

SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

STEPHEN EDWARD HAJEK, and
LOI TAN VO,

Defendants and Appellants.

Case No. S049626

San Clara County
Superior Court
No. 148113

COPY

APPELLANT'S REPLY BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of Santa Clara

The Honorable Daniel E. Creed

MICHAEL J. HERSEK
State Public Defender

ALISON PEASE
Sr. Deputy State Public Defender
Cal. State Bar No. 91398

801 K Street, Suite 1100
Sacramento, CA 95814-3518
Telephone (916) 322-2676

Attorneys for Appellant

SUPREME COURT
FILED

FEB - 8 2012

Frederick K. Ohlrich Clerk

Deputy

DEATH PENALTY

TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
III. THERE WAS INSUFFICIENT EVIDENCE OF EITHER A FIRST DEGREE LYING-IN-WAIT MURDER OR A LYING-IN-WAIT SPECIAL CIRCUMSTANCE	5
A. Respondent's Argument	5
B. Respondent has not Established Concealment, a Substantial Period of Watching and Waiting and a Surprise Attack	7
C. The Theory of Lying in Wait Presented at Trial Differed From That now Offered by Respondent	10
D. Appellant's Death Sentence Must be Reversed	14
IV. THE EVIDENCE WAS INSUFFICIENT TO PROVE EITHER TORTURE MURDER AS A THEORY OF FIRST DEGREE MURDER OR THE ALLEGATION OF A TORTURE MURDER SPECIAL CIRCUMSTANCE	18
A. Intent to Inflict Extreme and Prolonged Pain on a Living Human	19
B. Torture for the Purpose of Revenge	26
C. Insufficiency of Evidence on Theory of Torture Murder and/or of the Torture Special Circumstance Finding Requires Reversal	30
V. APPELLANT'S CONVICTION FOR MURDER VIOLATES DUE PROCESS BECAUSE CONSPIRACY IS NOT A THEORY OF CRIMINAL LIABILITY ON WHICH A CONVICTION FOR A SUBSTANTIVE CRIME MAY BE BASED	35

TABLE OF CONTENTS

	PAGE
A. This Issue was not Forfeited	35
B. Respondent Fails to Address the Improper Use of an Uncharged Conspiracy in this Case	37
C. Prejudice	40
VIII. ADMISSION OF AUDIOTAPE VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS EVIDENCE CODE SECTION 352	42
IX. THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF APPELLANT'S ALLEGED SATANIC BELIEFS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH SENTENCE	52
A. The Testimony of Lori Nguyen and Hajek's Letter to Vo, Exhibit 64	52
X. IT WAS ERROR TO ALLOW HIS CO-DEFENDANT TO INTRODUCE "OTHER CRIMES" AND PROPENSITY EVIDENCE AGAINST MR. HAJEK	60
XI. THE TRIAL JUDGE ERRED IN ADMITTING THE TESTIMONY OF NORMAN ("BUCKET") LEUNG	64
A. Denial of an Evidence Code Section 402 Hearing	64
B. The Evidence Should Have Been Excluded Under Evidence Code Section 352	66
C. Prejudice	67
XIV. THE TORTURE SPECIAL CIRCUMSTANCE INSTRUCTION GIVEN AT APPELLANT'S TRIAL WAS ERRONEOUS AND UNCONSTITUTIONAL	70

TABLE OF CONTENTS

	PAGE
XV. THE TRIAL COURT ERRED IN FAILING TO GIVE AN INSTRUCTION THAT THE TESTIMONY OF CO-DEFENDANT VO SHOULD BE VIEWED WITH CAUTION TO THE EXTENT THAT IT RELATED TO MR. HAJEK	76
XVI. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY	79
A. There was no Forfeiture	79
B. The Trial Court’s Failure to Fully Instruct the Jury on the Law of Conspiracy was Error	81
C. Confusing Instructions About Possible Objects of the Alleged Conspiracy and the Natural and Probable Consequences Theory	82
D. Reversal is Required	84
XXIV. THE TRIAL JUDGE ERRED IN FAILING TO ENFORCE THE CLEAR DICTATES OF PENAL CODE SECTION 190.9	87
A. Appellants Were Prejudiced by Failure to Follow § 190.9	87
B. The Mandate of Section 190.9 Should be Enforced	89
C. Appellant’s Eighth and Fourteenth Amendment Rights Were Violated	92
D. Under Both California Statutory Law and the United States Constitution, the Trial Court’s Failure to Record All Proceedings was Error and Requires Reversal of Appellant’s Convictions and Death Sentence	94

TABLE OF CONTENTS

PAGE

XXXIII. THE PROSECUTOR ENGAGED IN EGREGIOUS MISCONDUCT DURING BOTH THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL, REQUIRING THE REVERSAL OF MR. HAJEK'S DEATH SENTENCE 96

A. The Cross-Examination of Appellant's Psychological Expert was Purposely Deceptive and was not Designed to Elicit Relevant Information but to Prejudice Appellant 96

B. The Prosecutor's Improper Penalty Phase Argument Constituted Misconduct Requiring Reversal of Appellant's Death Sentence 100

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>Bailey v. Taaffe</i> (1866) 29 Cal. 422	65
<i>Beck v. Alabama</i> (1980) 447 U.S. 625	49
<i>Bollenbach v. United States</i> (1946) 326 U.S. 607	72, 84
<i>Brown v. Sanders</i> (2006) 546 U.S. 212	14, 31, 32
<i>Carter v. Kentucky</i> (1981) 450 U.S. 288	72, 84
<i>Chapman v. California</i> (1976) 386 U.S. 18	passim
<i>Commonwealth v. Spell</i> (Pa.2011) 28 A.3d 1274	23, 24
<i>Dawson v. Delaware</i> (1992) 503 U.S. 159	57, 58
<i>Dobbs v. Zant</i> (1993) 506 U.S. 357	92
<i>Domino v. Superior Court</i> (1982) 129 Cal.App.3d 1000	8
<i>Donnelly v. DeChristoforo</i> (1974) 416 U.S. 637	97
<i>Dunn v. United States</i> (5th Cir. 1962) 307 F.2d 883	97

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>Estelle v. McGuire</i> (1991) 502 U.S. 62	63, 68
<i>Fisher v. City of Berkeley</i> (1984) 37 Cal.App.3d 644	37
<i>Gamache v. California</i> (2010) 562 U.S. ___, 131 S.Ct. 591	51, 69, 75, 85, 94, 105
<i>Geders v. United States</i> (1976) 425 U.S. 80	93
<i>Glasser v. United States</i> (1942) 315 U.S. 60	93
<i>Griffin v. Illinois</i> (1956) 351 U.S. 12	92
<i>Griffin v. United States</i> (1991) 502 U.S. 46	31
<i>Hale v. Morgan</i> (1978) 22 Cal.3d 388	36
<i>Hicks v. Oklahoma</i> (1980) 447 U.S. 343	35, 68, 93, 105
<i>In re Cortez</i> (1971) 6 Cal.3d 78	65
<i>In re Edward S.</i> (2009) 173 Cal.App.4th 387	48
<i>In re Hardy</i> (2007) 41 Cal.4th 977	39

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>Jackson v. Virginia</i> (1979) 443 U.S. 307	21
<i>Johnson v. Mississippi</i> (1988) 486 U.S. 578	16, 33
<i>Kearns v. United States</i> (9th Cir. 1928) 27 F.2d 854	77
<i>Keeler v. Superior Court</i> (1970) 2 Cal.3d 619	39
<i>McKinney v. Rees</i> (9th Cir. 1993) 993 F.2d 1378	63
<i>Michelson v. United States</i> (1948) 335 U.S. 469	63
<i>Missouri v. Banks</i> (Mo. 2007) 215 S.W.3d 118	58, 59
<i>Montana v. Eglehoff</i> (1996) 518 U.S. 37	77
<i>Neder v. United States</i> (1999) 527 U.S. 1	75
<i>Newman v. Metrish</i> (6th Cir. 2008) 543 F.3d 793	22
<i>O’Laughlin v. O’Brien</i> (1st Cir. 2009) 568 F.3d 287	22
<i>Palmer v. Shawback</i> (1993) 17 Cal.App.4th 296	36

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>Parker v. Dugger</i> (1991) 498 U.S. 308	92
<i>People v. Abilez</i> (2007) 41 Cal.4th 472	76
<i>People v. Adams</i> (2004) 115 Cal. App. 4th 243	48
<i>People v. Alvarez</i> (1996) 14 Cal.4th 155	78
<i>People v. Babbitt</i> (1988) 45 Cal.3d 660	48
<i>People v. Barragan</i> (2004) 32 Cal.4th 236	81
<i>People v. Belmontes</i> (1988) 45 Cal.3d 774	41
<i>People v. Bemore</i> (2000) 22 Cal.4th 809	20, 26, 29
<i>People v. Blanco</i> (1992) 10 Cal.App.4th 1167	36
<i>People v. Bolin</i> (1998) 18 Cal.4th 297	54
<i>People v. Bolton</i> (1979) 23 Cal.3d 208	96
<i>People v. Box</i> (2000) 23 Cal.4th 1153	78

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Carpenter</i> (1997) 15 Cal.4th 213	5
<i>People v. Carrasco</i> (1981) 118 Cal.App.3d 936	72, 84
<i>People v. Chatman</i> (2006) 38 Cal.4th 344	25, 98
<i>People v. Chien</i> (2008) 159 Cal.App.4th 1283	48
<i>People v. Chun</i> (2009) 45 Cal.4th 1172	38
<i>People v. Cole</i> (2004) 33 Cal.4th 1158	25, 72
<i>People v. Cook</i> (2006) 39 Cal.4th.566	18, 26
<i>People v. Crittenden</i> (1994) 9 Cal.4th 83	18, 103
<i>People v. Daya</i> (1994) 29 Cal.App.4th 697	79, 80
<i>People v. Dennis</i> (1998) 17 Cal.4th 468	100, 101
<i>People v. Durham</i> (1969) 70 Cal.2d 171	37, 38
<i>People v. Dykes</i> (2009) 46 Cal.4th 731	90

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Edelbacher</i> (1989) 47 Cal.3d 983	63
<i>People v. Elliot</i> (2005) 37 Cal.4th 453	25, 72
<i>People v. Engleman</i> (2002) 28 Cal.4th 436	91
<i>People v. Estrada</i> (1998) 63 Cal.App.4th 1090	98
<i>People v. Ewoldt</i> (1994) 7 Cal.4th 380	62
<i>People v. Flood</i> (2000) 18 Cal.4th 470	75
<i>People v. Fosselman</i> (1983) 33 Cal.3d 572	47, 48
<i>People v. French</i> (2008) 43 Cal.4th 36	36
<i>People v. Gonzalez</i> (1990) 51 Cal.3d 1179	104
<i>People v. Green</i> (1980) 27 Cal.3d 1	30
<i>People v. Guinan</i> (1998) 18 Cal.4th 558	77
<i>People v. Guiton</i> (1993) 4 Cal.4th 1116	30, 31

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Harris</i> (2008) 43 Cal.4th 1261	90
<i>People v. Harrison</i> (2005) 35 Cal.4th 208	61
<i>People v. Hart</i> (1999) 20 Cal.4th 546	79, 80
<i>People v. Hill</i> (1992) 3 Cal.4th 959	3
<i>People v. Hill</i> (1998) 17 Cal.4th 800	96, 100
<i>People v. Hillhouse</i> (2002) 27 Cal.4th 469	20
<i>People v. Hinton</i> (2006) 37 Cal.4th 839	90
<i>People v. Huggins</i> (2006) 38 Cal.4th 175	90
<i>People v. Jennings</i> (2010) 50 Cal.4th 616	18
<i>People v. Johnson</i> (1978) 77 Cal.App.3d 866	53
<i>People v. Johnson</i> (1980) 26 Cal.3d 557	23
<i>People v. Johnson</i> (2004) 119 Cal.App.4th 976	36

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Jurado</i> (2006) 38 Cal.4th 72	5
<i>People v. Letner</i> (2010) 50 Cal.4th 99	90
<i>People v. Lewis</i> (2008) 43 Cal.4th 415	5, 7-10
<i>People v. Lovelace</i> (1929) 97 Cal.App.228	39
<i>People v. Marchand</i> (2002) 98 Cal.App.4th 1056	36
<i>People v. Marshall</i> (1997) 15 Cal.4th 1	21
<i>People v. McCoy</i> (2001) 25 Cal.4th 1111	35, 39
<i>People v. Mills</i> (2010) 48 Cal.4th 158	90
<i>People v. Moon</i> (2005) 37 Cal.4th 1	5
<i>People v. Morales</i> (1989) 48 Cal.3d 527	5, 20
<i>People v. Mungia</i> (2008) 44 Cal.4th 1101	24, 25
<i>People v. Pearson</i> (2012) ___ Cal.4th ___, 2012 WL 34145	18, 21, 74

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Pensinger</i> (1991) 52 Cal.3d 1210	26
<i>People v. Petznick</i> (2003) 114 Cal.App.4th 663	70, 71, 74
<i>People v. Polk</i> (1996) 47 Cal.App.4th 944	46
<i>People v. Prieto</i> (2003) 30 Cal.4th 226	39, 81
<i>People v. Proctor</i> (1992) 4 Cal.4th 499	26
<i>People v. Raley</i> (1992) 2 Cal.4th 870	26
<i>People v. Ramirez</i> (1987) 189 Cal.App.3d 603	36
<i>People v. Rogers</i> (2006) 39 Cal.4th 826	90
<i>People v. Roldan</i> (2005) 35 Cal.4th 646	62
<i>People v. Rundle</i> (2008) 43 Cal.4th 76	90
<i>People v. Russo</i> (2001) 25 Cal.4th 1124	81
<i>People v. Sedeno</i> (1974) 10 Cal.3d 703	80

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. St. Martin</i> (1970) 1 Cal.3d 524	80
<i>People v. Stevens</i> (2007) 41 Cal.4th 182	5
<i>People v. Stowell</i> (2003) 31 Cal.4th 1107	64
<i>People v. Taylor</i> (2010) 48 Cal.4th 574	90
<i>People v. Tubby</i> (1949) 34 Cal.2d 72	29
<i>People v. Valdez</i> (2004) 32 Cal.4th 73	101
<i>People v. Vera</i> (1997) 15 Cal.4th 269	36
<i>People v. Wagner</i> (1975) 13 Cal.3d 612	67
<i>People v. Waidlaw</i> (2000) 22 Cal.4th 690	21
<i>People v. Watson</i> (1956) 46 Cal.2d 818	93
<i>People v. Whisenhunt</i> (2008) 44 Cal.4th 174	25
<i>People v. Williams</i> (1988) 45 Cal.3d 1268	76

TABLE OF AUTHORITIES

CASES	PAGE/S
<i>People v. Wilson</i> (2005) 36 Cal.4th 309	90
<i>People v. Zambrano</i> (2007) 41 Cal.4th 1082	90
<i>Rushen v. Spain</i> (1983) 464 U.S. 114	92
<i>Sandstrom v. Montana</i> (1979) 442 U.S. 510	68
<i>State v. Kimball</i> (N.C. 1987) 360 S.E.2d 691	56
<i>Sullivan v. Louisiana</i> (1993) 508 U.S. 275	85
<i>United States v. Gonzales-Lopez</i> (2006) 548 U.S. 140	91
<i>Ward v. Taggart</i> (1959) 51 Cal.2d 736	37
<i>Woodson v. North Carolina</i> (1976) 428 U.S. 280	92
CONSTITUTIONS	
United States Constitution	
First	57
Sixth	passim
Eighth	passim
Fourteenth	passim

TABLE OF AUTHORITIES

CASES	PAGE/S
STATUTES	
Evidence Code section	
350	48
352	passim
402	64, 66
1101 (a)	passim
 Penal Code section	
4	39
6	38
31	35, 38, 39
190.2	18
190.3	15, 103
190.9	passim
995	10
1118.1	10, 12, 47
 JURY INSTRUCTIONS	
CALJIC. Nos.	
3.10	76
3.11	76
3.12	76
3.13	76
3.14	76
3.18	76, 77, 78
6.10.5	40, 82, 83
6.11	82, 83
8.80.1	71
8.81.18	70, 71, 73
17.41	91

TABLE OF AUTHORITIES

CASES

PAGE/S

CALIFORNIA RULES OF COURT

8.20 (A) (5) 87

OTHER AUTHORITIES

5 Witkin & Epstein, Cal. Criminal Law
(2d ed. 1988) Trial, § 2914 100

The Diagnostic and Statistical Manual
of Mental Disorders (DMS-IV) 98, 102



exposure for “streaking” naked in his neighborhood. The officer involved in investigating the incident noted in his police report that appellant might have psychiatric problems. (18 RT 4348.) While his probation officer could have recommended a sentence in a juvenile detention facility, she did not because she believed Mr. Hajek had mental problems. (18 RT 4264.) When he was 17 years old, Stephen was committed to a hospital for inpatient mental health treatment because the psychologist who was treating him believed that he was extremely depressed, was mentally decompensating and moving towards schizophrenia. (18 RT 4507.) During his hospitalization, Mr. Hajek began taking lithium, a medication used to treat bipolar disorder. The mental health professionals working with him noted a marked improvement in his attitude and conduct after he was medicated. (19 RT 4533-4534, 4552-4553.)

Not only did the evidence establish that Mr. Hajek had suffered from mental illness from an early age, it showed that his early childhood had been marred by significant trauma and disruption. His birth mother abandoned him in the hospital shortly after his birth, and he was placed in foster care when he was one week old. (23 RT 5741.) For the first eleven and half months of his life, appellant lived in a loving foster home; the state agency overseeing the foster care system in Florida, abruptly wrested him from that home because his foster parents wanted to adopt him. At the time, such an adoption was against the policy of the agency, the Florida Health and Rehabilitative Services. (23 RT 5741-5742.) Stephen Hajek lived in another foster home for nine months until he was placed with the Rector family, who were suppose to adopt him. (23 RT 5743.) Ultimately, however, Mr. and Mrs. Rector did not adopt Stephen. He was removed from the their home because of problems, including the fact that Stephen

and the Rectors' 6 year old daughter were fighting, and the Rectors reported that he was causing problems. (23 RT 5755-5756.) Ultimately, the Hajeks adopted Stephen when he was about 28 months old. (19 RT 4638.) Mrs. Hajek testified that when he first came to live with them, Stephen was an anxious and fearful little boy. (18 RT 4212-4215.)

In the face of all this evidence about his mental problems and his traumatic early childhood as well as the fact that he was only 18 years old at the time of the crimes, the prosecutor zealously pursued the death penalty for Stephen Hajek.² As appellant's opening brief and supplemental briefs establish, the convictions and death sentence in this case were obtained at a trial marked by significant errors.

In this reply brief, appellant addresses specific contentions made in respondent's brief where it is necessary to present the issues more fully to the Court. Appellant does not reply to respondent's contentions which are adequately addressed in his opening brief and in his supplemental briefs. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief and supplemental briefs, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties

² The decision to pursue the death sentence for Mr. Hajek, a troubled 18 year with a very limited criminal history accused of a single murder, contrasts with the decisions of the Santa Clara District Attorney's Office, during the same time period, to *not* pursue the death penalty in a number of other murder cases with more egregious facts, including multiple victims, and more criminally sophisticated defendants. (See Argument I, Hajek AOB at 39-51; italics added.)

fully joined.

The arguments in this reply brief are numbered to correspond to the argument numbers in appellant's opening brief and supplemental opening briefs.

* * * * *

III.

THERE WAS INSUFFICIENT EVIDENCE OF EITHER A FIRST DEGREE LYING-IN-WAIT MURDER OR A LYING-IN-WAIT SPECIAL CIRCUMSTANCE

Mr. Hajek argued in his opening brief that the evidence was insufficient to prove, on a theory of lying in wait, either first degree murder or a special circumstance. (Hajek AOB at 68-78.) Respondent's brief argues that there was sufficient evidence to support both a lying-in-wait murder conviction and a finding of true on the lying-in-wait special circumstance. (RB at 87-96.)

A. Respondent's Argument

A lying-in-wait special circumstance requires "proof of 'an intentional murder, committed under circumstances which include (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.'" (*People v. Lewis* (2008) 43 Cal.4th 415, 509, quoting *People v. Jurado* (2006) 38 Cal.4th 72, 119, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) This Court has said that the requirements of a lying-in-wait first degree murder are "slightly different" than those for the lying-in-wait special circumstance, which contains "more stringent requirements." (*People v. Moon* (2005) 37 Cal.4th 1, 22, quoting *People v. Carpenter* (1997) 15 Cal.4th 213, 288.) In *People v. Stevens* (2007) 41 Cal.4th 182, 204, the Court wrote that the distinction between the lying-in-wait special circumstance and lying-in-wait murder is that the former requires an intent to kill, while the latter does not.

