SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. MICHAEL FLINNER, Defendant and Appellant.	Supreme Court No. S123813 Superior Court No. SCE211301

AUTOMATIC APPEAL FROM THE
SUPERIOR COURT OF SAN DIEGO COUNTY

Honorable Allan J. Preckel

APPELLANT'S REPLY BRIEF

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Under appointment of the
California Supreme Court

DEATH PENALTY

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Argument

I

The transfer of appellant to a distant jail, and the imposition of serious restrictions on his access to counsel, made by the sheriff after consulting with the prosecutor and trial court without any hearing, violated appellant's rights to counsel and due process.

Appellant argues his fundamental constitutional rights to counsel and due process were violated by the trial court's order, made after secret meetings between the sheriff, the prosecutor and the trial court,

to move him from the downtown San Diego jail, where he had been ordered housed to accommodate the needs of trial counsel, to a more distant jail where he was placed in administrative segregation, and limited in his ability to consult with counsel. (AOB 46-85.) Restrictions in addition to solitary confinement included limited phone calls, visits, privacy during limited visits, and no access to members of the defense team other than his two primary lawyers, John Mitchell and Sandra Resnick.

All of this took place without any hearing allowing defense counsel to challenge the necessity for the restrictions. In fact, the jailer expressly refused to answer appellant's direct question about the reasons for the drastic changes, and the trial court ordered defense counsel to withhold from appellant the reasons for his new restricted status. (8 RT 1142-1143; and see sealed order designated Court Exhibit No. 112.) The information leading to the changes came from a jailhouse informant who had previously provided testimony in another case that led to a substantial reduction in his own sentence, and whose allegations in this case were accepted at face value by the court without any opportunity for questioning by defense counsel. (8 RT 1140.)

Appellant argues that the decision to move him to solitary

confinement in a distant location, along with the other restrictions, was an overreaction by the parties acting on behalf of the state, and that had appellant been given the hearing that due process requires, he would have established that the state's concerns could have been met by less drastic measures.

Limiting appellant's access to counsel as described above in his capital case violated his fundamental right to procedural due process, his right to counsel and constituted outrageous government conduct. (*Rochin v. California* (1952) 342 U.S. 165, 168; *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1263; *Boulas v. Superior Court* (1986) 188 Cal.App.3d 422, 435.)

Respondent seeks to minimize the constitutional violations by arguing the defense failed to properly object to the violations (RB 35), neither the prosecutor nor the trial court were involved (RB 36), the trial court had not previously ordered appellant to be housed downtown (RB 36), the jailer has the authority to impose whatever restrictions it deems necessary without a hearing (RB 36-37), and the restrictions imposed did not unfairly limit appellant's access to counsel. (RB 37-38.)

Respondent first argues that appellant forfeited the issues raised in the brief by failing to move for a dismissal based on the violation of

his right to due process or his right to counsel. (RB 35.)

However, respondent fails to acknowledge that the decisions being challenged were made at secret meetings that did not involve defense counsel. There can be no forfeiture where the decisions were made at meetings where defense counsel was excluded and the transcripts were sealed. While the defense lawyers were present at certain later discussions, they were never fully apprised of the relevant facts including that meetings had taken place between the sheriff, members of the District Attorney's Office, the trial judge and the presiding judge of the superior court. Defense counsel was told that the prosecution and the trial court had no input into the decisions affecting appellant's modified status, but the record shows that this was not true. (8 RT 1122, 1132.) And the trial court expressly forbade counsel from disclosing any of the relevant facts to appellant, an order counsel complained would adversely affect his relationship with the appellant and his ability to represent his client in his capital case. (8 RT 1146-1147.) It was only later that the court relaxed that restriction.

Trial counsel did complain to the court about the restrictions imposed, the prosecutor's involvement and the order forbidding an open discussion with appellant. (8 RT 1146-1147.) The purpose of objecting

is to put the court on notice of the specific grounds the party is complaining of. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Under the circumstances, these complaints by counsel must be considered a sufficient objection to justify review of the alleged violation. (See, e.g., *People v. McCullough* (2013) 56 Cal.4th 589, and cases cited at 593; see also *People v. Williams* (1998) 17 Cal.4th 148, 161-162 n.6.)

Respondent next addresses the merits of the claim and argues that neither the prosecutor nor the trial court were responsible for appellant's out-of-town transfer. (RB 36.) He acknowledges that both were present at the secret meetings where the issues were discussed, but claims the decisions were ultimately made by the sheriff. (RB 36.)

But respondent's claim is not supported by the facts, and to the extent that there is any ambiguity about the roles of the court or the prosecutor in the ultimate decisions, this is precisely why a full hearing was required where defense counsel could have challenged all of the assertions made by the participants in the secret meetings.

The record shows the prosecutor was very much involved in appellant's transfer and the new restrictions that accompanied his move to Vista. When defense attorney Sandi Resnick complained to the jail captain and a lieutenant that the restrictions were improper and

impaired her ability to defend appellant, she was told that the restrictions were put in place at the urging of the prosecutor and had been authorized by the trial court. (8 RT 1122.) In fact, at the precise moment that she was complaining to the jail authorities, they informed her that Deputy District Attorney Paul Morley, who was in charge of "special operations" within the office, had called to ensure the conditions of confinement that his office had apparently requested were being implemented by jail staff. (8 RT 1122, 1132.)

The matter was handled in a way that makes it difficult to know with certainty the level of involvement by the prosecutor and the trial court. But the record does show there was greater involvement for each than was disclosed to defense counsel.

Assuming the jailhouse informant, who was looking for a reduced sentence, was correct in suggesting that appellant had sought the addresses of Deputy DA Rick Clabby, Judge Preckel and others, and that a secret meeting of some kind was appropriate, there is no reason the facts of the meeting could not be disclosed to defense counsel afterward. Defense counsel Mitchell and Resnick were left in the dark as to the reasons for this major disruption in their ability to defend appellant in a case where the state sought his execution.

The sheriff, the prosecutor and the judge were all involved in a secret plan to modify appellant's status and access to counsel. Yet respondent claims the latter two were not responsible for the ultimate decisions even though the jailer informed defense counsel the judge and prosecutor were involved, and the prosecutor's office was closely monitoring the situation to ensure that all of the restrictions were in place. The absence of defense counsel from the process is critical because there was no one present to protect appellant's basic rights, and to keep the state authorities from overreacting.

A major flaw in the procedure used in this case was the lack of any analysis of whether the modifications adopted by the parties were the least intrusive necessary. The legitimate objective of the change was clear — keep appellant away from other inmates who could have helped him attempt to influence the parties and potential jurors in his case. But the objective could have been met just as easily by placing him in the administrative segregation unit at the central downtown jail. And counsel could have challenged the seemingly arbitrary decision that phone calls be limited to 20 minutes, official visits be limited to 45 minutes, three times a week, that visits be visually monitored by deputies, that counsel be searched upon entering the jail,

and that 24 hours notice was required for a visit. There should have been a full hearing to determine the necessity of the transfer and each restriction. And it also may have been determined that the jailhouse snitch embellished some of the facts in an effort to improve his own situation.

Instead of conducting a hearing on the allegations and examining the sheriff's response by placing appellant in administrative segregation, with restrictions not normally placed even upon administrative segregation inmates, the court took the long-discredited position of complete deference to the sheriff, that, in essence, "The sheriff doesn't try to tell me how to run my courtroom and I don't tell him how to run his jail." (8 RT 1123-1127.) Instead, the court had responsibility to ensure that the Constitution permeated the walls of the San Diego County Jail.

In an analogous context, a court may not simply defer to the judgment of custodial authorities as to what type of physical restraints may be placed upon a defendant in the courtroom. Instead, it must make an independent determination of whether and what restraints are justified and necessary. (*People v. Mar* (2002) 28 Cal.4th 1201, 1218; *People v. Vance* (2006) 141 Cal.App.4th 1104, 1112; *People v.*

Duran (1976) 16 Cal.3d 282, 293.) This is true not only because such restraints may prejudice the defendant in the eyes of the jury, but also because it has the potential to adversely affect the defendant's mental state, his ability to communicate with counsel and assist in his defense. (*People v. Hill* (1998) 17 Cal.4th 800, 846.)

Just as a court cannot abdicate to the sheriff its responsibility to protect a defendant from courtroom restraints that may affect the fairness of the trial, neither can it turn a blind eye to burdensome restrictions imposed by the sheriff on an incarcerated defendant when those restrictions may likewise affect a defendant's rights to communicate with his counsel, assist in preparing his defense and to a fair trial. These are the precise problems counsel complained of, and to which the court expressly stated it would not interfere. (8 RT 1145-1147.)

Appellant may have behaved badly and explored a plan that would provide facts about the case to witnesses. And he may have threatened or intended to threaten the prosecutor and the judge. The question is whether the changes in his custodial status and restrictions of his access to counsel were necessary to remedy the problem. If there was ever a situation where the state would seek to punish a

recalcitrant defendant, this was it. The state obviously sought to send the message to appellant that threats and attempts to improperly influence the witnesses or jurors would not be tolerated.

But logic suggests appellant's attempts to disrupt his trial could have been accomplished by simply isolating him at the downtown jail. This would have avoided the 84 mile round-trip for aging counsel (admitted to the California State Bar in 1962)[1], which is significant given that the court recognized the need for counsel to have ready access to appellant when it originally ordered that he be housed downtown. (3 RT 387; 15 CT 3342.) Appellant was on trial for his life and the court approved several barriers to attorney-client contact, and there was no evidence of the need to restrict appellant's access to counsel.

Due process required an evidentiary hearing that included notice of the allegations, a hearing, an opportunity to review the evidence against him, present evidence on his behalf, and a decision based on the evidence. (Calif. Code of Regulations, title 15, Minimum Standards for Local Detention Facilities, sections 1053 [administrative segregation], 1062 [inmate access to telephone], 1063 [inmate access to the courts

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[1] Taken from the State Bar of California website.

and counsel], 1081 [procedural rights and hearing]; *Wolff v. McDonnell* (1974) 418 U.S. 539, 559-560; *In re Davis* (1979) 25 Cal.3d. 384, 388, 391.)

Instead, the trial judge, prosecutor and jailer met in secret, never fully informed defense counsel of the relevant facts, and instructed defense counsel not to inform appellant regarding the things they were told.

Respondent next suggests the trial court never formally ordered that appellant be housed downtown originally, and the court's action in that regard was simply "a request." (RB 36.) But Judge Preckel emphasized that he had ordered appellant be housed downtown to increase his access to counsel. The judge said he "entered no orders written or otherwise, respecting Mr. Flinner's custodial status *other than those orders which have already been entered at the request of his counsel.*" (8 RT 1123.) The only request counsel had made was that appellant be housed downtown. (See also 3 RT 387, where the court agreed appellant should be housed downtown because it was more convenient for counsel and would help in the preparation of his defense.)

