IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, vs. WILLIAM LESTER SUFF, Defendant and Appellant.	Crim. S049741 Riverside County Superior Court No. CR 44010 Automatic Appeal/ Death Penalty

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of Death
of the Superior Court of the County of Riverside

Honorable W. Charles Morgan, Judge

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APPELLANT'S OPENING BRIEF

INTRODUCTION AND SUMMARY OF ARGUMENT

From late 1986 through early 1992, and thereafter, Riverside County was plagued by a "reign of terror." Lake Elsinore and Riverside prostitutes were dying with increasing frequency and the "specter of a serial killer running amok" had residents of both cities in a general state of panic. (7 RT 1342-1344.) The nation's focus on the area permanently changed the community. People who had come to the Inland Empire to escape these kinds of urban problems now wondered whether it really was a safe place to live. A vote to raise taxes to double the number of sheriff's deputies was attributed in large part to the serial killer. (7 RT 1366-1368.) In early 1991, a task force was formed to apprehend the serial killer. (See, e.g., 23 RT 4374, 4496-4497; 30 RT 6030, 6160; 33 RT 6891-6892.) The task force

believed their suspect was responsible for the deaths of 19 prostitutes. (3 CT 804; 3 RT 432; 4 RT 607, 623-624.) By late 1991 the killings were a hot topic. There was "kind of a buzz about it everywhere." (32 RT 6469.)

On January 9, 1992, after an unreasonable, fortuitous traffic stop (4 RT 488-513, 533-541, 554-558; 27 RT 5498-5504; 28 RT 5507-5547), appellant was arrested and questioned about the murders. (27 RT 5483-5489, 5495; 28 RT 5532-5537, 5545-5546, 5553-5605, 5618-5651; 37 RT 7968-7980.) The ensuing "flood of publicity" (7 RT 1331) made this "the most sensational multi-victim case in Riverside County history." (5 CT 1202.) Coverage of the case included over 250 articles, front page pictures, feature stories, in-depth analysis, editorials, letters to the editors, and photographs of 19 prostitutes whose deaths were attributed to appellant, the alleged serial killer. (5 CT 1208; 7 RT 1321, 1326-1332.) Appellant was labeled a "new anti-Christ" (7 RT 1358), a "demon in the legions of tormentors of our mind" (7 RT 1359), and worse. Innumerable references to inadmissible evidence were published. Many articles, for example, mis-reported that he had confessed to the crimes (7 RT 1344-1345), and many described in gruesome detail a previous Texas murder conviction for "beating his infant daughter to death" as well as the fact that he had served only 10 years of the 74-year sentence imposed by the Texas courts for the crime before being paroled to Riverside. (7 RT 1345-1350.) Many articles also featured psychologists describing the "serial killer profile" and how clear it was that appellant was, in fact, a serial killer. (7 RT 1351-1353.)

Appellant was charged with 14 of the 19 murders the task force investigated. (1 CT 1-14.) One of those charges was subsequently dismissed. (5 CT 1347; 8 RT 1573.) The evidence was almost entirely circumstantial and the prosecutor's case hinged largely on convincing the

jury that his experts' interpretation of forensic evidence gathered by the task force - hairs, fibers, DNA, shoe and tire impressions, et cetera - was accurate. Appellant's defense was that he did not commit any of the charged crimes. He did not testify. His case consisted largely of probing the inconsistencies in the testimony of prosecution witnesses and the prosecutor's serial killer theory, questioning the reliability of the prosecution experts' conclusions, and arguing that he was entitled to the benefit of conflicting inferences which could be drawn from the circumstantial evidence. Under the circumstances, it was crucial that he be given a fair opportunity to submit the prosecutor's case to a complete and rigorous examination and thereby present his only defense. Unfortunately, his ability to do so was thwarted by the trial judge at every turn.

First, at the prosecutor's request and over appellant's objection, the judge removed appellant's counsel, the Riverside County Public Defender, after 10 months of representation, for a nonexistent conflict of interest. (2 RT 172-175; *post,* at pp. 140-174.) The judge refused to permit the deputy public defender to detail in chambers, outside the prosecutor's presence, the reasons he believed there was no conflict, then refused to consider reasonable alternatives to the public defender's removal and to accept appellant's knowing offer to waive any conflict. (2 RT 82-93, 136, 158-164, 173, 267-270.) Instead, he appointed new, unwanted counsel who had much less time and resources to devote to the case. Appellant believed this had been the prosecutor's goal all along. (3 RT 267-270.) The judge's unwarranted removal of appellant's attorney shattered his confidence in appointed counsel, his faith in the judicial process and, ultimately, his ability to defend against the charges. The court of appeal subsequently condemned this judge's improper practice of automatically (or virtually

automatically) disqualifying the public defender for conflict of interest, as he did here. (*Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566, 1569, 1581; *post*, at pp. 147-150.) Unfortunately, the decision was not in time for appellant to salvage his relationship with the attorney he trusted.

Citing the unprecedented media frenzy surrounding the case, appellant's new attorneys moved for a change of venue. (5 CT 1199-1215; *post*, at pp. 175-193.) A public opinion survey commissioned by a noted venue expert showed that nearly 75% of the community was aware of the case and, of those who recognized the case, 67% believed appellant was guilty. (7 RT 1391-1398.) The survey showed the highest support for the death penalty the expert had ever seen. (7 RT 1398-1402.) In his opinion, this was a "monster case" both in terms of the extent of publicity and in the way appellant was characterized. (7 RT 1373.) Only three cases in which he had been involved, none of which were comparable, had generated more publicity. (7 RT 1332-1334.) He was concerned that the reporting, while essentially accurate, tended to be so prejudicial that it created a climate where the presumption of innocence changed to a presumption of guilt. (7 RT 1340-1341.) He believed that appellant could not receive a fair trial in Riverside County. (7 RT 1433.)

The judge refused to move the trial because, "based upon the questionnaires [and] my personal questioning, . . . you got - in fact, a huge percentage [of the jury] that know nothing" about the case. (5 CT 1317-1318; 7 RT 1559-1562; 19 RT 3603-3607.) But this simply was not true. Only 25% (five of 20) of the jurors and alternate jurors had no knowledge of the case. (3 Supp. CT 471, 666, 744; 5 Supp. CT 859, 1093.) Over two-thirds of the jury admitted that they had been exposed to the extensive, prejudicial, pretrial publicity. (2 Supp. CT 354, 432; 3 Supp. CT 540, 549,

588, 705; 4 Supp. CT 782, 820, 898, 937, 976; 5 Supp. CT 1015, 1054; 15 RT 2882-2884.) Moreover, many prospective jurors inaccurately believed that the serial prostitute killings stopped after appellant's arrest and incarceration, and that appellant must, therefore, be guilty. (See, e.g., 15 Supp. CT 3823; 15 RT 2854-2859.) Nonetheless, the judge made no effort to determine the extent to which prospective jurors had been exposed to publicity about the case, the nature of the publicity to which they had been exposed, and whether it was realistic to expect jurors to disregard repeated pretrial exposures to extremely prejudicial, inadmissible evidence. Under the circumstances, particularly in view of the nature and extent of the pretrial publicity and the jurors' awareness of the case, no jury could have given the charges against appellant the impartial, dispassionate consideration the Constitution demands.

Appellant's unwanted counsel also sought to suppress evidence obtained as a result of his detention and arrest. (3 CT 774-790; 4 CT 840-854; *post*, at pp. 194-233.) Appellant was detained and arrested by a motorcycle officer on January 9, 1992, a night when police were attempting to capture the serial killer by "contacting" everyone they believed to be involved in "any type of activity that appeared to be prostitution-related." (28 RT 5549-5571, 5606-5607.) The officer had seen a bulletin and sketch which described the serial killer suspect as a middle-aged, white male driving a two-tone, medium-gray over blue, Chevy Astro van. (4 RT 500-503, 533, 554; 27 RT 5498-5503; 28 RT 5517-5518.) Around 9:30 p.m., as he patrolled University Avenue, a high-prostitution area, he saw what he believed was prostitution-type activity. (4 RT 488-489.) A van made a U-turn and came to a stop in a dirt parking lot adjacent to a liquor store. (4 RT 490-497, 537-538; 27 RT 5503-5504; 28 RT 5507-5514, 5539-5541.) A

woman appeared to be approaching the van, but saw the officer when she was about five feet from the driver's window and turned and walked away. (4 RT 497-500, 536-537, 556-558; 28 RT 5514-5515, 5521-5523, 5541-5542.) Although the officer could not see into the van (28 RT 5515, 5521) and could not tell if the driver was either white or male, and notwithstanding the fact that the van was an ascot silver Mitsubishi, not a two-tone, medium-gray over blue Chevy Astro, he "kind of suspected" that the driver might be the serial killer and he decided to follow and stop the van. (4 RT 503-507, 539, 554-555; 28 RT 5522.) Within a half-mile, the driver came to a complete stop at a red traffic light, then made a right turn without signaling. The officer mistakenly believed a turn signal was required and detained the driver for a Vehicle Code violation. (4 RT 507-513, 539-541, 554; 28 RT 5524-5532, 5541-5544.) A subsequent search of the van led to appellant's arrest and virtually all the circumstantial evidence in the case. (28 RT 5535-5537, 5545-5546, 5553-5567-5569, 5571-5583, 5585-5595, 5627-5633; 37 RT 7968-7969.) Without the evidence obtained from this clearly unlawful traffic stop, the state would have had a much different, significantly weaker case - possibly no case at all. The judge ruled that the traffic stop was justified by the officer's suspicions and refused to suppress evidence obtained as its result. (4 CT 836-839, 855-856; 4 RT 481-645, 648-683.)

Appellant's unwanted counsel repeatedly sought discovery of the five uncharged homicides the task force had investigated, and of two similar prostitute murders which occurred after appellant's arrest and incarceration. (3 CT 662-664; 4 CT 1043-1049; *post*, at pp. 234-266.) They asserted that the discovery would help establish appellant's innocence by rebutting the prosecutor's serial killer theory, and would also assist in

developing alternate suspects and defense theories. (3 RT 433-434, 436-437.) The prosecutor claimed that the requested discovery related to ongoing investigations and was privileged. (3 CT 770-773; 4 CT 1060-1070.) The judge refused to examine any of this allegedly privileged material in camera (3 RT 437-439), but ruled nonetheless that it was in fact privileged and that appellant had not shown the murders were sufficiently similar to those with which he was charged to warrant discovery. (4 CT 1085; 3 RT 435, 439-441; 5 RT 1030-1037.)

Appellant's attorneys also sought discovery of serial profile evidence which had been used in the task force's investigation. (2 CT 224-256; 3 CT 660; 4 CT 904-915, 941, 943; 3 RT 424-425; 5 RT 905, 927-928, 931.) They were consistently told that a profile had not been prepared by the FBI or the California Department of Justice and that one did not exist. (4 CT 941; 5 RT 798-799, 905, 925-928.) On the 34th day of the guilt trial, the prosecutor unsuccessfully moved to introduce evidence from an FBI expert about profile work which had been performed by the agency's VICAP unit before appellant's arrest. (8 CT 2088-2121, 2128; 10 CT 2636, 2670; 35 RT 7197-7206; 45 RT 9846, 10007-10016.) The prosecutor's deplorable efforts to hide this information were misconduct which deprived appellant of the opportunity to prepare for trial and to present his defense.

The judge's rulings excluding defense evidence at the guilt trial simply gutted appellant's case. (*Post*, at pp. 267-289.) Appellant sought to introduce evidence of three murders which occurred after his arrest and incarceration. The crimes were eerily similar to those alleged in this case; the victims were drug-using prostitutes who died of stabbing and strangulation and whose bodies had been dumped in areas similar to those in this case. A suspect had already been convicted of one of the murders.

The others remained unsolved.[1] (7 CT 1874-1879; 19 RT 3624-3641.) Appellant's counsel asked for permission to tell the jury in his opening statement and, also, to present limited evidence of the fact that the pattern of serial killings alleged by the prosecutor had not stopped, as many of the prospective jurors believed. (7 CT 1876-1877; 19 RT 3624-3626, 3638-3639.) He argued that evidence of subsequent prostitute murders which fit the serial pattern alleged by the prosecutor tended to disprove one of the prosecutor's theories - that appellant was guilty because he was the serial killer responsible for all the charged murders. (19 RT 3634-3635.) He did not seek to have the jury infer that a specific third party was responsible for the charged crimes. Instead, he sought to introduce evidence from which an entirely different inference could be drawn - that appellant was innocent because the prosecutor's theory of guilt could not possibly be true. These facts were capable of raising a reasonable doubt and were therefore relevant and admissible. More importantly, they were crucial to appellant's defense. Nonetheless, the judge determined that appellant had not shown how the subsequent murders had any relevance to this case and excluded the evidence. (7 CT 1893, 1939; 19 RT 3636-3637, 3660-3662.)

The judge also excluded evidence that, before testifying in this case, Detective Keers had been arrested, indicted, and terminated by the police department for conduct involving moral turpitude. (8 CT 1884, 1982-1984, 1988-1989, 1995; 25 RT 4814-4815, 4824-4827, 4830-4832; 26 RT 4977-4981.) In the jurors' eyes, Detective Keers symbolized the awesome power of the state in this case. She headed the task force which had been formed

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[1] Appellant could not provide more particularized information about the murders because the judge had refused to order discovery. (5 RT 1030-1037.)

by her employer to capture the serial killer (4 RT 607, 623-624), and she represented that law enforcement agency in its effort to forfeit appellant's life. That effort depended largely on the jury crediting the work of Keers and the task force and their conclusion that appellant was the serial killer responsible for the charged murders. Throughout the trial, Keers was portrayed as an experienced, trustworthy, public servant who was in good standing with her employer. (See, e.g., 26 RT 5043-5044.) The true facts, however, were markedly different. After her arrest and indictment for what the prosecutor described as an "attempted receiving of stolen property violation," the police department had so little confidence in her trustworthiness that it fired her notwithstanding the risk of damaging her credibility in this major case. In assessing Keers's credibility, the jury was entitled to know these facts. Hiding the truth clothed both her testimony and the state's case with an inappropriate, entirely false aura of veracity to which they were not entitled.

Finally, the judge erroneously admitted evidence of damaging admissions. (*Post*, at pp. 290-307.) After his arrest, appellant was taken to the Riverside Police Department where he was interrogated by Detective Keers on three separate occasions over the next 20 hours. (31 RT 6179-6181, 6183, 6200-6201.) The third and final interrogation began at 2:50 p.m. on January 10, 1992. During this session, Keers obtained admissions that appellant had been at the Casares crime scene and saw her body and left his shoe prints there. (37 RT 7971-7974.) Appellant moved to exclude evidence of these post-arrest statements, alleging that they were involuntary and obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436, 467, 479. (8 CT 2010-2021.) The judge ruled that appellant had invoked his right to an attorney during the third interrogation session, but

only after he made the above-referenced statements. (8 CT 2075-2076; 32 RT 6548-6549.) The judge erred in determining that appellant's *Miranda* invocation occurred during the third interrogation session. Appellant told Detective Keers at the outset of the second interrogation session, "I want to know if I'm being charged with this, then I think I need a lawyer." (31 RT 6191, 6207-6208, 6218-6219.) This statement was a clear articulation of his desire to speak to counsel at that time. It should have been understood as such by Detective Keers, and questioning should have ceased at that point, before he made any statements about Casares. The judge should have determined that appellant invoked his Miranda rights during the second interrogation session and any statements he made thereafter should have been excluded. Admission of the evidence was extremely prejudicial. The statements were the only evidence in this case that appellant acknowledged any connection to any of the charged murders. Words illegally obtained from his own mouth improperly bolstered the prosecutor's largely-circumstantial case. Admitting this evidence while excluding evidence that the pattern of alleged serial killings had not stopped with appellant's arrest and that the lead task force Detective had been arrested, indicted, and fired for misconduct involving moral turpitude deprived appellant of a fair trial.

Appellant's death sentence was rendered unreliable by a penalty trial which degenerated into a side-show featuring extensive, highly emotional, and extremely prejudicial victim impact testimony highlighting family members' grief and sorrow. (*Post*, at pp. 311-350.) The judge arbitrarily permitted the prosecutor to call three impact witnesses per victim. (42 RT 9130, 9267.) Their testimony consumed nearly half of the penalty phase case-in-chief. (43 RT 9364-9394, 9399-9422, 9424-9437, 9439-9452, 9456-9472, 9475-9497, 9501-9528; 44 RT 9565-9576.) Three witnesses

broke down and cried on the stand. One became so emotional she could not continue. (43 RT 9369, 9394, 9518-9519.) Another had to be admonished out of the jury's presence about an emotional, accusatory outburst at appellant. The seasoned judge described the proceedings as difficult. Appellant's counsel believed they were heart-wrenching. (43 RT 9454.)

Witnesses were permitted to testify about respiratory infections, brain damage, cancer, and heart conditions family members suffered both before and after the crime; about a sibling's subsequent rape and a sibling's death in a car accident; and about why other family members were unable to come to court and testify. (43 RT 9419, 9470, 9485, 9502-9504, 9570-9571.) The jury was shown a large photoboard containing pictures of the victims, at least one of which had been taken as many as five years before the victim's death. (37 RT 7860-7861, 7981-7985, 7982-7984; *post*, at pp. 308-310.) The jury saw photographs of one victim's children at her grave and love notes they had written to her. (43 RT 9436-9438) It heard a portion of a ten-page story written by her 11-year-old niece about her aunt's life from "the beginning to the end." (43 RT 9457-9458) One witness showed the jury a cartoon her sister had sent her showing the love between a mother and child. (43 RT 9413.) She also read a religious poem her sister had written months before her death. (43 RT 9468-9469.) Another witness showed the jury two drawings by the victim's son. One depicted his mother as an angel; the other was of God crying tears. (43 RT 9405-9407, 9410-9411.)

Much of this testimony invited an irrational, purely subjective response, one based on emotion rather than reason, and diverted the jury's attention from its proper role of rationally weighing mitigating and aggravating circumstances. The prosecutor did not fail to capitalize on the

overly-emotional nature of the testimony. In his closing argument, just before urging the jury to return a death verdict, he emphasized the impact of appellant's acts on these witnesses and gave an extended recapitulation of their testimony. He concluded by arguing that appellant is "no longer a member of the human race" and that the jury "must kill it." (46 RT 10294-10300.) The judge's failure to place any meaningful limits on the extent and nature of this victim impact testimony rendered the jury's penalty determination unreliable.

Individually, the trial court's errors require reversal of the judgment of conviction and sentence in this case in their own right. Collectively, they deprived appellant of his rights to present his only defense and a fair trial and they rendered the sentence of death imposed by the jury unreliable. Appellant respectfully submits that the errors described herein deprived him of his right against unreasonable searches and seizures and his rights to counsel, to present defense evidence, to a fair trial, to due process, and to a reliable penalty determination in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I, sections 7, 13, 15, 16, and 17 of the California Constitution. For the reasons set forth below, the violations require reversal of the judgment of conviction, the special circumstance findings, and the death verdict in this case.

* * * * *

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death, and it is automatic. (Cal. Pen. Code, § 1239(b);[2] rule 13, Cal. Rules of Court.)

* * * * *

STATEMENT OF THE CASE

In a third amended indictment filed in the Riverside County Superior Court on March 22, 1995, appellant WILLIAM LESTER SUFF was charged with 13 counts of murder in violation of Penal Code section 187 (Counts 1 through 13) and one count of attempted murder in violation of Penal Code sections 664/187 (Count 14),[3] as follows:

Count 1: Kimberly Lyttle, June 28, 1989;

Count 2: Tina Leal, December 13, 1989;

Count 3: Darla Ferguson, January 18, 1990;

Count 4: Carol Miller, February 8, 1990;

Count 5: Cheryl Coker, November 6, 1990;

Count 6: Susan Sternfeld, December 19, 1990;

Count 7: Kathleen Milne, aka Kathleen Puckett, January 19, 1991;

Count 8: Cherie Payseur, April 26, 1991;

Count 9: Sherry Latham, July 4, 1991;

Count 10: Kelly Hammond, August 16, 1991;

Count 11: Catherine McDonald, September 13, 1991;

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[2] Unless otherwise noted, all statutory references are to California Codes.

[3] The original indictment, filed on July 24, 1992, charged appellant with an additional murder, Charlotte Palmer on December 10, 1986. (1 CT 1-14.) That charge was dismissed on February 16, 1995. (5 CT 1347; 8 RT 1573.)

Count 12: Delliah Zamora, aka Delliah Wallace, October 30, 1991;

Count 13: Eleanor Casares, December 23, 1991; and,

Count 14: Rhonda Jetmore, January 10, 1989.

Three special circumstances were alleged: appellant 1) committed multiple murders (Pen. Code § 190.2, subd. (a)(3)); 2) intentionally killed the victims while lying in wait (Pen. Code § 190.2, subd. (a)(15)); and 3) was convicted of the crime of murder in violation of Penal Code section 187 on or about April 11, 1974, in Tarrant County, Texas. (Pen. Code § 190.2, subd. (a)(2).) With respect to Counts 3, 5, 6, 12, and 14, it was also alleged that appellant personally used a dangerous and deadly weapon, a knife, in violation of sections 12022, subdivision (b), and 1192.7, subdivision (c)(23), of the Penal Code. (7 CT 1855-1870, 1873; 19 RT 3547-3548.) Proceedings on the prior-conviction special circumstance were bifurcated from trial of the other charges. (7 CT 1873; 19 RT 3547-3548.)

Jury trial began on February 28, 1995. (6 CT 1408; 9 RT 1657.) On July 19, 1995, the jury returned verdicts of guilt on all counts except count 8 (Cherie Payseur). It fixed the degree of each murder as murder in the first degree and found that the attempted murder was willful, deliberate and premeditated. It found true each of the lying-in-wait special-circumstance allegations, the multiple-murder special-circumstance allegation, and each allegation that appellant personally used a dangerous and deadly weapon. The court declared a mistrial as to count 8. (10 CT 2509-2555; 42 RT 9170-9193.)

Appellant waived his right to a jury trial on the prior-conviction special circumstance. (8 CT 2203; 42 RT 9126-9129.) The trial judge heard the allegation on July 19, 1995, and found it to be true. (9 CT 2556; 42 RT 9195-9201.)

The penalty phase began on July 24, 1995 (42 RT 9220), and the jury retired for deliberations on August 17, 1995. (10 CT 2694; 47 RT 10337.) It reached verdicts that same day fixing the penalty under counts 1 through 7 and 9 through 13 of the third amended indictment as death. (10 CT 2694; 11 CT 2790-2801, 2860; 46 RT 10351-10354.)

On October 26, 1995, the trial judge denied appellant's motions for a new trial and to reduce the penalty to life imprisonment without the possibility of parole. (11 CT 2967; 47 RT 10372-10387.) He imposed 12 death sentences; a consecutive term of life imprisonment for the attempted murder; five consecutive one year enhancements for personal use of a knife; and a restitution fine in the amount of $10,000. Count 8 of the third amended indictment was dismissed in the interests of justice. Appellant was credited with a total of 2,079 days for time served. (11 CT 2913-2916, 2967-2974; 47 RT 10401-10415.)

Notice of automatic appeal was filed on October 26, 1995. (11 CT 2975.)

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STATEMENT OF FACTS

GUILT PHASE

Prosecution Case

A. April 1984: Appellant's Relationship With Bonnie Ashley

In early 1984, appellant moved from Texas to Riverside County. He lived with his mother, Elizabeth Mead, in the Cottonwood Canyon area near Lake Elsinore. Bonnie Ashley also lived near Lake Elsinore, in a mobile home in the Sedco Hills area. Appellant and Ashley met and began dating, and he moved in with her in April 1984. (29 RT 5741-5744; 31 RT 6255-6256.) Appellant was unemployed but soon found work with a computer company in Corona, then with a McDonald's in Lake Elsinore, then with another computer company, Scharton's. He also worked one or two evenings a week and on weekends at John's Service Center on Main Street in Lake Elsinore. (29 RT 5744-5746, 5763-5764.) Ashley was a substitute teacher. In 1986, she began working for a real estate company. She kept real estate documents (pamphlets, brochures, papers, and things of that nature) in her car, a 1985 Toyota Tercel. (29 RT 5747-5749, 5763-5767.) According to Ashley, appellant had a mustache and he wore silver, wire-framed glasses. He did not have an extensive wardrobe. He often wore cowboy boots, and he had a western-style belt buckle with his name on it. He also wore muscle shirts (shirts with no sleeves). He did not wear western-style shirts, but she occasionally saw him wearing western-style clothes after they separated. (29 RT 5753-5756, 5758-5759, 5770.)

B. October 1986: Appellant's Job at the Riverside County Supply Warehouse

In October 1986, appellant began working at Riverside County's

supply warehouse as a stock clerk, preparing supply orders for shipment to other county departments. His normal work hours were 7:00 a.m. to 4:30 p.m. He worked with other stock clerks at packing tables located at the ends of rows of shelves containing supplies. These work stations were assigned on "kind of a rotating basis," but he primarily used and "hung around" the packing table at the end of aisle six. He also ate lunch and took his breaks there. (29 RT 5746, 5790-5792, 5976-5802, 5804-5811, 5813, 5822, 5839-5843, 5872, 5950-5951.)

C. March 1987: Appellant's Apartments, 1410 Morro Way, Lake Elsinore

Ashley and appellant separated in March 1987. He moved to the basement at John's Service Center for about a week, then to a one-bedroom apartment, number 7, in an apartment complex at 1410 Morro Way in Lake Elsinore. On June 28, 1988, he was involved in a motorcycle accident and was hospitalized with head injuries and a broken left leg and right arm. He moved back in with Ashley when he was released because he could not walk up the steps to his second floor apartment. In March 1989, when he recovered, he moved from Ashley's residence to a two-bedroom apartment, number 9, in the same Morro Way complex. (29 RT 5756-5758, 5767-5769, 5772-5773, 5778-5779, 5811-5812, 5815-5820; 31RT 6228-6230.)

D. January 1989: The Assault of Rhonda Jetmore (Count 14)

Rhonda Jetmore began using drugs in 1987. By January 1989 she was using as much cocaine as she could get each day. To support her habit, she worked the main streets of Lake Elsinore as a prostitute. One weekday evening during the first two weeks of January 1989, she was sitting on a bench outside of John's Service Center in Lake Elsinore where she normally

conducted business. She had last used cocaine between 6:00 and 7:00 that evening and was hoping to get a "date" (money exchanged for sexual favors) so she could buy more. It was a very slow night. (20 RT 3816-3822, 3824, 3851, 3872-3873, 3889-3890.) Around 11:00 p.m., a small, two-door, station wagon - possibly tan or cream-colored with a tan or light brown interior - pulled up. She asked the driver if he was looking for a date. He moved a box of papers from the passenger seat to the back of the station wagon and asked her to get in. The papers appeared to be organized in files; Jetmore thought they had something to do with real estate. The man said he was Bob from Sedco Hills. He asked if Jetmore had a room they could go to. She said no, but she knew of a vacant house three or four blocks away where they could go.[4] They agreed on a price of $20 for "straight sex." (20 RT 3819, 3823-3828, 3833-3834, 3883-3884, 3896, 3912.)

The man parked his car in back of the vacant house and Jetmore got out her six-inch, plastic flashlight so they could see. They entered the house through the back door and went to the front bedroom. Jetmore sat down on the bed and asked the man for money. He handed her a one dollar bill and, before she could say anything, grabbed her by the throat with both hands and pushed her down on the bed and began choking her. (20 RT 3828-3829, 3834-3839.) Jetmore believed the man was trying to kill her. She could not move and felt as if she was about to lose consciousness. She

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[4] Jetmore often used the house to conduct business, and she slept there when she had nowhere else to go. It had no electricity and, except for a bed, hardly any furniture. She did not have a key to any of several locks on the front door. She customarily used the unlocked back door so the neighbors would not see her coming and going. (20 RT 3826- 3829.)

managed to break his grip by hitting him in the head with her flashlight, then ran into the living room and started yelling for help. He tackled her and tried to rip her clothes off and rape her, telling her he just wanted to fuck her. She pled with him: "You really don't want to do this to me. Bill, just let me go. I won't tell anybody."[5] She bit his finger so hard that her tooth broke, then got up and ran to the front door and began fumbling with its locks. He grabbed her again, still trying to rip her clothes off and saying he wanted to fuck her. She pled with him not to hurt her. (20 RT 3840-3844, 3891-3893, 3895-3896.)

During the struggle the man lost his glasses. He agreed to let Jetmore go if she would help find them. She scanned the floor with her flashlight and spotted the glasses. When he went to get them, she ran out the front door, into the street, and stopped a car coming in her direction. She knew the men who were in the car and told them what had just happened. The passenger got out and fired two or three shots at her assailant as he got into his car. (20 RT 3844-3848, 3893-3895.) The entire incident lasted an hour at the longest. (20 RT 3898.)

Jetmore was scared and did not contact the authorities to report the assault. Instead, she left Lake Elsinore and went to her mother's house in Perris Valley. Within a week or two she learned that the Riverside County Sheriff's Department was looking for her. She called Investigator Lawrence Nielsen on January 20, 1989,[6] and told him about what had happened at the vacant house. She said it seemed like she had seen the man

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[5] Although the man said his name was Bob, Jetmore noticed that his belt buckle had the name Bill on it. (20 RT 3839, 3892.)

[6] Nielsen wanted to interview Jetmore in connection with another investigation. (20 RT 3908-3909.)

before but could not really place him. He identified himself as Bob, but his silver belt buckle had the name Bill on it, and he seemed to respond when she called him Bill. He was in his mid-30's, 5 feet 10 inches tall, and he weighed 175 to 180 pounds. He had short, reddish-brown hair, a mustache, little sideburns, and a two or three day growth of stubble. He was neat in appearance and wore very thick, round, metal-framed glasses. He was driving a small, newer-model station wagon. She thought she could identify him if she saw him again. (20 RT 3817-3818, 3833-3834, 3841, 3848-3851, 3854, 3875-3880, 3897, 3906-3912.)

E. April 1989: Appellant's Van

On April 14, 1989, appellant bought a new, ascot silver, Mitsubishi van with a gray interior. The standard tires were Yokohama Y382's, a popular tire which is used on many vehicles. (29 RT 5758; 30 RT 6108-6121; 31 RT 6265-6268; 33 RT 6821.) On November 9, 1989, appellant bought two Armstrong Ultra Trac tires at Costco in Riverside. The tires were mounted on the left and right front wheels on a vehicle with the license BILSUF1. (30 RT 6168-6175; 31 RT 6363-6364.) On Memorial Day weekend in 1991 he bought a used front tire for the van at Wayne's Tires in Paso Robles. (31 RT 6345-6346, 6366-6368, 6410.) On December 6, 1991, he bought two Uniroyal XTM tires at Costco in San Bernardino. The tires were mounted on the right front and rear wheels on a silver, 1989, Mitsubishi van with the license BILSUF1. (30 RT 6156-6161, 6163-6168; 31 RT 6360-6363; 33 RT 6823.)

F. June 1989: The Death of Kimberly Lyttle (Count 1)

Kimberly Lyttle was a prostitute and a drug user who worked the Main Street area of Lake Elsinore. Her good friend and former roommate, Janice Farmer, last saw her on June 24 or 25, 1989, at Farmer's apartment.

(21 RT 3963-3964, 3966-3968.) Leann Fults lived with the father of Lyttle's daughter. Lyttle called Fults around 10:00 or 11:00 a.m. on June 26, 1989, and made arrangements to take her daughter to dinner the next day to celebrate Lyttle's birthday. She never showed up. (21 RT 3971-3974.)

On June 28, 1989, Edward Caraza and Alan Stewart were working at a residential construction site in a rural area near Lake Elsinore. They drove to a shady spot about a mile and a half away to have lunch. Stewart got out of the truck to relieve himself but came back right away and told Caraza he had found a body. He showed the body to Caraza and they immediately drove to the closest phone and called the sheriff's department. (21 RT 3976-3981.)

Around 1:00 p.m., Investigator John Davis responded to a call regarding a dead body near Sycamore Canyon Road and Railroad Canyon Road, but was unable to locate Sycamore Canyon Road. Stewart and Caraza met him after they got off work, around 3:00 p.m., and showed him where the body was located, on Lost Road between Cottonwood Canyon and Gafford Street, above an old mobile home housing tract called Sedco Hills. Davis observed the victim, who was subsequently identified as Kimberly Lyttle (21 RT 3973, 4009-4010), lying off of the roadway, face-down in some shrubbery near a tree. She was covered with a blue towel and was dressed in pink shorts, a blue top, dark-colored socks, and open-toed sandals. (21 RT 3979, 3982-3985, 3987-4002, 4005-4008, 4011; 29 RT 5744.) Farmer did not recall Lyttle ever having worn some of the clothing she was wearing when her body was found, particularly the black socks and bluish-gray, western-style shirt with snaps down the front and on the sleeves. (21 RT 3964-3966, 3968-3969; 31 RT 6269-6271.)

Dr. Sara Reddy performed an autopsy on July 1, 1989. Reddy believed Lyttle had died three days earlier of asphyxia due to manual strangulation. She had both benzodiazepine and opiates in her blood at the time of her death. Her hyoid bone was fractured and she had hemorrhages on her hyoid bone and thyroid cartilage. There were antemortem bruises and numerous fingernail marks on her neck. Hemorrhaging underneath her scalp, a little above the forehead area, was consistent with antemortem blunt force trauma. She had three cigarette burns on her body. (27 RT 5367-5391, 5462-5463.)

G. December 1989: Appellant's Apartment, Chestnut Street, Lake Elsinore

Appellant moved from the Morro Way complex to an apartment on Chestnut Street in Lake Elsinore in December 1989. Kristina Seeger stayed with him for about a month and a half during the early part of 1990. Appellant took her in because her brother had thrown her out and she had nowhere to go.[7] (31 RT 6230-6231, 6244-6251, 6323-6324.)

H. December 1989: The Death of Tina Leal (Count 2)

Tina Leal and her children lived in Perris with her parents and her brother, Jesse Leal. On the evening of December 12, 1989, Tina, Jesse, and a man named Scooter smoked rock cocaine at the Leal residence. Tina left with Scooter and returned alone between 6:00 and 7:00 p.m. and smoked more cocaine. Jesse walked her up the street and she just "took off." She was wearing blue pants, a brown trench coat, purple and white socks, and black and white tennis shoes. (21 RT 4038-4047.)

Around 12:30 p.m. on December 13, 1989, Jimmy Going and his

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[7] Seeger and her boyfriend had stayed with appellant before, at another apartment, for about five or six weeks. (31 RT 6247-6251.)

wife were driving on Old Goetz Road, a "discontinued" road in the Lake Elsinore area which was rarely traveled by cars. As they crested a hill, Going's wife told him she had seen a body in the road. He stopped and backed up until he could see the top of a head. At first he thought it was a dummy or a mannequin, but he walked closer and determined it was a dead girl. They drove to the Quail Valley Fire Department, about three or four miles away, to notify authorities. Fire department personnel followed them back to the body. (21 RT 4026-4031.)

Officers began arriving at the scene in the vicinity of New Goetz and Old Goetz Roads around 12:56 p.m. (21 RT 4013-4014, 4033-4035, 4049, 4061-4062; 22 RT 4074-4075.) They found the victim, who was subsequently identified as Tina Leal (21 RT 4021-4022), lying in the road within a quarter mile or so of an illegal dumping area. (21 RT 4014-4023, 4050-4055, 4063; 22 RT 4077, 4085.) Her socks were pulled up over the outside of her pant legs and her arms were inside her T-shirt. She was not wearing panties or a bra. It appeared that her wrists had been bound; each bore two-inch wide marks which appeared to be adhesive residue from tape. She had stab wounds in her upper center chest, a cut around one of her areolas, and a thin ligature mark on her neck. (21 RT 4056-4057; 22 RT 4078-4086.) Short drag marks ended at each of her heels, and there were five tire impressions and four shoe impressions in the area around her body. Jesse Leal identified the blue pants and purple and white socks as the clothing Tina had been wearing the last time he saw her, but he had never seen the Kings Canyon T-shirt. She did not cut the arms off her T-shirts. Nor did she tuck her pants into her socks. (21 RT 4042-4043.)

Dr. Reddy performed an autopsy on December 15, 1989. In her opinion, Leal had died between 24 and 48 hours earlier of asphyxia due to

ligature strangulation, and also of stab wounds to the heart. She had ligature-type abrasions on her neck, wrists, and ankles, and petechial hemorrhaging in her eyes. Her hyoid bone and thyroid cartilage were not fractured, but there were hemorrhages in the back of her esophagus and sternocleidomastoid muscle. Scratch marks on her chin and face and a blackened left eye were consistent with having been hit in the face. There was an antemortem, cutting-type of incised wound to her left breast area. Two of four antemortem stab wounds to her chest penetrated her heart. Reddy believed the responsible instrument had a blade at least three or four inches in length. Leal also had two antemortem lacerations of her vagina caused by blunt force, and an antemortem stab wound which penetrated to her pubic bone. A 95-watt GE Miser light bulb had been inserted into her uterus, probably through her vagina and cervix. Reddy could not say whether it had been inserted before or after death. Leal had ingested a lot of drugs before her death. The toxicology report showed the presence of cocaine, opiates, and methamphetamine in her blood and Reddy found old needle tracks and some crusted, recent punctures on both sides of her neck. (27 RT 5391-5415, 5463, 5470-5471; 30 RT 6039-6045.)

I. January 1990: The Death of Darla Ferguson (Count 3)

Barney Mains lived on Geary Street in the Cottonwood Canyon area of Riverside County. He was like a father figure to a woman named Darla who visited him almost every morning. Mains was concerned when Darla did not come to visit one day in January 1990. His home caretaker drove him around Sun City, but they did not find her. (22 RT 4147-4155.)

Around 8:30 a.m. on January 18, 1990, Elouise Garcia and her son and daughter were driving through Cottonwood Canyon looking for wood when her son said he had seen human legs on the side of the road. Garcia

turned around and went back and spotted the legs in some bushes about 15 to 20 feet off the road. She went straight home to call the police. An officer met her at her house around 9:15 a.m. and followed her to the scene. (22 RT 4091-4092, 4094-4095.) He found the victim, who was subsequently identified as Darla Ferguson (22 RT 4112-4113), about 19 to 20 feet north of Cottonwood Canyon Road, a fairly well-used dirt road, in some heavy brush near an area in which trash and vehicles had been dumped. He walked into the brushy area to within ten feet or so of Ferguson's body and saw that she was covered with a green plastic trash bag which had been secured around her waist by rope or twine. (22 RT 4096-4100, 4103-4105, 4109-4110, 4120.)

Other officers began arriving at the scene around 10:00 or 11:00 a.m. and found Ferguson with her legs "propped up." They observed obvious sores and what appeared to be two or three ligature-type marks on her wrists. Bruising on her neck suggested she might have been strangled. There were no signs that she had been dragged. None of her clothing or personal belongings were found. (22 RT 4103, 4110-4116, 4119-4121, 4124-4125; 23 RT 4234-4235, 4239-4240, 4250, 4252.) A white paint chip from her chin, a hair from her abdomen, and a short, dark-colored hair which was stuck in blood on one of her arms were collected as evidence. (22 RT 4111-4112, 4134-4140; 23 RT 4236-4239, 4251.) Several tire impressions were found. One set with different tread designs was found on the north edge of the roadway, right in line with the body. It appeared as if someone had pulled off the roadway and had deposited Ferguson's body where it was found. Four shoe impressions were located near her body in an area with leaves, branches, and debris on the ground. The officers could not easily tell their direction (i.e., the location of the toe and the heel). (22

RT 4107, 4116-4119, 4121, 4129-4134, 4140-4143; 23 RT 4242-4245, 4247-4249.)

Dr. Reddy performed an autopsy on January 20, 1990. In her opinion, Ferguson had died one or two days earlier of asphyxia due to a combination of manual and ligature strangulation. Reddy observed petechial hemorrhaging in Ferguson's right eye and lips, bands of antemortem hyperemia on her wrist, and a pattern abrasion on her neck. She had fingernail marks on her neck, hemorrhages in her neck muscles and thyroid cartilage, and bruising under both mandibles. Her tongue was protruding and was bitten between her teeth. An antemortem hemorrhage underneath her scalp on the left side of the top of her skull was consistent with a blunt force trauma injury. There were needle tracks on both arms, and morphine was present in her blood at the time of her death. (27 RT 5416-5433, 5464.)

J. February 1990: The Death of Carol Miller (Count 4)

Phyllis Hernandez lived near Riverside's University Avenue in an abandoned house known as the shooting gallery. Addicts used the house to inject drugs and stayed there if they had nowhere else to live. Hernandez spent the afternoon of February 6, 1990, at the shooting gallery with her good friend and former roommate, Carol Miller, whom she knew to be a prostitute and a drug user. Hernandez left to go for a walk around 4:30 p.m. She planned to meet Miller back at the house later that evening and to spend the night at Miller's house. Around 9:00 p.m., she saw Miller on University Avenue getting into a little blue car with a white male. She was not close enough to tell what the man looked like, but she knew he was not a friend of Miller's. Miller never showed up at the shooting gallery as planned. Hernandez recalled that she was wearing jeans and a blouse and had her

purse with her, and that she had on some gold chains, an ankle bracelet, and some hand bracelets. (22 RT 4202-4207.)

On the morning of February 8, 1990, Lloyd Ward and Louie Sanchez were spreading fertilizer at a grapefruit grove near Mount Vernon and Palmyrita Streets in the Highgrove area of Riverside. Around 8:00 a.m. they discovered what they thought might be a dead body in the grove. They walked back to their truck and drove about a half-mile to ranch headquarters to call their boss, Robert Renfro. (RT 4157-4167.) People occasionally dumped trash in the grove, and Renfro thought that someone might have discarded a mannequin. When he went to the grove, he found that it was a dead body. He called the sheriff's department and met a deputy at Mount Vernon and Pigeon Pass Roads around 9:00 a.m. The deputy walked down a row of grapefruit trees to within about 10 to 15 feet of the victim, who was later identified as Carol Lynn Miller (23 RT 4291-4292), and saw that she had what appeared to be some kind of black cloth over her face. (22 RT 4170-4186.)

Other officers began arriving at the scene at approximately 10:10 a.m. They found a black T-shirt partially covering Miller's face. Her lower lip looked like someone had been pushing down and to the rear with the T-shirt. There were ligature marks on her wrists and at least one stab wound to her chest. Several other marks below her left breast, toward her left hip, were still bleeding. It was difficult to determine how many stab wounds there were because of the blood, but it appeared they had been inflicted at the scene. Dirt and abrasions on her right knee and right forearm indicated either that she had been dropped or dragged on her right side or that some sort of force had been used. There were no drag marks at the scene, but that was not unusual given the surface between the trees where her body was

discovered. (22 RT 4190-4191, 4197-4200, 4208-4210, 4212-4213, 4223, 4225-4226; 23 RT 4255, 4268-4270, 4274-4281, 4283-4284, 4289, 4410.) The officers saw numerous tire impressions of varying length and quality representing up to six different types of tires corresponding to more than one vehicle. Several of the impressions had the same characteristics and several appeared to have been made by the same vehicle. 16 of what appeared to be the most recent impressions were documented. Shoe impressions were also found in the immediate area of Miller's body, but the dirt they were in contained tree branches and leaves from the orchard and they were not of good quality. Seven possible partial shoe impressions were documented. (22 RT 4196, 4215-4223, 4226-4227; 23 RT 4258-4268, 4272-4274, 4281-4288.)

Dr. Reddy performed an autopsy on February 9, 1990. She believed Miller had died of stab wounds to the chest 24 to 48 hours before her body was refrigerated. Three of five antemortem stab wounds to her chest penetrated her heart. The responsible instrument had a blade at least three inches long and one-half inch wide. One side of the blade was dull and the other had a cutting edge. Reddy saw no significant hemorrhaging underneath the skin of Miller's neck or in her throat organs and neither her hyoid bone nor her thyroid cartilage were fractured, but she had other signs of asphyxia due to smothering such as antemortem ligature marks around both wrists and petechial hemorrhages in her eyes and lips. An abrasion on her upper lip and a laceration of the frenulum (the tissue attaching the lip to the gum), both antemortem, were consistent with having been struck in the face and with having been smothered. Reddy noted that Miller had numerous, small, antemortem scratch marks on the back of her legs, the back of her right ankle, and the back of her left upper arm. She had old

needle tracks consistent with intravenous drug use on her arms, and she had opiates in her blood at the time of her death. (27 RT 5434-5455, 5464-5465.)

K. March 1990: Appellant's Marriage to Cheryl Lewis

In February 1990, 18-year-old Cheryl Lewis was attending Lake Elsinore High School and working at a Circle K store from 2:00 to 10:00 p.m. Appellant generally dropped by the store every evening because another Circle K employee had asked him to help keep an eye on things there. Cheryl and appellant began dating and she moved into his Chestnut Street apartment at the end of February or beginning of March 1990. A woman named Kristina Seeger was staying there, but she moved out shortly thereafter. Cheryl and appellant married in Las Vegas on March 17, 1990. (31 RT 6245, 6247, 6321-6325, 6329-6332, 6408-6409.)

According to Cheryl, appellant usually left for work at the supply warehouse around 6:30 a.m. and was home by 5:30 or 6:00 p.m. He sometimes worked an hour of overtime, but he was always given a week's notice and Cheryl was able to verify from his paychecks that he had worked overtime. (31 RT 6397-6399, 6417-6418, 6421.) He told Cheryl he worked once or twice a month during the evenings - from after work until 7:00 or 8:00 p.m. and sometimes as late as 11:00 p.m. or midnight - at earthquake presentations in Riverside and Indio. Cheryl never asked to go to one of the earthquake shows with him. (31 RT 6334-6335, 6404, 6413-6414.) Appellant did not drink and he never came home with torn clothing or smelling of perfume. He often went to Kaiser Hospital in Riverside, occasionally late at night, because he had allergies and other ailments. (31 RT 6399-6400, 6416-6417, 6420-6423.) Cheryl recalled that they had no checking account or credit cards during their marriage, and they rarely had a

telephone or cable television. (31 RT 6327-6328, 6374-6375, 6379, 6408.) She also recalled that appellant wore metal-framed glasses, liked subdued colors, and wore western-style clothing and muscle-style T-shirts. He had one pair of black cowboy boots and some slip-on shoes. He did not have any orange construction boots. (31 RT 6342-6344, 6379, 6383-6385, 6418.)

L. October 1990: The Death of Cheryl Coker (Count 5)

Cheryl Coker and her husband, Boyd Coker, lived at the Westward Ho Motel on University Avenue in Riverside. Both were long-time drug users; Cheryl injected a gram of heroin each day while Boyd injected a gram of heroin and a quarter ounce of cocaine. To support their $200 to $300-a-day habit, Cheryl worked University Avenue as a prostitute. Customarily, after she had earned $50 or more, Cheryl would give Boyd the money to buy drugs. They would meet in their motel room and use the drugs, then Cheryl would go back out on the street to earn money for more drugs. Around 8:00 on the evening of October 30, 1990, Cheryl gave Boyd $60 and told him she was going back out on University Avenue to earn more money so they could buy heroin for the following morning. She was wearing black slippers, black jogging pants, and a striped top. She did not have a purse. Boyd went to a place a block away to buy cocaine and returned to their motel room about 20 minutes later. Cheryl never arrived. Boyd tried to find her over the next few days. He did not go to the police, but he talked to people who might have seen her. He recalled that she had been taking her "johns" to an area off Palmyrita Street, near some citrus groves, because vice officers were watching University Avenue. He might have seen her leave earlier that evening with an individual in a silver-blue, Datsun pickup truck. He did not remember telling officers that Cheryl was

afraid of a guy in a silver-blue Datsun pickup truck. (23 RT 4294-4309.)

Roslynn McDonald worked for a company that was moving into a new building in an industrial complex at 779 Palmyrita in Riverside. On the afternoon of November 5 or the morning of November 6, 1990, she placed some wooden pallets in the trash enclosure area behind the building with a forklift. (23 RT 4319-4325.) Louis Messen, a landscape supervisor at the building, arrived at work at approximately 5:45 a.m. on November 6, 1990. He noticed that the door to the trash enclosure area behind the building was slightly more than halfway open. (23 RT 4327-4334.) Later that morning Randolph Claunch was installing a laminating machine in the building, He went to the trash enclosure area looking for wood with which to balance the machine's legs and saw a foot sticking out from underneath some branches. He thought it was a mannequin or a dummy at first, but he removed a branch and took a better look and realized it was a human body. He had a forklift driver confirm his opinion, then went to a neighboring building and called 911. (23 RT 4310-4316.)

Officers began arriving at the scene about 12:10 p.m. They found the victim, who was subsequently identified as Cheryl Coker (23 RT 4340), in the trash enclosure area, covered with vegetation. Her hands were partially mummified and there were maggots and a large amount of blood in her mouth. Her back exhibited vegetation lividity (bruising from blood settling down to the lowest part of the body). There appeared to be a ligature mark around the right side of her neck. Her right breast had been removed. It was found approximately 30 feet behind the trash enclosure area. A fiber was embedded in the skin at the bottom of the wound where the breast had been removed, and a fiber-type material was embedded in part of the injury to the left side of her neck. A used yellow condom that

did not appear to be old was found near her feet. (23 RT 4335-4364, 4370-4376.) No tire impressions were found, but officers observed a half-dozen or so partial shoe impressions in the area where the wood pallets had been. They looked like they had been made in the dirt while it was wet. One was more complete than the others; essentially it was a good quality impression of an entire shoe. (23 RT 4365-4370, 4376-4381; 31 RT 6426-6428.)

Dr. Joseph Choi performed an autopsy on November 8, 1990. He believed Coker had been dead from six to eight days. The cause of her death was ligature strangulation. The ligature had been applied from back to front, probably by a right-handed person. Choi noted needle track scars from the inside of Coker's right elbow to her right wrist, and toxicological reports showed that she had quite a bit of cocaine and morphine in her system at the time of her death. Her body was in a state of moderate decomposition. She had small maggots in her mouth and nose, her fingers were partially mummified, and her body was bloated. Choi could not detect any petechial hemorrhaging due to decomposition, but he believed the reddish-brown color of her eyes probably indicated some hemorrhaging may have occurred. A deep, narrow wound on the front right side of her neck appeared to have been caused by a knife, but Choi concluded it was the result of a thin, very strong ligature. There were four much narrower and thinner linear abrasions on the left side of the back portion of her neck. Coker's hyoid bone and thyroid cartilage were intact, but hemorrhaging underneath the ligature mark indicated her strangulation was antemortem. Fingernail marks on both sides of her neck were consistent with her having tried to grab a ligature which had been placed around her neck. Coker's right breast had been cut off after her death with many relatively sharp, small cuts that appeared to have been made by a medium-size knife. A non-

serrated steak knife with a four to six inch blade could have caused the injury. (26 RT 5123-5165; 27 RT 5465, 5471-5472.)

M. December 1990: The Suffs' Apartment, 210 North Beechwood, Rialto

In September 1990, the Suffs moved from their Chestnut Street apartment to Cheryl's parents' house in Rialto. (31 RT 6325-6326, 6330-6331.) In December 1990, they moved to the Vineyard Apartments in Rialto. They became friends with Rebecca Ross, the leasing consultant there.[8] Appellant dropped by the rental office to see Ross at least once a week, sometimes more often. As time went on she saw him less often, maybe once a month or so. He was very friendly. He wore western-style shirts with buttons and he had a big belt buckle. Ross did not recall seeing him wearing T-shirts with no sleeves or cowboy boots. (29 RT 5904-5905, 5909, 5917-5918; 31 RT 6326.)

N. December 1990: The Death of Susan Sternfeld (Count 6)

Susan Sternfeld worked the University Avenue area of Riverside as a prostitute. Her friend, George Vivian, took her to a court hearing on the morning of December 19, 1990. After court they drove around and visited some friends and injected about $30 worth of heroin and cocaine. (23 RT 4418-4422, 4426-4429.) Sternfeld decided to "turn a trick" to get money to buy more drugs. Vivian dropped her off at the Bank of America on Chicago and University around 2:00 p.m. and went to the Denny's Restaurant parking lot to wait while she walked down University Avenue. He expected the wait to take around 20 minutes, maybe 40 minutes if she got a date. When she had not appeared by 4:00 p.m., he drove up and down

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[8] Ross recalled that the Suffs rented the apartment in August 1990. (29 RT 5904.)

University Avenue several times looking for her. He called her mother later that evening, but she had not seen or heard from her either. (23 RT 4422-4426, 4429-4431, 4434-4436.)

Officer Charles Hall received a "man down with medical aid responding" call around 3:30 p.m. on December 21, 1990. He arrived at the location, an industrial complex in an orange grove area at 1660 Iowa in Riverside, within five minutes. Paramedics who were already at the scene told him they had found the body of a deceased female and had covered her with a sheet. (23 RT 4386-4391.) Other officers began arriving at the scene about 4:50 p.m. They found the victim in a stone trash receptacle enclosure near a loading area at the rear of the complex. No injuries to her neck were visible. No shoe tracks or tire impressions were found and a search of the area failed to turn up any of her clothing or personal items. The officers surmised that her injuries had been inflicted elsewhere and that she probably had been in the trash enclosure for some period of time. (23 RT 4392-4415.) A detective assigned to the vice detail thought he recognized the victim as a prostitute by the name of Susan Sternfeld. (23 RT 4402.) Vivian saw an article in the newspaper a couple of days later about another prostitute's body being found. He called the police department and said he thought he knew who she was. (23 RT 4431-4434.)

Dr. Robert Ditraglia performed an autopsy on December 24, 1990. He believed the cause of Sternfeld's death was either manual or ligature strangulation. He saw petechial hemorrhages in her eyes and three abrasions on the right side of her neck. Her hyoid bone was intact, but the right superior horn of her thyroid cartilage was fractured and there was bleeding in her sternocleidomastoid muscle. There were postmortem abrasions on the front of her right knee, on the outside of her right ankle,

and on her superior buttocks. Ditraglia observed injection sites and needle tracks on Sternfeld's body, and cocaine and morphine were detected in her blood at the time of her death. (26 RT 5175-5213; 27 RT 5257-5261, 5465.)

O. January 1991: The Death of Kathleen Milne, aka Kathleen Puckett (Count 7)

Kathy Puckett lived with her sister, Sylvia Griggs, near Tyler and Arlington in Riverside. Griggs knew that Puckett was a prostitute who worked the University Avenue area of Riverside. She also knew that Puckett had been a heroin addict her entire adult life. She believed that Puckett had begun using heroin heavily once again in December 1990. On January 18, 1991, between 5:00 and 7:00 p.m., Puckett said she was going to see a family friend to make sure she had a ride to Whittier where her daughters were playing soccer early the next morning. She was wearing blue jeans, a blue tank top, a medium blue baseball jacket, tennis shoes, and white, sports-type socks. Griggs never saw her again. (23 RT 4443-4452.)

Around 3:30 p.m. the next day, Tony Volpe and Palmer Hurley dropped Hurley's children off at their father's house in Lake Elsinore. Volpe decided to drink a beer before getting on the freeway to return to Hurley's home in La Mirada. As they slowed to a stop on a dirt road near the Lake Street on-ramp, Hurley spotted a dead body near a bunch of garbage. They went to the sheriff's office in Lake Elsinore, reported what they had seen, and accompanied an officer back to the area. (23 RT 4454-4461.)

Other officers began arriving at the scene at approximately 5:50 p.m. They found the victim, who was subsequently identified as Kathleen Puckett (23 RT 4506), in a mostly-rural area about seven miles north of

downtown Lake Elsinore, near the end of a small box canyon which mainly was used as a dumping area. Puckett was lying approximately 30 feet off a well-traveled dirt road on a large, sun-bleached, weathered and tattered red robe. Her lower back and upper buttocks had abrasions consistent with having been drug on the ground. Officers observed partial shoe impressions around her body. Their quality was poor, possibly because of the dirt they were made in. Several sets of tire tracks were found in a turnaround area near her body. There appeared to be extended drag marks in the general proximity of the tire tracks at the top of the access road and at a few other spots closer to her body. None of Puckett's clothing, personal items, or identification were found. (23 RT 4468-4523.)

Dr. Ditraglia performed an autopsy on January 21, 1991. Puckett had petechial hemorrhages in her eyes and mouth. Her hyoid bone was intact, but the right superior horn of her larynx had been fractured and bleeding in her left sternohyoid muscle was the result of compression to the neck. Ditraglia recovered a white sock with a blue stripe from her oral pharynx. He believed that "both strangulation and this sock jammed in the back of the airway [were] the cause of death." Antemortem abrasions were found on her forehead, right cheek, left knee, and on the back side of her left and right shoulders. Postmortem brush burns on her lower back, superior buttocks, and both heels were consistent with having been drug across the ground. There were needle tracks in the bends of both elbows and on the back of her left-hand, right hand, and right wrist. (26 RT 5213-5236.)

P. The Homicide Task Force

Due to the similarities among the victims and the crimes, a homicide task force was created shortly after Puckett's body was found. (21 RT

4008; 23 RT 4374, 4496-4497; 24 RT 4632, 4662, 4802; 25 RT 4876-4877, 4900, 4909, 4959-4960; 26 RT 5039, 5044, 5059, 5071, 5082, 5086, 5167-5168, 5192-5193; 28 RT 5584, 5639; 29 RT 5895, 5961; 30 RT 6030, 6081, 6148, 6151, 6153, 6160, 6174; 31 RT 6268, 6281, 6424; 32 RT 6467; 33 RT 6828, 6837, 6852, 6891-6892; 35 RT 7396; 38 RT 8251; 39 RT 8321; 40 RT 8784.) The task force, based in Lake Elsinore, was comprised of officers from various stations and agencies in Riverside County. Task force members talked at least every other day so that they were all familiar with the investigation and the information being obtained. (40 RT 8781-8782.) Beginning with the discovery of Sherry Latham's body in July 1991 (*post*, at p. 39), the entire task force responded to each crime scene. (24 RT 4632.)

Q. April 1991: The Death of Cherie Payseur (Count 8)

Cherie Payseur lived with her grandmother, Ellis Peters, on Arlington Avenue in Riverside, about a mile and a half from the Concourse Bowling Alley. Payseur had been deaf since birth, but she could read lips and she could hear sounds with the assistance of the hearing aid she wore. Peters knew that Payseur used drugs. She did not know if Payseur was a prostitute. Around 10:00 p.m. on April 26, 1991, Payseur left the house on foot to go to the Vons store about three or four blocks away and buy something for her sister's birthday party the next morning. She was wearing a pink top (like an angora sweater), gray stonewashed jeans with zippers on the back, and white shoes. She had a little bit of money with her. Peters never saw her again. (24 RT 4555-4558.)

Around midnight that night, Dylan Bourdages and his friends went to the back parking lot area at the Concourse Bowling Alley to get some air. They noticed what appeared to be a mannequin lying in a dirt planter. As

they got closer they realized it was a human body. They panicked and ran to tell security guards. Several people followed them back out to the body. Bourdages noticed that someone had placed a jacket over the body. (24 RT 4530-4538.) Howard Bingham, the bowling alley manager, had been a reserve law enforcement officer for seven to eight years. He recalled that several kids came in shortly after midnight and told him there was a body in the back parking lot. He immediately dialed 911, then went out to make sure they were right. Someone followed him and, before Bingham could stop him, placed a Levi or jean jacket over the body. (24 RT 4539-4553.)

Officer Randy Ryder received a call at 12:34 a.m. concerning a body which had been located in the back parking lot area of the Concourse Bowling Alley. He arrived at the scene about two minutes later. Bingham was in the back parking lot area trying to make sure people did not approach the body. Ryder checked it for a pulse, then began to secure the area. (24 RT 4559-4567.) Other officers began arriving at the scene around 2:05 a.m. They found the victim, who was subsequently identified as Cherie Payseur, in a planter at the inside corner of the building. The area was searched, but none of her clothing was found. Tire marks in the asphalt parking lot were rather uncharacteristic, with no details. There were, however, a number of good-quality shoe impressions. At least eight or nine different types of shoes were documented. Seven footprints in the planter and four more in dirt near the planter were photographed. As the body was being processed, automatic sprinklers came on for a minute or two. Officers scrambled unsuccessfully to find the timer to turn them off, then stepped on the risers and put cups over them so they would not spray water. Payseur's legs, part of her groin area and left arm, and a little bit of the left side of her torso got wet. (24 RT 4567-4616.)

Dr. Ditraglia conducted an autopsy on April 28, 1991. He found it very unlikely that Payseur died of natural causes, but he was unable to determine the cause of her death. He could not say she died from asphyxiation because his internal examination revealed no hemorrhaging or fractures and no evidence of traumatic injury. Petechial hemorrhaging in her mouth and two horizontal, linear abrasions on her neck were consistent with the possibility that she was strangled or suffocated or died from asphyxiation. Also, swelling and bruising around her left eye and a lateral scleral hemorrhage in the white of her left eye were consistent with blunt force trauma to the face, and there were antemortem abrasions on her back, the back of her thighs, and her right knee. Ditraglia observed scabs and bruises consistent with intravenous drug use on Payseur's bilateral forearms and the toxicology report showed the presence of morphine in her system at the time of her death. (26 RT 5237-5246; 27 RT 5250-5257, 5261-5267, 5466.)

R. July 1991: The Death of Sherry Latham (Count 9)

Dean Mack was walking on Grape Street in the Lake Elsinore area around 6:00 a.m. on July 4, 1991, when he saw a woman's naked body in the bushes. He went back to his house and called 911, then returned to the scene with his wife and waited outside his truck. (24 RT 4691-4695.) An officer arrived around 6:27 a.m. Mack showed him where the body was located, approximately 12 feet east of the edge of the roadway. The location did not appear to be an illegal dumping area. (24 RT 4619-4625.)

Other law enforcement officers began arriving at the scene, a frontage road approximately a half-mile from Grape Street, around 7:30 a.m. They observed the unclothed victim lying face down, with no obvious signs of trauma. Detective Robert Creed recognized her as Sherry Latham,

a prostitute who worked the downtown area of Lake Elsinore. There were no signs she had been moved or posed. Her legs and arms had already begun to decompose and, as the day went on and it got hotter and hotter, they literally watched her body decompose. An area search was conducted, but no clothing or items of identification or personal property were found. The officers did not see any drag marks or any indication that the very dry parched brush around Latham's body had been walked on. No shoe impressions were located, but five tire impressions were found on the north shoulder of Grape Street, three within 15 or 20 feet and two more about 60 feet east of Latham's body. (24 RT 4625-4646, 4648-4655, 4657-4659, 4660-4680.)

Dr. Ditraglia conducted an autopsy on July 6, 1991. He believed Latham died of either manual or ligature strangulation. Decomposition made identification of traumatic injuries quite difficult. Her eyes were severely discolored and were undergoing a decomposition process which made it essentially impossible to identify petechial hemorrhages. There was an area of dark red hemorrhaging in her left sternohyoid and sternothyroid muscles, a fracture of the left superior horn of her thyroid cartilage, and hypermobility of her hyoid bone. Ditraglia noted a postmortem puncture of the skin on Latham's left abdomen. The toxicology report showed the presence of morphine, cocaine, and alcohol in her system at the time of her death, though the presence of alcohol was consistent with the degree of her body's decomposition. (27 RT 5267-5279, 5466.)

S. July 1991: The Suff's Daughter, Brigette

Cheryl Suff gave birth to a daughter, Brigette, on July 26 1991. (31 RT 6328-6329, 6331.)

T. August 1991: The Death of Kelly Hammond (Count 10)

Kelly Whitecloud moved to Riverside upon her release from prison on parole in April 1991. She had been a prostitute since 1980. By August 1991 she had a $300-a-day drug habit[9] and was staying in a motel near University Avenue. She had known Kelly Hammond, another prostitute and drug user who was also living in a motel near University Avenue, since 1986 when they were in jail together. (24 RT 4698-4700, 4725-4726.)

On the morning of August 15, 1991, Whitecloud and Hammond were "sick" and needed to use heroin. They bought some heroin but did not have a hypodermic needle and syringe with which to inject it, so they visited a man named Russell, "this dude who lived in a field in a cardboard box," and injected the drugs there. Whitecloud explained that she used the heroin so she could "get well" and get through the day. She used heroin again a couple of hours later. Her last "fix" of the day was between 8:30 and 11:00 p.m. In all, she used heroin "maybe" four times that day. She claimed she was not feeling the effects of the heroin at all. She had also used cocaine that day, the last time by injection in the afternoon. (24 RT 4701-4703, 4726-4728.)

Between 10:00 and 12:00 that night, Whitecloud and Hammond were working as prostitutes on University Avenue. A bluish-gray van with gray carpet and three captains chairs pulled over to the curb where Whitecloud was standing. The driver was about 35 to 40 years old, about five feet ten inches tall, and he weighed about 170 pounds. He had short

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[9] Whitecloud used two grams of heroin and an eighth ounce of cocaine every day. She claimed that heroin and cocaine have reverse reactions on her. While heroin makes most people "nod," she gets "up." Cocaine, on the other hand, makes her go to sleep. (24 RT 4728-4729.)

brown hair, parted on the side, and no facial hair. He wore wire-rimmed glasses with big lenses. Whitecloud saw what appeared to be a Bible on the van's center console. She got in and asked if he wanted a date, and they agreed on a "straight lay" for $20. He agreed to take her to McDonald's because she said she was pregnant and hungry. (24 RT 4703-4704, 4716-4718, 4733-4735.)

The McDonald's manager, Ben Amos, had seen Whitecloud in the restaurant before, and he suspected she was a prostitute. He watched her because he believed she was responsible for plugging up his toilets with broken-up soda cans she used for drugs. That night she was with a nervous white male wearing cowboy boots, a western shirt, and a round, western-style, silver and gold belt buckle. She ordered a hot fudge sundae, but it was not made the way she liked (the nuts were on top of the sundae and she wanted them on the bottom). She "raised a little bit of hell" and asked to talk to the manager. Amos instructed one of his employees to make the sundae the way she wanted. He did not see Whitecloud and the man leave. The entire incident lasted two to three minutes. During that time, his attention was directed at the woman who was screaming and yelling and complaining about the sundae. He looked at the man who was with her about five to ten seconds. (24 RT 4704-4708, 4729-4732; 28 RT 5708-5712, 5720-5721, 5726-5727.)

Whitecloud and the man argued when they returned to the van because he wanted to take her to the orchards. She asked him, "Why do I want to go there when I have my room?" The look on his face suddenly changed and he said he could only pay her $10 because he bought her food and did not have any more money. Whitecloud was upset because there had been no understanding the food would come out of her $20. She told him

she wanted to get out of the van. When he failed to stop, she held the door open with her leg and jumped out. She fell flat on her stomach and ruptured her placenta and went into early labor. The man drove about half a block to the corner and picked up Hammond. Whitecloud yelled at her not to go, that it was not worth it. Hammond looked back at her, smiled, and said she would come back. She never returned. (24 RT 4708-4711, 4731-4733, 4743-4744, 4746-4747, 4749-4750.)

James Tyhurst arrived at his business, a trucking company on Sampson Street in Corona, at approximately 6:45 a.m. on August 16, 1991. As he turned to drive into the office, he noticed what looked like a bundle on the left side of the alleyway. As he got closer he realized it was a woman's body. He went to the office and called the police. (24 RT 4757-4761.) Officer Daniel Leary received a call around 6:46 a.m. regarding a body that had been found in an alleyway near an industrial complex in the 1700 block of Sampson Street. He arrived at the location within about three or four minutes. The fire department arrived about the same time. They located what appeared to be a deceased female in the alleyway, near a brick wall. (24 RT 4762-4767.)

Other officers began arriving at the scene at 7:45 a.m. They found the victim, who was subsequently identified as Kelly Hammond (24 RT 4778-4779), lying on her face up against a cinder block wall. Her nude body had been posed: her right arm was underneath her body; her left arm was bent at the elbow with the palm of the left-hand facing upward; her left leg was drawn up into her chest area; and her right leg was extended outward. There appeared to be a ligature mark on the right side of her neck. It appeared that her body had been dumped because her feet were clean. A search of the area failed to turn up any of her clothing or personal

belongings. No shoe impressions were found. Tire tracks could be seen throughout the length of the alleyway, but no impressions were distinguishable. (24 RT 4768-4805.)

Christine Keers, the lead Riverside Police Department detective assigned to the homicide task force, knew Hammond to be a University Avenue prostitute. She went to University Avenue later that morning to attempt to locate other prostitutes who might have seen Hammond the night before. She contacted Whitecloud, whom she knew from prior contacts, at about 10:00 a.m. Whitecloud was emotional. She had been using drugs and appeared to be coming down quite hard. She told Keers about what had happened the night before. She said the man in the van was in his late 40's, had a medium build, and was wearing a plaid, long-sleeved shirt, faded blue jeans, and orange construction boots. She said he wanted her to go "up near UCR" and that he left her at McDonald's, then drove across the street and made contact with Hammond. (24 RT 4718-4719, 4745; 26 RT 5048-5052, 5064-5073.)

Dr. Ditraglia performed an autopsy on August 17, 1991. He believed Hammond died of strangulation, but listed acute opiate intoxication as a condition contributing to her death. The toxicology report showed the presence of both codeine and a significant level of morphine in her blood at the time of her death, and he noted needle tracks on her body. Ligature-type injuries were observed on her neck and left wrist. She had petechial hemorrhaging in both eyes and, possibly, the right eyelid, and there was bleeding in her tongue and her right, submandibular, salivary gland. Her thyroid cartilage and hyoid bone were intact, but four separate areas of bleeding in her neck were indicative of compression to the neck. She had two antemortem lacerations on the center of her forehead. An area of

bleeding under the scalp corresponded directly to these lacerations. Antemortem abrasions were visible on her right elbow, the back of her left foot, and the lateral aspect of her left ankle. Perimortem or postmortem abrasions were distributed over the right side of her forehead, cheek, chin and nose, and on her knees and the inside of her right ankle. (27 RT 5279-5281, 5284-5309, 5467.)