First, it should be noted, respondent's brief offers a different analysis of the lying-in-wait theories of first degree murder and special circumstance than was offered by the prosecution at trial. Respondent now claims that the object of the watching and waiting in this case was the victim, Mrs. Su Hung, rather than her granddaughter, Ellen Wang. (RB at 89-91.) This was not the theory which the prosecutor argued to the jury in this case.

In line with this new theory of the object of the lying in wait, respondent argues that the evidence satisfied all elements of the crime, because, inter alia:

Once inside, they [the defendants] concealed their purpose. Although they incapacitated Su Hung by tying her hands and blindfolding her, and isolated her from Alice by bringing her to her bedroom, *they did not harm her, threaten her, or give her reason to believe their hostile intent extended beyond Ellen.*

(RB at 89, italics added.)

There is nothing in the record to support the italicized portion of this claim by respondent; it is pure speculation. There was no testimony or other evidence about what the defendants said to Su Hung once she was in the bedroom. Alice Wang, Su Hung's other granddaughter who was at the house during the entire time appellants were there, testified that her grandmother seemed scared and was trembling when they tied her up shortly after their arrival. (14 RT 3302-3303.) Therefore, according to the prosecution's own witness, Mrs. Su Hung was frightened well before she taken upstairs. Further, there is no testimony or any other evidence establishing that Su Hung knew that the defendants were looking for Ellen or that their "hostile intent" only applied to Ellen. The evidence did show that Su Hung did not understand English and thus would not understand what either defendant said to her.

Respondent also asserts that the defendants lulled Su Hung into a false sense of security before killing her. In support of this claim, respondent states that the defendants initially blindfolded Su Hung, tied her up, took her upstairs, left her alone for a period of time; untied her and removed the blindfold and then tied her up again and killed her. (RB at 90.) This scenario is based on speculation. Alice Wang did testify that after her mother, Cary Wang, came home, one of the defendants took her upstairs to see her grandmother. However, Alice testified that she really only got a glimpse, from the doorway of the bedroom, of her grandmother. She saw her grandmother lying on the bed, but the only parts of her body which Alice saw were her legs. (14 RT 3306.) She could not see her grandmother's face because there was a newspaper in the way. Alice could see her grandmother's hands on either side of the paper, and they may have moved. (14 RT 3307.) However, neither she or grandmother said anything. (14 RT 3307.)

B. Respondent has not Established Concealment, a Substantial Period of Watching and Waiting and a Surprise Attack

In *People v. Lewis, supra*, 43 Cal.4th 415, a case involving five murder victims, the Court set aside several lying-in-wait special circumstance findings. The grounds for these reversals were: (1) insufficient evidence of a substantial period of watching and waiting as to one victim and (2) insufficient evidence that the murder occurred while the defendants were lying in wait as to three other victims. (*Id.* at pp. 507-509; 511-515.) As to the first basis, the killing occurred right after the collision of the victim's car with the car of a friend of one of the defendant. The Court found there was not a sufficient period of watching and waiting to

sustain the lying-in-wait special circumstance as to that victim. In addition, the Court found the killing of three of the other victims did not take place close enough in time with the concealment, the watching and waiting and the surprise attack to sustain those lying-in-wait special circumstances. (*Id.* at p.514-515.)

The facts of this case are similar to those in the *Lewis* case in terms of the time periods involved. The Court found insufficient evidence of lying in wait in *Lewis* because three of the victims were killed one to three hours after they had been kidnaped. (*People v. Lewis, supra*, 43 Cal.4th at p. 514.) The Court determined that such an interruption meant that there was no concealment of purpose contemporaneous with a substantial period of watching and waiting for an opportune time to act, followed by a surprise attack on an unsuspecting victim from a position of advantage; accordingly, the lying-in-wait special circumstance findings as to three of the victims must be invalidated. (*Ibid.*) Similarly, in *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, the Court of Appeal found that the killing “. . . must take place during the period of concealment and watchful waiting or the lethal acts must begin at and flow continuously from the moment the concealment and watchful waiting ends. If a *cognizable interruption* separates the period of lying in wait from the period during which the killing takes place, the circumstances calling for the death penalty or life without possibility of parole do not exist.” (*Id.* at p. 1007; italics added.)

In this case, the killing of Mrs. Su Hung apparently took place several hours after the defendants entered the house looking for Ellen Wang. As respondent points out in its brief, Mrs. Su Hung was separated from her granddaughter, taken upstairs and held by herself in a bedroom for some time before she was killed. (RB at 90.) These facts do not support a

finding of concealment and surprise attack, required elements of a lying-in-wait special circumstance. As this Court said of some of the victims in *People v. Lewis, supra*, Su Hung “must have been aware of being in grave danger long before getting killed.” (*Id.*, 43 Cal.4th at p. 515 .)

Respondent argues that the evidence in this case established that appellants concealed their purpose “by using a ruse to gain entry to the Wang household, saying they wanted to talk to or leave a note for Ellen.” (RB at 89.) In fact that was not a ruse; it is undisputed that one of the purposes of going to the Wang house was to talk to Ellen. Respondent further claims that they continued to conceal their purpose when they tied Su Hung up, blindfolded her, and took her upstairs to the bedroom. Respondent unconvincingly claims that, despite these unfriendly acts by appellants, Su Hung somehow would not have concluded that they were hostile to her. (RB at 89.)

In *People v. Lewis, supra*, this Court rejected a similar argument about the concealment prong of the lying-in-wait special circumstance. In *Lewis*, the prosecution claimed that although the murders in that case did not occur until several hours after the defendants had kidnaped the victims, defendant had concealed his purpose to kill each of them until the moment they were killed. (*Ibid.*, 43 Cal.4th at p. 514.) In response to this argument, the Court wrote:

Were we to hold that sufficient evidence supports the lying-in-wait special circumstance allegations the jury found true here, it would be difficult to say there is any distinction between a murder committed “by means of lying in wait” and a murder committed “while” lying in wait. Such a construction of the lying-in-wait special circumstance would read the word “while” out of the statute.

(*Id.* at p. 515.)

The prosecutor did not prove when during the hours that the defendants were in the Wang household waiting for Ellen that Su Hung was killed. The evidence suggests that it might have been several hours. Alice Wang testified that she checked on her grandmother after her mother, Cary Wang, returned home to have lunch. (14 RT 3297.) Mrs. Cary Wang did not return home until more than an hour after the appellants entered the Wang house. (14 RT 3297.) This Court should follow its own analysis in *People v. Lewis, supra*, and find that the prosecutor did not present substantial evidence of a lying-in-wait special circumstance.

C. The Theory of Lying in Wait Presented at Trial Differed From That now Offered by Respondent

In assessing the sufficiency of the evidence of both lying-in-wait first degree murder and the lying-in-wait special circumstance one must consider how these theories were presented to the jury in this case.

As respondent's brief points out, the question of whether there was sufficient evidence to support the lying-in-wait theories arose pretrial. Appellant filed, pursuant to Penal Code section 995, a motion to dismiss, inter alia, the lying-in-wait special circumstance, and the trial court granted it. (5 CT 1197-1200, 1349.) After the district attorney filed an interlocutory appeal, the Court of Appeal reinstated the allegation. (6 CT 1429-1432.)

At the close of the prosecution's case, appellant filed a motion for acquittal under Penal Code section 1118.1 regarding, inter alia, the lying-in-wait special circumstance. (7 CT 1741-1756.) During the initial discussions on the 1118.1 motion, the trial judge suggested that he believed that the defense objections to both the lying-in-wait and torture special circumstances had merit. (17 RT 4190-4191.) There were subsequent discussions among the trial court and counsel about whether the lying-in-

wait special circumstance should go the jury, and the trial judge expressed real concerns about the sufficiency of the evidence of this special circumstance. (18 RT 4371-4373, 21 RT 5265-5265, 5273-5374.)

It is clear from the record that a principal stumbling block for the trial judge in allowing the lying-in-wait special circumstance to go to the jury was his finding that the “target” of the defendants’ alleged plan was Ellen Wang, not the victim, Mrs. Su Hung. The trial judge stated:

I’m kind of concerned, where is the lying in wait with this particular victim? If Ellen came home and she was murdered when she came home, I would have no problem with lying in wait. But it appears, you know, the evidence interpreted best for the People, they forced their way into the home and take the grandmother kind of hostage and take her upstairs at that time, and somewhere upstairs she meets her demise. . . . If Ellen died I could see where there would be that special, but it’s grandma.

(18 RT 4371-4372.)

Later in this colloquy, the judge asked the prosecutor whether the lying-in-wait intent could be transferred from victim to victim: “So it attaches because the intent to kill Ellen, that lying in wait is a special, would go to the grandmother?” (18 RT 4372.) The prosecutor responded to this question by asserting:

Yes, because it is the way they went about killing this woman. They didn’t know her. They didn’t know she existed, but because she was a family member they were going to wait for the opportune time to show off the death to Ellen. I think there’s enough evidence there.

(18 RT 4373.)

In a subsequent discussion about this issue, the trial judge ruled:

It’s [sic] the lying in wait I have taken a global approach. And as I see Ellen as the target of the lying in wait, I see that the murder occurred— the murder did occur during the process of lying in wait. So that special will not be dismissed.

(19 RT 4794.)

When the 1118.1 motion was renewed after the close of evidence at the guilt phase, the trial judge concurred with defense counsel's statement that it was very difficult, under the case law, to distinguish between lying in wait as a first degree murder theory and lying in wait as a special circumstance. (21 RT 5265.) The judge also stated: "Ellen Wang is the target and Su Hung is the incidental victim while the lying in wait is taking place. That is my position." (21 RT 5266.) Later in that colloquy, the trial judge said he would not dismiss the lying-in-wait special circumstance because he did not believe that the target of the lying-in-wait plan had to be the actual victim of the killing. (21 RT 5268.)

In its brief, respondent repudiates the trial judge's analysis that the lying-in-wait special circumstance applied in this case because they killed Mrs. Su Hung while lying in wait for Ellen. (RB at 91, n. 31.) However, during his closing argument to the jury at the guilt phase, in discussing the lying-in-wait special circumstance, the prosecutor described the defendants' focus on Ellen Wang:

They continued on in their plan. The course of action was to get Ellen. And they continued on in that plan till the police came and saved the rest of the family. It wasn't a break or a stop in their plan, their intentions where (sic) they waiver (sic).
(22 RT 5568.)

Given this argument, there is a reasonable possibility that one or more jurors believed that they could find the lying-in-wait special circumstance based on the view that the defendants were lying in wait for Ellen Wang and killed her grandmother during the period that they were waiting for Ellen to come home. Certainly, such a view is consistent with

the most important evidence, as identified by the prosecutor, offered in support of the theory of lying in wait – appellant’s alleged statement to Teyva Moriarty that he and his friends were going to wait for Ellen to come home and make her watch while they killed members of her family. It was also consistent with the prosecutor’s arguments at both the guilt and penalty phases of the trial that the murder of Mrs. Su Hung was the result of the defendants’ desire to seek revenge against Ellen.

At trial, the judge, the prosecutor and the defense all believed that the person for whom the defendants were watching and waiting was Ellen Wang, not her grandmother, Su Hung, the actual victim. Although the trial judge expressed doubt about whether the lying-in-wait theory would apply if the target of the watching and waiting was not the actual murder victim, he ultimately allowed the issue to go to the jury on that basis. The prosecutor so argued to the jury:

Number two, a substantial watching and waiting for an opportune time to act. That was clear from Mr. Hajek’s plan that he wanted to kill them in front of Ellen and they were gonna (sic) have to get them all there when Ellen was there. So they had to wait for Ellen to come. In fact, they did wait for some period. Mr. Vo describes going up and seeing her alive. Alice describes going up later and seeing her alive. And just—they just couldn’t wait forever, apparently, and they kept going up and taking turns checking on her. Lastly, the surprise attack on an unsuspecting victim from position of advantage. Obviously, they had tied her up, so they had a position of advantage. She had been allowed to read a newspaper, she had been kept waiting, nothing had happened to her. I submit to you that when they did kill her, it was a surprise attack because she had no way of crying out. She didn’t warn anyone or didn’t react.

(21 RT 5379.)

Because the prosecution failed to present substantial evidence proving a concealment of purpose, a substantial and uninterrupted period of

watching and waiting and a surprise attack on Mrs. Su Hung, this Court should reverse the finding of a lying-in-wait special circumstance and also find that the evidence does not support a conviction of first degree murder based on a theory of lying in wait.

D. Appellant's Death Sentence Must be Reversed

Respondent argues that even if the evidence were insufficient to support the lying-in-wait special circumstance, appellant's death sentence should not be reversed because the jury also found true the torture murder special circumstance. (RB at 92.) However, as set forth in Argument IV of Mr. Hajek's opening brief and Argument IV of this reply brief, *post*, the torture murder special circumstance finding also must be reversed.

Respondent cites *Brown v. Sanders* (2006) 546 U.S. 212 in support of its claim that the invalidation of the lying-in-wait special circumstance does not require reversal of appellant's death sentence. Respondent argues that because the jurors could use the alleged facts of the lying-in-wait special circumstance as "circumstances of the crime," factor (a) of the California death penalty statute, any error caused in allowing the lying-in-wait special circumstance to go to the jury was harmless error. (RB at 93.)

The facts presented in this case distinguish it from the facts of *Brown v. Sanders, supra*. In the *Sanders* case, two of four special circumstances true findings were invalidated by this Court, which set aside the burglary special circumstance under the *Ireland* merger doctrine and the heinous, atrocious and cruel special because it was unconstitutionally vague. Because two of the four special circumstances findings remained valid, this Court did not reverse Mr. Sanders' death sentence.

When the case reached the United States Supreme Court on habeas corpus, it also affirmed Mr. Sanders' sentence. (*Brown v. Sanders, supra*,

546 U.S. at p. 224.) The Court found:

. . . [T]he jury's consideration of the invalid eligibility factors in the weighing process did not produce constitutional error because all of the facts and circumstances admissible to establish the "heinous, atrocious, or cruel" and burglary-murder eligibility factors were also properly adduced as aggravating facts bearing upon the "circumstances of the crime" sentencing factor. They were properly considered whether or not they bore upon the invalidated eligibility factors.

(*Ibid.*)

The striking of the two special circumstances in the *Sanders* case did not involve findings that the evidence was insufficient. Thus, *Sanders* involved only the judge's determination of the applicability of a legal theory to the facts, not the facts themselves, which were then available to the jury during the penalty phase as bearing upon the "circumstances of the crime" under Penal Code section 190.3, subdivision (a). (*Ibid.*) By contrast, in this case appellant has established that the lying-in-wait and torture special circumstances must be reversed because the evidence of those special circumstances was insufficient.

The reversal of the lying-in-wait and torture special circumstances for insufficiency of evidence would mean that the jury should not have found appellant guilty of either of these types of murder. The jury findings of lying-in-wait and torture cannot be characterized as "inconsequential" when the jury was specifically instructed to consider the special circumstances as aggravating factor separate from the circumstances of the crime. The trial judge instructed appellant's jury as follows: "The following factors may be considered by you as either factors in aggravation or factors in mitigation: (1) The circumstances of the crime of which the defendant was convicted in the present, *and* the existence of any special

circumstances found to be true.” (10 CT 2648; italics added.) While in the *Sanders* case the special circumstances were invalidated on purely legal grounds which did not affect the actual findings upon which the guilt and special circumstances were based, in this case, the factual underpinnings of the two special circumstances have been shown to be insufficient. The jury’s consideration of these aggravating factors raises an unacceptable and unconstitutional risk that the jurors considered evidence and factual “findings” which were not valid factors for the jury’s consideration of the appropriate punishment. That is, consideration of a special circumstance which “has been revealed to be materially inaccurate” is a violation of the Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 590.)

Moreover, even if the evidence relevant to the lying-in-wait special circumstance could be considered, within the discretion of the jurors, as “circumstances of the crime,” the instructions given limited that discretion. The jurors were instructed that they “*shall* consider, take into account, and be guided by the following factors, if applicable: (a) The circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstance[s] found to be true. . .” (10 CT 2643, italics added.) Appellant’s jury knew that their decision to find the special circumstances of lying in wait and torture true made him eligible for the death sentence. To instruct that evidence relevant to an alleged lying-in-wait special circumstance is serious enough to make the defendant eligible to be executed imbues that evidence with a seriousness it would not have if it had not been portrayed as evidence of lying in wait. Without this instruction stating that special circumstance findings shall be considered as aggravating factors, jurors may not have considered the evidence offered to

prove lying in wait as actually aggravating.

The record in this case suggests that the jurors were having some difficulties coming to an unanimous verdict that Mr. Hajek should be executed. The jurors deliberated for five days before deciding to sentence appellant to death. (10 CT 2618, 2622, 2626, 2627, 2666.) The following note from the jurors suggests that at least some of them were struggling with voting for the death penalty: "We know we need a unanimous decision for the death penalty, but do we need a unanimous decision for life imprisonment without parole." (10 CT 2624.) Because the jury took so long to agree on a death sentence, the prosecution cannot prove beyond a reasonable doubt that the fact that the jurors went into the penalty phase deliberations believing that the defendants had committed a special circumstance lying-in-wait murder did not affect their sentencing decision.

For all of the foregoing reasons as well as for the reasons set forth in his opening brief, Mr. Hajek's murder conviction, the special circumstance finding of lying in wait and the death sentence must be reversed.

* * * * *

IV.

THE EVIDENCE WAS INSUFFICIENT TO PROVE EITHER TORTURE MURDER AS A THEORY OF FIRST DEGREE MURDER OR THE ALLEGATION OF A TORTURE MURDER SPECIAL CIRCUMSTANCE

As explained in Mr. Hajek's opening brief, the prosecution failed to present substantial evidence that the murder of Mrs. Su Hung constituted a first degree torture murder³ or a torture murder special circumstance.⁴

³ Very recently, in *People v. Pearson* (Cal. Jan. 9, 2012), Cal.4th, 2012 WL 34145, this Court explains the elements of first degree murder by torture:

(1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.] (*People v. Cook* (2006) 39 Cal.4th 566, 602.) The prosecution need not establish that the defendant intended to kill the victim (*ibid.*), but must prove a causal relationship between the torturous acts and the death [citation]. (*People v. Jennings* (2010) 50 Cal.4th 616, 643.) (*Id.* at p. 20.)

⁴ The torture special circumstance requires that a murder be "intentional and involve[] the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18); *People v. Elliot* (2005) 37 Cal.4th 453, 479 ["the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose".]) In order to prove the special circumstance of torture murder, the prosecution is not required, however, to prove that the acts of torture inflicted upon the victim were the cause of her death. (*People v. Crittenden* (1994) 9 Cal.4th 83, 141-142.)

(Hajek AOB at 79-110.)

Respondent's brief focuses on two of the factors necessary to prove both torture murder first degree murder and the torture murder special circumstance: (1) the intent to inflict extreme and prolonged pain on a living human being and (2) the purpose of such torture, in this case identified as revenge. The first problem with the respondent's argument is that it conflates the underlying desire to commit revenge against Ellen Wang, who was not the murder victim, and the evidence that the prosecutor alleges show that the defendants had an intent to inflict pain on the victim, Ellen's grandmother, Mrs. Su Hung. The second problem is that, like the prosecutor at trial, respondent in its analysis does not treat torture murder and the torture murder special circumstance as distinct crimes with different elements.

A. Intent to Inflict Extreme and Prolonged Pain on a Living Human

Respondent argues that there was substantial evidence that the defendants in this case intended to inflict extreme and prolonged pain beyond the pain associated with death. (RB at 97.) In support of this proposition, respondent contends that Mrs. Su Hung was attacked by three different methods: a blow to the chin, strangulation, and stabbing. Without citation to any authority, respondent asserts: "The multifaceted attack to various parts of the victim's body clearly reflect an intention not merely to kill, but to inflict extreme pain as well." (*Ibid.*)

This assertion, that a "multifaceted attack" necessarily demonstrates an intent to inflict extreme pain, is not persuasive. Appellant agrees that this Court has stated in several opinions that the intent to inflict extreme and prolonged pain may be inferred from the circumstances of the crime. (See,

e.g., *People v. Morales* (1989) 48 Cal.3d 527, 559.) However, contrary to respondent's claim that a "multifaceted attack" in and of itself reveals an intent to inflict extreme and prolonged pain, it is not the number of different means employed in killing that will meet that test. The question is whether the way a victim was killed, based in substantial part on the wounds inflicted, shows an intent to inflict extreme and prolonged pain; that is, pain "in addition to the pain of death." (*People v. Bemore* (2000) 22 Cal.4th 809, 841.)

