IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. CATHERINE THOMPSON, Defendant and Appellant.	Case No. S033901 (Los Angeles County Superior Court No. SA004363)

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Los Angeles County

(HONORABLE GEORGE W. TRAMMELL, III, of the Superior Court)

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PEOPLE OF THE STATE OF CALIFORNIA	)	
Plaintiff and Respondent,	)	Case No. S033901
v.	)	(Los Angeles County Superior Court No.
CATHERINE THOMPSON,	)	SA004363)
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

- - -

INTRODUCTION

Catherine Thompson was convicted of conspiring to kill her husband and sentenced to death because the trial court refused to sever her case from the codefendant's case, and allowed the prosecution to vilify her character at both the guilt and penalty phases.

Because she was forced to go to trial with her co-defendant, Catherine Thompson was tried by two prosecutors, one of whom – Phillip Sanders – was not constrained by the rules that apply to the prosecution and insure a fair trial. Appellant's and Phillip's defenses were antagonistic and irreconcilable: appellant argued that Phillip murdered her husband to get money to support his cocaine habit; Phillip claimed that appellant, acting alone, committed the crime. On this sole basis, appellant should have been

granted a separate trial. Beyond these bare facts, however, as the trial unfolded, additional bases for severance erupted which rendered the trial, as the trial court stated, "[L]ike a chess game" (RT55:9014), with "slick maneuvering," and parties "outflank[ing]" one another. (RT55:9013.)

Appellant's trial did not proceed in an orderly manner, but rather was a web of ex parte in camera proceedings between the codefendant, the court and the prosecution from which appellant was excluded. The substance of these hearings was revealed only after appellant had presented her case: mid-trial appellant was confronted with evidence against her produced by her codefendant, in full cooperation with the prosecution which had foregone its right to discovery in order to ambush appellant, all sanctioned by the court.

During the course of the trial, the prosecution also entered into an agreement with Phillip in which it would not "urge death" for him in exchange for his waiving the marital privilege. (RT39:6592.) When the collusion between the codefendant and the prosecution became even too much for this trial court, after the guilt convictions, the remedy fashioned by the court was finally to sever the codefendat's case from appellant's case and to force appellant to face the guilt jury alone at the penalty trial.

In addition to having to defend herself in a three-sided trial, appellant faced a guilt and penalty trial replete with evidence offered only to disparage her character for honesty and defame her qualities as a wife. The prosecution theory was that appellant conspired to have her husband killed for the life insurance proceeds. However, the court admitted evidence of financial trouble, fraud and dishonesty by appellant dating back to 1972 without regard to its connection to the prosecution theory. The court went so far as to allow evidence that appellant gambled with the pawned proceeds of jewelry removed from her husband's body after the funeral, and

permitted the victim's son to offer his opinion that appellant was more upset by the death of her cat than the deathof her husband. It was in this highly charged and inflammatory atmosphere that the jury convicted appellant and rendered the death sentence against her.

STATEMENT OF THE CASE

On February 21, 1991, an amended information was filed in Los Angeles County Superior Court charging appellant, Catherine Thompson,[1] and codefendants Phillip Conrad Sanders, Carolyn Louise Sanders, and Robert Louis Jones, with conspiracy to commit murder in Count I, the murder of Melvin "Tom" Thompson on June 14, 1990 in Count II, and grand theft of personal property of a value exceeding $25,000 from Mellie Thompson, Melvin Thompson and Carolyn Thompson Jones, committed on November 28, 1989 in Count III. (Pen. Code § 182(1); Pen. Code § 187; Pen. Code §§ 487(1), 12022.6(a).[2]) (CT3:687.)[3]

The Information alleged eight overt acts in support of the conspiracy, as follows:

Overt Act I: Carolyn Sanders solicited a person between June 1, 1990 and June 14, 1990 to commit murder;

Overt Act II: Between June 1, 1990 and June 14, 1990,

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[1] Due to the fact that so many of the parties share surnames, appellant will hereafter refer to Catherine Thompson as "Catherine" or appellant, Melvin "Tom" Thompson as "Tom", Mellie Thompson as "Mellie" and Phillip Sanders as "Phillip."

[2]All further section references are to the California Penal Code unless otherwise noted.

[3]In this brief, appellant will use the following abbreviation to refer to the record: "RT," Reporter's Transcript; "Augmented Reporter's Transcript; "CT," Clerk's Transcript; "ACT," Augmented Clerk's Transcript.

Catherine Thompson delivered $1,500 to Carolyn Sanders;

Overt Act III: On June 14, 1990, Robert Jones and Phillip Conrad Sanders removed the license plate of a 1990 Plymouth;

Overt Act IV: On June 14, 1990, in the early evening hours, two phone calls were placed from 15025 Polk, Sylmar, to 11001 Santa Monica Boulevard, Los Angeles;

Overt Act V: On June 14, 1990, Phillip Conrad Sanders and Robert Jones drove to 11001 Santa Monica Boulevard;

Overt Act VI: On June 14, 1990, in the early evening hours, Phillip Conrad Sanders shot and killed Melvin Thompson;

Overt Act VII: Between June 14, 1990 and July 1, 1990, Robert Jones melted parts of a gun;

Overt Act VIII: On June 29, 1990, appellant applied for $400,000 in life insurance proceeds from Prudential Insurance.

It was further alleged that the murder was intentional and committed for financial gain. (CT3:930; 4:937.)

On February 19, 1991, the superior court (Honorable David M. Rothman) appointed Gerald Chaleff to represent appellant and transferred the case to Department West H (Honorable Jacqueline Weisberg) for all purposes. On March 4, 1991, after an *in camera* and *ex parte* inquiry into the qualifications of several attorneys, Judge Weisberg appointed Donald Wager as co-counsel pursuant to Penal Code section 987D. (CT3:885,931.)

On March 7, 1991, Mr. Chaleff filed a motion requesting to be relieved from the representation of appellant because Judge Weisberg had rejected Mr. Chaleff's request to appoint Gigi Gordon as second counsel, on the ground that it was the court, and not counsel, who would select second counsel to assist in the preparation of the defense. (CT4:939-942.) Judge Weisberg relieved Mr. Chaleff and appointed Donald Wager as lead

counsel pursuant to Penal Code section 987.2, and Paul Takakjian as co-counsel pursuant to Penal Code section 987D. (CT4:944.)

Appellant was arraigned on March 7, 1991, and entered pleas of not guilty to all counts and denied the special circumstances alleged in Count II. (CT4:944.) Codefendant Phillip Sanders was arraigned on the same date and also entered pleas of not guilty and denied the special circumstances alleged in Count II. (CT4:945.)

On September 4, 1991, the court granted in part appellant's section 995 motion to dismiss, setting aside the lying-in-wait and special circumstances allegations, and dismissing Count III, the grand theft charge, in its entirety. (CT4:1145.)

On December 3, 1991, the prosecution filed the notice pursuant to section 190.3 that during the penalty phase it would seek to introduce appellant's prior felony convictions in aggravation. (CT4:1155.)

On March 5, 1992, the trial court severed the case of Carolyn Sanders and Robert Jones from the trial of appellant and codefendant Phillip Sanders, and set appellant's and Sander's joint trial to be tried first. (RT1:241, 245.)

On April 3, 1992, appellant filed a motion to sever her trial from Sanders's trial. (CT6:1679.) That motion was heard and denied on April 14, 1992. (CT6:1806.) Appellant renewed her motion to sever on numerous occasions prior to and during her joint trial with Sanders. (CT7:1854, 1933, 2010, 2086; 8:2432; 9:2451, 2452, 2470, 2500, 2501, 2502; 11:3099, 3100, 3101.)

Jury selection began on June 24, 1992, before Honorable George Trammell. (CT7:2086.) On July 21, 1992, a jury and four alternates were sworn. (CT8:2374.) The case was submitted to the jury on September 3, and after four days of deliberation, the jury convicted appellant and Phillip

on all charges. (CT9:2644-2645.) As to the murder charged in Count II, the jury found that the murder was of the first degree. The jury found true the special allegations that the murder was intentional and carried out for financial gain within the meaning of section 190.2(a)(1). (CT9:2645.)

On September 21, 1992, the court granted Phillip's motion for a mistrial and a separate penalty trial but denied appellant's request for a new jury for penalty. (CT10:2823.) On September 28, 1992, after approximately two days of deliberations, the jury returned a verdict of death. (CT10:2892, 2894.)

On April 27, 1993, appellant filed a motion for verdict modification pursuant to section 190.4, subdivision (e). (CT12:3419.) On June 10, 1993, that motion was heard and denied and the court pronounced the judgment of death pursuant to the verdict and findings of the jury. (CT12:3477.)

STATEMENT OF FACTS

A. Prosecution's Case-in-Chief

1. The Foreclosure on the Hillary Street Home and the Refinancing of the Sycamore Street House

In 1978, Melvin "Tom" Thompson separated from his wife Mellie. (RT23:3923.) She blamed appellant for the breakup of their marriage. (RT23:3927.) Under the terms of their divorce agreement, Mellie was permitted to remain in the family home at 3534 South Sycamore, Los Angeles, until their youngest child reached 18 in 1988, when the house would be sold, the profits split between Mellie and Tom, and Mellie would pay Tom an additional $2500. (RT23:3899, 3930.) In 1988, Mellie asked Tom to sell her his interest in the house so that she could remain there. (RT23:3946.) Because he wanted to take his money out of the house, Tom agreed and gave Mellie written authorization to sell. (RT23: 3933, 3936, 3946, 4057-58.) Despite adding her adult daughter to the title, however,

Mellie was unable to obtain refinancing. (RT23:3932-33, 4057-58.)

After Tom divorced Mellie, he and appellant married and moved to Fox Hills, with Tom's son Elbert and appellant's son Girard Jacquet. (RT26:4535.) They later purchased a house together at 8034 Hillary Street in West Hills, and appellant began working with Tom at his business, Kayser Automotive in Santa Monica. In 1986, appellant worked as the office manager at Edith Ann's Answering Service. She became indebted to them in the amount of $33,000 and executed a deed of trust on the Hillary Street house in that amount. (RT25:4333-34.)

In September of 1989, the Hillary Street house was sold at a foreclosure sale to Tony DeGreef, co-owner of BID Properties, and a notice to vacate the premises was served on October 18, 1989. (RT24:4101; 25: 4341.) DeGreef was later contacted by Isabelle Sanders to discuss appellants's re-purchase of her home, and DeGreef agreed to rent the house to appellant for $4500.00 per month during their negotiations. (RT24:4111.) Most of DeGreef's discussions were with Isabelle Sanders, who told him that appellant wanted to buy the house back under her maiden name, Catherine Bazar, because of her bad credit history. (RT34: 4113, 4140.) At a meeting with Isabelle, appellant, and appellant's lawyer, Bruce Blum, in January of 1990, appellant told DeGreef she expected to receive money from a trust, and that she did not want her husband to know about the foreclosure because he was ill. (RT24:4113, 4116.)

On November 28, 1989, Dorothy Reik, a mortgage broker, met with appellant, Isabelle Sanders and Isabelle's son, codefendant Phillip Sanders. (RT23:3949-50.) Isabelle, who seemed to be in charge, introduced appellant and Phillip as Mellie and Mel Thompson, and they presented temporary driver's licenses in those names. (RT23:3979-80.) Ms. Reik noticed that there was a discrepancy between Phillip's weight and the

weight listed on his license and that both licenses had been issued that day; she was told that he had been sick, and that both had been robbed and their licenses stolen. (RT21:3779-81; 23:4013.) She called Tom's business and spoke to someone named Rene who confirmed their explanations. (RT23:3982.) Carolyn Sanders (Phillip's wife) and Carolyn Moore (Isabelle's daughter) also verified that appellant and Phillip were the Thompsons. (RT23:3957, 4007.)

Appellant and Phillip signed a deed of trust in the names of Mellie and Tom Thompson on the Sycamore house for $98,000. (RT23:3960.) Reik described the loan as a "hard money loan" – one based on the value of the property, not on the borrowers' credit or ability to repay. (RT23:3973.) Appellant and Phillip received $25,000 before escrow closed, and another $27,822 after escrow closed; the remainder was used to pay property taxes and the first deed of trust held by Cal Fed. (RT23:3960-3963, 4001.) Reik later learned that appellant and Sanders were not Mellie and Mel Thompson. (RT23:3964.)

Bruce Blum, an attorney, was initially contacted by Isabelle Sanders, who told him her daughter had lost her home in foreclosure and asked if he could help her buy it back. (RT24:4161.) Because of appellant's poor credit history, Blum attempted to negotiate the sale in Isabelle's name, and when that failed, in appellant's maiden name. (RT24:4170.) Blum did not intend to deceive BID properties about the identity of the prospective buyer, and appellant did not ask him to do so. (RT24:4171, 4180.) Appellant was using her maiden name in order to get credit, and Blum identified Catherine Bazar as Catherine Thompson in a letter he sent to BID on March 9, 1990, memorializing the offer on the house. (RT24:4171, 4178.) At BID's request, Blum obtained a full release of all claims signed by appellant and Tom outside of Blum's presence. (RT24:4173-4175.) In December of

1989, Blum received a $20,000 check from appellant drawn on the Kayser Service account, which he used to pay rent while appellant attempted to obtain financing. (RT24:4167.) Appellant told Blum that the money had come from an escrow account. (RT24:4177.)

David Yourist, a mortgage broker, met with Isabelle Sanders and appellant, who identified herself as Catherine Bazar, in March of 1990. (RT23:4047.) Appellant wanted to obtain a loan to purchase the Hillary Street house. (RT23:4048.) She told Yourist she was married to a man who operated an auto repair business, but that she would be taking title in her own name. (RT23:4053-4054.) On the loan application form, she listed her bank as the Community Bank, and the address of Tom's business as the bank's address. (RT23:4050.) A few weeks later, Yourist visited the shop. (RT23:4054.) He testified that he only learned from the newspaper that Catherine Bazar was Catherine Thompson. (RT23:4055.)

Yourist referred appellant to escrow agent Jane Rogers to handle the paperwork for the sale. (RT23:4024.) The terms of the sale required a cash payment of approximately $50,000, and the remaining $400,000 was to be financed by a bank loan and a second loan carried by the seller. (RT23:4028.) Rogers received a copy of an assignment of proceeds from a life insurance policy to Catherine Bazar, also known as Catherine Thompson, dated July 13, 1990, but never received the money and the sale did not go through. (RT23:4033, 4039.) Rogers testified that in her experience, married people sometimes buy property individually and that the existence of an escrow account on a piece of property would tend to keep the seller from seeking other buyers while escrow was pending. (RT23:4043.)

In December of 1989, Mellie Thompson learned that the Sycamore property had been refinanced without her knowledge or consent.

(RT23:3936.) She testified that she did not authorize anyone to obtain a driver's license in her name, did not sign a deed of trust on November 28, 1989 refinancing the Sycamore property, and did not obtain an advance payment as a result of that transaction. (RT23:3902, 3905-3906.)[4] She sued Tom, appellant and others, naming her ex-husband as a defendant because she wanted to include "everyone who had a hand" in the fraud. (RT23:3938-3940.)[5]

2. The Homicide

Charlotte Wark lived next door to Tom's auto repair business in Santa Monica. (RT25:4288.) On June 14, 1990, she arrived home at about 6:40 p.m. (RT25:4294.) As she turned into her garage, she stopped to talked to Tom, who was standing inside the gate of his business. (RT25:4290.) Tom was pleasant but appeared nervous, looking toward the office and bathroom in his shop rather than at Wark. (RT25:4296.) He said that he and appellant were going to see Tommy (his son) at the shop later that evening. (RT25:4294.) Within a few minutes, after parking her car but while still in the garage, she heard four or five shots which she thought was the sound of firecrackers. (RT25:4307-4308.) She looked outside but did not see Tom or anyone else. Later that evening, after hearing that Tom had been shot, she and her husband went to UCLA to wait with appellant in the emergency room. (RT25:4311.) Appellant was very distraught and cried when she learned that Tom had died. (RT25:4313-4314.)

Michael Lutz was in the gas station at the corner of Santa Monica

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[4] Carolyn Thompson Jones also testified that she did not sign any of the documents or give a power of attorney to Isabelle Sanders. (RT23:4058-4059.)

[5] As a result of Tom's death, Mellie and her daughter Carolyn became the sole owners of the Sycamore Street house. (RT23:3940.)

Boulevard and Greenfield Avenue, across the street from Kayser Automotive at around 6:30 p.m. on June 14th, taking a break from selling newspaper subscriptions. (RT25:4348-4350.) He noticed a white Plymouth Acclaim stop near the alley north of Greenfield. He saw the passenger get out of the car and enter the alley, and the car drove away. (RT25:4354-4355.) Lutz identified Phillip Sanders as the passenger, and Robert Jones as the driver. (RT25:4353-4356.) Two or three minutes later, Lutz heard two loud bangs. (RT25:4357.) Sanders came back out of the alley, holding his arm across his chest as if he was concealing something inside his jacket. (RT25:4361-4362, 4419.) When the white Plymouth returned and picked up Sanders, Lutz wrote down the car's license plate number. (RT25:4363.) Lutz then saw appellant, who was distraught, emerge from the alley and go to a pay phone at the gas station. (RT25:4367-4368.) Lutz used another pay phone to call 911. (RT25:4367.)

Los Angeles homicide detective Kurt Wachter responded, arriving at Kayser Automotive at about 6:55 p.m. (RT33:5745.) He found a black male seated with his back against the bathroom wall, with gunshot wounds to the head, mouth and chest. (RT33:5750-5754.) The victim was fully clothed and his wallet was intact. (RT33:5753, 5756.) Appellant was outside on the sidewalk; at trial, Wachter described her as "mildly upset," but admitted testifying at the preliminary hearing that she was distraught and shocked. (RT33:5833-5834.) At the hospital where the victim was taken for treatment, appellant told Wachter she left the shop at about 5:45 p.m. to recycle cans, and returned 45-60 minutes later. (RT33:5814-5817, 5838.) After parking her car, she noticed a black man walking in the alley. (RT33:5816.) Appellant also gave Wachter information about cash and personal property kept at the shop, including a Rolex watch her husband kept in a desk drawer when he was wearing his work clothes. (RT33:5839-

5841, 5818.) Tom died at the hospital later that evening as a result of three gun shot wounds: one penetrated his chest and abdomen, one penetrated his head above his left eyebrow, and one penetrated his upper right arm. (RT35:6094-6095.)

By midnight, the police had traced the license plate number given to Wachter by Michael Lutz to a car rented by Phillip Sanders, and went to Phillip's home in Sylmar to investigate. (RT33:5763-5764.) A white Plymouth was parked outside, with the same license number. Phillip's wife, Carolyn, permitted them to enter the residence, where Phillip was sitting on a couch. (RT33:5766.) Wachter noticed a set of keys with a Thrifty car rental tag lying on a piece of paper on a counter. (RT33:5767.) Wachter asked for and received Phillip's permission to search the car, and when he retrieved the car keys to do so, he saw a telephone number on a paper that coincided with the number of the victim's home that appellant had given the police. (RT33:5767.) Wachter then arrested Phillip, who denied being in West Los Angeles that evening or using the car after 6 p.m. (RT33:5776.)

3. The Investigation Leading to Appellant's Arrest

Appellant was initially taken into custody on June 18, 1990, at Forest Lawn Cemetery. (RT27:4712.) Homicide Detective Lee Kingsford testified that when appellant was told she was being arrested because she had hired someone to murder her husband, she said "I didn't know Phil Sanders at all. I only met him once . . . about the sale of a car." (RT27:4717.) According to Kingsford, Sanders's name had not been mentioned by anyone else at that point. (RT27:4714.) However, Phillip's arrest four days earlier, was the subject of a press release. (RT27:4720-4722.) Appellant also told Kingsford that she loved her husband and they got along well. (RT27:4717.) Appellant was not charged at that point, and was released from custody a few days later.

Carolyn Walsko, a claims consultant at Prudential Insurance, testified that there were two life insurance policies on Tom, one issued in 1988 for $100,000, and a second issued in 1990 for $150,000, with a double indemnity clause for accidental death, including homicide. (RT26:4439-4440, 4469.) The total monthly premium for the two policies was more than $1100. (RT26:4443.)

Appellant submitted a request for payment of the proceeds of the policies in June of 1990, but as of the time of Walsko's testimony, nothing had been paid because of the homicide investigation. (RT26:4448.) Walsko testified that the question was not whether they would pay, but whom they would pay; the named beneficiary cannot benefit if he or she is involved in homicide. (RT26:4456, 4458, 4460, 4468.)[6]

Tom's son, Tommy Thompson, Jr., worked with his father at Kayser Service. (RT26:4474-4475.) About two weeks before his father died, Phillip came to the shop looking for appellant. (RT26:4487, 4604-4605.) Robert Jones came by about a week later, asking about a tune-up. (RT26:4490.) When Tommy left the shop on June 14th at 5:55 p.m., his father was still there; Tom's normal practice was to lock the gate, lower the bays, and then change back into street clothes after cleaning up. (RT26:4488-4490.)

Tommy testified that his father loved appellant, and that she did many things for him. (RT26:4480-4481, 4484, 4540.) Tom had an alcohol problem, but stopped drinking three or four years before his death.

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[6] An attorney representing Tom's ex-wife Mellie and her children confirmed that he had filed a claim on their behalf. (RT37:6366-6367.)

(RT26:4475-4476.)[7] Tom was hospitalized for a blood clot a few months before he died, and also suffered from pancreatitis. (RT26:4475.) His father liked to gamble, as did appellant. (RT26:4476.) In Tommy's opinion, after his father married appellant, she took over managing the finances for the business, as well as other aspects of his father's life. (RT26:4477-4482.)[8] When Tommy tried to talk to his father about this, Tom became angry. (RT 26:4483-4484.) Tommy did not get along with appellant, but respected her as his father's wife. (RT26:4537.) After his father died, appellant did not return to work at the shop but sent Rene Griffin to the shop to pick up the receipts. (RT26:4499, 4509-4510.) Griffin worked at the shop in 1987-1988, and she and appellant's friends, Pat Ceasar and Isabelle Sanders, hung out with appellant at the shop. (RT26:4579, 4616.)

Sometime after his father's funeral, Tommy found a note in appellant's handwriting at her desk at the shop, describing a person resembling his father, which he gave to Detective Wachter. (RT26:4512-4514, 4523-4524.) He also found documents in the name of Catherine Bazar with an address on Barranca in Covina,[9] a letter from a Katrina Brazarre on paper with a letterhead for Guaranty Bank and Trust Company,

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[7] Tom's ex-wife, Mellie, testified that when she and Tom separated in 1978, he was a gambler and sometimes drank excessively. (RT23:3923.)

[8] Tommy's younger brother, Elbert, agreed that appellant took on more and more of the work around the house, the cooking, getting the mail, tending to him and Girard, and driving Tom to and from work. (RT26:4631-32.) Elbert also confirmed that his father owned a Rolex, but he did not know if it was real or a fake. (RT26:4636.)

[9] Bazar was appellant's maiden name, and her son Girard lived at the Barranca address. (RT36:6329.)

and stencils with the same print as the letterhead. (RT26:4517-4518, 4501-4502.) He did not know if that was a name used by appellant, and she never mentioned to him that she expected to receive money from an inheritance or from oil leases in Louisiana. (RT26:4501, 4507-4508.) In addition, he found a letter in his father's desk, dated December 23, 1986, with the salutation "Dear Tom." (RT26:4517.)

Nancy Rankin, a friend of appellant's, testified that on the night Tom was killed, while she and Rene Griffin were driving appellant home from the hospital, appellant said something like "it wasn't supposed to happen this way," or "I didn't mean for it to happen this way." (RT34:5975-5976, 5984.) Rankin thought it was more to the effect of "it wasn't supposed to happen this way." (RT34:5985.) Appellant was not talking to Rankin, but was just talking, saying the kind of things that people say when someone has been killed. (RT34:5983-5985.) Appellant seemed to be drugged or sedated. (RT34:5984.) After they took her home, she appeared to be lost, like she did not know what she was going to do without Tom. (RT34:5994.)

At some point after the murder, Rankin showed appellant a newspaper photo of Phillip Sanders, and appellant said she did not know him. (RT34:5976.) On another occasion, Rankin found a watch wrapped in a piece of underwear while looking, with appellant's permission, for something in an armoire containing Tom's clothes located in the master bedroom of the Hillary Street house. (RT34:5977-78, 5986.) Rankin left it where she found it, and did not mention it to the police until after the police searched appellant's house in August. (RT34:5977-5979.) Rankin testified that the watch found by Wachter during his search on August 7, 1990, was

similar to but not the same as the watch she found. (RT34:5980.)[10] Around the week of June 24, 1990, Rankin, Griffin and appellant drove to

Laughlin, Nevada to gamble. Rankin and Griffin confirmed that the trip was their idea. (RT34:5988-5990; 35:6132.)

Pat Ceasar, a friend of appellant's who worked as a police dispatcher, was interviewed by the police in August of 1990. (RT27:4730; 34:5961.) Ceasar told the police that appellant told her she was returning from recycling when she heard shots and ran into a tall thin Black man coming from the shop. (RT34:5961-5962.) In response to Ceasar's questions, appellant said she knew Phillip Sanders but it was not him. (RT34:5961-5962.) In a letter she wrote to Ceasar in March or April of 1991,[11] appellant said that Greg Jones was the person whom the eyewitnesses saw getting out of the car at the time of the murder. (RT27:4779; 34:5963, 5967-59 69; Exhibit 123.)

Rene Griffin, another close friend of appellant's, spent time with appellant after Tom died, and testified that appellant seemed like she was in shock. (RT34:5957.)[12] Appellant told her that when Tom was killed, a Black man whom she did not recognize came around the corner from Santa Monica and she almost ran into him. (RT34:5940-5941, 5952.) After Griffin saw a picture of Phillip Sanders in a newspaper, she asked appellant

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[10] Wachter did not ask Rankin if the watch he found in appellant's dresser was the same as the one she saw a few weeks earlier. (RT34:6009.)

[11] Ceasar turned over to the prosecution the letters appellant wrote to her after her arrest. (RT34:5962, 5967.)

[12] Det.Wachter admitted he asked Griffin to wear a tape recorder and ask appellant a list of questions, but she refused to do so. He also admitted that he surreptitiously taped a number of other witnesses. (RT34:6012, 6010.)

if that was the guy and appellant said no. (RT34:5945-5946, 5950.)[13] She testified that the weekend after Tom was killed, appellant told her that Tom's Rolex had been recovered in San Francisco. (RT34:5944.) Griffin was not aware that the Hillary Street house was in foreclosure; when she noticed a sheriff's notice on the door of appellant's home, appellant told her it had to do with the other house. (RT34:5947.) Griffin denied representing herself as an officer of the Community Bank or giving out any false information about Tom. (RT34:5944.)

On August 7, 1990, Wachter executed a search warrant at appellant's home on Hillary Street; he found a fake Rolex watch wrapped in a stocking inside a locked drawer in an armoire in the master bedroom, and drivers' licenses in the name of Catherine Thompson and Catherine Bazar, with the address of 1335 North Barranca, Number 19, in Covina. (RT33:5769, 5820, 5770-5771.) Appellant's son Girard Jacquet lived at that address until sometime after Tom died. (RT36:6329.) Business records obtained from the County of Los Angeles showed that appellant had put Tom's business in her own name eight days before Tom was shot. (RT33:5773.)

Anita Freedman, the switchboard operator at Barish Chrysler where Phillip Sanders worked before his arrest, testified that she took several telephone messages for Sanders from appellant on May 17, May 31 and June 13, 1990. (RT27:4697-4698.) Appellant told her she was calling about buying a car, and was upset when Sanders was not available on June 13, 1990. (RT27:4699.) Appellant also left a message for Joe Campbell, another salesman at Barish, on May 21, 1990. (RT27:4707.)

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[13] At trial, Griffin did not recall telling Det. Wachter that appellant told her she met Sanders while trying to buy a car. (RT34:5958.)

4. Christine Kuretich's Report of a Conspiracy

Sometime between May 17 and May 24, 1990, Christine Kuretich moved into the home of Phillip and Carolyn Sanders in Sylmar, renting a room for $300 a month. (RT29:5084-5085; 30:5275, 5278.) She and Carolyn had met in 1988 when they were working at a film studio run by a former boyfriend of Kuretich, and the two had become close friends. (RT30:5324; 32:5620-5622.)

Kuretich testified that she was an alcoholic and also used marijuana socially while living with the Sanders and until sometime after the preliminary hearing in this case. (RT29:5098-5100; 30:5163.) She admitted that during that period, she was generally intoxicated except when she was at work. (RT30:5160.) Although the Sanders were using a great deal of cocaine--several hundred dollars worth a night-Kuretich testified she had stopped using cocaine in January of 1990. (RT30:5162.) Kuretich's work schedule was irregular and she was frequently away from the house when she was not working, spending evenings with friends or with Carolyn Sanders's brother, Bobby Greenwood, with whom she was having an affair. (RT30:5224-5225, 5273, 5288, 5294, 5322.)

Kuretich testified that between the end of May and June 14, 1990, she overheard eight to ten conversations between Carolyn and Phillip regarding the murder of Melvin Thompson and the fact that appellant wanted her husband dead and would pay someone to do it. (RT29:5087-5089; 30:5287; 32:5497.) In early June, Carolyn asked her if she could find someone who would kill for money. (RT30:5339.) Carolyn told her a person named Catherine wanted to hire someone to kill her husband for the insurance money, and had hired them for "thousands and thousands" of dollars. (RT32:5522-5523.) Kuretich did not know why Carolyn would ask her such a question, and denied ever doing anything to find someone to

do it. (RT30:5340.)

During the same two-week period, Kuretich took five or six telephone messages for Phillip or Carolyn from a woman who identified herself as Cathy.[14] Shortly before June 14, the Sanders said that Phillip was going to do it because they had already accepted some money as a down payment and used it to pay their rent. (RT29:5089-5090.) According to Kuretich, Carolyn asked her son, Robert Jones, who lived next door with his family, to get them a gun. (RT29:5091, 5086, 5087; 30:5184.) Kuretich did not report these conversations to the police because she did not take them seriously. (RT29:5111-5112.)

On the night of the murder, after Phillip's arrest, Carolyn called Kuretich and asked her to return home. (RT32:5525.) Carolyn was very upset and told her what had happened. (RT32:5525.) When Gregory Jones, the husband of Phillip's sister Loviera, arrived, there was a further discussion of what had happened. (RT32:5526.) Kuretich did not go to the police with this information (RT29:5115), and when they contacted her a month later, she falsely told Detective Monsue that Gregory Jones was responsible for the murder, even though she knew he was not involved. (RT29:5096-5097; 32:5527.)

She repeated this lie to Detective Wachter and Deputy District Attorney Mader during the first part of their 1 hour and 45 minute tape-recorded interview with her on August 27, 1990. (RT29:5097, 5110; 30:5183.) Carolyn had asked her to tell this lie, and she thought it was in her best interest to do so. (RT29:5116; 32:5527, 5625-5626.) Kuretich changed her story, however, after Wachter questioned whether she was

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[14]Kuretich had never met appellant before seeing her in court, and confirmed she had no basis on which to determine if appellant was the woman who called. (RT30:5184.)

telling the truth, mentioned giving her a lie detector test, and explained that "people were either part of the problem or part of the solution," and she was "at risk of being part of the problem and going to jail." (RT30:5203; 29:5118.) Kuretich told Wachter she did not want to take a lie detector test, and was never given one. (RT30:5265-5266.)

Before she changed her story, the police had told her they knew that Carolyn, Phillip and Robert Jones were involved in the killing, and that there was "only one sophisticated person in the case who hadn't been named." (RT30:5214.) She "could not think who that person was," and her first guess was Greg Jones. (RT30:5217.) Monsue told her that was not right, so she tried again and said "you guys, meaning the police," and they said no. (RT30:5216.) They then asked her who the other player was whom they had not mentioned; at that point, she had a pretty good idea of what Monsue wanted to hear, and she named appellant. (RT30:5214-5217.)

During the second part of the interview, Kuretich said that the first time she heard about any of these events was on the night of June 14, after Carolyn called her following Phillip's arrest (RT30:5202), and that she tried to figure out what had happened after the killing. (RT30:5196.) Similarly, at the preliminary hearing, she testified that she did not learn who the victim was until that night, and that it was difficult to distinguish between conversations she heard before June 14, and the many conversations about the events that occurred later. (RT30:5190, 5196, 5165-5166.)

At trial, Kuretich admitted that she could not pinpoint the dates or times when the conversations about the killing occurred, but claimed she knew who said what on each occasion, and that she could distinguish between what was said before the murder and what was said after. (RT 30:5172-5173.) She insisted that her memory of the events was better at

trial than it had been earlier, when she was still drinking. (RT29:5095, 5105; 30:5172-5173.) At the time of the preliminary hearing, she was still drinking and was living in a truck yard; she was hung over, the questioning was grueling and some things got "jumbled up." (RT29:5106-5107; 30:5241.) In February of 1991, she stopped drinking and smoking marijuana when she learned she was pregnant. (RT29:5101.)

After testifying at the preliminary hearing in January of 1991, she left Los Angeles and did not tell the prosecution where she had gone. (RT29:5096-5097, 5103; 30:5149-5150.) She testified she left because she was afraid of Phillip and appellant, but admitted she knew they were in custody and in fact had never threatened her; she also denied telling the prosecutors it was her boyfriend she feared, not the defendants. (RT30:5266-5270, 5157.) Kuretich was found in Kansas and returned to Los Angeles where an attorney was appointed to represent her at the request of the prosecutor. (RT29:5114; 30:5153-5155, 5270.) After her return to Los Angeles, she met with the prosecutors and Detective Wachter, but refused to meet with defense counsel. (RT29:5159.)

Kuretich denied receiving any compensation from the prosecution or receiving anything for her testimony. (RT29:5108.) She admitted worrying in August of 1990 about whether she could be charged, but denied discussing her possible liability as an accomplice or accessory after the fact with the prosecution. (RT30:5257-5258.)

B. Appellant's Defense

Pat Ceasar, a police dispatcher, introduced appellant and Tom in 1977 or 1978; her husband, Julius Ceasar, worked for Tom for four months shortly before Tom's death. (RT4733-4735.) When Ceasar introduced them, Tom had a drinking problem and would drink at work; he also had a gambling problem, and would bet hundreds of dollars on a single race.

(RT27:4751-4754.) Appellant helped Tom to clean up. (RT27:4753.) Appellant was also generous with her friends; she gave Ceasar gifts and loaned her money, and never pressured her to repay it. (RT27:4762, 4780.) In Ceasar's opinion, appellant and Tom had a friendly and loving relationship; they seemed happy and did not fight. (RT27:4735.) Ceasar described appellant as a "more reserved [type] of person," and testified that when she visited appellant on the day after Tom's murder, she "acted like her normal self." (RT27:4739-4740, 4759.)

Rene Griffin was a close friend of the Thompsons during their marriage, visiting them at their home and business, and socializing with them on occasion. (RT35:6102-6103.) They seemed to get along well and appeared to be financially secure. (RT35:6104, 6109.) Appellant did not like firearms. (RT35:6106-6107.) Appellant did not easily show her emotions, but broke down at the funeral parlor when it was time to select a casket for Tom: she "came unglued ... got emotional, started crying [and] her legs went out from under her. I thought she was going to pass out. Very unusual. I never seen her act like this. I thought she was in shock." (RT35:6112.)

Appellant was in custody on the day of the funeral, and Griffin took care of the arrangements. (RT35:6113.) At appellant's request, Griffin asked the mortician to remove the jewelry on Tom's body before he was buried and she returned it to appellant following her release from custody. (RT35:6114.) She later heard that appellant pawned the jewelry. In August of 1990, Detective Wachter asked Griffin to "wear a wire" and ask appellant certain questions, but Griffin refused. Griffin was not afraid of appellant. (RT35:6116.)

Leonard Williams, a sales agent for Prudential Insurance, sold life and home insurance policies to the Thompsons. In 1987, appellant

purchased a $100, 000 life insurance policy, naming Tom as her beneficiary (RT35:6172); in 1988, Tom purchased a policy for the same amount, and named appellant as his beneficiary. (RT35:6175.) Both policies had an accidental death benefit provision, which meant the company would pay double the face amount of the policy if death occurred by any means other than natural causes. (RT35:6173, 6176.) Although this provision would apply if either died as a result of homicide, Williams never explained that to appellant. (RT35:6235.)

In early 1990, Williams approached Tom about increasing the amount of his policy. (RT35:6180, 6182.) He believed that Tom was under-insured, and that he had made no provisions for a retirement income. (RT35:6187, 6194.) Williams suggested a combination of term and whole life insurance, under which the benefits would change over a period of years but the premiums would remain the same. (RT35:6184.) Because Tom had been hospitalized in 1988 for a pancreatic condition, the policy was approved on a "severely rated" basis, i.e, at a high monthly premium. (RT35:6182-6183, 6185.) Williams reviewed the contestability clause with the Thompsons, under which the company could contest any claim submitted within two years from the issue date of the policy if the company deemed information in the application to have been a misrepresentation. (RT35:6201.) Tom represented his income as $250,000 and appellant estimated hers as $60,000. (RT35:6208.)[15] Because Tom was a self-employed business proprietor, the $300,000 face amount of the new policy

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[15] Ms. Walsko, the claims examiner, had no information that any statements on the applications concerning Tom's health were false, and a misstatement regarding income would not affect payment on the policy. (RT26:4446, 4449.) Tom denied he was an alcoholic on both applications. (RT26:4463.)

was reasonable. (RT35:6213.)

For several years, Williams visited Kayser Automotive once a month to collect the premiums. (RT35:6211, 6216.) Appellant and Tom appeared to be a good team: he ran the mechanical side of the business and she ran the office. (RT35:6211.) Tom seemed very outgoing, with a strong personality, and Williams did not the form the impression that appellant controlled or manipulated Tom. (RT35:6215, 6214.)

At the time of his death, Tom was insured for $500,000: $100,00 under the first policy, plus $100,000 for accidental death, and $300,000 under the second policy. (RT35:6227.) Williams never told the Thompsons that accidental death would include the murder of an insured, and never discussed who could collect if there was a murder. (RT35:6235.)

Charles Kayser owned and operated Kayser Automative at 11001/11007 Santa Monica Boulevard from 1952 to 1982. (RT36:6251.) He hired Tom in 1968. (RT36:6252.) When Kayser retired in 1982, two businesses were operating on his property, Kayser Service and Community Brake Westwood. (RT36:6251.) Kayser gave the operator of Community Brake a master lease to the property, and let Tom take over Kayser Automotive at no charge, other than to pay Community Brake on the lease. (RT36:6251.)

Kayser's wife, Isabel, handled the lease and the business aspects of the property after her husband retired. (RT36:6255.) She negotiated a lease with Tom in 1982 (RT36:6265), and negotiated a second lease with Tom and appellant in 1987, after Tom took over Community Brake. (RT36:6259-6262.) Tom seemed knowledgeable as a businessman, and she never formed the impression that he did not understand the terms of the lease. (RT36:6264.) After 1988, the Thompsons had problems with late payment of the rent, which Mrs. Kayser discussed with both Tom and

appellant. (RT36:6268-6269.) In April of 1990, they signed an addendum to the lease, reducing the rent because of extensive work the Thompsons had been required to do on the property by the city. (RT36:6270.) The rent had been paid the day before Tom died, but a late penalty was still due. (RT36:6270.)

Mrs. Kayser went to the hospital on the night Tom was shot. Appellant was "very upset." (RT36:6273.) Appellant gave Mrs. Kayser the impression that she believed that Tom had been killed in the course of a robbery. (RT36:6283.)

Appellant's son, Girard Jacquet, was 12 or 13 years old when appellant and Tom started their relationship. (RT36:6298.) Girard's father, Louis Jacquet, died when Girard was 5 years old. (RT57:9297.) Girard lived with Tom and appellant until 1986, and returned home about a year and a half later for nine months. (RT36:6322.) Tom had a strong character and, after he stopped drinking, his relationship with Girard improved substantially and he became more like a father figure. (RT36:6299-6301.) His mother loved Tom; they had an affectionate relationship, and were generous with each other and their children. (RT36:6331, 6302-6303, 6308, 6310.) Appellant was also financially generous with her friends, including Isabelle Sanders. (RT36:6313.) In Girard's view, Isabelle "was always wanting money" from his mother. (RT36:6327.)

In May of 2000, Girard talked to Phillip Sanders about buying a car. (RT36:6319.) Girard had met Phillip through his friendship with relatives of Sanders's who were Girard's age. (RT36:6318.) It was through those friends that appellant met Isabelle Sanders, Phillip's mother. (RT36:6314.) Girard had credit problems and eventually bought a different car from someone else. (RT36:6319-6320, 6322.)

A few months before Tom died, Tom and appellant approached Jera

Trent, a legal secretary who lived near Kayser Automotive, and asked if they could take property out of Tom's ex-wife's name and put it in appellant's name. (RT37:6351-6353, 6355.) Ms. Trent said she would ask her employer and requested copies of the paperwork and a retainer check. (RT37:6354.) She had a total of twelve conversations with them: one conversation with Tom alone, two with appellant alone, and the rest with both of them; during their joint conversations, they talked equally and both referred to Tom's ex-wife as a "bitch." (RT37:6363, 6354, 6356.) Although she reminded both of them on several occasions to give her the documents, she never received them. (RT37:6364-6365.)

Huey Shephard, the attorney representing Tom's children in the probate of Tom's estate, confirmed that he had advised the insurance company that he would be filing a claim on behalf of Tom's heirs (three of whom had testified for the prosecution), depending upon the outcome of the criminal trial and any civil suit that might be filed. (RT37:6366-6367.) Shephard believed that appellant would not get any proceeds from the insurance policies if it was determined that she unlawfully contributed to her husband's death. (RT37:6374.)

C. Phillip Sanders's Defense

Phillip Sanders testified in his own behalf, denying that he shot Tom or conspired to kill him. He claimed that appellant shot her husband in his presence without any prior warning, and then foisted the murder weapon on him, promising to pay him if he destroyed it. Phillip first told this version of events to the police and prosecutors in April of 1992, almost two years after his arrest, at the direction of his attorneys. (RT42:7211.)

On direct examination, Phillip testified that he met appellant through his mother, Isabelle Sanders, who asked him in November of 1989 to do a favor for a friend and sign some documents. (RT39:6618, 6621.) His

mother gave him Tom's name, height, weight and date of birth on a piece of paper and told him to get a driver's license in that name. (RT39:6622.) Phillip did so, committing perjury on his application for a temporary license to use to defraud the Banker's Group. (RT40:6883, 6925.) When he went to sign the documents, his mother, his wife Carolyn, his sister-in-law Carolyn Jeanette Moore, and appellant were all there. (RT39:6624; 41:7008.) He pretended to be Tom, and his mother paid him and his wife $100 each for their help. (RT39:6625.)

Phillip claimed that he did not learn how much money was involved in this transaction until the trial. (RT41:7104.) Sometime after he was paid, it occurred to him that the payment he received was not adequate for what he had done, which amounted to the commission of a number of felonies. (RT41:7101.) He also became concerned that his perjury would be discovered; when he shared his apprehensions with his mother, she told him it "wasn't a problem, it was going to help her friend to save her house, and everybody was fine with the situation." (RT41:7103-7104.)

Phillip testified he had no contact with appellant between November of 1989 and May of 1990, when his mother called to say appellant was interested in buying a car for her son Girard. (RT39:6627.) At that time, Phillip worked as a salesman at Barish Chrysler. (RT39:6619.)[16] On May 4, 1990, he called appellant at Kayser Service to set up an appointment. (RT39:6637.) On May 10, he met with her and Girard at Barish to discuss the purchase. (RT39:6628-6629, 6631.) After Girard selected a vehicle, the credit department discovered that neither Girard nor appellant could qualify to finance the purchase. (RT39:6634.) Appellant returned to Barish

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[16] Sanders graduated from the University of Wisconsin with a BS degree in communications, and did graduate work at the General Motors Institute. (RT40:6875.)

on May 16, and Sanders gave her the name of someone who could help "fix" their credit, i.e., provide a new social security number, driver's license and other documents. (RT40:6681.) He received information later that their credit had been "adjusted," but that the deal would have to be restructured for a smaller and less expensive car, which Girard decided not to purchase. (RT39:6633-6635, 6645.)

Phillip testified that the telephone calls he made to appellant's home and work before June 11 were all related to the car deal and his efforts to salvage that deal after the credit restructuring. (RT39:6736.) He subsequently learned that Girard purchased a Ford Probe from another dealer in February (RT39:6742) but he insisted that the telephone conversation with appellant were about buying a car. (RT39:6746.) Phillip claimed that when appellant returned to Barish with her new credit documents, she asked him if he knew anyone who could get rid of someone, saying that "a lot of things could be solved if she could get rid of her stupid step-son, Tommy Lee." (RT41:7110.) He thought it was a humorous remark, shook his head and went back to filling out forms. (RT41:7110-7111.) That evening he mentioned to his wife what appellant had said. (RT39:6707.) According to Phillip, appellant stopped by Barish about a week later, asking if he had heard of anyone and saying "it would be worth a couple of grand," but he said he did not know anyone. (RT39:6706.) He did not take her comments seriously. (RT40:6895.)

Phillip described his drug use in May of 1990 as "occasional;" he snorted cocaine and would occasionally smoke it. (RT39:6694-6695; 40:6862-6863.) He denied using marijuana but believed that his wife smoked it with Christine Kuretich, who had moved in with the Sanders in late April. (RT39:6695-6696; 40:6865.) Phillip testified that Kuretich also used cocaine and often appeared to be "loaded." (RT39:6696, 6698.) She

was intoxicated most of the time, except in the morning when she left for work, and at times she stumbled, staggered, slurred her words and was disoriented and inattentive. (RT42:7280-7281.) She could drink a case of beer a night, and Phillip had observed her getting sick in the living room from drinking and on occasions when she had passed out. (RT42:7284.)

Kuretich was having an affair with Carolyn Sanders's brother, Bobby Greenwood (the husband of Carolyn Greenwood Moore), which created quite a bit of discomfort in the Sanders's home. (RT39:6696-6697.) Phillip wanted to tell Kuretich to leave, but Carolyn did not want him to say anything to Kuretich and said she would handle it; they would have whispered conversations about this situation. (RT39:6697-6698.) Kuretich also failed to pay for her food and rent. (RT39:6698.)

A week or so after Phillip told his wife about his alleged conversation with appellant, Kuretich, who was drunk, mentioned that she had talked to her drug dealer, Earl, about finding someone for the killing. Phillip testified that he was shocked that Carolyn had mentioned the conversation to Kuretich, and told them both he did not want anyone talking about it any more. (RT39:6706-6708.)

Phillip had cash flow problems in June and was unable to pay the rent. (RT39:6653; 40:6862.) After his employer refused to give him an advance, he decided to approach appellant for a loan. (RT39:6653-6654.) He explained that he went to her because she had expressed her appreciation for his help in connection with her attempt to buy Girard a car, and because he knew she had lent money to his sister, Lovieria Jones, when Lovieria and her husband Greg needed additional capital for a down payment. (RT39:6654-6655.) Appellant had also been helping Phillip's mother Isabelle financially for over a year, and in other ways as well; Isabelle had a heart condition and appellant would take her to her medical

appointments. (RT40:6866; 41:7094-7095.) Phillip knew appellant by reputation to be a generous woman and he did not think she would refuse a request from her best friend's son. (RT41:7117.)

He called Kayser Service on June 11 to get in touch with appellant about a loan. (RT40:6689.) They talked the next morning and she agreed to lend him $1500, and there were further telephone calls that day to make arrangements for Carolyn Sanders to pick up the money. (RT39:6690-6692, 7123-7124.) Carolyn met appellant and received the $1500, which she used to pay the rent and buy food and other supplies. (RT42:7148-7150.) Phillip did not talk to Tom about the loan, but had no reason to think that Tom did not know about it.

On June 14, Carolyn drove Phillip to work, then picked him up around 3:30 p.m. for a doctor's appointment. (RT39:6700-6701.) Phillip had suffered back and neck injuries in a car accident about a month earlier, and he was taking muscle relaxants and pain killers. (RT39:6699-6700.) He took a muscle relaxant and a Darvon before leaving work. (RT39:6702.) When he arrived home at around 5:00 p.m., he called appellant at Kayser to arrange to go to the shop that evening to sign papers for the repayment of the loan. (RT39:6702.) He wanted to put the terms of the loan in writing to avoid any disagreement like the one that had occurred between appellant and Greg Jones. (RT39:6703.) He contemplated making $500 payments in July, August and September, but did not anticipate paying any interest. (RT42:7152, 7154.)

Phillip called Kayser again at 6:03 p.m. to say he was still planning to come to the shop. (RT39:6703, 6752.) In the previous hour, he had drunk one and one-half or two 20-ounce bottles of malt liquor, and taken another pain killer and muscle relaxant. (RT42:7162, 7164.) He realized he was intoxicated and asked Robert Jones, his wife's son, to drive him to

Santa Monica. (RT42:7165.) Robert Jones dropped him off at the corner of Santa Monica Boulevard and Greenfield, and he walked into the shop through the front gate at the Santa Monica entrance. (RT39:6709; 41:7024-7025; 42:7167.) He called out to appellant, and she waved him in. (RT39:6710.) According to Phillip, appellant then turned and walked toward a door in the back, and he noticed that she had something in her hand; she knocked on the door and said something, the door opened, and she raised a weapon and fired twice at a man whom Phillip said he did not know. (RT39: 6711-6712; 41:7027.) Holding the gun by the barrel, appellant walked toward Phillip, handed him the weapon and said something like, "get rid of this and you'll be taken care of." (RT39:6712; 42:7187; 41:7030-7031.) He construed her statement as a promise to pay him money. (RT42:7188.)

Phillip walked out the front gate and threw the gun into some ivy outside a nearby building. (RT39:6713.) He did not call 911 or attempt to obtain help. (RT40:6943-6944.) When Robert Jones picked him up, Phillip told him that he had just gotten rid of a gun; Jones told him to go back and get "your" gun and he did. (RT39:6714-6715.) When they arrived home, he gave the gun to Jones who got rid of it. (RT39:6715.) Phillip told his wife that there had been a shooting, but denied telling her who was shot or who did the shooting. (RT39:6716; 41:7072.) He testified that during the five hours before the police arrived at his home, he went to the bathroom and got sick, took more muscle relaxant, changed clothes, drank beer and laid down on the couch. (RT39:6716.)

At the time of his arrest on June 14, Phillip lied to the police when he said he had not been in West Los Angeles that evening. (RT39:6718; 40:6941.) On June 17, against the advice of his lawyer, he talked to the police again and again lied about what had happened, suggesting other

possible suspects including Greg Jones. (RT39:6720-6721; 41:6990.) He admitted that he did not tell Wachter that his calls to appellant on June 14 were about the loan. (RT40:6793.) He explained that he was trying to protect himself, not appellant, and that he believed it was in his best interest not to say anything. (RT39:6720.)

After his arrest, Phillip began to receive letters from appellant.[17] (RT39:6730-6732.) Some of the letters offered him money or financial benefits to change his testimony, and told him not to trust his lawyers. (RT40:6831.) One of the letters written by Jennifer Lee, Exhibit 138, is captioned "act two, scene one, confession;" another, Exhibit 141, is entitled "conversation of sorts with mama." (RT39:6730-6731.) He testified he knew nothing about "act one" or why the letter refers to "act two."

Phillip gave the letters to his lawyers. (RT40:6833-6836, 6904, 6906.) He did not discourage appellant from writing and, at his lawyers' direction, continued to write to her. (RT40:6911, 6914, 6927, 6930.) Sanders did not view this as "setting up" appellant, but as helping himself. (RT40:6912-6913.) He did not mention these letters to the police in April of 1992, when he first told them the story he testified to at trial, and he wrote at least one more letter to appellant at the direction of his lawyers after the April, 1992 meeting. (RT43:7352.) He did not make the decision whether the letters should be shown to the police or the prosecutors, and did

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[17] One of these letters, Exhibit 142, was written by appellant, while others were written by Jennifer Lee, who was in custody with appellant from May until October, 1991. (RT40:6805, 6811-6815.) At the time of her testimony, Lee was serving a state prison sentence for kidnaping. (RT40:6811.) Lee testified that she copied the contents from what appellant wrote out, and that appellant then threw the originals away. (RT40:6818.) According to Lee, appellant said she was very rich and was on a cruise when her husband was killed. (RT40:6818-6819.)

not know when they were told. (RT42:7303, 7279.)

When confronted with the purchase order from another car dealer showing that Girard purchased the Ford Probe in February of 1990, Phillip continued to insist that his conversations with appellant and Girard occurred in May and June of that year (RT39:6746; 40:6776-6777), and asserted that if Girard purchased a car in February, "there must have been something wrong with it because he needed another car in May." (RT39:6746.)

Phillip denied knowing how much money was involved in the Bankers' Group transaction, denied returning to Dorothy Reik's office to pick up a check and denied forging Tom's name on the check. (RT42:7308, 7311.) When shown a $25,000 check made payable to the victim, he admitted that it "appeare[d]" to have his signature, but claimed he did not recall signing the check and that he did not look at the figures on the papers he signed until he saw them in court. (RT41:7313-7315.)

D. Prosecution Rebuttal

Tommy Thompson testified that the note he gave to Detective Wachter, Exhibit 85, was found under a blotter on the desk at Kayser Automotive, not on the floor. (RT43:7374-7376.) He denied ever using the name Lee or Tommy Lee, or having any insurance on his life in 1990. (RT43:7376.) Lee Thompson is the name of his father's brother, who at some point worked at Kayser. (RT43:7378.)

Detective Wachter testified that the barrel of the gun Phillip claimed appellant handed to him would have been hot immediately after firing and uncomfortable to the touch. (RT43:7390.) In Wachter's opinion, Phillip would not have been able to see inside the bathroom if the door was opened in the way he described it. (RT43:7394.) Phillip admitted to Wachter that he had been to Kayser Service in the past. (RT43:7408.)

Appellant's son Girard testified that he was not sure when he met

with Phillip about purchasing the car; he testified earlier that it was May in response to a question that referred to May. (RT43:7453- 7454.) He purchased a Ford Probe on February 24, 1990, after his mother vetoed his purchase of a LeBaron. (RT43:7456-7458.)

Carolyn Thompson Jones, Tom's daughter, testified that on the evening of the shooting at the hospital, appellant did not appear to be sincerely grieving. (RT43:7508, 7526-7527.) The next day, she again seemed calm and did not show any grief. (RT43:7512-7513.) Carolyn Thompson worked as an investigator for the Department of Defense, and had received training in observing a person's body language, tone of voice, and facial expressions. (RT43:7507-7508, 7514.) Although she received no special training in mourning or grieving, she claimed to have "particularly acute powers of observation." (RT43:7515.)[18] She identified jewelry that appellant pawned on June 22 as jewelry the funeral director removed from her father's body and gave to Rene Griffin. (RT43:7510-7512, 7532-7538.)

After the presentation of the prosecution's rebuttal and appellant's surrebuttal, appellant re-opened her defense to present the testimony of Carolyn Sanders, Phillip's wife.[19] Carolyn testified[20] that on the evening of

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[18] Carolyn Thompson was certain that Charles Kayser was at the hospital the night her father died, but both the Kaysers testified on surrebuttal that he remained home that night. (RT44:7567, 7570.)

[19] She became available as a witness late in the trial when Sanders waived the marital testimonial privilege in return for the prosecutor's agreement not to "argue for death" for Sanders. The prosecutor advised the Court that no agreement existed "between prosecution and Mr. Jaffe [Carolyn Sanders's attorney] as to the understanding and terms under which she has agreed to testify" (RT44:7615-7616), but Carolyn Sanders testified that she expected to be in jail for less time because of her cooperation.

(continued...)

June 14, 1990, Phillip told her he had just shot someone three times and that he kicked in the bathroom door to do it. (RT44:7619; 45:7787.)[21] About a week earlier, she found a typewritten note on Phillip's dresser that referred to a bearded man and "Tuesday or Thursdays between 6:00 and 7:00 being best." (RT 45:7768.) She destroyed the note (RT45:7811), which she told the police had a handwritten symbol at top which she described as the letter "C." At trial, however, she testified that the symbol matched the "CB" on the sign at Community Brake, next door to Kayser Automotive, which she passed one day on the jail bus. (RT45:7767-7768, 7855).

Carolyn confirmed that Kuretich had both a drinking problem and a "bad" cocaine habit, and that she and Phillip were also using cocaine and had financial problems. (RT44:7623-7624.) Phillip arranged for them to borrow $1500 from appellant, which Carolyn picked up and used to pay their back rent. (RT45:7627-7629.) Carolyn denied asking Kuretich if she knew someone who would kill for money, and denied telling her that

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[19](...continued)
(RT45:7772-7773.)

[20] Prosecutor Mader represented that there was no agreement with Carolyn's lawyer about the terms under which she would testify (RT 44:7615-7616), however, prosecutor Goldberg contradicted Ms. Mader: he admitted that they had agreed not to use her testimony at appellant's trial against her, and that they would re-evaluate her case after her testimony. (RT44:7678-7680.) Carolyn herself admitted telling a friend that she did not expect to go to trial, and expected to get less jail time as a result of her cooperation. (RT46:7772-73.)

[21] Contrary to her earlier testimony during the hearing on marital privilege, Carolyn said no one else was present at the time. (RT44:7635.) Also, on July 15, 1992, six weeks before her testimony at appellant's trial, she told the prosecutor and the police that Phillip told her he would kill some one for the insurance money. (RT44:7626.)

appellant had hired Carolyn and Phillip to kill her husband (RT45:7791-7792.)

Carolyn was arrested on August 29, 1990. She spoke to the police in October of 1990, thinking she would "get something out of it;" the police told her that to get what she wanted (to go home), "there [were] certain things that were important to them that they wanted." (RT45:7788-7790.) On July 15, 1992, she told Detective Wachter and prosecutor Goldberg that Phillip told her before the murder he was going to kill someone for appellant for insurance money. (RT45:7626, 7864.)

While awaiting trial, Carolyn wrote many letters to Phillip. In one letter, she was "trying to have him tell the truth, that no one else was involved." (RT45:7796; Ex. 157.) In another letter, she told him he would be taken care of if he took the blame; she meant that when she got out, she would get a job. (RT45:7796.) Carolyn denied that appellant told her what to say in court, denied that she and appellant had decided to put the blame on Phillip, and denied that appellant ever told her she shot her husband. (RT44:7638, 45:7795-7796.)

