No. S074624

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

TOMMY JESSE MARTINEZ,

Defendant and Appellant.

Automatic Appeal from a Judgment of Death
of the Superior Court of the State of California
County of Santa Barbara
Case Nos. SM 103236; SM 101161
Honorable Rodney S. Melville

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This automatic appeal from a final judgment of conviction and imposition of a sentence of death is authorized by Penal Code section 1239, subdivision (b).[1]

STATEMENT OF CASE

On June 5, 1997, an Indictment was filed by the foreperson of the Grand Jury in Case Number SM 103236 in the Santa Barbara Superior Court accusing Tommy Jesse Martinez of murder, rape, and robbery of Sophia Castro Torres. (CT 2-4). Count One of the Indictment charged that on or about November 15, 1996, in the County of Santa Barbara, State of California, that Appellant Martinez committed the act of murder in violation of § 187(a), a felony, and further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(1). Count Two charged that on or about November 15, 1996, in the County of Santa Barbara, Appellant Martinez committed the crime of rape as to Sophia Castro Torres in violation of § 261(a)(2), a felony, and further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(3). Count Three charged that on November 15, 1996, in the County of Santa Barbara, Appellant Martinez committed the crime of robbery as to Sophia Castro Torres, in violation of § 211, a felony, and further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(19). A special allegation was also set forth in that the alleged crimes of murder, rape, and

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[1] All further statutory references are to the Penal Code unless otherwise indicated. For easier reading, Appellant generally will not use the word "subdivision" or the abbreviation "subd." in statutory citations that include a reference to a subdivision. The reporter's transcript of the trial is denominated RT. The clerk's transcript is denominated CT.

robbery were committed by Appellant Martinez by use of a deadly weapon, to wit, a knife, within the meaning of § 12022(b), thereby causing said crimes to become serious felonies pursuant to § 1192.7(c)(23). Special circumstances were also alleged in that the murder of Sophia Castro Torres was committed by Appellant Martinez while in the commission of the crime of rape in violation of § 261(a)(2) within the meaning of § 190.2(a)(17)(C). Further, special circumstances were alleged in that the murder of Sophia Castro Torres was committed by Appellant Martinez while engaged in the crime of robbery in violation of § 211, within the meaning of § 190.2(a)(17)(A).

On December 6, 1996, a two-count felony complaint was filed in the Municipal Court, Santa Maria Division, of the Northern Santa Barbara County in case number M966404 as to Appellant Tommy Jesse Martinez, Jr. (CT 2194-2197). Count One charged that on December 4, 1996, Appellant Martinez committed the crime of attempted kidnapping, in violation of § 664/207(a), a felony, as to Sabrina Perea and further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(20). Count Two charged Appellant Martinez with the crime of assault, great bodily injury and with a deadly weapon, in violation of § 245(a)(1), a felony, as to Sabrina Perea and that said assault was committed with a deadly weapon, to wit, a knife.

On December 9, 1996, an amended felony complaint was filed in the Municipal Court, Santa Maria Division, of the Northern Santa Barbara County in case number M966404 which added Counts Three and Four. (CT 2203-2207). Count Three charged that on November 3, 1996, Appellant Martinez committed the crime of assault with the intent to commit rape in violation of § 220, a felony, as to Maria Morales and that Appellant

Martinez assaulted Morales with intent to commit rape in violation of §§ 261(a)(2) and (a)(3), and further, that the offense was a serious felony within the meaning of § 192.7(c)(10). It was further alleged that the offense was committed with the use of a deadly weapon, to wit, a knife, within the meaning of § 12022.3(a) and that the offense was a serious felony within the meaning of § 1192.7(c). Count Four alleged that on November 3, 1996, Appellant Martinez committed the crime of assault great bodily injury and with deadly weapon, in violation of § 245(a)(1), a felony, as to Maria Morales with a deadly weapon, to wit, a knife.

On January 16, 1997, a Six Count second amended felony complaint was filed in the Municipal Court, Santa Maria Division, Northern Santa Barbara County in case number M966404 as to Appellant Tommy Jesse Martinez. (CT 2208-2212). Counts Two, Three, Five and Six restated the four counts previously charged in the original felony complaint and amended complaint. Count One charge that on July 22, 1996, that Appellant Martinez committed the crime of assault with intent to commit rape, in violation of § 220, a felony, and assaulted Myriam Gurba with intent to commit rape in violation of §§ 261(a)(2) and (a)(3), sodomy in violation of § 289(a), and oral copulation in violation of § 288(a). Count One further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(3), (c)(4), (c)(5) and (c)(25). Count Four charged that Appellant Martinez on December 2, 1996, committed the crime of assault with intent to commit rape in violation of § 220, a felony, and that Appellant Martinez assaulted Laura Zimmerman with intent to commit rape in violation of § 261(a)(2) and (2)(3), sodomy in violation of § 289(a) and oral copulation in violation of § 288(c), and further, the offense was alleged

to be a serious felony within the meaning of § 1192.7(c)(3), (c)(4), (c)(5), and (c)(25).

After a preliminary hearing on January 21 and 22, 1997 before Judge Diana R. Hall (CT 2217-2341), the matter was transferred to the Superior Court and designated as case number SM 101161. (CT 2215 and 2216).

On February 5, 1997, an Eight Count Information was filed in the Santa Barbara Superior Court, case number SM 101161 as to Appellant Tommy Jesse Martinez, Jr. Count One alleged that on July 22, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Myriam Gurba, in violation of § 220, a Felony. Count Two alleged that on November 3, 1996, Appellant Martinez committed the crime of kidnapping with intent to commit rape, oral copulation, sodomy, and rape by instrument as to Maria Morales in violation of § 208(d), a felony. Count Three alleged that on or about November 3, 1996, Appellant Martinez committed the crime of kidnapping for robbery as to Maria Morales, in violation of § 209(b), a felony. Count Four alleged that on November 4, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Maria Morales, in violation of § 220, a felony. Count Five alleged that on December 2, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Laura Zimmerman, in violation of § 220, a felony. Count Six alleged that on December 4, 1996, Appellant Martinez committed the crime of attempted kidnapping with intent to commit rape, oral copulation, sodomy and rape by instrument as to Sabrina Perea, in violation of § 664-208(d), a felony. Count Seven alleged that on December 4, 1996, Appellant Martinez committed the crime of attempted kidnapping for robbery as to Sabrina Perea, in violation of § 664-209(b), a felony. Count Eight alleged that on

December 4, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Sabrina Perea, in violation of § 220, a felony. (CT 2343-2349).

On September 12, 1996, an Amended Eight Count Information was filed in the Santa Barbara Superior Court in case number SM 101161. (CT 2410-2416). The Amended Information charged substantially the same crimes as asserted in the initial Information.

On January 16, 1998, a Nine Count Second Amended Information was filed in the Santa Barbara Superior Court as to Appellant Tommy Jesse Martinez, Jr. (CT 2682-2689). Count One alleged that on November 3, 1996, Appellant Martinez committed the crime of assault with a deadly weapon as to Maria Morales, in violation of § 245(a)(1), a felony, with a deadly weapon, to wit, a knife. Count Two alleged that on November 3, 1996, Appellant Martinez committed the crime of kidnapping with the intent to commit rape and oral copulation as to Maria Morales, in violation of § 208(d), a felony, and further alleged that the offense was a serious felony within § 1192.7(c)(20). It was further alleged that Appellant Martinez used a deadly and dangerous weapon, to wit, a knife, causing the offense to be a serious felony within the meaning of § 1192.7(c)(23). Count Three alleged that on November 3, 1996, Martinez committed the crime of kidnapping for robbery as to Maria Morales, in violation of § 209(b), a felony, and further that the offense was a serious felony within the meaning of § 1192.7(c)(20). It was further alleged that Appellant Martinez, in the commission of the offense, used a deadly and dangerous weapon, to wit, a knife, causing the offense to be a serious felony within the meaning of § 1192.7(c)(23). Count Four charged that on November 3, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to

Maria Morales, in violation of § 220, a felony, and in violation of §§ 261(a)(2) and (a)(3) and that the offense was a serious felony within the meaning of § 1192.7(c)(10). It was further alleged that in the commission of the offense, Appellant Martinez used a deadly and dangerous weapon, to wit, a knife, thereby causing the offense to be a serious felony within the meaning of § 1192.7(c)(23). Count Five alleged that on December 2, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Laura Zimmerman, in violation of § 220, a felony, and in violation of §§ 261(a)(2) and (a)(3). It was further alleged that the offense was a serious felony within the meaning of § 1192.7(c)(10). Count Six alleged that on December 4, 1996, Appellant Martinez committed the crime of attempted kidnapping with intent to rape and oral copulation as to Sabrina Perea, in violation of § 664/208(d), a felony. It was further alleged that the offense was a serious felony within § 1192.7(c)(20) and further that Appellant Martinez used a deadly and dangerous weapon, to wit, a knife, thereby causing the offense to be a serious felony within § 1192.7(c)(23). Count Seven alleged that on December 4, 1996, Appellant Martinez committed the crime of attempted kidnapping for robbery as to Sabrina Perea in violation of § 664/209(b), a felony, and further, that the offense was a serious felony within § 1192.7(c)(20). It was further alleged that Appellant Martinez, in the commission of the offense, used a deadly and dangerous weapon, to wit, a knife, thereby causing the offense to be a serious felony within § 1192.7(c)(23). Count Eight charged that on December 4, 1996, Appellant Martinez committed the crime of assault with intent to commit rape as to Sabrina Perea, in violation of § 220, a felony and in violation of §§ 261(a)(2) and (a)(3), and further, that the offense was a serious felony within § 1192.7(c)(10). It was further alleged that within the

commission of the offense, Appellant Martinez used a deadly and dangerous weapon, to wit, a knife, thereby causing the offense to be a serious felony within § 1192.7(c)(23).

On July 7, 1997, the People filed a motion to consolidate pursuant to § 954, the capital case, case number SM 103236 with the non-capital cases in case number SM 101161. (CT 00087-89 and 00306-00319). On August 20, 1997, Judge Richard A. St. John granted the People's motion to consolidate and ordered that the capital case, case number SM 103236 be consolidated with the non-capital cases, case number SM 101161. (CT 00342-00343). On April 16, 1998, the consolidated case was assigned to Judge Rodney S. Melville for all purposes, including trial. (CT 00825-826). On April 24, 1998, Judge Melville entered an order that all papers and documents shall be filed under case number SM 103236 only, from April 24, 1998 forward. (CT 01004).

On May 4, 1998, Appellant's trial began with jury selection. (CT 01049-1051). On May 19, 1998, the prosecution began to present evidence. (CT 01128-1130). On May 27, 1998, the defense began to present its case. (CT 01164-01166). On June 2, 1998, the jury commenced guilt phase deliberations. (CT 01178-1179).

On June 3, 1998, the jury found Appellant Martinez guilty of the crime of murder as charged in Count One of the Indictment in the first degree and found the special circumstances alleged to be true. The jury found Appellant Martinez guilty of the crime of rape in violation of Penal Code § 261(a)(2) as charged in Count Two of the Indictment and further found that Appellant personally used a deadly and dangerous weapon. The jury found Appellant Martinez guilty of the crime of robbery in violation of Penal Code § 211, as charged in Count Three of the Indictment and further

determined that Appellant personally used a deadly and dangerous weapon. The jury also found Appellant Martinez to be guilty of Counts One, Two, Three, Four, Five, Six, Eight, and Nine of the Information and further found the special allegations of a serious felony as to Counts Two, Three, Four, Six, and Eight to be true. As to Count Seven of the Information, the jury found Appellant Martinez not guilty. The jury did find Appellant Martinez guilty of a lesser included offense to the crime charged in Count Seven of the Information with respect to attempted kidnapping, in violation of § 664/207 and further found that the special allegation of a serious felony to be true. (CT 01184-1186; 01284-1296; RT 2744-2767 and 2773-2777).

On June 10, 1998, the penalty-phase trial commenced with the prosecution presenting evidence. (CT 01408-1410). On June 11, 1998, the defense began to present its evidence. (CT 01415-1417). On June 22, 1998, the court instructed the jury and the parties presented argument. (CT 01493-01495 and RT 3938-3953, 3954-4024, and 4025-4080). On June 23, 1998, the jury returned a verdict of death. (CT 01496-01498 and 01757). On September 15, 1998, the court denied Appellant's motion for a new trial pursuant to § 1184 and further denied the application for modification of the verdict under § 190.4(e) and sentenced Appellant to death. (CT 01912-01918). Moreover, on September 21, 1998, the court pronounced judgment of death and entered the commitment and judgment of death. (CT 01931 and 01932-01937).

STATEMENT OF FACTS

I. GUILT PHASE

A. Overview.

During the period of November 3, 1996 through December 4, 1996, a series of events transpired in Santa Maria, Santa Barbara County which resulted in the capital charge and non-capital charges involving four female victims against Tommy Jesse Martinez, Jr. As to the capital charge, Martinez was charged with the murder of Sophia Castro Torres on November 15, 1996 during the commission of a rape and robbery involving the use of a deadly weapon, to wit, a knife. As to the non-capital charges, Martinez was charged with assault with a deadly weapon, to wit, a knife, kidnapping with intent to commit rape, kidnapping for robbery, and assault with intent to commit rape as to Maria Morales on November 3, 1996. Martinez was also charged with assault with intent to commit rape as to Laura Zimmerman on December 2, 1996. Martinez was charged with attempted kidnapping with intent to commit rape, attempted kidnapping for robbery, assault with intent to commit rape, and assault with a deadly weapon, to wit, a knife as to Sabrina Perea on December 4, 1996.

Both the capital and non-capital charges were consolidated and tried together before a jury in one proceeding. For the most part, the prosecution presented its case chronologically, incident by incident, with the Morales incident of November 3, 1996 being first, followed by the Torres incident of November 15, 1996, and thereafter by the Zimmerman incident of December 2, 1996 and the Perea incident of December 4, 1996. Therefore, for the sake of clarity, the capital case and non-capital cases will be addressed separately and in chronological order as presented to the jury.

B. The Prosecution's Case.

1. Maria Morales - November 3, 1996.

Maria Morales, a 16-year old high school student at the time, worked at the Discount Mall in Santa Maria in November of 1996. (RT 1536-1537). On Sunday morning, November 3, 1996, she was walking to work by way of an alley that is to the rear of the La Joya Plaza in the parking area of the Discount Mall. She felt someone grabbing her from behind, hugging her with one hand; the other hand had a blade. He said that she should go with him and that she should not do anything. She tried to slip away, but he held onto her tighter telling her not to say anything and "come with me." He grabbed her by the hair. (RT 1538). They walked for awhile to a place where they were all alone. She had bracelets, rings and a beeper. He wouldn't say anything but just continued walking along. He threw her against the wall, tried to take her belt off, untied her blouse, and she kept asking what he wanted to which he said "I want you." He tried kissing her and said he would mark up her face and for her to do nothing. She stated that she heard someone coming and so he grabbed her and took her to the middle of the alley. There was a young man there on the other side of the fence. (RT 1539).

As the assailant saw that the young man was approaching, there were sounds like a cellular or beeper. Her assailant then put her in front of him and hit her - "a very hard blow" - to the face. He then ran away. (RT 1540 and 1566). She dropped everything she was carrying. (RT 1540). Morales identified Tommy Martinez as the assailant. (RT 1541-1542).

She did have a purse which contained thirty dollars that was in a small backpack. She also had a folder and some school books. (RT 1542). After she was hit, the man from the parking lot came up to help her. (RT

1549-1550). She did have a pager attached to her pant's pocket, but when the incident was over the pager was gone. (RT 1557). She also noticed that two rings were gone. (RT 1568-1569). Subsequently, she did call the number on her own beeper and someone returned the page. In response to her statement that "this beeper is mine", the caller stated "no, lady, that beeper is mine." The caller sounded like someone younger than Martinez and was about 16. (RT 1569-1570).

Based on the testimony of Maria Morales as reflected in the photographic evidence, Detective Gregory Carroll paced off the distance from where Morales was first contacted by the assailant to that point in the alley where she ultimately ended up and determined the total distance to be 181 feet. (RT 1909-1911). Detective Carroll confronted Martinez regarding the Maria Morales and Sabrina Perea incidents. According to Detective Carroll, Martinez stated that he did those, but he was only going to rob them. (RT 1600-1602). As to the Morales incident, Martinez denied that he had undone the buckle of her pants and that he had untied her blouse and stated that he was only going to rob her. (RT 1602-1603).

2. Sophia Torres - November 15, 1996.

On November 15, 1996, at 11:07 p.m., Marsha Martinez, Police Dispatcher for the Santa Maria Police Department, received a 9-1-1 call from a location up on Main Street which was tape recorded. (RT 1607-1611, Exh. 12).

The 9-1-1 Call

The 9-1-1 dispatch call provided as follows:

DISPATCHER: 9-1-1 Emergency.

MALE VOICE: Yes, there is a lady being attacked on ... the ... Westside Little League Park by the snack bar, by two black girls ... send help quick.

DISPATCHER: Wait, wait, wait, wait, wait, where, where is this park at?

MALE VOICE: Its Oakley, the Westside Little League ...

DISPATCHER: Oakley Park?

MALE VOICE: Yes.

DISPATCHER: And, is this the one off of Western? or ...

MALE VOICE: Yes, send help quick ...

DISPATCHER: And, they're beating her up?

MALE VOICE: Yes they are. It's two black girls.

DISPATCHER: And, they're in the baseball diamond?

MALE VOICE: Um, they're by the snack bar ... and, they're hitting her with baseball bats and everything.

DISPATCHER: They're hitting her with baseball bats?

MALE VOICE: Yes.

DISPATCHER: Can you give me a description of these people?

MALE VOICE: Well, it's just two black girls, they're kinda heavy set.

DISPATCHER: Do you have any clothing description?

MALE VOICE: Um, no.

DISPATCHER: Ok you're calling from West Main how come you went so far to call?

MALE VOICE: Hung up the phone. Call ended.

(Exh. 12A, CT 03112).

The Crime Scene

Police Officer Louis Murillo of the Santa Maria Police Department was dispatched to Oakley Park at 11:08 or 11:09 p.m. on November 15, 1996. He had been advised that two black females were beating up a Hispanic female with bats. As he proceeded down Western, which fronts on one side of the park, he was not able to see into the park as the lighting conditions were very poor. He drove into the park to look further. There was a baseball diamond where the concession stand was but he could not see it. As he drove his vehicle through the park, he noticed a female lying on the ground on the right side of the snack bar. There was blood all around her and he called for an ambulance. He checked for vital signs and did not find any. (RT 1614-1621). Police Officer Douglas Alan Coleman of the Santa Maria Police Department Crime Lab was an Identification Technician who had experience in blood spatter patterns. (RT 1641-1643). He documented the bleachers, snack bar and the baseball diamond area immediately adjacent to Sophia Torres. (RT 1645). On the third base side of the baseball diamond by the bleachers, on and below the bleachers, he found what looked like the contents of a woman's purse which included a fingernail file, pencil, toothbrush, and some perfume vial or plunger. (RT 1655 and RT 1704-1705). There was no blood on the third base side in the bleachers. (RT 1704-1705). He found blood spatters on the cement

walkway behind home plate and on the wall of the snack bar. (RT 1657-1658). On the first base side of the diamond, he found quite a bit of blood on and below the bleachers. (RT 1664-1665). On the bleacher seats, the blood spatters had a relatively high velocity which means they spattered as if someone had been running down from behind home plate and ran into the bleachers. The blood had gone directly across the bleacher seats. The blood at the end and just under the bleacher seats appeared to have just dropped straight down and had no velocity, and thus, it appeared that someone was sitting on the bleachers or resting against the bleachers at that point. In effect, there was a dripping pattern at the bottom of the bleachers. (RT 1665-1666).

He found two blood spots, one on the sidewalk, and one on the asphalt just south of the sidewalk on the north end of Western in the north end of the park. (RT 1678-1679). He also found a toothbrush near the third base side of the baseball diamond. (RT 1675). He noticed bicycle tire tracks that traveled across the grass between the snack bar and a large tree all the way to the sidewalk on Western. (RT 1676). Officer Coleman found three partial palm prints in the blood at the scene, two of them adjacent and close to the bleachers and the third next to the large pool of blood on the cement. (RT 1669-1672). It was impossible to determine whose partial palm prints they were. (RT 1688-1689). Officer Coleman also found footprints in blood near the victim, Sophia Torres, which he surmised were deposited by paramedics or policemen. (RT 1711-1712).

Officer Coleman also did an analysis of a couple of latent palm prints that he took off the public phone located at the phone booth in the La Joya Shopping Plaza which had been identified as the origin of the 9-1-1 call. He compared the palm prints off the phone booth with known prints

from Martinez and determined that the latent palm prints from the phone booth were not made by Martinez. (RT 1681-1688). Moreover, Officer Coleman was not able to recover any prints from the black purse (Exh. 40, RT 1690-1691) which had belonged to the victim, Sophia Torres (RT 1762).

Sgt. Dennis L. Prescott of the Santa Barbara Sheriff's Department was the supervisor in the coroner's office and conducted death investigations. He responded to the Torres crime scene on November 16, 1996 at 1:00 a.m. It is the coroner's responsibility to determine the time of death and the manner and cause. He determined that the time of death was 10:30 p.m. or 11:00 p.m. on November 15, 1996. (RT 1780-1791).

Sonny Garcellano resided at 1002 Gunner which is at the corner of West Gunner and Western. The backyard of his house is adjacent to Oakley Park. In November of 1996, he found a black bag (Exh. 40) in his backyard which is on the Western Street side. He opened the bag and found an alien I.D. card and a few coins. He then called the police. (RT 1716-1720).

The Forensic Evidence

Dr. Robert Failing is a physician whose specialty is pathology. He performed an autopsy on the body of Sophia Torres on November 18, 1996. Dr. Failing described the condition of the body as follows: The left side of the face and head was markedly swollen and contused. The nose was fractured. There was a marked swelling of the right eye, and the eyelid was lacerated. The lips were swollen, bruised and lacerated. On the right cheek, extending from the hairline of the temple, down onto the cheek, there was a very deep, sharp, cutting laceration. It measured approximately three and a half or four inches long. There was a laceration on the right elbow. There was a large bruise to the left breast area. There was also a

large bruise over the left hip area. There were abrasions to both knees. (RT 1801-1808).

Dr. Failing noted that the skull was intact, but the brain was markedly swollen. The cause of death was "subarachnoid subdural hemorrhage, brain contusions, with the swelling that forces the brain down" into the medulla, and "that swelling causes marked depression to obliteration of the normal physiological functions such as respirations and heartbeat." (RT 1809-1811). Dr. Failing concluded that a blunt structure hit the left side of the head at least once, if not more times, with a great deal of force. (RT 1811-1812).

He also noted that there were separate blows unrelated to the blow to the head of the victim. (RT 1812). That is, the bruise to the chest area, bruise to the left hip, and injury to the hand were all caused by separate blows. (RT 1812-1815). The long laceration across the cheek was caused by a sharp instrument, like a knife. (RT 1818-1820). The crush injury between the eyebrow and the eyelid was the result of a blunt force injury. (RT 1820-1821). The fracture of the nose and injury to the lip were caused by separate blows. (RT 1823-1825). Dr. Failing noted that the instrument that caused the blunt force injuries had a relatively smooth surface and probably was a broad structure approximately one half to three quarters of an inch in diameter which could include a baseball bat. (RT 1830).

Dr. Failing did an examination of the vagina. He looked for bruising and tearing. He found no bruising, no tearing, and no trauma to the vagina. (RT 1829). Dr. Failing noted that the lack of bruising, tearing, or trauma to the vagina does not rule out the possibility of sexual assault. (RT 1830).

Charlene Marie is a Sr. Criminalist, employed by the Department of Justice Crime Lab of the Attorney General's Office located in Goleta. (RT

1833-1835). She examined a number of pieces of physical evidence. (RT 1836). This included a vaginal swab of the victim, Sophia Torres, and a slide from that vaginal swab. (Exhibit 47A and 47B; RT 1839 and RT 1788-1793). She saw sperm heads on that slide. She also conducted an examination of Exhibit 48A and B which were two swabs that had been obtained from the victim on November 16, 1996. She prepared a slide from the swabs to examine it for the presence of sperm. She found intact sperm and concluded based on her analysis that the intercourse or the deposit of the sperm was fairly recent, about a day, prior to the sample being obtained. (RT 1842-1844 and RT 1788-1793).

She also did genetic testing called PGM of the swab that was taken by the coroner on November 16, 1996 and determined that the victim's bands were present but she also saw bands that were foreign to her in the semen sample and they were the same type as that of Tommy Martinez. (RT 1853-1856 and RT 1788-1793). She then prepared a packet of materials which were forwarded to the Crime Lab in Berkeley for DNA testing. (RT 1856-1857). She also examined eight hairs which were provided to her from the victim's hand. (RT 1858-1860 and RT 1889). Based on her analysis, she concluded that the hairs at issue were in the range of the hairs of the victim, Sophia Torres, and excluded Tommy Martinez as the source of those hairs. (RT 1860-1868).

She examined the black dress, Exhibit 56, which was the dress of the victim, Sophia Torres. She noted the presence of both blood and semen on the dress. (RT 1876-1877). She found semen deposited on the inside of the back of the skirt of the dress, down low, starting at the hem, up about 18 inches, and from about the center of the back over to the right side seam. (RT 1880 and 1885-1887). She also found semen on the front of the dress.

(RT 1886-1887). She also found a light head hair on the black dress which did not belong to the victim. (Exhibit 56, RT 1892).

Ms. Marie also tested the entire red Huffy mountain type bicycle for blood which apparently belonged to Tommy Martinez and did not find any blood on that bicycle. (RT 1893-1894 and 1874-1875). Further, she examined the knife, Exhibit 8, for the presence of blood and did not detect any. (RT 1873-1874). The knife, Exhibit 8, was subsequently identified as the one used in the Sabrina Perea incident (RT 2208 and 2203-2204) as well as being similar to the one used in the prior Maria Morales incident. (RT 1554). She also participated in the service of a search warrant on the Martinez home and seized a pair of white athletic shoes. One of the shoes had a very small droplet of blood which she sent to the DNA Lab. (RT 1894).

It was stipulated that Sippa Pardo was qualified as an expert in DNA analysis. She was employed with the Department of Justice Crime Lab in Berkeley and does PCR DNA analysis. She examined the shoe that was forwarded to the Department of Justice in this case which had a very small blood spot on it, or a spot that was determined to be blood, and that the blood did not match the blood of Martinez nor did it match the blood of the victim, Sophia Torres. (RT 2221-2223). It was also stipulated that Mr. Kish of the Santa Barbara County Sheriffs Toxicology Lab was qualified and performed an analysis of the blood samples of Sophia Torres. Based on the examination of those samples, he detected no alcohol or drugs in her system. (RT 2019). It was further stipulated that on November 15, 1996, that Sophia Torres did not wear any undergarments at any time that day. (RT 1955-1956). The court approved the stipulations, and instructed the

jury that they were bound by the stipulations. (RT 2223; 2019; and 1955-1956).

Matthew Piucci is employed with the Department of Justice DNA Laboratory in Berkeley. (RT 2085). He is an expert with regard to DNA identification and notes that DNA is basically a chemical blueprint for all living things. (RT 2087-2089). The Berkeley Laboratory does forensic DNA tests. There are two basic types. One is called the RFLP which stands for Restriction Fragment Length Polymorphism. This test is used when there is a fairly relatively large amount of DNA available. The other type are PCR-base type, which are Polymerase chain reaction. These tests are used when there is less sample available or the sample has been degraded. (RT 2093). Any biological material can be tested for DNA, such as semen and blood. (RT 2097).

Based on his DNA analysis, he concluded that they were unable to make a distinction between the sperm fraction of the vaginal swab which was taken from the victim, Sophia Torres, and the blood sample from Tommy Martinez. (RT 2129). He noted further that the sperm fraction of the vaginal swab from the victim, Sophia Torres, and the blood sample from Tommy Martinez are the same. (RT 2134-2135). Based on his analysis, Matthew Piucci concluded that there was strong evidence that the sperm sample taken from the vaginal swab of Sophia Torres came from Tommy Martinez. (RT 2140-2142). That is, a profile that was observed in the sperm fraction occurs in one in 3.75 million Hispanics. (RT 2142-2143).

David Kary, astronomer, opined that the moon set at 9:38 p.m. on November 15, 1996, and hence, there was no light from the moon generated on that particular evening. Based on his study of the lighting at Oakley Park, he concluded that on the night of November 15, 1996, that it was

"very dark" and that it was difficult to determine who people were as well as whether there were people in many parts of the park. (RT 1968-1978).

The Investigation and Interviews

Detective Greg Carroll was one of the detectives who was placed in charge of the investigation into the murder of Sophia Torres. (RT 1897). He arrived at the crime scene at 12:10 a.m. - 12:20 a.m. (RT 1897). He observed a bicycle track during his investigation at Oakley Park. (RT 1902). As a part of his further investigation, he walked from Oakley Park to the Martinez residence which took seven minutes and thirty seconds. He also walked from the Martinez residence to the phone booth at the La Joya Plaza where the 9-1-1 call had been made which took four minutes and twenty five seconds. (RT 1906-1908 and 1681-1688). He bicycled from Oakley Park to the Martinez residence which took two minutes and fifty seconds. (RT 1908). It also took him approximately two minutes to bicycle from the Martinez residence to the phone booth at the La Joya Plaza. (RT 1909 and 1681-1688).

He also inspected the black purse that was recovered from the Sonny Garcelano house. There was some change in the purse, but no bill currency. (RT 1911-1912). The Arizona Identification Card of the victim, Sophia Torres, was also in the purse. (RT 1912). Moreover, he found a toothbrush, some make-up, lipstick, miscellaneous papers, and a brush or a comb in the purse. (RT 1955).

Carroll was aware that Martinez had been arrested in connection with the attempted abduction of Sabrina Perea (see Argument II., post pp. 121-122) and was being housed at the County Jail in Santa Maria. (RT 1918-1919). He also had listened to the 9-1-1 tape that had been made on the evening that the victim, Sophia Torres, had been killed. (RT 1919). He

asked some people who were familiar with Martinez to listen to the tape prior to interviewing Martinez on the morning of December 5, 1996. (RT 1919). Over objection, he testified that they indicated that they thought the voice on the tape was Martinez. The testimony was allowed for the limited purpose as to what the officers did in their investigation.

The plan of Detective Carroll and his partner, Detective Mike Aguillon, was to interview Tommy Martinez for a little while in order to record his voice on a handheld microcassette, then bring the microcassette out into the hallway and play it against the 9-1-1 tape to determine if the voices sounded similar. (RT 1920). They had a conversation with Martinez which was recorded, took a break and compared the Martinez tape with the 9-1-1 tape, and then went back into the interview room to talk to Martinez. (RT 1920-1922). The tape of the interview between Detectives Carroll and Aguillon and Tommy Martinez (Exhibit 61) was played to the jury (RT 1920-1925) over the objections of defense counsel (RT 1923) and with the limiting instruction that the questions and statements by the detectives could only be considered as they give meaning to the defendant's responses and for no other purpose. (RT 1924). The transcript of the tape, Exhibit 61-A (CT 03113-03126), was provided to the jurors for the purpose of review during the playing of the tape recorded interview, Exhibit 61. (RT 1924-1925).

Recorded Interview #1

In brief, the first tape-recorded interview reflects an interrogation by Detectives Carroll and Aguillon of Tommy Martinez on December 5, 1996, regarding the knife assault on Sabrina Perea outside of the King's Table Restaurant the day before and the earlier homicide of Sophia Torres at Oakley Park. After some initial questioning, Detective Carroll made

reference to Martinez being read his rights the night before and inquired as to whether he remembered those rights. Martinez responded: "Yeah."

Martinez first responded to questions concerning the Perea knife assault outside of the King's Table Restaurant. He stated that he had been at the mall to see his cousin Aimee (Amy), but she was not there. Then he was going to Jack in the Box to get something to eat, but changed his mind and decided to go to a friend's house. He was on his bicycle crossing Miller Street when he was stopped by the police regarding the Perea incident.

Detective Carroll then inquired about the 911 tape recording concerning the Oakley Park incident. Martinez initially denied being the caller, but after Detective Carroll advised that his prior case worker, Rick Diaz, and his probation officer, Randy Miller, indicated that the voice on the tape sounded like his, Martinez admitted to making the 911 call. Martinez told the detectives that he was going to meet Sophia Torres at Oakley Park to buy drugs, i.e., crank. This was to be his first purchase of drugs from her. He had earlier met her at the Los Tres Amigos bar at the La Jolla Plaza. As he was walking to Oakley Park, he saw "two black chicks" fighting with Torres. He also saw a car with a guy in it parked in front of the park. It was dark, but he saw the black girls chasing Torres from the playground toward the baseball field, and they were hitting her. He then walked home. Martinez denied any involvement in the homicide. After he got home, Martinez thought about it and decided to get her some help. He then walked to a pay phone at the La Jolla Plaza and called 911. He did not say his name because he was high on crank and did not want to get arrested. After the call, he walked home. (RT 1925; Exhibit 61; see also, CT 03113-

03126; Exhibit 61A).[2] Over objection, the transcript of the first recorded interview as set forth in Exhibit 61A was admitted into evidence. (RT 2061-2063).

Over objection, Detective Carroll specifically attested to portions of the transcript of Exhibit 61A at pages 11 and 13 (CT 03123-03215) as it related to a diagram of the crime scene, Exhibit 38, noting the gestures made by Martinez as well as his conclusion that Martinez was being untruthful in the interview. (RT 1935-1940).

Detective Carroll also obtained a search warrant from the courts to obtain a blood sample and hair sample of Tommy Martinez. (RT 1912-1913). He, along with his partner, Detective Aguillon, took Tommy Martinez to the Valley Community Hospital to obtain a blood sample and hair sample which were transported back to the Santa Maria Police Department and booked into evidence. (RT 1912-1914). Detective Carroll also attested to a conversation with Martinez while he was being transported from the Foster Road Sheriff's facility to the Valley Community Hospital to execute the search warrant. According to Carroll, Martinez stated as follows:

(1) He had gone to the park to buy some crank off of the victim, and then that's when he saw two black girls beating on her;

(2) One was hitting her. The other was just kind of holding a bat;

(3) The two black girls were described as about 5'6" to 5'7" and heavy, e.g., chunky; and

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[2] The text of the transcript reflecting in pertinent part the first recorded interview is set forth in Argument II., e.g., the Miranda argument, post at pp. 132-146.

(4) He noted that if he saw the two black girls again that he thought he could identify them.

(RT 1940-1943).

Recorded Interview #2

At 7:00 p.m. on December 5, 1996, Detectives Carroll and Aguillon engaged in a second tape recorded interview of Tommy Martinez. The tape of the interview was Exhibit 62 and the transcript of the interview was Exhibit 62A. (RT 1943-1944). Over objection (RT 1945-1948), transcripts were provided to the jury while the tape was played to the jury. (RT 1949). The second tape recorded interview provided in pertinent part as follows:

AGUILLON: We'll probably have to pull up a chair. Let me get another chair real quick.

CARROLL: OK Tommy, do you understand everything that we did at the hospital there, what that was all about?

MARTINEZ: Uh huh.

CARROLL: Do you understand, um, that from blood samples they can tell if that's your semen or not?

MARTINEZ: Yeah.

CARROLL: Because, semen does have some blood in it, traces in it, and they will be able to tell from that. Do you understand all that?

MARTINEZ: Yeah.

CARROLL: OK. Um, the other thing that I, I just kinda want to lay out what we have right now OK? What evidence we're looking at as far as, we have two other cases right now where you have been identified as a suspect. Three?

AGUILLON: Well, two others, and this one.

CARROLL: Yeah, two others and this one. One is an attempt rape, and three, yeah, all not, um ...

AGUILLON: Near the discount mall, over there off of Russell, between Russell and Blosser, you grabbed a young girl there, and tried to drag her through the back. She ended up struggling, someone saw you and yelled hey, you ended up punching her in the mouth and you ran.

CARROLL: You hit her on the side of the face.

AGUILLON: She identified you through photographs that you were the suspect and that was 15 days prior to Oakley that that happened OK.

CARROLL: OK. OK. This gal has said you, and, just so you know, she looked at probably, what, 100 photographs, um in the days before. She had been looking through photographs and photographs. Today we show your photograph with a bunch of others and without hesitation she goes, that's him. No hesitation. The other thing is that the same type of knife is used in last night's. A small paring type knife with a chrome blade and a black handle. When we did the search warrant at your house, we found the larger knife to that set at the house.

MARTINEZ: The larger knife?

AGUILLON: Matching handles, they look the same, they're similar.

CARROLL: They're plastic Ginsu knife with a handle, OK, they're the same. Um, the other one is a lady from the mall?

AGUILLON: Right.

CARROLL: Another lady in the mall who got into her car, you came up, she says you came running up, tried to open the door, and then was asking something about the time, um, she said no she

wouldn't open the door and you said something about the time again and then took off running.

AGUILLON: She also identified you in a photo line-up.

CARROLL: Right, same type of thing. Your picture with several other people and she said, "That's him for sure." OK?

AGUILLON: Her statement was if it was a 1-10, what would you say and she said, "He's a 10, that's him, that's the guy."

CARROLL: Do you understand what he means by that, what's a 10?

MARTINEZ: Yeah.

CARROLL: OK. Um . . .

AGUILLON: And, we had last night's, she's you, you know in a line-up as far as driving up, we call a field show-up, and she says, "That's the guy." That's why you were placed into custody. So, we have three different women within about a months time, I mean, a month and a half time. One 15 days before Oakley, one about 15-20 days after Oakley, and one right after the next one and three of them, who don't know each other, have never made contact with one another, don't know you, but yet they pick you out and say that's the guy, I am 100% sure that's the guy that grabbed me, that's the guy that tried to get in my car, that's the guy that put the knife up to me, that's the guy. OK.

CARROLL: OK. So you understand where we are at and what we have.

MARTINEZ: Uh huh.

CARROLL: And what were we talking about earlier being cooperative, remorseful and all of that.

AGUILLON: You also remember what we are going to do is that we are going to place your face in the newspaper and on T.V. so that

everybody can see you, OK, so anybody else that comes up and says, "Yeah, I remember that guy, that's the guy that grabbed me too, or that's the guy that tried to grab me to, or was talking to me, or threatened me, or whatever," the ones that didn't come up to the police because they weren't sure whether to do it or not, they are all going to see you too and then the phones are gonna start ringing and they are going to say, "Yeah, I remember that guy, that guy was over there at such and such a place and doing that too." Remember that's going to happen. OK.

MARTINEZ: Yeah.

CARROLL: So, what were saying is this is it. This is your last opportunity to give a statement for yourself or decide what your going to do. Do you know what I am talking about? And, like he said, we, um, and you understand what being remorseful is now right?

MARTINEZ: Yeah.

CARROLL: And, that's gonna play a big part in what happens from here on out. Um, I can tell you that we did the search warrant on your house obviously, that we got the knife there, a lot of clothing, and things like that, OK, and some shoes, and before we can get a search warrant we have to take it to a judge, not only do you have to take it to a judge but take it to the District Attorney first. The District Attorney looks at it, and the reason they all look at it is to say, yeah, there is enough evidence right now to go to court with him, I will allow you to go search his house. Because, in the United States, it is a big thing for police to go into a house and search, to do an actual search of a house, so they take it very seriously. You understand?

MARTINEZ: Yeah.

CARROLL: So, this District Attorney looked at it and then a judge looked at it. The judge signed it saying yeah, go ahead. The District Attorney looked at it and said hey, you got enough evidence right now to take him to court and hold him over to trial and with this case, not only for the homicide, but the other two instances that we

are talking about. The one that occurred last night.

AGUILLON: The one that occurred over by the discount mall.

CARROLL: You understand all that?

MARTINEZ: Yeah.

CARROLL: OK. And that's why right now we are giving you this chance and see where you go with it.

MARTINEZ: My story is still the same.

CARROLL: OK. Why don't you, then go over to me what happened at the park, and you don't know why these other people would identify you?

MARTINEZ: No.

CARROLL: No reason. You don't remember the thing over by the discount mall in that field?

MARTINEZ: No.

CARROLL: You never grabbed a girl over there?

MARTINEZ: Uh huh.

CARROLL: Why, why does she pick you out? I don't understand.

AGUILLON: Out of all these photos that we show people, of all these things, they looked at photos and everything else and they pick you out of this crowd and then say, "That's the guy."

CARROLL: What's gonna happen, OK you go to court, I don't know if your gonna take the stand, but you get up and say no, it's not me. And then we get this lady that's going to go up says, yeah, that's him. And that is like, totally different. Yeah, that's him, yeah that's him. Now we have three, but there may be more coming up and if all these people do this, if you were on a jury, what would you say?

Yeah, that's him.

MARTINEZ: Yeah.

AGUILLON: And, also they'd say, "Yeah, he's lying."

CARROLL: He's lying, and that's what's gonna get you in trouble when it comes to this homicide because we are going to try and connect everything and we pretty much have according to the DA, he thinks we got enough.

AGUILLON: Let me ask you ...

CARROLL: We're gonna say, all these things lead to this thing right here, and yeah, he did it. If there is somebody else, if it's not you, we want to know now. And, this, these black females are not cutting it.

AGUILLON: Nothing is going to make it out there. I don't believe that you are a cold-hearted killer cause you called 9-1-1. You thought at least about saving her life at one point or another. If you keep on with this, "I don't know, it wasn't me, it wasn't me, it wasn't me, I don't care, I'm gonna save my own life, you are going to turn out looking like a cold-blooded murderer. Now what we want you to do is just tell us the truth and if it was an accident, if you hit her too hard, then that's fine, that's cool, just tell us that.

MARTINEZ: I didn't hit her.

AGUILLON: But the stuff about, you know, oh, it was two black girls out there, that, well, it's not going to fly. Well, there's people that can't even, no witness in the world is gonna say there was two black girls out there.

CARROLL: The other thing that we have too, is we have a witness in the, that lives across the street from the park who said he saw a male coming out of the park at about the time this all happened.

AGUILLON: Nobody says there was any black females inside that park around there earlier, after, around that time, nothing.

CARROLL: There is the guy who was out delivering pizza. We asked him, did you see anybody out there, and he was there almost at the same time. And he says, when I get out of my car, cause I carry money, I look around, I make sure. He didn't see no car, he didn't see no black females. Shortly after this pizza guy leaves, this other guy who lives across the street, says, "Yeah, I saw a guy coming out of the park. As a matter of fact, he was a male Hispanic, looked like a 'cholo' to me."

AGUILLON: Nothing about black females.

CARROLL: Nothing, nobody sees black females, no one, except you.

MARTINEZ: Yeah.

CARROLL: Do you see where we are going here?

MARTINEZ: Yeah.

CARROLL: I mean, why not help yourself?

MARTINEZ: Cuz, what I told you is what I seen.

CARROLL: How, OK, let's get back to the 9-1-1 tape then. Why did you say on the 9-1-1 tape, she's on the cement between the snack bar and the bleachers.

MARTINEZ: I didn't say that.

CARROLL: It's on the tape. We've listened to the tape. We've made sure.

MARTINEZ: I don't know.

CARROLL: I mean, that's what I don't understand. Yet, you had to be where, at a point where you could see her at that spot. There, there's, that's the only way.

MARTINEZ: I, this is what I seen. I was walking up to meet her

there and then I see her fighting. She was only fighting with one black female, the other one had a baseball bat. There was someone parked and out of the car in back, I don't know, and then she was running back and the black one, she was just hitting her, and the other one with the baseball bat was just standing right there and they chased her up, cause they weren't actually at the playground, there were this way more and they were chasing her towards the snack bar and then I just walked up Western, turned on Bunny and I crossed the street on Western, right when I seen them, I crossed over, I walked down Bunny, walked to the corner, walked back.

CARROLL: Walked back where?

MARTINEZ: Back towards Western.

CARROLL: Back towards the park?

MARTINEZ: Yeah. And I seen them going out more towards the snack bar then I took off and I walked home. Then I thought about it, I went to Main Street and used the phone.

CARROLL: Why now are you saying this? Why didn't you tell us this earlier?

MARTINEZ: This is what I told you earlier.

CARROLL: No it is not. You never told us you came back. You said you weren't close to the snack bar. You told me when we were in the car on the way over the last time you saw them, was when they were half way in between going to the playground and towards the snack bar.

MARTINEZ: Yes, they was going towards the snack bar.

CARROLL: This is what's gonna kill you. Your lies.

MARTINEZ: It ain't a lie, I told you earlier ...

AGUILLON: Let me ask you something. Do you know what physical evidence is?

MARTINEZ: No.

AGUILLON: OK, well we have lab technicians. People who come out and pick up evidence and take photographs and take measurements pick up fingerprints, blood in fingernails, everything they can grab ... OK ... We all know, we can prove that what happened happened at the snack bar.

MARTINEZ: OK.

AGUILLON: It didn't happen somewhere else and continue to there. We can find out where it happened, where it started, how it progressed and where it ended. We know that just by physical evidence all right?

CARROLL: Let me show you where it all happened and how it happened, although I am sure you are pretty aware of it. This is Western right.

MARTINEZ: Yes.

CARROLL: There is a tree here, right. Playground is down over in this area right? I am not a very good artist but, this is the cement pad, right?

MARTINEZ: Yeah.

CARROLL: Baseball diamond right?

MARTINEZ: Yeah and the bleachers are right here right ...

CARROLL: Hold on. And this is the cement, we're doing a small scale thing. Snack bar. Right? Bleachers. Bleachers. Right?

MARTINEZ: Yeah. Pretty much.

CARROLL: Let me show you what us and the lab technicians who went out and scoured the scene - we walked the whole park. The next morning, we went through this whole park. The park was blocked off. We went back through the whole park. No hair, no

blood, no nothing in this area. All over this area. Right here, hair, some items apparently from the victim's purse on the ground here. Quite a bit of hair on the bleachers here that appear to be from the victim. Down this way, if you go through here, there is blood splattered on the wall here. This is where she was first struck with something. Do you understand that?

AGUILLON: That caused her to bleed.

CARROLL: That caused her to bleed, and whatever she was hit with, transferred when the person brought it back up, blood went across the wall. Do you understand that?

MARTINEZ: Yeah.

CARROLL: OK. Blood on the ground here, here, blood on the ground basically in all this area, on these bleachers blood. A larger pool of blood here. Victim here, right? More blood here. Everything was here. Nothing here, nothing here, nothing here, and nothing here. Nothing in the school. We walked the whole school, nothing. Everything is here. Why is that?

MARTINEZ: I don't know cuz this is the way I walked ...

AGUILLON: This is a large grass area right, I know ... It was a heavy dew that night, it was really wet, there were no footprints going from here to here. There are bike trails coming out here. The only thing we could find was the bike trail was coming out of there. Between here and here the grass hasn't even moved. I mean, you can see, you could look, early morning, you could look across the grass and there isn't a single blade that is even moved around.

CARROLL: You know what dew on the grass looks like right?

MARTINEZ: Yeah.

AGUILLON: You know how it brings, you can walk in it, you can tell where someone's been stepping.

CARROLL: There is no footprints, no nothing.

MARTINEZ: I walked right here, down Western, and then here's Bunny, I think it's Bunny, the first street, you just turn right there, OK, I walked, I crossed over, and I came through here. And, they were right here, like, somewhere around right here, they, they, she was just slapping her and chasing her towards this way. And so, I crossed over and I walked all the way to the corner cause it goes down like that and it turns, and I walked to the corner and then I went back and then I just came like that across the road, the same way I walked to there and the same way I walked back and they were headed towards going this way. And then so, I went home and then I thought about it ...

CARROLL: Where's the car?

MARTINEZ: The car was parked somewhere along right here.

CARROLL: The whole time?

MARTINEZ: I don't know about the ...

CARROLL: I mean the whole time you were there?

MARTINEZ: When I walked, they left, the car was parked right there and a guy was sitting in there.

CARROLL: A white guy?

MARTINEZ: I don't know.

CARROLL: Mexican?

MARTINEZ: I don't know.

CARROLL: Black?

MARTINEZ: I'm not sure.

CARROLL: You walked right by him though.

MARTINEZ: Not right, right by him. I walked like that, I just let,

he looked, he was parked, there the corner of my eye. And then I see him right there and I don't want to stare too much ...

CARROLL: You started walking and your walking along the sidewalk here ...

MARTINEZ: OK, see, here's the sidewalk, OK and I crossed over ...

CARROLL: What, you were walking this way?

MARTINEZ: Yes, I was walking towards this way, cause there's a fence right here, before the playground. OK, and as I got to the fence, I see them about here and I then I saw, I crossed over and I, cause I seen that guy in the car, and I crossed over ...

CARROLL: Is there a reason that your fingerprints would be on her purse that was found in the backyard over here?

MARTINEZ: No.

CARROLL: There's not? So the fingerprints that they are matching up right now, that the lab guy says is yours is not true? You've never touched her purse? Your positive?

MARTINEZ: Yeah.

AGUILLON: You know you say ...

CARROLL: You know, that's what I'm saying, there's a ton of evidence, remember what I told you this morning, we have tons of physical evidence and it's slowly all pointing one way right?

MARTINEZ: OK.

CARROLL: And that's what I'm talking about. This story about the two black females is not true and you know it.

MARTINEZ: It is true.

AGUILLON: You said on the phone, 9-1-1 tape. They were hitting her with baseball bats, come quick. Send help quick. You kept saying that, send help quick, they are hitting her with baseball bats. Not once said you were saying oh, they're beating with her, they are fighting with her, you actually said, they are beating her with a baseball bat. OK, over here, all this time you've been talking, you never mentioned one holds the baseball bat but no one ever strikes her with the baseball bat.

MARTINEZ: No they didn't hit her with the baseball bat when I was there I just ...

CARROLL: Then why did you say on the phone, they are beating her with baseball bats.

MARTINEZ: Cause I just wanted help to get out there quick, ah, I don't know, it's just that ... my mind was, my mind wasn't straight.

AGUILLON: But you went home, you sat at home for a while thinking about it, doesn't your house have 9-1-1.

MARTINEZ: Yeah.

CARROLL: Why didn't you call from your house?

AGUILLON: A neighbor?

MARTINEZ: I didn't even want you guys to trace the call UNINTELLIGIBLE I didn't want UNINTELLIGIBLE

CARROLL: When the dispatcher asked you why you were calling from Main Street, you hung up without saying anything else. Why is that?

MARTINEZ: I don't know, I just wanted to leave.

CARROLL: OK, so what all this physical evidence is saying is you had contact with her. Why is all this evidence doing that?

MARTINEZ: I don't know. There shouldn't be no evidence of me

having contact with her.

AGUILLON: And those other girls are wrong about you having any contact with her too right?

MARTINEZ: Yeah ...

CARROLL: So, all the evidence is lying, all the people are lying, you're the only one being truthful with us?

AGUILLON: You were the one that called us and you never did call us again to say, "Hey, this is what I know, it was two black girls."

CARROLL: Why? I mean, why not make a anonymous phone call to the Police Department saying, hey, I'm the one who called to 9-1-1 that day and this is what I know? Why not?

AGUILLON: So, so all these people are lying and all the evidence is lying, all the physical evidence is lying, and you just didn't lie, you were scared about talking to us.

MARTINEZ: Yeah. I didn't want to get violated for probation, for doing drugs.

AGUILLON: If you would have called us a couple of days afterwards, we wouldn't have cared about drugs right.

MARTINEZ: I didn't know that.

CARROLL: OK, I mean, back to the, at your house we find the knife that was used last night, that is, the same style and type as the one that was used last night, and we find the same style inside at your house. OK, um, we're sending all your clothes that we recovered from your house, in your bedroom, up to the lab. Who knows what we are going to find on that. Any traces of the victim's clothing, any traces of blood from the victim, who knows right? We've got your shoes, all the shoes that are from the house, these shoes now. I don't know did you throw any shoes away after that?

MARTINEZ: Not that I know of.

CARROLL: Not that you know of. Well, if you did, and there's anything, there is no way that you can wash this stuff out. OK?

MARTINEZ: OK.

CARROLL: They're gonna find it. This is it huh? This is your story?

MARTINEZ: Yeah.

CARROLL: And all these gals are lying, they're lying?

MARTINEZ: Uh huh.

CARROLL: You never grabbed her and you never put a knife to her throat.

MARTINEZ: No.

CARROLL: Do you have anything else Mike before we take him out. We were together. You have nobody who can say that because you were at the park. Right?

MARTINEZ: Yeah.

AGUILLON: Nobody.

MARTINEZ: I was walking to the park.

AGUILLON: Now see how, how bad that is?

CARROLL: The other thing is, is we've been to La Jolla Plaza. We've talked to people there, showed the victim's picture there. She doesn't hang out there, according to the people there. Why is that, why is it that she only hangs out there when you meet her there?

MARTINEZ: I don't know.

AGUILLON: OK. You see everything that doesn't jive with your story. See how, you just get ...

CARROLL: We have totally ...

AGUILLON: We have went door to door. Door to door. I mean we ...

CARROLL: That whole neighborhood. Every house in that neighborhood. Nobody saw two black girls.

AGUILLON: You see we know why she was there.

CARROLL: Nobody.

AGUILLON: We do. She was walking home. That's where she always walks home. She wasn't selling crank. She wasn't looking for you.

MARTINEZ: She asked me to meet her there.

AGUILLON: She wasn't looking for you.

CARROLL: How could she be selling you crank if she does not sell crank.

AGUILLON: She didn't have a dime. She barely had money. You know where she ate lunch all the time? Salvation Army. Because she had no money. She was transient.

CARROLL: How was she gonna get crank to sell to you? That's asinine.

AGUILLON: She couldn't even get welfare, she's a wet. She can't even apply for even aid or food stamps or nothing, she was penniless.

CARROLL: But, she's selling you methamphetamine.

MARTINEZ: Well, I never bought it off of her, it was only the first

time . . .

CARROLL: Also, she conned END OF TAPE

(Exhibit 62A, CT 03127-03139, and RT 1949; see also RT 1944 and 1949). Over objection, the transcript of the second recorded interview as reflected in Exhibit 62A was admitted into evidence. (RT 2061-2063).

The transcript of the second recorded interview, again over objection, (Exhibit 62A) was utilized by both the district attorney in his examination of Detective Carroll and in the testimony provided by Carroll. (RT 1947-1948). Detective Carroll utilized the transcript (Exhibit 62A) to illustrate that the statements by Martinez in the second taped interview reflected in Exhibit 62 relative to what he observed, where he observed it from, and the route that he took were inconsistent with his statement in the first recorded interview as reflected in Exhibit 61. Detective Carroll also mimicked the hand gestures and finger pointing employed by Martinez during his second recorded statement (Exhibit 62) and noted the differences in the second recorded statement with regard to the direction of his entry into Oakley Park as well as the nature of the altercation with respect to the female slapping the victim as opposed to hitting her with the fist. (RT 1949-1951).

On the morning of December 6, 1996, Detective Carroll again interviewed Martinez regarding the circumstances surrounding the death of Sophia Torres. According to Carroll, he again "confronted" Martinez about the discrepancies and asked him what had happened to which Martinez basically gave the same story about two black girls beating the victim at the park. Further, Detective Carroll "confronted" Martinez about the other females identifying him to which Martinez admitted to two of the other

incidents, but stated that he was only going to rob them, he wasn't going to rape them. (RT 1952-1953).

Carroll admitted that some of the statements he made to Martinez were not true and were made as a part of a technique to interview suspects. (RT 1951-1952). Moreover, Carroll admitted that during all four interviews of Martinez that he stated matters that were not true in order to either trick Martinez or to get him to confess. (RT 1957). For example, he told Martinez that there were fingerprints as to Martinez when there were no fingerprints. (RT 1958). Detective Carroll noted that Martinez in the fourth conversation admitted that he committed the Perea incident and the Morales incident, but he continued to deny the Zimmerman incident. (RT 1967).

Detective Mike Aguillon of the Santa Maria Police Department worked with Detective Carroll as a partner in solving the case involving the death of Sophia Torres. (RT 2006-2007). In December of 1996, he participated with Carroll in a number of conversations with Tommy Martinez. On December 5, 1996, he participated in the execution of a search warrant at the Martinez residence located at 1114 West Rosewood. (RT 2008). In searching the bedroom, he did not find any white pants, white t-shirts, or a white baseball hat which were the type of clothing that Martinez had stated he wore the night that Sophia Torres was killed. (RT 2011-2012). He also did not find any men's briefs or underwear. (RT 2012). Aguillon noticed that Martinez was not wearing any briefs at the hospital when he was executing the search warrant for the SART kit. Martinez stated either that he didn't feel comfortable with them or that he felt more comfortable without them. (RT 2013).

Additional Witnesses

(a) Character Evidence - Sophia Torres.

Diana Bagwood was employed as a cook for the Salvation Army in Santa Maria at the Cook and Miller location where she did all the cooking for the homeless people. She knew Sophia Torres as a person that came to the Salvation Army for lunch. On November 15, 1996, Sophia Torres signed in and had lunch. She appeared very quiet. She never sat with anybody and always wore a black jacket and carried a black purse. When she saw Torres outside the Salvation Army, she was always alone and always walking. (RT 1726-1734).

Armida Ojeda was an Outreach worker for the Good Samaritan Shelter. Sophia Torres stayed at the Shelter in the middle of May through June of 1996. She was a very quiet, timid and shy person. She did not consume alcohol nor did she use drugs. When she would see Sophia Torres outside the shelter, she was usually walking and always alone. (RT 1736-1741).

Ofelia Francisco resided at 1733 North Alison Avenue in Santa Maria. She knew Sophia Torres through her sisters and considered Sophia to be a friend. She had been staying with her for about one week. Generally, Sophia Torres would leave around 9:00 a.m. in the morning and would return the same day just before dark. On November 15, 1996, she left around 9:00 a.m. in the morning. She took her black purse with her (Exh. 40). She did not consume any alcohol nor did she use drugs. To her knowledge, Sophia Torres did not have any relationships with men. (RT 1745-1751).

Maria Leon was the older sister of Sophia Torres. Sophia Torres had previously resided in Arizona but returned to Santa Maria in October of

1995 where she resided until her death in November of 1996. She had a boyfriend who was killed in Arizona, and consequently, Sophia Torres lost everything including her apartment and things. After the loss of her boyfriend, she was depressed and could not keep a job. She just liked to go walking. She did not consume alcohol or use drugs. With the exception of her boyfriend who had been killed, she did not have relationships with any other men. She did carry a purse with her (Exh. 40; RT 1754-1762).

(b) Tres Amigos Bar - November 1996.

