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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED
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Frederick K. Ohlrich Clerk
DEPUTY

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

KERRY LYN DALTON,

Defendant and Appellant.

San Diego County
Sup. Ct. No.135002

APPELLANT'S OPENING BRIEF

Appeal from the Judgment of the Superior Court
of the State of California for the County of San Diego

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DEATH PENALTY

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff and Respondent,	)	
v.	)	(San Diego County Sup.Ct. No. CR 135002)
KERRY LYN DALTON,	)	
Defendant and Appellant.	)	

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

On November 13, 1992, an information was filed in the Superior Court of San Diego County charging appellant Dalton and her codefendants Mark Lee Tompkins and Sheryl Ann Baker with conspiracy to murder Irene Melanie May, in violation of Penal Code section 182, subdivision (a)(1) (Count 1), and the murder of Irene Melanie May, in violation of Penal Code section 187, subdivision (a) (Count 2). (1 CT 48-52.) The murder was alleged to have occurred on or about June 26, 1988. Two special circumstances were alleged in the information: 1) intentional killing while lying in wait (Pen. Code, §190.2, subd. (a)(15)) and 2) intentional killing involving the infliction of torture (Pen. Code, §190.2, subd. (a)(18)). (*Ibid.*)

Appellant and her codefendants were also accused of having personally used a dangerous and deadly weapon within the meaning of Penal Code section 12022, subdivision (b). The information also alleged against appellant a no probation prior within the meaning of Penal Code section 1203, subdivision (e)(4); two prior prison term enhancements within the meaning of Penal Code section 667.5, subdivision (b); and a prior serious felony enhancement within the meaning of Penal Code sections 667, subdivision (a) and 1192.7, subdivision (c)(18). (*Ibid.*)

The defendants' trials were severed on July 14, 1993. (11 CT 2120.) On July 5, 1994, Ms. Baker entered a plea to second degree murder and on July 6, 1994, Mr. Tompkins entered a plea to first-degree murder with an admission of a serious felony prior. (See 10 CT 2062.)

On December 22, 1994, an amended information was filed against appellant Dalton correcting the date of the conspiracy and adding five overt acts. (5 CT 999.)

Jury selection began on January 20, 1995 (11 CT 2151), and a jury and three alternates were sworn on January 31, 1995 (11 CT 2155) – nearly seven years after the alleged killing. The presentation of evidence in the guilt phase of the proceedings began on February 6, 1995. (11 CT 2159.)

On February 21, 1995, at the close of evidence at the guilt phase, appellant moved under Penal Code section 1118.1 to dismiss counts 1 and 2, to dismiss Penal Code section 12022, subdivision (b) allegations as to both counts, to dismiss both the lying in wait and torture special circumstances, and to dismiss overt acts 1, 2 and 6. The court struck the section 12022, subdivision (b) allegations as to the metal skillet and electrical cord as to both counts. The court also found that the evidence did not support overt acts 1 or 6 and granted the motion to strike them. (38 RT

3665, 3672-3675, 3678; 11 CT 2180.)

The jury was instructed on February 22, 1995, and began deliberations that same day. (27 RT 2183-2184.) On February 24, 1995, the jury returned its verdicts, finding appellant guilty of conspiracy to murder and the murder of Melanie May. The jurors also found the use enhancements and lying-in-wait and torture special circumstances to be true. (11 CT 2188-2190.)

The penalty phase of trial began on March 2, 1995, and the presentation of evidence was completed on March 6, 1995. (11 CT 2197-2199, 2204-2206.)[1] On March 7, 1995, counsel made their closing arguments and the jury was instructed. The case was submitted to the jury at 2:43 p.m. (11 CT 2210-2211.) At 3:25 p.m. the next day, March 8, the jury announced a verdict of death. (11 CT 2212-2213.)

On May 23, 1995, the court heard arguments on appellant's motions for a new trial, to modify the verdict and to reduce the verdict from first-degree to second-degree murder. (11 CT 2215; 48 RT 4622 et seq.) The court denied all motions, then sentenced appellant to death, staying the prison and serious felony priors pending outcome of the appeal. (*Ibid.*)

STATEMENT OF APPEALABILITY

This automatic appeal is from a final judgment imposing a verdict of death. (Pen. Code, §1239, subd. (b)); Cal. Rules of Court, rule 13.)

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[1] Both the defense and prosecution briefly re-opened their cases on March 7 to introduce stipulations. (11 CT 2210-2211.)

INTRODUCTION

Kerry Dalton was convicted of murder and sentenced to death based on hearsay, informant testimony and street speculation by methamphetamine users.[2] The prosecution presented no body, no weapon, and no physical evidence of any of the alleged acts. There were no eyewitnesses to the events that made her eligible for the death penalty; there were no unbiased, unmotivated witnesses to the alleged homicide. Instead, the prosecutor wove a web of conjecture. He threw out enough unsupported accusations to cultivate an atmosphere of fear and intimidation, which, he convinced the jurors, could only be dispelled by Dalton's conviction. He portrayed Ms. Dalton as a fearsome creature, then carefully layered speculation upon supposition, unhampered by the limits of hard evidence. And the jurors, also unrestrained by evidence, were left to envision the torture the victim Melanie May endured.

The prosecutor told the jurors that Dalton "intimidated, scared and threatened witnesses" and then warned them: "Don't let the same thing happen to you. Don't let the same thing happen to you as to what your job, your function is." (39 RT 3787, 3857.) The prosecutor's maneuver worked – the next day the jurors sent the court a note stating that all the jurors and alternates requested that their names and addresses be removed from the public record. (8 CT 1621; 40 RT 3911.) The day after that, they returned guilty verdicts. (40 RT 3918 et seq.)

The prosecution built a compelling – but ultimately dishonest and

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[2] Indeed, a detective observed about this case: "A lot of people had little bits of information about this case and I think they all expounded on it, you know, and, and, kind of ad-libbed and added to it and a lot of information got put out that wasn't necessarily true." (4 CT 713.)

unsound – case that, by its very lack of evidence, became almost impossible to defend against. Appellant was left to prove a negative – the evidence that was never recovered and the existence of which was denied by half the prosecution witnesses, did not exist, despite the prosecution's assurance that it added up to torture and death.

STATEMENT OF GUILT PHASE FACTS

Late on the night of June 25, 1988, Joanne Fedor[3] was driving home with two of her three young children to the trailer park where she lived in Live Oak Springs. (30 RT 2564-2567, 2596.)

At approximately 11:30 p.m., Fedor pulled off the road because of car trouble. (30 RT 2567.) Shortly after she stopped, someone knocked on the car window and Fedor turned to see appellant Dalton. (*Ibid.*) Fedor was relieved to see someone she knew and explained her situation to Dalton, who offered to take the children in her car. (30 RT 2569.)[4]

Dalton and a man took the children in their truck; two people in a Datsun pickup were behind Fedor. (30 RT 2570-2572.) Ms. Dalton followed Fedor for about 1/4 of a mile, and then Fedor could no longer see her headlights in the rear view mirror. (30 RT 2573.) She panicked and looked for them, then raced home, arriving at about midnight. (30 RT 2573-2575.) When she found no one there, Ms. Fedor called 911 to report

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[3] Although at the time of trial she used her maiden name, Joanne Braccio, the witness's married name was Joanne Fedor. (30 RT 2563.) Since that is the name she was known by at the time of the offense, that is the name used in this brief.

[4] Fedor testified that Dalton and Tompkins had stayed at her trailer a couple of weeks earlier; however she told District Attorney Investigator Cooksey that she had last seen appellant five years before June 1988. (30 RT 2631-2633.)

her children missing. Finally, at about 2:30 a.m., appellant Dalton, the two children and four other adults – T.K. (Mark Tompkins), Melanie (Irene Melanie May),[5] Sheryl Baker, and George[6] – arrived at the trailer. (30 RT 2575-2576.)

Fedor told her visitors that they could stay the night, but they had to leave in the morning because she was going to visit her boyfriend at the La Cima Honor Camp. (30 RT 2578-2579, 2591.) Fedor then took her children into her room and tried to sleep. (30 RT 2579.) The others stayed up and used drugs. (30 RT 2581.) Fedor did not join them (30 RT 2634-2635), but she did hear Dalton and May arguing in the other part of the trailer. (30 RT 2579.) Dalton told May that she was a snitch (30 RT 2579) and accused her of selling Dalton's property after Dalton went to jail. (30 RT 2580.) The others were also angry at May because they discovered they had shared a needle with her, and May had hepatitis. (30 RT 2581.)

Fedor did not get much sleep that night. Several times she had to ask the others to be quiet, and at one point, her neighbor sent someone over to complain. (30 RT 2581.)

The next morning, after Fedor awoke and injected meth-amphetamine, she observed that Dalton was treating May "like a slave," directing her to wash Fedor's dishes, clean her house and make breakfast for and dress Fedor's children. (30 RT 2581-2582, 2635.) While Fedor and May were washing the dishes, May held a knife and said she wanted to use

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[5] Irene Melanie May is referred to as Melanie May throughout this brief.

[6] This second man was referred to as both Bob and George. He was never apprehended or identified beyond his first name. Appellant refers to him as George throughout this brief.

it on Dalton. When Dalton came in at one point, May pulled the knife up like she was thinking about it. (30 RT 2584-2586.) May also asked how she could get out. (30 RT 2585.) Fedor told her how to get to the freeway and she told her to go outside and scream if she was afraid. May did neither. (30 RT 2586.)

May was having breathing problems, and Tompkins and Baker went to the store to get something for asthma. Someone called 911, and at about 11:30 a.m. (30 RT 2637), as Fedor was getting ready to leave, she heard a paramedic talking to Tompkins. (30 RT 2587-2588.) The paramedic, Lonnie, lived in the trailer park and knew Fedor. (30 RT 2635-2636.) Tompkins told Lonnie that things were okay and that she could go. (30 RT 2588.)

Lona Agnew, a volunteer EMT/fire fighter for the Boulevard Fire & Rescue Department, confirmed that she responded to Fedor's trailer on the morning of June 26, 1988, after receiving a page regarding a possible asthma attack. (31 RT 2706-2707, 2709.) Eventually a tall, pony-tailed man came down the hallway and asked what she was doing there. (31 RT 2712-2713.) When she explained, the man said that there was no problem, then told the girl to get Agnew out of there. (*Ibid.*)

After Agnew returned to her trailer, she called her chief, Lou Faulkner, who she knew was on his way to meet her. Agnew felt that there was something wrong and reported it to Faulkner. (31 RT 2712-2713.) As Agnew was talking to Faulkner, he pulled up in front of her residence. She got in the truck with him and they drove to Fedor's trailer. Faulkner got out of the truck and was approached by three people Agnew had met at the trailer earlier. (31 RT 2716-2718.) The pony-tailed man asked what was going on and Faulkner explained that they had received a report that

someone needed medical aid. The man said there was no problem, and Agnew and Faulkner left. (31 RT 2719-2721.)

Later that morning, Baker and Tompkins drove Fedor and her children to the honor farm.[7] (30 RT 2592, 2594.) Fedor thought they agreed to pick her up from the farm later that afternoon. (30 RT 2595-2596.) Baker, however, was unaware of any such plan. (7 CT 1423-1424.) When no one showed up to take Fedor home, she and the children hitchhiked back to the trailer, arriving at about 5 to 5:30 p.m. (30 RT 2596, 2639.) Fedor found Baker washing the kitchen floor with a bottle of shampoo. (30 RT 2597.) Appellant Dalton was about to take a shower in Fedor's room. (30 RT 2597-2598.) After Dalton took her shower, Fedor noticed that the bar of soap was purple – like dried blood. (30 RT 2601.)

Fedor also testified that the trailer had been rearranged. Her waterbed was sitting up like a book shelf, a Lazy Boy chair was missing and everything had been removed from her bed. The kitchen trash can had been dumped all over the floor of the back bedroom (30 RT 2598-2599), and she found a pillow from her bedroom dripping wet with blood in the trash can outside. (30 RT 2600.) Dalton explained that she had gotten blood all over things when she accidentally cut herself with a knife, so she took them to the wash. (30 RT 2598-2599.) She also said that the boys had taken May back to Lakeside. (30 RT 2599.)

A short while later, Tompkins pulled up in the pickup. (30 RT 2602.) Fedor noticed that Tompkins had white concrete-like dust on him. (30 RT 2602.) Dalton, Tompkins, Baker and George then all left, telling

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[7] Fedor testified that George accompanied them, but Baker was clear that he did not. (33 RT 3120-3122.)

Fedor they were going to town and would be right back. (30 RT 2602.) After the group was gone, Ms. Fedor, while putting things back in order, found a pocketknife and a screwdriver in the pop-out room. She saw hair stuck to the screwdriver and what looked like skin from the scalp or skull. The pocketknife was full of blood. (30 RT 2604.) Fedor put everything, including the bar of soap, into her truck in case anyone came looking for it. (30 RT 2642.)

Fedor then called the Sheriff's Department, and Deputy Dave Wilson responded to her trailer at about 9 or 9:30 p.m. (30 RT 2608, 2640-2641.) Fedor tried to explain to him what happened, but, Fedor testified, it did not go very well. (30 RT 2608.) She wanted to give Deputy Wilson the knife and screwdriver, but she had hidden them in her truck and Wilson would not let her go outside. Fedor looked for the pillow but, she testified, it was "gone from where I had put it." (30 RT 2609.)[8] She had put the trash can with the pillow in it in her truck but then could not find it. (30 RT 2609-2610.) She forgot to tell him about the bar of soap. (30 RT 2643.) Fedor told Deputy Wilson that she would go get the screwdriver and knife out of her truck, but he said it was too dark and that he would get them in the morning. (30 RT 2610, 2643.)

After Deputy Wilson left, Fedor went through the trailer, and as she was looking around, she noticed that the cord to the chandelier in her bedroom had been cut and that the chandelier was gone. (30 RT 2605, 2643, 2645.) The cord was split in two and the electric wire was exposed and burned on the edge. Fedor found two extension cords that were in the

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[8] Ms. Fedor later testified that she was not sure whether she had told Deputy Wilson about the bloody pillowcase. (30 RT 2645.)

shape of a figure-eight. (30 RT 2606.)

In addition, Fedor claimed that the inside of her thermal heater was full of blood spatters and the top of the wall in her kitchen was spattered with blood. Fedor explained that you could hardly see it, but something was spattered on her paneling. (30 RT 2607.)

Fedor did not call law enforcement after she found the cords, but she did call her CPS worker Marsha Burns and asked her to help Fedor find out what had happened at her trailer. (30 RT 2645.) In early to mid-July, Fedor gave the heater, which Fedor believed had blood on it, to Ms. Burns. (30 RT 2645, 2653.)[9] Fedor understood that Burns turned the heater over to the Sheriff's Department. (30 RT 2646.)

Deputy Dave Wilson presented a different picture of his encounter with Fedor on the evening of June 26, 1988. He testified that at 8:55 p.m. that evening, he received a call regarding a reported burglary at Space 25 of Live Oak Springs Trailer Park. (31 RT 2738-2739, 2742, 2751.) Wilson responded and arrived at the trailer at 9:02 p.m. It was dark. Fedor let Wilson into the trailer through the back door. He went through the kitchen into the living room and then into the master bedroom area. (31 RT 2746.) Even though a light was on in the kitchen and master bathroom, it was dim in the trailer. Wilson, however, had his flashlight and was able to see. He saw no blood in the kitchen, living room or master bedroom (31 RT 2766), and Fedor did not point out to him any blood. (31 RT 2767.) If she had, it

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[9] Fedor later testified that she had wanted to give Burns the knife, the screwdriver and the heater, but the knife and screwdriver disappeared so she just gave her the heater. (30 RT 2663.) Cooksey testified that at some point he took possession of the heater and Buck knife that Darlene Burns received from Fedor. He had both items tested for blood. No blood was found on either. (37 RT 3639-3644, 32 RT 2989.)

would have concerned Wilson, and he would have made note of it. (31 RT 2767.)

Deputy Wilson testified that Fedor appeared to be on methamphetamine. She was acting paranoid and excited and would not complete her sentences. (31 RT 2747, 2767.) Wilson tried to calm Fedor down, but she would not answer his questions. She rambled and spoke very fast. Wilson described her as "a tough interview." (31 RT 2748.) Wilson had had previous contact with Fedor and had interviewed her in the past. (*Ibid.*)

While Wilson was in Fedor's bedroom, her phone rang. (31 RT 2749.) Wilson had his portable radio with him and while Fedor was on the phone, she asked Wilson to turn it off because she did not want "them" to hear it. (31 RT 2749-2750.) When he asked who they were, she would not answer. She was afraid and crying. (31 RT 2750.) She refused to tell Wilson the names of the people on the phone. She said she was fearful for her safety or the safety of a friend of hers who had been there earlier. She would not tell Wilson the name of her friend. (31 RT 2751.)

When Wilson asked about the reported burglary Fedor said a yellow trash can and a chair slipcover had been taken. (31 RT 2751.) Fedor pointed out to Wilson a chair that had a bunch of car parts on it. She also said she had found her blood-soaked pillowcase on her bed. Wilson looked on the bed with his flashlight but could not find the pillowcase or a trace of blood. (31 RT 2752, 2768.) When Wilson did not find any blood, Fedor told him she had put the pillowcase in a box under her trailer. In response to this, Wilson looked with his flashlight underneath the trailer, but he was unable to find any box. He looked under the trailer from five different positions, but still could not find anything. (31 RT 2752, 2769.)

Fedor then said that the pillowcase might be in her truck and told

Wilson to look in the trash in her truck. (31 RT 2752-2753, 2769.) He did not do a thorough search, but he did look in the back of the truck. He stood at the side of the vehicle and lit up the area with his flashlight. It did not appear to him that the trash in the truck had been disturbed. (31 RT 2752-2753.) Fedor did not tell Wilson about any screwdriver with blood and hair on it in the back of the truck. (31 RT 2769.) Nor did she tell Wilson about a knife she had in her trailer (31 RT 2770) or a bar of soap. (31 RT 2778.) Wilson had had contact with Fedor prior to this occasion and knew her to be a methamphetamine user. (31 RT 2770.)

Deputy Wilson left Fedor's trailer at 9:20 p.m., returned to his residence and went back to bed. (31 RT 2753.) Wilson had had training on how to investigate a burglary, and he found no evidence to support Fedor's burglary complaint. (31 RT 2770.) Wilson did not check back with Fedor, and he did not write a report until September 15, 1988, because he did not believe that a burglary had occurred. (31 RT 2753-2756.)[10]

Fedor testified that when Deputy Wilson did not return the next morning, she drove to her girlfriend Lacy Grote's house. (30 RT 2611-2612.) Fedor told Lacy, Alan Woods and Mikey Hissom about the screwdriver. According to Ms. Fedor, Hissom played a joke and took the

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[10] Deputy Wilson finally wrote a report after receiving additional information. On August 17, 1988, he contacted Nina Tucker, May's casework at Child Protective Services, regarding another matter. During that interview, Joanne Fedor's and Melanie May's names came up. He did not make a connection between what Tucker told him and what he had seen and heard at Joanne Fedor's residence in June. (31 RT 2756-2757.) Then, on September 15, 1988, Wilson was patrolling the trailer park area when he noticed unmarked Sheriff's Department vehicles in the trailer park. He contacted the deputies and they asked him to make a report of the June incident, which he did on September 15, 1988. (31 RT 2756.)

screwdriver from the truck and put in into the freezer. (30 RT 2612-2613.) The screwdriver disappeared from the freezer, and Fedor never saw it again. (30 RT 2613.) Fedor later claimed that Hissom put both the screwdriver *and* the knife in the freezer, and that she saw neither of them again. (30 RT 2651.) She said that the bar of soap and the extension cords were "lost in the shuffle." (*Ibid.*)

Jeanette Bench, a friend of Lacy Grote and her boyfriend Alan Woods, was at Grote's house in June 1988, when Fedor came over with a screwdriver. Fedor was hysterical. (32 RT 3017-3019.) Bench initially testified that she saw something on the metal shaft of the screwdriver, but she did not know what it was. After the prosecutor reminded her that she had earlier told Cooksey that the substance on the screwdriver appeared to be dried blood and skin and that the screwdriver appeared to have hair on it, she remembered seeing hair on it. (32 RT 3022-3023.) Fedor left after showing Lacy and Bench the screwdriver. (32 RT 3023.)

Grote's boyfriend, Patrick Allan Woods, testified that in 1988, he and Grote lived together in Santee. (32 RT 3039-3041.) Fedor, whom Woods described as a "piece of shit," lived with them for a while, until Woods kicked her out. (32 RT 3041.) Woods did not recall Fedor coming by the house, but did recall finding an "odd-ball screwdriver" in a freezer in his garage and throwing it away. (32 RT 3042-3043.) He found the screwdriver in a dirty paper bag. It had "dirt, lint, shit" on it. (32 RT 3043, 3045.) "It looked like what was either grease – it could have been blood – I don't know. . . ." (32 RT 3043.) If there was hair on the screwdriver, it would have been lint or dog hair. (32 RT 3045.) It looked old. He described it as "chipped up shit." (32 RT 3043.) When the prosecutor asked if he wanted to get it out of the house, Woods replied, "I probably

had enough stolen tools at the time." He did not need anything else like that. (32 RT 3044.) During that time frame, Woods was using methamphetamine. (32 RT 3045.)

In addition to her two younger children, Fedor had an older daughter, Alisha Fedor, who was 12 in 1988. Alisha spent the weekend of June 25-26, 1988, at a girlfriend's house. (30 RT 2660, 2668.) When she returned to the trailer, maybe on Monday, June 27, Alisha found everything out of place. (30 RT 2660, 2668-2669.) In her bedroom she found the kitchen trash can and all the trash dumped in her room. (30 RT 2669.) Alisha also noticed that the cord had been cut from the hanging lamp in her mom's bedroom. (30 RT 2671.) It was still plugged in, but the ends were bare, and the wire was exposed and looked like it had been burned. (*Ibid.*) The room also smelled and there were no sheets, blankets or other bedding on the bed. (30 RT 2671, 2674.)

Alisha also saw on the carpeted floor of her mother's room small splatter marks, that she thought was blood because of their dark, reddish-brown color. (30 RT 2671-2672.)[11] She also thought there were blood spatters on the heater, and what looked like blood splatters on the floor and walls of the pop-out area of the trailer. (30 RT 2672-2673.) Alisha claimed to have seen a yellow screwdriver that she said had hair and blood on it, which was on her mother's truck. (30 RT 2674.)

On cross-examination, Alisha recalled that after her mother picked

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[11] At one point, Alisha began to explain that she had thought it was blood because her mother "had told her the story . . . ," but her answer was stricken as hearsay. (30 RT 2672.) Her mother had testified that Investigator Cooksey came to the trailer to talk to Fedor several times. She could not recall whether Alisha was present during those interviews. She may have been in the next room. (30 RT 2661.)

her up from her sleepover, they entered the trailer and went through it together. (30 RT 2675.) She recalled speaking with Investigator Cooksey in 1991, but did not remember telling him that she had been told by her mother about things that were in the trailer. Her mother told her about "things that were going on . . . but . . . before I got to the trailer but . . . ." (30 RT 2675.) She did not recall telling Cooksey that she was not sure whether she had seen a screwdriver or whether her mother had just told her about it.[12] She remembered seeing the screwdriver near the tail gate of a truck parked in front of the trailer. She was not sure whether it was her mom's truck or not. The tail gate was down and it was lying in the space between the gate. (30 RT 2676.)

In September, 1988, a number of police officers came out to Fedor's trailer to take samples. (30 RT 2651-2652.) Fedor still had the same bed she had in June of that year. (30 RT 2652.) After Fedor consented to a search, the officers took samples from the bedroom, kitchen, living room, family room and expando room. They also took samples from the kitchen floor, and they cut up several pieces of padding and carpet. (30 RT 2652.)

Sergeant Terry Wisniewsky, a detective with the homicide division of the San Diego County Sheriff's Department, was one of the officers who searched Fedor's trailer for traces of blood on September 15, 1988. (35 RT 3435-3436.) Also present on that day were Sam Bové, criminalist Randy Robinson and Detective Mark Parmely. (35 RT 3438-3439.) Sergeant Wisniewski and the others conducted an "intensive search," specifically looking for traces of blood. (35 RT 3440.) To his knowledge, no blood

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[12] Cooksey later testified that he interviewed Alisha Fedor and she told him that she was not sure whether she actually saw a screwdriver. (38 RT 3653.)

was found. (35 RT 3442; see also 35 RT 3493-3500 [testimony of crime scene investigator Sam Bové].)

Criminalist Robinson testified that he was at the trailer for three hours and went through the entire trailer systematically looking for blood. He had a very bright flashlight and reagents for testing for the presence of blood. (34 RT 3330-3333.) He checked all the rooms and all the surfaces – the walls, the ceilings, the carpet, baseboards, appliances. At that time, he had been a criminalist for the San Diego Sheriff's Department for 16 years, and he used all his knowledge as a criminalist on that day. Nevertheless, he found no evidence of blood in the trailer. (34 RT 3334-3335, 3340.) Had Robinson received any type of reaction for blood at the trailer, he would have seized the sample and had the area photographed. He did not find any blood. (34 RT 3347.)

In August or September, 1988, Ms. Fedor got a dog. On November 16, 1988, Sergeant Terry Wisniewski returned to the trailer with criminalist Walter Fung, as well as a number of detectives from the Metropolitan Task Force. (30 RT 2653, 2630; 35 RT 3440-3441.) Wisniewski was at the scene for four hours, and the Task Force conducted "an intensive, exhaustive search" of the trailer for bloodstains. (35 RT 3441, 3494.) They also did a neighborhood check for witnesses and searched the field around the trailer. (35 RT 3441-3442.) Some items were tested for blood, but no blood was found during this search either. (35 RT 3442, 3445-3446, 3449.)

It was criminalist Walter Fung's responsibility to identify and preserve physical evidence, as well as to assist in documenting the crime scene and reconstructing it. His job on November 16, was to look for blood. (36 RT 3520, 3522.) He first searched for blood visually. He had hema sticks with him to perform presumptive tests on any suspected blood

he found. If he got a positive reaction from any item, he would take that item to the lab for further analysis. (36 RT 3523.) Fung spent about two and one-half to three hours at the trailer and did a visual search for blood in the master bedroom and bathroom area, the living room and parts of the kitchen and pop-out room. (36 RT 3524, 3526.) He checked the carpet, walls and ceiling and then used the hema stick on anything he believed could be blood. As a result of this search, he took back to his lab three pieces of carpet pad from under the bed, a piece of carpet from the kitchen and the living room threshold area and a piece of tile from under the refrigerator. (36 RT 3525.) After testing the items at his lab, he was not able to detect any blood on them. He found no blood in the trailer. (36 RT 3526.)

Fedor was evicted in January or February of 1989, and she moved out of the trailer in early March 1989. The trailer was left behind for someone else. (30 RT 2654.)

Laurie Najor, her husband and brothers-in-law owned the trailer park where Fedor lived in Live Oak Springs. (35 RT 3478.) In June through September 1988, Joanne Fedor lived in space 25 of the trailer park. (35 RT 3479.) Najor's three sons stayed in a trailer in space 24 during the summer of 1988, and Najor and her husband lived in a trailer in space 23. There was also someone living in space 26 in June of 1988. (35 RT 3480.)

Najor explained that after Fedor moved out of the trailer, there were two or three other families who lived in the trailer before her son Gil moved into it. Gil was 19 or 20 years old at the time. At some point, Gil had to move out because law enforcement wanted to perform tests on the interior of the trailer. (35 RT 3482-3483, 3489.)

Melanie May's husband, Robert May (Robert), testified that he and

Melanie had two children together, and that she had one child from a prior relationship. (31 RT 2781-2783.) In 1991, Cooksey went to see Robert at Avenal. (31 RT 2785.) Cooksey wanted assistance with the case, but Robert told him he had nothing to say. (31 RT 2786.) Cooksey told Robert he could get out of prison early and offered him protection, but Robert told Cooksey he wanted no part of it. (31 RT 2786-2787.) Robert remembered that Cooksey told him he might have to testify, but he could not recall saying "I'll lie through my fucking teeth if I'm called down there to testify." (31 RT 2787.) According to Robert, he simply turned down the request for an interview. (*Ibid.*)

Robert testified that he last saw his wife on June 17, 1988. They had gotten into an argument in front of a western clothing store; the police were called and Robert was taken to jail. He had not seen her since and had made no effort to find her. (31 RT 2789-2790.) As far as he was concerned, when he went to jail that day, he and his wife split up permanently. (31 RT 2790.) After Robert was released, he began dating Phyllis Cross. (31 RT 2791.)

Before Robert went to jail, his and Melanie May's children were in protective custody. They were trying to get the children back, but, according to Robert, Melanie was not making much of an effort – "she was working on getting high, a little more higher every day." (31 RT 2792.) This was not the first time the children had been taken from them. The first time they were taken, Robert made numerous court appearances to get them back, and both he and Melanie attended counseling sessions and a parenting class and both were tested for drug use. After nine months of this, the children were returned to them, only to be taken away again in early June 1988, shortly before Robert's arrest. (31 RT 2792-2795.)

Robert denied that he and Tompkins were enemies or that Tompkins ever threatened them. Tompkins did not take Robert to the desert and threaten to kill him if he did not back off this case. (31 RT 2804.) Robert never told anybody otherwise. (31 RT 2805.)[13]

On cross examination, Robert stated that in July 1988, after he got out of jail, he saw his wife partying with a friend in front of the Lakeside Hotel. He asked her to come back, work it out and get the kids back. He was in love with her and wanted her back. Melanie did not want to do that. She wanted to go running around. Robert also recalled that after he was released he saw Melanie driving on Highway 8, but he could not get her to pull over. (31 RT 2808.)

Kandi Koliwer, an attorney, represented Melanie in the juvenile dependency petition filed in regard to her children. Child Protective Services had removed the children from the care of Melanie and Robert May for the children's protection. (31 RT 2812.) Ms. Koliwer was first appointed to represent Melanie in June 1987. (31 RT 2813, 2816.) In the beginning, Melanie missed court appearances because she was incarcerated, but other than that, made her appearances until she missed the hearing scheduled for June 30, 1988. (31 RT 2816-2818.) Melanie did not appear for that, or any other subsequent court appearances. Ms. Koliwer never saw Melanie again after the June 15, 1988 court appearance. (31 RT 2824.) Ms. Koliwer testified that the children were very important to both Melanie and Robert and that they were doing what they could to regain custody of

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[13] Jeannette Bench told Investigator Cooksey that Robert May had been threatened, but not that Robert told her that. She did not remember telling Cooksey that Robert said he was taken out to the desert and threatened by Tompkins. (32 RT 3025.)

them. (31 RT 2825-2826.)

Phyllis Cross testified that she met Robert May shortly after Melanie May became missing. (31 RT 2838-2839.) Cross and Robert May lived together as boyfriend and girlfriend for almost three years. During that time, Cross accompanied May on more than one occasion while he looked for his wife's remains. (31 RT 2839.) Robert was serious about finding May, but never did. (31 RT 2842-2843.) Cross could not recall whether Robert had described to her a threat he received from Tompkins. (31 RT 2843.) She had said earlier that Tompkins told Robert to stop looking for his wife. (31 RT 2844.) Cross claimed that Dalton had once told her and Robert that Melanie was alive and offered to take them to where she was in Riverside. (31 RT 2845.) They agreed to meet later, but Dalton did not show up. (31 RT 2846-2847.)

Kathy Eckstein testified that in 1988, she lived in Alpine with her husband and their three sons, one of whom, Fred, was 15 or 16 years old at the time. (31 RT 2855-2856.)[14] Kathy testified that she went to Fedor's trailer and saw nickel and dime-sized red spots that looked like dried blood all over the place – on the walls, floor, carpeting and blankets. (31 RT 2764, 2759.) Kathy later elaborated that she saw stains in the master bedroom floors, wall, and on some blankets on the bed. She had no trouble seeing the stains. (31 RT 2759, 2863.) She also said that Fedor showed Kathy a bar of soap from her bathroom with teeth marks in it and a plastic extension cord from the kitchen cupboard that had an end cut off and knots or loops in it. (31 RT 2759-2761.) Upon further questioning, Kathy was not sure of

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[14] For purposes of this case, Kathy Eckstein's husband is referred to as Fred, Sr. and their son is referred to as Fred.

the month or year that this occurred; she was only certain that it was a Sunday. (31 RT 2862.) Kathy used methamphetamine, but not on a regular basis during this period. Joanne Fedor also used drugs. (31 RT 2864.)

Fred Eckstein, 21 years old at the time of trial, testified that sometime in June of 1988, he could not recall the date or day of the week, Joanne Fedor drove him to her trailer so he could help her around the trailer. (31 RT 2869-2870.)[15] When they arrived, Fedor pointed out some spots on the walls and carpet of the living room only. (31 RT 2871-2872.) It was hard to tell the colors, but the spots looked like blood. (31 RT 2871.) In the living room he also saw some extension cords that looked like they were tied in a knot, "like something was bound in them and cut." (31 RT 2872-2873.) Fedor also showed Fred a rusty screwdriver. (31 RT 2873.) Fred recalled that Fedor had a recliner in the trailer, but it was not there that evening and he never saw it again. (31 RT 2874.) Fred testified that he helped Fedor clean up and replaced the carpets and padding. (31 RT 2884, 2874, 2882.)

Fred had used methamphetamine that day. He had no idea how much he had used, but at that time, he was using it more than once a day and quite often, more than twice a day. (31 RT 2879, 2883.) At that time, Fred had used methamphetamine on a regular basis for at least one year; he got his methamphetamine from Fedor, who also used methamphetamine. (31 RT 2878-2879, 2884.)

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[15] Fred testified that although "you guys" believed that the day he described was in June, Fred was "not positive on that." (31 RT 2877.) He recalled that school was in session and school did not end until late June. Fred, however, was suspended from school at the time. (*Ibid.*)

During his closing argument, the prosecutor conceded that the Ecksteins were not at Fedor's trailer the weekend of June 26, 1988. (39 RT 3769.)

Howard Simmons, an employee of the county Department of Social Services testified that Ms. May received AFDC from April 9, 1986, to June 30, 1987, and then again from October 1987 until June 1988, when welfare ended because the department lost contact with May. She did not submit her monthly reports and did not cash a check after June 1, 1988. (31 RT 2893-2901.)

The San Diego County District Attorney's Office made a number of unsuccessful attempts to locate Ms. May. Marla Tottress testified that she ran a records check of all 50 states and Puerto Rico for names, arrest warrants and car registration for Melanie May and other names she might have used. Tottress also ran a criminal history check of May and found only a San Diego arrest on June 2, 1988. (31 RT 2911-2914, 2927.)

The parties stipulated that May and Tompkins had ABO blood type A and that Dalton and Baker had type O. Dalton was also an A secretor. (32 RT 2930-2931.) Then, over an on-going objection (32 RT 2924-2925), the prosecution presented evidence about blood detected in Fedor's trailer.[16] Gary Dorsett, an evidence technician with the San Diego Police Department Crime Lab, testified that on August 12, 1991, he went to Fedor's former trailer and found spots that tested presumptive for blood. (32 RT 2932-2934, 2938-2943.)

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[16] The testimony regarding these searches and the results therefrom are discussed in greater detail in Argument III.

Dorsett returned to the trailer on August 24, 1991, and did additional testing and collected samples that tested presumptive for blood. (32 RT 2944-2945.) Some of the samples were from the south wall of the living room and the living room ceiling. (32 RT 2949-2950.) Dorsett also did another luminol test in the dark, which would react to smears that might occur if someone tried to clean the walls. (32 RT 2951.) The luminol test revealed nothing of great significance, but there were some positive reactions on the walls in the living room and the front master bedroom. (32 RT 2952.)

Dorsett first went to the trailer in August 1991, more than three years after the alleged June 1988 crime. (32 RT 2954-2955.) This suspected crime scene was contaminated. (32 RT 2958.) Dorsett did not know how the samples he collected got to that location, or where or how long they had been there. (32 RT 2961.)

Dorsett performed only presumptive tests. The tests were not conclusive for blood, and there are other substances that will cause a positive reaction to the luminol test. He collected samples from places where he detected a reaction. Some of the samples were the size of a pin head. (32 RT 2960.) He could not determine whether the specks, if blood, were from a human or an animal. (32 RT 2961.)

Jennifer Mahalovich, a criminalist at Forensic Science Associates, performed presumptive tests for the possible presence of blood on items from the trailer provided to her by Cooksey and found a number that tested positive for presumptive blood. (32 RT 2974-2976, 2979, 2982-2984, 2990.) She also examined and tested a floor heater sent to her by Cooksey on March 23, 1992. She detected no blood. (32 RT 2989.)

Mahalovich gave Gary Harmor, a forensic serologist at the

Serological Research Institute, six samples to examine and asked him to determine the species origin and the ABO type. (32 RT 2992-2994.) The stains appeared to be many months or a year old. (32 RT 3004.) He was able to type all six samples as either type A or O blood (32 RT 2996-2997), but he could not determine the species of animal from which the blood samples came.[17] (32 RT 2998.) He testified that 86% of the Caucasian population has type A or O blood. (32 RT 3000.)

Laurie Carlyle, who had been in custody with appellant Dalton, once told Dalton that Pat Collins said hello. (32 RT 3053.) According to Carlyle, Dalton responded that she did not want to be linked with Collins, because Collins could get her into trouble by running her mouth. (32 RT 3054.)

Dalton also allegedly told Carlyle that Sheryl Baker could cause her problems because of a murder investigation in Live Oak Springs. (32 RT 3054-3055.) Dalton said that she, Baker, and Tompkins were involved in the case and that the victim was Melanie May. (32 RT 3055.) Carlyle also claimed that Dalton told her that the murder took place with battery acid. Dalton said that the body was in the bottom of a well on an Indian reservation somewhere in Live Oaks. (32 RT 3055-3056.)

Carlyle claimed to have had the conversation with Dalton in 1992. (32 RT 3058.) However, in 1993, Carlyle wrote Baker and told her that she had heard Dalton's name, but had never met her. (32 RT 3059.) Carlyle testified that she did not get any information about this case from either Pat

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[17] Many animals, including dogs, have ABO blood types. (32 RT 3000-3001.)

Collins or Baker.[18] She did hear a few things from Sue Aguilar when she and Aguilar were incarcerated together in 1992, but nothing that she had testified to in court. (32 RT 3060.) After defense counsel reminded Carlyle of a statement she gave to Cooksey, Carlyle admitted that in 1992, she told Cooksey that Sue Aguilar told her the body was on a federal or Indian reservation. (32 RT 3061-3062.)

Carlyle had testified in another case and knew that prosecution witnesses sometimes get benefits. She, however, had not. (32 RT 3062-3063.)

Donald Richard McNeely was a cellmate of Mark Tompkins (whom he knew as T.K.) in San Diego County Jail from June to August 1992. (32 RT 3071-3072, 3079.) According to McNeely, Tompkins told him about his case, and described in detail the murder of Melanie May in June 1988, in a trailer in the Live Oak Springs, Boulevard area. (32 RT 3073-3076.) After McNeely heard this information, he went to his attorney, and then spoke to Cooksey. (32 RT 3076.) McNeely did not seek and did not receive any consideration for his participation in this case. (32 RT 3077-3078.)

Sheryl Baker, a codefendant charged with capital murder in this case, was allowed to enter a plea of guilty to second degree murder in exchange for her testimony against Kerry Dalton. Baker's sentencing had been put off until after her testimony in this case. (33 RT 3093-3094, 3148-4149.) Baker testified that on what would have been June 24, 1988, she, Melanie May, Sherri Fisher, Kim and others were in Lakeside "partying" –

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[18] At the time of her testimony, Carlyle was housed in the same unit as Collins at Las Colinas. (32 RT 3066.)

getting high on "pot and crystal." (33 RT 3095-3096, 3097.) The next day, Baker did the same thing, then left with Melanie May to go to May's former apartment. (33 RT 3096-3097.) Both Baker and May had injected methamphetamine that day. (33 RT 3159.) May had been evicted but was going to move her property to a nearby storage facility. (33 RT 3097.) May's husband was in jail so they got a man known only as George to help them. (33 RT 3098.) While they were unloading May's things, a number of people showed up, including Dalton, Pat Collins and Pam McGee. (33 RT 3099, 3158.)

Dalton told Baker that most of the furniture and other items from the apartment were hers and she wanted them back. She was specifically looking for some jewelry. Baker said she would look for Dalton's property and give her what she found. Dalton, Collins and McGee then left. (33 RT 3101.)

After they finished moving, Baker, George and May tried to procure methamphetamine. (33 RT 3101.) While waiting for it at a U-Totem or a Circle K store, Baker telephoned Dalton to let her know that she had not found anything of Dalton's among May's possessions. (33 RT 3102-3103.) Within minutes, Dalton and Tompkins showed up at the store in a yellow pickup truck. Dalton and Tompkins helped them find drugs and then asked Baker if she would help them steal a car. Baker agreed, and May and George accompanied her voluntarily. (33 RT 3104.) After the drugs arrived at the market, they all left. (33 RT 3159.) Dalton and Tompkins were in one vehicle, and the others were in George's pickup. (33 RT 3106, 3110.) They left the market at around 6 p.m. and drove for what seemed like hours. (33 RT 3107.)

Eventually, Dalton and Tompkins pulled off the freeway, where they

spotted a small truck parked alongside the road. Dalton and Tompkins stopped, and Baker, May and George parked behind them. (33 RT 3108.) In the truck was a woman Baker did not know, but who was later identified as Fedor, and two children. Dalton offered to give the children a ride home. (33 RT 3108-3109.) Fedor apparently agreed and then drove off. The rest followed, but got lost, and then Tompkins' truck broke down. (33 RT 3109-3110.) They all piled into George's pickup and finally made it to a trailer park in the "boonies." (33 RT 3110.) By then, it was quite late. Fedor was upset, thinking that her children had been kidnaped. (33 RT 3111.)

While Dalton talked to Fedor, Baker went to the bathroom and did drugs. (33 RT 3111.) They eventually stayed all night doing the drugs George had bought earlier. (33 RT 3113-3114.) They had 1 3/4 to 3 ½ grams of drugs.[19] Baker used the most, but they were all using, except Fedor. (33 RT 3114.)

At one point, Dalton talked to May about her property and dumped out May's purse, in which she found some of her jewelry. At that point Dalton became angry and began ordering May around. (33 RT 3115-3116.)

Baker did not sleep at all that night. Early the next morning, she, Tompkins and George went to get the truck that had broken down the night before. They got it started and Tompkins drove it back. They were gone about an hour. (33 RT 3118.)

Someone had called about an asthma attack and rescue people arrived. Tompkins spoke to them and told them everything was fine.

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[19] Baker misspoke and said 1 3/4 or 2 ½ grams, but it is clear that she intended to say 1 3/4 or *3* ½, which is two 16ths. (See also 33 RT 3163.)

(33 RT 3118-3119.) At that point, May was in the back bedroom with Dalton. (33 RT 3119.)

Later that morning, Tompkins drove Fedor and her two children to see her boyfriend at the honor camp. (33 RT 3117, 3120.) Baker went with them. (33 RT 3120.) After they dropped off Fedor, Baker and Tompkins drove to Baker's drug connection in Lakeside, about 1 ½ to 2 hours from the camp. There, Baker got more methamphetamine and injected it. (33 RT 3122, 3169-3170.) Tompkins left to make a phone call. He returned to pick up Baker in a panic. (33 RT 3123.) He said they had to go back to the trailer. "Something has happened." (33 RT 3124.) At that point, Baker was high on methamphetamine. She had earlier told Cooksey and the prosecutor, "I didn't care about nothing else that was going on, I had all of the dope, I was flying." (33 RT 3186.)

Tompkins and Baker returned to the trailer sometime in the afternoon. (33 RT 3124.) George was outside. Baker and Tompkins went in and found Dalton sitting in the room off the kitchen. (33 RT 3125.) May was tied up to a chair in the kitchen with a sheet over her.[20] Dalton was upset and told Baker that something had happened while she was gone. They were going to kill May, and Baker had no choice but to participate. (33 RT 3126-3127.) Tompkins went along with her. Baker was scared and did not say anything. (33 RT 3127.)

Dalton told Baker they were going to shoot May up with battery acid. "It would be real quick." (33 RT 3127.) Tompkins went outside and Dalton took Baker to the back bedroom where there were four or five

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[20] Presumably it was May. Baker never saw the person's face. (33 RT 3171.)

syringes filled with a clear substance that Dalton said was battery acid. (33 RT 3127-3128.) Baker did not know for sure what the substance was. It could have been water. (33 RT 3173.)

Dalton then went and stood by May's head and Baker stood by her feet. Dalton told May she was going to give her a sedative to calm her down, and then asked Baker to inject May. (33 RT 3128-3129.) Baker could not see May, and May did nothing. (33 RT 3129.) She did not respond to Dalton's comments, never moved and never uttered a sound. (33 RT 3171-3172, 3174.) Baker testified that May could have been dead already. Baker thought she was alive at the time, but "years later," Baker looked back and believed the person might have been dead before Baker and Tompkins even returned to the trailer (33 RT 3172.) Some of the things Baker observed led her to believe this. (*Ibid.*)

Baker inserted the needle in two places, but could not find a vein. Dalton then tried herself. (33 RT 3129.) Baker believed Dalton pressed one syringe, one time. After that, Dalton told Baker that May was suffering that they had to do something about it. She handed Baker a cast iron frying pan and Baker hit May because she felt bad that May was suffering. (33 RT 3130.) Baker hit her in the head so hard that the bottom of the pan broke. (33 RT 3131.) Even then, May made no sound. (33 RT 3174-3175.)

Dalton said they would have to get Tompkins because "[t]his isn't working." When Tompkins came in, he was mad, calling them stupid bitches. Dalton and Tompkins talked and decided to stab May. As Tompkins got ready to do so, Dalton said she wanted Baker's hand on the knife too. (33 RT 3132.) Tompkins gripped Baker's hand on the knife, but Baker pulled her hand away. Tompkins stabbed May twice, once in the

throat and once in the chest. He did not remove the sheet. (33 RT 3133.) Baker never saw any blood on the sheet, but there was a very small amount on the floor. (33 RT 3175.)[21]

After Tompkins stabbed May, Baker left. She was scared to death and thought she was next. (33 RT 3134.)

The next thing she recalled was that Tompkins and George wrapped up May in a carpet and put her in the back of George's truck. Tompkins and George left to get rid of the body. Dalton told Baker they were going to burn it. (33 RT 3134-3136.) She did not know what they did with the body. (33 RT 3178.)

Dalton and Baker were supposed to clean up while the men were gone, but Dalton told Baker to first take a shower. While Baker showered, Dalton cleaned up the kitchen, but there was not much blood. (33 RT 3135-3136, 3138.) After showering, Baker collected a breaker bar, a screwdriver (she did not know if they had been used) and the pan. Tompkins had the knife. Baker threw away the frying pan, screwdriver and breaker bar at a gas station in Alpine. She later saw a knife in George's truck. (33 RT 3177.)

Baker did not recall seeing an extension cord that may have been used on the person; she did not recall seeing a recliner chair in the kitchen;

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[21] May later stated that she did not recall there being any blood. She did not see blood elsewhere in the trailer, and she did not see blood coming from the body covered with the sheet. (33 RT 3180.) Still later, Baker testified that she did not remember a lot of blood in the trailer. (33 RT 3193.) Baker acknowledged that she had told Investigators Richard Cooksey and Robert Hoxter of the San Diego Metropolitan Homicide Task Force, District Attorney's Office, that there was blood and that she and Dalton both cleaned it up, but denied that that was accurate. (33 RT 3193-3194.)

she never saw or disposed of a bloody pillow or pillowcase (33 RT 3176, 3199.) She did not see a bar of soap with blood on it. (33 RT 3177.)

When Fedor returned she was upset because the trailer was a mess. Dalton explained that she and May had gotten into a fight. May had left and Dalton was cleaning up. (33 RT 3137.) Baker testified that she never cleaned up in the kitchen and did not clean up the floors. (33 RT 3137-3138.) She remembered earlier telling the prosecution that she was on the floor, cleaning, but "it happened a long time ago. I blocked a lot of things out." (33 RT 3138.) Baker cleaned up by putting anything that might have been involved in a green plastic trash can from the back bedroom. At one point, Dalton put some things under the trailer. Baker could not remember what, but she got them and put them in the trash can. (33 RT 3192.)

After this happened, Baker left town. (33 RT 3194.) She went with Marsha Watson and Watson's son to Yucca Valley because she was scared for her life. (33 RT 3195.)

Baker testified that she "loved" drugs. She had used crystal methamphetamine, marijuana and heroin. (33 RT 3151.) Baker and the others, including May, used drugs at the trailer and partied all through the night. They finished all the methamphetamine they had brought with them – either 3 ½ or 1 3/4 grams of it. (33 RT 3163-3164, 3160.) Baker had been up at least 24 hours. (33 RT 3164.) She testified that there was no plan to go to Fedor's trailer. (33 RT 3165.) Fedor stayed up with the others partying. She may have used drugs, but Baker did not see her do so. (33 RT 3165-3166.)

Pat Collins, an acquaintance of appellant and Baker. testified that during the summer of 1988, she went to a garage sale in Lakeside with Dalton where Collins bought a dresser from May, whom Collins described

as a "skinny little speed freak." (33 RT 3206-3207.) After her purchase, Collins went home by herself. She did not know what Dalton did, but a few days later Dalton came to Collins' apartment trying to sell a jacket. According to Collins, Dalton seemed nervous and scared. She said she needed money and a place to stay. (33 RT 3208.)

A few months after that, both Collins and Dalton were in the county jail and Collins asked Dalton "why she did it," and Dalton said because May was a rat and deserved to die. (33 RT 3209-3210.) Dalton gave no further details.

At some point, while she was in custody at Las Colinas, Collins agreed to cooperate with law enforcement in this case. Police officer Lusardi asked Collins to make taped telephone calls to Baker in order to get information about the case, and Collins did so on November 14 and November 15, 1988. For her cooperation, Lusardi helped Collins get out of jail on March 15, 1989 – fifteen days early. (33 RT 3213-3214, 3219, 3221.)

Collins acknowledged that she had used a number of different names and that she had been convicted of felony conspiracy to manufacture methamphetamine in 1986. Nonetheless, she claimed never to have given information to get out of trouble. (33 RT 3215, 3205.) Collins also testified that she was a drug addict and had a terminal illness due to her drug use. (33 RT 3216.)

Dalton told Collins that May "must be alive." She also said that there was no body, so the police did not have a case. (33 RT 3218.) Dalton also told Collins that May was not dead, but with her "sancho" – a boyfriend when one's husband is locked up. (33 RT 3219.)

Collins denied that officers had threatened to lock up her husband if

she did not cooperate, and she did not recall ever saying that. Collins also said that she had never used drugs in custody. (33 RT 3218.) Although Collins did not consider herself an informant, she acknowledged that she had given information while she was in jail. (33 RT 3222.)

Pam Aitchison, who at one point lived with Pat Collins, testified that the general reputation of Collins in the community was that she was dishonest – a thief and a liar. (37 RT 3615-3616, 3621.)

Sherri Lyn Fisher, a former methamphetamine user and seller, testified that in 1988, she and her then-boyfriend lived in Lakeside and sold drugs out of their residence. (33 RT 3223-3224, 3232.) In late June 1988, she met May when May was homeless and invited May to stay with her, which she did. (33 RT 3224.) The last day Fisher saw May was when May left Fisher's apartment with Baker. (33 RT 3225.) Fisher next saw Baker about three days later. Fisher described Baker as "hysteric [sic]." (33 RT 3226.) Baker and Fisher talked and then Baker went to Yucca Valley with Fisher's mother. (33 RT 3226-3227.) Baker wanted to leave because she was afraid; she had done something. She talked about a murder. (33 RT 3227.) She also said that the victim had died slowly. She said that May would not die. It took "a long time." (33 RT 3228.)

A few hours after Baker left with Fisher's mother, Dalton came by and asked for May's belongings. (33 RT 3228.) Fisher gave Dalton May's purse and some papers. (33 RT 3229.)

After Fisher was interviewed about this case, she ran into Dalton, who told Fisher to deny knowing May or that May had lived with Fisher. (33 RT 3230.)

Marsha Watson, Fisher's mother, testified that in June of 1988, she visited her daughter in Lakeside because she wanted to kick her own heroin

habit. She had been told, "if I got some good speed that I could kick the heroin habit," but it had not worked. (33 RT 3234-3235.) Toward the end of Watson's stay, Baker came to the house and was hysterical, saying she had to leave the area. Fisher asked Watson to take Baker to the desert with her. Watson did not want to get involved, but agreed to take Baker home to Yucca Valley with her. (33 RT 3236.) They left Lakeside on June 30, 1988. Baker spent the night, and then returned to San Diego the next day. (33 RT 3238-3239.) Baker left some papers in Yucca Valley, among which were birth certificates for May's boys. (33 RT 3238-3239.) A few months later, May's husband, Robert, came by and picked up the birth certificates. (33 RT 3240-3241.)

Watson described Baker as "spun," which meant that she had taken too much speed. She elaborated that Baker was "over-amped" and "tweaked on speed." (33 RT 3243.)

Judy Brakewood testified that in October or November 1992, she read a newspaper article that reminded her of an earlier conversation she had had with Dalton and that prompted her to call Cooksey. (33 RT 3251-3252, 3257-3258.) According to Brakewood, in 1987 or 1988, she was in a van doing drugs with Steven Nottoli and Dalton. While Dalton was out of the car, Nottoli told Brakewood that they had shot up a girl with battery acid and burned her. Dalton then entered the passenger seat of the car and said "Yep, we really fucked that girl up." (33 RT 3255-3259.) Steven Nottoli testified that the incident never happened. (37 RT 3627-3631.)

Dr. Brian Blackbourne, a San Diego County pathologist, did not perform an autopsy in this case (34 RT 3283-3285), but he did testify as to the effects of battery acid and electric shock on a body. He stated that an injection of battery acid "hurts; and stings," just like an injection. If

injected into a vein, it would be painful going up the vein until it was neutralized by the tissue, which would take seconds. (34 RT 3289.) If it were injected into the muscle, the person would feel pain in the area injected. (*Ibid.*) Acid injected in the vein would be much more painful than in the muscle, which would cause a Charlie-horse type of pain. (34 RT 3290.) He also testified that electric shock causes pain. (34 RT 3291.)

Darlene Burns was Joanne Fedor's social worker from May 31 to August 1988, and in that capacity she traveled to Fedor's trailer to work with Fedor and her children. (34 RT 3300-3301.) When Burns met with Fedor in August 1988, Fedor was upset about something that happened at her trailer. (34 RT 3302-3303.) On August 17, 1988, Fedor showed Burns areas on the living room carpet where Burns saw dark spots. (34 RT 3304-3305.) "They looked like they could have been blood." (34 RT 3305.) Burns called Deputy Wilson and asked him to recheck it, but she did not hear back from him. (34 RT 3306.) On September 7, 1988, Fedor gave Burns a large knife and a heating unit, which Burns gave to the deputy at the local Sheriff's station in Campo. (34 RT 3308-3309.)

Nina Tucker testified that in 1987 and 1988, she worked with Child Protective Services and was the caseworker for Melanie and Robert May and their three children. (35 RT 3362-3363.) On June 14, 1988, Tucker filed to have the children removed from Melanie May. The last contact Tucker had with May was on June 24, 1988. May called to say she was staying with a friend in Lakeside and told Tucker she wanted to make changes. She was tired of being on the street. She wanted to change her lifestyle and get her children back. (35 RT 3367-3368.) During that call, May agreed to call Tucker on the following Monday. May did not do so, and Tucker never spoke with or saw May again. (35 RT 3368-3369.) She

did, however, receive a telephone call from Joanne Fedor regarding May. After speaking with Fedor, Tucker called the Boulevard Sheriff's Station to report what Fedor had told her. (35 RT 3369.) The following week, Tucker filed a missing persons report with the Spring Valley Sheriff's Station. (35 RT 3370.)

Tucker gave her opinion that May loved her children very much. She would not harm or abandon them. (35 RT 3370.) She was aware, however, that the children had previously been removed from May's home for lack of care. (35 RT 3371.) Tucker attributed that to drug use. (35 RT 3372.) Although Tucker testified that May called Tucker "frequently" and that they were in regular contact, she acknowledged on cross-examination that May called only three times, and that in March 1988, Tucker wrote the Mays that she had been trying to reach them for several days. She had left messages, but not heard back from them and it was important to get in touch to determine if the children were okay. (356 RT 3372.) In addition, in April 1988, Robert May was concerned about Melanie's condition, and in June 1988, Tucker received information about the condition of the children in the May home. (35 RT 3373.)

On June 10, 1988, Tucker, a Santee Sheriff's Department representative, and a social worker from CPS removed three children from the May home because the children were improperly supervised. (35 RT 3373-3374.) Tucker had information that May had left the home for three days, and when Tucker took the children into custody, they were dirty and smelly. (35 RT 3374.) When she went to the trailer to retrieve the children, Robert May and a babysitter were home. Melanie May was not. (35 RT 3379.) The babysitter first told Tucker that Robert was not there, but they later found him hiding upstairs. He appeared to be under the influence.

(35 RT 3379-3381.)

Tucker initially could not find one of the children, so she called law enforcement. (35 RT 3380.) Tucker, law enforcement, the babysitter, Robert May and Phyllis Davenport canvassed the neighborhood on foot, looking for the child, but they could not find her. (35 RT 3381.) Robert then said she was with a friend. They eventually found all the children and removed them. (35 RT 3381-3382.)

Richard Cooksey, the San Diego District Attorney's Office investigator assigned to this case, testified that he had not given or promised any of the witnesses anything. (35 RT 3394.) Donald McNeely did not ask for anything, was not promised anything and did not receive anything. (35 RT 3394.) Nor did Carlyle, Brakewood, or Bench. (35 RT 3395-3397.) Cooksey later acknowledged that he told McNeely that, in exchange for his cooperation, the District Attorney's Office might write a letter to his sentencing judge, advising him of McNeely's cooperation. (35 RT 3407.)

Cooksey began working on the case in 1991, and he was involved in two formal searches for Melanie May, one near her trailer and another at the Viejas Indian Reservation. (35 RT 3397-3399.)

Cooksey had interviewed Robert May, who once told Cooksey that he found family documents and birth certificates in an abandoned house in the desert. (35 RT 3400-3401.) Cooksey made no promises to Robert in exchange for cooperation. (35 RT 3401.) When Cooksey advised Robert that he might have to testify, Robert said "I'll lie through my fucking teeth." (35 RT 3401-3402.)

Cooksey also interviewed Bench, who told Cooksey that Robert May told her that he had been threatened by Tompkins. (35 RT 3404.) Bench also told Cooksey that Dalton told Bench that she did not know anything

about the case and that Bench was "a dead woman." Appellant then spit on Bench's window. (35 RT 3406.)

Dr. Clark Smith, a psychiatrist, testified that he was the medical director of Vista Pacifica, a drug and alcohol treatment hospital, and the clinical director for drug and alcohol treatment programs for Mesa Vista Hospital and the Vista Hill Foundation. He had training in chemical dependancy and had treated approximately 2000 people with chemical dependancy problems, about 30% of which were addicted to methamphetamine. (36 RT 3549.) He stated that intravenous use of methamphetamine was the most dangerous. Methamphetamine has certain definite and very predictable effects on the brain. One effect is euphoria, but it also can cause a sense of excitability, even psychosis, paranoia and hypervigilance. People on methamphetamine often act impulsively without thinking about what they are doing or considering or understanding their actions. Methamphetamine alters perception of time and regular stimuli. (36 RT 3550-3551.) A person on methamphetamine might also misinterpret someone's actions and feel threatened by someone who meant no harm. (36 RT 3552.)

Dr. Smith also testified that methamphetamine use can cause physiological problems to the user's brain by changing the physiological and chemical balance of the brain. It can lead to psychosis. There are also anatomical changes such as microscopic strokes that occur with methamphetamine abuse. (36 RT 3553.) Methamphetamine users are suggestive and commonly suffer psychotic delusions and hallucinations. (36 RT 3554-3555.)

Dr. Smith testified that hallucinations are common with amphetamine abuse – happening to 90% of users. (36 RT 3556, 3573.)

The euphoria usually wears off after eight hours, but the hallucinations and paranoia can often last for days or even weeks after the drug is cleared out of the system. (36 RT 3556-3557.) He explained that users also suffer from hypervigilance and have delusions that someone is trying to attack them. (36 RT 3557.) The drug affects – and can distort – all possible perceptions. Anything that is perceived can be distorted – time and what the person thinks he or she sees, hears, smells, tastes and feels. (36 RT 3558.) The combination of amphetamine abuse and sleep deprivation can heighten all the problems discussed. (36 RT 3559.)

Methamphetamine in combination with asthma medications can cause heart attacks or seizures of the heart. (36 RT 3561.) In addition, a usual dose of amphetamines could become lethal for a person with hepatitis. (36 RT 3562.)

Dr. Smith also explained that although it was uncommon, two people could experience the same hallucination. (36 RT 3582.) It occurs as a result of "shared delusional disorder," and it is probably an effect of suggestibility. (36 RT 3583.) Paranoia is another common symptom. (36 RT 3585.)

Over objection, the court permitted the prosecution to play a tape of Baker's March 4, 1992, surreptitiously videotaped interview with Cooksey. Because of the court's ruling regarding the March tape, the defense requested that Baker's taped statement of July 5, 1994 be introduced. (37 RT 3596-3598, 3603-3604.)[22]

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[22] While the videotape of the March 4, 1992 interview (Exhb. 37) was played for the jury, the jurors were given a 78-page transcript of the interview (Exhbs. 37A at 8 CT 1513) to read. Accordingly, counsel (continued...)

In the March 4 statement played before the jury, Baker gave a version of events similar to her testimony, except for two major discrepancies. She told the investigators that when she and Tompkins returned to the trailer, May was still alive. (8 CT 1528-1529.) Baker did not talk to her, but she described May as uninjured and "fine." (8 CT 1529.) After Cooksey told Baker, incorrectly, that they had found quite a bit of blood in the trailer, Baker explained that the blood was a result of Tompkins' stabbing of May. (8 CT 1555.) Baker could not remember all that happened because she did not want to remember. She had blocked it. (8 CT 1558.) In her March statement, Baker told the officers that May said that she did not want to die. May said, "please don't kill me I'm sorry." (8 CT 1558.) That is all May said. (8 CT 1580.) She also uttered some kind of noise after Baker hit her on the head with a pan. (8 CT 1581.) Baker also said that there was not a lot of blood (8 CT 1565), but she did clean blood off the kitchen floor. (8 CT 1569.)

A videotape of the July 5, 1994 interview with Ms. Baker was also played for the jury. Again, a transcript of the video was provided to the jurors and the court reporter did not transcribe the video. (38 RT 3653-3654.)[23]

In the July 5 statement, Baker stated that she remembered more then than she did during the previous interview. (20 CT 4146.) She no longer believed that May was alive when Baker and Tompkins returned to the

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[22] (...continued)
stipulated that the reporter did not have to transcribe the videotape. (37 RT 3604-3605.)

[23] The transcript of the July 5, 1994 video was marked as Exhibit K1 and is found at 20 CT 4115.

trailer. "You know like when you ask me if she made noises, and I think I just wanted her to make noises, I don't think she was alive when we got there." (20 CT 4148-4149.)

Baker also said that, contrary to what she said during the first interview, her first statement, she did not help clean up blood. She faints at the sight of blood. (20 CT 4154.)

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GUILT PHASE ARGUMENTS

I.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE THE HEARSAY STATEMENTS OF MARK TOMPKINS THROUGH JAIL-HOUSE INFORMANT DONALD MCNEELY.

A. FACTS BELOW.

The prosecution sought to offer as evidence against Kerry Dalton, the testimony of Donald McNeely, a cellmate of Dalton's severed codefendant Mark Tompkins, regarding statements Tompkins allegedly made to him about the Melanie May homicide, including, "We tortured the hell out of that bitch. Violence is my thing. Pain is the name of the game." (19/24 RT 1183.)[24]

Defense counsel argued that the hearsay statements lacked sufficient reliability, that admission of McNeely's testimony violated Dalton's right to confrontation, and that the statements ran afoul of *Bruton v. United States* (1968) 391 U.S. 123, and *People v. Aranda* (1965) 63 Cal.2d 518, 47. (19/24 RT 1188-1189.)[25] The trial court rejected counsel's arguments,

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[24] One physical volume of the reporter's transcript contains volumes 19 through 24 and has been designated "19/24."

[25] Defense counsel objected to introduction of McNeely's testimony throughout the trial court proceedings. They filed a memorandum in opposition to admission of codefendant hearsay statements (5 CT 946); they objected just prior to McNeely's trial testimony (32 RT 3068-3069); and after his testimony they moved for a mistrial based on the prejudicial effect of the testimony. (32 RT 3083.) They raised the issue in their motion for new trial. (10 CT 1977.)

The defense also argued that if testimony regarding Dalton's personal relationship with Tompkins were admitted, which it was (see 30 RT 2570-2571), it would compound the *Bruton-Aranda* problem

(continued...)

ruling that the statements were admissible under the hearsay exception for statements against penal interest (Evid. Code, § 1230) and that there was no *Aranda* violation, so long as the term "we" was redacted and substituted with "I." (19/24 RT 1184, 1190-1192.)

At trial, the parties stipulated that Tompkins was unavailable under Evidence Code section 240, and Donald McNeely took the stand. (32 RT 3069-3070.)

McNeely testified that in June 1992, he was in custody in San Diego County Jail before pleading guilty to eight burglary charges. (32 RT 3071-3072.)[26] While in jail, he was a cellmate of Mark Tompkins for approximately three months. (32 RT 3073-3074.) McNeely described Tompkins as "an acquaintance," and claimed that Tompkins confided in him about the Melanie May torture-slaying with which he was charged. (32 RT 3074.) He told McNeely that it took place in a trailer in a trailer park in the Boulevard area. McNeely felt that Tompkins "seemed to enjoy" the torture. Tompkins said "he was really into violence. He was into the violent scene, and he said that he tortured the hell out of her." (*Ibid.*) Tompkins used to say "pain was the name of the game" and phrases such as that. (*Ibid.*)

McNeely testified that Tompkins told him that the "original plan" was to give May a "hot shot." (32 RT 3074.) Tompkins also "mentioned"

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[25] (...continued)
inherent in McNeely's testimony regarding Tompkins' statements, in violation of Dalton's First, Sixth and Eighth Amendment rights. (29 RT 2462-2463.)