E. Penalty Phase

Appellant's case went forward alone at the penalty phase of the trial.[22] Carolyn Thompson Jones, Tom's daughter, testified that the last time

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[22] Immediately after the jury returned the guilt verdicts, Sanders moved for severance of his penalty phase from appellant's. Sanders's counsel argued that severance was the only means to give effect to the agreement in which Sanders waived the marital privilege in exchange for the prosecution not arguing or seeking death against Sanders. (RT54:8857-8860.) The prosecutor and appellant opposed the severance. (RT54:8860, 8861-8862, 8864-8865.) The trial court denied the motion to sever without prejudice to renew (RT54:8870, 8891) and thereafter Sanders's counsel again moved for a mistrial or severance. (RT55:8987-8988.) The trial (continued...)

she saw her father was on Christmas Day 1989 because shortly thereafter she and her mother filed a civil lawsuit against her father and appellant. (RT56:9105.) Although she did not know what the lawsuit was about, she was instructed not to contact her father after the suit was filed. (RT56:9106.) She felt heartbroken about the fact that she did not speak to him since December 1989, and wished she could tell him she loved him, that she accused him of and prosecuted him falsely for something he had nothing to do with. (RT56:9107.) Upon the murder of her father, she lost a good friend, someone she could talk to, someone she was once close to and who made her the responsible independent person she is. (RT56:9108.) She and her father always celebrated their birthdays together, even if it was just over the telephone. (RT56:9108.)

Protestant chaplain Leslie Miotzek knew appellant from seeing her in church and Bible study every week while appellant was at the Sybill Brand Institute for Women. (RT57:9144.) Within the context of these interactions, Miotzek found appellant has the character of someone who was "consistent in Bible study," "dependabl[e] to administer to other inmates," with "a willingness to help reach out and help others," and a "faithfulness" and a "hunger within her to know the Lord of God and to let God's word administer to her heart and her life." (RT57:9145.)

Miotzek had never seen appellant exhibit any character trait for violence or ill temper in the time she had know her. (RT57:9145.) She never saw appellant give the sheriff's deputies any trouble or commit an

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[22](...continued)
court ruled the proceedings would be bifurcated (RT55:9008), but eventually granted Sanders's motion for a mistrial as to the penalty phase of his case. (RT55:9028.) Ultimately, the prosecution elected not to proceed with a penalty phase against Sanders and he was sentenced to life in prison without the possibility of parole. (CT12:3429.)

infraction of the rules. It appeared to Miotzek that appellant abided by the rules in jail and submitted to the jail authorities. (RT57:9146.) Overall Miotzek found appellant to be a positive influence and an encouragement to Miotzek and others. (RT57:9147.)

On cross-examination, the prosecution was permitted to ask questions pertaining to appellant's character trait for honesty including: soliciting perjured testimony from another inmate (RT57:9150), applying for credit while in custody (RT57:9151), involvement in a 1972 embezzlement from Aetna Sheet Metal Company (RT57:9174), a 1973 embezzlement from Franklin Sheet Sales (RT57:9175), a 1986 incident in which appellant stole $33,000.00 from Edith Ann's Answering Service (RT57:9175), a 1986 incident in which appellant posed as her husband's ex-wife and obtained a loan on property that wife owned with her husband (RT57:9176), an incident in which appellant obtained a driver's license in the name of Catherine Bazar in 1990 (RT57:9176), the creation of an alternative personality with a new identity card and social security number (RT57:9176), the creation of a letter from a guarantee trust company (RT57:9176), an attempt to obtain a loan on the basis of the new personality to purchase a house she had lost in foreclosure (RT57:9176), the conversion of a Rolls Royce (RT57:9176), a writing to the court in 1974 asking for leniency by falsely claiming she had a kidney removed and was on dialysis (RT57:9159-9160), and whether appellant's conviction for murdering her own husband would involve a breach of trust. (RT57:9178.)

Karen Brudney, also a chaplain at Sybil Brand Institute for Women testified that appellant was consistent in attending weekly Bible study and working at Sunday mass. (RT57:9181.) Brudney saw no incidents in which appellant was violent or lost her temper, but saw appellant act in a caring manner with the other women. (RT57:9182.) Although she had not

heard anything about appellant asking Jennifer Lee to write a letter to solicit perjurous testimony in the trial she did know Lee to be a shy and mild-mannered person. (RT57:9187-9188.)

Girard Jacquet, the son of appellant and Lewis Jacquet, had a close relationship with his stepfather in the last two years of his life.[23] (RT57:9191.) Jacquet benefitted from the good values both Tom and his mother instilled in him while growing up. (RT57:9193.) Other than his mother, Jacquet has no relatives he is close to. (RT57:9194.) He testified that her conviction would affect and change his relationship with her. Although he planned to visit her, and still loved her, he would not be able to continue the relationship he has with her in the same manner. (RT57:9196.)

In its rebuttal case, the prosecution introduced an unredacted copy of a letter appellant wrote to her husband in 1986, identified as the "Dear Tom" letter,[24] in which appellant admitted the embezzlement from Edith Ann's Answering Service. (RT57:9247.) Detective Wachter identified a letter he found in the court file relating to appellant's 1974 conviction for forgery in which appellant asked for leniency because of a mastectomy and kidney removal (RT57:9245), and an insurance application recovered in the search of appellant's house in which appellant made no mention of a mastectomy or kidney removal. (RT57:9246.)

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[23] The 1974 death certificate of Lewis Jacquet was entered into evidence. (RT57:9190, 9209.) Jacquet died of hepatic failure due to severe fatty metamorphis of the liver on May 3, 1974, at the Los Angeles Police Department's central jail. (Ex.173.)

[24] A redacted copy of the letter was introduced at the guilt phase. (RT26:4517-4518; Ex. 87.)

I

THE TRIAL COURT'S REFUSAL TO SEVER APPELLANT'S TRIAL FROM THE TRIAL OF CODEFENDANT PHILLIP SANDERS VIOLATED HER RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

The prosecution's theory of the case was that appellant conspired with Phillip Sanders, Phillip's wife Carolyn, and Carolyn's son, Robert Jones, to kill her husband in order to collect the insurance on his life. The prosecutor argued that Phillip was the trigger person, that Carolyn acted as the "go between" between appellant and Phillip, and that Carolyn's son Robert drove Phillip to and from the scene of the crime.

At trial, Phillip testified that appellant, acting alone, shot her husband. Appellant's defense was precisely the opposite: Phillip, acting alone out of anger or the need for money to support his cocaine habit, shot her husband. Their defenses were not merely inconsistent but antagonistic and irreconcilable: the jury could not accept Phillip's defense without convicting appellant, and vice-versa. As the prosecutor argued, "if you look at it logically . . . both of those defenses can't be true because, if that's true, then that means that nobody killed Melvin Thompson and he's still alive." (RT49:8307.)

Under these circumstances, a joint trial was a three-sided or "trilateral" one (RT5:762; 28:4824), at which appellant was forced to defend against two different theories of liability: the prosecution's theory that appellant was guilty because she hired Phillip to kill her husband, and Phillip's theory that she was guilty as the trigger person. Moreover, because Phillip was not constrained by the rules of fundamental fairness

that apply to the prosecution in a criminal case, the prosecutors could "sit back and watch as the two codefendants become gladiators in the ring against one another to see who is the last survivor standing." (RT37:6438.)

Before, during and after the guilt phase, appellant made repeated motions for a separate trial or a separate jury, based on the mutually exclusive defenses and the prejudicial impact of Phillip's presentation of his defense at trial. Despite the trial judge's opinion that he had never seen a case with such "a clear conflict between two people" (RT19:3470), however, the court failed to take action.

As appellant's counsel had predicted prior to trial, Phillip's counsel took every opportunity to persuade the jury that appellant alone was responsible for her husband's death. The conflicts at trial between the codefendants about the admissibility of evidence, the scope of cross-examination and other matters were so numerous and severe that the trial judge commented mid-trial: "I have never seen a case like this. Never. And I have been around 30 years." (RT44:7664.)

As the trial progressed, it became clear that the efforts of Phillip's counsel to exonerate him by convicting appellant went far beyond what appellant's counsel could have predicted, and far beyond what the prosecution would have been permitted to do. For example, in ex parte in camera proceedings held before and during trial, the substance of which was not disclosed to appellant until after the trial, Phillip's counsel capitalized on the court's opinion that the discovery statute did not require reciprocal discovery between codefendants, and obtained the court's authorization to defer complying with his statutory duty to disclose to the prosecution evidence he intended to produce in his case-in-chief that incriminated appellant, thereby ensuring that the evidence would not be disclosed until appellant "lock[ed] herself into a position." (RT5:762.)

At a later ex parte in camera hearing, Phillip's counsel informed the court they were orchestrating the presentation of other evidence with the prosecution[25] to enhance the state's case against appellant.

The prosecutors also exploited the antagonistic positions of Phillip and appellant. They agreed to forego their right to discovery of evidence to be introduced by Phillip, to ensure that the evidence would not be disclosed until appellant no longer had a meaningful opportunity to defend against it. They also relied upon information received from Phillip and his lawyers to obtain a mid-trial search warrant for appellant's jail cell and property. Rather than presenting the seized evidence as part of their case, the prosecutors deferred its introduction to Phillip, and then argued that he had proven "95% of the prosecution's case." (RT51:8681.)

Moreover, when the trial court belatedly concluded midtrial that severance would be necessary to ensure appellant a fair trial, the prosecution struck a deal with Phillip, agreeing not to argue for death for Phillip at the penalty phase in return for the withdrawal of his objection to his wife's testimony that he confessed to killing Tom (RT39:6592), and then joined with Phillip to prevent appellant from examining Phillip about the agreement and its effect on his testimony against appellant. The agreement between Phillip and the prosecution remained in effect only long enough to avoid a severance during the guilt phase. Following the conviction of both defendants, the court ruled that there had been no true meeting of the minds between Phillip and the prosecutors and determined

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[25] Two deputy district attorneys represented the prosecution at trial, Katherine Mader and Hank Goldberg. Appellant was represented by Donald Wager and Paul Takakjian, and Phillip was represented by David Wesley and Cary Weiss.

that Phillip, and not appellant, should receive a separate penalty trial before a different jury. Shortly after the jury returned a death verdict against appellant, the prosecution declined to proceed against Phillip and he was sentenced to life without possibility of parole. (CT12:3429; RT68:9704.2.)

Under the unprecedented circumstances of this case, the denial of appellant's multiple requests for a separate jury or dual juries, and the rejection of her related attempts to obtain a fair trial, was a clear abuse of discretion. At the joint trial, appellant was deprived of her rights to notice and a meaningful opportunity to investigate, confront and rebut the evidence used against her, to the effective assistance of counsel and a meaningful opportunity to formulate and present a defense, and to due process and equal protection of law, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments, and article 1, section 15 of the California Constitution. The joint guilt phase trial with Phillip was fundamentally unfair, and appellant's conviction and the death judgment must therefore be reversed. Moreover, the denial of appellant's motion for a new jury to determine penalty following the court's ruling declaring a mistrial as to Phillip, independently violated appellant's rights under these authorities and require's reversal of the death judgment.

B. Procedural Background

Appellant repeatedly moved to sever her trial from Phillip's before, during and after the guilt phase of the trial. Her motions were based on the antagonistic and irreconcilable defense presented by Phillip, and the prejudicial effects caused by that conflict at trial.

1. Pretrial Motions

On April 3, 1992, following Judge Jacqueline Weisberg's decision to sever the trial of appellant and Phillip from the trial of Carolyn and Robert Jones, appellant moved to sever her trial from Phillip's, arguing that (1) the prosecution's case against Phillip was based on direct evidence while the case against appellant was circumstantial, (2) appellant would be prejudiced by her prior association with Phillip in fraudulently obtaining a loan on the Sycamore Street house in 1989, and (3) her defense and Phillip's were "mutually antagonistic and irreconcilable." (CT6:1679-1694.)[26]

On April 14, 1992, appellant's counsel made an in camera offer of proof regarding the irreconcilable defenses.[27] Mr. Wager explained that appellant denied conspiring with anyone to kill her husband (RT3:534), and would testify that she and Phillip participated in fraudulently obtaining a loan on the Sycamore Street house that was still owned by Tom and his former wife Mellie, that Tom was aware of this fraud, and that appellant and Melvin used the money to avoid defaulting on the mortgage on their

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[26] Appellant also argued that Phillip's incriminatory post-arrest statements to Juanita Williams (whose son met Phillip at the county jail), which contained references to appellant, would be inadmissible at a joint trial. (CT6:001685-1687.) This reason to sever became moot when the prosecutor agreed not to call Juanita Williams as a witness. (RT3:316.)

[27] After the jury returned its penalty verdict, the court unsealed and distributed the transcripts of the in camera ex parte hearings held during the trial, which were later made part of the record on appeal. (See Orders filed December 4, 1998; January 20, 1999.) (RT65:9576-9583; See also orders filed.) Because the transcript of the in camera proceeding before Judge Weisberg is unavailable, the substance of counsel's in camera presentation was addressed in a settled statement. Appellant's trial counsel confirmed that the in camera presentation made to Judge Trammel on June 8, 1992, was essentially the same as the earlier presentation to Judge Weisberg.

own home on Hillary Street and to help operate Tom's business. (RT3:532, 539.) A conflict developed between Phillip and the Thompsons about how much money Phillip would receive for his participation in the fraud and about the method of payment. (RT3:533.) Phillip wanted his money and the situation "began to heat up enormously"(RT3:533-534); as a result, there was increasing communication between Phillip and the Thompsons shortly before Melvin's death. (RT3:532-533, 534.) Appellant would testify that Phillip threatened to take "some kind of action if he didn't get his money" (RT3:534), and that she made indirect payments to him through his wife Carolyn and his mother Isabelle. (RT3:531.)

Counsel explained to Judge Weisberg that appellant was not present when her husband was shot, but believed, based on Phillip's actions, that Phillip must have shot him, either out of anger or to obtain money to support his cocaine habit. (RT3:536-538.) Independent evidence placed Phillip at the scene, and he admitted the shooting to his wife Carolyn. (RT3:536.) Appellant's testimony would be corroborated by the Thompsons' use of their business accounts to service the Sycamore Street loan, the fact that Mellie sued Tom as well as appellant in connection with the fraud, and records of telephone calls between the Thompson's home and business and Phillip's job and residence. (RT3:542.) In addition, counsel explained that Phillip used jail "kites" and other methods to threaten appellant to dissuade her from testifying against him, and asked her for money to finance an independent defense for him to keep him from testifying against her. (RT3:534-535.)[28] Appellant's counsel anticipated

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[28] It was not until the prosecutor's cross-examination of Phillip at trial that appellant's counsel learned that Phillip's counsel had encouraged him to correspond with appellant for the purpose of obtaining evidence (continued...)

that Phillip would testify that he was not a conspirator but simply a shocked witness who observed appellant unexpectedly shoot her husband when he arrived at Kayser Automotive to discuss his repayment of a $1500 loan he had received from appellant. (RT3:535-537.) Thus, there was a clear conflict about who shot the victim. The court denied the motion, reasoning that "these problems arise always when you have a joint trial. I don't see anything here that is any different from what happens in many situations and nothing that would preclude Catherine Thompson from having a fair trial with the cases joined as it is [sic]." (RT3:315.)

Shortly after Judge Weisberg's denial of the motion, Phillip gave a statement to Detective Wachter and prosecutor Mader, admitting for the first time that he was present at the shooting but denying any involvement in the crime. (RT3:479.) Phillip claimed that he went to the victim's business to arrange for the repayment of a loan, that without warning appellant pulled out a gun and shot her husband, that she handed him the gun and told him to get rid of it, and that he gave the gun to Robert Jones for that purpose. This statement contradicted his post-arrest statement to the police denying any knowledge of the killing, and his later admission to Juanita Williams that he personally shot the victim. (CT7:1856-1857.)

Based on this new evidence, appellant renewed her motion to sever, and Phillip joined the motion. (RT3:494.) Appellant argued that Phillip's new statement confirmed that his defense was irreconcilable with and mutually antagonistic to appellant's defense, "in that the jury's exoneration of one defendant will necessarily require conviction of the other, and vice versa." (CT7:1864.) Phillip's counsel agreed, noting that Phillip's new

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[28](...continued)
against her. (RT40:6929-6930.)

statement and other information known to counsel made this case a "classical example of antagonistic defenses." (RT3:494.) Despite her earlier comment that Phillip's statement was a "significant change" warranting additional time to prepare (RT3:479), Judge Weisberg again denied the motion, simply referring back to her earlier decision: "Well, as I stated before, it is within the court's discretion and I considered the matter of inconsistent defenses, and I am exercising my discretion and denying the motion." (RT3:496.)

On June 8, 1992, the case was transferred to Judge Trammel without explanation. (RT3:506.) Judge Trammel later advised the parties that the case had been transferred because of Judge Weisberg's "inability to handle the case because of what she's going through, her and her husband." (RT5:664.)[29] Appellant renewed her motion to sever, and the prosecution moved to reconsolidate the trials of all four defendants, renewing the motion for dual juries rejected by Judge Weisberg.

In support of severance, appellant emphasized that her defense and Phillip's were not merely inconsistent but mutually antagonistic, and argued that Judge Weisberg's ruling was clearly erroneous. (RT4:515-549.) Phillip took no position on appellant's renewed motion (RT4:519). Appellant's counsel stated, without contradiction, his belief that, "in the months immediately preceding the transfer, that all counsel would agree that Judge Weisberg seemed very distracted from her duties, and at points seemed unable or unwilling to enter the litigation. [¶] I don't know that I can explain that much more clearly except to say that I recognize that she

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[29]Judge Weisberg took a leave of absence following threats to her and her husband, Judge Stanley Weisberg, in connection with the Rodney King case and the public events surrounding that trial. (CT11:3123.)

has been under a great deal of pressure and as a result, the rulings that may go for and against the defense may have suffered as a result of it. [¶] I believe it is appropriate to look at all the rulings that are brought up by either side within that context." (RT4:557-558.)

Appellant presented an ex parte offer of proof regarding the irreconcilable defenses to Judge Trammell, reiterating the substance of the in camera presentation she had earlier made to Judge Weisberg. (RT4:531-544.) Before concluding the in camera hearing, Judge Trammel asked counsel their position on the alternative of dual juries, and they indicated they had no opposition, with the understanding that appellant's jury would not hear Phillip's testimony. (RT4:541.)

Citing this Court's decision in *People v. Hardy* (1991) 2 Cal.4th 86, prosecutor Goldberg argued that the presence of inconsistent defenses did not mandate severance. (RT4:552.) He also argued that trying the case twice would be "an enormous burden, not only in terms of the witnesses and court time, but just in terms of the financial costs." (RT4:553.) Finally, he contended that appellant had not identified any evidence that would be admissible at a joint trial but inadmissible at a separate trial. "So even if the court were to grant the severance motion, what hypothetically would prevent the prosecution from working out some kind of deal? I'm not suggesting he would do this, but what hypothetically would prevent us from working out a deal or do something else to encourage Mr. Sanders to testify against Ms. Thompson?" (RT4:554.)

After expressing concern that Judge Weisberg's original ruling was res judicata, Judge Trammel concluded that the information appellant had presented "was not sufficient . . . to override" Judge Weisberg's decisions. (RT4:560-561.)

I feel there's got to be a degree – certainly too you've gone

through this motion twice with her – that I believe we've got to be in agreement – res judicata, maybe that's a poor choice of words because res judicata means without any exceptions; that ruling is final.

I don't view it like that...*I'm telling you I probably would have granted this motion had this been made for the first time.* Out of an abundance of caution and the way I try cases, the way I believe – I do not believe in her rulings exercising discretion that she did, that it was error.

Not that I am sitting as an appellate court, but I am merely saying it's my belief to abide by that decision.

(RT4:561; emphasis added.) Reiterating that if the motion had been made for the first time before him, he would have exercised his discretion the other way, Judge Trammel concluded there was no reason to "overturn" Judge Weisberg's decision. (RT4:562-563.)

Appellant again moved for severance or for dual juries on June 24, 1992, based on the court's receipt of undisclosed information from Phillip at an ex parte, in camera hearing held on June 9, 1992. At that hearing, the substance of which was not disclosed to appellant until after the jury returned its penalty verdict (RT65:9577), Judge Trammel had granted Phillip's request to withhold from the prosecutors evidence incriminating appellant for the express purpose of circumventing the prosecutor's duty to disclose that evidence to appellant in order to ambush appellant after she presented her defense and "lock[ed] herself into a position." (RT4:762 (See Argument II, *infra.*) In camera, Phillip's counsel explained that there were "three sides in this case" because of the antagonistic defenses, and that the prosecutors were aware of their request to withhold discovery from them and were "agreeable." (RT5:762, 764.)

Phillip's counsel also told the court in camera that they believed their

decision to withhold discovery was a new reason to sever that was "relatively critical in terms of whether or not the court should grant the motion," but that they could not disclose this information in open court. (RT5:764.) Judge Trammel responded:

> I can't resolve your dilemma other than – very definitely, the district attorney wants to keep this case together. Because this is a death penalty case and because that affects the other defendant, even though the other defendant has been insisting on a separate trial, I would be reluctant in hearing such a motion to do it out of the presence of that defendant.
>
> But in any event, even if I were to exclude that defendant out of the hearing involving the district attorney, the district attorney would be under an obligation once they found this out to disclose it to the other side.
>
> It's really a catch 22. I don't know how to tell you to proceed because it really is a catch 22.

(RT5:765.)

The court then granted Phillip's request to withhold discovery (RT5:765-766), but took no action to protect appellant's rights.

At the time of their renewed motion to sever on June 24, appellant's counsel knew only that Phillip's counsel had requested an in camera hearing on a discovery matter and had told the court that what they wished to discuss in camera "might affect the court's decision" on severance or separate juries. (RT5:736; 9:1155-1156.) Without disclosing what had been discussed in camera, the court denied the renewed motions on the ground that "nothing was revealed at the in camera that would cause me to believe it is necessary" to sever the trials or empanel two juries. (RT9:1156.)

On July 21, 1992, appellant requested the court to alter the order of

proof so that she could present her defense after Phillip presented his defense. She argued that if she were required to proceed first, she would be "sandwiched" between two accusers: the prosecutor who would attempt to prove that she hired Phillip to shoot her husband, and Phillip, who would testify that she shot her husband. (CT8:2368; RT22:3795-3798.) Appellant noted the importance to the penalty determination of the jury's finding regarding the identity of the trigger person. (CT8:2367.) In addition, appellant argued that allowing her to follow Phillip would save time and avoid confusion by allowing her to rebut both the prosecution and Phillip at the same time. (CT8:2368.)

Phillip's counsel opposed the motion and requested the court to consider the sealed transcript of their ex parte, in camera hearing on June 9, 1992, arguing that they had "a reason not to disclose information on our defense for the safety of witnesses." (RT22:3795, 3797-3798.) The court denied appellant's motion, "primarily for the reasons disclosed in the ex parte in camera motion," and rejected the request of appellant's counsel to disclose those reasons to counsel in appellant's absence. (RT22:3798.) Based on these rulings, appellant renewed her motion to sever, which was again denied. (RT22:3809.)

2. Motions During Trial

In his opening statement, the prosecutor told the jury that Phillip was "charged as the shooter, the person who took the gun and shot" Melvin. (RT22:3829.) Phillip's counsel told the jury he would prove that it was appellant who shot her husband in Phillip's presence. (RT22:3857, 3868.) Immediately after these opening statements, appellant renewed her motion for severance or for two juries, arguing that it was now even more apparent that she would have to defend against two prosecutors. (RT 22:3878.) The court denied the motion without comment. (*Ibid.*)

During its case-in-chief, the prosecution called Phillip's wife Carolyn to testify. Phillip objected to any testimony regarding his statements to her on the evening of the killing, arguing that they were confidential marital communications. After a hearing outside the jury's presence, the court upheld Phillip's assertion of privilege. (RT32:5708.) Appellant then moved for a mistrial and severance because the court's ruling precluded her from introducing Phillip's admission to Carolyn that he shot Melvin. (RT33:5711.) In arguing the critical significance of this evidence, appellant's counsel reminded Judge Trammel of his own earlier statements that "the very issue as to who may receive the death penalty if there is a conviction, is the issue as to who shot Melvin Thompson." (RT33:5713.)

In response, the prosecutor advised the court he would forego calling Carolyn if necessary to avoid severance. (RT33:5734.) The court ultimately agreed that appellant would be entitled to introduce evidence of Phillip's confession to his wife if she were being tried separately, and therefore refused to permit the prosecutor to call Carolyn. (RT33:5736.) The court also observed: "I've never seen a case that has more turning issues and who knows where this case is going? Certainly I don't." (RT33:5737.)

Recognizing that the issue would arise again if Phillip testified in his defense that appellant shot her husband, appellant's counsel argued that where there are antagonistic defenses, "every time . . . you try and meet one of these issues, it's like a rosebush, new thorns spring up. . . . [A]s we continue to move back and forth, new issues are emerging and blooming." (RT33:5738). Counsel therefore renewed the motion to sever, based not on the ground on which the court had just ruled, "but on the whole of our earlier arguments, as well as not only what the court sees presently but what

prospectively could very easily cause a mistrial a week from now or two weeks from now." (RT33:5739.) The court stated it saw no grounds for a mistrial "at this point, [b]ut that's not to say a week from now or two weeks from now – I'll cross those bridges when I get to them." (*Ibid.*)

On August 13, 1992, after calling several witnesses, appellant's counsel advised the court she would not testify and was prepared to conditionally rest, subject to "picking up the loose oddds and ends witnesses." (RT37:6425.) Counsel explained that this decision was based "among other things . . . on the lack of severance, the order of proof, the scope of permissible cross-examination and on the court's ruling on the 1101b motion." (RT 37:6425.) The court warned appellant that her decision would be irrevocable because Phillip's counsel, who were about to present his defense, would "commit themselves" based on her election. (RT37:6429.)

In response, appellant's counsel again asked the court to alter the order of the proceedings by requiring the prosecution to present its rebuttal evidence against appellant at that point, instructing the jury and holding Phillip's case in abeyance until the jury reached a verdict as to appellant. (RT37:6425.) Counsel explained that this procedure would effectively sever the cases without requiring separate trials or separate juries, and would permit each defendant to be judged only on the evidence against him or her, without being affected by the problems created by the presentation of irreconcilable defenses at a joint trial.

Although Phillip did not oppose appellant's request, the court denied it because of a concern that allowing the jury to first determine appellant's guilt would necessarily entail some assessment of Phillip's culpability, which would prevent the jury from later passing on his case in an unbiased manner. (RT37:6442-6443.) The court also rejected, without explanation,

appellant's fall-back request to declare a mistrial as to one or the other of the defendants, which counsel argued would alleviate the court's concerns about Phillip's rights and also avoid the prejudice caused to appellant by "not knowing and not being able to discover what is coming from" Phillip. (RT37:6444.)

The next morning, appellant's counsel received their first notice of what was coming from Phillip. The prosecutor gave appellant's counsel four letters he had received the night before from Phillip's lawyers (RT38:6481, 6487), letters which the prosecutor said appellant had sent to Phillip. He described their contents as a discussion of a possible defense of mistaken identity, and a proposed confession for Phillip that would exonerate his wife and appellant. (RT38:6481.)

Appellant's counsel informed the court they had just seen this material for the first time that morning, and reminded the court that appellant's motion for the production of documents from Phillip had been denied and that Phillip's counsel had declined to voluntarily disclose any material. (RT38:6494.) Counsel therefore moved for a mistrial and severance of appellant's case, arguing that it was a "manifest violation of appellant's due process rights to ask her to defend in front of a jury, a capital jury, against evidence of which she has no notice." (RT38:6494-6495.) Counsel emphasized that they had received "nothing even approaching adequate notice . . . in which we would have a chance to evaluate [that evidence between] counsel, have a chance to speak with our client, to examine the evidence, to get her explanations and interpretations." (RT38:6495.) Observing that appellant had been on notice of Phillip's defense since opening statements, the court denied the motion. (RT38:6497.) The court also denied appellant's renewed motion to direct Phillip to disclose his witnesses and the manner in which he intended to

authenticate the letters (three of which were not in appellant's handwriting), explaining: "I don't believe I have the right to do that because it's a codefendant." (RT39:6724.)

The next day, after Phillip identified the letters,[30] his counsel interrupted his direct testimony to call Jennifer Lee, an inmate at the California Institute for Women at Frontera who met appellant when both were incarcerated at the county jail. (RT40:6811-6815). Lee testified that she copied the letters and sent them to Phillip as a favor to appellant. Following Lee's testimony, appellant again unsuccessfully moved for a mistrial because she had received no notice of Lee or the fact that she would be called as a witness, and had no opportunity to attempt to interview her before she testified. It was not until after the jury sentenced appellant to death that her counsel learned that the court had authorized Phillip's counsel to withhold disclosure of Lee's identity and the letters, and to use the prosecutor's investigating officer in this case to transport Lee to and from court on the morning of her testimony, interviewing her along the way.

Immediately after the court denied appellant's motions based on Phillip's failure to disclose the letters, the court was required to return to the question of the admissibility of Carolyn's testimony regarding Phillip's post-crime confession. Once again, the prosecutor was willing to forego impeaching Phillip's testimony to avoid severance. (RT38:6506). Weighing appellant's right to a fair trial against Phillip's statutory privilege, Judge Trammel told the prosecutor he was now "seriously considering" granting a mistrial. (RT38:6501-6503, 6506.)

I'm finding myself almost like I'm now becoming an

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[30] Exhibits 138, 139, 140,141, 142.

advocate against everybody for nobody, but the situation I'm now in is you say you will not call her to impeach Mr. Sanders when he testifies.

This is a joint trial because you disagree with me. There's nothing wrong with that. It happens to me every day. That's your tactic because you don't want to build in error. If there's going to be error, you want Takakjian to do it himself.

[Carolyn Sanders] will testify if you call her. That's the way I understand it from what Mr. Jaffe [Carolyn's lawyer] said. In a joint trial she will testify. [¶] If it's a severed trial or somebody else calls her she won't. . . . If I sever – I think this case has taken a lot of twists and turns that I don't think anybody anticipated; maybe I'm wrong. [¶] *And I will have to say at this point it is my feeling it would have been better to have tried this with two juries and that's in retrospect.* I'm not backing away from my original ruling based on what I saw at the time, and it may still be that way that we gain nothing from the double trial, but certainly there have been a lot of issues that have arisen because of two defendants.

[I]f I sever, then Mrs. Thompson does gain because then Mr. Sanders testimony does not come in and there's nothing to impeach.

I don't know how I can do anything else.

(RT38:6512-6514; emphasis added.) Phillip also requested severance, arguing that at a separate trial, he could successfully assert his marital privilege. (RT38:6504-6505.)

At the prosecutors' urging, the court deferred its decision until the next court day, Monday, August 17, 1992. Over that week-end, the prosecution obtained and served search warrants on the cells of appellant, Phillip and Carolyn Sanders in an attempt to find additional letters exchanged among the defendants to use to impeach Phillip. (RT40:6843.) The affidavit in support of the warrant was based on information about the letters disclosed to Detective Wachter by Phillip and his lawyers.

(RT54:8887.) The trial court observed that this mid-trial search of the defendants' cells was "something else that hadn't happened in [his] 22 years on the bench." (RT40:6845.)

On August 17, the prosecutor asked the court to revisit and reverse its earlier ruling that the marital privilege applied to Phillip's statement to his wife. The court refused, and stated that after further consideration over the week-end, he believed that "in fairness to everybody, severance should be granted." (RT39:6564, 6568.) Acknowledging that the situation was "very convoluted" and one he "never envisioned back when I had the motion for severance that we would get into this situation," the court reasoned that at a separate trial of appellant, there would be no evidence that she was the shooter, and that at a separate trial of Phillip, the prosecutor would not attempt to impeach him with his statement to his wife because of Phillip's marital privilege claim and because, as the prosecutor admitted, that piece of evidence was not very important to the prosecution's case. (RT39:6567.) The court also expressed its concern that at a joint trial, at which appellant was entitled to introduce the statement for its truth, the jury would not be able to limit its consideration of the statement against Phillip. (RT39:6566.)

In response to the prosecutor's argument that a ruling on severance was still premature because appellant might choose not to call Carolyn to impeach Phillip (RT39:6570), appellant's counsel made clear that he would be compelled to call Carolyn at the joint trial because "the question of who lives and who dies may turn on who pulled the trigger. . . . Mrs. Thompson's position now is very precarious, and if I have to choose between saving her life and trying to avoid calling Carolyn Sanders because [she] will say a number of things that would be detrimental to the defense, I would nevertheless choose to save her life and call her to prove Mr. Sanders

did the shooting." (RT39:6572-6573.)

After expressing concern about the prosecutor's willingness to forego impeaching Phillip's testimony that appellant was the shooter, the court denied the motion to sever. (RT39:6582.) The court did, however, alter the order of proof, directing the prosecutor to cross-examine Phillip before appellant. The court indicated that it would look at the posture of the case at that point, and if nothing had changed, would grant severance. (RT39:6583.)

Following a 15-minute recess, Phillip's counsel announced what the court described as another "unbelievable twist" in the case: Phillip would waive his marital privilege with respect to the confidential communication with his wife, and in return for his waiver, "the People will not be asking for death with respect to Mr. Sanders." (RT39:6591.) Prosecutor Mader clarified her position by noting that if there were to be a penalty phase, it would proceed as to both defendants, but they would not urge death for Phillip: "We would basically submit it to the jury and say you have heard the various culpabilities of these people and what you think is worse or not as bad is up to you." (RT39:6591-6592.) Moreover, if the jury returned a death verdict as to Phillip, the prosecution would not take a position on a motion to the court to reduce the penalty. (RT39:6593.) Phillip's counsel agreed that this was their understanding, and Phillip then waived his marital privilege. (RT39:6594.)

Although this agreement was entered at the beginning of Phillip's direct examination, the court precluded appellant from examining Phillip about the effect of the agreement on his testimony. At the joint request of the prosecutors and Phillip's counsel, the court struck Phillip's testimony that "in [his] mind right now," this was not a death penalty case "for [him]," and directed the jury to "totally disregard . . . anything regarding penalty."

(RT42:7213, 7270.) In addition, the court informed the jurors of the terms of the agreement, and then instructed them to disregard that information as well.[31]

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[31] The court instructed the jury:

> There were someinnuendos from some questions that were asked and I think I have no other choice but to make the following comment to you and then ask you to totally disregard it.
>
> In this case, late last week, it became apparent to me that a possible severance motion would have to be granted in order to maintain both defendants' rights to a fair trial.
>
> A severance motion means a motion in which one defendant would continue with his or her trial and the other defendant would have to start all over again from the beginning with a different jury other than yourselves.
>
> The reason for the possible severance had to do with a very complex legal issue that's known as the marital communication privilege.
>
> Generally, the privilege gives one spouse the right to prevent another spouse from testifying against him or her.
>
> Thus, Phillip Sanders could have prevented his wife Carolyn Sanders from testifying against him. In order to avoid the severance, Phillip Sanders would have to waive and give up his marital communication privilege so that Carolyn Sanders could be called by any of the parties to testify in this trial.
>
> To avoid the severance, the People agreed that if Phillip Sanders would waive his marital communication privilege, that they would not argue one way or the other to the jury in a penalty phase as to whether or not he deserved

(continued...)

In response to appellant's further complaint that the instruction failed to inform the jury that the prosecution had also agreed not to oppose a motion to reduce the penalty if the jury returned a death verdict against Phillip, prosecutor Mader extended the same offer to appellant. Mr.

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[31](...continued)
the death penalty.

> Now, that is an explanation for some of the innuendos from the question that was asked.
>
> I have struck the question and the answers and I am now going to ask you to play the mental gymnastics of striking from your mind what I just told you.
>
> In other words, I'm only telling you this because I know it's very difficult with what went on with the defendant asking to talk to his counsel. Put that out of your mind and don't wonder what is going on. So I told you what is going on and now I want to put it completely out of your mind and not let any of that affect your determination of the issues in this phase of the case.

(RT42:7270-7272.)

> Immediately after the court gave the instruction, appellant unsuccessfully moved for a mistrial, arguing that the court's description of the agreement was incorrect insofar it failed to inform the jury that the prosecution "left open their option at any time to tell jury trial [sic] that they did not think that he deserved the death penalty." (RT42:7273). After the jury returned its guilty verdicts, appellant again unsuccessfully moved for a mistrial, based on the court's refusal to give her proposed instruction on the full nature of Phillip's agreement with the prosecution. (RT56:9111.)

Takakjian immediately accepted the offer, but his cocounsel Wager rejected it. (RT42:7226-7227.) Finding that "this thing is getting very convoluted," the court excused the jury for lunch, and the prosecutor then withdrew the offer. (RT42:7227, 7235.)

During the colloquy that preceded the court's instruction on the agreement, it became apparent that the prosecutors and Phillip's counsel did not have the same understanding of their agreement, but the court refused to pursue that conflict and its significance at that point. (RT42:7252-7255.)

Later that day, appellant renewed her motion for mistrial and severance, arguing that the circumstances that caused the court to conclude that a mistrial and severance were necessary had not changed and would not change until the prosecution called Carolyn to impeach her husband. (RT39:6726-6728.) Appellant then moved to call Carolyn as part of her case-in-chief, after the conclusion of Phillip's direct examination of Phillip but before the prosecution's cross-examination of Phillip. (RT39:6728-29.) The court made no ruling on this request, and the prosecutor's cross-examination of Phillip began, subject to "further direct," without the presentation of Carolyn's testimony.

During prosecutor Mader's cross-examination, Phillip admitted that he gave appellant's letters to his attorneys as soon as they visited him (RT 40:6904), and wrote back to appellant on the advice of his attorneys in order to elicit more letters from her. (RT40:6929-6930.) He claimed he could not remember what he wrote and had not made copies. (RT40:6914, 6927.) Appellant moved for a mistrial and severance, arguing that because it was a joint trial, she could not confront and cross-examine Phillip's attorneys on this issue. (RT40:6947-6948.) "Obviously, I would like to call his attorneys as rebuttal witnesses against this evidence, but I know from my

experience and also because Mr. Weiss has said so, if I call either one of them to the stand, they will invoke the attorney client privilege and I will not be able to impeach Mr. Sanders." (RT40:6948.) The court denied the motion. (*Ibid.*) The next day, appellant again objected that her inability to call Phillip's lawyers to impeach his testimony that he had discussed his story with his attorneys before disclosing it to the police in April, 1992 (RT41:7111) violated her right of confrontation and requested a mistrial and severance. (RT41:7111, 7044). The court summarily denied the motion. (*Ibid.*)

In light of Phillip's testimony denying that he confessed to his wife (RT39:6716) and the prosecutors' refusal to call Carolyn Sanders to impeach him, appellant's counsel was forced to call Carolyn to testify about her husband's admission that he killed the victim. (RT44:7619; 45:7787.) On direct examination by appellant's counsel, she denied having heard about a plan to kill someone for appellant for money prior to the killing, but was impeached on cross-examination with her prior inconsistent statements to the prosecutors. (RT45:7626, 7864.)

3. Motions Following Conviction

After the jury convicted Phillip and appellant, Philip moved to sever his penalty trial from appellant's on the basis of his agreement with the prosecutor, arguing that he could not get the benefit of his bargain at a joint trial at which the prosecutor was permitted to present victim impact evidence and argue that the circumstances of the crime warranted death. (RT54:8858.) Both appellant and the prosecutor opposed this motion. (RT54:8860-8861.) Appellant argued that severance of the penalty trial would prejudice her, as one of her defenses at the penalty stage would be to argue that Phillip was the more culpable party because he was the trigger person. (RT54:8864-65; 55:9002.)

After considering but rejecting the alternatives of bifurcating the jury's penalty deliberations or precluding the prosecution from arguing for death as to either defendant, the court commented that "the best way is to grant [a mistrial] as to everybody. That would make me real popular with mu colleagues, I'm sure." (RT55:9025.) At the urging of the prosecutors, the court granted a mistrial as to Phillip only (RT56:9028), and rejected appellant's argument that the removal of Phillip from the penalty phase would prejudice appellant by undermining, the jury's ability to engage in a meaningful evaluation of the relative culpabilities of appellant and Phillip and constituted "good cause" to empanel a new jury under Penal Code section 190.4(c) . (RT55:9046, 9054.)

Appellant was then forced to proceed alone before the jury that had been selected with the expectation that any penalty trial would be a joint trial, and whose composition was influenced by the participation of Phillip's counsel in its selection. (RT55:9046, 9054.)

At the beginning of the penalty phase, the court informed the jurors that it had granted Phillip's request for a mistrial but, over appellant's objection, directed them not to consider this fact.[32] (RT55:9104-9105,

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[32]The court instructed:

> You are instructed that the issue of penalty as to the defendant Phillip Sanders is no longer before you. This is because the court has granted a mistrial with respect to the penalty phase as to Mr. Sanders at his request. I granted in this trial as to the penalty phase for the following reason: As I previously instructed you, the defendant, Phillip Sanders, and the prosecution entered into an agreement during the course of the guilty phase of the trial[,] that in return for Mr. Sanders giving up his right under California law to claim the marital communication privilege, it will be [sic] prohibiting his wife

(continued...)

9330.) The court also refused appellant's request to inform the jury of the full terms of the agreement between Phillip and the prosecution. (CT10:2831-2832.)

As appellant's counsel had predicted (RT54:8887), Phillip did not have a separate penalty trial. He was sentenced to life without possibility of parole by the court on May 11, 1993, after the jury returned a verdict of death against appellant but before judgment was pronounced. (CT12:3429; RT68:9704.2.)

C. Applicable Legal Principles

1. Standard of Review

Penal Code section 1098 provides:

> When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court orders separate trials. In ordering separate trials, the court in its discretion may order a

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[32](...continued)
Carolyn Sanders, from testifying with respect to any communications he may have had with her, the prosecution agreed not to argue one way or the other to you, the jury, the respect at which penalty you should impose as to him. The Court feels it would violate this agreement if the prosecution were to argue to the jury such an issue with respect to the defendant Catherine Thompson during a joint penalty trial; therefore, to ensure that Mr. Sanders receives the benefit of the agreement, the court has granted him a separate trial to be had at some future time with a different jury. You are not to consider or discuss the fact that the court has exercised its discretion to grant Mr. Sanders a mistrial and a separate penalty in determining what the appropriate penalty should be to the defendant, Carolyn Thompson - - Catherine Thompson.

(RT55:9104-9105.)

> separate trial as to one or more defendants, and a joint trial as to the others, or may order any number of the defendants to be tried at one trial, and any number of the others at different trials, or may order a separate trial for each defendant; provided, that where two or more persons can be jointly tried, the fact that separate accusatory pleadings were filed shall not prevent their joint trial.

Under this statute, a decision concerning severance of codefendants' trials is generally a matter within the trial court's discretion. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1286.) The purpose of the statute's preference for joint trials is to prevent repetition of evidence and save time and expense to the state as well as to the defendant. (*People v. Scott* (1944) 24 Cal.2d 774, 778-779.) However, "the pursuit of judicial economy and efficiency may never be used to deny a defendant his right to a fair trial." (*Williams v. Superior Court* (1984) 36 Cal.3d 441, 451-452; accord *Calderon v. Superior Court* (2001) 87 Cal.App.4th 933, 939.)

In a capital case, severance motions "should receive heightened scrutiny for potential prejudice." (*People v. Keenan* (1988) 46 Cal.3d 478, 500 [and authorities cited therein].) This is consistent with the Eighth Amendment's requirement of heightened reliability in capital cases. *Mills v. Maryland* (1988) 486 U.S. 367, 376. "Whether denial of a motion to sever the trial of a defendant from that of a codefendant constitutes an abuse of discretion must be decided on the facts as they appear at the time of the hearing on the motion rather than on what subsequently develops." (*People v. Turner* (1984) 37 Cal.3d 302, 312.)

Importantly, however, even if a motion to sever was properly denied at the time it was made, if the effect of joinder deprived the defendant of a fair trial or due process of law, reversal is required. (See, e.g., *People v. Mendoza* (2000) 24 Cal.4th 130, 162; *People v. Arias* (1996) 13 Cal.4th 92,

127; *People v. Johnson* (1988) 47 Cal.3d 576, 590; *People v. Boyde* (1988) 46 Cal.3d 212, 232; *People v. Turner, supra*, 37 Cal.3d 302, 313; *People v. Grant* (2003) 113 Cal.App.4th 579, 587; see also, e.g., *United States v. Ziperstein* (7th Cir. 1979) 601 F.2d 281, 286, cert. denied (1980) 444 U.S. 1031.) In this regard, "error involving misjoinder 'affects substantial rights' and requires reversal . . . [if it] results in actual prejudice because it 'had substantial and injurious effect or influence in determining the jury's verdict.'" (*United States v. Lane* (1986) 474 U.S. 438, 449; accord *Zafiro v. United States* (1993) 506 U.S. 534, 539; *People v. Grant, supra*, 113 Cal.App.4th at p. 587.) "In other words, the defendant must demonstrate a reasonable probability that the joinder affected the jury's verdicts." (*People v. Grant, supra*, 113 Cal.App.4th at p. 587.)

2. Mutually Antagonistic or Irreconcilable Defenses

This Court has recognized that conflicting defenses and likely juror confusion may require separate trials for codefendants. (See, e.g., *People v. Hardy* (1992) 2 Cal.4th 86, 167; *People v. Massie* (1967) 66 Cal.2d 899, 917.) As to the circumstances under which severance is required due to conflicting defenses, the Court has turned to federal authority for guidance. (*People v. Hardy*, supra, 2 Cal.4th at pp. 168-170.) The essential consideration in determining whether defendants who are jointly charged should be separately tried is whether "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." (*Zafiro v. United States, supra*, 506 U.S. at p. 539, cited in *People v. Cummings, supra*, 4 Cal.4th at pp. 1286-1287; *accord United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082 ["The touchstone of the court's analysis is the effect of joinder on the ability of the jury to render a fair and honest verdict"]; *United States v. Aulicino* (2d Cir. 1995) 44 F.3d 1102, 1116 [if a

"joint trial would compromise a trial right of the moving defendant or prevent the jury from making a reliable judgment about guilt or innocence," the trial must be severed].)

Under federal law, in order to challenge the failure to sever on appeal, the defendant must demonstrate that the effect of joinder compromised a specific trial right, prevented a reliable adjudication of guilt or innocence, or otherwise deprived him of a fair trial. This showing establishes both error and prejudice and requires reversal. (See, e.g., *United States v. Tootick, supra*, 952 F.2d at pp. 1082-1083 ["in order to establish an abuse of discretion, the defendants must demonstrate that clear and manifest prejudice did in fact occur," such as to deny the defendant "a fair trial;" if he does so, both error and prejudice are established and reversal is required]; *accord United States v. Mayfield* (9th Cir. 1999) 189 F.3d 895, 906 [where reviewing court finds abuse of discretion in failing to sever trials of codefendants with inconsistent defenses based on "manifest prejudice" that resulted, there is no need for separate harmless error analysis]; *United States v. Rucker* (11th Cir. 1990) 915 F.2d 1511, 1512 [in order to establish abuse of discretion, appellant must demonstrate that he "suffered compelling prejudice" from joinder, which deprived him of fair trial]; *United States v. Romanello* (5th Cir. 1984) 726 F.2d 173, 177 [same].) Thus, similar to the line of California authority recognizing that gross unfairness from joinder requires reversal even if the motion to sever was properly denied at the time it was made, this analysis necessarily turns on events that occurred at trial and subsequent to the court's denial of severance.

In light of these principles and under both federal and California law, mere inconsistent or blame shifting defenses alone do not alone require severance. (*People v. Cummings, supra*, 4 Cal.4th at p.1287; *People v.*

Hardy, supra, 2 Cal.4th at p. 170; *People v. Pinholster, supra*, 1 Cal.4th at p. 932, *People v. Turner, supra*, 37 Cal.3d at p. 312, *Zafiro v. United States, supra*, 506 U.S. at p. 538 [declining to "adopt a bright-line rule" regarding severance based on "conflicting defenses" or to hold that nature of conflicting defenses, without more, causes prejudice]; *United States v. Mayfield, supra*, 189 F.3d at pp. 899, 903-904; *United States v. Tootick, supra*, 952 F.2d at p. 1081 [same].) For instance, where more than one participant was involved in the crime, and one defendant attempts to absolve himself and cast blame on the other participants, but another defendant presents an alibi defense, their defenses are merely inconsistent because the jury's acceptance of one defense will not necessarily preclude acquittal of the other defendant. (See, e.g., *People v. Hardy, supra*, 2 Cal.4th at pp. 167-168.) Or, where defendants charged with the same murder admit their participation but attempt to shift blame to the other for landing the fatal blow, their defenses to the charge of murder are merely inconsistent because both are equally guilty of the charged crime under aiding and abetting principles, regardless of who inflicted the fatal blow. (*United States v. Brady* (9th Cir. 1978) 579 F.2d 1121.)

However, as the Ninth Circuit Court of Appeals has explained and this Court has recognized, defenses may prevent a reliable judgment of guilt or innocence, and therefore require separate trials, when they "'move beyond the merely inconsistent to the antagonistic'" to the point of being "mutually exclusive." (*United States v. Mayfield, supra*, 189 F.3d at p. 899, quoting *United States v. Tootick, supra*, 952 F.2d at p. 1081, cited with approval in *United States v. Zafiro, supra*, 506 U.S. at pp. 542-543, [conc. opn. of Stevens, J.]; accord *United States v. Sherlock* (9th Cir. 1989) 962 F.2d 1349, 1362.) Mutually exclusive defenses exist where "'the core of the codefendant's defense is so irreconcilable with the core of his own

defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant.'" (*United States v. Mayfield, supra*, 189 F.3d at pp. 899-900, quoting *United States v. Throckmorton* (9th Cir. 1996) 87 F.3d 1069, 1072; *accord People v. Hardy, supra*, 2 Cal.4th 86, 168 [where "defenses are irreconcilable" or "acceptance of one party's defense will preclude the acquittal of the other"]; *United States v. Tootick, supra*, 952 F.2d at p. 1086 ["mutually exclusive defenses are said to exist when acquittal of a codefendant would necessarily call for conviction of the other"]; *United States v. Rose* (1st Cir. 1997) 104 F.3d 1408, 1415, cert. denied 520 U.S. 1258 (1997) [mutually antagonistic defenses exist "if the tensions between the defenses are so great that the finder of fact would have to believe one defendant at the expense of another"]; *United States v. Rucker, supra*, 915 F.2d at p. 1512; *United States v. Romanello, supra*, 726 F.2d at pp. 178-181; *United States v. Ziperstein, supra*, 601 F.2d at p. 286.) A classic case is when the evidence demonstrates that one of the defendants must be guilty, one defendant can only deny his guilt by attributing it to the other, and consequently the jury cannot reasonably believe both defenses. (See, e.g., *United States v. Tootick, supra*, 952 F.2d at p. 1082; United *States v. Rucker, supra*, 915 F.2d at p. 1513; *United States v. Crawford* (5th Cir. 1978) 581 F.2d 489, 490-491.)

In assessing the effect of joinder in such cases, a reviewing court should be guided by several fundamental principles. First, "[j]oinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor. . . . Joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary." (*United States v. Tootick, supra*, 952 F.2d at p. 1082, quoted with approval in *Zafiro v. United States, supra*, 506 U.S. at pp. 543-544, conc. opn. of Stevens J.;

accord *United States v. Mayfield, supra*, 189 F.3d at pp. 899-900; *United States v. Sherlock, supra*, 962 F.2d at p.1363; *United States v. Romanello, supra*, 726 F.2d at p. 179.) "[C]ross examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant" and "closing arguments allow a final opening for codefendant's counsel to portray the other defendant" as the perpetrator. (*United States v. Tootick, supra*, 952 F.2d at p. 1082; accord *United States v. Mayfield, supra*, 189 F.3d at p. 900.) "The existence of this extra prosecutor is particularly troublesome because defense counsel are not always held to the limitations and standards imposed on the government prosecutor." (*United States v. Tootick, supra*, 952 F.2d at p. 1082.) Hence, the manner in which the codefendant conducts his defense may demonstrate prejudice and fundamental unfairness from joinder. (See, e.g., *United States v. Mayfield, supra*, 189 F.3d at pp. 900-902 [where codefendant's defense was that defendant was perpetrator and his counsel used "every opportunity" to implicate defendant, defenses were antagonistic and joinder was prejudicial and deprived defendant of fair trial]; accord *United States v. Tootick, supra*, 952 Fd.2d at pp.1084; *United States v. Romanello, supra*, 726 F.2d at pp. 178-181; *United States v. Johnson* (5th Cir. 1973) 478 F.2d 1129, 1133.)

Similarly, the prosecutor's argument is an important factor to consider in assessing the effect of joinder. (See, e.g., *United States v. Tootick, supra*, 952 F.2d at p. 1085 [finding reversible error in joinder of trials of codefendants with antagonistic defenses based in part on prosecutor's closing argument mocking defendants for placing the blame on each other and the logical impossibility of accepting both defenses]; *United States v. Sherlock, supra*, 962 F.3d at p. 162 [finding reversible error in joinder of defendants with inconsistent defenses based on prosecutor's

prejudicial argument utilizing evidence admitted against one defendant against them both].) Moreover, joining trials of codefendants with mutually antagonistic defenses may "invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant." (*Zafiro v. United States*, *supra*, 506 U.S. at p. 544, conc. opn. of Stevens, J.) This risk decreases the prosecution's burden of proof and is significant in assessing whether joinder affected the defendant's rights. (*Ibid.*)

Finally, the relative weight of the evidence against the defendants is an important factor to consider in assessing the harm from joinder. (See, e.g., *United States v. Mayfield*, *supra*, 189 F.3d at p. 907 [reversible error in denying motion to sever trials of codefendants with mutually antagonistic defenses in light of conduct of codefendant's counsel and fact evidence against defendant was not "overwhelming"].)

The application of these principles to the facts of this case demonstrates that the joint guilt phase trial resulted in gross unfairness at both the guilt and penalty phase and requires reversal of the judgment.

D. Judge Weisberg's Denial of Appellant's Pretrial Motions to Sever Was an Abuse of Discretion

In *People v. Massie*, *supra*, this Court found that the trial judge abused his discretion in denying the motion of Massie's codefendant for a separate trial because he failed to "*exercise* his discretion . . . under a correct view of the law." (*People v. Massie*, *supra*, 66 Cal.2d at pp. 917-918; emphasis in original.) The judge's comments showed that he refused to consider whether or not Massie had made an extrajudicial statement

implicating his codefendant,[33] and did not view the potential of guilt by association[34] or the strategic conflict between the codefendants[35] as reasons to sever. In addition, the record did not reflect whether the court considered an additional reason proffered in support of the motion, i.e., the possibility that Massie would testify for his codefendant at a separate trial.

As in *Massie*, the record shows that Judge Weisberg *failed to exercise* her discretion under a correct view of the law. In denying the motion, Judge Weisberg explained: "I heard the offer of proof as to these allegedly inconsistent defenses, *and these problems arise always when you have a joint trial.* I don't see anything here that is any different from what happens in many situations." (RT3:315; emphasis added.) These comments show that the court did not regard the existence of conflicting defenses as a potential reason to sever and further, that she did not appreciate that the defenses in this case were not merely inconsistent but particularly antagonistic and mutually exclusive.

Both this Court and the courts of other jurisdictions recognize that inconsistent defenses embrace a variety of defenses, ranging from the

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[33] "The judge stated, 'As far as I am concerned now, I don't even know that there were any extrajudicial statements. They are not before me. . . . They were not in the preliminary hearing'"; the court never asked the prosecutor "whether he had implicating confessions or whether [he] would forego use of the confessions at a joint trial." (*People v. Massie*, *supra*, 66 Cal.2d at p. 915, fn. 12, 916.)

[34] The court stated: "If they cannot identify your client, it doesn't matter how bad the case is." (*People v. Massie*, *supra*, 66 Cal.2d at p. 916, fn. 13.)

[35] "The court's only comment on this contention was 'I don't think you can force the District Attorney to waive jury.'" (*People v. Massie*, *supra*. 66 Cal.2d at p. 916, fn.14.)

merely inconsistent to the mutually antagonistic or exclusive. Inconsistent defenses include those cases in which one defendant attempts to shift some blame to another, most commonly when both defendants admit being involved in an underlying crime or transaction but dispute who committed the lethal acts. (See, e.g., *United States v. Brady, supra*, 579 F.2d 1121 [two defendants charged with manslaughter each claim the other inflicted the fatal act during their joint assault on victim]; *People v Jackson* (1996) 13 Cal.4th 1164, 1209 [evidence undisputed that both defendant's involved; defenses antagonistic only to extent that they disputed identity of killer]; *People v. Cummings, supra,* 4 Cal.4th at p.1207 [same].)

Also included in this category are cases in which one defendant claims innocence and the other attempts to shift blame to a third party or minimize his own culpability, in a context in which the defenses are not inherently contradictory. For example, in *People Hardy*, all three defendants denied culpability and speculated that one or both of the other defendants was responsible. At the in camera hearings in support of the motion to sever, Reilly said he would argue that he withdrew from the conspiracy; Hardy said he would argue he was not present at the crime scene, did not participate in the conspiracy, and that Reilly and Morgan must have committed the crime; finally, Morgan said he would rely on an alibi defense and argue that Reilly and an unknown third person committed the murders in order to blackmail him. This Court explained that severance was properly denied because these defenses, although "technically 'conflicting'," were not "particularly 'antagonistic'" (*Id.* at p. 168.)

> For example, it is perfectly consistent that Reilly withdrew from a conspiracy involving others but that Hardy was not one of the coconspirators. Morgan's reliance on his alibi that he was in Carson City when the murders occurred and that Reilly and an unknown third person committed the crimes is not fatally contrary to Reilly's

> claim that he withdrew from the conspiracy; because Morgan claims not to have been present, he could not know if Reilly actually withdrew from the conspiracy and left before the crimes were committed. Morgan claims not to have known of Hardy's involvement; their defenses were thus not antagonistic at all.

(*Id.* at pp. 168-169.)

