

# SUPREME COURT COPY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT  
FILED

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DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA, )

Plaintiff and Respondent, )

v. )

GENE ESTEL McCURDY, )

Defendant and Appellant. )

Kings Co. )

Sup. Ct. )

No. 95CM5316 )

## APPELLANT'S OPENING BRIEF

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

### ARGUMENT

VIII

(Pages 221-253)

(HONORABLE PETER M. SCHULTZ, JUDGE, of the Superior Court)

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# DEATH PENALTY

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	)	Sup. Ct.
v.	)	No. 95CM5316
	)	
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## VIII

### **THE TRIAL COURT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS BY DENYING A NEW TRIAL ON GUILT WHEN PRESENTED WITH NEWLY- DISCOVERED EVIDENCE THAT A THIRD PARTY CONFESSED TO ABDUCTING AND KILLING MARIA PICENO AND BY EXCLUDING THE CONFESSION AS MITIGATING EVIDENCE AT THE PENALTY PHASE**

#### **A. Factual Background**

During the guilt phase of his trial, appellant presented evidence that there were numerous similarities between the offenses against Maria Piceno and those against Angelica Ramirez. (14 RT 2406-2412, 2445-2449, 2452-2455.) Among other things, both Maria and Angelica were Hispanic; the two girls were of similar age, height and weight; they were both abducted from public places; they were both abducted in the month of March; and both were both found in waterways near Highway 99. (16 RT 2775-2780.) Appellant argued that, in light of those similarities, the fact that he had not committed the offenses against Angelica suggested that he had not committed the offenses against Maria either. (*Ibid.*) The jury obviously rejected this theory, for it found him guilty of the charged offenses and found the special circumstance allegation to be true. (12 CT 3412-3413.)

However, on February 3, 1997, after the jury had returned its guilt phase verdicts but before the penalty phase commenced, the prosecution advised the trial court and defense counsel that a suspect, Donald Bales, had confessed to the abduction and murder of both Angelica and Maria, although he had subsequently recanted as to the latter. (18A RT 2948-

2950.)<sup>1</sup> The prosecutor stated, “[E]verybody in law enforcement apparently believes for good reason that it is the person who did [the Ramirez] killing. He’s not a crank who has come forward.” (18A RT 2949-2950.) Another prosecutor elaborated, “[Bales] appears to have information that’s never been made public, even in our trial about the murder.” (18A RT 2950.) Defense counsel argued that newly discovered evidence of actual innocence should be considered by the jury at a new guilt phase, and pointed out that, at the penalty phase, a defendant is permitted to argue that there is “lingering doubt” as to his guilt. (18A RT 2950-2952.)

The following day, appellant explained that Bales, who was in custody on an unrelated charge of forcible oral copulation pursuant to Penal Code section 288, subdivision (c), had confessed to Angelica’s kidnap and murder. Bales had told the police that he met Angelica at a swap meet. He forced her into his car and drove to a location near Pixley, where her body was later found. There, he removed her clothing from below the waist and raped her. Finally, he strangled her and left her body in the water. (14 RT 2449; 20 RT 2985-2986.) Bales also had told police that he suffered from a sexual compulsion. (20 RT 2986.)

During the same interview, Bales was asked whether he had anything to do with the killing of a little girl from Lemoore (i.e., Maria).

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<sup>1</sup> Because the trial court ordered that details relating to the Ramirez investigation were to remain sealed (see 26A RT 3274-3275), Volumes 18A, 20, 24 and 26A of the Reporter’s Transcript and Exhibits AA through GG are sealed. Accordingly, appellant has filed a motion requesting that the instant argument be filed under seal; in the alternative, appellant moves that this Court order that the transcripts and exhibits be unsealed and that appellant be permitted to file this argument as a regular part of his opening brief.

Although he initially denied it, he subsequently paused for a long time, lowered his head, and admitted having killed her. A few minutes later, he recanted that confession. (20 RT 2987.) Appellant noted, however, that Bales had no firm alibi excluding him as a suspect in Maria's case. (20 RT 2988.)

Appellant then explained that the parties were awaiting further information from law enforcement regarding the accuracy of statements Bales made regarding Angelica's jewelry, clothing, and the manner of her death. (*Ibid.*) Appellant requested a continuance of the penalty phase in order to permit him to investigate the matter for the purpose of presenting penalty phase evidence; alternatively, he moved for a new trial. (20 RT 2989-2994.) The prosecution, however, argued that Bales's confessions had been coerced and were therefore inadmissible. (20 RT 2995-2999.) The prosecution also suggested that any newly discovered evidence was "irrelevant" to the current proceedings and could be raised solely in a motion for a new trial. (20 RT 3003-3004.)

On February 10, 1997, the trial court held a hearing, pursuant to Evidence Code section 402, on appellant's motion for a new trial or, in the alternative, admission of Bales's confessions at the penalty phase. Bales was called as a witness, but asserted his Fifth Amendment right not to testify. (24 RT 3060-3062.)

Detective Jess Gutierrez of the Tulare County Sheriff's Office then testified that he had interviewed Bales several times over the previous two weeks. (24 RT 3064.)<sup>2</sup> At an interview which took place on January 28,

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<sup>2</sup> The following exhibits, all of which recorded interviews with Bales, were admitted for the purpose of the 402 hearing: AA [videotape of (continued...)]

1997, Bales initially implicated another individual, Eddie Urias, in Angelica's disappearance. (24 RT 3064-3065.) During the interview, however, Bales also told Detective Gutierrez that Angelica had been wearing high-heeled shoes and necklaces, facts which were not commonly known, and which may have been confidential to law enforcement. Bales also claimed that, when Urias engaged in a sex act with Angelica, she was nude from the waist down and her blouse was pulled up to her chest area. Gutierrez had not told Bales that her clothes had been found in that very condition. (24 RT 3066-3068.)

In the next interview, Bales stated that he had accompanied Urias from the scene of Angelica's abduction to the location where she was raped and murdered. Prior to that time, Gutierrez had not told Bales where Angelica's body had been found, although the location had been publicized. (24 RT 3068-3070.) Bales said that Urias also admitted abducting the girl from Lemoore (i.e., Maria) and leaving her body in a Bakersfield creek. (24 RT 3070-3071.) He also stated that Urias drove a white 1988 Chevy S-10 pickup truck. (24 RT 3072.)<sup>3</sup>

The next day, Bales directed police officers to the location where he

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<sup>2</sup>(...continued)

Bales with investigators at the scene where he said the Ramirez murder occurred, filmed on January 31, 1997, at approximately 12:50 a.m.]; BB [videotape of February 1, 1997, interview]; CC [videotape of February 2, 1997, interview]; DD [audiotape of January 10, 1997, interview]; EE [audiotape of first January 28, 1997, interview]; FF [audiotape of second January 28, 1997, interview]; and, GG [videotape of January 30, 1997, interview]). (20 RT 3020-3021; 21 RT 3027-3028; 23 RT 3044-3048; 24 RT 3101.)