[26] McNeely in fact committed more than twelve felony burglaries over a period of a few months. (32 RT 3082-3083.)

a screwdriver, a knife, a heavy kitchen skillet, which he said worked "wonders on the knees," and an electrical cord, with which he gave her a "shock treatment." (32 RT 3075.) Tompkins said that he gave May the hot shot and "then there was some of the other instruments used," then he stabbed her with a knife because she would not die quickly enough. He just wanted it to end. (*Ibid.*) Tompkins allegedly explained to McNeely that he cut up May's body and buried it on a local Indian reservation because he felt it would be harder to get a search warrant for reservation land. (32 RT 3075-3076.)

McNeely claimed that after he learned this information, he told his attorney and then agreed to give a taped statement to San Diego County District Attorney's Office Investigator Richard Cooksey. (32 RT 3076-3077.) McNeely maintained that he neither sought nor received any benefit in exchange for the information about Tompkins. At the time he provided the information to Cooksey, McNeely had already entered a guilty plea and was awaiting sentencing; he faced a maximum of 20 years, and he in fact received a sentence of 20 years. (32 RT 3077.)

It is difficult even to identify, let alone unravel, the entwined constitutional, statutory and commonsense errors in the court's decision to allow into evidence against Dalton the hearsay statements of her codefendant – whose case had been severed precisely because his out-of-court statements were inadmissible against Dalton. As the prosecutor conceded nearly two years before trial, the three defendants in this case could not be jointly tried because of *Bruton* and *Aranda* problems (2 CT 285), and the court severed the three defendants on this basis. (6 RT 694-695.) Nonetheless, at trial, the court concluded otherwise, reasoning that the chilling statements recounted by McNeely were reliable and, once redacted

of any mention of Dalton, admissible at Dalton's trial "to establish that the events occurred in the trailer."[27] (19/24 RT 1185.) The court's reasoning was seriously flawed.

Tompkins' statements as related by McNeely were patently inadmissible. Moreover, even if the testimony was admissible to establish "only" that the crime occurred, that would presume that Dalton's jurors would be informed of this limited admissibility and instructed to view the hearsay statements of this undeniable accomplice with caution. Nothing of that kind was done in this case, and, as a result, the prosecutor was free to, and did, improperly rely on the statements to establish Dalton's guilt.

B. MS. DALTON WAS DENIED HER CONSTITUTIONAL AND STATUTORY RIGHTS TO DUE PROCESS AND A FAIR TRIAL, CONFRONTATION AND A RELIABLE GUILT AND PENALTY DETERMINATION AS A RESULT OF THE ERRONEOUS ADMISSION OF UNRELIABLE HEARSAY TESTIMONY.

Introduction of Tompkins' unreliable hearsay statements through in-custody informant McNeely violated the state hearsay rule as well as Dalton's due process rights under the Fifth and Fourteenth Amendments, her right to confrontation under the Sixth and Fourteenth Amendments and her right to a reliable guilt and penalty determination under the Eighth Amendment.

The Confrontation Clause of the Sixth Amendment, extended to the states by the Fourteenth Amendment, guarantees the right of a criminal defendant "to be confronted with the witnesses against him." (See *Pointer v. Texas* (1965) 380 U.S. 400, 406.) The Confrontation Clause "reflects a preference for face-to-face confrontation at trial. . ." accomplished through

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[27] The sophistry of this ostensible basis for admission is discussed in detail, below at I.B.3.

cross-examination of witnesses. (*Ohio v. Roberts* (1980) 448 U.S. 56, 62-63.)

> In short, the Clause envisions "a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the consciences of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."

(*Id.* at pp. 63-64, quoting *Mattox v. United States* (1895) 156 U.S. 237, 242-43.)

The right of confrontation is essential to a fair trial in that it promotes reliability in criminal trials and ensures that convictions will not result from testimony of individuals who cannot be challenged at trial. (*California v. Green* (1970) 399 U.S. 149.) When the prosecution seeks to offer a declarant's out-of-court statements against the accused, and, as in this case, the declarant is unavailable, courts must decide whether the Clause permits the government to deny the accused his usual right to force the declarant "to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth.'" (*Id.* at p. 158, footnote and citation omitted; accord, *Lilly v. Virginia* (1999) 527 U.S. 116, 123-124.)[28]

For nearly 25 years, the question of whether an unavailable witness'

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[28] The hearsay rule has been linked to goals that go beyond the concessions that might be obtained on cross-examination. The oath is believed to impress witnesses with the importance of testifying truthfully, and having witnesses testify before the fact finders enables them to take the witnesses' demeanor into account in assessing their credibility. And subjecting witnesses to a searching cross-examination helps the opposing party expose inadvertent as well as conscious inaccuracies in perception, recollection and narration. (See Fed. Rules Evid., art. VIII Advisory Committee's Note.)

prior statements could be used against a criminal defendant at trial was governed by *Ohio v. Roberts, supra*, 448 U.S. 56, which provides:

> [W]hen a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness.

(*Id.* at p. 66.)

In March 2004, the Supreme Court concluded that the *Roberts* rule was untenable, and in *Crawford v. Washington* (2004) 541 U.S. 36, held that admission of testimonial evidence from a witness who does not testify violates the Confrontation Clause unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination. The central holding of *Crawford* is that "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Crawford v. Washington, supra*, 541 U.S. at pp. 68-69.)

Dalton does not contend that Tompkins' statements were testimonial in the manner suggested by the Court in *Crawford*,[29] and the Court reserved

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[29] The Supreme Court did not define testimonial, but noted three formulations of "core" testimonial evidence: (1) "ex parte in-court testimony or its functional equivalent," such as affidavits, custodial examinations, prior testimony not subject to cross-examination, or "similar pretrial statements that declarants would reasonably expect to be used prosecutorially;" (2) "extrajudicial statements" of the same nature "contained in formalized testimonial materials;" and (3) "statements that (continued...)

for another day the question of whether nontestimonial statements remain subject to confrontation scrutiny. (*Id.* at pp. 59-62.) Whether to apply the *Crawford* or *Roberts* test in this case, however, is academic, because Tompkins' hearsay statements to McNeely are patently inadmissible under either test.[30] Under *Ohio v. Roberts*, hearsay statements are admissible only if the declarant is unavailable and his statement falls within a firmly rooted hearsay exception or bears particularized guarantees of trustworthiness. Ms. Dalton concedes that Tompkins was unavailable. His statements, however, do not fall within a firmly rooted hearsay exception. Nor are they reliable under any conceivable standard.

1. A Statement Against Penal Interest Exception Is Not a Firmly Rooted Hearsay Exception.

The trial court ruled that Tompkins' hearsay statements were statements against Tompkins' interest and they fell within the hearsay exception of Evidence Code section 1230.[31] (19/24 RT 1183.)[32] This

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[29] (...continued)
were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Crawford v. Washington, supra*, 541 U.S. at pp. 51-52.)

[30] "*Crawford* [left] the *Roberts* approach untouched with respect to nontestimonial statements." (*United States v. Saget* (2d Cir. 2004) 377 F.3d 223, 227; see also Horton v. Allen (1st Cir. 2004) 370 F.3d 75, 84; *United States v. Gibson* (6th Cir. 2005) 409 F.3d 325, 337-338 ["*Crawford* dealt only with testimonial statements and did not disturb the rule that nontestimonial statements are constitutionally admissible if they bear independent guarantees of trustworthiness"].)

[31] Section 1230 provides: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement,
(continued...)

exception, however, as applied to circumstances such as those of this case, is not "firmly rooted." In *Lilly v. Virginia*, *supra*, 527 U.S. at p. 134 (plur. opn. of Stevens, J.), four justices of the Supreme Court opined that "accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence." The same justices also held that the accomplice's statements did not contain the particularized guarantees of trustworthiness necessary to satisfy the concerns of the Confrontation Clause. (*Id.* at pp. 137-139.)

The plurality explained that statements against penal interest are offered into evidence in three principal situations: "(1) as voluntary admissions against the declarant; (2) as exculpatory evidence offered by a defendant who claims that the declarant committed, or was involved in, the offense; and (3) as evidence offered by the prosecution to establish the guilt of an alleged accomplice of the declarant." (*Lilly v. Virginia*, *supra*, 527

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[31] (...continued)
when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement unless he believed it to be true."

[32] Appellant does not concede that Tompkins' alleged statement to McNeely can accurately be described as a statement against interest. A statement of one inmate bragging to another inmate about crimes committed is not necessarily against penal interest at the time or under the circumstances it was made. (See, e.g., *United States v. Seabolt* (8th Cir. 1992) 958 F.2d 231, 233, cert. denied (1993) 507 U.S. 971 ["a statement by one criminal to another criminal (translated by the second criminal to a third criminal) about a heist the first criminal allegedly pulled off is more apt to be jailhouse braggadocio than a statement against his criminal interest"].)

U.S. at p. 127 (plur.opn. of Stevens, J.).) They observed that "statements in the first category – voluntary admissions of the declarant – are routinely offered into evidence against the maker of the statement and carry a distinguished heritage confirming their admissibility when so used." (*Ibid.*) Under that reasoning, Tompkins' statements could have been admitted against him were he on trial for the torture-murder of Melanie May. But Tompkins *was not* on trial. If he had been, Dalton would have been afforded more protection than she was in her severed trial. As the *Lilly* plurality explained, if the declarant were a codefendant in a joint trial "even the use of his confession to prove his guilt might have an adverse impact on the rights of his accomplices. When dealing with admissions against penal interest, we have taken great care to separate using admissions against the declarant (the first category above) from using them against other criminal defendants (the third category)." (*Ibid.*)

> In the years since *Bruton* was decided, we have reviewed a number of cases in which one defendant's confession has been introduced into evidence in a joint trial pursuant to instructions that it could be used against him but not against his codefendant. Despite frequent disagreement over matters such as the adequacy of the trial judge's instructions, or the sufficiency of the redaction of ambiguous references to the declarant's accomplice, we have consistently either stated or assumed that the mere fact that one accomplice's confession qualified as a statement against his penal interest did not justify its use as evidence against another person. See *Gray v. Maryland*, 523 U.S. 185, 194-195 . . . (1998) (stating that because the use of an accomplice's confession "creates a special, and vital, need for cross-examination," a prosecutor desiring to offer such evidence must comply with *Bruton*, hold separate trials, use separate juries, or abandon the use of the confession); 523 U.S., at 200 . . . (Scalia, J., dissenting) (stating that codefendant's confessions "may not be considered for the purpose of determining [the defendant's]

guilt").

(*Id.* at pp. 127-128.)

The third category of statements against interest includes cases like this one and *Lilly*, in which the prosecution sought to introduce "a confession by an accomplice which incriminates a criminal defendant." In *Lilly*, the plurality explicitly stated: "The practice of admitting statements in this category under an exception to the hearsay rule – to the extent that such a practice exists in certain jurisdictions – is, unlike the first category or even the second, of quite recent vintage. This category also typically includes statements that, when offered in the absence of the declarant, function similarly to those used in the ancient ex parte affidavit system." (*Lilly v. Virginia*, *supra*, 527 U.S. at pp. 130-131; see also *Lee v. Illinois* (1986) 476 U.S. 530, 546 [insufficient indicia of reliability "to overcome the weighty presumption against the admission of" a codefendant's confession inculpating the accused].)

If Tompkins' hearsay statements are not admissible under the "firmly-rooted hearsay exception" prong of the *Roberts* analysis, they must bear particularized guarantees of reliability to meet the second prong. No such guarantees exist. To the contrary, the circumstances under which the statements in this case were made and related severely undermine their trustworthiness because *both* the declarant – Tompkins – and the testifying witness – McNeely – were highly suspect. This confluence of two unreliable information sources renders McNeely's testimony inadmissible under the Due Process Clause of the United States Constitution.

Tompkins' reliability was diminished by the circumstances of his alleged admissions. It appears that if, in fact, the alleged statements were made, Tompkins was not confiding in McNeely so much as bragging or

puffing. Tompkins and McNeely were not close friends; Tompkins was not getting anything off his chest. He was in custody and wanted to be perceived of as tough. McNeely also admitted in his statements to law enforcement that Tompkins was happy about the conflicting stories regarding the alleged homicide, gave McNeely conflicting stories, and wrote deceptive accounts to others, knowing that law enforcement would check his mail. (See 5 CT 948.)

In addition, Tompkins' unreliability was not fully made known to the jurors by the very fact that he did not take the stand and was therefore not subject to impeachment. As a result, the jury did not learn of his two prior convictions for burglary, his prior conviction of conspiracy and his prior conviction of vehicle theft (6 CT 1198; 30 RT 2511-2512[33]), all of which should have been taken into account in assessing Tompkins' believability. (See CALJIC No. 2.23.)[34]

More suspect than Tompkins, however, was Donald McNeely.[35]

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[33] Tompkins also had a conviction of Penal Code section 148.9, false representation of identity to a peace officer. (See 6 CT 1198 [Ex. A of defense memorandum regarding impeachment].) The court, however, erroneously ruled that Tompkins' misdemeanor conviction was inadmissible. (30 RT 2511-2512.) (See Argument IX.)

[34] The court also failed to instruct that Tompkins was an accomplice as a matter of law, and therefore his testimony should be viewed with distrust (CALJIC No. 3.18) and must be corroborated by someone other than another accomplice. (CALJIC Nos. 3.11 and 3.13.) (See Argument I.C.)

[35] The trial court, when ruling on the motion for new trial, stated its view that the test is whether the declaration against interest is reliable; the test is not the credibility or reliability of the witness repeating the hearsay statements. (48 RT 4631.) While that may be true in many cases, it was (continued...)

McNeely was an in-custody informant, a class of witnesses whose very testimony must be viewed with caution. (Pen. Code, § 1127a; CALJIC No. 3.20.) As Justice Mosk explained in his concurring opinion to his majority opinion in *People v. Jones* (1998) 17 Cal.4th 279:

> Our Legislature has recognized the potential unreliability of jailhouse informants' statements, requiring that a jury be instructed about them in cautionary terms on request. (Pen.Code, § 1127a; see also *id.*, § 4001.1.) It enacted the law because "[n]umerous county jail informants have testified to confessions or admissions allegedly made to them by defendants while in custody. . . . Snitches are not persons with any prior personal knowledge of the crime. . . . They testify only that a defendant made an inculpatory statement to them while in proximity in the jail or place of custody. [¶] [Such persons] gather restricted and confidential information by duplicitous means and thereby lend the credibility of corroboration to wholly fabricated testimony." (Assem. Com. on Public Safety, Rep. on Assem. Bill No. 278 (1989-1990 Reg. Sess.) as amended May 4, 1989.)

(*Id.* at p. 323.)

McNeely had an extensive record of serious crimes and was a "con artist" of the most pernicious sort. When Tompkins allegedly confided in him, McNeely was in custody awaiting sentencing after pleading guilty to eight counts of residential burglary. (32 RT 3071-3072; see also 6 CT 1068-1069.) In all eight counts, McNeely had posed as an exterminator to gain entry into the victim's house. (*Ibid.*)[36] Mr. Dusek, the prosecutor in

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[35] (...continued)
not true here. The reliability of both Tompkins and McNeely were factors that should have been considered in determining the admissibility of accomplice Tompkins' hearsay statement to a jailhouse informant.

[36] The court erroneously refused to allow the defense to impeach
(continued...)

Dalton's case, filed a Statement of Aggravation in McNeely's case, and said of McNeely:

> By outward appearances and lifestyles this defendant does not fit the stereotype of the typical burglar that comes through this court. But if the court is able to examine what really counts, the man's soul and conscience, it will discover a confirmed thief and conman. The only difference between this burglar and the vast majority is that this defendant is not satisfied with a "nickel and dime haul." The defendant has the looks, brains, and wherewithal to make the big score. In fact, he scored big eight separate times.

(6 CT 1078.)

After McNeely moved to withdraw his plea in the case for which he was in custody at the time Tompkins allegedly confided in him, Mr. Dusek filed an opposition in which he stated that McNeely was "a manipulator and his manipulations did not bear fruit." (6 CT 1108.) As to certain of McNeely's allegations, Mr. Dusek responded: "These outrageous and irresponsible allegations are simply untrue. . . . The defendant is a desperate man. His day of judgment is near and he will resort to any tactic to postpone a lengthy prison sentence." (6 CT 1109.)[37]

McNeely's knowledge of details of the charged offenses was easily explained by his opportunity to review the case files that Tompkins kept in

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[36] (...continued)
McNeely with the circumstances of these burglary offenses, which would have at least informed the jurors of McNeely's skills of manipulation and ability to pose as something he was not. (See Argument I.D.2.)

[37] The defense attempted to use this information to impeach McNeely, but the court ruled it inadmissible. (See Argument I.D.1.)

their joint cell. (35 RT 3466-3467.)[38] Also, what McNeely reported was either published information or unconfirmed and uncorroborated.

In addition, McNeely obviously presented well – he had, according to Dusek, "the looks, brains, and wherewithal to make the big score" – while Tompkins, by all accounts, was a psychopathic speed-freak who would not have impressed the jurors with his trustworthiness or reporting skills. Because Dalton was denied her right to confront Tompkins, she was unable to show the jurors the real source of the alleged statements and let them judge for themselves Tompkins' credibility and reliability – to let them "*look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.*" (*Mattox v. United States*, *supra*, 156 U.S. at pp. 242-243, emphasis added.)

Accomplice Tompkins' hearsay statements to an in-custody informant contain no particularized guarantees of trustworthiness necessary to satisfy the concerns of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and should not have been admitted.

If nothing else, the trial court should have excluded Tompkins' hearsay statements under Evidence Code section 352. Where the probative value of the statement is slight, and its admission might confuse the jury,

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[38] Alan Fenton, Mark Tompkins's attorney, testified that after his appointment in this case in May 1992, he provided Tompkins with the 2000-3000 pages of reports he had received relating to this case as well as press coverage of the case. (35 RT 3461-3462.) The material he provided Tompkins included references to giving a someone a "hot shot;" the location of the homicide; a skillet; loading a body into a vehicle; cutting up a body; an Indian reservation; and the statement "to help her out of her misery." (35 RT 3462-3463.)

discretionary exclusion under section 352 is proper. (*People v. Chapman* (1975) 50 Cal.App.3d 872, 880.) Even assuming, arguendo, that Tompkins' statements satisfied the requirements for admissibility, they should have been excluded because they were "so ripe with condemning facts against the defendant that they are devastating or crucial to his case." (*People v. Rios* (1985) 163 Cal.App.3d 852, 867.) At the same time, the statement was highly untrustworthy.

Even when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission. (See *People v. Shipe* (1975) 49 Cal.App.3d 343, 354 [to satisfy the requirements of Evidence Code section 1230, a declaration must be distinctly against the declarant's penal interest "and must be clothed with indicia of reliability"].) To determine whether a particular declaration against penal interest passes section 1230's required threshold of trustworthiness, a trial court "may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant." (*People v. Cudjo* (1993) 6 Cal.4th 585, 607, internal citation omitted.) In this context, assessing trustworthiness "'requires the court to apply to the peculiar facts of the individual case a broad and deep acquaintance with the ways human beings actually conduct themselves in the circumstances material under the exception.'" (*People v. Frierson* (1991) 53 Cal.3d 730, 745, quoting *People v. Gordon* (1990) 50 Cal.3d 1223, 1251.)

As explained above, the declarant Tompkins and the witness McNeely were both highly suspect and admissibility of the substance of Tompkins' hearsay statements was, at best, questionable – while undeniably

prejudicial. Under such circumstances, the court should have exercised its discretion to exclude the hearsay statements. Its failure to do so denied appellant her right to due process, a fair trial and a reliable guilt and penalty determination.

2. Redaction Did Not Cure the Constitutional Error in this Case.

The trial court ruled that Tompkins' statements were admissible if they were properly redacted to avoid any reference to Dalton. The court, however, conflated two separate concepts. *Bruton* does not apply where the defendant and the declarant are tried separately. Redaction is meant to protect a defendant, such as Dalton, from statements admissible *only* against her codefendant at a *joint trial.* (*Bruton v. Unites States*, *supra*, 391 U.S. at pp. 123-124 [framing the question presented as "whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant's confession inculpating the defendant had to be disregarded in determining his guilt or innocence"]; *Gray v. Maryland* (1998) 523 U.S. 185, 194-95 [a prosecutor desiring to use an accomplice's confession must comply with *Bruton*, hold separate trial, or use separate juries]; *United States v. Hawk Wing* (8th Cir. 1972) 459 F.2d 428, 429 ["*Bruton* . . . requires a separate trial where out-of-court statements of a codefendant implicating the defendant will be deliberately spread before the jury in the event of a joint trial"].)

In other words, if Dalton and Tompkins had been tried jointly, the prosecution arguably could have admitted Tompkins' statements against Tompkins without violating Dalton's confrontation clause rights – assuming Tompkins' statements were properly redacted *and* a cautionary instruction was given.

Where, as here, the prosecution seeks to admit a non-testifying declarant's statements against the defendant at her separate trial, the defendant's confrontation clause rights are protected, and the statements are admissible, *only* if the statements bear adequate "indicia of reliability" under *Ohio v. Roberts*, *supra*, 448 U.S. at pp. 65-66. As explained above, they did not.

Moreover, even if redaction had been an appropriate option, the redaction in this case did not achieve its goal of shielding Dalton. The redacted confession, under the very unique circumstances of this case "facially incriminated" Dalton. In *People v. Fulks* (1980) 110 Cal.App.3d 609, 616-617, the court stated that:

> [A]lthough the most common circumstance in which *Aranda-Bruton* principles are brought into play is that the co-defendant is identified in the declarant defendant's statement as a co-participant in the crime . . . , *Aranda* makes it clear that the problem remains when the statements are "not only direct and indirect identifications of co-defendants but any statements that could be employed against nondeclarant co-defendants once their identity is otherwise established."

(Internal citations omitted.) These sentiments were echoed in *People v. Anderson* (1987) 43 Cal.3d 1104, 1123:

> Indeed, as *People v. Fulks* . . . correctly implies, what is material for *Bruton-Aranda* analysis is not how the statement under review should be classified in the abstract – as a confession, an admission, or even an exculpatory declaration – but rather whether on the facts of the individual case it operates to inculpate the other defendant.

Since Tompkins' statement was introduced at Dalton's severed trial without any articulated limitation, it was axiomatically inculpatory. Tompkins and Dalton were charged as co-conspirators; the court instructed the jurors that principals are equally guilty of the crimes. (39 RT 3879.)

Lest there remain any doubt about the incriminatory nature of Tompkins' statements, the jurors had only to listen to the prosecutor's closing argument. He told the jurors that they would have to decide whether or not Dalton was criminally responsible for the crime. (39 RT 3773.) He allowed that Tompkins was the one who actually committed the murder since he delivered the final blow, but he explained that the jurors would be given another instruction defining the people responsible for crimes, and under this instruction Dalton was equally guilty as an aider and abettor. "It makes no difference." "Either one applies. The ones who actually do the crime or aid and abet." "Under either theory, the defendant is criminally responsible, a principal of murder." (39 RT 3774.) Any ameliorative effect of the redaction was thus illusory.

It was alleged that Dalton and her coconspirators Baker and Tompkins tortured and murdered Melanie May, the truth of which had to be proved beyond a reasonable doubt by the prosecution. Tompkins' alleged admission that he tortured and killed May went to the central issue of the charge and irrefutably incriminated Dalton. Indeed, it virtually established her guilt. The absence of direct incriminatory references to Dalton therefore did nothing to minimize their significance as evidence inculpatory of Dalton. Redaction thus "cannot have had the prophylactic effect here that it presumptively has in the different context of *Bruton* . . . , when a statement of a non-testifying codefendant, besides being redacted, is admitted as evidence only against the codefendant who made the statement, and not against the defendant." (*Morten v. United States* (D.C. 2004) 846 A.2d 595, 602, internal quotes and citations omitted.)

Probably the most glaring problem with the redaction is that it rendered the statement false. In *Gray v. Maryland*, the majority had

suggested that the jointly tried codefendant's statement could have been redacted to omit any reference to a second party's involvement. In his dissent Justice Scalia observed:

> The Court minimizes the damage that it does by suggesting that "[a]dditional redaction of a confession that uses a blank space, the word 'delete' or a symbol . . . normally is possible." In the present case, it asks, why could the police officer not have testified that Bell's answer was "Me and a few other guys"? [Citation.] The answer, it seems obvious to me, is because that is not what Bell said. Bell's answer was "Me, Tank, Kevin and a few other guys." Introducing the statement with full disclosure of deletions is one thing; introducing as the complete statement what was in fact only a part is something else. And of course even concealed deletions from the text will often not do the job that the Court demands. For inchoate offenses – conspiracy in particular – redaction to delete all reference to a confederate would often render the confession nonsensical. *If the question was "Who agreed to beat Stacey?", and the answer was "Me and Kevin," we might redact the answer to "Me and [deleted]," or perhaps to "Me and somebody else," but surely not to just "Me" – for that would no longer be a confession to the conspiracy charge, but rather the foundation for an insanity defense.* To my knowledge we have never before endorsed – and to my strong belief we ought not endorse – the redaction of a statement by some means other than the deletion of certain words, with the fact of the deletion shown. The risk to the integrity of our system (not to mention the increase in its complexity) posed by the approval of such freelance editing seems to me infinitely greater than the risk posed by the entirely honest reproduction that the Court disapproves.

(*Gray v. Maryland*, *supra*, 523 U.S. at pp. 202-204 (dis. opn. of Scalia, J.) footnote omitted, emphasis added.)

The jury's function at trial is to attempt to reconstruct what occurred through the evidence presented at trial. That function is corrupted when the prosecutor and court intentionally misstate the evidence. By fundamentally

altering the statement to say that Tompkins alone tortured May, the statements became highly unreliable, confusing and misleading.

3. Tompkins' Hearsay Admissions Were Not Admissible to Establish Corpus.

The prosecutor ostensibly sought to introduce McNeely's testimony regarding Tompkins' statements to "prove the commission of the crimes." (3 CT 510 [Argument I of Prosecution's Points and Authorities in Support of Admission of Codefendant's Hearsay Statements].) He argued that the hearsay statements were proffered "to help establish the crimes charged, not to inculpate defendant Dalton." (*Ibid.*)[39] More than anything, this argument demonstrates the mendacity of the prosecutor and the weakness of his evidence. If the hearsay statement of an accomplice to an in-custody informant was the only evidence that certain elements of a crime even occurred, the prosecution case was seriously lacking.[40] Beyond that, there are several other problems with the prosecution's purported theory of admissibility.

a. Hearsay statements of an accomplice cannot be used to prove corpus.

"The corpus delicti of a crime consists of two elements [:] the fact of the injury or loss or harm, and the existence of a criminal agency as its cause." (*People v. Zapien* (1993) 4 Cal.4th 929, 985-986, internal quotations omitted.) In other words, in the case of unlawful homicide "[c]orpus delicti means, first, that a crime has been committed, that is to

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[39] Of course, the prosecutor argued otherwise to the jury. (See, e.g., Dusek's closing argument at RT 3770, 3772, 3780, 3796, 3798.)

[40] And in fact, as we have argued, Tompkins' statements are the *only* evidence of a number of allegations.

say, that the man is dead, and that his death has been caused by a crime." (*Regina v. Onufrejczyk* (1955) 1 Q.B. 388, 393 (per Lord Goddard, C. J.).)

In *Jones v. Superior Court* (1979) 96 Cal.App.3d 390, 396-397, the court ruled that the prosecution may *not* use the extrajudicial statements of a co-defendant to establish the *corpus delicti* of the crime charged against the accused. The court explained that "the policy reasons underlying the *corpus delicti* rule are equally applicable to the case where the *corpus delicti* is sought to be established by total reliance on the extrajudicial statements of a codefendant." (*Ibid.*) It concluded that to allow the extrajudicial statements of a codefendant to establish the *corpus delicti* would circumvent the policy behind the rule. "The prohibition against the formation of the *corpus delicti* by the extrajudicial statements of the accused should not be bent to allow proof of the *corpus delicti* through the extrajudicial statements of a codefendant, for the latter is no more trustworthy than the former." (*Id.* at p. 397.) Thus, the court held: "the corpus delicti of the crimes charged against the accused must be established independently of and without considering the extrajudicial statements of the accused or a codefendant." (*Ibid.*)

This rule is supported by Justice Mosk's concurring opinion in *People v. Jones, supra,* 17 Cal.4th 279, wherein he emphasized "the *corpus delicti* rule's importance in ensuring reliable determinations of guilt and, in capital cases, penalty. Though the rule is venerable, it is not a recondite academic curiosity or a quaint vestige of times when confessions commonly may have been extracted by torture or beating. Its importance endures." (*Id.* at p. 321.) As Justice Mosk explained:

> [T]he law's unease with uncorroborated confessions "stems from the possibility that the confession may have been

> misreported or misconstrued, elicited by force or coercion, based upon mistaken perception of the facts or law, or falsely given by a mentally disturbed individual. [Citations.] Thus, it is clear that the corpus delicti rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false." (*City of Bremerton v. Corbett* (1986) 106 Wash.2d 569, 576-577, 723 P.2d 1135, 1139.)

(*Id*. at p. 322.)

Justice Mosk expressed other concerns that particularly resonate in this case – the use of in-custody informants and the absence of a body in a murder case:

> The risk of erroneously executing an innocent individual because of a false confession appears to form one basis for the law's unease with convicting him or her solely on the basis of a confession. (Schwartz, [*California's Corpus Delicti Rule: The Case for Review and Clarification*] 20 UCLA. L.REV. at pp. 1063-1064.) In certain early English homicide cases "in which no body was found and conviction was based solely on a confession, the courts experienced the shock of having the person who had been thought dead turn up alive after his supposed murderer had been executed." (Note, *Proof of the Corpus Delicti Aliunde the Defendant's Confession* [1955] 103 U.PA. L.REV. at p. 638.)

(*People v. Jones*, *supra*, 17 Cal.4th at p. 322.)

It was Justice Mosk's view that the *corpus delicti* rule is not of "declining utility." "*If nothing else it is an important impediment to the growth of the pernicious industry of jailhouse informants*." (*People v. Jones*, *supra*, 17 Cal.4th at p. 323, emphasis added.) Justice Mosk concluded: "The potential for abuse should, especially in light of the problems with fabricated jailhouse-informant testimony in California, give pause to those who argue that the *corpus delicti* rule is less important than it

once was." (*Id.* at p. 324.)

b. The hearsay declarations were not admissible under People v. Epps.

In his argument in support of the introduction of Tompkins' hearsay statements, the prosecutor relied on *People v. Epps* (1973) 34 Cal.App.3d 146, to assert that declarations against interest are admissible "on the issue of whether or not a crime was actually committed." (3 CT 510.) He quoted from the case:

> None of the cases reviewed in this opinion suggest that it is *Bruton* or *Aranda* error to admit in evidence the admission or confession of one defendant, which reflects his commission of a crime that is revealed by the physical evidence, because it might reflect on the issue of whether or not a crime was actually committed by not only the declarant but also by another, whom evidence, other than the confession, links to the declarant's activities. In fact *Aranda* suggests the contrary.

(*People v. Epps*, *supra*, 34 Cal.App.3d at p. 157.)

Initially, it must be pointed out that the court in *Epps* was presented with a classic *Bruton* situation. The two defendants, Freeland and Epps, were tried jointly, and the declaration was admitted against only the declarant Freeland. The Court of Appeal observed that, "although it was Epps' presence at the time and place and under the circumstances that had developed at the time of his apprehension which incriminated him, *if he had demanded and secured a separate trial, the self-incriminating admissions of Freeland would not be admissible at all.*" (*People v. Epps*, *supra*, 34 Cal.App.3d at p. 157, emphasis added.) Accordingly, even under *Epps*, the self-incriminating admissions of Dalton's severed codefendant should not have been admitted. Furthermore, the court in *Epps* found that the statements attributed to Freeland were not binding on Epps and gave

appropriate limiting instructions.[41]

In addition, the prosecutor overstated the ruling in *Epps*. There, the extrajudicial statements did not directly implicate Epps.[42] They showed only that the codefendants were acquainted with each other, which was already suggested by the evidence.

Most importantly, at the time the case was cited by the prosecutor, this Court had disapproved of the precise language upon which the prosecutor relied. In *People v. Anderson*, *supra*, 43 Cal.3d at pp. 1122-1123, during the presentation of the codefendant's diminished capacity defense, each of the experts was cross-examined on the basis of his opinion and responded by recounting statements the codefendant had made incriminating the defendant. The defendant appealed, arguing that

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[41] The court gave CALJIC Nos. 2.08 and 2.09 and the following limiting instruction:

> Evidence has been admitted of a statement made by a defendant after his arrest. You are again instructed that you must not consider the evidence of such statement as against the other defendant. Your verdict as to each defendant must be rendered as if he were being tried separately. [¶] Certain evidence has been admitted for a limited purpose. You are admonished that it cannot be considered by you for any purpose other than the limited purpose for which it was admitted.

(*People v. Epps*, *supra*, 34 Cal.App.3d at p. 154 and fn. 4; see Argument I.C., *infra*.)

[42] In *Epps*, Freeland was arrested inside a building and admitted he was there to look for drugs. Epps was outside the building and claimed not to know Freeland. The only incriminatory effect of Freeland's statement was the possible inference that the two knew each other, which could give rise to the inference that they shared a common purpose. (*People v. Epps*, *supra*, 34 Cal.App.3d at pp. 156-157.) These facts are significantly different than those of this case.

admission of his codefendant's extrajudicial statements was error under *Bruton* and *Aranda*. (*Id.* at p. 1118.) This Court found that "the admission of the statements [codefendant] Sheila made to the experts was plainly error" under *Bruton* and *Aranda*, but concluded that the error was harmless beyond a reasonable doubt. (*Id.* at pp. 1122, 1129.)

In finding error, this Court dismissed the Attorney General's contention, based on language in *Epps* and other cases, that "it is not *Bruton-Aranda* error to admit extra-judicial statements that incriminate the defendant as well as the declarant codefendant when substantial independent evidence links the defendant to the crime." (*People v. Anderson*, *supra*, 43 Cal 3d at pp. 1122-1123.) As this Court explained, the substantiality of the other evidence goes not to whether the court erred in admitting the statements but to whether "the manifest error thus committed was prejudicial." (*Id.* at p. 1123.) Accordingly, it ruled that to the extent that *People v. Jackson* (1979) 92 Cal.App.3d 556, *People v. Romo* (1975) 47 Cal.App.3d 976, and *People v. Epps*, 34 Cal.App.3d 146, "suggest otherwise they are unsound . . . and are accordingly disapproved." (*Ibid.*, internal citation omitted.)

This Court stated that the unreliability of a codefendant's incriminating statements is "plainly not affected by the purpose for which they are introduced at trial. Nor is their impact: as we have observed, the accusation of the person who claims not only to have witnessed the defendant's act but also to have been his partner in crime – for whatever purpose it is received – is manifestly the kind of evidence that jurors cannot put out of their minds." (*People v. Anderson*, *supra*, 43 Cal.3d at p. 1124, citations omitted.)

If the prosecutor overstated the ruling in *Epps*, he understated the

intended purpose of Tompkins' statements. Many of Tompkins' alleged statements had nothing to do with *corpus*. McNeely's gratuitous testimony that Tompkins "seemed to enjoy" torture, said he was "really into violence. . . and the violent scene," and "pain was the name of the game" added nothing to the case against Dalton but served only to instill fear and outrage in the jurors.

For all these reasons, the testimony of McNeely should never have been presented to Dalton's jury. Moreover, even if the testimony *were* admissible under some unarticulated and fractured legal reasoning, it would only be so, provided the court properly instructed the jurors regarding McNeely's status as an accomplice and allowed the defense ample opportunity to impeach McNeely's credibility. The court did neither.

C. THE TRIAL COURT ERRED IN FAILING TO ADEQUATELY INSTRUCT THE JURY REGARDING THE SUSPECT NATURE OF THE STATEMENTS AND THE DECLARANT AND THE NEED FOR INDEPENDENT CORROBORATING EVIDENCE.

Once it allowed McNeely to testify regarding Tompkins' alleged statements, the court was obliged at least to instruct the jurors regarding Tompkins presumed unreliability and the need for corroboration of his statements. It did neither of these things. The failure to read standard CALJIC accomplice instructions misled the jurors and exacerbated the undeniable prejudice resulting from the unrestricted admission of the hearsay statements.

1. The Court Erred in Failing to Give Appropriate Accomplice Instructions as to Tompkins.

It is the duty of the trial court in a criminal case to give, on its own motion, instructions on the pertinent principles of law regarding accomplice testimony whenever the trial testimony is sufficient to warrant the

conclusion that a witness implicating a defendant was an accomplice. (*People v. Gordon* (1973) 10 Cal.3d 460, 466.) The appropriate instructions, whether the witness is found to be an accomplice by the court as a matter of law or found to be such by the jury as a factual issue, are (1) that the testimony of the accomplice witness tending to incriminate the defendant is to be viewed with caution (*People v. Guiuan* (1998) 18 Cal.4th 558, 569; see also CALJIC No. 3.18)[43], and (2) that the defendant cannot be convicted on the basis of the accomplice's testimony unless it is corroborated by such other evidence as shall connect the defendant with the commission of the offense (Pen. Code, § 1111; see also CALJIC No. 3.11).

Penal Code section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." The evidence in this case unquestionably establishes that Tompkins and Baker were, as a matter of law, accomplices of Dalton. They had been charged with identical crimes and were alleged to have participated in the commission of the crimes. The prosecutor regarded them both as such, and that they were accomplices was never disputed at trial. (See *People v. Ferlin* (1928) 203 Cal. 587, 601.) It was the duty of the trial court, therefore, to instruct the jury that both Tompkins and Baker were, *as a matter of law*, accomplices of the defendant. (*Ibid*; see also *People v.*

[43] The trial court gave the jurors the older version of CALJIC No. 3.18, informing them they should view the testimony of an accomplice with distrust. (8 CT 1684; 39 RT 3881.) The 1990 revision of CALJIC No. 3.18 (July 2002 Pocket Part at 32) informs the jurors they should view the testimony of an accomplice with caution. CALJIC No. 3.18 was revised in compliance with this Court's decision in *People v. Guiuan*, *supra*, 18 Cal.4th at p. 569.

Zapien, *supra*, 4 Cal.4th at p. 982 ["If the testimony establishes that the witness was an accomplice as a matter of law, the jury must be so instructed. [Citation.]"].)

The court properly informed the jurors that Sheryl Baker was an accomplice, instructing them,

> If the crimes of murder and conspiracy to commit murder were committed by anyone, the witness Sheryl Baker was an accomplice as a matter of law and her testimony is subject to the rule requiring corroboration.

(39 RT 3881; see CALJIC No. 3.16.)[44]

The court failed, however, to so instruct as to Tompkins. And by failing to mention Tompkins while specifically identifying Baker, the court suggested that the accomplice instructions did not apply to Tompkins' statements, thus denying Dalton the protection intended by Penal Code section 1111.[45] Similarly, by failing to define an accomplice in general terms, but only as it applied to Baker – the accomplice as a matter of law – there was a reasonable likelihood that the jurors believed that the accomplice instructions applied to Baker alone.[46] That is certainly what the

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[44] The trial court also gave CALJIC Nos. 3.10, 3.11, 3.12, 3.16, and 3.18 on how to view accomplice testimony. (8 CT 1680-1684.)

[45] Section 1111 provides in pertinent part:

> A conviction cannot be had upon the testimony of an accomplice unless it is corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

[46] In addition, although this Court has held that under Penal Code section 1111, the term "testimony" encompasses out-of-court statements,

(continued...)

prosecutor assumed. In his closing argument, he referred to the accomplice instructions, relating them directly – and exclusively – to Baker. "And, finally, the court tells you what is common sense. The testimony of an accomplice ought to be viewed with distrust. Sure, you should. You know she [Baker] is part of the crime. She got a great deal." (39 RT 3778.)

While the error might be understandable given the supposedly limited admissibility of Tompkins' statements, where the limitation was never articulated to the jurors, the failure to mention the applicability of the accomplice instructions meant that the jurors were not only allowed to improperly use Tompkins' statements to prove Dalton's guilt, but also allowed to do so without the benefit of cautionary instructions that would be required if they had *been* admitted to prove guilt. They were free to make findings on the basis of his statements alone.

The jurors' unrestricted reliance on Tompkins' statements to prove guilt was assured by the court's failure to give CALJIC No. 3.19, which would have informed the jurors that they could determine whether a witness was an accomplice.[47] Without such an instruction, the jurors in this case had no way of knowing that they were free to find that someone not so identified by the court – that is, Tompkins – could also be an accomplice.

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[46] (...continued)
the trial court did not modify CALJIC No. 3.18 to reflect this. As a result, the jurors undoubtedly understood that only *testimony* of an accomplice, not out-of-court statements, should be viewed with distrust and required corroboration before they could be used as proof of the defendant's guilt. (*People v. Belton* (1979) 23 Cal.3d 516, 526-527.)

[47] CALJIC No. 3.19 – Burden to Prove Corroborating Witness is an Accomplice – instructs the jurors that they "must determine whether the witness _________ was an accomplice as I have defined the term."

The court also erred in failing to instruct that one accomplice cannot corroborate another accomplice. CALJIC No. 3.13 provides that "[t]he required corroboration of the testimony of an accomplice may not be supplied by the testimony of any or all of [his] [her] accomplices, but must come from other evidence."[48]

This error allowed the jurors to use Tompkins' statements to corroborate accomplice Baker's testimony. The jurors undoubtedly did so, because that is just what the prosecutor invited them to do. Dusek first argued that the absent codefendant Tompkins could be channeled through the witness McNeely: "T.K. and McNeely. I linked them together because Mr. McNeely only knows what T.K. told him. He has no independent knowledge of what happened. All he can relate is what he was told by Mr. Tompkins, and it matches [Fedor's testimony]. It matches right down the line." (39 RT 3770.)

Dusek then argued that McNeely's account of what Tompkins allegedly related to him amounted to "direct evidence, eye witness evidence . . . from Mr. Tompkins through Mr. McNeely." (39 RT 3771-3772.)

> You got Mr. Tompkins, somebody who was there. He talked about the torture murder in June of '88 out in the mountains, in Live Oak Springs, at a trailer.
>
> He talked about the screwdriver, about using a knife, skillet and electricity and the hotshot. He said that he finally stabbed her. He finally killed her. She did not die quickly, so he stabbed her, he killed her, an eyewitness, a participant in this crime, and that he buried her on an Indian reservation because it is harder to get search warrants over there. Pretty

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[48] When the prosecution relies upon out-of-court statements, as opposed to testimony, "the trial court should substitute the word 'statement[s]' for 'testimony' . . . ." (*People v. Andrews* (1989) 49 Cal.3d 200, 215, fn. 11.)

sophisticated thinking.

(39 RT 3772.)

The prosecutor then argued that Baker was another eyewitness, corroborated by other witnesses, *including* accomplice Tompkins. (39 CT 3772.) "T.K. and McNeely back up Sheryl Baker. They talk about the weapons that were used and how T.K. eventually killed her." (39 RT 3780.) In fact, McNeely was the only one who talked about a screwdriver or electric cords being used – and those hearsay statements of an accomplice are not sufficient to prove beyond a reasonable doubt that those instruments were in fact used. Those unconfronted allegations introduced through a jailhouse informant do not amount to "direct evidence, eye witness evidence," and the court should have so informed the jurors. (39 RT 3771-3772.)

2. The Failure to Give Required Instructions Violated Dalton's Constitutional Rights.

The due process roots of the accomplice cautionary instruction are well-documented. (See *People v. Guiuan*, *supra*, 18 Cal.4th at pp. 564-569.) The concept is recognized as an important component of the defendant's right to a fair trial and to a reliable jury verdict. (*Ibid.*) Accordingly, the court's failure to properly instruct the jury on accomplice testimony as it applied to Tompkins violated Dalton's federal constitutional rights to due process and a fair jury trial under the Fifth, Sixth and Fourteenth Amendment. (See *Montana v. Egelhoff* (1996) 518 U.S. 37, 43 [historical practice is guide in determining "fundamental principles of justice" for due process analysis]; see also *Medina v. California* (1992) 505 U.S. 437, 446.) The instructional error also violated Dalton's right to reliable guilt and penalty verdicts under the Eighth Amendment.

The failure to give accomplice instructions as to Tompkins and the failure to give CALJIC No. 3.13 also lessened the prosecution's burden of proof by erroneously eliminating any possibility that the jurors would look for corroboration of Tompkins' hearsay statements. It also meant that the jurors could find that Baker was sufficiently corroborated by Tompkins and Tompkins sufficiently corroborated by Baker – neither of which was legally acceptable. Since the jury was not informed of the actual parameters of accomplice principles for the purposes of evaluating Tompkins' hearsay statements and proper corroboration, the prosecution's burden of proof was significantly reduced.

The United States Supreme Court has written, "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.) Jury instructions that relieve the government of this burden violate a defendant's due process rights. (See *Francis v. Franklin* (1985) 471 U.S. 307; *Sandstrom v. Montana* (1979) 442 U.S. 510.)

D. THE PREJUDICIAL EFFECT OF ADMITTING HEARSAY STATEMENTS THROUGH MCNEELY WAS EXACERBATED BY THE COURT'S ERRONEOUS RULINGS RESTRICTING IMPEACHMENT OF MCNEELY. [49]

The trial court refused to afford the defense an opportunity to fully

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[49] Appellant has also argued that even if the trial court correctly ruled that McNeely's testimony was admissible, the court's improper restriction of impeachment of McNeely was independent and prejudicial error. (Argument IX.)

and accurately cross-examine McNeely and reveal to the jurors his skill at and observed proclivity for manipulation and deceit. Instead, the court severely, unnecessarily and erroneously curtailed the defense's ability to impeach this critical prosecution witness.

1. The Court Erred in Refusing to Allow Impeachment of McNeely with Evidence of Prosecutor Dusek's Previously Expressed Views of McNeely's Unreliability.

a. Introduction and facts below.

The defense attempted to impeach McNeely's credibility with evidence that prosecutor Dusek had previously described this witness as a conman, thief, manipulator and accomplished criminal who would do anything possible to avoid a prison sentence. The trial court's ruling that such evidence was inadmissible hearsay was error.

The record establishes that prior to Dalton's trial, McNeely pled guilty to eight counts of residential burglary, in a case prosecuted by Deputy District Attorney Dusek. As noted above, when prosecuting McNeely in his burglary cases, Dusek described him in no uncertain terms:

> By outward appearances and lifestyles [Donald McNeely] does not fit the stereotype of the typical burglar that comes through this court. But if the court is able to examine what really counts, the man's soul and conscience, it will discover a confirmed thief and conman. The only difference between this burglar and the vast majority is that this defendant is not satisfied with a "nickel and dime haul." The defendant has the looks, brains, and wherewithal to make the big score. In fact, he scored big eight separate times.

(6 CT 1078 [Dusek's statement in aggravation filed in *People v. Donald Richard McNeely*, San Diego County Superior Court Case No. 105810].) Dusek concluded by stating, "The defendant is an accomplished criminal. He should be treated as such." (6 CT 1079.)

After McNeely attempted to withdraw his plea Dusek filed a written motion in opposition in which he stated, "The defendant is a manipulator and his manipulations did not bear fruit." (6 CT 1108.) Dusek referred to McNeely's allegations as "outrageous and irresponsible," and concluded that McNeely was "a desperate man" willing to "resort to any tactic to postpone a lengthy prison sentence." (6 CT 1109.)

At Dalton's trial, defense counsel served the prosecutor with a letter notifying him of their intention to call Dusek and Robert Phillips[50] as defense witnesses to impeach McNeely's credibility. (See 5 CT 1029 et seq.) Dusek asked that counsel serve the prosecutors with a subpoena and, when they did, moved to quash the subpoena. Dusek argued that the sentencing statement was inadmissible hearsay. (*Ibid.*) He also suggested that because sentencing memoranda were routinely filed in every case, and made without the prosecuting attorneys having personally spoken with the defendants, the value of the statements was somehow diminished. (29 RT 2476.)[51]

Trial counsel argued that, by presenting the testimony of McNeely, Dusek was offering him as a credible witness. The jurors thus were entitled to hear Dusek's previously-proffered contrary assessment. (29 RT 2477.)

The trial court quashed the subpoena and refused to allow the testimony, despite its obvious relevance and importance to the defense case,

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[50] Mr. Phillips was another deputy district attorney who prosecuted McNeely in the burglary case. (29 RT 2476.)

[51] Of course, as he explained in McNeely's criminal case, Dusek had been assigned to McNeely's prosecution from its origination in the office (see 6 CT 1106 [Declaration in support of Opposition to Motion to Set Aside Plea of Guilty]) and Dusek professed great insight into McNeely's "soul and conscience." (6 CT 1078.)

reasoning, first, that no attorney who is a party to a case should be called as a witness, absent a compelling need.[52] And there was no compelling need because McNeely would be impeached with prior convictions. Additional impeachment would only be cumulative. (29 RT 2473, 2478.) Second, the court believed that there was nothing in the statement in aggravation "where Mr. Dusek states an opinion with regards to the truthfulness and veracity of the potential witness." (*Ibid.*)[53]

The trial court's reasons for excluding the evidence are supported by neither law nor logic. Dalton's Sixth and Fourteenth Amendment right to defend, fundamental principles of fairness and her Eighth Amendment right to reliable guilt and penalty determinations required that the jurors know that the prosecutor at one time believed something different from what he was arguing to them.[54] Under the evidentiary rule that allows use of admissions by a party-opponent (Evid. Code, § 1220), Dalton should have

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[52] Trial counsel's offer to present the evidence by way of stipulation to avoid Dusek having to testify was ignored. (29 RT 2475.)

[53] The court also refused to permit counsel to question McNeely about the views Dusek expressed. On cross-examination, trial counsel asked McNeely whether he considered himself "to be a confirmed thief and con man?" McNeely answered, "I would say at one time, yea, that's – hu-huh, would have been appropriate. Prison has changed me somewhat." (32 RT 3082.) Counsel then asked, "Would you agree with this statement about you, that you're a manipulator." The prosecutor's objection "irrelevant as to what the statement is," was sustained. (*Ibid.*) In response to another question, McNeely stated that while others might say he was a manipulator, he did not consider himself to be one. (*Ibid.*)

[54] Defense counsel argued that the court's ruling denied Dalton her "right to confrontation under the 6th Amendment, right to due process under the 5th Amendment" and comparable state constitutional grounds. (29 RT 2477.)

been allowed to introduce Dusek's prior statements.

b. Dusek's expressed appraisal of McNeely's unreliability was relevant, reliable and admissible.

Nothing in this case corroborated or substantiated McNeely's testimony. At the same time, there was ample reason to suspect that he was lying. Apart from his well-documented history of manipulation and deceit, McNeely had access to police reports and transcripts that contained the information he claimed to have heard from Tompkins. Nonetheless, the prosecution presented McNeely as a disinterested and credible witness. As Dusek well knew, he was neither.

Dusek's statements were not inadmissible hearsay but party admissions that should have come in to inform the jurors of the inconsistencies in Dusek's positions. Evidence Code section 1220 provides:

> Evidence of a statement is not made inadmissible by the hearsay rule when offered against the declarant in an action to which he is a party in either his individual or representative capacity, regardless of whether the statement was made in his individual or representative capacity.

A number of cases have endorsed the admission of prosecutors' statements in related cases as party admissions. (See, e.g., *United States v. DeLoach* (11th Cir.1994) 34 F.3d 1001, 1005-1006 [statement of government prosecutor]; *United States v. McKeon* (2d Cir.1984) 738 F.2d 26, 33; *United States v. Salerno* (2d Cir.1991) 937 F.2d 797, 811-812 [statement of government prosecutor]; *United States v. Kattar* (1st Cir. 1988) 840 F.2d 118; *United States v Morgan* (D.C.Cir. 1978) 581 F.2d 933 [where the prosecutor "has indicated in a sworn affidavit to a judicial officer that it believes particular statements are trustworthy, it may not sustain an objection to the subsequent introduction of those statements on

grounds that they are hearsay"]; see also *United States v. Warren* (D.C.Cir.1994) 42 F.3d 647, 655 [statement of government agent]; *United States v. American Telephone & Telegraph Company* (D.D.C.1980) 498 F.Supp. 353, 357-58 [statements of government agencies].)

Remarkably similar concerns were at stake in *United States v. Kattar*, *supra*, 840 F.2d 118, where the defendant was tried for extorting money from the Church of Scientology. In his defense, Kattar attempted to introduce evidence of the government's previous highly negative characterizations of the Church to impeach a government witness's favorable testimony about the Church.

Kattar offered a sentencing memorandum submitted to the federal court by the Justice Department following a successful prosecution of high-level Church officials for nine counts of aiding and abetting burglary. In it, the government characterized the defendants' "brazen and persistent burglaries and thefts" as "but one minor aspect of the defendants' wanton assault upon the laws of this country." (*United States v. Kattar*, *supra*, 840 F.2d at p. 126.) In addition, Kattar sought to introduce a government brief filed in a civil case instituted by the Church against the F.B.I. The brief contained allegations against Church policies that directly contradicted the government witness's testimony at Kattar's trial. (*Ibid.*) The trial court allowed the government's witness to be impeached with the brief, but excluded the document from evidence, even after it was redacted. (*Ibid.*)

On appeal, the Court of Appeals found that the government was a "party-opponent" for purposes of Rule 801(d)(2) of the Federal Rules of

Evidence, the federal hearsay exception.[55] (*United States v. Kattar*, *supra*, 840 F.2d at. at p. 131.)

The Court of Appeals held that "the inconsistency of the government's positions about the Church should have been made known to the jury." (*United States v. Kattar*, *supra*, 840 F.2d at p. 131.) The court "could find no indication in the record as to the reasons for the trial judge's exclusion of the redacted briefs offered by the defendants. They were not hearsay . . . and they were certainly material to the defense." (*Ibid.*)

The Court of Appeals rejected Kattar's claim that the government presented knowingly false evidence because the court found that those portions of the testimony by the government witness that were directly contradicted by the Justice Department pronouncements made in the

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[55] The federal statute is comparable to Evidence Code section 1220, and the cited subsection provides that the following is *not* hearsay:

> (2) **Admission by party-opponent**. The statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or © a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish the declarant's authority under subdivision ©, the agency or employment relationship and scope thereof under subdivision (D), or the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

sentencing memorandum and the brief were related only to the counts on which Kattar was acquitted. Nevertheless, the court found it:

> [D]isturbing to see the Justice Department change the color of its stripes to such a significant degree, portraying an organization, individual, or series of events variously as virtuous and honorable or as corrupt and perfidious, depending on the strategic necessities of the separate litigations. Having previously acknowledged the Church's illegal practices . . . the government should not have attempted in this case to describe the Church as a righteous organization without any designs to unfairly discredit its enemies, in order that the defendant's actions would seem more egregious.

(*United States v. Kattar*, *supra*, 840 F.2d at p.127.)

The prosecution's flip-flop was no less disturbing in this case. Dusek portrayed McNeely as a selfless Samaritan who sought nothing in return for informing on Tompkins. On direct-examination, Dusek elicited from McNeely that he went to his attorney with the alleged information from Tompkins because of his innate sensitivity: McNeely explained, "Well, I'm not a violent person myself, and I – after hearing – you know, after hearing it over the course of days and weeks it – it really got to me after a while; and if you start the feel [sic] for this – " His answer was interrupted by trial counsel's relevance objection, which the court sustained, but then denied counsel's motion to strike the answer. (32 RT 3076.)[56] Dusek brought out that McNeely acted only out of concern, allegedly obtaining nothing in exchange for the information he provided. "No. I had

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[56] This was not the first or only time the trial court failed to strike the responses to sustained objections. (See 30 RT 2592, 2595, 2609; 32 RT 3024; 35 RT 3363-3364.) The court's failure to strike those answers diluted the impact the court's rulings and could only have confused the jurors about what evidence could be considered.

already pled guilty to my case at that time. I didn't – that really wasn't my object [sic] at the present time." (32 RT 3077-3078.)

Dusek capitalized on this testimony during his closing: "And one of the considerations on the jailhouse informant is you should consider the extent to which their testimony may have been influenced by the receipt of or expectations of any benefits to be gained by – by testifying. What kinds of deals were they going to get, did they expect to get?" (39 RT 3860.) Dusek argued McNeely got no benefits, yet, "he still came forward." (39 RT 3861.)

Dusek also portrayed McNeely as an innocent victim of hostile questioning and unfair innuendo by defense counsel:

> Donald McNeely was attacked here, asking you to create the impression, the inference that he's in there reading police reports, trying to get his story straight. It took Al Fenton who-knows-how-long to get ready for the prelim, to figure out what happened; and McNeely is in there, little guy, cell, with bad people; and he's going to pull out somebody's reports and read them.

(39 RT 3866.)

According to Dusek when he prosecuted McNeely, surreptitious reading of police reports is precisely the kind of conduct in which McNeely would engage. Dusek's words at Dalton's trial would have rung less true to a juror who knew that he had once described McNeely as a skilled conman and thoroughly dismissed his claims as "ludicrous," "outrageous" and "irresponsible." (6 CT 1108-1109.)

The trial court's characterization of Dusek's statements as cumulative is unfounded. The mere fact that a prosecution witness has a prior record, even when combined with other impeaching evidence, does not render otherwise critical impeachment evidence cumulative. (*United*

States v. Steinberg (9th Cir.1996) 99 F.3d 1486, 1489-1492.) In *United States v. Benn Lambert* (9th Cir. 2002) 283 F.3d 1040, 1056, the court stated:

> The fact that other impeachment evidence was introduced by the defense does not affect our conclusion. Where, as here, there is reason to believe that the jury relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial.

It especially has no cumulative impact on evidence that the *prosecutor presenting* the witness had earlier characterized – and dismissed – the witness as a confirmed conman.

Moreover, it is Dusek's earlier description, itself, that demonstrates that its introduction was not cumulative, but necessary to adequately impeach McNeely. Dusek explained, "By outward appearances and lifestyles [Donald McNeely] does not fit the stereotype of the typical burglar that comes through this court. * * * The defendant has the looks, brains, and wherewithal to make the big score." (6 CT 1078.)

The court's comments about McNeely when it ruled on the motion for new trial also underscore the need for adequate impeachment of this witness. The court ruled that it, and undoubtedly the jurors, found McNeely credible. (48 RT 4631.) So, too, did McNeely's burglary victims. That is why they allowed him to enter their homes. The jurors undoubtedly would have had a different view had Dusek's views (and the circumstances of McNeely's crimes [see Argument I. D. 2, below]) been introduced. Dusek's words discredit McNeely's otherwise reliable presentation –

despite his outward appearance, he cannot be trusted. The evidence clearly would have created substantial doubt as to McNeely's credibility in a way that no other evidence could have.

2. The Court Committed Prejudicial Error in Refusing to Allow Examination Regarding the Circumstances of McNeely's Prior Felonies.

During cross-examination, defense counsel attempted to question McNeely about the circumstances of his prior residential burglaries in order to reveal his deceptive nature *and* his skill at convincing people of his sincerity and trustworthiness while lying to their faces. (32 RT 3083.) After the prosecutor's objection was sustained, counsel explained at sidebar that they wished to question McNeely about the underlying facts of the felonies in support of their theory that McNeely was being deceptive in this case – simply reciting information he read in Tompkins' papers in the jail cell they shared. (32 RT 3084-3085.) Counsel reasoned that the deceptive nature of the crimes McNeely committed was relevant impeachment. The court disagreed, ruling that McNeely could only be impeached with the fact of the felony convictions. (32 RT 3084-3085.) The court erred in its reasoning and ruling, violating Dalton's rights to confrontation and cross-examination, to a fair trial, to due process of law, to present a defense, and to a reliable determination of both guilt and penalty. (U.S. CONST., 5th, 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15; *Davis v. Alaska* (1974) 415 U.S. 308, 316; *Delaware v. Van Arsdall* (1986) 475 U.S. 673.)

The Confrontation Clause of the Sixth Amendment guarantees a defendant the right to cross-examination of the witnesses against him, to test "the believability of a witness and the truth of his testimony." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 316; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at pp. 678-680 [Sixth Amendment implies a right to "'expose to the jury the

facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness'"].)

A violation of the Confrontation Clause is stated where a defendant is prohibited from engaging in otherwise appropriate cross-examination designed . . . "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." (*Davis v. Alaska*, *supra*, 415 U.S. at p. 318; *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) On cross-examination,

> the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness.

(*Davis v. Alaska*, *supra*, 415 U.S. at p. 316.)

Under California law at the time of Dalton's trial, the parameters of impeachment evidence were set forth in Article I, section 28, subdivisions (d) and (f) of the California Constitution. By its plain terms, section 28 subdivision (d) requires the admission in criminal cases of all "relevant" proffered evidence except under clearly delineated circumstances not present here. (*People v. Wheeler* (1992) 4 Cal.4th 284, 292; see Evid. Code, §351 ["Except as otherwise provided by statute, all relevant evidence is admissible"].)[57] The enactment of this subdivision removed the statutory

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[57] See also Evidence Code section 210, which provides that relevant (continued...)

limits placed on impeachment with specific acts of prior criminal misconduct,[58] other than a felony conviction. (*People v. Wheeler*, *supra*, 4 Cal.4th at pp. 291-292, citing *People v. Mickle* (1991) 54 Cal.3d 140, 168 [impeachment of jailhouse informant with evidence he had threatened witnesses in his own case]; *People v. Harris* (1987) 47 Cal.3d 1047 [prior reliability of a police informant admissible to attack or support witness's credibility].)

Article I, section 28, subdivision (f) provides that felony convictions can be used to impeach a witness "without limitation." In *People v. Castro*, this Court ruled that Section 28, subdivision (f) authorizes the use of any felony conviction of moral turpitude, even if the immoral trait is one other than dishonesty. (*People v. Castro* (1985) 38 Cal.3d 301, 315-317.) This Court reasoned,

> it is undeniable that a witness' moral depravity of any kind has "some tendency in reason" [citation] to shake one's confidence in his honesty. . . . [¶] There is then some basis – however tenuous – for inferring that a person who has committed a crime which involves moral turpitude other than dishonesty is more likely to be dishonest than a witness about whom no such thing is known..

(*Id.* at p. 314, fn. omitted; accord, *People v. Wheeler*, *supra*, 4 Cal.4th at p.

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[57] (...continued)
evidence means "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

[58] See Evid. Code, §§ 787-788.

295.)[59]

Since a witness may be impeached with conduct evidence other than felony convictions, the determination of whether certain prior misconduct is admissible to impeach a witness involves an analysis of both subdivision (d) and (f). Conduct reflecting moral turpitude may be separately admissible to impeach under 28(d) even if the conduct resulted in a felony conviction admissible under 28(f).

In this case, McNeely had been convicted of eight prior felonies of moral turpitude – residential burglary. The fact of these convictions – even eight of them – is far less impeaching of McNeely's credibility than the conduct underlying them. Nothing could have more of a "tendency in reason to prove or disprove" McNeely's honesty and veracity that the most basic description of his brazen home burglary method. Home burglaries can be committed in many ways and circumstances.[60] The methodology of McNeely's crimes suggest not only a proclivity to lie, but also an ability to

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[59] As discussed in Argument IX., infra, this Court has since recognized that the *Castro* federal due process rationale for exclusion of felonies not involving moral turpitude was undermined by the United States Supreme Court in *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 508-527, fn. 4. (See *People v. Wheeler*, *supra*, 4 Cal.4th at p. 296, fn. 6.) Accordingly, notions of federal due process no longer support the *Castro* decision, if they ever did. (*Ibid*; see also *People v. Clair* (1992) 2 Cal.4th 629, 655 [subdivision (f) "militates in favor of allowing a party to use any prior felony conviction to impeach any witness in any criminal proceeding".]

Since McNeely's crimes unquestionably involved moral turpitude, the distinction has no impact here.

[60] This Court has noted that a conviction for burglary does not necessarily involve an intent to deceive, defraud, lie or steal. (See *People v. Holt* (1984) 37 Cal.3d 436, 453.)

do so quite well. It demonstrated that McNeely was, as Dusek observed, a conman with "the looks, brains, and wherewithal to make the big score." (6 CT 1078.) McNeely did not sneak into people's homes; he met his victims face-on and lied his way into their homes, posing as an exterminator. The home burglaries take on a different and far more relevant weight when the underlying conduct is presented. Dusek recognized this as well, observing that "[b]y dressing up as a bug exterminator, the defendant [McNeely] intentionally built up a feeling of trust with the housekeeper. He then took advantage of that trust when he worked his way into the bedroom and stole the jewelry." (6 CT 1076.) The circumstances of the felonies were far more damaging to McNeely's credibility than the impeachment evidence of prior felony convictions. McNeely was the type of person who would – and could – subvert the court's truth-finding process for selfish reasons.

This Court recognized in *Wheeler* that impeachment evidence other than felony convictions entails problems of proof, unfair surprise and moral turpitude evaluations not present in felony convictions. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 296.) Where, as here, however, the moral turpitude evidence resulted in a felony conviction, the problems of proof and unfair surprise vanish. As this Court noted in *Wheeler*, a felony conviction "reliably establishes that the witness committed corresponding criminal acts; [and] a party or witness is unlikely to be surprised by use of felony convictions for impeachment." (*Id.* at p. 297, fn.7.)

In addition, as was true in *Wheeler*, "[t]his was not a case in which the prosecution sought to impeach an *accused* witness with evidence of her prior crimes. Hence, there was no danger that the prior-crimes evidence would create unfair prejudice on the issue of guilt or innocence" of the

defendant on trial. (*People v. Wheeler*, *supra*, at p. 297, fn.9.)

Moreover, the defense did not attempt to retry the convictions. Counsel simply wanted the jurors to know that the burglaries of which McNeely was convicted involved face-to-face deception.