Respondent next emphasizes that due process does not require a

hearing if the sheriff determines "that a change in custodial arrangement was necessary." (RB 36, citing *Sandin v. Conner* (1995) 515 U.S. 472, 483, and *Bell v. Wolfish* (1979) 441 U.S. 520, 540, fn. 23.) But neither of these cases, nor any other authority, stands for the proposition that a hearing is unnecessary to determine whether restricting access to defense counsel preparing for a capital case is required. These cases stand for the very different proposition that prison officials may take action against convicted prisoners in order to maintain security within the institution. The present case deals with the distinct question whether the court can meaningfully restrict a capital defendant's access to counsel when he has attempted to disrupt his trial but caused no problems relating to institutional security or order.

Again, the question is whether the result of the secret meetings between the prosecutor, the court and the sheriff were done in some measure to punish the recalcitrant appellant. All indications are that is exactly what happened as there is no showing or logic to suggest the concerns couldn't have been adequately addressed by simply moving appellant to the administrative segregation unit downtown after a hearing on that issue and any other necessary restrictions on

appellant's access to counsel. The failure to even consider the hearing shows the parties were interested in punishing appellant for his bad behavior and that due process may have hindered their ability to accomplish the intended result.

Respondent suggests, without any support in the record, that the Vista jail was "more secure" from having unfettered access to other inmates who might assist him in his efforts to thwart his trial. (RB 37.) But these are unsupported allegations by respondent, and there is no showing that Vista was more secure than the central downtown jail (or the administrative segregation unit in that jail) or that solitary confinement downtown would have been ineffective in keeping appellant away from other inmates who might have been interested in helping him interfere with his trial.

Finally, respondent argues appellant has failed to show that his relocation to Vista "improperly impinged upon his access" to counsel. (RB 37.) Appellant does not argue that the state's action of punishing him for his transgressions *eliminated* his access to counsel. Instead, appellant argues only that the new conditions improperly *limited* his access to counsel. Respondent cannot credibly argue that the modifications to appellant's custody did not restrict his access to

counsel. Following the move, counsel had to drive 84 miles to visit appellant. The court's earlier order to house appellant downtown for counsel's convenience and to assist in the preparation of his defense necessarily suggests that a move to a distant jail would inconvenience counsel and make it more difficult to prepare the defense. And it cannot be credibly argued that limiting the number and duration of phone calls and visits, as well as members of the defense team permitted to visit, and only under the visual surveillance of deputies, did not limit appellant's access to his legal team.

The District Attorney sought the death penalty in this case, a decision for which the law requires enhanced due process as the state seeks to execute someone it considers to be the worst of the worst. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Appellant issued ineffectual threats toward various parties–threats which were never acted upon, nor could they be given appellant's incarceration and lack of any association with criminal cohorts who could act in his stead.[2] Nevertheless, authorities punished him by moving him away from counsel and enacting measures that made it harder to see counsel and prepare a defense. There was no evidence in the record suggesting

[2] The judge said these threats had no affect on him and he wasn't particularly concerned. (8A RT 1152.)

the proper remedy for these threats could not be corrected by transferring him to the administrative segregation unit in the main jail. The act of conducting secret meetings, failing to inform defense counsel about the meetings, restricting appellant's access to counsel, having counsel withhold information from appellant, all without a hearing violated his right to due process. That the court subsequently made minor modifications to the original order did not remedy the violation. The record shows both the trial court and prosecutor were involved in the decision. Both were targets of appellant's alleged threats and no doubt approved the most serious available consequences.

Appellant was a very difficult defendant, and it is easy to see why the parties sought to punish him. But the state's actions violated his right to a fair trial. The prosecutor claimed his office had no role in that punishment, but the record showed this was not true and that the restrictions on appellant's access to counsel were being monitored at the highest level of administration at the DA's office. And while the court suggested it lacked the ability to intercede in the sheriff's decision to restrict appellant's access to counsel, the law says otherwise. (*People v. Mar*, *supra*, 28 Cal.4th at 1218.) Defense counsel would have

strenuously objected to the state's actions if they had known about them. As it was, they strongly complained even with the limited knowledge provided. Threats on the life of the prosecutor and judge are as serious as any matter that occurs in the criminal justice system. They would have made a strong impression at a hearing on the matter. But the threats did not justify skipping a hearing.

The state's actions violated appellant's federal constitutional rights and require reversal for all of the reasons described in appellant's opening brief.

II

The trial court violated appellant's right to be present and to counsel by conducting meetings designed to restrict attorney-client access without having appellant or counsel present.

Appellant argues the trial court violated his Sixth Amendment right to be present and to counsel at all critical stages of the proceedings by conducting the secret meetings restricting his access to counsel without him, or in some cases, defense counsel being present. (AOB 86-89.)

Respondent curiously argues that appellant forfeited the right to challenge the meetings that he did not know took place. Respondent cites *People v. Daya* (1994) 29 Cal.App.4th, 697, 714, in support of that

proposition. (RB 38-39.) But *Daya* involved a defendant who was present at trial but later claimed the trial court erred by failing to give certain jury instructions *sua sponte*. The case has little in common with the present situation where the trial court and prosecutor had private meetings where they conspired to limit appellant's access to counsel, and had other meetings (that were never disclosed to defense counsel) where they discussed the issue with the attorneys but ordered counsel to withhold from appellant the reasons his access to counsel was being restricted. Conducting these discussions outside the presence of counsel and appellant violated his statutory and constitutional right to be present and to due process of law. (Cal. Const., art. I, section 15; Penal Code section 1043; United States Constitution, Sixth Amendment; *Illinois v. Allen* (1970) 397 U.S. 337, 338; *In re Davis* (1979) 25 Cal.3d 384, 391.)

Respondent next claims the argument fails on the merits because the proceedings from which he was excluded occurred before the trial began, and were therefore not a critical stage of the proceedings. (RB 40.) Respondent cites no authority, nor is there any, to support the proposition that a critical stage of the proceedings for these purposes only includes trial proceedings or that interfering with the accused's

access to counsel is not outcome-determinative. In *People v. Butler* (2009) 46 Cal.4th 847, 861, this court found that due process guarantees the right to be present at *any stage* that is critical to the outcome and where the defendant's presence would contribute to the fairness of the procedure. (See also, *People v. Perry* (2006) 38 Cal.4th 302, 312; *United States v. Wade* (1967) 388 U.S. 218 (pre-indictment lineups are critical stage of proceedings requiring that counsel be notified beforehand and present unless waived.)

The preparation of the defense to the capital charges must be seen as critical to the outcome of the case, and defendant's presence at the meetings discussing restrictions to access to his defense team necessarily contributes to the fairness of the case. (See *Lankford v. Idaho* (1991) 500 U.S. 100, 126 n. 20 [emphasizing the importance of a defendant in a capital case having a fair opportunity to prepare his defense].)

There is no logical nexus between appellant's alleged mischievous actions in attempting to obtain the home addresses of witnesses and parties to the trial, and limiting the time and manner in which he could prepare a defense with his attorneys. Defense counsel, when informed of the restrictions, stated clearly that the new restrictions impaired the

attorneys' ability to prepare a defense. (8 RT 1142-1143, 1146-1147.)

This is not like a situation where the defendant disrupts trial proceedings, and the court makes a finding that he voluntarily absented himself from the trial. (See *People v. Price* (1991) 1 Cal.4th 324, 405.) If appellant acted badly while in the jail in this case the easy solution was to prove the claim at a hearing, and then have him housed in the administrative segregation unit of the downtown jail, with the least restrictive conditions necessary to provide for reasonable security concerns.

Respondent emphasizes that the restrictions did not terminate all access to counsel. (RB 40.) However, pretrial preparation of a capital murder trial is an arduous process and substantial restrictions on attorney-client contact should not have been ordered without a full hearing with all parties present.

Respondent fails to mention that some of the meetings took place with defense counsel being excluded. This practice also violates appellant's right to counsel at all critical stages of a prosecution. (*Gomez v. United States* (1989) 490 U.S. 858, 873)

These violations of appellant's fundamental constitutional rights were prejudicial for all of the reasons described in appellant's opening

brief. (AOB 86-89.)

III

Appellant was deprived of his right to due process where he was tried by a biased prosecutor.

Appellant argues that his right to a fair trial was violated due to the bias of Rick Clabby, the deputy district attorney who prosecuted his capital case. (AOB 89-96.)

Clabby's personal animus was a product of appellant's conduct in obtaining his home address, demeaning Clabby in letters where appellant threatened to rape him, making racially offensive comments about Clabby's black wife and mixed-race children, and allegedly making threats to kill him. (42 RT 4207.)

Respondent argues the claim must be rejected because appellant failed to move for Clabby's disqualification. (RB 41, citing *People v. Maury* (2003) 30 Cal.4th 342, 438; and *People v. Milwee* (1998) 18 Cal.4th 96, 123.)

While Penal Code section 1424 provides a method for removing a biased prosecutor when the disqualifying bias is discovered before trial, that remedy is not sufficient where, as here, the prosecutor failed to reveal his personal involvement in actions taken against the defendant before trial. The record here shows appellant's actions antagonized

Clabby, but does not show Clabby's response.

As described previously, Clabby was an active participant in secret meetings that included the sheriff and the trial court where it was determined that appellant's access to his attorneys would be meaningfully curtailed. But Clabby would twice inform defense counsel that neither he nor his office had any role in the decision to restrict appellant's access to his counsel. (8 RT 1123, 1133.) If this were true, there would have been no need for Clabby's presence at the secret meetings, or for DA Special Operations Chief Paul Morley to be monitoring the restrictions. (8 RT 1122.)

If a defendant fails to seek recusal of a prosecutor, the issue is most likely forfeited on appeal. (*People v. Maury, supra,* 30 Cal.4th 342, 438.) However, the law cannot logically require that an appellant move to recuse the prosecutor for bias where the prosecutor affirmatively misleads the defense about his role in violating appellant's constitutional acts after appellant's bad behavior in taunting the prosecutor. Under these facts, due process is violated where the record shows appellant was prosecuted by a person who had an axe to grind against the defendant. (*People v. Greer* (1977) 19 Cal.3d 255, 266; *People v. Eubanks* (1996) 14 Cal.4th 580, 589.)