<sup>3</sup> Mychael Jackson testified that Maria's abductor drove a Chevy S-10 pickup. (12 RT 1920-1921, 1974-1975, 1979.)

claimed Urias had left Angelica's body. It was the location where in fact she had been found. (24 RT 3073-3074.) Again, a number of details provided by Bales matched the actual facts developed by the police investigation: his description of the position and location of Angelica's body; his description of the condition of her clothing; his statement that an orange or orange peels had been left at the scene; and his description of where Urias's truck was parked, which generally matched the location where police found tire tracks. (24 RT 3074-3077.)

During an interview held on February 1, 1997, Bales stated that he alone had raped and killed Angelica. He stated that he took earrings and a necklace from Angelica and gave the necklace to one Marie Cosper. Bales described the necklace as a cheap-looking, tarnished gold necklace with an eagle on it. (24 RT 3077.) During that interview, Bales also stated that he himself had killed the Lemoore girl (i.e., Maria). (24 RT 3078.)

After recovering the necklace, Gutierrez showed it to Angelica's mother, who told him that it looked exactly like the one her daughter always wore. When he asked her to describe the emblem on the necklace, she said it was an eagle. (24 RT 3078, 3084-3086.)<sup>4</sup>

Appellant argued that Bales's confession as to Maria Piceno during the February 1, 1997, interview constituted a declaration against interest. He argued further that the prior interview should be admitted to provide context for that admission. Finally, appellant made an offer of proof that

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<sup>4</sup> Eric Anderson, an investigator with the Kings County District Attorney's Office, testified that he had interviewed Angelica's mother a few days earlier. The purpose of the interview apparently was to determine the manner in which Gutierrez showed the necklace to her. According to Anderson, the interview was "inconclusive." (24 RT 3081-3083.)

Detective Gutierrez would testify regarding the “points of accuracy” in Bales’s account of the Angelica Ramirez abduction. His testimony would be offered to further establish the reliability of the confession. (24 RT 3087.)

The prosecution argued that Bales’s statements regarding Angelica were irrelevant to the instant case. (24 RT 3088.) Further, the prosecution argued that his confession to Maria’s kidnaping and murder had been coerced and was the product of improperly leading questions, and that the January 30, 1997, statement constituted inadmissible and unreliable hearsay. (24 RT 3088-3094.)

According to the prosecutor, Bales was asked to provide details about those crimes, but could not. Instead, Bales recanted immediately, claiming he had confessed only because he was confused and scared. (24 RT 3089.) The prosecutor also argued that the officers who interviewed Bales engaged in various coercive tactics: promises of lenient treatment; threats that he would receive the death penalty if he failed to show remorse; and statements that they believed Bales suffered from a mental problem, that he was not responsible for his conduct, that Urias was to blame, and that Angelica’s death was accidental. (24 RT 3089-3091.)

The prosecution also made an offer of proof that: (1) an analyst from the Department of Justice would testify that, based upon serological testing, both Bales and Urias had been excluded as Angelica’s murderer; (2) Urias was working on the days the girls disappeared; (3) Bales had an IQ in the mid-70's and functioned at barely above a mentally retarded level; and (4) that the details provided by Bales were in fact inaccurate. (24 RT 3092-3094.)

Appellant responded that in the four interviews of Bales prior to

February 1, 1997, he was not subjected to any overbearing interrogation. (24 RT 3097.) Although appellant allowed that the police may have engaged in some coercive tactics during the February 1 interview, he argued that, for the following reasons, such tactics did not compromise the confession as to Maria: (1) any implied promises involved in the confession as to Angelica Ramirez were specific to that case; (2) nothing the investigators said suggested that he would receive more lenient treatment if he also confessed to the crimes against Maria; and (3) to the extent the issue was the reliability of Bales's confessions, it was significant that he had provided details of the crimes that were not known to the public. (24 RT 3097-3100.)

The trial court denied appellant's motion for a new trial and excluded the proffered evidence for purposes of the penalty phase. The court found that Bales's confessions were involuntary and unreliable. The trial court also ruled that, because the confessions were inherently unreliable, they were not admissible as declarations against interest under Evidence Code section 1230. Finally, the trial court sustained the prosecution's relevance and hearsay objections. (24 RT 3103-3115.)

As shown below, the trial court abused its discretion by denying appellant's meritorious new trial motion and excluding the Bales evidence from the penalty phase, depriving him of his state law and federal constitutional rights.

**B. The Trial Court Committed Reversible Error By Denying Appellant A New Trial**

**1. Applicable Legal Standard For New Trial**

Penal Code section 1181, subdivision (8), authorizes the trial court to grant a new trial "[w]hen new evidence is discovered material to the

defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial.” The standard of review for denial of a new trial motion is whether the trial court abused its discretion. (*People v. Davis* (1995) 10 Cal.4th 463, 524.) In determining whether the trial court abused its discretion in denying a motion for new trial on the ground of newly discovered evidence, “each case must be judged from its own factual background.” (*People v. Dyer* (1988) 45 Cal.3d 26, 50.)

This Court has held that, in ruling on a motion for a new trial on the ground of newly discovered evidence, it must appear that the evidence presented is: (1) newly discovered and material in nature; (2) not merely cumulative; (3) such that a different verdict would probably result and that the new evidence could not have been produced at the previous trial; (4) admissible in a court of law; and (5) that these facts have been shown by the best evidence of which the case admits. (See, e.g., *People v. Williams* (1962) 57 Cal.2d 263, 270; *People v. McGarry* (1954) 42 Cal.2d 429, 433; see also 6 Witkin & Epstein, *Cal. Criminal Law* (3d ed. 2000) *Criminal Judgment*, §§ 91, 93, pp. 122-126.)

## **2. Bales’s Confessions Were Admissible As Declarations Against Interest (Evid. Code, § 1230)**

Evidence Code section 1200 codifies the hearsay rule and provides in relevant part:

- (a) “Hearsay evidence” is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.
- (b) Except as provided by law, hearsay evidence is inadmissible.

(See also Evid. Code, § 225 [defining “statement” as “(a) oral or written verbal expression or (b) nonverbal conduct of a person intended by him as a

substitute for oral or written verbal expression”].)

An exception to the hearsay rule is codified in Evidence Code section 1230, which provides:

Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant’s pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true.

The proponent of evidence proffered under section 1230 must show “that the declarant is unavailable, that the declaration was against the declarant’s penal interest, and that the declaration was sufficiently reliable to warrant admission despite its hearsay character. [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 462.) A review of the record demonstrates that the criteria set forth in section 1230 were met in this case.

First, Bales was unavailable as a witness because he invoked his privilege against self-incrimination. (24 RT 3058-3062.) Evidence Code section 240, subdivision (a)(1), provides that a witness who is “[e]xempted or precluded on the ground of privilege from testifying” is deemed “unavailable as a witness.” Accordingly, a witness who has invoked the self-incrimination privilege is unavailable within the meaning of section 240. (*People v. Williams* (1968) 265 Cal.App.2d 888, 892-893.)