Able Contreras was employed at the Tres Amigos Bar in November of 1996 as the bar manager. (RT 1989-1990). Sophia Torres had been a part-time waitress at the Tres Amigos Bar. She worked two weekends, but it did not work out. (RT 1994-1995). She was a very meek, quiet person who did not socialize much. (RT 1996). He had no reason to believe that Sophia Torres used drugs and he never saw her drink alcohol. (RT 1996). In November of 1996, when officers came into the Bar and showed a picture of a woman killed in the park, Contreras did not see Sophia Torres in the Tres Amigos that evening. (RT 1993-1995). Moreover, Contreras did not see Martinez at the Los Tres Amigos Bar on the evening the officers came in. (RT 1997 and Exhibit 66).

Gloria Diaz was a Cashier and Waitress at the Los Tres Amigos Bar in November of 1996. (RT 1998-1999). She did not see Sophia Torres in the Los Tres Amigos on the night the officers came and showed her a picture of a lady who had been killed in the park in November of 1996. (RT 2000-2001).

3. Laura Zimmerman - December 2, 1996.

On December 2, 1996 at approximately 6:15 p.m., Laura Zimmerman was leaving her place of employment at Gotchalks and proceeded to her truck. She was on the second floor of the parking structure near Gotchalks. (RT 2020-2021). She observed a Hispanic male standing on the side of the ramp leaning against the wall but noted that people stand there all the time. (RT 2022-2023). As she walked by, she was probably four to five feet from the individual and her purse was on her left shoulder. Zimmerman walked to her Ford Ranger, put the key in, opened the door and sat down. The person was running from behind her toward the truck and she felt that there was "something strange about that." She immediately locked the door and as soon as she locked it, he lifted the handle to the truck and kind of "looked from side to side". He asked her "what time it was?" He pointed to his wrist. She stated "I don't know". He then looked around and ran down the stairs. (RT 2023-2027). After he ran down the stairs, Zimmerman realized what was going to happen. She felt that she was going to be taken away in her truck, driven away somewhere and that "[s]omething bad was going to happen." She was scared, nervous and went home upset. (RT 2029-2030). She locked the door because she felt that it was strange that someone was running from behind her. She notes that it was a "matter of seconds" between the time she locked the door and the time the handle was being pulled up. She identified Defendant Tommy Martinez as the individual that approached her truck. (RT 2025-2026). She notes that there was only one attempt to open the door with the handle. (RT 2041). She acknowledged that "you never know what's in someone's mind." (RT 2043). Further, she admitted that "no threats" were made against her. (RT 2044).

4. Sabrina Perea - December 4, 1996.

On December 4, 1996, Sabrina Perea, age 21, was working at Millers Outpost in the Santa Maria Mall as a Salesperson. (RT 2196-2197). She got off work around 9:00 or 9:30 p.m., called her mother for a ride, and went outside and sat on one of the two benches in front of the King's Table. (RT 2198-2200). The lights were still on in the area. (RT 2201). She had a little black wallet in the pocket of her jacket. (RT 2199).

After she sat down, she saw a guy come out from behind a cement wall of the parking lot and started walking towards her and looked around. (RT 2201). He sat down on the bench right next to her, shoulders touching, and pulled a knife with his left hand from under his sweater and stuck it to her side. He stated "[d]on't move, don't scream and I won't have to stab you." She told him that she was not going anywhere with him because she had just called her mom who she expected any second. (RT 2102-2203). He told her, "[j]ust come with me. Just come with me." She repeatedly told him that she was not going to go anywhere with him. (RT 2203).

He said "[g]et your hand off my knife." She looked down and noticed that she was holding onto the handle of his knife which had previously been pointed within an inch of her right side, right hip. (RT 2203). They both had the knife, she was holding the knife and he was also holding the knife. He stated, "[l]et go of my knife" and she told him "no." (RT 2204). She was concerned that if she let go of the knife that he would stab her. (RT 2204). They both pulled on the knife and got up at that time. (RT 2204). He grabbed her other arm with his other hand and was pulling her with the knife at the same time. (RT 2205). At this point, they were both standing up holding the knife. (RT 2205). He said to let go of his knife and she screamed for help about three times. He said, "give me my

knife." "[J]ust let go of my knife and I'll leave. (RT 2205). He had told her to be quiet and not to scream or he would stab her. They struggled over the knife for about two to three minutes. (RT 2206). He then let go of the knife and started to walk away calmly, as if nothing had happened. (RT 2206).

As he walked away, she looked at him and told him that he was not going to get away with it which she repeated three times. (RT 2206-2207). As he walked away casually, he turned around and smirked and walked away really calm. (RT 2207). She went back into the King's Table and asked that a 9-1-1 call be made and spoke with the dispatcher. (RT 2207-2208). She also had the knife in her hand which she identified as Exhibit 8. (RT 2208 and 2203-2204). He never asked her for her purse, money or jewelry. She thought that he wanted to take her and rape her and kill her. (RT 2211). She identified Tommy Martinez as the individual who placed the knife at her side. (RT 2205). She notes that she only moved a "couple steps - not much" away from the bench when they were struggling. (RT 2218).

At 9:51 p.m. on December 4, 1996, Camille Robles, Dispatcher for the Santa Maria Police Department, received a 9-1-1 call regarding the incident involving Sabrina Perea in front of the King's Table. (RT 2150-2153, Exhibit 78, Exhibit 78A - CT 3140-3148, RT 2224-2225). Sabrina Perea advised the dispatcher in pertinent part as follows:

> Yes, it's a little tiny knife but he's like, "Don't scream or don't say anything," and ... he's all "Just come with me" and I got a hold of the knife and he's like, he said, he said, "Let go of the knife" and I said, "No, I'm not going to let go of the knife" and I told him "I'm going to scream" and he's like, "Don't scream" and I

> started screaming and he just, he goes, "Let go of the knife" but he's trying to pull me with him and he took off. It's a little tiny knife so I grabbed a hold of it.

(CT 03141-03142).

Officer Jeff Lopez of the Santa Maria Police Department was working on December 4, 1996 at 9:51 p.m. when he was dispatched to a call at the King's Table regarding a possible attempted kidnapping. (RT 2154-2156). The description of the suspect was a male Hispanic with a black, hooded sweatshirt. (RT 2157). As he was turning southbound on Miller, he observed the subject riding a bicycle. He radioed other officers in the area for assistance. (RT 2158). The suspect was detained in the 200 block of South School by other officers. (RT 2158-2159).

Officer Lopez identified Martinez as the subject who had been stopped. (RT 2159). When he contacted Martinez, he appeared to be "nervous". (RT 2159). Over objection (RT 2167), Lopez attested to the conversations he had with Martinez while Martinez was standing on the west side of South School. In response to his inquiry, Martinez advised that he was coming from the mall and was going home to 1114 West Rosewood. Lopez inquired as to why he was going eastbound when Rosewood was on the west side of town. (RT 2166-2168). Martinez noted that he was going to his cousin's first on Boone Street to which Lopez responded that Boone was south of their location and he was going northbound on School. (RT 2168-2169). He responded to the effect that he might have gotten lost. (RT 2168). Lopez then advised him to sit down on the curb. (RT 2168). Martinez sat down on the cub while they were waiting for Ms. Perea to arrive by vehicle. Lopez told Martinez to cross his legs and his ankles.

Martinez never got up. Lopez acknowledged that being "nervous" was a natural reaction to being stopped by a police officer. (RT 2184).

Officer Al Torres of the Santa Maria Police Department transported Sabrina Perea to the location of the detention of Martinez on School Street. (RT 2168-2170 and RT 2190-2192). After her arrival, she identified Martinez as the perpetrator. (RT 2170 and 2192). She also gave Officer Torres a knife, Exhibit 8. (RT 2192-2193, and RT 1635). Lopez then placed Martinez under arrest. (RT 2170).

While Officer Lopez was transporting Martinez to the police department, Officer Al Torres radioed over the air that he had the "item used" in his possession. Martinez then asked if the officer found a knife. Lopez inquired "who said anything about a knife?" Martinez responded that he thought he heard one of the officers say that there was a knife found. (RT 2171-2172). Lopez took Martinez to one of the interview rooms at the police department and read him his Miranda rights. (RT 2172). In response to the inquiry by Officer Lopez as to whether he wished to speak with him, Martinez responded "yes". (RT 2173). Martinez stated that he had parked his bike on the outside bicycle racks located outside King's Table and he went inside to visit his cousin Amy Guzman. (RT 2175-2176). Martinez denied that he assaulted Sabrina Perea. (RT 2176-2177).

The court denied the motion by the defense for judgment of acquittal on all counts and special allegations. (RT 2229).

C. Defendant's Case.

Keith Gorman, paramedic, went to the Oakley Park on Western Avenue on the late evening hours of November 15, 1996. He arrived around midnight. (RT 2234-2236). He noticed what he thought was a bicycle track in the wet grass. The track was east of third base outside the

dugout and ended on Western, perhaps the middle of the block. (RT 2237). Gorman noticed the bicycle track was one set. He could see that it was two tires, a front and rear tire, going back and forth across the grass, and thus, one bike. (RT 2242 and RT 2247-2248).

Mario Martinez was the 16-year old brother of Tommy Martinez. In November of 1996, he was living with Tommy at their home. In November of 1996, Tommy came home with a pager. Tommy told Mario to answer the page because he kept getting pages. He answered the page and a girl said it was her pager. He asked her what the pager number was and he got the number. He told the girl the she paged the wrong number and he hung up. Tommy told Mario that he got the pager at the discount mall when he was walking by a girl and he snatched it from her pocket, that is, it had been clipped onto her pocket. Mario Martinez kept the pager for a couple of weeks until it went off and then he threw it away. (RT 2250-2252). Tommy Martinez had given him the pager. (RT 2253).

Francisco Javier Lopez was present at the discount mall on November 3, 1996, between 9:00 and 10:00 a.m., on Blosser in Santa Maria. (RT 2260). He was able to see a fence that separates the parking lot from the alley behind the building. (RT 2262). He saw what appeared to be a boyfriend and a girlfriend fighting. (RT 2263). She tried to go through the entryway, but he did not let her. (RT 2263). She looked at Lopez and realized that he was watching, and he knew that she worked there. (RT 2263). At this point, he activated the pick-up's alarm which was controlled by a manual button and sounded like a police alarm. (RT 2264-2265). The man appeared to be surprised and then he quickly pulled the girl towards north, up the alley behind the building. (RT 2265). Lopez then took the lamp and the telephone from the pick-up truck and went close to the alley.

(RT 2266). He then went out into the alley and saw the man and woman halfway down the building and he tried to call the police on the telephone. At this point, the man hit the woman, knocked her to the ground and then ran. (RT 2266-2267). Lopez recalls yelling something like let her go or what was going on. (RT 2267). He called 9-1-1. (RT 2267). Lopez ran to help the woman and she said that she was all right. (RT 2268). A few minutes later, the police arrived. (RT 2268).

D. Prosecution Rebuttal.

Roxanne Medley is employed with MobileComm. (RT 2293). They sell pagers and paging services. (RT 2292-2294). She notes that once a pager is deactivated, there can be no further calls because there is nothing to attach it to. (RT 2297). Exhibit 92 is a computer printout (RT 2297-2298 and 2300) and Exhibit 91 is a yellow 8 ½ by 11 paper with the name "Audio Express" and billing information for Maria Morales. (RT 2299). The computer printout in Exhibit 92 and the billing information in Exhibit 91 correspond by way of a cap code with respect to the pager of Maria Morales. (RT 2299-2300). Based on these records, the Morales pager was deactivated on November 4, 1996. (RT 2300). Maria Morales confirmed that Exhibit 91 entitled "Pager Equipment and/or Service Agreement" is the receipt she received when she purchased the pager. (RT 2304). She noted that the pager had the number on the back, but it was not very well visible. (RT 2305). After the incident at the Discount Mall on Sunday, November 3, 1996, the pager was gone. (RT 2304-2305). She made one call to her pager and a young man called back and returned the call to her work. (RT 2306). She then called to have her pager disconnected on that Sunday, but they could not do it until the following Monday. (RT 2306-2307).

Detective Gregory Carroll was requested to calculate the distance involved from the point where Morales was first grabbed to where she was taken which he approximated to be 171 feet. (RT 2312-2314).

II. PENALTY PHASE

A. Prosecution's Case of Aggravation.

The prosecution's case for aggravation centered on two particular areas. First, the prior conduct of Martinez involving crimes of violence or implied violence as a juvenile and adult with respect to five separate incidents with respect to the Alejandre home, Pepe's Liquors, The Strawberry Festival, Wellencamp, and the Delicious De Mexico Ice Cream Shop. Second, there was victim impact testimony from family members of the deceased victim, Sophia Torres, and from Maria Morales and Sabrina Perea. Moreover, an incident involving possession of a spork-knife while Martinez was in custody at the Santa Barbara County Jail awaiting trial on the current charges was also admitted.

1. Prior Crimes.

a. Alejandre Incident - April 2, 1996.

On the evening of April 2, 1996, Josephina Alejandre was at her home located at 1110 North Oakley in Santa Maria where she resided with four of her five children. (RT 2855-2857). Her son Willie, age 16, ran into the house, closed the door and locked it. He was frightened and said to call the police because someone was going to kill him. (RT 2858). As a result of banging and kicking, the front door opened. (RT 2858-2860). Martinez stated that he was looking for Willie and that he wanted Willie. (RT 2860). Martinez was accompanied by two other men. (RT 2861). Martinez, who was standing in the doorway was angry and asked, "[w]here is Willie?" (RT 2860-2862). A flower pot was thrown through the window. (RT

2862). Martinez also threw a beer can inside the house. (RT 2862). Josephina Alejandre's husband grabbed a hammer and chased everybody out of the yard. Martinez and the other two boys began to leave. (RT 2863 and RT 2880). Gabriel Resendez, a neighbor, came out to help and the three young men starting throwing things towards him. (RT 2864). The police arrived and the three young men as well as more young people began to run. (RT 2864). There were about 15 to 20 people in the streets at this time. (RT 2891). Josephina Alejandre said that she was afraid, but acknowledged that none of the boys had threatened her. (RT 2871).

Willie Alejandre, age 16, on April 2, 1996 was at his friend's house, Moy, across the street from his home. There was a group of people there who were drinking beer. (RT 2873-2874). In less than five minutes, a "big old guy" asked him if he was Flaco. Willie acknowledged that he was Flaco and the "big old guy" hit him because he had fought his cousin. (RT 2874). They fought and the "big old guy" fell on top of him and Willie tried to get away. The "big old guy" called out for a gun and Willie started running and ran straight home. (RT 2874-2875). Willie acknowledged that Tommy Martinez was not the individual that he fought. (RT 2874-2875).

Gabriel Resendez who resided at 1114 North Oakley, across the street from the Alejandre residence, heard the commotion on April 2, 1996. (RT 2877-2878). His wife called 9-1-1. (RT 2880). He noted that one gentleman came at him with a broomstick and said "[c]ome on" and swung and hit his truck. (RT 2881). He identified the individual as Tommy Martinez. (RT 2885). He went back inside and grabbed a bat to defend himself and as he walked outside his neighbor came and asked him for the bat which he gave him. (RT 2882). At this point, his son would not let him go back outside for a little while. (RT 2882).

b. Pepe's Liquors Incident - February 23, 1994.

On February 23, 1994, Francisco Chavez was employed at Pepe's Liquors. At 9:30 or 9:40 p.m., two teenagers came to the door and one came in and said he wanted money. Chavez said no and the teenager pulled a knife. Chavez advised him to leave before the cops came because he was on camera. He pressed the alarm and received a phone call from police shortly thereafter and advised that he was being robbed and then the teenagers took off running. The entire incident took two minutes. (RT 2912-2917). Officer Larry Ralston of the Santa Maria Police Department responded to the call about a robbery in progress. (RT 2917-2919). Ralston observed two people, one on a bicycle and the other on foot, he thought were associated with the robbery. (RT 2920). As he approached the individual on the bicycle, he jumped off his bike and started to run and then turned around and said "I give up, I give up." (RT 2920-2921). He also caught up with Tommy Martinez who was running. Martinez was taken into custody and detained. (RT 2921-2922). He did a field show-up with Mr. Chavez who confirmed that Martinez was the person who was inside the store with the knife. (RT 2922). After receiving his Miranda rights, Martinez informed Officer Ralston that the incident "was a joke." (RT 2922-2923). Martinez was 16 at the time of the incident. (RT 2913 and 2928).

c. Strawberry Festival Incident - April 22, 1995.

On April 22, 1995, at the Strawberry Festival, Officer Ralston conducted a search of Tommy Martinez which was just a routine probation search. He found a hunting knife that was stuffed inside the waistband of

his pants that did not have a sheath on it. (Exhibit 104, A/C CT 00756, RT 2924-2926 and RT 3007)[3]. Martinez was arrested. (RT 2926). He was 17 at the time. (RT 2924-2928).

d. Wellencamp Incident - September 1, 1993.

On September 1, 1993, Detective Paul Flores of the Santa Maria Police Department was dispatched regarding a commercial burglary in process at a bread store located at 222 North Blosser. At approximately 8:00 a.m., he saw an individual walk out from between the buildings north of Wellencamp's and south of the bread store. He fit the description given and Detective Flores called to him. He jogged over and Officer Flores performed a pat down and discovered a dagger in his pocket. (Exhibit 105, AR, Volume III, 00757; RT 3007). He took the dagger from his pocket. The individual identified himself as Isaac Martinez. Mrs. Martinez subsequently gave Officer Flores the right name, e.g., Tommy Martinez. (RT 2929-2934). Martinez was 15 at the time of the incident. (RT 2929 and RT 2928).

e. Delicias De Mexico Ice Cream Shop Incident -- April 24, 1992.

On April 24, 1992, Alicia Anaya was working at the Delicias De Mexico which is an ice cream shop at the Lo Joya Plaza in Santa Maria. (RT 2934-2935). A boy about 14 or 15 years old came in and asked for

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[3] All references to A/C CT are references to the Accuracy/Correction Clerk's Transcript which was augmented and corrected per Orders of the Santa Barbara Superior Court of November 5, 2003, January 5, 2004, February 19, 2004 and certified for accuracy on March 8, 2004 by the Santa Barbara Superior Court. The California Supreme Court certified the record for accuracy on May 27, 2004.

money. (RT 2936 and RT 2938-2939). She opened the cash register and he took money out. (RT 2940). He told her that she was pretty and reached out towards her and she blocked his hand. He then walked out. (RT 2941). The entire incident took a couple of minutes. (RT 2948). On May 2, 1992, Officer Kendall Greene of the Santa Maria Police Department contacted Tommy Martinez regarding his involvement in the robbery. After waiving his Miranda rights, Martinez denied his involvement in the robbery, but then admitted his involvement. (RT 2951-2954). He said he took the money because a friend needed some assistance. (RT 2955-2956). He was about 14 years old at the time. (RT 2956, 2935 and 2928).

The court also admitted records from three prior juvenile adjudications as Exhibits 111, 112 and 113. (RT 3005-3010, RT 3837-3842; CT 3150-3170). Exhibit 111 involved the juvenile adjudication of the attempted robbery of Pepe's Liquors on February 23, 1994. (CT 3150-3157; RT 3837-3842). Exhibit 112 involved the juvenile adjudication of grand theft of person of Alicia Anaya at the Delicias De Mexico Ice Cream Shop on April 24, 1992. (CT 3158-3163; RT 3837-3842). Exhibit 113 involved the juvenile adjudication of possession of a deadly weapon, to wit, a hunting knife, on April 22, 1995 at the Strawberry Festival. (CT 3164-3170; RT 3837-3842).

2. Victim Impact.

a. <u>Victoria Francisco</u>.

Victoria Francisco was the older sister of the deceased victim, Sophia Torres. As to the impact that the murder of her sister had on her, she noted that it was a like a dream and she has to realize that she is not with them anymore. What hurts her the most is that her sister "didn't die of natural death," "she suffered that night," and "she never did no harm to

nobody." (RT 2957-2958).

b. Gilbert Torres.

Gilbert Torres is the older brother of Sophia Torres. As to the impact that his sister's murder had on him, he noted that he thinks of her everyday especially because of "the brutal way she died." In Mexico, the family gathers every Christmas and New Years to celebrate. It has been two years since she has attended. He opened her casket in Mexico but did not recognize her because of her face and thought it wasn't her. She had all of these problems, but she was so shy and acted like a little girl sometimes. This all has had a lot of impact on him. He had hoped that she would return to the hard working person she once was. He had hoped that one day she would come back to be the normal Sophia, an independent and secure person who had a goal. He concluded that she was not going to be able to accomplish any of this now. (RT 3002-3003).

c. Angel Torres.

Angel Torres is the father of Sophia Torres. As to the impact that his daughter's murder had on him, he notes that he "felt her death very deeply." She was not a bad person and "never harmed anyone." He thinks of her often. (RT 3004-3005).

d. Maria Morales.

Maria Morales attested to the impact that the attack by Tommy Martinez had on her. In the first two weeks following the incident, she would become frightened when a man came near her. She was afraid. She was able to overcome this little by little. At this time, she fears going out alone, or even when she goes out with someone she is still afraid. When she sees young men, she is very scared of them. Her family has also been affected by the incident as well. Her mother is very afraid and worries

about her. She used to love chocolates before. As to Snicker bars, she could not eat them or smell them because it brings back the whole memory of the incident. (RT 2996-2997).

e. Sabrina Perea.

As to impact that the Martinez assault had on her, she noted that ever since the incident she gets very nervous around men. If men come close to her, she thinks that someone is going to pull out a knife or try to hurt her in some way. She referenced an example when she was working at Miller's Outpost in the mall. She was working late one night and was going to close. Then, a Mexican guy who had gloves on came into the store. No one else was in the store with the exception of one other sales girl. When he came into the store, she thought that it was odd that he had gloves on. Her heart started beating really fast when he came up to her and asked if she could help him find a pair of jeans for his girlfriend. She became really nervous. She attempted to help him but when he came close to her, she thought that he wanted to hurt her. After a while, she kept getting really nervous and could not take it anymore. She asked the other sales girl to help the guy. The incident really scared her. As a result of the attack, she is now more aware of her surroundings. When she gets in her car, she checks the back seat to make sure that no one is back there. When she goes places outside at night with her friends, the incident is always on her mind and she has to look around. (RT 2998-3001).

3. County Jail - Spork-Knife Incident.

Genario Gomez, Jr. is a correctional officer with the Santa Barbara County Sheriff's main jail in Goleta. He notes that when an inmate is admitted into the County Jail that they are given a copy of the rules and regulations for the Jail. These rules and regulations tell them that they are

not allowed to have weapons. On March 21, 1998, he entered the cell of Tommy Martinez, Northwest 8-A, which is classified as high security. He observed a homemade knife on the upper unoccupied bunk. The homemade knife appeared to be from a handle of a spork or a spoon. A spork is an eating utensil that is a combination of fork and spoon. The instrument is made out of plastic. He advised Martinez that he would have to write a paper on this which means a report. Martinez responded, "[c]ome on, it hasn't been sharpened enough to be a knife." Gomez felt that the blade was fairly sharp. It could cut an apple and if you put enough pressure behind the knife, it would cut through skin. He considered the knife to be a safety hazard and further noted that the offense was considered critical. The length of the knife was approximately 3 5/8 inches long while the sharpened edge was about 1-1/8 inch. He acknowledged that inmates were allowed to possess apples in their cells. (RT 2987-2995). (Exhibit 108, AR, Volume III, 00758-00759; RT 2993-2994). Over objection, Exhibit 108 which is a photocopy of the knife was admitted. (RT 3007).

B. Defense Case of Mitigation.

1. Overview.

Tommy Martinez, Jr. was a brain damaged 19 year old Hispanic boy who was raised in a broken home without appropriate limits by his unemployed, depressed mother. His mental difficulties caused him to have a split personality, one kind, loving, caretaking and gentle, and the other, impulsive, confused and addicted to drugs.

He was abandoned by his father both figuratively and literally through alcohol, extramarital affairs, prison, and by going to Oklahoma to find himself when Tommy was a young boy. Tommy attempted to fill the shoes of his father as a surrogate husband and companion to his mother

while missing school at her request as well as serving as a father figure to his younger brother Angel by coaching him in Little League and protecting him against other boys who sought to hurt him.

In the late hours of November 15, 1996, Sophia Torres was killed in Oakley Park. At 11:07 p.m. on November 15, 1996, Tommy Martinez made a 9-1-1 emergency telephone call to the Santa Maria Police Department. The transcript of the dispatched call provides in pertinent part as follows:

DISPATCHER:	9-1-1 Emergency.
MALE VOICE:	Yes, there is a lady being attacked on ... the ... Westside Little League Park by the snack bar, by two black girl ... send help quick.
DISPATCHER:	Wait, wait, wait, wait, wait, where, where is this park at?
MALE VOICE:	Its Oakley, the Westside Little League ...
DISPATCHER:	Oakley Park?
MALE VOICE:	Yes.
DISPATCHER:	And, is this the one off of Western? or ...
MALE VOICE:	Yes, send help quick ...

(CT 03112).

2. Psychological/Psychiatric Evidence.

a. Dr. Peter Robert Russell.

Dr. Peter Robert Russell is a Neuropsychologist. He received his B.A. and Masters degrees from the University of California at Santa Barbara and a Ph.D. in psychology from Cornell University at New York. Dr. Russell has been a neuropsychologist for 25 years. (RT 3012). A neuropsychologist has a special ability to assess and treat individuals with brain disorders. (RT 3014). He conducted a neuropsychological evaluation of Tommy Martinez on April 17, 1998, to determine if there was any indication of neurological or organic brain syndrome symptoms, given a history of prolonged substance abuse. (RT 3015-3016).

Based on his review of arrest records, medical records, and educational records, Dr. Russell gave Tommy Martinez a standardized series of tests that are common in the neuropsychological field. (RT 3016-3017). Dr. Russell administered a fairly broad range of tests to look at all aspects of an individual's higher cortical functions. This includes various abilities such as abstract reasoning ability, concentration and memory, reception motor ability, actual motor ability itself, and other areas that are commonly associated with brain functions. The tests that were administered include the Wechsler Adult Intelligence Scale, Third Edition, the Hooper Visual Organization Test, the Halstead-Reitan Neuropsychological Battery, the Finger Oscillation Test, the Wechsler Memory Scale, the Trail Making Test, the Rennick Repeatable Cognitive Perceptual Motor Battery, the Grooved Peg Board and the Wisconsin Card Sort Test. (RT 3017). These are standardized tests which cover a wide spectrum of varying functions for an individual at the age of Tommy

Martinez. (RT 3017-3018). The tests took nearly four hours. (RT 3018).

The Wechsler Adult Intelligence Scale contains fourteen subtests which roughly can be divided into verbal related and non-verbal related tests. The actual IQ score of Tommy Martinez would be equivalent to the 68th percentile or a standard score of 107. This is within the normal range of intelligence. A score of 85 would be normal. Dr. Russell noted that the 68th percentile would be high, normal. (RT 3018-3019). However, there was evidence of brain damage. Dr. Russell noted that there was a significant discrepancy between Tommy's verbal mediated cognitive abilities and his perceptual motor abilities in that his verbal abilities were at the 45th percentile while his non-verbal abilities were at the 90th percentile. (RT 3019-3020).

As to the Halstead-Reitan Neuropsychological Battery, the Finger Oscillation Test, there was a difference between his dominate right hand and his dominate left hand, although on a percentage scale basis he was still in the low, normal range. He was only at the 18th percentile on the dominate hand, while he actually did better with the non-dominate hand, which can be an indication of possible neurological problems or possible orthopedic problems in the upper extremity. (RT 3021).

As to the Rennick Repeatable Cognitive Perceptual Motor Battery including the Grooved Peg Board Test, Martinez had a definite abnormal or impaired pattern results. The right hand was quite poor. He obtained a percentile at the 5th percentile. The non-dominate left hand which should have actually been somewhat slower than the right hand was actually better and was at the 10th percentile. (RT 3023).

As to the Wisconsin Card Sort Test, this measures the frontal lobe functions. It is a good measure of the frontal lobes of the brain and the

patient's ability to exhibit flexibility of thought and also exhibit the ability to shift attention.

Moreover, the frontal lobe functions are also very subtle as exemplified in the famous case of Phineas Gage.[4] Phineas Gage was a railroad worker and one of his jobs was to set chargers with gunpowder. He took a large, metal tamping spike and was tamping it into the powder trying to set the charge and created a spark inside the hole which ignited an explosion that basically drove this four-foot tamping spike up under his eyebrow and it exited through his skull and was found fifty (50) feet away. He was knocked to the ground and was quite stunned but was still conscious. He basically recovered and appeared to be the same as far as certain functions. However, the most notable thing that happened to him was that he underwent a marked personality change. While before he had been a responsible, almost moralistic man, he turned into a completely uninhibited person and ended up in a carnival in California. (RT 3026-3027). This story exemplifies the point that a person who has frontal lobe damage may lose the ability to control impulses. (RT 3027).

Based on his review of the medical records of Tommy Martinez, Dr. Russell noted one instance in the medical history of Martinez that may have correlated with neurological impairment. Notes from the emergency room of Valley Medical Center indicated that Martinez thought he had a "head strike" while being detained by the police. Dr. Russell opined that a trauma to the brain can produce brain damage of various degrees. From the medical records of Valley Medical Center, Dr. Russell was not able to

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[4] The chronicles of Phineas Gage are set forth in "An Odd Kind of Fame: Stories of Phineas Gage" by Malcolm MacMillan (MIT Press, 2000).

determine whether associated with trauma factors were present. (RT 3027-3028).

Tommy Martinez stopped going to school around the age of 13 or 14. (RT 3028). At the age of 13, he also began using various substances which included marijuana, inhalants and solvents. Inhalants and solvents can be anything from gasoline to copy machine fluid, glue, paint, spray paint and things of that sort which have a solvent base and have an effect on the brain. He also used speed, amphetamines, and later he mainly used alcohol, including Tequila at an older age. (RT 3028-3029).

Dr. Russell testified that the use of solvents such as glue or paint at age 13 may have a deleterious effect on the brain development. (RT 3029-3030). The use of solvents by Tommy Martinez coincided fairly closely to the time that he quit going to school. (RT 3030). He also noted that the use of methamphetamines can contribute to neurological impairment. (RT 3030-3032).

Based on the testing and his evaluation, Dr. Russell concluded that Tommy Martinez may have some specific deficits associated with the interior frontal lobes, especially the right frontal lobe. (RT 3032-3033). Dr. Russell further concluded that Tommy Martinez did have a pattern which could be suggestive of a number of different diagnoses. One such diagnosis was that he had indications of neurological impairment commonly seen with the anterior frontal lobe. (RT 3034). Therefore, Dr. Russell recommended that a PET scan be conducted. (RT 3035).

Dr. Russell testified that the results of Martinez's Wechsler Adult Intelligence Scale, Third Edition, with respect to certain subtests on that particular battery are consistent with neurological impairment. He also noted that quite regularly one may have a normal or above average

intelligence but still suffer from brain damage. The reason that this is not unusual is because intelligence is a global summation of different parts of the brain and different factors of the brain. Thus, you could have a very impaired performance in one factor, but still end up with an average IQ.

b. Dr. Joseph Wu, M.D.

Dr. Joseph Wu is a medical doctor employed at the University of California at Irvine College of Medicine, Brain Imaging Center and is the Clinical Director of the Brain Imaging Center. He is also an Associate Professor at the College of Medicine. He did his premedical education at Stanford University where he obtained his Bachelor's Degree and obtained his Medical Degree at the University of California at Irvine, College of Medicine and did a residency in psychiatry. He also did a post doctorate fellowship in PET Scan imagery at the University of California, Irvine. (RT 3244-3245), and further has expertise in psychiatry. (RT 3272).

A PET Scan is short for "Positron Emission Tomography", and the "positron" is short for positive electron, and this is a kind of color picture of the brain function as opposed to brain structure. The difference between an MRI scan and a PET scan is that a MRI scan would show the brain whether the person is alive or dead. However, a PET scan shows brain function and if a person is dead, the PET scan will not show anything. When the brain is alive, you see what parts of the brain are "on." (RT 3245-3246).

During a PET scan, the patient is given a special kind of radioactive sugar. The more active a part of the brain is, the more sugar that part of the brain consumes. Thus, they can color code these, so that the areas of the brain that burn a lot of sugar are going to be hotter colors like red or yellow as opposed to areas of the brain that burn less sugar which would be colder colors, like blue or purple. The subject patients do standardized tasks. For

example, they have them do an attention task. They also have the subjects do behavioral tasks at the time of the scan. The PET scan takes about three to four hours. (RT 3246).

Dr. Wu has collected and analyzed over 3,000 PET scans from almost every kind of condition ranging from schizophrenia to dementia and depression and to a head injury. Based on his experience over the past ten years as Clinical Director, he is able to generate a clinical report and know whether the person's brain is normal or abnormal and whether it is consistent with a particular type of diagnosis. PET scans have been available in the medical profession for the past twenty years and are considered to be an accurate and reliable test of brain function and brain activity by the medical community. (RT 3249-3250 and 3289).

PET scans can be very useful for the assessment of certain kinds of substance abuse such as solvent exposure. Solvents can cause a certain kind of abnormality on brain scans, and published reports show that there are identified brain abnormalities with solvent exposure types of substance abuse. Solvents act like a kind of degreaser. They can actually dissolve certain important parts of the brain. PET scans can show the damage that results from solvents dissolving certain parts of the brain. (RT 3254).

Dr. Wu did a PET scan analysis on Tommy Martinez, Jr. on April 29, 1998, at the Brain Imaging Center at the Irvine College of Medicine. (RT 3254-3255). The PET scan of Tommy Martinez revealed that in the parietal lobe (the top back of the head), there is an unusual degree of low activity. A decrease in the parietal lobe is one of the abnormalities that has been reported in patients that have had solvent toxicity or solvent exposure. (RT 3259 and RT 3260-3261).

The PET scan of the brain of Tommy Martinez also revealed what

Dr. Wu noted to be a "reversal" of the "normal pattern." Instead of having the frontal lobes being more active than the occipital lobe or the back, the back part of the Martinez brain was actually more active than the front part of the brain. Dr. Wu noted that this is a "reversal". It is an unusual pattern, but one that is seen in brain injury cases. The Martinez PET scan demonstrated an unusual increase of activity in the occipital lobe areas, e.g., the back area of the brain, which is a typical pattern that has been seen in other patients with solvent injuries. (RT 3263-3265).

The frontal lobe of a normal PET scan shows a lot of red, i.e., high activity, hence, they are more active in the frontal area than in the back. However, the PET scan of Martinez does not reflect this normal pattern, that is, there is an abnormal increase in the back. Thus, there is something wrong with his brain. The Martinez PET scan shows damage to the areas of the brain that control or regulate emotions or aggression. (RT 3266-3267). There was very little activity in his orbital frontal cortex. The amygdala and the orbital frontal cortex are two very important circuits that help regulate emotions. When people have damage or injury to this area, they can get what is called a frontal lobe syndrome which means that sometimes they will do things that display poor judgment, they will sometimes act inappropriately, and they will have problems with a failure to inhibit inappropriate aggressive impulses. (RT 3267).

The abnormalities in the Martinez PET scan are associated with abnormalities on neuropsychological testing. There is a correlation between neuropsychological abnormalities and the PET scan abnormalities. Thus, many times, neuropsychological abnormalities can help identify areas that are supposed to be injured or abnormal. (RT 3268-3269).

Dr. Wu reviewed some of the Martinez neuropsychological

abnormalities in conjunction with the PET scans to see if the neuropsychological abnormalities matched the abnormalities that were seen on the PET scans. The Martinez neuropsychological abnormalities included poor performance on things like the Wisconsin card sort test, or the Trails A, or the groove pegboard, all of which are tests which are measures of the frontal lobe. Martinez showed abnormalities in the frontal lobe of his PET scans. This corroborated for Dr. Wu that Martinez did in fact show some kind of brain injury or abnormalities in the frontal lobe area. (RT 3269-3270). Thus, Dr. Wu's findings as far as evidence of brain damage with the PET scan correlated with what Dr. Russell anticipated would be seen by the PET scan. Dr. Wu concluded that Dr. Russell anticipated that there would be "frontal lobe abnormalities," and, in fact, the PET scans confirm "frontal lobe abnormalities." (RT 3270).

Dr. Wu noted that the type of personality and behavioral changes one would expect from a person with damage to their frontal lobe are as follows: (1) poor judgment; (2) the inability to anticipate the consequences of their behavior, e.g., they are like a child who focuses on the immediate, without thinking about the long term implications of their behavior; (3) they are very impulsive; (4) they are often times temperamental or aggressive; (5) they have a much poorer threshold for tolerating frustrations; and (6) they have difficulty deferring immediate gratification. (RT 3271-3272). [5]

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[5] The personality and behavioral changes noted by Dr. Wu as a consequence of frontal lobe damage have been the subject of much discussion and research. See, The Royal Society: Philosophical Transactions: Biological Science, Issue: Volume 359, Number 1451/November 29, 2004 (the Royal Society - UK, copyright 2003) (for a series of articles addressing the "Law and the brain" from a philosophical

(continued...)

Dr. Wu noted that the brain continues to mature well into late adolescence. Thus, if someone ingests or uses high quantities of solvents beginning at age 12 or 13 when their brain is developing, this would have a very drastic effect on the proper maturity of brain functioning. (RT 3272-3273). If someone were doing well in school and functioning well in his environment, and then all of a sudden he started using solvents, and his life completely took a different turn, this would be consistent with solvent abuse. (RT 3273-3274).

Based on the brain damage that he saw in Tommy Martinez, Dr. Wu concluded that this would have an effect on his ability to maintain a disciplined schedule and that people with these problems have difficulty seeing the consequences or implications of their impulsive actions and would have difficulty in deferring gratification, e.g., following through with a disciplined schedule like going to school. (RT 3274). He noted, however, that the brain damage reflected in his studies indicates that there is no effect on a person's IQ or intelligence level. He has seen people with solvent exposure who have intact IQ's but who have problems with personality, or problems with impulsivity and judgment. The damage to the frontal lobe area impacts what are called the "executive functions," that is, the ability to have long term planning and to defer inappropriate impulses. A person

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[5](...continued)
and scientific point of view as it relates to the law). In his article entitled: "A Neuroscientific Approach to Normative Judgment in Law and Justice", published by the Royal Society in the Journal noted above, at pp. 1709-1726, Professor Oliver Goodenough of Vermont Law School notes the discovery that moral judgment integrates frontal regions of the brain with other centers in a process that invokes emotion and intuition as fundamental components.

with a solvent abuse injury might still be able to think logically or might still be artistic. The brain is not universally affected in all domains or in all areas. The use of substances such as alcohol and amphetamine can also affect the brain function. However, the problems associated with solvent cases are more permanent. That is, problems with other kinds of drugs, for example, if one is kept off of these drugs for a long period of time, they start to show recovery. Thus, Dr. Wu concluded that solvent exposure could result in long-term impairments in some of the frontal lobe areas that control judgment and long term planning. (RT 3274-3278).

The PET scan of Martinez revealed both frontal lobe and parietal lobe defects. (RT 3285). As to whether Tommy Martinez has the ability at this point to control his behavior in light of the defects noted, Dr. Wu concluded as follows:

> I think that given the appropriate structured environment, I think that he would have that ability. But I think he would need to be in a very structured setting. I think if he were in a highly structured setting, a highly structured environment would, in effect, act like an external frontal lobe for him. The right kind of environment could do -- could provide for him the external feedback and the external limit-setting that he might not be able to provide for himself internally because of a defective frontal lobe.

(RT 3292-3293).

Dr. Wu concluded further as follows:

> I believe that -- given the right type of conditions, I think that he would be able to conform his behavior within the confines of a

well-structured environment such as a state prison.

(RT 3293).

3. Family Life.

a. <u>Eva Martinez - Mother</u>.

Eva Martinez is the mother of Tommy Jesse Martinez, Jr. (Tommy Jr.) (RT 3089-3090). She met Tommy Martinez, Sr. (Tommy Sr.) at the age of 13 when she was in junior high school. He was 15. (RT 3094). At the time, Tommy Sr. was in the Los Prietos Boys Camp. They would call and write each other. (RT 3095). Over time, their relationship developed into a romantic relationship and they became sexually intimate when she was 14 or 15. (RT 3095). Her father objected to the relationship. (RT 3095). She used to run away a lot with Tommy Sr. and was placed in juvenile hall at the age of 14 for running away. She was put on probation. (RT 3096). Tommy Sr. continued to have trouble with the legal system. (RT 3096). At age 15, her father tried to separate them by sending her to live with an aunt in New Mexico. (RT 3096). After six months, she returned home. (RT 3097). She resumed her intimate relationship with Tommy Sr. and at age 16 became pregnant with Tommy Jr. (RT 3097). Eva's family was Catholic and her father wanted her to either go away to a home for unwed mothers or to get married. Eva and her mother met with Tommy Sr. and his mother to inform them that she was pregnant. They also advised that either Tommy Sr. and Eva got married or she would be sent away. Tommy Sr. chose to marry her. (RT 3098). At age 16, Eva married Tommy Sr. on May 7, 1977 and Tommy was born on October 10, 1977 in Santa Maria. (RT 3099). However, in August of 1978, Eva and Tommy Sr. were living together as man and wife at Eva's parents when he was arrested for rape

and sent to the California Youth Authority. (RT 3099-3100).

Eva's mother, Dorothy, loved Tommy Jr. and spoiled him as he was the first grandchild. This love was reciprocated by Tommy Jr. (RT 3100-3101). Two months before Tommy Sr. was released from the Youth Authority, Eva moved into her own apartment. While he had been in prison, Eva gave birth to their second son, Isaac on February 27, 1979. Once Tommy Sr. was released from prison, he returned to Santa Maria and resided with Eva and the two boys, Tommy Jr. and Isaac. (RT 3101). Tommy Sr. worked once, but continued to have legal problems with regard to parole violations. The family was supported by AFDC. (RT 3101-3102). Dorothy continued to spend a lot of time with Tommy Jr. and Isaac and the boys formed an attachment to their grandmother, Dorothy. (RT 3102-3103). They also had a pretty close relationship with Eva's father, Jose. (RT 3103).

After Tommy Jr. was in the first grade, Eva and Tommy Sr. began to have marital problems as Tommy Sr. took up drinking and they fought a lot over his drinking as well as his going out. (RT 3105-3106). The situation grew worse over the years and eventually one of the arguments got physical. Tommy Sr. hit Eva. (RT 3106). Tommy Sr. was arrested a number of times for drunk driving and was also involved in an alcohol related traffic accident in which he was badly injured. However, he continued to drink. (RT 3106-3107). At this juncture, Tommy Jr. started to shy away. (RT 3107).

In October of 1987 when Tommy was 10 years old, his father became involved with another woman who lived across the street by the name of Tina McAllister. Eva caught them together several times but Tommy Sr. continued to live with her throughout this period. (RT 3107-

3109). Eventually, Tommy Sr. moved out. At this point, Eva and Tommy Sr. had three sons, Tommy Jr., Isaac and Mario. Eva attempted to save the relationship when Tommy Sr. was having the affair with Tina. She talked to him about having another baby because she felt her whole life was falling apart and figured the boys were at school and she was at home constantly alone. Although Tommy Sr. was not working, he was not much company. When he did work, after he got off work, he would not come home until about two in the morning. She got pregnant, but then Tommy Sr. did not want the baby. (RT 3108-3110).

During the period that Tommy Jr. was in grade school up until he was ten or twelve, Tommy Sr. would take all three boys bike riding. In fact, Tommy Sr. would also have his brothers and sisters and their children come along for these bike riding events. (RT 3110-3111).

Angel was born on November 20, 1987. However, Tommy Sr. moved out a couple of months before Angel was born, and moved in with Tina. He moved in and out of the house several times during 1987 and 1988. In 1988, he finally moved out and never came back. This was sad for Eva, who still loved him in spite of the abandonment. Tommy Jr. was just ten years old when Dorothy was killed in a car accident. During the Christmas of 1988, Tommy Sr. was in a rehabilitation center for alcoholics. (RT 3113-3117). A few months after he got out of the substance abuse program, he left for Oklahoma but no one knew where he went. (RT 3118). He was gone for a whole year and did not keep in touch. He did not call the boys, nor did he send them letters, Christmas or birthday cards. (RT 3118-3119). While he was away, Tommy age 12 and Isaac age 11 got arrested for stealing cassettes at the Target. (RT 3119-3120).

When Tommy Jr. was in the seventh grade, Eva would take him to

school in the morning and then when she was feeling down, she would get him at lunch time and take him out to eat. They would go to stores. She did this on the days that she was depressed and needed someone to talk to. This continued throughout seventh grade and for part of the eighth grade. (RT 3121-3123). Toward the end of eighth grade, Tommy Jr. was thrown out of El Camino and stopped going to school. When he was arrested for the robbery of the ice cream shop, he was placed on probation and was required to attend school, and thus, he attended El Puente for a period of time and was later placed in a probation school at the age of 14. (RT 3122-3123).

At age 12-13, Tommy Jr. became close to his cousin Roy. (RT 3123). Eva caught both Tommy and Roy in the house sniffing glue in Tommy Jr.'s room. She found little bottles of glue, rubber cement glue in Tommy Jr.'s room. Roy and Tommy Jr. told her they were using them to fix models, but there were no models in the room. She threw the glue away. She informed Tommy that he should not sniff glue, paint or other substances, because it would affect his brain. (RT 3123-3124). A few years later, she found a bunch of bags with paint in them in the garage. They were Lucky bags that had gold paint sprayed in them which was all dried up. There were six or seven bags that she found in the garage. These were paper bags that had been sprayed with paint on the inside. It appeared that the paint had been inhaled from the bags. (RT 3124-3125, RT 3155-3156). She suspected that Tommy Jr. and his cousin Refugio Raymond Martinez, known as Cuco, were using the paint and/or glue. They were spending a lot of time together. Every time Cuco came to her home, he had Coke cans filled with paint. (RT 3125-3126). Cuco would also go into the garage and inhale the gas from the lawnmower. (RT 3126). Cuco is now in a boy's home. (RT 3126). She also knew that Tommy smoked marijuana.

(RT 3127-3128). Tommy Sr. returned in the Fall of 1990. He was arrested for fighting and was placed in jail. (RT 3128-3129). He was also arrested for drunk driving in Ventura County and was sent to prison for two years. (RT 3129). Eva and Tommy Sr. divorced in September of 1991. (RT 3129). Tommy Sr. then married Tina. (RT 3129).

At age 14, Tommy had a sexual relationship with a young woman, age 19 or 20, who was living at their home in his room. When Eva discovered the sexual nature of their relationship, she confronted both of them, and the girl moved out. (RT 3129-3130).

During his middle adolescence, ages 15, 16, and 17, Tommy Jr. had a number of serious girlfriends. His first girlfriend was Veronica Placencia. This relationship lasted for a year and a half and was an intimate relationship. Veronica stayed at their home and slept in the same bed as Tommy until he got arrested. Tommy Sr. wanted Tommy Jr. and Veronica to stay at Eva's house so they moved into Tommy's room. This was done with Ms. Placencia's parents permission. They stayed there until Tommy Jr. was arrested for the second time with respect to the liquor store incident. He was then put in juvenile hall and sent to the Los Prietos Boys Camp. (RT 3132-3133).

Tommy Jr. was sent to the Los Prietos Boys Camp two or three times. Sometimes he would come back without permission. (RT 3134). Tommy Jr. stayed with his Uncle Louie for about three months when he was on the run from the Los Prietos Boys Camp. When Tommy Jr. returned home, he brought his Uncle Louie's stepdaughter with him, because he thought he was going to have her live with him at his mother's home but she declined, and instead, called probation, who came and they took him back to Los Prietos. (RT 3135-3136).

Tommy also had a relationship with Veronica Hernandez. She was 18 years old and eventually moved into Tommy's room. She resided there until the Alejandre vandalism incident. (RT 3138-3139). He also had relationships with Lisa Esquivel and Elizabeth Fuentes. (RT 3140). (See Statement of Facts, herein, post at pp. 83-85).

Both Tommy Jr. and Isaac went to Simi Valley to live with their father. This lasted for only one day, because as Tommy Sr. was bringing them back down to Santa Maria, he was pulled over for drunk driving in Santa Barbara County which resulted in his being sentenced to prison for four years. (RT 3136-3138).

Tommy had a good relationship with his brother Mario and a very good relationship with his brother Angel. He was a big brother to Angel and tried to fill the shoes of his father, Tommy Sr., who Angel never really knew. Tommy Jr. would always do things with Angel such as teach him to play baseball and take him bike riding. He would also take Angel out to eat and would spend time with him. (RT 3143-3144 and RT 3158-3159).

Tommy Jr. also had a good relationship with his Uncle Rick. Rick would pick Tommy up and take him to church. Tommy would always help Uncle Rick in the yard. Tommy also developed a special relationship with Uncle Rick's daughter, Jennifer. They considered themselves brother and sister. (RT 3145-3146). Tommy also wrote poetry. (RT 3152).

Tommy saw his mother, Eva, through some really hard times with his father. He was the only one she talked to because she never really talked to any other member of her family about anything. Tommy heard everything. Tommy was the one person that she would tell her troubles to. This started when he was 11 or 12 years old. She would take him out of school in the seventh grade because she was depressed over Tommy Sr.

She would tell her troubles to Tommy Jr. and he never said anything. He would always just sit there and listen. (RT 3157). Tommy Jr. was always helpful. "He was like the man of the house." He would help her with Angel and Mario. Tommy Jr. would also serve as the disciplinarian for Mario and Angel. He would pick Angel up from school on his bicycle and bring him home. (RT 3158). Tommy, along with his girlfriend, Veronica Hernandez, would go out with Angel, rent movies, and eat together. (RT 3159). When Tommy would return home after being out, he would always open the door to Eva's room and say "Mom?" . . . "Are you awake or are you asleep?" . . . "Well, I just came to let you know that I'm home and that I love you, and I'll see you in the morning." (RT 3161).

b. Tommy Martinez, Sr. - Father.

Tommy Martinez, Sr. is the father of Tommy Martinez, Jr. (RT 3163). At the time of his testimony, he was on parole having been released from the Tehachapi State Prison six months earlier and was currently employed as a sand operator. (RT 3165-3166 and RT 3170). Over the past several years, he has had six DUI's. (RT 3166).

He was born and raised in Santa Maria and is one of ten children. He grew up in a family environment of alcoholism. (RT 3167-3170). Since being released from prison, he has been attending AA meetings three to five times a week. (RT 3170).

Tommy Sr. met Eva when he was 15 years old and she was 13. (RT 3170-3171). They became sexually intimate within a year of meeting one another. There was a couch in Eva's room and he was allowed to sleep on the couch. (RT 3170-3171). At age 13, he started drinking alcohol. (RT 3171-3172). At age 15, he was sent to the Los Prietos Camp for truancy. (RT 3173). He married Eva when he was 18 and she was 16. (RT 3174).

Tommy, Sr. married Eva because he felt obligated as a result of the pregnancy. (RT 3177). They divorced eleven years later. (RT 3174). During their marriage, they had continuous arguments in front of the boys. (RT 3174-3175). This included physical fights. (RT 3182-3183).

Tommy Jr. was born in October of 1977. In 1978, Tommy Sr. was convicted of the crime of rape and sentenced to the California Youth Authority for five years and served two. (RT 3178-3179). Upon his release he worked at a vocational school. (RT 3179-3180). However, he continued to drink alcohol, missed work, and violated the terms and conditions of his parole seven times resulting in his incarceration for the balance of his parole. (RT 3180-3181).

Tommy Sr. noted that he would go bike riding with his sons Tommy Jr., Isaac and Mario. They all appeared to enjoy it. (RT 3185). Tommy Sr. was shocked by Eva's pregnancy with Angel due to the status of their relationship. At the time, Tommy Sr. was involved with another woman by the name of Tina. He had informed Eva that he was going to leave and the pregnancy appeared to be her way to keep him from leaving regardless of the status of their relationship. (RT 3182-3183).

Tommy Sr. resigned his job in Santa Maria and told his sons, Tommy Jr., Isaac, and Mario that he was leaving and that he would not see them for a while. He kept his destination a secret and moved to Oklahoma. He lived there for 13 months, did not call or send Christmas cards, and no one had any idea where he was at. (RT 3184). While he was in Oklahoma and continuing thereafter, he did not pay child support. (RT 3191).

At one point, Tommy Jr. confided in his father that he was "getting high." Tommy Sr. tried to counsel him against using drugs and getting stoned, but he was really no example because at the time he was drinking.

(RT 3193-3194). He wanted to get Tommy Jr. out of Santa Maria, because there were gangs. While in prison, he did correspond with Tommy Jr. and felt that their relationship seemed to have gone fairly well through letters. (RT 3194). Tommy Sr. loves Tommy Jr. and all of his boys. He cannot change anything that has taken place over the years. However, from the time of his release, he has done a lot for him that he did not do for him in the past several years. Tommy Jr. is important to him as he is his first boy. He owes Tommy and there is much he wants to make up to him. (RT 3194-3195).

c. Rick Martinez - Uncle.

Rick Martinez is the uncle of Tommy Martinez, Jr. and the brother of Tommy Sr. (RT 3209). He has two children, a daughter, age 18 named Jennifer, and a son, age 12 named Rick. (RT 3210). The use of alcohol was prevalent in the Martinez family when he grew up. Rick stopped drinking at age 29 some 13 years ago. (RT 3210-3211).

The disappearance of Tommy Sr. to Oklahoma had a profound affect on Tommy Jr. who worried about where his dad was at. (RT 3212 and 3214). At the same time, Tommy's grandmother, Dorothy, died. (RT 3213). Tommy Jr. was the oldest and felt more pain and hurt about losing her and not seeing his dad. (RT 3212-3214).

After the death of his grandmother, Dorothy, and the disappearance of his father, Tommy Sr., Tommy Jr. started getting into trouble with the law. (RT 3218). At this point, Rick started taking Tommy Jr. to church with him. Tommy Jr. was also beginning to open up to the youth pastor as he had a lot of anger in him because he was upset about his father. (RT 3218).

Tommy Jr. played the father role for his younger brother Angel. (RT

3215). Tommy Jr. also had a relationship with Rick's son, Ricky, who was a little younger. He would come over and talk, spend time, and play video games and hang out. (RT 3216-3217). He also had a relationship with his daughter Jennifer. They developed a close brother and sister relationship and spent a lot of time together. (RT 3217-3218). Tommy Jr. helped Rick coach the 9-10 Little League baseball team commencing in March of 1996. (RT 3219). As an assistant coach, he related well to the boys on the baseball team. (RT 3220 and 3225). Rick loved Tommy Jr. like he was a son. (RT 3221).

d. Debbie Martinez - Aunt.

Debbie Martinez is married to Rick Martinez and is the aunt of Tommy Martinez, Jr. (RT 3225-3227). As to Tommy Sr., he had a problem with alcohol. (RT 3227). After his father, Tommy Sr., had left home and his grandmother, Dorothy, had died, Tommy Jr. at age 12 to 13 started spending time at her home. (RT 3227-3228). He would help Uncle Rick clean the yard and fix things. (RT 3228). Tommy also was invited to church with them. He developed a relationship with her daughter, Jennifer. He would take care of Jennifer by picking her up, going on bike rides, and they would sit at the 7-11 and eat nachos. (RT 3230-3231). Tommy Jr. also became the father figure for his brother Angel. Tommy Jr. would come on his bike and pick Angel up because his brother was crying to come home. Her son, Ricky, also looked up to Tommy as a big brother. (RT 3231-3233). Tommy Jr. never disrespected her and she loved and trusted him like a son. (RT 3235-3236).

e. Jennifer Martinez - Cousin.

Jennifer Martinez, age 18, is the cousin of Tommy Martinez, Jr. (RT 3238). He had become a regular member of their household and she spent a

lot of time with Tommy Jr. He became her big brother. (RT 3239). She would confide in him about her boyfriends. (RT 3240). She also had read some of his poetry. (RT 3241). After she had been involved in an automobile accident, Tommy Jr. became her protector. He was never violent or disrespectful of women and never raised his voice to a woman. (RT 3242). She loved Tommy Jr. and wished that she could have him back. (RT 3243).

f. Roy Martinez - Cousin.

Roy Martinez is the younger cousin of Tommy Martinez. (RT 3386). When he was growing up, he had a relationship with Tommy Jr. that started when he was living with his Uncle Rick. Tommy Jr. used to help him with the yard work. (RT 3388-3389). Uncle Tommy (Sr.) would also take the boys bike riding and there might be as many as ten boys on a long bike ride. When the bike rides stopped, he felt sad. (RT 3401-3402).

When he was 13 and Tommy Jr. was 15, they used to sniff glue in Tommy's room. They also inhaled gold spray paint from plastic and grocery bags. (RT 3390-3392). Further, they used methamphetamines together which was also known as crank. (RT 3393-3394).

Tommy Martinez was a positive influence on Roy with respect to his rejoining his pregnant girlfriend and becoming a responsible family man. (RT 3394-3397). He loves Tommy Jr. (RT 3396).

g. Angel Martinez - Brother.

Angel Martinez, age 10, is the younger brother of Tommy Martinez, Jr. (RT 3449-3450). Tommy Jr. would write to Angel and kept in touch even when he was in jail. (RT 3450). One such letter provided as follows:

> Hi Angel, How have you been doing? Fine I hope. So your team beat my team. You guys

> just got lucky. So what place are you guys in? Are you still the pitcher? You should practice at home, have one of your friends practice with you cause you got a good pitching arm. And if you practice you will be the best pitcher in the [W]estside Little League, better than the majors, if you try your hardest, Angel. Can you feed Mariah every day for me and give her water too so she don't get all skinny like Chiquita? Well, Angel, I have to go now. I miss you. So till next time, take care of yourself. Love always, your big brother, Tommy Martinez. P.S., give mom a big hug for me.

(RT 3450-3451 and Exhibit N-36).

Angel has three brothers, Tommy Jr., Isaac and Mario. However, he feels closest to his brother Tommy Jr. because he took care of him like he was his father when his father was not around. Tommy Jr. has always been there for him. When he started school, Tommy Jr. would pick him up. (RT 3452). Angel also did things with Tommy and Veronica Hernandez such as going to the movies, staying home and ordering pizza, and going to the park. Tommy Jr. would practice baseball with Angel and watched him play his Little League games. (RT 3453-3454). Angel loves his brother Tommy Jr., misses him, and wishes he was back home. (RT 3455).

h. <u>Matilda Munguia - Aunt</u>.

Matilda Munguia is the aunt of Tommy Martinez, Jr. (RT 3455). As a teenager, she babysat for Tommy Jr. and his brother Isaac. (RT 3456). Tommy Jr. was always happy, cheerful, laughing with "a big ol' smile." (RT 3457). He was always welcome in her home. (RT 3458). Tommy Jr. had a special relationship with her mother, Dorothy, who was killed in a car accident when Tommy was ten years old. (RT 3459-3461). After Tommy

Jr.'s father moved out of the home and disappeared, she noticed that Tommy, Jr. was very lonely and sad. Tommy, Jr. looked up to his father and had a close relationship with him. (RT 3461). His father was a fun guy who would take his nephews and Tommy Jr. on bike rides, but he was irresponsible. Tommy, Sr. let his son down. (RT 3461).