The only evidence offered by the prosecution to establish this intent to inflict extreme and prolonged pain was the testimony of Dr. Angelo Ozoa, the medical examiner. Dr. Ozoa's description of the wounds on the body of Mrs. Su Hung does not provide substantial evidence of an intent to inflict extreme and prolonged pain. Respondent cites the blow to her chin as evidence of this intent. (RB at 97.) Concerning this injury, Dr. Ozoa testified that there was a contusion on the right side of her chin which measured 1/4 inch by 1/4 inch and appeared recent. (16 RT 3960.) According to Ozoa, the injury was caused by some blunt force, but he didn't know what kind of blunt force. It was the prosecutor's leading question—"for instance, a blow from a fist could cause that?"—that led Dr. Ozoa to state: "It's a possibility, yes." (*Ibid.*)

This statement that it was a "possibility" does not constitute substantial evidence that the blunt force injury was the result of a blow from a fist. As this Court pointed out in *People v. Hillhouse* (2002) 27 Cal.4th 469, 498-499, a mere possibility does not constitute substantial evidence. In *Hillhouse*, the issue was whether the victim of an alleged kidnaping for robbery was alive or dead when he was dragged from his truck. The pathologist testified that there was a *possibility* that the victim was alive

during all or part of the dragging. This Court rejected this evidence because a mere possibility does not constitute substantial evidence that the victim was alive. (*Ibid.*) As the United States Supreme Court observed in *Jackson v. Virginia* (1979) 443 U.S. 307, 320, a conviction cannot stand if the evidence does no more than make an the existence of any element of a crime slightly more probable than not.

Speculation, even when it is consistent with the proven facts, is not sufficient to support a conviction. (See, e.g., *People v. Marshall* (1997) 15 Cal.4th 1, 35.) Speculation is not evidence, and it is certainly not substantial evidence. (*People v. Waidlaw* (2000) 22 Cal.4th 690, 735.)

In a very recent decision, this Court discussed the role of speculation and mere possibility in analyzing sufficiency claims. In *People v. Pearson, supra*, the Court found that the prosecution did not present sufficient evidence to uphold the jury's findings that the appellant had personally used a stake as a weapon in the crime. The personal use findings formed the basis for several enhancement allegations in Mr. Pearson's case. The Court overturned the personal use findings on the ground that the evidence must be more substantial than merely showing that it was a possibility that Pearson had used the stake in attacking the victim, observing it "does not support a finding of such use beyond a reasonable doubt." (*Ibid.*, 2012 WL 34145, at p. 8.) The Court wrote:

The Attorney General argues the jury could infer defendant's personal use of the stake from his other violent criminal acts committed in concert with Hardy and Armstrong. *To do so, however, would go beyond deduction to speculation.*⁵ The defendant kicked and raped

⁵ Other courts have overturned convictions on insufficiency grounds because they were based on speculation rather than reasonable

(continued...)

the victim could lead a rational trier of fact to suppose he may also, like his companions, have beat her with the stake, but not to infer beyond a reasonable doubt that he did so.

(*Ibid.* at p. 9, italics added.)

These principles also apply to respondent's claim that Ozoa's testimony could support an inference that Mrs. Su Hung was alive when she received five very superficial wounds to her chest.⁶ (RB at 98.) While respondent relies on these superficial wounds to establish the crucial component of an intent to inflict extreme and prolonged pain, at trial the prosecutor asked Dr. Ozoa only a few questions about them. The focus of his direct examination of Dr. Ozoa was on the causes of Su Hung's death, to wit, the strangulation and the large cut to her neck. Accordingly, the evidence in the record regarding these superficial wounds is quite thin.

Respondent argues that because Dr. Ozoa stated that he could not determine whether these wounds were inflicted before or after Mrs. Su Hung's death, "the jury could determine, however, that the defendants would have no reason to lacerate the victim repeatedly once she was dead."

⁵(...continued)

inference. (See, e.g., *O'Laughlin v. O'Brien* (1st Cir. 2009) 568 F.3d 287, 302 [reversal because the identification of defendant as the perpetrator was based on "reasonable speculation" but not sufficient evidence]; *Newman v. Metrish* (6th Cir. 2008) 543 F.3d 793, 796 [reversal based on absence of sufficient evidence, despite "reasonable speculation," that the defendant was present at the crime scene, although the evidence did establish that the murder weapon belonged to him].)

⁶ Respondent's brief also mentions the two superficial cuts found alongside the large neck wound thought to be the cause of death, in conjunction with her strangulation. The only information about these two cuts found in the record are that they were about ½ inch in length and were confined to the outer layer of skin. (12 RT 3959.)

(RB at 98.) This issue was critical because, as stated in the two instructions regarding first degree torture murder and special circumstance torture murder, the prosecution had to prove beyond a reasonable doubt that the torturous acts were committed while the victim was alive. (7 CT 1895, 1908.) Further, the torture murder special circumstances instruction requires that the defendant intend to inflict extreme cruel physical pain on a living person for the purpose of revenge, extortion, persuasion or for any sadistic purpose. (7 CT 1908.)

Obviously, Ozoa's testimony that he could not determine whether Su Hung was alive when these wounds were inflicted did not constitute substantial evidence that she was alive. Such equivocal evidence does not constitute "... evidence which is reasonable, credible, and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578 [citation omitted].) If the prosecution's expert witness cannot determine whether the victim was alive at the time these wounds were inflicted, the jury certainly is not entitled to speculate and find that she was alive ⁷ and use that as a

⁷ Recently, the Pennsylvania Supreme Court reversed a death sentence, finding insufficient evidence of a torture aggravating circumstance. The injuries to the severely beaten victim in *Commonwealth v. Spell* (Pa.2011) 28 A.3d 1274, included ten lacerations to her head and neck, two fractures of her skull, a laceration of her brain, two broken ribs and bruising on her head, face, lower back, and legs. The Court reversed the torture aggravator because the prosecution had failed to show that the victim was either alive or conscious when she sustained these injuries. In the *Spell* case, as in the present case, there was no evidence establishing either fact. The Pennsylvania Supreme Court observed that when the evidence on these key points is inconclusive, it is insufficient:

We are mindful that the Commonwealth's theories about the

(continued...)

basis for finding true a crucial element of both the crime of torture murder and the torture murder special circumstance. As the Court observed in the *Pearson* decision, *supra*, the record in this case does not establish beyond a reasonable doubt the inference that Mrs. Su Hung was alive at the time the superficial wounds – identified by respondent as the evidence of an intent to cause severe and prolonged pain – were inflicted.

Respondent cites the decision in *People v. Mungia* (2008) 44 Cal.4th 1101, 1138, for the proposition that evidence of infliction of non-fatal wounds on Su Hung is evidence of a motive to inflict pain in addition to the pain of death. (RB at p. 99.) As discussed *ante*, there is not substantial evidence that the five very superficial wounds to Mrs. Su Hung's chest were made while she was still alive. That leaves the 1/4" by 1/4" contusion to her right chin and the stab wound to her right shoulder as the nonfatal wounds in this case. In the *Mungia* case, this Court found insufficient evidence of a torture murder special circumstance where the victim was beaten repeatedly before she died. (*Ibid.*) In that decision, the Court cited several cases where it found that the infliction of nonfatal wounds or deliberately exposing the victim to prolonged suffering supported a finding of a torture murder special circumstance. Each of those cases involved facts very different from those found in this case.

⁷(...continued)

torturous nature the crime are not inconsistent with the facts, but theories are not the equivalent of proof. There is insufficient evidence from the manner of death to indicate appellant sought to torture the victim. Neither is there actual evidence regarding the duration of appellant's attack, the order of the blows, or at what point in the attack the victim died. As such, there is insufficient evidence to support the aggravating circumstance of torture.

(*Id.*, 28 A.3d at p.1284.)

For example, in *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201, this Court observed that the victim, a small child, “was brutally kicked or punched, and that, after she was incapacitated, the perpetrator methodically poured hot cooking oil onto various portions of her body, repositioning her body so as to inflict numerous burns throughout her body, including her genital region.” The killing of Mrs. Su Hung did not involve any comparable injuries.

Similarly, in *People v. Chatman* (2006) 38 Cal.4th 344, 390, the victim was stabbed over 48 times, six were life-threatening wounds, and while the other wounds were characterized as “superficial,” the autopsy surgeon testified that these stabs severed all layers of the skin and went into the underlying tissue and produced “gaping injuries.” (*Ibid.*) Moreover, the record established that defendant Chatman had told other witnesses that he continued stabbing the victim even though she begged him to stop because it felt good and he kept doing it even after she became quiet. (*Ibid.*) A critical difference between the facts of the *Chatman* case and the instant case, apart from the fact that the victim in *Chatman* had many more wounds, is that there is no evidence that either Mr. Hajek or his co-defendant ever stated that he took any pleasure in killing Mrs. Su Hung.

All of the other decisions cited in the *People v. Mungia, supra*, where this Court found sufficient evidence of torture murder or torture murder special circumstance, also included evidence of either much more egregious nonfatal wounds and/or admissions by the defendants about desiring to inflict extreme pain on the murder victim. See *People v. Elliott* (2005) 37 Cal.4th 453, 467, [the defendant inflicted 81 stab wounds, only three of which were potentially fatal, and meticulously split the victim's eyelid with a knife]; *People v. Cole* (2004) 33 Cal.4th 1158, 1212-1213

[defendant made statements indicating he was angry at the victim, poured gasoline over her body, and set it alight]; *People v. Bemore* (2000) 22 Cal.4th 809, 842 [defendant inflicted eight unusual nonfatal wounds in the victim's flank before stabbing him to death and made statements implying that he inflicted those wounds in an effort to persuade the victim to open a safe]; *People v. Proctor* (1992) 4 Cal.4th 499, 531, [the coroner testified that the victim had been severely beaten and that a series of nonfatal incision type stab wounds to her neck, chest, and breast area had been inflicted while she was still alive and for the purpose of causing fear or pain]; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [the 5-month-old victim had been beaten, causing head injuries, a fractured collarbone and upper arm and numerous broken ribs; in addition, there were several long incisions to her body, by which the uterus, vagina and anus had been removed, demonstrating a calculated intent to cause inflict pain]; *People v. Cook* (2006) 39 Cal.4th.566, 602-603 [evidence sufficient to show first degree torture murder where the defendant kicked and beat the victim with a stick for a long period while he lay unresisting in the street]; and *People v. Raley* (1992) 2 Cal.4th 870, 889 [evidence sufficient to show first degree torture murder where the defendant inflicted 41 knife wounds on the victim while she screamed, wrapped her in rugs and left her unconscious in the trunk of his car for hours before throwing her down a ravine].)

B. Torture for the Purpose of Revenge

Respondent's brief relies heavily on out-of-court statements allegedly made by Mr. Hajek to Teyva Moriarty to prove that the murder of Mrs. Su Hung was done for the purpose of revenge. Moriarty testified that the night before the murder in this case, she received a telephone call from

appellant, whom she knew as a former co-worker. According to Moriarty, during this conversation, they talked about various matters, including a previous altercation his girlfriend and he had with a group of girls. (15 RT 3646-3647.) Moriarty testified that appellant told her that he planned to get back at one of those girls by killing her family members while she watched and then killing her. (15 RT 3652-3655.) Moriarty didn't believe that appellant would do these killings. (15 RT 3654.) He seemed to be in an upbeat mood but also didn't sound like he was "all there." (15 RT 3654, 3679.)

Respondent argues these statements to Teyva Moriarty show that appellant had the intent to torture because the motive for the killing was revenge. (RB at 98.) Respondent also claims: "Although appellants killed Su Hung before Ellen was there to bear witness, the jury could reasonably infer from Hajek's statement that the goal was to maximize the victim's, and, therefore Ellen's, suffering..." (RB at 98.) This argument is unpersuasive as it is not based on a reasonable inference from the evidence presented. Appellant's statements to Teyva Moriarty made clear that it was crucial to any plan of revenge against Ellen Wang that she actually be present when her family members were killed. And the prosecutor so argued to the jury during his guilt phase arguments. When arguing about that the murder was torture murder because it was done for revenge, the prosecutor stated:

The purpose of revenge is shown by Mr. Hajek when he talks to Teyva Moriarty. The whole purpose is to get revenge on Ellen. He is gonna (sic) kill them one-by-one, so he is gonna (sic) look in her eyes when she watches and kills her last.

(21 RT 5376.) In his second closing argument to the jury in the guilt phase, the prosecutor claimed:

You have the uncontradicted statements of the purpose of Mr. Hajek in this case was [he] was going to torture Ellen by killing her family in front of her for sadistic purpose and for revenge.

(22 RT 5563-5564.)

There is nothing in the evidence which would support a reasonable inference that appellant had any desire to inflict extreme pain on anyone other than Ellen. To the extent to which inflicting pain on one of her relatives would cause Ellen pain, it was crucial that she be present to see the infliction of pain. Thus, respondent's conjecture on this point relies on speculation, not on substantial evidence.

Moreover, according to the CALJIC instructions for both torture murder and the torture murder special circumstance an element of those crimes is the intent to inflict extreme and prolonged pain "for purpose of revenge, extortion, persuasion or any sadistic purpose." This requirement does not mean that any killing done for purposes of revenge is perforce a torture murder. If defendant X, with the purpose of revenge, poisons the food of Victim Y, and this poisoning, by its very nature, does not result in any pain to the victim, that does not amount to a torture murder.

Further, the most reasonable interpretation of the language of those instructions is that the human being upon whom the defendant intends to inflict pain and the person against whom one seeks revenge, among other enumerated purposes, are one and the same. If the person against whom one seeks revenge is not the murder victim, one cannot deduce an intent to inflict extreme and prolonged pain simply because revenge is a component of the killer's motivation. In this case, Mr. Hajek's alleged statements to Moriarty focused on getting revenge against Ellen Wang. As noted previously, there is nothing in Moriarty's testimony, or, indeed any other

evidence, to support the contention that appellant wanted to seek revenge on Ellen's family members, including the murder victim, her grandmother. Significantly, the instruction on the torture murder special circumstance requires that the defendant "intended to inflict extreme cruel *physical* pain and suffering." (7 CT 1908.) Under the evidence submitted by the prosecutor, in terms of killing Ellen's family members, the intent was to inflict emotional and psychological pain, not physical pain, on Ellen Wang.

Appellant's counsel has not found any California case law involving a fact pattern similar to the one presented here; that is, where the allegation is that the person against whom the defendant wants revenge is not the actual victim of the alleged torture murder. However, as this Court observed in *People v. Tubby* (1949) 34 Cal.2d 72, a torture murder case, the assailant's intent must be "to cause cruel suffering *on the part of the object of the attack*, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity." (*Id.* at p. 77, italics added.) Here, there was no evidence that anyone intended to inflict extreme and prolonged pain on the victim, Mrs. Su Hung, "in addition to the pain of death." (*People v. Bemore, supra*, 22 Cal.4th at p. 841.) Indeed, in his closing argument to the jury at the guilt phase, the prosecutor made clear that his theory of the case was that the defendants wanted to torture Ellen, not Su Hung, by killing her family in front of her. (22 RT 5564.)

//

//

C. Insufficiency of Evidence on Theory of Torture Murder and/or of the Torture Special Circumstance Finding Requires Reversal

Relying principally on this Court's decision in *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130, respondent argues that even if there were not sufficient evidence of torture murder and the torture murder special circumstance, the convictions and special circumstance findings remain valid because there was sufficient evidence to support first degree murder based on theories of lying in wait, burglary felony murder and premeditated murder and the lying-in-wait special circumstances. (RB at 100-101.) Respondent asserts: "Because review of the entire record does not affirmatively demonstrate a reasonable probability that the jury in fact found appellants guilty solely on the allegedly unsupported theory of murder perpetrated by means of torture, the murder convictions must be affirmed." (RB at 101, citing *Guiton, supra*, 4 Cal.4th at p. 1130.)

Respondent's argument is unpersuasive. The first problem with this argument is appellant has disputed the validity of these other theories of first degree murder. (See Hajek AOB, Args. III, VI, XIX.) Second, the principles stated in *People v. Guiton, supra*, do not dictate the result urged by respondent.

In *People v. Green* (1980) 27 Cal.3d 1, this Court stated the "settled and clear" rule on appeal that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (*Id.* at p. 69.) "*The same rule applies when the defect in the alternate theory is not legal but factual, i.e., when the reviewing court holds*

the evidence insufficient to support the conviction on that ground.” (*Id.* at p. 70, italics added.)

In *People v. Guiton, supra*, this Court relied on *Griffin v. United States* (1991) 502 U.S. 46, and created the following exception to the *Green* rule: “If the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.” (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.) The *Guiton* court based its holding on the following reasoning:

In analyzing the prejudicial effect of error, . . . an appellate court does not assume an unreasonable jury. Such an assumption would make it virtually impossible to ever find error harmless. An appellate court necessarily operates on the assumption that *the jury has acted reasonably, unless the record indicates otherwise.* [¶] . . . Thus, if there are two possible grounds for the jury’s verdict, one unreasonable and the other reasonable, we will assume, *absent a contrary indication in the record*, that the jury based its verdict on the reasonable ground.

(*Id.* at p. 1127, italics added.)

However, even under *Guiton*, appellant’s murder convictions must be reversed because there is “an affirmative indication in the record that the verdict[s] actually did rest on the inadequate ground.” (*People v. Guiton, supra*, 4 Cal.4th at p. 1129.) The “affirmative indication” in this case are the true findings by the jury of both the torture murder and lying-in-wait special circumstances. Mr. Hajek has challenged the sufficiency of evidence to prove either of these special circumstances. Citing *Brown v. Sanders* (2006) 546 U.S. 212, 224, respondent argues, as it did with the lying-in-wait special circumstance, that even if the Court decides to reverse

the torture special circumstance for insufficient evidence, appellant's death sentence need not be reversed. (RB at 101.) As argued *ante* in Argument III in this brief, respondent is wrong. The facts presented in this case distinguish it from the facts of *Brown v. Sanders, supra*. In the *Sanders* case, two of four special circumstances true findings were invalidated by this Court, which set aside the burglary special circumstance under the *Ireland* merger doctrine and the heinous, atrocious and cruel special because it was unconstitutionally vague. Because two of the four special circumstances found true remained valid, this Court did not reverse Mr. Sanders' death sentence.

Therefore, the United States Supreme Court's decision in *Sanders* involved a question solely of the applicability of a legal theory to the facts determined by the trial court, not to the facts themselves, which were then available to the jury during the penalty phase as bearing upon the "circumstances of the crime" under Penal Code section 190.3, subd.(a). The Court also addressed in *Sanders* whether "...the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal without regard to the rule we apply here." (*Brown v. Sanders, supra*, 546 U.S. at pp. 220-221.) Further, the Court noted that "the skewing that could result from the jury's considering as aggravation properly admitted evidence should not have weighed in favor of the death penalty." (*Ibid.*)

The striking of the two special circumstances in the *Sanders* case did not involve findings that the evidence was insufficient. By contrast, in this case appellant has established that both the lying-in-wait and torture special

circumstances must be reversed because the evidence of those special circumstances was insufficient. The jury's consideration of these aggravating factors raises an unacceptable and unconstitutional risk that the jurors considered evidence and factual "findings" which were not valid factors for the jury's consideration as aggravating circumstances at the penalty phase. Consideration of a special circumstance which "has been revealed to be materially inaccurate" is a violation of the Eighth and Fourteenth Amendment prohibitions against cruel and unusual punishment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 590.)

Another reason why a finding that there was insufficient evidence of a torture murder special circumstance requires the reversal of the death sentence is that the prosecutor relied heavily upon the theory that Mrs. Su Hung had been tortured to urge the jurors to sentence Mr. Hajek to death. Indeed, referring to the strangulation of Su Hung, the prosecutor told the jury: "That is, the *torture* of course earns them the death penalty." (25 RT 6387; italics added.) Later in this argument, the prosecutor again referred to the "torture murder" in this case: "He [Loi Vo]⁸ never expressed anywhere on this tape any recrimination [sic] or any shock, any remorse, for the torture murder of this grandma." (25 RT 6391.)