Second, as the trial court apparently conceded (24 RT 3111), there can be no question that Bales’s confessions were contrary to his penal

interest.<sup>5</sup> Bales's statements regarding the abduction and murder of two young children, and the sexual molestation of one of them, obviously subjected him to "the risk of . . . criminal liability" and "created . . . a risk of making him an object of hatred, ridicule, or social disgrace in the community." (Evid. Code, § 1230.)

Finally, Bale's confessions, particularly his confession to the abduction and murder of Maria, were sufficiently reliable to warrant admission. Although the trial court concluded that the interviewing officers had made both threats and promises to Bales (24 RT 3097-3101, 3111-3114), the fact that Bales had provided details about the Ramirez murder which were not known to the public (24 RT 3066-3068, 3072-3078) demonstrated the reliability of his confessions. Moreover, because the interviewers' conduct did not *induce* Bales's confessions, the authority cited by the trial court in finding his confessions to be coerced was inapposite. (24 RT 3106-3111, citing *People v. Hill* (1967) 66 Cal.2d 536, 549 [a suspect's statement will not be deemed involuntary unless it was induced by police conduct]; *People v. Flores* (1983) 144 Cal.App.3d 459, 469-470 [same].) Defense counsel pointed out that, on January 10, 28, and 30, 1997, the authorities advised Bales of his *Miranda* rights, and Bales waived those rights. Further, according to defense counsel, there was no indicia of undue pressure or coercion in obtaining his statement at any of those interviews, or at the interview held at the crime scene. (24 RT 3096-3097.)

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<sup>5</sup> To the extent the trial court suggested that Bales would not have recognized that confessing to Maria's kidnaping and murder exposed him to further prosecution (24 RT 3114-3115), its suggestion defies logic. Indeed, the fact that Bales recanted the confession demonstrates his awareness of the ramifications of his confession.

Finally, the confession as to Maria's murder was insulated from any supposed coerciveness as to the offenses against Angelica. (24 RT 3099-3100.) As defense counsel noted, any implied promises involved in the confession as to Angelica Ramirez were specific to that case, and nothing the investigators said suggested that he would receive more lenient treatment if he also confessed to the crimes against Maria. (24 RT 3097-3100.) Therefore, it cannot be inferred that the investigators' conduct induced the confession as to Maria.<sup>6</sup> At the very least, then, his confession to the abduction and murder of Maria should have been admitted.

The trial court erroneously relied upon *People v. Badgett* (1995) 10 Cal.4th 330, *People v. Douglas* (1990) 50 Cal.3d 468, and *In re Clyde K.* (1987) 192 Cal.App.3d 710, in ruling that Bales's confession should be excluded because it was coerced and therefore unreliable. In *People v. Badgett, supra*, 10 Cal.4th at pp. 343-345, this Court reaffirmed that a defendant's "relatively limited" right to exclude evidence under the due process clause on the ground that it was involuntarily obtained from a third party requires showing that the third party's statement was unreliable. (See also *People v. Douglas, supra*, 50 Cal.3d at pp. 499-502 [same]; *In re Clyde K., supra*, 192 Cal.App.3d at p. 718, overruled to the extent it is inconsistent with *People v. Badgett, supra*, 10 Cal.4th at p. 350.) In so holding, this Court emphasized that where the statement at issue was made by a third party (as opposed to the defendant), the sole concern is the reliability of the statement. (See *People v. Badgett, supra*, 10 Cal.4th at pp. 347-348.) It follows logically, then, that where the record reveals indicia of the

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<sup>6</sup> The trial court failed to address the reliability of Bales's statements independently of the issue of potential coercion. (24 RT 3103-3115.)

reliability of a third party's statement, such statement must be admitted.

Under these circumstances, Bales's confessions were admissible pursuant to Evidence Code section 1230.

### **3. The Trial's Denial Of A New Guilt Trial Constituted Reversible Error Under State Law And The Federal Constitution**

As noted above, a motion for a new trial made on the ground of newly discovered evidence should be granted where the evidence presented is: (1) newly discovered and material in nature; (2) not merely cumulative; (3) such that a different verdict would probably result and that the new evidence could not have been produced at the previous trial; (4) admissible in a court of law; and (5) that these facts have been shown by the best evidence of which the case admits. (*People v. Williams, supra*, 57 Cal.2d at p. 270; *People v. McGarry, supra*, 42 Cal.2d at p. 433.) Applying these criteria to the instant case, it is clear that the trial court abused its discretion in denying appellant's motion for a new trial.

First, as the trial court acknowledged, Bales's confessions comprised newly discovered evidence that was not available to the defense at the guilt phase. (24 RT 3104.) Bales did not confess to the murder of Maria Piceno until after the guilt verdicts had been reached in the instant case. (24 RT 3077-3078.) In fact, from the record it appears the defense was unaware that Bales had been interviewed by Tulare County authorities until after the guilt phase in appellant's case had ended. (20 RT 2989-2994.) Therefore, appellant could not have uncovered this evidence earlier.

Moreover, the evidence was clearly material, that is, "substantial, essential, relevant, or pertinent." (*People v. Wade* (1995) 39 Cal.App.4th 1487, 1496.) Surely, the jury would have understood that Bales's confession to the kidnap and murder of Maria Piceno was "substantial,

essential, relevant, or pertinent” to the issue of appellant’s guilt. The ultimate question for the jury at the guilt phase was whether the prosecution had proved beyond a reasonable doubt that appellant had kidnaped and murdered Maria. Evidence that Bales had confessed to the crimes constituted powerful “direct or circumstantial evidence linking [a] third person to the actual perpetration of the crime[s]” and thus, without question, was material. (*People v. Hall* (1986) 41 Cal.3d 826, 833.)

Moreover, contrary to the prosecution’s position (24 RT 3088), Bale’s confessions to the offenses against Angelica Ramirez were also relevant to the instant case. The evidence would have reinforced the defense evidence regarding the similarities between the two cases, not only making the defense seem more plausible, but identifying a specific third party suspect. Undoubtedly, the jury would have viewed evidence that a third party had confessed to the offenses against Maria, and that his confessions contained details not known to the general public, as “substantial, essential, relevant, or pertinent” to the question of appellant’s guilt. (See, e.g., 6 Witkin & Epstein, *Cal. Criminal Law, supra*, § 93, p. 125 [“[F]air consideration of competent new evidence tending to negate guilt is essential to any enlightened system of criminal justice.”].)

Second, for the same reasons, Bales’s confessions were not cumulative, that is, “repetitive of evidence already before the jury.” (*People v. Evers* (1992) 10 Cal.App.4th 588, 599, fn. 4.) They far exceeded in detail, scope and probative value the third party culpability evidence presented at guilt phase (i.e., examples of similarities between the two cases and evidence that appellant had been excluded as a suspect in the Ramirez case (14 RT 2406-2412, 2445-2449, 2452-2455; 16 RT 2775-2780). Again, the new evidence established that a specific individual (Bales) had

confessed to the offenses against Maria and Angelica, and even provided details not known to the public.