Respondent further argues that the present claim must fail for public policy reasons as defendants would routinely disrupt justice by threatening prosecutors if such threats would suffice to disqualify the prosecutor. (RB 42.) While inconvenient to the process, a defendant's threats to his prosecutor should always result in *at least* a hearing to find the facts and ensure a prosecutor won't respond with excessive retaliation. (See *People v. Conner* (1983) 34 Cal.3d 141, 147-148.) But it is unfair to say that a threatened prosecutor can mislead the parties regarding his involvement in matters not disclosed to the parties and avoid a claim of bias. A defendant's threats and personal insults may explain why a prosecutor became biased, but they do not obviate the constitutional requirement that the prosecutor remain impartial. (*Ibid.*)

Finally, respondent argues appellant's claims regarding Clabby's involvement in restricting his access to counsel were based only on conjecture. (RB 42-43.) But again, it is unfair to conduct the meetings on this subject in private with the threatened prosecutor present, and then conclude the sheriff was solely responsible for the decision. This is especially true where Clabby's office had taken an active role in monitoring the restrictions, and the deputy told counsel the decision

was not made by the sheriff alone. (8 RT 1122.) This court has held that whether a prosecutor's actions demonstrate actual prejudice, or only the appearance thereof, does not matter. (*People v. Conner, supra,* 34 Cal.3d 141,148.) In either case, allowing the prosecutor to remain impugns the integrity of the judicial system and deprives the defendant of due process of law and a fair trial.

IV

Appellant's due process rights were violated where he stood trial before a judge who was not impartial.

Appellant argues that he did not receive a fair trial because Judge Preckel lacked the requisite impartiality after appellant obtained his home address and threatened to kill the judge. (AOB 87-101, citing *People v. Freeman* (2010) 47 Cal.4th 993, 1000.)

Respondent argued the issue was forfeited due to appellant's failure to seek recusal in the trial court. (RB 44.) However, as in the previous argument regarding the prosecutor's bias, there can be no claim of forfeiture when the relevant facts were discussed in meetings designed to exclude appellant and his attorneys. In fact, as soon as a judge is made aware of facts that may create a conflict or bias, he is under a *sua sponte* duty to recuse himself. (Code of Civil Proc. Section 170.3(c)(1)). Judge Preckel failed to do so, and while defense counsel

had the opportunity to request recusal, he would run the risk of further alienating the judge by claiming the judge could not be fair. Moreover, trial before a biased judge is structural error and thus cannot be forfeited. (*Arizona v. Fulminate* (1991) 499 U.S. 279, 310.)

Respondent further argues the claim must fail on the merits because the trial court is presumed to be fair and impartial (*Withrow v. Larkin* (1975) 421 U.S. 35, 47), this was not an extraordinary case, and the trial court had nothing to do with the restrictions placed upon appellant's access to his trial counsel. (RB 43.)

The question is whether the relevant facts would establish the probability of judicial bias. (*People v. Freeman, supra,* 47 Cal.4th at p. 1001, citing *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. 868.) Respondent cannot credibly argue that the present facts are not extreme. Appellant was on trial for having his fiancé murdered, threatened to kill the judge (along with other parties), and took steps toward that end by obtaining the judge's home address. That Judge Preckel denied bias cannot be determinative.

The threat was taken seriously by the prosecutor, who issued a *Tarasoff* warning to Judge Preckel (*Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425), and during the private meeting where

the danger was assessed, numerous restrictions were placed on appellant's access to counsel. Respondent repeatedly argues that Judge Preckel had nothing to do with the penalties imposed upon appellant for his threats. (RB 46.) But the sheriff's department informed defense counsel that the change in appellant's status was ordered by Judge Preckel. (8 RT 1122.)

It is hard to imagine a more extreme set of facts. The court's lack of impartiality is further demonstrated by the discretionary rulings also challenged in this appeal including the ruling that allowed the jurors to learn that appellant had attempted to obtain their home addresses as well.

Appellant's threats against Judge Preckel, which resulted in secret rather than on-the-record discussions with members of the defense present, and unbalanced discretionary rulings, created a trial where the probability of bias by the judge was so great as to become constitutionally intolerable. (*People v. Freeman, supra,* 47 Cal.4th at p. 1001.)

The result is a structural error that requires automatic reversal of the judgment. (*Arizona v. Fulminante, supra,* 499 U.S. 279, 310.)

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V

The trial court violated appellant's right to due process and a fair trial by denying the motion to sever his case from that of his codefendant, and the "dual jury" procedure did not correct the problem.

Appellant argues that joining his trial with that of codefendant Ontiveros deprived him of due process and a fair trial, reduced the prosecution's burden of proof, and resulted in *Aranda-Bruton*[3] and *Crawford*[4] error.

Respondent first argues that simply because codefendants have inconsistent or antagonistic defenses does not compel severance. (RB 48, relying on *People v. Boyd* (1988) 46 Cal.3d 212, 233, and *People v. Turner* (1984) 37 Cal.3d 302, 313.) Respondent emphasizes the language in *Boyd*, which noted "the mere fact that codefendants who are jointly tried have antagonistic defenses" does not necessarily result in the denial of a fair trial even if one gives testimony that is damaging to the other and assists the prosecution. (*Ibid.*) In other words, those circumstances, without more, do not support a claim of error. But appellant does not assert such a bare claim.

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[3] *People v. Aranda* (1965) 63 Cal.2d 518, *Bruton v. United States* (1968) 391 U.S. 123.

[4] *Crawford v. Washington* (2004) 541 U.S. 26.

The partial quotation relied upon by respondent addresses the test to be applied in a pretrial severance motion. However, if a joint trial shows, "a gross unfairness occurred, such as to deprive the defendant of a fair trial or due process of law," then the defendant is entitled to a new, separate trial. (*People v. Boyd, supra,* 37 Cal.3d at 313.) Appellant's joint trial resulted in fundamental unfairness.

This stemmed from the prejudicial evidence solicited by codefendant's attorneys who, in effect, became part of the prosecution team. Codefendant's counsel took every opportunity to argue that, contrary to his denial of involvement in Keck's murder, appellant was the mastermind behind Keck's homicide and used his considerable powers of persuasion and intimidation to compel Ontiveros to act as the trigger man. (6 RT 952; 10 RT 1294.)

Codefendant's counsel made no secret of their trial strategy in this regard. Respondent claims that the argument here fails because there was no evidence introduced in the joint trial that would not have been admissible at separate trials, yet, even codefendant's counsel knew this was not so. In opposing appellant's pretrial severance motion, they said, "[W]ithout Mr. Flinner in the trial, . . . [We] can't prove what we want to prove, which is third party culpability evidence.

We can't prove that Flinner connived and manipulated this whole thing on his own using Mr. Ontiveros..." (6 RT 952; And see similarly 6 RT 1294.) Counsel asserted a non-existent right to be tried jointly with appellant.

Respondent's claim that no prejudicial evidence was introduced by codefendant's counsel that would not have come in otherwise, was belied by the fact that this evidence was *not introduced* by the prosecutor. Prosecutors don't generally omit admissible, inculpatory evidence that is highly damaging to a criminal defendant. And even if omitted by the prosecutor for tactical reasons, the fact remains that this evidence was *not* introduced by the prosecutor (for whatever reason), and came in *only* because appellant was tried jointly with Ontiveros. As argued below, even in a joint trial, this evidence *should* have been excluded as irrelevant, immaterial, without foundation and as more prejudicial than probative. In a separate trial it would certainly have been barred, had the prosecution tried to introduce it.

And, as detailed in the opening brief, the prejudicial evidence introduced by codefendant's counsel was substantial and highly inflammatory. (AOB 103-107.) Perhaps most damning was the alleged confession by appellant described by Marie Locke. (27 RT 4490-4492.)

While the court struck her testimony following appellant's request, the jury had already heard appellant's alleged confession. The court instructed the jury to disregard this testimony and respondent emphasizes that juries are generally presumed to have followed the court's instructions, citing *Weeks v. Angelone* (2000) 528 U.S. 225, 234, and *Richardson v. Marsh* (1987) 481 U.S. 200, 211. (RB 50-51.) However, *Weeks* involved a judge's reference to an instruction regarding mitigating evidence. (*Weeks v. Angelone*, supra, 528 U.S. at pp. 228-229.) It did not address the problems inherent when a defendant's alleged confession is proffered to a jury. In *Richardson*, the jury heard a codefendant's confession that had been completely redacted to omit any reference to the complaining defendant. (*Richardson v. Marsh, supra,* 481 U.S. at p. 204.)

Thus, neither case helps here and does nothing to mitigate the virtually irreversible affects of a jury hearing such an inadmissible confession as condemned by the United States Supreme Court and this Court. (See *Bruton v. United States, supra,* 391 U.S. at pp. 127-128, 135; *People v. Burney* (2009) 47 Cal.4th 203, 231; and *People v. Lewis* (2008) 43 Cal.4th 415, 453.)

And this highly damaging evidence was in addition to the other

testimony solicited by codefendant's counsel, including:

- Sterling Thomas's denial that appellant said he wanted to "get rid" of his girlfriend. (53 RT 9009, 9011, 9015.)
- Whether Robert Pittman had ever heard that appellant's first wife had "died mysteriously." (39 RT 6889.)
- Charles Cahoon's statement that he was afraid for his life because of appellant, that appellant "is a very bad man and should be stopped . . . He doesn't belong here on Earth," and that he would do whatever he could to get appellant off the street so he couldn't hurt or kill anyone else. (34 RT 5956.)
- Testimony from a police sergeant who read an anonymous letter found on a patrol car, implying that it was authored by appellant in an effort to incriminate Charles Cahoon. (33 RT 5802, 5813.)
- Testimony from a forensic computer expert that appellant had used his computer to print fraudulent checks. (41 RT 7302.)
- Impeaching appellant's mental health expert who appellant had called to challenge Martin Baker's competency. (54 RT 9192, 9201.)
- Calling Gil Lopez as its witness in order to have him testify that he heard appellant's incriminating remarks made in Locke's

presence (evidence that had been stricken by the court), and that appellant had once directed him to go to a pay phone, call his home number, and leave the phone off the hook in a scheme to mislead police. (59 RT 10017.) Lopez did not testify to anything involving Ontiveros.

By introducing this prejudicial evidence codefendant's counsel reduced the prosecutor's burden of proving appellant guilty and did so with evidence that the prosecutor, in a separate trial, would not have been able to introduce. (*United States v. Zafiro* (1991) 506 U.S. 534, 542.)

Finally, there remains the problem of the antagonistic defenses, which is a factor the court must consider. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296; *People v. Massie* (1967) 66 Cal.2d 899, 917.) And the defenses here were not just "antagonistic," but completely irreconcilable. Ontiveros claimed that appellant persuaded him to shoot Keck, while appellant asserted he had nothing to do with the murder. If the jury believed Ontiveros, it would have to convict appellant.

This is the rare case where "the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that

this conflict demonstrates that both are guilty." (*People v. Hardy* (1992) 2 Cal.4th 86, 168.) Reversal of the judgment is required.

