IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**DEATH PENALTY CASE**
	)	
Plaintiff/Respondent,	)	**No. S132256**
	)	
v.	)	**(Contra Costa Superior Court No. 3-196018-6)**
GLEN TAYLOR HELZER,	)	
Defendant/Appellant.	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable MARY ANN O'MALLEY, Judge Presiding

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**CAPITAL CASE**
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INTRODUCTION

Appellant Glenn "Taylor" Helzer robbed two and killed five people between July 31 and August 3, 2000, after several years of self-medicating his bipolar disorder with crystal methamphetamine, alcohol, Ecstasy, and other psychedelic drugs. Aided by his younger brother, Justin Helzer, and their friend, Dawn Godman, appellant believed that such crimes against a very small number of people were part of God's plan for them, and would fund a drug-distributing sex club, and ultimately, a "Transform America" program under which appellant could end human suffering.

Appellant's family was devoutly Mormon, as was appellant, until his

mid twenties. Godman was a recent convert. All three believed that appellant was a prophet of God; that God wanted them to do what they did; and that their crimes were not morally wrong, though illegal.

Five years earlier, when appellant was 25 and working as a stockbroker at a Dean Witter office in Concord, appellant sought counseling for depression at Kaiser's local facility. Dr. Richard Foster conducted an intake interview and saw appellant several times afterwards. Appellant reported that he needed help coming to terms with the discrepancy between his wife's and his own levels of sexual desire and related marital problems, and with depression "about the issue" Dr. Foster saw "grandiosity" and "self-inflation" and "narcissistic features" in appellant's personality, but not enough to diagnose any disorder.

The second time appellant saw Dr. Foster, appellant presented a "highly detailed plan to find an ideal woman who wanted sex daily. He was going to run an ad in Brazil, interview 80 to 120 applicants, choose 35 and date them. And based upon that, make a two year contract ... to make sure that he had sex daily." At their last meeting, which was a little less than five years before the capital crimes, appellant "was then convinced that the only way to avoid his misery was to leave his wife."

Dr. Foster expected appellant would have difficulty leaving his wife

"because another feature of narcissism is that you desperately crave the approval and admiration of others. Appellant "was very attuned to not wanting to disappoint his wife, not wanting her to be left. ... I saw, one, there was some capacity for empathy. He could put himself in her shoes. And secondly, that he just couldn't stand to have anybody think ill of him or be disappointed in him." He did not see appellant again. A decade later, Dr. Foster explained the system in which appellant came to him:

> There's a certain atmosphere at a managed care facility like Kaiser, and that atmosphere is to find a piece – a very limited piece of somebody's problem that can be dealt with in short-term therapy. . . . [T]here's a real motivation, a demand actually, to find some limited treatable piece.

In a private clinical practice, Dr. Foster explained, he "might have done considerable work evaluating the possibility of a mood disorder, bipolar disorder, which grandiosity and narcissism is a feature as well. ¶ That was just not done in the Kaiser setting. This man came in for a treatment and evaluation of a sexual issue, and for possible depression around that, and that would be the role that I was expected to perform. ¶ So coupled with what I learned later, and knowing that I was focused in just on the presenting problem, because that's the way one works within the Kaiser system, and knowing this additional information about individual

history, family history and sleep problems, I came to look at my initial diagnosis with some question." (27RT 6020-6021.)

Appellant found solace in a self-improvement program that posited that there was, in actuality, no right and wrong. He began using alcohol, and told his cousin that he believed that the story of Adam and Eve meant the paradigm of good and evil was given to us by the devil and we needed to reject it to be saved. He left his wife and young child, and became a poly-drug-abuser, while continuing to work at Dean Witter, until 1998, when appellant returned to Kaiser with evident bipolar disorder, and took disability leave from his job. He sold Ecstasy at raves and used the earnings of a girlfriend and his psychiatric disability benefits to get by. He recruited new acquaintances to attend the self-help program he had attended, and asked some of them if they would help him commit crimes. He and Godman drew up detailed plans for a sex and Ecstasy-distributing club in which selected women could be paid to "party"and be paid more if they "swing." A few interested women filled out applications for the jobs in which they were asked questions about spirituality and morality as well as their partying habits and desires. Appellant's Mormon background, decadence and grandiosity in the five years prior to the capital crimes formed a large part of the case in aggravation.

On July 31,2000, appellant and his brother killed Ivan and Annette Stineman, after kidnaping them and threatening their safety until they signed checks to relinquish their funds. The Stinemans were elderly former clients from appellant's past work as a stockbroker at Dean Witter, and trusted him despite his long, unexplained absence from the job. On August 2, appellant and his brother killed Selina Bishop, a young woman appellant had courted to set up a secret bank account in which to deposit stolen funds intended for appellant. On August 3, he killed Bishop's mother and her companion, James Gamble, after realizing that Bishop's mother knew what he looked like and would link him to Bishop's disappearance.

Appellant was arrested after a warrant was served at his home a few days later. After the brothers' motions for separate trials were denied, appellant pled guilty to all charges without any offer of leniency. Appellant's brother Justin was then given a separate trial in which he was convicted, found legally sane, and condemned.

Appellant's trial was a penalty-only trial. Despite the bizarre crime plan and diagnoses of major mental disorder and poly-substance abuse, despite appellant's lack of criminal record, the prosecutor told the jury that there were no statutory mitigating factors applicable to this case. This appeal will take issue with that prosecutorial claim, and with the

prosecutor's use of photographic and audio evidence of corpse mutilation to ensure that the jury would cringe and reject mental illness as mitigation.

But first, this appeal seeks to allow appellant to withdraw his guilty plea due to the erroneous denial of his motion to suppress evidence, and reversal of the death sentence on multiple additional grounds.

STATEMENT OF APPEALABILITY

This appeal is automatic (Cal. Const., art. VI, § 11, subd. (a); Pen. Code §1239, subd. (b)) and authorized by Penal Code section 1538.5, subdivision (m).

STATEMENT OF THE CASE

On December 28, 2001, Glenn Taylor Helzer, Justin Alan Helzer and Dawn Godman were charged by information with the following crimes in Contra Costa County, unless otherwise noted:

Count One: Conspiracy (Pen. Code §182, subd. (a)(1))[1] to commit murder (§187), extortion (§518), robbery (§211), burglary (§§459, 460), false imprisonment (§236), and obstruction of justice (§135), on or about March through August 2000, with 39 overt acts.

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[1] Unless otherwise indicated, references to statutes are to sections of the California Penal Code.

Count Two: Murder of Ivan Stineman, on or about July 30 through August 2, 2000, with robbery (§190.2(a)(17)(i)), multiple murder (§190.2(a)(3)) and kidnaping special circumstances. (§190.2(a)(17)(ii).)

Count Three: Murder of Annette Stineman, on or about July 30 through August 2, 2000, with robbery, multiple murder and kidnaping special circumstances. (§190.2(a)(17).)

Count Four: Murder of Selina Bishop, on or about August 2 through August 3, 2000, with the special circumstances of multiple murder and murder to prevent testimony. (§190.2(a)(10).)

Count Five: Murder of Jennifer Villarin, on or about August 3, 2000, in Marin County, with the special circumstance of multiple murder.

Count Six: Murder of James Gamble, on or about August 3, 2000, in Marin County, with the special circumstance of multiple murder.

Count Seven: Kidnaping (§209) of Ivan Stineman for purposes of extortion, on or about July 30 through August 3, 2000.

Count Eight: Kidnaping of Annette Stineman for purposes of extortion, on or about July 30 through August 3, 2000.

Count Nine: Extortion (§§518, 520) of Ivan and Annette Stineman on or about July 30 through August 3, 2000.

Count Ten: Robbery (§§211, 212.5(a)) of Ivan Stineman on or about

July 30 through August 3, 2000.

Count Eleven: Robbery of Annette Stineman on or about July 30 through August 3, 2000.

Count Twelve: Burglary (§§459, 460) of the home of Annette and Ivan Stineman on July 30, 2000.

The following counts name were alleged against appellant only:

Count Thirteen: Burglary (§§459, 460) of the home of William Sharp on August 7, 2000.

Count Fourteen: Attempted residential robbery (§§211, 212.5(a), 664) of William Sharp on August 7, 2000.

Count Fifteen: Burglary of the home of Mary Mozzochi on August 7, 2000, with use of a deadly weapon. (§12022, subd. (b)(1).).

Count Sixteen: Residential robbery of Burglary of the home of Mary Mazzochi on August 7, 2000, with use of a deadly weapon. (§12022, subd. (b)(1).).

County Seventeen: False Imprisonment of Mary Mazzochi on August 7, 2000, with use of a deadly weapon. (§12022, subd. (b)(1).).

Count Eighteen: Possession for sale of MDA, a controlled substance, in violation of Health & Safety Code section 11378, on or about March 1 through August 7, 2000. (7CT 2617-2627.)

After denial of their demurrers (7CT 2685; 1RT 61-64), all three defendants pleaded not guilty.

On October 15, 2002, the District Attorney was permitted to file a first amended information alleging that drug trafficking and pimping were among the objects of the conspiracy charged in count one, and that Selina Bishop was killed to prevent testimony respecting that conspiracy. (8CT 2835-2853, 2905, 2970-2981.) The court then heard, and denied, appellant's motion to set aside the information pursuant to Penal Code section 995. (7CT 2741; 8 CT 2905.)

On January 31, 2003, a demurrer to the first amended information was heard and denied.[2] All defendants again pled not guilty. (1RT 245.)

On the same date, the court began a series of hearings on the defendants' joint motion to suppress evidence pursuant to Penal Code section 1538.5. (8CT 3000, 3988.) The motion to suppress was denied in all respects. (1RT 280-281, 303-315; 3RT 690-719.)

The court also heard, and denied, pretrial defense motions to preclude the death penalty on constitutional grounds or require that supportive findings be proved beyond a reasonable doubt (10CT 3846; 1RT

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[2] All agreed that defense motions were joined by all defendants unless otherwise stated. (1RT 345.)

342) and for a change of venue. (10CT 3741;1RT 342-345.) The latter was denied without prejudice to a motion made at the time of jury voir dire. (10CT 3978; 2RT 469.)

On July 25, 2003, codefendant Godman entered a plea of guilty to counts one through six, and nine through eighteen, and to two new charges of kidnaping under Penal Code section 207, subdivision (a), for the abduction of Ivan and Annette Stineman, respectively. (10CT 3996.) The offered sentence was a determinate term of 12 years, eight months, consecutive to a term of 25 years to life, in exchange for Godman's agreement to testify truthfully in her codefendants' cases. (10CT 3997.)

On October 14, 2003, codefendant Justin Helzer entered a plea of not guilty by reason of insanity. (10CT 4055-57.)

On March 1, 2004, the court began hearing motions in limine. The court granted the defense motion to deem all defense objections to be continuing, and all *in limine* rulings binding at trial unless otherwise stated by the court. (11CT 4359, 4377.) The court also granted the defense motion to deem defense objections to include both state and federal constitutional arguments. (11RT 4359, 4381.)

On March 3, 2004, the court denied the Helzer defendants' motions to sever their cases for trial. (11CT 4357.)

On March 5, 2004, appellant changed his plea to guilty to all counts and waived his constitutional rights for the guilt phase of trial. (11CT 4415-23.) The court later granted his brother's request to sever his case for trial but denied his request to continue his trial until after appellant's trial on the remaining issue of penalty. (11CT 4431-4437, 4451-4455.)

Codefendant Justin Helzer's separate trial was held prior to that of appellant. A jury found him guilty and not legally insane on all charges submitted for decision. On August 8, 2004, the jury selected the death sentence for the first three murder counts, and a life without parole sentence for the last two counts of murder, i.e., those of Villarin and Gamble. (14CT 5497.) After denial of motions for new trial and of the automatic motion to modify the verdicts, Justin Helzer was sentenced to death on March 11, 2005. (17CT 7381.) He died while his appeal was pending.

Appellant's separate trial (limited to penalty) commenced on October 5, 2004, with a renewed motion to change venue, which the trial court denied. (15CT 6203, 16 CT 6534.) The jury was sworn on November 5, 2004. (15CT 6626-27.) The jury began deliberations on December 15, (17CT 6927) and returned a verdict for death on all counts submitted for decision on December 17, 2004. (17CT 6948.)

Appellant's motions to modify the verdict were denied and death

sentences were imposed on March 11, 2005. Sentence also was imposed on the noncapital felony counts. (18CT 7392, 7451.)

Specifically, the court imposed 25 to life for Count One (conspiracy), life without parole for Counts Seven and Eight (kidnap for extortion), the midterm of three years on Count Nine (extortion), the midterm of four years each on Counts Ten through Twelve (first degree residential robbery and burglary), and stayed those sentences pursuant to section 654. (18CT 7452; 30RT 6928-6929.) For Counts Thirteen and Fourteen, charging first degree and attempted first degree residential robbery against an additional victim, the court imposed the midterm of four years and two years respectively, unstayed. (18CT 7453; 30RT 6929.) On Counts Fifteen and Sixteen, charging residential robbery and burglary of other victims, the court chose the midterm of four years each, and stayed the sentence and the section 12022(b)(1) enhancement on Count Fifteen only, and imposed the sentence and a consecutive one year sentence for the section 12022(b)(1) enhancement for Count Sixteen. The court imposed the midterm of four years for Count Sixteen, and struck the enhancement for knife use. For Count Seventeen, false imprisonment by force on the victim in Counts Fifteen and Sixteen, the court imposed and stayed the midterm of three years pursuant to section 654, and struck the enhancement.

(18CT 7453; 30RT 6929-30.) The court imposed the midterm of two years on Count Eighteen (possession of controlled substance for sale) and ordered all sentences not stayed pursuant to section 654 to be stayed pending during the pendency of the automatic appeal of the death sentences in Counts 2 through 6. (18CT 7453; 30RT 6930.)

The court imposed a $5000.00 restitution fine, and a parole fine, and stayed only the latter. (30RT 6930.) Additional direct victim restitution was imposed by the court in subsequent proceedings. (7SCT 1505;10/21/05 RT 4-5.)

STATEMENT OF THE FACTS

I. The Capital Crimes

A. The kidnaping, robbery and killing of the Stinemans

Clint Carter lived across the street from the Stinemans in Concord. On Sunday, July 30, 2000, at about 8:30 PM, he saw two white males in front of the Steinmans' home. The men wore dark suits and ties and were carrying briefcases. Each had long hair in a ponytail. (15RT 3511.)

The men paused in front of the Steinman's house for few moments. The man with the darker brown hair, later identified as appellant, stopped and exhibited body language that indicated that he did not want to keep

walking. The lighter haired man, later identified as Justin Helzer, approached appellant, put his hand on his on his shoulder, and moved his head toward towards the Steinman's residence. The men began walking again and were last seen at the front Steinman's home. (15RT 3513-3514.)

Meanwhile, neighbor Rise Bradfield-Minder saw a white pickup truck pull up across the street and park at an odd angle, sticking out into the road. A woman with blond curly hair, later identified as Dawn Godman, was inside the truck, smoking. A white van pulled up next to the truck. A man's voice said something. Godman asked the man, "did you get it?" and said, "I'm right behind you." (15RT 3527.) After the van pulled away, Godman got out of the truck, walked across the street, came to the front gate of the Bradfield-Minder home, and spoke to the witness and her family. (15RT 3527-3528.) Godman said that she saw them watching her, thought they "were cool people" and wanted them to know that she had been waiting for her friends to buy "weed" from some "shady people down the street." (15RT 3528.)

Testifying under a grant of immunity at appellant's trial, Godman explained that she felt "the spirit" leading her to say something to the people on Reis Minder's porch who had been watching her. Godman, appellant and Justin Helzer were there to execute a kidnaping and extortion

plan appellant called Children of Thunder. They had "declared war against Satan" and put "out to the universe that we were committed to going through with God's will in order to further what we felt he wanted us to do." (20RT 4492.) The plan involved appellant creating a list of five former clients he believed he could extort. Godman purchased handcuffs, leg irons, a stun gun, trash bags, duffel bags and a reciprocating saw, the latter for dismemberment of the victims bodies. (20RT 4491.)

The defendants purchased a bottle of $40-$50.00 wine with which appellant was supposed to entice Bob White, whose name was at the top of appellant's list of clients due to his combination of assets and location, to invite the Helzer brothers into White's home to hear about his current investment scheme. Godman brought a bucket with extra handcuffs and leg irons to be used if White had guests. The bucket would enable the defendants to relieve themselves without leaving DNA in White's home if they had to keep White and his guests at White's house while the defendants liquidated White's accounts. (21RT 4733.) White happened to be away on the appointed day, and so they proceeded to the home of the Stinemans.

The briefcases the two brothers carried into the Stinemans' home contained handcuffs, a handgun, a blow torch, a taser gun Godman had

purchased, and a cell phone. (20RT 4502.) Appellant used the cell phone to call Godman to say they were coming out. Appellant drove up to her truck in the Stinemans' white van and said, "I got it." Godman saw the shadows of four people in the van as it drove away. (20RT 4504.)

The Stinemans were handcuffed together when they were brought into the livingroom of the defendants' home on Saddlewood Court. They sat on the couch and had their handcuffs removed. Appellant gave them the remote control for the television, and said he had some things he needed to do and would be with them shortly. Justin watched the Stinemans while appellant and Godman left the room to review papers on the Stinemans' investment accounts that he had gathered from their house. Godman and appellant also developed a list of questions about their plans so that people would not find their absence suspicious. (20RT 4507-4511.)

Using the list of questions, appellant questioned each of the Stinemans separately and examined his notes to see if their answers matched. (20RT 4512.) Appellant asked additional questions based on answers to the first set of questions. He advised Godman that Annette Stineman had a hair appointment that appellant wanted her to cancel, and that a message should be given to one of the Stinemans daughters who lived nearby. A telephone was brought to the Stinemans in the livingroom,

where they sat watching TV. Appellant told them to make the necessary phone calls. They agreed. (20RT 4513-4515.)

Appellant told the Stinemans he had run into some trouble, needed their money to get out of the country, and needed them to stay around until he got their money, after which he would leave. He said he would call someone to let them know where the Stinemans were after three days. He told them how to use the bathroom and eat. He took a mattress from his room to the livingroom so they could lay down and rest on it. They did so, and went to sleep. Godman and appellant spent the night going over plans and using methamphetamine to stay awake. (20RT 4515-4517.)

Early on the morning of July 31, Godman and appellant left the house and drove to a pay phone. Godman had practiced pretending to be Annette Stineman. She was to call Dean Witter and liquidate approximately $100,000.00 worth of stock in the Stinemans' account. (20RT 4517-4518.)

At 6:30 AM on Monday, July 31, 2000, George Calhoun was managing the Dean Witter office when he received a telephone call from someone who said she was Annette Steinman. (15RT 3576.) The woman said she wanted to liquidate her account because she had a medical emergency involving a family member who needed major surgery. She

said she had been up all night and she had to catch a flight. The investments she was liquidating were typically held long-term, and he tried to talk her out of it. She said she was in a hurry and told him to liquidate the account to the extent possible. Calhoun felt confident that she was who she said she was because she knew what she had in her account and she knew her account number. The conversation took about five minutes. (15RT 3577-3581.)

Godman did not believe that what they were doing was wrong, though she knew it was illegal. God's law was higher than man's law and God was telling her to do this. (20RT 4494-4495.)

Back at their home on Saddlewood Court, Godman and appellant woke the Stinemans and asked if they wanted coffee or food. Ivan requested coffee, and Godman brought him back a coffee from Starbucks. Appellant then drove Ivan to a payphone to make the calls they discussed the night before. They returned about a half hour later. After discussing with Godman the figures she had obtained from the Dean Witter representative, appellant took Ivan to a back room while Annette was restrained in a kitchen chair with handcuffs and leg irons. (20RT 4520-4521.) Appellant was to tell Ivan that Annette would be hurt by Godman if he caused any trouble. Ivan was to make out a check for a specified amount

payable to Selina Bishop. About ten minutes later, Annette was taken to a back bedroom with appellant and persuaded to make out a check while Ivan was restrained in the kitchen chair. (20RT 4522.)

The Stinemans were then given Rohypnol[3] in a quantity the defendants hoped would kill them. (22RT 4763.) Mrs. Stineman appeared sleepy. Wanting her to wake and sign another check, appellant lit a methamphetamine pipe and told her to inhale the smoke. (20RT 4522.) It did not work. Asleep or unconscious because of the Rophynol, Ivan and Annette were carried into the bathroom by appellant and Justin, one at a time. Annette was carried directly from the master bedroom to the bath after Justin and appellant brought Ivan to the bath.

At first everyone waited, hoping that the Rohypnol they had given the Stinemans was an overdose and that the Stinemans would die quietly in their sleep. Godman, a certified nurse assistant, monitored their breathing and blood pressure with a blood pressure cuff she had obtained in her prior hospital work. (20RT 4522, 22RT 4763-4764.) Appellant put his hand over Annette Stineman's nose and mouth. She started fighting back.

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[3] Rohypnol is a brand name for Flunitrazepam, a sleep inducing drug known to produce amnesia and facilitate "date rape." <http://pubchem.ncbi.nlm.nih.gov/summary/summary.cgi?cid=3380> [as of March 31, 2014.]

Godman went to the garage to get some plastic. (20RT 4523- 4524.) When Godman returned, appellant attempted to suffocate Annette while Justin tried to suffocate Ivan. When that did not work, appellant started banging Annette's head on the floor very hard. Justin attempted the same with Ivan. Annette was still struggling while Justin continued holding plastic over Ivan's head and banging his head on the floor. Appellant picked up Annette, put the upper part of her body in the bathtub, and slit her throat with a knife. The way he did so caused the blood to run into her lungs rather than outside her body. She suffocated in her own blood and stopped fighting. Ivan died right after that. Godman stood in the bathroom doorway watching. (20RT 4525- 4526.) All three defendants wore only their underwear.

Appellant told Godman to get dressed – they had stripped down to their underwear before killing the Stinemans – and practice writing so that she could sign a check from Annette to Ivan for $10,000.00. Appellant said this check should be deposited in the couple's checking account at a particular bank. He said that doing so would distract police. (20RT 4527.) Godman thought the check was supposed to make people think the Stinemans had gone on a mini vacation. (20RT 4731.)

Godman prepared the check, and drove to the Washington Mutual

Savings Bank in Petaluma. She was wearing bright green pants and a matching shirt. She used a wheelchair once inside the bank. Appellant had said the wheelchair would disguise her height and make it harder to identify her. After making the deposit she drove to the home of appellant's parents to get firewood to burn things, as appellant requested. (20RT 4528-4529.)

When Godman arrived back at the group's Saddlewood home, she saw a large piece of clear plastic laying on the floor in the hallway, and full plastic garbage bags on top. The plastic bags held the remains of the Stinemans, dismembered by appellant and Justin while Godman was out. Justin was cleaning the bathroom, wiping walls and counters. Godman could not recall seeing any blood while watching the killing of the Stinemans. "[E]verything I saw in the bathroom at that time was in black and white." Her memory of the scene was black and white too. She was not thinking or feeling anything when she watched appellant slit Annette Stineman's throat. (20RT 4531-4532.)

Appellant sent Godman out to buy new faucets and other things for the bath. She did so and helped Justin replace the faucets too. 4533. She did not help clean. (20RT 4532-4533.)

The checks the Stinemans had written were payable to Selina Bishop and were written for a total of $100,000.00 Godman took the two checks

to California Federal Bank ("CalFed") in Walnut Creek, wearing the same distinctive outfit she had worn when depositing the forged check in the Stinemans' account in Petaluma. Once inside the bank, she used a rented wheelchair to get around. (21RT 4542-4544.)

The manager at CalFed tried to contact the Stinemans at the phone number printed on the check. Appellant and Godman had not anticipated that response. Godman called appellant from the parking lot of the bank and suggested returning to the Stinemans' house and taking the outgoing message tape from their answering machine. Godman told appellant that the CalFed manager had called the number on the check. Appellant "was a little upset." She met appellant at the Stinemans' house. She drove his car, while he drove the Stinemans' van. Appellant got in and out of the house with the tape in a couple of minutes. (21RT 4558, 4714.)

Godman rented a pager with voice mail and left an outgoing message that was supposed to be that of the Stinemans. (21RT 4554.) Godman scripted and recorded an outgoing message for the pager number, one in which Godman was to sound like an elderly woman leaving a hurried message for CalFed. (21RT 4562.) Godman conveyed the pager number to the bank, saying it was the new number for the Stinemans, who had recently moved. (21RT 4555.) Appellant told Godman he didn't think it

was going to work. (21RT 4558.) Godman unsuccessfully tried to contact the manager at Cal Fed afterwards. The manager was not answering Godman's phone calls. Godman told appellant the manager acted like there was something going on and she didn't want to talk to Godman. (21RT 4553.) "Ultimately, [appellant] decided to – that we probably weren't going to be able to get the money out of the account." (21RT 4551.) They saved the Stinemans' identification cards because appellant felt that there might be another way to get the money out of the Stinemans' account. (20RT 4736.) Nevertheless, checks for $33,000.00, $67,000.00 and $10,000.00 were paid by Dean Witter. (16RT 3587-3596.)

Godman proceeded with the plan for disposing of the dismembered remains while maintaining communication with CalFed. Godman made an appointment to rent a jet ski in Livermore and went there with Justin. Justin had a tow hitch ball put on a truck to pull the trailer after obtaining insurance required for jet ski rental. (21RT 4542-4544.)

B. The Killing of Selina Bishop

According to Godman, appellant met and began courting 22-year old Selina Bishop a few months earlier with the "understanding" that Bishop was to be the person who would deposit into appellant's account the

funds appellant would extort from a former client, and then be killed with an overdose of Rohypnol. (20RT 4463-4464, 21RT 4574.) On day after the killing and dismemberment of the Stinemans, appellant met up with Bishop and took her to pawnshops where appellant unsuccessfully sought to sell Annette Stineman's rings. (20RT 4550.) Appellant returned to the house with Bishop late in the afternoon or early evening. Bishop seemed happy. Bishop and Godman discussed bathroom remodeling because the shelving and shower curtain had been removed. (20RT 4564-4566.)

Godman asked Bishop to look at bathroom and consider remodeling ideas to distract her so that Justin could hit her over the head with a hammer. Godman could not recall whose idea that was. There was a hammer on the floor of hallway near the bathroom, and Justin was standing nearby. But Justin did not hit Bishop with the hammer in the five to ten minute period in which Godman and Bishop discussed remodeling the bathroom because Bishop did not turn her back to him. (21RT 4567-4570.)

Godman, appellant and Bishop went to the living room and "smoked weed." Justin was somewhere in the house. Appellant and Bishop went to the back bedroom, ostensibly to shower and take a nap. Godman was supposed to throw a towel on Bishop's head while she napped, so Justin could hit her on the head with a hammer. But Bishop and appellant did

not sleep. Bishop came back to the living room, smoked more "weed" and played a board game called Risk, a world warfare game. (21RT 4570-4572.) Appellant put previously-crushed Rophynol in a glass of wine and served it to Bishop. (21RT 4573.) The drug did not dissolve completely and Selina noticed something in her wine glass. Appellant said there "was something dirty in it" and snatched it away, saying he would get her a clean glass. He poured her a new glass of wine, and they continued playing Risk. At some point appellant or Justin told Godman to go to bed. (21RT 4575-4576.) Godman did so, but got up about an hour later because she couldn't sleep. She saw appellant and Justin spreading blankets on the family room floor. She knew that they were ostensibly giving Bishop a back rub. She saw appellant rub Bishop's back for about 10 minutes. When Bishop's eyes closed, Justin came up beside her and hit her over the head with a hammer very hard. (21RT 4577.)

The first time Justin hit Bishop she cried out, but she made no noise after that. Appellant and Justin picked up the blanket with Bishop and carried it to the kitchen floor. There was blood on the blanket, and blood dripping on to the floor. Appellant told Godman to clean the blood off the carpet, while appellant and Justin went to the bathroom with a saw horse, an extension cord and a reciprocating saw. (21RT 4578.)

While cleaning Godman heard noise on the kitchen floor and started praying that Bishop would die quickly "so she wouldn't be hurt anymore." Appellant saw that Bishop was moving, picked up the hammer, said "I'm sorry" and hit her again multiple times while she was on the kitchen floor. Appellant and Justin carried her into the bathroom on the blanket while Godman continued cleaning the carpet. (21RT 4579.) Appellant called Godman into the bathroom and said "[S]pirit says you get to know this is for real." Appellant pulled Bishop's head back and slit Bishop's throat with a hunting knife. Godman had previously said that she did not feel like the events with the Stinemans were real and that she felt like it was a dream she could not get out of. (21RT 4580-4581.)

Godman went back to carpet cleaning. She heard the saw running and thuds in the tub. She kept cleaning the carpet while appellant lit a fire in the fireplace. Someone had previously burned the Stinemans' personal effects in the fireplace. Appellant burned additional materials, apparently belonging to Bishop, while Justin continued cleaning the bathroom. The duffel bags holding the remains of the Stinemans were in Justin's room. Additional duffel bags were placed on a plastic tarp in the hallway. (21RT 4581-4584.)

Prior to the capital crimes, Godman and appellant adopted three

large dogs from the animal shelter on the theory that the dogs could consume the bodies of people killed pursuant to the Children of Thunder plan. Godman built a dog run for them in the yard. (21RT 4706.) Meaty bones were bought to see how much the dogs could consume. Appellant determined that the dogs could not eat enough. (20RT 4473-4475.) But after Bishop's body was dismembered, and appellant and Godman were talking and burning things in the fireplace, appellant said he wanted to see if his dog, Jake, would eat human flesh. He then fed Jake a small piece or two of Bishop's skin that he held out on his finger. [4] (21RT 4586.)

C. The killing of Jennifer Villarin and James Gamble

While talking with Godman in front of the fireplace, appellant said he had realized that Bishop's mother and a coworker of Bishop named Karen were the only people in Bishop's circle who knew what he looked

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[4] Jake was taken from the home by Animal Control officers the night of the defendants' arrest. (25RT 5571-5572.) They sent an abandonment notification to appellant in jail. Appellant responded by writing that Jake "is a great, loving, real, all dog, big dog. He sits, stays, goes away with a finger point. Please try to find him a good home – please find a good home for him. He's all love and affection, eats anything, and won't go inside your house even with the door open. His name is Jake. Thank you. Glenn Helzer." The prosecutor had the Animal Control witness read the missive and reiterate that appellant said, "He eats anything." (25RT 5568.)

like. Appellant said he knew where Bishop's mother was, and he "could take of her then" and deal with Karen at a later time. (21RT 4585.)

Appellant and Godman decided to take two handguns and drive to Bishop's apartment in Woodacre, knowing that Bishop's mother was staying there that night. The drive to Woodacre took a half hour to 45 minutes. When they arrived, appellant went inside while Godman stayed in the car. Godman heard shots fired, started the engine of the car, and drove back to the home she shared with appellant. Appellant appeared "a little flustered" and out of breath when he first got in the car, and complained of Justin's failure to call with information from Bishop's address book. (21RT 4591-4597.)

Marin County Sheriff's deputies responding to a report of shots fired found the body of Bishop's mother Jennifer Villarin, and her companion, James Gamble, dead from gunshot wounds, in Bishop's Woodacre home, passing a car that could have been that of appellant while en route. (18RT 3986-3990.)

II. The Distribution of Remains

In accordance with appellant's expressed belief that the removal of teeth from the heads would prevent identification of the remains, Godman

noted on a piece of paper "head and teeth two hours" during one of her conferences with appellant. Appellant told Justin and Godman to carry out that plan after he and Godman returned from Woodacre, woke Justin, and had breakfast. Justin removed the heads of Bishop and the Stinemans from the duffel bags, and used a hammer and a "punch" to dismantle jaws and remove the teeth while Godman held the heads in place. Justin returned the heads and the teeth to the duffel bags when the work was complete. (21RT 4597-4599.)

Godman unhooked the jet ski and backed the truck into the driveway so that appellant and Justin could load the duffel bags. All three then drove the truck with the jet ski to a place on the delta that one of them had visited previously. (21RT 4600-4601.) Justin stabbed the duffel bags to prevent them from floating, and carried them on to the jet ski. Appellant, Godman and Justin operated the jet ski, and took out two bags at a time. (21RT 4605-4606.) Nothing in particular went through Godman's mind at the time. (21RT 4611.) After the bags were dumped she felt very calm, spiritual and peaceful. (22RT 4768.) She and appellant each drank a shot of tequilla at a bar where they stopped on the way home so Godman could use a bathroom. (21RT 4612.)

Back at their home in Concord, Godman and Justin cleaned the

house and returned the jet ski while appellant washed clothes and packed to leave for a previously-planned excursion to a reggae concert he was to attend with friends Alex and Jessyka Chompff. (21RT 4614-4615.) Appellant gave Godman and Justin a list of things to do while he was gone, including wiping down and driving the Stinemans' van to Oakland where they appellant said it would be stolen, and driving Bishop's car to Petaluma. Appellant instructed them to leave Ivan Stinemans wedding ring visible in Bishop's car, which was supposed to make police think that Bishop and Ivan Stineman had run off together. Godman did so after she loaded the truck with all the things appellant said they had to get rid of: two saws– one skill saw used only to cut up bloody sawhorses and the reciprocating saw used to dismember bodies, the Stineman's suitcases with the clothing changes they brought, and a bag of ashes from the fireplace. (21RT 4617.) Godman dumped those items in trash bins found at the backs of different businesses in Concord, and stopped at the home of a friend, Debra McClanahan, to borrow her carpet cleaner. Godman did not think she was doing anything wrong. (21RT 4621.)

Godman slept, woke up, and returned home to clean the carpet. Her efforts at cleaning did not remove the stain or the smell of blood, but left a lot of water. Godman had to go to McClanahan's house to sleep

because her house "smelled of death" and it bothered her after Bishop was killed. Godman had liked Bishop. (21RT 4622-4626.)

III. The Police Investigation

Marin County sheriff's deputies responding to the shooting at Bishop's home in Woodacre found, in addition to the dead bodies of Villarin and Gamble, shell casings and bullets fired from a 9mm semi-automatic handgun in addition to the bodies of Villarin and Gamble. (18RT 4008-4017.) Sheriff's Detective Steven Nash, a crime scene specialist, secured the home while a warrant was obtained. (22RT 4792.)

Seeking Villarin's daughter, Selina Bishop, Detective Nash went to the café where Bishop worked, and heard that Bishop had left town with a boyfriend who lived in Concord with his brother Justin and went by the name Jordan. Nash was made aware that Bishop had left behind a pager. Searching the pager for phone numbers, he saw one with an area code for Concord. The phone company informed him that the number was assigned to a prepaid cell phone issued by GTE to Denise Anderson. Finding a Denise Anderson in Concord who had nothing to do with the phone number, Nash determined that it was a pseudonym. He obtained from GTE the phone numbers called from the number on Bishop's pager. The phone

company gave Nash the names and addresses of the subscribers associated with those phone numbers. One of the subscribers was Justin Helzer on Saddlewood Drive in Concord. Another was Ann Helzer in Walnut Creek. Nash obtained from the DMV a photograph of Justin Helzer, and a description of his vehicle, a white Toyota pickup truck. He learned that Justin had purchased a 9mm semiautomatic handgun in May. The Marin County District Attorney obtained a search warrant for the Saddlewood home from the Marin County Superior Court at Nash's request. (22RT 4793-4801.)

Police forcibly entered the Saddlewood home at 6 a.m. on Monday, August 7, 2000. (23RT 5124.) Appellant fled through a window but was quickly captured by Nash and Marin Sheriff's Detective Alisia Lellis. Appellant spontaneously said his name was Jordan, he was at a reggae party the night before, his girlfriend was missing, and he should have called police. Lellis turned him over to Marin Sheriff's Detective Erin Inskip. (22RT 4917- 4918.)

Detective Inskip had appellant's handcuffs removed, and told him he was not under arrest and did not have to answer any questions. (23RT 5125.) She said she was investigating a double homicide in Marin and the disappearance of one victim's daughter. She asked appellant if he had any

nicknames, and he said "Jordan." She asked if he knew Selina Bishop and how. He said he had met her at a rave party near Easter, April 2000, and that they engaged in an intimate relationship. He had helped her move into her apartment and spent the night with her on a later date, and she had given him a key. (23RT 5127.)

Inskip asked appellant if he was under the influence of any drugs and he said no. She asked when he last saw Bishop, but could not "recall that he was able to give me a specific date or time of when he last saw her." (23RT 5127-5128.) He said he had talked to her on the phone on August 1 and they had a verbal fight. He said he could not recall why they fought, but Bishop was upset, and did not show up at the location where they planned to meet and travel to Yosemite the next day. He later drove to the Garberville area for Reggae on the River to sell mushrooms and Ecstasy because he was low on cash. He said he returned to Concord late Sunday evening. He said when he returned he found that his brother and his other roommate had videotaped a news broadcast of the disappearance and deaths; he regretted not going to police when he got home on Sunday, and didn't know where Bishop went. She was expecting a large inheritance from her grandparents whose names he didn't know. When Inskip began to move the patrol car in response to a call from another officer, she heard a

thud, and saw that appellant had thrown himself threw the car's open window and run off. (23RT 5129-5132.)

Running from Inskip's patrol car, appellant entered and threatened residents of two nearby homes, demanding cars, clothes, and a haircut. Neither home had a working car at the time. (23RT 5142-5148, 5152-5165, 5175-78.) Appellant was arrested after invading and fleeing the second home. (23RT RT 5133) Godman and Justin were arrested at Saddlewood.

Meanwhile, Detective Nash saw in the Saddlwood home several things that "caused me to go get a second search warrant" from the Marin Superior Court. He saw commercial carpet dryers under carpets, and red stains on the carpets in one of the bedrooms. He saw handcuffs, tazers, duct tape, and latex gloves in the garbage can. (22RT 4802-4803.) Detective Lellis saw a newspaper lying on kitchen counter open to a page saying "Woodacre Homicide Victim Daughter Cannot Be Found." It was dated August 5, 2000. She found numerous incriminating receipts, and a mobile phone contract in the name of Debra McClanahan, and McClanahan's phone number, inside a "day planner" she found on the kitchen table (22RT 4920-4929.)

Marin Sheriffs Deputy Barry Haying searched a white Nissan pickup truck at Saddlewood and found a garbage bag containing leg irons,

handcuffs and keys for handcuffs. (22RT 4935-4939.) He found more handcuffs and keys, and a receipt for a Baretta firearm, in a bedroom of the house. A tape in the VCR contained commercial news broadcasts that Selina Bishop was missing. (22RT 4940-4942.)

Nash returned with the second Marin warrant and collected "many hundreds" of items in the house. Concord Police joined him the following day with their own warrant for evidence concerning the Stinemans. (22RT 4804, 4807.)

Concord Police and Marin County Sheriff personnel occupied the defendants' Saddlewood for eight days. (22RT 4807.) The search yielded a wide array of items linking the defendants to the capital crimes,[5] personal

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[5] Nash recounted for the jury the sighting of a gun box, a knife with a compass, another knife, a tazer, an empty tazer case, latex gloves, water ski gloves with the fingertips removed, appellant's wallet, driver's license, $39.00 in cash, an In to Me See business card for Jordan Andrew Taylor, a cell phone, a yellow twist tie, a set of three plastic bags, pagers, an answering machine, a cell phone charger, a cell phone and cord, maps of the county, delta and northern California boating directories, a map of the loop of the delta and a circle around Pirate's Lair on Brannan Island road, carpet and odor cleaners, handcuff keys in appellant's car, ashes in fireplace, a button, messages on the answering machine in the family room, a bag of tools and parts, a hammer found on the bathroom sink, plumbing supplies, an owner's manual for a tazer and one for a Nissan pickup truck, and credit card statements with account numbers and no names, a rental agreement for the Saddlewood home, a manual for a Baretta, paper with phone numbers for the café where Bishop worked and her voicemail/pager, paper on which someone had written, "how to buy a car with Ivan's check", receipts for insurance. (22RT 4808-4833, 4838-4842.)

papers reflecting the debts owed by all three defendants (22RT 4835-4838, 4844-4849, 4856-4867, 4986-4988) and writings recording their thoughts, which were read to the jury by the officers who found them, and interpreted by Dawn Godman.

Detective Nash found in Godman's room a spiral notebook in which appellant had listed his "Principles of Magic." The notebook had an "R2D2 and C3PO" design on the cover. (22RT 4842.) He also found a note from Bishop to Jordan anticipating the opening of an X-men movie and getting together soon. (22RT 4851.) Binders full of odd handwritten notes, two of which mentioned Mexico, things to take, and things to do before leaving (22RT 4846-4860) were read by Nash and published to the jury, sans testimony identifying the authors.[6] (22RT 4860-4871, 4873-4913.) An officer who searched the garage of the residence after the killings described two sticks or staffs he discovered. The longer one had a claw holding a ball, and had feathers and beads. The shorter one had a clear glass or crystal ball on top and something like bones hanging out. (18RT 4103-4106.)

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[6]The trial court excluded one note on which "guns" was written at the top of the list of things to bring, but agreed with the prosecutor's claims that the bulk of the handwritten notes were relevant statements made in a conspiracy, and that conspiracy "is factor A in this case." (22RT 4862, 4869-4871.)

Concord Police Detective Patrick Murray, a financial crimes detective, reviewed the financial documents seized from Saddlewood and admitted into evidence at trial. He concluded that appellant owed $23,330.00 to credit card issuers in July 2000. (22RT 4949-4951.) Murray also sought the three checks that had been written on the Stinemans' accounts. All three had cleared the banks. $100,000.00 was in Selina Bishop's account available for withdrawal. The telephone number written on top of the $33,000.00 check was traced to Double Header Pagers and an application for a pager voice mail for Shirley and and Emil Robinson. Those names also appeared on utility bills found at the Saddlewood home. (22RT 4946-4948.)

Concord Police Officer Judy Elo helped search Saddlewood. and authenticated a box of questionnaires and business cards found in appellant's room. She described a Rolodex marked as that of J. Taylor Helzer, account executive, investments, for Dean Witter. The cards had client names, addresses, phone and account numbers. She described photographs found at Saddlewood, including one of a person covering his face, and of a dog, numerous bills and other evidence of debt. She described a receipt for Glenn Helzer's 1999 purchase $20.00 worth of red phosphorous powder, which is used in making methamphetamine. (22RT

4956-4968.) She read Exhibit 407, found in the trash in the garage:

> Maybe he hadn't thought of that. Like they saw something we overlooked. They're talking about an escape plan. Doing something to foil us. Create resistance, i.e., Ivan at the phone while with Sky. Expose that they were. Sky go with Ivan. I'm not going to jail. I'm going to put – I'm going to put a gun to my head and end it. Justin is too. If that's true, then why would I not kill you first. I feel betrayed. Kill you first who betrayed my trust. (22RT 4969-4970.)

Detective Elo attributed to appellant a note that read,"I want to manifest as the type of being that has the capacity that is without regard to mechanics to inspire transformation on a global level for divine celestial God-like consciousness" and to his former girlfriend a statement that read, "Well at this point in my life, all I want is to live life in the fullest ...". (22RT 4971-4972.) Elo found "magazines that sell certain sexual implements and sexually explicit material," cutouts from a magazine selling sexual play toys, an article "about divine advantage" addressing questions of manliness, "surgery aiding men who feel bigger is better," an ad for free "triple x videos," an ad for 1-900-cumcall, a photograph of appellant and former girlfriend Keri Mendoza in "her bunny outfit," a news article "about internet sales of fake ID's" and "ancient wisdom in the social mix, harmony and nature" all in the same filing cabinet. (22RT 4971 -4973.)

Elo also described Exhibit 413A-F as "a list of things to do and

things to offer" for "In To Me See", and said it was found in a box of papers with appellant's name. Elo said it had dollar figures including $33,000.00 and a projection of $144,000 income for "me" in "year two". (22RT 4975-4980.) Elo described Exhibit 413g as a writing about figures for manufacturing and selling Ecstasy with 40 people, and an $852,000.00 "bottom line." (22RT 4980.) Elo summarized an insurance document for appellant's car, and his military discharge papers, Exhibit 413H. Elo reported that appellant was an administrative specialist in the army for 10 weeks, earned a sharpshooter badge, and some service ribbons. Elo described a contract for garbage service at Saddlewood in the name of David and Sheri Bernhoff for the period of August 1 through November 1, 2000, appellant's "relationship coach" business card, and general information and a completed questionnaire for "In To Me See", all found in a file cabinet in appellant's room. (22RT 4981-4983.)

Elo affirmed that Exhibit 502 was found in the same place, and included papers related to "a dating and custom video, ten women, five women, with various amounts of time and dollar breakdowns 10,500, 26,400 and so forth" as well as the statement, "May have sex with any amount of women any amount of times, free alcohol, weed, guaranteed many more women than men, music dancing, pool, games, poker, strip

poker if they want. No extra tipping needed. They can tell a friend, but the fiend must request an invitation from one of the women and mentioned [sic] who referred him." (22RT 4984-4985.) The papers also bore the word "'school', and then "15 women and more dollar amounts." (22RT 4984-4985.) Elo affirmed that there was also a writing with "a little more explicit discussion about how to give oral sex, how to have anal sex, reaching the G-spot, stimulating breasts and things like that" under the heading "women who volunteer as porno actresses." Among the papers found in the same place was one with "the initial projections with swingers and nonswingers" with "a lot of handwritten editorial comments on the side . . .". (22RT 4985.)

Elo also conducted a "consent search" at the home of Debra McClanahan, whose contact information was found in the search of the day planner Detective Lellis found at Saddlewood under the first Marin search warrant. She found a safe that was left there by the defendants. Search warrants were obtained for the safe and a duffel bag. (22RT 4991-4992.) Inside the safe, police found identification and checks belonging to the Stinemans, a score sheet for "D" and "S" with a phone number, and a note that said "Sky and J live at 1900 Risdon road. Sky and J meet at two bird café at 5:00 am to go to Bolinas, but I sick, stayed home." (24RT 5284-

5301.) The safe also contained a loaded magazine for a nine millimeter semiautomatic weapon, a baggie with rocks of a white substance, a single edged razor blade, and a part of a pen open on both sides, suited for snorting powdery substances. There was also a porcelain heart containing a one dollar silver certificate, a two dollar bill, and a diamond wedding ring set belonging to Annette Stineman. (24RT 5302-5306.)

Additionally, the safe held a .22 caliber Smith and Wesson semi-automatic pistol, a black ringed binder, a white box with cotton padding that held several red, green and amber stones, a single page of paper with writing in a foreign language with dollar amounts, a box of nine millimeter ammunition, a gram scale, a container of psilocybin mushrooms, a prescription box for Ivan Stineman containing insulin and seven syringes, a pipe and bowl like that used for smoking controlled substances, a partially-used insulin container, bags of the type "frequently" used for controlled substances, a stun gun, a box with a nine millimeter Beretta semiautomatic pistol, a key found in safe, handcuffs, a single water type glove, handcuff keys, another glove, and more handcuffs tucked in a glove. (24RT 5310-5327.) The safe also held an answering machine tape or two, a razor blade, a camel cigarette pack with rolling papers, some partially smoked marijuana cigarettes, plastic bags with pictures of Playboy bunnies on them, some

little white pills, pipes, more drug paraphernalia and handcuff keys, and a box labeled Rohypnol with several greenish pills. There was also a box with green leafy residue, a bindle with two white pills, a cut straw, a torn copy of Selina Bishop's Social Security card and identification found in safe, a torn piece of white paper with the words Cal Fed and a number. (24RT 5327- 5333.) There were Morgan Stanley statements and a piece of paper with several paragraphs of text, apparently a script for Godman to use to explain the Stinemans' unavailability to the bank. There was a small piece of paper with a number on it that matched the account number on a check found in Bishop's apartment, notes, lists of names and addresses. corporate bylaws, and a check for $67,000 payable to Selina Bishop. There was a note written on the back of an envelope saying, "Is this an issue of `control'? Same problem we are dealing with. One day at a time." (24RT 5333-5338, 5343-5348.)

Police found the Stinemans' van in Oakland. It was unlocked. The windows were down and the ignition was turned to power the radio, which was on. There was a chainsaw box, a sawhorse, and wood chips in the back. Credit cards with the Stinemans' names were in the vehicle glove box, along with an Orchard Supply Hardware receipt. (23RT 5192-5193.) Police found Bishop's car in Petaluma. (18RT 4037.) Inside, on the

console, police found Mr. Stineman's wedding ring. (23RT 5213, 5217.)

The search of the Stinemans' home revealed a note from the top of the desk belonging to Ivan Stineman that included the name Taylor Helzer, and a Dean Witter business card for Taylor Helzer with a note that said "check with Taylor" regarding mutual funds. (16RT 3746-3747.)

IV. The Autopsy of the Distributed Remains

Gym bags containing the dismembered bodies of the Stinemans and Selina Bishop emerged in the Mokelumne River at an unspecified day and time. They were taken to the Medical Examiner for autopsy on August 8, 2000, the day following the defendants' arrest. (23RT 5134.) They were weighted with concrete stepping stones or rocks, and gradually brought to the surface by the gasses attending decomposition. (25RT 5477-5479, 5492, 5495, 5509-5511.) The bags and their contents were examined by Sacramento County coroner Gregory Reiber over a period of days beginning on August 8, 2000. (25RT 5468.)

The first bag examined on August 8 contained an upper torso identified as that of Annette Stineman under multiple layers of garbage bags. The torso was lacerated in front. All internal organs in the upper torso had been removed. The base of the neck was exposed by the

decapitation process. (25RT 5475-5477.)

The second bag contained a human head in a white trash bag and, under three or four layers of black plastic trash bags, a left and right leg and a right arm. The head had a ponytail in red beaded ties. The facial area of the head had extensive mutilation indicating "that there had been some attempt to remove and separately discard the upper and lower jaws." The parts in the second bag did not fit with the torso in the first. A third bag was examined that evening. It contained a small white plastic bag with a number of jaw segments with soft tissue attached, and a large bundle of black trash bags containing two legs and an arm. (25RT 5479-5482.)

On August 9, Dr. Reiber examined additional bags, including a bag containing Annette Stineman's head, a lower torso segment and a left arm identified as that of Ivan Stineman. (25RT 5486-5487.) There was bruising indicative of multiple antemortem blows to Mr. Stineman's abdominal area. (25RT 5518.) There were 26 post mortem stab wounds randomly placed on the lower torso, including the penis. (25RT 5488, 5520.) Dr Reiber saw little if any correlation between the wounds to the body parts and the holes on the gym bags In his opinion, the stab wounds were inflicted on the body parts before they were placed in bags, though the bags had been cut as well. (25RT 5489.)

On August 11, Dr. Reiber examined a bag containing an upper torso identified as that of Selina Bishop, and another bag containing her lower torso. (25RT 5490- 5493.) The upper torso had 34 stab wounds. A stab wound on the chest had been inflicted while she was alive. (25RT 5501-5503.) There was also antemortem blunt force injury to her left forearm and wrist. (25RT 5512.) Many other wounds were postmortem The upper torso showed a postmortem incision and removal of four to four and a half inches of skin near the upper left back. The tattoo of her name that she had worn there was missing. (25RT 5503-5504.) Her head showed massive trauma. Another bag contained Bishop's arms and legs. (25RT 5503-5504.)

Another bag contained the upper torso of Mr Stineman and a wad of fecal matter wrapped in paper. (25RT 5494-5495.) Mr Stineman's upper torso showed 11 postmortem stab wounds. (25RT 5517.) Yet another bag contained Mr. Stineman's head, Mrs. Stinemans lower torso, a heart, two lungs, the liver, fatty tissue containing a kidney, a length of intestine and several strips of skin and subcutaneous fat taken from other body segments. The heart was that of Annette Stineman, and had been stabbed after removal from the body. (25RT 5496-5498.) The lower torso had an intact kidney, ovaries, a uterus and a bladder. (25RT 5532.) It had one stab

wound in the hip area. (25RT 5533.)

An additional bag contained Mr. Stineman's head, and someone else's internal organs and strips of skin, wrapped in trash bags. (25RT 5497-5498.) The head showed bruises in the right front area and the left rear. There were a number of cuts associated with removal of the head from the torso. Also, "probably the most striking area of injury had to do with mid and lower face, where there was a great deal of damage during the process of the removal of the jaws." (25RT 5513.)

Dr. Reiber opined that the removed organs could not have simply fallen out of a cut torso, and had to have been purposefully disconnected from their surroundings. (25RT 5499- 5500.) He acknowledged that stabbing organs and large body parts are logical means of delaying the bloating of the remains that caused the bags to surface. (25RT 5509-5510.) He said that a reciprocating saw is a good tool for cutting bones, but not soft tissue. Marks on the bodies were consistent with use of such a saw to cut through bone, and knives of the sort found in the search of the defendants' home were used to cut soft tissue. (25RT 5514-5515, 5529-5531.)

The cause of death of each victim was said to be multiple traumatic injuries. (25RT 5525-5545.) Ivan Stineman had significant coronary

artery disease. An effort to suffocate him could have triggered a heart attack. (25RT 5525.) Annette Stineman's throat may have been cut prior to death. (25RT 5535.) A bruise over the outside of the eye socket indicated that the socket was fractured antemortem. Two or three stab wounds in her upper torso were antemortem. Cuts and stabs in the area of the right ear appeared and additional stab wounds on the torso appeared to be postmortem. (25RT 5527.) Her bodily fluids contained a small amount of methamphetamine consistent with having smoke blown in her face. (25RT 5534.) Selina Bishop's skull was fractured, and the brain tissue was bruised, so as to appear consistent with blunt force injury inflicted by multiple full-swing blows from a hammer. (25RT 5538-5540.) Her upper torso had five or six stab wounds that appeared to have been inflicted antemortem and capable of contributing to her death. (25RT 5541-5545.)

V. Prosecution Evidence of Appellant's Character & Background

A. Mormonism

1. Brent Halvorsen

Brent Halvorsen, an accountant and former bishop of a local "ward" (the Mormon equivalent of a parish) described the tenets of the faith. The Mormon Church's president, Gordon B. Hinckley, is considered a prophet

of God. He is assisted by 12 apostles, two counselors, and about 300 other general authorities who are said to have the "calling of the seventy." In addition to the president, there are another 14 modern-day prophets who are said to be holders of the keys to the Church. (19RT 4221-4224.)

The Mormon church came into existence in 1830 as a restoration of the Church of Jesus Christ that was established by Christ during his ministry in Palestine. Joseph Smith is the person first instructed by god to restore the church. He had a revelation and was later visited by Angel Moroni. (19RT 4226.) Angel Moroni was a resurrected being who had lived as a mortal man 400 years after the death of Christ. Angel Moroni showed Smith the vault containing the metal plates with writings from ancient times. Smith translated the writings by inspiration and spoke to a scribe what became the book of Mormon. Smith also produced the Doctrines and Covenants, a volume containing 138 of God's revelations to Smith addressing Church doctrine and administration. (19RT 4225-4229.)

The history relayed by Smith includes the story of a faithful man, Nephi, killing a man named Laban, when directed by an angel. Nephi was a son of Lehi, a prophet who lived 600 years before Christ. Lehi and Nephi traveled from the middle east after being warned that Jerusalem would be destroyed 4229. Before they reached their destination, God revealed to

Lehi that genealogy records left in Jerusalem were important to where God was leading him and his family, so Nephi and his brothers went back to Jerusalem to get them. They found that Laban had taken control of these records and of other property of Lehi. Nephi and his brothers told Laban to return their property, but he refused. They came back with an offer to pay Laban, and he refused that, saying they are not for sale. When Nephi saw someone laying in the street in a drunken stupor, an angel instructed him that this man was Laban and that Nephi should take his life to accomplish the errand the Lord had given them. (19RT 4229-4231.)

Nephi then used Laban's sword to kill Laban, donned Laban's clothes, went to the repository, and got the records, which were the metal plates that Moroni revealed to Joseph. Nephi took them across the pacific ocean. They were preserved by his progeny until revealed to Smith. In the interim, Christ visited the new world and formed a group of 12 apostles who functioned like the 12 Christ called to the ministry formed in Palestine. Three of them asked to live on until the second coming of Christ. (19RT 4232-4235.)

Mormons believe that the second coming of Christ will be preceded by darkness and conflict generated by Satan, a "real person that has power, that lived in the preexistence" and continues to exist. (19RT 4235-4236.)

Satan has many names, has a strong spirit and personality, and is very intelligent. Satan wanted to force everyone to remain perfect during mortal existence, and asked only that he rewarded with glory for making that happen. Christ wanted everyone to have free will, and offered to redeem with his life those who used their free agency to choose "righteousness, virtue, the spiritual way, the way going towards light and love." Christ and Satan thus began a war in heaven. Spirits that chose to follow Satan were cast out of heaven, and never received a physical body patterned after that of the heavenly father. Those spirits continue to exist "in a darkness mode." (25RT 4238.)

"Spirit" is "the real person that we are." It has personality and dimension, intelligence and the ability to make choices and communicate. It leaves the mortal body at death. There are also spirits that do not have bodies as a result of the war in heaven. People "tune into those disembodied spirits ... a little bit almost every day." People are more susceptible to receiving communication from disembodied spirits when not properly tuned into the spirt of God. People can communicate with the Holy Ghost, a personage of spirit, as well as the spirits who were cast out from heaven. (19RT 4250-4251.) Members who receive what they think are revelations are directed to pray in order to get confirmation. (19RT

4268.) The existence of free will is an essential principle of Mormonism and responsibility for one's choices is understood by the faithful. (19RT 4239.) The church encourages all members to receive revelations from God about their own jurisdiction, i.e., for oneself as an individual, for a parent the welfare of a family, for a bishop his local congregation, and on up. (19RT 4242.)

Joseph Smith preached that man can become godlike. "As God is, man may become." This was tied to the concept of mankind becoming perfect, given enough time. (19RT 4276.)

The church has estimated its membership at 12 million worldwide. (19RT 4241.)

2. Dawne Kirkland

Dawne Kirkland, a former roommate of Dawn Godman, was a devout Mormon and a Sunday School teacher when she testified at appellant's trial. She gave an account of the tenets of the faith that was consistent with that of Brent Halvorsen, but included a more personal account of the experience of direct revelation, and affirmed that there are at least 12 million people in the Mormon church, and they all believe that Joseph Smith was a prophet of God, and that the current church president, Gordon B. Hinckley, is also a prophet of God. (16RT 3701-3702.)

Kirkland heard God speak to her directly. "Sometimes my ears are on really good and I can hear, and other times I'm very distracted and I have to many things on my mind and I can't hear him talking to me. I think he's always talking, I just don't always tune in." (19RT 3702.) Lacking authority, Kirkland would not preach based on personal revelations. The Church teaches that a Northern California bishop would be mistaken if he believed that he received a revelation for members in Southern California. (19RT 3703-3704.)

When Mormons say "I feel the spirit" or "the spirit prompted me" they mean the spirit of God, the Holy Spirit that is one with God. The feeling Mormons get when they are receiving messages is talked about in the Scriptures as being like a burning in the breast, but Kirkland never had that feeling. She believed revelations from the spirit came to her in prayer in the form of an answer that did not connect to her current thoughts. Additional praying produced a good feeling that confirmed the revelation. (19RT 3708-3709.)

If a member of the church has personal feelings of disagreement with a prophecy that President Hinckley has revealed, the member is supposed to pray to the Lord about it. Usually, through prayer, Mormons are able to better understand the source of disagreement with church leaders, and clear

it up. If not, Mormons go to a bishop for counseling because it is not good to disagree with the prophet about what came from God. (19RT 3709-3710.)

B. Decadence After Apostasy

1. George Calhoun

George Calhoun was a stockbroker at Dean Witter in Concord when appellant was hired in 1992. Appellant impressed Calhoun as "a good clean Mormon kid; he was back from mission; vibrant and happy-go-lucky dynamic, young man clean-cut; short hair; he had lots of energy just a high-energy young kid." (15RT 3558.) Calhoun recalled appellant changing shortly after he was married and having his first child. The man who was previously a "good Mormon boy" was seen standing outside the door smoking, coming in late for work, and talking about going across and dancing the night before at the bar and dance club across from their office. (15RT 3562.) When Calhoun became assistant manager he started getting complaints from clients who would say, "'I left a message three days ago,' when somebody hasn't called back." Calhoun told appellant he was going to "screw up" a good life and a good job. Appellant's response was "something like, 'don't worry about it I can handle this; I'll be back; I am just taking a detour in life.'" Appellant continued to work at the firm for

about a year after Calhoun told him he was "screwing up." (15RT 3563-3564.)

Appellant and Calhoun talked a lot about economics and politics "because it's important to know what's going on in the world" in order to do their job. (15RT 3565.) Calhoun tried to steer appellant away from what he considered "New Age" philosophy when appellant was talking about that. Appellant was "going with some group up in Sacramento. . . . new age bullshit." Calhoun said something to the effect that "going out and not showing up for work and doing things like that were not going to impact positively for his career." Appellant said he could handle it; he would be okay, and be able to come back and function as a financial advisor and a father when he was ready and through having his fun. (15RT 3566-3567.)

2. Robin Dawn Stewart (nee Siler).

Robin Stewart met appellant in November of 1996 through a friend of hers, David Hovey. She invited both men to her sister's birthday party. She and appellant dated for a couple of weeks after that. They had a "close personal relationship" during those weeks which was followed by a friendship for a couple of years. (19RT 4283.) Appellant was "coming

out" of a marriage and using drugs. He had recently left the church and "was determined to experiment with new things that he felt had been taboo through his indoctrination in the church." (19RT 4284.) "[W]e had a lot of discussions about right and wrong, and he determined there was no such thing as right and wrong, and it was all – life was completely experience and growth, and you could grow as much from pain and other experiences as you could from anything else." Unlike appellant, Stewart felt that she had a firm grasp of what was right and wrong, and was opposed to experimenting with drugs. (19RT 4284-4285.)

Appellant was experimenting sexually because "he had been very – very true to the church's philosophy, not having experienced a lot before – or anything before his marriage, and then feeling very constrained within his marriage, so he definitely wanted to experiment sexually." His relationship with his wife "wasn't completely over." He expressed interest in pornography. He wanted to experience as much from life as possible, and a key to that was eliminating fear, not being afraid of pain and to embrace all life experiences. (19RT 4285-4286.)

Appellant told Stewart that he was breaking away from the Mormon church. They talked about spiritual and philosophical matters and God. Appellant believed that "all human beings had a potential to become gods if

they were open enough to learn enough, to grow enough, and that he himself was close to becoming a god." (19RT 4286-4287.) He said "that we were spiritual beings before we decided to enter the physical realm, and that we knew when we were pure spirit what was in store for us, all the trials and tribulations that we would face, and that we agreed to that life, and then we came into this life without – without the memory of it, but beforehand we had prior knowledge." (19RT 4288.) Appellant "was very enthusiastic, very energetic, very charismatic, very positive all the time.... The thing that was so attractive about [appellant] was he was very positive and very achievement-oriented, "like an anything's-possible, life-is-wonderful, you- are -wonderful, I- am-wonderful-kind of person." (19RT 4289.) He was still working at Dean Witter, and was very proud that he became a stockbroker without a college education. He seemed convinced that whatever he wanted to achieve he could achieve it. (19RT 4289-4290.)

The only instance of manipulative behavior that Stewart recalled had to do with appellant's roommates. "He was living with two roommates at the time that I knew him, and one of them was his cousin. And he had lied to his cousin about how much the rent was so that he would pay more than his fair share." His cousin found out and confronted him. Appellant "thought it was very funny, seeing what he could get away with." Stewart

didn't "think any of his behavior ever mortified him. He was very conscious about his actions. He was laughing, almost bragging about it." (19RT 4291.)

The last time she saw appellant was in 1998. They went river rafting with appellant's girlfriend, Keri. At the end he told Stewart that he had been up all night partying and that their lives had been in danger with him as their guide. It was selfish and upsetting to Stewart. (19RT 4292-4295.) She saw him once more in 1998. He and Keri came to Stewart's home and asked to use Stewart's computer to search the internet. They did not say what it was about, but Stewart was asked to spell "ecstasy" for them. Stewart never saw what she considered signs of appellant having any mental disability or disease. (19RT 4295.) However, appellant once said was able to make flies leave him alone by telling them to. This was in the context of discussing his spiritual growth, which he said was more advanced than other people's toward a godlike state. (19RT 4297.)

3. Tyler Berglund

In 1997, Tyler Berglund lived in the apartment complex in Concord where appellant lived with his brother Justin. Appellant and Berglund became friends while appellant was working at Dean Witter. (19RT 4301.) Appellant talked about selling marijuana, and presented written rules for

selling marijuana on a large sheet of paper while they were eating at a restaurant with Berglund's roommate. (19RT 4304.) Appellant also talked about pretending to be crazy as a way to get his bills paid. He may have said that he was "going to take from them what they've been taking from me, and I am not going to feel bad about it." (19RT 4311-4312.)

4. Keri Mendoza (nee Furman)

In 1998, Keri Mendoza was working as a cocktail waitress at the Peppermill in Concord when she met appellant as a customer. He left her a tip with a credit card and his business card with a note saying she was to buy herself something nice. She called him and said no thanks, if you want to buy me something you buy it. He came to her work to get the credit card within a week. They talked. They began a relationship in which he came in and talked to her after work. They were friends. (20RT 4335-4338.)