Tommy, Jr. became a substitute for Tommy, Sr. as to his mother, Eva. He took over some of the responsibilities of the discipline at the house as far as controlling his brothers. (RT 3462). At age 18, Tommy, Jr. provided her with emotional support with respect to the still born death of her twin babies. He attended the graveside services for the twins and was the first person to show up that morning. He told her how sorry he was for her loss and grieved with her and shared her pain. Tommy, Jr. is very important to her and he has a special place in her heart. He is a loving and caring person. (RT 3465-3466).

i. <u>Danny Dean Castillo - Youth Leader/Pastor</u>.

Danny Dean Castillo is a volunteer youth leader/ pastor of the Foursquare Church in Santa Maria. (RT 3573-3574). He had also been a volunteer youth adult leader at the small church called Abundant Grace Fellowship. Rick Martinez was a member of the congregation at Abundant Grace. He came to know Tommy Martinez through Rick Martinez. (RT 3574). Tommy Martinez was in his youth group. (RT 3574-3576). He was aware that Tommy Martinez was having some problems with the law. (RT 3576). Tommy Martinez related well to the other kids and he had no problem with Tommy Martinez in the youth group. (RT 3577-3578). Tommy Martinez was a quiet young man. (RT 3578). He was aware that there were some things that he was dealing with in his youth, but over all,

he considered Tommy Martinez to be upright and honest and that if he did something wrong he would confess to it. (RT 3579-3580).

4. Former Girlfriends.

a. Lisa Esquivel.

Lisa Esquivel, age 19, was introduced to Tommy Martinez Jr. by his cousin Jennifer. They developed a relationship of boyfriend and girlfriend four years earlier. They would go to Jennifer's house, his house, the park, and the movies. At age 15 or 16, when she was dating Tommy Jr., they developed an intimate loving relationship. When the relationship ended, there was no hostility and Tommy Jr. never hurt her. (RT 3403-3406).

b. Elizabeth Fuentes.

Elizabeth Fuentes, age 17, met Tommy Martinez, Jr. toward the end of 1995 and the beginning of 1996. She had a crush on him but he had another girlfriend, Veronica Hernandez, at the time. (RT 3408-3410). After Tommy Jr. went to jail, they started corresponding and he wrote poetry to her. (RT 3410-3414 and RT 3423). One of the poems that he wrote to her provided in pertinent part as follows:

> It seems a long, long time ago that this story first took place; of two young ambitious lovers who wished to see an amazing grace. It's often said you can't resist a calling within the heart; with Tommy and Elizabeth this is how we start. A gentleman, a lonely man, a gangster as well; upon first sight of Elizabeth, Tommy knew he fell. He passed her by, he caught her eye, her heart had skipped a beat; yes, this would be the lucky man to knock her off her feet. The aspects of this love unique is hard to comprehend. Impossible, most baffling, when analyzed from end to end; love between a boy and girl, two hearts that beat as one; they hunger

for each other's touch with passion on the run.
They love to live and live to love together as
friends; yes, this is the truth and story of
Tommy and Elizabeth from beginning to end.

(RT 3422-3423, Exhibit N-41).

Elizabeth Fuentes started a one month romance with Tommy Martinez, Jr. in the summer of 1996. (RT 3421 and 3424). She felt that Tommy Jr. cared for her, treated her nice, and she never got the feeling of danger. (RT 3422). During their one month romance, Elizabeth Fuentes was a virgin and decided that she wanted to have a sexual experience with Tommy Jr. She was with him at his house in his bed when they started to have sexual relations, but she asked him to stop because it was uncomfortable for her. He did stop and was not angry; she felt he understood her. She is still a virgin, and loves Tommy Jr. (RT 3424-3425).

c. <u>Veronica San Augustin</u>.

In 1993, she developed a friendship with Tommy Jr. which later developed into a boyfriend/girlfriend relationship. She was 15-16 at the time. Tommy Jr. wrote her loving letters and poetry. (RT 3428-3429). She loved Tommy Jr. very much. In fact, in January of 1994 when she was still attending high school with her parents permission, she moved in with Tommy at his house. (RT 3429-3430). She lived there for about a month and a half until Tommy Jr. was sent to the boys camp. (RT 3430). When she met Tommy, she was a virgin. (RT 3431). She had intimate relations with Tommy. No force was ever used and she never felt threatened or that he was a dangerous person. (RT 3431). She has now married, but Tommy Jr. deep in heart will always be her friend. (RT 3431-3432).

d. Veronica Hernandez.

Veronica Hernandez met Tommy Martinez, Jr. in April or May of 1995. They became boyfriend and girlfriend and had a relationship for almost three years. (RT 3433). Tommy Jr. would write poetry for her and draw for her. (RT 3434-3435). They would go for walks and bike rides, visit with his cousin Jennifer and watch T.V., go out to eat and spend time with his mother and brother. She became close to Tommy, Jr.'s family and, in fact, lived at the Martinez home for a period of time. (RT 3435-3436). Tommy Jr. had a special relationship with his brother Angel, and appeared to be a father figure to him. Angel liked Tommy a lot and he spent a great deal of time with Tommy, Jr. and Veronica. They spent time going out to eat, seeing movies and going to the park. (RT 3436-3437). He would always defend Angel. He would stop his other brothers from beating Angel up. (RT 3436-3437). When she met Tommy Jr. she was a virgin. They had intimate relations and he never used any force. (RT 3439-3440). Tommy Jr. was the major relationship for her in her life and she still loves him. (RT 3444).

5. James Esten - Correctional Expert Testimony.

James Esten is a correctional consultant. He received his BA degree in English from San Francisco State University and his Masters degree in Education from San Jose State University. (RT 3501). He retired from the California Department of Corrections in 1991 after serving 18 years in the department in various capacities including vocational printing instructor, correctional counselor, program administrator, head of the correctional training center, and inmate appeals investigator. (RT 3501-3507).

Esten reviewed the records and reports concerning Martinez regarding his incarceration at the Los Prietos Camp, juvenile hall, and

county jail as well as documents describing the commitment offense. (RT 3512). He also had four separate face to face interviews with Martinez. The purpose of his record and report review and interviews with Martinez was to determine whether Martinez was amenable for placement in a life without possibility of parole setting. (RT 3509).

As to the classification levels in the state prison system, Esten notes that there are four levels of security, with level four being the highest level, or maximum security. (RT 3509). Esten testified that Martinez would be assigned to a maximum security level four prison in light of being convicted of first degree murder with special circumstances and being sentenced to life in prison without the possibility of parole. (RT 3509-3510). In two of the maximum security prisons, there is also a security housing unit which is utilized for inmates who commit felonies after their commitment to the Department of Corrections. Thus, other than the security housing unit and death row, level four is the most restrictive and structured environment available. (RT 3510).

As to future prison performance, Esten notes that the classification manual states that prior prison behavior is the best indicator of future prison behavior. However, Esten notes that jail, juvenile hall and boys camp behavior are not relevant to a determination of future prison behavior because they do not parallel the kinds of behavior and expectations set in prison. (RT 3515). According to Esten, Martinez would be placed in a level four prison which is as structured an environment for a general population inmate as possible, excluding the security housing unit. In other words, this is a maximum security general population for life without possibility of parole housing. (RT 3515-3516). Esten opined that Tommy Martinez, Jr. had the ability and capacity to successfully adjust to life in a

level four maximum security prison as a life without possibility of parole prisoner. (RT 3516). He saw no reason based on his interviews with Martinez and reviewing all of the documentation that would preclude Martinez from being able to make a successful adjustment to prison life. (RT 3516).

Esten noted that Tommy Martinez's drug of choice is methamphetamine. This is and has been the drug of choice for inmates coming into the prison system for years, but fortunately methamphetamine is less available inside the prison than it is on the street. No one maintains a methamphetamine habit or ongoing methamphetamine use while incarcerated in the state prison. (RT 3520-3521).

As to lack of maturity, if an inmate were to enter a level four state prison with a belligerent attitude or a hostile attitude, the young inmate would fair badly as a consequence of the response by lifers who do not want the status quo of their home disrupted by some youngster coming in and stirring up the policies and procedures. (RT 3522-3524). Esten testified that Martinez matured through the trial process so as to recognize that he must make some changes in his own behavior to assimilate with the specific kind of society to which he will spend the rest of his life. (RT 3525). Everyone in a level four setting is a lifer who has killed somebody. Inmates do not like sex offenders and Martinez will be labeled as a sex offender as a consequence of the rape. Thus, he will be entering prison as a youngster looking over his shoulder not knowing who to trust and fearful from day one. (RT 3526-3528).

Prison gangs and disruptive groups are a problem in the state prison system. Martinez did not express any interest in joining a prison gang or becoming involved in any type of disruptive group. (RT 3530). Moreover,

Martinez expressed the conviction that he had the strength to resist the pressure within the prison to join such groups. (RT 3531-3532). Martinez also has artistic skills which will assist him in making a positive contribution to prison society. (RT 3532). After a period of years, Martinez would likely have the ability to serve as a mentor to younger prisoners. (RT 3534).

Esten had no reservations that Martinez could be a successful lifer without possibility of parole inmate in a level four maximum security institution. (RT 3534-3536).

During cross-examination by District Attorney Sneddon, Esten confirmed that the regulations of the Department of Corrections are set by the Director of Corrections who sets broad guidelines which are published in the California Code of Regulation, Title 15. The Director of Corrections can make changes in the way the prison is administered through the administrative process. Up until January of 1998 a person who was sentenced to life without possibility of parole was entitled to get married as well as have conjugal visits. (RT 3562-3563). The regulations allowing for marriage and conjugal visits have been changed. (RT 3563). The same regulations are capable of being changed back depending on who the Governor appoints as the head of the Department of Corrections because the regulations are often reflective of the political philosophy of the Governor. (RT 3563-3564). On the issue of gangs, Esten acknowledged that there can be a progression from a local neighborhood group, to a disruptive group as identified by Corrections and, ultimately, to a prison gang, if one choices to follow that path. He also acknowledged that there is a well documented initiation right into a gang membership in prison which is a "killing". (RT 3564).

C. Prosecution Rebuttal.

1. David Frecker, M.D.

Dr. David Frecker is a neurologist who practices medicine in Santa Barbara. (RT 3628-3630). He is familiar with the imaging called the PET scan. The primary difference between the PET scan and the MRI or the CAT scan is that the MRI or CAT scan are pictures of the brain and are commonly used. There are a number of techniques that use radioactivity to image the brain, one of which is a PET scan. (RT 3631-3632). He notes that the PET scan is used for a very gross study of the brain. (RT 3633). He testified that an MRI is a much better tool to diagnose a brain tumor while a PET scan may show a tumor only when it is fairly large; an MRI would be more sensitive than a PET scan. (RT 3635).

Dr. Frecker concluded that Dr. Wu's testimony was incorrect. He noted Dr. Wu concluded that there was an abnormality in the orbital frontal area, that is, an abnormality in the frontal lobe. Dr. Wu noted that he considered decreases in activity in the front part of what he referred to as the brain. (RT 3638-3639). However, according to Dr. Frecker, the referenced areas by Dr. Wu were not to the brain. (RT 3640). As a neurologist, Dr. Frecker deals with the anatomy of the brain everyday in his practice. Based on his review and study, he concluded that the testimony of Dr. Wu from an anatomical brain position simply could not be true. (RT 3640-3641 and 3639). The area in the PET scan that Dr. Wu attributed to the frontal lobe was, in effect, outside of the brain and, in fact, referenced the sinuses. (RT 3639-3642). There is no brain tissue in the sinuses, and hence, the lack of activity that Dr. Wu referenced as being in the frontal lobe of Tommy Martinez based on his PET scan was in effect a reference to his sinus cavities where there is no brain tissue. (RT 3640-3644).

Dr. Frecker also opined that the male brain is pretty well developed by age 12. (RT 3651). Dr. Frecker disagreed with Dr. Wu's testimony concerning solvent abuse and noted that one must obtain the patient's history concerning solvent abuse in order to make an appropriate assessment. (RT 3651-3655). Dr. Frecker testified that the PET scan is a questionable tool. (RT 3810-3811). In any event, Dr. Frecker found that the PET scan of Tommy Martinez was essentially normal. (RT 3656-3657 and 3802-3803). Dr. Frecker concluded that Dr. Wu's testimony regarding his analysis of abnormal brain activity in the frontal lobe on the 1.4 slice was, in effect, an image of the sinus cavity. (RT 3785). He notes that an MRI scan looks at the structure of the brain which really changes very slowly, while the function of the brain changes from moment to moment. (RT 3658). Anxiety and mood can affect the function of the brain. An essential part of a PET scan is that it is dependent on the state of the individual, unlike most scans of the brain. (RT 3659). Dr. Frecker opined that a PET scan simply cannot tell one about a single individual's behavior. You cannot look at a PET scan and say that the person will act in a certain way. The PET scan is not capable of doing that. (RT 3660-3661). Dr. Frecker opined further that you cannot look at a spot on the brain in a PET scan and make a cause-and-effect relationship between that spot and some behavior that a person demonstrates. (RT 3661).

On cross-examination, Dr. Frecker acknowledged that toxic encephalopathy means toxic brain mess-up. There have been many studies done on persons who have been exposed to solvents that have resulted in toxic encephalopathy, and hence, this has resulted in psychiatric problems, emotional problems and behavioral problems. (RT 3812-3813).

2. Peter Leyva, Jr.

Peter Leyva was employed by the Santa Barbara County Probation Department as a counselor at the [Los Prietos] Boys Camp. (RT 3580-3583). He became familiar with Tommy Martinez at the camp and noted that there were a couple of incidents where he was written up for disciplinary problems, repetitious acts of misconduct and failure to follow instructions from the staff. (RT 3583). He did not trust anybody at camp including Martinez. (RT 3583-3584). With other minors, Martinez was disruptive and influenced the group situation at times because of his defiance. (RT 3584). He opined that Martinez did not conform to the structure. (RT 3584-3585). Martinez was involved in a gang and openly made note of his moniker and his gang affiliation. (RT 3585-3586). Leyva observed Martinez at the camp in 1994 when he was 15-16 years old. (RT 3587).

3. Jim Reyes.

Jim Reyes was employed with the Santa Barbara County Probation Department and as a juvenile institution officer from 1992 to 1994 when he had interactions with Tommy Martinez at the Los Prietos Boys Camp. (RT 3587-3588). He notes that he had continuous problems with Martinez, who was written up on several occasions for disrupting the entire group and the program at the camp. Martinez also ran away from the camp a couple of times as well as associated with some known members of the West Park Gang. (RT 3589). He opined that Martinez was absolutely not trustworthy. (RT 3590-3591).

4. Victor Coronel.

Victor Coronel was employed with the Sheriff's Department as a correctional officer at the main gate in Goleta. (RT 3598-3599). He had

dealings with Tommy Martinez, Jr. (RT 3599). As to his attitude, he noted that when Martinez was asked to do something, he either appeared that he did not want to do it or did it very slowly on his own time. (RT 3600). During one of the inspections of his cell, Coronel requested that Martinez sit down, but Martinez refused to do so. (RT 3600-3601). He opined that Martinez cannot be trusted. (RT 3603). However, he acknowledged that he did not trust any inmate. (RT 3605).

5. Robert L. Reed.

Robert L. Reed is a Correctional Officer with the Santa Barbara County Sheriff's Department at the jail facility in Goleta. (RT 3671-3672). When he would have contact with Tommy Martinez, he notes that Martinez would give him a "cold, hard" type of look. (RT 3673-3674). Martinez also responded to his requests in a very nonchalant fashion. (RT 3674). He noted further that Martinez only followed the rules if he wanted to and that he defied a number of rules. (RT 3674-3675). One time, Martinez was in the shower and he advised him to go back to his cell. Martinez continued to shower without going back to his cell which caused a delay. (RT 3675). When Officer Reed spoke with him about following the rules, Martinez mumbled "I got no place to go, I'm here for life." (RT 3675). The law library at the jail was to be utilized as a law library and was a privilege. (RT 3676). He observed Martinez in the law library with a group of other individuals playing cards. He wondered why Martinez would be playing cards when his case was supposed to be important to him. (RT 3676-3677). He wrote Martinez up for the improper use of the law library. (RT 3677).

6. Kim Herman.

Kim Herman is employed with the Santa Barbara Juvenile Hall. She had previously been a supervisor at the Los Prietos Boys Camp and was in

charge of safety, security and welfare of the minors in the institution. She dealt with Tommy Martinez and found him to be defiant, argumentative, and non-compliant. He caused her problems as a supervisor. (RT 3682-3683). She opined that Tommy Martinez was not trustworthy. (RT 3684). Martinez was involved in a gang known as the Santa Maria West Park Gang. (RT 3684-3685).

Martinez drew a grotesque picture supposedly of her and her pet dog. (RT 3685-3686, Exhibit 110). She had a dog in the Camp by the name of Jack. The drawing by Martinez was that of a naked female on her hands and knees with a dog standing behind the female attempting sexual intercourse. There was a notation at the top of the drawing which stated: "Bitch, no wonder you can't get a man. It's cause you are into doggy style and when I say it I mean it. I would give you dick but I will probably catch Jack disease." There was also a notation on the drawing which stated: "Mrs. Herman, also known as Broadzilla." (RT 3685-3688, Exhibit 110). She noted that Martinez would try to intimidate weaker individuals and was eventually removed from the Camp. (RT 3689).

7. <u>Richard Diaz</u>.

Richard Diaz is a Probation Officer with the Santa Barbara County Probation Department. (RT 3691-3692). He supervised Tommy Martinez for two and a half years. (RT 3692-3693). He has training and experience with respect to drug recognition and also has been in contact with people under the influence of solvents. (RT 3694). That is, Toluene, which is generally found in aerosol products, paints and paint thinner. (RT 3694-3695). He notes that gold paint and silver paint are really popular among juveniles. (RT 3695). He spoke with Tommy Martinez regarding the use of substances and he never saw Martinez under the influence of Toluene. (RT

3696).

Martinez was a member of a gang known as the West Park Gang in Santa Maria. (RT 3698). In 1995, at the Strawberry Festival, Martinez was in possession of a knife which was a violation of the terms and conditions of his probation. (RT 3698-3699). By virtue of associating with other West Park Gang members, he was also in violation of his parole. (RT 3699). He escaped from the Los Prietos Boys Camp on April 6, 1994 and was apprehended on April 23, 1994. He also escaped from the Los Prietos Boys Camp in June of 1994 and was apprehended on September 28, 1994. (RT 3703).

As to his demeanor, most of the time Martinez was very quiet, showed no emotions, and was really flat. (RT 3703-3704). With regard to the use of solvents, he has noticed that youngsters who use solvents are disoriented and have a flat, far-away look in their eyes sometimes. (RT 3710-3711). He noted that it was common for youngsters, particularly gang members, to utilize solvents or ingest solvents. (RT 3722).

D. Defense Sur Rebuttal.

1. <u>James Esten</u>.

James Esten reviewed two additional reports relative to his opinion that Tommy Martinez had the potential for adjustment as a prisoner under commitment for life without possibility for parole. A report from Daniel Fondern of the Los Prietos Boys Camp concluded that Martinez was a smart young man, but he was defiant with a lot of pent-up frustrations. However, Fondern noted further that he did not have any trouble with Martinez. From this, Esten concluded that when faced with an authority figure who knows how to handle himself and is properly skilled in the handling of minors, Martinez "responds appropriately." (RT 3760-3761).

Esten also reviewed the interview from Mike Vaccaro who was a school teacher that taught Tommy Martinez at Juvenile Hall. Vaccaro described Martinez as a quiet, mellow student who followed the class rules and thought Martinez was an average student academically. From this, Esten concluded that given an appropriate authority figure, Martinez complied with the guidelines and rules that were set up for him. (RT 3761-3762). Esten noted that the last disciplinary incident involving Martinez while he was in jail was on April 28, 1998, when he engaged in the offense of continuous talking in the hallway awaiting transportation by bus. Since that time, Martinez has been disciplinary-free. (RT 3762-3763). The reports of Daniel Fondern and Mike Vaccaro and the disciplinary-free status of Martinez from April 28, 1998 supports his conclusion that Tommy Martinez has the potential to adjust as a life prisoner without possibility of parole. (RT 3763).

2. Joseph Wu, M.D.

Dr. Wu reviewed the transcripts of Dr. Frecker's testimony relative to the Frecker analysis of the Martinez PET scans. (RT 3915-3916). According to Dr. Frecker, a mistake was made either by the technician or by Dr. Wu in their review of the PET scan material with respect to the 1.4 slice. Dr. Frecker testified there is no brain matter in the frontal lobe. Exhibit Q depicted the area of concern on the 1.4 slice. (RT 3916-3917). Dr. Wu concluded that Dr. Frecker was definitely incorrect as sinus material has virtually no glucose metabolic activity, generally speaking on PET scans. Thus, it would be essentially black. Dr. Wu concluded that there is no way that what is depicted in Exhibit Q could be sinus material, and that what is depicted is definitely brain matter. Although it is very low-function brain matter, even low-function brain matter is still going to be much hotter than

sinus material. That is, because the brain, even if it is malfunctioning, still has neurons which are burning up sugar. The sinus has cells, but the cells in the sinus do not have nearly the same degree of activity of function as even low-functioning brain cells, and therefore, it would burn hardly any sugar at all. Dr. Wu noted that the activity on the PET scan was blue in color representing activity that was substantially above the black. Thus, in his opinion, Dr. Frecker was mistaken in his analysis. (RT 3917-3919).

Dr. Wu again reviewed the technician's notes. He did not discern any error in the technician's alignment of the skull as far as the performance of the test was concerned. Moreover, the technician performed the operation in the standard way. (RT 3918). Dr. Wu noted that he had reviewed 30 times as many PET scans as Dr. Frecker (RT 3922) and reiterated his opinions in every respect. (RT 3919-3927).

ARGUMENT

GUILT PHASE

I. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY DENYING APPELLANT'S REQUEST AND IN REFUSING TO QUESTION JUROR NO. 12 - DANA W.

A. The Relevant Facts.

In her Juror Questionnaire (CT 04185-04216), Juror No. 12 [684037] also known as Dana W. noted that she was employed as the lead clerk in the Santa Barbara Probation Department at the Juvenile Hall located in Santa Maria and had been so employed for 20 years. (CT 04187-04188).[6] She recognized the name Tommy Martinez from news media and other sources concerning the case, because he had been at the Santa Maria Juvenile Hall where she worked. (CT 04198 and 04187). Based on the information she had received about the case, she formed the opinion that this was a "very serious case." (CT 04199).

During the initial voir dire by defense counsel, Peter Dullea, Juror No. 12 acknowledged that she would be inclined towards the death penalty in the event of a guilty verdict with special circumstances, because of the severity of the charges. (RT 1088-1089). However, in response to questioning by the court, she also acknowledged that she would be able to follow the law and consider both penalties before she reached a verdict in

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[6] The complete names of the selected jurors and alternates have been sealed pursuant to the Trial Court's Order of June 23, 1998. (CT 01496-01498). See Code of Civil Procedure § 237(a)(2).

the penalty phase. (RT 1091). Defense counsel challenged Juror No. 12 (684037) for cause predicated on her leaning towards the death penalty which would impose a substantial burden on the defense with regard to Juror No. 12. (RT 1101). Defense counsel acknowledged that Juror No. 12 gave a "Yes" answer in response to the court's inquiry as to whether she was able to follow the law and consider both penalties, but defense counsel noted that the "tone" of her answer indicated that Juror No. 12 was "doubtful" in her response. (RT 1101-1102). The challenge for cause was denied. (RT 1103).

During further voir dire by defense counsel, Juror No. 12 (684037) acknowledged that it would be difficult for her to serve on the jury because she knew the defendant as well as the severity of the charges. (RT 1155). At the request of defense counsel, the court conducted confidential questioning of Juror No. 12 (684037) (RT 1154, 1155 and 1157). The court conducted the following inquiry outside the presence of the other prospective jurors in the presence of counsel as follows:

BY THE COURT:

Q. And Mrs. [Dana W. - Juror No. 12] (684037), you indicated that you know the defendant from when you were at juvenile hall?

A. Yes.

. . .

Q. Does the -- does the knowledge that you have about him prevent you from being a fair juror in this case?

A. I don't -- how do I want to say this? Just I am totally aware that he had an extensive juvenile record, and I think that he's had a lot of choices to make in his lifetime, and I don't see that he's made any better choices.

Q. Having those feelings, does that mean -- well, the question is, whenever we know somebody that's involved in a trial -- for example, when the Court, myself, when I know someone, I have to decide, is what I know about that person or how well I knew that person going to affect my judgment? And if I think it is, then I don't sit as a judge. I call another judge and ask them to handle the case. Because these cases can only be decided by what comes to us from the witness stand, the evidence in court.

A. Right.

Q. Now, there's a lot of people in this community I know who come into my courtroom and I decide their cases, so it's not just knowing someone.

A. Right.

Q. Because in a community this small, we run into each other all the time. So it's -- so the question gets back to, is this a person that you know so much about, or what you know about is such that it would affect your ability to be impartial in the case?

A. No.

(RT 1158-1160)

In follow-up questions by defense counsel, Juror No. 12 - Dana W. (684037) reiterated that she knew Tommy Martinez from her work at the juvenile hall and reaffirmed that Tommy Martinez had made a lot of choices but that in her judgment they had not been "real good choices." (RT 1160-1161). Defense counsel, Peter Dullea then challenged for cause Dana W. (Juror No. 12) as follows:

> I would - challenge juror -- or the panelist (Dana W.) (684037). Miss (Dana W.) (684037) is the lady that knows Mr. Martinez from juvenile hall, and I think that on guilt or

> innocence, someone who's been in a -- that kind of custodial setting and been a supervisor over Mr. Martinez and gotten to know a little bit about him should be disqualified from deciding his guilt or innocence, because, for one thing, she knows, at the guilt or innocence stage, that Mr. Martinez has committed prior offenses that are not otherwise admissible on the guilt phase of the trial.
>
> She may not remember or may not even have known at the time what they were, but she knows that they exist. She knows that he did something to get put in juvenile hall, and that's not knowledge that a juror should properly have.

(RT 1180-1181).

The court denied the challenge for cause. (RT 1182).

On May 12, 1998, the 12 jurors were sworn as well as four alternate jurors and the court was recessed until May 19, 1998. (CT 01125-01127).

On the morning of May 19, 1998, the first day of trial prior to opening statements, two reports were brought to the court's attention, one involving Juror No. 6 (Barbara C.) (016264) regarding a telephone call she had received, and the other involved Juror No. 12 (Dana W.) (684037) regarding contact with the District Attorney's investigator due to her job. (CT 01128-01130). The first report by David Dodd of the Guadalupe Police Department addressed an annoying phone call to Juror No. 6, Barbara C. (016264) as follows:

> SYNOPSIS: Victim receives an annoying phone call, which she believes may be intimidation linked to a murder trial.
>
> INVESTIGATION: On 05-13-98 at about 0920 hours, I was advised by Chief Cristopher Nartatez to contact [016264] at 4585 W. Main St., Puritan Ice Co., in reference to a phone call she received.

> Upon my arrival I contacted [016264]. She told me that she had received a phone call at about 1900 hours on 05-12-98 at her home. She said that the caller was a male with a, "very strong, educated voice". She told me that he had no accent. When the suspect began speaking, he said that he was calling for the, "Police and Sheriff". At that point, [016264] became suspicious and told the suspect that she was not interested. The suspect the [sic] whispered, "I know who you are". [016264] then hung up the phone.
>
> Due to the last statement of the suspect, [016264] became very upset. She told me that earlier in the day, she was appointed to the jury of a murder trial. The case is a, "death penalty" case against S/Tommy Jesse Martinez, in Santa Maria. [016264] fears that the phone call may be an attempt to intimidate her. She said that she is very upset that she was appointed to the jury, and she had been crying all afternoon before the phone call.

(A/C CT 00513).

The second report involved a communication between Tom Barnes of the District Attorney's Office and Juror No. 12, Dana W. (684037). Mr. Barnes confirmed his contact with Dana W. - Juror No. 12 in a Memorandum dated May 15, 1998, addressed to District Attorney Tom Sneddon as follows:

> Pursuant to your (via Tracy Grossman) request to obtain any disciplinary reports that may exist in Tommy Martinez's Juvenile Hall file, at about 11:30 AM, date, I phoned Juvenile Hall in Santa Maria and spoke with "Dana." After explaining what I needed, Dana spoke with her supervisor (name unknown) and said that I would need a court order in order to access the juvenile file.
>
> Over the next 30 or so minutes, in coordinating this matter with Tracy Grossman and Juvenile Hall, I spoke with Dana two or three additional times. During one of these subsequent

> calls, Dana informed me that she was "on the jury panel" for the Martinez case, to which I responded that I found it unusual that one side or the other hadn't excused her. I then asked Dana her last name and she stated "W" Dana, somewhat jokingly, then asked [i]f [sic] I could get her off the jury, and I responded that I could not, and I terminated the call.
>
> On my next call back to Juvenile Hall, I explained to Dana that it would be improper for her to be involved in this matter any further and I asked for her supervisor. I was then put in contact with Sandi Davis for any further assistance.

(A/C CT 00516).

Judge Melville conducted an in camera hearing regarding the two reports. (CRT 1451-1460).[7] Judge Melville inquired of Juror No. 6 (016264) regarding the phone call she received. (CRT 1452-1453). Juror No. 6 advised that it was either a "prankster call" or "somebody looking for a donation." Before she hung up, the caller stated something that she did not like. (CRT 1453). The court inquired further as follows:

> **THE COURT**: According to this, they said, "I know who you are."
>
> **JUROR NO. 6**: They whispered it, uh-huh.
>
> **THE COURT**: Is there anything now that you feel, out of that entire incident, would affect your decision in this case?
>
> **JUROR NO. 6**: No, I mean, at the time --
>
> **THE COURT**: You wouldn't hold this against the District Attorney's Office?

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[7] CRT references the Corrected Transcript Pages to the Reporter's Transcript on appeal per the Trial Court's 12-10-90 Order; see also (A/C CT 00304-00314).

JUROR NO. 6: No.

THE COURT: You wouldn't hold it against the defendant?

JUROR NO. 6: No.

(CRT 1453-1454).

The court then allowed counsel for both the defense and the prosecution to ask questions of Juror No. 6 (CRT 1454), and also cautioned Juror No. 6 not to discuss the incident with any of the other jurors. (CRT 1455).

Defense counsel, Peter Dullea, raised the issue of the second report regarding the contact between Juror No. 12 (Dana W.) (684037) and the District Attorney's investigator. The court inquired as to whether defense counsel wished to question Juror No. 12 (684037) (CRT 1456-1457) which resulted in the following colloquy between Judge Melville and defense counsel:

> **MR. DULLEA**: I guess I'm a little more concerned about the apparent attitude expressed by Mrs. (Dana W. - Juror No. 12) (684037). The report mentions that she asked Mr. Barnes if he could get her off the jury. And he stresses that that was half joking, but it still disturbs me a little that she would ask such a question. . . . [I]t might be advisable to inquire of Mrs. (Dana W. - Juror No. 12) (684037) if she's willing and able and fit for further duty in light of the comment.
>
> **THE COURT**: I'm not willing to do that, Counsel. Every one of these jurors would like to not be on this jury. . . . [T]hat you accepted the jury. And, you know, I just think that what she's expressing there is not -- doesn't relate to her qualifications. It just relates to, you know, a feeling that we would all have if we sat there. "Is there any way I don't have to do this?"

> And to then go back and give her an option, another option, not to serve is -- is -- you know, if we gave that to each juror, I'm sure they would take it. . . . [It] is something I'm not willing to delve into. She'd just tell us she doesn't want to be here, you know, and so would the other 14, 13, if we could ask them.

(CRT 1458-1489).

Mr. Dullea then requested that the two reports be filed and made a permanent part of the record which the court so ordered. (CRT 1459).

B. Standard of Review.

In light of the fact that Dana W. - Juror No. 12 (684037) knew Tommy Martinez from her employment at the Santa Maria Juvenile Hall - particularly her knowledge of his "extensive juvenile record," her concerns about the severity of the charges, the reservations that she expressed as to whether she could be a fair juror, the judgment she had formed that Tommy Martinez had not made necessarily "real good choices," coupled with her discussion with the District Attorney investigator wherein she inquired as to whether he could help her get off the jury, the trial judge was compelled, at a minimum, to conduct an inquiry as to whether Dana W. - Juror No. 12 was biased, incompetent and/or otherwise able to serve as a juror. The failure to do so constituted a prejudicial abuse of discretion requiring reversal of both the guilt and penalty verdicts.

The standard of review of the trial court decision whether to investigate the possibility of juror bias, incompetence, or misconduct -- like the ultimate decision to retain or discharge a juror, is abuse of discretion. People v. Ray (1996) 13 Cal.4th 313, 343. Generally, a hearing is required when the court possesses information which, if proven to be true, would constitute "good cause" to doubt a juror's ability to perform his duties and

would justify his removal from the case. Id. Penal Code section 1089 provides in pertinent part as follows:

> If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other good cause shown to the court is found to be unable to perform his **or her** duty, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, . . .

This Court has determined that Section 1089 authorizes a trial court to discharge a juror if "good cause" is shown that the juror is unable to perform his or her duty. When the trial court is put on notice that good cause may exist to discharge a juror, it is the duty of the court to make whatever inquiry is reasonably necessary to determine if the juror should be discharged and the failure to make such an inquiry is error. People v. Farnam (2002) 28 Cal.4th 107, 140-141 (2002); see People v. Engelman (2002) 28 Cal.4th 436, 442.

Thus, it is well settled that when the court has reason to believe that a juror may be unable to perform his or her duties, the court must conduct "an inquiry sufficient to determine the facts." (People v. Burgener (1986) 41 Cal.3d 505, 519, overruled on another ground in People v. Reyes (1998) 19 Cal.4th 743.) Such an inquiry is required in part because, on appellate review, "the trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence." (People v. Delamora (1996) 48 Cal.App.4th 1850, 1856.) Failure to conduct an adequate injury into allegations of juror misconduct or inability to perform has been held to be prejudicial and reversible error. (See, e.g., People v. Castorena (1996) 47 Cal.App.4th 1051, 1066 [failure to conduct an adequate inquiry into allegations of juror misconduct was prejudicial where the trial court "did

not have the requisite facts upon which to decide whether [the discharged juror] in fact failed to carry out her duty as a juror to deliberate or whether the jury's inability to reach a verdict was due, instead, simply to [the juror's] legitimate disagreement with the other jurors"]; People v. Delamora (1996) 48 Cal.App.4th 1850, 1856 [trial court's determination that good cause exists to discharge a juror must be supported by substantial evidence and where there is no evidence to show good cause because no inquiry of any kind was made, the procedure used was by definition inadequate]; see also People v. McNeal (1979) 90 Cal.App.3d 830, 838 [holding that "[o]nce the court is alerted to the possibility that a juror cannot properly perform his duty to render an impartial and unbiased verdict," the court "is obligated to make reasonable inquiry" as to the facts concerning impartiality and bias.].)

The record leaves a number of obvious and important questions unanswered. For example: (1) Whether the motivation of Dana W. - Juror No. 12 (684037) to get off the jury, as expressed to the D.A. Investigator, stemmed from either: (a) her knowledge that Appellant Martinez had an "extensive juvenile record"; (b) her opinion that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime; (c) her concern that this was a "very serious case" as reflected in the severity of the charges; and/or (d) all of the above. (2) Whether her desire to get off the jury was as a consequence of her belief that she could not be a fair and impartial juror in light of: (a) her knowledge that Appellant Martinez had an "extensive juvenile record", (b) her opinion that Appellant Martinez had not made "better choices" or "real good choices" in his lifetime; (c) her concerns that this was a "very serious case" as reflected in the severity of the charges; and/or (d) all of the above. (3) Whether the request by the D.A. Investigator for "disciplinary reports" as to Appellant Martinez further refreshed and/or

reinforced: (a) her knowledge concerning his "extensive juvenile record", (b) her opinion concerning his failure to make "real good choices" in his lifetime, and (c) her concerns relative to the severity of the charges, thereby impacting her ability to serve as a fair and partial juror. These questions and more needed to be addressed by the trial court.

The Court in Burgener, supra, 41 Cal.3d at 518-521, concluded that notwithstanding the error by the trial in failing to conduct an inquiry as to Juror M., the record was insufficient to establish that Juror M. had actually used intoxicants or that her ability to deliberate was affected by them. The Court attributed the insufficiency in the record to defense counsel's preference that the trial court conduct no inquiry. Further, the Court noted that the claim regarding Juror M.'s condition and behavior could be raised in a petition for a habeas corpus. Id. at 521-522.

In this case, defense counsel specifically sought an inquiry of Juror No. 12 - Dana W. (684037) to determine whether "she's willing and able and fit for further duty in light of the comment." (CRT 1458; A/C CT 00312). The court emphatically rejected the notion of such an inquiry by stating "I'm not willing to do that, Counsel." (CRT 1458; A/C CT 00312). Thus, it follows that any insufficiency in the record to determine whether Juror No. 12 - Dana W. was "willing," "able," and "fit for further duty" stems from the trial court's refusal to conduct an appropriate inquiry, rather than a request by defense counsel that such an inquiry not be made for tactical reasons as noted in People v. Burgener, supra, 41 Cal.2d 521. The failure of the trial judge to conduct an inquiry into the willingness, ability, and fitness for further duty by Juror No. 12 - Dana W. is even more egregious in light of the fact that the trial court conducted such an inquiry of Juror No. 6 - Barbara C. (016264) relative to the "prankster call" in

which the court not only conducted a further inquiry, but permitted counsel for both the defense and prosecution to ask questions of Juror No. 6 as well. (CRT 1452-1456; A/C CT 00306-00309). It follows that the trial judge abused his discretion when he refused to conduct an appropriate inquiry into the willingness, ability, and fitness for duty of Juror No. 12 - Dana W. as requested by defense counsel, and hence, both the guilt and penalty verdicts must be reversed.

C. The Trial Court's Refusal to Conduct an Inquiry as to Juror No. 12 Denied Appellant His Due Process Right to a Fair and Impartial Jury.

The right to a fair and impartial jury has been widely recognized as one of the cornerstones of the American judicial system. See: Ross v. Massachusetts (1973) 414 U.S. 1080, 1081 (Marshall, Douglas, and Brennan, J.J.J., dissenting). The Sixth Amendment's right to a trial by jury "is designed to ensure criminal defendants a fair trial by a 'panel of impartial, "indifferent" jurors.'" Irvin v. Dowd (1961) 366 U.S. 717, 722. The Due Process Clause of the Fourteenth Amendment requires that one accused of a crime be accorded a fair trial in conformance with the laws of the trying jurisdiction and the accused is entitled to the full benefit of such laws. See generally: Morgan v. Illinois (1992) 504 U.S. 719, 726; Duncan v. Louisiana (1968) 391 U.S. 145, 147-150. The Eighth and Fourteenth Amendments require a heightened degree of reliability for any judgment of death, thus reinforcing the requirement of an absolutely fair and impartial jury. See generally: Beck v. Alabama (1980) 447 U.S. 625, 636-638.

In this case, the trial judge refused to conduct an inquiry into the competence, that is, the willingness, ability, and fitness of Juror No. 12 -

Dana W. (684037) to serve as a juror notwithstanding her discussions with and comment to the investigator for the District Attorney's Office after she had been sworn as a juror. The failure to conduct such an inquiry undermined Appellant's right to due process and a fair and reliable sentencing determination by an impartial jury, in violation of Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 16, and 17 of the California Constitution. (See Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina (1976) 428 U.S. 280, 304 [plurality opinion]; Johnson v. Mississippi (1988) 486 U.S. 578, 584-585; In re Hamilton (1999) 20 Cal.4th 273, 293-295; People v. Nesler (1997) 16 Cal.4th 561, 577.

The United States Supreme Court in Smith v. Phillips (1982) 455 U.S. 209, explained the necessity of holding a hearing to determine juror impartiality as follows:

> Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a hearing . . . .

See: United States v. Brande (9th Cir. 2003) 329 F.3d 1173, 1178; United States v. Plache (9th Cir. 1990) 913 F.2d 1375, 1377-1378; see also: In re Carpenter (1995) 9 Cal.4th 634, 648; see generally: United States v. Dozier (2nd Cir. 1975) 522 F.2d 224, 228; United States v. Gersh (2nd Cir. 1964) 328 F.2d 460, 463-464.

Here, the trial judge in Appellant's case refused to conduct an appropriate inquiry as to Juror No. 12. This failure to conduct an inquiry constituted a prejudicial abuse of discretion. (See People v. Castorena

(1996) 47 Cal.App.4th 1051, 1065-1067 [murder conviction reversed when the court failed to obtain the facts necessary to decide whether a juror had failed to carry out her duties]; see also People v. Cleveland (2001) 25 Cal.4th 466, 478-486, [trial court had duty to investigate allegations of refusal to deliberate, though it must do so carefully to avoid questioning into the contents of deliberations].) Moreover, as noted, the failure of the trial judge to conduct an appropriate inquiry as to Juror No. 12 constituted a denial of Appellant's due process rights under both the state and federal constitutions.

D. Prejudice.

The prejudice suffered by Appellant cannot be over emphasized. After taking an oath to serve as a juror, Dana W. - Juror No. 12 (684037), as reflected in the report by the investigator for the District Attorney, sought to be relieved of her duties as a juror. Consequently, defense counsel properly raised the issue of whether Dana W. - Juror No. 12 was competent to serve as a juror, that is, whether she was willing, able, and fit to serve. Given the information disclosed by her Juror Questionnaire and during voir dire relative to knowing Tommy Martinez from her employment at the Santa Maria Juvenile Hall - particularly his extensive juvenile record, noting concerns as to the severity of the charges, expressing reservations as to whether she could be a fair juror, and concluding that Appellant had not made "real good choices," coupled with her discussion and comment to the investigator for the District Attorney's Office as to whether he could help her get off the jury, the trial judge was clearly on notice that there was an issue as to Dana W. - Juror No. 12's competence, that is, her willingness, ability, and fitness to serve as a juror. This issue was clearly raised by defense counsel, Peter Dullea.

1. **Guilt Phase.**

During voir dire examination by the court, Dana W. -- Juror No. 12 advised the court regarding her knowledge of the criminal background of Appellant as follows:

> . . . I am totally aware that he had an extensive juvenile record, . . .

(RT 1159).

The juvenile record of Appellant was the subject of the communication by the District Attorney's investigator, Tom Barnes, who set forth in his Memorandum to District Attorney Sneddon (Report No. 2) that he inquired concerning the "disciplinary reports" that may exist in the Juvenile Hall files of Appellant as follows:

> Pursuant to your (via Tracy Grossman) request to obtain any disciplinary reports that may exist in Tommy Martinez' Juvenile Hall file, at about 11:30 a.m., today, I phoned Juvenile Hall in Santa Maria and spoke with "Dana." [Juror No. 12 - 684037]. After explaining what I needed, Dana spoke with her supervisor (name unknown) and said that I would need a court order in order to access the juvenile file.

[A/C CT 00516].

Thus, the "extensive juvenile record" which was of concern to Dana W. - Juror No. 12 relative to her ability to be a fair juror was both highlighted and the importance of said record was emphasized by the request of the investigator to obtain the "disciplinary reports" from the Martinez Juvenile Hall file. The extensive juvenile record of Appellant was the subject of much testimony and evidence in the penalty phase. (See Statement of Facts, herein, ante. at pp. 51-55 and 91-94.) The juvenile record included: (1) the juvenile adjudication of the attempted robbery at

Pepe's Liquors on February 23, 1994 (see Statement of Facts, herein, ante. at p. 53); (2) the juvenile adjudication of grand theft of person of Alicia Anaya at the Delicias De Mexico Ice Cream Shop on April 24, 1992 (see Statement of Facts, herein, ante. at pp. 54-55); and (3) the juvenile adjudication of possession of a deadly weapon, to wit, a hunting knife, on April 22, 1995, at the Strawberry Festival (see Statement of Facts, herein, ante at pp. 53-54). The juvenile record also included the Wellencamp incident of September 1, 1993, regarding the possession of a dagger. (See Statement of Facts, herein, ante. at p. 54) Moreover, it included the testimony of Peter Leyva, Jr., Jim Reyes, and Kim Herman who were employed with the Santa Barbara County Probation Department who attested to the problems they encountered with Appellant at the Los Prietos Boys Camp. (See Statement of Facts, herein, ante. at pp. 91-93.) Defense counsel raised the issue of Dana W. - Juror No. 12's knowledge of Appellant's extensive juvenile record in his challenge for cause (RT 1180-1181) which the court denied (RT 1182).

The extensive juvenile record of Appellant was not relevant to the guilt phase of the proceedings, and moreover, the admission of said juvenile record clearly would have been prejudicial with respect to the determination in the guilt phase. Thus, the knowledge by one juror, Dana W. - Juror No. 12, as to the extensive juvenile record which was both highlighted and the importance of which was emphasized by the request of the investigator for the disciplinary reports prompted Dana W. - Juror No. 12 to seek assistance from the investigator relative to being removed from the jury. Therefore, the guilt and innocence of Appellant was determined by a juror who had knowledge of his extensive juvenile record which was

inadmissible in the guilt phase, thereby tainting the jury and depriving Appellant of his rights to a fair and impartial jury. The tainting of the jury cannot be overemphasized as Dana W. - Juror No. 12 served as the jury foreperson during the guilt phase deliberations. (RT 2744-2750).

2. Penalty Phase.

The prejudice suffered as a consequence of Dana W. - Juror No. 12 remaining on the jury was compounded by the prosecution during closing argument in the penalty phase. As noted, during voir dire, Dana W. - Juror No. 12 stated as follows:

> . . . I think that he's had a lot of choices to make in his lifetime, and I don't see that he's made any better choices.

(RT 1159).

Later, in voir dire, she again reaffirmed her belief that Appellant had made a lot of choices but she did not think that they had been "real good choices." (RT 1160). In his closing argument, D.A. Sneddon exploited the misgivings of Dana W. - Juror No. 12 regarding the "choices" made by Appellant. In addressing the question of mitigation (RT 3977-4024), D.A. Sneddon referenced the words "choose," "choice," and "choices" 42 times. (RT 3979, 3990-3997, 3997, 3999, 4000, 4006, 4012, 4022, and 4024). In an obvious attempt to garner the vote of Dana W. - Juror No. 12, D.A. Sneddon argued as follows:

> And what's it all about? Choices. What's it all about? Sex. Money. What's it all about? It's a decision not to care about people who aren't in the select little few. His choices.

(RT 4022).

D.A. Sneddon concluded his argument in which he asked that the death penalty to be imposed as follows:

> Ladies and gentleman . . . because of the defendant's bad choices, that the appropriate choice for you in this case is that the defendant should be sentenced to die for the crimes that he's committed.

(RT 4024).

It takes no imagination to appreciate that D.A. Sneddon was directing his argument to Dana W. - Juror No. 12, as his comments pertaining to "choices" paralleled those noted by Dana W. - Juror No. 12 during voir dire wherein she expressed reservations concerning her ability to be a fair juror in light of the "choices" Appellant had made as reflected in his extensive juvenile record. The argument by D.A. Sneddon achieved the desired result - a death verdict as to Appellant, Tommy Jesse Martinez, Jr.

In People v. Holloway (1990) 50 Cal.3d 1098, 1112, this Court made clear that a criminal defendant is entitled to be tried by 12 competent jurors, not 11, as follows:

> Defendant was entitled to be tried by 12, not 11, impartial and unprejudiced jurors. "Because a defendant charged with crime has a right to the unanimous verdict of 12 impartial jurors (*People v. Wheeler* (1978) 22 Cal.3d 258, 265-266 [148 Cal.Rptr. 890, 583 P.2d 748]), it is settled that a conviction cannot stand if even a single juror has been improperly influenced." (*People v. Pierce, supra*, 24 Cal.3d at P. 208; see also *In re Stankewitz* (1985) 40 Cal.3d 391, 403 [220 Cal.Rptr. 382, 708 P.2d 1260].) Accordingly, we hold that the judgment must be reversed for jury misconduct.

It follows that in light of questions raised concerning Dana W. - Juror No. 12's competence, that is, her willingness, ability, and fitness to serve which the trial court failed to inquire into, that the judgment as to the

guilt and penalty phases must be reversed. The trial court's error was not harmless beyond a reasonable doubt. People v. McNeal (1979) 90 Cal.App.3d 830, 840; see People v. Chavez (1991) 231 Cal.App.3d 1471, 1482-1483; see also People v. Burgener, supra, 41 Cal.3d 546-547 (Bird, C.J. Concurring and Dissenting).

II. THE TRIAL COURT ERRED IN NOT EXCLUDING STATEMENTS FROM APPELLANT OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS

On April 22, 1998, Appellant Martinez filed a Motion in Limine (Guilt Phase) to Exclude Evidence of his Statements and Other Evidence. (CT 00851). On April 30, 1998, the prosecution filed its opposition (CT 01017). A hearing was held on the Motion in Limine with respect to the exclusion of statements on May 6, 1998 (RT 620 et seq.).

A. Summary of Facts.

Appellant Martinez has sought to have excluded certain omissions, confessions and false exculpatory statements he allegedly made to Officer Lopez, and Detectives Carroll and Aguillon. (CT 00852).

1. Evidence in Written Motion.[8]

Maria Morales Incident.

On November 3, 1996 around 10:15 a.m., Maria Morales was approaching the rear of the "Discount Mall" in Santa Maria where she worked. Her normal route to work was northbound on Russell from Main, and then across the alley and through a fence area to reach the mall parking lot.

As Ms. Morales entered the mall parking lot through the walkway of the fence, she was accosted by a male Hispanic who came up behind her and placed her in a bear hug. A gentleman named Francisco Javier Lopez,

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[8] The facts outlined herein with respect to the written motion were largely set forth in the moving papers by Appellant Martinez which were filed with the trial court. (CT 00851-01002). The prosecution generally accepted as accurate Appellant Martinez's Statement of Facts as outlined in his Motion in Limine (Guilt Phase) (CT 01017 and 01024).

who was waiting in his car in the mall parking lot for the mall to open, saw the man accost Ms. Morales. Mr. Lopez activated his car alarm. Both Ms. Morales and the assailant appeared to make eye contact with Mr. Lopez. The assailant then dragged Ms. Morales down the alley and out of Mr. Lopez's view. Mr. Lopez grabbed a cell phone and a heavy flashlight and followed.

The man whom Ms. Morales said had a knife, said "I want you." She said he grabbed and untied her shirt, and grabbed at her belt and attempted to open her pants. Mr. Lopez appeared in the alley and frightened the man away. Before he left, the man hit Ms. Morales in the face, causing her to fall backward.

After her assailant departed, Ms. Morales noticed that she had lost her pager and several rings. (CT 00854).

Sophia Castro Torres Homicide Incident.

At 11:07 p.m. on November 15, 1996, the Santa Maria Police Department Emergency Dispatcher (911) received an emergency call. The anonymous male caller said that a woman was being attacked on the west side of Little League Park (also known as Oakley Park) by the snack bar, by two black girls, and requested immediate help. The caller said that the two black girls were hitting the woman with baseball bats. The dispatcher, alerted by her telephone system's "Caller ID" function that the call was coming from somewhere on West Main, asked the caller why he went so far from the park in order to place his call. The caller hung up the phone.

The dispatcher sent Officer Luis Murrillo to Oakley Park to investigate. Officer Murrillo received the call at 8 minutes after 11:00, and went to Oakley School at 1120 West Harding in Santa Maria. He entered the property off Western Avenue and turned on his patrol car's lighting

system. As he drove towards the snack bar adjacent to the baseball diamond and bleachers, he observed a woman lying face up on the northwest side of the snack bar. Officer Murrillo attempted to aid the woman, but she was deceased. (CT 00855-00856).

Laura Zimmerman Incident.

On December 2, 1996, sometime between 5:00 p.m. and 6:00 p.m., Laura Zimmerman was leaving work at the Town Center Mall in Santa Maria. A man ran up to her as she was entering her car in the parking structure. Ms. Zimmerman saw the man coming and pushed down the lock button on her car. The man approached and attempted to open the door. He was unsuccessful since she had locked the door. The man then pointed to his wrist and asked her what time it was. She started her car and the man fled. Ms. Zimmerman drove home and called the police. (CT 00857).

Sabrina Perea Incident.

On December 4, 1996, a young man approached Sabrina Perea as she sat outside the "King's Table" restaurant in the Town Center Mall, displayed a knife, and said, "Come with me." Ms. Perea struggled briefly with her assailant, took away the knife with which he had been threatening her, and called the police. (CT 00858).

Questioning by Officer Jeff Lopez.

Santa Maria Police Officer A. Torres was leaving the police department when he heard the dispatcher send Officer Jeff Lopez to the mall. Officer Torres also overheard the description of the assailant given by Ms. Perea. Since the man was last seen by Ms. Perea fleeing east in the direction of Miller Street, Officer Torres and other officers headed in that direction. (CT 00858).

Within a very few minutes after Sabrina Perea reported by telephone to the police that she had been assaulted, police officers spotted Appellant Martinez, who matched the description given in every particular, except that Ms. Perea had not mentioned a bicycle in her report to the dispatcher. Martinez was just a few blocks from the place where Ms. Perea had been assaulted, and he was heading away from the location of the assault. When Officer Lopez shined his spotlight on Martinez, Martinez appeared to notice the officer, and then stood up on the pedals of his bicycle and began to pedal harder and faster in an apparent attempt to get away from the officer. The officers then successfully detained Martinez. When he was apprehended, Martinez was surrounded by three police officers, Officers Lopez, Bongo and Olivares, and at that time he appeared to be very nervous. One of the officers asked Martinez where he was coming from and he replied that he was coming from the "Mall," which was an obvious reference to the Town Center Mall which contains the "King's Table" restaurant, which was the location of the reported assault. (CT 00871-00872).

Questioning by Officer Lopez in the Field.

Officer Lopez continued to question Martinez without advising him of his Miranda rights. Martinez told Officer Lopez that he went to the mall to visit a cousin, but learned that she was not working that night. Officer Lopez then asked Martinez where he was going, and he replied that he was going home to 1114 West Rosewood. The officer told Martinez that Rosewood was west from where they were at that moment, but that Martinez had been heading east. Martinez then said, "Oh, I meant to say that I was going to my cousin's house on Boone Street."

Officer Lopez pointed out that Boone Street was to the south, and that Martinez appeared to be heading north. Martinez hesitated and appeared very nervous. He then said that he was going to visit his cousin on Boone but that he did not know the exact address. He was breathing very heavily and was unable to stand still. Officer Lopez then ordered Martinez to sit down with his legs crossed to await the arrival of Officer Torres with the victim, Ms. Perea. (CT 00872).

Officer Torres then arrived with Ms. Perea, who identified Martinez as the person who assaulted her. The officers then advised Martinez that he was under arrest. Officer Lopez drove Martinez to Santa Maria Police Station and escorted him inside.

As Officer Lopez was escorting Martinez into the Santa Maria Police Station, Officer Torres radioed that he had retrieved the weapon used in the crime scene from Ms. Perea, and Officer Lopez heard this radio message on his personal radio. Martinez allegedly overheard the radio call and stated, "Excuse me officer, did they say something about them finding a knife?" Officer Lopez then said, "Who said anything about a knife?" Martinez then said, "I thought I heard one of your officers say they found a knife where I was at." (CT 00859-00860).

Questioning by Officer Lopez at the Santa Maria Police Department.

Officer Lopez then advised Martinez of his Miranda rights. According to Officer Lopez, Martinez said he understood those rights and wanted to make a statement. Martinez then made a statement to the effect that he had gone to the mall to visit has cousin, Amy Guzman. He parked his bicycle outside the King's Table in the bike racks. He entered the mall and went to the department store called "Lane Bryant" where Amy works.

Martinez noted that Amy was not there and he eventually left the mall on his bike. Martinez denied that he had ever approached the victim (Sabrina Perea) with any type of knife in his hand. Moreover, Martinez insisted that he did not assault anybody with that knife that night and left the mall only after he found that his cousin was not there. (CT 00948-00949).

Detective Carroll's Interviews With Appellant Martinez.

Santa Maria Police Detective Greg Carroll was assigned as the primary investigator in the homicide of Sophia Castro Torres. On December 5, 1996, the morning following Martinez's arrest in connection with the Perea incident, Santa Maria Police Sergeant J. Alm advised Detective Carroll that there might be similarities between the Perea incident and the Torres homicide. Detective Carroll also noted possible similarities between those crimes and the Maria Morales incident.

Santa Maria Police Detective J. Martinez then took a photo lineup to Ms. Morales, who positively identified Martinez as the person who had attacked her.

Santa Maria Police Detective Hammond learned that Laura Zimmerman had reported the approach of a suspicious male in the Town Center Mall on December 2, 1996. Detective Hammond presented Ms. Zimmerman with a photo lineup, and she identified Martinez as the person who attempted to open her car door.

Detective Carroll played the dispatcher's tape recording of the 911 call that had alerted police to the presence of Ms. Torres' body in Oakley Park for Deputy Probation Officer Randy Miller and Deputy Probation Officer Richard Diaz. Mr. Diaz told Detective Carroll that the voice on the 911 tape sounded exactly like Appellant Martinez.

Detective Carroll and Detective Michael Aguillon then proceeded to interview Appellant Martinez. Four interviews were conducted with Martinez over a two day period. (CT 00861). A brief summary of the four interviews conducted by Detectives Carroll and Aguillon follows:

Detective Carroll's First Interview with Appellant Martinez.

Detective Aguillon and Detective Carroll caused Martinez to be transported from the Santa Barbara County Jail on Foster Road to an interview room. They interviewed Martinez starting at approximately 10:10 a.m. on the morning of December 5, 1996. The conversation was partially recorded by Detective Aguillon, and a transcript of the resulting tape recording was prepared by the Santa Maria Police Department. (CT 00862 and 00968-00982).

Detective Carroll reminded Martinez of the conversation about his Miranda rights that he had had the previous night with Officer Lopez, and asked Martinez if he remembered those rights. (CT 00862-00863; 00970). Martinez replied that he did, and that he was willing to speak to the detectives. (CT 00863; 00970). Detective Carroll asked Martinez about the Perea incident. (CT 00863; 00970-00972). Mr. Martinez denied the involvement in the incident, but admitted being at the mall.

Detective Carroll then told Martinez that detectives were also investigating the recent homicide in Oakley Park. Detectives confronted Martinez with the fact that his voice sounded like the voice of the person who called 911 to report the presence of Ms. Torres in the park. Martinez denied calling 911. Detective Carroll told Martinez that Deputy Probation Officer Diaz had identified his voice. Martinez then admitted that he had called 911. (CT 00863 and 00974).