The cross-examination sought by Dalton was therefore relevant, probative and admissible. The trial court's denial of cross-examination on this point was, therefore, clearly erroneous.

A constitutional violation of a defendant's Sixth Amendment right of confrontation occurs when the excluded testimony could have produced "a significantly different impression of [the witness's] credibility. . . ." (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 680.) In assessing the prejudice from a wrongful denial of cross-examination, this Court is to assume "that the damaging potential of the cross-examination were fully realized," before determining whether the error was harmless beyond a reasonable doubt. (*Id.* at p. 684.) Relevant factors in that determination include the importance of the witness' testimony to the prosecution case, the presence or absence of evidence corroborating or contradicting the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution case. (*Ibid.*)

This was a weak case, and, as noted throughout this argument, McNeely was vital to the prosecution's case. Moreover, Dusek suggested that McNeely, although an informant, should be viewed like other witnesses – with care and caution (39 RT 3860), contrary to the law and what Dusek knew McNeely to be – a skilled conman. (6 CT 1078.) In fact, McNeely should not have been treated merely as an informant. The excluded evidence showed him to be far more developed and adept at deceit than your average informant. He was a highly untrustworthy witness who was

protected by the court's erroneous rulings from complete and meaningful impeachment.

3. The Court Committed Prejudicial Error in Refusing to Allow Impeachment With Prior Misdemeanor Misconduct Involving Moral Turpitude.

As explained above, misdemeanor conduct may be used to impeach credibility if it bears on the witness's veracity. (*People v. Wheeler*, *supra*, 4 Cal.4th 284.) Nevertheless, the trial court in this case ruled that it was "not going to allow misdemeanor priors to be used for impeachment and the reason for that is the time consumption involved in proving up the misdemeanor." (29 RT 2480.) As appellant has discussed more fully in Argument IX., *infra* (incorporated herein by reference), the court erred in so restricting Dalton's efforts to impeach the prosecution witnesses. This error was particularly Prejudicial as it applied to McNeely, as the misdemeanors show a pattern of deception and manipulation beginning as early as 1982, and not ending until his spree of residential burglaries that resulted in prolonged incarceration.

Counsel sought to impeach McNeely with, in addition to his felony convictions, conduct underlying a 1982 misdemeanor conviction of Penal Code section 273g (degrading, immoral, or vicious practices or habitual drunkenness in presence of children); conduct underlying a 1982 misdemeanor violation of Penal Code section 476a (checks, drafts or order on banks; insufficient funds; intent to defraud); conduct underlying a 1984 misdemeanor conviction of Penal Code section 459 (burglary); and conduct underlying a 1987 misdemeanor conviction of Penal Code section 487.1 (grand theft). (6 CT 1197.) Dusek objected to the introduction of this impeaching evidence. The court ruled:

With regard to the impeachment of [Donald] Richard

> McNeely, 1982 to 1987 convictions, I find those are all remote; secondly, they are all excluded under 352 because the undue consumption of time outweighs any probative value and in light of the fact he has at least ten felony moral turpitude convictions that may be used for impeachment.

(30 RT 2510.)

The court abused its discretion in making this ruling, violating Dalton's rights to confrontation and cross-examination, to a fair trial, to due process of law, to present a defense, and to a reliable determination of both guilt and penalty. (U.S. CONST. Amends. 5th, 6th, 8th, & 14th Amends.; CAL. CONST., art. I, §§ 7, 15.)

Quite clearly, evidence of McNeely's prior "degrading, immoral, or vicious" practices in the presence of children, passing of bad checks, burglary and grand theft are all crimes of moral turpitude. (See, e.g., *People v. Beagle* (1972) 6 Cal.3d 441, 453, superceded by statute as stated in *People v. Castro*, *supra*, 38 Cal.3d 301 [deceit, fraud, cheating or stealing are "'universally regarded as conduct which reflects adversely on a man's honesty and integrity'"]; see also *People v. Almarez* (1985) 168 Cal.App.3d 262, 267 [forgery and burglary are crimes of moral turpitude]; *People v. Hunt* (1985) 169 Cal.App.3d 668, 675 [burglary]; *People v. Parrish* (1985) 170 Cal.App.3d 336, 349-350 [forgery and voluntary manslaughter]; *People v. Stewart* (1985) 171 Cal.App.3d 59, 63 [robbery]; *People v. Knowlden* (1985) 171 Cal.App.3d 1052, 1056 [all burglaries, even if target offense does not involve dishonesty]; 3 Witkin, Cal. Evid. (4th ed. 2000) Presentation, § 306, p. 383.)

As explained in Argument IX.B., the court, despite professing to rule on each misdemeanor, failed to exercise any discretion in excluding the evidence. It concluded that proving up misdemeanor conduct was

inherently too time consuming and as a result, not surprisingly, excluded it all without discussion of or reference to the underlying conduct.

The exclusion was prejudicial standing alone, suggesting as it did that McNeely had gone through one tough patch in his life. In fact, as in *People v. Mansfield*, "such activity despite the knowledge of such risks is indicative of a 'conscious indifference or "I don't care attitude" concerning the ultimate consequences' of the activity (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1208) from which one can certainly infer a '"depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man."'" (*People v. Mansfield* (1988) 200 Cal.App.3d 82, 87.)

More than that, however, this was but one more area of impeachment of McNeely foreclosed to the defense. As a result, this skilled conman was presented as a reliable witness with no reason or inclination to deceive.

D. THE INTRODUCTION OF MCNEELY'S TESTIMONY WAS HIGHLY PREJUDICIAL.

The prejudice flowing from the admission of McNeely's testimony cannot be overstated. McNeely introduced the potent undercurrents of wanton torture and conspiracy that set the tone of the trial and that the prosecutor exploited to replace the hard evidence his case lacked.

It is well-recognized that the prosecutor's argument often heightens the prejudicial effect of error. (See *People v. Roder* (1983) 33 Cal.3d 491, 505; *People v. Brady* (1987) 190 Cal.App.3d 124, 138; *People v. Martinez* (1986) 188 Cal.App.3d 19, 26; see also *People v. Morales* (2001) 25 Cal.4th 34, 48 (2001) [observing that *People v. Green* (1980) 27 Cal.3d 1, 70, overruled on other grounds in *People v. Hall* (1968) 41 Cal.3d 826, 834,

fn.3, holds that "in cases suffering from insufficient evidence, deficient instructions or other errors made in presenting evidence or giving instructions, ill-advised remarks by the prosecutor may compound the trial's defects"].) Dusek's closing arguments reveal the reliance he placed on McNeely's testimony and his need for the jury to credit those statements. At the guilt phase, Dusek used McNeely's testimony to corroborate Joanne Fedor's testimony. (39 RT 3770.) Later in his argument, Dusek referred to Tompkins as an eyewitness. (39 RT 3771-3772.) He argued that "T.K. and McNeely back up Sheryl Baker. They talk about the weapons that were used and how T.K. eventually killed her." (39 RT 3780.) "T.K through Donald McNeely told us the same thing. She was not dying quickly enough. He got tired. He wanted to end it. He stabbed her with a knife. He talked about the torture and how he enjoyed it." (39 RT 3798.)

During his rebuttal argument, Dusek discussed how the jurors should view the testimony of accomplices and jailhouse informants. "Sure, you're supposed to question their testimony, treat it with caution; but you do not just kick it out because they have a title, because they have a label. You got to look at their testimony with care and caution, *just like you look at everyone else*." (39 RT 3860, emphasis added.) Of course, this is not true. As Judge Trott has recognized: "By definition, criminal informants are cut from untrustworthy cloth and must be managed and carefully watched by the government and the courts to prevent them from falsely accusing the innocent, from manufacturing evidence against those under suspicion of crime, and from lying under oath in the courtroom." (*United States v. Bernal-Obeso* (9th Cir. 1993) 989 F.2d 331, 334.)

There is every reason to believe that the jury relied heavily on McNeely's testimony to reach its verdict. He testified that Tompkins

suggested a conspiracy – a "plan" – and confessed to torture and premeditated murder, and the court and prosecutor instructed the jury that Dalton was guilty for the crimes of Tompkins. The admission of McNeely's testimony was constitutional error that cannot be characterized as "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24.) This Court must reverse the convictions and death judgment.

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II.

THE PROSECUTOR IMPROPERLY RELIED ON CO-CONSPIRATOR BAKER'S GUILTY PLEA TO ESTABLISH THE VICTIM'S MURDER AND MS. DALTON'S GUILT.

A. INTRODUCTION.

After initially pleading not guilty to conspiracy and murder, Sheryl Baker changed her plea to guilty of second degree murder and testified against Ms. Dalton at trial. During his opening statement, the prosecutor told the jury that Baker "pled to second degree murder for her part in this crime . . . . and she is looking at 15 to life." Defense counsel's objection was sustained without comment. (30 RT 2541.) Soon after that, defense counsel asked to approach the bench and expressed his concerns about the prosecutor's comments about Baker's potential sentence. Counsel requested that the jury be admonished and moved for a mistrial. The court denied the mistrial, and stated its belief that an admonition would only draw attention to the error. Counsel agreed and nothing further was said to the jury about this.

During direct examination, the prosecutor asked Ms. Baker about her guilty plea. A defense objection was overruled. (33 RT 3094.) The prosecutor made several references to Baker's plea in his closing argument. (See, e.g., 39 RT 3750, 3772, 3778, 3865.) The court gave no instruction limiting the jurors' use of Baker's plea.

Arguably, the only evidence that a crime *even occurred* was the guilty pleas of Tompkins and Baker.[61] Those pleas, however, were

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[61] After lengthy argument, the court ruled that evidence of Tompkins' guilty plea would be admissible. (30 RT 2508; 35 RT 3516.) Thereafter, the prosecutor announced that he had decided not to use (continued...)

inadmissible to establish the existence of May's murder – let alone to prove Ms. Dalton's guilt of that crime. Introduction of evidence of Baker's plea, the prosecution's use of the plea during argument and the court's failure to give a limiting instruction regarding the use of that plea all constitute prejudicial error and require that the guilt verdict and death judgment be reversed.

B. THE PROSECUTOR USED THE GUILTY PLEA FOR IMPERMISSIBLE PURPOSES.

As a principle of general acceptance, the guilty plea or conviction of a codefendant may not be offered by the prosecution and received over objection as substantive evidence of the guilt of those on trial. (*Baker v. United States* (9th Cir. 1968) 393 F.2d 604, 614, cert. denied (1968) 393 U.S. 836; *United States v. Halbert* (9th Cir. 1981) 640 F.2d 1000, 1004; *United States v. Gambino* (3d Cir. 1991) 926 F.2d 1355, 1363; *United States v. Hutchings* (8th Cir. 1984) 751 F.2d 230, 237; *People v. Young* (1978) 85 Cal.App.3d 594, 602 ["Error was committed when the trial court informed the jury that [codefendant] had pled guilty"].)

> The foundation of [this] policy is the right of every defendant to stand or fall with the proof of the charge made against him, not against somebody else . . . . The defendant ha[s] a right to have his guilt or innocence determined by the evidence presented against him, not by what has happened with regard to a criminal prosecution against someone else.

(*Biasccia v. Attorney Gen. of New Jersey* (3d Cir. 1980) 623 F.2d 307, 312, quoting *United States v. Toner* (3d Cir. 1949) 173 F.2d 140, 142;[62] see also

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[61] (...continued)
Tompkins' plea in his case-in-chief. (39 RT 3650.)

[62] *Bisaccia* was a habeas corpus proceeding that held that a
(continued...)

Babb v. United States (5th Cir. 1955) 218 F.2d 538, 542.)

While the fact of a plea agreement may sometimes be admissible, such admissibility "turns on the purpose for which it is offered." (*United States v. Halbert, supra*, 640 F.2d at p. 1004.) Thus, evidence of a plea may properly be considered by the jury in evaluating witness credibility. (See *United States v. King* (5th Cir. 1974) 505 F.2d 602; *Isaac v. United States* (9th Cir. 1970) 431 F.2d 11; *United States v. Whitehead* (4th Cir. 1980) 618 F.2d 523, 529; *United States v. Anderson* (9th Cir. 1976) 532 F.2d 1218, 1230.) Courts, however, must guard that the jury does not consider the plea for impermissible purposes. Thus, "if evidence of a coconspirator's guilty plea is admitted, . . . the jury must be instructed that the plea cannot be considered as evidence of the defendant's guilt." (*United States v. Harris* (9th Cir.1984) 738 F.2d 1068, 1071.) As a panel of the Ninth Circuit explained in *United States v. Halbert*,

> Recognizing the legitimate uses that may be made of the guilty plea evidence, we are nonetheless sensitive to the possibility of prejudice, and therefore both trial and reviewing courts have responsibility to insure that evidence of the plea is being offered by the prosecutor and used by the jury only for a permissible purpose. What may facially appear as a legitimate introduction of evidence of a plea becomes something else and on the level of prejudicial error when, for example, the prosecutor suggests in closing argument that the jury use the plea for a prohibited purpose, *United States v. Miranda*, 593 F.2d 590 (5th Cir. 1979), when the plea has been used improperly to vouch for the codefendant as a witness, *United States v. Little Boy*, 578 F.2d 211 (8th Cir.

[62] (...continued)
prosecutor's use of a co-conspirator's guilty plea to establish another defendant's guilt was error, and the case was remanded for a determination of whether the error was harmless.

> 1978), when the use of the plea involves aggravated circumstances known to the trial court, *United States v. Harrell*, 436 F.2d 606 (5th Cir. 1970), or when the plea is clearly offered as substantive evidence of guilt *Baker v. United States*, *supra*, 393 F.2d at 614. Furthermore, introduction of the guilty plea as evidence of credibility requires that the plea be brought to the jury's attention, but does not sanction allowing the subject to be disproportionately emphasized or repeated.

(*United States v. Halbert*, *supra*, 640 F.2d at p. 1005.)

Applying the above principles, the questions here are: (1) did the prosecution offer the evidence of Baker's guilty plea solely for a permissible purpose such as establishing witness credibility, and (2) if the purpose was legitimate, did the trial court's instructions adequately explain to the jury the purpose for which the evidence could be used. The answer to both questions is no.

Ms. Baker testified at trial, thus the existence of her plea was arguably relevant evidence bearing on Baker's credibility. On direct examination, the prosecutor elicited from Baker that she had been charged with murder in this case and had pled guilty to second degree murder. (33 RT 3093.) She testified that under the terms of her plea she would plead guilty to second degree murder and testify truthfully at Dalton's trial. (33 RT 3094.) A relevance objection was overruled. (*Ibid.*) During his closing arguments, the prosecutor exploited the evidence of Baker's plea to fill the gaping holes in his case against Dalton.

1. The Prosecutor Used the Existence of Baker's Plea to Prove Corpus and Ms. Dalton's Substantive Guilt.

During his closing argument, the prosecutor understandably grasped for corroboration of Fedor's and Baker's claims, and, at times, his attempts

to find support for his witnesses strained credulity. The prosecutor's comments about Ms. Baker's guilty plea, however, went beyond hyperbole and severely prejudiced Ms. Dalton. The prosecutor improperly used the evidence of Baker's plea, not to demonstrate her credibility, but to make his case for murder and prove Ms. Dalton's participation in the crime, including the infliction of torture on the victim. His actions were improper.

The prosecutor initially argued that Baker was an eyewitness and participant – "[n]ot only that, she put her money where her mouth is. She pled guilty to the murder of Irene Melanie May. She knows what happened." (39 RT 3772.) This argument was improper in several respects. The prosecutor used the plea as evidence that the charged offense occurred. He also relied on her plea not only to make his case but also to verify the truth of her testimony – she knows what happened and she took responsibility for what she did and pled guilty – while at the same time, he infringed on Dalton's presumption of innocence – Baker (unlike Dalton) "put her money where her mouth is." The prosecutor's comments – focusing on Dalton's failure to act similarly to Baker and plead guilty – implied that Dalton did not want to take responsibility for her actions and constituted impermissible argument in violation of the presumption of innocence. (See *State v. Jones* (La.App. 3 Cir. 1999) 734 So.2d 670 [Prosecutor's rebuttal comments that codefendant, whom defendant characterized as self-confessed liar, took responsibility for what he did and pled guilty whereas defendant did not want to take responsibility for his actions constituted impermissible argument in violation of presumption of innocence, where comments focused on defendant's failure to act similarly to codefendant and plead guilty and were not limited to explaining why codefendant was credible witness].)

The prosecutor also argued that Baker's guilty plea corroborated her testimony (39 RT 3780) and that her plea was proof that the victim was alive when she was injected, hit and stabbed. (39 RT 3797 ["Sheryl Baker tells you she [the victim] was alive, and she [Baker] pled guilty to murder, which tells you she was alive when she got back and did what she did"]; 39 RT 3865 ["And then she pled guilty to murder, not mutilating a corpse"].)

His repeated references unduly emphasized the plea and its purported, but impermissible, value.

The prosecutor invited the jurors to use the plea for all the impermissible purposes the court in *Halbert* warned of: he suggested the jurors use the plea for prohibited purposes; he argued its use as substantive evidence of guilt; and he "disproportionately emphasized or repeated" it. (See *United States v. Halbert*, *supra*, 640 F.2d at p. 1005.) Moreover, the court did nothing to prevent the jurors from doing what the prosecutor invited them to do – use the plea as evidence of murder and Dalton's substantive guilt of that murder. Accordingly, even if the plea was admissible on the issue of Baker's credibility, the court's failure to give a cautionary limiting instruction constitutes reversible error.

2. The Court Erred in Failing to Give an Appropriate Limiting Instruction.

Regardless of the propriety of the prosecutor's references to Baker's plea, under the circumstances of this case, a curative instruction was essential in order to dispel the danger that the jurors would misuse the plea evidence. (*United States v. Halbert*, *supra*, 640 F.2d at p. 1006 ["While each of the prosecutor's references to the guilty pleas was perfectly permissible, we are nonetheless compelled to reverse Halbert's conviction

for want of appropriate instructions to the jury on the limited purpose for which the pleas could be used"].)

In *Halbert*, the panel reversed *even though* there was an instruction regarding the permissible use of the guilty pleas. There, the trial court had cautioned:

> [D]isposition of Culbertson and Bucklan . . . should not control or influence you in your verdict with reference to the remaining defendant, Mr. Halbert. You must base your verdict as to him solely on the evidence presented to you in this courtroom.

(*United States v. Halbert*, *supra*, 640 F.2d at p. 1006.)

The panel concluded that this instruction did not sufficiently apprise the jury that it could use the pleas only as evidence of the witnesses' credibility.

> Evidence of the guilty pleas is amenable to misuse. Without instruction, it is possible the jury could use the pleas as evidence of Halbert's guilt. This danger may be averted only by adequate cautionary instructions that make it clear to lay people that evidence of a witness' own guilty plea can be used only to assess credibility. See *United States v. Binger*, *supra*, 469 F.2d at 276. The most effective practice would be to instruct the jury when the evidence of the plea is admitted, and again in final instructions. *But at least they should be told in unequivocal language that the plea may not be considered as evidence of a defendant's guilt.* See *United States v. Whitehead*, supra, 618 F.2d at 529-30; *United States v. Bryza*, *supra*, 522 F.2d at 424-25.
>
> Couched in legal abstrusity, as was done here, we cannot say that a reasonable juror would understand the limited use to be made of the evidence of the pleas. An acceptable instruction must address the purpose for which the evidence may be considered and exclude from the jury's mind the possibility that it may serve as evidence of guilt. Because of the danger of misuse and the substantial lack of clarity in this instruction, we cannot hold that the faulty instruction was

harmless error.

(*United States v. Halbert*, *supra*, 640 F.2d at pp. 1006-1007, emphasis added.)

The trial court must instruct sua sponte on the general principles of law relevant to the issues in the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) """The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." [Citation.]'" (*Ibid.*) This Court has recognized that instructions on the definition of an accomplice and the rules governing accomplice testimony must be given sua sponte. (*People v. Gordon*, *supra*, 10 Cal.3d 460, 470 ["the court erred in neglecting to instruct the jury sua sponte on the law of accomplices"].) An instruction regarding not only how to view accomplice testimony but also preserving the presumption innocence and the right to a jury trial are indisputably general principles of law relevant to the issues of this case, and the trial court erred in failing to instruct the jurors, sua sponte, that the fact that Baker entered a guilty plea could not be considered as evidence of Dalton's guilt.[63]

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[63] If nothing else, when the prosecutor argued to the jurors that they could use evidence of the plea for improper purposes, the court was obliged to disabuse the jurors of that notion by preclusively instructing, sua sponte, that Baker's plea could not be used as evidence of Dalton's guilt. (See *People v. Morales* (2001) 25 Cal.4th 34, 43.) In *Morales*, the issue was whether the prosecutor had committed misconduct by arguing an erroneous theory to the jury. In the course of analyzing this question, this Court reaffirmed *People v. Green* (1980) 27 Cal.3d 1, and categorized its holding as follows: "The evidence regarding the third movement did not describe a crime. When the court did nothing to 'disabuse [] the jury of [the] notion' (*People v. Green*, *supra*, 27 Cal.3d at p. 68) that it did (a defect it could
(continued...)

The lack of an instruction effectively informed the jury that it could take into consideration in determining the guilt of Dalton the fact that her codefendant had pleaded guilty. The danger of misuse of Baker's plea was enormous, and the court's failure to instruct the jury of its limited purpose was immensely prejudicial.

C. THE PROSECUTOR'S USE OF BAKER'S PLEA AND THE COURT'S FAILURE TO GIVE A LIMITING INSTRUCTION AS TO ITS PURPOSE WAS PREJUDICIAL AND COMPELS REVERSAL OF THE CONVICTION AND PENALTY VERDICT.

This, unquestionably, was a "demonstrably weak and in part untrustworthy" case.[64] (*United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1172 (conc. & dis. opn. of Trott, J.).) There was no body, no physical evidence, no weapons and apparently no witnesses to what happened between Dalton and May prior to Baker's observations of a person covered with a sheet and tied to a chair. Under such circumstances, "There is real danger that jurors will give undue emphasis to a crime-partner's guilty plea . . . [and] [i]t impinges on [the] defendant's right to be tried solely on the evidence." (*United States v. Binger* (9th Cir. 1972) 469 F.2d 275, 276.)

The prosecutor was well aware of the dangers inherent in admission of the plea. He nevertheless – or therefore – repeatedly reminded the jury of Baker's plea because it, and the swirling street talk, rumors and

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[63] (...continued)
have cured with a preclusive instruction), it ratified the prosecutor's error." (*People v. Morales*, *supra*, 25 Cal.4th at p. 43, emphasis added.)

[64] Indeed, Dalton has argued that there was insufficient evidence to sustain the conviction, special circumstance findings and penalty verdict. (See Arguments IV. & V.)

misinformation that enshrouded this case, served to tarnish Dalton, while giving the prosecution's case undeserved substance. Respondent cannot prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The convictions, special circumstance findings and penalty judgment must be reversed.

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III.

THE TRIAL COURT'S ERRONEOUS AND PREJUDICIAL ADMISSION OF IRRELEVANT AND UNRELIABLE BLOOD EVIDENCE VIOLATED KERRY DALTON'S CONSTITUTIONAL RIGHT TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE JUDGMENT OF DEATH.

The court allowed the prosecution to introduce, at various stages of the case, patently immaterial and irrelevant evidence of blood found at the alleged crime scene – Joanne Fedor's trailer – literally years after the alleged crime and after two previous unsuccessful searches of the trailer for blood. Although the prosecution and the court professed that the blood evidence was not ultimately significant and thus not prejudicial, the prosecution relied upon the evidence extensively throughout the case and it undeniably contributed to Dalton's conviction.

A. PROCEEDINGS BELOW.

At the preliminary hearing, forensic serologist Gary Harmor testified that he analyzed a series of wallboard samples taken from Fedor's former trailer on August 12, 1991, more than three years after the alleged murder. (1 RT 48.) Harmor was unable to determine the species origin of the blood or the age of the samples (1 RT 51-54, 61), but ascertained that some samples were blood type O and some were type A. (1 RT 58.) Harmor testified that all mammals have an ABO potential in their blood and a type A sample did not mean the blood was human. (1 RT 61.) The blood samples could have come from "any mammal" (1 RT 60) and could have been present since the construction of the trailer. (1 RT 63.)

During pre-trial motions *in limine*, the defense sought to exclude testimony about blood stains and test results on the grounds that the evidence was unreliable and thus irrelevant. Moreover, even if there was

some probative weight to the evidence, any value was significantly outweighed by its prejudicial effect. (19/24 RT 1154-1160.) The trial court ruled that although the blood stains could not be linked to the alleged crime, the evidence was relevant because the presence of blood was consistent with other evidence that there had been a violent confrontation in the trailer. (19/24 RT 1160.) The court offered, "[the confrontation] might have been with a polar bear, I don't know. It could have been anything." (*Ibid.*) The court further ruled that the blood evidence was not prejudicial, since its introduction would not create an emotional bias against the defendant. (19/24 RT 1154-1155.)

At trial, Sheriff's Deputy David Wilson testified that he responded to a burglary call from Joanne Fedor's trailer on June 26, 1988, the day of May's alleged murder. (31 RT 2741.) Deputy Wilson searched the interior of the trailer as well as Fedor's truck, but did not find any evidence of blood. (31 RT 2766-2769.) Fedor reported seeing a bloody pillowcase on her bed, but Wilson could find no pillowcase, let alone a bloody one; nor could he find any trace of blood on the bed or elsewhere in the trailer. (31 RT 2768.)

San Diego Sheriff's Department Sergeant Terry Wisniewski testified that he visited the trailer on two separate occasions. (35 RT 3437.) On September 15, 1988, Wisniewski and an investigation team performed a detailed search of the trailer, specifically looking for traces of blood. (35 RT 3439-3440.) No blood was found during this search. (35 RT 3442.) San Diego Sheriff's Department Criminalist Randolph Robinson testified that he and Deputy Sam Bové also went to the trailer on September 15, 1988, for the specific purpose of detecting the presence of blood. (34 RT 3332.) Robinson systematically searched the entire trailer for three hours,

checking the carpeting, walls, furniture, and ceiling with a bright flashlight and a chemical reagent capable of detecting blood. (34 RT 3332-3334.) Robinson found no blood in the trailer. (34 RT 3334.)

On November 16, 1988, Wisniewski returned to the trailer with the Metropolitan Task Force, and the team conducted an "intensive" and "exhaustive" search. (35 RT 3441.) Wisniewski testified that to his knowledge, no blood was found during the November search. (35 RT 3442.) San Diego Sheriff's Department Criminalist Walter Fung testified that he also searched the trailer for blood on November 16, 1988. (36 RT 3523.) He searched the master bedroom, the bathroom area, the living room, and parts of the kitchen, checking the carpet, walls, and ceiling in all of these rooms. (36 RT 3524-3525.) Fung took samples back to the lab of anything he thought might possibly contain blood, including samples of carpet pad from the bedroom, a piece of the living room carpet, and a piece of tile from the kitchen. (36 RT 3525.) After a visual search and laboratory tests, Fung was unable to detect any blood on any of the items he collected. (36 RT 3526.)

On August 12, 1991, more than three years after the alleged June 1988 murder, evidence technician Gary Dorsett, along with homicide investigator Richard Cooksey, returned to the trailer yet again to search for blood. (32 RT 2933.) The trailer had not been sealed between the time of the alleged crime and Dorsett's visit, and the scene was contaminated. (32 RT 2958.) Indeed, innumerable people, pets, insects and other contaminates had moved through the trailer during the period between the date of the alleged crime and the 1991 search.[65]

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[65] No fewer than four families lived at the trailer between the time of

(continued...)

Dorsett testified that during his search of the contaminated scene, he found spots the size of pin heads on the walls and ceilings of the living room and bedroom that tested presumptively positive for blood when sprayed with luminol or tested with a hema stick. (32 RT 2938-2939.) Another criminalist, Annette Peer, tested several places with phenolphthalein and also obtained a presumptive reaction for blood. (32 RT 2940.) Dorsett returned to the trailer on August 24, 1991, and marked all areas that had tested presumptively positive for blood. Luminol and hema stick testing were done on these areas.[66] Samples presumptive for blood were collected and taken from the trailer. (32 RT 2945.)

Criminalist Jennifer Mihalovich was contacted on October 2, 1991, and asked to conduct DNA typing on the samples collected from the trailer in August 1991. (32 RT 2975.) Mihalovich was unable to perform conclusive DNA testing on the samples because they were too old and of an insufficient amount. (32 RT 2976.) The testing she was able to perform yielded a presumptive reading for blood, but Mihalovich explained that this

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[65] (...continued)
the alleged crime and the law enforcement collection of evidence. Joanne Fedor lived in the trailer in June 1988. Laurie Najor, whose husband owned Live Oak Springs property, testified that after Fedor moved out, another family moved in. After this family moved out, two more families lived in the trailer. Finally, Najor's son moved in and was living there at the time of the 1991 search. (35 RT 3481-3483.)

[66] After Dorsett removed items from the wall, another luminol test was done in the dark, which would detect smears on the wall. (32 RT 2951.) The luminol test revealed nothing of great significance, but there were some positive reactions on the walls in the living room and the front master bedroom. (32 RT 2952.) In the bedroom, the smear area was closer to the baseboard, and in the living room, it was window sill height. (32 RT 2964.)

type of testing was not conclusive, as many other non-blood substances, such as metal, animal blood, and vegetables, can give the same results. (32 RT 2980.) Mihalovich also examined a floor heater from the trailer.[67] She was unable to detect any blood on it. (32 RT 2989.)

After Mihalovich completed her tests, she gave selected samples to serologist Gary Harmor so that he could perform ABO testing. (32 RT 2986.) Harmor received six samples and did species testing in 1992. (32 RT 2994, 3006.) ABO typing revealed that some samples were type O and some were type A, but he was unable to give a conclusive interpretation of the animal from which the blood came. (32 RT 2998.) It could have been human or animal, male or female. He could not determine how the blood got on the sample or its age. (32 RT 3002.) The parties stipulated that Melanie May and Mark Tompkins had type A blood, while Kerry Dalton and Sheryl Baker had type O. (32 RT 2930-2931.)

The defense objected to the testimony of Gary Dorsett, Jennifer Mihalovich, and Gary Harmor and the trial court granted a standing objection to any testimony involving blood evidence. (32 RT 2925.)

In his closing argument, the prosecutor informed the jury that "when the people who had the time, took the time, had the equipment, used the equipment, went back, they found evidence of torture, of this blood-letting. They found drops of blood around the room, and the pictures are here." (39 RT 3772-3773.) The prosecutor also insisted that the presence of blood corroborated the testimony of codefendant Sheryl Baker. (39 RT 3780.)

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[67] Law enforcement personnel had not found the heater during any searches of the trailer. Fedor had given it to her social worker Darlene Burns in 1988, and Burns turned it over to the Sheriff's Department. Richard Cooksey obtained the heater from the Sheriff's Department and sent it to Mihalovich in order to test for blood. (37 RT 3640.)

In their motion for new trial, defense counsel argued that the trial court erred in admitting irrelevant, prejudicial, and unreliable evidence of blood samples. (10 CT 2010-2017.) The trial court ruled that there was nothing about the blood evidence that was "unduly gruesome" or "likely to inflame the jury." It concluded that the evidence was relevant and the weight to be given to it was a question for the jury. (48 RT 4632-4633.)

The court erred in its rulings.

B. THE TRIAL COURT'S ADMISSION OF THE BLOOD STAIN EVIDENCE VIOLATED EVIDENTIARY STANDARDS OF RELEVANCE AND DENIED APPELLANT DALTON HER CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL AND A RELIABLE GUILT AND PENALTY DETERMINATION.

The difficulty here is not in formulating arguments for why the blood evidence should not have been admitted, but in identifying a single legitimate basis for its introduction. In two searches for blood made months, rather than years, after the alleged blood-letting, no trace of blood was found in Fedor's trailer. Three plus years and multiple occupants later, specks of unidentifiable blood were found in an undeniably contaminated location. The very *fact* that this blood evidence was admitted gave it an undeserved patina of relevance – if only relevant evidence is admissible, and the blood evidence was admitted, it must have some relevance to this case. It does not.

The test of relevance is whether the evidence tends logically, naturally and by reasonable inference to establish material facts such as identity, intent or motive. (*People v. Heard* (2003) 31 Cal.4th 946.) While the trial court has broad discretion in determining the relevance of evidence, it lacks the discretion to admit irrelevant evidence. (*People v. Benavides* (2005) 35 Cal.4th 946; *People v. Scheid* (1997) 16 Cal.4th 1.) An appellate court reviews for abuse of discretion a trial court's ruling on the

admissibility of evidence. (*People v. Harris* (2005) 37 Cal.4th 310.)

The probative value of the blood evidence with respect to disputed issues or facts in the case was minimal, if not nonexistent. (See Evid. Code, § 210) The recovered substance could not tend to prove or disprove a disputed fact because it could not even be confirmed as human blood. Moreover, three years after the alleged crime, the crime scene was so badly contaminated that no reliable determination of the origin of the blood stains could have reasonably been made. Indeed, the logical conclusion was that any blood found at the trailer in 1991, was deposited *after* the previous unsuccessful searches in September and November of 1988.

In addition, law enforcement personnel obtained only *presumptive* blood test results after sweeping the trailer using phenolphthalein,[68] luminol[69], and hemastick[70] testing mechanisms. (32 RT 2938-2939.)

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[68] The phenolphthalein test, commonly referred to as the Kastle-Meyer test, is used to perform a presumptive blood test by collecting a dry sample with a swab, adding a few drops of alcohol, then the phenolphthalein, and then hydrogen peroxide. If the sample turns pink it is presumptive for blood. The test can also cause a positive result with meat or vegetables and a follow up test is necessary to confirm for blood. (See *People v. Bradford* (1997) 15 Cal.4th 1229, 1276.)

[69] Luminol is chemiluminescent (gives off light via a chemical reaction) when it contacts iron. The iron in hemoglobin, the oxygen-carrying protein in red-blood cells, causes luminol to luminesce. Luminol also reacts to other metals, paints, cleaning products, bleach, and plant matter. Luminol's reaction to each differs in intensity. Luminol's value is that it shows investigators where blood *might* be. Other tests are required to verify that the substance is blood and that the blood is human blood. (*Missouri v. Daniels* (2005) 179 S.W.3d 273, 283, emphasis added.)

[70] The hemastick test is a presumptive test for blood, wherein a piece of plastic with litmus paper on the end is dipped in distilled water and then touched to the surface believed to have blood. If the presumptive test is

(continued...)

Likewise, Jennifer Mihalovich obtained only a *presumptive* result for blood when testing those same blood stains in her laboratory.[71] (32 RT 2982-2985.) The results of the presumptive tests were inconclusive and insignificant, as many metals, animal blood, vegetables, and certain cleaning supplies also test presumptive for blood, and neither Dorsett nor Mihalovich could make a real determination as to whether or not blood was present. (32 RT 2980; see also *Missouri v. Daniels* (2005) 179 S.W.3d 273, 283.)

Phenolphthalein, luminol, and hemastick are all methods used by criminalists as precursor tests to indicate the *possible* presence of blood. Courts in several jurisdictions have held that positive presumptive blood tests are not relevant to a determination of guilt without follow-up confirmatory tests. In *Houston v. State* (Ark. 1995) 906 S.W.2d 286, 287, the court held that because luminol testing can return false positive results by reacting with substances other than human blood, the results are *per se* irrelevant. The law is well-settled in Arkansas that luminol test results are inadmissible without follow-up tests confirming the presence of blood. (*Ibid.*) In *State v. Fukusako* (Hawaii 1997) 946 P.2d 32, 100-102, the Hawaii Supreme Court upheld the exclusion of expert testimony on both luminol and phenolphthalein test results because the prosecution expert testified that those tests can generate false positive reactions. Additionally, in *State v. Moody* (Conn. 1990) 573 A.2d 716, the court found it was error

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[70] (...continued)
positive for blood the litmus paper will turn from yellow to blue. (32 RT 2938.)

[71] Mihalovich used the ortho tolidine presumptive test on the samples. She testified that ortho tolidine has the same function, purpose, and result as the phenolphthalein test. (32 RT 2980.)

to admit the results of luminol testing where there was no follow-up testing done to establish that the substance causing the luminol reaction was a substance related to the alleged crime.

In this case, the possibility that some substances found in the contaminated trailer three years after the alleged homicide *may* have been blood did not tend to prove or disprove a material fact, especially without follow-up analysis. This lack of conclusive testing rendered both Dorsett's and Mihalovich's testimony regarding "blood" samples found at the alleged crime scene utterly irrelevant and inadmissible.

Mihalovich submitted only six presumptive samples to Gary Harmor for further testing. (32 RT 2995-2996.) Harmor was unable to perform a species test on any of the samples, and he could not even determine whether the sample was from a human. (32 RT 2998, 3002.) He did determine that the samples contained two different blood types, types A and O (32 RT 2998), but 86% of the Caucasian population has one of these blood types and rodents, cats and dogs also have ABO blood types. (32 RT 3000-3001.) Harmor could not determine the age of the samples, or how they were deposited in the trailer. (32 RT 3003.)

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In this case, there simply was no solid, credible evidence to suggest a single sample taken from the walls of the trailer in 1991, was Melanie May's blood, deposited there in 1988 when she allegedly was killed by Ms. Dalton. The blood stain evidence was totally irrelevant and should not have been presented to the jurors.

C. EVEN IF REMOTELY RELEVANT, THE BLOOD STAIN EVIDENCE WAS SO PREJUDICIAL THAT IT SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352.

Even if this Court determines that the blood evidence was relevant to some material fact in this case, the prejudicial effect of this evidence far outweighed its probative value. A trial court may properly exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) An appellate court reviews a trial court's determination to admit evidence pursuant to Evidence Code section 352 for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.) The trial court in this case concluded that the blood stain evidence was not unduly prejudicial because "the existence of these blood patterns or stains that are found a substantial period after the homicide, in my opinion, does not uniquely do anything to evoke an emotional bias against the defendant." (19/24 RT 1155.) This determination, however, was based on a misinterpretation of the law, an overstatement of the probative value of the blood stain testimony, as well as an underestimation of the devastatingly prejudicial effect of the evidence.

It is true that "undue prejudice" refers not to evidence that proves guilt, but to evidence that prompts an emotional reaction against the defendant and tends to cause the trier of fact to decide the case on an

improper basis: "The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. '[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is "prejudicial."'" (*People v. Karis* (1988) 46 Cal.3d 612, 638; see Simons, CAL. EVIDENCE MANUAL (2006) § 1.28, p. 33 ["The term 'undue prejudice' connotes a sense of unfairness"].) The prejudice in this case, however, does *not* naturally flow from "relevant, highly probative evidence," but instead from the introduction of irrelevant, non-probative evidence through expert testimony that endowed the evidence with an undeserved and unwarranted value. As even the trial court observed, the substance about which the experts offered their opinions could have been polar bear blood. "It could have been anything." (19/24 RT 1160.) Under these circumstances, evidence that blood was found in the trailer "uniquely tend[ed] to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]" (*People v. Samuels* (2005) 36 Cal.4th 96, 124.)

The jurors heard extensive testimony from reputable and respected officials about blood found at the alleged crime scene. At best, the testimony confused and misled the jurors into thinking that the blood that the court concluded "could have been anything" had something to do with the case before them. In fact, nothing connected the blood stains to the alleged crime, but introduction of the evidence falsely and erroneously created that link. The testimony was so speculative and so unreliable that an emotional bias against Dalton was inevitable. Admission of the blood stain evidence was overwhelmingly prejudicial to Dalton and should have

been excluded.

D. ADMISSION OF THE BLOOD STAIN EVIDENCE VIOLATED APPELLANT DALTON'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The improper admission of the blood stain evidence violated standards of California law and denied Dalton her rights to due process of law under both the federal and state constitutions. (U.S. CONST., 8th & 14th Amends.; CAL. CONST., Art. I, §§ 7 and 15.) The trial court's erroneous ruling admitting this evidence also denied appellant her state and federal constitutional rights to a fundamentally fair trial and a reliable judgment of death. (U.S. CONST., 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, and 17; *Estelle v. McGuire* (1991) 502 U.S. 62, 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The United States Supreme Court has recognized that due process can be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Here, the jurors were allowed to consider irrelevant testimony regarding the presumptive presence of blood as evidence of murder and corroboration of unreliable witnesses. The blood stain testimony suggested an unjustifiable link between Dalton and a bloody torture-murder that otherwise was supported by no physical evidence. Under these circumstances, the evidence was irrefutably prejudicial, if not determinative of the outcome. Admission of the evidence rendered Dalton's trial fundamentally unfair and violated her right to due process.

Ms. Dalton was also deprived of the state-created protections of Evidence Code sections 210, 350, and 352, and, as a result, Dalton was subsequently deprived of her right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi*

(1985) 472 U.S. 320, 328-333.) The inclusion of the irrelevant, inflammatory, and overwhelmingly prejudicial blood stain evidence effectively distorted the fact-finding process to such an extent that the resulting verdict could not have possible possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama* (1980) 447 U.S. 625, 638, fn. 13; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

E. UNDER BOTH FEDERAL AND STATE STANDARDS, THE TRIAL COURT'S ERROR IN ADMITTING THE BLOOD STAIN EVIDENCE TESTIMONY WAS PREJUDICIAL.

The due process violation requires that Dalton's conviction and death verdict be reversed unless respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana* (1993) 508 U.S. 275, 279; *Yates v. Evatt* (1991) 500 U.S. 391, 403.) Even if introduction of the blood evidence is state law error only, the conviction must be reversed because there is a reasonable probability that a more favorable result for Dalton would have been reached in the absence of the admission of this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The admission of the blood stain evidence was clearly prejudicial to Dalton's case. The prosecution introduced the testimony of a law enforcement officer and two different expert serologists to attest to the discovery of "blood" in the trailer. (See Argument III.A., *supra*.) Each of these witnesses possessed an element of authority that very likely affected the jurors and their verdict in a significant way. (See *People v. Shirley* (1982) 31 Cal.3d 18, 53; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1185.) By accepting the testimony of Dorsett, Mihalovich and Harmor, the jurors could have easily, albeit erroneously,

concluded that blood was present at the crime scene. This was physical evidence that purported to connect Dalton with the murder of Melanie May. In light of the utter lack of physical evidence connecting Dalton with the crime, this item of evidence assumed great importance in the prosecution's case.

The evidence was offered to persuade the jury that the presumptive presence of blood at the trailer was, in fact, evidence of blood at the trailer, *and* that the blood was from Melanie May as a result of Dalton's attack on her. It was also offered as evidence of a torturous "blood-letting" at the trailer. (See prosecutor's argument at 39 RT 3772-3773.)

The prosecutor relied heavily on the evidence to persuade the jurors that a murder had in fact occurred and was committed in the manner consistent with his case. In his opening statement the prosecutor asserted that blood splatters were found throughout Joanne Fedor's trailer. (30 RT 2538.) While he conceded the tests could not establish whether the blood was animal or human, he insisted that Fedor would testify that there were no animals in the trailer. (*Ibid.*)[72] He presented the testimony of a law enforcement official who testified at length regarding the collection of blood stain samples and the presence of blood in the trailer. (32 RT 2932-2952.) He introduced the testimony of a serologist to reiterate the result of the presumptive tests and had her painstakingly evaluate each sample and write 'P.B.' [presumptive blood] on a large board for the jurors to see. (32 RT 2982-2984.) He introduced a stipulation of the blood types of the alleged victim and of all three of the defendants (32 RT 2930-2931), and then presented the testimony of another serologist to explain that those

[72] In fact, Fedor testified that she got a dog in September 1988. (30 RT 2653.)

same blood types were found in the trailer, even if it could not be proven the blood was even human. (32 RT 2998.) And even though all of this testimony was conjectural and speculative, the prosecutor not only referred to the blood stains as evidence of a blood-letting in his closing argument, but he also told the jurors that the blood stain evidence corroborated Joanne Fedor's dubious testimony. (39 RT 3772-3773.)

It is overwhelmingly clear that in the absence of any other physical evidence, the prosecution relied heavily on the inconclusive, irrelevant and prejudicial blood stain evidence in order to make a case against Dalton. Since this evidence was central to the prosecution's case, the respondent cannot prove beyond a reasonable doubt that the error in admitting the blood stain evidence testimony did not contribute to the verdict obtained (*Chapman v. California*, *supra*, 386 U.S. 18); it is reasonably probable that, absent this evidence, the outcome would have been more favorable to Dalton. (*People v. Watson, supra*, 46 Cal.2d at p. 837.) The testimony regarding blood stain evidence was clearly constitutional error and warrants reversal.

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IV.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE OF CONSPIRACY AND FIRST-DEGREE MURDER.

A conviction violates due process if it is not supported by substantial evidence. (*Jackson v. Virginia* (1979) 443 U.S. 307.) A conviction must be reversed for insufficiency of evidence under *Jackson v. Virginia* and *People v. Johnson* (1980) 26 Cal.3d 557, unless, in light of the whole record, there is "substantial" evidence of each of the essential elements. (*Id.* at pp. 576-577.) Substantial evidence is that which is "reasonable, credible and of solid value – such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) Any such doubt must be reasonable only; it need not be "grave" or "substantial." (*Cage v. Louisiana* (1990) 498 U.S. 39 (*per curiam*), overruled on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4). What is required is "evidentiary certainty." (*Ibid.*)

"'Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact.'" (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, quoting *People v. Redmond* (1969) 71 Cal.2d 745, 755.) In *People v. Morris* (1988) 46 Cal.3d 1, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545 fn.6, this Court added:

> We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, "may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guesswork. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence." [Citations.]

(*Id.* at p. 21, original emphasis and ellipses; see also *People v. Anderson* (1901) 131 Cal. 352, 355 [While the reviewing court must review the whole record in the light most favorable to the judgment below, a conviction may not be based on mere speculation, conjecture, or suspicion].)

Upon review of a denial of a motion for acquittal,[73] the reviewing court must "review independently a trial court's ruling under section 1118.1 that the evidence is sufficient to support a conviction. [Citations.] We also determine independently whether the evidence is sufficient under the federal and state constitutional due process clauses." (*People v. Cole* (2004) 33 Cal.4th 1158, 1213.) In addition, the review of a denial of defendant's motion for acquittal under Penal Code section 1118.1 must be made "on the basis of the evidence as it existed at the close of the prosecution's case." (*People v. Valerio* (1970) 13 Cal.App.3d 912, 920; see also *People v. Belton, supra*, 23 Cal.3d at p. 521; *People v. Trevino* (1985) 39 Cal.3d 667, 695, disapproved on other grounds in *People v. Johnson* (1989) 47 Cal.3d 1194.)

The standard is "bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free." (*In re Winship, supra*, 397 U.S. at 372 (conc. opn. of Harlan, J.).)

A. SHERYL BAKER WAS AN ACCOMPLICE WHOSE TESTIMONY REQUIRED CORROBORATION.

The cornerstone of the prosecution's case was Sheryl Baker. As the

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[73] At the conclusion of guilt phase of trial, counsel made a motion for acquittal pursuant to Penal Code section 1118.1, arguing that there was insufficient evidence of the conspiracy, first-degree murder, the enhancement allegations and the special circumstance allegations of torture and lying in wait. (38 RT 3665 et seq.) The motion was denied as to the charges and special circumstance allegations. (38 RT 3675-3678.)

trial court observed, hers was the "key note testimony" of the trial. (35 RT 3414; see also 35 RT 3408 [court viewed Baker's testimony as "being significant]; 38 RT 3647 [Baker significant as the only alleged eyewitness].) Her testimony was essential to prove each charge. Baker, however, was a frail reed upon which to build a case.

Baker was a charged co-conspirator whose house was searched in March 1992, in connection with the suspected murder of Melanie May. At that time, the police played for Baker a tape of a secretly recorded telephone conversation she had with Pat Collins, in which Baker discussed her involvement in May's death. At that point Baker knew she had to tell the police a story that accounted for her involvement, but also portrayed her in the least culpable light. When she finally agreed to talk, Baker painted herself as a reluctant observer "in the wrong place at the wrong time." (8 CT 1525-1526.)

Baker's status as a suspect in the murder colored every statement she made about the events of that night. She was obviously concerned about her own culpability, and by the time she testified at appellant's trial, her account was riddled with inconsistencies, impeached, and tainted by bias.[74]

In addition, Baker was a methamphetamine user who had injected methamphetamine before going to Fedor's trailer, while at the trailer,[75] and

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[74] Baker had pleaded guilty to second degree murder and was to be sentenced after testifying against Dalton. There was an understanding that the district attorney would inform the Department of Corrections or the Board of Prison Terms of her cooperation and of her degree of involvement. (33 RT 3094, 3149, 3187-3188.)

[75] Baker testified that she used the majority of the eight ball – 3 ½ grams – of methamphetamine the group had. (33 RT 3185, 3114 [either an eight ball or a 16th – a gram and 3/4].) She also testified that she used (continued...)

after leaving the trailer. (33 RT 3156, 3184-3186.)[76] She did not sleep at all the night of June 25-26. (33 RT 3117.) Although she initially said she was only "high" when she returned to the trailer on June 26, Baker admitted that she had earlier told Dusek and Cooksey that she was "flying." (33 RT 3186; 20 CT 4134 ["I didn't care about nothing else that was going on, I had all of the dope, I was flying"].) As such, she was anything but a reliable chronicler of the events of that weekend.

The prosecutor acknowledged that Baker's testimony would "be difficult to accept," and he told the jurors he was not asking them "to accept her at face value." (39 RT 3767.) She had, he assured them, been corroborated – "backed up." (*Ibid.*) Unfortunately, a prime source of this "corroboration" was Joanne Fedor, who, if possible, was more unreliable still. Dusek said she too would be "difficult to accept." (*Ibid.*) But "[t]hey had gone out and found witnesses who confirm virtually everything that she says." (*Ibid.*)[77] Chief among those witnesses were Kathy Eckstein and her son Fred Eckstein who, even Dusek admitted, were not even at the trailer the weekend in question. (39 RT 3769 ["It does not look like it was that weekend, the times just don't match"].) If so, they could never have seen what they claimed to have seen at a time when it was meaningful. And, if that is so, their testimony cannot corroborate Fedor or Baker – no matter what they say they saw. Layered on top of such questionable testimony

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[75] (...continued)
about a gram. (33 RT 3102.)

[76] Baker testified that she "love[d] drugs." (33 RT 3151.) She had used methamphetamine, marijuana and heroin. (*Ibid.*) In 1988, she was using methamphetamine two to three times a day.

[77] Appellant has analyzed the insufficiency of the corroboration of Fedor in the next argument, V.B.4.

were the hearsay statements of Dalton's severed codefendant Mark Tompkins, ostensibly *not* admitted to prove Dalton's guilt, but heavily relied upon by the prosecution for that very purpose, and blood specks found three years after the alleged crime, after other occupants had moved in and out of the trailer and after two teams of technicians had unsuccessfully searched the trailer for blood.

To shore up Baker's testimony, the prosecution proffered evidence that was itself suspect, contradicted and uncorroborated. It built an evidentiary Ponzi scheme, one unreliable witness boosting another with little or no grounding substance. Such evidence cannot corroborate Baker's testimony, and it certainly cannot support the verdicts entered in this case.

1. An Accomplice Must Be Corroborated by Evidence That Ties the Defendant to the Crime and Satisfies the Jury That the Accomplice Is Telling the Truth.

"A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ." (Pen. Code, § 1111; see also CALJIC No. 3.11; *People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

The requirement that the corroborating evidence tie the defendant to some element of the crime is both explicit and purposeful. "We determined that the Legislature's purpose in enacting section 1111 was to prevent convictions based solely on evidence provided by such inherently untrustworthy sources as accomplices. [Citations.]" (*People v. Andrews* (1989) 49 Cal.3d 200, 214, overruled on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237.) The tendency of accomplices falsely to implicate others in order to dilute their own responsibility, curry favor with

prosecutors, or fulfill contingent plea agreements is a matter of both past and present concern. (See, e.g., Scheck, Closing Remarks: Symposium (2002) 23 CARDOZO L.REV. 899, 900-901.) The rationale for treating accomplice testimony with special care is that the accomplice is exposed to criminal liability for the offense about which she testifies. The underlying concern is that she might be motivated to shade her testimony in order to gain leniency from the prosecution or to minimize her own culpability for that offense. (*People v. Tobias* (2001) 25 Cal.4th 327, 331; see *People v. Guiuan*, *supra*, 18 Cal.4th at pp. 567-568.) Accomplice corroboration rules are the traditional safeguard against such problems in accomplice testimonial reliability. (Scheck, *supra*, at p. 906; *People v. Andrews*, *supra*, 49 Cal.3d 200.)

Distrust of accomplice testimony is an important component of a defendant's right to a fair trial and to a reliable jury verdict. (*People v. Guiuan*, *supra*, 18 Cal.4th at pp. 564-569.) The due process roots for safeguards in the use of accomplice testimony are deep and well-documented. (*Id.* at pp. 565-567.) As Justice Kennard explained in her concurring opinion:

> "A skeptical approach to accomplice testimony is a mark of the fair administration of justice. From Crown political prosecutions, and before, to recent prison camp inquisitions, a long history of human frailty and governmental overreaching for conviction justifies distrust in accomplice testimony."

(*Id.* at p. 570, conc. opn. of Kennard, J., quoting *Phelps v. United States* (5th Cir. 1958) 252 F.2d 49, 52.)

The danger of relying on testimony from people who receive a deal for their testimony was revealed in a study of the Actual Innocence Project that illustrated the high incidence of reliance on informants in cases where the defendant was later exonerated as innocent by DNA tests.

(*Commonwealth of the Northern Mariana Islands v. Bowie* (9th Cir. 2001) 243 F.3d 1109, 1124, fn. 6.)

Moreover, "special caution is warranted because an accomplice's firsthand knowledge of the details of the criminal conduct allows for the construction of plausible falsehoods not easily disproved." (*People v. Guiuan*, *supra*, 18 Cal.4th at p. 575, conc. opn. of Kennard, J.)

Thus, whenever an accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury must be instructed, sua sponte, that the accomplice's testimony should be viewed with caution. (*People v. Guiuan, supra*, 18 Cal.4th at p. 569.) Where a witness is an accomplice as a matter of law, the trial court must in addition instruct the jury that the accomplice's testimony must be corroborated. (*People v. Robinson* (1964) 61 Cal.2d 373; *People v. Dailey* (1960) 179 Cal.App.2d 482, 485-486.)

"'Corroborating evidence "must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged." [Citation.]'" (*People v. Zapien*, *supra*, 4 Cal.4th at p. 982, quoting *People v. Sully* (1991) 53 Cal.3d 1195, 1228.) To satisfy the corroboration requirement, the evidence must raise more than a conjecture or suspicion of guilt (*People v. Szeto* (1981) 29 Cal.3d 20, 27), and must connect the defendant with the crime rather than just its perpetrators. (*People v. Robinson* (1964) 61 Cal.2d 373, 400.) The prosecution "must produce independent evidence which, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. [Citation.]" (*People v. Perry* (1972) 7 Cal.3d 756, 769.) The evidence is not sufficient if it requires the

interpretation and direction of such testimony in order to give it value. (*People v. MacEwing* (1955) 45 Cal.2d 218, 225; see also *People v. Reingold* (1948) 87 Cal.App.2d 382, 393; *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 545.)

At bottom, the corroborating evidence must connect the accused to the commission of the offense "in such a way as reasonably may satisfy the jury that the accomplice is telling the truth." (*People v. Maldonado* (1999) 72 Cal.App.4th 588, 598, internal quotes omitted.) "[T]he entire conduct of the parties, their relationship, and their acts during and after the crime may be taken into consideration by the jury in determining the sufficiency of the corroboration of an accomplice's testimony. [Citations.]" (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1305.)

In this case, the corroboration does not tend to connect Dalton with the commission of the offense in such a way as reasonably may satisfy a jury that Baker is telling the truth. Baker's testimony is exactly what an accomplice would be expected to say when confronted with her involvement in a crime – I didn't do it; I didn't know anything about it; they did it and made me participate.

Moreover, the alleged corroboration offered by the prosecution was itself explained in light of Baker's testimony. That is, the alleged corroboration required Baker's testimony to connect Dalton with the commission of each crime.

Where there is insufficient corroboration of accomplice testimony, the conviction must be reversed. (See *People v. Robinson*, *supra*, 61 Cal.2d at pp. 398-399 [corroboration insufficient where fingerprints showed the defendant had been around the subject vehicle on some recent date and defendant's stories to police conflicted on a minor point]; *People v.*

Falconer (1988) 201 Cal.App.3d 1540, 1542-1543 [corroboration insufficient as to robbery of marijuana plants, where defendant was the father of one of the perpetrators, visited the residence eight to nine months earlier, and knew the victim grew marijuana]; *People v. Boyce* (1980) 110 Cal.App.3d 726, 737 [corroboration inadequate with respect to burglary, where defendant knew where the victims lived, knew they would be away at work, knew the accomplices, and visited them around the time the stolen property arrived]; *People v. Braun* (1939) 31 Cal.App.2d 593, 601-603 [insufficient corroboration of participation in robbery and homicide, where defendant was present at the café when the crimes occurred, associated with the perpetrators, and drove with them out-of-state while drunk].)

2. Baker's Testimony Was Insufficiently Corroborated.

In his closing argument, Dusek, after noting that Baker would "be difficult to accept" at face value (39 RT 3767), argued that the following examples corroborated her testimony:

- Deputy Baumann responded to the kidnap call that Fedor placed in the early morning of June 26, 1988, when the car with Fedor's children was late arriving at the trailer. Baumann received the call and acted on it, until he was called off. Baumann, according to Dusek, backed up Baker "right down the line." (39 RT 3778, 3767.) In fact, Baker testified that Tompkins' truck broke down and they got lost. (33 RT 3109-3110.) There was no kidnapping; nothing improper occurred, and nothing about the call or Baumann's response ties Dalton to the alleged crimes.
- Lona Agnew, the Emergency Medical Technician, received a call on June 26 about an asthma attack and tentatively picked

out Baker's photograph as someone who looked familiar. (39 RT 3778-3779, 3768.) Someone's asthma attack does not tie anyone to a crime. In addition, Fedor testified that Baker and Tompkins went to the store to buy medicine for May's asthma. (30 RT 2635.) Baker denied doing any such thing. (33 RT 3120.)

- Dusek told the jurors that Baker remembered a screwdriver and she remembered Fedor pulling it out of a trash can. According to Dusek, Baker's statement was corroborated by Fedor's testimony that she got a screwdriver out of the trash, and by Jeannette Bench and Allan Woods, to whom Fedor gave a screwdriver. (39 RT 3769, 3779.) Neither Baker's nor Fedor's testimony was a model of clarity on this point. Baker testified at trial, on February 9, 1995, that she remembered throwing away the screwdriver. (33 RT 3134.) On cross-examination she testified that after May was killed, the frying pan, the screwdriver and the breaker bar were all thrown away at a gas station in Alpine. (33 RT 3177.) During her second pre-trial interview, on July 6, 1994, Baker said "I just remember putting it in that trash can, and [Fedor] taking it out saying, this isn't trash." (20 CT 4179.) In that same statement she said, "I think that the reason that [Fedor] had that screwdriver, is because she seen the trash can and she goes, this isn't trash this is . . . a tool. That's how come she had it." (20 CT 4161.) Fedor, on the other hand, testified that she found the screwdriver under a chair in the popout room. (30 RT 2604.) She did not, as Dusek claimed, testify that she

found it in the trash Baker was collecting. It is unreasonable to argue that Baker's statement that she threw or gave away a screwdriver – that she never saw used – was corroborated by Fedor's statement that she later found a screwdriver under a chair in the trailer.

- According to Dusek, Sherri Fisher corroborated Baker's unremarkable assertion that on June 25, she and May were at Fisher's house earlier in the day before Baker helped May move out of her apartment. (39 RT 3779.) Fisher also corroborated Baker's assertion that she came to Fisher's house after May's death, scared and upset, then left town with Fisher's mother, taking along some of May's personal documents. (*Ibid.*) As much as anything, this corroborates Baker's complicity and fear of arrest. Only Baker fled town. Baker testified that she left because she was scared, but flight is also evidence of consciousness of guilt. (See CALJIC No. 2.52.) And Fisher testified that Baker left "because she said that she was – had did something, she had to leave." (33 RT 3227.) Moreover, there was no innocent explanation for why she took May's documents with her.[78]
- Sherri Fisher's mother, Marsha, corroborated that Baker left town with her on June 30. (33 RT 3227) Baker's flight, however, does not tie Dalton to any element of the crime.
- Dusek further argued that accomplice Tompkins and jailhouse

[78] Apparently aware that this was somewhat suspicious, during her March 4, 1992, interview, Baker denied that she took any of May's personal papers, asserting that only Dalton or Tompkins would have such material. (8 CT 1550.)

informant McNeely – who testified about Tompkins' alleged admissions – "back up" Baker. "They" talk about the weapons used and how Tompkins killed May. (39 RT 3780.) Of course, an accomplice cannot be corroborated by another accomplice. (See CALJIC No. 3.13; see also *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1132 [CALJIC No. 3.13 "acknowledges this danger [of an accomplice's self-serving motives] in the context of multiple accomplices who may be motivated by self-interest to offer complementary but inaccurate testimony adverse to the defendant"].) And, as appellant has argued, McNeely's testimony should not have been admitted for any purpose. (See Argument I.)[79]

- Dusek argued that Pat Collins corroborated Baker as to what they did the morning of June 25, 1988, and that after the event, Dalton went to Collins' house, upset, needing a place to stay, and wanting to sell her jacket. (39 RT 3780.) This does not tie the Dalton to any element of the crime.
- Pat Collins, Laurie Carlyle and Judy Brakewood "all tell you about the statements the defendant made tying her to this crime." (39 RT 3780.) That is, Pat Collins testified that when she later asked Dalton "why she did it," Dalton said because May was a rat who deserved to die. (33 RT 3210.) Brakewood testified that she overheard Dalton say, "we really fucked that girl up." (33 RT 3255.) Carlyle testified that

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[79] Appellant has argued in Argument XII.B. that the court erred in failing to instruct *sua sponte* with CALJIC No. 3.13, which instructs the jurors that one accomplice cannot corroborate another.

Dalton told her that she, Baker and Tompkins were involved in the murder of May by battery acid. (32 RT 3054-3056.)

Dalton's alleged statements to, or overheard by, Pat Collins, Laurie Carlyle and Judy Brakewood provide little corroboration or support for the prosecution's case. Collins and Carlyle were in-custody informants, a class of witnesses whose very testimony must be viewed with caution. (Pen. Code, § 1127a; CALJIC No. 3.20.) Collins and Brakewood were heavy methamphetamine users during the time about which they testified. None of them testified about anything that was not already public knowledge; they easily could have pieced together the information about which they testified. Moreover, assuming the truth of their testimony, it was, for the most part, equivocal and ambiguous. As he did throughout this case, Dusek broadly proclaimed the strength of his evidence. To assess the true value of Dalton's alleged admissions, however, this Court must look at the circumstances under which the alleged statements were made, the credibility and reliability of the witnesses reporting the statements and the actual substance of those statements. When this is done, the statements add up to the same innuendo and speculation that were the slim reeds supporting this case.

As appellant has argued *infra* (see ArgumentVIII.) Judy Brakewood's testimony was irrelevant, more prejudicial than probative and inadmissible hearsay. It should never have been introduced. Even if admissible, Brakewood's testimony

that appellant stated "we really fucked that girl up," was, at best, equivocal. The statement was not made in any context and was not tied to this case or its specifics. (33 RT 3253-3255.)

Laurie Carlyle, a methamphetamine user for ten years, with at least two aliases and an extensive record of forgery, theft and grand larceny, testified that while in custody with Dalton in 1992, Dalton told her that she, Tompkins and Baker were involved in the May murder case, and that the case involved battery acid. (32 RT 3052-3053, 3055-3056, 3058.) Carlyle acknowledged that she had heard details of the case from others. (32 RT 3058, 3060-3061.) Carlyle's testimony suggests that Dalton was merely explaining what and with whom she was charged.

Pat Collins, a methamphetamine user and drug addict from 1988-1991, who had been convicted of conspiracy to manufacture methamphetamine and had a number of aliases (33 RT 3215-3217), testified that while in custody with Dalton in the summer of 1988, she "asked her [Dalton] why she did it. She told me because she [May] was a rat." (33 RT 3210.) Collins explained that Dalton said she killed May because she was a rat who deserved to die. (*Ibid.*) Collins did not seek any explanation and Dalton gave no details. (33 RT 3211.) At other times, Dalton told Collins that May must be alive and that she had left town with a boyfriend. (33 RT 3218-3219.) In Collins words, Dalton "flopped back and forth all of the time." (33 RT 3220.)

It is important to note that after Collins agreed to cooperate with law enforcement, she surreptitiously taped a phone call with, not Dalton, but Baker. (33 RT 3213.) Also, Collins seemed, in her mind, at least, to face some criminal exposure in this case. Collins testified that Dalton told her that if Collins was blamed for the murder, Dalton would turn herself in. (*Ibid.*) Also, when Dusek asked Collins why she agreed to cooperate, she initially replied, "So that it wouldn't be blamed on me." (33 RT 3214.) Not satisfied with that answer, Dusek tried again, "weren't you upset – " Collins then said "it was a sick crime." (*Ibid.*) Then, after a leading objection was overruled, Dusek had Collins reiterate that it was the nature of the crime that motivated her – presumably *not* her concern with being charged with the crime. (*Ibid.*)[80] Collins also testified that although she did not consider herself an informant, she gave information while she was in jail. (33 RT 3222.) In addition, Collins was granted early release for her cooperation. (33 3214.)

- Dusek argued that blood specks found in the trailer in August 1991, nearly three years after the event, corroborated Baker – "certainly her first version." (39 RT 3780.)
- Dusek stated that the note "backs up what Sheryl Baker says

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[80] By his closing argument, the prosecutor had entirely forgotten about Collins' testimony that she cooperated because she did not want to be blamed for the crime. Dusek argued that Collins became involved because "[t]his is a sick crime." (39 RT 3799.)

that ties the defendant to the crime." (39 RT 3780.)[81]

- Finally, Dusek argued, Baker's guilty plea corroborated what she said. (39 RT 3780.)