Later, she began living with appellant and Justin Helzer on Victory Lane in Concord. She found appellant "very professional." (20RT 4339.) He was up early and went to work every day as a stockbroker. As soon as she turned 21, they attended goth clubs where people wore dark clothes and white makeup. Justin went with them a few times. (20RT 4355-4356.)

Appellant talked a lot about a program called Impact and how it served him in his life and how he based his day to day decisions on it. She

was very intrigued. She had very low self esteem and didn't know how a person could be as positive as appellant was. Appellant was "full of life and love." She had had a difficult life. She loved him. She attended "Harmony with Impact Training." (20RT 4340-4341.) "I – it just opened me up. I was very closed down, and it just – allowed me to, you know, work through my issues and become a better person. So I loved it." (20RT 4342.) She went through the program within the first couple of months of living with appellant. (20RT 4345.)

The ideology of Harmony denied the existence of right and wrong. Appellant was discussing those ideas from the time she first met him. At first, he was seeing how she could handle it; he became a little more intense five to six months after she moved in with him. (20RT 4342-4343.)

Before moving in with appellant, she did not use any recreational drugs. Appellant, who was still working as a broker, introduced her to Ecstasy about a month after she moved in. She liked the way it altered her mind. (20RT 4344.)

While working at Dean Witter, appellant talked to her about having a "breakdown" in order to pursue disability benefits. (20RT 4346-4347.) Two to three months after she moved in with appellant, he stopped working. (20RT 4344-4345.) He refrained from showering or shaving and practiced

his demeanor for the purpose of convincing the doctor of his disability. (20RT 4347.) Mendoza never thought there was anything wrong with him mentally. (20RT 4419.)

Appellant talked about a plan he called "Impact America, Transform America, hands over America, or something like that." (20RT 4345.) He also spoke of distributing drugs, including Ecstasy and methamphetamine, and about making money "for" an escort service. (20RT 4349.)

Before appellant left Dean Witter, Mendoza and appellant rented a home together on Oak Grove in Walnut Creek. Soon, everything changed. (20RT 4356.) It was a four bedroom house which she initially shared with just appellant and Justin. Then Olivia Embrey and Brandon Davids moved in. (20RT 4357-4348.) At Oak Grove, after appellant stopped working, he talked about scripture and ideas about religion, but she didn't understand it, it didn't make sense to her. (20RT 4412.) At some point she and appellant went to Tijuana to buy Rohypnol, which she understood to be a "date rape" drug. She made the purchase, but did not know why he wanted it. (20RT 4393.) She started working as a dancer at the Gold Club in San Francisco, where dancing involved removing most of her clothing. (20RT 4350, 4357.) Appellant asked her to try to influence other dancers to come and meet with appellant because he had an idea about starting some sort of

business where he would have "high class" men pay a certain amount of money to attend a party where they could have their choice of any woman in the room. The women would get paid a certain amount of money to be available to them. Ecstasy would be available to help them break down barriers, including sexual barriers. (20RT 4358-4359.) Men would pay a lump sum to be invited to be parties because of the beautiful women who would be paid to attend. She never saw any development of the idea; it appeared to be just talk. (20RT 4360-4361.) She thought the idea came from the movie *Eyes Wide Shut.* Appellant called this plan the Feline Club. (20RT 4362-4363.) She declined to help him recruit women to join. (20RT 4369.) She did not hear the plan referred to as "vibe alive" or help him develop the questionnaire or financial projections found in the search of his home. (20RT 4365-4368, 4374-4378.) But she did hear that he hoped to recruit women from Brazil, where he had served his mission for his church. (20RT 4392.)

Appellant offered counseling services to couples under the business name "Intimacy = Into Me See." Mendoza helped appellant design and obtain business cards for that project. As she understood the project, appellant would help couples in trouble by sharing how he viewed himself and relationships. (20RT 4363, 4384.) He counseled his mother and her

boyfriend on two occasions. (20RT 4364.) Mendoza did not know why appellant chose the name Jordan Andrew Taylor rather than his own name for the business card she helped him design. (20RT 4385-4386.)

Mendoza recalled "Impact America" as an idea appellant had for hiring facilitators to bring the Impact Harmony program they attended to people in other regions, free of charge. Appellant said he wanted at least two core people he could trust to help him with that plan. (20RT 4365.) The classes cost about $400.00 each; she inferred that he needed millions for his plan. (20RT 4391-4392.)

Mendoza lent appellant $1000.00 to purchase Ecstasy and helped appellant sell tabs of the drug at clubs and raves. He sold it for $20 a tab and might sell 50 tabs any given evening. Appellant grew his hair out and wore dance club attire, i.e., black leather pants and flashy shirts. (20RT 4353, 4390-4391.) He was not successful selling Ecstasy. (20RT 4414.) He had credit card debt, and she had car debt, and she supported him with her income. (20RT 4413.)

At one point appellant found someone who knew how to make methamphetamine, and did so in the garage at their home. Mendoza was against it. (20RT 4356.) She and appellant moved together to a home in Martinez, but grew distant. He wasn't loving when she was loving with him

and she "didn't get" what he was trying to say. (20RT 4421.) He was hanging out with people from his church. (20RT 4421.) "[H]e had his own agenda. And he was on his own. He had something going on, and it wasn't with me." (20RT 4421.) She was planning on posing for Playboy magazine. Appellant had encouraged her and took some pictures of her, but wanted nothing to do with Playboy when her opportunity emerged. (20RT 4387-4390.)

Mendoza left appellant to live with her father once Playboy accepted her, but first paid the rent on the home she and appellant shared because appellant had no money and "didn't have nowhere else to go." (20RT 4413-4314.) He called her frequently afterwards. They often argued when they spoke. On one occasion when she called him he said she should not call unless she was dying or seriously hurt. (20RT 4397-4398.)

5. Sarah Brents

Sarah Brents dated Brandon Davids when he lived with appellant, Justin and Mendoza and Olivia Embrey on Oak Grove in Walnut Creek. At one point, while appellant and Justin and Keri Mendoza were dressed in black capes, they invited her to go somewhere with them. Mendoza was dressed sexually provocatively. Appellant talked about "his big plans."

Brents asked him if he worked. Appellant said that Mendoza was going to be his meal ticket, and slapped her on her butt as she walked by. (19RT 4159-4160.)

6. Lina Richardson

Lina Richardson met appellant in the summer of 1998, when he was beginning "first level of Harmony training" with Keri Mendoza. Richardson was 18, and had broken with her family. Appellant called her, flirted with her; he was overwhelming and very intense. He invited her to go dancing with him and Furman, but when he showed up to take her dancing, he was alone. Other times he showed up at her apartment and left his card in the door when she wasn't there. Once he said he had been calling her every twenty minutes. (19RT 4171.)

On the occasion when he showed up alone to go dancing with her, he spent the night with her, but did not sleep. They stayed out all night talking about the breakthroughs he was having by spending time with her and his experiences of love and other feelings about her. He started to go through his emotional walls surrounding love, a practice she called "processing". . (19RT 4172- 4173.) He talked a lot about love. "It was extremely overwhelming. It was so overwhelming there wasn't really an opportunity for me to take up any space. . . . I got really small. I go really quiet because

he took up so much space that I mostly observed him because there wasn't a whole lot of room for anything else." (19RT 4174.) His talk was mostly flattery. He said he loved Richardson and did not love Keri, who knew he did not love her but wanted to be with him anyway. He did not disclose that he also had a wife. (19RT 4174.)

There was a three month period in which she did not see him. (19RT 4171-4176.) It followed an occasion when they stopped to eat on the way to go dancing because he was always hungry. After they ate they sat on a curb. He told her he had big plans. He wanted to spread peace and love, and make the ideas he learned in his Harmony training available to the entire world. He told her he was a stockbroker but was not working anymore because he was taking time off to work on bigger plans. He said he was on disability and had himself declared legally insane so that he could collect money from the state while he took time off. (19RT 4176- 4177.) He said he thought Ecstacy was a wonderful drug and he wanted to manufacture it. He was very excited. At some point he was excited about using "the system to put this plan together, the very system that he later was going to tear down and destroy or get rid of." He had an elaborate plan that involved distributing drugs from a central terminal through a network of distributors and different phone lines. He would be at the center of it. It didn't make

sense to her. (19RT 4178-4180.)

She later realized she did not feel good around him, that she was flattered but scared. She told appellant that his energy was dark and she couldn't be around him anymore, and she felt sick around it. By "dark" she meant overwhelming, constricting, bad, maybe malicious. (19RT 4180-4182.) He was upset and started crying but said he understood. He listened and was receptive, though he cried. She did not see him for the next three months, and then saw him at Harmony with people she liked. He was happy to see her, and she was lonely and sad. He was fun to be with. (19RT 4183.)

It was late fall of 1998. They became romantically involved, got very close and talked about marriage. He wanted her to go with him to North Dakota to pick up drugs, but his plans fell through. His back up plan for money-making was to start the feline club, an escort service, with Keri in charge. He got a phone number for it under the alias Jonathan Thompson. They did not talk about the escort service much and she never saw a business card for it. (19RT 4184-4186.) He talked about the inner circle, the core people around him who would not be known by others on the fringes of his organization. He said he wanted her to be in the center of it with him. He said he had talked to Carma, his mother, and said Carma was thinking about it. The inner circle would include Justin and Keri (Furman Mendoza) too.

(19RT 4188-4189.)

Richardson did not take drugs. Appellant did not do so around her, but she believed he was using Ecstacy. He appeared "[o]verwhelming, intense but not irrational." His thought processes and reason were "very clear" though "some of it didn't make sense to me but the thought processes were clear." (19RT 4188- 4189.) He said that he had learned how to hide money as a stockbroker, and that killing people was okay for the greater good. He needed trust and loyalty from his inner circle. (19RT 4190.) Keri was loyal, he said, "if he killed somebody at brought the body home" Keri would "cut them up and hide them for him without asking a single question. Richardson thought he was "crazy" when he said that. (19RT 4191-4192.)

They stopped seeing each other in February or April 1999. Before they did so, appellant joked about faking psychiatric illness, and seemed to feel clever about it. He said he, went to scheduled appointments with psychiatrists, and talked about the medication they wanted him to take and undergo a 24 to 48 hour observation. He said he had to take some of the medications to have some in his system when they tested him. The medications made him sick to his stomach. He said he would go in for observation if he had to. He said he would sit in a corner and rock back and

forth and call out her name and Keri's name "every so often." (19RT 4192-4193.)

Appellant liked sorcery and the movie "Merlin." He wanted her to see it. He talked about black magic. He talked about his daughter, who he said was his little soldier. He said that he would train her. (19RT 4194-4195.)

Richardson added that there was a lot more to appellant than what she has said in response to the prosecutor's questions. "There were extraordinary qualities about this man.... this is just one example. I remember being at a tire shop with him and Justin. . . . There were a number of people in the room. By the time we left, every single person in that room was smiling. Every single person. ¶ I have not met anyone in my whole life walk into a room and impact every single person in that room in a positive way. He impacted me. I felt special, beautiful, seen, loved. He saw something in me that I had trouble seeing in myself. ¶ And I saw that in other people's eyes, people who didn't know him. And it made it extraordinary to be around him. I've often thought of Taylor as a pendulum. And pendulum swings back and forth. And most people stay pretty much to the center. If one way is really dark and really evil and the other way is everything beautiful and light, I've never met anyone who swings in both

directions as deeply as this man does. ¶ I will always remember this person. This is somebody who had a huge impact in my life, although he scared me. It was double all the time. I chose to be around him and there were parts of him that scared me. Also parts of him that were extraordinary. And I don't know how to explain that." (19RT 4197-4199.) Asked if she saw goodness in him, she said, "Absolutely, extraordinary goodness, goodness." (19RT 4199.)

Richardson did not believe appellant was a prophet of God, but that he "came here with an opportunity to touch people's lives and make a huge impact on this world." She believed that people saw who called him a prophet were seeing the same thing she saw. He had an "extraordinary ability to bring out amazing qualities in people." (19RT 4200.)

7. Dawn Godman

In October or November of 1998, Dawn Godman met appellant and his brother Justin at a murder mystery dinner for single Mormons at a local ward. The brothers and a third man were dressed in black and seated at a table. No one else was talking to them. Godman and her young son sat next to appellant. He made her feel welcome. He played with Godman's son when he was being rambunctious. Another recent convert to the church,

Kelly Lord, joined them at the table. The conversation went on "through the entire night." (20RT 4438-4441.)

Godman and Lord saw appellant again when he came to Mormon Church services at their ward. (20RT 4441.) Appellant attended Sunday services, three times over a two-month period. His "presence was always recognizable .... you could just sense him in a room." (20RT 4442.) On one occasion, he gave "testimony," presentation to the congregation about an experience confirming Mormon faith. He said, "the week before he had been on his way to his parents' house for dinner, and he got a telephone call, and they canceled dinner, and he just felt like he shouldn't go home yet. So, he stopped at the Pacheco casino because he felt like the spirit was leading him to do something, and he wasn't really sure what it was, so he stopped there for a little while. He then drove in a different direction and encountered a woman with two kids and a broken-down vehicle. He gave them a ride to a phone. He said he felt like he was led to be in that place at that moment in order to help those people. There were raised eyebrows when he said he went to a casino. Godman was struck that he went out of his way to pay attention to what he felt the spirit was leading him to do and to actually take action to accomplish that, i.e. to help the woman. (20RT 4442-4444 .)

On another occasion, Godman saw appellant in the back row of the church with a woman she later learned was appellant's girlfriend, Keri. They were surreptitiously holding hands during the service. (20RT 4445.)

Godman's first social contact with appellant began in the Spring of 1998 when he asked her to go with him to the city one night. He didn't say why. He picked her up at her house in a van with other people. She thought it would be a date and was excited about that. When he arrived he said what they were doing was a surprise. He took her to an introductory section of the self-help program that Godman called Harmony. A long time later, after she completed a series of Harmony classes, she saw appellant again socially. In the interim, she saw appellant's brother Justin socially and felt closer to him than to appellant. (20RT 4446- 4448.)

When Godman next saw appellant socially there were many people "hanging out" in his home. It was New Year's Eve and people were getting ready to go out for the night. (20RT 4448-4449.) When she and appellant were able to speak, he said he believed that everything in your life could be "filtered through what he called the principles of magic. There were initially 12 principles." (20RT 4452.) One of his ideas was "that the Spirit always knows everything that's going on around you and with you and can guide you to be an instrument to get things done." She believed he meant

the spirit of God. (20RT 4452.) She understood the 12 Principles of Magic to be a "way of living your life so that you're more in alignment with God and everything he would have you do." (20RT 4453-4454.)

Godman learned that appellant had a plan called Transform America in December 1999 or January 2000. It was a plan to create an organization committed to bringing about harmony in the world by offering access to Harmony training, the self improvement program Godman had attended at appellant's instigation. The plan required a core group of three members, one in addition to appellant and Justin. Godman became a member in February or March, when appellant moved into her apartment, where he stayed for about a month. (20RT 4458-4461.)

The Children of Thunder plan was an idea to "get enough money, um, to invest it to get more money in order to start Transform America." As a middle step between Children of Thunder and Transform America , appellant had a "Dean Witter" plan whereby Godman would have underage girls, 15 to 16 years old, open Dean Witter accounts with Godman as their asserted parent. Someone would then put a young stockbroker in a situation where he would have sex with the girls. Someone would then blackmail Dean Witter. (20RT 4462.) Appellant said he would train the Dean Witter girls in how to please men sexually, and considered putting

them through Harmony. (22RT 4769.)

"Brazil" was the name of an idea that appellant had to open an orphanage in that country, where appellant had served his mission for the Mormon church. Godman and appellant would fake their deaths, stay in Brazil, and build the orphanage with money from Transform America. The orphans would be trained to be killers and be brought to Salt Lake City, kidnap the church hierarchy, and bring them back to appellant in Brazil if they were not killed during the kidnaping. Once in Brazil, the victims would write letters to their families and the church saying that appellant was revealed to be the new prophet. (21RT 4738.)

Godman believed the Brazil plan would bring about Christ's millennial reign on the earth. (22RT 4627-4628.) Godman also believed that appellant was a prophet of God. (20RT 4457.) This belief persisted despite hearing that appellant thought he could manipulate the stock of McDonald's by having random shootings at their sites across the country. Appellant said he would hire people for the shootings. (21RT 4627-4628.)

All three defendants prayed aloud, in a circle. They prayed for revelation about the overall feasibility of the Children of Thunder plan. They specifically prayed for the spirit to let them know, or stop them, if the plan should not be executed. They felt no response. (22RT 4742-4743.)

Sometimes appellant read scripture to them. Godman recalled him reading the story of Nephi, saying, "And I was led by the Spirit not knowing beforehand the things that I should do. Nevertheless I went forth..." (22RT 4740-4742.) Godman recalled hearing from appellant the bible story about God's disappointment with Saul's failure to smite and destroy enemies at God's direction, and appellant telling them they had to do what God said. (22RT 4744-4745.) Appellant discussed Joseph Smith's ideas, including, "That which is wrong under one circumstance may be right under another .... Whatever God requires is right, no matter what it is ... " (22RT 4746-4747.)

Appellant would talk, "sometimes for hours," trying to convince people that his ideas were correct. (22RT 4747.) He would "sometimes" stay up all night talking and talking. It was tough to get a word in and if you disagreed he would just talk over you. (22RT 4748.) He could not remember much, and would forget what he said five minutes later. He always remembered his major ideas but not details. (22RT 4750.) Godman said that she functioned like appellant's "executive secretary." (22RT 4638.)

Godman testified at length about the items seized in the search of the Saddlewood home, including cell phones, pagers, an outgoing message tape from the answering machine for Jordan Taylor at In To Me See, a photo of

herself and Justin dressed to go dancing at a goth club, and a half-empty box of business cards for Jordan Taylor and In To Me See. She said that she had passed out some of those business cards at a rave in February of 2000. (21RT 4631-4642.)

Godman authenticated writing in a notebook found in the home as that of appellant, which was then read to the jury. Appellant had written that "'agency is not a gift from God, but a law of the universe', or something like that." (21RT 4643.) Appellant had written a number of pages about covens, which Godman defined as group of witches that get together to practice their religion. Appellant told Godman he wanted to start a coven, but he did not say why. Godman supported the idea because she supported the principles of wicca. (21RT 4648-4649.)

Godman and appellant had extensive conversations about how the 12 Principles of Magic he had written down served to align one's life with God. She accepted that they were something helpful. (20RT 4454.) Reading from appellant's notebook, Godman reiterated each of the 12 Principles of Magic for the jury, and their meaning. (21RT 4649-4550.) The First, "I am already perfect and therefore can do no wrong" means "that as individuals we are perfect the way we are." (21RT 4650.) It seemed consistent with what she learned from the Book of Mormon. (20RT 4454.)

The second Principle, "There's no such thing as right and wrong," means that "right or wrong is a judgment that we as human beings put on anything — anything that happens, whether you drink a Pepsi is innately – it just – it is. And whether or not you decide it's right or wrong, such as drinking caffeine, is a judgment that as an individual you put on any given thing. ... Each individual's judgment is their own, it does not necessarily apply to anybody else." (21RT 4651.) This principle was not consistent with Mormonism. (20RT 4455.)

The third Principle, "I am all powerful, and therefore the creator of [and] accountable for everything that occurs in my life," means that everything that happens in your life you have created, whether consciously or not." (21RT 4651-4652.) She believed that to be true in the summer of 2000, in that she was all powerful within her own universe, not that she was as powerful as God, whose purposes would be furthered by Children of Thunder. It made sense when appellant said it. (21RT 4652-4653.) It was consistent with Mormonism's emphasis on accountability. (20RT 4455-4456.)

The fourth Principle, "Life is always right. I embrace all of my results," meant, "that in order to learn from life, you have to accept what life has given you." (21RT 4653.) Godman did not know how life could be

"right" if there is no such thing as right and wrong, but appellant seemed to know. The fifth Principle, "All of my results I have created to learn from at some level," meant that whatever life has brought you is a learning lesson, whether you're consciously aware of it or not." (21RT 4654.)

As to the sixth Principle, "I believe nothing. I simply perceive without fear," appellant said that it was a way to "learn a lot more from life." (21RT 4654.) Godman agreed with the prosecutor that belief in God had to be abandoned to comply with this principle, yet she believed in God, and she believed that appellant did so too, in the summer of 2000. (21RT 4656.) Godman also agreed that the seventh Principle, "It is of no concern to me how accurate or inaccurate my perceptions are, and therefore I am always right," was inconsistent with belief that there was no right and wrong. (21RT 4656.) Appellant did not explain how to reconcile that principle with the idea that there is no right and wrong. She did not ask appellant about the inconsistency because, "if you wanted to be around Taylor you accepted his principles." (21RT 4657-4658.) Godman said appellant believed that they could bend spoons with their minds if they could lose all of their beliefs, like he saw in the movie *The Matrix.* (21RT 4647.)

The eighth Principle, "Unconditional fearless love, most powerful force in the universe," meant that a childlike love was the most powerful

force because fearless love is "also courageous." Children of Thunder was a plan for the preservation and promotion of love. The ninth principle, "Spirit knows," meant that "our spirit and the spirit of God always knows everything that's going on." This principle did not refer to the disembodied spirits that Mormons believe were cast out of heaven with Satan. The defendants guarded against communicating with Satan's spirits by "asking to be protected by the beings of light and angels that surround us at all times." The Spirit referred to in the ninth principle was God himself. (21 RT 4659-4661.)

The tenth Principle, "I gain control by losing all control" meant that "life gives you what you want" after you release control. The desired result will come about if one believes it will, does what must be done, and is able to "let it go." (21RT 4661-4662.)

The eleventh Principle was rendered by Godman as, "Life is such a precious gift. When I give back to life, immediately life gives more back to me, and therefore I am for every [sic] indebted. What goes around comes around." (21RT 4662.) Godman agreed that the lives of the Stinemans and Selia Bishop were precious, but explained that those three lives had to be compared with those of the "billions that would be killed during the Apocalypse." (21RT 4663.)

While deciding what to do, the defendants continually prayed for God to lead the victims to them. Appellant suggested, and together "we felt that Ivan and Annette and Selina were willingly sacrificing their lives, whether they were aware of it or not." (21RT 4664.) Godman felt that only Satan was evil, because he was the opposite of God, which represented good. She never thought what they were doing was evil. They were following God's will. She got that through prayer and the feeling of the holy spirit within her. (21RT 4664-4665.)

The twelfth Principle – "There is a higher power than mine, and that is my Savior, Jesus Christ, the son of my father" – meant that Christ was more powerful than any individual. Describing Christ as "the son of my father" meant only that God is father to everyone, and was consistent with the Mormon church's view. She and appellant talked about themselves as brothers and sisters of Christ. Appellant did not say he was closer to God than other people were, but Godman believed he was. (21RT 4666-4668.)

Godman authenticated appellant's writing of the Principals on the back side of a psychedelic poster. (22RT 4869.) She did the same for a piece of paper on which appellant had written, "Reality is mine. Actuality is I use what is mine to shift what is." (21RT 4645.) Also, "The mechanics are in place to give me everything I want right now." (21RT 4646.) And,

"Somehow in some way the most appropriate ... counsel given to me is always exactly what I am vocalizing to other aspects, the matrix shifts to create a circumstance in which the opportunity for the growth or the hypocrisy is given." (21RT 4647.) On another piece of paper, "There is no such thing as imagination. If I think it, it is at some level in reality, and I bring it into being in this third dimension by choosing how I think I what [sic] believe." (21RT 4645.)

Godman authenticated a box of questionnaires found in the Saddlewood home as those she printed for Vibe Alive Girls, i.e., women interested in going to raves sponsored by appellant as In To Me See. (21RT 4644.) She attributed the writing on paper taken from the Saddlewood home that "talks about points" to a combination of appellant's ideas, her computations, and their shared projections, for the venture. (21RT 4686.) She explained that Vibe Alive Girls would party and dance like people did at any other rave. Some would be "non-swingers" who chose not to have sex with men. Swingers – women who agreed to have sex with the men – would be given more points and paid more than non-swingers under the point system. They would also get greater benefits like electrolysis or breast enlargement. Godman did not think she was talking to appellant about prostitution when they discussed these plans, but agreed with the prosecutor

that sex for money was prostitution. (21RT 4696-4700.)

Appellant was the one who suggested that she should look eccentric when she went into the bank to deposit the Stinemans' checks into Bishop's account. He said a wheelchair would help her look eccentric, and that "eccentric people weren't remembered." (21RT 4680.) She chose three outfits at thrift stores, and appellant chose the one she wore, a lime green pantsuit with a cowboy hat. (21RT 4680-4681.) She did not feel inconspicuous in that outfit, and noticed people looking at her in the banks. (21RT 4732.)

Godman authenticated and described for the jury several photographs of the defendants found in the search of their home, including a picture of appellant "covering his face; that's fairly typical of him" and a group playing Canasta. There were also ten pictures of Jake, the dog who was present at Saddlewood when the house was seized. Godman did not know why the pictures were taken. (21RT 4671.)

Godman said that the list of questions for the Stinemans and the scripts for her use that were found in the home were prepared jointly with appellant, as was a paper naming directors and officers for a nonprofit they contemplated. The list included appellant's wife, Ann Helzer, his mother, Teonae nee Carma Helzer, her friend, Jeannette Carter, Justin, Godman and

their friend, Debra McClanahan. (21RT 4688-4689.)

Godman authenticated Justin's writing on Exhibit 407, the last line of which said "`I'm not going to jail, rather put a' – its crossed out. Then it says, `I'm going to put a gun to head and end it. Justin is too." Below that it says. "If that's true, then why would I not kill you first" and `Who betrayed me first' is crossed out." All the handwriting appears the same. (21RT 4689-4690.) Godman did not know why Justin would have written something that referred to himself that way.

Godman and appellant talked about betrayal. Appellant felt that people would betray him all the time and he said he would take care of (kill or hurt) those who betrayed him when he was able. (21RT 4631.) He mentioned Keri, Brandon and Olivia. He said he could not hurt Keri because he loved her, but would make sure she never betrayed him by making sure she was well cared for and had lots of money. He would "make her the person that they used as a model for his record publishing idea, to put on the labels of the CD's. (21RT 4692.) She would be paid for being the model. The record company was to be funded by Transform America. Both the record company and Transform America would be profit-making enterprises for appellant. (21RT 4694.)

Godman authenticated a business card found in the Saddlewood home

as one appellant presented to her when he took her to San Francisco for Harmony training; the name on the card is Glenn Taylor. It says he is a relationship coach. Godman believed he was making money as such. (21RT 4694-4696.)

Godman was not aware of any plan to make pornographic films, or to teach men how to please women sexually. (21RT 4696.) She knew only that appellant had pornographic pictures for personal enjoyment. (21RT 4701.) She did not recognize articles on "designer vaginas" or the "dating custom video" found in appellant's papers seized from their home. They never discussed anal sex or the G-spot. (21RT 4697, 4700-4701.)

Appellant suggested that Godman read a book called *The Four Agreements* because many of the principles that he professed and believed were in the book. She read it while waiting near the Stinemans home and while waiting along the shores of the delta. She finished it after her arrest. (21RT 4702-4704.)

Godman disclosed, on cross examination, that she and appellant were smoking methamphetamine every day for some period of time. She used it every day, while appellant used it "maybe every other day or so." (21RT 4712-4713.) Godman also reported that appellant's Principles of Magic were not principles of Black Magic, wicca or Satanism. Appellant said the

principles had been revealed to him by God through "Spirit." He later added four more principles and discussed them with her. (21RT 4724.)

Appellant's belief that humans will become Gods, or become like God, is supported by Mormon scripture, and was something appellant espoused. (21RT 4725-4726.) His belief that what happens to people is the result of their own actions and can't be blamed on anyone else, and the idea that there was no right and wrong, were espoused in Harmony training, and by appellant after he took her to the introductory session. Appellant presented these ideas to her as his Principles of Magic before she heard them in Harmony training. (21RT 4727-4728.)

Godman's first session of Harmony training was called Quest and led by "Deon," who yelled at people, confronted them, and got in their faces, to begin the work of identifying and breaking down the walls in their lives. (21RT 4726.) In the second phase of training, called Summit, participants were told they were on a sinking ship, only three people could fit on the lifeboat, and they had to find a unanimous and equal way to choose three. Her group "didn't manage to come up with the answer that they wanted" so they were told they would be voting. The people drowning cried out to the people in the boat for help. The people in the boat did nothing. (21RT 4728-4729.)

8. Kelly Lord

Kelly Lord called appellant after their initial meeting at the murder mystery dinner for Mormon singles at which she and Godman met appellant for the first time (16RT 3612-13.) He took her to a presentation on self-help program (which she called "Impact") after seeing her at the temple and telling her she looked like she was "carrying the weight of the world" on her shoulders. (16RT 3617.) She had mixed feelings about the program, which involved talking about the abuse people have experienced and other things that people do not ordinarily talk about. The program taught participants that there was no right and wrong. She went to several more Impact training sessions and found it helped her a lot. (16RT 3616-3618, 3629.)

Once, when appellant, Lord, and Godman were in a car together, appellant said that Godman and Lord should not talk about him or the things he said to one of them when talking to each other. (16RT 3636.) Lord's friendship with appellant ended after he said other things she thought bizarre. (16RT 3632.) On one occasion when she and appellant were having lunch at a fast food restaurant, he asked her if she was open to the idea of robbing the restaurant. On another occasion, he asked her about carjacking, and whether she would come and get him if he were arrested.

He told her he had himself declared legally insane to get money from the government. (16RT 3631-3633.) He asked her if she would come and get him if she woke up one morning and his picture was on the front page of a newspaper saying he had done something criminal and was locked up. She said absolutely, she would come get him, without a doubt. She believed he was just testing her. (16RT 3633.) He told her that one of the reasons he had himself declared legally insane was so he would go to an institution and people could break him out if the newspapers said he did something wrong. He said she would be one of the people who would break him out, with help from others. Appellant also said that he believed that he had power over the energy of people in cars. He said he could make the people driving cars turn their heads "energetically." He "was pretty big on power over other people." (16RT 3635.)

Lord wasn't allowed to go to the house where appellant lived, which she assumed was on Oak Grove. She never knew why, and wondered what was wrong with her. She had met a lot of people who lived at the house. They were funny and cool, as was she, before she joined the church. She used to go clubbing. Appellant was sexy and intelligent and had a lot of people around him. He was very popular. Appellant told her she could go to the house if she went to the second level of Impact training. After she did

so, he said she had to graduate from the third level of training before she could come. (16RT 3636-3638.)

On one later occasion she drove to Los Angeles with Justin, and asked him a question about "Hands Across America." Justin looked at her like he had no idea what she was talking about. When she returned from Los Angeles, appellant called. He was very excited, as was often the case. He said Justin told him about their trip and he knew, now, that if he gave her a package to be delivered, that she would do it. He also reminded her that he had told her not to discuss Hands Across America with anyone. (16RT 3638-3639.) Although she hadn't spoken with appellant for awhile, and was excited to have the "loving energy" that appellant can give, she called him back and said she would not deliver any packages for him. He said that she was "obviously . . . not at that level" of awareness and knowledge, not yet. (16RT 3639-3640.)

Lord learned that appellant was using drugs when a mutual acquaintance told her he was using them. (16RT 3642.) At a subsequent "higher alignment" seminar held in autumn of 1999, she asked appellant to talk with her privately. Alone, she told him she knew about the drugs, and was upset, because she did not have people who did drugs or drank in her "world." He "got very big energetically", and very angry. Speaking of

Lord in the third person, he said "If Kelly gets in my way, she's fucked. Are we clear?" Lord took that as a threat, and told him he was going to be the next David Koresh. She left to return to the room where other people were gathered. Appellant ran after her, yelling her name, apparently not realizing that a number of other people were there. He left with Keri Mendoza. Lord left with appellant's mother and brother Justin. (16RT 3643-3645.)

In May of 2000, Lord heard that appellant was living with Dawn Godman. Lord invited appellant to dinner. She still had strong feelings for him. He had given her a lot of love and helped her in a lot of ways. When they first talked about Impact America and helping people, there was a true connection. She believed his intentions were sincere, and kept trying to tell him that they could do God's work on a higher level without doing anything in secret. She believed he could make different choices and get back on the right path. She also wanted to see if he still had any power over her, or if she had gotten strong enough to stand on her own. When he showed up for dinner he had a stack of "beautiful" pictures of Keri that represented her "audition photos" for Playboy. He said he and Keri had broken up. (16RT 3648-3650.) Appellant said he knew Lord would not do anything illegal, but wanted to know if she would help him afterwards. Lord thought it was

stupid to say such things. (16RT 3652.)

While they discussed spiritual things that night, appellant said they had to be quiet, because he was getting a message. He had done the same thing in the past. This time he was very excited and upset. He ran out her front door. It was drizzling or raining outside. She did not follow him, as she did in the past. He came back and said, "Kelly, please come be with me during this." She said okay, got up and went outside. Appellant had his arms up to the sky. He was talking and hearing whatever he was hearing. Lord stood there with him and then went back in the house. Appellant said, "I understand now, I get it now." He said, "you've helped me to see if anyone betrays me, I will have to kill them." She asked him to leave. There was no acrimony. (16RT 3652-3654.)

After appellant was arrested and Lord was interviewed by police she sent him a note saying she would like to see him. He wrote back, thanking her for her letter, and adding words like,"I see that you believe that I killed all these people by what you said to the police." He said he was innocent and had six people on his visitation list now, and could not change it, but if he gets convicted, he would have her visit then. She received no further communication from him and did not attempt to initiate any more. (16RT 3656.)

9. Dawne Kirkland

Dawne Kirkland met appellant at the church sometime in 1999 or 2000. He got up in front of the ward during a testimony meeting where people are expected to talk about God. He said things that were "kind of off." (16RT 3686-3691.) Appellant said he felt a prompting to come back to the church shortly before he received a call from someone in the church leadership about excommunicating him. Then he knew God wanted him to come back to the church in time to stop his excommunication. He asked the congregation if they knew what it was like to live without sin, said he lived without sin for a certain amount of time, and when he prayed about what he had done wrong, he was told it was when he didn't smile at the cashier at the store. He was wearing a long black trench coat. (16RT 3692-3694.)

She later heard about appellant talking in the church parking lot, and saw him talking when she looked through the church windows. The bishop of the church warned or asked her not to attend or go out there while appellant was speaking. Comments indicated 20 to 30 people were listening to him preach in the parking lot. Some of the people who attended his meetings in the parking lot stopped attending the church, and may have left the Mormon church altogether. People in the church were saying that 20 to 30 members have not been seen in the church in a while. After

appellant gave his testimony in church, she went up to say hello to Justin, and was introduced to appellant. She had no other contact with him. (16RT 3693-3696.)

10. Brent Halvorsen

Former Mormon Bishop Brent Halvorsen met the defendants while he was bishop of a ward for single Mormons. Godman joined the ward in 1996. She received financial and employment assistance from the Bishop's Welfare Program after living on the street with her small child. She showed great progress in wellness, appearance and social ability. (19RT 4245-4246.) Justin was a member of the same ward for a time.

Appellant was not a member of the singles ward, but he came on two occasions. First, appellant appeared at a Sunday open testimony meeting where people share experiences or thoughts about their faith. He came to the pulpit after several others did. His behavior when he was giving testimony was "way different than the normal I deal with.." His testimony was incoherent. (19RT 4259.) He told of having had a revelation that a car was coming at him, and said moving saved his life. (19RT 4264.) The "things he said were not cogent. I did not understand his message. ... And after two or three minutes, as bishop, I asked if he would be excused and make room for the next person. " (19RT 4252-4253.)

Appellant was wearing a black suit with an overcoat or long tails. He wore glasses. The glasses were very particular, as the rest of his apparel was particular. The glasses seemed to have small lenses and frames. His hair was long. He was "very distinctive in his manner and his apparel and his physical presentation on that day." Halvorsen shook appellant's hand later that day and saw no acrimony. (19RT 4253-4254.)

Two or three weeks later appellant again came to the ward, looking very different. He was clean shaven, groomed and dressed like other members. It was not an occasion for testimony. Halvorsen invited appellant to come into his office as he would with any congregation newcomer, to ask "where have you been coming from" and "why are you here today" and "where are you going" and, in that context, "is there anything I can do to be helpful." He considered the conversation confidential. That was the last time they spoke. (19RT 4254-4255.)

As to Godman's belief that the Brazil plan would facilitated the second coming of Christ, Halvorsen said there was no scriptural basis to believe that someone who accelerates the darkness and apostasy that precedes the second coming can accelerate the second coming.

11. Debra McClanahan

Debra McClanahan was a member of the Mormon church, and a self-

described "witch" when she met Dawn Godman at a Mormon church function in 1998. Godman asked her about witchcraft. Mclanahan invited Godman to come to her house and look at MClanhan's books on it. The two women became close friends. McClanahan met appellant in December 1999 when he came to McClanahan's home to pick up Godman after she became ill. (23RT 5013-5014.)

McClanhan got to know appellant better in February or March of 2000, and thought he was very nice, charming, loving, giving, and caring. He was very intuitive, smart, and knew scriptures. His name was embossed on the cover of his scriptures, i.e., his book of Mormon with the Doctrine and Covenants and his bible. Godman told McLanahan to call her Sky and appellant Jordan or she would not be able to go with them to the rave they were going to. After they went to a rave, appellant told her to call him Jordan even when they were alone. Appellant later said that it was important for the people around him to learn the Doctrine and Covenants verbatim. (23RT 5015-5018.)

McClanahan and appellant became "intimate" on just one occasion in March of 2000, after they held each other with their shirts off, massaging, and crying after attending a rave. She was also sexually intimate with Godman on one later occasion. She and Justin had intimacy in the form of

massage, but no sex. She considered all three of them intimate friends until the arrest. (23RT 5010-5021.)

At times she and appellant stayed up all night talking. (23RT 5076.) After the rave in March, appellant told McClanahan that "he wanted to get girls, take them on a cruise, teach them everything that they needed to know about sex. ¶ So that these girls would be able to get a job like at a Subway or sandwich place, and then go into the offices of Dean Witter and go up to stockbrokers and flirt with the stockbrokers ... and eventually get the stockbroker to get shares for them, or whatever, but get shares. ¶ And then they would be underage girls, they had to be underage. And that they would get involved with the stockbrokers. They would have the stockbroker in a hotel, have sexual contact with minors. They would give them Viagra, Ecstasy, have sex, massive amounts of sex, sex, sex. And afterwards, something would happen with the stocks. The girls would in turn inform the stockbroker that they were underage ... and that they would sue the company, Dean Witter, for – they were going to attempt to sue them for 50 million dollars, but that the girls, not wanting to be greedy would settle for 20 and that [appellant] would have them give the stockbroker a million dollars so that he wouldn't commit suicide." (23RT 5034.)

McClanahan asked appellant if he was afraid he would get caught.

He said that he "was legally crazy," and "Well, who wouldn't believe I was crazy? When I fell down on my knee, that I was saying that I was talking to God or that God was talking to me, who wouldn't believe I was crazy? And then, that way no one – I don't have to be held responsible for anything I do." (23RT 5035.)

Appellant wanted McClanahan to hand out fliers to underage girls at raves, and check their identification to confirm that they were indeed underage. He said he would "do a type of Harmony gathering and pick out three to take on the cruise ..." He would then pick the best two out of three. (23RT 5035-5036.) He had ideas and plans going on all the time. The blackmail scheme sounded a little bizarre; she never thought it would work. It wasn't realistic. (23RT 5074-5075.)

Appellant told her where he lived only after she promised never to show up uninvited. She then helped Godman and appellant move things out of Godman's apartment. She saw a safe that was 18" high, white and opened with a key. She did not know what was in the safe when she was helping them move. She visited frequently after that and played canasta most of the time. They smoked marijuana, played Risk or chess, and socialized. Appellant had a losing streak when he began playing chess, but became unbeatable after he kept at it, with McClanhan teaching him and

Godman playing with him. (23RT 5029.)

At some point that summer appellant told her he was selling Ecstasy. (23RT 5021-5022.) He also talked to her about his ideas for In To Me See. It was to offer parties where people would pay and drugs were supplied. Women who chose to have sex would be paid $500.00, and those who didn't would get $300.00 "This is how he was going to make money." He showed her a questionnaire, like that found in the search of appellant's home (People's Exhibit 32), and pictures of women in lingerie whom he said were applicants. Appellant asked McClanhan if she had a problem with the "survey" and she said no. (23RT 5023-5025.)

Previously, when appellant lived at Godman's apartment, he told McClanhan she would have to go through the first three steps of Harmony training and then do a fourth thing he would describe later before he could trust her. She finished the third stage of Harmony after appellant's arrest. She never learned about the fourth thing, and never heard of Children of Thunder. But she heard about Transform America, in Godman's Martinez apartment. Appellant was talking to Godman about how important and urgent it was to get the money to get it going, but they didn't say why it was important at that time. In another context, appellant said he needed 20 million dollars. (23RT 5025-5028.)

Appellant asked McClanhan to be one of 12 directors of Transform America. He said the board would oversee orphanages in Brazil and a pornographic film industry. She suggested making pornographic films herself. His response was to ask, "Is that what you want to be known for." She said she would not have a problem with it. (23RT 5075-5076.)

McClanahan prayed with the defendants at Saddlewood. They prayed to God, Heavenly Father, while holding hands in a circle. McClanhan saw no inconsistency between her witch practice and her religion. (23RT 5030.) McClanahan's practice of witchcraft was one of using the positive and negative energies and the elements to enhance lives. (23RT 5009-5010.) It was "white witchcraft", which is pure, nonintrusive, non-harmful and a force for good. A "warlock" was "male witch" and "coven" was a group of people who come together to practice witchcraft, with or without a leader. Witches draw energy forces together through chant, meditation, incantations and spells. She was a witch before 1988, when she became a Mormon. (23RT 5011-5012.) She knew that the scriptures condemn witches and seers to death.

McClanhan never discussed witchcraft with appellant or practiced with him at Saddlewood. (23RT 5031.) She practiced in front of Godman once, performing a protection ritual for appellant at Godmna's request,

because Godman said appellant was out doing something dangerous. (23RT 5032.) Godman did not say what dangerous thing appellant was doing. When McClanahan told appellant she had performed a protection ritual for him and he simply said thank you very much. (23RT 5032-5033.)

McClanahan's daughter, nine years old at the time, visited Saddlewood with McClanahan when appellant and Godman had three large dogs. One or both of appellant's daughter was there as well. They fed the dogs beef bones. They kept the bones in the refrigerator. Appellant did not say why he acquired the dogs. (23RT 5037.)

On the morning of July 30, 2000, appellant called McClanahan and said, "I've got a mission for you" and that he'd call her back "once I figure it out." (23RT 5038.) Over 45 minutes later he called back. He said he wanted her to get four tickets to see a new X-Men movie, and take her daughter to see the 8:10 show that evening. She said she had no money. He said no problem. Godman soon brought McClanahan a $100.00 bill and informed her that she would not see appellant and Godman at the movie as McClanahan had previously assumed. 5041. In the afternoon appellant called again to make sure she got the money and told her to take a taxi if need be, that he wanted to be sure she got there, and that she should buy four meals somewhere after getting the tickets. (23RT 5039-5042.)

McClanahan didn't think about why she was being asked to do such things because "you just don't question" appellant because he "doesn't like to be questioned" and at "that time my state of mind was ... do what I can to please [appellant]. He was so important to me at that time. He was so valuable to me." (23RT 5043.) McClanahan saw the movie with her daughter and bought six tickets "because at the time when I was purchasing the four tickets, I knew I shouldn't be doing this" because "it felt wrong." (23RT 5044.) She used the four tickets for the 8:10 show and threw away the other two tickets she had bought at 7:00 pm. She saved four ticket stubs. After the movie she bought four meals at Denny's, saved the receipts, and drove home. She called Godman's cell number and left her own cell phone number when she did not reach her. She called again after putting her daughter to bed, and left her home number for a call back. Appellant called her back, asked if everything went okay, and she said yes. He said don't call again and hung up. She put the stubs and receipts in a cigarette case. (23RT 5046-5048.)

Appellant called McClanahan again the next day, July 31, and asked her if she "had a rich uncle that I could possibly get $50,000 for." (23RT 5050.) Appellant said he could accept $35,000.00, but needed the funds quickly. His tone of voice was frantic. She said she had a piece of art she

received from her father that was estimated to be worth $30,000.00, and offered to pawn or sell it to get the money. He accepted her offer. She contacted Butterfield's and found she could not get a free appraisal until the first Monday of the month. (23RT 5051-5052.)

Two hours after the previous call, appellant called and said not to worry, everything was under control, and he was going to Los Angeles. But at 11:35 pm she woke up and found him standing above her bed. She jumped and cried out. He comforted her and asked for the key to the safe she had been storing since they left Godman's apartment for Saddlewood. She initially believed the safe had nothing but tax files, but later suspected that appellant kept ecstasy there. She saw appellant and Godman access the safe previously but never saw contents until July 31. (23RT 5052- 5055.) She saw tablets of Ecstasy, files and small cardboard boxes. Appellant removed the ecstasy and asked for a small bag. She gave him one. He said thank you, hugged her, told her she was a special person and his "very very best friend", adjusted her back and left after about 35 minutes. (23RT 5056-5057.)

On the following day, a Tuesday, Justin and Godman came to McClanahan's home to borrow her carpet steam cleaner and supplies. On Wednesday or Thursday Godman called her at 2:00 am and said she'd like to

come over with Justin. They came over. Godman ate. McClanahan gave Justin a massage. They left before 4:30 am. (23RT 5058-5059.)

Later, Godman came by with a suitcase, a wheelchair and a cardboard box with bongs for smoking marijuana and a bag with hair coloring. Godman wanted McClanhan to cut and color her hair and play canasta. She took what she brought into Debra's bedroom and closed the door. She could hear the safe being brought down from the shelf. It was heavy. Godman said the wheelchair was rented and that she would be returning it. Dawn spent the night and left on the following afternoon. They did not talk about what had been going on at Saddlewood. (23RT 5061-5063.)

After McClanahan learned of her friends' arrest for a crime involving bags of body parts found in the delta, police contacted her. She told them that she might have tickets providing an alibi for her friends, believing appellant would want her to do that, and that her friends were not guilty. She talked to the police again after she heard a further news report, told them what she knew, and gave consent to search her home for things left by her friends. (23RT 5064-5066.) Later she received from appellant's mother letters from appellant addressed to "Dee Benora" (her daughter's middle name) with a "Dear Debra" salutation. McClanahan decided to relocate, and received some financial assistance from the Department of Justice in so

doing. (23RT 5068-5072.)

12. Michael Henderson

Michael Henderson was a friend of Justin who once had dinner at the defendants' Saddlewood home. Justin had previously showed Henderson a 9mm Baretta semiautomatic handgun he had acquired. (16RT 3781-3787, 3798.) When Henderson arrived, appellant and Godman were there with Justin. Godman was introduced as "Sky." Appellant was introduced as "Glenn" though Justin had previously referred to him as "Taylor." Appellant said he was a warlock and Godman was a witch. Godman wore gypsy-like clothing. Appellant was wearing a shiny black outfit. He said he could read people's minds, and attempted to demonstrate his ability, but Henderson was not convinced. (16RT 3792.) It seemed he used a slight-of-hand trick or made guesses based on what had been said. (16RT 3800-3801.)

13. Jeannette Carter

Appellant telephoned Jeannette Carter, a close friend of appellant's mother, on two occasions in July of 2000. First he asked if he could come to her property and practice shooting out there. She refused, and told him to go to the target range nearby. (16RT 3730-3732.) Appellant made a second phone call to her in which he asked if she wanted to invest $5000.00 in a "business opportunity" and told her she would have her money doubled

within a week or two weeks. (16RT 3733.) She told him she didn't have $5000.00, but could come up with $1000.00, and offered to call around to raise the additional money for him if he needed it. Appellant said no. She she could hear the voices of Justin and Dawn Godman in the background. She knew Dawn Godman from Harmony, which was called Impact training then. (16RT 3735.) Shortly afterwards, appellant called her back and asked her to forget about the investment, and that it was a matter of trust. (16RT 3734-3736.) She had little contact with appellant previously. He had visited her house with his mother at some prior point at which they discussed selling health drinks made from juice. (16RT 3740.)

14. Selina Bishop and Jennifer Villarin

Julia Bernbaum was Bishop's best friend. In May of 2000, Bishop told her she had met appellant, referred to as Jordan, at a rave. She said he sold Ecstasy and she was selling it with him. She was very excited about him and talked about him exclusively. She said he told her he was expecting an inheritance from a grandparent that he wanted her to deposit in her own account, and he promised to give her $20,000.00 for doing so. Bernbaum saw Bishop for the last time on July 29, 2000. Bishop said she was going to Yosemite with Jordan for three days. (17RT 3893-3903.)

Kabrina Feickert worked with Selina Bishop at the Two Bird Café. Bishop was very kind, loving and trusting. She spoke to Feickert about a boyfriend she called Jordan whose last name she did not know. She said that Jordan had started becoming controlling, that he was trying to tell her what the relationship was going to be. He didn't want to spend much time with her and her family and her friends. He wanted just time with her. And after they had been sexually involved with each other he wanted to cut off the sexual nature of their relationship, and still be emotionally involved. (18RT 4042-4045.) Feickert inferred that Jordan was "doing some shady stuff" and "getting manipulative with her." Bishop wasn't able to fully tell Feickert what Jordan did for a living, but gave the impression he was dealing in drugs. Feickert met Jordan only once briefly when Selina brought him into the Two Bird Café to have brunch. Jordan was tall with dark hair and looked similar to appellant. (18RT 4046-4048.)

Jesse Sullivan and Selina Bishop grew up together and became close friends again in March of 2000. In May of 2000 Bishop spoke of meeting a man she called Jordan. (18RT 4127-4233.) Bishop told Sullivan that Jordan was very secretive. He had a cell phone that only she could reach him on. He did not want her to see her friends. (18RT 4133.) In June Bishop told Sullivan that Jordan was expecting an inheritance, and she was

to make money by helping him hide it from his ex-wife. There would be four deposits of $25,000.00 each, and she would keep. $5000.00 from each. She was to open a bank account in her name for this purpose. Bishop was in love and could not talk about Jordan enough. (18RT 4134-4136.)

David Levi lived with Jesse Sullivan in 2000, and knew Selina Bishop as a friend who often stayed at the home the two men shared. On the afternoon of the day Bishop's mother was killed, Levi received a telephone call from a man who identified himself as Jordan, the name associated with Bishop's boyfriend. Jordan said Bishop was about 90 minutes late in meeting him and was not responding to his calls. He said it was unlike Bishop to be late, and sounded concerned and anxious. He wanted to know where she was. He also said that Bishop better not be acting foolish or playing games, because he was too old for games. (18RT 4062-4067.)

Jennifer Villarin's best friend, Roseanne Lusk Urban, Bishop's friend Jordan Sullivan, Bishop's employer, Anthony Micelli, and Bishop's best friend, Julia Bernbaum, testified about hearing similar things about appellant from Bishop and Villarin indicating they were killed by appellant because of what they knew about him. (17RT 3815- 3833, 3840-3852, 3853-3882, 3893-3910.)

15. Kabrina Feickert

Feickert was working at the Two Bird Café on the morning that she heard that Selina Bishop's mother, Jennifer Villarin, had been killed. Before Feickert heard of Ms. Villarin's death, a man called the restaurant and spoke with a cook who gave the phone to Feickert. The caller identified himself as Jordan, Selina's boyfriend, and asked for Selina. Feickert replied that Selina was not there and was supposed to be on vacation with him. (18RT 4049-4050.) The caller then asked for Karen, another waitress at the café. Karen was good friends with Bishop, and had met Jordan. (18RT 4054.) Feickert said Karen was not there. The caller asked again for Karen, and received the same answer from Feickert. The caller became very flustered at that point and started telling Feickert that he hadn't seen Bishop all week, that he wanted to talk to her, that he was frustrated because she was supposed to meet him somewhere. The caller spoke very quickly.

The caller seemed nervous or paranoid "or something like that." Feickert told him to calm down, because she couldn't understand what he was telling her. The caller said that Bishop was playing games with him and he was sick of it. He told Feickert to tell Bishop she should call him if she saw her. Feickert heard a recorded message directing the caller to insert more coins to continue the call, indicating that the caller was using a pay

phone. Because the call was unusual Feickert told others in the restaurant about it. (18RT 4051-4055.)

16. Lynell Simon

Jennifer Villarin's roommate, Lynell Simon, recalled hearing appellant speak to Villarin in a manner she considered "real sickening sweet . . . . He was like brown-nosing." (17RT 3920.)

VI. Victim Impact Evidence

The Stinemans' adult daughters, Judy Nemec and Nancy Lane Hall, recalled in detail their family life, the trust their parents placed in appellant, and the pain of learning that their parents had been kidnaped and killed. (15RT 3426- 3494, 25RT 5615-5626.) Harry Dillon, a close friend of the Stinemans recalled their personal qualities, friendship and his grief at their deaths, and alluded to unkind feelings about appellant. (25RT 5557-5564.)

Several friends and relatives of Jennifer Villarin and her daughter Selina Bishop detailed their lives, characters, and the pain of losing them. Villarin's sisters, Yolanda Gaytan, and Lydia Young, recalled Villarin's childhood and early relationship with Elvin Bishop, Selina's father. (23RT 5087-5095, 5103-5112.) The jury also heard from Villarin's nieces, Melissa Villarin and Jill de Deigo, (23RT 5095-5102, 25RT 5594-5600) nephew,

Robert Young (25RT 5603-5606) and brother, David Villarin (25RT 5607-5614) as well as Villarin's sister, Olga Land, who also detailed what she did from the time she experienced after she learned of her sister's death to the end of uncertainty about Bishop's fate, including the search for appellant, who she referred to as "that thing." (25RT 5583-5592.) She recalled that she was attending a memorial for her sister when a reporter with a camera asked her if she had heard about Selina. She said no. The reporter said they found her in a river. "She had no right to tell me. Not with a camera. It should have been family. It should have been [Detective] Lisa Lellis. It should have been anybody but a reporter." (25RT 5592-5593.)

Frances Nelson, mother of James Gamble, spoke of his life and her loss of companionship after his death. (25RT 5573-5582.) Villarin's best friend, Roseanne Lusk Urban spoke of the long friendship between Villarin and Gamble. (25RT 3815, 3822-3824.)

VII. The Defense Case

A. Genetic Loading for Mental Illness

Appellant's younger sister Heather Helzer Allred, a member of the Mormon Church aware of the importance her religion places on genealogy, testified as the family historian. (29RT 6578-6579.) She described

Exhibit G, a chart displaying the names, gender, and relationships in her mother's family tree.

Asked to name those at each level of the tree who had mental illnesses, she identified their maternal grandmother, Dora Fay Sorenson as suicidal, and their mother's maternal aunt Eita Mae Sorenson as institutionalized. (29RT 6580-6581.)

Heather did not identify their grandfather, Doyle Sorenson, as mentally ill, but she authenticated a tape recording of him talking about being visited by Jesus. Asked how he felt in the presence of Jesus, their grandfather said, "Well, I never — I never started thinking about myself. I felt perfectly at ease. Man alive, he was thrilled to see me. . . . He look like that – he had been looking to see me for a long time." Their grandfather denied feeling important after Jesus met with him. He said Jesus showed him the scars on his hands, and he rubbed them. (29RT 6586.)

Two siblings of appellant's mother, Antone and Dianne, had been institutionalized, and Dianne was currently "on mental disability." (29RT 6580-6582 .) Another of their mother's sisters, Colleen, "feels incredibly ill but doctors find nothing wrong with her. She can't hold down a job or anything," She applied for disability benefits based on a physical disability, but was given it based on mental disability. "She's very offended and does

not accept that." (29RT 6582.)

Two of appellant's maternal first cousins, Chase and Chi Hoffman, have been diagnosed with mental illness, and a third, Cologne Hoffman, has had to deal with depression. (29RT 6582.) Chase testified that he was on disability for paranoid, borderline paranoid schizophrenia and bipolar disorder. (26RT 5693-5694.)

B. Childhood and Youth

Heather authenticated Exhibit H, displaying the frequency and span of the moves made by appellant's immediate family in his lifetime, beginning with his birth in Lansing Michigan on July 26, 1970. They moved more than most families, and had to live with their maternal grandparents, Dora Fay and Doyle Sorenson, for a year beginning in 1983. (29RT 6583-6584.) Doyle Sorenson, the grandfather who believed Jesus had visited him in the flesh, "loved to preach and took breakfast as an opportunity for that." (29RT 6601.) When living with their grandparents, they prayed every morning. (29RT 6587.) Appellant spent a lot of time discussing religion with his grandparents, and was particularly taken with Grandfather Doyle Sorenson. Appellant had been interested in spiritual things for as long as Heather could remember. He saw their grandfather as

a spiritual mentor. (29RT 6587.)

Throughout his youth appellant was "wonderful. He was a good brother. And not only that, he was a good person. And he was spiritual and he was fun. " (29RT 6588.) Appellant was ordained as a priest of the church at age 12, in accordance with Mormon tradition. (29RT 6600-6601.)

At age 16, appellant received from the church his "patriarchal blessing," whereby he was told he shares ` ... in the opportunities and the obligations in preparing for the eventual gathering together of the House of Israel in these last days.' and `In your own unique way, you must contribute to the fulfillment of that mission" and "you have the gift of discernment of spirits that permits you to distinguish that which is good from that which is bad and its ultimate effects' and You have the ability in this gift to understand the thoughts and minds of other persons and to understand their needs." (SSCT[7] 169-171, 29RT 6411-6412.) A patriarchal blessing is something everyone who is baptized in the LDS church can receive; it's a "one time blessing that is supposed to serve as guidance for life." (29RT 6601.)

Later in appellant's adolescence, he attended a church dance chaperoned by Dane Williams, then 19. Williams recalled that appellant

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[7] "SSCT" refers to the "Second Supplemental Clerk's Transcript."

came up and said he appreciated his standing up for what he believed in after Williams endured a challenge from other attendees. Appellant was very involved in the church, knew scripture very well and seemed to love everybody. (26RT 5840-5841.) At his high school, where he met his future wife, Ann, he was very outgoing, charismatic, knew a lot of people at the school, and was known to be helpful and nice. He worked at the cafeteria. Ann recalled that people knew they could ask him to "spot them for lunch" and he would. (29RT 6605.)

At age 17, appellant had graduated High School, and was on his way to serve in the National Guard when he visited Jill Tingey, a niece of his grandfather, Doyle Sorenson. She recalled him as "very sweet and wonderful. Anxious to help and obedient." (26RT 5762) When appellant was about 18, his family enjoyed card games, and he enjoyed sword fighting with Aaron Phister, who was a few years younger. Phister recalled that appellant always seemed "insightful and knew the scriptures really well. He seemed to have his own interpretations, most people would merely read over it; he would take the time to really think about every single word and sometimes interpret it differently than the majority would." (26 RT 5829.)

Appellant had a farewell party at the Martinez ward before he went on his mission. Most of the people who attended talked about insights

appellant had brought. He had a lot of respect, a lot of clout. People shared the insights into scripture that he had brought forth in his studies with them and the positive influence he had on their lives. (26RT 5797.)

Appellant's cousin, Charney Hoffman, recalled appellant at that time to be loving and kind, never judgmental. "[Appellant] always sought to foster a lot of love and understanding in all of his relationships." He had insight to know that Charney had been cruel to someone because he had been hurt and to reassure Charney that appellant still accepted him. He always used his influence to build relationships among other people and he did a good job of it. (26RT 5801-5803.)

C. Missionary Years

1. Appellant's journal 1989-1990

Appellant began the journal he kept for the first of his missionary years (Exhibit R, SSCT 120-168) on the day he left home to begin his missionary training. He recalled being "emotional" in leaving his mother, who did not cry, and thus "made" him "feel the emotion." He wrote of a dream that he interpreted to mean "my church is strict, and my laws are to be obeyed. ... Obey with exactness." (SSCT 122.) The next day, he wrote:

> I honestly feel that only through strict obedience will I obtain and retain the Spirit...The only way I can be in tune to the Spirit is to obey with exactness. ... Nobody should come on a mission unless they are ready or able to get ready to obey every single mission rule! (SSCT 123; emphasis in original.)

He later recalled being asked to give a talk five minutes before he had to give it, and that everyone said he did well. "'Obedience with exactness' is the best lesson I've learned since I've been here. Best lesson in a long time." After being asked to speak again, he wrote that he "spoke with power and authority, and the Spirit of God was with me." Sick from his second typhoid fever shot, and needing his wisdom teeth removed, appellant recalled telling his companion "as soon as you realize that everyone is weird, you will increase your self-esteem and become less judgmental." Appellant wrote, "it is gospel!" The entry then states:

> I also would like to take the space to bear witness that Satan is real. Our district a joint district held a meeting last night about the forces of the evil side. Earlier that day the Spirit impressed on my mind that Satan and his angels were working on our district specifically. I felt impressed to tell our district leader (one of the missionaries) that I needed to speak with him after class ... because I noticed a depression similar to the one I had gone through (a loss of the Spirit) for no apparent reason. . . . I shared what the Spirit had whispered to me in class. The Spirit confirmed to him that it was true and impressed him to ... warn the entire class. ... every hour of

> mortality is a constant war with the organization that Satan has working against us.... (SSCT 129.)

The entry for the following day declares, "I love this church! I love the people. I can hardly contain my excitement to be in the field." A week later, he wrote that his wisdom teeth were removed yesterday, he was on drugs for pain, had slept almost all day, and was awake at 3:00 am, writing, while his companion who also slept all of yesterday was "dead asleep." He recalled being woken up to take his pain pills, and going to the bathroom, where he "collapsed" while "finishing up." "It was kind of an instant faint, and instant recovery deal. I hit my hand, head, and elbow on the toilet, wall, or floor – I'm not sure which ... if not all of them. Either the fall itself, or the impact woke me up and I was able to get in bed." (SSCT 134.)

After seeing a Mormon video about families, he wrote, "I literally cried for want of my own family to love and raise. My own family to raise firm in the gospel with a woman I love ... is what I want most ... My current goal is to be an awesome missionary. My ultimate goal is to be an awesome father." He later wrote that he had decided to write in his journal less and study scriptures more. I know the scriptures I had before my mission but they have scriptures they like you to use. I feel I at least need

to know the scriptures they'd like me to use. "To all that may read my journal I bear witness that I know Joseph saw God. I know he was a prophet." (SSCT p. 135-136.)

The entry for February 1, 1990, recorded his prodromal mania:

> "There are nights like this night, that I just stay up and think about things. I can't help it. My mind just wont shut off. Most of the times I just stay up and think about things : 1) the Last Days 2) the faith it would take to do miracles, and 3) my future family. But there are some nights like last night where I just lay there and feel massive amounts of love for the people in general that I know. This has happened more often since I've been here at the MTC, and even more often lately. So much so that I wondered if I was just feeling a euphoria from the pain pills. I was taking for my wisdom teeth. But my companion says he hates the world when he's on that stuff and it hasn't stopped now that I've stopped taking the pills."

Appellant then wrote about a successful presentation he made impromptu:

> "Have been feeling the fruits of the spirit so strong all night. Love joy peace and happiness etc. The savior's yoke is easy and the burden is light. I can hardly wait to go in the field." (SSCT 137.)

He wrote about a meeting where "the Holy Ghost was thick in the room. There was an excitement, a feeling that anything was possible with the spirit to guide you; a knowledge that the church is God's. I bear solemn witness that this is the work of the Lord. I bear witness that our Church is

the Church of Jesus Christ. I know that I am a messenger of God, a servant of Christ, and a representative of the Deity's only true church." (SSCT 138.) He recalled feeling the Spirit, and jumping out of bed to pray. (SSCT 139.) He later wrote of talking to and praying with someone who had offended other missionaries, and of believing that God softened the man's heart by giving confirmation to appellant's words. (SSCT 143.)

On March 3, 1990, he wrote "Not a single sin or measure of disobedience is excusable. I can no longer disobey the slightest whispering of the Spirit. ... Why so important now? Because I leave for the field Monday the 5th ...". (SSCT 145.) Five days later, he "woke up early (4:15), feeling the Spirit so strong right now it's impossible to turn my mind off. I feel so much love peace and happiness. Towards everything... I feel so much confidence... constant companio0nship of Holy Ghost ... constantly obedient ... exquisite joy peace love and faith for about 3 hours the night before and ever since ... Thinks this is how the bible says one feels when the Spirit is with you. Has to testify and "warn them that they could be happier with life ... know so much more about their savior ... warn them of the need to repent of their sins...". His description of his thinking goes on for another page and a half. (SSCT 146-147.)

On April 1, 1990 he wrote that he has been in Brazil for six days,

liked the language, met a nice lady in Miami on the way to Brazil, gave her a Mormon pamphlet, talked to her about Book of Mormon, taught the first discussion to two people on the plane, gave away Book of Mormon to people committed to read, and felt the Spirit of Galatians 5:22-23. He said a stranger gave him a hug because he had the Spirit of love. (SSCT 150-151.)