Detective Carroll then asked Martinez to tell the detectives what he had seen the night of Ms. Torres' death. (CT 00863 and 00974).

Martinez then gave detectives an exculpatory statement. (CT 00863). Martinez stated that he used to get drugs off the victim (Sophia Torres). He had gone to meet her at Oakley Park as he was going to buy some drugs off her. It was "dark" and he intended to purchase some "crank." As he walked to the park he was on the sidewalk and saw two other girls with the victim and they were fighting. Upon seeing the fight, he continued walking along the sidewalk in front of Oakley Park and just kept on walking. Martinez noted that they were hitting her and that they were going towards the baseball field. (CT 00955). The detectives believed that portions of this statement were inconsistent and unbelievable; and they pointed this out to Martinez. After some discussion of the contradictions perceived by the detectives, Detective Carroll asked Martinez if Martinez would like some time to think, and offered to leave the room and give Martinez some time to consider his statement. (CT 00863).

The tape recorder was then turned off, and the detectives rose from the table. At this time, Martinez told Detective Carroll that he did not want to talk anymore. (CT 00863). According to the detective's police report, Martinez's statement was to the effect that ". . . he didn't think he wanted to talk anymore right now." (CT 00956; 00864). Detective Carroll replied "That was fine, that we would re-contact him later after he had time to think," to which Martinez replied, "Okay." (CT 00956; 00864).

Detective Carroll's Second Interview With Appellant Martinez.

Detectives then spent the next several hours preparing and obtaining a search warrant for Martinez's residence, and for a "S.A.R.T." exam of the

person of Appellant Martinez. The S.A.R.T. exam is an examination designed to collect evidence for laboratory analysis in cases of suspected sexual assault.

The officers then served the search warrant for the residence, and seized several items of possible evidentiary value.

Detective Aguillon and Detective Carroll then went back to the jail and picked up Martinez for transportation to Valley Community Hospital for the S.A.R.T. exam. They also seized Martinez's clothes and shoes. At 5:05 p.m. on December 5, 1996, the detectives took Martinez to Valley Community Hospital.

On the way to the hospital, Detective Carroll asked Martinez if he had been thinking about what the detectives had talked to him about earlier in the day. Martinez replied, "Not really." Detective Carroll then resumed questioning of Martinez about the Oakley Park homicide, without advising Martinez of his Miranda rights, and without reminding him in any way of those rights and without seeking an additional waiver. (CT 00864; 00957). Martinez again explained his version of the events at the park to detectives; and in the opinion of the detectives, Martinez's statement was inconsistent with his earlier statement. Detective Carroll again confronted Martinez with the perceived inconsistencies. As they were approaching the entrance to the hospital, Detective Carroll said that he "told [Appellant] Martinez that he should think about being truthful with us as it was very important for him to do so, and that we would talk some more later." (CT 00865; 00957-00958) (emphasis added).

The S.A.R.T. Test.

At the hospital, Martinez was escorted into an examination room. An exam was completed by R.N. Kathleen Doty for the purpose of

obtaining evidence that might be useful in determining whether Martinez was the person who had deposited the semen in Ms. Torres' vagina. This included a blood test, the collection of hair samples, and other tests. (CT 00865).

Detective Carroll's Third Interview With Appellant Martinez.

Martinez was taken back to the police station. Detective Carroll again placed Martinez in an interview room. He began again to interview Martinez. He told Martinez that he had been identified by Ms. Perea, Ms. Morales, and Ms. Zimmerman. Martinez again denied the crimes. (CT 00865). Detective Carroll again pointed out what he considered to be inconsistencies in Martinez's statements. (CT 00866).

Martinez drew a diagram of the ballpark and snack bar area on a piece of paper. This diagram has been lost or destroyed. This interview, in which Detective Aguillon participated along with Detective Carroll, was also partially tape recorded. A transcript of the tape recording was prepared by the Santa Maria Police Department. (CT 00866; 00984-00997). At the end of the interview, Detective Aguillon asked Martinez if he would be willing to take a polygraph test. Detective Aguillon told Martinez that the polygraph operator was immediately available. Martinez then stated: "I think I should talk to a lawyer before I decide to take a polygraph." (CT 00866; 00961). Martinez was then returned to the jail substation. (CT 00866).

Detective Carroll's Fourth Interview With Appellant Martinez.

On the morning of December 6, 1996, Martinez was transported by sheriff's personnel to Santa Maria Municipal Court for arraignment and

assignment of appointed counsel. Detective Carroll and Detective Aguillon approached Martinez, who was alone in a holding cell, and asked Martinez "if he mind if we spoke with him some more." Martinez answered "No," and shrugged his shoulders. This interview was not tape recorded.

The detectives again asked Martinez about the homicide. He again insisted that his statement the day before was what he saw. Detective Aguillon testified that he then asked Martinez if the Ms. Perea and Ms. Morales incidents actually occurred, and Martinez responded "Yeah, I did those, but I was just going to rob them." Detectives questioned Martinez briefly about some of the details of those two crimes. Martinez told officers that he had no intention of sexually assaulting the two women. (CT 00866-00867; 00961).

B. Evidence At Hearing.

On May 6, 1998, D.A. Sneddon moved the court for judicial notice of certain items in two court files, SMJ 10152 and Superior Court file SM 97060. (CT 01091-01092; RT 625-626). D.A. Sneddon argued that Appellant Martinez's sophistication and knowledge of his rights under the "totality-of-the-circumstances rules" could be considered by the court in evaluating his motion to exclude evidence. (RT 625). D.A. Sneddon made the following offer of proof in this regard:

> [M]y offer of proof is that in each of those instances, the defendant was contacted, he was a suspect in a crime, was arrested, was Mirandized, waived and gave a statement, and at no time during any of those conversations did he invoke his rights.

(RT 625-626).

D.A. Sneddon noted further that file SMJ 10152 was a juvenile file in which he was represented by the public defender and SM 97060 was an adult file in which he was also represented by the public defender. (RT 626). Thus, D.A. Sneddon concluded that Appellant Martinez knew that he had a constitutional right to a lawyer (RT 626). D.A. Sneddon called Officers Kendall Greene, Daniel Begg, Larry Ralston, and Jorge Lievanos to provide the factual basis for his assertions. (RT 625).

Officer Kendall Greene attested to the circumstances surrounding his arrest of Appellant Martinez regarding a robbery in May of 1992. Martinez was transported to the Santa Maria Police Department where Officer Greene advised him of his Miranda rights. Martinez signed a written waiver of his rights. Officer Greene then had a conversation with Martinez. (RT 628-637).

Officer Daniel Begg attested to his arrest of Appellant Martinez on March 30, 1993 in connection with a petty theft. Prior to having a conversation with Appellant Martinez, he advised him of his constitutional rights under Miranda. During the course of the conversation, Martinez did not invoke his rights either not to talk any further or to request the presence of a lawyer. (RT 638-641). Officer Begg acknowledged that Martinez was a juvenile at the time. The parties stipulated as to Appellant Martinez's date of birth being 10-10-77. (RT 641-642).

Officer Larry Ralston arrested Appellant Martinez on February 22, 1994 regarding a robbery at a local liquor store. He advised Appellant Martinez of his Miranda rights. Further, he also advised Martinez that he could have his mother present and she was, in fact, present. At no time during the conversation did Martinez request the presence of a lawyer nor did he decline to talk to Officer Ralston in any respect. (RT 642-648).

Officer Ralston acknowledged that Appellant Martinez's mother was present during the interrogation because he was a minor at the time. (RT 649).

Officer Jorge Lievanos arrested Appellant Martinez on April 2, 1996 in connection with a fight. (RT 649-651). Officer Lievanos interviewed Martinez at the Santa Maria Police Department. (RT 652). Prior to the interview, Officer Lievanos advised Martinez of his constitutional rights. (RT 652). He obtained a waiver of those rights from Martinez. (RT 652). During the interview, he confronted Martinez with the fact that he thought he was not telling the truth and that there were inconsistencies in his story. (RT 652). During the direct examination of Officer Lievanos by D.A. Sneddon, the following colloquy took place:

> **Q.** [Mr. Sneddon] . . . [A]t any time during that conversation, did Mr. Martinez request the presence of a lawyer, or invoke his right not to talk any further?
>
> **A.** There at the very end.
>
> **Q.** What happened at the very end?
>
> **A.** Where he indicated he had nothing further to state.
>
> **Q.** And then you terminated the conversation?
>
> **A.** That's correct.

(RT 653).

During cross-examination, defense counsel, Mr. Dullea, inquired further as follows:

> **Q.** [Mr. Dullea] . . . [Y]ou thought that Martinez was not being truthful in his first interview?

A. [Jorge Lievanos] Sure.

Q. And the second interview, you told him that, and he said, "I have nothing more to say"?

A. Correct.

Q. Indicating that he did not want to discuss it any more, correct?

A. Correct.

(RT 655).

D.A. Sneddon also called Officer Jeff Lopez (RT 656-693) and Detective Gregory Carroll (RT 693-735).

Officer Jeff Lopez

Officer Jeff Lopez attested to the circumstances surrounding the arrest of Appellant Martinez with respect to the assault of Sabrina Perea on December 4, 1996. (RT 656-663). Martinez was then transported to the Santa Maria Police Department and was placed in an interview room. (RT 664). He was advised of his rights, per Miranda. (RT 666-667). Martinez acknowledged that he understood his rights and noted that he wished to talk to Officer Lopez. (RT 667). Officer Lopez interviewed Martinez for approximately ten minutes (RT 669; 691). The focus of the ten minute interview was on whether Martinez had committed the crimes against Sabrina Perea which included an apparent kidnap attempt as well as an assault with a knife. (RT 691-692). Further, Officer Lopez pointed out inconsistencies in the Martinez story, communicated his disbelief, and made it clear that he strongly suspected that Martinez was guilty of the crimes against Perea. (RT 692-693). The ten minute interview concluded as

reflected in the following colloquy between D.A. Sneddon and Officer Lopez:

> **Q.** [Mr. Sneddon] Did, at any time during that conversation, Mr. Martinez indicate he wanted a lawyer?
>
> **A.** [Officer Lopez] No, he did not.
>
> **Q.** Did he indicate that he wanted to terminate the conversation?
>
> **A.** He told me at one point that this is all the information that he can tell me.
>
> **Q.** And then you --
>
> **A.** And then I stopped talking to him.

(RT 669).

Moreover, during cross-examination, defense counsel, Mr. Dullea, inquired further as follows:

> **Q.** (Mr. Dullea) Now, you took Mr. Martinez in and Mirandized him?
>
> **A.** (Officer Lopez) Correct.
>
> **Q.** And you had a conversation?
>
> **A.** Yes.
>
> **Q.** And that conversation was about ten minutes in length?
>
> **A.** Approximately, yes.
>
> **Q.** All right. And the focus of that conversation was whether or not he committed the crimes that Sabrina Perea described, which included an apparent kidnap attempt and had something to do with a knife; correct?

A. Yes.

Q. And you communicated that to Mr. Martinez?

A. Yes, I did.

Q. And he gave you an explanation?

A. Yes.

Q. And you didn't believe it?

A. At the time I did not, no.

Q. Okay. And you communicated your disbelief to him by pointing out inconsistencies and problems with his story; correct?

A. Correct.

Q. And you continued to do that for a couple of minutes?

A. Yes.

Q. All right. And finally, you asked why the victim would accuse him of doing such a thing?

A. Correct.

Q. Okay. And approximately at that point he said, "That's all I can tell you"?

A. That's correct.

(RT 691-692).

In light of the testimony of Officer Lopez, defense counsel, Mr. Dullea, sought leave to amend his motion to challenge the legality of Detective Carroll's first interview with Appellant Martinez. (RT 670-671).

The court granted leave for the defense to amend its motion to include the initial conversation with Detective Mr. Carroll. (RT 671). Defense counsel, Mr. Dullea, noted that the basis for the claim was that Martinez invoked his Miranda rights when he told Officer Lopez "that's all I can tell you." (RT 671).

Detective Gregory Carroll

In November of 1996, Detective Gregory Carroll was investigating the death of Sophia Torres at Oakley Park. He was informed on December 5, 1996 that Appellant Martinez had been taken into custody in connection with another incident. (RT 694). Based on his review of the initial reports completed by Officer Lopez and Officer Torres, he was aware that Martinez had been Mirandized the night before in connection with his arrest. (RT 696).

Interview #1

Detective Carroll and Detective Aguillon interviewed Martinez at 10:00 a.m. on December 5, 1996 at the Santa Barbara County Jail at the Santa Maria Substation located on Foster Road. (RT 695-696). Martinez was placed in an interview room at the request of Detectives Carroll and Aguillon. (RT 697). The interview was tape recorded. (RT 697). Detective Carroll admitted that he never personally read Martinez his Miranda rights from a card, nor did he ever give him a verbatim admonition of his rights. (RT 722). Moreover, the only time that Detective Carroll discussed the subject of rights at all with Martinez was prior to their first interview. (RT 723). Further, Detective Carroll relied on that portion of the written report by Officer Lopez in which he stated that he had read Martinez his Miranda rights. (RT 723). He also noted that Martinez had waived his Miranda rights. (RT 723). Detective Carroll did not remember

reading in the Lopez report that Martinez ended the conversation by saying "I have nothing more to state," or words to that effect. (RT 723-724).

The first interview between Detectives Carroll and Aguillon and Appellant Martinez was tape recorded. (RT 697). The tape of the interview was played to the court and further a transcript was provided which accurately represented the conversation as contained on the tape. (RT 698-699; RT 707; RT 710). The defense and prosecution stipulated that the court reporter did not have to report the tape recording. (RT 706-707). Further, Detective Carroll noted that the transcript, Exhibit 2A, accurately represented the conversation that was contained on the tape as reflected in Exhibit 2. (RT 699). The tape (Exhibit 2) and the transcript (Exhibit 2A) (CT 03069-03083) were admitted into evidence for purposes of the hearing. (RT 736).

The interview between Detectives Carroll and Aguillon and Appellant Martinez as reflected on the tape and transcript provided in pertinent part as follows:

CARROLL: How you doing. Your Tommy right?

MARTINEZ: Yes.

CARROLL: Hi. I'm Detective Carroll, this is Detective Aguillon.

MARTINEZ: How you doing?

AGUILLON: How you doing. Go and have a seat.

AGUILLON: Thanks.

CARROLL: Thank you.

. . .

CARROLL: What happened um ... Well, let me get your full name.

MARTINEZ: OK.

CARROLL: Your last name is?

MARTINEZ: Martinez.

CARROLL: First name?

MARTINEZ: Tommy . . .

. . .

CARROLL: Um, why don't you kinda run down, you remember the officer who read you your rights last night?

MARTINEZ: Yeah.

CARROLL: Do you remember those rights and do you still understand them and everything?

MARTINEZ: Yeah.

CARROLL: OK, um, do you still want to talk to us?

MARTINEZ: Yeah.

CARROLL: OK, what, what happened last night?

MARTINEZ: Well, ah, I really don't know what happened last night see cuz I was at the mall.

CARROLL: Uh huh.

MARTINEZ: . . . but, I wasn't really there that long. I, I went, during closing cuz my cousin Aimee works there, so I just parked my bike in front of where, um, what's that, Kings Table? And then I went upstairs to my cousin's and then she wasn't in her store so I walked to another store that she works

at, and she wasn't there so I got on my bike and I left. Well, I walked up the parking um parking lot, all three of them, to see if her car was there, then I left. Then, I went, what's that street called? I don't know the name of the street. It's the one that um from the mall, it takes you all the way down by the library.

AGUILLON: Oh, ah, McClellan?

MARTINEZ: I don't know.

CARROLL: OK.

MARTINEZ: And then I went down that way, I was gonna go to Burger King, to get, I mean not Burger King, Jack in the Box.

CARROLL: OK.

MARTINEZ: . . . to get me something to eat. And then, I decided not to, I was gonna go to my friend's house, and I came back down this way, and I went through the mall and went through those buildings right there, the law offices, I went through there and then I was crossing over Miller, and that's when I got stopped.

CARROLL: OK. Um, how about the knife?

MARTINEZ: I don't know. They said they got a knife?

. . .

AGUILLON: Do you know why the girl would pick you out and say that you were the one that was doing all this stuff?

MARTINEZ: Ah, I don't know. I don't even know what stuff she said. All I know is that, what, what the cops told me that somebody came up to her with a knife and that she took the knife away from them and, that's it. I don't know what happened last night.

CARROLL: OK, they, it was um, they put the knife up to her in a threatening manner and uh, told her to come with them. Do you know anything about that?

MARTINEZ: No.

CARROLL: You wouldn't be involved in anything like that?

MARTINEZ: No.

. . .

CARROLL: Do you have just, hang on here for just a minute, I want to talk to my partner out here.

MARTINEZ: OK.

TAPES SHUTS OFF.

CARROLL: And its, you were talking about the park on Western right?

MARTINEZ: Yeah.

CARROLL: And that's called?

MARTINEZ: Oakley Park.

CARROLL: Oakley Park and what baseball diamond?

MARTINEZ: I don't know, it's the Westside Little League.

CARROLL: It is the Westside Little League?

MARTINEZ: Yeah.

AGUILLON: And your gonna say that that tape is not your voice?

MARTINEZ: Yeah.

CARROLL: And you don't know anything about a gal, or you didn't drive your bike by and see this gal laying there and decide to try and get her some help?

MARTINEZ: No.

CARROLL: Your positive?

MARTINEZ: Yeah.

CARROLL: Well there's, I mean we took this tape recording to Probation.

MARTINEZ: OK.

CARROLL: Rick Diaz, you know Rick right?

MARTINEZ: Yeah.

CARROLL: He was your case worker for like three years?

MARTINEZ: Yeah.

CARROLL: He said, "Yeah, that sounds like Tommy. That sounds like him."

. . .

MARTINEZ: OK. I am the one that called in.

CARROLL: Good. That's what we needed. I mean, that's outstanding. What happened?

MARTINEZ: Um, that lady, well, I used to get drugs off of her.

CARROLL: Off of her?

MARTINEZ: Yeah.

CARROLL: OK.

MARTINEZ: And it's, I went to go meet her, her right there.

AGUILLON: At Oakley?

MARTINEZ: Yeah.

AGUILLON: What time?

MARTINEZ: I don't remember what time.

AGUILLON: Was it dark or was it light?

MARTINEZ: It was dark.

CARROLL: What, what kind of drugs were you getting off of her?

MARTINEZ: Crank.

CARROLL: And, what time of night was it?

MARTINEZ: Oh, I don't know.

AGUILLON: OK. Let me ah . . .

MARTINEZ: And then, as I got to . . .

AGUILLON: Hang on a second, hang on . . .

CARROLL: OK. Just so we get everything straight. OK, ah, you're Tommy Martinez, I'm Detective Carroll, and this is Detective Aguillon and you have just told us that you made the call on the 9-1-1 right?

MARTINEZ: Right.

CARROLL: OK, go ahead and go from there.

MARTINEZ: OK.

. . .

CARROLL: OK, go ahead.

MARTINEZ: I don't know where to start.

CARROLL: So, go ahead from when you met her at the park.

AGUILLON: And, this gal you used to buy drugs off of, crank, correct . . .

MARTINEZ: Yeah.

CARROLL: OK, go ahead.

MARTINEZ: Anyways, I went to the park to get some . . .

CARROLL: Go ahead.

MARTINEZ: Anyways, that's when I seen her fighting with, watched those two other girls fighting with her.

CARROLL: The two black chicks.

MARTINEZ: Yeah, anyways, there was a guy parked, in the front.

CARROLL: So, you saw two black chicks fighting with her?

MARTINEZ: Yeah.

CARROLL: And there was a guy parked where?

MARTINEZ: There was a guy parked in the front of the park.

CARROLL: What kind of car?

MARTINEZ: It was a little beat up car, I don't remember.

CARROLL: OK, and did you get a good look at this guy?

MARTINEZ: No.

CARROLL: OK. And, did you say anything when they were fighting?

MARTINEZ: I just kept on walking by.

CARROLL: You were walking on foot then?

MARTINEZ: Yeah.

CARROLL: And, what time of night was this about?

MARTINEZ: Um, er, I don't remember . . .

CARROLL: You don't remember at all?

MARTINEZ: No.

CARROLL: Was it, it was dark out though huh?

MARTINEZ: Yeah.

CARROLL: Do you remember what time you made the call?

MARTINEZ: Not really.

. . .

CARROLL: Were you high at the time?

MARTINEZ: Yeah.

CARROLL: On?

MARTINEZ: Crank. And that's, . . .

CARROLL: Why, why do you think these black chicks were beating her up?

MARTINEZ: I don't know.

CARROLL: OK. And, did you go directly to the pay phones over there and then call the police, or you kinda . . .

MARTINEZ: Well, I walked home, and then I thought about it, and then, I go, I gotta get her some help and I walked to the pay phone and I called. I didn't want to say my name because I was high on crank, and I didn't want to be arrested for it, so I walked to a pay phone and then I just walked home.

. . .

MARTINEZ: And they were chasing her, and they were just hitting her, she was like going this way like towards the baseball field . . .

AGUILLON: Playground.

MARTINEZ: No, they were at the playground . . .

AGUILLON: Right.

MARTINEZ: Going towards the baseball field.

CARROLL: OK. When, when you called in, how come you said they were near the snack bar?

MARTINEZ: Cause they were going towards that way.

. . .

CARROLL: Let's, if you were involved in this . . . OK, hold on, listen to me first OK . . . If you were involved in this, it's better to tell us now. To show, listen, to show some remorse, it'll play a lot later on. Because if your going to play this, and we know from the tape, you had to be right by that gal to call that in. OK, let me finish, hold on, OK, and if you start

playing a game, it's gonna come back and bite you in the ass later. Tell the truth now, hold on, let me finish OK. Because we have a lot of physical evidence and if stuff starts matching to physical evidence we find from you or your home, or things like that, then you're gonna be in trouble. Then you are looking at, uh, first degree, homicide. OK. And that's why now is important that you help yourself by telling the truth. OK.

MARTINEZ: OK, but the truth is what I have told you so far.

. . .

MARTINEZ: She was . . . She was still fighting when I left.

CARROLL: Things get out of, things get out of hand, right? And you go and call. That's our point that, no I didn't know she was dead. I was trying to get her help. You know, I was loaded I was high, . . . And, I screwed up, but I didn't mean to kill her, I meant to get her some help.

MARTINEZ: It wasn't me. But don't change the story around like I was the one beating her because it wasn't me . . .

CARROLL: OK, well, let me explain something . . .

MARTINEZ: See I was, I went to the park to meet her there. I was walking down Western, I could see right here, from the corner, they were fighting right here and they were headed that way. I crossed over the street and I walked down, I think it's Bunny . . . the first street right there. I walked down that street and then I walked back. I went, I walked down that street, walked to the corner, I went back this way and then I walked back to my house.

AGUILLON: You see, the odd thing about it is that, ah, even if we say two black girls were beating her up over there. Like we said, we know that she was sexually assaulted, how could two black girls sexually assault her and leave semen?

MARTINEZ: I don't know.

CARROLL: But you do know.

MARTINEZ: I don't know.

CARROLL: Are you going to be able to identify these black girls?

MARTINEZ: No.

. . .

AGUILLON: So it's like, maybe there was more than one of you and you don't know the one who sexually assaulted her? There was somebody else with you like just like the, like the breaking into that guy's house and beating him up, you just going to go ahead and take the rap for somebody else?

MARTINEZ: There was nobody with me. It wasn't me. I was walking, I was gonna meet her there.

CARROLL: OK, but let me explain something else. We've done our background on this gal. She don't deal dope. She's not a dope dealer. She's a semi transient gal, who was maybe a little mentally slow. She's not out there slinging dope. Nothing to indicate that she is a dope dealer. Your story about you buying dope from her is gonna fly about two feet before it crashes right into the ground and I am not trying to be a dick with you, I'm trying to help you out.

MARTINEZ: I've bought crank off of her.

CARROLL: Where does she get crank?

MARTINEZ: I don't know.

. . .

AGUILLON: Where did you meet her at?

MARTINEZ: Right there at that La Jolla Plaza, at that bar that Los Tres Amigos.

. . .

CARROLL: That was the first night you met her?

MARTINEZ: Yes.

CARROLL: So, that was the first time you bought crank off of her?

MARTINEZ: Well, the first time I was gonna buy crank off of her.

CARROLL: OK. So, but you recognized her from a distance in the dark as it being her. There's no lights there. If you're over here, she's over here, how you gonna recognize her?

MARTINEZ: I didn't say I recognized her as the one being beat . . .

CARROLL: Well, you did. You said you knew it was her cause that's the gal you buy crank off of, it's on the tape. I'm telling you, now is the time to come clean.

MARTINEZ: I am telling you the truth.

. . .

CARROLL: Do you understand what we're telling you, that the story does not make sense?

MARTINEZ: Yeah.

CARROLL: I mean your gonna help yourself out now, because later on when we stack this other evidence on you, your gonna fall hard.

MARTINEZ: What other evidence?

CARROLL: I'll tell you, there's gonna be a shit load.

MARTINEZ: All right, well . . .

AGUILLON: Do you understand what he meant about being

remorseful? Do you know what that is?

MARTINEZ: No.

AGUILLON: It means it's showing people like the courts and people that hear these statements and listen to you talking to us now that you felt sorry, that you didn't want, didn't mean it, to, your sorry you did it, and that your not gonna try and hide, your not trying to lie and try to get away with a homicide. See when they read that and they're looking at how they think your mind is working, they're saying gee, you know, he made the phone, 9-1-1 call, and he sounded like he wanted, he was concerned that she maybe she might be able to make it, but then the next day, or a couple of days after when he finds out that she is dead, he doesn't come to the cops at all. So when they finally confront him about it, he starts making up some wild story about hey, I wasn't even, barely met her, so, once bought crank from her, you don't show that you have any kind of concern toward her or the fact that she died.

CARROLL: Or, or her family whose now, you know, the ones who are the real sufferers in this thing, I mean it's over for her. She's dead.

AGUILLON: That's what he's, he's trying . . .

CARROLL: That's what we're talking about. You know, and like you say, that's what we mean about showing the court, hey, I am remorseful, things got out of hand and this is what happened. It makes a big difference.

AGUILLON: I was cranked up, whatever . . .

CARROLL: And it does, it makes a huge difference.

AGUILLON: Why don't you think about it. We'll let you have a break here now.

END OF TAPE

(CT 03069-03083; RT 707 and 710).

Detective Carroll stated that there were additional things that were said that were made the subject of a police report after the tape had been turned off. (RT 705). He noted that during the conversation Martinez told a version of the events with respect to both the Perea incident and the Torres incident in which he perceived inconsistencies. (RT 725). He thought there was something wrong. (RT 725). Further, both Detective Carroll and Detective Aguillon told Martinez that they did not believe him. (RT 725-726). Towards the end of the interview, Detective Carroll made it clear to Martinez that he did not believe him, that he thought Martinez should think it over and tell the truth. (RT 726). Detective Aguillon, at the conclusion of the interview, advised Martinez to "think about it" and noted further that they would take a break. (RT 726). The tape was then turned off. (RT 726). As everyone was preparing to leave, Martinez made the following statement: "I don't want to talk anymore right now." At this juncture, there was no questioning taking place. (RT 727-728; and RT 712). Detective Carroll noted that this was fine, that they were going to take a break, and suggested to Martinez that he "think about it," and that they would "come back and talk with" him. (RT 712). Martinez responded "Okay." (RT 712-713).

Interview #2

At approximately 5:00 later that day, Detectives Carroll and Aguillon picked Martinez up from the Santa Barbara Sheriff's Department Jail and transported him by car to the Valley Community Hospital for the S.A.R.T. exam. (RT 714 and 731). During the 10 to 15 minute ride to the hospital, Detective Carroll conducted a second interview of Martinez. He inquired as to whether Martinez had followed Detective Aguillon's suggestion of "thinking it over." Martinez responded "No, not really." (RT 715-716; and

731). Officer Carroll then specifically asked Martinez to tell him again his version of what transpired on the evening that Sophia Torres was killed. (RT 731 and 716).

Interview #3

Upon their return from the hospital to the Santa Maria Police Department, Martinez was again placed in an interview room. (RT 716 and 731). This third conversation lasted approximately 30 to 45 minutes. (RT 732). Detective Carroll then stated to Martinez "Let me lay out what we have, what evidence or what information we have so far." He then detailed information concerning the search warrant, photo labs on the other victims in the case, and further informed him that there was no longer just victim Perea from the mall who had identified him, but that "two other gals" had identified him as well. (RT 717-718). Martinez stated that he did not commit the homicide and again gave his version of the events regarding the "black girls." (RT 732). Detective Carroll said "I don't believe you." Martinez responded, "That is what happened." (RT 732). Detective Carroll then told Martinez "to continue to think about it." (RT 732). As Detectives Carroll and Aguillon were walking out of the room, they had stood Martinez up, and he had been handcuffed again. Detective Aguillon asked him if he would take a polygraph. (RT 719). He also stated that he could have someone there in five minutes. (RT 733). Martinez responded as follows: "I think I should talk to a lawyer before I decide to take a polygraph." (RT 735 and 720).

Interview #4

On December 6, 1996 at 9:00 a.m., Detectives Carroll and Aguillon interviewed Martinez for a fourth time. (RT 720-722). Detectives Carroll and Aguillon inquired of Martinez as follows: "You don't mind if we talk

to you?" Martinez responded "No," and kind of shrugged his shoulders and then they began talking. (RT 721). Detective Carroll again then asked questions concerning the death of Sophia Torres. Towards the end of the conversation, he stated as follows:

> So everybody here is lying but you. These gals who identified you, they are all lying. You're the only one telling the truth.

(RT 721).

According to Detective Carroll, the following exchange took place:

> [Martinez] [m]ade the statement that -- that he [Martinez] didn't -- referring to Zimmerman. I'm going to use her name, but he didn't, obviously, call her by name. But he said he didn't do Zimmerman, but he did the other two gals, and then stated that he wasn't going to rape them, he was just going to rob them.

(RT 721-722).

C. The Trial Court Rulings.

At the conclusion of the hearing on May 6, 1998, and after argument by counsel, the trial court orally denied the defense motion to exclude the admissions, confessions, and false exculpatory statements of Appellant Martinez predicated on Miranda violations. The trial court ruled as follows:

> **THE COURT**: All right. The -- as to the detention, the Court finds the detention was lawful. I don't think anyone really contests that. The Court finds no violation of *Miranda* for the questioning during the detention.
>
> . . .
>
> But at any rate, I find that the statements made during that detention are admissible, not in violation of *Miranda*.

The next item that the defense maintains is a statement of his -- or a claim of his rights under *Miranda*, "That's all I have to say," or "That's all I have to talk about," I don't believe is an unequivocal or a clear assertion of any constitutional right. I think he was saying at that point, "This is" -- as you both used the words, "This is my story and I'm sticking to it," and that's pretty much what he's saying there. And that's how I view it, so I don't believe that he did claim a right to stop talking at that point.

The next one is, "I don't want to talk about it anymore right now," and I cannot agree with Mr. Dullea that the "right now" is surplusage. I think it's -- it modifies the immediate sentence before it. "I don't want to talk about it anymore right now."

I'm reminded of the surrender of Geronimo after fighting and fighting the soldiers all of those years, and winning and winning. They finally coerced him out of the hills by threatening his -- you know, the children in the tribe, and he came down and he said, "I will fight no more forever." That's unequivocal.

"Right now" means just that. "Right now, I don't want to talk about it."

On the last one, where he said, "I think I used to" -- "I think I need to talk to my lawyer before I take a polygraph," I find that that was strictly as it says, a desire to talk to a lawyer before he would take a polygraph, not before he would talk any further.

So the Court finds all the statements are admissible, that there was not a violation of the defendant's rights under *Miranda* in those cases.

(RT 753-755; see also CT 01093-01095 at 01094).

As a consequence of the trial court's ruling, all statements made by Appellant Martinez, whether they be deemed admissions, confessions, and/or false exculpatory statements, were admitted at trial with respect to all four interviews involving Detectives Carroll and Aguillon. (RT 1597-1604; RT 1897-1925; RT 1933-1944; RT 1949-1967). This included the playing of the tape of the first interview between Detectives Carroll and Aguillon and Appellant Martinez on December 5, 1996 (People's Exhibit 61) as well as providing the jury with a copy of the transcript of the interview as set forth in Exhibit 61A (CT 03113-03126) to assist them in following along the tape recorded first interview. (RT 1923-1925). This also included the playing of the tape of the second interview between Detectives Carroll and Aguillon and Appellant Martinez which took place on the evening of December 5, 1996 (People's Exhibit 62) as well as providing the jury with a copy of the transcript of the interview as set forth in People's Exhibit 62A (CT 03127-03139) to assist them in following along the second tape recorded interview. (RT 1943-1943).[9]

The prejudicial effect of the various statements by Appellant Martinez as reflected in the four interviews with Detectives Carroll and Aguillon is self-evident with respect to both the capital charge and non-capital charges involving the decedent, Sophia Torres and surviving victims, Maria Morales, Laura Zimmerman, and Sabrina Perea.

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[9] Pursuant to a stipulation by the parties, the reporter was not required to report the tapes which recorded the first and second interviews as reflected in People's Exhibit 61 and 62. (See RT 706-707). Transcripts of the tape recorded interviews as reflected in People's Exhibits 61A (CT 03113-03126) and 62A (CT 03127-03139) were admitted into evidence. (RT 2061-2063).

D. Appellant's Miranda Rights Were Violated.

In People v. Crittenden (1994) 9 Cal.4th 83, 128-130, this Court generally summarized those principles involved in the invocation of Miranda rights as follows:

> We recently have observed that "'[t]he scope of our review of constitutional claims of this nature is well established. We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. [Citation.]'" (*People v. Johnson* (1993) 6 Cal.4th 1, 25 [23 Cal.Rptr.2d 593, 859 P.2d 673]; *People v. Boyer, supra*, 48 Cal.3d 247, 263.)
>
> As we stated in *People v. Sims* (1993) 5 Cal.4th 405, 440 [20 Cal.Rptr.2d 537, 853 P.2d 992], "[u]nder the familiar requirements of *Miranda*, designed to assure protection of the federal Constitution's Fifth Amendment privilege against self-incrimination under 'inherently coercive' circumstances, a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent." (Citing *Miranda v. Arizona, supra*, 384 U.S. 436, 444-445, 473-474 [16 L.Ed.2d 694, 706-707, 722-723].) "Once having invoked these rights, the accused 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.'" (5 Cal.4th at p. 440.) (Citations omitted). If, subsequently, assuming there is no break in custody, the police initiate a meeting in the absence of counsel, the suspect's statements are presumed involuntary and are inadmissible as substantive evidence at trial, even if the suspect executes a waiver and the statements would be considered voluntary under traditional standards. (*McNeil v.*

Wisconsin, supra, 501 U.S. 171, 176-177 [115 L.Ed.2d 158, 167-168]; see *Michigan v. Harvey* (1990) 494 U.S. 344, 350 [108 L.Ed.2d 293, 302, 100 S.Ct.. 1176].)

If a suspect indicates "in any manner and *at any stage of the process*," *prior to* or during questioning, that he or she wishes to consult with an attorney, the defendant may not be interrogated. (*Miranda v. Arizona, supra*, 384 U.S. at pp. 444-445 [16 L.Ed.2d at pp. 706-707], italics added; *id.* at pp. 470, 472-474, 477-479 [16 L.Ed.2d at pp. 721, 722-724, 725-727]; (Citations omitted).

. . .

We have observed previously that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent (*People v. Randall* (1970) 1 Cal.3d 948, 955 [83 Cal.Rptr. 658, 464 P.2d 114]), and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. (*People v. Burton, supra*, 6 Cal.3d 375, 382.) . . .

[We] apply federal standards in reviewing a defendant's claim that his or her statements were elicited in violation of *Miranda*. (*People v. Sims, supra*, 5 Cal.4th 405, 440; *People v. Markham* (1989) 49 Cal.3d 63, 67-71 [260 Cal.Rptr. 273, 775 P.2d 1042].) Subsequent to its decision in *Edwards*, the United States Supreme Court observed that "[t]he rule of [*Edwards*] applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. [Citation.] It requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*McNeil v. Wisconsin, supra*, 501 U.S. 171, 178 [115 L.Ed.2d 158, 168-169], italics omitted.)

The trial court erred in its determinations that Appellant Martinez did not invoke his right to remain silent under Miranda at the conclusion of the

Officer Lopez interview as well as at the conclusion of the first interview conducted by Detectives Carroll and Aguillon. Moreover, the trial court erred in its determination that Appellant Martinez did not invoke his right to counsel under Miranda at the conclusion of the third interview conducted by Detectives Carroll and Aguillon.

First Invocation of the Right to Remain Silent -- Lopez Interview.

The trial court determined that at the conclusion of the interview conducted by Officer Lopez that Appellant Martinez stated "That's all I have to say" or "That's all I have to talk about." (RT 754). The trial court concluded that such a statement did not constitute "an unequivocal or a clear assertion of any constitutional right." (RT 754). This court has clearly established that the determination of whether a suspect has invoked his right to remain silent under Miranda is a question of fact to be decided in light of all of the circumstances.

In People v. Musselwhite (1998) 17 Cal.4th 1216, 1238, this Court noted as follows:

> [A]s *Miranda* itself recognized, police officers must cease questioning a suspect who exercises the right to cut off the interrogation. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda, supra*, 384 U.S. at pp. 473-474 [86 S.Ct. at p. 1627].) "Whether the suspect has indeed invoked that right, however, is a question of fact to be decided in the light of all the circumstances . . . ." (*People v. Hayes* (1985) 38 Cal.3d 780, 784 [214 Cal.Rptr. 652, 699, P.2d 1259].) We have also said that "'[a] desire to halt the interrogation may be indicated in a variety of ways,'" (*id.* at p. 784) and that the words used "'must be construed in context.'" (*Id.* at pp. 784-785.)

Accord People v. Castille (2003) 108 Cal.App.4th 469-488, quoting Justice

Holmes as follows:

> As the revered Justice Holmes observed: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (Towne v. Eisner (1918) 245 U.S. 418, 425 [38 S.Ct. 158, 159, 62 L.Ed. 372].)

Thus, central to the analysis of whether a defendant has invoked the right to remain silent under Miranda is the principle that the words used must be placed in "context" in order to make such a determination. Here, the trial court did not place the words employed by Martinez in "context," and hence, the determination that he did not invoke his right to remain silent at the conclusion of the interview with Officer Lopez is not supported by substantial evidence. (People v. Crittenden, supra, 9 Cal.4th at 128.)

The prosecution proffered four prior instances in which Appellant Martinez was arrested, Mirandized, waived his rights, gave a statement, and at no time invoked his constitutional rights. (RT 625-626). According to the prosecution, under the "totality-of-the-circumstances rules" the court could consider the sophistication and knowledge of his rights by Appellant Martinez in evaluating his motion to exclude. (RT 625). However, the evidence did not substantiate the proffer by the prosecution.

Three of the instances involved juvenile proceedings as to Appellant Martinez for: (1) a robbery in May of 1992 when Martinez was 14 years of age, (2) a theft on March 30, 1993 when Martinez was 15 years of age, and (3) a robbery on February 22, 1994 when Martinez was 16 years of age. (RT 628-637; 638-641; and 642-648). Of note, as to the robbery incident on February 22, 1994, Appellant Martinez's mother was present during the interrogation because he was a minor at the time. (RT 649).

The prosecution also proffered one incident involving Martinez when he had reached the age of majority, i.e., age 18, involving a fight on April 2, 1996. (RT 649-652). However, the evidence adduced at the hearing with respect to this incident demonstrated that contrary to the assertions by the prosecution, Martinez did invoke his right to remain silent after being interrogated by Officer Jorge Lievanos. (RT 653 and 655). Officer Lievanos confirmed that he arrested Appellant Martinez, advised him of his constitutional rights, obtained a waiver of those rights, and then interviewed Martinez. After confronting Martinez with the fact that he thought he was not telling the truth and noting that there were inconsistencies in his story, Martinez, according to Officer Lievanos, invoked his right not to speak any further by stating "I have nothing further to say." (RT 653 and RT 655). Officer Lievanos then terminated the conversation in light of the invocation by Martinez of his right not to talk any further. (RT 653 and 655).

Thus, the sole prior incident involving Appellant Martinez as an adult in which he had been arrested, Mirandized, waived his rights, and encountered a confrontation by the investigating officer regarding telling the truth and inconsistencies in his story, resulted in Appellant Martinez invoking his right not to speak any further when he stated "I have nothing more to say." Officer Lievanos concluded that under the circumstances, this was sufficient to terminate the conversation and Officer Lievanos responded accordingly by honoring the assertion of Martinez's Miranda right to terminate the questioning.

In the recent decision of People v. Gonzalez (2005) 34 Cal.4th 1111, 1126, this Court articulated the "reasonable officer" standard relative to determining whether a defendant had invoked his right to counsel under

Miranda. This Court articulated the standard as follows:

> [W]hether defendant was sophisticated enough to have understood the difference between being booked and being charged seems to focus on his ability to clearly articulate his desire for counsel, a consideration *Davis* rejects.[3] (Footnote omitted). (*Davis, supra*, 512 U.S. at p. 460.) The question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying.

Thus, applying the reasonable officer standard outlined above to Appellant Martinez's right to remain silent or terminate further questioning,[10] clearly Officer Lievanos understood Martinez to be invoking his right to terminate the questioning when he stated "I have nothing more to say" in response to the confrontation by Officer Lievanos regarding telling the truth and inconsistencies in his story. By terminating the interview, Officer Lievanos, as a "reasonable officer," paid heed to the requirement that once a suspect invokes his or her right to silence, the right to cut off questioning must be "scrupulously honored". People v. Peracchi (2001) 86 Cal.App.4th 353, 362, quoting from Rhode Island v. Innis (1980) 440 U.S. 291, 301 [100 S.Ct. 1682, 1689-1690, 64 L.Ed.2d 297] (footnotes omitted). Therefore, predicated on the "context," the statement by Martinez that "I have nothing more to say," clearly constituted the invocation of the right to remain silent. People v. Musselwhite supra, 17 Cal.4th at 1238.

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[10] Federal courts have extended the reasonable officer standard adopted by the United States Supreme Court in Davis v. United States (1994) 512 U.S. 452, 459-460, regarding the invocation of the right to counsel under Miranda to the right to remain silent or to cut off further questioning as well. United States v. Acosta (11th Cir. 2004) 363 F.3d 1141, 1152; see James v. Marshall (1st Cir. 2003) 322 F.3d 103, 109.

The circumstances surrounding the termination of the custodial interrogation involving Officer Lievanos as to the assault incident parallel those surrounding the termination of the custodial interrogation involving Officer Jeff Lopez as to the Perea incident. Appellant Martinez was arrested, transported to the Santa Maria Police Department for questioning, advised of his Miranda rights, waived his rights, and was interviewed by Officer Lopez. During the interview, Officer Lopez confronted Martinez, pointing out inconsistencies in his story and made it clear that he suspected that Martinez was guilty of the crimes against Perea. (RT 656-659 and RT 691-693). The interview was terminated when Martinez stated "That's all I can tell you." (RT 669 and 691-692). Officer Lopez confirmed during his direct examination that Martinez wanted to terminate the conversation as follows:

> **Q.** [D.A. Sneddon] Did he indicate he wanted to terminate the conversation?
>
> **A.** He told me at one point that this is all the information that he can tell me.
>
> **Q.** And then you --
>
> **A.** And then I stopped talking to him.

(RT 669).

In cross-examination, Officer Lopez acknowledged that at this juncture Appellant Martinez had stated "That's all I can tell you." (RT 692-692). The trial court determined the quoted language to be "That's all I have to say" or "That's all I have to talk about." (RT 753-777). What is clear here is that Officer Lopez understood Martinez's statement to be an invocation of his right to remain silent and cut off further questioning, and

accordingly, Officer Lopez terminated the interview (e.g. "I stopped talking to him."). Thus, Officer Lopez "scrupulously honored" Appellant Martinez's invocation of his right to remain silent, just as Officer Lievanos had done under similar circumstances. Moreover, Officer Lopez acted as a "reasonable officer" when he interpreted Martinez's statement "That's all I can tell you" in response to his confronting Martinez as to crimes committed against Sabrina Perea to be an invocation of his right to remain silent.

The trial court's determination that Martinez did not invoke his right to remain silent when he stated "That's all I have to say" or "That's all I have to talk about" during the custodial interrogation by Officer Lopez is not supported by substantial evidence. The context of the statement makes clear that the statement "That's all I have to say" or "That's all I have to talk about" constituted an invocation of the right to remain silent thereby cutting off further questioning. This is clearly how Officer Lopez interpreted the statement.

Here, the trial court failed to contextualize the statement which included the interrogation being conducted at the Santa Maria Police Department, after Martinez had been arrested and Mirandized, in which he was being confronted by a police officer who was accusing him of committing crimes against Sabrina Perea. Moreover, the trial court failed to consider the fact that Officer Lopez interpreted Appellant Martinez's statement under the circumstances to be an invocation of his right to remain silent, and hence, he terminated the interview. Further, the prior invocation of his right to remain silent under similar circumstances involving Officer Lievanos as to the assault incident buttresses the conclusion that Appellant Martinez had invoked his right to remain silent. See People v. Gonzalez,

supra, 34 Cal.4th at 1127. It follows that an independent review of the record which this Court must perform to determine whether the right to remain silent was invoked, compels the conclusion that Appellant Martinez did invoke his right to remain silent as reflected by the conduct of Officer Lopez who terminated his interview. People v. Jennings (1988) 46 Cal.3d 963, 979; People v. Wash (1993) 6 Cal.4th 215, 236; People v. Peracchi (2001) 86 Cal.App.4th 353, 359.

It is well settled that the federal constitutional standard of Michigan v. Mosely (1975) 423 U.S. 96, is now the sole determinant of admissibility where a defendant is reinterrogated after invoking the Miranda right to remain silent. People v. DeLeon (1994) 22 Cal.App.4th 1265, 1270; see People v. Crittenden (1994) 9 Cal.4th 83, 129; see also People v. Peracchi (2001) 86 Cal.App.4th 353, 360. Thus, the question presented here is whether the conduct of Detectives Carroll and Aguillon relative to the reinterrogation of Appellant Martinez, after invoking his Miranda right to remain silent, meets the three factors outlined in Michigan v. Mosely to determine whether a defendant's right to cut off questioning was "scrupulously honored." Michigan v. Mosely supra, 423 U.S. at 103-104.

In 5 Witkin & Epstein, Cal. Crim. Law (3d. 2000), Criminal Trial, § 131, pp. 209-210, the treatise writers analyzed the Michigan v. Mosely decision as follows:

> In *Michigan v. Mosely* (1975) 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313, defendant was arrested in connection with a series of robberies, taken to the police station and advised of his *Miranda* rights. In response to interrogation, defendant said that he did not wish to answer questions about the robberies, and questioning ceased. Later that day, another police officer brought defendant to his office, again advised

defendant of his *Miranda* rights and interrogated him about an unrelated homicide. An incriminating statement made by defendant during this interview was introduced in his subsequent trial for murder, and defendant was convicted. At no time did defendant ask to see an attorney. *Held*, the statement was properly admitted.

(a) *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 1627, 16 L.Ed.2d 694, 723, supra, §91, provides that interrogation must cease when a defendant invokes the right to remain silent, but does not state under what circumstances a resumption of questioning is permissible. This cannot "sensibly be read to create a per se proscription of indefinite duration upon any further questioning by any police officer on any subject." (96 S.Ct. 326, 46 L.Ed.2d 321.) Instead, "the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (96 S.Ct. 328, 46 L.Ed.2d 321.)

(b) In this case, defendant's right to cut off questioning was fully respected: The first interrogating officer neither refused to discontinue the interrogation nor attempted to wear down defendant's resistance and make him change his mind. The second officer's interrogation about the unrelated homicide came only after the passage of a significant amount of time and a fresh set of warnings, and was quite consistent with a reasonable interpretation of defendant's earlier refusal to answer questions about the robberies. (96 S.Ct. 329, 46 L.Ed.2d 322.)

It follows from Michigan v. Mosely that there are three factors that the court must consider in determining whether the suspect's right under Miranda to cut off questioning has been honored. The three factors are: (1) whether the second interrogation involved crimes unrelated to those addressed in the first interrogation; (2) whether there was a passage of a significant amount of time between the two interviews; and (3) whether a

fresh set of Miranda warnings was given prior to the second interview. Michigan v. Mosely, supra, 423 U.S. at 105-106.

In People v. DeLeon (1994) 22 Cal.App.4th 1265, 1271-1272, the Court of Appeal reviewed the three factors outlined in Mosely to determine whether there was a Miranda violation with respect to the reinterrogation of the defendant as follows:

> In *Michigan v. Mosely*, *supra*, the suspect was properly advised of his *Miranda* rights, and upon his statement that he did not want to discuss certain robberies, the initial questioning ceased. In our case, after appellant received *Miranda* warnings in Buena Park, he "invoked his rights not to talk" about the Buena Park case, and his right to cut off questioning was honored by the Buena Park police. Neither the suspect in *Mosely* nor the appellant in this case ever indicated a desire to consult with an attorney. (423 U.S. at p. 97 [46 L.Ed.2d at pp. 317-318].) After more than two hours, the suspect in *Mosely* was again advised of his *Miranda* rights, and was then questioned by another police officer at another location about an unrelated holdup murder. (*Id.* at p. 104 [46 L.Ed.2d at p. 321].) In our case, five days elapsed between appellant's invocation of his right to remain silent in Buena Park and his subsequent questioning by the Los Angeles sheriffs, and the later interview involved crimes other than the Buena Park armed robbery.
>
> The court in *Mosely* noted that it was not a case "where the police failed to honor a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind. In contrast to such practices, the police here immediately ceased the interrogation, resumed questioning only after the passage of a significant period of time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation." (*Michigan v. Mosely*, *supra*, 423 U.S. at pp. 105-106 [46 L.Ed.2d at p. 322].) On these facts, the court

> found no violation of the suspect's right under *Miranda* to cut off questioning. The same factors yield the same conclusion in this case. Appellant's *Miranda* rights were not violated, and his confession was properly admitted.

The record clearly demonstrates that two of the three factors enumerated in Michigan v. Mosely were not satisfied relative to the reinterrogation by Officers Carroll and Aguillon with respect to their first interview of Martinez.

First, Appellant Martinez did not receive a fresh set of Miranda warnings as contemplated by Michigan v. Mosely, supra, 423 U.S. at 106. Detective Carroll admitted that he never personally read Martinez's Miranda rights from a card, nor did he ever give him a verbatim admonition of his rights. (RT 722). Detective Carroll relied on the report by Officer Lopez which noted that he had read Martinez's Miranda rights and that Martinez had waived them. (RT 723). Detective Carroll simply made an oblique reference to Officer Lopez reading him his rights the night before, inquired as to whether he remembered and understood "them and everything," and asked whether he "still want[s] to talk to us." to which, Martinez responded "Yeah." (CT 03069 at 03071).

Significantly, a review of the transcript of the interview clearly demonstrates that 2-1/2 pages of questions (e.g. 26 questions) precede Detective Carroll's oblique reference to his Miranda rights. (CT 03069-03071). The oblique reference to the prior Miranda advisement did not satisfy the Michigan v. Mosely requirement of a fresh set of Miranda warnings prior to reinterrogation.

Second, the subsequent interrogation by Detectives Carroll and Aguillon (e.g., reinterrogation) was not restricted to crimes that had not

been the subject of the earlier interrogation by Officer Lopez. Michigan v. Mosely, supra, 423 U.S. at pp. 105-106. Officer Lopez interrogated Martinez only as to the crimes pertaining to Sabrina Perea. (CT 858-861; CT 00948-00949; RT 656-669 and RT 691-693). A review of the transcript of the first interview by Detectives Carroll and Aguillon clearly demonstrates that the interview initially focused on the crimes against Sabrina Perea. (CT 03069 at 03071-03073). It was only after interrogating Martinez concerning the Perea incident that Detectives Carroll and Aguillon then questioned Martinez concerning the Sophia Torres homicide. (CT 03069 at 03074-03083).

Unlike Michigan v. Mosely and People v. DeLeon, the subsequent interview conducted by Detectives Carroll and Aguillon focused on the crimes against Sabrina Perea (e.g. the subject of the initial interview by Officer Lopez) as well as the crimes against Sophia Torres (e.g. not the subject of the initial interview by Officer Lopez). Thus, the factor articulated in Michigan v. Mosely that the second interrogation did not involve a crime that had been the subject of the earlier interrogation, has not been met here. Michigan v. Mosely, supra, 423 U.S. at 106.

As to the third factor regarding the passage of a significant period of time between the interrogations, this factor appears to have been satisfied in this instance since the initial interrogation by Officer Lopez took place on December 4, 1996, and the subsequent interrogation by Officers Carroll and Aguillon took place the following morning at 10:00 a.m. (CT 00858-00872; CT 00948-00949; CT 00862 and 00968-00982). Michigan v. Mosely, supra, 423 U.S. at 106.

The failure to provide Appellant Martinez with a fresh set of Miranda warnings and the failure to restrict the subsequent interrogation to

the crimes against Sophia Torres violates two factors noted by the Supreme Court in Michigan v. Mosely relative to honoring a "decision of a person in custody to cut off questioning." Michigan v. Mosely, supra, 423 U.S. at 105. The failures by Detectives Carroll and Aguillon to provide Appellant Martinez with a fresh set of Miranda warnings as well as to restrict their initial interrogation to solely those crimes against Sophia Torres clearly demonstrates that Martinez's "right to cut off questioning" under Miranda was not "scrupulously honored." Michigan v. Mosely, supra, 423 U.S. at 104-106. It follows that the first interview of December 5, 1996, between Detectives Carroll and Aguillon and Appellant Martinez (CT 03069-03083) as well as subsequent statements relating thereto (e.g., interviews 2, 3 and 4, see Statement of Facts, herein, ante. at pp. 23-41 and Argument II, ante. at pp. 146-148) should have been excluded and that the admission of said statements violated Appellant Martinez's right to remain silent under Miranda.

The prejudice suffered by Appellant Martinez relative to the admission of the first recorded interview between Detectives Carroll and Aguillon and Martinez of December 5, 1996 was overwhelming. The recorded interview was played to the jury, and further, a transcript of the interview was also provided to the jurors for the purpose of allowing them to review the transcript during the playing of the tape. (RT 1925; People's Exhibit 61, CT 03113-03126; People's Exhibit 61A; see Argument II, herein, ante at p. 132-146 and Statement of Facts, herein, ante at pp. 21-23). Moreover, the transcript of the interview, People's Exhibit 61A, was admitted into evidence at trial. (RT 2061-2063). After initially interrogating Martinez concerning the crimes against Sabrina Perea (CT 03113 at 03115-03117), Detectives Carroll and Aguillon then interrogated

Martinez regarding the incident involving the homicide of Sophia Torres at Oakley Park. (CT 03113 at 03117-03126). While Appellant Martinez did not testify at trial, his tape recorded statement relative to the first interview was played to the jury. (RT 1920-1925; CT 03113-03126).

This case was largely a circumstantial case since there were no eyewitnesses to the actual homicide of Sophia Torres. Much of the prosecution's case focused on disproving the recorded statement of Appellant Martinez with respect to the first interview of December 5, 1996 involving Detectives Carroll and Aguillon. For example, Martinez stated that he was going to buy drugs off Sophia Torres and that he went to the park to meet her. (CT 03118 and 03123). He also noted that he met Torres at the Los Tres Amigos bar in the La Jolla Plaza. (CT 03124). The prosecution called three prior employees of the Los Tres Amigos bar -- Able Contreras, Gloria Diaz, and Carlos Murguia (RT 1989-2005), who testified that Sophia Torres did not use drugs nor did she drink alcohol. Further, they never saw Appellant Martinez in the Los Tres Amigos bar. Additionally, the first recorded statement reflects that Martinez stated that he saw "two black chicks" fighting with Sophia Torres at the Oakley Park near the baseball field. (CT 03119-03122). Again, the prosecution called David Kary, an astronomer, who was the Director of the Astronomy Program at the Santa Barbara Museum of Natural History, who gave his opinion that based on his research, given the location of the moon, sun and other planets, it was dark on the evening of November 15, 1996, when Sophia Torres was killed, and consequently, one would not have been able to see clearly into the park to determine what was transpiring, which was contrary to the Martinez first recorded statement. (RT 1968-1988).

Thus, rather than seeking to prove that Martinez killed Sophia

Torres, the prosecution sought to disprove his statements contained in the first recorded interview. This clearly prejudiced Appellant Martinez and it cannot be said that the admitted recorded statement obtained in violation of Miranda was harmless beyond a reasonable doubt with respect to the Torres murder conviction. Chapman v. California (1967) 386 U.S. 18, 24.

Second Invocation of the Right to Remain Silent -- Carroll and Aguillon Interview.

The trial court determined that at the conclusion of the first interview between Appellant Martinez and Detectives Carroll and Aguillon, that Martinez stated "I don't want to talk about it anymore right now." (RT 753-755). This finding is supported by substantial evidence. (RT 727-728; RT 712). The court analogized to the surrender of Geronimo in which, according to Judge Melville, Geronimo stated "I will fight no more forever." Judge Melville noted that this was an unequivocal statement. (RT 753-755). Judge Melville concluded that the "right now" relative to the statement of Martinez simply meant that "right now, I don't want to talk about it." Thus, Judge Melville determined that the statement of Martinez was not unequivocal, and hence, he did not invoke his right to remain silent under Miranda thereby cutting off questioning. (RT 753-755; see also CT 01093-01095 at 01094). Judge Melville concluded further that the language "right now" was not surplusage. (RT 754-755 and CT 01094).

The statement attributed to Geronimo by Judge Melville is clearly an unequivocal statement that there will be "no more" fighting, e.g., forever. However, Geronimo apparently did not make the statement that Judge Melville attributes to him. A review of the autobiography of Geronimo reflects the actual statement made by Geronimo as he entered into a treaty

with General Miles after years of fighting. The statement is reflected in the following passage from his autobiography:

> Then I agreed to make the treaty. . . .
>
> We stood between his troopers and my warriors. We placed a large stone on the blanket before us. Our treaty was made by this stone, as it was to last until the stone should crumble to dust; so we made the treaty, and bound each other with an oath.
>
> . . .
>
> When we had made the treaty General Miles said to me:
>
> > "My brother, you have in your mind how you are going to kill me, and other thoughts of war. I want you to put that out of your mind, and change your thoughts to peace."
>
> Then I agreed and gave up my arms. I said:
>
> > "I will quit the war path and live at peace here after."
>
> Then General Miles swept a spot of ground clear with his hand, and said:
>
> > "Your past deeds shall be wiped out like this and you will start a new life."