Third, it is at least probable that a different verdict would have resulted had the jury heard Bales's confessions. Such evidence would have been likely to raise a reasonable doubt in at least one juror's mind, especially given the other problems with the prosecution's case, which are detailed in Arguments II through VII, which appellant incorporates by reference here.

Fourth, as noted above, the confessions, particularly the confession as to the offenses against Maria, were admissible as declarations against interest. (Evid. Code, § 1230.)

Finally, evidence relating to Bales's confessions came primarily from Detective Jess Gutierrez of the Tulare County Sheriff's Office, who had interviewed him and was therefore present when Bales confessed to the crimes. (24 RT 3062-3078, 3084-3086.) In light of Bales's invocation of his Fifth Amendment right not to incriminate himself (24 RT 3058-3062), the testimony of Detective Gutierrez constituted the best evidence available.

In this way, appellant satisfied all the criteria for obtaining a new trial based on newly discovered evidence. Nevertheless, the trial court denied appellant's motion because it deemed Bales's confessions to be unreliable. (24 RT 3103-3115.) This ruling clearly violated well-established high court precedent. As the United States Supreme Court has explained, the credibility of a confession is for the jury to determine. (*Crane v. Kentucky* (1986) 476 U.S. 683, 688.) Thus, the jury is to decide the weight and accuracy of a confession. (*Ibid.*) This is especially true where, as here, the confession is supported by indicia of reliability. (See *id.* at pp. 690-691.) Therefore, by ruling on the reliability of Bales's

confession, the trial court in this case usurped a factfinding function that should have been carried out by the jury. (24 RT 3103-3115.)

Where, as here, the “newly discovered evidence contradicts the strongest evidence introduced against the defendant,” the trial court abuses its discretion in denying a motion for a new trial. (See *People v. Minnick* (1989) 214 Cal.App.3d 1478, 1482.) Because the denial of appellant’s motion constituted a miscarriage of justice, the error warrants reversal. (Cal. Const., art. VI, § 13; *People v. Martinez* (1984) 36 Cal.3d 816, 823 [defendant entitled to new trial after newly discovered evidence corroborated his exculpatory explanation for the presence of his palm print at the crime scene]; *People v. Williams* (1963) 57 Cal.2d 263, 275 [trial court abused its discretion in denying motion for new trial where, among other things, the defendant had proffered newly discovered evidence, i.e., affidavits refuting the victim’s story in its entirety]; *People v. Randle* (1982) 130 Cal.App.3d 286, 293-294 [defendant entitled to new trial where, following conviction on sexual assault, he produced affidavits impugning victim’s credibility].)

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Moreover, as a result of the trial court’s denial of appellant’s motion for a new trial, appellant was precluded from presenting critical third party culpability evidence at the guilt phase, in violation of his federal constitutional rights to a fair trial and to present a defense. (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, §§ 7, 15, 17; *Crane v. Kentucky*, *supra*, 476 U.S. at p. 690 [the federal Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense,” rooted in both the Due Process clause of the Fourteenth Amendment and the Compulsory Process or Confrontation clauses of the Sixth Amendment]; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302-303 [the exclusion of

evidence relating to a third party's confession to crime for which the defendant was being prosecuted violated the defendant's due process right to a fair trial]; *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1003-1008, *cert. denied* (2005) \_\_\_ U.S. \_\_\_, 125 S.Ct. 1637; *People v. Hall* (1986) 41 Cal.3d 826, 831-833; *People v. Cole* (1979) 94 Cal.App.3d 854, 860 [ruling on merits of Cole's claim that trial court's denial of his motion for a new trial denied his constitutional right to a fair trial], disapproved on other grounds in *People v. Lohbauer* (1981) 29 Cal.3d 364 and *In re Kelly* (1983) 33 Cal.3d 267.)

There is little question that appellant would have attempted to introduce Bales's confessions had they come to light just a few days earlier, during the guilt phase. Moreover, it is likely that the trial court would have admitted the evidence. To be admissible, third party evidence "need only be capable of raising a reasonable doubt of defendant's guilt." (*People v. Hall, supra*, 41 Cal.3d at p. 833.) Further, there must be "direct or circumstantial evidence linking the third person to the actual perpetration of the crime. (*Ibid.*) As demonstrated above, Bales's confessions were sufficiently reliable to meet the criteria set forth in *Hall*. However, due to the mere happenstance that the confessions came to light just three days after the guilt verdicts were returned (18 RT 2937-2938, 18A RT 2948), appellant was denied the opportunity to offer evidence that was "central to [his] claim of innocence," and therefore his right to present a complete defense was rendered "an empty one." (*Crane v. Kentucky, supra*, 476 U.S. at p. 690.) As a result of the denial of his new trial motion, appellant was deprived "of the basic right to have the prosecutor's case encounter and 'survive the crucible of meaningful adversarial testing.'" (*Id.* at pp. 690-691, quoting *United States v. Cronin* (1984) 466 U.S. 648, 656.)

The trial court's error in denying the motion also had the legal consequence of violating his right to due process. (*People v. Partida* (2005) 37 Cal.4th 428, 436.) As this Court recognized, consideration of such a due process argument on appeal "entails no unfairness to the parties," who had an opportunity to litigate the matter. (*Ibid.*) Here, the trial court had notice of, and an opportunity to consider, appellant's motion for a new trial or, in the alternative, admission of the evidence at the penalty phase. (See Section A, *supra.*) Finally, the trial court's arbitrary deprivation of appellant's right to a new trial under section 1181, subdivision (8), also violated his federal due process rights. (*Hicks v. Oklahoma* (1983) 447 U.S. 343, 346.)

**C. Even If A New Trial On Guilt Was Not Required, The Trial Court Prejudicially Erred In Excluding Bales's Confession As Mitigating Evidence At The Penalty Phase**

Even if the trial court did not abuse its discretion in denying appellant's motion for a new trial, it erred in excluding Bales's confessions from the penalty phase. As appellant demonstrates below, the confessions were admissible for the following reasons: (1) they were admissible as declarations against interest under Evidence Code section 1230; and, (2) even if the confessions failed to meet the criteria set forth in Evidence Code section 1230, they were sufficiently reliable to warrant admission at the penalty phase. In either event, Bales's confessions constituted significant "lingering doubt" evidence. The trial court's exclusion of that evidence, therefore, violated appellant's rights under state law and the federal Constitution to present mitigating evidence, to rebut or mitigate the aggravating evidence, and to a reliable penalty verdict.

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**1. The Trial Court Disregarded Well-Settled California Law Permitting A Defendant To Present Evidence In Support Of A “Lingering Doubt” Theory**

In excluding evidence of Bales’s confessions at the penalty phase, the trial court disregarded well-settled California law that a capital defendant who did not have an opportunity at the guilt phase to adduce specific evidence showing his possible innocence may present that evidence at the penalty phase.

