 544.) That is essentially the same argument used by the prosecutor in the present case. *Steger* went on to consider the soundness of such reasoning.

After a historical review of the reasons for dividing the crime of murder into degrees, this Court concluded that first degree torture murder is simply one form of willful, deliberate, and premeditated murder; the means used necessarily establish the equivalent mental state. (*Id.* At p. 544-546, esp. fn. 2.) This Court explained:

"Accordingly, we hold that murder by means of torture under section 189 is murder committed with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain. In determining whether a murder was committed with that intent, the jury may of course consider all the circumstances surrounding the killing. Among those circumstances, in many cases, is the severity of the victim's wounds. **We admonish against giving undue weight to such evidence, however, as the wounds could in fact have been inflicted in the course of a killing in the heat of passion rather than a calculated torture murder.**

We do not hold that a defendant must have had a premeditated intent to kill in order to be convicted of murder by means of torture; such an interpretation would render superfluous the specific inclusion of murder by torture in section 189. A defendant need not have any intent to kill to be convicted of this crime (*People v. Mattison*

(1971) *supra*, 4 Cal.3d 177, 183), but he or she must have the defined intent to inflict pain.” (*People v. Steger, supra*, 16 Cal.3d at p. 546; emphasis added.)

The emphasized warning in the quoted language from *Steger* was not heeded by the present prosecutor; he gave undue weight to the severity of the wounds suffered by Genny Rojas, and ignored the far greater likelihood that whoever placed her in the scalding water did so in a heat of passion.

*Steger* went on to give various examples from prior cases that did demonstrate the willful, deliberate, and premeditated infliction of pain. One such example was considered to be a prototypical instance:

“*People v. Turville* (1959) *supra*, 51 Cal.2d 620, represents perhaps the paradigm torture case. There the defendants repeatedly hit and kicked their victim in an effort to persuade him to open his safe. The pain was clearly inflicted in a calculated manner, and this court upheld a torture murder conviction.” (*People v. Steger, supra*, 16 Cal.3d at p. 547.)

In contrast to the repeated assaults in *Turville* and other examples set forth in *Steger*, the assault that caused the death of Genny Rojas consisted of a single act that consumed at most just a few seconds, according to the prosecution experts. Even those few seconds were spent restraining a struggling child, not coldly calculating the infliction of pain. Such a lack of calculation was identified as the primary means of separating those cases where there was sufficient evidence of a willful, deliberate, and premeditated intent to inflict pain from those where there was not:

“In contrast, the cases reversing torture murder convictions have focused on the lack of evidence of calculation. In *People v. Bender*

(1945) *supra*, 27 Cal.2d 164, defendant, in a fit of anger, beat and choked his victim to death. We held, ‘The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer.’ (*Id.*, at p. 177.)” (*People v. Steger*, *supra*, 16 Cal.3d at p. 547.)

In the present case, we have very little information about the state of mind of the person who put Genny Rojas in the scalding water. However, the meager evidence that does exist points toward a person who acted “heedless of the suffering of his victim, in hot anger ...”

The importance of the calculation element identified in *Steger* was underscored in a later opinion of this Court which referred back to *Steger*:

“A murder by torture was and is considered among the most reprehensible types of murder because of the calculated nature of the acts causing death, not simply because greater culpability could be attached to murder in which great pain and suffering are caused to the victim. (*People v. Steger* (1976) 16 Cal.3d 539, 544-546.)” (*People v. Wiley* (1976) 18 Cal.3d 162, 168-169.)

*Steger* explained its conclusion that the evidence was insufficient in the case before it:

“It is clear from the foregoing analysis that on the record of the case at bar defendant cannot be guilty of first degree murder by torture. Viewed in the light most favorable to the People, the evidence shows that defendant severely beat her stepchild. But there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and pro-

longed pain. Rather, the evidence introduced by the People paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated." (*Id.*, at p. 548.)

The same is true in the present case. There is simply no evidence that the person who placed Genny Rojas in the scalding water acted with a cold-blooded intent to inflict extreme and prolonged pain.

*People v. Walkey* (1986) 177 Cal.App.3d 268, was a case with several aspects similar to the present case. There, the defendant was convicted of first degree torture-murder based on evidence that he inflicted serious injuries on a child over a period of time. Walkey and his wife had lived with another woman with whom Walkey was also intimate. That woman's two-year-old son, Nathanel, also lived in the household. Walkey was not Nathanel's father, but acted in that role. On occasion he physically punished the boy. (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 271-272.)

On a day when the boy's mother was out shopping, and Walkey and his wife were at home caring for the boy, the boy received a severe beating that resulted in his death. Circumstantial evidence indicated it was Walkey who caused the injuries. (*Id.*, at p. 273.) Walkey testified, denying that he ever struck the boy, claiming that he left the house for an hour-and-a-half, and that he returned to find the boy lying on his face at the bottom of a stairway. (*Id.*)

Walkey argued on appeal that the evidence was insufficient to support a first degree murder by torture verdict. The Court of Appeal reviewed many

of the same cases discussed earlier in this argument and agreed with Walkey's contention:

“... the prosecution failed to prove Walkey murdered Nathanel with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain. Although the medical experts testified Nathanel's injuries would have caused him pain, the amount of pain inflicted on the victim is not determinative of the crime of torture murder. (*People v. Wiley* (1976) 18 Cal.3d 162, 173; *People v. Steger, supra*, 16 Cal.3d at p. 546.) Although evidence was presented Nathanel's injuries had been inflicted over a period of several months, this does not lead to the conclusion Nathanel was tortured. Rather, the fact Nathanel was beaten on numerous occasions shows only ‘that several distinct “explosions of violence” took place, as an attempt to discipline a child by corporal punishment ....’ (*Id* at pp. 548-549.)

The People argue Walkey had the requisite deliberate and premeditated intent to torture Nathanel because Walkey resented taking care of Nathanel and had been seen spanking him. The People further point to evidence Walkey got upset and yelled at Nathanel when the child had a toilet training accident. However, this evidence merely shows the beatings Walkey inflicted on Nathanel were ‘a misguided, irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated.’ (*People v. Steger, supra*, 16 Cal.3d at p. 548.) Moreover, the prosecution's own witness, Dr. Chadwick, testified as follows: ‘Most instances of physical abuse are associated at the time of the individual act of abuse with some kind of immediate event that the abuser perceives as a stimulus to this. Maybe it is prolonged crying on the part of the child, maybe it is

a toilet training accident, maybe it is something that the infant or child does, something that the infant or child does which may well be within the range of normal behavior for the age, but which the adult caretaker perceives as inappropriate and becomes angry as a result.' Such explosive violence on the part of the abusing adult, without more, does not support a torture murder theory. Walkey's intent may have been to punish Nathanel after becoming frustrated or angry because Nathanel misbehaved or had difficulty being toilet trained. However, the record dispels any hypothesis Walkey's primary purpose was to cause Nathanel to suffer. (See *People v. Anderson* (1965) 63 Cal.2d 351, 360.) Accordingly, the court erred in instructing the jury on torture murder." (*People v. Walkey, supra*, 177 Cal.App.3d at pp. 275-276.)

The discussion just quoted similarly covers virtually everything that might have been relied on by the present jury if it returned the first degree murder verdict under the torture murder theory. Notably, the present trial featured expert testimony quite similar to the expert testimony described in the language just quoted from *Walkey*. (See prosecution expert testimony at RT 59:6628-6629, 6636 re: general family stress combined with a trigger, such as a child crying, leading to an explosion of abuse, and re: commonness of burn injuries occurring as a result of misguided punishment to end fussiness or some other unwanted behavior.) For all the same reasons as in *Walkey*, the evidence was insufficient to support such a verdict against Veronica Gonzales, regardless of whether it was her or Ivan Gonzales who placed Genny Rojas in the bathtub.<sup>123</sup>

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123. Although we do not know whether the first degree murder verdict was based on the torture theory or the mayhem theory or both, it is  
(Continued on next page.)

### **C. Mayhem Special Circumstance**

As with the theory of first degree felony-murder with mayhem as the felony, the jury was instructed that the mayhem special circumstance required proof of intent to commit mayhem. As shown in the earlier section of this argument pertaining to the felony-murder theory, the evidence was insufficient to support a finding of such an intent. For the same reasons, the evidence was insufficient to support the verdict finding the mayhem special circumstance true.

### **D. Torture Special Circumstance**

In the earlier section of this argument regarding the torture-murder theory of first degree murder, it has already been shown that the evidence was insufficient to support a finding of a willful, deliberate and premeditated intent to inflict torture. Since that is also an element of the torture special circumstance, the evidence is necessarily insufficient to support that finding either.

Additionally, the instruction on the torture special circumstance added the element of intent to kill, which had been expressly stated as unnecessary in the instruction on the torture murder theory of first degree murder. (Com-

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(Continued from last page.)

shown elsewhere in this argument that the evidence was also insufficient to support the verdict on a mayhem theory. Also, the same rationale that led to the conclusion there was insufficient evidence for the torture murder theory of first degree murder will also be directly applicable to the section later in this argument pertaining to the torture special circumstance.

pare RT 82:10651-10652; CT 16:3666; CALJIC 8.24 with CT 16:3696; RT 82:10669; CALJIC 8.81.18.) As noted in the preceding argument in this brief, there were also differences in language that raised questions: the first degree murder element of “intent to inflict extreme and prolonged pain” was changed to “intended to inflict extreme cruel physical pain and suffering...” Is pain and suffering something more pain alone? Is “cruel pain” different from “prolonged” pain? Is “physical pain” more limited than “pain”?

The torture special circumstance was construed by this Court in *People v. Davenport* (1985) 41 Cal.3d 247. There, the defendant argued that the torture special circumstance failed to meaningfully narrow the class of persons eligible for the death penalty. (*Id.*, at p. 260-261.) As *Davenport* explained,

“Appellant asserts the elements of the new special circumstance -- an intentional killing in which extreme physical pain is inflicted -- are illusory limitations. Neither provides a basis for separating capital crimes from other murders which is rational and tailored to the defendant’s personal responsibility and moral guilt, (see, *Enmund v. Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368]; *Furman v. Georgia* (1972) 408 U.S. 238, 313 [33 L.Ed.2d 346, 392, 92 S.Ct. 2726] (conc. opn. of White, J.))” (*People v. Davenport, supra*, 41 Cal.3d at p. 262.)

*Davenport* rejected the idea that the “intentional killing” element of the special circumstance could be satisfied by a mental state equivalent to implied malice. (*Id.*, at p. 262.) However, in regard to defining “torture” for the purpose of the special circumstance, this Court noted that the statutory language left open different possibilities. This Court sought a construction of

the statutory language which would render it constitutionally valid. (*Id.*, at pp. 263-266.)

With that goal in mind, this Court went on to conclude:

“...we are compelled to conclude that the electorate which enacted subdivision (a)(18) intended to incorporate so much of the established judicial meaning of torture as is not inconsistent with the specific language of the enactment.

‘Torture has been defined as the “Act or process of inflicting severe pain, esp. as a punishment, in order to extort confession, or in revenge.” (Webster's New Internat. Dict. (2d Ed.)) The dictionary definition was appropriately enlarged upon by this court in its original opinion in *People v. Heslen*, 163 P.2d 21, 27 in the following words: “Implicit in that definition is the requirement of an intent to cause pain and suffering in addition to death. That is, the killer is not satisfied with killing alone. He wishes to punish, execute vengeance on, or extort something from his victim, and in the course, or as the result of inflicting pain and suffering, the victim dies. ...” (See disposition of that case on rehearing, 27 Cal.2d 52.)’ (*People v. Tubby*, *supra*, 34 Cal.2d at p. 77.)” (*People v. Davenport*, *supra*, 41 Cal.3d at pp. 266-267.)

*Davenport* next reviewed the various judicial constructions of the crime of first degree torture murder, discussing many of the same principles discussed in the earlier section of this argument pertaining to that crime. (*Id.*, at pp. 267-269.) Next, this Court explained its rationale for rejecting the element of proof that the victim actually experienced the pain. (*Id.*, at pp. 269-270.) This was followed by an explanation justifying reading into the statute the requirement that the intent to cause pain and suffering be proved. (*Id.*, at pp. 270-271.) In the course of that explanation, this Court noted:

“...the statutory requirement of the infliction of extreme physical pain emphasizes the concern with the physical rather than the mental experience of the victim. The evident purpose of the statute is to encompass killings in which the perpetrator intentionally performed acts which were calculated to cause extreme physical pain to the victim and which were inflicted prior to death.” (*Id.*, at p. 271.)

Finally, this Court concluded:

“In sum, we find that the words used in section 190.2, subdivision (a)(18) must be understood in light of the established meaning of torture. Proof of a murder committed under the torture-murder special circumstance therefore requires proof of first degree murder, (§ 190.2, subd. (a)), proof the defendant intended to kill and to torture the victim (§ 190.2, subd. (a)(18)), and the infliction of an extremely painful act upon a living victim. (*Ibid.*) The special circumstance is distinguished from murder by torture under section 189 because under section 190.2, subdivision (a)(18) the defendant must have acted with the intent to kill.” (*People v. Davenport, supra*, 41 Cal.3d at p. 271.)

Once again, the evidence is simply insufficient to support the required findings of intent to inflict extreme physical pain, as well as to kill. Furthermore, while *Davenport* answers many of the questions posed earlier in this argument regarding whether various differences in language signified different meanings, the problem remains that the present jury did not have the benefit of this statement from *Davenport*. Thus, the questions posed earlier in this argument remained unanswered for the jury, even if the evidence could have been deemed sufficient to sustain a true finding by a properly instructed jury.

### **E. Aid and Abet Theories**

The present jury had to determine whether it believed Veronica Gonzales was guilty as a direct perpetrator, or was guilty on a theory that Ivan Gonzales was the sole direct perpetrator and Veronica Gonzales aided and abetted him. While we know the jury concluded she was guilty, the various verdicts do not reveal whether that finding was based on an aid and abet theory. If it was, then the complex mental state determinations facing the jury were made even more complex.

The various problems raised in earlier sections of this argument apply equally, regardless of whether the jury found guilt on an aid or abet theory or a direct perpetrator theory. If jurors relied on a direct perpetrator theory, it has been shown the evidence was not sufficient to prove beyond a reasonable doubt that Veronica Gonzales acted with the mental states required to establish first degree torture-murder or first degree felony-murder, based on mayhem as the felony. Similarly, the evidence was not sufficient to prove the mental states required for either the torture or the mayhem special circumstance.

On the other hand, if Veronica Gonzales was convicted on a theory that she aided and abetted Ivan Gonzales in the acts that caused the death of Genny Rojas, then the jury must have concluded that Ivan Gonzales had the requisite intent, that Veronica Gonzales had knowledge of Ivan's unlawful purpose, and that she intended to encourage or facilitate the commission of Ivan's acts. (RT 82:10652-10654; CT 16:3667 and 3671; CALJIC 8.27 and 8.34.) But if any jurors concluded that Ivan Gonzales was the direct perpetra-

tor, then they either believed what Veronica Gonzales said in her testimony or they did not. If they believed her, they still had insufficient evidence that Ivan Gonzales acted with the requisite mental states. Moreover, even if they could have found from Veronica's testimony that Ivan acted with the requisite intent, they had no basis to simultaneously find that Veronica Gonzales shared his purpose. But if they did not believe her, then they were again left with the same lack of evidence that Ivan acted with the requisite mental state, as was shown in each of the earlier sections of this argument.

#### F. Conclusion

A verdict unsupported by sufficient evidence violates the federal Fifth and Fourteenth Amendment Due Process clauses (*Jackson v. Virginia* (1979) 443 U.S. 307), and is necessarily unreliable in violation of the federal Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

**V. EVEN IF GUILT AND THE REQUISITE MENTAL STATES WERE PROVED, ANY CONVICTION FOR MURDER BASED ON FELONY-MURDER VIOLATED THE MERGER PRINCIPLE OF *PEOPLE V. IRELAND* (1969) 70 CAL.2D 522**

In *People v. Ireland* (1969) 70 Cal.2d 522, the defendant was convicted of second-degree felony-murder, with assault with a deadly weapon as the underlying felony.<sup>124</sup> Noting that the felony-murder rule relieved the jury of any need to find malice aforethought, this Court explained:

“We have concluded that the utilization of the felony-murder rule in circumstances such as those before us extends the operation of that rule ‘beyond any rational function that it is designed to serve.’ (*People v. Washington* (1965) 62 Cal.2d 777, 783.) To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault--a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law. We therefore hold that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the

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124. In *Ireland*, the defendant shot and killed his wife of ten years during a period of time in which their marriage was ending. He testified that he had no memory of the shooting. The couple's six-year old daughter testified she heard her parents talk about who was going to leave first. The defendant got a gun and wanted his wife to accompany him outside to talk by the swimming pool, but she refused. He took the gun from his pocket, said “Now what, Ann?” and fired three shots. The first missed, but the other two hit her in the eye and chest, killing her. (*People v. Ireland, supra*, 70 Cal.2d 522, 527-528.)

homicide and which the evidence produced by the prosecution shows to be an offense included in fact within the offense charged. [Footnote omitted.]” (*People v. Ireland, supra*, 70 Cal.2d 522, 539.)