A review of these claims reveals the insufficiency of the prosecution's corroborating evidence. Initially, neither Baker's guilty plea nor McNeely's statements regarding Tompkins' alleged admissions can be considered because that evidence was inadmissible. (*People v. Perry*, *supra*, 7 Cal.3d at p. 774 [evidence that should not have been admitted at trial is not considered on review], overruled on other grounds in *People v. Green* (1980) 27 Cal.3d 1; see Arguments I. & II.) Similarly, the blood evidence, such as it was, should never have been admitted. (See Argument III.) Even if admissible, evidence of blood amounts too small to be identified even as human, collected years after the event and after new occupants have moved in and out of the trailer, had little evidentiary value and did not corroborate a killing, let alone first-degree murder or conspiracy to commit murder.

The remaining "corroboration" showed only that the parties were together sometime before they went to Fedor's trailer (Collins and Fisher); that they went to the trailer with May (Fedor, Agnew and Baumann); that something happened to May at the trailer (Collins, Carlyle and Brakewood); and, not surprisingly, they were all worried about – and tried to avoid – being implicated (the note, Collins, Fisher and Watson).

At most, and assuming (without conceding) all the alleged corroboration, the evidence ties Dalton to a crime. But nothing suggests an agreement or a plan between two or more people or the commanding role

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[81] Presumably, Dusek was referring to the note allegedly written by Dalton stating that the she needed to disappear. (Exh. No 28.)

Baker attributes to Dalton.

To determine if sufficient corroboration exists as to each offense such that it is supported by sufficient evidence, Baker's testimony must be eliminated from the case, and the evidence of other witnesses examined to determine if there is inculpatory evidence tending to connect Dalton with the offenses of conspiracy and first-degree murder. (See *People v. Falconer*, *supra*, 201 Cal.App.3d at p. 1543.) Evidence that should not have been admitted is not considered on review (*People v. Perry*, *supra*, 7 Cal.3d at p. 774), and Baker's testimony cannot be used to create the connection between Dalton and the offenses. (*Id.* at p. 769.)

In this case, not simply Dalton's culpability – but the very existence of a conspiracy – cannot be found independent of Baker's testimony. Similarly, there is insufficient evidence of deliberate and premeditated first-degree murder.

B. THE CONVICTION FOR CONSPIRACY TO COMMIT MURDER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The verdict finding Dalton guilty of conspiracy to commit murder demonstrates the susceptibility of the jurors to the prosecution's scattershot approach to the case and starkly illustrates their inability to properly parse and evaluate the evidence as to each offense charged.

A conspiracy consists of two or more persons conspiring to commit any crime. (Pen. Code §, 182, subd. (a)(1).) "A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy. (§ 184; [citations].)" (*People v. Morante* (1999) 20 Cal.4th 403, 416.)

Only rarely can the prosecution present direct evidence of an agreement to commit a crime, and so the agreement must usually be established by circumstantial evidence. (*People v. Osslo* (1958) 50 Cal.2d 75, 94.) While it is not necessary for the prosecution to prove the alleged conspirators made an express or formal agreement or that they ever met, "[i]t is necessary . . . for the prosecution to establish that the facts which are known prove beyond a reasonable doubt the existence of an agreement to commit the underlying crime." (*People v. Austin* (1994) 23 Cal.App.4th 1596, 1606-1607, overruled on another point in *People v. Palmer* (2001) 24 Cal.4th 856, 861.)

The prosecution theory was that Dalton and Tompkins were acting as part of the conspiracy when they drove to the U-Totem to meet Baker and then led the group into the country. (See 38 RT 3667-3668 [hearing on Penal Code section 1118.1 motion for acquittal].) In his opposition to the defense motion for new trial, the prosecutor argued that Dalton "created a ruse to lure May into rural, isolated east San Diego County." (10 CT 2043.)[82] There was no evidence, however, that anyone lured May to the trailer – or indeed had any idea they would end up there. The prosecution's principal witness, Sheryl Baker, testified that, to her knowledge, no one planned anything. She was not aware of any plan to take May to the mountains. In fact, it was pure chance that May was with Baker that night. (20 CT 4169-4170 [7/5/94 interview].) Just as it was pure chance that they

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[82] Overt act one of the information alleged that on or about June 25, 1988, Dalton, Baker, Tompkins and an unidentified co-conspirator took May to Fedor's Live Oak Springs trailer. (5 CT 999 et seq.) The second overt act alleged that on June 26, 1988, Dalton, Baker, Tompkins and the unidentified coconspirator waited for Fedor to leave the trailer. (*Ibid.*) The court, however, ultimately dismissed overt act one. (38 RT 3674-3675.)

ran into Fedor by the side of the road. (20 CT 4170 [7/5/94 interview].) There was no evidence that Fedor's breakdown was planned or feigned or the trip to Fedor's trailer was pre-arranged. They had no plan once they arrived at Fedor's. (33 RT 3113.)

In addition, there was no evidence from Baker or anyone else that the defendants brought or obtained weapons; no evidence that George, Dalton and May remained at the trailer because of some prior agreement. In short, there was no evidence that Dalton sought out May or went to the trailer with Baker and Tompkins intending to do harm.[83]

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[83] These facts can be compared with *People v. Tran* (1996) 47 Cal.App.4th 759, 772-773; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464; *People v. Superior Court* (*Quinteros*) (1993) 13 Cal.App.4th 12, 21; and *In re Nathaniel C.* (1991) 228 Cal.App.3d 990, 996-997), where the courts found the necessary pre-planning.

In *Tran*, both defendants were armed, and together borrowed a car and went to the restaurant looking for the victim. One of them entered and shot the victim, while the other waited outside with a shotgun, which he fired toward the restaurant when the victim was shot. (See *People v. Tran*, *supra*, 47 Cal.App.4th at pp. 772-773.)

In *Herrera*, the defendant told his girlfriend that his gang was going to retaliate against a rival gang, and he admitted at trial that he got into his confederate's car intending to "'back up'" his fellow gang members; he armed himself with a gun, and after they cased the area, he fired the gun while the car made two passes in front of the apartment where the rival gang members had gathered. (*People v. Herrera*, *supra*, 70 Cal.App.4th at p. 1464.)

In *Quinteros*, when the defendant, a gang member, came out of a beach restroom and told a group of his fellow gang members that he had been "jumped," one of them said, "Let's go get him." They searched the restroom, then drove around until they found the victim and his friends and assaulted them. (*Quinteros*, *supra*, 13 Cal.App.4th at p. 19.)

Finally, in *Nathaniel C.*, a group of people, including several gang members, were riding together in a van on their way to a high-school dance. On the way, they spoke about the possibility of finding members of a rival

(continued...)

Baker had no reason to frustrate the prosecution's case. She testified willingly in exchange for a reduced sentence and could only have wanted to please the prosecution and assist in any way she could.[84] Her testimony and interview statements are the only evidence directly addressing conspiratorial intent – and they are wholly inconsistent with the prosecution's theory.

In addition, Baker's description of what she says occurred when she and Tompkins went to Lakeside after dropping off Fedor at the honor camp negates a suggestion of any such plan or agreement. According to Baker, she went to her connection's house and got drugs, while Tompkins went to telephone Dalton. Ten minutes later, Tompkins returned "in a panic." (33 RT 3123.) He told Baker to get into the car because "something happened." (33 RT 3124.) Baker did not want to go but he said they had to, "something has happened." (*Ibid.*) Baker believed that Tompkins was trying to prepare her for something – to prepare her for what was

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[83] (...continued)
gang at the dance and engaging them in a fight in retaliation for a recent stabbing. (*In re Nathaniel C.*, *supra*, 228 Cal.App.3d at p. 996.) Before arriving at the dance, the group put two baseball bats and a three-foot portion of a stairway handrail in the van. When the group found no rival gang members at the dance, they went to go to a park where the rivals were supposed to have gone. (*Id.* at p. 996.) It was at that moment that the defendant joined the group and rode with them to the park. While he was in the van, retaliation was again discussed, and the group reviewed its plan to attack the rival gang members. (*Ibid.*) The van dropped off three groups at the park. Two groups found and chased the rivals until one of them pointed what looked like a gun at pursuers, which prompted them to return to the van, where the defendant was arrested along with the other van occupants a short distance away. (*Id.* at pp. 996-997.)

[84] Baker was to be sentenced only after her testimony in Dalton's trial. (33 RT 3149.)

happening. (33 RT 3125.) Obviously, even according to the prosecution's main witness, whatever was happening had not been planned or agreed upon. The alleged behavior of Dalton also undermines the prosecution's theory. If the plan was to get May alone and then kill her when she was most vulnerable, why didn't Dalton do so when she had the opportunity?

"'Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense.' [Citations.]" (*Dong Haw v. Superior Court* (1947) 81 Cal.App.2d 153, 158; accord, *People v. Manson* (1976) 61 Cal.App.3d 102, 126 ["[a]ssociation, by itself, does not prove criminal conspiracy"].) The core of a conspiracy is an agreement to commit an unlawful act. (*United States v. Esparsen* (10th Cir. 1991) 930 F2d 1461, 1471; see also *United States v. Kelly* (3rd Cir. 1989) 892 F2d 255, 258 ["The essence of a conspiracy is an agreement"].) Conduct that furthers the objective of the conspiracy is not sufficient to make a person a conspirator even if the person knew about the conspiracy and voluntarily helped to further its objectives. (See *People v. Horn* (1974) 12 Cal.3d 290, 296; see also *United States v. Falcone* (1940) 311 US 205, 210-211; *United States v. Benz* (11th Cir. 1984) 740 F2d 903, 910-911.)

The only evidence suggesting joint intent or action was Baker's testimony regarding what occurred when she and Tompkins returned to the trailer from Lakeside on June 26. (33 RT 3123-3124.)[85] That testimony,

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[85] By the time he filed his opposition to the defense motion for new trial, Dusek had conceded as much. In that pleading he stated that "at the very least, the conspiracy to murder Irene May began when Mark Tompkins spoke on the telephone from Lakeside with the defendant." (10 CT 2043.)

(continued...)

however, does not describe a specific intent to agree or conspire.

Even presuming that Baker's described a specific intent to agree, her uncorroborated testimony would be the *only* such evidence. None of the corroborating evidence offered by the prosecution suggests an intent to agree or an intent to kill. No evidence corroborates conspiracy, and Baker's testimony alone cannot support the conviction.

C. THE FIRST-DEGREE MURDER CONVICTION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

For similar reasons, the totality of the circumstances failed to establish that Dalton committed first-degree murder. An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support a finding that the murder is first degree the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid*; see also *In re Winship*, *supra*, 397 U.S. 358; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-90 [state must prove every element that distinguishes a lesser from a greater crime].)

> In order for a murder to be first degree based upon a theory of premeditation and deliberation, the intent to kill must have been formed upon a preexisting reflection and must have been the subject of actual deliberation and forethought. [Citation.] A finding of first degree murder due to premeditation and deliberation is proper only when the slayer killed as the result of careful thought and weighing of

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[85] (...continued)
Of course, no one but Baker said that she and Tompkins went to Lakeside after dropping off Fedor; and no one but Baker said that Tompkins spoke with Dalton on the phone. There certainly was no evidence of what was said or that anything was agreed upon. In fact, Baker's description of Tompkins' reaction to the phone call suggests that there was no plan and that whatever had happened was unintended, unwanted and quite upsetting.

> considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design. [Citation.]

(*People* v. *Rowland* (1982) 134 Cal.App.3d 1, 7, citing *People v. Anderson, supra*, 70 Cal.2d at p. 26.)

In *Anderson*, this Court set forth the guidelines for reviewing a finding of first-degree murder based on premeditation and deliberation. (*People v. Anderson, supra*, 70 Cal.2d 15.) Although the *Anderson* tripartite test does not establish "normative rules" (*People v. Sanchez* (1995) 12 Cal.4th 1, 31) it provides a "framework to assist reviewing courts in assessing whether the evidence supports an inference that the killing resulted from preexisting reflection and weighing of considerations" (*People v. Thomas* (1992) 2 Cal.4th 489, 517), and this Court has continued to employ the test in deciding whether the murder occurred as a result of "preexisting reflection rather than unconsidered or rash impulse." (*People v. Sanchez, supra*, 12 Cal.4th at p. 31, quoting *People v. Pride* (1992) 3 Cal.4th 195, 247.)

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing.[86] (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) Typically, this Court will sustain a verdict of first-degree murder on a

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[86] The Court described category three as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

theory of premeditation and deliberation when there is evidence of *all three factors*; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing. (*Id.* at p. 27; *People v. Sanchez*, *supra*, 12 Cal.4th at p. 31.)

The appellate court must "judge whether the evidence of each of the essential elements constituting the higher degree of the crime is substantial; it is not enough for the respondent simply to point to 'some' evidence supporting the finding." (*People v. Bassett* (1968) 69 Cal.2d 122, 138.)

If Baker's testimony is eliminated from this case, and all inferences are drawn in favor of the conviction, the most that can be inferred is that May was killed while Fedor was visiting her boyfriend at the honor farm on the afternoon of June 26, 1988. Baker, Tompkins and George were as likely as Dalton to have been the perpetrator. Only Baker attributed the commanding role to Dalton. Only Baker gave a motive – stolen jewelry, even though Fedor said they were all angry with May because even though she had hepatitis, she shared needles with others in the group (30 RT 2581)[87] and other evidence suggests provocation or self-defense. Fedor testified that May had a knife and wanted to use it on Dalton. (30 RT 2585-2586.) Only Baker said that she and Tompkins did not immediately return to the trailer after dropping off Fedor at the honor farm. Only Baker

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[87] Under the *Anderson* analysis, motive evidence, *alone*, is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

described the weapons and who used them.[88] And only Baker described herself as an unwitting participant, forced to do what Dalton and Tompkins told her to do, although, as noted above, she was the only one who left town.

Only Baker described the alleged killing of May and her testimony alone cannot support the jurors' verdict. There simply is no evidence that is reasonable, credible and of solid value to support a finding that the killing of Melanie May was deliberate and premeditated first-degree murder.[89]

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[88] Even if we accept Baker's testimony, it establishes that there was no planning based on obtaining weapons. In *People v. Rowland*, the court concluded that strangulation of the victim with an electrical cord did not suggest that the defendant took "'thoughtful measures' to procure a weapon for use against the victim." (*People v. Rowland*, *supra*, 134 Cal.App.3d at p. 8.) The court reasoned that an electrical cord "is a normal object to be found in a bedroom and there was no evidence presented that defendant acquired the cord at any time prior to the actual killing." (*Ibid.*) The use of items found in the trailer (like the use of electrical cord in *Rowland*), did not suggest that appellant took "'thoughtful measures' to procure a weapon for use against the victim."

[89] There was evidence presented that George and Tompkins disposed of May's body, but that adds nothing to a determination of whether the killing was premeditated and deliberate. Evidence of a "cover up" of the crime is,

> irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing. Evasive conduct shows fear: it cannot support the double inference that defendant planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation.

(*People v. Anderson*, *supra*, 70 Cal.2d at pp. 31-32.)

D. CONCLUSION.

Even viewed in the light most favorable to the judgment, the evidence presented at appellant's trial does not support a finding that appellant conspired to commit murder or premeditated and deliberated the killing of Melanie May. Her conspiracy and first-degree murder convictions were obtained in violation of state law. (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35.) The improper convictions also violated appellant's federal rights to due process of law (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314 [the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt"]), to present a defense (*id.* at p. 314 ["[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused"]) and to a reliable guilt and penalty verdict. (U.S. CONST., 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, 16 and 17.)

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V.

THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE SPECIAL CIRCUMSTANCE ALLEGATIONS OF LYING IN WAIT AND TORTURE-MURDER.

The Due Process Clause requires the prosecution to prove beyond a reasonable doubt every element of the crime with which the defendant is charged. (*In re Winship*, *supra*, 397 U.S. at p. 364.) A criminal defendant's state and federal rights to due process of law, a fair trial and reliable guilt and penalty determinations are violated when criminal sanctions are imposed based on legally insufficient proof of guilt. (U.S.CONST., 6th, 8th & 14th Amends.; CAL. CONST. Art. I, Sections 1, 7, 12, 15, 16, 17; *Beck v. Alabama*, *supra*, 447 U.S. 625; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

The reasonable doubt standard is fully applicable to special circumstance proceedings. "In reviewing a claim that there was insufficient evidence of the special circumstances to find them true, we must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the [allegations] beyond a reasonable doubt." (*People v. Ochoa* (1998) 19 Cal.4th 353, 413-414, internal quotes and citation omitted.)

The special circumstances charged in this case were based on nothing more than speculation and suspicion. The findings must be reversed and the death judgment vacated.

A. THE EVIDENCE WAS LEGALLY INSUFFICIENT TO SUPPORT THE JURORS' FINDING OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE.

1. Factual Background.

Kerry Dalton was charged with, and the jury found true, the special circumstance of lying-in-wait as set forth in Penal Code section 190.2,

subdivision (a) (15). (5 CT 999; 8 CT 1709; 11 CT 2147.) At the conclusion of the prosecution's case-in-chief, defense counsel made a motion for acquittal pursuant to Penal Code section 1118.1. (11 CT 2181; 38 RT 3665, et seq.) Regarding the lying-in-wait special circumstance, counsel argued that it,

> requires both concealment and watchful waiting as well as the killing during the same time period. And there has got to be some type of uninterrupted attack commencing no later than the moment that the concealment ends. In this particular case, there is no substantial evidence to support lying-in-wait whatsoever; there is no evidence that would provide for that type of showing necessary to justify lying-in-wait and the elements of lying-in-wait were not met in this particular case.

(38 RT 3667.)

After hearing argument, the court denied the motion. (38 RT 3675; see also 11 CT 2181.)

Following trial, defense counsel filed a motion for new trial in which they again argued, *inter alia*, that there was insufficient evidence of lying in wait. (10 CT 1977.) The court denied the motion, stating that "once they got there [to the trailer], I think that the evidence is overwhelming that there was a substantial waiting for a period of time to act. It clearly was a surprise attack on the victim and clearly by those in a position of advantage." (48 RT 4630.) The facts simply do not support the court's conclusions or its ruling. A review of all the evidence reveals that the essential elements of lying in wait had not been proven beyond a reasonable doubt.

2. The Record Contains No Solid, Reliable Evidence to Support the Lying-In-Wait Special Circumstance.

The question whether a lying-in-wait special circumstance has occurred "is often a difficult one which must be made on a case-by-case

basis, scrutinizing all of the surrounding circumstances." (*People v. Morales* (1989) 48 Cal.3d 527, 557-558.) It requires "an intentional murder, committed under circumstances which include (1) concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." (*Id.* at p. 557; see *People v. Carpenter* (1997) 15 Cal.4th 312, 388.) This special circumstance requires that the killing either be contemporaneous with or "follow directly on the heels of the watchful waiting." (*People v. Morales*, *supra*, 48 Cal.3d at p. 558.)

The overriding defect in the lying-in-wait finding in this case was the utter lack of evidence of what occurred between Kerry Dalton and Melanie May at the most critical time in terms of establishing the elements of lying in wait. No one saw or heard what transpired between the two women before Sheryl Baker claimed she returned to the trailer to find May tied to a chair and covered with a sheet. The only hint was Dalton's statement that Baker did not know what had occurred while she was gone, suggesting that Dalton had experienced some ordeal prior to Baker's arrival. (33 RT 3126.) In the absence of any evidence, the prosecution's theory of when or how May was killed was just that – a theory. While all inferences must be made in favor of the conviction, rank guesswork ought not be.

The prosecution presented insufficient evidence that Dalton had an intent to kill May either before or after they all went to Fedor's trailer. Even if one accepts that Dalton was angry with May, there is no evidence that this anger included a desire to kill her – let alone sufficient evidence that Dalton concealed this intent to kill and watched and waited for an opportune time to act. More importantly, however, even assuming that

Dalton did all of these things, there was absolutely no evidence that Dalton attacked May from a position of advantage immediately after the waiting period ended.

a. Insufficient Evidence of Concealment of Purpose.

Since 1988, the year in which May was allegedly killed, the lying-in-wait special circumstance has been found to apply to those who did not physically conceal themselves from their victims. The law still requires, however, that the defendant at least conceal his or her true intent and purpose so that he or she can take the victim by surprise. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) "It suffices if the defendant's purpose and intent are concealed by his actions or conduct, and the concealment of purpose puts the defendant in a position of advantage, from which the factfinder may infer that lying-in-wait was part of the defendant's plan to take the victim by surprise." (*People v. Ceja* (1993) 4 Cal.4th 1134, 1140, citing *People v. Webster* (1991) 54 Cal.3d 411, 448; *People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555.)

Here, Dalton clearly did not physically conceal herself, and there is no evidence that Dalton had any sort of plan – let alone that she hoped to conceal this plan in order to place May in a vulnerable position from which to strike. Baker testified that Dalton and Mark Tompkins approached her at the U-Totem store to ask for her help stealing a car. Baker agreed, and May, knowing full well that Dalton would be present, voluntarily accompanied her friends Baker and George to Fedor's trailer in order to party. (33 RT 3159, 3156, 3110.) Dalton did nothing to lure May from a place of safety to a less secure place or isolate her from others for purposes of making a surprise attack. (See Argument IV.B.)

The prosecutor – and no one else – told the jurors that the plan to

steal a car about which Baker testified was "bogus." (39 RT 3781.) He also, alone, told the jurors that while driving to carry out this supposedly bogus scheme, Dalton and Tompkins planned an attack on May. (*Ibid.*)[90]

Even if one surmises that once the group arrived at the trailer, or once Dalton discovered her jewelry in May's purse, Dalton hatched a plan to attack May, there appears to have been no element of concealment or surprise. According to Fedor and Baker, Dalton was brazenly hostile to May. May knew Dalton was upset with her and allegedly told both Fedor and Baker that she was scared. She even showed Fedor a knife that she said she wanted to use on Dalton. (30 RT 2585-2586.) May also asked Fedor how she could get out of the trailer park. (*Ibid.*)[91] Unlike the unsuspecting victim in *Morales* who thought she was going shopping at the mall, May knew she was in a hostile environment and was thinking through her options. May was so far from being an unsuspecting victim that she was ready to stab Dalton.

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[90] Not even the court accepted this argument. In ruling on a defense motion for new trial (10 CT 1977), the court agreed with defense counsel that there was "insufficient evidence to show that Dalton specifically lured May to Fedor's trailer." (48 RT 4630.) The court did conclude, however, that there was evidence of a substantial waiting for a period of time to act once they all got to the trailer. (*Ibid.*) As Justice Moreno pointed out in his dissent in *People v. Hillhouse* (2002) 27 Cal.4th 469, 515, however, "mere advance planning or waiting for an opportune moment to attack the victim, without more, does not constitute lying in wait." As discussed *infra*, V. A.2.c.ii, the evidence does not establish "a surprise attack on an unsuspecting victim from a position of advantage." (*Ibid.*, quoting *People v. Morales*, *supra*, 48 Cal.3d at p. 557.)

[91] It should be noted, of course, that Fedor was quite able to make a phone call for May to cancel an appointment with her Child Protective Services worker. (30 RT 2590-2591.) The prosecutor argued that May also was able to call 911, seeking help for her asthma. (39 RT 3790-3791.)

b. Insufficient Evidence of a Substantial Period of Watchful Waiting.

There was no classic watching and waiting in this case. Dalton did not select a murder location and wait there for her victim to arrive (compare *People v. Sassounian* (1986) 182 Cal.App.3d 361); she did not stalk May or lure her to the murder location (compare *People v. Webster* (1991) 54 Cal.3d 411, 448-449); nor did she go to where the victim was (compare *People v. Hardy* (1992) 2 Cal.4th 86; *People v. Byrd* (1954) 42 Cal.2d 200, overruled on other grounds in *People v. Green* (1956) 47 Cal.2d 209, 232, and *People v. Morales, supra*, 48 Cal.3d 527; *People v. Superior Court* (*Jurado*) (1992) 4 Cal.App.4th 1217.)

Although the court concluded that once at the trailer, Dalton waited "for an opportune time to attack [May] by surprise when Miss Fedor was not there" (38 RT 3675), that conclusion appears to be based on nothing more than the court's finding that Dalton was upset with May:

> Just to cite a few of my recollections of the evidence in this area, Miss Fedor testified that on the first night when they arrived at the trailer, it is my recall that she testified that she heard the defendant, Miss Dalton, say to Melanie May, that she was a snitch just like Todd. . . . Further, that she heard Miss Dalton allegedly tell the victim that she had her property and sold it at a yard sale, that the defendant sounded angry, the victim sounded scared. The following morning, according to Miss Fedor, the defendant began treating the victim like a slave. Fedor told – was told by the victim, allegedly, that she was afraid of the defendant, wanted to know how she could get away.

(38 RT 3675-3676.)

The court also noted that Fedor said May was never left alone; that the person who responded to a 911 call was not allowed to contact May; that whatever occurred, occurred while Fedor was at the La Cima Honor

Camp; and that Fedor was not picked up from the camp at 3:30 p.m. as promised. (38 RT 3676.)[92] "My point is, I think that there is enough there, if found to be credible by the jury, that it would support a lying-in-wait special circumstance." (*Ibid.*) The court, however, missed an important step. Even if it were true that Dalton was angry at May, indeed, even if Dalton intended to kill May (neither of which, appellant submits, is supported by the evidence), these mental states do not establish lying in wait. Neither anger nor intent to kill is a substitute for the required elements of the lying-in-wait special circumstance – a substantial period of watching and waiting for an opportune time to act followed by an immediate surprise attack on an unsuspecting victim from a position of advantage.

Evidence of watchful waiting can be based on the condition of the victim's body. When an examination of a corpse reveals that the victim was sleeping at the time of death, or was shot in the back of the head after emerging from a room, it may be reasonable to infer that the killer watched and waited for an opportune moment to attack. (See *People v. McDermand* (1984) 162 Cal.App.3d 770 [one body was found lying in bed shot behind her ear and the other was found in the hall shot in the back of his head, suggesting that the defendant waited to kill until the first victim was asleep and then until the second came out of his room after being startled by the gunshot]); *People v. Ruiz* (1988) 44 Cal. 3d 589 [defendant's wife and stepson found buried in the yard, wearing bedclothes and wrapped in bedding and both were shot in the back of the head from close range. "From such evidence, the jury reasonably could infer that defendant watched and

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[92] Fedor testified that she knew of no arrangements to pick up Fedor from the camp. (7 CT 1423-1424.)

waited until his victims were sleeping and helpless before executing them"]; *People v. Nakahara* (2003) 30 Cal. 4th 705 [lying in wait found when the victim had been shot three times in the back].) Here, without a body, it is impossible to make any inferences of watchful waiting based on the physical evidence.

c. *Insufficient Evidence of a Surprise Attack on an Unsuspecting Victim from a Position of Advantage.*

There was no evidence presented about what occurred between Dalton, May and George during the "at least" three hour period (33 RT 3170) that Baker claimed she and Tompkins were away from the trailer. Baker testified that when she returned to the trailer, she saw a silent, motionless body covered in a sheet and tied to a chair in the kitchen. (33 RT 3126-3129.) She did not witness and was never told about what happened while she was gone. (33 RT 3127.) The time was unaccounted for, and nothing supports the conclusion that Dalton made a surprise attack from a position of advantage on an unsuspecting, and perhaps armed, May.

i. *No Evidence of an Immediate Attack.*

At the time of Dalton's trial, the lying-in-wait special circumstance required that the killing be either contemporaneous with or "follow directly on the heels of the watchful waiting." (*People v. Morales*, *supra*, 48 Cal.3d at p.558.)[93] In other words, the murder must have occurred without any "cognizable interruption" following the period of lying-in-wait. (*Domino v.*

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[93] At the time of this offense and until March 2000, statutory language distinguished between lying-in-wait as a ground rendering a murder first-degree (Penal Code section 189, "murder which is perpetrated *by means of* . . . lying in wait) and lying-in-wait as a special circumstance rendering the penalty as death or life without parole (former Penal Code section 190.2, subd. (A)(15) ["The defendant intentionally killed the victim *while* lying in wait"], emphasis added.)

Superior Court (1982) 129 Cal.App.3d 1000, 1011.) Either the killing must take place during the waiting period, or the lethal acts must begin at, and flow continuously from, the moment the concealment and watchful waiting ends. (*Ibid.*)

In *Domino*, the court concluded that the lying-in-wait special circumstance could not be sustained even though immediately after the period of concealment and watchful waiting, the defendant captured, stripped, handcuffed and beat the victim, and then killed him one to five hours later. (*Domino v. Superior Court*, *supra*, 129 Cal.App at p.1011.) The murder was not committed "while" lying in wait, as the Penal Code required, because there was a time gap between the ambush and the murder. (See also *People v. Merkouris* (1956) 46 Cal.3d 540 [defendant had not lain in wait, even though he waited near the crime scene for several days before the crime, because he was not observed waiting on the day of the crime].)

In *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 907-908, a panel of the Ninth Circuit found that "the temporal requirement" contained in the special circumstance of lying in wait, as explained in *Domino*, saved the circumstance from being unconstitutionally vague. Nonetheless, Proposition 18, adopted by the voters on March 7, 2000, changed the word "while" in the lying-in-wait special circumstance to "by means of," so that it would conform with the lying-in-wait language defining first-degree-murder, thus eliminating the immediacy requirement that *Houston* and *Domino* had placed on this special circumstance. (See Legis. Analyst's analysis of Prop. 18, Mar. 7, 2000 Ballot Pamphlet; Chief Counsel, Rep. On Sen. Bill 1878 to Assem. Comm. On Public Safety, June 23, 1998 hearing, pp. 10-11.) The analysis noted that the courts had,

> generally interpreted [while lying-in-wait] to mean that, in order to qualify as a special circumstance, a murder must have

> occurred immediately upon a confrontation between the murderer and the victim. The courts have generally interpreted this provision to rule out a finding of a special circumstance if the defendant waited for the victim, captured the victim, transported the victim to another location, and then committed the murder.

(*Ibid.*)

It concluded: "This change would permit the finding of a special circumstance *not only in a case in which a murder occurred immediately upon a confrontation between the murderer and the victim*, but also in a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, and then committed the murder." (Analysis of Prop.18, *supra*, at pp. 10-11, emphasis added.)

Appellant Dalton cites this legislation without comment on its constitutionality, but to underscore the element of immediacy required to prove the lying-in-wait special circumstance at the time of Dalton's trial: the prosecution had to prove that May's killing occurred "immediately upon a confrontation between the murderer and the victim." (Analysis of Prop.18, *supra*, at pp. 10-11.) Even if a juror could have found lying in wait in this case, he or she could not reasonably conclude that no cognizable interruption separated the lying in wait from the time of the killing. Indeed, if anything, the prosecution's theory *included* a "cognizable interruption." The prosecutor argued that something happened between Dalton and May while Tompkins and Baker were gone, then, hours later, after Tompkins and Baker returned – because something unexpected had happened – they killed May.

It is true that "[a]s long as the murder is immediately preceded by lying in wait, the defendant need not strike at the first available opportunity, but may wait to maximize his position of advantage before taking the victim

by surprise." (*People v. Ceja*, *supra*, 4 Cal.4th at p. 1145.) But in this case there was no evidence of the attack, so there is no proof that any such attack was a surprise or even that it was instigated by Dalton.

Assuming all was as the prosecution speculated in this case – Dalton watched and waited for an opportune time to kill May – there was no evidence that this plan was ever carried out. Moreover, it is uncontroverted that May was primed for a confrontation. She earlier had armed herself with a kitchen knife and expressed a desire to use it against Dalton. (30 RT 2586.) And Dalton told Fedor that she and May got into a fight. (33 RT 3137.) Although Baker testified that she returned to find May tied to a chair, Dalton, according to the prosecution theory, did not kill the incapacitated May but instead called Tompkins. (33 RT 3123-3124.) Under no stretch of the imagination could it be maintained that substantial evidence proved that May's killing flowed continuously from the moment the concealment and watchful waiting ended. (Compare *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1150 [defendant watched and waited for several hours outside the victim's house, gained entry to the house by a ruse and then "proceed[ed] straight to the master bedroom. . . and fatally shot [the victim].]".)

The evidence does not even convincingly support the proposition that Dalton attacked May, let alone that she attacked her immediately after she got the chance, without first revealing her intentions.

ii. No Evidence of Surprise, Position of Advantage or Unsuspecting Victim.

This Court has acknowledged that "[i]f the defendant and the victim engage in activities before the killing not designed to gain a position of advantage, or the defendant passes up several positions of advantage before killing during an argument, there is not lying-in-wait." (*People v. Ceja*,

supra, 4 Cal.4th at p. 1143, fn.3.) Again, the lack of evidence of what happened while Dalton, George and May were alone at the trailer undermines the prosecution's case. Even if Dalton planned to kill May, watched and waited until the rest of the group left, and then immediately attacked May, the lying-in-wait special circumstance cannot be sustained because there was no evidence of the required surprise attack on an unsuspecting victim from a position of advantage.

An ambush or a lethal attack where the victim is taken by surprise necessarily places the killer in a position of advantage. (*People v. Edwards* (1989) 54 Cal.3d 787, 823.) However, as discussed above, May was prepared to fight Dalton. May was not an unsuspecting victim, and any attack would not have been a surprise.

Dalton also had no physical advantage over May. Both Dalton and May weighed about 95 pounds at the time of the alleged homicide. (See, e.g., 20 CT 4157 [Baker could not imagine how Dalton "weighing all of 95 pounds" could have tied up May, even though May weighed that too].) Also, although May had a knife earlier that day, there was no evidence that Dalton had a weapon. (30 RT 2585.)

Again, since May's body was not found, and there was no testimony regarding how she was attacked, there was no evidence to show that May was attacked in a particularly vulnerable position. There is no reason to believe that May was attacked while sleeping (cf. *McDermand*, *supra*, 162 Cal. App.3d at p. 787 [victim's body showed that she had been shot from close range while sleeping]), or from behind (cf. *People v. Webster* (1991) 54 Cal.3d 411, 449 [defendant maneuvered himself behind the victim and then attacked without warning]), or while distracted (cf. *Hillhouse*, *supra*, 27 Cal. 4th at pp. 500-501 [victim attacked while urinating].)

As May was not an unsuspecting victim, Dalton had no physical advantage over her, and there is no bodily evidence of the attack, there is no evidence to show that Dalton attacked May from a position of advantage.

3. Conclusion.

The evidence was insufficient to prove an intentional murder, committed under circumstances that include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

This Court must strike the lying-in-wait special circumstance. It must also vacate the death judgment because, as appellant argues in the next section, the torture-murder special circumstance must also be struck for lack of evidence.

B. THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FINDING WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

The evidence was insufficient to support the torture-murder special circumstance under Penal Code section 1118.1 and the Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. The evidence was lacking in the elements of both torture and intent to inflict extreme pain.

1. Proceedings Below.

Following a pretrial hearing on a defense motion to dismiss the torture-murder special circumstance for lack of evidence, the court acknowledged that the lack of any physical evidence of the alleged torture was "troubling." It nonetheless concluded that, given the low probable cause threshold for a pretrial motion to dismiss, there was sufficient evidence to sustain the special circumstance. (5 RT 683-684.) The court based its denial of the defense motion on the "existence" of the following

evidence:

- The electrical cord found plugged into the wall with the cord ends stripped so that it had the potential for causing electrical shock.
- The substantial amount of blood found at the scene;
- A bar of soap with teeth marks it in, from which one could reasonably infer that the person who put the teeth marks in the bar of soap was under extreme pain;
- Testimony from an autopsy surgeon about the pain caused by electrical shock and injection of battery acid; and
- The defendants' – that is Baker's, Tompkins' *and* Dalton's – statements about what happened.

(5 RT 684.)

At the conclusion of the prosecution's case at trial, the defense moved under Penal Code section 1118.1 for an acquittal of the special circumstances due to insufficiency of the evidence. (35 RT 3418-3419; 38 RT 3651-3652, 3665 et seq.) The court denied the motion, but offered no analysis of the evidence. (38 RT 3676-3677.) At the same time, the court granted the defense motion to dismiss overt act 1, the allegation that the defendants took the victim to Fedor's trailer (38 RT 3674-3675; 11 CT 2180-2181), overt act 6, the allegation that Dalton administered an electric shock to May (38 RT 3678; 11 CT 2180-2181), and the personal use enhancements alleging that Dalton had used a metal skillet and electrical cords. (38 RT 3673;11 CT 2180-2181.)[94]

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[94] In their motion for new trial counsel also argued that there was insufficient evidence of torture. (10 CT 1977.) The court ruled that there was "substantial evidence to support both of the special circumstances" (48 RT 4629-4630), but did not refer to the evidence of torture as it did

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2. The Prosecution Presented Insufficient Evidence of the Means of May's Death.

At trial, Baker testified that May may have been dead when Baker and Tompkins returned to the trailer on June 26, 1988. (33 RT 3171-3172.) Baker never heard May speak. (33 RT 3172.) May never responded to Dalton's comments; she never moved or uttered a sound. (33 RT 3174.) Even after the "hot shot," May did not move and did not make a sound: "I never heard a noise from the person under the sheet." (*Ibid.*) Baker's testimony on this point was consistent with her July 1994 interview. (20 CT 4148 ["I don't think she was alive when we got there"].) It was only during her March 1992 interview that she claimed that May was alive and said she did not want to die. (8 CT 1558-1559.)[95] At trial, Baker explained that when she made those statements in 1992, she did not want to think about it. (33 RT 3198.) The truth, she testified, was that she did not hear any sounds from May when she returned to the trailer, and she did not know whether May was alive or dead at that point. "Anything to the contrary is not true." (33 RT 3199.) If May were indeed dead before the acts Baker described, there could be no torture. (See CALJIC No. 8.24.)

Even if May was still alive, however, the only evidence of the means of her death – and, thus, evidence of torture – came from accomplice

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[94] (...continued)
when analyzing the other grounds raised.

[95] It should be noted that Cooksey virtually put these words in Baker's mouth. Cooksey asked Baker: "Did she say that she didn't wanna die, did she ever say anything like that?" Baker then told him May said, "Please don't kill me, I'm sorry." (8 CT 1558.) During her second interview, Baker claimed that after they asked her if May made noises, "I think I just wanted her to make noises, I don't think she was alive when we got there. But I can't tell you that for sure either." (20 CT 4148-4149.)

Baker's uncorroborated testimony. Not one of the means of the alleged torture was recovered – no hypodermic needles, no battery acid, no knife, no broken frying pan. Most of the "evidence" relied upon by the judge who heard the pretrial motion to dismiss never materialized at trial. That, however, did not prevent the specter of these "means of torture" from contaminating the proceedings. A close review of the alleged evidence of torture reveals the stark shortcomings of the evidence.

a. Elusive Evidence of Electric Shock.

Some of the most damning, but unsubstantiated, evidence concerned allegations of electric shock. Baker testified that she never saw an electrical cord or observed anyone being shocked (33 RT 3176; see also 8 CT 1567 [no electrical cords were used on May; Baker would remember that]), and the overt act and enhancement involving the electric cord were dismissed by the trial court. (38 RT 3678, 3673; 11 CT 2180-2181.) Nevertheless, an assumption of electric shock torture pervaded the trial.

Fedor stated that she noticed that the chandelier in her bedroom had been cut down. (30 RT 2605.) The cord was still plugged in, and the protective cover of the cord was melted back so the electrical wire was exposed. (30 RT 2605-2606.) Her then 12-year-old daughter Alisha said she saw a hanging lamp with a cut cord in her mother's bedroom. (30 RT 2671.)[96] She did not mention extension cords. The other witnesses, rather

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[96] Alisha was obviously quite influenced by her mother. (30 RT 2672.) After stating that she saw blood spots in her mother's bedroom, Alisha explained, "I thought it was blood because my mom had told me the story –" (*Ibid.*) Her comment was interrupted by an objection. She later testified that she saw a screwdriver with hair and blood on it in her mother's truck (30 RT 2674), even though she told District Attorney Investigator Cooksey that she had never seen the screwdriver (38 RT 3653), her mother
(continued...)

than corroborating the Fedors, impeached them. All claimed to have been in Fedor's bedroom, but none saw or was shown the cut lamp and dangling plugged-in cord.

Although Fedor claimed that cut and exposed wires were hanging from her bedroom ceiling, and that she and San Diego Sheriff's Department Deputy Wilson were in the bedroom (30 RT 2644), Wilson never saw the dangling cords. Fedor also stated that she found two extension cords, one of which was in her bedroom. (30 RT 2606.) One of the cords was configured like two figure eights – "It was like another cord tied between the two figure 8s." (30 RT 2607.) Wilson never saw any extension cords, even though he was in the bedroom, kitchen and the living room of the trailer. (31 RT 2746.) Fedor claimed not to have found the extension cords until after Wilson left. (30 RT 2643.) She never described the extension cords as cut. Fred Eckstein, on the other hand, said that – on some unspecified date – he saw a cut extension cord in the living room tied in a knot. The loops of the knot were "fish-size."[97] (31 RT 2872.) He, alone, also saw a telephone cord on the living room floor. (31 RT 2881.) Kathy Eckstein claimed that Fedor showed her an extension cord with two loops, which Fedor pulled from a cupboard in the kitchen. Kathy, like her son, claimed that one end of the extension cord was cut off. (31 RT 2859-2860.)

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[96] (...continued)
had only told her about it, and even though according to Fedor's version of things, the screwdriver no longer would have been at the house. (30 RT 2612.)

[97] Fred, who at the time of trial filleted fish for a living, was prone to piscatorial references. As he explained, "I deal with a lot of fish." (31 RT 2871.) He recognized the shape as a loop because while working on fishing boats, "you tie a lot of loops around fish sometimes and drag them behind the boat when they're too big to bring onto the boat." (31 RT 2872.)

Neither Fred nor Kathy Eckstein mentioned a chandelier, even though Fred had been in Fedor's bedroom (commenting that it smelled like a fish that had been out all day (31 RT 2875)), as had Kathy. (31 RT 2859.) No one testified that the extension cords had exposed wires or were plugged into any socket.

The cord testimony highlights the difficulty the jurors would have had attempting to unravel the evidence. Cut chandelier cords, looped extension cords and a telephone cord, found in the bedroom, living room or kitchen, were referred to indiscriminately, until soon the looped extension cords became cut with burnt ends and the chandelier wires became cut, burned and looped into handcuffs. Even the court succumbed to the confusing presentation of evidence. At one point it concluded that there was "indirect" evidence of electric shock because, "The cord from a swag light was cut at one end and still plugged in. It was tied in loops about the size of handcuffs. The ends of the cord were burnt or smelled. Plastic ends were burnt, melted. That would constitute indirect evidence that it was used." (34 RT 3281.) It might constitute evidence – *if* such an item had been found at the trailer. It had not.

In his closing argument Dusek referred to still other variations: he first argued that "the cut extension cord was in the master bedroom with the burnt ends." (39 RT 3782.) A little later he argued, "the electrocution, the burn, the extension cord still plugged in, cut from the lamp. . . melted, darkened, dark." (39 RT 3795.)

Moreover, the fact remains that no one saw anyone use any cords. To extrapolate torture from the presence of a cut wire and knotted extension cords is nothing but guesswork and speculation.

Some of the most persuasive evidence of torture was that which

ostensibly was not admitted – and certainly not admissible – to prove Dalton's guilt – *and* it came from a witness who did not even testify at trial – Mark Tompkins. According to informant McNeely, Tompkins told him that he tortured the hell out of May and described the methods of torture he used. (32 RT 3074.) McNeely said Tompkins mentioned an electrical cord and "shock treatment." (32 RT 3075.) He also said, "Pain was the name of the game." (32 RT 3074.) While the court and prosecutor agreed the testimony was admitted to establish corpus, not Dalton's guilt (see, e.g., 10 CT 2047; 19/24 RT 1185), the jurors were never so instructed and undoubtedly impermissibly used it as proof of torture or, if nothing else, as corroboration of Fedor's testimony. (See Argument I and Dusek's closing argument at 39 RT 3770 [Tompkins' statements through McNeely corroborate Fedor].)

Probably the most influential – but improper – source of disinformation regarding torture were statements made by Investigator Cooksey. During his March 1992 interview of Baker, Cooksey made several pronouncements regarding the circumstances of May's killing that were simply untrue. While this may have been a legitimate interrogation tactic, his words were not legitimate evidence. Nevertheless, these undeniably false assertions were presented to the jury, without qualification, when a videotape of the interview was played for the jury.[98] Thus the jurors heard the prosecutor's investigator assert that "we have found quite a bit of blood." (8 CT 1555.)

> There was [sic] bloody pillows and there was bloody this and bloody that and . . we'd like to know where it was the blood came from?

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[98] Appellant has argued that the court erred in allowing the videotape to be played at trial. (See Argument VI.)

(*Ibid.*)

Cooksey also mentioned a screwdriver. (8 CT 1556.) When Baker could not remember a screwdriver, he questioned the truth of this statement, asking "[i]s it because you don't wanna remember?" Cooksey conveyed to the jurors he knew something more and Baker's denial should not be credited.

Cooksey also gave credit to the notion of electric shock, telling Baker – and the jurors – "We have some information that indicates that Melanie might've been shocked, in other words, an electrical cord mighta' been used on her?" He added: "like an extension cord was cut off and the ends were bare and. . . ." (8 CT 1566-1567.) Baker was clear that she did not see May shocked or see any cords: "No, no I would remember that, no." (8 CT 1567.) When pushed, however, she allowed that it could have happened before she got there, "I don't, I don't know." (*Ibid.*)

The jurors' exposure to Cooksey's probing, leading and misleading questions and assertions was improper and prejudicial. Those portions of the videotape and Tompkins' hearsay statements should never have been presented at trial. They may explain, but do not legitimize, the jurors' finding.[99]

b. Dubious Evidence of Blood-Letting.

Dusek told the jurors during his closing argument that once a team "took the time" and had the "equipment," "they found evidence of this torture, of this blood-letting." (39 RT 3772-3773.) Despite Dusek's

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[99] The jurors also heard the testimony of Dr. Blackbourne, who explained that electric shock and injection with battery acid cause pain. (See 34 RT 3283 et seq.) As argued elsewhere, the testimony should not have been introduced and suggested the existence of evidence that did not exist. (See Argument VII.)

assurances, no competent evidence of blood was found at the scene. Law enforcement agents searched Fedor's trailer for traces of blood on September 15, 1988, and again on November 16, 1988. (See, e.g., 35 RT 3437, 3439-3442.) No evidence of blood was found during either search. Nearly three years later, on August 12, 1991, law enforcement officers returned to the trailer a third time, and this time, they found on the top of the walls and ceilings of the living room and master bedroom, pin-head sized spots that tested presumptive for blood. (32 RT 2931-2932, 2938-2939.) They also obtained a presumptive reading following luminol testing on the walls of the living room and master bedroom. (32 RT 2941-2943.) No one was able to determine what species the blood came from. (32 RT 3000.) As appellant has argued, the fruits of the 1991 search should never have been admitted. (See Argument III.)

Testimony about observations made closer to the date of the alleged crime was no more reliable on the subject of blood. In her sworn testimony and during her second interview, Baker said there was little blood. (33 RT 3180 ["I did not see it [blood]. I do not recall there being any blood"]; 20 CT 4151 [no blood on the sheet, on the floor, no blood anywhere]; 20 CT 4154 [no blood after May was stabbed; "a little bit of blood on the floor, but not very much"]; 20 CT 4154 ["there wasn't much blood, "and I think that's something I would have remembered if there was like a lot of it"].) During Baker's first interview, the police told her – falsely – that they had found a lot of blood. (8 CT 1555.) Upon hearing that, Baker said it was from the stab wounds Tompkins inflicted. (*Ibid.*) She persisted, though, that there was not a lot of blood. (8 CT 1565 ["there was a little blood"]; 1573 ["there wasn't much blood"].)

Fedor testified that she found a bloody pillow in the trash and that

she asked Baker about it. (30 RT 2601.) Baker testified that she never saw or found a bloody pillow case or a bloody pillow. (33 RT 3199.) Fedor testified that she told Deputy Wilson that she found a blood-soaked pillow case on her bed.[100] (30 RT 2572.) She also claimed to have noticed something spattered on the kitchen paneling. (30 RT 2607.) She was not certain whether it was blood; she could hardly see it. (*Ibid.*) Fedor claimed that she put a trash can with the bloody pillow in it in her truck. (30 RT 2609-2610.)[101] She apparently never saw it again; nor did Deputy Wilson who looked into the rear of Fedor's truck with his flashlight at about 9 p.m. that night. (31 RT 2752-2753.) Deputy Wilson found no blood on the evening of the alleged "blood-letting." Kathy Eckstein testified that she saw nickel and dime sized spots of what looked like dried blood on the walls, floor, carpeting and blankets of the trailer. (31 RT 2859.) Her son Fred saw spots of what could have been blood on the walls and carpet of the living room. (31 RT 2871-2872.) Of course, no one could say when the Ecksteins made these observations, other than it was *not* June 26, 1988. Moreover, Fred said he replaced the carpeting in the trailer. (31 RT 2874.)[102]

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[100] Fedor variously described the object as a pillow (30 RT 2601), a pillow case (30 RT 2572) and a towel (30 RT 2600).

[101] She also claimed never to have seen it again after asking Baker about it. (30 RT 2601.)

[102] Dusek allowed that the Ecksteins were not at the trailer on June 26: "We are not sure when they showed up. It does not look like it was that weekend, the times just don't match." (39 RT 3769.) Furthermore, it is significant that Fedor never mentioned their alleged visit or showing them any blood or physical evidence.

c. The Bar of Soap.

No bar of soap was recovered; Baker never saw a bar of soap with blood on it (33 RT 3177); Fedor never showed a bar of soap to Deputy Wilson. (31 RT 2778.) Fedor, however, claimed that she found a bloodied bar in the shower Dalton used. (30 RT 2601.) Fedor did not mention teeth marks at trial. Kathy Eckstein, alone, testified that she observed teeth marks in a bar of soap – whenever it was that she was at the trailer. All we know about Kathy Eckstein's observations is that they were *not* made on the weekend of the killing. Her undated observations cannot support or corroborate anything at the trailer on June 26. Again, however, the trial court – and undoubtedly the jurors – conflated the testimony of Fedor and Eckstein, and cited the bloody soap with teeth marks as further "indirect" evidence of torture. (34 RT 3282.)

This phantom evidence, like that of the electric shock, had to have had an impact far beyond its value. The image of Melanie May clenching a bar of soap between her teeth to muffle her screams provided a frightening – and distorted – backdrop against which the prosecution presented its case.

d. Hot Shots.

Baker testified that she was given a syringe with clear liquid in it. She was told it contained battery acid, but she did not know what was in it – it could have been methamphetamine; it could have been water; it could have been "anything." (33 RT 3173.) Neither syringes nor battery acid was recovered.

A pathologist testified that the effect of an injection of battery acid would depend on where and how much of it was injected. (34 RT 3288.) One to ten ccs of battery acid injected into a vein would be painful until neutralized, which would take seconds. Injection of the same amount of

battery acid into the muscle would sting like an injection. One cc of battery acid would stay in the tissue near where it was injected, and a "Charley-horse" type pain would be experienced only in that area. (34 RT 3289-3290.) Baker testified that neither she nor Dalton injected May in a vein. She also testified that whatever amount of acid, if any, entered May, had no effect on her.

e. Statements.

All that remains to prove torture are Dalton's alleged statements. Assuming, without conceding, that Dalton made these statements, they are not evidence or corroboration of torture. Dalton's statement that May was a rat who deserved to die does not include an admission of guilt of anything other than disregard for May. Her other alleged statements can, at most, be interpreted as admissions of complicity in whatever happened to May, but not of torture.

In addition, it is difficult to believe a prolonged torture of May could have occurred in this trailer park during the middle of the day without someone becoming suspicious. Dusek went to great lengths to depict their location as isolated and remote, but it was actually a few feet from other trailers. (See Exhibits 3A-3E & 4.) A maintenance man and his wife lived next to Fedor on the right and next to them lived the owners of the trailer park. (30 RT 2626.) In back of Fedor's trailer there were two more trailers. (30 RT 2627-2628.) There were numerous trailers on her street and on the side street. There were homes just up the road and, near the entrance, a restaurant, store, gas station and a number of A-frame motel rooms. (30 RT 2628-2629.) Fedor agreed she had a neighbor to her right and neighbor to her left, but contended that the neighbors to her right were always working (30 RT 2629), and the owner, in a trailer to the right of the maintenance

man, was usually working in the store. (30 RT 2630.) The ones to her left were usually there. (*Ibid.*) June 26, of course, was a Sunday, and it is likely that most everyone would be at home. Moreover, Fedor had, as she described, a "nosey" neighbor, who, in fact, "sent somebody over to complain" about the noise they were making during the early hours of June 26. (30 RT 2581.) It was not an abandoned area – "there was people" (30 RT 2360) – and these people would have reported something had torture occurred.

Moreover, even if May was alive and suffered the injuries Baker described, the torture special circumstance must be vacated because there was no evidence of intent to torture.

3. The Prosecution Presented Insufficient Evidence of Specific Intent to Torture.

The torture special circumstance finding must be vacated because the evidence did not establish a willful and deliberate intent to cause pain. Penal Code section 190.2, subdivision (a)(18) defines the special circumstance of torture-murder as one where the "murder was intentional and involved the infliction of torture." This special circumstance requires all of the elements of first-degree torture-murder, with the exception of causation, see *People v. Crittenden* (1994) 9 Cal.4th 83, 141-142, plus an additional element of intent to kill. As this Court stated in *People v. Davenport* (1985) 41 Cal.3d 247, 271,

> In sum, we find that the words used in section 190.2, subdivision (a)(18) must be understood in the light of the established meaning of torture. Proof of murder committed under the torture-murder special circumstance therefor requires proof of first degree murder (section 190.2, subdivision (a)), proof the defendant intended to kill and to torture the victim (section 190.2, subdivision (a)(18)) and the infliction of an extremely painful act upon a living victim.

[Citation.]

(See also *People v. Wade* (1988) 44 Cal.3d 974, 994-995; *People v. Bemore* (2000) 22 Cal.4th 809, 839.)

This Court has repeatedly confirmed that a victim's awareness of pain is not a necessary element of the torture-murder special circumstance. (*People v. Davenport, supra*, 41 Cal.3d at p. 271; *People v. Raley* (1992) 2 Cal.4th 870, 898, fn.2) At issue is the state of mind of the accused, rather than the victim's experience of pain. (*People v. Davenport, supra*, 41 Cal.3d at p. 269.)

At the time of the alleged torture, commission of an act calculated to cause extreme pain no matter how long its duration was an element of the torture-murder special circumstance. (See *People v. Davenport, supra*, 41 Cal.3d at p. 271;[103] see also *Morales v. Woodford, supra*, 388 F.3d at p. 1169 [the Eighth Amendment requires that a finding of the torture special circumstance under California law be supported by a finding of intent to torture, not just that the murder involved the infliction of torture].)

It is not the amount of pain inflicted that distinguishes the torture-murderer from another murder, since most killings involve significant pain, but rather, "it is the state of mind of the torturer – the cold-blooded intent to inflict pain for personal gain or satisfaction – " which so distinguishes him and which society condemns. (*People v. Steger* (1976) 16 Cal.3d 539, 546.)

Torture-murder thus requires an intent to cause pain and suffering.

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[103] Proposition 115, effective June 6, 1990, amended section 190.2, subdivision (a)(18) by deleting the second sentence, which had read: "For the purposes of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration." This amendment, however, does not apply to crimes, like that here, committed before Proposition 115 was passed. (*People v. Bemore, supra*, 22 Cal.4th at p. 839 & fn. 17.)

(*People v. Steger*, *supra*, 16 Cal.3d at p. 544 [holding that defendant's murder of her stepchild was not accomplished with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain and thus not murder by torture]; see also *People v. Caldwell* (1955) 43 Cal.2d 864 [evidence did not support a finding that first-degree murder committed by torture since there was no evidence that the defendant had the intent to make the decedent suffer]; *People v. Bender* (1945) 27 Cal.2d 164, 177 ["The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer"].)

Intent to torture has been variously described as intent to inflict or cause "extreme pain" (*People v. Bemore*, *supra*, 22 Cal.4th at p. 841; *People v. Crittenden* (1994) 9 Cal.4th 83, 140), "extreme and prolonged pain" (*People v. Steger*, *supra*, 16 Cal.3d at p. 546; accord, *People v. Raley*, *supra*, 2 Cal.4th at p. 888; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239), and "'cruel pain and suffering for the purpose of revenge, extortion, persuasion or for any other sadistic purpose.'" (*People v. Wiley* (1976) 18 Cal.3d 162, 168; accord, *People v. Mincey* (1992) 2 Cal.4th 408, 432; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1101; *People v. Davenport*, *supra*, 41 Cal.3d at p. 267; *People v. Cole*, *supra*, 33 Cal.4th at p. 1226, citing CALJIC No. 8.81.18.)

For purposes of proving murder by torture, the intent to inflict extreme pain "may be inferred from the circumstances of the crime, the nature of the killing, and the condition of the victim's body." (*People v. Morales*, *supra*, 48 Cal.3d at p. 559; see also *People v. Steger*, *supra*, 16

Cal.3d 539; *People v. Wiley*, *supra*, 18 Cal.3d 162; *People v. Mincey*, *supra*, 2 Cal.4th at pp. 432-433.) In this case, of course, no body was recovered. The circumstances of the crime and the nature of the killing were described only by Baker, and she *consistently* maintained that no one intended to cause May pain. To the contrary, the intent was to cause her death as quickly as possible. In her first interview, Baker specifically stated she did not think they were torturing May. "I don't think they were trying to torture her, no." (8 CT 1565-1566.) They were not trying to make it painful for her. They were just trying to end it and did not know how. (*Ibid.*)

Baker testified that when she returned to the trailer Dalton told her that the "hotshot" "would be really quick and easy, that it would be over with." (33 RT 3127.) Baker at no point in any of her three accounts of the event said that May reacted in anyway to suggest she was suffering pain.[104] Moreover, according to Baker, when Dalton realized that the "hotshot" was not working, she became concerned that May might be suffering: "she told me that she wasn't dead, that she was suffering, that we had to do something about it." (33 RT 3130.)

According to Baker, Dalton then handed her a frying pan, with which Baker hit May on the head one time. She did so because she felt bad for May, not because she wanted to cause her pain. (33 RT 3130.) After that, Dalton said it still was not working and that they needed Tompkins. (33 RT 3132.) Tompkins then stabbed May twice in the throat and in the

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[104] Baker stated that neither she nor Dalton was able to inject May in a vein. (33 RT 3173-3175; 8 CT 1561.) According to Dr. Blackbourne, an injection of battery acid into the muscle would hurt like any injection. (34 RT 3289.) It would cause a "Charlie-horse type of pain." (34 RT 3290.) This type of pain would not cause a reaction such that the one inflicting could not know it was extremely painful or credibly argue a lack of intent to cause pain.

chest. (33 RT 3133.) In his closing, Dusek said that Tompkins stabbed May twice – "that is intentional torture." (39 RT 3796.) To the contrary, the described stabbing appeared designed to kill May – not cause her pain. (Compare *People v. Elliot* (2005) 37 Cal.4th 453 [torture-murder where victim suffered 81 pre-mortem stab and slash wounds, some suggesting a meticulous, controlled approach]; *People v. Robertson* (1982) 33 Cal.3d 21 [torture supported by evidence that victims suffered scores of knife wounds, that defendant mutilated their bodies with a knife and one victim was stabbed in the vagina while still alive]; *People v. Raley*, *supra*, 2 Cal.4th 870 [torture where, among other things, defendant inflicted 41 knife wounds on screaming victim].) Here, as in *People v. Heslen* (1944) 163 P.2d 21, 27,[105] there was "no indication that the defendant was endeavoring to prolong the agony or inflict pain preliminary to death."

4. The Torture-Murder Special Circumstance Cannot Be Upheld Based on Fedor's Testimony.

Lacking direct evidence of intent to torture, the prosecutor was forced to rely on Joanne Fedor to prop up his claim of torture. Fedor, a chronic methamphetamine user and self-described "tweaker,"[106] gave unreliable, unsupported, and, at times, incoherent accounts of what she claimed to have seen the weekend of June 25 and 26. Her testimony suffers from more infirmities even than Baker, and is constitutionally insufficient to support or provide corroborating evidence for the convictions, special circumstance finding and death judgment.

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[105] Modified on rehearing, *People v. Heslen* (1946) 27 Cal.2d 520.

[106] Baker described "tweaking" as a term for people really loaded and "really spun out." (33 RT 3152.) Someone who had been up for days and "you know, not normal." (33 RT 3153.)

Dusek acknowledged that not many of the jurors "have probably run into anyone like Joanne Fedor." (39 RT 3767.) She was "difficult to accept" and could not be accepted at face value. (*Ibid.*)[107] He assured the jurors, however, that "[t]hey had gone out and found witnesses who confirm virtually everything that she says." (*Ibid.*) Much of the alleged corroborative evidence was, like that of Baker's testimony, corroboration of nothing criminal, suspicious or even contested. Other of it was corroboration – but not of Fedor's assertions, rather of her unreliability.

In *People v. Mayfield*, this Court, noted that "generally, 'doubts about the credibility of [an] in-court witness should be left for the jury's resolution.'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 735, quoting *People v. Cudjo, supra*, 6 Cal.4th at p. 609.) Even in *Cudjo*, however, this Court recognized that in those rare cases of demonstrable falsity, a witness's testimony cannot be credited. The testimony of a single witness is not sufficient to support a finding where that testimony "is physically impossible or its falsity is apparent 'without resorting to inferences or deductions.' [Citations.]" (*People v. Cudjo, supra*, 6 Cal.4th at pp. 608-609.)

Other California courts have recognized that a judgment of conviction may be reversed on the ground that the testimony of a prosecuting witness is inherently improbable where the testimony is so apparently false and unbelievable that reasonable minds may not differ regarding its falsity. (*People v. Campbell* (1947) 80 Cal.App.2d 798; *People v. Mitchell* (1941) 48 Cal.App.2d 422, 429; *People v. Robinson* (1948) 87 Cal.App.2d 772; *People v. Meyers* (1943) 62 Cal.App.2d 24, 28;

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[107] Baker herself described Fedor as a "scumbag" who was "lying about a lot of that stuff." (20 CT 4160 [7/5/94 interview].)

Brown v. Guy (1959) 170 Cal.App.2d 256, 261.)

This is unquestionably a difficult standard to meet. Remarkably, Fedor's testimony makes it with ease – as Dusek seems to have recognized when he assured the jurors that Fedor would be corroborated. She was not.

- **Prosecution argument.** The fact that Deputy Baumann responded to the call Fedor placed about her children when Dalton, Tompkins, Baker, May and George were late arriving at Fedor's trailer corroborates Fedor. "She was thinking pretty coherently." (39 RT 3767.)

  Evidence. Baumann corroborates that Fedor made a call to 911 on the evening of June 25, 1988. It also suggests Fedor's – probably drug-related – paranoia. Fedor was not thinking "coherently;" her accusations of kidnaping were unfounded and irrational, as the 911 response suggests. Fedor claimed that the 911 operators – hardly a dismissive group of people – did not credit Fedor's account. She had to keep "calling them back, and they said, like, they didn't believe me." (30 RT 2576.) Fedor also claimed that although she had been burglarized five times, "cops were not believing that it was happening. They thought that it was a figment of my imagination." (30 RT 2609.)

- **Prosecution argument.** Lona Agnew "corroborates" that she was called about someone's asthma attack. (39 RT 3768.) Similarly, the calls to 911 and the social worker Nina Tucker were corroborated. (*Ibid.*)

  Evidence. While the evidence is consistent that there was a call to 911 and Tucker, the significance of these calls is elusive. The fact that methamphetamine users who had been up all night doing drugs

did not want anyone associated with law enforcement in the trailer is understandable. The fact that May wanted Fedor to cancel her meeting with the representative from Child Protective Services suggests that she was anything but an unwilling guest at Fedor's. She chose to remain at the trailer rather than meet with her children and husband who was then in jail. Moreover, the fact that Fedor could make such a call on May's behalf belies any suggestion that May was being held captive and could not seek help if she wanted it.[108]

- **Prosecution argument.** Burns corroborated Fedor in that she testified that she saw what looked like blood in Fedor's trailer. (39 RT 3768.) Inexplicably, the prosecutor also cited the knife and heater as corroboration: "With regards to the knife, *unfortunately it was the wrong one*, and the heater that probably had the blood burnt off by then; but all of that matches. It is consistent. What Joanne . . . Fedor is telling you is true." (*Ibid.*, emphasis added.)

  Evidence. Burns' observation of a knife that had nothing to do with May's disappearance corroborates nothing but Fedor's delusions. The fact that Fedor had a heater *without* blood on it does not corroborate that the heater had been full of blood – and certainly not

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[108] Dusek also argued that May made at least one telephone call herself. During closing argument, Dusek told the jurors that May made the 911 call for help with her asthma. (39 RT 3791.) Dusek also suggested that May really did not have asthma, but just claimed to have it in order to get help. (39 RT 3790.) If, in fact, she made the call and made it only because she wanted help, it is much more likely that she would have called 911 and told them she was being held against her will – not that she needed a medic for asthma.

because of anything Dalton may have done.[109] Moreover, Burns testified that she did not visit Fedor's trailer until August 17, 1988. (34 RT 3304.) At that time, Fedor showed her areas on the living room carpeting where Burns saw dark spots, that "could have been blood." (34 RT 3304-3305.) "Could have been blood" is not quite, as Dusek argued, "looked like blood." Be that as it may, Fred Eckstein testified that he replaced the living room carpet and padding in June 1988, shortly after the event. (31 RT 2874.) Even if that was not true, the three crime lab technicians who combed the trailer for traces of blood confirm that what looked like or could have been blood on the carpet, in fact, was *not* blood. (See 32 RT 2931 et seq, 2938-2940 [testimony of San Diego Police Department Crime Lab evidence technician Dorsett regarding August 12, 1991, search of trailer for blood]; 34 RT 3300 et seq [testimony of supervising criminalist for the San Diego Sheriff's Crime Laboratory Randy Robinson regarding September 15, 1988, search of trailer for blood]; 36 RT 3519 et seq [testimony of San Diego Sheriff's Department criminalist Walter Fung regarding November 16, 1988, search of trailer for blood].) No one found even a trace of blood on the carpeting in the trailer.