In contrast, antagonistic defenses do exist "where the acceptance of one party's defense will preclude acquittal of the other." (*People v. Hardy, supra*, 2 Cal.4th at p.168, quoting *United States v. Zipersein* (7th Cir.1979) 601 F.2d 281, 285.) Mutual exclusivity may exist when "only one defendant accuses the other, and the other denies any involvement" (*United States v. Romanello, supra,* 726 F.2d at p. 177), as well as when both defendants explicitly blame the other. "For a proclamation of innocence to constitute an accusation, the facts of the dispute must be closed in a fashion that does not suggest the intervention of a third party." (*United States v. Tootick, supra*, 952 F.2d at p.1081.)

Judge Weisberg's failure to recognize that the defenses of appellant and Phillip were antagonistic to the point of being irreconcilable and mutually inconsistent prevented her from exercising her discretion. By the time of appellant's renewed motion, Phillip had given a statement to the police and prosecutors blaming the murder solely on appellant and denying any involvement in a conspiracy. It was therefore apparent that Phillip's defense and appellant's defense would be irreconcilable. This is the "prototypical example" of mutually exclusive defenses – "a trial in which each of two defendants claims innocence, seeking to prove instead that the other committed the crime." (*United States v. Holcomb* (5th Cir. 1986) 797 F.2d 1320, 1324.)

Because the "probability of reversible prejudice increases as the case moves beyond the merely inconsistent to the antagonistic" (*United States v.*

Tootick, supra, 952 F.2d at 1081), Judge Weisberg should have undertaken an inquiry of the parties to ascertain the risk of prejudice at a joint trial. Such an inquiry would have taken into account the likelihood of the specific types of prejudice associated with mutually exclusive defenses, summarized in *United States v. Tootick, supra*, 952 F.2d at pp. 1082-1083:

> The joinder of defendants advocating mutually exclusive defenses can have a prejudicial effect upon the jury, and hence the defendants, in a number of ways. [First, d]efendants who accuse each other bring the effect of a second prosecutor into the case with respect to their codefendant. In order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the limitations and standards imposed on the government prosecutor. Opening statements, as in this case, can become a forum in which gruesome and outlandish tales are told about the exclusive guilt of the "other"defendant . . . Counsel can make and oppose motions that are favorable to their defendant, without objection by the government.
>
> [Second, c]ross-examination of the government's witnesses becomes an opportunity to emphasize the exclusive guilt of the other defendant or to help rehabilitate a witness that has been impeached. Cross-examination of the defendant's witnesses provides further opportunities for impeachment and the ability to undermine the defendant's case. The presentation of the codefendant's case becomes a separate forum in which the defendant is accused and tried. Closing arguments allow a final opening for codefendant's counsel to portray the other defendant as the sole perpetrator of the crime.
>
> [Third, j]oinder can provide the individual defendants with perverse incentives. Defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict their codefendants. These incentives may influence the decision whether or not to take the stand, as well as the truth and content of the testimony.
>
> [Fourth, t]he joint trial of defendants advocating mutually exclusive

> defenses produces fringe benefits for the prosecution. Joinder in these cases can make a complex case seem simple to the jury: convict them both. [¶] The government's case becomes the only unified and consistent presentation. It presents the jury with a way to resolve the logical contradiction inherent in the defendants' positions. While the defendants' claims contradict each other, each claim individually acts to reinforce the government's case. The government is further benefitted by the additive and profound effects of repetition. Each important point the government makes about a given defendant is echoed and reinforced by the codefendant's counsel.
>
> [Fifth, j]oinder of defendants who assert mutually exclusive defenses has a final subtle effect. All evidence having the effect of exonerating one defendant implicitly indicts the other. The defendant must not only contend with the effects of the government's case against him, but he must also confront the negative effects of the codefendant's case.

Without engaging in any inquiry or applying the "heightened scrutiny" appropriate to a capital case (*People v. Keenan, supra,* 46 Cal.3d at p. 500), Judge Weisberg denied the renewed motion, stating only: "Well, as I stated before, it is within the court's discretion and I considered the matter of inconsistent defenses, and I am exercising my discretion and denying the motion." (RT3:496.) Her bare assertion that she was "exercising [her] discretion" was not an adequate substitute for the careful inquiry mandated by the facts in this capital case. (See *United States v. Bonas* (9th Cir. 2003) 344 F.3d 945, 951 [declaration of mistrial was an abuse of discretion in the absence of a formal record of evidence considered by district court, despite court's expression of "the magic words, that the court finds that a manifest necessity exists'"].)[36] Because Judge

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[36] In his opinion in *Bonas*, Judge Kozinski trenchantly observed, a trial "is not a Harry Potter novel; there is no charm for making a

(continued...)

Weisberg did not recognize that the defenses in this case were irreconcilably inconsistent, she failed to weigh the heightened dangers of prejudice inherent in their presentation. As will be shown, the potential forms of prejudice identified in *Tootick*, and in the precedents of this Court and the Supreme Court, were actualized at appellant's trial.

E. Judge Trammel's Denial of Appellant's Pretrial Motion to Sever Was an Abuse of Discretion

On June 8, 1992, after the case was reassigned to Judge Trammel, appellant renewed her motion for a separate trial, arguing that her defense was not merely inconsistent with Phillip's defense, but mutually exclusive. (RT4:548-549.) Appellant's counsel expressed his concern, apparently shared by the parties, that Judge Weisberg had been under a great deal of pressure, and "seemed very distracted from her duties, and at points seemed unable or unwilling to enter the litigation" (RT4:558); as a result, counsel argued that it was "appropriate to look at all the rulings that are brought up by either side."[37]

The prosecution also sought reconsideration of Judge Weisberg's ruling severing the trial of appellant and Phillip from the trial of Carolyn Sanders and Robert Jones. (RT4:512.) Phillip's counsel took no position on appellant's motion (RT4:519), but the prosecution opposed it, arguing that judicial economy would be better served by a joint trial and that the same evidence would be admissible against appellant at a separate trial.

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[36](...continued)
defendant's constitutional rights disappear." (*United States v. Bonas, supra,* 344 F.3d at p. 951.)

[37] Judge Trammel also expressed concerns about Judge Weisberg's handling of the case. (See, e.g., RT22:3793 ["I haven't the foggiest idea how she runs a criminal case, much less a death penalty case, but she's not running it the way it should have been in several respects"].)

(RT4:553-554.)

Following an in camera presentation by appellant's counsel in support of the motion,[38] Judge Trammel denied the motion. Although he indicated that he would probably have granted the motion if it had been presented to him in the first instance (RT4:561, 562), Judge Trammel expressed his concern that Judge Weisberg's ruling was res judicata, and concluded that the information presented by appellant "was not sufficient to override" or "overturn" Judge Weisberg's decision, and that he would therefore "abide by" her decision. (RT4:560-561, 564.)

A court's exercise of legal discretion "must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the matter at issue." (*People v. Russel* (1968) 69 Cal.2d 187, 195, superseded by statute on another ground as noted in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) If a trial court's discretionary decision is influenced by an erroneous understanding of the applicable law or reflects that the court is unaware of the full extent of its discretion, it cannot be said that the court properly exercised its discretion under the law. (*People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn.8.) Here, by considering the prior rulings of Judge Weisberg and expressing his belief that the question before him was whether he should "overturn" or "override" those rulings, Judge Trammel improperly limited the scope of his discretion and relied upon an irrelevant and improper factor.

"In a criminal case, there are few limits on a court's power to reconsider interim rulings." (*People v. Castello* (1998) 65 Cal.App.4th 1242, 1246 [refusing to apply C.C.P. §1008 to limit court's authority to

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[38] At the in camera hearing, counsel reiterated the information they gave to Judge Weisberg, summarized in Section B, *supra.* (See footnote 3, *supra.*)

reconsider non-final ruling that out-of-state conviction was invalid].) This Court

> has often recognized the 'inherent powers of the court . . . to insure the orderly administration of justice. [Citations omitted.] In criminal cases, the court has acknowledged 'the inherent power of every court to develop rules of procedure aimed at facilitating the administration of criminal justice and promoting the orderly ascertainment of truth. [Citations omitted.] Some of the court's inherent powers are set out by statute, but the inherent powers are derived from the Constitution and are not confined by or dependent on statute. (Cal.Const., art. III, §3; *id.*, art. VI, §1....)

(People v. Castello, supra, 65 Cal.App.4th at p.1246-1248; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1203-1204 [no impediment to reopening motion to suppress for the purpose of modifying findings]; *People v. Fletcher* (1996) 13 Cal.4th 451, 467 [rulings made in advance of trial may be reconsidered "should the evidence at trial prove to be materially different than the parties had anticipated"]; *People v. Keenan* (1988) 46 Cal.3d 478, 513 [*in limine* ruling not binding at trial].)

Here, no statute precluded Judge Trammel from reconsidering the motion to sever. He had acquired jurisdiction of the case for all purposes, and because the trial had not yet commenced, the proceedings could be severed without prejudicing the parties. While there are policy reasons why one superior court judge should not generally reconsider and overrule another superior court judge (*People v. Riva* (2003) 112 Cal.App.4th 981, 995), those reasons are not present here. "[O]ne well-recognized exception to the rule is that the rule does not apply when the first judge has become unavailable. (*In re Alberto* (2002) 102 Cal.App.4th 421, 430.)" (*Alvarez v. Superior Court* (2004) 117 Cal.App.4th 1107, 1111 [general rule did not apply where judge who initially ruled on motion had been appointed to federal court].) Here, the case was reassigned when Judge Weisberg

became unavailable to continue. (RT5:664.) "Consequently, the policy concerns of discouraging forum shopping and preventing one judge from interfering with another judge's handling of a case are not present." (*Alvarez v. Superior Court*, *supra*, 117 Cal.App.4th at p. 1111.)

Moreover, Judge Trammel's decision cannot be upheld on the basis of the arguments raised by prosecutor Goldberg. First, it is well-established that a court's decision to deny severance must be evaluated on the basis of the facts as they appear at the time of the hearing. (*People v. Turner, supra,* 37 Cal.3d at p. 312; *People v. Isenor*, *supra*, 17 Cal.App.3d at p. 333 [severance properly denied where likelihood that codefendant would testify for defendant at a separate trial was not established].) Here, both defendants had pleaded not guilty and were exercising their right to a jury trial. The prosecutor's admittedly "hypothetical" argument that he might work out a deal with Phillip "to encourage him to testify against" appellant at a separate trial (RT4:554) therefore had no support in the record at the time of the hearing. In fact, evidence in the record indicates that the prosecution had recently *rejected* Phillip's efforts to negotiate a deal when Phillip failed the polygraph test given to him in connection with his statement to the police in April 1992, implicating appellant. (RT54:8894.) Calling Phillip to testify for the prosecution would be tantamount to knowingly presenting false evidence.

Second, appellant's inability to specify the particular evidence that would not be admissible at a separate trial was not a legitimate reason to deny severance under the circumstances of this case. The reason why appellant's counsel could not point to specific pieces of evidence at the time of the hearing was because Phillip's counsel refused to disclose, and the court refused to order them to disclose, the evidence Phillip intended to produce. (See Argument II, *infra*.)

Finally, the prosecutor's argument regarding the cost of separate trials was insufficient to justify the denial of the motion. "Whenever the death penalty is at issue, significant judicial and governmental resources are expended, as they must be, before trial ever begins, on a myriad of pretrial issues and jury selection issues. In this context, having two trials is an incremental burden on the Court and the government but not an inordinate burden." (*United States v. Perez*, (D.C. Conn. 2004) 299 F. Supp.2d 38, 44.) Moreover, the alternative of dual juries would have substantially decreased the costs.

F. Judge Trammel's Denial of Appellant's Motion for Dual Juries Was an Abuse of Discretion

The court's refusal to grant dual juries for Phillip and appellant as an alternative to severing their trials was also a clear abuse of discretion. Judge Trammel stated that he "probably would have tried the cases together with dual juries," but believed that there was "no abuse of discretion and . . . no reason to overturn" Judge Weisberg's decision. (RT4:563.) In contrast to the motion for separate trials, however, there was no prior exercise of discretion by Judge Weisberg to "overturn." Judge Weisberg had considered dual juries only in the context of the prosecution's request for dual juries – one jury for Carolyn Sanders and Robert Jones, and a second jury for appellant and Phillip (CT5:1480) – which she rejected without explanation. (RT2:219-220.) There is no indication in the record that Judge Weisberg ever considered dual juries for appellant and Phillip.

In addition, the parties believed that Judge Weisberg's ruling rejecting the prosecution's motion was based on her concerns about security and the size of her courtroom. (RT5:507, 638.) But as Judge Trammel recognized, those factors did not apply in his courtroom in downtown Los Angeles, which was larger and more secure than Judge

Weisberg's courtroom in Santa Monica. (RT5:655.) Judge Trammel had "done two juries in the past without any problem." (RT5:645, 661-662.) Thus, even if there had been a prior ruling by Judge Weisberg on the alternative of dual juries, the transfer of the case to Judge Trammel's court was a change of circumstances justifying de novo consideration of the request.

The record contains no evidence that Judge Trammel in fact exercised his discretion, "guided by legal principles and policies appropriate to the matter at issue" (*People v Russel, supra,* 69 Cal.2d at 195), when he refused to empanel two juries. Judge Trammel affirmatively raised the possibility of dual juries with appellant's counsel in camera, and was aware that they did not oppose dual juries (RT4:543), but made no effort to determine the position of the prosecutors or Phillip's counsel on this issue. Had he conducted such an inquiry, he would have been compelled to conclude that the financial burdens of two trials and the burdens on the time of the court and witnesses cited by the prosecution in opposition to severance would be eliminated or substantially reduced by utilizing dual juries. (See, e.g., *People v. Von Harris* (1989) 47 Cal.3d 1047, 1056) [use of dual juries affords "a practical and reasonable alternative means by which to minimize the inconvenience and not inconsiderable burden on those witnesses who would otherwise have to testify in separate trials, and to conserve judicial resources").]

G. Information Presented to Judge Trammel In Camera by Codefendant's Counsel Required the Court to Grant Severance

At the ex parte in camera pretrial hearing on June 9, 1992, Phillip's counsel advised the court of significant new information relevant to the question of severance. At that hearing, Phillip's counsel sought and

received the court's permission to withhold disclosing to the prosecution evidence incriminating appellant that Phillip intended to introduce to support his defense, for the purpose of preventing disclosure to appellant. (RT5:761-767.) (*See* Argument II, *infra.*) The prosecutors were aware of Phillip's request and did not oppose it. (Id.) This information was not known to Judge Weisberg or Judge Trammel at the time they denied the earlier motions to sever. Moreover, as Phillip's counsel explicitly advised the court in camera, this information supported appellant's motion to sever. (RT5:764.)

Phillip's counsel's statements to the court in camera established "a serious risk that a joint trial would compromise a specific trial right of [appellant and] prevent the jury from making a reliable determination of guilt or innocence." (*Zafiro v. United States*, *supra*, 506 U.S. at p.539.) Due process of law "requires that an accused be advised of the charges against him in order that he may have a reasonable opportunity to prepare and present his defense *and not be taken by surprise by evidence offered at trial.*" (*People v. Hess* (1955) 45 Cal.2d 171, 175; emphasis added.) Under the Sixth and Fourteenth Amendments, a criminal defendant also has the right to the assistance of counsel who have had an opportunity to investigate and prepare to defend against that evidence. Without notice of the evidence to be introduced against the defendant at trial, counsel cannot fulfill this function or provide adequate representation, and the adversarial process breaks down. "Counsel's role is critical to the ability of the adversarial system to produce just results." *Strickland v. Washington* (1984) 466 U.S. 688, 685.) Phillip's ex parte presentation and the court's approval of Phillip's request unequivocally demonstrated that appellant would be denied these rights at a joint trial with Phillip.

Based on the information he received at this in camera proceeding,

Judge Trammel had a sua sponte duty to grant severance. A trial judge has a "continuing duty at all stages of the proceedings to grant a severance if prejudice does appear." (*Schaffer et al v. United* (1960) 362 U.S. 511, 516.) Instead, Judge Trammel gave Phillip's counsel "free rein to introduce evidence against [appellant] and act as second prosecutor." (*United States v. Mayfield, supra,* 189 F.3d at 897.) He effectively abandoned his neutrality and sided with Phillip's efforts to enhance the presentation of *his* defense, which in turn enhanced the prosecution's efforts to prove appellant's guilt, all at the expense of appellant's constitutional rights.

While the duty of Phillip's counsel to their client may have created a "dilemma" for them (RT5:765), the court was not similarly constrained. The fact that the district attorney "very definitely . . . wanted to keep this case together" (*ibid.*), did not relieve the court of its responsibility to ensure a fair trial for appellant. Faced with additional, unequivocal evidence of irreconcilable defenses and the three-sided nature of this case, the court was on notice that it was required to grant severance, "or employ other means of stemming the prejudice flowing from [Phillip's] mutually exclusive defense." (*United States v. Mayfield, supra,* 189 F.3d at p. 900, fn. 1 [in camera admission by one defendant's counsel that her defense would be the prosecution of the codefendant required severance or alternative protective measures].)

At a minimum, the court should have initiated a further inquiry with the prosecutor to determine if these new developments warranted severance. Contrary to the court's opinion (RT5:765), a discussion with the prosecutors would not have required disclosure of the identity of Phillip's witnesses or the specific nature of evidence being withheld. It was the *fact* that evidence supportive of Phillip's defense that appellant was the killer was being withheld, and not the specific pieces of evidence, that created the

risk that appellant would be deprived of her rights. In addition, the prosecutors were already aware of the proposed action of Phillip's counsel and had agreed to it. (RT5:759-760, 763-764.)

Because appellant's counsel had no knowledge of the substance of the in camera proceedings with Phillip's counsel, it was the responsibility of the court to bring to the prosecutors' attention the adverse impact of Phillip's proposed action on appellant's right to a fair trial. In light of this knowledge, the prosecutors might have agreed that severance of the trials, or a joint trial with two juries, would be necessary. If the prosecutors continued to oppose those alternatives to a joint trial, however, the court would have had no alternative but to grant appellant's motion. (See, e.g., *United States v. Perez, supra*, 299 F. Supp.2d 38 (severance compelled by *Zafiro* where defendant's ability to impeach evidence relied on by the government to prove charged conspiracy would be compromised at joint trial.)

H. Judge Trammel Abused His Discretion By Relying on Information Received from Phillip's Counsel Ex Parte and In Camera, Without Disclosure to Appellant or Her Counsel, to Deny Appellant's Motion to Alter the Order of Proof or for a Separate Trial

Following the denial of her pretrial motions to sever, appellant sought to mitigate the prejudicial effects of a joint trial by requesting the court to alter the production of evidence to permit her to present her defense after Phillip presented his defense. (CT8:2363-2368.) The prosecution took no position on this motion (RT22:3798), but Phillip opposed it on the basis of information contained in the sealed transcript of the ex parte in camera hearing held on June 9, 1992. (RT22:3795, 3797-3798.) At that hearing, the court had granted Phillip's request to delay disclosing to the prosecution the identity of a critical witness and the existence of

incriminating letters from appellant to Phillip until Phillip presented his defense at trial, for the explicit purpose of depriving appellant of notice of this evidence until after she presented her defense. (See Argument II, *infra.*) The court denied appellant's request, "primarily for the reasons disclosed in the ex parte in camera motion," and refused to disclose that information to appellant's counsel in the absence of appellant. (RT22:3798.) Based on these two rulings, appellant renewed her motion to sever, which the court summarily denied. (RT22:3878.)

The trial court had discretion to alter the production of evidence to permit appellant to present her defense after, rather than before, Phillip presented his defense. The sequence of procedural steps in a criminal trial stated in Penal Code section 1093 does not require that codefendants present their cases in the order in which their names are listed in the Information. In any event, Penal Code section 1094 authorizes the court to depart from section 1093 "for good reasons, and in the sound discretion of the court." A trial court's power "to vary the normal order of proof of issues is also well recognized." (3 Witkin, *Cal. Evid.* (4th ed. 2000) § 46, p. 79); *People v. McDermand* (1984) 162 Cal.App. 3d 770,792; Evid. Code. § 320.)

In *People v. McDermand, supra*, the court held that the trial court had abused its discretion when it postponed cross-examination of the defendant, over defendant's objection, "for the sole purpose of rendering the prosecutor's cross-examination more effective." (*People v. McDermand, supra*, 162 Cal.App.3d at p. 792.) Here, Judge Trammel's refusal to alter the order of appellant's presentation of her defense was based on a similarly improper consideration: the desire of Phillip's counsel, who acted as second prosecutors against appellant throughout the trial, to make the presentation of his defense more effective by withholding notice

of the letters and testimony of Jennifer Lee until after appellant had presented her defense.

Judge Trammel also erred by relying on information presented ex parte by Phillip's counsel. Appellant received no notice that the in camera hearing requested by Phillip's counsel on June 9 to discuss " some items in discovery" (RT5:736) would involve the ex parte presentation of information that the court would later use to deny appellant's motions to alter the production of evidence and to sever, and thus had no opportunity to object to the court's ex parte receipt of the information or to respond to Phillip's presentation. Indeed, appellant had no notice at all about the subject matter of that hearing at the time it occurred, and her later request to divulge the subject matter to her counsel, made when the court announced its reliance on the undisclosed information to deny her motion to present her defense after Phillip, was also denied. (RT22:3798.)

In *People v. Ayala* (2000) 24 Cal.4th 243, 262-264, this Court held that the trial court erred in allowing the prosecutor to explain her reasons for exercising peremptory challenges ex parte. The Court explained that,

> [a]s a general matter, ex parte proceedings are disfavored. [Citations omitted.] 'Two basic defects are typical of ex parte proceedings. The first is a shortage of factual and legal contentions. Not only are facts and law from the defendant lacking, but the moving party's own presentation is often abbreviated because no challenge from the defendant is anticipated at this point in the proceeding. The deficiency is frequently crucial, as reasonably adequate factual and legal contentions from diverse perspectives can be essential to the court's initial decision. . . . " (*United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 908 122 Cal.Rptr. 877, 537 P.2d 1237].)

The Ninth Circuit reached a similar conclusion in *U.S. v. Thompson* (9th Cir.1987) 827 F.2d 1254, holding that district court judge erred by permitting the prosecutor to state her reasons for challenging jurors ex parte

and then ruling on the objection without divulging the reasons to defense counsel. In a passage cited by this Court with approval in *Ayala,* Judge Trott observed in *Thompson*:

> The right of a criminal defendant to an adversary proceeding is fundamental to our system of justice. [Citations.] This includes the right to be personally present and to be represented by counsel at critical stages during the course of the prosecution. [Citation.] This is not mere idle formalism. Our system is grounded on the notion that truth will most likely be served if the decision maker--judge or jury--has the benefit of forceful argument by both sides.

(*United States v. Thompson*, *supra*, 827 F.2d at p.1258.) Thus, in the absence of "compelling justification, ex parte proceedings are anathema in our system of justice and ... may amount to a denial of due process." (*Id.* at p. 1259.)

Appellant demonstrates in Argument II, *infra*, that Phillip's counsel had no right to refuse to disclose the identity of witness Lee and the letters prior to trial, and that the court erred in holding an ex parte hearing on Phillip's request. A fortiori, there was no compelling justification permitting Judge Trammel to rely on undisclosed information presented ex parte by appellant's antagonistic codefendant in a different context to deny appellant's motions to alter the production of evidence or sever her trial. The court's action violated appellant's due process rights under the state and federal Constitutions. (U.S. Const., Amend. XIV; Cal.Const., art. I, §15.)

I. The Court's Refusal to Grant Severance or Empanel Two Juries Deprived Appellant of Specific Trial Rights Guaranteed By the Fifth, Sixth, Eighth and Fourteenth Amendments and Resulted in a Fundamentally Unfair Trial.

The court's refusal to sever appellant's trial or empanel two juries

requires reversal of the judgment for three independent reasons. First, as shown above, the repeated denials of appellant's motions were an abuse of discretion. Second, the joinder of appellant and Phillip for trial deprived appellant of specific trial rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments, and article I, section 15 of the California Constitution at the joint trial that occurred over her objections. Third, the joinder prevented a reliable determination of guilt and penalty, and resulted in gross unfairness at both phases of the trial.

Throughout the trial appellant "faced an extra prosecutor in the guise of [Phillip's] counsel." (*United States v. Romanello*, *supra*, 726 F.2d at p. 179.) Phillip advanced an additional, alternative theory of appellant's liability, testifying that she was the actual killer who acted without his participation or knowledge; his counsel told the jury, "to the extent that I can help the prosecutor show that [appellant] did the shooting, I'm going to do that." (RT50:8458.) In addition to his own extensive testimony over five court days, Phillip introduced the surprise testimony of Jennifer Lee and the letters that she testified she wrote to Phillip at appellant's request. The letters were admitted into evidence without limitation and used by Phillip's counsel and the prosecution as affirmative evidence of appellant's guilt. (RT50:8578-8588.)

The official prosecutors adopted parts of Phillip's testimony, arguing that it proved "95 per cent of the prosecution's case." (RT51:8681.) Prosecutor Goldberg argued to the court that the letter proved appellant's consciousness of guilty and to the jury that the letters proved there was a continuing conspiracy (RT40:6839; 49:8285-8299) Prosecutor Mader argued to the jury that the prosecution "could not have come up with more powerful evidence that all these people were in it together than the production of these letters." (RT51:8676.) At another point she argued:

> If you know there is a murder and you read these letters, which you'll have a chance to do in the jury room, you'll see that they are obviously intimately familiar with it and are planning a common defense; and you have added the testimony that was presented by the defense of Carolyn Sanders and you add the testimony of Phillip Sanders. You would convict these people based on the defense case, let alone the prosecution's case.

(RT51:8682-8683.)

At a separate trial, the evidence against appellant would have been "demonstrably different." (*People v. Hardy, supra*, 2 Cal.4th at p. 170.) Phillip's testimony and the evidence he produced was admissible only because this was a joint trial. Because of his privilege against self-incrimination, Phillip could not have been compelled to testify at a separate trial. Although the prosecutor argued that nothing prevented him from "working out some kind of deal . . . or do[ing] something else to encourage [Phillip] to testify against" appellant, he admitted that he was only speaking hypothetically" and was "not suggesting [Phillip] would do this." (RT4:554.) There is no evidence in the record to show that it was likely or even possible that Phillip would have agreed. Moreover, the prosecutor's hypothetical was inconsistent with his then-recent rejection of Phillip's pretrial effort to reach a plea agreement, after Phillip failed the polygraph test he was given when he told the police his story about witnessing appellant shoot her husband. (RT43:7144.) A decision to call Phillip to testify for the prosecution under these circumstances would be tantamount to the knowing presentation of perjury.

In addition, in the absence of Phillip's testimony, appellant would have had no reason to call Carolyn Sanders. It was only because the prosecutor refused to impeach Phillip's testimony with his statement to his

wife admitting that he shot the victim that appellant was compelled – whipsawed by Phillip and the prosecution – into calling Carolyn as a defense witness. (RT39:6572-6573). Under Evidence Code section 980, Phillip could prevent Carolyn from testifying at a separate trial about confidential marital communications,[39] and under Evidence Code section 970,[40] Carolyn could refuse to testify at all against her spouse. Similarly, without Phillip's testimony and cooperation, the prosecutor would not have been aware of and could not have presented the letters introduced by Phillip, the testimony of Jennifer Lee or the additional letters seized from appellant pursuant to the search warrant issued on the basis of information provided by Phillip and his lawyers.

Even if this record supported the conclusion that Phillip would have agreed to testify against appellant at a separate trial, his testimony at a separate trial would be subject to impeachment in several significant areas that were not available at the joint trial. In light of the prohibition against the presentation of false evidence, Phillip would be required to admit his liability for the murder, making him an accomplice as a matter of law whose testimony would be viewed with distrust. (See CALJIC No. 3.18.) Further, at a separate trial, the court would be required to instruct the jurors they could not convict appellant on the basis of his testimony unless that

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[39] "Subject to Section 912 and except as otherwise provided in this article, a spouse .. , whether or not a party, has a privilege during the marital relationship and afterwards, to refuse to disclose, and to prevent another from disclosing, a communication if he claims the privilege and the communication was made in confidence between him and the other spouse while they were husband and wife." (Evid. Code, § 980.)

[40] "Except as otherwise provided by statute, a married person has a privilege not to testify against a spouse in any proceeding." (Evid. Code, § 970.)

testimony was corroborated by independent evidence (excluding the testimony of other accomplices) that tended to connect the defendant to the commission of the crime. (See CALJIC Nos. 3.11, 3.12, 3.13.)

Moreover, it is highly unlikely that he would testify without being promised some benefit in return. As the prosecutor admitted, the way to obtain Phillip's testimony against appellant at a separate trial would be to offer him a deal, "offer him something to encourage him" to testify against appellant. (RT37:6434.) Of course, appellant would then be entitled to establish that Phillip was being rewarded by the prosecution for his testimony against her. If, for example, he pled guilty prior to his testimony, the conditions of that plea and his expectations regarding sentence would be properly explored on cross-examination to show he had a motive to shade his testimony in favor of the prosecution. In the alternative, if Phillip did not plead guilty prior to testifying, his motive to curry favor with the prosecution to get a better deal would provide additional reason to distrust his testimony.

Significantly, if Phillip did agree to testify for the prosecution at a separate trial, then the prosecutor would be required to disclose *before trial* evidence of the letters and the existence of witness Jennifer Lee. With advance notice, appellant and her counsel would have had a meaningful opportunity to prepare to meet this evidence. (See Argument II, *infra.*) Similarly, pretrial disclosure to appellant of Phillip's testimony about the letters would have accelerated the issuance of any search warrant for appellant's property, thereby preventing the mid-trial seizure of thousands of pages of material after appellant had conditionally rested her case (RT42:7702), at a time when her counsel did not have the time to undertake a meaningful review.

As the courts have recognized, the joinder of defendants advocating

mutually exclusive defenses can prejudice the jury because,

> [i]n order to zealously represent his client, each codefendant's counsel must do everything possible to convict the other defendant. The existence of this extra prosecutor is particularly troublesome because the defense counsel are not always held to the same limitations and standards imposed on the government prosecutor.

(*United States v. Tootick, supra*, 952 F.2d at p. 1082.) Here, Phillip's counsel engaged in conduct that the official prosecutors could not. They relied upon the absence of a statutory requirement mandating reciprocal discovery between defendants to withhold disclosure of the evidence they intended to produce at trial. Because the court denied appellant's motion to alter the production of evidence to permit her to present her defense after Phillip presented his, appellant was not confronted with the evidence of the letters until after her counsel advised the parties that she would not testify in her own behalf and conditionally rested her defense. That decision was itself based on the court's refusal to sever and the denial of appellant's related requests. (RT37:6425.) [41]

In addition to withholding discovery, Phillip's counsel directed their client to write to appellant for the purpose of eliciting incriminating responses. (RT40:6929-6930.)[42] This occurred well after appellant had

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[41] The court's bias in favor of Phillip was again apparent in the court's warning that the decision not to testify would be "irrevocable" because Phillip's counsel, who were about to open his defense, would "commit themselves" based on that decision. (RT37:6429.)

[42] In his closing argument to the jury, Mr. Wesley confirmed that Phillip "was instructed by his lawyers, keep writing, keep these people writing ... he got his instructions to keep writing and he writes" to appellant. (continued...)

been formally charged and was represented by counsel, at a time when the prosecution would be constitutionally prohibited from engaging in the same behavior. (*Massiah v. United States* (1964) 377 U.S. 201 [government's use of incriminating statements to codefendant deliberately elicited by government agents in the absence of counsel after Massiah was indicted violated the Sixth Amendment].)

Counsel's advice to Phillip and his actions illustrate the "perverse incentives" that affect a joint trial with mutually exclusive defenses: "Defendants do not simply want to demonstrate their own innocence, they want to do everything possible to convict their codefendants." (*United States v. Tootick, supra,* 952 F.2d at p. 1083.) While they were not bound by the strictures of the Sixth Amendment, Phillip's counsel appear to have violated Rule 2-100 of the California Rules of Professional Conduct, which provides in relevant part:

> A) While representing a client, a member shall not communicate, directly or indirectly, about the subject matter of the representation with a party the member knows to be represented by another lawyer in the matter, unless the member has the consent of the other lawyer.

This Rule is applicable in criminal as well as civil matters. (See *Kain v. Municipal Court* (1982) 130 Cal.App.3d 499, 503-504.) "It is designed to protect a represented party from overreaching by opposing counsel and to ensure that the adverse party's attorney can function properly. State Bar of California, Formal Opinion No. 1979-49, at II-A-128 (1979)." (*United States v. Lopez* (N.D. Cal. 1991) 765 F.Supp.2d 1433, 1449.)

The extraordinary degree of cooperation between Phillip's counsel

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[42](...continued)
(RT50:8577-8578.)

and the prosecutors further illustrates the prejudice suffered by appellant at the joint trial. Phillip's counsel secretly secured the prosecutors' agreement to defer receipt of the discovery they were otherwise entitled to under Penal Code section 1054.3. (RT5:760-764.) They also secured the prosecutors' agreement to use the chief investigating officer in this case, Detective Kurt Wachter, to transport Jennifer Lee, to and from court, and to use the Los Angeles Police Department handwriting expert to examine the letters. (RT 26:4647-4649.) As a result, Detective Wachter was able to interview Lee on the way to court, which enabled prosecutor Goldberg to elicit testimony from Lee regarding statements by appellant that the prosecution and the court characterized as indicative of a manipulative and deceitful character. (RT58:9372-9375;40:6840.)

At a mid-trial in camera hearing with Judge Trammel, Phillip's counsel frankly stated that they were orchestrating the presentation of evidence with the prosecutors: "[w]e haven't gone into things knowing they are going to cover it on rebuttal. There are things we could cross-examine on. They told us they want to do it in rebuttal so for our case it works fine." (RT26:4651.) Similarly, at a different ex parte hearing with the prosecutors, prosecutor Mader told the court that Phillip's counsel were informing them what they (Phillip's counsel) believed appellant's defense would be. (RT20:3510.) As noted above, they also provided the prosecutors with the information used to secure a search warrant for appellant's personal property at the jail (RT44:7710), which led to the discovery of additional evidence against appellant. The prosecution then deferred to Phillip's counsel, who introduced additional letters during his cross-examination of Carolyn Sanders. (RT45:7864-7866.)

The clearest example of this unprecedented cooperation and its prejudicial effect is the deal struck between Phillip and the prosecutors at

the outset of Phillip's testimony, within minutes of the court's decision to grant appellant's motion for mistrial and severance. (RT39:6591.) In order to avoid the severance that was necessary to protect appellant's right to a fair trial, the prosecutors agreed not to "urge the death penalty" for Phillip at the penalty trial in return for his waiver of his privilege to prevent disclosure of the confidential communications. (RT39:6591-6592.) Even after Phillip's waiver, however, the prosecutors declined to call Phillip's wife to impeach his testimony, forcing appellant to call Carolyn as a defense witness, which permitted both Phillip and the prosecutors to elicit additional evidence incriminating appellant during their cross-examination of Carolyn.

Phillip's counsel also used their cross-examination of appellant's witnesses in a way that prejudiced appellant. On his cross-examination of appellant's son Girard, Wesley raised the subject of Girard's attempt to purchase a car through Phillip, a subject that was not addressed during his direct examination by appellant. In response to a leading question, Girard confirmed that this occurred "in May." (RT36:6319.) During prosecutor Mader's cross-examination of Phillip, she attempted to impeach him with evidence that Girard purchased a car at another dealership in February, and then called Girard as a rebuttal witness. (RT45:7453-7458.) Phillip's efforts to use Girard to support his story made it appear that appellant had asked her son to testify falsely for her and, in the words of prosecutor Mader, "crucifie[d]" appellant as well as Phillip. (RT51:8672.)

At other points in the trial, Phillip's counsel made clear that they would introduce evidence against appellant if the prosecutors did not do so. For example, during argument about the admissibility evidence regarding appellant's pawning of jewelry removed from Tom's body, Mr. Wesley announced that he would introduce the evidence if the prosecution did not.

(RT43:7440.) The prosecutors and Phillip's counsel also helped each to overcome appellant's objections to the admission of evidence and prevent the introduction of evidence proffered by appellant. (See, e.g., RT40:6828.)

The joint trial prejudiced appellant in other ways as well. The length of the trial was prolonged by numerous interruptions in the presentation of evidence, sidebar conferences and recesses that were necessary to address the many issues created by the conflicting defenses. (See, e.g., RT42:7214-7228, 7273, 7291-7295; 43:7349-7357, 7380-7384, 7477-7478; 44:7614-7616, 7646, 7673.) The jury made clear its impatience with the delays. (RT44:7614 ["audible sigh from juror" during sidebar].) On August 26, 1992, for example, a juror asked what the Thanksgiving schedule would be. (RT45:7720.) The court's wholly unnecessary comment that "it costs a little over $9200 a day to run this courtroom (RT31:5393), undoubtedly compounded the prejudicial impact of the disruptions and delays.

The guilt phase lasted longer than the court anticipated during jury selection. (RT9:460.) As a result, after two days of guilt phase deliberations, the proceedings were suspended for a week to permit several jurors to honor other commitments. (RT46:7874; CT9:2534.) The delay in completing the guilt phase also resulted in the removal of a juror following the guilt phase verdicts because of his military commitment. (RT53:8824-8830.)

In addition, the antagonistic defenses and conflict between Phillip and appellant made the presentation of evidence so disjointed and confusing that the trial judge admitted at several points that he was unsure of the status of the case. (See, e.g., RT45:7762 ["Frankly, I have lost track whether they rested or what anybody did"]; RT49:8317 ["everybody was bringing witnesses in and it got to the point where you lost some kind of context as to whether somebody was rebuttal or direct"].) RT45:7818 [court tells

counsel "at this point anybody can lead"] .) Jurors also expressed their confusion. (RT43:7372.)

The conflicts between appellant and Phillip also necessitated limiting instructions directing the jury to engage in what the trial judge recognized was "mental gymnastics" (RT42:7272), an exercise that would have been unnecessary at a separate trial. On cross-examination by appellant, Phillip testified that as a result of his waiver of the marital privilege, he did not think this was a death penalty case as to him. (RT42:7213.) When he asked to consult with his lawyer before answering a follow-up question, the court intervened and, in another illustration of the court's bias toward Phillip, instructed the jury to disregard his testimony. The agreement between Phillip and the prosecutors was the subject of two lengthy admonitions, which explained the reasons for the agreement and then directed the jury to ignore that information. (RT42:7270-7272; 55:9104-9105.)

The prejudicial effects of the court's refusal to sever continued at the penalty phase. The prosecutor used the letters introduced by Phillip to argue that appellant was more deserving of death than Phillip because she was the ringleader, the moving force without whom the crime would not have occurred. (RT58:9347, 9359, 9356, 9383). Mader also argued extensively that the letters and the surprise testimony of Jennifer Lee proved that appellant would be a danger to others even if sentenced to life without possibility of parole. (RT58:8374-8375.) (See Argument II, *infra*.)

Moreover, Phillip's guilt phase testimony provided evidence that appellant personally shot her husband. Both the court and appellant's counsel believed that the identity of the trigger person would control who would receive the death penalty. (RT39:6572.) At penalty phase, appellant's counsel argued that Phillip was the trigger person and therefore more culpable than appellant, but nothing prevented the jurors from

reaching a different conclusion about the identity of the killer. (RT59:9416.)[43]

The court's denial of appellant's motion for a new jury for penalty independently compels reversal of the death judgment. The court's refusal to grant severance and the prosecution's insistence on a joint trial led to the prosecutors' agreement not to argue for death against Phillip in return for Phillip's waiver of his marital privilege. Without Phillip's waiver, the court was prepared to grant a mid-trial severance motion. (RT39:6564, 6568.) In turn, the agreement led to the court's decision to grant a penalty mistrial to Phillip, which Phillip argued was necessary to give him the benefit of his bargain.

Appellant's counsel "adamantly opposed" the belated de facto penalty phase severance:

> Sanders has been a millstone around our neck, but for his evidence and the way they presented his evidence, Mr. Wager and I are of the opinion that a much more favorable result could have been obtained for Mrs. Thompson.
>
> But now having opposed for so many months a joint trial and now having been saddled with that joint trial to sever Mr. Sanders out against our wishes where it might have some benefit to prosecutors, Mrs. Thompson in the sense that we could argue and will argue that if death is appropriate for anybody, it is appropriate for the triggerman and the person who got in front of the jury and lied.
>
> At the one time where it might be beneficial to us, . . . to remove him from the joint trial would be absolutely contrary to law, logic and fundamental fairness.

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[43] Although appellant's counsel believed that the jury's conviction of Phillip meant the jury had found he was the trigger person (RT54:8864), nothing in the jury's verdicts unambiguously supports that inference. No use clause was alleged and the instructions did not require the jury to determine the identity of the killer.

(RT54:8884-8885.) When the court nonetheless granted a mistrial to Phillip, appellant moved for a separate jury, arguing that the removal of Phillip was good cause to impanel a new jury because appellant would now become the sole focus of the jury's "aggregated feelings of hatred." (RT56:9082.)

In *People v. Kritzman* (Fla.1988) 520 So.2d 568, the Florida Supreme Court confronted strikingly similar circumstances. Kritzman and two codefendants were charged with capital murder. Before trial, one of his codefendants, Mailhes, agreed to plead guilty and testify against Kritzman in return for the state's agreement to recommend a life sentence. Despite his guilty plea Mailhes was permitted to participate in jury selection for the purposes of the sentencing phase, and the trial court overruled Kritzman's objections and motion to sever.

On appeal, the Florida Supreme Court reversed the conviction and death sentence, holding that the failure to grant the motions to sever deprived Kritzman of due process and a fundamentally fair trial, and required reversal for several reasons. First,

> Kritzman's trial was tainted from the very beginning. Allowing the state's star witness to participate in picking the jury that would eventually determine Kritzman's guilt and punishment amounted to a breakdown in the adversarial process. It is difficult enough for a jury to sift through the complicated issues surrounding a murder case; it is nearly impossible to do when the lines between who is on trial and who is not are unclear.

(*Kritzman, supra*, 520 So.2d at p. 570.) Second, the jury was conditioned by the voir dire questions of Mailhes' attorney "to believe his client's story implicating the codefendant's and exonerating himself." (*Ibid.*) Third, the failure to sever "permitted the state's chief witness to excuse jurors who would be prone to disbelieving his story" implicating Kritzman, thereby

depriving Kritzman "of the ability to fairly choose jurors . . . Kritzman was forced to defend himself against the codefendant, as well as the state."

Although finding actual prejudice, the court held that this violation of substantive due process was presumptively prejudicial.

> Due process consists of more than the procedural rules we use to safeguard a fair trial. While there may not be a rule of criminal procedure which covers this exact situation (probably because this exact situation has never arisen before), due process requires that a defendant be given a fair trial in the substantive sense. We believe that the failure to sever Kritzman's trial . . . violates that principle. Moreover, while Kritzman has shown that he was actually prejudiced by the error below, we do not hold at this point that prejudice need be shown. Where substantive due process has been violated to this degree, we will presume prejudice.

(*Ibid.*)

As in *Kritzman*, appellant's sentence of death was imposed by a jury selected with the participation of a codefendant who was a primary witness against her, who was permitted to excuse jurors who would not be favorable to appellant, but who played no role at the penalty trial.

Moreover, forcing appellant to proceed before the same jury undermined the reliability of the death judgment, in violation of the Eighth Amendment, and violated her rights to a fair trial before an impartial jury, guaranteed by the Sixth and Fourteenth Amendments. As Judge Trammel recognized during the guilt phase (RT42:7215-7217,7221), it would be difficult for the jury to ignore the prosecutor's startling mid-trial decision to retreat from their decision to affirmatively seek death for the person they argued was the actual killer. The jury would likely infer from the agreement that, in the opinion of the experienced prosecutors, appellant was more culpable than the trigger person, and substitute that judgment for their own. The length of the instructions on this subject and the fact that it

was necessary to instruct twice on the agreement, once during Phillip's guilt phase testimony and again at the outset of the penalty phase trial (RT42:7271-7272; 56:9103), made the jury's attempt to follow the court's directive to ignore the detailed explanation of the agreement and the reasons for it less likely to succeed. Further, the penalty phase instruction merely directed the jury "not to consider or discuss the fact that the court has exercised its discretion to grant Mr. Sanders a mistrial and separate penalty trial" in determining the appropriate penalty for appellant. (RT56:9103.) Significantly, nothing in the instruction directed the jury not to consider the agreement and its implications in determining appellant's sentence.

In addition, the instruction was misleading in advising the jury that whether Phillip would be sentenced to death remained an open question that would be determined by another jury. As appellant's counsel correctly anticipated (see, e.g., RT54:8887-8888), the prosecution did not proceed against Phillip after securing the death judgment against appellant. (RT68:9707.2; CT123429,3494.)

The court's refusal to sever appellant's trial resulted in a fundamentally unfair trial, one that was "reduced by the defense of Mr. Sanders to a farce and a sham in which we've had two prosecutors happily cooperating giving evidence." (RT54:8886.) Because the joint trial resulted in multiple violations of appellant's state and federal constitutional rights, the judgment must be reversed.

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II

THE COURT'S SUSPENSION OF RECIPROCAL DISCOVERY BETWEEN CODEFENDANT SANDERS AND THE PROSECUTION FOR THE PURPOSE OF DEPRIVING APPELLANT OF NOTICE OF THE EVIDENCE AGAINST HER VIOLATED PENAL CODE SECTION 1054 AND APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND ARTICLE I, SECTION 15, OF THE CALIFORNIA CONSTITUTION

A. Procedural Background

On June 9, 1992, before jury selection commenced, Judge Trammel held an ex parte, in camera hearing with Phillip's attorneys, Cary Weiss and David Wesley.[44] Wesley advised the court that he had located a witness, Jennifer Lee, whom he intended to call to authenticate several letters she wrote to Phillip at appellant's request. (RT5:761.) Wesley characterized one of the letters "as a script telling Phillip Sanders how he is to testify in this case. . . ." (RT5:761). Wesley made clear he did not want to disclose Lee's identity to the prosecutors because he would then be obligated to disclose the information to appellant. He emphasized that "there's three sides in this case" (RT5:762), explaining, "We have antagonist [*sic*] defenses in this case. That means we're being forced to disclose our defense to a codefendant and there is no law that says we have to do that." (RT5:759.) He recognized that Lee's identity would have to be disclosed at some point, but he wanted to wait until appellant "locked herself into a position." (RT5:762.)

Wesley assured the court that he had told the prosecution that Phillip

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[44] After the jury returned its penalty verdict against appellant, the court ordered the disclosure of the transcripts of all the in camera hearings held during the trial. (RT65:9576-9583.)

had a witness he had not disclosed, that the prosecution was aware "that the reason we have not disclosed it is because we don't want to disclose that witness to the codefendant, not to the prosecution" (RT5:760), and "the people have said okay, don't give it to us right now." (RT5:762.) Cocounsel Weiss elaborated: "We have informed the district attorney and we've [sic] informed them when we first received these letters of the possibility of trying to find a witness that's critical to our defense. We consistently advised them of the status of this particular witness and . . . that we couldn't give them discovery on this and they understand and are agreeable to that." (RT5:763-764.)

Wesley also asserted that Lee, who was serving a sentence at the California Institute for Women at Frontera for kidnaping, told him that she was afraid of appellant, and was equally afraid to be seen "talking to two people in suits" because other inmates would assume she was cooperating in a case. (RT5:760-761.) Judge Trammel raised the possibility of issuing a protective order prohibiting appellant's counsel from disclosing Lee's identity to appellant, but Wesley claimed they "couldn't because they [appellant's counsel] have an obligation to their client. They have to go see her and talk to her about it because she was her roommate" in county jail. (RT5:763.) In Wesley's opinion, "there's nothing we could think of to fashion that . . . would prohibit the other side from knowing, and we'd lose this witness and she is a crucial witness in this case." (RT5:763.) Without questioning Wesley's opinion that there was no alternative, the court authorized Phillip's counsel to withhold disclosing the name of Jennifer Lee, as a well as the letters and the handwriting expert's opinion, until after the direct testimony of appellant, or such other time that Phillip wished to present the evidence. (RT5:765-767.)

On July 27, 1992, at another ex parte in camera hearing with

Phillip's counsel, Judge Trammel approved Phillip's further agreement with the prosecution to keep appellant's counsel in the dark about evidence both wished to use against her. At the outset of the hearing, Wesley assured the court that "prior to doing this ex parte hearing, we did talk to the district attorney and let them know we were doing this so that we're not trying to play games with anybody." (RT26:4646.) Wesley then explained that he had arranged for Detective Wachter, the prosecution's chief investigating officer in this case, to pick Lee up at Frontera on the day of her testimony; "he will drive out there the morning she is to testify and pick her up, interview her on the way to court. She will testify and at the end of the day he will drive her back to Frontera." (RT26:4647-4648.) As counsel confirmed at a later ex parte hearing regarding the timing of Lee's testimony, he was planning on "literally walsing [sic] her into the courtroom and walsing her out." (RT37:6417.)

At the July 27 ex parte hearing, Phillip's counsel obtained the court's approval of his agreement with prosecutor Goldberg, permitting Wesley to turn over additional letters to the Los Angeles Police Department's handwriting expert for analysis, with an order directing the expert not to disclose the letters without a court order authorizing disclosure. (RT26:4648-4649.) During the same hearing, Phillip's counsel revealed that their cooperation with the prosecution went beyond withholding the identity of Jennifer Lee and the letters. In the context of discussing scheduling, Wesley advised the court that he believed the prosecution case was "truncated in the sense that they're going to be calling a lot of rebuttal witnesses to rebut" appellant's testimony (RT26:4650), and that the prosecution's rebuttal would be "quite long because we haven't gone into things knowing they're going to cover it on rebuttal. There are things we could cross-examine on. *They told us they wanted to do it in rebuttal so for*

our case it works fine." (RT26:4651; emphasis added.) At a separate ex parte hearing held with the prosecutors on July 15, 1992, prosecutor Mader told the court that Philip's counsel had told her "what they thought appellant's defense would be." (RT20:3510.)

Appellant did not learn about the letters until the day Phillip actually presented this evidence, after appellant had rested her case and two months after Phillip's counsel had received the court's permission to withhold discovery. On the morning of Friday, August 14, 1992, the prosecutor gave appellant's counsel four letters that he said he had received the night before from Phillip's counsel. (RT38:6481, 6487) The prosecutor described the letters as discussing a possible defense of mistaken identity, and a suggested confession by Phillip that would exonerate appellant and Phillip's wife. (RT38:6481.)

Emphasizing that they had just seen the letters for the first time that morning, appellant's counsel asked the court to release the jury for the day to allow counsel to prepare to meet the new evidence and make appropriate motions. (RT38:6489.) When the court denied that request, appellant reminded the court that it had previously denied her request for the production of documents from the codefendant, and that Wesley had refused to voluntarily disclose any documents. (RT38:6494.) Appellant then moved for a mistrial and severance, arguing that it was a "manifest violation of her due process rights to ask her to defend in front of a jury, a capital jury, against evidence of which she has no notice." (RT38:6494-6495. The court denied this motion, as well as appellant's renewed motion for production of all the letters to be introduced against appellant and her motion for a continuance so that she could have an opportunity to prepare to defend against this evidence. (RT38:6497.)

It was not until this point in the proceedings that the court recognized

that appellant had not yet even been provided with copies of the letters but had only been shown the copies that Phillip's counsel gave to the prosecution. (RT 38:6498.) The court ordered that copies be given to appellant, and told Phillip's counsel that they should now disclose the identity of the witnesses they intended to use to authenticate the letters. Refusing to comply with the court's order, Phillip's counsel requested another in camera, ex parte hearing, at which he persuaded the court to again defer disclosure. (RT38:6497, 6536-6538.)

On August 17, 1992, before Phillip's direct examination began, appellant objected to the introduction of the letters that were not in her handwriting based on a lack of authentication.[45] Wesley again refused to disclose how he intended to authenticate those letters, and the court did not require him to do so, ruling instead that Phillip could not discuss the content of the letters until they were authenticated. (RT39:6589.) The court denied appellant's renewed motion for the production of documents and the list of witnesses Phillip intended to call, explaining: "I don't believe I have the right to do that because it's a codefendant." (RT39:6724.)

On direct examination, Phillip identified five letters he believed came from appellant. (RT40:6730-6732 [Exhibits 138, 139, 140, 141, 142].) The parties stipulated that appellant wrote one of them, Exhibit 142. (RT40:6805). Phillip's direct testimony was then interrupted and he called Jennifer Lee,[46] who testified that she copied Exhibits 138 through 141 as a

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[45] Appellant also asked the court to redact the letters by eliminating references to discussions with her lawyers. (RT39:6586.) The court denied this motion.

[46] At that point, appellant's counsel objected on the ground that he had not received even the one day's notice of the identity of Lee that he had

(continued...)

favor to appellant. (RT40:6813-6815.) Lee also testified that appellant and Phillip's wife, Carolyn, were friends at the county jail. (RT40:6816.) On cross-examination by the prosecution, she testified that appellant told her that she was on a cruise when her husband was killed, that she had a lot of money, owned a yacht and lived in Calabasas near then Los Angeles County Sheriff Sherman Block. (RT40:6818-6820.) Lee's testimony did not refer to any alleged threats from appellant or anyone else.

Following Lee's testimony, appellant moved for a mistrial because of the significant prejudice she suffered as the result of the court's refusal to order severance. As counsel argued, the effect of the discovery statute was to deny appellant due process and equal protection

> because the prosecution was entitled to know about Mrs. Lee before she hit the witness stand, and was entitled to receive a statement from her, and in fact apparently did. We were not entitled to receive anything, not even the witness' name, until that witness was called....[T]hat works a fundamental breach of due process because Mrs. Thompson should have, any defendant should have the right to know what evidence she is going to confront before the jury. . . .

(RT40:6841-6842.) The court denied the motion, but advised counsel that the witness would be returned if he wished to question her. (RT40:6842.)

The letters were passed among the jurors during Phillip's testimony. He testified that in the letters, appellant offered him money to change his testimony, told him how he could testify and advised him not to trust his

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[46](...continued)
been promised, contrary to the court's order directing the parties to disclose the identity of the witnesses who would be called on a specific date one day in advance. The court overruled the objection, reiterating that "there is no right of discovery between codefendants." (RT40:6803.)

lawyers. He claimed he did not follow any of the advice contained in the letters, and instead turned them over to his lawyers. (RT40:6831-6835.)

In closing arguments, both the prosecution and Phillip's counsel exploited the letters. Prosecutor Mader argued that the prosecution "could not have come up with more powerful evidence that all these people were in it together than the production of these letters." (RT51:8676.) Phillip's counsel displayed enlarged copies of the letters during his closing argument, described them as the most important evidence in the case, and discussed them at length. (RT51:8575, 8569, 8483, 8576, 8580, 8582.).

B. The Court Abused Its Discretion By Authorizing Phillip's Counsel to Withhold Discovery of the Letters and Witness Lee From the Prosecution, and Violated Appellant's Constitutional Rights

This Court has "repeatedly stated that 'a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an *intelligent defense* in light of all relevant and reasonably accessible information.' [Citations omitted.]" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960; emphasis in original.) The right to discovery is necessary to implement the defendant's due process right to notice of the charges against him, "in order that he may have an opportunity to prepare and present his defense and not be taken by surprise by evidence offered at trial." (*In re Hess* (1945) 45 Cal.2d 171, 175.) Discovery is also necessary to implement a defendant's Sixth Amendment right of confrontation. "Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on the issues in the case, and in particular, the state has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits."

(*People v. Riser* (1956) 47 Cal.2d 566, 585, overruled on other grounds in *People v. Morse* (1964) 60 Cal.2d 631; see also *In re Littlefield* (1993) 5 Cal.4th 122, 131.)

The parties' duty to disclose the evidence they will introduce at trial is now regulated by Penal Code section 1054. Proposition 115, adopted in 1990, amended the California Constitution and the Penal Code in numerous respects, among them to authorize reciprocal discovery in criminal cases. Section 30, subdivision (c), added to article I of the California Constitution by Proposition 115, declares: "In order to provide for fair and speedy trials, discovery in criminal cases shall be reciprocal in nature, as prescribed by the Legislature or by the people through the initiative process." Penal Code section 1054 et seq., also added by Proposition 115, governs the scope and process of criminal discovery. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356; *In re Littlefield, supra,* 5 Cal.4th at p. 129; *People v. Tillis* (1998)18 Cal.4th 284, 289-294.)

Section 1054.1 provides:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> (b) Statements of all defendants.
>
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
>
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.

(e) Any exculpatory evidence.

(f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

Section 1054.3 provides:

The defendant and his or her attorney shall disclose to the prosecuting attorney:

(a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, or reports of the statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.

(b) Any real evidence which the defendant intends to offer in evidence at the trial.

Under these rules for reciprocal discovery, the defense has a right to discover the names and addresses of persons that the prosecution reasonably anticipates that it is likely to call as witnesses, and the prosecution has a right to discover the names and addresses of persons that the defense reasonably anticipates that it is likely to call as witnesses. (*People v. Tillis*, *supra,* 18 Ca1.4th at p. 290; *Izazaga v. Superior Court, supra,* 54 Cal.3d at p. 376, fn. 11; Pen. Code, §§ 1054.1 & 1054.3.) Moreover, once the defense discloses the names, addresses, and reports of persons it reasonably anticipates calling as witnesses, the prosecution is required to disclose the

names, addresses, and reports of persons it reasonably anticipates calling as witnesses to refute the defense witnesses disclosed. (*Izazaga v. Superior Court, supra,* 54 Cal.3d at pp. 373-376 [rejecting due process challenge to statute by requiring prosecution to disclose its rebuttal witness, and the reports of their statements, despite absence of express requirement in the statute]; *People v. Gonzalez, supra,* 38 Cal.4th at pp.956-957.)

The disclosures mandated by the statute "shall be made at least 30 days prior to the trial, "unless good cause is shown why a disclosure should be denied, restricted or deferred . . .'*Good cause' is limited to threats or possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement.*" (Pen.Code, §1054.7; emphasis added.) Upon the request of any party, the court may permit an in camera showing of good cause. (*Ibid.*) In addition, the court has the authority to restrict the pretrial disclosure of the identity of a witness "to defense counsel (and their ancillary personnel) alone." (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1150.)