This Court noted that such a limitation on the felony-murder rule was in effect in New York, Oregon, Arizona, and Kansas. (*Id.*, at p. 540.) The reasoning underlying the doctrine as it had been stated in those states was labeled “basically sound” and this Court concluded it “should be applied to the extent that it is consistent with the laws and policies of this state.” (*Id.*)

*Ireland* expressly dealt only with the second-degree felony-murder rule, and expressed no opinion on whether its conclusion would apply in a first degree felony-murder context. (*Id.*) However, the following year, this Court did extend the rule to the first degree felony-murder context, in *People v. Wilson* (1970) 1 Cal.3d 431, and in *People v. Sears* (1970) 2 Cal.3d 180. Both cases resulted in convictions of first degree murder, with burglary as the underlying felony. The burglaries were based on entry of homes of estranged wives, with intent to commit a felonious assault. (*People v. Sears, supra*, 2 Cal.3d at pp.184-186.) *Wilson* was summarized in detail in *Sears*, in language directly applicable to the present case:

“In reversing the judgment convicting defendant of first and second degree murder we stated with respect to the first degree felony-murder instruction: ‘Here the prosecution sought to apply the felony-murder rule on the theory that the homicide occurred in the course of a burglary, but the only basis for finding a felonious entry is the intent to commit an assault with a deadly weapon. When, as here, the entry would be nonfelonious but for the intent to commit the assault, and the assault is an integral part of the

homicide and is included in fact in the offense charged, utilization of the felony-murder rule extends that doctrine "beyond any rational function that it is designed to serve." We have heretofore emphasized "that the felony-murder doctrine expresses a highly artificial concept that deserves no extension beyond its required application." (*People v. Phillips* (1966) *supra*, 64 Cal.2d 574, 582.)

"The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for killings they commit." (*People v. Washington* (1965) 62 Cal.2d 777, 781.) Where a person enters a building with an intent to assault his victim with a deadly weapon, he is not deterred by the felony-murder rule. **That doctrine can serve its purpose only when applied to a felony independent of the homicide.** In *Ireland*, we reasoned that a man assaulting another with a deadly weapon could not be deterred by the second degree felony-murder rule, since the assault was an integral part of the homicide. Here, the only distinction is that the assault and homicide occurred inside a dwelling so that the underlying felony is burglary based on an intention to assault with a deadly weapon, rather than simply assault with a deadly weapon.

We do not suggest that no relevant differences exist between crimes committed inside and outside dwellings. We have often recognized that persons within dwellings are in greater peril from intruders bent on stealing or engaging in other felonious conduct. (See, e.g., *People v. Talbot* (1966) *supra*, 64 Cal.2d 691, 703.) Persons within dwellings are more likely to resist and less likely to be able to avoid the consequences of crimes committed inside their homes. However, this rationale does not justify application of the felony-murder rule to the case at bar. Where the

intended felony of the burglar is an assault with a deadly weapon, the likelihood of homicide from the lethal weapon is not significantly increased by the site of the assault. Furthermore, the burglary statute in this state includes within its definition numerous structures other than dwellings as to which there can be no conceivable basis for distinguishing between an assault with a deadly weapon outdoors and a burglary in which the felonious intent is solely to assault with a deadly weapon. [Footnote omitted.]

In *Ireland*, we rejected the bootstrap reasoning involved in taking an element of a homicide and using it as the underlying felony in a second degree felony-murder instruction. We conclude that the same bootstrapping is involved in instructing a jury that the intent to assault makes the entry burglary and that the burglary raises the homicide resulting from the assault to first degree murder without proof of malice aforethought and premeditation. To hold otherwise, we would have to declare that because burglary is not technically a lesser offense included within a charge of murder, burglary constitutes an independent felony which can support a felony-murder instruction. However, in *Ireland* itself we did not assert that assault with a deadly weapon was a lesser included offense in murder; we asserted only that it was 'included in fact' in the charge of murder, in that the elements of the assault were necessary elements in the homicide. (70 Cal.2d at p. 539 and fn. 14.) In the same sense, a burglary based on intent to assault with a deadly weapon is included in fact within a charge of murder, and cannot support a felony-murder instruction.' (*People v. Wilson, supra*, 1 Cal.3d 431, 440-441.)" (*People v. Sears, supra*, 2 Cal.3d at pp.186-188; emphasis added.)

The same rationale applies in the present case. When a person assaults a child with the specific intent to maim, as the prosecution alleged here, that

person is not deterred by the felony murder rule. Here, the felony-mayhem was in no way independent of the homicide. The very acts that constituted mayhem – the burning of the skin - led directly to the death of the victim. Just as burglary, based on entry with intent to assault, does not constitute a felony independent of the ensuing killing, neither does mayhem. The fact that mayhem is not a lesser offense necessarily included makes no difference. It was included in fact, under the circumstances of the present case.

In *Wilson*, this Court also noted:

“We recognize that *Ireland* dealt with a court-made rule while this case involves first degree felony murder, which is statutory. [Footnote omitted.] However, the statutory source of the rule does not compel us to apply it in disregard of logic and reason. (*County of Sacramento v. Hickman* (1967) 66 Cal.2d 841, 849, fn. 6.)” (*People v. Wilson, supra*, 1 Cal.3d 431, 441.)

Thus, the rationale set forth above must apply equally to the present first degree felony murder.

The next question is whether the *Ireland* doctrine should apply when the underlying felony is mayhem. The best guidance can be found in a series of cases dealing with the application to various felonies committed against children, resulting in death. In *People v. Shockley* (1978) 79 Cal.App.3d 669, a woman was convicted of second-degree felony-murder of her infant son. The underlying felony was Penal Code section 273a, subd. (1) willful cruelty toward, and endangerment of, a child. The 21 month old child was found in a room smelling of urine and feces, with recent bruises and lacerations. The cause of death was malnutrition and dehydration.

The *Shockley* Court concluded that the *Ireland* doctrine was not applicable in these circumstances. After reviewing cases that had applied *Ireland*, the Court explained:

“Where the underlying felony is based on an independent felony not related to the assault causing the murder, a different result follows. An armed robbery, for example, has as its primary purpose the acquiring of money or property and thus the felony-murder rule would apply (*People v. Burton, supra*, 6 Cal.3d 375, 387). The purpose of the felony-murder rule is to deter felons from killing negligently or accidentally by holding them strictly responsible for the killing they commit (*People v. Washington*, 62 Cal.2d 777, 781). So, too, in *People v. Taylor*, 11 Cal.App.3d 57, the court held the felony-murder instruction was properly given when the underlying felony was the furnishing of heroin. The court concluded the felony had a ‘collateral and independent felonious design’ (*People v. Taylor, supra*, 11 Cal.App.3d 57, 63). In other words the felony was not done with intent to commit an injury which would cause death. The Supreme Court in *People v. Mattison*, 4 Cal.3d 177 went further to hold the second degree felony-murder instruction was properly given when the underlying felony was poisoning a food, drink or medicine with intent to injure (Pen. Code, § 347). The court in *Mattison, supra*, at page 185, pointed out administering poison was indistinguishable from administering heroin and quoted that portion of *Taylor* which said, “[w]hile the felony-murder rule can hardly be much of a deterrent to a defendant who has decided to assault his victim with a deadly weapon, it seems obvious that in the situation presented in the case at bar [poisoning], it does serve a rational purpose: knowledge that the death of a person to whom heroin [poison] is furnished may result in a conviction for

murder should have some effect on the defendant's readiness to do the furnishing.”

Here the propriety of using the felony-murder rule is even more justified. The underlying felony here is occasioned when, under circumstances or conditions likely to produce great bodily harm or death, the person having the care or custody of any child willfully causes or permits the child to be placed in such a situation that its person or health is endangered (Pen. Code, § 273a, subd. (1)). The act of leaving the child in a position that endangers its person or health is clearly collateral and independent of any design to cause death. The act may be based on indifference or neglect or simply failure to take time to properly look after the child. We find this properly within the purpose of the legislative effort to deter the felonious conduct which may result in death. The felony-murder rule properly applies.” (*People v. Shockley, supra*, 79 Cal.App.3d at pp. 676-677.)

In the circumstances of the present case, the rationale applied in *Shockley* leads to the opposite result. Here, the underlying felony, mayhem, consists of the very same assaultive conduct that caused death. Here, the jury necessarily found that the felony was committed with the deliberate and premeditated intent to maim. The felony-murder rule cannot be much of a deterrent to a person who has decided to assault a child with intent to maim. Since intent to maim was necessarily found by the present jury, it cannot be said that the fatal injuries suffered by Genny Rojas were the product of neglect or indifference. Thus, the felony-murder rule should not be utilized here.

In *People v. Northrop* (1982) 132 Cal.App.3d 1027, the defendant was convicted of second degree murder with Penal Code section 273a felony

child abuse as the underlying felony. There, the defendant entered a hospital emergency room carrying his dead 22-month-old child. An autopsy revealed 10 fractured ribs, caused by blunt force which also damaged internal organs. The Court of Appeal noted that the purpose of the felony-murder rule was to deter those engaged in felonies from killing negligently or accidentally. The Court then explained:

“The ‘*Ireland*’ doctrine furthers this goal by precluding use of the felony-murder doctrine where the underlying felony is ‘a necessary ingredient of the homicide,’ or its elements ‘were necessary elements in the homicide.’ (*People v. Wilson* (1969) 1 Cal.3d 431, 438-441.) The rule is to be applied only when the subject felony is ‘independent of the homicide.’ (*Id.*, at p. 442, fn. 5.)” (*People v. Northrop, supra*, 132 Cal.App.3d at p. 1035.)

This summary appears to clearly support the application of the *Ireland* doctrine in the present circumstances. Here, the underlying felony (mayhem) was clearly an essential ingredient of the homicide. The *Northrop* Court continued:

“Appellant submits that the felony of child abuse is an ‘integral part’ of and included in fact in the homicide. Since felony child abuse, under the statutory definition, requires an intent to inflict or permit infliction of punishment or injury under conditions ‘likely to produce great bodily harm or death’ [footnote omitted] (*People v. Atkins* (1975) 53 Cal.App.3d 348, 358), appellant reasons that the same acts and intent which constitute the underlying felony here also constituted the homicide, thereby making the *Ireland* exception applicable.” (*People v. Northrop, supra*, 132 Cal.App.3d at p. 1035.)

This analysis, if accepted, would apply equally in the present context. Here, the mayhem was an integral part of the homicide and was included in fact in its commission. Here also, a specific intent to maim was an essential element, comparable to the intent element applicable to Northrup. However, the *Northrup* Court went on:

In *People v. Burton, supra*, 6 Cal.3d 375, however, the Supreme Court specifically rejected the notion that *Ireland* and *Wilson* should be interpreted 'to mean ... that if the facts proven by the prosecution demonstrate that the felony offense is included in fact within the facts of the homicide and integral thereto, then that felony cannot support a felony-murder instruction.' (*Id.*, at p. 387.) The court explained that the purpose of the felonious conduct must be examined, and noted that in both *Ireland* and *Wilson* '[t]he desired infliction of bodily injury was in each case not satisfied short of death.' (*Ibid*) [Footnote omitted.]

We find the purpose of the felony-murder rule to be furthered by its application here. Felony child abuse, even if based upon the same acts as the homicide, can be committed without inflicting death, and, more importantly, without intending to inflict injuries which will result in death. In *People v. Jaramillo* (1979) 98 Cal.App.3d 830, the court reasoned that under section 273a: 'For the felony punishment there is no requirement that the actual result be great bodily injury. The statute is intended to protect a child from an abusive situation in which the probability of serious injury is great.' (*Id.*, at p. 835.)

Thus, felony child abuse can be, and often is, committed without infliction of fatal injuries, so that application of the felony-murder doctrine

serves its deterrent function by holding those who commit felony child abuse strictly responsible for deaths that occur either intentionally or accidentally from commission of the underlying felony.” (*People v. Northrup, supra*, 132 Cal.App.3d at p. 1035-1036.)

Although this aspect of *Northrup*'s analysis could be seen as inconsistent with the present argument, any such interpretation must be rejected. *Northrup*'s reasoning is clearly fallacious. The fact that felony child abuse can be committed without inflicting death, or without intent to inflict injuries that will result in death, cannot be the basis for rejecting the *Ireland* doctrine; the very same things are equally true about the crime of assault with a deadly weapon. That crime focuses upon the assault, not its results. The use of a deadly weapon completes the crime, even if no serious injury is inflicted. Like felony child abuse, the crime of assault with a deadly weapon “can be, and often is, committed without infliction of fatal injuries, ...” (*Id.*) In other words, the *Northrup* rationale does not distinguish its facts from *Ireland*. Instead, it would abrogate *Ireland* entirely, which is not within the power of a Court of Appeal. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

The error that led to the illogical reasoning in *Northrup* originated from its misinterpretation of this Court's rationale in *Burton*. *Northrup* states without qualification that *Burton*:

“... specifically rejected the notion that *Ireland* and *Wilson* should be interpreted ‘to mean ... that if the facts proven by the prosecution demonstrate that the felony offense is included in fact within the facts of the homicide and integral thereto, then that felony cannot support a felony-murder instruction.’ (*Id.*, at p. 387.)”

(*People v. Northrop, supra*, 132 Cal.App.3d at p. 1035.)

That is not exactly what this Court actually did in *Burton*. The context of the *Burton* discussion was whether the *Ireland* rationale should apply to the crime of robbery simply because the force element of robbery requires some kind of assaultive conduct. *Burton* was simply saying that the fact that some assaultive conduct is involved in a particular felony is not enough to bring it within the *Ireland* doctrine. The true rationale of *Burton* was set forth clearly:

“We conclude that there is a very significant difference between deaths resulting from assaults with a deadly weapon, where the purpose of the conduct was the very assault which resulted in death, and deaths resulting from conduct for an independent felonious purpose, such as robbery or rape, which happened to be accomplished by a deadly weapon and therefore technically includes assault with a deadly weapon. Our inquiry cannot stop with the fact that death resulted from the use of a deadly weapon and, therefore, technically included an assault with a deadly weapon, but must extend to an investigation of the purpose of the conduct. In both *Ireland* and *Wilson*, the purpose of the conduct which eventually resulted in a homicide was assault with a deadly weapon, namely the infliction of bodily injury upon the person of another. The desired infliction of bodily injury was in each case [footnote omitted] not satisfied short of death. Thus, there was a single course of conduct with a single purpose.” (*People v. Burton* (1971) 6 Cal.3d 375, 387.)

In this crucial respect, the present case falls well within the *Ireland* rationale and is easily distinguishable from *Burton*. Here, the purpose of the mayhem

was the very assault which resulted in death. That follows necessarily from the fact the jury found the specific intent to maim. Here, there was a single course of conduct with a single purpose.

*Northrup* can also be distinguished from the present case because it went on to rely on an analogy to *People v. Shockley*, *supra*, 79 Cal.App.3d 669, discussed earlier in this argument. Expressing approval of *Shockley*, the Court in *Northrup* explained:

“Felony child abuse may be committed without either an intent to kill or the infliction of great bodily harm, and thus has a felonious design independent of the resulting homicide. This is so particularly where, as here, the evidence suggests appellant may well have committed the felony by suffering the child to endure grievous injury without treatment, rather than actually inflicting the death-producing injuries.” (*People v. Northrop*, *supra*, 132 Cal.App.3d at p. 1036.)

Thus, as shown earlier, *Shockley* relied in part on the fact that child endangerment could be based on indifference or neglect, rather than an assault. Similarly, *Northrup* relied in part on the fact that felony child abuse could have been based on failure to obtain treatment for grievous injuries, rather than on the infliction of the injuries. However, here, the underlying felony of mayhem could have been based only on the assaultive conduct that resulted in death.