VI

The trial court improperly admitted irrelevant evidence that would taint the jury, including evidence that appellant attempted to obtain the jurors' home addresses, that he threatened to rape the prosecutor in front of his wife and children, and that others feared that appellant would kill them.

The prosecution was permitted to introduce highly inflammatory evidence that was nothing more than character assassination against appellant. This evidence was more prejudicial than probative of any relevant issue, almost certainly frightened the jury and deprived appellant of a fair trial.

It included the testimony of Gregory Sherman, a "jailhouse snitch," who described appellant's plans to obtain the home addresses of jurors, the prosecutor, judge, bailiff, investigators, and his former counsel. According to Sherman, this was part of a scheme to taint appellant's trial by sending inadmissible evidence to jurors and make it appear the information had come from officials involved in the case. Once appellant decided who to blame, he would arrange to have them killed. (37 RT 6443-6444.)

There was a separate claim that appellant told another inmate he intended to rape the prosecutor in front of his wife. (42 RT 7407.)

Appellant's former neighbor, Charles Cahoon, testified that he once saw appellant inside his apartment as he was coming out of the shower and that he was afraid for his life. He expressed his belief that appellant was guilty, an evil person, and that co-defendant Ontiveros was "a good man . . . who was manipulated by appellant." (33 RT 5842.)

Catherine McLarnan, a former friend, said that after appellant was arrested, she agreed to mail anonymous letters to prosecution witnesses, but then changed her mind. (38 RT 6626.) She was also afraid that appellant might hurt her. (38 RT 6641.)

Respondent first claims there were no "specific objections" to this evidence regarding McLarnan, and therefore the claim is forfeited. (RB 54.) Respondent ignores the relevant *in limine* proceedings. (See 3 RT 458 [trial court agreed that defense objections are made on all relevant state and federal grounds], 459 [all pre-trial evidentiary objections will be deemed sufficient for trial purposes], 18 RT 191 [discussion regarding appellant's alleged efforts to suppress or fabricate evidence], 12 RT 1536, 1538 [appellant's efforts to suppress evidence] 1552, 1555, 1565 [court overrules defense objections to evidence regarding

McLarnan].) Objections made *in limine* to exclude specific evidence will generally preserve the issue on appeal, even if not repeated in trial. (*People v. Rowland* (1992) 4 Cal.4th 238, 264 n. 3, citing *People v. Morris* (1991) 53 Cal.3d 152, 190.)

Respondent then argues the evidence regarding appellant's alleged plans to obtain jurors' and officials' home addresses and efforts to have McLarnan mail anonymous letters was relevant to demonstrate appellant's consciousness of guilt by attempting to thwart his trial, and that it was not unduly prejudicial. (RB 53-55.)

Respondent relies on *People v. Hill* (1995) 34 Cal.App.4th 727, to argue that evidence of a defendant's attempt to eliminate a potential witness properly demonstrates a consciousness of guilt. In *Hill*, the court's focus was on the relevancy of the evidence, rather than a section 352 analysis. The appellate court held the evidence of Hill's attempt to eliminate a potential witness was relevant to show his state of mind at the time of the shooting. (*Id.* at p. 737.) The court concluded, with no detailed analysis, the evidence was not more prejudicial than probative. (*Ibid.*) Any section 352 challenge must focus on the specific facts before the court. (*Brainard v. Cotner* (1976) 59 Cal.App.3d 790, 796; *Kelly v. New West Fed. Savings* (1996) 49 Cal.App.4th 659, 674.)

Respondent next claims that appellant "cannot establish that the evidence would have invoked bias or prejudice from the jury. There was nothing in this evidence to show an intent on Flinner's part to threaten or harm the jurors." (RB 55.) That is not true. The jurors were inundated with evidence of appellant's dangerousness. He sought the home addresses of his former lawyer, the prosecutor (who appellant bragged about wanting to rape in front of his wife), the bailiff, investigators, and the judge. (37 RT 6331, 6439.) He allegedly said he might kill certain people. The jurors then heard that appellant had taken steps to obtain their home addresses as well. (37 RT 6446- 6447.)

Nothing could be more prejudicial to a jury than to hear evidence suggesting the defendant might threaten their lives. If they didn't convict him, he would be free and could follow up on the threats. Respondent cannot demonstrate this evidence would not influence a jury.

Respondent also argues the alleged threats against the prosecutor demonstrates appellant's consciousness of guilt. (RB 55-56.) Appellant argued the letters containing this information, which were not sent to the prosecutor but third parties, simply showed his frustration with the case. And this was no doubt exacerbated by the

unlawful and unexplained actions of the prosecutor and jailers in transferring him to the Vista jail, placing him in isolation and restricting his access to counsel and other members of the defense team.

Respondent seems to argue that a defendant could improve his chances at trial by intimidating the prosecutor. (RB 56.) This is unrealistic and not shown here where appellant merely conveyed to others that he hated the prosecutor. But these statements should never have been shown to a jury in a capital case. (See *People v. Zapien* (1993) 4 Cal.4th 929, 958.)

As to the testimony of Charles Cahoon, respondent asserts his testimony was relevant to establish that appellant tried to frame him for Keck's murder and explain his delay in reporting appellant to police. (RB 57-58.)

The first problem with this argument is that there was *no delay* in Cahoon complaining to police about his suspicions regarding appellant. Cahoon called police and filed a complaint on the day he claimed to have seen appellant in his apartment. (33 RT 5838.) When he found a sock with bullets in the car he had purchased from appellant, Cahoon again contacted police. (45 RT 5832.) The cases cited

by respondent involved a witness who refused to testify or avoided police. (See *People v. Valdez* (2012) 55 Cal.4th 82, 135, and *People v. Ricardi* (2102) 54 Cal.4th 758, 818.) That is not what happened here. Cahoon was a willing witness for the prosecution who discussed with friends how he might keep appellant in prison forever. (33 RT 5935.)

Even if one accepts respondent's argument in this regard, it does not justify admitting Cahoon's comments that appellant was an evil person who manipulated Ontiveros and did not deserve to be on Earth where he could hurt other people.

As to Catherine McLarnan's evidence, respondent repeats his argument regarding relevancy and lack of prejudice, claiming her testimony that she feared appellant was proper in judging her credibility. (RB 59.)

Appellant was a difficult defendant with obvious psychological problems. He acted irrationally in ways that could only be described as self-destructive. The prosecutor took advantage of this and the court failed to fairly balance its decisions in deciding what evidence the jury should receive.

A trial court has wide discretion in ruling on the admissibility of evidence, and this discretion is rarely condemned on appeal. However,

a trial court has no discretion to admit irrelevant evidence that will deprive the defendant of a fair trial. Given the cumulative prejudice incurred by the admission of this inflammatory evidence, the judgment must be reversed.

VII

The trial court improperly admitted appellant's alleged derogatory statements about Keck.

The trial court admitted irrelevant, inflammatory comments appellant allegedly made about Keck, both before and after her death. These alleged comments served no purpose other than to inflame the jury. They included appellant's references to Keck as a "cunt," "bitch," and "slut," made when Keck was present, and that after Keck's death, while visiting a floral shop, appellant saw a woman passing by and said, "Hey, baby, I'm single now," and laughed. (26 RT 4348; 32 RT 5486.) When the florist asked if appellant wanted to include a card with the funeral arrangement, he replied, "Tammy's fucking dead. It's not like she can read it anyway." (26 RT 4384.)

Respondent argues this evidence was relevant "because the way Flinner treated Keck and his feelings about her were highly probative to show his willingness to kill her. In his mind, she was not a person but a mere object to be manipulated and used to advance his own

purposes." (RB 61.) Respondent notes that the court admitted this evidence "to establish motive, identity, and state of mind." (RB 61.) Respondent fails to explain how these statements could show motive. The prosecution's entire case was based on the premise that appellant arranged Keck's murder so that he could collect on a $500,000 life insurance policy. Animosity was not part of the prosecution's theory.

The same is true of "identity." Appellant's co-defendant admitted to police that he shot Keck and claimed he did so because appellant promised him $5000, and otherwise intimidated him. (27 RT 4650, 4654; 28 RT 4669.)

While "state of mind" might appear to be a more legitimate basis for the holding, it too was improper. This is so, first, because many of the statements were made in Keck's presence. (See, e.g., 32 RT 5487.) Apparently, they both occasionally made comments like these to third persons. (32 RT 5487; 41 RT 7144.) The statements had no tendency to prove appellant's state of mind regarding Keck and provided *no evidence* of respondent's claim that appellant "harbored sufficient animosity toward the victim such that he was motivated to kill her." (RB 61.) They were therefore irrelevant and should have been excluded. (Evid. Code §210.)

And even if the remarks were marginally relevant to some issue, their prejudicial effect on the jury far outweighed any probative value.

Testimony regarding "state of mind"of the declarant, in the case is admissible where his state of mind is relevant to an issue in the case. But there are rigid limitations on the admission of such testimony. One limitation is that the testimony is not admissible if it refers solely to past conduct on the part of the accused. This is so because it would be almost impossible to separate state of mind from the truth of the charges.

The serious prejudice from such evidence is obvious. Where the declarations are of such a nature as to be obviously prejudicial, and where the possible proper benefit to the prosecution is outweighed by the prejudicial effect to the accused, it should be excluded. "Under such circumstances, where the true evidentiary bearing of the evidence is at best, slight and remote, and yet the evidence is of a nature to make it very prejudicial to the party against whom it is offered, the evidence should be excluded." (*People v. Hamilton* (1961) 55 Cal.2d 881, 894, overruled on other grounds in *People v. Wilson* (1969) 1 Cal.3d 431, 442, in turn overruled in *People v. Gonzales* (2011) 51 Cal.4th 894, 942.)

The evidence was "slight and remote" and did little more than

add to the mounting hatred the jury undoubtedly harbored toward appellant.

VIII

The trial court prejudicially erred by admitting a series of letters and events implicating appellant in Keck's death or his subsequent attempts to implicate others, as no foundation was established to support the introduction of this evidence, and the content was irrelevant and highly inflammatory.

The trial court admitted several highly prejudicial letters allegedly written by appellant in an attempt to implicate others in Keck's death. Yet it was never proven that appellant wrote them.

The evidence included an anonymous letter found on the windshield of a police car, which contained details of Keck's murder and blamed her death on Cahoon. (33 RT 5794; 60 RT 10242.)

Appellant's mother testified about receiving a cryptic letter made from cut-out pieces of lettering from magazines and containing threats toward appellant. (38 RT 6672.)

Judge Preckel also admitted a letter he received where the writer claimed Ontiveros murdered Keck. (38 RT 6694.)

After Ontiveros was arrested for Keck's murder, deputies at the jail intercepted a letter in which the author warned him to "keep your mouth shut." (42 RT 7374.)