Around 10:00 a.m. on August 17th, Keers picked Whitecloud up and took her to the police department to work with an artist to produce a composite drawing of the suspect. (24 RT 4720-4721; 26 RT 5050-5051, 5062-5064, 5079-5080.) On August 18th or 19th, she took Whitecloud to the auto center to see if Whitecloud could identify the make of van the man had been driving. She remembered going to Ford and Chevy dealerships, but not a Mitsubishi dealership. Whitecloud identified a blue-gray, Chevy Astro van as most similar to the van the man was driving. (24 RT 4719-4720; 26 RT 5052-5053, 5070-5074, 5628-5629.) Keers prepared and distributed a police bulletin describing the suspect as five feet ten inches tall with a medium build and a slight mustache, and wearing a plaid long-sleeved shirt, faded blue jeans, and orange construction boots. A light mustache was initially drawn in the sketch of the suspect, but was erased because Whitecloud felt it did not look right. (26 RT 5065, 5071-5072, 5606; 28 RT 5628.)

U. September 1991: The Death of Catherine McDonald (Count 11)

Catherine McDonald lived in an apartment on Lou Ella Lane in Riverside with her children, 12-year-old Charlia Howard and her younger brother, Charleston. Catherine's sister, Dorothy McDonald, knew that Catherine worked as a prostitute, usually on University Avenue west of

Chicago. Dorothy sometimes accompanied her. Dorothy also knew that Catherine used cocaine. Around 7:00 or 8:00 p.m. on September 12, 1991, Catherine told Charlia she was going to the store. She was wearing tight black pants, a black shirt, a black jacket, and shoes. She might have had on some rings, a necklace with a cross, and some earrings. Charlia never saw her again. (25 RT 4841-4844, 4846-4848.)

Around 1:30 p.m. the next day, Gregory Lewis was driving near Lake Elsinore on an access road between Summerhill Drive and Greenwald. As he approached the top of a hill, he saw what he thought was a tree root or log, but then realized was a human body. He stopped about 20 feet from the body and attempted to call 911 on his cell phone. He could not get reception, so he backed down the road and called again. He met two squad cars at the In-N-Out Burger on the corner of Railroad Canyon and the freeway and directed officers to the body. The officers walked up the middle of the road to within about 30 feet of the body and decided it was related to the killings that had been going on in the area. (25 RT 4850-4871.)

Other officers began arriving at the scene between 1:30 and 1:45 p.m. They found the victim, who was subsequently identified as Catherine McDonald (25 RT 4904), posed about four feet off the roadway with her feet together, her legs spread apart, and her arms extended outward from her body. There was a large, gaping laceration to the left side of her neck and what appeared to be two puncture wounds to the center of her chest. Her right breast had been removed. An area search was conducted, but none of her clothing or personal property were found. No blood was found at the scene. Shoe impressions were observed in the immediate location of McDonald's body and on the dirt roadway near her body. All had the same

kind of tread pattern. There were also relatively fresh tire impressions in the general area of her body. It was easy to follow them and determine that a vehicle had entered the area and then turned around and continued on towards where her body was found. (25 RT 4872-4906, 4909-4941.)

Dr. Ditraglia performed an autopsy on September 14, 1991. He believed the causes of McDonald's death were multiple sharp force injuries and neck compression. He could not tell whether the neck compression was caused by manual or ligature strangulation. There were petechial hemorrhages on the top half of the white portion of both eyes, and there were abrasions along the right side of her jaw and neck. An antemortem cut wound to the left side of her neck transected her left jugular vein and her left sternocleidomastoid muscle. The wound also cut her trachea, her left common carotid artery, and her thyroid gland. Two of three antemortem stab wounds to her anterior torso penetrated her heart. Ditraglia believed the blade of the knife that inflicted these wounds had to have been two or three inches long. McDonald's right breast had been excised postmortem. It appeared as if it had been removed by something sharp, like a knife, using several circumferential cuts. There was a stab wound and four cut wounds, both antemortem and postmortem, to her external genitalia. (27 RT 5310-5332.)

V. October 1991: Brigette Suff's Hospitalization

Cheryl Suff began studying to become a ticket agent at the International Air Academy in Ontario on September 9, 1991. She attended classes from 6:30 to 10:00 p.m., Monday through Thursday. She either drove appellant's van to and from class or appellant dropped her off and picked her up after class. (31 RT 6332, 6337-6338.) Their daughter, Brigette, became ill and was hospitalized on October 25, 1991. Cheryl had

to drop out of the International Air Academy to care for her. (31 RT 6344-6345, 6414-6415.)

W. October 1991: The Death of Delliah Zamora, aka Delliah Wallace (Count 12)

Deputy Danny Bragdon received a call at approximately 7:30 a.m. on October 30, 1991, regarding a body that had been found near an interchange of the 60 freeway in the area of Granite Hill and Country Village Street. He got to the scene, which was near a Park and Ride lot but was not visible from the freeway, within about a minute. A California Department of Forestry engineer showed him the body and advised that he had tried unsuccessfully to find a pulse. Bragdon walked to within about 15 feet of the body and saw that the victim was wearing cycling shorts, a light T-shirt, and some earrings. She did not have shoes on. Members of the fire department had covered her with a white gauze sheet. The only sign of trauma Bragdon could see was to the front of her neck. He noticed some signs of postmortem lividity in her head, right arm, and feet. (25 RT 4942-4952.)

Other officers began arriving at the scene around 8:15 a.m. It was a clear but extremely windy day. A portion of a tractor-trailer had blown over on the 60 freeway and wind advisories had been issued. They found Delliah Zamora's body about five feet north of the dirt shoulder of the roadway. She was wearing black, bicycle-type shorts and a blouse that was pulled up from her abdomen area. A white blanket was near her head. There was drainage from her mouth, injuries to her upper lip area, and bruising on her neck near her throat. She had some marks on the front of her neck and some scratches on her legs. The left side of her vaginal area appeared to have some sort of indentation that caused bleeding. A brief,

unsuccessful effort to locate and identify tire or shoe impressions was made and the area was searched for clothing, personal items, and evidence that might have been associated with the homicide. Around 10:15 a.m., out of concern that the severe wind conditions would destroy trace evidence, Zamora's body was placed in a body bag and transported to the coroner's office in Riverside for processing. (25 RT 4953-4975.)

Dr. Ditraglia conducted an autopsy on November 1, 1991. He believed Zamora died from either manual or ligature strangulation Her larynx and both the left and right superior horns of her thyroid cartilage were fractured and there was an area of acute hemorrhage inside of her tongue. Seven areas of hemorrhage in her neck were indicative of compressive force. There were a number of antemortem abrasions and "fingernail injuries" on her neck, and there were petechial hemorrhages on both the whites of her eyes and her eyelids. Ditraglia observed needle tracks and the toxicology report showed the presence of cocaine and heroin in her blood at the time of her death, though in levels consistent with what might be characterized as recreational. (27 RT 5333-5346, 5467, 5472.)

X. November 1991: The Suffs' Apartment, 1316 South Meadow Lane, Colton

On November 8, 1991, Rebecca Ross went to work at an apartment complex at 1316 South Meadow Lane in Colton. She lived on the property as a resident manager with her boyfriend, Gary Bell. Appellant helped Ross and Bell move into the apartment. During the move, Bell found a wood-handled knife between the passenger seat and the console of appellant's van. The Suffs moved into an upstairs apartment in the complex, number 224, around the end of November 1991. Ross's friend, Cristen Thompson, began working at the complex on November 23, 1991. She moved into the

complex on December 9, 1991. (29 RT 5890-5891, 5906-5908, 5910, 5914-5915, 5925-5926, 5934-5937, 5943, 5947-5948, 5950-5955; 31 RT 6327-6328, 6409.)

Y. November 1991: The Suff's Brief Separation

On the weekend before Thanksgiving 1991, Cheryl left appellant and went to live with her parents in Paso Robles. Appellant was involved in a traffic accident near Kaiser Hospital in Riverside on December 4, 1991. The accident damaged the right rear portion of his van (30 RT 6087-6097) and left him in great pain. (31 RT 6249-6251, 6360.) He took several days off work and had to get medication for his back. (29 RT 5820; 31 RT 6403-6406.) Cheryl moved back in on the day of the accident and began working at Carl's Jr. in Colton. Her normal shift was from 5:00 p.m. to closing - 12:00 a.m. on weekdays and 1:00 a.m. on weekends, and it sometimes took until 3:00 a.m. to clean up after closing. She either drove their van to and from work or appellant took her to work and came back and left the van. (31 RT 6338-6342, 6387-6389, 6403.)

Z. December 1991: The Death of Eleanor Casares (Count 13)

Eleanor Casares lived in Riverside with her parents and her brother, Phillip Casares. Phillip knew that Eleanor used heroin. He had heard that she also worked as a prostitute. On December 22, 1991, Eleanor left the house around 8:00 p.m. wearing Levi's, a black jacket and, probably, the white L.A. Gear tennis shoes she always wore. Phillip did not recall whether she used drugs before she left. He never saw her again. (26 RT 4984-4991, 5047-5048.) Another brother, Joe Casares, was a "dope fiend" who watched out for many of the prostitutes who worked on University Avenue. Joe knew that Eleanor used drugs and that she was a prostitute.

Eleanor usually worked the streets in the evening, between 8:00 and 11:00 p.m., and then again early in the morning. Joe last saw her between 10:00 and 11:00 p.m. on December 22, 1991, wearing black clothes and walking down Park Street towards University Avenue. (26 RT 4993-4997, 5060-5061.) Eleanor called her sister, Adela Soliz, on December 23, 1991, between 10:00 and 11:00 a.m., and asked Soliz to bring her ten dollars. Soliz said she did not have the time. Eleanor said she was going to find a ride and come pick up the money. She never arrived. (26 RT 4999-5002, 5061.)

Around 1:00 that afternoon, Charles Petty was driving to a citrus grove to set up irrigation water when he saw what he thought was someone sleeping in the groves just west of Jefferson. He backed up and stopped about 10 to 15 feet from the person and took one or two steps before he realized it was a dead body. He called his office and asked that they call the police. (26 RT 5004-5011.) Officer Richard Bradley received a dispatch shortly after 1:00 p.m. regarding a body that had been found in the orange groves off of Victoria Avenue. He met Petty at the scene around 1:20 p.m. They walked into the grove until Bradley could see the body. (26 RT 5012-5017.)

Other officers began arriving at the scene at approximately 1:40 p.m. A black jacket covering the victim's head was removed. Detective Keers recognized her as Eleanor Casares, a prostitute who worked University Avenue. They had become quite friendly during the course of the task force investigation. (26 RT 5043-5046, 5048, 5053-5060.) Casares's body was in full rigor. Her legs were spread apart, her left arm was underneath her body, and her right arm was somewhat extended away from her body. She had a stab wound to the center of her chest and her right breast had been

removed. It was found one row of trees (about 40 feet) south of the body. A search of the area failed to turn up any of Casares's clothing or personal items. Tire and shoe impressions were found in the access road off of Victoria leading to the scene. One of the tire tracks basically stopped or started near Casares's head. The dirt between the body and the access road appeared to have had something dragged through it. Shoe impressions with the same design were found on the access road and in the immediate vicinity of Casares's body. (26 RT 5019-5042, 5080-5121; 30 RT 6123-6124.)

Dr. Ditraglia performed an autopsy on December 24, 1991. He believed Casares died from manual or ligature strangulation. There were many petechial hemorrhages within her eyes, and antemortem abrasions on her neck were consistent with strangulation. The left superior horn of her thyroid cartilage and her hyoid bone had been fractured. An antemortem stab wound in the center of her chest was also fatal. The only question in Ditraglia's mind was whether the strangulation or the stab wound actually killed her. Casares's breast had been cut off in a postmortem, circumferential, cutting process. (27 RT 5346-5362.)

AA. January 1992: Appellant's Arrest and Interrogation

On January 8, 1992, the Riverside Police Department began Operation Apprehension, a concerted effort to catch the individual or individuals responsible for the prostitutes' deaths. The city was divided into three or four sections and a two-man team was assigned to canvas each section. In the words of an officer assigned to the operation, "[i]f you saw any type of activity that appeared to be prostitution-related, then you would stop and talk to the girls as well as the customers." (28 RT 5550.) Each team was given a sketch of a possible suspect and the police bulletin

Detective Keers had prepared indicating the suspect's van was a two-tone, medium-gray over blue, Chevy Astro. (28 RT 5549-5553, 5566-5567, 5569, 5571, 5606-5607.)

Officer Frank Orta patrolled the Eastside area of Riverside on a motorcycle. He knew that an investigation of multiple murders of prostitutes in the Riverside and Lake Elsinore areas was ongoing and that a task force had been formed to investigate the murders. He also knew that Operation Apprehension was working the Eastside area trying to locate the serial killer. He was not part of that operation. He did not recall having seen Detective Keers's August 1991 bulletin, but he was sure that he had and that he had carried it with him. A sketch of the suspect was attached to the bulletin. Orta had also seen it in the newspaper. (27 RT 5498-5503; 28 RT 5517-5518.) Around 9:30 p.m. on January 9, 1992, as he was patrolling University Avenue, Orta saw a grayish van making a U-turn in the dirt parking lot of the Discount Liquor store.[10] The van came to a stop in the parking lot with its headlights on. Orta could not tell if its engine was still running. A woman approached the driver's side of the van from the front of the Discount Liquor store, but saw Orta when she was within about five feet of the van. She stopped, made an about-face, and walked away towards the Discount Liquor store. Orta could not see the driver of the van and could not tell how many people were in it. Nor could he tell if the driver's window was down or if there was any kind of conversation between the woman and the driver. Nonetheless, it appeared to him to be a typical prostitute-client type of contact. (27 RT 5503-5504; 28 RT 5507-5523,

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[10] Orta did not then know, but another officer had seen the van on University Avenue around 11:30 p.m. the previous night and had almost stopped it. (28 RT 5672-5680.)

5539-5542, 5544-5545.)

Orta "kind of suspected" that the driver might be the serial killer the task force was looking for because the van appeared to be similar to the one described in Detective Keers's bulletin. He decided to contact the driver and made a U-turn and "fell in" behind the van as it traveled westbound on University Avenue. The van stopped in the No. 2 traffic lane at a red light at the intersection of University and Park, then turned right onto Park. Orta decided to stop the driver for making a right hand turn without signaling. He activated his emergency lights. The van turned left onto 7th Street and pulled over. Orta did not "radio in" the traffic stop or ask for other officers to respond to his location. He contacted appellant, the driver. Appellant gave Orta his driver's license. The address on the face of the license - 33021 Orchard, Lake Elsinore, California - had been crossed out. Handwritten on the back of the license was "new address, 1410 Morro Way, No. 9, Lake Elsinore, California." Below that was a second handwritten address, "210 N. Beechwood, No. 469, Rialto, California." Orta thought these addresses were significant because some of the prostitutes' bodies had been found in the Lake Elsinore area. He also knew that the suspect had last been seen wearing "real thick-framed glasses," and appellant was wearing glasses. The van's personalized license plates (BILSUF1) contained current registration tabs, but appellant could not produce a vehicle registration certificate. Orta decided to impound the van. He went back to his motorcycle and started writing out a citation. (28 RT 5522-5534, 5541-5543, 5546-5547.)

As he was finishing the citation, Officers Don Taulli and Duane Beckman, who were part of Operation Apprehension, happened to drive by. Orta told them what he had observed and asked them to assist in processing

the van for impoundment. Taulli looked inside the van and saw a gun sticking out from under the driver's seat. He opened the door and pulled out what appeared to be a Colt Python, a long-barreled and large-framed revolver, in a brown holster with a strap over the top. He told Beckman to handcuff appellant and resumed searching the van.[11] He found a steak knife wedged in the right hand track of the driver's seat. The blade was approximately five inches long and had what appeared to be blood on it. He also found white clothesline rope in the map pocket on the back of the driver's seat, and a black day/date book on the console behind the driver's seat. On the center console, Beckman found a CHP hat draped over a CB radio, a pair of glasses with silver frames, and a plastic photo or credit card holder with several cards in it. (28 RT 5532-5537, 5545-5546, 5553-5565, 5567-5569, 5571-5583.)

A supervising officer who responded to the scene contacted Detective Keers and informed her that the van's left front tire was a Yokohama. Keers knew that the car at the Casares crime scene had a Yokohama tire on the left front wheel, Uniroyal tires on the passenger side wheels, and an undetermined brand on the left rear wheel. She also knew that gray carpet fibers, rope fibers, and red and green fibers had been found on some of the victims' bodies. She asked the officer to "freeze the scene" until she could get there. She arrived at 10:20 p.m. and inspected the van. She found a Yokohama tire on the van's left front wheel, Uniroyal tires on its passenger-side wheels, and a Dunlop tire on its left rear wheel. There was rope and a green blanket in the back of the van, and it had gray carpet.

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[11] Later, when Taulli took the gun out of the holster and looked at it closer, he realized it was only a BB gun. (28 RT 5557.)

She requested that the van be towed to the Riverside Police Department. (28 RT 5537, 5565-5566, 5580-5581, 5585-5595, 5627-5628, 5630-5633; 37 RT 7968-7969.)

Keers asked an officer to find the woman Orta had seen at the Discount Liquor store. The officer brought Roberta Gamboa to the police station 15 to 20 minutes later.[12] Gamboa said that she had stopped at a liquor store on University Avenue to buy a soft drink around 9:30 p.m. She had been working as a prostitute earlier that evening, but was not at the time because there were too many police around. She saw a gray van, "all smashed in" on the passenger side, coming up University Avenue as she entered the liquor store. She made eye contact with the driver, a white male whom she believed was looking for a date. When she came out of the store a couple of minutes later, she saw that the van was parked in the dirt lot next door, facing University Avenue with its engine still running. The driver motioned with his hand for her to come to the van. She walked toward the driver's window. When she was within about five feet of the van, he asked if she was working,. She said "no, not right now." He offered her $30 for a date. She told him again she was not working, then spotted an officer on a motorcycle and walked away. (27 RT 5475-5483, 5489-5496.) Keers showed Gamboa photographs of the van Orta had stopped on 7th Street. Gamboa identified the van, indicating that its passenger side had been damaged. Sometime after midnight, perhaps as late as 1:00 or 2:00 a.m., she identified appellant, who was then located in an interview room at the police station, as the driver of the van. (27 RT

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[12] Gamboa was about the same size and stature as the woman Orta saw approaching the van, but he could not say if she was the woman he saw. (28 RT 5521.)

5483-5484, 5488-5489, 5495; 28 RT 5600-5605, 5618-5621, 5634.)

Keers began interviewing appellant around 11:00 p.m., within an hour after he arrived at the police department. She knew that shoe impressions at the Casares crime scene had been made by Converse tennis shoes, and she noted he was wearing Converse tennis shoes. She also saw scratches on his chest and on the side of his face. The interview lasted approximately 50 minutes. Around 1:15 a.m., blood and saliva samples and hair exemplars were collected. (28 RT 5604-5605, 5621, 5634, 5639-5651; 37 RT 7969-7970, 7977.) Keers then resumed the interview and questioned appellant off and on all night. When he was not being interviewed, he was in a holding cell where he was fed and given sodas. He slept some and he was periodically taken to the bathroom. (37 RT 7970, 7974, 7979.) His clothes were collected as evidence. (28 RT 5635-5638.) Photographs were taken around 4:00 a.m. (28 RT 5656-5664.)

Keers and Detective Davis resumed questioning around 5:00 or 5:30 p.m.. Keers asked several times if appellant was in pain. He said he was and that he needed medication. Keers asked if he was in so much pain that he wanted to stop the interview. He said he wanted to continue talking. He initially denied being in an orange grove area off of Victoria Avenue on December 23, 1991, but admitted he had been there after Keers told him that tracks from his van's tires were found in the grove. He initially said there was nothing else in the orange grove, but eventually admitted there was a body there. He admitted leaving shoe prints in the orange grove, but denied putting the body there. Throughout the interview he denied killing Casares or anyone else. (37 RT 7971-7980.)

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BB. The Searches of Appellant's Apartments and Van

A search warrant was executed on the Suffs' Meadow Lane apartment in Colton on the morning of appellant's arrest. Officers found a pair of black, Pro Wings tennis shoes at the foot of the couch and a 95-watt General Electric light bulb in one of the lamps. 95-watt and 75-watt light bulbs were found in a closet. Nylon rope and a large cardboard box containing a pair of metal handcuffs were found in the living room area. Lengths of white cotton rope and yellow nylon rope were found in the spare bedroom. Two captains chairs for appellant's van were stacked together in a corner. A fold-down bench seat for a vehicle, apparently the van, was found in a bedroom closet. An adult cat and two kittens were in the apartment. Exemplar hairs were taken from each. Several boxes of male clothing, including western-style shirts, were taken from the apartment. (29 RT 5956-5984; 30 RT 6045-6053, 6056; 31 RT 6281-6285, 6333-6334, 6352-6353, 6357-6360.) A second search warrant was executed on the apartment on January 13, 1992. Officers found a road map on the floor between the apartment's entryway and living room areas. Two locations were marked on the map by what looked like an ink or felt-tipped pen. They corresponded to the areas where Hammond's and Zamora's bodies were found. (30 RT 6058-6063; 33 RT 6875-6878.) On March 24, 1992, the now-vacant Meadow Lane apartment was searched yet again. A tire brochure and a San Bernardino Costco receipt in appellant's name were found. Several sleeveless T-shirts and a western-style shirt with snap buttons were collected as evidence. (30 RT 6148-6155; 31 RT 6271-6280.)

Appellant's van was searched on January 15, 1992, at the Department of Justice crime lab. A sleeping bag, green blanket, and gold pillow were collected as evidence. Carpet and seat fibers were collected as

exemplars. (28 RT 5610-5617, 5620-5621, 5626-5627; 31 RT 6360, 6879-6891; 34 RT 6923-6926; 37 RT 7967-7968.) The van was photographed and processed for latent fingerprints. 14 fingerprints were found. Five were of comparable quality. None matched the fingerprints of the 13 victims in this case. One, from the inside passenger's sliding door window, matched appellant's right ring finger. (28 RT 5665-5670.) The inside of the vehicle was tape lifted and any areas which might have contained human blood were preserved. (33 RT 6888-6889.)

On February 13, 1992, carpet samples were obtained from apartment numbers 7 and 9 at 1410 Morro Way in Lake Elsinore. The brown carpet was the same in both apartments and was consistent from room to room. Additional exemplars from apartment number 9 were obtained in May 1992. (21 RT 3922; 33 RT 6852-6854, 6857-6858; 34 RT 6926.)

CC. Appellant's Hatred of Prostitutes

Appellant's brother, Robert Suff, was helping with yard work at Ashley's residence in 1984, a couple of weeks after appellant moved in. He and appellant were looking at the nearby Dunes Casino and talking about the fact that it would be a perfect place for someone to meet a woman. Out of the blue, appellant told Robert he hated prostitutes. (32 RT 6256-6263.)

Pamela Jones managed the Morro Way apartment complex where appellant lived. She and appellant were friends. Jones did not want her 13 or 14-year-old daughter using makeup. Appellant tried to help by telling her daughter that only prostitutes wear a lot of makeup; she should try to look natural, more like a lady and not like a prostitute. Jones recalled a slumber party on August 19, 1989, her daughter's 14th birthday. The girls dressed up like "Barbies" and did their hair and put on makeup, glitter, and eye shadow. Jones and five or six girls went to appellant's apartment and

asked him to judge who was the prettiest. Appellant said the girls who were wearing makeup looked like "goddamn prostitutes." They should try to look natural, like the lone girl who wore no makeup and was more "lady-looking." Jones also recalled that appellant once got very agitated about four girls who were living with a man at the apartment complex. He said the women were whores and it was degrading for other women to have to be around something like that. She recalled that appellant wore western-style clothing and muscle T-shirts. (31 RT 6227-6242.)

Kristina Seeger also recalled that appellant did not care for prostitutes. While she was staying at his apartment, he told her nearly every night that prostitutes needed to be killed because they were sluts. They argued because Seeger believed prostitutes needed help. (31 RT 6244-6251.)

DD. Shoe and Tire Impressions, Trace, DNA, and Other Evidence of Appellant's Guilt[13]

Appellant owned two pairs of Pro Wings tennis shoes, a PayLess Shoes brand. One was black and the other was light-colored. He wore each pair equally. He also owned a pair of new black Converse tennis shoes. They had been an early Christmas gift, purchased on a payday (either December 6 or 20, 1991) at a SportMart grand opening. As far as Cheryl knew, these were the only tennis shoes he had. He was hard on shoes. (31 RT 6351-6357, 6361-6362, 6366, 6382, 6419-6420, 6429-6431; 32 RT 6472-6474; 33 RT 6859-6873.)

The sleeping bag, green blanket, gold pillow, and multi-colored knit

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[13] Exhibit No. 919, a graphic representation of the evidence in the case, showed the commonalities among the victims and the crimes. (8 CT 2147-2148, 2170-2172; 37 RT 7861-7866, 39 RT 8354-8355.)

Afghan found in the back of the van were appellant's. Cheryl remembered putting the sleeping bag, the pillow, and the green blanket in the van in December, not long before he was arrested, when they went to a drive-in movie with Ross and her children. (31 RT 6359-6360, 6410.) Cheryl identified the brown, wood-handled steak knife found in the van as a knife from her kitchen. (31 RT 6364-6365.) She recalled that they got a cat when they lived on Chestnut Street in Lake Elsinore. The cat was with them "continually," and it rode in the van when they moved. They got two kittens on December 23 or 24, 1991, from a friend who lived in the complex. (31 RT 6412-6413.)

DNA testing failed to exclude appellant as the semen donor in any of these cases. (36 RT 7750; 37 RT 7807; 38 RT 8087-8088.)

1. Kimberly Lyttle

Bonnie Ashley's residence was within two and a half miles of the location where Lyttle's body was found. (21 RT 4008-4009.) Appellant occasionally took Lost Road to get from Ashley's home to his mother's house. (29 RT 5744.)

Fibers on the blue towel which covered Lyttle's body were similar to the carpet, the side panel, and the seats in appellant's van (34 RT 6941-6957); to the red acetate lining, the white stuffing, and the blue nylon exterior of the sleeping bag in the van (34 RT 6957-6958, 6966-6973, 7057-7058, 7088-7089); and to the sisal rope in the van. Hairs on the towel were similar to appellant's head and pubic hair. (34 RT 7000-7001, 7006-7008, 7010.) The existence of both head and pubic hair on the towel strengthened the weight of the conclusion that they could have been appellant's. (34 RT 7089-7090, 7093-7095.) One fiber on Lyttle's shirt was similar to the sisal rope in the van. (34 RT 6978-6980.)

RFLP analysis of the known sample from Lyttle and the male and female fractions of her vaginal swab revealed no DNA profiles from any of the probes. (36 RT 7559-7568, 7573-7576, 7715-7719, 7722.) DQa analysis showed that the male fraction of the sample matched appellant. The profile frequency (the probability of selecting someone at random who would have DNA matching appellant's (36 RT 7580-7581)) is one in nine for blacks, one in 11 for Caucasians, and one in five for Hispanics. (37 RT 7783-7785, 7806-7807.)

2. Tina Leal

Ashley and appellant camped at Kings Canyon National Park around the Fourth of July of either 1986 or 1987. (29 RT 5749-5753.)

In November 1989, Leah Gibbons moved into the Morro Way apartment complex where appellant lived. She and appellant became friends and they saw each other every day. Gibbons drove around the Lake Elsinore hills with him four or five times and recalled being with him on Railroad Canyon and Cottonwood Canyon Roads. He told her his parents lived or had lived in Cottonwood Canyon. Appellant gave her a pair of red and white tennis shoes in April 1990. (28 RT 5682-5685, 5693-5706.)

One tire impression at the Leal crime scene could have been made by a tire on appellant's van, an Armstrong Coronet Ultra Trac. Two impressions could have been made by another tire, a Yokohama 382. (32 RT 6606-6608, 6625-6629, 6633, 6636-6643, 6648-6651, 6653, 6657-6659, 6663; 33 RT 6686-6688, 6690-6692, 6694, 6697-6699, 6706-6708, 6723-6727, 6742-6745, 6747-6751, 6820-6827.)

Fibers on the T-shirt Leal was wearing were similar to the gold pillow and the red acetate lining of the sleeping bag in appellant's van (34 RT 6973-6974. 6982-6983) and to the carpet in appellant's Morro Way

apartments. (34 RT 6983-6986.) Two hairs on the shirt were similar to appellant's pubic hair. (34 RT 7008-7010.) A fiber in Leal's head hair was similar to the sisal rope in the van. (34 RT 6980-6981.) Two hairs on Leal's socks and one from the body bag used to transport her to the coroner's office were similar to appellant's head hair. (34 RT 7001-7003.) A fiber on the socks was similar to the red and white tennis shoes appellant gave to Leah Gibbons. Purple-brown fibers on the T-shirt and on the red and white tennis shoes appeared to be the same, and a hair similar to Leal's was found in the tennis shoes. This suggested that the tennis shoes might be related to the clothing Leal was wearing or even her head hair. But all of these fibers are fairly common and it may just show that they, at some time, had been in contact with a similar environment. (34 RT 6986-6991.)

3. Darla Ferguson

Two tire impressions at the Ferguson crime scene could have been made by a tire on appellant's van, an Armstrong Coronet Ultra Trac. Assuming the vehicle was moving forward, the tire was on the front of the vehicle. One impression could have been made by another tire, a Yokohama 382. Assuming the vehicle was moving forward, the tire was on the rear of the vehicle. (32 RT 6630, 6633-6643, 6651-6653, 6663; 33 RT 6688-6690, 6692-6694, 6706-6708, 6719-6723, 6742-6751, 6820-6826; 34 RT 7096.)

Fibers from tape lifts of Ferguson's body were similar to the red acetate, the white nylon, and the white acrylic fiber of the sleeping bag in appellant's van. (34 RT 7096-7102, 7105-7107.) A hair from a tape lift was similar to appellant's head hair. (34 RT 7122-7128.) The rope removed from Ferguson's body and the rope in appellant's van were similar. (34 RT 7107-7110.) Fibers on Ferguson's body and one in her

head hair were similar to the rope in the van. (34 RT 7110-7111.) The tape lifts of Ferguson's chin, arm, wrist, and leg had a number of paint chips which were blue on one side and white on the other. (34 RT 7132-7139, 7146-7153, 7155.)

RFLP analysis of Ferguson's vaginal swab revealed that, at the D17 and D5 probes, DNA in the two upper bands in the male fractions was consistent with appellant's. (36 RT 7568-7573, 7576-7582, 7719-7720.) DQa analysis revealed matches to appellant's DNA in the male fraction of the sample. The combined profile frequency for RFLP and PCR results is one in 34,000 for blacks, one in 154,000 for Caucasians, and one in 8,500 for Hispanics. (37 RT 7785-7788, 7806-7807.)

4. Carol Miller

Twelve tire tracks at the Miller crime scene were consistent with a tire on appellant's van, an Armstrong Coronet Ultra Trac. Assuming the vehicle was moving forward, the tire was on the front of the vehicle. Two tire tracks were consistent with another tire, a Yokohama 382. Assuming the vehicle was moving forward, the tire was on the rear of the vehicle. The track width of the impressions was consistent with a Mitsubishi van. (32 RT 6608-6653, 6663; 33 RT 6680-6686, 6690-6692, 6694, 6698-6715, 6717-6719, 6725, 6732-6742, 6747-6753, 6754.16-6754.19, 6754.29, 6809-6810, 6820-6826.)

Fibers on the black T-shirt found at the scene were similar to the red acetate (34 RT 7098-7100), the white nylon (34 RT 7102-7103), and the blue nylon (34 RT 7103-7104) fibers of the sleeping bag in appellant's van; to the van's carpet (34 RT 7113-7115); and to the dark woven fabric in the stripes in its seats. (34 RT 7117-7119.) One hair on the shirt was similar to appellant's head hair. (34 RT 7126-7129.) Fibers from the shirt and from

Miller's pubic hair were similar to the rope in the van (34 RT 7111-7113) and to the van's side panel material. (34 RT 7115-7117.) A fiber from her chest was similar to the light gray velour fabric in the van's seats. (34 RT 7117-7119.) A hair from her vaginal area was similar to appellant's pubic hair. (34 RT 7129-7132.) Several paint chips, blue on one side and white on the other, were found. Their source was never determined, but chemical analysis of a paint chip from Ferguson's chin and two from Miller's T-shirt revealed that they were similar in elemental and organic composition. Assuming there was one source for the paint chips, Miller and Ferguson came into contact with the same source. (34 RT 7132-7139, 7146-7153, 7155-7156.)

RFLP testing of Miller's vaginal swab revealed matches to appellant's DNA at the D17, D1, and D5 probes. (36 RT 7582-7594, 7727-7728.) DQa analysis revealed matches to appellant in both the male and female fractions of the sample. The combined profile frequency for RFLP and PCR results is one in 234,000 for blacks, one in one million for Caucasians, and one in 55,000 for Hispanics. (37 RT 7788-7795, 7806-7807, 7835.)

5. Cheryl Coker

One of the shoe impressions found under the wood pallets at the Coker crime scene could have been made by appellant's left, light-colored, Pro Wings tennis shoe. Another could have been made by his right, light-colored, Pro Wings tennis shoe. The soles of appellant's shoes were more worn than the shoes that left the impressions but, assuming someone continued to wear the shoes from the date Coker's body was found, more wear and less definition on the sole of the shoe was to be expected. (31 RT 6432-6449; 32 RT 6475-6476, 6494-6497, 6501-6502, 6505, 6514-6517,

6550-6560, 6581-6582, 6586-6588.)

Fibers from Coker's pubic area were similar to the sisal rope in appellant's van (34 RT 7156-7159) and to the van's carpet. (34 RT 7162-7164.) A hair from Coker's pubic area was similar to appellant's head hair. (34 RT 7172-7174.)

RFLP testing of the condom found at the scene revealed matches to appellant at the D2, D17, D1, D10, and D5 probes. A five probe match is an extremely uncommon event in any database. The combined profile frequency is one in over a billion for blacks; one in two billion for Caucasians; and one in 300 million for Hispanics. Furthermore, because the DNA was from sperm cells, only a male could have produced the DNA and the combined profile frequency numbers can be doubled. (36 RT 7594-7601, 7723-7727, 7731-7736; 38 RT 8089.) DQa testing was not done because, at the time, a three-probe RFLP match had already been made. (37 RT 7795, 7806-7807.)

6. Susan Sternfeld

Fibers found in a tape lift of Sternfeld's buttocks were similar to the van's carpet (34 RT 7164-7167), side panel upholstery (34 RT 7167-7169), and seat fabric (34 RT 7169-7170); and to the rope (34 RT 7159-7161) and the red acetate lining of the sleeping bag in the van. (34 RT 7170-7171.)

RFLP analysis of Sternfeld's vaginal swab revealed matches to appellant at the D2, D17, D1, D10, and D5 probes. The combined profile frequency is one in 540 million for blacks, one in one billion for Caucasians, and one in 150 million for Hispanics. (36 RT 7601-7608, 7727-7728, 7731-7736.) DQa testing was not done because, at the time, a three-probe RFLP match had already been made. (37 RT 7795, 7806-7807.)

7. Kathleen Milne [aka Kathleen Puckett]

One of the tire impressions at the Puckett crime scene could have been made by a tire on appellant's van, an Armstrong Coronet Ultra Trac, the same type tire and possibly the same tire that left one of the impressions at the Miller crime scene. Nothing about the tire's wear between the discovery of Miller's and Puckett's bodies would lead one to believe the same tire did not make both impressions. (32 RT 6619-6625, 6630, 6632-6633, 6636-6643, 6663; 33 RT 6686-6688, 6694, 6705-6708, 6742, 6820-6826.)

A fiber from Puckett's head hair was similar to the van's carpet. (25 RT 7208-7210.) A tuft of yarn recovered from the sock that was removed from her mouth was similar to the van's light gray, velour seat fabric. (35 RT 7210-7212.)

RFLP analysis of Puckett's vaginal swab revealed matches to appellant at the D2, D1, D10, and D5 probes. The combined profile frequency is one in 16 million for blacks, one in 23 million for Caucasians, and one in 13 million for Hispanics. (36 RT 7608-7612, 7727-7728.) DQa testing was inconclusive. (37 RT 7795-7798, 7806-7807, 7836-7837, 7841-7843.)

8. Cherie Payseur

Appellant gave Bonnie Ashley a map showing the places he frequented in Riverside. One of the locations he labeled on the map was the Concourse Bowling Alley on Arlington in Riverside. Ashley knew that appellant bowled in a league there, and she saw him there once or twice. (29 RT 5759-5762, 5773-5778.) Cheryl Suff recalled that appellant often put gas in his van at the Thrifty gas stations on University and Arlington. There was a bowling alley in the area, but he did not bowl there while he

was married to her. (31 RT 6375-6376, 6378, 6413.)

Cheryl's calendar showed that appellant worked at an earthquake show in Temecula on April 26, 1991. She did not know what time he got home that night. (31 RT 6334-6336, 6385-6387, 6396, 6404, 6413-6414.) According to appellant's supervisor, Joe Pajak, the supply warehouse sold "earthquake kits" containing disaster and medical items to county departments and employees, and appellant helped display the kits five times in Riverside and once in Indio during his normal working hours. He did not work at any of these displays after 6:00 p.m. (29 RT 5786-5788, 5791-5792.)

Appellant's right, light-colored, Pro Wings tennis shoe was consistent with an impression at the Payseur crime scene. The shoe was much more worn than the shoe that left the impression but, assuming someone continued to wear it from the date Payseur's body was found, more wear and less definition on the sole of the shoe was to be expected. (31 RT 6449-6455; 32 RT 6476-6478, 6488-6490, 6498-6501, 6515-6516, 6551-6560, 6581-6582, 6655-6656.) The impression at the Payseur scene and an impression at the Coker scene could have been made by the same shoe. Assuming the same person continued to wear the same shoe from the discovery of Coker's body, the wearing of the sole pattern was consistent and as expected. (32 RT 6478-6483, 6494-6498, 6510-6513.)

A hair in Payseur's body bag was similar to the hairs from appellant's cat. (35 RT 7214-7223.) A blonde hair in the Payseur tape lifts was lighter in color than appellant's pubic hair and was not within the exemplar, but it may have been one of his pubic hairs changing to white, so it was deemed inconclusive. (35 RT 7223-7224, 7231-7234.)

RFLP analysis showed that there were two semen donors in the male

fraction of Payseur's vaginal swab. The primary semen donor's bands were similar to appellant's DNA profile, but the results were deemed inconclusive due to the second semen donor. (36 RT 7612-7615, 7634-7639, 7719-7720.) DQa analysis confirmed that there was a second sperm contributor. (37 RT 7798-7800, 7806-7807, 7835-7836.)

9. Sherry Latham

Appellant and his wife spent the evening of July 4, 1991, at a family barbeque at Ross's mother's house in Lake Elsinore. (29 RT 5917, 5928, 5931-5932.)

A hair from a tape lift of Latham's buttocks was similar to the hair from appellant's cat. (35 RT 7236-7237.) The tape lift also included fibers similar to the sisal rope in appellant's van. (35 RT 7245-7246.) Fibers from a tape lift of Latham's body were similar to the red acetate and the white nylon fibers in the sleeping bag in the van. (35 RT 7256-7260.)

10. Kelly Hammond

Kelly Whitecloud was in the Contra Costa County jail on January 23, 1992. She did not know about appellant's arrest. Detective Keers showed her two photographic lineups. Whitecloud picked appellant's photograph from each lineup. (24 RT 4721-4724; 26 RT 5074-5080.) She identified him in court as the man who was driving the van she jumped out of on the night of Hammond's murder. (24 RT 4716-4718, 4724, 4733-4735.)

In January 1992 Ben Amos saw appellant's picture in the newspaper above a caption identifying him as the man who had been arrested for the prostitutes' murders. He recognized appellant as the man who had been in McDonald's with Whitecloud in August 1991. (28 RT 5727-5729.)

A citation issued to Kelly Marie Hammond on August 8, 1991, eight days before her body was discovered, for lewd conduct and possession of a

syringe was found in the glove box of appellant's van. (28 RT 5607-5610.)

Fibers on Hammond's body were similar to the van's seat fabric (35 RT 7246-7249), carpet (35 RT 7250-7253), and side panel upholstery (35 RT 7249-7250), and to the rope (35 RT 7240-7245) and the red acetate fiber of the sleeping bag in appellant's van. (35 RT 7254-7256.) A hair on Hammond was similar to the hairs from appellant's cat. (35 RT 7237-7240.)

RFLP analysis of Hammond's vaginal swab revealed matches to appellant at the D5 and D1 probes. (36 RT 7639-7646, 7727-7728.) DQa analysis revealed matches to appellant in the male fraction of the sample. The combined profile frequency for RFLP and DQa results is one in 7,000 for blacks, one in 18,000 for Caucasians, and one in 4,000 for Hispanics. (37 RT 7800-7801, 7806-7807.)

11. Catherine McDonald

One of the shoe impressions at the McDonald crime scene could have been made by appellant's left, black, Pro Wings tennis shoe. Another impression could have been made by the right, black, Pro Wings tennis shoe. (32 RT 6521-6530, 6532-6551, 6557-6558, 6581-6584.)

Two tire impressions at the crime scene were consistent with the Yokohama 371 tires on the front of appellant's van. One impression was consistent with the Yokohama 382 tire on the right rear wheel of the van. The tire wear on this impression was greater than that seen on the Yokohama 382 impressions at the Miller crime scene, which was consistent with someone having driven the same vehicle with the same tire on it during that period of time. The left rear tire on the van was a Dunlop, and it could have made one of the impressions. The track width and wheelbase of the impressions were consistent with a Mitsubishi van. (33 RT 6754.1-

6754.32, 6766-6773, 6781-6782, 6793-6794, 6820-6826, 6837-6842, 6847-6851.)

Fibers from McDonald's body were similar to the van's seat fabric (35 RT 7292-7294), to the gold pillow in appellant's van, and to the sleeping bag's red acetate and white nylon fibers. (35 RT 7284-7288, 7296-7299.) Hairs from her pubic area and vagina were similar to appellant's pubic hair (35 RT 7304-7308) and to hairs from his cat. (35 RT 7301-7304.) A hair from the cargo area of the van was similar to McDonald's hair. (35 RT 7308-7312.)

RFLP analysis of McDonald's vaginal swab revealed a match to appellant at the D5 probe. The profile frequency is one in 115 for blacks, one in 250 for Caucasians, and one in 119 for Hispanics. (36 RT 7646-7649.) DQa analysis of the sample was inconclusive. (37 RT 7801-7803, 7806-7807.) DQa analysis of what looked like a pubic hair showed a mixture of DNA on the root. The major contributor to the mixture could have been appellant. The profile frequency for the major donor is .068 of African-Americans, .10 of Caucasians, and .20 of Hispanics. The profile frequency for the minor donor is .23 of African-Americans, .20 of Caucasians, and .18 of Hispanics. (37 RT 7916-7918, 7927-7935.)

12. Delliah Zamora [aka Delliah Wallace]

In October 1991, appellant told Ross that he had overheard a report on a police officer friend's scanner about another prostitute's body being found right down the street behind the Burger King at Mission and Railroad Canyon. He said he was warning Ross for her safety because she was in the area. Ross and her mother watched the news that evening about the murder of a prostitute. (29 RT 5918-5919.)

In early-November 1991 appellant gave his wife, Cheryl, a blue

denim or Levi purse. It contained a black notebook, some makeup, and an identification card. She did not remember the name on the identification card or if it contained a photograph. He told her his boss found the purse in his garage. She said she did not want it and left it in the van. (31 RT 6346-6349, 6407.) Around that time appellant gave Vivian Swanson, who also lived in the Rialto apartment complex, a blue denim or Levi-type purse. He said it belonged to Cheryl, but she no longer used it. The purse belonged to Delliah Zamora. (29 RT 5879-5880, 5882, 5887-5889; 30 RT 6000-6004, 6008, 6011-6012, 6034, 6036, 6065-6066, 6071; 31 RT 6327.)

Around Thanksgiving 1991 appellant gave Swanson a gold bracelet. He said he bought it from a home shopping television show for Cheryl, but he and Cheryl had separated and he wanted to give it to Swanson as an early Christmas present. The bracelet belonged to Delliah Zamora's niece. (29 RT 5880-5883, 588; 30 RT 6069.) According to Cheryl, appellant never purchased items from mail-order catalogs or from television shows while he was living with her. In fact, they did not even have cable television at the time. (31 RT 6378-6379.)

Officers visited the Riverside County supply warehouse on January 13, 1992. They found Zamora's white blouse with pink stripes on the bottom shelf of packing table seven. (30 RT 6005, 6021-6022, 6026-6027, 6066, 6082-6086.) Raymond Ramirez was working off court fines at the warehouse in the county's work release program. After the officers left, he found a little purse underneath his work station at the end of aisle six. The purse looked as if someone had already been through it. Ramirez and his co-workers looked inside the purse and found condoms, tampons, and three folded-up citations issued to Delliah Zamora. One was for prostitution on University Avenue. The others were for possession of a syringe and being

under the influence of narcotics. Ramirez saw a supervisor coming and threw the condoms and tampons in the trash. He put the purse back under the packing table, then went to the restroom and flushed the citations down the toilet. (29 RT 5803-5804, 5812-5813, 5824-5836, 5843-5849; 30 RT 6126-6130, 6135-6136.) One of Ramirez's coworkers reported the incident, and officers came back to the warehouse on January 15, 1992. Ramirez's supervisor gave them the purse. On February 18, 1992, a deputy showed Ramirez citations he had obtained from the police department; four for Zamora and a fifth in the name of Delliah Wallace. Ramirez picked out the ones he remembered seeing. A co-worker also identified two of the citations. (29 RT 5825, 5836-5838, 5849-5852, 5894-5902; 30 RT 6081-6082, 6130-6134, 6136-6137.)

Robert Guilliam was also working off fines at the supply warehouse. In the latter part of December 1991 he was straightening up underneath the packing table at the end of aisle six when he found a box containing three small zip-type purses. One was a leather pouch containing a lot of paperwork, a condom package, some folded-up tickets, and photo-identification cards for a black woman named McDonald and a Mexican woman named Casares. He did not look at the names on the tickets. Another purse had an Indian design on it and contained three sets of earrings. He did not look inside a smaller, faded, red purse because it did not feel like there was anything inside it. He put all the purses back in the box and, on his last day of work, January 3, 1992, took the purse with the Indian design with him. He planned to give the earrings to his daughters. On January 27, 1992, he gave the purse and three sets of earrings to a deputy. (29 RT 5856-5872, 5892-5893.) The purse and two of the sets of earrings belonged to Delliah Zamora. (30 RT 6003-6004, 6007-6008,

6013-6017, 6024-6026, 6066-6068, 6071-6072.)

Cheryl Suff moved out of their Meadow Lane apartment a couple of days after appellant's arrest. She left some of appellant's shirts. Later, she found jewelry in her jewelry box that was not hers. She normally kept the jewelry box in her bedroom. Only she and appellant had access to it, and she only got into it about once a year. She gave the jewelry to the authorities on January 31, 1992. (31 RT 6361-6362, 6379-6382, 6411-6412; 33 RT 6854-6857.) It belonged to Delliah Zamora. (30 RT 6022-6023.)

Fibers on Zamora and her clothing were similar to the red acetate fibers in the sleeping bag in appellant's van (35 RT 7288-7290) and to the sisal rope (35 RT 7290-7292) and the gold pillow in the van. (35 RT 7300-7301.) Fibers from the velcro clasp on the blue denim purse appellant gave to Swanson were similar to fibers from the carpet at Zamora's house. (35 RT 7312-7316, 7396-7398.) A hair removed from the velcro clasp was similar to her hair. (35 RT 7317-7319.) Two independent types of trace evidence constitutes a strong association between Zamora and the purse. (35 RT 7331-7333.)

RFLP analysis of Zamora's vaginal swab was inconclusive. (36 RT 7649-7652, 7720-7723, 7730-7731.) DQa analysis of the sample revealed a match to appellant. (37 RT 7803, 7806-7807.) DQa analysis of a hair found on the velcro of a purse was consistent with Zamora but not with appellant. D1S80 analysis was inconclusive in that the hair could have come from either Zamora or appellant. The combined population frequency figure for Zamora's DQa and D1S80 types is .21 of the African-American population, .30 of the Caucasian population, and .12 of the Hispanic population. (37 RT 7911-7915, 7926-7927.)

13. Eleanor Casares, Count 13

The supply warehouse was closed during Christmas week in 1991. Appellant's time cards confirmed that he did not work that week. He had the van at times during the week. Cheryl was not sure if he had it on December 22nd. He was at home when she awoke on December 23rd between 10:00 and 12:00 a.m. (29 RT 5782-5785, 5788-5790, 5811-5812, 5815-5821, 5892; 31 RT 6342, 6371-6372, 6389-6390, 6400-6404, 6415-6416, 6421-6422.)

On the evening of December 23, 1991, nine or ten people were celebrating at Ross's apartment. Appellant joined them around 7:00 p.m. He had what looked like three fingernail scratches on the right side of his face, from his eye down to his jaw. He said he had been picking up a prescription at Kaiser in Fontana when a man and a woman got into an argument. He stood up for the woman, who then started sticking up for her husband and had scratched him. He said that hospital security had responded to the fight. Cristen Thompson had seen the "claw-like" marks on his face earlier that day. Cheryl Suff had also noticed the scratches earlier that day. Appellant told her the cat had scratched him. He showed Gary Bell that he also had scratches on his chest. (29 RT 5915-5916, 5926-5927, 5929-5931, 5937-5939, 5942-5943, 5948-5949, 5954; 31 RT 6375.) According to Kaiser's security manager in Fontana, a report would have been prepared if the incident appellant described had occurred. He searched the records at Kaiser in both Fontana and Riverside and did not find any record of such an incident involving appellant in December of 1991, though he did find a report of appellant's traffic accident near Kaiser that month. (30 RT 6098-6106.)

Appellant gave Cheryl a pair of Lee blue jeans in November or

December 1991. She did not remember the size. He said he found them on the balcony. It seemed strange to her. She told him they did not fit her. (31 RT 6368-6369, 6406.) He offered to give the jeans to Cristen Thompson on December 24, 1991. She, too, declined. She believed the jeans were about a size 10 because they were too small for Cheryl and too large for her. Cheryl told Thompson that the jeans were not hers and she did not know how they got to her apartment. (29 RT 5915-5916, 5919-5921, 5926-5928, 5936, 5940-5943.) On January 3, 1992, appellant gave Yvonne Cady a pair of jeans. Cady and her daughter cut off the legs. (29 RT 5881-5885, 5889-5890.) The jeans belonged to Casares's daughter; Casares was wearing them the night before her body was found. (30 RT 5988-5995, 5997-5999.) Swanson gave the authorities the pants and one of the legs Cady had cut off. She could not find the other leg. (29 RT 5885-5887; 30 RT 6034-6036.)

Sometime during the week of Christmas 1991 Cheryl found a black sweater in the dryer with her clothes. Appellant had been doing the wash that day. He said he found it in the spare bedroom and thought it was hers. (31 RT 6369-6374, 6406-6407.) On January 9, 1992, between 4:00 and 6:00 p.m., Cheryl and appellant visited Ross in her office. Appellant gave Ross a black sweater. She put it on the shelf under her desk. Later that day appellant visited Ross's apartment for about five minutes. She left shortly thereafter and saw him in the parking lot cleaning his van and moving things around. Ross gave the sweater to the authorities. It belonged to Casares's daughter; Casares was wearing it the night before her body was found. (29 RT 5910-5913, 5925-5926, 5929; 30 RT 5988-5995, 5997-5999, 6034-6036, 6053-6057; 31 RT 6374.)

One of the shoe impressions near Casares's body and one in the

roadway alongside the tire tracks could have been made by the left Converse tennis shoe appellant was wearing when he was arrested. Four of the impressions could have been made by the right Converse tennis shoe. (32 RT 6561-6566, 6568-6592, 6597-6606.)

Based on the placement of the tires on appellant's van and their wear characteristics, it is very unlikely any vehicle other than the van could have left the tire impressions at the Casares crime scene. The left front tire on the van, a Yokohama 371, could have made one of the impressions; the right front tire, a Uniroyal Tiger Paw XTM, could have made another; the right rear tire, also a Uniroyal Tiger Paw XTM, could have made a third; and the left rear tire, a Dunlop, could have made a fourth. The Uniroyal impressions were from fairly new tires. (33 RT 6773-6794, 6796-6826.)

Fibers on Casares's black jacket were similar to the carpeting in appellant's van (35 RT 7334-7337), to the red acetate fibers and white stuffing of the sleeping bag in the van (35 RT 7340-7343), and to the sisal rope in the van. (35 RT 7343-7345.) Fibers from the jacket and Casares's head hair were similar to the green blanket and gold pillow in the van. (35 RT 7336-7340.) A hair from the jacket was similar to appellant's head hair. (35 RT 7351-7352.) Hairs from the jacket and from Casares's body were similar to appellant's pubic hair. (35 RT 7352-7355.) Hairs from her body were similar to hairs from appellant's cat. (35 RT 7345-7348, 7350-73651.) A fiber from the black sweater appellant gave to Ross and a fiber from the black jacket were similar and could have common origin. Fibers in Casares's head hair were also similar to the sweater. (35 RT 7356-7360.) Two hairs on the green blanket in appellant's van were similar to Casares's hair. The fact that green blanket fibers were also found on Casares made this association stronger than just a single transfer. (35 RT 7360-7363.)

No conclusive RFLP profiles were obtained from Casares. (36 RT 7652-7653, 7720-7723.) DQa analysis was inconclusive. (37 RT 7803-7804, 7806-7807.) DQa and D1S80 analysis of a hair tape lifted off Casares's stomach was also inconclusive. The hair could have come from either Casares or appellant. The combined population frequency figure for their shared DQa and D1S80 types is .17 of the African-American population, .54 of the Caucasian population, and .95 of the Hispanic population. (37 RT 7898-7906, 7922-7925.)

The knife found in appellant's van on the night of his arrest had red stains along the bottom portion of the hilt and a smear of reddish stain on both sides. The stains tested positive for human blood. ABO and PGM enzyme typing showed that the blood and a pinkish/whitish substance on the knife could have been Casares's. 1.8% of the Caucasian population, 1.2% of the black population, and 1.9% of the Hispanic population would have the same combined ABO and PGM profiles as Casares and the blood and tissue on the knife. (35 RT 7443-7478.) DQa analysis of the stains was inconclusive. Polymarker analysis revealed that the stains matched Casares. (37 RT 7805-7807.)

14. Rhonda Jetmore

Rhonda Jetmore lived in Siskiyou County in January 1992. She did not have a television or subscribe to a newspaper and she did not know that appellant had been arrested. On January 28, 1992, she spoke with Deputy Theodore Hoffman on the telephone. Hoffman told her that someone had been arrested in Riverside County in connection with the murder of prostitutes in the Lake Elsinore area and he wanted to talk to her about her January 1989 assault. She told him she would never forget the face of the man who attacked her and she thought she could identify him and, possibly,

his car. (20 RT 3852-3853, 3867-3868, 3897-3898; 21 RT 3924-3926, 3945.) Hoffman met with Jetmore in Siskiyou County on March 25, 1992. (20 RT 3854-3856, 3862-3863, 3879; 21 RT 3926-3927, 3932-3933, 3945-3947.) She picked appellant as her assailant from a photographic lineup. Hoffman also showed her a photographic lineup of vehicles. She did not recall which vehicle she selected, but believed she said all of them looked similar and she could not be absolutely positive. (20 RT 3863-3870, 3884-3887; 21 RT 3928-3932, 3939-3945, 3947-3952, 3954-3956, 3959-3961.) She identified appellant in court as the man who had attacked her: "That's him. I'll never forget that face." (20 RT 3870-3871, 3898-3899.)

15. Other Evidence

James Dees, a Riverside County correctional officer, made weekly trips to the county's supply warehouse and saw appellant there every second or third trip, maybe twice a month on average. Appellant brought up the serial prostitute killings five or six times. He usually asked if Dees knew the detectives who were working on the cases and if the investigation was closing in on the perpetrator. Shortly before Christmas 1991, appellant asked Dees what kind of person he thought could commit such acts. Dees said he thought it was someone who had contracted AIDS or something of that nature from a prostitute. Appellant said thought it was somebody who was basically going to clean the place up. The subject came up almost every visit in late 1991, when the murders were "kind of a hot topic" and there was "kind of a buzz about it everywhere." (32 RT 6463-6471.)

Appellant visited Ross's apartment on the evening of December 24, 1991. A television advertisement announced that Silence of the Lambs, a recent movie about the FBI's pursuit of a serial murder suspect, would be airing later that night. One of the scenes in the movie depicts the suspect

waiting at a young lady's residence and luring her into his van. Someone made a comment about the movie and appellant said "she was stupid for getting in the van." (29 RT 5919-5921, 5936, 5939-5945; 37 RT 7852-7855.)

Defense Case

A. Rhonda Jetmore

Rhonda Jetmore admitted it was "possible" she had been convicted of solicitation for prostitution on April 7, 1986. (20 RT 3873.) In 1989 she told Detective Nielsen her assailant's glasses were small, round, and metal-framed (20 RT 3876, 3911); that his belt buckle was silver[14] (20 RT 3877, 3909); and that her assailant first contacted her around 6:00 p.m., not 11:00 p.m. (20 RT 3890-3891, 3910.) She did not tell him anything about a two to three day growth of stubble. (20 RT 3911.) In 1992 she told Deputy Hoffman her assailant had straight, short, brown hair. (20 RT 3881; 21 RT 3956.) She said the station wagon he was driving was a two-door with a tan or light-brown interior, and that his belt buckle was gold colored.[15] (20 RT 3883-3884, 3887; 21 RT 3936, 3939, 3956-3958.)

B. Kimberly Lyttle

Kimberly Lyttle's friend, Janice Farmer, used heroin and cocaine and occasionally worked as a prostitute. Lyttle introduced her to appellant in 1987 or 1988, and she engaged in acts of prostitution with him many times in the back room at John's Service Center where he worked on weekends.

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[14] Appellant's belt buckle was brass or gold colored. (20 RT 3899.)

[15] The interior of Ashley's station wagon was gray, black, and blue. (21 RT 3956.)

He paid for her services with money out of the cash register, from $20 up to $300 depending on his moods. There were never any disputes or problems over money, and he never hurt her in any way or tried to do any unusual things. He was nice to her, like a friend, and he seemed ordinary. She became his companion and there were times she saw him without engaging in acts of prostitution. She never engaged in an act of prostitution with him after he got married. She went to his Morro Way apartment once or twice and to his Chestnut Street apartment a few times. During most of the time she knew him he had a blue, Toyota Celica. At some point he got a van, but she only saw it a few times. She did not believe she had ever been in the van. Farmer knew that appellant cruised Main Street in Lake Elsinore and contacted prostitutes, but she did not see him do it often. All the prostitutes knew him and where he was at. He did not like prostitutes who were "gutter-bound" and "chasing drugs 24 hours a day and never taking care of themselves." (38 RT 8204-8212.)

C. Tina Leal

Jesse Leal admitted he had been convicted of two felonies: robbery in 1986 and petty theft with a prior in 1993. (21 RT 4044.) Bonnie Ashley did not believe appellant purchased a Kings Canyon T-shirt while they were camping there in 1986 or 1987. She generally did the laundry and was familiar with appellant's clothing. If he had a Kings Canyon T-shirt, she would have seen it because she would have washed and ironed it. (29 RT 5749-5753, 5770.)

D. Cheryl Coker

Cheryl Coker's husband, Boyd, admitted that he had been convicted of burglary and receiving stolen property in 1975, burglary in 1976 and 1981, receiving stolen property in 1989, and possession of "some kind of

drugs" in 1991. He had been doing missionary work since his last felony conviction. (23 RT 4303-4304.)

E. Susan Sternfeld

Appellant's time card from the county supply warehouse showed that he worked nine hours, from 7:00 a.m. to 4:30 p.m., on December 19, 1990, the day Susan Sternfeld disappeared. The time card was signed by appellant and approved by his supervisor. (38 RT 8096-8105.) The Bob's Big Boy located at the intersection of Iowa and University is between 5.7 and 6.9 miles from the supply warehouse, and the drive takes between 14 and 15 minutes. (38 RT 8107-8110.) Department of Justice criminalist Faye Springer identified a hair removed from a rope in appellant's van as similar to Sternfeld's hair. Subsequent DNA analysis excluded Sternfeld as its contributor. Springer explained that she uses the term "similar" in making identifications because there are always other individuals who exhibit similar characteristics. How big this group of individuals is depends on how unusual the microscopic characteristics are. (35 RT 7394-7395.) George Vivian admitted that he had been convicted of a felony in 1986. (23 RT 4432.)

F. Cherie Payseur

Andre Atkinson, a former Illinois correctional officer, was at the Concourse Bowling Alley on the night Payseur's body was discovered when some kids ran in saying there was a dead body in the back parking lot. He went out with other people and covered the body with his jacket. He and another man were inside the planter area with Payseur's body. He told officers at the scene he had seen a male Mexican in his 20's, about five foot six inches tall and real muscular, hopping over the fence. (38 RT 8139-8144.)

ABO and PGM typing of Payseur's vaginal swab showed the presence of seminal fluid that could not have come from appellant. The findings, however, could have been consistent with there being two semen donors and, assuming a second semen donor, appellant could not be excluded as a donor. (38 RT 8151-8176.)

G. Sherry Latham

The prosecutor subpoenaed Sherry Latham's boyfriend, Joe Garrett, in April 1995. Garrett complied with the subpoena but the prosecutor sent him home. Garrett knew that Latham was a prostitute who used heroin and cocaine. He watched out for her when she was working. He generally stood about a half-block away, watched her get in the car, and waited for her to come back. Latham usually met her customers on Lake Elsinore's Main Street and took them to a field on Minthorn Street by the welfare office. She would generally be gone about 10 or 15 minutes and the customer would bring her back. Garrett last saw her around 8:30 or 9:00 p.m. on July 2, 1991. She got into a vehicle like a black Nissan Maxima. The driver had dark hair, no facial hair, and did not wear glasses. He had not seen the vehicle or the driver before. The car made a U-turn and took a route Latham usually did not take. Garrett was alarmed. He waited about an hour and a half, but Latham never returned. He told Detective Creed about the incident a couple of days later. Garrett admitted he had used drugs on the day Latham disappeared. Nonetheless, he was positive about what had occurred. (39 RT 8279-8288.)

H. Kelly Hammond

Kelly Whitecloud had been convicted of a narcotics violation in 1984, kidnapping in 1989, and burglary in 1992. At the time of her testimony she was in state prison for violating parole. She admitted that her

intent on the night Hammond disappeared was to "rip off" the man in the van, "if it would have come down to that." (24 RT 4747-4749.) The toxicology expert had never heard of someone experiencing reverse effects from cocaine and heroin, as Whitecloud claimed she did. (27 RT 5472-5473.) Whitecloud did not remember telling Detective Keers the suspect was about five feet eight inches tall and weighed about 170 pounds. She remembered saying he was five feet eight inches to five feet 10 inches tall. She told the grand jury he weighed about 140 to 150 pounds. (24 RT 4751.)

On August 17, 1991, Detectives Carl Carter and John Davis spoke with Whitecloud about the last time she had seen Hammond. She was under the influence of something and she was quite despondent and upset about the murder of her friend. She was somewhat cooperative, but she was not focused on what the officers were trying to talk to her about. Carter did not notice any physical injuries to Whitecloud. She did not tell them she jumped out of the man's van while it was moving. She said that she did not care for the guy, that he spooked her, and they parted ways. (38 RT 8250-8256.)

Private investigator Patricia Barnaby interviewed Whitecloud on June 6, 1992, at a state prison in Chowchilla. Barnaby gave Whitecloud her business card and made it clear she was a defense investigator. Whitecloud initially resisted speaking with her, saying she did not want to help appellant out. She requested that the conversation be off the record, but Barnaby refused. She became less reluctant to talk when Barnaby told her she would ask a series of questions and Whitecloud could answer or not answer as she chose. Whitecloud said she saw a bible between the front seats of the van. Barnaby asked if she had fallen out of the van and Whitecloud said no, she had landed on her feet. Whitecloud said she was

maintaining about a $1,000-a-day drug habit at the time. (38 RT 8257-8269.)

According to Whitecloud, she did not know Barnaby was working for the defense, and she did not want to talk any more when she found out. She wrote a note for Barnaby to give to appellant's attorney: "I hope the bastard rots and I'll be in court." She denied telling Barnaby she was upset that appellant had an attorney and would be able to have a defense. She denied telling Barnaby that the man she saw looked like an ordinary type of guy, like a grandfather. (24 RT 4735, 4742-4743, 4753-4755.) She denied telling Barnaby she was under the influence of drugs and not feeling well when she went to the police station. (24 RT 4752-4753.)

Detective Keers contacted Ben Amos a few days after Hammond's body was found. Amos told her he could not remember the man the woman was with. He did not tell her the man had a silver belt buckle. He did not recall if he told her the man had a western-style shirt on and was wearing cowboy boots. If he made any reference to the man's clothing at all, he was sure he said he was dressed "sort of like a cowboy." (28 RT 5726.)

Filberto Beltran arrived at the location in Corona where Hammond's body was found on the morning of August 16, 1991, around 6:05 a.m., just before Jim Tyhurst. He unhooked the forklift he was towing and waited in his truck for Tyhurst to arrive. He heard someone drive up about two minutes later. He could only see the vehicle's headlights, but he assumed it was Tyhurst. The vehicle circled his truck, then drove off towards the alley. He got out of his truck wondering why Tyhurst was leaving. He heard what sounded like someone closing a car trunk. As he walked towards the alley, he saw the vehicle's headlights making a left turn and then a right turn at the end of the building. He heard the vehicle peel out in the gravel, almost

hitting Tyhurst's truck as Tyhurst turned into the alleyway. Tyhurst arrived about a minute later and asked if Beltran had seen the dead body. Beltran said no. He told investigating officers he was driving real slow and he would have seen the body had it been there when he arrived. (38 RT 8112-8119, 8126-8137.)

Detective Robert Joseph spoke with Debra Sosa on October 8, 1991, at about 10:00 p.m., near the intersection of University and Kansas Avenues. He believed Sosa was a prostitute. She told him that, around midnight on the night Hammond disappeared, she was walking towards Sterns Liquor Store on University Avenue looking to "score some dope." She saw Hammond on the corner of 7th and Chestnut getting into a blue pickup truck driven by a white male. She talked to Whitecloud a couple of days later and realized she had seen Hammond on the night she disappeared. She went to the sheriff's department on October 9, 1991, and helped prepare a composite drawing of the person driving the truck. She said she had seen a composite drawing of a suspect based on Whitecloud's description and had confronted Whitecloud about it. She said she was willing to sit down with the police and confront Whitecloud about the information she had given. Sosa told Joseph she had already given the same information to other investigators, and Joseph learned later that Detective Creed had, in fact, contacted Sosa several times and had taken a statement from her about Hammond's murder. (39 RT 8314-8326.)

At the time of her testimony, Sosa was in custody for violation of the terms of her probation for felony petty theft with a prior. She did not want to testify and help appellant. The court determined she was a hostile witness. Sosa admitted that she started using barbituates and heroin when she was about 20 years old and that she had been arrested for prostitution in

1993. She claimed she did not know Hammond or Whitecloud and she did not remember talking to any police officers about the murder of Hammond or other street prostitutes. She denied assisting in the preparation of a composite drawing of the suspect. She did not remember being shown another composite sketch of the alleged serial killer and she did not tell Detective Joseph it did not look anything like the person she saw leave with Hammond on the night she disappeared. She did not remember getting arrested in the lobby of the jail on August 14, 1991, for being under the influence of drugs. (39 RT 8290-8313.)

I. Eleanor Casares

On December 23, 1991, appellant's wife, Cheryl, slept in until somewhere between 10:00 a.m. and 12:00 p.m. Appellant was there when she awoke. (31 RT 6402, 6416, 6421-6422.) Cheryl believed, but was not sure, that she had the van on December 23rd. (31 RT 6404.)

Around 3:15 a.m. on December 23, 1991, Arlene Gomez and Lisa Pereya saw Casares standing in front of the Stop-N-Go market near the corner of Comer and University. They gave her a ride to the USA Gas Station about a block away to get some cigarettes. She was wearing jeans and a black jacket or sweater. They left the USA Gas Station about 3:30 a.m. and offered her a ride home, but Casares declined. (38 RT 8178-8182,)

Tony Thomas worked in the vicinity of Victoria and Jefferson and drove the dirt access road at the Casares crime scene every day. He did not see a body there between 9:00 and 10:00 a.m. on the morning Casares's body was discovered. A couple of days earlier he had seen a small to medium-sized, light blue, Toyota-type car near the area where Casares's body was found. He had not seen the car before. He watched for about ten

minutes because he thought the driver, a white male in his mid-30s with shoulder-length, light brown hair was stealing wood. The man left when Thomas started walking toward the car. Thomas told Detective Keers about the incident on December 26, 1991. No one showed him any photographs of cars or people for identification. (38 RT 8184-8197, 8241-8243, 8248-8249.)