In *People v. Terry* (1964) 61 Cal.2d 137, 153, overruled on another ground in *People v. Laino* (2004) 32 Cal.4th 878, 892, this Court held that the trial court should admit “evidence tending to show defendant’s possible innocence of the involved crimes” so that the jury may consider any lingering doubts of his guilt as a mitigating factor in the penalty determination. Since *Terry*, cases have held that “residual doubt about a defendant’s guilt is something that juries may consider at the penalty phase under California law, and a trial court errs if it excludes evidence material to this issue.” (*People v. Hawkins* (1995) 10 Cal.4th 920, 966-967, overruled on other grounds in *People v. Blakely* (2000) 23 Cal.4th 82, 89, and *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

In *Terry*, which involved a retrial of the penalty phase (*id.* at p. 140), this Court pointed out,

if the same jury determines both guilt and penalty, the introduction of evidence as to defendant’s asserted innocence is unnecessary on the penalty phase because the jury will have heard that evidence in the guilt phase. If, however, such evidence is excluded from the penalty phase [retrial], the second jury necessarily will deliberate in some ignorance of the issue.

(*People v. Terry, supra*, 61 Cal.2d at p. 146.) No case limits lingering doubt evidence to the evidence introduced at the prior guilt trial. Indeed,

the opinions in several retrial cases reveal that the defendants did introduce additional exonerating evidence, either as to guilt or as to the truth of the special circumstances, at their penalty retrials. (Compare *People v. Anderson* (2001) 25 Cal.4th 543, 561, with *People v. Anderson* (1987) 43 Cal.3d 1104, 1117; *People v. Davenport* (1995) 11 Cal.4th 1171, 1191-1192,<sup>7</sup> with *People v. Davenport* (1985) 41 Cal.3d 247, 256-260; *People v. Easley* (1988) 46 Cal.3d 712, 719, with *People v. Easley* (1983) 34 Cal.3d 858, 864-867.)<sup>8</sup>

The same latitude to present additional lingering doubt evidence is even more appropriate where, as here, evidence casting doubt on the conviction arises after a guilt verdict has been rendered. In this case, no trier of fact, whether a court or a jury, heard evidence that Bales had confessed to the abduction and murder of Maria Piceno. That is, appellant's jury deliberated the penalty phase in *complete* ignorance of the issue. (Cf. *People v. Terry*, *supra*, 61 Cal.2d at p. 146.)

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<sup>7</sup> *People v. Davenport*, *supra*, 11 Cal.4th 1171 was overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.

<sup>8</sup> See also *People v. Alcala* (1992) 4 Cal.4th 742, where both phases of the trial were heard by the same jury. At the penalty phase “defendant testified on his own behalf (not having done so at the guilt phase)” and denied committing the murder. (*Id.* at p. 766.) This Court did not indicate any disapproval of that procedure; it held instead that the exclusion of evidence of wrongful convictions in other capital cases “did not prevent defendant from introducing *relevant evidence* regarding the circumstances of [the victim’s] death, in an attempt to create a lingering doubt. Indeed, defendant’s own testimony at the penalty phase, denying the commission of any offense against [the victim], attempted to create such a doubt.” (*Id.* at p. 807, italics added; see also *People v. Fierro* (1991) 1 Cal.4th 173, 203 [noting that the defendant testified at the penalty phase, but not the guilt phase, of the trial].)

Accordingly, if, as California law unequivocally holds, lingering doubt may be considered as mitigation, then the defense must be permitted to introduce evidence giving rise to that doubt.

**2. *In Re Gay*, Decided After The Trial In This Case, Does Not Require A Different Result**

In *In re Gay* (1998) 19 Cal.4th 771, 814, this Court held that evidence that does not come within the category of mitigating evidence which must or may be admitted at the penalty phase under either Penal Code section 190.3 or the Eighth and Fourteenth Amendments to the United States Constitution is not admissible at the penalty phase because it is not relevant to the circumstances of the offense or the defendant's character and record.<sup>9</sup> This holding ignored three independent, but related, rules of stare decisis.

First, "the language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts." (*Trope v. Katz* (1995) 11 Cal.4th 274,

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<sup>9</sup> The holding in *Gay* relies exclusively on the holding in *People v. Zapien* (1993) 4 Cal.4th 929, 989. In *Zapien*, the evidence that was excluded by the trial court was that the defendant had been offered prior to trial a plea bargain that included a sentence of life without the possibility of parole, and that the prosecutor (Van Camp) committed misconduct in interviewing a potential witness who did not testify at trial. In upholding the ruling of the trial court, the *Zapien* court held that "the trial court acted within its traditional authority in excluding evidence relating to Van Camp's alleged prosecutorial misconduct in interviewing a potential witness who was not called to testify, and in excluding evidence of a plea bargain offered by the prosecution but rejected by defendant" because "[t]he proffered evidence did not bear upon defendant's character, prior record, or the circumstances of his offense and, thus, did not constitute mitigating evidence" under *Lockett v. Ohio* (1978) 438 U.S. 586. (*People v. Zapien*, *supra*, 4 Cal.3d at p. 989.)

284, citations and internal quotation marks omitted; accord, *Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.) Because this Court in *Gay* was reviewing a case which did not involve new evidence that was unavailable at the time of the guilt phase, its holding regarding the admissibility of lingering doubt evidence does not govern this case.

Second, just as the facts of the case before the court must be considered, so too must the statements of law in the opinion be examined. “Cases are not authority for propositions they do not consider. [Citation.]” *People v. Martinez* (2000) 22 Cal.4th 106, 118; accord, *People v. Wells* (1996) 12 Cal.4th 979, 984, fn. 4; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.) Because the decision in *Gay* says nothing about the admission of lingering doubt evidence in cases in which the penalty jury did not hear the lingering doubt evidence, and that evidence could not have been discovered and presented as part of the guilt phase defense, it provides no authority for the exclusion of that evidence in this case.

Third, overruling by implication is disfavored (*Agostini v. Felton* (1997) 521 U.S. 203, 237), and a precedent cannot be overruled in dictum. (*Trope v. Katz, supra*, 11 Cal.4th at p. 287.) *People v. Terry, supra*, 61 Cal.2d at pp. 146-147, 153, held – without qualification – that a defendant was entitled to introduce lingering doubt evidence at a penalty retrial, and that same unqualified holding was repeated in subsequent cases. (E.g., *People v. Davenport, supra*, 11 Cal.4th at p. 1193; *People v. Hawkins, supra*, 10 Cal.4th at p. 966-967; see also *People v. Wader* (1993) 5 Cal.4th 610, 660-661,<sup>10</sup> *People v. Alcala* (1992) 4 Cal.4th 742, 766, 807,<sup>11</sup> and

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<sup>10</sup> In *People v. Wader, supra*, 5 Cal.4th 610, 660-661, this Court held:

(continued...)

*People v. Cox* (1991) 53 Cal.3d 618, 677,<sup>12</sup> all of which hold that lingering doubt evidence is admissible at the penalty phase of a capital case.)<sup>13</sup>

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<sup>10</sup>(...continued)

Eighth Amendment concerns are satisfied when a capital defendant is not deprived of the opportunity to present evidence on lingering doubt and to have the jury weigh this evidence. “The fair opportunity to present relevant [lingering doubt] evidence and to argue forbearance thereon sufficiently preserves the defendant’s interest in having the jury consider fully all germane aspects of the offense and the offender . . . .” [Citations.]