These distinctions were expressly recognized by this Court in *People v. Smith* (1984) 35 Cal.3d 798. There, the defendant was convicted of second degree felony-murder based on the underlying felony of Penal Code section 273a, subd. (1) felony child abuse. This Court traced the history of the *Ire-*

*land* doctrine and noted that in cases involving 7 different crimes for which the doctrine was found inapplicable, *Northrup* was the **only one** that involved an underlying felony that had as its primary purpose an assault on the person of the victim. (*People v. Smith, supra*, 35 Cal.3d at p. 805.)

This Court then acknowledged that felony child abuse covered a wide range of conduct that could be either active or passive. (*Id.*, at p. 806.) This Court explained:

“The language of *Ireland, Wilson* and *Burton* bars the application of the felony-murder rule ‘where the purpose of the conduct was the very assault which resulted in death.’ (*People v. Burton, supra*, 6 Cal.3d at p. 387.) In cases in which the violation of section 273a, subdivision (1), is a direct assault on a child that results in death (i.e., causing or permitting a child to suffer or inflicting thereon unjustifiable physical pain), it is plain that the purpose of the child abuse was the ‘very assault which resulted in death.’ It would be wholly illogical to allow this kind of assaultive child abuse to be bootstrapped into felony murder merely because the victim was a child rather than an adult, as in *Ireland*.” (*People v. Smith, supra*, 35 Cal.3d at p. 806.)

Here, too, it is plain that the purpose of the mayhem was the very assault that resulted in death. The fact that the victim was a child clearly does not preclude application of the *Ireland* doctrine. In words equally applicable to the present case, this Court explained further:

“In the present case the homicide was the result of child abuse of the assaultive variety. Thus, the underlying felony was unquestionably an ‘integral part of’ and ‘included in fact’ in the homicide within the meaning of *Ireland*. [Footnote omitted]. Furthermore, we can conceive of

no independent purpose for the conduct, and the People suggest none; just as in *Ireland*, the purpose here was the very assault that resulted in death. To apply the felony-murder rule in this situation would extend it 'beyond any rational function that it is designed to serve.' (*People v. Washington, supra*, 62 Cal.2d 777, 783.) We reiterate that the ostensible purpose of the felony-murder rule is not to deter the underlying felony, but instead to deter negligent or accidental killings that may occur in the course of committing that felony. (*Id.*, at p. 781.) When a person willfully inflicts unjustifiable physical pain on a child under these circumstances, it is difficult to see how the assailant would be further deterred from killing negligently or accidentally in the course of that felony by application of the felony-murder rule."

In *Ireland*, we reasoned that one who violates section 245 is not deterred by the felony-murder rule. The elements of section 245 and the offense here are strikingly similar; [footnote omitted] the principal difference is that the assault prohibited by section 273a is committed on a child. Accordingly, despite our deep abhorrence of the crime of child abuse, we see no escape from our duty to apply the merger doctrine we carefully enunciated in *Ireland* and its progeny. A sister jurisdiction has come to a similar conclusion, holding that 'the felony committed, child beating, is not independent of the homicide and must merge into the homicide.' (*Massie v. State* (Okla. Crim. 1976) 553 P.2d 186, 191, fn. omitted.) (*People v. Smith, supra*, 35 Cal.3d at p. 806.)

Next, this Court in *Smith* discussed the *Northrup* case, analyzed above. *Smith* rejected the *Northrup* conclusion that there was an independent purpose to the child abuse just because there could have been no intent to

kill. (*People v. Smith, supra*, 35 Cal.3d at p. 807.) *Northrop* was expressly disapproved, to the extent it was inconsistent with the reasoning in *Smith*. (*People v. Smith, supra*, 35 Cal.3d at p. 808.) *Shockley* was also distinguished because death there followed from malnutrition and dehydration, while in *Smith* the cause of death was clearly a severe beating. In the present case, the cause of death was the very same conduct that constituted the crime of mayhem. Thus, *Smith* is controlling and it was error to instruct on the felony murder doctrine in the present case. As in *Smith*,

“The People cannot show that no juror relied on the erroneous instruction as the sole basis for finding defendant guilty of murder. In these circumstances it is settled that the error must be deemed prejudicial. (*People v. Green* (1980) 27 Cal.3d 1, 73-74; *People v. Henderson* (1977) 19 Cal.3d 86, 96, and cases cited.)” (*People v. Smith, supra*, 35 Cal.3d at p. 808.)

Although preclusion of the felony-murder verdict based on mayhem would still leave the alternative torture-murder theory of first degree murder viable, the error cannot be deemed harmless. As shown in Arguments III and IV, earlier in this brief, the torture-murder theory was invalid for separate reasons; the instructions given to the jury were incomprehensible and left the jury with no rational basis to determine whether the elements of the crime had been proved beyond a reasonable doubt. Furthermore, in that same argument, it was shown that the evidence was insufficient to support a conclusion that Veronica Gonzales possessed the requisite mental state to support a first-degree torture murder verdict. In sum, under the combined impact of the errors set forth in the present argument and in Arguments III and IV, the first-degree murder verdict is left with no valid theory to support it.

Allowing the jury to rely on the invalid theory here resulted in the denial of due process of law, the denial of a fundamentally fair jury trial, the denial of the reliability required for a verdict that supports a death sentence, and improperly allowed the first degree murder verdict to be based on an improper substitution for the otherwise essential elements of deliberation and premeditation, violating the federal Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739; *People v. Figueroa, supra*, 41 Cal.3d at p. 726, quoting from *Cabana v. Bullock* (1986) 474 U.S. 376, 384-385 [88 L.Ed.2d 704, 715, 106 S.Ct. 689, 696]; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

**VI. INDIVIDUALLY AND/OR COLLECTIVELY,  
THE ERRORS THAT OCCURRED DURING  
THE GUILT PHASE TRIAL WERE PREJU-  
DICIAL**

**A. Introduction**

In a number of arguments, Veronica Gonzales has shown particular reasons why a particular error was prejudicial, with specific citations to federal constitutional bases, whenever applicable. In this argument, a number of broader factors and principles that apply to each of the errors and to the federal constitutional prejudice analyses urged in this brief, are set forth. In other words, this argument will focus on the assessment of the facts and the general principles of law that lead to the conclusion that the errors that occurred in this trial, considered individually or collectively, cannot be deemed harmless.

Of course, the primary factor that should influence the assessment of the prejudicial impact of any of the errors that occurred in this case is the extreme closeness of the evidence in regard to whether Veronica Gonzales was criminally responsible for the injuries inflicted on Genny Rojas and, even if so, whether the requisite mental states for either theory of first degree murder or for either special circumstance were shown. As noted, federal constitutional violations have been identified in regard to every error set forth in this brief, thereby calling for the use of the very stringent standard of error set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. However, even if this Court disagrees and chooses to apply the less stringent standard of *People v. Watson* (1956) 46 Cal.2d 818 to some of the errors identified in this

brief, the closeness of the case remains a crucially important factor in assessing prejudice. In other words, the extreme closeness of the case makes it impossible to declare any meaningful error harmless under **either** standard.

In addition to the evidentiary weaknesses, other well-established principles also lead to the conclusion that this was a close case, and/or that any errors that occurred were especially likely to have had an impact on the outcome of the case.

**B. The Evidence of Guilt Was So Weak That the Present Case Must be Seen as Extremely Close**

In Argument IV, earlier in this brief, regarding the insufficiency of the evidence to establish the requisite mental states for either theory of first degree murder or for either special circumstance, it was shown in some detail just how weak the evidence was in the present case. But even if this Court finds sufficient evidence to uphold the verdicts, the same reasoning demonstrates that, at the very least, the evidence must be considered close. For similar reasons, the evidence that Veronica Gonzales bore any criminal responsibility for the injuries suffered by the victim must also be deemed close at best.

Indeed, if we put aside for the moment the evidence pertaining to the statements made by Veronica Gonzales to the police after her arrest, the evidence of her responsibility for the death of the victim, or of a culpable mental state, is virtually non-existent. All other prosecution evidence demonstrated no more than the fact that either Veronica or Ivan Gonzales, or both of them, were responsible for the injuries to the victim.

While bits and pieces of the various statements made by Ivan Gonzales, Jr. could be seen in isolation as incriminating, any fair review of all of his statements compels the conclusion that his statements were filled with unexplained inconsistencies, ambiguities, and contained many matters known to be indisputably incorrect. This is not surprising, as he was only eight years old at the time of the events, he was apparently not in a position to actually witness the most significant events, and the manner in which he was interviewed by investigators and by therapists violated numerous undisputed principles regarding appropriate methods to obtain accurate information from young witnesses. Thus, no rational trier of fact could rely on his statements to prove any element of the present charges.

Returning to the statements made by Veronica Gonzales to the police in the days after her arrest, certainly she made many false statements. This could support an inference of some kind of consciousness of guilt, but any such inference was strongly countered by her trial testimony. She gave undisputed testimony describing the childhood physical and sexual abuse inflicted upon her by her mother and stepfather. She gave undisputed testimony describing the physically abusive and emotionally controlling treatment she received at the hand of her husband, who she married at the age of sixteen. With six children under the age of 8 by the time she was in her mid-twenties, and with an education that ended in mid-high school, she explained that even when she wanted to leave her husband, she had no realistic alternative, and perceived herself as trapped.

Her explanation that her circumstances and her state of mind left her feeling helpless to stop her husband's abuse of Genny Rojas was fully sup-

ported by strong expert testimony regarding the impact of being a battered spouse. Similar strong expert testimony corroborated her explanations as to why she did not report her husband to the authorities and why she lied to the police in a misguided effort to protect the man upon whom she had depended throughout her adult life, even after both were under arrest. Indeed, even prosecution experts conceded the evidence was compelling that she had suffered severe childhood abuse and that she was a battered spouse. Rational jurors could have easily accepted her testimony and her supporting experts, but any significant error could have caused jurors to turn against her, after seeing photographs of the horrific injuries inflicted on the young victim.

Thus, with no physical evidence to tie Veronica Gonzales directly to the acts that led to the death of the victim, or to prove the requisite mental states, the main task facing the jury was to determine the credibility of Veronica Gonzales and her supporting experts. This Court has expressly recognized that difficult credibility questions are a major ingredient of close cases. (*People v. Anderson* (1978) 20 Cal.3d 647, 651; *People v. Taylor* (1982) 31 Cal.3d 488, 500-501.)

“Where the evidence, though sufficient to sustain the verdict, is extremely close, ‘any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.’ “ (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; *People v. Briggs* (1962) 58 Cal.2d 385, 407.)

**C. Other General Principles of Law Indicate That Errors in the Present Case Were Likely to Be Prejudicial**

One indication that this was perceived as a close case by the jurors who heard the testimony is the length of the jury deliberations. In *People v. Collins* (1968) 68 Cal.2d 319, 332, this Court relied on such a factor where the deliberations lasted eight hours. In *People v. Woodard* (1979) 23 Cal.3d 329, 341, this Court observed, "The issue of guilt in this case was far from open and shut, as evidenced by the sharply conflicting evidence and the nearly six hours of deliberations by the jury before they reached a verdict." Similarly, in *People v. Cardenas* (1982) 31 Cal.3d 897, 907, this Court commented on a twelve hour deliberation and noted, "Here, the jury deliberated twice as long as the jury in *Woodard*, a graphic demonstration of the closeness of this case." Again, in *People v. Rucker* (1980) 26 Cal.3d 368, 391, this Court commented on the fact that liability was not clear-cut and then noted, "The fact that the jury deliberated nine hours before reaching a verdict underscores this fact." In *In re Martin* (1987) 44 Cal.3d 1, 51, this Court concluded, "First, the case was very close. The fact that the jury deliberated almost 22 hours over 5 days **practically compels the conclusion.**" (Emphasis added.)

In the present case, deliberations began on April 23, 1998 and continued on April 24, 27, 28, and 29. (RT 83:11003-11027.) Finally, after further deliberations on May 1, the jury reached its verdicts. (RT 83:11028.) Thus, the total deliberations on the issue of guilt lasted 3 full court days, plus parts of two more.

Of course, while this Court has cited the length of the deliberations as evidence of a close case in the cases noted above, and in many other cases, it has also concluded in some cases that long deliberations resulted simply from the fact that a case was complex. (See, for example, *People v. Cooper* (1991) 53 Cal.3d 771, 837, concluding that, despite 27 hours of deliberations over 7 days, the inference that the case was close was weaker than in other cases because the case was a complex capital case.) Undoubtedly, the length of the trial contributed to the length of deliberations in the present case. Nonetheless, when jurors have deliberated over 5 court days, this cannot be dismissed as merely a demonstration that the jurors were conscientious. Rather, it is clear that the jury did not perceive the case to be open-and-shut.

Furthermore, while the trial was long, the only guilt-phase choices the jury had to make were whether Veronica Gonzales was guilty of homicide and, if so, whether her mental state met the requirements for finding murder in the first degree and for the special circumstance. While those were difficult decisions, as set forth above, it is the very difficulty of those decisions that made this a close case. In sum, the only reasons for extended debate were doubts about the sufficiency of the evidence that Veronica Gonzales was criminally responsible for the death of the victim, and/or about the sufficiency of the evidence of the requisite mental states. **Doubts on any of those matters could only mean that the jury viewed this as a close case.**

It should also be kept in mind that there were many reasons why Veronica Gonzales should have been quickly convicted if the jurors somehow perceived the evidence against her as being clear-cut. In *People v. Adams* (1939) 14 Cal.2d 154, 167, this Court recognized that where the nature of the

alleged crimes is particularly inflammatory, average jurors would tend to convict anybody accused, and the burden of proof was likely to be placed erroneously on the defendant instead of on the prosecution. While *Adams* involved a charge of child molestation, the present crime was also very inflammatory. Here, a four-year-old was scalded to death in a bathtub while in the care of her relatives. The prosecution contended that the child had been the victim of intentional maiming and torture. The jury was shown particularly horrible photographs of the devastating injuries suffered by the young victim. Thus, the following observation made in *Adams* should be equally applicable here:

“Errors committed either by the prosecution or the court in the course of the trial, which ordinarily might be considered trivial and as of no material consequence from a standpoint of adverse effect upon the rights of a defendant, may become of great importance when committed in a case of the character of that here involved.” (*Adams, supra*, 14 Cal.2d at 168.)

Here, the undisputed evidence also showed that Ivan and Veronica Gonzales were supported solely by funds received from welfare, and that they often used those funds to support their illegal use of methamphetamine, rather than for food or clothing for their children. This gave the jury ample reason to dislike Veronica Gonzales regardless of the extent of her involvement in the infliction of injuries on the victim. This Court has recognized that “ ‘the jury might not be able to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor.’ (Note (1964) 78 Harv.L.Rev. 426, 436.)” (*People v. Thompson* (1980) 27 Cal.3d 303, 317.)

That the jury could deliberate so long, despite such reasons why they should have been eager to convict, thoroughly demonstrates that the prosecution evidence must have left the jurors with cause for substantial hesitation.

On the other hand, this is not a case where it can be said that the lengthy deliberations indicate that the jurors deliberated cautiously despite the negative influences of the factors just discussed. To the contrary, as demonstrated in the sufficiency of the evidence argument (see Argument IV, earlier in this brief), a properly functioning jury should not have found that the requisite mental states for either theory of first degree murder, or for either special circumstance, were proved beyond a reasonable doubt, as this jury did. That the jury could convict Veronica Gonzales on such weak evidence strongly supports the conclusion that the jury was improperly influenced by the various errors set forth in this brief.

**D. All Instances In Which This Court Finds Guilt Phase Error, But Finds the Error Harmless When Considered Individually, Must Also Be Assessed Together to Determine Whether Their Cumulative Impact Was Prejudicial**

Many of the errors urged in this brief are sufficiently important as to justify reversal in and of themselves, at least in the unusual context of this trial. However, if this Court finds more than one error, but concludes that each error, standing alone, can be deemed harmless despite the factors discussed above, then this Court must also consider the cumulative effect of the errors. (*Williams v. Taylor* (2000) 529 U.S. 362, 399; *People v. Hill* (1998) 17 Cal.4<sup>th</sup> 800, 844-845; *People v. Cardenas* (1982) 31 Cal.3d 897, 907;

*People v. Duran* (1976) 16 Cal.3d 282; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Zerillo* (1950) 36 Cal.2d 222, 233; *People v. Williams* (1971) 22 Cal. App.3d 34, 40; *People v. Vindiola* (1979) 96 Cal.App.3d 370, 386-387; and *People v. Cruz* (1978) 83 Cal.App.3d 308, 334.) Indeed, federal 5<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendment due process and reliability concerns mandate meaningful appellate review in capital cases. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321.) Absent a consideration of the cumulative impact of errors, meaningful appellate review would not be possible.