Ann Hawley and her husband were detained at a police roadblock on Victoria Avenue on December 30, 1991. Officers asked if they had seen anything unusual in the last week. Hawley told them she had seen a man standing on the bank facing the orange grove, just looking into the grove. She thought it was strange because the man did not move. He did not even turn his head. He just stood like he was hypnotized. He appeared to be Mexican, had a slender build, and was about five feet six or five feet seven inches tall. He was standing near a car. Hawley remembered commenting to her husband that she thought he was going to steal oranges, but he did not look like anyone who was going to take oranges because he stood so still. (38 RT 8215-8221.)

Carlos Looney began working off fines at the Riverside County supply warehouse on December 9, 1991. He took a few days off for the Christmas holiday and finished his service a day or two after Christmas. He occasionally talked with appellant and sometimes worked with him. He never saw any injuries or scratches on appellant's face or arms. (39 RT 8328-8333.)

Celia Gawrych worked as a waitress at Zacatecas Cafe on University and Park. Shortly after Christmas 1991, she was detained at a roadblock where police were asking if people had seen Casares. Gawrych told them she had seen Casares on more than one occasion, at both Zacatecas and on

University Avenue. She suspected that Casares was a prostitute. She had seen her at about 9:00 a.m. on December 23, 1991, at the USA Gas Station at Victoria and University, where Gawrych and Casares were both buying cigarettes. She believed Casares got into a light blue, old-model truck with two young men. Gawrych was certain of the date because she read about Casares's death in the newspaper a few days later and told several people. She would have told the police if she was unsure of the date. (39 RT 8335-8351.)

J. January 1992: Appellant's Arrest

Roberta Gamboa admitted she had been convicted of four felonies: robbery, possession of narcotics for sale, and a couple of other narcotics offenses. (27 RT 5496.)

K. Appellant's Alleged Hatred of Prostitutes

Appellant's brother, Robert Suff, was convicted of misdemeanor grand theft auto in 1972, felony receiving stolen property in 1974, felony burglary in 1975, and felony larceny in 1986. (31 RT 6263.) Bonnie Ashley did not recall Robert having been at her residence in 1984 as he claimed. According to Ashley, the Dunes Casino is not visible from any point on her property. (38 RT 8147-8149.) Investigator Patricia Barnaby confirmed that the casino sign could not be seen from Ashley's home. (38 RT 8270-8272.) Florence Scharton had known appellant for about 13 years. Appellant had once worked for her, and she visited him when he lived with Ashley on Orchard Street. According to Scharton, one cannot see the Dunes Casino from Ashley's property because there is a church in the way. She never heard appellant say anything derogatory about prostitutes. (40 RT 8615-8624.)

L. Trace and DNA Evidence

Sisal fiber is a very commonly used fiber and is present in materials other than rope. Sisal twine is also very common. Springer admitted she probably could not distinguish fibers from different sisal ropes. (34 RT 7181-7183.)

Appellant used his van on several occasions to transport workers from the county's work release program to the warehouse and back. Some of these workers were African-American and Hispanic. In addition, African-American supply warehouse employees rode in appellant's van. (38 RT 8100-8101, 8104.)

PGM testing of semen found on vaginal swabs from Ferguson, Puckett, Hammond, and McDonald showed activity consistent with the victims' PGM types but not with appellant's. However, based on the low to moderate levels of sperm present on these vaginal swabs and the elevated level of PGM activity, it is more probable that the PGM type came from the victims' vaginal fluid secretions than from the semen donor. (38 RT 8222-8240.)

Under extremely hot conditions, it is important to test DNA samples as quickly as possible. Not much DNA analysis was being done in the forensic community in 1991, and there was not a focus on avoiding contamination and properly preserving DNA samples. (24 RT 4681-4686.)

Two witnesses questioned the reliability of the DNA results in the case. Dr. Laurence Mueller, an associate professor at the University of California, Irvine, and an expert in the fields of population genetics and evolution biology, addressed the FBI's RFLP procedures. Mueller questioned the manner in which the FBI calculates profile frequencies and reports the rarity of the profile. In his opinion, the FBI's procedures result

in profile frequency predictions which are much rarer than can be justified. Specifically, he believed the FBI's use of a fixed-bin system to calculate the frequency of genetic variance in the populations it uses - Caucasians, Blacks, and Hispanics - is inappropriate because there is evidence of subgroups within these populations. In one study, the actual profile frequency of a six locus match was one in 37 while it would have been estimated as one in 96 million using FBI techniques. Mueller also criticized the FBI's quantitative criteria to confirm a visual match. This criteria permits the FBI to declare matching bands when they are within plus or minus five percent of each other. The same adjustment should be made to the FBI's population databases. The result is a report that the chance of finding matching bands is much rarer that it actually is. (39 RT 8430-8466, 8497-8515, 8518-8520, 8526-8527; 40 RT 8565-8598, 8606-8614.)

The National Research Council (NRC) addressed these concerns in a report published in April 1992. The report recommended specific procedures which would prevent overstating the rarity of an RFLP pattern. The FBI, however, chose not to follow the NRC's recommendation. The result is that the FBI's match probability is much rarer than it should be. Dr. Mueller computed the RFLP match probabilities in this case according to the methodology of the NRC's recommendations. (See Defense Exhibit OO.) When the NRC guidelines are used, the true frequencies are as follows: Ferguson = one in 40; Miller = one in 111; Coker = one in 11,000; Sternfeld = one in 6,972; Puckett = one in 6,100; Hammond = one in 50; and McDonald = one in 23. The difference between these figures and the FBI's is due to two factors. First, the FBI's failure to merge bins has a a dramatic impact on the final frequencies. The effect of not merging bins in a profile like the one in Sternfeld, which has a total of nine bands, could be

as large as two to the ninth. Second, the FBI uses the product rule rather than the ceiling principle. The ceiling principal takes the largest frequency from an array of populations whereas the product rule restricts itself to frequencies from just a single population. (39 RT 8466-8487, 8515-8518, 8520-8525, 8527-8531; 40 RT 8599-8606, 8613.)

Dr. Mueller also questioned the FBI's combination of DQa results with RFLP results in this case. There have been only a few studies with DQa and the RFLP markers and none show the kind of independence that would even suggest this would be appropriate for the array of genetic markers used here. The ceiling principal, even though it is designed to be conservative, is not expected to work if there is a lack of independence between the constituent members. (39 RT 8487-8493.)

Dr. John Gerdes, the clinical director of a company that matches organ donors and recipients and an expert in the field of microbial genetics, addressed the FBI's PCR procedures. Gerdes uses the PCR technique in his business where the need for precision is great; a mistake could result in a patient's death. (38 RT 8014-8015, 8019-8020, 8057-8059.) He explained that the risk of contamination in PCR analysis is great. Clinical labs incorporate more rigorous controls than do forensic labs. Also, personnel in a clinical lab aseptically collect a sample from a known individual and then analyze that sample. In a forensic setting, personnel in the field frequently are not trained well in aseptic technique. In addition, unlike a clinical lab, a crime scene is not a sterile environment and there is no way to know if a sample came from a single individual. This creates interpretation problems. It is possible that contamination can be present even when the test shows a clear or clean control dot. Gerdes believed that these contamination problems present equal chances of false exclusion and false inclusion.

Until adequate controls exist to ensure that these kinds of errors do not occur, or at least to define how often they do occur, PCR should not be used in a forensic setting. (38 RT 8050, 8059-8060, 8063-8064.) The NRC has concluded that major and minor donors should not be identified in cases of mixed donors, particularly identifications based on dot intensities. (38 RT 8024-8047, 8052-8053, 8061-8063, 8069-8071, 8074-8077.) Finally, in Gerdes's opinion, the conclusion "inconclusive but cannot be excluded" is misleading. In any situation where there is evidence of a mixture, such as the Puckett case, the bottom line is that the results are simply inconclusive. (38 RT 8054-8056.)

Prosecution Rebuttal Case

A. Sherry Latham

Detective Creed responded to the Grape Street location where Latham's body was found at about 7:45 a.m. that morning. He did not observe any discoloration to Latham's body at all. As noon approached the ground temperature was around 113 or 114 degrees. He saw her body start to decompose. Her skin surface changed from a flesh to a bluish-green color and had a marbled look with veins of color running through it. As the day progressed her skin actually blistered and he could see her body fluids bubble underneath the surface from the gases. (40 RT 8773-8781, 8783.)

B. Kelly Hammond

Officer Daniel Leary talked to Gilbert [sic] Beltran at the Hammond scene in Corona around 7:00 a.m. on August 16, 1991. Beltran said something to the effect that the body may or may not have been there when he arrived. (40 RT 8728-8734.)

Detective Creed knew Debra Sosa as Debra Navarro and "Gypsy," and he knew she had about 12 or 13 other aliases. He contacted her in the

University Avenue area on August 16 or 17, 1991, within a day or two after Hammond's body was found. She said she thought the last time she saw Hammond was two or three days before her body was found. Creed told Detective Joseph that Sosa had given inconsistent statements. Sosa explained to Joseph that she did not want to get involved when she talked to Creed but, after talking to other prostitutes, she realized she needed to clear this up because she had seen Hammond leave with a different person. (40 RT 8760-8762, 8772, 8778-8779, 8781-8783.)

C. Eleanor Casares

Jennifer DiMaggio oversaw the county's work release program. Her records showed that Carlos Looney was not in the program in December 1991. He was referred to begin work at the supply warehouse on October 28, 1991, and he completed 21 days of service on November 27, 1991. (40 RT 8735-8737.)

Detective Rene Rodriguez participated in a roadblock at the intersection of 14th and Park during the early morning hours of December 30, 1991. Around 10:30 a.m. a woman by the name of Celia Gawrych was stopped and interviewed. She indicated she had seen Casares during the morning hours of December 23, 1991, at the USA Gas Station on University Avenue. Gawrych was in the drive-through behind a pickup truck containing two male individuals. She saw Casares make contact with the passenger. When the truck pulled away, she pulled up and got out of her vehicle and went to buy cigarettes. The truck was pulling out of the gas station parking lot and Casares was walking in the same general direction. Both Casares and the truck were gone when she got back. (40 RT 8738-8744.)

D. Appellant's Arrest

Detective Michael Hearn monitored Detective Keers's taped interview of appellant on January 9 and the early morning hours of January 10, 1992. Appellant was informed that part of the reason he was there was that officers had seen a girl approach his vehicle out on the street. Appellant repeatedly denied ever having solicited a prostitute, saying "I've got no reason to. I've got a happy home life with my wife." (40 RT 8784-8791.)

E. Trace and DNA Evidence

Brenda Battle spent five days in the county's work release program in April 1990. She worked upstairs, filing, at the county supply warehouse. She rode from the sheriff's department to the supply warehouse with appellant three times. On each occasion she was the only passenger in his van. Appellant was always a total gentleman. She recalled seeing camping gear and a rolled-up sleeping bag in the back of the van. (40 RT 8753-8757.)

Dr. Bruce Budowle began evaluating and developing DNA techniques for the FBI in 1985. The FBI began using RFLP methodology in early 1989 and PCR methodology in 1992. Budowle was also involved in compiling the population databases the FBI uses to interpret DNA results. After years of analysis and data collection, he believes DNA is a viable procedure and a valid, reliable method. The peer review literature is overwhelmingly supportive of the FBI's procedure. While some disagreement with the calculation methods exists, predominantly in the legal setting and in the newspapers, the scientific literature of peer-reviewed articles is overwhelmingly in support. He believes there are actually only a small number who disagree. (40 RT 8625-8632, 8634-8636, 8672-8674.)

Budowle does not have a high regard for Dr. Mueller. Mueller's research involves fruit flies, and he believes Mueller does not sufficiently appreciate the differences between human and fruit fly populations to make assumptions about differences between human populations. Budowle once collaborated with Mueller on a project. The values Mueller came up with in a genetic distance test made Southwestern and Southeastern Hispanics more genetically different than humans and chimpanzees. This is just not consistent with what is known about human populations. He believes there are flaws in Meuller's calculations in this case. The FBI allows a five percent measurement error for matching purposes to account for the fact that the sample might be of low quality. The database, however, is composed of good quality samples and there is no need for a similar adjustment to it, as Mueller suggests. The profile frequency Mueller calculated for Coker, 1 in 354, is more common than two brothers who have a 1 in 1,000 chance of having the same DNA type. This defies both genetics and science. The more two people are related, the more likely they are to have the same DNA type. Mueller also had concerns with the five probe match in Sternfeld because the databases he had available were very limited. The FBI has substantially larger databases. Mueller used a database which is not the most representative of the area where the crimes were committed. He chose the database because it is the most common frequency amongst all the databases regardless of how relevant they are to this particular community. Budowle believes multiplying RFLP and DQa results is acceptable. An analysis of the FBI databases showed there was no problem doing so. (40 RT 8638-8641, 8655-8660, 8667-8668, 8705-8707.)

Budowle acknowledged the debate about population substructure and its impact on statistics, and he agreed there would be cause for concern

if there were substantial differences between groups for the genetic markers the FBI uses. But if one takes the population groups within a major category, the degree of difference seen does not produce substantially different estimates. One can therefore have confidence that the estimate is precise, and that another subgroup database would not change the estimate substantially. The FBI's procedures and statistical analyses take into account any variance in substructure. The FBI has studied 2,000 DNA profiles and estimates of their frequencies in all the different databases and has demonstrated that population substructure does not have a substantial impact. It once found two individuals who matched in the database, an event it believes should be exceptionally rare. The samples turned out to be duplicates. The fact that these duplicates could be discovered tends to show how robust the system is. (40 RT 8632-8634, 8653-8655, 8687-8701.)

Budowle does not believe the NRC's April 1992 report is a good product backed by good science. The report was heavily criticized, particularly the portion dealing with statistics, and there was a lot of dissatisfaction with the creation of the ceiling principle as an approach. (40 RT 8636-8638, 8670-8672, 8674-8676.) Dr. Eric Lander, who served on the NRC board which published the report, has been viewed as an opponent of the FBI's procedure. In October 1994. Lander and Budowle co-authored an article entitled "DNA Fingerprinting War Laid to Rest." The gist of the article, which was published in Nature magazine, was that estimates of the rarity of a profile should be presented to the jury by both sides and the jury should decide which is right. The FBI has chosen to adopt this approach and to continue using the method it has evaluated and tested by looking at lots of populations and lots of validation studies, one it believes gives a more realistic estimate of the rarity of the profile. (40 RT 8641-8653, 8669,

8677-8679, 8703-8704.)

With respect to PCR testing, Budowle indicated that he attempts to exclude every time he performs a DNA test. The fact that a person cannot be excluded has some value. So does an inconclusive determination. Contamination of any sample is a concern no matter what method is used, and the FBI employs safeguards which allow it to identify and/or inhibit contamination. Budowle believes the fact that 90 percent of a match is based on visual observation is a strength, not a weakness, of the PCR process. A computer can confirm the match, but it would be silly to try to convince anyone that a match exists if it cannot be seen. (40 RT 8660-8664, 8680-8687, 8701-8703.)

PENALTY PHASE

Prosecution Case

A. Evidence of the Crimes in This Case

1. Tina Leal

Dr. Reddy discovered a light bulb in Tina Leal's uterus on December 15, 1989. (44 RT 9697-9698.)

2. Catherine McDonald

On September 14, 1991, Dr. Ditraglia determined that Catherine McDonald was about four months pregnant. He basically delivered a dead fetus during the autopsy. One could not tell McDonald was pregnant by looking. (44 RT 9699-9700.)

B. September 1973: The Death of Dijanet Suff

In September 1973 appellant and his wife, Teryl, were living in an apartment in Fort Worth, Texas. On September 25, 1973, their two-month-old daughter, Dijanet, died. Dr. Feliks Gwozdz, the medical examiner for Tarrant County, Texas performed an autopsy. (44 RT 9578-9580.) Dr.

Darryl Garber, a Riverside County forensic pathologist, reviewed Gwozdz' autopsy protocol and his trial testimony in the Texas case, some photographs and X-rays of Dijanet, and a radiologist's report regarding the X-rays. He described Gwozdz' pertinent findings to the jury. Dijanet was two months old at the time of her death. She measured about 23 inches and weighed approximately 9 pounds, and she appeared to be normally well-developed and well-nursed. Numerous bruises covered the front of her body, and her abdomen was protruding extensively and was very firm to the touch. A bruise on her abdomen appeared to be a human bite mark. There were multiple bruises on the side of her face and what appeared to be a cigarette burn on her foot. Two or three weeks before her death she suffered a fracture of her arm and multiple fractures of her ribs on both sides. While any normal sized adult could probably have caused her injuries, it would have taken more than just rough handling. The acute cause of Dijanet's death was blunt force trauma shortly before her death which resulted in extensive abdominal injuries as well as injuries to her lungs and brain. Her liver was ruptured in two areas and there were areas of bruising of the mesentery and the pedicle of fat which supports the intestines. There was hemorrhage into one of her adrenal glands, in the periphery of her lungs, and in the region around her spleen. A tremendous amount of force was required to cause these internal injuries. There were focal areas of subarachnoid hemorrhage on the surface of the top of her brain. Her brain also showed a flattening of the compilations of the gyri, indicating there was swelling after the injury. This kind of injury occurs when there has been a significant blunt force trauma to the head or, possibly, severe shaking. (44 RT 9627-9639.)

Detective B. G. Whistler, who was assigned to investigate Dijanet's

death, arrested appellant and Teryl the day after the autopsy. He attended appellant's trial and was present when the jury found him guilty of murder. He identified the judgment and sentence document from that case (Exhibit 950). Appellant pled guilty to another felony in that proceeding, theft of property over the value of $200 and under $10,000. (RT 9578-9586.)

Judy Miller was one of the jurors in the case and heard all the evidence presented against appellant and Teryl during the course of the trial. The jury returned a unanimous verdict convicting appellant of Dijanet's murder. Miller recalled evidence that appellant was Dijanet's caretaker when the injuries were reported. She concluded from the evidence that Dijanet's injuries were sustained over a period of time, and that whoever bathed her and changed her diapers would have seen her injuries. Miller believed that appellant was personally responsible for brutalizing and beating his three-month-old baby daughter to death while his wife, Teryl, was responsible for failing to take action to stop him. Miller was taken aback by Teryl's coldness during the trial. (44 RT 9587-9595.)

C. January 1988: The Death of Lisa Lacik

Prostitutes Connie Anderson and Lisa Lacik were working on the corner of 8th and H Streets in San Bernardino one day in January 1988 when a man in an older model, light-colored, mid-sized car in "raggy, bad condition" pulled up. Lacik talked to the man. She told Anderson that he had offered her $100 and he wanted Anderson to come along, too. Anderson declined because the driver did not appear to her to be the $100-date type. Anderson told Lacik she was concerned about the man. Lacik told her not to worry, that she could handle it. She said she was going to the Palms Hotel and she got in the car with the man and drove off. Anderson

walked across the street and told a friend she was very concerned. They waited four or five hours for Lacik to return, but she never did. (43 RT 9314-9317, 9330-9333.)

Wayne Martin and his girlfriend went hiking in the Manzanita Flats area of San Bernardino County on Monday, January 18, 1988. Around noon they noticed something unusual about 20 feet from the edge of the road, down a very steep bank. They were not sure what it was, so Martin worked his way down the bank until he could see that it was a human body. They put some rocks on the road so they could remember where the body was and went to a ranger station about five miles away to notify authorities. (42 RT 9234-9240.)

Officers began arriving at the scene, an unpaved forestry road off of Highway 330, around 4:00 p.m. They believed the body, which was identified as Lisa Lacik's, had been dumped from the road. There were indentations on the dirt berm leading down to where it was found and it appeared that a rock had stopped it from going any further downhill. No footprints or shoe prints were seen in the vicinity of Lacik's body, but the previous day's rain might have washed away whatever had been there. Pictures were taken of tire tracks on the road. A search of the area failed to turn up any of Lacik's clothing or personal belongings. (42 RT 9241-9256, 9258-9265.)

Dr. Gregory Reiber performed an autopsy on Lacik on January 19, 1988. He believed she had been dead at the scene for at least 48 hours and perhaps as long as four or five days, and that she died from a stab wound to her abdomen, just above her navel. The wound consisted of one surface injury but at least three or four different internal wounds which cut through the inferior vena cava, the major vein that drains the lower part of the body

into the heart, and severed another substantial vein. It appeared that the knife had been redirected internally in several different directions during the course of the stabbing. The wound itself was between an inch and inch and a half long from tip to tip and a little over six inches in depth from the surface of the skin. An abdominal wound, however, can be deeper than the length of the knife which inflicted it. Reiber thought a knife at least four inches long - possibly considerably longer depending on how much of the blade was inserted - had inflicted the wound. Reiber found a defect where Lacik's right breast should have been, what medically could be termed a radical mastectomy where even the pectoralis muscle had been completely removed, exposing the rib cage underneath. Marks extending from the edges of the wound were left by a serrated blade. There was no evidence that she had been strangled or asphyxiated. There were a number of bruises and abrasions on the underside of her chin and on the front and right side of her neck, varying from about a quarter of an inch up to a little over an inch in diameter. Some appeared to be antemortem injuries, but most were either perimortem or postmortem. The faint lines on her neck could have been caused by fingernails, by a thin ligature, or by vegetation that swiped across the front of her neck as she tumbled down the hill. Large postmortem scrapes were found on the small of her back, just above her buttocks. Needle tracks typical of intravenous drug abuse were found in her forearm areas, and her lung tissue showed an accumulation of crystalline material which is very typical of a chronic, intravenous, heroin abuser. Her liver tissue showed the presence of morphine, and she had used cocaine within two or three hours of her death. (43 RT 9285-9312.)

Within a week of Lacik's disappearance, Anderson saw the car and driver again. She was afraid that the man might be looking for her because

she tied him in as Lacik's killer. Shortly thereafter she heard that the sheriff's department was looking for her and she called and talked to an investigator. A day or two later she was arrested on an outstanding warrant and, while she was in custody, she told investigators about what she had seen on the day Lacik disappeared. She said she could only see the man driving the car from the chest up. She had never seen him before. He was dirty and looked like he had been working or had not showered for a while. His clothing was disheveled and unkept. His messy, sloppy appearance made it difficult to determine his age, but he appeared to be in his 30's. He was heavy-set (fat rather than muscular) with greasy-looking, dirty, blond hair and a mustache. It appeared that he had not shaved for a few days, which made it seem like his hair was longer. He was not wearing glasses. His car reminded her of a car her grandmother had, a Dodge Polara. She was not sure, but it seemed like it was a two-door. She tried to remember the license plate because she had a real bad feeling; it contained the numbers 776 or 778. She told investigators she thought she could identify the man if she saw him again, and she assisted in putting together a composite drawing. The drawing was not completed because she was upset about being in custody and quit cooperating. She was shown photographs of vehicles, and she identified one she felt looked somewhat similar to the one the man was driving. (43 RT 9317-9322, 9324-9330, 9333-9348.)

On April 22, 1988, Deputy Robert Ridley stopped a green, two-door, 1975 Dodge Duster on state Highway 74 near Lake Elsinore. The car had Arizona plates, license number DPT 770. Ridley issued a citation to the driver, appellant, who lived at 3302 Orchard Street in Lake Elsinore, for violating Vehicle Code section 27400, wearing a radio headset while operating a motor vehicle. (43 RT 9350-9357.)

Anderson went with Detective Gonzalez to the sheriff's department on April 1,1992, and selected appellant's picture from a photographic lineup. (43 RT 9322-9324.)

D. October 1990: The Injury of Brigette Suff

In August 1990, appellant's wife, Cheryl, began working at a mail-order catalog business in Perris where she met and became friends with Terry Woodruff. Cheryl became pregnant in October 1990 and quit working in November 1990. She and appellant moved to a two-bedroom apartment in Rialto in December 1990. Woodruff and her fiancé, Jeremy Taylor, moved in with them in July 1991 and agreed to share the rent. Woodruff was not employed. Taylor found work at Little Caesar's Pizza in Rialto. In September 1991, Cheryl and Woodruff began studying to become ticket agents at an airline school in Ontario. Classes were generally from 6:30 to about 10:00 p.m., Monday through Thursday. Appellant cared for their new-born daughter, Brigette, on those evenings. Taylor was often there, too. (44 RT 9599-9604, 9619-9622, 9641-9645.)

Brigette was fussy when Cheryl and Woodruff got home from class on October 25, 1991. She was crying and did not open her eyes when Cheryl picked her up. Cheryl was concerned. Around 10:30 p.m., she told appellant she wanted to take Brigette to the hospital. Appellant said no because he had to go to work at 5:30 the next morning. Cheryl called her mother and the nurse at Kaiser. The nurse told her to bring Brigette in. Appellant refused. Brigette awoke around 7:45 the next morning, still crying and still not herself. Appellant had already left for work in the van. Cheryl called Kaiser and made an appointment, and appellant came home from work and took them to the hospital. Doctors thought at first that Brigette had an ear infection. They took a blood sample. Appellant took

Cheryl and Brigette home and went back to work. The hospital called later that afternoon and asked Cheryl to bring Brigette back in because she had a high white blood cell count. Appellant took them back to the hospital where doctors noticed some twitching in Brigette's face. They decided to admit her into the hospital. Cheryl learned later that Brigette had suffered cranial bleeding, and that she had several broken ribs and was in danger of dying. (44 RT 9604-9612.)

According to Dr. Eiko Furusawa, the treating pediatrician, Brigette's parents brought her to the hospital on October 25th complaining of fussiness since the night before. Brigette was extremely fussy but had no etiology. A blood test was requested to see if there were any signs of infection. The results came back later that day and the white count was very, very high, which was suggestive of infection. Her parents brought Brigette back in and Furusawa noticed she was having a one-sided focal seizure (shaking on one side of her body). Cheryl told Furusawa she first noticed the shaky movements earlier that afternoon. A spinal tap and CT scan showed possible hemorrhaging, and the pediatric neurologist saw retinal hemorrhages in her eyes. Brigette started having respiratory depression on October 27th and was transferred from Kaiser Riverside to Kaiser Fontana because she needed intubation. (44 RT 9659-9667.)

Dr. Robert Stevenson, a radiologist at Kaiser Hospital in Fontana, was a member of the Suspected Child Abuse and Neglect (SCAN) team, a group at Kaiser which gathers each month to review cases of suspected child abuse. The SCAN team reviewed Brigette's case in October and November 1991. Stevenson was not present, but he reviewed X-rays and specifically interpreted the X-rays of her wrists and ankles. He also reviewed bone scans and a CT examination. According to Stevenson, a

corner-type fracture in one of Brigette's ankles, at the lower end of the bone just above the ankle joint, almost never occurs accidentally and is highly specific for child abuse. Her chest X-rays showed that four ribs in the back of her rib cage, near the spine, were fractured. Stevenson explained that an infant's bones, particularly ribs, are resilient and tend not to break very easily. Based on the rate of healing he observed on the X-rays, the rib fractures were two to three weeks old. They are not in the same category as corner fractures, but they almost never occur accidentally and are highly suggestive of child abuse. The CT scan showed that Brigette had a deceleration/acceleration injury, similar to whiplash from a car crash, which caused widespread swelling of the brain. Her injuries were consistent with having been shaken violently, what is sometimes called "Raggedy-Ann syndrome." Stevenson could not say if the injuries were the result of many shaking incidents or only one. He believed the injuries occurred eight to 10 days prior to the scan. He noted that Brigette's injuries were all non-accidental. While it does not require much force to injure a young, immature brain, her injuries were not consistent with a three-month-old hitting her head or falling. (44 RT 9668-9679.)

Dr. Bertica Rubio, the head of Kaiser Fontana's forensic department and SCAN team, explained that the team is a multi-disciplinary group comprised of radiologists, pediatricians, and people in different fields who interact with child abuse cases. In cases where child abuse is suspected, a SCAN pediatrician usually sees the patient and starts the evaluation process. The team evaluated Brigette in 1991. There were several signs of child abuse. She was a three month old baby with no evidence of infection who had seizures, an indication of brain irritability. She had retinal hemorrhages which are indicative of what is called "shaken syndrome." The

radiographic examination of her brain indicated trauma. Further examination revealed provable evidence of skeletal injuries, some of which on their own, without any other history or any other findings, are what is called pathognomonic (caused by non-accidental trauma). The brain injuries could have occurred 12 to 24 hours before Brigette started exhibiting symptoms. The rib fractures were difficult to date, but most likely occurred before the shaking incident. They could have been caused merely by pressure as opposed to blunt force trauma. Brigette's injuries almost caused her death. She could have died if she had seizures and stopped breathing at home, as she did at the hospital. She also could have died from intracranial pressure caused by swelling. The swelling process was stopped to a certain degree because she was treated very aggressively in the hospital. (44 RT 9681-9696.)

Cheryl denied ever physically abusing Brigette or seeing appellant, Woodruff, or Taylor abuse her. Appellant had been very nice to her during her pregnancy and was excited about having a baby. He was a typical, proud father who bragged about his baby and Cheryl. Cheryl watched Brigette during the day and appellant usually watched her during the evenings. Woodruff and/or Taylor sometimes looked after her during the day, but only for a half-hour at most while Cheryl ran an errand. She was never left in their care for long periods of time.[16] Cheryl did recall that once, possibly on October 23rd, she came home and found a lump on Brigette's head. She had gone to cash a check and was gone 20 minutes at most. Woodruff, who had been watching Brigette, told her that Brigette

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[16] Woodruff recalled differently, that Cheryl and appellant occasionally just left, and she and Taylor were stuck babysitting. (44 RT 9653.)

crawled under the metal-framed bed and hit her head when she tried to turn over. Cheryl did not think there was anything unusual about it. It was not like Woodruff was trying to hide anything. Cheryl checked Brigette and found a little bump on her head. Otherwise she was acting fine. She was fine the next day, too. It was not until Thursday night, when Cheryl came home from class, that she noticed Brigette was acting differently. (44 RT 9612-9619, 9622-9623, 9645-9646.)

Woodruff recalled that Taylor usually worked at the pizza parlor four to five days a week, from 5:00 p.m. to closing, and usually got home around 1:00 or 2:00 a.m. He also worked in the morning sometimes. She did not recall if he was working days or nights the week before Brigette's injury. She did not see how Brigette was acting when she and Cheryl got home on the 26th. She remembered that Brigette was crying but did not know why. She denied ever mistreating Brigette and never saw Taylor or Cheryl mistreat her either. She did see appellant mistreat Brigette three or four times. He got real short-tempered when Brigette started to fuss. He would pick her up by her body, underneath her shoulders, and shake her back and forth and yell at her, telling her to shut up. (44 RT 9647-9648.)

Woodruff told an officer on the night Brigette was taken to the hospital that she never saw Cheryl or appellant shake or play with Brigette excessively or do anything to cause her injuries. Later, she told another officer that she once saw appellant shake Brigette three or four times for a couple of seconds. She believed the incident may have occurred the weekend before Brigette went to the hospital. She said she never saw a similar incident. She told the officer that the Suffs did not know how to take care of their baby and that Brigette cried quite a bit, often at night, and Cheryl would take her bassinet out into the living room so they would not

have to listen to her crying. Woodruff spoke with defense investigator Barnaby in March 1993. She told Barnaby that appellant was a good father, but he sometimes lacked patience. She did not recall telling Barnaby that appellant was patient with Brigette and sometimes he was the one who was able to calm her down and get her to go to sleep. She did not tell Barnaby she never saw either Cheryl or appellant abuse Brigette. (44 RT 9648-9655.)

E. Victim Impact Evidence[17]

Sixteen victim impact witnesses testified about the deaths of ten of the murder victims. Their testimony consumed nearly half (five of 11.5 hours) of the prosecution's penalty phase case. Three witnesses testified about Catherine McDonald (43 RT 9475-9497); three testified about Delliah Zamora (43 RT 9424-9437; 9439-9452; 9456-9463); two testified about Susan Sternfeld (43 RT 9399-9422); two testified about Eleanor Casares (43 RT 9513-9528); and one testified about each of the following victims: Kimberly Lyttle (43 RT 9364-9377); Darla Ferguson (43 RT 9378-9387); Kathy Puckett (43 RT 9387-9394); Carol Miller (43 RT 9464-9472); Kelly Hammond (43 RT 9501-9512); Tina Leal. (44 RT 9565-9576.)

Witnesses testified about how they learned of the victims' deaths, the effect the deaths had on the family, and the good character of the victims. Three witnesses cried on the stand or could not continue testifying. (43 RT 9369, 9394, 9518-9519.) The prosecutor introduced photographs of Zamora's children at her grave (43 RT 9436-9438), love notes they had written to her (43 RT 9436), and a portion of a ten page story written by her

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[17] The testimony of victim impact witnesses is summarized in full in Argument VIII. (*Post*, at pp. 313-339.)

11-year-old niece about her aunt's life from "the beginning to the end" (43 RT 9457-9458); a religious poem Miller had written months before her death (43 RT 9468-9469) and a Dennis the Menace cartoon she sent to her sister showing the love between a mother and child (43 RT 9413); and two drawings by Sternfeld's son showing his mother as an angel and God crying tears. (43 RT 9405-9407, 9410-9411.) Witnesses were permitted to testify about illnesses and unfortunate circumstances family members suffered both before and after the crime: Leal's father suffered from cancer (44 RT 9571); Hammond's sister was raped and her mother suffered from brain damage and a poor memory (43 RT 9503-9504); McDonald's mother had a heart condition and her sister died in a car accident (43 RT 9485); and Miller's sister suffered from respiratory infections (43 RT 9470.) Testimony about why other family members would not testify in court was also permitted: Leal's brother testified about his mother's inability to testify (44 RT 9570-9571); Miller's sister testified about her nephew's inability to testify (43 RT 9470); Sternfeld's mother testified about her grandson's inability to come to court (43 RT 9419); McDonald's sister testified about her mother's inability to testify (43 RT 9485); Hammond's brother testified about his father's inability to testify (43 RT 9502-9503.) Out of the presence of the jury, the judge described the proceedings as "difficult." Defense counsel believed the testimony was "heart-wrenching." (43 RT 9454.)

Defense Case

A. The Death of Lisa Lacik

Connie Anderson admitted she had suffered a felony conviction in 1986. She told Sergeant Larry Brown that Lisa Lacik had been in hiding because she had witnessed a murder and she feared for her safety. The

homicide bureau had no knowledge of a murder at the motel she named, the Central City Motel in San Bernardino. Anderson did not recall telling Brown that Lacik was scared because she had witnessed a murder and was hiding from the police. She claimed to have said that she (Anderson) was afraid because she had seen the man and thought he might be dangerous. She gave Brown a description of the individual she saw with Lacik: a grubby-looking, heavyset, male in his late 30's to early 40's. (43 RT 9325-9326, 45 RT 9907-9911.)

Detective Frank Gonzales interviewed Anderson on April 1, 1992. He knew her to be a drug user, but she did not appear to be under the influence of drugs. She said did not get a really great look at the person seated inside the vehicle. She gave a "parameter" of ages. She indicated he had no facial hair. Gonzales showed Anderson the composite drawing of the suspect she had assisted in making. She said she had described the person as having longer hair back in 1988, but his hair was shorter than it appeared in the drawing. Gonzales subsequently showed Anderson a photographic lineup. She looked at it for about 10 seconds before selecting appellant's picture as the person she saw driving the vehicle Lacik was last seen getting into. She never wavered or hesitated at all or was indecisive about making that selection. (45 RT 9919-9925.)

Robert Allen began working at the county supply warehouse in May 1987. He drank and used drugs and missed a lot of work, which is undoubtedly why he lost his job when he was hospitalized during the first two weeks of January 1988 with double pneumonia. He decided to clean up his act when he got out of the hospital, and he moved into appellant's Morro Way apartment in Lake Elsinore in March 1988. Appellant treated Allen well and Allen felt like he got to know him as a person. He was very

outgoing and very friendly. He got along with everybody at work. He was a little toward the "nerdy" type, like he wanted to try to fit in but did not. He seemed to go out of his way to help people, like he had helped Allen when he needed to get out of the environment he was in. Allen never saw him looking sloppy and dirty and disheveled. He was clean-cut and well-groomed, and he always wore glasses. Allen never saw appellant with prostitutes and never heard him say anything derogatory about prostitutes. They did not socialize because Allen liked to party and appellant did not. Appellant did not like cigarette smoke or drugs and he only tolerated Allen's drinking, and he made that clear to Allen many times

Allen drove a green Dodge Dart with Arizona plates and paint that was beginning to oxidize. It was parked near his apartment complex in Rubidoux when he was in the hospital. He left the keys with a friend and asked her to start it periodically. He did not give her permission to loan the car to people. Appellant occasionally used Allen's car when his Toyota Celica broke down. Appellant was driving the car one night in May or June 1988 when the transmission went out.

Allen cleaned up a little after he moved in with appellant, but then started drinking and doing drugs again. Appellant believed he was destroying himself. He tried to encourage Allen to stay sober, and he got upset a couple times when Allen was not. Allen paid rent until his unemployment ran out and he had no money. He moved out in October 1988 when appellant told him he had to either get sober, get a job, and start paying rent or move out. He went into a recovery home in Indio for eight months and has been clean and sober a little over three years. He has not seen much of appellant since. He was shocked when he learned that appellant was involved with these murders. (46 RT 10238-10263.)

B. The Injury of Brigette Suff

Officer Joseph Cirilo interviewed Terry Woodruff on October 30, 1991, at approximately 2:05 p.m. He asked if she had ever seen appellant shake Brigette. She said she saw him shake her once. Brigette was crying and appellant picked her up and yelled at her to shut up. He shook her roughly three or four times with both hands. Other than that she did not see any abuse. Woodruff told him about an incident on the Wednesday or Thursday before Brigette went to the hospital where she crawled underneath a bed. She said that Brigette crawled around and would bump up against things. (45 RT 9901-9905.)

C. Character Witnesses

1. Elizabeth Mead

Appellant was born in February 1950 in Torrance and is the oldest of Elizabeth Mead's five children by her first husband, William. William worked in the aerospace industry in Anaheim for 16½ years. He had a good job, benefits, and good pay, and he was a typical father until the day he quit his job to become a drummer in Lake Elsinore. The family suffered financially. One morning he took Elizabeth to work at the small cafe they managed. He had breakfast and left at 9:30 a.m. saying, "I'll see you at 3:30." He went home and gathered up all his stuff and left. Elizabeth has not seen him since. He did not say anything to his children before he left and never wrote or sent them a birthday or Christmas card or any money. Elizabeth learned later that he was with his parents in Michigan when someone wrote her attempting to collect a bad check he had written. (45 RT 9952-9955, 9966, 9973-9974.)

Elizabeth had to fend for herself after William left. She tried to work at a Mexican restaurant in Perris, but one of her neighbors reported

that her children were home alone. The authorities came and picked them up and she had to go to court to get them back. The judge told her to stay home and take care of the kids. She said she had to work to support them. He told her to apply for state aid or he would take the children and put them in a foster home. She applied for aid and had to move out of the house they were in. According to Elizabeth, there were just too many kids around for her to worry about: "When you've got seven kids that you raise, you don't try to keep track of all of them." Nonetheless, she did not think William's departure changed the nature of her interaction with her children or left her with less time to deal with them. They always managed to do things together. All the kids were active in scouts, and she was their den mother for 12 years. They went on field trips. She did notice that the children changed after their father left, but she did not talk to them about it. She never said anything about him to any of them. She simply explained that he had left, that nobody knew why, and that she could not get an answer. She figured they could go find him when they were old enough and learn for themselves what he was like. (45 RT 9955-9957, 9965, 9971-9973.)

Appellant was about 16 years old when his father left. He became the adult male in the house and he helped his mother any way he could. He got a part-time job and he helped with his brothers and sisters. He was a typical kid, not one of the radical kids. He was courteous when it was not the thing to be. Other kids described him as a "nerd," someone who would not do things with the rest of them. He was a Boy Scout, and he helped with the Cub Scouts. He was taught not to fight, but to turn the other cheek or walk away. Once, when there was a semi-riot at the high school, appellant left and went to the junior high school to get his two brothers. The act was not untypical. He had played the trumpet since the fifth grade

and he was in the honor and jazz bands at Perris High School. His goal was to join the Air Force and be in the band. In October or November 1968, after graduating from high school, he enlisted in the Air Force. Later that year, when the school band went to play at the Rose Bowl, he met a girl named Teryl. Teryl became the new woman in his life. (45 RT 9956, 9958-9959, 9966-9968, 9974-9976.)

Appellant reported for his Air Force duty in Texas in January or February 1969. He and Teryl continued to correspond, and he proposed to her in a letter. She wrote back and accepted, but subsequently wrote that she had to call it off and would explain later. She told him in another letter that she was pregnant with someone else's child but would still marry him. They married in Perris on December 13, 1969. He came home on emergency leave when Teryl's baby was born. They asked Elizabeth and her new husband, Earl Mead, to keep the girl and raise her as their own. The Meads agreed on the condition that appellant and Teryl would sign adoption papers. Teryl and appellant returned to Texas in April 1970. A son, William Suff Jr., was born in November 1971, and a daughter, Dijanet, was born in July 1972. Appellant called Elizabeth in December 1973 and told her he had been arrested in connection with Dijanet's death. He was convicted and sentenced to prison. He finished his education and got two degrees while he was in custody. Elizabeth went to Texas in May 1983 for his college graduation. (45 RT 9957, 9959-9964.)

Appellant was released from prison after serving ten years. He returned to California and stayed with Elizabeth, Earl, their daughter Bernice, and Teryl's daughter, Dina, for a month to six weeks. While he had been talkative and outgoing before, he was now more withdrawn. He preferred not to talk about what had happened in Texas and Elizabeth did

not press the issue. He found a job and moved out and she did not have much contact with him after that. He came around when he had time, but mostly he stayed in Lake Elsinore or wherever he was living. She knew he started seeing Bonnie Ashley and that he had been involved in a motorcycle accident. She also met a couple of other girls he went with and he introduced her to Cheryl. (45 RT 9964-9966, 9968-9969.)

In Elizabeth's view, appellant had a normal childhood. Looking back, nothing stood out as very unusual about him. There were no problems. He was never physically abused or molested. He never had any problems with drugs or alcohol. He was never violent or aggressive. Even when one of his three brothers teased and/or picked on him, he never lost his temper. She had never seen him react around a crying baby and she did not know much about how he interacted with his own children. He was in Texas and she was in California, and she only saw pictures of the children. She has seen his new daughter, Brigette, only once. She had a dispute with him in the late 1980's. When he received the settlement for his motorcycle accident, he gave her $2,000 to help them move. She thought the money was a gift for all the things she had done for him over the years and that some of it could help cover the cost of his collect calls from the jail. He asked her to pay the money back. (45 RT 9969-9971, 9974, 9983, 9991-9993.)

Appellant's behavior in Texas and Riverside County has caused her and her family a lot of grief and hardship. They are going to have to live with what he has done for quite some time. She has had three and one-half years to think and try not to go insane. That is part of the reason she did not visit him a lot in jail. It seems to her like a bad dream that she has had to live through before, one from which she cannot awake. Her emotions and

her feelings towards appellant have been like a "roller coaster ride." In August 1994 she told the prosecution that she believed he might be guilty and, if so, she hoped he was hanged. She explained that she often says things before she thinks. She also gave the prosecutor a copy of a letter she wrote to appellant on September 5, 1993, alleging that all of the murders had occurred around a special day or date. She asked in the letter, "So why all the lies now? Is your memory that bad or are you so tied up with all the fictional stories you have written that you can't remember how to tell the truth?" During an infrequent jail visit she asked appellant why he was picking oranges when he hated oranges. He said he was picking them for his wife, Cheryl. She asked why he had taken the knife out of the victim's chest and why he took her clothes. He said he did not know. She told the prosecutor that she stood behind appellant in Texas, but she was not going to do it this time because Brigette's injuries were very similar to Dijanet's, and she was just not sure. (45 RT 9978-9980, 9982-9984, 9988-9994.)

Elizabeth has never believed in the death penalty and she does not want to see appellant executed. She thought it was a stupid question to ask a mother. She believes that appellant could have but did not commit these murders. Delving too much into his guilt brings a lot of pain. She would rather put her trust in the system and just let it go. She would like to see him live out his life in prison. (45 RT 9969, 9977-9978, 9995.)

2. Diane Anderson

Diane Anderson painted a different picture of Elizabeth Mead. Anderson had seen a newspaper article about the case which mentioned Mead's name and contacted appellant's attorney the day before she was called to testify. Anderson met Elizabeth in 1968 at a bar in Perris or Riverside, and she saw her there quite often. Anderson was involved with a

musician who played at the bar. She was 18, pregnant, not married and not getting along with her parents, and she needed a place to stay. She moved in with Elizabeth and stayed at her house in Perris for three or four months. She did not pay rent, but helped with whatever was needed. Elizabeth had five children. Anderson got along well with all of them, but she was a little closer to appellant. They were closer to the same age, and they could talk. She was going through turmoil in her life and he was always a friend. She recalled that he did well in school. He was in the band and he was pretty involved with the church in Perris. He was kind - a nice guy. She never saw him aggressive or violent. Among the four boys, he was the peacemaker. (45 RT 10071-10076, 10079-10082.)

According to Anderson, Elizabeth never worked and, in the evening, was often down at the bars. She was living with a man named Earl Mead. They did not interact as a normal family. The environment was cold and uncaring. There was no loving interaction. Everyone seemed to pretty much keep to themselves. The children were given chores as soon as they walked in the door and they never had much time to go out and play with friends. They rarely ate meals together. Everyone usually just grabbed a plate and sat where they wanted. Elizabeth and Earl just did not seem to have a lot of interest in being involved in what the kids were doing. They spent most of their time at the kitchen table eating chips and salsa while the kids cleaned the house, did the laundry, and pretty much just stayed together and talked to each other. Earl was a strict disciplinarian, like a drill sergeant, with Elizabeth's children, but his son was always put on a pedestal. He was better than anyone else. Anderson never saw any physical abuse, but she never saw Elizabeth hug any of her children or compliment them either. They could never do anything right. Whatever they did was

wrong or not good enough. Everything she said to them seemed to be derogatory, about their bad points and what they were not doing well enough. She did not do as much of the yelling and dictating as Earl did, but she never defended her kids or took up for them. She just stood by and let Earl verbally abuse the children. Anderson could not understand why Elizabeth's children did not run away from home. She remembered wondering how they would grow up and whether they were going to hate women. (45 RT 10076-10079, 10081-10084.)

Anderson knows that appellant was convicted in Texas in 1974 of murdering his three month-old daughter. She also knows that he has been convicted of 12 counts of murder in this case. She refuses to judge him. He should be punished if he is guilty. She has a hard time believing he is capable of the acts, and she does not want to see him die. (45 RT 10080, 10085.)

3. James Dinkins

James Dinkins, a correctional deputy at the Banning Rehabilitation Center, knew appellant in 1967 or 1968 when he was in high school. They lived in the same lower-middle class neighborhood. Appellant was about three years older than Dinkins, but they had mutual friends. He believed appellant had a pretty normal childhood. Appellant's father left shortly after they met. After that, appellant pretty much took care of the family. He took over the father role and made sure his brothers and sisters were behaving themselves. He was always courteous and was always respectful of adults and authority. He never disrespected teachers. He was always very polite and well-mannered. Dinkins was not aware of any mistreatment or any out-of-the-ordinary problems in high school. About 20 years later, Dinkins worked with appellant at the supply warehouse. They lived near

each other and car-pooled to work for a while. The arrangement did not last long because Dinkins sometimes got back to the warehouse after closing time and appellant did not want to wait around for a ride home. They socialized at lunch but never went out after work together. As far as Dinkins could tell, appellant was a fine employee. He did not seem too much different than when he was younger. He did his job and was courteous, outgoing and friendly, and he was always willing to help and do his part. Dinkins never saw him lash out or get angry and strike out at anyone. He has not had much contact with appellant since 1985 or 1986, when he went to work for the sheriff's department. Dinkins learned from family members that appellant had been convicted of murder in Texas. He did not know he had murdered his three-month-old daughter. (44 RT 9712-9721.)

4. Joseph Beeson

Joseph Beeson, a retired Perris High School vice principal, remembered appellant as a normal, very quiet student who caused no problems. Their last contact was in 1968 when appellant graduated. Appellant was a member of an extracurricular reading class Beeson taught. He was also a member of the band. Outside of that, Beeson did not believe appellant was in any group at all. He was more of a loner and stayed by himself. Band activities required him to stay after normal classes and practice. He played one of the wind instruments, a saxophone, as Beeson recalled. He rarely saw appellant in his office and he saw no indications that appellant had any problems with females in the class. He was not someone who dated a lot, but he was always around females. His point of emphasis seemed to be the band, music, and reading. (45 RT 9942-9950.)

5. Bonnie Ashley

Bonnie Ashley met appellant in early 1984. In April 1984 they began seeing each other exclusively and spending a great deal of time together. Ashley was older than appellant, and she was the financial mainstay. Her residence on Orchard Street in Lake Elsinore was paid for and she worked as a substitute teacher. She also received approximately $400 a month from the state for taking care of her grandmother, who was in her mid-90's. Appellant did more of the daily chores than Ashley because he had more time. Ashley could not overemphasize how much he did to help her. He assisted with all her school activities when she was a teacher. He helped check papers and prepare lesson plans, and he brought baby quail to school to show her students. One Halloween, he helped put up the booth for the carnival when she was sick. He also helped with a backdrop at the Christmas program. He also assisted in her real estate work. He helped her prepare for the license examination, and he went to San Diego with her to take the test at the end of 1985. He entered listings into his computer so she could correspond with people and he helped with open houses. Once there was a fire near one of her client's homes. Appellant had a shovel and he worked hard to save the house. He did not get a penny for it. He did it just to help. Ashley owned a rental property in Sun City with her brother. When the renter moved out, appellant helped clean it up and pulled weeds in the backyard. She also owned property in Moreno Valley, and appellant helped her with that, too. Most importantly, though, appellant helped her care for her grandmother. Without his help she could not have managed that responsibility. Her grandmother had three-quarters of an acre with 52 fruit trees and a garden, and the work was extensive. In addition to caring for the property and trees, her grandmother had to be bathed and they had to

do all her washing and house cleaning and some of her cooking. Her grandmother died in February 1989. She lived to be 102 because of appellant's efforts. (45 RT 10029-10036, 10039-10040, 10043, 10049, 10051-10052.)

Appellant bought Ashley a wedding ring in 1985 and she thought she was going to marry him, but their relationship gradually deteriorated. They were together until mid-July 1987 and remained friendly even after they stopped seeing each other. Appellant was involved in a serious accident in 1988. His motorcycle was completely demolished and he was thrown 100 feet. Even though they had stopped seeing each other, he moved back into her residence to recuperate. While he was there he took $900 from her grandmother's social security account. He told her, "I've done all this work. All this work. And I feel that you should have made sure that I had some money." Ashley wanted to be fair and agreed to pay back half of the money. Appellant paid the rest. She reported the incident to the police, but nothing much was done. After that, she felt it was best to break off their relationship because she could no longer trust him. When he left in March 1989, he took mementos of the relationship (personal pictures, a little gray ceramic mule, and jewelry he had given her throughout the years) without her permission. She never got them back. She did not see him often after that. (45 RT 10036-10040, 10044-10052, 10054.)

The person on trial is not the person Ashley knew. The person she lived with and loved for several years was extremely caring and attentive. He was never abusive to her or anyone else. She believes that appellant should not be executed. (45 RT 10041-10043, 10047-10048, 10053-10055.)

6. Dennis Boyer

Dennis Boyer taught a computer class at a regional occupation program in Lake Elsinore in 1984. Appellant attended the class four hours a day, four to five days a week, for 42 weeks. According to Boyer, appellant was an excellent student who was interested and had some talent in the computer area. (45 RT 9916.) Appellant also took Boyer's introduction to computer and data processing class in the fall of 1984, and his computer programming class in the spring of 1985 at Mount San Jacinto College. He had very good logical skills and his abilities at computer programming were excellent. He was very energetic and enthusiastic and was very helpful with other students. His participation was above average. He received a grade of B in the introductory data processing course and an A in the computer programming course. Boyer did not have very much contact with appellant outside the classroom. Appellant gave him an appreciation gift, and Boyer wrote a letter of recommendation for the position he obtained with the county. Appellant's conviction was a shock and it has changed Boyer's feelings about him. The person he knew is not the type of person he could perceive doing the kinds of things for which appellant has been convicted. (45 RT 9913-9918.)

7. Bradley Wilhelm

Bradley Wilhelm owned a company in Lake Elsinore that distributed medical and fitness equipment and supplies. Appellant worked for Wilhelm for about six months doing customer service, data entry, and some shipping and receiving. He was a good employee, never any problem at all. He was friendly, good on the phone with people, and eager to do whatever he was asked to do. He was quite punctual. He was a good typist and his computer abilities were excellent. He did not seem to have any problems with other

employees. Wilhelm's wife and female receptionist occasionally worked with appellant when Wilhelm was out on sales calls. He got along fine with everybody. Wilhelm never socialized with appellant and never really had any contact with him outside of the normal working hours of his business. When he quit, appellant said he had an opportunity to work for a computer company. He had a real aptitude for computers and he was really excited about that. Wilhelm did not know that appellant had a felony conviction and had served a prison sentence. (45 RT 9929-9932.)

8. The Scharton Family

Florence and David Scharton owned a computer consulting business in Lake Elsinore. They met appellant around Christmas 1985 when he came in to look at the computers on display. David eventually hired him as a commissioned sales representative. Unfortunately, appellant never made a sale and David usually gave him money just to keep him going. He became part of the family. (44 RT 9743-9744, 9752, 9759-9760, 9764.) Appellant told David about his Texas murder conviction when they were talking about his possible involvement with the company. David did not delve into the details because, at the time, he really did not care. He just needed help. He told appellant, "That has no effect on your work. You paid the price. We'll give you a try." Appellant started working for him, and he never had a problem. Florence learned about appellant's parole status shortly after he was hired. She knew he had been convicted of something, but was not that interested and did not really get the specifics. His parole officer checked their business and appellant's employment and talked to them about what type of employee he was. She remembers his parole officer coming in and saying appellant was released from parole. Forms were signed and he shook his hand and said, "Congratulations, you're

a free man." (44 RT 9746-9747. 9754-9755, 9768-9769.)

The Schartons had daily interaction with appellant from the latter part of 1986 to the middle part of 1987. During that time he kept them going. He was always there if they needed him, and he was the biggest help they could have had. He helped them move into their house on Chestnut Street in Lake Elsinore. He also helped paint the house. They offered to compensate him for his time, but he refused. At the time, David was the acting president of the downtown business association, and he and Florence were heavily involved in its affairs. Appellant worked with them in various functions for Lake Elsinore, and the business community got to know him very well. He was drafted into a lot of the situations they were involved in. He ran a lot of errands and talked to businesspeople. It was a fast-paced year. (44 RT 9745, 9747-9748, 9761.)

The Schartons had four children. Appellant interacted and played with them and took them where they needed to go. In a way he was like a nanny. They did things with him on evenings and weekends. There was never a problem. He was listed as one of the family's emergency contacts on their school's emergency notification card and he was there when their sixth-grade son, Michael, shattered his right wrist while playing on the monkey bars at school. The school could not reach the Schartons, so they called appellant. Appellant went to the school and got upset because he did not believe Michael had been cared for adequately. He took him to the doctor and had his arm fixed before his parents even knew about it. He paid for Michael's care. They were supposed to pay him back but never did. Michael, who was just a "kid," did not pay a lot of attention, but he thought appellant was a really nice guy who did well around children. His brothers and sisters really liked appellant, too. (44 RT 9738-9741, 9745-

9746, 9762-9764.)

Appellant was fanatically straight. Florence never saw him use drugs. He refused to do anything illegal; he was scared to death to do anything wrong because he did not want to go back to jail. He refused to drink or smoke, but was never negative about anyone who did. When they had drinks he would excuse himself and leave. It was really strange and they felt odd about it. He did not have much monetary sense; he was too easygoing and he always cared about everyone but himself. Someone could take advantage of him easily because he is always very caring and always looks at a person's best side. David was comfortable with appellant being around his family. He had questions the first time he came home at 10:00 or 11:00 at night and found appellant with his wife, but decided there was no way appellant would have had an affair with his wife because all he thought about was helping people. That is all he has ever done. Florence never felt threatened around him. He never made a pass at her and never did anything to the children to make David worry. (44 RT 9746, 9749-9751, 9760-9762, 9764-9765.)

Appellant was in a relationship with Bonnie Ashley. Ashley did not care much for the Schartons and she did not like appellant associating with them. She became very jealous of the time he spent with them. At first they saw him on a daily basis, but he began to withdraw as Ashley caused more and more friction. He lived with them for three or four days in 1986. Ashley came over and basically grabbed him by the ear and gave him an ultimatum: "Either you don't talk to them ever again or I leave." He ended up going back to her and they did not see him as much after that. He would stop by once a week or so to see how they were doing, but it was not every day for 12 to 15 hours. Ashley tried to get him to sue them to collect his

salary, but he was a salesperson and they had a signed contract. They occasionally saw him after his relationship with Ashley ended, but it was always awkward. He said he was happier. (44 RT 9744-9745, 9749-9754. 9756-9757, 9760-9761, 9765-9767.)

Neither David nor Florence believes appellant committed any of the murders in this case. Florence does not think he is capable of doing something like that and has continued to be a friend while he has been in custody. David was shocked when he heard appellant had been arrested. There is no way appellant could ever have been that way, even if he tried. It is not in his nature. He has never shown David any sign that he could commit a murder. (44 RT 9755-9756, 9770.)

9. The Merrifields

In the 1980's John Merrifield owned John's Service Center, an appliance sales and repair business, telephone answering service, and Greyhound bus agency on Lake Elsinore's Main Street. He and his wife, Mary, who is wheelchair-bound, lived in the building which housed the business. Appellant worked for them for a year and a half, maybe two years, beginning in June 1986, primarily as a telephone answering service clerk. He also sold bus tickets when necessary, and he sometimes sold an appliance part. He worked weekday evenings and on weekends. He was a very good employee, punctual, and always clean and neat. He never came to work disheveled or with dirty hair. He followed directions and was reliable and polite. They never got complaints from customers that the phones were not being answered. He was very likable. Basically he was a talker. Mary never saw him aggressive with customers or anyone else. Appellant was at the business with her many times when John was away. She never felt unsafe or scared when he was around. They asked him to

stay overnight in a spare room once or twice when they were away. He got up at night to answer telephones. Their relationship ended when appellant began working for the county and it became too much for him to travel back and forth on weekends after he moved to the Riverside area.

Money was missing from the cash register on several occasions and John knew that appellant had to be responsible. He asked about it and appellant admitted, "Yes, I borrowed the money." He promised to pay back $323. John did not fire him. John knew that appellant received a sizable settlement from his motorcycle accident, and he was hoping he would pay back the money out of its proceeds. Appellant bought a brand new van, but never paid the money back. The Merrifields were not aware that appellant took money out of the cash register to pay for prostitutes and engaged in sexual activity in their store. It is hard for Mary to believe or accept the fact that appellant killed these women even though the evidence says he did. (44 RT 9800-9809, 9811-9817.)

10. Judith Sanders

From 1985 through 1987, Judith Sanders was an assistant manager and manager of a Circle K store in Lake Elsinore. Her normal shift was from 11:00 p.m. to 7:00 a.m. Appellant worked for the county and would come over at night and keep Sanders company. Depending on how tired he was, he stayed anywhere from 15 minutes to all night. He was friendly and talkative. He was always clean, never sweaty or dirty or disheveled. There were never any holes or tears in his shirts or his blue jeans. Any time Judith needed help, all she had to do was ask. If she had a problem, appellant was there to help her take care of it. He helped her set up displays at the beginning and end of the month. Once, seven men came in and took beer worth $300. The man in charge had a gun in a holster under his arm. He

pulled it out and told Judith and appellant to stay where they were. Appellant kept her calm and cool. He got their vehicle's identification and would not let her chase after the men. The police came and took them to where the men had been pulled over, and they made an identification. Appellant even went to court with her. He was also with her the night a man came into the store and left a package under the counter. Appellant left to go home, but was returning to retrieve something he forgot when someone called and said there was a bomb in the package. Judith had to get people out of the store and get the store locked down. They found two sandwiches in the package. Appellant helped her get the store opened up again and stayed with her the rest of the night. Judith was not supposed to let prostitutes loiter around the store. Appellant would go out and quietly tell the prostitutes in the area to move along. He did it nicely. He was never forceful or brutal. She never even heard him use foul language.

Cheryl Lewis came to work for her as a trainee, and she introduced her to appellant. He started teaching Cheryl how to drive and they began to date. Later on they got married. Judith is their daughter, Brigette's, Godmother. Brigette had appellant wrapped around her little finger from the day she was born. If she whimpered a little bit he was right there to find out what was going on. Once, someone had a birthday and they brought balloons around to everyone. Appellant tied two of them to Brigette's crib and said, "That's my baby." He was a doting father. He always had her dirty diapers changed promptly. Judith never saw Cheryl treat the child roughly. She was the typical first-time mother who was scared her baby was a china doll who was going to break, but she had good parenting skills. She asked questions like "What's the best way of doing this?" She was a young person who did not know what to do.

Judith was not aware that appellant dated prostitutes, and it would surprise her if he did. That would be out of character for the man she knew. Nor did she know he had been convicted in Texas of murdering his three-month-old daughter. That fact does not change her opinion of him. She does not believe he committed the murders in this case. Her head tells her that appellant might be guilty because the frenzy stopped when he was arrested. Her heart tells her that appellant could not have done it. (44 RT 9782-9798.)

11. Catherine Johnson

Catherine Johnson knew appellant for six to eight months. They met in January 1988 when she worked the late night shift, 11:00 p.m. to 7:00 a.m., at a Circle K store in Lake Elsinore. Appellant worked for Riverside County and had a side job selling cameras. He was a very nice, caring, helpful man and they became very good friends. He would come in around 2:00 or 3:00 a.m. and help Johnson stock the cooler and just sit and visit. It did not seem odd to her. He told her he had just got off work. Johnson never felt threatened around him. She did not really socialize with him, but she invited him to her house and introduced him to her husband and stepdaughter. Her husband did not care for appellant much and was not really pleased with their relationship. She learned at some point that appellant was getting married and she met his wife. She did not know they had been living together. Appellant gave Smith some jewelry. She gave it to the police. Appellant once asked Johnson to go to breakfast with him. She refused because she was married. He did not persist. He also asked her to go to the mountains or desert with him so he could take her picture. Johnson did not go with him. Her last contact with appellant was in April or May 1990 at her mobile home in Quail Valley. (44 RT 9729-9737.)

12. The Pajaks

Joseph Pajak was appellant's supervisor at the county warehouse. He hired appellant in 1986 because he had computer experience. Appellant conducted himself very well in the interview and he was an excellent worker. He was very punctual and could be depended upon. He was basically a courteous, efficient employee. Joseph could not remember ever hearing him use profanity. He was always well-groomed and he dressed appropriately. He was never dirty or disheveled. He liked to talk a lot and he did quite a bit of reading during breaks. He sounded knowledgeable about a lot of things. His interaction with other employees was very good for the most part. Cheryl often called with concerns about their child coughing or being ill, which caused problems because he had to be away from his job to talk on the phone. He had to be counseled at least once because he was using all the time allotted each pay period for illness. Pajak socialized with appellant and other employees at lunch time and during breaks. He did not usually socialize with appellant after hours. He recalled that they both attended a party at the Concourse Bowling Alley on Arlington Avenue in 1986 or 1987. Appellant volunteered three or four different times to set up and demonstrate a display of the warehouse's earthquake preparedness kits during work hours. He also volunteered and ran the county's chili cook-off.

Pajak recalled that appellant was in charge of the chili cook-off at the county picnic at Lake Skinner in 1991. He was there with his wife, Cheryl, and their new child. Joseph's wife, Betty, went over to say hello. She recalled that appellant was very interactive with the baby, very concerned and mindful of her. He was very proud and anxious to show her off. They came over and sat by the Pajaks later in the afternoon Betty was

concerned when it looked like Cheryl was going to put the baby on top of all the things in an overflowing stroller. She thought the child was too small and would fall off. Appellant reached over and took the child. Betty never saw appellant act other than as a doting father to Brigette. She was not aware that he had been convicted of basically beating his three month-old child to death. She found that out through a newspaper article. Joseph probably would not have hired appellant had he known he had been convicted of murdering his three-month-old baby. (44 RT 9819-9837.)

13. Donnella Shearer

Donnella Shearer worked at the supply warehouse from September 1983 until March 1988. She was a clerk in the office and had daily contact with appellant after he began working there. He was always courteous, a nice guy who went out of his way to help people. He always got along with his co-workers. Shearer played on the employee softball team with him twice a week. They socialized at county picnics and Saturday auctions, and they gave each other rides to pick up cars at the shop a couple of times. He stopped by her house once to show her his new vehicle. He asked her out, but she declined. She knew he had an on and off again relationship with Bonnie Ashley, and she made it clear that she did not want to date a co-worker. She was just a friend. She left the supply warehouse to work at the courthouse, but she still saw appellant when he delivered supplies at the courthouse and when she visited her boyfriend at the warehouse. She was totally shocked when she learned that appellant had been arrested. She thought it could not be the same person she knew and worked with. She heard about his Texas murder conviction on the news and could not believe it. She did not know the evidence and was not saying anyone made an incorrect decision, but she does not believe appellant committed these

murders. The man she knew and worked with is incapable of committing the crimes. (45 RT 10019-10027.)

14. Brandy Smith

Brandy Smith met appellant in 1991 when she was working off a traffic fine at the supply warehouse. Appellant picked her up at the work release program facility and drove her to the warehouse. He showed her where the office was and introduced her to the people working there. She worked at the warehouse every day for 30 days. Even though it was out of his way, appellant gave her rides to and from work because she did not have her own transportation. They were friends and they talked on breaks. They shared recipes and each other's problems and got advice from each other. Her interaction with him was always cordial. He was never fresh with her. He was always courteous in that way. He was concerned when she told him about problems with her boyfriend and said she and her five-year-old son were welcome to move in with him and his wife. Smith was surprised at the offer. She thanked him and told him she appreciated it, but her situation was not that bad. (44 RT 9722-9728.)

D. Institutional Adjustment

After his arrest, appellant was housed in the county jail with another prisoner for a few months. Out of concern for his safety, he was moved to a single person cell where he was allowed no contact with other prisoners. Any time he was moved within the facility, that portion of the facility went into what is called a lockdown where there was no other prisoner movement. Around 60 of the jail's 1,100 inmates were housed in similar single person cells for their safety. These inmates were allowed to have a television in their cells and they were given telephones from which collect calls could be made so officers did not have to shut everything down to

escort each of them to use the phone. Appellant had one disciplinary marker while housed in the jail for possession of contraband - a safety pin, a paper clip, and a staple. (45 RT 9895-9900.)

Janet Surber, a nurse at the jail, met appellant within a week of his incarceration and had contact with him from time to time during the three and a half years he was there. She saw him more often when he was housed in the old jail, usually in the medical office or at his cell when she was passing out medications. Their contact was usually quite brief and very limited. He was always pleasant and polite. He was never sullen or nasty to anyone. He liked small talk and telling her about things he had done, like raising quail. He seemed very knowledgeable about current events and public affairs. He kept up with things and was very aware of what was going on. He kept busy watching public television, reading books, and writing a cookbook. Unlike the typical inmate, he made productive use of his time in jail. He was up most of the time, not laying around and sleeping a lot. (45 RT 9934-9940.)

James Park, an expert in prisoner classification and prison adjustment, read the grand jury transcripts in this case and reviewed materials relating to appellant's incarceration in Texas. He also interviewed appellant once in the county jail for an hour to an hour and a half. He found appellant to be an intelligent, very verbal person who presented himself well. He asked relevant questions about what might occur in prison if he goes there, and he was pretty realistic about his situation. He expressed a strong desire to work in prison. He does not want to be idle. He wants to have something to do. While it is evident that he has some problems relating socially, Park did not notice any social ineptitude problems during the interview. (45 RT 9849-9856, 9867-9868, 9872-9873, 9889.)

Park believed that appellant's adjustment in the Texas prison system was between average and above average. He made constructive use of his time by working in a prison craft shop making and selling crafts. He worked pretty steadily, was an adequate worker, and got along with the staff. He also pursued high school and college work and received associate of arts and bachelor of arts degrees. He used the grievance system on several occasions, which is what prisoners are encouraged to do if they feel an officer has not done what he is supposed to do. Park saw no violence in appellant's Texas record at all. In fact, in his 10 years in Texas appellant had only two disciplinary writeups, both for possessing what Park considered minor contraband. In 1975, appellant had a suture needle and a pair of scissors. Park explained that a prisoner possessing scissors is not an unusual violation. Prisoners collect these little things which might or might not have some future use. In 1980, appellant absconded with the volume control to the inmate radio system, possibly to replace his own. Two disciplinary markers in 10 years is an exceptional record, particularly in Texas, which is not an easy system in which to get along. (45 RT 9856-9859, 9569-9570, 9875-9877.)

If sentenced to life without possibility of parole, appellant would likely receive a level four classification. He would be housed in a cell a little bigger than a ping-pong table. He would be allowed to have a television set, a stereo system, and a typewriter in his cell if he has the money. (Prisoners on death row can also have these items in their cells.) He could also purchase personal items from the prison canteen, send and receive mail, receive packages from friends or loved ones on a limited basis, and have family visits with a spouse and/or children. He could get married. If he was in the general population he could hold a job. He could

also participate in hobbies and sell items in the inmate craft store. It would be very difficult for him to get to a level three prison, very unlikely that he would get to a level two prison, and he would never get to a level one prison.[18] If he did well in the prison system over the years, he could earn a lower-level rating and go to a less secure prison. But the Department of Corrections is very conservative about this. In order to gain level three classification, appellant would have to burn off points, which would take at least a year or two. Then he would have to be evaluated and recommended with some enthusiasm by the prison staff. That recommendation goes to Sacramento where the director's review board looks at the case, so it is not automatic. Advanced age could be a reason for a classification change from level four to level three. (45 RT 9877-9882, 9891-9894.)