In this case, having made a decision to call Lee to testify, Phillip was required under section 1054.3, subdivision (a) to disclose to the prosecution her name, address and any relevant statements or reports of her statements. Having also made a decision to introduce the letters, Phillip was required under section 1054.3 subdivision (b) to disclose them to the prosecution. And, as the prosecution conceded in its opposition to appellant's motion for a new trial (CT10:3324), once it received this evidence, it was required to disclose it to appellant. The letters written by appellant or by Lee at appellant's request were clearly statements of appellant within the meaning of 1054.1, subdivision (b), and under the court's discovery order, the prosecution had a continuing duty to disclose.

Judge Trammel's order suspending the reciprocal discovery duties of Phillip and the prosecution violated this statutory scheme and was a clear abuse of discretion. At no time during the ex parte hearing did either the court or Phillip's counsel discuss the application of section 1054.7, which would have permitted the court to authorize Phillip's counsel to defer disclosing the identity of witness Lee and the existence of the letters only upon a showing of "good cause" as defined in the statute. Judge Trammel made no finding of good cause in support of his order. The stated reason for withholding disclosure of the evidence to the prosecution -- to deprive appellant of notice of the evidence, which both Phillip and the prosecution would then use against her -- is not at all related to "threats or possible danger to the safety of a victim, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7.)

Nor does the record support a finding of good cause. Phillip's counsel told Judge Trammel that Lee said she "had received threats from appellant because appellant felt Lee was somehow involved in the case" (RT4:761), but did not provide anything to corroborate this hearsay allegation. He did not explain the nature of the alleged threats, the source of the threats, why Lee believed that any threat she may have received was from appellant, or how appellant, who was in custody in Los Angeles, contacted Lee, who was in the custody of the Department of Corrections at Frontera. Significantly, Lee did not claim in her testimony that she had been threatened by appellant or anyone else. (RT40:6810-6822.)

Moreover, Judge Trammel made no inquiry into the facts purportedly supporting Wesley's representations. Given their desire to keep the identity of witness Lee a secret from appellant, Phillip's counsel had no incentive to volunteer any information that might raise questions

about the trustworthiness of Lee's allegation. Because this was an ex parte in camera hearing, appellant's counsel were excluded and therefore unable to question the factual underpinnings and reliability of the threat allegation. If present, appellant's counsel could also have argued that any perceived danger to Lee from appellant would be negated by arranging that she not be placed in the same facility as appellant when she appeared to testify, an arrangement that in fact was made with the cooperation of the prosecution and Detective Wachter who transported Lee to and from court.

In *Alvarado v. Superior Court*, *supra*, 23 Cal.4th at p.1125, this Court held that good cause supported an order authorizing the prosecution not to disclose prior to trial the identity of three jail inmates who witnessed a killing at the Los Angeles County Jail allegedly ordered by the "Mexican Mafia," but reversed the order insofar as it precluded disclosure during trial. The portion of the order upheld by the Court was based on specific factual findings made by the trial court following a series of in camera hearings at which the prosecution presented evidence to show good cause, including evidence that a witness was attacked and cut in jail after the killing in that case by a person "aligned with" the Mexican Mafia who warned the witness not to testify, and that one of the defendants in the case threatened a witness who was already in protective custody and said someone would get him. (*Id.* at pp. 1128-1129.)

The uncorroborated hearsay information presented to Judge Trammel falls far short of the evidence presented in *Alvarado*. Moreover, Judge Trammel's order was more severe than the one upheld in *Alvarado*, where the prosecution did disclose the witnesses' grand jury testimony (replacing their names with numbers) and information regarding their criminal histories prior to trial, and the trial court directed the prosecution to produce the witnesses for pretrial interview by defense counsel. (*Alvarado*

v. Superior Court, *supra*, 23 Cal.4th at pp. 1128, 1130.) In contrast, appellant received no notice of the evidence prior to trial.

Indeed, Judge Trammel's order was very similar to the portion of the order this Court set aside in *Alvarado.* The order here prevented appellant from learning about the *existence* of the witness and the substance of her testimony until she appeared *at trial*, after appellant had presented her defense, and from learning until after she rested her defense that the letters would be used against her by Phillip, when she had no opportunity to investigate the credibility of Lee, or to evaluate the impact of the letters on the defense. Given the severity of this restriction and its interference with appellant's Sixth and Fourteenth Amendment rights to the effective assistance of counsel, confrontation and due process, more than the statements of cocounsel was required to justify the order.

At the ex parte hearing, Wesley also stated that Lee was afraid to be seen talking to "people in suits," an apparent reference to lawyers, because other inmates might assume she was cooperating in a case. (RT4:760-761.) But every witness in a criminal case likely has some degree of apprehension about the possible effects of their participation. Without more, a witness' objections to contact by defense counsel is not sufficient to establish good cause under section 1054.7. (*See Reid v. Superior Court* (1997) 55 Cal.App.4th 1326 [sexual assault victims' declarations objecting to contact by defense counsel insufficient to support order barring defense counsel from attempting to interview the victims].) If appellant's counsel had been present at the hearing, he could have argued that Lee's desire not to be viewed as a "snitch" by other prisoners did not fall within the narrow statutory exception to disclosure contained in section 1054.7, and that this concern may have caused her to manufacture a threat or perceive one where none existed.

Finally, Phillip's counsel did not explain why it was necessary to prohibit appellant's counsel, whom he referred to as "the other side" (RT4:763), from knowing about Lee, or why she would be "lost" as a witness if her identity was disclosed *only to appellant's counsel.* (*Ibid.*) The court had discretion to limit disclosure of Lee's identity and whereabouts to appellant's "counsel (and ancillary personnel) only" (*Alvarado v. Superior Court, supra*, 23 Cal.4th at p.1150), and Judge Trammel raised this alternative with Phillip's counsel in camera. Phillip's argument against disclosure -- that if Lee was disclosed, appellant's counsel would attempt to interview her and investigate her credibility and role in the case in order to meet her testimony at trial (RT4:763) -- was not a valid reason to withhold discovery, but rather the reason to compel it, as appellant's counsel would surely have argued if they had been present.[47] Phillip had the right to subpoena Lee, and her status as a prisoner in the custody of the Department of Corrections would have made it impossible for her to refuse to appear. Once again, the absence of appellant's counsel from the ex parte hearing deprived the court of information that would have demonstrated why a protective order was sufficient to protect the interests of all parties. Viewed in this context, it is apparent that Phillip's concern that Lee would be "lost" meant simply that her effectiveness as a surprise witness would be lost.

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[47] Wesley's efforts to prevent appellant's counsel from attempting to interview Lee were contrary to the ABA Canons of Professional Ethics: "[A]s a general rule, '[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party.' Canon 39 of the ABA Canons of Professional Ethics (1955)." (*Reid v. Superior Court, supra*, 55 Cal.App.4th at p. 333.)

On this record, it is clear that Judge Trammel abused his discretion in granting Phillip's request to defer discovery. The court failed to weigh appellant's constitutional rights against Phillip's non-constitutional based desire to obtain the maximum strategic impact of their evidence by ambushing appellant.

C. The Prosecution's Agreement to Eschew Discovery Violated Penal Code Section 1054 and Violated Appellant's Constitutional Rights

In *In re Littlefield, supra*, this Court rejected the argument that section 1054.1 permitted the defense to avoid its duty to disclose the address of a witness by deliberately failing to obtain that information. The Court explained:

> California courts long have interpreted the prosecutorial obligation to disclose relevant materials in the possession of the prosecution to include information 'within the possession or control' of the prosecution. (See *Hill v. Superior Court* (1974) 10 Cal.3d 812, 816 [112 Cal.Rptr. 257, 518 P.2d 1353, 95 A.L.R.3d 820].) In *Pitchess v. Superior Court, supra,* 11Cal.3d 531, 535, we construed the scope of possession and control as encompassing information "*reasonably accessible*" to the prosecution.

(*In re Littlefield, supra*, 5 Cal.4th at p.135; emphasis added.) Similarly,

> [a]llowing the defense to refrain deliberately from learning the address or whereabouts of a prospective witness, and thus to furnish to the prosecution nothing more than the name of such a witness, would defeat the objectives of the voters who enacted section 1054.3: to permit the prosecution a reasonable opportunity to investigate prospective defense witnesses before trial so as to determine the nature of their anticipated testimony, to discover any matter that might reveal a bias or otherwise impeach the witnesses's testimony, and to avoid the need for midtrial continuances for these purposes. (See *Hobbs v. Municipal Court, supra,*

233 Cal.App.3d at pp. 685-686.)

(In re Littlefield, supra, 5 Cal.4th at p. 131.)

In this case, the prosecutors engaged in precisely the type of gamesmanship condemned in *Littlefield*: they deliberately refrained from learning the identity of the witness and other information that they were entitled to under Penal Code section 1054.3, and they did so with the understanding that their arrangement with Phillip's counsel was designed to prevent appellant's counsel from preparing to meet the evidence that Phillip intended to present. (RT4:759, 762.) Phillip's statement to the police in April of 1992 made clear that he would defend himself by incriminating appellant. The prosecutors' willingness to agree to delay their discovery of evidence to be presented by Phillip was therefore based on their belief that the evidence would assist them in proving their case against appellant. By aiding and abetting Phillip's counsel, the prosecutors were able to do precisely what the voters who enacted section 1054.3 intended to prevent: deny appellant a "reasonable opportunity to investigate the witness prior to trial so as to determine the nature of [her] anticipated testimony, to discover any matter that might reveal a bias or otherwise impeach the witness's testimony, and to avoid the need for mistrial continuances for these purposes." *In re Littlefield, supra,* 5 Cal.4th at p. 131. Under California's scheme of reciprocal discovery, the prosecution, like the defense, cannot deliberately refrain from obtaining discoverable information for the purpose of delaying disclosure.

The prosecutor's exploitation of Phillip's desire to ambush appellant was particularly unfair, given their insistence on a joint trial. If appellant and Phillip had been tried separately, Phillip would have had no argument for delaying disclosure to the prosecution. If Phillip were tried first, then

the evidence would have been disclosed prior to appellant's trial, and if appellant were tried first, the evidence might not have been disclosed by Phillip at all prior to her trial. The prosecution's willingness to eschew discovery from Phillip was inconsistent with basic principles of fundamental fairness, which prohibit a state from taking undue advantage of the situation it has created. (*See, e.g., Payne v. Arkansas* (1958) 456 U.S. 560, 567 [coerced confession inadmissible for any purpose in part because it would be fundamentally unfair for state to force defendant to confess and then use forced confession against him at trial]; *People v. Wilkes* (1955) 44 Cal.2d 679, 687-88 [when state confers on a witness privilege against testifying that defendant has no power to override, it is improper for prosecutor to invite jury to draw adverse inferences from absence of witness's testimony]; *People v. Frohner* (1976) 65 Cal.App.3d 94, 104 [same; such conduct is "grossly improper"]; *People v. Daggett* (1990) 225 Cal.App.3d 751, 758 [improper for state to fault defendant for not presenting evidence that was excluded upon state's own motion]; *People v. Varona* (1983) 143 Cal.App.3d 566, 570 [same]; *United States v. Ebens* (6th Cir. 1986) 800 F.2d 1422, 1440-1441 [prosecutor took unfair advantage of court's ruling restricting admission of evidence by inviting jury to draw adverse inference from its absence].)

D. Penal Code Section 1054 Should Be Construed to Require Reciprocal Discovery Among Jointly Tried Codefendants Whose Defenses Are Mutually Irreconcilable

Both Phillip's counsel and the trial court assumed that the discovery statute did not require discovery between codefendants. (RT4:759; 39:6724.) However, this Court has not yet addressed whether section 1054 should be construed to require *guilt* phase discovery among codefendants with antagonistic defenses who are jointly tried. In *People v. Ervin* (2000)

22 Cal.4th 48, 101, this Court rejected an ineffective assistance of counsel claim predicated on trial counsel's failure to move for discovery of the codefendant's penalty phase witnesses. Observing that defendant conceded that the statute did not require reciprocal discovery among codefendants, this Court rejected the claim. This Court reached a similar result in *People v. Coffman* (2004) 34 Cal.4th 1, 112-113, but relied solely on Penal Code section 190.3 for the proposition that a codefendant has no obligation to provide notice of penalty phase evidence.

Appellant submits that for purposes of reciprocal discovery, there is no meaningful distinction between the prosecution and an adversely situated codefendant like Phillip who attempts to obtain an acquittal by convicting his codefendant at a joint trial.

> Among the primary purposes of the new discovery chapter, as expressly stated in section 1054, are "[t]o promote the ascertainment of truth in trials by requiring timely pretrial discovery" . . . . These objectives reflect, and are consistent with, the judicially recognized principle that timely pretrial disclosure of all relevant and reasonably accessible information, to the extent constitutionally permitted, facilitates 'the true purpose of a criminal trial, the ascertainment of the facts."

(*In re Littlefield*, 5 Cal.4th at pp. 130-131.) The reciprocal discovery statute promotes "the ascertainment of truth by liberal discovery rules which allow parties to obtain information in order to prepare their cases and reduce the chance of surprise at trial." (*Thompson v. Superior Court* (1997) 53 Cal.App.4th 480, 487, citing *People v. Jackson* (1993) 15 Cal. App 4th 1197, 1201.)

At its core, reciprocal discovery must be an "even trade:" "Reciprocity requires a fair trade, defense witnesses for prosecution

witnesses, and nothing more." (*Izazaga v. United States, supra,* 54 Cal.3d at p. 376.) Where codefendants each maintain their innocence amd present irreconcilable defenses at a trial, there is no "even trade" without reciprocal discovery among all parties. Where the trial is a three-sided one, as in this case, (see RT4:762 [codefendant's counsel stated there are "three sides in this case]), then discovery must also be three-sided.

Moreover, the plain language of section 1054 subdivision (b) supports such a construction. To determine intent of the voters, "the court turns first to the words themselves for the answer." (*In re Littlefield, supra,* 5 Cal.4th at p. 130.) Section 1054 subdivision (b) clearly states that discovery must be conducted "between and among" the parties. Black's Law Dictionary defines "between" as "a space which separates" (1979 ed. p.146) thereby referring to the opposing parties in a case, i.e., prosecution and defense. Black's defines "among" as "in the same group or class" (1979 ed. p. 76), thereby referring to members of a class that may be grouped together, i.e., co-counsel or co-defendants. That the drafters of the statute used both words makes clear that they intended the reciprocal discovery rules to apply to all those involved in a criminal case as "parties." There can simply be no other interpretation of the inclusion of both "between" and "among" in the statute's statements of purpose. Any other interpretation of the words "between" and "among" in the statute would require the courts to read one or both words as surplusage. Such a reading would violate the "cardinal rule of construction . . . that . . . a construction making some words surplusage is to be avoided." (*State of South Dakota v. Brown* (1978) 20 Cal. 3d 765, 776-777.)

In addition, it is axiomatic that a statute should be construed to avoid constitutional problems. (*People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497, 509.) As this case illustrates, the failure to require reciprocal

discovery among codefendants who are presenting irreconcilable defenses raises serious constitutional concerns. This Court has "repeatedly stated that 'a criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an *intelligent defense* in light of all relevant and reasonably accessible information.' [Citations omitted.]." (*People v. Gonzalez, supra*, 38 Cal.4th at p. 259; emphasis in original.) For that reason, the Court recently concluded that the denial of discovery of the prosecution's potential rebuttal evidence thwarts defense counsel's ability to present an intelligent defense and to make an informed tactical decision" about what evidence to present. (*Ibid.*)

This Court has also recognized that the erroneous denial of discovery undermines the defendant's Sixth Amendment right of confrontation. In *Alvarado v. Superior Court, supra,* 12 Cal.4th at p. 1137-1138, the Court explained:

> "The right of confrontation, which is secured for defendants in state as well as federal criminal proceedings, *Pointer v. Texas* 380 U.S. 400 [85 S. Ct. 1065, 13 L. Ed. 2d 923] (1965), 'means more than being allowed to confront the witness physically.' *Davis v. Alaska, supra,* 415 U.S. at p. 315 [94 S. Ct. at p. 1110]. Indeed, "'[t]he main and essential purpose of confrontation is *to secure for the opponent the opportunity of cross-examination.*"'(*Id.,* at pp. 315-316 [94 S. Ct. at p. 1110] (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940) (emphasis in original)." (*Delaware v. Van Arsdall, supra*, 475 U.S. 673, 678.)

For this reason, the Court unanimously concluded in *Alvarado* that disclosure of the identity of critical witnesses is "essential to defendant's ability to conduct an effective cross-examination." (*Alvarado v. Superior Court, supra,* 12 Cal 4th at p. 1146.)

In addition, the Sixth and Fourteenth Amendments guarantee

criminal defendants "'a meaningful opportunity to present a defense.'" (*Holmes v. South Carolina* (2006) ___ U.S. ___, 126 S.Ct. 1727, 1731; citations omitted.) In *Reid v. Superior Court*, *supra*, 55 Cal.App.4th at pp. 1332-1333, the court addressed the interplay between that right and a defendant's opportunity to interview the witnesses prior to trial.

> "The right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution [citation]" (*People v. Schroeder* (1991) 227 Cal. App. 3d 784, 787 [278 Cal. Rptr. 237]), and a judge, as well as a prosecutor, can improperly interfere with an accused's right to a fair trial. (*Id.*, at p. 788.)
>
> A criminal defendant does not have a fundamental due process right to pretrial interviews or depositions. (*People v. Municipal Court (Runyan)* (1978) 20 Cal. 3d 523, 530-531 [143 Cal. Rptr. 609, 574 P.2d 425, 2 A.L.R.4th 681].) However, a defendant does have a right to the names and addresses of prosecution witnesses and a right to have an opportunity to interview those witnesses if they are willing to be interviewed. (See, e.g., *Clark v. Superior Court* (1961) 190 Cal. App. 2d 739, 742-743 [12 Cal. Rptr. 191]; *People v. Lopez* (1963) 60 Cal. 2d 223, 246-247 [32 Cal. Rptr. 424, 384 P.2d 16].) "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." (*Gregory v. United States* (D.C. Cir. 1966) 369 F.2d 185, 188 [125 App.D.C. 140].) "As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial. [Citations.] Exceptions to this rule are justifiable only under the 'clearest and most compelling circumstances'. [Citation.] [P] Where there is no overriding interest in security, the government has no right to interfere with defense access to witnesses." (*United States v. Cook* (9th Cir. 1979) 608 F.2d 1175, 1180 [54 A.L.R.Fed. 661], fn. omitted.)

If Detective Wachter's own investigation had led to the discovery of the letters and Jennifer Lee, the prosecution would have been required to

disclose that evidence prior to trial. No different result should be permitted under the circumstances of this case.

E. The Admission of Lee's Testimony and the Letters Was Not Harmless Beyond a Reasonable Doubt

The delayed disclosure of Lee and the letters deprived appellant's counsel of an opportunity to attempt to interview Lee or investigate her credibility and role in the case. Counsel had no opportunity at all to prepare to cross-examine Lee, and therefore could not question her at all. (RT40:6822.) It also deprived counsel of a meaningful opportunity to present a defense to the letters, or to determine the implications of Phillip's disclosure on cross-examination that he wrote to appellant at the direction of his attorneys for the purpose of eliciting an incriminating response.

The arrangements between Phillip's counsel and the prosecution, approved by the trial court, gave the prosecution an unfair advantage. Wesley told Detective Wachter that he was "free to ask her anything he wants" during the two-hour trip to court. (RT38:6536.) This permitted the prosecution to learn about appellant's alleged false statements to Lee about her wealth and related matters, which prosecutor Goldberg then elicited during his cross-examination of Lee and which prosecutor Mader exploited in her penalty phase closing argument. (RT58:9372-9375.)

Both the prosecution and Phillip regarded the letters as the most significant evidence in the case. Wesley argued that the letters were the most important evidence in the case. (RT51:8569.) In addition to distributing them to the jury during his direct examination of Phillip, Wesley displayed enlarged copies during his closing argument, and discussed them extensively. (RT51:8575-8578.)

Prosecutor Mader cross-examined Phillip extensively about the contents of the letters (RT43:7358, et seq.), and later argued to the jury that

the prosecution "could not have come up with more powerful evidence that all these people were in it together than the production of these letters." (RT51:8676.) Prosecutor Goldberg commented on the letters at length, telling the jury that they proved a continuing conspiracy among the defendants, and that appellant was the ring leader. (RT49:8285-8297.) In light of these arguments, "[t]here is no reason why [this Court] should treat this evidence as any less 'crucial' than the [dual] prosecutor[s] – and so presumably the jury – treated it." (*People v. Cruz* (1964) 61 Cal.2d 861, 862.)

The delayed disclosure prejudiced appellant in other ways as well. When the prosecutors received the letters from Phillip's counsel during Phillip's direct examination, they sought and obtained a search warrant for the cells and jail property of appellant, Phillip and his wife Carolyn. Thousands of pages of material were seized and delivered to the parties following the trial court's in camera review of potentially privileged information. (RT43:7346.) At a time when counsel should have been attempting to respond to the surprise evidence, they were required instead to redirect their energies to a review of this material and to litigate the validity of the search warrant.

The erroneous denial of discovery also undermined the reliability of the death judgment, in violation of the Eighth Amendment. In penalty phase argument, prosecutor Mader cited the letters to disparage the testimony of the two county jail chaplains who testified in mitigation, arguing "these witnesses are worthless because they don't know Catherine Thompson. It's a charade. She is repenting before these witnesses . . . and she's going to church on Sunday and on Monday she's having Jennifer Lee in the jail write the letters for her urging false testimony by her co-conspirators." (RT58:9372.)

The prosecutor also singled out appellant's statements to Lee as indicative of a manipulative character that would make her a danger to other prisoners if she were sentenced to life without the possibility of parole.

> There are prisoners of all types in the institutions. Jennifer Lee was a very good example because she shows you that[,] it was kind of startling when it came out of her mouth that she was in there for kidnapping [sic] because she doesn't seem like the type of person you would think of as being the kidnaper. But you saw besides the fact that she was in there for a serious crime that she was somewhat of a naive person who appeared truly to be terrified of Catherine Thompson.
>
> She really believed that Catherine Thompson lived in a gated community in Calabasas and that one of her neighbors was Sherman Block.
>
> Why did Catherine Thompson choose Sherman Block to tell this woman she lived close to. This was not just somebody whose name she plucked out of the sky. Sherman Block as the Sheriff of Los Angeles County, of course, is in charge of the jail. So Catherine Thompson knew that she could manipulate her cellmate to do her bidding if somehow she convinced her cellmate that she had an in, that she somehow was connected with the head honcho over there, Sherman Block.
>
> It would be simple for her to convince prisoners to do her bidding for her by intimidating them and telling them she has wealth somehow on the outside that they would be made available to do what she wants them to do.
>
> Catherine Thompson is not personally going to do the dirty work. She is obviously going to get someone else to do it. Just like Jennifer Lee did her dirty work in jail.

(RT58:9374-75.)

Under the circumstances, the prosecution cannot show that the erroneous denial of discovery was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S.18.) Appellant's conviction and

the judgment of death must therefore be reversed.

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III

THE EXCLUSION OF APPELLANT AND HER COUNSEL FROM SEVERAL EX PARTE HEARINGS REGARDING DISCOVERY OF CRITICAL WITNESSES AND EVIDENCE DEPRIVED APPELLANT OF HER RIGHT TO BE PERSONALLY PRESENT, HER RIGHT TO COUNSEL AT ALL CRITICAL STAGES OF THE PROCEEDINGS, AND DUE PROCESS OF LAW

A. Introduction

Appellant was denied her right to be personally present and to be represented by counsel when the trial judge excluded her and her attorney from several in camera and ex parte hearings regarding discovery concerning two antagonistic witnesses, Jennifer Lee and Christine Kuretich.

"A defendant 'is entitled to the assistance of counsel at all critical stages of the proceedings under the Sixth Amendment of the United States Constitution.'" (*People v. Stewart* (1983) 145 Cal.App.3d 967, 972.) In *Gideon v. Wainwright* (1963) 372 U.S. 335, the United States Supreme Court held that the Sixth Amendment, as applied through the Due Process Clause of the Fourteenth Amendment, was applicable to the States. Accordingly, there is an absolute right to appointment of counsel in felony cases.

Cases interpreting *Gideon* have established that counsel is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected, or every "critical stage" of the proceedings. (See, e.g., *United States v. Wade* (1967) 388 U.S. 218, 224; *Mempha v. Rhay* (1967) 389 U.S. 128, 134.) Given that a defendant's right to the effective assistance of counsel in investigating and preparing her defense is implicated in discovery proceedings, and that the effective assistance of counsel is unquestionably a substantial right, discovery proceedings must be held to constitute a critical stage of a criminal trial.

A criminal defendant also has a right to be personally present at the trial under various provisions of law, including the confrontation clause of the Sixth Amendment of the United States Constitution, the due process clause of the Fourteenth Amendment of the United States Constitution, section 15 of article I of the California Constitution, and sections 977 and 1043 of the California Penal Code. (*United States v. Gagnon* (1985) 470 U.S. 522, 526; *Snyder v. Massachusetts* (1934) 291 U.S. 97, 105-107; (*People v. Waidla* (2000) 22 Cal.4th 690, 741-742.) The right to be present is guaranteed "at any stage of the criminal proceedings that is critical to its outcome if [her] presence would contribute to the fairness of the procedure." (*Kentucky v. Stincer* (1987) 482 U.S. 730, 745; *Snyder, supra*, 291 U.S. at pp. 105-08; *see also People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

B. Background

During appellant's trial, the court held several ex parte and in camera hearings with Phillip's counsel regarding their presentation of evidence that incriminated appellant. At the first hearing on June 9, 1992, Phillip's counsel obtained an order authorizing them to withhold disclosing the existence of this evidence to the prosecution for the purpose of concealing it from appellant. The prosecution was aware that Phillip's counsel had a witness they had not disclosed, and aware that the reason for nondisclosure was to conceal the witness from appellant. (RT4:759-767.) During several more in camera ex parte conferences on July 27, August 11, August 13 and August 14, 1992, codefendant's counsel discussed and obtained the court's approval of their efforts to prevent discovery until the very moment Ms. Lee testified. (RT26:4650-4651; 35:6238-6243; 37:6416-6418; 38:6536-6538.) (See Argument II, *supra.*)

Neither notice of these hearings nor an opportunity to attend were afforded to appellant and her attorney. And until the trial was concluded and

a verdict was entered, appellant and her attorney had no idea the hearings had taken place. Earlier in the proceedings, Judge Weisberg held an ex parte hearing for the purpose of appointing counsel to represent witness Christine Kuretch, and ordering her to reside with her parents. (RT5:1515.) The court sealed the record of this proceeding. Like Judge Trammel's hearings with Phillip's counsel, appellant's counsel had no notice of the hearing.

C. The Ex Parte Hearings Were Not Permitted By Section 1054.7 And Violated Appellant's Right To Due Process

Section 1054.7 does not permit either the prosecution or the defense to obtain ex parte orders regulating or denying discovery. Although the statute provides for in camera proceedings to ascertain good cause for limiting discovery, the section gives no indication that those hearings may be held ex parte. To the contrary, the Legislature plainly intended that the opposing party would have notice of the hearing, because the statute provides for review by writ of any orders limiting discovery.

Section 1054.7 provides in pertinent part that, "[u]pon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. This section provides for in camera hearings, but does not authorize ex parte hearings. Black's Law Dictionary defines "in camera" as "[i]n chambers: in private." (5th ed., 1979, p. 684.) A cause is said to be in camera either when the hearing is had before the judge in his private room or "[i]n the courtroom with all spectators excluded." (*Ibid.*) In camera is not synonymous with "ex parte," which is defined by Black's Law Dictionary as "[o]n one side only. usu. without notice to or argument from the adverse party." (5th ed., 1979, p. 517.)

The cases interpreting section 1054.7 do not suggest that any party may be denied notice of hearings held pursuant to section 1054.7. In

Alvarado v. Superior Court (2002) 23 Cal.4th 1121, for example, the defendants received notice of the hearings, but were excluded from them: "*Over defendants' objections,* the trial court held a series of . . . hearings, *from which the defense was excluded*, to permit the prosecution to demonstrate good cause why disclosure of the witnesses' names and photographs should be denied." (*Id.* at p. 1128; first emphasis added.)

While the trial court may hold an ex parte hearing on a discovery matter, the hearing must comport with the general principles of due process. (*See Miller v. Superior Court* (1999) 21 Cal.4th 883, 896.) At minimum, due process requires that notice and an opportunity to be heard be afforded to other parties. (*See City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, 1131; *see also Department of Corrections v. Superior Court* (1988) 199 Cal.App.3d 1087, 1092.) As discussed in the cases below, when the court conducts an ex parte proceeding on one party's motion to obtain a discovery exemption, the proceeding may constitute a denial of due process.

In *City of Alhambra v, Superior Court, supra*, 205 Cal.3d 1118, the defendant in a multiple murder case used various means to discover evidence that may have supported his theory that a third party was responsible for the crimes, including an ex parte motion for an order requiring the district attorney's office to provide copies of 12 specific homicide reports. To preserve the confidentiality of the defense theory, the defendant's attorney submitted his sealed declaration for the court to review. The court granted the motion and issued the order. The prosecution filed a petition for writ of mandate asking the appellate court to vacate the superior court's order, arguing it was denied a fair hearing because it was not provided a copy of the defense attorney's declaration and that the discovery request was overly broad and lacked specificity.

In addressing those arguments, the appellate court recognized that, in order to keep the defense theory confidential, the court may be required to conduct an in camera examination of the supporting evidence to determine the legitimacy of the claim of confidentiality and the necessary scope of any protective order. (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1130.) While such ex parte proceedings may be necessary, the court observed:

> [i]t does not follow that the prosecutor (or interested third parties), must be precluded from effective participation in an important pretrial matter merely because the defendant asserts that the factual or legal showing made in support of a particular motion should remain confidential. If that were the rule, all defense discovery motions would soon be made and conducted *in camera*, to the detriment of our system of criminal justice in that those proceedings would not then be tested by the stringent and wholesome requirement of adversary litigation.

(*Ibid.*) In striking a balance between the defendant's right to confidentiality and the prosecutor's right to discovery, the court in *Alhambra* set forth the following procedures: first, the defendant should give proper and timely notice of the motion and include with his motion any supporting evidence and an explanation for requesting in camera consideration of the motion; second, the court should make a finding on the record that it received the defendant's papers and state whether and for what reason in camera consideration is justified; and, finally, the court must determine what portions of the papers must be sealed and what portions can be disclosed. (*Id.* at pp. 1131-1132.)

After the court's in camera examination, the court must give the opposing party reasonable notice and an opportunity to participate in the proceedings. The opposing party, therefore, should be involved to the

maximum extent possible in the trial court's consideration of the merits of the discovery motion. (*City of Alhambra v. Superior Court, supra,* 205 Cal.3d. at p. 1132.) None of these measures were taken here. Because appellant's counsel was precluded from participation, the court was "deprived of factual and legal contentions on which to base its decision," and the nondisclosure order swept "more broadly than necessary." (*Id.* at p. 1131 [citing *United Farm Workers of America v. Superior Court* (1975) 14 Cal.3d 902, 908-909].)

In the *City of Los Angeles v. Superior Court* (*Davenport*) (2002) 96 Cal.App.4th 255, the defendant filed a *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion for an order requiring the City to hand over all records pertaining to his case. The defendant filed with the trial court a sealed affidavit in support of his motion. The court granted the motion and the city filed a writ of mandate, asking the appellate court to vacate the trial court's order.

Unlike the district attorney in *Alhambra*, the city in *Davenport* was not afforded a fair adversarial hearing. Although *Davenport* involved a *Pitchess* motion, the court found the analysis in *Alhambra* equally applicable. While ex parte proceedings may be necessary, the opposing party must be allowed to participate in the proceedings. (*Davenport, supra,* 96 Cal.App.4th at p. 263.) In the context of a *Pitchess* motion, the court's determination of whether the moving party has shown good cause, as required under Evidence Code section 1043, must be tested by the adversarial process. (*Id.*) The court concluded that the city attorney, because he was not involved with the defendant's prosecution, should have been allowed to review the affidavit under a protective order and file any responsive papers under seal. (*Id.* at p. 264.)

From these cases, it is apparent that, while ex parte proceedings are

permissible, they are appropriate only for the initial determination of whether the moving party is entitled to confidentiality and to what extent the moving papers should be sealed. After making that determination, the court must provide "every reasonable opportunity to participate to any opposing party." (*City of Alhambra v. Superior Court*, *supra*, 205 Cal.App.3d at p. 1132.) In this case, however, the court's order completely excluded appellant from participating in the proceedings. She was not given notice or an opportunity to respond to the request for the nondisclosure order. Appellant was unaware that her co-defendant intended to call Jennifer Lee as a witness until the very day that she testified. Even then, appellant was not informed of the pretrial discovery motion, the ex parte hearing, and the trial court's nondisclosure order.

These ex parte procedures violated appellant's right to due process and a fair trial. A trial court may conduct a sealed, in camera hearing to determine if there is good cause for denying or requesting disclosure. However, a trial court may *not* engage an ex parte discussion simply to assist one party in taking a criminal defendant by surprise.

Under section 1054.7, a party may seek writ review to challenge an order denying or regulating discovery obtained as the result of an in camera hearing. It is for that purpose that section 1054.7 requires that a transcript of the hearing be prepared: "A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ." (Pen. Code, § 1054.7.) In *Alvarado*, both the prosecution and the defense sought writ review of the order stemming from the hearing under section 1054.7. (*Alvarado*, *supra*, 205 Cal.3d at p. 1130.)

Of course, it is not possible to seek writ review of an order about which a party knows nothing. An ex parte hearing, therefore, denies the excluded party not only the opportunity to be heard at whatever portion of the hearing is held in open court, but also the opportunity to seek writ review of the order obtained from the in camera portion of the hearing. The excluded party can only wait until the trial is over and attempt to seek relief on appeal. Post-trial, however, is not a "meaningful time" for purposes of procedural due process. By that time, significant damage has already occurred from the lack of discovery before and during trial. (*People v. Sutton* (1993) 19 Cal.App.4th 795, 803.)

Thus, the parties have a due process right to be heard at hearings in which the other party seeks orders restricting discovery. It follows that the ex parte hearing in this case violated appellant's right to due process.

D. In Conducting The Ex Parte Hearing, The Judge Violated The Code of Judicial Ethics

The California Code of Judicial Ethics limits ex parte communications:

> (7) A judge shall accord to every person who has a legal interest in proceeding, or that person's lawyer, full right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding, except as follows:
>
> [. . .]
>
> (d) A judge may initiate ex parte communications, where circumstances require, for scheduling, administrative purposes, or emergencies that do not deal with substantive matters provided:
>
> (i) the judge reasonably believes that no party will gain a

procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(e) A judge may initiate or consider any ex parte communication when expressly authorized by law to do so.

(Cal. Code Jud. Ethics, Canon 3B(7).)

Section 1054.7 provides no authority for trial courts to conduct ex parte hearings under the exception in paragraph (e). Although the statute gives trial courts discretion to limit discovery based on an in camera showing of good cause, the statute does not authorize those hearings to be conducted without notice to the opposing party.

Because none of the exceptions to the ban on ex parte communications listed in Canon 3B applies to hearings under section 1054.7, the court violated the Canon.

E. The Ex Parte Hearing And The Order Violated Appellant's Right To Effective Assistance Of Counsel

Similarly, the orders, which withheld from appellant not only Ms. Lee's name, but her letters and the handwriting expert evidence, and the current address of Ms. Kuretich, denied appellant the effective assistance of counsel. The essence of the right to counsel guaranteed by the Sixth Amendment is the opportunity to investigate and prepare a defense for trial. (*Powell v. Alabama* (1932) 287 U.S. 45, 58, 71.) Denying a defendant access to that evidence prior to trial "thwarts defense counsel's ability to present an intelligent defense and to make informed tactical decision[s]." (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960.) Counsel was denied that opportunity when discovery of Lee's testimony and evidence related thereto

was not made until the after the trial was underway.

F. The Exclusion of Counsel from the Ex Parte Hearings Is Prejudicial Per Se

The Supreme Court has interpreted the Sixth Amendment guarantee of the right to assistance of counsel to apply to "critical stages" of the proceedings. (*United States v. Wade* (1967) 388 U.S. 218.) The principle was first articulated by the Court in a due process context in *Powell v. Alabama* (1932) 287 U.S. 45. In 1961, the Court applied the principle in a Sixth Amendment analysis to pretrial confrontations. (*Hamilton v. Alabama* (1961) 386 U.S. 52.) The Court determines whether a particular pretrial proceeding constitutes a "critical stage" by evaluating two factors. First, the Court determines whether the presence of counsel is necessary to assure the accused's right to a fair trial. The Court also considers whether the accused's rights would be substantially prejudiced from the confrontation and whether the presence of counsel would help avoid that prejudice. (*United States v. Wade, supra*, 388 U.S. at p. 227; *Childress v. Johnson* (5th Cir. 1997) 103 F.3d 1221; *Williams v. Turpin* (11th Cir. 1996) 87 F.3d 1204.)

The Court has found that critical stages arise at arraignment (*Hamilton v. Alabama, supra*, 368 U.S. at pp. 53-54), and preliminary hearings (*White v. Maryland* (1963) 373 U.S. 59), as well as at certain pretrial identification procedures. (See, e.g., *Stovall v. Denno* (1967) 388 U.S. 293.) In recent right-to-counsel cases, the Court has shifted the focus of its critical stage analysis from a consideration of the fair trial implications for the accused to a determination of whether formal adversary proceedings have been initiated. (*Kirby v. Illinois* (1972) 406 U.S. 682; *Moore v. Illinois* (1977) 434 U.S. 220.)

Following the initiation of adversary proceedings, the critical stage

analysis also requires consideration of the nature of the proceeding in question. The Court has held, for example, that in-person identification procedures do require Sixth Amendment protections (*United States v. Wade*, *supra*, 388 U.S. at pp. 235-42), but photo line-ups do not. (*United States v. Ash* (1931) 413 U.S. 300, 316-21.) If the procedure is one that can be readily replicated, such as photo identifications or the taking of handwriting samples, the procedure is unlikely to be considered a critical stage. However, pre-trial proceedings that may impact the trial, even if not mandatory, can be considered a critical stage. (*Coleman v. Alabama* (1970) 399 U.S. 1, 6-11.)

If the proceeding is one in which a lawyer is unlikely to make a difference, if there is no confrontation, and if a defendant is unlikely to give up significant rights, the courts have found that critical stage protections are not implicated. As a result, the Court has held that Sixth Amendment protections do not apply to appearances before a Grand Jury, medical examinations, etc. (See e.g., *United States v. Mandujano* (1976) 425 U.S. 564, 581; *Wheel v. Robinson* (2d Cir. 1994) 34 F.3d 60, 66-67.)

The Ninth Circuit has applied a similar analysis to distinguish between finding a Sixth Amendment right to counsel during negotiations or interviews seeking to obtain a lower sentence through cooperation (*United States v. Leonti* (9th Cir. 2003) 326 F.3d 1111) from interviews with probation officers preparing presentencing reports. (*United States v. Benlian* (9th Cir. 1995) 63 F.3d 824, 827-828.) The *Leonti* opinion focuses on the concept that critical stage is linked to the nature of the adversarial process itself. A critical stage is a "trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice." (*Beaty v. Stewart* (9th Cir. 2002) 303 F.3d 975, 991-992.)

Thus, the essence of a "critical stage" is not its formal resemblance to a trial, but the adversarial nature of the proceeding, combined with the

possibility that a defendant will be prejudiced in some significant way by the absence of counsel. (*United States v. Leonti* (9th Cir. 2003) 326 F.3d 1111 [citing *United States v. Wade*, *supra*, 388 U.S. at pp. 228-29].) The ex parte in camera hearings in this case were clearly a critical stage of the proceeding. Phillip's counsel functioned as second prosecutors throughout the trial (see Argument I, *supra)*, and their position was clearly adversarial to appellant. During the first ex parte hearing on June 9, they candidly informed the court that there were "three sides in this case." (RT4:762.) If appellant's counsel had prior notice of the ex parte hearing, they could have argued that Phillip had no constitutional or statutory right to an in camera hearing and further, that there was no good cause to delay disclosing the identity of Lee and the real evidence she would authenticate.

Not only were the hearings adversarial in nature, but the probability of prejudice to appellant's right to a fair trial was plain. As counsel argued when the existence of Lee was finally disclosed, it was a "manifest violation of appellant's due process rights to ask her to defend in front of a jury, a capital jury, against evidence of which she has no notice." (RT38:6494-6495.) If counsel had been present at the in camera hearings, he would have had an opportunity to persuade the court that disclosure of Lee's identity to counsel alone was sufficient to protect the legitimate interests of Phillip, and necessary to permit counsel to prepare to meet the evidence and structure their defense accordingly.

The absence of counsel during a critical stage of a trial is a "structural defect" that is per se reversible error. (*United States v. Gonzalez-Lopez* (2006)___U.S.___, 126 S.Ct. 2557, 2564.) "The right to counsel is 'so basic to a fair trial that [its] infraction can never be treated as harmless error.' " (*Penson v. Ohio* (1988) 488 U.S. 75, 88 [quoting *Chapman v. California* (1967) 386 U.S. 18, 23].) "The complete denial of counsel during a critical

stage of a judicial proceeding mandates a presumption of prejudice." (*Roe v. Flores-Orteca* (2000) 528 U.S. 470; *see also United States v. Cronic* (1984) 466 U.S. 648, 659 fn. 25.)

Here, as in *Penson*, due to the trial court's actions, counsel simply was not present. A rule of *per se* reversal must therefore be applied. (*See Perry v. Leeke* (1989) 488 U.S. 272, 277-80 [noting that reversal without a showing of prejudice in *Geders v. United States* (1976) 425 U.S. 80, which involved the failure to permit counsel to confer with his client, "was consistent with the view we have often expressed concerning the fundamental importance of the criminal defendant's constitutional right to be represented by counsel"].)

Appellant recognizes that this Court did not apply a per se rule of reversal in *People v. Ayala* (2000) 24 Cal.4th 243, where appellant and his counsel were excluded from a hearing at which the prosecutor explained her reasons for exercising peremptory challenges. Citing *Rushen v. Spain* (1983) 464 U.S. 114, 118-119, the Court found that any denial of Ayala's federal constitutional rights to presence and counsel was harmless beyond a reasonable doubt under *Chapman v. California* (1967) 386 U.S. 18. (*People v. Ayala, supra*, 24 Cal.4th at p. 269.) Appellant submits that this Court's reliance on *Rushen* to apply the *Chapman* test of harmless error should be re-evaluated in light of the Supreme Court's more recent pronouncements on the absence of counsel from a critical stage of the proceedings, including *United States v. Gonzalez-Lopez, supra,* ___U.S.___; 126 S.Ct. 2257.

Moreover, the circumstances presented in *Ayala* are distinguishable in several important respects. First, in contrast to appellant's counsel, Ayala's counsel had prior notice and an opportunity to object to the ex parte hearing. (*People v. Ayala, supra*, 24 Cal.4th at p. 260.) Second, it was possible in that case to assess the effect of the error – permitting the prosecutor to justify her exercise of peremptory challenges in camera – in light of the "well-

developed record of jury selection." (*Id.* at p. 268.) Because the error did not affect the composition of the record, review for harmless error was possible. Neither circumstance is present here.

G. Even If The Denial Of Appellant's Rights to Presence and to Counsel Is Not Reversible Per Se, The State Cannot Show That The Errors Were Harmless Beyond a Reasonable Doubt Under *Chapman*

No matter how this Court assesses or characterizes the trial court's error, appellant is entitled to a new trial. This is because the denial of assistance of counsel here was an error, if not structural, so prejudicial that it requires reversal. While denial of counsel at the critical stage of a criminal proceeding is not always prejudicial as a matter of law,

> prejudice will be presumed where the denial "may have affected" the substantial rights of the accused. Only the "most compelling showing" to the contrary will suffice to overcome the presumption, and courts will not engage in "nice calculations" in making such a determination. And of course the foundational constitutional requirement, in determining the harmlessness of such error, is *Chapman v. California*'s mandate that the "court must be able to declare a belief that [the denial of counsel] was harmless beyond a reasonable doubt."

(*People v. Dagnino* (1978) 80 Cal.App.3d 981, 989.)

In the present case, this Court need not look far to determine that the presumption cannot be rebutted. The several ex parte hearings were essentially adversarial proceedings conducted in the absence of one of the defendants. Had appellant's counsel been permitted to participate in the ex parte hearing, they certainly would have objected to the nondisclosure order, predicated as it was merely on the one-sided assertions of Mr. Wesley and Mr. Weiss.

Because appellant's counsel were not permitted to attend the several ex parte hearings, Wesley and Weiss were allowed to unreasonably bias Judge

Trammell that disclosure of Lee's identity to the defense would place her life in danger. Had appellant's counsel been allowed to participate in the court's consideration of this issue, they would have certainly asserted their right to cross-examine Lee, and assured the court that, to appease Wesley and Weiss' concern, they would not disclose Lee's identity to appellant. Appellant's counsel could have also, in accordance with the *Davenport* decision, *supra*, proposed terms for a properly tailored protective order. Finally, appellant's counsel would have also undoubtedly objected to Wesley and Weiss' month-long effort to prevent appellant's counsel from sufficiently preparing for trial by interviewing Lee; an effort which included their plan to have the investigating officer in the case retrieve Lee from state prison on the day of her testimony, and interview her alone for nearly two hours. (RT38:6536.) Thus, not only was defense counsel unable to protect appellant's rights, but Phillip's counsel were permitted undue influence in the proceedings, unfettered by the presence of appellant's counsel.

This Court cannot accurately determine what damage was done to the defense by the deprivation of appellant's right to counsel at the several ex parte hearings, or what evidence was made unavailable to the defense as a result. Had appellant's counsel been allowed to participate in the multiple ex parte discussions, it is likely Wesley and Weiss would not have been permitted to introduce any evidence as to Lee. (RT5:762 [if ordered to disclose Lee, Wesley insisted he would "not turn over [the] witness"].) In the alternative, appellant would have had an opportunity prepare her defense to meet this evidence. In these circumstances, the compelling showing necessary to overcome the presumption of prejudice cannot be made. If not reversible per se. The error cannot be deemed "harmless beyond a reasonable doubt." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Appellant's conviction must therefore be reversed.

IV

THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO WITHHOLD NUMEROUS STATEMENTS MADE BY ITS WITNESSES

Due process requires that a defendant be provided with reciprocal discovery in a timely manner. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Under California law, the prosecution has a duty to disclose all relevant statements of witnesses whom the prosecution intends to call at trial, even if those statements are merely oral. (See Pen. Code, § 1054.1(f); *Roland v. Superior Court* (2004) 124 Cal.App.4th 154, 167.)[48] In addition, Penal Code section 1054.7 requires that, absent a showing of good cause, such disclosures be

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[48] Penal Code section 1054.1 states, in pertinent part:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
>
> (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial.
>
> [...]
>
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements or experts made in conjunction with the case, including the results of physical or mental examinations, scientific test, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial.

made at least 30 days before trial.[49] "'Good cause' is limited to threats of possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7.) This is the sole statutory exception to disclosure.

Here, the trial court refused to compel discovery of oral statements taken from witnesses the prosecution called at trial. This conclusion runs afoul of the criminal discovery statutes and has been rejected by *Roland v. Superior Court*, *supra,* 124 Cal.App.4th 154. The admission of this evidence violated appellant's Sixth Amendment rights to confront and cross-examine the witnesses against her, and to the effective assistance of counsel and undermined the reliability of the death judgment, in violation of the Eighth Amendment.

A. Relevant Factual Background

During the guilt phase of appellant's trial, four prosecution witnesses testified without their relevant statements having been provided in discovery. Carolyn Thompson Jones, testified at a hearing outside the jury's presence to conversations with her father prior to his death concerning his business affairs. Appellant objected that she had received no discovery with respect to this witness. (RT23:4067, 4069-4070.) The prosecution conceded that there was no written report. (RT23:4068) Although appellant's relevance objection to this testimony was ultimately sustained, other objections were overruled. (RT23:4079.)

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[49] Section 1054.7 states, in pertinent part:

> The disclosures required under this chapter shall be made at least 30 days prior to the trial, unless good cause is shown why a disclosure should be denied, restricted, or deferred.

In the presence of the jury, the prosecution introduced evidence of When Carolyn Thompson Jones's "special training in observing people and their reactions" (RT43:7497-7498) to bolster her opinion that defendant's expressed grief over her husband's death was feigned. The defense objection on the basis of lack of discovery was overruled. (RT43:7499, 7503.)

Prosecution witness, Tony DeGreef, testified that his conversations concerning the sale of the Hillary Street property were only with appellant or with Isabelle Sanders. The prosecutor asked:

> Q: Did Catherine Thompson ever explain why you weren't speaking to Melvin Thompson?
>
> A: Yes, she told me almost initially that he was very ill to the point of being bedridden in some cases, and it would be much better that I not speak with him because she did not want to get him more upset in regards to this matter.
>
> Q: Did she indicate anything regarding whether she wanted him to know about the foreclosure?
>
> A: She indicated that she did not want him to know.

(RT24:4113.)

When the defense objected that it had received no discovery concerning these statements of the defendant, the prosecution responded, "You know, we can't have each and every sentence that the witness is testifying to." (RT24:4114.) Defense counsel argued that he had been "sandbagged" since whether the victim was aware of the Hillary Street house foreclosure was a particularly critical issue. Counsel also argued that the evidence was taken in violation of the court's discovery order regarding all statements and utterances of the defendants. The court denied appellant's motion for mistrial. (RT24:4114-4116.)

Similarly, when prosecution witness Tommy Thompson testified concerning appellant's emotional state after her cat died, in contrast to her grief at the loss of her husband (RT26:4508), the prosecution by their own admission failed to turn over this evidence in conformity with the court's discovery order. Counsel for appellant argued that the only way to stop the prosecution from violating the court's order would be to suppress the evidence. (RT26:4504-4505.) The court declined to sanction the prosecution and the evidence came before the jury. (RT26:4508-4509.) Finally, as discussed in Argument II, *supra*, the prosecutor elicited testimony from Jennifer Lee regarding appellant's alleged claims of wealth (RT40:6818-6820) over appellant's unsuccessful objection to the admission of this evidence on the ground that she had received no discovery on the matter. (CT40:6803, 6841.)

B. The Erroneous Admission of Witnesses Undisclosed Oral Statements Was Prejudicial Error

In *Roland v. Superior Court*, the trial court ordered the discovery of any reports of relevant statements, "regardless of whether the reports were written or oral." (*Roland, supra*, 121 Cal.App.4th at p. 161.) The trial court further gave counsel the option of "handing over copies of written reports of the witnesses' statements, or simply telephoning [opposing counsel] and providing him with an oral summary of their statements." (*Ibid.*) Counsel, however, flatly refused and extraordinary writ relief was sought.

The *Roland* court held, the statute's "disclosure requirement applies to relevant oral statements of witnesses." (*Roland, supra*, 121 Cal.App.4th at p. 163.) The court of appeal noted, "the words 'written or recorded' modify 'statements,' not 'reports of the statements.' " (*Ibid.*) To further prevent "reports of the statements of witnesses" from being mere

surplusage, the court held this a discrete requirement, separate from the obligation to disclose "written or recorded statements of witnesses." (*Id.* at p. 164.) As such, "reports of the statements of witnesses" was held to "cover[] statements left out of the ["written or recorded"] requirement, namely the oral statements of intended witnesses." (*Ibid.*)

The *Roland* court also noted a strong policy basis for its finding:

> [E]xcluding [oral] statements from the disclosure requirement of section 1054.3 – and concomitantly section 1054.1 – would undermine the [statute's] intent because it would permit defense attorneys and prosecutors to avoid disclosing relevant information by simply conducting their own interviews of critical witnesses, . . . and by not writing down or recording any of those witnesses' statements.

(*Roland, supra*, 121 Cal.App.4th at p. 167.)

Further, because "witnesses [for a party] often refuse to talk [to the other side]," counsel would "not have a reasonable opportunity to determine the nature of their anticipated testimony" "without the disclosure of relevant oral as well as written and recorded statements of witnesses." *(Roland, supra*, 121 Cal.App.4th at p. 167.) This concern was, in fact, so compelling that the court prevented counsel from resorting to "the simple expedient of not writing [oral statements] down." (*Id.* at p. 165.) Though the court weighed its policy against competing concerns, it could find "no logical reason" to require disclosure of the written statements of witnesses, but not "oral statements such witnesses made directly to counsel." (*Id.* at p. 167.)

Prior to trial in the present matter, appellant's counsel requested and then moved to compel discovery of the following evidence:

> 31. All statements, conversations, interviews, and utterances of any potential witnesses in this case, whether such statements, conversations, and utterances are *written, tape-recorded, committed to memory or otherwise preserved* and

whether or not signed or acknowledged by such witnesses.

32. All statements, conversations, interviews, and utterances of such testifying witnesses in any way relevant to this case, whether such statements, conversations, and utterances are *written, tape-recorded, committed to memory or otherwise preserved* and whether or not signed or acknowledged by such witnesses.

(RT13:1836-1837; italics added.) In refusing to comply with this request, the prosecutor cited Penal Code section 1054.1 and argued that "[t]he People are only required to produce 'written or recorded' reports of witness interviews of witnesses the prosecution intends to call at trial." (RT13:1925.) Part of the prosecutor's justification for its refusal was that compliance would require it to create a report by writing down oral statements. (*Ibid.*) The court agreed with the prosecutor.

The court in *Roland v. Superior Court, supra*, however, rejected this argument and held the parties to an affirmative obligation to write down oral statements. The court in *Roland* further gave counsel the option of telephoning opposing counsel and providing an oral summary of a witness' statement. (*Roland, supra*, 121 Cal.App.4th at p. 161.) Refusing these reasonable alternate measures, the prosecution covertly elicited undisclosed trial testimony concerning the Hillary Street house foreclosure and appellant's emotional state. The prosecution's pattern of questioning strongly suggests it knew its witnesses would testify as they did. Yet there is no evidence that the prosecutor ever disclosed those witness statements to defense counsel, let alone disclosed such statements at least 30 days prior to trial as required under the statute. The prosecution's failure to disclose that information in a timely manner constitutes a serious discovery violation. Moreover, it deprived appellant of the opportunity to investigate the undisclosed claims further, to prepare her case for trial, and to move to

exclude the evidence as highly prejudicial. These deprivations constituted a violation of appellant's rights under the Sixth and Fourteenth Amendments.

Pure "gamesmanship" such as this violates *Roland*, the criminal discovery statutes, and the pending discovery order at trial, and should not be sanctioned on appeal. (*See Roland v. Superior Court*, 124 Cal.App.4th at pp. 165-167.) The surprise nature of this testimony prevented appellant from preparing to meet it and interfered with her counsel's ability to provide effective assistance, in violation of appellant's rights under the Sixth and Fourteenth Amendments. The erroneous introduction of the evidence additionally deprived appellant of a fundamentally fair trial, and undermined the reliability of the death judgment, in violation of the Eighth and Fourteenth Amendments, and article 1, section 15, of the California Constitution. The testimony of Tony DeGreef improperly undercut appellant's guilt phase defense that Tom was aware of her efforts to save the Hillary Street house. Evidence of appellant's allegedly feigned grief at the death of Tom, and her purportedly greater emotional reaction to the death of a family pet, improperly bolstered the prosecutor's penalty phase argument that appellant was a cold and callous person, that her "heart, mind and soul" was that of a person who "should not be allowed to live in any society, even a prison." (RT58:9351.) Finally, the prosecutor commented extensively in her penalty phase arguments about the statements to Lee, arguing that they showed that appellant's manipulative nature would make her a danger to other prisoners." (RT58:9374-9375.)

Because the state cannot prove that these errors were harmless beyond a reasonable doubt, the judgment must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

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V

THE TRIAL COURT PREJUDICIALLY ERRED BY PERMITTING THE PROSECUTOR TO WITHHOLD DISCLOSURE OF CRITICAL INFORMATION ABOUT CHRISTINE KURETICH FROM APPELLANT'S COUNSEL

Due process requires that a defendant be provided with reciprocal discovery in a timely manner. (*Wardius v. Oregon* (1973) 412 U.S. 470, 474; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356.) Under California law, the prosecution has a duty to disclose the names and addresses of any witnesses it intends to call as witnesses at trial. (See Pen. Code, § 1054.1, subdiv. (a) cited in pertinent part in Argument IV, *supra*.) In addition, Penal Code section 1054.7 requires that, absent a showing of good cause, such disclosures be made at least 30 days before trial. "'Good cause' is limited to threats of possible danger to the safety of a victim or witness, possible loss or destruction of evidence, or possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7, cited in pertinent part in Argument IV, *supra*.) This is the sole statutory exception to disclosure.

Here, the trial court refused to compel discovery of a current address for Christine Kuretich, a critical prosecution witness who the prosecution called at trial. This conclusion runs afoul of the criminal discovery statutes and violates appellant's right to confront and cross-examine the witnesses against her, guaranteed by the Sixth and Fourteenth Amendments (*Alfred v. United States* (1931) 282 U.S. 687), and undermined the reliability of the death judgment, in violation of the Eighth Amendment.

A. Relevant Factual Background

On February 4, 1992, appellant moved for an order compelling the prosecution to disclose the address of prosecution witness Christine

Kuretich. (CT5:14.) At the preliminary hearing, Kuretich testified to numerous alleged details of the murder plan, and to appellant's connection therewith. She testified, *inter alia*, that in early June 1990, she was living with co-defendants Carolyn and Phillip Sanders on Polk Street in the San Fernando Valley when Carolyn Sanders asked her whether she knew anyone who would kill somebody for money. (CT1:132, 135.) She further testified that the money would be paid from insurance that appellant was supposed to get from her husband's death. (CT1:136.) She testified to numerous other alleged details of the murder plan, and to appellant's connection therewith on the basis that the statements were in furtherance of a conspiracy between the defendants. Kuretich was "one of the only witnesses whose testimony would directly link [appellant] to the killing of her husband." (CT7:2127.)

Materials produced by the prosecution prior to trial, however, indicate that Kuretich had "fabricated evidence" in her discussion with the authorities. The witness admitted that she had lied to the police when she was first interviewed with them. (CT1:155.) She also admitted that she had falsely implicated an innocent person in the commission of the murder. (*Ibid.*) Moreover, the witness admitted that she abused narcotics and alcohol during the period of time that she was living at the Sanders residence. (CT1:159.) Materials produced by the prosecution included "numerous contradictory and inconsistent statements by the witness," and tended to show that Kuretich has been an active member of the conspiracy to kill Tom.