He recalled speaking as a missionary to a bus load of Brazilians on an 18 hour bus ride. He told God he was willing to get up and tell everyone who he was and where he was going and why, if God wanted him to. "Four and a half hours later, I knew he wanted me to stand up and introduce myself to the people on the bus." (SSCT 155.) Since people were sleeping, he asked God when he should speak. Without an answer from God, he felt the "spirit that I needed to do it." He waited until morning. He said, "attention, please," introduced himself as Elder Helzer, with Elder Fagg, and said they were the first two missionaries to go to Miracima, and God has given him love for people of Brazil, etc. Some cheered and clapped when he said amen. He wondered if it was Spirit, or his own brain, that told him to give a sick woman a blessing, all the while knowing that these were each excuses to avoid realization of the real reason – "I did not have enough faith ... to say the words spoken to me in my heart

for that lady." He cited the Mormon Doctrines &Covenants 121:34-37, 40, "only when a person is righteous can the powers of heaven be controlled." (SSCT 155-159.)

Apropos human ability to become God, he wrote that he wanted his children to remember the powers of heaven can be controlled, and "you need to be righteous. . . . Because a sinner has a hard time having faith that his prayers will be answered, his prophecies will be fulfilled, citing Jacob 4:6, Nephi, and Mormon 9, that anyone with total faith can ask for anything and have it granted ." (SSCT 158-159.) "Pure from sin and obedient to every commandment, any male member of the church/priesthood can command in the name of Jesus and be obeyed." (SSCT 159.)

For a few more months, appellant's entries indicated enjoyment of the experience of serving in Brazil, and of teaching and performing magic tricks for children, and happiness in flying to a new district, where he hoped to have a Brazilian companion. Appellant wrote that he thought himself more like the Brazilians than the Americans around them. His last entry was dated July 18, 1990. (SSCT 160-168.)

2. Companion Missionary Jonathan Taylor

Jonathan Taylor arrived in Brazil "a few months" after appellant, and found him "energetic, passionate, seemed to really relish the mission experience. He also struck me as very intelligent. ... I liked him immediately. He spoke the language relatively well for somebody who had been in the country as long as he had. He was on his mission a few months longer than I had been ..." (26RT 5773.). Appellant seemed to work very hard. He was a "de facto companion" in the work for six months. He was very passionate, animated, and seemed to have a genuine care for the people, and was particularly effective at teaching. People seemed to like him. He had a very capable manner. They studied scripture together. Appellant enjoyed it and was more skilled in it than most others. They became very good friends. (26RT 5773-5774.)

They spent most of their time discussing "the merit of man, where do we come from, what was the preexistence before this life, what's next, where will we all end up? What is the next life like? He had some interesting ideas about the end of the world. They discussed the apocalypse and second coming of Christ and book of revelations. He was comfortable pulling and piecing togther scriptural references to support his conclusion. (26RT 5775-577.)

The change in appellant "was fairly abrupt. Probably about three and a half to four months into their six months together," the conversations they enjoyed together "started to change a little bit." Some of the conclusions and beliefs that he began to draw, he began to state them more emphatically and would certainly make conclusions, you know, more directly than I would ...[T]he relationship became a little bit strained. The conversations ... weren't fun anymore. " They butted heads.

Appellant would be told, "`I think you're taking that a little bit too far. I don't see the same connection you make'," or `we're lacking certain pieces of information in order to make that connection.' ¶ He seemed more comfortable making those connections and stating these emphatically, stating that he knew, he had sensed, or he had kind of been given additional inspiration to kind of understand how those things connected. ¶ It also carried over into our teaching. ... [H]e began to teach those things that he was studying in our discussions with nonmembers who were anxious to learn more about the church. The church has a very set regimen and curriculum that you're supposed to teach people who are interested in hearing ... about church doctrines . . .". (26RT 5776-5778.)

Appellant discussed his views with the mission president, who was headquartered 60 miles away. Afterwards , appellant said he had brought

up points that the president didn't know anything about or couldn't add anything to. He seemed frustrated with the mission president who couldn't answer his questions. Appellant started to read more about the writings of higher level church leadership, and dismissed them as either not knowing or not revealing the truth. (26RT 5779.)

A few months later appellant was moved to a different place in the mission. They parted as friends, and spoke three or four months later. Appellant immediately started talking about doctrinal issues, saying that he had received additional thought and inspiration. It was the wrong place to have those discussions. (26RT 5780.)

3. Mission President Richard Knudsen & Bonnie Knudsen

The Knudsens arrived to head the mission in Brazil in 1991, about six months before appellant's term would end. To Bonnie Knudsen, he seemed personable, a leader, very kind and gentle. He was at their home once or twice. He was very kind and friendly to their maid and their guard. (26RT 5898.) Richard Knudsen thought appellant was a typical, normal, well-functioning, dedicated missionary. They talked only once about his interpretation of scripture, and that was just prior to appellant leaving. He mentioned something that was not sound doctrine. (26RT 5902.) He said he had to go though the experiences that Christ went through and suffer like

Christ. "One of the basic tenets of the church is that you don't have to do that, to become like God, in God's presence when you die. . . . I was unable to dissuade him from that point of view." This discussion with appellant in which he said he "needed to go through the process of being a Christ at some point in the future" was the only one that "disturbed" Mr. Knudsen. (26RT 5903.)

D. Homecoming, Impact Training, Courtship and Marriage

When appellant returned home in late 1991, his aunt Dianne in Utah had begun to lead "the whole family" to take a "large group awareness training" called Impact that was available in Sacramento. It had many Mormon participants. Appellant attended his first training in December 1991. His sister Heather started hers in November of 1991. They went together in January. (29 RT 6591-6592.)

Appellant was still devoutly Mormon. He met Kristina Kelly, a Christian but not a Mormon, with whom he discussed religion, including his religion's prohibition of premarital sexual activity. He spoke of feeling very guilty and suicidal about masturbating in his youth because doing so was "going against God." (26RT 5859.)

In December of 1991 appellant ran into his former classmate and future wife, Ann Adams. She was not a Mormon at that time . Hoping to

date her, he introduced her to Mormonism and persuaded her to learn more about the church. She met with missionaries for about six weeks and then joined the church. (26RT 5799, 29RT 6606.) They had their first date when she was baptized into the church. (26RT 5799.)

Meanwhile, appellant met with Dane Williams to talk about scriptures and study them together. Williams recalled that some of appellant's views began, or had begun, to change. Appellant had come to believe that the church went in the wrong direction after death of Joseph smith. Williams made some futile efforts to try and talk to him and help him to see that some of the things he was talking about were not right. He was not successful. (26RT 5843.)

Appellant's aunt Marcia Burnell Helzer recalled appellant talking of reincarnation and of progressively moving toward a better life, and saying his love for their father in heaven and for his family had grown and his desire to do things for other people blossomed . (26RT 5721.)

Appellant's cousin, Charney Hoffman, recalled appellant had drawn very different conclusions from scripture after he returned from his mission. (26RT 5798.) Previously, appellant had sought to establish the supremacy of the Mormon church. After his mission, "he seemed more interested in showing people how the LdS church had deviated from its path that was

previously holy." Appellant was very "zealous to point out differences between what the church had taught in the early days with what the church had been teaching in more recent times." He was previously loyal to the church, but said he no longer cared what leaders of the church said because they had departed from the path set by the founders. He became very upset when Hoffman disagreed with him. (26RT 5800-5801.)

Among the new beliefs appellant expressed after returning from his mission was that the story of Adam and Eve meant that the paradigm of good and evil was given to us by the devil and we needed to reject it to be saved. One rejects the false paradigm by "accepting that all things are to provide people an opportunity learn and to progress in their respective spiritual paths. (26RT 5814.)

In the summer of 1992 appellant met and dated Elaine Totten, a student at Brigham Young University, at a Mormon church dance. She recalled him as a very positive person, always intense and focus-oriented, who drove erratically when he took her to an Impact event. His entire family had been to Impact training at that point, and he spoke of his perception of the program rather than about scripture. To express how much he cared for Totten, he stuck plastic forks in her front lawn with little notes telling her she was wonderful and how much he liked her. She and

appellant kept in touch after she went back to Utah for school. He called her when he started working as a stockbroker in 1992, and invited her to attended his wedding to Ann Adams in 1993. (26RT 5944-5947, 5952-5954.) When she saw him again, in 1997, he had a preoccupation with scripture, and in particular with an interpretation supporting reincarnation. He talked of how the church had strayed from Joseph Smith's truer reflection of God's will. (26RT 5956.)

Neil Fisher was the enrollment director for the Impact training program in Sacramento for about two years in between 1990 to 1993. (26RT 5914.) The fundamental philosophy of Impact was one of "celebrating life, learning to be committed to one's life and to be alive and love yourself and love your neighbor and develop a community of people that could live in harmony and peace together." (26RT 5916-5617.) To teach people to get rid of self-limiting beliefs, trainers confronted people about their belief systems, in a "confrontational, in your face" way, "calling you on your lack of commitment, lack of responsibility, that sort of thing." (26RT 5918.) The purpose in Impact "was to get someone to emotionally let go, to stop holding on to emotion so tightly and holding on to their feelings so tightly that they wouldn't express them. The intent was to get emotional release and feel free to express themselves in other ways." (26RT

5918.) Participants developed intimacy with each other and the ability to help and "love one another in a way that would support their life's dreams." (26RT 5921.)

Fisher met appellant around 1992 or1993. (26RT 5928.) At that time, Fisher was breaking away from the Impact program because of problems getting paid by the owner in Salt Lake City. (26RT 5915.) Fisher started an independent program he called Introspect, and hired two Impact trainers who had left for the same reason he did, i.e., trouble with "business inequities" at Impact. (26RT 5920.) Many of the concepts and terms used in Impact training were used in Introspect. Some were similar to those articulated in appellant's writings. (26RT 5921-5928.)

Appellant took the Introspect course sometime during or after 1993, but Fisher did not remember him as a trainee. The course was a "kinder, gentler" version of the Impact training appellant had previously received. Fisher recalled speaking to appellant a couple of times after the training, when he called Fisher expressing love for the workshops and desire to work in Introspect. He impressed Fisher as a "very sensitive, very caring, very kind young man, got along very well with others in the group and everybody seemed to really care about his and really – really loved him."

Fisher was stunned when he learned of appellant's crimes, which did not fit with what he knew of appellant. (26RT 5933-5934.) He never saw any "mental instability" in appellant. Appellant was passionate about living and loving life, a seeker, wanted to know "how to live a happy full life." Appellant was a stockbroker at that time. (26RT 5942.)

Appellant's wife Ann recalled appellant having a hard time with chaotic or noisy situations if there was no sense of control for him. She used to think he had ADHD. He was honest, unable to hold things in, wore his heart on his sleeve, and was either very happy or very sad, emotionally. (29RT 6617-6618.) She recalled that appellant had been "doing telemarketing for a company" before her uncle helped him get his job at Dean Witter. He lacked "a realistic view of people or the world in general." Appellant's family had no cable television, and did not permit him to watch any television unsupervised. His mother did not use white flour, only wheat. They didn't have pasta or sugary foods like cereal or cake. "They like vegetables and pretty – kind of holistic food." (29RT 6608.)

Once married, appellant would stay up all night watching television. She would go to bed at 10:00 pm and get up at 6:00 am, and find him still watching. "[H]e wouldn't be able to pull himself away." He would tell her,

after a couple of months, "There's just always interesting stuff on. It just never ends. There's always something great. I couldn't go to sleep." He would be too tired to go to work the next day. So they had the TV turned off. (29RT 6609-6610.) Appellant's "memory was really bad. He couldn't really remember anything without sticky notes." He carried around his day timer; otherwise he couldn't remember phone numbers, not even his own for a long time. (29RT 6610.) He left work around five with directions on what to buy and would not be home at seven or eight. He went to an arcade near his work, where he would "get all wrapped up," lose track of time and forget that somebody was depending on him. He needed notes to get things done at work. He had a lot of ideas, but would forget them or find them to be too much trouble "as soon as he hit a road block." (29 RT 6611.)

In 1994, appellant's sister Heather saw that he was unhappy in his marriage and disillusioned with his job. She was working as a receptionist at the Dean Witter office where appellant worked. She thought he accepted that his job was something he had to do to make money. He was "still spiritual ... still interested in family ... still behaving really well. ... [But] he just wasn't very happy." (29RT 6592-6593.) She thought he would "overcome the problems and that he'd be fine." (29RT 6593.)

In June of 1995, appellant's first child was born. In September 1995, Heather left for a year and a half to serve her own mission. (29RT 6590.) When she returned, in 1997, she saw severe and "shocking" changes. (29RT 6593.)

E. Treatment by Psycholgist Richard Foster, Ph.D.

In August of 1995, two months after the birth of his first child, and a month before the departure of his sister Heather, appellant began seeing psychologist Richard Foster at the local Kaiser facility. He complained of marital problems attributable to the discrepancy between his wife's sexual desire and his own, and related depression. He wanted Dr. Foster to help him come to terms with his depression "about the issue." (27RT 6008-6009.)

Dr. Foster saw grandiosity and self-inflation suggestive of narcissistic personality disorder, but did not want to diagnose that disorder based on just one meeting, since that diagnosis says it a long-standing trait that's going to be with him throughout his life. (27RT 6009- 6010.) He ruled out depression and gave appellant an Axis II diagnosis of "narcissistic features." (27RT 6009.)

At appellant's trial, Dr. Foster explained further:

> [A] lot of young men present as having discrepancy in their sexual desire from their wife or their partner. Many of them feel somewhat entitled in the sense that they deserve this. This is – they work hard. It's their wife's role to provide sexual gratification when they want. That's the background that one might expect to be common among young men. ¶ But in the case of Mr. Helzer, there was something that seemed much more what I would call 'entitled' about that, that he was presenting ... that he was pretty much able to make happen whatever he wanted to happen. And this was one area of his life that he couldn't make it happen....¶ And he felt as though he deserved to have it happened, that he was entitled to have it happen, that he was misled by his wife, that she had somehow tricked him in the sense of appearing much more sexually active and sexually exploratory earlier in their relationship and now that was taken away from him. ... [T]here was a sense of `I deserve this' and a lack of ability to put himself in the shoes of his wife, that went beyond sort of the normal presentation.... ¶ That's typical of a narcissistic personality, that others are often valued for what they can provide in terms of one's own gratification and that there's not very much ability to see the other person as an independent person with their own needs .... ¶ There was also some statements that seemed overly inflated about his personal power. He felt he could implement anything except for that." (27RT 6011-6012.)

Dr. Foster wrote in his report, "He is quite inflated about what he has to offer others in the world and has a parallel sense that he deserves everything he wants; for example, a wife whose sexual behavior is like what he witnesses in pornographic film." (27RT 6013.)

Dr. Foster recalled that appellant "made a statement to the effect of `how humanity is progressing in general, both as a society and individuals

and that man is becoming like the Father in heaven.' And when I inquired about that – about his own ability to provide some kind of reforming of society. And that again, was tied. `I can do all of this and I have power in these areas but not in the ability to have my wife perform as I want.'" (27RT 6012-6013.)

Appellant told of being a Mormon who had "made a commitment to be a virgin when he married. And that his faith included not only having sexual relations, not masturbating, not watching pornography." But he did masturbate and watch pornography and felt that he was not being a good Mormon. That was "stressful" for him. He also suggested that his premarital virginity was one of the reasons he was entitled to an ideal sexual relationship. (27RT 6014.) Dr . Foster described the feeling as "I ought not to be frustrated. I ought to be gratified. I cannot stand any frustration." (27RT 6057.)

In his second meeting with Dr. Foster, appellant presented a "highly detailed plan" to find an ideal woman who wanted sex daily. He was going to run an ad in Brazil, interview 80 to 120 applicants, choose 35 and date them. "And based upon that, make a two year contract ... to make sure that he had sex daily." Appellant said his bishop and his wife had commented on "the self-centeredness of his behavior and he wanted to discuss it further

when we met again." (27RT 6015.)

Dr. Foster saw appellant five times. Their last time was on October 4, 1995. "He was then convinced that the only way to avoid his misery was to leave his wife." Dr. Foster knew appellant would have difficulty leaving his wife "because another feature of narcissism is that you desperately crave the approval and admiration of others.. And Mr. Helzer was very attuned to not wanting to disappoint his wife, not wanting her to be left. ... I saw, one, there was some capacity for empathy. He could put himself in her shoes. And secondly, that he just couldn't stand to have anybody think ill of him or be disappointed in him." (27RT 6016.)

Appellant did not want to continue treatment after Dr. Foster declined his suggestion to see his wife with him and tell her about his unhappiness and the predicament he was in. Dr Foster declined because "it would be a better boundary if he were going to return with his wife to return to that psychiatrist [he saw with her previously]." (27RT 6017.)

At one point Dr. Foster noted appellant said that he was "spiraling downward and sometimes he could care less if he died." (27RT 6062.) Dr. Foster explained, "When people say they are spiraling down, they are almost always referring to their mood." Lability (dramatic fluctuation) in mood is "what bipolar is all about." (27RT 6063.) Also, central to the

concept of narcissism is the theory that a person who exhibits a superiority complex does so because he has an inferiority complex. All writers on narcissism share notion that "grandiosity and entitlement is a variation of wavering self esteem. ¶ External factors make them feel good about the world and on top of things and then internal factors make them very, very vulnerable and feeling very un-esteemed [sic]. So the issue of shame, that's how I was talking about the issue of shame before. And that's the statement about, `I feel as though I can have anything but I can't even get my wife to satisfy my sexual needs.' .... [B]oth sides of that are in that statement, that you have sort of the superiority notion and he's fighting that . . . a sense of `I'm not even powerful enough to have a wife who wants me.'" (27RT 6063-6064.)

Dr. Foster's intake report noted that appellant said that perhaps if he were more advanced spiritually, he would be able to change, which indicates that he thought he could make a good sexual relationship in his marriage if he became more advanced spiritually. In the next sentence he noted that appellant "though unable to do so, he no longer wants to be with people and no longer even cares about being rich." (27RT 6065.) His intake report also says that appellant "wants to stop going to church because he feels unworthy and doesn't believe that he will quit making the same

mistakes and refers to pornography and masturbation." (27RT 6066.) These statements are consistent with mood disorders.

He explained that bipolar disorder "is about fluctuating depression and mania, though you can receive a `bipolar one" disorder diagnosis without ever having a clear-cut depressive episode." (27RT 6066.) Appellant's statements of unworthiness are "certainly consistent with a depression which is part of a bipolar one picture. . . . . And feeling unworthy is – is a classic symptom of depression, self derogation, hopelessness. " ¶ "Shame is tied up with this." (27RT 6067.)

In summing up appellant's mental status, Dr. Foster's report noted "considerable manifestation of grandiose entitled notions." This is "very definitely" consistent with the criteria for diagnosing a manic episode. (27RT 6067.)

Dr. Foster also wrote that appellant was self assured and arrogant and that "[t]he meeting had the flavor of his trying to help me see what the world is really like." (27RT 6067.) This "can be" consistent with a manic episode, or narcissism. Based on the information he had at that meeting, he chose the narcissistic diagnosis. "It could be, with other information, consistent with a manic episode, prodromally at least." (27RT 6068.) Prodromal symptoms are those that means the disease is incipient and can

or will grow into a full-fledged manic episode. (27RT 6068.) Dr. Foster said he has since reconsidered his diagnosis of appellant, but has not applied a new one because he has not interviewed him again. (27RT 6069.)

Dr. Foster emphasized the limited information and institutional mandate he had when he saw appellant in 1995. He did not know, and appellant did not disclose, that he was having sleep problems or mood fluctuations, or that he had a family history of mental illness. Dr. Foster was in a system where he was pressured to deal only with presenting problems, and appellant did not present as acutely depressed. (27RT 6070-6071.) He explained:

> There's a certain atmosphere at a managed care facility like Kaiser, and that atmosphere is to find a piece – a very limited piece of somebody's problem that can be dealt with in short-term therapy. . . . [T]here's a real motivation, a demand actually, to find some limited treatable piece.

Dr. Foster admitted that he would have looked at appellant's bipolar disorder symptoms and perhaps treated appellant effectively if appellant had come to him in a private practice setting "and there was some of this grandiosity . . . I might have done considerable work evaluating the possibility of a mood disorder, bipolar disorder, which grandiosity and narcissism is a feature as well. ¶ That was just not done in the Kaiser setting. This man came in for a treatment and evaluation of a sexual issue,

and for possible depression around that, and that would be the role that I was expected to perform. ¶ So coupled with what I learned later, and knowing that I was focused in just on the presenting problem, because that's the way one works within the Kaiser system, and knowing this additional information about individual history, family history and sleep problems, I came to look at my initial diagnosis with some question." (27RT 6020-6021.)

Dr. Foster added that Kaiser had very long waiting lists for people wanting psychotherapy, and those who waited were motivated by a serious need. In the Kaiser setting, "there's much more of a likelihood that people would be suspected of malingering when they're not, rather than that it be missed. . . . Kaiser therapists' antenna are up for possible malingering because that's going to be working with someone who's not motivated and it's going to require paperwork for disability forms. . . . They don't want that." (27RT 6021-6022.)

Dr. Foster would not infer that appellant was malingering if informed that appellant later said that he was faking psychosis when he returned to Kaiser three years later, in 1998. The doctor explained that appellant "desperately wants an approval and wants to be seen as more than the average person. . . . [M]any people in that kind of serious mental illness,

they are very ambivalent about wanting to take help, needing the help, at times taking medication, at times going for treatment, and other times saving face by saying they're faking and so forth . . . ." (27RT 6034-6035.) The concept of ambivalence is "central to the issue of mental illness." (27RT 6036.) Shame and stigma are common in people with serious mental illness. "[S]aying `I'm healthy, I don't need this, I'm pretending, I'm doing it just for disability ...' is part of a face saving ambivalence" about accepting their condition and their need for treatment. (27RT 6037-6038.)

F. Dissolution

A few months before separating from appellant in June of 1996, Ann Helzer perceived that appellant felt that he "didn't get to live life like everybody else had. . . . [H]e started feeling the compounds of his upbringing and his religion, and he left basically saying that he wanted to go out and try everything ... that everyone else had tried, and that involved alcohol and smoking cigarettes, having a non-monogamous lifestyle." (29 RT 6613.) Their first child, Sierra, was one year old. Appellant became less dependable, but usually came over twice a week to from 6:00 to 9:00 to be with Sierra. (29RT 6614.)

In 1996, appellant renewed contact with Elaine Totten, who found

him "not good at following through with plans and ideas. He was always late. . . . Lots of ideas swirling around that he would talk about." He had a boat but no way to attach it to his car. He was still working for Dean Witter. (26RT 5949-5950.)

Ann and appellant conceived a second child, Savannah, who was born in 1998. After the birth, "his whole appearance and just being able to communicate with him got very difficult." He let his hair grow out. He had previously been neat, clean, and meticulous about his appearance. He didn't like to wear clothes unless they were ironed. He showered every day at least once sometimes twice. "And then after 1998, he seemed to not only wear his clothes really tattered, he looked like he picked them off the ground." He stopped wearing the bright colors he wore previously, and wore only black and gray. He often looked very dirty, like he hadn't showered for a week, when he came over to see her and his children. (29 RT 6612-6614.) He did not tell her that he had stopped working for Dean Witter until the following year, when he told her to go to the Social Security office to obtain monthly disability payments for their daughters. (27RT 6618-6619.)

Appellant called Kristina Kelly, whom he met in 1992, and said he had left his wife, and was drinking and using drugs. She met him for lunch

at his father's house. Appellant's mother, Carma Helzer, had moved out of the family home. Kelly moved in as a renter, and stayed for two years. Appellant lost weight, became very skinny, grew his hair long, looked tired, and was living a "fast lifestyle with his girlfriend." (26RT 5865.) He talked to Kelly about an escort service idea; she did not think it was a prostitution ring, though appellant said money would be made from sex. (26RT 5866.) Appellant said he had big plans, but gave no details. She heard that appellant been diagnosed mentally ill and was on medication, including the drug Haldol. She saw him use Ecstasy, marijuana and "speed." (26RT 5862-5863.) She went to two raves with him, used Ecstasy, met Keri and Dawn, and heard that appellant was upset when Keri was offered money for oral sex and did not take the money. (26RT 5867.)

Appellant wrote to his sister Heather about his decision to abandon his religion, leave his wife, smoke cigarettes and experiment with drugs before Heather returned from her mission in 1997. Yet when Heather saw that appellant was smoking, it shocked her "because "most people pick up that habit when they're immature teenagers. They don't start smoking when they're an adult." (29RT 6593.) Heather found it hard to listen to him talk. He was using all kinds of bad language. "He was really confrontational. . . . [H]e wanted to argue and fight with me about God and

the church." (29RT 6593-6594.) "He wanted me to see that my religion was false and that he knew greater truths." Heather became disillusioned with the way appellant and Justin were behaving, and with all the new age ideas that her parents had also embraced, and so moved to Alaska to finish college. (29RT 6954.)

In 1997, Juliet McCamy began working as a sales assistant at what was then Morgan Stanley Dean Witter, and found appellant very kind and chatty, and different from other brokers in a positive way. He liked client contact but not "wheeling and dealing." (26RT 5872-5873.) He associated with brokers who were "lower on the totem pole" and it would surprise her to learn that he actually started in 1992 or 1993. (26RT 5877-5878.) He sometimes avoided contact with clients, and admitted he hid under his desk in a darkened office because he didn't want to deal with them. "I don't think he liked maybe giving bad news." (26RT 5874.) He did not want to lie. Appellant was unusually honest. (26RT 5882.)

McCamy and appellant became friends quickly because he was very open. She thought he needed to see a therapist within the first two weeks of knowing him, and was glad when she heard he was seeing a psychiatrist. (26RT 5875-5877.) Their friendship grew into a dating relationship "maybe just six months into it." (26RT 5875.) He spent time

with her dad, son and friends. She noticed something unusual about his sleeping habits:

> He never slept. He didn't – he seemed always a little manic, go, go, go all the time. He always seemed like – there was something that was a little off and not sleeping was a constant thing. (26RT 5875.)

Their relationship turned back into a friendship before he left the firm, but they stayed friends and continued to do things together. He talked about his beliefs, "I thought it was very odd and it didn't make a lot of sense to me. He would talk about this stuff a lot. . . . [I]t just seemed like gibberish. It didn't make any sense to me. Just made him – he seemed very odd. His ideas just didn't make any sense to me at all." She could not recall exactly what those ideas were. One of the first times she met him he talked about someone he knew bending spoons with "their mind" and from that conversation on, "any time he brought up any of his beliefs, I just tuned him out. . . ." (26RT 5879.)

Elaine Totten recalled appellant being preoccupied with interpreting scripture in 1997. He showed her "in one of the books of the church how reincarnation could be supported using the L.d.S. scriptures, when the Ld.S. faith doesn't believe in reincarnation, but he was using their scriptures ... to say that they did. They . . . just didn't know it." (26RT 5956.) He

believed that Joseph Smith's prophecies were a true reflection of God's will, and that later prophets were misguided. (26RT 5957.) Totten saw another drastic change in appellant in December 1998. He had facial hair, smelled of cigarette smoke, and told her he had been clubbing and smoking marijuana. Like appellant's wife, Totten recalled appellant switching to dark clothing. "[H]is whole countenance was not radiant, ... he was not a bright shining person like he used to be." (26RT 5958.) He told her he had conversations with animals, giving as an example telling a fly that if it landed on his food, he would have to kill it, and hearing the fly say "I won't." (27RT 5958.)

Juliet McCamy saw appellant for the last time in February 2000, at her apartment, where he showed up at 3:00 am. "And that was Taylor." He was always going, never sleeping, and had no real sense of time. He looked different from the last time she saw him. He had long hair, pierced nipples, but was still manic. (26RT 5877.)

At some point, appellant's cousin, Charney Hoffman, heard from appellant that he was claiming to be mentally incapacitated and collecting disability. Appellant implied that he was not really disabled in asking Hoffman to promise not to tell anyone what he was doing. (26RT 5808-5809.) Hoffman ranted about how the welfare system was messed up.

Appellant said that he would fix the system by doing what he was doing. "It didn't make a lot of sense to me at the time. It seemed nutty." (26RT 5808-5809.)

G. Treatment at Kaiser by Psychologist Jeffrey Kaye, Ph.D.

From 1988 until April of 1999, Dr. Kaye was a staff psychologist at Kaiser. In 1998, he was assigned to an intensive outpatient psychiatric program ("IOP") set up to treat patients who had been diagnosed with major mental illnesses and were often psychotic. (27RT 6075-6076.) Another psychologist asked him to see appellant after appellant appeared to be in "bad shape" and a "perfect candidate for IOP" when seen at hospital intake.

On September 1, 1998, appellant arrived at the appointed time with his girlfriend. (27RT 6083.) Appellant had failed to come to an appointment the day before, so Dr. Kaye's first concern was to establish a connection. Appellant appeared upset, scared and unable to function at his job or understand what was happening to him mentally and emotionally. He wanted his girlfriend to stay in the room that day, but he did not ask that she be allowed in the room on subsequent visits. (26RT 6086.) "It was quite clear to me that he was in some kind of a manic phase by the pressured speech that he presented, by the lability . . . the difficulty he had

in modulating his emotions.... by the jerkiness of his movements, by his obvious distress and the concern of his girlfriend as well. (26RT 6087.)

On his "face sheet" appellant had endorsed so many issues as to suggest an exaggeration of symptoms or a cry for help or a sign of "incipient decompensation." He looked like the latter, and looked to be headed toward hospitalization, or so the witness thought just about every time he saw him. (27RT 6088.) He complained of difficulty functioning at work. He said he couldn't concentrate, and was becoming irritable and inappropriately angry. He was paranoid, and thought people were judging him. He thought people were able to look and see through him. He did not complain of hearing spirits talking to him or of having delusions or hallucinations "but those types of things began to come up as you were talking to him. Those were observations on my part, or constructions, hypotheses. " (27RT 6090.) He was emotionally labile and "all over the map. On the verge of tears, kinda angry the next moment." (27RT 6091.)

Dr. Kaye prepared a "Patients Progress Report" noting appellant's "religiosity," a term Kaye used if a patient brings up religious themes in a perserverative or paranoid way, or persistently says he has had personal contact with God. (27RT 6092.)

Dr. Kaye's diagnosis was bipolar disorder, type one, which means

that most recent episode was manic with psychotic features. Appellant told him he recently used marijuana and Ecstasy. (27RT 6093.) Kaye set up a treatment plan under which appellant would come to treatment in the morning and afternoon three days a week and meet with a psychiatrist for medication evaluation. Appellant saw a number of different psychiatrists there. Monitoring use of medications is a big part of what the IOP was supposed to do. (27RT 6095.)

Dr. Kaye spoke to appellant by phone on September 10, 1998 because he wasn't coming to the clinic or following up on the treatment plan after their first meeting. Appellant was feeling paranoid, and thought lithium would "lobotomize" him. Dr. Kaye tried to entice appellant to come back and take his medications. He spoke with appellant's girlfriend and tried to encourage her to get resources for herself. (27RT 6096.) He spoke with appellant next on September 30. Appellant came in on October 1 for a treatment planning meeting. They talked about medications and the need to monitor the laboratory work to set the dosage within the narrow band where it is helpful. (27RT 6097.) Appellant talked about conversing w spirits, but Dr. Kaye didn't push it because his main purpose was to foster medication compliance. (27RT 6098.)

On November 20, 1998, and appellant expressed paranoia about Dr.

Kaye in relation to the forms that the doctor signed to get "disability" and take time off from work. Appellant had state disability insurance and a special type of insurance through work that would help him pay his credit card debt while he was on disability. One or the other denied him benefits. Appellant was upset and believed that Dr. Kaye "was implicated" in trying to keep him from getting disability benefits. (27RT 6101.) Dr. Kaye noted "ongoing delusional material" and continued mood swings. He recommended that appellant voluntarily hospitalize himself at Kaiser's expense. Dr. Kaye thought that there was a good chance the hospital would declare appellant "5150" and hold him involuntarily for 72 hours if appellant did so, and allowed treatment to begin. (29RT 6102-6103.) Dr. Kaye did not personally initiate legal proceedings to hold patients involuntarily. He would have to call the police to do it, and they would drag appellant away, and appellant would never trust him again. Also, appellant did not fit the criteria, he was not imminently suicidal or homicidally threatening nor grossly disabled, i.e., he could cross a street and was not completely out of it at that time. However, a 5150 hold was placed on him later. (29RT 6103-6104.)

On December 10, 1998, appellant gave Dr. Kaye "more concerns" than he had on other days." He had stopped taking his medications "and

was doing worse as a result." When he had lithium levels within the right band, his mood had "ever so slightly seemed to improve." He had seemed more composed during that brief period. But after he stopped taking his medication, he seemed "very grandiose." His mood was "mixed" in clinical terms which means " manic and irritable and depressed and more ... jumbled up...". He said Keri threatened to leave him if he didn't take his medications, and so he was going to try to do that. He didn't stay compliant long enough to be sure that lithium improved his presentation, but it seemed to have been helping him previously. (27RT 6104-6105.) Appellant told Dr. Kaye he gave a stranger a ride, then lent him his car, and the stranger stole the car from him. He now had no car and was quite upset and but too afraid to call police at that time. (27RT 6106-6107.)

Appellant came in to see Dr. Kaye on December 22, 1998, in a "full-fledged panic attack." That means his heart was beating fast, he was hyperventilating, and his arms may have been tingling and his chest felt constricted. A panic attack feels like a heart attack, and causes the person to feels intense fear. Appellant had just come from a doctors appointment where he had been diagnosed with genital warts, and the diagnosis was overwhelming to him. "It was representative of an individual who had poor ego functioning, the ability to tolerate and deal with the stresses of life."

(27RT 6107-6108.)

On January 5, 1999, appellant came in dressed bizarrely, wearing a poncho and sunglasses, and looked like a strange cartoon character. Previously, he was poorly dressed and unkempt, but never to the level of a street person. He appeared depressed and suspicious, but less labile, and said he was more relaxed. He agreed to try hospitalization after he saw his kids. "This became one of a number of procrastinations about the hospitalization issue." (27RT 6109-6110.)

On January 13, appellant appeared slightly calmer but "still fairly agitated." He volunteered (which was not usual for him) that he'd been walking in the street when a voice told him to approach and talk to a man he saw on a motorcycle, that some great money might come of it. Nothing came of it. He had previously declined to talk about what the voices he heard were telling him. He began to talk about his internal life, about God having had great plans for him, what the very high spirits told him about the universe, how they ran the universe. When asked what was planned for him, he said something big, like being president. (27RT 6110-6111.)

As to his fear of Dr. Kaye undermining his disability benefits, appellant said the voices told him not to use illegal drugs and go back on the legal ones. Appellant's use of illegal drugs was a problem. He once

came to a session in October 1999 "looking really dragged out and quite oversedated." (27RT 6112.) He said he had used "crank" the night before and was in the crash period of using. He also used marijuana and Ecstasy while in treatment. (27RT 6113-6114.)

Dr. Kaye was not involved in the decision to place a 5150 hold on appellant. He was sent to Mt. Diablo Hospital because Kaiser did not have an impatient unit in the area. He saw another doctor there. The IOP was sent the discharge summary in February 1999. Dr. Kaye received a call from Keri on February 23, 1999, saying appellant had stopped taking his psychiatric medication because he believed it conflicted with his genital wart medications. Dr. Kaye did not see appellant again until March 9, 1999, although appellant was supposed to come in four days before then. (27RT 6114-6115.)

On March 9, 1999, appellant appeared pressured and agitated, with more depressive type symptoms. He spoke of spirits and voices and said he was committed to compliance with his medication orders. He looked like the hospital experience had some impact. He sometimes seemed to be "holding back tears and starting to feel like he's going to blubber and catch himself." It seemed a genuine response to something within himself. (27RT 6115-6116.) Appellant was never histrionic in presenting his

symptoms. On March 24, appellant complained of erectile problems and asked for Viagra and received a prescription from the head of the psychiatrist in the clinic, Dr. Levy, who said "Yeah, bring him in." He said there were no drug interactions. (27RT 6117-6118.)

On April 4, 1999, appellant "presented probably as good as he ever did with me." He said for the first time that it was possible that he may not be a prophet but have only felt the spirit of one, and he now felt "an absence of that kind of inner rage or homicidal thoughts, which, by the way, he had from time to time." He had previously said he had such feelings about people on the street or people who cut him off in traffic. He said he had gone for a little while without those feelings and was a little bit more comfortable in public. (27RT 6118-6119.) As to being a prophet, Dr. Kaye had heard from Keri that appellant thought he was a prophet, and appellant probably said so before she did, since her statement did not seem strange. Appellant certainly said he had a special mission from the spirits, bringing peace to the world, and something big, like being president. (27RT 6121.)

Dr. Kaye acknowledged that he did not know what it means to be a prophet in the Mormon religion. He knew appellant was Mormon, but did not think there was a religion in which a person who believes he is specially

ordained as a prophet to bring about a mission on this planet would not appear to be suffering from a religious delusion. (27RT 6120-6121.) Thinking you are a prophet "is generally believed to mean you have a delusion. It's a psychotic thought that you have a special relationship with God to such a degree that you are his agent in the world ...". When he said he might not be a prophet and have the spirit in him, that sounded "less psychotic." (27RT 6119-6120.)

Due to Dr. Kaye's decision to cease working at the clinic, his last meeting with appellant was on April 23, 1999. Appellant knew Dr. Kaye was leaving the clinic. Dr. Kaye was having difficulty with several patients who knew he was leaving. (27RT 6121.) Appellant arrived very late and said, "See, I want to show you I can – I can be good,' in essence." He looked like he was a stockbroker again, dressed causally but neatly in nicely pressed pants, and a nice Hawaiian shirt. His hair was nicely cut. He was well-groomed and clean shaven and kind of snappy. (27RT 6122.) "[B]ut his presentation was still one of someone who's nervous, overanxious ... kind of labile still, and ... definitely trying to impress me. And he told me a strange story about how he had ... been sleepwalking in the night, or so his girlfriend had told him, and saying, `No, no,' or saving himself. I'm not even clear looking at my notes what – what he meant. ¶ But he also said

something that was important to me at the time, something I had worked on. . . . [H]e had come to recognize that his bizarre appearance and behaviors might, in fact, affect other people, and that they would be frightened of him or they would act towards him in a way that was odd, which he might interpret as somehow a judgment on him or bad about him." (27RT 6122-6123.)

Dr. Kaye thought this insight might enable him to feel better about going into therapy groups and tolerate them. Keri seemed to be providing emotional support. Dr. Kaye spoke with Justin, trying to help appellant's support group be supportive. He referred Keri to a therapist. Her concerns as expressed to him seemed to be authentic. (27RT 6124-6125.) She called and expressed concern that appellant wasn't showing up for treatment. She seemed "way in over her head" with someone who was very ill, more ill than she recognized. Dr. Kaye talked to Keri and Justin about the how risky it was for appellant to take illegal drugs. Keri seemed scared for appellant in October of 1998, when she called to say that appellant had left for the mountains to "be part of a program called Amanae." (27RT 6126-6127.)

At some point or points appellant complained that the prescribed medications were causing constipation and nausea, a common side effect.

(27RT 6125-6126.) In the Fall of 1998 he was given Haldol, a well known anti-psychotic drug, lithium, and Klonopin, a benzodiazepine. Zyprexa was soon substituted for Haldol. (27RT 6129.) He was also given Neurontin, an anticonvulsant for people who have epilepsy and brain seizures which also calms mania and is given to patients who can't use lithium. No psychiatric medication works for everybody. (27RT 6130.) "[T]he manic patients were always the hardest, as well as the floridly schizophrenic, floridly psychotic . . . . hardest to adhere to a treatment program." (27RT 6126-6127.)

Clinicians do not usually look for malingering, but they did at Kaiser. Kaiser wanted to limit the amount of treatment for financial purposes of their own. The expectation that patients are often exaggerating to stay on disability or get time off work was part of the culture. (27RT 6130- 6131.)

Getting disability payments was a major concern for appellant, but he did not follow Dr. Kaye's directions as to how to get them. (27RT 6131-6132.) Appellant didn't consistently do anything that Dr. Kaye recommended. He often expressed worry that the doctors were not going to help him with his disability, when in fact, the doctors had no problem signing disability claims for him. But appellant was so disorganized and

unable to follow through that he didn't fill out the forms he was supposed to fill out and return them by the day specified. "[H]e just didn't have it together. ¶ So, sometimes I would help him fill it out in my office, as I did. ...[T]his was not surprising, I did this almost every day I worked in IOP for someone or another.... That's the kind of people I was seeing ...." (27RT 6132.) A person who wants to get disability benefits must comply with a regimen of treatment. Appellant did not comply, and that resulted in him losing his benefits. That may include taking medications, depending on "the clinician who's signing him off on it." (27RT 6133.) If someone is malingering to get disability benefits, "its unusual and almost incomprehensible from a logical point of view to then cavalierly or presumably cavalierly, if they're not psychotic or disorganized, not follow through with the plan." (27RT 6134.)

When appellant was off his medications, he would get worse, even to the point of "decompensation." That means "you really have lost the ability to function such that you wind up in the hospital." Dr. Kaye has suspected some people were exaggerating symptoms in IOP, but "if you read the literature on it, you will see that even – unless you have absolute proof, it's very difficult to say . . . with complete certainty that someone is malingering." (27RT 6134.) Appellant's manifestation with him was not

stereotypical or florid. According to literature and the clinicians he has talked to, malingerers come in with "florid' i.e., obvious and blatant symptoms, and they want you to know about those symptoms such as hallucinations or delusions. They will be dramatic and typically consistent. Either mute, or curled up in a ball. (27RT 6135.)

Appellant presented symptoms in the spectrum of mood disorders, but not in a stereotyped or classic way. Appellant was consistent in the content of his religious delusions, but he was not consistent in how straightforward he was with his clinicians, nor consistent in his mood presentation. Nor was he showing mania one day and major depression the next. No textbook would show a presentation like appellant's. (27RT 6136.) Also, malingering manic behavior is considered extremely difficult because of the tremendous amount of energy it would take to keep up a presentation over time. (27RT 6137.)

On cross examination, Dr. Kaye again acknowledged that he lacked familiarity with the Mormon church's use of the term prophet to describe a multitude of people who have a special communication with God. He conceded that the patient's cultural and religious traditions were relevant when assessing ideas that appear delusional. (27RT 6139-6140.) Also, appellant was doing a better job in organizing himself to get disability

payments by the end of his treatment in 1999, after Dr. Kaye worked with him on the forms. Very little organization was required, however, to keep his disability checks coming. All he had to do was open an envelope, check a box, put the form in an envelope, put a stamp on it and mail it. (27RT 6146.)

Dr. Kaye was not aware of appellant leading meetings in a parking lot outside the Mormon church and did not know much about appellant's talent for bringing people together. Appellant's presentation at the clinic indicated he was fearful of groups. When asked how he reconciles that with appellant's presentation at the clinic, Dr. Kaye noted the additional difficulty appellant faced in the clinic setting being as a result of being looked at and labeled mentally ill, and suggested that appellant was manic or "boosted" by drugs when he was behaving as the prosecutor described. (27RT 6152.) "[T]o be manic means to be expansive, to be grandiose,... the primary symptoms of mania are really grandiosity and denial. ¶ Grandiosity is what [appellant] was doing when he was the organizer and the prophet, I believe." In the clinic, he was experiencing the idea that he was not great, but crazy. "That's a horrible thought. It means what you believe is good . . . that is in line with God, that is helpful for humanity, is in fact a mental illness is . . . shattering to a person's identity, particularly a

person's identity who's very fragile." (27RT 6153.)

Appellant's final appearance in normal attire suggested to Dr. Kaye "a schism within the person and their identity" in a "very deeply ill person." (27RT 6155.) It also reminded him of the movie *The Ruling Class*, where Peter O'Toole thought he was Jesus Christ, and when convinced he was not, turned into Jack the Ripper, and looked completely different. "[P]eople who are psychotic are so split inside that they can present in many different ways." (27RT 6156.)

Dr. Kaye denied that he had assumed appellant was suffering delusions "because he's talking about a prophet" and explained, "that was only one thing. If that had been the only thing, I would have said, `Gee, I have to find out more what it means to be –' he could have discussed it with me. See, the problem is, he couldn't discuss it. He didn't want to." (27RT 6156.)

H. Post-Crime Evaluation by Douglas Tucker, M.D.

An expert on drug addiction as well as forensic psychiatry, Dr. Tucker saw appellant for the first time in 2004, after a colleague who had been working on the case became ill and there was a need for someone to fill in. He interviewed appellant for three hours to evaluate him

diagnostically and to complete a substance abuse history. He reviewed materials from Kaiser, Mt. Diablo, and the report of another forensic psychiatrist. He was "pretty convinced" that appellant had a mental illness before he talked to him, "but I was fairly certain during the interview, and I became as certain as a you get as a physician – we can say with reasonable medical certainty – by the time I reviewed my notes afterwards that he did have a mental disorder, yes." Specifically, appellant had an underlying psychotic disorder, which was schizoaffective disorder, bipolar type. (28RT 6172.) He also met diagnostic criteria for dependence on a number of substances, primarily smoked methamphetamine, but also ... hallucinogens, mescaline, LSD, psilocybin mushrooms, all of which he was abusing over a period of years. "Also GHB, gamma-hydroxybutyrate, it's called a club drug, and marijuana, he was smoking daily for years, and also alcohol, drinking daily up to a couple of bottles of wine a day." The most severe and the predominant problem was the smoked methamphetamine dependence. (28RT 6173.)

In the interview, appellant's nonverbal presentation, his manner of speech and organization, indicated a psychotic disorder. He became very pressured in his speech, particularly when discussing religious or philosophical issues. His voice became loud, and he became disorganized,

jumping from idea to idea. The technical term is tangentiality, going off on a tangent and not coming back to where he started. Appellant seemed very bright and very frustrated by this, and wanted to make certain that Dr Tucker could remind him where he started so that he could stay on focus, but "he was having great difficulty staying focused on the topic. "He's what's called affectively labile, which means his mood was very intense and would fluctuate and change rapidly depending on what we were talking about." (28RT 6174.)

Appellant described what Dr. Tucker believed were hallucinations or delusions of hearing God's voice coming from the vents in the detention facility. Appellant " was sure that this was God's voice for a number of years. Now he realizes when he's on meds, that goes away." (28RT 6175.)

Appellant appeared uncertain about what is true with regard to his offenses, and throughout his life. He has "very, very powerful beliefs that he is not ... actually a human being; that he is a manifestation of God's consciousness that is an illusion, and has the illusion of being an individual, but is actually a fragment of a larger whole, which has this illusion of individuality in order that it might distinguish good from evil and find ... its way toward God." (28RT 6175.)

Dr. Tucker weighed what he heard from appellant alongside his

analysis of the records he reviewed. "[C]onsistency going on over many years with various evaluators, including evaluators at times when there's no benefit from showing symptoms, ... is quite convincing ... that this is a genuine illness going on." (28RT 6176.)

The mental state called "mania" is defined in the diagnostic manual by a number of components, including "decreased need for sleep, increased physical activity, restlessness, agitation, increased involvement in activities that are pleasurable but risky and can get you in trouble that involve basically poor judgment .... excessive self-destructive behavior or inappropriate sexual or business ventures or things that you just can get carried away and lose in – lose yourself in." (28RT 6177.)

"[S]ubjective euphoria or intense irritability are symptoms of acute mania." So is disorganization of thought, where the thought process becomes jumbled and people go from idea to idea...there's 18 thoughts coming in at once, and they're a variety, and it's pressured speech." (28RT 6177.) Acute mania expression is very fast, very loud, and has a lot of affect; laughter, crying, anger all happening at once." (28RT 6178.) In the most severe level of mania, "you have psychotic features, which is what is present in this case, which is where the person is not only on a manic high ... euphoric, pressured speech, very enthusiastic, rambling with ideas, but

also is losing contact with reality ...". (28RT 6178.)

Grandiose delusions are the usual way in which severe acute mania manifests a loss of contact with reality. Such delusions have to do with a grandiose identity, often contact with God or being God ... that would phase into religious delusions.... In this case, there were religious and grandiose delusions. ¶ Hallucinations is the other part of psychotic features with mania. Hearing things that others don't hear, voices, are most common. "And in this case, it was the voice of God, which is consistent with his mood, [and] with his delusion...". (28RT 6178.) His disorder is called schizoaffective in that he has delusions, hallucinations or disordered thinking, even when he is not manic or depressed. (28RT 6179.)

Dr. Tucker believed that appellant had manifested all of the diagnostic criteria for manic episodes, beginning with inflated self esteem or grandiosity. The idea that you are god or the next prophet for the Mormon religion is a classic grandiose delusion of identity. (28RT 6181.) Now that he is on medication, he does not always believe this, and he is disturbed because it might mean that all of that he felt and believed and acted on was wrong ...". (28RT 6182.) Decreased need for sleep in the past was also evident in the records. (28RT 6182.)

Episodes of being more talkative than usual or pressure to keep

talking are also evident in records, and goes back at least as far as his Mormon missionary days, and he showed pressured speech and excessive talkativeness during the interview too, particularly in talking about religious ideas. "There's a lot of emotional incentive connected with these ideas ...." (28RT 6183-6184.) Flight of ideas, or racing thoughts, is the subjective equivalent of pressured speech. "They've got 18 thoughts coming in at one time, and they ... don't want to lose them either because they're all extremely important." (28RT 6185.)

Dr. Tucker also observed tangentiality, flight of ideas and distractibility in appellant. Distractability was evident in his comments on things in the environment during the interview. Tangentiality is a very severe type of disorganization of thought process, creating a conversation that goes nowhere. (28RT 6187-6188.)

Mania symptoms are very difficult to fake, particularly for more than a few minutes, because it takes a lot of energy. People rarely try to fake mania. "[T]here may be people who try to exaggerate their underlying symptoms and throw in a little suicidal or homicidal stuff or more voices or more something else, but the actual nonverbal body language of mania and distractability and emotional intensity and pressured speech, to keep that up for three house is close to impossible." (28RT 6189-6190.)

Also, appellant's presentation did not suggest he was faking mania. "[T]he consistency with which he presented this throughout the interview and also the consistency between my interview and the descriptions of previous interviews that he's had prior to any legal case were what was convincing to me that this was real." (28RT 6190.)

Among the drugs appellant used, the stimulants – methamphetamine and Ecstasy – were for him the most toxic, and were the drugs with which he was most heavily involved. (28RT 6191-6192.) His daily use of alcohol since 1996 and marijuana since 1998, were next in order of significance. He used hallucinogenic drugs, ketamine (a PCP relative) psilocybin mushrooms, mescaline and peyote, every two to four weeks interchangeably from 1996 until a few months before the offense. "He stopped using them because they were sort of feel-good drugs that distracted him from what he saw as his important goal, which was to carry out this project called Transform America." Methamphetamine helped him focus on that, and kept him awake and productive. (28RT 6192.)

In low doses methamphetamine produces euphoria, excitation and happiness. (28RT 6194.) An amphetamine "crash" is a phase in a binge. Binges of high dose use followed by withdrawal end in a phase where people sleep for 24 hours or more, eat ravenously, and feel terrible and

often suicidal. It replicates the oscillation between manic and depressive phases in bipolar disorder. (28RT 6198.) With greater use, the effects "get shot through with anxiety and agitation, and especially the sleep deprivation starts to get involved." (28RT 6194.) Users experience agitation, can't sit still, can't stop talking, become paranoid, believing people are trying to harm them, thinking that there is hidden meaning in things. "And depending on how long the binge goes, it can reach horrific proportions, which it actually did in this case . . .". (28RT 6194.)

Smoking methamphetamine is one of the "high intensity routes." Swallowing or snorting will not bring full effect to the brain for 30 minutes, but smoking rushes the full effect of the drug to the brain within about five to seven seconds. The brain responds by releasing dopamine, which is the pleasure chemical, and norepinephrine, which is like adrenalin. (28RT 6195.)

The use of methamphetamine by people with mental illnesses like schizoaffective disorder was the focus of Dr. Tucker's research at the VA hospital. The psychotic patients they were treating "really liked these drugs, the stimulants. Crack cocaine or meth, which was a paradox because it made them so much worse." Their delusions and hallucinations got worse and they became paranoid. Paranoia is a very painful symptom. "Its very

hard to enjoy anything when you think somebody's about to kill you, and yet people would continue to use these drugs." (28RT 6195-6196.) Dr. Tucker concluded that the drug heightens the grandiose delusions and it may medicate the depression bipolar people experience. Schizophrenics finds these drugs transform the isolation and loneliness they experience "into something that has some rewarding properties." People with all kinds of mental disorders, but especially those with bipolar or schizoaffective disorders, "feel alive on these drugs." (28RT 6196-6197.) They use drugs and alcohol at much higher rates of abuse than in the general population. (28RT 6197.) Stimulants make the disorder "much much worse" and harder to treat. (28RT 6199.)

There is a controversy in the literature over whether people without illnesses who use methamphetamine for a long time develop mental illness as a result of the drug itself. Dr. Tucker's reading and experience suggests that long term use can make you "crazy" for life. Methamphetamine is a neurotoxin and damages the brain. Most people who don't have an underlying mental illness who use methamphetamine will emerge from the depression of the crash phase after a few days with craving or perhaps sleep disturbance and mood disturbance, but "they start to not be sure if things are moving or that's whispering they're hearing." (28RT 6200-6201.)

Appellant had "a very unusual history for a drug addict." Most addicts start using in their teens, but appellant was straight and a model Mormon until age 26. He was quite mentally ill at that point. Impact and Introspect had "a very toxic and negative effect on him. . . . [I]t further decreased his bearings with reality when he went through this. The whole idea of these programs is to disengage you from reality and get you thinking about various things." (28RT 6202.) At age 26, after Introspect, he realized that "he had been duped by religion, ... these absolutes, thou shall not do this, thou shall not do that, that that was all bull, and he should just perceive without fear is how he puts it, and not have, you know, perception plus belief, which is then religion or, you know, conviction." (28RT 6202-6203.)

Dr. Tucker recalled learning of appellant going to church alone and telling God he still believed and was committed to God but the church was all false teachings. Appellant had his first alcohol within a week and loved it, which confirmed his suspicions that the rules he had been taught were wrong, He became dependent on alcohol quickly, and drank a lot on a daily basis, beginning in 1996. (28RT 6203-6204.)

Appellant soon began using marijuana, which he got from his wife's brother. He became a daily user of marijuana in 1998, after experimenting

with various hallucinogens. He started using methamphetamine in 1998 with a few weeks of meeting Keri. He began using methamphetamine once or twice a month, usually smoking it, and gradually moved to weekly use by early 2000. He became a daily user, and used it multiple times daily in the months just before the crimes. (28RT 6205.) The half life of methamphetamine in the body is 10 hours. People get psychotic more quickly and severely on methamphetamine than on crack cocaine. (28RT 6207.) Smoking meth, as appellant did, gave him maximal addictive and destabilizing effect. (28RT 6208.)

Dr. Tucker said his diagnosis of appellant relied on a report prepared by another psychiatrist, Dr. Chamberlain, who had spent many more hours with appellant, and reviewed more documents, than Dr. Tucker did. (28RT 6209.) Dr. Tucker recalled "good evidence that as early as 14 [appellant] was getting messages from God, which were distinct from . . . the messages [he] would be used to getting. So they were seen as unusual and inappropriate, not clearly voices per se, that he was hearing through his ears, but these were communications from God." (28RT 6209.)

Dr. Tucker concluded that appellant was psychotic when he was 20-22 years old and working in Brazil. "Wonderful missionary, great zeal and fervor. The problem us he's not preaching our religion." Appellant had

grandiose and religious delusions back then, well before any drug use. (28RT 6209.) Delusions continued and intensified after methamphetamine "came on board" but was clearly present prior to that. (28RT 6209-6210.)

Dr. Tucker also specifically concluded that appellant was not presenting false symptoms or malingering at present. Malingerers thrust forward their symptoms, whereas people with mental illness hide them. (28RT 6211.) Appellant presented as "a clean-cut and friendly guy who ... makes eye contact and is struggling to ... be helpful and be honest with you and tell you things. Appellant didn't like talking about hearing noises in the vents and his reasons for being uncertain whether they were voices from God. (28RT 6212.) Malingerers do not usually acknowledge the possibility that the voices are not symptoms of illness. They are often surly and non-cooperative in a variety of ways. (28RT 6213.) They "keep their symptoms in front of you all the time so that you can't miss the fact that they're crazy. Taylor didn't do that." (28RT 6214.)

Dr. Tucker acknowledged that "it is best" to consult a representative of any religious subculture to which the patient belongs to see if any strange beliefs are consistent with those of the religion. (28RT 6215.)

Also, expressions of remorse for the crime are not determinative of whether someone is malingering. But appellant's expressions of remorse

"struck" Dr. Tucker as "real remorse. " (28RT 6216.) "He feels bad that people died in this, but it was tempered by the fact that he's just not sure ... if he was doing God's will, and he told me he was checking with God throughout, and he wanted God to kill him if he was not doing the right thing and if he was not understanding, ... and [if] these were real communications from God, then he may have just failed in what he was supposed to do. ¶ And at the time the ... calculus of it where some people die so that millions of people can be saved and freed from sexual slavery and — and all sorts of other horrific sufferings that he was thinking he was saving people from, ... maybe he had the right idea and just did it wrong." (28RT 6216-6217.)

Dr. Tucker concluded that appellant is "a guy who wants to do right" and "he's all confused about what right is, and his intensely religious upbringing . . . interacted with his mental illness in a negative way, but ... he doesn't have an antisocial orientation. ¶ His orientation is to helping people, to being Godly, to doing what's good, the most good for the most people. . . . He's not in full contact with reality still . . .". (28RT 6217-6218.)

On cross examination, Dr. Tucker acknowledged that claiming special knowledge of the tenets of a religion does not mean a person is

"mentally ill." Also, he acknowledged that he was not aware of all the testimony given at trial, and cursorily reviewed a stack of witness interview reports and a sheaf of documents from the previously-retained drug abuse expert. He was not sure if appellant thought he was faking mental illness when he said he had done so. He particularly read interviews of caregivers and mental health caregivers, in 1995 and 1998. (28RT 6119- 6223.) Asked what he knew about Exhibits "1A1 and 3A1," (photographs of the Saddlewood home and Bishop's residence), Dr. Tucker said he knew only what he was told in the last ten minutes by the attorneys who retained him after the prosecutor "put them up on the break". (28RT 6224.) He acknowledged that he did not know how many of the people whose statements provided the symptom history in the report of Dr. Chamberlain considered appellant mentally ill, but pointed up those accounts of appellant's behavior that indicated mental illness without using those words. (28RT 6225-6245.)

Dr. Tucker also conceded the existence of a "substantial body of information out there about this case and the history of the defendant" that is not included in the records he reviewed. (28RT 6245.) Also, Dr. Tucker relied on Dr. Chamberlain's report of appellant's own statements for the conclusion that appellant started receiving "inaudible messages before he

was 14" and therefore had "premonitor [sic], low grade, early onset of symptoms" at that time, (28RT 6250.) He also relied on the same sources in concluding that appellant attempted suicide between the age of 14 and 16. (28RT 6250.) He again acknowledged that it is important to understand what Mormons believe about receiving revelation from God. (28RT 6254.) He could not recall any descriptions of behavior suggesting depression outside the Kaiser records, nor any evidence of appellant binging and crashing on alcohol or methamphetamine. (28RT 6256.)

Asked to explain his notes of appellant's statements during the interview, Dr. Tucker said appellant's use of the terms good and evil do not mean that appellant understood the difference between good and evil. They reflect "a confused and intellectualized wrestling" with good and evil which he distinguishes from right and wrong and religious and society's law. (28RT 6257.) Appellant said right and wrong are "situational or illusions but good and evil are deeper eternal truths." (28RT 6258.) He said the spirit told him to stop smoking methamphetamine and go to church and pray more and read scripture and that "I was only partially following the voice of the lord." (28RT 6259.) He said "I regret what I did." (28RT 6259.) He took pains to say "I'm not blaming the drugs," but he was confused. (28RT 6260.) He thought a few people dying so that millions more could live and

be saved was his "calculus." It made sense to him at the time. "He now sees that's wrong because that's against Christ" but his mission was "the betterment of humanity, "and that is beautiful and right and good." (28RT 6260-6261.) He also said, "I'm guilty as charged" and other things like that with a "lot of emotional intensity." (28RT 6261-6262.) Dr. Tucker quoted his notes:

> "'I could end starvation, war, sexual slavery and suffering. The only reason not to act on Transform America ... was because of selfish purposes like avoiding jail, being a hypocrite, just enjoying the paradise of my life instead of effecting worldwide change,' which he felt he could do. 'I was smoking too much methamphetamine.'" (28RT 6262.)

I. Post-Crime Evaluation by John Chamberlain M.D.

Dr. Chamberlain was a practicing board-certified psychiatrist since 1998, an instructor in forensic psychiatry, and a department head at the University of California at San Francisco. Previously, he had evaluated people being considered for parole, or sent to San Quentin for 90-day diagnostic evaluations, or for possible commitment to a mental hospital after prison. (28RT 6267-6276.) He had also performed competency and sanity evaluations in state and fed courts, and made presentations to police officers and staff at correctional institutions. He had testified in two competency evaluations and one proceeding on restoration of competency

in state court, and was appointed in two for federal court cases when the court wanted to know whether a person had a psychiatric diagnosis and how it affected behavior. (28RT 6277-6278.) Dr. Chamberlain saw appellant seven times between February and September 2004, typically for two to three hour interviews. (28RT 6280.)

Dr. Chamberlain concluded that appellant suffered from schizoaffective disorder, methamphetamine and cannabis dependence, and alcohol abuse. Schizoaffective disorder is schizophrenia with a mood disorder. Appellant had the bipolar type, a condition in which people cycle from depression to its opposite, with "incredible amounts" of energy, and need one or two hours or no sleep for up to a week or more at a time. Sufferers talk fast. Their thoughts seem to be racing. They engage in reckless or impulsive behavior. Their mood changes are very intense. They spiral down into suicidal depression. If they also have hallucinations or delusions even when mood is stable, they are said to have schizoaffective disorder. (28RT 6281-6284.)

When patients say they hears voices, Dr. Chamberlain looks at whether they are distracted during the conversation or stare off into space as though hearing something. He also looks for observations from people who have seen the patient over long period of time, family history of

psychiatric conditions, and the results of tests "designed to pick up whether someone is faking or not or exaggerating symptoms." (28RT 6287.) A known family history of similar disorder makes schizoaffective disorder more probable, but the absence of a similar diagnosis in family members does not necessarily mean that the patient is the first in family to be ill, since people didn't always talk about mental illness as they do now. (28RT 6288.)

As to bipolar mania, appellant manifested significant grandiosity. In the interviews, he always claimed to be an incredibly intelligent person who had a divine mission and divine powers, who was wrestling with whether he was divine or becoming so. He compared himself to God, Jesus and says things such that they were brethren on the same path. At times he said that he had evolved beyond human into some sort of spiritual being above where "homosapiens, the rest of us, were . . . evolutionarily". (28RT 6295.) Appellant told Dr. Chamberlain that it was difficult to talk to him because he obviously did not understand what appellant was trying to communicate. Appellant was irritated when asked to explain or repeat things that were "a little bit convoluted." (28RT 6295.) Dr. Chamberlain contrasted his observations with accounts of appellant as a humble, cheerful youth, but could not determine when the change began. He concluded that the change

emerged when appellant was in Brazil in 1990, based on reports from other missionaries who found him somewhat difficult to be around and demeaning to the leaders of church who disagreed with him. Later reports of his stated belief that he was a prophet, and that his mission was separate and more important than missions generally, is consistent with grandiosity, as are descriptions of him becoming aggressive with his roommates about making rules and saying that they could not have rented the house they shared without him. (28RT 6296-6297.)

Grandiose people feel angry when other people don't recognize that they are special. It is an extreme version of what we all have. The anger grandiose people feel when their specialness is not perceived seems inexplicable to others. Entitlement and belief in his ability to do what he wanted (as expressed in 1995) is also consistent with grandiosity. (28RT 6297-6298.)

Little need for sleep is among the DSM criteria, and was noted in the journal appellant kept in Brazil. Specifically, appellant noted his reduced need for sleep (compared to colleagues), and that he was rising earlier and going to bed later than others, and writing in his journal at 3:00 or 4:00 am. Appellant noted that this inclination persisted after he stopped taking the medication that he initially suspected to be the cause. There were several

references to disturbed sleep problems during his mission. (28RT 6301.)

Evidence that people found him wanting to talk all night is also consistent with mania. People with mania have racing thoughts; their minds won't shut down. They talk a "mile a minute" and tend to be loud and hard to interrupt. (28RT 6302-6303) "[I]t's a nice objective thing. You can see it." It's hard to fake for a long time. A person without mania can talk very fast for awhile, but not for three hours without getting tired and running out of things to say. (28RT 6304.)

Appellant also showed distractibility, particularly in rooms where outside noise could be heard, which indicates that the symptom was not being malingered. (28RT 6307-6308.)

The pressured speech associated with mania includes both jumping around and perseveration. Appellant manifested pressured speech and racing thoughts in his interviews. To varying degrees, depending on the topic, his speech was very rapid and loud. It got more rapid and loud when he was talking about religious beliefs and spiritual experience. He got irritable when told to slow down. (28RT 6305- 6306.) It is very hard to malinger racing thoughts manifested in prolonged loud and pressured speech . (28RT 6310.)