Earlier in his cross-examination of Mr. Hajek's psychiatric expert at the penalty phase, the prosecutor asked Dr. Minagawa several times why he

⁸ The fact that the prosecutor was talking about Loi Vo when he made this comment is immaterial. The prosecutor repeatedly told the jurors that the two defendants were both equally responsible for Mrs. Su Hung's death and that they didn't need to decide which of the defendants did what in the course of the murder.

did not ask Mr. Hajek about “why he tortured Su Hung to death?”⁹ (23 RT 5894-5895.)

The record clearly shows that the special circumstance finding of torture murder was not “inconsequential” in this case. Characterizing the murder as a torture murder was essential to the prosecutor’s argument that the jury should sentence Mr. Hajek to death. The entire focus of the prosecutor’s narrative for the death sentence was that Mr. Hajek was a sadist, a worshiper of Satan, was evil and monstrous; central to that narrative was the claim that not only did he torture Su Hung, but that he enjoyed torturing her. (25 RT 6391-6392, 6419.)

For all of the foregoing reasons as well as for the reasons set forth in appellant’s opening brief, the Court should reverse appellant’s murder conviction and the special finding of a torture special circumstance and vacate his sentence of death.

* * * * *

⁹ The prosecutor’s follow-up question to Dr. Minagawa on torture murder was:

And you purposely avoided researching (sic) him on that asking a simple question, why did you torture this 73-year-old stranger, to him, didn’t you?

(23 RT 5895.)

V.

**APPELLANT'S CONVICTION FOR MURDER
VIOLATES DUE PROCESS BECAUSE CONSPIRACY
IS NOT A THEORY OF CRIMINAL LIABILITY ON
WHICH A CONVICTION FOR A SUBSTANTIVE
CRIME MAY BE BASED**

In the opening brief, Mr. Hajek argued that it was improper to allow the prosecutor to use conspiracy as a basis for finding him guilty of murder because under California law an uncharged theory of criminal liability violates the requirement that all such liability must be authorized by the Penal Code. (Penal Code § 6.) Penal Code section 31 is the statute which describes the theories that are bases for convicting a defendant of a crime in California. It recognizes two groups of principals for purposes of criminal liability: those who actually and directly commit a crime and those who aid and abet the actual perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.) Section 31 does not list as principals those who conspire to commit a crime and therefore does not recognize conspiracy as a theory of criminal liability. Because the use of an uncharged conspiracy as the basis for a murder verdict is not permitted under California statutory law, this failure to comply with state law also violated appellant's federal due process right to a state-created liberty interest, i.e., enforcement of a state statute's procedural protections. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) (Hajek AOB at 92-100.)

A. This Issue was not Forfeited

Respondent contends that this issue is forfeited because neither defendants objected at trial to the use of an uncharged conspiracy as a theory of criminal liability for murder. (RB at 107.) Respondent is wrong. First, appellant's counsel did object to the prosecution's use of an

uncharged conspiracy as a basis for obtaining a murder conviction in this case. In responding to the prosecutor's claim that he should be able to use a letter Mr. Hajek wrote in jail to show a conspiracy which involved not only appellant and Loi Vo but also Norman ("Bucket") Leung, appellant's trial counsel:

I also think that essentially what the district attorney is trying to do is to use Mr. Leung as a way in which to establish a broad conspiracy which does not apply to the 187 [referring to Penal Code section for murder]. That's the problem I have with attempting to use this type of evidence.. I don't know that I'm articulating that in the clearest way possible. I think that it also is not clear by looking at this evidence that it is evidence of a conspiracy between my client and between Loi Vo. . .

(16 RT 3900.)

Further, a pure issue of law can be raised for the first time on appeal if it does not involve disputed facts. (*Palmer v. Shawback* (1993) 17 Cal.App.4th 296, 300.) This Court has held "that a litigant may raise for the first time on appeal a pure question of law which is presented by undisputed facts" and has recognized that California courts have "examined constitutional issues raised for the first time on appeal, especially when the enforcement of a penal statute is involved . . . , the asserted error fundamentally affects the validity of the judgment . . . , or important issues of public policy are at issue" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394, citations omitted; see *People v. Vera* (1997) 15 Cal.4th 269, 276 ["[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights"], abrogated in part on other grounds, *People v. French* (2008) 43 Cal.4th 36, 47, fn. 3; see also *People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985; *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061; *People v. Blanco* (1992) 10 Cal.App.4th 1167, 1172-1173; *People v. Ramirez* (1987) 189

Cal.App.3d 603, 618, fn. 29 [all adjudicating a constitutional challenge that the defendant did not raise in the trial court].)

The issue of the lawfulness of using conspiracy as the basis for a conviction of first degree murder and a special circumstance murder finding presents a pure question of law that does not require additional factual development and presents significant concerns. Not only can an appellate court always review a question of law that arises on undisputed facts (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742), but the court should do so when the issue involves an important question. (*Fisher v. City of Berkeley* (1984) 37 Cal.App.3d 644, 654.)

B. Respondent Fails to Address the Improper Use of an Uncharged Conspiracy in this Case

Respondent fails to address adequately appellant's argument that the use of an uncharged conspiracy as a theory of criminal liability violated California law and the federal constitution because it created an impermissible mandatory presumption. (Hajek AOB at 98-99.) Citing *People v. Durham* (1969) 70 Cal.2d 171, respondent argues that no such presumption is involved because "anyone concerned in the commission of a crime, however slight such concern may be, is liable as a principal under section 31." (RB at 108.)

Respondent misreads the *Durham* decision. In that case, the Court disclaimed any inference that conspiracy is itself a separate theory of criminal liability. The Court observed that in some cases "the prosecution properly seeks to show through the existence of conspiracy that a defendant who was not the direct perpetrator of the criminal offense charged aided and abetted in its commission..." (*Id.*, 70 Cal.2d at p. 180, fn. 7.) The

Durham opinion also notes that “. . . the resort to language of conspiracy in cases such as that under consideration does not refer to the crime of that name but only to the fact of combination as it has relevance to the question of aiding and abetting in the commission of the charged crime.” (*Id.* at p. 182, fn. 9.)

Respondent cites footnote 11 of *People v. Durham, supra*, 70 Cal.2d at p. 184, for the proposition that anyone involved in a crime is liable as a principal under Penal Code section 31. However, the *Durham* decision does not support respondent’s position. In that case, the Court found that Mr. Durham’s criminal liability for a murder had to rest on aiding and abetting and not on a conspiracy theory. (*Id.* at p. 185.) In footnote 11, cited by respondent, the Court noted that under California law liability as a principal is fixed by the provisions of section 31 and no instruction can add anything to that liability. (*Id.* at p. 184, fn. 11.) Therefore, the *Durham* decision established that a defendant can be found guilty only on a theory that he actually committed the crime or on the theory that he aided and abetted the crime. The only role a conspiracy can play is evidentiary; that is, it can help support a theory that the defendant aided and abetted the crime at issue. Thus, the Court found in *Durham* that the prosecution’s use of conspiracy principles was not for the purpose of establishing criminal liability separate and apart from aiding and abetting, but rather to show that the defendant’s involvement in a continuing criminal enterprise resulted in a murder. (*People v. Durham, supra*, 70 Cal.2d at p. 179.)

California law is clear that no act is criminal or punishable except as authorized by the Penal Code. (Pen. Code § 6.) As this Court has recently reiterated, “[t]here are, or least should be, no non-statutory crimes in this state.” (*People v. Chun* (2009) 45 Cal.4th 1172, 1183.) The Penal Code

section which describes the bases for convicting a defendant of a crime is section 31, which defines principals. Section 31 recognizes two groups of principles: those who actually commit a crime and those who aid and abet the actual perpetrator. (See, e.g., *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117.) The provisions of the Penal Code “are to be construed according to the fair import of their terms. . . .” (Pen. Code §4.) Unless it appears that the words in a statute are used in a particular sense, they should be viewed as having “the usual, natural, or ordinary meaning attributed to them.” (*People v. Lovelace* (1929) 97 Cal.App.228, 230.) Courts cannot enlarge a statute by inserting words or giving words unusual meanings. (*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 632.) Accordingly, conspiracy cannot constitute a separate theory of liability under California law.

Despite the fact section 31 does not define conspirators as principals, there has arisen in California a body of case law which suggests that conspiracy is a theory of criminal liability for a substantive offense, and which treats a conspirator as a principal in the crime. For example, in *In re Hardy* (2007) 41 Cal.4th 977, 1026, this Court stated: “One who conspires with others is guilty as a principal. (§ 31.)” Other decisions of the California appellate courts have stated that conspiracy is not only a substantive offense but is also an acceptable theory of derivative or vicarious liability. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 249-250.) Mr. Hájek asks the Court to reconsider the statements about conspiracy in those cases, or in the alternative, clarify how using an uncharged conspiracy as a theory of criminal liability can be harmonized the clear language of Penal Code section 31.

C. Prejudice

The improper use of an uncharged conspiracy in this case prejudiced Mr. Hajek. The prosecutor presented to the jury a plethora of theories on which a first degree murder conviction could be based, including conspiracy, aiding and abetting, felony murder, torture murder and lying-in-wait murder. It is true that two of those theories — torture murder and lying-in-wait murder — resulted in true findings of special circumstances; however, because there was not any unanimity instruction regarding the theories of murder, it is not possible to know if any of the jurors relied upon the alleged uncharged conspiracy to convict Mr. Hajek of first degree murder. Unlike the other theories proffered by the prosecution, the jurors were specifically instructed that the crime of conspiracy was not charged in this case.¹⁰ No instruction was ever given that the existence of the conspiracy must be proved beyond a reasonable doubt in order to use it as a vehicle for finding Mr. Hajek guilty of first degree murder.

Since the jury was instructed that the other grounds for finding a first degree murder in this case must meet the beyond the reasonable doubt standard, appellant was prejudiced by the prosecution's use of an uncharged conspiracy in this case because there is no way to know for certain that none of the jurors relied upon the alleged but uncharged conspiracy to find defendant guilty of first degree murder. Accordingly, the theory of the uncharged conspiracy as a basis for a first degree murder conviction was the only one which did not require the jurors to find its existence beyond a

¹⁰ The trial judge instructed the jurors using CALJIC 6.10.5, which stated in relevant part: "Conspiracy is a crime, but is not charged as an offense in the information in this case." (12 RT 5294, 7 CT 1858.)

reasonable doubt. In talking about the first degree murder count in his closing argument to the jury, the prosecutor spent a significant amount of time arguing that there was a conspiracy in this case and that it could form the basis for finding the defendants guilty. (21 RT 5369-5375.) While this Court rejected a similar claim in *People v. Belmontes* (1988) 45 Cal.3d 774, 789-790, appellant urges the Court to reconsider its holding in that case.

For all of the foregoing reasons and for the reasons set forth in appellant's opening brief, respondent cannot show beyond a reasonable doubt that the erroneous use of the uncharged conspiracy theory was harmless. (*Chapman v. California* (1976) 386 U.S. 18, 24.) Therefore, reversal of Mr. Hajek's murder conviction and death sentence is required.

* * * * *

VIII.

ADMISSION OF AUDIOTAPE VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS AS WELL AS EVIDENCE CODE SECTION 352

In his opening brief, Mr. Hajek argued that the trial judge erred in admitting into evidence an audiotape of a conversation between appellant and his co-defendant while they were being held in the county jail in the hours after their arrests. The tape was recorded surreptitiously by the police in the early morning hours. At trial, the defendants objected, under California Evidence Code section 352, to the admission of the tape because it was largely inaudible and therefore unreliable. Its admission violated the defendants' due process rights because its poor quality would invite speculation as to its content. (Hajek AOB at 120-121.) In addition, the use of such unreliable evidence in a case where the prosecution sought and obtained a death sentence violated appellant's Eighth Amendment right to a trial where the process involved heightened reliability.

Respondent acknowledges that portions of the tape recording were indeed inaudible and thus unintelligible, but argues that the trial judge did not abuse his discretion in admitting the tape. (RB at 117.) Citing four California appellate court decisions, respondent argues that "[a] recording is admissible so long as enough of it is intelligible to be relevant without creating an inference of speculation or unfairness." (*Ibid.*) Mr. Hajek does not dispute that this is the law; rather, it is his position that too much of the tape at issue in this case was inaudible and unintelligible, and its admission prejudiced him precisely because it promoted speculation on part of the jurors about what was said on the tape.

Respondent claims that certain parts of the tape were understandable and thus “clearly relevant.” In particular, respondent asserts that the tapes were audible on the following subjects: “Hajek stated to Vo that they were murderers, expressed his anger at Ellen, demonstrated his lack of remorse and plotted with Vo about how to deal with the charges they would be facing.” (RB at 118.) The problem with this assertion is that there is nothing in the record to verify that the portions of the tape actually played to the jury either included these “facts” or that the tape was audible because the prosecutor did not preserve for the record which parts of the tape he played for the jurors during trial, nor did the court reporter transcribe, as was required by Penal Code section 190.9, what was played.

Further, what respondent claims was clearly audible is not what the two jurors, who testified at the hearing regarding the new trial motions, heard. Respondent asserts that it was Mr. Hajek, rather than Mr. Vo, who was heard making incriminatory statements. (RB at 118.) However, both the jurors, Ms. Frahm and Ms. Miller, testified at the post-trial hearing that while listening to the tape during the penalty phase deliberations, they heard Vo, not Hajek, say they killed her. Ms. Miller said she heard Vo, not Stephen Hajek, say “we killed her.” (10/12/95 at 19-20.) Ms. Frahm testified that she did not hear on the tape recording Mr. Hajek say “we killed her.” (10/12/95 RT at 24.) Indeed, she stated that she didn’t hear Mr. Hajek say anything about the killing. (10/12/95 RT at 24-25.)

These contradictory positions about what was on the tape belie respondent’s argument that the tape was audible and thus admissible. Indeed, these inconsistencies establish that the tape was so inaudible that it invited impermissible speculation about what was said and by whom.

Introducing such unreliable evidence during a capital trial violated appellant's Eighth Amendment rights to a highly reliable trial process.

Respondent argues that it is Mr. Hajek's fault that a transcript prepared by the prosecutor of what was supposedly on the tape recording was not admitted into evidence. (RB at 118.) This is a misleading portrayal of the record in this case. Appellant objected to the admission of the tape itself because so much of it was inaudible and thus unintelligible. (12 RT 2951.) The trial judge overruled that objection. When the prosecutor attempted to admit one of the transcripts his office had prepared, defense counsel objected:

And frankly, my suggestion at this point would be that, given the prejudicial effect of submitting a transcript which is – I don't know what the court's conclusion was in listening (sic) to this transcript, but my feeling was it was inaccurate, it wasn't totally incomplete, but it was – attributions were given one person or another which were not supported by the actual evidence. And I think for it to be a starting point is inadequate and prejudices the defense. And it would be my position that there be no transcript given to the jurors at all. That if the court is going to admit the tape, let the jurors conclude what they're going to from it. Given its state, it would seem to me that they will be the best judges of what is on there.

(12 RT 2951.)

It is clear from these statements that defense counsel's position was that neither the tape or the transcript offered by the prosecutor should be admitted because of their unreliability. Her alternative position was that if the court were going to allow the tape into evidence, which she objected to, the transcript offered by the prosecution at trial should be excluded because it was even less reliable than the tape itself. Vo's trial attorney also argued that neither the tape or the transcript should be admitted because it was so inaudible, particularly "when it comes to important parts," and invited the

jurors to engage in speculation and surmise as to what was on the tape. (12 RT 2952.)

The record shows that the trial judge concurred with defense counsel about the inadequacy of the transcript and excluded it because:

. . . I had trouble with the – I was hearing things that were not on the transcript; there are certain things on the tape that I hearing that were not in the same order that they were on the transcript. *So it's the court's opinion the transcript is misleading.* I don't think it is intentional because sometimes I had to listen to it three and four times.

(12 RT 2953, italics added.)

At the subsequent post-trial hearing on the motions for a new trial, the trial judge reiterated his finding that the transcript offered by the prosecution of the tape recording was inadequate and unreliable:

When I was listening to the tape and I was reading the transcript, they were not the same. So I ruled early on that the transcript was not an adequate transcription of what I heard on the tape. So I think I ruled that where normally the transcript would be given to the jurors, in this case the transcript was so unreliable that I did not allow it.

(10/25/95, RT 21)

Given these statements on the record by the trial judge that he believed that the transcript was very unreliable, it is immaterial that defense counsel objected to the admission of the transcript. In any event, the admission of the unreliable transcript would not have cured the error of admitting an inaudible tape.

Respondent argues that the fact that the jurors heard different things when the tape was played on a different recording device during the penalty phase deliberations than they had during the guilt phase deliberations

somehow supports the trial court's ruling admitting the evidence:

The testimony of Ms. Miller and Ms. Frahm did not detract from the court's ruling. On the contrary, it supported it by showing that more of the tape was audible and relevant than the jury realized in the guilt phase.

(RB at 119.)

This argument is specious if not ridiculous. Indeed, the opposite is true. The fact that, after listening to portions of the tape played at trial and then listening to the tape numerous times during the guilt phase deliberations and then again listening to the tape while deliberating in the penalty phase, the jurors heard different things is proof that the tape was so inaudible that it encouraged speculation on the part of the jurors. If repeated playing of the tape, including on different recording devices, yields different conclusions about what is said on the tape, the trial court's admission of this substantially inaudible tape was an abuse of discretion because it invited speculation about the contents of the tape. (See, e.g., *People v. Polk* (1996) 47 Cal.App.4th 944, 952.)

Respondent criticizes appellant for not proving what was actually on the tape:

Even if the reported statements [what jurors Frahm and Miller said they heard during the penalty phase deliberations] had not in fact been recorded on the tape, appellants would be left in the same position as when the court ruled in the first place. They have not shown that the tape, though believed audible when the court ruled, was actually inaudible, making its ruling error.

(RB at 120.)

First, it is not the appellants' fault that they were not able to prove what Frahm and Miller said they heard on the tape was not there because the prosecutor blocked their efforts to make such an offer of proof. At the

hearing on the new trial motions, the prosecutor objected to defendants' requests that the trial judge listen to the tape on the same recorder that the jurors heard it on in the deliberation room during the penalty phase. (10/12/95 hearing at 25.) Defense counsel argued at that hearing that the trial judge would have to make a factual finding about what was actually on the tape and how it corresponded with what the jurors said they heard on the tape during penalty phase deliberations. (*Ibid.* at 14.) She pointed out that because this is a capital case, the Fifth, Eighth and Fourteenth Amendments of the United States Constitution required that the evidence be reliable. (*Ibid.* at 15.) Without explaining why, the trial judge refused the request to listen to the tape on the tape recorder used by the jury during the penalty phase deliberations. In failing to listen to the tape, as proposed by defense counsel, and to settle whether the statements described by Jurors Frahm and Miller were actually on the tape, the trial judge erred. In order to afford the defense a fair hearing on their motions for a new trial, it was imperative that the judge listen to the tape and make a factual finding about whether the statements heard by Jurors Frahm and Miller were in fact on the tape.

In *People v. Fosselman* (1983) 33 Cal.3d 572, this Court found that trial judges may hear and decide non-statutory, constitutional grounds for a new trial. In fact, California trial courts have a *duty* to use the vehicle of a motion for new trial to resolve constitutional defects in the trial beyond the grounds specified in the statute authorizing new trial motions, Penal Code §1181. In *Fosselman*, the court reasoned that §1181 (listing new trial grounds) "should not be read to limit the constitutional duty of trial courts to ensure that defendants be accorded due process of law." (*Ibid.* at p. 582.) Although the *Fosselman* decision involved a claim of ineffective assistance, its principle has been broadly extended to permit presentation of evidence of

constitutional defects in the trial capable of being resolved by the trial court. (*In re Edward S.* (2009) 173 Cal.App.4th 387, 398 n. 3; *People v. Chien* (2008) 159 Cal.App.4th 1283, 1288 [*Fosselman* thus stands broadly for the proposition that a defendant may bring a motion for a new trial based on constitutional grounds not specified in the new trial statute.”].) In this case, the constitutional grounds raised in appellants’ new trial motions involved the right to due process, to a fundamentally fair trial and to a highly reliable capital trial process.

In this case, the trial judge’s refusal to listen to the tape and decide whether it corroborated or disproved the testimony of Jurors Frahm and Miller constituted an abnegation of his duty to consider all evidence presented by the defendants in support of their motions for a new trial before deciding the important constitutional issues raised.