<sup>11</sup> In *People v. Alcala*, *supra*, 4 Cal.4th 742, the defendant presented evidence at the penalty phase “regarding the circumstances of [the victim’s] death, in an attempt to create a lingering doubt. Indeed, defendant’s own testimony at the penalty phase, denying the commission of any offense against [the victim] attempted to create such a doubt. Defendant also presented testimony which sought to undermine the prosecution’s theory regarding the gold ball earrings found in the Seattle storage locker.” (*Id.* at p. 807.)

<sup>12</sup> *People v. Cox*, *supra*, 53 Cal.3d at pp. 676-677, was the first case to decide the issue of the admissibility of lingering doubt evidence at the penalty phase of a capital trial under the 1978 death penalty law, the law under which petitioner’s case was tried. In *Cox*, this Court, after analyzing the decisions of the United States Supreme Court in *Lockett v. Ohio*, *supra*, and *Franklin v. Lynaugh* (1988) 487 U.S. 164, 177-180, held that a defendant in a capital case “may not be precluded from offering [lingering doubt] evidence or arguing its relevance in mitigation.”

<sup>13</sup> See also *People v. Memro* (1995) 11 Cal.4th 786, 883, where this Court held:

We have held that neither the federal nor the state Constitution entitles a defendant to an instruction on lingering doubt. [Citation omitted.] But [t]his is not to say that the jury’s consideration of any such doubt is improper; defendant may urge his possible innocence to the jury as a factor in

(continued...)

Therefore, the statements in *Gay*, which did not address admission of evidence at a penalty retrial, cannot be viewed as changing the rule that *Terry* established.

For the purposes of the instant case, it is significant that this Court has recognized: (1) the right of a defendant to present, and argue the significance of, “lingering doubt” evidence at a penalty retrial, i.e., to a penalty phase jury which has not previously heard guilt phase evidence relating to lingering doubt (*People v. Terry, supra*, 61 Cal.2d at pp. 145-147; *People v. Davenport, supra*, 11 Cal.4th at p. 1193; *People v. Hawkins, supra*, 10 Cal.4th at p. 966-967); and (2) that a defendant may present “lingering doubt” evidence at penalty phase over and above what he presented at the guilt phase (*People v. Alcala, supra*, 4 Cal.4th at p. 807).

Finally, to the extent the *Gay* opinion precludes a defendant from presenting evidence in support of a “lingering doubt” defense, the opinion violates his rights to present mitigating evidence under the Eighth Amendment and Due Process clause, at least where the jury has not already had an opportunity to hear that evidence. (Cf. *Oregon v. Guzek* (2006) \_\_\_ U.S. \_\_\_, 126 S.Ct. 1226, discussed in Section C.4, *infra*.)

Under these circumstances, the trial court was bound to follow *People v. Hawkins, supra*, 10 Cal.4th at pp. 966-967, *People v. Terry, supra*, 61 Cal.2d at pp. 146-147, 153, and other opinions permitting the

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<sup>13</sup>(...continued)  
mitigation. [Citation omitted.] An instruction of the type given here . . . , derived from factor (k) of section 190.3, adequately supports a defendant’s presentation of *evidence* or argument that lingering doubt militates against a verdict of death. [Citation omitted.]

(Italics added.)

introduction of lingering doubt evidence to a jury that did not have a prior opportunity to hear it. Its failure to do so deprived appellant of his right “to have his trial conducted in accordance with the law prevailing at the time.” (*People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 872.)

**3. Evidence of Bales’s Confessions Was Relevant Under Both Factor (a) and Factor (k) Of Penal Code Section 190.3**

Penal Code section 190.3, factor (a), permits the defense, as well as the prosecution, to introduce evidence of “[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the presence of any special circumstances found to be true . . . .” (*People v. Smith* (2005) 35 Cal.4th 334, 352.) Pursuant to section 190.3, factor (k), the defendant may offer in mitigation “[a]ny . . . circumstance [beyond those set forth in factors (d) through (j)] that attenuates the gravity of the crime even though it is not a legal excuse for the crime.” The evidence regarding Bales’s confessions, like any evidence that raises a lingering doubt, was relevant under both factors. Not only were the confessions relevant, but, as noted above, they were admissible as declarations against interest within the meaning of Evidence Code section 1230.

This Court has acknowledged that it has adopted an expansive interpretation of factor (a), explaining that “[t]he word ‘circumstances’ as used in factor (a) of section 190.3 does not mean merely the immediate temporal and spatial circumstances of the crime. Rather, it extends to ‘[t]hat which surrounds materially, morally, or logically’ the crime. [Citation.]” (*People v. Smith, supra*, 15 Cal.3d at p. 352, quoting *People v. Edwards* (1991) 15 Cal.3d 787, 833.) On that basis, this Court has permitted the introduction of a wide array of evidence, including: the testimony of a clinical psychologist that crimes such as those committed by

the defendant are generally committed by sexual sadists who derive sexual pleasure from carrying out a fantasy involving restraint and molestation of a child victim (*People v. Smith, supra*, 15 Cal.3d at p. 354); victim impact evidence (*People v. Edwards, supra*, 15 Cal.3d at pp. 834-835); evidence of a massive five-day search for the defendant after the crime was discovered (*id.* at pp. 831-832); a photograph of the victim when alive (*People v. Lucero* (2000) 23 Cal.4th 692, 714-715); and evidence of the defendant's hatred of his wife's religion (*People v. Nicolaus* (1991) 54 Cal.3d 551, 581).

Evidence that a third party had confessed to the charged offenses directly concerned the circumstances of the crimes. That is, evidence that appellant had not committed the crimes directly implicated the central circumstances of the crime: what happened, and who did it?

Similarly, it is highly likely that the jury would have found Bales's confessions to constitute powerful factor (k) evidence. Appellant's deathworthiness presupposed and was entirely dependent upon his guilt of the charged crimes.<sup>14</sup> The case in aggravation consisted solely of the circumstances of the crime, since appellant had no prior record. Evidence that, in fact, he had not committed the crimes would have changed radically the jury's picture of appellant – i.e., whether he was in fact the person reflected by its guilt verdicts – and whether he deserved the death penalty.

Accordingly, the trial court should have admitted this relevant

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<sup>14</sup> Factor (j) of Penal Code section 190.3 provides that the jury may consider as mitigation the defendant's "relatively minor" participation in the commission of the offense; surely, appellant's jury would have considered as mitigating evidence that he had played no role whatsoever in the commission of the offense.

evidence.