For these reasons, appellant considered it a priority of her defense to interview Kuretich. (CT5:1478.) Although Kuretich claimed at the time of her testimony that she had ceased her abuse of drugs and alcohol, defense counsel sought out her present location in order to verify the veracity of her

claim. The defense believed that if it could demonstrate Kuretich continued to abuse drugs and alcohol during her tenure as a prosecution witness, her credibility would be shattered. Not only would Kuretich's character for honesty be called into question, but also her ability to recollect the matters about which she testified.

After an independent attempt to locate Kuretich was unsuccessful, appellant's counsel contacted the prosecutor on January 30, 1992 for further assistance. (CT5:478-479.) Prosecutor Mader indicated she knew where Kuretich was presently located, but refused to disclose the witness' address. (CT5:1479.) Appellant's counsel then advised the prosecutor that he would move to compel disclosure of the witness' location. (*Ibid.*) Appellant filed the motion to compel the following day. (CT5:1474.) The matter was calendared for February 4, 1992, but Judge Weisberg continued the matter on her own motion to February 11, 1992. (CT11:3085.)

On February 5, the day following appellant's appearance, "the prosecution . . . caused Ms. Kuretich to be arrested at an unknown location, and brought her to court for an ex parte appearance." (CT7:2124.) Appellant was not provided with prior notice of this appearance. (*Id.*) During this ex parte proceeding, Judge Weisberg appointed counsel to represent Kuretich, and released her on the condition she reside with her parents. (CT7:2128.) "The prosecution sought and received an order sealing certain portions of the transcript." (*Ibid.*)

Throughout the remainder of the proceedings, appellant sought and was denied information on Ms. Kuretich's current whereabouts. (CT7:2127.) At the same time, the prosecution "enjoyed exclusive access to Kuretich," during which they likely discussed her testimony in appellant's trial. (CT7:2128.) Appellant renewed her motion compelling disclosure of Kuretich's address on several occasions. (CT4:599-609;

5:680-694, 699-700.) Though the court agreed to order disclosure of her previous address, the court declined to order the prosecution to turn over Kuretich's present address. (RT6:771.)

By housing Kuretich at an undisclosed location in violation of an order by the magistrate court, the prosecution also participated in and facilitated a violation of the conditions of Ms. Kuretich's release from custody. (CT7:2128-2129.) Despite assurances "no address or telephone information about Kuretich [would] be shared with [appellant]" (CT7:2129), the trial court denied each of appellant's motions to contact Ms. Kuretich in preparation for trial.

B. The Court's Refusal to Compel Disclosure of Kuretich's Address at the Time of Trial Was Prejudicial Error

Penal Code section 1054.1 sets forth the defendant's discovery obligations. As stated previously, it requires in pertinent part that the prosecution disclose "the names and addresses of persons . . . [it] intends to call as witnesses at trial." (Pen. Code, § 1054.1, subdiv. (a).) The fundamental importance of this discovery obligation can not be understated. In *Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, this Court held that:

> [w]hen the credibility of a witness is in issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid the most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself.

(*Alvarado*, *supra*, 23 Cal.4th at pp. 1125-1126 [quoting *Smith v. Illinois* (1968) 390 U.S. 129, 131]; *Miller v. Superior Court* (1979) 99 Cal.App.3d [quoting *Alford v. United States, supra* 282 U.S. at pp. 691-692].) Direct

contact with adverse witnesses is, thus, a basic predicate of criminal discovery. In contrast, withholding the address of a witness encroaches on a defendant's right to confront and cross-examine witnesses, and is rarely permitted. The reasons for doing so, moreover, should be well-substantiated.

Although exceptions to this rule continue to be argued, they are widely proscribed. *Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, held that a trial court cannot consider fashioning an alternative discovery process to direct contact with a witness unless there has been a showing of sufficient danger of harassment, threats or harm to the witness to justify a prohibition against the defense directly contacting them. (*Id.* at p. 1333.) Further, the showing must consist of "actual rather than conjectural threats to the witness' safety." (*People v. Benjamin* (1975) 52 Cal.App.3d 62, 74.) The prosecutor in this case, as in *Reid*, failed to meet this threshold showing.

With no finding of fact and without providing the defense an opportunity to be heard, the trial court permitted the prosecutor to withhold Christine Kuretich's address and telephone number. In so doing, the trial court ignored that "as proponent of the witness, the People bear the burden of . . . showing [disclosure would create a threat to the witness' safety] by competent evidence." (*Montez v. Superior Court* (1992) 5 Cal.App.4th 763, 770.) To the extent there is any evidence that Kuretich was threatened or harassed, no such evidence was ever presented to the trial court in defense counsel's presence. Failing this, the standard enumerated in *Reid* is not met.

A generalized or unfounded "fear" does not suffice. Appellant was in custody, and neither she, nor anyone on her behalf, was shown to have made any effort to contact Kuretich. In *Montez, supra*, there were threats

implied by some *conduct* on the part of the defendants against more than one witness. In this case, however, there is no evidence of threats, or harassment, or danger to the witness by appellant, or even inappropriate attempts to contact the witness. Kuretich never suggested that she received an implied threat, and the court instructed the jury that there was no evidence that either defendant did anything to cause any witness, to be afraid to testify. (RT51:8707-8708.)

As a result, no good cause was shown for denying or restricting disclosure to the defense of a critical witness' contact information. If the prosecution were allowed to withhold witness information based purely on an asserted generalized fear, absent actual threat, then the formidable threshold showing required by section 1054.7 would never be met, and a defendant's right to confront and cross-examine witnesses would be lost. (See *People v. Benjamin* (1975) 52 Cal.App.3d 63, 74.)

Because the prosecution provided no evidence of potential witness danger, section 1054.7 cannot provide the basis for the trial court's restrictive discovery order in this case. (*Reid, supra*, 55 Cal.App.4th at p. 1337.) In refusing to compel disclosure, the trial court also ignored established authorities holding a defendant has a right to the names and addresses of prosecution witnesses and a right to have an opportunity to interview those witnesses. (See, e.g., *Clark v. Superior Court* (1961) 190 Cal.App.2d 739, 742-743; *People v. Lopez* (1963) 60 Cal.2d 223, 246-247.) "A criminal trial, like its civil counterpart, is a quest for truth. That quest will more often be successful if both sides have an equal opportunity to interview the persons who have the information from which the truth may be determined." (*Gregory v. United States* (D.C. Cir. 1966) 369 F.2d 185, 188.) "As a general rule, a witness belongs neither to the government nor to the defense. Both sides have the right to interview witnesses before trial.

[Citations.] Exceptions to this rule are justifiable only under the 'clearest and most compelling circumstances.' [Citation.] [¶] Where there is no overriding interest in security, the government has no right to interfere with defense access to witnesses." (*United States v. Cook* (9th Cir. 1979) 608 F.2d 1175, 1180, fn. omitted.)

Therefore, as a general rule, "[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party." (Canon 39 of the ABA Canons of Professional Ethics (1955); *see also* Canon 10 of the Code of Trial Conduct of the American College of Trial Lawyers (1972); *Gregory, supra*, 369 F.2d at p. 188; *United States v. Vole* (7th Cir. 1970) 435 F.2d 774.) Generally, "[a] defendant is entitled to have access to any prospective witness although such a right of access may not lead to an actual interview." (*United States v. Scott* (6th Cir. 1975) 518 F.2d 261, 268, italics omitted.) "[I]t [is] better procedure [for] the trial court [to] permit[] the attorneys for the defense to hear directly from the witness . . . whether he would be willing to talk to the defense attorneys, either alone or in the presence of his attorney." (*United States v. Long* (8th Cir. 1971) 449 F.2d 288, 296; *see also United States v. Walton* (4th Cir. 1979) 602 F.2d 1176, 1180.) The trial court disregarded all of the above authorities.

The trial court also ignored authorities that hold a proper investigation is a critical part of the right to the effective assistance of counsel. "Trial counsel has a duty to adequately investigate possible defenses to enable formulation of an informed trial strategy." (*People v. Jennings* (1991) 53 Cal.3d 334, 376.) An attorney's failure to investigate the charges against his client denies the client the effective assistance of counsel required by both the California and United States Constitutions. (*In re Cordero* (1988) 46 Cal.3d 161.)

In sum, the prosecution failed to show "actual rather than conjectural threats to the witness' safety." (*Benjamin, supra*, 52 Cal.App.3d at p. 74.) Hyperbole is not evidence, and it is not a basis for the trial court's finding that the witnesses will become unavailable. Such hyperbole certainly cannot outweigh a defendant's right to be provided the address of a critical prosecution witness and her right to have an opportunity to interview that witness. The trial court abused its discretion in permitting the prosecutor to withhold Kuretich's address and telephone number from the defense, violating appellant's due process rights to a fair trial, her right to present a defense, and her Sixth Amendment rights to confrontation and the effective assistance of counsel.

This error was prejudicial under any test of prejudice. Kuretich provided the prosecution's only direct evidence of a conspiracy, and her prior inconsistent statements raised serious questions about both what she heard and when she heard it. (See, e.g. RT30:5196, 5202 [first heard about events surrounding killing after it happened, when she tried to piece it together]; RT30:5165-5166, 5190, 5196 (had difficulty distinguishing what she heard before the killing and the conversations that occurred later].) Her attempt to explain away her prior inconsistencies centered on her claim that she had better recall of the events two years later at trial because she was no longer using drugs or alcohol. (RT29:5095, 5101, 5105-5107; 30:5172-5173, 5241.) Thus, as appellant's counsel argued (RT5:683, 688, 692-693), information about her current address was necessary to investigate her reputation for alcohol and drug use at the time of trial. The court's refusal to disclose her residence address and place of employment at the time of trial prevented counsel from conducting the investigation critical to ascertaining these facts, and requires reversal of the judgment.

VI

THE TRIAL COURT ERRED IN ADMITTING HEARSAY STATEMENTS OVERHEARD BY CHRISTINE KURETICH BECAUSE THEY DID NOT COME WITHIN THE COCONSPIRATOR EXCEPTION TO THE HEARSAY RULE

A. Introduction and Factual Background

Appellant moved to exclude as hearsay the testimony of witness Christine Kuretich relating conversations between Phillip Sanders, Carolyn Sanders and Robert Jones. (CT3:891-935.) The prosecutor argued the statements were admissible under Evidence Code section 1223, an exception to the hearsay rule that permits evidence of admissions of a coconspirator. (RT3:462-463; CT7:1846-1852.) Appellant argued the evidence should not be admitted because no independent evidence of a conspiracy to murder had been established and because any post-crime statements were not in furtherance of the conspiracy. (CT3:898.)[50]

Evidence Code section 1223 provides an exception to the hearsay rule as to statements made during the existence of a conspiracy that are in furtherance of its objective. The statute provides:

> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime . . . and in furtherance of the objective of that conspiracy;
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
> (c) The evidence is offered either after admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the

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[50] Prior to the taking of testimony, appellant also argued the hearsay testimony violated her Sixth Amendment confrontation right. (CT6:898.) Subsequently, both Phillip Sanders and Carolyn Sanders testified at the trial. Robert Jones did not testify and statements attributed to him ultimately were not admitted.

order of proof, subject to the admission of such evidence.

The defense requested a hearing pursuant to Evidence Code sections 402 and 403 so that the trial court could make a finding as to whether a prima facie showing of the existence of a conspiracy had been made and whether the statements were made in furtherance of the conspiracy as required by Evidence Code section 1223. (RT3:454; 29:4966.) The court initially denied the defense request for a hearing "based on the People's representation that they do not at this time intend to introduce statements that were made after the homicide." (RT3:489) After reading the preliminary hearing transcript, however, the court granted a hearing in order to determine whether the prosecutor could establish the existence of a conspiracy, and whether the proffered statements were made within the scope of the conspiracy. (RT22:3882, 3885.)

The prosecution sought to introduce at trial evidence of four statements or groups of statements: 1) a conversation in early June 1990 between Carolyn Sanders and Christine Kuretich in which Carolyn Sanders asked Kuretich if she knew anyone willing to kill for money; 2) statements made after the first conversation between Phillip Sanders and Carolyn Sanders between June 1 and June 14, 1990 in which Kuretich overheard discussions about details of the murder plan; 3) statements involving Robert Jones, Phillip Sanders and Carolyn Sanders discussing details of the murder plan including that Sanders would do the shooting and Jones would drive the car and provide the gun; and 4) a post-murder statement by Robert Jones to Carolyn Sanders that he had melted the gun. (CT9:2663.)

The trial court rejected the prosecution theory that there was a conspiracy to kill at the time of the November 1989 transaction involving the fraudulent loan on the Sycamore Street house. (RT29:5006.) However, the court said, "I do find that the evidence I feel would be sufficient prima

[sic] to show that defendant formed an intent to kill her husband." (RT29:5007.) The court did *not* find that the evidence established Sanders was part of a conspiracy on June 1. However, "clearly by his own statements he was part of the conspiracy during those statements in which he, his wife and at times Kuretich discussed the murder," so that the first statement made prior to that time would not be admitted. (*Ibid.*) The court also excluded the post-murder statement, finding it was not made in furtherance of the conspiracy. (RT29:5011.)

The court ruled the groups of statements labeled two and three would be admitted because "there is sufficient evidence to show a prima facie showing that in fact both parties were part of said conspiracy." (RT29:5007.) In addition to objecting to the introduction of the statements, appellant also moved for a judgment of acquittal under Penal Code section 1118.1 at the close of the prosecution case. (RT35:6135.)

B. No Prima Facie Case of a Conspiracy Was Made

In order for Kuretich's hearsay statements to be admissible under Evidence Code section 1223, the prosecutor needed to establish by a preponderance of the evidence the existence of a conspiracy and of appellant's participation in that conspiracy at the time statements two and three were made, independent of the statements themselves. (*People v. Herrera* (2000) 83 Cal.App.4th 46, 62, citing *People v. Lucas* (1995) 12 Cal.4th 416, 466.) A reasonable jury had to be able to find it more than likely that appellant was participating in a conspiracy at the time the codefendants made the statements, (*People v. Herrera, supra,* 83 Cal.App.4th at p. 62), and that finding had to be established by evidence independent of the statements themselves. (*Id.* at p. 65, citing *People v. Hardy* (1998) 2 Cal.4th 86, 139, *People v. Leach* (1975) 15 Cal.3d. 419, 430.)

A conspiracy exists when one or more persons have the specific intent to agree to commit an offense, as well as the specific intent to actually commit that offense, along with proof of the commission of an overt act in furtherance of the conspiracy. (Pen. Code sec., 184; *People v. Morante* (1999) 20 Cal.4th 403, 416; *People v. Swain* (1996) 12 Cal.4th 593, 600.) Once the existence of the conspiracy has been independently established, the proponent must show that: (1) the declarant (who may or may not be the defendant) was participating in a conspiracy at the time of the declaration; (2) the declaration was made in furtherance of the objective of the conspiracy; and (3) at the time of the declaration, the party against whom the evidence is offered was participating, or would later participate, in the conspiracy. (*People v. Sanders* (1995) 11 Cal.4th 475, 516; *People v. Hardy, supra*, 2 Cal.4th at p. 139, accord, Evid.Code, § 1223.) California courts require that the existence of the conspiracy be established by evidence independent of the proffered declaration. (*People v. Leach, supra,* (1975) 15 Cal.3d at p. 430; *People v. Hardy, supra*, 2 Cal.4th at p.139.)

The prosecution offered no independent evidence that appellant had entered into an agreement with the Sanders to kill her husband for life insurance proceeds. While proof of the elements of a conspiracy by circumstantial evidence is permitted and proof of a physical meeting of the coconspirators is not required, the circumstances must reasonably show that the conspiratorial agreement has been reached in some manner. (*People v. Garcia* (1992) 201 Cal.App.2d 589 592.) None of the prosecution's evidence proved that a conspiratorial agreement had been reached. The evidence established only that: 1) Sanders killed Thompson [evidence of the killing, lack of motive for the killing, sighting of Jones and Sanders at the shop in the weeks before crime, whispering in Sanders's house]; and 2) appellant conducted some unilateral business and financial transactions

[placing business and Hillery Street house in her name, increase in life insurance policy]; and 3) appellant and Sanders were associated in other matters [telephone calls, November fraud, denial of greater relationship, phone number located at Sanders's house]. None of these, contrary to the prosecutor's argument, established "by logical inference, Cathy Thompson has to be guilty as well." (RT29:4981-4982.) The final piece of the prosecutor's prima facie case – the "ambiguous" letter found by Tommy Thompson under a blotter at the car shop months after the crime in appellant's handwriting which described a male black with salt and pepper hair who could be found at the shop between 6 and 7 p.m. – has no bearing on the existence of a conspiracy between appellant and others to murder Thompson. The letter does not, as the prosecutor argued, show a "need for communication" because it was never communicated to anyone. (RT29:4985.)

Without some proof of the corpus delecti of conspiracy the hearsay statements cannot be admitted. (*People v. Garcia, supra,* 201 Cal.App.2d at p. 593.) Proof cannot be supplied by mere conjecture. In *People v. Linde* (1933) 131 Cal.App. 12, 19, the court held that evidence that appellant was in the company of the accomplice during the afternoon and evening of the day on which the burglary was committed and that two days after the commission of the offense appellant asked the accomplice's brother to furnish him with the accomplice's address, was insufficient to prove the existence of a conspiracy. "To hold that these slight circumstances furnished sufficient proof of the existence of a conspiracy to make the proffered evidence admissible is, we think, not justified and we therefore entertain the opinion that the court committed no error in rejecting the evidence." In *Jong v. United States* (9th Cir. 1957) 25 F.2d 392, the court ruled that "guilt by association" is insufficient. "Ong was constantly with

Wee. Wee sold narcotics. Therefor, Ong must have supplied the heroin. This is a classic non sequitur." (*Id.* at p. 394.) The court found that while there may be strong suspicion of a conspiracy, there was no proof and the declarations of the coconspirator could not be admitted.[51]

In the present case, the prosecutor argued that by "extrapolating backwards" from the murder one could "infer a conspiracy"at the time of the statements. (RT29:4978.) In other words, because the murder occurred, a conspiracy could be presumed. Like the reasoning in *Jong*, this is also a non sequitur and fails to address the elements of Evidence Code section 1223, specifically, whether evidence independent of the statements themselves proved that a conspiracy existed at the time the statements were made, and whether appellant was a part of the conspiracy at that time.

Here, there was no evidence independent of the statements themselves that established by a preponderance of the evidence a conspiracy and appellant's connection to the conspiracy. Statements two and three were made during a conversation between Phillip and Carolyn Sanders and Christine Kuretich or were overheard by Kuretich at various unspecified times around June 1 and June 14. The court impermissibly relied on these statements themselves to establish that Sanders was part of the conspiracy. ["[C]learly by his own statements he was part of the conspiracy during those statements in which he, his wife and at times Kuretich discussed the murder." (RT29:5007.) The existence of a conspiracy must be established by evidence independent of the proffered declaration. (*Leach, supra*, 15 Cal.3d at p. 430; *Hardy, supra*, 2 Cal.4th 86.) The court must also have relied on the statements themselves to

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[51] Federal rule of Evidence, Rule 801(d)(2)(E) is similar to the California rule. (See 4 Mueller & Kirkpatrick, Federal Evidence 2d, § 425.)

establish that appellant was part of the conspiracy because without such reference there was insufficient evidence to establish that appellant was part of the conspiracy at the time the statements were made.[52]

Accordingly, there was insufficient evidence to support a jury finding that the statements were made at a time when appellant had actually agreed to participate in a conspiracy to kill her husband, and they were inadmissible under state law. And, because appellant had a state-created liberty interest under Evidence Code section 1223 that the untested statements would only be admitted against her if they met the requirements of this exception to the hearsay rule, introduction of this statement also violated appellant's rights under the federal Constitution to due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *People v. Webster* (1991) 54 Cal.3d 411, 439.)

C. Admission of the Statements Was Prejudicial to Appellant's Case

The admission of the testimony of Christine Kuretich was especially damaging to appellant's case. Appellant was only implicated in two of the alleged overt acts establishing the conspiracy – providing $1500 to Carolyn Sanders and applying for life insurance – which, on their face, did not establish appellant's role in the conspiracy. (RT23:3893, 3893.) Kuretich's testimony was the only evidence that did not come from the codefendants that tied appellant to the conspiracy to kill Thompson. The jury's consideration of Kuretich's testimony corroborated Carolyn Sanders's

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[52] These statements might have been admissible against Sanders as a party admission (see RT29:5014); however, they were not admissible against appellant. (Evid. Code, sec., 1220 ["Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party. . . ."].)

testimony that appellant had hired Phillip to kill her husband and Phillip Sanders's testimony that appellant wanted her husband killed. The prosecutor's use of Christine Kuretich's testimony was crucial in countering appellant's defense that she was not involved in a conspiracy with Sanders to kill her husband. Christine Kuretich was repeatedly referred to as the key witness in the prosecution's case. (RT28:4914, 4916.) In closing argument, the prosecutor acknowledged that Kuretich's testimony provided the first evidence of the conspiracy, "This is now when the conspiracy is starting with all of the surrounding facts taking place at the same time and Christine Kuretich testified that this is the point in time where she started hearing whispering in the Sanders'[s] household in early June and then finally heard the plan – plans; that were carried out in order to murder Melvin Thompson." (RT48:8253; see e.g., *People v. Powell* (1967) 67 Cal.2d 32, 56-57, citing *People v. Cruz* (1964) 61 Cal.2d 861, 862 ["There is no reason why we should treat this evidence as any less 'crucial' than the prosecutor – and so presumably the jury – treated it."].)

Respondent cannot prove beyond a reasonable doubt that there is no "reasonable possibility that [these statements] might have contributed to [appellant's] conviction." (*Chapman v. California* (1967) 386 U.S. 18, 24.) Appellant's convictions must be reversed.

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VII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY THAT POLYGRAPH QUESTIONS BY BOTH APPELLANT AND THE PROSECUTOR WERE IMPROPER AND SHOULD BE DISREGARDED

A. Factual Summary

On direct examination by the prosecutor, Christine Kuretich testified that she lied to the police on several occasions placing the blame for the murder on a third party, but eventually implicating appellant. (RT29:5096-5097.) On cross-examination, in response to defense counsel's question why she changed her story, Kuretich answered, "I was nervous. It was just time I told the truth, and they mentioned a lie detector so I knew they would know anyway." (RT29:5118.) Kuretich testified that her conscience and her fear of the polygraph examination prompted her to change her story (RT29:5122), and that when she changed her story she told Detective Wachter she did not want to take the polygraph exam. (RT30:5265.) Finally, without objection by the prosecution, Kuretich testified on cross-examination that the police never conducted the polygraph examination they had threatened to take. (RT30:5265-5266.)

On redirect examination, the prosecutor asked Kuretich if she would be willing to take a polygraph test that day. (RT32:5581.) Defense counsel objected and the court sustained the objection. (RT32:5581.) Defense counsel also moved for a mistrial. (RT32:5582.) During the argument on the mistrial motion, the trial court ruled defense counsel's questions were proper. "His questioning about the polygraph had to do with [] what the motivation was for her to [] make an explanation why she made the change." (RT32:5583.) However, the court found the prosecutor's question whether the witness would be willing to take a polygraph that day to be improper because such a question gave the jury the erroneous

impression that they could decide the issue by relying on polygraph results which are known to be inherently unreliable. (RT32:5583.)

Following further argument by the prosecutor, the court opined that both sides took "cheap shots" (RT32:5584) and decided it would instruct the jury. (RT32:5585-5586.) Defense counsel asked the court not to instruct the jury[53] (RT32:5586), but immediately after the witness testified, the court instructed the jury:

> I think one of the worse [sic] things the jury [sic] likes to do in the middle of a trial is give a cautionary comment.
>
> At the very end of Mr. Takakjian's cross-examination of this witness, he asked her whether or not she had ever taken a polygraph examination.
>
> Ms. Mader has countered with a question that she just asked a minute ago.
>
> Both of these questions are improper. Polygraphs in my opinion and I think in the opinion of a lot of people are inherently unreliable.
>
> That's why they're not admissible in a court of law in California and you shouldn't take that into consideration at all, whether someone takes a polygraph or they don't.
>
> Now, the one area that it may – it's a good investigative tool that the police use. Sometimes the threat of using or requesting a polygraph can have a salutary effect.
>
> That portion of the questioning Mr. Takajian dealt with that was proper but whether or not this witness has ever taken a

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[53] The court told counsel if there was no comment, the prosecutor would be allowed to ask Kuretich the improper question regarding her willingness to take a polygraph examination that day, putting appellant on the horns of a dilemma. (RT32:5586.)

polygraph or would take a polygraph or wouldn't take a polygraph is totally irrelevant. You should put that out of your mind.

(RT32:5588-5589.)

B. Only the Results and Willingness of a Witness to Take a Polygraph Examination Are Inadmissible

California Evidence Code section 351.1 provides:

> (a) Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.
>
> (b) Nothing in this section is intended to exclude from evidence statements made during a polygraph examination which are otherwise admissible.

This Court has long held that the results of a polygraph test are inadmissible due to the lack of reliability and lack of probative value. (*People v. Thornton* (1974) 11 Cal.3d 738, 764; *People v. Carter* (1957) 48 Cal.2d 737, 752.) The rule against introduction of polygraph evidence "is a 'rational and proportional means of advancing the legitimate interest in barring unreliable evidence.'" (*People v. Maury* (2003) 30 Cal.4th 342, 413.) This Court has also long held that the evidence of a suspect's willingness or unwillingness to take a lie detector test should be excluded as well. (*People v. Thornton, supra,* 11 Cal.3d at p. 764; *People v. Carter, supra,* 48 Cal.2d at p. 752; *People v. Hinton* (2006) 38 Cal.4th 839, 846-847; *People v. Samuels* (2005) 36 Cal.4th 96, 128, *People v. Wilkinson*

(2004) 33 Cal.4th 821, 849-850.) Nevertheless, appellant's questions regarding Kuretich's motivation for changing her story to the police were proper.

Unlike cases such as *Thornton, supra,* and *Carter, supra,* which involved defendants trying to admit evidence of a polygraph to bolster their credibility and show their innocence, as the trial court here recognized, appellant's questions were designed to impeach Kuretich's testimony to show why she changed her story to the police. (RT32:5583.) Defense counsel's theory was that Kuretich told the police the version of the story she knew they wanted to hear when the police threatened to give her a polygraph test. (RT32:5585.) Defense counsel did not use the reference to a polygraph test to show Kuretich's willingness or unwillingness to submit to the polygraph exam, but rather to show that the police threat of a polygraph motivated her to change her story.

Appellant did not seek to introduce unreliable evidence or to bolster Kuretich's own credibility with the questions regarding the polygraph exam. Rather, the defense questions to Kuretich were proper impeachment which challenged Kuretich's testimony that her story implicating appellant was the truth while her other stories to the police were fabricated. Such impeachment regarding Kuretich's motivation for changing her story to the police is admissible. Therefore, the trial court properly admitted the defense references to the polygraph examination into evidence for impeachment purposes.

C. It Was Error for the Prosecutor to Ask Kuretich if She Was Willing to Take a Polygraph Exam

Although defense counsel's examination was proper, the prosecutor's question whether Kuretich would be willing to take a polygraph at the time of trial clearly violated the prohibition against

polygraph evidence. In *People v. Basuta* (2001) 94 Cal.App.4th 370, the court instructed the prosecutor to ensure that no evidence about the results of the prosecuting witness's polygraph examination be mentioned. However, on direct examination a police officer testified that the witness had taken a polygraph test. Defendant's objection and motion for a mistrial were denied. (*Id.* at pp.388-389.) The court of appeal reversed, holding the admission of the polygraph evidence was clear error due to the "unreliable nature" of polygraph results, and due to the fear that jurors will "attach unjustified significance to the fact of or the outcome of such examination and because the introduction of polygraph evidence can negatively affect the jury's appreciation of its exclusive power to judge credibility." (*Id.* at p. 390; see also See *People v. Carter* (1957) 48 Cal.2d 737; *People v. Porter* (1955) 136 Cal.App.2d 461; *People v. Porter* (1950) 99 Cal.App.2d 506; *People v. Wochnick* (1950) 98 Cal.App.2d 124; *People v. Aragon* (1957) 154 Cal.App.2d 646.)

"It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]" (*People v. Cox* (2003) 30 Cal.4th 916, 952.) In the present case, the prosecutor asked Kuretich if she would be willing to take a polygraph examination that day. (RT32:5581.) Defense counsel objected and the court sustained the objection, but denied appellant's motion for a mistrial. In *People v. Parrella* (1958) 158 Cal.App.2d 140, without objection, the defendant testified he had volunteered for a lie detector test and the prosecutor cross-examined the defendant more fully on the subject, and even offered to introduce the result of the test. The court ruled, properly, that the results of the tests were not admissible, and instructed the jury "not to consider any question about lie detector." (*Id.* at p. 147.)

In the present case, the prosecutor argued the defense had opened the

door to the polygraph testimony and therefore her question was proper. (RT32:5583.) However, as the court held in *Parrella*, legitimate cross-examination "does not extend to matters improperly admitted on direct. Immaterial and irrelevant testimony cannot be thus brought before the jury under the guise that it is legitimate cross-examination." (*People v. Parrella,* 158 Cal.App.2d at p. 147.) In a similar vein, the prosecutor in appellant's trial cannot be permitted to ask an improper question as to the witness' willingness to take a polygraph exam because defense counsel properly impeached the witness' motivation to change her story due to, among other things, the police threat of a polygraph. The trial court correctly found that the prosecutor erred in asking Kuretich whether she would submit to a polygraph test that day.

D. The Error by The Prosecutor Was Prejudicial and Was Not Cured by the Court's Admonition Which Told the Jury to Disregard Proper Impeaching Evidence

The trial court instructed the jury to disregard both the prosecutor's improper question and defense counsel's proper questions. While the trial court was correct to find the prosecutor's question improper, the error was prejudicial and was not cured by the admonition.

The erroneous admission of polygraph evidence is not always cured by a warning instruction. (*People v. Wochnick, supra*, 98 Cal.App.2d 124; *People v. Aragon* (1957) 154 Cal.App.2d 649, 657-659.) Rather, only a timely and correct admonition which the jury is presumed to follow will cure such prejudice. (*People v. Cox* (2003) 30 Cal.4th 916, 953; *People v. Price* (1991) 1 Cal.4th 324, 428.)

In *People v. Basuta, supra,* 94 Cal.App.4th 370, the prosecutor's case was based largely on the testimony of one witness and her credibility was crucial. Because the jury might have concluded that the witness's

readiness to take a polygraph reflected her confidence in it's results, the court held that one or more of the jurors could have concluded that the witness passed the exam because she was now testifying at the trial, and in combination with the trial court's exclusion of possible exculpatory evidence the error was prejudicial. (*Id.* at p. 391.)

Kuretich was the main witness for the prosecution. The prosecutor's question whether she would submit to a lie detector test was a clear attempt to improperly bolster her credibility. Just as in *Basuta*, by asking Kuretich if she would take a polygraph exam, the prosecutor attempted to show that Kuretich was telling the truth because, otherwise, she would not risk submitting to the polygraph test. The jury was clearly misguided on how to make a determination of credibility upon Kuretich by the prosecutor's improper question.

In *People v. Parrella, supra*, 158 Cal.App.2d 140, the court found the error was not prejudicial because, in part, the trial court had "carefully, correctly and fully warned the jury" not to consider any evidence about the polygraph examination.[54] The trial court instructed the jury, "I think I explained to the jury during the trial and I will instruct you now, you are not to consider any question about lie detector. It is not admissible and whether it was good, bad or indifferent makes no difference and when you go into the jury room, I don't want anyone to mention or think of any lie detector test. Now, that settles that. There's no lie detector business in this case." (*Id.* at p. 148.)

In the present case, the trial court did not "carefully, correctly and fully warn[] the jury" not to consider the improper polygraph evidence.

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[54] The court also found the error was invited and the evidence of guilt was strong. (*People v. Parella, supra,* 158 Cal.App.2d at p. 148.)

(*People v. Parella, supra*, 158 Cal.App.2d at p. 148.) The court sustained the defense objection, but did not immediately tell the jurors to disregard the answer, but rather, at a later point, the court delivered an erroneous, confusing and rambling instruction which failed to tell the jury which evidence was inadmissible and which evidence could properly be considered.

The court's instructions were not specific on which evidence to accept and which to disregard. The court cautioned the jury against "the very end" of defense counsel's cross-examination where he asked whether the witness had ever taken a polygraph, and the question the prosecutor asked "a minute ago," and told the jury in its opinion and "the opinion of a lot of people" that polygraphs are inherently unreliable and shouldn't be taken into consideration. (RT32:5588) However, in direct contradiction to that instruction, the court told the jury that polygraphs are a "good investigative tool," and the threat of using one can have a "salutary effect" so "that portion of the questioning [by defense counsel] was proper but whether or not this witness has ever taken a polygraph or would take a polygraph or wouldn't take a polygraph is totally irrelevant. You should put that out of your mind." (*Ibid.*)

Thus, this is not a case where one improper question was immediately struck and a strong, correct, timely admonition given. (See *People v. Cox, supra,* 30 Cal.4th at p. 954.) The confusing and contradictory admonition delivered by the trial court failed to specify for the jurors what they could and could not consider; for what purpose they could consider the proper testimony; and undermined defense counsel's impeachment of the witness. The likely effect of the instruction was to confuse the jurors as to how to consider the various testimony regarding the polygraph exam. It is just as possible that one of the jurors applied the

warning to the proper questions by defense counsel and disregarded that evidence along with the improper question by the prosecutor or discounted all polygraph testimony since it was too difficult to parse out which testimony could properly be considered and which could not. This court's instruction to the jury did not cure the error.

The defense theory was that Kuretich lied to the police but changed her story to match what she knew the police wanted to hear when she was threatened with a lie detector test. The prosecutor sought to lessen the impact of this impeachment by asking Kuretich precisly what Evidence Code section 351.1 prohibits – whether she would be willing to presently take a polygraph test – in order to bolster her credibility. The court's admonition to the jury failed to cure this error and additionally undermined the defense impeachment by telling the jurors that the use of the threat of a polygraph exam is "a good investigative tool" which can have a "salutary effect." the court's actions improperly undermined appellant's cross-examination of the witness and placed information before the jury that appellant had no opportunity to confront or rebut, in violation of the Sixth and Fourteenth Amendments. Accordingly, reversal is required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the issue is reviewed only under State law, the combined errors clearly prejudiced appellant's case before the jury and her convictions and sentence must be reversed.

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VIII

THE ERRONEOUS ADMISSION OF EVIDENCE OF NUMEROUS UNCHARGED BAD ACTS WAS PREJUDICIAL

A. Introduction

In an attempt to shore up its weak case against Catherine Thompson, the prosecution offered extensive and wholly unrelated evidence of prior fraud transactions, dishonesty, gambling, and a lack of sufficient grief over her husband's death to prove appellant's conduct – that is, her alleged involvement in the conspiracy to murder her husband. The trial court erred in admitting evidence of numerous bad acts designed to portray appellant as a dishonest individual and uncaring wife.

Evidence of a defendant's prior convictions, uncharged crimes, or unsavory acts may not be admitted into evidence for the purpose of showing that a defendant has a propensity to commit crimes or is of bad character. Such evidence may only be admitted if it makes a *fact* – such as motive, opportunity, intent, preparation, plan, knowledge or identity – other than a defendant's propensity to commit such an act – more likely, and even then, the evidence comes in only after the court has conducted a balancing test to determine whether the evidence, although probative, is too prejudicial to go before a jury. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393; *People v. Balcom* (1994) 7 Cal.4th 414, 422; Evid. Code § 352.)

The trial court erroneously admitted evidence of prior fraud transactions, dishonesty, gambling, and a lack of sufficient grief over her husband's death under Evidence Code section 1101, subdivision (b). Such evidence should not have been admitted because 1) it did not come within a recognized exception to the rule against propensity evidence, 2) the prosecutor used the evidence of other acts for the impermissible purpose of

trying to prove appellant committed the instant crime based on bad character, and 3) the emotional impact of the other crimes evidence unfairly prejudiced and inflamed the jurors against appellant in violation of her rights to due process and a fair trial under the Fifth and Fourteenth Amendments to the Federal Constitution, and analogous provisions of the California Constitution. In addition, the introduction of the evidence of the other crimes infringed upon appellant's right to a reliable determination of guilt and penalty as guaranteed by the Eighth and Fourteenth Amendments to the United States Constitution and analogous provisions of the California Constitution.

B. Legal Standard

Subdivision (a) of Evidence Code section 1101 prohibits the admission of evidence of a person's character, including specific instances of conduct, to prove the conduct of that person on a specific occasion. Subdivision (b), however, provides an exception to this rule when such evidence is relevant to establish some fact other than the person's character or disposition such as motive, opportunity, intent, preparation, plan, knowledge or identity. (*People v. Ewoldt, supra*, 7 Cal.4th at p. 393.)

At the time of appellant's trial, Evidence Code section 1101, subdivision (a) provided:

> Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specific occasion.[55]

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[55] Since then, the statute has been amended to include exceptions to the general prohibition against the admission of propensity evidence. They are not pertinent to this argument.

The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (*People v. Alcala* (1984) 36 Cal.3d 604, 630-631; 1 Wigmore, Evidence (3d ed.1940) §§ 194, pp. 646-647; see also *People v. Ewoldt, supra,* 7 Cal.4th at p. 392 [rule excluding evidence of criminal disposition derives from early English law and is currently in force in all American jurisdictions by statute or case law]; *People v. Garceau* (1993) 6 Cal.4th 140, 186 [acknowledging rule]; *People v. Smallwood* (1986) 42 Cal.3d 415, 428 [same]; *People v. Stewart* (1890) 85 Cal. 174, 175 [reversing conviction]; *U.S. v. Castillo* (10th Cir.1998) 140 F.3d 874, 881[ban on propensity evidence dates to 17th-century England and early United States history]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381, and fn. 2 [rule of exclusion has persisted at least since 1684 to the present and is established in every United States jurisdiction].)

Such evidence:

> is [deemed] objectionable, not because it has no appreciable probative value, but because it has too much. The natural and inevitable tendency of the tribunal - whether judge or jury – is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of the guilt of the present charge.

(*People v. Baskett* (1965) 237 Cal.App.2d 712, 715-716.)

The United States Supreme Court in *Michelson v. United States* (1948) 335 U.S. 469, stated:

> The inquiry is not rejected because character is irrelevant, on the contrary, it is said to weigh too much with the jury and so to overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of

issues, unfair surprise and undue prejudice.

(*Id.* at p. 476.)

Other crimes evidence must be evaluated with extreme caution, and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Alcala, supra*, 36 Cal.3d 604, 631, accord, *People v. Thornton* (1994) 11 Cal.3d 738, 756.)[56]

This Court held in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007, that "evidence of a defendant's commission of a crime other than one for which he is then being tried is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue. . . [b]ecause evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care." The primary focus of this careful analysis, of course, is to ensure that the evidence is *not* offered to prove character or propensity *and* that its practical value *outweighs* the danger the jury will nevertheless view it as evidence of criminal propensity.

C. The Prosecution's Theory of Admissibility Under Evidence Code Section 1101, Subdivision (b)

The prosecutor argued that to understand what happened to the Hillary Street house is "the key to understanding this case" because "this is not [] a murder case that involves these incidentally fraudulent acts. . . . Rather, it could be viewed as a fraud case that incidentally involves murder." (RT8:1067.) Over defense objection, the prosecutor sought to introduce evidence of motive under Evidence Code section 1101, subdivision (b) through evidence of the following acts: 1) embezzlement

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[56] In *People v. Alcala, supra*, 36 Cal.3d 604, the error in admitting "criminal propensity" evidence required reversal of a capital conviction.

from Edith Ann's Answering service, 2) a fraudulent loan in 1989 on the Sycamore property, and 3) evidence of appellant's efforts to buy the Hillary Street house as a single woman.[57] (CT7:1870-1885; 8:1064, 9:1122.)

In his offer of proof, the prosecutor contended that while working for Edith Ann's Answering Service in 1986, appellant allegedly embezzled $33,325. In exchange for the employer taking no legal action, appellant agreed to repay the money. She forged Tom's signature on a deed of trust on the Hillary Street house guaranteeing the debt. (RT8:1068.) Later, appellant wrote Tom a letter admitting the forgery, asking for his forgiveness, and promising never to make the same mistake. (RT8:1069.) When the Hillary Street property went into foreclosure due to nonpayment of the first and second deed of trust, Bid properties bought the house in September 1989. (*Ibid.*) Appellant then began renting the house from Bid. (RT8:1070.)[58]

Tom co-owned a home on Sycamore Street with his former wife Mellie. As part of the divorce decree between Mellie and Tom, Mellie was allowed to live there until the youngest child turned 18, at which time it was to be sold. (RT23:3930.) However, Mellie wanted to stay in the house past that time so she added her daughter's name to the title and tried unsuccessfully on two occasions to refinance the property and buy Tom out.

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[57] A fourth incident, the alleged conversion of a Rolls Royce, was not admitted because it occurred after the homicide. (RT14:1545.)

[58] The prosecutor argued that he had evidence that Tom knew nothing about the rent back (RT8:1070), and he later argued that Tom knew nothing about the fraudulent loan on the Sycamore Street property (RT46:7910, 7943), however these points were contested by the defense. (See, e.g., RT8:1106; 24:4184; 35:6033; 46:7915.)

(RT23:3931-33.)[59] In November 1989, appellant and Phillip Sanders obtained driver's licenses in the names of Tom and Mellie and obtained a loan for $98,000 on the Sycamore property. (RT8:1071-1072.) Appellant gave her attorney Bruce Blum $25,000 to pay rent on the Hillary Street house through April 1990. (RT8:1072.)

In March 1990, Blum approached Bid Properties and tried to purchase the Hillary Street property for appellant in the name of Catherine Bazar, appellant's maiden name. In an attempt to secure a loan for $475,000 from Uris Loans, appellant opened an escrow account and claimed she had money in Community Bank, a fictitious institution. (RT8:1078-1080.)

The court ruled evidence of uncharged misconduct was admissible to show motive and "scheme and design possibly" and that the probative value outweighed the prejudice. (RT14:1543-1545.) The court excluded the evidence of the embezzlement from Edith Ann's Answering Service, but ruled that evidence of the forged deed of trust following the embezzlement would be admitted. (RT14:1545.)

The prosecutor also sought to admit over appellant's objection, evidence that appellant had her husband's jewelry removed from his body and pawned it the day after the funeral as evidence of motive to gain financially from her husband's death. (RT9:1541; 14:1541). The court admitted the evidence, finding the probative value outweighed the prejudicial effect of the evidence, based on the defense contention that appellant and Tom had a loving relationship. (RT24:4243; 34:6127.)

Finally, the prosecution sought to introduce evidence of betting

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[59] Tom and appellant had conversations with Jera Trent, a legal secretary and neighbor, about hiring her employer to get the property away from Tom's former wife. (RT37:6351-6353.)

receipts to show that appellant gambled in casinos in Laughlin, Nevada two days after pawning Tom's jewelry. (RT25:4325.) The court ruled the evidence could be admitted. (RT25:4325.)

D. The Trial Court Erred in Admitting Evidence of the 1989 Fraudulent Transaction on the Sycamore Property

The prosecution theory at trial was that appellant entered into a conspiracy with Phillip and Carolyn Sanders and Robert Jones to murder her husband. Her motive, according to the prosecution, was to acquire the proceeds from Tom's life insurance policy for which appellant was the beneficiary. In order to prove their case, however, the prosecution relied on extraneous and highly prejudicial evidence.

Over defense objection (RT9:1122; 35:6025; 35:6029), the prosecutor was permitted to show that appellant and Phillip Sanders obtained drivers' licenses in the names of Mellie and Tom. (RT23:3902-3904, 3953.) Using those drivers' licenses, with Isabelle Sanders, Christine Sanders, and Carolyn Jeanette Moore as witnesses, they obtained a mortgage in the amount of $98,000 on the home on Sycamore Street owned jointly by Tom and Mellie. (RT23:3953, 3960.) Later, Mellie and her daughter sued appellant and Tom over the fraudulent transaction. (RT23:3937.) Evidence of these transactions was ostensibly offered to show that appellant had a motive to obtain money from Tom's life insurance policy.

Motive is not a matter whose existence the prosecution must prove or whose nonexistence the defense must establish. (See CALJIC No. 2.51.) Nonetheless, "[p]roof of the presence of motive is material as evidence tending to refute or support the presumption of innocence." (*People v. Beyea* (1974) 38 Cal.App.3d 176, 194-195.) A "motive" is defined as a

"[c]ause or reason that moves the will and induces the action[,]""[a]n inducement, or that which leads or tempts the mind to indulge a criminal act." (Black's Law Dict. (rev. 4th ed.1968) p. 1164, col. 2.) Motive is an intermediate fact that may be probative of such ultimate issues as intent (see, e.g., *People v. Thompson* (1980) 27 Cal.3d 303, 319, fn. 23 [intent and state of mind]), identity (see, e.g., *People v. Linkenauger* (1995) 32 Cal.App.4th 1603, 1610-1611), or commission of the criminal act itself (see, e.g., *People v. De La Plane* (1979) 88 Cal.App.3d 223, 246).

The intermediate fact of motive may be established by evidence of "prior dissimilar crimes." (*People v. Thompson, supra*, 27 Cal.3d 303, 319, fn. 23.) "Similarity of offenses [is] not necessary to establish this theory of relevance" for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense. (*Ibid.*) The existence of a motive requires a nexus between the prior crime and the current one, but such linkage is not dependent on comparison and weighing of the similar and dissimilar characteristics of the past and present crimes. (See, e.g., *People v. Daniels* (1991) 52 Cal.3d 815, 857 [direct relationship between prior robbery where defendant rendered paraplegic by police and murder of officers in retribution]; *People v. De La Plane, supra*, 88 Cal.App.3d 223, 245-246 [prior robberies evidence admissible to show motive to murder witnesses].)

Thus, evidence of motive may be established by evidence of prior dissimilar crimes only if there is established "a nexus between the prior crime and the current one." (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018.) In cases like those cited by the prosecution at trial, motive for the charged crime arises simply from the fact of the commission of a prior crime. (*People v. Gonzales* (1948) 87 Cal.App.2d 867 [victim's girlfriend told the victim that defendant had raped her], *People v. Lopez* (1969) 1

Cal.App.3d 78 [victim's brother had previously fought with defendant and testified against defendant in a criminal prosecution].) In those cases, the motive exception to Evidence Code section 1101, subdivision (a) clearly applies. However, in cases where the motive does not arise from the commission of the prior crime, there must be a direct relationship between the prior offense and an element of the charged offense. *(People v. Robillard* (1960) 55 Cal.2d 88, 100 [past crimes admissible to show intent and motive]; *People v. Durham* (1969) 70 Cal.2d at pp. 186-189 [parole status and recent criminal activity relevant to show premeditated murder of police officer]; *People v. De La Plane, supra*, 88 Cal.App.3d at pp. 245-246 [evidence of prior robberies admissible to show motive to murder witnesses]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 756-758 [evidence of prior interest in killing law officers admissible to show intent].)

This Court has upheld the introduction of bad acts evidence to prove motive when there is a solid, clear connection between the two crimes: the motive for the later offenses stems directly from the former. For example, in *People v. Daniels, supra*, 52 Cal.3d 815, two officers came to the defendant's home to take him into custody after his conviction for a bank robbery had been affirmed on appeal. In the course of the bank robbery for which he had been convicted, shots had been exchanged, and the defendant was left paralyzed from the waist down. (*Ibid.*) This Court held that evidence of the prior robbery, including the details of the shoot-out, was admissible because it established a direct relationship between the defendant being shot by the police and his motive to murder the two police officers who came to take him to prison for that offense. (*Id.* at p. 856.)

In the instant case, there is no direct relationship between any element of the charged offense – even an intermediate fact such as motive – and the conduct in the previous fraud. The prosecutor's theory that

appellant was motivated to kill Tom so that he would not leave her when he found out that she had forged his name again is not only inconsistent with the facts, it makes no sense. (RT8:1092, 48:8231-8232, 46:710) The lawsuit was filed by Mellie and her daughter against appellant and Tom in April 1990. Because the lawsuit was filed against both appellant and Tom, any financial gain or deficit from the alleged fraud were the same for appellant whether her husband was dead or alive and whether or not he knew about the fraud.[60] Because the evidence that Tom knew about the existence of the lawsuit was not dispositive, the prosecutor argued it both ways: if Tom knew about the fraud, then appellant must have turned on him (RT 48:8219), or if Tom did not know about the fraud, then appellant had a motive to have him killed. (RT48:8224.) The prosecutor's specious arguments were merely an excuse to introduce what is no more than propensity or bad character evidence. If Tom was unaware of the loan (RT23:3915-3916), there is simply no way that a desire to murder Tom derived from appellant's alleged fraud on the Sycamore property since the fraudulent transaction was perpetrated against the loan company and not Tom. If Tom was involved in the fraud, then he was as guilty as appellant.

In *People v. Edelbacher, supra,* 47 Cal.3d 983, the defendant owed his ex-wife child support arrearages and a payment to equalize a community property division. Evidence that defendant had a number of other debts, some of which were in arrears, was admitted only after a debtor-creditor relationship was established between the defendant and the victim because then, as the Court ruled, the evidence "had substantial relevance to show the motive for the murder of defendant's creditor, and this relevance clearly

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[60] In fact, Mellie and her daughter became sole owners of the property when Tom died. (RT23:3940.)

outweighed the risk of undue prejudice." (*Edelbacher, supra,* 47 Cal.3d at p. 1024.)

No analogous facts exist in the present case. The connection between the fraud in 1989 and appellant's perceived gain upon Tom's death is tenuous, at best. To the extent that the prosecutor argued that the fraud and the murder were perpetrated for the same reasons – that is, to buy back the house on Hillary Street that was in foreclosure – the same argument could have been made simply by presenting evidence that the house had been foreclosed and that appellant was the beneficiary of the insurance. Far from showing a motive for Tom's murder, the fraud evidence showed only that appellant was willing to commit a crime to buy back the Hillary Street house. This, however, is exactly the type of propensity evidence precluded by Evidence Code section 1101. (Evid. Code, sec. 1101, sub. (a) [evidence of a person's character or a trait of his or her character . . . is inadmissible when offered to prove his or her conduct on a specified occasion].) Labeling the evidence as motive evidence does not change the fact that it is simply propensity evidence and thus plainly inadmissible.

It is also irrelevant that the alleged motives for the fraud and for the murder – buying back the Hillary Street house – were allegedly the same. As discussed above, Evidence Code section 1101, subdivision (b) does not make an exception for the introduction of prior crimes evidence simply because there is a common motive between two acts when the similarity of behavior is not critical to the chain of relevance of the material fact. (*People v. Thompson, supra*, 27 Cal.3d 303, 319, fn. 23) [similarity of offenses not necessary to establish this theory of relevance for the evident reason that the motive for the charged crime arises simply from the commission of the prior offense].) Rather, the motive for the crime being tried must arise from, and be directly connected to, the prior act. (*People v.*

Scheer, supra, 68 Cal.App.4th 1009.)

The evidence was not, as the trial court ruled, admissible as "scheme or design." (RT11:1544.) The court's ruling reflects an impermissible fusion of two distinct concepts: motive and common plan or design. "Evidence of a common design or plan is admissible to establish that the defendant committed the act alleged." (*People v. Ewoldt*, *supra*, 7 Cal.4th at p. 394, fn. 2.) Thus, a common design or plan, like motive, is simply an intermediate fact. "Unlike motive, however, a common plan or scheme depends on the existence of striking similarities between the prior misconduct and the charged crime, and a nexus between the commission of the two is unnecessary. In other words, a common scheme or plan focuses on the manner in which the prior misconduct and the current crimes were committed, i.e., whether the defendant committed similar distinctive acts of misconduct against similar victims under similar circumstances." (*People v. Scheer, supra,* 68 Cal.App.4th at p. 1020). The presence of the same motive in both instances may be a contributing factor in finding a common plan or design. (See, e.g., *People v. Lisenba* (1939) 14 Cal.2d 403 [murder of two wives, each of whom apparently drowned accidentally, motivated by desire to collect on double-indemnity insurance policy for each wife].) However, the manner in which the prior misconduct was committed, which is the focus of the common plan or design inquiry, does not give rise to a motive, i.e., incentive or impetus, for commission of the charged crime. (*Scheer, supra*, 68 Cal.App.4th at p. 1021.)

Finally, to the extent that evidence of the fraudulent acts was admissible, it should have been excluded under Evidence Code section 352 because its prejudicial effect vastly outweighed its probative value. Besides relevancy to a matter other than the defendant's bad character or criminal disposition, "[t]here is an additional requirement for the admissibility of

evidence of uncharged crimes: The probative value of the uncharged offense evidence must be substantial and must not be largely outweighed by the probability that its admission would create a serious danger of undue prejudice, of confusing the issues, or of misleading the jury." (*People v. Scheer, supra*, 68 CalApp.4th at p. 1018.) The court must consider the proffered evidence and determine whether the probative value of the evidence outweighs any undue prejudice the evidence may cause. (Evid. Code, sec. 352.) The United States Supreme Court has defined "unfair prejudice" as that which "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." (*Old Chief v. United States* (1997) 519 U.S. 172, 180.)

Whenever other-crimes evidence is offered under Evidence Code section 1101, subdivision (b), there exists the potential for great prejudice to a defendant because of the possible misuse of the evidence by the jury as character trait or propensity evidence. "The jury is very apt to use such evidence to punish a defendant because he is a person of bad character, rather than focusing upon the question of what happened on the occasion of the charged offense." (*People v. Gibson* (1976) 56 Cal.App.3d 119, 129.) Although Evidence Code section 352 gives the trial judge wide discretion, "it is a discretion that must be exercised with discerning care in connection with the question of the admissibility of other-crimes evidence offered against a defendant, because of the inherently prejudicial nature of such evidence as constituting character trait and propensity evidence." (*Id.* at p. 131.)

The prejudicial impact of the evidence of the fraud on the Sycamore Street property was increased because evidence of the fraud was much stronger than evidence of the conspiracy to commit murder and because

appellant had never been punished for the fraudulent transaction, both factors this Court has identified as relevant to the calculus for admission of the evidence. In *People v. Balcom, supra*, 7 Cal.4th 414, a rape prosecution, evidence of a rape for which defendant was convicted in another state, which demonstrated a common design or plan with the charged rape, was admitted. The jury learned that the uncharged acts resulted in a criminal conviction and a substantial prison term. This circumstance decreased the prejudicial impact of the evidence in two ways, according to this Court. First, because the jury would not be tempted to convict the defendant of the charged offenses, regardless of his guilt, in order to assure that he would be punished for the uncharged offenses, and second, the attention of the jury would not be diverted to a determination whether or not defendant had committed the uncharged offenses, because that fact had been determined conclusively by the resulting Michigan conviction. (*Id.* at p. 427.)

In the same vein, this Court held in *People v. Ewoldt, supra*, 7 Cal.4th 380, the prejudicial effect of evidence of uncharged prior molestations was heightened by the circumstance that the defendant's uncharged acts did not result in criminal convictions. "This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues' (Evid. Code, § 352), because the jury had to determine whether the uncharged offenses had occurred." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405.)

Further, appellant was never convicted of the fraud. Although she was sued for her actions, she had not been charged with a crime, and had

certainly not been convicted or sentenced.[61] The fact that in the eyes of the jurors appellant was not charged makes it more likely that the jurors would seek to punish appellant for her previous wrongdoing. (*People v. Ortiz* (2003) 109 Cal.App.4th 104.)

Significantly, the circumstances of the prior fraud in the present case were highly prejudicial. In fact, the evidence of the uncharged fraud in 1989 described a plan that was much more elaborate and more fully developed than that for the murder. Although the murder is admittedly a more serious crime, the evidence of appellant's involvement in it was largely circumstantial. The only direct evidence against her came from the testifying codefendants, who had an incentive to make appellant seem more culpable, and from Christine Kuretich, whose testimony should not have been admitted and cannot be credited.[62] On the other hand, the evidence against appellant with regard to the fraud was largely documentary and voluminous. The jurors could see it with their own eyes, and hold it in their hands. Here, it was likely that the jury would be persuaded that appellant committed the fraud and use this information to convict her of murder despite the lesser evidence regarding the murder, and despite any doubts they might have regarding her guilt.

Nor is the evidence of the fraud independently admissible to prove the special circumstance of financial gain. The financial gain alleged was the proceeds expected from the life insurance policy for which appellant was the beneficiary. As discussed *supra*, appellant had nothing to gain

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[61] A charge on the basis of the 1989 fraud was brought as part of the instant case but dismissed under Penal Code section 995 and not refiled. (RT2:174; 9:1126.)

[62] See Argument VI and VII, *supra*.

financially from Tom's death with regard to the fraud. The lawsuit had been filed by Mellie and her daughter against appellant and Tom, and appellant was not going to gain any advantage in the lawsuit due to Tom's death.

The special circumstance of financial gain focuses on the defendant's intention at the time the murder was committed. "The relevant inquiry is whether the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain. . . . What is relevant is the particular defendant's purpose." (*People v. Howard* (1988) 44 Cal.3d 375, 409-410.)

In this case the prosecution theory was that appellant had her husband killed to reap the benefit of the life insurance money. The special circumstance of murder for financial gain has been properly found where a person kills to obtain insurance proceeds (*People v. Hamilton* (1989) 48 Cal.3d 1142) or who kills to avoid having to repay a debt (*People v. Edelbacher, supra*, 47 Cal.3d 983, *People v. Silberman, supra*, 212 Cal.App.3d 1099). Evidence of the 1989 fraud is not evidence of insurance proceeds or, as discussed above, the canceling of a debt, and the misconduct should not have been admitted for the purpose of proving the financial gain special circumstance.

E. The Court Erred in Admitting Evidence of the 1986 Forged Deed of Trust to Edith Ann's Answering Service

The court erred in admitting evidence of a 1986 transaction, in which appellant forged Tom's name on a deed of trust which she turned over to Edith Ann's Answering Service, her employer, to repay a $33,000 debt to them. (RT25:4333.) The debt was from money allegedly embezzled by appellant from her employer. The court ruled that the fact of the embezzlement from Edith Ann's was too remote in time to be admitted.