While a trial court generally has broad discretion to admit proffered evidence, it has no discretion to admit irrelevant evidence: (Evid. Code, § 350.) In *People v. Babbitt* (1988) 45 Cal.3d 660, 681-682, this Court found that evidence which produces only speculative inferences is irrelevant evidence. The inaudible tape offered by the prosecution in this case invited such speculation and thus should have been excluded as irrelevant. (See also *People v. Adams* (2004) 115 Cal. App. 4th 243, 250-255 [trial court properly excluded drawings, physical evidence and testimony that was speculative.])

Respondent also argues that because the voices on the tape were not clearly audible, “any issue about what the jurors heard is a question of fact, not a question of law for the court.” (RB at 120) While it is true that what is actually audible on the tape is a question of fact, it is matter of objective fact. Either the words are on the tape or they are not. If listeners cannot agree

about what words are spoken on the tape, the tape is not reliable evidence and should not have been admitted, especially in a case involving the death sentence. Such unreliable evidence does not meet the Eighth Amendment requirement that there be heightened reliability in trials involving the death penalty. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

The trial court abused its discretion in this case when it admitted the substantially inaudible tape into evidence. Before the tape was admitted there was ample evidence of its unreliability. The trial judge refused to admit the transcript offered by the prosecution because it did not accurately reflect what the judge himself had heard after listening to the tape three or four times. (12 RT 2953.) Based on that fact, the trial judge should have granted the defense requests at trial that both the tape and transcript be excluded. The Eighth Amendment required no less in this death penalty case.

By the time appellants had filed their motions for a new trial there was evidence, the testimony of the two jurors about what they heard and did not hear listening to the tape many times during penalty phase deliberations, that confirmed the unreliability of the tape.¹¹ The fact that they heard different things during the penalty phase deliberations than they had heard during the guilt phase deliberations merely because the tape was played on a different recording device establishes that the tape was not sufficiently audible to be admitted into evidence and certainly did not constitute reliable and competent evidence as required by the Eighth Amendment. The trial

¹¹ Defense counsel also stated during the hearing that she had listened to the tape several times and that the statement “we killed her was not on the tape.” (10/12/95 hearing at pp. 10, 13.)

judge again abused his discretion at the time of the new trial motions because he refused to listen to the tape on the tape recorder used during penalty phase deliberations, as requested by the defendants, to determine whether the statements the two jurors claimed to have heard were actually on the tape.

Because the admission of the audiotape in this case violated appellant's federal constitutional rights, the State must prove that its admission was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no "reasonable possibility" that this error "might have contributed to [appellant's] conviction." (*Ibid.*) The prosecution cannot do that because Jurors Frahm and Miller testified said what they heard on the tape during the penalty phase deliberations affected their decision to sentence the defendants to death, and it is reasonably likely it also affected the decisions of other jurors. Mr. Vo's trial attorney submitted a declaration, under penalty of perjury, that another juror in the case, Mr. Ronald Eadie, stated that "a number of jurors placed great weight upon statements made by the defendants when their conversations were tape-recorded after their arrest" during both the guilt and penalty deliberations. (10 CT 2774.)

Certainly, the prosecutor thought the tape recording was an important piece of evidence for his case for the death sentence since he referred it in his concluding remarks to the jury in his closing argument at penalty: "I submit Mr. Hajek is monstrous, voice on that tape." (25 RT 6419.) Moreover, the fact that the jury deliberated five days before it reached its penalty determination suggests that the sentencing decision in this case was not an easy one. (10 CT 2618, 2622, 2626, 2627, 2666.)

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case this Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592-593.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that “in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman*.” (*Ibid.*) With this word of caution from four justices of the United States Supreme Court in mind, appellant respectfully requests that the Court find the admission of the audiotape into evidence to be reversible error.

For all of the foregoing reasons and for the reasons stated in Argument VIII in appellant’s opening brief, the Court should reverse Mr. Hajek’s convictions and death sentence.

* * * * *

IX

THE TRIAL COURT'S ERROR IN ADMITTING EVIDENCE OF APPELLANT'S ALLEGED SATANIC BELIEFS REQUIRES REVERSAL OF APPELLANT'S CONVICTIONS AND DEATH SENTENCE

As Mr. Hajek argues in his opening brief, this Court should reverse his convictions and death sentence because, inter alia, the trial court allowed the prosecutor to introduce irrelevant and highly prejudicial evidence regarding appellant's alleged belief in Satan. (Hajek AOB, Arg. IX, pp. 133-145.) The prosecutor relied substantially on appellant's alleged Satanic beliefs along with his supposed sadism to argue at the penalty phase that appellant was evil and a monster, whom the jury should sentence to death.

A. The Testimony of Lori Nguyen and Hajek's Letter to Vo, Exhibit 64

Respondent argues that Mr. Hajek waived his claim that the prosecutor's questions to Lori Nguyen concerning appellant's statements about Satan were error. Respondent makes a similar claim of waiver as to the issue of whether the trial judge erred in admitting into evidence, over defense objection, a letter written by Mr. Hajek to his co-defendant, Loi Vo, while they were incarcerated in county jail awaiting trial in this case. (RB at 138-139.) In the alternative, respondent claims that admission of this evidence was not error, and if it were, it was harmless. Respondent is wrong on all counts.

Both appellants objected to the questions to Ms. Nguyen about Mr. Hajek's statements about his interest in Satan. First, both counsel objected on grounds of hearsay and relevancy when the prosecutor asked what the appellant had said about his interest in "Satanic things." The prosecutor

argued that it was relevant to Mr. Hajek's mental state and motivation, and the trial judge overruled the objection. (17 RT 4090.) While appellant's counsel initially responded she didn't "care if he got into it," she objected again when the prosecutor asked Ms. Nguyen if she "ever hear[d] him [Mr. Hajek] say he wanted to kill someone as part of his Satanic beliefs." (17 RT 4091.) The trial court sustained this objection. However, in what was a pattern at this trial, the prosecutor ignored the judge's ruling and reposed the question, asking: "Did he ever say he would kill the people in this case, Ellen Wang's grandmother, for this reason." (17 RT 4091.) As the Court of Appeal has observed, "improper questions that violate a previous ruling of the trial court are particularly inexcusable." (*People v. Johnson* (1978) 77 Cal.App.3d 866, 973-874.)

Similarly, the record shows that Mr. Hajek did object to the admission of Exhibit 64, a two-page letter he sent to Vo while they were in county jail. Regarding this letter, Mr. Hajek's trial counsel stated:

I will just make this a standing objection that applies to each letter, where there's evidence that's admitted that's inflammatory but does not tend to prove a disputed issue, it doesn't just involve 352 Evidence Code, but because it's a capital case, involves the constitution (sic) consideration whether the evidence is actually reliable, or whether, you know, we are simply presenting evidence that is, in a sense, designed to make him look like a bad person, which is clearly what the district attorney wants to do.
(17 RT 4161.)

Counsel further argued that the fact vel non of appellant's interest in or belief in Satan was not relevant because the prosecutor had made no effort to tie that alleged interest to the killing itself, for example, by alleging and proving that the murder was a "satanic ritual killing." (17 RT 4161-4162.) The prosecutor did not respond to this assertion of defense counsel, and the

trial judge admitted the letter over the defense's objection. (17 RT 4162.) This was error because all evidence regarding appellant's supposed belief in Satan was irrelevant; moreover, its prejudicial effect outweighed any probative value it might arguably have had. For purposes of Evidence Code section 352, tying appellant to Satan worship constitutes unduly prejudicial evidence, in that it "uniquely tends to evoke an emotional bias against defendant," and it should have been excluded. (*People v. Bolin* (1998) 18 Cal.4th 297, 320.)

Respondent argues that even if the questions to Lori Nguyen about appellant's interest in Satanism were improper, this error was harmless because she testified that his interest was limited to listening to Ozzie Osborne music and because Dr. Minagawa testified that many adolescents are interested in Ozzie Osborne and Satanic material. (RB at 139.) In attempting to minimize the significance of the evidence about Mr. Hajek's alleged interest in Satan, respondent throws into question the good faith of the prosecutor in persisting to emphasize appellant's interest in Satan as evidence of his evil nature making him worthy of a death sentence.

Certainly, if respondent is now arguing that appellant's interest in Satan was in fact a youthful and harmless fad, the prosecutor did not treat it that way. In his closing argument at the penalty phase, the prosecutor argued:

He [Mr. Hajek] says, "Hail, Satan." Describes in the letters how he would like to get a hold of a satanic bible. That's what Mr. Hajek is about. Worship of evil.

(25 RT 6393.)

At another point in his penalty phase closing argument, the prosecutor told the jury that the "Hajeks admitted to you they raised him going to the

church, raised him values of right and wrong. It is not them that taught him the values of Satan or Satanism.” (25 RT 6412.)

The primary theme of the prosecutor’s argument for the death penalty was that Mr. Hajek was not mentally ill but was just a sadistic, evil and monstrous person. Emphasizing appellant’s interest in Satan or Satanism was an important part of the prosecutor’s narrative; he urged the jurors to consider Mr. Hajek’s references to Satan and the Satanic Bible as proof that he worshiped evil.

In discussing the admission of a letter sent by Mr. Hajek to co-defendant Vo, Exhibit 64, respondent makes an argument which conflicts with another argument made elsewhere in respondent’s brief, that is, that evidence of appellant’s interest in Satanism was not prejudicial. In that letter, appellant wrote, among other things, “The devil made me do it! Satan!” (20 ACT 5889.) Respondent claims that this letter with its reference to Satan was properly admitted because

The letter itself establishes the connection [between devil worship and the killing]. That this may not have been Hajek’s only or even primary motivation is of no moment. The statement had some tendency in reason to explain Hajek’s conduct and to prove that he was in fact guilty. It was not admitted, as Hajek contends, simply to show that he was evil.

(RB at 140.)

Respondent cannot have it both ways—on the one hand, that the admission of Nguyen’s testimony about Mr. Hajek’s interest in Satan was not prejudicial because it was clear from her testimony and the testimony of Dr. Minagawa that this interest was just a harmless adolescent fad, but on the other hand, that admission of his letter stating that the devil made him do it was relevant to show that his belief in Satan was one motivation for the

crime.

It is beyond cavil that any suggestion that a defendant charged with murder believes in Satanism is inflammatory, given the general opprobrium in which such beliefs are held. The average person does not respect indeed abhors the idea of Satanic worship. Defense counsel made this point when she argued against the admission of Exhibit 64:

I think the problem I have in particular with the District Attorney in his wanting to go into the Satanic references in my client's letters is that the District Attorney's theory of the case is not that this was a Satanic ritual killing. If it were, this would be relevant. Since it's not, then I don't see that it is particularly germane, particularly because he has presented no evidence as to what that even means. If he had — if he wanted to bring some expert in here to talk about this particular killing fit that particular cult or something, that would, you know, perhaps be a little different thing. But it's clear that he [the District Attorney] is doing — what he expects the jury to do which is seize on that as something which looks bad, inflammatory and it doesn't — it doesn't have any meaning unless interpreted in some type (sic) of way.

(17 RT 4161-4162.)

Other courts have found that injecting into a criminal trial the issue of a defendant's belief in Satan or Satanic religion necessarily arouses the passion and prejudice of the jury. In *State v. Kimball* (N.C. 1987) 360 S.E.2d 691, 694, the North Carolina Supreme Court reversed the defendant's murder conviction because the prosecutor had cross-examined defendant about his supposed involvement in "devil worshiping" and "black magic." The *Kimball* Court found that these questions were irrelevant to the alleged crimes and that their "real effect ... [could] only have been to arouse the passion and prejudice of the jury." (*Ibid.*) In *Kimball*, as in this case, the fact that the defendant might worship the devil had no relevance to the question of whether he committed a murder. In both cases, the evidence was

introduced only to show the defendant's bad character.

Respondent does not address appellant's federal constitutional claims regarding the prosecutor's injection of the issue of Mr. Hajek's supposed interest in or worship of Satan into his trial. Appellant's opening brief discusses the United States Supreme Court's decision in *Dawson v. Delaware* (1992) 503 U.S. 159, 163. In that case, the Court found such bad character evidence, when it involved nothing more than detested "abstract beliefs," violated the defendant's First and Fourteenth Amendment rights. The *Dawson* decision is highly relevant to the issues raised here.

Dawson was also a capital case where the disputed evidence was part of the prosecution's case at sentencing; the parties had stipulated that Mr. Dawson had belonged to the Aryan Brotherhood, a white racist prison gang. The Court held that Mr. Dawson's racist beliefs had no relevance to the crime. (*Id.* at p. 166.) Also, the prosecution had not proved that the Aryan Brotherhood had committed any unlawful or violent crimes, just as the prosecutor in this case did not offer any evidence that people who believe in Satan commit unlawful or violent crimes because of that belief. Third, the Supreme Court rejected the prosecution's claim that Mr. Dawson's abstract beliefs, as a member of the Aryan Brotherhood, should be considered "character" evidence. The Court wrote:

Whatever label is given to the evidence presented, however, we conclude that Dawson's First Amendment rights were violated by admission of the Aryan Brotherhood evidence in this case, because the evidence proved nothing more than Dawson's abstract beliefs.
(*Id.* at p. 167.)

Further, the Court also found that the Aryan Brotherhood evidence was not relevant to rebut any mitigating evidence offered by Dawson, even though

his mitigation was so-called “good character” evidence. (*Ibid.*) The Court concluded that “the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant ‘bad’ character evidence in its own right.” (*Id.* at p. 168.)

The evidence of Mr. Hajek’s alleged interest in Satan worship is no different than the evidence of membership in the Aryan Brotherhood at issue in *Dawson v. Delaware, supra*. In both cases, the unpopular abstract beliefs were not tethered in any way to the crimes committed and thus were not relevant either as evidence in the guilt phase or as support for a death sentence at the penalty phase.

A decision of Missouri Supreme Court addresses the perniciousness of introducing Satan or the Devil into a trial where it has no legitimate relevance to the facts of the case. In *Missouri v. Banks* (Mo. 2007) 215 S.W.3d 118, the Court reversed a murder conviction because the prosecutor in his rebuttal closing argument to the jury called the defendant the Devil. In that case, the primary defense was challenging the believability and reliability of prosecution witnesses to the shooting, which occurred at a “crack house.” In closing argument, the defense questioned both the ability of these witnesses to perceive events accurately and their credibility. (*Ibid.* 215 S.W.3d at p. 119.) In rebuttal, the prosecutor told the jury:

And ladies and gentlemen, when the scene is set and held and we have to go and catch the Devils, there are no angels as witnesses. This is Hell. He is the Devil. They aren’t angels. He is guilty beyond a reasonable doubt.

(*Ibid.*)

The Missouri Supreme Court found this one reference to the defendant as the Devil was sufficiently inflammatory and prejudicial to

reverse a murder conviction. The Court cited several of its previous opinions finding that calling a criminal defendant the Devil was improper. It found the error prejudicial in the context of the *Banks* case, where many of the State's witnesses were drunk and/or high at the time of the murder. The Missouri Supreme Court wrote:

To strengthen the state's witnesses, the prosecutor directly called Banks [the defendant] the chief of this world of hell: "the devil himself." In so doing, the State failed to distinguish proper and legitimate argument from personal and inflammatory attack. The trial court should have promptly and firmly rebuked counsel in front of the jury. The court's failure to do so prejudiced Banks.

(*Ibid.* at p. 122.)

Certainly, if this one reference to the Devil in the *Banks* case was sufficiently prejudicial to warrant reversal of a murder conviction, the admission of evidence concerning Mr. Hajek's alleged interest in Satan, equating that interest with being evil and arguing to the jury that this interest made Mr. Hajek deserving of the death sentence also were so prejudicial as to require a reversal of his convictions and death sentence.

* * * * *

X.

**IT WAS ERROR TO ALLOW HIS CO-DEFENDANT TO
INTRODUCE "OTHER CRIMES" AND PROPENSITY
EVIDENCE AGAINST MR. HAJEK**

As discussed in Mr. Hajek's opening brief, the trial judge erred when he allowed co-defendant/appellant, Loi Vo, to introduce evidence of alleged violent conduct on the part of appellant. (Hajek AOB at 146-152.) Mr. Vo called two witnesses to testify against Mr. Hajek at the guilt phase of their joint trial. John O'Brien, who had worked at the Round House Pizza with appellant when they were teenagers, testified that appellant and he got into a fight. O'Brien claimed that appellant started it for no apparent reason, and O'Brien's nose was broken. The second witness called by Vo was Douglas Vander Esch, a correctional officer at the Santa Clara County Jail, who testified about appellant damaging property in the day room of the jail. This argument focuses on the error of the trial judge and not on the conduct of the prosecution; nonetheless, respondent defends the trial court's rejection of appellant's objections to allowing his co-defendant to call witnesses to testify about Mr. Hajek's purported bad conduct or prior criminality. Moreover, to the extent that this evidence tended to prove that Mr. Hajek killed Mrs. Su Hung, it inured to the benefit of the prosecution.

Respondent's argument regarding this issue focuses on the alleged harmlessness of the error in allowing the witnesses' testimony over appellant's objection. Respondent concedes that the trial court did not state a reason for allowing the evidence. Further, respondent assumes *arguendo* that the admission of this evidence constituted an abuse of discretion. (RB at 146.) Respondent's argument is that because other defense witnesses referred to these two incidents during their testimony, appellant was not

harmful by Mr. Vo's presentation of the testimony of O'Brien and Vander Esch. (RB at 146-147.) This argument is not persuasive.

First, during his argument in support of a motion for severance, Mr. Vo explained that he wanted to call these two witnesses because it was vital to defense to show "Mr. Hajek is unable to control his behavior and lashes out." (1 RT 104.) During that pre-trial hearing, Vo's counsel also argued that Vo needed to prove that because of his psychiatric problems, it was Mr. Hajek who lost control and ended up killing Mrs. Su Hung. (1 RT 104.)

Before co-defendant Vo started presenting his case-in-chief at the guilt phase, Mr. Hajek's trial counsel again argued against the admission of the testimony of O'Brien and Vander Esch. She cited Evidence Code section 352 for the proposition that the testimony of these two witnesses was cumulative and prejudicial. She also argued that it was improper "bad character evidence." (20 RT 4855.)

It is undisputed that Mr. Vo presented the two witnesses, James O'Brien and Douglas Vander Esch, to try to establish that appellant had a propensity to act violently and therefore he, not Vo, killed Su Hung. Thus, this other crimes evidence was offered, in effect, to prove the identity of the actual killer in this case. It is immaterial that it was co-defendant Vo, who offered this evidence rather the prosecution; its admission was both improper and unduly prejudicial to Mr. Hajek, regardless of its proponent.

Evidence Code sections 352 and 1101 control admissibility of "other crimes" evidence. The underlying legal principles for other-crimes evidence are also well settled. In *People v. Harrison* (2005) 35 Cal.4th 208, this Court wrote:

Evidence Code section 1101, subdivision (a) generally prohibits the

admission of a criminal act against a criminal defendant 'when offered to prove his or her conduct on a specified occasion.' Subdivision (b), however, provides that such evidence is admissible 'when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity ...).' To be admissible, such evidence ' "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." [Citation.]' Under Evidence Code section 352, the probative value of the proffered evidence must not be substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

(*Id.* at p. 229, quoting in part from *People v. Ewoldt* (1994) 7 Cal.4th 380,404.)

The standard for using other crimes evidence to show identity is the most rigorous. "For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] 'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*People v. Roldan* (2005) 35 Cal.4th 646, 706, quoting *People v. Ewoldt, supra*, 7 Cal.4th at p. 403.) Certainly, in this case, co-defendant Vo did not establish that either of the "crimes" involving his witnesses, Mr. O'Brien and Mr. Vander Esch, shared such strong similarities, i.e., signatures, as to justify Vo's use of this evidence to show it was Mr. Hajek, not him, who actually killed Mrs. Su Hung

Contrary to respondent's claims, appellant was prejudiced by the testimony of O'Brien and Vander Esch. While other defense witnesses did testify in passing about these incidents, that testimony was obviously not as powerful as the testimony of the people actually involved in the incidents. In particular, the testimony of Mr. O'Brien about being attacked by Mr. Hajek when O'Brien was 15 years old for what O'Brien saw as no apparent

reason, was highly prejudicial. (20 RT 4931.) As this Court has noted in the context of allowing the prosecution to reject stipulations regarding evidence, live testimony of a victim is certainly more powerful than a reference in passing to incident. For example, in *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007, the Court observed: “The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state’s case of its persuasiveness and forcefulness.” That line of cases, while other factors were also present, implicitly recognizes that testimony of a victim of a crime is powerful evidence.