Appellant's heightened pressure of speech in discussing religion, and

disinterest in talking about anything else, is perseveration consistent with mania. It is also seen in schizoaffective disorder, where the focus is on a fixed belief. (2RT 6312-6314.)

The increase in goal directed activity associated with mania makes people productive and feel good about themselves. "[A] lot of people like to be manic or at least have some symptoms of mania ...". (28RT 6314.) People with mania will start project number two etc., without finishing the first project, or anything else. It is hard to fake. (28RT 6315.) Appellant showed this symptom, even in the interviews, in writing out quotes from scripture and finding portions to show the doctor and presenting them in a pressured way, trying to prove that his thoughts on religion were correct. (28iRT 6318-6320.)

The final criteria for mania, progressively excessive involvement in pleasurable activities that have a high potential for painful consequences, is evident in reports appellant gave of his sexual encounters and all the pleasures of life without regard to consequences. It includes drug use and the hypersexuality he presented to Kaiser in 1995, when he said he wanted sex multiple times a day then, and more sexual outlets to satisfy his needs. (28RT 6316-6318.)

Appellant scored 108 on an IQ test Dr. Chamberlain gave him,

indicating he is nearer to the high end of the average range of intelligence. He also took a test called TOMM designed to test for malingering of symptoms. It is presented as a memory test. His results were not consistent with a person who was trying to fake problems with the test. (28RT 6322.) He appeared truthful in interviews, and his symptoms were consistent with those recorded in the past, an important factor in assessing whether a patient is truly ill. Mental illness is "like diabetes. It's always there. Sometimes it can be more out of control or evident than at other times." (28RT 6323-6324.) Over time, the symptoms tend to get worse, and the person's ability to function goes down. (28RT 6325.)

Schizoaffective disorder is diagnosed if the bipolar patient has psychotic symptoms – hallucinations or delusions – even when there are no mood symptoms. (28RT 6326.) A delusion is a fixed belief that other people in your culture do not share. People "who have delusions get very perseverative on them, they focus on them and they become . . . incredibly sort of narrow – sort of tunnel vision. . . They're just fixated on that belief . . .". (28RT 6314.)

Dr. Chamberlain detected a delusion that appellant is no longer part of the human race, that he had evolved into something more, and had divine powers, and could telepathically communicate with other people and

animals. Appellant also had a grandiose delusion about his own superior understanding and wisdom, tied to his religiosity. Appellant also manifested a delusion that people, other than jail staff, were trying to spy on him and listening to his conversations in ways different from those to be expected in the setting. (28RT 6326-6327.)

Appellant also manifested delusions of reference when he was taking the IQ test and expressing suspicion that the pictures he was being shown and words he was asked to define were intended to provoke a response related to his case or his condition. Appellant became suspicious of the meaning behind a third to a half of the words used in the questions, seeing a grand meaning in terms of his life or purpose. (28RT 6329.) And Dr. Chamberlain thought appellant's journal entry about God wanting him to speak about his mission to passengers on a bus indicated he perceived a special message coming from God. (28RT 6330.) Likewise, Dr. Chamberlain thought it was delusional for appellant to infer, in 1998, that he could communicate with a fly near his food, and that a pen found on the street was given to him by God because he needed a pen. "That's ... quite a leap I think for most of us." (28RT 6330-6331.)

Dr. Chamberlain acknowledged that "you have to understand the person's culture and frame of reference. If they come from a culture where

they're expected to get messages from divine beings or inspiration, you have to talk to another representative from that culture to see if the way the person is describing receiving messages from divine beings is consistent with the culture." (28RT 6332.) Dr. Chamberlain attributed appellant's episode of preaching on a bus in Brazil to a belief not shared with other Mormon church members because of the testimony of the mission president and of appellant's companion that what appellant was experiencing and the thoughts he was having in Brazil were not consistent with church doctrine, and that appellant became increasingly focused on those thoughts. (28RT 6336, 6340-6341.)

Dr. Chamberlain also looks at how consistently and insistently the patient expresses the odd belief, and how the patient responds to fake hints of what he might want to say. Dr. Chamberlain questioned appellant in ways to insure what he was hearing was the truth. (28RT 6333.) Appellant was consistent. He considered but rejected the suggestion that he was mentally ill because he had received so may true divine messages. That's not consistent with malingering. It is consistent with schizoaffective disorder. (28RT 6334.)

Dr. Chamberlain also noticed that appellant would link together verses from different books of scripture and try to make them read as one,

picking little bits and combining them in an idiosyncratic way. It was something a person with a delusional process will do, looking for any little bit of evidence to make their case. The case he was trying to make was that he was not crazy, that he was taking Judeo-Christian beliefs to a new level of understanding. (28RT 6343-6344.) Appellant pulled together quotes from scripture to make the case that God would command people to do things that seemed wrong at the time. (28RT 6347.) He used to argue that we have the glory that was designed for Christ. (28RT 6349.) Appellant became upset and argumentative at times if the doctor questioned how he tried to combine things, and seemed to be making a speech, arguing a point he thought was important. (28RT 6344.)

People with mental illnesses will on occasion exaggerate their mental illness. That does not mean that they are not mentally ill. (28RT 6349-6350.) Dr. Chamberlain's protocol for determining whether someone who says he hears voices is malingering or hallucinating is such that "many malingerers don't know the correct answer to those questions." (28RT 6350.) Appellant did not seem sophisticated in mental health, and the books that describe how real hallucinations are reported were not available to him. (28RT 6353.)

Dr. Chamberlain also looks at whether the person seems to be

responding to internal stimuli during the interview or talking normally. (28RT 6351.) Appellant "pretty consistently reported that he was hearing voices or receiving special messages." (28RT 6351.) "There were certainly times when he would sort of turn to hear things seemingly" that the doctor couldn't hear or see. (28RT 6351-6352.) Appellant said he heard multiple voices, part of the time. He thought he was receiving external input when a thought popped into his head, without voices. These are delusions of reference. (28RT 6352.)

In the beginning of the interview process, appellant was very polite and ingratiating. On the second visit he said he found the doctor perceptive and had enjoyed speaking with him. That changed after the doctor tried to focus on his history or why he was arrested. Appellant very rapidly became convinced that the doctor didn't want to hear what he had to say, and was not a nice person. He didn't know if he wanted to talk to the doctor, and became angry. He went quickly from laughter to irritability at times. He was often labile and unstable. (28RT 6356.)

According to the literature, people with mania and psychosis are drawn to stimulating drugs because people who use those drugs will have elevated energy and rapid speech and flow of ideas, and people with mania like to be around people who are able to keep up with them. (29RT 6372.)

Schizoaffective people have odd language patterns. "Tenses might not match or they might use complex words and not be sure of the meaning, associate words more based on sound than on meaning. Their speech is hard to follow. Ideas are convoluted and answers are long. These behaviors are very difficult to mimic in a sustained way. (29RT 6373.) "It's tough to string the words together, even though I know what it's supposed to sound like. I can't really mimic it." (29RT 6375.) Appellant manifested those patterns during the interview. (29RT 6375.)

People who have appellant's illness do not always appear crazy to the people around them. Sometimes the disease is less evident than at other times. Also, people using methamphetamine speak rapidly and have jumbled thoughts and hallucinations and paranoia and may not see the psychotic behavior of appellant as not normal. (29RT 6376.)

Real malingerers do not tell many people that they are faking. (29RT 6376.) The fact that appellant told people that he was faking illness suggests he was trying to appear normal after becoming aware that he had symptoms. (29RT 6377.)

Charisma is consistent with mania, which makes people energized and forceful. Although the language use of person with psychosis is odd, it often sounds very interesting and intriguing to people. (29RT 6378.)

People who have a high IQ or are high functioning generally can mask symptoms or explain them away better than others. (29RT 6379.)

To experts, people who have schizoaffective and other psychotic disorders appear to have impairment in the frontal lobes of the brain. (29RT 6380.) They see a big thing they want to accomplish and see where they are but they are not good at planning how to get there. "They often make mistakes ...." (29RT 6381.)

Appellant's "Brazil" plan seems "like an unrealistic plan . . . a lot of gaps in how one might accomplish that. Why would people be willing to enter the contract? How would he support the people...? Where do they stay?" The plan also has an element of self entitlement or grandiosity in assuming that women would be willing to interview for this position, and an an element of hypersexuality, consistent with schizoaffective disorders. (29RT 6382.)

The plan to hire people to commit shootings at a fast food chain to lower the price of its stock is also consistent with schizoaffective disorder. It shows a grandiose sense of ability to control something as large as a stock market in a bizarre way. (29RT 6383.) There were a lot of holes in the logic, and no indication of any thinking about who to hire, where to get money to pay them, etc. (29RT 6383-6384.)

Having someone wear a lime green suit and a cowboy hat and sit in a wheelchair when depositing a check is likewise consistent with schizoaffective disorder. There is the flamboyance associated with mania and the illogic of thinking that outfit would be inconspicuous. People with mania tend to dress in flashy, provocative ways and don't see it that way. (29RT 6384.) Suiting Dawn in lime green suggests very little insight into likely impact on others. (29RT 6385.)

The plan to start an orphanage in Brazil where orphans would be trained as killers, brought to Salt Lake, kidnap 15 church leaders, and get them to write letters saying the person who came up with this plan would be the next prophet of the church is "absolutely" consistent with schizoaffective disorder. (29RT 6385.) There is a delusional grandiosity in thinking that he will be able to convince other people to behave in an aberrant way, move people across countries and continents, make children into assassins, etc. (29RT 6386.) It also shows a tendency to think about the beginning and the end of the plan and not the necessary steps in the middle. (29RT 6386.)

The Children of Thunder plan is also consistent with schizoaffective disorder in the grandiosity of thinking he would change the whole world, finance the plan and not be caught, and convince huge numbers of people to

participate. Likewise, the religious delusion that this would manipulate the second coming of Christ is consistent with schizoaffective disorder, and not with Mormon doctrine. (29RT 6387-6388.)

On cross examination, Dr. Chamberlain agreed that the diagnostic manual provides "diagnostic features" for schizoaffective disorder, and states that the essential feature is an "uninterrupted period of illness during which at some time there is either a major depressive, manic or fixed episode concurrent with symptoms that meet criterion A for schizophrenia." Criterion A includes delusions and hallucinations. (29RT 6391.) Criterion B for diagnosing schizophrenia requires delusions or hallucinations for at least two weeks in the absence of prominent mood symptoms. (29RT 6392.) Also, mood symptoms must be present for a substantial portion of the total duration of the illness and not due the direct physiological affects of a substance or medical condition. Dr. Chamberlain added that people are diagnosed bipolar after they exhibit mania because no one can have mania without some periods of depression, but agreed that the "quality of manicness has to be due to something other than a controlled substance." (29RT 6392- 6393.)

Dr. Chamberlain acknowledged that he is not a Mormon, and had not consulted Brazil mission president Richard Knudsen or anyone else

knowledgeable in the tenets of the Mormon church before concluding that appellant was delusional when he departed from Mormon doctrine during his mission. He agreed that the Diagnostic Manual's directions require clinicians to consult people familiar with the patient's culture when assessing patients from cultural groups not their own. He explained that his reading of Knudsen's testimony and reported statements assessing appellant's behavior as abnormal obviated any need to consult with him or others about the tenets of the faith. (29RT 6395-6398.) He understood that Mormons are encouraged to believe they can receive messages from God through prayer. He explained that he did not base his diagnosis on any of appellant's statements in isolation, but only in the context of statements of other Mormons about appellant's beliefs. (29RT 6402.)

Dr. Chamberlain acknowledged that he did not request, receive or review any police-generated reports of interviews other than that of Dawn Godman. He agreed that most of the defense investigator's reports were from 2002 or 2003, and that many of the interviewees were friends or family of the defendant. (29RT 6404-6408.) He agreed that his report cited very little from the reported statements of appellant's parents, other than his mother's statement of having received a message that an evil spirit was causing her to have a headache, and she was able to command it away.

(29RT 6409-6410, 6419.)

He agreed that his report cited some of the statements appellant's brother Justin made to the doctors appointed in his case. (29RT 6421-6424.) Justin stated that he was 26 when appellant first approached him with a plan to transform America, and the doctor agreed that Justin was 26 in 1998. (29RT 6423.) The program would "help bad habits, seeing the truth themselves, stopping addiction and stop cheating." (29RT 6423-6424.) According to Justin, appellant started focusing attention on the means to raise capital for the plan in April or May 2000. Justin considered but ruled out the possibility that appellant's ideas resulted from drugs because appellant "had the experiences" on and off drugs. (29RT 6424.)

He agreed that his report did not include all of the things Justin reportedly said, including: "Taylor and I became spiritual warriors. We had to make a dent in what Satan was doing. Something had to be done. And we thought that Taylor might be one of the prophets. Taylor was channeling information. At first we didn't believe that. We wondered what's this." Nor did his report include Justin's statement that appellant didn't hear voices or anything like that. It was like thoughts would flow through him. "It was clear, concise, accurate. He was perceptive and he could read things off people. He could instantly. It worked." (29RT

6437.) Dr. Chamberlain explained that he tried to include what was most relevant, and that Justin's perception of whether appellant was channeling rather than hearing the information he conveyed was not as important as Justin's knowledge of whether the phenomena occurred when appellant was not using any drugs. (29RT 6437-6438.) He conceded he did not review Dr. Tucker's notes from his interview of appellant respecting his use of various hallucinogens. (29RT 6425-6426.)

He agreed that he had not seen any testimony that appellant was outgoing and talkative about scripture rather than humble when he was an adolescent attending Sunday School, and that such a statement would "seem counter" to his statement that appellant used to be humble. (29RT 6412-6414.) His opinion that appellant was humble as a teenager was based upon the statements of a first cousin who said that appellant was likeable, hard working, calm and patient in helping her around the house when he stayed with her for six weeks in 1988, appellant's statements of how hard he worked to follow the rules of his church, and how he felt when he failed to follow its prohibition of masturbation. (29RT 6515-6517.) He agreed that appellant displayed grandiosity as well as humility when he saw Dr. Foster in 1995. (29RT 6418.) He acknowledged that appellant has made a lot of grandiose statements about his impact on other people over a period

of several years, and that grandiosity was not as well confined to the summer of 2000 as his reported indicated he believed. (29RT 6427-6433, 6461, 6466-6468.)

Dr. Chamberlain did not rely upon or quote reports of statements made by people who testified at appellant's trial, including many made by Keri Furman, though he quoted her saying that she heard appellant express a lot of hair-brained ideas, most of which had not come to fruition. (29RT 6440-6447.) The doctor did not recall any accounts of appellant's behavior between 1990 and 1998 indicating that appellant had abandoned or changed his view on reincarnation, getting closer to God, or becoming a warrior preacher, or the disdain for church leadership that he expressed in 1990. (29RT 6450-6455, 6460.) However, he recalled evidence that appellant's views on what steps to take to get closer to God changed over that period and afterwards. (29RT 6465.)

The doctor agreed that mental health evaluators commonly believe that someone who thinks he is a prophet is delusional, and a lay person could conclude that saying such things will cause psychologists to see mental disorder. (29RT 6487.) He said he was not aware that appellant was practicing and asking others how to fake disability. Assuming that to be true, he would "absolutely be concerned about" the reliability of Dr.

Kaye's 1998 diagnosis with that information. (29RT 6488-6490.)

Dr. Chamberlain knew from the jail records that appellant had hoarded and sold his medications for cartons of milk, and that jail staff found his medications in a milk carton in his cell. (29RT 6490-6491.) His report notes a rope was found in appellant's cell and that appellant told jail staff he made it for suicide. He knew the rope was 40 feet long and made from sheets and shirts, but he did not mention the length in his report, nor question the jail clinician's concerns that appellant was suicidal or their acceptance of appellant's statement that he created it for suicide, though the length of the rope "raises concern about truth." (29RT 6494.)

Dr. Chamberlain agreed that a letter appellant wrote to Morgan Stanley while he was out on disability and a note found with the letter (Exhibit 96) were well-written and that his notebook writings make "grammatical and logical sense." (29RT 6494, 6503.) The doctor also conceded that it was not unreasonable for appellant to expect women in Brazil "to give fully of themselves for the opportunity" to live in this country, nor to expect the price of McDonald's stock to fall if he could arrange to have people shooting others at their restaurants. (29RT 6504-6506.). He agreed that having Godman use a wheelchair might take advantage of sensitive people's reluctance to look directly at a disabled

person for fear that he would think you were staring because he was disabled, and that the brim of a cowboy hat would obscure her face from cameras. (29RT 6507-6508.) He agreed that the idea of kidnaping leaders and perhaps killing them to effect political change is not new in the history of mankind, but said "it seems a little bit farfetched, over the top, this Brazil plan to enlist the assistance of orphans ... to turn them basically into kidnappers and assassins and use that training to latch onto the leadership of the [church] . . . It seems to be an outlandish plan in my opinion." (29RT 6512-6513.) The doctor agreed that Children of Thunder plan to "kill all of those people and feed their remains to canines to affect the ends that they were seeking . . . was over the top and unrealistic" yet "it did happen in this case". (29RT 6513.)

The doctor said he that he did not know if his report included various things appellant said about the execution of the capital crimes that the doctor recorded in his notes, but confirmed that appellant spoke as indicated in his notes, and that his demeanor was somber rather than tearful when recounting the killings. (29RT 6514-6519, 6521-6522.) He agreed that commission of violence, including removal of human organs, was important to consider when "assessing" a person's "psychological profile" yet he did not ask appellant why organs were removed. (29RT 6518-6519.)

He was aware that Godman said appellant cut the tattooed skin from Bishop's shoulder and fed it to Jake, and agreed that "it's a pretty dramatic action" and was not sure why he did not ask appellant about it. He agreed that appellant did not offer any explanation for that act. (29RT 6523-6524.)

On redirect, Dr. Chamberlain said he did not conclude that appellant was psychotic in 1990, but rather that his behavior in Brazil was "consistent with the prodromal symptoms" of schizoaffective disorder, i.e., the mild forms of a symptom that are seen in the gradual onset of mental illness, and fluctuate. (29RT 6546.) Grandiosity as a symptom varies in intensity over time. (29RT 6547.)

Appellant's journal of his missionary years has entries indicating appellant's humility. (29RT 6547.) On January 6, 1990, appellant wrote of realizing that his church is strict and God's laws are to be obeyed, and quoted scripture saying, "I give most men weaknesses that they might be humble. Man can rise above his weaknesses and obey with exactness. (29RT 6548.) On January 7, 1990, he wrote that he needed to "obey with exactness" to be fully in tune with the spirit and achieve a successful mission. (29RT 6548.) On February 13, 1990, he wrote "how humbling" it was to have counseled someone and to have felt himself to be an instrument in the hands of God. (29RT 6548-4965.) On the next page he

wrote, "There are two great lessons that I believe (I hope !) I have learned. I need to work hard on them both, but I have definitely learned and developed a testimony of the importance of them. Without them a missionary is either [illegible word] or mediocre. One is the importance of obedience with exactness and the other is the importance of humility. The power and spirit of God will be with the humble and obedient missionary. And the thing I want more than anything for the next two years is the spirit of God. For with the spirit of God all things are possible." (29RT 6549-6950.)

On March 3, 1990, appellant wrote, "I need to work on everything. Neither a single sin or measure of disobedience is excusable. I cannot longer disobey the slightest whispering of the spirit. I can no longer afford to disobey the slightest rule. I feel that I need to make a goal and then decide to do so, I need to follow through with that goal no matter what. I need to be totally submissive to my leaders. Not an ounce of complaint or counter suggestion should come to my life unless moved upon by the Holy Ghost." (29RT 6550.) On April 1, 1990, he wrote about an encounter with a rock and roll band on the plane to Brazil. Before he knew they were famous, he smiled at them, "and they were sort of dead. Didn't really make any type of response at all. ¶ I hope I always remember that it is not money,

fame or any amount of worldly things that make a person truly happy. I hope that my priorities are always straight, clear and in order." (29RT 6551.)

Dr. Chamberlain also saw in the journal indications of significant sleeping problems. On February 1, 1990, appellant wrote: "There are nights like last night that I just stay up and think about things. I can't help it. My mind just won't shut off. Most of the time I think about three things. Number one, the last days. Number two, the faith that it would take to do miracles. And three, my future family. But there are nights like last night where I just lay there and feel massive amounts of love for the people in general that I know. This has happened more often since I've been here any [sic] MTC and even more often lately. So much that I've wondered if I was just feeling euphoria from the pain pills I was taking for my wisdom teeth, but my companion says he hates the world when he's on that stuff, and it hasn't stopped now that stopped [sic] taking the pills. I have been feeling the fruits of the spirit so strong all night, love, joy peace, happiness, et cetera. The Savior yoke is easy and this burden is light." (29RT 6551-6552.) On March 8, 1990: "This morning I'm up before my other two companions." (29RT 6553-6554.)

Delusional disorders and schizoaffective disorder in particular do not

make people incapable of writing sustained and logical pieces or speaking coherently at all times. (29RT 6554-6555.) Methamphetamine is a stimulant and makes people extroverted. (29RT 6556.) In his experience he never has all the information he would like to have, but he is able to make a diagnosis anyway by analyzing the info he has and uses it "to arrive at what seems to be the most reasonable diagnosis." That is what he did in this case. (29RT 6556-6557.)

Dr. Chamberlain looked for symptoms that are difficult to fake, and for inconsistencies between the reported symptoms and the person's behavior, and the stability of the symptoms over time, and for symptoms shown at times when the person had no interest in faking. Lying, however, is not inconsistent with schizoaffective disorder. (29RT 6558.)

The testimony of Lina Richardson about appellant's rapid speech and continual speaking for hours at a time was significant to him. (29RT 6558-6559.) Her testimony also described him having periods of intense emotional outlet and his emotional state varies dramatically. (29RT 6559.) There was no apparent advantage in faking symptoms in her presence, and his claim to have faked mental illness with others tends to confirm that he was truly ill. (29RT 6559.)

The information included in his reports is the information "that

illustrates how I came to my conclusions." He will quote data that is inconsistent if it is relevant, and did not exclude anything from his report on appellant because it was inconsistent with his diagnosis. (29RT 6560.)

The doctor said he had seen about 1000 patients with illnesses similar to appellant's. It is possible that appellant fooled him, but he doesn't think it is probable. Appellant's symptoms, and his past diagnoses, including that of bipolar disorder, are consistent with him having schizoaffective disorder, to a reasonable degree of medical certainty. His opinion would not change even if he removed appellant's "religious fixation" from his consideration. (29RT 6561-6562.)

On re-cross, the doctor agreed that reports of appellant faking some or all of his symptoms are "not consistent" with schizoaffective disorder. (29RT 6564.) He again admitted that he had not done research on how excited missionaries who do not have a mental illness experience the power of the spirit. (29RT 6565-6566.) He agreed that someone who "does a really bad thing, could do it independent of any mental disability that they had." (29RT 6567.) He was aware that "intense emotional outlet" is part of the Impact and Harmony programs and admits it is "possible" that such an "outlet" is due to something other than mental illness. (29RT 6569.)

On further redirect examination, Dr. Chamberlain confirmed that

appellant's delusions were not all religious. Non-religious grandiose delusions of being a very special person were manifested in his plans for bringing large numbers of women into contractual relationships for sex with him. Believing he could communicate with insects is a delusion. Hearing them talking back would be an hallucination. The religious delusions that he was being guided and receiving messages from an outside entity, and that the millennial reign of Christ would be ushered in peacefully if he were successful, are all consistent with his delusions of grandeur. (29RT 6571-6573.)

On further cross examination, Dr. Chamberlain clarified that belief in the millennial reign of Christ, the virgin birth or any other tenet of one's religion, or that humans can have *nonverbal* communication with animals, would not suggest to him that the believer was delusional. (9RT 6575.)

J. Execution Impact Evidence

Appellant's former wife, Ann Helzer, testified about appellant's ongoing relationship with his daughters and his importance in their lives. She described the effect his death would have on their lives as "catastrophic." (29RT 6622.)

Appellant's sister Heather said she and her family felt awful about the crimes, and could not say how shocked and sorry the family felt in seeing the evidence that appellant's arrest was not a mistake. Still, she loved her brother and did not want him to die. (29RT 6603-6604.)

I. APPELLANT'S MOTION TO SUPPRESS ALL EVIDENCE OBTAINED FROM SEARCHES OF HIS HOME SHOULD HAVE BEEN GRANTED DUE TO THE SEARCHING OFFICERS' FLAGRANT DISREGARD FOR THE TERMS OF THE AUTHORIZING WARRANTS AND THE PROSECUTOR'S FAILURE TO SHOW THAT ALL OF THAT EVIDENCE WAS LEGALLY SEIZED

Introduction

Most of the evidence tying appellant to five capital murders was obtained by the forcible entry and search of appellant's home and vehicles on Saddlewood Court in Concord (Contra Costa County) under the color of search warrants M00-294 and M00-295, issued by a Marin County judge on August 7, 2000. The first was issued before the house was searched; the second was issued after the initial entry and search revealed the outline of a body on a wet carpet. Among the fruits of the Saddlewood searches was information leading police to the custodian of appellant's safe and probable cause for a warrant to search that safe.

Both of the Saddlewood warrants were supported by probable cause and were particularized on their face, yet were used as general warrants by officers who disregarded the particularization, both as to the victims and crimes for which evidence was being sought and as to the nature of the writings they were supposed to be seeking.

The reason or reasons that the particularization of the warrants was

ignored remain unclear. Steve Nash, the detective who obtained the warrants issued in Marin, also led the search team.

Detective Nash testified at the suppression hearing, but did not disclose what if anything he understood, or told the searching officers, about the limitations of their warrants as to the crime under investigation or the documents to be sought.

In asserting that he seized a variety of things "as indicia" pursuant to the warrants, his testimony assumed that his warrants authorized him to pursue whatever he considered indicia, without regard to how that term was defined in his warrants. He testified that he approved the immediate search of a document container and the seizures of all manner of writings that appeared to be potentially useful as investigative leads, telling the trial court how useful they were in proving that any person of interest occupied the home at some point. At no time did he explain why he sought warrants with a narrow definition of indicia of occupancy, knowing he would be applying a very broad and innovative definition of that term in executing those warrants.

Likewise, Nash asserted that the plain view doctrine authorized him to seek and collect evidence he deemed helpful in establishing that the occupants had kidnaped, extorted, murdered, and dismembered the corpses

of an elderly couple, the Stinemans, crimes nowhere mentioned in his warrants which were committed entirely in Contra Costa County. He testified that he learned early on the afternoon of the day he served the Marin warrants that the Saddlewood home held evidence of the crimes against the Stinemans. But he did not testify to any reason why he did not stop to seek a third warrant targeting evidence of crimes against the Stinemans, nor ask the Concord Police or Contra Costa County District Attorney to do so.

Concord Police and Contra Costa District Attorney's Office personnel ended up seeking such a warrant that night, using the fruits of searches conducted under the Marin warrants, in addition to other data collected by Concord Police. Detective Nash helped them obtain that warrant by providing testimony in an "oral affidavit" process, and continued to direct the search team after that third warrant for Saddlewood was issued, but he did not familiarize himself with the list of items to be sought and seized under that warrant, because he was not familiar with the Contra Costa District Attorney's warrant form and Concord Police personnel were on the scene.

After hearing that the mutilated corpses of the Stinemans and Ms. Bishop had emerged in the Delta, and that an organ had been removed from

one of the Stinemans, Nash seized or approved the seizure of all documents that indicated that any of the occupants practiced witchcraft or owned posters depicting dragons or wizards. He approved the seizure of a poster displaying a marijuana leaf that was stored in the garage because he considered it "lifestyle evidence" because marijuana is a gateway drug. He testified that these seizures were authorized by his warrants, but when asked to show the provision for same, he found none.

Around the fourth day of Nash's eight-day occupation of Saddlewood, the quantity of seized items filled a U-Haul truck. The returns and inventories filed by Nash a few weeks later ran 23 pages, even though the officers used blanket terms like "indicia" and "box of indicia" to record the seizure of unspecified pages of writings.

The prosecutor took the position that a search warrant that lists among its objects any form of "indicia" effectively authorizes police to search every nook and cranny where a writing might be found. Therefore, the burden was on the defense to prove that items not specified in any warrant were not seized lawfully under the plain view doctrine.

The trial court's ruling adopted the prosecutor's legal theory and applied it to the court's manifestly inaccurate recollection of the evidence presented at the hearing. Many pages of this brief are devoted to setting

out the facts in detail as well as the arguments made by counsel below. First, it is helpful to note the case law that supports appellant here.

First, an officer who conducts a search of a home without knowledge of the details of the warrant under which he presumes to act violates clearly established law. (*Guerra v. Sutton* (9th Cir. 1986) 783 F.2d 1371, 1375 ["Officers conducting a search should read the warrant *or otherwise become fully familiar with its contents*, and should carefully review the list of items which may be seized. [Citations.]" as quoted in *Marks v. Clarke* (9th Cir. 1997) 102 F.3d 1012, 1029-1030, emphasis in *Marks*.) "In order for a warrant's limitations to be effective, those conducting the search must have read or been adequately apprised of its terms." (*United States v. Heldt* (D.C. Cir. 1981) 668 F.2d 1238, 1261.)

Accordingly, this court's rejection of the claim of flagrant disregard of the terms of the warrant in *People v. Bradford* (1997) 15 Cal. 4th 1229, 1307, was premised on this court's finding that "the record does not demonstrate that the officers had not been briefed or prepared as to the objects of the search."

Second, disregard for the stated objects of a search warrant may be "standard procedure" and nevertheless require suppression of all evidence. (*United States v. Foster* (10th Cir. 1996) 100 F.3d 846, 850-852 [flagrant

disregard of terms of warrant established where officers followed their "standard procedure" for search warrant execution in gathering data from, and seizing, a much broader array of items than those identified in the warrant in order to determine if occupants were guilty of additional crimes]; *United States v. Rettig* (9th Cir. 1978) 589 F.2d 418, 422 [scope of search held to exceed terms of warrant when conducted for a purpose not disclosed to the magistrate].)

Nash's failure to seek magistrate approval before expanding the focus of the search to include financial crimes and extortion as well as the murder of three additional people (and mutilation of their bodies) confused the court below. After noting that the first Saddlewood warrant "did include indicia" the trial court erroneously found that the second Saddlewood warrant was sought and obtained to search for evidence linking the defendants to crimes against the Stinemans, and the third Saddewood warrant authorized searches for evidence of additional crimes. (3RT 716.)

Moreover, the number of pages and the content of all the written material seized, the nature and number of other items, and the aggregate bulk of the Saddlewood seizures were debated by counsel yet never clarified by the evidence. The lengthy inventories of seized evidence that Nash authenticated include entries that simply say "indicia" or "box of

indicia" or "basket of clothing." The trial court required the prosecutor to develop a list encompassing only the items he expected to use at trial, and refused to review the items that the prosecutor did not wish to use, even though the defense urged the court to do so for the purpose of determining whether searches were exploratory and the warrants treated as general warrants.

The trial court encouraged, but did not require, the prosecutor to prove that items on his list were identified in a warrant or that they were seized in compliance with all the elements of the plain view doctrine. The prosecutor submitted only his own abbreviated arguments (i.e., the initials SW for search- warrant-authorized, or PV for plain view, evidence going to "mens rea") on a revision of the list of items that the defense papers asserted were not identified in any warrant and had appeared on the list of items the prosecutor wished to use.

The defense adduced through cross examination some pertinent evidence of the thinking behind the seizure of the listed items, and asked the trial court to make findings as to which listed items were identified in a warrant, not identified in a warrant, or shown to have been seized in plain view, and to revisit the issue of the overbreadth of the warrants after making those findings. However, the trial court did not make the

requested findings, let alone revisit the question of whether the warrants were overbroad, as the defense requested.

For these and other reasons discussed below, "it is not possible for the [reviewing] court to identify after the fact the discrete items of evidence which would have been discovered had the agents kept their search within the bounds permitted by the warrant[s]". (*United States v. Rettig, supra*, 589 F.2d 418, 423.) It is also not possible to determine that the same evidence would have been "inevitably discovered" and seized by Contra Costa authorities on their own warrant. Consequently, all evidence from the Saddlewood search should be suppressed. (*Ibid.*) Appellant must be permitted to withdraw his guilty plea and proceed to trial on the remaining evidence. (*People v. Rios* (1976) 16 Cal. 3d 351 [guilty plea entered after erroneous denial of motion to suppress under Pen. Code, § 1538.5 not subject to harmless error analysis].)

A. Historical Facts

1. Issuance of Saddlewood Warrant #1

Marin County Sheriff Detective Steve Nash obtained warrant M00-294, the first Marin warrant for appellant's home on Saddlewood Court in Concord, California, shortly before 6:00 AM on August 7, 2000. (9SCT

1848.) His affidavit requested authorization to search Saddlewood for a 9mm semi-automatic handgun, 9mm copper-jacketed ammunition, expended 9mm cartridges, "light colored possibly off-white woman's tee shirt with small flowers, dark pants or jeans, and:

> 4. Receipts and documents related to 9mm handguns and ammunition,
>
> 7. Indicia of ownership, including but not limited to leasing documents, Department of Motor Vehicles documents indicating ownership of the vehicle, letters, credit card gas receipts, keys and warranties,
>
> 8. Indicia of occupancy or ownership; articles of personal property tending to establish the identity of persons in control of said premises, storage areas or containers where the above items are found consisting of rent receipts, cancelled checks, telephone records, utility company records, charge card receipts, cancelled mail, keys and warranties." (SCT 1847-1848, emphasis added)

The supporting affidavit used similar language to describe the indicia of occupancy to be sought, i.e., items "such as cancelled checks, telephone records, charge card records, cancelled mail, keys and warranties that will establish who has control of premises."

There was no mention of any intent or practice to seek retail store receipts, or any other papers, for the purpose of locating videotapes of the purchasers of unspecified items or for any form of investigative leads.

There was in fact no indication of interest in documents that would establish facts ownership of any item other than the specified weapon, house, and motor vehicle.

2. Serving Saddlewood Warrant #1

Nash served the first Saddlewood warrant on the morning of August 7, 2000, at 6:00 am. Nash entered behind a SWAT team that had effected the entry and detained the occupants. (2RT 615-616.)

Nash saw near the entry area two carpet dryers underneath carpets that appeared to have been cleaned. (2RT 625-626.) He saw stains consistent with biological evidence on the carpets. He decided he would seek a second warrant for Saddlewood, one authorizing him to seize everything with traces of blood and other biological evidence. (2RT 626.)

Between 6:00 and 6:33 AM, Marin Sheriff Detective Lellis seized from the kitchen counter a day planner which contained a glass smoking pipe inside a leather pouch. During the same interval, Nash found what appeared to be psilocybin mushrooms and a plastic bag containing less than one ounce of marjiuana in a suitcase in the livingroom. (7CT 2484.)

Detective Lellis also found in the day planner a GTE Wireless receipt in the name of Debra McClanahan with contact information for her,

numerous retail store receipts as well as a carpet cleaning receipt, an automobile insurance ID card, and a receipt for service on a Saturn automobile. The seizure of these items was logged on Detective Lellis "evidence property report." (9SCT 1866, SASSCT 42.)

Marin Sheriff Lieutenant Heying found and seized items from several locations. His inventory listed a receipt for purchase of a gun "and ammo #Ber 185983, found at the foot of the bed in bedroom #2, a set of black handcuffs with two keys, found on a closet shelf in the same room, an unopened box of duct tape, two bundles of nylon rope, plastic bag with assorted `ammo,' a Stevens model 311 Side by Side 12 gage shotgun #5100, a Browning 12 gage shotgun model 69 M #16896," all found in the closet of bedroom three. Also listed wss one videotape found in the VCR in room 7, and two leg cuffs and three handcuffs seized inside a plastic bag in on the passenger side floor of a Nissan truck. (9SCT 1867.)

After assigning his officers to search particular rooms, Nash left to obtain the second Saddlewood warrant from the Marin County Superior Court. (2RT 526, 608.)

3. Issuance of Saddlewood Warrant #2

Detective Nash's affidavit in support of the second warrant for

appellant's home states that "in the process of searching for the 9mm handgun ... your affiant observed in the family room hallway entry area the carpet pulled up at the seam with a large industrial sized dryer . . .". (9 SCT 1883.) The affidavit and warrant thus sought seizure of all items containing or likely to contain traces of blood and other biological evidence.

This second Saddlewood warrant affidavit also reported that appellant, his brother Justin, and Dawn Godman were inside the residence when police entered, and that appellant had jumped out a bedroom window, and once detained, admitted that Selina was his girlfriend, that he was sometimes known as "Jordan," and that he should have contacted police about Selina's disappearance when he returned from a Reggae concert the previous day. Advised that he was not under arrest but the police car in which he was being interviewed had to be moved, appellant jumped out a car window and fled, threatened a neighborhood woman and was arrested in the woman's home. (9SCT 1883-1884.)

Nash's affidavit requested authorization to seize all electronic data storage devices because "your affiant believes that if an individual was attempting to find a remote location to hide evidence that connects to the *death or disappearance of Selina Bishop,* 'MapQuest' or similar programs available over internet sites could assist in locating these remote locations."

(9SCT 1885, emphasis added.)

The affidavit disclosed that Detective Heying had found documentation for the purchase of a nine millimeter hand gun. (9SCT 1884) It requested authorization to seize a day planner, reporting that Nash was informed that Selina Bishop kept one and that it was not found at her home. (9 SCT 1885.) It did not disclose that Detective Lellis had opened a day planner in the kitchen wherein she located a glass smoking pipe in a leather pouch nor any of the items on the Lellis inventory for the first Marin warrant.

The second Marin warrant contained the same two clauses for indicia of occupancy, ownership, and control that were present in the first warrant (9SCT 1877-1878), and authorized seizure of three other categories of documents:

> 9. Items of Identification which might tend to establish the identity of persons who might have been within the premises to be searched;
>
> 10. Diaries, journals, lists, plans, photographs, audio cassettes, video cassettes, answering machines, communications, correspondence and other materials setting forth or expressing threats, anger or violence towards the victims;
>
> 11. Documentation or other material describing the operation of any computer, software, and /or computer peripherals found at the premises, including instructions on how to access disks, files or other stored items within same,

including but not limited to, computer manuals, printouts, passwords, filename lists, "readme" and/or "help" files. (9SCT 1876-1877.)

4. Action after Issuance of Saddlewood Warrant #2

Nash obtained the second Saddlewood warrant at about 1:00 pm on the afternoon of August 7. (9SCT 1878; 2RT 614.) He returned to Saddlewood and soon found a deputy District Attorney and additional Concord police officers on the scene "because somebody saw something related to the Stinemans and was aware that they were a missing couple and that's when we started making some links at that point." (2RT 622.)

No one sought a warrant authorizing a search for Stineman-related evidence at that juncture. For the rest of the afternoon and evening, Nash and other Marin detectives continued searching the house and gathering whatever appeared important to any crime, and they provided Concord Police and Marin deputies with investigative leads derived from the documents they discovered. At no time during the period in which Nash was executing his Marin warrants did he identify an item that he wanted to take that he did not believe to be covered by those warrants. (2RT 622-623.)

On the evening of August 7, 2000, Nash heard from another Marin

detective involved in the Saddlewood search that human remains, including a face resembling Selina Bishop, were found floating in gym bags in the delta. (2RT 614.) Nash did not seek another warrant at that juncture.

5. Application for Saddlewood Warrant #3

At 9:35 that night, several Concord Police Detectives, Detective Nash, and representatives from the Marin and Contra Costa District Attorneys met with Contra Costa County Judge Peter Spinetta to present oral affidavits for the issuance of another warrant covering the home and cars already covered by the first and second Marin warrants for Saddlewood, i.e., appellant's Saturn vehicle and Justin's Nissan truck. (9SCT 1937; 2RT 526-527.)

The Saddlewood warrant presented to Judge Spinetta sought authorization to seize nine items said to be property stolen from the Stinemans. It sought authorization to seize clothing worn by the defendants in connection with the crimes, i.e., – two light brown men's suits, woman's lime green cotton shirt and pants, and a gold cowboy hat – in which the defendants had been seen, a pair of tan women's driving gloves, any receipt for the purchase or rental of a wheelchair, and "handwriting and handprinting [sic] exemplars found inside the house of people who live in

the house or who visit the house, specifically including" the defendants. (9SCT 1939.)

It also sought authority to seize "documentation of the names and account information of people who have accounts with Morgan Stanley Dean Witter. The documentation may be on paper or it may be in a computer or on some type of computer storage media." It sought authority to seize documentation, "such as letters, notes, diaries, journals, etc., which tend to prove a connection between Selina Bishop and Glenn Helzer, and any documentation that tends to show the nature of that relationship" as well as latex gloves, hair dye, any item which would tend to show where Mr. or Mrs. Stineman are, and any footwear with a waffle pattern sole having certain dimensions. Finally, the warrant sought authority for "processing of the property for blood which may belong to Mr. or Mrs. Stineman." (9SCT 1940.)

Contra Costa County District Attorney Investigator Robert Hole began by eliciting the testimony of Detective Nash after all were sworn by Judge Spinetta. Nash related his investigation of the Woodacre murders and the disappearance of Selina Bishop. (9SCT 1949-1964.) He recounted the search of Selina Bishop's pager, identification of her contacts with a cell phone number acquired by someone using the pseudonym "Denise

Anderson", and securing warrants for the telephone records of people who had phone contact with the person using the pseudonym, thereby finding contacts with two Helzers in two different locations. Justin Helzer was the subscriber to the number registered at the Saddlewood Court home for which Nash obtained the first Saddlewood warrant. (9CT 1964- 1966.)

Nash testified that the main purpose of the warrant was to find the 9mm firearm used in the Woodacre murders. One such weapon had been purchased by Justin Helzer The other primary object of the warrant was the clothing of "our missing person Selina." A forced entry was effected by the Concord Police Special Response team. (9SCT 1967-1968.) Appellant fled the house through a window when the battering ram hit the door. He was captured, detained, and interviewed in a police car, fled out the car window, threatened people in neighboring homes, and took clothing from one before being recaptured. (9SCT 1969-1971.) Justin Helzer and Dawn Godman were detained inside the Saddlewood home and then booked. (9SCT 1972.)

Asked to summarize the items of significance discovered under the authority of the first warrant for Saddlewood, Nash mentioned the stained carpet and commercial carpet dryers in two rooms, duct tape and rope in a bedroom, a man's black and white shirt and a pair of latex gloves in the

garbage, a pair of brown boots with stains of an undetermined nature, a carpet cleaner and a statement from Dawn Godman that the carpet cleaner was needed because "the prior tenants were filthy pigs" – an allegation "that's not quite consistent with the rest of the residence" nor with what the investigation had turned up. He knew he would be getting " a more descriptive search warrant for these particular types of forensic items versus just a firearm." (9CT 1975-1976.)

The significance of the shirt and the boots was explained to Judge Spinetta by Contra Costa District Attorney Investigator Hole: "You will hear testimony in a moment that ... one of the two missing Concord victims, which is another case that's being investigated in conjunction with Detective Nash's, he was last seen wearing some type of black and white outfit . . . . there is a sole impression on that victim's vehicle which was stolen and subsequently recovered. And the reason I ask [sic] him about the sole pattern was to see if those boots had a pattern that matched the print that was on the headliner of the van." Detective Nash had not seen the footprint and did not know if there was a match. (9SCT 1977.) He did not know about the significance of the black and white shirt "until we were sitting here just this minute." Mr. Hole said there were seen and/or seized inside the house. I want to make sure we cover all those. And I am not

particular about whether they were seen on the first or second search warrant. It really doesn't matter." (9SCT 1978.)

Mr. Hole brought out from Nash that Marin County Sheriff Detective Lellis had found, at an unspecified location, a receipt for the rental of a wheel chair to Ms. Godman, six or seven new containers of hair dye "sitting on the kitchen sink", a taser on a bedroom dresser, handcuffs in the same bedroom, and handcuffs and leg irons under the passenger seat of a truck registered to Justin Helzer parked in front of the residence. (9SCT 1979-1980.)

Mr. Hole then turned to Concord Police Detective Steve Chiabotti to establish that he was investigating the disappearance of 84 year old Ivan Stineman and his 78 year old wife Annette Stineman from their Concord residence. (9SCT 1981.) A neighbor saw one of them outside their home on July 30, at approximately 6:00 in the evening "wearing some type of black and white colored outfit." One of the Stineman's daughters reported them missing. She had spoken with her mother on the telephone at about 8:30 that evening. Her mother said she had company, couldn't talk, and would call back later. She seemed annoyed with the company but not scared at that time. (9SCT 1983.) The Stineman's daughter reported that her parents did not her call back. They had an answering machine hooked

up to the telephone in their house. (9SCT 1984.) Neighbors of the Stinemans told a patrol officer that they saw a white pickup truck in the area occupied by a woman who could have been Dawn Godman. She parked her truck in an odd place and was continually looking down the lane toward the Stinemans' home on the night they disappeared. The neighbors watched as a white minivan driven by a white male with a dark ponytail approached the truck. The male talked briefly with the woman before driving off. The woman in the truck got out and approached the neighbors, told them she had been looking out for friends buying "weed." (9SCT 1988.) Another neighbor recalled seeing a white male with long dark hair in a white car with a wheelchair in the back seat near the area where the truck was seen. A third neighbor reported seeing two white male adults walk up to the front door of the Stinemans' home at about 8:30 the night they disappeared. The men wore light colored brown suits, long hair, and ponytails. Concord Police talked to about a dozen people in the Stinemans neighborhood. (SCT 1989-1994.)

The Stinemans' daughter reported finding moldy food on the stove and a cat locked in a bathroom when she entered on August 3. (9SCT 1999-2001.) On August 6, Concord Police searched the Stinemans' home with their daughter's consent. The answering machine cassette tape was

missing. (SCT 1998.) No purses or wallets were found. The Stinemans' white minivan was not there. (SCT9 1998.) Nor was there any book in a cloth cover that the daughter said each Stineman kept for pleasure reading. (9SCT 2002.) Mr. Stineman's insulin kit and a suitcase was missing. (9SCT 2003.) Their van was later found abandoned in Oakland. (SCT 1989-1994, 2001.) Two sets of keys for the van were found inside, one of which was in the ignition. The Stinemans had two sets of keys. (9SCT 2008.) A waffle-patterned shoe print was found on the headliner of the van. (9SCT 2008.) Two pairs of tan or brown leather gloves were found inside. (9SCT 2010.)

Concord Police Detective Chiabotti added that the Stinemans had one account with Morgan Stanley Dean Witter, as well as credit cards and a bank account at Washington Mutual, and there had been some recent activity on some of those accounts. (9SCT 2006.) Concord Police Detective Norris added that a bank manager who saw the news of the Stinemans' disappearance called police to say she remembered the name Stineman from a transaction at the bank in which a white female who called herself Jackie had presented checks from the Stinemans, one purportedly signed by Ivan and the other by Annette. One was for $67,000 and one was for $33,000.00, both dated August 1, 2000. (9SCT 2011.) "Jackie" told the

bank manager that she was a close friend of the Stinemans and that the Stinemans gave her the checks to deposit into their granddaughter, Selina Bishop's account because the she needed the funds to pay for heart surgery (9SCT 2102, 2104.) Selina Bishop's account had been opened on June30, 2000. There was one withdrawal from that account on July 31, 2000. (9SCT 2022.)

The bank manager described Jackie's appearance consistently with the appearance of Dawn Godman, and added that Jackie came into the bank on a manual wheelchair and wore a lime green shirt and matching pants, and a gold cowboy hat. (9SCT 2013-2014.) While Jackie waited, the bank manager called the phone number for the Stinemans imprinted on one of the checks and reached an answering machine with the voice of an elderly male saying it was the Stineman residence. Jackie then gave the manager what she said was a new number for the Stinemans. When the manager called the latter number, she reached a recording of a young male voice saying it was the home of the Stinemans. (9SCT 2016.) The bank manager identified Dawn Godman as Jackie in a photo lineup. (9SCT 2021.)

Concord Police Detective Judy Elo added that the telephone number that Jackie said was the Stinemans' new number was not listed or assigned

to anyone. Recalling that Saddlewood area residents had seen an AT&T cable truck parked outside Saddlewood often and that one of the residents was a technician for AT&T, Elo speculated that the residents of Saddlewood might have a way of making the number not show up in phone company records. (9SCT 2017.)

Detective Norris added that Detective Chiabotti told him that appellant had worked for Dean Witter. Chiabotti (speaking for himself) said he had learned that information from Marin county deputies who said that when they searched the house that morning, they located some business cards indicating appellant was a financial planner for DeanWitter. (9SCT 2023.)

The Marin deputies had also told Chiabotti that they had found near the business cards "an index file which appeared to contain customer information from Dean Witter customers" in the Concord, Walnut Creek, and Danville areas. (9SCT 2024.) Detective Norris subsequently interviewed the Dean Witter advisor who took over appellant's accounts after he departed, and learned that appellant had worked for the company almost five years, and had left a year and a half ago on medical disability leave. (9SCT 2024-25.) Norris also interviewed the office manager who had received a call on July 31 from a person identifying herself as Annette

Stineman requesting liquidation of her assets due to a family emergency. The checks that were deposited in Selina Bishop's bank account were funded by that liquidation. (9SCT 2017.)

Concord Police Officer Tiffany Delatorre told the magistrate judge that the bank in which the Stinemans had their checking account reported receiving a $10,000 check as a deposit from a male who was not Mr. Stineman or the either of the Helzer brothers. (9SCT 2028-31.) Other officers reported other leads to additional suspects, none of which bore fruit, and information from some Saddlewood neighbors who had seen Selina Bishop and Dawn Godman at the house, and new jet skis parked in front of the house. (9SCT 2033-35.) Chiabotti told of meeting appellant at the jail at appellant's request and receiving his promise to disclose a lot of information about "Selina and Ivan and Annette" once he received assurances that his brother and Dawn had legal counsel. (9SCT 2035-37.) Corporal Grimes said that a palm print lifted from the exterior of the Stinemans' van matched that of Justin Helzer.

When Judge Spinetta asked what items they wished to get a warrant for at that juncture, Mr. Hole offered what he referred to as the "wish list" already incorporated in the warrant form. The judge asked if they wished to search the family residence already searched by the Marin deputies. Mr.

Hole elicited Detective Chiabotti's testimony that the Marin officers had suspended their search of the Saddlewood house for the night "for purposes of convenience and fatigue" and "the residence is still under exclusive police control with intent to resume it again in the morning." He told the judge that the requested warrant would be served simultaneously with the continuing search by Marin officers. (9SCT 2042.) The judge asked if Concord Police would serve their own warrant "so you can search it principally from the perspective of the Stinemans' situation." Chiabotti said that was correct. The judge asked about "the lime green cotton clothing" that was on the wish list, and was told that it was worn by the woman who arrived in a wheelchair and deposited checks at the bank. (9SCT 2043.)

Mr. Hole elicited rounds of denials that the officers possessed any exculpatory evidence or evidence tending to show that the evidence sought by the warrant was not at the Saddlewood residence or in the vehicles identified in the warrant. (9SCT 2046.) Mr. Hole did not ask whether Marin officers had already located and seized that clothing – and the other items on the "wish list" -- pursuant to the Marin warrants. No one volunteered that information, nor any reason why they were seeking a warrant to seize what had already been seized. Mr. Hole requested that the record of the oral affidavit be sealed, saying, inter alia, that there was a

[p]ossibility that all the evidence we are seeking may not be found where we are seeking it now ...." (9SCT 2048.) When the representative of the Marin District Attorney's office requested that the new warrant be sealed, Mr. Hole averred that "of course, the officers at the scene need to know what they're searching for so it needs to be in their possession." The judge declared a finding of probable cause for the requested warrant and signed it at 11:48 p.m.. He also ordered that it not be disclosed to anyone except the law enforcement agents who are carrying out its execution "as they need to review it in connection with the investigation." (9SCT 2049.).

6. **Continued Search of Saddlewood, 8/8 to 8/15/00**

Nash continued to direct teams from both counties in searching the Saddlewood home until August 15, 2000, when the Contra Costa Crime lab began a specific chemical analysis of the scene. (2RT 529-531.)

Nash did not, however, obtain or create a list of the items he could seize under the Contra Costa County warrant. He relied on the local detectives to apply the language of their warrant. He could not locate any description of the items to be seized under that warrant when he testified at the hearing. (2RT 592.)

For eight days, his agents seized not only the evidence that related to the Marin crimes, but also that related to the Contra Costa crimes. Only that which related solely to the Concord crimes went to Concord. (2RT 593.)

A "group decision" was made as to every item seized. "There was several of us that would set there, look at it, evaluate it, does it look important, do we want to take it." (2RT 622.) Throughout the eight day search of the house, he took every item he wanted to take. (2RT 622-623.)

B. MOTION TO SUPPRESS

1. Omnibus motion and response

Defense counsel for appellant joined in codefendant Godman's motion to suppress evidence and traverse warrants pursuant to section 1538.5. (8CT 3000-3179; 9CT 3415; 5SCT 974-975.) The notice said the motion was based on all the papers and records on file in the case. (8CT 3004.) Approximately 200 pages of warrants, affidavits, returns and evidence inventories were attached to a Memorandum of Points and Authorities. (8CT 3005-3179.)

Apropos the issues on appeal, the initial "omnibus" suppression motion argued that the return to the second Marin warrant for Saddlewood

revealed that the search was excessive in scope and, if authorized by that warrant, rendered that warrant a "general warrant" as a matter of law.[8] (8CT 3016-3019.) The motion asserted that the Contra Costa County warrants, including that for the Saddlewood home and a safe and duffel bag discovered in the home of Debra McClanahan, were fruit of illegal searches conducted under the color of the Marin warrants. (8CT 3003.)

Offering several examples of the variety of things seized, the moving papers "urged the court to individually review the items described in the warrant and compare them with the items listed in the return to the warrant. There is no reasonable correlation between the two." (8CT 3018.) All of the Saddlwood warrants and their affidavits were attached as exhibits to the motion (8CT 3022-3083, 3109-3279), as was an inventory of things taken from Saddlewood pursuant to the second Marin warrant. (8CT 3086-3108.) The omnibus motion also asserted that the "Court will have to review each item and determine if it comports with the scope of a permissible search, should the Court not suppress the evidence in its entirety." (8CT 3016.)

The prosecutor's written response to the omnibus motion did not

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[8]The omnibus motion also argued that the warrants for Saddlewood were fruit of tainted searches for telephone records, were issued without probable cause, were based on material misrepresentations, and that the second Marin warrant exceeded that court's jurisdiction. (8CT 3012-3021.)

acknowledge those claims, except insofar as he presented a detailed argument that the evidence at Saddlewood would have inevitably been discovered and that suppression was inappropriate because all officers relied on the warrants in good faith. (9CT 3488-3490.)

2. Oral Argument, stipulations and ruling on preliminary issues

The court began hearing oral argument on the motion on January 31, 2003. (1RT 246.) All counsel stipulated that they would treat as testimony the assertions made in declarations from Contra Costa County Judge Peter Spinetta and Deputy District Attorney Robert Hole authenticating their corrected copies of the warrants and affidavits composed after the warrants at issue here. They also stipulated to the court's use of Detective Erin Inskip's report of a statement of a witness respecting the probable cause and material misstatement issues. (9CT 3302-3414, 1RT 247-248-249.)

The prosecutor asked for a stipulation to the facts asserted in the pleadings. "I think that we need at least some kind of agreement by counsel that the Court can consider the statement of facts in the pleadings for purposes of ruling on the motion before we proceed to the point of argument because otherwise there is no evidence before the court." (1RT

251.) No such stipulation was reached. The prosecutor said he planned to call witnesses "solely for the purposes of laying the foundation for the search warrants" he had marked as exhibits.

The prosecutor stipulated that all the defendants have standing to object to the searches at the Saddlewood home and to the later search of a safe and a duffel bag at the home of Debra McClanahan. The prosecutor said he was "not disputing that there was a search or that the defendants or some of them had an expectation of privacy. That's not an issue. We agree that they do." (1RT 252.) The prosecutor contended that the defendants lacked standing only as to phone record searches that led officers to target the Saddlewood home. (1RT 252.)

After hearing argument, the court declined to suppress the phone record data, and invited argument on what was referred to as "search 4" – the first search of the Saddlewood home. (1RT 252-255.)

Copies of the Marin warrants for Saddlewood, marked as People's Exhibits 2 and 3, and the Contra Costa warrants, marked as People's Exhibits 4, 5 and 6, were offered and received in evidence. (8SCT 1602; 9SCT 1846- 2053; 1RT 260.)

The court heard and rejected the defense claims that the affidavit for the first Saddlewood warrant failed to state probable cause and contained

material misrepresentations respecting probable cause. (1RT 262- 282.)

The court invited argument on the validity of the second Saddlewood warrant, acknowledging that the defense papers argued that this warrant was fruit of the poisonous tree, and operated as a general warrant, and that the search exceeded its scope. (1RT 283.)

3. First Session Oral Argument on Execution of Marin Warrants

"[B]asically what happened is they moved in to – they went in to seize evidence related to the shooting, the gun and so forth" under the first Marin warrant for Saddlewood," saw "something that looked suspicious," and went back for a second warrant with an affidavit that sought only "permission to remove a portion of the carpet" a shirt, and some other forensic evidence. (1RT 284.)

"Once the officers went in, they just started taking virtually any document, any file, any piece of paper, any computer, videotapes, audiotapes, books, keys, clothing pillows, comforters, couches, chairs," defense counsel argued, directing attention to the return on the warrant filed as exhibit to the omnibus motion. "And you can see from that there was virtually no limits on the extent and scope of that search from beer bottles

right on down to the television remote control". (8CT 3084-3018; 1RT 285-286.)

Counsel displayed before-and-after pictures of the home and of officers "literally digging up the front yard and removing all of the pipes that went to the plumbing." (1RT 287.)

Defense counsel represented that Concord Police Detective Chiabotti would testify that he arrived at the Saddlewood home "on the morning of the service of the search warrant" and saw officers seizing things "that weren't related to the Marin County case and weren't on their warrant" and in fact related to the disappearance of the Stinemans. (1RT 288.)

Defense counsel added that the prosecutor's written response to the motion suggested that he declare "what we believe is outside the scope of the Marin County warrant" by going through the return "item by item" and that the defense would do so if the court would set aside an appropriate time. (1RT 289.)

The prosecutor conceded that the return on the Marin County search warrant was longer than the return on the Contra Costa warrant, but not that Marin County seized more evidence than Contra Costa did. (1RT 291.) He asserted that Detective Nash, the investigating officer from Marin County, "was a little bit more meticulous in itemizing his return." (1RT

292-293.) He added that the Marin and Concord investigations were joined on August 7, 2000, and anything related to the Stinemans was relevant to the Marin murders as well. (1RT 293.)

The prosecutor also asserted that anything not mentioned in the warrant that was seized during the eight days Marin and Concord officers occupied Saddlewood was presumptively seized under the plain view doctrine "as the fruits or instrumentalities of the crime then being investigated." (1RT 294.)

The prosecutor denied that Concord Police Detective Chiabotti was concerned about Marin officers taking "more evidence than they were entitled" to take and therefore pursued his own warrant. He submitted that Chiabotti "went and got a warrant ... because it became apparent that there was information . . . or evidence with respect to the disappearance of the Stinemans that was inside the house" and because the connection between the Marin killings and the Stinemans "had not been made" or disclosed to the magistrate who issued the Marin warrants. (1RT 291.)

The prosecutor asserted that the connection was made "absolutely apparent to anybody involved in those investigations" early in the process of executing the Marin warrants, i.e., "not later than that point" on the morning of August 7, when a bank manager reported receiving the hundred

thousand dollars in checks payable to Selina Bishop on the brokerage account of the Stinemans. (1RT 292.)

The prosecutor asserted that Concord Police acted "very quickly" to elicit the attention of Judge Spinetta and "swear out an oral affidavit in support of a search warrant for evidence pertaining to the disappearance of the Stinemans." (1RT 292.)

The prosecutor asserted that the defense had the burden to prove that anything seized by the officers during the Saddlewood searches was taken without probable cause, and, ergo, the defense "would need to call witnesses to, and specifically I mean the finders, to identify the justification for the items that were seized. We have two witnesses outside that are available." (1RT 294.)

He added that it was "incumbent upon the defense" to identify what it considered prejudicial items of evidence that the defense believed fell outside the scope of a warrant "so that we can specifically respond to the question of whether or not, one, that item falls within the purview of the warrant, or in the alternative, two, it constitutes a plain view observation." (1RT 295.) He said he would not accept the defense "invitation to go through the return and *try to justify each and every piece of evidence that was seized. I don't think it's a practical thing that can be done*, and I

don't think the burden is on the People to do that once they have established the existence of a warrant." (1RT 295, emphasis added.)

Defense counsel alerted the court to the errors in the prosecutor's claims respecting timing of the searches and the warrants, to wit: the first Saddlewood warrant was served at 6:00 a.m., the next at 1:00 p.m., and the third – the Contra Costa warrant – was obtained at 11:48 pm and served the following day. Also, the return to the Contra Costa warrant return is very specific as to what was taken: six suits, a large jacket, leather driving gloves, credit card, footwear, hair coloring, and a cowboy hat.

Defense counsel averred that "3,000 or 4,000 documents . .. were seized from the residence, including single pieces of paper. . . under color of the Marin warrant and were used to prove charges related to the Stinemans at the preliminary hearing. (1RT 296.) Those voluminous documents were outside the scope of the Marin warrant. (1RT 297) Marin did not have jurisdiction to issue a warrant for those items. "And there was . . . almost 12 hours between the time that ... Marin started seizing items and Contra Costa decided to get a warrant, . .." (1RT 297.)

Defense counsel again suggested that they "go through" the return on the Marin warrant. The court refused:

THE COURT: We're not going to go through it.

DEFENSE COUNSEL: I'm sorry?

THE COURT: We're not going to go through it. (1RT 297.)

Summing up, defense counsel said he thought the court "can see our point" in that the Marin magistrate had in mind a very different search and seizure than the one that was carried out. Once officers realized they were seizing evidence of a kidnaping and murder not contemplated by their warrant, they should have immediately sought another. (1RT 298.)

The prosecutor retorted that the defense had not proved and could not prove that the evidence sought by the Contra Costa warrant for Saddlewood had already been seized when the warrant was obtained. He asserted that it was "standard practice, particularly investigation [sic] like this, is not to seize anything initially. That first day was spent searching and photographing. ¶ I would venture to say that if counsel was inclined to call witnesses, he'd find out that the vast majority of this evidence was seized three, four or five days after the 7th because they were there for 10. There was a lot of evidence that was seized and both warrants were in effect then." (1RT 299.)

The court observed that the Marin warrant return was not executed

until August 30, and therefore failed to show when the evidence was actually taken. Defense counsel pointed out that some but not all of the property lists were dated August 7, and others were dated August 16 or August 18. (1RT 300-302.) The court said it understood that the officers need not have moved anything to have effectively seized everything for Fourth Amendment purposes by exercising authority and control over the home. The prosecutor disagreed. Both sides submitted. (1RT 301.)

4. Ruling on the validity of the second Marin warrant

The trial court held that the Marin court had jurisdiction to issue a second warrant for Saddlewood in that the Woodacre murders were unsolved, Selina Bishop was missing, and the initial entry and search of Saddlewood revealed additional grounds to believe that evidence related to those crimes would be located at Saddlewood. . (1RT 302-303.) The trial court also noted its belief that even if Marin lacked jurisdiction, the *Leon* rule would "certainly save this search." (1RT 303.)

The court held that there was probable cause for the second Marin warrant for appellant's home in the "evidence of the body print on the carpet, ... a map on ... the printer tray from Mapquest, and Ms. Bishop was

still missing." (1RT 303.) The court held that a computer that the warrant authorized the officers to seize was also a proper target "to establish the idea [sic] of the persons in that residence and so forth." (1RT 303.)

The trial court acknowledged and again refused the defense request to review all of the items seized under the warrant to assess counsel's argument that the scope of the warrant was overbroad. "Because of the volume of the items, it's difficult for the Court to take on such a task and won't do so." (1RT 303-304.)

The court held that the warrant was not overbroad under the rule of *People v. Bradford* (1997) 15 Cal.4th 1229, which had approved a relatively "generalized description" of the items to be seized where the case is complex and circumstantial rather than simplified and "resting upon more direct evidence," nor under *People v. Kraft* (2000) 23 Cal.4th 978, 1043, a multiple homicide case in which this court rejected a claim that the warrant was overbroad and that the search was a general search. In that case, a warrant authorized "the search of defendant's home and the seizure of, among other things, weapons, blood, fingerprints, bodily fluids, hair samples, fiber samples, drugs, written or pornographic material pertaining to homicides, papers tending to show the identity of any victims, homosexual literature, and certain clothing ...". (*Id.* at p. 1046.) (1RT 305.)

The trial court echoed this court's observation that the "breadth of the warrant in this case was commensurate with the scope of the investigation" (Id. at p. 1043) as "deciding reasons I find particular here." (1RT 305.)

The trial court did not identify any portion of the Marin warrants in the case at bar that resembled the warrants in *Kraft* or *Bradford*. However, the court noted that this court found, in *Kraft,* the seizure of a large number of items and the extensive search of the defendant's car were justified by probable cause and the plain view doctrine. (1RT 305-306.)