In other words, in some situations an error can be found to be sufficiently minor so that a more favorable result on a retrial is unlikely. However, if there is a series of errors that would **all** be corrected at a retrial, it becomes much more difficult to conclude that a different result is unlikely.

In the present case the nature of the errors set forth in Arguments I and II, earlier in this brief, went to the heart of the crucial issues regarding Battered Woman's Syndrome, and of the credibility of Veronica Gonzales and her expert witnesses. "An error that impairs the jury's determination of an issue that is both critical and closely balanced will rarely be harmless." (*People v. McDonald* (1984) 37 Cal.3d 351, 376.)

Cumulatively, the guilt phase errors resulted in the deprivation of a fundamentally fair trial by an impartial jury, in accordance with federal 5<sup>th</sup>, 6<sup>th</sup>, and 14<sup>th</sup> Amendment and state constitutional guaranties of due process of law.<sup>125</sup> Furthermore, as a result of the errors shown, the ability of the

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125. Nearly every error set forth in this brief implicated federal due process and other federal constitutional concerns. Specific citations relating  
(Continued on next page.)

jury to fairly resolve the disputed facts was inadequate to assure the degree of reliability needed to satisfy the federal 8th Amendment, in the case of a guilt judgment used to support a death sentence. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280.) In light of the very weak prosecution case on the key issues of Veronica Gonzales' involvement and of her mental state, the likelihood of a more favorable verdict absent the errors was very substantial. Thus, none of the errors can be deemed harmless, and together they present an unusually strong case for finding prejudice.

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(Continued from last page.)

the particular type of error at issue to federal due process and other constitutional concerns are contained within each such argument.

## INTRODUCTION TO PENALTY PHASE ARGUMENTS

It is readily apparent that the prosecutor was desperate to obtain a death verdict against Veronica Gonzales. After all, early in the proceedings, both Veronica and Ivan Gonzales offered to plead guilty as charged and admit all special circumstances, as long as the prosecutor would agree not to seek a death sentence. In other words, both defendants were willing to accept sentences of life in prison without the possibility of parole. (RT 9:883, ll. 13-18.) When this offer was made, Deputy District Attorney Luis Aragon expressed unusual sentiments for a prosecutor in a capital trial:

“And, and I must say--and I say this proudly, and I speak for Mr. Goldstein--it was a moment of pride as a member of the bar of this community to see counsel speak with obvious care and concern for the children. And I was really impressed and thought that their points could not have been argued better, certainly not with any more sincerity and genuine concern.”  
(RT 9:883-884.)

The trial court also recognized the advantage of settling this case with guilty pleas, and thereby avoiding and need to have any of the children of Ivan and Veronica Gonzales testify in a trial in which the execution of their parents was being sought:

“But I would like to toss out a couple of my views just to be on the table as this discussion is going on. And they, they come from the two years’ experience I recently had in the dependency court and, to some extent, some of the things I saw in the delinquency court, but more specifically the two years in the dependency court where I repeatedly had the opportunity to

examine child witnesses as they gave testimony, clearly harmful to their parents, and watched the discomfort that inherently goes with that and heard testimony from experts about the long-term consequences which to some extent are mixed, but carry a heavy negative element.

And I have been concerned in this case, too, irrespective of any initial vulnerability, on the part of these kids. If these were the strongest kids in the world, I'd have a lot of concern about the impact on them being brought into court to testify in a manner that would cause their parents' execution, what baggage that would carry through their lives.

I'm a little more concerned about that in light of the indications I've gotten that Ivan is somewhat fragile right now, making the concerns all the more important or more serious in my mind. So I don't imagine that I said anything that wasn't already on the table, but this was my chance to bring us up to pace and I felt strongly enough about it to express it." (RT 9:884-885.)

Aside from avoiding potential detrimental impact on the children of Ivan and Veronica Gonzales, there were other powerful reasons in favor of resolving this case with guilty pleas that would result in sentences of life without parole. Here, neither Ivan nor Veronica Gonzales had any prior history of criminal convictions. [CT 38:8389-8400.] Indeed, at Veronica Gonzales' penalty trial, the **only** category of aggravating evidence the prosecutor was able to present in his case-in-chief consisted of the circumstances of the present offense. When the penalty phase evidence began, the prosecutor simply announced, "Your Honor, the people will rely on the guilt phase evidence." (RT 88:11677.)

Furthermore, the evidence was undisputed that Veronica Gonzales had suffered from severe and prolonged physical and sexual abuse when she

was a child. The surviving family of the victim was also the family of Veronica Gonzales. The evidence left considerable uncertainty as to the relative culpability of Ivan and Veronica Gonzales – even after the trials, we simply do not know who did what, or what was the true mental state of either of them.

Before the proposed plea agreement could be finalized, it was necessary for Deputy District Attorney Aragon to go before a seven-member major case review committee. (RT 9:898.) For unknown reasons, that committee rejected the proposed agreement. (RT 9:915-916.) Afterward, both defendants continued to offer to plead guilty and accept penalties of life without parole, but the People refused to agree to such terms. (RT 9:947.)

This decision was a very expensive one for the prosecution. Subsequently, a severance was granted, forcing the People to proceed with two separate trials instead of one. (RT 30:3304-3311.) Ivan Gonzales was tried first. His penalty trial ended in a hung jury, causing the prosecution to have to retry the penalty phase. (RT 34:3415-3417.) Thus, before the two death verdicts were obtained, the prosecution had to try two guilt trials and three penalty trials, resulting in sixteen months of near-continuous trial litigation.

Aside from the expense of multiple trials, the prosecution decided that death verdicts were so important that they were willing to risk traumatizing two children in order to obtain such verdicts. The prosecution subpoenaed Ivan Gonzales, Jr. and Michael Gonzales, and originally expected them to be important prosecution witnesses in the trials that could result in the execution of their parents. After a hearing was held, the trial court quashed the subpoenas and determined these two young witnesses were so much in dan-

ger of suffering traumatic consequences if they were required to testify against their parents that they should not be required to testify. (See detailed description of these events in Subdivision A (9)(a) of the Statement of the Facts, at pp. 125-126, earlier in this brief.)

In sum, the prosecution turned down an offer that would have resulted in life without parole terms for two defendants who had no prior criminal records. The prosecutor made the decision to risk traumatizing two innocent children, and would have gone through with those plans but for the trial court order quashing the subpoenas. The prosecutor incurred the great expense of two guilt trials and three penalty trials. It seems clear that the prosecutor would have been greatly disappointed if he failed to ultimately obtain the desired verdicts. Perhaps this explains his loss of perspective and the lengths to which he was willing to go during Veronica Gonzales' penalty trial.

Earlier in this brief, it was shown that the prosecutor openly acknowledged the fact that Veronica Gonzales had suffered extensive physical and sexual abuse as a child, but the prosecutor took the unusual step of trying to use that background against her, as proof that she was probably a child abuser herself. (See Argument II, earlier in this brief.) In the penalty phase portion of this brief, it will be shown that the prosecutor went even further during the penalty trial, trying to use Veronica Gonzales' unfortunate childhood as a reason why she should not be permitted to live. Worse than that, in the most perverted use of "victim impact" evidence imaginable, the prosecutor openly trashed virtually every adult relative Veronica Gonzales (and victim

Genny Rojas) had in a misguided effort to show that the entire family was so worthless that executing Veronica Gonzales was the appropriate response.

This was only the tip of the iceberg. As noted above, the prosecutor had earlier been determined to traumatize the children of Ivan and Veronica Gonzales by forcing them to testify in a trial that would seek the execution of their parents. Ivan and Veronica, on the other hand, were so determined to avoid such traumatization that they were both willing to plead guilty and accept sentences of life without parole. In the penalty trial, Veronica Gonzales offered compelling evidence from the children's therapists that even without being required to testify at trial, they would still almost certainly suffer trauma if both their parents were executed. In response, the prosecutor did everything he could to try to convince the jury that these children would be better off in the long run if their parents were executed.

The end result was so ironic the prosecutor himself apparently never even realized the terrible inconsistency of his own position. As will be shown, during his argument to the jury, he took the position that throughout her short life, nobody cared for Genny Rojas. He stressed the manner in which she had been passed repeatedly from one relative to another, with nobody offering her protection from harm. In a naked effort to elicit an emotional verdict, he read to the jury a fictitious letter to the deceased Genny Rojas in which he called upon the jurors to join him in promising Genny Rojas that they would honor her memory and serve as her protectors by not letting Veronica Gonzales escape with her life.

What the prosecutor never seemed to realize was that if Genny Rojas had survived the abuse committed against her, the prosecutor's own experts

would have predicted it was likely that she would have grown up to be a child abuser herself. If that had happened, would this prosecutor have still been ready to show her the compassion he claimed during this penalty trial? Clearly not. Instead, he would have been just as ready to seek the maximum punishment against her, as he was to seek it against Veronica Gonzales.

In sum, if this prosecutor had really felt compassion for Genny Rojas, he would have realized that Veronica Gonzales deserved the same compassion. Instead of using Veronica Gonzales' history of severe abuse as a child as a weapon against her, the prosecutor should have recognized it as especially compelling evidence in mitigation of the penalty. In view of this strong mitigation, the absence of any prior criminal record, and the great uncertainty about the state of mind of Veronica Gonzales when the abuse against Genny Rojas occurred, death is clearly not the appropriate penalty in this case.

**VII. THE TRIAL COURT ERRED IN ALLOWING THE PROSECUTOR TO CROSS-EXAMINE MARY ROJAS ABOUT IRRELEVANT MATTERS THAT SERVED ONLY TO DENIGRATE THE RELATIVES OF VERONICA GONZALES, AND THE PROSECUTOR EXACERBATED THE ERROR IN HIS ARGUMENT TO THE JURY**

**A. Introduction**

Veronica Gonzales' penalty trial contained several unusual factors. The prosecution had no evidence in aggravation to offer other than the circumstances of the crime. The defense had powerful mitigating evidence. Veronica Gonzales had never previously been convicted of any crime. She had suffered years of physical and sexual abuse from her early childhood until she left home shortly before she married Ivan Gonzales. She also had two other very rare kinds of powerful mitigating evidence. In most death penalty trials the prosecutor is able to present dramatic family impact evidence in aggravation of the penalty, but here, the mother of the victim was also the sister of Veronica Gonzales, and testified in her favor. Second, the defense offered testimony from the counselors who were treating the children of Ivan and Veronica Gonzales, and who testified that those children would be likely to suffer further psychological damage if both of their parents were executed.

The prosecutor chose to react to these circumstances in a most inappropriate manner. In a typical capital case, the prosecutor can simply concentrate on dehumanizing the defendant in order to persuade a jury to vote in favor of a death sentence. In the present case, in order to offset the impact of testimony from relatives of the victim who supported the defendant, and

from the counselors treating the defendant's children, the prosecutor simply chose to dehumanize the entire family. While this tactic was apparently effective in the present case, it should not be tolerated by this Court. As will be shown, the prosecutor repeatedly emphasized matters calculated to create an emotional reaction against the entire family, but those matters were entirely irrelevant to the jury's determination of the proper penalty for Veronica Gonzales.

### **B. Evidence Admitted Erroneously**

Mary Rojas was the mother of the victim of the crime, Genny Rojas. She was also the sister of Veronica Gonzales. She was never called as a witness by either side during the guilt phase of the trial, but the defense called her during the penalty trial.

Mary Rojas described the conditions of physical and sexual abuse to which she and her sisters were subjected during their childhood. (RT 89:11895-11902.) Mary also described how her children were taken from her custody when she experienced substance abuse problems and when her husband was imprisoned for molesting one of their children. After the death of Genny Rojas, Mary turned her life around, successfully completing a live-in drug program, remaining sober for four years (as of the time of trial), and regaining custody of her remaining children. (RT 89:11903-11905, 11910, 11971-11974.) During the course of her direct examination, Mary mentioned the fact that after Genny Rojas had died, Mary had given birth to a seventh child and had chosen to also name that child Genny. (RT 89:11904.)

Mary also testified that she loved Genny and missed her. Genny's death had been hard on her family. Nonetheless, Mary's sister, Veronica, still meant a lot to her. Her children still talked to their Aunt Veronica on the phone. Her family had been through a lot, and if her sister, Veronica Gonzales, were executed, her children would be hurt once again. (RT 89:11913-11915.) Thus, the gist of Mary Rojas' testimony, in regard to whether death was the appropriate punishment for Veronica Gonzales, was that despite the tragic death of her daughter while in the custody of Veronica and Ivan Gonzales, Mary Rojas still loved her sister and believed her family would be better off if Veronica was allowed to live.

It would probably be a rare case where a prosecutor would seek to impeach or rebut such evidence. Instead, one would expect a prosecutor to simply argue to the jury that whatever aggravating evidence there was outweighed the importance of this particular aspect of the case in mitigation. Here, however, the prosecutor decided to take on the family of the defendant, which also happened to be the family of the victim. The result was as unseemly as it was erroneous.

Early in the cross-examination of Mary Rojas, the prosecutor forced her to admit she was not a great mother to Genny Rojas, and that she did not have money to feed her children because she had been using her welfare money to buy drugs. (RT 89:11923-11924.) While this may be a good method of causing a jury to dislike Mary Rojas, it is not at all apparent how it changes the fact that she still loved her sister, or how it tended to prove that death was the more appropriate punishment for Veronica Gonzales. Mary Rojas character was not in issue, and the only apparent explanation for

the prosecutor's tactics is that he believed that he could make the whole family look so horrible that the jury would feel that Veronica Gonzales' children would be best off with both of their parents executed.

But the prosecutor was merely warming up. Soon, the following exchange occurred:

“Q I'm curious about where Genny is buried.

Now, you said that you had to get money from a church to get enough money to bury her?

A Yes. But --

Q “Yes”?

A Yes.

Q Okay. What happened to the money the state gave you?

A You know what? I don't know.

Q Well --

A No. For reals.

Q Let me ask you this: were you aware, first of all, that your mother Tillie was given \$2,000 for burial expenses from the state crime victims' fund?

A Well, I heard she got money afterwards. But that's what -- we were trying to get some money because we heard that, you know. There was no money. I mean, I don't know. I didn't see none of those, the --

Q Well, weren't you given \$2700 from the state crime victims' fund?

A Me get 27- --

Q Yeah.” (RT 89:11927-11928.)

Further questioning eventually made it clear that no money whatsoever was given directly to Mary Rojas. The State paid \$2,700 from the Victim Impact Fund for counseling for Mary Rojas and her children, but all of that money was paid directly to counselors, not to Mary Rojas. (RT

89:11928-11929, 11960.) As for \$2,000 provided for burying Genny Rojas, as the prosecutor conceded in his own question, that money was given to Mary's mother Tillie, who had legal custody of Genny at the time of her death. (RT 89:11958-11959.) After Mary denied ever seeing any of the money that was given to her mother, the prosecutor made no effort whatsoever to contest that claim. Once again, there appears to be no relationship at all between the manner in which the State funds were disbursed and the appropriate penalty for Veronica Gonzales. Once again, the only apparent reason for asking such questions was to get the jury to dislike Veronica Gonzales' family so much that they would feel comfortable voting for her execution.

When Mary Rojas denied knowledge of what happened to the \$2,000 the State gave Tillie for Genny Rojas' burial, she said she was still paying \$15 or \$16 every month to pay off the expenses of the burial. The prosecutor responded: "And Genny's burial plot has no headstone or plaque, or anything?" (RT 89:11929.) Mary Rojas acknowledged this was true and explained that she had to pay off the burial plot before she could borrow money for a headstone. This was followed by a series of questions that was simply astonishing for its bad taste:

"Q So your -- the old Genny, Genevieve, doesn't have a headstone, but you decide to have another child and name her Genny?

A Yes.

Q Can you -- can you tell me why maybe you wouldn't want to wait awhile until you got the old Genny a headstone?

Ms. Clemens: Objection. Relevance.

The Court: Argumentative.  
Ms. Clemens: Argumentative.  
The Court: I'll sustain that." (RT  
89:11929.)