Before trial, appellant's father found a container in his yard. Inside was an expended bullet with "Tammy" written on it. (45 RT 7594.) It also had a live round with "Mike" written on it. The bullets were of the same caliber and brand as the bullet that killed Keck. The court admitted these items as well. (41 RT 7317.)

Shortly after Keck's murder, the sheriff's department received and recorded a telephone call from a Hispanic woman. (40 RT 7057.) She claimed a man named Ernesto told her he killed Keck to exact revenge against appellant. The recording was played for the jury. (40 RT 7054.)

While in custody, appellant met an inmate named John Baker. The prosecution alleged appellant later sent letters to Baker in which he discussed issues regarding his case, including another jail house acquaintance who had since became an informant. (50 RT 8569.) In another letter, the writer warned Baker about the dangers of becoming a witness for the state. (50 RT 8571.)

The prosecution also introduced a letter admittedly written by appellant to Congressman Duncan Hunter, seeking his intervention. (42 RT 7431.)

Respondent first asserts that many of these arguments are

forfeited by appellant's failure to object or, more specifically, his failure to object based on a lack of authentication. (RB 63.)

Once again, respondent ignores the court's pretrial ruling granting appellant's requests that all objections by the defense would be regarded as having been made on all relevant state and federal grounds, and that all pretrial evidentiary objections would be deemed sufficient for trial purposes. (3 RT 458, 459.)

As to the anonymous letter found on the windshield of a police car, respondent claims it didn't really require authentication because it "was a complete fabrication and therefore not admitted to prove anything asserted in it. Instead, the relevance of the letter was that it existed; that some person had created it in an effort to frame Cahoon." (RB 64.) In respondent's view, it was for the jury to decide whether appellant was the author.

Authentication of a document is required before it can be admitted into evidence. (Evidence Code section 1401, subd. (a).) A court must make a finding that sufficient foundational facts have been introduced before allowing the writing to go before the jury. (*People v. Lucas* (1995) 12 Cal.4th 415, 468.) Failure to do so constitutes error. (*People v. Beckley* (2010) 185 Cal.App.4th 509, 514.)

Respondent presents no applicable exception to the Evidence Code or cases interpreting section 1401, subd. (a).

Respondent relies upon *People v. Adamson* (1953) 118 Cal.App.2d 714, 720, a land condemnation suit, to claim that when the truthfulness of assertions in the writing are not at issue, authentication of authorship is "largely unnecessary." (RB 63.) As noted by respondent, the letter in *Adamson* was introduced to show that a witness had received it, and acted upon it. It didn't matter who produced the letter. Its authenticity had no bearing on the witness' actions.

Here, the author of the letter is the key to its relevance. To be relevant, the letter must be shown to have been written by appellant, and left on the police car. If appellant did not write it, then it is not relevant. The letter had to be authenticated to be admitted regardless of whether the prosecution relied upon the truthfulness of its content.

It is true that authentication can be proven by circumstantial evidence. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372.) The prosecution had no direct evidence connecting appellant to any of these writings. Instead, it flooded the jurors with letters, a tape recorded conversation and ammunition, and asserted an otherwise unsupported allegation that it was all part of a grand scheme by appellant to divert

attention away from him as a suspect. Respondent repeats this theme in the reply brief. (RB 63-74.) The state used volumes of improper evidence to prove its case against appellant, hoping that if the jurors believed any of it they would believe all of it.

Prosecutors cannot be allowed to gather unauthenticated documents and introduce them as incriminating evidence, hoping the jury will *assume* the defendant was involved in producing them. The admission of this unauthenticated anonymous letter was erroneous. (*People v. Beckley, supra,* 185 Cal.App.4th 509, 514.)

Respondent repeats its forfeiture claim regarding the admission of the letter received by appellant's mother and asserts that, like the letter found on the police car, authentication was unnecessary as the prosecution was relying on its mere existence rather than the truth of its contents. (RB 66.) But the argument fails again. To be relevant, there must be *some* showing that it was produced by appellant or at his direction. Authentication was the key and the prosecution produced no such evidence.

Judge Preckel also admitted an anonymous letter he received. The letter stated that the writer had witnessed Ontiveros shoot Keck and that he did so after Rick Host paid him $5000. (38 RT 6694.) This

evidence suffers from the same deficiency as the letter found on the police car and the one received by appellant's mother. There was simply *no showing* that it was written by or sent at the behest of appellant.

And the same is true of the letter from "Eli" directed to Ontiveros and intercepted by jailers. (42 RT 7373.) There was no credible evidence connecting it to appellant. Nor could the letters to John Martin be authenticated as having been written by appellant. (50 RT 8569, 8571.)

A trial court enjoys wide discretion in the admission of evidence. However, a trial court has no discretion to admit irrelevant evidence. (*People v. Honig* (1996) 48 Cal.App.4th 289, 343.)

Appellant's letter to Congressman Hunter suffers from a different problem. It was entitled to confidentiality pursuant to Penal Code section 2601, which does not contain an exclusionary remedy, but nevertheless creates a reasonable expectation of privacy protected by the Fourth Amendment. (AOB 138-140.) Respondent does not dispute that theory, but instead asserts that the statute is directed towards state prisoners rather than county jail inmates and therefore doesn't apply. (RB 74-75.) Respondent's argument is illogical in that it would provide convicted state prisoners with more civil rights than pretrial

detainees such as appellant. In any case, this court long ago held the provisions of sections 2600 and 2601 apply with equal force to county jail inmates. (*DeLancie v. Superior Court* (1982) 31 Cal.3d 865, 870; accord: *Inmates of Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850, 860.) This letter should not have been admitted.

Appellant does not claim here the exclusion of this evidence, by itself, would have resulted in a more favorable verdict. However, these letters were part of an avalanche of inadmissible, irrelevant and inflammatory evidence. Its cumulative prejudicial effect almost certainly contributed to bias against him in the minds of the jurors.

The tape recording of the anonymous Hispanic woman's telephone call to the sheriff's department and the ammunition found on appellant's father's property likewise lack a foundational showing that this evidence could be connected to appellant. And, as in the case of the letters, without establishing appellant's involvement in the production of this evidence, i.e., authentication, it is irrelevant for any purpose.

Respondent does not address appellant's claim that this evidence should have been excluded under Evidence Code section 352. The prosecutor brought it in under the guise of establishing appellant's consciousness of guilt. But it further prejudiced the jury against a

defendant who was already "unlikeable." As noted above, "where the true evidentiary bearing of the evidence is at best, slight and remote, and yet the evidence is of a nature to make it very prejudicial to the party against whom it is offered, the evidence should be excluded." (*People v. Hamilton, supra,* 55 Cal.2d 881, 894.) It was error to admit this evidence. Its cumulative prejudicial impact requires reversal of the judgment.

IX

The trial court prejudicially erred by admitting unreliable hearsay testimony suggesting appellant admitted killing Keck.

Marie Locke, the girlfriend of appellant's former roommate, Gil Lopez, testified that a few days after Keck's death she went out to dinner with appellant and Lopez. Appellant became drunk and morose, and said something to the effect that he was "sorry he had killed her." (27 RT 4492.)

The trial court eventually found the statement was inadmissible hearsay in that Locke was relating what Lopez had told her, and ordered that it be stricken. (27 RT 4498.) The court instructed the jury to disregard the statement. (27 RT 4498.)

Co-defendant Ontiveros called Gil Lopez to testify and he said

that while at dinner with Locke and appellant, he saw that appellant was drunk and heard him say, "I shouldn't have killer her"or "I shouldn't have killed Tammy." (59 RT 10004.) Later, after taking several sleeping pills, appellant mumbled "I shouldn't have killed her." (59 RT 10012.)

Respondent argues this evidence was admissible under Evidence Code section 1230 as a statement against appellant's penal interest. (RB 77-79.)

Section 1230 requires that the court first determine trustworthiness. (*People v. Chapman* (1975) 50 Cal.App.3d 872, 878; *People v. Frierson* (1991) 53 Cal.3d 730, 743.) In making this determination, the trial court is not limited to the words of the statement, but the circumstances under which it was made. (*People v. Chapman, supra,* 50 Cal.App.3d 872, 879; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 334.)

Appellant made the first statements at a restaurant after consuming a large amount of alcohol and becoming depressed over Keck's death. (59 RT 10093.) He allegedly made the second statement some time later after taking several sleeping pills. Lopez, who had also been drinking heavily that night, had to help appellant up the stairs to

his bedroom. (59 RT 10012; 61 RT 10376.) Lopez testified that he did not understand appellant to mean that he killed Keck, but rather that he felt responsible for Keck's death in that he failed to prevent it. (59 RT 10130.) He said that when appellant drank too much he would "talk a lot of trash." (59 RT 10093, 10095.)

Under these circumstances, the statements cannot reasonably be considered to be highly reliable as section 1230 requires, and under section 352 when assessing the probative value of the evidence. (See *People v. Duarte* (2000) 24 Cal.4th 603, 614-617 [declarant's intoxication taken into account when assessing the statement's reliability].) And it certainly does not meet the requirement of "heightened reliability" as to evidence introduced in a capital case. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.)

The statements were also inadmissible under section 352 as being more prejudicial than probative. Contrary to respondent's claim, appellant does not "misconstrue the aim of section 352." (RB 79.) The prejudice of presenting an inadmissible confession is obvious and cannot be so easily dismissed. (See *Jackson v. Denno* (1964) 378 U.S. 368, 336, where the court described the impact of an improperly admitted confession and questioned whether a jury could reasonably be

expected to disregard such evidence even if instructed to do so.)

The statements here were not admissible under Evidence Code section 1230. Any probative value the statements may have had was far outweighed by the prejudicial affect due to their inherent unreliability. This is because they were made by appellant when he was morose and drunk, and then later after he ingested sleeping pills. The admission of these statements also violated the Eighth Amendment requirement of "heightened reliability." (*Woodson v.North Carolina,supra,* 428 U.S. at 305.) For all these reasons, the judgment must be reversed.

X

The trial court prejudicially erred by admitting evidence that Keck may have been pregnant when she was killed.

During his opening remarks, the prosecutor informed the jury that Keck may have been pregnant when she was killed. (4 RT 660.) The medical examiner testified that he discovered a "corpus luteum" in Keck's ovary. (29 RT 4995.) This, along with the condition of her uterus "suggested a possible early pregnancy." (29 RT 4995.) In his closing, and rebuttal, the prosecutor emphasized that Keck was "pregnant at the time she was murdered. There's no question about

that." (63 RT 10534, 10539, 10692.)

The evidence was inadmissible because it was irrelevant and more prejudicial than probative under Evidence Code section 352.