**4. Exclusion Of Bales's Confessions Violated Appellant's State And Federal Constitutional Rights**

The trial court's exclusion of Bales's confessions, particularly his confession as to the offenses against Maria, violated appellant's constitutional right to present relevant mitigating evidence under both state law (*People v. Davenport, supra*, 11 Cal.4th at p. 1193; *People v. Hawkins, supra*, 10 Cal.4th at p. 966-967; *People v. Wader, supra*, 5 Cal.4th at pp. 660-661; *People v. Alcala, supra*, 4 Cal.4th at p. 807, *People v. Cox, supra*, 53 Cal.3d at p. 677; *People v. Terry, supra*, 61 Cal.2d at pp. 146-147, 153) and, in light of the unique circumstances present in this case, the federal Constitution (*Tennard v. Dretke* (2004) 542 U.S. 274, 285; *Skipper v. South Carolina* (1986) 476 U.S. 1, 7; *Lockett v. Ohio* (1978) 438 U.S. 586, 614-616). The trial court's exclusion of the confessions also violated appellant's constitutional right to fair and reliable capital sentencing (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328, overruled on other grounds in *Atkins v. Virginia* (2002) 536 U.S. 204; *Johnson v. Mississippi* (1987) 486 U.S. 578, 584; *People v. Horton* (1995) 11 Cal.4th 1068, 1135) and to due process (*Green v. Georgia* (1979) 442 U.S. 95, 97; *Gardner v. Florida* (1977) 430 U.S. 349, 362).

Exclusion of Bales's confessions violated appellant's Eighth Amendment right to present mitigating evidence. Again, evidence that Bales had confessed to the kidnaping and murder of Maria Piceno, which was admissible as a declaration against interest under Evidence Code section 1230, directly implicated the circumstances of the charged offenses and inevitably would have cast appellant's character and record in a more favorable light. The probative value of the confessions was especially

pronounced given the noteworthy similarities between the Piceno and Ramirez cases. (14 RT 2406-2412, 2445-2449, 2452-2455.) In addition, that Urias possessed a white 1988 Chevy S-10 pickup truck (24 RT 3072) was another intriguing fact, given Mychael Jackson's testimony that Maria's abductor drove a Chevy S-10 pickup (12 RT 1920-1921, 1974-1975, 1979). Therefore, Bales's confession constituted critical mitigating evidence within the meaning of *Lockett v. Ohio, supra*, 438 U.S. at pp. 614-616, as well as *People v. Terry, supra*, 61 Cal.3d at p. 153.

Appellant acknowledges that the United States Supreme Court recently held that neither the Eighth Amendment nor the Fourteenth Amendment grant a capital murder defendant the right to present additional alibi evidence at the penalty phase which is inconsistent with his prior conviction. (*Oregon v. Guzek, supra*, 126 S.Ct. at pp. 1230-1233.) However, the high court declared that its holding was a "narrow" one, and it rested upon three circumstances which are not all present in this case: (1) although sentencing traditionally concerns *how*, not *whether*, a defendant committed the crime, the evidence at issue in *Guzek* (i.e., alibi evidence) concerned only *whether*, not *how*, he did so; (2) the parties previously litigated the issue to which the evidence is relevant, i.e., whether the defendant committed the basic crime; and (3) the negative impact of a rule restricting the defendant's ability to introduce *new* alibi evidence was minimized by the fact that Oregon state law gave the defendant the right to present to the sentencing jury *all* the evidence of innocence from the original trial. (*Ibid.*)<sup>15</sup>

In contrast, appellant's jury never had an opportunity to consider

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<sup>15</sup> *Guzek* involved a retrial of the sentencing hearing. (*Id.* at pp. 2-5.)

Bales's confessions, which did not occur until after the guilt phase had ended. Unlike Guzek, who had the opportunity to present evidence of his innocence but simply failed to do so, appellant never had an opportunity to present such evidence. Therefore, when appellant's jury "litigated" the issue of *whether* he had committed the offenses, it did so without having heard this crucial evidence. Moreover, it was through no fault of appellant that his jury did not hear the evidence. As such, it is inconsequential that appellant's evidence of third party culpability concerned *whether*, not *how*, he committed the offenses.

Thus, given its admittedly "narrow" holding, the *Guzek* Court did not rule that the Eighth and Fourteenth Amendments do not confer a right to present "lingering doubt" evidence where, as here, the jury has not had a meaningful opportunity to consider such evidence.<sup>16</sup>

To deny appellant an opportunity to present newly discovered evidence of his innocence would elevate interest in finality over fundamental fairness. Appellant is entitled to relief in light of the unique circumstances of his case – i.e., a third party's confession following the guilt phase but before the penalty phase.

The trial court's refusal to admit the evidence also violated appellant's due process and Eighth Amendment rights to rebut or mitigate the aggravating evidence and victim impact evidence. (See *Gardner v. Florida* (1977) 430 U.S. 349, 362 [defendant's due process rights were violated by sentencer's consideration of prosecution evidence that he did

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<sup>16</sup> In any event, the Court noted that a defendant may present lingering doubt evidence where permitted to do so under state law. (*Id.* at pp. 2-5.) Such is the case in California, as discussed in Section C.1-3, *supra*.

not have an opportunity to deny or explain]; *People v. Harris* (2005) 37 Cal.4th 310, 374 [defendant may present evidence to rebut victim impact testimony].) Because appellant had no history of violent acts or crimes, the circumstances of the offense and victim impact testimony comprised the only aggravating evidence against him. With respect to appellant's deathworthiness, the aggravating nature of the prosecution evidence would have been blunted, if not eliminated altogether, by the proffered evidence, which would have suggested that he was actually innocent of the charged offenses. The trial court's ruling that Bales's confessions were inadmissible denied appellant his constitutional right to rebut aggravating evidence.

Even if the confessions constituted hearsay, their exclusion also deprived appellant of a fair trial in violation of the due process clause of the Fourteenth Amendment. (See *Chambers v. Mississippi, supra*, 410 U.S. at pp. 302-303.) Due process requires the admission of hearsay evidence at the penalty phase of a capital trial, even though a state's evidentiary rules are to the contrary, "if both of the following conditions are present: (1) the excluded testimony is 'highly relevant to a critical issue in the punishment phase of trial,' and (2) there are substantial reasons to assume the reliability of the evidence." (*People v. Kaurish* (1990) 52 Cal.3d 648, 704, quoting *Green v. Georgia, supra*, 442 U.S. at p. 97; see also *Chambers v. Mississippi, supra*, 410 U.S. at pp. 302-303.) Therefore, even if Bales's confessions could not have been admitted at the guilt phase, they were relevant and sufficiently reliable to justify their admission at the penalty phase, and therefore Eighth Amendment and due process considerations demanded their admission. (See *Green v. Georgia, supra*, 442 U.S. at p. 97; *Chambers v. Mississippi, supra*, 410 U.S. at pp. 302-303; *People v. Kaurish, supra*, 52 Cal.3d at p. 704.)