5. Request for Evidentiary Hearing And Renewal of Request for Judicial Review of Everything Seized From Saddlewood

After a brief discussion of the nature of the items seized, defense counsel asked the trial court to withhold ruling on the validity of the second Marin warrant as well as the Contra Costa warrants until he could present evidence on various issues. (1RT 310-311.) The trial court gave no clear response at that time. At the next calling of the case, defense counsel reminded the court that "we left some things undone in the last motion"and addressed the court as follows. (1RT 321.)

Defense counsel noted that there were a large number of seized items

listed on the search warrant returns "that nobody could really tell what they were" and asked to schedule a hearing at which all of the seized items would be before the court and the court could "see what they were." (1RT 321.)

The prosecutor opposed the request. "[H]aving just visited the evidence room at the Concord Police Department, I guarantee you, you would not want to, nor as a practical matter, could you, bring all of the evidence in here. It's a fairly voluminous collection." (1RT 321.)

The court rejected the defense request and stated that "it's not my job to go through each and every one of the items to determine whether or not, you know, if it's within the scope of the warrant. If there were things you think should be suppressed because they go beyond the scope of the warrant, then that's what you need to bring me." (1RT 322.)

Defense counsel disagreed, adding I think it is your job." He also averred that he could not identify the items that were seized outside the warrant, and needed testimony from the seizing officers to "explain exactly what the items are that correspond to the items listed." (1RT 322.)

The prosecutor said he was working on preparing a list of the evidence he wished to use or might use. (RT 327-329.) All counsel and the court agreed to reconvene after the prosecutor had completed his list and

defense counsel examined the evidence at the storage facility . (1RT 331, 337.)

6. Defense asserts that officers flagrantly disregarded the terms of the warrants

The court reconvened proceedings on the motion to suppress evidence and traverse warrants on June 13, 2003. (2RT 442, 469). The court acknowledged receipt of supplemental points and authorities from the defense, including a list of seized items that the defense alleged to be outside the scope of the warrants. (The eight-page list appears to be a subset of the 39-page list of seized evidence that the prosecutor provided to the defense to indicate the items he intended to use at trial. See "Defendant Godman's Supplemental Notice and Motion to Suppress Evidence and Traverse Various Search Warrants" dated June 7, 2003 (5SCT 1038), and the 39-page list of seized evidence that follows. (5SCT 1049.).) The court also made reference to a responsive paper prepared by the prosecutor, noting that the prosecutor had not been "precisely all that clear" in his response and that the court would like to review certain items personally. (2RT 443.)[9]

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[9] None of the papers or items of evidence discussed with the court at the June 13 hearing were retained by the court for the appellate record. The prosecution papers were never found anywhere. (See Appellant's first

The parties stipulated that the pathologist would testify about the bodies found in the gym bags as set forth in the prosecutor's pleading. (2RT 470.) The prosecutor said he had brought to the courtroom for the court's review "all of the exhibits that were itemized in the defendant's supplemental motion." (2RT 444.)

Defense counsel said he wished to present a "scope issue" that was not presented at the points and authorities. "And I want to make sure that it's clear on the record that we're preserving the issue on the record." The court replied, "That's my understanding." (2RT 472.) Counsel then articulated the claim as follows.

> "...[T]he general rule is, of course, that a search warrant has to be limited to the terms of the warrant. ... "[If]f evidence is seized outside the scope of the warrant, the court does not need to suppress all evidence seized under the warrant, but only those items that were seized outside the scope of the warrant absent some legal justification for the seizure. . . . [T]hat is unless there was a flagrant disregard for the terms of the warrant." (2RT 472.)

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application to augment and correct the record, etc., and Declaration of Deputy Clerk filed 8/12/10, items 14 and 15, in the (first) "Addendum to Second Supplemental Clerk's Transcript (hereafter, "ASSCT") at p.13.) The defense papers – entitled "Defendant Godman's Supplemental Notice and Motion to Suppress Evidence and Traverse Various Search Warrants" dated June 7, 2003, and the 39-page list of evidence (5SCT 1049) were preserved as exhibits to a writ petition that the record was augmented to include. (5SCT 1038.)

7. Further Discussion of Quantity of Items Seized and Procedure for Determining Facts

Defense counsel told the court that he had examined the prosecutor's selected evidence. "It was some 36 boxes to be fair, some 32 of which or 30 of which contained multiple items and not just a bunch of rocks ..." (2RT 472-473.)

Defense counsel added that those 36 boxes of items that the prosecutor deemed useful evidence represented "20 percent or so of the items seized. . . . ¶ [S]tacked floor to ceiling we could probably fill the jury box from the wall to the jury box with items and that doesn't include the items that are in the warehouse – bathtubs and flooring and other such things. . . .[Y]ou really don't get as much of a feeling from looking at the returns than from looking at this mass of material stacked on shelves and in more shelves and in more shelves. ¶ [W]e maintain that all the evidence must be suppressed because of the . . . . flagrant disregard for the terms of the warrant." (2RT 474.)

Defense counsel added that "it doesn't matter if the few items that we parse today are found to be outside the scope of the warrant, that the search was so flagrant in exceeding the terms of the warrants that the police

did have that all evidence must be suppressed. (2RT 475.) He added, "This is a different issue now than . . . what your honor has directed us to." (RT 476.)

The prosecutor disputed the claim that the evidence he brought to court represents only 20 percent of the items seized, and noted that the items not brought might be relevant to probable cause even if not sufficiently relevant to introduce at trial. (2RT 477.) He added that a visit to the Concord Police Department property room "would somewhat assist the court" in getting a general sense of the total volume of the items that he had not brought to court but the property record prepared by the Concord police "specifically itemized every single item, every single package that they booked in." (2RT 478-479.)

The court noted that visiting the Concord Police property room would not enable a determination of what items were seized under the warrant rather than under the plain view doctrine. (2RT 480.)

Defense counsel reported that the property log shown to him at the Concord Police property room was about a foot and a half thick, and predicted that the court would not like to review that stack even if he highlighted the items that appeared to fall in or outside the warrant's authorization. (2RT 481.)

He also noted that the property logs were not useful without an examination of the documents seized, because a single property item number had been assigned to a 10-12 page group of documents, one or two of which might be seized as indicia under the warrant, while the rest were not. (2RT 483.) Some documents, such as phone bills, that were clearly indicia, were grouped with "seven or eight pages of miscellaneous notes that can't be attributable to anyone. They don't describe anything that appears to be relevant. . . . [C]learly not all of those documents were permissibly seized but a couple might have been. ¶ Indicia is going to be our biggest problem." (2RT 484.)

Defense counsel suggested that they start by examining the items "under our number 1, the unboxed items" listed on the supplemental motion (5SCT 1040), several of which were posters that were not specified in any warrant, and hear from the seizing officer about his state of mind. Counsel argued that the prosecutor's statement of opinion as to the relevance of items was not evidence. The court agreed. (2RT 488.)

The prosecutor said he could bring the officers in at a later date, but did not think he needed to do so for the court to rule on the items he had brought to the courtroom. The affidavits in support of the warrants show what the officers knew at the time, including the information from the bank

manager who received the Stinemans checks for deposit into Selina Bishop's account, that provided justification for seizing the "financially-related material" challenged by the defense. (2RT 491.) He said he "may not be able to establish the exact time the specific item was formally seized" and asserted that the *Gallegos* case cited in his brief[10] made such proof unnecessary absent a claim that the justification for seizure was information not known until after the returns to the warrants were filed..

(2RT 492.)

Defense counsel challenged the prosecutor's reliance on information generally available to law enforcement, and renewed his prior suggestion that they address each item listed in his motion. (2RT 496.)

8. Agreement that some or all of the items listed in defense papers were not described in any warrant

When the court asked, the prosecutor quickly agreed that the first 12 "unboxed" items, "A-1 through E"(5SCT 1040, 2RT 493) were not covered by any warrant.

The first nine items were posters depicting (1) a marijuana leaf (2) a Grateful Dead type skeleton (3) Wonder Woman type with dogs (4) Wonder

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[10] *People vs. Gallegos* (2002) 96 Cal.App.4th 612, was discussed in a prior session.

Woman type with Viking Warrior, (5) a Rock Poster Glow-in-the-Dark skull (6) Valhalla warriors fighting with axes and swords. (7) a fire-breathing dragon/ dragon spit, (8) Wizard with a dragon lord, (9) a dragon and a warlock, framed. The remaining three were a "sword addressed to Ann," a saw box, and "two staffs with skull and crystal." (5SCT 1040.)

The prosecutor asserted that these items were seized because "dismembered bodies, with organs removed, started floating up in the Delta" and officers were developing "information about profits (sic) from Gods and witchcraft and warlocks, and we have something like this in the grarage. . . . Now all of a sudden we have voodoo occultists, kinds of staffs with crystals and skulls." (2RT 494.) A poster showed "an evil looking warlock type person with lightening coming out of one hand." (2RT 495.) The empty Craftsman saw box was seized because the bodies appeared to have been cut with an electrical reciprocating saw. (2RT 494.)

9. Ruling that Saddlewood warrants authorized unlimited exploratory search of home and seizure on probable cause

After the discussion noted above, the prosecutor submitted that the search warrants permitted the officers to go "virtually anywhere" and into any container inside the house in view of the warrants' "authorization,

... to seize, not only indicia also pursuant to the second Marin County warrant, trace evidence, physical evidence." (2RT 496.) Then:

> THE COURT: So virtually be a little space be [sic] in plain view.
>
> THE PROSECUTOR: I cannot think of a single place -- I defy counsel to suggest one, that they will not be permitted to go in to search.
>
> THE COURT: Initially.
>
> MR. JEWETT: Pursuant to the proposition of the warrant, that's why we stated in our responsive pleadings, this is not about the scope of the search because the warrant, as they exist, permitted the officers to search every single place they did search. (2RT 496-497.)

The court heard the prosecutor's argument for probable cause to seize each of the items listed on the first page of the list in the defense motion (5SCT 1040) based on the theory that probable cause would be sufficient for seizure or at least support the prosecutor's inevitable discovery theory. (2RT 498-507.)

The court then asked the prosecutor to submit a written statement of his position on each item on the defense list that he wished to assert was covered by a warrant, identify that warrant, and as to the remaining items,

concede that thy were not covered by any warrant, and state what the seizing officers would say in justification for the seizure if called to testify. (2RT 508-509.) The prosecutor agreed to make a list of the items that he believed were covered by a warrant, and have the lead officer from each jurisdiction available to testify at the next hearing. (2RT 510-511.)

10. Briefing and Exhibits for June 27, 2003 Evidentiary Hearing

The prosecutor signed and distributed (but apparently failed to file with the clerk)[11] a "Supplemental Response to Defendant's Motion to Suppress Evidence" dated June 19, 2003. (3SCT 654.) It included as Exhibit "A" a "Defendant's List of Challenged Items" on which the prosecutor listed most, but not all, of the items that the defense alleged were beyond the scope of any warrant in the supplemental motion to suppress. (3 SCT 657-662, 5 SCT 1040-1048.) The defense list included a "day timer" with the designated Concord Police evidence item number K113 (5SCT 1043), and the prosecutor's list did not. Although the court and the prosecutor later agreed that the authority for opening that item was

[11] The "Supplemental Response to Defendant's Motion to Suppress Evidence" dated June 19, 2003 and presented at 3SCT 654 was located by appellate counsel in trial counsel's files, authenticated during record completion proceedings, and thereby included in the augmented appellate record. (4/6/2010 RT 94-95.)

important, its absence from the prosecutor's Exhibit "A" was not noted in proceedings below.

Next to the description of each item on the prosecutor's list, there were initials "SW" for Search Warrant, and/or "PV" for plain view, or the words "not seized from Saddlewood." followed by a reference to photograph number on a list of evidence photos attached as exhibit "B". (3SCT 657-662.)[12] The designation of an item as "SW" was accompanied by descriptive terms such as "handwriting"or "indicia of occupancy" that appeared on one or more of the warrants issued for Saddlewood. The designation "PV" was not accompanied by any description of what a seizing officer would say if called to testify, as the trial court had requested, but rather a word or two on the prosecutor's theory of the item's relevance, e.g., "mens rea" for the dragon posters. (3SCT 657.)

The prosecutor's written argument responded to the defense claim

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[12] The opening paragraph of the prosecutor's supplemental response signed on June 19, 2003, states that he had also attached "descriptions of the items remaining on the shelves"as Exhibit "C", and "copies of items 5LL4, 5LL6, and 5LL8" which a footnote says are copies of three receipts on the defense list that were made prior to darkening of the receipts with "ninhydrin (fingerprint) processing." (3SCT 654.) These exhibits have not been located. The pages following Exhibit "B" in the supplemental clerk's transcript do not correspond to the prosecutor's description of his exhibits. The only page in the record that corresponds to the issues discussed in the prosecutor's papers is a copy of a photograph of storage boxes on shelves. (3SCT 666.)

that the officers flagrantly disregarded the terms of the warrants by quoting *People v. Bradford, supra*, 15 Cal.3d 1229, 1305, on the contours of the doctrine generally, and emphasizing that the magnitude of the seizures does not itself establish a constitutional violation. (3SCT 655.)

More notably, the prosecutor's papers averred that "*virtually* every one" of the items seized from Saddlewood that was not listed in "the warrant [sic] falls within the plain view doctrine" without specifying the items he would concede were illegally seized. (3SCT 655.) He added that "the vast majority of the items" stored as evidence at the Concord Police Department in connection with this case were seized at locations other than Saddlewood and are stored in boxes occupying "the equivalent of 163 cubic feet" and thus not large enough to fill the jury box floor to ceiling, as defense counsel had claimed. (3SCT 655-656.)

The prosecutor concluded that "the judgment exercised by investigating officers in the service of the search warrants in this case was conscientious, professional, and reasoned" and was therefore "far from `flagrant disregard.'" (3SCT 656.) He did not, however, claim that the officers' judgment involved any attention to the terms of their warrants.

The defense response, filed June 25, 2003, cited federal case law establishing that a search must be limited to the terms of a warrant, and the

volume and breadth of the material seized from Saddlewood as circumstantial evidence of disregard for the warrants' terms. Also, the defense papers submitted that the material depicted in the prosecutor's photographs (Exhibit "B") would not fit in the jury box, and the prosecutor's stated justifications (Exhibit A) are "so general that without a further elaboration Ms. Godman is unable to respond. (10CT 3985-3987.)

11. June 27, 2003 Evidentiary hearing

a. Submission of photos of evidence on disk

The prosecutor submitted a computer disc containing photographs of the evidence listed on Exhibit "B" to his brief. (3SCT 663.) The disk was marked as People's Exhibit 3 – Photos of Challenged Evidence, and preserved for the appellate record. However, the photographs of the seized evidence contained on the disk did not show the writing in books and journals and were not accepted by court as representations of all of the evidence at issue. (2RT 520.) (Notably, nothing that appears to be the day planner omitted from exhibit "A" appears in any of the photographs on the disk.)

b. Testimony from Detective Nash (Direct) and Exhibits

Called by the prosecutor, Detective Nash testified that he had been employed by Marin County Sheriff's Office as a crime scene investigator and latent print specialist since 1988. He obtained the first and second Marin warrants for Saddlewood. He also participated in presenting an oral affidavit for the third warrant for the home at the request of Concord Police on the evening of the day he served his Marin warrants. (2RT 525-527.) The oral affidavit included information regarding the transfer of approximately $100,000 from the portfolio account of Ivan and Annette Stineman in two checks presented for deposit to the account of Selina Bishop by a woman identified on August 7 as Dawn Godman, a resident of Saddlewood. (2RT 527.)

During the course of executing the search warrants, officers from Marin and Concord worked together to investigate the disappearance of the Stinemans and Ms. Bishop. Joint briefings were held each day, from August 7, 2000, until August 15th, when Nash's team left Saddlewood. Throughout that period Nash oversaw and coordinated all of the operations at the Saddlewood crime scene, including the supervision of Concord police at the scene. (2RT 528-531.) He was consulted by other officers about whether or not there was "jurisdiction for the seizure of certain items."

(2RT 532.)

Nash made, in his "mind, every effort to try to seize only those items that were either specifically listed in the warrant or items which [he] believed there was probable cause to believe constituted the fruits of [sic] instrumentality of the crime." (2RT 532.)

The prosecutor asked Nash if he had reviewed the list of contested items contained in the defense briefs (5SCT 1036-1038, 1040-1048) "in an effort to determine whether there were any items on that list that, in your opinion, either did not fall within the purview of the warrant or were not seized pursuant to, say, probable cause to believe they contained or were the fruits of [sic] the instrumentality of the crime?" Nash said yes. The prosecutor asked Nash if he found any items in the defense brief "that did not fall, in your judgment at least, into one of those two categories?" He answered, "No, I did not." (2RT 533.)

The prosecutor did not elicit from Nash any basis for his stated belief about the legality of the seizure of everything listed in the defense briefs.

Instead, the prosecutor asked Nash if he became aware of the discovery of body parts in gym bags in the delta while he was executing his Saddlewood warrants on August 7, his first day at the scene, and whether he later learned that the cut marks on the bones found in the delta suggested

that a reciprocating power saw had been used, and that mandibles and teeth were missing. (2RT 535-536.) He brought out that Nash learned, on the fifth or sixth day of the search, that the torso identified as that of Annette Stineman had had its organs removed. (2 RT 535.) Nash also learned that a tattoo had been removed from a shoulder blade identified as that of Selina Bishop, that Taylor's former girlfriend said he had plans involving three core people, religion, and selling the drug Ecstasy, and that a former dinner guest had heard Dawn Godman identify herself as a witch, and Taylor identify himself as a warlock. (2RT 536, 539.) Nash heard that an aunt of the Helzer brothers told a detective that both brothers at one point said that Satan's got a bad rap." (2RT 541.)

Also during the search, Nash provided investigating officers with leads based on documents found and photocopied at Saddlewood. Nash personally discovered and shared a receipt from Cool Rides Jet Ski Rental in Livermore, and received word that Concord Police Detective Warnock had found a duplicate receipt at that facility. (2RT 538-539.)

Nash had a photocopy machine brought to the house to copy papers containing investigative leads for distribution to other officers. (2RT 531.)

Nash heard that appellant had attended a reggae concert, and that his former girlfriend said appellant claimed to be a prophet and had a plan to

carry out a mission with two other people selling Ecstasy. (2RT 538-539.) He was aware that a receipt he found from "Not Too Naughty" for two sets of leg irons had enabled an officer to obtain from the store a videotape of the purchase reflected in the receipt. (2RT 540-541.) He learned that Selina Bishop had recently died her hair and was planning on going camping with the person she knew as Jordan around July 31st. (2RT 542-543.) He was aware that Selina sold Ecstasy for "Jordan"and that Jordan had a brother, Justin, and a roommate, Sky, with whom Selina had gone to a club in Berkeley in late July. (2RT 544.)

The prosecutor had Nash authenticate People's Exhibit 10, a copy of a Marin Sheriff property receipt attached to photocopies of 10 receipts and other documents taken from Saddlewood by Detective Lisa Lellis of his department. (2RT 545-547, 552-553.)

Nash observed that Exhibit 10 appeared to record activity under the first Saddlewood warrant in that it had the initials of the finding officer, in accordance with the convention adopted in executing the first warrant, but no number designating the room in which the items were found, a convention adopted in recording seizures under the later warrants. (2RT 547.)

Exhibit 10 states that Detective Lellis found the listed items, except

for the newspaper, in a "Day Planer [sic] on the kitchen counter."[13] (SASSCT 35.) Page citations below refer to the documents that were attached.

Item #

SLL1 Carpet cleaning receipt

SLL2 Chronicle Newspaper for August 5, 2000

SLL3 A receipt from Not Too Naughty for the purchase of leg irons on July 30, 2000, at 4:13 pm; (SASSCT 36.)

SLL4 A Safeway receipt dated August 5, 2000, reflecting the purchase of carpet cleaner, bleach and laundry detergent, and bearing the name Dawn Godman; (SASSCT 37.)

SLL5 The back of vehicle insurance ID card; (SASSCT 38.)

SLL6 Receipts from Copeland's Sports for the purchase of one-hole masks, Pro Grip gloves, and Masterline Weekender Gloves, on July 2, 2000, and for return of the latter gloves on July 13, 2000. (SASSCT 38.)

SLL7 A receipt from Long's drugs for carpet deodorizer, air freshener,

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[13] Exhibits 10 through 13 were so marked when they were offered as exhibits at the preliminary hearing. Copies are presented at pages 35 to 164 in the Second Addendum to the Second Supplemental Clerk's Transcript, hereafter referred to as "SASSCT."

candy, gum and hair color, showing payment with $100.00 in cash. (SASSCT 39.)

SLL8 A Home Depot receipt dated July 2, 2000, at 4:07 p.m., reflecting purchase of a spade bit, duct tape, a staple gun and a poly sheet. (SASSCT 40.)

SLL9 A receipt for repair maintenance service from Saturn of Concord in the name of Glenn T. Helzer. (SASSCT 42.)

SLL10 A GTE Wireless receipt for a mobile ID number 925-586-0034 in the name of Deborah McClanahan. (SASSCT 42.)

Nash also identified Exhibits 11a through 11J as copies of inventories of evidence and documents that he personally collected at Saddlewood. (2RT 553.) One of those exhibits, Exhibit 11H, dated August 7, 2000, is headed "Kitch" over "Room 5, which is crossed-out. (SASSCT 120.) Nash is identified as the finder of the following items in a "Day Planner of Godman."

KI-1 receipts from Yardbird in Concord

KI-2 " " Home Depot for building supplies in June (SASSCT 121-122.)

KI-3 " " K-Mart for duffel bags and attache cases (SASSCT 123.)

KI-4 " " Copeland Sports for HO. ProGrip Glove (SASSCT 124.)

KI-5 " " Copeland Sports for Masterline Weekender (SASSCT 125.)

KI-6 " " Safeway

KI-7 " " Wolf Camera

KI-8 " " Not Too Naughty for leg irons at 4:13 pm on July 30. (SASSCT 126.)

KI-9 " " Cool Rides (SASSCT 127.)

KI-10 Documents for "Meth" (SASSCT 121-131)

K-11 Document Hand Written Numerous Items (SASSCT 132.)

K-12 Misc Room Deodorizers

The day planner itself was listed as KI-13 on Exhibit 11H and said to have been located on the kitchen counter, and to have also held a narcotics pipe and tubing, a rock and a brush. (SASSCT 120.) The KI-13 designation was stamped on two subsequent pages depicting receipts for cash purchases from Sears, Cork & Bottle and Bacon East pharmacy. The latter includes a book-like background and the words "from Day Planner Saddlewood." (SASSCT 132-134.)

Nash also identified Exhibits 12A and 12B, and Exhibit 13, as inventories of evidence and copies of documents seized by Marin Sheriff's

office personnel that were prepared at or near the time of the seizure. (2RT 556-557.) Their contents do not indicate when they were prepared. Numerous documents are attached as exhibits.[14]

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[14]Exhibit 12-A is dated August 7, 2000 and headed "Room 8" and describes locations within the garage. It lists Officer M. Crain as finder of a black Craftsman Tool Case containing a reciprocating saw blade, four audiotapes in a recycle bin, yellow rope, plastic bag with boxes of assorted "ammo," ziplock baggies with computer disks, two reciprocating saw blades atop a desk, sawdust, duct tape cigarette butts, hand saw, clothing, a toilet lid cover, a white towel and "misc items" and misc boxes in a garbage bag in a trash can; latex gloves in a ziplock bag in a trash can, more clothing, brown shoes, "misc papers", a note pad, cassette tape, plastic bottle, wiring, boxes of carpet deodorizer, in a garbage can, clothes from a bin in front of the dryer, a bath mat, drill case, painter's plastic, plastic bags, cleaning supplies, hear the dryer, and dryer lint, a wad of duct tape, an ash tray, a green wash cloth with red stains, tooth brush, receipt for jet ski boating pamphlets, athletic bag tags, a white rag with red stain, a black glove, dryer lint with hairs, sunglasses, and three pieces of paper with handwriting, all in a garbage bag in a trash can; a sword with blood stains, Conan daggers, knives and magazines, machete and two hatchets, rusty machete , Box for Skil saw, paper towels in hanger, machete with red stains, Ruger Min, thirty s/s Barrell #12947452, Browning 30-06 rifle #C6017NY327, Remington shotgun #61819bm, a paper towel roll and a manual for a reciprocating saw, washing machine filter, versatool battery charger, cigarette butts, broken black beads, hair and debris from electric broom, lint from dryer trap, a piece of duct tape, three pieces of paper with handwriting in a garbage can, a long dark human hair, two long sticks, one with a skull, one with a glass ball, and two trsh can liners. (SASSCT 141-144.) Attached are notes saying "Sky Please wake me up as soon as you get up! I love you. Justin" and 1900 Risdon Road, Concord CA, next to a card for a cab company, a Cool Rides Watercraft rental agreement naming Dawn Godman and Justin Helzer and related boating law and waterway maps and materials, a note with the words Court, shots fired, about aliby [sic], and Blame T for not enough $," etc., a Home Depot receipt for staples and a knife, and a notepad headed "shopping list," a page of notes with names and phone numbers, a reciprocating saw and Skil saw manuals, and

Exhibit 13, like Exhibit 10, appears to be a copy of an inventory filed as an exhibit to the return on the first Marin warrant for Saddlewood. (9SCT 1867; SASSCT 162.) It is dated August 7, 2000. It lists as seized by Officer B. Heying a receipt for purchase of a gun "and ammo #Ber 185983, found at the foot of the bed in bedroom #2, a set of black handcuffs with two keys, found on a closet shelf in the same room, an unopened box of duct tape, two bundles of nylon rope, plastic bag with assorted "ammo" a Stevens model 311 Side by Side 12 gage shotgun #5100, a Browning 12 gage shotgun model 69 M #16896, all found in the closet of bedroom three. Also listed is one videotape found in the VCR in room 7, and two leg cuffs and three handcuffs seized inside a plastic bag in on the passenger side floor of a Nissan truck. (SASSCT 162.) Attached is the Dealer's Record of the sale of the Beretta firearm to Justin Helzer on May 5, 2000, and a receipt for same. (SASSCT 163-164.)

The prosecutor asked Nash no further questions on direct. He did

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notes saying "Salina [sic] not available" and directions to Cool Rides and Korth's Pirates Lair. (SASSCT 145-159.)

Exhibit 12 B is dated August 7, 2000, headed Rear Yard, and records seizure of stepping stones, "possible tissue" and contents of a bag found in "dog run," a box of rocks, soil sample, vegetation sample and samples from bathroom drain line. (SASSCT 160-162.)

not ask Nash to provide justifications or explanations for his search or seizure of anything at Saddlewood. He did not have Nash link any portion of any warrant to any seizure. He did not ask Nash to identify items not described in the warrant, much less state how he came to discover them and his reasons for seizing them. Nor did he ask Nash if he wished to adopt the positions on the justification for the seizures indicated in the prosecutor's "Exhibit A". Although asked to do so, he prosecutor declined to link the officers' testimony to the item designations used in the papers he submitted. (2RT 545.)

c. Cross examination of Detective Nash

Defense counsel asked Nash under what provision of the first search warrant the Copeland's Sport receipt was seized. Nash answered that the receipt "would come under indicia to see who had occupancy of the residence because you could use the receipts to show who made the purchases and then deposit the receipt at the residence." (2RT 567.) Nash added that "we track people all the time down by receipts to identify who made the purchases." (2RT 568.) "Most all these stores you see all have videotape where you can go and retrieve who actually made the purchases." (2RT 568.) Consequently, all of the receipts attached to

Exhibit 10 were seized, copied, and all individuals or businesses named on the document were pursued by officers who "went out and investigated." (2RT 568.)

Nash asserted that some of the receipts, such as the one for leg irons seized during execution of the fist warrant, also had evidentiary value. (2RT 568-569, 571.) He conceded that there was no provision for leg irons in the first warrant, and offered that they "became visible in looking for the items within that warrant." (2RT 572.) He did not specify what items seizable under the warrant were being sought when and where the leg irons were found. He said it did not occur to him to include leg irons in his application for the second Saddlewood warrant because "those items had already been seized under the first warrant so writing another warrant for something that has already been seized is not proper." (2RT 572.)

When Nash returned to Saddlewood with the second Marin warrant, he made copies and had a briefing. Lieutenant Heying (the finder of items on Exhibit 13) was with him. (2RT 574-576.) Under the sections of the warrant authorizing seizure of items with stains or possible traces of blood, they seized the bathtub and floor boards because presumptive tests were positive for blood. (2RT 576-579.)

Under the authority of the second Marin warrant, Nash and Officer

Crain found posters of dragons "and other such things" later logged as Concord Police Department Item number 2108. They were stored, not displayed, in the garage. (2RT 582-584.) Asked to show the portion of the warrant authorizing the seizure, Nash said they saw the posters in plain view "while we were there looking for the items mentioned in the warrant. (2RT 584.) The "basis" for seizing those items was "information that there may have been some witchcraft and occult type activities within the residence and to the -- at least one the victims, so we collected this kind to show some of the activities that the residents were possibly involved in." (2RT 585.)

Nash posited that "these type of dragons . . . are not the normal posters that you would see posted in your residence." (2RT 586.) Nash said the posters were seized to "show the lifestyle of the individuals who were involved in the murders." (2RT 587.) He noted that the posters had pin holes, indicating that they were hung up somewhere at sometime, and speculated that the occupants "may put them up for certain events, certain times of the year, and take things down, so it goes to show their lifestyle." (2RT 588.).

Nash said that they found "a long ring" and "some candles" and "had information ... Mrs. Stineman, part of her had been removed." They also

had information from a witness that the residents believed in the occult and witchcraft. (2RT 586.) Nash had heard that appellant thought he was "the prophet of God" and that the residents were Mormons and "practiced in the witchcraft side of things." (2RT 596.) He added that they had found burned clothing pieces in the fireplace and "felt that this type of stuff would show that they definitely believed in the witchcraft or that type of environment." (2RT 588.)

Nash added that the seizure of a poster related to marijuana might possibly be justified in that "that goes to show the drug usage. It's kind of a gateway drug that people that use higher level drugs will start and they will use marijuana." (2RT 590.)

Nash seized a book on the game Dungeons & Dragons from a bedroom and tagged it with miscellaneous indicia to Justin Helzer. He asserted that it was seized as "lifestyle evidence" in plain view. (2RT 597-601.) As with the posters he seized, he was "adding all these things together with – in adding things up pretty soon it leads you to witchcraft or the real serious issues that were discovered on the bodies. These bodies weren't just killed. These bodies were mutilated, they were cut, they were separated. And that's not a normal everyday type of murder." (2RT 601-602.)

They found, but did not seize, some bibles, and "quite a number of books on Mormonism and scripture." (2RT 589-591.) Concord Police Detective Chiabotti told Nash to look for materials on "Impact America" and a scheme to carry out a big plan, but Nash did not recall the specifics. (2RT 594.) "It's just stuff that was fed to us to look for Impact America information." (2RT 595.) Nash said "we had a lot of writings." (2RT 589.)

They seized under the Marin warrant's provision for indicia of occupancy several pairs of eyeglasses from the residence, believing that the Stinemans wore glasses. (2RT 591-592.)

Nash was not familiar with the Concord police warrant. Two detectives from that agency were at the scene, and they made their seizure decisions together. (2RT 592-593.) Items that "overlapped" or were not clearly covered by the Concord warrant or related to the Stinemans were seized under the Marin warrants. (2RT 592, 610.)

After a recess, defense counsel asked Nash if he understood and agreed with the prosecutor's assertions on "Defendant's List of Challenged Items," specifically that items marked "PV" were not seized "under the authority of a search warrant specifically" and items marked "SW" were specified in a warrant. Nash said he agreed with all but one of the

prosecutor's designations. The bottle of Viagra that the prosecutor's marks indicated was seized in plain view was actually seized as indicia "because even though the name had been removed, I knew we can track a prescription code to determine who actually received that prescription." (2RT 604-605.) "Defendant's List of Challenged Items" was received into evidence as Court Exhibit 1. (2RT 606-607.)

Nash also testified that "a lot" of law enforcement people, at least 10 from Marin County, were present for the execution of the first warrant. They entered at 6:00 a.m., behind a Concord SWAT team, which effected the entry and detained the occupants at the house. (2RT 615.)

Collection of items by Marin personnel "commenced immediately upon execution of the first warrant." (2RT 620.) Nash did not see any Concord officers searching at that point. (2RT 621.) Seeking another warrant, Nash left Saddlewood less than an hour after the entry. (2RT 617-618.) Nash first testified that he initially "went around and designated the rooms and other people actually started searching." (2RT 607-608.) He then made a "cursory exam of the entire residence" and left Concord for Marin "while they searched for the 9-millimeter weapon and the items related to it." (2RT 607-608.) Nash later testified that it was Lieutenant Heying who assigned people to search rooms because Nash was out seeking

the second warrant. (2RT 617.) Items of evidence were collected in his absence. (2RT 618.)

Bedroom one, where the Dungeons and Dragons book was seized, was initially searched under the first warrant, "looking for the firearm and casings and that kind of stuff." (2RT 618-619.) The inventory for "room 1" has entries for knives, a Beretta firearm box and manual, a basket of clothing, a "blue binder with indicia" as well as strands of hair, stained carpet and padding, "indicia to Justin," a fan and a key. (SASSCT 43.)

Items were entered and enumerated on the property inventories in the order in which one or more officers decided that they were "evidentiary in nature". (2RT 611-612.) Other than the order in which rooms were searched, and the protocol for recording seizures, Nash could not say when items were seized. (2RT 620.)

Nash returned to Saddlewood with the second warrant at 1:00 or 2:00 in the afternoon of August 7. (2RT 614.) Concord Police and a Deputy District Attorney arrived at or near the same time "because somebody saw something related to Stinemans and was aware that they were a missing couple and that's when we started making links at that point." (2RT 622.) Together, they made group decisions on whether to seize particular items. (2RT 622.) Nash looked at every item that is

entered on the inventory with his initials, SN. (2RT 613.)

The first "real briefing" they had was on the morning of August 8, 2000, after the third warrant was obtained. (2RT 614.) But Nash heard about the emergence of body parts, including a head with a facial description like that of Selina, from Marin County Sheriff's Detective Inskip on the evening of August 7, the night Concord Police obtained a new warrant. (2RT 614.) The posters found in the garage were likely among the last items seized, because the garage was the last area searched. (2RT 615.)

At no time did Nash see an item that he wanted to take but did not take because it was not covered by his warrants. Throughout the eight days, he took every item he wanted to take. (2RT 622-623.) A U-Haul truck was filled and taken to Marin after three or four days. (2RT 608-609.)

d. Redirect of Detective Nash

On redirect, the prosecutor asked Nash how he decided "whether or not something was something you wanted to take." Nash said "we would evaluate the information that we were getting from the investigators during briefings or we would look at it in the total picture of is this related to this series of homicides or the financial information that we were developing."

(2RT 623.) Nash would not have seized the stepping stones if not for what they heard was found in the river. (2RT 624-625.) Nash sought a second warrant because of the carpet dryers and stains he saw at the house. (2RT 626.) Some of the information about what to seize afterwards was gained from the papers he encountered at the house and copied for distribution to investigators. (2RT 627.)

The prosecutor also had Nash affirm that the entire house was searched "at the time of the service of the first search warrant" and "pursuant to the provisions of that warrant" which included "indicia," and "there would be very few places that you could not look into pursuant to the authority of the first warrant." (2RT 627.) And, immediately upon encountering a receipt, he would pass on the information it contained, so as not to risk take a chance on a store recording over a surveillance videotape. (2RT 629-630.)

The court acknowledged an unresolved issue as to whether copying of receipts or papers and distribution of the copies or the information they contain constitutes a seizure of that item within the meaning of the Fourth Amendment. (2RT 629.) People's Exhibits 10 through 13 were received in evidence. (2RT 630-631.)

e. Recross of Detective Nash

On recross, Nash testified as follows. The search of Saddlewood began in the living room that has a fireplace, and then the hallway entry area, then the hallway leading to the bedrooms, and then the bedrooms themselves, beginning with the bedroom that they designated room 1, then the other bedrooms designated Room 2 and Room 4, then the family room and the kitchen. (2RT 631-635.) The master bedroom was designated Room 4, and the den/computer alcove room was designated Room 6. (2RT 635-638.) Room 5 was the kitchen. (2RT 637.)

Nash added that "there was some points where we would stop and move to another area and then come back so it wasn't – each room wasn't inclusively done every time we just went into a room. In other words, we would collect some stuff. Then we may – somebody else may find something else and we'd have to go to another room to do that." (2RT 635-636.)

After searching officers observed, copied and distributed the "Not Too Naughty" receipt, the receipt was placed "back there with the rest of the stuff to be collected all as one item when we got to that room for collection purposes." By "back there" he meant the location where it was first observed. (2RT 642.)

In Nash's view, they "had control over the entire residence so in reality we had control over everything" under the search warrant. (2RT 643.)

Nash was aware that the occupants were Mormons. He saw but did not seize bibles, and had no recollection of the number of Mormon bibles, nor of a poster of a prophet receiving God's word that counsel said was hung in the hallway. (2RT 640.) He was not aware of any discussion of whether to seize or leave the "Christian stuff" behind. "It didn't really matter to what we were investigating at that point." (2RT 645.)

f. Direct Examination of Detective Chiabotti and Exhibits

The prosecutor called just one additional witness, Concord Police Detective Steve Chiabotti. (2RT 649.) Detective Chiabotti had responsibility for investigating the disappearance of the Stinemans. He obtained his warrant to search Saddlewood by presenting an oral affidavit to Judge Spinetta on the night of August 7. He served it on the morning of August 8. (2RT 650.) When he served it, work was being done on two previous Marin warrants. (2RT 650-651.)

His responsibility was to "coordinate the investigation, assign leads to be followed up on and communicate back and forth" while others

searched for evidence at Saddlewood. (2RT 651-652.) In daily briefings of Concord Police and Marin Sheriff deputies, they discussed "the different information that we developed with each of the separate investigators the previous day. We created what we call a lead sheet, to write different leads up, assign them out to whatever investigator we decided, and we share information back and forth. And the evidence collection team always sent a representative to the briefing so they would be kept up to date of any new developments in the case." (2RT 652-653.)

Concord Police Officer Warnock told Detective Chiabotti that one Kelly Lord said that she had known Dawn, and met Justin and Taylor at a church social. Taylor invited her to go to a meeting at the Harmony Institute in Sacramento, and later to a "wicken meeting" with the three defendants and Taylor's former girlfriend. (2RT 654.) Taylor was said to have talked to Kelly Lord about "different ways that he's tried to raise money" such as "[c]arjacking and selling cars to make money" and to have asked "If we did something like a robbery at a small place like this, would you be open to it?" (2RT 654-655.) Ms. Lord said Taylor said "he had himself declared legally insane" to obtain disability and that this might help him out in the future legally" and that he would kill anyone who was a part of his Impact America plan who betrayed him. (2RT 656.)

Concord Police Detective Delatorre told Detective Chiabotti about a George Calhoun of Morgan Stanley Dean Witter on August 7. Calhoun said he had received a call from someone saying she was Annette Stineman at 6 am on July 31, 2000. He had never spoken with her before. She asked him to liquidate her assets and put them in a money market account. She had a $100,000.00 stock portfolio. (2RT 657-658.)

Another Concord Police Officer informed Detective Chiabotti that a neighbor of the Stinemans reported seeing two white males with long hair, dressed in suits, at the front door of the Stineman home on the night that they were last seen. (2RT 658.) A detective who interviewed Justin Helzer's insurance agent reported that Justin had contacted the agent for extra coverage for a jet ski he rented on August 1. (2RT 658.) The agent recalled that Justin and Taylor came to his office on the evening of August 1, and said they were going to take the jet ski to the Rio Vista area of the Delta. (2RT 659.)

Chiabotti communicated the above information to officers searching Saddlewood because "[i]t was important to look for evidence associated with Morgan Stanley Dean Witter accounts for the Stineman's large transactions through their accounts to anywhere else. Receipts for jet skis were relevant because it was certainly a possibility" that they were used to

deposit the remains found in the Delta. "So we wanted to find some indicia *to determine who had rented the jet skis, when and where*." (2RT 659, emphasis added.)

His "guidelines" for deciding what to seize encompassed "anything that was related to instrumentality of the crimes that we were investigating, evidence that would tend to show who committed the crimes, how the crimes were committed, evidence which went to state of mind rather, planning, preparation." (2RT 661.)

Concord police officers participated in the seizure. Police Detective Judy Elo "took a fairly heavy role in the collecting of evidence from the Concord side of things." (2RT 661.)

Exhibit 14 "documents the various evidence that was collected by Detective Elo from Saddlewood.." [15] It was prepared in the ordinary course of business. (2RT 662-663.) The attachments are "photocopies of various items of evidence that Detective Elo collected that are listed on the her

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[15] Exhibit 14 is an 11-page Concord Police Department Offense Report listing items seized at Saddlewood, numbered 1101 through 1199, and 2100 through 2116. (SASSCT 165-176.)

inventory, which is, I think, the first 10 pages." [16] (2RT 664.) The court

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[16] Attached were 93 pages, consisting of: a cartoon, a bank withdrawal receipt indicating $1130.00 was withdrawn on August 2, 2000, handwritten notes of questions about vacation habits, commitments for the next three days, and daughters names; a bank statement for Glenn Taylor Helzer indicating a zero balance after withdrawal of $1135.00 on June 2, 2000, and a handwritten note stating "Hi, this message is for CalFed, O.K., Hun, I'll do it later. I'll be right there." (SASSCT 177-181.) Also attached were a First Select Account statement addressed to Glenn Helzer at the Walnut Creek PO Box, showing a balance of $9,040.39 due June 15, 2000, a collection letter from a law firm dated February 28, 2000, seeking $12,294.83 from GT Helzer, a letter from Chase BankCard Services to Glenn Helzer dated April 7, 2000, seeking $8,441.21; a collection letter to Glenn Helzer dated April 14, 2000, from Chase Manhattan, seeking $866.50, a collection agency letter dated June 17, 2000, on behalf of MCI seeking $1234.70, addressed to Glenn Helzer at PO Box in Walnut Creek and a Capital One Student Loan Account statement seeking a payment of $378.19, due April 5, 2000, and addressed to Carma Helzer and Taylor Helzer at the same PO Box in Walnut Creek. (SASSCT 187.) Also attached: a hand-annotated version of the sheet headed Financial Projections and Vibe Alive Girls, a page of handwritten notes, a Citibank Student Loan statement for Justin Helzer requiring a payment of $81.66 on August 8, 2000, three pages of calculations under the heading Dating/Custom Video 10 Women, a typed letter signed Jordan describing Intimacy= Into Me See as a private party that caters to men whose net worth is in Excess of Two Million, addressed to an unnamed woman who placed an ad, followed by two more pages of financial calculations for a club in which volunteer porno actresses teach men sexual techniques. (SASSCT 188-196.) These were followed by a letter dated July 14, 1998, from the California Stake of the Church of Jesus Christ of Latter-Day Saints addressed to Taylor Helzer at an address on Victory Lane in Concord, informing him that a Disciplinary Council meeting regarding his membership will be held on July 21, 1998, a Church letter to Glenn Helzer dated May 4, 2000, at the Walnut Creek PO Box seeking his street address to determine where his membership record should be assigned, and a two-page undated letter to Taylor signed "I love you Keri." (SASSCT 201.) This note was followed by an abstract of judgment entered against Taylor G. Helzer on April 5, 2000, in favor of Providian Bank in the amount of

$15, 622.58, a letter dated April 7, 2000, from MetLife to Glen Helzer at an address on Oak Grove, seeking $2,729.58 as reimbursement for an overpayment of Long Term Disability Benefits because claim benefits were terminated on December 31, 1999; a People's Bank credit card statement with a balance of $2,467.46, but no name or address, an invoice from All Discount Lab Supply, Inc for phosphorus powder purchased by Glenn T Helzer on April 1, 1999, no balance due.(SASSCT 201-204.) Also attached was a page of handwritten notes headed "Maybe he hasn't thought of (that)" and ending with "I not going to jail, I'm going to put a gun to head and end it. Justin is too. If that's true, then why would I not kill you first .. ~~betrayed my first~~." (SASSCT 205.) Next was a receipt for handcuffs from Not Too Naughty, and one for a "dong" and a "wet light", both dated June 16, 2000, followed by Dawn Godman's resume, a PG&E bill Shirley and Emil Robinson with a balance of $142.95 due July 23, 2000, a Demand for Payment of $4, 081.57 addressed to Glenn T Helzer at his PO Box in Walnut Creek from a collection agency for American Express, a Notice of Proposed Assessment from the Franchise Tax Board dated March 8, 1999, addressed to Glenn T Helzer at the Victory Lane address in Concord, saying that he failed to file a return for 1997 and owes $691.37 based on estimated income; magazine or newspaper articles on penis enlargement and designer vaginas, advertisements for sexual aids and pornographic magazines and videos addressed to GT Helzer at Winwood Court in Martinez, and an Army Training Center Diploma for completion of the Administrative Specialist Course by Private Glenn T. Helzer on December 16, 1988. (SASSCT 206-225.) This was followed by a 1997 form 1040 for Glenn T. Helzer stating an income of 43644.65 and an amount due of $23.49; a letter to "Dearest Taylor" signed "Love, Keri" two pages of handwritten notes on a Dean Witter note pad, an Amador County District Attorney Family Support Division statement for Dawn Godman showing a balance of $1340.38, due in March 2000, a letter to Taylor signed "Your friend always, Keri," and an April 27, 2000, storage rental agreement for Dawn Godman with Teonae Helzer stated at the alternate contact, and Jordan Taylor and Justin Helzer as people who will have access. (SASSCT 226-236.) Next is a Sacramento City College transcript and Assessment report for Dawn Godman, a summons and complaint for unlawful detainer against Dawn Godman, Army discharge papers for Glenn Helzer stating he entered service on Augusat 19, 1988 and was separated December 17, the same year, with a reserve obligation until

accepted Exhibit 14 into evidence over objection based on the witness's lack of personal knowledge of whether the document was prepared at or near the time of any event or occurrence. (2RT 665-667.)

g. Cross examination of Detective Chiabotti

Chiabotti was not personally present when all the items were seized, nor did he seize anything himself. (2RT 667.) The warrant he obtained for Saddlewood was served by Detective Elo. (2RT 669.) He is not aware of any record of the dates and times that any of the items were collected at Saddlewood. (2RT 670.)

The briefings were held at the Concord Police Department. He

November 1995. (SASSCT 237-241) Next was a tenant application for Taylor Helzer and Keri Furman dated August 10, 1988, for a house in Concord, a printed page headed "EXTACY" stating a need for manufacturing know-how, etc, and calculations of income from sales, followed by a copy of Penal Code 266f-I, through 647, two pages of darkened handwritten notes, and eight pages of calculations for Dating/Custom Video (SASSCT 242-258.) Next were two pages of handwritten notes of things to do, a typed page headed Marketing, a bill from Concord Disposal Service for August through October 2000, to David and Sheri Bernoff at the Saddlewood address, one page handwritten notes, an article entitled "I am a high class call girl", Justin Helzer's certificate of honorable release from missionary service dated September 7, 1993, a typed poem entitled Shadow Play by Daniel Joseph McCloud, ads for nightclubs and Harmony of Sacramento, and a note to Jordan from Sky saying she went to Livermore to get handcuffs and was unable to rent something illegible. (SASSCT 259-270.)

"tried to have at the briefing somebody from the seizing group of officers available." (2RT 667.) Sometimes Detective Nash came; sometimes Detective Elo came, and sometimes Corporal Grimes of the Concord police Department came. (2RT 668.) Someone involved in the search was present at each briefing. (2RT 670.) Sometimes every member of the search team was present. (2RT 671.) No record was made of the subject matter presented or the identity of the officers who attended a briefing. (2RT 671.) There was no minute-taking, formal note-taking or electronic recording. (2RT 671.) Chiabotti destroyed his notes after preparing reports. (2RT 675.)

Chiabotti sometimes communicated through Nextel. When he briefed people orally, he relied on them to brief others involved in the search. (2RT 668-669.) If new information developed during the day indicating a need to seize something at Saddlewood, "we would contact the search team at Saddlewood and let them know." (2RT 672.) The information would be repeated at the briefing held the following morning. (2RT 674.)

He visited Saddlewood and watched "some" items being gathered, checked, and identified. Officers collected items from the locations where they had been assigned. They would "bag them to be marked later." (2RT

673.) He did not know what would happen to the location of an item after being identified by one of the finders. (2RT 673.)

His department relinquished control over Saddlewood on or about August 22, 2000. (2RT 674.)

h. Re-direct of Detective Chiabotti

The Saddlewood search was the first and only search in his experience where there were three separate search warrants for a single residence. (2RT 675-676.)

i. Recross of Detective Chiabotti

Detective Chiabotti did not prepare the three-page return to his warrant. He did not know which return if any listed the items on Exhibit 14. However, if items were not seized pursuant to his warrant, they were seized pursuant to one of the Marin warrants. (2RT 677.)

j. Re-redirect of Detective Chiabotti

The return to his warrant listed about 30 items, including handwriting exemplars for the three suspects, and miscellaneous receipts for retail purchases. (2RT 678.)

k. Other evidence

A photograph of the seized posters that was attached as an exhibit to the prosecutor's response was stipulated to be appropriate for the court's consideration. (2RT 680.) A photocopy of the cover of the Dungeons and Dragons book was marked as court exhibit 2, and the disk of photographs was marked as court exhibit 3. (2RT 681-682.) The court acknowledged receipt of "very clear" prints of the photographs on the disk (2RT 682.)

l. Discussion of the day planner after close of evidence

Defense counsel submitted that the admissibility of each document "has rested on its own merits" but the photographs showed only documents in a group. (2RT 682.) The prosecutor responded that he did not "necessarily agree that each document necessarily has to stand or fall on its own merits. The reason being, I think we argued in our brief and, for example, for instance, the day planner, I think which I marked as KI. A number of documents in the defense exhibit. KI, 13 all of those documents were actually removed from a single item that was seized in the day planner." (2RT 682-683.)

The prosecutor continued:

> "And as the court knows because I think we've accumulated it, if its part of the item seized was the day planner, if there was probable cause to seize the day planner, anything that goes with the day planner was properly seized."
>
> We do not believe that there's an obligation on the part of the police to go through that particular item which the very process may change the character of and try to separate out the wheat from the chaff right there at the scene. If there's probable cause to seize the day planner there's probable cause to seize any contents inside of the day planner, that's our position. (2RT 683.)

Defense counsel disagreed insofar as probable cause to seize a file cabinet in a stolen property case does not entitle officers to "get out the documents inside the file cabinet to see each and every one of them regardless of their content. Particularly if they don't reflect on the stolen property claim that led to the seizure of the contents to begin with." (2RT 683.) The court replied:

> I agree with that. It depends on why the day planner was seized. Why the file cabinet was seized. If the file cabinet itself was an instrumentality of the crime or kept records of a business that was the criminal – or was the focus of the crime, then you would take the whole cabinet.
>
> If it wasn't, just one little piece that you're looking for, I agree, no other documents in that file cabinet would be relevant. So I guess it will depend on what the arguments are as to each item. And I guess we'll try to take that as we go, okay? (2RT 684.)

All agreed to argue the matter later. (2RT 684.)

12. Briefs filed after the testimony

The defense filed a "second supplemental notice and motion to suppress" based on the record developed through the evidentiary hearing. (10CT 3988.) This paper argued that "life style evidence" was not a legally cognizable justification for seizure under the plain view doctrine, and that the nameless receipts claimed to have been seized as indicia of occupancy under the Marin warrants were in fact "non-indicia that led to an investigation for incriminating evidence. They required an additional warrant." (10CT 3990.) The papers argued that the court should suppress all the items listed in the motion to suppress. (10CT 3991.)

The prosecutor filed a supplemental response. (10CT3992.) He submitted that Nash's use of the term "'life style evidence' notwithstanding, visual representations of warlocks, dragons, skulls and monsters of various types is relevant to intent (mens rea) and were seized under the plain view doctrine." The prosecutor also defended the seizure of all receipts as indicia and as relevant evidence "because of what was purchased, e.g., leg irons, tools, gym bags, plastic tarp, etc." (10CT 3993.)

13. Oral Argument Heard July 25, 2003

Defense counsel reminded the court that "a warrant has to be so specific in those items to be seized that it leaves nothing to the discretion of the searching officer." (3RT 691.) The search warrants are fairly clear in identifying a variety of items that might constitute indicia of occupancy or ownership, and they do not include every receipt. (3RT 692.) Seizure of items that do not readily appear to be particularly described in the warrant must be justified by the prosecutor. (3RT 691-692.)

Defense counsel noted that the prosecutor did not offer any justification, and defense counsel did not obviate the need to do so when he cross examined Nash about his agreement with the prosecutor's designations on Exhibit A. Defense counsel did not ask Nash if he agreed with the prosecutor's suggested justifications. His question was carefully framed to establish only that all but one of the items the prosecutor marked "PV" were indeed items that the warrant did not specify. (3RT 691-693.) The court must now determine what was inside and outside the provisions of the warrant on an item-by-item basis in light of the warrant language and the invalidity of a warrant that lacks particularization. (3RT 694.)

Defense counsel also asserted that police should have sought a warrant that described the additional things they wished to seize when they

learned new information, such as the emergence of body parts in the Delta, during their occupation of Saddlewood. Nash's affidavit for the second Marin warrant said that the affiant "specifically seeks permission to seize a piece of carpet." (3RT 697.) The "digging up the front yard, the pulling of the pipes, the trashing of the bathroom, the taking of the bathtub, so forth, was not what was comprehended by the magistrate ...". (3RT 698.) The receipts and eyeglasses were investigative leads and required an additional warrant because they are not indicia on their face. (3RT 693.)

Defense counsel added that the court can revisit the question of whether or not the descriptions in the warrant serve as a justification for the seizure of a particular item, and whether they were "sufficiently specific so as not to leave any discretion to the seizing officer." (3RT 695.)

Defense counsel also submitted that, when the officers learned about the discovery of body parts, they were required to go back to the magistrate and ask for authorization to seize things that they discovered in the search and now believe to be relevant based on the new information. (3RT 696-697.) Nash's affidavit for the second Saddlewood warrant said he wanted to seize a piece of carpet. The magistrate never contemplated what followed. (3RT 698.)

Apropos the day planner and the other evidence seized that was not

identified in the warrant or justified in the testimony, defense counsel argued that all must be suppressed. (3RT 699-700.) As to the posters, he averred that he found no authority allowing seizure of lifestyle evidence without a warrant. The officers' failure to seize other kinds of lifestyle evidence, specifically bibles, Mormon books, and a picture of a prophet or Jesus, confirms that the lifestyle evidence justification is vague, obtuse, and not supported by the law. (3RT 701.) There is no evidence that the dismemberment of the bodies or other criminality activity was related to witchcraft, and the officers had no expertise in such things. (3RT 702-703.)

The prosecutor argued that officers "are entitled to rely on common sense meaning of the English language, perhaps even history of the United States and what witches and witchcraft mean. And at least the reasonable possibility that there could be a conjunction used [sic] looking at nothing more than common sense between witchcraft and the dismemberment of bodies." (3RT 704.)

A "poster of a half-naked woman on a dragon standing next to a sabertooth monster . . . might, in fact, constitute evidence of mens rea of the people in the home who at that time were being investigated for the murder of five people, including dismemberment of them, through a matter of common sense that the officers can use, and certainly this court can use ...".

(3RT 704.) The second Marin warrant was not limited to a piece of carpet, and included trace evidence, which could be in the sewer line. (3RT 705). There is no need to get a new warrant to seize additional evidence from a location they are entitled to search under an existing warrant. (3RT 706.) The plain view doctrine allows seizure of evidence based on new information. (3RT 706-707.)

As the prosecutor recalled, defense counsel asked Nash if he would "adopt or otherwise agree with the designation on Exhibit A" and Nash answered yes. (3RT 707-708.) The photographs for which he laid a foundation "display all of those items" and are "accurate reflections of the items that were challenged and of the subject of this motion right now. In addition . . . we have laid the foundation for the documentary items." (3RT 709.)

In response, defense counsel' said that he had asked Nash only whether he understood the prosecutor's PV and SW designations, and whether he agreed with those. There was no reference made to "any justification for the seizure of those items. ¶ All I was trying to do was merely establish whether or not the officer agreed that they were seized outside the scope of the warrant. He alluded that they were. And then the burden shifts to the People ...". (3RT 710.)

Defense counsel argued that when the officers decided to "expand the scope of a search ... the Constitution compels that they stop, secure the premises and get themselves a warrant." (3RT 711.) Also, the designations on "Exhibit A" are mere conclusions. And the implications of witchcraft are no more common knowledge today them they were in the 17th century in Salem. (3RT 712.)

The prosecutor replied that he agreed with the defense claim respecting the lack of common knowledge of witchcraft, yet that does not "change the question of whether or not the items were properly seized." (3RT 712.) Also, he argued that the scope of the search was not expanded. "It's not the question of whether or not the officers went into places that they otherwise would not do because of acquired knowledge or plain view seizures. ¶ It was a question of whether or not they could seize items that had already come into their view. . . . [E]verywhere the police went was pursuant to the authority of the search as designated by the magistrate. The only question is whether the seizure of some of these items was appropriate, but in doing so they did not intrude upon any additional privacy interests." (3RT 713-714.) Also, anything improperly seized during the execution of the warrants based on new information would have been inevitably discovered under a new warrant. (3RT 714.)

Defense counsel's brief reply noted that "in these warrants the officers were so specific that they could ask for a pair of plastic gloves removed from the garbage can in the garage . . . that in itself bespeaks the whole enormous extent to which this exceeded the intention of the magistrate in permitting them to continue to search to the extent that they did." (3RT 714.)

14. Ruling from the Bench July 25, 2003

After the court repeated its prior rulings on the validity of the warrants and the defense burden to identify items believed to be illegally seized (RT 715-715) the court made the following relevant findings of fact:

The first Saddlewood warrant sought the gun used in the Marin homicides but "did include indicia." (3RT 716.)

"Once they entered the residence they saw imprints on the wet carpet in the shape of two[17] bodies; therefore, there was new and different evidence . . . in plain view.

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[17] No evidence supporting this finding was adduced. Nash's affidavit in support of the second Saddlewood warrant states that he saw the shape of one body, not two. (9SCT 1883.) Nash's testimony did not contain any assertions that he saw an outline of a second body, nor that he had any other reason to suspect that more than one person had been killed in the house at that juncture.

"They had information at the time that Selina Bishop was missing, as well as the Stinemans shortly after that.[18] And that then they gotten [sic] the second warrant which included forensic evidence, trace evidence, which could possibly link the crimes for [sic] the missing persons, the Stinemans,[19] Ms. Bishop or the deaths of them and other evidence that would relate to those crimes." (3RT 716.)

"In looking over the list and the testimony of Detective Nash and Detective Chiabotti, who I did find both to be credible witnesses, *I find that the officers were in a place they had a right to be in, and that would encompass the entire house, the tenant building, the yard, et cetera. And they have the right to look for trace evidence which would allow them to look virtually in every nook and cranny of those places.* (3RT 716-717,

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[18] There was likewise no evidence that any of the officers who searched Saddlewood pursuant to the first warrant learned about the Stinemans disappearance until after Nash returned with the second warrant, i.e., at least five hours after the search commenced. Nash testified that he returned to Saddlewood with the second warrant at 1:00 or 2:00 in the afternoon of August 7. (2RT 614.) Concord Police and a Deputy District Attorney arrived at or near the same time "because somebody saw something related to Stinemans and was aware that they were a missing couple and that's when we started making links at that point." (2RT 622.)

[19] The second warrant did not authorize a search for anything related to the Stinemans. The affidavit for that warrant makes no mention of them. Nash testified that he learned about their disappearance only after he obtained the second Saddleood warrant. (2RT 622.)

emphasis added.)

"*While doing that, they continued to find evidence linking the defendants to more crimes. Because of that, they did go back and get subsequent warrants*, but not after each and every item was found as counsel concedes. That would be ridiculous, but when the evidence revealed new and different crimes or methods learned in which the crimes were carried out. I don't find any of these items to be beyond the scope of the warrant or not within plain view to view [sic] because of the incriminating nature and connection to the case. (3RT 717, emphasis added.)

The court held that receipts are "proper indicia" insofar they "can be reasonably traced to connect a person with that item to that location in a house". (3RT 717.) Further, if any victim is known to wear eyeglasses, any and all eyeglasses found in the search "would be a relevant item within plain view that would connect the household to this murder – murders."

"As far as lifestyle evidence, such as posters, the officers learned that the defendants were involved in cults slash witchcraft type activities. So possibly to the officers, Mormon bibles and/or books relevant to the cult activity they were looking for. [Sic] Posters of flowers of landscapes or puppy dogs wouldn't be relevant, but skeleton warriors with axes, skulls

dragons, lords and et cetera would be. I don't feel that an officer needs to have a specific definition or understanding of witchcraft before an officer can seize an item that they believe, in good faith, relates to that evidence that they are involved in a cult slash witchcraft-type activity...." (3RT 718.)

The court added that the seizure of pipes under the bathroom floor or in the front yard was "reasonable in this case because they felt the bodies had been dismembered in the tub.

"Finally, any item that any court might feel was seized outside the warrant, which I do not, of warrant four or five, would have inevitably been discovered through warrant six[20]." (3RT 718-719.)

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[20] The searches of Saddlewood conducted under Marin warrants were sometimes referred to as searches four and five. The search conducted under the Contra Costa warrant was referred to as search six, because Nash conducted three searches of phone records before obtaining the first warrant for Saddlewood. Two of the phone record searches were warrantless. No "warrant six" was before the court.

1. Marin Detectives Violated Appellant's Fourth Amendment Rights in Conducting Searches and Seizures Beyond the Scope of Their Warrants

The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." (U.S. Const. amend. IV.)

The warrant requirement is the cornerstone of the Fourth Amendment's guarantee of the right to privacy. (*Johnson v. United States* (1948) 333 U.S. 10, 13–14.) As the Supreme Court has observed:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. *The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional*

> *requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.*(*McDonald v. United States* (1948) 335 U.S. 451, 455-456, emphasis added.)

A search pursuant to warrant must be directed "'toward the objects specified in the warrant or for other means and instrumentalities by which the crime charged had been committed.' [Citation.]" (*United States v. Rettig, supra*, 589 F.2d 418, 423 cf. *Horton v. California* (1990) 496 US 128, 141 ["if the three rings and other items named in the warrant had been found at the outset -- or petitioner had them in his possession and had responded to the warrant by producing them immediately -- no search for weapons could have taken place."]; *Creamer v. Porter* (5th Cir. 1985) 754 F.2d 1311, 1319 ["[a] reasonable officer would be aware . . . [of] the rule confining the search to items particularly described in the warrant"].)

Following *Horton*, this court correctly held that "[w]here an officer has a valid warrant to search for one item but merely a suspicion, not amounting to probable cause, concerning a second item, that second item is not immunized from seizure *if found during a lawful search for the first item*." (*People v. Bradford, supra*, 15 Cal.4th at p. 1293, emphasis added.)

Later, citing a 1978 Supreme Court decision and *Whren v. United States* (1996) 517 U.S. 806, 813, this court repeated the rule of *Horton* as

quoted above, but declared itself unable to consider evidence or claims that an officer was not searching for the first item when he came upon the second. (*People v. Carrington* (2009) 47 Cal. 4th 145, 168 ["Courts must examine the lawfulness of a search under a standard of objective reasonableness without regard to the underlying intent or motivation of the officers involved]."")

Appellant submits that evidence of the underlying intent and motivation of the officers in obtaining and ostensibly executing a search ought not be ignored, and should be objectively assessed, in determining the objective unreasonableness of the search.

The decision in *United States v. Retting, supra*, 589 F.2d 418, is much on point here. It was authored by Justice Kennedy while a judge on the Ninth Circuit, and has been cited with approval many times in the wake of *Whren.* (See, e.g.,*United States v. Sedaghaty* (9th Cir. 2013) 728 F.3d 885, 914-915; *Pacific Marine Center., Inc. v. Silva* (E.D. Cal. 2011) 809 F. Supp. 2d 1266, 1280.)

In *Rettig,* a federal agent obtained a warrant to search the defendant's home for marijuana and "indicia of the identity of the residents of said house . . .". The affidavit accurately presented probable cause for marijuana possession, but it did not disclose that the agents intended to

search the subjects home office to prove a conspiracy to import cocaine. The agent had unsuccessfully sought from another judge a warrant to search the house for evidence of that crime, which was denied due to the staleness of the agent's information respecting that offense.

The court held that the undisclosed intention of the agents did not invalidate the warrant, and would not have done so if disclosed. "However, the failure to disclose does enlighten our review of the search and seizures that actually took place as we determine whether or not the agents went beyond the confines of the warrant. *(United States v. Rettig, supra*, 589 F.2d 418, 422.) The court explained:

> Had the state judge who issued the search warrant been informed of the true reason for the warrant request and of the scope of the search contemplated, he might have concluded that it was permissible to issue the warrant for the purpose of searching for evidence of the conspiracy here in question, subject to explicit limitations on the scope of discovery and seizure in order to prevent an overly intrusive search. But the agents withheld this information. A judicial officer cannot perform the function of issuing a warrant particularly describing the places to be searched and the things to be seized, and of supervising the proper return of such process, where the police fail to disclose an intent to conduct a search the purposes and dimensions of which are beyond that set forth in the affidavits." (*United States v. Rettig, supra*, 589 F.2d 418, 423.)