Respondent argues this evidence was relevant because it established another reason for appellant to kill Keck. (RB 81-82.) Respondent fails to address whether the evidence should have been excluded under Evidence Code section 352.

The relevance of Keck's pregnancy has not been demonstrated. First, there was no reliable evidence that Keck was actually pregnant, just that it was possible. Reliability is a foundational requirement, and the proof here was speculative at best. And such speculative "evidence" cannot reasonably be said to meet the Eighth Amendment requirement of heightened reliability. (*Woodson v. North Carolina,supra,* 428 U.S. at 305.)

Respondent claims it does not matter whether Keck was actually pregnant, only that she and appellant *believed* she was, thus establishing another reason appellant would want to murder her. (RB 81.) But this contradicts the state's case at trial. The prosecution's sole theory was that appellant caused Keck's death in order to collect on her life insurance policy. Her possible pregnancy played no role. Appellant

bought the life insurance policy about six months before the murder. (25 RT 4063; 26 RT 5069.) Appellant and Keck had only been living together for a short time. (27 RT 4549, 4552; 32 RT 5559.) There is not even a suggestion that she was pregnant, or that either of them believed she was, when appellant insured her life, yet, according to the prosecutor's own theory, the die had been cast at that point. In *People v. Cash* (2002) 28 Cal. 4th 703, 729, this court held that evidence of a victim's pregnancy was irrelevant, so inflammatory as to violate due process, and violated the reliability standards imposed by the Eighth Amendment.

Even if this speculative evidence was marginally relevant, its probative value was far outweighed by its prejudicial impact on the jury — a point respondent fails to address.

This evidence informed the jury that appellant was not only so cold-blooded as to murder his teenage fiancé for an insurance payoff, but also killed his own unborn child. Any reasonable juror hearing this would view appellant as evil to the core.

And this inflammatory evidence must be viewed together with the admission of evidence that appellant had planned to obtain jurors' home addresses, rape the prosecutor in front of his wife and children,

the expressions by several witnesses that they feared appellant and believed him to be evil, and that he manipulated Ontiveros into shooting Keck. Moreover, the jurors were told of appellant's derogatory comments regarding Keck, his alleged efforts to frame others for her murder, and his "confessions" to Lopez that he killed her. The allegations regarding Keck's pregnancy did nothing more than add to the hatred for appellant that almost certainly burned inside the jurors.

The erroneous introduction of the evidence also violated the Eighth Amendment requirement of heightened reliability, and the Fourteenth Amendment guarantee of a fair trial by an unbiased jury. This is judged under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Because the prosecution cannot prove beyond a reasonable doubt that this error was harmless, reversal of the judgment is required.

XI

Martin Baker was an incompetent witness and the trial court prejudicially erred by admitting his testimony.

The prosecution called Martin Baker as a witness to testify that appellant tried to frame him for Keck's murder, and also attempted to poison him. (49 RT 8372.)

Baker had a history of psychosis and ingesting illegal drugs. (54

RT 9175, 9181, 9183.) At a section 402 evidentiary hearing, Baker made incomprehensible statements and refused to reveal the ages of his siblings saying, "I plead the Fifth . . ." (49 RT 8377.) His trial testimony was bizarre. (AOB at pp. 155-157.) Also noteworthy is that when Baker was taken by deputies from appellant's house to the sheriff's substation, he tested positive for methamphetamine, THC and Xanax. (48 RT 8154, 8157, 8187.)

Appellant argues that Baker was an incompetent witness and his testimony violated Evidence Code sections 701 and 702. (*People v. Davis* (1998) 17 Cal.4th 468, 525.) Because Baker was incompetent, appellant was deprived of his Sixth Amendment right of confrontation. (*Crawford v. Washington, supra,* 541 U.S. 36, 43-44.) And his testimony rendered the trial so unfair that it violated appellant's Fourteenth Amendment right to due process. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70.)

Respondent argues that, while Baker's testimony was perhaps, "odd," he "clearly demonstrated an ability to perceive and recollect events and an ability to convey his recollection understandably to the jury." (RB 83.) The record doesn't support this claim. Baker testified that when he left appellant's apartment he felt like he was

overruled appellant's objection that this procedure violated his right to confrontation and cross-examination. (1 CT 199; 4 RT 651.)

Following the verdicts, the United States Supreme Court issued its decision in *Crawford v. Washington, supra,* 541 U.S. 36. The parties conceded that *Crawford* applied, but the court held the error was harmless. (79 RT 12951.)

Relying on *Bruton v. United States* (1968) 391 U.S. 123, 126-137, and *Richardson v. Marsh* (1987) 481 U.S. 200, 208, respondent argues the statement was properly admitted because it did not implicate appellant. (RB 84-86.) Respondent is incorrect.

Ontiveros' statement included his admissions that he drove the white Nissan to the location near Tavern Road on June 11th, 2000; Keck picked him up and he got into her car; He had parked his car in the cul-de-sac and instructed Keck where to park. (38 RT 6597-6600.)

While he did not mention appellant by name, Ontiveros' defense was that he committed the murder, but had been directed to do so by appellant. By admitting these facts that were corroborated by other physical evidence, he bolstered the credibility of his claim that appellant was responsible for Keck's murder.

These statements incriminated appellant, who denied any

involvement in Keck's killing. The court and the prosecutor must have believed these statements incriminated appellant, or they would have been introduced only in front of the Ontiveros' jury. Instead, they were admitted as to *both* defendants.

The erroneous admission of these statements was not harmless as respondent suggests. (RB 86.) Instead, the evidence contributed to the cumulative unfairness of the trial. When considered in conjunction with the introduction of the other inadmissible evidence pointing towards appellant's guilt, respondent cannot demonstrate that his error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at 24.)

XIII

There was insufficient evidence to sustain the finding that the codefendant killed Keck by means of lying-in-wait either as a theory of first degree murder or as a special circumstance.

Appellant argues that there was insufficient evidence to sustain the jury's first degree murder and special circumstance findings that Ontiveros killed Keck by means of lying-in-wait. (AOB 174-178.)

Respondent claims there was "substantial evidence Flinner and Ontiveros laid in wait to find the opportune time to shoot and kill the unsuspecting Keck." (RB 87.) Respondent further argues that "The

lying-in-wait special circumstance includes the elements of first degree murder but requires the additional element that the killing was intentional. (Penal Code section 190.2 subd.(a)(15); *People v. Mendoza* (2011) 52 Cal.4th 1056, 1073.) Thus, if substantial evidence supports the lying-in-wait special circumstance, then it will necessarily also support the lying-in-wait substantive murder conviction. (*Mendoza, supra,* at p.1073.) (RB 88.)

Three elements must be found by the jury to support a lying-in-wait allegation. The first is concealment of purpose by the killer. Second, the killer must be engaged in a substantial period of watching and waiting for an opportune time to act. And, third, immediately thereafter the killer must have launched a "surprise attack" on the victim from a position of advantage. (*People v. Mendoza* (2011) 51 Cal.4th 1056, 1073.)

Appellant concedes Ontiveros and appellant concealed their purpose from Keck when she was summoned to the scene where Ontiveros had parked his car. But concealment alone is not sufficient. (*People v. Morales* (1989) 48 Cal.4th 405, 557-558.)

The gap in the evidence here concerns the elements of "watchful waiting" and a surprise attack launched from a position of advantage.

(*Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1008, cited with approval in *People v. Lewis* (2008) 43 Cal.4th 415.)

Ontiveros and appellant met at a gas station near the eventual murder scene. (51 RT 8630.) Ontiveros parked his car in a nearby cul-de-sac and walked back to the gas station. (50 RT 8027.) Appellant then telephoned Keck, who was shopping in El Cajon, and asked her to meet Ontiveros at the Alpine gas station and help him start his car. (34 RT 6059; 50 RT 8025.) When Keck arrived, they drove to the cul-de-sac, and parked her car "hood-to-hood" with Ontiveros' car. (24 RT 3886; 50 RT 8036; 51 RT 8547.) While she stood outside her car with the hood raised, Ontiveros shot her in the back of the head and drove away. (29 RT 5015.) These events took less than three minutes. (51 RT 8549.) There was no "substantial period of watchful waiting" and no surprise attack from an advantageous position.

Respondent suggests that the court should take into account not only the events immediately surrounding the shooting, but also appellant and Ontiveros' meeting at the gas station earlier that morning. (RB 89.) Respondent claims this started the period of at least two hours where both defendants were watching and waiting for Keck to arrive. But the evidence does not support this claim. According to

the prosecution's theory, there was no reason for appellant to be in the area when the murder occurred. In fact, under that theory, this was the purpose in hiring Ontiveros to commit the actual killing, so that appellant could "distance himself," both literally and figuratively. They met at the gas station to finalize their plans. (51 RT 8630.) Appellant left and went to his parents' house. (34 RT 6059; 50 RT 8025.) Ontiveros left and returned, parked his car down the street and walked back to the gas station. (30 RT 3882.)

The meeting at the gas station and surrounding events were not contiguous with the murder, and cannot be considered as part of a plan to lie in wait. (*People v. Streeter* (2012) 54 Cal.4th 205, 248.) Examining the facts of other lying-in-wait cases is instructive.

In *People v. Arrellano* (2004) 125 Cal.App.4th 1088, the defendant, after making a long series of death threats to his ex-wife, waited in concealment outside her home. (*Id.* at p.1092.) When the victim returned home from the movies with a friend, Arrellano stepped up and shot her at close range. (*Ibid.*) "The evidence demonstrated Arrellano was watching and waiting for Angelica to return home, that he was lurking close to her house and, after she drove up, that he approached her and started shooting while Angelica was still sitting in

her car." (*Ibid.*) The court affirmed the lying-in-wait allegation.

In *People v. Moon* (2005) 37 Cal.4th 1, the defendant concealed himself inside the victim's home. (*Id.* at p. 22.) When she returned he hid from her until she saw him near the living room. He pushed her down a stairway and then strangled her. (*Id.* at p. 23.) The court found the evidence supported lying-in-wait. (*Ibid.*)

In *People v. Sims* (1986) 185 Cal.App.3d 471, two defendants ordered a pizza to be delivered to their motel room. (*Id.* at p. 473.) When the delivery driver arrived, the men lured him into the room, robbed and stabbed him. (*Ibid.*) The appellate court reversed the trial court's order dismissing the lying-in-wait allegation. (*Id.* at p. 474.)

In *People v. Padayao* (1994) 24 Cal.App.4th 1610, several defendants waited on a roadway for the victim to drive by. (*Id.* at p. 1613.) When they saw him, they followed and lured him into stopping. When he did, they kidnapped him, drove to another location. tortured and killed him. The court upheld the lying-in-wait allegation. (*Ibid.*)

In each situation the defendant engaged in what the courts have termed "watchful waiting" for an opportunity to launch a surprise attack. Nothing like that happened in this case and no reported case supports the allegation under similar facts.