*Green v. Georgia, supra*, 442 U.S. at p. 97 is particularly instructive. There, the defendant attempted to prove, during the penalty phase of his trial, that he had not been present when the murder occurred. To that end, he sought to introduce the testimony of his codefendant's cellmate, who was prepared to testify that the codefendant had admitted that he was the sole murderer. The trial court excluded the proffered testimony. The high court, however, found substantial indications of the reliability of the cellmate's testimony: there was significant corroborating evidence, the statement was against the codefendant's penal interest, and the prosecution itself had relied on the cellmate's testimony during its case against the codefendant. (*Green v. Georgia, supra*, 442 U.S. at p. 97; cf. *People v. Kaurish, supra*, 52 Cal.3d at p. 704-705 [trial court did not err in denying defendant's motion to permit the playing of his entire tape-recorded interrogation; there was no indication that exculpatory statements contained therein were anything but self-serving].)

Furthermore, the exclusion of the proffered evidence infringed appellant's Eighth and Fourteenth Amendment rights to a fair, accurate, and reliable capital sentencing determination. The United States Supreme Court has declared that "capital sentencing must be reliable, accurate, and nonarbitrary," and explained that, because death is qualitatively different from other punishments, a capital sentencing determination requires a heightened degree of reliability. (*Saffle v. Parks* (1990) 494 U.S. 484, 493; *Penry v. Lynaugh, supra*, 492 U.S. at p. 328; *Johnson v. Mississippi, supra*, 486 U.S. at p. 584; *People v. Horton, supra*, 11 Cal.4th at p. 1135; see also *Lankford v. Idaho* (1991) 500 U.S. 110, 125, fn. 21; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 328-329; *California v. Ramos* (1983) 463 U.S. 992, 998-999; *Lockett v. Ohio, supra*, 436 U.S. at p. 604; *Woodson v.*

*North Carolina* (1976) 428 U.S. 280, 305 (lead opn. of Stewart, Powell, and Stevens, JJ.)) The proffered evidence was crucial to a reliable assessment of appellant's deathworthiness. The trial court's exclusion of the evidence prevented the jury from basing its capital sentencing determination on the full complement of salient facts. A death verdict rendered at a trial in which the jury did not hear critical defense evidence pertaining to the circumstances of the offense, as well as to appellant's character and record, could not be fair, accurate, or reliable. (See *In re Gay, supra*, 19 Cal.4th at p. 814; § 190.3.)

Finally, for the reasons set forth above, the trial court's error in excluding Bales's confessions also had the legal consequence of violating the federal constitutional rights discussed above, i.e., his due process rights to a fair trial, to present mitigating evidence and to rebut aggravating evidence, and his Eighth Amendment right to a reliable penalty verdict. (*People v. Partida, supra*, 37 Cal.4th 428, 436.) Again, the trial court had notice of, and an opportunity to consider, appellant's motion for a new trial or, in the alternative, admission of the evidence at the penalty phase. (See Section A, *supra*.)

In appellant's case, the State's interest in excluding Bales's confessions did not outweigh appellant's interest in a fair and reliable penalty determination, even if (1) the evidence constituted hearsay or (2) could not have been admitted at the guilt phase pursuant to Evidence Code section 1230. Bales's confessions were not only reliable, they were, without question, highly relevant to appellant's penalty case: evidence that appellant did not commit the charged offenses certainly implicated the circumstances of those offenses and would have placed his character and record in a significantly more favorable light, and therefore was relevant.

(*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604; see also *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 7.) As the trial court acknowledged, Bales's confessions comprised newly discovered evidence which was not available to the defense at the guilt phase. (24 RT 3104.) Indeed, the third party culpability evidence presented at guilt phase – namely, examples of similarities between the crimes charged and the Ramirez case and evidence that appellant had been excluded as a suspect in the latter (16 RT 2775-2780; 24 RT 2406-2412, 2445-2449, 2452-2455) – paled in comparison to Bales's confessions in terms of detail, scope and probative value. (See *Chambers v. Mississippi*, *supra*, 410 U.S. at p. 294 [as a result of state's evidentiary rules, which unfairly barred evidence of third party culpability, defense was far less persuasive than it might have been].) Appellant's deathworthiness presupposed and was entirely dependent upon his guilt; the jurors would not have sentenced appellant to death if they believed he was innocent.

Therefore, the trial court abused its discretion in excluding Bales's confessions.

**5. Because The Trial Court's Error Was Prejudicial, Appellant's Death Sentence Must Be Reversed**

Evidence that someone other than appellant committed the offenses against Maria was the heart of his defense at both the guilt and penalty phases. The exclusion of Bales's confessions undercut this defense at the penalty phase. Notwithstanding the guilt verdicts, it is likely that the jurors would have voted for life imprisonment without possibility of parole had they heard evidence that a third party suspect had confessed to the crimes; this was powerful evidence of actual innocence which the jury had not already considered. (See Koosed, *Averting Mistaken Executions By*

*Adopting the Model Penal Code's Exclusion of Death in the Presence of Lingering Doubt* (2001) 21 N. Ill. U. L. Rev. 41, 54-60 [discussing several studies demonstrating the "primacy" of lingering doubt as the reason for giving a life sentence rather than the death penalty]; Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?* (Oct. 1998) 98 Colum. L. Rev. 1538, 1563 [study of jurors who sat in 41 capital murder cases showed that "[r]esidual doubt' over the defendant's guilt is the most powerful 'mitigating' fact"].)

The proffered evidence would also have countered, even arguably eliminated, the force of the aggravating and victim impact evidence. Appellant's deathworthiness presupposed and was entirely dependent upon his guilt of the charged crimes. If the trial court had admitted evidence that in fact someone else committed those crimes, it is likely that the jury would have given less aggravating weight to the prosecution evidence.

Because the State cannot demonstrate beyond a reasonable doubt that the trial court's error was harmless beyond a reasonable doubt, appellant's death sentence must be reversed. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Even if this Court were to apply the lower standard review set forth in *People v. Brown* (1988) 46 Cal.3d 432, 446-447, appellant's death sentence must be reversed, because there exists a reasonable possibility the defendant would not have been sentenced to death if the trial court had not erred.

Accordingly, under any standard of review, the judgment of death must be vacated.



DATED: July 13, 2006

Respectfully submitted,

MICHAEL J. HERSEK  
State Public Defender

A handwritten signature in black ink, appearing to read "Gary D. Garcia". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

GARY D. GARCIA  
Deputy State Public Defender

Attorneys for Appellant

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**DECLARATION OF SERVICE**

Re: People V. GENE ESTEL McCURDY

No. S061026  
Kings County Sup. Ct.  
No. 95CM5316

I, ROSEMARY MENDOZA, 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**

**ARGUMENT  
VII  
(Pages 221-253)**

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

Bill Lockyer  
Attorney General of the State of California  
Attn.: Catherine Tennant  
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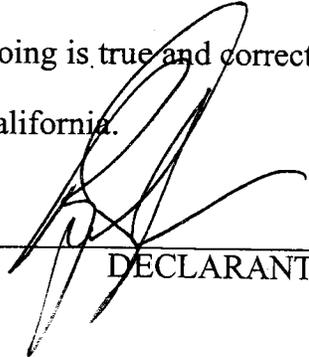
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Each said envelope was then, on July 13, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on July 13, 2006, at San Francisco, California.

  
\_\_\_\_\_  
DECLARANT