The prosecutor was still unsatisfied. After a lunch recess, he returned to Court with four photographs of the unmarked plot where Genny Rojas was buried. He wanted to introduce them in evidence, using Mary Rojas to authenticate them. The prosecutor explained he believed these photographs constituted proper victim impact evidence because, "This is where Genny is now." (RT 89:11935.) The defense objected, noting that "at some point, it becomes cruel to the mother of the victim." (RT 89:11935.) Counsel added that the photos were not relevant, and that they should also be excluded under Evidence Code section 352. (RT 89:11935-11936.)

The trial court ruled in favor of the prosecution. The court explained:

"... the defense has raised the issue whether the family, the extended family and Mary Rojas personally, were hurt, affected by Genny's death, attempting to show that they're real, caring people who were hurt by her death. The prosecution is entitled, I believe, to meet that to the extent that he can show that there are -- there was either little feeling or mitigated feeling about it." (RT 89:11937.)

The judge added that since there had already been testimony regarding the gravesite, he saw no additional harm in providing the visual portrayal the prosecutor desired to share with the jury. (RT 89:11937.) Subsequently, the photos were identified by Mary Rojas. (RT 89:11950; see People's Exhibits 91-A through D.)

The ruling allowing these photographs in evidence cannot be supported either by the rationale stated by the judge or the one claimed by the

prosecutor. The judge was simply incorrect in identifying the gist of the defense evidence as showing that Genny's family were caring people who were hurt by her death. That was not what was important to the defense because that would not have been relevant to the issue of whether the appropriate penalty for Veronica Gonzales was death or life without parole. Instead, the defense had simply tried to show that the closest relatives of the victim nonetheless believed that Veronica Gonzales should be allowed to live.

Alternatively, even if the judge was correct in his description of what the defense had shown, the prosecution evidence did not rebut that. There was no evidence whatsoever that Mary Rojas ever had any access to the \$2,000 the state had given Tillie for Genny Rojas' burial. Whatever Tillie did with the money had nothing to do with whether or to what extent Mary Rojas was genuinely hurt by the death of her daughter, and even less to do with what was the proper penalty for Veronica Gonzales. The prosecutor never disputed Mary Rojas' claim that she could not afford a headstone for Genny until she finished paying for the burial site. This was simply cruel, insensitive, and emotional evidence designed only to cause the jury to dislike the entire family, and thereby feel better about voting for the death of Veronica Gonzales.

Nor can this evidence be defended as victim impact evidence. First, the prosecution never gave notice that it would seek to utilize such evidence in aggravation of the penalty, as required by Penal Code section 190.3:

“Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation

unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the Court, prior to trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.”

Although the last sentence of the portion of section 190.3 just quoted allows evidence in rebuttal without advance notice, any attempt by the People to rely on that provision produces a conundrum. If the evidence was offered in rebuttal to defense evidence, then it was not victim impact evidence in aggravation of the penalty, and it was not relevant rebuttal for the reasons given above. On the other hand, if the evidence was offered as victim impact evidence in aggravation, rather than as rebuttal, then notice was required.

In any event, this cannot be considered proper victim impact evidence. The **only** mechanism for the introduction of victim impact evidence in aggravation under California law is if the evidence comes within the meaning of the circumstances of the crime:

“For these reasons, we believe that the injury inflicted is generally a circumstance of the crime as that phrase is commonly understood. We need not divorce the injury from the acts. We thus hold that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. **This holding only encompasses evidence that logically shows the harm caused by the defendant.** We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne, supra*, 501 U.S. 888. (*People v. Edwards* (1991) 54 Cal.3d 787, 835-836; emphasis added.)

It is difficult to comprehend how the ability or desire of the family of the victim to spend the money necessary for a headstone to mark the grave of the deceased victim can be considered a circumstance of the crime. Certainly Veronica Gonzales had no control over what Tillie decided to do with the funds the state provided for the burial of Genny Rojas, nor did she have control over how Mary Rojas decided to honor the memory of her daughter. It is simply impossible to comprehend what this could have to do with the determination of the proper penalty for Veronica Gonzales. Instead, the prosecutor was blatantly seeking to strike an emotional chord with the jury, and the rulings made by the Court enabled him to succeed in achieving that improper goal.

Having persuaded the judge erroneously to allow this much, the prosecutor pressed for more. Noting that Mary's children were originally taken from her custody because she chose to live with their father, Pete Rojas, despite his drug use and his molestation of one of his own children, the prosecutor wanted to elicit the fact that Pete Rojas was also the father of Mary's newest baby. The defense objected on the ground of relevance, but the judge simply noted that since Mary had mentioned on direct examination that Pete Rojas had been the father of her earlier children, the question the prosecutor desired to ask was within the scope of the direct examination. (RT 89:11944-11945.) Subsequently, the prosecutor did elicit this fact. (RT 89:11948-11949.) Once again, nobody ever explained how this rebutted any of Mary Rojas' testimony about Veronica Gonzales, or how it was in any way relevant to the proper penalty for Veronica Gonzales. Once again, the only apparent point of the evidence was to increase the jurors' dislike for

Mary Rojas, allowing them to feel more comfortable about voting for the execution of her sister.

Having been successful so far, the prosecutor continued his theme of showing that nobody wanted Genny Rojas:

“Q Ma’am, I want to try and ask you where Genny was living, Genevieve was living at various times in her life, okay?”

A (Witness nods head affirmatively.)

Q Now, she started out with you, correct?

A Uh-huh.

Q Is that a “yes”?

A Yes.

Q Okay. And then did she go to Tillie’s, her grandmother’s?

A Yes.

Q Okay. And then from Tillie’s she went to Victor and Anita’s?

A Yes.

Q And then from Victor and Anita’s she went back to Tillie’s?

A Yeah.

Q And then from Tillie’s, she went to Ivan and Veronica Gonzales?

A Yeah.

Q Okay. Now, so Tillie couldn’t -- so Tillie didn’t keep her, correct? Tillie gave her up?

A Yes.

Q And Anita and Victor gave her up, correct?

A Yeah.

Q And you gave her up, correct?

A Yeah.

Q And then Tillie gave her up to Ivan and Veronica?

A Yes.

Q Okay. Is it fair to say that nobody wanted Genny?

A No. I wanted Genny.

Q How much did you want her?

A You're saying nobody wanted Genny?

Q Well, it seems like --

A Well, I wanted Genny.

Q You wanted Genny. She was getting passed around to the various --

A Yeah, I know, because I was on drugs; yeah, you're right, because I was on drugs, yes.

Q You wanted your drugs more than you wanted Genny?

A I had an addiction problem; you're right." (RT 89:11946-11947.)

Once again, it is mystifying how this could have any bearing on the appropriate penalty for Veronica Gonzales. This does not impeach or rebut in any way the testimony of Mary Rojas that, despite what happened to her daughter, she still loves her sister and believes she and her family would be better off if her sister were allowed to live.

### **C. Improper Prosecution Argument**

Apparently forewarned by the kinds of arguments the prosecutor made during Ivan Gonzales' previous penalty trials, Veronica Gonzales' defense team moved early to attempt to head off improper arguments. On January 12, 1998, the defense filed a Motion to Preclude Comment by the Prosecutor about Reserving a Seat for Genny and No One Caring for Genny. (CT 9:2317-2324.) On May 11, 1998, the defense filed a motion to limit penalty phase argument. (CT 16:3597-3613.)

Before the arguments began, defense counsel requested that objections he had unsuccessfully made in advance be deemed made during argument, and admonitions requested, so they would not have to be repeated in front of the jury. The prosecutor had no objection, and the judge agreed to this procedure. (RT 90:12011-12012; see also RT 87:11507.)

When his argument began, the prosecutor wasted no time in turning the focus away from Veronica Gonzales and to her family. After a few introductory paragraphs (RT 90:12023-12024), the prosecutor sharply attacked Mary Rojas for expressing love for her sister:

“As we sat here on Thursday and listened to the victim’s mother come into this trial, it had to be the most offensive and repulsive testimony ever heard in a Courtroom. It was shocking. It was without humanity, and it was without compassion.

Now, think about this, don’t think about it in this case setting; just think about it generically. We had a victim’s mother, a victim’s mother come in and testify for the defense in a case where a daughter was horribly murdered--that, that is different again than any reality that we will ever know outside of a Courtroom like this, a victim’s mother testifying for the defense--we didn’t just have any victim’s mother, it was Genny’s mother, this little girl’s, in this last photograph that we have of her, her mother.

And I hate even saying those words, ‘mother.’ Let’s call her the biological mother because that’s all she is. She is genetically related to what was Genevieve Rojas, not Genny Rojas, Genevieve Rojas, the old Genny.” (RT 90:12024-12025.)

Unquestionably, it was not an easy situation for Mary Rojas. She had lost her daughter, Genny, but her sister was on trial for her life. Compassion for

Mary Rojas would be warranted in these circumstances. However, even if we put the prosecutor's total lack of compassion aside, the fact remains that whatever the prosecutor felt about Mary Rojas had nothing to do with the determination of the appropriate penalty for Veronica Gonzales. Once again, the prosecutor made a blatant appeal to emotions.

But the prosecutor here was merely warming up. He knew he was in an unusual and difficult situation, with the mother of the victim being the sister of the defendant in a death penalty case, urging that her sister's life be spared. He chose to attack the mother as viciously as he could:

“Real parents who lose a child freak out. They lose their minds. They wear their child's death on their sleeve as a badge. They never get over it. It alters their lives forever. They lose their marriages. They lose their jobs. They end up with alcohol problems. They commit suicide because, when you lose a child, you lose a part of you. That's what being a parent is.

And if you remember in voir dire, back in February, when I asked you about--and it sounded like a stupid question—what's a parent? It was for Thursday. It was for Mary Rojas, because she's not a parent; she's biologically related to Genny Rojas, and that is it.”(RT 90:12025-12026.)

There could be endless debates about whether Mary Rojas should have stood by her sister, or should have stood by her deceased daughter and turned a cold shoulder to her sister. Whatever might be the appropriate response, the important fact is that none of Mary's shortcomings as a parent had anything whatsoever to do with the determination of the proper penalty for Veronica

Gonzales. The prosecutor's improper appeal to emotions could not have been more blatant.

“ ‘ “The jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason.” ’ ” ( *People v. Robinson* (2005) 37 Cal.4th 592, 651.) “... the prosecution may not introduce irrelevant or inflammatory material that ‘ “diverts the jury’s attention from its proper role or invites an irrational, purely subjective response.” ’ ( *People v. Edwards, supra*, 54 Cal.3d at p. 836.)” ( *People v. Prince* (2007) 40 Cal. 4<sup>th</sup> 1179, 1287.)

Certainly it was unusual when Mary Rojas had another daughter after Genny’s death, and named the new daughter Genny. Once again, there could be endless debates about whether that was an appropriate response. But even if it was not, it was Mary’s decision, with no suggestion whatsoever that Veronica Gonzales was even consulted. Nonetheless, despite the fact that this had nothing whatsoever to do with the real issue of the appropriate penalty for Veronica Gonzales, the prosecutor could not resist returning to this oddity:

“Of course, then she names her daughter ‘Genny,’ her new Genny. She gets back together with her molesting husband, who molested one of the other daughters. And she testifies on direct that she never sees Pete anymore, Pete Rojas, and that’s her choice. Of course, on cross, she finally admits, ‘Oh, yeah, he’s the father of New Genny.’”

New Genny, people who lose dogs and cats don’t rename their new pets after their old pets. That shows you what a fungible item Genevieve Rojas was to Mary Rojas and this

family, if that's what you want to call them." (RT 90:12027.)

That last comment by the prosecutor was perhaps his most blatant effort to dehumanize an entire family -- the family of the victim as well as of the defendant.

The prosecutor continued with this theme, arguing that "Genny, a four-year-old, was passed around like a piece of meat or a sack of potatoes by these people --" (RT 90:12029.) At this point defense counsel interrupted and objected to the inflammatory rhetoric. The judge simply said, "Overruled." (RT 90:12029.) Feeling free to pursue his inflammatory rhetoric, the prosecutor began reading what he described as a letter he wrote to Genny Rojas to describe society's outrage regarding this case. (RT 90:12033.) Defense counsel objected even before the prosecutor began reading his letter, but the Court once again overruled the objection. The prosecutor continued:

"Genny, perhaps it was a rainy, balmy day when you first cried in pain. Perhaps it was a day like this, a sunny day when happy children like to swing in swings, tumble down grassy banks and laugh and experience the freshness of life when the darkness we call child abuse crept into your life.

Wherever it was, whenever it was, Genny, we were not there. We were too late to hear your cry for help.

Mr. Popkins: Objection, your honor. It's inflammatory rhetoric, ask for an admonition.

The Court: Overruled.

Mr. Goldstein: You were too young to know that we would care, too young to know that you could reach out and we would help you.

We hear your cries of pain now as the story of those horrible last weeks of your life begin to unfold. It is so painful to picture the life as

you saw it, to picture the life of a beautiful little girl being destroyed.

We know now what they did to you. Before your death, we never imagined any human being with a heart and a soul could do that to a human being.

As if we were hearing a nightmare, we heard how you were handcuffed behind your back and until your tiny biceps bled. We heard how you were hung from a hook at night in a closet, alone and afraid. We felt your claustrophobic conditions when the defendant put you into a box, a closet, and a tub to scare you, that you were so frightened that you had diarrhea, which brought about more abuse and more torture. We know that now, too.

Mr. Popkins: Objection, your honor. Misstates the evidence, ask for an admonition.

Mr. Goldstein: It's what the defendant said.

The Court: Overruled, overruled." (RT 90:12033-12035.)

At this point the court interrupted the prosecutor and gave the jury the following admonition:

"Just let me add a comment, ladies and gentlemen, excuse the interruption of both counsel. It's impossible in a case like this for there not to be substantial emotions on both sides.

No matter whose version of the events, no matter whose take on the event you hear, it will be loaded with emotion; so you will hear and feel emotion today. I only remind you that that emotion needs to be channeled (sic) through the factors in aggravation, mitigation that I've instructed you about.

Excuse me. Go ahead." (RT 90:12035.)

Thus, the trial court expressly recognized the emotional nature of the prosecutor's "letter to Genny." However, rather than properly control this blatant

appeal to emotions, the Court simply told the jury to channel any resulting emotion through the factors in aggravation and mitigation. It is not clear what the Court thought such an admonition might accomplish. How would a juror interpret an instruction to channel emotion through aggravation and mitigation? The only apparent way to do that would be to let emotion be a factor in the determination whether aggravation outweighed mitigation. Thus, this admonition certainly did nothing to lessen the prosecutor's emotional appeal, and was probably interpreted as sanctioning it. In any event, the prosecutor continued:

“Mr. Goldstein: We see the shattered remnants of your smiling face, scarred with burns from a blow dryer as the defendant inflicted unimaginable amounts of pain on what was once your cute little chubby cheeks.

We see the bruises and wounds from people who embraced the pain of hitting a four-year-old in the face. We see your head, no longer with the wavy locks of a four-year-old child, but the grotesque red masses of a horrible burn.

We try to conceptualize, rationalize and make sense of your maiming, yet we can never know what it feels like to have the skin burned off your naked, bruised body. We will never know the horror you went through as your skin weeped and your life slowly and methodically was taken away from you.

How did it feel to stare at your abusers as your life ended? Did you have hope? Did you think of love? Did you think of your choice, your choice to live, your choice to die?

Genny, we do not understand. All of us want to help. All of us want to hold you. All of us want to stop them from attacking you, but we can't. It is too late to stop them from hurting you. And for that, we are truly sorry.

You must have been frightened. You must have been cold. You must have been lonely. You must have been tired and hungry; but worst of all, you must have felt abandoned by all of us.

To know the agony, the humiliation and the intimidation and other abuse you suffered before you gave into death makes us angry. To think that death would be a merciful end to your pain only illuminates the torture and abuse that you suffered. That, too, angers us, anger that society sleeps while other young children like yourself suffer.

Mr. Popkins: Objection, your honor. It's irrelevant, ask for an admonition.

The Court: Overruled.

Mr. Goldstein: That we did not hear you nor see your sadness in your eyes, your fear and your anxiety brings us shame. You had no spokesperson for life. And for that, we are truly sorry. For your whole life, not one person ever cared for you, cared for you as a parent and cared for you as a human being. You will never be able to go to a ball game, to play soccer, to play bobby sox softball or even go to a school play. When you needed it most, no one would hold you and love you, love you and tell you that everything would be all right.