The nature of the documents seized in *Rettig* was similar to that here. The *Rettig* court noted:

> Documents and papers throughout the house were examined, ostensibly to discover indicia of the residents' identity for the purpose set forth in the warrant. The Government stipulated to a complete inventory of the material taken, which lists some 2,288 items. The vast majority of the items listed are written material. While the list is too extensive for a detailed description here, the breadth of the search that took place can be understood by noting that the items seized included numerous United States government publications, blank applications for various credit cards, bank brochures, medical and dental records, drug store receipts for a period extending over two years prior to the search, photograph slides, undeveloped film, extensive financial records, credit cards, and travel documents. Also seized were a black leather case containing approximately four pounds of white powder, a triple beam balance scale, and several wine bottles.

The Court of Appeals concluded that search undertaken pursuant to the warrant "was for purposes and objects not disclosed to the magistrate." (*United States v. Rettig, supra*, 589 F.2d 418, 421.) Further,

> We find the record establishes that the agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions. As interpreted and executed by the agents, this warrant became an instrument for conducting a general search.. (*United States v. Rettig, supra*, 589 F.2d 418, 423.)

The same must be said here. The nature of the documents seized under the first Marin warrant for Saddlewood accords with the investigative

purpose that Nash articulated at the suppression hearing, and not with the nature and purpose of the indicia described in the warrants. As previously noted, the first Marin warrant particularly described the documents to be sought as follows:

> 4. Receipts and documents related to *9mm handguns and ammunition;*
>
> 7. Indicia of ownership, including but not limited to leasing documents, Department of Motor Vehicles documents *indicating ownership of the vehicle*, letters, credit card gas receipts, keys and warranties.
>
> "8. Indicia of occupancy or ownership; articles of personal property *tending to establish the identity of persons in control of said premises*, storage areas or containers where the above items are found consisting of rent receipts, cancelled checks, telephone records, utility company records, charge card receipts, cancelled mail, keys and warranties." [21] (9SCT 1847-1848, emphasis added)

The warrant makes no mention of other documents, nor of any need to establish the identity of the individuals who had purchased, owned or

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[21] The terms of the indicia clause underscored above are a common if not essential ingredient of a valid warrant for indicia of occupancy. See *Millender v. County of Los Angeles* (9th Cir 2010) 620 F.3d 1016, 1030.

controlled *anything other than the specified weapon, the specified house, and the specified motor vehicles.*

Clearly, the issuing magistrate did not approve a search for all items that would lead to the identification of people whose presence in the home was transitory, such as the eyeglasses seized as indicia of the Stinemans' occupancy, nor a search for the retail receipts that Nash's team immediately seized upon as investigative leads. The magistrate was told that officers would be seeking only specified documents, documents that are by nature stand-alone evidence of long term occupancy and control of the home, ownership of the vehicles, and ownership of the gun used in Woodacre. The Marin detectives were not guided by their warrants description of indicia, but by their own standard operating procedures.

Moreover, Nash's affidavit and warrant could have specified retail receipts, eyeglasses, handwritten materials, and anything else that he knew he would seek as leads to indicia of temporary or permanent occupancy. His failure to do so precluded the magistrate from examining the objective reasonableness of Nash's approach, and makes his use of a generic description of indicia unlawful and reprehensible.[22]

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[22] This court and many federal appellate courts have concluded that a generic description of the evidence to be seized cannot be used in a warrant application if a more specific description could have been given

Failing that, Nash was not free to ignore the specificity that his warrants employed. As previously noted, an officer who conducts a search of a home without knowledge of the details of the warrant under which he presumes to act violates clearly established law. (*Guerra v. Sutton, supra*, 783 F.2d 1371, 1375; *Marks v. Clarke, supra*, 102 F.3d 1012, 1029-1030; *United States v. Heldt, supra*, 668 F.2d 1238, 1261; accord *People v. Bradford, supra,* 15 Cal. 4th 1229, 1307 [noting that record "does not demonstrate that the officers had not been briefed or prepared as to the objects of the search."].)

The recent decision in *United States v. Sedaghaty* (9th Cir. 2013) 728 F.3d 885, confirms this point. There, government agents searched the defendant's home in 2004 pursuant to a valid search warrant authorizing the seizure of financial records and communications related to the preparation of a tax return. "The government emerged from the search, however, with much more: news articles, records of visits to various websites about

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with the information available to the affiant officer at the time. (See *People v. Eubanks* (2011) 53 Cal. 4th 110, 134-135; *United States v. Adjani* (9th Cir. Cal. 2006) 452 F.3d 1140, 1147-1148; *United States v. Leary* (10th Cir. 1988) 846 F.2d 592, 600 [Fourth Amendment requires that the government describe the items to be seized with as much specificity as the government's knowledge and circumstances allow, and warrants are conclusively invalidated by their substantial failure to specify as nearly as possible the distinguishing characteristics of the goods to be seized.)

Chechnya, photographs of Chechen war scenes, and other documents that were introduced at trial as evidence of Seda's desire to fund the Chechen mujahideen." The defendant, called Seda, moved to suppress evidence not listed in the warrant. The government contended that the accompanying affidavits provided justification to seize what they seized. The district court denied the motion to suppress because the seized evidence was relevant to the charges disclosed to the magistrate. The Court of Appeals reversed and remanded the matter to the district court for application of the exclusionary rule, and explained:

> Even if the affidavit is understood to describe evidence "relevant" to the violations, that does not authorize the far flung scope of the agents' search. Relevance, of course, is not the standard; the language of the warrant controls. *United States v. Tamura*, 694 F.2d 591, 595 (9th Cir. 1982) ("As a general rule, in searches made pursuant to warrants only the specifically enumerated items may be seized.") (citation omitted)... See *United States v. Heldt,* 668 F.2d 1238, 1266, 215 U.S. App. D.C. 206 (D.C. Cir. 1981) ("[T]he particularity requirement of the fourth amendment prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.") (internal quotation marks and citation omitted). In light of the specific limitations of the warrant, it is difficult to embrace the government's justification that the search terms "bore a logical connection to the affidavit" and that all of the materials seized "were relevant given the nature of the charges."
>
> * * *

The supervising agent here may well have believed that the affidavit took precedence over the warrant, but the subjective state of mind of the officer executing the warrant is not material to our initial inquiry. *United States v. Ewain*, 88 F.3d 689, 694 (9th Cir. 1996) ("A policeman's pure heart does not entitle him to exceed the scope of a search warrant . . . ."). Any other conclusion would elevate the author of the incorporated probable cause affidavit over the judge issuing the warrant. Cf. *Johnson v. United States*, 333 U.S. 10, 13-14, 68 S. Ct. 367, 92 L. Ed. 436 (1948) (noting that the Fourth Amendment requires that any inferences from the evidence be "drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime").

* * *

The Supreme Court has emphasized that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers" as opposed to physical objects, and that given the danger of coming across papers that are not authorized to be seized, "responsible officials, including judicial officials, must take care to assure that [searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Andresen v. Maryland*, 427 U.S. 463, 482 n.11, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976). The search warrant here was properly issued [*75] and clearly stated the locations to be searched and the items that could be seized. The government agents responsible did not minimize intrusions on privacy, however, but instead seized papers and records beyond those the warrant authorized. See *United States v. Rettig*, 589 F.2d 418, 423 (9th Cir. 1978) (concluding that although the warrant was sufficiently particular, the executing "agents did not confine their search in good faith to the objects of the warrant, and that while purporting to execute it, they substantially exceeded any reasonable interpretation of its provisions"). Unlike cases where the magistrate judge erred in filling out the warrant but the government reasonably relied on the judge's approval, here the magistrate judge properly

> authorized the warrant but the agents did not follow it. See Hurd, 499 F.3d at 969 (holding that officers reasonably relied on the warrant, though judge inadvertently failed to initial the appropriate line); *United States v. Hitchcock,* 286 F.3d 1064 (9th Cir. 2002) (determining that magistrate's error in post-dating one line of the warrant did not require suppression of the evidence seized). *(United States v. Sedaghaty, supra,* 728 F.3d 885, 913-915.)

Also instructive here is *United States v. Foster, supra*, 100 F.3d 846, in that the exploitation of the indicia clause to acquire investigative leads was related by Detective Nash as a standard operating procedure, thus revealing knowledge that the warrant's limiting terms would not be honored In *Foster,* an officer obtained a particularized warrant to search for marijuana and guns knowing that standard procedure for the execution of such a warrant in his jurisdiction involved searching all items with serial numbers in the house to determine if they were stolen, and seizing "everything of value." Officers in the county had been conducting searches this way for as long as he could remember, and did so in an effort to turn up evidence of additional crimes.

The appellate court concluded that "Foster's Fourth Amendment rights were violated by the seizure and removal of "anything of value" from his home. Furthermore, it is abundantly clear that the officers' disregard for

the terms of the warrant was a deliberate and flagrant action taken in an effort to uncover evidence of additional wrongdoing. Because the officers here flagrantly disregarded the terms of the warrant in seizing property, "the particularity requirement is undermined and [the otherwise] valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant. [Citation.] *(United States v. Foster*, 100 F.3d 846, 850-851.)

Here, the officers' disregard for the limiting terms of the indicia of occupancy provision was the first, but not the only, step over the line between executing a valid warrant and conducting a general search. Further points of similarity between this case and *Rettig, Sedaghaty,* and *Foster* emerge in reviewing the discussions of the numerosity and the bulk of the items seized that the prosecutor did not include on his list as well as the number of listed items that are not described in any warrant, and in Nash's testimony justifying pursuit of evidence of other crimes, witchcraft, and lifestyle, without a warrant to do so. As noted in *Rettig*:

> The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search." [citation.] The safeguards of the fourth amendment that a magistrate is charged with upholding consist not only in the guarantee that

> a search warrant be issued upon probable cause but also in the requirement that any warrant issued be one "particularly describing the place to be searched, and the persons or things to be seized." [Citation.] *An examination of the books, papers, and personal possessions in a suspect's residence is an especially sensitive matter, calling for careful exercise of the magistrate's judicial supervision and control.* [Citation.] *United States v. Rettig, supra*, 589 F.2d 418, 422-423, emphasis added.)

The trial court's erroneous assertion that the second Marin warrant authorized the search and seizure of Stineman evidence evinces the inherent difficulty in understanding Nash's failure to get a warrant for such evidence or attend to the terms of the warrant obtained by Concord Police. Trial court confusion notwithstanding, Nash had to have known that neither of the Marin warrant applications disclosed a purpose to gather evidence of financial crimes or of the murder of the Stinemans, let alone the development of documentary evidence of witchcraft in light of the condition in which the dead bodies emerged. Any reasonable officer would know that such activity was not authorized by any warrant. (See *Creamer v. Porter, supra,* 754 F.2d 1311, 1319 ["[a] reasonable officer would be aware . . . [of] the rule confining the search to items particularly described in the warrant".].)

As defense counsel asserted below, Nash could and should have halted all searching and seizing at Saddlewood and obtained an

appropriately targeted search warrant when he heard about the Stineman crimes and their apparent connection to the Saddlewood home. *(United States v. Sedaghaty, supra*, 728 F.3d 885, 913-915; Cf. *People v. Carrington, supra*, 47 Cal.4th 145 at p. 166-167 [Palo Alto police properly halted search and seizure by Los Altos Police executing a warrant for burglary evidence after seeing homicide evidence in plain view].) As stated in *Sedaghaty,* the "fact that the government sought a separate warrant for some materials outside the scope of the warrant does not somehow countenance the seizure of other materials outside its scope. Cf. *United States v. Crozier*, 777 F.2d 1376, 1381 (9th Cir. 1985) ('A search must be limited to the terms of the warrant.'). To the extent the agents wanted to seize relevant information beyond the scope of the warrant, they should have sought a further warrant." (*United States v. Sedaghaty, supra*, 728 F.3d 885, 913-915.)

Instead, like the agents in *Rettig* who sought to prove the occupants' involvement in a cocaine importation conspiracy, and those in *Sedaghaty* who gathered evidence of the defendants' connection to terrorism, the Marin detectives went about searching for purposes and objects not disclosed to the magistrate. In so doing, they intruded deeper upon the privacy of occupants than was to be expected in a search for evidence of the

Woodacre killings or the disappearance and death of Selina Bishop as described in the Marin warrants. It would be wholly unreasonable to assume that the Marin Detectives explored only the same places they would have explored within the home had they confined themselves to the objects of the Marin warrants. (*United States v. Ewain* (9th Cir 1996) 88. F.3d 689, 695 [search exceeds scope of a warrant when "the officers looked in places or in ways not permitted by the warrant."].)

Nash's seizure of "lifestyle evidence" and posters of "evil looking dragons" as well as books on the occult and countless personal writings and demonstrates the depth of the intrusion, as well as flagrant disregard for his warrants terms, that Nash's testimony links to his investigation of the Stineman crimes after the removal of Mrs. Stineman's heart was conveyed to him. Those items, most or all of which appear on the prosecutor's "Exhibit A" include numerous posters, a staff with skull and crystal and "witch books," have no immediately (or otherwise) apparent ability to prove anyone guilty of any crime. The gathering of such items can only be understood as an effort to raise prejudice against the occupants of the house and ensure that they received death sentences. The fact that the officers declined to seize bibles and other indicia of conventional religious beliefs confirms that the search and seizure of lifestyle and "witchcraft" evidence

was directed toward aiding the prosecutor in presenting the defendants in an unfavorable light. When officers seize evidence of not illegal but rather immoral acts, they are using their warrant as an instrument for conducting a general search so as to merit blanket suppression of evidence. (*Myers v. Medical Center* (D. Del. 2000) 86 F. Supp. 2d 389 [concluding as a matter of law that officers pursuing evidence of an occupant's "immoral acts" converted the first warrant into an instrument for conducting a general search.]"

2. Suppression of all Saddlewood evidence is appropriate due to the flagrant disregard of the terms of the Marin warrants and absence of proof that the same evidence would have been inevitably discovered under the Contra Costa warrant

At the time of this writing, the most recent decision of this court concerning a claim for blanket suppression of evidence due to flagrant disregard of a warrant's terms is *People v. Bradford, supra*, 15 Cal.4th 1229, 1304-1306.

In *Bradford,* this court openly questioned whether it should follow the majority of federal circuit courts in holding that flagrant disregard of the terms of a warrant justifies or requires suppression of all the seized evidence, including items described in the warrant. (Ibid.) This court

concluded that blanket suppression would be inappropriate in Bradford because "the trial court properly found that the application of that extreme remedy was not warranted and suppressed only items not covered by the warrant." (Id., at p. 306.)

Here, unlike *Bradford,* the trial court did not make any such finding. Our trial court identified nothing wrong in any aspect of any search during the siege of the Saddlewood home. The ruling is explicitly premised on mistaken recollection of testimony about the scope of the second Marin warrant. The record shows that the Marin detectives ignored or willfully disregarded the particularization of the indicia clause in their warrants, and the trial court did the same in its ruling. This appellant has not yet received a ruling on the legality of the police activity based on substantial evidence, let alone the benefit of a trial court parsing of the evidence like that in *Bradford.*

Another important distinction between *Bradford* and the case at bar is the state of the record on which the trial court ruled. In *Bradford*, the trial court had a description of all the seized items, not merely those that the prosecutor wished to use at trial. Here, the trial court rejected repeated defense requests to review, item by item, everything seized at Saddlewood. The total quantity and quality of seized items was never established. The

trial court decided the case in a state of deliberate ignorance of significant evidence that officers treated their warrants as general warrants. (See, e.g. *United States v. Medlin* (10th Cir 1988) 842 F.2d 1194, 1198-1199 ["When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant thereby requiring suppression of all evidence seized under that warrant."]; *United States v. Rettig, supra,* [scope of search revealed by complete inventory of seized items listing 2,288 items, mostly written material].)

Another significant distinction between *Bradford* and the present case is the failure of the prosecutor to shoulder the burden of proving that all of the seized items, or even the subsets presented in the defense papers or in his Exhibit A, were described in a warrant or found in plain view while pursuing an item described in a warrant. "[S]earches and seizures inside a home without a warrant are presumptively unreasonable." (*Payton v. New York* (1980) 445 U.S. 573, 586.) In general, "seizures of personal property are 'unreasonable within the meaning of the Fourth Amendment . . . unless . . . accomplished pursuant to a judicial warrant.'" *Illinois v. McArthur* (2001) 531 U.S. 326, 330, quoting *United States v. Place* (1983) 462 U.S. 696, 701.) The burden of proving that the items not described in

the warrant were seizable under the plain view doctrine lies squarely with the prosecution. (*People v. Murray* (1978) 77 Cal. App. 3d 305, 310-312 ["While a search and seizure conducted pursuant to a warrant is presumed to be legal and the burden is on the defendant to show the illegality [citation], the seizure before us was not pursuant to a warrant but was by virtue of the plain view doctrine. The burden therefore in this regard is upon the prosecutor [citation] to show the applicability of the plain view doctrine.].)

Penal Code section 1538.5 requires that the burden be met by testimony. (*People v. Johnson* (2006) 38 Cal. 4th 717, 723-726.) A prosecutor cannot fulfill this burden by expressing his own conclusions, nor by testimony from an officers asserting the belief that everything on the inventories was seized pursuant to the warrant or that he agrees with most of the prosecutor's conclusions. The submission of a list of items with abbreviated statements of the prosecutor's opinion as to whether items were "SW - indicia" or "PV – mens rea" was supposed to be augmented with offers of proof from the searching officers and references to a specific portion of a specific warrant. The prosecutor's belief that the defense would not stipulate to his offers of proof does not excuse his failure to produce evidence, nor his failure to offer even an abbreviated opinion on

the justification for searching and seizing the day planner and exploiting its contents for investigative leads under the authority of the first Saddlewood warrant.

The search of the day planner, for which the prosecutor offered not even an abbreviated opinion on justification, was a particularly important event in the scheme of things not only because it produced investigative leads and evidence, but also because it occurred soon after entry, and solely on the authority of the first Marin warrant. The prosecutor could have offered testimony from Detective Lellis about her opening of this item if not for fear of having her say that she was not looking for the indicia described in the warrant but for the investigative leads Day Planners are likely to contain. Such fear is certainly understandable in light of Nash's testimony about his copying and distribution of information from receipts like those found in the Day Planner. The extraction or movement of objects for copying of their numerical data was itself a search requiring justification. (*Arizona v. Hicks* (1987) 480 U.S. 321, 324 [movement of items for purpose of recording serial numbers is a search].) Although the prosecutor asserted that some of the receipts and other contents were evidence of a crime in plain view, he did not establish that any incriminating value was immediately apparent, an element of any lawful seizure under the plain

view doctrine. (*Minnesota v. Dickerson* (1993) 508 U.S. 366, 378.)

Moreover, unlike any of the reported excesses in *Bradford*, this case presents official pursuit and selective seizure of evidence of the occupants' lifestyle, ideas and abstract beliefs in an effort to prove them to be evil-minded. At appellant's trial, the prosecutor repeatedly asked about two staffs seized from the garage at Saddlewood (People's Exhibit 710). The defense moved to preclude the prosecutor from referring to witchcraft in arguing for death at appellant's penalty trial. (16CT 6763.) The prosecutor's response focused on an entry in appellant's seized notebook referring to a coven and a description of appellant "that included witchcraft or sorcery." The prosecutor declared that he wanted to argue that appellant "chose evil" and was influenced by his "dabbling in the occult, in sorcery, in witchcraft, and understanding that there are evil spirits and using them as a source of power. . . [T]apping into evil power is one of appellant's motives." (29RT 6528.)

"[T]he constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the `things' are books, and the basis for their seizure is the ideas which they contain." *(Stanford v. Texas* (1965) 379 U.S. 476, 485.) Nash's inability to point to any provision in any warrant that he believed

described what he saw fit to seize as evidence of "lifestyle" and witchcraft, after initially claiming that a warrant authorized this endeavor, was lamely followed by an assertion of the plain view doctrine, without any indication of how the items he seized could prove anyone guilty of any crime. The prosecution has offered no authority extending the plain view doctrine to justify seizure of materials based on the abstract ideas they represent, and is unlikely to be able to do so here. When the targeted ideas are not criminal plans or records of criminal activity, but rather odd ideas and religious practices, a general search precluded by the Fourth Amendment is manifest. Consequences to the government must follow. "The constitutional impossibility of leaving the protection of [First Amendment] freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case." (*Stanford v. Texas*, *supra*, 379 U.S. 476, 485.)

The United States Court of Appeals for the Second Circuit has settled that "[g]overnment agents 'flagrantly disregard' the terms of a warrant so that wholesale suppression is required only when (1) they effect a 'widespread seizure of items that were not within the scope of the warrant,' . . . and (2) do not act in good faith." (*United States v. Liu* (2d Cir. 2000) 239 F. 3d 138, 140 [quoting *United States v. Matias* (2d Cir. 1988)

836 F. 2d 744, 748].) "[T]o satisfy the first prong of the two-part test described above, the search conducted by government agents must actually resemble a general search." *Ibid; United States v. Metter* (E.D.N.Y 2012) 860 F.Supp.2d 205, 216.)

In *Metter* , the government created an image of the hard drives on seized computers, returned the hard drives, and kept the imaged evidence while conducting off-site searches. The court held that the 15-month delay in returning the imaged evidence merited blanket suppression of all seized and imaged evidence, noting that the imaging of the hard drives resembled a general search, and lack of good faith on the part of the government "can be inferred from its conduct" and statements that "indicate that it had no intention of fulfilling its obligations as promised in the search warrants." (*Ibid.*)

Here, it is evident that Marin and Concord agents effected a "widespread seizure of items that were not within the scope of the warrant" even if one focuses exclusively on the subset of items that the prosecutor indicated he wished to use at trial. Lack of good faith is shown (with more certainty than in *Metter*) by the discrepancy between the representations of intention in the warrant application process and the intentions shown by the subsequent conduct.

This is particularly clear with respect to Nash's request for a narrow warrant provision for indicia of occupancy with knowledge that its particularity would not be honored (*United States v. Foster, supra*) but is also apparent in Nash's failure to become familiar with the warrant for Stineman-related evidence and restrict his searches and seizures accordingly.

Finally, blanket suppression and rejection of the "inevitable discovery" claim is appropriate because it is not possible for the court "to identify after the fact *the discrete items of evidence which would have been discovered had the agents kept their search within the bounds permitted by the warrant.*" *(United States v. Rettig, supra,* 589 F.2d 418, 423, emphasis added.) It is certainly possible that Concord Police could have obtained a warrant for Saddlewood without Nash's testimony about his discoveries inside the home, but there is no evidence that they would have conducted a search as intrusive and intensive as that conducted by Detective Nash. The fact that Concord Police did not seek a warrant to seize, and did not seize, all of the evidence that Nash seized under the Marin warrants makes any inevitable discovery claim dependent upon speculation and unresponsive to the historical facts. (*Nix v. Williams* (1984) 467 U.S. 431, 444, fn. 5 ["inevitable discovery involves no speculative elements but focuses on

demonstrated historical facts capable of ready verification or impeachment"].)

3. No error in denying the suppression motion can be held harmless

This court has long held that a defendant who pleads guilty after denial of a motion to suppress evidence under Penal Code section 1538.5 must be allowed to withdraw that plea in the event the reviewing court determines that the denial of his motion was erroneous and that some or all of the evidence must be suppressed. "In view of the magnitude of the consequences of a guilty plea and the lack of an adequate basis upon which an appellate court can evaluate the impact of a trial court's error, we conclude the doctrine of harmless error is inapplicable in the context of an appeal under section 1538.5, subdivision (m)." (*People v. Rios, supra*, 16 Cal. 3d 351, 358, quoting *People v. Hill* (1974) 12 Cal.3d 731, 768.)

Furthermore, reversal of the judgment as to appellant's guilt would be required even if a harmless error analysis were to be applied. It is beyond cavil that the evidence seized from Saddlewood, including the pieces that the prosecutor never attempted to justify searching and seizing, compelled Dawn Godman to testify against the Helzer brothers to avoid the

death penalty, and ensured that appellant would be found guilty if he did not plead as he did. Additionally, the improperly searched and seized evidence was used extensively to make the case for death at appellant's penalty trial, as was Godman's plea-bargain-induced testimony about the circumstances of the capital crime. In no way can it be said that the erroneous ruling on the motion to suppress was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [federal constitutional error is reversible unless the state proves "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."].)

II. THE COURT'S REMOVAL OF A VENIRE MEMBER MODERATELY OPPOSED TO THE DEATH PENALTY WHOSE ABILITY TO FOLLOW THE OATH AND INSTRUCTIONS WAS NOT SUBSTANTIALLY IMPAIRED VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND AN IMPARTIAL JURY

A. The Relevant Facts

At the trial court's suggestion, counsel stipulated to excuse for cause those venire members whose responses to the juror questionnaire revealed grounds for removal. Thirty-seven venire members wrote that they could not or would not impose a death sentence and were excused by stipulation, most without voir dire.[23]

No stipulation permitted the removal of prospective juror Jeanne

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[23] See Volume 3, Jury Questionnaire Clerk's Transcript [hereafter, "JQCT"] 908, 8RT 2161; 5JQCT 1417, 9RT 2349 ; 5JQCT 1485; 9RT 2349; 5JQCT 1519, 9RT 2349; 5JQCT 1621, 9RT 2349; 5JQCT 1587; 10RT 2391; 5JQCT 1723, 10RT 2391; 6JQCT 1825, 10RT 2594; 6JQCT 1926, 10RT 2392; 6JQCT 1960, 10RT 2376; 7JQCT 2233, 9RT 2249; 7JQCT 2335, 9RT 2249; 8JQCT 2710, 13RT 3195; 4JQCT 1316, 9RT 2376; 6JQCT 2199; 9RT 2258; 8JQCT 3050, 12RT 2806; 9JQCT 3152, 10RT 2593; 9JQCT 3288, 11RT 2593; 9JQCT 3356,10RT 2476; 10JQCT 3630, 11RT 2593; 10JQCT 3714, 13RT 3185; 11JQCT 4039, 13RT 3102; 11JQCT 4106, 13RT 3109; 11JQCT 4140, 13RT 3012; 11JQCT 4208; 13RT 3109; 12JQCT 4378; 12RT 2805; 12JQCT 4650, 13RT 3109; 14JQCT 5136; 14JQCT 5236; 14JQCT 5271; 14JQCT 5403; 14JQCT 5534; 15JQCT 5700; 16JQCT 5833; 16JQCT 6064; 17JQCT 6229; 17JQCT 6527.

Wolf ("JW"). A 57 year-old director of the "major claims" department of an insurance company, JW had received a B.A. in economics and a secondary school teaching certificate from U.C. Berkeley. (10JQCT 3665-3668.) She wrote in her questionnaire that she was not sure she believed in the death penalty, that it was used too often, and that it would be a terrible sentence to receive. She wrote "I think?" and "hopefully" above her affirmative answers where asked if she would be willing to listen to all of the evidence, as well as the judge's instructions on the law, and give honest consideration to both life in prison without parole and death before reaching a decision. (10JQCT 3683-3684.)

JW checked the boxes indicating she would not always or automatically impose either death or life, and chose "moderately against" as the most accurate reflection of her opinion on the death penalty. (10JQCT 3684-3685.)

In the space provided for anything not covered in the questionnaire, she wrote, "I think I lean toward being against the death penalty. I'm just not sure what I would decide." (10JQCT 3686.) She checked "yes" where asked if she would have any difficulty in applying the law as given by the judge if the judge's instructions differed from her personal views. (10JQCT 3674.) The trial court asked JW how she felt about having

checked "yes" in her answer to that question. JW said she still thought it would be difficult, but she believed in the system and would have to follow the law as the court instructed. She denied that she had in mind anything in particular when she marked the "yes" box. (12RT 2948.)

As to her present feelings on the death penalty, she said, "I have to say that if I had to vote on the death penalty, I would vote against it. That being said, could I just – don't know what I would do."(12RT 2953.)

Before examining JW, the prosecutor noted that she had written that she was inclined to be against the death penalty (12RT 2964.) Asked if she would do what the system required of her, she said "I would like to say that I would, you know, you just don't know until the time comes, what you're going to." (12RT 2966.)

The prosecutor explained that the law "never tells you you have to impose the death penalty. . . .¶ The court gives you factors A through K. They basically – they outline different subject matter that kind of tries to direct your attention to certain areas to look in this area and see what you see . . . . The test the judge is going to give at the conclusion of this case is, you can impose the death penalty if, and only if, the evidence in aggravation is so substantial in comparison to the evidence in mitigation that it warrants the death penalty, okay. . . .¶ You're not going to get an instruction from the

Court defining aggravation, except something that – something along the line of increasing the enormity. ¶ You're going to get a definition of mitigation. You're surely not going to get a definition of what is warranted. All of those things are up to you. ¶ And you're not going to get an indication from the court that you must abandon your beliefs, okay. . . . ¶ In fact, there's an instruction that says, 'Jurors may consider the moral or sympathetic value of the evidence in making a determination ... in this kind of a trial,' ... ¶So you bring your emotions in here with you. You bring your moral compassion in here with you, and that you use. ¶So if your moral compass says 'I'm opposed o the death penalty, and the Court tells us you can use your moral compass for purposes of making a decision in that context, kind of inconsistent with whether you are to vote for the death penalty, wouldn't it?" JW said, "Yes, it would." (12RT 2966-2967.)

The prosecutor asked JW if she would agree that "it would be very difficult if not impossible for you, given your belief structure, to ever *impose* the death penalty?" JW replied, "I think when I was thinking about it, I would say one percent chance." The prosecutor asked, "So 99 times out of 100 you would not? Would that be based upon your moral or philosophical beliefs about the death penalty?" JW said yes. (12RT 2967-2968.)

Defense counsel asked JW if she could see herself in an appropriate case imposing the death penalty. JW said, "I couldn't see myself." (12RT 2995.) JW also said she would have no hesitation in discussing her views with other jurors after hearing the evidence. But she could not say that she would consider death as an option at that point. She said, "I just don't know what I would do." (12RT 2995.) She added, "But I sincerely doubt that I would." (12RT 2996.) Asked if she felt she would keep an open mind, she said, "I like to think I would." Asked if she "could do it in the appropriate case" she said, "I doubt it" and "I just don't know." (12RT 2996.)

The prosecutor challenged JW for cause. Defense counsel said "I'd submit it, Judge."

On November 1, 2004, the trial court granted the challenge, and explained, "I do believe that Ms. Wolf has a bias against the death penalty such that I think she said in one percent she might have been thinking – considering it, but in all reasonable likelihood, not very likely. I will excuse Ms. Wolf for cause." (12RT 3005.)

B. The Removal of JW Violated *Gray, Witt, Adams & Witherspoon*

The trial court erred in removing JW "for cause." "The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes *by not following their oaths*.' *Wainwright v. Witt* [1985] 469 U.S. [412] at 423, 105 S. Ct. 844, 83 L. Ed. 2d 841. To permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stack[s] the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' *Witherspoon v. Illinois* [1968] 391 U.S. [510], at 523, 88 S. Ct. 1770, 20 L. Ed. 2d 776." *(Gray v. Mississippi* (1987) 481 U.S. 648, 658-659, emphasis added.)

The oath taken by California jurors in death penalty cases promises only that they will "well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court." (Cal. Civ. Proc. § 232, subd. (b).) California capital jurors' instructions do not require that they impose death under any circumstances or even that they put aside their morals, values, or

feelings in determining whether death is warranted. As this court explained in *People v. Stewart* (2004) 33 Cal.4th 425, 447:

> Because the California death penalty sentencing process contemplates that jurors will take into account their own values in determining whether aggravating factors outweigh mitigating factors such that the death penalty is warranted, the circumstance that a juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt, supra*, 469 U.S. 412. ... A juror might find it very difficult to vote to impose the death penalty, and yet such a juror's performance still would not be substantially impaired under *Witt*, unless he or she were unwilling or unable to follow the trial court's instructions by weighing the aggravating and mitigating circumstances of the case and determining whether death is the appropriate penalty under the law."

JW's statements clearly affirmed her willingness to engage in the weighing process and impose death if she thought it appropriate. She wrote on her questionnaire that she would not vote automatically for either sentence and had no feelings that would prevent her from ever voting for life or death. (10CT 3684.) She thought she leaned toward being against the death penalty but was not sure what she would decide. (10CT 3686.)

As stated by this court in *People v. Pearson* (2012) 53 Cal.4th 306:

> To exclude from a capital jury all those who will not promise to immovably embrace the death penalty in the case before them unconstitutionally biases the selection process. So long as a juror's views on the death penalty do not prevent or substantially impair the juror from "conscientiously consider[ing] all of the sentencing alternatives, including the death penalty where appropriate" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1146 [36 Cal. Rptr. 2d 235, 885 P.2d 1]), the juror is not disqualified by his or her failure to enthusiastically support capital punishment. (*People v. Pearson, supra,* 53 Cal.4th 306, 332.)

In estimating the probability of *voting* for death at 1%, juror J.W. specifically reaffirmed her readiness to conscientiously consider doing so. Since she gave that estimate after the prosecutor told her a penalty juror would be able to follow her own moral compass in deciding on a sentence, it represents willingness to not only consider death, but impose it, when no law compelled her to do so. Accordingly, the trial court did not express any finding that JW was incapable of following her instructions or her oath to return the verdict she thought appropriate. Defense counsel's submission of the matter without argument, and failure to respond to the trial court's statement of why the challenge was to be granted, was no doubt informed by this court's long history of reviewing claims of error based on wrongly removing a juror due to anti-death penalty views whether or not any objection was lodged at trial. No objection was required to preserve the claim of error in removing a death-scrupled juror in 2004, when this was

tried.

Removal of jurors whose reservations about capital punishment make them unlikely to impose death is properly accomplished by exercise of peremptory challenges. (*People v. Martinez* (2009) 47 Cal.4th. 399, 460 [Moreno, J. conc. and diss.] Accordingly, this court's decisions note the presence of other factors justifying a challenge for cause in upholding removal of jurors who indicated they were not likely to choose that sentence.

In *Martinez,* the majority upheld removal of juror who had described her likelihood of voting for death at 10 percent ("[R]ealistically, if I had to put a number on it, it would be like, say, 10 percent possibility I could vote for the death penalty") who also had "strong feelings" against the rule that a person who could never impose the death penalty should be excluded from a capital jury, and who "displayed signs that she was `upset' and `irritated'" and "resistant" when the prosecutor attempted to probe her views. The trial court did not base its ruling on any estimate of the likelihood of her voting for death, but rather on these additional factors. (*Id.* at pp. 435-437.) The concurring and dissenting opinion concluded that the other factors were insufficient, and observed:

> Values, far from being set aside, are the very basis for the juror's decision, albeit guided by certain statutory markers.

> Accordingly, if we can imagine a hypothetical system in which jurors serve on multiple capital juries, and their voting records can be discovered, juror A, who voted five times for life imprisonment without parole and five times for death, would not necessarily be a more objective or conscientious juror than juror B, who served on the same 10 juries but voted for death nine times out of 10, or juror C, who voted for life imprisonment without parole nine out of 10 times. **Although juror B may be strongly predisposed to vote for the death penalty, and juror C against, each would be following his or her oath as long as he or she followed the statutory directive to choose a penalty by weighing aggravating and mitigating circumstances, even though their attitudes toward the death penalty would cause them to differ from each other, and from juror A, as to the weights given.** [24] *People v. Martinez, supra*, 47 Cal.4th at p. 459, emphasis added.)

Thus, California cases permitting removal of death penalty opponents who cannot "conscientiously consider" imposing death, and jurors who are afraid to return such a verdict even when they believe it to be

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[24] A footnote at this juncture notes that "the problem of how to deal with prospective jurors in capital cases who oppose the death penalty may well be a large and growing one." The cited 2005 Field Polls "show that about one-third of those surveyed in this state oppose the death penalty, up from only 14 percent in 1989. . . . *The exclusion of one out of three potential jurors because the attitudes toward the death penalty might predispose them to vote for life imprisonment without parole would indeed result in a jury panel "uncommonly willing to condemn a man to die" in violation of the defendant's Sixth Amendment rights. (Witherspoon, supra,* 391 U.S. at p. 521.) (*People v. Martinez, supra*, 47 Cal.4th at p. 459, fn.1, emphasis added.)

appropriate, are distinguishable here. When this court has described excused jurors as impaired in their ability to apply our death penalty law, vote for death, or return a death verdict, it has cited statements of inability to return a death verdict in the case on trial or in any case. (See, e.g., *People v. Haley* (2004) 34 Cal. 4th 283, 306-307 [juror stated "that man shouldn't take a life]; *People v. Rodrigues* (1994) 8 Cal. 4th 1060, 1147, fn 51 [juror said I don't think so" when asked if she could vote for death if she thought it was justified]; fn. 52 [juror said "moral views and sleeping at night" would impair her ability to return death verdict she believed to be appropriate]; *People v. Millwee* (1998) 18 Cal.4th 96, 146-147 [juror C said he thought imposing death sentence might haunt him, etc., juror L did not believe the state had the right to take life, juror G said he would not impose death because life imprisonment is worse punishment].)

Here, the trial court's explanation for excluding JW ("I do believe that Ms. Wolf has a bias against the death penalty such that I think she said in one percent she might have been thinking – considering it, but in all reasonable likelihood, not very likely." – 12RT 3005) reports what the trial court thought was a strong bias against the death penalty. Appellant's research has uncovered no case recognizing "bias against the death penalty" as the equivalent of unwillingness, inability, or even substantial impairment

of ability, to follow the juror's oath or the trial court's instructions in California. On the contrary, this court distinguished bias against the death penalty from grounds for removal under *Witherspoon* in *In re Tahl* (1970) 1 Cal.3d 122, 137. And while *Witt* holds that a juror's bias "need not be proved with unmistakable clarity" it does not hold that bias against imposing a particular penalty, even when proved with perfect clarity, is grounds for exclusion in jurisdictions where penalty jurors are allowed to make value-based judgments.

Accordingly, this court's post-*Witt* decisions carefully point out that the removal of jurors who described themselves as "biased against the death penalty" — or were so described by the trial court — had also stated unwillingness to consider, or inability to return, a death verdict. (See, e.g., *People v. Riccardi* (2012) 54 Cal. 4th 758, 781 ["prospective Jurors E.H. and J.F. wrote "yes" in response to question No. 68, which asked whether the prospective juror would automatically and absolutely refuse to vote for the death penalty in any case."]; *People v. Thomas* (2011) 52 Cal. 4th 336, 357-358 [juror answered yes where asked whether her moral, religious, or philosophical beliefs in opposition to the death penalty were so strong that she would be unable to impose the death penalty regardless of the facts]; *People v. Ramos* (2004) 34 Cal.4th 494, 517 [juror indicated "she could

never vote to impose the penalty, regardless of the evidence, and repeated similar sentiments when the court's questioning continued."].)

Juror JW estimated the probability of her *voting* for death at 1%, which necessarily includes consideration of death as a realistic possibility. The trial court's recollection of JW's statements was inaccurate. ("I do believe that Ms. Wolf has a bias against the death penalty such that *I think she said in one percent she might have been thinking – considering it*, but in all reasonable likelihood, not very likely. " – 12RT 3005.) When JW spoke of having estimated "about one percent" she was responding to a question about *imposing* death, not one about merely considering it. (12RT 2968.) To the extent the court's ruling implies a finding that JW would simply *consider* imposing death in only one percent of the cases she might decide, it is not supported by substantial evidence. Exclusion of death-scrupled venire members based on a trial court's honest misunderstanding of the law or the facts is reversible error. (*People v. Pearson, supra,* 53 Cal.4th 306, 330-333 [removal decision erroneous based on finding that venire members views were vague and largely unformed and was therefore equivocal]; *People v. Heard* (2003) 31 Cal.4th 946, 967 [removal erroneous based on finding that panelist would consider mental health issues mitigating and was "clear in [her] declarations that [she] would

attempt to fulfill his responsibilities as a juror in accordance with the court's instructions and [her] oath."].)

C. Conclusion

Trial courts cannot, consistent with existing law, remove qualified jurors simply because they are "not very likely" to find imposition of the death penalty warranted and appropriate after hearing the evidence and the law. To do so is to tilt the jury venire in favor of capital punishment by granting a selective prosecutorial challenge for cause of a qualified juror within the meaning of *Uttecht v. Brown* (2007) 551 U.S. 1, 9; *People v. Pearson, supra,* 53 Cal. 4th 306, 328-330 [finding reversible error under *Uttecht*].) The removal of juror Wolf "for cause" demands reversal. (*Gray v. Mississippi, supra*, 481 U.S. 648, 658-659.)

III. THE DENIAL OF THE RIGHT TO ASK VENIRE MEMBERS IF THEY COULD CONSIDER MITIGATING FACTORS AFTER EXPOSURE TO THE HORRIFYING CORPSE DESECRATION EVIDENCE THE COURT ALLOWED THE PROSECUTOR TO PRESENT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND AN IMPARTIAL JURY

Introduction

Two years before the trial of this case, in *People v. Cash* (2002) 28 Cal.4th 703, 721,[25] this court established that defendants can no longer be "categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment." (*People v. Valdez* (2012) 55 Cal. 4th 82, 165 [internal citations omitted].)

Appellant's trial judge violated that rule. At the prosecutor's urging, the trial court held that the defense cannot inform jurors of the case in aggravation when probing prospective jurors about their ability to impose a life sentence. Instead, only the statutory "special circumstances" that

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[25] In *Cash*, the defendant was convicted of murder in the course of robbery and attempted murder. During the penalty phase, the prosecution presented evidence that the defendant killed his elderly grandparents when he was 17 years old. The jury returned a verdict of death. (*Id.*, at pp. 714, 717.) On appeal, the defendant claimed the court erred by refusing to allow defense counsel to ask prospective jurors whether they would automatically vote for death if the defendant had previously committed another murder. This court agreed and reversed. (*Id.*, at pp. 723-728.)

were charged in the pleadings, i.e., robbery, kidnaping, and commission of more than one murder, should be presented in questioning venire members about their ability and willingness to refrain from voting for death automatically.

The trial court and all counsel knew that the case in aggravation would include a vivid account of the defendant's chainsaw dismemberment of three bodies, his feeding of a young woman's flesh to a dog, and his distribution of mutilated body parts by placing them in multiple bags and throwing them off a jet ski – "evidence that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury –invariably to vote for the death penalty, regardless of the strength of the mitigating evidence." (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1123.)

The record does not suggest any good reason to deny the defense request to ask prospective jurors about the impact of corpse desecration evidence. The defense never proposed asking jurors to prejudge the penalty issue based on a summary of the aggravating and mitigating circumstances, as condemned under *People v. Cash, supra.* In fact, the defense never sought to disclose a summary of its mitigating evidence, let alone ask jurors to weigh it against a summary of the aggravating evidence.

There was no suggestion that anyone was seeking to commit jurors to vote for life after hearing only the aggravating evidence, nor that anyone was attempting to use horrifying facts to "death qualify" jurors who said they would not impose death. (Compare *People v. Tully* (2012) 54 Cal. 4th 952, 1003; Cf. *People v. Fields* (1983) 35 Cal. 3d 329, 357-358, fn. 13 [noting that *Witherspoon* allows removal of prospective jurors who will not impose death only if they would hold that position "'without regard to any evidence that might be developed at the trial of the case . . . .' [Citation.] ."]

The only trial court concern, express or implied in this record, was based on the trial court's misreading of the case law. Ignoring or overlooking this court's two-year old decision in *Cash*, the trial court incorrectly read this court's decisions to express disdain for trial judges who have allowed prosecutors to use case-specific factors in death qualifying jurors. Ergo, the trial court adamantly declared that it did not want to, and would not, allow the defense to disqualify jurors based on case-specific factors not amounting to statutory special circumstances.

Here, as in *Cash*, and in *Morgan v. Illinois* (1992) 504 U.S. 719, the trial court's error makes it impossible to determine from the record whether any of the individuals who were ultimately seated as jurors were unable to weigh the case in mitigation after hearing the case in aggravation. Here,

unlike any other case uncovered in appellant's research, the trial court's error in precluding the defense from screening prospective jurors for bias in relation to critical facts was compounded by error in allowing the prosecutor to exploit those biases by presenting a horror show in pictures of body parts, and the sound of the power saw used in dismembering bodies. Appellant's right to be tried by impartial jurors able to consider mitigating evidence, and to a fundamentally fair trial, requires reversal and remand for a new penalty trial.

A. The Relevant Facts & Procedural History

In late October of 2003, before appellant's case was severed from that of his brother for trial, the trial court suggested that all counsel prepare a proposed questionnaire or work on one together. All agreed to do so and report back. (3RT 781-783.) On January 30, 2004, attorneys for appellant and Justin Helzer told the court they were working to finalize a juror questionnaire agreeable to the prosecutor. The court said it would give counsel some latitude, but did not want jurors to be asked to prejudge the facts or state conclusions without hearing the evidence. (3RT 853-854.)

On February 20, 2004, the court noted it had received documents headed "contested questions removed questionnaire" and "contested

questions" memo. [26] The court and counsel discussed the items on the latter document in detail. (3RT 916.) The prosecutor objected at length to the questions designated Questions 133 and 134 on the "contested questions" memo. (SSCT 30-31; 3RT 935). Question 133 asked, "What purpose do you think the death penalty serves?" Question 134 asked, "In what types of cases do you think the death penalty should be imposed? " (SSCT 30-31.) Against the defense argument that question 134 would reduce the time needed to explore those areas on voir dire, he argued that:

> [I]t is absolutely inappropriate for counsel, for instance, to inquire of the jurors whether they [sic] if they were to assume certain facts like, and in those circumstances would they impose the death penalty, absolutely requires them to prejudge the evidence, that is clearly an objectionable question.
>
> What is not objectionable, what they can ask, what this questionnaire does include, is inquiries into whether or not based upon the special circumstances themselves would those alone be enough or cause them to automatically vote for the death penalty in every case, okay, we agree with that. (3RT

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[26] The court did not keep a copy of either document. After extensive record settlement proceedings, the parties agreed that the document presented at SSCT 25 was a true copy of the "contested questions" memo discussed at the February 24, 2004, hearing. There was no agreement or settlement of the content of the "contested questions removed questionnaire." (6/18/10RT 142, 145-149; 11/4/11RT 40-44, 79; 12/22/11RT 5-12.) The draft questionnaires included in the original clerk transcript were filed March 23, 2004, and have marks and content indicating they were prepared after the hearing on February 20, 2004. (11CT 4463, 4506, 12CT 4508, 4561.)

937-938.)

Counsel for Justin Helzer, Dan Cook, noted that Question 134 said nothing about dismemberment or other facts of the case. (3RT 939-40.) After lengthy discussion of other questionnaire items that were similarly devoid of information about the case facts likely to arouse bias (3RT 940-952), the prosecutor declared:

> "If you were to create a scenario, the most horrible scenario that we could imagine, then ask somebody, would you automatically vote for death, that doesn't necessarily form the basis for a challenge for cause. (3RT 953.)

The trial court expressed agreement with the prosecutor, but did not say why. (3RT 953.)

The prosecutor then claimed that a challenge for cause lies only against those who would automatically impose death based on the special circumstances alone. (3RT 953.) He cited no authority, but reiterated his point that only those who would vote for death automatically based solely on one of the alleged special circumstances should be disqualified. He interrupted the court with an oration spanning three transcript pages. (3RT 953-955.) About midway through his argument, he declared:

> "The law says that the special circumstance is not going to be sufficient without more to just [sic] imposition of the death penalty. ¶ Obviously the detail of how the crime was

> committed can form the basis for those additional pieces of aggravation warrants position [sic] of the death penalty, but I think the law is focusing on the question of the facts, the minimum facts necessary to establish the special circumstance itself, that's what the whole automatic language is addressed to ...'. (3RT 954.)

On March 1, 2004, counsel for both Helzers informed the court that they had finalized a questionnaire for a joint trial, though both defendants had pending motions to sever their cases. (4RT 1020.) On the following day, while arguing the severance motion, counsel for Justin Helzer observed that the prosecutor's photo board had a number of photos "that depict body limbs, and body parts and so forth. Clearly, he intends to make that a focal point of his presentation ...". (4RT 1100-1101.)

On March 3, appellant's counsel objected to the use of the photos of body parts that the prosecutor mounted, and added, "we are more than willing to stipulate to any and – any evidence, any inference and every inference that the Prosecutor is trying to prove by showing these photographs." (4RT 1170-1171.)

The prosecutor claimed no stipulation could reflect the relevance of the photos, marked Exhibit 4-C-1 to 4C-10. (4RT 1175.) The water in which they were found had removed the blood, revealing "the incisions, the cutting, the ripping, the tearing personally participated in by the two

defendants. And it is extremely probative of intent, of their maliciousness and disregard for the bodies – the beings that they were in the process of killing and dismembering. And therefore, it is extremely probative of the mental state accompanying the crime of murder. " (4RT 1175.)

The prosecutor described the content of the photos for the record, indicating that many photos depicted only garbage bags, stones used to add weight to the bags, and the gym bags in which all were found. As to the body parts, he said that Exhibit 4-C-1-C shows the torso of Annette Stineman partially wrapped in a dark colored plastic bag, 4-C-1-D is a gym bag with cuts indicating "somebody thrust a knife or a sharp object into the bag several times, 4-C-2-E is a side photo of Selina Bishop's head identifiable as such by the depiction of a "scrunchy"-bound pony tail, 4-C-2-F is a face view of Bishop's head showing that the jaw was removed, and 4C-2-G shows "the other body parts that were removed from that bag" which he believed to be the legs and torso of Ivan Stineman. (4RT 1176-1177.) He said 4-C-3-D shows the jaw bone pieces from all three dismembered bodies, which were put in one bag, and 4-C-3-E shows one leg and one arm, and 4-C-3-F is the other leg. (4RT 1177-1178.) Also, 4-C-4-E shows the lower torso of Bishop, 4-C-5-C shows Annette Stineman's head, with its jaw removed, and 4-C-5-D shows the torso of Annette and the

left arm of Ivan Stineman. (4RT 1178-1179.) Exhibit 4-C-6-D shows the head of Ivan Stineman amidst white and dark garbage bags, 4-C-6-E shows internal organs of Annette Stineman taken from a dark garbage bag, 4-C-6-F is a torso, 4-C-6-G is a right arm, and 4-C-8-C shows the anterior view of the upper torso of Bishop, and 4-C-8-D is the posterior view, showing where the tattoo she wore on her left shoulder blade had been "sliced off" to prevent identification. (4RT 1179-1180.) Finally, 4-C-9-C shows the arms and legs of Annette Stineman, and 4-C-10, shows each body reconstructed from their dismembered parts. (4RT 1181.)

The prosecutor explained he included 4-C-10 "primarily because in addition to the complete disconsideration [sic] of the body that this represents and what it says about the people who did it. There's a meticulousness and methodical way about which the bodies were dismembered that don't come through with each photograph of each body part individually. ¶The court should know and it will become clear that all the body parts were mixed up. There were pieces of each of the three persons in each bag. So it's not real clear just how uniform and business-like this dismemberment was. I mean, this was an assembly line kind of mental state that went into the disposal of these remains." (4RT 1181.)

The prosecutor gave the court an envelope of similar photographs so

that "the Court can review what's out there to see if there is a lesser way to display what it is the People, I believe, have a right to prove." He added that he did not intend to show any photos depicting the bodies as dissected in the autopsy process, but only as dissected by the defendants. (4RT 1182.)

Defense counsel for Justin Helzer counted 22 photographs of body parts on the prosecutor's display, and objected to all of them on relevance grounds. (4RT 1184-1185.) The prosecutor countered that the "assembly line intent is directly relevant to deliberation" in that it suggests a cold and calculating judgment to kill, and shows an intent to destroy evidence which shows that the defendants knew their conduct was wrongful. (4RT1185.)

The court ruled for the prosecutor, and explained:

> Well, this is a very gruesome case. And I think how the bodies were disposed of is probably what makes it that way the most, although most murder cases are gruesome and the photos attached to those cases are as well.
>
> But I think that intent is very much an issue here. And how the bodies were disposed of, which shows a preplanning, such as the bags used, the purchase of the bags, tying this in to the meticulous plan of how the bodies were dissected, weighed and taken to a location and disposed of, goes not only to the details and the conspiracy, but also to the intent on the part of the parties.
>
> And so I do find them to be highly probative. They are rather

> gruesome, so the question is whether the probative value is substantially outweighed by any prejudice. And there's no doubt that the jury is going to learn from statements of the attorneys as well as witness statements what was the plan and who did it and how it was carried out. And I don't think the prejudice does substantially outweigh the probative value of what all this shows and what it goes directly to, the heart of intent, which is at the heart of this case, especially for one defendant. (4RT 1186.)

The court further noted that all of the jaw pieces were presented in a single photo, and the photos were not duplicative. Also, "as the photos are laid out on each of the photo boards, I find it to be the least offensive way possible for those to be shown or displayed." (4RT 1187.)

On September 17, 2004, counsel for appellant and the prosecutor met with the trial court to discuss the revised prospective juror questionnaires each had prepared for use at appellant's penalty-only trial.[27] (6RT 1551-1552.) During that discussion, the court observed that someone had deleted a question asking prospective jurors if gruesome photographs would upset or influence them so that they "would be unable to remain impartial" to either side. The prosecutor said he thought the question was inappropriate

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[27] The draft questionnaire discussed at this hearing was not retained by the court. The drafts that were retained and filed on March 23, 2004, are marked either "Justin Helzer only" (11CT 4463, 4553) or "initial questionnaire drafted with both defendants in mind." (11CT 4506-4507, 4598-4599.) Another, filed April 5, 2004, has content indicating it was also prepared for Justin Helzer's separate trial. (12CT 4651.)

for appellant's jury because appellant had pled guilty. He acknowledged that jurors have to keep an open mind about penalty, "but because the presumption of innocence no longer applies, it is not inappropriate for them to look at photographs, for instance, or for that matter, hear testimony, and have a reaction that causes them to not feel kindly towards Taylor Helzer." He said the questionnaire item "suggests in its language, even when you hear that testimony, see that picture, you have to remain impartial. No they don't. No they don't. They can start forming impressions. They have to keep an open mind, yes, because they have to evaluate all the factors in aggravation and mitigation. They hear `aggravation,' they don't have to remain impartial." (6RT 1567-1568.)

Responding to the prosecutor's claim that jurors need not be able to remain impartial throughout the trial, defense counsel argued that a juror who sees gruesome photographs and says, "[h]e should die, I'm not going to listen to anything else, care about anything else" is not a fair juror. She added, "We know how horrendous the pictures are. We know the influence on the jury that heard Justin's trial." (6RT 1569.)

The trial court did not disagree with appellant's counsel's assessment of the pictures shown at Justin's trial, but sided with the prosecutor on the need to edit the question. The court said the present

wording "sounds like a preguilt (sic) type of question." Defense counsel agreed to work with the prosecutor in redrafting the question. (6RT 1569-1570.)

After discussion of other questionnaire items, the trial court ordered the deletion of a defense-requested question as to whether there are any circumstances under which the juror believed that death should be automatic. The prosecutor said the question asked jurors to prejudge the evidence and imagine facts on which they would automatically vote for death. The trial court recalled from the use of that question in the questionnaire used at Justin's trial, "most people would write about children and so forth." (6RT 1576.) The defense countered that some prospective jurors would also say that death should automatically be imposed on "anyone who intentionally kills." The trial court was unmoved, noting that "a lot of it is ignorance of the law. I think you've covered the circumstances of the robbery, kidnaping more than one murder. The other circumstances don't apply." (6RT 1576-1577.)

On October 5, 2004, the trial court heard and denied several defense motions, including appellant's to change venue, which presented in great detail the extensive publicity the case had received, and community-member reactions to the published facts. (15CT 6203; 11SCT 4397-17SCT

5547; 6RT 1587- 1602.) The motion noted that, "[t]hroughout each stage of the case, the press has continued to emphasize the grisly nature of the murders and the dismemberment and disposal of the bodies of the three victims." (15 CT 6217.) It also revealed the prosecutor's view of the case as quoted in the press: "Given the evidence of conspiracy and the grotesque mistreatment of the bodies, this more than meets the requirements of a maximum penalty case." (17 SCT 5539.)

The trial court then heard appellant's post-guilty-plea motion to restrict the prosecutor's use of gruesome photographs at his penalty trial. (6RT 1603-1623.) The prosecutor claimed that his photographs showing the extent to which the bodies were dismembered and mutilated "are, in fact. circumstantial evidence of what is inside Taylor Helzer" and probative of the enormity of the crime. (6RT 1618.)

The trial court noted that the "hardest photos are obviously the parts, the body parts. . . . . [B]ut as far as body parts go, they were cleaned up. . . . they hadn't been in the river that long. I mean, you could imagine it being worse."

Further, "I think the hardest photos to look at were the faces because the jaws and the teeth had been hammered out of the Stinemans and Ms. Bishop and put in a different bag, but I think the fact that that was done is

relevant to the case for this jury in deciding which penalty they should impose." (6RT 1621-1622.) The trial court denied the defense motion to restrict the use of such photos, but asked the prosecutor not to leave them "on the big screen or in the presence of the jury" when examining witnesses about unrelated matters. (6RT 1623.)

After other motions were heard and denied, the court acknowledged receipt of a defense memorandum of points and authorities regarding voir dire[28] and the prosecutor's response. (15CT 6458-6462; 6RT 1633.) The defense papers requested sequestered voir dire, which the court denied, except to the extent questionnaire responses indicated a need to discuss pretrial publicity or the result of Justin Helzer's trial, or if defense counsel refused to stipulate to excuse a juror whom the prosecutor felt would not impose the death penalty. (6RT 1634-1643.)

Regarding case-specific aggravation, the defense argued that they should be permitted to ask jurors case-specific hypothetical questions incorporating the aggravating evidence likely to be presented at trial. (15CT 6303-6311.) The argumentatively-entitled "People's Response to

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[28] See 15CT 6291-6313, 6321-6322, discussing *Morgan v. Illinois* (1992) 504 U.S. 719, *Wainwright v. Witt* (1985) 469 U.S. 412, and *Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188, as well as many of this court's decisions on the right to adequate voir dire.

Defendant Taylor Helzer's Motion to Invite Jurors to Prejudge the Evidence" (15CT 6458) cited *Cash*, and *People v. Coffman* (2004) 34 Cal.1, and declared that *Cash* and *Coffman,* when read together, show that questioning by counsel must be limited to "generalized subject matters" and framed to determine whether a juror would automatically and invariably vote for death based on that generalized subject matter. (15CT 6460.) He did not disclose the actual basis for this court's rejection of the claim of error in *Coffman*, i.e., "the trial court did not categorically prohibit inquiry into the effect on prospective jurors of the other murders, evidence of which was presented in the course of the trial." (*Id.*, at p. 47.)

After reviewing the papers, the court asked defense counsel,"how specific with regard to, you know, special circumstances and/or the facts were you wanting to get with smaller groups when you voir dire?" (6RT 1660.)

Defense counsel submitted that "because of the gross and gruesome and horrendous and horrific nature, and all the other words that have been in the newspaper" jurors should be questioned closely about their ability to put aside their emotions and apply their reason after seeing the photographs the prosecutor would offer. (6RT 1660-1661.)

The court again declared unwillingness to allow counsel to ask jurors

if they would invariably impose death if the crime involved "this fact and this fact and this fact. I mean, clearly, when you get specific like that and you pose it with regard to would you impose death or would you impose life, I mean, you are asking them to make a predetermination based upon certain facts that you're giving them. And that, I don't want to do." (6RT 1664.) The court cited no authority.

Turning to the open-ended "follow up" questions suggested in defense counsel's memorandum regarding voir dire (15CT 6313-6315) the trial court declared them inappropriate. The court read, "question number 4, ` Can you give me an example of the kinds of factors that would make you feel that death was the correct punishment?' and declared, " I mean, loaded question all over." (6RT 1664-1665.) The court recalled use of that question in selecting a jury for at Justin's trial and "every juror said if a child were murdered or if it involved rape or torture. A lot of jurors said, `Well, if it was premeditated.'" (6RT 1665.) The court complained that such responses were "loaded" but did not cite any authority or further explain why it would not be appropriate to identify prospective jurors inclined to impose death outside of the statutory scheme.

Finally, defense counsel declared, "I think we should be able to ask questions about how do you feel about dismemberment of bodies or the

desecration of bodies." (6RT 1666.)

The court deflected the claim, asking counsel, "How would you imagine anybody would feel about that?" (6RT 1666-1667.) Defense counsel argued that she should be able to ask jurors, if they are "going to be able to sit here and say this man should live when you hear he dismembered and desecrated three people's bodies?" (6RT 1667.)

The prosecutor threatened, "Boy, you can expect an objection from the People on a question like that." The court backed the prosecutor, telling defense counsel, "again, you are asking them to prejudge the case based on that fact." (6RT 1667.)

Defense counsel declared that she was not asking them to prejudge the case. She needed to know which prospective jurors would be able to refrain from prejudging the case after exposure to the mutilation and dismemberment evidence that the prosecutor would present, and was simply "asking them if they can put that aside and not prejudge the case." (6RT 1667.) The prosecutor claimed that jurors "don't have to put that aside. That's a circumstance in aggravation." (6RT 1667.) He declared that counsel can ask whether or not they can keep an open mind, but

> [W]e absolutely object to questions like `How do you feel about' or `Would you be – can you envision a scenario where you would give life to a person who has killed and dismembered three people' because that is doing precisely

> what the opinion we cited here in *Coffman*, 34 Cal.4th at 1, says you can't do. *You can't ask questions that are so specific that it requires the perspective (sic) jurors to prejudge the penalty phase issue based on a summary of the mitigating and aggravating evidence likely to be presented.* That's exactly what you cannot do. Get a preview from the juror as to which direction they may go depending on certain aggravating or mitigating evidence." (6RT 1667-1668.)

Defense counsel asserted appellant's Fifth, Sixth, Eighth and Fourteenth Amendment right to "know what their feelings or opinions are about some of these issues." But the court remained adamant:

> THE COURT: We're not putting the picture in front of them and saying, "Look at this picture. See that picture? Now, do you think that you can be a fair juror in this matter?"
>
> DEFENSE COUNSEL: Or not even telling them what's in the picture, though?
>
> THE COURT: We tell them its gory and it's body parts ... But its different than saying – and that is based upon them remaining – that's based upon them being able to perform a duty of looking at graphic evidence ... and being able to sit and listen to evidence beyond that. Asking jurors about issues is different than asking jurors about facts." (6RT 1668-1669.)

In addition to citing the United States Constitution at that juncture, defense counsel called the court's attention to the cases cited in her memorandum of points and authorities in which prosecutors used fact-based

hypothetical questions on voir dire.[29] The court said it had read the cases counsel cited, and "in every single one of those cases the Court said you know what? We weren't happy with it. We're not condoning that, that the judge allowed that. . . . ¶ [T]hey're saying, `Judge, how could you possibly let that go that far? . . .". (6RT 1669.)

The trial court declared, "I don't want to go as far as those cases allowed. I think there were other reasons why the court didn't reverse those cases, but I don't think it had anything to do with them being happy or allowing or thinking that that's the way voir dire should be conducted. But again, it's case by case, it's question by question, and we'll just go from there. But I think everyone knows how I feel on that." (6RT 1670.)

The questionnaire the court subsequently produced for appellant's trial did not ask prospective jurors if they would invariably impose death

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[29]See 15CT 6303-6311, discussing *People v. Coleman* (1988) 46 Cal.3d 749, *People v. Kaurish* (1990) 52 Cal.3d 648, *People v. Mickey* (1991) 54 Cal.3d 612, 681, *People v. Boyette* (2002) 29 Cal.4th 381, 415, *People v. Fields* (1983) 35 Cal.3d 329, 357, *People v. Rich* (1988) 45 Cal.3d 1036, *People v. Clark* (1990) 50 Cal.3d 583, 596-59, *People v. Pinholster* (1992) 1 Cal.4th 865, *People v. Visciotti* (1992) 2 Cal.4th 1, *People v. Noguera* (1993) 4 Cal.4th 599, *People v. Kirkpatrick* (1994) 7 Cal.4th 988, *People v. Riel* (200) 22 Cal.4th 1153, 1178, *People v. Mendosa* (2000) 24 Cal.4th 130, 168, *People v. Ochoa* (2001) 26 Cal.4th 398, 428, *People v. Seaton* (2001) 26 Cal.4th 598, 635, *People v. Champion* (1995) 9 Cal.4th 879, 908-909, but not *People v. Cash, supra.*)

after exposure to the aggravating facts the prosecutor would present. Rather, it conformed to the prosecutor's theory that only statutory special circumstances should be used in qualifying the jury. It asked, in question 107, "Would you always vote for the death penalty in a case involving more than one murder? In other words, would you automatically vote for a sentence imposing the death penalty regardless of what the evidence was during the penalty trial?" Questions 108 and 109 substituted the words "committed during a robbery" and "committed during a kidnaping." (See, e.g., 1JQCT 20.)