Fedor testified that she gave Burns the heater in July 1988. (30 RT 2653.) She did not give her the knife because it was gone by then. (30 RT 2663.) Burns testified that Fedor gave Burns the knife

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[109] It is also unreasonable to conclude, as Dusek does, that the heater would have been used for any length of time in July in San Diego. Surprisingly, Dusek found nothing significant about the absence of blood on the heater two months after the event, while the discovery of pinpoints of blood on the trailer walls three years later was deemed meaningful.

and the heater (both of which tested negative for blood (37 RT 3642, 2989) on September 7, 1988. (34 RT 3307-3308.)

Contrary to Dusek's claim, Burns's testimony did not "match." It was not "consistent" with Fedor's.

- **Prosecution argument.** The prosecutor had the hubris to tell the jurors that Deputy Wilson corroborated Fedor. His story "match[ed] Fedor's;" they simply had different "interpretations" of what was going on. (39 RT 3768.)

Evidence. This example probably best reveals the prosecutor's mistaken perception of what qualifies as corroboration. Yes, Deputy Wilson corroborated the fact that Fedor called him, but that is not the significance of his testimony. What is noteworthy is that he responded to the trailer shortly after the alleged murder and found nothing out of the ordinary – except for Fedor. (See 31 RT 2747.) Fedor testified that she called Wilson shortly after the others left the trailer. (30 RT 2640.) She claimed that at that point she had seen a bloody bar of soap, a screwdriver, a knife and a bloody pillow (or pillowcase [30 RT 2645, 2752] or towel [30 RT 2600]). She put everything, including the bar of soap, in her truck. (30 RT 2642.) She was most concerned about the screwdriver; she did not recall whether she mentioned the pillowcase to him. (30 RT 2643-2645.) She contended she told Wilson the screwdriver and knife were in her truck, but he would not let her get them. (*Ibid.*)

Wilson testified that he responded to Fedor's call at approximately 9 p.m. on June 26, 1988. (31 RT 2741, 2746.) The kitchen and bedroom lights were on and Wilson had a flashlight. (31 RT 2746-2747.) Wilson looked around the kitchen, living room

and master bedroom of the trailer. He saw no blood in any of those rooms, and Fedor did not point out any blood to him. (31 RT 2747, 2766-2767.) He testified that Fedor was acting paranoid and appeared to be under the influence of methamphetamine. She was unable to complete her sentences. (31 RT 2747.)

Fedor told Wilson that she had found a blood-soaked pillowcase on her bed, but he was unable to find it.[110] He looked on the bed with his flashlight, but could not find a trace of blood. (31 RT 2752, 2768.) Wilson also looked for the pillowcase underneath the trailer, because after he was unable to find the pillowcase on the bed, Fedor told him she had put it in a box under the trailer. (31 RT 2752, 2769.) Wilson knelt down and shined his flashlight under the 60-foot trailer in five different places but found nothing. Fedor then told him it might be in her truck, and he should look in the trash in her truck. (31 RT 2752, 2769.) Wilson did not enter the truck, but shined his flashlight on the interior. He did not see the pillowcase, and it did not appear to him that the trash had been disturbed. He did not believe Fedor about the pillowcase. (31 RT 2752-2753, 2769.)

Fedor did not mention anything to Wilson about a knife or a screwdriver with blood and hair on it in the back of the truck. (31 RT 2769-2770.) She did not show him a bar of soap; she did not

[110] It should be noted that, in addition to testifying under oath that she found a blood-soaked pillowcase on her bed, Fedor testified that she found it in the trash and asked Baker about it. (30 RT 2601.) Baker testified that she never saw or found a bloody pillowcase or a bloody pillow. (33 RT 3199.) Fedor testified that she never saw the pillow again after asking Baker about it, *and* she testified that she placed it in a trash can that she put into her truck. (30 RT 2609-2610.)

show him or give him a heater; and she did not ask him to look at the carpet or on the walls. Wilson saw no blood in the trailer. (31 RT 2778-2779.)

Deputy Wilson described Fedor as "5149 ½ – almost 5150," a term for a person so mentally ill that she can be hospitalized against her will. (31 RT 2772.) He said that she was rambling and did not make sense. (31 RT 2773.) He tried to follow up on her claims, but nothing supported what she said. (*Ibid.*)

Wilson was an unbiased law enforcement official who entered the trailer shortly after Fedor claimed Dalton, Tompkins, Baker and George left. He neither found nor was given any of the "evidence" Fedor claimed to possess. He does not corroborate Fedor – he refutes and discredits her on virtually every point of importance. He corroborated only that Fedor was a paranoid, agitated and drugged-up individual.

- **Prosecution argument.** The prosecutor argued that Fedor's daughter, Alisha, confirmed what her mother said. He said that she saw the blood. He argued that she "probably saw," then corrected himself to say "she said that she saw" the screwdriver. She saw the exposed extension cord – "cuffs." (39 RT 3769.)

Evidence. Alisha, 12 at the time, had been gone for the weekend of June 25-26. Fedor picked up Alisha and brought her back to the trailer – "maybe Monday." (30 RT 2668.) Alisha claimed to have seen blood on the floor of her mother's bedroom (30 RT 2671); a heater with blood spattered on it (30 RT 2672); a substance that looked like blood on the floor and wall of the pop-out area (30 RT 2673); and a screwdriver with blood and hair on it. (30 RT 2674.)

Investigator Cooksey, however, testified that when he interviewed Alisha, she was not sure whether she had actually seen the screwdriver. (38 RT 3653.) Nevertheless, Alisha testified at trial that she saw a yellow screwdriver near the open tailgate of a truck parked in front of the trailer. It was lying in the space between the gate. She did not see anything with it. (30 RT 2676.) Alisha did not recall whether it was her mother's truck, but Fedor said that she put it in her truck. This presumably was the truck she had used to pick up Alisha. It is unclear how the screwdriver could have gotten into that position after Alisha and her mother returned. More problematic, however, is Fedor's claim that she took the screwdriver to Lacy Grote the morning following Wilson's visit (30 RT 2611), which means she did not have it for Alisha to see.

Alisha's testimony about seeing blood may have also been influenced by her mother. When she was asked why she thought what she saw on her mother's bedroom carpet was blood, she began to explain that "her mother had told her the story. . . ." (30 RT 2672.)

Contrary to Dusek's argument, Alisha at no time mentioned seeing extension cords or "cuffs."

- **Prosecution argument.** The prosecutor also makes the remarkable contention that Fred and Kathy Eckstein corroborate Fedor. While acknowledging that "[i]t does not look like it was that weekend" that they showed up at Fedor's trailer, he argued that they saw "blood, screwdrivers, extension cords." (39 RT 3769.) Dusek believed that Fred even saw the exposed wire tucked on the hanging lamp. (*Ibid.*)
  Evidence. The Eckstein family presented some of the most

internally inconsistent and incomprehensible testimony of the trial. It also appears to be totally irrelevant, since we do not know anything about when the Ecksteins were at the trailer, other than it could *not* have been the day of or after May's disappearance.

Kathy Eckstein testified that her husband Fred Eckstein, Sr. drove their teenage son Fred to Fedor's trailer at 1 or 2 p.m. on Sunday. She thought it was on June 26, 1988; she was certain, however, that it was a Sunday. (31 RT 2857.) It was a 30-45 minute drive, and before Fred, Sr. returned home, Fred called and asked Kathy to pick him up, so when Fred, Sr. returned at about 5 p.m., she told him that she was going out to pick up Fred. (31 RT 2857-2858.) She did not testify that her husband accompanied her, although Fred believed that both his parents picked him up. (31 RT 2876.)

Kathy testified that it was about 5:00 p.m. when she arrived at Fedor's trailer. It was just getting dark. (31 RT 2865.)[111] When Kathy honked, Fred came out and told her that Fedor wanted to talk to her. She entered the trailer, where she saw Fedor, Mike Howard and Fred. (31 RT 2858.) Kathy testified that the trailer was a mess. (*Ibid.*) Even though it was dark outside, she was able to see nickel and dime-sized spots that looked like blood all over – the walls, floor, carpeting and blankets. (31 RT 2859.) She also testified that Fedor showed her a bar of soap with teeth marks in it and a plastic extension cord that had an end cut off and knots or loops in it that Fedor retrieved from the kitchen cupboard. (31 RT 2859-2861.)

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[111] When Dusek questioned her about it being dark at five in June, she explained that it gets dark around 5:00 in June; at the time of trial, in January, it gets dark later, at about 6:30. (31 RT 2865-2866.)

Kathy took her son and left. Upon further questioning, she conceded that she was not certain of the month or year this occurred – only that it was on a Sunday. (31 RT 2862, 2865.)

Contrary to Dusek's suggestion, Kathy never mentioned seeing a screwdriver.

<u>Fred Eckstein</u> testified that Fedor, not his father, drove him to Fedor's trailer. (31 RT 2870.) Fred said that he saw spots on the carpet. "It's hard to tell the colors and that, but it looked like blood, *if possible*." (31 RT 2871, emphasis added.)[112] He also saw in the living room a cut extension cord in the shape of a loop. (31 RT 2872-2873.) Contrary to Dusek's assertion during closing argument (39 RT 3769), Fred never said anything about seeing exposed wire from a hanging lamp. Fred claimed that Fedor showed him a rusty screwdriver, but he did not notice anything on it. (31 RT 2873.)

Fred testified that Fedor supplied him with methamphetamine, and they both were using it on the day he described. (31 RT 2879.) That may explain some of his testimony. Fred testified at one point that his father and mother picked him up later that day, at approximately 4:00 or 5:00. (31 RT 2876.) He later said that his parents did *not* pick him up later that day. He thought that he stayed overnight and part of the next day. His father and mother picked him up just before dark the following day. (31 RT 2880.)[113]

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[112] Fred explained, "I deal with a lot of fish. I have dealt with fish for a while, and I just know what blood looks like." (31 RT 2871.) He continued, "but. . . ," but was interrupted by Dusek asking a new question. (*Ibid.*)

[113] Fred explained that it was almost dark when they left at about (continued...)

Fred had no idea what day or month this occurred. He was suspended from school, did not have a job, and did not care what day it was. (31 RT 2885.) Fred did not recall the date that this occurred, but did *not* think that it was in June. (31 RT 2877.)

Of course, neither Fred nor Kathy could have been at the trailer during the afternoon and early evening of Sunday, June 26, 1988. Fedor said she herself did not return until 5:00 or 5:30 p.m. that day (30 RT 2639), and Deputy Wilson was there at 9:00 p.m. (31 RT 2746.) Moreover, Fedor testified that she did not stay at her trailer "for, like, a month, a month and a half after things happened." (30 RT 2654.) It thus was quite likely that the Ecksteins did not go to the trailer until at least after August 1988.

- **Prosecution argument.** Jeannette Bench and Allan Woods corroborated Fedor's assertion that she found a screwdriver with hair, skin and what looked like blood on it. (39 RT 3769-3770.)

  Evidence. Baker did not testify that she observed anyone use a screwdriver while she was at the trailer on June 26, 1988. She did recall throwing away a screwdriver from Fedor's trailer at a gas station in Alpine. (33 RT 3134, 3177.) In an earlier statement, on July 6, 1994, Baker remembered putting a screwdriver in trash can, "and [Fedor] taking it out saying, this isn't trash." (20 CT 4179, p. 64.)[114] Fedor, however, testified that she found the screwdriver under a chair in the pop-out room. (30 RT 2604.) She did not mention taking it from trash that Baker was collecting.

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[113] (...continued)
4:00-5:00 p.m. "It had to be the summer. It was long days." (31 RT 2876.)

[114] Baker never mentioned seeing anything on the screwdriver.

Alisha Fedor testified that she saw a screwdriver with hair and blood on it in her mother's truck (30 RT 2674), but Cooksey testified that she told him that she was not sure that she had actually seen the screwdriver. (38 RT 3653.)

Fred Eckstein saw a rusty screwdriver whenever it was that he was at Fedor's trailer. He did not remember seeing anything on it. (31 RT 2873.) His mother said nothing about seeing a screwdriver at Fedor's.

Fedor said that when Deputy Wilson did not return to Fedor's trailer the morning of June 27, 1988, she took the screwdriver, which she had hidden in the tailgate of her truck, to Lacy Grote's house. (30 RT 2611-2612.) Fedor said she told Lacy, Alan Woods and Mikey Hissom about the screwdriver. She did not mention showing it to anyone or even telling Bench about it. (30 RT 2612-2613.) Fedor said Mikey Hissom took the screwdriver from its hiding place in the tailgate of her truck and put it in the freezer. (*Ibid.*) It disappeared from there. (*Ibid.*) She later explained that she had placed a knife in her truck and it, too, was put in the freezer and disappeared. (30 RT 2650.)

Jeannette Bench, who was in custody at the time of trial, testified that in the summer of 1988, she was at Lacy Grote's house when Fedor showed up with a screwdriver. (32 RT 3035.) She did not know the date; it could have June (32 RT 3019) August or September. (32 RT 3035.) She said she saw "stuff" on the shaft, but did not know what it was. (32 RT 3022.) She also testified that it appeared to be only dirty. (32 RT 3035.) She also acknowledged that during an interview with Cooksey in October 1991, she told him

that there appeared to be dried blood, skin and hair on the screwdriver. (32 RT 3022.) Bench was using methamphetamine on a regular basis during this time. (32 RT 3036.)

Allan Woods testified he threw away an "odd-ball" screwdriver he found in his freezer. He thought it had lint or deer hair on it. (32 RT 3042.) It had "dirt, lint, shit on it." He could not tell what was on it. "It looked like what was either grease – it could have been blood – I don't know. . . ." (32 RT 3043.) He did not know when he found it, not even the year. (32 RT 3045.)

- **Prosecution argument.** Tompkins and McNeely corroborated Fedor. "It matches right down the line." (39 RT 3770.)

  Evidence. Appellant has argued that Tompkins's hearsay statements were inadmissible on numerous grounds. (See Argument I.) Moreover, as even the trial court acknowledged, Dusek did not offer Tompkins's statements to implicate Dalton. (19/24 RT 1180.)

- **Prosecution argument.** The fact that Fedor could identify Dalton, Tompkins and Baker in a lineup shows that "[s]he was working all right." (39 RT 3770.)

  Evidence. Even Dusek recognized that the fact that Fedor could identify Dalton and Tompkins was not significant. (39 RT 3770.) He nonetheless found it significant that Fedor was able to pick out Baker, with whom she had spent at least one weekend. No one has suggested that Fedor was so incapacitated that she could not distinguish those with whom she associated. Recognition of Baker does not exclude extreme paranoia and delusional thinking.

- **Prosecution argument.** "The blood evidence, it matches."

  Evidence. Blood specks – not even identified as human – found

three years after the event in question – and after other sets of people had moved in and out of the trailer and after two teams of technicians had searched the trailer for blood – are evidence of nothing but the weakness of the prosecution's case.

Virtually nothing that Fedor said was corroborated – and nothing she said could corroborate anyone else's testimony. Her testimony was simply more smoke and innuendo, used to obscure the bankruptcy of the prosecution's case and to cloud with fear the jurors' assessment of the evidence.

5. Conclusion.

Even viewed in the light most favorable to the judgment, the evidence presented at trial does not support a finding that Kerry Dalton committed premeditated first-degree murder of Melanie May with a willful, deliberate and premeditated intent to inflict pain. Accusations, rumor and hearsay were swirling, and the jury may have speculated about a number of scenarios, but the evidence, in its totality, was far too equivocal to support the special circumstance finding.

This Court must strike the torture-murder special circumstance finding. It must also vacate the death judgment because, as appellant argued in the previous section, the lying-in-wait special circumstance must also be struck for lack of evidence. Moreover, even if that special circumstance is upheld by this Court, the death judgment must be vacated because the facts and circumstances admitted to prove the invalid torture-murder special circumstance were not properly adduced as aggravating facts and circumstances under the "circumstances of the crime" sentencing factor. (Compare *Brown v. Sanders* (2006) __U.S. __, 126 S.Ct. 884, 892 ["An invalidated sentencing factor (whether an eligibility factor or not) will

render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances"].) In *Sanders* the Court clarified that "If the presence of the invalid sentencing factor allowed the sentencer to consider evidence that would not otherwise have been before it, due process would mandate reversal." (*Ibid.*) Here, unlike in *Sanders*, evidence introduced to support the torture-murder special circumstance should never have been placed before the jurors. It was unreliable, speculative, inadmissible, and should not have considered for *any* purpose. Due process mandates reversal of the death judgment.

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VI.

THE COURT ERRED IN ALLOWING THE PROSECUTION TO INTRODUCE SHERYL BAKER'S MARCH 4, 1992 TAPED STATEMENTS TO LAW ENFORCEMENT OFFICERS.

A. INTRODUCTION AND PROCEEDINGS BELOW.

On March 4, 1992, a search warrant was executed upon Sheryl Baker's home and person, authorizing law enforcement officials to collect blood and hair samples in connection with the suspected murder of Melanie May. After service of the warrant at Baker's residence, Investigators Cooksey and Hoxter took Baker to a motel room they had set up so their interview with her could be surreptitiously videotaped. (37 RT 3603-3604.) During this interview, Cooksey and Hoxter played a tape that Pat Collins had recorded of her conversation with Baker, in which Baker discussed her involvement in May's death.

During this March 4, 1992, interview, and then again on July 5, 1994, when Baker gave another statement following her guilty plea to second degree murder, Baker recounted the details of the crime and her involvement in the alleged murder of May. (Exhs. EX 37 & K.)

At trial, the prosecutor moved to introduce all discussion on the videotape "regarding what happened in this case" as both prior consistent statements that predated any bias or motive and prior inconsistent statements regarding cleaning up blood and whether May was alive and spoke. (34 RT 3356; 35 RT 3410.)[115] That amounted to virtually the entire

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[115] On February 9, 1995, the prosecutor filed a motion requesting that, should the defense cross-examine prosecution witnesses in an attempt to prove that their trial testimony was fabricated, it be allowed to offer into evidence previously tape-recorded interviews of these witnesses to show that their stories were consistent. (6 CT 1235.) In its motion in opposition,
(continued...)

videotape, omitting only the very beginning of the tape where Baker gave a blood sample, and all references to a gang or cult and to an El Cajon motel room incident (35 RT 3415), still leaving over an hour of playing time. Over objection, and following lengthy argument, the court ruled that the videotape could be played for the jury. (35 RT 3414-3415.)

Thereafter, the jury viewed the minimally redacted version of Baker's March 1992, videotaped interview. The jury was also provided with transcripts of the interview while they watched the video. (37 RT 3605-3606; 7 CT 1513 et seq.)[116]

Introduction of the videotape of Baker's earlier interview denied appellant her rights to due process, a fair trial, confrontation, and a reliable guilt and penalty determination. (U.S. CONST., 6th, 8th, & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, 16 and 17.)

B. BAKER'S MARCH 1992 VIDEOTAPED STATEMENT WAS INADMISSIBLE AS A PRIOR CONSISTENT STATEMENT BECAUSE HER MOTIVE TO FABRICATE AROSE BEFORE SHE GAVE THAT STATEMENT.

Prior statements consistent with testimony are, as an exception to the hearsay rule, admitted for the purpose of rehabilitation following an attempt to impeach the testimony. (*People v. Duvall* (1968) 262 Cal.App.2d 417,

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[115] (...continued)
the defense objected to admission of Baker's March 4, 1992, videotaped interview on the ground that it was neither a prior inconsistent nor consistent statement. (7 CT 1248.)

[116] After the videotape was played, defense counsel made a motion for mistrial, arguing that the jury was infected by having viewed the contents of the tape. (37 RT 3607.) The motion was denied. (37 RT 3608.) Then again, in their motion for new trial, counsel argued that the tape was improperly admitted. (10 CT 2017 et seq.) The court found no error. (48 RT 4633.)

420-421; Evid. Code, § 1236.) If, however, the consistent statement was made after an improper motive is alleged to have arisen, the statement is inadmissible. (*People v. Doetschman* (1945) 69 Cal.App.2d 486.) The Evidence Code codified that rule in section 791, which provides:

> Evidence of a statement made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after: . . . (b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen.

(See also comment to Cal. Evid. Code, §791, Law Revision Com.) The reasoning for this is clear: when there is a contradiction between the testimony of two witnesses it cannot help the trier of fact in deciding between them merely to show that one of the witnesses has asserted the same thing previously. "If that were an argument, then the witness who had repeated his story to the greatest number of people would be the most credible." (4 Wigmore, Evidence (3d ed. 1940) § 1127, p. 202; see also *People v. Gentry* (1969) 270 Cal.App.2d 462, 473.)

Thus, to establish the admissibility of the prior consistent statements under section 791, subdivision (b) of the Evidence Code, it is incumbent on the proponent to show that the statements were made before the improper motive is "alleged to have arisen." (*People v. Coleman* (1969) 71 Cal.2d 1159, 1166.) In *Coleman*, the court found that the admission of consistent statements was error where there was no reason to believe that an improper motive did not arise before the accomplice confessed his involvement to a third party. Instead, it was entirely consistent with the defendant's implied charge that the improper motive arose immediately after the murder when the accomplice realized his predicament and potential exposure to criminal

liability. (*Ibid.*)

Dean Wigmore also observed that an accomplice is nearly always under suspicion of discredit due to improper motives (or alleged improper motives) at the very outset. Therefore it is rare that rehabilitation could ever result from showing his prior consistent statement. (Wigmore, *supra*, § 1128, pp. 203-205.)

During cross-examination of accomplice Baker in this case, the defense elicited testimony about the terms of her plea and the fact that she had not been sentenced, as well as the details of her agreement to testify against her codefendants. (33 RT 3148-3149.) The testimony also revealed that the prosecution agreed to inform the authorities that Baker had cooperated in the case and attempts would be made to house her out of state. (33 RT 3149-3150, 3187-3189.) Baker indisputably had such consideration in mind at the time of her March 4, 1992, statement. At the onset of the interview, Investigator Richard Cooksey[117] informed Baker not only that law enforcement had enough information to charge her with murder, but also his belief that they would charge her with murder. (8 CT 1522.) The investigator then encouraged Baker to describe her part in the incident, providing Baker with motive and opportunity to paint her own actions in the best possible light. (8 CT 1520.) Through a series of leading questions, punctuated with hearsay statements by other witnesses, and false claims of the existence of other evidence, the investigator gave Baker the

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[117] The March 4, 1992, interview of Sheryl Baker was conducted by Investigators Richard Cooksey and Robert Hoxter, both of the San Diego Metropolitan Homicide Task Force, District Attorney's Office. The majority of the questions were asked by Cooksey, with Hoxter injecting questions infrequently. Where the identity of the questioner is not apparent, appellant has referred to him only as the investigator.

incentive and enough information to implicate the others while portraying herself as an unwilling bystander. He told Baker that he thought she "got duped." (8 CT 1534.) "You didn't know what was gonna happen." "You had some, misplaced trust in, in people you thought [] were your friends." (*Ibid.*) The investigator repeatedly assured Baker that she did not have to tell them what Mark Tompkins and Dalton did; he just wanted to know the extent of Baker's involvement. (8 CT 1520.) He also told Baker, "What you're doing is setting the record straight for what part of this you did take part in and the people who *actually killed her*. . . ." (8 CT 1537, emphasis added.) They needed Baker to think about what Tompkins and Dalton did because "then that's one less thing that you did." (8 CT 1556-1557.)

At the same time, the investigator stressed to Baker that, "the thing I wanna tell you is you realize of course, that . . . the other people involved are, being the kind of people they are, are probably gonna wanna point the finger at you." (8 CT 1590.) It thus was clearly in Baker's interest to limit her role as much as possible. By allowing her to paint a less than complete picture of the incident, Baker was essentially invited to fabricate the extent of her own involvement.

In addition, the motive to get a "good deal" clearly existed at the time of her March 4, 1992, statement. Early on, Baker understood that she would be imprisoned for her involvement. (See, e.g., 8 CT 1520.) Less than a third of the way through that interview, Baker insists "I'm going into protective custody, you can believe that." (8 CT 1533.) The investigator assured her, "[t]here's lots of things we can do. You may not even have to do time in California, it could be in another state. There's lots of arrangements that could be made." (8 CT 1533.) Baker was obviously aware that her cooperation could result in a lighter punishment or special

treatment for herself. Her motive to fabricate in order to procure a better deal for herself, a motive either impliedly or expressly alleged by the cross-examination, *clearly* existed at the time of the March 4, 1992, interview.

In fact, Baker's motive to fabricate existed well *before* her March 4, 1992, statement. The alleged crime occurred in 1988, nearly four years before Baker gave her statement, giving her ample time and opportunity to determine exactly how to depict – and minimize – her own culpability. She admitted to Cooksey, "I really, I knew this case would surface, you know, I knew it would." (8 CT 1525.) Baker also had been questioned in October 1989, regarding her knowledge of the disappearance and possible murder of Melanie May. (See 7 CT 1277.) She certainly was on notice at that point that she was suspected of involvement in the case. Consequently, any statements made by Baker after October 5, 1989, and certainly the one made on March 4, 1992, were tainted with an improper motive to minimize her own culpability.

C. BAKER'S MARCH 4, 1992, STATEMENT WAS IMPROPERLY ADMITTED AS A PRIOR INCONSISTENT STATEMENT.

The court also permitted the prosecution to introduce Baker's March 1992, videotaped interview as prior *in*consistent statements under Evidence Code section 1235, which provides:

> Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770.

(Evid. Code, §1235; 35 RT 3409.)

Section 770 provides:

> Unless the interests of justice otherwise requires, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless:

> (a) The witness was so examined while testifying as to give him an opportunity to explain or deny the statement; or
> (b) The witness has not been excused from giving further testimony in the action.

(Evid. Code, §770.)

The fundamental requirement for admissibility of a prior statement of a witness, whether used to attack credibility or to prove the truth of the facts asserted in the statement, is that the out-of-court statement be inconsistent with some portion of the witness' current testimony. (*People v. Plasencia* (1985) 168 Cal.App.3d 546, 551.) Prior inconsistent statements are admissible because,

> [i]n many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy which gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court.

(*People v. Williams* (1976) 16 Cal.3d 663, 667-668, quoting the official comments of the Law Revision Commission relating to section 1235, which are declarative of the intent of the Legislature.)

The inconsistency is to be determined, not by individual words alone, but by the whole impression or effect of what has been said or done. The prior statement is admissible if it tends to contradict or disprove the testimony or any inference to be deduced from it. It is enough if the prior statement, taken as a whole, either by what it says, or by what it omits to say, permits the jury to conclude that the witness' true recollection is

different from his or her present testimony. (*People v. Loyd* (1977) 71 Cal.App.3d Supp. 1, 13; see also, 3A Wigmore, Evidence (Chadbourn rev. ed. 1970) pp.1048-1049.)

As Dusek himself acknowledged, the only statements from Baker's March 4, 1992, interview that met this hearsay exception requirement were statements regarding:

- whether or not Baker cleaned up blood; and
- whether or not May was alive and made statements once Baker returned to the trailer. (35 RT 3410.)

Baker's other statements were substantially consistent with her testimony at trial, and they should not have been played for the jurors. At most, then, the jurors should have viewed only those very few parts on the tape where Baker said she helped clean up blood and heard May speak.

D. THE ADMISSION OF BAKER'S VIDEOTAPED INTERVIEW AS PRIOR CONSISTENT AND INCONSISTENT STATEMENTS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, A FAIR TRIAL, CONFRONTATION AND A RELIABLE GUILT AND PENALTY DETERMINATION AND WAS UNDULY PREJUDICIAL.

Even if this Court concludes that Baker's videotaped interview was admissible as prior consistent and inconsistent statements under Evidence Code sections 791 and 1235, the videotape nevertheless should have been excluded as cumulative, confusing, unnecessarily time-consuming and overwhelmingly prejudicial evidence. Introduction of the videotape in this case deprived appellant of her constitutional rights to due process, a fair trial, confrontation and a reliable guilty and penalty phase determination. (U.S. CONST., 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, 16 and 17.)

In ruling on the admissibility of the March 1992, videotape, the court

stated that "the testimony of Miss Baker is obviously the key note testimony in the trial so far. I think that the truth in evidence rules provides that the jury should have her statement put in context." (35 RT 3414.) In fact, Baker testified at trial, and there was no need or reason to put her prior interrogation "in context." Even if there were, the fact remains that introduction of the tape was error.

A court in its discretion may exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §352.) The probative value of proffered evidence depends on the extent to which it tends to prove an issue by logic and reasonable inference (degree of relevancy), the important of the issue to the case (degree of materiality), and the necessity of proving the issue by means of this particular piece of evidence (degree of necessity). (*People v. Thompson* (1980) 27 Cal.3d 303, 318, fn.20; see *People v. Schader* (1969) 71 Cal.2d 761, 774 [The chief elements of probative value are relevance, materiality and necessity].) If evidence is "merely cumulative with respect to other evidence which the People may use to prove the same issue," it is excluded under a rule of necessity. (*People v. Thompson*, *supra*, 27 Cal.3d at p.318; *People v. Guerrero* (1976) 16 Cal.App.3d 719, 725, 727.)

Even if it could be argued that Baker's videotaped interrogation was relevant or material, it indisputably was not necessary. Baker testified at trial, and she was thoroughly impeached with her prior inconsistent statements during both direct and cross-examination. When Baker testified that she recalled seeing, but not cleaning up, blood on the floor (33 RT 3194), the prosecutor impeached this testimony by having Baker read from

the transcript of her March 4, 1992, interview, where she stated she cleaned up blood. (33 RT 3193-3194.) Baker explained this inconsistency by rationalizing that the events happened a long time ago and she had blocked out a lot of things. (33 RT 3137-3138, 3193.)

At trial, Baker testified that she did not know whether or not the person she saw under the sheet was alive when they returned to the trailer. (33 RT 3171.) The prosecutor impeached Baker with her earlier statement that May was alive and spoke. (33 RT 3196.) Baker explained that at the time of the incident she believed May was alive, but when she later had time to reflect on all that had happened, she came to believe that May might have already been dead. (33 RT 3172.) On re-direct examination, the prosecutor again impeached Baker, reading verbatim from the transcript of her March 4, 1992, statement. (33 RT 3196.)

There was absolutely no need to play the actual videotape *in addition* to reading from the transcript of that videotape. Playing the videotape for the jury was repetitious, cumulative and only succeeded in giving undue weight to the earlier statements. Moreover, the practical effect of admitting both the March 4, 1992, and July 5, 1994, videotaped interviews,[118] was that the jurors heard Baker's description of the alleged crime *three* separate times, yet she was only cross examined once. (Cf. *Fields v. Commonwealth* (Ky.2000) 12 S.W.3d 275, 281-282 [prosecutor could not play recorded witness testimony at the opening statement, because he was not entitled to admit his evidence three times: during the opening statement, the case-in-chief and then summation].)

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[118] Appellant argued that neither videotape should be admitted, but if the March 4, 1992, interview was introduced, the July 5, 1994, interview should be played as well. (35 RT 3414-3413.)

Although the defense certainly was able to cross-examine Baker during her trial testimony, the playing of the videotapes added additional hours of uninterrupted and unchallenged testimony. Introduction of the videotape was overwhelmingly prejudicial, as it exposed the jurors not only to multiple hours of redundant, duplicative, and unnecessary testimony by an accomplice, but also the leading, misleading, and inflammatory interrogation techniques of the investigators.

1. The Investigators' Interview Techniques Elicited Misleading Information and Injected Inflammatory and Inaccurate Information into the Trial.

Prior to playing the videotape, the court admonished the jurors that, just as statements of counsel are not evidence, "the statements of the investigators on the tape are relevant to your determination of the facts in this matter only in that the question gives meaning to the answer" given by Baker. (37 RT 3602.) This admonishment was wholly inadequate in the face of the investigators' assertions and interrogation techniques and in light of the general lack of evidence, but abundance of innuendo, in this case.

a. Minimization of Baker's Role.

A common element of modern law enforcement interview technique is presentation of "alternative" questions. The interrogator presents the suspect with a choice, either 1) there was an inexcusable or repulsive motivation for committing the crime, or 2) the motivation was attributable to error or the frailty of human nature. (Inbau & Buckley et al., Criminal Interrogations and Confessions (1986) p.165.) The interrogator gives the suspect a false sense of security by providing excuses for why the crime occurred. (Kassin & Kiechel, *The Social Psychology of False Confessions* (May 1996) 7 Forensic Science 3, 125.) The interrogator communicates the idea that if the suspect adopts the "good" choice – the one in which she

is not morally culpable – she will receive a lesser punishment.

Cooksey and Hoxter clearly employed this technique during their March 4, 1992, interview of Baker. By encouraging Baker to identify herself as an unknowing victim, present only under duress, they successfully elicited a confession from her. However valid or successful this technique may have been, the fact remains that Baker's answers were tainted by its use in this case. For example, when Baker claimed responsibility for taking May to the trailer, the investigator reassured her that she was not responsible; rather she was "used" by her codefendants:

> A: You know what bothers me the most is that I didn't know it was gonna happen and I feel like I took her there, you know.
> Q: So you feel like you're responsible because she was in that situation?
> A: Yeah.
> Q: Well, if you didn't know, I mean how could you be responsible?
> A: Cause she [May] didn't wanna go and I told her. . . .
> Q: You think you got used by anybody?
> A: Oh, I think I got used all the way around but. . . .
> Q: I think so too.

(8 CT 1530.)

The investigator asked who "forced" Baker to take part in what was going on and expressed his opinion, "I think you got duped." (8 CT 1553-1554.)

Similarly, throughout the interview the investigators told Baker that Dalton and Tompkins were not her friends and assured her that her actions were understandable given their untoward influence over her. They convinced Baker that Dalton and Tompkins were untrustworthy and she had better tell on them before they told on her.

> Q: But I don't think you were stupid for being there I just

don't [sic] think you didn't know. . . .
A: I didn't know about it. . . .
Q: You didn't know what was gonna happen.
Q: You had some, some misplaced trust in, in people you thought . . . were your friends.
A: Yeah I did.
Q: Well, it's not fair Sheryl. . . .

(8 CT 1534.)

The investigators also sympathized with Baker's assurances that she was an unwilling participant and provided absolution, while encouraging her anger toward Tompkins and Dalton.

A: and I didn't want to [inject her].
Q: I don't blame you she was your friend.

* * *

Q: They made you watch that [the stabbing]?
A: Yes, they made me be there, they made me be there. . .
Q: They made you watch that?
A: Yes, they wanted me to be a part of it.
Q: So they had to implicate you to protect themselves?
A: Why didn't they just let me go, why did they even take me back there in the first place!
Q: Well see, you see what they're doing?
A: Yeah, they're trying to make me fall for their thing and that's fine, you know.
Q: It's not fine. . . . It is not fine, why is that fine?

(8 CT 1536, 1539.)

The investigator then warned Baker, "the thing I wanna tell you is you realize of course, that. . . the other people involved are, being the kind of people they are, are probably gonna wanna point the finger at you." (8 CT 1590.)

The investigators were attempting to shift culpability away from Baker and affix moral blame upon Dalton, repeatedly providing Baker with the opportunity to implicate Dalton as the ringleader and organizer. (See

Reid, et al., Criminal Interrogation and Confessions (4th ed. 2001) p.213 (hereinafter *Reid*).) They assured Baker that she did not need to "snitch" on Dalton because she has already told on herself. (8 CT 1519, 1520.) Then they asked leading questions designed to place the blame on Dalton.

> Q: What's, what was Kerry's part in this, what did she do as far as the, uh, causing injury to Melanie?
> A: See, Kerry's kinda' smart, well I think Kerry tried not to do as much as possible.
> Q: But did she egg people on, in other words did she say do this or. . . do that?
> A: Yeah, everything, I, I don't think that, that I did the things I did without being told to do them!

(8 CT 1560-1561.)

They took this one step farther by formulating Baker's statement into a motive:

> Q: So that's why she, I knew she was mad at Melanie, but. . . .
> A: Yeah.
> Q: We really couldn't pinpoint what the reason was. . . .
> A: Yeah something, something about. . . .
> Q: We knew it had something to do with, with something that had happened between her and Melanie but we weren't real positive . . what that was.
> A: And then she kills her over jewelry, I think that's really stupid.
> Q: Oh that's sad. Now that's really sad.

(8 CT 1559-1560.)

The investigator then assured Baker that she was doing a great job. "I don't think anything bad about you. . . ." (8 CT 1534.) He continued, "You're doing pretty well. I think you're. . . . I think you're better at it than you think you are. . . . This had to of made an impression on you that would be hard to forget." (8 CT 1548.)

The admission of the investigators' comments and reassurances was

extremely prejudicial. The jurors were not apprised of the sophisticated psychological interrogation methods employed or the impact they have on the person being interrogated. Rather, the jurors heard a member of the prosecution team express agreement with Baker's version of the events and actually sympathize with her. After all, "[i]t is far easier to admit wrongdoing to someone who appears to be a sympathetic acquaintance, if not a friend, than to someone whose role is simply to build the most damning case possible and send one to prison." (Ofshe & Leo, *The Decision to Confess Falsely: Rational Choice and Irrational Action* (1997) 74 DENV. U.L.REV. 979, 987.) The prejudice is apparent. Baker's testimony received an (albeit undeserved) patina of credibility that could not be neutralized by the defense. If Hoxter and Cooksey, seasoned investigators and trusted members of the prosecution team, believed in and sympathized with Baker, why shouldn't the jury also accept her testimony.

b. Leading Questions.

During her March 4, 1992, interview, Baker repeatedly claimed not to know or remember specific details of the alleged crime. But, through a series of leading, and at times cajoling questions, the investigators themselves often provided the answers they were looking for. As a result, many specifics originated from Hoxter and Cooksey, not Baker, who merely parroted back their words. When Baker was either reluctant or unable to reveal specific details, the investigators pushed her with leading questions until she acquiesced and agreed.

Q: Are you sure it was a knife he used?
A: I think so. I'm not sure.
Q: Did anyone have a screwdriver?
A: Maybe. I don't, I don't remember.
Q: You don't remember?
A: No.

Q: Is it because you don't want to remember?
A: Might be I, I don't know. . . . I don't know I remember that, I think he hit her with something but I don't remember what it was. Like maybe, uh, you know how they have those extensions for, uh, sockets, long extensions. . . .
Q: Like a breaker bar?
A: Yeah.
Q: Yes.
A: Something like that. Something like that.
Q: Where did he hit her with that?
A: I don't remember, I just remember the, I remember the bar.
Q: Did you see him hit her with it?
A: I'm not. . . .
Q: We need you to really think about this Sheryl because if you saw him hit it, hit her with it, *then that's one less thing that you did.*

(8 CT 1556-1557, emphasis added.)

Thus the investigator not only suggested instruments that could have been used, he also warned Baker that if she did not implicate someone else, she herself would be implicated.

Similarly, even though Baker could not remember when she left the trailer or where she went, the investigator provided her with his information, which Baker then assimilated into her own memory:

Q: Okay, when you got back, when you walked into the trailer Joann [sic] was gone?
A: We took her to visit her ol' man.
Q: Exactly.
A: We dropped her off on the, um. . . .
Q: And you went up to the...up to the camp . . . La Cima Honor Camp, right?
A: Yeah, I don't know, I fell asleep on the way there.
Q: But it was up in the Laguna Mountains someplace.

(8 CT 1528.)

By providing her with details from other sources, the investigator

allowed Baker to supplement and in some cases, substitute, his information for her true recollection, giving Baker's testimony unearned credibility. The investigators also employed this technique to solicit information about Dalton and Tompkins.

They also would not accept Baker's professed lack of knowledge or memory and literally put words in her mouth.

Q: What happened then after that, after you saw Melanie tied in the, in the chair?
A: Well I, I, Kerry talked to me and then I don't, I don't remember.
Q: What did, what did Kerry say to ya'?
A: I don't know, something to the extent of, you can either deal with this one way or the other way and, I don't think Kerry wanted me to die so she had to make me a part of it.
Q: In other words she, she felt that, that if you didn't participate that, that Tompkins would, would somehow or – do you harm?
A: Right but Tompkins, yeah.

(8 CT 1530-1531.)

Employing yet another common interrogation technique, the investigator either provided Baker with information he claimed to have learned from others or provided a rational explanation for her behavior. If a suspect denies knowledge or culpability, the interrogator will do whatever it takes to prevent subsequent denials. This tactic, "deprives the guilty suspect of the psychological fortification that would be derived from repetitions of disclaimers of guilt, because the more often a guilty suspect repeats a lie, the harder becomes the task of the interrogator to persuade the suspect to tell the truth." (*Reid*, *supra*, at p.143.) If Baker was permitted simply to answer she "doesn't know"or "doesn't remember," she could stand firm behind her original denial. The investigators thus found it

necessary to pin her down with a definitive answer – even if it did not come from her own recollection.

Q: Okay. I mean so now you, who – who got the battery acid?
A: I don't even know I think it was already made.
Q: Did they tell you what it was?
A: Yeah, yeah. And, um, but I don't know for sure.
Q: What kind of, uh, what happened after, after you tried to inject it and didn't?
A: (No verbal response)
Q: They did, then?
A: Yeah, I just remember crying and they kept telling me to shut up, shut up, and I, I didn't wanna be there, you know, but didn't have no way to leave.
Q: We understand that, that's why we're asking you to tell us just what you had to do with this.

(8 CT 1538.)

They employed the same tactic later:

Q: Did, did you see any damage to her, in other words if she was covered up how did you know that she had any damage to her?
A: I don't.
Q: You don't?
A: No.
Q: Okay. You don't know what, what if any damage that inflicted on her?
A: I don't think it did inflict much damage.
Q: Did you say anything to her, or did she say anything as a result of being hit ooh, ow or. . . .
A: It sounded like that I don't, I don't remember it.
Q: Some kind of noise came from . . . her as a result of being hit?
A: Yeah.

(8 CT 1581.)

The physical and psychological environment that yields a confession can be of substantial relevance to the ultimate factual issue of guilt. (*Crane v. Kentucky* (1986) 476 U.S. 683, 689.) In this case, there was no

explanation of the psychological environment in which Baker gave her statement. As a result, rather than providing a "context" in which to view Baker's statements, as the trial court intended (35 RT 3414), the videotape provided a false level of knowledge and degree of certainty, acceptable as an interrogation technique, but not as evidence at trial.

c. The Investigators Introduced Unsupported and Inadmissible Aggravating Information during the Videotaped Statement.

During questioning of Baker, the investigators referred to rumors and suspicions as fact to elicit information from Baker. Again, while perhaps an accepted interrogation technique, it was not evidence. Even with the court's admonition, however, the risk was great that the jurors would be influenced by the investigators' assertion that the prosecution possessed independent and reliable information about evidence at issue during trial. For example, as appellant has argued elsewhere (see Argument V.B.2.a.), there was no evidence presented that anyone was subjected to electric shock in this case, but there was endless unsupported and prejudicial speculation on this topic. The investigator added his weight to the subject of electric shock – presenting it as known fact. Even though Baker had no knowledge of or information about electric cords or shock, the investigator coaxed out of her the possibility that it occurred.

Q: We have some information that indicates that Melanie might've been shocked, in other words, an electrical cord mighta' been used on her?

A: Uh-huh.

Q: Like, like an extension cord was cut off and the ends were bare and . . .

A: No.

Q: No.

A: No, no. I would remember that, no.

Q: You don't recall anything like that happening?

A: Unless it happened before I got there and, um, I don't,

> I don't know. Because I know when I got there, um, she was in that chair and Kerry's telling me well you don't know what we went through and all this shit and I'm telling her Kerry please don't do this, just let me leave, please, she goes no you can't leave now.

(8 CT 1566-1567.)

The state of the evidence is that Baker never saw electric cords and never saw anyone shock May. At the same time, the jurors heard from the prosecution investigator that they possessed information that May might have been subjected to electric shock *and* they heard testimony from a pathologist on the painful effect of electric shock (34 RT 3293), not to mention the hearsay statements of Tompkins through jail house informant McNeely that they gave May a "shock treatment." (32 RT 3075.) It is likely that no further "evidence" was necessary for the jurors to reach their verdict. The admission of this exchange between the investigator and Baker distorted Baker's repeated denial that she witnessed or heard anything about electric shock and gave credibility to unsupported rumor.

Similarly, Baker never described what happened to May as torture, until the investigator introduced the concept.

> Q: Sheryl let's, let's try to remember it like this, let's remember from Melanie, okay, from her point of view. Try to think just of Melanie, now not who did it, just what things did Melanie suffer?
> A: She didn't wanna die.
> Q: Well obviously, I can't think of anybody that does?
> Q: You know of anyone that would?
> Q: Unless...they're like . . . tortured.
> A: Eh, yeah, I, yeah, at that point I would wanna die. I would wanna die.
> Q: Did she say that she didn't want to die, did she ever say anything like that?
> A: Yeah, yeah.
> Q: What did she say?

A: Please don't kill me, I'm sorry. It had something to do with jewelry, had something to do with jewelry, I know that much.

(8 CT 1558-1559.)

He continued to press Baker for details about "torture."

Q: Would you say the things that they were doing to Melanie was, was, torturing her?
A: I don't think they were trying to torture her, no. I think that they were just trying to end it and they really didn't know how to do it and, then it just got real ugly, you know, I don't, I don't believe that they tried to torture her, no. I don't believe they were trying to, uh, to make it painful for her.
Q: They weren't?
A: I don't believe that they meant to, no.
Q: Was it painful anyway? Versus ending . . . quick?
A: Yeah, yeah.

(8 CT 1565-1566.)

It was the investigator's job to find torture, and he pushed until Baker gave a response he wanted. Again, this may have been a valid interrogation technique, but, without a contextual explanation, the jurors were left with Baker's "yeah, yeah" to a long painful death, despite Baker's original and continuous disavowal of torture.[119] The investigators' statements were undeniably prejudicial and never should have been played for the jury.

d. The Investigators' Statements during the March 1992, Interview Misled and Confused The Jurors with False and Extraneous Evidence.

The court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will create substantial

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[119] In addition to stating that no one intended to cause May pain, Baker said that "it happened relatively quick." (8 CT 1569.)

danger of misleading the jury. (Evid. Code, § 352(b).) A number of the investigators' statements during the videotaped interview undoubtedly misled the jury as to the existence of certain evidence. They made statements that were not altogether true, and others that were outright lies. These statements undoubtedly confused and misled the jurors on key areas of contention, and, in a case such as this one, such confusion might very well have been determinative of the jurors' verdict.

As appellant has argued elsewhere, there was virtually no competent evidence of blood found at the scene, despite Dusek's description of it as a "blood-letting." (See Argument III.; 39 RT 3772-3773.) The investigators weighed in on this subject, falsely telling Baker, "we have found quite a bit of blood," and that "there was [sic] bloody pillows and there was bloody this and bloody that, and, uh, we'd like to know where it was the blood came from." (8 CT 1555.)

In fact, no discernible blood was found at the trailer – no bloody pillows or anything else. The investigators' suggestion otherwise, however, *especially* in combination with Dusek's description of a "blood-letting," created a substantial probability of confusing and misleading the jurors as to the existence of physical evidence.

The investigators' statements about the existence of a screwdriver and breaker bar are equally confusing and misleading. When initially asked whether anyone had a screwdriver, Baker said, "[m]aybe. I don't, I don't remember." (8 CT 1556.) The investigator challenged her, "[i]s it because you don't wanna remember?" He explained that she was "real reluctant to [think about what happened] because it bothers you so much." (*Ibid.*) Later, Baker said "he hit her with something," then mentioned extensions for sockets, which sounded like an extension cord, but which the

investigator translated as a breaker bar. (*Ibid.*) Not wanting to argue with him, Baker replied only, "yeah." (*Ibid.*) The investigator then asked "where did he hit her with that?" Baker could not remember, prompting the investigator to ask, "[d]id you see him hit her with it?" Baker could not remember. (8 CT 1556-1557.) None of this came out during Baker's testimony; indeed, all of Baker's references to use of the breaker bar were struck from the record because she did not know if it was even used. (See 33 RT 3133-3134, 3136.) Nonetheless, the unsubstantiated image of Tompkins hitting a defenseless May with a breaker bar was undoubtedly planted in the jurors' minds. The investigator's words provided more than a potential for unreliable corroboration and a certain confusion of the true state of the evidence.

The investigators' statements during the interrogation also misled the jurors regarding the strength of their case. At one point the investigator told Baker that they were from the District Attorney's Office and work differently than the police. "We don't do anything, we don't arrest anybody till we have absolutely every shred of information we can, can gather and have a case put together that we know we could win." (8 CT 1515.) He then assured Baker, "We're right on the verge of that right now." (*Ibid.*) This gratuitous statement should never have been placed before the jurors. It undermined the presumption of innocence and the instruction that the jurors should not be biased against a defendant because she has been arrested, charged with a crime or brought to trial. (See CALJIC No. 1.00.)

2. The Videotape Included Numerous Statements That Were Neither Consistent Nor Inconsistent with Baker's Trial Testimony and Admissible under No Theory.

Despite an ostensible redaction of the March 1992 videotape, it ultimately contained a number of statements that were neither consistent nor

inconsistent with her trial testimony and instead were inflammatory, irrelevant and wholly self-serving statements.[120] Baker assured the investigators, "I mighta' been a junkie and I mighta' been a thief but I'm not a murderer and if I did kill somebody I'd shoot 'em I wouldn't kill'em, you know. . . ." (8 CT 1565.) She repeatedly explained that her culpability was negligible and she participated only under duress. The investigators gave her ample opportunity to minimize her role. They asked "[w]hat we want to talk to you about is, just exactly from your perspective what was your part and what do you feel your part was? What was going on in your mind when this was happening?" (8 CT 1520.) Baker replied: "I'm in the wrong place at the wrong time. . . ." (8 CT 1521.)

The investigator also asked Baker, "just between you and me, . . . do you think you should be held to answer for any of this?" Her reply? "Honestly, no." (8 CT 1576.) "I don't feel that I did anything, besides I mean, yes I did do things but it was out of fear for my life!" (*Ibid.*)

This self-serving statement was irrelevant, unnecessary and inadmissible as it did not rebut a charge of recent fabrication or conflict with anything that Baker said at trial. (*People v. Thompson*, *supra*, 27 Cal.3d at p.318.) The jurors impermissibly heard hours upon hours of Baker denying her own culpability, minimizing her own role and casting blame on others. Such evidence served no legitimate purpose and should never have been presented.

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[120] In the motion in opposition to the admission of the March 4, 1992, videotaped interview, appellant requested that the tape be redacted to exclude irrelevant matters and/or hearsay and/or self-serving questions and comments of interviewers and/or prejudicial statements pursuant to Evidence Code section 352. (7 CT 1250.)

3. The Videotape Contained Inadmissible Victim Impact Evidence.

Victim impact evidence largely has no relevance at the guilt phase of a trial.[121] "An appeal to sympathy for the victim is out of place during an objective determination of guilt." (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057; see *People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) This Court has recognized that victim impact evidence, even at the penalty phase, carries an extraordinarily high potential for inflaming the jury and may "divert the jury's attention from its proper role or invite an irrational response." (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1182.) Accordingly, when this evidence is improperly admitted at the guilt phase, it violates state and federal due process.

Excerpts of Baker's videotaped interview played during the guilt phase of appellant's trial clearly constituted improper victim impact evidence that was necessarily inflammatory and enormously prejudicial. While questioning Baker, the investigators stressed how important it was that they find out what happened to May and emphasized the impact her disappearance and possible murder had had on her family and children.

> We want, we want, we'd like to find Melanie because the family would like to put her to rest in someplace decent instead of where she is now. Her children would probably like to know where she is someday. . . . So that they could come and visit her. Now, they're obviously gonna find out one of these days, I know where the children are now and they'll someday be made aware of what happened to their mother and who she is.

(8 CT 1516.)

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121 *Payne v. Tennessee* (1991) 501 U.S. 808, decided after the crime in this case, did not authorize the introduction of victim impact testimony at the guilt phase of a capital trial.

Similarly, the investigator argued that he did not believe May deserved what happened to her:

Q: That was really, uh, uh, Melanie didn't deserve that.
A: I don't think so either.
Q: I think that's what bothers you the most.

(8 CT 1530.)

He later told Baker, "let's try to remember it . . . from Melanie, okay, from her point of view. Try to think just of Melanie, now not who did it, just what things did Melanie suffer?" (8 CT 1558.)

The investigators made these statements about May to dramatize the impact of her disappearance and to evoke an emotional response from Baker. Their words undoubtedly invoked the same response from the jurors. Such irrelevant and inflammatory rhetoric diverted the jurors' from their proper role and invited an irrational, purely subjective response. Introduction of victim impact at the guilt phase of Dalton's trial was so unduly prejudicial that it rendered the trial fundamentally unfair and thus violated appellant's rights to a fair trial and due process under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution.

E. CONCLUSION.

The error in allowing the prosecution to play for the jury the videotaped statement of Sheryl Baker was not harmless because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 [the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error"]; *Yates v. Evatt*, *supra*, 500 U.S. 391, 403 ["To say that an error did not contribute to the ensuing verdict is . . . to find that

error unimportant in relation to everything else the jury considered on the issue in question"].)

The error is not harmless even under the less restrictive *Watson* standard. There is a reasonable probability or chance that a more favorable result would have been reached had the videotaped statement not been played for the jury. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *College Hospital Inc. v. Superior*, *supra*, 8 Cal.4th at p. 715 ["We have made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*" [original italics].) As a result, the convictions, special circumstance findings and death judgment should be reversed.

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VII.

THE COURT ERRED IN ADMITTING PREJUDICIAL AND SPECULATIVE TESTIMONY FROM A PATHOLOGIST AS TO THE EFFECT OF ELECTRIC SHOCK AND BATTERY ACID ON THE HUMAN BODY.

Kerry Dalton was alleged to have tortured Melanie May with electric shock and battery acid. (5 CT 999.) To prove this special circumstance, the prosecution introduced not evidence of the alleged acts and instruments of torture, but testimony that electric shocks and battery acid cause pain. Dr. Brian Blackbourne, a pathologist and Chief of the San Diego County Medical Examiner's Office, did not autopsy May's body; he did not examine her body or any other physical evidence of torture; and he had no other basis by which to ascertain or evaluate May's purported injuries. He nevertheless proffered his opinion as to the effects of electricity and battery acid on the human body. (25 RT 2002-2003.) The admission of Dr. Blackbourne's expert testimony was irrelevant, unnecessary and highly prejudicial. The introduction of this testimony violated Dalton's rights to a fair trial, to due process of law, and to a reliable determination of both guilt and penalty. (U.S. CONST., 5th, 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 1, 7, 12, 15, 16, 17.)

A. PROCEEDINGS BELOW.

1. Pretrial Proceedings.

The defense filed a pre-trial motion *in limine* to exclude the testimony of Dr. Blackbourne on the grounds that his testimony was entirely speculative and enormously prejudicial. (5 CT 979; 25 RT 2000.) The trial court denied the motion based on the fact that Dr. Blackbourne's testimony was not offered to prove torture was the cause of death, but rather to show what effect the torture would have on the human body. (25 RT

2004-2005.) The court stated that it was a question of fact for the jury "as to whether or not Miss Fedor saw what she is going to say that she saw, especially in view of the fact they don't have any physical evidence of what she claims to have seen." (25 RT 2004.) Similarly, it was a question of fact for the jury with regard to Baker's testimony that the victim was tortured with electricity and battery acid. (*Ibid.*)[122] But if believed, the testimony of Baker and Fedor would support Dr. Blackbourne's testimony. (*Ibid.*)

2. Testimony of Purported Foundation Witnesses.

As explained in detail above (see Argument V.B.), the foundational evidence of torture was lacking. Joanne Fedor claimed she noticed that the chandelier in her bedroom was missing and the cord to the chandelier was plugged in but cut, split in two and melted so the electric wire was exposed. (30 RT 2605-2606.) She also testified that she found several extension cords that were tied in the shape of figure-eights. (30 RT 2606.) Fedor never mentioned that the extension cords were cut. No extension cords or chandelier cords were recovered. Baker did not show any cords to Deputy Wilson, who was at the trailer the evening of June 26th, and he did not mention observing any cords. The cords were, according to Fedor, subsequently "lost in the shuffle." (30 RT 2651.)[123] Joanne Fedor could not testify that she had ever seen any of these devices used against any person, at any time, in any way.

Sheryl Baker, who claimed she was present at the time of the alleged murder, did not see an extension cord and did not see anyone subjected to

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[122] Of course, Baker never testified that anyone was shocked.

[123] She clarified, "I mean, I had maybe one of them when I moved; but I stored my stuff somewhere, and everything was stolen, so it got lost in the shuffle, too." (*Ibid.*)

electric shock of any kind. (34 RT 3176.)

Kathy Eckstein testified that at some unknown time, she saw in Fedor's trailer an extension cord that was tied into knots with one end cut off. (31 RT 2860.) Fred Eckstein also testified that at an unknown point in time, Fedor showed him an extension cord in the shape of a loop with one end cut off. (31 RT 2861.) Fedor's daughter, Alisha Fedor, did not see an extension cord, but remembered a lamp being missing from her mother's bedroom, with a cut cord still plugged into the wall. (30 RT 2671.)

Regarding battery acid, Sheryl Baker testified that when she returned to the trailer on June 26, Dalton showed her four or five filled syringes and told Baker to inject the person Baker believed to be May with one of the syringes. (33 RT 3127-3128.) Baker said that Dalton told her the syringes were filled with battery acid (33 RT 3127), but Baker did not see Dalton or anyone else fill the syringes, and she had no idea what was in them. (33 RT 3128.) It could have been methamphetamine; it could have been water; "it could have been anything." (33 RT 3173.) Baker testified that neither she nor Dalton could find a vein on the person, although Baker inserted the syringe in two places and Dalton in one. (33 RT 3129-3130.) Baker did not see any blood drawn back into the syringe, supporting the assumption that no one ever hit a vein. (33 RT 3130, 3184.) Baker also testified that even when injected, the person under the sheet did not move or make a sound. (33 RT 3174.)

3. Defense Objection and Trial Court's Ruling.

Prior to Dr. Blackbourne's testimony at trial, the defense argued that there was insufficient evidence of torture to make Dr. Blackbourne's testimony relevant and moved to exclude the testimony under Evidence Code section 352 as unduly prejudicial evidence of minimal probative

value. (34 RT 3279.)

The court determined there was indirect evidence of electric shock based on the testimony of witnesses who claimed to have seen an extension cord and a cord from a lamp that had been cut.[124] While not making any findings that the objects actually existed, the court concluded that such objects "would indicate, if the jury finds them to be true, that electricity might have been used, if it might have been used." It thus would be "beneficial for [the jurors] to understand what the effect would be." (34 RT 3282.) The court also determined that there was testimony regarding the use of battery acid and the fact that the victim took a long time to die. (34 RT 3280.) The court thus overruled the defense objection and Dr. Blackbourne was allowed to testify. (25 RT 3282.)

4. Testimony of Dr. Blackbourne.

Following the "foundational" witness testimony and trial court's ruling, Dr. Blackbourne testified that he did not perform an autopsy in this case because there was no body to autopsy. (34 RT 3285.) He was, however, familiar with the effect of electricity on the human body, having performed autopsies on approximately 25 persons who had died of electrical injuries. (34 RT 3291.) According to Dr. Blackbourne, electricity can have two effects on the human body: a local effect where the electricity goes through the skin and causes burning or an electrocution effect where the electricity goes through the body to either the brain or heart. (34 RT

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[124] The court initially based its findings on its recollection that Fedor said she saw a lamp with a cord that was cut and tied in loops the size of handcuffs, with burned or melted ends. (34 RT 3281.) Defense counsel corrected the court that she said she saw an extension cord, not the lamp cord, tied in loops. (34 RT 3282.) The court adopted defense counsel's recollection. (*Ibid.*)

3291.)

Dr. Blackbourne testified that 110 volts is the normal household current (34 RT 3293), and instant contact with that voltage would not necessarily produce a burn. Sustained contact, however, would cause a burn. (34 RT 3292.) The electric burn would be sensed by the person who received it and cause pain. (34 RT 3293.) Pain would not cause unconsciousness, but shock as a result of pain could cause unconsciousness. (*Ibid.*)

Dr. Blackbourne also testified that he was familiar with battery acid as a type of sulfuric acid. (34 RT 3287.) According to Dr. Blackbourne, battery acid is a corrosive and very strong acid. (34 RT 3288.) If battery acid were injected into a vein, the vein would experience a burning sensation, and pain would be active until the acid was neutralized by a muscle, which would occur in a matter of seconds. (34 RT 3289.) If the acid were injected into a muscle, the tissue in that area would be damaged and the pain would be experienced in that area. (*Ibid.*) Dr. Blackbourne described it as a "charlie-horse type of pain." "As we all know that have had an injection into the muscle, it hurts." (*Ibid.*) It would be more painful to inject acid into a vein than it would be to inject it into a muscle. (34 RT 3290.) Dr. Blackbourne testified that a person injected with battery acid would scream or jerk around. (34 RT 3295.) Even an unconscious person would exhibit some level of movement. (34 RT 3299.)

The admission of Dr. Blackbourne's testimony was error on many levels. The jurors did not need an expert to explain to them that electric shock and acid cause pain. They certainly did not need to know the effects of various voltages and placements of the shock and acid since there was absolutely no evidence concerning the use of those agents, let alone their

strength or placement. Finally, the evidence was tremendously prejudicial, outweighing whatever possible probative value it had. The jurors had to believe that Blackbourne's testimony was introduced because the acts alleged occurred – the only issue being whether they caused pain. It is more than probable that the jurors erroneously concluded that Blackbourne's testimony that the charged instruments of torture cause pain was evidence that the instruments were used in this case.

B. THE TESTIMONY OF DR. BLACKBOURNE WAS NOT ADMISSIBLE BECAUSE HIS EXPERT OPINION REGARDING THE EXPERIENCE OF PAIN WAS NOT RELEVANT.

The crime of torture focuses on the mental state of the defendant rather than on the pain inflicted on the victim. (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1042-1043; *People v. Hale* (1999) 75 Cal.App.4th 94, 108.) It is the intent to inflict torturous pain and suffering on the victim that is "at the heart of" the allegation. (*People v. Davenport*, *supra*, 41 Cal.3d at p. 268.) As a corollary to the emphasis on the acts and intention of the perpetrator, it has long been held that awareness of pain by the victim is not an element of first-degree murder by torture. (*Ibid.*) Thus, this Court has held,

> a special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first degree murder with the possible exception of those occasions on which the victim's death was instantaneous. Such a distinction may have nothing to do with the mental state or culpability of the defendant and would not seem to provide a principled basis for distinguishing capital murder from any other murder.

(*Id.* at pp. 265-266.)

This Court has also observed:

> Attempts to measure the amount of pain, if any, suffered by

> victims of torturous acts, some of whom like William, may have been rendered insensitive to pain by alcohol or drugs, others of whom mercifully may have been quickly rendered unconscious at the outset of the homicidal assault, not only promises to be futile, but are unnecessary. The Legislature did not make awareness of actual pain an element of torture-murder. Although it has been assumed in the past opinions in torture-murder cases that the victim probably felt pain, it does not follow that awareness of pain is an element of the offense. The murderer who exhibits "the cold-blooded intent to inflict pain for personal gain or satisfaction" may not assert the victim's condition as a fortuitous defense to his own deplorable acts.

(*People v. Wiley* (1976) 18 Cal.3d 162, 173.) The same reasoning applies to the special circumstance of torture-murder. (*Engert v. Superior Court* (1980) 103 Cal.App.3d 688, 692.)

The issue in this case, then, was *not* that Dr. Blackbourne believed that the alleged acts were causing extreme pain, but whether Kerry Dalton intended to inflict torturous pain. An expert opinion on pain was thus irrelevant and unnecessary, albeit highly prejudicial.

C. THE TESTIMONY OF DR. BLACKBOURNE WAS NOT ADMISSIBLE EXPERT OPINION EVIDENCE BECAUSE HIS OPINIONS ON THE EFFECT OF ELECTRIC SHOCK AND BATTERY ACID WERE BASED ON COMMON KNOWLEDGE.

Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is:
>
> > (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and
> > (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of

> a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

(See also 1 , Cal. Evidence (3d ed. 1986) § 475, p. 447.)

In *People v. Hopper* (1956) 145 Cal.App.2d 180, the court adopted Professor Wigmore's criteria for receiving opinion evidence: "[C]an a jury from this person receive appreciable help?" This Court has stated: "[T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of the expert would assist the trier of fact." (*People v. Cole* (1956) 47 Cal.2d 99, 103.)

Dr. Blackbourne should not have been permitted to give an opinion about the effect on the human body of electric shock and battery acid, because the jurors clearly did not need an expert opinion to explain this "phenomenon" to them. Any person of reasonable intelligence understands that electricity and battery acid are painful. This is not a case where the expert opinion is necessary to tie the defendant to the victim or to explain the wounds. (Compare *People v. Slone* (1978) 76 Cal.App.3d 611, 629 [expert testified that it was the defendant's teeth that caused the bite mark on the victim's thigh] and *People v. Demond* (1976) 59 Cal.App.3d 574, 584 [expert testimony that from the nature and extent of the injuries it was clear that they could not be attributed either to a seizure or to the activities of an accident-prone child].) In *Slone*, the expert did not give an opinion that a bite hurts; in *Demond*, the expert did not opine that traumatic injury due to beating is painful. In this case, that is the only information the expert

supplied.

Nevertheless, the fact that an expert gave his opinion on the subject of pain suggested not only that the alleged torture occurred, but also that it was something beyond a layperson's understanding. It was somehow greater and more agonizing than the jurors were able to grasp, thus increasing the prejudicial effect of the testimony at the same time that it lent unwarranted support to the prosecutor's case.

In addition, Dr. Blackbourne did not base his opinion on matter perceived by or personally known to him. Dr. Blackbourne was educated and trained in the field of pathology, the science of diagnosing disease, and he had performed thousands of autopsies (34 RT 3284-3285) – but not one on Melanie May's body. He acknowledged he could not provide any specific insight on the condition of her body, as there was no body for him to autopsy or examine. (34 RT 3285.) Dr. Blackbourne's testimony was, as a result, limited to generalities and speculation. He provided no factual or medical evidence, nor additional insight on the subject of torture.