Not only did the admission of the testimony of O’Brien and Vander Esch violate California’s evidentiary law, it violated appellant’s federal constitutional rights to a due process and a fundamentally fair trial. (*Michelson v. United States* (1948) 335 U.S. 469; *Estelle v. McGuire* (1991) 502 U.S. 62, 70.) Because this error is of federal constitutional dimension, it is subject to the *Chapman* standard of review. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378 [erroneous admission of bad character evidence amounts to federal constitutional error]. This requires the state¹² to prove, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no “reasonable possibility” that this error “might have contributed to [appellant’s] conviction.” (*Ibid.*) The prosecution cannot meet this burden in this instance.

* * * * *

¹² While the prosecution did not call O’Brien and Vander Esch as its witnesses in the guilt phase, respondent has chosen on appeal to defend the admission of this testimony; therefore, the state must meet the burden of proving the evidence was not prejudicial.

XI.

THE TRIAL JUDGE ERRED IN ADMITTING THE TESTIMONY OF NORMAN (“BUCKET”) LEUNG

A. Denial of an Evidence Code Section 402 Hearing

Respondent claims that Mr. Hajek’s argument that the trial judge erred when he failed to hold a 402 hearing on defense objections to allowing Norman (“Bucket”) Leung to testify at the guilt phase of the trial was forfeited because appellant did not join in co-defendant Vo’s motion for such a hearing. (RB at 151.) This claim is without merit. This Court has noted that the forfeiture doctrine is designed to prevent both the unfairness and inefficiency that results when a claim of error is not brought to the trial court’s attention. (*People v. Stowell* (2003) 31 Cal.4th 1107, 1114.) Mr. Vo’s argument for a 402 hearing to test the foundational basis, vel non, of the prosecutor’s assertion that Bucket was part of a conspiracy involving Mr. Hajek and Mr. Vo was sufficient to preserve the issue for appellate review. Respondent has not explained, and in fact, cannot explain, how the purposes of the forfeiture doctrine have been violated by appellant’s failure to join specifically in the call for a 402 hearing.

Moreover, it is undisputed that Mr. Hajek objected to the testimony of Bucket and to the admission of letters written by him to Vo containing references to Bucket. (16 RT 3907-3908.) His defense counsel argued that the prosecutor was putting on witnesses, including Bucket, McRobin Vo and possibly Lori Nguyen, whom he knew had nothing relevant to say. (16 RT 3908.) Mr. Hajek’s counsel pointed out that the prosecutor’s questions, such as ones which began with “were you threatened,” were prejudicial. Moreover, the prosecutor knew that Bucket would not give him the answers the prosecutor wanted. (16 RT 3908.) Mr. Hajek’s trial counsel argued:

And, frankly, the fact Mr. Leung was willing to waive counsel is an indication of that. He's not going to say anything. So to throw him up there like spaghetti and see what sticks is inappropriate in a capital case. If the court has a question I'm happy to give you the D.A.'s investigative report and you can read what he told them and make a decision about whether the district attorney should be allowed to actually confront him with these letters, assuming he gets answers back —

(16 RT 3908-3909.)

Moreover, during argument about the proposed testimony of Bucket, the prosecutor conceded that asking Bucket about such things as whether appellant had threatened him and about statements in appellant's letters would be futile. (16 RT 3910.)

The trial court refused to convene a short 402 hearing to find out what foundational basis the district attorney could make to justify calling Bucket as a witness. In so doing, the judge abused his discretion and violated appellant's constitutional rights to a fair and reliable capital murder trial. This Court has said of judicial discretion:

The term implies absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason. To exercise the power of judicial discretion, all the material facts must be known and considered, together also with the legal principles essential to an informed, intelligent and just decision.

In re Cortez (1971) 6 Cal.3d 78, 85-86.)¹³

¹³ See also *Bailey v. Taaffe* (1866) 29 Cal. 422, 424, where the Court wrote:

The discretion intended, however, is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice...'

As set forth in detail in appellant's opening brief, the prosecutor's questions to Bucket, as predicted by the defense, did not result in any probative evidence relevant to the issues before the jury. (Hajek AOB at 158-160.) Moreover, the reason given by the trial judge for refusing to grant a 402 hearing — that he didn't like to try a case twice, once out of the jury's presence and once before the jury¹⁴ — demonstrates that he did not exercise judicial discretion in a manner that respected the gravity of a capital trial and the constitutional rights of the defendants. This explanation given by the trial judge suggests that, in order to avoid the inconvenience of "trying a case twice," he would never or almost never hold a 402 hearing. Such a modus operandi does not constitute a responsible exercise of judicial discretion.

B. The Evidence Should Have Been Excluded Under Evidence Code Section 352

Once again, respondent incorrectly argues that appellant has forfeited this claim because he did not join Vo's objection to Bucket's testimony. As explained *ante*, this forfeiture argument has no merit. Not only did appellant object to the testimony of Bucket, but defense explained that the probative value, assuming there was any, of his testimony and the disputed letters were outweighed by their unduly prejudicial impact. (16 RT 3907-3909.) Respondent argues that the trial judge did not abuse his discretion because the evidence was not prejudicial and the prosecutor's questions were not improper. (RB at 152-153.) A central focus of the prosecutor's questioning of Bucket was the issue of whether appellant had threatened him after the crime in order to dissuade Bucket from testifying

¹⁴ The trial judge stated: "I really don't like to try a case twice. Once outside the presence of the jury and have kind of like a dress rehearsal and try the case then in front of the jury." (16 RT 3907.)

against him. (16 RT 3927-3928.) Certainly, the subject of alleged threats to a potential witness by a defendant was highly prejudicial.

Respondent also contends that the questions by the prosecutor to Bucket were not subject to the strictures of section 352 because they were not evidence. However, that is exactly the point. The prosecutor insisted on calling Bucket as a witness in order to ask him questions which he knew Bucket would evade, thus allowing the prosecutor to get improper information before the jury. The prosecutor may not ask questions solely to get before the jury the facts inferred from and the insinuations and suggestions contained in the question. (*People v. Wagner* (1975) 13 Cal.3d 612, 619.)

C. Prejudice

Respondent argues even if it were error to allow the testimony of Bucket, it was not prejudicial because there was other evidence of appellant threatening witnesses in the record. (RB at 153.) As Mr. Hajek pointed out in his opening brief, any evidence — even if it is in the form of the prosecutor's question — suggesting that a defendant has been threatening potential witnesses is highly prejudicial to that defendant. Moreover, the fact that Bucket answered many of the questions by saying "he didn't recall" tended to create an impression that Bucket's evasiveness was somehow the fault of Mr. Hajek—perhaps the result of the alleged threats. Of course, before he called Bucket as a witness, the prosecutor knew Bucket would be evasive and that Bucket's evasiveness would benefit the prosecution.

The improper use of Bucket as a witness was, as defense counsel pointed out at trial, part of the prosecutor's pattern, calling witnesses whom he knew offered nothing substantive to proving the charges in the case, but "just by asking the questions in and of themselves, were you threatened by Mr. Hajek, isn't it a fact he asked you to participate in this, that and the other, it is inherently prejudicial." (16 RT 3908.)

This tactic of the prosecution violated appellant's federal constitutional rights to due process and to a fundamentally fair trial. (*Estelle v. McGuire* (1993) 502 U.S. 62, 67; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) Moreover, it tended to lighten the prosecution's burden of proof and to permit the jury to find appellant guilty because of his supposed criminal propensity. (See., e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) Moreover, in this case, the prosecutor relied heavily on Bucket's testimony during his guilt phase closing argument to the jury. (21 RT 5386-5388.) He argued that Bucket lied to the jury about the nature of his relationship with both Hajek and Vo, about his knowledge and involvement in the alleged conspiracy to kill the Wang family and that he had been a dishonest witness because he had been threatened by Mr. Hajek. (21 RT 5387-5388.)

Paradoxically, the prosecutor argued to the jury that although Bucket was a liar they should credit his testimony that Mr. Hajek did not appear to have any mental health problems and was "normal." (21 RT 5388.) The prosecutor cited this testimony in support of his argument that the jurors should reject appellant's mental defense. Apparently, in the view of the prosecutor, this uneducated young man, while deemed untruthful by the prosecutor, was a worthy authority on the mental health of Mr. Hajek.

Because the admission of the testimony of Bucket and the letters written by appellant violated, inter alia, Mr. Hajek's federal constitutional rights to due process and a fundamentally fair trial, the prosecution must prove these errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no "reasonable possibility" that this error "might have contributed to [appellant's] conviction." (*Ibid.*) The prosecution cannot meet this burden.

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case this Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592-593.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmless error can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that "in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman*." (*Ibid.*) With this word of caution from four justices of the United States Supreme Court, Mr. Hajek respectfully requests that the Court find the improper admission of Bucket's testimony to be reversible error, especially when considered in the context of other trial error in this case.

* * * * *

XIV.

THE TORTURE SPECIAL CIRCUMSTANCE INSTRUCTION GIVEN AT APPELLANT'S TRIAL WAS ERRONEOUS AND UNCONSTITUTIONAL

In his opening brief, appellant argued that the jury instruction regarding the torture special circumstance (CALJIC No. 8.81.18, 7 CT 2033) was improper because it told the jurors that they could find appellant and/or his co-defendant guilty of this special circumstance if they found “a defendant” had a certain intent and engaged in certain acts. (Hajek AOB at 174-181.) The language of this instruction¹⁵ — the failure to make clear that neither of the defendants could be held liable for the torture murder special circumstance merely because the other had an intent to kill, had an intent to inflict extreme cruel physical pain and suffering and did in fact inflict such pain — was incorrect and prejudicial requiring reversal of appellant’s death sentence.

Appellant’s opening brief notes that in *People v. Petznick* (2003) 114 Cal.App.4th 663, 686, the California Court of Appeal held that a similar instructional error constituted a violation of the defendant’s Fourteenth Amendment due process rights and of the Sixth Amendment’s right to trial by jury. (Hajek AOB at 176.)

Respondent concedes that a similar instruction was indeed found erroneous in the *Petznick* case; however, it argues that because of all of the other instructions given during appellant’s penalty phase, “there is no reasonable likelihood the jury applied the challenged instruction in an

¹⁵ The challenged instruction was a modification of 1991 version of CALJIC No. 8.81.18.

unconstitutional manner.” (RB at 164) Specifically, respondent points to language in another instruction, CALJIC No. 8.80.1, that states: (1) if the jury cannot determine whether a defendant is the actual killer, an aider and abetter or a co-conspirator, in order to find the special circumstance, the jury must find beyond a reasonable doubt that such defendant had an intent to kill and (2) the jury must decide separately as to each defendant regarding the special circumstance. (RB at 164-165.) Respondent also notes that the two verdict forms for the defendants about the torture murder special circumstance required that in order to find allegation true, they must find that “the murder of Su Hung was intentionally committed by the defendant [name].” (8 CT 2107.)

Contrary to respondent’s argument, these additional instructions did not cure the harm caused by the giving of modified CALJIC No. 8.81.18, an instruction found unconstitutional by the California Court of Appeal in *People v. Petznick, supra*. First, this error must viewed in the context of the myriad and confusing instructions used in this case. (Hajek AOB at 171-174.) The muddle of instructions in this case resulted from the decision of the prosecution to proceed on so many different theories of murder. By advancing theories of torture murder, lying-in-wait murder, burglary felony murder, an uncharged conspiracy and aiding and abetting, the prosecutor was able to argue that the jury need not agree on which of the two co-defendants actually murdered Mrs. Su Hung. The prosecutor’s tactic was to throw a lot of mud against the wall and see what stuck. The instructions reflected that strategy, and the confusion inevitably generated by them, violated appellant’s constitutional rights under the Eighth and Fourteenth Amendments to due process, a fair trial and a highly reliable trial process in a case where the prosecution was seeking the death penalty.

The United States Supreme Court has noted that “[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law.” (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Accordingly, jury instructions are supposed to provide clear guidance to the jurors, not challenge them to harmonize contradictions and confusion contained in or among the instructions. The California Court of Appeal has observed: “It cannot be overemphasized that instructions should be clear and simple in order to avoid misleading a jury.” (*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) See also *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613 [“Discharge of the jury’s responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge’s responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria.”].)

As Mr. Hajek pointed out in his opening brief, the prosecutor’s closing argument further confused the situation. (Hajek AOB at 177-179.) He erroneously told the jurors that in order to find murder by torture they did not need to find a causal connection between the torturous acts and death, but in order to find the torture murder special circumstance true, they must find that “the act or acts taken by the perpetrator to inflict extreme and prolonged pain were a cause of the victim’s death.” (21 RT 5376.) Respondent incorrectly asserts that is an accurate statement of the law. (RB at 166.) It is true that for a first degree murder by torture, the prosecution must show that the acts of torture caused the death of the victim while no causal requirement is necessary to find a torture murder special circumstance true. (*People v. Elliot* (2005) 37 Cal.4th 453, 466-467; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1229-1230.)

However, as pointed out in Mr. Hajek's opening brief, the entire argument by the prosecutor about the first degree torture murder and the torture murder special circumstance conflated the two. After describing the elements of first degree torture murder (21 RT 5375-5376), the prosecutor made this confusing statement:

Then from there, if you find that first degree murder happened, you can find the special circumstance true that would be also proven in the torture murder.

(21 RT 5376.)

After that reference to the special circumstance, which implied that the prosecutor was then going to talk about what was required to find true the torture murder special circumstance allegation, the prosecutor then stated that he did not need to prove either that the perpetrator intended to kill Su Hung or that she was alive at the time she was tortured.(21 RT 5376-5377.) The prosecutor said nothing more about the elements of the torture special circumstance during his closing argument, thus reinforcing the fact that he has conflated the two—the first degree torture murder and the torture murder special circumstance. Given that the distinctions between the two can be hard for a juror or even an expert in California homicide law to understand, it is highly likely that the prosecutor's muddled conflation of the two in his closing argument confused one or more jurors in this case.

Respondent claims that the Court should not consider what the prosecutor said during his closing argument when determining whether the instruction, modified CALJIC No. 8.81.18, was error requiring reversal of the true finding of torture murder special circumstance against appellant. (RB at 165.) Respondent argues that this issue should have been raised as a claim of prosecutorial misconduct. Respondent is wrong. In assessing the

prejudicial effect of this improper instruction, it is important to look to the prosecutor's argument and its possible effect on how the jurors might view the evidence and apply the instructions.¹⁶

The prosecutor's misstatements about the elements of both first degree torture murder and the torture murder special circumstance added to the confusion created, not only by the improper instruction regarding this special circumstance, but by the many theories offered by the prosecutor of what kind of murder occurred in this case. The multiple theories required a plethora of instructions. Even an expert in homicide law would have difficulty sorting through these instructions and applying them to the evidence in this case which had the added complication of involving two defendants.

Just as the Court of Appeal did in *People v. Petznick, supra*, 114 Cal.App.4th at p. 686-687, the Court should consider the strength of the evidence in this case regarding whether either of the defendants intended to inflict severe pain and suffering on Mrs. Su Hung. As the arguments in Mr. Hajek's opening brief and the instant reply brief establish, the evidence in this case was not sufficient to establish crucial elements of either first degree torture murder or the torture murder special circumstance, including the intent to torture and whether Su Hung was alive at the time the wounds identified by the prosecutor as showing an intent to torture were inflicted. (Hajek AOB at 79-110; Hajek ARB, *ante*, at)

The torture murder special circumstance instruction given in this

¹⁶ In *People v. Pearson* (Cal. Jan. 9, 2012) 2012 WL 34145, 11-12, this Court looked at the prosecutor's closing argument as a factor in determining whether the instructional error was harmless or not.

case effectively removed a necessary mental element and thus violated state law as well as appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments. (*People v. Flood* (2000) 18 Cal.4th 470, 471; *Neder v. United States* (1999) 527 U.S. 1, 8.) Under *Chapman v. California* (1967) 386 U.S. 18, 23-23, reversal is required unless the prosecution establishes beyond a reasonable doubt that the error "did not contribute to the verdict obtained." Thus, *Chapman* requires reversal if there is any reasonable possibility that an error might have contributed to the conviction; therefore, the prosecution must establish the error "did not contribute to the verdict obtained." (*Id.*, 386 U.S. at p. 24.)

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case this Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Id.* at p. 593.) Justice Sotomayor cautioned that "in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman*." (*Ibid.*)

Respondent cannot prove that this erroneous instruction did not contribute to the true finding of torture murder special circumstance against Mr. Hajek. Accordingly, that finding must be stricken, and appellant's death sentence must be reversed.

* * * * *

XV.

THE TRIAL COURT ERRED IN FAILING TO GIVE AN INSTRUCTION THAT THE TESTIMONY OF CO-DEFENDANT VO SHOULD BE VIEWED WITH CAUTION TO THE EXTENT THAT IT RELATED TO MR. HAJEK

In his opening brief (Hajek AOB at 182-187), appellant argued that the trial judge should have instructed the jury with CALJIC No. 3.18, which, at the time of his trial stated:

You should view the testimony of an accomplice with distrust. This does not mean that you may arbitrarily disregard that testimony. You should give that testimony the weight you think it deserves after examining it with care and caution and in the light of all the evidence in the case.

This instruction was needed because his co-defendant, Loi Vo, testified at their joint guilt phase trial and blamed Mr. Hajek for the murder of Mrs. Su Hung. Mr. Hajek did not testify. It is undisputed that Mr. Vo and Mr. Hajek both qualified as accomplices to each other. The jury did receive five instructions about accomplices, CALJIC Nos. 3.10, 3.11, 3.12, 3.13 and 3.14, but it did not receive the crucial warning that accomplice testimony should be viewed with caution. In his opening brief, Mr. Hajek argued that the failure to give CALJIC No. 3.18 violated both state law and his federal constitutional rights. (Hajek AOB at 182-187.)

Respondent's brief simply argues that at the time of appellant's trial there was no sua sponte duty on the part of a trial judge to instruct the jury with CALJIC No. 3.18 unless the prosecution called the accomplice as a witness. In support of that claim, respondent cites two decisions of this Court, *People v. Williams* (1988) 45 Cal.3d 1268, 1314, and *People v. Abilez* (2007) 41 Cal.4th 472, 519.) In *Abilez*, as in the instant case, the

co-defendant testified on his own behalf. Mr. Hajek agrees that the Court in the *Abilez* decision found that at the time of Abilez's trial, there was no sua sponte duty to give CALJIC No. 3.18 when a witness was not called by the prosecution. (*Id.* at p. 519.) Appellant respectfully requests the Court to re-examine the *Abilez* holding. As respondent notes, since the trial in this case, this Court has directed that the standard instruction specify that to the extent an accomplice gives testimony tending to incriminate the defendant, it should be viewed with caution, regardless of which party calls the witness. (RB at 167, fn. 54, citing *People v. Guinan* (1998) 18 Cal.4th 558, 569.)

In determining appellant's due process claim, this Court should consider the historical significance of the cautionary instruction about accomplice testimony because the United States Supreme Court has recognized that "historical practice" is the primary guide in determining whether a principle is so fundamental as to implicate the due process clause of the Fourteenth Amendment. (See, e.g., *Montana v. Eglehoff* (1996) 518 U.S. 37, 43.) The history of the accomplice cautionary instruction in California dates back to 1872 when the Legislature codified the principle that juries should view accomplice testimony with distrust. (*People v. Guinan* (1998) 18 Cal.4th 558, 565.) Moreover, at least one federal appellate court has recognized the same principle has common law origins. In *Kearns v. United States* (9th Cir. 1928) 27 F.2d 854, 857, the court of appeals wrote:

While the testimony of an accomplice is to be treated like that of other witnesses, and considered for all purposes, and may be believed, such testimony is not regarded with favor, but should be received with caution, should be closely scrutinized, and viewed with distrust, and even under the common-law rule that it is not essential that testimony of accomplices be corroborated, the jury should be

instructed as to the danger of convicting upon the evidence of accomplices alone.