That questionnaire also solicited prospective jurors' recollection of the publicity and of any impressions formed in response. The questionnaire disclosed the names of all three defendants and the five victims, the fact that two of the victims were an elderly couple, and that "[t]he dismembered remains of the Stinemans and Selina Bishop were found floating in gym bags along the Mokulemne River (Delta region) in August, 2000." (See, e.g., 1JQCT 15.)

It did not, however, ask if jurors could consider mitigating facts or refrain from imposing death after seeing the dismembered remains, let alone after hearing that appellant was personally responsible for the dismemberment, and for the feeding of a young woman's skin to his dog.

As to photographs, there was no mention of mutilated body parts or any other gruesome or inflammatory content. The questionnaire disclosed only that jurors would be asked to view "photographs or videos of the people who were killed in the scene where it occurred." It then asked only if the panelist believed he would be "unable or unwilling to consider other evidence presented" afterwards. (1JQCT 17.)

Responses from venire members who recalled the pretrial publicity showed that the aggravating circumstances, particularly the corpse desecration evidence, would cause many otherwise-qualified jurors to invariably and automatically vote for death, regardless of the mitigation, though they would not vote automatically based on the statutory special circumstances disclosed. Most were excused without voir dire. (See, e.g., questionnaires of Jose Reyes (10JQCT 3918, 3922), Frank Matulvich (13JQCT 5581- 5582, 5585-5586), Joseph Kehoe (13JQCT 5681-5686), Judy Zenoni (4JQCT 1398, 1402-1403), and Tamila Williams (2JQCT 637, 658-659.)

A few panelists who recalled the case from pretrial publicity made sufficiently neutral remarks about it on their questionnaire to avoid being excused by stipulation. Those who indicated they were leaning toward death based on those facts underwent voir dire and were asked about their

ability to consider a life sentence. But as to those venire members who knew or recalled only what was disclosed in the questionnaire and expressed no prejudgment, the court would not allow the defense to probe the impact of the horrific facts known to the court to be a major part of the case in aggravation.

At one point in the voir dire, defense counsel's questioning disclosed that the case involved premeditation of murder, and asked jurors if they could come back with a verdict of life without parole "if you thought the case was appropriate." (12RT 2894-2895.) The prosecutor renewed his claim that panelists should not be disqualified based upon prejudgments triggered by disclosure of the aggravating facts. Defense counsel briefly reiterated the need for the court to allow the defense to expose prejudgment of the appropriateness of the death penalty based on aggravating factors to be shown by the evidence. (12RT 2901-2902.)

The prosecutor went on to insist, with no citation of authority, that the "essence of the People's case in aggravation" should not be disclosed in qualifying the jury. (12RT 2903.) As to telling prospective jurors about the corpse desecration in this case, he insisted, "[t]hat is not the basis for a challenge by injecting the element that I won't mention because family members are in the courtroom, other than to say aggravating aspects of this

case and for instance what took place in the bathroom. If you inject some of those, I have a feeling that more people would be leaning towards the death penalty. I have a feeling." (12RT 2903-2904.) The court appeared to take the prosecutor's point, saying, "I think considering other evidence after learning of dismemberment would be difficult for anybody." (12RT 2905.) Further on, the court reminded counsel and the panelists, *"[W]e're not going to get into specifics here. I won't allow that."* (13RT 3044, emphasis added.)

B. The Restrictions Placed on Defense Inquiries Violated Settled Law, Had No Legitimate Purpose, Represented An Abuse of Discretion, Precluded Identification of Jurors Who Would Automatically Impose Death and Violated Appellant's Federal Constitutional Rights

As noted in *Cash,* "a challenge for cause may be based on the juror's response when informed of facts or circumstances likely to be present in the case being tried." (*People v. Kirkpatrick* (1994) 7 Cal. 4th 988, 1005.) "We have endorsed such particularized death-qualifying voir dire in a variety of situations." (*People v. Cash,* 28 Cal. 4th 703, 720-721.)

Indeed, the "gravamen" of *Cash* and its progeny is that capital defendants should not be denied "the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for

death at the time they answer questions about their views on capital punishment." (*People v. Valdez, supra,* 55 Cal.4th 82, 165.) Accordingly, "this court has held that `either party is entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence.' *(People v. Cash* (2002) 28 Cal.4th 703, 720–721 [122 Cal. Rptr. 2d 545, 50 P.3d 332].) In other words, a trial court errs in precluding all counsel `[from] ask[ing] jurors if they would automatically vote for or against death 'in cases involving any generalized facts, *whether pleaded or not*, that were likely to be shown by the evidence' [citation]. (Id. at p. 720.)" *(People v. Pearson* (2013) 56 Cal. 4th 393, 412, emphasis in original.)

This court in *Cash* further held that voir dire "must not be so specific that it requires the prospective jurors to *prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.* [Citation.]" (*Id.* at pp. 721–722.) This barrier is not, and cannot, be violated by questioning of ostensibly-death-qualified jurors after disclosure of only the *aggravating* evidence to be adduced. Such questioning does not involve asking jurors to prejudge the penalty issue, but

rather to judge the juror's ability to hear mitigating evidence after exposure to the inflammatory aggravating facts the prosecutor will present.

In *People v. Coffman,* the only case the prosecutor offered in support of his claim that aggravating evidence should be hidden from jurors, this court found no *Cash* error because the trial court "merely cautioned" counsel not to present evidence likely to be adduced at trial *for the purpose of seeking juror commitments to vote a particular way if that evidence was adduced.* (*People v. Coffman* (2004) 34 Cal.4th 1, 47-48.) Here, unlike in *Coffman,* the only commitment the defendant sought – and could reasonably seek from a death-qualified prospective juror aware of only the most inflammatory aggravating evidence – would be a commitment to refrain from prejudging the case for death upon the case in aggravation alone.

To be sure, this court has not yet held that a trial court erred in failing to allow the defense to disclose the dismemberment of a corpse in life-qualifying a jury. This court has so far held only that post mortem dismemberment is not "necessarily" a fact that must be disclosed. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1142 [prospective jurors "need not *necessarily* be informed that a charged homicide involved dismemberment, at least in the absence of evidence that the dismemberment occurred while the victim was still alive."]

The first of two cases in which this court considered requiring disclosure of dismemberment evidence was *People v. Zambrano* (2007) 41 Cal.4th 1082, 1122-1123. There, the defendant was sentenced to death after being convicted of, inter alia, one count of first degree murder with a special circumstance of witness killing (Pen. Code, § 190.2, subd. (a)(10).) The homicide victim's body was decapitated, dismembered and left in the Lafayette Hills. The majority held that "the condition of the adult murder victim's body when found" was not a fact "that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury – invariably to vote for death, regardless of the strength of the mitigating evidence." (*Id.* at. p. 1122.) Also, a question about the effect of this circumstance would not have been "entirely fair in the context of [that] case" because "the circumstances surrounding the dismemberment of [the homicide victim's] body were hotly disputed, and jurors' "attitudes toward the dismemberment thus might well be affected by which version they believed." (Id., at p. 1123.)

Justice Kennard dissented from that portion of the holding in *Zambrano*, noting:

> Here, the murder victim's dismemberment by defendant was "a general fact or circumstance" likely to elicit a strong emotional response from the jurors. [Citation.] . . . Voir dire at the outset of trial would have revealed whether this

> "general fact or circumstance" would cause any juror to invariably vote for the death penalty, without considering mitigating evidence presented by defendant.
>
> The majority insists that the dismemberment of the victim's body was not a circumstance "that could cause a reasonable juror ... invariably to vote for death, regardless of the strength of the mitigating evidence." (Maj. opn., *ante*, at p. 1122.) I disagree. The fact of dismemberment may be of great significance to a prospective juror. Undoubtedly, there are prospective jurors who consider the integrity of the body of a deceased person to be extremely important. The history of torts is rife with lawsuits brought by relatives alleging mishandling of the bodies of their loved ones. [Citations.] Thus, the trial court here erred in not permitting defense counsel to ask the prospective jurors whether the murder victim's dismemberment would affect their views on the choice of penalty. *People v. Zambrano, supra*, 41 Cal. 4th 1082, 1200-1201 (conc. & dis. opn. of Kennard, J.)

In *People v. Rogers, supra,* 46 Cal.4th 1136, 1142, this court rejected a claim of error in failing to "ascertain whether the prospective jurors' penalty phase decisionmaking would be affected by the particular circumstances that defendant was close to his three alleged murder victims, that one of the victims was pregnant, that another was the mother of his child, and that two were dismembered." (Ibid.) Citing *Zambrano*, this court concluded that "it was more than sufficient that the prospective jurors—having been informed that defendant allegedly murdered a male friend and two former girlfriends—were asked, in various ways, whether there were circumstances under which they would impose the death penalty

automatically regardless of other legally relevant factors. Prospective jurors, moreover, need not *necessarily* be informed that a charged homicide involved dismemberment, at least in the absence of evidence that the dismemberment occurred while the victim was still alive. [Citation.]" (*People v. Rogers*, *supra*, 46 Cal.4th 1136, 1142, emphasis added.)

Thus, the only cases in which this court has addressed the defendant's right to voir dire prospective jurors about the effect of dismemberment evidence did not involve desecration beyond dismemberment of the corpse, nor a penalty-only trial following a plea of guilty. Those cases involved dismemberment of bodies, but not the feeding of human flesh to an animal. And they were cases in which the circumstances of the dismemberment were contested or of debatable importance in the penalty phase. Here, appellant pled guilty and raised no issue as to the prosecutor's corpse desecration evidence. Yet corpse desecration beyond dismemberment formed a major part of the prosecutor's presentation of a horror story, in pictures, and narrated by a former codefendant.

Moreover, the record in this case, particularly the totality of the questionnaire responses the court received, establishes that the corpse desecration element of this case meets the test established in *Zambrano,* i.e.,

that it was a fact "that could cause a reasonable juror – i.e., one whose death penalty attitudes otherwise qualified him or her to sit on a capital jury – invariably to vote for death, regardless of the strength of the mitigating evidence." (*People v. Zambrano, supra*, 41 Cal.4th 1082, 1022.) The trial court should have, but did not, withdraw its restrictive ruling after seeing and hearing how it propelled reasonable jurors to close their minds prematurely, i.e., to prejudge the penalty issue without regard to mitigation.

Also, the trials of *Rogers* and *Zambrano* occurred long before 2002, when *Cash* was decided. (*People v. Rogers, supra,* 46 Cal.4th at p. 1148 [tried 1997]; *People v. Zambrano, supra*, 41 Cal.4th at p. 1194 [tried in 1992 and 1993].) Thus, "when the court made its ruling, the law was clear that `[i]t is not a proper object of voir dire to obtain a juror's advisory opinion based upon a preview of the evidence,' and that the relevant inquiry was the juror's `general neutrality toward capital punishment.' [Citation.] The court could reasonably rely on our advisement that `[t]he inquiry is directed to whether, without knowing the specifics of the case, the juror has an 'open mind' on the penalty determination.' [Citation.]" (*People v. Butler* (2009) 46 Cal. 4th 847, 860.) Consequently this court could not say in *Butler* and other earlier cases that the trial court "abused its discretion" in following the law as it existed when the case was tried (*Ibid.*)

This case, however, was tried two years *after Cash*. *Cash* was acknowledged in the prosecutor's memorandum within a page of the older and lesser authorities on which the prosecutor relied. Appellant's trial court could *not* have *reasonably* relied on this court's previous advisements in the wake of *Cash*. Yet appellant's trial court precluded defense counsel from disclosing more than the charged statutory special circumstances when examining the qualifications of jurors who did not recall the case and offered no prejudgment on their questionnaires, and insisted that this court has shown only disdain for trial judges who have allowed disclosure of case-specific facts. (6RT 1669) Appellant's trial court made its decisions unmoored from the reality of existing law.

"[W]hen a trial court's decision rests on an error of law, that decision is an abuse of discretion. [Citations.]" (*People v. Superior Court (Humberto S.)* (2008) 43 Cal. 4th 737, 746; accord *Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711–712; *People v. Knoller* (2007) 41 Cal.4th 139, 156 [abuse of discretion "arises if the trial court based its decision on ... [citation] ... an incorrect legal standard."]; *People v. Brunette* (2011) 194 Cal. App. 4th 268, 276; [restitution order resting upon a demonstrable error of law constitutes an abuse of discretion.].)

The trial court's refusal to allow defense counsel to ask ostensibly

death qualified jurors about their ability to consider mitigating evidence after hearing and seeing the prosecutor's corpse desecration evidence was thus an abuse of discretion under state law.

It was also a violation of appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth amendments, *Morgan v. Illinois, supra*, 504 U.S. 719, and *Wainwright v. Witt* (1985) 469 U.S. 412.

Consideration of mitigating evidence is the duty of every capital juror under California law and the United States Constitution. Under the latter, a sentencing jury must be able to provide a "reasoned moral response" to a defendant's mitigating evidence--particularly that evidence which tends to diminish his culpability--when deciding whether to sentence him to death. (*Brewer v. Quarterman*, (2007) 550 U.S. 286, 289.)

Here, the trial court acknowledged that "considering other evidence after learning of dismemberment would be difficult for anybody." (12RT 2905.) The questionnaire responses of venire members who recalled the publicity demonstrated that some otherwise qualified capital jurors would find it not only difficult, but impossible or immoral, to consider mitigating evidence after hearing and seeing the horrific aggravating evidence. The prosecutor's intended presentation of corpse desecration evidence would surely have that disabling effect on some of those who had not formed a

prejudgment of the case based on pretrial publicity or the brief reference to dismembered remains in the description of that publicity. "Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence cannot be fulfilled." *(Rosales-Lopez v. United States* (1981) 451 U.S. 182, 188 .)

When the crime itself is likely to inflame the passions of jurors, courts must be especially vigilant in ensuring that the demands of due process are met. (*McKenzie v. Smith* (6th Cir. Mich. 2003) 326 F.3d 721, 727-728 "[T]he greater the probability of bias, the more searching the inquiry needed to make reasonably sure that an unbiased jury is impaneled." (*Oswald v. Bertrand* (7th Cir 2004) 374 F.3d 475, 480.) Questions on voir dire must be sufficiently specific to identify prospective jurors who hold views that would prevent or substantially impair them from performing the duties required of jurors. (*Morgan v. Illinois, supra*, 504 U.S. at pp. 734-735.) Any juror to whom mitigating factors are irrelevant should be disqualified for cause. (Id. at p. 739.)

In California, inability or impairment of ability to consider or impose death in the case being tried is disqualifying, regardless of whether the juror could fairly consider imposing death in other capital cases. By the same

token, inability or impairment of ability to consider mitigation and impose life in the case being tried disqualifies a juror, regardless of any ability to do so in other capital cases. (*People v. Cash,* 28 Cal. 4th 703, 720-721.) This rule follows inexorably from this court's decisions authorizing prosecutorial disclosure of case facts that could prevent some death-qualified jurors from fairly considering imposing death in the case being tried. Just as "[t]he State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses" (*Wardius v. Oregon* (1973) 412 U.S. 470, 475) the State must not hide aggravating case facts when examining the ability of death-qualified jurors to fairly consider life, while exposing case facts that will cause death scrupled jurors to disqualify themselves.

In addition to offending the Due Process principles underlying *Wardius,* suppression of aggravating facts in life-qualifying prospective jurors while allowing full disclosure of mitigating facts tilts the venire in favor of capital punishment, in violation of the capital defendant's Sixth Amendment jury trial rights. (Cf. *Uttecht v. Brown, supra,* 551 U.S. 1, 9.) A venire stripped of all who will not fairly consider imposing death in the case being tried cannot be considered neutral unless it is effectively purged of all who will not fairly consider imposing life in the case being tried.

C. Reversal is Required

At the urging of the prosecutor, appellant was"categorically denied the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death" when prospective jurors were asked "questions about their views on capital punishment." (*People v. Valdez, supra,* 55 Cal.4th 82, 165 [internal citations omitted].) Only the statutory "special circumstances" that were charged in the pleadings, i.e., robbery, kidnaping, and commission of more than one murder, were presented in questioning venire members unfamiliar with the case about their ability and willingness to refrain from voting for death automatically. Such preclusion of effective life-qualification voir dire was condemned by this court two years before the trial. (*People v. Cash, supra,* 28 Cal.4th at pp. 721-728.)

Several of appellant's jurors were people who did not recall the case facts from pretrial publicity, and did not know (and therefore could not tell) if they could or would be able to hear mitigating evidence after the prosecutor's case. (1JQCT 15, 114, 147, 182, 219, 281.) For example, Juror No. 1 (venire member No. 3), a 51-year old man, wrote that he heard about the case on television. He did not recall what he saw or how he reacted. (1JQCT 15.) Even if we assume Juror No. 1 and the other sworn

jurors had in mind the facts provided in the description of the pretrial publicity when they answered the general question about his ability to be fair in this case, we cannot reach the conclusion that they must have known the case in aggravation would involve corpse desecration beyond dismemberment, let alone the feeding of human flesh to an animal.

Moreover, we cannot conclude that Juror No. 1 (or any other seated juror) did not hold the disqualifying view that anyone responsible for corpse desecration should invariably be sentenced to death, without regard to mitigation. Like all the seated jurors, Juror No. 1 wrote that he would not always and automatically vote for death based on the alleged statutory special circumstances. (1JQCT 20.) But as shown by the responses of prospective jurors who recalled concluding that death was the only appropriate punishment for appellant, lack of readiness to vote for death automatically in every robbery, kidnaping or multiple murder case does not mean the juror was not inclined to do so on the aggravating facts of this case.

"Because the trial court's error makes it impossible to determine from the record whether any of the individuals who were ultimately seated as jurors held the disqualifying view that the death penalty should be imposed invariably and automatically" on the aggravating facts the

prosecutor presented at trial, "it cannot be dismissed as harmless." (*People v. Cash, supra*, 28 Cal.4th 703, 728.) Likewise, [b]ecause the "inadequacy of voir dire" leads us to doubt that petitioner was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment, his sentence cannot stand. [Citation.]" (*Morgan v. Illinois, supra,* 504 U.S. 719, 739.)

IV. THE ADMISSION OF PHOTOGRAPHIC AND AUDITORY EVIDENCE OF CORPSE DISMEMBERMENT DENIED APPELLANT HIS RIGHT TO A FUNDAMENTALLY FAIR PENALTY TRIAL IN VIOLATION OF THE FIFTH, SIXTH , EIGHTH AND FOURTEENTH AMENDMENTS AND STATE CONSTITUTIONAL COROLLARIES

As noted in the previous argument, the defense filed a pretrial motion to exclude or limit the use of gruesome autopsy photographs. It pointed out the lack of relevance to a disputed, material issue, the absence of judicial discretion to admit irrelevant evidence, and the impropriety of admitting such prejudicial evidence that did not show the pre-mortem violence or add anything to the testimony of the medical examiner. (15CT 6500.) Citing *Payne v. Tennessee* (1991) 501 U.S. 808, the trial court ruled for the prosecutor.

Consequently, horrifying photos of detached body parts were published to the jury and/or displayed on a photo board or in the prosecutor's "Elmo" projector and described during the testimony of the medical examiner. (See, e.g., 25RT 5475-5477, Exh 4-C-1, 3SCT 709, showing eviscerated upper torso of Annette Stineman with large laceration in front, green skin, tissue damage at the shoulders where the arms would have been, and a circular dark area at base of the neck exposed by the decapitation process]; 25RT 5477-5480, Exh 4-C-2, 3SCT 712-713

[showing head of Selina Bishop in a white trash bag, with wide-open eyes and mutilated facial tissue around upper and lower jaws, and limbs of another victim found in the same bag]; 25RT 548, Exh 4-C-3, 3SCT 414-716 [jaw segments with soft tissue attached, two legs and an arm].)

Also, despite specific objections from the defense, the prosecutor was allowed to, and did, activate the reciprocating saw during his closing argument. (24RT 5261-5265, 29RT 6536, SASSCT 23.) Declarations and published reports presented to the court with appellant's record settlement motion[30] (7SCT 1590-1592, SSCT 16-24) indicate that the prosecutor activated the saw while asserting that appellant tore or cut people apart, words reflected in the reporter's transcript of the argument. (30RT 6654.) Author Claire Booth described the scene in her book about the case: "'He cut those people up, and he cut those families up,' Jewett said. And then in a bit of courtroom theater, he drove home the point by starting a saw and letting its roar fill the courtroom as he pointed to the smiling faces of the Stinemans, Jenny and Jim, and Selina, projected on the

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[30] The trial court denied appellant's motion to settle the record as to the pictures shown, gestures made or words spoken immediately prior to, during, or after the saw was activated. The trial court believed that the witness declarations were inconsistent and no one's recollection was reliable and complete several years after the events in question. (6/18/10 RT 115-145, 1/4/11RT 18-34.)

wall." (Booth, *The False Prophet* (2008) p. 258.)

The prosecutor's written response to the defense motion provided no support for admission of the autopsy photographs beyond claiming that they were "the best evidence of the methodical and cold-blooded manner in which this defendant killed five people. Contrary to defendant's assertion regarding the `damaging effects of the river' that the bodies of three of those victims were in the water for a few days served to cleanse the remains. What did those body parts look like in the bathroom? Photographs of the murdered remains of five people, and the desecration of the bodies of three of them, are directly related to the enormity of the crimes committed." (15CT 6523.)

At the hearing of appellant's motion to exclude autopsy photographs, the prosecutor told the court he wished to use the same autopsy photographs at appellant's trial that he had used at Justin Helzer's trial. (6RT 1615.) In response to defense counsel's observation that, unlike Justin, appellant pled guilty and thus relieved the prosecutor of the need to prove him so, the prosecutor said he was entitled to show how the crimes were committed. (6RT 1617.) The prosecutor presented no basis for his claims that the photographs of the dismembered remains showed the manner in which the Stinemans or Selina Bishop were killed.

The prosecutor also argued that the photos of dismembered bodies were circumstantial evidence of "what is inside Taylor Helzer." (6RT1618.) The prosecutor did not articulate any logical path or present any expert testimony linking the appearance of the victims' remains in the photographs to any aspect of appellant's character. Assuming that the gruesome photographs were indeed circumstantial evidence of "what is inside" appellant, the prosecutor submitted that they "are very probative of the enormity of the crime, which directly relates to the question of whether or not the evidence in aggravation is so substantial that it warrants imposition of the death penalty." (6RT 1618.)

The trial court ruled as the prosecutor requested after misreading or mis-recalling the applicable law and confusing postmortem dismemberment for disposal with the capital crimes to which the death penalty applied.

First, as to the applicable law, the trial court incorrectly asserted that *Payne v. Tennessee* (1991) 501 U.S. 808, "allows the jury to consider such evidence, even though it's hard to look at" so long as "it is relevant on the matter of victim impact and relevant to the case and not such that would just inflame the jury." (6RT 1622.) In fact, the Court in *Payne* never considered, let alone resolved, the admissibility of pictures of any decedent's remains as penalty phase evidence. The video of the crime

scene with the bodies of a mother and child as they were left by the defendant was not the subject of any objection reviewed by the high court. The only challenge the *Payne* court reviewed was directed to the testimony of the grandmother regarding the toddler's continual crying for his mother and sister after their death.[31]

After misstating the holding in *Payne*, the trial court declared that the jurors "are being shown body parts because these people were cut up and that's how they were disposed of. The teeth and the jaw is part of the design and the plan to take those out.... They actually show the manner in which the crime was committed, part of the plan." (6RT 1622.) The court thus seems to have blurred the line between the capital crime and what followed. While dismemberment was indeed part of the plan for disposing of the bodies, the court erred in conflating violence to a corpse with "the manner in which the crime was committed." (6RT 1622.) The capital

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[31] The testimony related that the surviving child "cried for his mother and baby sister and could not understand why they did not come home." The unchallenged evidence – the videotape of the crime scene with bodies in place – was far more inflammatory. "Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived -- only to witness the brutal murders of his mother and baby sister." (*Id.* at pp. 831-832.)

murders of Selina Bishop and the Stinemans were completed when the victims expired. (*United States v. Taveras* (E.D.N.Y. 2007) 488 F. Supp. 2d 246, 253.) Later mutilation of the corpses for the purpose of concealment and disposal can be confused with the manner of killing, but it is not the same thing. (*Ibid; People v. White* (Colo. Supreme 1994) 870 P.2d 424, 447-448 [trial court erred in relying upon how the defendant disposed of the bodies the following day in finding that the killing was especially heinous]; *Blair v. State* (Fla. Supreme Ct. 1981) 406 So.2d 1103, 1108-1109 ["once the victim dies, the crime of murder was completed and the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances."].)

When the defendant plead not guilty, and photographs of the victims' remains showed pre-mortem violence, this court has found logical relevance in photographs of scattered or decomposed remains. (*People v. Solomon* (2010) 49 Cal. 4th 792, 842 [photographs depicting the victims' bound, decomposing bodies were relevant to the circumstances of the crimes in that they "disclosed the manner in which the victims died and substantiated that defendant intended and deliberated the murders."]; *People v. Zambrano, supra*, 41 Cal.4th 1082, 1149 [photographs of intact remains of two victims

"illustrated the nature and extent of [their] injuries" and dismembered remains of third victim indicated "that it had been dismembered and scattered by human hands to hamper its identification [and] bore on matters the prosecution was obliged to establish beyond a reasonable doubt. . . . Hence, the evidence had a tendency in reason to prove material facts in the case."].)

But here, no one testified, and the prosecutor did not claim, that the photographs represented any fatal wounds or peri-mortem violence. Insofar as the autopsy photographs of the dismembered remains of the Stinemans and Bishop had no legal or logical relevance, the court did not have discretion to admit them. (*People v. Turner* (1984) 37 Cal.3d 302, 321 [trial court erred in admitting photographs after neither the court nor the prosecution articulated the relevance of the position of the bodies or the manner of the infliction of the wounds to the issues presented. "Although the admissibility of photographs lies primarily in the discretion of the trial court [Citations], it has no discretion to admit irrelevant evidence. (Evid. Code, § 350.).)

Even if the photographs of dismembered remains had some logical relevance, the trial court could and should have excluded them under Evidence Code section 352, and the United States Constitution. The trial

court was aware that photographs depicting the desecration of the remains of the first three victims would surely make it difficult for anyone to hear other evidence afterwards. The trial court recalled that the hardest photos to look at were of the faces because "the jaws and teeth had been hammered out of the Stinemans and Ms. Bishop and put in a different bag". (6RT 1621-1622.) But rather than exclude the facial or other autopsy photographs, the court ruled for the prosecutor, explaining simply, "I think that the fact that that was done is relevant to the case for this jury in deciding which penalty they should impose." (6RT 1621-1622.)

However reasonable, a trial court's belief that a penalty jury should consider exactly how the defendant treated the bodies of the victims does not obviate the need for a trial court to determine if photographic evidence is logically relevant, not cumulative, and not unduly prejudicial. Admission of gruesome photographs that do not meet all three criteria represents an abuse of discretion. (See *State v. Spreitz* (1997) 190 Ariz. 129, 142 [945 P.2d 1260, 1273] holding that trial court abused its discretion in allowing use of gruesome autopsy photos of partially decomposed remains that "provide little or no additional aid" in understanding the coroner's testimony.)

Moreover, allowing the prosecutor to horrify the jury with the sights

and sounds of corpse dismemberment denied appellant's right to an impartial jury and fundamental fairness at sentencing in violation of the United States Constitution, Amendments 6, 8, and 14. *(Spears v. Mullin* (10th Cir. Okla. 2003) 343 F.3d 1215, 1226 [photographs depicting numerous post-mortem stab wounds, large gash wounds, exposed intestines and swollen face and black eye rendered penalty trial fundamentally unfair when evidence showed that victim died or lost consciousness early in the beating and "neither the peri-mortem stab wounds nor conscious suffering were connected to the specific photographs'].) Such evidence, particularly photographs of dismembered or mutilated bodies, tends to have "an excessive impact on the finding and weighing of aggravating and mitigating factors." *(United States v. Taveras* (E.D.N.Y. 2008) 584 F. Supp. 2d 535, 539; citing *United States v. Taveras* (E.D.N.Y. 2006) 436 F. Supp. 2d 493, 515 ("The court has a duty to minimize the 'risk [of] a verdict impermissibly based on passion, not deliberation.'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 836, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Souter, J., concurring)).

The sentence imposed at the penalty stage is supposed to "'reflect a reasoned moral response to the defendant's background, character, and crime.'" (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 252 (quoting

California v. Brown (1987) 479 U.S. 538, 545 (O'Connor, J., concurring).) And, as previously noted, a sentencing jury must be able to provide a "reasoned moral response" to a defendant's mitigating evidence – particularly that evidence which tends to diminish his culpability – when deciding whether to sentence him to death. (*Brewer v. Quarterman* (2007) 550 U.S. 286, 289.)

"'It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 51 L. Ed. 2d 393 (1977). By excluding evidence of postmortem dismemberment, the 'risk [of] a verdict impermissibly based on passion, not deliberation' is minimized. *Payne v. Tennessee*, 501 U.S. 808, 836, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991) (Souter, J., concurring)." *United States v. Taveras* , supra, 488 F. Supp. 2d 246, 254.)

The autopsy photographs of the dismembered remains of Bishop and the Stinemans were horrifying to the point of obscuring the difference between torturous chainsaw murder and dismemberment of a corpse. Research confirms that jurors do not always distinguish postmortem dismemberment from premortem dismemberment, notwithstanding the legal and moral difference between the two. (See, e.g., Garvey, Stephen P.,

Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 Colum. L.Rev 1538, 1555 ["[H]ow the defendant treated the victim's body after death is almost as important as how he treated the victim before death, with over 70.0% of jurors indicating that post-mortem maiming or mutilation of the victim's body did or would make them more likely to impose death."].)

Furthermore, defense counsel presented evidence of how jurors conflate premortem and postmortem dismemberment with appellant's motion to limit use of photographic evidence. Counsel attached and quoted a newspaper story quoting one of Justin Helzer's jurors saying that "it was hard to look at" the photos of the mutilated bodies "and not react." (15CT 6505.) Also, as to Justin Helzer, the juror was quoted saying "He didn't just react in a moment of anger and shoot someone. *He thought about it and went back and cut them up.*" (15CT 6505.)

Furthermore, public display of photographs of the victims' bodies, naked and mutilated, naturally augmented the suffering of the family members in connection with the trial, and thus increased the suffering for which the jury would hold appellant responsible. It is beyond cavil that the State should not present its case in a manner that augments the pain of the survivors while citing that pain in urging the jury to sentence the defendant

to death. Jurors invited to consider in aggravation the capital crimes' impact on the surviving family members cannot help but consider in aggravation the survivors' pain in seeing photographs of their loved ones' naked remains displayed in a public courtroom.

Finally, there can be no question that the challenged evidence provoked disgust, a state of mind that can preclude consideration and weighing of mitigating evidence. "The danger of allowing evidence of post-mortem dismemberment is that the jurors may react with such disgust at the defendant's distasteful actions, that they will be unable to carefully weigh the factors necessary to determine a fair sentence. [Citation.] (*United States v. Taveras* (E.D.N.Y. 2007) 488 F. Supp. 2d 246, 254.)

For all the above reasons, and in light of the substantial mitigation this case presents, the erroneous admission of the challenged photographic and auditory evidence of corpse desecration was not harmless. (*Chapman v. California, supra,* 386 U.S. 18, 24; *People v. Watson* (2008) 43 Cal. 4th 652, 693 [state law error requires reversal of death penalty if there is a "reasonable possibility" of a life verdict, a standard identical to that required by *Chapman*].) We cannot say, with the requisite certainty, that there is no reasonable possibility that the jury would have chosen life if not for this error. The judgment must be reversed.

V. THE PROSECUTOR'S CLOSING ARGUMENT AND THE TRIAL COURT'S REFUSAL TO GIVE THE JURY APPROPRIATELY SPECIFIC INSTRUCTIONS RENDERED OUR DEATH PENALTY STATUTORY SCHEME UNCONSTITUTIONAL AS APPLIED, PREVENTED CONSIDERATION OF MITIGATING FACTORS, AND COMPROMISED CONSIDERATION OF MITIGATING EVIDENCE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND STATE CONSTITUTIONAL COROLLARIES

Introduction

As adopted by the voters, California's death penalty statute directs the sentencing jury to consider specified factors in mitigation, including the lack of any criminal record, the influence of any extreme mental or emotional disturbance, and any impairment of the capacity to conform conduct to the requirements of the law. (Pen. Code §190.3, factors (b) (c), (d) and (h).)

But that was not how the State presented California law to the jury. Although the court instructed the jury to "consider, take into account, and be guided by" those factors, among others, "if applicable" (CALJIC No. 8.85, 16CT 6908: 30RT6859) the prosecutor had already told the jury that those mitigating provisions of the law need not be considered by appellant's jury because they did "not apply" to appellant's case. (30RT 6647-6653.)

As the prosecutor declared, factors (b) and (c) apply only if the defendant has a record of prior felony convictions or acts of violence; (d) applies only to transitory conditions and impulsive crimes, and (h) applies only if the defendant lacked any capacity to know the criminality of his conduct at any time during the period he was mentally ill.

Objection in the trial court would have been futile. Because of this court's precedents, the trial court adamantly declared twice prior to closing argument that it would not tell the jury that any factor or evidence was mitigating or aggravating. The trial court also refused to instruct the jury on the meaning of factors (d) or (h) as the defense requested, having declared that such instructions were argumentative. Accordingly, defense counsel did not offer a closing argument that disputed the prosecutor's claims about the applicable law.

Because the prosecutor's false claims about the law were uncontradicted, it is more than reasonably possible that the jury was misled. Therefore, whether or not this court finds that the prosecutor committed misconduct or that the court's instructions were inherently inadequate, reversal is required.

A. The Relevant Facts

Prior to closing argument, defense counsel submitted several special instructions, most of which were refused by the court. In remarking on a special instruction modifying CALJIC No. 8.85 to state that factors other than (a), (b) and (c) can only be mitigating (16CT 6727) the court said it had read "Davenport, Fudge and Williams" and "in each of those cases, the court's not required to differentiate which of these factors is mitigating and which is aggravating, and I'm not going to." (25 RT 5658.) Further, the trial court rejected as "argumentative" a defense special instruction saying that being under the influence of a mental or emotional disturbance is a mitigating factor even if not such as to overcome reason or preclude deliberation, and regardless of cause.[32] (16CT 6735, 25RT 5668.) the trial court said it would inform the jury that the mental impairment referred to as factor (h) is not limited to evidence which excuses the crime or reduces the defendant's culpability, but includes any degree of mental defect, disease, impairment or intoxication "which the jury determines is of

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[32] The proposed instruction also contained addition language distinguishing factor (d) from the heat of passion caused by provocation that will reduce murder to manslaughter, and asserted that this mitigating circumstance exists if the defendant's "mind or emotions were disturbed, that is, interrupted interfered with, from any cause" including drugs, alcohol, and mental illness, "regardless of whether there is a reasonable explanation or excuse for such disturbance." (16CT 6735.)

a nature that death should not be imposed." [33] (16CT 6739, 25RT 5671-5672.)

The court also rejected as argumentative a proposed instruction informing the jury that the mental disease or defect referred to in CALJIC No. 8.85 is not legal insanity, but rather a condition in which the defendant's ability to appreciate the wrongfulness of his conduct or to conform to the requirements of the law was impaired . (16CT 6740, 25RT 5672.)

Later, in rejecting special instructions informing the jury that the absence of factors (i) and (j) cannot "be considered aggravation." (16CT 6741-6742) the court stated it would not give such instructions because "the Court has already determined that it doesn't want to designate which is mitigating and which is aggravating." (25RT 5672-5673.)

The court also refused to give special instructions informing the jury that the listed mitigating factors are merely examples of some of the reasons jurors can decide to impose life, and that mitigating factors need not be

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[33] The court later read that statement to the jury after reading not only CALJIC No. 8.85 but other instructions as well, most immediately: " You must face your duty with regard to sentencing soberly and rationally, and you may not impose a death sentence as a result of a purely emotional response to evidence and argument re the victims. (30RT 6862, 16CT 6910-6913.)

proved beyond a reasonable doubt. (16CT 6743-6745, 25RT 5673.)

In closing argument, the prosecutor told appellant's jury that California's statutory mitigating factors "do not apply" to appellant's case.

First the prosecutor declared that Factors (b) and (c), presence or absence of a violent criminal history or violent felony convictions, "don't apply" because appellant had neither. (30RT 6647.) Defense counsel remained silent.

The prosecutor then claimed that Factor (d), whether or not the defendant was under some extreme mental or emotional disturbance, does not apply, either. He claimed that Factor (d) applies only to angry or impulsive killings, to wit:

> "The defense spent all of their time talking about mental illness. No, it doesn't [apply]. Those assertions don't apply. It applies down below, but not here.
>
> What this is talking about are things like ... heat of passion, extreme anger, circumstances under which are not [sic] justifications but a person in a moment operating under some extreme disturbance. Okay?
>
> Another one might be Mr. Tucker's testimony. Interesting, particularly in the context of methamphetamine that you heard about in this case. What did Doctor Tucker talk about? In terms of the effects of methamphetamine? Impaired judgment, impulsivity and anger. Those are very well-known side affects [sic] of the use of methamphetamine.

> A jury could say, you know, maybe they acted a little bit impulsive because of the use of methamphetamine. Maybe they were quick to anger because of the use of methamphetamine and would not have been so quick to anger, so impulsive if they hadn't used a drug, and consider this a circumstance in mitigation.
>
> You know what, folks? ***That doesn't apply in this case***. Yes, the defendant was using methamphetamine. First of all, there is no evidence of ever any crashing that Doctor Tucker characterized as a typical result of a binge of methamphetamine. Not only do you not have that, this crime in this case is as far removed from impulsivity [sic] and anger as it could be. This is as cold-blooded and premeditated as it could possibly be. This case is not the product of extreme mental or emotional disturbance. Factor D does not apply. " (30RT 6647-6648, emphasis added.)

Defense counsel again remained silent.

After correctly observing that factors (e), (f) and (g) were inapplicable, the prosecutor denied the application of Factor (h), on the theory that it requires incapacity to appreciate the criminality of the conduct, or impairment of capacity to conform conduct to the requirements of the law throughout all the years of mental illness:

> H, you might think `What about H?" Whether or not at the time of the offense, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defects or the effects of intoxication. Doesn't this apply?
>
> I mean, that's what we heard from the defense, mental illness and intoxication, including drugs. Doesn't have to be

alcohol, even though that's how we commonly think of it. It's ingestion of any foreign substance that has an impact on a person's central nervous system and clarity of thought.

Doesn't this apply? No. Why not? There's some key language here. Here's one of 'em, right here. Here's another one, right here. Capacity. Agency, free will to make choices is a separate question. Do they have a capacity to what? Appreciate the criminality of their conduct.

What were these for? What are these for? And these are just facsimiles. We spared you the smell. What were they for? To hide the bodies, right? So nobody would find out, right? Obviously the defendant appreciated the criminality of his conduct, when he put the dismembered bodies in gym bags and put them in the river with weights, and also when Jennifer Villarin and James Gamble killed [sic] because they may identify Jordan as the person involved in all of this, including the murder of Selina. Obviously, he appreciates the criminality of his conduct. It's precisely the motive for many of the acts that you see in this case.

What about conforming conduct to the requirements of the law? Well, I've talked about methamphetamine, no evidence of crashing. There he is ... Mr. Berglund. He sees the defendant at the end of July, maybe a little bit hurried, but looked like the normal Taylor. There with his daughters in the Willows Shopping Center – what? – within a week of the time that Children of Thunder jumped off.

If you buy into the defense that the defendant was mentally ill, he was since 1990: right? Is the Defense seriously suggesting that as a result of schizoaffective disorder with bipolar that somehow he was not able, he was not capable – capacity — capable of conforming his conduct to the requirements of the law when he was a telemarketer and a stockbroker? Because if you say that as a result of mental illness he couldn't conform his ... conduct to the requirements of the law, you should see all kinds of criminality going on between 1990 and 1998. And you don't.

> Why? No matter what you say, in the final analysis, whether you accept the premise of mental illness, the fact of the matter is it does not prevent the defendant the capacity to conform to the requirements of the law. This factor does not apply. (30RT 6650-6552.)

After observing (correctly) that factors (i) and (j) were not applicable in this case, the prosecutor told appellant's jury that he could not deny the application of factor (k) because "it's the kitchen sink. `Any other circumstance which extenuates.' Whatever the Defense wants to put in, whatever they want to say extenuates, they get under Factor K." (30RT 6653.)

Following discussion of the rule prohibiting consideration of sympathy for the defendant's family, the prosecutor focused his argument on the harm done to the families of the victims, and suggested that jurors look at the photographs of the human remains if "you have any doubt what the defendant did to the people." (30RT6654.) He went on to recount the testimony of each witness, spoke at length about appellant's character and thought processes, and submitted that he conned all of the doctors who testified that he was mentally ill. (30RT 6655-6795.)

Defense counsel's argument did not respond to that of the prosecutor on any matter of law, or cite all of the applicable statutory mitigating factors. (30RT 6800-6829.) She relied only on factor (d), telling the jury,

"You will be instructed by the judge that if these crimes were committed while the defendant was under the influence of extreme mental or emotional disturbance, that is mitigation, that is reason not to kill Taylor." (30RT 6822.) She recounted much of the testimony indicating appellant was extremely mentally disturbed, asserted that he struggled with his illness, argued that imposing the death penalty would solve nothing, and asked the jury to exercise mercy. (30RT 6800-6829.)

B. Allowing a Prosecutor to Tell a Jury That Applicable Mitigators Do Not Apply Undermines the Standard Instructions, Imparts a Distorted Picture of the Statutory Scheme, Denies the Defendant His Right to a Jury Determination of the Statutory Factors As Well As Consideration of Mitigating Evidence, and Invites Arbitrary and Capricious Application of the Death Penalty

When a jury decides whether the death penalty should be imposed on a defendant who has admitted guilt of special circumstance murder, the "State must ensure that the process is neutral and principled so as to guard against bias or caprice in the sentencing decision. [Citation.]" (*Tuilaepa v. California* (1994) 512 U.S. 153, 189.)

Jury instructions on "the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to

the sentencing decision" can ensure that the decision is not a function of bias or caprice. (*Gregg v. Georgia* (1976) 428 U.S. 153, 192.) Accordingly, this court has observed that "the jury's knowledge of the full range of factors provides a framework for the exercise of its discretion and can assist the jury in placing the particular defendant's conduct in perspective. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 192 [49 L. Ed. 2d 859, 885, 96 S. Ct. 2909].)" *(People v. Miranda* (1987) 44 Cal. 3d 57, 104-105.)

"The jury is entitled to know that defendant's crimes lack certain characteristics which might justify more lenient treatment than other offenses in the same general class. [Citations.]" (*People v. Whitt* (1990) 51 Cal. 3d 620, 653.) By the same token, the jury is entitled to know when the case presents "certain characteristics which might justify more lenient treatment than other offenses in the same general class."

A false or misleading presentation of the applicability of statutory mitigating factors by the attorney representing the State imposes upon the jury a distorted picture of our scheme and the jury's sentencing discretion, particularly if the court's instructions are ambiguous on the point, and the defense does not join the argument. (*People v. Crandell* (1988) 46 Cal. 3d 833, 883-885.) "Argument stating that particular mitigating factors have

not been proven is, of course, entirely appropriate. [Citation.]" (*Id.* at p. 884.) A prosecutor may "observe" in closing argument that some of the statutory mitigating factors are inapplicable. (*People v. Ruiz* (1988) 44 Cal. 3d 589, 620.) That said, falsely asserting or implying limitations on the application of statutory mitigating factors so as to remove those factors from the jury's consideration is not appropriate and should not be tolerated.

Such argument can prevent the jury from considering and giving effect to mitigating facts (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. 233, 259, fn. 21 [reversing sentence and recognizing that prosecutorial argument may, like instructions from the court, deprive jury of a "'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence"].) It also denies the defendant the protective elements of the statutory scheme, and thus, due process of law. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) It invites arbitrary and capricious imposition of the death penalty so as to make the scheme unconstitutional as applied. (See *Tuilaepa v. California, supra*, 512 U.S. at p.991 [Blackmun, J., dissenting, noting that "lack of guidance to regularize the jurors' application of these factors create a system in which, as a practical matter, improper arguments can be made in the courtroom and credited in the jury room."]; *People v. Foster* (2010) 50 Cal. 4th 1301, 1364; *People v. Hernandez* (2003) 30

Cal.4th 835, 863.)

This court examined an unopposed argument like that given by the prosecutor here, and reversed the judgment as to sentence, in *People v. Crandell, supra*, 46 Cal. 3d 833, 883-885. There, "the prosecutor failed to acknowledge the existence of mitigating circumstances and strongly implied there were none" after the prosecutor had "introduced no evidence of prior criminal activity by the defendant involving violence and no evidence of any prior felony conviction. (See § 190.3, factors (b) & (c).)" (*Id.,* at p. 884.)

The defendant, in pro per, offered no evidence or contrary argument. The prosecutor remarked that "[t]he defendant has stated just moments ago he can offer nothing in mitigation of his defense. Viewed in context with the prosecutor's focus on the circumstances of the capital offenses and his focus on the absence of justification, this comment implied that a death verdict was virtually compelled by the absence of any mitigating factors and in particular the absence of the one factor -- i.e., moral justification -- which could have provided a basis for a sentence less than death." (*Id.* at pp. 884-885.) The jury instructions told the jury that it "shall" impose death if any mitigating circumstances were outweighed by aggravating ones. This court concluded that the "prosecutor's exploitation of the instructions'

ambiguities might well have been cured by a defense argument" but, because the defendant did not respond, "it cannot be said with confidence that the jury received a correct understanding of the scope of its sentencing discretion and of its duty to consider all relevant mitigating evidence. (*People v. Crandell, supra,* 46 Cal. 3d 833, 884-885.)

This court in *Crandell* also observed that "[t]he absence of prior violent criminal activity and the absence of prior felony convictions are significant mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past. [Citations.] (*People v. Crandell*, 46 Cal. 3d 833, 884.)

As in *Crandell*, this court need not determine whether the prosecutor's arguments in the present case should be characterized as error or misconduct. A prosecutor's misinterpretation of the law in argument to the jury may be effectively misleading to the jury, yet not described or appropriately chargeable as "misconduct" for any number of reasons. (See *People v. Morgan* (2007) 42 Cal.4th 593, 612 [reversal required due to prosecutor's misinterpretation of law in closing argument at a time when language in one of this court's decisions may have misled the prosecutor to think his argument was proper]; *People v. Lucero* (1988) 44 Cal. 3d 1006, 1031, fn 15 [prosecutorial argument effectively eliminated a statutory

mitigating factor, yet no misconduct or basis for faulting the defendant's failure to object on misconduct grounds where trial was held prior to appellate decisions disapproving prosecutor's interpretation of death penalty law].)

The court's concern "is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury." (*Ibid;* accord *People v. Milner* (1988) 45 Cal. 3d 227, 254-258 [reversing death sentence, without a charge or finding of misconduct, where prosecutor argued that jury did not have final sentencing responsibility and neither trial court's instructions nor defense counsel's argument effectively contradicted the prosecutor's claim]; *People v. Robertson* (1982) 33 Cal. 3d 21, 57-59 [reversing on other grounds, while noting that "the prosecutor's line of argument [regarding sympathy] was seriously misleading, for it erroneously foreclosed the jury from considering potentially mitigating factors which may have persuaded one or more jurors that life imprisonment without possibility of parole, rather than death, was the appropriate punishment."].)

Likewise, the United States Supreme Court's Eighth Amendment jurisprudence does not call for a determination of whether the prosecutor's argument constituted misconduct. "The jury must have a `meaningful basis

to consider the relevant mitigating qualities' of the defendant's proffered evidence. [Citation.]" *Abdul-Kabir v. Quarterman, supra*, 550 U.S. 233, 259.) "A jury may be precluded from doing so not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden." (*Id.* at fn. 21.) "Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar." (*Johnson v. Texas* (1993) 509 U.S. 350, 367, accord *Abdul-Kabir v. Quarterman, supra,* 550 U.S. 233, 241-242 [reversing sentence where prosecutor's statements during jury voir dire and closing argument construed Texas scheme so as not to recognize the defendant's mitigating evidence as such].)

Furthermore, examination of the constitutionality of California's statutory scheme "as applied" in this case necessarily involves an examination of the prosecutor's argument, sans objection in the court below. This court has consistently resolved "as applied' challenges to California's death penalty law on their merits "without discussing whether they were raised at trial. [Citations.]" *(People v. Foster* (2010) 50 Cal. 4th 1301, 1364.)

Nevertheless, it is appropriate to observe that objection or request for special instruction during or after the prosecutor's argument would have been futile. (See, e.g. *People v. Whitt , supra,* 51 Cal.3d 620, 655, fn. 27 [prosecutorial argument implying that absence of mitigating factor was aggravating addressed despite lack of objection below where case tried before decision in *People v. Davenport* (1985) 41 Cal.3d 247, 288-289, and objection would have been futile given view of law manifested by trial judge during sentence modification hearing].)

In addition to the trial court's stated unwillingness to tell the jury that any factor was mitigating or aggravating, appellant was up against this court's decisions encouraging trial court reticence. This court had "concluded in prior decisions that a trial court need not instruct that the absence of prior felony convictions is necessarily mitigating." (*People v. Jones* (2003) 30 Cal.4th 1084, 1124.) "We reasoned that a jury instructed that it may consider the absence of prior felony convictions [citations] and any " 'aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death' " [citations] will necessarily understand that it may consider in mitigation a defendant's lack of prior felony convictions." (*People v. Pollock* (2004) 32 Cal. 4th 1153, 1194.)

In *Pollock*, the prosecutor argued that factor (c), was "not

applicable." The defense requested a special instruction on the point. This court found no error, and explained:

> We have never decided whether factor (c) can only be a factor in aggravation or whether, instead, it can be either aggravating or mitigating. [Citations.] But even if we assume for the sake of argument that factor (c) can be mitigating, nothing in the trial court's instruction here suggested otherwise. The trial court expressly instructed the jury, twice, to consider "the presence or absence" (italics added) of prior felony convictions by defendant involving the use, attempted use, or threatened use of force or violence. Because the absence of prior felony convictions by a capital defendant could not be aggravating, the jury would necessarily understand that, depending on the evidence, it could regard the absence of prior felony convictions as mitigating." (*People v. Pollock, supra*, 32 Cal. 4th 1153, 1194-1195.)

This court followed *Pollock* recently in *People v. Pearson* (2013) 56 Cal.4th 393, 473-474) a case involving the same prosecutor, and prosecutorial tactic, as the instant case. But in *Pearson*, the defense objected to the prosecutor's argument denying applicability of statutory mitigators. The defense first objected when the prosecutor claimed that factors (b)and (c) were inapposite or neutral where the defendant had a clean record, and again when the prosecutor falsely claimed that factor (h) required legal insanity. After the argument concluded, the trial court in *Pearson* sustained the defense objections, and gave corrective instructions

to the jury. This court held that the corrective instructions were adequate to cure the harm. (*People v. Pearson, supra*, 56 Cal.4th at pp. 473-474.)

The present case is distinguishable from *Pearson* and *Pollock*, in that appellant's counsel did not object to the prosecutor's argument or otherwise alert the jury to the existence of an issue respecting the prosecutor's claim that factors (b) and (c) are inapplicable where the defendant has no record. "In the absence of any argument on defendant's behalf, however, it cannot be said with confidence that the jury received a correct understanding of the scope of its sentencing discretion and of its duty to consider all relevant mitigating evidence." *(People v. Crandell, supra*, 46 Cal. 3d 833, 885.)

Moreover, presuming that the jury nevertheless consulted their instructions leads only to further reason to doubt that the absence of evidence of a prior felony conviction or prior violence were indeed recognized as lawful mitigating factors by appellant's jury. According to the instruction, factor (k) applies only to an aspect of the defendant's character or record "*that the defendant offers* as a basis for a sentence less than death . . .". [emphasis added.] Appellant could not and did not prove the negative, i.e., that he had no felony convictions or prior acts of violence. Accordingly, the prosecutor never suggested that appellant's record was mitigating, or could be considered so, under factor (k). The law "presumes

that jurors, conscious of the gravity of their task, attend closely [to] the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." (*Francis v. Franklin* (1985) 471 U.S. 307, 324 fn.9.) Attending closely to the instructions could only confirm that the prosecutor was correct in claiming that factors (b) and (c) were inapplicable, and factor (k) did not provide an alternative route.

The Eighth and Fourteenth Amendments require, in a capital case, that the sentencing jury be "permitted to give meaningful effect or a 'reasoned moral response' to a defendant's mitigating evidence." (*Abdul-Kabir v. Quarterman, supra,* 550 U.S. 233, 264.) Here, the court instructions permitted appellant's jury to disregard his lack of felony convictions or prior threats of violence insofar as he failed to offer evidence that he had no criminal record. Viewed together with the arguments of counsel, there is more than a "mere possibility" -- and thus a "reasonable likelihood" (*Boyde v. California* (1990) 494 U.S. 370, 380) that the jury did not understand the instructions to say that it should, or even could, find mitigation in appellant's lack of criminal record.

A somewhat different set of issues surrounds the prosecutor's claims that factors (d) and (h) did not apply in appellant's case, and that the mental

illness evidence appellant offered could only be considered in the "kitchen sink" of factor (k).

Factor (d) of section 190.3 promises that the sentencing jury will be directed to consider whether or not the capital crimes were committed under the influence of "any actual extreme mental or emotional disturbance from which the defendant suffered at the time the offense." (*People v. Holt* (1997) 15 Cal. 4th 619, 695.) The terms "under the influence of," "extreme," and "disturbance," are, in this court's experience, "commonly understood and take on no arcane meaning when applied in the context of penalty phase deliberations." (*Ibid.*) That is, unless the prosecutor gives those terms a special meaning, as did the prosecutor in the case at bar, in telling the jury that factor (d) applies only to transitory conditions associated with impulsivity, and not to premeditated murder. As the prosecutor put it,

> What this is talking about are things like ... heat of passion, extreme anger, circumstances under which are not [sic] justifications but a person in a moment operating under some extreme disturbance. Okay? . . .¶ [T]his crime in this case is as far removed from impulsivity [sic] and anger as it could be. This is as cold-blooded and premeditated as it could possibly be. This case is not the product of extreme mental or emotional disturbance. Factor D does not apply." (30 RT 6647-6648.)

In truth, factor (d) was applicable here as a matter of law.

The scope of factor (d) is broad. (*People v. Rogers* (2006) 39 Cal. 4th 826, 898-899.) As such, it represents society's judgment that the influence of any extreme mental or emotional disturbance should be considered in sentencing a defendant for any and all forms of capital murder. Accordingly, appellant's counsel relied on factor (d) in her closing argument. Yet she did not rebut or even acknowledge the prosecutor's claim that it did not apply here. She simply said the court would instruct the jury that the influence of an extreme mental or emotional disturbance was mitigating, and that appellant was indeed extremely mentally disturbed. (30RT 6822-6833.) Apparently, counsel was not prepared to deal with the prosecutor's claim that it was inapplicable to appellant.

Due Process, the jury trial right guaranteed by the Sixth Amendment, and the statutory right to have a jury determine whether death is the appropriate penalty, require that a defendant who has presented evidence that he was under the influence of an extreme mental or emotional disturbance during the premeditation and execution of his capital crimes be able to have his jury consider and determine whether he indeed suffered from an extreme mental or emotional disorder. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) But under the prosecutor's construction of the instructions given, the presence or absence of an extreme disorder need not

be considered or determined by the jury because factor (d) does not apply to murders premeditated in cold blood. We cannot assume the jury knew better. "Evidence matters; closing argument matters; statements from the prosecutor matter a great deal." (*United States v. Kojayan* (9th Cir. 1993) 8 F.3d 1315, 1323.)

The prosecutor's claim that factor (h) did not apply to this case was likewise premised on a misrepresentation of the law, i.e., that factor (h) requires that the defendant lack all capacity to appreciate the criminality of his conduct or conform to the requirements of the law. As the prosecutor may have recalled from being corrected on the point after making a similar claim at the trial of *People v. Pearson, supra*, 56 Cal.4th at pp. 474-475), factor (h) calls for consideration of any *impairment* of the relevant capacities by mental disease, defect or intoxication. Appellant's grandiose schemes for avoiding criminal sanctions, and his belief in the viability of those schemes, were linked to his schizoaffective disorder by expert testimony as well as common sense. His disease impaired his ability to conform his conduct to the law, just as the delusion of being able to fly like a bird impairs a man's ability to refrain from jumping out a window as a means of reaching a building a block away.

C. The Court Was Obliged to Render Curative Instructions

When a prosecutor erroneously claims that a mitigating factor is inapplicable, the trial court is obliged to give a corrective instruction. (*Brown v. Payton* (2005) 544 U.S. 133, 146 [trial judge should have advised the jury that factor (k) was applicable to the evidence of post-crime religious conversion after prosecutor argued otherwise because "judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel]; *People v. Morgan* (2007) 42 Cal. 4th 593, 611 [reversing where"[n]othing in the instructions ... disabused the jury of [the] notion" that a distance less than 90 feet could constitute "substantial distance" under the law at the time in question."].)

The fact that appellant requested more specific instructions on factors (d) and (h) prior to closing argument lends additional support to that conclusion. The proposed instruction on factor (d) stated, inter alia, that extreme mental or emotional disturbance is a mitigating factor even if not such as to overcome reason or preclude deliberation. (16CT 6735.) Although not directly contradictory to the prosecutor's claim that (d) applies only to impulsive killings, it addressed the point indirectly. The trial court's belief that the instruction was, in some unspecified way, argumentative, does not justify its wholesale denial. Although this court

has rejected a claim that another portion of the proposed instruction should have been rendered in *People v. Rogers, supra*, 39 Cal.4th 826, 898-899, that portion – which posited that there need not be any "reasonable explanation or excuse for such disturbance" (*ibid*) is not at issue here. The trial court could and should have deleted the unnecessary or inappropriate portions of the instruction and given the rest. (See *People v. Falsetta* (1999) 21 Cal.4th 903, 924 [trial court erred in denying outright rather than modifying and giving defense proposed limiting instruction]; *People v. Cole* (1988) 202 Cal.App.3d 1439, 1445-1447 [trial court should modify or delete incorrect portions of proposed instruction on defense theory].)

Moreover, the instruction on factor (h) that the defense unsuccessfully requested was completely correct and directed entirely to the proper point, i.e., it simply informed the jury that factor (h) does not require legal insanity and applies to any impairment of capacity to conform conduct to the requirements of the law. (16CT 6739.) This instruction would have directly contradicted the prosecutor's false claim that (h) applies only if the defendant had no capacity to appreciate the criminality of his conduct or conform to the requirements of the law. The trial court's rejection of the instruction as argumentative (25RT 5672) was particularly unreasonable, and indefensible after the prosecutor made a false and contrary claim.

(*Brown v. Payton, supra,* 544 U.S. 133, 146; *People v. Morgan, supra*, 42 Cal.4th at p. 611.)

The prejudice to appellant resulting from the trial court's refusal and neglect was in no way ameliorated by telling the jury that the "mental impairment" referred to in an unspecified instruction includes any degree of mental defect, disease, impairment or intoxication "which the jury determines is of a nature that death should not be imposed." (30RT 6862, 16CT 6912-6913.)[34] The trial court's instruction did not, and was never intended to, disabuse the jury of the prosecutor's claim that factors (d) and (h) are inapplicable. It did not communicate our Death Penalty Law's demand that jurors consider and determine the influence of any extreme mental or emotional disturbance on any capital crime. It simply told jurors that they could find any mental impairment to be a reason not to impose death if they determine it is indeed "of a nature that death should not be imposed." (16 CT 6913.) It was, in a word, circular.

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[34] The trial court read, "You must face your duty with regard to sentencing soberly and rationally, and you may not impose a death sentence as a result of a purely emotional response to evidence and argument regrading the victims" followed by , "The mental impairment referred to in this instruction [sic] is not limited to evidence which excuses the crime or reduces the defendant's legal culpability, but includes any degree of mental defect, disease, impairment or intoxication which the jury determines is of a nature that death should not be imposed." (30RT 6862, 16 CT 6912-6913.)

It bears emphasis here that "the jury must be allowed not only to consider such evidence, or to have such evidence before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Brewer v. Quarterman, supra*, 550 U.S. 286, 296.) As stated in Penry II:

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence." 492 U.S. at 319 (emphasis added). See also *Johnson v. Texas,* 509 U.S. 350, 381, 125 L. Ed. 2d 290, 113 S. Ct. 2658 (1993) (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence," id. at 319 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)). *(Penry v. Johnson* (2001) 532 U.S. 782, 797.)

D. Reversal is Required

Although the United States Supreme Court has not expressly stated

whether precluding a jury from giving full effect to mitigating evidence can be found harmless by a reviewing court, it has consistently declined to apply any harmless error test where trial errors precluded juries from fully considering mitigating evidence before imposing the death penalty. (See, e.g., *Brewer v. Quarterman*, *supra*, 550 U.S. 286, 293-296 [instructional error precluded full jury consideration of mitigating evidence at defendant's penalty phase, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Tennard v. Dretke* (2004) 542 U.S. 274; *Penry v. Johnson* (2001) 532 U.S. 782, 796-803 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same]; *Eddings v.Oklahoma* (1982) 455 U.S. 104 [death sentence reversed without application of a harmless error test after sentencer refused to consider evidence regarding defendant's childhood]; *Lockett v. Ohio* (1978) 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test]; see also *Smith v. Texas* (2007) 550 U.S. 297, 316 (Souter, J., concurring) ["In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with error as described in *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). We do not and need not address that question here."].)

Accordingly, lower federal courts have held that this type of error is not subject to harmless error review. (See, e.g., *Nelson v. Quarterman* (5th Cir. 2006) (*en banc*) 472 F.3d 287, 314, observing that the "reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments" to which harmless error tests are applied.)

In *People v. Lucero* (1988) 44 Cal. 3d 1006, 1031-1032, this court read the Supreme Court's decision in *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, to "suggest" that "a harmless error test might apply" to instructions precluding consideration of mitigating evidence. This court therefore applied *Chapman* analysis to error in excluding mitigating evidence in *Lucero* and in other cases decided since then. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Mickle* (1991) 54 Cal.3d 140, 193.) While *Chapman* may still be appropriate for evidentiary exclusion errors, it is not equally appropriate where jury instructions erroneously precluded or limited the jury's discretion to choose a life sentence. (*Nelson v. Quarterman, supra*, 472 F.3d 287, 314.) As stated by the high court:

> [I]t is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely

> individual human being' and has made a reliable determination that death is the appropriate sentence," id. at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)). (*Penry v. Johnson, supra*, 532 U.S. 782, 797.)

Assuming that this kind of error can be harmless, it was not harmless here. In *People v. Crandell*, where only two statutory mitigating factors were wrongly denied, and then only by implication, this court reversed. As noted in *Crandell*,"[t]he absence of prior violent criminal activity and the absence of prior felony convictions are significant mitigating circumstances in a capital case, where the accused frequently has an extensive criminal past. [Citations.]" (*People v. Crandell*, 46 Cal. 3d 833, 884.) Here, the defendant suffered removal of those same two statutory mitigating factors, plus two others that directed that mitigating effect be given to the evidence of major mental illness on which he relied. One cannot say that there is no reasonable possibility of a better outcome for appellant.

VI. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW AND TRIAL BY JURY WHEN IT INSTRUCTED THE JURY THAT THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY MEMBERS SHOULD BE DISREGARDED UNLESS IT ILLUMINATES SOME POSITIVE QUALITY OF THE DEFENDANT'S BACKGROUND OR CHARACTER

At the prosecutor's request, the trial court rendered a version of CALJIC No. 8.85 which stated, inter alia:

> Sympathy for the family of the defendant is not a matter you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character. (16CT 6820, 6846, 6909.)

This instruction appears to be based on *People v. Ochoa* (1998) 19 Cal.4th 353, 456. There, the defendant asked that the jury be instructed to consider sympathy for his family as a circumstance in mitigation. This court rejected Mr. Ochoa's claim, and has since rejected similar claims on similar grounds. (See *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 [holding there was no Eighth Amendment violation in telling jury that sympathy for the defendant's family was not to be considered]; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [same].)

This court recently rejected a challenge to the instructional language challenged here, on most of the same grounds, in *People v. Williams* (2013)

56 Cal.4th 165, to wit:

> Defendant contends this aspect of the standard instruction violated California's death penalty statute and his rights under the Eighth Amendment. Established precedent is to the contrary. "The impact of a defendant's execution on his or her family may not be considered by the jury in mitigation. (*People v. Smith* (2005) 35 Cal.4th 334, 366–367 [25 Cal. Rptr. 3d 554, 107 P.3d 229]; *People v. Smithey* (1999) 20 Cal.4th 936, 1000 [86 Cal. Rptr. 2d 243, 978 P.2d 1171]; *People v. Ochoa* (1998) 19 Cal.4th 353, 454–456 [79 Cal. Rptr. 2d 408, 966 P.2d 442] (Ochoa).)" (*People v. Bennett* (2009) 45 Cal.4th 577, 601 [88 Cal. Rptr. 3d 131, 199 P.3d 535].) "[N]othing in the federal Constitution requires a different result (*Ochoa*, at p. 456) and defendant identifies no reason to reconsider our conclusion." (*Bennett*, at p. 602.) Defendant's reference to family considerations in probation determinations is not on point. "Unlike [the probation statutes], section 190.3 identifies examples of matters relevant to aggravation, mitigation, and sentence including, but not limited to, the 'circumstances of the present offense, any prior felony conviction ... , and the defendant's character, background, history, mental condition and physical condition.' We concluded that, '[i]n this context, what is ultimately relevant is a defendant's background and character—not the distress of his or her family.' (*Ochoa,* ... at p. 456, italics added [in Bennett].)" (*Bennett*, at p. 602.) (*People v. Williams, supra* 56 Cal. 4th 165, 197-198.)