Blackbourne's testimony was improperly admitted (Evid. Code, § 801(a); *People v. Stoll* (1989) 49 Cal.3d 1136, 1154 [exclusion of expert opinion evidence is required when such evidence would add nothing to the jury's common fund of information]), and should have been excluded from the jury's consideration. (Evid. Code, § 803 [The court may, and upon objection shall, exclude testimony in the form of an opinion that is based in whole or in significant part on matter that is not a proper basis for such an opinion].)

D. THE TESTIMONY OF DR. BLACKBOURNE WAS NOT ADMISSIBLE EXPERT OPINION EVIDENCE BECAUSE HIS CONCLUSIONS ON THE EFFECT OF ELECTRIC SHOCK WERE INTRODUCED WITHOUT ADEQUATE FOUNDATION.

Even if this court determines that expert opinion was needed or warranted in this case, Dr. Blackbourne's opinion on the effect of electric shock and battery acid on the human body was still inadmissible because there simply were no foundational facts from which he could properly opine.

The trial court's discretion to admit or exclude expert testimony is not unlimited. "The discretion of a trial judge is . . . subject to the limitations of legal principles governing the subject of its action, and to reversal on appeal where no reasonable basis for the action is shown. [T]he courts have the obligation to contain expert testimony within the area of the professed expertise, and to require *adequate foundation for the opinion*." (*Kotla v. Regents of University of California* (2004) 115 Cal.App.4th 283, 291-292, internal quotes and citations omitted, emphasis added.)

Here, Dr. Blackbourne provided his expert opinion on the physical effects of electricity and battery acid on a human being, without examining – indeed, without even viewing – the victim's body or the alleged means of torture. He did not know where or how much of the alleged, but never confirmed, battery acid was injected into the unseen body. He did not know how, where or with what May was allegedly shocked.

The trial court ruled that physical evidence was inconsequential because Blackbourne's testimony was not to determine cause of death but to assist the jurors in determining the effects of electricity and acid should they find these instruments were used in this case. (25 RT 2005.) But even if the testimony of the "foundational" witnesses is accepted without

question (an impossibility because they gave conflicting accounts), none of these witnesses actually saw anything meaningful.

Fedor saw an extension cord tied into a "figure-eight" loop and a cord that had been cut from a lamp. (30 RT 2606.) She did not see a cord or any other electric device used on anyone. No one told her the cord was used to deliver an electric shock to May or anyone else. No cords were examined or analyzed by law enforcement or forensic personnel. (30 RT 2643, 2645.) Baker did not recall seeing an extension cord, and she did not believe any electric shock of Irene May had taken place. (33 RT 3176.)

It is an enormous leap to take the testimony that Fedor found an extension cord and a cord from a lamp, two common household objects, and extrapolate the foundation from which an expert could testify as to what effect an electric shock from these cords might have on the human body. Under this analysis, the court would have found a toaster, a hair dryer, or any other object found in the trailer that conducts electricity sufficient to provide a foundational basis for an expert to testify on the effects of electric shock. The fact that an object has the potential to carry an electric charge is simply not adequate foundation for an expert, or any other witness, to give an opinion on the pain caused by the unknown use of that object.

Furthermore, without having seen electric cords or physical injury, Dr. Blackbourne had no foundation upon which to speculate as to the force or intensity of any electric shock that might have been delivered. He could not calculate the voltage, determine the way it was used, or measure the extent of damage that may have been inflicted by these elusive electric objects. There was no legitimate value to Blackbourne's opinion on the abstract and speculative effects of electric shock.

Similarly, there was no foundation from which Dr. Blackbourne

could properly offer an opinion on the effect of battery acid on the human body. First, there was no evidence of battery acid. Baker said Dalton told her the syringes contained battery acid, but Baker did not see the syringes filled nor did she see anything resembling battery acid in the trailer. (33 RT 3127.) She had no idea what was in the syringes, and no syringes or battery acid were recovered. (33 RT 3128, 3173.) In addition, without the substance in the syringes and without a body to examine, Blackbourne could not evaluate the composition or strength of the acid or where it was injected. Absent this information, any testimony he was able to give on the effect of battery acid was irrelevant.

Dr. Blackbourne's testimony was provided without context and did not assist the jurors in making a reasonable and informed decision on the evidence. His opinion, based on assumptions of fact without evidentiary support, should have been excluded from evidence. (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1116 [an expert's opinion based on speculative or conjectural factors has no evidentiary value and may be excluded from evidence].)

E. THE TRIAL COURT'S ADMISSION OF DR. BLACKBOURNE'S TESTIMONY WAS AN ABUSE OF DISCRETION UNDER EVIDENCE CODE SECTION 352, AS ITS PREJUDICIAL EFFECT FAR OUTWEIGHED ITS PROBATIVE VALUE.

Even if this court determines that Dr. Blackbourne's testimony was probative, helpful, and relevant, the prejudicial effect of his testimony was enormous and far outweighed any probative value it may have had. The court thus abused its discretion under Evidence Code section 352 by admitting Blackbourne's expert opinion.

Evidence Code section 352 provides that the "court in its discretion may exclude evidence if its probative value is substantially outweighed by

the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice." Section 352 is designed to prevent the admission of evidence having little evidentiary impact, but evoking an emotional bias. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1369.) Evidence is substantially more prejudicial than probative if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome'" (*People v. Waidla* (2000) 22 Cal.4th 690, 724) and "uniquely tends to evoke an emotional bias against the defendant without regard to its relevance on material issues" (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 650; *People v. Wright* (1985) 39 Cal.3d 576, 585).

The trial court's decision to admit the expert opinion testimony of Dr. Blackbourne resulted from incorrect assignments of value to the competing interests of probity and prejudice. The court concluded that Dr. Blackbourne's testimony was relevant and probative because it would help the jurors determine the effect of electric shock and battery acid – should they make the factual finding that those items were used in this case. (34 RT 3280-3281.) No one could credibly argue that this was crucial – or even important – testimony. As discussed above, it does not take an expert to explain that electric shocks and battery acid can cause pain, and this element of pain is not the determinative factor in a torture special circumstance allegation. At the same time, the expert testimony describing torture unquestionably evoked an emotional bias against Dalton. The Chief of the San Diego County Medical Examiner's Office described the painful effects of injection with battery acid and exposure to electric shock. He gave substance, prestige and life to the otherwise highly speculative and ill-defined torture allegation. Dr. Blackbourne's testimony in this case was not

merely prejudicial, it was irresponsible. He had no information about what occurred in this case, yet this reputable and respected physician told the jurors that a person unlucky enough to be shocked with electricity and injected with acid would suffer a prolonged and painful death.

F. ADMISSION OF DR. BLACKBOURNE'S EXPERT OPINION VIOLATED MS. DALTON'S CONSTITUTIONAL RIGHTS TO DUE PROCESS OF LAW AND A FAIR TRIAL AND TO A RELIABLE GUILT AND PENALTY DETERMINATION.

For the reasons discussed above, the trial court erred in admitting Dr. Blackbourne's expert opinion testimony that electric shock and battery acid cause pain to the human body. The improper introduction of this evidence was contrary to California law and denied Dalton her constitutional rights to due process of law, a fundamentally fair trial and a reliable guilt and penalty determination. (U.S. CONST., 5th, 6th, 7th & 14th Amends.; CAL. CONST., Art. I, §§ 7, 15, 16, and 17; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The United States Supreme Court has recognized that due process is violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Relying on Dr. Blackbourne's authoritative testimony, the jury likely accepted the fact that May was tortured with electric shock and battery acid. Absent Dr. Blackbourne's testimony, the prosecution would have had little credible basis for this scenario. Under these circumstances, it can hardly be doubted that Dr. Blackbourne's testimony was highly prejudicial, if not determinative, of the outcome. Because there was no basis in the evidence for Dr. Blackbourne's testimony, its admission rendered Dalton's trial fundamentally unfair and violated her right to due process.

Moreover, by shifting the responsibility from the jury to Dr. Blackbourne to find evidence of the special circumstance of torture, the trial

court deprived Dalton of her right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-333); arbitrarily deprived her of the state-created protections of Evidence Code sections 210, 350, 352 and 720; and distorted the fact-finding process to such an extent that the resulting verdicts do not possess the reliability required by the Eighth Amendment (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638, fn. 13; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305).

G. THE TRIAL COURT'S ERROR IN ADMITTING DR. BLACKBOURNE'S TESTIMONY WAS HIGHLY PREJUDICIAL.

The error in admitting Dr. Blackbourne's testimony was not harmless because respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. 18, 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. 275, 279 [the issue is "whether the . . . verdict actually rendered in this trial was surely unattributable to the error"]; *Yates v. Evatt*, *supra*, 500 U.S. 391, 403 ["To say that an error did not contribute to the ensuing verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question"].)

The error cannot be deemed harmless even under the less restrictive *Watson* standard. There is a reasonable probability or chance that a more favorable result – a failure to find the special circumstance of torture – would have been reached in the absence of Dr. Blackbourne's testimony. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836; *College Hospital Inc. v. Superior* (1994) 8 Cal.4th 704, 715 ["We have made clear that a 'probability' in this context does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility*" [original italics].)

As a result, reversal is required.

As many courts – including this one – have recognized, an expert like Dr. Blackbourne has an "aura" or "mantle" of authority that can profoundly affect a jury's verdict. (See, e.g., *People v. Shirley* (1982) 31 Cal.3d 18, 53; *Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1185; *Elsayed Mukhtar v. California State University, Hayward* (9th Cir. 2002) 299 F.3d 1053, 1063; *United States v. Arenal* (8th Cir.1985) 768 F.2d 263, 270.) This Court has also recognized the seemingly "scientific and infallible" nature of such evidence. (See, e.g., *People v. Farnam* (2002) 28 Cal.4th 107, 160; *People v. Webb* (1993) 6 Cal.4th 494, 524.)

No doubt the jury was duly impressed by Dr. Blackbourne's expertise. They heard him testify to his many years of experience in medicine and anatomic and forensic pathology. (34 RT 3284.) He was the head of the San Diego medical examiner's office and had performed over 4,500 autopsies. (34 RT 3285.) Dr. Blackbourne clearly had an aura of authority that very likely affected the jurors and their verdict in a significant way. The practical effect of Dr. Blackbourne's testimony was to add his expertise and credibility to a completely abstract and hypothetical situation in order to create a new scenario in which not only was "someone" killed, but that "someone" also must have died a long and painful death.

The prejudice resulting from Dr. Blackbourne's testimony was devastating. Even though Dr. Blackbourne gave only an opinion on the hypothetical effects of shock and battery acid on the human body, his testimony provided much needed respectability, coherence and authority to the prosecution's otherwise tarnished and compromised evidence. He gave the jurors permission to find true the special circumstance of torture without seriously examining the inconsistencies in and improbabilities of the other

witnesses' testimony.

Respondent cannot prove beyond a reasonable doubt that the error in admitting Dr. Blackbourne's testimony did not contribute to the verdict obtained (*Chapman v. California*, *supra*, 386 U.S. 18); and it is more than reasonable that in the absence of Dr. Blackbourne's testimony the jury would not have found the special circumstance of torture (*People v. Watson*, *supra*, 46 Cal.2d at p.836.) Accordingly, this Court must reverse the special circumstance finding and death judgment.[125]

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[125] As explained in Argument V., the evidence introduced to support the torture-murder special circumstance should not have been before the jurors and would not have otherwise been admitted at the penalty phase of trial, thus *Brown v. Sanders* __U.S. __, 126 S.Ct. 884, 892 does not apply.

VIII.

THE COURT COMMITTED ERROR WHEN IT ALLOWED PROSECUTION WITNESS JUDY BRAKEWOOD TO TESTIFY REGARDING STATEMENTS MADE BY STEVE NOTTOLI.

A. PROCEEDINGS BELOW.

Just prior to Judy Brakewood taking the stand, defense counsel objected to her testimony on the grounds that it was not relevant. (33 RT 3246.) According to the investigative report, Brakewood allegedly had a conversation with Steve Nottoli and Kerry Dalton in either 1987 or 1988. Counsel argued that if the conversation indeed happened in 1987, it was "completely irrelevant" because it preceded May's alleged killing in 1988. (*Ibid.*) Even if Brakewood believed it took place in 1988, her testimony should have been excluded as irrelevant and because its prejudicial impact outweighed any probative value under Evidence Code section 352. (33 RT 3246-3247.)

The prosecutor argued that Brakewood contacted the District Attorney's Office and spoke with Investigator Cooksey after she read a newspaper article about the case that reminded her of a conversation she had had with Nottoli and Dalton about battery acid. (33 RT 3247.) Even though Brakewood was "not able to specifically state when the conversation was . . . it is clear she was referring to the murder that we're talking about in this case." (*Ibid.*) The prosecutor explained that Brakewood would, "talk about the defendant being excited about the murder, about having taken the body, I believe, to an Indian reservation; that battery acid was used and it was fun torturing the victim." (33 RT 3248.)

Defense counsel pointed out that Brakewood read the article in 1992, and there was nothing to indicate the conversation happened before the

alleged killing of Melanie May in 1988. (33 RT 3248.)

The court ruled that the fact that Brakewood did not know when the conversation took place went to weight, not admissibility, and refused to exclude it under Evidence Code section 352. (33 RT 3248-3249.)

Brakewood testified that she met Kerry Dalton in the spring of 1987 or 1988 at Dalton's home in Lakeside. (33 RT 3251.)[126] In 1992, Brakewood contacted Cooksey after reading a newspaper article about a pending case. (*Ibid.*) She recognized Dalton's name in the article, which contained a couple of words that she remembered from a conversation she had had with Dalton and Steve Nottoli, whom she knew as Streaker, and another woman in a green van at a 7-11 parking lot in Spring Valley. (33 RT 3252.)

Brakewood testified she received a call from Streaker one night at around midnight, asking that she bring him drugs at the 7-11. She drove to the 7-11 and got into the van in order to get high. Streaker was in the driver's seat and the other unidentified woman and Brakewood were on the floor in the back. They all did drugs. At one point, when Dalton was *not* in the van, but outside on the telephone, Nottoli and Brakewood had a conversation in which he said they shot up this girl with battery acid and burned her. Dalton came in on the tail end of the conversation and said, "Yep, we really fucked that girl up." Dalton was not there when Nottoli said what happened, and Dalton did not give any details about what she meant. (33 T 3253-3255, 3972.) No one mentioned anything about anyone being killed. (33 RT 3268.) Defense counsel objected that Brakewood's

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[126] She later concluded it must have been spring of 1988 (33 RT 3262, 3271) – May or June of 1988. (33 RT 3269.)

testimony regarding what Nottoli allegedly said was inadmissible hearsay. The objection was overruled. (33 RT 3255.)

On cross-examination, defense counsel gave Brakewood a copy of the October 28, 1992, newspaper article she had read, which Brakewood reviewed. (33 RT 3257.) The names of Dalton, Baker and Tompkins were all in the article. The article contained a quote by Investigator Cooksey that May had been injected with a "hot shot" of battery acid. (33 RT 3258.)

Brakewood explained that in 1987-1988, she was injecting 3/4 to 1 gram of methamphetamine a day. (33 RT 3265.) In the spring of 1987, she also was selling methamphetamine. (33 RT 3263.)

Steve Nottoli later testified that the meeting Brakewood described never happened. There was never a time when he, Dalton, another woman and Brakewood were together in a green van. (37 RT 3630.) In fact, he never drove a green van. (*Ibid.*) He never told Brakewood that he and someone else burned and shot up a girl up with battery acid. He never heard Kerry Dalton say "Yeah, we really fucked that girl up." Anyone who said that was not truthful. (37 RT 3631.)

B. THE COURT SHOULD HAVE EXCLUDED BRAKEWOOD'S TESTIMONY AS IRRELEVANT.

As explained above (see Argument III.), the test of relevance is whether the evidence tends logically, naturally and by reasonable inference to establish material facts such as identity, intent or motive. (*People v. Heard*, *supra*, 31 Cal.4th 946.) A trial court lacks the discretion to admit irrelevant evidence. (*People v. Benavides* (2005) 35 Cal.4th 946; *People v. Scheid* (1997) 16 Cal.4th 1.) An appellate court reviews for abuse of discretion a trial court's ruling on the admissibility of evidence. (*People v. Harris* (2005) 37 Cal.4th 310.)

In this case, Brakewood initially did not even recall what year the alleged conversation in the van occurred. After being directed by the prosecutor – whose second question of Brakewood was, "I'd like to go back to, oh, 1988 . . ." (33 RT 3250) – she focused in on 1988, but even then, she recalled the conversation was in May or June of 1988 (33 RT 3269), while the alleged murder was supposed to have occurred on June 26, 1988. Just as significantly, according to Brakewood, Dalton's alleged statement was uttered spontaneously and without context. Dalton was not present when Nottoli made his alleged statement about battery acid; Dalton simply hopped into the van and said "we really fucked that girl up." (33 RT 3254-3255.) As unlikely as that appears, even if it were true, Dalton's comment could have meant many and various things, and cannot be narrowly construed by words spoken in her absence.[127] According to Brakewood, Dalton seemed excited and happy (33 RT 3255) – undoubtedly unaware of the context in which her statement was being placed.

Moreover, no one has suggested that Nottoli was in any way involved in May's disappearance or death. And, contrary to the prosecutor's statement to the court, Brakewood stated that no one mentioned a killing – *not* that Dalton was "excited about the murder."[128] It appears then, that *if* the conversation with Nottoli did take place, he may have been talking about something other than the May case. To the extent that the jurors considered that there may have been *another* case that

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[127] Indeed, it was just as likely that Dalton was commenting on the conversation *she* had just had on the telephone, rather than Nottoli and Brakewood's conversation.

[128] Also contrary to the prosecutor's statement to the court, Brakewood did not state that Dalton said it was fun torturing the victim. (33 RT 3248.)

involved battery acid, the prejudice was enormous.

C. BRAKEWOOD'S TESTIMONY SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE 352 AS MORE PREJUDICIAL THAN PROBATIVE.

Even if this Court determines that Brakewood's testimony was relevant to a material fact in this case, the prejudicial effect of this evidence far outweighed its probative value. The trial court may properly exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) An appellate court reviews a trial court's determination to admit evidence pursuant to Evidence Code section 352 for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 449.)

The probative value of Brakewood's testimony was negligible. She did not mention what she claimed to have heard until years after the conversation was supposed to have occurred and only after she had read a newspaper article that included all the incriminating facts she described. She offered nothing that was not already known and reported, and her testimony implicated Dalton only tangentially and through inference of Dalton's knowledge of Nottoli's statements to Brakewood.

The prejudicial effect, on the other hand, was great. Dalton was portrayed as adopting a statement of Nottoli's made in her absence and incriminating her in something she never claimed to be a part of. The testimony was misleading and confusing and contradicted by Nottoli, who testified that the encounter never occurred. Brakewood's testimony should not have been admitted.

D. BRAKEWOOD'S TESTIMONY REGARDING WHAT NOTTOLI ALLEGEDLY TOLD HER WAS INADMISSIBLE HEARSAY.

"Hearsay evidence" is "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200(a).) "Except as provided by law, hearsay evidence is inadmissible." ((Evid. Code, § 1200(b).)

The prosecutor asked Brakewood about a conversation she had with Nottoli while Dalton was not present in the van. When Brakewood began to describe what Nottoli allegedly told her, counsel made a hearsay objection. The court overruled the objection, ruling "[i]t's foundational." (33 RT 3255.) When Brakewood then testified that Nottoli told her that they shot up a girl with battery acid and burned her, counsel asked the court to strike that testimony because it was not foundational, it was hearsay. (*Ibid.*) The court asked to hear the next question before it ruled. The prosecutor then asked whether Dalton acknowledged Brakewood's conversation with Nottoli. Brakewood responded that Dalton said, "yeah, we really fucked up that girl." The court overruled the objection. (*Ibid.*) The court did not explain its ruling, but presumably concluded that Dalton's statement was an adoptive admission of Nottoli's comments.

Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if "the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth." (Evid. Code, § 1221.) Admissibility of an adoptive admission is appropriate when "'a person is accused of having committed a crime, under circumstances which fairly afford him an opportunity to hear, understand, and to reply, and which do

not lend themselves to an inference that he was relying on the right of silence guaranteed by the Fifth Amendment to the United States Constitution. . . .'" (*People v. Riel* (2000) 22 Cal.4th 1153, 1189, quoting *People v. Preston* (1973) 9 Cal.3d 308, 313-314.) "There are only two requirements for the introduction of adoptive admissions: '(1) the party must have knowledge of the content of another's hearsay statement, and (2) having such knowledge, the party must have used words or conduct indicating his adoption of, or his belief in, the truth of such hearsay statement.' [Citation.]" (*People v. Silva* (1988) 45 Cal.3d 604, 623, 247.) The analytical basis for this exception is that the adopting party makes the statement her own by admitting its truth. The statement or conduct of the adopting party thus expresses the same statement made by the declarant. (See 1 Witkin, Cal. Evid. (4th ed. 2000) Hearsay, § 102, p. 805.)

The evidence in this case did not establish that Dalton either had knowledge of Nottoli's words or meant to adopt them. Brakewood testified that Dalton was not in the van when Brakewood entered it and that she had a conversation with Nottoli "[w]hile Kerry Dalton was gone." (33 RT 3253-3254.) Dalton entered at the "tail end" of Brakewood's conversation with Nottoli. (33 RT 3255.) Brakewood did not think Dalton was in the van when Nottoli said "what really fucked her up." (*Id.*) That, of course, would have been Nottoli's statement that they shot her up with battery acid and burned her. If Dalton did not even *hear* this statement, she could not adopt it as her own. As noted above, Dalton's comment upon entering the van more likely referred to the telephone conversation she had just had rather than one spoken in her absence.

E. ADMISSION OF BRAKEWOOD'S TESTIMONY VIOLATED APPELLANT DALTON'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

The improper admission of Brakewood's testimony violated standards of California law and denied Dalton her rights to due process of law under both the federal and state constitutions. (U.S. CONST., 8th & 14th Amends.; CAL. CONST., Art. I, §§ 7 and 15; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) The erroneous admission of Brakewood's testimony also denied appellant her state and federal constitutional rights to a fundamentally fair trial and a reliable judgment of death. (U.S. CONST. 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, and 17; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Walters v. Maass* (9th Cir. 1995) 45 F.3d 1355, 1357.)

The United States Supreme Court has recognized that due process can be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Here, the jurors were allowed to consider irrelevant testimony regarding statements of an individual who was demonstrably uninvolved in May's disappearance. Admission of this evidence rendered Dalton's trial fundamentally unfair and violated her right to due process.

Dalton was also deprived of the state-created protections of Evidence Code sections 210, 350, and 352, and, as a result, Dalton was subsequently deprived of her right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-333.) The inclusion of this testimony distorted the fact-finding process to such an extent that the resulting verdict could not have possibly possessed the reliability required by the Eighth Amendment (*Beck*

v. Alabama, *supra*, 447 U.S. at p. 638, fn. 13; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

F. Under Both Federal and State Standards, the Trial Court's Error in Allowing Brakewood to Testify Was Prejudicial.

The due process violation requires that Dalton's conviction and death verdict be reversed unless respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Yates v. Evatt*, *supra*, 500 U.S. at p. 403.) Even if introduction of Brakewood's testimony is state law error only, the conviction must be reversed because there is a reasonable probability that a more favorable result for Dalton would have been reached in the absence of the admission of this testimony. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) In a case such as this one – lacking virtually any evidence proving appellant committed the alleged crime – every piece of evidence that purportedly tied her to the murder must be deemed significant.

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IX.

THE TRIAL COURT ERRED IN UNDULY RESTRICTING CROSS-EXAMINATION OF PROSECUTION WITNESSES.

"'[T]he right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, . . . to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law.' [Citation.]" (*People v. Brown* (2003) 31 Cal.4th 518, 538.) Further, a defendant in a criminal case must have an opportunity to present a complete defense to the charges against him. (*People v. Adams* (2004) 115 Cal.App.4th 243, 253-254; *People v. Sixto* (1993) 17 Cal.App.4th 374, 398-399.

The right of cross-examination includes "exploration of bias." (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 349; see also *People v. Box* (2000) 23 Cal.4th 1153, 1203.) "'Evidence showing a witness's bias or prejudice or which goes to his credibility, veracity or motive may be elicited during cross-examination.' [Citation.]" (*People v. Carpenter* (1999) 21 Cal.4th 1016, 1054.) "'[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness."' [Citations.]" (*People v. Frye* (1998) 18 Cal.4th 894, 946.) Confrontation clause questions arise where restrictions imposed by the trial court effectively "'emasculate the right of cross-examination itself.'" (*Delaware v. Fensterer* (1985) 474 U.S. 15, 19, quoting *Smith v. Illinois* (1968) 390 U.S. 129, 131.) "'It is the

essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. . . .' [Citations.]" (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1139-1140.)

A. THE TRIAL COURT ERRED IN DENYING IMPEACHMENT OF FEDOR WITH PENDING CRIMINAL CHARGES.

1. Introduction and Proceedings Below.

On February 6, 1995, while the parties and court were discussing which priors could be used for impeachment of prosecution witnesses, defense counsel informed the court that they had just learned that Joanne Fedor had a pending grand theft felony charge. (30 RT 2514.) Dusek stated that it was not a conviction but a pending charge in El Cajon. (30 RT 2515.) With that, the court moved on to the next witness. (*Ibid.*) A short time later the court stated, "the 487 [grand theft] ended up a felony conviction. That could be used. At this point, it is just a pending case, therefore, inadmissible." (30 RT 2519.)

Still later, defense counsel informed the court that they had just learned that the El Cajon case included a forgery charge and that although the case was filed on August 23, 1994, Fedor's first appearance was scheduled for December. Her preliminary hearing was scheduled for February 16, 1995 – ten days after her testimony in Dalton's case. Counsel renewed their request to question Fedor about these charges and the significant gap between filing of the charges in August and Fedor's first appearance in December. (30 RT 2656-2657.)

Dusek told the court that it sounded "like a fishing expedition." Fedor had a readiness conference that Friday and the case was "proceeding in its regular course." Dusek also assured the court that he had not

interceded on Fedor's behalf in that case. (30 RT 2657.) The court ruled, "All right. Well, the motion to question her on a pending matter is denied." (*Ibid.*) The court explained:

> [The fact] that the matter is still pending in and of itself doesn't indicate to me that there's been any promises made whatsoever. In fact, Mr. Dusek specifically says there hasn't been; and as far as impeachment goes, it's obviously not usable for impeachment, since it's pending and she may be found not guilty. I don't know. I don't know the strength of the charges. [¶] But in any event, your request to question her on that pending grand theft case is denied.

(30 RT 2658.)

The court's comments reveal its basic misunderstanding of the full scope of cross examination, for the court did not exclude the evidence of Fedor's pending charges in the exercise of its discretion under Evidence Code section 352; it instead erroneously concluded that it was not proper impeachment because it was not a conviction. The court either was unaware or ignored the fact that a witness with pending charges in the same court will be compromised by biases, prejudices or ulterior motives. The curtailment of cross-examination of Fedor to expose possible bias and ulterior motive effectively denied Dalton her Sixth Amendment right of cross-examination.

2. A Prosecution Witness May Be Impeached with the Fact of Pending Charges.

The Supreme Court has observed that there are two ways to discredit a witness's credibility: "One way of discrediting the witness is to introduce evidence of a prior criminal conviction of that witness. By so doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average

trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness." (*Davis v. Alaska* (1974) 415 U.S. 308, 316.)

The Court then described a second way to discredit witnesses:

> *[a] more particular attack on the witness' credibility* is effected by means of cross-examination directed toward revealing possible biases, prejudices or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." [Citation.] We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. [Citation.]

(*Ibid.*, emphasis added.)

It thus is longstanding law that a prosecution witness can be impeached by the mere fact of pending charges. (See *People v. Coyer* (1983) 142 Cal.App.3d 839, 842.) Such a situation is a "circumstance to show that he [ ] may, by testifying, be seeking favor or leniency. [Citations.]" (3 Witkin, Cal. Evid. (4th ed. 2000) Presentation at Trial, § 271, p. 343; accord, *People v. Martinez* (2002) 103 Cal.App.4th 1071, 1080-1081; cf., *People v. Easley* (1988) 46 Cal.3d 712, 727 [reasonably competent counsel "would have impeached [prosecution witness] with the evidence about (and circumstances surrounding) his pending federal civil suit"].)

Cross-examination regarding pending charges is permissible to support the inference that the witness may be seeking leniency by testifying. (*People v. Claxton* (1982) 129 Cal.App.3d 638, 662; see also *People v. Blackwell* (1927) 81 Cal.App. 417, 419-420 ["The fact that a criminal

charge against the witness was then pending in the same court was competent evidence, not of the truth thereof, but as tending to show that the testimony of the witness was influenced by a desire to gain the favor of the district attorney by aiding in the conviction of the defendant, and thereby escaping prosecution in her own case. [Citations]".) The pendency of criminal charges is material to a witness' motivation in testifying even where no express "promises of leniency or immunity" have been made. During trial, defense counsel "is permitted to inquire whether charges are pending against a witness as a circumstance tending to show that the witness may be seeking leniency through testifying. [Citations.]" (*People v. Claxton* (1982) 129 Cal.App.3d 638, 661.) Thus, in *People v. Allen* (1978) 77 Cal.App.3d 924, the Court of Appeal found prejudicial error in the trial court's restriction of defense counsel's inquiry into juvenile charges pending against a witness – "[i]t must be emphasized that there is no requirement that the minor witness' motive to fabricate had a reasonable basis for its existence." (*Id.*, at p. 932.) Similarly, "a witness' probationary status may be used to show his potential bias or prejudice based on concern of jeopardy to his probation" and exclusion of such evidence can constitute reversible error. (*People v. Espinoza* (1977) 73 Cal.App.3d 287, 291; see also *Davis v. Alaska*, *supra,* 415 U.S. 308.)

As the court summarized in *People v. Brown* (1970) 13 Cal.App.3d 876, cert. den. 404 U.S. 835, dismissed on other grounds in *Donald L. v. Superior Court* (1972) 7 Cal.3d 592, it is the witness' subjective expectations, not the objective bounds of prosecutorial influence, that are determinative: "Impeachment by showing improper motive depends on the witness' state of mind; the actual power of the authorities to aid or harm him is not conclusive." (*Id.*, at p. 883.)

A defendant is thus entitled to submit to the trier of fact the question of whether a witness' concern over charges pending has contributed to her willingness to provide testimony favorable to the prosecution in the instant trial. (See *People v. Allen*, *supra*, 77 Cal.App.3d at pp. 932-933; *People v. Coyer*, *supra*, 142 Cal.App.3d at pp. 842-843.)

3. Appellant Dalton Was Prejudiced by the Court's Restrictive Ruling.

Because of the court's policy of refusing to allow impeachment with prior misdemeanor misconduct (see Argument B, below), Fedor was not impeached with a single conviction or act of moral turpitude. She appeared to be bias-free and while perhaps unreliable, not necessarily dishonest. The pending grand theft and forgery charges presented an entirely different picture of Fedor. She had an incentive to please the prosecution that the jurors should have been apprised of. Where, as here, "'the prohibited cross-examination would have produced a significantly different impression of [the witness'] credibility' the court's error in restricting cross-examination violates the Sixth Amendment." (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 494, internal citations omitted; see also *People v. Brown*, 31 Cal.4th at pp. 545-546.)

B. THE TRIAL COURT ERRED IN RESTRICTING IMPEACHING EVIDENCE TO FELONY CONVICTIONS OF MORAL TURPITUDE AND DENYING IMPEACHMENT WITH CONDUCT UNDERLYING MISDEMEANOR CONVICTIONS INVOLVING MORAL TURPITUDE.

1. Introduction.

At a hearing in February 1995, the trial court ruled that it would restrict impeachment with felony convictions to only those felonies involving moral turpitude. It also ruled that it would not allow

impeachment of any witnesses with misdemeanor conduct: "I'm not going to allow misdemeanor priors to be used for impeachment and the reason for that is the time consumption involved in proving up the misdemeanor." (29 RT 2480.) It concluded that "proving up conduct is too time consuming for the benefit of the misdemeanor conviction especially when these witnesses, as I understand it, will have felony convictions." (*Ibid.*)

Shortly after this hearing, defense counsel filed a memorandum objecting to these rulings and arguing that evidence of prior conduct underlying misdemeanor convictions and evidence of true findings in juvenile courts should be admissible to impeach prosecution witnesses at trial. (6 CT 1186-1215.) Attached to the memorandum as Exhibit A were three letters and a five-page list setting forth the prior convictions with which the defense sought to impeach prosecution witnesses. (6 CT 1194 et seq.) They marked certain convictions about which the prosecutor and defense could not agree, all of which were either misdemeanor convictions involving moral turpitude or felony convictions that did not involve moral turpitude. (*Ibid.*)

The court ruled on each of the contested convictions, and, consistent with its earlier pronouncement, refused to allow impeachment with any one of the 31 misdemeanors listed. (30 RT 2507-2520.) It also refused to allow impeachment with felony convictions not involving moral turpitude. (*Ibid.*)

It is well-established that a witness's prior criminal conduct involving dishonesty or other moral turpitude is admissible to impeach that witness. (See generally *People v. Wheeler* (1992) 4 Cal.4th 284, 290-297.) It is also true that "[a]dmission of such evidence, however, is subject to the trial court's discretion to exclude it under Evidence Code section 352." (*People v. Robinson* (2005) 37 Cal.4th 592, 626.) "'A court abuses its

discretion when its ruling "falls outside the bounds of reason." [Citation.]' [Citation.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1149, quoting *People v. Kipp* (1998) 18 Cal.4th 349, 371, quoting *People v. De Santis* (1992) 2 Cal.4th 1198, 1226.)

In this case, the trial court excluded *all* misdemeanor conduct, without exception, based on the fact that it felt proving the conduct was too time-consuming. (29 RT 2480; 30 RT 2508 ["the probative value is outweighed by the consumption of time proving up misdemeanor conduct"].) Proving the conduct, however, was the *only* way in which such evidence could have been introduced. (*People v. Wheeler*, *supra*, 4 Cal.4th at p. 300 [witness can be impeached by evidence of prior misdemeanor conduct that involves moral turpitude but evidence of a misdemeanor conviction remains inadmissible hearsay].) By indiscriminately finding the only method of introducing impeaching evidence to be too time-consuming, the court denied all impeachment with non-felony conduct involving honesty and moral turpitude. That is not an exercise of discretion; it is an arbitrary proscription without any regard to the facts of the prior misconduct.

It is true that after defense counsel filed their motion, the court reviewed the convictions of disputed admissibility, ostensibly exercising its discretion as to the admissibility of each conviction. (30 RT 2507-2520.) The court's rulings, however, belie such a conclusion. It appears quite clear that the court paid only lip-service to the weighing process and was instead simply confirming that its earlier decree would be enforced – no misdemeanor conduct would be introduced.

In *People v. Stewart* (1985) 171 Cal.App.3d 59, 65, the court defined judicial discretion as:

> [T]he absence of arbitrary determination, capricious disposition, or whimsical thinking. (*People v. Giminez* (1975) 14 Cal.3d 68, 72. . . .) The term means the exercise of discriminating judgment within the bounds of reason. To exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. [Citation.] [¶] . . . Moreover, the trial court's ruling under [Evid.Code] section 352 will be upset only if there is a clear showing of an abuse of discretion.

The record below reveals such abuse. The court made no comment on the facts of the misdemeanors, and while it claimed to be considering the admissibility of all conduct and convictions the defense sought to introduce, it in fact refused to allow impeachment with even one of the misdemeanors.

The court also restricted impeachment with felony convictions to those involving moral turpitude. (See, e.g., 30 RT 2509 ["not a moral turpitude offense, therefore, is not relevant"], 2510 [same], 2512-2516, 2518-2520.)

The California Constitution provides that: " Any prior felony conviction of any person in any criminal proceeding . . . shall subsequently be used without limitation for purposes of impeachment. . . ." (CAL. CONST., art. I, § 28, subd. (f).) If the plain terms of this constitutional mandate are applied, all prior felony convictions are admissible for purposes of impeachment.

The lead opinion in *People v. Castro*, *supra*, 38 Cal.3d at p. 306, held that "[article I] subdivision (d) [of the California Constitution], as well as due process, forbids the use of convictions of felonies which do not necessarily involve moral turpitude." Such "moral turpitude," however, was unrestricted "even if the immoral trait is one other than dishonesty." In

1992, this Court recognized that the *Castro* federal due process rationale for exclusion of felonies not involving moral turpitude was undermined by the United States Supreme Court in *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 508-527, fn. 4. (See *People v. Wheeler, supra,* 4 Cal.4th at p. 296, fn. 6.) Accordingly, notions of federal due process no longer support the *Castro* decision, if they ever did. (*Ibid.*)

In *People v. Ballard* (1993) 13 Cal.App.4th 687, 695, the court concluded that,

> [a] substantial body of authority has implicitly or explicitly questioned the precedential value of the *Castro* lead opinion in excluding impeachment by felonies not involving moral turpitude, despite the plain language of [CAL. CONST., Art. I, §28(f)]."

And in *People v. Clair* (1992) 2 Cal.4th 629, 655, this Court recognized that subdivision (f) "militates in favor of allowing a party to use any prior felony conviction to impeach any witness in any criminal proceeding."

At the very least, these cases and observations teach that moral turpitude should be interpreted quite broadly. For instance, in *People v. Forster* (1994) 29 Cal.App.4th 1746, 1757, the court concluded that multiple convictions of driving under the influence, a Vehicle Code violation, involved moral turpitude because it was a "recidivist type crime involving an extremely dangerous activity."

> Having suffered at least three previous convictions for driving under the influence, a person who has violated section 23175 is presumptively aware of the life-threatening nature of the activity and the grave risks involved. (See *People v. David* (1991) 230 Cal.App.3d 1109, 1114-1115.) Continuing such activity despite the knowledge of such risks is indicative of a "conscious indifference or 'I don't care attitude' concerning

> the ultimate consequences" of the activity (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1208) from which one can certainly infer a "'depravity in the private and social duties which a man owes to his fellowmen, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.'" ([*People v.*] *Mansfield* [1988] 200 Cal.App.3d [82], 87; *accord People v. Bautista* (1990) 217 Cal.App.3d 1, 7 [felony hit-and-run driving (§ 20001) found to involve a "'general readiness to do evil' or moral turpitude"]; see also *People v. Ballard* (1993) 13 Cal.App.4th 687, 697 [felony indecent exposure (Pen.Code, § 314, subd. 1) involves moral turpitude, noting recidivist nature of offense].)

(*Ibid.*)

In this case, the trial court also ruled that many of the prior convictions or conduct underlying misdemeanor convictions of moral turpitude would be cumulative, given the number of felony convictions the witness had. (See, e.g., 30 RT 2510, 2512.) As a Ninth Circuit panel has recognized, however, "[w]here, as here, there is reason to believe that the jury relied on a witness's testimony to reach its verdict despite the introduction of impeachment evidence at trial, and there is a reasonable probability that the suppressed impeachment evidence, when considered together with the disclosed impeachment evidence, would have affected the jury's assessment of the witness's credibility, the suppressed impeachment evidence is prejudicial" (*United States v. Benn Lambert* (9th Cir. 2002) 283 F.3d 1040, 1056.)

2. The Court Erroneously Restricted Impeachment of Prosecution Witnesses.

In this case, the trial court refused to allow full impeachment of the following witnesses:

- **Sheryl Baker.** It was clear to all that Baker was the

prosecution's central witness. The court, however, ruled that the majority of her prior convictions and misconduct were inadmissible.

1. The conduct underlying her juvenile forgery finding was inadmissible. (30 RT 2507.)

2. The conduct underlying her misdemeanor conviction in receiving stolen property in 1983 was too remote and would unduly consume time. (30 RT 2507.)

3. The conduct underlying her misdemeanor possession of a weapon in 1984 was not a serious felony offense, was too remote and would unduly consume time at trial. (30 RT 2507-2508.)

4. The probative value of her 1986 misdemeanor grand theft was outweighed by the consumption of time proving up misdemeanor conduct. (30 RT 2508.)

5. Loitering near a school or other places attended by children was not a crime of moral turpitude and proof would require undue consumption of time under Evidence Code section 352. (30 RT 2509.)

6. Baker's possession of a hypodermic needle and giving of false information in 1988 were not crimes of moral turpitude, not relevant and their value was outweighed by the undue consumption of time required to prove the conduct. (30 RT 2509.)

7. The conduct underlying her misdemeanor conviction for receiving stolen property in 1989 had little probative value

because of her felony conviction of the same crime, and because of undue consumption of time at trial. (30 RT 2509-2510.)

8. The conduct underlying her 1990 conviction for possession of a controlled substance was not admissible because it did not involve moral turpitude. (30 RT 2510.)[129]

Baker was thus impeached at trial only with one grand theft auto conviction, the date of which she was not certain, and her guilty plea to second degree murder in the instant case. (33 RT 3093.) Even the impact of the murder plea, however, was undercut by Dusek's elicitation that she was allowed to plead guilty to second degree murder in exchange for "truthful" testimony in Dalton's case. (33 RT 3093-3094.)

- **Jeanette Bench.** The court excluded the conduct underlying Bench's 1983 misdemeanor conviction for forgery because it was too remote, unduly time consuming, and had insignificant probative value in light of five felony convictions that were admissible for impeachment.
- **Richard McNeely.** The court excluded as too remote the conduct underlying McNeely's convictions in 1982 through 1987. The court also excluded them because "the undue consumption of time outweighs any probative value" and he would be impeached with "at least ten felony moral turpitude convictions." (30 RT 2510.) At trial, McNeely testified that

[129] The court failed to rule on the Vehicle Code violation of giving false information to a police officer. (6 CT 1196.)

he had about twelve felony burglary convictions in San Diego, that occurred "over a couple-month period." (32 RT 3071.) He also had four felony convictions in Missouri that occurred in April 1990. (30 RT 3071-3072.) The earlier conduct reveals a pattern and attitude that two sprees in 1989 and 1990 do not.[130]

- **Judy Brakewood.** Brakewood testified about alleged admissions of Dalton. The court refused to allow impeachment with her misdemeanor possession of a weapon in 1989, concluding that it was not a crime of moral turpitude, thus not relevant. (30 RT 2512-2513.) During her testimony, Brakewood admitted that she injected methamphetamine, began selling it in the Spring of 1987 and was selling it in 1988. (33 RT 3263.) Although counsel attempted to question her about her sales of methamphetamine, the court cut him off. (33 RT 3262-3263.)

- **Pat Collins.** Collins also testified regarding alleged admissions. The court ruled that her 1987 and 1988 convictions for possession of drugs were inadmissible because they were not crimes of moral turpitude and too remote. (30 RT 2513.) It also ruled that her felony conviction for being an ex-convict or addict in possession of a gun was inadmissible because it is not a crime of moral turpitude. (30 RT 2513.) During her testimony, the court

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[130] The court also restricted the impeachment of Tompkins. (30 RT 2511-2512.) Since Tompkins only testified through his alter ego McNeely, his credibility was never impeached at all.

also improperly restricted cross-examination of Collins regarding her possible prior work as an informant in other cases, including work with Richard Lusardi, with whom she worked in this case and for whom she tape-recorded telephone conversations with Sheryl Baker. (33 RT 3219, 3221.)

- **Phyllis Cross.** Cross was Robert May's girlfriend and testified that she accompanied Robert on excursions to look for Melanie May's remains. (31 RT 2839.) The court ruled that Cross's 1989 misdemeanor conduct of resisting or obstructing an office and possession of a hypodermic needle in 1989 were not crimes of moral turpitude, were unduly time consuming and remote. (30 RT 2513.)
- **Joanne Fedor.** The court ruled that evidence regarding Fedor's three 1982 misdemeanor convictions for illegal possession of a hypodermic needle and syringe, theft and forgery was inadmissible as too remote and unduly time consuming. (30 RT 2514.) It also ruled that a 1983 misdemeanor battery conviction was not admissible because it did not involve moral turpitude. (30 RT 2519.)[131]
- **Laurie Carlyle.** Carlyle was an inmate who testified about alleged statements of Dalton. (32 RT 3051 et seq.) The court restricted Dalton's opportunity to impeach Carlyle by ruling that acts underlying her two convictions of possession of

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[131] As discussed above, the court also erroneously ruled that Fedor could not be impeached with pending charges. (See Argument IX.A.)

drugs, her convictions of theft and grand theft, her conviction of forgery, and her conviction of giving false identification were inadmissible because they did not involve moral turpitude and were remote and unduly time consuming. (30 RT 2519.)

- **Pamela Johnson.** Johnson testified during the penalty phase regarding Dalton's alleged violence and threats of violence. The court refused to allow impeachment of Johnson with evidence relating to her 1982 misdemeanor check forgery because it was too remote and unduly time consuming. (30 RT 2519-2520.)

3. Appellant Dalton Was Prejudiced by the Court's Ruling Restricting Impeachment.

The court's rulings unduly restricted appellant's right to cross-examine witnesses, violating her rights to confrontation and cross-examination, to a fair trial, to due process of law, to present a defense, and to a reliable determination of both guilt and penalty. (U.S. CONST., 5th, 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 1, 7, 12, 15, 16, 17.) The perceived volume, breadth and recidivist nature of the witnesses' prior convictions and conduct was severely and qualitatively diminished by the court's rulings. There is a reasonable probability that the suppressed impeachment evidence would have affected the jurors' assessment of each individual witness's credibility, which would have diminished the strength of the prosecution's case in general. The suppression of the impeachment evidence was prejudicial, and this Court must reverse the convictions, special circumstance findings and death judgment.

C. THE TRIAL COURT ERRONEOUSLY RESTRICTED CROSS-EXAMINATION OF OTHER PROSECUTION WITNESSES.

1. Kandy Koliwer.

The court ruled that defense counsel could not cross-examine Kandy Koliwer, an attorney assigned to represent May in the juvenile dependency petition filed as to her children (31 RT 2812), regarding May's methamphetamine problem. (31 RT 2833.) Koliwer testified about her knowledge of May and May's devotion to her children, as well as Koliwer's belief that regular drug use was not an issue in the case she was handling for May. (31 RT 2826, 2836.) Koliwer's knowledge, or lack of knowledge, regarding May's drug use would certainly relate to her credibility and reliability as a witness about May, and the court erred in refusing to allow questioning in this area. (See, e.g., Welfare and Institutions Code, § 300.2 ["The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child"].)

2. Fred Eckstein.

Defense counsel attempted to question Fred Eckstein regarding his parents' use of methamphetamine. The prosecutor's objections that it was irrelevant and called for speculation were sustained. (31 RT 2879.) The court erred in its ruling. Kathy Eckstein had just testified about entering Fedor's trailer and observing nickel and dime-sized spots of what looked like dried blood on the walls, floor, carpeting and blankets. She also claimed to have seen a bar of soap with teeth marks in it and a knotted extension cord. (31 RT 2859.) She testified that she was using methamphetamine during this time, but not on a regular basis. (31 RT 2864.) Dusek relied on Kathy Eckstein's testimony to prove the torture

special circumstance and to corroborate Fedor. He argued that she and Fred saw "blood, screwdrivers, extension cords." (39 RT 3769.) Fred's observations of his mother's use of methamphetamine around the time of her alleged observations would have been important impeaching evidence of Kathy's credibility and powers of observation. (See *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1557 [witness' "previous felony conviction and his drug use undermined his credibility"]; *People v. Castro* (1979) 99 Cal.App.3d 191, 198 [defendant presented evidence bearing on witness' credibility, including his drug use].)

D. THE CUMULATIVE EFFECT OF THE COURT'S RESTRICTION ON CROSS-EXAMINATION WAS HIGHLY PREJUDICIAL.

The trial court restricted defense efforts to impeach prosecution witnesses on many fronts. It refused to allow impeachment with pending cases; it refused to allow impeachment with conduct underlying misdemeanor convictions of crimes of moral turpitude; it refused to allow impeachment with felony convictions not involving moral turpitude. Even if this Court concludes that no one, or even no category, of restriction of cross-examination was serious enough to warrant relief, the cumulative result of the court's erroneous rulings was to shield a number of prosecution witnesses from full impeachment of their credibility and unduly enhance the quality of the prosecution's evidence. The cumulative effect resulted in a denial of Dalton's rights to confrontation, cross-examination, a fair trial, due process and a reliable guilt and penalty determination.

X.

THE COURT ERRED IN FAILING TO GRANT A MISTRIAL FOLLOWING FEDOR'S UNSOLICITED AND UNFOUNDED STATEMENT THAT KERRY DALTON MOLESTED HER CHILDREN.

A. PROCEEDINGS BELOW.

The prosecution's first witness was Joanne Fedor. Midway into her direct examination she asked, referring to Kerry Dalton, "Does she have to stare at me the whole time?" (30 RT 2615.) Defense counsel objected, and the court admonished Fedor, "Just don't look at her." (30 RT 2616.) Fedor responded, "Your honor, she molested my kids." (*Ibid.*) The court ordered that her statement be stricken and chastened Fedor, "Don't talk like that." (*Ibid.*) The court refused to allow counsel to approach the bench and said they could discuss it during the next recess. It then reiterated: "To the jury, if you heard her last comment, disregard it. It is stricken." (*Ibid.*) With that, the prosecutor continued his examination of Fedor.

At the next recess, out of the presence of the jurors, defense counsel moved for a mistrial, arguing that "it is hard to unring the bell." (30 RT 2620.) The court stated:

> The record should reflect that the witness turned, faced me when she made that statement, made it loud enough, obviously, that I heard it. I struck it from the record, I admonished the jury to disregard it, if they heard it. [¶] I didn't repeat it when I admonished them. Motion for mistrial is denied.

(30 RT 2620-2621.)

The court then instructed Fedor not to mention anything like that again in front of the jury. (30 RT 2621.)

The next day, before the jurors entered the courtroom, the court

informed counsel that it wanted "to make a better record on that incident yesterday involving Miss Fedor. . . ." (31 RT 2681.) The court proposed bringing in each juror individually and asking whether he or she heard the statement and, if so, whether the juror could disregard it and give Dalton a fair trial. (*Ibid.*) The parties agreed and the first juror was brought into the courtroom. The court asked him:

> Yesterday afternoon when the witness, . . . Miss Fedor . . . was on the witness stand, we were in a lull in the proceedings while the district attorney was over at my clerk's desk having an exhibit marked. The witness turned to me, made a statement to me regarding her children, which I subsequently struck from the record. [¶] Did you hear the statement that she made?

(31 RT 2683-2684.)

When the juror said that he had heard it, the court asked whether he could follow the admonition, informing the juror that the statement was an "unfounded allegation, no evidence whatsoever to support it." (31 RT 2684.) The juror said that he could follow the admonition, proceed as a fair and impartial juror and give Dalton a fair trial. (*Ibid.*) The juror was then excused, and the process was repeated with the rest of the jurors and alternates. (31 RT 2684-2697.) Eleven of the twelve jurors heard the statement. (31 RT 2684-2694.)[132] All eleven assured the court they could follow the admonition and give Dalton a fair trial. (*Ibid.*) The defense again moved for a mistrial, and the court again denied it. (31 RT 2697.)

Fedor's accusation was so prejudicial that no admonition could have been sufficient to cure it. The court, therefore, should have granted

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[132] One of the three alternates heard Fedor's statement. (31 RT 2695-2697.)

Dalton's motion for mistrial. The failure to do so was an abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 210 [appellate court applies the abuse of discretion standard of review to any ruling on a motion for a mistrial].)

B. APPELLANT DALTON'S CHANCES OF RECEIVING A FAIR TRIAL WERE IRREPARABLY DAMAGED BY FEDOR'S ACCUSATION OF CHILD MOLESTATION.

"A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. (*People v. Woodberry* (1970) 10 Cal.App.3d 695, 708." (*People v. Haskett* (1982) 30 Cal.3d 841, 854; see also *People v. Stansbury* (1993) 4 Cal.4th 1017, 1060; *People v. Cooper* (1991) 53 Cal.3d 771, 838-839; *People v. Wharton* (1991) 53 Cal.3d 522, 565.) In *Woodberry*, the court observed that "a motion to strike presupposes error of some sort, whereas the motion for mistrial presupposes error plus incurable prejudice. In the first instance, the trial may go on to a conclusion; but in the second instance it is terminated, perhaps to begin anew." (*People v. Woodberry*, *supra*, 10 Cal.App.3d at p. 708.)

While it is true that "[w]hether a particular incident is incurably prejudicial is by its nature a speculative matter" (*People v. Haskett*, *supra*, 30 Cal.3d at p. 854), it is indisputable that "evidence of sex crimes with young children is especially likely to inflame a jury." (See *Coleman v. Superior Court* (1981) 116 Cal.App.3d 129, 138 [denial of motion to sever was abuse of discretion as jury confronted by evidence of defendant's propensity to commit sex crimes would be hard-pressed to decide the murder case exclusively upon evidence related to that crime].) Even though the trial court immediately struck Fedor's words and admonished the jury appropriately, it is hard to unring a bell so loudly rung. (See *People v. Hill*

(1998) 17 Cal.4th 800, 845 ["'It has been truly said: "You can't unring a bell"'"].)

The Supreme Court has observed that courts will normally presume that jurors follow an instruction to disregard inadmissible evidence inadvertently presented to it,

> unless there is an "overwhelming probability" that the jury will be unable to follow the court's instructions, *Richardson v. Marsh*, 481 U.S. 200, 208. . . (1987), and a strong likelihood that the effect of the evidence would be "devastating" to the defendant, *Bruton v. United States*, 391 U.S. 123, 136 . . . (1968).

(*Greer v. Miller* (1987) 483 U.S. 756, 766, fn.8.)

As Justices Frankfurter, Black, Douglas, and Brennan explained in their dissent in *Delli Paoli v. United States* (1957) 352 U.S. 232, 248, overruled in *Bruton v. United States* (1968) 391 U.S. 123, "[t]he Government should not have the windfall of having the jury be influenced be evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." (See also *Krulewitch v. United States* (1949) 336 U.S. 440, 453 ["The naive assumption that prejudicial effects can be overcome by instructions to the jury, cf. *Blumenthal v. United States* [1947] 332 U.S. 539, 559 . . . , all practicing lawyers know to be unmitigated fiction" (conc. opn. of Jackson, J.)]; *Dunn v. United States* (5th Cir. 1962) 307 F.2d 883, 886 ["one 'cannot unring a bell'; 'after the thrust of the saber it is difficult to say forget the wound;' and finally, 'if you throw a skunk into the jury box, you can't instruct the jury not to smell it"].)

In this case, there certainly was an overwhelming possibility that no instruction could neutralize Fedor's inflammatory accusation and the

emotional effect it must have had on the minds of the jurors. An admonition to ignore certain testimony in reaching a factual conclusion in a logical manner may be effective. But it is far harder to blot out an emotion or a vivid image from the mind of a juror. Words and the images and associations they conjure are powerful instruments in forming human judgments. In a trial as emotionally conceived as this one, they may have been decisive. No objection or admonition could cure the effect of Fedor's accusation; once spoken, the emotional impact of the words was locked in the minds of its hearers. This was undoubtedly true for jurors Owings and Tennent, both of whom described experiences with molestation charges during voir dire. (11 CT 2316; 27 RT 2204-2206 [Juror Owings' four-year-old daughter was molested by her babysitter's husband, who later pleaded guilty]; 12 CT 2476; 27 RT 2245, 2248 [Juror Tennent's former roommate was convicted and served time for child molestation].)

The accusation of child molestation was certainly devastating to Ms. Dalton. It was especially likely to have an impact on the jury's verdict in a weak case such as this, where the prosecutor relied heavily on fear and speculation to obtain a conviction. Fedor's accusation added one more bit of tarnish to Dalton's image and gave the jurors, even if subconsciously, another ground to mistrust Dalton and her defense. The error was a violation of appellant's constitutional right and the *Chapman* harmless error standard should apply. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Moreover, had the court granted the motion and impaneled new jurors, untainted by the accusation, it is reasonably probable that a result more favorable would have been obtained. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Reversal of appellant Dalton's convictions is required.

C. Failure to Grant a Mistrial Violated Ms. Dalton's Constitutional Rights to Due Process of Law and a Fair Trial and to a Reliable Guilt and Penalty Determination.

For the reasons discussed above, the trial court abused its discretion when it denied the defense motion for a mistrial. This abuse of discretion violated California law and denied Ms. Dalton her constitutional rights to due process of law, a fundamentally fair trial and a reliable guilt and penalty determination. (U.S. CONST., 5th, 6th, 7th & 14th Amends.; CAL. CONST., Art. I, §§ 7, 15, 16, and 17; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

The United States Supreme Court has recognized that due process is violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry* (1995) 513 U.S. 364, 366 (*per curiam*).) Little could be more inflammatory than allegations of sexual abuse of a child, and added to the other unsubstantiated accusations in this case, its effect was enormously prejudicial, rendering Dalton's trial fundamentally unfair and violating her right to due process.

Moreover, the denial of a mistrial deprived Ms. Dalton of her right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-333) and distorted the fact-finding process to such an extent that the resulting verdicts do not possess the reliability required by the Eighth Amendment (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638, fn. 13; *Woodson v. North Carolina*, *supra*, 428 U.S. 280, 305).

This Court has recognized that error that does not affect the guilt determination can have a prejudicial impact during penalty trial.

> Conceivably, an error that we would hold nonprejudicial on the guilt trial, if a similar error were committed on the penalty

> trial, could be prejudicial. Where, as here, the evidence of guilt is overwhelming, even serious error cannot be said to be such as would, in reasonable probability, have altered the balance between conviction and acquittal, but in determining the issue of penalty, the jury, in deciding between life imprisonment and death, may be swayed one way or another by any piece of evidence. If any substantial piece or part of that evidence was inadmissible, or if any misconduct or other error occurred, particularly where, as here, the inadmissible evidence, the misconduct and other errors directly related to the character of appellant, the appellate court by no reasoning process can ascertain whether there is a 'reasonable probability' that a different result would have been reached in absence of error.

(*People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; see also *People v. Brown* (1988) 46 Cal.3d 432, 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error].)

In this case, Fedor's accusation that Dalton molested her children could have had a significant impact on at least one of the jurors's penalty determination.[133] It thus cannot be said that the error had "no effect" on the penalty phase verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341.) Accordingly, at the very least, the death judgment must be reversed.

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[133] See *Mayfield v. Woodford* (9th Cir. 2001) 270 F.3d 915, 937 (conc. opn. of Gould, J.) ["in a state requiring a unanimous sentence, there need only be a reasonable probability that 'at least one juror could reasonably have determined that . . . death was not an appropriate sentence'"], quoting *Neal v. Puckett* (5th Cir. 2001) 239 F.3d 683, 691-692, footnote omitted.

XI.

THE LYING IN WAIT SPECIAL CIRCUMSTANCE IS UNCONSTITUTIONAL.

In order to avoid the Eighth Amendment's prohibition against cruel and unusual punishment, sentencing must provide a meaningful basis for distinguishing cases in which the death penalty is sought from cases where it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) In addition, the death penalty, as the most irrevocable sanction, should be reserved for only the most extreme cases. (*Gregg v. Georgia* (1976) 428 U.S. 153, 182.) Therefore, a special circumstance must provide a meaningful basis for distinguishing capital and noncapital cases so that the death penalty will not be imposed in an arbitrary or irrational manner, and will be only be given to the most culpable defendants.

California's lying-in-wait special circumstance fails to provide a meaningful basis for distinguishing capital from noncapital cases, and it does not punish only the most extreme offenders. As it has been interpreted and applied in recent years, the special circumstance "has been expanded to such a degree that the line between premeditated murder and capital murder is but an illusory veil." (*Morales v. Woodford* (9th Cir. 2003) 388 F.3d 1159, 1180 (conc. & dis. opn. of McKeown, J.).) California has "mistaken the lying-in-wait special circumstance with simply having a plan." (H. Mitchell Caldwell, *The Prostitution of Lying in Wait* (2003) 57 U. Miami L. Rev. 311 (hereinafter *Caldwell.*)

California has attempted to comply with Eighth Amendment requirements by the use of statutory "special circumstances" that purport to circumscribe a certain class of death-eligible offenders from all first-degree

murderers; a class which is broadly defined in California. (See Pen. Code, §§ 190.2(a), 189; *People v. Bacigalupo* (1993) 6 Cal.4th 457, 467-468; see also *Tuilaepa v. California* (1994) 512 U.S. 967, 975.) Thus, California's special circumstances are susceptible to constitutional challenge when they do not meaningfully circumscribe the class of first-degree murders to those truly deserving of the ultimate punishment. (See, e.g., *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1320 [noting that, absent a narrowing construction, "the torture special circumstance would fail to provide a principled basis for distinguishing capital murder from any other murder"].)

For the lying-in-wait special circumstance to perform this function, given the breadth of California's first-degree murder statute, it necessarily must exclude a significant portion of premeditated and deliberate first-degree murderers from potential death sentences. Instead of performing this function, the lying-in-wait special circumstance, as interpreted and applied by this Court, defines capital conduct in a manner identical to that which is required to establish premeditated murder.

Murder perpetrated by means of lying-in-wait has historically constituted first-degree murder in California. (Pen. Code, § 189.) The lying-in-wait special circumstance that was added to California's death penalty scheme with the passage of the Briggs Initiative in 1978 differed from the first-degree murder theory of lying-in-wait in only minor respects. The lying-in-wait special circumstance is established if the defendant commits an intentional murder with: (1) a concealment of purpose; (2) a substantial period of watching and waiting for an opportune time to act; and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People v Morales* (1989) 48 Cal.3d 527, 557.) Far from narrowing the class of first-degree murders eligible for a death

sentence, the elements of the lying-in-wait special circumstance – as interpreted by this Court – apply to virtually all premeditated and deliberate murders in California

Concealment, the first element of lying-in-wait, illustrates perhaps the most glaring constitutional shortcoming of this special circumstance. Traditionally, lying-in-wait was found where the perpetrator's physical presence was concealed, as in an ambush, and lying-in-wait cases, including early special circumstance cases, were typically limited to such ambush scenarios. (See *People v. McNeal* (1958) 160 Cal.App.2d 446, 451; *People v. Merkouris*, *supra*, 46 Cal.2d at pp. 558-560 [lying-in-wait not established absent evidence of physical concealment or surprise].) Despite the notion that physical concealment has been the defining feature of lying-in-wait in California, this Court completely eliminated this requirement in *Morales*. (See *People v. Morales*, *supra*, 48 Cal.3d at pp. 554-555.)

Under this Court's interpretation, the concealment prong means nothing more than subjective intent to take a victim unawares, and is satisfied merely if the defendant conceals his or her murderous plan from the victim. (*People v. Morales*, *supra*, 48 Cal at pp. 556-557.) Thus, whenever a killer fails to announce a murderous intent to the victim prior to inflicting the fatal injuries, the concealment element is satisfied. This Court has expanded this special circumstance even further, holding that it can apply even when such an announcement of intent *is* made. (See *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 501.)

Although this Court has purported to require a substantial period of watching and waiting to establish the second element of lying-in-wait, the watching and waiting actually required by the Court must merely be of such duration as to "show a state of mind equivalent to premeditation or

deliberation." (*People v. Carpenter* (1997) 15 Cal.4th, 312, 390-391, emphasis omitted.) As with a finding of premeditation and deliberation, the duration element is virtually standardless.

Further, the killer need not be hiding; rather, the watching and waiting can occur in the victim's presence and with full knowledge by the victim that the killer is present. (See, e.g., *People v. Webster* (1991) 54 Cal.3d 411, 448.) In fact, the killer need not actually "watch" or even view the victim during the period of lying-in-wait, so long as he or she was "watchful," i.e., "alert and vigilant" while waiting. (*People v. Sims* (1993) 5 Cal.4th 405, 433.) This Court has even gone so far as to conclude that this element is satisfied even if the "vigilant" defendant falls asleep before the victim arrives. (See *People v. Tuthill* (1947) 31 Cal.2d 92, 100-101.) Since the "watching and waiting" elements are simply substitute methods of explaining premeditation and deliberation – i.e., all premeditated murders automatically satisfy this element – the remaining two elements of this special circumstance must adequately distinguish the lying-in-wait special circumstance from other premeditated murder.

The third element of lying-in-wait – the requirement of a "surprise attack on an unsuspecting victim from a position of advantage" (*People v. Morales*, *supra*, 48 Cal.3d at p. 557) – similarly fails in this regard. In California, a defendant is "in a position of advantage" if he or she is sitting, walking, or standing behind the victim at the moment of the attack, even if the victim is fully aware of the defendant's presence. (*Id.* at pp. 557-559.) Indeed, the killer need not even be physically behind the victim, as long as the victim is "vulnerable," which has been found to be the case when there are no other people around. (See *People v. Edwards* (1991) 54 Cal.3d 787, 825-826.) Finally, the "surprise attack on an unsuspecting victim from a

position of advantage" prong may be satisfied even if the victim becomes aware of the killer's intent. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 501.)

Under this Court's broad construction of lying-in-wait, it is difficult to imagine a premeditated murder that does not in some way meet the definition of this special circumstance. Consequently, the elements set forth in jury instructions and as interpreted by courts in this state, provide no clear, objective, and principled way for a jury to identify the few cases in which lying-in-wait should be found from the many cases in which it should not. As a result, juries routinely apply this special circumstance inconsistently, even when faced with virtually identical fact patterns.

The Eighth Amendment demands more than merely narrowing the class of death-eligible murderers. "When the purpose of a statutory aggravating circumstance is to enable the sentencer to distinguish those who deserve capital punishment from those who do not, the circumstance must provide a principled basis for doing so." (*Arave v. Creech*, *supra*, 507 U.S. at p. 474; see *Lewis v. Jeffers* (1990) 497 U.S. 764, 776.) An aggravating or special circumstance is unconstitutionally vague when it fails to create any inherent restraint on the arbitrary and capricious infliction of the death sentence, because under such circumstances a person of ordinary sensibility could find that almost every murder fit the stated criteria. (*Zant v. Stephens*, *supra*, 462 U.S. at p. 878.)