Genny, you will not be forgotten. We promise that you will not die in vain. We promise that you will always be in our hearts, in our souls. We choose, we collectively choose to adopt you and to care for you.

Mr. Popkins: Objection, your honor. Inflammatory rhetoric, statement of personal opinion, ask for an admonition.

The Court: Overruled.

Mr. Goldstein: You --

The Court: Excuse me." (RT 90:12035-12037.)

At this point, the Court once again interrupted the argument for an admonition:

“With regard to the statement of personal opinion, the personal opinion of none of the attorneys in this case is relevant to you, ladies and gentlemen. Your personal opinions are relevant, and I remind you of that.

Go ahead.” (RT 90:12037.)

To the extent the jury had understood the prosecutor as offering his own personal opinion, this admonition was no doubt appropriate and helpful. But the real vice of the prosecutor’s inflammatory rhetoric was that he was not using the personal pronoun, “I.” Instead, he was speaking in the plural, repeatedly saying “we,” as though he was expressing the personal opinion of the jurors. To that extent, the admonition was harmful, as it told the jurors directly that it was fine to act on their own personal opinions. Thus, once again, the prosecutor was making a blatantly emotional call for the jury to join him in making promises to Genny before deliberations had even begun, to commit themselves in advance to voting for the execution of the person who had been convicted of causing Genny’s death. To the extent jurors understood that meaning, the admonition only exacerbated the harm.

The prosecutor continued his emotional appeal to reject Veronica Gonzales’ entire family, calling upon the jurors to instead make themselves her family:

“Mr. Goldstein: We choose as a group to adopt you and to take care of you. You are a member of our family, those of us who have lived with you here in Department 32. We refuse to reject you as your mother and father did for a life of drugs and molestation.

We refuse to ignore you as your grandmother and other relatives did to you. You are us and we are a part of you. We will hold your torturers accountable, no matter what pain it puts us

through, for we, Genny, will put you first and foremost in our souls.

We will not allow the defendant to portray herself as a victim. We have seen your journey of torture and abuse --

Mr. Popkins: Your honor, I object, also inflammatory rhetoric, statement of personal opinion, improper, ask for an admonition.

The Court: Overruled.

Go ahead, counsel.

Mr. Goldstein: The defendant is not a victim. No one who does this to a child can ever be called a victim. No one who embraces inflicting pain upon your body should ever be allowed to portray herself as a victim.

We know now what a victim is. A victim is someone who has a blow dryer placed against her face, who is hung in a closet and who is stuffed in a box. We, Genny, make a commitment, a commitment to stop the defendant and hold her accountable.

Our strength will not wax nor wane despite the assaults on our logic and common sense. We see you as an example of courage and commitment. We will not let you go nor will we ever let you down." (RT 90:12037-12038.)

"It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." (*Gardner v. Florida* (1977) 430 U.S. 349, 358.) It is not yet clear exactly what a prosecutor has to say before this Court will conclude that an appeal to emotions has gone too far, but the present case offers an extreme example.

In *People v. Ghent* (1987) 43 Cal.3d 739, 772, this Court found no prejudice in a prosecutor's argument which agreed it would not be right for the family of the victim to determine the proper penalty in a capital case. The

prosecutor then added, “Rather it’s better to have it removed from them and placed in your hands. But you have to consider them, you are the community of which they are a part. ...” This Court explained, “Isolated, brief references to ... community vengeance such as occurred here, although potentially inflammatory, do not constitute misconduct so long as such arguments do not form the principal basis for advocating the imposition of the death penalty. (Citation.)” *Id.*, at p. 771.)

The present case stands in sharp contrast. Here, the prosecutor’s lengthy “letter to Genny” was neither brief nor mild, and constituted the centerpiece of his advocacy in favor of a death sentence. This blatantly emotional appeal for the jurors to jump on the bandwagon and avenge what happened to Genny Rojas, combined with the overall denigration of the entire family of Veronica Gonzales, should be considered too much.

#### **D. Conclusions Regarding the Errors**

As shown in section B of this argument, the jury was permitted to hear a significant amount of evidence that may have reflected poorly on some of Veronica Gonzales’ relatives, but this evidence was not relevant to the determination whether death or life in prison was the appropriate penalty, nor was it relevant to impeach the testimony of any defense witness. As shown in section C of this argument, the prosecutor exacerbated the evidentiary errors with a series of improper arguments that fully exploited the errors. Separately or combined, this invited the jury to reach a verdict based on raw emotions rather than to soberly and rationally determine whether the cir-

cumstances of the crime outweighed Veronica Gonzales' strong mitigating factors of no prior record, a very questionable mental state, and a history of abuse and control, first by her parents and later by her husband.

Veronica Gonzales' federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury determination of the penalty in accordance with due process of the law, and to a reliable penalty decision, were violated. (*Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739.) In view of the powerful mitigating evidence in this case, such an error cannot be deemed harmless.

In an earlier argument in this brief, it was shown that the prosecutor improperly relied on evidence of Veronica Gonzales' history of childhood sexual and physical abuse as evidence of her guilt. (See Argument II, earlier in this brief.) In the penalty argument, the prosecutor returned to this theme even more strongly:

“One other thing that proves she did it, and that's her child abuse history. She learned, she was schooled in terror. She has a bachelor's degree in child abuse. She learned to discipline and she learned to punish. She is Tillie -- actually, she's worse than Tillie. She's graduated. She has a Ph.D. in child abuse.” (RT 90:12060.)

The defense had unsuccessfully objected to any such argument in advance. (RT 87:11507-11508.) The prosecutor and court had agreed that such objections need not be repeated during the argument. (RT 90:12011-12012; see also RT 87:11507.) For all the reasons set forth in the guilt phase argument on this subject, it was improper to utilize such evidence to persuade the jury of the guilt of Veronica Gonzales, and unconscionable to use it to persuade the jury that the proper penalty was death. This also deprived Veronica Gonzales' of her federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury determination of the penalty in accordance with due process of the law, and to a reliable penalty decision.

**VIII. THE TRIAL COURT IMPROPERLY PRECLUDED DEFENSE COUNSEL FROM REFERRING TO WELL KNOWN CASES THAT WERE MORE EGREGIOUS, BUT DID NOT RESULT IN A DEATH SENTENCE, WHILE ALLOWING THE PROSECUTOR TO EFFECTIVELY STATE THIS WAS THE WORST CASE**

In this case, the prosecutor was allowed to have his cake and eat it, too.

Before penalty phase arguments began, the prosecutor expressed concerns about points defense counsel might make during argument which the prosecutor believed were improper. One example he gave was comparing the present case to other capital cases and stating the present case is not as bad as some others. Defense counsel responded that he would only do that if the prosecutor first argued "If ever there was a case that cries out for the death penalty, this is it." Defense counsel believed that such an argument by the prosecutor would open the door to comparisons by the defense. (RT 87:11635.)

The prosecutor conceded he planned to make exactly that argument, but he believed that as long as he kept it generic – not referring to any other specific case – then the defense should not be able to respond with specific examples. The judge responded that he wanted to review some cases before ruling. (RT 87:11636-11637.)

When the matter was discussed again, defense counsel reiterated his belief that if the prosecutor argued, "If any case deserves the death penalty, this is the one," then the prosecutor is effectively comparing this case to all other cases. If the prosecutor did that, defense counsel would want to re-

spond with comments on 2 or 3 specific cases. As possible examples he noted that no death sentence was imposed for the murder of Dr. Martin Luther King, or for the killing of a number of children in Atlanta, Georgia. Another example was Terry Nichols, who was instrumental in the Oklahoma City bombing where a large number of people were killed, but who did not receive a death sentence. Another example was Ted Kaczynski, who did not get a death sentence in the Unabomber case. (RT 89:12002-12004.)

The Judge believed there was no discretion in the matter. He cited *People v. Pride* (1992) 3 Cal.4<sup>th</sup> 195, 261 as “black-letter law” holding that comparisons to other cases are irrelevant as a matter of law. The judge was also concerned that arguing other cases would take the focus away from the individualized sentencing decision that must be based on the present defendant. (RT 89:12005.) The judge went on to explain that he did not want the defense to cite examples that would cause the prosecutor to try to explain why a death sentence was imposed in another specific case. He did not want to litigate why another case did not get a death sentence, and he did not see how that could be avoided if the defense referred to a major, nationally known case. (RT 89:12006.)

Defense counsel aptly noted that the judge’s concerns could all easily be met by precluding the prosecutor from arguing that if any case deserves the death penalty, this one does. Nonetheless, the judge took a firm position allowing the prosecutor to make the argument he desired, but precluding the defense from responding with specific examples. (RT 89:12007-12008.)

As he indicated he would, the prosecutor did, in fact, make just such an argument: "If any murder requires the death penalty, this is it. If this isn't an appropriate case for capital punishment, then nothing is." (RT 89:12042.)

There were multiple flaws in the trial court's analysis of this problem. First, the court misread the case that it concluded was controlling. The entire relevant discussion in *Pride* was as follows:

"Shortly before the defense penalty case began, defendant moved outside the jury's presence to introduce testimony by Dr. Radelet, a college professor. Dr. Radelet had purportedly conducted a survey of 'miscarriages of justice' in capital cases, i.e., cases in which the defendant was 'pardoned or found factually innocent because of circumstances that arose after trial.' Defendant argued that this information would assist the jury in determining whether there was a lingering doubt as to defendant's guilt. The prosecutor objected primarily on relevance grounds. The court sustained the objection.

Aside from any foundational or other problems, the proffered evidence was irrelevant as a matter of law. Much like accounts of the executions of others (see discussion, *ante*), information about trials, verdicts, and sentences in unrelated criminal cases had no bearing on the appropriate penalty in this particular case. As we have said many times, such a determination rests on the jury's individualized assessment of the circumstances of the capital crime, and the character and background of the defendant. No error occurred. (See *People v. Grant, supra*, 45 Cal.3d 829, 860.)" (*People v. Pride, supra*, 3 Cal.4<sup>th</sup> at p. 261.)

The present case was quite different. Here, the defense was not contemplating the use of any expert witness or other evidence about details of

other cases in which no death sentence was imposed. Instead, the defense simply proposed to refer in argument to matters of widespread public knowledge. It has long been deemed permissible to refer to such matters in argument. For example, in *People v. Woodson* (1964) 231 Cal.App.2d 10, the defense was based on a claim of mistaken identity. The trial court precluded defense counsel from reading newspaper articles to the jury about people who had been identified by witnesses and convicted of crimes for which they were later proved innocent. The Court of Appeal found this was error, pursuant to *People v. Love* (1961) 56 Cal.2d 720, and *People v. Travis* (1954) 129 Cal.App.2d 29, 37-39. *Woodson* described language that Love had quoted from *Travis*:

“That was a case in which the trial court had curtailed in a most peremptory manner the right of defendant’s attorney to cite illustrations of the unreliability of confessions made under pressure. She had tried to discuss the confession of Cardinal Mindszenty and others, and had proposed to read from a current issue of Time Magazine. The appellate court, in *Travis, supra* (per Presiding Justice Shinn), deploring the trial court’s ruling, noted (on p. 37) that it had ‘confused argument with evidence. The ground of the rulings was that in the course of argument to a jury counsel in the case may recount or read nothing that has not been received in evidence. This concept of what is proper by way of argument is contrary to well-recognized privileges and practices of the profession as old as the law itself. If argument is to be so restricted, there could be no use made of the writings of philosophers, patriots, statesmen or judges. ...’” (*People v. Woodson, supra*, 231 Cal.App.2d at p. 16.)

*People v. Guzman* (1975) 47 Cal.App.3d 380, 392, relied on the same cases to conclude counsel should be allowed to refer in argument “incidents of misidentification, a matter of common knowledge,…” Similarly, *People v. Williamson* (1977) 71 Cal.App.3d 206, 215-217, approved the reading of articles about matters of common knowledge. (See also *People v. Palmer* (1984) 154 Cal.App.3d 79, 84 and 89, fn. 9.)

The error in the trial court’s reliance on *Pride* in the capital penalty phase context was made especially clear in *People v. Marshall* (1996) 13 Cal.4<sup>th</sup> 799, 853-855, decided well before the penalty phase in the present case. In *Marshall*, the defense wanted to refer in argument to the facts of other well-known murder cases in the same county in which Marshall was being tried. This Court described the ruling of the trial court:

“The trial court concluded that while it would be improper for defense counsel to refer to what the juries in those cases did, counsel could permissibly comment on and compare the circumstances of the present case with those existing in the other cases. Defense counsel could make reference to aggravating factors present in other cases but absent from this. Thus, the court permitted defense counsel to refer to the fact this case was not a cold-blooded killing for hire, and that it did not involve rape or torture (unlike the *Guzman* and *Easley* cases, *supra*). However, the court ruled defense counsel could not argue the facts of those cases in detail.” (*Id.*, at p. 854.)

The issue on appeal in *Marshall* was whether the court had erred in prohibiting defense counsel from giving detailed information about the facts of the other cases. The People on appeal made an argument similar to the position taken by the present trial court, but this Court rejected it:

“Contrary to the argument of the Attorney General, this claim is not governed by the settled rule that our death penalty law does not encompass intercase proportionality review. (See, e.g., *Pulley v. Harris* (1984) 465 U.S. 37, 50-53; *People v. Fierro* (1991) 1 Cal.4th 173, 253.) Defendant does not here specifically contend the jury should have been instructed to conduct intercase proportionality review (footnote omitted) or that this court should do so; rather, he complains of improper limitation on the scope of trial counsel’s closing argument, an aspect of the right to counsel. (See *Herring v. New York* (1975) 422 U.S. 853, 856-862 [45 L.Ed.2d 593, 597-601, 95 S.Ct. 2550].)” (*People v. Marshall, supra*, 13 Cal.4<sup>th</sup> at p. 854.)

This Court in *Marshall* did go on to find no error in the case before it, concluding that:

“The court’s ruling fell within its discretion to control the scope of closing argument and did not preclude defendant from making his central point: that there have been murder cases involving more shocking, heinous, cruel or callous facts than those present here.” (*id.*)

In the present case, different circumstances should lead to a different result. Here, defense counsel was not proposing to make any detailed comparison of the facts of different cases. Instead, all counsel wanted to do was refer to two or three well-known cases and argue they were worse, but did not result in a death sentence. Furthermore, it cannot be said that the present ruling was a proper exercise of discretion, because the record is clear that the trial court misread *Pride* as controlling, and believed that decision left no discretion in the matter.

“ ‘[W]here fundamental rights are affected by the exercise of discretion by the trial court, ... such discretion can only be truly exercised if there is no misconception by the trial court as to the legal basis for its action.’ (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496; *People v. Davis* (1984) 161 Cal.App.3d 796, 802-803.) To exercise the power of judicial discretion, all material facts and evidence must be both known and considered, together with legal principles essential to an informed, intelligent and just decision. (*People v. Davis, supra*, 161 Cal.App.3d at p. 804.) A court which is unaware of the scope of its discretionary powers can no more exercise informed discretion than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8 [193 Cal.Rptr. 882, 667 P.2d 686].)” (*People v. Lara* (2001) 86 Cal.App.4<sup>th</sup> 139, 165-166.)

Thus, there was no proper exercise of discretion in the present case. Furthermore, if discretion had been exercised, it would have been an abuse of discretion to restrict the defense in the manner it was restricted here, while simultaneously allowing the prosecutor to make the argument that if any case ever deserved a death sentence, it was the present case.

Indeed, even aside from the legal errors in the court’s ruling, the prosecutor’s own argument here violated the very rationale that the trial court cited against the defense. As noted above, the judge defended his ruling based in part on his concern that arguing other cases would take the focus away from the individualized sentencing decision that must be based on the present defendant. (RT 89:12005.) However, it was the prosecutor’s argument that violated that rule. The prosecutor argued “If any murder requires the death penalty, this is it. If this isn’t an appropriate case for capital pun-

ishment, then nothing is.” (RT 89:12042.) Such an argument tells the jury to look only at the nature of the present murder, claiming it is so bad that a death sentence is required no matter what mitigating evidence was presented. This also tells the jurors that anybody who favors capital punishment in general must necessarily approve it in this particular case. In other words, his argument was that anyone who votes against death in this case would never approve it in any case.<sup>126</sup>

For the prosecutor, this may have seemed like an effective tactic to combat a defendant who had no prior record, who had herself been the victim of physical and sexual abuse as a child, who had the support of the victim’s mother, and who had the apparent support of the counselors seeking to mitigate the trauma suffered by the defendant’s six children. But to urge the jury that none of those factors can matter in a case like this one is to deprive Veronica Gonzales of her right to individualized sentencing, based on the jury’s overall assessment of the defendant as well as of the crime.