Appellant requests reconsideration of the propriety of telling jurors that they cannot consider the impact of an execution on the defendant's family, per se, in determining whether a death sentence is appropriate. In addition to the grounds urged in *Williams*, appellant argues that he had Fifth, Sixth, Eighth and Fourteenth Amendment rights to a jury trial on the

question of whether the imposition of the death penalty was not only warranted, but appropriate, in light of all the facts. (See Argument VII, *infra.*)

Furthermore, an affirmative instruction inviting disregard for the interests of children of a parent who has committed a capital crime is reminiscent of the archaic "corruption of the blood", an attribute of a common bill of attainder preventing a criminal's heirs from inheriting his property, which the founders clearly intended to prohibit. ("No Bill of Attainder or ex post facto Law shall be passed [by the Congress]." Art. I, § 9, cl. 3. "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ." Art. I, § 10.) "The provisions outlawing bills of attainder were adopted by the Constitutional Convention unanimously, and without debate." *(United States v. Brown* (1965) 381 US 437, 441-442.)

Accordingly, appellant concludes that, however warranted a death sentence may be, or appear to be, after considering the factors specified in the standard jury instructions, the jury must be free to choose a life sentence when they deem it appropriate in light of the needs of the defendant's family.

The error was not harmless. Appellant's former wife, Ann Helzer, testified about the impact of a death sentence on their children to the extent the defense was permitted to adduce such testimony to establish appellant's character. She testified that appellant writes to their daughters, and talks to them on the phone. (29RT 6620.) The elder daughter, Sierra, writes letters to appellant. The younger Savannah "can't write yet but sends pictures." The girls love their father. (29RT 6621.) "It would be really catastrophic to my two girls. ¶ This is their dad. It is who they write to. It's who when they don't feel they can talk to me they call him. They rely on him, you know, as an outlet for them. ¶ And already this has been incredibly hard. They obviously don't know the context or what reason he's there, and it would be a huge loss for them." (29RT 6622.) Appellant's sister Heather Helzer testified that she loved him and did not want him to die. (29RT 6603-6604.) These individuals were clearly faultless. The jury had no reason, apart from the erroneous instruction, to disregard their interests as stated in their testimony. On this record, one cannot say that the erroneous instruction to ignore those interests was harmless beyond a reasonable doubt.

VII. THE TRIAL COURT'S REFUSAL TO INSTRUCT THE JURY THAT IT COULD DECLINE TO IMPOSE DEATH FOR ANY REASON IT DEEMED APPROPRIATE RENDERED CALIFORNIA'S DEATH PENALTY SCHEME UNCONSTITUTIONAL AS APPLIED

Appellant requested instructions informing jurors that they could deem death an inappropriate sentence for any reason. (16CT 6732 ["The normative function of deciding which penalty should actually be imposed is entirely in your hands"] 16CT 6749 ["You may impose a life sentence without finding the existence of any statutory mitigating circumstances. Even if you should find beyond a reasonable doubt the existence of a statutory aggravating circumstance and find no mitigating circumstance, you may still decide that a sentence of life imprisonment is the appropriate punishment in this case. . . . You may spare the life of Taylor Helzer for any reason you deem appropriate and satisfactory."]

These instructions were rejected as argumentative. Appellant's jury was given CALJIC Nos. 8.85 and 8.88 with no significant modifications. (16CT 6908-6909, 6916-6917.)

A jury that could withhold the death penalty for any reason it deemed appropriate was available to all American citizens when the Bill of Rights was adopted. As noted in *McGautha v. California* (1971) 402 U. S.

183, 198, there was almost from the beginning of this country a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. (*Ibid.*) But juries "took the law into their own hands" and refused to convict on the capital offense. (*Id.*, at p. 199.) ¶ "In order to meet the problem of jury nullification, legislatures . . . adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." (*McGautha v. California, supra,* 402 U. S. 183, 198.)

Thus, when the Founders contemplated "due process" in capital cases, they saw the guarantee of trial by a jury with unchecked discretion to spare the defendant's life. They did not contemplate a sentencing scheme in which sentencing bodies are told to consider only factors bearing upon the circumstances of the crime, and the defendant's character or record.

That history is important. In a series of decisions issued over the last 13 years, the Supreme Court has reexamined much of its Sixth Amendment jurisprudence. In those decisions, the Court has consistently explained that the contours of the Sixth Amendment are no longer to be determined by seeking to balance competing interests but instead are to be determined by assessing the intent of the Framers. Indeed, the court's

decisions over the last decade show that the court has not hesitated to overrule its prior Sixth Amendment precedents to incorporate into its Sixth Amendment jurisprudence a fidelity to the Framers' intent. (*See, e.g.*, *Alleyne v. United States* (2013) ___ U.S. ___, 133 S.Ct. 2151 overruling *Harris v. United States* (2002) 536 U.S. 545; *Ring v. Arizona* (2002) 536 U.S. 584 overruling *Walton v. Arizona* (1990) 497 U.S. 639; *Crawford v. Washington* (2004) 541 U.S. 36 overruling *Ohio v. Roberts* (1980) 448 U.S. 56.)

The starting point for this analysis is the court's decision in *Jones v. United States* (1999) 526 U.S. 227. There, the court addressed whether a particular factual finding was an element of the offense (which had to be proven to a jury under the Sixth Amendment) or merely a sentencing factor which could be decided by a judge. In making this assessment, the Court emphasized the Sixth Amendment implications based on the historical role of juries.

Thus, the court explained that, historically, there had been "competition" between judge and jury over their respective roles. (*Id.*, at p. 245.) Juries had the power "to thwart Parliament and Crown" both in the form of "flat-out acquittals in the face of guilt" and also "what today we would call verdicts of guilty to lesser included offenses, manifestations of

what Blackstone described as 'pious perjury' on the jurors' part." (*Ibid.*, quoting 4 William Blackstone, Commentaries on the Laws of England at pp. 238-39.) The court explained that "[t]he potential or inevitable severity of sentences was indirectly checked by juries' assertions of a mitigating power when the circumstances of a prosecution pointed to political abuse of the criminal process or endowed a criminal conviction with particularly sanguinary consequences." (*Jones v. United States, supra,* 526 U.S. 227, 245.)

One year after *Jones*, the court again invoked the Sixth Amendment's "historical foundation" as support for its conclusion that a jury must find a defendant guilty of every element of any charged crime beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 477.) Like *Jones*, *Apprendi* was not a capital case. It involved firearms charges and the potential for a sentencing enhancement under a New Jersey hate-crime statute. But in analyzing the question presented, the court again focused on the jury's historical role as a "guard against a spirit of oppression and tyranny on the part of rulers," and "as the great bulwark of [our] civil and political liberties . . . ." (*Ibid.*, quoting 2 Joseph Story, *Commentaries on the Constitution of the United States,* pp. 540-41 (4th ed. 1873)). These principles, important in a case where the consequence at

stake for a defendant is imprisonment, are indispensable in the context of a capital case.

Two years later, the Court applied the Sixth Amendment principles set forth in *Jones* and *Apprendi* in the capital context. (*See Ring v. Arizona* (2002) 536 U.S. 584.) *Ring* involved the question whether it violated the Sixth Amendment for a trial judge to alone determine the presence or absence of aggravating factors required for imposition of the death penalty after a jury's guilty verdict on a first degree murder charge. In answering that question "yes," the Court reversed its earlier holding in *Walton v. Arizona* (1990) 497 U.S. 639 and recognized that "[a]lthough 'the doctrine of stare decisis is of fundamental importance to the rule of law[,] . . . [o]ur precedents are not sacrosanct." *Ring*, *supra*, 536 U.S. at p. 608.)

In *Ring*, the Court continued its focus on the historical right to a jury trial and discussed the juries of 1791, when the Sixth Amendment became law --just as Justice Stevens had done in his *Walton* dissent. (*See Walton*, *supra*, 497 U.S. at p. 711.) *Ring* unequivocally stressed that at the time the Bill of Rights was adopted, the jury's right to determine "which homicide defendants would be subject to capital punishment by making factual determinations, many of which related to difficult assessments of the defendant's state of mind" was "unquestioned." (*Ring*, *supra*, 536 U.S. at

p. 608.) In addition, the court repeated that "the Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." (*Id.* at p. 607.) "The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of the least controversial provisions in the Bill of Rights. It has never been efficient; but it has always been free." (*Ibid.*)

Two years after *Ring*, the court again overturned one of its earlier Sixth Amendment decisions which had not relied on a historical understanding of the Sixth Amendment. In *Crawford v. Washington* (2004) 541 U.S. 36 the court focused on an historical interpretation of the Sixth Amendment's Confrontation Clause and reversed its holding in *Ohio v. Roberts*, *supra*, 448 U.S. 56.

As noted above, in *Roberts* the court had held that the Sixth Amendment permitted the state to introduce preliminary hearing testimony against a defendant at trial as a method of accommodating the "competing interests" between the goals of the Sixth Amendment and the Government's interest in effective law enforcement. (448 U.S. at p. 64, 77.) In *Crawford*, however, the court took a very different approach, one that was consistent with the approach it took in *Jones*, *Apprendi* and *Ring*. The court examined the "historical record" and concluded that under the common law in 1791,

"the Framers would not have allowed admission of testimonial statements of a witness who did not appear at trial . . . ." (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 53-54.) The court acknowledged that its contrary holding in *Roberts* had failed to honor the historical role of the jury and thereby created a framework that did not "provide meaningful protection from even core confrontation violations." (*Id.* at p. 63.)

Only three months after *Crawford*, the court applied its historical record model yet again in the Sixth Amendment context. In *Blakely v. Washington* (2004) 542 U.S. 296, the Court held that it violated the Sixth Amendment for a judge to impose a longer sentence based on fact-finding not made by the jury. As the Court reiterated, again citing Blackstone, every accusation against a defendant should "be confirmed by the unanimous suffrage of twelve of his equals and neighbours." (*Id.* at p. 301.) Once again the Court focused on the Framers' intent, stressing that "the very reason the Framers put a jury-trial guarantee in the Constitution is that they were unwilling to trust government to mark out the role of the jury." (*Id.* at pp. 306-08, citing Letter XV by the Federal Farmer (Jan. 18, 1788), reprinted in 2 The Complete Anti-Federalist 315, 320 (H. Storing ed., 1981) (describing the jury as "secur[ing] to the people at large, their just and rightful controul in the judicial department"); John Adams, Diary Entry

(Feb. 12, 1771), reprinted in 2 Works of John Adams 252, 253 (C. Adams ed., 1850) ("[T]he common people, should have as complete a control . . . in every judgment of a court of judicature" as in the legislature); Letter from Thomas Jefferson to the Abbe Arnoux (July 19, 1789), reprinted in 15 Papers of Thomas Jefferson, 282, 283 (J. Boyd ed., 1958) ("Were I called upon to decide whether the people had best be omitted in the Legislature or Judiciary department, I would say it is better to leave them out of the Legislative."); *Jones*, *supra*, 526 U.S. at pp. 244-48.)

More recently, the Supreme Court again overruled a Sixth Amendment precedent which had not been connected to a historical understanding of the Sixth Amendment. In *Alleyne v. United States*, *supra*, 133 S.Ct. 2151, the Court held that the Sixth Amendment required a jury trial even for facts that served only to increase the mandatory minimum sentence for a crime. The Court overruled its contrary decision in *Harris v. United States*, *supra*, 536 U.S. 545 precisely because it was "inconsistent . . . with the original meaning of the Sixth Amendment." (133 S.Ct. at p. 2155.)

Meanwhile, the court's Eighth Amendment jurisprudence calling for guided discretion in capital sentencing has been criticized by Members of the Court for diverse reasons. As summarized by the majority in *Kennedy*

v. Louisiana (2008) 554 U.S. 407, 436-437:

> The tension between general rules and case-specific circumstances has produced results not altogether satisfactory. See *Tuilaepa v. California*, 512 U.S. 967, 973, 114 S.Ct. 2630, 129 L. Ed. 2d 750 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time") *Walton v. Arizona*, 497 U.S. 639, 664-665,110 S. Ct. 3047, 111 L.Ed. 2d 511 (1990) (Scalia,J., concurring in part and concurring in judgment) ("The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve"). This has led some Members of the Court to say we should cease efforts to resolve the tension and simply allow legislatures, prosecutors, courts, and juries greater latitude. See id., at 667-673, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (advocating that the Court adhere to the *Furman* line of cases and abandon the *Woodson-Lockett* line of cases). For others the failure to limit these same imprecisions by stricter enforcement of narrowing rules has raised doubts concerning the constitutionality of capital punishment itself. See *Baze v. Rees*, 553 U.S. 35, 89, 128 S. Ct. 1520, 170L. Ed. 2d 420 (2008)(Stevens, J., concurring in judgment) *Furman,* [(1972) 408 U.S. 38] at 310-314, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (White, J., concurring) *Callins v. Collins*, 510 U.S. 1141, 1144-1145,114 S. Ct. 1127, 127 L.Ed. 2d 435 (1994)(Blackmun, J.,dissenting from denial of certiorari).

Moreover, the *Furman* and *Woodson-Lockett* lines of cases are merely prophylactic doctrine, while the right to jury trial is an explicitly declared constitutional right to a specific procedural protection. As explained by Sixth Amendment scholar and Stanford Law Professor Jeffrey

L. Fisher, the court's recent decisions demonstrate its commitment to honor such rights over prophylactic rules developed by the court to implement general values, like those expressed in the Eighth and Fourteenth amendments:

> "When the Constitution makes a choice instead of identifying a value, that choice must be categorically enforced. . . . Although categorical requirements may be over-and under-inclusive with respect to the background values they implement, they are necessary to give meaning and effect to the Constitution's selections of particular choices. (Fisher, J., *Categorical Requirements in Constitutional Criminal Procedure* (2006) 94 Geo. L.J. 1493, 1528-1529.)

Most recently, two current Supreme Court Justices urged the court to grant certiorari to extend the right to jury sentencing in capital cases in states where judges can override a jury's choice of a life sentence . (See *Woodward v. Alabama* (2013) ___ U.S. ___, 134 S. Ct. 405 [Sotomayor and Breyer, JJ., dissenting from denial of certiorari on the constitutionality of judicial overrides of jury verdicts for life].) Among the facts noted by Justice Sotomayor was the statement of one Alabama judge explaining his perceived need to override a life sentence that a jury selected for a Caucasian defendant because, otherwise, he would have sentenced only Black defendants to death. (*Id.*, at p. 409.)

Justice Breyer's concurring opinion in *Ring v. Arizona, supra*, 536 U.S.584, 614-618, unequivocally declares his belief that "jury sentencing in capital cases is mandated by the Eighth Amendment." He explained his view in terms of respect for the ability of the jury to go beyond finding facts and weighing mitigating and aggravating factors to assess whether a death sentence will, in a particular case, serve the retributive function for which the penalty was intended.

Although the majority opinion in *Ring v. Arizona* does not require that states instruct juries that they can withhold a death sentence for any reason they deem appropriate, this court should adopt appellant's claim without further action on the issue from the high court. The state of California has over 700 men and women already condemned to death, and no way to ensure that death sentences affirmed by this court on direct appeal will be executed. As observed by Ninth Circuit Chief Judge Alex Kozinski, "we as a society may be willing and able to carry out thirty, forty, maybe fifty executions a year, but ... we cannot and will not do a thousand a year, or even two hundred and fifty." (Kozinski & Gallagher, *Death: The Ultimate Run-On Sentence* (1995) 46 Case W. Res. 1, 29-30.)

Allowing juries to decide whether the cases coming before them should be added to that backlog, mitigation notwithstanding, would

empower the citizenry as the Founders intended, and halt the compulsion to impose death sentences that serve no purpose, such as that issued for a 79-year old defendant in 2013. (See Fraley, Marin Independent Journal, *Serial Killer Naso's Death Sentence Revives Capital Punishment Debate*[35], quoting the prosecutor on his decision to seek a death sentence unlikely to be executed: "This is a serial killer ... and with regard to use of the death penalty, if it's a law in this state, which it is, this is a case where a jury needed to make a decision.")

Although "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action" (*Gregg v. Georgia* (1976) 428 U.S. 153, 189 (opinion of Stewart, Powell, and Stevens, JJ.) this court need not presume that juries will arbitrarily and capriciously choose a life sentence under an instruction informing them that they can withhold a death sentence for any reason they deem appropriate. Rather, this court should presume that juries will serve as the Founders intended, and take account of all the circumstances that reasonable people would consider, before choosing a life sentence over death.

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35 <http://www.contracostatimes.com/contra-costa-times/ci_24244200/serial-killers-death-sentence-revives-capital-punishment-debate> [as of October 16, 2013.]

Here, if the jury had been instructed as appellant requested, there is more than a reasonable possibility of a life verdict. In addition to traditional mitigating factors, like lack of prior criminality, that were not actually mitigating under the prosecutor's argument about the statutory factors (Argument V, *supra*) the jury could have withheld the death sentence for the sake of appellant's children, or even for the benefit of the families of the decedents, who are now forced to wait decades for closure of the case. The jury could have withheld the death sentence in order to ensure that appellant was forced to live in the general prison population, as the brother of one of Joseph Naso's victims declared to be the appropriate punishment for him. Any error in failing to give the jury full discretion to withhold the death sentence cannot be harmless.

VIII. THE EXCLUSION OF PROSPECTIVE JURORS BECAUSE OF UNWILLINGNESS OR IMPAIRED ABILITY TO IMPOSE DEATH VIOLATED APPELLANT'S RIGHT TO AN IMPARTIAL AND REPRESENTATIVE JURY

As explicated in argument VII, recent decisions of the United States Supreme Court show that the intent of the Framers, as established by the practice at the time the Bill of Rights was adopted, is the new touchstone for understanding the Sixth Amendment right to jury trial. A jury that could withhold the death penalty for any reason it deemed appropriate was available to all American citizens at that time. Here, appellant addresses the closely-related question of whether it was then possible to exclude from jury service in a capital case any and all who thought such punishment was in all events improper. Appellant concludes that no such mechanism existed at that time, and that the death qualification process denied appellant his state and federal constitutional rights to an impartial jury.

The notion that people who will not apply a death penalty should be excluded from serving as jurors in capital cases is a recent product of this nation's judiciary, and lacks any footing in the text of the Constitution or the expressed intent of the Framers. (Quigley, *Capital Jury Exclusion of Death Scrupled Jurors and International Due Process* (2004) 2 Ohio St. Crim. L 262, 269-271; Cohen & Smith, *The Death of Death-Qualification*

(2008) 59 Case W. Res. L. Rev. 87.) As stated in the latter article, "the exclusion of prospective jurors based upon their views on the death penalty was not permitted at common law or at the adoption of the Sixth Amendment to the United States Constitution" and "substantially weakens the people's check" on government power. *(Id.*, at p. 90.)

Indeed, permitting jurors to be struck for cause because of their views toward the death penalty is antithetical to the Framers' understanding of an "impartial jury." Steeped in the experience of overreaching criminal laws (such as libel laws that were used to punish political dissidents), the Framers considered a jury to be the conscience of the community, serving as an important bulwark against the machinery of the judiciary. The jury was free to use its verdict to reject the application of a law that it deemed unjust -- indeed, it was its duty to do so -- and this was (and should again be) at the heart of the "impartial jury" guaranteed to all criminal defendants under the Sixth Amendment.

At common law, striking a juror on the basis of bias, or *"propter affectum,"* was limited to circumstances in which the juror had a bias toward a party (relational bias); it did not include striking a juror on the basis of her opinion of the law or the range of punishment for breaking the law. As Blackstone cogently articulated:

> Jurors may be challenged propter affectum, for suspicion of bias or partiality. This may either be a principal challenge, or to the favour. A principal challenge is such where the cause assigned carries with it prima facie evident marks of suspicion, either of malice or favour: as, that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward or attorney, or of the same society or corporation with him: all these are principal causes of challenge; which, if true, cannot be overruled for jurors must be omni exceptione majores." (3 William Blackstone, *Commentaries on the Laws of England* 363.)[36]

Chief Justice Marshall acknowledged this exact understanding of the *propter affectum* challenge, and its connection to the Sixth Amendment, in *United States v. Burr* (C.C.Va. 1807) 25 F. Cas. 49, 50, noting that "[t]he end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality." And the limited understanding of "bias" or "partiality" is not some historical footnote: at the time of the Framers,

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[36] Blackstone specified three other grounds that justified the exclusion of a juror: propter honoris respectum, which allowed challenges on the basis of nobility; propter delictum, which allowed challenges based on prior convictions; and *propter defectum*, which allowed challenges for defects, such as if the juror was an alien or slave. (*Id.* at pp. 361-364.)

bias as to the law was both welcomed and expected from jurors. The colonial and early American experience teaches that the right to reject the law as instructed was crucial to the role the jury played in its check against the judiciary and executive. For example, when England made the stealing or killing of deer in the Royal forests an offense punishable by death, English juries responded by committing "pious perjury," i.e., rejecting these politically motivated laws by acquitting the defendant of the charged offense. (Hostettler, *Criminal Jury Old and New: Jury Power from Early Times to the Present Day* (2004) p. 82; *see also Sparf v. United States* (1895) 156 U.S. 51, 143 [Gray, J., and Shiras, J., dissenting] [observing that juries in England and America returned general verdicts of acquittal in order to save a defendant prosecuted under an unjust law].)

One well known example of such "pious perjury" is the 1734 trial of John Peter Zenger. The Royal Governor of New York, in an effort to punish Zenger for his criticism of the colonial administration, prosecuted Zenger for criminal libel. Andrew Hamilton, representing Zenger at trial, argued that jurors "have the right beyond all dispute to determine both the law and the fact" and thus could acquit Zenger on the basis he was telling the truth, even though the libel laws at the time did not provide that truth was a defense. (Alexander, *A Brief Narrative of the Case and Trial of John Peter*

Zenger 78-79 (Stanley N. Katz ed., 2d ed. 1972).) Zenger was acquitted on a general verdict. This trial, and others like it, provides necessary context for understanding what animated the Framers' intent in guaranteeing a defendant the constitutional right to an impartial jury.

Reinforcing how the Framers themselves viewed the issue, a different (and even more famous) Hamilton successfully made a similar argument seventy years later on behalf of a man accused of libeling John Adams and Thomas Jefferson. In that case Founding Father Alexander Hamilton argued:

> "It is admitted to be the duty of the court to direct the jury as to the law, and it is advisable for the jury, in most cases, to receive the law from the court; and in all cases, they ought to pay respectful attention to the opinion of the court. *But, it is also their duty to exercise their judgments upon the law, as well as the fact; and if they have a clear conviction that the law is different from what it is stated to be by the court, the jury are bound, in such cases, by the superior obligations of conscience, to follow their own convictions*. It is essential to the security of personal rights and public liberty, that the jury should have and exercise the power to judge both of the law and of the criminal intent." (*People v. Croswell* (N.Y. Sup. 1804) 3 Johns. Cas. 337, 346, emphasis added.)

At base, the notion of striking a juror because of his opinion on the propriety of the law was entirely foreign to the nation's founders. In fact, it

was expected that the jurors would follow their conscience and render a verdict that was against a law they deemed unjust -- this was at the heart of the impartial jury as understood by the Framers. As John Adams wrote in 1771:

> And whenever a general Verdict is found, it assuredly determines both the Fact and the Law. It was never yet disputed, or doubted, that a general Verdict, given under the Direction of the Court in Point of Law, was a legal Determination of the Issue. Therefore the Jury have a Power of deciding an Issue upon a general Verdict. And, if they have, is it not an Absurdity to suppose that the Law would oblige them to find a Verdict according to the Direction of the Court, against their own Opinion, Judgment, and Conscience[?]" (1 Legal Papers of John Adams 230 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965).

See also Akhil Reed Amar, America's Constitution 238 (2005) ("Alongside their right and power to acquit against the evidence, eighteenth century jurors also claimed the right and power to determining legal as well as factual issues -- to judge both law and fact 'completely' -- when rendering any general verdict.").

This principle was echoed in the instructions given by Chief Judge Jay who, at the end of a trial before the Supreme Court, charged the jurors with the "good old rule" that:

> [O]n questions of fact, it is the province of the jury, on

> questions of law, it is the province of the court to decide. *But it must be observed that by the same law, which recognizes this reasonable distribution of jurisdiction, you have nevertheless a right to take upon yourselves to judge of both, and to determine the law as well as the fact in controversy.* On this, and on every other occasion, however, we have no doubt, you will pay that respect, which is due to the opinion of the court: For, as on the one hand, it is presumed, that juries are the best judges of facts; it is, on the other hand, presumable, that the court are the best judges of the law. *But still both objects are lawfully, within your power of decision.*" (*Georgia v. Brailsford* (1794) 3 U.S. 1, 4, emphases added).

Indeed, appreciation for the importance of this right was widely shared by those attending the Constitutional Convention. (*See* Federalist 83 (Hamilton), reprinted in The Federalist Papers 491, 499 (Clinton Rossiter ed., 1961) ("The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government.").

The current death-qualification standard reflects none of this -- and conflicts with all of it. To the Founding Fathers, it was the solemn duty of a jury to issue a verdict reflecting the jury's conscience. There was no exception to this rule carved out for cases where the State sought a sentence

of death. Our death qualification case law was designed to accommodate the interests of the state, contradicts the intent and understanding of the Framers of the Sixth Amendment, and erodes the Sixth Amendment's guarantee of an impartial jury where it is needed most. Death qualifying appellant's jury violated appellant's Sixth, Eighth and Fourteenth Amendment jury trial rights and requires that the penalty judgment be reversed.

This court may reach the same result by reference to the state Constitution as well. Article I, section 16 of the California Constitution, originally enacted in 1850, provides that "[t]rial by jury is an inviolate right and shall be secured to all . . . ." This Court has long recognized that the state right to a jury trial "is the right as it existed at common law, when the state Constitution was first adopted." (*Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 75-76. *Accord Crouchman v. Superior Court* (1988) 45 Cal.3d 1167, 1173-1274; *C & K Engineering Contractors v. Amber Steel Co.* (1978) 23 Cal.3d 1, 8-9; *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal.2d 283, 287.) As this Court has noted, in assessing the scope of the state jury trial guarantee, "[i]t is the right to trial by jury as it existed at common law which is preserved; and what that right is, is a purely historical question, a fact which is to be

ascertained like any other social, political or legal fact. The right is the historical right enjoyed at the time it was guaranteed by the Constitution." (*People v. One 1941 Chevrolet Coupe, supra*, 37 Cal.2d at p. 287.)

Thus, to determine if death qualification of appellant's jury violated appellant's state constitutional jury trial right, this court must examine the common law. And as the above analysis of the common law shows, death qualification is simply irreconcilable with the common law. As such, the trial court's death qualification process not only violated the Sixth Amendment, but violated the state constitution as well.

Of course, in making this argument appellant recognizes the similarity between the state and federal constitutional jury trial guarantees. But as Article 1, Section 24 of the California Constitution establishes, the "[r]ights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution." And as numerous justices of this court have made clear over the years, in assessing the independent force of the state constitution, the Court "should disabuse [itself] of the notion that in matters of constitutional law and criminal procedure we must always play Ginger Rogers to the high court's Fred Astaire -- always following, never leading." (*People v. Cahill* (1993) 5 Cal.4th 478, 557–558 [Kennard, J., dissenting]. *Accord People v. Flood* (1998) 18 Cal.4th 470, 547 [Mosk,

J., dissenting].)

Finally, this court can reach the right result for this case by accepting as binding the plain language of California's only legislative enactment on the point. In pertinent part, Code of Civil Procedure section 229 states:

> A challenge for implied bias may be taken for one or more of the following causes, *and no other*:
>
> . . .
>
> (h) If the offense is chargeable with death, the entertaining of such conscientious opinions *as would preclude the juror finding the defendant guilty*; in which case the juror may neither be permitted nor compelled to serve.

This court has long provided a "judicial gloss" to this statutory language so as to allow the "for cause" removal of jurors whose views would preclude them from imposing a death penalty, notwithstanding their ability to find the defendant guilty of a capital crime. (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 9, fn. 7, 9, and cases cited therein interpreting the same language in former Pen. Code § 1074, subd. 8.) This court reasoned that the statute was ambiguous, and that any failure to

construe the statutory language to permit removal of jurors who would not impose death "would in all probability work a de facto abolition of capital punishment, a result which, whether or not desirable of itself, is hardly appropriate for this court to achieve by construction of an ambiguous statute." (*People v. Riser* (1956) 47 Cal.2d 566, 575-576.)

Such reasoning overlooks the ability of the legislature to amend that statute or provide for additional peremptory challenges in capital cases. Moreover, the practical effect of that judicial gloss is to ensure that prosecutors who wish to pursue death sentences will be able to secure cooperative juries no matter how small a percentage of the citizenry believes that the pursuit of death sentences makes good sense. In November of 2012, 48% of the California electorate[37] voted for Proposition 34, even though it went beyond precluding additional death sentences, and mandated that existing death sentences be deemed sentences of life without parole. Perhaps an even larger percentage of the electorate, if called for capital jury service, will have to tell the court that they are unwilling to impose a death sentence in any new cases, seeing that

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37. California Secretary of State, Statement of Vote, November 2012, Prop. 34, p. 69. < www.SOS.CA.Gov/elections/sov/2012-general/soc-complete.PDF> [as of March 31, 2014.]

California already has over 700 un-executed sentences of death.[38] Yet under this court's construction of the statute, prosecutors can pursue death sentences ad infinitum, excluding from capital jury service however large a percentage of the venire cannot or will not impose death. That is inconsistent with the proper separation of powers, and with the defendant's right to an impartial and representative jury.

The denial of an impartial, representative jury is never harmless error. A new penalty trial is needed.

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38. Howe, *Can California Save Its Death Sentences? Will Californians Save the Expense?* (2012) 33 Cardozo L. Rev. 1451, 1452-1460.

IX. THE DEATH PENALTY AS ADMINISTERED IN CALIFORNIA IS CRUEL AND UNUSUAL PUNISHMENT WITHIN THE MEANING OF THE EIGHTH AMENDMENT

The United States Supreme Court has long insisted that the death penalty be imposed "fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma, supra,* 455 U.S. 104, 112.)

Appellant submits that California's death penalty has not been, and cannot be, administered or executed fairly with reasonable consistency. The backlog of over 700 cases in federal and state courts proves that California's death penalty has not been administered with reasonable consistency so far. That backlog also prevents California from achieving fair and reasonably consistent administration of the death penalty going forward. Thus, under existing federal law as determined by the high court, this court can and should hold that California cannot impose the death penalty *at all* without violating the Eighth Amendment.

Interpreters of the Constitution who focus on the intent of the Framers can support this court in abolishing California's death penalty because of the large and growing backlog of cases still under review and the long hiatus in executions in this state.[39] Those who adhere strictly to

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[39] At the time of this writing, no executions have occurred in California since 2006, when federal courts declared the state's previous

"originalism" will note:

> "Under the common law ideology that formed the basis for the Cruel and Unusual Punishments Clause, practices that fall out of usage for a significant period of time lose their place in the tradition and become `unusual.'" (Stinneford, *The Illusory Eighth Amendment* (2013) 65 Am. U.L. Rev. 437, 493, emphasis added, citing *James v. Commonwealth*, 12 Serg. & Rawle 220, 228 (Pa. 1825) ("The long disuetude of any law amounts to its repeal."); Edward Coke, The Compleat Copyholder § 33 (1630) ("Custome ... lose[s its] being, if usage faile."), reprinted in 2 *The Selected Writings and Speeches of Sir Edward Coke* 563, 564 (Steve Sheppard ed., 2003) (Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation* (2008) 102 Nw. U. L. Rev. 1739, 1813.)

Additionally, those who interpret the constitution more liberally will support this court in striking down California's death penalty because the state's failure to administer it with reasonable consistency has forced an unprecedented number of people to languish for decades on death row. Justices Breyer and Stevens have repeatedly called for courts high and low to consider the constitutionality of death sentences that the state was unable to

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lethal injection procedure violative of the Eighth Amendment. Since then, state courts have blocked executions in California because the state failed to proceed to properly adopt a new execution protocol in compliance California's Administrative Procedures Act. (*Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App. 4th 1059.)

execute in a timely manner. (See, e.g., *Johnson v. Bredesen* (2009) 558 U.S. 1067 [Breyer and Stevens, JJ., dissenting from denial of certiorari]; *Allen v. Ornoski* (2006) 546 U.S. 1136 [Breyer, J., dissenting from denial of cert.]; *Lackey v. Texas* (1995) 514 U.S. 1045 [Stevens, J, respecting denial of certiorari].)

Most recently, Justice Kennedy pointedly questioned whether Florida, another state with multi-decade delays in executing death sentences, was administering its death penalty scheme consistently with the sound administration of justice and with the purposes that the death penalty is designed to serve. (See March 3, 2014 Oral Arg. Transcript at 46:4-20, *Hall v. Florida*, United States Supreme Court Case No. 12-10882[40].) In *Hall*, the question on which the court granted certiorari was the constitutionality of a Florida rule deeming an IQ test score of 70 or above to disqualify a capital defendant from being deemed mentally retarded for purposes of capital punishment. After oral argument, a reporter wrote:

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40 <http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-10882_7758.pdf>

> Late in the argument, Kennedy brought up something that he and his clerks must have turned up in preparing for this case. The last ten people Florida had executed, Kennedy said, had been on death row for an average of 24.9 years. He wondered if that was consistent with the Constitution and with the orderly administration of a death-sentencing scheme. Winsor seemed caught off-guard, saying only that he thought this was consistent with death penalty law.
>
> Justice Scalia intervened to try to help out Winsor, noting that most of the delays for people on death row had resulted from the complexity that the Supreme Court itself had caused in the process.
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> * * *
>
> Kennedy's skepticism was entirely shared by Justices Kagan, Stephen G. Breyer, Ruth Bader Ginsburg, and Sonia Sotomayor. Chief Justice John G. Roberts, Jr., played only a minor role in the hearing. Justice Clarence Thomas, as is his custom, remained silent.[41]

The situation in California differs from that in Florida principally in that California lacks reasonable *consistency* in executing the death penalty, as well as a record of doing so in a timely manner. California has executed only 13 men since reinstating the penalty in 1977. Those 13 men served an average of 210.7 months (17.5 years) on death row. (California Depart of Corrections and Rehabilitation [hereafter, "CDCR"] (March 4, 2014)

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[41] Denniston, *When simplicity won't do*, SCOTUSblog (Mar. 3, 2014,)<http://www.scotusblog.com/2014/03/argument-analysis-when-simplicity-wont-do/ > [as of March 31, 2014.]

Inmates Executed, 1978 to Present, <http://www.cdcr.ca.gov/Capital_Punishment/Inmates_Executed.html.>.) The inmates who are now first in line for execution in California have been on death row for well over 25 years. If executions resume, the average number of years of incarceration of all those executed will increase substantially with each new execution.

Backlogs aside, the impossibility of making a death penalty scheme work fairly, and with reasonable consistency, was well described by former Supreme Court Justice Blackmun, who voted to sustain the death penalty during most of his judicial career, but came to conclude that the high court's death penalty case law was unworkable. In his dissent from the denial of certiorari review in *Callins v. Collins* (1994) 510 U.S. 1141, Justice Blackmun wrote:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, and with reasonable consistency, or not at all, see *Furman v. Georgia,* and, despite the effort of the States and courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake. This is not to say that the problems with the death penalty today are identical to those that were present 20 years ago. Rather, the problems that were pursued down one hole with procedural rules and verbal formulas have come to the surface somewhere else, just as virulent and pernicious as they were in their original form. Experience has taught us that the constitutional goal of eliminating arbitrariness and discrimination from the administration of death, can never be achieved without compromising an equally essential

component of fundamental fairness-individualized sentencing. (*Callins v. Collins, supra*, 510 U.S. at pp. 1143-1144.)

In his own concurring opinion on the denial of certiorari in *Callins,* Justice Scalia pointed out that he and Justice Thomas had previously "acknowledged the incompatibility" of the high court's death penalty jurisprudence and again argued for the court to eliminate the constitutional requirement of discretion and the broad presentation of mitigating evidence. (*Callins v. Collins, supra*, 510 U.S. at p. 1141.) The idea of doing away with those requirements has not held sway. On the contrary, since 1994 the high court has shown increased regard for the importance of ensuring that capital defendants can present, and that sentencing entities can act upon, evidence militating in favor of sparing an individual life. And, as indicated by the statements of several current justices at the oral argument in *Hall v. Florida*, a majority of the justices are not inclined to permit restrictions on mitigation to reduce complexity, even in a state with a backlog of cases second to that of California.

Former Supreme Court Justices Souter and Stevens have expressed additional concerns about the high court's continued acceptance of death penalty schemes. In *Kansas v. Marsh* (2006) 548 U.S. 163, 207-208, Justice Souter, in dissent, questioned the fairness and reliability of

America's death penalty schemes, particularly in light of the danger of executing an innocent person. In *Baze v. Rees* (2008) 553 U.S. 35, Justice Stevens wrote a concurring opinion concluding that those schemes persisted only as "the product of habit and inattention rather than an acceptable deliberative process that weighs the costs and risks of administering that penalty against its identifiable benefits, and rest in part on a faulty assumption about the retributive force of the death penalty. (*Id.,* at p. 78.) Further,

> In *Gregg v. Georgia*, 428 U.S. 153, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (1976), we explained that unless a criminal sanction serves a legitimate penological function, it constitutes "gratuitous infliction of suffering" in violation of the Eighth Amendment. We then identified three societal purposes for death as a sanction: incapacitation, deterrence, and retribution. See id., at 183, and n 28, 96 S. Ct. 2909, 49 L. Ed. 2d 859 (joint opinion of Stewart, Powell, and Stevens, JJ.). In the past three decades, however, each of these rationales has been called into question. (*Baze v. Rees*, *supra*, 553 U.S. 35, 78.)

After explaining how each of the societal purposes for which the death penalty was previously deemed appropriate had been negated by subsequent developments, Justice Stevens concluded that "`the imposition of the death penalty represents "the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State [is] patently

excessive and cruel and unusual punishment violative of the Eighth Amendment.' *Furman*, 408 U.S., at 312, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (White, J., concurring)." (*Baze v. Rees, supra*, 553 U.S. at p. 86 [Stevens, J. dissenting].)

In California, backlogs in the appellate process exacerbate and augment the more widespread problems identified by Justices Breyer, Stevens, Souter, and Blackmun. At least three judges of the Ninth Circuit Court of Appeals have written about the causes and the undesirable results of administering the death penalty while a large backlog of cases exists. Their opinions are instructive.

First, in *Jeffers v. Lewis* (9th Cir 1994) 38 F.3d 411, 425-427, Judge Noonan wrote a dissenting opinion noting that in Arizona average stays on death row exceeded two decades, and death penalty cases were backlogged in federal and state courts. "On the face of these facts it appears that the administration of the death penalty in Arizona is so arbitrary as to constitute cruel and unusual punishment in violation of the Eighth Amendment to the Constitution of the United States as made applicable to the state of Arizona by the Fourteenth Amendment."

As stated by Judge Noonan, "To sentence many and execute almost none is to engage `in a gruesome charade.' Franklin E. Zimring and

Gordon Hawkins, *Capital Punishment and the American Agenda* (1980) 95." Further,

> . . . It is one thing to preserve an inanimate object such as the flag as a symbol, another thing to take a human life as a symbol. To take a human life as a symbol suggests human sacrifice as a custom of the state; no rational modern society believes in such a custom. . . . [A] sentence to live under a sentence of death is not a penalty prescribed by Arizona law; mock death cannot be substituted for the real thing. . . . (*Jeffers v. Lewis, supra*, 38 F.3d 411, 424 (Noonan, J. diss.)

In 1995, Chief Judge Kozinski of the Ninth Circuit Court of Appeals and Sean Gallagher wrote that "we have little more than an illusion of a death penalty in this country." (Kozinski & Gallagher, *Death: the Ultimate Run-On Sentence* (1995) 46 Case W. Res. L. Rev. 1, 3.) Further, "we have endless and massively costly reviews by the state and federal courts; and we do have a small number of people executed each year. But the number of executions compared to the number of people who have been sentenced to death is minuscule, and the gap is widening every year. *Whatever purposes the death penalty is said to serve--deterrence, retribution, assuaging the pain suffered by victims' families--these purposes are not served by the system as it now operates.*" (Kozinski & Gallagher, *Death: the Ultimate Run-On Sentence, supra,* 46 Case W. Res. L. Rev. 1, 4.)

The authors suggested that the solution to the "impasse on the death penalty" would be to decrease the number of crimes punishable by death and the circumstances under which death may be imposed so that we only convict "the number of people we truly have the means and the will to execute." (Kozinski & Gallagher, *Death: the Ultimate Run-On Sentence* (1995) 46 Case W. Res. L. Rev. 1, 31.) "This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and *then pick those who will actually die essentially at random.*" (*Ibid,* emphasis added, fn. omitted)).

Twelve years after the publication of *Death: the Ultimate Run-On Sentence*, Senior Ninth Circuit Judge Alarcon published an article focused on the California situation. (*Remedies for California's Death Row Deadlock* (2007) 80 S. Cal. L. Rev. 697.) Citing former Chief Justice Ronald M. George's statement that California's death penalty had become "dysfunctional" because the California Legislature has failed "to adequately fund capital punishment" while "death row inmates languish[] for decades at San Quentin State Prison" (*id.*, at. p. 698) Judge Alarcon wrote:

> The unconscionable delay in the disposition of appeals and habeas corpus proceedings filed on behalf of California's death row inmates continues to increase at an alarming rate. It is now almost double the national average. Procedural changes must be made to the manner in which death penalty judgments are reviewed to avoid imprisoning a

> death penalty inmate for decades before the condemned prisoner's constitutional claims are finally resolved.
>
> This Article identifies the woeful inefficiencies of the current procedures that have led to inexcusable delays in arriving at just results in death penalty cases and describes how California came to find itself in this untenable condition. It also recommends structural and procedural changes designed to reduce delay and promote fairness. These recommendations include: transferring exclusive jurisdiction over automatic appeals from judgments of death away from the California Supreme Court to the California Courts of Appeal; requiring that capital case state habeas corpus petitions be filed in the trial court with the right to appeal to the California Courts of Appeal, rather than filing the petitions with the Supreme Court in the first instance; providing adequate training and compensation for counsel appointed to represent indigent death row inmates; and providing continuity of counsel for state and federal habeas corpus proceedings. These changes would significantly reduce delay and promote a more just resolution for death penalty inmates and society. (*Id.*, at p. 697-698.)

Judge Alarcon offered a series of recommendations, including increasing compensation of appointed counsel in capital appeals and state habeas corpus proceedings. He also observed that "[i]n the twelve years that have elapsed since Judge Kozinski's article was published, the Legislature had not taken his suggestion" to "decrease the number of crimes punishable by death and the circumstances under which death may be imposed `so that we only convict the number of people we truly have the means and the will to execute.' In fact, the list of special circumstances

accompanying first degree murder that qualify an individual for the death penalty has been expanded on several occasions." (*Id.*, at p. 699.)

One year later, the California Commission on the Fair Administration of Justice, Final Report (June 30, 2008) noted that "the elapsed time between judgment and execution in California exceeds that of every other death penalty state." (California Commission on the Fair Administration of Justice Final Report (June 30, 2008) [hereafter "*Final Report*"] at p. 2.[42]) The Final Report recommended that the legislature increase funding for the Habeas Corpus Resource Center and the Office of the State Public Defender, and for appointed counsel. The Final Report concluded that funding for the two state agencies should be increased by 500% and 33%, respectively. (*Id.* at pp. 6-8.)

Two years later, in *In re Morgan* (2010) 50 Cal. 4th 932, this court published a decision acknowledging its inability to recruit enough capital habeas counsel to represent the inmates whose cases have been affirmed on direct appeal:

> [O]ur task of recruiting counsel has been made difficult by a serious shortage of qualified counsel willing to accept an appointment as habeas corpus counsel in a death penalty case. Quite few in number are the attorneys who meet this court's

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[42]<http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20DEATH%20PENALTY.pdf > [as of March 16, 2014]

> standards for representation and are willing to represent capital inmates in habeas corpus proceedings. The reasons are these: First, work on a capital habeas corpus petition demands a unique combination of skills. The tasks of investigating potential claims and interviewing potential witnesses require the skills of a trial attorney, but the task of writing the petition, supported by points and authorities, requires the skills of an appellate attorney. Many criminal law practitioners possess one of these skills, but few have both. Second, the need for qualified habeas corpus counsel has increased dramatically in the past 20 years: The number of inmates on California's death row has increased from 203 in 1987 to 670 in 2007. (Cal. Com. on the Fair Admin. of Justice, Final Rep. (2008) p. 121 (California Commission Final Report).) (*In re Morgan, supra,* 50 Cal. 4th 932, 938.)

Citing Judge Alarcon's 2007 *Remedies* article, this court in *Morgan* noted that the "number of cases the HCRC can accept is limited both by a statutory cap on the number of attorneys it may hire and by available fiscal resources." (Alarcon, *Remedies for California's Death Row Deadlock* (2007) 80 So.Cal. L.Rev. 697, 739.) (*In re Morgan (2010)* 50 Cal. 4th 932, 938.)

That same year, Judge Alarcon and Loyola Law School Adjunct Professor Paula Mitchell wrote a second article addressing California's situation: *Executing the Will of the Voters?: a Roadmap to Mend or End the California Legislature's Multi-billion-dollar Death Penalty Debacle* (2010) 44 Loy. L.A. L. Rev. 41. It began:

Despite numerous warnings of the deterioration of California's death penalty system over the last 25 years, and more recent signs of its imminent collapse, the Legislature and the Governor's office have failed to respond to this developing crisis. The net effect of this failure to act has been the perpetration of a multibillion-dollar fraud on California taxpayers. California voters have been led to believe that the capital punishment scheme they have been financing for the last 32 years would execute those murderers guilty of committing "the worst of crimes." This has not occurred. Instead, billions of taxpayer dollars have been spent to create a bloated system, in which condemned inmates languish on death row for decades before dying of natural causes and in which executions rarely take place.

* * *

By failing to provide the funds necessary to appoint competent counsel to represent capital prisoners in their automatic appeals and state habeas corpus proceedings, the state has ensured that, on average, death row inmates are warehoused in the costly condemned inmate facility at San Quentin for as many as 10 years before the California Supreme Court reviews their convictions and sentences on direct appeal. For the first four or five years of that period, condemned inmates simply sit awaiting the appointment of counsel. If the conviction and sentence are affirmed on direct appeal, the condemned inmate waits an additional three or more years before state habeas corpus counsel is appointed, only to find that the California Legislature has not provided sufficient funds to permit counsel to conduct an adequate investigation into the merits of his or her claims of state and federal constitutional violations. Finally, because the California Legislature fails to provide adequate funds to state habeas corpus counsel, federal courts are compelled to ensure that appointed federal habeas corpus counsel is sufficiently funded to investigate claims of constitutional violations that should have been, but were not, investigated during the state habeas corpus proceeding. Under the current system, the cost

> to federal taxpayers to litigate the federal constitutional claims of those prisoners sentenced to death since 1978 will total approximately three-quarters of a billion dollars. (Alarcon & Mitchell, *supra*, 44 Loy.(L.A). L. Rev. 41, 42-43.)

Other writers, including one retired California Superior Court judge, called for repeal of California's Death Penalty Law, noting, among other things, the cruelty it visits upon the families of the victims. Judge James Gray wrote:

> [N]ot only does the death penalty not bring closure, it actually keeps the families of the victims on an emotional roller coaster. Because of the appeals and occasional re-trials, the families are forced for years to relive the grisly details of their loved one's death - over and over again. *In many ways, this is actually using the grieving families as bit players in a long-continuing political drama.* And when it comes down to it, many of the families discover that it does not furnish much satisfaction to see the object of one's hatred simply go to sleep when hooked up to a needle. For all of these reasons, what we are doing is actually the opposite of closure for the victims' families. (Gray, *Facing Facts on the Death Penalty* (2010) 44 Loy. L.A. L. Rev. 255, 256-257.)

Of course, imposing and affirming on direct appeal many more death sentences than can be finally reviewed and executed in a timely manner is also cruel to the condemned inmates, and to their families. (See, e.g.,

Sullivan, *Efforts to Improve the Illinois Capital Punishment System: Worth the Cost*? (2007) 41 U. Rich. L. Rev. 935, 967[noting "the psychological and often the financial injuries inflicted on victims' families," upon the defendant's family, and upon the defendants themselves]; Lanier & Acker, *Capital Punishment, The Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases* (2004) 10 Psych. Pub. Pol. & L. 577, 603 [discussing the "host of secondary victims" affected by capital punishment].)

Although this court has rejected appellate arguments based on the mental states and prison conditions endured by the condemned inmates themselves (see *People v. Carter* (2005) 36 Cal. 4th 1114, 1213, and *People v. Barnett* (1998) 17 Cal.4th 1044, 1182-1183) this court has not yet considered the impact of a death sentence on the families of those killed, or on the children of the condemned defendant. Both are worthy of this court's consideration. If appellant's death sentence is executed five, ten or twenty years from now, his children will not only lose their father, but also suffer from the renewed publicity that will be given to their father's horrific crimes. Like the grieving families of the people appellant killed, appellant's children have done nothing to deserve the punishment inherent in the sporadic re-emergence of individual cases in a grossly underfunded,

inconsistently utilized death penalty scheme.

Appellant acknowledges that this court has held that delays inherent in the appellate process "do not constitute cruel and unusual punishment because they resulted from the `desire of our courts, state and federal, to get it right, to explore ... any argument that might save someone's life.' [Citations.]" (*People v. McDowell* (2012) 54 Cal. 4th 395, 412.) This court has also held that the "the slow pace of executions in California, which defendant contends is similar to the conditions condemned by Judge Noonan in his dissenting opinion in *Jeffers v. Lewis* (9th Cir. 1994) 38 F.3d 411, 425–427, does not render our system unconstitutionally arbitrary. [Citations.]" (*People v. Lee* (2011) 51 Cal. 4th 620, 654.)

Appellant's claim differs significantly from those previously-rejected claims. In addition to noting the historical meaning of the cruel and unusual punishment clause of the Eighth Amendment, and the backlog of un-executed death sentences and unresolved cases, appellant brings his own history in his own appellate record. As of the date of this writing, appellant has been on death row for over nine years without habeas counsel. Like most condemned prisoners in California, he had to wait four years for appointment of appellate counsel. He has, or had, a solid basis on which to seek reversal of his conviction as well as his sentence on appeal as soon as

the sentence was imposed, because it was based on a plea of guilty after denial of his motion under Penal Code section 1538.5. (See Appellant's Opening Brief ["AOB"] Argument I, AOB p. 201 et. seq., *supra.*)

Moreover, this appellant attacks a systemic problem in the administration of California's Death Penalty Law in which the delay in his state appellate process, the lack of habeas counsel, the conditions of life on death row, and the lack of recent executions are not the only symptoms of an Eighth Amendment violation. Appellant asks that this court consider the large and ever-growing number of un-executed death sentences in California, and the prospects for any court system to secure enough funding to review that many cases in the foreseeable future. Even if all cases pending in this court were transferred to lower courts of appeal, completing review of all the capital cases in this court would be expensive, and fruitless, given the backlog of capital cases in the federal courts in our circuit. As written by Chief Judge Kozinski:

> Think of our judicial system as a large snake. It feeds largely on field mice, an occasional squirrel, maybe a game hen here and there. Then, one day, it sees a moose, and ravenously swallows it. For a long time thereafter, it lies immobilized, as the bulge slowly works its way toward the part of the snake opposite its mouth. In this metaphor, our capital cases are a herd of caribou. (Kozinski & Gallagher, *Death: the Ultimate Run-On Sentence, supra,* 46 Case W. Res. L. Rev. 1, 5.

In 2008, the California Commission on the Fair Administration of Justice reported that "the backlog is now so severe that California would have to execute five prisoners per month for the next twelve years just to carry out the sentences of those currently on death row." (Final Report, pp. 20-21.) The backlog is now worse. In 2008, there were 670 people living on death row in California. (Id., at p. 2.) As of March 4, 2014, the number had grown to 746. (California Department of Corrections and Rehabilitation, Condemned Inmate List [43].)

California's death penalty has not been executed with the "reasonable consistency" that the Supreme Court has long demanded. (*Eddings v. Oklahoma , supra,* 455 U.S. 104, 112 ["fairly, and with reasonable consistency, or not at all."].) The California legislature has not provided funding to expedite the state appellate process as recommended by its own investigative commission. Likewise, Congress has not, and likely will not, provide funding to expedite review in the federal courts. There is too little consensus on the wisdom of doing so. And there are too many good reasons to believe that fair and reasonably consistent

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[43]http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf. > [as of March 16, 2014.]

administration of the death penalty is not possible. As Justice Blackmun wrote:

> In my view, the proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution. (*Callins v. Collins, supra,* 510 U.S. 1141, 1157 [Blackmun, J., dissenting from denial of certiorari].)

For reasons beyond the control of this court, appellant, his family, or the families of the victims, execution in California has become "unusual" and the death penalty "cruel" as those terms were understood by the Framers of the Eighth Amendment. Insofar as this court cannot make the administration of the death penalty fair and reasonably consistent, it must declare California's death penalty violative of the Eighth Amendment to the United States Constitution.

X. CALIFORNIA'S FAILURE TO *TIMELY* PROVIDE CONDEMNED DEFENDANTS WITH HABEAS COUNSEL OFFENDS THE DUE PROCESS AND EQUAL PROTECTION GUARANTEES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS AND REQUIRES REVERSAL OF APPELLANT'S CAPITAL CONVICTION AND SENTENCE

Appellant has been on death row since 2005 for crimes committed in 2000. His only appointed counsel is appointed only for his direct appeal to this court. He has no habeas counsel, and no reason to believe he will be given habeas counsel, as soon as this brief is filed. His right to counsel, confrontation, and to appear and defend, and other elements of due process as guaranteed by the federal and state constitutions, have been effectively suspended by the state legislature.

In 2008, the California Commission on the Fair Administration of Justice reported that "[t]he average wait to have habeas counsel appointed [by the California Supreme Court] is eight to ten years after the imposition of [a death] sentence." (Final Report, pp. 50-51.)

As described in the previous argument, the Commission's report explained the role of inadequate funding of public agency and private habeas counsel in delaying appointment of counsel, and the risk that failure

to appoint habeas counsel while direct appeal proceedings are pending can foreclose presentation of meritorious claims in state and federal courts. (Final Report, pp. 47-55.)

As of the time of this writing, the state legislature has not yet seen fit to provide that funding. It is unlikely to do so in the foreseeable future, seeing that 48% of the voters in November 2012 voted to scrap California's death penalty altogether.

Appellant acknowledges that this court rejected as "speculative" a similar claim in *People v. Williams* (2013) 56 Cal.4th 165, 202. That position should not be taken in the present case. No speculation is necessary at this time. The essential facts are settled. The state legislature's failure to fully fund the agencies and court appointed counsel as recommended in the Final Report, how long appellant waited for appointment of appellate counsel, and appellant's present lack of habeas counsel, are matters of history, and will continue to be a matter of record at the time this direct appeal is decided.

Also it is now clearer than before that condemned defendants have a constitutional right to the assistance of counsel in presenting a post-conviction claim based on ineffective assistance of counsel at trial on habeas corpus, as required by state law. (*Trevino v. Thaler* (2013) __ U.S.

__, 133 S. Ct. 1911, 1921.) It is also well settled that condemned defendants have a broader right to have meaningful access to the courts that California does not ensure through alternative means. (*Murray v. Giarratano* (1989) 492 U.S. 1, 14-15 [controlling opinion of Justice Kennedy concurring in the judgment rejecting a claimed right to appointed habeas counsel where "no prisoner on death row in Virginia has been unable to obtain counsel to represent him in post-conviction proceedings, and Virginia's prison system is staffed with institutional lawyers to assist in preparing petitions for postconviction relief."]

And because appellant is being denied counsel or other means to access the courts in a critical stage of the proceedings, no proof of prejudice is required. (See *People v. Hernandez* (2012) 53 Cal. 4th 1095, 1104 [acknowledging high court precedents requiring reversal "without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding."].) This court should reverse appellant's conviction and sentence, and need not speculate about any future events in order to do so.

XI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

Introduction

Appellant now presents arguments that this court has rejected in many prior cases. In *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, this court held that "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of this court's directive in *Schmeck*, appellant briefly presents the following challenges in order to urge reconsideration and to preserve these claims for federal review.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238,

313 [conc. opn. of White, J.].) Meeting this criteria requires a state to genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1982) 462 U.S. 862, 878.)

California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, section 190.2 contained 19 special circumstances. Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty.

This court has long rejected challenges to the statute's failure to meaningfully narrow the scope of eligibility for capital punishment. *(People v. Williams* (2013) 58 Cal.4th 197, 294; *People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider the issue and strike down section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Penal Code Section 190.3, Subdivision (a) Violated Appellant's Constitutional Rights

Section 190.3, factor (a), directs the jury to consider the "circumstances of the crime." Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing. This court has never applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) As a result, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As such, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other

than that the particular set of circumstances surrounding the instant murder warrants death. (Cf. *Tuilaepa v. California* (1994) 512 U.S. 967, 975-976 [majority], 985-988 [Blackmun, J., dissenting.) This court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. *(People v. Williams* (2013) 58 Cal.4th 197, 295; *People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 34 Cal.4th 382, 401.) Appellant urges the court to reconsider this holding.

C. Appellant's Death Sentence Is Unconstitutional Because It Is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require the application of a reasonable doubt standard during any part of the penalty phase, except as to proof of prior criminality offered by the prosecution under Penal Code section 190.3, factors (b) and (c). (CALJIC Nos. 8.86, 8.87; *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) Accordingly, the trial court denied appellant's timely request that the court

instruct the jury that findings supporting a death sentence required proof beyond a reasonable doubt under the federal constitution. This was federal constitutional error.

The aggravating factors on which a jury relies in assessing the substantiality of the case in aggravation, and the determination of whether those factors outweigh mitigation, are findings of fact without which a death sentence is unauthorized. Therefore, those findings must be made with the highest level of certainty, and on proof beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270; *Blakely v. Washington, supra,* 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; *Apprendi v. New Jersey* (2000) 530 U.S. 466.) This court has repeatedly rejected this claim. Specifically, this court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). The Court has also repeatedly rejected the argument that *Blakely*, *Ring* and *Apprendi* impose a reasonable doubt standard on California's capital penalty phase proceedings. *(People v. Williams, supra,* 58 Cal.4th 197, 295.)

Appellant urges the Court to reconsider its past decisions on this

claim so that California's death penalty scheme may comport with the principles set forth in *Blakely*, *Ring* and *Apprendi,* and provide due process of law. Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This court has rejected the claim that either the due process clause or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding in light of the high court's continued insistence that punishment be imposed only on facts that a jury has found true beyond a reasonable doubt. *(Descamps v. United States* (2013) ___U.S. ___; 133 S. Ct. 2276, 2288 ["The Sixth Amendment contemplates that a jury—not a sentencing court—will find [facts underlying prior conviction used to enhance sentence] "unanimously and beyond a reasonable doubt."]; *S. Union Co. v. United States* (2012) 567 U.S. ___, 132 S.Ct. 2344, 2350 [principles of *Apprendi* invoked to

invalidate fines imposed on a natural gas distributor for violation of federal environmental regulations because the "amount of a fine, like the maximum term of imprisonment or eligibility for the death penalty, [was] calculated by reference to particular facts" and "requiring juries to find beyond a reasonable doubt facts that determine the fine's maximum amount is necessary to implement *Apprendi*'s 'animating principle': the 'preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense.'" (*Id.*, at 2351, quoting *Oregon v. Ice* (2009) 555 U.S. 160, 168.)

D. Appellant's Death Sentence Is Unconstitutional Because The Verdict Was Not Premised on Jury Findings Made Unanimously Or By A Majority Or Super Majority of Jurors

Imposition of a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance that the entire jury, or even a majority of the jury, ever agreed upon a single aggravating fact or set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra,* 428 U.S. at p. 305.) As the high court more recently stated in respect to facts underlying a prior conviction used to justify a

higher sentence, "The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt." *(Descamps v. United States, supra,* ___U.S. ___; 133 S. Ct. 2276, 2288.)

Nonetheless, this court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.)

This court should reconsider. In addition to the reference to the need for unanimous jury findings last year in *Descamps v. United States, supra,* ___U.S. ___; 133 S. Ct. 2276, 2288) this court should consider how the quality of jury deliberations are likely affected by inviting jurors to return a verdict without requiring agreement on the supporting facts. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.)

Furthermore, the failure to require capital juries to unanimously find aggravating factors to be true violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his

sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to more, not less, rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

E. Appellant's Death Sentence is Unconstitutional Because The Jury Was Not Required to Make Written Findings

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make written findings. The state's failure to require specific, written findings before returning a death verdict deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

F. Appellant's Death Sentence is Unconstitutional Because The Jury Instructions Given At His Trial Used Vaguely Restrictive Adjectives In Defining Mitigating Factors

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85; § 190.3, factors (d) and (g) (4 CT 1167-1168; 47 RT 6111-6113) could have acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth,

Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367, 384; *Lockett v. Ohio, supra*, 438 U.S. at p. 604.) Appellant is aware that this court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration.

G. Appellant's Death Sentence is Unconstitutional Because The Trial Court Failed to Instruct the Jury That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators

In accordance with customary state court practice, nothing in the instructions advised the jury that some of the sentencing factors in CALJIC No. 8.85 could only be mitigating. The Court has upheld this practice. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 509.)

As a matter of state and federal constitutional law, however, several of the factors set forth in CALJIC No. 8.85 –factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289.) The jury should have been so instructed.

Over and above the usual concerns about aggravation being implied from the mere absence of a statutory mitigating factor, this appellant's

record presents prosecutorial argument denying the applicability of statutory mitigating factors that applied as a matter of law. (See Argument V, *supra.*) Accordingly, appellant asks the court to reconsider its holding that trial courts need not instruct the jury that certain sentencing factors are relevant only as mitigators.

H. **California's Death Penalty Violates International Norms**

This court has repeatedly rejected the claim that the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101). (*People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges the Court to reconsider its previous decisions.

XII. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL AND A DEATH JUDGMENT THAT MUST BE REVERSED UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Where no single error appears to warrant reversal, the cumulative effect of all the errors may require reversal in accordance with the due process guarantee. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-03 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 n.15, ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

Accordingly, appellant asks this court to consider the cumulative effect of all of the errors if this court is not persuaded that any single error warrants appellate relief. (See *In re Avena* (1996) 12 Cal.4th 694, 772, fn.32 (dis. opn. of Mosk, J.) ["Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial"]; *Cooper v. Fitzharris* (9th Cir. 1978)

586 F.2d 1325, 1333 (en banc) ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Indeed, where there are a number of errors at trial, "a balkanized, issue-by-issue harmless error review" is far less meaningful than analyzing the overall effect of all the errors in the context of the evidence introduced at trial against the defendant. (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476.) Thus, this court should also consider any errors that this court may have found cured by a trial court's instruction. "We recognize that a trace of prejudice may remain even after a proper instruction is given. If we find a residue of prejudice, we will take it into account." (*United States v. Berry* (9th Cir. 1980) 627 F.2d 193, 200-201; see also *United States* v. *Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1282.)

Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown several errors. Even if this Court were to determine that no single penalty phase error, by itself, was

prejudicial, the cumulative effect of all of the errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that appellant was denied the fair trial and due process of law to which he is entitled before the State can claim the right to take his life. Reversal is mandated because respondent cannot demonstrate that the errors, individually or collectively, had no effect on the penalty verdict. (*Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

CONCLUSION

Appellant has shown that his conviction should be reversed based on the erroneous denial of his motion to suppress evidence seized in the search of his home. Appellant has also shown that multiple grounds call for reversal of his death sentence. Accordingly, the judgment should be reversed and the case remanded.

Dated: April 11, 2014

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I hereby certify that this brief was created in 13 point roman typeface and contains 107815 words as counted by WordPerfect Version 12.

Dated: April 11, 2014

Respectfully submitted,

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PROOF OF SERVICE BY MAIL

RE: People v. Glen Taylor Helzer, California Supreme Court No.132256

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is P.O. Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached **APPELLANT'S OPENING BRIEF** by placing same in a sealed envelope addressed as indicated below, and causing same to be deposited in the mail with postage thereon fully prepaid.

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Executed under penalty of perjury under the laws of the state of California and the United States of America on APRIL 15, 2014.

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