In Park's opinion, appellant would make an excellent adjustment if sentenced to life in prison without possibility of parole. Based on his past prison record alone, he would be an excellent, nonviolent, conforming prisoner, who would work as assigned and do what he's told, one who could live a productive and nonviolent life in prison. (45 RT 9860-9863, 9882-9883, 9891.) The fact that he served only ten years of a 70-year sentence in Texas tends to show that he would adjust well in prison. While it is true that he had an incentive to be a good prisoner, he would not have been released early from prison if he had not adjusted well. While he might be dangerous in the community, he probably would not pose a danger to any other inmates or correctional personnel. He will encounter female

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[18] 1,576 (of 131,000) prisoners are serving life without possibility of parole sentences in California. Of those, 300 to 400 are in level three institutions and two or three are in level two prisons. Only one is in a level one facility, and he is dying in the prison hospital. (45 RT 9881.)

correctional officers, counselors, psychologists, and instructors in prison, but Park was confident they could all take care of themselves. In addition, he would likely have an "R" suffix which would restrict his ability to work or be around women or children. Because of the nature of his crimes, he faces a high probability of being victimized himself. If the Department of Corrections agreed that he needed protective custody, one of the units at the new Folsom prison has been designated at least unofficially as a protected or restricted custody unit. (45 RT 9869-9874, 9882-9884.)

Park has always testified for the defense, and he is paid for his testimony. He has never been called by the prosecution. He has actively advocated for abolition of the death penalty. He does not believe it is a solution to the problem of violence. He believes it is wrong for society to attempt to solve its serious crime problems by killing people. He does not think that works in the long run. But he does not believe people should go unpunished. The question is what punishment is appropriate and necessary. He believes life without possibility of parole is a substantial punishment. He assured the jury that, despite his opposition to the death penalty, he would not testify that someone would adjust well in prison if he did not believe that to be the case. He is confident that the prison system can and does control even the most violent of people. (45 RT 9865, 9884-9887, 9890-9891.)

Prosecution Rebuttal Case

A. The Death of Lisa Lacik

The car Connie Anderson saw Lacik get into and drive away in was an older Dodge, like a Polara. She does not remember whether the license plate was from California or not. It seems like the exhaust pipe was hanging down, but she cannot remember. (46 RT 10189-10194, 10198-

10202.)

B. Character Witnesses

George Hudson, an investigator with the District Attorney's office, spoke with Elizabeth Mead on August 30, 1994, at her house. Most of the conversation was about the family's background and history. She said she knew a lot about the crimes from the defense investigator to whom she had spoken. She told Hudson appellant should be hanged if he is found guilty of the crimes he is charged with. At the time she was pretty distraught. She told Hudson later that she made the statement out of frustration. She did not feel comfortable being interviewed by the defense and requested that Hudson and Detective Creed accompany her on several occasions. (45 RT 10104-10106, 10114-10119.)

C. Institutional Adjustment

Appellant had been housed in the county jail in an isolation cell with its own shower since January 1994. Everything he needed was in the cell so officers did not have to remove him for anything. For his own protection, he had less freedom to roam around and more security than anyone in the jail. On the weekends he got a full change of clothes and laundry for his bed. When he was out of his cell getting new laundry, officers searched his cell for contraband. On April 15, 1995, after this trial had started, deputy William D'Angelo conducted a clothing exchange search of appellant's cell. He found a paper clip taped underneath the seat of the wall table. Nothing had been underneath the table when D'Angelo searched appellant's cell two weeks earlier. D'Angelo also found a safety pin secreted in a box full of medical ointments and a legal staple (a staple about three-quarters of an inch long and made of a heavier gauge of steel) mixed up with some of his legal paperwork. Each of these items was contraband which is not allowed

to be possessed inside the jail. All three items can be sharpened down and made into jail knives, or shanks. Safety pins and paper clips can also be used as crude handcuff keys. According to D'Angelo, it is not uncommon for inmates to have legal documents in their cell. Someone normally checks for staples, but from time to time inmates are given a document with a staple in it. If that happens, they are supposed to give the staples to an officer. It is not unusual for inmates to have contraband, and there is nothing too exceptional about what was found in appellant's cell, but the fact that this was William Suff makes it more significant. (45 RT 10089-10103.)

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I.
THE REMOVAL OF COUNSEL VIOLATED APPELLANT'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS AND REQUIRES REVERSAL OF HIS CONVICTION AND SENTENCE

A. Introduction

The trial judge granted the prosecutor's motion to remove appellant's appointed counsel, the Riverside County Public Defender, on the grounds that the office's prior representation of victims and witnesses created actual and potential conflicts of interest. While it is true that various attorneys in the public defender's office had represented victims and witnesses, there was no showing that the representation was related in any way to the charges against appellant. More importantly, the deputy public defender assigned to appellant's case had not personally represented any of these victims or witnesses, and he possessed no confidential information as a result of their prior representation by his office. As he attempted to explain to the judge, he could not use privileged information in appellant's defense because he had none. Under this Court's well-established precedent, the judge's determination that a conflict of interest existed was an abuse of discretion. The judge also abused his discretion by permitting the district attorney to prosecute the motion, by refusing to accept appellant's offer to waive any conflict, and by refusing to consider reasonable alternatives to removal. The removal of appellant's attorney under these circumstances violated his right to counsel under the federal and state constitutions and requires reversal of his conviction and sentence.

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B. The Removal of Appellant's Counsel

On October 19, 1992, the prosecutor, Paul Zellerbach (Zellerbach), moved for an order removing appellant's appointed counsel, the Riverside County Public Defender, because that office had previously represented eight of the homicide victims (Ferguson, Miller, Coker, Sternfeld, Payseur, Latham, Hammond, and Zamora [aka Wallace]), the surviving attempted murder victim (Jetmore), and more than a dozen prosecution witnesses. (2 CT 349-435.) Attached to his motion were affidavits from relatives of each of the eight homicide victims, from the surviving victim Jetmore, and from many prosecution witnesses declining to waive their attorney-client privilege. (2 CT 371-434.)

Zellerbach believed that the mere fact of the public defender's previous representation of a victim or witness in this case constituted an irreconcilable conflict of interest which precluded every deputy in the public defender's office from representing appellant, regardless of the extent of the deputy's participation - or lack thereof - in the previous representation. He opined that the conflict was obvious: "family members of the victims will be confronted with the deceased victim's [sic] illicit and illegal sexual practices by the very institution [with] which the deceased women shared these confidences." He argued that it was central to his case to establish that the charged murders were of a serial nature and that appellant chose his victims because he believed they were prostitutes, and the public defender's office was in a unique position to know the extent to which the victims were, in fact, prostitutes because it had handled many of their cases. Also, if victim impact evidence became relevant the office would know whether family members it had previously represented lived in the same household as the victims or whether they had prior theft or drug-

related criminal records. (2 CT 486-487.) Zellerbach agreed to provide the deputy public defender assigned to the case, Floyd Zagorsky (Zagorsky), with a list of potential witnesses, but refused to provide statements from these witnesses so Zagorsky could evaluate their relationship to the case and his office's relationship to them with respect to the case. The judge refused to order disclosure of these statements. (2 RT 80-96.)

Zagorsky explained in his response (2 CT 466-480) that he had no information concerning the relationship of several people listed in the motion to the case, and only limited statements from others. He needed this information to evaluate and respond in full to the alleged conflict. (2 CT 476.) He declared that he had represented appellant for over ten months; they had formed a close and harmonious working relationship and appellant wished to continue with his present representation; his office had reviewed the prosecutor's motion and was satisfied that its present and future representation of appellant breached no ethical duty to appellant or any other person; and the public defender was not declaring a conflict as to appellant's case. (2 CT 478.)

The motion was heard on November 20, 1992. (2 CT 496-497; 2 RT 102-179.) Zellerbach alleged there was an actual conflict of interest with respect to Rhonda Jetmore, the surviving victim who had been represented by the public defender's office on seven previous occasions, because Zagorsky would have to "attack that witness's ability to identify the defendant" and "to recall and recollect the circumstances of the events wherein she was attacked." Thus, appellant's interests diverged with respect to a material factual or legal issue or to a course of action with respect to the previous representation of Jetmore: "How can the interests of the surviving victim not be divergent from the person that attacked her, both

of whom are public defender clients or have been?" (2 RT 124-125, 128-129.) Furthermore, the public defender's office had previously represented seven or eight of the homicide victims, some on more than ten separate occasions, on prostitution charges which emanated from the same area where appellant was alleged to have picked up his victims. Thus, the public defender had a conflict of interest because it was the prosecution's theory that appellant was a serial killer who selected prostitutes to kill, and Zagorsky was ethically prohibited from attacking the counts involving his office's former clients when it knew they were, in fact, prostitutes. (2 RT 126-127.) Zellerbach argued that Zagorsky's declaration was insufficient to establish that a substantial relationship of trust and confidence existed between appellant and Zagorsky or that appellant was willing to waive any conflict of interest. (2 RT 127.) If appellant was inclined to enter a waiver, separate counsel should be appointed to advise him as to its ramifications, and the court could reject the waiver. (2 RT 131-132.)

Zagorsky reminded the judge that he had limited information on only two of 12 witnesses listed by the prosecutor. He had not seen 10 of the names in any police report and had not received any additional discovery on these witnesses. While he was prepared to address the two witnesses about whom he had information, he would not have a full opportunity to respond to the motion without information about the other 10 witnesses. (2 RT 139-141.) He advised the court that his full energy had been devoted primarily to appellant's case for over ten months. Consequently, his relationship with appellant was very substantial. Appellant was satisfied with the representation he was receiving, requested that it continue, and objected to recusal of the public defender's office. Zagorsky invited the judge to inquire of appellant regarding their attorney-client relationship. (2 RT 137-

139.)

With respect to the alleged conflict, Zagorsky argued that there was no relationship between his office's representation of former clients and its representation of appellant: "[T]here have been representations by various deputies in the public defender's office as to these former clients in cases that are unrelated to this particular case." (2 RT 163-164.) His only connection to any of the cases was one routine appearance in one of the cases when the client had failed to appear. The office's case file for that client contained no confidential information. He did not believe he had any contact with the client and he did not recall anything about the case. Other than this lone appearance, he had no involvement whatsoever in any of the cases cited by Zellerbach. He had not reviewed - and would not review - any of their case files. Thus, even if relevant, confidential information did exist as a result of his office's prior representation of victims and witnesses, he had not personally represented any of the individuals named in Zellerbach's motion and was unaware of any information about their cases, confidential or otherwise. Under the circumstances, he argued, there was neither an actual nor a potential conflict of interest because he was not going to use any confidential information, if it existed, in his representation of appellant (2 RT 144-147): "We are not going to disclose any confidences; therefore, we are not violating . . . the Rules of Professional Conduct . . . the Attorney General Opinion . . . nor the State Bar Opinion. . . ." (2 RT 156-157.)

Zagorsky urged the judge to consider options less drastic than disqualification if he believed there to be a potential conflict of interest. One alternative was to appoint separate counsel for the limited purpose of advising appellant and determining whether he wished to waive the conflict.

Another was to employ either backup counsel for the limited purpose of cross-examining the witnesses who had been previously represented by the public defender or second "outside" counsel in addition to the public defender's office who would have no access to the confidential information. (2 RT 159-163.)

In response, Zellerbach produced minute orders showing that the public defender's office currently represented Joan Payseur, the mother of one of the homicide victims, and had appeared on her case as recently as the previous Friday. "[T]hat is a good indication of what the People are trying to avoid in bringing this motion in the first place. . . . They continue to represent very relevant, highly relevant witnesses in this case, even after they've been put on notice." (2 RT 167-168.)

The judge found that there were both actual and potential conflicts of interest in the case: "It appears that there has [sic] been confidences, numerous and replete, by the public defender's office with these various potential witnesses." He found the "enormity" of Jetmore's representation by the public defender to be "staggering." Also, 38 deputy public defenders (at least 25 of whom were still with the office) had represented the individuals identified by the prosecutor. He refused to entertain appellant's offer to waive any conflict:

> [T]here are a number of conflicts that exist and there are multiple holders. Mr. Suff who is willing and with advise of independent counsel willing to waive his potential conflict with his present attorney, he would still be faced with a proposition of Ms. Jetmore, the other witnesses, or at least ones co-counsel has represented, and that appears by virtue of the declarations there's no evidence to deem otherwise, refused to waive that confidential relationship.

In the judge's opinion, "I think the only way to do it is to recuse your office

at this early stage and not at any later date . . . so this trust and confidence can be built and so we can in fact go forward. . . . So we're not going to wait until any potential penalty phase. We will address the issue head-on as early as we can." He granted the prosecutor's motion and relieved the public defender as appellant's counsel. (2 RT 173-175.)

C. The Trial Judge's Determination That a Conflict of Interest Existed Was an Abuse of Discretion

"'A trial court's authority to disqualify an attorney derives from the power inherent in every court "[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto."' (*People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1145, 86 Cal.Rptr.2d 816, 980 P.2d 371 (*SpeeDee Oil*).) Inherent in the question whether a trial court may disqualify a criminal defense attorney over the defendant's objection is the conflict between the defendant's preference to be represented by that attorney and the court's interest in 'ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.' (*Wheat v. United States* (1988) 486 U.S. 153, 160, 108 S.Ct. 1692, 100 L.Ed.2d 140 (Wheat); see also SpeeDee Oil, supra, at pp. 1144-1147, 86 Cal.Rptr.2d 816, 980 P.2d 371.)" (*People v. Jones* (2004) 33 Cal.4th 234, 240.)

Trial courts have "substantial latitude" to refuse waivers of conflicts of interest "not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (*Id.* at pp. 242-245; *Wheat v. United States, supra,*

486 U.S. at p. 163.)

A trial court's removal of counsel for an indigent criminal defendant is reviewed for abuse of discretion. (*People v. Cole* (2004) 33 Cal.4th 1158, 1187.)

The trial judge removed Zagorsky because: 1) other deputy public defenders had previously represented victims and witnesses in this case; 2) the former Acting Public Defender had personally appeared in two of those matters, one of which was totally unrelated to appellant's case; and 3) the former Acting Public Defender's wife, who until recently had been appellant's co-counsel, was attorney of record in the unrelated matter and her client entered guilty pleas to a series of misdemeanor offenses. (2 RT 171-172.) The judge did not determine that relevant confidential information existed, that such information (if it existed) remained confidential because it had not been disclosed to unnecessary third parties, that Zagorsky was privy to the information, or that he would have to use that information in the course of defending appellant. Removing the public defender without making these determinations was an abuse of discretion.

The court of appeal has addressed this judge's practice of disqualifying the Riverside County Public Defender for conflict of interest because the office has previously represented a witness for the prosecution, as he did here. (*Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566 (*Rhaburn*).) *In Baez v. Superior Court* (*Baez*), a case decided with *Rhaburn*, the judge granted the prosecutor's motion to disqualify the public defender because the office had represented the complaining witness on felony charges some 12 years earlier. (*Id.* at p. 1571.) The prosecutor's position was the same as Zellerbach's here, that the public defender's previous representation of a witness and/or victim and its current

representation of the charged defendant created an inherent conflict of interest. According to both prosecutors, there is an irrefutable presumption that the public defender possesses information acquired from the witness in confidence in the course of the previous representation and that the information is of such a nature that it could be used "adversely" to the witness/former client. (*Id.* at p. 1574; see, e.g., 2 RT 88-89: "[T]his is a legal issue that must be decided by the court, not a factual issue.") The deputy public defender stated that his office's prior representation of the witness would not affect his trial performance or strategy, and he subsequently executed a declaration stating that he had not reviewed any of the witnesses' criminal files. Nonetheless, the judge found that the previous representation of a prosecution witness created a conflict of interest and removed the public defender as counsel. (*Id.* at p. 1571.)

Baez petitioned for a writ of mandate. The court of appeal found that the judge "erred in applying a rigid rule of vicarious disqualification." (*Id.* at p. 1581.) It soundly rejected the prosecutor's argument and the judge's reasoning:

> In neither case did trial counsel have a "direct and personal" relationship with the witness, and the direct acquisition of confidential information need not (and should not) be presumed. [Citation omitted.] Instead, the trial court should evaluate the totality of the circumstances in determining whether there is a reasonable possibility that the individual attorney representing the defendant either has obtained confidential information about the witness collected by his or her office, or may inadvertently acquire such information through file review, office conversation, or otherwise. . . . We also stress in a case that does not involve "direct and personal" representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come

> into possession of any confidential information acquired from the witness and will not seek to do so.

(*Ibid.*)

The court observed that rigid rules of disqualification "can create hardship to the new client and can also be abused as an improper tactical maneuver. [Citation.] More recent civil cases have taken a more pragmatic view, and declined to order disqualification of a firm if the challenged attorney is unlikely in fact to have acquired confidential information from the former client." (*Id.* at p. 1575.) The same is true in the criminal context.

> [T]he Supreme Court's focus on the factual issue of whether actual or potential conflict existed in the *Clark* [*People v. Clark* (1993) 5 Cal.4th 950] line of cases strongly suggests that a different approach is appropriate in the criminal context. Thus, counsel's former representation of a prosecution witness does not compel the assumption that confidential information was acquired from the witness. (See also *Vangsness v. Superior Court* (1984) 159 Cal.App.3d 1087, 1090-1091, 206 Cal.Rptr. 45 [cited in *People v. Cox*], in which the court found no difficulty in accepting a public defender's representation that he possessed no confidential information about a former client of his office who would be a witness for the prosecution.)

(*Id.*. at pp. 1578-1579.)

The court noted several reasons for declining to apply a rigid presumption in cases where the public defender is counsel. Public sector lawyers have less, if any, incentive to breach client confidences because, unlike their private sector counterparts, they do not have a financial interest in the matters on which they work. (See *City of Santa Barbara v. Superior Court* (2004) 122 Cal.App.4th 17, 24-27.) The public defender also has a steady source of supply; the office is not dependent on referrals or

solicitation and need not worry about attracting new clients or retaining the loyalty of former clients. (See *Castro v. Los Angeles County Bd. of Supervisors* (1991) 232 Cal.App.3d 1432, 1442.) Furthermore, unlike a private client involved in expensive civil litigation, the economic interests of a witness or victim are not at stake. Nor does a public defender client select an attorney on the basis of perceived compatibility and trustworthiness; he accepts the representation because he must, not because he desires a confidant. (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1579.)

The public defender also handles a high volume of cases. "There is good reason to assume that the average public defender is unlikely to remember any confidential information imparted by the average past client without a great deal of coaxing, and no reason to suppose that such information remains permanently floating in the office ether or is the subject of repeated conversations. The risk that confidential information will be passed through casual 'watercooler' conversations is substantially less than in the private sector." (*Ibid.*, footnote omitted.) Moreover, frequent disqualifications substantially increase the cost of legal services for public entities. (See *In re Lee G.* (1991) 1 Cal.App.4th 17, 28.) "It has been held that if there would be only 'speculative or minimal benefit,' the 'dislocation and increased expense of government' caused by disqualification are unjustified. (*People v. Municipal Court* (*Byars*) (1978) 77 Cal.App.3d 294, 301, 143 Cal.Rptr. 491.)" (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1580.) In addition, "public law offices often develop specific expertise in particular areas of law, and disqualification may deprive the People of the benefits of this acquired and cultivated expertise. (See *City of Santa Barbara v. Superior Court, supra*, 122

The judge's disqualification of Zagorsky in this case was an abuse of discretion, as it was in Baez. Despite Zagorsky's repeated pleas, the judge refused to evaluate the totality of the circumstances and determine whether there was a reasonable possibility that he had obtained confidential information about the witnesses or may inadvertently have acquired such information. Zagorsky represented that he was unaware of any confidential information relating to his office's prior representation of the individuals specified in Zellerbach's motion. He had not personally represented any of them and he had not reviewed - and would not review - any of their case files. (2 RT 144-147.) He swore under penalty of perjury that he was satisfied his office's present and future representation of appellant breached no ethical duty to appellant or any other person (2 CT 478), and he pledged not to use, disclose, or rely on any confidential information, if it existed, from any other case. (2 RT 156-157.) "Sworn representations have been held to be effective in assuring the court that insulation of prior confidential communications from present representation has occurred and will continue to occur." (*People v. Clark, supra*, 5 Cal.4th at p. 1002.) Zagorsky's representations should have been given "the weight commensurate with the grave penalties risked for misrepresentation." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486, fn. 9.) He was the person "in the best position professionally and ethically" to make these determinations (*People v. Hardy* (1992) 2 Cal.4th 86, 137; *People v. Clark, supra*, 5 Cal.4th at p. 1001; *People v. Belmontes* (1988) 45 Cal.3d 744, 776; *United States v. Crespo de Llano* (9th Cir. 1987) 838 F.2d 1006, 1012), and there was not even the slightest hint they might be untrue. Nonetheless, the judge rejected them and found that the possible conflicts of other deputy public defenders required his removal from the case. (2 RT 171-172.)

This Court has repeatedly found that the public defender's previous representation of prosecution witnesses, by itself, does not create a conflict of interest requiring disqualification of the entire office. For example, in *People v. Daniels* (1991) 52 Cal.3d 818, reversed on other grounds in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, the Court held that evidence of an actual conflict of interest by the individual deputy defender who represents the defendant, not a mere theoretical conflict involving the entire office, is required before disqualification of the public defender is appropriate. In *Daniels*, the defendant alleged that the trial court's appointment of the Riverside County Public Defender created a conflict of interest because he was then asserting the incompetence of one of the public defender's deputies as a basis for overturning an unrelated bank robbery conviction. This Court said:

> [A] rule of automatic disqualification is unnecessary, and would hamper the ability of public defenders' offices to represent indigents in criminal cases. . . . Since defendant has not shown any personal or professional relationship suggestive of a conflict of interest between the deputies actually representing him in this case and the departed deputy who had represented him in the bank robbery trial, we conclude that the trial court was not required to find a conflict of interest barring appointment of the public defender.

(*People v. Daniels, supra*, 52 Cal.3d at p. 843.)

Since *Daniels* the Court has gone even further and has found no conflict of interest even when the same attorney provided the previous and current representation. In *People v. Clark*, for example, the Court found that no conflict existed because the attorney did not cross-examine his former client and he represented that he did not share any confidential information with the attorney who did. (*People v. Clark, supra*, 5 Cal.4th at

pp. 1001-1002.) More recently, the Court determined that no conflict of interest existed in a case much like this one where other attorneys in defense counsel's firm had represented three prosecution witnesses in matters that were unrelated to the current trial. (*People v. Cox* (2003) 30 Cal.4th 916, 947-951.) Defense counsel had been appointed to represent a fourth witness, but never spoke to the witness before being replaced. The Court relied in large part on counsels' representations that they had no confidential information as a result of the prior representation. (*Ibid.*; see also *People v. Belmontes, supra*, 45 Cal.3d at pp. 774-777 [no conflict when the defendant's attorney's firm previously represented a codefendant but the attorney possessed no confidential information]; *People v. Lawley* (2002) 27 Cal.4th 102, 145-146 [no conflict when advisory counsel possessed no confidential information from prior representation of a prosecution witness in several factually unrelated cases]; *Vangsness v. Superior Court, supra*, 159 Cal.App.3d at pp. 1089-1092 [no conflict unless public defender possesses relevant confidential information]; *People v. Pennington* (1991) 228 Cal.App.3d 959, 965-966 [no conflict when deputy is unaware of public defender's previous representation of prosecution witness].)

The judge's refusal to consider the totality of the circumstances and determine whether Zagorsky had or might inadvertently acquire confidential information about the victims and witnesses his office had previously represented was a manifest abuse of discretion, particularly in view of Zagorsky's sworn representations that he had no such information. The record clearly establishes that there was no conflict of interest and, hence, no reason to remove the public defender as appellant's counsel.

Even if the knowledge of other deputies in the public defender's office is imputed to Zagorsky, there was no conflict of interest in the case.

Zellerbach argued that Zagorsky was ethically prohibited by the confidential communications privilege from attacking the counts involving his office's former clients because it knew they were, in fact, prostitutes. (2 RT 126-127.) None of the victims, however, had attorney-client privileges to assert. "[T]he attorney-client privilege of a natural person transfers to the personal representative after the client's death, and the privilege thereafter terminates when there is no personal representative to claim it." (*HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, 65.) There was no showing in this case that any of the relatives claiming an attorney-client privilege on behalf of the victims were current personal representatives of the victims. Furthermore, while information the witnesses gave their attorneys during the course of their representation might have been confidential, Zellerbach was concerned that the public defender knew the victims were prostitutes. (2 RT 126-127.) The fact that the victims were prostitutes was hardly confidential. The prostitution charges resulted in adjudications of guilt which were matters of public record. Thus, Zellerbach knew precisely what Zagorsky did, that the victims had been convicted of prostitution and other misdemeanor charges on which they had been represented by the public defender's office. If the prosecutor was aware of this information, how could it be confidential? (Evid. Code, § 912.)

Moreover, it is difficult to envision how anything one of the victims or witnesses might have related in confidence in a routine drug or prostitution case could have any bearing on these murder charges against appellant. It is highly improbable that something related in confidence during one of those cases could help establish a defense for appellant or that the surviving victim, Jetmore, was lying about the entire incident.

Therefore, even if confidential information existed, it was not relevant to appellant's case.

Zellerbach was also concerned that, if victim impact evidence became relevant, the public defender would know whether family members he had previously represented lived in the same household as the victims or whether they had prior theft or drug-related criminal records. (2 CT 486-487.) This is not confidential information either. It is routinely contained in witness statements the prosecutor is obliged to turn over to the defendant, and it is information the witness must normally disclose once he or she takes the witness stand. Also, like prostitution convictions, theft and drug-related convictions are matters of public record. Thus, if necessary, Zagorsky could have pursued these facts using information which was not confidential. But, in reality, attempting to counter the highly-emotional victim-impact evidence in this case with the fact that the witness did not live with the victim or had drug or theft-related convictions is simply a ludicrous proposition at best.

Furthermore, if confidential information did exist as a result of the public defender's representation of these victims and witnesses, there was a substantial question whether it remained confidential. Zellerbach obtained declarations from some 29 former public defender clients. In the process of determining they had a privilege to assert with respect to confidential attorney-client communications, he surely discussed the nature and substance of their conversations with their former attorneys. How could he have a good faith basis to claim the existence of privileged information if he did not? To the extent these conversations were revealed to Zellerbach, any confidentiality was waived. (Evid. Code, § 912.) Inexplicably, the court refused to make any inquiry into the nature and extent of Zellerbach's

refused to make any inquiry into the nature and extent of Zellerbach's communication with former public defender clients to determine if any privilege had been waived by disclosure.

Before removing Zagorsky, the judge should have considered, at the least: "1) the length of time that has elapsed since the witness was represented by the public defender's office; 2) the nature and notoriety (vel non) of the witness' case; 3) whether the current attorney was a member of the public defender's office at the time of the witness' case, and whether the attorney responsible for the witness' case remains with the office; 4) the nature and extent of any measures or procedures established by the public defender to ensure that information acquired by one deputy in a previous case is made unavailable to the current attorney." (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1581.) He also should have determined that relevant confidential information existed, that the information (if it existed) remained confidential because it had never been disclosed to unnecessary third parties, that Zagorsky was privy to the confidential information, and that he likely would have to use that information in the course of defending appellant. Absent these findings, the judge's removal of Zagorsky because other deputies had represented victims and witnesses in this case was an abuse of discretion.

D. The Prosecutor's Participation in Proceedings to Determine Who Would Serve as Appellant's Counsel Was Both Prosecutorial Misconduct and an Abuse of the Trial Judge's Discretion

Zagorsky objected to Zellerbach's participation in the proceedings to determine whether he would continue serving as appellant's counsel. "I think when it gets down to a court making a determination as to whether counsel for a particular client should be recused or disqualified, that is a

public and the District Attorney." (2 RT 90.) With respect to his responsive pleadings, he said:

> I have a question of whether Mr. Zellerbach should be served with that. . . . Once he raises the issue, I am not sure that Mr. Zellerbach is a party to that particular process. It is the Court's determination as to whether the attorney-client relationship that presently exists should continue or should be severed. I do not believe that once he has raised the issus, that Mr. Zellerbach is in fact a party to that particular action, and I'm not sure that he should be served with those particular documents.

(2 RT 91-92.)

> I think the basic premise of the law is, your honor, that the prosecution can raise an issue with the Court when it relates to an attorney-client relationship. However, by law basically I believe the District Attorney has no particular interest in who represents a criminal defendant. So once the issue is raised to the Court, in essence it is then for the Court to make this determination. ¶ At this particular point in time, the prosecution no longer has any particular interest in terms of who should be the attorney for the defendant. [¶] It's the same as when the Court does a Marsden hearing the prosecution does not usually -

(2 RT 92-93.)

The judge overruled the objection and ordered Zagorsky to serve Zellerbach with copies of his responsive pleadings. "I think it's unfortunate the District Attorney has to raise this issue and has to then force you to make this determination. ¶ I think you now have an obligation to respond to the District Attorney's motion. I think the District Attorney has a right to know what the response is." (2 RT 93.)

At the hearing, the judge assigned the burden of proof on the motion to Zellerbach. (2 RT 115.) Zagorsky requested that he be permitted to respond to Zellerbach's allegations in camera:

> [W]e understand that the prosecution has a right to raise the issue of a potential conflict of interest in a case. . . ¶ However, basically, what the law does find once that issue is raised is that the Court must conduct an inquiry. However, at that particular point in time the prosecutor no longer has a particular interest in who the attorney is for that particular client. ¶ It would be my request at this particular junction to ask the Court to go in camera on this issue. I would suggest to the Court this is an issue of the continued representation of myself on behalf of Mr. Suff as a deputy public defender of Riverside County Public Defender's Office, and since that issue is similar or analogous to what is raised typically in Marsden hearings, that it would be our request that the Court then go in camera for purposes of relating to that particular issue.

(2 RT 134-135.)

The judge denied the request:

> [A]t this point in time, I'm going to deny that request. There is a great and vital need to keep confidences in dealing with the law. . . . It is sometimes a very fragile thing. But . . . every occasion that the courts allow something to be done in secret, it subjects that procedure to ridicule, and people - everyone has a right to know what happens. And I agree that soemtimes we have to do those things, but I want you to respond in open court as you have done with your points and authorities to Mr. Zellerbach's contentions as well as his arguments.

(2 RT 135.)

During the hearing, the judge refused to allow Zagorsky to "briefly respond to a couple things Mr. Zellerbach raised" because Zellerbach had the burden of proof. "This is his motion, his burden. He has the last say." Zagorsky explained, to no avail, that one of the issues he wanted to address was the fact that he had not had the opportunity to review minute sheets Zelllerbach submitted to the court and of which the court took judicial

notice. (2 RT 171.)

A prosecutor may file a motion seeking a determination as to whether or not a conflict of interest exists between a defendant and his counsel: "Whether a conflict of interest exists such that a defendant should have a different attorney is a very sensitive matter. The prosecution could legitimately be concerned that if the court had not examined the question, any conviction it received might have been doomed to reversal on appeal even before the trial began. (See, e.g., *People v. Mroczko* (1983) 35 Cal.3d 86, 197 Cal.Rptr. 52, 672 P.2d 835.) We see no impropriety in the prosecution's cautiously seeking a determination before trial whether a conflict existed rather than waiting for a defense challenge to a conviction after trial." (*People v. Harris* (2005) 37 Cal.4th 310, 342.)

Zellerbach's participation in this sensitive matter was anything but a cautious effort to seek a determination in about whether or not Zagorsky had a conflict of interest. Instead, he was a zealous advocate who fought tooth and nail for Zagorsky's removal from the case. To ensure his success he contacted witnesses whom he believed had been represented by the public defender. As noted above, many did not have a privilege to assert. Nonetheless, he persuaded them that the public defender could not defend appellant's case without breaching this non-existent privilege and convinced them to sign declarations refusing to waive any privilege with respect to the information. (2 CT 371-434.)

Asserting any privilege that may have existed was not Zellerbach's job. A prosecutor has no standing to represent the interests of third parties to an underlying criminal prosecution. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1043-1046 [district attorney prosecuting underlying criminal

case has no standing in a *Pitchess*[19] motion because he represents neither the custodian of records nor their subject and therefore has no direct stake in the outcome in what is "essentially a third party discovery proceeding"]; *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, 32-33 [district attorney recused for appearing on behalf of a third party to an underlying criminal prosecution in mandate proceedings seeking to compel the superior court to vacate its order allowing the defense access to the third party's home for discovery purposes].) Assuming legal and ethical obligations to third parties to a criminal prosecution is inconsistent with a prosecutor's duties. "A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] . . . . [T]he prosecutor represents a 'sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.' [Citation.]" (*People v. Hill* (1998) 17 Cal.4th 800, 820.) By giving legal advice to these witnesses and asserting a purported attorney-client privilege on their behalf, Zellerbach himself created an irreconcilable conflict of interest between their interests and his duties to see that justice was done. If witnesses in this case had privileges to assert, they should have been asserted personally or through their own counsel.

As a shrewd advocate, Zelerbach also attempted to develop the facts in the manner most beneficial to his position. He successfully resisted giving Zagorsky information needed to determine if a conflict existed (2 RT

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[19] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

80-96),[20] and he made highly questionable if not perjurious representations to the court. For example, on October 19, 1992, in his quest to secure Zagorsky's removal, he swore under penalty of perjury that "the People fully intend on presenting victim impact evidence during the penalty phase portion of this trial." (2 CT 365.) He argued over eight months later that he had no obligation to provide discovery of the victims' convictions to appellant because he had not yet determined if victim impact testimony would be presented. (3 RT 397-398.) Which of these statements is true? How could Zellerbach believe there was a conflict of interest with respect to victim impact witnesses if he had not yet decided he would seek to introduce victim impact evidence? Zellerbach also argued that Zagorsky should be removed from the case because his office currently represented "very relevant, highly relevant witnesses in this case," witnesses like Joan Payseur. (2 RT 167-168; see 2 CT 500-509.) Joan Payseur's relevance to the case is best judged by the fact that the only time her name appears in the record is in connection with Zellerbach's mission to have Zagorsky removed from the case. Clearly, she was anything but the highly relevant witness Zellerbach made her out to be. Furthermore, almost half of the 35 potential witnesses named in Zellerbach's motion did not even have a case in which they had been represented by the public defender's office. (3 CT 276-279.) Of the 17 that did, only four testified at appellant's trial.[21]

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[20] Zagorsky only had discovery on two of the 14 victims at the time of his removal. (2 RT 182-183.)

[21] Jesse Leal (21 RT 4038-4047; *ante*, at pp. 22-23 & p. 81); Boyd Coker (23 RT 4294-4309; *ante*, at p. 30 & p. 81); Phillip Casares (26 RT 4984-4991; *ante*, at p. 50); and Joe Casares. (26 RT 4993-4997; *ante*, at p. 50.)

Nothing was elicited from these witnesses which could even remotely be said to implicate their attorney-client privilege with the public defender's office.

Zellerbach's vigorous campaign to have Zagorsky removed from the case raises substantial questions about his motivation. Was he truly concerned with protecting appellant's right to counsel or, as appellant claimed, was it that he "did not anticipate such a rigorous opposition as Mr. Zagorsky represented in the early stages of this most arduous case" (3 RT 267-268) and he wanted less effective opposition? (See *Alcocer v. Superior Court* (1988) 206 Cal.App.3d 951, 958 [noting the risk that a prosecutor reluctant to litigate against a specific defense attorney may seek to remove him or her "where there is only the hint of a conflict"].) These proceedings were intended to protect appellant's right to counsel. (*People v. Jones* (2004) 33 Cal.4th 234, 244-245.) There was no appropriate role for an overzealous advocate who sought not to protect the right but to destroy it and thereby silence a too-effective advocate for appellant. Zellerbach's attempt to persuade the court with misrepresentations, half-truths, and possibly worse was misconduct which infected appellant's trial with such unfairness as to make the conviction a denial of due process in violation of both the federal and state Constitutions. (*People v. Morales* (2001) 25 Cal.4th 34,44; see *People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

The judge did nothing to mitigate the harm caused by Zellerbach's participation in the proceedings. In fact, he compounded the harm by denying Zagorsky's request to respond to Zellerbach's allegations in camera. (2 RT 134-136.) In this setting, Zagorsky could have explained why, irrespective of the existence or non-existence of confidential

information, his defense strategy would not have implicated the public defender's obligations to former clients. Instead, the judge forced him to respond to Zellerbach's allegations in open court at the risk of disclosing appellant's defense strategy to his adversary. The judge then refused to permit Zagorsky to respond to Zellerbach's representations because Zellerbach had been assigned the burden of proof. "This is his motion, his burden. He has the last say." (2 RT 115, 171.) By refusing to permit Zagorsky to respond to Zellerbach's misleading representations and by requiring him to detail the facts of his confidential attorney-client relationship with appellant in open court or not at all, the judge intentionally deprived himself of the ability to hear and consider crucial information in determining whether a conflict of interest existed. None of this seems consistent in the least with protecting appellant's right to counsel. (*People v. Jones, supra*, 33 Cal.4th at pp. 244-245.)

The exclusion of the prosecutor from Marsden hearings[22] is required upon a timely request by the defendant and even without such a request when information to which the prosecutor is not entitled or which could conceivably lighten his or her burden of proving the case will be presented. (*People v. Dennis* (1986) 177 Cal.App.3d 863, 871; *People v. Madrid* (1985) 168 Cal.App.3d 14, 19; see also, Keenan v. Superior Court (1982) 31 Cal.3d 424, 430 [to avoid undue disclosure of defense strategy, defendant may make confidential in camera showing in support of an application for the appointment of a second attorney].) The only substantial difference between *Marsden* and conflict of interest hearings like the one in this case is that the defendant seeks to remove his counsel in one and, in the

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[22] *People v. Marsden* (1970) 2 Cal.3d 118.

other, the court or the prosecutor seeks to remove his counsel. In either case, "[t]he district attorney may be able to provide the court with valuable input that is necessary and appropriate to a just resolution . . . [but] there are situations in which the district attorney's presence would inhibit defendant or his counsel from freely discussing the facts surrounding the specific allegations." (*People v. Madrid, supra*, 168 Cal.App.3d at pp. 18-19.) This was certainly one of those situations.

Appellant was entitled to the same protections he would have had if he, not Zellerbach, had sought Zagorsky's removal from the case. Indeed, defendants who seek to keep their counsel are much more in need of this protection than defendants who are trying to jettison their attorney. The latter rarely seek or need a confidential forum to air their grievances. Many are eager to publicize their dispute and even routinely communicate with the court and the prosecutor about their attorney's shortcomings, thereby waiving any confidentiality. When a defendant seeks to keep his attorney, it is often because he agrees with counsel's strategy for defending against the charges. Such a defendant has two choices; either refuse to give the court full and complete information in the prosecutor's presence and risk having his preferred attorney removed, or reveal confidential information and his defense strategy at the risk of giving the prosecutor a significant advantage in the case. There is simply no principled basis on which to distinguish between a defendant and a prosecutor who seeks to have the defendant's attorney removed. In either case, absent a compelling need the prosecutor should not be permitted to be present. The Court should extend the holdings in *People v. Dennis, supra*, and *People v. Madrid, supra*, to a court's inquiry concerning alleged conflicts of interest. Even if it does not, Zellerbach's actions cannot be characterized as the permissible "cautious

effort" to seek a determination about whether or not Zagorsky had a conflict of interest. Under the circumstances of this case, the judge's failure to exclude him from the proceedings was an abuse of discretion.

E. The Trial Judge's Refusal to Accept Appellant's Offer to Waive Any Conflict of Interest Was an Abuse of Discretion

A defendant may properly waive his right to the assistance of an attorney unhindered by a conflict of interest. (*Holloway v. Arkansas, supra*, 435 U.S. at p. 483, fn. 5; *People v. Bonin*, (1989) 47 Cal.3d 808; *People v. Cox, supra*, 30 Cal.4th at p. 949.) The trial court, however, has discretion to reject a proffered waiver. Absent an abuse of discretion, doing so does not violate a defendant's right to counsel under the federal or state Constitutions. (*People v. Jones, supra*, 33 Cal.4th at pp. 241, 244-245.)

The judge refused to accept appellant's offer to waive any conflict of interest with Zagorsky and/or the public defender's office (2 RT 136, 158-164, 267-270) because former clients refused to waive their confidential relationship with the public defender. (2 RT 173.) As set forth above, there may not have been any privilege for the public defender's former clients to assert. The deceased victims had no privilege, and the judge refused to hear and consider the witnesses' testimony or even to permit Zagorsky to receive and review discovery pertaining to these witnesses. He thereby knowingly deprived himself of the ability to determine if any confidential information existed, a practice he has apparently had for at least 13 years. (See *Rhaburn v. Superior Court, supra*, 140 Cal.App.4th 1566.) Refusing to accept appellant's offer to waive any conflict without first determining that a confidential relationship existed and that appellant's representation threatened a breach of confidentiality was an abuse of discretion.

The court of appeal observed in *Vangsness v. Superior Court*, that it is unwise to permit former indigent clients to dictate who can represent a current indigent defendant:

> We are less than comfortable with a prosecution witness forcing the recusal of an attorney on such a minimal showing and over the defendant's objection, simply because he does not want to be cross-examined by a different deputy from an office which once represented him. The public paid for [the witness'] previous encounters with the law; it need not suffer him to add to the bill in a case where he is merely a witness and not a party. His function is only to tell the truth on the stand, whomever the cross-examiner happens to be.

(*Vangsness v. Superior Court, supra*, 159 Cal.App.3d at p. 1091.) Condoning the practice would undoubtedly increase the costs of indigent representation and would arguably decrease the quality of that representation because it would inevitably result in frequent disqualifications, even when only minor, theoretical conflicts exist. This seems unnecessary in light of counsel's ethical duty to bring meaningful potential conflicts to the court's attention. (*People v. Bonin, supra*, 47 Cal.3d at p. 835.) Attorneys should be "trusted to obey not only the instructions of their superiors, but also the obvious dictates of their ethical duties." (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1576, citing City of Santa Barbara v. Superior Court, supra, 122 Cal.App.4th at pp. 24-27.)

This case is distinguishable from *People v. Jones, supra*, 33 Cal.4th 234. In *Jones*, there was a real and immediate potential for a conflict of interest, the defendant's attorney's previous representation of a man whom the defense suspected of committing the charged murder. (*Id.* at p. 236.) The former client may have provided confidential information pertaining to

his whereabouts at the time of the murder and to his financial status, matters that could have become relevant if the defense later obtained information linking him to the murder. This created a serious potential conflict of interest for the attorney who found the possibility of a conflict "very troublesome," with the potential of "creating problems." He admitted that his fear of being sued by the former client might affect his representation of the defendant. (*Id.* at p. 242.)

Here, there is little likelihood that confidential information existed, that it was relevant to the case, or that Zagorsky would use it in appellant's defense. Indeed, it is difficult to envision how anything related to his office's previous representation of victims and witnesses in prostitution and/or drug cases could be relevant to these murder charges. Nor is there any evidence that Zagorsky was unmindful of his ethical duties. To the contrary, he specifically cited the relevant rules and regulations and represented that there was no conflict. (2 RT 144-147, 156-157.) He was not troubled in the least that any duty to these former clients might cause him to pull his punches in the course of appellant's representation. Instead, he represented without hesitation or reservation that he had no confidential information; he would not use, disclose, or rely on any confidential information, if it existed, from any other case; his present and future representation of appellant breached no ethical duty to appellant or any other person; and there was no conflict of interest. Under these circumstances, appellant's "expression of willingness to continue with an attorney with whom he [had] formed a relationship should [have been] respected." (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1581.)

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F. The Trial Judge's Failure to Consider Reasonable Alternatives Before Removing the Public Defender Was an Abuse of Discretion

Zagorsky urged the judge to consider options less drastic than disqualification if he believed there to be a potential conflict of interest. Specifically, he proposed that backup counsel be employed for the limited purpose of cross-examining the witnesses who had been previously represented by the public defender, or that the court appoint second "outside" counsel who would have no access to the confidential information. (2 RT 159-163.) The judge's failure to consider either of these reasonable alternatives was an abuse of discretion.

"'[T]he involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.' *(Cannon v. Commission on Judicial Qualifications* (1975) 14 Cal.3d 678, 697 [122 Cal.Rptr. 778, 537 P.2d 898]; see *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 615 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333]; *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561 [68 Cal.Rptr. 1, 440 P.2d 65].)" (*People v. Daniels* (1991) 52 Cal.3d 815, 846, reversed on other grounds in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181.)

> [T]hat action should be taken with great circumspection and only after all reasonable alternatives . . . have been exhausted. Failure to observe these standards . . . will compel a reversal of the ensuing judgment; and this result will follow regardless of whether the defendant's substituted counsel was competent or whether the defendant received a "fair trial" with respect to the guilt-determining process. (*People v. Crovedi* (1966) 65 Cal.2d 199 [53 Cal.Rptr. 284, 417 P.2d 868].) The value in issue, we said in *Crovedi*, is "the state's duty to refrain from

> unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." (*Id.* at p. 206.)

(*Smith v. Superior Court, supra*, 68 Cal.2d at p. 559.)

Zagorsky's suggestion that a second "outside" counsel be appointed who would have no access to the arguably confidential information was a reasonable alternative. This attorney could have cross-examined any former public defender clients. (See, e.g., *People v. Clark, supra*, 5 Cal.4th at pp. 1001-1002.) The judge appointed two attorneys to replace the public defender. (2 RT 175-179; 3 RT 293-294.) He just as easily could have left the public defender on the case and appointed one "non-conflicted" attorney who could have cross-examined any problematic witnesses. The judge was obligated to exhaust this reasonable alternative before removing the public defender. His failure to do so was an abuse of discretion.

G. Appellant Is Entitled to an Automatic Reversal

Indigent defendants have fewer rights under the Sixth Amendment than defendants with the financial means to retain counsel. The United States Supreme Court has explained that "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." (*Wheat v. United States , supra*, 486 U.S. at p. 159.) Indigent defendants have no Sixth Amendment right to their choice of counsel (*United States v. Gonzalez-Lopez* (2006) ___ U.S. ___, 126 S.Ct. 2557, 2561), or to a meaningful relationship with appointed counsel. (*Morris v. Slappy* (1983) 461 U.S. 1, 13-14.) Moreover, trial courts have "substantial latitude" under

the federal Constitution to refuse waivers of conflicts of interest "not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses." (*Wheat v. United States, supra*, 486 U.S. at p. 163.)

Neither this Court nor the United States Supreme Court has said, however, that the right to be represented by one's preferred attorney, which is comprehended by the Sixth Amendment (*Id.* at p. 159), does not include the right to a continuing relationship with one's appointed attorney free from unwarranted state interference. In other words, neither Court has found that, because the "essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers" (*Ibid.*), a trial court has the unfettered discretion to remove appointed counsel without adequate cause. Indeed, as Justice Brennan observed in *Morris v. Slappy*, "where an indigent defendant wants to preserve a relationship he has developed with counsel already appointed by the court, I can perceive no rational or fair basis for failing at least to consider this interest in determining whether continued representation is possible." (*Morris v. Slappy, supra*, 461 U.S. at p. 23, (conc. opn. of Brennan and Marshall, JJ.).)

> [C]onsiderations that may preclude recognition of an indigent defendant's right to choose his own counsel, such as the State's interest in economy and efficiency, see generally Tague, An Indigent's Right to the Attorney of His Choice, 27 Stan.L.Rev. 73 (1974), should not preclude recognition of an indigent defendant's interest in continued representation by an appointed attorney with whom he has developed a relationship of trust and confidence. To recognize this interest

> and to afford it some protection is not necessarily to afford it absolute protection. If a particular jurisdiction has sufficiently important interests, such as the structure of its public defender's office, which make continued representation by a particular attorney impractical, the trial judge may take this into account in balancing the defendant's interest in continued representation against the public's interests. The fact that such interests might exist in some jurisdictions, however, is not a sufficient reason to refuse to recognize that an indigent defendant has an important interest in a relationship that he might develop with his appointed attorney. There is no need to decide on this record which state interests might be sufficient to overcome an indigent defendant's interest in continued representation by a particular attorney with whom he has developed a relationship.

(*Id.* at p. 23, fn. 5.)

This Court addressed an analogous situation in *People v. Ortiz* (1990) 51 Cal.3d 975. There, the trial court refused to discharge the indigent defendant's retained attorney and appoint new counsel, and forced him to go to trial with unwanted counsel. (*Id.* at pp. 979-981.) This Court held:

> [W]e must presume prejudice when an indigent criminal defendant is forced to proceed with a retained attorney whom he has consistently, and in a timely manner, sought to discharge in favor of the public defender or other court-appointed counsel. We must not speculate as to the prejudicial effect of "'injecting an undesired attorney into the proceedings'" (*People v. Courts* (1985) 37 Cal.3d 784, 796 [210 Cal.Rptr. 193, 693 P.2d 778]) . . . . ¶ In fact, any standard short of per se reversal would "inevitably erode the right itself" (*People v. Courts, supra*, 37 Cal.3d at p. 796, fn. 11), by relegating appellate review of a constitutional right to mere speculation. As we suggested in *Courts* (*id.* at p. 796), to assess "'why or how an accused's trial was disadvantaged by injecting an undesired attorney into the proceedings would require an impossibly speculative comparison'" of the

> performance of the counsel whom the court refused to discharge with the unrealized performance of an appointed attorney.

(*Id.* at p. 988.)

Removing appointed counsel without cause and forcing an indigent defendant to go to trial represented by unwanted counsel is little different than forcing an indigent defendant to go to trial with unwanted, retained counsel. "[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained." (*Smith v. Superior Court, supra*, 68 Cal.2d at p. 562.) "[A]n indigent criminal defendant who is required to undergo a trial with an attorney from whom he believes he is receiving inadequate representation, or with whom he is locked in an irreconcilable conflict, is just as certainly deprived of the effective assistance of counsel as his nonindigent counterpart." (*People v. Ortiz, supra*, 51 Cal.3d at p. 984.)

The state had no interests in this case which justified its interference with appellant's interests in his continued representation by Zagorsky. As demonstrated above, there was neither a conflict of interest nor any reason to refuse his offer to waive any conflict of interest. Removing his counsel without cause and forcing him to go to trial with unwanted attorneys was a manifest abuse of discretion. Like the erroneous deprivation of the right to counsel of choice, the consequences of removing appointed counsel without cause are necessarily unquantifiable and indeterminate, and unquestionably qualify as structural error. *(United States v. Gonzalez-Lopez, supra*, 126 S.Ct. at p. 2564.)

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of

> defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante, supra*, at 310 - or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

(*Id.* at pp. 2564-2565.)

The Court "must not speculate as to the prejudicial effect of 'injecting an undesired attorney into the proceedings' (*People v. Courts* (1985) 37 Cal.3d 784, 796 [210 Cal.Rptr. 193, 693 P.2d 778]) . . . . ¶ In fact, any standard short of per se reversal would 'inevitably erode the right itself' (*People v. Courts, supra*, 37 Cal.3d at p. 796, fn. 11), by relegating appellate review of a constitutional right to mere speculation." (*People v. Ortiz, supra*, 51 Cal.3d at p. 988.) Accordingly, appellant is entitled to automatic reversal.

H. Conclusion

Zagorsky did not have a conflict of interest in this case. The judge's determination that he did was part of an improper practice of automatically (or virtually automatically) removing the public defender for conflict of interest and was an abuse of discretion. The judge also abused his discretion by prohibiting Zagorsky from receiving and reviewing

information with which he could conclusively establish there was no conflict, by knowingly refusing to hear and consider facts which were pertinent to the alleged conflict, by permitting Zellerbach to prosecute the motion and refusing to allow Zagorsky to respond outside his presence, by refusing to accept appellant's offer to waive any conflict, and by removing Zagorsky without first considering reasonable alternatives. These errors forced appellant to go to trial with unwanted counsel and violated his right to counsel under the federal and state constitutions. They are reversible per se.

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II.

THE REFUSAL TO GRANT A CHANGE OF VENUE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL BY AN UNBIASED JURY

A. Introduction

Inflammatory and highly-prejudicial pretrial publicity precluded any hope for a fair trial in this case. The trial judge's denial of appellant's motion for change of venue was erroneous. The error violated appellant's rights to due process and to a fair trial by an unbiased jury guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and Article I, sections 7, 15, and 16 of the California Constitution, and it requires that his conviction and death sentence be set aside.

B. Applicable Legal Standards

"'In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process.' *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (citing *In re Oliver*, 333 U.S. 257 (1948)). Because a criminal defendant has the right to an impartial jury, a court must grant a motion to change venue 'if prejudicial pretrial publicity makes it impossible to seat an impartial jury.'" (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1210.) When there is a reasonable likelihood that the jury pool in a particular venue has been exposed to information concerning the case sufficient to cause potential jurors to form opinions concerning crucial aspects of the case, trial in that venue cannot adequately guarantee the basic constitutional requirement of

impartiality and the trial must be moved to a venue that has not been so tainted. In other words, a trial court should grant a change of venue when the defendant shows there is a reasonable likelihood that a fair trial may not be had in the original venue. (*People v. Vieira* (2005) 35 Cal.4th 264, 278; *People v. Coffman* (2004) 34 Cal.4th 1, 44; Pen. Code, § 1033 subd. (a); *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383-384.)

The rules applied to review of the denial of a motion for change of venue are well settled. (*People v. Coffman, supra*, 34 Cal.4th at p. 44.) On appeal, the reviewing court should accept any factual determinations made by the trial court if supported by substantial evidence, and then make a de novo determination of whether there was a reasonable likelihood that a fair and impartial trial could have been conducted in that venue. (*Ibid*; *People v. Bonin* (1988) 46 Cal.3d 659, 670-671.) The review of the record should include the whole of the jury selection process, not merely that pertaining to the seated jurors. (*Odle v. Superior Court* (1982) 32 Cal 3d. 932, 943-944 ["Resolution of the venue question requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do."].) When this review discloses a reasonable likelihood that the defendant did not receive a fair trial before an unbiased jury, the proceedings are structurally defective and the conviction must be reversed. (*People v. Coffman, supra*, 34 Cal.4th at p.44, *People v. Edwards* (1991) 54 Cal.3d 787, 807).

The ultimate question in cases involving prejudicial pretrial publicity is whether, on the peculiar facts of the case, there is a reasonable likelihood that the jurors who were chosen for the trial had formed such fixed opinions as a result of that publicity that they could not impartially make the decisions required of them. (*People v. Bonin, supra*, 46 Cal.3d at pp.

672-673.) The term "reasonable likelihood," when used to assess the possibility of prejudicial exposure to publicity, whether on appeal or at the initial hearing in the trial court, means something less than "more probable than not" but more than merely "possible." (*Id.* at p. 673.) This Court has identified five factors for consideration (*People v. Vieira* (2005) 35 Cal.4th 264, 278): the nature and gravity of the offense; the nature and extent of the news coverage; the size of the community; the status of the defendant in the community; and the popularity and prominence of the victim. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1130.) No single one of these factors is automatically determinative, and the possibility of prejudice should be determined on a case by case basis. (See *People v. Weaver* (2003) 26 Cal.4th 876, 905 [gravity of the offense weighs strongly, but is not determinative].)

C. Factual Background

Citing extensive coverage of his case by Riverside County's largest newspaper, the Press Enterprise;[23] by many small-circulation, local papers in the Lake Elsinore area where many of the homicides occurred; and by all the major television networks in Southern California, appellant moved for a change of venue on December 21, 1994. Coverage of the case, "the most sensational multivictim case in Riverside County history" (5 CT 1202), included over 200 articles, front page pictures, feature stories, in-depth analysis, editorials, letters to the editors, and photographs of 19 prostitutes whose deaths were attributed to the "serial killer."[24] In addition, criminal

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[23] At the time, the Press Enterprise had a weekday circulation of 163,004 and a Sunday circulation of 171,139. (5 CT 1208.)

[24] Appellant was not charged with five of these alleged murders. (7 (continued...)

charges then pending against Detective Keers, the primary law enforcement officer assigned to the case, received extensive coverage as did the trial of appellant's brother, who previously had been convicted of a sex crime and was charged with another. Their connections to this case were noted regularly in the media. Claims were also published that investigation of the charges was not being pursued aggressively because the victims were prostitutes. A public opinion survey of Riverside County residents revealed a high rate of recognition of the case and of appellant's prior murder conviction, and a very high rate of presumption of guilt. (5 CT 1199-1215.)

The prosecutor opposed a change of venue, arguing that measures which had been taken to ensure a fair trial had been effective, and that searching voir dire and careful admonitions would ensure a jury that was not unfairly biased or prejudiced. He noted that there also had been sympathetic and positive media coverage of the case and that appellant's name had appeared in the headlines only 33 times. He pointed out that Riverside County's population of 600,000 previously had been determined to be a neutral factor in the venue equation. (*People v. Anderson, supra*, 43 Cal.3d at p. 1131.) The county had since grown to over twice that size. According to the prosecutor, the prostitute/drug addict victims did not engender any particular community sympathy and, aside from the alleged crimes themselves, nothing about appellant engendered any unusual local hostility. Many of the more gruesome, prejudicial facts had not been disseminated to the public, and the publicity surrounding Detective Keers's arrest had generated only a limited focus on her activities and her

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[24] (...continued)
CT 1855-1870, 1873; 19 RT 3547-3548.)

responsibility for this case. The prosecutor argued that coverage of the case should be divided into four stages: 1) the month after appellant's arrest in January 1992 when 85% of the articles appeared; 2) July 1992 when appellant was indicted; 3) May 1993 when the grand jury transcripts were released; and 4) October 1993 when appellant's motion to suppress evidence was heard. He contended that coverage of the case had been rare since January 1994 and that, given the passage of two years since the vast majority of the coverage, memories of the case's details must certainly have dimmed. (5 CT 1272-1311.)

The motion was heard on January 26 and 27, 1995. (5 CT 1312-1314; 7 RT 1300-1556.) The only witness, venue expert Dr. Edward Bronson, a California State University, Chico professor, testified that he reviewed most of the newspaper coverage and a limited portion of the television coverage of the case.[25] (7 RT 1302-1308, 1322-1323.) He prepared a "newspaper media log" (Exhibit D) and a "summary and pattern of newspaper publicity patterns" (Exhibit E) which showed there had been a "flood of publicity" about this case. Only three cases in which he had been involved, none of which were comparable, had generated more publicity.[26]

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[25] He found, as usual, that the television coverage generally mirrored what was in the newspapers, but in a far less comprehensive manner. (7 RT 1323.)

[26] This fact assumes even more significance when Bronson's experience is considered. In short, Bronson is one of the preeminent venue and jury selection experts in the country. He has worked in the field for approximately 25 years, and it has been a major area of his professional interest for the last 12 years. He has qualified over 50 times as an expert witness on venue and as many or more times on the issue of death-qualified jurors in courts in California, Texas, Alabama, Illinois, Arizona,

(continued...)

(7 RT 1325-1334.) Based on a review of about half the newspaper articles, he also prepared a "newspaper publicity analysis" (Exhibit F) to identify prejudicial or non-prejudicial themes in the coverage.[27] The analysis showed that the nature of the publicity about appellant and the case was emotional and/or inflammatory, and it tended to dehumanize appellant and humanize the victims. There were 265 "serial killer" references in just the first half of the articles; 64 were in headlines. The articles compared appellant to known serial killers and to the most notorious cases in California and the country. He was labeled "a new anti-Christ" and "a demon in the legions of tormentors of our mind." Many of these characterizations came from people with special credibility: law enforcement officers, prosecutors, and family members. Criminal justice officials were quoted as saying he was guilty and the case was over. His ex-wife reportedly said, "I hope he rots in hell." His father related, "I think they made a . . . big mistake to release him from prison." There were innumerable references to specific pieces of evidence which supposedly demonstrated appellant's guilt. Most were inadmissible, at least in the guilt phase. For example, many articles mis-reported that appellant had confessed to the crimes, and many reported that he previously had been

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[26] (...continued)
Washington, Oregon, Colorado, and many other states. He has testified on change of venue motions in 57 cases. He was a witness in the federal habeas corpus hearing in *Lockhart v. McCree* (1986) 476 U.S. 162, and much of his research was cited at length by this Court in *Hovey v. Superior Court* (1980) 28 Cal.3d 1. (7 RT 1302-1308.)

[27] Bronson believed he reviewed "more than enough, by a factor of umpteen," to determine the nature and extent of the publicity. (7 RT 1372-1374.)

convicted of murder in Texas. The fact that he previously had been convicted of "beating his infant daughter to death" became part of his standard media description. There were also many references to recent abuse of his three-month-old daughter which left her near death. In Bronson's opinion, most of the reporting was essentially accurate, but he feared that it tended to be so prejudicial as to create a climate where the presumption of innocence changed to a presumption of guilt. (7 RT 1334-1362.)

Based solely on a review of the publicity, Dr. Bronson was able to tentatively conclude there was a reasonable likelihood appellant could not receive a fair trial in Riverside County. In his expert opinion, this was a "monster case" both in terms of the extent of publicity and in the way appellant was characterized. (7 RT 1372-1374.) He commissioned a telephone survey to measure public awareness of the case, prejudgement of crucial guilt and penalty issues, and knowledge of its specific elements. On the first probe, almost three-quarters of the community (73.2%) was aware of the case, most overwhelmingly so. About 67% of those who recognized the case and nearly 50% of all those surveyed believed appellant was guilty. The survey showed the highest support for the death penalty Bronson had ever encountered. Even in the worst cases, the level is normally 50% to 60%. Here, of those who recognized appellant's case, 74.8% opted for the death penalty as punishment. Bronson found this "dramatic and surprising. While I thought it would be substantial support of the death penalty, given my reading of the publicity in this case, this was a – I don't want to say shocking, but at least a pretty dramatic finding. Let's put it that way." The survey results confirmed his opinion that there was a reasonable likelihood appellant could not receive a fair trial in Riverside County. (7 RT 1374-

1433.)

Given the publicity about his case and the survey results Dr. Bronson did not think voir dire effectively could dispel the widespread prejudice against appellant. He explained that the publicity was very guilt-oriented and the survey showed that the more people knew about the case the more likely they were to prejudge guilt and penalty. (7 RT 1423-1432.) Also, he believed that voir dire is often an inadequate tool to deal with issues like pretrial publicity because some jurors tend to minimize their prejudicial attitudes, knowledge, or awareness in a fairly systematic way. In the formal setting of a courtroom they are sometimes hesitant to admit feelings they freely express in the "real world," particularly when cued by the judge about the "right" answers. (For example, by saying "you realize the defendant must be given a fair and impartial trial," a judge suggests that the appropriate response is that the juror is fair and impartial.) These jurors often give the "right" answers regardless of their real feelings. (7 RT 1409-1416, 1441-1443.) Admonitions concerning pretrial publicity do not help and, by focusing a juror's attention on inappropriate areas, may hurt. (7 RT 1444.)

Notwithstanding Bronson's findings and concerns, the trial judge denied appellant's motion on January 31, 1995, but indicated the ruling would not become final until the conclusion of voir dire. The judge agreed to modify the previously-announced voir dire procedure. Each session would now be limited to eight jurors and each side would be allowed 15 minutes per session to question prospective jurors. The judge also said he would re-examine the jury questionnaire for possible modifications. (5 CT 1317-1318; 7 RT 1559-1562.)

On March 14, 1995, the second day of jury selection, appellant

moved to dismiss the jury panel on the ground that the panel did not constitute a valid cross-section of the community. 97% of the prospective jurors supported the death penalty; only seven or eight prospective jurors (of 238 or 239) opposed it. (15 RT 2738-2739.) The judge expressed his belief that "we have a good cross section" and denied the motion. (15 RT 2740-2741.) Appellant renewed his venue motion on March 22, 1995, at the conclusion of voir dire. (6 CT 1872-1873, 1892-1893.) His counsel explained that they had only used 10 of 19 peremptory challenges because "the mix [of jurors] was as good as we were going to get." They argued that 65 to 70 percent of the prospective jurors remembered the case and they had not been given adequate time during the voir dire process to determine the nature and extent of their recollections. The judge, "convinced that Mr. Suff can get a fair trial, based upon this publicity issue," denied the motion. He explained that prospective jurors who "expressed any knowledge about the case to any extent other than Yes" had been placed in "confidential mode; that is, we questioned them outside the hearing of others," and counsel had been allowed unlimited time to question these prospective jurors. Six of the jurors and alternates knew nothing about the case, and another four (Juror Numbers 3, 6, 8, and Alternate Juror Number 7) had only limited knowledge of the case. "[B]ased upon the questionnaires [and] my personal questioning, . . . you got - in fact, a huge percentage that know nothing." (19 RT 3603-3607.)

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D. The Nature and Extent of the Pre-trial Publicity, Paired with the Fact That over Two-thirds of Actual and Potential Jurors Remembered the Publicity, Made it Reasonably Likely That the Jurors Who Were Chosen for the Trial Had Formed Such Fixed Opinions as a Result of the Publicity That They Could Not Impartially Make the Decisions Required of Them.

In *Daniels v. Woodford, supra,* 428 F.3d 1181, another Riverside County case, the defendant sought a change of venue due to extensive pretrial publicity surrounding the murder of two police officers. The trial court denied the motion, taking the position that the outcome of the voir dire process would determine whether an impartial jury could be empaneled. The motion was renewed and denied twice, once during voir dire and again after voir dire. This Court upheld the conviction on automatic review, finding the "decisive" factor to be Daniels's failure to exhaust his peremptory challenges: "In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial." (*People v. Daniels, supra,* 815, 854.)

Daniels petitioned the federal courts for a writ of habeas corpus. The district court granted the petition, finding, inter alia, that Daniels's due process rights had been violated by the cumulative effect of several trial court errors, including the denial of his motion to change venue. *(Daniels v. Woodford, supra*, 428 F.3d at p. 1195.) On appeal, the Ninth Circuit independently reviewed the record to determine if Riverside County was so saturated with prejudicial and inflammatory publicity about the crime that prejudice could be presumed. It considered three factors: (1) whether there

was a barrage of inflammatory publicity immediately prior to trial, amounting to a huge wave of public passion; (2) whether the news accounts were primarily factual because such accounts tend to be less inflammatory than editorials or cartoons; and (3) whether the media accounts contained inflammatory or prejudicial material not admissible at trial. (*Id.* at p. 1211.) The court concluded: "Applied here, these factors compel a finding 'that the venue [was] saturated with prejudicial and inflammatory media publicity about the crime' sufficient for a presumption of prejudice." It determined that the nature and extent of the pre-trial publicity, paired with the fact that the majority of actual and potential jurors remembered the publicity, warranted a change of venue, and held that the trial court's denial of the motion violated Daniels right to a fair and impartial jury and thus, his right to due process. (*Id.* at pp. 1211-1212, citing *Ainsworth v. Calderon* (9th Cir. 1998) 138 F.3d 787, 795, as amended, 152 F.3d 1223.)

In support of its conclusion, the court of appeals cited the extensive and nearly continuous publicity immediately after the shootings and again before Daniels's trial. Daniels had been identified in press accounts as the killer from the very beginning, and the murdered officers were turned into "posthumous celebrities." Although the publicity diminished after his arrest, it resumed as trial approached. News articles reflected the prosecution's theory of the case, attributing the killings to Daniels's desire to escape justice. Daniels's past criminal offenses, including an arrest for shooting at a police officer, were well-publicized by the press. This information was highly prejudicial and would not have been admissible at the guilt phase of his trial. Three months before the trial, news articles covered the local school board's proposal to rename its football stadium in honor of one of the officers. One month before trial, on the anniversary of

the killings, a statue commemorating fallen police officers was unveiled by the county. The publicity surrounding the memorial and its unveiling ceremony largely referred to the officers killed by Daniels. The memorial statue, standing nine feet tall, was located across the street from the Riverside County courthouse where Daniels was tried. The fact that 87% of the jury pool recognized the case from the media coverage showed that the news coverage saturated the county. Two-thirds of those empaneled remembered the case from the press accounts. (Ibid.)

As in Daniels, the public response to the publicity in this case was a huge wave of passion. Dr. Bronson's public opinion survey demonstrated not only that the community was overwhelmingly aware of the case but also that a substantial majority already believed appellant was guilty and that he should be put to death. (7 RT 1374-1433.) While the reporting about the case was essentially accurate, its nature and extent created a climate where the presumption of innocence changed to a presumption of guilt. (7 RT 1340-1341.) Headlines and articles repeatedly used terms such as "grisly," "gruesome," and "reign of terror plaguing Riverside area" to describe the case. (7 RT 1343.) Appellant was referred to as "a murderer with a vicious streak," a "monster" and an "animal," and he was tied to notorious criminals. (7 RT 1358.) Repeated references to the term "serial killer" and to a motive characterization (e.g., "Specter of a Serial Killer on the Loose," "Serial Killer Running Amok," "Serial Killer Stalking," etc.) were extremely prejudicial. (7 RT 1341-1342.) Victims were alleged to have been stabbed, strangled, suffocated, bludgeoned, tortured and dumped, and several articles referred to the fact that bodies had been sexually mutilated. The District Attorney himself pointed out at a press conference that some of the victims had been sexually mutilated; that semen had been found on all

19 bodies; that several bodies had been posed in lewd positions; and that some had bite marks. This last detail was particularly troubling because the media also reported that appellant's infant daughter, the victim in his previous murder conviction, also had bite marks on her body. (RT 1342.)