Failure to give the instruction, CALJIC No. 3.18, in this case violated Mr. Hajek's Fourteenth Amendment due process rights; therefore, reversal is required unless the prosecution can prove that the error was harmless beyond a reasonable doubt. No one, other than co-defendant Loi Vo, offered evidence that it was appellant, and not Mr. Vo, who killed Su Hung. The prosecutor hedged his bets and told the jury that he could not say who was the actual killer and that it did not matter. For that reason alone, Vo's testimony was perhaps the most prejudicial evidence against appellant, despite the fact the evidence was offered by Mr. Vo and not by the prosecution. This Court has recognized that it is immaterial whether the testimony of an accomplice is offered by a co-defendant or by the prosecution. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217-218; *People v. Box* (2000) 23 Cal.4th 1153, 1209.) Therefore, respondent cannot carry its burden to prove beyond a reasonable doubt that the failure to instruct the jury that the testimony of co-defendant Vo as it portrayed Mr. Hajek as the killer did not prejudice Mr. Hajek.

For all of the foregoing reasons and for the reasons set forth in Argument XV of Mr. Hajek's opening brief (Hajek AOB at 182-187), the Court should reverse his conviction for capital murder and his death sentence.

* * * * *

XVI.

THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY GIVING INCOMPLETE AND CONFUSING INSTRUCTIONS ON CONSPIRACY

In his opening brief, Mr. Hajek argued that the trial judge failed to give complete and accurate instructions relating to the law of conspiracy. Specifically, the judge failed: (1) to identify any overt acts; (2) to identify the object or objects of the conspiracy; (3) to require unanimous agreement on the object or objects and overall finding of conspiracy; and (4) to require proof beyond a reasonable doubt, violating appellant's federal constitutional rights under the Sixth, Eighth and Fourteenth Amendments to a fair jury trial, a reliable guilt determination and due process, as well as his state constitutional and statutory rights. (Hajek AOB at 188-203.)

Respondent's brief argues that this challenge to the jury instructions regarding uncharged conspiracy was forfeited because appellant did not object to the instructions or request additional or clarifying instructions. Respondent further contends that there was no instructional error. (RB at 167-179.) All of these claims lack merit.

A. There was no Forfeiture

Citing *People v. Hart* (1999) 20 Cal.4th 546, 622, and *People v. Daya* (1994) 29 Cal.App.4th 697, 714, respondent claims that appellant's argument regarding the conspiracy jury instructions was forfeited because "if appellants wanted the standard jury instruction clarified or amplified, they had an obligation to make a request for additional instruction." (RB at 168.) Appellant's failure to object to the trial court's instructions in this regard, or to request any additional instructions, does not waive the issue, because a trial court has a sua sponte duty to give correct instructions

regarding the principles of law essential to the determination of the case; that is, those “closely and openly connected with the facts before the court, and which are necessary for the jury’s understanding of the case.” (*People v. Sedeno* (1974) 10 Cal.3d 703, 715, quoting *People v. St. Martin* (1970) 1 Cal.3d 524, 531.)

Moreover, the cases cited in support of respondent’s forfeiture argument are not persuasive. The *Hart* decision has nothing to do with the issue of waiver in the current situation. Rather, *Hart* involved a claim “that the jury instructions were impermissibly ambiguous and that the trial court failed to fulfill its *sua sponte* duty to offer clarifying instructions” regarding first and second-degree felony murder. (*Hart, supra*, 20 Cal.4th at p. 622.) Here there is no claim that the instructions were ambiguous or that the trial court had a *sua sponte* duty to offer “clarifying instructions.” The instructions on conspiracy in this case were incomplete and confusing and contradicted one another. Similarly, *People v. Daya, supra*, also cited by respondent, is inapposite. In *Daya*, the court of appeal rejected the appellant’s argument about the jury instructions given in his case; however, it did not find forfeiture or waiver. It simply rejected the appellant’s claim of instructional error on the merits. (*Daya, supra*, 29 Cal.App.4th at p. 714.)

Complete instructions – including instructions identifying specific overt acts and the object or objects of the conspiracy, and requiring unanimous agreement on the object or objects and overall finding of conspiracy – were required in this case to correctly instruct the jury on the law of conspiracy, which was offered by the prosecution as a basis for a murder conviction and two special circumstances findings. In the absence of such instructions, it cannot be said that the jury in this case was correctly instructed about the applicable principles of law within the meaning of the

Sedeno decision. Under these circumstances, the claim is cognizable on appeal.

B. The Trial Court's Failure to Fully Instruct the Jury on the Law of Conspiracy was Error

Mr. Hajek acknowledges that this Court has rejected previously the argument that the failure to allege specific overt acts constitutes error. (See *People v. Prieto* (2003) 30 Cal.4th 226, 251.) Moreover, appellant acknowledges that this Court has held that jury unanimity is not required where conspiracy is used as a theory of liability rather than as a crime itself. (See *People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.) However, in neither of those decisions did the Court address the federal constitutional issues involving the Fifth, Sixth and Fourteenth Amendments, raised here regarding the conspiracy instructions. The Court has held that case law is not authority for propositions not considered by the appellate court in the particular case. (See, e.g., *People v. Barragan* (2004) 32 Cal.4th 236, 243.) Moreover, even if the Court views the holdings of the *Russo* and *Prieto* cases as controlling, Mr. Hajek respectfully requests, for the reasons set forth in his opening brief, that this Court reconsider its prior decisions and hold that, in cases involving a theory of uncharged conspiracy, the trial court must instruct the jury sua sponte (1) as to the specific overt acts alleged, (2) that the jurors must agree unanimously as to the object or objects and the overall finding of conspiracy, and (3) and that the jury must make that determination beyond a reasonable doubt. (Hajek AOB at 188-203.) Incomplete and confusing instructions regarding an uncharged conspiracy should not be allowed when the prosecution uses an uncharged conspiracy to convict a defendant of a special circumstance murder, making him eligible for a death sentence.

C. Confusing Instructions About Possible Objects of the Alleged Conspiracy and the Natural and Probable Consequences Theory

In his opening brief, appellant identified a contradiction between the language of CALJIC Nos. 6.10.5 and 6.11 regarding the meaning of an “originally contemplated” criminal objective or target crime and the “natural and probable consequence” language of the latter instruction. (Hajek AOB at 194-196.) At appellant’s trial, the jury received a version of CALJIC No. 6.10.5, which in relevant part stated:

A conspiracy is an agreement between two or more persons with the specific intent to agree to commit a public offense, such as Burglary and Murder, and with the further specific intent to commit such offense, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement.

(21 RT 5294, 7 CT 1858.)

The jury also received CALJIC No. 6.11:

A member of a conspiracy is not only guilty of the particular crime that to his knowledge his confederates are contemplating committing, but is also liable for the natural and probable consequences of any act of a coconspirator to further the object of the conspiracy, even though such act was not intended as a part of the original plan and even though he was not present at the time of the commission of such act.

(21 RT 5295, 7 CT 1860.)

The jury was subsequently instructed that it had to decide whether “the defendant is guilty as a member of the conspiracy to commit the crime originally contemplated, and, if so, whether the crime alleged in Count 1 (murder) was a natural and probable consequence of the originally contemplated criminal objective of the conspiracy.” (*Ibid.*)

Appellant argued in his opening brief that these instructions were

inherently confusing because CALJIC No. 6.10.5 suggested murder as one of the possible objects of the conspiracy while CALJIC No. 6.11 asked the jury to determine whether murder is the natural and probable consequence of an agreement to commit murder. (Hajek AOB at 195.) Respondent's brief does not address the issue of the contradictions between the two instructions; instead, it merely asserts that no reasonable juror would have been confused. (RB at 174-175.) Respondent speculates about how jurors possibly could have harmonized the gaps and contradictions in CALJIC Nos. 6.10.5 and 6.11. (RB at 175.) In this scenario, according to respondent, the jurors would ignore the fact that the first paragraph of the version of CALJIC No. 6.10.5 (7 CT 1858) identifies both burglary and murder as the public offenses that may have been the objects of the uncharged conspiracy in this case and would realize that the part of CALJIC No. 6.11 which asked the juror to determine "whether the crime alleged [in Count[s] 1 (murder)] was a natural and probable consequence of the originally contemplated criminal objective of the conspiracy" only referred to burglary as the criminal objective. (RB at 175.) Finally, respondent argues that even if the jurors had interpreted this contradictory language to mean that murder could be the object of the conspiracy, as stated in CALJIC No. 6.10.5, they could still have found that murder was the natural and probable consequence of that conspiracy:

Even if it [the jury] did so interpret the instruction, however, the answer, which is patently yes, would lead the jury to find appellants guilty of a murder that they found appellants conspired to commit, which is nonetheless a correct application of the law.

(RB at 175.)

Respondent's argument is not persuasive, and it does not address the issue of whether the challenged instructions in this case violated the principle that "[j]urors are not experts in legal principles; to function effectively, and justly, they must be accurately instructed in the law." (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.) Jury instructions are supposed to provide clear guidance to the jurors, not challenge them to harmonize contradictions and confusion contained in the instructions. The California Court of Appeal has observed: "It cannot be overemphasized that instructions should be clear and simple in order to avoid misleading a jury." (*People v. Carrasco* (1981) 118 Cal.App.3d 936, 944.) See also *Bollenbach v. United States* (1946) 326 U.S. 607, 612-613 ["Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria."].)

D. Reversal is Required

The effect of the erroneous conspiracy instructions in this case must be assessed in the light of the prosecution's numerous theories of murder and the concomitant instructions. Given these factors, it was particularly important that the jury be given clear and consistent instructions on each theory; that did not happen with the theory of uncharged conspiracy. Appellant therefore was prejudiced because one or more jurors may very well have based the decision to convict appellant of murder on a misunderstanding of conspiracy law because of the incomplete and confusing jury instructions.

Because the confusing and contradictory instructions on conspiracy given in this case violated appellant's Sixth, Eighth and Fourteenth

Amendments to a fair jury trial, a reliable guilt determination and due process, the State must show that these instructions were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no “reasonable possibility” that this error “might have contributed to [appellant’s] conviction.” (*Ibid.*) The prosecution cannot meet this burden.

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that this Court had misapplied the *Chapman* standard of review for harmless error in that case by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592-593.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that “in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman*.” (*Ibid.*)

Under *Chapman, supra*, reversal is required if there is *any* reasonable possibility that an error might have contributed to the conviction and the burden is on the prosecution that the error did not contribute to the verdict. (*Id.*, 386 U.S. at p. 24.) The proper inquiry “is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this case was surely unattributable to the error.” (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.)

Because respondent cannot establish beyond a reasonable doubt that

Mr. Hajek's murder conviction and judgment of death were surely unattributable to the erroneous, confusing and contradictory conspiracy instructions, the entire judgment must be reversed.

* * * * *

XXIV.

THE TRIAL JUDGE ERRED IN FAILING TO ENFORCE THE CLEAR DICTATES OF PENAL CODE SECTION 190.9

Both the opening briefs of Mr. Hajek and co-appellant identify the numerous times¹⁷ the trial judge in this case failed to comply with the requirement of Penal Code section 190.9 that all proceedings shall be conducted on the record with a court reporter in any case in which a death sentence may be imposed. (Hajek AOB at 269-275, Vo AOB at 362-374.)¹⁸

A. Appellants Were Prejudiced by Failure to Follow § 190.9

Respondent argues that the appellants have failed to show that these failures prejudiced them. Respondent also speculates that: “Most of the unreported proceedings likely involved routine matters or rulings in appellants’ favor, or matters such as instructions or jury requests that can be reviewed by reference to the instructions or responses themselves.” (RB at 206.) Respondent does not point to anything in the record of the case which supports the speculation that most of the unreported proceedings involved routine matters or rulings in appellants’ favor. By contrast, appellants have identified parts of the record which suggest that important proceedings occurred that were unreported. For example, portions of a tape recording of a conversation between the defendants, which occurred shortly after their

¹⁷ Appellant’s opening brief identifies 60 incidents of unreported proceedings. (Hajek AOB at 269-271.)

¹⁸ In his Second Supplemental Opening Brief, Mr. Hajek adopted, pursuant to rule 8.200(a)(5) of the California Rules of Court, Argument 21 of Vo’s AOB, as augmentation to his argument regarding the trial court’s failure to comply with Penal Code section 190.9. (2d Supp.AOB, at 4.)

arrest and which was surreptitiously recorded, were played during trial. The tape was played and then portions of it were replayed, and Officer Robinson was asked to identify who was speaking during these portions of the tape. (16 RT 3816-3618.) This tape recording was a crucial and controversial piece of evidence, which was objected to at trial; both Mr. Hajek and Mr. Vo have challenged its admission in their opening briefs. (Hajek AOB at 120-132 and Vo AOB at 238-249.) The failure to transcribe what was played to the jury during trial prejudiced appellants' ability to challenge the admission of this evidence on appeal. It also made it impossible to challenge on appeal the accuracy of Officer Robinson's testimony about the tape.

Another example of an important proceeding which was held off-the-record is a discussion among counsel and the trial judge about a note sent to the court during their deliberations. (7 CT 1823.) The note requested a transcript of the tape recording discussed *ante*. The minute order for the day states: "After informal conference with respective counsel, the Court responds in writing to the jury's written request." (7 CT 1821.) This informal conference was not transcribed, and the only information about the resolution of the jurors' request is a written response by the judge which states: "No. The transcript was not received in evidence." (7 CT 1824.) As discussed *ante*, this tape recording was a controversial piece of evidence objected to by both defendants. Its importance to the jurors was demonstrated not only by their request for a transcript during jury deliberations but also by evidence submitted during the post-trial motions about what certain jurors thought they had heard in that tape recording. (See Argument VIII, *ante*.)

As pointed out in appellant's opening brief, it is very difficult, if not impossible, to prove prejudice from the failure to comply with section 190.9 precisely because these proceedings were not recorded. The idea that settled statements can make up for big gaps in the record, due to failure to comply with section 190.9, is unrealistic and contrary to the whole purpose of the mandate of section 190.9 that all proceedings in a capital case must be transcribed by a court reporter.

The record in this case demonstrates the inadequacy of the settled statement process. During record correction, both appellants submitted requests to prepare settled statements regarding unreported proceedings. Mr. Vo's motion listed sixteen unreported proceedings, for which he wanted to try to obtain settled statements. (22 ACT¹⁹ 6232-6233.) Mr. Hajek's motion identified 60 references in the record which indicated there had been some type of proceeding which was off-the-record and for which settled statements were needed. (22 ACT 6345-6368.) The parties met to discuss settled statements for these unreported proceedings but were not able to agree about what occurred during those proceedings. Indeed, at the record correction hearing on May 15, 2001, the district attorney made the following observations about settled statements:

I can foresee that a lot of the settled statements I wouldn't be able to agree to. *I don't think there'll be any memory from myself or the other attorneys.* And I can see that I'll be coming and saying, no I can't agree to that; I don't think there's any record for it.

(5/15/01 RT 17-18, italics added.)

As the prosecutor predicted, the parties could not agree to any settled statements in this case. (12/07/01 RT 4-5.)

¹⁹ ACT refers to the augmented clerk's transcript.

By placing on defendant the burden to prove prejudice resulting from the trial court's failure to comply with the unequivocal mandate of section 190.9 is unfair. While the mandate is clear, trial courts routinely ignore it, and this Court has allowed them to continue to do so. During the last six years, this Court has addressed this issue in at least 12 death penalty appeals.²⁰ In all these decisions, where appellants have raised claims under section 190.9, this Court has agreed that the trial judges had erred but nonetheless have denied any relief. Therefore, the mandate of section 190.9 has become truly toothless. Neither the trial court nor the prosecution has any incentive to comply since a failure to do so has no consequence except for the defendant in a capital case, who supposedly has a right under the statute for a complete record, but in fact does not.

Mr. Hajek respectfully requests this Court to adopt a new approach to the problem of noncompliance by trial courts with the requirement of section 190.9 that all proceedings at a capital trial be recorded by a court reporter. The language of section 190.9 is clear. It is a directive to the superior courts that all proceedings in a capital case shall be conducted on the record with a court reporter present. The statute does not allow for any discretion on the part of the trial judge to determine what are merely "routine" or "scheduling" proceedings and thus not subject to the

²⁰ *People v. Letner* (2010) 50 Cal.4th 99, 194-195; *People v. Taylor* (2010) 48 Cal.4th 574; *People v. Mills* (2010) 48 Cal.4th 158; *People v. Dykes* (2009) 46 Cal.4th 731; *People v. Harris* (2008) 43 Cal.4th 1261; *People v. Rundle* (2008) 43 Cal.4th 76; *People v. Zambrano* (2007) 41 Cal.4th 1082; *People v. Rogers* (2006) 39 Cal.4th 826; *People v. Cook* (2006) 39 Cal.4th 566; *People v. Huggins* (2006) 38 Cal.4th 175; *People v. Hinton* (2006) 37 Cal.4th 839; and *People v. Wilson* (2005) 36 Cal.4th 309.

requirement that a court reporter be present.

The error of failing to comply with section 190.9 adversely affects—or prejudices— an appellant not at the trial level but on appellate review. Without a complete record, appellate counsel cannot determine if and what kind of error occurred in the off-the-record proceedings. If one can only speculate about what happened during the off-the-record proceeding, one certainly can't show that the failure to transcribe the proceeding was prejudicial. Given these factors, harmless error analysis is impossible because one cannot reasonably assess the probability or possibility that the error had a specific prejudicial effect. (See *United States v. Gonzales-Lopez* (2006) 548 U.S. 140, 148, n.4, where the Court found that the trial judge's denial of defendant's counsel of his choice was structural error, stating: “. . .as we have done in the past, we rest our conclusion of structural error upon the difficulty of assessing the effect of the error.”)

In addition, Mr. Hajek urges this Court to exercise its supervisory power over the superior courts to assure compliance with the requirements of section 190.9, just as it did in *People v. Engleman* (2002) 28 Cal.4th 436, 449, where the Court directed that CALJIC No. 17.41.1 not be given in trials conducted in the future because that instruction created “. . . a risk to the proper functioning of jury deliberations and [that it] is unnecessary and inadvisable to incur this risk.” CALJIC No. 17.41.1 informed jurors at the beginning of jury deliberations that

should. . . .any juror refuse[] to deliberate or express[] an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of the situation.

In the *Engleman* case, this Court did not hesitate to direct the lower courts to henceforth not use this instruction, and it should adopt a similar approach to the persistent problem of trial courts not complying with the clear mandate of section 190.9.

Alternatively, if this Court maintains that a violation of section 190.9 is not reversible per se, the burden of proving harmless error should not fall on appellant. Using its supervisory powers, this Court should issue a rule that the failure to transcribe all proceedings in a capital trial will be deemed to be presumptively prejudicial to the defendant. Therefore, the burden would fall on the prosecution to show the error was not prejudicial.

C. Appellant's Eighth and Fourteenth Amendment Rights Were Violated

Under the Fourteenth Amendment, the record on appeal must be sufficient to permit adequate and effective appellate review. (See, e.g., *Griffin v. Illinois* (1956) 351 U.S. 12, 20; *Rushen v. Spain* (1983) 464 U.S. 114, 118.) The right to a complete and accurate record is of particular importance in death penalty appeals, given the Eighth Amendment requirement of heightened reliability in capital cases. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) The United States Supreme Court has emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally (*Parker v. Dugger* (1991) 498 U.S. 308, 321) and has stressed the importance of reviewing capital sentences on a complete record. (*Dobbs v. Zant* (1993) 506 U.S. 357, 358.)

Further, the trial court's failure to comply with the requirements of section 190.9 violated appellant's right to a state-created liberty interest as described in *Hicks v. Oklahoma* (1980) 447 U.S. 343. It is the duty of the trial judge to see that the trial is conducted with solicitude for the essential rights of the accused (*Glasser v. United States* (1942) 315 U.S. 60, 71), and to this end the trial judge is expected to exert substantial control over the conduct of the proceedings. (*Geders v. United States* (1976) 425 U.S. 80, 87.) Given the provisions of section 190.9, that duty includes insuring that in death penalty cases "all proceedings conducted in the superior court, including all conferences and proceedings, whether in open court, in conference in the courtroom, or in chambers, shall be conducted on the record with a court reporter present." (Penal Code section 190.9; italics added.) By creating the special requirement that all trial proceedings in all cases in which the death penalty may be imposed be conducted in the presence of a court reporter, the California Legislature created a specific liberty interest, and that interest is one the Fourteenth Amendment preserves against arbitrary deprivation by the state.