Respondent notes, "if substantial evidence supports the lying-in-wait special circumstance, then it will necessarily also support the lying-in-wait substantive murder conviction." (RB 88.) The evidence here supports neither. Both the substantive charge and the lying-in-wait special circumstance must be reversed.

XIV

The modified version of the lying-in-wait special circumstance provision described in Penal Code section 190.2(a)(15) is now indistinguishable from the lying-in-wait theory of first degree murder and is therefore unconstitutionally vague, and creates an arbitrary and capricious application of the death penalty by failing to narrow the class of death-eligible defendants.

In March, 2000, California voters passed Proposition 18, which modified Penal Code section 190.2 subd. (a)(15) so that in order to qualify for the death penalty a defendant must commit a murder "*by means of* lying-in-wait," rather than "*while* lying-in-wait." Appellant contends this change made the special circumstance statute virtually identical to the first-degree murder lying-in-wait provision of Penal Code section 189. By eliminating the former distinction, the electorate removed the definite guideline needed to prevent arbitrary and capricious enforcement of these laws as required by the Eighth and Fourteenth Amendments. (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428;

Gregg v. Georgia (1976) 428 U.S. 153, 188. And see *People v. Musslewhite* (1998) 17 Cal.4th 1216, 1265, and *People v. Caitlin* (2001) 26 Cal.4th 81, 90.) (AOB 179-181.)

Respondent notes that while "This change aligned the special circumstance more closely with the substantive lying-in-wait murder," nonetheless, because the lying-in-wait special circumstance of section 190.2 subd. (a)(15) requires an intent to kill and the first degree murder definition contained in section 189 does not, section 190, subd. (a)(15), is not unconstitutional. (RB 91-92,) Respondent is incorrect, and this is especially true as applied here.

In a case cited by appellant and ignored by respondent, the Ninth Circuit addressed the issue prior to the 2000 amendment. That court found the only reason section 190.2, subd.(a)(15) was not void for vagueness, was the subtle difference of that statute requiring the defendant killed "while" lying in wait, as opposed to "by means of lying-in-wait." (*Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906-907.)[5] Yet, the following year that distinction was eliminated.

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[5] In *Bradway v. Cate* (9th Cir. 2009) 588 F.3d 990, 992, the court was presented with the same issue, but failed to rule on its merits. The court found the defendant failed to show that the claim qualified for federal habeas corpus review under the Anti-Terrorism and Effective Death Penalty Act because the Supreme Court had not previously decided the issue. (*Ibid.*)

Respondent relies upon *People v. Superior Court (Bradway)* (2003) 105 Cal.App.4th 297, 306-307, for the proposition that because section 190.2 subd.(a)(15) requires the state to prove the killing was intentional, and section 189 does not, this distinction adequately narrows the class of persons to which the special circumstance can be applied in order to pass constitutional muster. (RB 92.) For the reasons set forth in Justice Kennard's dissent in *People v. Ceja* (1993) 4 Cal.4th 1134, 1146-1157, and repeated by Justice McDonald in his dissenting opinion in *Bradway* (105 Cal.App.4th at pp. 311-314), appellant submits that *Bradway* was wrongly decided and should be disapproved by this court.

And even if this court agrees with the holding in *Bradway,* it does not apply to the present case. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362 [the constitutionality of a statute is judged on an "as-applied basis"].) The *Bradway* court noted the defendant's intent to kill his victim was an inescapable conclusion given the facts of that case. (*Bradway* at p. 310.) Here, because appellant did not personally commit the murder, Penal Code section 189 required the prosecution to prove appellant's intent to kill the victim. (*People v. Musselwhite, supra,* 17 Cal.4th 1216 at 1265,) Thus, given the facts of this case,

there was no meaningful distinction between the statutes. Respondent recognizes this point in the counter-argument to appellant's contention that there was insufficient proof to sustain the lying-in-wait allegations of both statutes. Respondent asserts "If substantial evidence supports the lying-in-wait special circumstance, then it will necessarily also support the lying-in-wait substantive murder conviction." (RB 88, 91.) This statement supports the present claim.

Respondent finally claims that even if appellant's argument has merit, it would not entitle him to relief as the jury also found true the special circumstance allegation that appellant committed the murder for financial gain. According to respondent, this renders the jury's lying-in-wait special circumstance verdict as "merely a surplus finding." (RB 92.) Respondent relies on *People v. Bonilla* (2007) 41 Cal.4th 313, 333-334, to support this claim. However, because the court recognized the murder in that case occurred before the amendment of the lying-in-wait special circumstance statute, it found that it did not apply and therefore declined to consider the merits of the argument. The statement regarding a "surplus finding" is therefore *obiter dictum* and has no binding effect or precedential value. (*Stockton Theaters, Inc. v. Palermo* (1956) 47 Cal.2d 469, 474.)

Even if there is a remaining valid special circumstance against appellant, respondent takes too narrow a view. For one cannot say what future changes in the law may work to appellant's favor regarding how this court must remedy the consideration of the invalid lying-in-wait special circumstance as to these findings. Moreover, the elimination of one of the two special circumstances would inevitably help appellant in any future clemency consideration. To not decide this question of law as fully presented by appellant, would deny him the appellate review this automatic appeal entitles him to. Moreover, this question will certainly arise again and, if not resolved here, present and future capital prosecutions may be placed in jeopardy by applying an erroneous interpretation of the lying-in-wait first degree murder circumstance versus the lying-in-wait special circumstance.

The amendment to Penal Code section 190.2, subd. (a)(15) instituted by Proposition 18 eliminated the only substantive distinction between the special circumstance and section 189, rendering it unconstitutional under the Eighth and Fourteenth Amendments. Even if one accepts the questionable holding in *People v. Bradway, supra,* 105 Cal.App.4th 297, that case does not apply to the distinguishable circumstances of this case where appellant did not personally commit

the murder.

Once the jury reached its verdict under section 189, accepting that appellant intended to kill Keck and did so by lying-in-wait, its subsequent finding that appellant qualified for the death penalty under the lying-in-wait special circumstance was inevitable because the jury was not required to consider any additional information in making its decision. This is in violation of the Eighth Amendment's requirement that factors making a defendant eligible for the death penalty must properly channel the jury's discretion and narrow the class of first degree murders which a jury may impose capital punishment. The lying-in-wait special circumstance finding must be reversed.

XV

A juror committed prejudicial misconduct by writing a book about the case during the trial, exaggerating various details in the process.

Appellant argues that Juror No. 1 committed prejudicial misconduct by working on a book about the case throughout the trial. (AOB 182-208.) She decided to write the book during opening statements at the guilt phase. (74 RT 12030-12031.) During the trial, she took many notes for the book and solicited other jurors to participate. (74 RT 11865-11866; 11895-11896.)

She also received a loan to help with the effort, solicited a publisher, and within weeks of the verdict had finished her third draft of the book. (74 RT 12041-12044, 11895-11896.) She only ended the project after being threatened by a stranger in a mall parking lot. (74 RT 11909.)

The record showed Juror No. 1 was unique or controversial: she had been eager to be accepted as a juror, concealed information during voir dire about her status as a party to a restraining order, and exaggerated acts of misconduct involving other jurors. (17 CT 3880; 78 RT 12847-12850; 79 RT 12910-12911.)

The trial court rejected the claim of misconduct, focusing on Juror No. 1's exaggerated claims regarding other jurors. The court found that she, 1) lacked credibility, 2) fabricated parts of her testimony, and 3) had a personal agenda. (79 RT 12910-12913.)

The issue is whether Juror No. 1 lost focus on her duties as a fact finder in a serious capital case by using the trial as an opportunity to enhance her own interests in writing a book. In *Dyer v. Calderon* (9th Cir. 1998) 151 F.3d 970, the Ninth Circuit explained that a juror's literary ambition about the trial may create an implied bias, as the zeal and interest in the book may introduce "the kind of unpredictable

element into the jury room that the doctrine of implied bias is meant to keep out." (*Id.* at p. 982.)

Respondent argues there was no misconduct. (RB 97-100.) Respondent first seeks to distinguish Juror No. 1 from the biased juror in *Dyer* by arguing that Juror No. 1 "concealed nothing to get on the jury." (RB 99.) Respondent claims the temporary restraining order was not secured by Juror No. 1 and did not directly involve her. (RB 99.) The record does not show who obtained the restraining order but it makes clear that Juror No. 1 and her sister were both parties to that order, which required the sister's boyfriend to stay away from both. (74 RT 12161-12162.)

Juror No. 1 was very concerned about the restraining order, she researched the former's boyfriend's location and twice contacted the bailiff about her concerns regarding the restraining order during the trial. (78 RT 12849-12850.) She swore on the juror questionnaire that she had never been a victim of a crime or a party to a lawsuit, and failed to disclose her serious concern about being a party to a restraining order. (14 CT 3876, 3878.)

Juror's No.1's concern for her safety against her sister's dangerous former boyfriend was relevant during jury selection. She was

enthusiastic about becoming a juror and concealed that fact on her questionnaire and during voir dire.

Respondent claims there was no evidence that Juror No. 1's literary aspirations demonstrated a bias. (RB 99.) The record shows many ways in which this is not true. For instance, Juror No. 1 took notes not just for purposes of the trial, but also for the book. (73 RT 11865-11866.) Juror No. 1 also made multiple claims of misconduct against other jurors that the court later found were grossly exaggerated or false. (79 RT 12910-12911.) During the trial she was soliciting loans and a publisher. (74 RT 12041-12044.) In order to secure a loan on a proposed book project, or to gain the interest of a publisher, it is obvious that she must have discussed the case with third parties. And she was enlisting the participation of other jurors to help. (74 RT 11895-11896.)

Of course she didn't admit that her ambition in writing the book (that might bring fame and fortune) influenced her performance in the case. But the record shows that at a time when she was supposed to be impartially receiving and considering the evidence, she was thinking about her book. The trial court, in denying the new trial motion, even went so far as to find that she lied about the allegations she made regarding the other jurors. (79 RT 12910-12911.)

It cannot be credibly argued that someone who was lying about things that were happening during the trial, things that added an element of sensationalism to the trial, was properly and seriously considering the evidence along with the other jurors.

XVI

Appellant was deprived of his right to an impartial jury where a juror had become biased against appellant and sexually fixated with the lead detective.

Appellant argues the evidence presented during the new trial motion demonstrated that Juror No. 10 was biased against him. (AOB 198-208.)

There is no dispute in the record that Juror No. 10 dressed in a sexually provocative way, and routinely discussed her sexual fixation not only with Detective Scully, but also the bailiff and a court reporter.