This and other evidence which was inadmissible in the guilt phase was published extensively. Articles referred to appellant's letter from prison stating that he could not be killed because he really was not alive; to the recent child abuse case involving his daughter; and to the deaths of five prostitutes with which he was not charged. (7 RT 1350-1351.) Repeated references to an alleged confession were extremely prejudicial. According to Dr. Bronson, "social scientists agree . . . that's about the most prejudicial kind of stuff there is." (7 RT 1344-1345.) The speculation and prejudice were made even worse by the District Attorney's refusal to say whether or not appellant had, in fact, confessed. Half of the survey respondents knew that appellant previously had been convicted of "beating his daughter to death" in Texas. This was "extremely awful publicity." Headlines declared "Jurors Believe Suff Tortured Daughter To Death," and articles described the crime in lurid terms: "Hit with a blunt instrument until her liver ruptured;" "12 ribs and her wrist broken;" "dozens of bruises;" "foot burned all the way to the bone with a cigarette." They also reported that appellant beat his infant son, too, and that the jury took only 30 minutes to convict. The Texas prosecutor referred to appellant and his wife as "animals." Appellant's Texas defense attorney added that he thought appellant was dangerous. Many of the articles focused on appellant's early parole from Texas. This could only have evoked one of the real concerns of jurors in capital cases, that life in prison does not really mean life in prison. (7 RT 1345-1349, 1358.)

Despite this overwhelmingly prejudicial pretrial publicity and the fact that almost three-quarters of those surveyed knew about the case, the trial judge denied a change of venue because, "based upon the questionnaires [and] my personal questioning, . . . you got - in fact, a huge percentage [of the jury] that know nothing." (19 RT 3603-3607.) With due respect, the record simply does not show that a huge percentage of the jury knew nothing about the case. In fact, it shows just the opposite. Only five of the jurors and alternates indicated they had no knowledge of the case.[28] One juror, Number 8, said he could not remember if he had read articles about the case (4 Supp. CT 627), and what he knew or did not know about the case was never established. All the other jurors and alternates knew about appellant and/or the case.[29] The judge's belief that four of them had only limited knowledge is also belied by the record. Juror Number 6 did not indicate she had limited knowledge of the case, as the judge believed. (3 Supp. CT 549-550.) Nor did Juror Number 8. He said he could not remember if he had read articles about the case and no effort was made to question him further to determine what he did remember. (3 Supp. CT 627-628.) Juror Number 3 indicated he read about the case in the "Newspaper

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[28] Juror Number 4 (3 Supp. CT 471); Juror Number 9 (3 Supp. CT 666); Juror Number 11 (4 Supp. CT 744); Alternate Juror Number 2 (5 Supp. CT 859); and Alternate Juror Number 8. (5 Supp. CT 1093.)

[29] Juror Number 1 (2 Supp. CT 354); Juror Number 2 (15 RT 2882-2884); Juror Number 3 (2 Supp. CT 432); Juror Number 5 (3 Supp. CT 540); Juror Number 6 (3 Supp. CT 549); Juror Number 7 (3 Supp. CT 588); Juror Number 10 (3 Supp. CT 705); Juror Number 12 (4 Supp. CT 782); Alternate Juror Number 1 (4 Supp. CT 820); Alternate Juror Number 3 (5 Supp. CT 898); Alternate Juror Number 4 (5 Supp. CT 937); Alternate Juror Number 5 (5 Supp. CT 976); Alternate Juror Number 6 (5 Supp. CT 1015); and Alternate Juror Number 7. (5 Supp. CT 1054.)

(Press-Enterprise) - skimmed the initial article." (2 Supp. CT 432.) And Alternate Juror Number 7 said he had, "Probably read about [the case] in local papers but didn't give it much attention. I lived in Ohio until 1992." (5 Supp. CT 1054.) These comments might establish that the jurors' exposure to pretrial publicity was brief. They do not establish that the jurors did not acquire prejudicial information during that brief exposure. In short, the record clearly shows that, of the 20 jurors and alternate jurors selected, over two-thirds (14) knew about appellant's case and the knowledge of one juror was never established. Only 25% of the jurors and alternates - hardly the "huge percentage" cited by the judge - had no knowledge of the case.

This case is virtually identical to Daniels, and appellant's conviction must be reversed for the reasons cited therein. There was a barrage of inflammatory, extensive, and nearly continuous publicity immediately after appellant's arrest and again before and during his trial. The news accounts were primarily factual but, due to their nature and extent, they were nonetheless extremely inflammatory and prejudicial. From the outset appellant was identified in press accounts as the serial killer responsible for 19 murders, including five murders with which he was never charged. Although the victims were shadow people on the margins of society (people perceived to be of lesser worth), a redemptive process occurred in the media. Many interviews with the victims' families were published. Some of this coverage featured victims' families calling for the death penalty. In a way, the victims were turned into "posthumous celebrities." (7 RT 1358, 1360-1361.) News articles reflected the prosecutor's theory of the case, that appellant was a serial killer who preyed on prostitutes. Highly prejudicial evidence which was inadmissible at the guilt phase of his trial -

his alleged confession, his prior conviction, his early parole from Texas, the deaths of five women with which he was never charged, and the alleged recent abuse of his infant daughter - was well-publicized by the press. Furthermore, Dr. Bronson explained that, because Riverside County's population density was relatively small - only two of its cities, Moreno Valley and Riverside, had populations over 100,000 - media coverage of the case projected the sense of a small town. There was much community concern about the families and victims, and the national focus on the area permanently changed the community.[30] People had come to the area to escape these kind of urban problems but now questioned whether it really was a place where they could be safe. One article speculated that a recent vote to double the number of sheriff's deputies was in large part due to the serial killer. (7 RT 1363-1368.) The public opinion survey showed that, despite its size, news coverage of the case saturated Riverside County. Nearly three-quarters of the community was aware of the case on the first probe, most overwhelmingly so, and 67% of those who recognized the case believed appellant was guilty. Over two-thirds of those empaneled remembered the case from the press accounts.

The judge believed that the questionnaires and his "personal questioning" established that a huge percentage of the jury knew nothing about the case. (19 RT 3603-3607.) As set forth above, this belief was unfounded. Perhaps that is why he made no effort at all to ascertain what, in fact, the jurors did know about the case. Dr. Bronson's concern was that the essentially accurate but extremely prejudicial pretrial publicity,

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[30] One of the top stories of the year was a newspaper article about the case entitled "Nation Focuses on Lake Elsinore." (7 RT 1368.)

particularly the extensive publication of inadmissible evidence, had created an atmosphere where the presumption of innocence had changed to a presumption of guilt. The press supported the prosecutor's theory of the case, that appellant was a serial killer of prostitutes, from the outset, and the media was saturated with details of the grisly murders of 19 prostitutes. Appellant was not charged with five of these alleged murders and had no chance to defend against them. The media was also saturated with reportage of an alleged confession which the District Attorney refused to confirm or deny; of appellant's prior conviction and 70-year sentence for "beating his infant daughter to death;" of an early parole to California after serving ten years of that sentence; and of the more recent injuries to his daughter, Brigette. As Dr. Bronson made clear, it was not only the extent but also the nature of these pretrial reports that threatened the impartiality and indifference of the jury. The judge, however, made no effort to determine what any of the jurors did know about the case and whether or not they had been exposed to this highly prejudicial, inadmissible evidence.

Given the nature and extent of the publicity, the fact that over two-thirds of the jurors remembered the case from the press accounts, and the judge's failure to make any effort to determine if they had been tainted by the exposure, it is reasonably likely that a good portion of the jurors who were chosen for the trial had formed such fixed opinions as a result of the publicity that they could not impartially make the decisions required of them. (*People v. Bonin, supra*, 46 Cal.3d at pp. 672-673.) Under the circumstances, the judge's refusal to grant a change of venue violated appellant's right to a fair and impartial jury and thus, his right to due process. (*Daniels v. Woodford, supra*, 428 F.3d at pp. 1211-1212, citing *Ainsworth v. Calderon, supra*, 138 F.3d at p. 795.)

Respondent will undoubtedly argue that appellant has waived his right to raise this issue by virtue of his failure to exhaust his peremptory challenges. (See, *People v. Daniels, supra*, 52 Cal.3d at p. 854.) Appellant used 10 of 19 peremptory challenges. However, as this Court explained in *People v. Daniels*, supra, counsel's failure to utilize his remaining peremptory challenges signifies his recognition that the jury as selected was fair and impartial only in the absence of some explanation or an objection to the jury as finally composed. (*Id.* at p. 854.) Here, counsel objected to the jury as finally composed by moving to have the panel dismissed (15 RT 2738-2739) and by renewing his venue motion at the conclusion of voir dire. In addition, he explained that he was not satisfied with the composition of the jury, but quit exercising peremptory challenges because the defense had determined "the mix [of jurors] was as good as we were going to get." (6 CT 1872-1873, 1892-1893; 19 RT 3603-3607.) Furthermore, an inference that a defendant's failure to exhaust peremptory challenges signifies his satisfaction with the jury as composed is inappropriate under the federal Constitution. In *Daniels v. Woodford, supra*, the 9th Circuit found a due process violation even though Daniels failed to exhaust his peremptory challenges. In fact, the court of appeals did not even mention Daniels's failure to exhaust his peremptory challenges. Accordingly, an inference that counsel was satisfied with the jury in this case is inappropriate. (See also *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 314 [defendant not required under federal law to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve claim that the for-cause ruling impaired the defendant's right to a fair trial].)

E. Conclusion

It is simply unrealistic to conclude that over two-thirds of the jurors in this case compartmentalized their knowledge of the highly-inflammatory, inadmissible evidence which had been extensively publicized. The error rendered the proceedings structurally defective. Accordingly, appellant's conviction must be reversed. (*People v. Coffman, supra*, 34 Cal.4th at p.44, *People v. Edwards* (1991) 54 Cal.3d 787, 807.)

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III.

APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS ERRONEOUSLY DENIED

Appellant moved to suppress evidence obtained as a result of his warrantless detention and arrest. (3 CT 774-790; 4 CT 840-854.) The prosecutor opposed the motion. (3 CT 797-831.) After a hearing, the trial judge denied the motion (4 CT 836-839; 4 RT 481-645, 648-680), finding that the detention was justified under the totality of the circumstances by articulable, reasonable suspicions of criminal activity and that the detention was not unduly prolonged. (4 CT 855-856; 4 RT 681-683.) The judge's refusal to suppress evidence was erroneous. Admission of the fruits of the unlawful detention and arrest as evidence violated appellant's rights under the Fourth Amendment to the United States Constitution and article 1, section 13 of the California Constitution.

A. Relevant Law

An officer may justify an investigatory traffic stop in two ways. A stop is justified if the police officer has a reasonable suspicion that a traffic violation has occurred. (*United States v. Lopez-Soto* (9th Cir. 1996) 205 F.3d 1101, 1104-1105; see also *People v. Durazo* (2004) 124 Cal.App.4th 728, 734-735; *People v. Bell* (1996) 43 Cal.App.4th 754, 760-761.) If an officer has such a suspicion, it does not matter whether the basis for the stop is merely pretextual. (See *Whren v. United States* (1996) 517 U.S. 806, 817-19.) An investigatory traffic stop is also justified if the officer has reasonable suspicion that criminal activity is afoot. (*United States v. Arvizu* (2002) 534 U.S. 266, 273-74; *United States v. Colin* (9th Cir. 2002) 314 F.3d 439, 442.)

"[R]easonable suspicion is formed by 'specific articulable facts

which, together with objective and reasonable inferences, form the basis for suspecting that the particular person detained is engaged in criminal activity.' An officer is entitled to rely on his training and experience in drawing inferences from the facts he observes, but those inferences must also be 'grounded in objective facts and capable of rational explanation.'" (*United States v. Mariscal* (9th Cir. 2002) 285 F.3d 1127, 1130 (citations omitted); see also *United States v. Twilley* (9th Cir. 2000) 222 F.3d 1092, 1095; *United States v. Lopez-Soto, supra*, 205 F.3d at p. 1101.) This "specific and articulable fact" requirement is the touchstone of the Fourth Amendment's reasonableness requirement. (*People v. Glaser* (1995) 11 Cal.4th 354, 374.)

"'The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. [Citation.] [¶] . . . An individual's presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (*People v. Huggins* (2006) 38 Cal.4th 175, 241-242; see also *United States v. Arvizu, supra*, 534 U.S. at pp. 273-274; *United States v. Sokolow* (1989) 490 U.S. 1, 7; *United States v. Cortez* (1981) 449 U.S. 411, 417; and *Terry v. Ohio* (1968) 392 U.S. 1, 9.) Likewise, a mere hunch or "gut feeling" that a person is involved in criminal activity is insufficient to create the reasonable suspicion necessary to justify an investigatory stop. (*People v. Durazo, supra*, 124 Cal.App.4th at pp. 735-736, citing *United States v. Sokolow, supra*, 490 U.S. at p. 7, and *People v. Bennett* (1998) 17 Cal.4th 373, 387.) "'A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for necessary

specific, articulable facts required to justify a Fourth Amendment intrusion.'" (*People v. Pitts* (2004) 117 Cal.App.4th 881, 889, citing *United States v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192).)

On review, the ultimate question of reasonable suspicion for an investigatory stop is reviewed de novo. (*Ornelas v. United States* (1996) 517 U.S. 690, 691; see *United States v. Mariscal, supra*, 285 F.3d 1127, citing *United States v. Dorias* (9th Cir. 2001) 241 F.3d 1124, 1128.) The appellate court "defers to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, [the appellate court] exercise[s] [its] independent judgment." (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) As a matter of law, this Court determines whether there has been an unreasonable search and/or seizure based on relevant legal principles applied independently to the historical facts. (*People v. Knight* (2004) 121 Cal.App.4th 1568, 1572.)

B. The Investigatory Detention of Appellant

On August 12, 1993, defense counsel moved to exclude "any and all evidence including all statements derived from [appellant's] detention and warrantless arrest . . . on January 9, 1992 by Riverside police officers" on the grounds that the detention lacked probable cause and was therefore unlawful because it was an unreasonable and unlawful pretext stop. (3 CT 774-775, 779-789.)

The prosecutor opposed the motion. (3 CT 797-831.) He argued that there was reasonable suspicion to stop appellant's van based on an officer's observation of prostitution-type activity, the characteristics of the area, and the officer's knowledge of the serial prostitute killings (3 CT 805-811); that the officer's traffic stop of appellant for failing to signal was not

a pretext stop (3 CT 811-817); that the detention was not unduly prolonged (3 CT 818-822); that the search of appellant's van was lawful because the van itself was an instrumentality of the serial killings and because the van was impounded and inventoried pursuant to Riverside Police Department regulations (3 CT 823-828); and that the evidence seized during the search would inevitable have been discovered. (3 CT 828-829.)

The motion was heard on September 24 and 27, 1993. (4 CT 836-839; 4 RT 481-647.) Officer Frank Orta testified that he was patrolling University Avenue on January 9, 1992, on a motorcycle. University Avenue is predominantly a commercial area. There are very few residences in the general vicinity, but there are homes on the adjacent streets. He had seen prostitutes or prostitution activity close to a thousand times during the five years he had patrolled the area; it was a common occurrence every night when he was on patrol. He did not often contact the prostitutes, but he knew how they dress and how they approach their customers. (4 RT 485-489, 558-560.) Around 9:30 p.m. he saw a gray or silver mini-van making a U-turn in the dirt lot adjacent to the Discount Liquor store. He was not able to see into the van at all and there was nothing illegal or unusual about the U-turn. (4 RT 490-497, 537-538.) It did not appear that the driver was parking in such a way as to conduct business with any of the commercial establishments in the general vicinity. (4 RT 559.) A woman walked toward the van from the direction of the Discount Liquor store. Orta was sure that he had seen her around, but he did not know her name. He did not notice any verbal or non-verbal communication between the woman and the person in the van. He was not able to see into the van at all. The woman observed Orta as she approached the van, then turned and walked away in the direction from which she had come. Orta described her as "Hispanic or

dark-complected Caucasian, 25 years, about five-five, and 120, with brown, straight shoulder-length hair." She was wearing blue jean pants. He was not sure about the color of her top, but it had a bright, broad, yellow or lime-colored stripe from her right shoulder through her chest. "[A] lot of females dress like that up and down University." Orta described it as "not a real neat or upkept look" - "street-person type dress." Based on his training and experience having patrolled the area for five years, he believed she was a prostitute because she was a young woman on foot in the University area and she was dressed similar to other prostitute's he had seen walking up and down the street, and she had approached the van and walked away when she saw him. He believed she was attempting to make contact with the driver to engage in an act of prostitution.[31] (4 RT 497-500, 535-538, 556-558.)

Orta was aware that there was a suspected serial prostitute killer on the loose. He did not know that several of the prostitutes who had been killed were from the University Avenue area. He was generally aware of a police bulletin indicating that the suspect might be wearing metal-frame glasses and driving a late model, two-tone, medium blue over gray, Chevy Astro van. He had not seen the bulletin for five or six months. He had also seen a sketch of the suspect in the roll call room and in the newspaper. While he claimed that he did not have a hunch that the driver of the van was the serial killer, he thought the fact that the van was medium blue or gray in color was significant and he decided to circle the block and "sit up on the vehicle" and watch to see if the woman got into the vehicle. If she did, he

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[31] Orta knew that the Thunderbird Lodge, just west of the Discount Liquor store parking lot, was often utilized by prostitutes. He did not see the woman come from the motel. (4 RT 560-562.)

intended to stop the van. (4 RT 500-504, 533, 542, 554.)

When the woman did not get into the van, but instead walked away, Orta decided to "make contact with the van anyways" to gather field information about the van and its driver for Detective Keers, as the bulletin requested. (4 RT 505.) He made a U-turn and accelerated and caught up with the van, which had exited the parking lot and was proceeding westbound on University Avenue. He saw that the driver was the only occupant in the van. Within a quarter to a half-mile the van stopped at a red light at University and Park Avenue. There was no vehicle in front of or approaching the van, and there was no pedestrian traffic in the area. Orta stopped directly behind the van. There was no indication that the driver was aware of his presence. The van made a right turn without any kind of signals or without moving over towards the curb. Orta decided to stop the van for violation of Vehicle Code section 22108. He followed it and immediately turned on his emergency lights. The driver proceeded approximately 80 feet to a stop sign at the corner of Park and Seventh streets. He signaled for and made a left-hand turn, then pulled over to the right and stopped. (4 RT 505-513, 539-543, 554.)

Orta did not call in the stop to the dispatcher. He contacted the driver, appellant, and asked for a driver's license and vehicle registration. Appellant said he was aware of the traffic violation and that he had "changed his mind or knew he didn't signal." Orta thought it was significant that he was wearing wire-frame glasses. He believed that appellant matched the police artist's sketch of the serial killer suspect. Appellant provided an expired driver's license in the name of Bill Lee Suff. On the front was an address in Lake Elsinore. It was scratched out. On the back was another address from Lake Elsinore and one from Rialto. Orta

thought these addresses were significant because he knew some of the serial killer's victims' bodies had been dumped in Lake Elsinore and one had been dumped in the area of Highway 60 and Country Village, close to Rialto. The van had current 1992 registration tabs on its personalized license plate, BILSUF1, but appellant did not have the van's registration with him. The van had a cracked windshield. Orta walked back to his motorcycle to write a citation for the traffic violations. The dispatcher advised him that appellant's license had been suspended and that its registration had expired in 1990. (4 RT 514-524, 555.)

About five or six minutes after the initial stop, as he was writing the citation and filling out forms to confiscate appellant's suspended driver's license and impound his van, officers Don Taulli and Duane Beckman arrived. Beckman advised him that they were part of a task force that was working in the University Avenue area with respect to the serial killer investigation. Orta told them about what he had observed. He intended to forward the citation to Detective Keers with a note to look at the vehicle and the suspect. He asked Beckman to take pictures of appellant and escorted appellant to the back of the van. He asked Beckman and Taulli to assist him in conducting an inventory search of the van. (4 RT 521-522, 524-531, 551-552.)

Later that evening, Orta unsuccessfully tried to locate the woman he had seen approaching the van on University Avenue. He also went to the police station and looked at mug shot books of known prostitutes, but was unable to identify anyone. (4 RT 531-532, 552.) Orta admitted that failing to signal is a very common occurrence among drivers. It is his practice to impound vehicles if the registration had been expired over a year. That was not a policy, and he did not know if it was a practice of the department, but

it was a pretty common practice among officers. He also impounds vehicles for suspended driver's licenses when there is not another licensed driver present who is capable of driving the vehicle. He was not aware if the department had a written procedure covering the practice. (4 RT 547-550.)

Officers Beckman and Taulli knew University to be an area high in drug, gang, and prostitution activity. On January 9, 1992, Operation Apprehension, an effort to catch the serial prostitute killer by cruising University Avenue and the orange groves where some of the victims' bodies had been found, began. Beckman and Taulli were assigned to the operation. They had been briefed with the bulletin and sketch of the suspect Detective Keers had prepared. Around 9:45 p.m. they happened upon the scene where Orta had stopped appellant. Orta informed them of his observation of the van and driver. The van appeared to match the description of the van in the bulletin. It was a Mitsubishi, not a Chevy, and it was silvery-gray, not two-tone, but it appeared to be two-toned until illuminated properly. The bulletin indicated that the suspect wore glasses and appellant was wearing glasses. Beckman offered to photograph appellant, to do a field interview, and to inventory the van. The back of the van was kind of messy with blankets and coke cans and things of that nature. He saw what looked like a CHP hat on the CB radio mounted at the forward portion of the van. He opened the passenger door and saw wire-framed glasses on the center console next to a plastic credit-card holder containing a California parole card with appellant's name on it. Appellant told him that he was on parole for 10 years out of Texas. He found a large, black calendar notebook that looked like a Bible directly behind the driver's seat. The bulletin advised that a Bible had been on the center console of the suspect's van. In a map holder on the back of the driver's seat, he found

numerous pieces of nylon, clothesline-type cord. Several appeared to have been freshly cut to certain lengths. Taulli stuck his head in the open driver's window and found what he initially believed to be a handgun, a .357 magnum Colt Python with a 6-inch barrel and a large frame, sticking out from under the driver's seat. He opened the door and took out the gun. Beckman informed appellant he was under arrest for possession of a firearm and handcuffed him. Appellant told him that the gun was just a pellet gun, and they confirmed that it was, in fact, a pellet gun. Taulli then found a fishing-type knife wedged in between the runners on the right side of the driver's seat. There appeared to be blood at the base of the knife. Beckman told appellant he was under arrest for parole violation, having a fixed-blade knife. They contacted their supervisor, Sergeant Blythe. Blythe called Detective Keers. He asked Taulli what kind of tires were on the van. Taulli checked the left front tire and told him it was a Yokohoma. Blythe told him to "Freeze the scene . . . Detective Keers is en route." Keers arrived about 20 minutes later. (4 RT 531, 551, 563-583, 588-621.)

Detective Keers was the primary Riverside Police Department investigator assigned to the homicide task force. In August 1991 she had prepared and distributed a bulletin and sketch concerning the supsect in the Hammond murder. The bulletin said the suspect was wearing metal-frame glasses and described him as "a white male, 40, five-ten, brown hair, medium build, [and a] slight mustache," wearing orange construction boots, a plaid, long-sleeve shirt, and faded blue jeans. It described his vehicle as a two-tone, medium blue over gray, Chevy Astro-type van with bucket seats and a center console. Keers worked closely with Department of Justice supervising criminalist Steve Secofsky, who was also a task force member. Secofsky had informed her that green, gold, and white color hemp-type rope

fibers were showing up on numerous of the victims' bodies. He also had told her the left front tire on the vehicle at the Casares crime scene was a Yokohama brand, the right front and rear tires were Uniroyals, and the right rear was different from the other three but was unknown. He had also advised her that a shoe print at the Casares scene had been left by a Converse brand tennis shoe. Keers received a call from from Sergeant Blythe at approximately 10:00 p.m. on January 9th. He advised her that a vehicle had been stopped which was similar to the van in her bulletin and that the driver had been seen attempting to solicit a prostitute. She asked him to have the officers at the scene give her the brand name of the left front tire. Blythe advised her it was a Yokohama. She asked him to have the officers freeze the scene. She arrived at the scene at approximately 10:20 p.m. and spoke with Taulli about the things he had found inside the van, then looked at the van's tires. The left front tire was a Yokohama, the right front and rear tires were Uniroyals, and the left rear tire was a Dunlop. The Mitsubishi van was similar in appearance to a Chevy Astro van. She introduced herself to appellant and asked for his permission to search the van. He gave Keers his permission. In the van, she found a folding buck knife and fibers that appeared to be consistent with those found at homicide scenes - gray carpet fibers, green blanket fibers, and white rope fibers. Appellant was wearing white Converse tennis shoes. She requested that he be transported to the police station where she could interview him as a suspect in the serial killings. (4 RT 622-643.)

Appellant filed a supplemental brief on October 7, 1993. In it he pointed out that Orta was unaware that several of the prostitutes who had been killed were from the University Avenue area. Moreover, there was nothing unique about appellant's van. It had no distinguishing

characteristics. Orta could not see into it and was not able to distinguish any of the driver's features. He did not hear any conversation between the alleged prostitute and the driver, thus he could not have made an arrest for solicitation of prostitution. He knew that the woman did not get into the van. Nothing about the characteristics of University Avenue added to the equation. Orta decided to stop appellant's van before he observed what he mistakenly thought was a traffic violation. Under the totality of the circumstances, he decided to stop a van that had done nothing illegal based on mere curiosity and hunch. His observations did not amount to reasonable suspicion of articulable criminal activity. (4 CT 840-854.)

On October 15, 1993, the prosecutor argued that Officer Orta had a reasonable suspicion to detain appellant based on "the solicitation of prostitution activity that he observed as well as Mr. Suff and that van being a possible suspect in the serial killings." (4 RT 668.) According to the prosecutor, the totality of the circumstances - the woman's mannerisms, her attire, the way she approached the vehicle, the location of the vehicle, the characteristics of the area, Orta's training and experience, and his knowledge of the serial killings, particularly the bulletin's description of the suspect's van, and of Operation Apprehension - gave Orta reasonable suspicion to stop and detain appellant's van to investigate his possible involvement in the solicitation of prostitution. (4 RT 651-657.) Even though the woman saw him and walked away, Orta's assumption that prostitution activity was occurring was justified and his intent to stop the van and obtain field information for Detective Keers was legitimate, what the prosecutor called a "minimal intrusion, a momentary detention for the purposes of obtaining personal identification information." (4 RT 657-659.)

The prosecutor contended that, as the events unfolded, Orta accumulated more and more specific, articulable facts which warranted further investigation. (4 RT 663.) It appeared to him that the driver of the van was not conducting any legitimate business. The driver's departure from the parking lot when the woman walked away evidenced a consciousness of guilt. His failure to signal at the red light justified the detention for a Vehicle Code violation. The driver fit the description of the suspect closely enough to warrant further investigation. The addresses on his driver's license also aroused his suspicion. Orta's decision to impound the van was justified as was his decision to search the van, and Taulli's discovery of the gun and knife justified appellant's arrest for possession of a concealed weapon and possessing a knife while on parole. His discovery of other items of concern, including what he believed to be blood in the cargo area of the van, combined with knowledge that the left, front tire on the van matched a tire at the Casares crime scene justified prolonging the detention until Detective Keers could arrive at the scene of the traffic stop. Her observations at the scene justified all the subsequent police conduct. (4 RT 659-667.)

Defense counsel argued that Orta's observations did not provide reasonable suspicion that appellant was involved in the solicitation of prostitution. He could not see the driver of the van. Nor did he see any communication between the woman and the driver. He did not see the driver do anything illegal. The woman did not get into appellant's van. Instead, she turned and walked away. Nothing about the characteristics of the area justified any suspicion; University Avenue has many commercial establishments and homes. According to counsel:

We have a very generic looking van. . . . There's nothing

> distinctive or particularized about this particular vehicle. . . . ¶ So basically he has a vehicle. Doesn't know what the person looks like in it. Doesn't even know if it's a man or woman. Doesn't know anything about it. Just a van that is in an area. He thought it might be a prostitute. Doesn't even know for sure if it's a prostitute. But give him his due; he assumes it was. I think that's fair enough to make that assumption on his part. But that's awfully thin to go in and deprive somebody of their liberty and stop the vehicle.

(4 RT 669-673.)

Counsel argued that appellant's failure to signal at the red light did not warrant his detention because his conduct did not violate the Vehicle Code. Even if the conduct was illegal, Orta had already formulated the intent to stop appellant and investigate whether he was the serial killer, and the stop was merely pretextual. (4 RT 674-676.)

> [Although] there's been some erosion of Fourth Amendment protections for individuals, I still don't think that the police have the right to conduct what's almost a generalized search, or you see some very common vehicle in a particular area that they can just pull it over and stop it and infringe on somebody's liberty like that. ¶ . . . [I]f there was something essentially unusual they were on the lookout in the bulletin for, some unusual vehicle . . . that might have made a difference also. But here you have such a common vehicle, not even knowing who the driver was, you know - it could have been a woman for all we know, could have been anybody - that it was so thin, so lacking in specific aticulable facts of criminal activity that amounted to a hunch stop, that's exactly what it was.

(4 RT 677.)

The prosecutor countered that the woman's mannerisms and her dress gave Orta reasonable suspicion to investigate further. (4 RT 678-680.)

The judge denied the motion. Taking Orta's experience and the

surrounding area into consideration, Orta had articulable reasonable suspicions of criminal activity under the totality of the circumstances. His observations gave him reasonable suspicion to believe that the driver of the van might have been involved in criminal activity. Orta also had objectively reasonable cause to stop the van due to the traffic violation he observed.

> [A]t every juncture, at every turn of the screw a little bit more was developed without prolonging the detention of the vehicle, but in the course of investigating the prior incident. ¶ . . . [E]ach turn of the screw develops something a little bit more that only would heighten one's sensibility or impression that criminal activity was afoot and this vehicle, in particular, if not the person associated with the vehicle, was involved in this prior criminal activity. ¶ And this ultimately led to, I think, the linchpin here is the tires. All four tires when Detective Keers gets there. ¶ The time lapse between the beginning of this, the search of the vehicle for the impound, which is very permissible, and very logical given the information at the time up until Detective Keers makes a determination that these are the tires is very short in duration as to the information and the totality of what they're faced with. ¶ I'm going to deny your motion to suppress. . . . [A]s I see it, I think this is good police activity from the very initial point until the end point. The driver's license, the wrong tabs on the vehicle, the blood seen in the van - or what they believed, as reasonable peace officers with their training and experience seeing the blood - the rope, the fibers, - I think this is what we . . . pay these peace officers to do.

(4 RT 681-683.)

C. Officer Orta Lacked Reasonable Suspicion to Believe Appellant Committed a Traffic Violation

Officer Orta's belief that appellant violated section 22108 was based on his misunderstanding of the law. Appellant's failure to signal his intention to turn violated neither section 22108 nor any other provision of

the Vehicle Code. In fact, the conduct observed by Orta was specifically authorized by the Vehicle Code.

Section 21453 of the Vehicle Code regulates motorists' behavior at red lights. It provides in pertinent part:

> (a) A driver facing a steady circular red signal alone shall stop at a marked limit line, . . . and shall remain stopped until an indication to proceed is shown, except as provided in subdivision (b).
>
> (b) Except when a sign is in place prohibiting a turn, a driver, after stopping as required by subdivision (a), facing a steady circular red signal, may turn right, ... A driver making that turn shall yield the right-of-way to pedestrians lawfully within an adjacent crosswalk and to any vehicle that has approached or is approaching so closely as to constitute an immediate hazard to the driver, and shall continue to yield the right-of-way to that vehicle until the driver can proceed with reasonable safety.

This statute clearly and unambiguously authorizes a motorist to turn at a red light after stopping and yielding the right of way to pedestrians within an adjacent crosswalk and to other vehicles that are so close as to constitute an immediate hazard to the driver. It contains no requirement that a signal of any kind be given before making such a turn.

Section 22108, on the other hand, is part of a statutory scheme which addresses a motorist's obligation to signal his or her intention to turn in moving traffic. Section 22107 specifies when a signal of intention to turn is required:

> No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal provided in this chapter in the event any other vehicle may be affected by the movement.

Sections 2210 and 2211 specify when and in what manner a signal, if required by section 22107, "shall be given by signal lamp" or by "hand and arm signals." Section 22108 addresses the duration of any required signal: "Any signal of intention to turn right or left shall be given continuously during the last 100 feet traveled by the vehicle before turning." When motorists form the intent to turn after coming to a complete stop at a red light, as appellant did here (4 RT 555), it is physically impossible to comply with the provisions of section 22108 by giving a continuous signal during the last 100 feet traveled by the vehicle. Under these circumstances, there is simply no obligation under California law to give a signal of any kind.

This interpretation of the Vehicle Code is supported by the history of the sections in question. Section 22107 and 22108 were originally subdivisions of the same statute, section 544. Subdivision a (section 22107) clearly applied to any and all turns: "No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement." Subdivision b (section 22108) specified the duration of any required signal. Section 21453 (then section 476) was amended in 1947 so as to authorize right turns at red lights under specified conditions. This provision conflicted with section 544, which required a signal at all turns. How could a driver who decided to turn after stopping at a red light comply with section 544 by continuously signaling an intention to turn for a specified distance? Therefore, section 544 was amended in the same legislative session to provide that a signal is required only when a vehicle turns "from a direct course or move[s] right or left upon a roadway." Whereas all turns had theretofore required a signal, the amendment made clear that the statute

only required vehicles turning from a direct course (i.e., moving) or those moving right or left on a public roadway (i.e., changing lanes) to give a signal of an intention to turn. Turns at red lights, which were now authorized, required only that a driver "yield the right-of-way to pedestrians lawfully within an adjacent crosswalk and to any vehicle that has approached or is approaching so closely as to constitute an immediate hazard to the driver, and shall continue to yield the right-of-way to that vehicle until the driver can proceed with reasonable safety." (Veh. Code, § 21453.)

The 1947 amendment of Vehicle Code sections 476 and 544 and the Legislature's failure to include any requirement of a turn signal in section 476 evince an unmistakable intent to limit the application of section 544 to moving traffic and to permit motorists to turn right at red lights, after coming to a complete stop, without signaling. Section 21453 is a special statute governing the driving conduct required at red lights. A special statute dealing specifically with the particular criminal act involved controls or supersedes the general statute. (See *People v. Duran* (2004) 124 Cal.App.4th 666, 670; *People v. Hernandez* (1993) 18 Cal.App.4th 1840, 1846.) Thus, section 21453 supersedes the general statutes requiring the use of turn signals. Furthermore, a statute must be considered as a whole, and all parts harmonized so far as possible. (*People v. Gliksman* (1978) 78 Cal.App.3d 343, 349.) The only manner in which these provisions of the Vehicle Code can be harmonized is by the statutory construction set forth above. Any other construction would require a physically impossible act. To the extent these statutory provisions can be interpreted to require such an act, they are ambiguous and the Court must adopt the interpretation more favorable to appellant. "[W]hen a statute defining a crime or punishment is

susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1022; *People v. Farell* (2002) 28 Cal.4th 381, 394-395; *People v. Avery* (2002) 27 Cal.4th 49, 57; *People v. Garcia* (1999) 21 Cal.4th 1, 10; *People v. Gardeley* (1996) 14 Cal.4th 605, 622; 1 Witkin & Epstein, Cal.Criminal Law (3d ed. 2000) Introduction to Crimes, § 24, p. 53.)

The Legislature knows how to require turn signals when it deems them necessary. One must therefore assume that it intentionally omitted the requirement from section 21453. (See *In re Timothy E.* (1979) 99 Cal.App.3d 349, 354.) Appellant's failure to signal at the red light did not violate section 22108, as Officer Orta believed, but rather was specifically authorized by section 21453. His legal behavior provided no reasonable suspicion upon which Orta could base a valid traffic stop.

Even if appellant's conduct was governed by section 22108, his failure to signal his intention to turn did not violate that section. California's Vehicle Code does not always require a driver to signal his intention to turn. (*People v. Cartwright* (1999) 72 Cal.App.4th 1362, 1366, Fn. 6.) In fact, unless the movement may affect other vehicles, no turn signal of any kind is ever required. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 930.) In *Miranda*, the court of appeal found that a police officer in a moving patrol car behind a vehicle may be affected by a failure to signal at a traffic light, and that the failure constitutes reasonable cause for a traffic stop. (*Id.* at p. 930, citing *Stephens v. Hatfield* (1963) 214 Cal.App.2d 140, 144.) Miranda, however, is distinguishable. The defendant there did not contend that the stop lacked reasonable suspicion. Instead, he conceded that his failure to signal provided a basis for the traffic

stop and alleged instead that the stop was pretextual. The holding was therefore unnecessary to the court's decision and is dictum. (See *Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 432.) *Miranda* is also distinguishable on its facts. It involved an officer who was tailing the vehicle in question in a moving police car which truly could have been affected by the failure to signal, for example by having to slow down to avoid running into the turning vehicle or by having to avoid other traffic and pedestrians who might also have been affected by the defendant's movement. In contrast, Officer Orta was on a stationary motorcycle directly behind appellant's van. There is no way he could have been affected by the turn. *Miranda* is therefore inapplicable to the facts of this case.

The facts in *United States v. Mariscal, supra*, 285 F.3d 1127, a case involving a stationary police vehicle, are remarkably similar to those here. In *Mariscal*, Phoenix Arizona officers were conducting undercover surveillance of a house and car. At 9:41 p.m. they were stopped at a stop sign at 52nd Drive and McDowell Road, a heavily traveled street, waiting for the car. The car turned right in front of them, from McDowell Road onto 52nd Drive, without signaling. The officers immediately made a U-turn and stopped the car. A search of the vehicle revealed a handgun. The defendant's motion to suppress the handgun was denied, and he was convicted of possessing a concealed weapon. (*Id.* at p. 1129.) On appeal, the 9th Circuit found that Arizona does not always require a driver to use a turn signal. "[W]hat Arizona law actually provides is that '[a] person shall not so turn any vehicle without giving an appropriate signal in the manner provided by this article in the event any other traffic may be affected by the movement." "Plainly," a violation only occurs where traffic would be "affected by the movement" of the appellant when making the right-hand

turn. Because the government did not offer a "shard of evidence that any vehicle other than [Mariscal's] was affected by the right turn[,]" he did not violate Arizona traffic laws and his right turn without signaling provided no cause for his detention. (*Id.* at p. 1131, citing Ariz. Rev. State. § 28-754(A).)

The court was "dubious" about the proposition that the police car itself was traffic.

> In Arizona, traffic is defined as 'pedestrians, ridden or herded animals, vehicles and other conveyances either singly or together while using a highway for purposes of travel.' Ariz.Rev.Stat. § 28-601(26). In some sense a stationary but occupied police car can be said to be using the roadway for travel, inasmuch as it is there for the purpose of moving along the road at some point, but to suggest that Officer Garrett's car was traveling at the time that the Crown Victoria made its right turn is stretching a point. A dictionary definition of traffic suggests that "circulation" or "flow" or "movement" is referred to by that term, and the Arizona statute has that same flavor.

(*Id.* at p. 1132, footnote omitted.) Even if the car was "traffic," it was at a standstill on the other side of the street. The right turn could not by any stretch of the imagination have had any effect upon it. "[O]ne finds it highly unlikely that the Arizona legislature had in mind police officers parked at the side of the road looking for traffic violators when it referred to 'traffic [that] may be affected by the movement' of an automobile." (*Ibid.*) The court found that the traffic stop violated the Fourth Amendment because the officers lacked reasonable suspicion to believe a traffic violation had occurred.

> Because most people are not such paragons of driving skill and virtue that they consistently adhere to each one of the complex laws relating to the operation of motor vehicles,

> there are many opportunities to stop targeted vehicles like the Crown Victoria. But those opportunities are not limitless. Suspicions must be reasonable, and they cannot be if they are not sufficient to cause an officer to believe that the driver has done something illegal. [¶] If an officer simply does not know the law, and makes a stop based upon objective facts that cannot constitute a violation, his suspicions cannot be reasonable. The chimera created by his imaginings cannot be used against the driver. . . . Simply put: A suspicion based on such a mistaken view of the law cannot be the reasonable suspicion required for the Fourth Amendment, because "the legal justification [for a traffic stop] must be objectively grounded." In other words, if an officer makes a traffic stop based on a mistake of law, the stop violates the Fourth Amendment. *Id.* (citations omitted); see also *United States v. King*, 244 F.3d 736, 741-42 (9th Cir.2001) (a mistaken belief that a driver's conduct violated the law could not support a reasonable suspicion that a crime had been committed, even if the officer otherwise behaved reasonably).

(*United States v. Mariscal, supra*, 285 F.3d at p. 1130; see also *In re Justin K.* (2002) 98 Cal.App.4th 695, 700.)

Like Arizona, California requires a signal of intention to turn only "in the event any other vehicle may be affected by the movement." (Veh. Code, §22107.) And, like Arizona, traffic includes "pedestrians, ridden animals, vehicles, street cars, and other conveyances, either singly or together, while using any highway for purposes of travel." (Veh. Code, § 620.) It is just as unlikely that our Legislature intended the statute to apply to traffic officers on stationary vehicles looking for traffic violators any more than did Arizona's. More importantly, even if Orta's stationary motorcycle was "traffic" there is no way that appellant's right turn possibly could have affected him. As in *Mariscal*, there was not a "shard of evidence" in this case that any vehicle other than appellant's was affected by the right turn. Orta was at a compete stop directly behind appellant's

van. The turn gave him unimpeded access to the intersection. He was free to turn or proceed straight ahead totally unobstructed. He did not have to worry about slowing down or watching out for other traffic or for pedestrians who might also have been affected by the turn. Under the circumstances, appellant was not required to give a signal of his intention to turn. Orta's traffic stop was therefore based upon objective facts that do not constitute a violation of the law. His suspicions were not reasonable and they cannot serve to justify his detention of appellant.

D. Officer Orta Lacked Reasonable Suspicion to Believe Criminal Activity Was Afoot

In determining whether an officer has reasonable suspicion to conduct an investigatory stop of a vehicle where no traffic violation is observed, a court considers the "'totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis' for suspecting legal wrongdoing.'" (*United States v. Arvizu, supra*, 534 U.S. at p. 273, citing *United States v. Cortez, supra*, 449 U.S. 411, 417.) The circumstances are based on the officer's knowledge at the time of the stop. (*United States v. Turner* (N.D. Cal. 1993) 815 F.Supp. 1332, 1336.) An officer may draw on training and experience to make inferences about facts observed, but such inferences must be "grounded in objective facts and be capable of rational explanation." (*United States v. Lopez-Soto, supra*, 205 F.3d at p. 1105.) Specifically, the officer must supply particularized, objective facts that led to the investigatory stop. A stop "predicated on mere curiosity, rumor, or hunch" lacks such particularized, objective facts and is, therefore, violative of the Fourth Amendment. (*In re Tony C.* (1978) 21 Cal.3d 888, 893; see also *Terry v. Ohio, supra*, 392 U.S. 1, 22.) In reviewing the circumstances that lead to an investigatory stop, a

give each of the factors the officer or officers relied upon adequate consideration. (*People v. Pitts* (2004) 117 Cal.App.4th 881, 886.) To do so, "[the court] must review each of [the] factors in turn, and then consider their relation to the whole." (*Id.*)

In *United States v. Davis* (10th Cir. 1996) 94 F.3d 1465, 1468, for example, officers articulated four factors justifying their suspicion that the defendant was engaging in criminal activity: 1) the defendant parked outside a known criminal establishment; 2) he made and then broke eye contact with the officers; 3) he kept his hands in his pockets when walking toward the establishment; and 4) the officer's knowledge of his prior criminal record. The court examined the factors alone and then considered them as a whole. (*Id.* at pp. 1469-1470.) First, "the fact that [the defendant] was in a neighborhood frequented by criminals, standing alone, is not a basis for concluding that [defendant] himself was engaged in criminal conduct." (*Id.* at p. 1468, citing *Brown v. Texas* (1979) 443 U.S. 47, 52.) Moreover, approaching a business known for criminal activity, but that also conducts legal activities, does not give rise to reasonable suspicion. (*Ibid.*) Second, glancing at officers is not a sufficient particularized and objective basis for suspecting criminal activity, and, thus, cannot lead to reasonable suspicion. (*Ibid.*; see, e.g., *Ornelas v. United States* (1996) 517 U.S. 690, 694; *United States v. Santillanes* (10th Cir. 1988) 848 F.2d 1103, 1105-1108.) Such glances cannot justify reasonable suspicion even when combined with refusal to stop when specifically requested by an officer. (*Id.* at p. 1469.) The court dismissed the officers's other two reasons for making the investigatory stop and held that, even when taken together, the four factors did not amount to reasonable suspicion justifying their actions. The factors, including furtive glances and

a neighborhood known for criminal activity, failed to show "any specific factual basis for suspecting that a particular crime was being committed." (Id. at p. 1470.) Therefore, the stop violated the Fourth Amendment.

The court of appeal took a similar approach in *People v. Pitts, supra*, 117 Cal.App.4th at p. 886, and found the factors relied upon by the officers to search the defendant for drug possession "insufficient in their individual parts and sum total to constitute the requisite amount of specific and articulable facts to justify [the defendant's] detention." (*Id.* at p. 889.) Specifically, the court found the following four factors "irrelevant, unreliable, and unrelated" to the reasonable suspicion standard: 1) a "be on the lookout" police bulletin issued for defendant a month prior to the stop; 2) criminal activity at a residence in the area of the stop; 3) conduct of other individuals present near the stop characterized as a "common behavior pattern in drug transactions" (including making and breaking eye contact with the officers); and 4) the defendant's presence near criminal activity. (*Id.* at pp. 885, 889.) In reviewing the defendant's motion to suppress, the *Pitts* court found each of the "pieces of information [the officers] relied upon somehow flawed or inadequate." (*Id.* at 889.) No reliable evidence corroborated the "be on the lookout" bulletin. (*Id.* at 886.) Likewise, criminal activity in the area cannot "elevate . . . facts into a reasonable suspicion of criminality."

> "The 'high crime area' factor is not an activity of an individual. Many citizens of this state are forced to live in areas that have 'high crime' rates or they come to these areas to shop, work, play, transact business, or visit relatives or friends. The spectrum of legitimate human behavior occurs every day in so-called high crime areas ...." Before [stopping the defendant, the officer] had neither confirmed why [the defendant] was in the area, nor reduced the wide spectrum of

possible explanations for [defendant's] presence.

(*Ibid.* citing *People v. Loewen* (1983) 35 Cal.3d 117, 124.) The court determined that the officers's third justification, observations of activities described as "common" in drug transactions and breaking eye contact with the police, was insufficient to provide reasonable suspicion. (*People v. Pitts, supra*, 117 Cal.App.4th at p. 888.) "While observations of evasive or erratic driving tactics or other furtive conduct by people coming to and going from a particular residence" can indicate illegal conduct, the officers observed no such activity. (*Ibid.*, citing *United States v. Thomas, supra,* 211 F.3d 1186 at p. 1190).) Moreover, "looking at a police officer and then looking away does not provide the officer with 'a particularized and objective basis for suspecting the person stopped of criminal activity.'" (*People v. Pitts, supra*, 117 Cal.App.4th at p. 888, citing *United States v. Davis, supra*, 94 F.3d at p. 1468.) Finally, the defendant's mere presence in the area cannot furnish sufficient reasonable suspicion. The defendant's presence was consistent with possible illegal activity, "but also with the activity of any law-abiding pedestrian." (*People v. Pitts, supra*, 117 Cal.App.4th at p. 889.) Thus, no specific information linked the defendant to criminal activity.

More importantly, the *Pitts* court held that, when taken together, the circumstances known to the officers did not include any specific or reliable information indicating that the defendant engaged in criminal activity. (*Ibid.*) In reviewing "the whole picture," the court determined that the factors were so "internally flawed or irrelevant or unrelated to the circumstances [of the stop], that they are unreliable or inadequate in the reasonable suspicion determination." (*Ibid.*) Instead of relying on specific and articulable facts, the officers merely "reacted on hunch." (*Ibid.*)

Thus, like the court in *Davis*, the *Pitts* court held that the stop failed to meet the reasonable suspicion standard and was, therefore, unlawful.

In like manner, courts routinely find reasonable suspicion lacking where factors used to justify reasonable suspicion describe too many individuals. (See *United States v. Turner, supra*, 815 F.Supp. at 1336; *United States v. Jiminez-Medina* (9th Cir. 1999) 173 F.3d 752; *United States v. Hernandez-Alvarado* (9th Cir. 1989) 891 F.2d 1414; *United States v. Rodriguez* (9th Cir. 1992) 976 F.2d 592.) For instance, in *Hernandez-Alvarado*, the court concluded that six factors proffered by an officer were insufficient. (*United States v. Hernandez-Alvarado, supra*, 891 F.2d at p. 1416.) Factors such as nervous demeanor, reduction in speed, or physical characteristics of a vehicle associated with criminal activity "allow certain inferences to be drawn" but taint too many people to create a particularized suspicion required by the Fourth Amendment. (*Id.* at p. 1418.) The court discredited nearly identical factors in *Rodriguez*. (*United States v. Rodriguez, supra*, 976 F.2d at p. 596.) Again, it concluded that the factors described too many individuals to create reasonable suspicion. (*Ibid.*)

In contrast, the United Supreme Court in *Sokolow* held that the highly-particularized suspicions of DEA agents supported a reasonable suspicion that the defendant was involved in drug smuggling. (*United States v. Sokolow* (1989) 490 U.S. 1.) The agents relied on the following information to justify the stop: "(1) [defendant] paid $2100 for two airplane tickets from a roll of $20 bills; (2) [defendant] traveled under a name that did not match the name under which his telephone number was listed; (3) [defendant's] original destination was Miami, a source city for illicit drugs; (4) [defendant] stayed in Miami for only 48 hours, even though a roundtrip . . . takes 20 hours; (5) he appeared nervous during his trip; and (6) he

checked none of his luggage." (*Id.* at p. 3, quoting *United States v. Turner, supra*, 815 F. Supp. at p. 1336 .) While "any one of these factors alone is not by itself proof of illicit conduct," the court found the factors taken together justified further investigation. (*Id.* at p. 9.) Accordingly, the officer met the reasonable suspicion standard.

As these cases demonstrate, "courts address each case in the specific totality of circumstances that it presents, but generally have required a relatively high degree of particularity." (*United States v. Turner, supra*, 815 F.Supp. at p. 1337; see also *United States v. Hernandez-Alvarado, supra*, 891 F.2d at p. 1416.) While the generalized and/or unreliable information in *Davis* or *Rodriquez* did not satisfy the reasonable suspicion standard, the more particularized factors in *Sokolow* presented an objective basis for suspecting that particular person of criminal activity. Courts are understandably leery of justifying an investigatory stop or detention with a mere inchoate hunch, grounded in little more than conjecture. (See *Terry v. Ohio, supra*, 392 U.S. at p. 22.) Thus, factors cannot be "so few or mundane that they describe too many individuals." *(United States v. Turner, supra*, 815 F.Supp. at p. 1336.)

Much like the officers in *Pitts*, *Davis*, and *Rodriquez*, Officer Orta lacked the specific, objective, and reliable information required by the Fourth Amendment to justify stopping appellant. Although certain inferences may be drawn from appellant's conduct and from Orta's observations, the "individual pieces of information [Orta] relied upon [are] somehow flawed or inadequate." (*People v. Pitts, supra*, 117 Cal.App.4th at p. 889.) When reviewed separately and considered collectively, the information he had does not rise to the level of specificity required by the Fourth Amendment. Instead, he reacted on a mere hunch that appellant was

somehow involved in criminal activity. "However fortuitous its results, [Orta's] stop of [appellant] was unreasonable under the Fourth Amendment." (*United States v. Turner, supra*, 815 F.Supp. at p. 1340.)

1. Orta's Suspicion That Appellant Was Soliciting a Prostitute

Nothing Orta observed about the van was inconsistent with the normal, lawful activity of any citizen. He saw it make a U-turn and come to a stop in the dirt lot adjacent to the Discount Liquor Store. There was nothing illegal or unusual about the U-turn. He was not able to see into the van at all. He did not know how many people were in it and could not tell the driver's sex or race. He did not see any verbal or non-verbal communication between Gamboa and the driver. Then he saw the van exit the lot. Nothing about these facts generates any suspicion whatsoever that the driver of the van might have been involved in criminal activity. Orta did not even know if the driver saw Gamboa. University Avenue is a "busy" area populated with commercial businesses - gas stations, motels, and markets - as well as nearby residences. (4 RT 491-492, 558-560.) For all he knew, the driver could have been a female who intended to patronize the liquor store next door. Or perhaps she pulled into the lot to attend to a crying baby or to crawl into the back of the van and retrieve something. After all, "[t]he spectrum of legitimate human behavior occurs every day in so-called high crime areas." (*People v. Pitts, supra*, 117 Cal.App.4th at p. 887, citing *People v. Loewen, supra*, 35 Cal.3d at p. 124.) Are all individuals on University Avenue also tainted with suspicion merely because of their presence in the area?

Orta's observations of the van simply do not warrant his conclusion that the driver was male, that he was not going to patronize one of the

commercial establishments in the area, and that he was attempting to solicit Gamboa for an act of prostitution. His beliefs were not conclusions based on particularized behavior. Instead, he simply guessed that the driver was a male attempting to solicit a prostitute. Thus, his observations of the driver do not justify a reasonable belief that he or she was involved in any inappropriate activity. Parking in the lot of a legitimate business at 9:30 in the evening is not itself indicia of reasonable suspicion, even if the business is in an area known for criminal activity. A history of criminal activity in a locality does not justify suspension of the constitutional rights of everyone, or anyone, who may subsequently be in that locality. (*People v. Aldridge* (1984) 35 Cal.3d 473, 479.) An area "frequented by [criminals] standing alone is not a basis for concluding [the defendant] was himself engaged in criminal conduct." (*Brown v. Texas, supra*, 443 U.S. at p. 52.) Like the officer in *Pitts*, Orta neither reduced nor confirmed the "wide spectrum of possible explanations for [the driver's] presence" on University Avenue. (*People v. Pitts, supra*, 117 Cal.App.4th at p. 887.) Accordingly, his suspicion that appellant was involved in criminal activity was not reasonable

If Orta did observe and articulate suspicious behavior, it was Gamboa's. Based on his training and experience having patrolled the area for five years, her physical appearance, clothing, and actions made her look like many prostitutes he had seen walking up and down the streets. Orta described it as "not a real neat or upkept look." (4 RT 557.) The Thunderbird Lodge was just west of the parking lot where he observed the van. Prostitutes often used the motel to consummate their transactions with customers, but he did not see her come from the motel and he did not know if she had ever been there. (4 RT 560-562.) He determined there was a

strong likelihood she was a prostitute because she was a young woman on foot in the University Avenue area, she approached a van that had just pulled into the lot, and she turned around and walked away from it when she observed him. (4 RT 557.) Thus, if he had a reasonable suspicion, it was that Gamboa might have been involved in illegal activities.

But from Orta's cursory observations of Gamboa's behavior, one cannot even reasonably conclude that she was attempting to solicit an act of prostitution. Orta did not describe exactly what it is about the way prostitutes dress and act that permits him to immediately determine if a young woman is a prostitute. Moreover, he failed to describe in particular what it was about Gamboa's nondescript appearance and manner that justified his conclusion. He was unable to articulate anything specific about her dress and behavior that caused him to believe she was a prostitute. She was a 25-year-old Hispanic or dark-complected Caucasian female, about five feet, five inches tall and 120 pounds, with brown, straight shoulder-length hair. She was wearing blue jean pants. He was not sure of the color of her blouse, but saw that it had a bright, broad, yellow or lime-colored stripe running through the right shoulder and chest. Nothing about the blouse was distinctive as to what a prostitute would wear. In fact, "a lot of females dress like that up and down University [Avenue]." (4 RT 535-536, 556-557.)

An officer may rely on his training and experience in drawing inferences from the facts he observes, but "those inferences must also be grounded in objective facts and be capable of rational explanation." (*United States v. Rojas-Millan* (9th Cir. 2000) 234 F.3d 464, 468-469.) Though an officer's experience may furnish the background against which the relevant facts are to be assessed as long as the inferences he draws are

objectively reasonable, experience is not an independent factor in the reasonable suspicion analysis. (*United States v. Montero-Camargo* (9th Cir. 2000) 208 F.3d 1122, at pp. 1131-1132.) Orta's primary duty on patrol was traffic enforcement. He had never personally arrested a prostitute for soliciting an act of prostitution and had only occasionally made contact with a woman he suspected was a prostitute. (4 RT 489, 538.) Thus, even if he thought he had some mystical ability to distinguish prostitutes from law-abiding citizens at a glance, his ability had never been tested. His training and experience alone cannot make his otherwise unreasonable belief reasonable. Although prostitutes might be present on University Avenue, so are markets, gas stations, motels, commercial business, homes, and various other shops. How did Orta determine that Gamboa was a prostitute rather than a resident of the area, a patron of the nearby business, or a homeless person? Gamboa merely walked in front of a van occupied by an unknown driver. At no time did she make contact with the driver. For all Orta knew, she was an ordinary citizen who stopped in the liquor store to get a soft drink and happened to walk in front of the van's headlights as she continued on her way. Orta also knew there were a number of street people in the area, and Gamboa was unkempt and had the appearance of a street person. (4 RT 556-557.) She just as easily could have been a homeless person approaching the van looking for spare change.

Solicitation requires "personal petition," not simply "waving to a passing vehicle, nodding to a passing stranger, or standing on a street corner in a mini-skirt." (*People v. Superior Court* (1979) 10 Cal.3d 338, 345-346.) Surely, walking in front of a vehicle can hardly be characterized as a "personal petition" for illicit conduct. Furthermore, the fact that a woman is "young" and "on foot" is not a particularized, objective fact. Are all young

women walking on foot on University Avenue tainted with suspicion? Nothing Gamboa did provided adequate reasonable suspicion that she was attempting to solicit the driver of the van. She glanced at Orta as she walked in front of the van's headlights, then hurriedly walked away. "Looking at a police officer and then looking away does not provide the officer with a 'particularized and objective basis for suspecting . . . criminal activity.'" (*United State v. Davis, supra*, 94 F.3d at p. 1468, citing *Ornelas v. United States* (1996) 517 U.S. 690.) Both the *Davis* and *Pitts* courts found this factor wholly uncompelling in a reasonable suspicion analysis. Likewise, in *Huntsman*, two officers observed two men behind an open trunk holding a plastic container, who, upon seeing the officers, "hurriedly walked away." (*People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1087.) The court found that "'the suggestion that an apparent effort to avoid a police officer may justify a detention has been refuted in numerous decisions of [the California Supreme Court]. [Citation.]' (*People v. Aldridge, supra.*, 35 Cal.3d at p. 479.) Where an officer makes no observation of conduct objectively suggesting criminal activity, the mere avoidance of police officers by a citizen cannot justify a detention. (*Ibid.*) A fortiori, the citizen's avoidance of officers cannot justify a warrantless search. (See *Terry v. Ohio, supra*, 392 U.S. 1, at p. 22 [20 L.Ed.2d 889, 906, 88 S.Ct. 1868]; *In re Tony C., supra.*, 21 Cal.3d at p. 892.)" *(People v. Huntsman, supra*, 152 Cal.App.3d at p. 1091.) The same logic holds true in this case. Orta did not observe any criminal conduct. Merely glancing at an officer or hurriedly walking away does not furnish the specific, objective facts required for a reasonable suspicion analysis.

Orta had absolutely no reason to believe the driver of the van had done anything wrong. If he had any just cause, it was to investigate

Gamboa. But her physical appearance fits innumerable people, and her actions are likewise unreliable as indicia of criminal activity. Vaguely suspicious conduct in an area where some unlawful conduct has previously taken place but that is also used for legitimate purposes cannot and does not justify an investigatory stop. (See *United States v. Turner, supra*, 815 F.Supp. at p. 1340.) Without more, Orta's characterization of Gamboa as a prostitute does not constitute specific and articulable facts rendering his suspicions objectively reasonable. The characterization impermissibly sweeps many ordinary citizens into a generality of suspicious appearance. (See, e.g., *United States v. Hernandez-Alvarado, supra*, 891 F.2d at p. 1418.) Thus, to the extent Orta's stop of appellant was based on his observation of what he believed to be prostitution activity, he acted solely on hunch, speculation, and conjecture which do not constitute the required reasonable suspicion.

2. Orta's Suspicion that Appellant's Van was Similar to the Serial Killer's

The appearance of the vehicle, an ascot silver Mitsubishi van, also aroused Orta's suspicion because a bulletin issued five to six months before described the possible serial killer as a white male with metal-frame glasses, driving a two-tone, blue over gray, Chevy Astro van. (4 RT 502.) While police bulletins based themselves on reasonable suspicion may justify an officer briefly detaining an individual reasonably suspected of criminal activity (see *United States v. Hensley* (1985) 469 U.S. 221, 229-233), the officer must nonetheless verify that current observations correspond to the police bulletin. An investigatory stop violates the Fourth Amendment where the stop is based on generalities and a mere hunch that an individual fits the description in the police bulletin. (See *Washington v. Lambert,*

supra, 98 F.3d at p. 1190.) For instance, in *Hensley*, the United States Supreme Court held that the officer's investigatory stop was justified under the Fourth Amendment as it was based on specific, articulable facts supporting reasonable suspicion. (*United States v. Hensley, supra*, 469 U.S. at p. 232.) Not only did the officer rely on a "wanted flyer" supported by reasonable suspicion, but the officer's specific, objective observations supported that reasonable suspicion. The flyer contained the defendant's name, a photo, and the date and location of the crime he was wanted for. (*Id.* at p. 223.) The officer observed the defendant in the driver's seat of the vehicle and, in reliance on the wanted flyer, stopped the defendant shortly after attempting to get verification from police dispatch. (*Id.* at p. 224.) The officer's observations were an exact match to the wanted flyer. Consequently, the court held that the investigatory stop satisfied Fourth Amendment reasonable suspicion requirements where the officer made the stop in reliance on the specifications in the bulletin itself based on specific, articulable facts supporting reasonable suspicion. (*Id.* at p. 233.)

Likewise in *United States v. Rodriguez* (5th Cir. 1988) 835 F.2d 1090, an anonymous call to a Customs Agent reported the suspected concealment of illegal contraband in a truck. The caller gave the agent the license number, the exact location, and a physical description of the truck, as well as information regarding the vehicle and behavior of the driver. (*Id.* at p. 1092.) Based on the caller's information, the agent located the truck. (*Ibid.*) In an attempt to discern if it contained illicit contraband, he watched for thirty minutes and, while doing so, observed unusual boxes and bundles loaded into the truck. (*Id.* at pp. 1091 & 1093.) Officers stopped the truck shortly thereafter and, upon a consensual search of the vehicle, discovered marijuana. (*Id.* at p. 1092.) The court held that the stop did not violate the

Fourth Amendment. (*Ibid.*) Not only did the agent confirm the location, license plate number, and physical description of the van, but he corroborated the caller's concerns regarding illicit contraband with his own observations. Specifically, the agent's verification of the caller's information provided the requisite reasonable suspicion to stop the vehicle. (*Id.* at p. 1093.)

On the other hand, the court in *Washington v. Lambert* (9th Cir. 1996) 98 F.3d 1181 stated that an officer's reliance on a police-issued bulletin "clearly" did not "give rise to even reasonable suspicion necessary" to make an investigatory stop where so few similarities existed between the bulletin and the individuals stopped. (*Washington v. Lambert*, supra, 98 F.3d at p. 1191.) Although the court ultimately decided the merits of the case on the severity of the police intrusion and the aggressiveness of the police actions, it discussed at length the officer's reliance on a police bulletin. (*Ibid.*) A Santa Monica police officer followed two African-American men from a restaurant based principally on a belief that they fit the description of a police bulletin describing two serial robbery suspects. (*Id.* at p. 1183.) The bulletin described the robbery suspects as follows: two African-American males, aged 20-30, one tall (150-170 pounds), and the other short (170-190 pounds). It listed a variety of vehicles used in the robberies. (*Ibid.*) However, no specific similarities existed between the men stopped and information listed in the bulletin. The men "did not even match the few physical details that did accompany the general physical descriptions" in the bulletin. (*Id.* at p. 1190.) Both the weight and height measurements of the two men were entirely dissimilar. (*Ibid.*) Moreover, the car the men drove was not the same color or make as the numerous cars listed in the bulletin. (*Id.* at p. 1191.) The court found that a "car of a different make and model

[] used in one of the numerous robberies does not lend any credence to the argument that the police reasonably suspected that they had found" the culprits. The court did not decide the legality of the investigatory stop because the parties did not raise the issue. It did note, however, that "it is extremely questionable whether the tenuous general physical similarities between [the two men] and the supermarket robbers give rise to even the reasonable suspicion necessary to make a *Terry stop*." (*Ibid.*)

Orta's observations here, like those of the officer in *Washington*, did not correspond with the police-issued bulletin regarding the serial prostitute killer. Instead, only general similarities of his van's physical characteristics linked him to the bulletin. Orta was unable to see inside the vehicle at all, let alone observe its driver. (4 RT 537.) At no time prior to stopping the vehicle did he confirm that the driver fit the description of the suspect in the bulletin, a white male, as required by *Hensley* and *Rodriguez*. For all he knew, the van could have been driven by an African-American female. Thus, he could not even verify if a "general similarity" existed between the driver of the vehicle and the bulletin. Furthermore, the bulletin specifically described a blue over gray Chevy Astro van. The van appellant was driving was an ascot silver Mitsubishi. Thus, the only similarity between the bulletin and Orta's observations was that the vehicle was a van.

Orta did not articulate an objective, particularized, or reasonable basis for suspecting that appellant and his vehicle matched the police bulletin, as required under the Fourth Amendment. No direct corroborative evidence links appellant and his vehicle to the bulletin. Unlike *Hensley*, Orta did not confirm that the driver of the vehicle fit the description of the driver listed in the police bulletin. Unlike *Rodriguez*, Orta did not verify that the vehicle he observed corresponded to the vehicle described in the

bulletin. Rather, the circumstances are similar to the facts in *Washington*, in which the court stated that the officer likely lacked reasonable suspicion to stop the defendants. Tenuous, unverified, and general similarities between an officer's observations and a bulletin or report, as is the case here, are insufficient to satisfy the reasonable suspicion threshold. Reasonable suspicion must be based on a particularized and objective basis, not founded on a hunch or gut feeling.

Orta also lacked a reasonable basis for the stop because the factors he relied on describe too many individuals to create an objective and particularized reasonable suspicion. The meager facts he articulated to justify curtailing appellant's liberty describe a very large group of presumably innocent persons who live near the University Avenue area or visit the area's businesses. An unknown driver in a van only slightly resembling that in a police bulletin "could certainly fit hundreds or thousands of law abiding daily users of the highways of Southern California." (*United States v. Rodriquez* (9th Cir. 1992) 976 F.2d 591, 596.) Orta's observations are "too mundane" to meet the need for highly particularized information when upholding a reasonable suspicion analysis. (*United States v. Turner, supra*, 815 F.Supp. at p.1336.) The law does not allow officers to "sweep many ordinary citizens into a generality of suspicious appearance" based only on an unsubstantiated hunch. (*United States v. Rodriquez, supra*, 976 F.2d at p. 596.) Even where it proves true, a stop based on a hunch is no less violative of the Constitution. If general descriptions relied on by officers "can be stretched to cover" appellant, then a significant percentage of citizens "might well find themselves subjected to similar treatment." (*Washington v. Lambert, supra*, 98 F.3d at pp. 1190-1191.) "It would be a sad day for the United States if [individuals] who

somewhat resemble a very general description of [suspects] in the same general area of a major metropolis can for that reason alone be subjected" to an investigatory stop. (*Id.* at p. 1193, emphasis in original.)

3. Totality of the Circumstances

"While each of the individual pieces of information [Orta] relied upon were somehow flawed or inadequate, this is not the end of the reasonable suspicion analysis." (*People v. Pitts, supra*, 117 Cal.App.4th at p. 889.) When reviewing an investigatory stop, a court must also take into account the "the totality of the circumstances – the whole picture." (*Id.* at p. 885, citing *United States v. Cortez, supra*, 449 U.S. 411, 417-418.) One factor alone may be insufficient to justify a stop, but taken together with other factors may suffice. However, "based upon that whole picture, the detaining officer [. . .] must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." (*Ibid.*)

Alone, the factors Orta relied upon to make the stop are so "internally flawed or irrelevant or unrelated . . . that they are unreliable or inadequate to the reasonable suspicion determination." (*Ibid.*) Even when taken collectively, the circumstances known to Orta at the time of the investigatory stop are equally lacking in specific and articulable facts indicating appellant was engaged in criminal activity. A woman dressed in "street-person" clothes, walking in front of a vehicle, and a vehicle's slight resemblance to that in a police bulletin cannot be characterized as identifying any specific unlawful activity. Moreover, once Orta's observation of a woman dressed in street-person type clothes walking in front of a van is eliminated, "the rest of [Officer Orta's] reasonable suspicion topples like a house of cards." (*United States v. Jiminez-Medina, supra*, 173 F.3d at p. 756.) As detailed in *Davis*, *Pitts*, and *Turner*, courts

require a high degree of particularity in order to uphold an investigatory stop based on the totality of the circumstances. Orta's observations do not meet that threshold of specificity. Rather than relying on specific and particularized facts, Orta reacted to a hunch that the driver of the van was connected to the prostitute murders. A hunch, no matter how fortuitous, cannot serve as "a substitute for the necessary specific, articulable facts required to justify a Fourth Amendment intrusion." (*People v. Pitts*, *supra*, 117 Cal.App.4th at p. 889.)