In previous decisions, this Court has applied the prejudice standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, to determine whether the violation of section 190.9 prejudiced appellant. (See footnote 3, *ante*.) That is the wrong standard. Even if an automatic reversal standard is not applicable, reversal is required because the denial of a complete record in a death penalty appeal constitutes a denial of Eighth and Fourteenth Amendment rights. Therefore, because the violation involved federal constitutional rights, the proper standard for determining prejudice is the one found in *Chapman v. California* (1967) 386 U.S. 18, 24. In this case, *Chapman* requires the prosecution to prove beyond a reasonable doubt that

the error did not adversely affect the ability of appellant to obtain effective appellate review before this Court. Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that this Court had misapplied the *Chapman* standard of review for harmless error in that case by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592-593.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmlessness can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that “in future cases the California courts should take care to ensure their burden allocation conforms to the commands of *Chapman*.” (*Ibid.*) With this word of caution from four justices of the United States Supreme Court in mind, appellant respectfully requests that the Court decide that when a trial judge has failed to follow the mandate of section 190.9 the burden of proving that the error was not prejudicial falls, where it belongs, on the prosecution.

D. Under Both California Statutory Law and the United States Constitution, the Trial Court’s Failure to Record All Proceedings was Error and Requires Reversal of Appellant’s Convictions and Death Sentence

Appellant, like all defendants who face the death penalty in California, was entitled under Penal Code section 190.9 to have all proceedings in the trial court be on the record in the presence of a court reporter. Moreover, the Eighth and Fourteenth Amendments of the United States Constitution guaranteed a complete record of appellant’s capital trial so he would be afforded adequate and effective appellate review in this Court. If this Court decides the 190.9 issue in this case as it has done in all

other decisions involving violations of section 190.9, it will place an unjust and ultimately unconstitutional burden on appellant. It is fundamentally unfair to require a defendant tried for capital murder to bear the burden of showing how portions of the record which do not exist prevent him from raising issues about which he can only speculate. In writing section 190.9, the California Legislature placed a special burden on trial courts in cases involving the death penalty. In those cases, it was determined that trial courts would not have any discretion to not conduct certain proceedings, however insubstantial, without a court reporter present. Thus, section 190.9 is a recognition by the California Legislature that death penalty cases require special care. The failure of the California trial courts to abide by the unequivocal mandate of section 190.9 and this Court's resistance to forcing compliance violates the fundamental constitutional rights of defendants being tried for capital murder. If the courts do not feel compelled to follow the law, why should anyone?

* * * * *

XXXIII.

THE PROSECUTOR ENGAGED IN EGREGIOUS MISCONDUCT DURING BOTH THE GUILT AND PENALTY PHASES OF APPELLANT'S TRIAL, REQUIRING THE REVERSAL OF MR. HAJEK'S DEATH SENTENCE

Both appellant and co-appellant Vo raised numerous claims of prosecutorial misconduct in their opening briefs. (Hajek 2nd Supp.AOB at 9-17; Vo AOB at 424-435.) Respondent argues that there was no prosecutorial misconduct. (RB at 215-243.) In this reply brief, appellant will address only those arguments in respondent's brief which concern the prosecutor's conduct vis-a-vis appellant.

A. The Cross-Examination of Appellant's Psychological Expert was Purposely Deceptive and was not Designed to Elicit Relevant Information but to Prejudice Appellant

First, respondent claims that appellant has forfeited his claim that the prosecutor because "counsel did not object on this ground until the end of the cross-examination." (RB at 221.) This is not correct; defense counsel repeatedly objected to this improper questioning. And even though most of those objections were sustained, the prosecutor persisted. (23 RT 5915-5922, 5937-5939.)

Respondent also criticizes appellant for not asking the trial judge to admonish the prosecutor. (RB at 221.) However, as this Court has observed, there is no requirement of a request for an objection or an admonition if it would be futile or would not have cured the harm created by the misconduct. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 822.) The efficacy of an admonition is often limited. This Court pointed out in *People v. Bolton* (1979) 23 Cal.3d 208, "[m]erely to raise an objection to [improper] testimony – and more, to have the judge tell the jury to ignore it

–often serves but to rub it in.” (*Id.* at pp. 215-216, fn. 5.) In *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886, Chief Judge Gewin of the Fifth Circuit Court of Appeals wrote: “If you throw a skunk into the jury box, you can’t instruct the jury not to smell it.”

The futility of both objecting to and requesting an admonition about this line of questioning is illustrated in the record. For example, defense counsel objected to the prosecutor’s irrelevant and blatantly prejudicial questions to the defense expert about sexual sadism; this objection was sustained by the trial judge. (23 RT 5916.) Undaunted by this ruling, the prosecutor asked, as his very next question, another question about the bogus issue of appellant’s alleged sexual sadism. (23 RT 5916-5917.) This led defense counsel to make another objection, which again was sustained. (23 RT 5917.) The prosecutor then proceeded to ask yet another question about sadism, and defense counsel objected again. This time the trial judge overruled the objection, a seeming example of that age-old adage that the squeaky wheel gets the oil. (23 RT 5917.) This sequence of events shows the persistence of the prosecutor in asking questions which had been ruled irrelevant. Given the prosecutor’s failure to obey the rulings of the trial judge, it would certainly have been futile to ask for an admonition. The prosecutor in this case apparently was not aware of Justice Douglas’ observation in *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 648-649:

The function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial.

As appellant described in his second supplemental opening brief, the questioning about sadism was extensive. Indeed, it, along with appellant’s alleged belief in Satan, was the primary focus of the prosecutor’s cross-

examination of Dr. Minagawa, one of the mental health experts called by the defense. (23 RT 5915-5922.) Re-direct examination of this witness established that the version of The Diagnostic and Statistical Manual of Mental Disorders (DMS-IV) current at the time of appellant's trial did not recognize a diagnosis of sadism per se, only of sexual sadism. Moreover, appellant did not meet the criteria for that diagnosis since there was absolutely no evidence he ever committed any sadistic sexual acts. (23 RT 5928-5931.) Nonetheless, on re-cross examination, the prosecutor continued to beat this drum, asking more questions about sexual sadism and sadism; defense counsel objected to these questions as improper and her objections were sustained. (23 RT 5937-5939.)

Respondent also attempts to distinguish between the prosecutor's questions about sadism and sexual sadism and suggests that appellant's "only legal argument on appeal is that the prosecutor continued to question Minagawa about *sexual sadism* even after the trial court repeatedly sustained defense objections on that topic (as opposed to non-sexual sadism.)" (RB at 221, italics in the original.) This argument is specious and sets up the proverbial straw man. Defense counsel's objections at trial were to the prosecutor's questions about why Dr. Minagawa did not diagnose appellant as a sadist or a sexual sadist. These areas of questioning were co-mingled by the prosecutor, done in bad faith and objected to by appellant. Even if objections were not made to all instances of misconduct, because the misconduct was part of a pattern and multiple objections were made, it is appropriate for the reviewing court to consider the misconduct in evaluating a pattern of impropriety. (*People v. Estrada* (1998) 63 Cal.App.4th 1090, 1100.) Moreover, in *People v. Chatman* (2006) 38 Cal.4th 344, 380, the Court recognized that it is not necessary to object to

every instance of prosecutorial misconduct when defense counsel has made repeated objections concerning the misconduct.

Respondent argues alternatively that even if this questioning were misconduct, “no reasonable juror would have believed that Hajek suffered from sadism or faulted Minagawa for failing to diagnose it.” (RB at 221.) This is a telling concession by respondent. Surely, if no reasonable juror would have believed this, perforce no reasonable prosecutor would have, in good faith, persisted in asking question after question about the subject despite sustained objections. In deciding the question of whether appellant was prejudiced by this relentless and improper questioning one cannot look at the examination of Dr. Mingawa in isolation. As was discussed in appellant’s second supplemental opening brief and will be further discussed *post*, this instance of prosecutorial misconduct was just one element of the prosecutor’s misconduct during the trial, which culminated in his closing argument to the jury at the penalty phase²¹ where he tied together the inflammatory and fabricated threads of sadism and Satanism to urge the jury to sentence appellant to death because he was monstrous and evil. (25 RT 6392, 6419.)

Respondent also argues the prosecutor’s questions about sadism and sexual sadism were not improper because “[a]n attorney should not be expected to know more than a psychologist about what does and does not qualify as a mental disorder.” (RB at 222.) This argument is also unpersuasive. As discussed previously, the record establishes that the

²¹ Also, during his guilt phase closing arguments, the prosecutor told the jury that appellant was sadistic (21 RT 5408; 5410, 22 RT 5573, 5576); he also commented on appellant’s alleged belief in Satanism. (22 RT 5576, 5583.)

prosecutor persisted in asking questions for which he knew there was no basis. If he planned to challenge Dr. Minagawa about failing to make a diagnosis of sadism or sexual sadism, he should have known whether the DSM-IV actually contained such a diagnosis, and, if so, what constituted the elements of that diagnosis. While California law gives substantial latitude in cross-examining expert witnesses, such questioning must, at the minimum, be done in good faith. (*People v. Dennis* (1998) 17 Cal.4th 468, 519.) For the reasons stated *ante* and in appellant's second supplemental opening brief, the record establishes that the prosecutor's questioning of Dr. Minagawa lacked good faith and amounted to reversible prosecutorial error.

B. The Prosecutor's Improper Penalty Phase Argument Constituted Misconduct Requiring Reversal of Appellant's Death Sentence

Respondent argues that appellant's claims of prosecutorial misconduct are waived because he did not object to and seek an admonition during the course of the prosecutor's argument. As noted *ante*, this Court has stated that such an objection is not required when it would be futile to do so. The record in this case establishes such futility.²² As this Court has

²² The futility of objecting to the prosecutor's improper statements during closing argument was demonstrated during the guilt phase of the trial. The prosecutor, in his rebuttal argument, made repeated references to defense's counsel "salesmanship" during her closing argument. (22 RT 5557, 5560, 5561.) Finally, defense counsel objected, stating: "I'm going to object to this repeated reference to salesmanship. That is improper argument. Focus is on the law and the facts, not my ability as an attorney." (Footnote continued.) (22 RT 5562.) The trial judge overruled that objection even though the law is clear that it is improper to impugn the integrity of another counsel during oral argument. (See, e.g., *People v. Hill* (1998) 17 Cal.4th 800, 832; 5 Witkin & Epstein [Cal.Criminal Law (2d ed. 1988)] Trial, section 2914, p. 3570.) The prosecutor's references to the great salesmanship of the two defense

made clear, prosecutorial misconduct is not waived even when no objection is made if an admonition would not have cured the harm caused by the misconduct. (*People v. Valdez* (2004) 32 Cal.4th 73, 122.) This Court has held that a claim of prosecutorial misconduct is not waived when the conduct is “inherently prejudicial.” (*People v. Dennis, supra*, 17 Cal.4th at p. 521.)

Before closing arguments at the penalty phase, the attorneys for appellant and his co-appellant filed objections, asking the trial judge to restrict improper argument by the prosecutor as well as a motion to restrict the scope of the prosecutor’s penalty phase argument. (8 CT 2126-2131, 2170-2200.) In addition, these motions were the subject of a hearing. (25 RT 6350- 6368 .) During that hearing, the prosecutor stated that he intended to argue that “. . . a mental problem such as sadism or suffering from anti-social personality disorder is not a mitigator at all and it’s more something that makes him blame worthy.” (25 RT 6361.) The trial judge pointed out that Dr. Minagawa never diagnosed appellant as a sadist or even agreed that such a diagnosis existed. (*Ibid.*) Moreover, on its face the prosecutor’s justification was nonsensical. He did not need to educate that the jurors that being a sadist is not a mitigating factor as no one would ever imagine it was.

During this hearing, appellant’s trial counsel discussed her greatest concern about what the prosecutor would argue in this case:

Based on the cross-examination he [the prosecutor] has done, I fully expect to hear that Mr. Hajek is a psychopathic sado-murderer who should be essentially be exterminated because he is defective. That’s

attorneys was an obvious and snide swipe at their honesty and integrity.

really what Mr. Waite [the prosecutor] wants to argue and that's essentially what it gets down to."

(25 RT 6363.)

Defense counsel pointed out such an argument is "... unconstitutional and cannot be allowed by the court...." (*Ibid.*) Further, counsel argued that if the prosecutor were allowed to make this argument, it would "infect the proceedings with error" and would violate the Eighth Amendment because it asked the jury to return a death verdict on an unreliable factor and was designed to "inflame the passions of the jury." (*Ibid.*)

The trial judge ruled that the prosecutor could argue to "negat[e]" the mitigating factor of mental illness but he could not do so by making mental illness an aggravating factor. (25 RT 6364.) He cautioned the prosecutor that he must be careful not to cross that line. (25 RT 6364.) As appellant's second supplemental opening brief makes clear, however, the prosecutor did cross that line. (Hajek 2nd Supp.AOB at 14-16.) Certainly, arguing that Dr. Minagawa had deceptively not asked appellant about his belief in Satan or that he deliberately avoided diagnosing appellant as a sadist (25 RT 6412-6416), even though DSM-IV did not recognize such a diagnosis, did not constitute a legitimate negation of the mental health mitigation offered by the defense.

Mental health experts have no expertise in determining whether individuals are "monstrous" or "evil," because those are not mental illnesses or disorders. Neither is a belief in Satan the basis for a mental illness diagnosis. If the prosecutor had been interested in legitimately challenging or "negating" the mental health evidence offered by the defense, he would have called his own witness, or at the least, his cross-examination of Dr. Minagawa would have focused on the mental health

issues raised by his testimony, rather than baiting the doctor, attempting to impugn his motives and asking him inflammatory questions about the defendant's supposedly evil and monstrous character. The prosecutor's statements during closing argument at the penalty phase tying together appellant's alleged belief in Satan and his alleged sadism under the rubric of evilness was improper. Because the prosecutor never offered any evidence that Mr. Hajek actually was a Satanist or that he was a sadist, nor did the prosecutor ever establish the relevance of these matters to any of the aggravating factors set forth in Penal Code section 190.3, his arguments to the jury on these subjects should not have been permitted.

In addition, the prosecutor's statements about appellant's alleged lack of remorse were improper.²³ As discussed in appellant's second supplemental opening brief, the prosecutor's repeated claims that the defendants' purported lack of remorse was a reason to sentence them to death violated the rule that the prosecution cannot rely on non-statutory aggravators, such as a lack of remorse. (See, e.g., *People v. Crittenden* (1994) 9 Cal.4th 83, 148.) (Hajek 2d Supp AOB at 16-20.) Respondent's brief argues that the prosecutor's statements about how appellant had no remorse were proper because "he told the jury not to extend mercy to appellants as the defense would ask you to do because they showed no remorse at the time of the crime or immediately afterward in jail." (RB at 239.) This is a different tack than the prosecutor at trial took when claiming that he should be allowed to argue lack of remorse at the scene of the crime

²³ Also, during his guilt phase closing arguments, the prosecutor made several references to Hajek's alleged lack of remorse. (21 RT 5406, 22 RT 5576, 5579.)

as part of factor A circumstances of the crime. (25 RT 6367-6368, 6370-6371.) In fact, the prosecutor's references to lack of remorse all focused on statements of appellant made either in conversations or in letters which occurred after the crime. (25 RT 6392, 6419.) This Court has observed: "Post-crime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating." (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1232.)

To argue, as respondent's brief does, that a prosecutor is allowed to urge lack of remorse as a reason not to grant a capital defendant mercy is to eviscerate the rule that the prosecution is limited to the statutory aggravators. In this case, Mr. Hajek never offered his remorse about the crime as a factor K mitigating factor.²⁴ The issue of remorse was solely the province of the prosecutor in this case. Not only did he argue to the jury that Mr. Hajek was "a person who shows absolutely no remorse," the prosecutor argued that because of that lack of remorse Mr. Hajek "deserves no mercy, no mitigation." (25 RT 6392.) If a defendant does not offer remorse as a mitigating factor, perforce a prosecutor should not be allowed the lack of remorse to "negate" something that was never asserted in mitigation. To allow that would, in fact, constitute a judicially-created additional aggravating factor in violation of California law. Further, to deny arbitrarily appellant his state-created rights violates his right to due process under the Fourteenth Amendment of the United States Constitution.

²⁴ Appellant's counsel did make a short rebuttal in her penalty phase closing argument to the prosecutor's statements in his penalty phase argument about appellant's alleged lack of remorse. (25 RT 6443.) However, appellant never offered evidence of his remorse as a mitigating factor.

(*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The *Hicks* decision makes clear that while appellant had a statutory right to a penalty phase trial where the prosecution was limited to the statutory aggravating factors, the denial of this right is not merely a matter of state concern; appellant had a liberty interest in that statutory restriction that the “Fourteenth Amendment preserves against arbitrary deprivation by the State.” (*Ibid.*)

The prosecutorial misconduct in this case was pervasive and violated appellant’s rights under both the California and United States Constitutions. It violated his due process rights, his rights to a fundamentally fair trial and an impartial jury, and his rights to a reliable adjudication of guilt and penalty in a capital case. Because of the constitutional nature of these errors, the prosecution must prove beyond a reasonable doubt that the errors were harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) In other words, the state must prove there is no “reasonable possibility” that the misconduct “might have contributed to [appellant’s] conviction.” (*Ibid.*)

Recently, in an order denying a petition for certiorari in a California case, four justices of the United States Supreme Court noted that in that case this Court had misapplied the *Chapman* standard of review for harmless error by placing the burden of proof on the criminal defendant rather than on the prosecution where it properly belongs. (*Gamache v. California* (2010) 562 U.S. ___, 131 S.Ct. 591, 592-593.) In the statement, written by Justice Sotomayor and joined by Justices Ginsburg, Breyer and Kagan, the justices observed that the allocation of the burden of proving harmless error can be outcome determinative in some cases. (*Ibid.*) Justice Sotomayor cautioned that “in future cases the California courts should take care to ensure their burden allocation conforms to the commands of

Chapman.” (*Ibid.*) With this word of caution from four justices of the United States Supreme Court in mind, appellant respectfully requests the Court to find that the respondent has failed to prove that the cumulative error resulting from prosecutorial misconduct was harmless. The Court should reverse appellant’s convictions and death sentence.

* * * * *

CONCLUSION

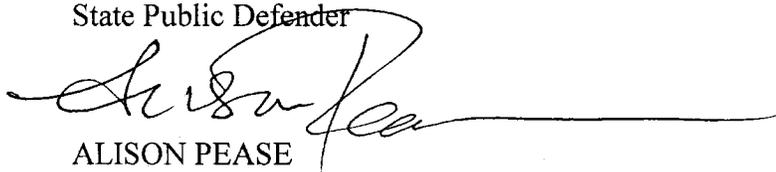
For all of the foregoing reasons as well as for the reasons stated in his opening brief, appellant's convictions and his sentence of death should be reversed.

Dated: February 6, 2012

Respectfully submitted,

MICHAEL J. HERSEK

State Public Defender

A handwritten signature in black ink, appearing to read "Alison Pease", with a long horizontal flourish extending to the right.

ALISON PEASE

Sr. Deputy State Public Defender

Attorneys for Appellant Hajek

CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, Alison Pease, am the Deputy State Public Defender assigned to represent appellant Stephen Edward Hajek, in this automatic appeal. I have conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 29, 953, words in length excluding the tables and this certificate.

DATED: February 6, 2012


Alison Pease
Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Case Name: ***People v. Hajek and Vo***
Case Number: **Superior Court No. Crim. 148113**
Supreme Court No. S049626

I, the undersigned, declare as follows:

I am over the age of 18, not a party to this cause. I am employed in the county where the mailing took place. My business address is 801 K Street, Suite 1100, Sacramento, California 95814. I served a copy of the following document(s):

APPELLANT'S REPLY BRIEF

by enclosing them in an envelope and
// **depositing** the sealed envelope with the United States Postal Service with the postage fully prepaid;
/ **X / placing** the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelope was addressed and mailed on **February 7, 2012**, as follows:

Moona Nandi
Deputy Attorney General
Office of the Attorney General
455 Golden Gate Ave., Suite 1100
San Francisco, CA 94102

Stephen E. Hajek
Post Office Box J-82900
San Quentin State Prison
San Quentin, CA 94974

Santa Clara Superior Court
Death Penalty Appeals Clerk
191 N. First Street
San Jose, CA 95110

Doron Weinberg
Weinberg & Wilder
523 Octavia Street
San Francisco, CA 94102

Kathryn K. Andrews
Attorney at Law
3020 El Cerrito Plaza
PMB356
El Cerrito, CA 94530

Michael Laurence/ Margo Hunter
Habeas Corpus Resource Center
303 Second Street, Suite 400 south
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **February 7, 2012**, at Sacramento, California.


Sandra Alvarez