(RT14:1543; 20:3710-3712; 22:3837.) However, the court allowed testimony of the fact that there was a debt of $33,000 which appellant had arranged to pay back by signing a deed of trust on the Hillary Street house. (RT14:1543-1544; 25:4331; 4333.) The jury also learned that appellant forged Tom's name on the deed of trust, and that she admitted this to Tom in a letter to him asking him to forgive her. (RT26:4517.)

Evidence of a defendant's poverty or indebtedness, without more, is inadmissible to establish a motive for robbery or theft because it is unfair to make poverty a ground of suspicion. The probative value of the evidence is deemed to be outweighed by the risk of prejudice. (*People v. Hogan* (1982) 31 Cal.3d 815, 854.) Evidence of poverty or indebtedness is admissible, however, in a variety of circumstances, such as to refute a defendant's claim that he did not commit the robbery because he did not need the money (*People v. Gorgol* (1953) 122 Cal.App.2d 281, 303), or to eliminate other possible explanations for a defendant's sudden wealth after a theft offense (*Hogan, supra*, 31 Cal.3d at p. 854; *People v. Orloff* (1944) 65 Cal.App.2d 614, 620). (See generally, 2 Wigmore, Evidence (Chadbourne rev. 1979) § 392, pp. 430-433.) No facts exist in this case that would render evidence of the 1986 forged deed of trust relevant to anything other than appellant's bad character.

Moreover, evidence of the debt secured by the trust deed was tantamount to introduction of the fact that appellant had embezzled money. Defense counsel noted that the redacted letter described appellant's meeting with an attorney and obligation to sign the trust deed. (RT47:7997.) The jury was certain to speculate why she owed such a large sum of money to her employer, and it is difficult to imagine a legitimate reason for such a debt. Thus, the jury was told, *de facto*, of the embezzlement, which the trial court had properly excluded. The trial court's attempt to sanitize the

conduct by eliminating the reason for the debt was ineffective. The court correctly ruled that evidence of the embezzlement was inadmissible; the acts surrounding it were inadmissible as well.

The prosecutor used the letter to Tom speciously as motive evidence. The prosecutor argued that appellant had made a mistake once and Tom had forgiven her; she was afraid if it came out again that she had forged his name, he would leave her. Thus, she decided to kill him. (RT48:8232.) Not only is this description of an alleged motive illogical – the forgery of Tom's signature to secure a debt to her employer and the acknowledgment of the forgery to Tom as a reason to kill him – the letter is not evidence of this purported motive. In fact, the evidence of the letter, presumably sent shortly after the incident, relates solely to events arising out of appellant's embezzlement, a bad act which the trial court had already ruled too remote.

Admission of the 1986 evidence was error even if the 1989 evidence was properly admitted. This transaction does not relate to the Hillary Street house – which appellant was, according to the prosecutor, willing to kill for. The 1986 fraud evidence shows nothing more than a propensity to commit fraud. Propensity is not a valid consideration in criminal trials, and propensity to commit *fraud* is not relevant to the murder committed in this case. In the context of this case, it was highly prejudicial to admit this evidence not only because of the negative light it cast on appellant's character, but also because it was highly prejudicial for the jury to believe that appellant had acted similarly in the alleged 1989 fraud. It was that fraud, according to the prosecutor, that led directly to the murder of Tom and started the conspiracy. The court ruled that the conspiracy to kill Tom did not begin with the 1989 fraud but rather began some time in June 1990. (RT29:5006-5007.) The court also ruled that the embezzlement was too remote in time to be admitted (RT14:1545) however, the period of time

between the acts is not necessarily significant to the determination of whether evidence is admissible as evidence of motive. Rather it is the direct relationship between the prior act and the charged crime which controls. (*People v. Daniels, supra*, 52 Cal.3d 815.) Here there is no such direct relationship.

F. The Court Erred in Allowing Evidence of Appellant's Efforts to Buy Back the Hillary Street House

The trial court abused its discretion when it admitted evidence of appellant's efforts to buy back the Hillary Street house. The prosecutor was permitted to show that the house went into foreclosure and in an attempt to avoid eviction and buy back the house appellant created phony assets and a "false" identity in order to negotiate a loan for purchase of the house. Over defense objection, the court admitted evidence that appellant had used aliases (RT2:181-182) such as the name "Catherine Bazar," her maiden name, to attempt to get financing. (RT24:4178.) The court also allowed testimony that appellant had created the identity "Katrina Brazarre." (RT26:4501.) The prosecutor argued that appellant created the identity of Katrina Brazarre to sign a false guaranty trust letter, and that the name was similar enough to Catherine Bazar that anyone calling to speak to Katrina Brazarre would be referred to Catherine Bazar, who was, in fact, appellant. (RT48:8242.) The court permitted the prosecutor to show, over defense objection (RT26:4519), that appellant had two other driver's licenses – one in her own name with her son's address and one in the name of Catherine Bazar – and a social security card with a different social security number. (RT33:5770; 48:8245.) The court admitted income tax forms on which appellant had allegedly lied (RT23:4051), and finally, evidence was admitted that appellant forged Rene Griffin's signature on paperwork for an escrow account appellant set up to buy back the house. (RT34:5943.)

Prior misconduct that evinces moral turpitude – such as dishonesty – is admissible to *impeach* a defendant or a witness. (*People v. Ayala* (2000) 23 Cal.4th 225; *People v. Wheeler* (1992) 4 Cal.4th 284.) In this case, however, appellant did not testify[63] nor did she present evidence of her own moral, law-abiding, or honest character. Thus, her veracity was not at issue. Moreover, the misconduct evidence was introduced in the state's case-in-chief; it could not possibly have been meant to rebut defense claims. Nor was evidence of appellant's attempts to buy back the house evidence of "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident" as required for admissibility under Evidence Code section 1101, subdivision (b).

Evidence of appellant's dishonest efforts to buy back the Hillary Street house was admitted solely to show that appellant was a bad and dishonest person. This is not permissible – courts disallow "resort by prosecution to any kind of evidence of a defendant's evil character to establish a probability of [her] guilt." (*Michelson v. United States* (1948) 335 U.S. 469, 475-476.)

Evidence of appellant's use of a false identity was admitted in conjunction with appellant's effort to obtain financing for the house on Hillary Street. The evidence should have been excluded because it was not relevant to motive under Evidence Code section 1101, subdivision (b). In addition, the use of false names prejudiced the jury against appellant, because it was inadmissible evidence of her character for dishonesty, which was irrelevant in this case.

This Court has allowed the introduction of an alias in certain

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[63] Her decision not to testify was based, in part, on the possible impeachment if she did so. (RT37:6407.)

circumstances. In *People v. Brown* (2003) 31 Cal.4th 518, the defendant had the nickname "Bam-bam" or "Bam." This Court held that it was not improper to admit this alias since identity was an issue in that case, and several of the witnesses knew the defendant only by a nickname. (*Id.* at p. 548.) Moreover, the prosecutor in *Brown* did not emphasize the nickname. (*Id.* at p. 550.) (See also, *United States v. Beedle* (3d Cir. 1972) 463 F.3d 721, 725 [evidence of an alias is improper if it "served no useful purpose and could only prejudice [the defendant]."]

In this case, in which there was no issue of identity, as in *Brown*, testimony of the aliases served no purpose, other than to prejudice appellant. No witness knew appellant only as Catherine Bazar or Katrina Brazarre. In particular, since "Catherine Bazar" was actually appellant's maiden name, referring to it as an alias made it sound more nefarious than it was. While the use of other names may be relevant to the issue of whether appellant committed a fraud, that was not the charge at trial and the use of an alias is *not* probative of whether appellant conspired to murder her husband. This evidence of evil character was not relevant, and was certainly less probative than prejudicial.

G. The Court Abused its Discretion When it Admitted Evidence That Appellant Pawned Her Husband's Jewelry and Used the Proceeds to Gamble

The trial court erroneously admitted evidence that appellant pawned the jewelry worn by her husband in his coffin and used the money to gamble in Laughlin, Nevada, shortly after his death. Evidence of this nature was designed only to inflame the passions of the jury against a purportedly unfeeling and scheming widow.

Appellant objected to the prosecutor's attempt to introduce evidence that appellant pawned Tom's jewelry after the funeral. (RT9:1140.) As

discussed above, the court ruled that it would admit evidence in three categories[64] but refused to rule on other items of evidence, saying it would give only a "generalized macro view." (RT14:1546-1547.) The court's procedure was contrary to this Court's clear directive, that in ruling upon the admissibility of evidence of uncharged acts, "it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 406.)

The prosecutor sought to introduce evidence of the pawning (RT24:4240), arguing that the evidence went to appellant's state of mind, and that he was entitled to prove any way in which appellant profited from Tom's death. (RT24:4242.) The trial court held that the evidence was admissible only to rebut defense evidence of a loving relationship between appellant and Tom. (RT25:4245.) The prosecutor attempted to introduce the pawnshop evidence several more times during his case-in-chief, arguing that the defense had opened the door to the testimony, but the court refused to allow it. (RT24:4239, 25:4323, 26:4623.)

Rene Griffin, a friend of appellant's, testified on direct examination during the defense case that appellant and Tom "got along well" and that appellant never expressed any hatred of Tom. (RT35:6106.) Griffin testified that at appellant's request she retrieved the jewelry from Tom's body from the funeral director and gave it back to appellant. (RT35:6114.) Based on Griffin's direct testimony, over defense objection, the court ruled that evidence of pawning the jewelry was admissible to rebut defense

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[64] The categories are: 1) evidence of an embezzlement from Edith Ann's Answering service, 2) evidence of a fraudulent loan in 1989 on the Sycamore property, 3) evidence of appellant's efforts to buy the Hillary Street house as a single woman. (CT7:1870-1885; 8:1064; 9:1122.)

evidence that the relationship between appellant and Tom was "loving." (RT35:6125-6126.)

On cross-examination, Griffin testified that she was aware that appellant had pawned the jewelry a day or two after the funeral. (RT35:6130.) She testified on re-direct that the fact that the jewelry was pawned did not change her opinion that the relationship between appellant and Tom had been a loving one.[65] (RT35:6131.)

Over defense objection (RT43:7440), the prosecutor also introduced evidence from the pawnshop owner who identified appellant as the woman who pawned the man's jewelry on June 22, 1990. (RT44:7533-7534.)

The court also allowed testimony that appellant went to Lauglin, Nevada, to gamble two days after she pawned the jewelry. On cross-examination of Ms. Griffin, the prosecutor was allowed to ask whether Griffin was aware that appellant took money from the pawned jewelry to Laughlin. (RT35:6130.) The court ruled that the defense had opened the door to the issue of gambling when it introduced evidence that Tom was a gambler. (RT25:4325.) Nancy Rankin, a friend of appellant's, testified for the prosecution that sometime after June 14, 1990, she took appellant to Laughlin, Nevada to gamble. (RT34:5988.)[66] However, evidence that

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[65] Griffin did not testify on direct that the relationship had been a "loving" one, but the court ruled that her testimony had established this fact. (RT35:6124.) During redirect examination of Griffin, the prosecutor objected to the use of the term "loving," arguing the witness had not given her opinion that appellant and her husband had a loving relationship. The court overruled the objection saying "she did." (RT35:6131.)

[66] The evidence showed that both appellant and Tom liked to gamble. (RT26:4476; 27:4737.) Tom's son, Tommy Thompson, testified for the prosecution that appellant was a gambler, and would go to the track with her husband. (RT26:4476.) Nancy Rankin testified that she had been (continued...)

appellant took the money from the pawned jewelry and gambled it two days after Tom's death was separately objectionable.

In the prosecutor's closing argument, the pawning of the jewelry[67] was mentioned as evidence of the extreme financial strain that appellant was under – presumably enough of a strain that she would murder her husband to escape it. (RT48:8239.) And the prosecutor argued that only a cold, calculating person would pawn her husband's jewelry to pay for gambling. (RT51:8670.)

Introduction of the evidence that appellant pawned the victim's jewelry and gambled with the proceeds was erroneous, as the evidence was substantially more prejudicial than it was probative. Moreover, the defense did not open the door to this evidence. (See *People v. Ramirez* (1990) 50 Cal.3d 1158 [error to permit prosecutor to present evidence of defendant's prior misconduct as rebuttal to mother's testimony of adverse circumstances of defendant's early childhood]; *People v. Mattson* (1990) 50 Cal.3d 826 [where defendant offers evidence that he would be law-abiding in prison environment, prosecution may offer evidence of future dangerousness in rebuttal]; *People v. Benson* (1990) 52 Cal.3d 754 [defendant, over prosecution's objection, introduced videotape on infliction of death penalty, and prosecution presented rebuttal evidence as to nature of life without possibility of parole; held, defendant was responsible for any error in

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[66](...continued)
to Las Vegas to gamble with appellant on at least two occasions (RT34:5990) and to the Los Alamitos race track. (RT35:6103.)

[67] After the prosecutor introduced evidence of the jewelry pawning in June 1990, appellant's counsel brought out on cross-examination of the pawnshop owner that appellant had pawned and retrieved the same man's jewelry in January 1990. (RT43:7540.)

allowing evidence]; *People v. Mitcham* (1992) 1 Cal.4th 1027 [evidence of defendant's conduct as juvenile is admissible to rebut mitigation evidence of good character while a juvenile].) Under Evidence Code section 352 and its federal counterpart, Federal Rules of Evidence, rule 403, evidence once deemed inadmissible may be admitted if some action at trial opens the door to its admission. (*United States v. Hegwood* (9th Cir. 1992) 977 F.2d 492, 496 [when defendant opens the door to testimony about an issue by raising it himself, he cannot complain about subsequent government inquiry into the issue], *United States v. Bailleaux* (9th Cir. 1982) 685 F.2d 1105, 1110 [where defendant offered evidence of his prior conviction on direct examination, court need not consider any prejudice to defendant].)[68]

The trial court's ruling that the door had been opened to admission of this evidence is not supported by the record. Ms. Griffin testified only that Tom and appellant "got along" and stated specifically that she never saw them being affectionate with one another. (RT35:6104.) This testimony did not seek to portray a "loving relationship" that could be properly rebutted by the prosecution. Evidence that appellant pawned her husband's jewelry and gambled with the proceeds is nothing more than inadmissible character evidence offered in the hope that the jury would use it against appellant as improper evidence of guilt.

H. The Court Erred in Admitting Testimony About the Death of Appellant's Cat

In what can only be viewed as an act of desperation, the prosecution sought to prove that appellant was more upset about the death of her cat

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[68] Decisions of federal courts are, of course, not controlling in this Court. However, such decisions are particularly compelling when the California code is based on federal code, as is the case with Evidence Code section 352 and Federal Rules of Evidence, rule 403. (*People v. Soto* (1998) 64 Cal.App. 4th 966.)

than the death of her husband. Over objection (RT26:4498, 4504), the court allowed Tommy Thompson, Tom's son, to testify that appellant was very upset when her cat died a month or two before Tom was killed. The court ruled the evidence was relevant to "how close she was and how attached she was to her husband." (RT26:4504.) Tommy testified appellant stayed home from work for three to four days after the cat died, and even when she returned to work, she was crying about how her husband had thrown the dead cat in the trash. (RT26:4508.) This contrasted with Tommy's impression of appellant that she did not seem to be upset over his father's death. (*Ibid.*)

Opinion evidence from a lay witness may be admissible. In *United States v. Meling* (9th Cir. 1995) 47 F.3d 1546, the court allowed testimony from a 911 operator regarding her perception of the defendant's agitation at the time of the call, as well as testimony from a paramedic that the defendant was feigning grief because "paramedics are trained to respond quickly in emergency situations, and while treating Meling's wife, the paramedic had ample time to form the impression that Meling was feigning grief" and, "the jury was not in the same position as the 911 operator to compare Meling's behavior with that of other emergency callers or to assess whether it was abnormal." (*Id.* at pp. 1556-1557.) This case differs from *Meling* because Tommy Thompson had no particular experience in evaluating grief. Moreover, the fact that he had witnessed appellant's grief after her cat died was irrelevant and unnecessary to his opinion. The prosecution need only have laid the foundation that he had seen her upset before. To elicit testimony that she had been much more upset upon the death of her cat is inflammatory and serves no probative purpose but to cast a negative light on appellant's role as a wife. This evidence is merely character evidence that is inadmissible if it does not relate to an element of

the offense. The evidence was used by the prosecutor solely in an attempt to portray appellant's bad character – that she cared more for an animal than for her husband.

I. The Admission of the Bad Acts Evidence Prejudiced Appellant and Violated Her Constitutional Rights

1. The Improper Use of Propensity Evidence Violates Due Process

This Court has repeatedly held that "[f]rom the standpoint of historical practice, unquestionably the general rule against admitting [propensity] evidence is one of long-standing application." (*People v. Falsetta* (1999) 21 Cal.4th 903, 913 [legislative exception created to admit evidence in sexual assault cases must not unduly offend due process].) "The rule excluding evidence of criminal propensity is nearly three centuries old in the common law." (*People v. Alclala, supra*, 36 Cal.3d 604, 630-631.) The rule "is currently in force in all American jurisdictions by statute or case law." (*People v. Ewoldt, supra*, 7 Cal.4th at p. 392; *People v. Falsetta, supra*, 21 Cal.4th at p. 913.)

While *Falsetta* holds that propensity evidence may, under certain circumstances, be admitted to prove certain types of sex offenses (*People v. Falsetta, supra*, 21 Cal.4th at p. 913), this Court has not yet decided whether the erroneous admission of propensity evidence in other cases implicates federal due process, but has assumed such to be the case. (*People v. Garceau* (1993) 6 Cal.4th 140, 192.)

The United States Supreme Court has held that it is not a violation of due process to admit other crimes evidence for purposes other than to show conduct in conformity therewith, where the jury is given a limiting instruction "that it should not consider the prior conviction as any evidence of the defendant's guilt on the charge on which he was being tried."

(*Spencer v. Texas* (1967) 385 U.S. 554, 558, 563-564; accord *Estelle v. McGuire* (1991) 502 U.S. 62, 74-75.)[69] However, in *McKinney v. Rees,* (9th Cir. 1993) 993 F.2d 1378, 1384, the Ninth Circuit held the admission of other crimes evidence to prove criminal propensity violated due process. (See also *Jammal v. Van De Kamp* (9th Cir. 1991) 926 F.2d 918, 920.)

In this case, the introduction of all of the prior fraud transactions, dishonesty, gambling and failure to grieve evidence violated appellant's right to due process under the Fourteenth Amendment which "protects the accused against conviction except upon proof [by the state] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship, supra,* 397 U.S. at p. 364.) The trial court's erroneous admission of evidence that permitted the jury to find appellant guilty of this crime simply because she had committed other dishonest acts lightened the prosecution's burden of proof. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, the introduction of the evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; *Masoner v. Thurman* (9th Cir. 1993) 996 F.2d 1003, 106. See also *McKinney v. Rees*, *supra*, 993 F.2d 1378.)

In addition, the admission of this inflammatory evidence violated appellant's Fifth Amendment due process rights by arbitrarily depriving her of a liberty interest created by Evidence Code section 1101 not to have her

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[69] In his partial dissent in *Spencer*, Chief Justice Warren argued that "[w]hile this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions . . . suggest that evidence of prior crimes introduced for no other purpose than to show criminal disposition would violate the Due Process Clause." (*Spencer v. Texas, supra,* 385 U.S. at pp. 572-574.)

guilt determined by propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) By ignoring well-established state law that allows evidence of motive to be admitted only where a nexus between the prior case and the current offense is established, which prevents the state from using evidence admitted for a limited purpose as general propensity evidence, and which excludes the use of unduly prejudicial evidence, the state court arbitrarily deprived appellant of a state-created liberty interest in due process.

The error in this case violated appellant's Fourteenth Amendment rights under the United States Constitution to due process, and to a fundamentally fair trial, as well as her Eighth Amendment right to a reliable penalty verdict. Accordingly, reversal is required unless the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if the issue is reviewed under California statutory law (Evid. Code, §§ 1101, 352), the judgment must be reversed because it is reasonably probable that the error contributed to the verdict. (*People v. Watson, supra*, 46 Cal.2d 818.)

2. The Use of the Propensity Evidence Was Extremely Prejudicial to Appellant's Case

> [E]vidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose. (*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

The prosecution theory was that appellant conspired to murder her husband (RT51:8693) to obtain the proceeds of his life insurance policy.

(RT51:8610.) Prosecutor Goldberg also argued appellant had the motive to commit the crime because of the prior fraud allegedly committed against the victim. (RT48:8219, 8222, 8232.) He argued that she set up a new, unmarried identity for herself in anticipation of killing her husband. (RT48:8245.) Prosecutor Mader argued that if it was established that appellant wanted the house back, "what you are really saying is that Catherine Thompson is guilty because she had no source of funds to get back that house . . . . [s]he needed to kill her husband." (RT51:8686.)

Prosecutor Goldberg argued that the pawning of the jewelry and the gambling belied the picture of appellant as a sincerely grieving widow. "And she pawns the jewelry of her husband. She scavenges his body and picks it clean; and then the grieving widow Thompson immediately uses the money to go to Laughlin, Nevada, where on June 24th she wins money gambling." (RT49:8280.) In the final closing argument, prosecutor Mader argued that "Catherine Thompson has no motive to kill her husband other than for the insurance money" (RT51:8610), but then argued there is a difference between pawning jewelry because you need money and pawning jewelry to go gambling. "That is really cold." (RT51:8670.)

However, the crime of conspiracy to commit murder was not established independent of the bad character evidence admitted by the court. The prosecution offered no evidence independent of the hearsay testimony of Christine Kuretich to establish every element of the crime charged. (*In re Winship* (1970) 397 U.S. 358, 364.) Instead, the prosecutor relied on the bad character evidence of the prior fraud transactions, dishonesty, gambling, and failure to grieve to prove appellant's conduct – that is, her alleged involvement in the conspiracy to murder her husband.

The erroneous introduction of the character evidence permitted the prosecutors to both fabricate an alternative motive for the crime and to

appeal to the emotions of the jury to condemn appellant as a cold, calculating woman who had "turned" on her husband. Also, because of the presence of the same motive in both the crime and the prior frauds, the prosecutors were able to argue that because she had the same motive before she had the same motive again and must have committed the crime.

This was clearly an improper use of the motive evidence. "The presence of the same motive in both instances may be a contributing factor in finding a common plan or design. [Citation.] In contrast, the converse is not true [for motive evidence]. The manner in which the prior misconduct was committed, which is the focus of the common plan or design inquiry, does not give rise to a motive, i.e., incentive or impetus, for commission of the charged crime." (*People v. Scheer, supra,* 68 Cal.App.4th at p. 1020.)

The error in admitting the motive evidence was not harmless. Because the evidence that appellant had engaged in a conspiracy to murder her husband for financial gain was not substantial, it is reasonably probable that the error in admitting the emotionally charged evidence contributed to the verdict. All of the bad acts evidence discussed, *supra*, served to paint a portrait of appellant as a bad person, a person of evil character. It showed her as a conniving and lying person who had a deeper emotional attachment to her pet that to her husband. It showed her character for dishonesty. The admission of this evidence violated appellant's rights under the Fifth and Fourteenth Amendments to due process, and her Eighth Amendment right to a fair penalty determination. Appellant did not place her credibility in issue, yet the prosecution was repeatedly allowed to attack it. The prosecutor was allowed to present substantial evidence of uncharged misconduct, probative of nothing except bad character. The admission of this evidence created a reasonable likelihood that appellant was convicted not on the strength of the evidence against her, but because the jury found

her to be a person of bad character, one either likely to have committed another crime, or deserving of punishment for those prior bad acts.

This Court must review the lower court's ruling for abuse of discretion. (*People v. Ortiz, supra*, 109 Cal.App.4th at p. 117.) Since there was no acceptable reason for the admission of the bad acts evidence under Evidence Code section 1101, subdivision (b), the trial court abused its discretion in admitting the evidence. In the alternative, even if the evidence were admissible, the court abused its discretion by failing to exclude the evidence under Evidence Code section 352. Appellant suffered significant prejudice from the admission of this evidence: without a finding that the murder was committed for the purpose of financial gain, appellant would not have been eligible for the death penalty. Further, the prosecutor's penalty phase argument focused on appellant's character as the reason to impose death. (See, e.g., RT58:9352 ["[S]he has been amoral, dishonest for at least 17 or 18 years.].) Accordingly appellant's convictions, the special circumstances finding and the death penalty must be reversed.

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IX

THE TRIAL COURT IMPERMISSIBLY BURDENED APPELLANT'S RIGHT TO REMAIN SILENT BY OVERTLY AND DIRECTLY SOLEMNIZING APPELLANT'S SILENCE

The trial judge committed serious misconduct by improperly commenting upon appellant's decision not to testify at trial. This misconduct violated appellant's right to a fair jury trial, to due process, and to reliable determinations of guilt and death eligibility under both the state and federal constitutions. (Cal. Const., art. I, §§ 15, 16, 17; U.S. Const., V, VI, VIII, XIV Amends.)

A. Relevant Proceedings in the Trial Court

During the defense case, outside the presence of the jury, the trial court discussed the defense case with the attorneys. Appellant's counsel informed the court that appellant would not be testifying. (RT37:6429.) The trial court warned counsel and appellant that this decision would likely be irrevocable once the codefendant began his case. (RT37:6429-6430.) The trial court obtained an express waiver from appellant of her right to testify. Defense counsel stated, "We discussed it with her and she's exercising her right not to testify and she understands it's her right?" The court responded. "Is that correct, Ms. Thompson?" Appellant replied, "Yes, it is," and the court remarked, "I don't know how much clearer it can be." (RT37:6461.)

Defense counsel then presented his last witness[70] and, in the presence of the jury, announced that he rested his case. Immediately the court rejoined, "You are resting without calling your client?" (RT37:6469.)

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[70] Russell Furie's testimony was concluded in less than four full pages of the trial transcript. (See RT37:6466-6469.)

Defense counsel asked to approach the bench, where he moved the court for a mistrial due to the *Griffin*[71] error. He stated; "Your honor, with all due respect, I believe the court committed *Griffin* error by asking me in the jury's presence whether I was going to rest without calling my client. . . . [¶] And the fact that the jury is instructed at the conclusion of the case, pursuant to I believe [CALJIC Nos.] 2.60 and 2.61, no inference can be drawn from her failure to testify, so the court with its imprimatur authority asking the question if we're going to rest without calling her I think directly focuses the jury on her failure to testify." (RT37:6472.) The court denied the motion. (RT37:6472-6473.)

In marked contrast, appellant's co-defendant, Phillip Sanders testified extensively at trial. Three volumes of the record are devoted to his testimony. (RT39:6614-43-42:7373.) Over the course of several days, Sanders made numerous statements incriminating appellant. He testified that appellant initiated plans to commit the murder (RT39:6704-6709), and repeated several times that appellant acted alone in preparing and carrying out the crime. (RT39:6710-712; 41:6995-7070; 42:7177-7203, 7286-7290.)

The court's comment before the jury implied that counsel should have called his client to testify, which under the rule of *Griffin v. California* (1965) 380 U.S. 609 and *Wilson v. United States* (1893) 149 U.S. 60 is clearly impermissible. Moreover, in light of codefendant's extended and protracted testimony, the court's inexplicable comment was fundamentally unfair and violated appellant's rights to due process and a fair trial guaranteed by the Sixth and Fourteenth Amendments, and Article I, section 15 of the California Constitution.

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[71] *Griffin v. California* (1965) 380 U.S. 609.

B. The Trial Court Violated Appellant's Constitutional Rights When it Directly Referred to Appellant's Silence and Refusal to Testify

The Fifth Amendment to the United States Constitution and article I, section 15, of the California Constitution provide that no person may be compelled in any criminal case to be a witness against himself. The privilege reflects "our preference for an accusatorial rather than an inquisitorial system of criminal justice." (*Murphy v. Waterfront Comm.* (1964) 378 U.S. 52, 55). The privilege further operates to place the burden of proof entirely on the government to establish guilt before depriving any person of liberty.

To give full effect to this protection of liberty provided by the state and federal constitutions, the California and United States Supreme Courts have specifically delineated the sweep and scope of the privilege and hold that if a criminal defendant chooses not to offer his own testimony to explain and defend himself to the jury, then his failure "to testify in his own defense 'shall not create any presumption against him.'" (*Stewart v. United States* (1961) 366 U.S. 1, 2; *see also Wilson v. United States* (1893) 149 U.S. 60; *Raffel v. United States* (1926) 271 U.S. 494, 496-499; *Johnson v. United States* (1943) 318 U.S. 189, 196; *Grunewald v. United States* (1957) 353 U.S. 391, 425-426 [Black, J. concurring]; *Griffin v. California* (1965) 380 U.S. 609, 614; *Chapman v. California* (1967) 386 U.S. 18, 26; *Doyle v. Ohio* (1976) 426 U.S. 610, 618; *Jenkins v. Anderson* (1980) 447 U.S. 231.)

In *Griffin v. California, supra*, the defendant, who had not testified, was found guilty by a jury of first-degree murder. The prosecution had indicated to the jury in closing argument that the defendant, who had been with the victim just prior to her demise, was the only person who could provide information as to certain details related to the murder, and yet, he

had "not seen fit to take the stand and deny or explain." (*Id.* at p. 611.)

The United States Supreme Court held that the prosecutor's comments impermissibly infringed upon the defendant's Fifth Amendment right to remain silent because commenting on the silence of a defendant is a negative inference against the right to invoke the Fifth Amendment. This Court reached an identical conclusion in *People v. Modesto* (1965) 62 Cal.2d 436, analyzing the state constitutional equivalent of the Fifth Amendment.

Commenting on the refusal to testify "is a remnant of the 'inquisitorial system of criminal justice,'" *Murphy v. Waterfront Comm.*, 378 U.S. 52, 55 (1964), which the Fifth Amendment outlaws." (*Griffin*, *supra*, 380 U.S. at p. 614.) Imposing such a burden or penalty on the exercise of the right against self-incrimination transgresses the Constitution. Thus, neither the prosecuting attorney nor the judge may comment on the fact that the defendant did not testify. (*United States v. Sehnal* (9th Cir. 1991) 930 F.2d 1420 [prosecutor overstepped boundary of permissibility when, in closing argument, he asked questions which could only be answered by the defendant, implicating his failure to testify].)

In the present trial, as in *Griffin*, appellant did not testify. However, at the close of the defense case, and in the jury's presence, the court exclaimed: "You are resting without calling your client?" (RT37:6469.) An explicit reference to the failure of a defendant to take the stand is the seminal *Griffin* violation. The trial court's question involved a direct comment on appellant's invocation of the Fifth Amendment, but even if considered an indirect comment on appellant's right to remain silent it is a violation of appellant's Fifth Amendment right. This Court has thoroughly condemned both "direct [and] indirect comment[s] upon the failure to take the witness stand." (*People v. Miranda* (1987) 44 Cal.2d 57, 112; *see also*

People v. Medina (1995) 11 Cal.4th 694, 755.) Thus, it is *Griffin* error for either the prosecutor or the trial judge to make remarks that are "of such a character that the jury would naturally and necessarily take [them] to be a comment on the failure to testify." (*United States v. Ponce* (9th Cir. 1995) 51 F.3d 820, 831 [quoting *United States v. Mayans* (9th Cir. 1994) 17 F.3d 1174, 1185]; *Lincoln v. Sun* (9th Cir. 1987) 807 F.2d 805, 809; *see also United States v. Cotnam* (7th Cir. 1996) 88 F.3d 487, 497.)

In *People v. Vargas* (1973) 9 C.3d 470, 474, the prosecutor commented about the lack of contradiction of a witness' testimony that she saw the defendants with the victim, and added, "And there is no denial at all that they were there." The comment was held improper because, while a comment that no explanation was given is acceptable, the word denial connotes a personal response by the accused himself. "Any witness could 'explain' the facts, but only the defendant himself could 'deny' his presence at the crime scene. Accordingly, the jury could have interpreted the prosecutor's remarks as commenting upon defendant's failure to take the stand and deny his guilt." (*People v. Vargas, supra*, 9 C.3d at p. 476; see *People v. Mendoza* (1974) 37 C.A.3d 717, 726, [*Griffin* rule violated by "thinly veiled" comment about case involving lewd acts being hard to defend against, indicating a failure to testify could be considered by jury]; *People v. Medina* (1974) 41 C.A.3d 438, 457 [claim that testimony was unrefuted by the defendants was *Griffin* error]; *People v. Hardy* (1992) 2 C.4th 86, 153 [*Griffin* error committed when prosecutor argued that jurors should ask themselves why defendant did not "just come out and say, I didn't do it, it was Cliff"].) If an inferential statement can violate *Griffin*, then, *a fortiori* "a direct comment on the defendant's failure to testify is clearly a fifth amendment violation." (*United States v. Goodapple* (7th Cir. 1992) 958 F.2d 1402, 1405.)

At appellant's trial, the court directly referred to appellant's failure to take the stand and testify by asking defense counsel if the defense was resting without calling his client to testify. By focusing attention on the fact that appellant was not going to testify, the court violated appellant's right not to offer her own testimony to explain and defend herself to the jury, and to rely on the government's burden to prove her guilt beyond a reasonable doubt. The court's question, undeniably, violated her constitutional rights as enunciated in *Griffin*.

The impact of this error ballooned over the course of several days when the codefendant, Phillip Sanders, took the stand and testified. Had appellant been tried alone, Sanders would likely not have testified or at least, limited his testimony. (See Argument I, *supra*.) Instead, he became appellant's second accuser, drawing the jury's attention to her responsibility and denying his own. In the face of this two-pronged attack, book-ended by censure from both the prosecution and her codefendant, the court's comment on appellant's silence was fundamentally unfair and extremely prejudicial.

C. An Overt Violation of the *Griffin* Rule by the Court Should Not Be Subject to Harmless Error Analysis

Griffin error, like other violations of a constitutional right, is reversible unless harmless beyond a reasonable doubt. (See *People v. Hardy, supra*, 2 Cal.4th 154 [*Griffin* error harmless beyond a reasonable doubt in light of overwhelming evidence of defendant's guilt].) Thus *Griffin* error is prejudicial where the improper comment either fills an evidentiary gap in the prosecution's case or "touch[es] a live nerve" in the defense. (*People v. Vargas, supra*, 9 Cal.3d 481; see *People v. Glass* (1975) 44 Cal.App.3d 772, 780, [although comment was brief and indirect, indicating it could have been harmless, there was little evidence of guilt;

error served to fill evidentiary gap]; *People v. Medina, supra*, 41 Cal.App.3d 463 ["gap" that comment helped fill was credibility of accomplice witnesses; fact that jury took 5 days to reach verdict was significant].) Appellant submits that where the error, as here, is a direct, overt comment by the trial court before the jury in conscious disregard of a defendant's right not to be a witness against herself, the error is reversible per se.

Griffin itself readily distinguished between "[w]hat the jury may infer, given no help from the court," i.e., an indirect comment; and "[w]hat [the jury] may infer when the court solemnizes the silence of the accused," i.e., a direct comment. (*Id.* at pp. 614-615.) Thus, it held that in the case before it where a direct comment had been made, the error was reversible. (*Id.* at p. 612 [holding that, had the Court previously held the Fifth Amendment applicable to the States, reversal would be clear as per *Wilson v. United States* (1893) 149 U.S. 60 – decided over seventy years prior].) In *Griffin*, the prosecutor argued that the defendant had "not seen fit to take the stand" (*id.* at p. 611.), while in the present case the *trial court* itself solemnized appellant's silence. The trial court's question, "You are resting without calling your client?" could not be a more plain rebuke for appellant invoking her constitutional rights. The dubious intent of the court's question is underscored by prior discussions with counsel during which the court was apprised of the fact that appellant would not testify. Thus, the court's question before the jury cannot be dismissed as a regrettable but understandable expression of his surprise.

Other courts, including the Ninth Circuit, have also held that a direct comment on a defendant's invocation of the Fifth Amendment requires reversal. (*United States v. Patterson* (9th Cir. 1987) 819 F.2d 1495, 1506 [suggesting that reversal is appropriate where statements directly refer to

the defendant's failure to testify]; *see also Ex parte Wilson* (Ala. 1990) 571 So.2d 1251 [direct comment on defendant's failure to testify warrants reversal, where court did not give curative instruction immediately after harmful statement, but instead waited until after closing arguments concluded nearly 25 minutes later]; *People v. Crabtree* (Ill. App. 1987) 515 N.E.2d 1323 [trial court's solitary statement that defendant could take stand and testify required reversal]; *State v. Hale* (Tenn. 1984) 672 S.W.2d 201 [direct comment required automatic reversal of murder conviction]; *Gonzales v. State* (N.M. 1980) 612 P.2d 1306 [direct comment, as contrasted with indirect comment, on defendant's failure to testify constituted reversible error]; *Koller v. State* (Tex. Crim. App. 1975) 518 S.W.2d 373 [direct references to defendant's failure to testify required reversal].) In each of these cases, an apparent and self-evident comment on a defendant's refusal to testify, such as the one voiced by the trial court here, resulted in reversal.

There is, in fact, a strong justification for reversing when a direct comment is made. Solitary indirect comments, which require the jury to draw their own conclusions, can be overshadowed by overwhelming evidence of guilt and corrected by an appropriate curative instruction. Direct comments, on the other hand, leave nothing to the jury's imagination and once uttered, are bells that can not be unrung. In the more than 40 years since *Griffin* was decided, trial courts and prosecutors have been well apprised that direct comments infringe on a defendant's constitutional rights. Thus, there is no reasonable explanation for making them today, unless the speaker intends to prejudice the defendant. Applying harmless error analysis to such a flagrantly prejudicial comment would permit courts and prosecutors to directly comment on the invocation of a person's constitutional right to remain silent, knowing that, where the comment does

not fill an evidentiary gap in the prosecution's case, or touch a live nerve, it will pass appellate muster.

Such unvarnished gibes are precisely the "remnant of the 'inquisitorial system of criminal justice,'" which *Griffin* was designed to prevent. (*Griffin v. California, supra,* 380 U.S. at p. 614 [quoting *Murphy v. Waterfront Comm.* (1964) 378 U.S. 52.) Thus, the *Chapman* standard should not be applied to a direct comment on a criminal defendant's refusal to testify.

D. Even under the *Chapman* Test, the Court's *Griffin* Violation Was Not Harmless Beyond a Reasonable Doubt

As stated *supra*, a direct, as contrasted with indirect, *Griffin* violation should not be considered harmless error. Applying harmless error analysis to the trial court's direct comment, however, would nevertheless result in reversal.

An error is harmless beyond a reasonable doubt only when the prosecution demonstrates, beyond a reasonable doubt, that the improper comment did not contribute to the defendant's conviction. (*Chapman v. California, supra*, 386, U.S. 18, 24.) The *Chapman* test, thus, places the error within the context of the trial as a whole. "The question is 'whether the guilty verdict actually rendered in *this* trial was surely attributable to the error.'" (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) In this case, appellant was faced with a codefendant who acted as second prosecutor (see Argument I, *supra*), and who, in contrast to appellant, testified at trial and incriminated appellant. The case against appellant was a close one, based only on circumstantial evidence and the statements of coconspirators. (See Argument VI, *supra*.) In this context, the government cannot prove that the explicit question from the *trial court itself* as to appellant's failure to testify was "harmless beyond a reasonable doubt." The court's decision to

solemnize appellant's silence under the circumstances of this case was extremely prejudicial. (See *People v. Guzman* (2000) 80 Cal.App.4th 1282, 1288, 1290, [prosecutor's remarks, which, by emphasizing victim's cooperation with police and willingness to testify, impliedly invited jury to consider defendant's failure to testify as proof that his actions were criminal, were not harmless beyond reasonable doubt; jury rendered split verdict, indicating it had doubts about victim's credibility].

As stated previously, trial counsel raised an immediate objection to the trial court's direct violation of appellant's right to remain silent and requested a mistrial. The trial court gave no immediate admonition or curative instruction. While the trial court did eventually instruct the jury in terms of CALJIC No. 2.60 that "you must not draw any inference from the fact that a defendant does not testify" (RT51:8714), such an instruction, delivered 21 days later with the other routine instructions for evaluating the evidence presented at trial, could not cure the error. (*See United States v. Kerr* (6th Cir. 2001) 236 F.3d 777, 787-788 [prosecutor's misconduct in argument to jury not cured by curative instruction where it is not given at the time of the improper comments, but with other routine instructions prior to deliberations].)

This is particularly true where, as here, there was nothing directly linking the instruction to the misleading and improper statement made by *the trial court itself.* (*See U.S. v. Matt* (2d. Cir. 1997) 116 F.3d 971 [if the judge's actions create an impression of partisanship, curative instructions will generally not save the day]; *State v. Wilkins* (Mont. 1987) 746 P.2d 588 [informing defendant of his right to testify in front of the jury was reversible error, even though the trial court had not manifestly intended to comment on defendant's failure to take stand; such error could not be remedied by curative instruction].)

In *Wilkins*, the trial court orally assured the defendant of his right to testify at trial and asked him if he waived such right. (*Wilkins*, *supra*, 746 P.2d at p. 589.) In that case, the state Supreme Court found the trial court's questioning of the defendant required reversal of the conviction. (*Id.* at p. 590.) Although the trial court did not intend to comment on defendant's failure to testify, the effect of the exchange between the court and the defendant was to focus the attention of the jury on the lack of defendant's testimony. (*Ibid.*) Likewise, in the instant case, the trial court, in front of the jury, questioned whether appellant would testify, or invoke her constitutional right not to testify.

The prosecution cannot carry its burden of establishing that the judge's improper comment, and the absence of any action by the trial court to correct its error, was harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at p. 24.) There is, therefore, no basis for concluding that the jury's verdicts were surely unattributable to the court's misconduct. (*Sullivan*, *supra*, 508 U.S. at p. 279; *Chapman*, *supra*, 386 U.S. at p. 24; *People v. Brown* (1998) 46 Cal.3d 432, 447-448) and reversal of the judgment is required.

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X

THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(CT9:2608; RT51:8703-87044 [oral version].) This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. Const., 6th, 8th and 14th Amends.; Cal. Const., art. I, §§ 7 and 15.)

A. The Instruction Allowed the Jury to Determine Guilt Based on Motive Alone

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, it is beyond question that motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia, supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (*See, e.g., United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The language in CALJIC No. 2.51 that the presence of motive may tend to establish guilt carried the inference that guilt was in fact proved in this case and effectively lowered the prosecution's standard of proof. The motive instruction allowed the jury to infer a finding of guilt from evidence of motive. "Permissive inference jury instructions are disfavored because they 'tend to take the focus away from the elements that must be proved.' [Citation.]" (*Hanna v. Riveland* (9th Cir. 1996) 87 F.3d 1034, 1037.) Nevertheless, a permissive inference instruction comports with due process unless, "under the facts of the case, there is no rational way for the jury to make the connection permitted by the inference." (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157.) Under those circumstances, there is an unacceptable "risk that an explanation of the permissible inference to a jury, or its use by a jury, has caused the presumptively rational fact finder to make an erroneous factual determination." (*Ibid.*) "Instructing the jury that the People have introduced evidence 'tending to prove' appellant's guilt carries the inference that the People have, in fact, established guilt." (*People v. Owens* (1994) 27 Cal.App.4th 1155, 1158.) Appellant recognizes that this Court rejected this claim in *People v. Snow* (2003) 30 Cal.4th 43, but the Court also stated that "[i]f the challenged instruction somehow suggested that motive alone *was* sufficient to establish guilt, defendant's point might have merit." (*Id.* at pp. 97-98, original italics.)

Here, the motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (*See* RT51:8704, 8705, 8706 [CALJIC Nos. 2.03, 2.04, and 2.06 stating with regard to false statements and attempts to fabricate or suppress evidence that each circumstance "is not sufficient by itself to prove guilt . . . ."].) The

placement of the motive instruction, which was read immediately before the false statement instruction, served to highlight its different standard.

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (*See People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; *see also People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].)

The decision in *Snow* did not address appellant's contextual argument; however, in *People v. Cleveland* (2004) 32 Cal.4th 704, this Court briefly rejected a contextual attack on the motive instruction by finding the claim "merely goes to [its] clarity[.]" (*Id.* at p. 750; see also *People v. Petznick* (2003) 114 Cal.App.4th 663, 685 [the instruction serves an

"additional purpose of clarifying that motive is not an element of a crime"].) Appellant submits, nevertheless, that the instruction's comparative wording remains prejudicial. The instruction was insufficiently clear; in context, the instruction allowed the jury to infer intent to kill (for practical purposes here, appellant's guilt) based on motive alone.

Citing *People v. Jackson* (1996) 13 Cal.4th 1164, the court of appeal in *People v. Bell* (2004) 118 Cal.App.4th 249 found prejudicial error based on CALJIC No. 2.28 regarding late disclosure of defense witness statements. The court found the same comparative, contextual analysis significant:

> Significantly, other instructions [CALJIC Nos. 2.03, 2.04, 2.05, 2.06, 2.52] that address a defendant's consciousness of guilt "ma[k]e clear to the jury that certain types of deceptive or evasive behavior on a defendant's part could indicate consciousness of guilt, *while also clarifying that such activity was not of itself sufficient to prove a defendant's guilt*, and allowing the jury to determine the weight and significance assigned to such behavior. The cautionary nature of the instructions benefits the defense, admonishing the jury to circumspection regarding evidence that might otherwise be considered decisively inculpatory." (*People v. Jackson,* 13 Cal.4th at p. 1224.) No such clarification was included here. As a result, the jurors may have concluded they were free to find Bell guilty merely because he failed to comply with the discovery statute.

(118 Cal.App.4th at p. 256; emphasis in original.)

Appellant requests the Court to reconsider this issue. In the present case, the instruction highlighted the omission, because the other instructions (CALJIC Nos. 2.03, 2.04 and 2.06) admonished the jurors that those circumstances were insufficient to establish guilt. In contrast, the omission in CALJIC No. 2.51 would have permitted the jurors to understand that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. Const., 6th,

8th and 14th Amends; Cal. Const., art. 1, §§ 7 and 15.)

B. The Instruction Impermissibly Lessened the Prosecutor's Burden of Proof and Violated Due Process

The jury was instructed that a conspiracy to commit murder requires the specific intent to agree to commit the murder (RT48:8170-8171). The jury was also instructed that in order to find appellant guilty of the special circumstance of murder committed for the purposes of financial gain they had to find the specific intent to commit the act. (RT48:8192.) By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on two crucial, contested elements of the prosecutor's capital murder case – *i.e.*, that appellant had the intent to conspire and to kill for financial gain. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (*See Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case. The prosecution's theory underlying the first degree murder allegation was that appellant had her husband killed to receive insurance proceeds in order to keep her home, the Hillary Street house. Under these circumstances, the jury would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]"

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87; emphasis added.)

> "A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008; emphasis added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795; emphasis added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful."

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.) Quite clearly, the terms "motive" and "intent" are commonly used interchangeably under the rubric of "purpose."

As the court of appeal stated in *People v. Maurer* (1995) 32 Cal.App.4th 1121, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.)

There was potential for conflict and confusion in this case. The jury was instructed to determine if appellant had the intent to conspire to murder, and the prosecution case hinged on the theory that appellant was motivated to have her husband killed in order to reap the insurance proceeds so that she could stay in the Hillary Street house, but was also told that motive was not an element of the crime. Thus the prosecution's burden was lessened in violation of appellant's constitutional right to due process.

C. The Instruction Shifted the Burden of Proof to Imply That Appellant Had to Prove Innocence

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of proof on appellant to show an alternative motive to that advanced by the

prosecutor. In *People v. Frye* (1998) 18 Cal.4th 894, 958 and *People v. Prieto* (2003) 30 Cal4th 3226, 254, this Court found the use of the term "innocence" in the motive instruction did not shift the burden of proof, however, appellant respectfully requests this Court to revisit this issue and find the instruction shifted the burden of proof. As used in this case, CALJIC No. 2.51 deprived appellant of her federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (*See Beck v. Alabama* (1980) 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

D. Reversal Is Required

The evidence against appellant was purely circumstantial or based on the statements of coconspirators. The motive instruction given in this case diluted the prosecution's obligation to prove beyond a reasonable doubt that appellant had a specific intent to conspire to kill for financial gain. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent to conspire and to kill for financial gain was unnecessary for guilty verdicts on the conspiracy and first degree murder charges and a true finding of the special circumstance allegation. Accordingly, this Court must reverse the judgments on Count One, Count Two and the special circumstance allegation because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

XI

THE TRIAL COURT ERRONEOUSLY EXCUSED PROSPECTIVE JURORS PETER B., NANCY N., MARIA ELENA GARY-A., BRENDA M., KUSUM P., BETTY F. AND YOLANDA N. WHO WERE EQUIVOCAL ABOUT WHETHER THEIR ATTITUDES ABOUT THE DEATH PENALTY WOULD AFFECT THEIR PENALTY PHASE DELIBERATIONS; REVERSAL OF THE DEATH SENTENCE IS REQUIRED[72]

A. Introduction

Prospective jurors Peter B., Nancy N., Maria Elena Gary-A., Brenda M., Kusum P., Betty F. and Yolanda N. told the trial court they were unsure if their views on capital punishment would impact their deliberations. The prosecution moved to discharge these jurors for cause, and the trial court sustained all challenges. As more fully discussed below, the trial court erred and violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. Because none of the dismissed jurors stated they would not consider death as an option under proper instructions from the trial court with the requisite degree of certitude, reversal is required.

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[72] Because this case predates Code of Civil Procedure, section 237 and the jurors discussed in the brief were not seated jurors, the case is not covered by the statute. Nevertheless, in an abundance of caution, appellant will not use the prospective jurors' last names in this brief.

B. A Prospective Juror in a Capital Case May Not Be Excused for Cause Based on Opposition to the Death Penalty Unless the Voir Dire Affirmatively Establishes the Juror Will Not Follow the Law or Consider Death as an Option

The Sixth and Fourteenth Amendments guarantee a criminal defendant a fair trial by a panel of impartial jurors. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 149-150; *Irvin v. Dowd* (1961) 366 U.S. 717, 722.) In capital cases, this right applies to the determinations of both guilt and penalty. (*Morgan v. Illinois* (1992) 504 U.S. 719, 727; *Turner v. Murray* (1986) 476 U.S. 28, 36 n. 9.) This right also is protected by the California State Constitution. (See Cal. Const., art. I, § 16.)

The United States Supreme Court has enacted a process of "death qualification" for capital cases. (See *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522); *Wainwright v. Witt* (1985) 469 U.S. 412, 421.) Appellant maintains that this process produces "juries more predisposed to find a defendant guilty than would a jury from which those opposed to the death penalty had not been excused" in violation of the Sixth and Fourteenth Amendment right to a fair trial by an impartial jury. (*Witt v. Wainwright*, (1985) 470 U.S. 1039 (Marshall, J., dissenting from denial of certiorari); *Grigsby v. Mabry* (8th Cir. 1985) 758 F.2d 226, revd. sub nom, *Lockhart v. McCree* (1986) 476 U.S. 162, 176.) The reasons supporting this claim are set forth in Justice Marshall's dissenting opinions in (*Witt*, *supra*, at pp. 1040-1042, and in *McCree*, *supra*, at pp. 184-206), which are incorporated herein to preserve the issue for federal habeas corpus review, if necessary.

Even with a death qualification process, the Supreme Court has held that prospective jurors do not lack impartiality, and thus may not be excused for cause, "simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its

infliction." (*Witherspoon v. Illinois*, *supra*, 391 U.S. at pp. 520-523, fns. omitted.) Such an exclusion violates the defendant's rights to due process and an impartial jury "and subjects the defendant to trial by a jury 'uncommonly willing to condemn a man to die.'" (*People v. Hayes* (1999) 21 Cal.4th 1211, 1285, quoting *Witherspoon v. Illinois*, *supra*, 391 U.S. at p. 521.) Rather, under the federal Constitution, "[a] juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath." (*Wainwright v. Witt*, *supra,* 469 U.S. at 421, quoting *Adams v. Texas* (1980) 448 U.S. 38, 45.) The focus on a prospective juror's ability to honor his or her oath as a juror is important:

> [T]hose who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law.

(*Lockhart v. McCree*, *supra,* 476 U.S. at p. 176; see also *Witherspoon*, *supra*, 391 U.S. at p. 514, fn. 7 [recognizing that a juror with conscientious scruples against capital punishment "could nonetheless subordinate his personal views to what he perceived to be his duty to abide by his oath as a jury and to obey the law of the State."].) Thus, all the State may demand is "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Adams v. Texas*, *supra*, at p. 45.) The same standard is applicable under the California Constitution. (See, e.g., *People v. Guzman* (1988) 45 Cal.3d. 915, 955; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In applying the *Adams-Witt* standard, an appellate court determines whether the trial court's decision to exclude a prospective juror is supported by substantial evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962); see

also, *Wainwright v. Witt*, *supra*, 469 U.S. at p. 433 [ruling that the question is whether the trial court's finding that the substantial impairment standard was met is fairly supported by the record considered as a whole].) As this Court has explained:

> On appeal, we will uphold the trial court's ruling if it is fairly supported by the record, accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous.

(*People v. Heard* (2003) 31 Cal.4th 946, 958, quoting *People v. Cunningham* (2001) 25 Cal.4th 926, 975, citations omitted.) The burden of proof in challenging a juror for anti-death penalty views rests with the prosecution. "As with any other trial situation where an adversary wishes to exclude a juror because of bias, then, it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality." (*Witt*, *supra*, 469 U.S. at p. 424; accord, *Morgan v. Illinois* (1992) 504 U.S. 719, 733.) The exclusion of even a single prospective juror in violation of *Witherspoon* and *Witt* requires automatic reversal of a death sentence. (*Gray v. Mississippi* (1987) 481 U.S. 648, 668.).

Finally, given the per se standard of reversal for *Witherspoon-Witt* errors, the trial court bears a special responsibility to conduct adequate death qualification voir dire. As this Court emphasized, when a prospective juror's views appear uncertain, the trial court must conduct careful and thorough questioning, including follow-up questions, to determine whether his "views concerning the death penalty would impair his ability to follow the law or to otherwise perform his duties as a juror." (*People v. Heard*, *supra*, 31 Cal.4th at p. 965.) In short, the trial courts must "proceed with great care, clarity, and patience in the examination of potential jurors,

especially in capital cases." (*Id.* at p. 968.)

In this case, the trial court erred in excluding Peter B., Nancy N., Maria Elena Gary-A., Brenda M., Kusum P., Betty F. and Yolanda N. because the record failed to show that their views on capital punishment would have substantially impaired the performance of their duties as jurors. Accordingly, appellant's death sentence must be set aside.

C. Application of the *Adams/witt* Standard Requires Reversal Because Although Prospective Jurors Peter B., Nancy N., Maria Elena Gary-a., Brenda M., Kusum P., Betty F. and Yolanda N. Gave Equivocal Responses, None of Them Made Certain They Would Not Consider Death as an Option

1. The voir dire in this case

a. Peter B.

Peter B. Was a 65-year-old male with extensive military service in the U.S. army. Although he found it hard to answer whether he could personally impose the death penalty (RT18:2996-2997), juror B told the court he thought there are "certain cases where a crime is so vicious that" the death penalty "would fit the crime." (RT18:2996.) He said he would "favor" life imprisonment (RT18:3000), and "is sometimes sort of leery about sentencing someone to death" (RT18:3001), but he would not say he would never vote for death because "the potential is there." (RT18:3001.)

He described himself as in the center of a scale of people who either always or never vote for death, i.e., a 5 on a scale of 10. (RT18:3002.) He thought some people who are sentenced to death got what they deserved (RT18:3004), while for him to sentence someone to death, the crime would have to be vicious like a multiple killing, in which case he would "have no problem deciding to put that person to death." (RT18:3004.) However, he did not know whether he would put a person to death for a one-on-one

killing. (RT18:3004.) In a one-on-one killing for money, "the chances are" that he would favor a sentence of imprisonment for life. (RT18:3004.) In this kind of case, he placed himself as a 10 on a scale of 100 in favor of death. (RT18:3006.)

On his questionnaire, Mr. B. stated the penalty must fit the crime and that he supported the 1978 initiative to reinstate the death penalty. (RT 18:3008.) He also stated that he actively opposed Rose Bird's confirmation to the California Supreme Court based on his views of the death penalty (Response to Question 103; ACT5:4057) and stated that the purpose of the death penalty is that it "removes from society a very bad person who is a danger to all." (Response to Question 104; ACT5:4058.) He disagreed somewhat with the proposition that someone who intentionally kills another person should always get the death penalty, because there may be self-defense (Response to Question 107; ACT5:4058) and also disagreed somewhat with the fact that anyone who intentionally kills another person should never get the death penalty. (Response to Question 108; ACT5:4058.)

The prosecutor claimed Mr. B. was impaired due to his military service and because he indicated in this type of case he would most likely vote for life (RT18:3008), but in fact he only stated that in a murder for financial gain he would need to know more circumstances. (RT18:3004.)

The trial court sustained the prosecution's challenge for cause. (RT 18:3009.) The trial court disregarded the fact that prospective juror B had placed himself in the middle of the scale of those who would always or never would vote for death, because it felt this was in contradiction to the juror placing himself at the bottom 10 of a scale of 100 in a "killing for

money" case. (RT18:3009.)[73]

b. Nancy N.

Nancy N. was a 54-year old African-American librarian. She described herself as non-religious and a Republican. (Responses to Questions 41 and 45; ACT5:1166.) In her questionnaire, Ms. N. stated that the death penalty serves very little purpose. (Response to Question 104; ACT5:1182.) Although she stated "none" in response to the question asking what types of cases she felt warranted the death penalty (Response to Question 105; ACT5:1182), she also stated that she "disagreed somewhat" with the fact that a person who intentionally kills another person should always get the death penalty (Response to Question 107; ACT5;1182.)

During voir dire, Ms. N.'s attitude reflected in her questionnaire answers towards the imposition of the death penalty became even more apparent. Although she stated that she was opposed to capital punishment, and did not believe it has a place in society (RT15:2233, 2243), she also affirmed that she could consider the death penalty as an appropriate punishment in certain cases. (RT15:2233.) She expressed a preference for life, stating she "thinks she would choose life over the death sentence." (RT15:2239.) When questioned by the court whether she could vote for death in a crime such as that of Jeffrey Dahmer, she said yes. (RT15:2234.) She was not asked to enumerate other crimes in which she could vote for the death penalty. Ms. N. also affirmed that in an appropriate case, she personally could vote to impose the death penalty. (RT15:2233-2234.)