For all of the foregoing reasons, based on the totality of the circumstances the general behavior of a woman characterized as prostitute activity and incompatibility between the bulletin and Orta's observations did not amount to a "particularized and objective basis" for suspecting the van's driver was engaged in criminal activity. Nor did Orta have a reasonable belief that appellant had committed a traffic violation. Therefore, the investigatory stop violated of the Fourth Amendment.

E. All Fruits of the Illegal Stop must Be Suppressed

The trial judge erred in concluding that Officer Orta had a reasonable suspicion justifying the investigatory stop. All "fruit of the poisonous tree" of the illegal stop and search should have been suppressed. (*Wong Sun v. United States* (1963) 371 U.S. 471, 488.) As demonstrated by Exhibit No. 919, a graphic representation of the evidence in the case (8 CT 2147-2148, 2170-2172; 37 RT 7861-7866, 39 RT 8354-8355), the fruit of the search includes nearly all the circumstantial evidence in the case. Orta's unlawful detention of appellant led to the discovery of appellant himself. Appellant's DNA was allegedly found in or around most of the victims. Hair similar to his head and pubic hair was found on some of the victims. He was wearing shoes that could have left impressions at the Casares crime scene, and he

admitted that he had been at the scene. The discovery of appellant's identity led to family members and acquaintances who provided damaging evidence about appellant's physical appearance and about statements he had made, and they gave authorities some of the victims' possessions which appellant had given them. It also led to the discovery of appellant's job at the county supply warehouse where other of the victims' possessions were found. Finally, it led to appellant's identification by Jetmore and Whitecloud. Orta's unlawful detention also led to discovery of appellant's van. In the van was a knife, a sleeping bag, a green blanket, a gold pillow, rope, and a citation which had been issued to Hammond. Tires on the van matched impressions at the crime scenes. Fibers similar to the van's interior and from the sleeping bag, green blanket, and gold pillow were discovered on the victims. Casares's blood was allegedly found on the knife. Information obtained as a result of the unlawful detention formed the basis for warrants to search appellant's apartment. The searches led to the discovery of shoes that could have left impressions at several of the crime scenes; light bulbs that connected appellant to the Leal crime scene; cat hair that was similar to hair found on some of the victims; and a road map on which locations corresponding to the areas where Hammond's and Zamora's bodies were discovered had been marked.

All this evidence should have been suppressed as fruit of the poisonous tree. Without it, it is unlikely that the case would have been pursued. Respondent cannot show that the introduction of this illegally obtained evidence was harmless beyond a reasonable doubt. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 972.) Accordingly, appellant's conviction and death sentence must be reversed.

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IV.

DISCOVERY VIOLATIONS DEPRIVED APPELLANT OF HIS RIGHTS TO A FAIR TRIAL AND AN INTELLIGENT DEFENSE IN LIGHT OF ALL RELEVANT AND REASONABLY ACCESSIBLE INFORMATION

A. Factual Summary

One of the prosecutor's primary theories of guilt in this case was that appellant was guilty of the charged murders because they were serial in nature. (See, e.g., 35 RT 7198-7199: "It is the people's theory of the case that this is a serial murder case. ¶ There is a great crossover in the circumstantial evidence in the majority of, if not all, of these cases. And that's going to be the People's argument, certainly, at the conclusion of the guilt phase.") Under this theory, evidence of murders which fit within the alleged serial pattern but that appellant could not have committed could raise a reasonable doubt of his guilt. Appellant therefore sought discovery of seven similar prostitute murders. The trial judge refused to order the prosecutor to provide any of this discovery, even in redacted form. Appellant also sought information about any profile that had been prepared and/or used by law enforcement agencies in connection with the serial killer investigation in the case. The prosecutor consistently denied that any profile had been prepared or used. Then, late in the guilt trial, he unsuccessfully sought to introduce such evidence. He never gave any profile discovery to appellant.

1. Evidence of Other Prostitute Murders

The homicide task force originally believed that appellant was responsible for the deaths of 19 prostitutes. (3 RT 432.) He was charged

with 14 of the murders.[32] (7 CT 1855-1870, 1873.) Five murders remained unsolved and uncharged: Micelle Yvette Gutierrez, who was killed on or about October 30, 1986; Linda Ann Ortega, who was killed on or about April 29, 1988; Martha Bess Young, who was killed on or about May 2, 1988; Linda Mae Ruiz, who was killed on or about January 17, 1989; and Judy "Julie" Lynn Angel, who was killed on or about November 11, 1989. After appellant's arrest and incarceration another known prostitute, Cheryl Clark, was killed. She died of strangulation and stabbing and her body had been dumped in a trash receptacle. A suspect was in custody and was facing charges for her homicide. Appellant believed all these crimes were similar to the serial crimes with which he was charged by reason of the nature of the victims (prostitutes and drug users), the possible locations where their bodies had been found, and other factors known only to law enforcement. (3 CT 662.) Accordingly, he requested discovery of investigation reports of similar crimes occurring after his arrest (*ibid.*); of information regarding any and all alternate suspects (3 CT 663); and of information regarding interaction between the task force and other counties. (3 CT 663-664.)

The prosecutor argued that information concerning the task force's investigation of the five uncharged deaths was privileged under Evidence Code section 1040, subdivision (b)(2), because the investigations were still open.[33] In addition, Penal Code section 1054.7 specifically excepts the

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[32] One of the charged murders was subsequently dismissed due to insufficient evidence. (3 CT 751-752; 3 RT 325-386.)

[33] Evidence Code section 1040, subdivision (b)(2), provides: "A public entity has a privilege to refuse to disclose official information, and to (continued...)

information from disclosure:

> The disclosures required under this chapter shall be made . . . unless good cause is shown why a disclosure should be denied, restricted, or deferred. . . . "Good cause" is limited to . . . possible compromise of other investigations by law enforcement. [¶] Upon the request of any party, the court may permit a showing of good cause for the denial or regulation of disclosures, or any portion of that showing, to be made in camera. A verbatim record shall be made of any such proceeding. If the court enters an order granting relief following a showing in camera, the entire record of the showing shall be sealed and preserved in the records of the court, and shall be made available to an appellate court in the event of an appeal or writ. . . .

The prosecutor asserted that the privacy rights of the victims' families were particularly compelling. Defense counsel would have to ask them intimate and embarrassing questions about the victims' life-styles and this would force them to relive the trauma of the loss of their family members. Finally, he argued that the evidence was not relevant because the defense had not linked an alternate suspect to some evidence regarding the victims in this case. "The defense must simply rely on the prosecution to follow its legal and ethical duty to provide any exculpatory information. Justice would simply not be served to permit the defense to obtain all the statements gathered through We-tip and other sources to go on a purely speculative 'fishing expedition' to find a fabled alternate suspect." (3 CT 770-773.)

Defense counsel explained at the discovery hearing that the evidence

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[33] (...continued)
prevent another from disclosing official information, if the privilege is claimed by a person authorized by the public entity to do so and: (b) Disclosure of the information is against the public interest because there is a necessity for preserving the confidentiality of the information that outweighs the necessity for disclosure in the interest of justice. . ."

could help establish his defense. If the crimes were similar to those that fit within the prosecutor's serial murder theory, and if appellant could be excluded as a suspect in any of those crimes, then he could not possibly be responsible for the serial murders with which he was charged:

> What we're saying here is that in a case like this where you have both the public perception and law enforcement target investigation of a serial killer that targets these sorts of people, that these types of reports and the specific situations of these killings could be relevant in the defense, to say that these - some - these killings are so similar, and yet there is clearly an exclusion, perhaps, of Mr. Suff from them. ¶ So it is in the nature of a - potentially relevant to be introduced, although I'm not asking the court to make some ruling here. All I'm trying to do is to indicate to the court that there is a potential relevancy of it being used if they are extremely similar in some ways to some of the homicides in our indictment.

(3 RT 433-434.) The judge responded, "I don't think that another investigation could be germane to any particular prosecution. As far as getting into those other uncharged crimes that are still being investigated by any agency, I think you have to be more - show a much greater need, more specificity than a question simply because they were prostitutes killed during the same time frame." (3 RT 435.) Counsel replied:

> We don't know anything about these five . . . other than what we say [sic] in the newspaper . . . we don't even have an autopsy that will say how the body died or some such thing. We know they were prostitutes. They came along the same period of time. The timing would be important because there are . . . certain injuries to Mr. Suff, certain period he was debilitated. . . . [S]imilarities between, say, a charged offense that's weak and a noncharged offense in which Mr. Suff has been ruled out of perhaps could be used to say, as relevancy to his not being guilty of a charged offense. But that's the essence of what we're saying. We're in the dark about it. We

> can't make a crystal-ball judgment of how its relevancy would be argued until we have some analysis of the type of investigation that occurred.

(3 RT 436.) Co-counsel added,

> "[T]here are . . . other people who were potential suspects in some of the 14 that either matched descriptions or in a area at a particular time of a murder. If those people in one or two of Mr. Suff's - once [sic] he is charged in happen to be in these other five, I mean that's a potential defense for us. Defense may end up being something like that, that he didn't do all these -

(3 RT 436-437.)

The judge opined that appellant's only recourse was to rely on the prosecutor's good faith in discharging his obligation to provide exculpatory evidence. (3 RT 437.) Counsel, an ex-prosecutor, voiced his concerns about prosecutorial tunnel vision, specifically that prosecutors' perspectives and mind-sets are often improperly skewed by being "on one side of the fence for a long period of time." (3 RT 438.) "[I]t's difficult to be neutral when you're an advocate." (3 RT 439.) He asked that the judge review the requested discovery and, "decide if it's appropriate to be turned over. We in the defense, especially in a capital case like this, need to have a neutral situation as much as possible to say, 'If there's even a close call, then the Court makes the determination.'" (*Ibid.*) The judge refused to review the materials. "[T]hat solution is not a solution, that alternative you're offering the Court, because I have no idea of what has gone before, would I? . . . Not until I have heard the evidence. And that would be too late one way or the other." (*Ibid.*) The judge ordered the prosecutor to provide all exculpatory information as to the charged crimes and urged him to personally review the files in question. (3 RT 439-441.)

On August 4, 1994, appellant again sought discovery concerning Clark's death, and of the death of Stephanie Janine Shepard. Clark's body had been found in Riverside on March 17, 1992, and Shepard's body was discovered in Lake Elsinore on May 3, 1994. He alleged that there were great similarities between the details of these homicides and the charged murders. (4 CT 1043-1049.) The prosecutor responded that a man named Mark Spencer had been convicted of the Clark homicide on June 15, 1994, the Shepard homicide was an ongoing criminal investigation, Penal Code section 1054 required only that exculpatory material be turned over, and appellant was required to rely on his good faith. (4 CT 1060-1070.) The judge denied the requested discovery on the grounds that the Shepard murder was an ongoing investigation and was not discoverable under Penal Code section 1054. The Clark murder had been litigated in open court and someone had been convicted. He asked the prosecutor to review the status of both cases and suggested that defense counsel should make a more specific request: "With conversations with people you could learn a lot of information." (4 CT 1085; 5 RT 1030-1037.)

2. Evidence Concerning a Serial Killer Profile

From the outset of the case, appellant sought discovery of "all information relating to a profile or profiles of the killer or killers which was developed by law enforcement in relation to the charged deaths and/or the alleged prostitute victims of a serial killer or killers." (See, e.g., 3 CT 660.) He was consistently told that neither the FBI nor the California Department of Justice had prepared a profile, and that none existed. (See 4 CT 941; 5 RT 798-799, 905, 925-928.) He first requested the information on October 16, 1992, before the public defender's removal from the case. (2 CT 224-256.) The request was renewed on May 24, 1993. (3 CT 660.) At the

initial discovery hearing (3 CT 747-748), the prosecutor claimed he was not sure what appellant was seeking. (3 RT 423.) Counsel explained that he wanted information concerning any psychologists/psychiatrists employed by law enforcement "to help them analyze or just to come to some general agreement in their professional view of what person might be the suspect in this general category." (3 RT 424.) The judge said he did not see the relevance of the information, "because it could be way off base either way . . . .relating to Mr. Suff or not. If . . . . something developed wasn't used, I mean, this is sheer speculation. This could be in the form of hocus-pocus." (*Ibid.*) Counsel replied, "They could be absolutely right about some of them, that's just it. It might lead to some introduceable evidence." (3 RT 425.)

The prosecutor refused to say whether or not a profile had been prepared, arguing that, if one existed, it was not relevant because, "these types of things are utilized as an investigation tool or aid to assist law enforcement as to what they might want to be looking for or focus in on a potential suspect." (*Ibid.*) The court denied the request, without prejudice. "I don't see how you have focused or demonstrated any possible relevancy, and I'm trying to look at it through your eyes." (*Ibid.*; 3 CT 748.)

Appellant filed a more particularized request on March 23, 1994. (4 CT 904-915.) In it, he sought:

> F.B.I. file # 95-HQ-1040216 which may include documents, statements, interviews, profiles, notes, etc. Contents are unknown to defense.

(4 CT 906.); and,

> Notes and reports regarding meeting between Det. Keers and Mike Prodan (D.O.J. Sacramento) and Detective Creed. Date mentioned for meeting in 3/91. Request was for a "profile" of

Riverside homicide cases.

(4 CT 909-910.) At the hearing of this motion (4 CT 918-919), the prosecutor said he had shown defense counsel the FBI file, a DNA report on Eleanor Casares which had been given to the defense in June 1993. (5 RT 798.) Defense counsel explained:

> [W]e were unaware if the FBI had set up a file during the course of the investigation of this matter. And my understanding is, in talking to the prosecution, that that was not done and that the file number was created only at the end on Casares only. We were not sure if there was an – FBI lab had that, profiles, et cetera. Now we have been told that did not occur; that if there was a profile created, it was done by the Department of Justice. So we're satisfied with that.

(5 RT 798-799.) With respect to the profile meeting, the prosecutor said he had spoken with Detective Keers that morning and there were no notes or reports concerning the meeting. (5 RT 828.)

Appellant filed yet another request on May 27, 1994. (4 CT 939-1005.) In it defense counsel addressed the status of his previous requests:

> Prosecution has indicated that no reports exist for "Profiles" of potential serial killer created during ongoing investigation.

(4 CT 941); and,

> Prosecution indicates that there are no notes or reports generated from this meeting. Mike Prodan is the D.O.J. person trained by the F.B.I. to provide "Profiles" on Serial Killers. The defense request any report or memo, generated by D.O.J., which attempts to "profile" person or persons who might be responsible for Serial Killings under this investigation.

(4 CT 943.) He explained in court that, "[m]y understanding is that there was – from the prosecution there was no profile set up by the FBI; that there may be an individual later on . . . from the Department of Justice who was

trained by the FBI that may have done some work in that area." (5 RT 905.) A discussion of the "profile meeting" ensued:

> Mr. Driggs: [T]he last time, Mr. Zellerbach indicated that this meeting that they did not take notes may have been a session in which they were just discussing possibilities and such and would not normally create notes or reports. I think it's Mr. Prodan . . . was the person we . . . believe had training through the FBI on serial killers to try and come up with a profile. And that if such profiles were generated by him, that they be provided.
>
> The Court: Mr. Zellerbach.
>
> Mr. Zellerbach: Your honor, we have already litigated this issue. Defense already previously made this request and the Court's denied it.
>
> The Court: I have down here that there are none. That's my notes.
>
> Mr. Zellerbach: None were prepared by the FBI. That was the previous request the defense had made in their supplemental request for discovery as well as previously indicated.
>
> The Court: Sounds as if I denied it, then there's none in existence, so there's no order to be made.

(5 RT 925-927.)

The judge went on to indicate that he would deny the request "if all the information contained in the profile came from other reports you already have in existence. . . . If there has been some independent investigation, thereby bringing in new, other evidence, that could very well be discoverable. But seems to me if they take this accumulation of all the reports you have and thereby put together some configuration or some probability chart, I don't think that's discoverable." (5 RT 927.) Defense

counsel responded:

> [W]hat I'm referring to when I talk about a profile is the psychological or character description. . . . I think they'd say it's informed analysis. They may reflect upon shyness, you know, any number of personality characteristics for certain types. . . . And they use that analysis generally maybe to help target investigation. . . . And it's used as an investigative tool. . . . And the FBI did not do one. And our analysis or belief from the reports is that Mr. Prodan, who is with the Department of Justice, may have been trained to do it, and there was a meeting. I don't know if some . . . description was done to help law enforcement. But . . . if it is done, then we're requesting a copy of it. [¶] That's the best I can say. . . . [N]ot everything we request has to be evidentiary, to turn in to be admitted to the Court as evidence in the trial. . . . [T]his could be valuable to the defense in analyzing the other evidence of potential suspects and violence against these particular victims.

(5 RT 927-928.) The prosecutor replied:

> [A]ny profile that would be prepared would be based upon all the information in the investigative reports regarding the nature of the crimes, the nature of the victim, things of – that are factual in nature. . . . [T]he individual responsible for creating this profile then puts together a psychological, or whatever, package to assist law enforcement in trying to define or better determine who a suspect might be. I mean, that's what profiling is all about. . . . [T]hat's done based on the reports that they have, first of all; and second of all, if a profile was created, it was created long before Mr. Suff was ever arrested or identified as the suspect in these homicides.

(5 RT 928-929.) The judge ruled:

> I can't envision how that would be helpful to the defense. [¶] It's not admissible. . . . [Y]ou couldn't use that if it was a negative; that is describe your client differently. You couldn't admit that. Call them and say, "That's what you developed from this." I don't see how that would be admissible in court. And you have the opportunity to, through the discovery and

any other, to develop a psychological work-up of your client independent of theirs for any purpose you wish.

(5 RT 929.)

Counsel reminded the court that there might also be a penalty phase. The judge replied, "I'm assuming the latter. I don't know how that would be admissible then either, in any penalty phase." (*Ibid.*) Counsel made one last plea: "If this is in existence, it was generated through the course of the investigation. [¶] I assume they sat down and said: Tell us the type of person who does this. Who would you be looking for? Who is our potential type of suspect? Is it the guy next door? Is it this or that? It may have been a brainstorming session. I don't know. What we're saying is, if they did generate a physical report and gave it to law enforcement, that - and went into the investigative file, we be allowed access to it." (5 RT 930-931.) The judge ruled, "I'm going to deny the request based on my discussion with you Mr. Driggs. . . . I think everything is available to you to develop for either phase through your own expert." (5 RT 931.)

On May 23, 1995, the 34th day of trial, despite his representations that a profile of the potential serial killer had not been created during the ongoing investigation, the prosecutor moved to introduce expert testimony from John Douglas, a member of the FBI's National Center for Analysis of Violent Crime (NCAVC). (8 CT 2088-2121.) He explained that NCAVC and its agents help federal, state, and local agencies investigate and prosecute serial murder cases by developing a profile of the perpetrator based on evidence that has been gathered and by suggesting various techniques to apprehend the suspect. It maintains a computer database analysis unit called the Violent Criminal Apprehension Program (VICAP). The program had been employed before appellant's arrest. (8 CT 2090-

2091.) Mr. Douglas' testimony would show that each of the charged murders was committed by the same person. "Posing, genital and breast mutilation, evidence of binding and ligature strangulation are all factors, among others, that [Douglas] will rely upon to form an opinion that each of the killing were committed by the same individual." (8 CT 2098.) "After having examined information concerning the facts gathered in each homicide investigation in this case, [Douglas] will illuminate the unusual characteristics of the homicides based on his knowledge and experience gathered in other serial murder investigations and speaking with actual known serial murderers." (8 CT 2093.)

According to the prosecutor, Douglas would testify primarily about what he called serial murder linkage, characteristics showing the crimes were the work of a single individual:

> A few of the more interesting points made concerning the perpetrator in this case will be that the killings are "organized activity" outside of a "comfort zone." . . . The evidence of particular victim selection - primarily white female prostitutes - paired with the evidence of binding and asphyxiation exemplifies the individual who has engaged in long-term planning. . . . The measure of the confidence of the organized killer is the extent to which the killer is willing to operate outside a "comfort zone." Even the organized, calculating killer, the expert will testify, typically prefers to commit the killings in the home or business because it is possible to control egress by the victim or ingress by potential witnesses. . . . It is the confident organized killer that is willing to operate outside such fixed locations both with regard to the killings themselves and the disposal of the bodies.
>
> With regard to the activities performed by the perpetrator on the victim, the expert will testify that binding is evidence of prolonged contact with the victim. The killing is not committed immediately and the victim must first be rendered

> helpless. The expert will also discuss "unusual inputs" into the killings, activities that go beyond that necessary to render the victim lifeless. Genital and breast mutilation and post mortem stabbing are evidence of such activities and demonstrate a linkage among the killings. The expert witness will also illuminate the unusual pattern of body disposal in many of the murders. . . . The posing of the bodies and re-dressing in some instances is evidence of unusual inputs going beyond the act of killing.
>
> These are only a few examples of the type of information the expert will provide.

(8 CT 2091-2092.) At the hearing of the motion, the prosecutor added:

> [T]he People need to prove premeditation and deliberation to achieve a first-degree murder conviction. And, again, a serial killer expert is going to speak to that issue as well, as far as the preparation, the planning, the common theme. In this case, obviously, the person that committed these crimes was preying upon a select group of individuals.

(35 RT 7199.) The motion was denied on May 26, 1995. (8 CT 2128; 35 RT 7197-7206.) The prosecutor renewed the motion during the penalty phase and sought to introduce the testimony of Mr. Prodan, the California Department of Justice's serial profiler. The judge denied it once again. (10 CT 2636, 2670; 45 RT 9846, 10007-10016.) At the hearing on this last request, defense counsel pointed out:

> [W]hen you look at the due process argument, I think - I just want the Court to realize, I've never been given a report from this serial killer expert. Even though, obviously, they've had him - he's been involved in this case for a couple years. I remember when I said Mr. Park was going to be testifying and I hadn't given a report to Mr. Zellerbach and he was complaining. The Court said, "oh, you've got to give him a report," and I did. Even though he usually doesn't make a report, he did do a report instead of vitae. ¶ Here I have no idea what this person is going to say. I have no report.

(45 RT 10010.)

B. Relevant Legal Principles

This Court has "repeatedly stated that 'a criminal defendant's right to discovery is based on the "fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.' (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84, 260 Cal.Rptr. 520, 776 P.2d 222, italics added, quoting *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535, 113 Cal.Rptr. 897, 522 P.2d 305; accord, *People v. Luttenberger* (1990) 50 Cal.3d 1, 17, 265 Cal.Rptr. 690, 784 P.2d 633.)" (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960-962.) A criminal defendant may compel discovery by "demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial." *(Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 536.) "But the trial court has discretion 'to protect against the disclosure of information which might unduly hamper the prosecution or violate some other legitimate governmental interest,' or when there is an 'absence of a showing which specifies the material sought and furnishes a "plausible justification" for inspection. . . .' [Citation.] Although policy may favor granting liberal discovery to criminal defendants, courts may nevertheless refuse to grant discovery if the burdens placed on government and on third parties substantially outweigh the demonstrated need for discovery. [Citations.]" (*People v. Kaurish* (1990) 52 Cal.3d 648, 686.)

These principles were codified in 1990 by the passage of Proposition 115, the Crime Victims Justice Reform Act, which enacted Penal Code section 1054 et seq. (*People v. Jackson* (2003) 110 Cal.App.4th 280, 285-286.) Under these criminal discovery statutes, exculpatory evidence shall

be disclosed to the defendant if it is "in the possession of the prosecutor or if the prosecutor knows it to be in the possession of the investigating agencies." (Pen. Code, § 1054.1, subd. (e).) Disclosure may be denied if good cause is shown. "Good cause" includes "possible compromise of other investigations by law enforcement." (Pen. Code, § 1054.7.) This governmental privilege weighs heavily against a criminal defendant's right to potentially exculpatory material. (*People v. Jackson, supra*, 110 Cal.App.4th at p. 287.) Determining whether there is good cause requires the same balancing of interests as required by Evidence Code section 1040. (*People v. Jackson, supra*, 110 Cal.App.4th at p. 291.) Upon the request of any party, the court may permit a showing of good cause to be made in camera. (Pen. Code, § 1054.7.)

C. The Trial Judge Abused His Discretion by Refusing to Examine the Requested Discovery in Camera

As noted above, the prosecutor claimed that the homicide investigations in question, some of which were almost seven years old, were privileged under Evidence Code section 1040 and that the government's interest in effective law enforcement required that appellant not be given access of any kind to the information in police files of the investigations. (3 CT 770-773.)

By its terms, Evidence Code section 1040 applies to official information which is acquired "in confidence by a public employee in the course of his or her duty and not open, or officially disclosed, to the public." The conditional privilege survived the passage of Proposition 115. (See *People v. Hammon* (1997) 15 Cal.4th 1117, 1124-1128 ["we decline to extend the defendant's Sixth Amendment rights of confrontation and

cross-examination to authorize pretrial disclosure of privileged information"].) Ongoing police investigations fall under this privilege. (*People v. Jackson, supra*, 110 Cal.App.4th at p. 287; *County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 764.)

When a claim of privilege for official information is made, the burden is on the governmental agency to demonstrate the privilege and the court should hold an in camera hearing. (*People v. Superior Court* (2000) 80 Cal.App.4th 1305, 1316-1317; see *In re Muszalski* (1975) 52 Cal.App.3d 475, 483.) "The judge must determine in each instance the consequences to the public of disclosure and the consequences to the litigant of nondisclosure and then decide which outweighs the other. He should, of course, be aware that the public has an interest in seeing that justice is done in the particular cause as well as an interest in the secrecy of the information." (Assem. Com. on Judiciary, reprinted at 29B pt. 3 West's Ann. Evid.Code (1995 ed.) foll. § 1040, p. 375.) The passage of Proposition 115 did not alter the trial court's duty to weigh the government's claim of privilege against the defendant's constitutional right to present a defense. (*People v. Jackson, supra*, 110 Cal.App.4th at pp. 290-291.)

Evidence Code section 915, subdivision (b) sets forth the in camera procedure to be followed by a court when ruling on a claim of privilege for official information:

> When a court is ruling on a claim of privilege under Article 9 (commencing with Section 1040) of Chapter 4 (official information and identity of informer) . . . and is unable to do so without requiring disclosure of the information claimed to be privileged, the court may require the person from whom disclosure is sought or the person authorized to claim the privilege, or both, to disclose the information in chambers out

> of the presence and hearing of all persons except the person authorized to claim the privilege and any other persons as the person authorized to claim the privilege is willing to have present. . . .

The court of appeal explained the process in somewhat greater detail in *Torres v. Superior Court* (2000) 80 Cal.App.4th 867:

> The official information privilege, once asserted, should not be sustained unless the court is presented with a showing that the information sought to be protected is covered by the privilege. There are, no doubt, circumstances where this is self-evident, or nearly so. (See, e.g., *People v. Walker* (1991) 230 Cal.App.3d 230, 282 Cal.Rptr. 12 [point of surveillance].) But if it is not, the party claiming the privilege must either show in open court why the matter is privileged, or declare that doing so would compromise the privilege. If it appears to the trial court, based on this representation, that the claim cannot be determined in open court without "disclosure of the information claimed to be privileged," the court may call for that disclosure in camera, pursuant to section 915, subdivision (b).
>
> If the court sets an ex parte in camera hearing following a proper assertion of privilege by the People, and a finding of need by the court, petitioner should be given an opportunity to propose questions to be asked at the in camera hearing. (*People v. Montgomery* (1988) 205 Cal.App.3d 1011, 1021, 252 Cal.Rptr. 779.) In order to protect petitioner's right to appellate review, "[t]he trial court can and should exercise its inherent power to order that the proceedings be recorded and transcribed and that the transcript be sealed." (*Ibid.*, fn. 4.)
>
> The in camera proceeding is to be only a preliminary inquiry into the question of disclosure. As the court explained in *People v. Superior Court* (1971) 19 Cal.App.3d 522, 97 Cal.Rptr. 118, the in camera hearing provided by section 915, subdivision (b) "offers the judge a guarded look into the government's secrets as a prelude to a more extended inquiry. Although it may furnish a fairly accurate measure of the

> government's claim, it supplies no more than a tentative, strictly provisional notion of the defendant's need. It does not place the court in readiness to rule on the claim of privilege. The court should continue its inquiry in an adversary setting, probing the information's relevance to the defense, exploring with counsel the availability of other alternatives and, if necessary, hearing testimony voir dire. Only at the conclusion of an adversary inquiry is the court in a position to assess the counter-balancing weight of the defendant's need, to appraise the possibility of reasonable alternatives and to determine what cost shall be exacted of the prosecution. Only at the conclusion of an adversary inquiry is the court qualified to rule for or against the government's claim of privilege. (*Id.* at p. 531, 97 Cal.Rptr. 118; see also § 1042, subd. (d).)

(*Id.* at pp. 873-874.)

In this case, appellant's need for the requested discovery was critical. It was the only way he could refute the prosecutor's theory that he was a serial killer. On the other hand, the government's interest in keeping the information in question confidential did not appear to be great. The investigations were old, and appellant had been the primary if not the only suspect. The amount of time that passes after an investigation begins and whether a suspect has been identified are factors that may be considered when weighing a defendant's right to otherwise privileged information under Evidence Code section 1040. As time passes and an investigation lapses or is abandoned, the need for confidentiality in police files wanes. (*County of Orange v. Superior Court, supra*, 79 Cal.App.4th at pp.764-765.) However, this decline never renders the investigative files automatically discoverable. (*People v. Jackson, supra*, 110 Cal.App.4th at p. 290.) A balancing of interests must still occur. (*County of Orange v. Superior Court, supra*, 79 Cal.App.4th at pp. 768-769.)

The judge here could not possibly have known or considered either

the need for confidentiality in the police files in question or appellant's need for the information, because he declined the opportunity to obtain that information. (3 RT 439-441.) Instead, he determined that the material was in fact privileged based solely on the prosecutor's claim that the cases were dissimilar. Surely some information could have been provided, even if only in a redacted form, that would have satisfied both the government's need for confidentiality in these aged investigations and appellant's need for evidence to establish his defense. The judge's concern that he could not effectively review the materials was misplaced. The judge believed he would,

> have to read every single report . . . in those homicides. And then I'd have to read all the reports in your case. . . .I'd have to read everything, because maybe that is the sole thing . . . shoe print in one place, shoe print in the other place. . . . I have to read through all the reports to come to that understanding. Then I'm going to have to see those photographs. ¶ You understand my problem? Let's say there's a hair fiber. Fine. What am I going to do? Send that out for analysis? Comes up there was a prostitute was killed; body was found in an open area. But there is some hair and fiber found. We know that there's some hair and fiber here because of the process we've gone through in DNA and getting those things up to the Department of Justice. . . . Am I supposed to, now that I know there is, have that order made that those be analyzed to compare?

(19 RT 3638-3639; see 3 RT 439.) But the process of reviewing the material would not have been nearly as onerous as the judge believed. As counsel pointed out, "I don't think it has to be that much evidence. Just have to have some that would point towards him." (19 RT 3628-3639.) Furthermore, counsel could have guided the judge's inquiry by proposing specific questions to be asked and/or answered at the in camera hearing.

(*Torres v. Superior Court, supra*, 80 Cal.App.4th at p. 874.)

Even if the judge was right, though, and such a review would have been time-consuming, it was nonetheless his duty to review the materials and balance the government's need for confidentiality against appellant's need for the information to establish his defense. In order to exercise discretion properly, a trial court must know and consider all material facts and all legal principles essential to an informed, intelligent, and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1849 ["the nature of discretion requires that the court's decision be an informed one"].) The judge's refusal to perform his duty and consider all the material facts and all legal principles essential to an informed, intelligent, and just decision of appellant's discovery request was an abuse of discretion.

Before determining that the government had met its burden of demonstrating the privilege, the judge should have held an in camera hearing in compliance with the provisions of Evidence Code section 915. (*People v. Superior Court, supra*, 80 Cal.App.4th at pp. 1316-1317; *In re Muszalski, supra*, 52 Cal.App.3d at p. 483; *People v. Jackson, supra*, 110 Cal.App.4th at pp. 290-291.) As a prelude to a more extended inquiry, this preliminary inquiry would have given him a guarded look into the government's secrets. He then could have probed the information's relevance to the defense, explored with counsel the availability of other alternatives and, if necessary, heard testimony voir dire. Only at the conclusion of this inquiry could he have been in a rightful position to rule for or against the government's claim of privilege. (*Torres v. Superior Court, supra*, 80 Cal.App.4th at p. 874.) Instead, based solely on the prosecutor's judgment that there was nothing about the investigations which

would be of assistance to appellant in preparing and presenting a defense, the judge determined that the government had met its burden of demonstrating the privilege. Determining that this information was privileged without seeing any of it was a manifest abuse of discretion.

Respondent has previously conceded that, before denying discovery of police files relating to uncharged similar crimes, a trial court must conduct an in camera review of the documents. (*People v. Jackson, supra*, 110 Cal.App.4th at p. 284.) The doctrine of judicial estoppel precludes the government from now advocating another position simply because it has become beneficial to do so. (*People v. Watts* (1999) 76 Cal.App.4th 1250, 1261-1262.}

D. The Trial Judge Abused His Discretion by Refusing to Order the Requested Discovery

In *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, the defendant requested and was given discovery of 12 police reports pertaining to other crimes "which bore some similarities to the crimes with which the defendant was charged." (*Id.*, at p. 1136.) The court of appeal found no abuse of discretion because "[a] minimal demonstration of plausible justification was made" and "no serious question has been raised that the release of this information would have violated any protected governmental interests or any third party confidentiality or privacy rights." (*Id.* at p. 1135-1136.) A similar issue arose in *People v. Littleton* (1992) 7 Cal.App.4th 906, where the defendant's request for discovery of 12 police reports involving other similar burglary-rape cases had been denied by the trial court. (*Id.* at pp. 909-910.) The Littleton court distinguished City of Alhambra and found no abuse of discretion because, unlike City of Alhambra, no one had been arrested or charged with the other crimes and

the information in the reports would have been of no value to the defendant unless he was able to solve the other crimes and identify the perpetrator. The only connection between the charged and uncharged crimes was that the police had identified the defendant as a possible suspect in the other cases, but had not charged him because the victims in those cases could not identify him as the perpetrator. This connection and the possible benefit to the defendant were too tenuous and speculative to outweigh both the government's interest and the third parties' confidentiality and privacy interests. (*Id.* at pp. 910-911.)

Littleton was upheld in *People v. Jackson* (2003) 110 Cal.App.4th 280. "As the *Littleton* court found, it is not enough to claim that the defense 'might' have done a better job than the police in investigating the crime. The trial judge must be persuaded that, had the files been disclosed, it was reasonably probable that the defense investigation would have turned up admissible exculpatory evidence." (*Id.* at p. 289.)

> The mere fact that the crimes were similar and the victim failed to identify the defendant does not provide the "direct or circumstantial evidence linking the third person to the actual perpetration of the crime" required for admissibility under *People v. Hall* (1986) 41 Cal.3d 826, 226 Cal.Rptr. 112, 718 P.2d 99. In *People v. Edelbacher* (1989) 47 Cal.3d 983, 1017-1018, 254 Cal.Rptr. 586, 766 P.2d 1, evidence of the victim's association with bikers and drug dealers offered to prove that someone other than the defendant committed the crime was properly excluded because it did not identify a possible suspect other than defendant or link any third person to the commission of the crime, and did not even establish an actual motive but only a possible or potential motive for the murder by a third party. (*Ibid.*) Likewise, in *People v. Bradford* (1997) 15 Cal.4th 1229, 65 Cal.Rptr.2d 145, 939 P.2d 259 evidence of the victim's statements that she previously had been in fear of "a man" were insufficient to

> link someone other than defendant to the actual perpetration of the murder. (*Id.* at p. 1325, 65 Cal.Rptr.2d 145, 939 P.2d 259.) At a minimum, the evidence must tend to exclude the defendant as the perpetrator of the crime.

(*Ibid.*)

Applying these principles, the judge here found that appellant had not shown sufficient similarity between the charged and uncharged murders to warrant discovery. (See, e.g., 3 RT 435: "I don't think that another investigation could be germane to any particular prosecution. As far as getting into those other uncharged crimes that are still being investigated by any agency, I think you have to be more - show a much greater need, more specificity than a question simply because they were prostitutes killed during the same time frame.") But neither *Littleton* nor *Jackson, supra*, are applicable to this case. As noted, they apply in cases where the defendant seeks to establish his innocence through evidence that someone else committed the crime. Appellant, however, sought to have the jury draw an entirely different inference from the evidence, that the mere fact of murders which could not be excluded from the alleged serial pattern and which he could not have committed disproved the prosecutor's theory of guilt.

The prosecutor sought to prove his theory by showing what he called serial murder linkage, characteristics showing the crimes were the work of a single individual. "[T]he People need to prove premeditation and deliberation to achieve a first-degree murder conviction. And, again, a serial killer expert is going to speak to that issue as well, as far as the preparation, the planning, the common theme. In this case, obviously, the person that committed these crimes was preying upon a select group of individuals." (35 RT 7199; see also 8 CT 2091-2092.) Appellant could raise a reasonable doubt of his guilt under this theory by establishing that he

was not responsible for one of the investigated but uncharged murders which fit within the prosecutor's alleged pattern or that murders which fit within the serial pattern occurred after his arrest and incarceration. This evidence did not depend on an inference that someone else was responsible for the charged crimes. The mere fact that such murders occurred tends to create a reasonable doubt by showing that the prosecutor's theory of guilt could not possibly be true. Thus, neither *Littleton* and *Jackson* and their rules concerning third party culpability are applicable to this case. This evidence of appellant's innocence was clearly admissible to rebut one of the prosecutor's primary theories of guilt and thereby establish his innocence. He should have been given access to the information, even if in redacted form, so he could prepare and present an intelligent defense. The judge's refusal to order the discovery was an abuse of discretion which deprived appellant of a fair trial.

Even if *Littleton* and *Jackson* do apply to the case, denial of the requested discovery was nevertheless erroneous. As set forth above, while the prosecutor might have known how similar or dissimilar the charged and uncharged crimes were, the judge did not. In fact, he specifically rejected the suggestion that he become familiar with the facts before deciding the issue. (3 RT 439-441) Absent at least a passing knowledge of the facts, determining that the cases were dissimilar and that the government's privilege outweighed appellant's need was an abuse of discretion. Furthermore, in making this uninformed decision, the judge applied the wrong standard. The test, of course, is whether the requested information would facilitate the ascertainment of the facts and a fair trial. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 536.) The judge, however, required appellant to show the relevancy of the requested information. (See, e.g., 3

RT 435.) Counsel pointed out the absurdity of the proposition: "We can't make a crystal-ball judgment of how its relevancy would be argued until we have some analysis of the type of investigation that occurred." (3 RT 436.) The requested discovery might not have been admissible, but it could have facilitated the ascertainment of the facts and a fair trial by helping to establish alternate suspects and defense theories. Requiring appellant to show the relevancy of information he had not seen was an abuse of discretion. (See, e.g., *People v. Gonzalez, supra*, 38 Cal.4th at p. 960 [denial of discovery forced counsel to make an uniformed, unintelligent decision. "We will not require defense counsel to make an uninformed decision. . . ."].)

In addition, while the Shepard homicide remained unsolved, the Clark homicide had allegedly been solved and someone had been convicted of the murder. (4 CT 1060-1070.) The judge denied discovery of both cases under Littleton's rationale that the reports would have been of no value to appellant unless he was able to solve the crimes and identify the perpetrator. (*People v. Littleton, supra*, 7 Cal.App.4th at pp. 910-911; see 19 RT 3638-3639: [Y]ou're not entitled to it. It's an ongoing investigation.) Under *Littleton*, reports of the Clark murder would have been of value because the perpetrator had purportedly been identified. The possible benefit to appellant was neither tenuous nor speculative to outweigh both the government's interest and the third parties' confidentiality and privacy interests. The judge's denial of discovery of the Clark homicide under this rationale was an abuse of discretion.

The judge's refusal to order discovery of serial killer profile evidence was also an abuse of discretion. The judge applied the wrong standard once again and required appellant to show the relevancy of the

information without having seen it: "I don't see how that would be admissible in court." (5 RT 929; see also 3 RT 425; 3 CT 748.) He indicated that, if the information existed, he would deny the request "if all the information contained in the profile came from other reports you already have in existence. . . . If there has been some independent investigation, thereby bringing in new, other evidence, that could very well be discoverable. But seems to me if they take this accumulation of all the reports you have and thereby put together some configuration or some probability chart, I don't think that's discoverable." (5 RT 927.)

Appellant could not establish what was or was not reviewed in the process of developing a profile because he did not have the information. But any profile that was developed was undoubtedly based on the details of the 19 murders the homicide task force investigated. (3 RT 432.) Appellant was denied discovery of five of these homicides. The profile was therefore not based on an "accumulation of all the reports" appellant had, but rather on crucial information he did not have. This information could have provided the basis for questioning the profile, the task force's conclusions, and the prosecutor's serial killer theory of guilt. Appellant adequately established that the requested discovery might lead to some admissible evidence (3 RT 425) and assist in developing alternate suspects and defense theories. The requested information was not privileged and it would have facilitated the ascertainment of the facts and a fair trial. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 536.) Refusing to provide this discovery on the rationale that it was not admissible at trial and that appellant had all the information upon which the profile was based was an abuse of discretion which deprived him of the right to prepare for trial and present an intelligent defense. (*People v. Gonzalez, supra*, 38 Cal.4th

at pp. 960-962.)

E. The Prosecutor's Concealment of Evidence Deprived Appellant of Due Process of Law

Prosecutors have a special obligation to promote justice and the ascertainment of truth.

> The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present to the court the evidence material to the charge upon which the defendant stands trial, and it is the solemn duty of the trial judge to see that the facts material to the charge are fairly presented. [Citations.] In the light of the great resources at the command of the district attorney and our commitment that justice be done to the individual, restraints are placed on him to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth.
>
> The search for truth is not served but hindered by the concealment of relevant and material evidence. Although our system of administering criminal justice is adversary in nature, a trial is not a game. Its ultimate goal is the ascertainment of truth, and where furtherance of the adversary system comes in conflict with the ultimate goal, the adversary system must give way to reasonable restraints designed to further that goal. Put another way: "For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest that 'justice shall be done.' He is the 'servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.' [Citations.]" (*United States v. Agurs* (1976) 427 U.S. 97, 110-111, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342.)

(*In re Ferguson* (1971) 5 Cal.3d 525, 531.)

Despite repeated requests for information about profile evidence, the prosecutor concealed the fact that the FBI had compiled extensive profile

evidence before appellant's arrest until the 34th day of trial. Even then, he failed to provide the defense with any of the information. (See 45 RT 10010: "I have no idea what this person is going to say. I have no report.")

On this record, it is difficult to determine exactly what the prosecutor had in his possession. Appellant requested "all information relating to a profile" (3 CT 660) employed by law enforcement "to help them analyze or just to come to some general agreement in their professional view of what person might be the suspect in this general category." (3 RT 424.) "What we're saying is, if they did generate a physical report and gave it to law enforcement, that - and went into the investigative file, we be allowed access to it." (5 RT 930-931.) The prosecutor represented that no reports had been prepared by the FBI (5 RT 925-927) and that no notes or reports were prepared as a result of the meeting with California Department of Justice profiler, Mr. Prodan. (5 RT 828.) He did not correct defense counsel's representation that, "My understanding is that there was – from the prosecution there was no profile set up by the FBI; that there may be an individual later on . . . from the Department of Justice who was trained by the FBI that may have done some work in that area." (5 RT 905, see also 5 RT 798-799, 927-928.)

The FBI and California Department of Justice may not have prepared notes or reports about the profile, but the prosecutor's representation that no profile was created by the FBI in this case (5 RT 925-927) was obviously untrue. In seeking to admit evidence of serial murder linkage during the guilt phase (8 CT 2088-2121), the prosecutor revealed that an FBI computer database analysis unit called the Violent Criminal Apprehension Program (VICAP) had been employed before appellant's arrest. VICAP is maintained by the FBI's National Center for Analysis of Violent Crime

(NCAVC), which helps local agencies investigate and prosecute serial murder cases by developing a profile of the perpetrator based on evidence that has been gathered and by suggesting various techniques to apprehend the suspect. (8 CT 2090-2091.) The evidence the prosecutor sought to introduce, expert FBI testimony that would show each of the charged murders was committed by the same person (8 CT 2098), appears to be the information requested by appellant relating to a profile employed by law enforcement to help analyze or just to come to some general agreement in their professional view of what person might be the suspect in this general category. (3 CT 660; 3 RT 424.) In fact, the prosecutor's description of the proposed testimony about serial murder linkage (e.g., "organized activity" outside of a "comfort zone," and "unusual inputs" into the killings [activities that go beyond that necessary to render the victim lifeless] (8 CT 2091-2092)) appears to be precisely what appellant sought, information relied upon for the purpose of analyzing what person might be the suspect.

Appellant established that this discovery might lead to some admissible evidence (3 CT 425) and could be valuable to the defense in analyzing the other evidence of potential suspects and violence against the victims. (5 RT 927-928.) Whether or not a report was prepared, disclosure of the information would have facilitated the ascertainment of the facts and a fair trial. *(Pitchess v. Superior Court, supra,* 11 Cal.3d at p. 536.) Accordingly, it was discoverable. Furthermore, the prosecutor's duty to provide this discovery was not limited to the time before trial. It was an ongoing responsibility which extended throughout the duration of the trial. (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.) Hiding the information from appellant was misconduct which requires reversal. Moreover, if the prosecutor believed this was relevant, material evidence, and his efforts to

admit the evidence show that he surely did, he was obligated to provide it to appellant 30 days before trial. (Pen. Code, § 1054.7.) He had forced a defense expert to prepare and turn over a report even though the expert normally did not prepare a report. (45 RT 10010.) His failure to turn the information over before trial, as he was required to do, violated the reciprocal discovery provisions of Penal Code section 1054 et seq. and deprived appellant of his right to the names and addresses of prosecution witnesses and his right to an opportunity to interview those witness if they were willing to be interviewed. (*People v. Panah* (2005) 35 Cal.4th 395, 458.)

"'The right of a criminal defendant to present a defense and witnesses on his or her behalf is a fundamental element of due process guaranteed under the Fourteenth Amendment to the United States Constitution [citation]' (*People v. Schroeder* (1991) 227 Cal.App.3d 784, 787, 278 Cal.Rptr. 237), and a judge, as well as a prosecutor, can improperly interfere with an accused's right to a fair trial. (Id. at p. 788, 278 Cal.Rptr. 237.)" (*Reid v. Superior Court* (1997) 55 Cal.App.4th 1326, 1332.) The prosecutor's concealment of evidence violated his duty to "further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth." (*United States v. Agurs, supra*, 427 U.S. at pp. 110-111; *In re Ferguson, supra*, 5 Cal.3d at p.531.) His misconduct deprived appellant of his fundamental right to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (*People v. Gonzalez, supra*, 38 Cal.4th at pp. 960-962.)

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F. The Discovery Violations Were Prejudicial and Require Reversal

"Ordinarily, 'to prevail on a contention made on appeal from a judgment of conviction on the grounds of violation of the pretrial discovery right of a defendant, the defendant must establish that "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different."' (*People v. Bohannon, supra*, 82 Cal.App.4th at pp. 806-807.)" (*People v. Gonzalez, supra*, 38 Cal.4th at p. 960.) However, to the extent the denial of discovery implicates a defendant's federal due process rights the applicable test is whether the error is harmless beyond a reasonable doubt under *Chapman v. California, supra,* 386 U.S. at p. 18.) (*People v. Gonzalez, supra*, 38 Cal.4th at pp. 960-961.)

A due process violation occurred here because denial of the discovery of this critical evidence deprived appellant of a meaningful opportunity to present a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690; *Taylor v. Illinois* (1980) 484 U.S. 400.409.) Additionally, the prosecutor's concealment of profile evidence violated California's reciprocal discovery provisions (*People v. Gonzalez, supra*, 38 Cal.4th at p. 955, citing *Izazaga v. Superior Court* (1991) 54 Cal.3d 356) and thereby deprived appellant of due process. Accordingly, the errors must be judged under Chapman's harmless beyond a reasonable doubt test. (*Chapman v. California, supra*, 386 U.S. 18.)

The errors were not harmless beyond a reasonable doubt. The discovery denials precluded a full and truthful disclosure of critical facts and risked a judgment based on incomplete testimony. The government had no legitimate interest in denying appellant access to all evidence that could

have thrown light on the issues in the case and, in particular, it had no interest in convicting on the testimony of witnesses who had not been as rigorously cross-examined and as thoroughly impeached as the evidence permitted. (*People v. Riser* (1956) 47 Cal.2d 566, 586.) The error deprived appellant of the opportunity to prepare and present his only defense to the jury. The state cannot show beyond a reasonable doubt that it did not contribute to the verdict. (*Yates v. Evatt, supra*, 500 U.S. at p. 403.)

The judge's refusal to order discovery and the prosecutor's concealment of relevant evidence also deprived appellant of the ability to present to the jury any relevant circumstance that could cause it to decline to impose the death penalty. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 306.) In determining whether penalty phase errors are harmless beyond a reasonable doubt, this Court applies the test for state law error at the penalty phase, whether there is a reasonable possibility the verdict would have been different absent the error. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448; *People v. Gonzalez, supra*, 38 Cal.4th at p. 961.) The Court reasons that this standard is the same in substance and effect as Chapman's harmless beyond a reasonable doubt test (*People v. Gonzalez, supra*, 38 Cal.4th at p. 960, citing *People v. Ashmus* (1991) 54 Cal.3d 932, 990), because Chapman itself found "little, if any, difference between our statements in *Fahy v. Connecticut* about 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction' and requiring the beneficiary of a constitutional error to 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.)" (*People v. Gonzalez, supra*, 38 Cal.4th at p. 961, fn. 6.)

Appellant respectfully submits that requiring a defendant to show a

reasonable possibility the verdict would have been different (*People v. Brown, supra*, 46 Cal.3d at pp. 446-448, emphasis added) is not the same in either substance or effect as determining whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction. (*Fahy v. State of Connecticut* (1963) 375 U.S. 85, 86-87, emphasis added.) Moreover, neither standard is equivalent to a determination that the government has shown that the error is harmless beyond a reasonable doubt under Chapman. The discovery violations in this case deprived appellant of the ability to present his only defense to the jury. Respondent cannot show that the errors were harmless beyond a reasonable doubt. Accordingly, they must be deemed prejudicial and the judgment of conviction and sentence must be reversed.

* * * * *

V.

THE ERRONEOUS EXCLUSION OF EVIDENCE WAS PREJUDICIAL AND DEPRIVED APPELLANT OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

"'[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials.' *United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 140 L.Ed.2d 413 (1998); see also *Crane v. Kentucky*, 476 U.S. 683, 689-690, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986); *Marshall v. Lonberger*, 459 U.S. 422, 438, n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); *Chambers v. Mississippi*, 410 U.S. 284, 302-303, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973); *Spencer v. Texas*, 385 U.S. 554, 564, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967). This latitude, however, has limits. 'Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense."' *Crane, supra*, at 690, 106 S.Ct. 2142 (quoting *California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 81 L.Ed.2d 413 (1984); citations omitted). This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are '"arbitrary" or "disproportionate to the purposes they are designed to serve."' *Scheffer, supra*, at 308, 118 S.Ct. 1261 (quoting *Rock v. Arkansas*, 483 U.S. 44, 58, 56, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987))." (*Holmes v. South Carolina* (2006) __ U.S. __, 126 S.Ct. 1727, 1731.)

As set forth below, appellant's right to a meaningful opportunity to present a complete defense was abridged by the trial court's exclusion of evidence in this case. The error violated appellant's rights to present

defense evidence, a fair trial, and a reliable guilt and penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

A. Factual Background

Appellant sought to introduce evidence of three subsequent, similar prostitute murders to rebut the prosecutor's theory that he was the serial killer responsible for the murders charged in this case. The judge found that the evidence was irrelevant. Appellant also sought to impeach Detective Keers's credibility with the fact that she had been arrested and indicted for crimes involving moral turpitude and had been terminated by her employer, the Riverside Police Department. The judge found that the benefits the defense would derive from such impeachment were outweighed by undue consumption of time.

1. Evidence of Similar Prostitute Murders

On March 23, 1995, appellant moved to present evidence of three Riverside County murders which occurred after his arrest and incarceration. (7 CT 1874-1879; 19 RT 3624-3641.) Defense counsel believed there had been more than three subsequent prostitute killings, but he only sought to introduce evidence of those where the victims were also drug users whose bodies had been dumped - subsequent murders which were similar enough to those with which appellant was charged that "a jury could conclude that maybe the same person that did the 13, did those." (19 RT 3634-3635.) Counsel argued that several prospective jurors believed that the prostitute killings had stopped after appellant's arrest, and he was entitled to inform the jury as part of appellant's right to establish a defense that the prostitute killings had not stopped. (7 CT 1876; 19 RT 3624.) He noted that the court

had denied previous discovery requests for reports of two of the three murders because they were ongoing investigations (7 CT 1877; 19 RT 3624-3625), and he explained that he just wanted to get the fact that three more prostitutes had died since appellant's arrest and incarceration before the jury. He asked that he be allowed to mention the three murders in his opening statement and to call the investigating officers as witnesses and ask questions which would establish that fact. (19 RT 3625-3626, 3639.)

The judge ruled that appellant had not shown that the murders in question had any relevance to this case and excluded the evidence. (7 CT 1893, 1939; 19 RT 3660-3662.) He explained that the prosecutor had been directed to examine the reports in two of the cases to "see if there's anything whatsoever that would be used in any fashion to help exculpate Mr. Suff," and found nothing that would indicate "they were of such a similar nature to the one's he's accused of [that] third party culpability could have come into view." (19 RT 3636-3637.) The prosecutor confirmed that he had spoken to investigators about two of the murders. Both victims were prostitutes, and he was sure they were probably drug users as well, but there were many dissimilarities to the murders appellant was charged with committing in this case. (*Ibid.*)

Defense counsel complained that he was handicapped and could not show more of a connection because he did not have access to the reports. (19 RT 3638.) The following colloquy occurred:

> The Court: I think we talked about this. There are certain times when . . . one has to rely on the discretion of the prosecutor. I mean, for instance, I would have to read every single report, I would think, in those homicides. And then I'd have to read all the reports in your case, because - let's say, shoe prints or something that just didn't leap out at you - shoe print found at one of these homicides that's unsolved; shoe

print that I know exists in this case.

Mr. Peasley: I don't have - I don't think it has to be that much evidence. Just have to have some that would point towards him.

The Court: But I'd have to read everything, because maybe that is the sole thing . . . shoe print in one place, shoe print in the other place. There's no other thing. But I have to read through all the reports to come to that understanding. Then I'm going to have to see those photographs. ¶ You understand my problem? Let's say there's a hair fiber. Fine. What am I going to do? Send that out for analysis? Comes up there was a prostitute was killed; body was found in an open area. But there is some hair and fiber found. We know that there's some hair and fiber here because of the process we've gone through in DNA and getting those things up to the Department of Justice. . . .

Mr. Peasley: Absolutely. If we'd had that information, we would have had our criminalist see if some of the fibers on these three bodies were -

The Court: But you're not entitled to it. It's an ongoing investigation. Am I supposed to, now that I know there is, have that order made that those be analyzed to compare?

Mr. Peasley: No. My request is simply get before the jury that three more prostitutes have died since he's been arrested. . . . Wigmore says "The Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that doubt.

(19 RT 3638-3639.)

The prosecutor added, "just for clarification purposes," that he did not intend to argue to the jury that appellant was guilty because the killings of prostitutes in Riverside County stopped after his arrest, but rather that the

weight of the evidence pointed specifically to appellant in the victims' death. (19 RT 3639.)

2. Evidence of Detective Keers's Arrest, Indictment, and Termination From the Police Department

On or about August 14, 1994, Detective Christine Keers, the lead Riverside Police Department detective assigned to the homicide task force, was arrested. The department immediately placed her on administrative leave. On or about October 13, 1994, a grand jury indicted her for violation of Penal Code sections 496, subdivision (a) (misdemeanor), and 653f, subdivision (a), solicitation to commit burglary. The police department fired her on or about December 16, 1994. (7 CT 1884.) The Riverside County District Attorney's office was prosecuting her case and an estimated two-week trial was scheduled to begin on April 12 1995.[34] (25 RT 4814-4815.)

The prosecutor moved to exclude this evidence, which he described as an "attempted receiving of stolen property violation" pursuant to Evidence Code section 352. (8 CT 1974-1981.) He argued that Keers's arrest and indictment were "highly tangential" to the facts in this case and that defense counsel had not shown how they were relevant to proving that her testimony was not trustworthy. (8 CT 1975, 1978; 25 RT 4820-4821.) "We're getting into nitpicking wars over collateral credibility issues." (8

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[34] The court apparently saw no potential for a conflict of interest arising from the District Attorney's prosecution of Keers, its star witness in this case, for conduct involving moral turpitude. (See 26 RT 4978-4979.) The scenario was little different than that which the prosecutor had argued required the public defender's removal from the case. With the shoe on the other foot, however, the conflict did not require resolution and hiding the truth from the jury became an appropriate solution.

CT 1977; 25 RT 4822, 4824.) According to the prosecutor, Keers would testify to facts concerning her interaction with Kelly Whitecloud; to her involvement in the tape recorded interviews of appellant on the night of his arrest; and to having recovered some of the victims' clothing and jewelry from appellant's family members and acquaintances. (8 CT 1974-1975.) Virtually every fact she would relate had a second percipient witness who could provide the same testimony. (8 CT 1977; 25 RT 4818-4819, 4823.) Her grand jury testimony constituted only 62 of 900 pages. (8 CT 1975.) He believed that there were far better ways to evaluate her veracity than to bring up the fact of an unrelated property investigation which had occurred over two and one-half years after her conduct in this case, and that the proffered impeachment evidence would only misdirect the evidence and cause confusion by bringing up collateral issues. (8 CT 1975, 1977-1979; 25 RT 4828.) Furthermore, the primary witness who had all the conversations with Keers regarding the underlying offenses was dead, and multiple witnesses would be required to prove her misconduct. (25 RT 4821-4822.)

Defense counsel responded that Keers's credibility was in issue; that article I, section 28(d) of the California Constitution requires the admission of all relevant evidence; and that the fact she had been charged with receiving stolen property and, as a result, had been terminated by her employer was relevant because it involved dishonest conduct constituting moral turpitude. Prohibiting the trier of fact from knowing these facts about Keers would cloth her with a false aura of veracity. (8 CT 1982-1984; 25 RT 4824-4827.)

The judge determined that evidence of Keers's misconduct was irrelevant and that the benefits the defense would derive from impeaching

her veracity were outweighed by the undue consumption of time. He granted the prosecutor's motion and excluded the impeachment testimony. (8 CT 1988-1989; 25 RT 4830-4832.)

Before Keers testified, counsel sought to revisit the issue and obtain permission to at least put evidence of her termination before the jury. (8 CT 1995; 26 RT 4977-4979.) The prosecutor objected:

> [I]f we tell the jury that Ms. Keers has been terminated without explaining why, then that, basically, asks them to speculate or conjecture, which they're not entitled to do. And again, I don't have access and am not aware, specifically, as to what the police department utilized for that termination, neither does Mr. Peasley. So in a sense, he's speculating to a certain extent . . . . [T]hat's even more of a sticky situation, which would involve personnel matters more than anything else, because they're privileged. . . . I intend on bringing up, asking her if she is no longer working for the police department, which is truthful and accurate. And I intend on leaving it at that.

(26 RT 4979-4980.) The judge ruled, "No, we shan't get into the fact she's been terminated from the Riverside Police Department. I think it's irrelevant. And to leave it dangling like that is completely irrelevant. Enough said." (26 RT 4981.)

Detective Keers testified on April 11, 1995. (26 RT 5043-5081.) The prosecutor did not ask if she still worked for the police department, as he said he would. (26 RT 4980.)

> Mr. Zellerbach: Ms. Keers, back in December of 1991, by whom were you employed?
>
> Detective Keers: Riverside Police Department.
>
> Mr. Zellerbach: In what capacity?
>
> Detective Keers: As a homicide detective.

Mr. Zellerbach: As of December of 1991, how long had you been with the police department?

Detective Keers: Approximately 15 years.

Mr. Zellerbach: Of those 15 years, how long had you been a homicide investigator or - detective or investigator?

Detective Keers: Approximately five.

Mr. Zellerbach: Again, as of December 1991, approximately how many homicides had you investigated or assisted the investigation of?

Detective Keers: I would say over a hundred.

Mr. Zellerbach: All right. You were also a member of the Riverside County Homicide Task Force that has been created to investigate the murder of numerous prostitutes in Riverside County, had you not?

Detective Keers: That's correct.

Mr. Zellerbach: And you were a part of that team - well, when did you first become a member of that task force?

[¶]

Detective Keers: I don't recall the exact date.

Mr. Zellerbach: All right. As of December 1991, were you a member of that team?

Detective Keers: Yes.

(26 RT 5043-5044.) This is all the jury knew about Detective Keers's status with the police department. It never learned that she had been arrested and indicted for conduct involving moral turpitude which suggested her willingness to lie, or even that she had been terminated by the police

department.

B. The Excluded Evidence Was Relevant

> The principles governing the admission of evidence are well settled. Only relevant evidence is admissible (Evid.Code, §§ 210, 350), "and all relevant evidence is admissible unless excluded under the federal or state Constitutions or by statute. (Evid.Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)" (*People v. Heard* (2003) 31 Cal.4th 946, 973, 4 Cal.Rptr.3d 131, 75 P.3d 53.) "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. Garceau* (1993) 6 Cal.4th 140, 177, 24 Cal.Rptr.2d 664, 862 P.2d 664.) In determining the credibility of a witness, the jury may consider any matter that has a tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to: a witness's character for honesty or veracity or their opposites; the existence or nonexistence of a bias, interest, or other motive; his attitude toward the action in which he testifies or toward the giving of testimony; and his admission of untruthfulness. (Evid.Code, § 780.) Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352. (See *People v. Wheeler* (1992) 4 Cal.4th 284, 295-296, 14 Cal.Rptr.2d 418, 841 P.2d 938.) . . . . The trial court has broad discretion in determining the relevance of evidence. (See *People v. Crittenden* (1994) 9 Cal.4th 83, 132, 36 Cal.Rptr.2d 474, 885 P.2d 887.) [¶] We review for abuse of discretion a trial court's rulings on the admissibility of evidence. (*People v. Heard, supra*, 31 Cal.4th at p. 972, 4 Cal.Rptr.3d 131, 75 P.3d 53; *People v. Rowland* (1992) 4 Cal.4th 238, 264, 14 Cal.Rptr.2d 377, 841 P.2d 897.)

(*People v. Harris, supra,* 37 Cal.4th at pp. 310, 337.)

"Any relevant evidence that raises a reasonable doubt as to a defendant's guilt, 'including evidence tending to show that a party other than

the defendant committed the offense charged,' is admissible. (*People v. Hall, supra* 41 Cal.3d 826, 829, 226 Cal.Rptr. 112, 718 P.2d 99; see also *People v. Lewis, supra*, 26 Cal.4th at p. 372, 110 Cal.Rptr.2d 272, 28 P.3d 34; Evid.Code, §§ 210, 350, 351.)" (*People v. Avila* (2006) 38 Cal.4th 491, 577.) "This definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843; see also *People v. Williams* (1997) 16 Cal.4th 153, 249.) While a trial court has broad discretion in determining the relevance of evidence and lacks the discretion to admit irrelevant evidence (*People v. Scheid* (1997) 16 Cal.4th 1, 14), "a trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial." (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1777.)

Evidence of subsequent, similar prostitute murders tends logically, naturally, and by reasonable inference to establish a material fact in this case (*People v. Garceau, supra*, 6 Cal.4th at p.177), that appellant could not be the serial killer responsible for the deaths of the victims, as the prosecutor alleged, because the pattern of deaths had not stopped after his arrest. As explained above (see pp. 256-257, *ante*), the mere fact of the murders tends to establish his innocence. Therefore, he did not have to meet the standard test for third-party culpability by demonstrating what third party may have been guilty. For the evidence to be admissible, he only needed to show that the subsequent murders arguably fit within the prosecutor's alleged pattern of serial killings. He did that by establishing that the victims were drug using prostitutes who had been killed in ways similar to the prostitutes in this case and whose bodies had been dumped. (19 RT 3634-3635.) This evidence was indisputably relevant to rebut the prosecutor's theory that

appellant was a serial killer of prostitutes and to corroborate appellant's defense, regardless of who might have committed the crimes.

Evidence of Detective Keers's arrest, indictment, and termination was likewise relevant and admissible. "[I]t 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 . . . some basis . . . for inferring that a person who has committed a crime which involves moral turpitude [even if dishonesty is not a necessary element] . . . is more likely to be dishonest than a witness about whom no such thing is known." (*People v. Castro* (1985) 38 Cal.3d 301, 315.) Put another way, "[m]isconduct involving moral turpitude may suggest a willingness to lie (see *People v. Castro, supra*, 38 Cal.3d 301, 314-315, 211 Cal.Rptr. 719, 696 P.2d 111; *People v. White* (1904) 142 Cal. 292, 294, 75 P. 828; *People v. Carolan* (1886) 71 Cal. 195, 196, 12 P. 52; *Gertz v. Fitchburg Railroad* (1884) 137 Mass. 77, 78), and this inference is not limited to conduct which resulted in a felony conviction." (*People v. Wheeler, supra,* 4 Cal.4th 284, 295 [superseded by statute on another point, *People v. Duran* (2002) 97 Cal.App.4th 1448, 1459-1461].)

The proffered impeachment testimony has some tendency in reason to suggest Detective Keers's willingness to lie. (*People v. Wheeler, supra*, 4 Cal.4th at p. 295.) Moreover, it suggests that her employer, the law enforcement agency responsible for much of the investigation in this case, questioned her veracity. The jury therefore had reason to question both her veracity and the work of the task force she headed. (Evid. Code § 210.) In assessing Keers's credibility, the jury was entitled to know that she was facing charges herself, and that her testimony in this case might be tailored so as to achieve a favorable outcome for herself in that case.

C. By Excluding the Proffered Evidence, the Trial Judge Abused His Discretion and Violated Appellant's Constitutional Right to Present Evidence in His Defense

"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, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) A trial court's rulings on relevance and the exclusion of evidence under Evidence Code section 352 are reviewed for abuse of discretion. (*People v. Avila, supra*, 38 Cal.4th at p. 578.) While a trial court has broad discretion in determining the relevance of evidence and lacks the discretion to admit irrelevant evidence (*People v. Scheid* (1997) 16 Cal.4th 1, 14), "a trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial." (*People v. Williams, supra*, 46 Cal.App.4th 1767, 1777.)

This Court has directed trial courts to "simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid.Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (§ 352)." (*People v. Harris, supra,* 37 Cal.4th at p. 340, citing *People v. Hall, supra*, 41 Cal.3d at p. 834.) To be admissible, such evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. (*Ibid.*) Evidence of subsequent, similar prostitute murders was capable of raising a reasonable doubt of appellant's guilt in this case. Accordingly, it should have been admitted. Appellant was only obliged to show that the crimes could arguably be included in the prosecutor's alleged serial killer pattern. The

judge erred by requiring him to establish that the crimes were sufficiently similar for third-party culpability purposes.

Even if third-party culpability was the appropriate standard, the judge lacked any factual basis for determining that the murders were not similar to the murders with which appellant was charged. The prosecutor believed that the crimes were dissimilar (19 RT 3636-3637), but all the information the judge had tended to show that the murders were similar. In fact, all the judge knew was that, after appellant's arrest and incarceration, three murders eerily similar to those with which he was charged were committed. Cheryl Clark, a known prostitute, died of strangulation and stabbing. Her body had been dumped in a trash receptacle in the La Sierra area of Riverside on March 17, 1992. Mark Spencer was convicted of her homicide on June 15, 1994. Stephanie Shepard, a prostitute, was found on May 3, 1994, dumped in a dirt alley in Lake Elsinore. Her death was the subject of an ongoing investigation. A third subsequent, allegedly-similar prostitute murder also occurred. (3 CT 662; 4 CT 1043-1049, 1060-1070; 7 CT 1874-1879; 19 RT 3624-3641, 3634-3635.) The judge also knew that the prosecutor had spoken to investigators about the Clark and Shepard murders and he believed there were many dissimilarities to the murders appellant was charged with committing in this case. Other than counsel's representation that the murder was similar to those in this case (7 CT 1874-1879; 19 RT 3624-3641), the judge had no information at all about the death of the third prostitute. Nonetheless, he refused appellant's request to examine the reports concerning these crimes in camera (3 RT 431-441), thereby intentionally depriving himself of the ability to determine whether or not the subsequent murders were similar. Absent some factual basis for his determination that the crimes were dissimilar, the judge's exclusion of this

evidence was an abuse of discretion. (*In re Cortez, supra*, 6 Cal.3d at pp. 85-86; see also *People v. Filson, supra*, 22 Cal.App.4th at p. 1849.)