Rather than remedy the constitutional infirmities inherent in this special circumstance, this Court has exacerbated the vagueness problem by routinely expanding the elements of lying-in-wait, thereby creating greater confusion and less guidance to juries who are charged with applying it. Because even diametrically opposed scenarios can satisfy the special

circumstance, California juries are left with no guidance in determining when it should and should not apply.

Not only does the lying-in-wait special circumstance fail to substantially narrow the class of death-eligible offenders, but it also fails to reserve the death penalty for the most culpable defendants. A killer who watches and waits may be no more blameworthy than one who attacks immediately and openly. (*People v. Morales*, *supra*, 48 Cal.3d at p. 575 (dis. opn. of Mosk, J.).) Several judges have pointed out the absurdity of the distinctions that mean the difference between life and death. (See, e.g., *People v. Roberts* (1992) 2 Cal. 4th 271, 323 [where the only distinction between the defendant's case and one that would not be death-eligible was locomotion]; *People v. Webster*, *supra*, 54 Cal.3d at p. 467 [where one defendant may have been found guilty of the special circumstance merely because he attacked the victim from behind in a "position of advantage," while his codefendant was not death-eligible because he attacked from the front].) The death penalty can now be given to a defendant who enters his wife's house through the front door in the daytime and shoots her new lover, but theoretically may not be give to a "sadistic person, who wants the victim to know what is coming, and has no doubt of his ability to accomplish the crime," and so tells the victim of his murderous intentions beforehand. (See *People v. Gutierrez*, *supra*, 28 Cal. 4th 1083; *Morales v. Woodford*, *supra*, 388 F.3d at p. 1175.)

The lying-in-wait special circumstance permits the wanton and freakish imposition of the death penalty prohibited by the Eighth Amendment. (See *Gregg v. Georgia*, *supra*, 428 U.S. at p. 195, fn. 46.) "Overall, it is relatively clear that murder by lying-in-wait as applied by the California Supreme Court has been stretched to the breaking point."

(*Caldwell*, *supra*, at p. 371.) The lying-in-wait special circumstance is so broad that it embraces nearly all premeditated murders. It does not appreciably narrow the class of death-eligible defendants, and it does not punish the most extreme criminals. Therefore the lying-in-wait special circumstance is unconstitutional.

For all the foregoing reasons, this Court should find the lying-in-wait special circumstance unconstitutional and reverse the special circumstance finding and death judgment in this case.

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XII.

THE TRIAL COURT'S ERRONEOUS, MISLEADING AND INCOMPLETE INSTRUCTIONS TO THE JURY AT THE GUILT PHASE WERE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND MANDATE REVERSAL.

The trial court committed numerous errors while instructing the jury at the guilt phase of appellant's trial. Jurors are presumed to understand and apply instructions as read. (*Yates v. Evatt* (1991) 500 U.S. 391, 402-405.) In addition, "an appellate court presumes the jurors faithfully followed the trial court's directions, including erroneous ones." (*People v. Lawson* (1987) 189 Cal.App.3d 741, 748; *People v. Holt* (1993)15 Cal.4th 619, 662.) Erroneous, contradictory, incomplete and misleading instruction can violate due process, even where correct instructions are given and no element of the crime is necessarily entirely removed from the jury's consideration. (U.S. CONST., 14th Amend.; *Francis v. Franklin* (1985) 471 U.S. 307, 322; *Gilmore v. Taylor* (1993) 508 U.S. 333, 349 [some erroneous state-law instructions may violate due process].)

Legally erroneous instructions that affect substantial rights are reviewable without requirement of objection below. (Pen. Code, § 1259; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn.7.) Section 1259 embodies the law that a trial court has ultimate responsibility for fulfilling the judicial duty of correctly instructing in a criminal case. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1127-1128; *People v. Tapia* (1994) 25 Cal.App.4th 984, 1030-1031.)

The determination of prejudice from the delivery of erroneous instructions is to be made on the facts of each case. For all instructional error claims, the evidence is viewed in a light most favorable to the claim of

instructional error. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663, 673-674; *Clement v. State Reclamation Board* (1950) 35 Cal.2d 628, 643-644.) This standard was restated in *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149:

> With respect to our review of issues relating to . . . an issue [of legal instructional error], as well as the question of their prejudicial impact, we do not view the evidence in a light most favorable to the successful [respondent] and draw all inference in favor the judgment. Rather, we must assume that the jury, had it been given proper instructions, might have drawn different inferences more favorable to the [appellant] and render a verdict in [appellant's] favor on those issues as to which it was misdirected.

(*Id.* at p. 1156, citations omitted.)

In this case, the instructional errors, taken singly and together, would have confused a "reasonable juror" (*People v. Ashmus* (1991) 54 Cal.3d 932, 940) and they mandate reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments. The instructions as a whole fostered a verdict that was not in accord with the heightened reliability standard of the Eighth Amendment and created undue risk that the verdict and subsequent death sentence were tainted by arbitrariness. (*Gardner v. Florida* (1977) 430 U.S. 349, 361; *Beck v. Alabama, supra*, 447 U.S. at p. 638.)

A. THE COURT ERRED IN FAILING TO INSTRUCT THAT MARK TOMPKINS WAS AN ACCOMPLICE AS A MATTER OF LAW AND THEREFORE HIS STATEMENTS, WHICH WERE INTRODUCED THROUGH DONALD MCNEELY, SHOULD BE VIEWED WITH CARE AND CAUTION (CALJIC NO. 3.18).

Distrust of accomplice testimony is an important component of a defendant's rights to due process, a fair trial and a reliable jury verdict. (*People v. Guiuan* (1998) 18 Cal.4th 558, 564-569.) Thus, whenever an

accomplice, or a witness who might be determined by the jury to be an accomplice, testifies, the jury must be instructed, *sua sponte*, that the accomplice's testimony should be viewed with caution. (*Id.* at p. 569.) Similarly, an out-of-court statement of an accomplice received for the purpose of proving that what the accomplice stated out-of-court was true must be viewed with caution. (*People v. Andrews*, *supra*, 49 Cal.3d 200.)

The trial court in this case properly instructed that the testimony and out-of-court statements of an accomplice must be viewed with distrust and corroborated. (8 CT 1681, 1684; 39 RT 3880-3881.) It also instructed that Sheryl Baker was an accomplice as a matter of law. (8 CT 1683; 39 RT 3881.) It failed, however, to instruct that Mark Tompkins was also an accomplice as a matter of law, or even to give instructions suggesting that the jurors had the power to make that determination themselves.[134]

As appellant has argued above (Argument I., incorporated herein by reference), Mark Tompkins was an accomplice as a matter of law. He was "liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; accord, 3 Witkin, Cal. Evid. (4th ed. 2000) Presentation at Trial, § 97, pp. 132-133.) Where there is no dispute as to either the facts or the inferences to be drawn therefrom that the witness was an accomplice, the witness is an accomplice as a matter of law and the jury must be instructed that the witness's testimony must be viewed with distrust and corroborated by other evidence that tends to connect the defendant with the commission of the offense. *(People v. Robinson, supra*, 61 Cal.2d at p.

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[134] The court did not instruct with CALJIC No. 3.19, which would have informed the jurors that they could determine whether a witness was an accomplice.

394; *People v. Valerio* (1970) 13 Cal.App.3d 912, 924; *People v. Fauber* (1992) 2 Cal.4th 792, 833-834; *People v. Zapien*, *supra*, 4 Cal.4th at p. 982.)

Accordingly, for all the reasons stated in Argument I, above, the failure to so instruct was error of constitutional dimension and highly prejudicial. The convictions, special circumstance findings and death judgment must be reversed.

B. THE COURT ERRED IN FAILING TO INSTRUCT THAT AN ACCOMPLICE MUST BE CORROBORATED BY SOMEONE OTHER THAN ANOTHER ACCOMPLICE (CALJIC NOS. 3.11 AND 3.13).

To prevent convictions from being based solely upon evidence from the inherently untrustworthy source of an accomplice, the Legislature enacted Penal Code section 1111 to require corroboration whenever an accomplice provides the evidence upon which a conviction is sought. (*People v. Belton*, *supra*, 23 Cal.3d at p. 525.) To corroborate the testimony of an accomplice, the prosecution must produce independent evidence that, without aid or assistance from the testimony of the accomplice, tends to connect the defendant with the crime charged. (*People v. Bunyard* (1988) 45 Cal.3d 1189, 1206.)

An accomplice cannot corroborate himself (*People v. Andrews* (1989) 49 Cal.3d 200, 214), nor can the testimony of one accomplice corroborate another accomplice (CALJIC No. 3.13; *People v. Clapp* (1944) 24 Cal.2d 835, 837; *People v. Dailey* (1960) 179 Cal.App.2d 482, 486). The jurors in this case were simply unaware of this requirement. In fact, they were affirmatively told otherwise by the prosecutor, who argued that McNeely's testimony regarding what Tompkins' allegedly told him

corroborated Fedor (39 RT 3770) and Baker. (39 RT 3780 ["T.K. and McNeely back up Sheryl Baker. They talk about the weapons that were used and how T.K. eventually killed her"].)

For all these reasons and those stated in Argument I.C., above, the court committed prejudicial error in failing to instruct the jurors pursuant to CALJIC No. 3.13 that one accomplice cannot corroborate another.

C. THE TRIAL COURT ERRED IN FAILING TO INSTRUCT *SUA SPONTE* THAT DALTON'S ORAL STATEMENT OF MOTIVE SHOULD BE VIEWED WITH CAUTION.

1. Facts Below.

Sheryl Baker testified that on June 25, 1988, while she was helping Melanie May move out of her apartment, Dalton came by and told Baker that most of the furniture and other items in the apartment belonged to her. Baker testified that Dalton was particularly interested in recovering jewelry she believed May had taken from her. Dalton, according to Baker, was very angry that the jewelry was missing. (33 RT 3097-3100, 3103.) Baker also testified that while they were at Fedor's trailer, Dalton found some of her jewelry in May's purse. After that, Dalton made May her "slave." (33 RT 3115.)[135]

Dalton's pretrial statements related by Baker were used by the prosecutor to establish Dalton's motive to kill May. During his closing argument, the prosecutor argued that Dalton was "the one that had the motive, the reason to kill, the reason to torture; some stupid jewelry, lousy,

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[135] It should be noted that Baker described slavery as making May clean the trailer and kitchen and do the dishes. (33 RT 3115.) Curiously, Fedor used the same work, "slave," to describe Dalton's treatment of May. (30 RT 2582.)

worthless, stupid jewelry she wanted back." (39 RT 3775.) "If there was a motive, it was that stupid jewelry, something that had supposedly been sold. She couldn't get it back. She couldn't find it, so she is going to take out her vengeance." (*Ibid.*)

The trial court did not deliver any cautionary instructions to the jury as to how they should view appellant's alleged pre-offense statements. The omission was erroneous and prejudicial.

2. The Court Erred in Failing to instruct with CALJIC No. 2.71.7.

CALJIC No. 2.71.7 – Pre-Offense Statement by Defendant – reads:

> Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which he is charged was committed. [¶] It is for you to decide whether the statement was made by the defendant. [¶] Evidence of an oral statement ought to be viewed with caution.

This instruction, when applicable, must be given *sua sponte*. (*People v. Lang* (1989) 49 Cal.3d 991, 1021; *People v. Williams* (1988) 45 Cal.3d 1268, 1315; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224; *People v. Heishman* (1988) 45 Cal.3d 147, 166.) The purpose of the instruction is to assist the jury in determining if the admission was in fact made and if it was accurately reported. (*People v. Beagle*, *supra*, 6 Cal.3d at p. 456.)

Baker's testimony that Dalton was upset and angry with May because she believed May had stolen her jewelry was introduced to establish Dalton's motive to kill May. Baker was the one who mentioned the jewelry,[136] and the prosecutor relied on her account to explain the killing

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[136] Significantly, Pat Collins, who went to May's garage sale with (continued...)

and portray Dalton as the brutal ringleader of a murder. Under the circumstances, CALJIC No. 2.71.7 should have been given *sua sponte*. The failure to deliver that instruction is error under long-standing precedent. (*People v. Stankewitz* (1990) 51 Cal.3d 72, 93.)

3. The Error Was Prejudicial and Requires Reversal of the Convictions, Special Circumstance Findings and Ensuing Death Judgment.

Appellant recognizes that this Court has held that the failure to give CALJIC No. 2.71.7 is reversible error only where the omission is prejudicial under the standard of *People v. Watson*, *supra*, 46 Cal.2d at p. 836. (*People v. Carpenter* (1997) 15 Cal.4th 312, 393.) Dalton submits, however, that the *Chapman* standard for federal constitutional error applies in this case. The error lowered the prosecutor's burden in this capital case, denying Dalton a fair trial and reliable verdict in violation of her Fifth, Sixth, Eighth, and Fourteenth Amendment rights. The distinction, however, is academic, because the instructional error was prejudicial under any standard.

"Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately. [Citations.]" (*People v. Pensinger*, *supra*, 52 Cal.3d at p. 1268; see also *People v. Ford* (1964) 60 Cal.2d 772, 799-800, overruled on other

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[136] (...continued)
Dalton and at her suggestion, never mentioned anything about Dalton being upset with May or saying that May had taken her jewelry. (33 RT 3206-3207.)

grounds in *People v. Satchell* (1971) 6 Cal.3d 28, 36-40) [reversible error where witnesses reporting admission were hostile and inconsistent].)

Here, Baker was indisputably a hostile witness; her unquestionable bias against Dalton is a factor to be considered in determining whether the failure to give cautionary instructions resulted in prejudice. (*People v. Lopez* (1975) 47 Cal.App.3d 8, 14.) In addition, Baker, the one who mentioned the alleged motive and described the alleged killing, was also charged with the murder and thus highly motivated to shift all blame onto Dalton. She had a great deal at stake in having Dalton perceived as the one with a motive who forced a reluctant Baker to become involved.

The Court must also consider the critical importance of Dalton's alleged oral admission to the prosecution's case. "Where a defendant's admissions are vitally important evidence in the case, it is likewise vitally important that the jury be guided as to the manner in which it is to view and evaluate that evidence." (*People v. Lopez, supra*, 47 Cal.App.3d at p. 14.) In this case, the statement was immensely important to the prosecution's theory of the case. It provided the motive that cast Dalton as the instigator of the alleged murder. It allowed Baker – the one who testified about the motive – to claim a secondary and reluctant role. It provided a scenario – a basis for speculation – about what may have occurred when no witness was present. The person who most benefitted from admission of this testimony was the person who provided it – Baker.

It is true that the trial court instructed the jurors that a defendant's out-of-court oral admission should be viewed with caution, in accordance with CALJIC No. 2.71. (8 CT 1648; 39 RT 3877.) The fact that Dalton thought May stole something from her, however, would not ordinarily be viewed as an incriminating statement or an admission. Without CALJIC

No. 2.71.7, the jurors had no way of knowing that such statements of motive are themselves to be viewed with caution.

Accordingly, under either *Chapman* or *Watson*, the error was prejudicial because, at the very least, "it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 393.) The verdict must be reversed because there exists "at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error has affected the result." (*People v. Watson*, *supra*, 46 Cal.2d at p. 837.)

D. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY ON CONSCIOUSNESS OF GUILT.

At the request of the prosecutor and over defense counsel's objection (38 RT 3679-3685), the trial court gave two instructions that permitted the jury to infer consciousness of guilt by appellant Dalton. The first instruction, CALJIC No. 2.03, concerned false or misleading statements:

> If you find that before this trial [the] defendant made a willfully false or deliberately misleading statement concerning the crime[s] for which she is now being tried, you may consider such statements as a circumstance tending to prove a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(8 CT 1633; 39 RT 3872[oral version].)

The second instruction given, in the language of CALJIC No. 2.06, addressed efforts to suppress evidence:

> If you find that a defendant attempted to suppress evidence against herself in any manner, such as [by destroying evidence] or [by concealing evidence], such attempt may be

> considered by you as a circumstance tending to show a consciousness of guilt. However, such conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are matters for your consideration.

(8 CT 1634; 39 RT 3872 [oral version].)

Both instructions were unnecessary and argumentative and permitted the jury to draw irrational inferences against appellant. These instructional errors, especially when considered together, deprived appellant of her rights to due process, a fair trial, a jury trial, equal protection and reliable jury determinations on guilt, the special circumstance and penalty. (U.S. CONST., 6th, 8th, & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, 16, & 17.) Accordingly, the convictions, the special circumstance findings and the death judgment must be reversed.

1. The Consciousness-Of-Guilt Instructions Improperly Duplicated the Circumstantial Evidence Instructions.

The instructions under CALJIC Nos. 2.03 and 2.06 were unnecessary. This Court has held that specific instructions relating to the consideration of evidence that simply reiterate a general principle upon which the jury already has been instructed should not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-363; *People v. Ochoa* (2001) 26 Cal.4th 398, 454-455; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-1080, overruled on another ground in *People v. Hill* (1998) 17 Cal.4th 800.) In this case, the trial court instructed the jury on circumstantial evidence with the standard CALJIC Nos. 2.00 and 2.01. (8 CT 1630-1631; 39 RT 3869- 3871.) These instructions informed the jurors that they may draw inferences from the circumstantial evidence, i.e. that they could infer facts tending to show appellant's guilt from the circumstances of the alleged crimes. There was no need to repeat this general principle under the guise

of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the prosecution violated both the due process and equal protection clauses of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [state rule that defendant must reveal alibi defense without opportunity to discover prosecution's rebuttal witnesses gives unfair advantage to prosecution in violation of due process]; *Lindsay v. Normet* (1972) 405 U.S. 56, 77 [providing arbitrary preference to particular litigants violates equal protection].)

2. The Consciousness-Of-Guilt Instructions Were Unfairly Partisan and Argumentative.

The consciousness-of-guilt instructions were not just unnecessary, they also were impermissibly argumentative. The trial court must refuse to deliver any instructions that are argumentative. (*People v. Sanders* (1995) 11 Cal.4th 475, 560.) The vice of argumentative instructions is that they present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.) Such instructions unfairly highlight "isolated facts favorable to one party, thereby, in effect, intimating to the jury that special consideration should be given to those facts." (*Estate of Martin* (1915) 170 Cal. 657, 672.)

Argumentative instructions are defined as those that "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.' [Citations.]" (*People v. Mincey*, *supra*, 2 Cal.4th 408, 437.) Even if they are neutrally phrased, instructions that "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815,

870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and hence must be refused. (*Ibid.*)

Judged by this standard, CALJIC Nos. 2.03 and 2.06, the consciousness-of-guilt instructions given in this case, are impermissibly argumentative. Structurally, they are almost identical to the instruction reviewed in *People v. Mincey*, 2 Cal.4th 408, which read as follows:

> If you find that the beatings were a misguided, irrational and totally unjustified attempt at discipline rather than torture as defined above, you may conclude that they were not in a criminal sense wilful, deliberate, or premeditated.

(*Id.* at p. 437, fn. 5.)

Both instructions here tell the jury, "[i]f you find" certain facts (false or misleading statements or an attempt to suppress evidence in this case and a misguided and unjustified attempt at discipline in *Mincey*), then "you may" consider that evidence for a specific purpose (showing consciousness of guilt in this case and concluding that the murder was not premeditated in *Mincey*). This Court found the instruction in *Mincey* to be argumentative (*id.* at p. 437), and it also should hold CALJIC Nos. 2.03 and 2.06 to be impermissibly argumentative as well.

In *People v. Nakahara* (2003) 30 Cal.4th 705, 713, this Court rejected a challenge to consciousness-of-guilt instructions based on analogy to *People v. Mincey*, *supra*, 2 Cal.4th, 408, holding that *Mincey* was "inapposite for it involved no consciousness of guilt instruction" but rather a proposed defense instruction that "would have invited the jury to 'infer the existence of [the defendant's] version of the facts, rather than his theory of defense.' [Citation.]" However, this holding does not explain why two

instructions that are identical in structure should be analyzed differently or why instructions that highlight the prosecution's version of the facts are permissible while those that highlight the defendant's version are not.

"There should be absolute impartiality as between the People and defendant in the matter of instructions, . . ." (*People v. Moore* (1954) 43 Cal.2d 517, 526-527, quoting *People v. Hatchett* (1944) 63 Cal.App.2d 144, 158; accord, *Reagan v. United States* (1895) 157 U.S. 301, 310.) An instructional analysis that distinguishes between parties to the defendant's detriment deprives the defendant of his due process right to a fair trial (*Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Wardius v. Oregon*, *supra*, 412 U.S. at p. 474), and the arbitrary distinction between litigants also deprives the defendant of equal protection of the law (*Lindsay v. Normet*, *supra*, 405 U.S. at p. 77). Moreover, the prosecution-slanted instructions given in this case also violated due process by lessening the prosecution's burden of proof. (*In re Winship*, *supra*, 397 U.S. at p. 364.)

To insure fairness and equal treatment, this Court should reconsider the cases that have found California's consciousness-of-guilt instructions not to be argumentative. Except for the party benefitted by the instructions, there is no discernable difference between the instructions this Court has upheld (see, e.g., *People v. Nakahara*, *supra*, 30 Cal.4th at p. 713; *People v. Bacigalupo* (1991) 1 Cal.4th 103, 123 [CALJIC Nos. 2.03 "properly advised the jury of inferences that could rationally be drawn from the evidence"]), and a defense instruction held to be argumentative because it "improperly implies certain conclusions from specified evidence." (*People v. Wright*, *supra*, 45 Cal.3d at p. 1137.)

The alternate rationale this Court employed in *People v. Kelly* (1992) 1 Cal.4th, 495, 531-532, and a number of subsequent cases (e.g., *People v.*

Arias (1996) 13 Cal.4th 92, 142), is equally flawed. In *Kelly*, the Court focused on the allegedly protective nature of the instructions, noting that they tell the jury that the consciousness-of-guilt evidence is not sufficient by itself to prove guilt. From this fact, the *Kelly* court concluded: "If the court tells the jury that certain evidence is not alone sufficient to convict, it must necessarily inform the jury, either expressly or impliedly, that it may at least consider the evidence." (*People v. Kelly*, *supra*, 1 Cal.4th at p. 532.)

More recently, this Court abandoned the *Kelly* rationale, holding that the error in not giving a consciousness-of-guilt instruction was harmless because the instruction "would have benefitted the prosecution, not the defense." (*People v. Seaton* (2001) 26 Cal.4th, 598, 673.) Moreover, the allegedly protective aspect of the instructions is weak at best and often entirely illusory. The instructions do not specify what else is required before the jury can find that guilt has been established beyond a reasonable doubt. They thus permit the jury to seize upon one isolated piece of evidence, perhaps nothing more than evidence establishing the only undisputed element of the crime, and use that *in combination* with the consciousness-of-guilt evidence to conclude that the defendant is guilty.

Finding that a flight instruction unduly emphasizes a single piece of circumstantial evidence, the Supreme Court of Wyoming has held that giving such an instruction always will be reversible error. (*Haddan v. State* (Wyo. 2002) 42 P.3d 495, 508.) In so doing, it joined a number of other state courts that have found similar flaws in the flight instruction. Courts in at least eight other states have held that flight instructions should not be given because they unfairly highlight isolated evidence. (*Dill v. State* (Ind. 2001) 741 N.E.2d, 1230, 1232-1233; *State v. Hatten* (Mont. 1999) 991 P.2d

939, 949-950; *Fenelon v. State* (Fla. 1992) 594 So.2d 292, 293-295; *Renner v. State* (Ga. 1990) 397 S.E.2d 683, 686; *State v. Grant* (S.C. 1980) 272 S.E.2d 169, 171; *State v. Wrenn* (Idaho 1978) 584 P.2d 1231, 1233-1234; *State v. Cathey* (Kan. 1987) 741 P.2d 738, 748-749; *State v. Reed* (Wash.App.1979) 604 P.2d 1330, 1333; see also *State v. Bone* (Iowa 1988) 429 N.W.2d 123, 125 [flight instructions should rarely be given]; *People v. Larson* (Colo. 1978) 572 P.2d 815, 817-818 [same].)[137]

The reasoning of two of these cases is particularly instructive. In *Dill v. State, supra*, 741 N.E. 2d 1230, the Indiana Supreme Court relied on that state's established ban on argumentative instructions to disapprove flight instructions:

> Flight and related conduct may be considered by a jury in determining a defendant's guilt. [Citation.] However, although evidence of flight may, under appropriate circumstances, be relevant, admissible, and a proper subject for counsel's closing argument, it does not follow that a trial court should give a discrete instruction highlighting such evidence. To the contrary, instructions that unnecessarily emphasize one particular evidentiary fact, witness, or phase of the case have long been disapproved. [Citations.] We find no reasonable grounds in this case to justify focusing the jury's attention on the evidence of flight.

(*Id.* at p. 1232, fn. omitted.)

In *State v. Cathey, supra*, 741 P.2d 738, the Kansas Supreme Court cited a prior case which had disapproved a flight instruction, and extended its reasoning to cover all similar consciousness-of-guilt instructions:

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[137] Other state courts also have held that flight instructions should not be given, but their reasoning was either unclear or not clearly relevant to the instant discussion. (See, e.g., *State v. Stilling* (Or. 1979) 590 P.2d 1223, 1230.)

> It is clearly erroneous for a judge to instruct the jury on a defendant's consciousness of guilt by flight, concealment, fabrication of evidence, or the giving of false information. Such an instruction singles out and particularly emphasizes the weight to be given to that evidence by the jury.

(*Id.* at p. 748-749; accord, *State v. Nelson* (Mont. 2002) 48 P.3d 739, 745 [holding that the reasons for the disapproval of flight instructions also applied to an instruction on the defendant's false statements].)

In this case, the argumentative consciousness-of-guilt instructions invaded the province of the jury, focusing the jury's attention on evidence favorable to the prosecution, placing the trial court's *imprimatur* on the prosecution's theory of the case, and lessening the prosecution's burden of proof. They therefore violated appellant's due process right to a fair trial and his right to equal protection of the laws (U.S. CONST., 14th Amend.; CAL. CONST., art. I, §§ 7 & 15), his right to receive an acquittal unless his guilt was found beyond a reasonable doubt by an impartial and properly-instructed jury (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and his right to a fair and reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17).

3. The Consciousness-Of-Guilt Instructions Permitted The Jury To Draw Two Irrational Permissive Inferences About Appellant's Guilt.

All the consciousness-of-guilt instructions suffer from an additional constitutional defect – they embody improper permissive inferences. Each instruction permits the jury to infer one fact, such as appellant's consciousness of guilt, from other facts, i.e., false or misleading statements (CALJIC No. 2.03) and suppression of evidence (CALJIC No. 2.06). (See *People v. Ashmus* (1991) 54 Cal.3d, 932, 977.) A permissive inference

instruction can intrude improperly upon a jury's exclusive role as fact finder. (See *United States v. Warren* (9th Cir. 1994) 25 F.3d 890, 899.) By focusing on a few isolated facts, such an instruction also may cause jurors to overlook exculpatory evidence and lead them to convict without considering all relevant evidence. (*United States v. Rubio-Villareal* (9th Cir. 1992) 967 F.2d 294, 299-300 (en banc).) A passing reference to consider all evidence will not cure this defect. (*United States v. Warren*, *supra*, 25 F.3d at p. 899.) These and other considerations have prompted the Ninth Circuit to "question the effectiveness of permissive inference instructions." (*Ibid*; see also *id.* at p. 900 (conc. opn. of Rymer, J.) ["I must say that inference instructions in general are a bad idea. There is normally no need for the court to pick out one of several inferences that may be drawn from circumstantial evidence in order for that possible inference to be considered by the jury"].)

For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67; *United States v. Rubio-Villareal*, *supra*, 967 F.2d at p. 926.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences – not just presumptions – be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro*, 38 Cal.3d at p. 313.) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167, fn. 28; see also *Schwendeman v. Wallenstein* (9th Cir. 1992) 971 F.2d 313 [noting that the Supreme Court has required "'substantial assurance'

that the inferred fact is 'more likely than not to flow from the proved fact on which it is made to depend.'"].) This test is applied to judge the inference as it operates under the facts of each specific case. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 157, 162-163.)

In this case, the consciousness-of-guilt evidence was relevant to whether Ms. Dalton was responsible for conspiring to kill and then killing Melanie May with premeditation and deliberation. (*People v. Anderson* (1968) 70 Cal.2d 15, 32-33.) Under the facts here, at least two types of irrational inferences were permitted.

The first irrational inference concerned Dalton's mental state at the time the charged crimes allegedly were committed. The improper instructions permitted the jury to use the consciousness-of-guilt evidence to infer, not only that Dalton killed May, but also that she had done so while harboring the intents or mental states required for conviction of first-degree murder and conspiracy. Although the consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind *after* the killing, it is *not* probative of her state of mind immediately prior to or during the killing. (*People v. Anderson*, *supra*, 70 Cal.2d at p. 32.) As this Court explained:

> evidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but it does not bear upon the state of the defendant's mind at the time of the commission of the crime.

(*Id.* at p. 33.)[138]

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[138] Professor LaFave makes the same point:

> Conduct by the defendant *after* the killing in an effort to avoid detection and punishment is obviously not relevant for purposes of showing premeditation and deliberation as it only

(continued...)

Therefore, appellant's actions after the crimes, upon which the consciousness-of-guilt inferences were based, simply were not probative of whether she harbored the mental states for conspiracy to commit murder and first-degree premeditated murder. There was no rational connection – much less a link more likely than not – between appellant's alleged false or misleading questions and destruction of evidence and consciousness by her of having specifically intended to agree and specifically intended to commit murder or of having committed a homicide with (1) premeditation; (2) deliberation, (3) malice aforethought, and (4) a specific intent to kill. Whether taken individually or in combination, appellant's alleged false statements and destruction of evidence cannot reasonably be deemed to support an inference that she had the requisite mental state for conspiracy and first-degree murder, as opposed to second degree murder or manslaughter.

This Court has previously rejected the claim that the consciousness-of-guilt instructions permit irrational inferences concerning the defendant's mental state. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 348 [CALJIC No. 2.03]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 579 [CALJIC Nos. 2.03 & 2.52]; *People v. Boyette* (2002) 29 Cal.4th 381, 438-439 [CALJIC Nos. 2.03, 2.06 & 2.52].) Appellant, however, respectfully asks this Court to reconsider and overrule these holdings and to hold that in this case delivery of the consciousness-of-guilt instructions was reversible

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[138] (...continued)
goes to show the defendant's state of mind at the time and not before or during the killing.

(LaFave, Substantive Criminal Law (2nd ed. 2003), vol. 2, § 14.7(a), pp. 481-482, original italics, fn. omitted.)

constitutional error.

The foundation for these rulings is the opinion in *People v. Crandell* (1988) 46 Cal.3d 833, which noted that the consciousness-of-guilt instructions do not specifically mention mental state and concluded that:

> A reasonable juror would understand "consciousness of guilt" to mean "consciousness of some wrongdoing" rather than "consciousness of having committed the specific offense charged."

(*Id.* at p. 871.)

The *Crandell* analysis is mistaken for three reasons. First, the instructions do not speak of "consciousness of some wrongdoing;" they speak of "consciousness of guilt," and *Crandell* does not explain why the jury would interpret the instructions to mean something they do not say. Elsewhere in the instructions the term "guilt" is used to mean "guilt of the crimes charged." (See, e.g., 8 CT 1677 [CALJIC No. 2.90 stating that the defendant is entitled to a verdict of not guilty "in case of a reasonable doubt whether her guilt is satisfactorily shown"].) It would be a violation of due process if the jury could reasonably interpret that instruction to mean that appellant was entitled to a verdict of not guilty only if the jury had a reasonable doubt as to whether her "commission of some wrongdoing" had been satisfactorily shown. (*In re Winship*, *supra*, 397 U.S. at p. 364; see *Jackson v. Virginia*, *supra*, 443 U.S. at pp. 323-324.)

Second, although the consciousness-of-guilt instructions do not specifically mention the defendant's mental state, they likewise do not specifically exclude it from the purview of permitted inferences or otherwise hint that any limits on the jury's use of the evidence may apply. On the contrary, the instructions suggest that the scope of the permitted

inferences is very broad. They expressly advise the jury that the "weight and significance" of the consciousness-of-guilt evidence "if any, are matters for your" determination.

Third, this Court itself has drawn the very inference that *Crandell* asserts no reasonable juror would make. In *People v. Hayes* (1990) 52 Cal.3d 577, this Court reviewed the evidence of defendant's mental state at the time of the killing, expressly relying on consciousness-of-guilt evidence among other facts, to find an intent to rob. (*Id.* at p. 608.)[139] Since this Court considered consciousness-of-guilt evidence to find substantial evidence that a defendant killed with intent to rob, it should acknowledge that jurors might do the same.

The consciousness-of-guilt instructions permitted a second irrational inference, i.e., that appellant was guilty not only of unlawfully killing Melanie May, but also of agreeing with others to intentionally kill her, as well as lying-in-wait and torture. This Court approved an inference precisely that far-reaching in *People v. Rodriguez* (1994) 8 Cal.4th 1060, when it held that the defendant's false statements about an injury to his arm "tended to show consciousness of guilt of *all* the charged crimes." (*Id.* at p.

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[139] In *Hayes*, this Court wrote:

> There was also substantial evidence, apart from James' testimony, that defendant killed Patel *with the intent to rob him* and then proceeded to ransack the motel's office and the manager's living quarters. *Defendant demonstrated consciousness of guilt by fleeing the area and giving a false statement when arrested*, the knife that killed Patel was found in the manager's living quarters, defendant was seen carrying a box from the office to James' car, and four days later defendant committed similar crimes against James Cross.

(*People v. Hayes*, *supra*, 52 Cal.3d at p. 608, emphasis added.)

1140, original emphasis; accord, *People v. Griffin* (1988) 46 Cal.3d 1011, 1027 [holding that it is rational to infer "that false statements regarding a crime show a consciousness of guilt of all the offenses committed during a single attack"].)

To determine if the sweeping inferences permitted by the consciousness-of-guilt instructions are constitutional in this case, the Court must ask: If Dalton made false or misleading statements regarding the homicide and destroyed or concealed evidence, is it more likely than not that she *also* conspired to kill, lay in wait for and tortured May in connection with the homicide? Obviously, the answer is, "No,"[140] and the inferences permitted by the consciousness-of-guilt instructions accordingly are constitutionally infirm. (*Ulster County Court v. Allen*, *supra*, 442 U.S. at pp. 165-167.)

Because the consciousness-of-guilt instructions permitted the jury to draw irrational inferences of guilt against appellant, use of those instructions undermined the reasonable doubt requirement and denied her a fair trial and due process of law (U.S. CONST., 14th Amend.; CAL. CONST., art. I, §§ 7 & 15). The instructions also violated appellant's right to have a

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[140] Appellant's misleading and false statements and disposal of evidence could not conceivably indicate consciousness of guilt of conspiracy, premeditated and deliberate murder, lying-in-wait and torture – unless one first assumes that appellant, in fact, committed those crimes and special circumstances. (See *United States v. Durham* (10th Cir. 1998) 139 F.3d 1325, 1332; *United States v. Littlefield* (1st Cir. 1988) 840 F.2d 143, 149 [ruling that consciousness of guilt instructions should not be given where they, in effect, tell the jury "that once they found guilt, they could find consciousness of guilt, which in turn is probative of guilt."].) Embodying such "circular" reasoning (*id.*) in a jury instruction permitting a jury to arbitrarily infer guilt therefrom would – and in this case did – constitute a clear denial of due process. (U.S. CONST., 14th Amend.)

properly instructed jury find that all the elements of all the charged crimes had been proven beyond a reasonable doubt (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and, by reducing the reliability of the jury's determination and creating the risk that the jury would make erroneous factual determinations, the instructions violated her right to a fair and reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17).

4. Reversal is Required.

Giving the consciousness-of-guilt instructions was an error of federal constitutional magnitude as well as a violation of state law. Accordingly, appellant's conspiracy and murder convictions, the special circumstance findings and the death judgment must be reversed unless the prosecution can show that the error was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; see *Schwendeman v. Wallenstein*, *supra*, 971 F.2d at p. 316 ["A constitutionally deficient jury instruction requires reversal unless the error is harmless beyond a reasonable doubt"].) This the prosecution cannot do.

The jury was given not one, but two unconstitutional instructions, which magnified the argumentative nature of the instructions and their impermissible inferences. Moreover, the error affected the pivotal contested issues of the case: was appellant guilty of the conspiracy and killing; if so, what was the nature and degree of the homicide? In the context of this case, these instructions were not harmless beyond a reasonable doubt. Therefore, the judgments on Counts One and Two, the special circumstance allegations and the death judgment must be reversed.

E. The Trial Court Committed Instructional Error That Unfairly and Prejudicially Bolstered the Credibility of Baker In Violation of Appellant Dalton's Due Process and Other Fundamental Constitutional Rights (CALJIC No. 2.13).

In *Wardius v. Oregon*, supra, 412 U.S. 470, the United States Supreme Court found a violation of due process in a state procedure that unfairly skewed discovery obligations in favor of the prosecution. The High Court warned that "[t]his Court has . . . been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." (*Id.* at p. 475, fn. 6, citing, *inter alia*, *Washington v. Texas* (1967) 388 U.S. 14, 22 & *Gideon v. Wainwright* (1963) 372 U.S. 335, 344.) The Supreme Court explained the constitutional underpinnings of its decision as follows:

> Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded, . . . it does speak to the balance of forces between the accused and the accuser.

(*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474, citation omitted.)

With respect to the particular issue before it, the Court held "that in the absence of a strong showing of state interests to the contrary, discovery must be a two-way street." (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 475.)

California law specifically applies such principles to the giving of one-sided jury instructions. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions must "avoid misleading the jury or in any way overemphasizing either party's theory"]; *People v. Mata* (1955) 133 Cal.App.2d 18, 21 [instructions must not "strongly present the theory of the prosecution and minimize that

of the defense"].) In *People v. Moore*, this Court, in reversing a manslaughter conviction because of one-sided self-defense instructions, used reasoning *apropos* of the instruction appellant challenges herein:

> It is true that the four instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication. . . . There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.

(*People v. Moore*, *supra*, 43 Cal.2d at pp. 526-527, internal quotation marks omitted.)

Here, the delivery of CALJIC No. 2.13 similarly violated the Due Process Clause of the Fourteenth Amendment and California case law by impermissibly tilting the balance in favor of the prosecution with respect to the jury's evaluation of the credibility – or lack thereof – of the most critical prosecution witness. The written instruction given to the jurors at appellant's trial read as follows:

> Evidence that on some former occasion, a witness made a statement or statements that were inconsistent [or consistent] with [his] or [her] testimony in this trial, may be considered by you not only for the purpose of testing the credibility of the witness, but also as evidence of the truth of the facts as stated by the witness on such former occasion.
>
> [If you disbelieve a witness' testimony that [he] or [she] no longer remembers a certain event, such testimony is inconsistent with a prior statement or statements by [him] or [her] describing that event.]

(8 CT 1636; see 39 RT 3872-3873 [oral version].)

This instruction, though a standard one, obviously applied with great

relevance to the testimony of Sheryl Baker who had given two statements prior to trial. The prosecutor impeached and corroborated Baker with the earlier statements. And he urged the jurors to use the prior statements for their truth. (See, e.g., 39 RT 3780, 3796-3797, 3865.)

CALJIC No. 2.13, as given to the jury, strongly and unfairly buttressed the prosecution's contentions and undermined appellant's position in at least two ways: (1) by telling the jurors only that they could consider those prior inconsistent statements for their "truth," but not telling them that they could also consider those statements for their "falsity," it unfairly skewed those credibility determinations in the prosecution's favor; and (2) by telling the jurors to consider the prior statements as evidence of the truth of "the facts" as stated by the witness on those former occasions, by definition it strongly implied to them that the prior statements were factual. Thus, the use of the two terms "the truth" and "the facts" in the instruction effectively, and prejudicially, constituted the kind of "one-way street" deemed by the Supreme Court in *Wardius* to be violative of due process, and by this Court to be improperly stated "from the viewpoint solely of the prosecution." (*People v. Moore*, *supra*, 43 Cal.2d at p. 526.)

F. THE INSTRUCTIONS ERRONEOUSLY PERMITTED THE JURY TO FIND GUILT BASED UPON MOTIVE ALONE.

The trial court instructed the jury under CALJIC No. 2.51, as follows:

> Motive is not an element of the crime charged and need not be shown. However, you may consider motive or lack of motive as a circumstance in this case. Presence of motive may tend to establish guilt. Absence of motive may tend to establish innocence. You will therefore give its presence or absence, as the case may be, the weight to which you find it to be entitled.

(8 CT 1645; 39 RT 3876 [oral version].)

This instruction improperly allowed the jury to determine guilt based upon the presence of an alleged motive and shifted the burden of proof to appellant to show an absence of motive to establish innocence, thereby lessening the prosecution's burden of proof. The instruction violated constitutional guarantees of a fair jury trial, due process and a reliable verdict in a capital case. (U.S. CONST., 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7 & 15.)

1. The Instruction Allowed Guilt Based On Motive Alone.

CALJIC No. 2.51 states that motive may tend to establish that a defendant is guilty. As a matter of law, however, motive alone is insufficient to prove guilt. Due process requires substantial evidence of guilt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 320 [a "mere modicum" of evidence is not sufficient].) Motive alone does not meet this standard because a conviction based on such evidence would be speculative and conjectural. (See, e.g., *United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 [motive based on poverty is insufficient to prove theft or robbery].)

The motive instruction stood out from the other standard evidentiary instructions given to the jury. Notably, each of the other instructions that addressed an individual circumstance expressly admonished that it was insufficient to establish guilt. (See 39 RT 3872 [CALJIC Nos. 2.03 and 2.06 stating that neither false or misleading statement nor an attempt to suppress evidence "is not sufficient by itself to prove guilt . . . ."].)

Because CALJIC No. 2.51 is so obviously aberrant, it undoubtedly prejudiced appellant during deliberations. The instruction appeared to

include an intentional omission that allowed the jury to determine guilt based upon motive alone. Indeed, the jurors reasonably could have concluded that if motive were insufficient by itself to establish guilt, the instruction obviously would say so. (See *People v. Castillo* (1997) 16 Cal.4th 1009, 1020 (conc. opn. of Brown, J.) [deductive reasoning underlying the Latin phrase *inclusio unius est exclusio alterius* could mislead a reasonable juror as to the scope of an instruction].)

This Court has recognized that differing standards in instructions create erroneous implications:

> The failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.

(*People v. Dewberry* (1959) 51 Cal.2d 548, 557; see also *People v. Salas* (1976) 58 Cal.App.3d 460, 474 [when a generally applicable instruction is specifically made applicable to one aspect of the charge and not repeated with respect to another aspect, the inconsistency may be prejudicial error].) Here, the context highlighted the omission, so the jury would have understood that motive alone could establish guilt. Accordingly, the instruction violated appellant's constitutional rights to due process of law, a fair trial by jury, and a reliable verdict in a capital case. (U.S. CONST., 6th, 8th & 14th Amends; CAL. CONST., art. 1, §§ 7 & 15.)

2. The Instruction Impermissibly Lessened The Prosecutor's Burden Of Proof And Violated Due Process.

The jury was instructed appellant could not be found guilty of first-degree murder or the lesser crime of voluntary manslaughter without intent to kill. (39 RT 3883, 3886-3888 3890.) She could not be found guilty of conspiracy to commit first-degree murder without the specific intent to agree and to kill. (39 RT 3885.) And the jurors were instructed that both special circumstances required an intent to kill (39 RT 3895, 3896-3897) and that torture included the intent to inflict extreme cruel physical pain and suffering upon a living human being (39 RT 3897). By informing the jurors that "motive was not an element of the crime," however, the trial court reduced the burden of proof on crucial, contested elements of the prosecutor's capital murder case – i.e., that appellant had the intent to agree, to kill and to torture. The instruction violated due process by improperly undermining a correct understanding of how the burden of proof beyond a reasonable doubt was supposed to apply. (See *Sandstrom v. Montana* (1979) 442 U.S. 510; *People v. Lee* (1987) 43 Cal.3d 666, 673-674 [conflicting instructions on intent violate due process]; *Baldwin v. Blackburn* (5th Cir. 1981) 653 F.2d 942, 949 [misleading and confusing instructions under state law may violate due process where they are "likely to cause an imprecise, arbitrary or insupportable finding of guilt"].)

There is no logical way to distinguish motive from intent in this case, and the jurors would not have been able to separate instructions defining "motive" from "intent." Accordingly, CALJIC No. 2.51 impermissibly lessened the prosecutor's burden of proof.

The distinction between "motive" and "intent" is difficult, even for

judges, to maintain. Various opinions have used the two terms as synonyms:

> An aider and abettor's fundamental purpose, *motive and intent* is to aid and assist the perpetrator in the latter's commission of the crime. He may so aid and assist with knowledge or awareness of the wrongful purpose of the perpetrator [citations] or he may so act because he has the same evil intent as the perpetrator. [Citations.]

(*People v. Vasquez* (1972) 29 Cal.App.3d 81, 87, emphasis added.)

> A person could not kidnap and carry away his victim to commit robbery if the *intent* to rob was not formed until after the kidnaping had occurred." [citation] . . . . Thus, the commission of a robbery, the *motivating* factor, during a kidnaping for the purpose of robbery, the dominant crime, does not reduce or nullify the greater crime of aggravated kidnaping.

(*People v. Beaumaster* (1971) 17 Cal.App.3d 996, 1007-1008, emphasis added.)

> [T]he court as a part of the same instruction also stated to the jury explicitly that mere association of individuals with an innocent purpose or with honest *intent* is not a conspiracy as defined by law; also that in determining the guilt of appellants upon the conspiracy charge the jury should consider whether appellants honestly entertained a belief that they were not committing a wrongful act and whether or not they were acting under a misconception or in ignorance, without *any criminal motive*; the court further stating, "Joint evil *intent* is necessary to constitute the offense, and you are therefore instructed that it is your duty to consider and to determine the good faith of the defendants and each of them." Considering the instruction as a whole, we think the jury could not have misunderstood the court's meaning that a corrupt *motive* was an essential element of the crime of conspiracy.

(*People v. Bowman* (1958) 156 Cal.App.2d 784, 795, emphasis added.)

> In *Union Labor Hospital v. Vance Lumber Co.* [citation], the trial court had found that the defendants had entered into certain contracts detrimental to plaintiff's business solely for the purpose and with the *intent* to subserve their own interests. The Supreme Court said [citation]: "But if this were not so, and their *purpose* were to injure the business of plaintiff, nevertheless, unless they adopted illegal means to that end, their conduct did not render them amenable to the law, for an evil *motive* which may inspire the doing of an act not unlawful will not of itself make the act unlawful.

(*Katz v. Kapper* (1935) 7 Cal.App.2d 1, 5-6, emphasis added.)

Quite clearly, the terms "motive" and "intent" are commonly used interchangeably under the rubric of "purpose."

In *People v. Maurer* (1995) 32 Cal.App.4th 1121, the defendant was charged with child annoyance, which required that the forbidden acts be "'motivated by an unnatural or abnormal sexual interest or intent.'" (*Id.* at pp. 1126-1127.) The Court of Appeal emphasized, "We must bear in mind that the audience for these instructions is not a room of law professors deciphering legal abstractions, but a room of lay jurors reading conflicting terms." (*Id.* at p. 1127.) It found that giving the CALJIC No. 2.51 motive instruction – that motive was not an element of the crime charged and need not be proved – was reversible error. (*Id.* at pp. 1127-1128.)

There is a similar potential for conflict and confusion in this case. As in *Maurer*, the motive instruction was federal constitutional error.

3. The Instruction Shifted The Burden Of Proof To Imply That Appellant Had To Prove Innocence.

CALJIC No. 2.51 informed the jurors that the presence of motive could be used to establish guilt and that the absence of motive could be used to establish innocence. The instruction effectively placed the burden of

proof on appellant to show an alternative motive to that advanced by the prosecutor. As used in this case, CALJIC No. 2.51 deprived appellant of her federal constitutional rights to due process and fundamental fairness. (*In re Winship*, *supra*, 397 U.S. at p. 368 [due process requires proof beyond a reasonable doubt].) The instruction also violated the fundamental Eighth Amendment requirement for reliability in a capital case by allowing appellant to be convicted without the prosecution having to present the full measure of proof. (See *Beck v. Alabama*, *supra*, 447 U.S. 625, 637-638 [reliability concerns extend to guilt phase].)

4. Reversal is Required.

The motive instruction given in this case diluted the prosecution's obligation to prove beyond a reasonable doubt that appellant had the specific intents to agree, to kill and to torture. CALJIC No. 2.51 erroneously encouraged the jury to conclude that proof of a specific intent was unnecessary for guilty verdicts on conspiracy and first-degree murder and a true finding of the special circumstance allegations. Accordingly, this Court must reverse the judgments on Count One, Count Two, the special circumstance allegations and the death judgment because the error – affecting the central issue before the jury – was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

G. THE INSTRUCTIONS IMPERMISSIBLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT.

Due Process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364; *accord*, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder*

(1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia*, *supra*, 433 U.S. at p. 323.) The reasonable doubt standard is the "bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363) and at the heart of the right to trial by jury. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"].) Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally required. Because the instructions violated the United States Constitution in a manner that never can be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

1. The Instructions On Circumstantial Evidence Undermined The Requirement Of Proof Beyond A Reasonable Doubt (CALJIC Nos. 2.90, 2.01, 2.02, 8.83 & 8.83.1).

The court instructed the jurors with CALJIC No. 2.90 that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving her guilty beyond a reasonable doubt." (8 CT 1677; 39 RT 3879.) These principles were supplemented by several instructions that explained the meaning of

reasonable doubt. CALJIC No. 2.90 defined reasonable doubt as follows:

> It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

(8 CT 1677; 39 3879 [oral version].)

The terms "moral evidence" and "moral certainty" as used in the reasonable doubt instruction are not commonly understood terms. While this same reasonable doubt instruction, standing alone, has been found to be constitutional (*Victor v. Nebraska*, *supra*, 511 U.S. at pp. 13-17), in combination with the other instructions, it was reasonably likely to have led the jury to convict appellant on proof less than beyond a reasonable doubt in violation of his Fourteenth Amendment right to due process.[141]

The jury was given four interrelated instructions that discussed the relationship between the reasonable doubt requirement and circumstantial evidence – CALJIC No. 2.01 [sufficiency of circumstantial evidence] (8 CT 1631; 39 RT 3871); CALJIC No. 2.02 [sufficiency of circumstantial evidence to prove specific intent or mental state] (8 CT 1632; 39 RT 3871-3872); CALJIC No. 8.83 [special circumstances – sufficiency of

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[141] Defense counsel requested that this language be used rather than that of the revised CALJIC No. 2.90; however, it is appellant's contention that it was the instructions on circumstantial evidence that allowed the jurors to find guilt on less than reasonable doubt based on this language in 2.90. Instructional errors are reviewable even without objection if they affect a defendant's substantive rights. (Pen. Code, §§ 1259 & 1469; see *People v. Flood* (1998) 18 Cal.4th 470, 482, fn. 7; *People v. Jones* (1998) 17 Cal.4th 279, 312.)

circumstantial evidence] (8 CT 1649; 39 RT 3897-3898); and CALJIC No. 8.83.1 [special circumstances – sufficiency of circumstantial evidence to prove required mental state] (8 CT 1650; 39 RT 3898.) These instructions, addressing different evidentiary issues in nearly identical terms, advised appellant's jury that:

> if . . . one interpretation of such evidence appears to you to be reasonable and the other interpretation to be unreasonable, *you must accept the reasonable interpretation and reject the unreasonable.*

(8 CT 1631, emphasis added; see also 8 CT 1632, 1649, 1650.)

These instructions informed the jurors that if appellant *reasonably appeared* to be guilty, they could find her guilty – even if they entertained a reasonable doubt as to guilt. This repeated directive undermined the reasonable doubt requirement in two separate but related ways, violating appellant's constitutional rights to due process (U.S. CONST., 14th Amend.; CAL. CONST., art. I, §§ 7 & 15), trial by jury (U.S. CONST., 6th & 14th Amends.; CAL. CONST., art. I, § 16), and a reliable capital trial (U.S. CONST., 8th & 14th Amends.; CAL. CONST., art. I, § 17). (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *Carella v. California* (1989) 491 U.S. 263, 265; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

First, the instructions not only allowed, but compelled, the jury to find appellant guilty on all counts and to find the special circumstances to be true using a standard lower than proof beyond a reasonable doubt. (Cf. *In re Winship*, *supra*, 397 U.S. at p. 364.) The instructions directed the jury to find appellant guilty and the special circumstances true based on the appearance of reasonableness: the jurors were told they "must" accept an incriminatory interpretation of the evidence if it "appear[ed]" to them to be

"reasonable." (8 CT 1631, 1632, 1649, 1650; 39 RT 3871-3872, 3897-3898.) An interpretation that appears to be reasonable, however, is not the same as an interpretation that has been proven to be true beyond a reasonable doubt. A reasonable interpretation does not reach the "subjective state of near certitude" that is required to find proof beyond a reasonable doubt. (*Jackson v. Virginia*, *supra*, 443 U.S. at p. 315; see *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 78 ["It would not satisfy the Sixth Amendment to have a jury determine that the defendant is probably guilty"].) Thus, the instructions improperly required conviction on a degree of proof less than the constitutionally required standard of proof beyond a reasonable doubt.

Second, the circumstantial evidence instructions were constitutionally infirm because they required the jurors to draw an incriminatory inference when such an inference appeared to be "reasonable." In this way, the instructions created an impermissible mandatory presumption that required the jurors to accept any reasonable incriminatory interpretation of the circumstantial evidence unless appellant rebutted the presumption by producing a reasonable exculpatory interpretation. "A mandatory presumption instructs the jury that it *must* infer the presumed fact if the State proves certain predicate facts." (*Francis v. Franklin* (1985) 471 U.S. 307, 314, emphasis added, fn. omitted.) Mandatory presumptions, even those that are explicitly rebuttable, are unconstitutional if they shift the burden of proof to the defendant on an element of the crime. (*Id.* at pp. 314-318; *Sandstrom v. Montana* (1979) 442 U.S. 510, 524.)

Here, all four instructions plainly told the jurors that if only one interpretation of the evidence appeared reasonable, "you *must* accept the

reasonable interpretation and reject the unreasonable." In *People v. Roder*, *supra*, 33 Cal.3d at p. 504, this Court invalidated an instruction that required the jury to presume the existence of a single element of the crime unless the defendant raised a reasonable doubt as to the existence of that element. *A fortiori*, this Court should invalidate the instructions given in this case, which required the jury to presume *all* elements of the crimes supported by a reasonable interpretation of the circumstantial evidence unless the defendant produced a reasonable interpretation of that evidence pointing to her innocence.

The constitutional defects in the circumstantial evidence instructions were likely to have affected the jurors' deliberations. During his closing argument the prosecutor told the jurors that "circumstantial evidence is dynamite stuff," and then stressed the "reasonable" language of the instructions. (39 RT 3858.) "Circumstantial evidence, though, what's the *reasonable* interpretation. That's all we're looking for. What is reasonable? What isn't?" (*Ibid.*, emphasis added.) He continued: "That's all we're talking about, is what's reasonable. Is this the reasonable interpretation?" (39 RT 3858-3859.) Under the challenged instructions, the jurors had to accept the prosecution's view of the evidence if they found it to be reasonable. Contrary to the prosecutor's argument, however, the jurors had to find that the prosecution carried its burden of proving appellant's guilt beyond a reasonable doubt.

The prosecution's incriminatory interpretation of the evidence may have been reasonable, but it was not sufficient to prove the conspiracy, murder, lying-in-wait and torture special circumstances alleged. The circumstantial evidence instructions permitted and indeed encouraged the jury to convict appellant upon a finding that the prosecution's theory was

reasonable, rather than upon proof beyond a reasonable doubt.

The focus of the circumstantial evidence instructions on the reasonableness of evidentiary inferences also prejudiced appellant in another way – by requiring that she prove her defense was reasonable before the jury could deem it credible. Of course, "[t]he accused has no burden of proof or persuasion, even as to [her] defenses." (*People v. Gonzales* (1990) 51 Cal.3d 1179, 1214-1215, citing *In re Winship*, *supra*, 397 U.S. at p. 364, and *Mullaney v. Wilbur* (1975) 421 U.S. 684; accord, *People v. Allison* (1989) 48 Cal.3d 879, 893.)

For all these reasons, there is a reasonable likelihood that the jury applied the circumstantial evidence instructions to find appellant's guilt on a standard that is less than constitutionally required.

2. Other Instructions Also Vitiated The Reasonable Doubt Standard (CALJIC Nos. 1.00, 2.21.1, 2.21.2,2.22, 2.27, 2.51 & 8.20).

The trial court gave other standard instructions that individually and collectively diluted the constitutionally mandated reasonable doubt standard: CALJIC No. 1.00, regarding the respective duties of the judge and jury (8 CT 1625; 39 RT 3867-3868); CALJIC No. 2.21.1, regarding discrepancies in testimony (8 CT 1639; 39 RT 3874); CALJIC No. 2.21.2 regarding willfully false testimony (8 CT 1640; 39 RT 3874-3875); CALJIC No. 2.22, regarding weighing conflicting testimony (8 CT 1641; 39 RT 3875); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (8 CT 1644; 39 RT 3875-3876); and CALJIC No. 2.51, regarding motive. (8 CT 1645; 39 RT 3876.) Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions

implicitly replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

As a preliminary matter, several instructions violated appellant's constitutional rights by misinforming the jurors that their duty was to decide whether appellant was guilty or innocent, rather than whether she was guilty or not guilty beyond a reasonable doubt. For example, CALJIC No. 1.00 told the jury that pity for or prejudice against the defendant and the fact that she has been arrested, charged and brought to trial do not constitute evidence of guilt, "and you must not infer or assume from any or all of [these circumstances] that she is more likely to be guilty than innocent." (8 CT 1626; 39 RT 3868.) CALJIC No. 2.01, discussed above, also referred to the jury's choice between "guilt" and "innocence." (8 CT 1631; 39 RT 3871.) CALJIC No. 2.51, regarding motive, informed the jury that the presence of motive "may tend to establish guilt," while the absence of motive "may tend to establish innocence." (8 CT 1645; 39 RT 3876.)

These instructions diminished the prosecution's burden by erroneously telling the jurors they were to decide between guilt and innocence, instead of determining if guilt had been proven beyond a reasonable doubt. They encouraged jurors to find appellant guilty because she had not proven that she was "innocent."[142]

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[142] As one court has stated:
We recognize the semantic difference and appreciate the defense argument. We might even speculate that the

(continued...)

Similarly, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (8 CT 1640; 39 RT 3874-3875, emphasis added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a "mere probability of truth" in their testimony. (See *People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[143] The essential mandate of *Winship* and its progeny – that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt – is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In*

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[142] (...continued)

> instruction will be cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect *standing alone.*

(*People v. Han* (2000) 78 Cal.App.4th 797, 809, original emphasis.) *Han* concluded there was no harm because the other standard instructions, particularly CALJIC No. 2.90, made the law on the point clear enough. (*Ibid.*, citing *People v. Estep* (1996) 42 Cal.App.4th 733, 738-739.) The same is not true in this case.

[143] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

re Winship, *supra*, 397 U.S. at p. 364.)

Furthermore, the jurors were instructed:

> You are not bound to decide an issue or fact in accordance with the testimony of a number of witnesses, which does not convince you, as against the testimony of a lesser number or other evidence, which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the simple process of counting the number of witnesses [who have testified on the opposing sides]. The final test is not in the [relative] number of witnesses, but in the convincing force of the evidence.

(CALJIC No. 2.22; 8 CT 1641; 39 RT 3875.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which witnesses, or which version, was more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence standard," i.e., "not in the relative number of witnesses, but in the convincing force of the evidence." The *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a

single witness to prove a fact (8 CT 1644; 39 RT 3875-3876), likewise was flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; she cannot be required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that testimony of a single witness which they believed was "sufficient for the proof of that fact" and that they "should carefully review all the evidence upon which the proof of such fact depends" – without qualifying this language to apply only to *prosecution* witnesses – permitted reasonable jurors to conclude that (1) appellant herself had the burden of convincing them that she was not guilty and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

Finally, CALJIC No. 8.20, defining premeditation and deliberation, misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other conditions *precluding* the idea of deliberation. . . ." (8 CT 1623; 39 RT 3888.) The use of the word "precluding" could be interpreted to require the defendant to absolutely eliminate the possibility of premeditation, rather than to raise a reasonable doubt about that element. (See *People v.*

Williams (1969) 71 Cal.2d 614, 631-632 [recognizing that "preclude" can be understood to mean "'absolutely prevent'"].)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*In re Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand – in the face of so many instructions permitting conviction upon a lesser showing – that he or she must find appellant not guilty unless every element of the offenses was proven by the prosecution beyond a reasonable doubt.

The instructional errors mandate reversal under the Fifth, Sixth, Eighth and Fourteenth Amendments. The instructions as a whole fostered a verdict that was not in accord with the heightened reliability standard of the Eighth Amendment and created undue risk that the verdict and subsequent death sentence were tainted by arbitrariness. (*Gardner v. Florida*, *supra*, 430 U.S. at p. 361; *Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

3. The Court Should Reconsider Its Prior Rulings Upholding The Defective Instructions.

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See, e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200 [addressing false testimony and circumstantial evidence instructions];

People v. Crittenden (1994) 9 Cal.4th 83, 144 [addressing circumstantial evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC No. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings*, *supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale – that the flawed instructions were "saved" by the language of CALJIC No. 2.90 – requires reconsideration. (See *People v. Crittenden*, *supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin*, *supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People v.*

Kainzrants (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is specific and the supposedly curative instruction is general." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction.[144] It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one – rather than vice-versa – the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard eleven separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable doubt standard: the oft-criticized and confusing language of Penal Code section

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[144] A reasonable doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d at p. 495, but it was not held to cure the harm created by the impermissible mandatory presumption.

1096 as set out in former CALJIC No. 2.90.[145] This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People v. Wilson*, *supra*, 3 Cal.4th at p. 943, citations omitted.) Under this principle, it cannot seriously be maintained that a single, quite imperfect instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

4. Reversal Is Required.

Because the erroneous circumstantial evidence instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible *per se*. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California*, *supra*, 491 U.S. at pp. 266-267.) Here, that showing cannot be made. Appellant contested the evidence against her and the truth of the

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[145] As this Court has noted, the statutory language – with its references to "moral evidence" and "moral certainty" – is problematic. (See *People v. Freeman* (1994) 8 Cal.4th 450, 503.) In combination with the instructions discussed in this argument, it is reasonably likely that CALJIC No. 2.90 allowed the jurors to convict appellant on proof less than beyond a reasonable doubt in violation of his right to due process. (*In re Winship*, *supra*, 397 U.S. 358.)

special circumstances. Accordingly, the dilution of the reasonable-doubt requirement by the guilt-phase instructions, particularly when considered cumulatively with the other instructional errors set forth above, must be deemed reversible error no matter what standard of prejudice is applied. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra*, 33 Cal.3d at p. 505.)

The convictions, the special circumstance findings and the death judgment must be reversed.

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PENALTY PHASE

STATEMENT OF FACTS

In his case in aggravation, the prosecutor introduced testimony from a prisoner housed near Dalton who claimed to have overheard Dalton describe killing May and express her lack of remorse about what happened six years earlier. He introduced testimony that Dalton had elbowed and made an implied threat to an inmate testifying against her. He also introduced evidence that Dalton had six prior convictions and testimony regarding a home burglary in which Dalton participated.

Dawn Crawford testified that while she was in custody at Las Colinas in the fall of 1994, she was housed in a cell next to Kerry Dalton. (43 RT 4083-4084.)[146] A vent connected the two cells, and through this vent, Crawford overheard Dalton discussing her pending murder case with her cellmate Terry Carbaugh. (43 RT 4084, 4086.) According to Crawford, Dalton said the victim owed her $80. She called the victim a bitch and said she was tied up and injected with battery acid. (43 RT 4087.) Dalton said that hearing the victim scream was the "greatest high that she has ever experienced." She also said the victim was stabbed in the head, cut up and mutilated. Dalton mentioned also an Indian reservation. (43 RT 4088.)

Crawford denied that she told inmates Arlene Whitney and Dawn Moore that she would contact the District Attorney about their cases. (43 RT 4093-4094, 4101.) Crawford allowed that she had written a lot of grievances about other inmates, including about their cases, and that she

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[146] At the time, Crawford was charged with assault with a deadly weapon by means of force likely to produce great bodily injury. She pled guilty to felony assault using force likely to produce great bodily injury, and the deadly weapon allegation was dismissed. (44 RT 4171.)

was moved out of "B" housing. (43 RT 4095.)

Pamela Kuuipo-Aloha Johnson testified that in September 1993, she was in custody at Las Colinas. (43 RT 4104-4105.) While Johnson was in the visiting area on September 13, 1993, Dalton approached her and said Johnson was a snitch. If Johnson snitched Dalton out, she would pay for it – she would die. Dalton also asked Johnson how it felt to have a son who was a junkie just like her. (43 RT 4107-4108.) When Johnson stood up to leave, Dalton told her she could not get away from her, and then elbowed Johnson under her right rib. The deputies then came in and separated them. (43 RT 4109.) Photographs of Johnson's bruises were shown to the jurors. (43 RT 4109-4110.) After Dalton hit Johnson, she asked her whether she had heard from her husband or son lately. (43 RT 4110.) There were approximately 27-37 inmates in the visiting area when this happened. (43 RT 4115.) Dalton also once told someone on the bus going from Las Colinas to court that Johnson was a snitch. (43 RT 4118-4119.)

Cynthia Johnson testified that in February 1992, she and her husband lived in a trailer behind the house where her brother and mother lived in San Diego County. (43 RT 4122-4123.) Her mother was sick with cancer and was taking morphine. (43 RT 4127.) One morning, a man in a hockey mask entered the trailer and grabbed Cynthia Johnson's hair and tried to push her down. A woman in a ski mask followed him into the trailer. (43 RT 4124-4125.) The man addressed Johnson by name. (43 RT 4127.) He told her he did not want to hurt her, and then hit her with a flashlight eight to ten times. (43 RT 4127-4128.) While the man hit her, the woman took Johnson's purse then pulled down her jewelry case and took jewelry from it. (43 RT 4128-4130.) Johnson later identified Dalton as the woman. (43 RT 4134.) Johnson's mother's morphine, Johnson's jewelry and just

under $300 were missing. (43 RT 4135-4136.) Most of the jewelry was recovered. (43 RT 4137.) Dalton was charged and pled guilty to robbery in connection with this incident. (44 RT 4172.)