Juror No. 1 testified that Juror No. 10 dressed provocatively in order to get appellant's attention and at least one point during the trial, mouthed the words, "I want you dead" to Flinner. (73 RT 11883-11884.) The court ultimately ruled Juror No. 1 was not credible–and that she engaged in "outright fabrication." (79 RT 12911.)

But the court made no factual findings other than to say that Juror No. 1 lacked credibility.

Even though Juror No. 1 was the only person who claimed to have seen Juror No. 10 tell appellant that she wanted him dead (73 RT 11883-11884), there was plenty of troubling testimony from other jurors regarding Juror No. 10's actions. Green Juror No. 11 witnessed Juror No. 10 use a water bottle to mime an oral sex act during trial. (74 RT 11979-11981.) This was likely an effort to taunt appellant but Green Juror No. 11 believed the act was directed toward him so he reciprocated. (74 RT 11975-11977.)

Several jurors laughed about Juror No. 10's provocative dress, as she apparently had her breasts on display to the extent that two of the Green jurors approached her after the trial to discuss her breasts. (76 RT 11235-12537; 78 RT 12813-12816.)

Green Juror No. 10 also testified that Juror No. 10 opened her legs to allow Detective Scully to see up her short skirt, although Juror No. 10 denied the incident. (78 RT 12809; 77 RT 12705-12707.) But several jurors acknowledged (and Juror No. 10 admitted) that she regularly spoke about Detective Scully in a sexual manner. The other jurors participated in these conversations, which also included references to the bailiff and a court reporter. (76 RT 12485-12486, 12570-12575; 77 RT 12637-12640.)

Respondent argues that there was no misconduct because only Juror No. 1 claimed to see Juror No. 10 attempt to communicate with appellant. (RB 101.)

Respondent acknowledges that Green Juror No. 11 also saw the offending juror mime a sex act with a water bottle, but dismisses the incident as "far-fetched." (RB 101.) But there was no judicial finding that Green Juror No. 11 was not credible. And this can either be seen as an act of taunting appellant or flirting with Green Juror No. 11, which apparently never happened again. And Green Juror No. 10 testified that he saw Juror No. 10 staring at appellant throughout the trial. (78 RT 12813-12816.)

The record shows Juror No. 10 was an overtly sexual person whose regular display of her breasts in the clothing she selected was a source of comedy to the other jurors. And she was fixated with the lead detective and may have been exposing her crotch to him at various times.

The trial court's inquiry did not go far enough here, and the court failed to make factual findings sorting out all of the bizarre claims. The court simply found Juror No. 1 was a liar, and then moved on. Absent findings to the contrary this court is left with demonstrated misconduct showing Juror No. 10 was biased in favor of the state's case. The court's

ruling that Juror No. 1 committed perjury during her testimony demonstrates an additional act of implied bias. Reversal of the judgment is required either way.

XVII

The trial court deprived appellant of his right to due process by failing to order a competency hearing after his suicide attempt before the penalty phase began.

When the jury returned the guilt phase verdicts on October 16th, 2003, the court ordered them sealed pending the decision of the co-defendant's jury. (65 RT 10812-10913.) Three days later, appellant was found lying on the floor of his cell "in an apparent state of physical distress." (65 RT 10812-10813.) Jailers transferred him to the UCSD Medical Center. (65 RT 10816, 10825.)

The next day, jailers informed the court that appellant had been hospitalized due to a suicide attempt. (65 RT 10825, 10837.) Counsel requested a hearing saying that appellant's actions raised an issue regarding his competency. (65 RT 10837; 10 CT 24130, 24132.) The following day appellant was discharged from the hospital and returned to the jail. (65 RT 10825.)

The prosecutor opposed any competency hearing, noting that appellant has a "documented history of suicide attempts." (11 CT 2487.)

He suggested that appellant's actions did not raise an issue of competency but was instead an act consistent with his "criminal history . . . of manipulation and deceit." (11 CT 2490.)

On October 23rd, the court discussed appellant's motion for a competency hearing, having received the medical records from UCSD and a large file of medical and psychiatric records from the jail. (65 RT 10817.) Counsel indicated that some records were missing, including those regarding appellant's recent hospital discharge after his suicide attempt. (65 RT 10821.) Following a quick review, the court noted that a medical expert was needed to interpret the records. (65 RT 10820-10822, 10835.)

Counsel argued that the suicide attempt raised "a serious question" regarding appellant's present competency, and that the records supported this conclusion. (65 RT 10828-10829.)

The prosecutor argued that there had not been a suicide attempt, basing his diagnosis on the fact that appellant's vitals were not "off the scales." Without evidence of a suicide, there was no reasonable doubt regarding appellant's competency. (65 RT 10832.)

Without receiving further evidence, or expert assistance with the medical records, the court denied the motion for a competency hearing,

emphasizing there was "not much, if any concrete evidence" that appellant had attempted suicide. (65 RT 10833.) The court noted that it had observed appellant in court that morning and he did not appear disoriented or lacking cognizance of his surroundings and the proceedings. The court had seen appellant speaking with counsel and noticed nothing out of the ordinary. (65 RT 10833.)

Respondent adopts the theory that there was no "substantial evidence of a suicide attempt or incompetence," and, without such evidence, there was no basis for the court to conduct a competency hearing. (RB 102.)

Contrary to this claim, there was substantial evidence establishing appellant's suicide attempt and therefore raising a question regarding his competence. It began when he was found lying on the floor of his cell unconscious. Deputies and jail medical staff found appellant's condition to be so serious that he was transported to the UCSD Medical Center. (65 RT 10816, 10825.) Appellant had been prescribed several powerful medications over the past year (enough to fill a 27 page report), so he obviously had the means to attempt suicide by taking an overdose of prescription medication.[6] Hospital emergency

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[6] One of the records missing from those given to the court was the results of a toxicology screen. (65 RT 10833.)

department staff admitted appellant and kept him for observation and treatment for three days. (65 RT 10825.) When jail staff first informed the court that appellant had been hospitalized they characterized it as a suicide attempt. (65 RT 10825, 10837.) Appellant had a documented history of attempting to take his own life and suffered from psychiatric problems. (See AOB 208-214.)

These facts raised a reasonable doubt as to appellant's competency and required a hearing. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92; *People v. Jones* (1991) 53 Cal.3d 1115, 11522 383 U.S. 375.) And this is true regardless of any contrary evidence, including any personal doubts by the court. (*People v. Welch* (1999) 20 Cal.4th 701, 737-738; *People v. Pennington* (1967) 66 Cal.2d 508, 518-519.)

Respondent's personal opinion regarding appellant's competency is irrelevant. The United States Supreme Court has cautioned judges "not to engage in the business of medical or psychiatric diagnosis." (*Parham v. J.R.* (1979) 442 U.S. 584, 608.) The same must be true for counsel.

And the prosecutor's conclusion that appellant's history of attempting suicide was actually evidence of his manipulative and deceitful character does not comport with common knowledge that some people who commit suicide often have made prior earnest attempts at

doing so, nor of the psychiatric community's view of multiple suicide attempts.

The record here shows that appellant attempted to commit suicide in his jail cell. An attempted suicide "suggests a rather substantial degree of mental instability contemporaneous with trial." (*Drope v. Missouri* (1975) 420 U.S. 162, 181.) And even if appellant's failed attempt to kill himself does not, by itself, create a reasonable doubt, the additional evidence in this case does. (*People v. Rodgers* (2006) 39 Cal.4th 826, 848.)

Denying a hearing following the psychiatric diagnosis by the trial court and the prosecutor violated appellant's due process rights. (*Drope v. Missouri, supra,* 420 U.S. 162, 171; *Pate v. Robinson* (1966) 383 U.S. 275, 377; *People v. Hale* (1988) 44 Cal.3d 531, 539.) Respondent's argument is not persuasive. Since it is now impossible to assess appellant's competency at the time of trial, the judgment must be reversed and a new trial ordered.[7]

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[7] The main concern of a trial court when assessing whether a defendant's conduct warrants a competency hearing is whether the defendant is actually malingering, seeking to derail and delay his trial. (See e.g., *People v. Lewis and Oliver* (2006) 39 Cal.3d 970, 1048.) Here, appellant attempted to commit suicide over the weekend of October 19th. He was discharged from the hospital on October 22nd, and appeared in court on October 23rd. At that time the court considered and rejected counsel's request for a competency hearing. That

XVIII

The cumulative impact of the errors denied appellant of his right to a fair trial.

Appellant argues the cumulative impact of the many errors described above deprived him of his right to due process. (AOB 220-222.)

Respondent argues that no errors were committed, and that if any errors did occur, they were "utterly insufficient to deny Flinner his due process right to a fair trial." (RB 107.) Respondent provides no analysis for these conclusions.

Appellant believes for all of the reasons argued in the opening brief that the many errors, when considered together, rendered the trial fundamentally unfair.

Appellant's pretrial misbehavior upset the trial judge and prosecutor, and resulted in some of the most bizarre legal rulings and consequences imaginable.

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afternoon his co-defendant's jury reached its verdicts, and the verdicts of appellant's jury were thereafter unsealed and recorded. The court told the jury it would be returning in approximately one week to commence the penalty phase. (65 RT 10863.) The penalty trial actually began on November 3rd. (68 RT 11245.) So the court could have easily appointed psychiatric experts to examine appellant, prepare reports for the court, and conduct an expedited competency hearing with little or no delay in the proceedings. Yet it chose not to do so.

The trial judge and prosecutor had secret meetings devising a plan to restrict appellant's access to his attorneys. The court admitted volumes of irrelevant and inflammatory evidence, including the fact that appellant might be targeting the jurors' families. One consequence of this out-of-control proceeding was that a juror sought to write a book, and another hated appellant and became infatuated with the lead detective.

Under any fair reading of this case, the mistakes were numerous and serious. Appellant is entitled to a new and fair trial.

Conclusion

The judgment must be reversed for all of the reasons argued above.

Date: 6/26/14

Respectfully submitted,

Patrick Morgan Ford
Attorney for Appellant
MICHAEL FLINNER

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 19,507 words, as determined by the word count feature of the program used to produce the brief.

Dated: 6/26/14

PATRICK MORGAN FORD

People v. Michael Flinner CASE No. S123813

DECLARATION OF SERVICE BY U.S. MAIL AND ELECTRONIC SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served an *Appellant's Reply Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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Additionally, I electronically served a copy of the above document as follows: 1) California Supreme Court' electronic notification address, Courts.CA.gov/supremecourt , 2) Court of Appeal's electronic notification address, 4d2nbrief@jud.ca.gov, and 3) the Attorney General's electronic notification address, ADIEService@doj.ca.gov. I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge. Executed on July 1, 2014, at San Diego, California.

Esther F. Rowe