The judge’s only attempt to explain why he believed the prosecutor’s desired argument was permissible was, “... it’s what we call hyperbole. It’s puffing. It’s a generalized, non-specific statement that this is the real deal from his standpoint.” (RT 89:12007, ll. 14-16.) This reason was also flawed. First, this rationale is internally inconsistent. “Hyperbole” and “puffing”

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126. During jury selection, the prosecutor was careful to get each prospective juror to agree that they would be able to return a death verdict in an appropriate case. (See, for example, RT 46:4235-4237, 4239, 4245-4246.) In light of that, the prosecutor was effectively arguing that any juror who failed to support a death verdict here would be violating his or her oath. (See also RT 90:12042,)

mean “exaggerated.” That is exactly the opposite of “the real deal.” Certainly the prosecutor did not believe he was exaggerating, and there is no basis to conclude the jury would perceive this as such. Moreover, to the extent the prosecutor was arguing “this is the real deal from his standpoint,” this was an improper expression of a personal belief. (*United States v. McKoy* (9th Cir. 1985) 771 F.2d 1207, 1210-1211.)

Indeed, the present circumstances constituted a penalty-phase equivalent of an expression of a prosecutor’s personal belief in the guilt of the defendant:

“Nor may a prosecutor express a personal opinion or belief in a defendant’s guilt, where there is substantial danger that jurors will interpret this as being based on information at the prosecutor’s command, other than evidence adduced at trial. The danger is acute when the prosecutor offers his opinion and does not explicitly state that it is based solely on inferences from the evidence at trial. In *People v. Kirkes* (1952) 39 Cal.2d 719, this court said: ‘The classic expression of the rule appears in this oft-quoted statement in *People v. Edgar*, 34 Cal.App. 459, 468: “When the district attorney declared that he would not prosecute any man he did not believe to be guilty he thereby wrongfully placed his personal opinion of the guilt of the defendant in evidence in the case. He was privileged to argue to the jury that it was his opinion formed from deductions made from the evidence adduced at the trial that the defendant was guilty of the crime charged [citation]; but his declaration to the jury that he would not prosecute any man whom he did not believe to be guilty was tantamount to an assertion that he believed in the guilt of the defendant at the very inception of the prosecution; and necessarily such belief must have been

founded upon the result of the district attorney's original and independent investigation of the charge, and therefore in all likelihood was based, in part at least, upon facts which did not appear and which perhaps could not have been shown in evidence." ' (*People v. Kirkes, supra*, 39 Cal.2d 719, 723-724.)" (*People v. Bain* (1971) 5 Cal.3d 839, 848.)

Here, telling the jury that if any case merited the death penalty, this was it, was comparable to a guilt phase assertion that if guilt had ever been proved in any case, this was it. Furthermore, here the jury could only infer that the prosecutor was basing his personal belief on expertise he had obtained in prosecuting a variety of cases that did or did not merit a death sentence. After all the jurors had no detailed knowledge of any other murder case to validly compare to the case before them. Nothing in the evidence gave them sufficient information to make a meaningful comparison of Veronica Gonzales' background and the crime for which she had been convicted with other crimes and offenders that did or did not merit a death sentence. But the jurors would assume that the experienced prosecutor did have such detailed knowledge from his exposure to many other cases. Thus, the prosecutor was effectively an unsworn expert witness on when a death sentence would be appropriate.

In sum, the prosecutor's argument, and the trial court ruling precluding the defense from making a fair response to it, resulted in a deprivation of Veronica Gonzales' federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to a fundamentally fair jury trial in accordance with due process of law, to a reliable penalty determination, and to the effective assistance of counsel. *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382,

2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978; *Herring v. New York* (1975) 422 U.S. 853, 856-862, 45 L.Ed.2d 593, 597-601, 95 S.Ct. 2550; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.); *Morgan v. Illinois* (1992) 504 U.S. 719, 739.) In view of the strength of the mitigating evidence in this case, this error cannot be deemed harmless.

## IX. A VARIETY OF ADDITIONAL ERRORS AND FLAWS IN THE CALIFORNIA CAPITAL SENTENCING PROCEDURES ALSO MANDATE REVERSAL OF THE DEATH JUDGMENT

In addition to the many errors that have been set forth in this brief, the present death judgment is also flawed because of a number of substantive and procedural defects in the California capital sentencing law. Although many of these points have been rejected by this Court in other cases, they should be reconsidered, and they have not yet been finally determined in the federal courts. (See *People v. Schmeck* (2005) 37 Cal.4<sup>th</sup> 240, 303-304.)

A. The failure to require the jury to unanimously find that aggravating circumstances relied on were true beyond a reasonable doubt, or to unanimously find that aggravation outweighed mitigation beyond a reasonable doubt, or to unanimously find that death was the appropriate punishment beyond a reasonable doubt, violated 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendment due process, trial by jury, and reliability requirements. (See *In re Winship* (1970) 397 U.S. 358; *Cunningham v. California* (2007) 549 U.S. \_\_\_, 127 S.Ct. 856, 166 L.Ed.2d 856; *Apprendi v. New Jersey* (2000) 530 U.S. 466, nor *Ring v. Arizona* (2002) 536 U.S. 584, 1428 nor *Blakely v. Washington* (2004) 542 U.S. 296.). *Ring* held that the Sixth Amendment right to trial by jury applies to all factual determinations necessary to support a death sentence. In California, when a jury returns a verdict finding a defendant guilty of first degree murder, and finding one or more special circumstances true, there are still additional findings that must be made before a death sentence can be imposed. Those findings include: 1) that at least one aggravating factor exists; 2) that the aggravating factor or factors outweigh any mitigating

factors; and 3) that death is the appropriate punishment. (Penal Code section 190.3.) In the present case, the jury was not required to make any of those factual findings beyond a reasonable doubt. The jurors were also not required to agree with one another in determining which aggravating factor or factors existed. Therefore, under *Ring*, the penalty must be reversed. While this Court rejected such an analysis in *People v. Prince* (2007) 40 Cal.4th 1179, 1297-1298, it did so by a simplistic conclusion that nothing in *Cunningham, supra*, simply extended *Blakeley, supra*, to *Apprendi, supra*, to California's Determinate Sentence Law, and said nothing about the death penalty law. However, until *Cunningham* was decided, this Court refused to accept the fact that *Apprendi* and *Blakely* were clear enough to invalidate California's determinate sentence law. (*People v. Black* (2005) 35 Cal. 4th 1238.) The rationale set forth in *Cunningham* in regard to the Determinate Sentence Law undermines the rationale this Court has relied on in regard to the death penalty law. In *Black*, this Court concluded that once a person was convicted of a crime covered by the Determinate Sentence Law, the upper term constituted the maximum sentence and *Apprendi* had no application. (*Black, supra*, at p. 1255-1261.) In *Cunningham*, the High Court rejected such reasoning and concluded that the middle term was the statutory maximum in the absence of additional fact-finding. Relying on the very same reasoning rejected in *Cunningham*, this Court in *Prince, supra*, concluded that death was the maximum sentence permitted for a conviction of capital murder. But just as in *Cunningham*, death is not available as a sentence based only on the finding of guilt. Under California's capital sentencing law, death cannot be imposed unless it is determined that aggravating factors exist, that

they outweigh mitigating factors, and that death is the appropriate penalty. Certainly the first of those requirements is a factual determination, and the second requires a weighing of the strength of some factual findings against others. Under *Ring* and *Cunningham*, such factual findings must be made beyond a reasonable doubt, and by a unanimous jury.

B. The failure to require written findings as to the aggravating factors relied on by the jury, to require jury unanimity on all aggravating factors relied on, and the failure to provide a procedure enabling meaningful appellate review of the sentencing decision, violated 5th, 8th, and 14th Amendment due process and reliability requirements. (See *People v. Jackson* (1980) 28 Cal.3d 264, 315-317 (dissenting opn. of Bird, C.J.); but see *People v. Frierson* (1979) 25 Cal.3d 142, 172-188.)

C. California's statutory list of special circumstances include so many different types of murders, and have been interpreted so broadly, that almost every crime that could support a convictions for first degree murder would come within one or more of the special circumstances. Additionally, California's overly broad definition of felony murder exacerbates the problem by further expanding the range of death-eligible homicides. As a result, California's death penalty law fails to adequately narrow the class of persons who are death-eligible, in violation of the federal Eighth Amendment and article I, section 17 of the California Constitution. (*Furman v. Georgia* (1972) 408 U.S. 238, 313; see also Shatz & Rivkind, "The California Death Penalty Scheme: Requiem for *Furman*?" (1997) 72 NYU L.Rev. 1283.)

D. California's failure to require inter-case and intra-case proportionality review violates the federal Fifth, Sixth, Eighth, and Fourteenth

Amendment rights to be free from arbitrary and/or unreviewable proceedings leading to imposition of a death sentence, and to due process, a fair jury trial, and reliable penalty determinations. (*Gregg v. Georgia* (1976) 428 U.S. 153, 198; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994; *Proffitt v. Florida* (1976) 428 U.S. 242, 259.)

E. California's death penalty law creates an impermissible barrier to consideration of mitigating evidence by precluding reliance on mental or emotional disturbance, or the dominating influence of another unless such factors are "extreme" (§ 190.3, factors (d), (g)) and/or "substantial" (*id.*, factor (g)), in violation of the federal 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860; *Lockett v. Ohio* (1978) 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954.) While this Court has held that such excluded mitigating evidence can be considered under other listed mitigating factors, that principle is so counterintuitive that it would not likely be understood by most jurors. Indeed, why did the drafters choose to use such limiting adjectives if not to cause jurors to think their leeway to consider important mitigating evidence was limited? Notably, in the present case, the prosecutor expressly argued that the "domination" mitigating factor applied only if it was extreme or substantial. (RT 90:12058.) Defense counsel responded by arguing that the domination in the present case was substantial (RT 90:12071-12072), and never stated that it could be considered even if it was less than substantial. If even counsel felt constrained by the limiting language, certainly the lay jurors would also feel such constraints.

F. California grants unlimited discretion to prosecutors to decide

when to seek a sentence of death, and when to offer or agree to a plea bargain that precludes a sentence of death. This results in completely different standards from one county to another throughout California, leading to a denial of due process, equal protection, and reliability in capital sentencing, in violation of the federal 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendments. *Bush v. Gore* (2000) 531 U.S. 98, 104-111, found federal equal protection violations where procedures for counting ballots in one county may differ from procedures for counting ballots in another county; surely procedures for determining which murder cases merit seeking a death penalty must also be reasonably uniform from one county to another.

G. Veronica Gonzales was on death row for nearly 60 months before counsel was ever appointed to represent her on her automatic appeal. Based on past history, it is likely to take five-to-seven additional years from the date counsel was appointed until her appeal is decided. The psychological brutality that results from such a prolonged wait for execution does not comport with “evolving standards of decency that mark the progress of a maturing society” from which the Eighth Amendment draws its meaning. (*Trop v. Dulles* (1958) 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630.) As a result, California’s system results in the infliction of cruel and unusual punishment in violation of the federal 8<sup>th</sup> and 14<sup>th</sup> Amendment *before* the sentence of death is ever executed.

H. The Penal Code section 190.3 factors in aggravation have been applied in such a broad manner that they include virtually every feature of every murder, including those that contradict one another. The result is so arbitrary and contradictory that jurors have inadequate guidance in determin-

ing which convicted murderers should live and which should die, in violation of the federal Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, a fair trial by jury, and a reliable penalty determination. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363, 100 L.Ed.2d 675, 56 S.Ct. 1853.)

I. The failure to provide for a presumption in favor of life results in a violation of the federal Fifth, Eighth, and Fourteenth Amendment rights to due process and reliable penalty determinations. In guilt determinations, it has long been recognized that the presumption of innocence is necessary to protect the accused and to safeguard against errors in close cases. (*Estelle v. Williams* (1976) 425 U.S. 501, 503.) In a penalty trial, where the stakes are even greater, there must be some comparable protection.

J. Counsel for Veronica Gonzales expressly sought voir dire procedures in which jurors would be questioned regarding their death penalty attitudes individually and outside the presence of any other jurors, in accordance with this Court's ruling in *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (CT 5:854 *et. Seq.*) After *Hovey* was decided, Proposition 115 amended Section 223 of the Code of Civil Procedure, to provide that, in capital cases the trial court must conduct voir dire of "any prospective jurors ..., where practicable, ... in the presence of the other" prospective "jurors ...." *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168 held that this amendment did not preclude sequestered voir dire on death penalty attitudes. Instead, it abrogated the mandatory aspect of *Hovey* and left the matter to the discretion of trial courts. (See also *People v. Waidla* (2000) 22 Cal.4th 690, 713-714.) The present trial court adamantly rejected the notion of death qualification

pursuant to the *Hovey* procedures. (RT 14:1238.) Veronica Gonzales contends that the fairness rationale of *Hovey* could not simply disappear because the voters passed an initiative. Failure to follow the procedures set forth in *Hovey* deprived her of her federal 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> Amendment rights to a fundamentally fair trial by an impartial jury in accordance with due process of law, and to reliability in the fact-finding supporting the guilt and penalty verdicts. (*Murphy v. Florida* (1975) 421 U.S. 794, 44 L.Ed.2d 589, 95 S.Ct. 2031; *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J.; *Jeffries v. Wood* (9th Cir. 1997)(*en banc*) 114 F.3d 1484, 1490-1492; *Marino v. Vasquez* (9th Cir. 1987) 812 F.2d 499; *Dickson v. Sullivan* (9th Cir. 1988) 849 F.2d 403, 406; *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978.)

K. Because the California Supreme Court has proven itself unable to review death judgments without being unduly influenced by political pressure, appellant has been denied his federal 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 14<sup>th</sup> amendment rights to due process of law, equal protection of the law, to impartial appellate Justices, to meaningful appellate review, and to reliable determinations in proceedings leading to imposition of a death judgment. (See *Parker v. Dugger* (1991) 498 U.S. 308, 321, regarding the need for meaningful appellate review. See *Beck v. Alabama* (1980) 447 U.S. 625, 637, 643; 100 S.Ct. 2382, 2389, 2392; 65 L.Ed.2d 392, 402-403, 406; *Woodson v. North*

*Carolina* (1976) 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978, regarding the need for reliable fact-finding; see *Estelle v. McGuire* (1991) 502 U.S. 62; *McKinney v. Rees* (9<sup>th</sup> Cir. 1993) 993 F.2d 1378; *Bryson v. Alabama* (5<sup>th</sup> Cir. 1981) 634 F.2d 862, 865; see also *Spencer v. Texas* (1967) 385 U.S. 554, 573-575 (conc. and dis. opn. of Warren, C.J. regarding the need for fundamental fairness and impartial decision-making.) In *People v. Kipp* (2001) 26 Cal.4<sup>th</sup> 1100, 1140-1141, this Court accepted the fact that between 1979 and 1986, the California Supreme Court reversed 95% of the death judgments it reviewed. In 1986, a wide-spread political campaign succeeded in unseating three sitting Justices, largely as a result of the high percentage of death penalty reversals. (See *People v. Cox* (1991) 53 Cal.3d 618, 696.) Immediately, appellate review of death judgments in California went to the opposite extreme. From July 1987 to December 1994, the California Supreme Court affirmed 84% of the death judgments it reviewed, and between 1990 and 1994, the affirmance rate rose even higher, to 94%.<sup>127</sup> (*Kipp, supra.*) In *Kipp*, this Court simply concluded that any relationship between affirmance of death sentences and retention in office was irrelevant, because there had been no showing that the Court must affirm every death sentence, or that *Kipp*'s own case had been affected. Furthermore, the same problem would infect every California judge, so under the common law rule of necessity, the Supreme Court Justices would not be disqualified. *Kipp*, however, misses the point. If California's death penalty law is so pervaded by politics that most, or even just many instances of appellate review are affected, then meaningful appel-

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127. A similar affirmance rate has continued since 1994.

late review is impermissibly compromised even if an occasional extreme case results in relief. The appropriate response is to recognize that the death penalty cannot be carried out in California in a manner consistent with the various federal constitutional rights set forth above, and that federal constitutional protections therefore preclude carrying out any death sentences in California. Indeed, if fair appellate review is impossible, this must be considered a structural defect which mandates reversal of the penalty without the need to show prejudice in a given case. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

L. The various violations of state and federal law that have been articulated in this argument, and in other arguments in this brief, also constitute violations of international law. The United States Constitution, Article VI, section 1, clause 2 includes all treaties made by the United States as part of the Supreme Law of the Land, binding judges in every state. (See *Weinberger v. Rossi* (1982) 456 U.S. 25, 33.) Articles 6 and 14 of the International Covenant on Civil and Political Rights require fair and public hearings in the determination of criminal charges, and preclude arbitrary determinations to invoke the sentence of death. Also, Articles 1, 2, and 6 of the American Declaration of the Rights and Duties of Man protect the rights to life, liberty, and security, guaranty equality before the law, and protect the right of due process of law. For all of the reasons set forth in various arguments above, these rights were violated by the various errors that occurred in Veronica Gonzales' trial.