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[73] In fact, Mr. B.'s answers were not in conflict. He placed himself as a 5 on a scale of 10 of those who would always or never vote for death, and as a 10 on a scale of 100 of those who would always or never vote for death in the specific case of a one-on-one killing for money. Thus, contrary to the trial court's position, the answers were not contradictory, because the scales measured different things.

Consistent with that view, she stated that in very extreme cases, which she estimated to be 1 out of 100 cases, she would feel that the death penalty was appropriate. (RT15:2237-2238.)

Ms. N. also emphatically stated that she would not vote "not guilty" just to avoid the penalty phase (RT15:2235), and affirmed that she would consider aggravating and mitigating factors in deciding whether to impose the death penalty. (RT15:2242.) Ms. N.'s opposition to capital punishment stemmed from both a concern that jurors may convict an innocent person (RT 15:2243 and response to Question 100[74]; ACT5:1181) and the fact that she would feel extremely uncomfortable being a participant in a process in which the death penalty would be imposed. (RT15:2243.)

After the prosecution's request for a challenge for cause, the court found Ms. N. as "not even coming close," and to be substantially impaired. (RT15:2245.) The trial court did not indicate any reasons or specify which comments led to its finding that Ms. N. was substantially impaired. (RT 15:2245.)

c. Maria Elena Gary-A.

Ms. Gary-A. was a 36-year-old Latina, who had been working as a secretary in the airline industry for over 14 years. (ACT16:4386-4387.) Ms. Gary-A. felt that the death penalty has a place in society (RT19:3391) and could personally vote to impose it. (RT19:3391.) She favored life without possibility of parole and stated that it would be a difficult decision on her part to impose the death penalty. (RT 19:3396.) Upon further questioning by the court, she explained that there are some circumstances in

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[74] In her answer to Question 100, she noted "the ratio of human error seems to indicate that the jurors may convict an innocent person." (ACT16:4409.)

which she could consider voting for the death penalty. (RT19:3397.) In a murder for financial gain, she placed herself at a 2 ½ on a scale of 10, after the judge told her that she had be somewhere between 1 and 5, with 5 being a person who honestly "does not know." (RT19:3397.)

Ms. Gary-A. also stated that she could consider the death penalty for rape or murder situations. (RT19:3398.) When the prosecution tried to elicit from her that she would not vote for death in the case of a murder for financial gain, she insisted that she "would stick with her 2 ½," and commented that it is difficult to make a decision without having heard anything about the case, and that she would need to know background information about the defendant. (RT19:3399.) Although she stated that in a financial gain situation, it would probably be a slim chance that she would vote for death, she immediately clarified that in that case, death was a possibility, though she would lean more towards life. (RT19:3400.)

Consistent with her answers on voir dire, Ms. Acosta stated in her questionnaire that she was satisfied with the present criminal justice system (Response to Question 72; ACT16:4403), and that her opinion regarding the death penalty was 50/50, because it would depend on the circumstances involving the case. (Responses to Questions 99 and 100; ACT16:4409.) Ms. Gary-A. further stated that she would not always give death for someone who kills intentionally for financial gain, clarifying that it depended on the circumstances, and conversely stated that she would not always vote for life, as that would also depend on the circumstances. (Response to Questions 107-110; ACT16:4410-4411.)

The prosecution challenged Ms. Gary-A. for cause by arguing that someone who says "a slim chance" is "someone who is going to fight like heck not to impose the death penalty." (RT19:3401.) The court sustained the challenge because it felt that "the words 'slim' and 'it's unlikely"

showed substantial impairment. (RT19:3402.)

d. Brenda M.

Ms. Brenda M. Was a 30-year-old white administrative analyst at UCLA at the Department of Psychology. (RT ACT21:998-999.) During voire dire, questioning Ms. M. reaffirmed the statement she made in her questionnaire that the death penalty is right in a few cases by testifying that "there are a few cases in which I could go for the death penalty." (RT13:2042.) In the case of murder for financial gain, she did not think she would vote for the death penalty, but stated "it's hard to say" because she knew so little about the case. (RT13:2040.) She "couldn't say for sure," but thought she would have a "hard time voting for the death penalty." (RT13:2041.) After reflecting for a minute, Ms. M. again stated that she could think of cases in her mind where the death penalty is appropriate. (RT13:2041-2042.) She believed that "a lot of times, they should go with the life imprisonment." (RT13:2042.) Ms. M. stated she has no problem setting aside her personal opinions about the death penalty and would/could follow the law. (RT13:2044.)

During further voir dire questioning by the prosecution, Ms. M. explained that she mainly did not like the death penalty because it is irreversible. (RT13: 2046.) Although she would have a hard time voting for death because it is not within her values, it would be easier for her in the case of people who have declared their guilt, because there is not even a slight chance that they are not guilty. (RT13:2046-2047, 2049.) Although she stated she did not think she could personally impose the death penalty (RT13:2051), she might change her personal feelings on the case after deliberating with the jury, and then might vote for the death penalty. (RT13:2052.)

In her questionnaire, Ms. M. wrote that the death penalty is right in a

very few cases. (Response to Question 99; ACT4:1021.) She felt that the death penalty serves a purpose, such as when a person has irreversible problems or in the case of multiple life sentences. (Response to Question 104; ACT4:1022.) She disagreed somewhat with the proposition that people who kill for financial gain should always get the death penalty, explaining that there are circumstances that are not always known. (Response to Question 107; ACT4:1022.) Ms. M. also agreed somewhat with the proposition that a person who kills more than one person should always get the death penalty. (Response to Question 109; ACT4:1023.)

In response to the prosecution's challenge for cause, defense counsel countered that Ms. M's problem with the death penalty was its irreversibility, which is a legitimate concern, since the defense intended to argue lingering doubt. (RT13:2055.) The trial court considered Ms. M. to be "a true *Witt* situation," because she was tortured and both sides were attempting to drag her from one side to the other. (RT13:2056.) The court also felt that because of Ms. M.'s prepaid vacation, which conflicted for a few days with the trial of the case (RT13:2035-2036), there normally would have been a hardship stipulation, and implied that the defense's refusal had returned to stipulate was a tactic designed to force the prosecution to utilize a peremptory strike. The court found that Ms. M. was "close to the line" but substantially impaired. (RT13:2056.)

e. Kusum P.

Kusum P. was a 34-year-old maintenance administrator of Indian descent. (ACT26:7300-7301.) Although Ms. P. did not feel that the death penalty has a place in society (RT18:3108), she could vote for it in some cases. (RT18:3109.) Although she favored life imprisonment (RT18:3109), she would not always vote for life imprisonment in the case of a murder for financial gain. (RT18:3110-3112.) Ms. P. did not feel the

death penalty is a deterrent, as it will not stop others. (RT18:3113.) However, she conceded that it might serve some other purpose. (RT18:3113.) When asked by the prosecutor whether she could look at the defendants, "the man seated between the two lawyers with the gold glasses and the woman there with the flowered outfit on, could you look them in the eye and say: it's my decision that you should die?" She initially responded "no," but then explained that it would depend on "what happened and what were the circumstances." (RT18:3114.) When further pressed by the prosecutor whether she personally could be the person to impose the death penalty, she replied "no." (RT18:3114.)

In her questionnaire, Ms. P. stated that she did not believe the death penalty is good, and expressed a preference for "a punishment that will change other people." (Response to Question 99; ACT26:7323.) Her opposition to the death penalty stems from her belief that it is not a deterrent to others, will not change anybody else, and will not teach a lesson. (Responses to Questions 100 and 107; ACT26:7323, 7324.) However, Ms. P. also agreed somewhat with the proposition that someone who intentionally kills another person should always get the death penalty (Response to Question 107; ACT 26:7324), and agreed somewhat with the proposition that someone who intentionally kills more than one person should always get the death penalty. (Responses to Question 109; ACT26:7325; RT18:3118.)

In support of her challenge for cause, the prosecutor relied heavily on Ms. P.'s responses in the questionnaire. (RT18:3113-3115.) The prosecutor argued that Ms. P.'s response to Question 107 (indicating she agreed somewhat that someone who intentionally kills another person should always get the death penalty) was contradicted by her written notation to the same question stating that the death penalty is not going to

change anybody. The prosecutor also relied on Ms. P.'s answer to Question 99 stating "I don't believe that death penalty is good. I won't go for that, instead give some punishment that will change other people." (Response to Question 99; ACT26;7323; RT18:3115.)

Defense counsel objected to the challenge for cause and also objected to the form of questioning by the prosecutor asking whether Ms. P. could look at the defendants, and vote for death as this was beyond what is required by law. (RT18:3116.) Based on Ms. P.'s answers in the questionnaire and her answers in court, the court found her substantially impaired. (RT18: 3119.)

f. Betty F.

Ms. F. felt that the death penalty "kind of has a place in society," and that there are some circumstances where the death penalty might be warranted. (RT19:3347.) Although she initially stated that she did not think she could personally vote for the death penalty because she would not want to have the full responsibility (RT19:3347), she then stated on further voir dire that she might personally impose the death penalty after hearing all the evidence. (RT19:3347-3348.)

In response to the question whether she would always vote for death or life in a financial gain murder, she stated "I would have to say that I would not in either case" . . . "because I would think that I wouldn't have enough information." (RT19:3353.) Ms. F. did not prefer life imprisonment over the death penalty so strongly that she would vote for life imprisonment independent of the facts. (RT19:3353.) After the trial court suggested that she must be somewhere between a 1 and 5 on a scale of 10, she placed herself at a 2. (RT19:3354.)

When questioned by defense counsel, Ms. F. reaffirmed her answer on the questionnaire that life without possibility of parole is not a severe

punishment, expressing her belief that "it is not severe enough" when referring to certain types of crimes. (RT20:3555.) She stated that, in a "horrible" case, she could look at somebody and personally say to them that they will have to die for what they have done. (RT19:3356.)

Ms. F. also corrected her earlier responses made to the court by stating that it was difficult to explain to the judge why she could vote for death, and that she did explain herself better and more accurately in response to defense counsel's questions. "I didn't think I was able to explain why I felt I could go for the death penalty, but with [defense counsel], I did explain whether or not kind of . . . what had to be horrible, and I could in those circumstances. . . .") (RT19:3358.) She explained that she would have a hard time voting for death if all the circumstances led to her believe that it wasn't "horrible." (RT19:3359.) Horrible crimes for her included the murder of children, "gross" murders, anything harmful to children, and "where it's intent to murder like their mothers and father that are killed because kids go off and stuff," emphasizing "I don't like that." (RT19:3360.)

When further pressed by the prosecution as to which cases she could vote for the death penalty, Ms. F. stated "for sure kids that have been brutally murdered, raped and sodomized, I could." (RT19:3361.) With regard to other cases, she stated "I know a lot of cases that have happened, but . . . for kids, I don't care what the circumstances are." (RT19:3361-3362.) She added: "Because you are hoping that they die." (RT19:3362.) When asked by the prosecution whether she could vote for the death penalty in the case of an intentional murder for financial gain, she responded that she would vote for life without parole. (RT19:3362.) The prosecution then asked whether in such a case, presenting it as one "not as gruesome as what you are talking about" she would always vote for life in prison. (RT19:

3362.) Ms. F. then replied: "Yes, without parole." (RT19:3362.)

In her questionnaire, Ms. F. expressed a preference for the death penalty by stating that the reason for the death penalty was that "innocent lives have been taken so carelessly" (RT19:3364) and considered life without parole not to be a severe punishment. (RT19:3364.)

The trial court granted the prosecution's challenge for cause, finding Ms. F. to be honest, but that she did not really understand the subject, and was substantially impaired. (RT19:3365.)

g. Yolanda N.

Yolanda N. believed that sometimes the death penalty has a place in society, and sometimes it does not. (RT16:2696.) If there was enough evidence, she thought she would personally vote to impose the death penalty. (RT16:2697.) In a murder for financial gain, she would not always vote for life nor the death penalty, and expressed a desire to know facts about the defendant prior to imposing the penalty. (RT16:2701-2702.) She affirmed that she would be fair to every side. (RT16:2702.) When asked whether she felt strongly about the death penalty, she stated that it depended on the evidence. (RT16:2703.) She reaffirmed her response in the questionnaire in which she agreed "somewhat" that anyone who intentionally kills another person should always get the death penalty, explaining that she agreed "to some degree." (RT16:2704.)

Ms. N. also stated that, because of her Christian roots, she would have a preference for life in prison in the case of a murder for financial gain. (RT16:2704-2705.) However, in such a case, she would not try to convince other jurors to also vote for life in prison. (RT16:2705.) Furthermore, she testified that there are cases of intentional murder for financial gain in which she could see herself voting for the death penalty. (RT16:2706.) In deciding the proper punishment, she would want to know

as much evidence as possible, and she would be very interested in knowing background information about the defendant. (RT16:2706.)

Regardless of her religious beliefs, Ms. N. felt strongly that the death penalty should be imposed on rapists and child molesters – a view which she had also expressed on her questionnaire (RT16:2706), because "that's the most horrendous crime that you can commit. It's like a "cardinal sin." (RT16:2707.) She would have a harder time voting for the death penalty in a murder involving an adult and could not think of any case she had read about in which she felt it was appropriate to give that person the death penalty. (RT16:2708.) When further pressed by the prosecution whether she had a strong preference for life, she replied repeatedly, "I think so" (RT16:2709), explaining that a person should be given a chance to repent. (RT16:2709.) Because her religion teaches that we all deserve life, it would be contrary to her personal beliefs to give the death penalty. (RT16: 2709-2710.) When further pressed by the prosecution, Ms. N. conceded that she could personally vote for the death penalty, but in 99.9 percent of murder cases, she could not. (RT16:2710.) When then asked whether she could vote for death in the case of a murder for financial gain, she replied "very hard that I would vote for death." (RT16:2710-2711.) The prosecution then challenged Ms. N. for cause. (RT16:2711.)

2. Because Prospective Jurors Peter B., Nancy N., Maria Elena Gary-A., Brenda M., Kusum P., Betty F. and Yolanda N. Made Clear Their Views Would Not Improperly Impact Deliberations or Preclude Them from Considering Death as an Option, They Should Not Have Been Discharged for Cause

Prospective Jurors Peter B., Nancy N., Maria Elena Gary-A., Brenda M., Kusum P., Betty F. and Yolanda N. each expressed some concern that their views on the death penalty would affect their deliberations. As

discussed above, however, the teaching of *Adams* and *Gray* is that a prospective juror's equivocal responses do not satisfy the state's burden of proving substantial impairment. Absent an affirmative showing that a juror's views would either preclude death as an option, or otherwise prevent him or her from following the law, the juror may not be excluded for cause. Simply holding a belief or opinion which would make it very difficult for a juror to impose the death penalty is also an insufficient basis to show impairment. Indeed, a comparison of the responses of prospective jurors B., N., Gary-A., M., P., F., N. and P. with the jurors held to have been improperly excluded in *Adams* and *Grey* removes any doubt that the exclusions in this case were improper.

a. Peter B.

Juror B.'s views on the death penalty seemed to affect his ability to consider the death penalty as an option much less than those of the wrongfully excluded jurors in *Adams*. Although Mr. B. favored life imprisonment (RT18:3000), he also described himself as at the center of a scale of people who would either always or never vote for death. (RT18:3002.) He indicated that in the cases of vicious killings he had "no problem deciding to put that person to death" (RT18:3004), although he expressed some reservations about sentencing a person to death for a one-on-one killing for financial gain. (RT18:3004.)

Mr. B.'s responses were no different from those of prospective jurors Mahon and Coyle in *Adams*. Just like these jurors, Mr. B. could impose death under certain circumstances. (Compare RT18:3004 with *Adams* Appen. at pp. 34, 1023.) Mr. B.'s responses were also less emphatic than those of prospective *Adams* juror McDonald. Ms. McDonald stated that she did not believe in capital punishment and would consider herself in a group that is flat against it. (*Adams* Appen. at p. 4497.) When pressed, juror

McDonald conceded that she might consider death in a "very, very aggravated case," but she would not vote for death in a case involving murder of a police officer – the exact crime for which defendant was on trial in that case. (*Adams* Appen. at p. 4497.)

Like Ms. McDonald, Mr. B. stated that he had no problem imposing the death penalty in a vicious killing. (RT18:3004.) Although he stated that he did not know whether he would vote for death in a one-on-one killing for money, which was the type of murder at issue in defendant's case, contrary to *Adams* juror McDonald, Mr. B. did not categorically deny his ability to do so. Rather, Mr. B. indicated that in a one-on-one killing for money, he would be a 10 on a scale of 100 in favor of death. (RT18:3006.)

If the McDonald voir dire in *Adams* was insufficient to uphold a discharge, the same result is compelled with respect to prospective juror B. in this case, who was less reluctant to vote for death than McDonald. As the Court concluded in *Adams*, the Sixth Amendment does not permit for-cause exclusion of jurors simply because they are "unable positively to state whether or not their deliberations would in any way be affected." (*Adams v. Texas, supra,* 448 U.S. at p. 50.)

In fact, Mr. B.'s answers were not in conflict. He placed himself as a 5 on a scale of those who would always or never vote for death, and as a 10 on a scale of 100 of those who would always or never vote for death in the specific case of a one-on-one killing for money. Therefore, contrary to the trial court's position, the answers were not contradictory. Thus, the court should have taken into account Mr. B.'s answer that he is a 5 on a scale of 10 as an accurate reflection of his views on the death penalty, and not found him to be substantially impaired. Hence, Mr. B.'s excusal for cause was wrongful on this basis as well.

b. Nancy N.

Similarly, Ms. N.'s responses during voir dire mirrored those of prospective juror White in the *Adams* case. Just like prospective juror White, Ms. N. said that because of her feelings about the death penalty, she did not think she could consider death as an option in most cases. (Compare RT15:2239 with *Adams* Appen. at pp. 1543.) Like White and Bounds, Ms. N. should not have been excluded. She never stated with certainty that she would under all circumstances reject death, or that she would not impose the death penalty in this case. To the contrary, Ms. N. stated that in an appropriate case she could vote for the death penalty (RT15:2233), and affirmed that she could personally vote for death. (RT15:2233-2234.) The Sixth Amendment does not permit for-cause exclusion of jurors because they are "unable positively to state whether or not their deliberations would in any way be affected." (*Adams v. Texas*, *supra*, 448 U.S. at p. 50.)

c. Maria Elena Gary-A.

Just as the juror in *Adams*, Ms. Gary-A. expressed a preference for life without possibility for parole. However, contrary to Ms. White's response in *Adams*, in which she stated she did not think she could vote for death (*Adams* Appen. at pp. 1543), Ms. Gary-A. was never equivocal about her ability to vote for death. She stated unambigously that she would be able to vote for death in certain circumstances, and specified that she could consider the death penalty in rape and murder situations. (RT19:3397-98.) She specifically affirmed that "death was a possibility" in the case of a murder for financial gain, even though she would lean more towards life. (RT19:3400.) Thus, since Ms. White in *Adams* was much less inclined to vote for death than Ms. Gary-A., and she was held to have been wrongfully excluded, Ms. Gary-A.'s discharge was also wrongful.

Lastly, because there was no evidence that Ms. Gary-A.'s views would prevent or impair her ability to sit as a juror, her acknowledgment that it would be a difficult decision on her part to impose the death penalty (RT19:3396) is entirely consistent with that of a qualified juror.

d. Brenda M.

The voir dire responses by Ms. M. demonstrated relevant similarities to those of prospective *Adams* jurors Ferguson and McDonald. In *Adams*, prospective juror Ferguson stated that, because of the way he felt, it would be too hard for him to impose the death penalty. He conceded: "Now, I am not going to say that I might not see enough that would convince me, but at that point, it would almost be impossible that I should say, kill somebody." (*Adams* Appen. at p. 615.) Juror Ferguson did not believe that he could ever personally sign a death warrant, and affirmed that because of his conscience, he would automatically vote against the death penalty, and did not believe that he could, in good conscience, ever consider the sentence of death. (*Adams* Appen. at pp. 616 and 622.)

Similar to the position expressed by juror Ferguson in *Adams*, Ms. M. stated that she did not think she could personally impose the death penalty (RT13:2051), although she might change her personal feelings on the case after deliberating with the jury, and then might vote for the death penalty. (RT13:2052.) Just like juror Ferguson whose conscience affected her ability to consider the death penalty, Ms. M. stated she would have a hard time voting for death because it was not within her values. (RT13:2046.)

Furthermore, contrary to prospective *Adams* juror McDonald, who could not consider voting for death in the case of the crime for which defendant was on trial (murder of a police officer) (*Adams* Appen. at p. 4497), Ms. M. was not so categorical. Although she did not think she

would vote for the death penalty in the case of a murder for financial gain, she was equivocal, because it was hard for her to state an opinion without knowing more about the case. (RT13:2040.)

Thus, since the response by juror Ferguson in *Adams* was insufficient to uphold a discharge, Ms. M. should also not have been excluded from the jury. Additionally, the Court in *Adams* made it very clear that a prospective juror who opposed capital punishment could be discharged for cause only where the record demonstrated his inability to follow the law as set forth by the court. (*Adams v. Texas, supra*, 448 U.S. at p. 48.) Ms. M. clearly stated that she had no difficulty in setting aside her personal opinions about the death penalty and following the law (RT13:2044), and there was no evidence to assume otherwise. Thus, her discharge was improper.

e. Kusum P.

Ms. P.'s answers on voir dire expressed identical concerns with those of prospective jurors Mahon and Coyle in *Adams*. Just like those jurors, Ms. P. said she could impose death under certain circumstances. Compare (RT18:3109 with *Adams* Appen. at pp. 34, 1023.) Furthermore, Ms. P. was much more willing to vote for death than prospective *Adams* juror McDonald, who when pressed, conceded that she might consider death in a "very, very aggravated case," but she would not vote for death in a case involving murder of a police officer – the exact crime for which defendant was on trial in that case. (*Adams* Appen. at p. 4497.) Ms. P., on the other hand, indicated that she would not always vote for life imprisonment in the case of a murder for financial gain, i.e. the crime with which this defendant was charged. (RT18:3110-12.) Thus, since prospective jurors Mahon, Coyle and McDonald were wrongfully excluded, so was Ms. P.

Ms. P.'s answers also mirrored the equivocal nature of the answers

of prospective *Gray* juror Bounds. (Compare RT18:3108-3114 with *Gray,* Joint Appen. at pp. 16-19.) As noted above, when Ms. Bounds asked if she had any "conscientious scruples" against the death penalty, she replied "I don't know." (*Gray v. Mississippi,* Joint Appen. at p. 16.) When asked if she would automatically vote against imposition of death, she first explained she would "try to listen to the case" and then responded, "I don't think I would." (*Id.* at pp. 17, 18.) When pressed by the trial court to commit to a position, she agreed that she did not have scruples against the death penalty where it was "authorized by law," (*id.* at p. 18), but when directly asked by the prosecution whether she could vote for death, she said "I don't think I could." (*Id.* at p. 19.) Seeking to resolve the ambiguity, the trial court asked Ms. Bounds whether she could vote for the death penalty and she responded, "I think I could." (*Id.* at p. 22.)

Similarly, Ms. P. indicated that she could vote for the death penalty in some cases. (RT18:3109.) When asked by the prosecutor whether she could look at the defendants, "the man seated between the two lawyers with the gold glasses and the woman there with the flowered outfit on, could you look them in the eye and say: it's my decision that you should die?" she initially responded "no," but explained that her decision would depend on the circumstances. (RT18:3114.) When pressed again by the prosecutor as to whether she could actually look the co-defendant in the eye and say it was her decision that he die, she then replied "no." (RT18:3114.) In addition to the improper questioning by the prosecutor, to which defense counsel objected after conclusion of the voir dire (RT18:3116), Ms. P.'s responses expressed the same degree of equivocation as those of Ms. Bounds. Thus, since Ms. Bounds' exclusion was improper, so was that of Ms. P.

Furthermore, as noted above, the prosecutor based her challenge for

cause on Ms. P.'s responses to the questionnaire (RT18:3113-15), and the court sustained the challenge "based on the answers to the questionnaire, answers in court." (RT18:3119.) However, the prosecutor's argument that Ms. P.'s response to Question 107 indicating she agreed "somewhat" that someone who intentionally kills another person should always get the death penalty (ACT26:7324) was contradicted by her written notation to the same question stating that the death penalty is not going to change anybody, should be rejected. Since Ms. P. had indicated that she "agreed somewhat" with the proposition that such a person should always get the death penalty, her explanation that there is little deterrent or rehabilitative effect to the death penalty could easily be understood as an explanation to always vote for death in such a case. Thus, her explanation was consistent with her answer to Question 107. (ACT26:7324.) Furthermore, as the court in *Heard* made very clear, the trial court should have clarified any ambiguity inherent in questionnaire responses of prospective jurors. (*People v. Heard, supra,* 31 Cal.4th at pp. 946, 965.)

f. Betty F.

Prospective Juror F., as a result of suggestive questioning by the prosecutor, changed her views from being able to impose the death penalty in the case of a murder for financial gain to always voting for life without parole in such a type of murder. (Compare RT19:3353 to RT19:3362.)

Furthermore, Ms. F.'s answers are comparable to those of prospective jurors Mahon and Coyle in *Adams*. Just like those jurors, Ms. F. could impose death under certain circumstances. (Compare RT19:3360 with *Adams* Appen. at pp. 34, 1023.) Ms. F.'s responses were also less emphatic than those of prospective *Adams* juror McDonald. Ms. McDonald stated that she did not believe in capital punishment and would consider herself in a group that is flat against it. (*Adams* Appen. at p. 4497.) When

pressed, juror McDonald conceded that she might consider death in a "very, very aggravated case," but she would not vote for death in a case involving murder of a police officer – the exact crime for which defendant was on trial in that case. (*Adams* Appen. at p. 4497.) Unlike Ms. McDonald, Ms. F. did not consider herself among those in a group flat against the death penalty, and to the contrary, named a list of cases in which she could vote for death, which included intentional murder of close relatives. (RT19:3360.) Furthermore, she initially indicated a need to know more facts in order to decide whether to vote for death in a murder for financial gain. (RT19:3353.) It was not until the end of a lengthy voir dire, and in response to suggestive questioning by the prosecutor, that Ms. F. stated that she would always vote for life without parole in the case of a murder for financial gain presented as "not so gruesome." (RT19:3362.)

Finally, even assuming that Ms. F. had actually not exhibited ambivalence in her ability to impose death in a murder for financial gain, her exclusion would also be improper based on the reasoning in *Heard*. In *Heard*, the wrongfully excluded Juror H. implied that if there was evidence of certain psychological factors, he would always vote for life without possibility of parole. (*People v. Heard*, *supra,* 31 Cal.4th at p. 965.) As noted above, this Court found that the fact that the existence of psychological factors might influence the juror's determination whether or not the death penalty would be appropriate in a particular case that did not impair the juror's ability to serve in a death penalty case under United States Supreme Court law. The court reasoned that the trial court failed to explain what it was in the juror's responses that indicated that he would not be willing to follow the law in deciding between life without parole or death and questioned why the trial court failed to clarify any uncertainty with additional follow-up questioning. (*People v. Heard*, *supra,* 31 Cal.4th at p.

965.) This, of course, is consistent with the holding of *Adams*, where the United States Supreme Court found that a prospective juror who opposed capital punishment could only be discharged for cause where the record showed him unable to follow the law as set forth by the court. (*Adams v. Texas*, *supra*, 448 U.S. at p.48.)

Under *Heard*, the voir dire of Ms. F would not have been sufficient to exclude her, as there was nothing in her responses indicating that she was unable to follow the law as set forth by the court, and there was no evidence that the trial court attempted to clarify her alleged inability to follow the law with additional questions. To the contrary, Ms. F. clearly stated that in a murder for financial gain, she would not automatically vote for death, nor would she automatically vote for life. (RT19:3352-3353.) Ms. F. listed a broad category of crimes, including intentional murder of relatives, in which she felt the death penalty was appropriate (RT19:3360-3362), and there was no other evidence that she could not be a fair or impartial juror. Thus, Ms. F.'s exclusion was wrongful on this basis also.

g. Yolanda N.

Ms. N. told that judge that if there was enough evidence, she thought she would personally vote to impose the death penalty. (RT16:2697.) Furthermore, she testified that there are cases of intentional murder for financial gain where she could see herself voting for the death penalty. (RT16:2706.) She expressed this view in her questionnaire and reaffirmed it during voir dire questioning, that "to some degree" anyone who intentionally kills another person should always get the death penalty. (RT16:2704.) Lastly, as previously indicated, on her questionnaire, she also stated she felt strongly that the death penalty should be imposed on rapists and child molesters. (RT16:2706.) At the conclusion of the voir dire, and upon repeated questioning by the prosecutor, Ms. N. repeatedly stated that

she thought she had a strong preference for life and indicated that in the case of a murder for financial gain, it would be very hard to vote for death. (RT16:2710-2711.)

Again, just like jurors Mahon and Coyle in *Adams*, Ms. N. made clear that there were cases in which she would impose the death sentence (RT16:2706), and similar to prospective *Adams* juror McDonald, who had indicated that death would not be appropriate under the facts of the case (*Adams* Appen. at p. 4497), Ms. N. – in contrast to her earlier answers – only indicated that a death sentence was very unlikely in the case of financial gain murder, and that "it would be very hard" to vote for death. (RT16:2710-11.) The lack of evidence of substantial impairment is further demonstrated by her repeated insistence that she would base her decision to personally vote to impose the death penalty on sufficient evidence. (RT16:2697.) In addition to expressing a desire to know facts about the defendant prior to imposing the penalty in the case of murder for financial gain (RT16:2701-2702), Ms. N. also affirmed that she would be fair to every side. (RT16:2702.)

Thus, under *Adams*, there was no evidence that Ms. N. was unable to follow the law as set forth by the court, and since her responses expressed substantially similar concerns to those of jurors Mahon and Coyle, her exclusion was wrongful.

D. Conclusion

The voir dire responses of Peter B., Nancy N., Maria Elena Gary-A., Brenda M., Kusum P., Betty F. and Yolanda N. were remarkably similar to those of jurors held to have been improperly excluded in *Adams*. Although these jurors were unable to state that their views on the death penalty would not impact deliberations, *Adams* establishes this will not support a challenge for cause. (*Adams, supra,* 448 U.S. at p. 50.) The for-cause exclusions in

this case violated appellant's rights to an impartial jury, a fair capital sentencing hearing, and due process of law under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16, and 17 of the California Constitution. As noted above, the erroneous granting of even a single challenge for cause requires reversal. (*Gray v. Mississippi*, *supra*, 481 U.S. at p. 660.) The excused jurors were not substantially impaired, and there was no evidence that they were unable to follow the law.

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XII

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF OTHER CRIMES AND BAD CHARACTER EVIDENCE THROUGH CROSS-EXAMINATION OF A DEFENSE MITIGATION WITNESS AND IN REBUTTAL AT THE PENALTY PHASE

A. Background

At the penalty phase, the defense presented the testimony of two chaplains from the jail where appellant was housed for two years during the trial. Protestant chaplain Leslie Miotzek testified she knew appellant from church and Bible study where appellant attended every week while she was housed at the Sybil Brand Institute for Women. (RT57:9144.) Based on what Miotzek observed, she testified that, in her opinion, appellant has the character of someone who was "consistent in Bible study," "dependabl[e] to administer to other inmates," with "a willingness to help reach out and help others," and a "faithfulness" and a "hunger within her to know the Lord of God and to let God's word administer to her heart and her life." (RT57:9145.) "With her coming to Bible study and to church and seeing her, I have been able to form an opinion by seeing her consistency and her ability to make some changes in her life and to prioritize her life." (RT57:9145.)

In addition, Moitzek testified she had never seen appellant exhibit any violence or ill temper in the time she had known her. (RT57:9145.) Miotzek never saw appellant give the sheriff's deputies any trouble or commit an infraction of the rules. It appeared to Miotzek that appellant abided by the rules in jail and submited to the jail authorities. (RT57:9146.) Overall, Miotzek found appellant to be a positive influence and encouraging to Miotzek and others. (RT57:9147.)

Karen Brudney, also a chaplain at Sybil Brand Institute for Women, testified for the defense that appellant was consistent in attending weekly Bible study and working at Sunday mass. (RT57:9181.) Brudney saw no incidents in which appellant was violent or lost her temper, and saw appellant act in a caring manner with the other women. (RT57:9182.)

The court ruled that trial counsel had not limited the scope of character evidence by this testimony(RT57:9156-9157), and the court found that because counsel had introduced the issue of "trustworthiness," the court would permit the prosecutor to ask questions and introduce evidence of appellant's character trait for honesty. (RT57:9161.)

The prosecutor then asked Miotzek whether she was aware of the following incidents:

- a 1972 embezzlement from Aetna Sheet Metal Company (RT57:9174);
- a 1973 embezzlement from Franklin Sheet Sales (RT57:9175);
- a 1986 embezzlement of $33,000.00 from Edith Ann's Answering Service (RT57:9175);
- a 1989 incident in which appellant posed as her husband's ex-wife Mellie and obtained a loan on property Mellie owned with her then husband (RT57:9176);
- obtaining a driver's license in the name of Catherine Bazar in 1990 (*ibid.*);
- obtaining a new identity card and new social security number (*ibid.*);
- the creation of a fraudulent letter from a guarantee trust company for use in an attempt to obtain a loan on the basis of the new personality to purchase the house she had lost in

foreclosure (*ibid.*);

- the conversion of a Rolls Royce (*ibid.*);
- a letter to the court in 1974 asking for leniency by falsely claiming she had a kidney removed and was on dialysis (RT57:9159-9160).

In addition, the prosecutor was permitted to ask Miotzek whether appellant's conviction for murdering her own husband would involve a breach of trust. (RT57:9178.)[75]

The prosecutor was also permitted to ask Brudney about an uncharged incident involving Jennifer Lee. Brudney testified that, although she had not heard anything about appellant asking Jennifer Lee to write a letter to solicit perjurous testimony in the trial, she did know Lee to be a shy and mild-mannered person. (RT57:9187-9188.)

Thereafter, in rebuttal, the prosecutor sought to introduce an unredacted copy of a letter appellant wrote to Tom in 1986, identified as the "Dear Tom" letter;[76] a copy of a letter written to the court in 1974 asking for leniency because appellant had suffered a mastectomy and had a kidney removed, and an insurance form in which appellant allegedly states she has no problem with her kidneys; evidence of the Rolls Royce conversion; and evidence that appellant was not particularly religious before her

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[75] Evidence of all of these incidents had been admitted in the guilt phase except for the 1972 and 1973 embezzlements, the 1986 embezzlement, though the jury learned appellant had signed a deed of trust to repay the $33,000 to Edith Ann's, the conversion of the Rolls Royce and the letter to the court.

[76] A redacted copy of the letter, which omitted the reference to appellant's embezzlement of $33,000.00 from Edith Ann's Answering Service, but showed appellant had forged Tom's name to the deed of trust was introduced at the guilt phase. (RT26:4517.)

incarceration. (RT57:9211-9212.) Over appellant's objection, the court admitted the entire "Dear Tom" letter; the letter to the court, and evidence of recent religious conversion. (RT57:9214-9215, 9218, 9222, 9223, 9246, 9247.)

The trial court's ruling permitting the introduction of evidence of appellant's character for honesty and dishonesty on the ground that appellant had "opened the door" to such testimony was error under state law, and violated appellant's federal constitutional rights. Admitting this evidence violated appellant's rights to have reasonable limits placed on the admission of aggravating evidence (U.S. Const., 5th, 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27); to due process and a fair trial (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [federal constitutional error to deprive defendant's interest in having state adhere to specific methods prescribed for deciding whether to impose death penalty]; *Estelle v. McQuire* (1991) 502 U.S. 62; Cal. Const., art. I, §§ 7, 15]); and to a reliable penalty determination. (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gardner v. Florida* (1977) 430 U.S. 349; Cal. Const., art. I, §§ 7, 27.) Reversal of the death judgment is thus required both under California law and the federal and state constitutions.

B. The Evidence was Not Proper Rebuttal to Appellant's Evidence in Mitigation

Admission of rebuttal evidence is proper only when made necessary by the defendant, "'in the sense that he has introduced new evidence . . . .'" (*People v. Thompson, supra*, 27 Cal.3d at p. 330, quoting from *People v. Carter* (1957) 48 Cal.2d 737, 753-754; *People v. Jackson* (1980) 28 Cal.3d 264, 333 (dis. opn. of Bird, C. J.).) "[T]he usual rule [on rebuttal evidence]

will exclude *all evidence which has not been made necessary by the opponent's case in reply.*" (7 Wigmore, Evidence (Chabourne rev. 1978) §1873, emphasis original.) This Court has held that "[t]he scope of [penalty phase] rebuttal must be specific, and evidence presented or argued as rebuttal must relate directly to a particular incident or character trait defendant offers in his own behalf." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 792, fn. 24; *People v. Jones* (1998) 17 Cal.4th 279, 307; *People v. Carpenter* (1997) 15 Cal.4th 312, 408-409.)

In determining whether evidence falls within the "proper scope of rebuttal," the relevant question is "whether two statements 'cannot at the same time be true. . . . [T]hus, it is not a mere difference of statement that suffices; . . . an inconsistency [] is required.'" (*James v. Illinois* (1990) 493 U.S. 307, 325, fn.1 (dis. opn. of Kennedy, J.), quoting 3 Wigmore, Evidence (Chadbourne ed. 1970) § 1040.) Thus, in discussing whether previously-excluded evidence should be admitted to rebut a defendant's false testimony, Justice Kennedy said trial courts should have no difficulty "[d]efining the proper scope of rebuttal," because the rule requires a "direct conflict" between the two versions of the facts. (*James, supra*, at p. 325, fn. 1.)

Accordingly, a defendant who places her character in issue by presenting mitigating evidence opens the door to "prosecutor evidence tending to rebut that 'specific asserted aspect' of [her] character." (*People v. Mitcham* (1990) 1 Cal.4th 1027, 1072; *People v. Hart* (1999) 20 Cal.4th 546, 653.) That rule is based on the principle that "[g]enerally, the scope of bad character evidence must relate directly to the particular character trait concerning which the defendant has presented evidence." (*People v. Mitcham, supra,* 1 Cal.4th at p. 1072; *People v. Rodriquez, supra,* 42 Cal.3d at pp. 791-792; see also *In re Jackson* (1992) 3 Cal.4th 578, 613 [penalty

phase rebuttal cannot "go beyond the aspects of the defendant's background on which the defendant has introduced evidence"].)

The trial court recognized that the issue of what could be introduced in rebuttal was limited by the witnesses' answers. (RT57:9157 ["wide open to the extent [of the witness'] answers"], see also RT57:9156 ["how much the door is open is limited by the answers of the witness"].) However the court admitted rebuttal evidence the scope of which far exceeded the evidence introduced by the defense. Defense counsel objected to the prosecutor's cross-examining Miotzek about "anything that does not concern contact with [appellant] in the context of their religious studies because that is all I have asked her about whether or not she submitted to authority." (RT57:9155.) While the court believed that defense counsel had opened the door generally on the question of character, defense counsel denied he had offered evidence of appellant's character trait for honesty. (RT57:9156.) Counsel stated, "All [Miotzek] said was [appellant] was dependable and it is not the question but it is the answer which opens up the cross examination. I had specifically asked that witness ahead of time not to discuss anything that concerned a character trait for honesty and she has refrained from doing so." (*Ibid.*) The prosecutor argued that he should be able to question the witness about appellant's character trait for honesty since the witness had claimed appellant to be trustworthy. (RT57:9156-9157.) Defense counsel argued the character trait the witness described was dependability, not trustworthiness. (RT57:9156.) The trial court stated that the door would not be totally open to the prosecutor, but would be limited by the witness' answers. (RT57:9157-9158.) The prosecutor opined that "as a practical matter" there was nothing he could ask that would not be "open to trustworthiness." (RT57:9158.) The court did not respond to the prosecutor's characterization of the ruling.

Trustworthiness and reliability, while somewhat synonymous, identify distinctly different characteristics. Reliability "implies that a person or thing can be safely trusted and counted on to do or be what is expected, wanted or needed: *I have always found this to be a reliable brand of canned goods*," while trustworthiness "implies that a person is fully deserving of complete confidence, as in his truthfulness, honesty and good judgment: *He is a trustworthy news commentator*." (*World Book Dictionary*, Thorndike, Barnhart, 1988 ed, Vol L-Z, p. 1765.) The character traits for honesty or dishonesty associated with trustworthiness thus are different than those associated with the character traits of dependability or reliability. The witness' answers were clearly limited to dependability and reliability and did not address the character traits for honesty and dishonesty. (RT57:9145 ["consistent in Bible study"], ["dependabl[e] to administer to other inmates"], ["faithfulness"], and ["consistency and her ability to make some changes in her life and to prioritize her life"].) Therefore, the trial court's failure to limit the scope of cross-examination and admission of rebuttal evidence[77] was erroneous and highly prejudicial for several reasons.

First, it exposed the jury to additional bad character evidence and other crimes evidence that was inadmissible in the prosecutor's case-in-chief. (*People v. Boyd* (1985) 38 Cal.3d 762, 775-776.) Through the prosecutors's cross-examination and evidence presented in rebuttal, the jury learned for the first time about appellant's 1972 embezzlement from Aetna Sheet Metal Company (RT57:9174), a 1973 embezzlement from Franklin Sheet Sales (RT57:9175), and a 1986 embezzlement of $33,000.00 from

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[77] Defense counsel asked to withdraw Miotzek as a witness if the trial court were to rule the witness had opened the door to the evidence of lack of honesty. (RT57:9157.)

Edith Ann's Answering Service[78] (RT57:9175), the conversion of a Rolls Royce (RT57:9176), and learned appellant had sent a letter to the court in 1974 asking for leniency by falsely claiming she had a kidney removed and was on dialysis. (RT57:9159-9160.) The jury also learned that she had applied for credit while in custody. (RT57:9151.) *Boyd* found that once the defense has presented evidence of circumstances admissible under factor (k), prosecution rebuttal evidence would be admissible only "as evidence tending to 'disprove any disputed fact that is of consequence to the determination of the action.' (Evid. Code, § 210.)" (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.) The purpose of the statutory exclusion is to prevent the jury from hearing evidence of conduct which, although criminal, is not of a type which should influence a life or death decision. (*Ibid.*)

Second, the admission of this highly damaging evidence came at a particularly sensitive point in the trial – shortly before the jury retired to begin its deliberations. Even evidence that could properly have been introduced during the prosecutor's case-in-chief can be unfairly prejudicial if it is introduced during rebuttal, where its impact is unduly magnified by its dramatic introduction late in the trial. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1211; *People v. Golden* (1961) 55 Cal.2d 358, 371-372; *People v. Carter* (1957) 48 Cal.2d 737, 753.)

Third, although this evidence was actually inappropriate rebuttal evidence because it did not contradict the evidence of reliability presented in mitigation, the introduction of that testimony obscured the absence of true rebuttal and created the false impression that the prosecutor had

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[78] Previously, the jury had only heard that appellant had forged the signature of her husband on a deed of trust payable to Edith Ann's Answering Service, but did not learn the money was owed because it had been embezzled. (RT48:8229-8230.)

evidence to counter the defense case. Although Miotzek testified that her knowledge of these fraudulent incidents would not change her opinion of appellant (RT57:9177), the mere recitation of the evidence implied that the witness' testimony was somehow "rebutted." Thus, introduction of this evidence suggested that the defense case had weaknesses which did not in fact exist.

The prejudicial potential of the erroneous rebuttal was fully exploited by the prosecutor during her closing argument. She argued:

> You have heard about the two prior forgeries that Catherine Thompson has, 17 and 18 years ago; and the importance of these is really for us all to understand that she did not embark upon this life of crime recently. This didn't just start when Melvin Thompson somehow came into her life. That she has been amoral, dishonest for at least 17 or 18 years. . . . [No] [o]nly the intensity and the severity of her actions had increased; but the duplicity, the dishonesty has been there for a considerable period of time.

(RT58:9352.)

The prosecutor used the letters to Tom and the court and the insurance application to argue appellant was a lying manipulator who was able to hoodwink the jail chaplains. She stated:

> And by showing you this history, by showing you the fact that what she did in 1974, in 1986, the point is to show you that these witnesses as to the character of Catherine Thompson as they are perceiving her now in custody in 1990 are worthless because they don't know Catherine Thompson. It's a charade. She is repenting before these witnesses also and she's going to church on Sunday and on Monday she's having Jennifer Lee in the jail write these letters for her urging false testimony by her co-conspirators.

(RT58:9371-9372.)

Through this argument, the prejudicial impact of the improper rebuttal reached fruition. Admission of this evidence allowed the

prosecutor to go far beyond the limits of rebuttal evidence and aggravating evidence and argue appellant should be killed because she is the "mistress of deception." (RT58:9377.) The fact that the rebuttal evidence exceeded proper parameters created precisely the kind of prejudicial juror confusion that the rules on rebuttal were designed to prevent. (See *People v. Katz* (1962) 207 Cal.App.2d 739, 749-751.)

By permitting evidence and testimony on the character trait for dishonesty the trial court failed to set reasonable limits on the admission of aggravating evidence and allowed the prosecutor to argue impermissible factors in aggravation resulting in an unreliable death penalty in violation of appellant's constitutional rights. (U.S. Const., 5th, 8th and 14th Amends.; *Lockett v. Ohio* (1978) 438 U.S. 586; Cal. Const., art. I, §§ 7, 15, 27), to receive due process and a fair trial (U.S. Const., 5th and 14th Amends.; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [federal constitutional error to deprive defendant's interest in having state adhere to specific methods prescribed for deciding whether to impose death penalty]; *Estelle v. McQuire* (1991) 502 U.S. 62; Cal. Const., art. I, §§ 7, 15]), and to a reliable penalty determination. (U.S. Const., 8th and 14th Amends.; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; see also *Gardner v. Florida* (1977) 430 U.S. 349; Cal. Const., art. I, §§ 7, 27.) Reversal of the death judgment is thus required both under California law and the federal and state constitutions.

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XIII

THE TRIAL COURT ERRED BY INSTRUCTING THE JURY ON ALTERNATIVE METHODS OF EXECUTION THEREBY DIMINISHING THE JURORS' RESPONSIBILITY FOR THE SENTENCING

A. Introduction

During the penalty phase of the case, the defense sought to introduce evidence of the method of execution under the authority of *Skipper v. South Carolina*, (1986) 476 U.S. 1 and *Eddings v. Oklahoma*, (1982) 455 U.S. 104 and factor (k) in order to show the manner in which the death penalty would affect appellant. (RT54:8940.24-8940.27.) The trial court ruled such evidence was inadmissible. (RT54:8940.28.)

Defense counsel sought to introduce evidence of the manner in which the gas chamber operates and the way in which a person dies. (RT54:8940.24-8940.25.) The trial court pointed out that as of January 1, 1993, a new law would go into effect which permitted the prisoner to select execution by gas or lethal injection. (RT54:8940.25.) Defense counsel argued that the state of the law remained unclear, and therefore, if appellant did receive the death penalty it would be possible that she would be executed by gas. (RT54:8940.25-8940.26.) The prosecution argued that if the method of execution evidence were permitted it would seek to introduce evidence of the conditions of prison under a life without possibility of parole sentence. (RT54:8940.27.) The trial court suggested that if the parties agreed to each other's evidence it would not intervene, but in the face of the prosecution's objection to the method of execution evidence it would sustain the objection and not permit the evidence to be introduced.

(RT54:8940.28.)[79]

Thereafter, during closing argument, the prosecutor analogized appellant to "the Nazis who worked in the gas chambers [who] could go to concerts at night and listen to Mozart and enjoy the beautiful music." She likened appellant to "[t]he same brutal people who could work in crematoriums and gas chambers. They would kiss their wi[ves] and children in the morning. They would say goodbye. They would do their work, and they'd come home at the end of the day after they killed scores of people and they would go to a concert at night and listen to this wonderful music." (RT58:9366-9367.)

In response, in his closing argument, defense counsel stated, "I found it exceptionally ironic that [the prosecutor] talks about an analogy of Cathy Thompson and Nazis who gas Jews in World War II since that is precisely what they want to do with Cathy Thompson is death by lethal gas." (RT59:9423.)

Following the argument, the prosecutor asked for a special instruction on lethal injection because defense counsel mentioned lethal gas in its argument. (RT59:9449.) The trial court thereafter instructed the jury: "During the defense argument reference was made to the death penalty being carried out by lethal gas. Effective the 1st of January, 1993, the law will change allowing the condemned to select between lethal gas or lethal

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[79]In response to later arguments about the admissibility of future dangerousness evidence by the prosecution, the trial court stated that it found evidence of the conditions of confinement "improper, just as much as I think it's improper to bring in evidence with respect to the administration of lethal gas, the physiological [effects]." (RT55:8968.) The trial court reiterated that if the parties came to some agreement between them it would not interfere, but no agreement was reached and the defense objected to the prosecution evidence. (RT55:8968-8969.)

injection." (RT59:9452-9453.) Defense counsel objected and moved for a mistrial (RT59:9453), which the trial court denied. (*Ibid.*)

By instructing the jury that appellant would be able to elect an arguably less painful method of execution – lethal injection – the trial court diminished the jurors' sense of responsibility for their sentencing decision in violation of appellant's Eight Amendment right to a reliable penalty determination. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.) At the same time, the court prevented the defense from presenting evidence on the method of execution which would have provided the jury with factual information about this area and prevented the speculation that a death sentence in appellant's case would be less heinous due to the election of a less painful method of execution.

B. The Historical Background on the Method of Execution

At the time of appellant's trial, the method of execution of death by lethal gas was under scrutiny. As originally enacted, Penal Code section 3604 provided that the "punishment of death shall be inflicted by the administration of a lethal gas." (Stats.1941, ch. 106, § 15, p. 1117.) In 1992, the Legislature amended section 3604 to provide that the "punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death" (*id.*, subd. (a)) at the election of the condemned prisoner (*id.*, subd. (b)). (Stats. 1992, ch. 558, § 2.) This change was motivated by intense public debate on the use of lethal gas in executions. (See , e.g., Berger, *Holocaust Parallel Close to Home: The cyanide gas used in state executions is chemically the same as that used at Auschwitz*, L. A. Times, (Aug. 23, 1992) p. 5.)

Thereafter, execution by lethal gas was held to constitute cruel and unusual punishment in violation of the Eighth Amendment, although that

ruling was later overturned by the United States Supreme Court. (*Fierro v. Gomez* (N.D.Cal.1994) 865 F.Supp. 1387, aff'd. *Fierro v. Gomez* (9th Cir.1996) 77 F.3d 301, 309, cert. granted, vacated, 519 U.S. 918, 117 S.Ct. 285, 136 L.Ed.2d 204.) The question of whether lethal gas constitutes cruel and unusual punishment was never resolved in California because the issue was determined to be moot after the California Legislature, in 1996, amended section 3604 to provide that lethal injection should be used to carry out death sentences unless the defendant requests that the State use the gas chamber. "Thus under either the terms of the new statute or the terms of the judgment of the Court of Appeals, lethal injections will be used to carry out [death sentences]." (*Gomez v. Fierro, supra*, 519 U.S. 918.)[80]

At the time the jurors in appellant's case were considering her sentence however, death by lethal gas was being questioned as cruel and unusual and death by lethal injection was being considered as a less heinous form of execution. (See, e.g., Jacobs, *Execution by Lethal Injection OKd Capital Punishment: Governor signs the bill. Wilson says it will eliminate last-minute pleas that the gas chamber is cruel and unusual punishment*, L. A. Times, (Aug. 29, 1992) p. 6.) In the discussion on whether to permit the introduction of evidence of the method of execution by lethal gas, the trial court opined that if it permitted such evidence the prosecution then "should be able to put on the humane aspect" of death by lethal injection. (RT54:8940.26.)

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[80] On remand, the Ninth Circuit ordered the district court to vacate its judgment, subject to reinstatement on the motion of a death row inmate who has standing and presents a ripe claim. (*Fierro v. Terhune* (9th Cir.1998) 147 F.3d 1158.)

C. The Jurors' Responsibility for Their Sentencing Decision must Not Be Diminished in Any Way

Juror determinations may not be the product of "emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase," or "extraneous emotional factors." (*California v. Brown* (1987) 479 U.S. 538, 542-543.) Nor may jurors be misled "to minimize the importance of [their] role," or "to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *(Caldwell v. Mississippi, supra,* 472 U.S. at pp. 328-329.) The trial court ruled that the defense would not be permitted to introduce evidence on the method of execution finding that such evidence is not allowed (RT54:8940.27), however, the court then instructed the jury about that precise issue in a manner that relieved the jurors of some of their responsibility for sentencing appellant to death by telling them the method of execution would likely be a less gruesome option than the previous method of death by lethal gas.

Evidence of the method of execution and evidence of the conditions of confinement has not been permitted in California. (*People v. Morris* (1991) 5 Cal 3d 152; *People v. Thompson* (1988) 45 Cal.3d 86, 138-139; *People v. Grant* (1988) 45 Cal.3d 829, 860.) In *People v. Harris* (2005) 37 Cal.4th 310, defense counsel was stopped from arguing that in Utah executions are carried out by firing squad. The court there explained that it would not allow counsel to equate jurors with "executioners standing in a firing squad." The limitation on counsel's argument "prevented the improper suggestion that the jurors had more responsibility than they actually did and that each one of their votes was akin to a live round of ammunition shot by a firing squad. Such an argument would have mischaracterized the jurors' role in the penalty phase and engendered an

emotional response 'not rooted in the aggravating and mitigating evidence introduced during the penalty phase.' (*California v. Brown, supra*, 479 U.S. at p. 542.)" *(Harris, supra,* 37 Cal.4th at pp. 356-57.) In the present case, the court's instruction to the jury that the method of execution would be lethal injection - a more "humane" method of execution had the opposite effect on the jurors. It permitted them to feel relieved of some of the responsibility of their decision.

Argument by defense counsel did not invite the erroneous instruction. The trial court ruled that evidence of the method of execution and the conditions of life imprisonment would not be permitted in the trial. No such evidence was admitted, however, in closing argument the prosecution likened appellant to the Nazis who murdered millions of people in the gas chamber. Defense counsel's remarks were an attempt to deflate the extreme hyperbole of the prosecution's argument. The remarks were short, isolated, and unemphatic and did not introduce to the jury any of the improper aspects of evidence of the method of execution which is not permitted in California. The instruction, on the other hand, did precisely what the trial court had tried to prevent in barring evidence of the method of execution. It injected into the jury deliberations the topic of the method of execution emphasizing that the method would likely be less heinous than previously practiced due to the new legislation. As this Court has stated, "*Caldwell's* prohibition against misleading the jury as to the importance of their role 'is relevant only to certain types of comment – those that mislead the jury as to its role in the sentencing process in a way that allows the jury to feel less responsible than it should for the sentencing decision.' *(Darden v. Wainwright* (1986) 477 U.S. 168, 184, fn. 15.)" (*Harris, supra*, 37 Cal.4th at p. 356.) Just as the *Harris* court found argument on the method of execution by firing squad would improperly inflate the jurors' sense of

responsibility for the defendant's punishment this court must find that the trial court's instruction on the method of execution improperly relieved the jury of its responsibility to weigh only the aggravating and mitigating evidence introduced at the penalty phase in violation of appellant's Eight Amendment right to a reliable penalty determination. (*Caldwell v. Mississippi, supra*, 472 U.S. 320.)

The error was not harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Defense counsel objected to the instruction arguing the instruction would make the death penalty more palatable to the jury. (RT59:9451-9452.) The case was a close and difficult one for the jurors. They deliberated for over 6 and one-half hours over three days. (*Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [six hours of deliberations is evidence of a close case].) Phillip Sanders, the actual triggerman in the crime, had been removed from the case leaving appellant as the only target for punishment by the jurors. The jurors asked for reinstruction on what the trial court called "the guts of the whole thing" – the definition of aggravating versus mitigating. (RT60:9455.) (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 "[j]uror questions and . . . are indications the deliberations were close. [Citations.].") In such a close case, the effect of the jury instruction which made the death penalty easier to impose was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 38 Cal.3d. 18, 24.)

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XIV

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 violate the United States Constitution, either alone or in combination with each other. Individually and collectively, these various constitutional defects require appellant's sentence to be set aside.

First, the application of Penal Code section 190.3, subdivision (a) resulted in the arbitrary and capricious imposition of the death penalty on appellant. The California death penalty statute, and the instructions given in this case, assign no burden of proof with regard to the jurors' choice between the sentences of life without possibility of parole and death. They delineate no burden of proof with respect to either the preliminary findings that a juror must make before he or she may impose a death sentence or the ultimate sentencing decision. Neither the statute nor the instructions require juror unanimity as to the existence of aggravating factors. In addition, the failure of the instructions to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violates the federal constitutional rights to meaningful appellate review and equal protection of the law. As shown below, these omissions and others in the California capital-sentencing scheme run afoul of the Sixth, Eighth and Fourteenth Amendments. The lack of needed safeguards to ensure reliable and fair determinations by the jurors and reviewing courts means that randomness dominates the entire process of applying the penalty of death. Accordingly, this Court should find that the death penalty scheme is unconstitutional in several respects.

A. The Instruction on Penal Code Section 190.3, Subdivision (A) and Application of That Sentencing Factor Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Penal Code section 190.3, subdivision (a), permits jurors deciding whether a defendant will live or die to consider the "circumstances of the crime." The jurors in this case were instructed to consider and take into account "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true." (RT59:9436.) In 1994, the United States Supreme Court rejected a facial Eighth Amendment vagueness attack on this section, concluding that – at least in the abstract – it had a "common sense core of meaning" that juries could understand and apply. (*Tuilaepa v. California* (1994) 512 U.S. 967, 975.)

However, an analysis of how prosecutors actually use section 190.3, subdivision (a) shows that they have subverted the essence of the Court's judgment. In fact, the extraordinarily disparate use of the circumstances-of-the-crime factor shows beyond question that whatever "common sense core of meaning" it once may have had is long since gone. As applied, the California statute leads to the precise type of arbitrary and capricious decision making that the Eighth Amendment condemns.