The error is of constitutional dimension for it deprived appellant of the ability to present the only defense he had. Appellant's sole defense at trial was that he did not commit any of the charged offenses. He did not testify. The evidence against him was almost entirely circumstantial. His case consisted largely of probing the inconsistencies in the testimony of prosecution witnesses and the prosecutor's serial killer theory; questioning the reliability of the prosecution experts' conclusions; and arguing that he was entitled to the benefit of conflicting inferences which could be drawn from the circumstantial evidence. Under the circumstances, it was imperative that he be permitted to submit the prosecutor's evidence to a full, complete, and rigorous evaluation. Disproving the prosecutor's serial killer theory was one of the only ways he could establish his innocence. To do this, defense counsel sought to inform the jury that three more prostitutes had died since appellant's arrest and incarceration. (19 RT 3638-3639.)

Presentation of this crucial evidence would have caused no delay, prejudice, or confusion, and it would have required little time. As counsel noted, the jury was predisposed to believe the prosecutor's theory. (7 CT 1876; 19 RT 3624.) Several prospective jurors expressed a belief that the serial prostitute killings stopped after appellant's arrest and incarceration. The sentiment was perhaps best expressed by prospective juror Carl Barbaro. In his questionnaire, Mr Barbaro wrote that he had formed an opinion about appellant's guilt or innocence as a result of what he had seen or heard about the case: "He's in custody and the murder spree stopped which doesn't make him guilty but definitely doesn't rule in his favor." (15 Supp. CT 3823.) When questioned by the court, he explained:

> While the fact that he's in custody does not constitute guilt, in my mind, we have the killing spree that once was and is no longer. He may in fact be guilty. Possibly he just coincidentally happens to fit into being a prime suspect. And another possibility is the fact that he may have been framed. I doubt that he was framed. I doubt that he is just coincidentally here. I think that, more than likely, they have got some pretty solid stuff against him. The killings quit. Doesn't necessarily mean he did it. All I know is that they are not happening anymore, and the man is in custody.

(15 RT 2854-2859.) Other prospective jurors expressed the same belief. Prospective juror Joyce Brown indicated that she knew appellant was accused of killing prostitutes in various locations in the city and that things were found in his van to connect him to the crimes. She believed he was guilty because of the way the cases were tied together and because the murders stopped when he was arrested. (33 Supp. CT 8660-8661.) Prospective juror Colette Clark believed that appellant was guilty because, "There have not been anymore body's [sic] found since his arrest." (24 Supp. CT 6124.) When prospective juror Donald Donner heard about the case, his initial reaction was "Glad that murder chain had stopped." (29 Supp. CT 7412.) Prospective juror Merlyn Bostrom believed that appellant was guilty because the murders stopped. (18 Supp. CT 4565; 16 RT 2961-2962.)[35] Over two-thirds of the sitting jurors knew about the case. (See pp.

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[35] See also 11 Supp. CT 2652 ["They caught the serial killer and they had enough evidence to convict him."]; 13 Supp. CT 3120 [relieved that no one else would be hurt or killed]; 19 Supp. CT 4682-4683 ["Due to multiple charges, bodies involved I believe Suff is probably guilty."]; 19 Supp. CT 4721 ["was glad they had caught him"]; 21 Supp. CT 5265 [a number of women were killed by a serial killer - felt sorry for the women and wondered how anyone could do these things]; 21 Supp. CT 5343 [women's bodies were found and the murders may have been connected]; (continued...)

188-189, *ante*.) The judge did nothing to determine if these jurors had similar feelings and, if so, whether they could disregard them and base any verdict on the evidence presented in court. With just a little probing, the judge surely would have discovered similar sentiments among the jurors empaneled to try the case.

In his closing argument, despite his assurance that he was not going to argue that appellant was guilty because the killings stopped upon his arrest (19 RT 3639), the prosecutor reinforced the jury's predisposition by arguing that appellant was guilty because he was the serial killer responsible for all the charged deaths. For example, he told the jury there was a "consistent pattern in many respects in these cases." (41 RT 8864.) "It's this cross-association of evidence that in and of itself, if you look at it in a vacuum, may not be that significant. But when you look at the big picture . . . we see continual patterns that repeat themselves with respect to many different types of evidence." (41 RT 8901.)

> With respect to tire impressions and also shoe impressions, their mere presence at all these crime scenes are certainly very important. But we have more than that. It's just not the fact that they were there. But what's also important is their location or proximity to the bodies. . . . Same thing with the shoes. . . . So it's just not the mere presence of these shoes and tires that are similar to Mr. Suff's, but also their location in relation to the bodies. . . . [I]t's highly unique and unusual that we can follow Mr. Suff's life by the tires that he purchases and the shoes that he purchases as we progress through each of these murder scenes. ¶ Who else in this world, folks, could have those types of tires and have them change over time

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[35] (...continued)
24 Supp. CT 6084-6085 ["I would say most likely he's guilty due to the number of people involved."]; 33 Supp. CT 8621 ["They finally caught him!"]; 35 Supp. CT 9284 ["it took a long time to ID a suspect"].

> consistent with the purchase of tires that Mr. Suff made? Who else in the world could have these shoe impressions similar to the three pairs of different types of shoes that Mr. Suff purchased and possessed and was wearing? Who else in the world would have all these different colors and types of fibers in their environment that Mr. Suff had that we found on these victims? Who else has the DNA profile that Mr. Suff has with respect to the analysis of semen that was found on the vaginal swabs from these women? There is no one else in the world that committed all of these murders except for Mr. Suff.

(41 RT 9048-9049.) He urged the jury to "Use your common sense. It doesn't take a rocket scientist to figure out he's the murderer. He is the serial killer." (41 RT 8944.)

> We're talking about the murder of 13 separate human beings, the taking of 13 separate lives by one man: Mr. Suff, who is, and was for many years, a serial killer. ¶ And that term "serial killer" has significance. We've seen and heard or read about serial killers in the past. We know they exist, for whatever reason. And oftentimes we can't explain or give you commonsense reasoning as to why serial killers do what they do. If you think historically of the serial killers that you're aware of - and I'm sure you've all read or heard about some of them - you think, "how could someone do that? How could someone keeps the body parts in their refrigerator? How could they eat human flesh? How could they bury them in their basement?"

(41 RT 9033.) He continued on this theme at the penalty phase:

> Mr. Suff is a monster. For whatever reason, he needed to kill prostitutes. It was almost like a feeding frenzy. And if you look at the dates of the murders, it began to pick up. The number of the killings began to increase more rapidly. It got to a point where he was almost killing one woman a month before he was finally arrested in January of 1992. He had the whole county . . . in a state of concern. He was terrorizing not only the prostitutes but everyone else . . . in our community. One man was doing that. For years he was doing that.

[¶] . . . [¶]

> [H]e doesn't only stop with just killing them. He has to do more. He is trying to send a message of some sort. And for the first two murders, he re-dressed them in his own clothes, at least partially. Then thereafter, he would pretty much leave them nude. Some were obviously posed, cutting off breasts. He left them in locations were obviously they would be found. He wanted them to be found. He wanted to shock our conscience. He fed off of that. He enjoyed that. And he'd still be out there doing it, folks, but for the fortuitous events that took place on the evening of January 9th 1992. ¶ He was terrorizing this entire community for three or four years. Is that someone who is worthy of sympathy and mercy?

(46 RT 10291-10293.)

Faced with a jury predisposed to believe that he was guilty because the serial killings stopped upon his arrest and a prosecutor who argued that he was guilty and should be put to death because he was a serial killer who would "still be out there doing it," evidence that would corroborate appellant's defense that he did not commit the charged murders was crucial. The error was not harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. 18.)

This Court rejected a similar argument in *People v. Yeoman* (2003) 31 Cal.4th 93, 141-142, finding that "neither due process nor *Chambers v. Mississippi* has led the high court to 'question[ ] the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliability - even if the defendant would prefer to see that evidence admitted.' (*Crane v. Kentucky, supra*, 476 U.S.at pp. 683, 690, 106 S.Ct. 2142, 90 L.Ed.2d 636; see *People v. Babbitt, supra*, at pp. 684-685, 248 Cal.Rptr. 69, 755 P.2d 253.)" *In Holmes v. South Carolina* (2006) __ U.S. __, 126 S.Ct. 1727, the defendant sought to

introduce proof that another man had attacked the victim. (*Id.* at pp. 1730-1731.) The trial court excluded the evidence and the South Carolina Supreme Court found that exclusion of the evidence was appropriate because the defendant could not "overcome the [strong] forensic evidence against him to raise a reasonable inference of his own innocence." (*Id.* at p. 1731.) The Supreme Court reversed. (*Id.* at p. 1735.) It found that the trial judge failed to focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the critical inquiry concerned the strength of the prosecution's case. (*Id.* at p. 1734.)

> [B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt. Because the rule applied by the State Supreme Court in this case did not heed this point, the rule is "arbitrary" in the sense that it does not rationally serve the end that the Gregory rule and other similar third-party guilt rules were designed to further. Nor has the State identified any other legitimate end that the rule serves. It follows that the rule applied in this case by the State Supreme Court violates a criminal defendant's right to have "'a meaningful opportunity to present a complete defense.'" *Crane*, 476 U.S., at 690, 106 S.Ct. 2142 (quoting *Trombetta*, 467 U.S., at 485, 104 S.Ct. 2528)

(*Id.* at p. 1735.)

Like the judge in Holmes, the trial judge here failed to focus on the probative value or the potential adverse effects of admitting the defense evidence. Indeed, he refused to examine the very reports which would have given him this information. (3 RT 431-441.) Instead, he focused on the similarity of the subsequent crimes to those with which appellant was charged, and he relied on the prosecutor's judgment in two of the cases that the crimes were not similar enough to show third-party culpability. Other than defense counsel's representations, he had no information whatsoever

about the third, subsequent murder. He then barred the evidence because the subsequent crimes were not sufficiently similar. Absent an evaluation of the evidence, the judge could reach no logical conclusion regarding its probative value. (*Holmes v. South Carolina, supra*, 126 S.Ct. at p. 1735.) The rule he applied is therefore arbitrary in the sense that it does not rationally serve the end that California's third-party guilt rules were designed to further and it violated appellant's right to have a meaningful opportunity to present a complete defense. (*Ibid.*) Exclusion of the evidence violated appellant's rights to present defense evidence, a fair trial, and a reliable guilt and penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

Exclusion of evidence to impeach Detective Keers's credibility was also prejudicial. The judge determined that the benefits the defense would derive from impeaching Keers was outweighed by the undue consumption of time. (8 CT 1988-1989; 25 RT 4830-4832.) Although the judge had broad latitude under Evidence Code section 352 to exclude the evidence in order to prevent the trial from "degenerating into nitpicking wars of attrition over collateral credibility issues" (*People v. Wheeler, supra*, 4 Cal.4th at p. 296), permitting Detective Keers to testify in this case while cloaked with a false aura of veracity was an abuse of discretion. Detective Keers played a crucial role in the case. As the head of the homicide task force, her testimony carried the full weight of the law enforcement agency she spoke for. In order to bolster her credibility, the prosecutor was permitted to elicit the fact that she had worked for the Riverside Police Department for approximately 15 years, that she had been a homicide detective or investigator for approximately five years, that she had investigated or assisted in the

investigation of over 100 homicides, and that she was a member of the homicide task force. (26 RT 5043-5044.) The jury was led to believe that she was an experienced, upstanding officer who was trusted by her employer and who would not lie to the jury. The true facts, however, were just the opposite. She was not a trusted employee. She had been charged with misconduct involving moral turpitude which showed a willingness to lie and her employer had fired her. The jury should have known that she no longer worked for the law enforcement agency on whose behalf she was testifying because that employer believed she was dishonest.

As the prosecutor pointed out below (8 CT 1977; 25 RT 4818-4819, 4823), some of Keers's testimony was independently corroborated. Her interaction with Kelly Whitecloud was not, and Whitecloud was a crucial prosecution witness. (See pp. 41-45, p. 69, & pp. 83-87, *ante*.) The artist's sketch of the "serial killer" suspect and Keers's bulletin were both based on Whitecloud's description of the man who had picked her and Hammond up on August 15, 1991, and of the van he was driving. (24 RT 4720-4721; 26 RT 5050-5051, 5062-5065, 5071-5072, 5079-5080; 28 5606, 5628.) That information subsequently served as the basis for appellant's detention and arrest. Were it not for that traffic stop, appellant would not have been charged. Detective Keers was the prosecution's only link to Whitecloud. She interviewed Whitecloud on University Boulevard after Hammond's body was discovered and took her to look at vans. (24 RT 4718-4719, 4745; 26 RT 5048-5052, 5064-5073.) She also interviewed her in the Contra Costa county jail, after appellant's arrest, where Whitecloud identified appellant as her assailant. (24 RT 4721-4724; 26 RT 5074-5080.) There was no independent corroboration of these incidents.

The jury had reason to doubt Whitecloud, an admitted prostitute, drug

abuser, and felon who admitted that her intent on the night Hammond disappeared was to "rip off" the man in the van "if it would have come down to that." (24 RT 4747-4749.) The toxicology expert had never heard of someone experiencing reverse effects from cocaine and heroin as Whitecloud claimed she did. (27 RT 5472-5473.) She testified that she had jumped out of the man's van while it was moving, but she told Detectives Carter and Davis that she did not care for the guy, that he spooked her, and they parted ways. (38 RT 8250-8256.) She did not remember telling Detective Keers that the suspect was about five feet eight inches tall and weighed about 170 pounds. She remembered saying he was five feet eight inches to five feet 10 inches tall. She told the grand jury that he weighed about 140 to 150 pounds. (24 RT 4751.) She told private investigator Patricia Barnaby that she was certain she had seen a Bible between the front seats of the van, that she had not fallen out of the van, and that she was maintaining about a $1,000-a-day drug habit at the time. (38 RT 8257-8269.)

With Whitecloud's credibility in doubt, Detective Keers's credibility or lack thereof was extremely probative, particularly as to the Hammond charges. The jury knew that Whitecloud might not be trustworthy. It did not know that Keers was a disgraced officer who had been fired for alleged conduct which suggested a willingness to lie. Had it known the true facts, the jury would have had reason to seriously consider that either Whitecloud or Keers, or both, were not telling the truth and that the police had arrested the wrong man. And, of course, the convincing force of the circumstantial evidence against appellant largely depended on the assumption that the police had arrested the right man, the serial killer. Keers's termination from the police force would have required very little time to establish. Surely, one

question calling for a yes or no answer cannot consume enough time to justify clothing an officer with a false aura of veracity, as the judge did here. The benefit to appellant of establishing her willingness to lie was not outweighed by the negligible time that would have been required to establish the fact of her arrest, indictment, and termination. (*People v. Wheeler, supra*, 4 Cal.4th at p. 295.)

The judge's exclusion of evidence violated appellant's rights to present defense evidence, a fair trial, and a reliable guilt and penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution. Appellant's conviction and sentence must therefore be reversed.

* * * * *

VI.

APPELLANT IS ENTITLED TO A REVERSAL BECAUSE POLICE QUESTIONING DID NOT CEASE AFTER HE INVOKED HIS MIRANDA RIGHTS

Appellant moved to exclude evidence of his post-arrest statements to Detective Keers, alleging that they were involuntary and obtained in violation of *Miranda v. Arizona, supra*, 384 U.S. 436, 467, 479. (8 CT 2010-2021.) The prosecutor opposed the motion. (8 CT 2042-2064.) After a hearing, the court ruled that appellant's statements were voluntary, but that questioning should have ceased when appellant invoked his right to an attorney during the third interrogation session at the Riverside Police Department. It prohibited the prosecutor from using any of appellant's statements thereafter in his case in chief. (8 CT 2075-2076; 32 RT 6548-6549.) The court correctly ruled that appellant invoked his right to counsel. That invocation, however, occurred at the outset of the second interrogation session, not during the third session as the judge ruled. The admission of statements appellant made after this invocation was prejudicially erroneous and requires reversal of appellant's conviction and sentence.

A. Factual Background

Appellant was arrested for violation of parole at approximately 10:00 p.m. on April 9, 1992. He was taken directly to the Riverside Police Department and, over the next 20 hours, was interrogated by Detective Keers on three separate occasions. The questioning took place in a small, second-floor room with carpeted walls and no windows, containing only a table and three chairs. (31 RT 6179-6181, 6183, 6200-6201.) The initial interrogation began at approximately 12:30 a.m. on January 10, 1992, and

lasted about 40 minutes. Appellant was not in handcuffs, no one else was present, and the door was shut. Keers walked into the room, handed him her business card, told him she was a homicide investigator, and advised him of his rights. He signed a form agreeing to waive his Miranda rights and talk with her. (31 RT 6184-6185, 6188, 6202-6203.) He asked, "Do I need a lawyer?" Keers responded, "Well, I don't know. Do you need a lawyer?" He replied, "I don't know. For what I've done, I don't see why I need a lawyer." She said, "All I'm doing is asking you to talk to me. Do you want to do that?" He said "Okay." (31 RT 6185-6186, 6203-6204.) Questioning ceased at about 1:10 a.m. and appellant was placed in the holding tank - an eight foot by eight or ten foot cell with no bathroom facilities and nothing but a bench on which to sleep (31 RT 6182) - while Keers waited for the rest of the task force to arrive. (31 RT 6186-6188, 6204, 6208.)

Keers interrogated appellant again about 20 minutes later, at 1:30 a.m. (31 RT 6187, 6204.) He complained of pain in his back several times and asked for pain medication. Keers told him she was not able to give it to him. He said he hoped his wife would bring his pain medication, but she never did. Each time he complained Keers asked if he was in so much pain that he wanted to end the interview, and he said no. He asked for a Pepsi Cola and she got him one. Keers knew that Converse tennis shoe impressions had been found at the Casares crime scene, and she saw that appellant was wearing Converse tennis shoes. She asked for permission to search his apartment. While signing a document authorizing a search of his residence, appellant asked "Am I being accused of these murders?" Keers responded, "You're not under arrest." Appellant told her, "I want to know if I'm being charged with this, then I think I need a lawyer." She said, "At this time, no, you're not been charged with this." Appellant continued talking, but told her

shortly thereafter, "You're scaring me now." Keers replied, "I'm not trying to scare you." He repeated, "You just got me scared now." She said "I don't want to scare you." He asked, "Are you charging me? Am I being accused of these murders?" She responded "Not at this time." Appellant was returned to the holding tank at 2:45 a.m. Keers checked on him every 15 or 20 minutes thereafter and it appeared that he was lying down or sleeping on the holding tank's bench. He was not given any breakfast because he was not hungry, but he was given lunch at about 1:00 p.m. (31 RT 6189-6194, 6204-6208, 6218-6219.)

A third interrogation session began at 2:50 p.m. Keers and Detective Davis interrogated appellant for nearly three hours. The prosecutor, Zellerbach, was also present, monitoring the session from another room. Occasional breaks were taken when appellant indicated he needed a drink of water or to stretch or go to the bathroom. He asked several times what information law enforcement had which linked him to the murders. (31 RT 6192-6195, 6201, 6205, 6209-6210.) During the last third of this session Keers began to put more pressure on him. The questioning became heated and appellant became very emotional and raised his voice several times. Around 5:00 p.m., when the discussion turned to the subject of shoe prints found near Casares's body, Davis had to caution appellant about raising his voice. Appellant responded, "I better get a lawyer now. I better get a lawyer, because you think I did it and I didn't." Keers answered, "You said that before," and she asked, "Who did it?" Appellant told her, "I don't know, but I didn't do it. I swear to God I didn't do it." She asked, "Are you telling me that you don't want to talk to me right now, Bill?" Appellant told her "I'm telling you the truth." She said "Okay, I'm giving you the opportunity to talk to me. . . . Do you want to do that?" Appellant said "Yes,

I do." Keers said "Okay, now we'll start slow. Okay? . . . I'll take you through this. All right? . . . Will you feel better if I take you through that?" Appellant said "Please." (31 RT 6195-6198, 6210-6211, 6219.) Someone then knocked on the door and Keers left the room for a discussion with Zellerbach about clarifying whether or not appellant wanted to continue the interview. (31 RT 6212.)

Davis, who remained in the interview room with appellant, said, "Bill, you want to talk to us?" Appellant said "Yes, I do." Davis said, "A couple of minutes ago you said you wanted a lawyer. Now, you want to talk to us about this." Appellant said "I think I need a lawyer over here." Davis asked again, "Do you want to talk to us?" Appellant said, "I want to try to clear this up. I want to make sure you end up knowing I didn't kill her. I took the clothes, because they were lying nearby her and that's it." (31 RT 6199-6200, 6212-6213, 6219.) Keers returned to the room and said, "I asked you if you want to talk to us, if you want to tell us the truth. Do you understand that?" Appellant said, "Yes." Keers asked again, "Do you want to talk to us and tell us the truth?" Appellant said, "Yes." (31 RT 6200, 6213.) For the next 35 minutes Keers's questioning became more pointed. She confronted appellant with the fact that impressions from the tires on his van and his shoes were found at the crime scene. He began to acknowledge that he had been at the crime scene and had done certain things and had taken possession of certain items there. Keers concluded her questioning about the Casares homicide and Davis began asking appellant about the McDonald homicide. When he showed appellant a photograph of McDonald, appellant indicated he did not want to talk anymore: "We can't talk anymore then. We can't talk anymore then, because you think I'm lying, and I'm not." Keers asked, "You can't talk anymore?" Appellant said, "I

can't talk anymore about any of it anymore, because you are saying I'm lying and I'm not." Keers said, "Okay, Bill. We're going to terminate this interview because you don't want to talk to us anymore." Appellant said, "I want a lawyer." Keers said, "Okay," and the interrogation was terminated at 5:40 p.m. (31 RT 6200, 6210, 6213-6216.) Keers believed that appellant was given his dinner when he was booked in jail at the conclusion of the interview. (31 RT 6195.)

Keers explained that during the first two interviews she was basically just obtaining background information, things like appellant's whereabouts, where he lived, what areas he was familiar with, etc. Appellant told her he was employed in the prison system in Texas and that he had been convicted of a crime but had only served a few days in custody and was then placed on probation. During the 12 hours between the second and third interview, law enforcement personnel were attempting to obtain more information about appellant's parole status and the warrant which had been issued for his arrest, and they were contacting and interviewing witnesses. (31 RT 6208-6209.) Keers claimed to believe that appellant knew he did not have to talk with her. It appeared to her that he wanted to continue talking as long as he felt he could talk his way out of the charges. (31 RT 6213, 6216.) She told him several times he was not under arrest for the murders. Even though he mentioned having a lawyer present several times, she maintained she was not sure he wanted a lawyer until he insisted on one and the interview was terminated. (31 RT 6200-6201.)

As noted above, the court ruled that appellant's statements were voluntary, but that questioning should have ceased when he invoked his right to an attorney during the third interrogation session, before Keers left the interview room to consult with Zellerbach, by saying "I better get a lawyer

now. I better get a lawyer, because you think I did it, and I didn't." It prohibited Zellerbach from using any of appellant's subsequent statements in his case in chief. (8 CT 2075-2076; 32 RT 6548-6549.)

B. Relevant Legal Principles

This Court recited the relevant standards in *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1122-1123. An accused must be warned "prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney, one will be appointed for him prior to any questioning if he so desires." (*Miranda v. Arizona, supra*, 384 U.S. at pp. 467, 479.) *Miranda* is a rule of constitutional magnitude. (*Dickerson v. United States* (2000) 530 U.S. 428, 437-441.) Once a suspect has asserted his or her right to counsel during custodial interrogation, the interrogation must cease and the suspect "is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.)

The purpose of the *Miranda-Edwards* guarantee is to protect the suspect's desire to deal with the police only through counsel. (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 177-178.) Therefore, invoking the Fifth Amendment interest "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*Id.* at p. 178.) The holding in *Edwards*, by its terms, applies only where "the accused in custody . . . has clearly asserted his right to counsel." (*Edwards v. Arizona, supra*, 451 U.S. at p. 485.) Whether a suspect has invoked his or

her right to counsel "is an objective inquiry." (*Davis v. United States* (1994) 512 U.S. 452, 459.) "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Ibid.*) If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. Accordingly, "the suspect must unambiguously request counsel." (Ibid.)

"A reviewing court – like the trial court in the first instance – must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. (*Davis v. United States, supra*, 512 U.S. at pp. 460-462, 114 S.Ct. 2350.) In reviewing the issue, moreover, the reviewing court must 'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. [The reviewing court] independently determine[s] from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' (*People v. Cunningham, supra*, 25 Cal.4th at p. 992, 108 Cal.Rptr.2d 291, 25 P.3d 519.)" (*People v. Gonzalez, supra*, 34 Cal.4th at p. 1125.)

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C. The Trial Judge Correctly Determined That Appellant Invoked His Miranda Rights, but Erred in His Determination of When That Invocation Occurred

The trial judge was correct in finding that appellant invoked his *Miranda* rights, but wrong in determining that the invocation occurred during the third interrogation session, immediately before Detective Keers left the room, when appellant said "I better get a lawyer now. I better get a lawyer, because you think I did it, and I didn't." (31 RT 6196-6198, 6219.) Appellant actually invoked his *Miranda* rights at the outset of the second interrogation session, when he told Detective Keers "I want to know if I'm being charged with this, then I think I need a lawyer." (31 RT 6191, 6207-6208, 6218-6219.) This statement was a clear articulation of a desire to speak to counsel at that time. It should have been understood as such by Detective Keers and Davis and questioning should have ceased at that point. Any subsequent statements are inadmissible.

In *People v. Gonzalez*, this Court determined that a similar statement was insufficient to invoke a suspect's *Miranda* rights. There, the defendant agreed to take a lie detector test, but said "one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing. Because my brother-in-law told me that if they're trying to charge you for this case you might as well talk to a public defender and let him know cause they can't [Untranslatable]." (*People v. Gonzalez, supra*, 34 Cal.4th at p. 1119.) The detective told him, "Well, you can do that anytime you want to. [¶] The thing is, that – that we're going to book you tonight. . . . If that's okay? And if you come out – if you come out telling the truth tomorrow, we'll let you go." (*Ibid.*) Gonzalez asked, "Book me on what?" The detective said, "On murder. That doesn't mean you're

going to be filed on. That doesn't mean you're going to be filed on, okay?" Another detective explained that he was being booked for murder "based on what we have right now," that more investigation would be done if the polygraph results indicated he was being truthful, and that being booked for the murder did not mean he was "getting violated, and going to do that five years you're so worried about either." Later, the detective told him, "[A]n arrest is not a prosecution; you hear me?" (*Ibid.*) The following day, Gonzalez told the polygraph examiner he had been advised of and had waived his rights the previous day, and he waived them again. Before taking the polygraph test he said, "Sir, I was going to ask you that, is there any, like – cause they told me about a public defender." (*Id.* at p. 1120.) The polygrapher asked, "What about a public defender?" Gonzalez said, "They said that he would show up for anything." The polygrapher told him, "Oh, you have a right to a public defender. That's why I asked you did they – they told you about your rights." Gonzalez replied, "They read my rights, yeah." There was no further mention of a public defender. (*Ibid.*)

This Court found that Gonzalez's statements were conditional on their face; he wanted a lawyer if he was going to be charged. "The conditional nature of the statement rendered it, at best, ambiguous and equivocal because a reasonable police officer in these circumstances would not necessarily have known whether the condition would be fulfilled since, as these officers explained, the decision to charge is not made by police. Confronted with this statement, a reasonable officer would have understood only that 'the suspect might be invoking the right to counsel,' which is insufficient under Davis to require cessation of questioning. (*Davis, supra*, 512 U.S. at p. 459, 114 S.Ct. 2350.)" (*People v. Gonzalez, supra*, 34 Cal.4th at p. 1126.) Moreover, the detectives explained the difference between

being arrested and booked and being charged, thus providing Gonzalez with an opportunity to clarify his meaning, but at no point in this initial exchange did he unequivocally request the immediate presence of an attorney before he would answer any more questions. Thus, while the detectives were not required, under Davis, to ascertain whether, when he used the word "charged," Gonzalez actually meant "arrested" or "booked," they gave him the opportunity to clarify this point when they explained to him the difference between those terms. (*Id.* at pp. 1126-1127.)

The fact that the detectives in Gonzalez truthfully explained the defendant's predicament to him tends to show that they truly did not know if he had invoked his rights. Gonzalez's responses and subsequent conduct established both that he was not invoking his right to counsel and that a reasonable officer would not have understood that he was. In contrast, Keers resorted to deceit and trickery to convince appellant to continuing talking with her and Detective Davis. Keers was the lead investigator for the Riverside Police Department in the serial killer task force. She had been at the scene of appellant's arrest and knew that appellant's van matched the gray van Kelly Whitecloud had described and, also, that three of the van's tires matched the tires she expected to find on the suspect's van. She knew, too, that impressions from Converse tennis shoe were found at the Casares crime scene, and that appellant was wearing Converse tennis shoes. Nonetheless, she claimed, "I was not sure we had our man." Appellant appeared to be a suspect, but there was a lot of work to be done and she was continuing the investigation. (31 RT 6179-6180, 6200-6201.) Therefore, when appellant said "I want to know if I'm being charged with this, then I think I need a lawyer," she told him, "At this time, no, you're not been charged with this."

The rule articulated in Gonzalez is inapplicable in this case because, in light of all of the circumstances surrounding the ongoing investigation, Keers could not have understood appellant's request for counsel to be "conditional" on his being charged. Whether a suspect has invoked his or her right to counsel "is an objective inquiry." (*Davis v. United States, supra*, 512 U.S. at p. 459.) A reasonable officer who knew what Keers knew could only have construed appellant's statements as an invocation of his right to counsel. She had evidence linking appellant to one murder and, by the line of questioning she pursued over the next several hours, it is obvious that she was deliberately buying time in an effort to keep him talking. To do that, she responded deceptively to his request to speak to a lawyer "if I am being charged with this" by telling him that he was not under arrest and was not being charged "at this time." Given Keers's knowledge, appellant's request clearly is not classifiable as "ambiguous" or "equivocal."

It is well-settled that a request for counsel need not be a model of eloquence and clarity in order to qualify as an unequivocal invocation of the right to counsel. "[A] suspect need not speak with the discrimination of an Oxford don." (*Davis v. United States, supra*, 512 U.S. at p. 459.) The words of the request will be "understood as ordinary people would understand them." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 530.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' *Id.* (citations omitted); see also, *United States v. de la Jara* , 973 F.2d 746, 750 (9th Cir.1992) (noting that a suspect's words must be taken "as ordinary people would understand them")." (*Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, 997-998.) "Ordinary people" would reasonably construe appellant's words to be an expression of

a desire for the assistance of an attorney. At the beginning of his first interrogation, he had the following conversation with Keers:

> Appellant: Do I need a lawyer?
>
> Keers: Well, I don't know. Do you need a lawyer?
>
> Appellant: I don't know. For what I've done, I don't see why I need a lawyer.

(31 RT 6185-6186, 6203-6204.) Less than an hour later, upon learning that Keers intended to search his apartment, he said "I want to know if I'm being charged with this, then I think I need a lawyer." (31 RT 6190-6191, 6207-6208, 6218-6219.) Viewed in context, it appears that appellant initially did not think he needed counsel, but changed his mind when it became more obvious that he was going to be charged with a crime. The sequence of interrogation shows, and Keers testified, that appellant was willing to cooperate with his interrogators as long as he thought he could "talk his way out of it." (31 RT 6213, 6216-6217.) As the interrogation became more focused on the murders, his requests to speak to counsel were repeated, but each time diverted, until finally he refused to speak altogether. In this light, his statement was neither equivocal nor ambiguous. He was informing Keers, "I do think I need an attorney now."

Keers simply could not have interpreted this as a conditional request because she knew that the condition was virtually certain to manifest itself. Any doubt could have been resolved easily by asking Zellerbach, the prosecutor assigned to the task force, who monitored the third interrogation session from another room. (31 RT 6209-6210.) She then could have explained appellant's status to him truthfully, as did the officers in Gonzalez. Instead, she chose to deceive appellant and keep important facts from him which would have informed his decision to keep talking or not. Her reliance

on a deceptive technicality to trick appellant out of consulting an attorney tends to show that she must have understood appellant wanted to consult counsel. If not, why did she believe she had to deceive him into continuing the conversation? As the Court made clear in *Gonzalez*, if she understood that appellant was invoking his right to counsel, it was her duty to cease questioning, not to try to get a confession by deceiving him.

The United States Supreme Court has made it clear that the police are forbidden to resort to trickery in order to obtain a waiver of a suspect's rights. (*Miranda v. Arizona, supra*, 384 U.S. at p. 476.) Whether a suspect has validly waived *Miranda* is examined in the totality of the circumstances surrounding the interrogation: "[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception . . . the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]" (*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Appellant's *Miranda* waiver was not "voluntary" in that it was secured by Keers's deception. Although technically true (charges had not yet been filed against appellant), her answer to appellant's question was at best misleading and at worst deliberately untrue. Her deceptive response was designed to prevent appellant from obtaining the "requisite level of comprehension" of his role in the investigation: namely, that he was the primary suspect in the murder investigation and that, in all probability, charges would be filed against him.

Appellant was kept in the dark by police, and he waived his *Miranda*

rights without a full appreciation of his status in the criminal proceedings. As such, his *Miranda* waiver was not sufficiently "voluntary and knowing" to satisfy constitutional standards. It is obvious that appellant had no intention of talking to police if he thought he was going to be charged with murder. Appellant's remark in the course of the interrogation, "I better get a lawyer now. I better get a lawyer, because you think I did it and I didn't," shows that he thought he could handle the police himself, if he were not being charged, but that he knew he needed counsel if he was facing charges. But he was told that he was not under arrest and that charges were not being filed against him "at this time," and he was led to believe that he was not in trouble for anything other than a parole violation. Keers refused to apprise him of the severity of his predicament, even after he asked whether he was being charged, in order to trick him into continuing to speak with her. Her withholding of critical information thus rendered his *Miranda* waiver involuntary and unknowing. Accordingly, his statement "I want to know if I'm being charged with this, then I think I need a lawyer" (31 RT 6191, 6207-6208, 6218-6219) at the outset of the second interrogation must be deemed a a clear articulation of a desire to speak to counsel at that time.

Appellant's conviction also requires reversal because Keers's questioning exceeded his limited *Miranda* waiver. In *Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, the state introduced into evidence a recording of an interrogation in which the defendant consented to be interviewed but clearly expressed a desire not to be taped. The defendant validly waived his *Miranda* rights but, thirty minutes into the interview, when told that his conversation was going to be taped, he said he did not want to talk on tape and responded to all substantive questions after police started running the tape by answering "no comment." The state secured Arnold's conviction in

part by using the tape. (*Id.* at p. 863.) The Ninth Circuit reversed the conviction, holding that a defendant who agrees to talk to police may selectively invoke his *Miranda* rights to limit the police interrogation:

> Any reasonable application of the law must begin by recognizing that Arnold clearly and unequivocally invoked his *Miranda* rights selectively, with respect to a tape-recorded interrogation. See *Connecticut v. Barrett, supra*, 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 (holding that a suspect can selectively invoke *Miranda* rights as to a written statement, but waive them as to oral interrogation; and explaining that the words of a *Miranda* request will be "understood as ordinary people would understand them"). See also *Michigan v. Mosley*, 423 U.S. 96, 103-04, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975); *Bruni v. Lewis*, 847 F.2d 561, 563 (9th Cir.1988). Any reasonable application of the law must recognize that Arnold's statement precluded the interrogator from turning on the tape recording during the interrogation. See *Miranda*, 384 U.S. at 473-74, 86 S.Ct. 1602 ("If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.")

(*Id.* at pp. 864-865.) The court thus recognized that a defendant may waive his *Miranda* rights yet still place conditions on the interrogation. For instance, a defendant may consent to be interrogated but "selectively invoke" his right to remain silent as to written statements or to tape recording.

In this case, appellant waived his *Miranda* rights by signing the waiver form and talking to police, but he placed a condition on his waiver. At the outset of the second interview, after he had consented to a search of his apartment, he stated "I want to know if I'm being charged with this, then I think I need a lawyer." Shortly thereafter, as the questioning grew more particular, he told Keers that she was "scaring" him. (31 RT 6189-6191, 6207-6208, 6219.) An "ordinary understanding" of appellant's statement requires the conclusion that his consent to waive his rights only existed if he

were not being charged with the crime. There was nothing ambiguous or equivocal in his request. Like the defendant in Arnold, he made a clear expression which can only be understood by an "ordinary person" as invoking the right to counsel. As the Arnold court stated:

> Indeed, it is difficult to imagine how much more clearly a layperson like Arnold could have expressed his desire to remain silent. See *Barrett*, 479 U.S. at 529, 107 S.Ct. 828 (explaining that the words of a request for counsel will be "understood as ordinary people would understand them.") Concluding that Arnold's statement was ambiguous and equivocal would suggest that a suspect never invokes his right to silence unless he intones some sort of talismanic phrase, such as "I invoke my right to silence under the Fifth Amendment."

(*Id.* at p. 866.) Although the right appellant invoked is a different *Miranda* right - the right to counsel rather than silence - its invocation is no less clear. *Connecticut v. Barrett, supra*, 479 U.S. at p. 529 does not require that a defendant be as articulate as a lawyer, only that the words of a request for counsel be capable of being "understood as ordinary people would understand them." Appellant could not have been more clear - if he was the target of police investigation for murder, he wanted the assistance of counsel. Keers's attempt to bypass that invocation by assuring him that he was not being charged shows her understanding of it. Thus, under *Arnold*, appellant's statements were taken in excess of the scope of his *Miranda* waiver.

D. The Admission of the Statements in Question Was Prejudicial and Requires Reversal

Miranda errors are analyzed under the *Chapman* "harmless beyond a reasonable doubt" standard. (*People v. Johnson* (1993) 6 Cal. 4th 1, 32-33; *Chapman v. California, supra*, 386 U.S. at p. 18.) The United States

Supreme Court has explained that *Chapman* requires reversal unless it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403.) "To say that the error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question. . ." (*Id.* at p. 403.)

During the third interrogation session, after appellant actually invoked his *Miranda* rights during the second interrogation session, Keers obtained damaging admissions that he had been at the Casares crime scene and saw her body and left his shoe prints there. (37 RT 7971-7974.) In this largely circumstantial case, this was the only evidence that appellant acknowledged any connection to any of the charged murders. In other words, the only non-circumstantial evidence the jury received which placed appellant at the scene of any of these crimes were his own words. Had they been excluded, the state would have had an entirely circumstantial case. It requires little effort to see how an otherwise circumstantial case is strengthened when the defendant's own admissions connect him to one of the crimes, and that was precisely the case here. (See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166 [statement taken in violation of *Miranda* was the "most compelling evidence of defendant's guilt" introduced at trial].)

On this record, the state cannot seriously contend that introduction of the statements was "unimportant . . . to everything else the jury considered" on the issue of appellant's guilt. (*Yates v. Evatt, supra*, 500 U.S. at pp. 402-403.) The admission of a statement which constitutes the only direct evidence placing appellant at a crime scene cannot be said "beyond a reasonable doubt" to have had no influence on the jury's determination of

guilt for any of the crimes charged. Thus, Chapman requires reversal of appellant's conviction. (*Chapman v. California, supra*, 386 U.S. 18.)

* * * * *

VII.

THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENCE PICTURES OF THE VICTIMS WHEN THEY WERE ALIVE

During the guilt trial, the judge admitted Exhibit 448, a photoboard containing pictures of the 13 murdered prostitutes when they were alive and the date and approximate location in which their respective bodies were found, over appellant's objection. (37 RT 7860-7861, 7981-7985.) Appellant argued that the photographs, at least one of which had been taken five years before the victim's death, had been provided by the victims' families and depicted the victims "under the best of all possible circumstances." Accordingly, they were an inappropriate emotional appeal, particularly when the prosecutor had portrayed the victims throughout the trial as "street and drug using prostitutes." (37 RT 7982.) The prosecutor responded, "it's important for the jury to identify a name with a face, especially in a case like this." (37 RT 7983.) The judge overruled appellant's objection: "I am going to allow it to come in, because [the jurors] can see the similarity between these photographs and those photographs of these women at their worst. . . . [S]omeone put them at their worst. And I think it's appropriate to let [the jurors] see them, these individuals not necessarily at their best, but at least as you and I are seeing them on a daily basis and the jurors in associating or identifying those victims from various parts of our county." (37 RT 7984.)

In *People v. Zapien* (1993) 4 Cal.4th 929, the prosecution offered into evidence a photograph taken of the victim while alive, wearing a fur coat and gold jewelry. On appeal, this Court held that a trial court has discretion to admit photographs of victims while alive if they are relevant,

but warned that such photographs should not be admitted if they have no bearing on any contested issue in the case. In *Zapien*, the victim was engaged in an adulterous relationship with the defendant's brother-in-law, and anger and jealousy on the part of the defendant's sister was asserted as a motivating factor for the murder. The photograph showing the attractive and well-dressed victim was therefore admissible because it had some relevance - her possession of valuable items of personal property provided a motive for robbery. (*Id.* at p. 983; see also *People v. Cooper* (1991) 53 Cal.3d 771, 821 [photographs relevant to show whether one person alone could have killed all four victims, or whether three persons were involved].)

In this case, the sole ground for the purported relevance of the victims' photographs was the importance of identifying "a name with a face, especially in a case like this" (37 RT 7983), so the jurors could "see the similarity between these photographs and those photographs of these women at their worst." (37 RT 7984.) Matching a name with a face and seeing the similarity, if any, between autopsy photographs and photographs taken while the victims were alive simply does not tend to prove or disprove a disputed fact. Unlike *Zapien* and *Cooper*, photographs of the victims taken while they were alive did not tend to show a motive for the alleged crimes. Nor could they have had any bearing on a contested issue because appellant contested little if any of the prosecutor's guilt case.

Instead, photographs of the victims while they were alive shown to the jury for the first time immediately before it retired to deliberate appellant's guilt, were an inappropriate emotional appeal to the jury by a prosecutor who had depicted the victims throughout the trial as "street and drug using prostitutes" (37 RT 7982) and now sought to portray them in a different light. The prosecutor argued that it was important that the jurors

identify "a name with a face, especially in a case like this." (37 RT 7983.) The judge believed the jurors should "see the similarity between these photographs and those photographs of these women at their worst." (37 RT 7984.) But the prosecutor never tried to connect any of the victims' names with their faces. He did not ask any questions about the exhibit and did not mention it in his closing arguments at either the guilt or penalty trials. Instead, the photographs served only to arouse the jury's passion by portraying the victims in a different, more sympathetic light than the prosecutor had depicted them throughout the trial, as appellant feared. The judge should have excluded the exhibit. His failure to do so was an abuse of discretion.

Sending the jury off to deliberate guilt on the heels of this improper appeal to emotion made it unlikely that it could retain its impartiality and rationally consider the evidence which had been presented. Had the photographs not been admitted, it is reasonably probable that the jury would have reached a more favorable result. (*People v. Watson* (1956) 46 Cal.2d 818, 837; see *People v. Taylor* (1990) 52 Cal.3d 719, 731; *People v. Anderson* (1990) 52 Cal.3d 453, 475; *People v. Frank* (1990) 51 Cal.3d 718, 734; *People v. Zapien*, supra, 4 Cal.4th at p. 983.) Even if the error, standing alone, does not establish grounds for reversal, reversal is required when the cumulative effect of the related error of the admission of excessive and prejudicial victim impact evidence is considered. This improper evidence rendered appellant's trial fundamentally unfair and the death sentence unreliable and is federal constitutional error. The error requires reversal of appellant's conviction.

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VIII.

THE ADMISSION OF PREJUDICIAL AND INFLAMMATORY VICTIM IMPACT EVIDENCE IN THIS CASE DEPRIVED APPELLANT OF DUE PROCESS, A FAIR TRIAL AND A RELIABLE PENALTY DETERMINATION

A. Introduction

Victim impact evidence is admissible during the penalty phase of a capital trial. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827 (*Payne*); *People v. Edwards* (1991) 54 Cal.3d 787, 833 (*Edwards*).) Such evidence, however, may be "so unduly prejudicial that it renders the trial fundamentally unfair" in violation of a defendant's rights under the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) Emotional evidence and argument containing "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed." (*People v. Edwards, supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 864.) Trial courts are expected to weigh the probative nature of the victim impact evidence against its prejudicial effect and strike an appropriate balance between concerns about victim redress and a defendant's right to due process. Such evidence may be introduced only to offer a "quick glimpse" of the victim's life in order to show his or her uniqueness as a human. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822; *People v. Edwards, supra*, 54 Cal.3d at p. 836; Cal. Evid. Code, § 352.)

The extent and nature of the victim impact evidence in this case went far beyond the "quick glimpse" the *Payne* and *Edwards* courts found constitutionally acceptable. The trial judge abused his discretion by arbitrarily permitting three impact witnesses per victim and by failing to

curtail prejudicial testimony despite defense counsel's continued objections. These errors deprived appellant of his right to due process, a fair trial and a reliable penalty determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments. Federal constitutional error requires reversal unless the state proves that the error is harmless beyond a reasonable doubt. *(Chapman v. California* (1967) 386 U.S. 18, 24.) California's Constitution requires reversal of a death judgment if there is reasonable possibility that the error affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 446-448.) It cannot reasonably be said that the extent and nature of the victim impact testimony presented in this case left appellant's substantial rights unaffected. The error requires reversal of the death judgment under both the state and federal prejudice standards.

B. Factual Summary

Prior to the penalty phase, appellant moved to exclude victim impact testimony. He argued that the testimony would be so unduly prejudicial it would render the penalty phase of the trial fundamentally unfair and thus deny him due process of law. He requested that an Evidence Code § 402/352 hearing be held if the court did not exclude all of the victim impact evidence. Such a hearing could at least limit the testimony and ensure that the jury's decision would be an individualized determination based on reason rather than emotion. (4 CT 1050-1059.) The judge denied the motion and the request to conduct a hearing. (4 CT 1084.) He promised, though, to "wield the sword" to pare down the evidence so that only an "appropriate and equitable" amount of victim impact evidence would be admitted. (5 RT 1028.)

As the penalty phase approached and confirmation of a finite number of victim impact witnesses was requested, the prosecutor presented a list of

35-40 individuals from over a dozen families. (42 RT 9129-9130.) The judge said he "couldn't envision a situation where more than three [witnesses] as to a victim would be necessary" and allowed the prosecutor to call that number to the stand. (42 RT 9130, 9267.) Appellant asked that limitations be placed on the "kind of testimony" permitted and that such evidence be narrowly focused on the actual impact of his conduct to ensure that due process was not violated. The judge responded that he intended to "keep the proceedings under control." (42 RT 9267-9268.)

At the penalty trial, the prosecutor's victim impact witnesses provided the following testimony.

1. Kimberly Lyttle

Kimberly Lyttle was 38 years old when she was murdered. The third of four children, she lived as a child with her family in Buena Park. Her father, Sam Lyttle, loved her like he did all his children, but "Kimmy" was special. She had red hair and freckles, and she was the smartest of the kids and did the best at school. Sam saw more potential in her than in the others. She began using marijuana in high school, and she got pregnant and had a daughter, Sarah, when she was 16. The pregnancy devastated Sam, who believed she was too young, but he helped her as much as he could to be a mother. Kimberly lived with Sarah's father, John Steen, in an apartment in Anaheim. They never got married and were together about two years, maybe longer. Sam knew they smoked marijuana once in a while, but he tried not to get too involved in her life because she was doing well with Steen and they were happy. Steen was a great father, always making sure that Sarah never wanted for anything. Even after he and Kimberly split up, he was always over visiting Sarah and, with Sam's consent, he has taken care of her since her mother's death. Sarah is now about 16 years old and knows what

happened to her mother. Sam had visited her about two years earlier. She sent him a letter six or seven months before he testified saying she was having a difficult time knowing this case was going on, and that she was trying to cope. (43 RT 9364-9366, 9372-9377.)

As the years progressed, Sam became aware that Kimberly was using illegal narcotics. He tried to talk to her about it many times, and he helped her out financially quite often. She always promised she was going to change, but he thought it was just to satisfy him. He last saw her about seven months before she was murdered. She called and told him where she was living in Lake Elsinore and invited him to come see her. He drove down on a Sunday morning and told the girl who came to the door he would like to speak with his daughter. She replied, "I'm Kim." He did not recognize her because she had lost so much weight and the drugs made her look much older. They spent about four hours visiting. He knew she had been living a difficult lifestyle, but Sarah seemed quite happy and he was content with that. He learned of Kimberly's death when Steen called and told his wife. Sam thought at first she had overdosed on drugs. He could not get the memory of the photographs of his daughter, stuffed under a tree, out of his mind. He arranged for her burial in Westminster Cemetery, about the same place her mother, who died in 1969, is buried. Sam was advised against seeing his daughter, but he had the funeral director open the casket. Kimberly was inside a heavy-duty plastic bag. He was going to open the bag but did not have the heart. Instead, he just felt her arms and her legs and where her head would be inside the bag, then had the casket closed. They placed some little photographs inside the casket with her so she would not be alone. (43 RT 9366-9371, 9375-9376.)

2. Tina Leal

Tina Leal, the youngest of eight children, was Jose Leal's sister. She had a good personality. Jose was closer to her than to any of his other brothers and sisters. Around 1985, she lived right behind him in Perris and their children played together all the time. He learned that she was using heroin when she was 21 or 22. He tried to help her out as much as he could. In 1987 she told him she did not like that life anymore and wanted to get off drugs. He called some rehabilitation centers trying to get her in. He and his wife also once transported her to a methadone clinic on a daily basis. Jose was living in Walla Walla, Washington, in 1989. He talked to Tina every time he called his mother. He last saw her around July 1989 in Perris while on a vacation. Tina was the first one to greet them when they pulled up. She looked good. She pulled his wife off to the side and told her she was getting off drugs. She wanted Jose to be proud of her because she did not want any money and she was really trying hard to stay off drugs. Jose learned that she had been killed when a sister called with the news. His father did not have the funds for a funeral. Jose and his family raised the money to have her buried in Perris Cemetery, next to her grandmother. He believed her children went to live with their father's parents in Mexico after her death, Tina's death affected him a lot. The way she was killed was really hard on him and the whole family. It really affected his mother, who was in court but unable to testify. He could still see the hurt in her eyes every time they talked about it. She was trying to block it off, but Jose knew it still hurt her and that she wanted this to be over. His father had cancer, and he just kind of gave up when Tina was killed. Tina was particularly fond of Jose's son Chris, and her death affected him, too. Jose drank a lot more than he should have for several years after Tina's death, and his drinking affected his

family. He is just glad to finally find out who killed Tina. He is trying to cope with it, trying to continue on with life. (44 RT 9566-9575.)

3. Darla Ferguson

Darla Ferguson was the mother of Mary Bucher's granddaughter, eleven-year-old Jennifer, who was present during her grandmother's testimony. Ferguson was 15 when her mother moved away from Riverside. Ferguson refused to go with her because she was in love with Bucher's son. She gave birth to Jennifer when she was 17, but never married Bucher's son. Bucher was in contact with her about 80 percent of the time during the year or two before her death. Ferguson was living with a boyfriend at the time of her death. She left Jennifer with Bucher quite often. After her death, Bucher took custody of and raised Jennifer. She initially told Jennifer that her mother was ill and went to heaven to be with God. But, as time went on and appellant's arrest was on television quite a bit, she told Jennifer the truth, that a bad man had killed her mom. Jennifer was filled with anger and has been scared ever since that this bad man is going to kill her, too. She received counseling for two years. She was doing all right in school and had adjusted very well, but Bucher saw a great deal of sadness and anger in her, and she talked to her all the time.

Bucher knew that Ferguson used drugs, but did not know she was a prostitute. Her descent into drugs was gradual. Bucher had many conversations with her about it and tried to make her aware of the dangers and persuade her to quit. Ferguson tried to quit quite a few times and once got on methadone, but something always happened when they went for help; they were told "you have to wait," or "there's no room," or Ferguson could not find a ride. Bucher once took her to the drug team in Riverside and was told it would be a three-week wait. When they got outside, Ferguson said "I

feel better already." She was so proud that she had taken the first step. Bucher last saw Ferguson on Christmas eve 1989. She learned that Ferguson had been killed when Detective Creed came to her house. She had read about the death of an unidentified girl in the paper that morning, She looked at the newspaper sitting on the table, then turned to him and said, "Tell me that's not her." There was no funeral service because Ferguson's mother could not afford it. Instead, they all pitched in to help pay to have Ferguson cremated. Bucher was not allowed to touch Ferguson before she was cremated, but she saw her body. She was wrapped in a sheet, like a mummy, with just her face and hair exposed. Ferguson's mother did not even go in to see her daughter one last time. According to Bucher, she refuses to believe this has happened. (43 RT 9378-9386.)

4. Carol Miller

Carol Miller was Maria Harrison's sister. Carol was a very caring person. She had a very gentle spirit and loved to write poems. Maria read a poem Miller wrote in 1989:

I was moving right along,
singing my song,
had it all, it was mine,
just about to align.
Looking for my friend,
his heart I'm going to win.
I was happy and carefree
until I looked up and who did I see?
Oh, no, it's you.
So I stumble, stumbled and fell,
went through nine kinds of hell.
But Satan my soul's just not for sale,
because you see he shined on me.
Had this tiger by the tail
while you were pushing me to fail.
Satan, Satan, we all know you fell,

but ha, I got a different story to tell.
When things were looking pretty down,
he was always around.
Even when I was sitting and a grinning,
doing whatever I could scrounge,
until I just figured out,
Jesus is the only true love around.

Carol had a son, 23-year-old Shannon Harrison. Shannon has lived with Maria since he was five years old. He has a three-year-old son. Carol never had an opportunity to see her grandson and experience the joy of being a grandmother. Maria and Carol kept in touch after they became adults, particularly towards the end of Carol's life. They got together quite often for birthdays and holidays. She was not aware that Carol was practically homeless just before her death. For quite some time Carol had a place of her own. She knew that Carol used drugs. According to Maria, she copped out on life and escaped into drugs in December 1973 when their older sister had been murdered. Carol could not deal with her death and had been on drugs for 16 or 17 years. Maria talked to her about it and tried to help her kick the habit Before her murder, Carol was trying to get off of drugs. She was going to narcotics anonymous and to church. She wanted to get her life straight for her son and herself. Carol always called when she got arrested or went to jail. It caused a lot of heartache for their mother, but she still loved Carol. Maria learned of Carol's death when her aunt called and told her an officer had been showing pictures in the Rubidoux area. She knew somehow that her sister had been killed when she called to talk to the officer. She asked him not to call her mother; she did that. Carol's death affected Maria in many ways. She kept getting sick with respiratory infections, and she is under medical care because she suffers from major depression,. She misses talking with Carol. She wishes she could be with

her son and grandson. They need her. Shannon could not come to court and testify. He told Maria he would be there in spirit, but he just could not do it. He is still very upset. His mother's death really affected him. He got really close to her the last couple of years before she died. (43 RT 9464-9472.)

5. Susan Sternfeld

Susan Sternfeld was Carol Carillo's sister. Susan was the second youngest child in the family, 17 years younger than Carillo. She was sweet and thoughtful. She always remembered everyone's birthday, particularly her nieces' and nephews', and she always managed to send a Christmas card or call. She was full of love. The thing Carillo remembered about her best is that she always tried to please everyone else. She always tried to do something special for each person so they would know she loved them. She bought Carillo's daughter her first Bible and she used to read it with her. She loved life and people and she would always give anything she had to try to help them, particularly if they were in trouble. Carillo thought that sometimes drew her into the wrong crowd.

Carillo became aware that Susan was involved with drugs in 1983 or 1984. Susan never came around Carillo's children when she was using drugs because she loved them and did not want to be a bad influence. The family tried to communicate with her about what she was doing to herself and everyone around her, and efforts were made to get help, but beds were not available. Her mother went from agency to agency with her to find a place and there would not be a bed or they did not have the money. By the time a place became available, Susan would be arrested again. Carillo's mother told her stories about how Susan would go through withdrawals and the pain she would be in and how she would cry and shake and shiver. In the end she was in a great deal of pain all the time. She was on methadone,

and she cried from the pain of withdrawal.

Susan tried to get out of her situation many, many times because she loved her children and she wanted more than anything to be with them. She desperately wanted to get off drugs and to straighten herself out for her children, Mikey and Tony. Susan's mother, Hester, now cares for Mikey, as she always did when Susan ended up in jail. She clings to him and is scared to let him out of her sight. He looks so much like Susan, her baby girl who had gone through so much pain and suffering. She is holding onto Susan by holding onto him, and just cannot let go of him. The family loves and cares for him and gives him hugs and kisses and lets him know there are people who care for him. If he needs anything, he knows they are there for him. Mikey was at Carillo's daughter's wedding, dressed up in a suit, and for a minute he forgot about everything. He was really happy and he told Carillo and her sister, "Don't worry, if you get old I'm going to be there to take care of you," something his mom would have said. When he watches television and there happens to be a program with a mother and child, you can see in his eyes that he wonders what it would be like. Carillo showed the jury a drawing Mikey made three years after Susan's death. He told Carillo it was Jesus, and he was sad because he didn't have his mommy. He said it was God and those were God's tears. He knows about Jesus because Susan read the same Bible stories to him that Carillo used to read to her when she was little. Carillo also displayed another of Mikey's drawings, one he said was a picture of his mommy. She was in heaven and she was an angel.

During the year or two before her death, Susan was in and out of custody. Every time she went to jail, she was involved with the preachers and Bible study and visiting other jails and prisons to talk about the Bible. She called when she got picked up or was in jail. She always asked about

her dad, who she wanted to go see as soon she got better and got her son. She said in a letter to Carillo that all she thinks about is going home and cleaning house and washing dishes, being a mommy to her sons. That was the thing that most stuck out. She just wanted to be home and be a regular person again. She told Carillo that every time she called. The conversation was always about how and what Mikey was doing.

At the time of Susan's death, Carillo lived in Long Beach and they did not have as much contact as she would have liked. She last talked to Susan when she called after getting out of jail to let Carillo know she would come to see her. She asked if Carillo would take her to see her dad. Carillo learned of her death about a month and a half later, when she called to tell her mother she was bringing Christmas gifts. Her brother told her they had just identified Susan's body. Carillo broke down. Her husband drove her to her mother's house, and she stayed there for a couple of days. They cancelled Christmas that year.

Susan's death affected Carillo. She had so much anger and hate at first that everyone at work noticed. She had always been friendly and helpful, but she kind of grew cold for a while. She is only now regaining some trust in and liking people. She cannot watch movies or television, especially violent shows, because she sees her sister in that situation. The pain is always there; it doesn't get any easier. Susan is always there no matter what she does, and every little thing reminds Carillo of her. Every Christmas she has ornaments that Susan made for her. Susan always cleaned the house from top to bottom when she came to visit. She always found flowers and put them in a vase on the table. Carillo now sees Susan whenever she goes to the park or sees wild flowers. She keeps a picture Susan sent her from prison over her desk at work. The picture is of Dennis

the Menace in his mother's arms, pointing to heaven and saying "And I love you all the way up to heaven and way past God." Carillo's daughter looks a lot like Susan. She has long dark hair like Susan did, and she is full of life and very friendly like her. Many things she does and the way she does them remind Carillo of Susan. Carillo is always scared for her, always checking up on her; "where are you going . . . Make sure your car is locked." Mikey, too, looks a lot like his mom and he reminds Carillo a lot of her.

Even though Susan had problems and was addicted to drugs, she was a caring, loving person who was always trying to make everyone else laugh. Her family misses her a lot. They saw all the pain she went through and how she had struggled to try to pull herself back together. Knowing that she also suffered in death caused them to cry uncontrollably. Susan was particularly close to her brother, Chris. They were closer in age and grew up together. Chris always looked out for her and tried to help her out of her problems. She was always there for him if he needed moral support, and she always pushed him to go to school. According to Carillo, Chris was just destroyed by Susan's death. He kind of just withdrew into a shell and they could not reach him for months. He swore never to have children because he does not want them to be brought up under these circumstances. The funeral affected him tremendously. He took off the Levi jacket he always wore and put it on Susan because he wanted her to have something of his. The jacket meant a lot to him. He had saved and saved and saved to buy it. He eventually had to be pulled away from the casket. He just could not leave her. He would sit at the cemetery for days and just cry and do his homework there. If his mother needed him, she knew she would be able to find him at Susan's grave. Sometimes he went there before school and then again after school. They gave him money for school, but he took the money and bought flowers

for his sister. (43 RT 9399-9413.)

Sternfelds's mother, Hester, recalled that Susan was the fifth of six children, a kind, sweet, loving girl who liked to do almost everything. She was like a light when she walked into a room, always just a ball of energy. Susan loved her family very dearly. She often referred to Hester as her best friend, and she told her everything. Hester knew that Susan would call every Mother's Day, even if nobody else remembered. Wen she was 20 years old, Susan had a son named Michael. Hester took care of him on and off for many years when Susan was in custody, and she is raising the now eleven-year-old boy after Susan's death. Michael was not told about the problems which resulted in his mother's incarceration. Hester took him to visit her, but told him it was where she worked. He knows now because he is 11 and Hester does not lie to him. Michael's father does not visit him. (43 RT 9415-9419, 9421-9422.)

Hester was aware that Susan was involved with drugs. She tried to help her, but could not find a way to do so. She tried to enroll Susan in all the available drug programs. Most of the free programs had such long waiting lists that it was impossible to get in. She left names and telephone numbers. She took Susan to different hospitals to see if she could afford it, but found that she could not. Hester once sat with Susan for about 3 days trying to help her kick the drugs. Susan had severe pain in her stomach and went through convulsions. Hester stayed with her day and night to try and help her. She was very sick but got over it and dried out for a little while, but something threw her off and she started using again. Hester also knew that Susan was involved in prostitution, and she was trying to help her with that part of her life, too. According to Hester, Susan was on the streets because she had to have money to support her drug habit. She was not proud

of herself and did not like prostituting herself, but the drugs were so powerful she could not stop. She would rather be home taking care of her son, but she was so addicted she had to use the drugs in order to feel normal. She never wanted Hester to meet any of the people she knew who were involved in drugs. Hester followed Susan on the streets several times and told her to come home. She talked with her about the fact that prostitutes were getting killed in Riverside. She showed her the newspapers and said, "Please, honey, you have to be careful." Susan pinched her on the cheeks, like she always did, and said, "Mama, I'm a big girl. I can take care of myself. I'll be careful." Susan tucked her in at night with a kiss on the cheek, saying "You worry too much, mama." (43 RT 9416-9421.)

Hester last saw Susan when she dropped her children off at Hester's house one morning. She was a little scared because she had to clear up her last bit of business with the courts that day. She said she was supposed to have been there the day before but had messed up her calendar and was coming in late, so she was not sure what was going to happen. She was afraid she might be in trouble. She was always scared when she had to do anything like that. She called Hester three or four times that day. Hester's life has been totally different since Susan's murder. Susan always gave her a special Christmas gift, a bottle of Jean Nate perfume. She has not used it since Susan's death. Susan's favorite drink was iced tea. To this day, Hester remembers Susan when she makes iced tea and smells it brewing, and she enjoys the tea for both of them. Hester's son, Christopher, was planning his 21st birthday with Susan when she died. Now, he goes to the cemetery at least twice a week. When he was in college, he sat by her grave and did his homework. He could not even come to see appellant in the courtroom. Appellant had no right to take Susan from her. Hester still sees her face. (43

RT 9417-9420.)

6. Kathy Puckett

Kathy Puckett was Sylvia Griggs's sister. The third of four daughters, Kathy was around kindergarten age when the family came to California. They lived in Anaheim when she was in high school. Kathy always rooted for the underdog and always raged against injustices and inequities. She lived with Sylvia during the last year of her life. She had three children, a son and two teenage daughters, whom she loved. Less than a month before she died, she told Sylvia that raising the girls was the only real reason she had to live. She cared about them very much. And, of course, they cared about her. All Kathy ever wanted were simple things, her family, friends, good food, and no drugs. She had been introduced to drugs in her late teens and started using heroin when she was 19 or 20. Through the years Sylvia attempted to help her with her drug addiction. There were lots of successes, but none were permanent. Kathy described heroin to Sylvia as taking away any hurt, and she hated it. She did not want to be addicted. In Sylvia' opinion, she did not have to hurt. She was very, very bright and understood a lot more than Sylvia or most people around her did. Kathy left Sylvia's house on a Friday night on a holiday weekend. She was going to leave early the next morning to go to Whittier to watch her daughters play soccer. She did not come back. Sylvia's daughter-in-law saw an article in the Sunday newspaper about a body being found in Lake Elsinore and was very worried. Sylvia tried to reassure her that it was not Kathy, but she was so upset that Sylvia began calling the sheriff's department to make sure it was not her. She was not able to get through because it was a holiday. She talked to Detective Creed on the following Tuesday. He was kind of evasive and said he wanted to come and talk.

When he came to the house, she knew from the look on his face that it was Kathy. The whole family gathered together to tell Kathy's daughters their mother was dead. Sylvia is now raising the teenage girls. (43 RT 9387-9394.)

7. Kelly Hammond

Kelly Hammond was one of David Hammond's three sisters. The family lived in Perris until David was in about the seventh grade, then moved to the Redding area where they stayed for four or five years before moving to Fontana. Kelly lived with her parents off and on during the two years before she was murdered. She had three children: Vivian, 14; Sean, 10; and Margaret Sue, 8. Her parents and Sean's father took care of the children, but she would come by and see them. Her father is now caring for the girls and her aunt is taking care of Sean. Kelly was a great person when she was at home. She was better to her mom and had more respect for her than her two sisters did. She did anything her mom needed. She even gave her money if she needed it. David knew that Kelly used drugs. She never used drugs at home. Her problems with substance abuse were difficult for his parents to accept. He did everything he could as a brother to help with her problems without interfering too much in her life, but he never talked to her about it. He knew she got arrested from time to time and went to jail, and he knew she had to go to prison. He did not visit her there. He learned she had been murdered when he came home from work and saw two detectives on the front porch talking to his father. One of them told him she had been murdered. There was no funeral service because his father did not want her children being confronted by the press at school. Kelly's death affected David a lot. He misses her and he often wishes she were here. She could help care for their mother, who became ill just before Kelly was killed.

Her heart stopped and she stopped breathing and, as a result, her brain was damaged. She really does not have a good memory now and she thinks in the past. She does not even know Kelly is dead. Telling her would probably worsen her condition. She asks where Kelly is and they tell her she is in the Riverside area and she is all right. They cannot even cry or show emotion because she would ask why they were crying. His father was not willing to come to court to testify. He told David he could not bear it. He just wants to remember Kelly as she was. Kelly's sister, Laurie, was raped a year after Kelly's murder. She always worries about Kelly's children. The two girls ask about where their mother is. The oldest is 14 and she needs her mother. (43 RT 9501-9512.)

8. Catherine McDonald

Catherine McDonald was sixteen-year-old Charlia Howard's mother. Charlia has two brothers and one sister. The last time she saw her mother, she and her brother, Charleston, were sitting watching television around 7:00 or 8:00 p.m. Her mother said she was going to go to the store and would be right back. She never returned. Charlia awoke the next morning and got Charleston ready, and they went to school. The manager let her into the apartment after school. Charleston wanted to call their grandmother but Charlia said, "No, don't call them. You just sit here. She's going to be back." The police came around 7:00 or 8:00 that night and told them their mother had been killed. Charlia has been living with her grandmother in Los Angeles ever since. She misses her mother and thinks about her all the time. (43 RT 9475-9481.)

Catherine was one of Ida Simmons' six sisters. They grew up in the Watts area of Los Angeles. Their mother still lives there. Catherine's nickname was "Nett." She was a pretty independent woman. Catherine was

close to her daughter, Charlia. Her son, Charleston, spent a lot of time with Ida and was closer to her. Ida's mother has him now and he is doing fine. Her son, Charles, lived initially with his paternal grandmother. After she died, he chose to live with his aunt in Los Angeles. Ida tried to help Catherine by getting her to change. She tried to get her to move out of the Los Angeles area and come to Riverside because she thought it would be a better, safer place to live. She told her she should get herself together so she could raise her kids. Catherine said she was doing what she wanted to do, living her life the way she wanted to live it, and she would give Ida a call when she got ready to change. She called in 1991 and told Ida she wanted to change her lifestyle and get herself together. Ida welcomed her into her home, and Catherine and her children moved to Riverside and lived with her for about a month and a half before getting their own apartment.

The apartment was in what seemed like a very nice neighborhood, but the prostitutes and the drugs were just blocks away. Catherine did not look like she was using drugs or going out prostituting at night. Right after Payseur's body was found by the bowling alley, Ida talked with her about the fact that prostitutes were getting killed in Riverside. Catherine told her it was like having a second mother and said, "Oh, you so old-fashioned. You don't know what you're talking about. He's only killed white women. Anyway I'm not no prostitute anyway." Ida said, "Don't be his first black victim."

Ida last saw Catherine the Sunday before she was killed. She learned of her death when one of her sisters called with the news. Ida did not believe it and thought she was joking. Ida attended Catherine's funeral and observed her in the casket. She did not look like appellant had terrorized her and that she died in shock. It looked like maybe they started to fight and she

died real quick. At the mortuary they had to make sure her makeup and clothes were fixed, and they were joking that one of her breasts was not very big. Ida asked the mortician for some tissue and they fixed it to look like the other one. About a week later, she was shocked when she read in the newspaper that some of the victims' breasts had been cut off.

Catherine's death affected Ida. She had come to Riverside to change her lifestyle; Ida never thought she would end up dying. She was a sweet person who never took anything from anyone. Ida does not understand why she was killed the way she was. Her violent murder has had a bigger impact on her than if she had died from a drug overdose. It is really hard for their mother. She has a heart condition and her sister died in a car accident. Ida does not want her in the hospital again. It hurts Ida, but she is a little bit stronger than their mother and can handle it better. (43 RT 9482-9493.)