Geronimo: His Own Story, The Autobiography of a Great Warrior, Stephen Melvil Barrett, Geronimo, Notes by Frederick Turner, Chapter 16 - The

Final Struggle, (Plume, March 1, 1996).

Thus, the actual words employed by Geronimo as reflected in his autobiography were "I will quit the war path and live at peace here after." In light of the context, e.g. after years of fighting and entering into a peace treaty with General Miles, these words have the same force and effect as interpreted by Judge Melville. That is, they mean as Judge Melville interpreted them to be, "I will fight no more forever." Thus, the "context" of the statement gives meaning to the words as noted by Justice Holmes in Towne v. Eisner, supra, 245 U.S. at 425.

In People v. Peracchi (2001) 86 Cal.App.4th 353, 361-362, cert. denied (2001) 534 U.S. 901, the Court of Appeal squarely addressed the question of whether the statement "I don't want to discuss it right now" invoked the right to remain silent. The Court framed the issue as follows:

> . . . Whether a suspect has invoked his right to silence is a question of fact to be determined in light of all of the circumstances, and the words used must be considered in context. (Footnote omitted).

People v. Peracchi, supra, 86 Cal.App.4th at 359-360.

Moreover, the Court stated further:

> Pursuant to *Miranda*, "[i]f the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Footnote omitted). The United States Supreme Court has recently affirmed that the *Miranda* warnings are rights of constitutional dimension. (Footnote omitted). The California Supreme Court has previously observed "that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent (*People v. Randall* [, *supra,*] 1 Cal.3d 948, 955 . . .), and the suspect may invoke this right by any words or conduct reasonably

> inconsistent with a present willingness to discuss the case freely and completely. (*People v. Burton*, *supra*, 6 Cal.3d 375, 382.) (Footnote omitted). . . .

Id. at 360. Thus, the "context" was central to the analysis of whether the words employed by the defendant invoked the right to remain silent under Miranda.

The Court concluded that Peracchi's statement, "I don't want to discuss it right now" clearly indicated that he intended to invoke his right to remain silent. People v. Peracchi, supra, 86 Cal.App.4th at 361. The Court determined that the statement was unambiguous and indicated an invocation of the right to remain silent. People v. Peracchi, supra, 86 Cal.App.4th at 360-361. Moreover, the Court noted that while the initial statements to the officer regarding whether Peracchi was willing to waive his rights may have been ambiguous, his intent to remain silent became clear when he stated "I don't want to discuss it right now." Thus, the context was critical to the Court's analysis. People v. Perrachi, supra, 86 Cal.App.4th at 361.

In this case, Martinez was interrogated at length by Detectives Carroll and Aguillon regarding both the Perea incident and the Torres incident, both Detectives Carroll and Aguillon advised Martinez that they did not believe him and pointed out inconsistencies in his story, and further, Detective Carroll advised Martinez that he should think it over and tell the truth. (RT 725-726). After this confrontation, when no questions were pending and everyone was preparing to leave, Martinez stated: "I don't want to talk about it anymore right now." (RT 726-728; RT 712, and RT 754).

Under these circumstances, Appellant Martinez was clearly indicating his intent to exercise his right to cut off questioning, that is, his

right to remain silent. Just as Perrachi indicated his intent to invoke his right to remain silent predicated on the statement "I don't want to discuss it right now," Martinez similarly invoked his right to remain silent by virtue of his statement "I don't want to talk about it anymore right now."

It follows that under the circumstances that Appellant Martinez did invoke his right to remain silent, and hence, his statements elicited in the second, third and fourth interviews should have been excluded on this ground as well as predicated on his initial invocation of his right to remain silent to Officer Lopez.[11] The violations of Martinez's Miranda right to cut off questioning predicated on the invocation of that right at the conclusion of the interview with Detectives Carroll and Aguillon compels the exclusion of both inculpatory and exculpatory statements relative to the second, third and fourth interviews conducted by Detectives Carroll and Aguillon. Miranda v. Arizona (1966) 384 U.S. 436, 444; Jackson v. Giurbino (9th Cir. 2004) 364 F.3d 1002, 1009.

This would include Martinez's version of the events at Oakley Park as he expressed to Detectives Carroll and Aguillon while being transported to the Valley Community Hospital for the S.A.R.T. exam, e.g., second

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[11] Apparently the People will also contend that the reply by Detective Carroll, "That was fine, that we would re-contact him later after he had time to think," to which Martinez replied, "Okay," vitiated the invocation of the right to remain silent. (CT 00864-00865; RT 712-713). However, the Supreme Court has indicated that once an accused has invoked the right to remain silent, "subsequent statements are relevant only to the question of whether the accused waived the right he had invoked. Invocation and waiver are entirely separate inquiries, and the two must not be blurred by merging them together." (Footnote omitted). See Smith v. Illinois (1984) 469 U.S. 91, 97-98.

interview. (CT 00864-00865; CT 00957-00958; RT 715-716; and RT 731). Detective Carroll attested to Martinez's statement that he saw "two black girls" beating up the deceased victim, Sophia Torres. (RT 715-716 and RT 731).

The third interview included the assertion by Detective Carroll that Perea, Morales and Zimmerman had identified Martinez as the perpetrator of the crimes against each of them as well as Martinez's disclaimer concerning the crimes. (CT 00865-00866). The interview was partially tape recorded and a transcript of the tape recording was prepared by the Santa Maria Police Department. (CT 00866; and CT 00984-00997).[12] The transcript again reflected Martinez's statement that there were two black females of Oakley Park. One was fighting with Torres and the other had a baseball bat. (CT 00989). It also reflected that he was going to meet Torres at Oakley Park to buy drugs off her. (CT 00996-00997).

The fourth interview again focused on the homicide of Sophia Torres wherein Appellant Martinez insisted that his prior statement was correct. Moreover, it also focused on the crimes against Perea and Morales and the exculpatory/inculpatory statement by Martinez that he only intended to rob them, not rape them. (CT 00866-00867; CT 00961; and RT 720-722). The prejudice suffered by Appellant Martinez as a consequence of the introduction of his statements relative to the second, third and fourth interviews was overwhelming. As noted, Appellant Martinez did not testify at the time of trial. The prosecution focused on disproving his statements

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[12] The tape recorded portion of the interview was also transcribed (Exh. 62A, CT 03127-03139) into a transcript entitled "Interview with Tommy Martinez. The text of the transcript is set forth in pertinent part in the Statement of Facts herein, ante. at pp. 24-40.

relative to the crimes alleged as to Torres, Morales, Perea, and Zimmerman. In this regard, the prosecution sought to disprove his statements relative to the events concerning the Torres incident. (See Statement of Facts, herein, ante at pp. 19-20 and 42-43.) Moreover, the prosecution called victims Maria Morales (RT 1535-1574), Laura Zimmerman (RT 2020-2044), and Sabrina Perea (RT 2191-2219) to refute the statements of Martinez.

Further, Detective Carroll (RT 1897-1923 and RT 1933-1944) and Detective Aguillon (RT 2006-2016) were called to attest to statements attributed to Martinez relative to the crimes against Torres, Morales, Zimmerman and Perea. The taped conversation of the interview on the evening of December 5, 1996, e.g., the third interview, was played to the jury, and further, a transcript of the interview was provided to the jury for purposes of following the tape recorded conversation. (RT 1943-1944 and RT 1949). In fact, Detective Carroll made specific references to the second recorded interview (Interview #3), interpreting the recorded statement while at the same time pointing out inconsistencies thereby suggesting that Martinez was being untruthful in his statement. (RT 1949-1951).

Thus, much of the evidence presented by the prosecution was directed at refuting the exculpatory and inculpatory statements of Appellant Martinez. If the court had excluded the statements of Martinez relative to the second, third and fourth interviews, it follows that much of the prosecution's case would not have been admissible. This is particularly true with regard to the second tape recorded statement (e.g., the third interview) People's Exhibit 62, and the transcript of the tape, People's Exhibit 62A. The tape recording as reflected in Exhibit 62 was played to the jury (RT 1949), and further, a copy of the transcript (People's Exhibit 62A) was

admitted into evidence. (RT 2061 and CT 03127-03139). The admission of the second tape recorded interview (e.g. Interview #3) again reflected on the observations of Martinez as to what took place at Oakley Park involving Sophia Torres relative to her encounter with two black girls as well as the crimes against Morales and Perea. (CT 03127-03139). In fact, without the benefit of the tape recorded statements reflected in the first interview, People's Exhibit 61, and the transcript, People's Exhibit 61A (CT 03113-03126), and the second tape recorded interview reflecting Interview #3, People's Exhibit 62, and the transcript, People's Exhibit 62A (CT 03127-03139), the evidence presented at trial would have been insufficient to sustain a conviction as to Appellant Martinez relative to the homicide of Sophia Torres.

Invocation of the Right to Counsel -- Carroll and Aguillon Interview.

The trial court determined that at the conclusion of the third interview between Appellant Martinez and Detectives Carroll and Aguillon, that Martinez stated "I think I need to talk to my lawyer before I take a polygraph." (RT 753-755). This finding is supported by substantial evidence. (RT 735 and 720; CT 00866 and 00961). The trial court concluded further that the statement neither invoked the right to counsel, nor did it invoke the right to remain silent. The trial court concluded as follows: "I find that that [Martinez's statement] was strictly as it says, a desire to talk to a lawyer before he would take a polygraph, not before he would talk any further." (RT 753-755; CT 01094).

In People v. Crittenden, supra, 9 Cal.4th 129-130, this Court analyzed the issue of the invocation of the right to counsel as follows:

> . . . Subsequent to its decision in *Edwards*, the United

States Supreme Court observed that "[t]he rule of [*Edwards*] applies only when the suspect 'ha[s] expressed' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*. [Citation.] It requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*McNeil v. Wisconsin, supra*, 501 U.S. 171, 178 [115 L.Ed.2d 158, 168-169], italics omitted.)

Most recently, in *Davis v. United States* (1994) 512 U.S. ___, ___ [129 L.Ed.2d 362, 368, 114 S.Ct. 2350], in determining that a suspect's remark to Naval Investigative Service agents – "Maybe I should talk to a lawyer" – was *not* a request for counsel, the United States Supreme Court has held further that a suspect must *unambiguously* request counsel. (512 U.S. at p. ___ [129 L.Ed.2d at p. 371].) The court in that case stated: "As we have observed, 'a statement either is such an assertion of the right to counsel or it is not.' *Smith v. Illinois* [(1984)] 469 U.S. 91, 97-98. . . . Although a suspect need not 'speak with the discrimination of an Oxford don[]' . . . (Souter, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. . . .

This Court again noted that "no particular form of words or conduct is necessary" to invoke such a right, and further, that the defendant's statement must be "[v]iewed in context" in order to determine whether the defendant's statement invoked the right to counsel in dealing with the custodial interrogation. People v. Crittenden, supra, 9 Cal.4th 129-131.

In this Court's recent decision of People v. San Nicolas (2004) 34 Cal.4th 614, 642, reh'g denied, (Cal. Jan. 19, 2005) 2005 Cal. Lexis 578,

this Court has set forth the standard of review as follows:

> In reviewing defendant's *Edwards* claims, we apply a de novo standard of review to the trial court's denial of defendant's motion to suppress the May 16 statement to the degree that the trial court's underlying decision involved a measurement of the facts against the law. (See, e.g., *People v. Waidla*, *supra*, 22 Cal.4th at p. 730.) Regarding the trial court's subordinate determinations, we apply independent review to its determinations of law and look for substantial evidence of its determinations of fact. Mixed questions of fact and law we will resolve by the standards above according to whether they are predominantly legal or factual. (*People v. Louis* (1986) 42 Cal.3d 969, 985-987 [232 Cal.Rptr. 110, 728 P.2d 180].)

In light of this standard of review, the trial court's determination that Martinez stated "I think I need to talk to my lawyer before I take a polygraph" involves a question of fact which is supported by substantial evidence. However, the trial court then concluded that "I find that [e.g. Martinez's statement] that was strictly as it says, a desire to talk to a lawyer before he would take a polygraph." Here, the trial court is simply making a legal determination, that is, that Martinez was not invoking his right to counsel in light of his statement and the surrounding circumstances. Thus, this portion of the trial court's determination involves a mixed question of fact and law which involves predominantly a legal question, that is, was the statement made by Martinez in light of the surrounding circumstances an invocation of his right to counsel? The answer lies in whether a "reasonable officer" under the circumstances would have understood Martinez to be invoking his right to counsel. People v. Gonzalez (2005) 34 Cal.4th 1111, 1126. Here, clearly a reasonable officer would have concluded that Martinez in fact was invoking his right to counsel. This is

how both Detectives Carroll and Aguillon interpreted Martinez's statement.

A review of the record reveals that Martinez had been interviewed at length by Detectives Carroll and Aguillon on three separate occasions in a ten hour time frame, commencing with the first interview at 10:00 a.m. on December 5, 1996 and concluding with the third interview in the early evening hours of December 5, 1996. (See pp. 8-13 above, and pp. 22-41). Two of the interviews involved lengthy tape recorded statements, People's Exhibit 2A (CT 03069-03083) and Defense Exhibit G (CT 00983-00997). Moreover, the other interview was in connection with being transported to Valley Community Hospital for a S.A.R.T. exam which included a blood test, a collection of hair samples, and other tests. Thus, after three interviews as noted and a physical examination involving blood and other testing, at the conclusion of the third interview in the early evening hours of December 5, 1996, after he had been handcuffed again, Detective Aguillon asked if he would take a polygraph (RT 719) and stated further that they could have someone there in five minutes. (RT 733). Thus, what is transpiring under these circumstances is a request by Detective Aguillon that the interrogation continue via a polygraph examination within five minutes. It should be noted that a polygraph examination is itself a form of interrogation. People v. Franklin (1987) 115 Ill.2d 328, 334; 504 N.E.2d 80, 82; People v. Wilberton (2004) 348 Ill.App.3d 82, 87; 809 N.E.2d 745, 750, appeal denied (2004) 823 N.E.2d 977.

Thus, viewed in context, the statement by Martinez, "I think I need to talk to my lawyer before I take a polygraph," takes on an entirely different meaning than ascribed by Judge Melville. Under these circumstances, the first portion of the statement that "I think I need to talk

to my lawyer" evidences a clear "need," (e.g. require)[13] to speak with not "a" lawyer but "my" lawyer. Further, the second portion of the statement "before I take a polygraph" must again be placed in context. Here, Detective Aguillon has just informed Martinez that the continued interrogation via a polygraph examination will take place in "five minutes." (RT 733).

Contrary to Judge Melville's interpretation, Martinez was clearly invoking his right to counsel, that is, he was informing Detectives Carroll and Aguillon that he needed (e.g. required) to speak with his attorney which obviously could not be accomplished within the next five minutes. Here, Detectives Carroll and Aguillon obviously contemplated the polygraph examination going forward in five minutes but for Martinez's request to speak with his ["my"] attorney.

The response of Detectives Carroll and Aguillon also makes clear that a "reasonable police officer" under the circumstances would understand Martinez to be invoking not only his right to counsel, but also his right to cut off questioning. The fact that Detectives Carroll and Aguillon did not proceed with the polygraph examination within five minutes clearly demonstrates that they understood Martinez to be invoking his rights both to counsel and to cut off questioning since they did not persist in bringing the polygraph examiner within the stated "five minutes." As Justice Holmes noted, it is "the circumstances and the time in which it is used" that gives meaning to the spoken word. Towne v. Eisner, supra, 245 U.S. 425.

Here, Appellant Martinez, after having endured three interrogations,

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[13] According to Webster's Ninth New Collegiate Dictionary (Merriam-Webster, 1991) as a verb, the transitive senses of need: to be in need of: require.

two of which were tape recorded, and a trip to the Valley Community Hospital for the purposes of a S.A.R.T. exam which included numerous tests, including blood, all of which transpired within a ten hour period, and after having endured numerous accusations regarding the death of Sophia Torres, invoked his rights both to counsel and to remain silent when confronted by the Detectives who were seeking to continue their interrogation via a polygraph examination within five minutes.

Under these circumstances, there can be no doubt that Martinez was invoking both his right to counsel as well as his right to cut off questioning. Moreover, both Detectives Carroll and Aguillon understood this as any reasonable police officer would given the circumstances. In fact, the conduct of Detectives Carroll and Aguillon in not pursuing the polygraph examination within five minutes is indicative of their understanding that Martinez had asserted his rights both to counsel and to cut off questioning.

The prejudice suffered by Appellant Martinez as a consequence of the introduction of his statements relative to the fourth interview is self-evident. The exculpatory/inculpatory statement that he was not going to rape either Morales or Perea, but was only going to rob them, implicated him in crimes against both Morales and Perea. At trial, Detective Carroll attested to these admissions. (RT 1967). Thus, it cannot be said that these admissions obtained in violation of Miranda were harmless beyond a reasonable doubt with respect to the Perea and Morales convictions. Chapman v. California (1967) 386 U.S. 18, 24.

In summary, the failure of the trial court to properly exclude statements from Appellant Martinez relative to the four interviews conducted by Detectives Carroll and Aguillon which were obtained in violation of his Fifth, Sixth and Fourteenth Amendment rights, resulted in a

trial that was fundamentally unfair and a denial of due process. The record, as outlined above, makes clear that Appellant Martinez invoked his right under Miranda to cut off questioning at the conclusion of the interview by Officer Lopez which preceded the four interviews by Detectives Carroll and Aguillon. Moreover, at the conclusion of the first interview by Detectives Carroll and Aguillon, Appellant Martinez again invoked his right to cut off questioning under Miranda. Further, at the conclusion of the third interview involving Detectives Carroll and Aguillon, Appellant Martinez again invoked his rights under Miranda both to counsel and to cut off questioning. It follows that the statements obtained from Appellant Martinez, whether they be deemed exculpatory or inculpatory, should have been excluded. The admission of these statements resulted in a trial that was fundamentally unfair and a denial of due process. This is particularly true with regard to the first tape recorded statement, People's Exhibit 61A (CT 03113-03126), and the second tape recorded statement, People's Exhibit 62A (CT 03127-03139), as to the conviction of Appellant Martinez relative to the homicide of Sophia Torres. As noted, Appellant Martinez did not testify at trial. Thus, the admissibility of these two tape recorded statements relative to the homicide of Sophia Torres, allowed the prosecution to simply disprove the statements contained in the recorded interviews rather than prove that Appellant Martinez was responsible for the homicide of Sophia Torres.

III. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY ON THE ISSUE OF CONSENT AS TO THE CRIME OF RAPE VIOLATED APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS, TRIAL BY JURY, AND TO PRESENT A DEFENSE AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. The Relevant Facts.

Appellant Martinez was charged with the murder of Sophia Castro Torres on November 15, 1996 during the commission of a rape and robbery. (See Statement of Case, herein, ante at pp. 1 and 2.) As to the crime of rape, the defense submitted two instructions on the issue of consent, CALJIC 1.23.1, "Consent" -- Defined in Rape, Sodomy, Unlawful Penetration and Oral Copulation and CALJIC 10.65, Belief as to Consent -- Forcible Rape -- Unlawful Oral Copulation, Sodomy or Penetration by Foreign Object. (CT 01514-01522, at 01516 and 01521, as well as 01645 and 01629-01630).[14] The trial court rejected both instructions. (RT

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[14] The CALJIC 1.23.1 instruction proposed by the defense defined "consent" as follows:

> In [prosecutions under] Penal Code section 261, the word "consent" means positive cooperation in an act or attitude as an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved.

(CT 01645).

The CALJIC 10.65 instruction with respect to "Belief as to Consent" proposed by the defense provided as follows:

(continued...)

2426-2427 and 2452-2453). Both the defense and prosecution proposed the CALJIC 10.00 instruction, Rape -- Spouse and Non-Spouse -- Force or Threats. (CT 01520 and 01503). The trial court agreed to give a modified CALJIC 10.00 rape instruction (RT 2425) and gave the following modified instruction:

> The defendant is accused in Count 2 of the Indictment of having committed the crime of rape in violation of Section 261, subdivision (a)(2).

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[14](...continued)

> In the crime of [unlawful] [forcible rape]
>
> by force, [violence] [fear] [or] [threats to retaliate]], criminal intent must exist at the time of the commission of the rape. There is no criminal intent if the defendant had a reasonable and good faith belief that the other person voluntarily consented to engage in [sexual intercourse] of
>
> Therefore, a reasonable and good faith belief that there was voluntary consent is a defense to such a charge.
>
> [However, a belief that is based upon ambiguous conduct by an alleged victim that is the product of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another is not a reasonable good faith belief.]
>
> If after a consideration of all of the evidence you have a reasonable doubt that the defendant had criminal intent at the time of the [sexual intercourse]
>
> you must find [him] [her] not guilty of the crime.

(CT 01629-01630).

. . .

Every person who engages in an act of sexual intercourse with another person who is not the spouse of the perpetrator accomplished against that person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury to that person or to another person, is guilty of the crime of rape in violation of Penal Code Section 261, subdivision (a)(2).

Any sexual penetration, however slight, constitutes engaging in an act of sexual intercourse. Proof of ejaculation is not required.

"Against that person's will" means without the consent of the alleged victim.

"Menace" means any threat, declaration, or act which shows an intention to inflict an injury upon another.

"Duress" means a direct or implied threat of force, violence, danger or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which he or she would not otherwise have performed, or acquiesce in an act to which he or she otherwise would not have submitted. The total circumstances, including the age of the alleged victim and his or her relationship to the perpetrator, are factors to consider in appraising the existence of the duress.

The fear of immediate and unlawful bodily injury must be actual and reasonable under the circumstances.

In order to prove this crime, each of the following elements must be proved: A -- one, a male and female engaged in an act of sexual intercourse; two, the two persons were not married to each other at the time of the act of sexual intercourse; three, the act of sexual intercourse was against the will of the alleged victim; four, the act was accomplished by means of force, violence, duress, menace, or fear of

immediate and unlawful bodily injury to the alleged victim or to another person.

(RT 2503-2505; CT 01187 at 01262-01264).

The prosecution opposed the CALJIC 10.65 Belief as to Consent instruction on the grounds that this was not a Mayberry case involving some issue of whether the defendant reasonably was mistaken about whether the person actually consented to sexual relations. (RT 2426). In response, the defense argued as follows:

> **MR. DULLEA**: To begin with, the prosecution has the burden of demonstrating lack of consent. That's an element. There is some circumstantial evidence here, based on what Dr. Failing said, that from the physical autopsy evidence the sex could have been consensual or nonconsensual. The evidence of the victim's personality, I think, is sufficient to allow me to argue that she might have consented, or that, based on her behavior, the defendant might have had a reasonable belief in consent.

(RT 2426-2427).

The prosecution conceded that the defense was entitled to argue that "they had consensual sex," but noted that such an argument could not be predicated on a "good-faith belief or reasonable belief" theory based on the facts of the case. (RT 2427). The trial court refused the proposed CALJIC 10.65 Belief as to Consent instruction (RT 2426-2427). The defense also requested the CALJIC 1.23.1 instruction which the defense noted "defines consent" which was not otherwise defined in the instructions, and noted further that "consent, or lack thereof, is an element of rape." (RT 2452-2453). The court rejected the CALJIC 1.23.1 instruction. (RT 2452-2453).

B. The Relevant Law.

The crime of rape has been generally defined as an act of sexual intercourse with a person without that person's effective consent. 2 Witkin & Epstein, Cal. Crim. Law (3d ed.), Sex Offenses And Crimes Against Decency, § 1, p. 317. The law recognizes two forms of consent with respect to the defense of the crime of rape. 1 Witkin & Epstein, Cal. Crim. Law (3d ed.), supra, Defenses, § 44, pp. 376-378. There is what has been termed actual, express, and/or straight consent. See People v. Williams (1992) 4 Cal.4th 354, 363 (actual consent); People v. May (1989) 213 Cal.App.3d 118, 125 (actual consent); People v. Burnett (1992) 9 Cal.App.4th 685, 691 (express consent); People v. Stitely (2005) 35 Cal.4th 514, 552 (straight consent). This form of consent, whether it be referenced as actual, express, and/or straight consent, is reflected in CALJIC No. 1.23.1 which " speaks in terms of a sexual act freely, voluntarily, and knowingly performed." People v. Stitely, supra, 35 Cal.4th at 553. See also People v. Williams, supra, 4 Cal.4th at 361, fn. 6, and People v. Burnett, supra, 9 Cal.App.4th at 690, fn. 2.

The second form of consent is what has been termed "Mayberry consent" or the "Mayberry defense." People v. May, supra, 213 Cal.App.3d at 125 (Mayberry consent), and People v. Williams, supra, 4 Cal.4th at 360 (Mayberry defense). In People v. Williams, supra, 4th Cal.4th at 360-361, this Court analyzed the Mayberry consent and/or the Mayberry defense as follows:

> In *People v. Mayberry, supra*, 15 Cal.3d 143, this court held that a defendant's reasonable and good faith mistake of fact regarding a person's consent to sexual intercourse is a defense to rape. (*Id.* at p. 155.) *Mayberry* is predicated on the notion that under section 26,[4] (footnote omitted)

> reasonable mistake of fact regarding consent is incompatible with the existence of wrongful intent. (Citations omitted.) . . .
>
> The *Mayberry* defense has two components, one subjective, and one objective. The subjective component asks whether the defendant honestly and in good faith, albeit mistakenly, believed that the victim consented to sexual intercourse. (Footnote omitted). In order to satisfy this component, a defendant must adduce evidence of the victim's equivocal conduct on the basis of which he erroneously believed there was consent.
>
> In addition, the defendant must satisfy the objective component, which asks whether the defendant's mistake regarding consent was reasonable under the circumstances. Thus, regardless of how strongly a defendant may subjectively believe a person has consented to sexual intercourse, that belief must be formed under circumstances society will tolerate as reasonable in order for the defendant to have adduced substantial evidence giving rise to a *Mayberry* instruction. (Citations omitted).

This Court has also referenced Mayberry consent and/or the Mayberry defense as the "mistake-of-fact defense." People v. Stitely (2005) 35 Cal.4th 514, 553-554. Regardless of whether the defense is referenced as Mayberry consent, Mayberry defense, and/or the mistake-of-fact defense, CALJIC No. 10.65 embodies this defense.

In this case, the trial court rejected not only the instruction as to actual consent reflected in CALJIC 1.23.1, but also the Mayberry consent instruction reflected in CALJIC 10.65. (RT 2426-2427, 2449, 2452-2453).

Here, the trial court clearly erred in refusing to give the instruction on actual consent reflected in CALJIC 1.23.1. It is well settled that a trial court must instruct on any theory of the case that is supported by substantial evidence. People v. Flannel (1979) 25 Cal.3d 668, 685; People v. Burnett

(1992) 9 Cal.App.4th 685, 690; see United States v. Escobar de Bright (9th Cir. 1984) 742 F.2d 1196, 1201-1202. Moreover, trial courts have a broad sua sponte duty to instruct. In People v. Wickersham (1982) 32 Cal.3d 307, 323, overruled on another ground in People v. Barton (1995) 12 Cal.4th 186, 200-201; accord People v. Marks (1988) 45 Cal.3d 1335, 1345, this Court noted as follows:

> The trial court functions both as a neutral arbiter between two contesting parties and as the jury's guide to the law. This role requires that the court fully instruct the jury on the law applicable to each particular case. "'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.' (Citation omitted). . . ."

Further, this Court has held that the testimony of a single witness can constitute substantial evidence requiring the court to instruct on its own initiative. People v. Lewis (2001) 25 Cal.4th 610, 646.

A review of the record reflects that there was substantial evidence to support the defense of actual consent reflected in CALJIC 1.23.1 as to the charge of rape with respect to the victim, Sophia Torres. Dr. Robert Failing, pathologist, performed an autopsy on the body of Sophia Torres. (RT 1801-1808). He also did an examination of the vagina in which he looked for bruising and tearing. He found no bruising, no tearing, and no trauma to the vagina. (RT 1829). Dr. Failing did note that the lack of bruising, tearing or trauma to the vagina does not rule out the "possibility" of sexual assault. He has handled sexual assault cases in which he has found trauma to the vagina and other cases in which he has not found

trauma to the vagina. (RT 1830). Moreover, Dr. Failing attested to the multiple blows suffered by the victim, Sophia Torres. (RT 1809-1830). Sgt. Dennis L. Prescott determined the time of death of Sophia Torres to be 10:30 p.m. or 11:00 p.m. on November 15, 1996. (RT 1780-1791). The police dispatcher at the Santa Maria Police Department received a 911 call at 11:07 p.m. on November 15, 1996. (RT 1607-1611, Exhibit 12). The male caller informed the dispatcher of an attack on a lady at the Westside Little League Park, Oakley Park, and repeatedly stated: "Send help quick." (Exhibit 12A, CT 03112). Appellant Martinez later acknowledged that he made the 911 call. (RT 1925; Exhibit 61; see also, CT 03113-03126; Exhibit 61A).

This evidence supports the defense contention of consensual sex between Appellant Martinez and Sophia Torres. The lack of injury to the vagina, multiple blows which resulted in the death of Sophia Torres, the time of death of 10:30 p.m. to 11:00 p.m., and the 911 call shortly thereafter at 11:07 p.m. in which Martinez reported that a lady was in trouble at the Oakley Park and requested that the police "send help quick" supports the following scenario: Appellant Martinez and Sophia Torres meet at Oakely Park, eventually have consensual sex, things then turn sour, Torres sustains multiple blows resulting in her death, and Martinez attempts to remedy the situation by calling the police and requesting that they "send help quick." Thus, there clearly was substantial evidence to support the defense of actual consent, and consequently, the trial court erred in refusing to give CALJIC 1.23.1.

Moreover, when the trial court discussed the consent instructions with counsel, the prosecution conceded that the defense was entitled to argue "consensual sex." (RT 2427). In closing argument, the prosecution

summarized the case as follows:

> [I]n a nutshell what . . . this case boils down to is a really simple truth and a really simple decision on your case, on your part. And that is, did Sophia Torres have consensual sex in a park on that night with the defendant in this case?

(RT 2517). D.A. Sneddon then went on to repeatedly argue that Sophia Torres did not have consensual sex with Appellant Martinez. (RT 2519, 2523, 2525, 2526, and 2540).

In closing argument, the defense asserted that Appellant Martinez had consensual sex with Sophia Torres. (RT 2657-2662). The defense argued as follows:

> Sophia Castro Torres was obviously depressed, . . . It's obvious that the woman was isolated, for whatever reason, disconnected from her own family.
>
> What do we know about human beings? People in this kind of obvious pain sometimes seek to relieve that pain. Many human beings, many of us, will seek pain relief in a variety of ways. Sophia Castro Torres didn't drink, which is one of humanity's favorite ways. She didn't use drugs, which is another one that's unfortunately growing in popularity. But she may have used another that's even older than alcohol. Sophia Castro Torres may have sought connectedness, warmth, comfort, pain relief, a sense of relatedness, a sense of belonging, whatever you want to call it, through sex with a stranger. People -- people, human beings, do things like that.

(RT 2660-2661).

The record also reflects that Sophia Torres was a loner and depressed (RT 1731-1734, 1738-1739, and 1756-1759), who had recently returned to Santa Maria from Arizona where her boyfriend had been killed, and consequently, she lost everything, including her apartment and things. (RT

1757-1759). She did not consume alcohol or use drugs. (RT 1750 and 1761). These facts support the argument made by defense counsel that Sophia Torres consented to sexual relations with Appellant Martinez as a form of "pain relief." (RT 2660-2661).

Therefore, the question of consensual sex was central to this case as both the prosecution and defense argued consensual sex extensively in their respective closing arguments. The CALJIC 10.00 rape instruction defines rape as "sexual intercourse . . . against that person's will" and then defines "against that person's will" as meaning without the consent of the alleged victim. The Use Note to CALJIC 1.23.1 (2004 Revision) expressly states that the definition of consent as reflected in CALJIC 1.23.1 should be used in prosecutions under Penal Code section 261 (e.g., rape). It follows that the jury was not properly instructed on the question of actual consent, and thus, the jury determination that Appellant raped Sophia Torres cannot stand.

In People v. Stitely, supra, 35 Cal.4th 542-543, this Court rejected the defense contention which implied that a lack of vaginal injury precludes the jury from finding rape. This Court aptly concluded that the determination of whether the lack of vaginal injury means that the victim was not raped rests with a jury, albeit, a jury that is properly instructed on the issue of actual consent as reflected in CALJIC 1.23.1. Id. The jury was instructed on the issue of actual "consent" as reflected in CALJIC 1.23.1 which defined actual consent as "a sexual act freely, voluntarily, and knowingly performed." People v. Stitely, supra, 35 Cal.4th at 553. Here, there was also a lack of vaginal injury, but the trial court did not, as the trial court did in Stitely, instruct the jury on the issue of actual consent as reflected in CALJIC 1.23.1. In a case where consent was a critical issue,

the trial court erred by refusing and failing to instruct the jury on the issue of actual consent as reflected in CALJIC 1.23.1.

C. The Failure to Define Consent Violated Appellant's State and Federal Constitutional Rights.

The trial court's modified CALJIC 10.00 rape instruction was deficient both in terms of its generality and lack of completeness on the issue of consent. (RT 2503-2505; CT 01187 at 01262-01264). The trial court gave a modified CALJIC 10.00 instruction which defined rape as the "act of sexual intercourse" which is accomplished against another "person's will." The instruction further defined "[a]gainst that person's will" as being "without the consent of the alleged victim." However, the term "consent" is not defined in the instruction. (RT 2503-2505; CT 01187 at 01262-01264). Accordingly, the instruction was deficient both in terms of its general reference to consent as well as in the failure to define consent.

In People v. Reed (1952) 38 Cal.2d 423, 430, this Court quoting from People v. Carothers (1946) 77 Cal.App.2d 252, 255, addressed the issue as follows:

> "Where an instruction on a particular point or points as given by the court is correct as far as it goes, and the only valid objection, if any, to it is that it is deficient or inadequate by reason of its generality, indefiniteness, or incompleteness, if defendant desires additional, amplified, explanatory, fuller, or more complete, elaborate, comprehensive, definite, specific or explicit instructions on such point or points, he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instruction." (*People* v. *Carothers,* 77 Cal.App.2d 252, 255 [175 P.2d 30].)

Here, the modified instruction was deficient both in terms of its generality and lack of completeness. This is clear from the Use Note to CALJIC 1.23.1 (2004 Revision) which confirms that the definition of consent as reflected in CALJIC 1.23.1 should be utilized when instructing on prosecutions under Penal Code section 261 (e.g., rape).

It follows that the trial court's failure to give the CALJIC 1.23.1 instruction which defines consent violated several of Appellant's constitutional rights. It violated his right to trial by jury (U.S. Const., Amends., 6 and 14; Cal. Const., art. I, § 16) by denying him the right to have a properly-instructed jury determine each element of the crime, and it violated his right to due process of law (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15) by denying him both a fair trial and the benefit of the presumption of innocence and the requirement of proof beyond a reasonable doubt. (United States v. Gaudlin (1995) 515 U.S. 506, 509-510 ; Carella v. California (1989) 491 U.S. 263, 265; People v. Kobrin (1995) 11 Cal.4th 416, 423.)

In addition, the failure to define consent for the jury violated Appellant's federal right to due process (U.S. Const., Amend. 14) by arbitrarily denying him a liberty interest created by state law. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346; Vitek v. Jones (1980) 445 U.S. 480, 488).

Furthermore, because this was a capital case, and rape was one of the theories used to secure the conviction for first-degree murder upon which a death sentence was ultimately imposed, the failure to define consent violated Appellant's rights to a fair and reliable capital guilt trial. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, § 17; Beck v. Alabama (1980) 447 U.S. 625, 638.)

Because the rape formed the basis for one of the special circumstances which made Appellant Martinez death-eligible (CT 01284), and because the rape special circumstance was used as a factor in aggravation at the penalty phase (CT 01534; RT 3940), the failure to define consent also violated Appellant's right to a fair and reliable capital penalty trial. (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, §§ 7, 15, and 17; Johnson v. Mississippi (1988) 486 U.S. 578, 586; see also Godfrey v. Georgia (1980) 446 U.S. 420, 429, which condemned "[t]he standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury.")

D. The Failure to Define Consent Was Reversible Error.

The failure to define consent deprived Appellant Martinez of a jury determination concerning whether he engaged in sexual intercourse with Sophia Torres against her will, a necessary element of the crime of rape. This error is a "structural defect" in the trial process which is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. 275, 281-282; see People v. Kobrin, supra, 11 Cal.4th at pp. 428-429.)

Even under the more lenient standard of Chapman v. California (1967) 386 U.S. 18, 24, which governs non-structural constitutional errors, reversal is required here because the instructional error was not harmless beyond a reasonable doubt. The evidence of lack of consent was not "so dispositive" that this Court can say that a properly-instructed jury would necessarily have found it to exist. (Cf. Rose v. Clark (1986) 478 U.S. 570, 583.)

Moreover, this was not a case in which the issue posed by the omitted instruction was necessarily resolved by the jury under other, correct instructions. (Cf. People v. Lewis (2001) 25 Cal.4th 610, 646.) No other

instruction defined the term consent. Accordingly, the conviction pertaining to rape and the felony murder conviction predicated on rape must be reversed. (CT 01286 and 01284).

IV. THE PROSECUTOR'S MISCONDUCT DURING CLOSING ARGUMENT IN THE GUILT PHASE OF THE TRIAL COMPELS REVERSAL

During the closing argument of the guilt phase, the prosecution engaged in various forms of misconduct which include: (1) appeals to passion and prejudice; (2) references to the subject of punishment and the penalty phase; and (3) impermissible vouching for the credibility of a witness. Appellant submits that the prosecutor's numerous acts of misconduct constituted an improper attempt to inflame the jury against him and deprived Appellant of due process of law guaranteed by the Fifth and Fourteenth Amendments, as well as the Eight Amendment right to reliable determination of this penalty. (See e.g., Darden v. Wainwright (1986) 477 U.S. 168, 178-179.) The error cannot be said to have been harmless beyond a reasonable doubt, and reversal is therefore required.

A. Appeals to Passion and Prejudice.

The role of a prosecutor is to see that those accused of crime are afforded a fair trial. This obligation "far transcends the objective of high scores of conviction . . . ." (People v. Andrews (1970) 14 Cal.App.3d 40, 48.) A prosecutor is held to a standard higher than that imposed on other attorneys because he or she exercises the sovereign powers of the state. (People v. Espinoza (1992) 3 Cal.4th 806, 820.) The duties of a prosecutor were summarized in People v. Daggett (1990) 225 Cal.App.3d, 751, 759 as follows:

> "As a representative of the government a public prosecutor is not only obligated to fight earnestly and vigorously to convict the guilty, but also to uphold the orderly administration of justice as a servant and representative of the law. Hence, a prosecutor's duty is more comprehensive than a simple obligation to press for conviction. As the court said

> in *Berger v. United States* (1935) 295 U.S. 78, 88 [79 L.Ed. 1314, 55 S.Ct. 629]: '[The Prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor--indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.' [Citations.]"

See People v. Hill (1998) 17 Cal.4th 800, 819-820; see also People v. Beal (1953) 116 Cal.App.2d 475, 478; see generally, 5 Witkin & Epstein, Cal. Crim. Law, Criminal Trial, § 571, pp. 815-817, and §§ 594-597, pp. 851-854.

Moreover, this Court and the federal courts have often held that during jury argument "it is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice." (People v. Mayfield (1997) 14 Cal.4th 668, 803, cert. denied (1997) 522 U.S. 839; Viereck v. United States (1943) 318 U.S. 236, 247-248; Commonwealth of Northern Mariana Islands v. Mendiola (9th Cir. 1992) 976 F.2d 475, 486-487; see also United States v. Monaghan (D.C. Cir. 1984) 741 F.2d 1434, 1441, cert. denied, 470 U.S. 1085 (1985).

In this case, D.A. Sneddon sought to arouse passion and prejudice during the prosecution's initial closing argument in the guilt phase. He referred to the deceased victim, Sophia Torres, as "that poor lady" (RT 2566) and he also referred to the injuries on "that poor woman's body and

face." (RT 2569). Further, D.A. Sneddon described the encounter between Appellant and the deceased victim as a "savage beating" and concluded with the rhetorical notation "that one human being could do that to another being." (RT 2513). In addressing the Maria Morales incident, D.A. Sneddon argued that Appellant Martinez was "insulting your intelligence" by the suggestion that he did not intend to rape Maria Morales. (RT 2527).

D.A. Sneddon also exploited the suffering of the surviving victims who testified at trial as follows:

> [I]t is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of the defendant in this case on them.

(RT 2515).

D.A. Sneddon argued further as follows:

> Who can forget their looks of discomfort of just having to face the defendant again? . . . [J]ust the uncomfortableness of having to come into court and sit here and be in the same room with their attacker.

(RT 2515-2516).

Moreover, D.A. Sneddon sought to have the jurors place themselves in the proverbial shoes of the victim Maria Morales when he posed the following rhetorical question:

> But can any of you really deny the spontaneous and truthful nature of Maria Morales as she testified in this trial, as you saw the tears evoked as she was reliving what happened to her, the attack by the defendant?

(RT 2529).

Further, D.A. Sneddon also referenced the suffering of the deceased victim, Sophia Torres, in conjunction with his comments concerning the photographs of the crime scene as follows:

> [W]hen you have cases like this particularly, you can't avoid the necessity of bringing those photographs here. And, if anything, if it makes you uncomfortable, it's probably a measure of the true violent capabilities of the defendant in this case and the true measure of the suffering of the victim in this case.

(RT 2560).

D.A. Sneddon spent considerable time responding to the rhetorical question he posed as to: "Who was Sophia Torres?" (RT 2521-2525). He characterized her as a "very nice woman" who was raised in Sonora, Mexico, the fourth of 13 children, who came to America with her brothers and sisters to try to make a better life for herself. He noted her personal tragedy in which her boyfriend had been murdered in Phoenix, Arizona, which "obviously destroyed her life." She lost everything and took to living in shelters and on the streets. She was depressed but also contemplative and just wanted to be left alone. (RT 2521-2525).

In his final comments to the jury during the initial closing argument, D.A. Sneddon, under the guise of rebutting the defense theory of consensual sex, sought to arouse passion and prejudice in the jury by asking them to send a message to everyone concerning who Sophia Torres was. D.A. Sneddon argued as follows:

> Ladies and gentlemen, in this case the victim, Sophia Torres, has been spared no indignity by the defendant to escape responsibility for her brutal murder. . . .
>
> And I can't sit down without saying to you, is there no

> dignity or fairness for Sophia Torres even in death? Well, you have the power, and knowledge is power. And the power isn't in the rhetoric of anybody speaking to you. The power is in the knowledge and the compelling force of the facts of this particular case. By the power of that knowledge and your responsibility, you 12 people have the ability in this case to tell everyone, you have the ability to tell everybody in this courtroom, you have the ability to tell everybody in this community, you have the ability to tell everybody on both sides of this lawsuit, everyone, by your verdict, that Sophie Torres was a kind person, that she was a nice person, that she was a gentle person, that she was a loner, and that the only thing that, at this point in her life, that she ever asked, the only thing she was ever asking was to be left alone so she could contemplate - depressed, contemplative - the loss of the person that she loved more than anybody else in life, her boyfriend that was killed. All she ever asked.
>
> You have the power, by your verdicts, to tell everybody that she was not a promiscuous woman, that she was not somebody who would engage in a one-night stand with the defendant. Ladies and gentlemen of the jury, you have the power to tell everyone, and especially the person responsible for those lies and for her death, . . . to tell . . . Tommy Jesse Martinez, that Sophia Torres was raped, Sophia Torres was robbed, and Sophia Torres was beaten to submission and left for dead by the defendant. I and Miss Grossman are asking you to do that.

(RT 2579-2581).

Thus, the prosecution sought to arouse passion and prejudice in the jury by focusing on the suffering endured by both the surviving victims, most notably Maria Morales, and the deceased victim, Sophia Torres. It is well settled that an appeal for sympathy for the victim is out of place during an objective determination of guilt. People v. Stansbury (1993) 4 Cal.4th 1017, 1057, reversed on other grounds by Stansbury v. California (1994)

511 U.S. 318; see People v. Simington (1993) 19 Cal.App.4th 1374, 1378-1379 (prosecutor's argument that jurors should place themselves in position of innocent victim of knife attack was improper appeal to passion and prejudice); see also People v. Fields (1983) 35 C.3d 329, 362; People v. Wiley (1976) 57 Cal.App.3d 149, 163.

Although the defense did not object to the prosecutor's conduct as outlined above during the initial closing argument in the guilt phase, in response, defense counsel, Mr. Dullea, sought to diffuse the prosecution's appeal to passion and prejudice as follows:

> My job, and I think the job of lawyers, is to get up here at the end of the trial and explain how, in our view, the facts and the law come together to support our view of the case, our view of what the evidence shows. I was therefore a little bit dismayed and disappointed when Mr. Sneddon stood up this morning and, for the first ten minutes of his argument what we heard were words, what you might call hot words, emotional words, words that appeal to a part of us that, although it may be important and it may be valid, don't help a jury make a decision in a case like this.
>
> . . .
>
> Now, a person listening to that -- Mr. Sneddon's an accomplished orator, and that part of his remarks, and indeed his whole speech today, was very moving from an emotional point of view. And it was so, because the crimes that he was describing are awful crimes. No one denies that. But wasn't much of Mr. Sneddon's speech, especially this morning, directed to convicting the crimes of being bad crimes rather than showing us how the facts and the law supported Mr. Martinez's guilt?
>
> No one denies that these are awful crimes. Some of them have been proved; some of them haven't. No one denies the terror suffered by Maria Morales. No one denies the horror that Sophia Torres must have suffered. No one denies

> that Sabrina Perea was badly frightened, but not much of Mr. Sneddon's speech was directed to discussing the facts and the law, and how much of it was directed to the emotional issues?
>
> It's perfectly all right, ladies and gentlemen, and it's perfectly natural to feel revulsion for these crimes. I'm sure we all do. And while that was a very nice speech, that isn't how the law expects you to make your decision, based on your -- based on your gut, or based on your reaction, or based on your revulsion. Mr. Martinez is entitled to a fair trial, and the way he gets a fair trial is if you use your common sense, your intelligence, your analytical powers, and you put the facts together with the law.
>
> If you feel emotions, feel them. Recognize them for what they are, set them aside. If you're angry at Mr. Martinez for the things he did do, feel that. But convict him fairly for what he did, and acquit him for what he didn't do.

(RT 2582-2584).

Although, as noted, defense counsel did not object to the prosecutor's improper argument, an objection is not required where a retraction by the prosecutor or admonition by the court would not have cured the harm. (People v. Green (1980) 27 Cal.3d 1, 28.) "Objection is an idle act when it is reasonably probable that no such cure will follow." Id. at 28. There are two reasons why that is the situation here.

First, is the sequence of the comments. Although the prosecutor began making comments referencing the sympathy for the surviving victims and the deceased victim early in his initial argument, the improper comments increased in both frequency and severity as the argument went on, reaching a crescendo during the prosecutor's closing comments regarding sending a message with respect to who Sophia Torres was. By the time it became obvious that the prosecutor's entire argument would be

built around a theme of sympathy for the victims, particularly the deceased victim, Sophia Torres, the damage had been done, and it was too late for an objection and admonition to cure the harm.

This case thus resembles People v. Bandhauer (1967) 66 Cal.2d 524, where the issue of prosecutorial misconduct was also raised for the first time on appeal. In that case, this Court found that the issue had not been waived because the prosecutorial misconduct consisted of improper comments that were "injected gradually into the argument" so that by the time the error became apparent, it was too late for an admonition to remedy the harm. Id. at 530. Therefore the Court found that the issue was recognizable on appeal. See also People v. Jaspal (1991) 234 Cal.App.3d 1446, 1461.)

Second is the volume and variety of the comments. Cleansing this prosecutor's argument of error would have required almost constant objection by the defense, and it has long been recognized that repeated objections can serve to magnify, rather than reduce, the harm. (People v. Kirkes (1952) 39 Cal.2d 719, 726; People v. Pitts (1990) 223 Cal.App.3d 606, 692.)

For both of these reasons, objections would have been futile and hence are not required. The issue should be reviewed on its merits.

The efforts by the prosecution to appeal to passion and prejudice with respect to sympathy for the surviving victims and deceased victim during the guilt phase argument amounts to a due process violation, and hence, an error of constitutional dimension. Therefore, it mandates reversal unless the People can prove beyond a reasonable doubt that it was harmless to the defendant. (Chapman v. California (1967) 386 U.S. 18, 24.) The errors in this case stemming from prosecutorial misconduct were not

harmless beyond a reasonable doubt.

B. The Subject of Penalty or Punishment in the Guilt Phase Argument.

The prosecution sought to inject the subject of penalty or punishment in the guilt phase deliberations. It is well settled that a defendant's possible punishment or penalty is not a proper matter for the jury's consideration in determining guilt or innocence. People v. Holt (1984) 37 Cal.3d 436, 458; People v. Honeycutt (1977) 20 Cal.3d 150, 157, n.4; People v. Shannon (1956) 147 Cal.App.2d 300, 306; CALJIC 8.83.2; CALJIC 17.42.

Both the prosecution and the defense requested that the trial court give CALJIC 8.83.2 entitled "Special Circumstances - Jury Must Not Consider Penalty." (CT 1500 at 1502; 1514 at 1519). The trial court agreed to give the instruction. (RT 2404). Moreover, the prosecution requested that the court give CALJIC 17.42 entitled "Jury Must Not Consider Penalty - Non-Capital Case." (CT 1500 at 1503). The trial court agreed to give that instruction as well. (RT 2446-2447).

The trial court instructed the jury before closing arguments in the guilt phase which included CALJI 8.83.2 as follows:

> In your deliberations, the subject of penalty or punishment is not to be discussed or considered by you. That is a matter that must not in any way affect your verdict or affect your finding on the special circumstances alleged in this case.

(RT 2461 at 2491).

Moreover, after the arguments by counsel in the guilt phase, the court further instructed the jury which included CALJIC 17.42 as follows:

> In your deliberations, do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

(RT 2721 at 2722).

During the prosecution's initial closing argument in the guilt phase, D.A. Sneddon sought to inject the subject of punishment and penalty into the jury's guilt phase deliberations. D.A. Sneddon argued as follows:

> So as I told you, there are some simple truths in this case. And the simple truth is Sophia Torres was raped and the simple truth is that the evidence presented is overwhelming and virtually uncontested. The simple truth is this trial went quickly and it's a precursor to the second trial in this case.

(RT 2547).

The reference to the "second trial in this case" is clearly a reference to the penalty phase determination. Further, the fact that the guilt phase determination is a "precursor" to the penalty phase determination in light of the District Attorney's efforts to arouse the passion and prejudice of the jury with regard to sympathy for the surviving victims and deceased victim as noted above, clearly indicates to the jury that once they make a guilt determination that they will then be able to move forward with the penalty phase determination, that is, they will be able to proceed with the punishment of Appellant.

D.A. Sneddon also argued in addressing the murder of Sophia Torres and the other crimes as follows:

> How about after the murder? Is there anything in the defendant's conduct after the murder -- and by the way, isn't that a scary thought, that we not only have somebody before, we have somebody who is killed and then we have somebody out there doing this again? Are there no lessons learned in

life?

(RT 2543).

Here, D.A. Sneddon is referring to the alleged sequence of the crimes, that is, the crimes alleged in connection with the incident involving Maria Morales on November 3, 1996, the murder of Sophia Torres on November 15, 1996, the incident involving Laura Zimmerman on December 2, 1996, and the incident involving Sabrina Perea on December 4, 1996. Thus, the rhetorical question posed by D.A. Sneddon with respect to "lessons learned in life" clearly injects a punishment and/or penalty phase issue into the jury's guilt phase deliberations, that is, that Appellant should receive the death penalty as opposed to life imprisonment because he is beyond rehabilitation as he is incapable of learning lessons in life.

Moreover, D.A. Sneddon, by his references to the suffering of both the surviving victims and deceased victim, also sought to inject the question of victim impact into the guilt phase deliberations which is only relevant to the penalty determination. See People v. Bacigalupo (1993) 6 Cal.4th 457, 466. D.A. Sneddon injected the issue of victim impact with respect to the surviving victims as follows:

> In observing the surviving victims in this case and their testimony . . ., it is clear from the psyche that the memory of each of the victims will always be scarred from their individual suffering and the terror created by the attacks of the defendant in this case on them.
>
> . . .
>
> Who can forget their looks of discomfort of just having to face the defendant again? . . . [J]ust the uncomfortableness of having to come into court and sit here and be in the same room with their attacker.

(RT 2515-2516).

Here, the reference to each surviving victim having a memory that "will always be scarred" as a consequence of their "suffering" and the "terror" caused by the defendant, clearly injects the issue of victim impact into the guilt phase determination. Moreover, the repeated references to the suffering of deceased victim, Sophia Torres, further injected the issue of victim impact into the guilt phase determination. For example, D.A. Sneddon referred to deceased victim, Sophia Torres, as "that poor lady" (RT 2566), noted the "savage beating" she endured (RT 2513), and referenced the photographs of the crime scene as reflecting "the true measure of the suffering of the victim [Sophia Torres] in this case." (RT 2560).

Although the defense did not object to the conduct of the prosecution in this regard, at the conclusion of the guilt phase arguments by both the prosecution and defense, the trial court gave some concluding instructions which included CALJIC 17.42 as follows:

> In your deliberations, do not discuss or consider the subject of penalty or punishment. That subject must not in any way affect your verdict.

(RT 2721 at 2722).

Thus, in light of the subsequent instruction by the trial court relative to CALJIC 17.42, the fact that defense counsel did not object to the prosecution's misconduct is of no moment as the court gave a supplemental instruction that the jury was not to consider the subject of penalty or punishment in their deliberations. The USE NOTE to CALJIC 8.83.2 entitled "Special Circumstances - Jury Must Not Consider Penalty" advises

that CALJIC 8.83.2 must be used when a special circumstance is charged and not CALJIC 17.42. In this instance, the CALJIC 17.42 instruction that the subject of penalty or punishment must not affect the verdict, was clearly supplemental to the CALJIC 8.83.2 instruction. Therefore, the jury was instructed both before and after the prosecution's argument that the subject of penalty or punishment was not to affect their verdict. The failure to object did not preclude the trial court from giving a curative instruction relative to the improper conduct by the prosecution as the trial court de facto gave such an instruction by virtue of CALJIC 17.42, and hence, the issue must be deemed preserved. See People v. Hill (1998) 17 Cal.4th 800, 820-822. Moreover, this case is similar to the case of People v. Holt (1984) 37 Cal.3d 437, 457-459, in which this court determined that such an instruction did not negate the improper reference to punishment by the prosecutor. It follows from People v. Holt, supra, that the judgment must be reversed.

C. Prosecutorial Vouching.

It is well settled that the attempt to bolster a witness's credibility by reference to facts outside the record constitutes prosecutorial vouching and is improper. 5 Witkin & Epstein, Cal. Crim.Law.3d, Criminal Trial, § 587 at pp. 538-540. See People v. Turner (2004) 34 Cal.4th 406, 431 [prosecutor improperly vouched for credibility of court-appointed experts in competency hearing on basis of facts outside record, consisting of his personal knowledge of those experts and his prior use of them]; see also People v. Hill, supra, 17 Cal.4th at 828 [a prosecutor may not go beyond the evidence in his argument to the jury].

The Ninth Circuit Court of Appeals has also addressed the issue of improper vouching in a number of decisions. In United States v. Frederick

(9th Cir. 1996) 78 F.2d 1370, 1378, the Ninth Circuit restated the rule as follows:

> The Ninth Circuit rule on vouching is clearly expressed in *United States v. Roberts*, 618 F.2d 530, (9th Cir. 1980), cert. denied, 452 U.S. 942, 69 L. Ed. 2d 957, 101 S. Ct. 3088 (1981), "It is improper for the prosecution to vouch for the credibility of a government witness." Id. at 533. We said:
>
> > Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. The first type of vouching involves personal assurances of a witness's veracity and is not at issue here.
> >
> > The second type of vouching involves prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record. It may occur more subtly than personal vouching, and is also more susceptible to abuse.
> > . . .

See United States v. Sarkisian (9th Cir. 1999) 197 F.3d 966, 989-990; United States v. Jackson (9th Cir. 1996) 84 F.3d 1154, 1158, cert. denied, (1996) 519 U.S. 986; see also, United States v. Sanchez (9th Cir. 1999) 176 F.3d 1214, 1224.

Thus, both the state and federal courts concur that prosecutorial remarks which bolster a witness's credibility by references to matters outside the record, constitutes impermissible vouching. In this case, the prosecution clearly vouched for the credibility of victim witness, Maria Morales, by referring to matters outside the record. In the rebuttal closing argument as to the guilt phase, Assistant District Attorney Tracy Grossman vouched for the credibility of Maria Morales as follows:

What Maria Morales said -- which she has said, ladies and gentlemen, every time she's been asked. Every time. She's been consistent with police, in prior testimony, and here before you.

(RT 2689).

Here, A.D.A. Grossman references statements by Morales to the police as well as in prior testimony, both of which are outside the record. Defense counsel, Mr. Dullea, made a timely and proper objection which was responded to by D.A. Sneddon and overruled by the court as follows:

MR. DULLEA: I'm going to object. There's no evidence of prior testimony before this jury.

MR. SNEDDON: There is, too.

THE COURT: I'll overrule the objection. Go ahead.

(RT 2689).

Thus, the misconduct of A.D.A. Grossman in vouching for the credibility of Maria Morales was compounded by D.A. Sneddon's rejoinder "There is, too." As noted, the court overruled the objection. A.D.A. Grossman then went on to recite the trial testimony of Maria Morales which she sought to bolster by reference to the purported "consistent" statements to the police and purported "consistent" prior testimony as follows:

MR. GROSSMAN: Excuse me, let me just -- Maria Morales' words to you, ladies and gentlemen:

"I felt someone grabbing me from behind, hugging me from behind with one hand, and with the other the person had a blade. And he said that I should go with him, that I should not do anything.

"I was afraid. I tried to slip away. And he held onto me tighter, telling me at the same time not to say anything. And he would say in English, 'Come with me.' And I was able to slip out a little bit. And he grabbed me by the hair and said that I was to go with him and I had to go with him.

"He took me to -- we walked for a while, and then he took me to a place where we were all alone. And I would say along the way what he wanted. I had my bracelets, I had rings, I had a beeper. I asked him what he wanted. I offered the rings. He wouldn't say anything. He just continued walking along.

"We arrived at a place, and he threw me against a wall. He tried to take my belt off. I had a blouse that was tied and he untied it. I had the books right here. And he kept asking" -- "I kept asking what he wanted. And in English, he said, 'I want you.'

"And I -- I struggled to set myself free, but he tried kissing me. I kept moving. I didn't want that. He said he would mark up my face, for me not to do anything."

(RT 2689-2690).