The governing principles are clear. When a state chooses to impose capital punishment, the Eighth Amendment requires it to "adopt procedural safeguards against arbitrary and capricious imposition of the death penalty." (*Sawyer v. Whitley* (1992) 505 U.S. 333, 341.) A state capital punishment scheme must comply with the Eighth Amendment's "fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action" in imposing the death penalty. (*Maynard v. Cartwright, supra*, 486 U.S. at p. 362.)

As applied in California, however, section 190.3, subdivision (a), not only fails to "minimiz[e] the risk of wholly arbitrary and capricious action" in the death process, it affirmatively institutionalizes such a risk. This can be seen upon examination of a cross-section of cases before this Court.

Prosecutors throughout California have argued that the jurors 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 argued that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

- because the defendant struck many blows and inflicted multiple wounds,[81] or because the defendant killed with a single execution-style wound;[82]
- because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination, avoiding arrest, sexual gratification),[83] or because the

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[81]See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, (RT3094-3095) (defendant inflicted many blows); (*People v. Zapien*, No. S004762), (RT36-38) (same); (*People v. Lucas*, No. S004788, RT2997-2998 (same); *People v. Carrera*, No. S004569, (RT160-161) (same).

[82]See, e.g., *People v. Freeman*, No. S004787, RT3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT3026-3027 (same).

[83]See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT968-969 (same); *People v. Belmontes*, No. S004467, RT2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT6759-6760 (sexual gratification); *People v. Ghent*, No. S004309, RT2553-2555 (same); *People v. Brown*, No. S004451, RT3543-3544 (avoid arrest); *People v. McLain*, No. S004370, RT31 (revenge).

defendant killed the victim without any motive at all;[84]

- because the defendant killed the victim in cold blood,[85] or because the defendant killed the victim during a savage frenzy;[86]
- because the defendant engaged in a cover-up to conceal his crime,[87] or because the defendant did not engage in a cover-up and so must have been proud of it;[88]
- because the defendant made the victim endure the terror of anticipating a violent death,[89] or because the defendant killed instantly without any warning;[90]

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[84]See, e.g., *People v. Edwards*, No. S004755, RT10 544; (defendant killed for no reason); *People v. Osband*, No. S005233, RT3650 (same); *People v. Hawkins*, No. S014199, RT6801 (same).

[85]See, e.g., *People v. Visciotti*, No. S004597, RT3296-3297 (defendant killed in cold blood).

[86]See, e.g., *People v. Jennings*, No. S004754, RT6755 (defendant killed victim in savage frenzy (trial court finding).

[87]See, e.g., *People v. Stewart*, No. S020803, RT1741-1742 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT4192 (defendant did not seek aid for victim).

[88]See, e.g., *People v. Adcox*, No. S004558, RT4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT3030-3031 (same); *People v. Morales*, No. S004552, RT3093 (defendant failed to engage in a cover-up).

[89]See, e.g., *People v. Webb*, No. S006938, RT5302; *People v. Davis*, No. S014636, RT1,125; *People v. Hamilton*, No. S004363, RT4623.

[90]See, e.g., *People v. Freeman*, No. S004787, RT3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT2959 (same).

- because the victim had children,[91] or because the victim had not yet had a chance to have children;[92]
- because the victim struggled prior to death,[93] or because the victim did not struggle;[94]
- because the defendant had a prior relationship with the victim,[95] or because the victim was a complete stranger to the defendant.[96]

These examples show that although a plausible argument can be made that the circumstances-of-the-crime aggravating factor once may have had a "common sense core of meaning," that position can be maintained only by ignoring how the term actually is being used in California. In fact, prosecutors urge juries to find this aggravating factor and place it 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

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[91]See, e.g., *People v. Zapien*, No. S004762, RT37 (Jan 23, 1987) (victim had children).

[92]See, e.g., *People v. Carpenter*, No. S004654, RT6,**752** (victim had not yet had children).

[93]See, e.g., *People v. Dunkle*, No. S014200, RT3812 (victim struggled); *People v. Webb*, No. S006938, RT5302 (same); *People v. Lucas*, No. S004788, RT2998 (same).

[94]See, e.g., *People v. Fauber*, No. S005868, RT5546-5547 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT160 (same).

[95]See, e.g., *People v. Padilla*, No. S014496, RT4604 (prior relationship); *People v. Waidla*, No. S020161, RT3066-3067 (same); *People v. Kaurish* (1990) 52 Cal.3d 648, 717 (same).

[96]See, e.g., *People v. Anderson*, No. S004385, RT3168-3169 (no prior relationship); *People v. McPeters*, No. S004712, RT4264 (same).

use of the circumstances-of-the-crime aggravating factor to embrace facts which cover the entire spectrum of facts inevitably present in every homicide:

- **The age of the victim** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly;[97]
- **The method of killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed, or consumed by fire;[98]
- **The motive for the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to

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[97]See, e.g., *People v. Deere*, No. S004722, RT155-156 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT16,**752** (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63 (26-year-old victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT4376 (victim was 77); *People v. Bean*, No. S004387, RT4715-4716 (victim was "elderly").

[98]See, e.g., *People v. Clair*, No. S004789, RT2474-2475 (strangulation); *People v. Kipp*, No. S004784, RT2246 (same); *People v. Fauber*, No. S005868, RT5546 (use of an axe); *People v. Benson*, No. S004763, RT1149 (use of a hammer); *People v. Cain*, No. S006544, RT6786-6787 (use of a club); *People v. Jackson*, No. S010723, RT8075-8076 (use of a gun); *People v. Reilly*, No. S004607, RT14, 040 (stabbing); *People v. Scott*, No. S010334, RT847 (fire).

eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all;[99]

- **The time of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early in the morning, or in the middle of the day;[100]
- **The location of the killing** -- Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park, or in a remote location.[101]

The foregoing examples of how the factor (a) aggravating circumstance actually is being applied establish that it is used as an aggravating factor in every case, by every prosecutor, without any

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[99]See, e.g., *People v. Howard*, No. S004452, RT6772 (money); *People v. Allison*, No. S004649, RT969-970 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT6759-6761 (sexual gratification); *People v. Ghent*, No. S004309, RT2553-2555 (same); *People v. Brown*, No. S004451, RT3544 (avoid arrest); *People v. McLain*, No. S004370, RT31 (revenge); *People v. Edwards*, No. S004755, RT10,544 (no motive at all).

[100]See, e.g., *People v. Fauber*, No. S005868, RT5777 (early morning); *People v. Bean*, No. S004387, RT4715 (middle of the night); *People v. Avena*, No. S004422, RT2603-2604 (late at night); *People v. Lucero*, No. S012568, RT4125-4126 (middle of the day).

[101]See, e.g., *People v. Anderson*, No. S004385, RT18:3167-3168 (victim's home); *People v. Cain*, No. S006544, RT6787 (same); *People v. Freeman*, No. S004787, RT3674, 3710-3711 (public bar); *People v. Ashmus*, No. S004723, RT7340-7341 (city park); *People v. Carpenter*, No. S004654, RT16,749-16,750 (forested area); *People v. Comtois*, No. S017116, RT2970 (remote, isolated location).

limitation whatsoever. As a consequence, from case to case, prosecutors turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors that they argue to the jurors as factors weighing on death's side of the scale.

The circumstances-of-the-crime aggravating factor 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 principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright*, *supra*, 486 U.S. at p. 363.) That this factor may have a "common sense core of meaning" in the abstract should not obscure what experience and reality both show. This factor is being used to inject the precise type of arbitrary and capricious sentencing the Eighth Amendment prohibits. As a result, the California scheme is unconstitutional, and appellant's death sentence must be vacated.

B. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

In California, before sentencing a person to death, the jurors must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541, revd on other grounds, *California v. Brown* (1987) 479 U.S. 538; *see also People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the

jurors' satisfaction pursuant to any delineated burden of proof.[102]

The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments. Although this Court has rejected similar claims (*see, e.g. People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774), the issue must be revisited in light of recent Supreme Court authority that creates significant doubt about the continuing vitality of California's current death penalty scheme.

With the issuance of three opinions within the past five years, *Jones v. United States* (1999) 526 U.S. 227, *Apprendi v. New Jersey* (2000) 530 U.S. 466, and *Ring v. Arizona* (2002) 536 U.S. 584, the United States Supreme Court has dramatically altered the landscape of capital jurisprudence in this country in a manner that has profound implications for penalty phase instructions in California capital cases. As the Court has observed, "*in 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.'"" [Citations.]" (*Monge v. California, supra,* 524 U.S. at p. 732, emphasis added.)

Nevertheless, this Court has reasoned that, because the penalty phase determinations are "moral and ... not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) As the above-quoted statement from *Monge*

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[102] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of unadjudicated violent criminal activity (Pen. Code, § 190.3, subd. (b)) must be proved beyond a reasonable doubt.

indicates, however, the Supreme Court contemplates the application of the reasonable doubt standard in the penalty phase of a capital case. It has made this point clear in the trilogy of cases that began with *Jones v. United States*, *supra*, 526 U.S. 227.

In *Jones*, the Court held that under the Due Process Clause of the Fifth Amendment and the jury trial guarantee of the Sixth Amendment, any fact increasing the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt. (*Jones v. United States*, *supra*, 526 U.S. at p. 243, fn. 6.) *Jones* involved a federal statute, but in *Apprendi v. New Jersey*, the Court extended to the states through the Fourteenth Amendment the holding of *Jones*, concluding:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range or penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt."

(*Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 490, quoting *Jones v. United States*, *supra*, 526 U.S. at pp. 252-253.)

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the

basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

In *Ring v. Arizona*, the Court applied *Apprendi's* principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, where the jury determines guilt but has no participation in the sentencing proceedings, and concluded that the scheme violated the petitioner's Sixth Amendment right to a jury determination of the applicable aggravating circumstances. Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*: "[c]apital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 589.)

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to

all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[103] The Court observed: "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. We hold that the Sixth Amendment applies to both." (*Ibid.*)

Despite the holding in *Apprendi*, this Court stated that "*Apprendi* does not restrict the sentencing of California defendants who have already been convicted of special circumstance murder." (*People v. Ochoa* (2001) 26 Cal.4th 398, 454.) The Court reasoned that "once a jury has determined the existence of a special circumstance, the defendant stands convicted of an offense whose maximum penalty is death." (*Ibid.*) After *Ring*, however, this holding is no longer tenable.

Read together, the *Jones-Apprendi-Ring* trilogy renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (*See Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As the Court stated, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Ibid.*) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life

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[103] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).)

imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (Pen Code, § 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona*, *supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona*, *supra*, 536 U.S. at p. 610 (conc. opn. of Scalia J.).) They thus trigger *Ring* and *Apprendi* and the requirement that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

The Court in *Ring* and *Apprendi* made an effort to remove the game of semantics from sentencing determinations. "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 v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) Accordingly, whether California's weighing assessment is labeled an

enhancement, eligibility determination or balancing test, the reasoning in *Apprendi* and *Ring* require that this most critical "factual assessment" be made beyond a reasonable doubt.[104]

In addition, California law requires the same result.[105] The

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[104] It cannot be disputed that the jury's decision of whether aggravating circumstances are present, whether the aggravating circumstances outweigh mitigating circumstances, and whether death is the appropriate penalty are "assessment[s] of facts" for purposes of the constitutional rule announced in *Apprendi* and *Ring*. This Court has recognized that "penalty phase evidence may raise disputed factual issues." (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236.) The Court has also stated that the section 190.3 factors of California's death penalty law "direct the sentencer's attention to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on [the defendant's] moral culpability." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 595; *see Ford v. Strickland* (11th Cir. 1983) 696 F.2d 804, 818 ["the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard"].)

[105]The practice in other states also supports this conclusion. Twenty-six states require that any factors relied on to impose death in a penalty phase must be proved beyond a reasonable doubt, and three other states have related provisions. (*See* Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 18-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); GA. CODE ANN., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); 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); MONT. CODE ANN., §§ 46-18-302(b)(B), 46-18-305; Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); 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

(continued...)

reasonable doubt standard is routinely applied in this state in proceedings with less serious consequences than a capital penalty trial, including proceedings that deal only with a prison sentence. Indeed, even such comparatively minor matters as sentence enhancement allegations, *e.g.*, that the defendant was armed during the commission of an offense, must be proved by the standard of beyond a reasonable doubt. (*See* CALJIC No. 17.15.)

The disparity of requiring a higher standard of proof for matters of less consequence while requiring no standard at all for aggravating circumstances that may result in a defendant's death violates equal protection and due process principles. (*See, e.g.*, *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421 ["A state should not be permitted to treat defendants differently ... unless it has 'some rational basis, announced with reasonable precision' for doing so."].) Accordingly, both the *Jones-Apprendi-Ring* trilogy and consistent application of California precedent require that the reasonable doubt standard be applied to all penalty phase determinations, including the ultimate determination of whether to impose a death sentence.

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[105](...continued)
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).

Moreover, in at least eight states in which the death penalty is permissible, capital juries are specifically instructed that a death verdict may not be returned unless the jury finds beyond a reasonable doubt that aggravation outweighs mitigation and/or that death is the appropriate penalty. (*See* Acker & Lanier, *Matters of Life or Death: The Sentencing Provisions in Capital Punishment Statutes* (1995) 31 Crim. L. Bull. 19, 35-37, and fns. 71-76, and the citations therein regarding the pertinent statutes of Arkansas, Missouri, New Jersey, Ohio, Tennessee, and Washington.)

C. The Sixth, Eighth and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues," (*People v. Superior Court (Mitchell)*, *supra*, 5 Cal.4th at p. 1236), it also has held that a burden of persuasion at the penalty phase is inappropriate given the normative nature of the determinations to be made. (*See People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied

from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the state while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor of the defendant. (*See Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jurors have found the defendant guilty of murder and have found at least one special circumstance true. The jurors must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (*see* Pen. Code, §190.3), and may impose such a sentence even if no mitigating evidence was presented. (*See People v. Duncan*, *supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code Section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances

are contrary to law or the evidence presented."[106]

A fact could not be established – *i.e.*, a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jurors of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (*See* Cal. Rules of Court, rule 420, subd. (b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) As explained in the preceding argument, to provide greater protection to noncapital 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 p. 374; *Myers v. Ylst*, *supra*, 897 F.2d at p. 421.)

D. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

The jurors were not instructed that their findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating

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[106] Of course, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (*See Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v. Washington* (1984) 466 U.S. 668, 686-87; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.)

factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (*See, e.g.*, *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (*See People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; *see also People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (*See Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina*,

supra, 428 U.S. at p. 305.)[107]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[108]

Applying the *Ring* reasoning here, juror unanimity is required under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of

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[107] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (*See, e.g., Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[108] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto* (2003) 30 Cal.4th 226, 265.) Appellant, however, does not believe that the Court fully addressed the arguments raised therein. Further, appellant must raise this issue to preserve his rights to further review. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra*, 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida* (1977) 430 U.S. 349, 359 (plur. opn. of White, J.); *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes juror unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial 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 also People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jurors unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[109] For example, in cases where a criminal

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[109] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (*See* Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3

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defendant has been charged with special allegations that may increase the severity of his sentence, the jurors must render a separate, unanimous verdict on the truth of such allegations. (*See, e.g.*, Pen. Code, § 1158, subd. (a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (*see Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), – and, since providing more protection to a noncapital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (*see, e.g.*, *Myers v. Ylst*, *supra*, 897 F.2d at p. 421) – it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could 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.

E. California Law Violates the United States Constitution by Failing to Require the Jurors to Base Death Sentences on Written Findings Regarding Aggravating Factors

The instructions given in this case under CALJIC No. 8.85 (RT59:9436-9439) and No. 8.88 (RT59:9441-9443) did not require the jurors to make written or other specific findings about the aggravating

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[109](...continued)
(Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of her Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review as well as her Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia, supra*, 428 U.S. at p. 195.) Because California jurors have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1984) 512 U.S. 967, 979-80), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact." (*See Townsend v. Swain* (1963) 373 U.S. 293, 313-316.)

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland, supra*, 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* p. 383, fn. 15.)

While this Court has held that the 1978 death penalty scheme is not unconstitutional in failing to require express juror findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for denying parole, because "[i]t 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." (11 Cal.3d at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (*See also People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; Pen. Code, § 1170(c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan*, *supra*, 501 U.S. at p. 994.) Since providing more protection to noncapital than to capital defendants violates the equal protection clause of the Fourteenth Amendment (*see* generally *Myers v. Ylst*, *supra*, 897 F.2d at p. 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes*, *supra*, 52 Cal.3d at p. 643), and "moral" (*People v. Hawthorne*, *supra*, 4 Cal.4th at p. 79), does not mean its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital sentencing systems, 25 require some form of written findings specifying the aggravating factors the jurors relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to

impose death.[110] California's failure to require such findings renders its death penalty procedures unconstitutional.

F. As Interpreted by this Court, California's Death Penalty Statute Forbids Inter-case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, or Disproportionate Impositions of the Death Penalty

In applying the Eighth Amendment ban on cruel and unusual punishment to the imposition of the death penalty, courts have required death judgments to be proportionate and reliable. Part of that requirement of reliability involves attempting to guarantee "'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*, *supra*, 463 U.S. at p. 954 (plur. opn.), alterations in original, quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 (opn. of Stewart, Powell, and Stevens, JJ).)

One important mechanism for ensuring reliability and

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[110] *See* Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); 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(8)(a)-(b) (2003); 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., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); 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); 41 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., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

proportionality in capital sentencing is comparative proportionality review, which this Court has rejected. While the United States Supreme Court declined, in *Pulley v. Harris* (1984) 465 U.S. 37, 51, to hold that comparative proportionality review is constitutionally required in capital sentencing, it did nonetheless note that "a capital sentencing scheme [could be] so lacking in other checks on arbitrariness that it would not pass constitutional muster without [that type of] review." California's 1978 death penalty statute, as applied by this Court, is the kind of arbitrary sentencing scheme *Harris* indicated would not be upheld without inter-case proportionality review.

In *Harris,* California's 1977 statute was at issue. However, the Supreme Court noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Pulley v. Harris*, *supra*, 465 U.S. at p. 52, n. 14.) That greatly expanded list of special circumstances set out in section 190.2 fails to meaningfully narrow the pool of death-eligible defendants, and leaves more room for arbitrary sentencing than the death penalty schemes struck down in *Furman v. Georgia*, *supra*. Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions. The lack of comparative proportionality review deprives California's sentencing scheme of the only mechanism that might enable it to "pass constitutional muster."

Moreover, the lack of inter-case review makes it impossible to consider other factors affecting the imposition of the death penalty. In this case, for instance, appellant was sentenced to death on the basis of an attempted rape established solely through inferences of a sexual intent. Appellant is not aware of any other case that has similarly led to a death sentence. The unique application of the death penalty would indicate that the sentence was arbitrary or disproportionate in violation of due process

and Eighth Amendment standards. Yet, denial of inter-case review does not allow appellant to establish this claim, or for this Court to review it.

Similarly, 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; in that case, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 206.) It is difficult, if not impossible, to demonstrate such a societal evolution without considering the facts and outcomes of other cases. Thus, the U.S. Supreme Court regularly considers the facts of other cases in resolving claims that imposing the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Thompson v. Oklahoma*, *supra*, 487 U.S. at pp. 821, 830-31; *Enmund v. Florida*, *supra*, 458 U.S. at p. 796 n. 22; *Coker v. Georgia*, *supra*, 433 U.S. at p. 596.)

Comparative or "inter-case," appellate review is a common feature in other jurisdictions that impose the death penalty; thirty-one of the thirty-four states that carry out capital punishment require it. By statute, Georgia requires its high court to determine whether a death "sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann., § 27-2537(c).) That provision was approved by the United States Supreme Court, because it provides a further safeguard "against a situation comparable to that presented in *Furman* [*v. Georgia*, *supra*, 408 U.S. 238] . . . ." (*Gregg v. Georgia* , *supra*, 428 U.S. at p. 198.) Toward the same end, Florida judicially "adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida*, *supra*, 428 U.S. at p. 259.) Twenty states have statutes similar to Georgia's, and seven have

judicially instituted similar review.[111]

Nothing in the death penalty statute forbids similar review; its prohibition 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 making defendants eligible for death, and the absence of other procedural safeguards to ensure reliable and proportionate sentences, this Court's categorical refusal to engage in inter-case proportionality review violates due process the Eighth Amendment. It permits the same kind of arbitrariness and discrimination that the United States Supreme Court has long rejected. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192.)

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[111]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).

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.

G. The Prosecution May Not Use Unadjudicated Criminal Activity as Aggravation; Even If Such Use Were Constitutionally Permissible, it must Be Unanimously Found True Beyond a Reasonable Doubt

1. Introduction

The prosecutor in this case argued that unadjudicated offenses constituted factor (a) aggravation – circumstances of the crime.

> There are other crimes you have heard about in this case. They don't fall within factor c. And the reason they don't is because they are not prior felony convictions and they don't show a prior act of violence.[112] But you can consider the other crimes that have been shown to have been committed by Catherine Thompson in this case under factor a again, which is the circumstances of the crime.
>
> It's almost – there are almost too many crimes to enumerate that were shown during the evidence but they range from federal type crimes involving such things as false social security numbers, state crimes such as perjury to the Department of Motor Vehicles when she got a false driver's license, fraudulent loan applications, grand theft involving the Sycamore house and perhaps even local crimes involving the fraudulent transfer of business license.

(RT58:9352-9353.)

The prosecutor argued that along with the evidence of two felony convictions, such evidence was "substantial" evidence of aggravation. (RT57:9253.) The jurors were told they could rely on this aggravating factor in the weighing process necessary to determine if appellant should be executed. (RT59:9441-9443.) In regard to factor (c) evidence the jurors properly were told that before they could rely on this evidence, they had to find beyond a reasonable doubt that appellant did in fact commit the

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[112]The prosecutor had previously stated that there was no factor (b) evidence. (RT58:9352.)

criminal acts alleged. (RT59:9439.) They were not told the same thing with respect to the unadjudicated crimes which the prosecutor labeled as factor (a) aggravating evidence.[113] Although the jurors were told that all 12 must agree on the final sentence (RT59:9443), they were not told that during the weighing process, before they could rely on the alleged unadjudicated crimes as aggravating evidence, they had to unanimously agree that, in fact, appellant committed those crimes. On the contrary, the jurors were explicitly instructed that such unanimity was not required:

> There is no requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror must make an individual evaluation of each fact or circumstance offered in mitigation or aggravation.

(RT59:9440.)

Thus, the sentencing instructions contrasted sharply with those received at the guilt phase, where the jurors were told they had to unanimously agree on appellant's guilt, the degree of the homicide (if any), and the special circumstance allegation.

As set forth below, the unadjudicated crimes evidence should not have been relied upon as factor (a) evidence, but even assuming the evidence was constitutionally permissible, the aspect of section 190.3, which allows jurors to sentence a defendant to death by relying on evidence on which they have not agreed unanimously violates both the Sixth Amendment right to a jury trial and the Eighth Amendment's ban on

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[113]As part of the factor (c) instruction, the jurors were told that it may not consider evidence of any other crime as an aggravating circumstance. (RT4:513.) However, the prosecutor labeled the unadjudicated crimes evidence as factor (a) evidence which the jurors were told was unlimited. "The circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to e true." (RT59:9436.)

unreliable penalty phase procedures.

2. The use of unadjudicated criminal activity as aggravation renders appellant's death sentence unconstitutional

The instruction and evidence in this case violated the Eighth Amendment, because they permitted the jurors to consider unreliable evidence of appellant's alleged unadjudicated criminal conduct. Relying on evidence of previously unadjudicated criminal conduct as aggravation violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (*State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Thus, expressly instructing the jurors to consider such evidence in aggravation violated those same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst*, *supra*, 897 F.2d at p. 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

3. The failure to require a unanimous juror Findings on the unadjudicated acts denied appellant's sixth amendment right to a jury trial and requires reversal of her death sentence

Even assuming, arguendo, that the reliance on evidence of the prior unadjudicated offenses was constitutionally permissible at the penalty phase, the failure of the instructions pursuant to section 190.3, to require proof beyond a reasonable doubt and juror unanimity on the allegations that appellant committed prior unadjudicated criminal acts renders her death sentence unconstitutional. The Sixth Amendment guarantees the right to a jury trial in all criminal cases. The Supreme Court has held, however, that the version of the Sixth Amendment applied to the states through the Fourteenth Amendment does not require that the jury be unanimous in non-capital cases. (*Apodaca v. Oregon* (1972) 406 U.S. 404 [upholding conviction by a 10-2 vote in non-capital case]; *Johnson v. Louisiana* (1972) 406 U.S. 356, 362, 364 [upholding a conviction obtained by a 9-3 vote in non-capital case].) Nor does it require the states to empanel 12 jurors in all non-capital criminal cases. (*Williams v. Florida* (1970) 399 U.S. 78 [approving the use of six-person juries in criminal cases].)

The United States Supreme Court also has made clear, however, that even in non-capital cases, when the Sixth Amendment does apply, there are limits beyond which the states may not go. For example, in *Ballew v. Georgia* (1978) 435 U.S. 223, the Court struck down a Georgia law allowing criminal convictions with a five-person jury. Moreover, the Court also has held that the Sixth Amendment does not permit a conviction based on the vote of five of six seated jurors. (*Brown v. Louisiana* (1979) 447 U.S. 323; *Burch v. Louisiana* (1978) 441 U.S. 130.) Thus, when the Sixth Amendment applies to a factual finding – at least in a non-capital case – although jurors need not be unanimous as to the finding, there must at a

minimum be significant agreement among the jurors.[114]

Prior to June of 2002, none of the United States Supreme Court's law on the Sixth Amendment applied to the aggravating factors set forth in section 190.3. Prior to that date, the Sixth Amendment right to jury trial did not apply to aggravating factors on which a sentencer could rely to impose a sentence of death in a state capital proceeding. (*Walton v. Arizona* (1988) 497 U.S. 639, 649.) In light of *Walton*, it is not surprising that this Court had, on many occasions, specifically rejected the argument that a capital defendant had a Sixth Amendment right to a unanimous jury in connection with the jury's findings as to aggravating evidence. (*See, e.g., People v. Taylor* (2002) 26 Cal.4th 1155, 1178; *People v. Lines* (1997) 15 Cal.4th 997, 1077; *People v. Ghent* (1987) 43 Cal.3d 739, 773.) In *Ghent* for example, the Court held that such a requirement was unnecessary under "existing law." (*People v. Ghent, supra*, 43 Cal.3d at p. 773.)

On June 24, 2002, however, the "existing law" changed. In *Ring v. Arizona, supra*, 536 U.S. 584, the United States Supreme Court overruled *Walton* and held that the Sixth Amendment right to a jury trial applied to "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609; accord *id.* at p. 610 (conc. opn. of Scalia, J.) [noting that the Sixth Amendment right to a jury trial applies to "the

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[114] The Supreme Court often has recognized that because death is a unique punishment, there is a corresponding need for procedures in death penalty cases that increase the reliability of the process. (*See, e.g., Beck v. Alabama, supra*, 447 U.S. 625; *Gardner v. Florida* (1977) 430 U.S. 349, 357.) It is arguable, therefore, that where the state seeks to impose a death sentence, the Sixth Amendment does not permit even a super-majority verdict, but requires true unanimity. Because the instructions in this case did not even require a super-majority of jurors to agree that appellant committed the alleged unadjudicated acts, there is no need to reach this question here.

existence of the fact that an aggravating factor exists]"].) In other words, absent a numerical requirement of agreement in connection with the aggravating factor set forth in section 190.3, subdivision (b), this section violates the Sixth Amendment as applied in *Ring*.

Here, the error cannot be deemed harmless because, on this record, there is no way to determine if all 12 jurors would have agreed that appellant committed the alleged prior offenses. (*See People v. Crawford* (1982) 131 Cal.App.3d 591, 599 [instructional failure which raises possibility that jury was not unanimous requires reversal unless the reviewing court can tell that all 12 jurors necessarily would have reached a unanimous agreement on the factual point in question]; *People v. Decliner* (1985) 163 Cal.App.3d 284, 302 [same].)[115]

4. Absent a requirement of jury unanimity on The unadjudicated acts, the Instructions on penal code section 190.3, Allowed the jurors to impose the Death penalty on appellant based on Unreliable factual findings that were never deliberated, debated or discussed

The United States Supreme Court has recognized that "death is a different kind of punishment from any other which may be imposed in this country." (*Gardner v. Florida, supra*, 430 U.S. at p. 357.) Because death is such a qualitatively different punishment, the Eighth and Fourteenth Amendments require "a greater degree of reliability when the death sentence is imposed." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604.) For this

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[115] This assumes that a harmless error analysis can apply to *Ring* error. In *Ring*, the Supreme Court did not reach this question, but simply remanded the case. Because the error is not harmless here under *Chapman v. California, supra,* 386 U.S. at p. 24, there is no need to decide whether *Ring* errors are structural in nature.

reason, the Court has not hesitated to strike down penalty phase procedures that increase the risk that the factfinder will make an unreliable determination. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-30; *Green v. Georgia* (1979) 442 U.S. 95; *Lockett v. Ohio*, *supra*, 438 U.S. at pp. 605-06; *Gardner v. Florida*, *supra*, 430 U.S. at pp. 360-62.) The Court has made clear that defendants have "a legitimate interest in the character of the procedure which leads to the imposition of sentence even if [they] may have no right to object to a particular result of the sentencing process." (*Gardner v. Florida*, *supra*, 430 U.S. at p. 358.)

The California Legislature has provided that evidence of prior felony convictions (Pen. Code, § 190.3, subd. (c)) can be presented during the penalty phase. Before the factfinder may consider such evidence, it must find that the state has proven the act beyond a reasonable doubt. The jurors also are instructed, however, that they need not agree on this as they were in this case. "There is no requirement that all jurors unanimously agree on any matter offered in mitigation or aggravation. Each juror must make an individual of each fact or circumstance offered in mitigation or aggravation." (RT59:9440.)

Thus, as noted above, the jurors in appellant's case were permitted individually to rely on this – and any other – aggravating factor any one of them deemed proper as long as all the jurors agreed on the ultimate punishment. Because this procedure totally eliminated the deliberative function of the jurors that guards against unreliable factual determinations, it is inconsistent with the Eighth Amendment's requirement of enhanced reliability in capital cases. (*See Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 388-89 (dis. opn. of Douglas, J.); *Ballew v. Georgia*, *supra*, 435 U.S. 223; *Brown v. Louisiana*, *supra*, 447 U.S. 323.)

In *Johnson v. Louisiana*, *supra*, 406 U.S. at pp. 362, 364. a plurality

of the United States Supreme Court held that the jury trial right of the Sixth Amendment that applied to the states through the Fourteenth Amendment did not require jury unanimity in state criminal trials, but permitted a conviction based on a vote of 9 to 3. In dissent, Justice Douglas pointed out that permitting jury verdicts on less than unanimous verdicts reduced deliberation between the jurors and thereby substantially diminished the reliability of the jurors' decision. This occurs, he explained, because "nonunanimous juries need not debate and deliberate as fully as must unanimous juries. As soon as the requisite majority is attained, further consideration is not required . . .even though the dissident jurors might, if given the chance, be able to convince the majority." (*Id.* at pp. 388-389 (dis. opn. of Douglas, J.).)

The Supreme Court subsequently embraced Justice Douglas's observations about the relationship between juror deliberations and reliable factfinding. In striking down a Georgia law allowing criminal convictions with a five-person jury, the Court observed that such a jury was less likely "to foster effective group deliberation. At some point this decline [in jury number] leads to inaccurate factfinding. . . ." (*Ballew v. Georgia*, *supra*, 435 U.S. at p. 232.) Similarly, in precluding a criminal conviction on the vote of five out of six jurors, the Court has recognized that "relinquishment of the unanimity requirement removes any guarantee that the minority voices will actually be heard." (*Brown v. Louisiana*, *supra*, 447 U.S. at p. 333; *see also Allen v. United States* (1896) 164 U.S. 492, 501 ["The very object of the jury system is to secure uniformity by a comparison of views, and by arguments among the jurors themselves."].)

The Supreme Court's observations about the effect of jury unanimity on group deliberation and factfinding reliability are even more applicable in this case for two reasons. First, since this is a capital case, the need for

reliable factfinding determinations is substantially greater. Second, unlike the Louisiana schemes at issue in *Johnson*, *Ballew*, and *Brown*, the California scheme does not require even a majority of jurors to agree that an act which involved the use or attempted use of force or violence occurred before relying on such conduct to impose a death penalty. Consequently, "no deliberation at all is required" on this factual issue. (*Johnson v. Louisiana*, *supra*, 406 U.S. at p. 388, (dis. opn. of Douglas, J.).)

Given the constitutionally significant purpose served by jurors' deliberation on factual issues and the enhanced need for reliability in capital sentencing, a procedure that allows individual jurors to impose death on the basis of factual findings that they have not debated, deliberated or even discussed is unreliable and, therefore, constitutionally impermissible. A new penalty trial is required. (*See Johnson v. Mississippi* (1988) 486 U.S. 578, 586 [harmless error analysis inappropriate when trial court introduces evidence that violates Eighth Amendment's reliability requirements at defendant's capital sentencing hearing].)

H. Even If the Absence of the Previously Addressed Procedural Safeguards Did Not Render California's Death Penalty Scheme Constitutionally Inadequate to Ensure Reliability Capital Sentencing, Denying Those Safeguards to Capital Defendants Violates Equal Protection

As noted in the preceding arguments, the United States Supreme Court has repeatedly said that greater reliability is required in capital cases, 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 pp. 731-732.) Despite that directive, California's death penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with non-capital crimes. This differential treatment violates the heightened reliability requirement of the Eighth

Amendment and the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identifying the interest at stake. Here, the interest in life and liberty requires the highest degree of scrutiny by this Court. Indeed, 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.) Strict scrutiny is therefore required. (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.)

Under this standard of review, a state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification, and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra,* 17 Cal.3d 236; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet that burden here. In a capital case, the interest at stake is not simply liberty, but life itself. The differences between capital defendants and non-capital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

This Court has most explicitly responded to equal protection challenges to the death penalty scheme by rejecting claims that failing to afford capital defendants the disparate sentencing review provided to non-capital defendants violates equal protection. (*People v. Allen*, *supra*, 42 Cal.3d at pp. 1286-1288.) In holding that it was rational not to provide capital defendants the disparate sentencing review provided to non-capital defendants, the Court first distinguished death judgments by pointing out that the primary sentencing authority in California capital cases is normally the 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 p. 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 reflected in a pattern of verdicts. (*McCleskey v. Kemp*, *supra*, 481 U.S. at p. 305.) Juries are not immune from error, and may stray from the larger community consensus as expressed by statewide sentencing practices.

While the state cannot preclude a sentencer from considering any factor that could cause it to reject the death penalty, it can and must provide rational criteria to narrow the sentencer's discretion to impose death. (*McCleskey v. Kemp*, *supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the statutory criteria that narrow death eligibility, or the flat judicial prohibitions against imposing the death penalty on certain offenders, or for certain crimes.

Moreover, jurors are also not the only sentencers. A verdict of death is always subject to independent review by a trial court, and a trial judge not only can reduce a jury's verdict, he or she is required to do so under some circumstances. (See, Pen. Code, §190.4; *People v. Rodriguez*, *supra*, 42 Cal.3d at pp. 792-794.) Thus, the lack of disparate sentence review cannot be justified on the ground that reducing a jury's verdict would interfere with its sentencing function.

A second reason *Allen* offered for rejecting the equal protection claims was that the range available to a trial court is broader under the Determinate Sentencing Law ("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 p. 1287.) That rationale cannot withstand scrutiny, because the difference between life and death is not in fact "narrow," particularly not when contrasted with that between a sentence of two years and five years in prison.

The notion that the disparity between life and death is "narrow" not only violates common sense, it also contradicts specific pronouncements by the United States Supreme Court: "Th[e] especial concern [for ensuring that every possible procedural protection is provided in capital cases] 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 p. 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, supra*, 428 U.S. at p. 305 (opn. of Stewart, Powell, and Stephens, JJ.) The qualitative difference between a prison sentence and a death sentence therefore weighs in favor of equal protection concerns.

Finally, this Court said the additional "nonquantifiable" aspects of capital sentencing, as compared to noncapital sentencing, support the different treatment of felons sentenced to death. (*Allen, supra*, 42 Cal.3d at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification, because it is one with very little difference. A trial judge may base a sentence choice under the DSL on a set of factors that includes precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare Pen. Code, §190.3, subds. (a) through (j), with Cal. Rules of Court, rules 421 and 423.) It reasonable to presume that the legislature created the disparate review mechanism discussed above because "nonquantifiable factors" permeate all sentencing choices.

In short, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guarantees each and every person 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, 104-105.) There is no basis to deny capital defendants the disparate sentence review provided all other convicted felons, because that type of review is routinely provided in virtually every state that applies the death penalty, and by the federal courts in considering whether evolving community standards permit the imposition of death in a particular case.

Nor can equal protection justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. Those procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death sentencing proceedings; withholding them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and cannot withstand the close scrutiny that should be applied when a fundamental interest is affected

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XV

THE INSTRUCTION DEFINING THE SCOPE OF THE JURORS' SENTENCING DISCRETION, AND THE NATURE OF THEIR DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant. If after having heard all the evidence and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> A mitigating circumstance is any fact, condition, or event which as such, does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider.
>
> In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and

> appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances.
>
> To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire and select one of your number to act as a foreperson. That person will preside over your deliberations. In order to make a determination as to the penalty, all 12 jurors must agree. Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided, and then you shall return with it to this courtroom.

(RT59:9441-9443.)

The above-quoted instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in that crucial instruction violated appellant's fundamental rights to due process (U.S. Const., 5th & 14th Amends.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of her sentence. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. 367, 383-384.)

B. The Instruction Caused the Jurors' Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

The sentence of the foregoing instruction that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in

comparison with the mitigating circumstances that it [sic] warrants death instead of life without parole." (RT49:8388.) Thus, the decision whether to impose death hinged on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury.

To meet constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death-penalty sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty. . . ." (*id.* at pp. 361-62.) A death-penalty sentencing scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth Amendment. (*Ibid.*)

The phrase "so substantial" is so lacking in any precise meaning that it did not inform the jurors what they were required to find to impose the death penalty, and so varied in meaning, and so broad in usage, that it is virtually incapable of explication or understanding in the context of deciding between life and death. It suggests a purely subjective standard, and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Maynard, supra*, 486 U.S. at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. (*Arnold v. State* (Ga. 1976) 224 S.E.2d 386), held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective

standards' necessary to control the jurors' discretion in imposing the death penalty. [Citations.]" (*Id.* at p. 391; see *Zant v. Stephens, supra*, 462 U.S. 862, 867, fn. 5.)[116]

In analyzing the word "substantial," the *Arnold* court concluded:

> Black's Law Dictionary defines 'substantial' as 'of real worth and importance'; 'valuable.' Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [fn.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(224 S.E.2d at p. 392.)

It is true that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty-phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course *Breaux*, *Arnold*, and this case, like all cases, are factually different, but appellant submits that their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

First, all three cases involve claims that the language of an important penalty-phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra*, 224 S.E.2d at p. 392.) The instruction in *Arnold* concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*;

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[116] The Georgia Supreme Court seems to have analyzed the vagueness issue in *Arnold* under the Due Process Clause of the Fourteenth Amendment. (*Arnold, supra*, 224 S.E.2d at p. 391; compare *Maynard v.Cartwright, supra*, 486 U.S. at pp. 361-362.)

emphasis added), while this instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)[117]

In fact, using the term "substantial" in CALJIC No. 8.88 gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia, supra*, 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black, supra*, 503 U.S. 222, 235-236.) It is constitutionally impermissible to base the decision to impose death on such unspecific and subjective criteria. Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th and 14th Amends.), the death judgment must be reversed.

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[117] Significantly, the United States Supreme Court has noted with apparent approval *Arnold*'s conclusion that the term "substantial" is impermissibly vague in the context of determining whether a defendant had a "substantial history of serious assaultive criminal convictions." (See *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

C. The Instruction Did Not Convey That the Central Determination Is Whether the Death Penalty Is Appropriate, Not Merely Authorized under the Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. 280, 305; *People v. Edelbacher, supra*, 47 Cal.3d 983, 1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown, supra*, 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257.)

Again, this instruction told the jurors they could "return a judgment of death [if] ... persuaded that the aggravating circumstances [we]re so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," that instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether it was appropriate.

Those two determinations are clearly not the same; a rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Webster's Third New International Dictionary, Unabridged (1976 ed.) defines the verb "warrant" as, inter alia, "to give authority or power to for doing or forebearing to do something," or "to serve as or give sufficient ground or reason for" doing something. (*Id.* at p. 2578.) By contrast, "appropriate" is defined as "specially suitable" or "belonging

peculiarly." (*Id.* at p. 106.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was legally or morally permitted. That is a far different finding than the one the jurors are actually required to make: that death is a "specially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of that earlier stage in our statutory sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier passing reference to a "justified and appropriate" penalty. (RT59:9443 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is

justified and appropriate. . . ."].) That sentence did not tell the jurors they could return a death verdict only if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The deliberative instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.), and must be reversed.

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D. The Definitions of Aggravation and Mitigation as Used in the Instruction Are Defective[118]

The definition of aggravation used in the instruction – "any fact, condition or event attending the commission of the crime which increases its guilt or enormity or add [sic] to its injurious consequences which is above and beyond the elements of the crime itself" (RT59:9442) – is overly broad and authorizes consideration of facts that are above and beyond the elements of the crime in contravention of the rulings of the United States

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[118] After receiving the standard CALJIC instruction described above, the jurors asked for clarification. " We need clarification of the definition of an aggravating factor versus mitigating circumstances as related to this case. Would it be possible to define these in quote "layman's terms?" (RT 60:9455.) Thereafter the court instructed the jury:

> First of all, you've used, I notice with respect to the word "aggravating" the word "factor," and with respect to mitigating circumstance, I think factor and circumstance are really [sic] should mean the same . We use the terms aggravating factors and mitigating factors where you could say aggravating circumstances or mitigating circumstances.
>
> You're instructed that the words aggravation and mitigation were not used in the instructions in any technical sense but are to be understood in accordance with their commonly accepted and ordinary meaning.
>
> The word aggravation is an act or circumstance that makes less serious or less severe. You should in determining the appropriate penalty should [sic] take into consideration both factors in aggravation and factors in mitigation. The weight to be given to any factor in aggravation or any factor in mitigation is to be – is, is of course , each of your sole and independent determination as to how much weight to be given to any such factor.

(RT60:9459-9460.)

Supreme Court in (*Ring v. Arizona* (2002) 536 U.S. 584, and *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

In *Apprendi*, the court held that the Fourteenth Amendment's due process clause requires the state to submit to a jury, and prove beyond a reasonable doubt to the jury's unanimous satisfaction, every fact, other than a prior conviction, that increases the punishment for a crime beyond the maximum otherwise prescribed under state law. In *Ring,* the court held that *Apprendi* operates in the capital context.

In *People v. Prieto* (2003) 30 Cal.4th 226, 262-263, this Court held that *Ring* and *Apprendi* are inapplicable to the determination of penalty in a capital case under California law finding all of the facts that increase the punishment for first degree murder beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to either life imprisonment without possibility of parole or death are already submitted to a jury in connection with at least one special circumstance, prior to the commencement of the penalty phase. Therefore, this Court ruled, at the penalty phase itself no further facts need to be proved in order to increase the punishment to either death or life imprisonment without possibility of parole, because both now are prescribed as potential penalties. However, at the penalty phase, the choice between death and life imprisonment without possibility of parole depends on a determination as to which of the two penalties is appropriate, which in turn depends on a determination whether the evidence in aggravation substantially outweighs that in mitigation. (See, e.g., *People v. Brown* (1985) 40 Cal.3d 512, 538-545, & especially fns. 13 & 19 on pp. 541-542, 545, revd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538.) Thus, the ultimate determination of the appropriateness of the penalty and the subordinate determination of the balance of evidence of aggravation and mitigation

entail findings of fact that can increase the punishment for murder of the first degree beyond the maximum otherwise prescribed. Those determinations do amount to findings of fact and must be subject to the requirements of *Apprendi*. The instruction on the determination of penalty violate the Fifth and Sixth Amendments to the United States Constitution and article I, sections 7 and 15 of the California Constitution, as well as the Eighth Amendment's cruel and unusual punishment clause and the Fourteenth Amendment's due process clause.

The jurors were instructed that "[a] mitigating circumstance is any fact, condition or event which as such does not constitute a justification or excuse for the crime in question but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty." (RT59:9442.) This definition of mitigation was insufficient to inform properly the jurors of the full scope of evidence that must be considered in determining whether life imprisonment without the possibility of parole, rather than death, is the appropriate sentence. The failure of the trial court to provide the jurors with an adequate understanding of this critical legal concept undermined the reliability of the ensuing death judgment in violation of the Eighth Amendment's cruel and unusual punishment clause and the Fourteenth Amendment's due process clause, as construed in (*Lockett v. Ohio* (1978) 438 U.S. 586, 604) the Eighth and Fourteenth Amendments.[119] It is constitutionally required that the jury "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense

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[119]As this Court has repeatedly recognized, trial courts must "instruct sua sponte on those general principles of law which are closely and openly connected with the facts and are necessary for the jury's understanding of the case. (*People v. Vann* (1974) 12 Cal.3d 220, 226.)

that the defendant proffers as a basis for a sentence less than death," however, the definition of a mitigating circumstance incorporated in the instruction precluded the jury from giving such consideration.

A study of capital jury instructions in California found that only 12% of the college-educated subjects were able to define mitigation in a legally correct fashion. (Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions* (1994) 18 Law & Human Behavior 411, 420.) Even more disturbing, 41% of these subjects were either totally incorrect in their definition or completely unable to fashion any definition whatsoever. As for the scope of the definition, 53% attempted to define mitigation by focusing on the nature of the crime. (*Id.* at p. 421.)

In another study, based upon interviews with actual capital jurors in California, it was found that of 30 California jurors interviewed, only 13 showed "reasonably accurate comprehension of the concepts of aggravating and mitigating." (Craig Haney et al., *Deciding to Take a Life: Capital Juries. Sentencing Instructions, and the Jurisprudence of Death* (1994) J. Social Issues, vol. 50, No. 2, pp. 149, 169.) Moreover, the study noted that "fully one-third of our sample refocused the penalty phase inquiry entirely on the nature of the crime itself, and did so in a way that amounted to a presumption in favor of death." (*Id.* at p. 162.)

A definition of mitigation limited solely to circumstances surrounding the capital crime violates the constitutional requirement that the jury be permitted to consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Any verdict of death premised on such an abridged interpretation of mitigation fails to reflect the

"reasoned *moral* response to the defendant's background, character, and crime" that is required under the Eighth Amendment. (*California v. Brown, supra*, 479 U.S. at p. 545 (O Connor, J., concurring) (emphasis in original).)

This Court's assumption that "mitigating" is a commonly understood term necessitating no further definition (*People v. Kirkpatrick, supra*, 7 Cal.4th at p. 1018; see also *People v. Holt* (1997) 15 Cal.4th 619, 702) is clearly refuted by empirical evidence. Moreover, this same empirical evidence indicates that one of the primary misconceptions harbored by jurors concerning "mitigation" is that it relates only to the circumstances surrounding the crime. The definition provided to the jurors in appellant's case, rather than eradicating the confusion that exists as to the meaning of the term "mitigation," reinforced the commonly held belief that mitigating evidence must be directly related to the crime in order for the jury to consider it as a basis for a sentence less than death.

The failure properly to instruct the jurors in appellant's case regarding the full scope of mitigating evidence was tantamount to an explicit instruction to the jury not to consider mitigating evidence if not directly related to the crime. Such instructions are unconstitutional. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 398-399.) The failure of the trial court to give an adequate definition of mitigation irreparably and unconstitutionally tainted the jurors' verdict of death, requiring reversal of appellant's sentence.

E. The Instruction Did Not Tell the Jurors They Could Impose a Life Sentence Even If Aggravation Outweighed Mitigation

The instruction at issue was also defective because it implied that death was the *only* appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances . . . ." However, it is clear under California law that a penalty jury may always

return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown, supra,* 40 Cal.3d at pp. 538-541.) Here, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation outweighed that in mitigation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909, disapproved on another ground in *People v. Carmen* (1951) 36 Cal.2d 768.)[120]

Moreover, the instruction failed to affirmatively inform the jurors that they could return a life sentence even if the circumstances in aggravation outweighed those in mitigation. Such an affirmative instruction was required even absent a request, in light of the trial court's duty to instruct sua sponte "on the general principles governing the case. . . ." (*People v. Flannel* (1979) 25 Cal.3d 668, 681.) Because the principle at

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[120] Nor did the trial court clarify this principle when it answered a jury question asking the court to define aggravation and mitigation in "layman's terms." (RT60:9459.) Over defense objection the court told the jury:

> You're instructed that the words aggravation and mitigation were not used in the instruction in any technical sense but are to be understood in accordance with their commonly accepted and ordinary meaning.
>
> The word aggravation is an act or circumstance that makes more serious or more severe. The term mitigation is an act or circumstance that makes less serious or less severe. You should in determining the appropriate penalty [] take into consideration both factors in aggravation and factors in mitigation. The weight to be given to any factor in aggravation or any factor in mitigation is to be – is, of course, each of your sole and independent determination as to how much weight to be given to any such factor.

(RT60:9459-9460.)

issue here is well-established and governs any capital case in California (see *People v. Brown, supra,* 40 Cal.3d at pp. 538-541), the trial court was obliged to instruct the jurors on that point.

The failure to instruct on this crucial point was prejudicial because it deprived appellant of her right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Moreover, since the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, its delivery deprived appellant of due process (U.S. Const., 5th & 14th Amends.; *Hicks v. Oklahoma, supra,* 447 U.S. 343, 346), and made the resulting verdict unreliable (U.S. Const., 8th & 14th Amends.; *Furman v. Georgia, supra,* 408 U.S. 238). The death judgment must therefore be reversed.

F. The Instruction Failed to Inform the Jurors That Appellant Did Not Have to Persuade Them That the Death Penalty Was Inappropriate

The instruction in question was also defective because it failed to inform the jurors, as this Court has held they must be informed, that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D. Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the

> nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]

(*Id.* at pp. 727-728.)

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

The instant instruction, taken from CALJIC No. 8.88, suffers from the same defect, with the result that capital jurors in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

G. Conclusion

The Eighth Amendment requires capital sentencing jurors to be carefully advised in order to avoid arbitrary and capricious application of the death penalty. Because the trial court's main sentencing instruction failed to comply with that requirement, appellant's death judgment must be reversed.

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XVI

APPELLANT'S DEATH SENTENCE MUST BE VACATED BECAUSE IT VIOLATES INTERNATIONAL LAW, WHICH IS BINDING ON THIS COURT, AS WELL AS THE EIGHTH AND FOURTEENTH AMENDMENTS

The California death penalty procedure violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth and Fourteenth Amendments as well. (*See Roper v. Simmons* (2005) 543 U.S. 551; *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21.)[121]

Article VII of the International Covenant of Civil and Political Rights ("ICCPR"), ratified by the United States in 1992,[122] prohibits "cruel, inhuman or degrading treatment or punishment."[123] Article VI, section 1 of

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[121] *See also* fn. 3, *infra*.

[122] The United States Court of Appeals for the Eleventh Circuit has held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; *but see Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

[123] When the United States ratified the ICCPR, it specifically set forth the following statement "the United States considers itself bound by article 7 to the extent that 'cruel, inhuman or degrading treatment or punishment' means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." (ICCPR, United States of America, Reservation 3.

the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his [or her] life."

Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land.[124] (*See, e.g., Zschernig v. Miller* (1968) 389 U.S. 429, 440-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[125]

Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between sentencing and execution under the California death penalty system, the implementation of the death penalty in California generally, and specifically against appellant, constitutes "cruel, inhuman or

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[124] Additionally, the United States Supreme Court has acknowledged that the ICCPR "does bind the United States as a matter of international law." (*Sosa v. Alvarez-Machain* (2004) 542 U.S. 692, 735.)

[125] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. See, for example: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

degrading treatment or punishment" in violation of Article VII of the ICCPR. Further, with respect to the death sentence imposed against appellant, this Court especially should consider the specific application of international norms, given that appellant was not the actual killer and the actual killer received a life verdict. This broad use of the death penalty in appellant's case violates the restrictive nature of international law.

Appellant recognizes that this Court repeatedly has rejected claims that the death penalty is contrary to international law and conventions. (*See People v. Ghent* (1987) 43 Cal.3d 739, 778-779, 780-781; *People v. Hillhouse* (2002) 27 Cal.4th 469, 511 [death sentence rendered in accordance with California and federal constitutional and statutory requirements does not violate international law]; *People v. Ramos* (2004) 34 Cal.4th 494, 533 [international law and treaties do not compel elimination of death penalty]; *People v. Vieira* (2005) 35 Cal.4th 304 [international treaties and resolutions cited by defendant have not been held effective as domestic law]; *People v. Schmeck* (2005) 37 Cal.4th 240, 305 [claim of international law violation rejected, citing *Hillhouse*].) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular,[126] should be applied to the United States.

Earlier this year, at the end of the October 2005 term, the United States Supreme Court invoked international law and held that the military commission convened to try a Guantanamo Bay detainee "lack[ed] power to proceed because its structure and procedures violate[d] ... the Geneva Conventions." *Hamdan v. Rumsfeld* (June 29, 2006, No. 05-184) ___ U.S.

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[126] *See United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Day* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).)

___ at ___ [2006 WL 1764793].)[127] With respect to the specific relationship between capital punishment and international law, just last term, the United States Supreme Court ruled that executing offenders who were juveniles at the time they committed capital crimes violated the Eighth and Fourteenth Amendments, noting that "the opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation of our own conclusions." (*Roper v. Simmons, supra*, 543 U.S. at p. 578.) The Court concluded: "[i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom." (*Roper v. Simmons, supra*, 543 U.S. at p. 578.)

The Court's increasing respect for, and willingness to look towards, international law as manifested in *Hamdan* and *Roper*, is but a reaffirmation of similar views expressed three years earlier in the Court's decision holding that executing the mentally retarded violated the Eighth Amendment. (*Atkins v. Virginia, supra*, 536 U.S. at p. 316, fn. 21 [fact that the "world community" "overwhelmingly disapprove[s]" of executing the mentally retarded supports the conclusion that doing so violates the Eighth Amendment].)

Thus, appellant requests that the Court reconsider and, in this

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[127] Just one day before the Court issued its decision in *Hamdan*, in an opinion authored by Chief Justice Roberts, the Court again acknowledged the importance of international law, recognizing that its holding that states may bar foreign nationals from raising the issue of their rights under international law to talk with a consular officer if they did not raise that issue at trial "in no way disparages the importance of the Vienna Convention." (*Sanchez-Llamas v. Oregon & Bustillo v. Johnson* (June 28, 2006, Nos. 04-10566, 05-51) ___ U.S. ___ [2006 WL 1749688].)

context, find appellant's death sentence violative of international law, as well as the Eighth and Fourteenth Amendments. (*See Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].)

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XVII

CUMULATIVE ERROR UNDERMINED FUNDAMENTAL FAIRNESS AND VIOLATED EIGHTH AMENDMENT STANDARDS OF RELIABILITY IN THIS CASE

Even assuming that none of the errors identified by appellant are prejudicial by themselves, the cumulative effect of these errors undermines the confidence in the integrity of the guilt and penalty phase proceedings. (*Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438- 1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

This Court must reverse unless it is satisfied that the combined effect of all the errors in this case, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying *Chapman* standard to the totality of the errors].)

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (*See Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (*en banc*), *cert. denied*, 440 U.S. 974 (1979) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v.*

Wallace (9th Cir. 1988) 848 F.2d 1464, 1476.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Appellant has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone, was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found. The case against appellant was a close one, based only on circumstantial evidence and the statements of coconspirators. In addition, because the court refused to grant severance, appellant was forced to defend herself in a trial against two prosecutors - the government and her codefendant, Phillip Sanders. The trial court permitted character evidence to be used against appellant showing her to be a dishonest person, and an uncaring spouse who gambled with the pawned proceeds from her husband's jewelry and who grieved more for her dead cat than her husband. Finally, in an inexplicable violation of her right to remain silent, the trial court solemnized appellant's decision not to take the stand in the jury's presence. The combination of these errors was greater than the sum of its parts and resulted in egregious error mandating reversal. A trial free from the errors in this trial would provide *no* evidence to prove appellant committed these crimes. The cumulative effect of the errors must be found to have been prejudicial, and appellant's guilt judgment must be reversed.

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (*See People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may

otherwise not affect the guilt determination can have a prejudicial impact during penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error. (*People v. Hamilton* (1968) 60 Cal.2d 105, 136-37.)

(*See also People v. Brown* (1988) 46 Cal.3d 432, 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405; *Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, the actual shooter's case was finally severed from appellant's case at the penalty phase, leaving appellant as the only possible subject for punishment. Again at the penalty phase, the court erroneously permitted appellant's character for dishonesty to become the object of the

testimony. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

CONCLUSION

For all the reasons stated above, the guilt and penalty verdicts in this case must be reversed.

DATED: August 21, 2006

Respectfully submitted,

MICHAEL J. HERSEK
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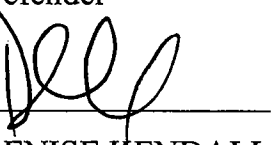

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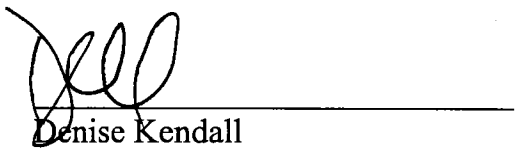
CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Denise Kendall, am the Assistant State Public Defender assigned to represent appellant, Catherine Thompson, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 98, 755 words in length excluding the tables and certificates.

Dated: August 21, 2006



Denise Kendall

PROOF OF SERVICE BY MAIL

Re: PEOPLE v. CATHERINE THOMPSON No.S033901

I, GLENICE FULLER, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105. A true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Scott Hayward, Esq.
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HAND DELIVERED SEPTEMBER 15, 2006

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HONORABLE ROBERT PERRY
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Each said envelope was then, on August 21, 2006, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 21, 2006, at San Francisco, California

Glenice Fuller
DECLARANT