Catherine was also Dorothy McDonald's sister. Of all her sisters, Dorothy was probably closest to Catherine. They were like twins. They dressed alike and they were always together. They knew things about each other that no one else knew. Dorothy usually talked to her every day. After Catherine moved to Riverside, Dorothy visited for about two weeks. The last time she saw her was the day she left, August 7th. Dorothy was at home when she learned of Catherine's death. Her uncle came to the house and told her she had been killed. Dorothy could do nothing but stand there. Catherine's death affected her. She is still trying to get over it. She just tries to deal with it day by day. She just misses her not being here. Catherine was good to everybody. She would not do anything to make appellant want to kill her or torture her like he did. (43 RT 9495-9497.)

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9. Delliah Zamora

Delliah Zamora was Anna Zamora's older sister. Growing up with Delliah was great. She was like a mother. She took Anna and her younger sister everywhere. They went to the park and the river. After she got married, Delliah had them over for weekends and they would stay longer in the summer. Delliah was always around and doing things with them. It was fun. Later on, Anna lived with her and they worked together, although on different shifts. She was supportive of Anna as she grew up and Anna learned a lot from her. She treated Anna with respect, not like a bratty little sister who wanted to tag along. Anna was only 18 and Delliah was teaching her how to cook and be independent. They did a lot of stuff together, like shopping and taking care of the kids and cooking. Delliah cross-stitched and crocheted. Anna told her she was going to be getting an apartment and she wanted Delliah to make her some doilies. She asked her to make whatever she thought would look good. One of the last times Anna talked to her, she was going to teach Anna how to crochet. It never happened. Anna always told Delliah she wanted to be a police officer or a correctional officer or something like that, but she believed those jobs were for men who are bigger and stronger and that she probably could not do it. Delliah told her to never let anything stand in her way, that she could do anything she set her mind to.

Delliah was very affectionate and was more apt to show her feelings than most brothers and sisters. No matter how long it had been since she saw you, Delliah would run up smiling, hugging and kissing you and saying I missed you. Holidays were a special time in the Zamora family. They always got together, and it was crazy in their house with seven brothers and sisters and their spouses, all their children, and 20 grandchildren. Delliah would participate in these family get-togethers. Their father passed out the

presents. After many hours, he would sit down and she would take over calling out the names.

Anna was aware that Delliah had a drug problem and knew that she had gone to jail and to prison. It caused a lot of heartache for her family. Dellian was tired of that life and wanted a more settled life like their parents'. Delliah's husband took custody of her children when Delliah was in custody, but Delliah always got them back. She loved her children, especially her babies who were her life. She had a scrapbook of each of her children containing their awards and pictures of them getting awards or just attending school. They always wrote love notes to her because they loved her a lot. Delliah showed them a lot of love. Anna was not aware that Delliah's children were taken away from her in 1986 for child abuse and neglect.

Anna learned that Delliah had been murdered when her mother called and asked if she was coming straight home after work. Anna said she was going to the mall. Her mother said, "Well, just come home," and gave her the news when she got there. Anna cannot forget that day, the worst day of her life. They could not celebrate anything during the first year. It was awful. They just sat there. They did what they could for the kids, but the holidays are for everybody to be together and with Delliah missing it was not the same. They pretty much just went to the cemetery and stayed there. Anna had to go to Delliah's apartment and clean out her things. It was unreal, like she was there but she was not. She thinks occasionally that she sees Delliah when she is driving down the street or walking around. Things just are not the same. Anna knows she still has her parents and her brothers and sisters, but there is a void, an emptiness. Some days she is okay and some days it is like she is in a whirlwind with everything going by and she is

just standing still. (43 RT 9424-9433.)

Delliah was Jose Zamora, Jr.'s sister. They were very close growing up and did a lot of things together. Jose has four children and Delliah was very close to them. Every time Delliah moved, Jose helped her. They had a lot of fun. His kids always helped, too. Jose talked to Delliah while she was having problems with substance abuse. He did not know a lot of the problem. Before Delliah was killed, the family would celebrate holidays either at his mother's house or at his house. They all got together and did the normal things all families do on holidays. Since Delliah's murder, the family celebrates holidays at the cemetery. Going on five years, the first question his children ask him on a holiday is, "What time are we going to the cemetery to take flowers to my aunt Del?" After that it is not easy to celebrate anything. They are happy for the gifts they get and they try to celebrate, but he can see in their faces that something is missing. There was a glow and a sunshine on their faces every time Delliah was around. He has not seen that for nearly five years. They are happy, but the glow is gone. They do not go trick-or-treating on Halloween anymore. They constantly ask about how Delliah died and what happened to her. For four years they have asked every day. They always remember the last spot they saw her and stopped and talked to her, the USA Gas Station in the Eastside. Every time they go by it they say, "Dad, remember, this is where we last spoke to Aunt Del?" They remember when they went to parks or Delliah came to the house and something funny happened. When they go to the cemetery, his seven-year-old son, Joshua, tells him, "Dad, Aunt Dell is just sleeping. She's resting because she's real tired." He tells Jose every day, "You know, Dad, if you pray hard enough every day, she'll come back alive." That is what Joshua has been doing for three years, praying real hard every day. His 11-

year-old daughter, Yvonne, had to prepare and present a report at school. All her classmates told about family vacations and parties. Yvonne prepared a 10-page report entitled "The Beginning to the End" about her Aunt Delliah's life. While everyone was reading about how much fun they had on their vacations, his daughter read:

> Then, my aunt Dell had moved to Eastside with her kids and my father plays softball on the Eastside. They were always at the park. One day the whole family was looking for my aunt Dell. We never found her for two days. We went to my father's baseball game at night. We came back. My grandma called our house and said to go to her house that it is very important. My dad called us back and said my aunt Dell had got murdered. She was found. They didn't find the killer. We went to her funeral and came back. Everyone was crying. Months later they found the killer.

Jose was stunned when Yvonne showed it to him. He broke down and had to go to his room.

Jose coaches softball, hardball, and basketball and does a lot with the youth in the community. He is known by kids all over because of the time he gives to sports and activities. During the four years since Delliah's death, he has gone from being all that to being a man who "sat in that chair in this courtroom and wondered how I can actually destroy somebody else." After taking a good look at himself, though, he realized that is "not me," and that it was not worth it because the only ones destroyed, again, would be his children. They were the ones who really suffered because, for the first year and a half, he was no longer the dad they knew. He was not the dad who understood and who helped them with their homework. He was a different man who just did not care anymore. He did not care if they played sports or even went to practices. He regrets that he can never take back how he acted during that time. He has been able to look inside and evaluate himself and

has stopped some of the negative things he felt he was imparting to his children. He is back doing what he did before Delliah was murdered. He has attempted to use his understanding of himself and what he has gone through to impart knowledge to his children. They have learned from the lessons he has learned that there are many things, such as someone taking a life, they do not understand. One thing no one can ever take away are the memories Delliah left. He will have those until the day he dies and no one can take them from him. (RT 9449-9450, 9456-9462.)

Delliah was Dina Zamora's daughter, her oldest child. She was born in Orange County, but spent her entire life in Riverside. Dina was 16 when Delliah was born, and she was more like a little sister than a daughter. They had a real good relationship. There was nothing special or unique or different about Delliah. All her children have very nice personalities. They like to joke and laugh a lot and do things together. Holidays are a big event in the family and Delliah and her kids always came over to celebrate. They went to Delliah's house a couple of times when she had her family and her home. Delliah had moved into her own apartment in order to qualify for welfare. Dina did not like the area, and she begged Delliah not to get the apartment. Delliah said, "Mom, I have to, because if I don't get it, I don't have an address. . . . I'll only be here a few months. I promise. Then I'll move into another home." That satisfied Dina, but she still was not happy about Delliah living in the apartment. Dina and her husband went to check on her and make sure everything was okay almost every other day. While Delliah was struggling, Dina took her to appointments and made sure her children had food. She would make dinner and put the food in bowls and take it to them. They would go to restaurants on the Eastside for breakfast or lunch if Dina had money.

Dina last saw Deliah about two days before she was killed. She was walking down University Avenue all by herself, wearing brown corduroy pants, a brown, silk-like shirt that Dina had given her, and sandals. Dina and her husband were just passing by. They did not want her to think they were spying on her. Her husband said, "Oh, well, she's fine. So let's keep going." They just wanted to know she was okay because they had heard there was a serial killer and were so scared. They were going to warn her and check that she was alive and okay and tell her "Please don't come out at night. Don't go anywhere." She learned that Deliah had been murdered when a loud knock on the door alarmed her. Her husband went to the door and Dina heard strange voices. She went to the hallway and saw two men. One of them asked if she was Mrs. Zamora. They asked to come in and sit down. She knew something was wrong because of the look on their faces. She thought maybe one of her boys had been arrested. They told her, "we found your daughter on the freeway." Dina said, "I just saw her two days ago." She did not want to believe she was dead. One of the detectives showed her a picture and asked if it was Delliah. It was. Dina did not say anything. She could not even cry. She was just stunned. They probably thought she was real cold, but she was shocked by what they were telling her. She stayed like that. She had to wait nine days before she could even see Delliah, and she was beside herself. She did not know what to do. She could not even make arrangements for the funeral. When she finally was able to see Delliah, she did not look like her daughter at all. She looked like a mummy in a museum. She was horrible. They could not even close her eyes or her mouth. Delliah had long fingernails. They were all cut off. Dina knew she put up a fight because they were full of blood.

There has been a void in Dina's life since Delliah's death. Dina

misses her very much. Her death shocked Dina very much and has hurt her very deeply. Through her whole funeral, Dina could not even cry. She stood in front of the casket for the longest time just looking and staring, trying to remember how Delliah was before. She thought, "This is not my daughter that's in there. Doesn't even look like her." She was in shock for months and months. Sometimes she just sits by herself and cries. The tears also come on the way home from work when she passes through the cemetery.

Delliah's death has also affected Dina's family. They miss her when they have family gatherings. They used to celebrate Halloween, but not any more because Delliah died on Halloween. Delliah's three youngest boys are with their father. Dina is comforted by just having them around. They do not visit the cemetery often, but she takes them to their mother's grave site when they stay with her. They put down flowers and sit by themselves. Dina leaves them alone so they can have a chance to mourn, and they just sit and think and cry. They write "I love you" notes to Delliah. Dina showed the jury photos of the children writing the notes at the cemetery and putting flowers on her grave. Dina also showed the jury letters written by the children. One, written on the back of a homework assignment, was entitled "A letter to Mom" and signed "love, Carl." It talks about how much Carl loves his mother. Another letter dated June 8, 1991, was also written on the back of a homework assignment several months before the murder, close to Delliah's birthday. It is also entitled "A letter to Mom" and has the name Jacob on it. It says "You're the only Mom I had and the only one I want. You're special to me and caring and sweet and beautiful to me." Dina's family goes to the grave site often; on Christmas and other holidays and on Delliah's birthday, June 19th. They take purple flowers because that was Delliah's favorite color. Delliah's brother Jonathan, who shares the same

birthday, no longer celebrates his birthday. (43 RT 9434-9436, 9439-9447.)

10. Eleanor Casares

Eleanor Casares was the mother of David Navarro, 19-year-old Rosemary Ureta, and 18-year-old Rosanne Guzman. Roesmary had a good relationship with her mother. They were more like sisters. She was understanding about everything, someone they could turn to if they had problems . They could talk to her and tell her things. They did not have to hide anything from her. She was quiet and softhearted, a fun person who would make things happy and make them laugh. They could do something wrong and she would be mad, but they would say something to make her laugh and she would forget all about it. She always put them first before anything else. She was always there for their birthdays. They all laughed because she would always show up just as they were going to eat the cake. She could finish a whole cake by herself. Rosemary played softball and her mother made sure she showed up, even for five minutes, so Rosemary could see she was there.

Rosemary lives with her grandmother now, as she did before her mother's death. She last saw her mother the night before she died. She learned that she had been killed when a cousin came to the house and said he just heard that their mother was dead. David got angry and was going to fight with him, saying "Don't mess around. Don't play like that." Her cousin said, "I'm not playing. Why should I be playing about something like that?" Rosemary and David did not know what to do. David took off looking for their mother but could not find her. They told their grandmother and aunt and sister, who had gone Christmas shopping, when they got home. No one knew if it was true or not. They did not know what to believe or what to do. David stayed up all night on the front porch, looking at the corner, saying

"Mom, just come around the corner. Just come."

Rosemary misses her mother. It was and is just like a dream. There are still times when she thinks she sees her in a car. She always said she was going to go somewhere far away, like Texas or Hawaii. When she died, people said "No, it can't be. She's left. She went to Texas with her friend, like she said. She's not dead." It made Rosemary "flip." She wants to kill herself. She cannot take it anymore. She does not even go to her grave site. (43 RT 9513-9518.)

Eleanor was Adela Soliz' older sister. There were seven children in the family and they were close. Adela was closer to Eleanor than to any of her siblings. They lived across the street from each other, and she saw or talked to her almost every day. Eleanor was the one Adela could confide in. They talked a lot and helped each other out. Adela has six children and Eleanor watched the kids any time Adela needed to go out. She was that kind of person. She didn't take from anyone. She helped out and she was always there. She had a real kind heart and was very understanding. She was fun to be around.

Eleanor and her children lived with her mother for a number of years before she died. She helped Adela and their mother care for their paralyzed brother. Adela would run errands while Eleanor helped their brother. Eleanor also helped their mother if she was sick. She participated in her children's school activities, and she took them to the doctor when they were sick. Her mother now takes care of the children. Adela knew that Eleanor had a drug problem, but she had so much respect for her older sister that she could not even bring herself to smoke in front of her, so her drug use was not a problem with Adela. Adela received a phone call from Eleanor the morning she was killed. She wanted to borrow some money. She learned

that Eleanor had been killed when she got home from Christmas shopping. Her husband and her two boys came up behind her and held onto her and told her. She had a hard time believing it because she had just talked to her that morning.

Eleanor's death affected everyone in her family. They talk about her like she is not gone. They feel sometimes like she is going to walk in, and they always say "I feel like my aunt's out there somewhere." Adela's husband says, "I still can't believe my sister-in-law is gone" because he was very close to her, too. Adela's children miss Eleanor. They still talk about her and to her. They wish she was back. They always go to the cemetery. Her son just went and left her flowers. Eleanor's murder affected Adela. She cannot talk about a lot of things she would like to, things you can tell your sister but not your mother. Eleanor was her fighting partner in little family fights. She was more understanding and more lenient on the kids. She would tell Adela "Don't be so rough on them. They'll grow out of it." The thing Adela misses most is not being able to yell at her. Eleanor was there for Adela, and Adela still thinks about her. She does not feel like she is gone. If something goes wrong she just talks to her, and she feels like sometimes she is being answered. Eleanor was a drug user, but she was a human being. She had a heart like all of us. She had feelings. She did not deserve to die the way she did. Adela could have handled her death if it had occurred in any other manner. (43 RT 9520-9528.)

C. The Trial Judge's Decision to Permit Three Victim Impact Witnesses per Victim Was an Abuse of Discretion

A trial court's exercise of discretion in admitting or excluding evidence will not be disturbed except on a showing that the trial court

exercised its discretion in an "arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice." (*People v. Robinson* (1999) 20 Cal.4th 1, 9-10.) The judge here abused his discretion by arbitrarily placing a three witness per victim limit on the evidence.

Payne does not hold that "victim impact evidence must be admitted, or even that it should be admitted." (*Payne v. Tennessee, supra*, 501 U.S. at p. 831 (conc. opn. of O'Connor, White, and Kennedy, JJ.).) The United States Supreme Court clearly cautioned against victim impact evidence that could threaten a defendant's constitutional right to due process. (*Id.* at p. 825.) In *People v. Edwards*, this Court limited victim impact evidence to only that which is a "circumstance of the crime" under Penal Code § 190.3, subdivision (a), warning that, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed in Payne. . ." (*People v. Edwards, supra*, 54 Cal.3d at pp. 834-836.)

Although this Court is not bound by the law of other states, appellant respectfully submits that it should observe the limitations and outer boundaries other jurisdictions have placed on victim impact evidence to ensure that it is not admitted in a manner that would violate defendant's due process rights or allow the arbitrary imposition of the death penalty. For example, in *State v. Muhammad* (1996) 678 A.2d 164, a defendant charged with kidnaping, rape and murder challenged the constitutionality of New Jersey's victim impact statute under the United States and New Jersey Constitutions. The New Jersey Supreme Court held that admission of victim impact evidence during the sentencing phase of a capital trial is constitutional, but it placed limitations on such evidence in order to

minimize the possibility that victim impact evidence would inflame the jury and prevent it from deciding an appropriate punishment. *(State v. Muhammad, supra*, 678 A.2d at p. 180.) The court observed that "the greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant." Absent special circumstances, one witness per victim is adequate to provide the jury with "a glimpse" of the victim's uniqueness and help jurors make an informed assessment of the defendant's moral blameworthiness. In addition, before a family member is allowed to testify, the trial court should conduct a hearing to determine admissibility. Testimony should also be reduced to writing to enable the trial court to avoid any prejudicial content. (*Ibid.*)

In *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330, the Texas Court of Criminal Appeals found that the probative value of a seventeen-minute video montage of approximately 140 photographs set to music from the movie Titanic was substantially outweighed by the possibility of unfair prejudice. (*Salazar v. State, supra*, 90 S.W.3d at p. 332.) The court held that the following factors should be evaluated in considering the admissibility of victim impact evidence: 1) how probative the evidence is; 2) the potential of the evidence to impress the jury in some irrational but nevertheless indelible way; 3) the time the proponent needs to develop the evidence; and 4) the proponent's need for the evidence. (*Ibid.*) The court acknowledged that victim impact evidence could be inadmissible by sheer volume alone. (*Ibid.*) It encouraged trial courts to place appropriate limits on "the amount, kind, and source" of such evidence. (*Ibid.*)

In this case, the only limit on the prosecutor's use of victim impact evidence was the judge's three-witness limitation which was based solely on

the fact that he "couldn't envision a situation" where more than three would be necessary. (42 RT 9267.) The number of witnesses who testify has nothing to do with evaluating the admissibility of their testimony under Payne and Edwards and whether it should be excluded because it is more prejudicial than probative. Most or all of one witness' testimony might be objectionable while all of several witnesses' testimony might be admissible. The question the judge should have addressed was whether "irrelevant information or inflammatory rhetoric" would "divert[] the jury's attention from its proper role" and invite "an irrational, purely subjective response. . ." (*People v. Edwards, supra*, 54 Cal.3d at p. 836, quoting *People v. Haskett, supra*, 30 Cal.3d at p. 864), thereby rendering the penalty trial "fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.) His arbitrary three-witness-per-victim limitation ensured that the prosecutor would not present the testimony of 35 to 40 witnesses. It did absolutely nothing, however, to ensure that appellant's rights to due process were not violated by the testimony that was presented.

The judge promised to "wield the sword" to pare down the victim impact evidence (5 RT 1028), but ultimately failed to place any meaningful limitations on "the kind of testimony" that would be permitted, even after appellant requested such a limitation. (42 RT 9267-9268.) Victim impact witnesses were permitted to give cumulative, emotional and inflammatory recitations with virtually no limitations. For example, two of the three witnesses who testified about Delliah Zamora gave testimony that was clearly more prejudicial than probative. Her mother, Dina Zamora, gave lengthy and often irrelevant narratives (43 RT 9443-9447) and showed the jury highly emotional photographs of Zamora's children at her grave and love notes they had written to her. (43 RT 9439-9441.) Her brother, Jose

Zamora, Jr., read out loud a portion of a ten-page story written by his daughter about "the beginning to the end" of Zamora's life. (43 RT 9457-9458) The single witness testifying for Carol Miller gave repetitive testimony about Miller's good character and also read out loud a religious poem Miller had written months before her death. (43 RT 9464-9468.)

The predictable result was that the admission of pictures, writings and unfocused narratives as evidence, like the video montage in *Salazar v. State, supra*, 90 S.W.3d at p. 332, substantially prejudiced appellant. The judge should have conducted a hearing to determine the admissibility of the proposed victim impact testimony without regard to the number of witnesses required to present the evidence. He then should have limited the presentation of that evidence to as few witnesses as possible so as to minimize the possibility that the evidence would inflame the jury and prevent it from deciding an appropriate punishment. (*State v. Muhammad, supra*, 678 A.2d at pp. 179-180.) His failure to do so was an abuse of discretion which rendered appellant's penalty trial "fundamentally unfair." (*Payne v. Tennessee, supra*, 501 U.S. at p. 825.)

D. The Trial Judge's Failure to Curtail Cumulative and Excessively Emotional Testimony Was an Abuse of Discretion

The victim impact evidence in this case went far beyond a "quick glimpse" into each victim's life. (*Payne v. Tennessee, supra*, 501 U.S. at p. 822.) By refusing to curtail the admittedly emotional and prejudicial testimony, the judge failed to strike a balance between the probative and the prejudicial (*Edwards, supra*, 54 Cal.3d at p. 836; Evid. Code, § 352.) His failure to do so was a miscarriage of justice and an abuse of discretion.

In evaluating whether victim impact evidence has violated a

defendant's constitutional rights, brevity is an important consideration. (See, e.g., *Payne v. Tennessee, supra*, 501 U.S. at pp. 831-832 [court describes admissible victim impact testimony as "brief"]; *People v. Jurado* (2006) 38 Cal.4th 72, 132 [admissible victim impact testimony of three witnesses was described as "relatively brief, comprising just 25 pages in the reporter's transcript"]; *People v. Harris* (2005) 37 Cal.4th 310, 352 [court upholds as proper testimony that was "very brief, consuming no more than 16 lines of transcript"]; *People v. Roldan* (2005) 35 Cal.4th 646, 732 [describing a witness's time on stand as "short and subdued" when considering whether testimony was proper]; *Salazar v. State, supra*, 90 S.W.3d at p. 336 [victim impact evidence may become unfairly prejudicial through "sheer volume"]; *State v. Hooks* (N.C. 2001) 548 S.E.2d 501, 511 [admissible testimony only "constituted a small portion of the State's overall case"]; *Lambert v. State* (Ind. 1996) 675 N.E.2d 1060, 1065 [admission of victim impact evidence was not harmless error because testimony was "not brief" and "state played an active role in eliciting the testimony"]; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 828 [testimony should constitute a "quick glimpse"].) As noted, sheer volume of victim impact evidence alone can render a trial unfairly prejudicial. (*Salazar v. State, supra*, 90 S.W.3d at p. 336.)

The judge's arbitrary three-witness-per-victim limit in this case enabled the prosecutor to call sixteen victim impact witnesses who cumulatively testified about ten victims. Nearly half of his penalty phase case-in-chief was devoted to victim impact testimony. One witness, Dina Zamora, gave lengthy, narrative responses to questions asked during her direct examination. (43 RT 9443-9445; 43 RT 9445-9447.) Out of the presence of the jury, defense counsel objected, noting his practical inability to interrupt a victim impact witness during such emotional testimony:

> Mr. Peasley: "...with Mrs. Zamora, Delliah's mother, there were a couple questions asked that were so narrative, the response was so long in there, I think there was some objectionable hearsay. It's really hard to object in the middle and interrupt her. It's heart-wrenching. I'd ask the questions be a little bit more specific and not call for long, long narrative answers of that type."
>
> The Court: "...I agree with you, sir. But I – you're going to have to object, if you want to. This is difficult enough as it is. But the question related to under what circumstance was the last time you saw your daughter. And she went off on --"
>
> Mr. Peasley: "I know."
>
> The Court: "– moving and getting a new house and applying for welfare. That's the question and answer you're talking about?"
>
> Mr. Peasley: "I think so, yeah. Two of them. Twice."
>
> The Court: "I agree with the question, but you're going to have to object."

(43 RT 9454-9455.)

The judge failed to "wield the sword" and "keep the proceedings under control" as he had promised he would. (5 RT 1028, 42 RT 9268.) Neither he nor the prosecutor reigned in this witness, or others. Their rambling narratives included irrelevant, prejudicial information about illnesses and unfortunate circumstances that family members had suffered. Jose Leal testified that his father suffered from cancer. (44 RT 9571.) David Hammond testified that his mother suffered from brain damage and a poor memory before and after Hammond was killed (43 RT 9503-9504) and that his sister was raped after Hammond's death. Ida Simmon's testified that her mother had a heart condition and her sister died in a car accident. (43

RT 9485.) Maria Harrison testified that she suffered from respiratory infections and depression. (43 RT 9470.) This testimony gave the jury the impression that appellant was responsible for more than just the direct harm caused by his crime and was to be punished for subsequent disease and crimes by third parties as well. The overwhelming emphasis in the penalty phase on victim impact testimony diverted the jury's attention from its proper purpose of "soberly and rationally" weighing aggravating and mitigating circumstances to a side show highlighting family members' grief, sorrow, and many extraneous matters. (See *People v. Robinson* (2005) 37 Cal.4th 592, 651.) Deliberation of a death sentence in the face of this excessive testimony which reflected the mourning processes of sixteen family members rendered the verdict unreliable.

When striking a balance between victim redress and a defendant's due process rights, the kind of victim impact evidence admitted is also an important consideration. The Salazar court warned, "the punishment phase of a criminal trial is not a memorial service for the victim. What may be entirely appropriate eulogies to celebrate the life and accomplishments of a unique individual are not necessarily admissible in a criminal trial." (*Salazar v. State, supra*, 90 S.W.3d at p. 336.) While a state may properly admit victim impact evidence and prosecutorial argument that shows the direct harm caused by the defendant (*Payne v. Tennessee, supra*, 501 U.S. at pp. 825-827), such evidence must present specific harm caused by the defendant that surrounds the crime "materially, morally, or logically" in order to be within the scope of § 190.3, subdivision (a). (*People v. Edwards, supra*, 54 Cal.3d at p. 833.) Testimony that is so inflammatory as to elicit from the jury an irrational or emotional response untethered to facts of the case is not admissible. (*People v. Pollock* (2004) 32 Cal.4th 1153, 1180.)

In this case, certain testimony and documentary evidence should have been excluded because it was largely cumulative, often irrelevant, and prejudicial. Dina Zamora, Delliah Zamora's mother, testified that Delliah's children write their dead mother "I love you" notes and visit her grave. (43 RT 9436.) Over appellant's objection that they were irrelevant and unduly prejudicial (43 RT 9436-9437), the judge permitted the prosecutor to show the jury four photographs of the children writing the notes and placing them on the grave. (43 RT 9436-9438.) The photographic depictions did not provide any evidentiary value to the testimony already given about the victim and the impact the death had on the family. Instead, the photographs served primarily to elicit sympathy and should have been excluded. The judge's response to the defense's request to limit this prejudicial evidence was that he would allow the children to testify if he excluded the pictures. (43 RT 9437.) His failure to limit this kind of evidence and his invitation to admit even more inflammatory and emotional evidence was an abuse of discretion.

Over hearsay and relevancy objections (43 RT 9468), the judge permitted Carol Miller's sister, Maria Harrison to read out loud a religious poem Miller had written months before her death. (43 RT 9468-9469.) It cannot be said that the poem reflects information that "materially, morally, or logically" surrounds the crime. (*People v. Edwards, supra*, 54 Cal.3d at p. 832.) Harrison testified that Miller "loved to write poems or songs." This testimony sufficiently described Miller's personal characteristics and allowed the jury a "quick glimpse" of her. The poem did not provide any information about the direct impact that Miller's death had on the witness or other family members, nor was it tethered to the facts of the crime itself. Allowing the religious poem to be read made the victim impact testimony emotional, largely irrelevant, and repetitive. This irrelevant and emotional

evidence should have been excluded by the trial judge.

Carol Carillo, Susan Sternfeld's sister, testified that Sternfeld's son, Mikey, drew pictures of his mother after her death. She showed the jury two of his drawings. One depicted Sternfeld as an angel. The other was of God crying tears because Mikey "didn't have his mommy." (43 RT 9405-9406.) Such highly emotional and repetitive images should have been excluded. Carillo also showed the jury an irrelevant picture of Dennis the Menace in his mother's arms pointing to heaven and saying "I love you all the way up to heaven and way past God." (43 RT 9413.) She testified that Sternfeld had sent the picture to her on one of the many occasions when she was in custody. (43 RT 9413.) The Dennis the Menace picture did not reflect the direct harm caused by Sternfeld's death. The image was solely meant to elicit strong emotion in the jury by depicting the love between a mother and child.

Testimony about why other family members would not testify in court was also permitted. The judge overruled hearsay objections to Ida Simmons' testimony about her mother's inability to testify (43 RT 9485) and David Hammond's testimony about his father's inability to testify. (43 RT 9502-9503.) Additionally, three other witnesses were permitted to testify on this same objectionable issue: Jose Leal testified about his mother (44 RT 9570-9571); Maria Harrison testified about her nephew (43 RT 9470); and Hester Sternfeld testified about her grandson. (43 RT 9419.)

Over hearsay objections, Silvia Griggs, Kathy Puckett's sister, told the jury how Puckett felt about her daughters. (43 RT 9391.) Over relevancy objections, Maria Harrison, Carol Miller's sister, testified about Miller's "gentle spirit." (43 RT 9465, 9468.) While there is a strong presumption for admissibility of evidence which demonstrates that a victim

is a unique human being, victim impact evidence should not be used as a means of weighing the worth of the defendant against the worth of the victim. (*State v. Muhammad, supra*, 678 A.2d at pp. 179-180.) The victim is not on trial and whether her character is good or bad cannot constitute an aggravating or mitigating circumstance. (*Payne v. Tennessee, supra*, 501 U.S. at p. 859 (dis. opn. of Stevens, J.).) Victim impact testimony that described the love Puckett had for her daughters or the "gentle spirit" of Miller was irrelevant to the jury's sentencing decision. Such testimony forced appellant's attorney to put the victim's status as drug-using prostitutes on trial and cross-examine the victims' mourning family members.

The excessive amount and prejudicial nature of the victim impact testimony permitted made it likely that emotion improperly overcame reason in the jury's death judgment. The trial judge abused his discretion in failing to curtail the testimony.

E. Under the Circumstances of this Case, Appellant's Constitutional Guarantees to Due Process, a Fair Trial and a Reliable Penalty Determination Were Violated

The judge's arbitrary three-witness limitation and his failure to meaningfully curtail emotional and prejudicial testimony created an emotionally charged courtroom. Rosemary Ureta, Eleanor Casares's daughter, broke down and cried on the stand saying "she could not take it anymore." (43 RT 9518-9519.) Sam Lyttle, Kimberly Lyttle's father, also cried on the stand. (43 RT 9369.) Sylvia Griggs, Kathy Puckett's sister, became so emotional while testifying that she could not continue. (43 RT 9394.) During his testimony, Jose Zamora made an accusatory and emotional outburst at appellant and was subsequently admonished out of the presence of the jury. (43 RT 9450-9452.) It was difficult, if not impossible,

for jurors to rationally weigh mitigating and aggravating circumstances when they were bombarded with this grief and sorrow. The prosecutor took full advantage of the jury's emotional state. In his closing argument, just before urging the jury to return a death verdict, he emphasized the impact of appellant's acts on the victims and gave an extended recapitulation of their testimony. He concluded by arguing that appellant is "no longer a member of the human race" and the jury "must kill it." (46 RT 10294-10300.)

Failure to place meaningful limits on the extent and nature of victim impact testimony deprived appellant of due process and a fair trial. His right to a reliable penalty determination under the Eighth Amendment was violated because the jury likely chose to impose death based on emotion rather than reason. (*Gardner v. Florida* (1977) 403 U.S. 349, 358.) There is a reasonable possibility that the error contributed to the penalty verdicts and confidence in the reliability of the outcome is sufficiently undermined that reversal is required. (*Chapman v. California, supra*, 386 U.S. at p. 24; *People v. Brown, supra*, 46 Cal.3d at p. 448.)]

* * * * *

IX.

THE CALIFORNIA DEATH PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF[36]

The California death penalty statute fails to provide any of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. As set forth elsewhere in this brief, juries do not have to make written findings (see Arg. XIII, *post*, at p. 406) or achieve unanimity as to aggravating circumstances. As discussed herein, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Arg. XI, *post*, at p. 397.) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose

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[36] Appellant is aware of this Court's ruling in *People v. Schmeck* (2005) 37 Cal.4th 240, 303-304, holding that "[r]outine instructional and constitutional challenges," will be deemed "fairly presented" for the purposes of state and subsequent federal review so long as the appellant's brief: (1) identifies the claim in the context of the facts; (2) notes that the Court has rejected the same or a similar claim in a prior decision; and (3) asks the Court to reconsider that decision. However, out of concern that the federal courts may take a different view as to whether these challenges have been fully preserved on appeal, appellant has not followed the guidelines recommended by the *Schmeck* decision.

death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth, and Fourteenth Amendments.

A. The Statute And Instructions Unconstitutionally Fail To Assign To The State The Burden Of Proving Beyond A Reasonable Doubt The Existence Of An Aggravating Factor, That The Aggravating Factors Outweigh The Mitigating Factors, And That Death Is The Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (Pen. Code, § 190.3) and that "death is the appropriate penalty under all the circumstances." (*People v. Brown* (1985) 40 Cal.3d 512, 541, rev'd on other grounds, *California v. Brown* (1987) 479 U.S. 538; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634.) Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[37] The failure to assign a burden of proof renders the California death penalty scheme unconstitutional, and renders appellant's death sentence unreliable and unconstitutional in violation of the Sixth, Eighth, and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that

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[37] There are two exceptions to this lack of a burden of proof. The special circumstances (Pen. Code, § 190.2) and the aggravating factor of violent criminal activity (Pen. Code, § 190.3 subdivision (b)) must be proved beyond a reasonable doubt.

they outweigh mitigating factors ...." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) However, this Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 471-472, *Ring v. Arizona* (2002) 536 U.S. 584, 607, and *Blakely v. Washington* (2004) 542 U.S. 296, 300-313.

Apprendi considered a New Jersey state law that authorized a maximum sentence of ten years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey, supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. (*Ibid.*) The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the

facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at pp. 478.)

In *Ring v. Arizona*, the Court applied *Apprendi*'s principles in the context of capital sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (*Ring v. Arizona, supra*, 536 U.S. at p. 607.) The Court considered Arizona's capital sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court previously had upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi*.

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona, supra*, 536 U.S. at p. 609.)[38] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death. We hold that the Sixth Amendment applies to

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[38] Justice Scalia distinctively distilled the holding: "All facts essential to the imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be made by the jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

both." (*Ibid.*)

In Blakely, the Court considered the effect of *Apprendi* and Ring in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra*, 542 U.S. at p. 300.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely v. Washington, supra*, 542 U.S. at p. 303, original italics.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[39] Only California and

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[39] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. (continued...)

four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance – and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are "moral and . . . not factual," and therefore not

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[39] (...continued)
Code Crim. Proc. Ann., art. 905.3 (West 1984); Md. Ann. Code, art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann.,§ 39-13-204(f) (1991); Tex. Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Az. 2003) 65 P.3d 915.)

"susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[40] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was read to appellant's jury, "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." (10 CT 2739-2740, 2782-2783; 46 RT 20335-10336; CALJIC No. 8.88.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable

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[40] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,'(fn. omitted) we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460.)

verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.[41]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see Pen. Code, 190.2 subdivision (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See, e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], Ring imposes no new constitutional requirements on California's penalty phase proceedings"]; see also *People v. Snow* (2003) 30 Cal.4th 43.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases render the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact – no matter how the State labels it – must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra*, 536 U.S. at p. 586.) As Justice Breyer, explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged, but also

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[41] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

(all punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely v. Washington, supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.), original italics.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than authorized by the jury's guilt verdict?" (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 494.) The answer in the California capital sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring v. Arizona, supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 541(dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase – that is, a finding of at least one aggravating factor plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring v. Arizona, supra*, 536 U.S. at p. 604, quoting *Apprendi v. New Jersey, supra*, 530 U.S. at p. 494) and are "essential to the imposition of the level of punishment that the defendant receives." (*Ring v. Arizona, supra*, 536 U.S.

at p. 610 (conc. opn. of Scalia, J.).) They thus trigger the requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered.[42] The Court held that *Ring* does not apply, however, because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow, supra*, 30 Cal.4th at p.126, fn. 32, citing *People v. Anderson, supra*, 25 Cal.4th at pp. 589-590, fn.14.) The Court has repeatedly sought to reject Ring's applicability by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto, supra*, 30 Cal.4th at p. 275; *People v. Snow, supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence – in both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be

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[42] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, normative determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448.)

sufficient to impose death – no single specific factor must be found in Arizona or California. In both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And Blakely makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the defendant does not comport with the federal Constitution.

In *Prieto*, the Court summarized California's penalty phase procedure as follows:

> Thus, in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California, supra*, 512 U.S. at p. 972). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate.

(*People v. Prieto, supra*, 30 Cal.4th at p. 263, italics added.) This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present – otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring, supra*, 65 P.3d at p. 943 ["Neither a

judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency"]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People* (Colo.2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi, Ring*, and *Blakely*. In *Blakely* itself the State of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own – a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the State's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. *(Blakely v. Washington, supra*, 542 U.S. at p. 304.) Thus, under *Apprendi, Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made beyond a reasonable

doubt.[43]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi, Ring* and *Blakely* are: (1) What is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in CALJIC No. 8.88? The maximum sentence would be life without possibility

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[43] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]'": "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of ... moral condemnation." (*People v. Griffin, supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?

(*Leatherman, supra*, 532 U.S. at p. 429.) This finding, which was a prerequisite to the award of punitive damages, is much like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive damages award to a plain-error standard, or whether such awards could be reviewed *de novo*. Although the court found that the ultimate amount was a moral decision that should be reviewed *de novo*, it made clear that all findings that were prerequisite to the dollar amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's contention that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

of parole; (2) What is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for withholding rather than extending procedural protections. (*People v. Prieto, supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents "no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent." [Citation.] The notion "that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence."

(*Ring v. Arizona, supra*, 536 U.S. at p. 606, quoting with approval *Apprendi v. New Jersey, supra*, 530 U.S. at 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in Ring:

> Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the

> legislature conditions an increase in their maximum punishment . . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death.

(*Ring v. Arizona, supra*, 536 U.S. at p. 589.)

The final step of California's capital sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to eliminate procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of Ring to any part of California's penalty phase violates the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The State And Federal Constitutions Require That The Jurors Be Instructed That They May Impose A Sentence of Death Only If They Are Persuaded Beyond A Reasonable Doubt That The Aggravating Factors Outweigh The Mitigating Factors And That Death Is The Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice

system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendment. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases "the sentencing process, as well as the trial itself, must satisfy the requirements of the due process clause." (*Gardner v. Florida, supra*, 430 U.S. at p. 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition Of Life Or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship, supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general and the jury in particular the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*In re Winship, supra*, 397 U.S. at p. 364.) Selection of a constitutionally appropriate burden of persuasion is accomplished by weighing "three distinct factors . . . the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing

governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall, supra*, 375 U.S. at p. 525), how much more transcendent is human life itself? Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *In re Winship, supra*, 397 U.S. at p. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338, 342 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306, 310 [same]; *People v. Thomas* (1977) 19 Cal.3d 630, 632 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219, 225 [appointment of conservator].) The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the State the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure," the United States Supreme Court reasoned:

> [I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants.... When the State brings a criminal action to deny a defendant liberty or life, ... "the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement

> they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment." [citation] The stringency of the "beyond a reasonable doubt" standard bespeaks the "weight and gravity" of the private interest affected [citation], society's interest in avoiding erroneous convictions, and a judgment that those interests together require that "society impos[e] almost the entire risk of error upon itself."

(*Santosky v. Kramer, supra*, 455 U.S. at p. 755, quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423, 424, 427.)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child neglect proceedings dealt with in Santosky. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kramer, supra*, 455 U.S. at p. 763.) Imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*In re Winship, supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable doubt standard. Adoption of that standard would not deprive the State of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. at pp. 625, 637-638.) No greater interest is ever at stake. (See *Monge v. California, supra*, 524 U.S. at p. 732.) In

Monge, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden of proof requirement to capital sentencing proceedings: "[I]n a capital sentencing proceeding, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that ... they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California, supra,* 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441, emphasis added.) The sentencer of a person facing the death penalty is required by the due process and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but also that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin, supra*, 33 Cal.4th at p. 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision in a death penalty case. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable doubt standard:

> We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its

> understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment.

(*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Monge v. California, supra*, 524 U.S. at p. 732.) Consequently, under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth, And Fourteenth Amendments Require That The State Bear Some Burden Of Persuasion At The Penalty Phase

In addition to failing to impose a reasonable doubt standard on the prosecution, the penalty phase instructions failed to assign any burden of persuasion regarding the ultimate penalty phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it also has held that a burden of persuasion at

the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth, and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as proof beyond a reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigns the burden of proof and persuasion to the State while another assigns it to the accused, or because one juror applied a lower standard and found in favor of the State and another applied a higher

standard and found in favor of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden of persuasion for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented. (See *People v. Duncan, supra*, 53 Cal.3d at p. 979.)

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Penal Code section 190.4, subdivision (e) requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[44]

A fact could not be established – i.e., a fact finder could not make a finding – without imposing some sort of burden on the parties presenting the

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[44] As discussed below, the Supreme Court consistently has held that a capital sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

evidence upon which the finding is based. The failure to inform the jury of how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 4.420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code, § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue"].) There is no statute to the contrary. In any capital case, any aggravating factor will relate to wrongdoing; those that are not themselves acts of wrongdoing (such as, for example, age, when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Section 520 is a legitimate state expectation in adjudication and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) The failure to articulate a proper burden of proof is constitutional error under the Fifth, Sixth, Eighth, and Fourteenth Amendments. In addition, to provide greater protection to noncapital than to capital defendants violates the Due Process, Equal Protection, and Cruel and Unusual Punishment Clauses of the Eighth and Fourteenth Amendments. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors – and the juries on which they sit – respond in the same way, so the death penalty is applied evenhandedly. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or

not at all." (*Eddings v. Oklahoma, supra*, 455 U.S. at p. 112.) It is unacceptable – "wanton" and "freakish" (*Proffitt v. Florida, supra*, 428 U.S. at 260) and the "height of arbitrariness" (*Mills v. Maryland, supra*, 486 U.S. at p. 374) – that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the State on the same facts, with no uniformly applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury. The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case. The same is true if there is no burden of proof but the jury is not so told. Jurors who believe the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. This raises the constitutionally unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards. The error in failing to instruct the jury on what the proper burden of proof is – or, as the case may be, is not – is reversible per se. (*Sullivan v. Louisiana, supra*, 508 U.S. 275.)

D. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Juror Unanimity On Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1992) 1 Cal.4th 103, 462-464 (cert. granted on other grounds in *Bacigalupo v. California* (1992) 506 U.S. 802); see also *People v. Taylor, supra*, (1990) 52 Cal.3d pp.719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to aggravating circumstances encouraged the jurors to act in an arbitrary,

capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[45]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo* – particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640 – should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring* makes the reasoning in *Hildwin* questionable, and thereby, undercuts the constitutional validity of this Court's ruling in *Bacigalupo*.[46]

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[45] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth, and Fourteenth Amendments. (See, e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[46] Appellant acknowledges that the Court recently held that *Ring* does not require a California sentencing jury to find unanimously the existence of an aggravating factor. (*People v. Prieto, supra*, 30 Cal.4th at 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas

(continued...)

Applying the *Ring* reasoning here, jury unanimity is required 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.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1980) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California*, 524 U.S. at p. 732; accord *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury. (Cf. *Johnson v. Louisiana* (1972) 406 U.S. 356, 360 [holding that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were not violated by a Louisiana rule which allowed for conviction based on a plurality vote of nine out of twelve jurors].)

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265

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[46] (...continued)
corpus review].) *People v. Ghent* (1987) 43 Cal.3d 739, 773-77

[confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable in California to noncapital cases.[47] For example, in cases where 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, supra*, 524 U.S. at p. 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. Ylst, supra*, 897 F.2d at p. 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

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[47] The federal death penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann., § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann., § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat., ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code, art. 27, § 413(i) (1993); Miss. Code Ann., § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann., § 630:5(IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iv) (1982); S.C. Code Ann., § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.071 (West 1993).)

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.

In *Richardson v. United States* (1999) 526 U.S. 813, 815-816, the United States Supreme Court interpreted 21 U.S.C. § 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "continuing series of violations" necessary for a continuing criminal enterprise [CCE] conviction. The high court's reasons for this holding are instructive:

> The statute's word "violations" covers many different kinds of behavior of varying degrees of seriousness.... At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire.

(*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecutor offers up multiple theories or instances of

alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and didn't do; and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. *(People v. Hawthorne, supra*, 4 Cal.4th at p. 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the type of factual determinations for which appellant is entitled to unanimous jury findings beyond a reasonable doubt.

E. 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

Compounding the error from the failure of the jury instruction to inform the jurors about the burden of proof was the trial court's rejection of the defense's requested instructions. (10 CT 2689, 2741-2745; 46 RT 10135-10185.) This impermissibly foreclosed the full consideration of

mitigating evidence required by the Eighth Amendment. (See *Mills v. Maryland, supra,* 486 U.S. at p. 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.)

"There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case." *(Boyde v. California* (1990) 494 U.S. 370, 380.) Constitutional error thus occurs when "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." (*Ibid.*) That likelihood of misapplication occurs when, as in this case, the jury is left with the impression that the defendant bears some particular burden in proving facts in mitigation.

A defendant is not required to meet any particular burden of proving a mitigating factor to any specific evidentiary level before the sentencer considers it. However, this concept was never explained to the jury, which would logically believe that the defendant bore some burden in this regard. Under the worst case scenario, since the only burden of proof that was explained to the jurors was proof beyond a reasonable doubt, that is the standard they would likely have applied to mitigating evidence. (See Eisenberg & Wells, Deadly Confusion: *Juror Instructions in Capital Cases* (1993) 79 Cornell L. Rev. 1, 10.)

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 convict appellant of any charge or special circumstance. Similarly, the jury was instructed that the penalty determination had to be unanimous. 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.

The failure of the California death penalty scheme to require instruction on unanimity and the standard of proof relating to mitigating circumstances also creates the likelihood that different juries will utilize different standards. Such arbitrariness violates the Eighth Amendment and the Equal Protection and Due Process Clauses of the Fourteenth Amendment. 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.

F. The Penalty Jury Should Also Be Instructed On The Presumption Of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (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.)

Appellant submits that 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. XIV; 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. VIII & XIV; Cal. Const. art. I, § 17), and his right to the equal protection of the laws. (U.S. Const. Amend. XIV; Cal. Const., art. I, § 7.)

In *People v. Arias* (1996) 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.

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G. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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X.
THE INSTRUCTIONS DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION AND THE NATURE OF ITS DELIBERATIVE PROCESS VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

In the penalty phase, the trial court instructed the jury with CALJIC No. 8.88[48] on the weighing process. This instruction was vague and

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[48] The trial court instructed the jury: "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on each defendant. ¶ After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider and take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed. ¶ 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. A mitigating circumstance is any fact, condition or event which as such, does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. ¶ The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing various circumstances, you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantially - so substantial in comparison with the mitigating circumstances that it warrants death instead of life without the possibility of parole. ¶ You shall now retire and select on of your number to act as a foreperson who will preside over your deliberations. In order to reach a determination as to the penalty, all 12 jurors must agree. ¶ Any verdict that (continued...)

imprecise, failed to describe the weighing process that jurors must apply in a capital case accurately, was improperly weighted toward death and deprived appellant of the individualized, moral judgment required under the federal Constitution. This instruction, which formed the centerpiece of the trial court's description of the sentencing process, violated appellant's rights to a fair jury trial, reliable penalty determination and due process under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding sections of the California Constitution.[49] (See e.g., *Mills v. Maryland, supra*, 486 U.S. at pp. 383-384.) Reversal of the death sentence is required.

B. The Instructions Caused The Jury's Penalty Choice To Turn On An Impermissibly Vague And Ambiguous Standard That Failed To Provide Adequate Guidance And Direction

Pursuant to the CALJIC No. 8.88 instruction, the question of whether to impose a death sentence on 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." The words "so substantial," however, provided the jurors with no guidance as to "what they have to find in order to impose the death penalty. . . ." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 361-362.)

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[48] (...continued)
you reach must be dated and signed by your foreperson on the form that will be provided, and then you shall return with them to this courtroom." (10 CT 2739-2740, 2782-2783; 46 RT 10335-10336.)

[49] Appellant recognizes that this Court has rejected arguments challenging CALJIC No. 8.88 in cases such as *People v. Prieto, supra,* 30 Cal.4th at p. 264 and *People v. Catlin* (2001) 26 Cal.4th 81, 174. However, for the reasons stated below, those decisions should be reconsidered.

The use of this phrase violates the Eighth and Fourteenth Amendments because it creates a standard that is vague, directionless and impossible to quantify. The phrase is so varied in meaning and so broad in usage that it cannot be understood in the context of deciding between life and death and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia* . . . ." (*Id.* at p. 362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, 391, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (See *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)

> In analyzing the word "substantial," the *Arnold* court concluded:
>
> Black's Law Dictionary defines "substantial" as "of real worth and importance," "valuable." Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result.

(*Arnold v. State, supra*, 224 S.E.2d at p. 392, fn. omitted.)[50]

Appellant acknowledges that this Court has opined, in discussing the

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[50] The United States Supreme Court has specifically recognized the portion of the *Arnold* decision invalidating the "substantial history" factor on vagueness grounds. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 202.)

constitutionality of using the phrase "so substantial" in a penalty phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold's* analysis. While *Breaux, Arnold*, and this case, like all cases, are factually different, their differences are not constitutionally significant and do not undercut the Georgia Supreme Court's reasoning.

All three cases involve claims that the language of an important penalty phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold v. State, supra*, 224 S.E.2d at p. 392.) The instruction in Arnold concerned an aggravating circumstance that used the term "substantial history of serious assaultive criminal convictions" (*ibid.*, italics added), while the instant instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)

In fact, using the term "substantial" in CALJIC No. 8.88 arguably gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold*. The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222, 235.) Because the instruction rendered the penalty determination unreliable (U.S. Const., Amends. VIII and XIV), the death judgment must be reversed.

C. The Instructions Failed To Convey the Central Duty of Jurors in the Penalty Phase

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1037.) Indeed, this Court consistently has held that the ultimate standard in California death penalty cases is "which penalty is appropriate in the particular case." (*People v. Brown, supra*, 40 Cal.3d at p. 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; accord, *People v. Champion* (1995) 9 Cal.4th 879, 948 (disapproved on other grounds in *People v. Combs* (2004) 34 Cal.4th 821, 860); *People v. Milner* (1988) 45 Cal.3d 227, 256-257; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962.) However, the instruction under CALJIC No. 8.88 did not make clear this standard of appropriateness. By telling the jurors they could return a judgment of death if the aggravating evidence "warrants" death instead of life without parole, the instruction failed to inform the jurors that the central inquiry was not whether death was "warranted," but whether it was appropriate.

Those two determinations are not the same. A rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Merriam-Webster's Collegiate Dictionary (10th ed. 2001) defines the verb "warrant" as, inter alia, "to give warrant or sanction to" something, or "to serve as or give adequate ground for" doing something. By contrast, "appropriate" is defined as "especially suitable or compatible." Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was permitted. That is a far different determination than the finding the jury is actually required to make: that death is an "especially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of the earlier phase of the California capital-sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding the existence of a special circumstance that authorizes the death penalty in a particular case. (See *People v. Bacigalupo, supra*, 6 Cal.4th at pp. 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the

penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier reference to the appropriateness of the death penalty. (10 CT 2739; 46 RT 10335.) That sentence did not tell the jurors they could only return a death verdict if they found it appropriate. Moreover, the sentence containing the "appropriateness of the death penalty" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]." (10 CT 2740; 46 RT 10336.)

The crucial sentencing instructions violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by state law. The death judgment is thus constitutionally unreliable (U.S. Const., Amends. VIII and XIV) denies due process (U.S. Const., Amend. XIV; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346) and must be reversed.

D. 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

California Penal Code section 190.3 directs that after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances."

(§ 190.3.)[51] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California, supra*, 494 U.S. at p. 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by Penal Code section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.

By failing to conform to the specific mandate of Penal Code section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.)

In addition, the instruction improperly reduced the prosecution's burden of proof below that required by Penal Code section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates all the jury's findings," can never be harmless. (*Sullivan v. Louisiana, supra*, 508 U.S. at p. 281, original italics.)

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[51] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown, supra,* 40 Cal.3d at p. 544, fn. 17.)

This Court has found the formulation in CALJIC No. 8.88 permissible because "[t]he instruction clearly stated that the death penalty could be imposed only if the jury found that the aggravating circumstances outweighed [the] mitigating." (*People v. Duncan, supra*, 53 Cal.3d at p. 978.) The Court reasoned that since the instruction stated that a death verdict requires that aggravation outweigh mitigation, it was unnecessary to instruct the jury of the converse. The *Duncan* opinion cites no authority for this proposition, and appellant respectfully asserts that it conflicts with numerous opinions that have disapproved instructions emphasizing the prosecution theory of a case while minimizing or ignoring that of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Costello* (1943) 21 Cal.2d 760; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on "every aspect" of case, and should avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[52]

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[52] There are due process underpinnings to these holdings. In *Wardius v. Oregon, supra*, 412 U.S. at p. 473, fn. 6, the United States Supreme Court warned that "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" violate the defendant's due process rights under the Fourteenth Amendment. (See also *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary" ... there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon, supra*, 412 U.S. at p.

(continued...)

People v. Moore, supra, 43 Cal.2d 517, is instructive on this point. There, this Court stated the following about a set of one-sided instructions on self-defense:

> It is true that the ... 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. The difference between a negative and a positive statement of a rule of law favorable to one or the other of the parties is a real one, as every practicing lawyer knows. . . . 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.

(*Id.* at pp. 526-527, internal quotation marks omitted.)

In other words, contrary to the apparent assumption in *Duncan*, the law does not rely on jurors to infer one rule from the statement of its opposite. Nor is a pro-prosecution instruction saved by the fact that it does not itself misstate the law. Even assuming they were a correct statement of law, the instructions at issue here stated only the conditions under which a death verdict could be returned and contained no statement of the conditions under which a verdict of life was required. Thus, Moore is squarely on point.

It is well-settled that courts in criminal trials must instruct the jury on any defense theory supported by substantial evidence. (See *People v. Glenn* (1991) 229 Cal.App.3d 1461, 1465; *United States v. Lesina* (9th Cir. 1987) 833 F.2d 156, 158.) The denial of this fundamental principle in appellant's

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[52] (...continued)
474.) Though *Wardius* involved reciprocal discovery rights, the same principle should apply to jury instructions.

case deprived him of due process. (See *Evitts v. Lucey* (1985) 469 U.S. 387, 401; *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) The instruction given here is not saved by the fact that it is a sentencing instruction as opposed to one guiding the determination of guilt or innocence, since any reliance on such a distinction would violate the Equal Protection Clause of the Fourteenth Amendment. Individuals convicted of capital crimes are the only class of defendants sentenced by juries in this state, and they are as entitled as noncapital defendants – if not more entitled – to the protections the law affords in relation to prosecution-slanted instructions. Indeed, appellant can conceive of no government interest, much less a compelling one, served by denying capital defendants such protection. (See U.S. Const., Amend. XIV; Cal. Const., art. I, §§ 7 & 15; *Plyler v. Doe* (1982) 457 U.S. 202, 216-217.)

Moreover, the slighting of a defense theory in the instructions has been held to deny not only due process, but also the right to a jury trial because it effectively directs a verdict as to certain issues in the defendant's case. (See *Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, aff'd and adopted, *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; cf. *Cool v. United States* (1972) 409 U.S. 100 [disapproving instruction placing unauthorized burden on defense].) Thus, the defective instruction violated appellant's Sixth Amendment rights as well. Reversal of his death sentence is required.

E. The Instructions Failed To Inform The Jurors That Appellant Did Not Have To Persuade Them The Death Penalty Was Inappropriate

The sentencing instruction also was defective because it failed to inform the jurors that, under California law, neither party in a capital case bears the burden to persuade the jury of the appropriateness or

inappropriateness of the death penalty. (See *People v. Hayes, supra*, 52 Cal.3d at p. 643 ["Because the determination of penalty is essentially moral and normative ... there is no burden of proof or burden of persuasion"].) That failure was error, because no matter what the nature of the burden, and even where no burden exists, a capital sentencing jury must be clearly informed of the applicable standards, so that it will not improperly assign that burden to the defense.

The instructions given in this case resulted in this capital jury not being properly guided on this crucial point. The death judgment must therefore be reversed.

F. Conclusion

As set forth above, the trial court's main sentencing instruction, CALJIC No. 8.88, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment and with the Cruel and Unusual Punishment Clause of the Eighth Amendment. Therefore, appellant's death judgment must be reversed.

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XI.

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

A. The Lack Of Intercase Proportionality Review Violates The Eighth Amendment Protection Against The Arbitrary And Capricious Imposition Of The Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plurality opinion, alterations in original), quoting *Proffitt v. Florida*, *supra*, 428 U.S. at p. 251 [opinion of Stewart, Powell, and Stevens, JJ.].)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme

Courts as methods for ensuring that the death penalty will not be imposed on a capriciously selected group of convicted defendants. (See *Gregg v. Georgia, supra*, 428 U.S. at p. 198; *Proffitt v. Florida, supra*, 428 U.S. at p. 258.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun has observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death penalty scheme:

> [I]n *Pulley v. Harris*, 465 U.S. 37, 51 [], the Court's conclusion that the California capital sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review" was based in part on an understanding that the application of the relevant factors "'provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,'" thereby "'guarantee[ing] that the jury's discretion will be guided and its consideration deliberate.'" *Id.* at 53, [], quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (9th Cir. 1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley*

v. Harris.

(*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.).)

The time has come for *Pulley v. Harris*, to be reevaluated. Comparative case review is the most rational – if not the only – effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[53] The capital sentencing scheme in effect at the time of appellant's trial was the type of scheme that the United States Supreme Court in *Pulley* had in mind when it said that "there could be a capital sentencing system so lacking in

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[53] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Coop. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre, supra,* 572 P.2d at p. 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.)

other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris, supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital sentencing scheme does not operate in a manner that ensures consistency in penalty phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

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XII.
CALIFORNIA'S USE OF THE DEATH PENALTY VIOLATES INTERNATIONAL LAW, THE EIGHTH AMENDMENT, AND LAGS BEHIND EVOLVING STANDARDS OF DECENCY

The Eighth Amendment "draw'[s] its meaning from evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The "cruel and unusual punishment" prohibited under the Constitution is not limited to the "standards of decency" that existed at the time our Framers looked to the 18th century civilized European nations as models. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830 (plur. opn. of Stevens, J.).) Rather, just as the civilized nations of Europe have evolved, so must the "evolving standards of decency" set forth in the Eighth Amendment. With the exception of extraordinary crimes such as treason, the civilized nations of western Europe which served as models to our Framers have now abolished the death penalty. In addition to the nations of Western Europe, Canada, Australia, and New Zealand have also abolished the death penalty. In 2004, five more nations (Bhutan, Greece, Samoa, Senegal, and Turkey) abandoned the death penalty. In 2005, Liberia and Mexico abolished the death penalty and in 2006, the Philippines also abolished it. Forty countries have abolished the death penalty for all crimes since 1990. Indeed, since 1976 an average of three countries a year have abolished the death penalty. (Amnesty International, *The Death Penalty, Abolitionist and Retentionist Countries* (as of August 2006), Amnesty International webcite, [www.amnesty.org]; "Facts and Figures on the Death Penalty," Amnesty International, August 2006.) The United States stands as one of a small number of nations that

regularly uses the death penalty as a form of punishment, a blemish on a rapidly evolving standard of decency moving to abolish capital punishment worldwide. (See *Ring v. Arizona, supra*, 536 U.S. at p. 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824 (dis. opn. of Harrison, J.) Indeed, in 2005, ninety-four per cent of all known executions took place in China, Iran, Saudi Arabia and the United States. (Amnesty International, supra, "*Facts and Figures on the Death Penalty*," August 2006.) While most nations have abolished the death penalty in law or practice, this nation continues to join a handful of nations with the highest numbers of executions. The United States has executed more than 1000 people since the death penalty was reinstated in 1976, and as of January 1, 2005, over 3,400 men and women were on death rows across the country. (Amnesty international, *supra, About the Death Penalty.*) As Dr. William F. Schulz, Executive Director of Amnesty International USA ("AIUSA") has said:

> Our report indicates that governments and citizens around the world have realized what the United States government refuses to admit - that the death penalty is an inhumane, antiquated form of punishment . . . Thomas Jefferson once wrote that 'laws and institutions must go hand in hand with the progress of the human mind;' it is past time for our government to live up to this Jeffersonian ideal and let go of the brutal practices of the past.

(April 5, 2005, AIUSA Press Release, "Amnesty International's Annual Death Penalty Report Finds Global Trend Toward Abolition.")[54]

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[54] Amnesty International has also called attention to instances in which U.S. citizens were sentenced to death for crimes they did not commit: "The cases of Derrick Jamison [in February 2005, Jamison became the 119th wrongfully convicted person to be released from death row on the grounds of innocence] and the other 118 individuals released from death

(continued...)

The continued use of capital punishment in California and the United States is therefore not in step with the evolving standards of decency which the Framers sought to emulate. As set forth above, nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See, e.g., *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law of nations principle that citizens of warring nations are enemies].) California's use of death as a regular punishment, as in this case, therefore violates the Eighth and Fourteenth Amendments. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky, supra*, 492 U.S. at pp. 389-390 (dis. opn. of Brennan, J.).)

Additionally, the California death penalty law violates specific provisions of international treaties. The Universal Declaration of Human Rights, adopted by this country via the United Nations General Assembly in December 1948, recognizes each person's right to life and categorically states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." According to Amnesty International, imposition of the death penalty violates the rights guaranteed by the UDHR. (Amnesty International, *International Law*, Amnesty International website, *supra.*)

Additional support for this position is also evident by the adoption of international and regional treaties providing for the abolition of the death

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[54] (...continued)
row since 1973 demonstrate that no judicial system is infallible. However sophisticated the system, the death penalty will always carry with it the risk of lethal error . . ." (*Ibid.*)

penalty, including, inter alia, Article VII of the International Covenant of Civil and Political Rights ("ICCPR") which prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1990. Under Article VI of the federal Constitution, "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." Thus, the ICCPR is the law of the land. (See *Zschernig v. Miller* (1968) 389 U.S. 429, 439-441; *Edye v. Robertson* (1884) 112 U.S. 580, 598-599.) Consequently, this Court is bound by the ICCPR.[55]

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital sentencing process, the conditions under which the condemned are incarcerated, the excessive delays between sentencing and appointment of appellate counsel, and the excessive delays between

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[55] The ICCPR and the attempts by the Senate to place reservations on the language of the treaty have spurred extensive discussion among scholars. Some of these discussions include: Bassiouni, *Symposium: Reflections on the Ratification of the International Covenant of Civil and Political Rights by the United States Senate* (1993) 42 DePaul L. Rev. 1169; Posner & Shapiro, *Adding Teeth to the United States Ratification of the Covenant on Civil and Political Rights: The International Human Rights Conformity Act of 1993* (1993) 42 DePaul L. Rev. 1209; Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights* (1993) 6 Harv. Hum. Rts. J. 59.

sentencing and execution under the California death penalty system, the implementation of the death penalty in California constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. For these same reasons, the death sentence imposed in this case also constitutes the arbitrary deprivation of life in violation of Article VI, section 1 of the ICCPR.

In the recent case of *United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284, the Eleventh Circuit Court of Appeals held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (But see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant recognizes that this Court has previously rejected an international law claim directed at the death penalty in California. (*People v. Brown* (2004) 33 Cal.4th 382, 403; *People v. Ghent* (1987) 43 Cal.3d 739, 778-781; see also 43 Cal.3d at pp. 780-781 (conc. opn. of Mosk, J.); *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero, supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Appellant requests that the Court reconsider and, in this context, find the death sentence violative of international law. (See also *Smith v. Murray, supra*, 477 U.S. at p. 534 [holding that even issues settled under state law must be reraised to preserve the issue for federal habeas corpus review].) The death sentence here should be vacated.

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XIII.
CALIFORNIA'S DEATH PENALTY SCHEME FAILS TO REQUIRE WRITTEN FINDINGS REGARDING THE AGGRAVATING FACTORS AND THEREBY VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS TO MEANINGFUL APPELLATE REVIEW AND EQUAL PROTECTION OF THE LAW

California's death penalty scheme fails to require that the jury make a written statement of findings and reasons for its death verdict. Although this Court has held that the absence of such a requirement does not render the death penalty scheme unconstitutional (*People v. Fauber* (1992) 2 Cal.4th 792, 859), that holding should be reconsidered as the failure has deprived appellant of his Fifth, Eighth, and Fourteenth Amendment rights to due process, equal protection, and meaningful appellate review of his death sentence.

The importance of explicit findings has long been recognized by this Court. (See, e.g., *People v. Martin* (1986) 42 Cal.3d 437, 449, citing *In re Podesto* (1976) 15 Cal.3d 921, 937-938.) Thus, in a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentencing choice. (*Ibid*; Pen. Code, § 1170, subd. (c).) Because the Eighth and Fourteenth Amendments afford capital defendants more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and because providing more protection to a non-capital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see *Myers v. Ylst, supra*, 897 F.2d pp. 417, 421), it follows that the sentencing entity in a capital case is constitutionally required to identify for the record the aggravating and mitigating circumstances found and rejected.

As discussed previously in this brief, the decisions in *Apprendi v. New Jersey, supra*, 530 U.S. 466, *Ring v. Arizona, supra*, 536 U.S. 584, and *Blakely v. Washington, supra*, 124 S.Ct. at p. 2543, require that a jury decide unanimously and beyond a reasonable doubt any factual issue allowing an increase in the maximum sentence. Without written findings by the jury, it is impossible to know which, if any, of the aggravating factors in this case were found by all of the jurors.

Moreover, the Court itself has stated that written findings are "essential to meaningful [appellate] review." (*People v. Martin, supra*, 42 Cal.3d at pp. 449-450.) Explicit findings in the penalty phase of a capital case are especially critical because of the magnitude of the penalty involved (see *Woodson v. North Carolina, supra*, 428 U.S. at p. 305) and the need to address error on appellate review. (See, e.g., *Mills v. Maryland, supra*, 486 U.S. at p. 383, fn. 15.) California capital juries have wide discretion, and are provided virtually no guidance, on how they should weigh aggravating and mitigating circumstances. (*Tuilaepa v. California, supra*, 512 U.S. at pp. 978-979.) Without some written explanation of the basis for the jury's penalty decision, this Court cannot adequately assess prejudice where, as in appellant's case, aggravating factors have been improperly considered.

Accordingly, the failure to require written findings regarding the sentencing choice deprived appellant of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, equal protection of the law, and meaningful appellate review of his death sentence. This constitutional deficiency in California's death penalty law requires reversal of appellant' s death sentence and remand for a new penalty trial.

* * * * *

XIV.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS WHICH UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of those errors nevertheless undermines confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*People v. Hill, supra*, 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; See *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"].)

Furthermore, cumulative error analysis is not only a more rational method of assessing prejudice than is "a balkanized issue-by-issue harmless error review" (*United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1476), it is also the method which this Court is required to employ in order to vindicate appellant's constitutional right to due process of law. (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 & 15.) The combined effect of the errors in this case resulted in an unfair trial which constituted a denial of due process of law. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.)

In addition, the death judgment itself must be evaluated in light of the

cumulative error occurring at both the guilt and penalty phases of the trial. (See *People v. Hayes, supra*, 52 Cal.3d 577, 644 [considering the prejudice of guilt phase instructional error in assessing prejudice in the penalty phase]; *People v. Brown, supra*, 46 Cal.3d 432, 466 [an 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].)

Reversal of the death judgment is mandated here because it cannot be shown that the penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt trial and repeated at the special circumstance trial, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina* (1986) 476 U.S. 1, 8; *Caldwell v. Mississippi* (1985) 472 U.S. 320, 341; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

* * * * *

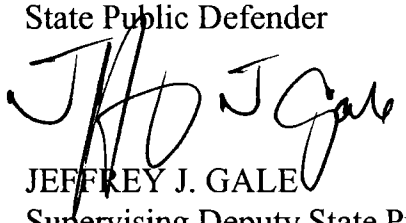
CONCLUSION

For all of the reasons stated above, the judgment of conviction and sentence of death in this case must be reversed.

DATED: November 1, 2006

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 36(b)(2))

On the basis of a word count of the computer program used to prepare this brief, I certify that the brief, excluding tables and certificates, is 124,672 words in length.

Dated: November 1, 2006.

Jeffrey J. Gale

DECLARATION OF SERVICE BY MAIL

Case Name: People vs. William Lester Suff
Case Number: Crim. S060803; Sup. Court No. CR-59671

I, the undersigned, declare:

I am a citizen of the United States, over the age of 18 years and not a party to the within action; my place of employment and business address is 801 K Street, Suite 1100, Sacramento, California 95814. On November 1, 2006, I served the attached

APPELLANT'S OPENING BRIEF

by placing a true copy thereof in an envelope addressed to each of the persons named below at the addresses shown, and by sealing and depositing said envelopes in a United States Postal Service mailbox at Sacramento, California, with postage thereon fully prepaid.

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Mr. Bill Suff
(To be personally served by
counsel by November 15, 2006)

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

Executed on November 1, 2006, at Sacramento, California.

Veronica Ezechukwu

VERONICA EZECHUKWU