The referenced testimony by A.D.A. Grossman was, in effect, verbatim from the trial testimony of Maria Morales: [RT 1538-1539]. This testimony was critical to the kidnapping charge as to Maria Morales with respect to the asportation element. However, there were no statements to the police nor was there any prior testimony referenced during the trial whether "consistent" or otherwise regarding her encounter with Appellant. The two police officers who testified regarding the Morales matter did not address the encounter issue. Police Officer Kellene Brooks attested to her observations of the physical and emotional condition of Ms. Morales following the incident, efforts to identify her assailant, and a general

description of the crime scene area. (RT 1577-1590). Police Officer Jose Martinez testified regarding the identification of Appellant by Ms. Morales. (RT 1591-1596). Thus, neither officer attested to statements made by Ms. Morales relative to her encounter with Appellant nor did the prosecution place in evidence any statement by Ms. Morales to the police which was consistent with her trial testimony concerning her encounter with Appellant as stated by A.D.A. Grossman. Moreover, the only reference to prior testimony by Ms. Morales came in cross-examination by defense counsel, Mr. Dullea, as follows:

> **Q.** BY MR. DULLEA: Miss Morales, let's go to the point where the man is trying to kiss you, Mr. Martinez. Right then is when you said to him, to Mr. Martinez, "Someone's coming," correct?
>
> **A.** Well, he was trying to do all things at the same time.
>
> **Q.** All right. At some point, you said, "Someone's coming," correct?
>
> **A.** Yes.
>
> **Q.** Had you heard Francisco coming, or were you just guessing?
>
> **A.** No.
>
> **Q.** Do you mean you just made that up?
>
> **A.** I made it up, but I did hear people speaking, but I didn't hear anyone coming.
>
> **Q.** Do you remember -- I'm going to ask you to think way back to January 21st, 1997.

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Do you remember testifying across the courtyard in Municipal Court?

A. Uh-huh.

Q. There was a woman judge named Judge Hall. Do you remember that?

A. Uh-huh.

Q. Do you remember being asked about someone coming down the alley?

A. If they asked me that?

Q. Yeah.

A. (Nods head up and down.)

Q. I couldn't hear you.

A. I don't remember.

Q. Oh. Do you remember saying, "I heard someone coming," in reference to Francisco?

A. I don't remember if I said that.

(RT 1563-1564).

Thus, the only reference to prior testimony is with regard to the prior preliminary hearing testimony of January 21, 1997, before Judge Hall. Ms. Morales could not recall her prior testimony regarding someone coming down the alley, nor could she recall her prior testimony regarding whether she "heard someone coming."

Ms. Morales testified further under cross-examination relative to being halfway down the alley with respect to someone coming as follows:

> **A.** I told him [Appellant Martinez] that someone was coming, but I wasn't really sure if anyone was really coming. But I said that because I could hear people and sounds. And so that's when he took me halfway down the alley, and the young man, that's when he was there. And I was looking at him, and he looked at me, but he [Appellant Martinez] was grabbing on to me. I was trying to stop him [the young man] with my eyes. I was so frightened. I was yelling, but he says he didn't hear me.

(RT 1565). Under further cross-examination, Ms. Morales also acknowledged that she could not "remember" telling the public defender investigator, Patrick Quintana, that she heard footsteps in the alley and heard someone coming before she told Appellant Martinez that someone was coming. (RT 1570).

Thus, the credibility of Maria Morales was significantly challenged and undermined by her lack of recollection and potential inconsistent statements regarding whether she heard someone coming down the alley during her encounter with Appellant Martinez, or whether she heard someone coming and informed Appellant Martinez that someone was coming while they were in the alley which would impact the kidnapping charge on the issue of asportation. That is, if someone was coming, the movement experienced by Ms. Morales may not have placed her in danger, and consequently, the asportation element of the kidnapping charge would not be satisfied.

The prosecution sought to buttress the testimony of Maria Morales whose credibility had been subject to challenge based on her prior preliminary testimony and her discussions with the public defender

investigator, Patrick Quintana. The prosecution recognized the damage that had been done to the credibility of victim witness, Maria Morales, and sought during closing argument to repair the damage by vouching for her credibility by referencing statements to the police and prior testimony, neither of which can be found in the record. Thus, the prosecution engaged in classic vouching for the credibility of Miss Morales. A timely objection was made by the defense which was overruled by the court, and hence, the error has been preserved.

In People v. Hill, supra, 17 Cal.4th at 819, this court addressed the standards of review for prosecutorial misconduct as follows:

> . . . "The applicable federal and state standards regarding prosecutorial misconduct are well established. '"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.'"' (*People v. Giois* (1995) 9 Cal.4th 1196, 1214 [40 Cal.Rptr.2d 456, 892 P.2d 1199]; *People v. Espinoza* (1992) 3 Cal.4th 806, 820 [12 Cal.Rptr.2d 682, 838 P.2d 204].) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves '"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."' (*People v. Espinoza, supra*, 3 Cal.4th at p. 820.)" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 [64 Cal.Rptr.2d 400, 938 P.2d 2] (hereafter *Samayoa*).)

It is submitted that prosecutorial vouching constitutes both a deceptive and reprehensible method employed by the prosecution to persuade the jury to convict. This is particularly true in this instance in which the prosecution is vouching for a critical victim witness, Maria Morales, on the key issue of asportation relative to the kidnapping charge.

Moreover, the prosecutorial vouching was part of a pattern of conduct resulting in the trial being fundamentally unfair, and hence, a denial of due process under the federal Constitution.

In summary, the conduct of the prosecution in appealing to passion and prejudice, injecting the subject of punishment and penalty into the guilt phase, and prosecutorial vouching, both separately and collectively, constitute deceptive and reprehensible methods to persuade the jury to convict and resulted in prejudicial prosecutorial misconduct in violation of state law. People v. Hill, supra, 17 Cal.4th at 819. Further, the pattern of conduct by the prosecution of appealing to passion and prejudice, injecting the subject of punishment and penalty into the guilt phase, and vouching, both separately and collectively, comprise a pattern of conduct which resulted in an unfair trial, thereby rendering the conviction a denial of due process under the federal Constitution. Id. Accordingly, the judgment of conviction must be reversed.

V. THE CUMULATIVE EFFECT ON THE GUILT PHASE ERRORS REQUIRES REVERSAL OF THE GUILT JUDGMENT

Serious constitutional errors impacted the guilt phase of Appellant Martinez's trial and, as argued supra, each error was sufficiently prejudicial individually to warrant reversal of Appellant's guilt judgment. However, when evaluated cumulatively, the prejudice of these errors was even greater and the true measure of the harm to Appellant is the cumulative effect of these errors, not their individual harm.

Thus, all of the guilt phase errors must be considered together in order to determine if Appellant received a fair guilt trial. (People v. Buffum (1953) 40 Cal.2d 709, 726; United States v. Rivera (10th Cir. 1990) 900 F.2d 1462, 1470; United States v. Wallace (9th Cir. 1988) 848 F.2d 1464, 1475.)

Furthermore, this cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. The curative effect of any instruction is uncertain and lingering prejudice can remain even after the most detailed and forceful admonition. Thus, this Court should also:

> [C]onsider errors and instances of misconduct which we earlier held were adequately cured by the court's instruction. We recognize that a trace of prejudice may remain even after a proper instruction is given. If we find a residue of prejudice, we will take it into account.

(United States v. Berry (9th Cir. 1980) 627 F.2d 193, 200-201, cert. denied (1981) 449 U.S. 1113; see also United States v. Necochea (9th Cir. 1993) 986 F.2d 1273, 1282.)

This was a close case. Appellant's prosecution was based primarily on circumstantial evidence, particularly as to the capital charge involving deceased victim, Sophia Torres. Therefore, the cumulative effect of the errors must be found to have been prejudicial and Appellant's guilt judgment must be reversed.

PENALTY PHASE

VI. THE GUILT PHASE ERRORS MUST BE DEEMED PREJUDICIAL TO THE PENALTY PHASE UNLESS THE STATE CAN PROVE BEYOND A REASONABLE DOUBT THAT THE ERRORS DID NOT AFFECT THE PENALTY VERDICT

Appellant Martinez has demonstrated that this Court should reverse his conviction because of substantial guilt phase errors. Those same errors also poisoned his penalty phase defense. Should this Court hold that the guilt phase errors were harmless as to the guilt determination, it should nonetheless reverse the death sentence because of the prejudice those errors caused Martinez at the penalty phase.

The jury was instructed by the trial court that they should consider all guilt phase and penalty phase evidence in deciding the sentence:

> In determining which penalty is to be imposed on a defendant, you shall consider all the evidence which has been received during any part of the trial of this case except as you may hereafter be instructed.

(RT 3940; CT 01534). The prosecutor noted this instruction during closing argument. (RT 3957).

At the guilt phase, Appellant Martinez argued reasonable doubt in light of the circumstantial nature of the evidence against him. (RT 2584, 2622, and 2623-2673). Therefore, the errors that provided for the admissibility of statements, admissions, and confessions by Martinez directly affected his defense at the penalty phase. In addition, even if the admission of said evidence at the guilt phase had been permissible under state law, that evidence was not sufficiently reliable to form the basis for a death sentence.

This court has recognized that guilt phase errors can prejudice the penalty decision, even in cases where evidence of guilt is overwhelming:

> 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. . . . [I]n 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, . . . the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in the absence of error. If only one of the twelve jurors was swayed by the inadmissible evidence or error, then, in the absence of that evidence or error, the death penalty would not have been imposed.

(People v. Brown (1988) 46 Cal.3d 432, 464 (conc. opn., Mosk, J., quoting from People v. Hamilton (1963) 60 Cal.2d 105, 136-137).

In Satterwhite v. Texas (1988) 486 U.S. 249, the Supreme Court considered the effect of constitutional error in the guilt phase upon the penalty determination. In Satterwhite, the Court held that the harmless error standard in Chapman v. California (1967) 386 U.S. 18, should be used to decide whether psychiatric evidence obtained in violation of the defendant's Sixth Amendment right to counsel and admitted at the penalty phase of a capital trial was prejudicial enough to require reversal of the death sentence. The Supreme Court stated that such error requires reversal of a death sentence unless the State proves "beyond a reasonable doubt that a constitutional error complained of did not contribute to the verdict." (Satterwhite, supra, 486 U.S. at 256, quoting Chapman, supra, 386 U.S. at 24.)

In Smith v. Zant, (11th Cir. 1988) 855 F.2d 712, affd. (1989) 887

F.2d 1407, the Eleventh Circuit followed Satterwhite and vacated a habeas corpus petitioner's death sentence because the defendant's written confession, obtained in violation of Miranda v. Arizona (1966) 384 U.S. 436, was admitted at the guilt phase of his trial. The court found that the error was harmless as to the guilt determination, but the court could not conclude beyond a reasonable doubt that the erroneously admitted confession did not influence the sentencing jury because of the difference in tone between the written confession and the defendant's more detailed and sympathetic trial testimony. (Smith v. Zant, supra, 855 F.2d at 722.)

Although Satterwhite and Smith involved Fifth and Sixth Amendment violations, Appellant submits that a similarly stringent harmless error standard should be applied in cases in which the Eighth Amendment requirements are violated, because the federal constitutional right to freedom from cruel and unusual punishment is equally worthy of protections.

This Court has adopted a "reasonable-possibility" standard for assessing prejudice resulting from state law errors at the penalty phase. (People v. Brown, supra, 46 Cal.3d at 447-448.) In Chapman, supra, the United States Supreme Court equated an almost identically worded standard adopted by it in Fahy v. Connecticut (1963) 375 U.S. 85, 86-87, with the Chapman standard of "harmless beyond a reasonable doubt." The Supreme Court stated:

> There is little, if any, difference between our statement in *Fahy v. State of Connecticut* about "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction" and requiring the beneficiary of a Constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.

(Chapman, supra, 386 U.S. at 24.)

Thus, the Supreme Court has recognized that the language of "reasonable-possibility" and of "harmless beyond a reasonable doubt" implicate virtually the same standard and impose the same burden upon a "beneficiary of a constitutional error." This Court should similarly recognize that the "reasonable-possibility" standard articulated in Brown, is functionally equivalent to the "harmless beyond a reasonable doubt" standard adopted in Chapman. Under this standard, it is not certain beyond a reasonable doubt that the guilt phase errors were harmless with respect to the jury's decision to impose a death sentence.

Thus, even if the guilt phase errors were harmless as to the guilt determination, the prejudice of those errors requires reversal of Appellant's death sentence, particularly in light of the eight hours of jury deliberations over two days, (RT 4081 and 4106; CT 01494 and 01497; see In re Martin (1987) 44 Cal.3d 1, 51 [lengthy deliberations]; Karis v. Calderon (9th Cir. 2002) 283 F.3d 1117, 1140-1141 [three days of deliberations]; Mayfield v. Woodford (9th Cir. 2001) 270 F.3d 915, 932 [reversible error in light of counsel's incompetence, a jury question, and one and a half days of juror deliberations]), and two juror questions which prompted a further special instruction by the trial court. (RT 4104-4105 and CT 01496-01497; People v. West (1983) 139 Cal.App.3d 606, 610 [jury's requests during deliberations material to prejudice analysis]; see, People v. Beeman (1984) 35 Cal.3d 547, 562; People v. Williams (1971) 22 Cal.App.3d 34, 40 [request for rereading of testimony suggests close case].) Accordingly, the death verdict must be set aside.

VII. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT MARTINEZ' STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND DUE PROCESS OF LAW BY ADMITTING PREJUDICIAL VICTIM IMPACT EVIDENCE

A. The Relevant Facts

On June 5, 1998, defense counsel filed an extensive motion to limit "victim – impact" evidence. (CT01329-01375). The prosecution had identified six family members of deceased victim, Sophia Torres who would testify on the issue of victim-impact as well as victims, Maria Morales and Sabrina Perea who would testify regarding the impact that the non-capital crimes had on them. (CT013427-01350). The defense also sought an evidentiary hearing to allow the trial court to properly evaluate the admissibility of the testimony of the Torres family members as well as the further testimony of Morales and Perea. (CT01349-01350). In particular, the defense requested that the trial court issue an order barring the Torres family members from stating their opinions and/or making characterizations of the crime, the defendant, and the appropriate sentence, citing Booth v. Maryland (1987) 42 U.S. 496; 111 S. Ct. at p. 2611, n.2. (CT01330). In fact, the defense argued as follows:

> Both *Payne v. Tennessee* (1991) 501 U.S. ___, 115 L.Ed.2d 720, 111 S. Ct. 2609 and *People v. Edwards* (1991) 54 Cal.3d 787 recognize that there are limits on the admissibility of "victim-impact" evidence. Indeed, *Payne* explicitly left intact *Booth v. Maryland*'s (1987) 482 U.S. 496 holding that "the admission of a victim's family members' characterizations and opinion about the crime, the defendant, and the appropriate sentence violate the Eighth Amendment" (see *Payne v. Tennessee, supra*, 111 S.Ct. at p. 2611, fn. 2).

(CT01352).

The defense sought to exclude the testimony of Maria Morales and Sabrina Perea who were victims in the consolidated non-capital case on the grounds that such testimony would not only be cumulative and repetitive, but inflammatory and prejudicial. (CT01349-01350). Further, the defense argued that the victim-impact evidence should be excluded under Evidence Code Section 352, the Eighth Amendment to the Federal Constitution, and Article 1, Section 17 of the California State Constitution as follows:

> Victim-impact evidence can be so inflammatory and/or prejudicial that it must be excluded under Evidence Code § 352. The Eighth Amendment (and its California counterpart, article I, § 17) provide twin bases for ensuring that capital defendants are tried under a "fundamentally fair decision-making process" (*People v. Ramos* (1984) 37 Cal.3d 136, 152-153). It has been repeated many times that the need for accurate and reliable decision-making is never greater than it is in capital cases (*Gilmore v. Taylor* (1993) 508 U.S. __, 124 L.Ed.2d 306, 318, 113 S.Ct. __ [and cases cited therein] see also *Gardner v. Florida* (1977) 430 U.S. 349, 357 [death is a qualitatively different" than "any other punishment imposed in this country"]). Footnote omitted
>
> In *Payne*, the United States Supreme Court explicitly recognized that victim-impact evidence may be "so-unduly prejudicial that it renders the trial fundamentally unfair [under the Due Process Clause of the Fourteenth Amendment" (*Payne v. Tennessee*, *supra*, 111 S.Ct. at p. 2608; emphasis added).

(CT 01352-01353)

On June 8, 1998, the prosecution filed its "Response To Defense Motion To Limit The Victim-Impact Evidence". (CT 01390-01398). The prosecution noted that it intended to elicit limited victim-evidence as follows:

> With respect to family members in the present case, we are seeking to introduce brief testimony regarding the relationship of the family member to Sophia Torres, the impact her death has had on them, and the facts of her life that relate to or have some bearing on the circumstances of the crime. We do not intend to introduce any testimony regarding the witnesses' characterization or opinion of the defendant, his character, or what the appropriate sentence should be. With respect to Sabrina Perea and possibly Maria Morales we intend to introduce brief testimony with respect to the impact that the circumstances of the crimes has had upon them. Footnote omitted.

(CT01392)

Moreover, the prosecution asserted that the defense is not entitled to an evidentiary hearing and that the Torres family members and victims should not be subjected to testifying on two separate occasions. Further, the prosecution noted that it did not intend to ask repetitive questions and that the cumulative testimony would be no more than one to two hours. Finally, the prosecution acknowledged that the scope of victim-impact evidence is "not boundless". (CT01396)

On June 9, 1998, the Court held a hearing regarding the victim-impact evidence motion. The defense noted its concern regarding the "cumulative and somewhat inflammatory" nature of the potential victim-impact testimony from the family members of the deceased victim, Sophia Torres. (RT796-2800). The defense also noted that it would be reviewing in detail the statements of Sabrina Perea and Maria Morales and would advise the court whether the particular statements or portions of the statements were objectionable. (RT2800-2801).

The prosecution made the following proffer regarding the victim-impact evidence concerning Sophia Torres:

> We intend to call a few family members to talk about the impact that this has had on them, and basically the impact is this: That at the time this crime was committed, Sophia Torres was in a depressed, isolated state. Because of that state, the defendant took her life, and she will never have the opportunity to regain or become the person that she once was. And the impact that the crime has had on the family, the way she died, the manner she died, has had a significant impact on these people. And under the law, they have the right to briefly discuss the impact that this crime has had on them. They're not going to comment on the defendant or what they think the penalty should be. They will be told they are not to go there. But they should, under the law, have the right to discuss the impact that this horrible crime has had on them.

(RT2802)

The trial court ruled as follows:

> THE COURT: Well, based on what you said in your points and authorities and what you're saying here, with the limitations that you've expressed both here and in your points and authorities, I'll allow that testimony, subject to staying within the limits that you've sort of self-imposed here, including I would allow some evidence of the desire to — you know, that she was killed before they could help her.

(RT2805-2806).

The prosecution acknowledged that the testimony would generally relate to the impact that the loss of their sister (Sophia Torres) had on the family, that no reference would be made to what they think the penalty or the punishment should be, and the they would express no opinion about the defendant as this would be "clearly out of bounds". (RT2807-2808).

1. Victim-Impact Evidence – Opinion and Characterization of Crime

At trial, the prosecution called three family members of the deceased victim, Sophia Torres regarding victim-impact. The prosecution called Victoria Francisco, older sister of Sophia Torres (RT2957-2958), Gilberto Torres, oldest brother of Sophia Torres (RT3002-3003) and Angel Torres, father of Sophia Torres (RT3004-3005). Both Victoria Francisco and Gilberto Torres characterized and gave opinions regarding the crime which resulted in the death of their sister. Victoria Francisco testified as follows:

> [W]hat hurts me the most is, you know, she didn't die of natural death, you know. And, you know, thinking all that she went through, you know, that night, you know, it hurts me a lot. You know, all she suffered that night, you know. And I know, you know, that she never do no harm to anybody, you know"...

(RT2958)

Moreover, Gilberto Torres testified as follows: "Well, I think of her every day, especially for the brutal way she died." (RT3002).

The day following the testimony of Victoria Francisco before the testimony of Gilberto Torres and Angel Torres, defense counsel, outside the presence of the jury, objected to the testimony of Victoria Francisco and noted that the testimony violated the court's earlier ruling on victim-impact testimony as well as representations by the prosecution that there would be no testimony regarding the "character of the defendant" or the nature of the crime. (RT2979-2980).

Defense counsel noted that the testimony by Victoria Francisco quoted above clearly involved a characterization of the nature of the crime in violation of the Booth and Payne decisions. (RT2979-2980). Defense

counsel (Mr. Dullea) stated as follows:

> I believe it is, that the Court – that is, *Payne* left intact *Booth*'s holding that evidence of victim's family members, characterizations and opinions about the crime, the defendant, or the appropriate sentence violates the Eighth Amendment.

(RT2980-2981).

Defense counsel noted that the testimony of Victoria Francisco was "inappropriate", "inflammatory and an appeal to emotion", which "did not supply an answer to the question of victim-impact." He requested that the court instruct the prosecutors not to present that "kind of evidence", and further requested the court to instruct the witnesses to avoid "that kind of reference." (RT2981) Defense counsel further noted the difficulty for the defense in responding to this type of testimony as follows:

> It's obviously – when that sort of testimony is delivered, it obviously puts defense counsel in a very uncomfortable position. The woman was crying and obviously in pain over the loss of her sister, and I risk incurring the jury's anger if I get up and interrupt and make an objection at that point. So I think it's important that the guidelines be very carefully laid out before it starts.

(RT2981)

The court and counsel then engaged in a lengthy colloquy regarding whether the testimony provided by Victoria Francisco involved an expression of feelings over the death of her sister or constituted a characterization of the crime as reflected in the following:

> **MR. SNEDDON** (prosecution): [T]he question was proper and the response was responsive.
>
> **MR. DULLEA** (defense counsel):I can respond briefly when the Court's done reading.

MR. SNEDDON: And I would point out, she said nothing about the defendant or what the penalty should be. It was totally her feelings about what the impact has been on her personally.

THE COURT: Go ahead.

MR. DULLEA: Mr. Sneddon's comments about what else he might put on notwithstanding, the remarks that Miss Torres [Victoria Francisco] made about the victim's suffering have never been admitted by any court that I know of, and they're still inadmissible under Booth and Payne. . . . I'm just asking you to rule that . . . no other witnesses make any argumentative remarks about the victim's suffering or any other description of the crime, because that's –

THE COURT: You're saying that the family cannot say that one of the impacts on themselves was the thought of their sister feeling the suffering through the attack?

MR. DULLEA: Yes, because it's inflammatory. Because I think that's the distinction made in Payne and later in Edwards, . I'm not objecting to the woman crying, I'm not objecting to her stating her feelings about losing her sister, at least not past a certain point, but I think the cases are fairly specific that you can't get in evidence of their characterization of the crime.

THE COURT: See, that didn't happen. She didn't characterize the crime. She –

MR. DULLEA: She –

THE COURT: She just said, you know, that her feeling – one of the impacts was her imaging what her sister went through in that attack.

MR. DULLEA: She talked about all that she suffered that night. It's at page 2958.

THE COURT: Yeah, about her sister. I don't find that to be prejudicial or beyond the area that they can go into. It's clear that

they can't talk about their view of the crime. We wouldn't allow them to get into a discussion that, you know, the defendant hit her eight times with a heavy object, or six times, and hit her in the face with the object. We're not going to allow that. But for them to be allowed to say that one of the impacts is their reliving what she must have gone through is I don't think prejudicial, and I'll allow it.

MR. DULLEA: May that be a continuing objection –

THE COURT: Yes.

MR. DULLEA: -- so I don't have to restate it?

THE COURT: So you don't have to do that.

MR. DULLEA: Unless the witnesses exceed that scope?

THE COURT: Right.

MR. DULLEA: And I still think that that was a characterization of the crime. I don't want you to think I'm conceding the point.

THE COURT: Well, I -- yeah, in a sense it is, but it's not, I think, the type of characterization they're trying to prohibit. They're dwelling on the, you know, re-going - through what the injuries were and how they came here. I'm not going to allow that. The Payne case doesn't allow that.

MR. DULLEA: That's all I have this morning. I think we're ready to go.

(RT2983-2986)

As noted, Gilberto Torres subsequently testified that he thinks of his sister "every day, especially for the brutal way she died." (RT3002)

2. Victim-Impact Evidence - In Non-Capital Case

Maria Morales and Sabrina Perea, victims in the consolidated non-capital case both testified regarding the impact that the subject crimes had on them. Morales testified that as a result of the attack, within the first two weeks of the incident, she became frightened when a man came near her. Moreover, she feared going out alone. Further, when she saw a young man, she became very scared of him. She was able to overcome these fears "little by little." Her mother was also "very afraid" and worried about her. She also used to love chocolates, e.g. snicker bars, but now she cannot eat them or smell them because it brings back the "whole memory" of the incident. (RT2996-2997)

Sabrina Perea testified that she gets "very nervous around men." She thinks that someone is going to "pull out a knife or hurt" her in some way. She is now "more aware" of her surroundings. For example, she checks the back seat before she gets into her car to make sure no one is back there. She notes that the incident is "always on my mind." (RT2998-3001)

B. The Admissibility Of Victim-Impact Evidence

In Payne v. Tennessee (1991) 501 U.S. 808, 827, the United States Supreme Court held that the Eighth Amendment erects no per se bar to admission of victim-impact evidence, including the personal characteristics of the victim and the impact of the crime on the victim's family. According to the Supreme Court, these matters demonstrate "the specific harm" caused by the defendant's capital crimes. (Id. at p. 825). Thus, if it chooses to do so, a state may properly authorize such victim-impact evidence "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness." . . .(Ibid)

However, the Supreme Court warned that there are definite limits to the introduction of victim-impact evidence. Specifically, such evidence will violate the due process clause of the Fourteenth Amendment where it "is so unduly prejudicial that it renders the trial fundamentally unfair . . . ." (501 U.S. 808, 825.)

In California, Penal Section 190.3 lists the matters that the trier of fact shall consider during the penalty phase of a capital case in deciding whether to return a verdict of death. In particular, section 190.3, subdivision (A) specifies the "circumstances of the crime of which the defendant was convicted in the present proceedings. . . ."In People v. Edwards (1991) 54 Cal.3d 787, 835-836, this court determined that the prosecution may present victim-impact evidence under Section 190.3, subdivision (A)'s "circumstances of the crime" provision. Nevertheless, the mere statutory authorization for the jury to consider the "circumstances of the crime" does not permit all forms of victim-impact evidence. Significantly, in Edwards, the Court warned as follows:

> 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 in an argument allowed by *Payne*. . . .

(Id. at pp. 835-836.)

Moreover, this Court echoed Payne's admonition about the admission of unduly prejudicial victim-impact evidence. 54 Cal.3d at p. 835; see also id. at p. 836, quoting People v. Haskett (1982) 30 Cal.3d 841, 864 ["'[T]he jury must face its obligation soberly and rationally, and should not be given the impression that emotion may reign over reason..'"].)

As set forth below, it follows that state law and the federal and state

constitutions preclude the admissibility of opinions and characterizations of the crime by family members of the deceased victim, nor is it permissible for victims of non-capital crimes to provide victim-impact evidence relative to the non-capital crimes.

C. Characterizations Or Opinions About the Crime

It is now well settled that characterizations or opinions about the crime by the victims' family members or friends is prohibited by the state law and the Eighth Amendment to the federal Constitution. In People v. Pollock (2004) 32 Cal.4th 1153, 1180, this Court addressed the issue concerning characterizations or opinions about the crime as follows:

> In a capital trial, evidence showing the direct impact of the defendant's acts on the victims' friends and family is not barred by the Eight or Fourteenth Amendments to the federal Constitution. (*Payne v. Tennessee* (1991) 501 U.S. 808, 825-827 [115 L.Ed.2d 720, 111 S.Ct. 2597].) Under California law, victim impact evidence is admissible at the penalty phase under section 190.3, factor (a), as a circumstance of the crime, provided the evidence is not so inflammatory as to elicit from the jury an irrational or emotional response untethered to the facts of the case. (*People v. Boyette*, *supra*, 29 Cal.4th at p. 444; *People v. Edwards* (1991) 54 Cal.3d 787, 835-836 [1 Cal.Rptr.2d 696, 819 P.2d 436].) But victim impact evidence does not include characterizations or opinions about the crime, the defendant, or the appropriate punishment, by the victims' family members or friends, and such testimony is not permitted. (*People v. Smith* (2003) 30 Cal.4th 581, 622 [134 Cal.Rptr.2d 1, 68 P.3d 302].)

Moreover, in People v. Smith, (2003) 30 Cal.4th 581, 622, this Court noted that the characterizations and opinions about the crime by the victims' family members violated the Eighth Amendment, citing Payne v. Tennessee, supra, 501 U.S. at p. 830 n.2. Thus, it is clear that the admission of characterizations and opinions about the crime violates both state law

and the federal Constitution.

Here, the testimony by Victoria Francisco that what hurts her the most is that her sister did not "die of natural death," and "all that she went through" – "all she suffered that night", as well as "she never do no harm to nobody" clearly involves a characterization or opinion concerning the crime. (RT2958) Contrary to the trial court's determination, this testimony did involve a characterization or opinion concerning the crime.

The trial court also determined that this testimony was not prejudicial as it allowed the family members to describe one of the impacts of the crime, that is, their "reliving" what she [Sophia Torres] must have gone through." (RT 2984-2985). However, as noted, a review of the testimony by Victoria Francisco does reflect a characterization or opinion concerning the crime. Further, this characterization and opinion was buttressed by the testimony of Gilberto Torres in which he characterized the crime as "the brutal way she died". (RT 3002)

Thus, the characterizations or opinions by Victoria Francisco and Gilberto Torres regarding the suffering experienced by Sophia Torres as well as the brutality involved with respect to her murder clearly constitutes characterizations and/or opinions concerning the crime which is precluded by both state law and by the federal Constitution. The inflammatory nature of the reference to the suffering experienced by the victim as well as the brutality involved resulted in a sentencing determination which was fundamentally unfair and a denial of due process under both the state and federal constitutions.

In sum, the emotional victim-impact evidence noted above not only should have been excluded under Evidence Code Section 352 as more prejudicial than probative, but because it was so unduly prejudicial, it

rendered the penalty phase determination fundamentally unfair in violation of Appellant Martinez' constitutional right to due process. Furthermore, since this evidence likely provoked the jury to act in an arbitrary and capricious manner in imposing the death penalty, its admission violated the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and Article I, section 7, 15, 17, and 24 of the California Constitution. (See, e.g., Gardner v. Florida supra, 430 U.S. at p. 358; Gregg v. Georgia supra, 428 U.S. at p. 189.

D. Victim Impact Evidence As To Non-Capital Case

In People v. Mitcham (1992) 1 Cal.4th 1027, 1062-1063, this Court addressed the question of whether postcrime trauma sustained by a surviving victim with respect to a capital offense was proper victim-impact evidence as to the circumstances of the underlying crime within the meaning of Section 190.3(a). The trial court determined that such evidence was admissible as evidence of the circumstances of the crime under Section 190.3(a). This Court affirmed and held as follows:

> In determining the appropriate punishment, the jury's resolution of the question whether the defendant should be put to death turns not only upon the facts but upon the jury's moral assessment of those facts. In this process, among the most significant considerations are the circumstance s of the underlying crime. (§190.3, factor (a); *People v. Marshall* (1990) 50 Cal..3d 907, 929 [269 Cal.Rptr. 269, 790 P.2d 676]; *People v. Haskett* (1982) 30 Cal.3d 841, 863-864 [180 Cal.Rptr. 640, 640 P.2d 776] (*Haskett I*).) Assessment of, and reaction to, the crime from the victim's standpoint is highly relevant to this consideration. (*Haskett II, supra,* 52 Cal.3d 210, 247 *People v. Marshall, supra,* 50 Cal.3d at p. 929; *People v. Lewis* (1990) 50 Cal.3d 262, 284 [266 Cal.Rptr 834, 786 P.2d 892].) Evidence of the impact of the defendant's conduct on victims other than the murder victim is relevant if related directly to the circumstances of the capital offense.

(See *People v. Clark* (1990) 50 Cal.3d 583, 629 [268 Cal.Rptr. 399 [789 P.2d 127]; *Haskett I, supra*, 30 Cal.3d at pp. 863-864.)

In *Haskett I,* we held the prosecution's invitation to the jurors to identify with the surviving victim of an attempted murder, who also had witnessed the murder of her two sons, and to imagine the suffering the defendant's acts had inflicted upon her, was appropriate at the penalty phase. (Id. at pp. 863-864.) Similarly, in *People v. Clark, supra*, 50 Cal.3d 583, we held that the impact of a defendant's homicidal conduct on persons injured but not killed by that conduct is relevant to the penalty decision. (*Id.* at p. 629).

In the present case, Williams's testimony as a surviving victim of defendant's attempted murder, describing the psychological and emotional trauma suffered by her as a direct result of defendant's homicidal conduct, related to the nature and circumstances of the capital offense. . . .

[T]he high court in *Payne v. Tennessee* (1991) 501 U.S. __ [115 L.Ed.2d 720, 111 S.Ct. 2597], overruled *Booth* and *Gathers* to the extent those decisions held that the federal Constitution prohibits a state from authorizing the admission of victim-impact evidence. (Id., 501 U.S. at p. ____ [115 L.Ed.2d at pp. 736-737, 111 S.Ct. at p. 2609]; see *People v. Edwards* (1991) 54 Cal.3d 787, 833 [1 Cal.Rptr.2d 696, 819 P.2d 436].) Moreover, we previously held that the holdings in *Booth* and *Gathers* did not extend to preclude evidence or argument concerning the nature and circumstances of the capital offense. (*People v. Benson, supra*, 52 Cal.3d at p. 797; *People v. Marshall, supra*, 50 Cal.3d 907, 929.)

Thus, this Court's analysis and holding in Mitcham make clear that victim-impact evidence regarding the nature and circumstances of the capital offense meets the requirements of Section 190.3(a) as well as the Eighth Amendment of the federal Constitution. However, the same is not true as to victim-impact evidence with regard to non-capital crimes which

are consolidated with capital crimes for purposes of trial. See also People v. Smith (2003) 30 Cal.4th 581, 622 (noting that the views of a crime victim, especially of the victim of one of the non-capital crimes, regarding proper punishment has no bearing on the circumstances of the offense, citing Skipper v. South Carolina (1986) 476 U.S. 1, 4).

Moreover, the Supreme Court in Payne v. Tennessee, supra at p. 825 made clear that the purpose of victim-impact evidence was to inform the sentencing authority about, "the specific harm" caused by the defendant's capital crimes. Clearly, the Supreme Court was addressing victim-impact evidence as it pertained to capital crimes. See U.S. v. Chathadara (10th Cir. 2000) 230 F.3d 1237, 1273 (noting that the Supreme Court in Payne v. Tennessee upheld the constitutionality of victim-impact evidence in capital sentencing). It follows that the Supreme Court has determined that victim-impact evidence regarding capital crimes is permissible under the Eighth Amendment but that the admission of victim-impact evidence regarding a non-capital crime would violate the Eighth Amendment.

In this case, the admission of the victim-impact evidence regarding Maria Morales and Sabrina Perea for the non-capital crimes violated Section 190.3(a) as well as the state and the federal constitutional provisions. Section 190.3(a) provides in pertinent part as follows:

> The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true pursuant to Section 190.1.

The reference to Section 190.1 refers to a case in which the death penalty may be imposed. Thus, what is contemplated by Section 190.3(a) are the circumstances of a "crime" which may result in the imposition of the

death penalty. The crimes involving Maria Morales with respect to the assault with a deadly weapon, kidnapping with intent to commit rape, kidnapping for robbery, and assault with intent to commit rape did not constitute capital crimes. Moreover, the crimes involving Sabrina Perea with respect to attempted kidnapping with intent to rape, attempted kidnapping for robbery, and assault with intent to commit rape again did not constitute capital crimes.

It follows that the victim-impact evidence as to Morales concerning being frightened and scared as well as the testimony of Sabrina Perea regarding her fear and nervousness was inadmissible under Section 190.3(a) as this evidence did not relate to the circumstances of the capital crime, i.e., the murder of Sophia Torres. Moreover, said evidence was inflammatory and prejudicial, resulting in a trial that was fundamentally unfair resulting in a violation of Appellant Martinez' state and federal Constitutional guarantees to due process of law and a reliable penalty determination. (U.S. Constitution Amendments 5, 8, 14; Cal. Constitutional Article 1, Section 7, 15, 17, 24.)

Appellant Martinez moved to exclude the testimony of Morales and Perea on the grounds that it was cumulative, repetitive, inflammatory, prejudicial, and that the prejudicial effect of the testimony outweighed the probative value. (CT-1349) Although the issue that the subject testimony of Morales and Perea involved victim-impact testimony by victims pertaining to non-capital crimes was not asserted, the court was clearly aware of the fact that both Morales and Perea were victims of the non-capital crimes as opposed to the capital crime. (CT-1349). Thus, the issue concerning the admissibility of victim-impact evidence regarding non-capital crimes was preserved.

In any event, a new theory involving only a question of law may be considered. People v. Carr (1974) 43 Cal.App.3d 441, 446; 6 Witkin and Epstein, Cal. Crim. Law 3d Ed., Criminal Appeals, § 141, p. 389. Moreover, assuming arguendo that the question of whether Martinez preserved the issue on appeal is "close and difficult", the Court assumes the issue is preserved and addresses it on the merits. People v. Hernandez (2003) 30 Cal.4th 835, 863. Further, the question of whether victim-impact evidence regarding victims of non-capital crimes may be admissible in a capital case involves a Constitutional question involving the Eighth Amendment and Fourteenth Amendment, as reflected in the Supreme Court decision of Payne v. Tennessee supra, and hence, the issue involves a denial of federal due process under the Fourteenth Amendment. Accordingly, the issue may be considered by this Court. See People v. Kiihoa (1960) 53 C.2d 748, 752-753; 6 Witkin and Epstein, Cal. Crim. Law 3d Ed., Reversible Error, § 20, p. 472.

Further, the admission of victim-impact evidence regarding the non-capital crimes also deprived Appellant Martinez of a fair trial, and hence, this implicates his federal due process rights. It is well settled that where defendant has been denied any essential element of a fair trial or due process the judgment cannot stand. Cooper v. Superior Court (1961) 55 C.2d. 291, 302; 6 Witkin and Epstein, Cal. Crim. Law 3d Ed., supra at Section 20, p. 473. Finally, the federal rule permits review of "plain errors" despite a failure to object at trial. See United States v. Olano (1993) 507 U.S. 725, 113 S. Ct. 1770, 1776; Johnson v. United States, (1997) 520 U.S. 461, 117 S.Ct. 1544, 1549; 6 Witkin and Epstein, Cal.Crim. Law 3d Ed., supra 836, p. 495.

E. Section 190.3(a) Is Constitutionally Overbroad and Vague as Applied to this Case.

As a general matter, California's death penalty law, including § 190.3(a) is not unconstitutionally overbroad or void for vagueness. (Tuilaepa v. California (1994) 512 U.S. 967, 976; People v. Bacigalupo supra, 6 Cal.4th 457.) However, a distortion of section 190.3, subdivision (a)'s statutory phrase "circumstances of the crime" to include characterizations or opinions of the crime by family members under the guise of expressing their feelings as well as victim-impact testimony by non-capital victims regarding other crimes raises state and federal constitutional concerns about vagueness and the arbitrary application of this section. (U.S. Const., Amends. V, VIII, XIV; Cal. Const., Art. I, §§ 7, 15, 17, 24.)

Here, the trial court permitted family members, Victoria Francisco and Gilberto Torres, to make characterizations and to express opinions concerning the murder of Sophia Torres on the theory that they were simply expressing their "feeling(s)" concerning the crime. (RT 2983-2985). Further, the trial court permitted Maria Morales and Sabrina Perea to testify regarding the impact that the other non-capital crimes had on them. None of this evidence was directed at providing the jury a 'quick glimpse of the life' of deceased victim, Sophia Torres. See Payne v. Tennessee, supra at 111 S. Ct. 2607, and (conc. opn. O'Connor, J.) 2611. (CT 01353).

The defense sought to exclude all victim-impact evidence. (CT 01354). However, the trial court permitted three family members who were not personally present at the murder of Sophia Torres to testify, that is, Victoria Torres, Gilberto Torres, and Angel Torres. Furthermore, in an unprecedented expansion of what constitutes the "circumstances of the

crime," the trial court allowed victims of entirely separate crimes to testify about the impact of those crimes on their lives.

Allowing three family members who were not present at the crime to present victim-impact testimony, as well as victims of completely different crimes, represents an undue expansion of the "circumstances of the crime" term as used in factor (a) of Section 190.3. The trial court abused its discretion which resulted in the statute being unconstitutionally overbroad and vague as applied to this case. See generally People v. Fierro (1991) 1 Cal.4th 173, 257-265 (conc. and dis. opn., Kennard, J.).

1. Presence at the Scene

In Payne v. Tennessee, supra -- the seminal case on the admission of victim-impact evidence -- the United States Supreme Court upheld the admission of victim-impact evidence to the extent that it described the impact on a family member who was personally present during or immediately following the capital crime. (501 U.S. at p. 816.) There, a mother and her 3-year-old daughter were killed with a butcher knife in the presence of the mother's 2-year-old son, who survived critical injuries suffered in the attack. The prosecutor presented the testimony of the boy's grandmother that he missed his mother and sister, and argued that he will never have his "mother there to kiss him good night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (Ibid.)

Similarly, in People v. Edwards, supra, this Court observed that its authorization of victim-impact evidence only encompassed evidence that logically shows the harm caused by the defendant, "including the impact on the family of the victim." (54 Cal.3d at p. 835.) For its part, Edwards merely approved the introduction of photographs of victims taken near the

time of the crimes in order to establish how the victims appeared to defendant when he committed the crimes against them. (Id. at p. 828; see also People v. Fierro, supra, 1 Cal.4th at p. 235 [upholding prosecution's argument that capital murder was committed in front of victim's wife, who was traumatized by murder, and that she will have to live with the trauma for rest of her life].)

In Texas, as in California, the death penalty statute expressly directs the jury to take into consideration all of the evidence, "including the circumstances of the offense." (Tex. Code Crim. Proc., Art. 37.071, § 2(e).) The Texas Court of Criminal Appeals has held that the only type of victim-impact evidence which can qualify as part of the circumstances of a capital crime under Article 37.071 is evidence which describes the impact on a family member who was present during or immediately following the crime. (Ford v. State (Tex.Crim.App. 1996) 919 S.W.2d 107, 115-116; Smith v. State, (Tex.Crim.App. 1996) 919 S.W.2d 96, 97, 102.)

In California, victim-impact considerations are irrelevant and may not be considered in aggravation except to the extent they qualify as part of the circumstances of the crime under Penal Code section 190.3. (People v. Edwards, supra, 54 Cal.3d at pp. 835-836.) Thus, as the above authority suggests, the only type of victim-impact evidence which can be described as within the "circumstances of the crime" is the impact on family members who were present during or immediately following the capital crime.

2. Single Victim-Impact Witness

Moreover, because of its inherently prejudicial nature, victim-impact evidence must be limited to a single victim-impact witness. See State v. Muhammad (N.J. 1996) 678 A.2d 164, 180 (where the New Jersey Supreme Court clarified the scope of victim-impact evidence which may be properly

introduced consistent with the constitutional guarantee of due process, and held that only one relative could testify to the jury about the victim.). (Accord Illinois Rights of Crime Victims and Witnesses Act, 725 ILCS 120 § 3(a)(3) [limiting testimony about impact of victim's death in Illinois to a single representative who may be spouse, parent, child or sibling of a person killed as a result of a violent crime].)

It follows that as applied to this case, the "circumstances of the crime" factor as reflected in subdivision (a) of Section 190.3, is unconstitutionally overbroad and vague as interpreted by the trial court. Here, the trial court permitted three family members, who were not present at the scene, to testify regarding the Sophia Torres murder, which included two of them characterizing and providing opinions regarding the crime, and further, it allowed Maria Morales and Sabrina Perea to testify regarding the impact that the other non-capital crimes had on them. Under these circumstances, there appears to have been no defined standard employed by the trial court in ruling on the admissibility of victim-impact evidence pertaining to the "circumstances of the crime" as contemplated by § 190.3(a).

F. The Death Verdict As To Appellant Martinez Must Be Reversed Because The Erroneously Admitted Victim Impact Evidence Was Prejudicial

The erroneous admission of victim-impact evidence regarding the characterizations and opinions regarding the capital crime by two members of the family of the deceased victim, Sophia Torres, that is, Victoria Francisco, and Gilberto Torres as well as the victim impact evidence by Maria Morales and Sabrina Perea regarding the non-capital crimes resulted in substantial prejudice to Appellant Martinez depriving him of a fair trial

and violating his due process rights. Accordingly, the subject victim impact-evidence regarding characterization and opinions of the crime and victim impact evidence regarding non-capital crimes resulted in a trial that was fundamentally unfair thereby implicating Appellant Martinez' rights under both the state and federal Constitutions. Accordingly, the error must be reviewed under the harmless error standard enunciated in Chapman v. California, supra 381 U.S. at p. 24.

When a violation of the Constitution occurs at the penalty phase of a capital trial, a reviewing court must proceed with particular caution. (Satterwhite v. Texas (1988) 486 U.S. 249, 258 ["[T]he 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."].) Further, in evaluating the effect of the error, the reviewing court does not consider whether a judgment of death would have been rendered in a hypothetical trial in which the error did not occur; rather, it must decide whether the death sentence in this case was "surely unattributable to the error." (Sullivan v. Louisiana (1993) 508 U.S. 275, 279.)

The admission of evidence regarding the characterization and/or opinion as to the capital crime as well as the evidence of victim-impact regarding the non-capital crimes was error and clearly represents an expansion of victim-impact evidence not permitted by the Eighth and Fourteenth Amendments of the federal Constitution or by the state Constitution. Moreover, the admission of testimony by more than one victim-impact witness who was not present at the scene of the crime also violates the federal and state Constitutions.

The prejudicial nature of the victim-impact evidence regarding the characterizations and opinions of the crime by family members of deceased

victim, Sophia Torres, as well as the victim-impact evidence concerning the non-capital crimes cannot be seriously disputed. The wrenching testimony proffered by Maria Morales and Sabrina Perea likewise carried a powerful emotional message

The erroneously admitted victim-impact evidence was crucial for the prosecution to secure a death sentence. This is clearly reflected in the closing argument by the prosecution which emphasized that the lives of the victims had been "unalterably changed and indelibly affected by the defendant in this case. . . . " (RT 4022). Thus, reversal of the death verdict is required.

VIII. THE TRIAL COURT VIOLATED STATE LAW AND APPELLANT'S RIGHT TO DUE PROCESS AND RELIABILITY IN THE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY LIMITING THE TESTIMONY OF CORRECTIONAL EXPERT, JAMES ESTEN.

A. Relevant Facts

On June 4, 1998, the prosecution filed a Motion to Limit the Testimony of Defense Expert James M. Esten. (CT 01319-01324). The prosecution acknowledged that the defendant should be allowed to call an expert to offer an opinion as to how he will adjust in a structured prison setting, citing People v. Lucero (1998) Cal. 3d 1006, 1026, and also acknowledged that defendant was entitled to offer character evidence to the effect that he would be unlikely to commit future crimes and would be able to adjust to prison life, citing Skipper v. South Carolina (1986) 476 U.S. 1. However, the prosecution asserted that the defense correctional expert, James Esten, should be precluded from testifying "as to what it's like to live in prison." (CT 01322). Relying primarily on People v. Daniels (1991) 52 Cal. 3d 815, 877, which upheld the exclusion of a video tape of a defendant's future prison routine, the prosecution asserted that the "future conditions of confinement" for one sentenced to life without possibility of parole simply are not relevant. Thus, the prosecution asserted that correctional expert, James Esten, should be allowed to express his underlying opinion that Appellant Martinez would be able to make a "successful adjustment" to life in prison, but he should be precluded from testifying regarding the "details" of confinement. (CT 01323).

The defense filed an extensive response. (CT 01419-01433). The

defense conceded that generally evidence of prison conditions is not relevant to demonstrate that life prisoners suffer a "miserable existence," or that life prisoners are "punished enough." (CT 01420). The defense noted that it intended to offer evidence relative to certain aspects of what might be loosely termed as "prison conditions" which were relevant for two purposes: First, the defense intended to call Mr. Esten who would testify that Martinez had the potential to make a "successful" adjustment to life in prison without the possibility of parole. Thus, it was necessary for the jury to have a "basic understanding" of the circumstances that he would be required to adjust to. Second, the evidence would be relevant to rebut an "express or implied allegation of future dangerousness." (CT 01420-01421). The defense then detailed at length the proposed evidence that it intended to present through Mr. Esten regarding prison security relative to an evaluation of Martinez making a satisfactory adjustment to life in prison and rebutting the assertion of future dangerousness as follows:

> Mr. Esten's proposed testimony regarding the conditions of Mr. Martinez's future confinement will focus primarily on two aspects of prison security.
>
> First, Mr. Esten will describe those conditions of security which are relevant to the prevention of escape by inmates. Among other aspects of this topic, Mr. Esten will describe the following:
>
> 1. New prison architecture and construction techniques;
> 2. Electric fences surrounding Level IV institutions;
> 3. The direct observation of inmates at all times by armed officers;
> 4. The confinement of Level IV inmates to the most secure areas of the prisons; and
> 5. Other restrictions on activities, movement in the institution, and job assignments that are relevant to minimizing the risk of escape by inmates serving sentences of

life in prison without the possibility of parole.

Second, Mr. Esten's testimony will focus on those aspects of prison security which are designed to prevent inmates from securing weapons, particularly knives, and those aspects of prison security designed to prevent inmates from committing assaults upon staff members and upon other inmates. Measures to be described by Mr. Esten will include the following:

> 1. A description of modern prison construction techniques with emphasis on those aspects of prison construction which are designed to minimize inmate access to materials which might be used to fashion weapons. For example, Mr. Esten will describe cell construction, and describe how fixtures such as toilets, sinks and beds consist of stainless steel units with few or no moving parts, which are set into concrete, thus eliminating the possibility for disassembly by inmates;
>
> 2. Mr. Esten will also describe the manner in which Level IV inmates are supervised and observed at all times by armed officers, with a view to deterring assaults by inmates upon one another and upon staff. Mr. Esten will also describe response measures that are in place in order to respond to such incidents as they may occur; and
>
> 3. Mr. Esten will also describe other measures designed to discourage inmate conflicts, such as cell assignments, inmate seating at meal time, transportation within the institution of inmates of different races, and other security measures designed to ensure safety of inmates and prison staff.

(CT 01423-01425).

The defense noted that the evidence of the "actual conditions" of confinement was necessary in order for the jury to be able to evaluate Mr. Esten's testimony that Martinez could make a "successful adjustment" to life in prison. Moreover, the "actual conditions" of confinement also related to Mr. Esten's assessment of Martinez' character relative to his

ability to adjust and to function successfully "in the environment" that he would be living. (CT 01427-01428). In effect, the testimony of Mr. Esten was offered to provide the jury a "realistic view of the environment" that Martinez would be functioning in in order to assess "the likely interplay between Mr. Martinez's character traits and his environment," thereby allowing the jury to accurately assess his potential for future adjustment. (CT 01428). Second, this evidence was necessary to rebut the implied or express argument by the prosecution regarding future dangerousness. (CT 01428-01432).

The trial court held a hearing regarding the motion. (RT 3470-3497). The prosecution again acknowledged that the defense had a right under the Skipper and Lucero decisions to put on evidence with regard to the ability of Martinez to adjust to life in prison. Further, the prosecution conceded that Esten had the expert credentials to provide such an evaluation and opinion. (RT 3470-3471). However, what the prosecution objected to was the defense going into the "details of what it's like to live" in prison "on a day to day basis." (RT 3471). The prosecution asserted that Mr. Esten should be allowed to state his credentials and his "opinion" without going into a lot of "details." (RT 3471-3472). The prosecution also disputed that it had offered evidence of express or implied future dangerousness. (RT 3474-3476). The defense asserted that evidence of prison conditions was relevant to rebut the assertion of "future dangerousness" (RT 3476) as well as to support Esten's opinion concerning the character of Martinez as it pertains to his ability to adjust as a life prisoner. (RT 3476, 3480).

The prosecution objected to the evidence concerning prison conditions on the grounds that said evidence involved the details of prison

life. (RT 3482). Mr. Sneddon noted that "I'm objecting to the details." (RT 3483). The trial court inquired of the defense as follows: "What is your argument on why you can bring in evidence about life in the prison as to this defendant?" (RT 3483). The defense responded in pertinent part as follows: "The details are relevant to Mr. Esten's opinion that Mr. Martinez will make a successful adjustment." (RT 3483). In this regard, the defense had earlier noted as follows:

> [Mr. Esten] will tell us what it is about Mr. Martinez's surroundings that will operate to make him a safe prisoner, to help him control himself, to help him mature, to help him stay out of trouble, and to help him get past a certain danger age, . . .

(RT 3480) Further, the defense noted that the evidence of prison conditions was relevant to rebut the claim of future dangerousness. (RT 3483).

The trial court then distilled the issue as follows:

> **THE COURT**: . . . [Y]ou understand . . . he's only objecting to you having the expert describe the daily life in the prison that he will be living under, and there's a case that says that that's a valid objection."

(RT 3484).

The defense responded as follows:

> **MR. DULLEA**: What I'm seeking to do, especially under federal due process and Eighth Amendment guarantees, is to point out that, in my opinion, the California cases that have made that restriction have given short shrift to due process and the Eighth Amendment, and to point out – and I think this is a principle that comes up a lot – that something that is irrelevant and inadmissible for one purpose may become relevant if another valid purpose is asserted. And that's what I'm trying to do.

(RT 3484).

The court then requested that the defense outline its position and the defense responded by making the following additional offer of proof:

> **MR. DULLEA**: My position is that certain details of daily prison – not everything. Not the -- not the food, or the company, or the -- the T.V. hours, or the number of books you're allowed to have, or any of that stuff, but some other details are relevant. These details are -- and I think that the most important one to Mr. Esten's opinion is the fact that in Level 4, the inmates are directly observed and supervised, and observed at all times by an officer, or one or more officers, with guns, who will shoot them if they engage in assaultive conduct.
>
> There are other details that are also important to Mr. Esten's opinion. Those are disclosed in the photos that I mentioned. They are, for example, modern cell construction. Modern cells, as depicted in these photos, are designed in such a way that there are really no loose or moving parts of anything available. For example, in the past, a prisoner could disassemble toilets or sinks or beds. And those items are stainless steel units that are very heavy gauge and are embedded in concrete.
>
> Floors under bunks are painted with thick paint to discourage knife-sharpening, to reveal knife-sharpening if someone should try to sharpen a knife or sharpen some implement into a knife.
>
> Mr. Esten would also testify that all Level 4 institutions are surrounded, by law now, with a triple fence. The inner and outer fences are high fences topped with razor wire, and the inside fence is an electric fence which is fatal if anyone touches it.
>
> He would also testify to certain details regarding how prisoners are escorted in order to avoid racial violence and prisoner-upon-guard violence. He would also testify to measures regarding the alteration and sealing of inmate televisions that prevents them from taking them apart and

getting weapon stock out of the televisions.

> These are in all of these exhibits. Exhibit S-8 depicts a dining hall and a tier showing some of the cells, which essentially he can use to illustrate the security and -- especially with the observation and supervision. . . . Mr. Esten will testify that these factors are important determinants of his opinion about Mr. Martinez, . . . I think that those details, and those are really the only details we're greatly interested in, and especially the armed observation, are essential both to -- to -- to establishing a relevance and the validity of Mr. Esten's opinion about Mr. Martinez's character, and they're also essential to rebut what I think was a strong implied, if not express, case for future dangerousness. . . .

(RT 3484-3487). The defense also offered exhibits S-1 through S-8 to support its position. (RT 3486-3487; ACT 00760-00776).

The trial court then ruled as follows:

> **THE COURT**: The Court is going to rule that the expert may express his underlying opinion. I will not allow him to go into the details of the prison system as it relates to how all the prisoners are treated in Classification 4. I think we have to draw the line between the general descriptions of prison life and his specific opinion as to this defendant as to his dangerousness. I would allow his opinion that he wouldn't harm other prisoners, if that's his opinion.
>
> **MR. DULLEA**: May he express his opinion that a Level 4 is a structured environment?
>
> **THE COURT**: Yes. . . .
>
> **MR. DULLEA**: May he express the opinion that part of that structure involves direct observation by armed guards at all times?
>
> **THE COURT**: I think I'll stop you where he starts talking about the specific facts of the particular prisons.

MR. DULLEA: I'm -- I'm not sure if that means a yes or no on the armed guards question.

THE COURT: It means a no. . . .

MR. DULLEA: I'm still not clear on what details, if any, of the conditions of the structure -- the structured environment I can adduce.

THE COURT: Just his opinion that he needs a structured environment, and that is a structured environment that would meet that requirement.

. . .

THE COURT: . . . What I'm not going to allow him to do is to testify as to, as in the photographs in your exhibit, the floors are painted this way, the guards look this way, the tables are made out of this, the toilets are made out of that. . . .

(RT 3492-3495; CT 01442).

At the conclusion of the prosecution's rebuttal case in the penalty phase (RT 3735), the defense sought to recall James Esten for purposes of surrebuttal to rebut the prosecution's evidence concerning Martinez' custodial behavior. (RT 3738-3741). In response to defense counsel's offer of proof that Esten would contradict, explain, or essentially minimize the prison adjustment evidence regarding Martinez' behavior in a custodial setting offered by the prosecution, defense counsel noted that Esten could "explain the appropriate technique for dealing with that" type of conduct, to which the court ruled: "That's not allowed." (RT 3742-3743). The trial court then reaffirmed its earlier ruling precluding evidence concerning the details of prison life as follows:

> We don't need that. That's the part of the stuff that's not allowed. You know, how the prison deals with people, what the facilities are, that's where I've drawn the line in the case.

(RT 3744).

B. Relevant Law

The trial court's ruling limiting the testimony of correction expert, James Esten violated California state law as reflected in Evidence Code § 355, but more importantly, the ruling violated the Eighth Amendment and Fourteenth Amendment to the United States Constitution as reflected in the decisions of Skipper v. South Carolina (1986) 476 U.S. 1, and Simmons v. South Carolina 512 U.S. 154. The limitations imposed by the trial court which precluded Mr. Esten from relying on "prison conditions" as a basis for his opinions had the effect of taking the teeth out of his opinions and thereby rendering him a toothless tiger. In effect, the trial court permitted Mr. Esten to state his qualifications as well as opinions that Appellant Martinez could make a successful adjustment as a life prisoner and that he would not present a danger to others without going into the details of the prison facilities and/or how the prison deals with people that would have supported these opinions. (RT 3492-3497 and RT 3743-3744).