**X. GUILT PHASE ERRORS THAT DO NOT REQUIRE REVERSAL OF THE CONVICTIONS MUST ALSO BE CONSIDERED IN THE PENALTY PHASE; ANY SUBSTANTIAL ERROR AT THE PENALTY PHASE MUST BE DEEMED PREJUDICIAL**

**A. Errors That Were Harmless in the Guilt Phase Might Still Adversely Impact the Penalty Determination**

This brief contains a variety of arguments urging this Court to find reversible error during the guilt phase of the trial. Should this Court reject those arguments and hold that the errors committed during the guilt phase were harmless as to the guilt phase determinations, then it would be necessary to give separate consideration to the possibility that a harmless guilt phase error had a prejudicial impact on the penalty determination.

The jury was expressly told that all guilt phase evidence must be considered during the penalty phase: "In determining which penalty is to be imposed on defendant, you shall consider all of the evidence which has been received during any part of the trial of this case." (CT 88:11652.) However, since the question the jury resolves at the guilt phase is fundamentally different from the question resolved at the penalty phase, the possibility exists that an error might be harmless as to the guilt determination, but still be prejudicial at the penalty phase.

For example, one guilt phase argument demonstrated the impropriety of the prosecutor's unfounded insinuation that Veronica Gonzales had conspired with her husband to blame each other for the death of the victim in order to both escape punishment. Another argument showed the impropriety

of contending that the sexual and physical abuse Veronica Gonzales suffered as a child made it more likely that she was the instigator of the abuse against the present victim. Even if either or both of these errors could somehow be deemed harmless at the guilt phase, they still resulted in improper negative character evidence that could have been determinative in the penalty trial.

This Court has expressly recognized the danger that improper character evidence can taint the penalty determination, even in cases where the evidence of guilt is overwhelming. Obviously, the concerns expressed by this Court would have even greater application where the evidence of guilt is much more closely balanced, as in the present case.

“Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, **particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant**, the appellate court by no reasoning process can ascertain whether there is a ‘reasonable probability’ that a different result would have been reached in absence of error.” (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; emphasis added.)

Aside from the obvious prejudicial impact of improper character evidence, there is another, more subtle way in which guilt phase error can be

devastating at the penalty phase. This Court has recognized that, at a capital penalty trial, lingering doubts about guilt constitute a proper factor in mitigation of the penalty. (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-968.) The present trial instructed the jury that lingering doubt of guilt could be considered in mitigation. (RT 90:12020.) During argument, counsel urged the jury to consider any lingering doubts about guilt in mitigation. (RT 90:12135.)

In view of the closeness of the present case in regard to guilt, this factor was potentially significant in the present penalty phase. By definition, it takes less to raise a lingering doubt than it takes to raise a reasonable doubt. Obviously then, guilt phase errors which might be found harmless under traditional guilt phase tests of prejudice might nonetheless have the effect of negating a lingering doubt as to guilt. Consequently, such errors may prejudicially impact the penalty determination even if they can be found harmless as to the guilt verdict.

Accordingly, this Court must make a separate assessment of the impact of each guilt phase error, and of the cumulative impact of all guilt phase errors, on the penalty determination.

#### **B. Any Substantial Error Requires Reversal of the Penalty Verdict**

Prior to the adoption of California's current death penalty procedures, in which juror discretion is guided by a statutory list of aggravating and mitigating factors, this Court recognized in two key cases that assessment of the impact of an error is more difficult in a penalty trial than in a guilt trial:

Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal. But in determining the issue of penalty, the jury, in deciding between life imprisonment or death, may be swayed one way or the other by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a "reasonable probability" that a different result would have been reached in absence of error. (*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137.)

.....

... the jury may conceivably rest the death penalty upon any piece of introduced data or any one factor in this welter of matter. The precise point which prompts the [death] penalty in the mind of any one juror is not known to us and may not even be known to him. Yet this dark ignorance must be compounded 12 times and deepened even further by the recognition that any particular factor may influence any two jurors in precisely the opposite manner.

We cannot determine if *other* evidence before the jury would neutralize the impact of an error and uphold a verdict.... We are unable to ascertain whether any error which is not purely insubstantial would cause a different result; we lack the criteria for objective judgment.

Thus, *any* substantial error in the penalty trial may have affected the result; it is “reasonably probable” that in the absence of such error “a result more favorable to the appealing party would have been reached.” (Citation.) (*People v. Hines* (1964) 61 Cal.2d 164, 169.)

After some experience implementing the current death penalty law, this Court expressed dissatisfaction with what had come to be known as the *Hamilton/Hines* standard, referring to it as the:

... very generous rule of penalty phase prejudice applicable to pre-1972 death penalty statutes. In view of the jury’s “absolute” penalty discretion under these laws, any “substantial” penalty phase error was deemed prejudicial and reversible. (*Id.*, at p. 763.) This strict standard of penalty phase reversal no longer applies, however, under the 1977 and 1978 death penalty laws, which include constitutionally sufficient standards to guide jury discretion. (*Robertson, supra*, 33 Cal.3d at p. 63 [conc. opn. of Broussard, J.]; see *Davenport, supra*, 41 Cal.3d at pp. 280 [plur. opn.] & 295 [conc. & dis. opn. of Broussard, J.]

While it is true that juries today have more guidance in choosing the penalty than did juries in the days of the death penalty law at issue in *Hamilton* and *Hines*, the fact remains that penalty determinations are still very different from guilt determinations. In the guilt phase, the jury makes inherently factual decisions – exactly what events occurred? What was the defendant’s state of mind when they occurred? Which witnesses should be believed? In a penalty phase, juries make similar decisions in some respects, but they also make a highly normative determination when they make the ultimate deci-

sion as to whether death or life without parole is the appropriate penalty for a particular crime and offender.

Thus, it is clear that the discretion that a jury possesses in deciding penalty remains much broader than the discretion possessed when determining guilt or innocence. Indeed, the present penalty phase jury was instructed, “Each of you is free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors that you’re permitted to consider.” (CALJIC 8.88, at RT 90:12021.) No guilt phase jury possesses discretion comparable to that.

In regard to review of the impact of state-law errors on a capital penalty verdict under the modern death penalty law, this Court has modified the *Hamilton/Hines* standard and held that the correct standard is whether there is a reasonable or realistic possibility that the jury would have rendered a different verdict absent the error or errors. (*People v. Brown* (1988) 46 Cal.3d 432, 448.) The particular error under discussion in *Brown* was a failure to instruct on the need to find that prior violent criminality could be considered in aggravation only if found true beyond a reasonable doubt. Because the prior violent criminality was proven overwhelmingly and not refuted by the defense at trial, this Court was able to conclude that the omitted instruction would have made no difference.

However, the *Brown* standard is not so easily applied when a jury hears evidence it should not have heard, or is deprived of evidence it should have received, or when the error at issue impacts on the overall normative decision being made, rather than impacting strictly on a factual decision as in *Brown*. *Brown* did not expressly accept or reject the underlying principles set

forth in *Hamilton* and *Hines*. On the other hand, *Brown* did find that other penalty errors, which resulted in the jury hearing arguably improper aggravating evidence, argument, and/or instructions, were also harmless. This result was reached without substantial discussion, and was based on a simple conclusion that the properly admitted aggravating evidence was overwhelming, and that a consideration of all of the instructions and arguments indicated that the jury would not have been confused about proper legal principles. (*People v. Brown, supra*, 46 Cal.3d at 449, 451-454, 456.)

It is questionable whether the *Brown* reliance on “overwhelming” aggravation evidence is consistent with the principle that each juror has considerable discretion to determine how much weight should be assigned to each aggravating or mitigating factor. Thus, Veronica Gonzales contends that any substantial error that was not purely technical must be deemed to satisfy the reasonable possibility test set forth in *Brown*.

Indeed, the “reasonable possibility” test was derived from a comment by Justice Broussard in a concurring opinion in which he simultaneously recognized the continued validity of the “any substantial error” test, albeit with a slight modification:

I am also troubled by the majority’s discussion of prejudicial error. The majority quote from cases decided during the 1960’s (*People v. Hines* (1964) 61 Cal.2d 164, 169; *People v. Hamilton* (1963) 60 Cal.2d 105, 135-137) which stress the impossibility of determining whether any particular factor may have influenced one of the twelve jurors to vote for the death penalty. That language, however, was prompted by the fact that the jury at the time those cases were decided was required to decide the question of pen-

alty “without benefit of guideposts, standards, or applicable criteria.” (*People v. Hines, supra*, 61 Cal.2d at p. 168, quoting *People v. Terry* (1964) 61 Cal.2d 137, 154.) It does not apply with equal force to verdicts under the statute with constitutionally sufficient standards to guide jury discretion. **We may still use the “any substantial error” test developed in the cited cases**, but “substantiality” now should imply a careful consideration whether there is any reasonable possibility that an error affected the verdict. (*People v. Robertson* (1982) 33 Cal.3d 21, 63 [conc. opn. of Broussard, J.; emphasis added].)

Moreover, this court has recognized another context in which the “any substantial error” standard set forth in *Hamilton* and *Hines* applies: “Where the evidence, though sufficient to sustain the verdict, is extremely close, ‘any substantial error tending to discredit the defense, or to corroborate the prosecution, must be considered as prejudicial.’ (*People v. Briggs* (1962) 58 Cal.2d 385, 407.)” (*People v. Gonzales* (1967) 66 Cal.2d 482, 493-494; see also *People v. Hickman* (1981) 127 Cal.App.3d 365, 373.) As will be shown in the next section of this argument, the present case must be deemed unusually close, especially in regard to the penalty determination.

Furthermore, the United States Supreme Court has expressly recognized the validity of the rationale underlying the conclusion reached in *Hines*, as set forth above:

It is important to avoid error in capital sentencing proceedings. Moreover, the evaluation of the consequences of an error in the sentencing phase of a capital case may be more difficult because of the discretion that is given to the sentencer. (*Satterwhite v. Texas* (1988) 486 U.S. 249, 258, 100 L.Ed.2d 284, 108 S.Ct. 1792.)

In another capital case, the High Court again recognized this principle:

In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., *Lockett v. Ohio*, 438 U.S. at 605 (“[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty ... is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments”); *Andres v. United States*, 333 U.S. 740, 752 (1948) (“That reasonable men might derive a meaning from the instructions given other than the proper meaning of § 567 is probable. In death cases, doubts such as those presented here should be resolved in favor of the accused”); accord, *Zant v. Stephens*, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the “improper” ground, we must remand for resentencing. (*Mills v. Maryland* (1988) 486 U.S. 367, 377, 100 L.Ed.2d 384, 108 S.Ct. 1860.)

Certainly any error that impacts on the reliability of the judgment in a capital case -- even if it is purely an error of state law - carries federal 8th Amendment reliability implications. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305, 49 L.Ed.2d 944, 961, 96 S.Ct. 2978.) Furthermore, within the discussion of each error set forth in this brief, it has been shown that there are multiple reasons why the particular error should be considered federal constitutional error. Thus, every error in this case that affected the penalty determination should be reviewed under the federal constitutional standard, set forth in *Chapman v. California* (1967) 386 U.S. 18 [whether the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict].

Of course, the federal *Chapman* standard is also affected by the inescapable fact that the greater discretion in sentence determinations, compared to guilt determinations, makes it far more difficult to determine whether an error did or did not have an impact on the outcome. For example, in *Caldwell v. Mississippi* (1985) 472 U.S. 320, 86 L.Ed.2d 231, 247, 105 S.Ct. 2633, 2646, a death judgment was reversed when the Court found an error and concluded, “[b]ecause we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires.”

**C. The Present Penalty Trial Must Be Considered  
Unusually Close, So No Error That Impacted the  
Penalty Determination Can Be Deemed Harmless**

Whether this Court uses the “no effect” standard, the *Chapman* standard, or *any other standard*, it is especially clear in the present case that any guilt or penalty phase error that potentially impacted on the penalty determination must result in reversal of the penalty verdict. Here, there was no evidence that Veronica Gonzales had ever previously been convicted of any felony offense, or had ever committed or attempted to commit any prior criminal acts involving the use or threat to use force or violence. Here the jury heard none of the “victim impact” evidence commonly received in capital cases. Indeed, here the prosecution was unable to offer any aggravating evidence at all, except for the circumstances of the crime as shown by the guilt phase evidence.

In regard to the circumstances of the crime, it is true the victim was a child, the injuries were horrible, and the jury found the intentional infliction of torture and mayhem. On the other hand, this was not a case where multiple victims were murdered, or where anybody other than the single murder victim was physically injured. There was no basis for finding anything more than a single period of aberrant behavior.

In contrast, there was a considerable amount of compelling evidence in mitigation. Even the prosecution experts acknowledged the evidence was strong that Veronica Gonzales had been physically and sexually abused by her mother and step-father, and that she had been battered by her husband. There was no evidence that Veronica Gonzales had ever abused any of her own six children, and there was strong evidence that she was a loving mother. Even the closest relatives of the victim testified in her support.

Uncontradicted testimony from multiple prison employees and others demonstrated that even after the present offense occurred, Veronica Gonzales' children loved her and looked forward to their visits with her. Uncontradicted testimony from multiple prison employees also established that once Veronica Gonzales was no longer subject to the control of her husband, she was a remarkably well-behaved model prisoner who was helpful to staff and other inmates.

Furthermore, even if the guilt-phase sufficiency of the evidence arguments are rejected, they at least demonstrate the great closeness of the guilt phase evidence. Thus, lingering doubt as to guilt should be considered another strong mitigating factor.

In sum, Veronica Gonzales has been sentenced to death for a single homicide, despite the lack of any prior criminal history and despite the great dearth of inculpatory evidence regarding her actual role in the crime or her mental state when the crime occurred. In such circumstances, a death verdict was by no means a foregone conclusion, unless it was based on the visceral emotional reaction to the photographs of the injuries suffered by the victim, or on the prosecutor's unfair attacks on her character.

Because of the closeness of the case, the normative decision-making involved in a penalty trial, and the wide discretion left to a penalty jury, no error in the present penalty trial can be deemed harmless.

## CONCLUSION

Serious errors have been demonstrated. Which impacted both the guilt and penalty phases of this capital trial. It has also been shown that these errors were prejudicial under any standard for a number of reasons – not importantly the unusual closeness of the evidence in regard to both phases of the trial. Under these circumstances, neither the guilt nor the penalty verdicts should be allowed to stand.

DATED: October \_\_\_\_, 2007

Respectfully submitted,

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## DECLARATION OF SERVICE BY MAIL

I, Ellen I. Cutler, declare as follows:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is P.O. Box 172, Cool, CA 95614-0172.

On October \_\_\_\_, 2007 I served the attached

### APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to the persons named below at the addresses shown, and by sealing and depositing said envelope in the United States Mail at Cool, California, with postage thereon fully prepaid. There is delivery service by United States Mail at each of the places so addressed, or there is regular communication by mail between the place of mailing and each of the places so addressed.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed this \_\_\_\_ day of October, 2007, at Cool, California.

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Ellen I. Cutler

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SUPREME COURT OF THE STATE OF CALIFORNIA **FILED**

OCT - 5 2007

PEOPLE OF THE STATE OF CALIFORNIA, )  
 )  
 Plaintiff and Respondent, )  
 )  
 v. )  
 )  
 VERONICA UTILIA GONZALES, )  
 )  
 Defendant and Appellant. )  
 )  
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)  
 ) Frederick K. Ohlrich Clerk  
 ) S072316  
 )  
 ) (San Diego County  
 ) Number SCD 114421)

## APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SAN DIEGO

Honorable Michael D. Wellington, Trial Judge

### APPELLANT'S OPENING BRIEF

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