In their case in mitigation, the defense called a number of witnesses to impeach Crawford and her claimed ability to hear a conversation in a neighboring cell. They also presented testimony that Dalton had become a student of the Bible and was loved by her family.

In the fall of 1994, Theresa Carbaugh was a cellmate of Dalton at Las Colinas. (44 RT 4173.) Crawford was housed in the cell next door. (44 RT 4174.) Carbaugh refuted everything Crawford said about the overheard conversation. Dalton never spoke to Carbaugh about her case. Dalton never said anyone was tied up and injected with acid. She never referred to the victim in her case as "the bitch." She never said anything about cutting up or mutilating a body. She did not talk about hearing someone scream and calling it the greatest high. She did not talk about an Indian reservation. (*Ibid.*)

Carbaugh testified that she had seen Crawford on a daily basis for four to six weeks and "[i]t is a fact that I know that she is a liar." (44 RT 4175-4176.) She had a reputation for dishonesty. (44 RT 4176.)

Carbaugh also saw Dalton on a daily basis and observed that she had a daily, "24-hour devotion" to religion. (44 RT 4177.) Carbaugh described Dalton as "sensitive, very caring, and thoughtful." (*Ibid.*)

Carbaugh testified that the "vent" Crawford claimed to have listened through was an intercom box with an emergency button to be used when the police needed to reach the inmates or they needed to reach police. (44 RT 4177, 4184.) That box was not used to listen to other people's

conversations from around the facility. You could not hear anything audible from the next room. (44 RT 4178.) Moreover, the deputies could listen to what was said in the cell through that box. (*Ibid.*) The intercoms are on each side of the wall, but she did not say whether they were back-to-back. (44 RT 4184.)

Gwen Coleman testified that she was the lead trustee at Las Colinas. (44 RT 4194-4195.) Coleman knew Dawn Crawford, who was housed in "B-1" while Coleman was lead trustee. Coleman has discussed with others Crawford's reputation for honesty, and it was that she is deceitful, evil and a liar. (44 RT 4196-4197.)

Coleman believed Dalton to be a compassionate person, and described how Dalton shared her canteen with others who did not have as much as she. Coleman testified that Dalton was not loud, vile or vulgar. (44 RT 4198.)

Coleman also explained that the intercom boxes in the cells allowed deputies to listen to what was being said in the cells. Inmates did not use it to listen to other inmates. You could not hear a conversation clearly through the wall. (44 RT 4199.) In the cell, an inmate was always concerned that a deputy might be listening. (44 RT 4200.)

Robin Wilson testified that she was presently an inmate at Las Colinas and was housed in the same unit as Dawn Crawford for approximately 60 days. (44 RT 4211-4213.) Wilson described Crawford as an exaggerator who took bits and pieces of different statements and "adds and takes out." "To me, I think she's a habitual liar." (44 RT 4213.) That was Wilson's opinion and it had been expressed by others. (44 RT 4214.)

Wilson testified that she would never talk about her case in her cell

because of the grated speakers on the wall through which the deputies could hear what was said. She would be concerned that the deputies would listen in on her conversation. (44 RT 4214.) She could only hear conversation in the next cell if the people were screaming, not if they were talking in a normal tone of voice. (44 RT 4215.)

Judith Reeves testified that she managed an apartment building where Dawn Crawford was a tenant from June to October 1994. She knew Crawford pretty well. (44 RT 4231-4232.) Reeves could not find a time when Crawford was honest. "Everything was upside down, wrong, a lie, everything from the time I knew her." (44 RT 4232.) Crawford had a reputation as a dishonest person. (44 RT 4233.)

Jeannie Shim had known Dawn Crawford since August 1993 and was her neighbor in the same apartment complex Reeves managed. In Shim's opinion, Crawford did not tell the truth. She would lie or manipulate in order to gain something for herself. Other neighbors she spoke to also believed Crawford to be a liar. (44 RT 4235-4237.) Just about everything Crawford ever told her had been a lie. (44 RT 4239.) Shim also revealed that there was "bad blood" between her and Crawford because Crawford once stabbed Shim, and later pleaded guilty to that assault. (44 RT 4238, 4240.)

Cameo Brooks testified that she was an inmate at Las Colinas and observed the September 1993 incident in the visiting room about which Pamela Johnson testified. (43 RT 4142-4143.)[147] While Johnson was

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[147] As argued above, Argument IX.B, the court refused to allow impeachment of Johnson with evidence relating to her 1982 misdemeanor check forgery. (30 RT 2519-2520.) Defendant argued below, and reasserts (continued...)

waiting to be transferred to court, Dalton entered and had a conversation with Brooks. (43 RT 4143-4144.) When Johnson noticed Dalton in the waiting room, she became hysterical. Not immediately, but at some point, the deputies responded and removed Dalton. (44 RT 4244.) Dalton did not say anything to Johnson; she did not threaten her; and she had not hit her. (44 RT 4244-4245.) Johnson was screaming that she was not supposed to be in the same room with "this lady" – Dalton. She was yelling for the deputies and making a major scene. (44 RT 4253.) After this incident, the three were on a bus together going to court. Brooks did not hear Dalton say anything to Johnson during the bus ride. (44 RT 4245-4246.)

Michele Pease, an inmate at Las Colinas, had known Dalton since October 1995, and at one time was housed in the same unit with Dalton. (44 RT 4283-4284.) Pease was familiar with the emergency boxes in the rooms. One could hear voices through the walls, but you could not discern what was being said. (44 RT 4285-4286.) The rooms also had vents, located high on the wall close to the ceiling. You could not hear conversations through the vents. (44 RT 4286.)

Dalton was one of the first people who befriended Pease at Las Colinas, and they studied the Bible together. It comforted Pease as she was going through her case. (44 RT 4286.)

Romie Cervantes, a full-time volunteer chaplain at Las Colinas, testified that she had known Dalton since 1992, and described Dalton as "one of [her] better sheep." Cervantes saw Dalton on a weekly basis and saw her grow into a "beautiful Christian woman." Cervantes believed that

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[147] (...continued)
here, that the court's restriction of cross-examination was prejudicial error.

Dalton's religious commitment was real. And she did not want Dalton to receive a death sentence. (44 RT 4259-4262.) Cervantes knew nothing about Dalton's criminal history or the current conviction. (44 RT 4263.) Dalton had expressed remorse. She did not go into details, but said she had done some awful things. (44 RT 4264.) Cervantes had observed a change in Dalton. (44 RT 4265.) Cervantes did not want Dalton to die because she had touched other inmates' lives. If Dalton can be "that little light, she deserves to have it on" so she can help other inmates. (44 RT 4269.)

Charlene Gill, who since 1992 had taught Bible study at Las Colinas, testified that Dalton had participated in the program since October 1992 and was a serious student of the Bible. (44 RT 4273-4275.) Gill believed that Dalton's commitment to the Lord was strong, and she hoped Dalton did not receive the death penalty. (44 RT 4276.)

Duetta Bellamy led a Bible study class at Las Colinas, in which Dalton participated. (45 RT 4366-4367.) Bellamy described Dalton as kind and spoke of instances when she helped comfort other women in the class. (45 RT 4366.) Bellamy believed that Dalton would be of assistance as a lay minister in prison. She believed that Dalton should live and would be a tremendous testimony to other women in the jail. (45 RT 4368.) She acknowledged that her knowledge of Dalton was confined to what she saw and heard in Bible study. (45 RT 4371.)

Marion Pasas was a private investigator hired by the defense to go to the rooms[148] Crawford described in order to determine whether one could

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[148] Crawford testified that when she allegedly heard Dalton's conversation, Crawford was housed in room 169 and Dalton was in room 168. (43 RT 4086.) Pasas testified that rooms of those numbers did not
(continued...)

hear a conversation through the walls. (44 RT 4292-4302.) She took photographs of the rooms, which showed that each room had two vents about ten feet high on the walls: both rooms had a vent above the sink located on the back wall; 268 had a second vent at the ceiling; 269 had it above the door. (44 RT 4295-4296, 4306.) Each room also had a call box, but the boxes in the two rooms were not at the same height. The one in room 269 was higher. (44 RT 4296-4297.) Pasas also testified that the cells were separated by an 8-10 inch thick concrete block. (44 RT 4297.)

Pasas visited Las Colinas twice, each time accompanied by another investigator, Allan Cotten. (44 RT 4298-4299.) On their first trip, Pasas went into room 269 and Cotten went into room 268. The doors in both rooms were closed. Cotten had been instructed to speak in a conversational tone, as though conversing with someone in the cell. (44 RT 4299, 4303.) Pasas stood in the middle of Room 269, and listened; she climbed on to the top bunk and listened; and she moved about the cell listening. She was unable to hear Cotten in the next cell from any of her locations. Pasas and Cotten then switched rooms and repeated the same procedure. Again, she was unable to hear Cotten. At one point, Pasas got right up next to the vent in 268, something she was not able to do in 269 because the vent is over the door and she could not get close to it – even when she stood on a chair. (44 RT 4299-4301.) When she put her ear up to the vent in room 268, she was able to hear muffled voices, but she was unable to distinguish any conversation except for one woman who was yelling. (44 RT 4301.)

Pasas and Cotten made a second trip to Las Colinas the night before

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[148] (...continued)
exist, but she did find rooms 268 and 269. (44 RT 4293.)

Pasas' testimony, and they did the same experiment with the call boxes. Pasas placed herself directly in front of the call box and sat at the desk in front of it. She was unable to hear Cotten from any location. (44 RT 4301-4302.)

Cotten testified that he entered the cell, closed the door and talked in a conversational voice in various areas of the cell. Pasas, in the next cell, determined whether she could hear him through the vents, which were high up on the ceiling. In one cell, he got as close as he could to the vent – approximately four to five feet from it. (45 RT 4375, 4379.) He spent several minutes speaking in each room. (45 RT 4376.) They followed the same procedure to determine whether Pasas could hear through the speaker box on each wall. (45 RT 4377.) The boxes were located about 4 feet from the floor. (45 RT 4380.) He talked standing directly in front of the box with his mouth two feet away. He did not talk as loud as he could, but he raised his voice. There are holes in the speaker to allow air and sound to penetrate the wall. The box on the other side of the wall was not aligned with the box in the adjoining cell, but it was on the back side of the same wall. It was embedded in the cement wall. (45 RT 4381-4383.)

Dalton's sister Vicky Perez testified that she had four children, one of whom, Hannah, then 12 ½, she adopted from Dalton. (44 RT 4321-4322.) Perez had been in contact with Dalton on a regular basis since May 1992. Hannah knew Dalton was her birthmother. She visited Dalton and loved her. (44 RT 4324.) Perez' three other children also had a relationship with Dalton. They too visited Dalton and loved her very much. (44 RT 4325.)

Many of Perez' visits with Dalton were about the Lord and learning the word of God. This had brought great joy to Perez, who believed that

Dalton had a religious understanding and depth that many Christians in her church did not. (44 RT 4325.)

Perez testified that if Dalton were not sentenced to death, Perez would continue to visit and write to her. She and her family would have contact visits with Dalton. Perez did not want her sister to die. (44 RT 4327.)

Perez explained that Hannah had lived with Dalton the first two and one-half years of her life. When Dalton went to jail, she was unable to care for Hannah, who was placed in foster care until Perez took her. (44 RT 4329.) Dalton loved her children, but she could not take care of them. (44 RT 4330.) She was controlled by drugs. (44 RT 4332.) Perez discussed Dalton's battle with drugs and unsuccessful attempts to stop using them. She joined Alcoholics Anonymous and Narcotics Anonymous, but always returned to drugs and alcohol. (44 RT 4334-4335.) There was a two to three year period prior to 1992, when neither Perez nor her family saw Dalton because it was too emotionally difficult. (44 RT 4336.)

Perez saw Dalton in May 1992, but it was not until July or August that Dalton said she was going to recommit herself to the Lord. Perez was emotionally cautious, but eventually saw the "fruits of [Dalton's] life." Dalton developed patience, self-control and love. (44 RT 4338.)

Hannah did not know what Dalton was convicted of. Perez had recently told the children that they would not see Aunt Kerry outside of the prison for a very, very long time. The children cried. They would like to see her. (44 RT 4339-4340.)

Perez had seen a dramatic change in Dalton over the last two and one-half years. It would mean a great deal to Perez if Dalton were allowed

to be in prison for the rest of her life. It would be a blessing to have her in their lives. (44 RT 4340.)

Dalton's brother, Todd Thorpe, testified that he cared about his sister and visited her at Las Colinas. He considered himself a Christian and discussed religion with Dalton during his visits. He believed that God opened Dalton's eyes, and she turned her life around. (44 RT 4342.) He believed that Dalton could make a difference in prison. She could touch people who needed support and help them make the right decisions. He wanted his sister to live because she had a lot to contribute. (44 RT 4343.) Thorpe testified that he loved Dalton regardless of the facts of this case. (44 RT 4349.)

Dalton's father, Keith LaChance, testified that he left the family when Dalton was six years old. He had been drunk the ten years he was married to her mother. (44 RT 4350-4351.) He reestablished contact with Dalton in 1992. The relationship meant a lot to him. Dalton was his daughter and he loved her. He wanted his daughter to live. He wanted to visit her and continue the relationship. (44 RT 4352.)

On cross-examination, LaChance stated that Dalton was born in 1960. He did not recall the month or day – he was drunk at the time. (44 RT 4354.) He deserted Dalton when she was six. When she was fifteen, Dalton had some problems in school and went to Alaska to live with LaChance. Prior to that, he had had no contact with her. (44 RT 4357-4358.) He loved Dalton, but he did not handle the situation properly when she came to Alaska. (44 RT 4358.) And Dalton could not handle Alaska in winter so returned to San Diego. (44 RT 4358-4359.) The next time LaChance saw Dalton was in 1992, when she was 32. (44 RT 4360.)

LaChance believed that he had grown in the last two and one-half years and realized he missed things with all of his children. This case has brought him back to the family. He has given up just about everything to have a relationship with his daughter. (44 RT 4362-4363.)

Dalton's mother, Rosalie Thorpe, testified that Dalton was one of her four children. (45 RT 4385-4386.) Dalton herself had five children: David 16, Hannah 12, Brianne 11, Jason 10 and Christiana 6. Her eldest son lived with his father; her youngest with Dalton's sister Laurie. (45 RT 4387.) Brianne and Christiana lived with Rosalie, who adopted them. (45 RT 4388.) Rosalie and the girls started visiting Dalton at Las Colinas in the fall of 1994. The girls loved Dalton very much. They sang songs from school over the phone to her, which made Dalton fall apart. They wanted to touch Dalton but could not. They said "I love you" and blew her kisses when leaving from their visits. (*Ibid.*)

Brianne and Christiana asked to visit Dalton. They prayed for her at night, and Rosalie did not know what she would tell them if they could never see Dalton again. The two girls attended Calvary Chapel Christian School. Rosalie volunteered there in return for tuition. Rosalie understood that the jurors decided penalty. She thought Dalton could minister in the prison, helping others. She believed Dalton had changed. She had never been this way before. There had been times as a teenager when Dalton claimed to know God, but she back-slid. The main problem was drugs. Drugs took Dalton from the family. Now she was back. (45 RT 4389.)

Rosalie wanted the jury to save her daughter's life. She prayed that God would do His plan, but selfishly hoped it would be to allow Dalton to stay with her family and do His work. Dalton's family, her children, prayed for her life. (45 RT 4390.)

Rosalie explained that she did not start to visit Dalton until 1994, because previously Dalton had been different. Her family and others told her that Dalton had changed so she went to see her. She knew a different daughter now. (45 RT 4391-4392.)

Rosalie did not believe that Dalton had killed anyone. God told her that she had not. (45 RT 4392.)

Rosalie attributed Dalton's previous behavior to drug addiction. She made efforts to get off drugs, but they were unsuccessful. (45 RT 4393-4394.)

Dalton's son David last lived with Dalton at age four and one-half. (45 RT 4396.) Brianne lived with Dalton for two months, then Rosalie became her guardian. Dalton raised Jason for eight months, and then she was arrested. He lived with Dalton's sister Laurie. Dalton tried to resume parental authority when she left prison, but the family knew she could not. (45 RT 4396-4397.) Dalton's last child was Christiana, whose birth name was Chenoa Witachie Tompkins. (45 RT 4397-4398.) Dalton has never assumed parenting of her. Rosalie took the Christiana from the hospital because she had drug withdrawal symptoms. (45 RT 4398.) Rosalie did not tell Christiana that Dalton was her mother until she was three and one-half. The girls called Dalton "Aunt Kerry." (45 RT 4402.)

In rebuttal, the prosecutor introduced testimony that Dalton had previously expressed a desire to change her ways and adopted religion, only to relapse. San Diego Probation Officer Carol Roberts testified that she prepared a sentencing report for Dalton in February 1987. (45 RT 4427-4428.) Dalton prepared a lengthy written statement in which she talked about making life changes. She also said she had talked with a Christian

drug program leader for Victory Outreach, a Christian residential treatment program that accepted individuals with substance abuse problems. Dalton wanted the program to show her God. Roberts and Dalton discussed Dalton entering the Entra Casa Program, a women's release center. She was admitted into the program in March 1987. (45 RT 4429-4432.)

In Roberts' dealings with her, Dalton had denied having a drug problem, although she was apparently attending NA meetings. (45 RT 4429.)

Counsel stipulated that Dalton had twelve rule violations while at Las Colinas between December 1992 and January 1995. None of these violations resulted in criminal charges being filed. (45 RT 4434.)

The prosecutor then introduced witnesses to refute defense witnesses who refuted Dawn Crawford. District Attorney Investigator Dave Decker testified that on March 2, 1995, he and Investigator Cooksey went to Las Colinas to determine what could be heard between the cells. (45 RT 4435-4436.) He and Cooksey went into a different cell, shut the door, then spoke through the speaker mounted in each room and made voice tests to see if they could hear each other. (45 RT 4436.) He testified that the wall between the rooms was, he believed, hollow cinder block. He and Cooksey were able to communicate with each other through the air space in the speaker. (45 RT 4437.) He and Cooksey returned to Las Colinas on March 4, 1995, at which time Decker photographed the speaker vent. (45 RT 4438.) They also removed the speaker boxes and discovered that each speaker was mounted in a metal box connected to the adjoining box through a piece of one-inch conduit. (45 RT 4439.) The box in Room 269 sat four inches above the box in Room 268. (45 RT 4443.) During this visit they did further tests that they tape-recorded. (45 RT 4441-4442; Exhb. 55;

9 CT 1899.)

Cooksey testified that during his and Decker's first visit, he was able to hear what Decker said in the adjoining room. (45 RT 4448.) During the second visit, Cooksey had a tape recorder that he held next to the speaker grill in the room that he was in while Decker was in the opposite room. (45 RT 4449.) Cooksey instructed Decker to begin talking and then activated the tape recorder to see if they could record Decker's voice. The tape of Decker's voice was not of good quality. (45 RT 4449-4450.) Over objection, the tape was played for the jurors. (45 RT 4456.)

Over objection, the prosecution called Tompkins' attorney, Athena Shudde, who testified that during a pre-trial court appearance, Dalton spat at Tompkins. (45 RT 4461-4467.)

The parties stipulated that Dalton had the following prior convictions: petty theft with a prior on June 28, 1984; credit card forgery on June 28, 1984; petty theft with a prior on June 28, 1984; residential burglary on June 28, 1985; petty theft with a prior on March 4, 1987; and robbery on April 1, 1992. They also stipulated that Dalton was in prison on February 3, 1985; December 25, 1986; August 31, 1988; December 27, 1989; January 24, 1990; January 31, 1991; April 26, 1991; and September 19, 1991. She entered prison on the final time on April 4, 1992. (46 RT 4514-4515.) And, finally, they stipulated that from October 26, 1992, to February 6, 1995, Dalton made 43 court appearances in this case. (46 RT 4516.)

PENALTY PHASE ARGUMENTS

XIII.

DAWN CRAWFORD'S TESTIMONY WAS INADMISSIBLE.

A. PROCEEDINGS BELOW.

On October 31, 1994, during the guilt phase of trial, the prosecution received word that Dawn Crawford had information about this case and wanted to talk to the prosecution. Dusek and Investigator Cooksey attempted to contact her, but were told to contact her attorney, who, in turn, told them not to speak with her. (28 RT 2400-2401.) After resolution of Crawford's case and her sentencing on December 29, 1994, Dusek and Cooksey visited Crawford at Las Colinas in early February 1995. (28 RT 2401.) Crawford agreed to be interviewed, and Cooksey prepared a report of the interview, which Dusek faxed to defense counsel at 4:49 p.m. on Friday, February 3, 1995. (30 RT 2502, 6 CT 1172, 1179.) Opening statements were scheduled for Monday, February 6, 1995.

On February 6, defense counsel filed a motion to exclude Crawford's testimony or, in the alternative, to continue the trial date 45 days so that they could prepare impeachment evidence against Crawford. (30 RT 2500; 6 CT 1169, 1172, 1179.) The court excluded the testimony from the prosecution's guilt phase case-in-chief. (30 RT 2501, 2505-2506.) It was never introduced at the guilt phase.

Prior to the penalty phase of trial, defense counsel filed a motion to exclude testimony of Dawn Crawford as inadmissible evidence of lack of remorse. (9 CT 1790.)[149] During the last week of February 1995, Dusek

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[149] Dawn Crawford was not initially listed in the prosecution's

(continued...)

informed defense counsel that Crawford would be called to testify regarding circumstances of the offense. (42 RT 3973.)

The court then considered the defense motion to exclude certain of Crawford's statements as going to lack of remorse, specifically, Dalton's description of the victim as "bitch," and her alleged statement that the victim's screams were the greatest high she had ever experienced. (42 RT 3973, 4010.) The court tentatively ruled that that statement was not a circumstance of the crime, but an expression of lack of remorse, and therefore, inadmissible. (42 RT 3979-3980.)

The court subsequently reversed its position and ruled that Dalton's alleged statement expressed her mental state at the time of the offense. Her words showed a "complete lack of remorse" and described her attitude while committing the crime, and her statement was therefore admissible. (42 RT 4012.) Defense counsel argued that the comments were elicited from Crawford to show Dalton's lack of remorse. The prosecution specifically asked Crawford whether Dalton expressed any remorse, and in response, Crawford gave them Dalton's alleged statement. (42 RT 4013-4014.) The prosecution should not be allowed to prompt a witness to say something and then claim it is a circumstance of the offense. (42 RT 4016.) The court admitted that it was a "gray area," but concluded there was no requirement that the defendant had to express the mental state during the commission of the offense for it to be admissible as a circumstance of the crime. (42 RT 4018.)

At trial, Crawford testified that she overheard Dalton refer to the

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[149] (...continued)
notice of evidence in aggravation. (2 CT 416.) No amended notice was filed. (See 42 RT 3973.)

victim as a bitch and state that she does drugs but hearing the victim scream was the "greatest high that she has ever experienced." (43 RT 4087-4088.) Dusek referred to Crawford's testimony during his closing argument. (46 RT 4527.)

The court erred in allowing Crawford to testify regarding Dalton's lack of remorse. It was inadmissible non-statutory aggravating evidence. Moreover, even if the testimony was admissible, its value was far outweighed by its prejudicial effect and the undue consumption of time and confusion the testimony engendered.

B. CRAWFORD'S TESTIMONY REGARDING DALTON'S LACK OF REMORSE WAS INADMISSIBLE, UNRELIABLE AND TREMENDOUSLY PREJUDICIAL.

A prosecutor may not present evidence in aggravation that is not relevant to the statutory factors enumerated in section 190.3. (*People v. Crittenden* (1994) 9 Cal.4th 83, 148; *People v. Boyd* (1985) 38 Cal.3d 762, 772-776.) Lack of remorse is not a statutory aggravating factor. (See Pen. Code, § 190.3; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 449.)

It is true that "[c]onduct or statements *at the scene of the crime* demonstrating lack of remorse may be considering in aggravation as a circumstance of the capital crime under section 190.3, factor (a)." (*People v. Pollock* (2004) 32 Cal.4th 1153, 1184, emphasis added, citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1231-1232.) Post-crime evidence of remorselessness, however, does not fit within any statutory sentencing factor and therefore cannot be used as aggravating evidence. (*People v. Gonzalez*, *supra*, 51 Cal.3d at p. 1232 ["postcrime evidence of remorselessness does not fit within any statutory sentencing factor, and thus should not be urged as aggravating"]; *People v. Boyd*, *supra*, 38 Cal.3d at

pp. 771-776.) In *People v. Cain* (1995) 10 Cal.4th 1, 77, where the defendant, still bloody from the killings, returned to his friends and boasted of what he had just done, "the jury could infer his attitude during the crimes was one of callousness towards the victims." In *Gonzalez*, there was evidence that defendant after his arrest boasted to a jail inmate about "bagging a cop" who "had it coming. . . ." This Court held that the prosecution's argument of these facts as aggravating evidence was proper "[i]nsofar as the prosecutor was urging defendant's *overt* remorselessness *at the immediate scene of the crime*." (*People v. Gonzalez*, *supra*, 51 Cal.3d at pp. 1231-1232; original emphasis.)

The circumstances of the offense aggravating factor simply cannot be interpreted in such an open-ended fashion as to encompass comments made more than *six years* after the alleged offense.

Even if Dawn Crawford testified truthfully, which appellant vigorously disputes, she described an in-custody conversation that bore little indicia of reliability and could be dismissed as jailhouse puffing – *not* accurate reporting of a mental state experienced six years earlier.

Finally, an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is *above and beyond* the elements of the crime itself. (*People v. Dyer* (1988) 45 Cal.3d 26, 77-78.) Dalton was convicted of torture, which necessarily includes "the cold-blooded intent to inflict pain for personal gain or satisfaction." (*People v. Steger*, *supra*, 16 Cal.3d at p. 546.) Her subsequent statement, even if it reflected a mental state at the time of the offense, was not properly aggravating evidence above and beyond the elements of the torture special circumstance. It did not reveal an attitude toward the crime that was more

remorseless than may be inherent in any torture-murder situation.

The error of injecting non-statutory aggravation into appellant's trial violated the federal constitutional requirements that objective criteria guide the imposition of the death penalty (*Maynard v. Cartwright* (1988) 486 U.S. 356; *McCleskey v. Kemp* (1987) 481 U.S. 279, 299-306), and the heightened need for reliability in capital trial and sentencing procedures (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9 (plur. opn.); *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585). Furthermore, the evidence was sufficiently prejudicial to violate appellant's due process rights. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 639.) To the extent the errors are otherwise only state law issues, they also deprived appellant of a state-created liberty interest and thereby violated her federal due process rights. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. 343.)

Without the testimony that allowed the jury to consider appellant's purported lack of remorse as aggravating evidence, it is reasonably possible that the jury would have reached a verdict more favorable to appellant. (See *People v. Brown* (1988) 46 Cal.3d 432, 446-448.) Stated otherwise, the prosecution cannot show beyond a reasonable doubt that without the testimony that Dalton described May's screams as the greatest high she had ever experienced, the jury would have reached a verdict of death. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

The sentence and judgement of death must therefore be reversed.

C. CRAWFORD'S TESTIMONY REGARDING DALTON'S LACK OF REMORSE WAS MORE PREJUDICIAL THAN PROBATIVE, AND THE COURT ABUSED ITS DISCRETION IN RULING THAT HER TESTIMONY WAS ADMISSIBLE.

A trial court may properly exclude evidence if its probative value is substantially outweighed by the probability that its admission will either necessitate undue consumption of time or create a substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, § 352.) At the penalty phase, the trial court's discretion to exclude circumstances-of-the-crime evidence as unduly prejudicial under Evidence Code section 352 or the Due Process Clause is more circumscribed than at the guilt phase, but it still exists. (*People v. Box* (2000) 23 Cal.4th 1153, 1201.) Here, the evidence was clearly unduly prejudicial. The jurors had already exhibited some concern about their personal safety.[150] Evidence that Dalton found a woman's screams of pain intoxicating was devastating to her case.

As appellant has earlier pointed out, Fedor's trailer was a short distance from a number of other occupied trailers; the killing allegedly occurred on a Sunday afternoon; and at least one of Fedor's neighbors, whom Fedor described as nosey, had complained about noise while Dalton, Tompkins, Baker and May were simply up all night doing drugs. (See 30 RT 2626-2630, 2581; Exhibits 3A-3E & 4.) It is unlikely that prolonged screaming would have been missed or ignored.

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[150] On April 23, just prior to reaching their guilt phase verdict, the jurors and alternates sent the court a note requesting that their names and addresses be removed from public record. (8 CT 1621; 39 RT 3911.) After reaching the penalty verdict, the jurors sent a note requesting that they be polled on their decision by number not name. (10 CT 1994.)

In addition, Crawford's reputation for dishonesty and the circumstances under which she allegedly heard Dalton's statement undermine the reliability of Crawford's testimony. Theresa Carbaugh, the person to whom Dalton was supposed to have made the statement, denied that Dalton did so. (44 RT 4174.) Also, none of the other inmates at Las Colinas were familiar with listening in on other inmates' conversations through the vent or intercom. They could not hear through the intercom; moreover, it was widely understood that no one would say anything about their cases for fear that the deputies who used the intercoms would be listening in. (See testimony of Theresa Carbaugh [44 RT 4178]; Gwen Coleman [44 RT 4199]; Robin Wilson [44 RT 4214-4215]; Michele Pease [44 RT 4285-4286].) In addition, women from inside and outside prison testified as to Crawford's deceitful nature. (See testimony of Theresa Carbaugh [RT 4175-4176]; Gwen Coleman [RT 4196-4197]; Robin Wilson [RT 4213- 4214]; Jeannie Shim [RT 4235-4237, 4239]; Judith Reeves [RT 4232-4233].)

Probably the most compelling reason for excluding Crawford's testimony, however, was that the question of the plausibility of the testimony – impeaching it and buttressing it – took on a life of its own and infested the penalty phase of trial with collateral issues. Crawford's testimony was so incendiary that the defense was compelled to address it. As a result, they called five witnesses to testify regarding Crawford's reputation for dishonesty. They called four witnesses from Las Colinas to testify that no one would talk about anything private in a cell because the guards might be listening and that a conversation made in a normal tone of voice could not be overheard from an adjoining cell. They called two investigators to testify that they entered adjoining cells at Las Colinas and

could not hear someone speaking in an adjoining cell. The prosecution then called two witnesses to testify that they *could* hear someone speaking in an adjoining cell.

In all, ten witnesses testified in response to Crawford's 19 pages of testimony, consuming 139 pages of the 386 page penalty trial. This would seem to be the definition of the collateral evidence that section 352 was designed to prevent from confusing and misleading the jurors.

This, in combination with the untrustworthiness of Crawford's testimony, compelled the court at least to consider weighing the probative value of Crawford's testimony against its prejudicial impact. The court, however, believed, erroneously, that it did not have that power. It did, and it erred in failing to do so and then rule it inadmissible.

D. ADMISSION OF CRAWFORD'S TESTIMONY VIOLATED APPELLANT DALTON'S FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW.

Admission of Crawford's testimony regarding Dalton's statement of lack of remorse violated standards of California law and denied Dalton her rights to due process of law under both the federal and state constitutions. (U.S. CONST., 8th & 14th Amends.; CAL. CONST., Art. I, §§ 7 and 15.) The erroneous admission of this evidence also denied appellant her state and federal constitutional rights to a fundamentally fair trial and a reliable judgment of death. (U.S. CONST., 6th, 8th & 14th Amends.; CAL. CONST., art. I, §§ 7, 15, and 17; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72; *Walters v. Maass*, *supra*, 45 F.3d at p. 1357.)

Due process can be violated if admission of evidence was "so inflammatory as to prevent a fair trial." (*Duncan v. Henry*, *supra*, 513 U.S. at p. 366 (*per curiam*).) Admission of Crawford's testimony regarding lack

of remorse rendered Dalton's penalty trial fundamentally unfair and violated her right to due process.

Ms. Dalton was also deprived of the state-created protections of Evidence Code sections 210, 350, and 352, and, as a result, Dalton was deprived of her right to reliable fact-finding in a capital case under the Eighth and Fourteenth Amendments. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at pp. 328-333.) The inclusion of the inflammatory and overwhelmingly prejudicial evidence distorted the fact-finding process to such an extent that the resulting verdict could not have possibly possessed the reliability required by the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638, fn. 13; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.)

The due process violation requires that Dalton's death verdict be reversed unless respondent can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279; *Yates v. Evatt*, *supra*, 500 U.S. at p. 403.) Even if introduction of Crawford's testimony is state law error only, the conviction must be reversed because there is a reasonable probability that a more favorable result for Dalton would have been reached in the absence of the admission of this evidence. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

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XIV.

THE COURT ERRED IN ADMITTING EVIDENCE THAT DALTON SPAT AT CODEFENDANT TOMPKINS DURING A PRE-TRIAL PROCEEDING.

A. PROCEEDINGS BELOW.

Defense witness Gwen Coleman, a lead trustee at Las Colinas, testified about Dalton's generosity and compassion. (See 44 RT 4198.) She also testified that Dalton had a sincere religious commitment. (44 RT 4200.) On cross-examination, she acknowledged that she had not heard that Dalton tried to spit on another inmate's window. (44 RT 4201.) The prosecutor then asked whether she had heard that Dalton tried to spit on a co-defendant "in this courtroom" at an earlier hearing. (*Ibid.*) The defense objected that it assumed facts not in evidence, but the court ruled that "have you heard" questions were a proper means of impeaching a character witness. (*Ibid.*) Coleman replied that she had not heard that. (*Ibid.*)

Just prior to rebuttal testimony, defense counsel explained to the court that the prosecutor had informed him that he intended to call the court bailiff to testify that Dalton had spit at Tompkins. (45 RT 4422.) The court ruled that the evidence was admissible as proof of the prosecutor's "have you heard" question of Coleman. (45 RT 4424, 4463.) The defense opposed the testimony, questioning whether the prosecutor could create his own rebuttal evidence by the questions he asked. They also objected to it coming in through an officer of the court. (45 RT 4422-4423, 4463.) The court suggested a stipulation, which the defense found preferable, but the prosecutor would stipulate only if "the details could be worked out." (45 RT 4423-4424.)

After much discussion whether Dalton spat at Tompkins once or

twice, the prosecutor refused to enter into a stipulation and called Tompkins' attorney Athena Shudde who testified that during a pretrial court appearance Dalton and Tompkins were speaking in hushed tones and then Dalton spat in Tompkins' direction. (45 RT 4461-4467.) She did not recall a second spit. (45 RT 4468.)

This testimony was inadmissible, irrelevant, prejudicial and should never have been presented to the jurors.

B. THE COURT ERRED IN PERMITTING THE PROSECUTOR TO PROVE THE TRUTH OF THE IMPEACHING INFORMATION.

Spitting on a codefendant is not a statutory aggravating factor and thus would ordinarily be inadmissible in the prosecution's penalty case-in-chief. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776.) Such evidence may, however, be admissible to impeach testimony of defendant's good character. As this Court said in *People v. Rodriguez* (1986) 42 Cal.3d 730, 791, "[o]nce appellant placed his [or her] general character in issue, the prosecutor was entitled to rebut with evidence or argument suggesting a more balanced picture of his [or her] personality." Such rebuttal evidence need not meet the requirements for admissibility established in *People v. Boyd*, *supra*, 38 Cal.3d 762.

Here, however, the prosecutor sought to introduce such evidence – admissible *only* to impeach – as substantive evidence. The court's ruling allowing him to do so was error.

Where there is an attempt to impeach a witness' opinion testimony, the impeaching party may explore the basis of the witness' opinion by asking "whether the witness has heard of specific misconduct of the defendant inconsistent with the trait of character testified to on direct [examination.] [Citations.]" (*People v. Marsh* (1962) 58 Cal.2d 732, 745.)

"Have you heard" questions are the proper vehicle for impeachment of character opinion testimony because they make it explicit that the point of the questioning is to challenge the witness' basis for her stated opinion.

It is improper to ask a character witness if she knows as a fact that the defendant has performed certain wrongful acts, nevertheless she may be questioned as to whether she has heard rumors or reports of wrongful acts of defendant. This is relevant to the witness' qualifications to speak on the defendant's reputation. (*People v. Caldaralla* (1958) 163 Cal.App.2d 32, 41.) The true inquiry is general talk about the defendant, not the truth of the rumors. (*Michelson v. United States* (1948) 335 U.S. 469.)

While the prosecutor's question of Coleman was arguably acceptable,[151] the *underlying truth* of the rumor or report was not merely irrelevant, it was inadmissable. Thus presentation of a witness to establish the truth of the report or rumor was patently improper.

Moreover, since the court was of the misperception that the truth of spitting at Tompkins was somehow relevant, it failed to instruct the jurors with CALJIC No. 2.42, which provides:

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[151] Both the form and the substance of the question were flawed. In the first place, there was no evidence as to what precipitated the spitting incident or what may have provoked Dalton to act as she did. It may well have *not* reflected upon her character in the manner suggested.

In addition, as the Supreme Court has observed, "Since the whole inquiry, as we have pointed out, is calculated to ascertain the general talk of people about defendant, rather than the witness' own knowledge of him, the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed. (*Michelson v. United States*, 335 U.S. at p. 482.) While the prosecutor asked whether Coleman had heard of the spitting, he asked it in a manner to suggest that it was a fact. (44 RT 4201 [had she heard Dalton "tried to spit on a co-defendant in this courtroom at an earlier hearing?"].)

> Where on cross-examination a witness is asked if he or she has heard of reports of conduct of a defendant inconsistent with the traits of good character to which the witness testified, these questions and the witness' answers to them may be considered only for the purpose of determining the weight to be given to the opinion of the witness or to his or her testimony as to the good reputation or character of the defendant.
>
> These *questions and answers are not evidence that the reports are true and you must not assume from them that the defendant did in fact conduct himself inconsistently with those traits of character*.

(Emphasis added.)

It is true that CALJIC No. 2.42 ordinarily need not be given *sua sponte*. (*People v. White* (1958) 50 Cal.2d 428, 430-431.) Where, however, as here, the court affirmatively permitted the prosecution to prove the underlying truth of what the prosecutor mentioned in his question, a request for an instruction to the contrary would have been futile. The trial court here not merely failed to instruct the jurors that the prosecutor's question about the spitting incident was not evidence, it permitted the prosecutor to affirmatively prove the truth of the incident.

The introduction of Shudde's testimony placed before the jurors an improper aggravating factor in violation of *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776. This evidence and the failure to properly instruct the jurors on how they could consider the spitting incident about which the prosecutor questioned Coleman violated appellant's right to due process under the Fifth and Fourteenth Amendments, her Sixth Amendment right to a trial by jury and her Eighth Amendment right to a reliable penalty determination.

Taken by itself, evidence that appellant spat at her codefendant may

appear minor and of little consequence to the jurors' penalty determination. It cannot, however, be viewed in isolation. It must be seen as part and parcel of the prosecutor's attempt to disparage and sully Ms. Dalton from every angle at every stage of the proceeding. Also, given the lack of evidence regarding what prompted the event, it was unsubstantiated impeachment of Dalton's attempts to turn her life around and an unwarranted attack on her overall character. Respondent cannot "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) This Court must reverse the death judgment.

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XV.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of California's capital sentencing scheme violate the United States Constitution. This Court, however, has consistently rejected cogently phrased arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "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." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

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. Should the court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

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* (1983) 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, Penal Code 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 routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code 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 SECTION 190.3 (a) VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.[152]

Section 190.3 (a) directs the jury to consider in aggravation the "circumstances of the crime." (CALJIC No. 8.85; 9 CT 1939.) 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

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[152] Trial counsel argued that Penal Code section 190.2 (a) was unconstitutional on its face and as applied to Ms. Dalton and objected to the jury being instructed with CALJIC No. 8.85 (a). (9 CT 1737-1741.) The court ruled that "factor [a] evidence is constitutional and is constitutionally admissible in front of the jury." (45 RT 4485.)

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. In this case, the prosecutor introduced as a circumstance of the crime a statement Dalton allegedly made more than six years after the crime. (42 RT 4018; 43 RT 4087-4088.)

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 were enough in themselves, without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].) Appellant is aware that 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. 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. THE USE OF UNADJUDICATED CRIMINAL ACTIVITY AS AGGRAVATION, FACTOR (b), VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS, EQUAL PROTECTION, TRIAL BY JURY AND A RELIABLE PENALTY DETERMINATION.

Trial counsel objected to instructing the jurors with CALJIC No. 8.85 (b). (9 CT 1747-1749.) The instruction on factor (b) aggravation was upheld against an Eighth Amendment vagueness challenge in *Tuilaepa v. California*, *supra*, 512 U.S. at p. 977. The instruction, however, violated the Eighth Amendment, because it permitted the jury to consider unreliable evidence of appellant's alleged unadjudicated criminal conduct. (9 CT 1747.) The trial court denied counsel's motion and instructed the jurors on factor (b). (46 RT 4590.)

The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process under the Fourteenth Amendment, trial by an impartial jury under the Sixth Amendment and a reliable determination of penalty under the Eighth Amendment. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955 [prohibiting use of unadjudicated crimes as aggravating circumstance under state constitution including rights to due process and impartial jury]; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276 [prohibiting use of unadjudicated crimes as aggravating circumstances under Eighth and Fourteenth Amendments].) Admission of the unadjudicated prior criminal activity denied appellant the right to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offense") by an impartial and unanimous jury, effective confrontation of witnesses, and equal protection of the law. An instruction expressly permitting the jury to consider such

evidence in aggravation violates these same constitutional rights.

In addition, because California does not allow unadjudicated offenses to be used in noncapital sentencing, using this evidence in a capital proceeding violated appellant's equal protection rights under the state and federal Constitutions. (*Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.) And because the state applies its law in an irrational manner, using this evidence in a capital sentencing proceeding also violated appellant's state and federal rights to due process of law. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346; U.S. Const., 6th Amend.; Cal. Const., art. I, §§ 7 and 15.)

D. THE DEATH PENALTY STATUTE AND ACCOMPANYING JURY INSTRUCTIONS FAIL TO SET FORTH THE APPROPRIATE BURDEN OF PROOF.

1. Appellant's Death Sentence is Unconstitutional Because It is Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality (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"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (See 9 CT 1911-1942.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, and *Ring v. Arizona* (2002) 530 U.S. 584, 604, now require any fact that is used to support an increased

sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: the jury had to determine whether any mitigating or aggravating factors were present; the jury had to decide whether the aggravating factors outweighed the mitigating factors; and the jury had to decide whether the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 9 CT 1941-1942.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi* and *Blakely* require that each of these findings be made beyond a reasonable doubt. The court failed to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715.)

Appellant is mindful that 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), nor does it require factual findings. (*People v. Griffin* (2004) 33 Cal.4th 536, 595.) The Court has rejected the argument that *Apprendi, Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges the Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, and *Blakely*.

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 previously rejected appellant's 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 this Court reconsider this holding.

2. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided and appellant is therefore constitutionally entitled under the Fourteenth Amendment to the burden of proof provided for by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, appellant's jury should have been instructed that the State had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (9 CT 1939, 1941), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards, in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the exercise is largely moral and normative, and thus unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) This Court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict Was Not Premised on Unanimous Jury Findings.

a. Aggravating Factors.

It violates the Sixth, Eighth, and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or even a majority of the jury, ever found a single 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.) 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.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and application of the *Ring* reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also 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., Pen. Code, § 1158a.) Since capital defendants are entitled to more 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 would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st* (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 and by its irrationality violate both the Due Process and Cruel and Unusual Punishment Clauses of the state and federal Constitutions, as well as the Sixth Amendment's

guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the constitution and federal law.

b. Unadjudicated Criminal Activity.

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (CALJIC No. 8.87; 9 CT 1931.) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) In this case, the prosecution presented evidence regarding unadjudicated criminal activity allegedly committed by appellant Dalton against Pamela Johnson and Cynthia Johnson.[153]

The United States Supreme Court's recent decisions in *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a

[153] The jury was instructed that appellant pled guilty to the robbery of Cynthia Johnson, which occurred after the charged murder of Melanie May. (See 9 CT 1932.)

sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury. Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) She asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused The Penalty Determination To Turn On An Impermissibly Vague And Ambiguous Standard.

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (9 CT 1942.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.)

This Court has found that the use of this phrase does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) This Court should reconsider that opinion.

5. The Instructions Failed To Inform The Jury That The Central Determination Is Whether Death Is The Appropriate Punishment.

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*,

supra, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal constitution.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole.

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) Yet, CALJIC No. 8.88 does not address this proposition, but only informs the jury of the circumstances that permit the rendition of a death verdict. By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death

can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when a verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances.

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina*, *supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that the defendant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland*, *supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments, as well as his corresponding rights under article I, sections 7, 17, and 24 of the California Constitution.

8. The Penalty Jury Should Be Instructed On The Presumption Of Life.

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at

the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const. Amend. 14th; Cal. Const., art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const. Amends. 8th & 14th; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. 14th; Cal. Const., art. I, § 7.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, this state's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required.

E. FAILING TO REQUIRE THAT THE JURY MAKE WRITTEN FINDINGS VIOLATES APPELLANT'S RIGHT TO MEANINGFUL APPELLATE REVIEW.

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific

findings by the jury 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. THE INSTRUCTIONS TO THE JURY ON MITIGATING AND AGGRAVATING FACTORS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS.

1. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see CALJIC No. 8.85, factors (d) and (g); 9 CT 1939-1940) 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* (1978) 438 U.S. 586, 604.) Appellant is aware that the Court has rejected this very argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but urges reconsideration, especially in light of the prosecutor's closing argument urging the jurors to focus on the limited scope of factor (d).[154] He asked the jurors whether there was any evidence to support a conclusion that Dalton committed the offense while under the influence of extreme mental or emotional disturbance. He then answered his own question: "No. No there is not. We are not talking about any extreme emotional or mental

[154] Defense counsel requested that the court delete the word "extreme" from CALJIC No. 8.85, factor (d) (9 CT 1749-1751), but the court refused to do so (45 RT 4487).

disturbance. Maybe we will hear something about moderate or mild, but that well be covered down here at the bottom." (46 CT 4520.) The prosecutor's dismissal of moderate or mild mental disturbance, and his relegation of such moderate or mild mental disturbance to a factor "down here at the bottom," further diminished the mitigating impact of the evidence presented.

2. The Failure to Delete Inapplicable Sentencing Factors.

Defense counsel requested that the trial court delete from CALJIC No. 8.85, inapplicable sentencing factors (e), (f), (g), and (j). (9 CT 1735-1737. See also 9 CT 1742-1754.) The court agreed that "there just is no evidence" regarding several factors, but it concluded that it would be inappropriate to delete them. (45 RT 4482-4483.) The trial court's failure to omit those factors from the jury instructions likely confused the jurors and prevented them from making any reliable determination of the appropriate penalty, in violation of appellant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 36 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

3. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators.

Defense counsel requested that the court instruct the jurors that factors (a), (b) and © of CALJIC No. 8.85 are "the only factors that can be considered by you as aggravating factors." (9 CT 1750.)[155] The court

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[155] Counsel also objected to CALJIC No. 8.85 based on "the failure of the California scheme to identify which factors are aggravating and (continued...)

rejected counsel's request. (45 RT 4487-4488.) No other instructions advised the jurors which of the sentencing factors in CALJIC No. 8.85 were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. This Court has upheld this practice. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 509.) As a matter of state 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*, *supra*, 41 Cal.3d at pp. 288-289). Appellant's jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance.[156] Consequently, the jury was invited to aggravate appellant's sentence based on non-existent or irrational aggravating factors precluding the reliable, individualized, capital sentencing determination required by the Eighth and Fourteenth Amendments. As such, appellant asks the court to reconsider its holding that the court need not instruct the jury that certain sentencing factors are only relevant as mitigators.

G. THE PROHIBITION AGAINST INTER-CASE PROPORTIONALITY REVIEW GUARANTEES ARBITRARY AND DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other

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[155] (...continued)
which are mitigating," resulting in the risk of arbitrary and capricious imposition of the death sentence. (9 CT 1741-1742.)

[156] Counsel also requested that the "whether or not" language be deleted from CALJIC No. 8.85. (9 CT 1750.) The court did not specifically rule on this request, but it did instruct the jurors with the whether or not language of CALJIC No. 8.85. (See 46 RT 4590-4591.)

similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the court to reconsider its failure to require inter-case proportionality review in capital cases.

H. THE CALIFORNIA CAPITAL SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE.

California's death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; California Rules of Court, rule 4.42, subds. (b), (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that the court has previously rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but she asks the court to reconsider.

I. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms.

This court has rejected numerous times the claim that the use of the death penalty at all, or, alternatively, that the regular use of 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 recent 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.

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XVI.

THE TRIAL COURT ERRED BY REFUSING SEVERAL REQUESTED JURY INSTRUCTIONS.

The trial court refused several requested instructions that would have helped to alleviate confusion engendered by the instructions that were given, and would have informed the jury about how to evaluate mitigation in this case. None of these instructions was argumentative, or contained incorrect statements of law, and they were not properly refused on either of those grounds. (See *People v. Sanders* (1995) 11 Cal.4th 475, 560; *People v. Mickey* (1991) 54 Cal.3d 612, 697 (1991).) Moreover, the instructions were offered to pinpoint appellant's theory of the case, rather than specific evidence, and were thus proper. (See *People v. Kraft* (2000) 23 Cal.4th 978, 1068 (2000); *People v. Adrian* (1982) 135 Cal.App.3d 335, 338.) Refusing to deliver the requested instructions was reversible error.

A criminal defendant is entitled upon request to instructions which either relate the particular facts of his case to any legal issue, or pinpoint the crux of his defense. (*People v. Sears* (1970) 2 Cal.3d 180, 190; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 865; see *Penry v. Lynaugh* (1989) 492 U.S. 302.) Accordingly, "in considering instructions to the jury [the judge] shall give no less consideration to those submitted by attorneys for the respective parties than to those contained in the latest edition of . . . CALJIC . . . ." (Cal. Stds. Jud. Admin., § 5.) It is equally well-established that the right to request specially-tailored instructions applies at the penalty phase of a capital trial. (*People v. Davenport*, *supra*, 41 Cal.3d at pp. 281-283.)

The trial court's refusal to give the instructions at issue here deprived appellant of the right recognized in the above-cited cases, as well as his

rights to a fair and reliable penalty determination, as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and the applicable sections of the California Constitution.

A. THE TRIAL COURT ERRED WHEN IT REJECTED APPELLANT'S PROPOSED INSTRUCTION PROPERLY DEFINING THE PENALTY OF LIFE WITHOUT POSSIBILITY OF PAROLE.

Counsel requested that the second paragraph of CALJIC No. 8.84 be supplemented with the following:

> Life without the possibility of parole and death mean just that. You must assume, for purposes of determining the penalty, that either sentence will be carried out. If you sentence Ms. Dalton to life without the possibility of parole, she will spend the balance of her [natural] life in prison with no possibility of parole.

(9 CT 1731.)

The court stated that the jurors had already been informed to assume the penalty they decided upon would be carried out and that the proposed augmentation to CALJIC No. 8.84 was argumentative. It thus refused to give the requested instruction. (45 RT 4477-4478.)

Neither CALJIC No. 8.88 nor any other instruction given in this case informed the jurors that a sentence of life without possibility of parole meant that appellant would never be considered for parole. "Life without possibility of parole" is a technical term in capital sentencing proceedings, and it is commonly misunderstood by jurors. Defense counsel noted that the jury questionnaires revealed that several jurors were confused life without possibility of parole with life sentences. (45 RT 4478.) The failure to define for the jury "life without possibility of parole" thus violated due process by failing to inform the jury accurately of the meaning of the

sentencing options. The failure also resulted in an unfair, capricious and unreliable penalty determination and prevented the jury from giving effect to the mitigating evidence presented at the penalty phase in violation of the Sixth, Eighth and Fourteenth Amendments. (See *Caldwell v. Mississippi*, *supra*, 472 U.S. 320.)[157]

In *Simmons v. South Carolina* (1994) 512 U.S. 154, 168-169, the United States Supreme Court held that where the defendant's future dangerousness is a factor in determining whether a penalty phase jury should sentence a defendant to death or life imprisonment, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible. The plurality relied upon public opinion and juror surveys to support the common sense conclusion that jurors across the country are confused about the meaning of the term "life sentence." (*Id.* at pp. 169-170 and fn.9.) The *Simmons* opinion has been repeatedly reaffirmed by the United States Supreme Court. (See *Shafer v. South Carolina* (2001) 532 U.S. 36; *Kelly v. South Carolina* (2002) 534 U.S. 246.)

This Court has concluded that *Simmons* does not apply in California because, unlike South Carolina, a California penalty jury is specifically instructed that one of the sentencing choices is "life without parole." (*People* v. *Arias*, *supra*, 13 Cal.4th at pp. 172-174.) Empirical evidence, however, establishes widespread confusion about the meaning of such a

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[157] Although this Court has rejected this argument in the past (see, e.g., *People v. Gordon* (1990) 50 Cal.3d 1223,1277; *People v. Thompson* (1988) 45 Cal.3d 86, 130-131 [proposed instruction on the meaning of life without parole found to be inaccurate and not constitutionally required]), the Court should reconsider its decisions based on recent Supreme Court rulings.

sentence. (See Ramon, Bronson & Sonnes-Pond, *Fatal Misconceptions: Convincing Capital Jurors that LWOP Means Forever* (1994) 21 CACJ Forum No.2, at pp. 42-45; Haney, Hurtado & Vega, *Death Penalty Attitudes: The Beliefs of Death Qualified Californians* (1992) 19 CACJ Forum No. 4, at pp. 43, 45; Sacramento Bee, March 29, 1988, at pp. 1, 13; Bowers, *Research on the Death Penalty: Research Note* (1993) 27 Law & Society Rev. 157, 170; *Simmons*, *supra*, 512 U.S. at p. 168, fn. 9.)

The inadequate instruction also violated the principles of *Caldwell v. Mississippi*, *supra*, 472 U.S. 320, as interpreted in *Darden v. Wainwright* (1986) 477 U.S. 168, 183, fn.15, because it "[misled] the jury as to its role in the sentencing process in a way that allow[ed] the jury to feel less responsible than it should for the sentencing decision." Without instructional guidance on the meaning of life without parole, the jurors undoubtedly deliberated under the mistaken, but common misperception, that the choice they were asked to make was between two inherently different alternatives: death and a limited period of incarceration. The effect of this false choice was to reduce, in the minds of the jurors, the gravity and importance of their sentencing responsibility. Because of their probable distrust of "life imprisonment," the decision of the jury was simplified.

For all the foregoing reasons, appellant respectfully requests that the Court reconsider its previous decisions.

B. THE TRIAL COURT ERRED WHEN IT REJECTED APPELLANT'S PROPOSED EXPANSION OF THE FACTOR (k) INSTRUCTION.

Trial counsel requested that the court add the following after it instructed with CALJIC No. 8.85 (k):

> The mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Kerry Lyn Dalton. You should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstance presented as reasons for not imposing the death sentence.

(9 CT 1755.)

Counsel also requested that the court give the following instruction:

> The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take[] into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to specific factors.
>
> A juror may also consider any other circumstance relating to the case or to the defendant as shown by the evidences as reasons for not imposing the death penalty.
>
> A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.
>
> A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

(9 CT 1755-1756.)

The court ruled that the instruction was cumulative and argumentative and refused to give it. (45 RT 4492.) The court erred. This Court has stated that a substantially similar instruction was "consistent with Eighth Amendment guarantees." (*People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23, *cert. denied* (1992) 502 U.S. 1038.) The instruction accurately

informed the jurors that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince them to impose a sentence less than death. (See *Blystone v. Pennsylvania, supra*, 494 U.S. at p. 308; *McClesky v. Kemp* (1987) 481 U.S. 279, 305-306.) It also correctly informs the jurors that they need not be unanimous as to mitigation. (*Mills v. Maryland, supra*, 486 U.S. at p. 374.)

C. THE COURT ERRED WHEN IT REFUSED TO GIVE A PINPOINT INSTRUCTION ON MITIGATION.

Defense counsel requested that the court give the following pinpoint instruction:

> In determining the appropriate penalty for Kerry Lyn Dalton, you may consider as a circumstance in mitigation her potential for rehabilitation and leading a useful and meaningful life while incarcerated.

(9 CT 1756-1757.)

The court ruled that it was inappropriate to give a pinpoint instruction "highlighting" Dalton's potential for rehabilitation. (45 RT 4493-4494.)

All non-trivial aspects of a defendant's character or circumstances of the crime constitute relevant mitigating evidence. (*Tennard v. Dretke* (2004) 542 U.S. 274, 284-286.) The instruction accurately informed the jurors that mitigation is not limited to the enumerated factors but includes any mitigating information that may convince them to impose a sentence less than death. (See *Blystone v. Pennsylvania, supra*, 494 U.S. at p. 308; *McCleskey v. Kemp, supra*, 481 U.S. at pp. 305-306.)

The court's rejection of the instruction denied appellant her Eighth and Fourteenth Amendment rights to a fair, non-arbitrary and reliable

sentencing determination, to have the jury consider all mitigating circumstances (*see e.g.*, *Skipper v. South Carolina* (1986) 476 U.S. 1, 4; *Lockett v. Ohio*, *supra*, 438 U.S. at p. 604) and make an individualized determination whether she should be executed, under all the circumstances. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.)

D. THE TRIAL COURT ERRED WHEN IT REJECTED APPELLANT'S PROPOSED EXPANSION OF CALJIC NO. 8.88.

Counsel requested that paragraph two of CALJIC No. 8.88 be expanded to include the following:

> You may recommend a life sentence without finding the existence of an alleged statutory mitigating circumstance and even should you find beyond a reasonable doubt the existence of an alleged statutory aggravating circumstance. In other words, you may, in your good judgment, recommend a life sentence for any reason at all that you see fit to consider.

(9 CT 1758-1759.)[158]

As even the trial court recognized (45 RT 4496), the proposed instruction is an accurate statement of law. "The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death." (*People v. Duncan* (1991) 53 Cal.3d 955, 979.) The court nevertheless concluded that the proposed instructions were argumentative and covered by other instructions. (45 RT 4496.) In fact, the standard instructions do not make it

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[158] Counsel also offered the following alternative:
However, it is not essential to a decision to impose a sentence of life imprisonment without possibility of parole that you find mitigating circumstances. You may spare the life of Kerry Lyn Dalton for any reason you deem appropriate and satisfactory.
(9 CT 1759.)

clear that the jurors may choose a life sentence in the absence of mitigation. To the contrary, the language of CALJIC No. 8.88 implicitly instructed the jurors that if they found the aggravating evidence "so substantial in comparison with the mitigating circumstances," death was the permissible and proper verdict. That is, if aggravation was found to outweigh mitigation, a death sentence was compelled.

Since the jurors were never instructed that it was unnecessary for them to find mitigation in order to impose a life sentence instead of death sentence, they were likely unaware that they had the discretion to impose a sentence of life without possibility of parole even if they concluded that the circumstances in aggravation outweighed those in mitigation – and even if they found no mitigation whatever. As framed, then, the CALJIC No. 8.88 had the effect of improperly directing a verdict should the jury find mitigation outweighed by aggravation. (See *People v. Peak* (1944) 66 Cal.App.2d 894, 909, disapproved on other grounds in *People v. Carmen* (1951) 36 Cal.2d 768, 776.)

The defect in the instruction deprived appellant of an important procedural protection that California law affords noncapital defendants, thus depriving her of due process of law (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346), and rendered the resulting verdict constitutionally unreliable in violation of the Eighth and Fourteenth Amendments to the United States Constitution (*Furman v. Georgia*, *supra*, 408 U.S. 238).

E. THE TRIAL COURT ERRED WHEN IT REJECTED APPELLANT'S PROPOSED MERCY AND SYMPATHY INSTRUCTIONS.

Counsel requested that the court give the following instruction:

In determining whether to sentence Kerry Lyn Dalton to life

> imprisonment without the possibility of parole or to death, you may decide to exercise mercy on behalf of Ms. Dalton.

(9 CT 1759.)

Counsel also requested an instruction that sympathy or compassion is, by itself, sufficient for the jury to reject death and return a verdict of life without possibility of parole. (9 CT 1761-1762.)

The court ruled that the mercy instruction was inappropriate. (45 RT 4496.) It ruled that sympathy was an appropriate consideration, but that additional instruction was not needed. (45 RT 4496-4497.) In fact, the United States Supreme Court "has shown that mercy has its proper place in capital sentencing requiring 'individual consideration by capital juries' and 'full play for mitigating circumstances.' [Citation.]" (*Nelson v. Nagle* (11th Cir. 1993) 995 F.2d 1549, 1557.) In addition, the general factor (k) instructions given at appellant's trial did not suffice to inform the jurors they had the power to return a verdict of life without the possibility of parole based solely on considerations of sympathy or compassion. Those instructions merely informed the jurors they shall "consider" any "sympathetic. . . aspect[] of [appellant's] character or record," (46 RT 4591) but did not tell them that any feelings of sympathy engendered by those aspects of appellant's character were, in and of themselves, a sufficient basis for rejecting a death sentence.

Appellant recognizes that this Court has ruled that the requested instructions need not be given (see, e.g., *People v. Andrews* (1989) 49 Cal.3d 200, 227-228; *People v. Nicolaus* (1991) 54 Cal.3d 551, 588), but respectfully urges the Court to reconsider its previous decisions.

XVII.

CUMULATIVE GUILT AND PENALTY PHASE ERRORS REQUIRE REVERSAL OF THE GUILT JUDGMENT AND PENALTY DETERMINATION.

In some cases, although no single error examined in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may still prejudice a defendant. (See *Cooper v. Fitzharris* (9th Cir. 1978) 586 F.2d 1325, 1333 (en banc), *cert. denied* (1979) 440 U.S. 974 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 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.) Accordingly, in this case, all of the guilt phase errors must be considered together in order to determine if appellant received a fair guilt trial.

Appellant has argued that a number of serious constitutional errors occurred during the guilt phase of trial and that each of these errors, alone, was sufficiently prejudicial to warrant reversal of appellant's guilt judgment. It is in consideration of the cumulative effect of the errors, however, that the true measure of harm to appellant can be found. Introduction of McNeely's testimony, Dr. Blackbourne's testimony, Brakewood's testimony, Baker's videotaped interview and argument regarding codefendant Baker's guilty plea, were each, individually, serious error. The combination of these errors, however, was greater than the sum

of its parts and resulted in egregious error mandating reversal – especially when considered in light of the erroneous rulings restricting impeachment and incomplete and inaccurate jury instructions.[159]

The death judgment rendered in this case must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of trial. (See *People v. Hayes*, *supra*, 52 Cal.3d at p. 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) This Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact during penalty trial. (*People v. Hamilton*, *supra*, 60 Cal.2d at 136-137; see also *People v. Brown*, *supra*, 46 Cal.3d at p. 466 [state law error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].) Error of a federal constitutional nature requires an even stricter standard of review. *Yates v. Evatt*, *supra*, 500 U.S. at pp. 402-405; *Chapman v.*

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[159] Furthermore, a cumulative analysis must also include an inquiry into errors which prompted a curative admonition or other limiting instruction from the court. The curative effect of any instruction is uncertain and lingering prejudice can remain even after the most detailed and forceful admonition. Thus, this Court should also,

> consider errors and instances of misconduct which we earlier held were adequately cured by the 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.)

In particular, then, this Court must consider Fedor's outburst accusing Dalton of molesting her children.

California, *supra*, 386 U.S. at p. 24.) Moreover, when errors of federal constitutional magnitude combine with non-constitutional errors, all errors should be reviewed under a *Chapman* standard. (*People v. Williams* (1971) 22 Cal.App.3d 34, 58-59.)

In this case, appellant has shown dozens of errors in the guilt and penalty phases. Even if this Court were to determine that no single penalty error, by itself, was prejudicial, the cumulative effect of these errors sufficiently undermines the confidence in the integrity of the penalty phase proceedings so that reversal is required. There can be no doubt that Kerry Lyn Dalton was denied the fair trial and due process of law to which she is entitled before the State can claim the right to take her life. Reversal is mandated because respondent cannot demonstrate that the errors individually or collectively had no effect on the penalty verdict. (*Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi*, *supra*, 472 U.S. at p. 341; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399.)

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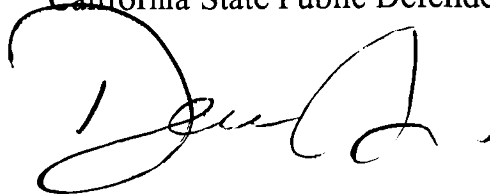
CONCLUSION.

For the reasons set forth above, the judgment of conviction entered against appellant Kerry Lyn Dalton for the crimes of conspiracy to commit murder and murder in the first degree, the true finding of the lying-in-wait and torture special circumstances, and the judgment of death entered in this case, should be reversed.

DATED: December 19, 2006.

Respectfully submitted,

MICHAEL J. HERSEK
California State Public Defender



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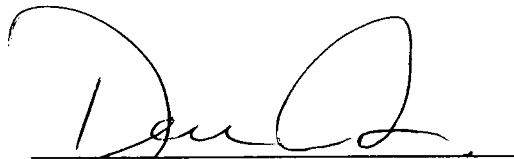
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2)

I, Denise Anton, am the Senior Deputy State Public Defender assigned to represent appellant KERRY LYN DALTON in this Appellant's Opening Brief. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 107,714 words in length.



DENISE ANTON
Attorney for Appellant

DECLARATION OF SERVICE

Re: PEOPLE v. KERRY LYN DALTON

No. CR-135002;
CSC No. S046848

I, **ROSEMARY MENDOZA**, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that on December 19, 2006, I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

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

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Each said envelope was then, on December19, 2006, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

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

Executed on DECEMBER 19, 2006, at San Francisco, California.

DECLARANT