1. Evidence Code § 355

The rule of limited admissibility is well-settled in California. See 1 Witkin, Cal. Evidence 4th Ed., Circumstantial Evidence §§ 30, 31, 35, pp. 360-362, 366-367. Evidence Code § 355 has codified the limited admissibility doctrine as follows:

> When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

See People v. Griffin (2004), 33 Cal.4th 536, 579. Generally, an abuse of discretion standard of review applies to a trial court's determination

concerning the admissibility of evidence. People v. Cox (2003), 30 Cal.4th 916, 955. However, a state law error at the penalty phase is tested by the "reasonable possibility" test. People v. Brown (2003), 31 Cal.4th 518, 576; People v. Brown (1988), 46 Cal.3d 432, 448. Moreover, given that the exclusion of evidence presented here involves a federal constitutional violation, the standard of review announced in Chapman v.California, supra, 386 U.S. 18 will apply, that is, the harmless beyond a reasonable doubt standard. People v. Brown, supra at 576.

The error committed by the trial court was in the exclusion of the proffered evidence concerning prison conditions. For example, the details of the physical facilities and armed observation by prison officers who will shoot in the event of assaultive conduct. (RT 3484-3487). Another example is the modern cell construction depicted in the photographs proffered by the defense reflecting that the toilets, sinks, and beds were stainless steel units of a very heavy gauge which were embedded in concrete and hence, they were incapable of being disassembled for the purpose of creating a weapon. (RT 3485). A further example is that the floors under the bunks were painted with thick paint to discourage knife sharpening and to reveal knife sharpening if someone made such an attempt. A final example are the dining hall and cells depicted in the photographs which were illustrative of the security in prison reflecting the ability of officers to observe and supervise. As noted, prisoners would be directly observed and supervised by officers who would shoot them if they engaged in assaultive conduct. (RT 3484-3488; Exhibits S-1 through S-8 at A/C CT 00764-00776).

The purpose of this evidence was to demonstrate that the surroundings Martinez would be operating in as a life prisoner (e.g., the

structured environment) support the opinions of Mr. Esten that not only would Martinez make a satisfactory adjustment as a life prisoner but that he would not be a danger to other prisoners. Defense counsel made this point in pertinent part as follows:

> He [Mr. Esten] will tell us what it is about Mr. Martinez's surroundings (e.g., prison) that will operate to make him a safe prisoner, to help him control himself, to help him mature, to help him stay out of trouble, . . .

(RT 3480). Defense counsel made the point that the details of the prison environment were essential to Mr. Esten's opinions relating to the "character" of Martinez and the question of "future dangerousness." (RT 3487). These opinions related directly to the psychological and psychiatric evidence provided by the defense. (RT 3994). Doctor Wu testified that based on his review and analysis that Appellant Martinez suffered from brain damage to the frontal lobe area which impacted his "executive functions," that is, the ability to have long-term planning and to defer inappropriate impulses. (RT 3274-3278). The pet-scan analysis performed by Dr. Wu revealed that Martinez had both frontal lobe and parietal lobe defects. (RT 3285).

On the question of whether Martinez had the ability to control his behavior in light of the defects noted, Dr. Wu concluded as follows:

> I think that given the appropriate structured environment, I think he would have that ability. But I think he would need to be in a very structured setting. I think if he were in a highly structured setting, a highly structured environment would, in effect, act like an external frontal lobe for him. The right kind of environment could do -- could provide for him the external feedback and the external limit-setting that he might not be able to provide for himself internally because of a defective frontal lobe.

(RT 3292-3293). Dr. Wu concluded further as follows:

> I believe that -- given the right type of conditions, I think that he would be able to conform his behavior within the confines of a well-structured environment such as a state prison.

(RT 3293).

Thus, the proffered testimony of Mr. Esten concerning the details of the prison structure and environment was not only relevant to his opinions that Martinez could successfully adjust as a life prisoner and would not present a danger to others, but also it would provide the background information necessary to establish the "highly structured setting" referenced by Dr. Wu which would, in effect, act as a "frontal lobe." Thus, the proposed testimony concerning the details of prison life was critical not only to the testimony of Mr. Esten, but also to the psychiatric and psychological testimony of Dr. Wu.

The trial court precluded evidence of the "details" of the structured prison environment, apparently relying on People v. Daniels, (1991), 52 Cal.3d 815, 876-877, and its progeny. (RT 3494). In People v. Daniels, supra, this Court upheld the exclusion of the proffered video tape of the future prison routine of a defendant who was a paraplegic on the ground that evidence of the manner of confinement "does not relate to the character or record of the defendant." People v. Daniels, supra at 878. The evidence proffered through Mr. Esten regarding the prison conditions was relevant to both the character of Martinez and to rebut the claim of future dangerousness. Thus, since the proffered evidence concerning the prison conditions was offered for an admissible purpose, the trial court erred by precluding said evidence. The appropriate remedy here regarding the proffered evidence was not exclusion, but a limiting instruction. See 1

Witkin, Cal. Evidence, 4th ed. supra, § 31 at pp. 361-363.

The issue presented here is strikingly similar to the issue presented in People v. Lucero (1988) 44 Cal.3d 1006, 1027-1029. In People v. Lucero, the defense inquired as to whether Dr. Conolley had an opinion regarding the defendant being a recidivist as well as an opinion on whether the defendant "would adjust in a structured setting like a prison four years down the road?" 44 Cal.3d at 1026. The trial court sustained the prosecutor's objections to both questions. This Court reversed the judgment of death and concluded as follows:

> The court's error in sustaining the prosecutor's objections, however, goes beyond questions of California evidentiary rules. The United States Supreme Court has expressly held that the sentencer must be permitted to consider "'any aspect of a defendant's character . . . that the defendant proffers as a basis for a sentence less than death.'" (*Eddings v. Oklahoma*, (1982) 455 U.S. 104, 110 [71 L. Ed. 2d 1, 8, 102 S. Ct. 869]; quoting *Lockett v. Ohio*, (1978) 438 U.S. 586, 604 [57 L. Ed. 2d 973, 990, 98 S. Ct. 2954].) Evidence that a defendant's character is such that he would be unlikely to commit future crimes, and would adjust to prison life, clearly comes within this rule. Thus the trial court's rulings excluding relevant mitigating evidence violated the Eighth Amendment to the United States Constitution.
>
> The United States Supreme Court decision in *Skipper v. South Carolina*, (1986) 476 U.S. 1 [90 L.Ed. 2d 1, 106 S. Ct. 1669] is directly in point. Skipper sought to introduce testimony of two jailers and one "regular visitor" to the jail to show that he had made a good adjustment to jail life; the trial court ruled the evidence irrelevant. The court described the question before it as "whether the exclusion from the sentencing hearing of the testimony petitioner proffered regarding his good behavior during the over seven months he spent in jail awaiting trial deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment."

> (P. 4 [90 L. Ed. 2d at p. 6, 106 S. Ct. at p. 1671].) It concluded that "[i]t can hardly be disputed that it did. . . . [The state does not dispute] that the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to prison. Although it is true that any such inferences would not relate specifically to petitioner's culpability for the crime he committed [citation], there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' *Lockett*, *supra*, at 604." (*Ibid.*)
>
> After finding constitutional error, the court in *Skipper* reviewed the record and concluded that "it appears reasonably likely that the exclusion of evidence bearing upon petitioner's behavior in jail (and hence, upon his likely future behavior in prison) may have affected the jury's decision to impost the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible error." *Supra*, 476 U.S. at p. 8 [90 L. Ed. 2d at p. 9, 106 S. Ct. at p. 1673].)

44 Cal.3d at 1026-1027.

In rejecting the efforts by the Attorney General to distinguish Skipper, this Court concluded further as follows:

> Lucero's background, his conduct in custody, and Dr. Conolley's testimony that the murders were a response to a specific mental disorder which could be controlled in a structured setting with therapy, all indicate that defendant would not be a danger in a prison setting. (footnote omitted). Defendant was entitled to establish this point as an important consideration in mitigation.

44 Cal.3d at 1028.

It follows from Lucero, that Martinez, who similarly had a mental disorder, e.g., a defective frontal lobe, which according to Dr. Wu could be controlled in a "highly structured environment," was entitled to establish the

same point as part of his mitigation defense. (RT 3292-3293). Mr. Esten's proffered testimony was offered to establish the "highly structured setting" of the prison environment that Martinez would be confronted with which would, in effect, serve as "an external frontal lobe" as noted by Dr. Wu. Thus, the details of the prison environment related to both the opinions of Dr. Wu and Mr. Esten relative to Martinez' ability to adjust to prison as a life prisoner as well as not be a danger to others. Consequently, the trial court erred in excluding this evidence.

2. Eighth Amendment Violation

In People v. Daniels, supra at 877-878, this Court concluded that evidence of confinement does not relate to the "character" of the defendant, and hence, is inadmissible. Subsequent decisions of this Court have reaffirmed this proposition. See People v. Jones (2003), 29 Cal.4th 1229, 1261; People v. Quartermain (1997) 16 Cal.4th 600, 632. The genesis of this holding stems from two United States Supreme Court decisions, Skipper v. South Carolina, supra, at 4 and Woodson v. North Carolina (1976) 428 U.S. 280, 304. People v. Daniels, supra at 877-878. However, a review of the Supreme Court decision in Woodson v. North Carolina, supra, at 303-304, makes clear that the Supreme Court was referring not just simply to "character," but the particularized consideration of the "relevant aspects of the character" and the "relevant facets of the character." Thus, the reference to character is multidimensional. The Supreme Court stated as follows:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming

> from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.

Woodson v. North Carolina, supra, at 304. See Skipper v. South Carolina, supra, at 8 n.2 (holding that "evidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination."). Further, the Supreme Court in Skipper, supra at 8, expressly held that the exclusion of evidence by the state trial court impeded the jury from "considering all relevant facets of the character" of the defendant compelling reversal of the death sentence.

Here, the details of the prison environment related directly to the character of Appellant Martinez with respect to his brain-damaged condition involving the defective frontal lobe. As Dr. Wu opined, "a highly structured environment" would in effect serve as "an external frontal lobe" impacting both his ability to satisfactorily adjust to prison life as well as providing limit-setting so that he would not be a danger to others. Clearly, the details of the prison environment in this context which would, in effect, function as a frontal lobe directly relates to the "aspects" and "facets" of the character of Appellant Martinez contemplated by the Skipper and Woodson decisions.

It follows from the Supreme Court's decisions in Skipper v. South Carolina, supra, and Woodson v. North Carolina, supra, and this Court's decision in People v. Lucero, that the exclusion of evidence of prison conditions proffered through Mr. Esten violated the Eighth Amendment of the United States Constitution.

3. Fourteenth Amendment Violation

The prosecution asserted both expressly and impliedly a claim of future dangerousness with respect to the punishment to be imposed on Appellant Martinez. (CT 01429-01432; RT 3483, 3487, 3491-3492). The trial court determined that the prosecution had advanced such a claim and ruled that "Esten may express his opinion of the dangerousness of the defendant." (CT 01442; RT 3493). Moreover, the trial court also excluded evidence concerning the details of the prison environment and precluded Mr. Esten from relying on them as a basis for his opinion that Martinez would not be a danger to others. (RT 3492-3497; CT 01442; and RT 3743-3744). The exclusion of evidence regarding the details of the prison environment violated Appellant Martinez' Fourteenth Amendment rights to due process as reflected in the Supreme Court decision of Simmons v. South Carolina (1994) 512 U.S. 154.

In People v. Lucas (1995) 12 Cal.4th 415, 496-499, this court analyzed the due process implications of a claim of future dangerousness as articulated in Simmons v. South Carolina, supra, as follows:

> In *Simmons*, *supra*, 512 U.S. 154, the court was faced with a question of proper jury instruction in a capital penalty trial The prosecutor had made much of defendant's potential for future violence, an issue that the high court explained it has permitted to be raised in capital trials. (*Id.* at pp. ___-___ [129 L. Ed. 2d at pp. 141-142] (plur. opn. by Blackmun, J.).) The defense introduced rebuttal evidence that defendant only posed a danger to elderly women, who would not be subject to his depredations if he were in prison. The court, however, refused to instruct the jury that defendant was statutorily ineligible for parole should they elect to impose a life term in prison rather than the death penalty. The plurality opinion reversing the judgment opened with the observation that "[t]he Due Process Clause does not allow the execution of a

> person 'on the basis of information which he had no opportunity to deny or explain.'" (*Id.* at p. ___ [129 L. Ed at p. 141]) (plur. opn. by Blackmun, J.).) It held that in a capital penalty trial, when the People put the issue of defendant's future dangerousness in issue and the defendant is legally ineligible for parole, it is a denial of due process to reject the defendant's request to instruct the jury on a natural question raised by the issue of future dangerousness, that is, whether defendant is legally eligible for parole should the jury elect to impose a term of life in prison. (*Ibid.*) Justice O'Connor, writing for herself and two other justices, concurred in the judgment, indicating that in a case of statutory ineligibility for parole, when future dangerousness had been put in issue, due process requires that the jury be informed, either through argument or instruction, of the defendant's ineligibility for parole. (*Id.* at pp. ___ -___ [129 L. Ed. 2d at pp. 149-151] (conc. opn. by O'Connor, J.).) (footnote omitted)

In People v. Lucas, the defense asserted that the prosecution opened the door to the issue of comparative culpability as to the defendant in closing argument when the prosecutor sought the death penalty and made statements such as: "if not this case, then what case[?]" People v. Lucas, supra at 496-499. In response to the argument, the defense argued that the case was not appropriate for the death penalty when compared to other multiple murderers who had received life in prison. The trial court sustained the prosecutor's objection and instructed the jury to disregard the comments made by defense counsel on this point. In upholding the trial court's decision, this Court addressed the defendant's Simmons claim in pertinent part as follows:

> To the extent that defendant claims, on the basis of *Simmons*, *supra*, 512 U.S. 154, that regardless of the relevance of the prosecutor's point, once it was made, defendant was entitled to rebut it, we reject that claim as well. In such a situation, it would seem defendant's proper remedy

> would be to object to the argument and secure an admonition to the jury to disregard it, rather than to use the argument as a wedge to introduce an irrelevant factor into his own argument. In any event, defendant's comparative culpability was not placed in issue in this case in the way future dangerousness was in *Simmons*. . . .

(12 Cal. 4th at 498).

The remedy noted by this Court in People v. Lucas, supra, simply does not apply here. The issue of future dangerousness was advocated by the prosecution through evidence presented during both the guilt and penalty phases of the trial. Consequently, the only remedy available to Martinez was to rebut the claim of future dangerousness by way of evidence through Mr. Esten. However, the trial court excluded the evidence concerning the prison environment, thereby precluding Mr. Esten from relying on such evidence as a basis for his opinion that Martinez would not present a danger to others. In doing so, the trial court deprived Martinez of his due process rights under the Fourteenth Amendment to effectively rebut the claim of future dangerousness. In Simmons v. South Carolina, supra at 175, Justice O'Connor in her concurring opinion, joined by Chief Justice Rehnquist and Justice Kennedy, set forth the basis for the court's decision predicated on due process considerations as follows:

> "Capital sentencing proceedings must of course satisfy the dictates of the Due Process Clause," (*Clemons v. Mississippi*, 494 U.S. 738, 746, 108 L. Ed. 2d 725, 110 S. Ct. 1441 (1990), and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him. *Cf. Crane v. Kentucky*, 476 U.S. 683, 690, 90 L. Ed. 2d 636, 106 S. Ct. 2142 (1986). In capital cases, we have held that the defendant's future dangerousness is a consideration on which the State may rely in seeking the death penalty. *See California v. Ramos*, 463 U.S. 992, 1002-1003,

> 77 L. Ed. 2d 1171, 103 S. Ct. 3446 (1983). But "where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, . . . the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain' [requires that the defendant be afforded an opportunity to introduce evidence on this point]." *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986) (quoting *Gardner v. Florida*, 430 U.S. 349, 362, 51 L. Ed. 2d 393, 97 S. Ct. 1997 (1977) (plurality opinion); *see also* 476 U.S. at 9-10 (Powell, J., concurring in judgment).

(512 U.S. at 175).

In light of the fragmented nature of the Court's opinion, Justice O'Connor's concurring opinion is viewed as announcing the Court's holding in Simmons. Richmond v. Polk (4th Cir. 2004), 375 F.3d 309, 332 n.10. The Fourth Circuit in Richmond v. Polk, supra at 331, analyzed Justice O'Connor's concurring opinion as follows:

> In *Simmons*, Justice O'Connor, whose concurring opinion we treat as controlling because it represents the narrowest grounds upon which the majority agreed, n.10 concluded that "where the State puts the defendant's future dangerousness in issue, and the only available alternative is life imprisonment without the possibility of parole, due process entitles the defendant to inform the capital sentencing jury -- by either argument or instruction -- that he is parole ineligible." *Id.* at 178 (O'Connor, J., concurring). Justice O'Connor rested her conclusion on the Court's precedent holding that "where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty . . . the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain [requires that the defendant be afforded an opportunity to introduce evidence on this point.]" Id. at 175 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 n.1, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (1986) (internal

quotation marks omitted)). . . .

See Jenkins v. State [Ms. Cr-97-0864, Feb. 27, 2004] ___ So. 2d ___, 2004 Ala. Crim. App. Lexis 30 (Ala. Crim App. 2004), affirmed in part and reversed in part, [Supreme Court of Alabama] Ala. S. Ct., Docket No. 1031313, Apr. 8, 2005] 2005 Ala Lexis 49. (The Court of Criminal Appeals of Alabama followed and quoted Simmons v. South Carolina, supra, as follows: "where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal.")

Thus, it is clear that when the prosecution presents evidence of future dangerousness in seeking the death penalty, due process considerations mandate that the defendant be entitled to present relevant rebuttal evidence. Here, the trial court excluded the proffered evidence regarding the prison environment. This ruling effectively precluded Mr. Esten from relying on such evidence as a basis for his opinions that Martinez would not present a danger to others, and deprived his opinion of the heart of its factual basis, thereby resulting in a deprivation of Martinez' due process rights as to the penalty determination.

C. Prejudice

Appellant Martinez was substantially prejudiced by the trial court's ruling excluding evidence of prison conditions, thereby precluding correctional expert, James Esten, from relying on the prison conditions as a basis for his opinion that Martinez would make a successful adjustment as a life prisoner and further that he would not present a danger to others. (RT 3500-3536). The opinions expressed by Dr. Wu suffered from the same

impediment. (RT 3292-3294). As a consequence, the trial court's ruling precluded Appellant Martinez from effectively rebutting the prosecution's claim of future dangerousness.

1. Character

The testimony of Dr. Wu reveals that Appellant Martinez suffers from brain damage and has a defective frontal lobe. As a consequence, this defect which impacts the "executive functions" affects his ability to have long-term planning, defer inappropriate impulses, and exercise judgment. (RT 3275). Dr. Wu concluded that, given an "appropriate structured environment," Martinez would have the ability to control his behavior. (RT 3292-3293). He opined that given the right type of "conditions" that Martinez "would be able to conform his behavior within the confines of a well-structured environment such as a state prison." (RT 3292-3293). However, the trial court's ruling precluded correctional expert, James Esten, from attesting to the "details" of the structured prison environment. (RT 3494-3495). He was permitted simply to express his opinion that Martinez would be placed in a Level 4 prison which is a "structured environment." (RT 3493). At trial, Esten opined that Martinez would be placed in a maximum security Level 4 prison, which is the most restrictive and structured environment available. (RT 3509-3510 and 3515). Per the trial court's ruling, he did not address the details of confinement as reflected in a Level 4 maximum security prison. (RT 3509-3516).

Thus, Mr. Esten was precluded from attesting to the "details" of the maximum security prison environment. These facts were critical to establishing that this environment constituted the "highly structured environment" that Dr. Wu opined would in effect act as an external "frontal lobe" which would provide Martinez with external feedback and external

limit-setting, making it possible for him to control his behavior within the confines of the prison environment. Moreover, this limitation also precluded Mr. Esten from utilizing the details of the prison environment as a basis to support his conclusion that Martinez would be able to make a successful adjustment as a life prisoner.

Both defense experts, Dr. Wu and Mr. Esten, were relegated to giving opinions that in their collective judgment Martinez would be able to make a successful adjustment as a life prisoner predicated on prison being a structured environment, without being allowed to show how that structure would impact Martinez in his adjustment. Thus, the defense was precluded from setting forth the details of prison life which would serve as a basis for the opinions of both Dr. Wu and Mr. Esten that Martinez would be able to successfully adjust as a life prisoner.

2. Future Dangerousness

From opening statement in the guilt phase through closing argument in the penalty phase, the prosecution repeatedly asserted both expressly and impliedly a claim of future dangerousness as to Appellant Martinez. In his opening statement in the guilt phase, the prosecutor's initial comments were as follows:

> This is a case about a serial sexual predator. It's a case about the knife-wielding Jesse -- Tommy Jesse Martinez, Jr., stalking, lying in wait, and attacking several women of this community. It's about the multiple armed abductions or attempted abductions of a 16-year-old Maria Morales, 20-year-old Sabrina Perea, and 30 -- 34-year-old Laura Zimmerman. In his most deadly encounter, it's a case about the brutal and the savage beating, rape and robbery of a 35-year-old Sophia Torres.

(RT 1479). In his closing argument in the guilt phase, the prosecutor made repeated reference to the use of a knife in connection with the crimes as to Maria Morales, Sophia Torres, and Sabrina Perea. (RT 2541-2544). Describing the injuries sustained by deceased victim, Sophia Torres, the prosecutor noted that the injuries reflected "the true violent capabilities" of Martinez. (RT 2560). In opening statement in the penalty phase, the prosecution referenced five separate incidents involving crimes of violence or implied violence, both as an adult, and as a juvenile, perpetrated by Martinez. In this regard, the prosecution outlined the cases involving the violence at the Alejandre home, the robbery of Pepe's Liquors, the Strawberry Festival incident, the incident involving a hunting knife, the dagger in the pocket incident, and the robbery at the ice cream store at the La Joya Plaza. (RT 2818-2837). During its case in chief, the prosecution also presented evidence on each of these incidents. (RT 2855-2956). The prosecution introduced evidence of the "homemade knife" or spork-knife incident while Martinez was in custody at the Santa Barbara County Jail pending trial. (RT 2987-2994). During the cross-examination of correction expert, James Esten, the prosecution inquired concerning the progression from local neighborhood groups into prison gangs. Finally, the prosecution elicited testimony regarding the well-documented rite of initiation into gang membership in prison as being a "killing." (RT 3564).

Prior to closing argument in the penalty phase, the defense filed a motion to limit the prosecution's penalty phase argument with respect to "future dangerousness." (CT 01461-01476, at 01467-01468). The trial court ruled that the People's argument on future dangerousness "must be based on the facts in evidence" (CT 01477 at 01478; RT 3895-3896). In closing argument, the prosecution made repeated references to the

possession or use of a "knife" with respect to the liquor store robbery and the Strawberry Festival incident. (RT 3962, 3994). The prosecutor also made particular note of the "unnecessary violence" with respect to the Alejandre incident. (RT 3996). He also detailed the five prior incidents involving Martinez with respect to "violence" or the "implied threat or use of violence" commencing at age fourteen and culminating with the four incidents that were the subject of his convictions in the present trial. (RT 4010-4011). Further the prosecution noted in detail the violence done to the victims in the present case. (RT 4012-4014). Thus, it is clear that the prosecution asserted a claim of express or implied future dangerousness as to Martinez.

The trial court's ruling precluded the defense from rebutting this claim by limiting the testimony of correctional expert, James Esten, and excluding evidence of prison conditions. The prejudice inherent in the trial court's ruling which effectively precluded the defense from rebutting the claim of future dangerousness was compounded by the jury instructions in both the guilt and penalty phases concerning expert testimony. The trial court gave the CALJIC 2.80 Jury Instruction concerning expert testimony in the penalty phase as follows:

> Witnesses who have special knowledge, skill, experience, training, or education in a particular subject have testified to certain opinions. Any such witness is referred to as an expert witness. In determining what weight to give to any opinion expressed by an expert witness, you should consider the qualifications and the believability of the witness, the facts or materials upon which each opinion is based, and the reasons for each opinion.
>
> An opinion is only as good as the facts and reasons on which it is based. If you find that any fact has not been

> proved or has been disproved, you must consider that in determining the value of the opinion. Likewise, you must consider the strengths and weaknesses of the reasons on which it is based.
>
> You are not bound by an opinion. Give each opinion the weight you find it deserves. You may disregard any opinion if you find it to be unreasonable.

(RT 3948-3949; CT 01531 at 01547 [penalty phase] (emphasis added); see also, RT 2473-2474; CT 1187 at 01211 [guilt phase]).

Thus, this instruction compounded the prejudice suffered by Appellant Martinez resulting from the exclusion of the evidence concerning prison conditions. Not only was the jury precluded from considering this evidence, but, most importantly, the opinions of Dr. Wu and Mr. Esten were compromised. The jury was expressly instructed that an expert's opinion was "only as good as the facts and reasons on which it is based." Here, Dr. Wu opined that "a highly structured environment" such as "a state prison" would, in effect, serve as "an external frontal lobe" providing Martinez with the external feedback and external limit-setting that he is not able to provide for himself internally because of "a defective frontal lobe." (RT 3292-3293). However, what is missing here are the details of confinement which demonstrate that the prison setting constitutes the "well structured environment" contemplated by Dr. Wu.

Similarly, the opinions of Mr. Esten that Martinez would make a successful adjustment as a life prisoner and that he would not present a danger to others also suffered from the same limitation. That is, he was precluded from attesting to the details of prison confinement which would have demonstrated to the jury the limits imposed in prison as well as the safeguards in place that would promote a successful adjustment as a life

prisoner by Martinez, and further would create an environment in which he would not be a danger to others. Thus, the trial court's ruling precluding the admissibility of the details of confinement dramatically impacted not only the opinion testimony of Mr. Esten, but Dr. Wu as well, effectively rendering both experts to the status of toothless tigers.

D. Conclusion

The position advanced by the prosecution that the details of daily life in prison are not relevant was predicated in large part on the theory that changes in administration philosophy impact the daily living conditions in prison, and hence, the details of daily prison life may change from administration to administration. (RT 3470-3473). The prosecution was relying in large part on this Court's decision in People v. Thompson (1988) 45 Cal.3d 86, 139, which stated in pertinent part as follows:

> Describing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do. (*Cf. Ramos*, *supra*, 37 Cal.3d at pp. 156-158.)

(CT 01323). However, the philosophic changes from administration to administration noted by the prosecution (RT 3471) and the "speculation" referenced by this Court in Thompson do not apply to the details of prison life proffered by the defense in this case as these conditions are static and will not change from administration to administration. For example, the defense proffered to have Mr. Esten describe modern prison construction as noted below:

> A description of modern prison construction techniques with emphasis on those aspects of prison construction which are designed to minimize inmate access to materials which might be used to fashion weapons. For example, Mr. Esten will

> describe cell construction, and describe how fixtures such as toilets, sinks and beds consist of stainless steel units with few or no moving parts, which are set into concrete, thus eliminating the possibility for disassembly by inmates.

(CT 01424; see also, RT 3485). Moreover, floors under bunks are painted with thick paint to discourage knife sharpening. Further, the subject prison institutions are surrounded by a triple fence. The inner and outer fences are high fences topped with razor wire, and the inside fence is an electric fence which is fatal if anyone touches it. (RT 3485). Additionally, the inmate televisions are sealed, thereby preventing them from being taken apart for the purpose of obtaining weapons stock. (RT 3486). These conditions were reflected in photographs proffered by the defense through Mr. Esten which were excluded by the trial court. (See Exhibits S-3 through S-8; RT 3487-3488, RT 3492-3496, RT 3743-3744; A/C CT 00764-00776). These details of prison life as reflected in the above proffer through Mr. Esten would not be subject to change from administration to administration, as these conditions are essentially reflected in the actual construction of the prisons themselves.

Thus, the evidence proffered by the defense relative to these prison conditions noted above, particularly as reflected in Exhibits S-3 through S-8, which were excluded, hardly rise to the level of "speculation" referenced in Thompson. In addition, the defense proffered to have Mr. Esten utilize these photographic exhibits to demonstrate how the prisoners are directly observed and supervised by armed guards. (RT 3486-3487). It cannot seriously be disputed that in any future administration that the prisoners will be observed and supervised by armed guards. Thus, the photographic evidence and testimony of Mr. Esten on this issue were certainly relevant to

his opinions concerning the character of Martinez and rebutting the claim of future dangerousness. (RT 3487-3488). As the defense noted, "Wardens and governors can change tomorrow, but the new physical plants will not change." (RT 3492).

It is important to note that the genesis of this Court's conclusion in Thompson that the description of future prison conditions relative to a life prisoner involves "speculation" regarding what future officials will do is predicated on this Court's decision in People v. Ramos, (1984) 37 Cal.3d 136, 156-158, which addressed the propriety of an instruction permitting the sentencing jury to consider post-conviction actions by other government entities, e.g., parole, commutation, and trial court review in determining the sentence that the defendant should receive. This Court concluded that such consideration was improper. 37 Cal.3d 156. This Court noted that for the jury to consider the possibility of future commutation of a sentence involved speculation, not only as to what a particular defendant will be like in the future, but also what a future unknown Governor may do in response to the defendant's then condition. 37 Cal.3d 157. However, the prison conditions reflected in the actual construction of the prison itself as depicted in Exhibits S-3 through S-8 (A/C CT 00764-00776) are not subject to the same speculative concerns regarding what an unknown future Governor may do, as the details of the prison environment are reflected in the modern construction of an already-built prison.

IX. THE CROSS-EXAMINATION OF DEFENSE EXPERTS AND CLOSING ARGUMENT BY THE PROSECUTION SO APPEALED TO THE PASSION AND PREJUDICE OF THE JURY AS TO DENY APPELLANT DUE PROCESS AND A FAIR AND RELIABLE PENALTY TRIAL.

A. Introduction

It is well settled that "[i]mproper remarks by a prosecutor can 'so infect[] the trial with unfairness as to make the resulting conviction a denial of due process.'" (People v. Farnham (2002) 28 Cal.4th 107, 167; Darden v. Wainwright (1986) 477 U.S. 168, 181; Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642. Moreover, even "conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law . . . if it involves 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.'" (People v. Farnham supra, 28 Cal.4th at 167; People v. Hill (1998) 17 Cal.4th 800, 819; People v. Espinoza (1992) 3 Cal.4th 806, 820.)

In a capital case when the advocate's art is used by the people's representatives to distort the record and manipulate jurors, higher values than skill or victory should be involved. As this Court stated in Hill, "[a] prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state." (People v. Hill, supra, 17 Cal.4th at 820.) As the United States Supreme Court has put it, the prosecutor represents "a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." (Berger v. United States (1935) 295 U.S. 78,

88). This obligation is all the more important in a capital case in which the Eighth and Fourteenth Amendments to the United States Constitution have special concerns that a death penalty verdict be arrived at through reliable means. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

The prosecution engaged in numerous instances of misconduct during the cross-examination of defense experts, Dr. Joseph Wu and Mr. James Esten. Most notably, the prosecutor repeatedly implied that Dr. Wu and Mr. Esten were lying by use of rhetorical statements, thereby seeking to invoke the passion and prejudice of the jury. The prosecution engaged in further acts of misconduct during closing argument, again seeking to appeal to the passion and prejudice of the jury.

B. Cross-Examination of Dr. Wu and Mr. Esten

Dr. Joseph Wu and Mr. James Esten were the principal experts called by the defense to support the claim of mitigation. In essence, Dr. Wu concluded, based on his medical training and pet-scan analysis, that Appellant Martinez had a brain disorder as reflected in the damage to his frontal lobe. Mr. James Esten, correctional expert, concluded that Appellant Martinez could make a satisfactory adjustment as a life prisoner and would not present a danger to others. Rather than seek to impeach the veracity of either expert or to undermine their respective opinions based on evidence, the prosecution took another tack.

In each instance, the prosecution employed the tactic of making rhetorical statements to each expert during cross-examination which did not call for an answer. However, the statements themselves sought to impugn the integrity of each expert and, in effect, suggest that each expert was a

liar, without affording the expert an opportunity to respond. Moreover, the prosecutor also sought to curry favor with the jury by the constant and repeated references to the "jury." During the cross-examination of Dr. Wu, the prosecutor made the following rhetorical statements: (1) "All right. So just to bring it back so we have it clear for the jury, . . ." (RT 3324); (2) "Okay. So -- and that's another thing I think this jury needs to know. . . ." (RT 3340); (3) "It's your testimony to the ladies and gentlemen of this jury . . ." (RT 3343); (4) "You told the ladies and gentlemen of the jury . . ." (RT 3354); (5) "[J]ust so the jury knows, . . ." (RT 3358); (6) "I'm not going to sit here with the jury, eyeball to eyeball, while I read these articles." (RT 3367). The same conduct by the prosecutor was repeated during the cross-examination of Mr. Esten as follows: (7) "Okay. It's a very simple point I want to make. Just so the jury doesn't have a misimpression about what when on here . . ." (RT 3557); (8) "[J]ust so you don't confuse the jury. . .." (RT 3560).

The repeated references to the "jury" in relation to "misimpression," "confuse," and making it "clear" constitutes an improper attempt by the prosecution to curry favor with the jury and, by implication, suggests that the defense witnesses, Dr. Wu and Mr. Esten, are not being truthful -- without affording either of them an opportunity to rebut such a suggestion. This clearly constitutes an appeal to passion and prejudice by the prosecution, and is a form of opinion, or reverse vouching, as well as an injection of improper testimony. The United States Supreme Court has repeatedly advised prosecutors "to refrain from improper methods calculated to produce a wrongful conviction. . . ." Berger v. United States, supra 295 U.S. at 88; see United States v. Young (1985) 470 U.S. 1, 7. Moreover, this Court has held that a prosecutor cannot use "deceptive"

methods to persuade the jury. (People v. Espinosa, supra, 3 Cal.4th at 820).

Although the defense did not object to the prosecution's conduct as outlined above, a review of the record makes clear that the aforementioned comments are interspersed with other statements and questions, rendering it impracticable for the defense to object. Here, the prosecutor was taking advantage of the "special regard" the jury has for the prosecutor. People v. Hill, supra, 17 Cal.4th at 828. As noted, the aforementioned comments were interspersed with other statements and questions throughout the cross-examination of Dr. Wu and Mr. Esten. Generally, appellate courts do not consider whether acts of prosecutorial misconduct constitute reversible error unless the defense has objected. (People v. Hill, supra, 17 Cal.4th at 820; People v. Berryman (1993) 6 Cal.4th 1048, 1072.) However, one of the exceptions to this rule includes when objections would be futile. (People v. Hill, supra, 17 Cal.4th at 820). Another exception is where the actions of the prosecutor constitute a pervasive course of conduct interspersing objectionable material among other materials, and hence, objections might well serve to reinforce the damaging force of the challenged assertions. (People v. Kirkes (1952) 39 Cal.2d 719, 726; People v. Pitts (1990) 223 Cal. App.3d 606, 692).

Moreover, there were two additional matters injected by the prosecution into the testimony of defense expert, Mr. Esten, during cross-examination regarding (1) the well-documented initiation rite into gang membership in prison as being a "killing" (RT 3564) and, (2) the potential that Martinez may enjoy "conjugal visits" as a life prisoner in the event that the Director of Corrections changes the guidelines pursuant to the administrative law process. (RT 3562-3564). Neither matter fell within the scope of the direct-examination by defense counsel. See Evidence Code §§

761 and 773.

In his testimony on direct-examination, Mr. Esten opined that Martinez could make a successful adjustment as a life prisoner. (RT 3500-3536, at 3536). Further, Mr. Esten noted that Martinez did not express any interest in joining a prison gang or becoming involved in a disruptive group. (RT 3530). He also noted that if Martinez did join a prison gang or a disruptive group, he would be placed in a security housing unit cell and identified as a gang member. Moreover, Martinez expressed his belief that he had the strength to resist joining either a prison gang or a disruptive group. (RT 3531). In response to cross-examination by the prosecution, Mr. Esten acknowledged that there is a progression from a local neighborhood group to a prison gang if one chooses to follow that path. (RT 3564). The prosecutor then concluded with a final question as follows:

> **Q.** (Prosecutor) Okay. And is there not a well-documented initiation rite into a gang membership in prison?
>
> **A.** (Mr. Esten) A killing.

(RT 3564).

The fact that a killing may be a well-documented rite of initiation for gang membership in prison was wholly unrelated to the issue of whether Martinez could make a successful adjustment as a life prisoner. Martinez did not express any interest in joining a prison gang. (RT 3530-3531). Moreover, the injection of a "killing"as being a well-documented rite of initiation for gang membership in prison not only references a "detail" of prison life that the trial court had ruled inadmissible (see Argument VIII, herein, ante at pp. 250-251) but, more importantly, the import of this evidence was obviously intended to appeal to the passion and prejudice of

the jury.

While Martinez was seeking to have his life spared by way of a sentence of life without possibility of parole, the prosecution was seeking a verdict of death. Here, the prosecutor is intimating to the jury that if Martinez receives a life sentence he will become a gang member and, in the process, kill someone. The prosecution had previously contended that it had not asserted a claim of future dangerousness (RT 3474-3475), and moreover, sought to preclude Esten from testifying regarding the details of prison life. (RT 3481-3483). However, the prosecution here disingenuously injects a "detail" of prison life, i.e., that a killing is a requirement to obtain the right to become a member of a prison gang. It cannot be seriously disputed that the import of this evidence regarding a "killing" was to appeal to the passion and prejudice of the jury in their deliberation process on the question of death as opposed to life, and was irrelevant to any legitimate issue.

By the same token, the prosecution also injected the issue of a potential future change in the regulations by the Director of the Department of Corrections, which would permit life prisoners to "get married" and have "conjugal visits." (RT 3562-3564). The import of the cross-examination of Esten on this issue was that life prisoners had recently been entitled to "get married" and to have "conjugal visits," but the recent change in the regulations precluded marriage and conjugal visits. However, the point being made by the prosecutor here is that the regulations could change, thereby permitting life prisoners to "get married" and enjoy "conjugal visits." (RT 3562-3564)

The question of marriage and conjugal visits had not been the subject of direct-examination by defense counsel. (RT 3500-3536). Moreover,

defense counsel had been precluded from going into the "details" of prison life based on the trial court's ruling. (RT 3492-3497). Here, the prosecution, addressed the details of prison life in a blatant effort to appeal to the passion and prejudice of the jury. (RT 3562-3564). As Martinez sought to obtain a sentence of life imprisonment as opposed to death, the prosecution wanted the jury to consider that life in prison could mean marriage and conjugal visits for Martinez. (RT 3562-3564 and 4001). Although no objection was made regarding the testimony concerning the rite of initiation into a prison gang being a "killing" and that a change in the regulations could mean the potential for "marriage" and "conjugal visits" for Martinez, the prejudice suffered by Martinez in his quest to obtain a sentence of life imprisonment is obvious. It is clearly borne out by the prosecution's closing argument in which he noted that life in prison for Martinez could mean getting married and having a family (i.e., enjoying conjugal visits) if they change the regulations. (RT 4001).

Notwithstanding defense counsel's failure to object at trial, these claims of prosecutorial misconduct are still preserved for appellate review because the misconduct constituted plain error involving a serious miscarriage of justice. (United States v. Young, supra, 470 U.S. 15; People v. Hill, supra, 3 Cal.4th at 1017 n.1 (conc. opin. of Mosk, J.).

In addition, the development and presentation by the prosecutor of evidence regarding the "details" of prison life, and the circumstances in prison awaiting Appellant Martinez, which Martinez was forbidden to do, also violated due process by unjustifiably creating an imbalance between the prosecution and defense. "[I]n the absence of a strong showing of state interests to the contrary" there "must be a two-way street" as between the prosecution and the defense. (Wardius v. Oregon (1973) 412 U.S. 470,

475.) Hence, the Due Process and Equal Protection Clauses of the Fourteenth Amendment are violated by unjustified and uneven application of criminal procedures in a way that favors the prosecution over the defense. (Ibid.; see also Lindsay v. Normet (1972) 405 U.S. 56, 77 [arbitrary preference to particular litigants violates equal protection]; Green v. Georgia (1979) 442 U.S. 95, 97 [defense precluded from presenting hearsay testimony which the prosecutor used against the co-defendant]; Webb v. Texas (1972) 409 U.S. 95, 97-98 [judge gave defense witness a special warning to testify truthfully but not the prosecution witnesses]; Washington v. Texas (1967) 388 U.S. 14 [accomplice permitted to testify for the prosecution but not for the defense]; Chambers v. Mississippi (1973) 410 U.S. 284 [unconstitutional to bar defendant from impeaching his own witness although the government was free to impeach that witness].)

C. Closing Argument

The prosecutor engaged in misconduct during closing argument by various appeals to passion and prejudice. On June 17, 1998, prior to closing argument, the defense filed an extensive "Motion To Limit Penalty Phase Argument" which sought an order limiting the prosecutor "to proper and constitutional penalty phase arguments." (CT 01461). The motion provided in pertinent part as follows:

> This motion is designed to give the prosecution proper notice of the scope of penalty phase argument, in order to insure that improper arguments are not repeated, and in order to avoid the necessity of defense counsel making objections during the argument to the jury.

(CT 01461). The defense outlined the basis for the motion in the introduction in pertinent part as follows:

> The prosecutor occupies a unique position in the criminal justice system. He is not just an advocate, but a public servant "whose interest, therefore, in a criminal prosecution is not that he shall win a case, but that justice shall be done." (*Berger v. United States*, [sic] (1934) 295 U.S. 78, 88).
>
> Nowhere is this responsibility more acute than in capital litigation. Since "death is a qualitatively different" than "any other punishment imposed in this country" (*Gardner v. Florida* (1977) 430 U.S. 349, 357), the Eighth Amendment requires a "greater degree of accuracy" and reliability (*Gilmore v. Taylor* (1993) 508 U.S. ___, 124 L.Ed. 2d 306, 318, 113 S. Ct. ___).
>
> These stringent requirements apply perforce to penalty phase argument. Indeed, any "decision on the propriety of a closing argument" is intimately tied "to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances, and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law" (*Coleman v. Brown* (10th Cir. 1986) 802 F.2d 1227, 1239). Thus, "even if a prosecutor's comments are confined to permissible subjects, if those comments are nevertheless designed to evoke a wholly emotional response from the jury, constitutional error can result" (*Ibid.*) In short, "when a man's life is at stake, a prosecutor should not play upon the passions of the jury" (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 951).

(CT 01463).

The defense then concluded by requesting a binding in limine ruling concerning the prosecutor's argument as follows:

> The best way to insure proper penalty phase summation is to define -- in advance -- the permissible bounds of argument. By doing so, the court eliminates not only the

> danger of incurable misconduct, but also the need for curative instructions, and the constant interruption of defense objections. On this last point, the Supreme Court has observed that repeated objections in the presence of the jury often "exacerbate[s] the problem of prosecutorial misconduct by affording the prosecutor an opportunity to elaborate and explain his comments" (*People v. Fosselman* (1983) 33 Cal.3d 572, 582). They also "involve a risk of antagonizing jurors" which "defendant is not required to bear" (*People v. Bain* (1971) 5 Cal.3d 839, 841), and can upset the flow of the prosecutor's argument and/or derail his/her concentration.
>
> All of these problems can be avoided by a binding in limine ruling restricting the prosecutor's argument to appropriate topics.

(CT 01464-01465). The defense then identified a number of common penalty phase arguments which were inappropriate and impermissible and sought a ruling from the court limiting argument in these areas which included, but are not limited to: (1) the death verdict as a message to the community (CT 01469-01471); (2) the death penalty as a deterrent; and (3) the cost of imprisonment. (CT 01473).

The motion concluded as follows:

> There is nothing novel in this memorandum. It has done no more than outline a series of penalty phase arguments that the courts have condemned as improper. By this motion, defendant asks only that the prosecutor abide by these authorities -- that he be ordered to refrain from clearly improper arguments. Should prosecutorial misconduct occur despite the court's admonitions, it will be clear that the conduct was intentional and in bad faith. In such cases, the proper remedy is normally mistrial. However, the court may in some cases decide to give a curative admonition (see *People v. Bolton* (1979) 23 Cal.3d 208, 213-216; *Mann v. Dugger* (11th Cir. 1988) 844 F.2d 1446, 1457.

(CT 01475).

The trial court held a lengthy hearing regarding the Motion To Limit Penalty Phase Argument. (RT 3891-3911).

The trial court granted the defense motion that the prosecutor may not argue that the death penalty has a deterrent effect upon other would be murderers. (RT 3899 and 3901; CT 01473). Moreover, as to the limitation on argument regarding the cost of life imprisonment, the court in effect granted the motion noting that it also intended to give an instruction on the issue. (RT 3901 and RT 3868-3869). The court had earlier agreed to give the Defendant's Proposed Special Jury Instruction Number 5, entitled "Jury May Not Consider Deterrence or Monetary Cost." (RT 3868-3870; CT 01451). Moreover, the court gave the special instruction which provided as follows:

> In deciding whether death or life in prison without the possibility of parole is the appropriate sentence, you may not consider for any reason whatsoever the deterrent or non-deterrent effect of the death penalty or the monetary cost to the State of execution or maintaining a prisoner for life.

(CT 01531 at 01537; RT 3938 at 3944).

The court and counsel discussed at length the motion to limit argument regarding death as a message to the community as follows:

> [**The Court**]: Okay. The next one is the death verdict as a message to the community. Are you going to send a message to the community, Mr. Sneddon?"
>
> **MR. SNEDDON**: . . . I don't see any cases that say that you can't talk about the implications of the decision for the community.
>
> **THE COURT**: Well, the thing that I'm thinking of is in terms that you're not allowed to argue deterrence.

MR. SNEDDON: Correct.

THE COURT: And that's where I'm coming from. To the extent that you start talking about a message to the community of deterrence, you've crossed that line. That's where I was thinking.

MR. SNEDDON: Yes, I understand the deterrence context of the remarks, Your Honor. On the other hand, there are -- there are things where you can talk about society in general and where somebody may go beyond a certain point that -- in conduct. And I understand the deterrence, and I understand you have to stay away from that, and I will stay away from that. . . . But I just don't think that a general prohibition -- I mean, being limited in my ability to point out some of the implications of this to society, or the implications of the death penalty in general in the context of the kind of crimes we have here is limited by any case that I've ever seen. That's all I'm suggesting. . . .

MR. DULLEA: There are two other objections besides deterrence. One is that such remarks, at the least, can be inflammatory. They can be an appeal to passion in an attempt to arouse the jury or an appeal to public opinion.

And secondly, an appeal to the jury to send a message to the community really has nothing to do with . . . any traditional concept of justice that I can think of. . . .

(RT 3899-3900).

The trial court ruled as follows:

THE COURT: I'm going to grant your request insofar as it enters the arena of deterrence. That's as far as I'm going. I can see comments about society or community that don't do that that I don't want to prohibit. But, once again, subject to what happens during argument, you can be free to object.

(RT 3901).

During closing argument, the prosecution, under the guise of generalized comments concerning the "implications of the death penalty" to

"society" sought to send a message to the community which addressed the prohibited issues of both cost of imprisonment and deterrence. The prosecutor argued as follows:

> And I also submit to you, after that same review of everything, that what the death penalty will do in this case is that it certainly will restore the confidence and the trust in the system's ability to deal with people that transgress it and that do it in situations that are so aggravated and without sufficient justifying or mitigating circumstances that the public can see justice is done. They can see and the families can see that justice means more than sympathy, and mercy, and warehousing, and rehabilitation, and that it takes into account the defendant's conduct and the method and manner of his crimes and the impacts that it's had on the ones who suffered.

(RT 4023-4024).

A review of this portion of the prosecutor's closing argument which took place at the conclusion of the argument clearly shows that the prosecutor in effect requested that the jury "send a message" on the issue of deterrence as well as raised the issue of the cost of imprisonment. The statement that the death penalty "will restore the confidence and the trust in the system's ability to deal with people that transgress it" and that "the public can see justice is done" by implication involves the sending of a message, and moreover, addresses the issue of deterrence by way of noting "the system's ability to deal with people that transgress it." Moreover, by reference to the public and the families being able to see "that justice means more" than "warehousing" and "rehabilitation," this by implication references the cost of imprisonment, i.e., warehousing and rehabilitation.

The prosecutor circumvented the trial court's order precluding argument on the issues of deterrence and the cost of imprisonment and

sought to have the jury send a message to the community under the guise of addressing the implications of the death penalty for society and the public in general. In this context, the appeal to passion and prejudice by the prosecutor in seeking to have the jury send a message to the community, a.k.a. society, constitutes prosecutorial misconduct. See Powell v. United States (D.C. Cir. 1982) 455 A.2d 405, 410; Hart v. United States, (D.C. Cir. 1988) 538 A.2d 1146, 1150. See also People v. Herring (1993) 20 Cal. App. 4th 1066, 1077 (noting that "[p]rosecutors must be aware that by engaging in improper prejudicial rhetoric they jeopardize what might otherwise be fairly won convictions"); see also 5 Witkin and Epstein, Cal.Crim. Law, 3d Ed., Criminal Trial § 594. pp. 851-853 (addressing appeals to passion or prejudice). Moreover, the trial court properly instructed the jury that they were not to consider the deterrent effect of the death penalty, (People v. Love (1961) 56 Cal.2d 720, 729-732) and properly instructed the jury that they were not to consider the cost of life imprisonment. (People v. Thompson (1988) 45 Cal.3d 86, 131-132) because to do so would implicate the Eighth and Fourteenth Amendments to the federal Constitution. (People v. Benson (1990) 52 Cal.3d 754, 807.)

The prosecutor also engaged in speculation concerning future prison conditions during closing argument. The prosecutor argued as follows:

> [T]he last thing you need to consider when you assess -- when you weigh Mr. Esten's testimony about whether the defendant can conform, whether he can have a good life in prison, is whether life without possibility of parole is a just punishment in this particular case.
>
> After all, ladies and gentlemen, it is life. It is life with visitations, it's life with friends, it's life with girlfriends, it's life with family, it's life potentially, if they change the

> regulations, to have a wife and family. It's a life. Everyday life.

(RT 4000-4001). Here, the prosecutor crossed the line by referencing a potential change in the regulations which would result in Martinez having the ability "to have a wife and family," e.g., conjugal visits. As discussed, (See Argument VIII, herein, ante at pp. 250-251), the trial court ruled that Mr. Esten could not attest to the details of prison life. This ruling was based in part on the prosecution's argument that changes in administration philosophy impact the daily conditions in prison, and hence, the details of daily prison life may change from administration to administration. (RT 3470-3473, (see Argument VIII, herein, ante at pp. 270-272). Moreover, this ruling was based in part on case law that "[d]escribing future conditions of confinement" would involve "speculation" as to what future government officials may do. (People v. Thompson, supra, 45 Cal.3d at 139.) (See Argument VIII, herein, ante at pp. 270-272). Thus, the speculative comments by the prosecutor regarding marriage and family as well as by implication conjugal visits violates both the letter and the spirit of the trial court's order regarding the "details of prison life."

As outlined above, the prosecutor had already engaged in misconduct during the cross-examination of Esten by injecting the question of a change in the regulations which would result in Martinez being able to get married and have conjugal visits. Here, as a basis for imposing a death verdict, the prosecutor in effect argues that a change in the regulations will permit Martinez to get married and have conjugal visits. This not only violates the trial court's earlier ruling precluding testimony concerning the "details" of daily life in prison, but, moreover, it undercuts the testimony of Mr. Esten by use of the very "details" that the trial court had precluded him

from describing and relying on as a basis for his opinion. The unfairness of this tactic is self-evident, and a violation of constitutional guarantees of Due Process and Equal Protection of the law. (See Wardius v. Oregon, supra.) The tactic of injecting potential married life and conjugal visits gave the jury a false picture of prison life that Appellant was not allowed to challenge, and appeals to passion and prejudice.

Defense counsel did not object to the deceptive and fallacious arguments crafted by the prosecution. Generally, appellate courts do not consider whether acts of prosecutorial misconduct constitute reversible error unless the defense has objected. (People v. Hill, supra, 17 Cal.4th at 820; People v. Berryman (1993) 6 Cal.4th 1048, 1072). However, as this court noted in Hill, there are exceptions, including where objections would be futile. (17 Cal.4th at 820). Moreover, where the actions of the prosecutor constitute a pervasive course of conduct interspersing objectionable material throughout the argument, objections might well serve to reinforce the damaging force of the challenged assertions. (People v. Kirkes (1952) 39 Cal.2d 719, 726; People v. Pitts (1990) 223 Cal.App.3d 606, 692). Appellant Martinez submits that the nature and volume of the inappropriate arguments and comments were so overwhelming that it was futile for the defense to attempt to remedy the situation by objecting. Moreover, in this instance, objecting would have only reinforced the damaging force of the challenged arguments and comments. This is particularly true here where the defense had moved the court prior to closing argument to limit the scope of the penalty phase argument to assure that the penalty phase summation by the prosecution would be confined to the permissible bounds of argument. (CT 01461 and 01464). The trial court granted, in part, and denied, in part, the motion.

If this court considers the issues preserved for review and agrees that many of the prosecutors' tactics and arguments violated the higher standard of conduct requiring the government's representatives in a death penalty case to avoid deceptive tactics, such a finding of a violation of state law is sufficient to justify a reversal of the death verdict in this case. Any weighing of the evidence suggests that another verdict was reasonably possible had the prosecution not used deceptive and inflammatory tactics. (People v. Brown (1988) 46 Cal.3d 432, 448). Reversal of the penalty verdict is appropriate as a remedy for these tactics.

Moreover, Appellant Martinez submits that the pervasive nature of the prosecution tactics amounted to a due process violation, depriving Appellant of a fair and reliable penalty process and therefore is reversible per se. (See People v. Hill, supra, 17 Cal.4th at 847 [reversing all counts of conviction based on pervasive misconduct, combined with numerous other errors].) Because of its pervasive and misleading character, the prosecutorial misconduct also violated Appellant's Eighth and Fourteenth Amendment rights to a reliable, individualized capital sentencing determination. (Zant v. Stephens (1983) 462 U.S. 862, 879; Woodson v. North Carolina, supra, 428 U.S. at 304; Johnson v. Mississippi, supra, 486 U.S. at 584-585).

X. THE CUMULATIVE EFFECT OF THE ERRORS COMMITTED IN THIS CASE REQUIRES REVERSAL OF THE GUILT VERDICTS AND THE JUDGMENT OF DEATH AND DEPRIVED APPELLANT OF HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND PENALTY PHASE

If the court does not agree that any one error requires reversal when considered by itself, then it is necessary to assess their cumulative impact. (Taylor v. Kentucky (1978) 436 U.S. 478, 487 and n.15 [reversing because "cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness:].)

State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. (Alcala v. Woodford (9th Cir. 2003), 334 F.3d 862, 883; Matlock v. Rose 6th Cir. 1984, 731 F.2d 1236, 1244; see also, Donnelly v. DeChristoforo (1974) 416 U.S. 637, 642-644.)

The Ninth Circuit has repeatedly noted that while some errors standing alone may be harmless, in connection with other errors they may render a trial so unfair that reversal on the basis of cumulative error is required. (McDowell v. Calderon (9th Cir. 1997) 107 F.3d 1351, 1368 [although no single alleged error may warrant habeas corpus relief, the cumulative effect of errors may deprive a petitioner of the due process right to a fair trial]; United States v. Frederick (9th Cir. 1996) 78 F.3d 1370, 1381 [prejudice resulting from the cumulative effect of several errors required reversal even though individual errors evaluated alone might not have warranted reversal]; United States v. Necoechea (9th Cir. 1993) 986 F.2d 1273, 1282 [while individual errors may not rise to level of reversible

error, their cumulative effect may nevertheless be so prejudicial as to require reversal]; Mak v. Blodgett (9th Cir. 1992) 970 F.2d 614, 622, cert. denied (1993) 507 U.S. 951 [cumulative effect of several errors, including deficient performance by counsel and faulty jury instruction, justified relief in habeas corpus death penalty case]; United States v. Wallace (9th Cir. 1988) 848 F.2d 1464, 1475 ["Although each of the above errors . . . may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted."].) The cumulative effect of the multitude of errors in this case violated the due process guarantee of fundamental fairness and requires reversal of Appellant's conviction. Where a court finds prejudice as the cumulative result of multiple errors, the court need not analyze the individual effect of each error. (See Harris by & through Ramseyer v. Wood (9th Cir. 1995) 64 F.3d 1432, 1439; Mak v. Blodgett, supra, 970 F.2d at 622.)

In People v. Hill (1998) 17 Cal.4th 800, 845, this court found numerous instances of prosecutorial misconduct and other errors at both stages of the death penalty trial were cumulatively prejudicial. That is, the combined, aggregate, prejudicial effect of the errors was greater than the sum of the prejudice of each error standing alone.

When a case is close, a small degree of error in the lower court should, on appeal, be considered enough to have influenced the jury to wrongfully convict the appellant. (See generally, People v. Holt (1984) 37 Cal.3d 436, 459; People v. Wagner (1975) 13 Cal.3d 612, 621; People v. Collins (1968) 68 Ca.2d 319, 332.) Additionally, in a close case, the cumulative effect of errors may constitute a miscarriage of justice. (See, People v. Buffum (1953) 40 Cal.2d 709, 726; People v. Zerillo (1950) 36 Cal.2d 222, 233; People v. Cruz (1978) 83 Cal.App.3d 308, 334; see also

United States v. McLister (9th Cir. 1979) 608 F.2d 785, 791.) The combined effect of instructional errors and/or evidentiary errors may create cumulative prejudice. (See, People v. McGreen (1980) 107 Cal.App.3d 504, 519-520; People v. Ford (1964) 60 Cal.2d 772, 798.)

Moreover, when errors of federal constitutional magnitude combine with nonconstitutional errors, all errors should be reviewed under a Chapman standard. (See People v. Williams (1971) 22 Cal.App.3d 34, 58-59.) Finally, there were cumulative errors in this case that infected the trial with unfairness requiring reversal. (See United States v. Frederick (9th Cir. 1996) 78 F.3d 1370, 1381 [cumulative effect of various constitutional errors, including improper comments by prosecutor, prosecutorial vouching and the admission of prejudicial testimony, was prejudicial requiring reversal on appeal].)

In cases where multiple errors of the same type have occurred, the appropriate standard of review is, logically, the pertinent prejudice standard. (See, e.g., Kyles v. Whitley (1995) 514 U.S. 419, 421-422 [cumulative effect of exculpatory evidence suppressed by the government in violation of Brady raised a reasonable probability that the outcome of the trial would have been different and warranted habeas relief]; Wade v. Calderon (9th Cir. 1994) 29 F.3d 1312, 1325, cert. denied (1995) 513 U.S. 1120 [cumulative effect of counsel's errors during the penalty phase created reasonable probability that, absent errors, result of penalty phase would have been different]; McKinney v. Rees (9th Cir. 1993) 993 F.2d 1378, 1386, cert. denied (1993) 510 U.S. 1020 [concluding that it was "highly probable" that evidence erroneously admitted throughout the trial had a "substantial and injurious effect or influence" on jury]; Kelly v. Stone (9th Cir. 1975) 514 F.2d 18, 19 [cumulative effect of instances of prosecutorial

misconduct denied defendant a fair trial and justified granting habeas relief]; see also Walker v. Engle (6th Cir.) 703 F.2d 959, 963, cert. denied (1983) 464 U.S. 951 [cumulative effect of evidentiary errors warranted habeas relief].)

The appropriate standard for determining cumulative harmless error is less certain in cases where, as here, the various errors, standing alone, each have differing standards of collateral review.

The Tenth Circuit has twice stated that, if any of the errors are constitutional errors, the Chapman harmless beyond a reasonable doubt standard should apply to the cumulative error analysis. (See United States v. Albers (10th Cir. 1996) 93 F.3d 1469, 1486 n.4 citing United States v. Rivera (10th Cir. 1990) 900 F.2d 1462, 470 n.6.) The Ninth Circuit also has cited Rivera for the proposition that, if any constitutional errors exist, then cumulative error analysis must be performed under the Chapman standard. (See United States v. Necoechea (9th Cir. 1993) 986 F.2d 1273, 1283.) Since Appellant's case involves a number of constitutional errors, the appropriate standard for harmless error review here is the Chapman standard. Under Chapman, the state cannot establish that the cumulative effect of the multiple errors in the guilt and penalty phases was harmless beyond a reasonable doubt. Under any standard of review, relief must be granted because the cumulative effect of all of the constitutional and nonconstitutional errors in this case clearly had a substantial and injurious effect or influence in determining the jury's verdicts in both phases of Appellant's trial.

As discussed, this was in fact a close case, particularly in light of the circumstantial nature of the evidence in the guilt phase and the strong case of mitigation offered by the defense in the penalty phase. Appellant

Martinez has established that, in the absence of error, a juror in this case reasonably could have found that life without parole was the appropriate sentence in this case. In light of that fact, and in light of the nature and seriousness of the errors noted above, it is both reasonably possible (Chapman v. California (1967) 386 U.S. 18, 24) and reasonably probable (Strickland v. Washington (1984) 466 U.S. 668, 693-965) that any combination of those errors adversely influenced the guilt verdict and the penalty determination of at least one juror. It certainly cannot be found that the errors had "no effect" on the penalty verdict. (Caldwell v. Mississippi (1985) 472 U.S. 320, 341.) The judgment of death must be reversed.

XI. AS APPLIED IN THIS CASE, THE ROBBERY AND RAPE SPECIAL CIRCUMSTANCE ALLEGATIONS VIOLATE THE EIGHTH AMENDMENT BECAUSE THEY PERMITTED THE JURY TO IMPOSE DEATH FOR AN ACCIDENTAL OR UNFORESEEABLE KILLING.

Appellant Martinez was convicted of first degree murder. He was eligible for a death sentence because the jury found true two felony-murder special circumstance allegations: (1) killing during the commission of a robbery and (2) killing during the commission of a rape (CT 2-4).

As more fully discussed below, the death eligibility finding in this case was unconstitutional and the death sentence must be reversed. Where a defendant is the actual killer in a felony-murder case, California law does not require the state to prove any culpable mental state at all in order to render the defendant death-eligible under the state's felony-murder special circumstance allegations. To the contrary, under California law a felony-murder defendant can be death-eligible even if the killing is accidental or unforeseeable. Pursuant to authority from the United States Supreme Court, and courts throughout the country, this is unconstitutional.[15] The death eligibility finding in this case – premised solely on two felony-murder special circumstance allegations – must be reversed.

A. Under California Law, A Defendant Can Be Convicted Of First-Degree Felony Murder, And Found Death-Eligible Under California's Special Circumstance Allegations, If The Killing is Negligent, Accidental Or Even Wholly Unforeseeable.

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[15] This Court has consistently rejected challenges to the constitutionality of California's death penalty statute, including claims that the death penalty law fails to adequately narrow the class of death-eligible offenders. People v. Brown (2004) 33 Cal.4th 382, 401-402; People v. Sapp (2003) 31 Cal.4th 240, 316-317. However, the argument made here as well as in Argument XII are to preserve the issues for federal habeas claims.

Under California law, the state cannot generally obtain a first degree murder conviction without proving that the defendant both premeditated and had the subjective mental state of malice. However, in the case of a killing committed during a robbery or rape as well as any other felony listed in Penal Code Section 189, the state can convict a defendant of first degree felony-murder without proof of any mens rea with regard to the murder. California's first degree felony-murder rule "includes not only [premeditated murders], but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable," People v. Dillon (1983) 34 Cal.3d 441, 477. This rule is reflected in the standard jury instructions for felony-murder, given in this case. (CALJIC 8.21; (RT 2376-2377; RT-2483; and, CT 1187 at 1226).

Under California law, however, this strict rule of culpability applies not only to the question of guilt, but to the question of death-eligibility as well. Thus, a defendant who is the actual killer in a felony-murder is eligible for death even if the state does not prove that the defendant had any distinct mens rea as to the killing. (See e.g., People v. Smithey (1999) 20 Cal.4th 936 [rejecting defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life]; People v. Earp (1999) 20 Cal.4th 826, 905, n.15 [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; People v. Musselwhite (1998) 17 Cal.4th 1216, 1264 [rejecting the defendant's argument that to prove a felony-murder special circumstance, the prosecution was required

to prove malice].) As this Court has long made clear, if a defendant is the actual killer in a felony-murder, he is also death-eligible under the felony-murder special circumstance. (See People v. Hayes (1990) 52 Cal.3d 577, 631-32 (the reach of the special circumstances is as broad as the reach of felony-murder and both apply to a killing "committed in the perpetration of an enumerated felony if the killing and the felony 'are parts of one continuous transaction.'")[16]

In other words, where the defendant is the actual killer, California's felony-murder rule permits a jury to find him guilty of murder even if the killing was negligent, accidental or even wholly unforeseeable. California's felony-murder special circumstances then permits the jury to go further, and find the defendant eligible for death, without proof that defendant harbored any culpable mental state as to the murder itself. As Justice Broussard has noted, under the California scheme "a person can be executed for an unintentional killing." (People v. Anderson (1987) 43 Cal.3d 1104, 1152 [Broussard, J., dissenting].)

This lack of any mens rea requirement for death eligibility stands in sharp contrast to the rule applied where the defendant is not the actual killer, but is an aider and abettor. In that situation, California law is now clear that a defendant is not eligible for death unless the state proves a culpable mental state as to the murder – either an intent to kill or, at least, a reckless indifference to human life. (See, e.g., People v. Anderson, supra, 43 Cal.3d at p. 1147; Penal Code Section 190.2, subdivision (d).)

The question then becomes whether such a broad special

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[16] The only exception to this rule is when the robbery is only incidental to the murder. In that situation, the felony-murder rule will apply though the felony-murder special circumstance may not. (See People v. Green (1980) 27 Cal.3d 1.)

circumstance – rendering defendants death eligible even where there has been no finding of a culpable mental state as to the actual killing – violates the Eighth Amendment. It is to that question Appellant Martinez now turns.

B. As Applied To An Actual Killer, The Robbery And Rape Special Circumstance Allegations Violate the Eighth Amendment Because They Permit Imposition Of Death Without Proof Of Any Culpable Mens Rea As To The Actual Killing.

In a series of cases beginning with Gregg v. Georgia (1976) 428 U.S. 153, the Supreme Court has recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in two general circumstances. First, the Court has held death disproportionate for a particular type of crime. (See Coker v. Georgia (1977) 433 U.S. 584 [death penalty disproportionate for rape of an adult woman]; Enmund v. Florida (1982) 458 U.S. 782 [death penalty disproportionate for aider and abettor to felony-murder.) Second, the Court has held death disproportionate for a particular type of defendant. (See, e.g., Atkins v. Virginia (2002) 536 U.S. 304 [death penalty disproportionate for mentally retarded defendant]; Roper v. Simmons (2005) ___ U.S. ___, 125 S. Ct. 1183 [death penalty disproportionate for a defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (Gregg v. Georgia, supra, 428 U.S. at p. 183.).

The Court first addressed the proportionality of the death penalty for felony-murders in two cases: Enmund v. Florida, supra, 458 U.S. 782 and

Tison v. Arizona (1987) 481 U.S. 137. In Enmund, the Court held that the Eighth Amendment barred imposition of the death penalty on an aider and abettor – the "getaway driver" to an armed robbery murder – because he neither took life, attempted to take life, nor intended to take life. (458 U.S. at pp. 789-793.) In Tison, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty in connection with an aider and abettor to felony-murder. The Court held that it was not, and that the Eighth Amendment would be satisfied by proof that such a defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (481 U.S. at p. 158).

Both Tison and Enmund involved felony-murder defendants who were not actual killers, but only aiders and abettors. The question here is whether Tison established a minimum mens rea solely for aiders and abettors, or whether it also established a minimum mens rea requirement also applicable to actual killers. That question was decided in Hopkins v. Reeves (1998) 524 U.S. 88.

In Reeves, the defendant was the actual killer in a felony-murder. He contended that the state court had erred in refusing to instruct on lesser offenses which focused on his mental state: second degree murder and manslaughter. In defending the trial court's refusal to provide such instructions, the state argued that the lesser offenses were inapplicable because felony-murder under Nebraska law did not require any culpable mental state as to the murder itself. In response, defendant relied on Enmund and Tison for the proposition that because proof of a more culpable mental state was required by the federal constitution, the lesser instructions were required. Although Reeves involved an actual killer (as

opposed to an aider and abettor), the Supreme Court made quite clear that the state still had to establish that defendant satisfied the minimum mens rea required under Enmund/Tison at some point in the case. (524 U.S. at p. 99). See also, Graham v. Collins (1993) 506 U.S. 461, 501 [Stevens, J., concurring] [stating that an accidental homicide (like the one in Furman) may no longer support a death sentence.])

Lower federal courts to consider the issue – both before and after Reeves – have uniformly read Tison to establish a minimum mens rea applicable to all defendants. (See, e.g., Lear v. Cowan (7th Cir. 2000) 220 F.3d 825, 828; Reeves v. Hopkins (8th Cir. 1996) 102 F.3d 977, 984-85, rev'd on other grounds, (1998) 524 U.S. 88; Loving v. Hart (C.A.A.F. 1998) 47 M.J. 438, 443; Woratzeck v. Stewart (9th Cir. 1996) 97 F.3d 329, cert. denied, (1997) 520 U.S. 1173; United States v. Cheely (9th Cir. 1994) 36 F.3d 1439. See also State v. Middlebrooks (Tenn. 1992) 840 S.W.2d 317, 345).

Even if it was not clear from the Supreme Court and lower federal court decisions that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty, the Court's two-part test for proportionality would dictate such a conclusion. In Atkins, the Court emphasized, that "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (536 U.S. at p. 312). An analysis of legislation in the felony-murder area confirms the unconstitutionality of a scheme that permits a death sentence for felony-murder without any culpable intent as to the murder itself.

Of the 38 death penalty states, there are at most 5 states – California, Florida, Georgia, Maryland, and Mississippi – where a defendant may be

death-eligible for felony-murder simpliciter. That at least 45 states (33 death penalty states and 12 non-death penalty states) and the federal government[17] reject felony-murder simpliciter as a basis for death eligibility reflects an even stronger "current legislative judgment" than the Court found sufficient in Enmund (41 states and the federal government) and Atkins (30 states and the federal government).[18]

Not only is the imposition of the death penalty on one who has killed negligently or accidentally contrary to evolving standards of decency, it fails to serve either of the penological purposes – retribution and deterrence of capital crimes by prospective offenders – identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (Enmund v. Arizona, supra, 458 U.S. at pp. 798-799). With respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. "It is fundamental 'that causing harm intentionally must be punished more

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17 See 18 U.S.C. § 3591(a)(2).

18 One recent discussion of this issue lists eight states including California which permit a death sentence for felony-murder simpliciter – California, Florida, Georgia, Maryland, Mississippi, Nevada, Montana and North Carolina. S. Shatz and N. Rivkind, *The California Death Penalty; Requiem for Furman?* 72 N.Y.U. Law. Rev. 1283, 1319 n.201 (1977). But Montana (by statute) and North Carolina (by court decision) now require a showing of some mens rea in addition to the felony-murder in order to make a defendant death-eligible. (See Mont. Code Ann. §§ 45-5-102(1)(b), 46-18-303; State v. Gregory (N.C. 1995) 459 S.E.2d 638, 665). And the Nevada Supreme Court has recently invalidated felony-murder simpliciter as a basis for death eligibility. McConnell v. State (Nev. 2004) 102 P.3d 606). Thus, there are only five states (including California that now permit a death sentence for felony-murder simpliciter.

severely than causing the same harm unintentionally.'" (Ibid. See also Tison v. Arizona, supra, 481 U.S. at 156 ["the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished."].) Plainly, treating negligent and accidental killers on a par with intentional and reckless indifferent killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Supreme Court has recognized, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." (Enmund v. Arizona, supra, 458 U.S. at pp. 798-99. Accord Atkins v. Virginia, supra, 536 U.S. at p. 319.) The law simply cannot deter a person from causing a result he never intended and never himself foresaw.

In short, because imposition of the death penalty for felony-murder simpliciter is contrary to the judgment of the overwhelming majority of the states, it does not comport with contemporary values. Because it serves no penological purpose it "is nothing more than the purposeless and needless imposition of pain and suffering." Here, because Appellant Martinez was not an aider and abettor, the felony-murder special circumstances allegations given to the jury permitted it to find him death eligible without making any finding at all as to whether he harbored a culpable mental state as to the killing itself. Moreover, this is not simply an academic argument as to Martinez. The record reflects that there was substantial evidence from which the jury could conclude that the killing of Sophia Torres was either negligent, accidental, or wholly unforeseeable. The lack of vaginal trauma suggests that the sexual encounter between Martinez and Torres was consensual. (See RT 1829-1830; see Argument III, herein, ante at pp. 180-

190.) The 911 call in which Martinez pleaded with the police dispatcher to "send help quick" (RT 1607-1611; Exh. 12) also indicates that the sexual encounter was consensual, but that it turned sour, and further, that Martinez wanted to help Sophia Torres, reflecting remorse and second thoughts regarding the encounter which resulted in her death. Accordingly, the robbery and rape special circumstances are unconstitutional as applied in this case to make Appellant Martinez eligible for death. The death sentence must be reversed.

XII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most

deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims of the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

A. Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a "meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord*,

Godfrey v. Georgia (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(People v. Edelbacher (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(Zant v. Stephens (1983) 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (People v Bacigalupo (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against Appellant the statute contained thirty-two special circumstances[19] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so

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[19] This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in People v. Superior Court (Engert) (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow and is now thirty-three.

numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic or under the dominion of a mental breakdown, or acts committed by others. (People v. Dillon (1984) 34 Cal.3d 441.) This Court has construed the lying-in-wait special circumstance so broadly as to extend Section 190.2's reach to virtually all intentional murders. (See People v. Hillhouse (2002) 27 Cal.4th 469, 500-501, 512-515; People v. Morales (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special-circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first

degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[20] It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (Ibid.). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing and does so with very little discussion. In People v. Stanley (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in Pulley v. Harris

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[20] The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special circumstance provisions. (Shatz and Rivkind, supra, 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim or, even more unlikely, advised the victim in advance of the lethal assault of his intent to kill – a distinctly improbable form of premeditated murder. (Ibid.)

(1984) 465 U.S. 37, 53. Not so. In Harris, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, supra, 465 U.S. at 52, n.14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and prevailing international law.[21] (See section E. of this Argument post).

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[21] In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in Furman v. Georgia (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes and, like those schemes, is unconstitutional.

B. Appellant's Death Penalty Is Invalid Because Penal Code § 190.3(a) as Applied Allows Arbitrary and Capricious Imposition of Death in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself.[22] Indeed, the Court has allowed extraordinary expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime,[23] or having had a "hatred of religion,"[24] or threatened witnesses after

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[22] People v. Dyer (1988) 45 Cal.3d 26, 78; People v. Adcox (1988) 47 Cal.3d 207, 270; see also CALJIC No. 8.88 (6th ed. 1996), par. 3.

[23] People v. Walker (1988) 47 Cal.3d 605, 639, n.10, 765 P.2d 70, 90, n.10, cert. denied, 494 U.S. 1038 (1990).

[24] People v. Nicolaus (1991) 54 Cal.3d 551, 581-582, 817 P.2d 893, 908-909, cert. denied., 112 S.Ct. 3040 (1992).

his arrest,[25] or disposed of the victim's body in a manner that precluded its recovery[26].

The purpose of section 190.3, according to its language and according to interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (Tuilaepa v. California (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue as a "circumstances of the crime"aggravating factor to be weighed on death's side of the scale:

a. That the defendant struck many blows and inflicted multiple wounds[27] or that the defendant killed with a single execution-style wound.[28]

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25 People v. Hardy (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, cert. denied, 113 S.Ct. 498.

26 People v. Bittaker (1989) 48 Cal.3d 1046, 1110, fn.35, 774 P.2d 659, 697, n.35, cert. denied, 496 U.S. 931 (1990).

27 See, e.g., People v. Morales, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); People v. Zapien, No. S004762, RT 36-38 (same); People v. Lucas, No. S004788, RT 2997-98 (same); People v. Carrera, No. S004569, RT 160-61 (same).

28 See, e.g., People v. Freeman, No. S004787, RT 3674, 3709 (defendant killed with single wound); People v. Frierson, No. S004761, RT

(continued...)

b. That the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification)[29] or that the defendant killed the victim without any motive at all.[30]

c. That the defendant killed the victim in cold blood[31] or that the defendant killed the victim during a savage frenzy.[32]

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[28](...continued)
3026-27 (same).

[29] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 968-69 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-60 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3543-44 (avoid arrest); People v. McLain, No. S004370, RT 31 (revenge).

[30] See, e.g., People v. Edwards, No. S004755, RT 10,544 (defendant killed for no reason); People v. Osband, No. S005233, RT 3650 (same); People v. Hawkins, No. S014199, RT 6801 (same).

[31]See, e.g., People v. Visciotti, No. S004597, RT 3296-97 (defendant killed in cold blood).

[32] See, e.g., People v. Jennings, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

d. That the defendant engaged in a cover-up to conceal his crime[33] or that the defendant did not engage in a cover-up and so must have been proud of it.[34]

e. That the defendant made the victim endure the terror of anticipating a violent death[35] or that the defendant killed instantly without any warning.[36]

f. That the victim had children[37] or that the victim had not yet had a chance to have children.[38]

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[33] See, e.g., People v. Stewart, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); People v. Benson, No. S004763, RT 1141 (defendant lied to police); People v. Miranda, No. S004464, RT 4192 (defendant did not seek aid for victim).

[34] See, e.g., People v. Adcox, No. S004558, RT 4607 (defendant freely informed others about crime); People v. Williams, No. S004365, RT 3030-31 (same); People v. Morales, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

[35] See, e.g., People v. Webb, No. S006938, RT 5302; People v. Davis, No. S014636, RT 11,125; People v. Hamilton, No. S004363, RT 4623.

[36] See, e.g., People v. Freeman, No. S004787, RT 3674 (defendant killed victim instantly); People v. Livaditis, No. S004767, RT 2959 (same).

[37] See, e.g., People v. Zapien, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

[38] See, e.g., People v. Carpenter, No. S004654, RT 16,752 (victim had not yet had children).

g. That the victim struggled prior to death[39] or that the victim did not struggle.[40]

h. That the defendant had a prior relationship with the victim[41] or that the victim was a complete stranger to the defendant.[42]

These examples show that absent any limitation on factor (a) ("the circumstances of the crime"), different prosecutors have urged juries to find aggravating factors and place them on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of factor (a) to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that

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[39] See, e.g., People v. Dunkle, No. S014200, RT 3812 (victim struggled); People v. Webb, No. S006938, RT 5302 (same); People v. Lucas, No. S004788, RT 2998 (same).

[40] See, e.g., People v. Fauber, No. S005868, RT 5546-47 (no evidence of a struggle); People v. Carrera, No. S004569, RT 160 (same).

[41] See, e.g., People v. Padilla, No. S014496, RT 4604 (prior relationship); People v. Waidla, No. S020161, RT 3066-67 (same); People v. Kaurish (1990) 52 Cal.3d 648, 717 (same).

[42] See, e.g., People v. Anderson, No. S004385, RT 3168-69 (no prior relationship); People v. McPeters, No. S004712, RT 4264 (same).

the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[43]

b. The method of killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[44]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[45]

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[43] See, e.g., People v. Deere, No. S004722, RT 155-56 (victims were young, ages 2 and 6); People v. Bonin, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); People v. Kipp, No. S009169, RT 5164 (victim was a young adult, age 18); People v. Carpenter, No. S004654, RT 16,752 (victim was 20), People v. Phillips, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old victim was "in the prime of his life"); People v. Samayoa, No. S006284, XL RT 49 (victim was an adult "in her prime"); People v. Kimble, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); People v. Melton, No. S004518, RT 4376 (victim was 77); People v. Bean, No. S004387, RT 4715-16 (victim was "elderly").

[44] See, e.g., People v. Clair, No. S004789, RT 2474-75 (strangulation); People v. Kipp, No. S004784, RT 2246 (same); People v. Fauber, No. S005868, RT 5546 (use of an ax); People v. Benson, No. S004763, RT 1149 (use of a hammer); People v. Cain, No. S006544, RT 6786-87 (use of a club); People v. Jackson, No. S010723, RT 8075-76 (use of a gun); People v. Reilly, No. S004607, RT 14,040 (stabbing); People v. Scott, No. S010334, RT 847 (fire).

[45] See, e.g., People v. Howard, No. S004452, RT 6772 (money); People v. Allison, No. S004649, RT 969-70 (same); People v. Belmontes, No. S004467, RT 2466 (eliminate a witness); People v. Coddington, No. S008840, RT 6759-61 (sexual gratification); People v. Ghent, No. S004309, RT 2553-55 (same); People v. Brown, No. S004451, RT 3544 (avoid

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d. The time of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in the middle of the night, late at night, early in the morning or in the middle of the day.[46]

e. The location of the killing. Prosecutors have argued, and juries were free to find, a factor (a) aggravating circumstance on the ground that the victim was killed in her own home, in a public bar, in a city park or in a remote location.[47]

The foregoing examples of how factor (a) is actually being applied in practice make clear that it is being relied upon as a basis for finding aggravating factors in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable

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[45](...continued)
arrest); People v. McLain, No. S004370, RT 31 (revenge); People v. Edwards, No. S004755, RT 10,544 (no motive at all).

[46] See, e.g., People v. Fauber, No. S005868, RT 5777 (early morning); People v. Bean, No. S004387, RT 4715 (middle of the night); People v. Avena, No. S004422, RT 2603-04 (late at night); People v. Lucero, No. S012568, RT 4125-26 (middle of the day).

[47] See, e.g., People v. Anderson, No. S004385, RT 3167-68 (victim's home); People v. Cain, No. S006544, RT 6787 (same); People v. Freeman, No. S004787, RT 3674, 3710-11 (public bar); People v. Ashmus, No. S004723, RT 7340-41 (city park); People v. Carpenter, No. S004654, RT 16,749-50 (forested area); People v. Comtois, No. S017116, RT 2970 (remote, isolated location).

variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.[48]

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder, . . . were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright (1988) 486 U.S. 356, 363 [discussing the holding in Godfrey v. Georgia (1980) 446 U.S. 420].)

C. California's Death Penalty Statute Contains No Safeguards to Avoid Arbitrary and Capricious Sentencing and Deprives Defendants of the Right to a Jury Trial on Each Factual Determination Prerequisite to a Sentence of Death; it Therefore Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

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[48] The danger that such facts have been, and will continue to be, treated as aggravating factors and weighed in support of sentences of death is heightened by the fact that, under California's capital sentencing scheme, the sentencing jury is not required to unanimously agree as to the existence of an aggravating factor, to find that any aggravating factor (other than prior criminality) exists beyond a reasonable doubt, or to make any record of the aggravating factors relied upon in determining that the aggravating factors outweigh the mitigating. (See section C of this argument, below.)

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

1. Appellant's Death Verdict Was Not Premised on Findings Beyond a Reasonable Doubt by a Unanimous Jury That One or More Aggravating Factors Existed and That These Factors Outweighed Mitigating Factors; His Constitutional Right to Jury Determination Beyond a Reasonable Doubt of All Facts Essential to the Imposition of a Death Penalty Was Thereby Violated.

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence.

All this was consistent with this Court's previous interpretations of California's statute. In People v. Fairbank (1997) 16 Cal.4th 1223, 1255, this Court said that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . ." But these interpretations have been squarely rejected by the U.S. Supreme Court's decisions in Apprendi v. New Jersey (2000) 530 U.S. 466 [hereinafter Apprendi]; Ring v. Arizona (2002) 536 U.S. 584 [hereinafter Ring]; and Blakely v. Washington (2004) 124 S.Ct. 2531 [hereinafter Blakely].

In Apprendi, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (Apprendi, supra, 530 U.S. at 478.)

In Ring, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (Id., at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (Walton v. Arizona (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring, supra,* 536 U.S. at 598.) The court found that in light of Apprendi, Walton no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it

must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Last year, in Blakely, the high court considered the effect of Apprendi and Ring in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (Blakely v. Washington, supra, 124 S.Ct. at 2535.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (Ibid.) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (Id. at 2543.)

In reaching this holding, the supreme court stated that the governing rule since Apprendi is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (Id. at 2537, italics in original.)

As explained below, California's death penalty scheme, as interpreted by this Court, does not comport with the principles set forth in Apprendi, Ring, and Blakely, and violates the federal Constitution.

a. In the Wake of Apprendi, Ring, and Blakely, Any Jury Finding Necessary to the Imposition of Death Must Be Found True Beyond a Reasonable Doubt.

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the

prosecution, and three additional states have related provisions.[49] Only California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding

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[49] See Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 1710-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann. §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann. § 99-19-103 (1993); State v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; State v. Simants (Neb. 1977) 250 N.W.2d 881, 888-90; Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Ohio Rev. Code § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iii) (1982); S.C. Code Ann. §§ 16-3-20(A), (c) (Law. Co-op 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); State v. Pierre (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann. § 19.2-264.4 (c) (Michie 1990); Wyo. Stat. §§ 6-2-102(d)(i)(A), (e)(I) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985). On remand in the Ring case, the Arizona Supreme Court found that both the existence of one or more aggravating circumtances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (State v. Ring (Az., 2003) 65 P.3d 915.)

need not be unanimous. (People v. Fairbank, supra; see also People v. Hawthorne (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of proof quantification"].)

California statutory law and jury instructions, however, *do* require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[50] As set forth in California's "principal sentencing instruction" (People v. Farnam (2002) 28 Cal.4th 107, 177), which was read to appellant's jury (RT 3942-3944), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; emphasis added.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors.[51] These factual determinations

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[50] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (People v. Brown (1988) 46 Cal.3d 432, 448.)

[51] In Johnson v. State (Nev., 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that

(continued...)

are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[52]

In People v. Anderson (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see section 190.2(a)), Apprendi does not apply. After Ring, this Court repeated the same analysis in People v. Snow (2003) 30 Cal.4th 43 [hereinafter Snow], and People v. Prieto (2003) 30 Cal.4th 226 [hereinafter Prieto]: "Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' (citation omitted), Ring imposes no new constitutional requirements on California's penalty phase proceedings." (People v. Prieto, supra, 30 Cal.4th at 263.) This holding is based on a truncated view of California law. As section 190, subd. (a),[53]

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[51](...continued)
aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' (footnote omitted) we conclude that Ring requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (Id., 59 P.3d at 460)

[52] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (People v. Allen (1986) 42 Cal.3d 1222, 1276-1277; People v. Brown (Brown I) (1985) 40 Cal.3d 512, 541.)

[53] Section 190, subd. (a) provides as follows: "Every person guilty of murder in the first degree shall be punished by death, imprisonment in the
(continued...)

indicates, the maximum penalty for any first degree murder conviction is death.

Arizona advanced precisely the same argument in Ring. It pointed out that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life imprisonment, and Ring was therefore sentenced within the range of punishment authorised by the jury's verdict. The Supreme Court squarely rejected it:

> This argument overlooks Apprendi's instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict." Ibid.; see 200 Ariz., at 279, 25 P.3d, at 1151.

(Ring, 536 U.S. at 604.)

In this regard, California's statute is no different than Arizona's. Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (Ring, supra, 536 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

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[53](...continued)
state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life."

Neither LWOP nor death can actually be imposed unless the jury finds a special circumstance (section 190.2). Death is not an available option unless the jury makes the further findings that one or more aggravating circumstances exist and substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed., 2003). It cannot be assumed that a special circumstance suffices as the aggravating circumstance required by section 190.3. The relevant jury instruction defines an aggravating circumstance as a fact, circumstance, or event beyond the elements of the crime itself (CALJIC 8.88), and this Court has recognized that a particular special circumstance can even be argued to the jury as a *mitigating* circumstance. (See People v. Hernandez (2003) 30 Cal.4th 835, 134 Cal.Rptr.2d at 621 [financial gain special circumstance (section 190.2, subd. (a)(1)) can be argued as mitigating if murder was committed by an addict to feed addiction].)

Arizona's statute says that the trier of fact shall impose death if the sentencer finds one or more aggravating circumstances, and no mitigating circumstances substantial enough to call for leniency,[54] while California's statute provides that the trier of fact may impose death only if the aggravating circumstances substantially outweigh the mitigating

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[54] Ariz.Rev.Stat. Ann. section 13-703(E) provides: "In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

circumstances.[55] There is no meaningful difference between the processes followed under each scheme.

"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (Ring, 536 U.S. at 604.) In Blakely, the high court made it clear that, as Justice Breyer pointed out, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the *way* in which the offender carried out that crime." (Id., 124 S.Ct. at 2551; emphasis in original.) The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes."

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. The Court held that Ring does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (Snow, supra, 30 Cal.4th at 126, n.32; citing Anderson, supra, 25 Cal.4th at 589-590, n.14.) The Court has repeatedly

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[55] Section 190.3 provides in pertinent part: "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."

sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (Prieto, 30 Cal.4th at 275; Snow, 30 Cal.4th at 126, n.32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts, in Arizona or California, that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death – no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And Blakely makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal constitution.

In Prieto, the Court summarized California's penalty phase procedure as follows: "Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (Tuilaepa v. California (1994) 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750.) No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (Prieto, 30 Cal.4th at 263; emphasis added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the

scale in support of a death sentence. (See, People v. Duncan (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, as noted above, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See State v. Ring, supra, 65 P.3d 915, 943 ("Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."); accord, State v. Whitfield (Mo. 2003) 107 S.W.3d 253; State v. Ring (Az. 2003) 65 P.3d 915; Woldt v. People (Colo.2003) 64 P.3d 256; Johnson v. State (Nev. 2002) 59 P.3d 450.[56])

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in Apprendi, Ring, and Blakely. In Blakely itself the State of Washington argued that Apprendi and Ring should not apply because the statutorily enumerated

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[56] See also Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L. Rev. 1091, 1126-1127 (noting that all features that the Supreme Court regarded in Ring as significant apply not only to the finding that an aggravating circumstance is present but also to whether mitigating circumstances are sufficiently substantial to call for leniency since both findings are essential predicates for a sentence of death).

grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding Ring and Apprendi fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (Blakely, supra, 124 S.Ct. at 2538.) Thus, under Apprendi, Ring, and Blakely, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable doubt.[57]

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[57] In People v. Griffin (2004) 33 Cal.4th 536, this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, analogies were no longer made to a sentencing court's traditional discretion as in Prieto and Snow. The Court cited Cooper Industries, Inc. v. Leatherman Tool Group, Inc. (2001) 532 U.S. 424, 432, 437 [hereinafter Leatherman], for the principles that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation"].) (Griffin, supra, 33 Cal.4th at 595.)

In Leatherman, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?"

Leatherman, supra, 532 U.S. at 429. This finding, which was a prerequisite

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The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to Apprendi, Ring and Blakely are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC 8.88? The maximum sentence would be life without possibility of parole. (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence would still be life without possibility of parole unless the jury made an additional finding -- that the aggravating circumstances substantially outweigh the mitigating circumstances.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (Prieto, 30 Cal. 4th at 263.) In Ring, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort

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[57](...continued)
to the award of punitive damages, is very like the aggravating factors at issue in Blakely.

Leatherman was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. Id., 532 U.S. at 437, 440. Leatherman thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed.

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(Ring, supra, 536 U.S. at 606, quoting with approval Justice O'Connor's Apprendi dissent, 530 U.S. at 539.)

No greater interest is ever at stake than in the penalty phase of a capital case. (Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in both its severity and its finality"].)[58] As the high court stated in Ring, supra, 536 U.S. at 608, 609:

> Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum

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[58] The Monge court, in explaining its decision not to extend the double jeopardy protection it had applied to capital sentencing proceedings to a noncapital proceeding involving a prior-conviction sentencing enhancement, the U.S. Supreme Court foreshadowed Ring, and expressly stated that the Santosky v. Kramer ((1982) 455 U.S. 745, 755) rationale for the beyond-a-reasonable-doubt burden of proof requirement applied to capital sentencing proceedings: "*[I]n a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at 732 (emphasis added).)

> punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

b. The Requirements of Jury Agreement and Unanimity

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (People v. Taylor (1990) 52 Cal.3d 719, 749; accord, People v. Bolin (1998) 18 Cal.4th 297, 335-336.) Consistent with this construction of California's capital sentencing scheme, no instruction was given to appellant's jury requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a *majority* of jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted the sentence of death. On the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence

based on a perception of what was aggravating enough to warrant a death penalty that would have lost by a 1-11 vote had it been put to the jury as a reason for the death penalty.

With nothing to guide its decision, there is nothing to suggest the jury imposed a death sentence based on any agreement on reasons therefor – including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Sixth, Eighth, and Fourteenth Amendments.[59] And it violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty.

The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical factual findings in California's sentencing scheme, and prerequisites to the final deliberative process in which the ultimate normative determination is made. The U.S. Supreme Court has made clear that such factual findings must be made by a jury and cannot be attended with fewer procedural protections than decisions of much less consequence. (Ring, supra; Blakely, supra.)

These protections include jury unanimity. The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (Brown v. Louisiana (1980) 447 U.S. 323, 334

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[59] See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; Den ex dem. Murray v. Hoboken Land and Improvement Co. (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].

[100 S.Ct. 2214, 65 L.Ed.2d 159].[60]) Particularly given the "acute need for reliability in capital sentencing proceedings" (Monge v. California, supra, 524 U.S. at 732;[61] accord, Johnson v. Mississippi (1988) 486 U.S. 578, 584), the Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) Capital

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[60] In a non-capital context, the high court has upheld the verdict of a twelve member jury rendered by a vote of 9-3. (Johnson v. Louisiana (1972) 406 U.S. 356; Apodaca v. Oregon (1972) 406 U.S. 404.) Even if that level of jury consensus were deemed sufficient to satisfy the Sixth, Eighth, and Fourteenth Amendments in a capital case, California's sentencing scheme would still be deficient since, as noted above, California requires no jury consensus at all as to the existence of aggravating circumstances.

[61] The Monge court developed this point at some length, explaining as follows: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' id., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (Monge v. California, supra, 524 U.S. at 731-732.)

defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see Monge v. California, supra, 524 U.S. at 732; Harmelin v. Michigan (1991) 501 U.S. 957, 994), and certainly no less (Ring, 536 U.S. at 609).[62] See section D, post.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[63] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (People v. Medina (1995) 11 Cal.4th 694, 763-764) – would by its inequity violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In Richardson v. United States (1999) 526 U.S. 813, 815-816, the U.S. Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

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62 Under the federal death penalty statute, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848, subd. (k).)

63 The first sentence of article 1, section 16 of the California Constitution provides: "Trial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See People v. Wheeler (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(Richardson, supra, 526 U.S. at 819 (emphasis added).)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (People v. Hawthorne, supra; People v. Hayes (1990) 52 Cal.3d 577, 643.) However, Ring and Blakely make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

2. The Due Process and the Cruel and Unusual Punishment Clauses of the State and Federal Constitution Require That the Jury in a Capital Case Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty.

a. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (Speiser v. Randall (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of

the Fifth and Fourteenth Amendment. (In re Winship (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (Gardner v. Florida (1977) 430 U.S. 349, 358; see also Presnell v. Georgia (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

b. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (Winship, supra, 397 U.S. at 363-364; see also Addington v. Texas (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (Winship, supra, 397 U.S. at 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (Santosky v. Kramer (1982) 455 U.S. 743, 755; see also Matthews v. Eldridge (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value," Speiser, supra, 375 U.S. at 525, how much more transcendent is human life itself! Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See Winship, supra (adjudication of juvenile delinquency); People v. Feagley (1975) 14 Cal.3d 338 (commitment as mentally disordered sex offender); People v. Burnick (1975) 14 Cal.3d 306 (same); People v. Thomas (1977) 19 Cal.3d 630 (commitment as narcotic addict); Conservatorship of Roulet (1979) 23 Cal.3d 219 (appointment of conservator).) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" Santosky, supra, 455 U.S. at 755, the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a criminal action to deny a defendant liberty or life, . . . "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation omitted.] The stringency of

> the "beyond a reasonable doubt" standard bespeaks the 'weight and gravity' of the private interest affected [citation omitted], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(455 U.S. at 755.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in Santosky. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (Santosky, supra, 455 U.S. at 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (Winship, supra, 397 U.S. at 363.)

The final Santosky benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (Woodson, supra, 428 U.S. at 305.) The only risk of error suffered by the State under the stricter burden of persuasion would be the possibility that a defendant, otherwise deserving of being put to death, would instead be confined in prison for the rest of his life without possibility of parole.

The need for reliability is especially compelling in capital cases. (Beck v. Alabama (1980) 447 U.S. 625, 637-638.) No greater interest is

ever at stake; see Monge v. California (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In Monge, the U.S. Supreme Court expressly applied the Santosky rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' ([Bullington v. Missouri,] 451 U.S. at p. 441 (quoting Addington v. Texas, 441 U.S. 418, 423-424, 60 L.Ed.2d 323, 99 S.Ct. 1804 (1979).)" (Monge v. California, supra, 524 U.S. at 732 (emphasis added).) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only are the factual bases for its decision are true, but that death is the appropriate sentence.

Appellant is aware that this Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See People v. Griffin (2004) 33 Cal.4th 536, 595; People v. Rodriguez (1986) 42 Cal.3d 730, 779.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the

weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(State v. Rizzo (2003) 266 Conn. 171, 238, n.37 [833 A.2d 363, 408-409, n.37].)

In sum, the need for reliability is especially compelling in capital cases. (Beck v. Alabama (1980) 447 U.S. 625, 637-638.) No greater interest is ever at stake. (See Monge v. California, supra, 524 U.S. at 732 ["the death penalty is unique in its severity and its finality"].) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

3. Even If Proof Beyond a Reasonable Doubt Were Not the Constitutionally Required Burden of Persuasion for Finding (1) That an Aggravating Factor Exists, (2) That the Aggravating Factors Outweigh the Mitigating Factors, and (3) That Death Is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would Be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose an enhanced sentence without the firm belief that whatever considerations underlay such a sentencing decision had been at least proved to be true more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to find "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign at least a preponderance of the evidence burden of proof. (See, e.g., Griffin v. United States (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given great weight in constitutionality determination]; Den ex dem. Murray v. Hoboken Land and Improvement Co., supra, 59 U.S. (18 How.) at pp. 276-277 [due process determination informed by historical settled usages].)

Finally, Evidence Code section 520 provides: "The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on

that issue." There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (Hicks v. Oklahoma (1980) 447 U.S. 343, 346.)

Accordingly, appellant respectfully suggests that People v. Hayes -- in which this Court did not consider the applicability of section 520 -- is erroneously decided. The word "normative" applies to courts as well as jurors, and there is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, the question whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (Hicks v. Oklahoma, supra, 447 U.S. at 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth, and Fourteenth Amendments and is reversible per se. (Sullivan v. Louisiana (1993) 508 U.S. 275.) That should be the result here, too.

4. Some Burden of Proof Is Required in Order to Establish a Tie-Breaking Rule and Ensure Even-Handedness.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (People v. Hayes, supra, 52 Cal.3d at 643.) However, even with a normative determination to make, it is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (Eddings v. Oklahoma (1982) 455 U.S. at 112.) It is unacceptable – "wanton" and "freakish" (Proffitt v. Florida, supra, 428 U.S. at 260) – the "height of arbitrariness" (Mills v. Maryland (1988) 486 U.S. 367, 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

5. Even If There Could Constitutionally Be No Burden of Proof, the Trial Court Erred in Failing to Instruct the Jury to That Effect.

If in the alternative it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (Sullivan v. Louisiana, supra.) The reason is

obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[64] This raises the constitutionally unacceptable possibility a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (Sullivan v. Louisiana, supra.)

6. California Law Violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (California v. Brown, supra, 479 U.S. at 543; Gregg v. Georgia, supra, 428 U.S. at 195.) And especially given that California juries have total discretion without any guidance on how to weigh potentially aggravating and

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[64] See, e.g., People v. Dunkle, No. S014200, RT 1005, cited in Appellant's Opening Brief in that case at page 696.

mitigating circumstances (People v. Fairbank, supra), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See Townsend v. Sain (1963) 372 U.S. 293, 313-316.) Of course, without such findings it cannot be determined that the jury unanimously agreed beyond a reasonable doubt on any aggravating factors, or that such factors outweighed mitigating factors beyond a reasonable doubt.

This Court has held that the absence of written findings does not render the 1978 death penalty scheme unconstitutional. (People v. Fauber (1992) 2 Cal.4th 792, 859.) Ironically, such findings are otherwise considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (In re Sturm (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id., 11 Cal.3d at 269.)[65] The same analysis applies to the far graver decision to put someone to death. (See also People v.

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[65] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, California Code of Regulations, section 2280 et seq.)

Martin (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (Ibid.; Penal Code section 1170, subd. (c).) Under the Fifth, Sixth, Eighth, and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (Harmelin v. Michigan, supra, 501 U.S. at 994.) Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In Mills v. Maryland, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., 486 U.S. at 383, n.15.) The fact that the decision to impose death is "normative" (People v. Hayes, supra, 52 Cal.3d at 643) and "moral" (People v. Hawthorne, supra, 4 Cal.4th at 79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-Furman state capital sentencing systems, twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all

penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[66]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As Ring v. Arizona has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or circumstances) and the finding that these aggravators outweigh any and all mitigating circumstances. Absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective

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[66] See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); Conn. Gen. Stat. Ann. § 53a-46a(e) (West 1985); State v. White (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann. § 921.141(3) (West 1985); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(e) (1987); Ky. Rev. Stat. Ann. § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann. art. 905.7 (West 1993); Md. Ann. Code art. 27, § 413(I) (1992); Miss. Code Ann. § 99-19-103 (1993); Mont. Code Ann. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); Nev. Rev. Stat. Ann. § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711 (1982); S.C. Code Ann. § 16-3-20(c) (Law. Co-op. 1992); S.D. Codified Laws Ann. § 23A-27A-5 (1988); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

fact-finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment.

7. California's Death Penalty Statute as Interpreted by the California Supreme Court Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (Barclay v. Florida (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original, quoting Proffitt v. Florida (1976) 428 U.S. 242, 251 (opinion of Stewart, Powell, and Stevens, JJ.)).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In Pulley v. Harris (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty

statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in Harris, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (Harris, 465 U.S. at 52, n.14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in Furman v. Georgia, supra. (See section A of this Argument, ante.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See Gregg v. Georgia, supra, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See Atkins v. Virginia (2002) 536 U.S. 304, 316

n.21; Thompson v. Oklahoma (1988) 487 U.S. 815, 821, 830-831; Enmund v. Florida (1982) 458 U.S. 782, 796, n.22; Coker v. Georgia (1977) 433 U.S. 584, 596.)

Twenty-nine of the thirty-eight states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in Furman v. Georgia (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (Gregg v. Georgia (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (Proffitt v. Florida (1976) 428 U.S. 242, 259, 96 S.Ct. 2960, 49 L.Ed.2d 913.) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[67]

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[67] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 03, 29-2522(3) (1989); Nev. Rev. Stat. Ann. § 177.055(d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(C)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 39-13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

(continued...)

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See People v. Fierro, supra, 1 Cal.4th at 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., People v. Marshall (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 -- a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in Pulley v. Harris – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in Furman in violation of the Eighth and Fourteenth Amendments. (Gregg

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[67](...continued)

Also see State v. Dixon (Fla. 1973) 283 So.2d 1, 10; Alford v. State (Fla. 1975) 307 So.2d 433,444; People v. Brownell (Ill. 1980) 404 N.E.2d 181,197; Brewer v. State (Ind. 1981) 417 N.E.2d 889, 899; State v. Pierre (Utah 1977) 572 P.2d 1338, 1345; State v. Simants (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; State v. Richmond (Ariz. 1976) 560 P.2d 41,51; Collins v. State (Ark. 1977) 548 S.W.2d 106,121.

v. Georgia, supra, 428 U.S. at 192, citing Furman v. Georgia, supra, 408 U.S. at 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

8. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible for the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve as a Factor in Aggravation Unless Found to Be True Beyond a Reasonable Doubt by a Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., Johnson v. Mississippi (1988) 486 U.S. 578; State v. Bobo (Tenn. 1987) 727 S.W.2d 945.) Here, the prosecution presented extensive evidence regarding unadjudicated criminal activity allegedly committed by Appellant Martinez regarding possession of a home-made knife (spork-knife) while in custody at the county jail pending trial. (RT 2987-2995; AR 00758-00759). The prosecutor referenced said knife and activity in his closing argument. (RT 3994).

The United States Supreme Court's recent decisions in Blakely v. Washington, supra, Ring v. Arizona, supra, and Apprendi v. New Jersey, supra, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a

reasonable doubt by a jury acting as a collective entity. (See Section C.1 ante.) The application of these cases to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See Section C.1, ante.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

9. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)) and "substantial" (see factor (g)) acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (Mills v. Maryland (1988) 486 U.S. 367; Lockett v. Ohio (1978) 438 U.S. 586.)

10. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or

mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory "whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (People v. Hamilton (1989) 48 Cal.3d 1142, 1184; People v. Edelbacher (1989) 47 Cal.3d 983, 1034; People v. Lucero (1988) 44 Cal.3d 1006, 1031, n.15; People v. Melton (1988) 44 Cal.3d 713, 769-770; People v. Davenport (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (Woodson v. North Carolina (1976) 428 U.S. 280, 304; Zant v. Stephens (1983) 462 U.S. 862, 879; Johnson v. Mississippi (1988) 486 U.S. 578, 584-585.)

It is thus likely that Appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the State – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (Stringer v. Black (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law"

conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of the sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious action'" (Tuilaepa v. California (1994) 512 U.S. 967, 973 quoting Gregg v. Georgia (1976) 428 U.S. 153, 189 (joint opinion of Stewart, Powell, and Stevens, JJ.)) and help ensure that the death penalty is evenhandedly applied. (Eddings v. Oklahoma, supra, 455 U.S. at 112.)

D. The California Sentencing Scheme Violates the Equal Protection Clause of the Federal Constitution by Denying Procedural Safeguards to Capital Defendants Which Are Afforded to Non-capital Defendants.

As noted in the preceding arguments, the U.S. Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., Monge v. California, supra, 524 U.S. at 731-732.) Despite this directive California's death

penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. In 1975, Chief Justice Wright wrote for a unanimous court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (People v. Olivas (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights,' Trop v. Dulles, 356 U.S. 86, 102 (1958)." (Commonwealth v. O'Neal (1975) 327 N.E.2d 662, 668, 367 Mass 440, 449.)

If the interest identified is "fundamental," then courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (Westbrook v. Milahy (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (People v. Olivas, supra; Skinner v. Oklahoma (1942) 316 U.S. 535, 541.)

The State cannot meet this burden. In this case, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification be more strict, and any purported justification by the State of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself.

To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In Prieto,[68] as in Snow,[69] this Court analogized the process of determining whether to impose death to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another. However apt or inapt the analogy, California is in the unique position of giving persons sentenced to death significantly fewer procedural protections than a person being sentenced to prison for receiving stolen property.

An enhancing allegation in a California non-capital case is a finding that must, by law, be unanimous. (See, e.g., sections 1158, 1158a.) When a California judge is considering which sentence is appropriate, the decision is governed by court rules. California Rules of Court, rule 4.42, subd. (e) provides: "The reasons for selecting the upper or lower term shall be stated orally on the record, and shall include a concise statement of the ultimate facts which the court deemed to constitute circumstances in aggravation or mitigation justifying the term selected." Subdivision (b) of the same rule provides: "Circumstances in aggravation and mitigation shall be established by a preponderance of the evidence."

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68 "As explained earlier, the penalty phase determination in California is normative, not factual. It is therefore analogous to a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (Prieto, 30 Cal.4th at 275; emphasis added.)

69 "The final step in California capital sentencing is a free weighing of all the factors relating to the defendant's culpability, comparable to a sentencing court's traditionally discretionary decision to, for example, impose one prison sentence rather than another." (Snow, 30 Cal.4th at 126, n.3; emphasis added.)

In a capital sentencing context, however, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply. (See sections C.1-C.5, ante.) Different jurors can, and do, apply different burdens of proof to the contentions of each party and may well disagree on which facts are true and which are important. And unlike proceedings in most states where death is a sentencing option or in which persons are sentenced for non-capital crimes in California, no reasons for a death sentence need be provided. (See section C.6, ante.) These discrepancies on basic procedural protections are skewed against persons subject to loss of life; they violate equal protection of the laws.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme in its rejection of claims that the failure to afford capital defendants the disparate sentencing review provided to non-capital defendants violated constitutional guarantees of equal protection. (See People v. Allen (1986) 42 Cal.3d 1222, 1286-1288.) In stark contrast to Prieto and Snow, there is no hint in Allen that capital and non-capital sentencing procedures are in any way analogous. In fact, the decision rested on a depiction of fundamental differences between the two sentencing procedures.

The Court initially distinguished death judgments by pointing out that the primary sentencing authority in a California capital case, unless waived, is a jury: "This lay body represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (People v. Allen, supra, 42 Cal. 3d at 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community

values which are reflected in a pattern of verdicts. (McCleskey v. Kemp (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality live in the area of death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses. (Coker v. Georgia, supra, 433 U.S. 584) or offenders (Enmund v. Florida (1982) 458 U.S. 782; Ford v. Wainwright (1986) 477 U.S. 399; Atkins v. Virginia, supra.)

Jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court empowered to reduce the sentence to life in prison, and the reduction of a jury's verdict by a trial judge is not only allowed but required in particular circumstances. (See section 190.4; People v. Rodriguez (1986) 42 Cal.3d 730, 792-794.)

The second reason offered by Allen for rejecting the equal protection claim was that the range available to a trial court is broader under the DSL than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (People v. Allen, supra, 42 Cal.3d at 1287 [emphasis added].) In truth, the difference between life and death is a chasm so deep that we cannot see the bottom. The idea that the disparity between life and death is a "narrow" one violates common sense, biological instinct, and decades of pronouncements by the United States Supreme Court: "In capital proceedings generally, this court has demanded that fact-finding procedures aspire to a heightened standard of reliability (citation). This especial concern is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (Ford v. Wainwright, supra, 477 U.S. at 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (Woodson v. North Carolina

(1976) 428 U.S. 280, 305 [opn. of Stewart, Powell, and Stephens, J.J.].) (See also Reid v. Covert (1957) 354 U.S. 1, 77 [conc. opn. of Harlan, J.]; Kinsella v. United States (1960) 361 U.S. 234, 255-256 [conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.]; Gregg v. Georgia, supra, 428 U.S. at 187 [opn. of Stewart, Powell, and Stevens, J.J.]; Gardner v. Florida (1977) 430 U.S. 349, 357-358; Lockett v. Ohio, supra, 438 U.S. at 605 [plur. opn.]; Beck v. Alabama (1980) 447 U.S. 625, 637; Zant v. Stephens, supra, 462 U.S. at 884-885; Turner v. Murray (1986) 476 U.S. 28, 90 L.Ed.2d 27, 36 [plur. opn.], quoting California v. Ramos (1983) 463 U.S. 992, 998-999; Harmelin v. Michigan, supra, 501 U.S. at 994; Monge v. California, supra, 524 U.S. at 732.)[70] The qualitative difference between a prison sentence and a death sentence thus militates for, rather than against, requiring the State to apply procedural safeguards used in noncapital settings to capital sentencing.

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[70] The Monge court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. 'It is of vital importance' that the decisions made in that context 'be, and appear to be, based on reason rather than caprice or emotion.' Gardner v. Florida, 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique 'in both its severity and its finality,' id., at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the 'qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also Strickland v. Washington, 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) ('[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." (Monge v. California, supra, 524 U.S. at 731-732.)

Finally, this Court relied on the additional "nonquantifiable" aspects of capital sentencing as compared to non-capital sentencing as supporting the different treatment of felons sentenced to death. (Allen, supra, at 1287.) The distinction drawn by the Allen majority between capital and non-capital sentencing regarding "nonquantifiable" aspects is one with very little difference – and one that was recently rejected by this Court in U and Snow. A trial judge may base a sentence choice under the DSL on factors that include precisely those that are considered as aggravating and mitigating circumstances in a capital case. (Compare section 190.3, subds. (a) through (j) with California Rules of Court, rules 4.421 and 4.423.) One may reasonably presume that it is because "nonquantifiable factors" permeate all sentencing choices.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees all persons that they will not be denied their fundamental rights and bans arbitrary and disparate treatment of citizens when fundamental interests are at stake. (Bush v. Gore (2000) 531 U.S. 98, 121 S.Ct. 525, 530.) In addition to protecting the exercise of federal constitutional rights, the Equal Protection Clause also prevents violations of rights guaranteed to the people by state governments. (Charfauros v. Board of Elections (9th Cir. 2001) 249 F.3d 941, 951.)

The fact that a death sentence reflects community standards has also been cited by this Court as justification for the arbitrary and disparate treatment of convicted felons who are facing a penalty of death. This fact cannot justify the withholding of a disparate sentence review provided all other convicted felons, because such reviews are routinely provided in virtually every state that has enacted death penalty laws and by the federal courts when they consider whether evolving community standards no longer

permit the imposition of death in a particular case. (See, e.g., Atkins v. Virginia, supra.)

Nor can this fact justify the refusal to require written findings by the jury (considered by this Court to be the sentencer in death penalty cases [People v. Allen, supra, 42 Cal.3d at 1286]) or the acceptance of a verdict that may not be based on a unanimous agreement that particular aggravating factors that support a death sentence are true. (Blakely v. Washington, supra; Ring v. Arizona, supra.)[71]

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible, and that the sentencer must articulate the reasons for a particular sentencing choice. It does so, however, only in non-capital cases. To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See, e.g., Mills v. Maryland, supra, 486 U.S. at 374; Myers v. Ylst (9th Cir. 1990) 897 F.2d 417, 421; Ring v. Arizona, supra.)

Procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings. (Monge v. California, supra.) To withhold them on the basis

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[71] Although Ring hinged on the court's reading of the Sixth Amendment, its ruling directly addressed the question of comparative procedural protections: "Capital defendants, no less than non-capital defendants, we conclude, are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (Ring, supra, 536 U.S. at 609.)

that a death sentence is a reflection of community standards demeans the community as irrational and fragmented and does not withstand the close scrutiny that should be applied by this Court when a fundamental interest is affected.

E. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former apartheid regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339, 366; see also People v. Bull (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., Stanford v. Kentucky (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; Thompson v. Oklahoma, supra, 487 U.S. at 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now

abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (1 January 2000), published at http://web.amnesty.org/library/index/ENGACT500052000.)[72]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chàncellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in Miller v. United States (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; Hilton v. Guyot (1895) 159 U.S. 113, 227; Sabariego v. Maverick (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; Martin v. Waddell's Lessee (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (Furman v. Georgia, supra, 408 U.S. at 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (Trop v. Dulles (1958) 356 U.S. 86, 100; Atkins v.

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[72] These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (Id.)

Virginia, supra, 536 U.S. at 325.) It prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world, including totalitarian regimes whose own "standards of decency" are antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." (Atkins v. Virginia, supra, 536 U.S. at 316, n.21, citing the Brief for The European Union as Amicus Curiae in McCarver v. North Carolina, O.T.2001, No. 00-8727, p. 4.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes -- as opposed to extraordinary punishment for extraordinary crimes -- is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See Atkins v. Virginia, supra.) Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (Hilton v. Guyot (1895) 159 U.S. 113, 227; see also Jecker, Torre & Co. v. Montgomery (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311].)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant

on Civil and Political Rights, which limits the death penalty to only "the most serious crimes."[73] Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. (Cf. Ford v. Wainwright, supra; Atkins v. Virginia, supra.)

Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence should be set aside.

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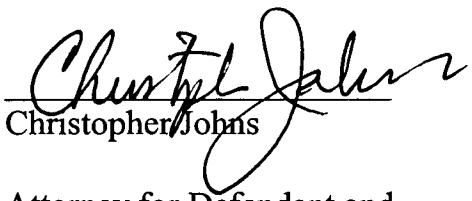
[73] Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res. L.Rev. 1, 30 (1995).)

CONCLUSION

For the reasons stated above, the conviction and death sentence must be reversed.

Date: August 26, 2005

Respectfully submitted,



Christopher Johns

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Appellant Tommy Martinez

WORD COUNT

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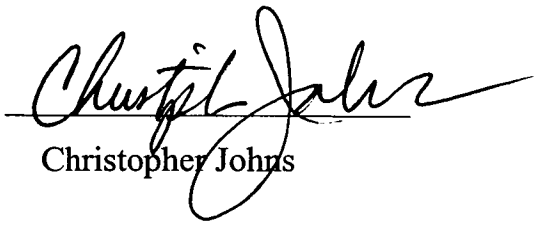

Christopher Johns

CERTIFICATE OF SERVICE

I, Denise M Brown, am over 18 years of age. My business address is 1010 B Street, Suite 350, San Rafael, California 94901. I am not a party to this action.

On August 29, 2005, I served the:

Appellant's Opening Brief

upon the parties and persons listed below by depositing a true copy in a United States mailbox in San Rafael, California, in a sealed envelope, postage prepaid, and addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on August 29, 2005, in San Rafael, California.

Denise M Brown