IN THE SUPREME COURT OF THE STATE OF CALIFORNIA



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| PEOPLE OF THE STATE OF CALIFORNIA,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>STEVEN ALLEN BROWN<br><br>Defendant and Appellant. | ) | Crim. S052374<br><br>Tulare County Superior Court No. 32842 |

**APPELLANT'S OPENING BRIEF**

Appeal from the Judgment of the Superior Court of the State of California for the County of Tulare

HONORABLE JOSEPH A. KALASHIAN, JUDGE

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| | ) | Tulare County |
| | ) | Superior |
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| Defendant and Appellant. | ) | |
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**APPELLANT'S OPENING BRIEF**

**STATEMENT OF APPEALABILITY**

This is an appeal from a judgment of death following a jury trial. This appeal is automatic. (Penal Code section 1239, subdiv. (b).)

**STATEMENT OF THE CASE**

On November 12, 1991, a complaint was filed in the Tulare County Municipal Court charging appellant, Steven Brown, in Count 1 with murder in the first degree in violation of Penal Code section 187, subd. (a). Four special circumstances were alleged within the meaning of Penal Code section 190.2, subd. (a)(17), to wit: that the murder was committed while the defendant or defendants1 were engaged in the crime of burglary (Penal Code section 459); that the murder was committed while the defendant or

1 Charles Richardson was previously convicted in the April Holley case and sentenced to death. (See *People v. Richardson* (2008) 43 Cal.4th 959.)

defendants were engaged in the crime of rape (Penal Code section 261); that the murder was committed while the defendant or defendants were engaged in the crime of sodomy (Penal Code section 286); and the murder was committed while the defendant or defendants were engaged in the crime of committing a forcible lewd act on a child. (Penal Code section 288, subd. (b).) In Counts 2-5, respectively, appellant was charged with burglary (Penal Code section 459); rape (Penal Code section 261); sodomy of a person under sixteen years of age (Penal Code section 286, subd. (b)(2) and sodomy by force (Penal Code section 286, subd. (c).) 1 CT 22-25.)

On November 16, 1992, appellant's preliminary examination commenced. Appellant was represented by attorney Donald Thommen. (PHT 4.)2 On December 7, 1992, appellant was held to answer as to Counts 1, 3, 4 and 5, as well as all special circumstances except for the burglary special. (1 CT 116-117.

On December 18, 1992, an information was filed in the Tulare County Superior Court charging appellant as follows: Count 1, violation of Penal Code section 187, subd. (a), first degree murder; Count 2, violation of Penal Code section 459, burglary; Count 3, violation of Penal Code section 261(2), rape; Count 4, violation of Penal Code section 288, subd. (b),

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2 "PHT" refers to the transcript of the preliminary examination.

forcible lewd act on a child; and Count 5, violation of Penal Code section 286, subd. (c), sodomy by force. As to Count 1, the same special circumstances were alleged as were alleged in the previous complaint. (1 CT 127-131.)

On April 18, 1995, attorney Donald Thommen was relieved as counsel of record and attorney Michael Cross was appointed to represent appellant. (1 CT 28.)

On October 16, 1995, appellant's guilt phase jury trial commenced. (1 CT 36.) On January 5, 1996, the jury found appellant guilty as to Counts 1, 4 and 5 (violations of Penal Code sections 187, subd. (a), 288, subd. (b)(2) and 286, subd. (c). Appellant was found not guilty as to Count 3 (alleged violation of Penal Code section 261.) The special circumstances alleging pursuant to Penal Code section 288, subdiv. (b) and 286, subd. (c), were found to be true. The alleged murder in the commission of rape special circumstance was found to be not true. (1 CT 101-102.)3

On January 16, 1996, appellant's penalty trial commenced. Before the day was over, the jury determined that the penalty should be death. (1 CT 103-105.)

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3 Count 2 (burglary) and the alleged burglary special were dismissed by the court on December 19, 1995, pursuant to appellant's motion for a directed verdict. (1 CT 92; Penal Code section 1118.1.)

On February 23, 1996, defense motions for a new trial and for modification of the verdict were denied. The court imposed a sentence of death. As to Counts 4 and 5 the court imposed full, separate and consecutive terms of six years in state prison for each count. (1 CT 109.)

As to case no. 29128 (the "Margaret Allen" case; see, Argument IV, *infra*), upon which appellant had previously been convicted and sentenced to state prison, appellant was resentenced as follows:

Count 2 (violation of Penal Code section 211, robbery): 12 years in state prison, designated the principle term.

Count 1 (violation of Penal Code section 459, burglary): six years in state prison, stayed pursuant to Penal Code section 654.

Counts 3-5 (violations of Penal Code section 289), full and consecutive terms of thirteen years in state prison.

Count 6, violation of Penal Code section 245, subd. (a)(1), two years in state prison, stayed pending successful completion of all unstayed terms. (1 CT 107-111.)

This appeal is automatic. (Penal Code section 1239, subdiv. (b).)

## STATEMENT OF FACTS

### Guilt Phase

During the early days of December of 1988 Naomi Holley lived at 162 West Addie in the Matheny Tract area of Tulare County, which is near the city of Tulare. Ms. Holley lived there with her daughters, including April, age 11, and Allison, the oldest. Another daughter, Tammy, was eight years older than April and was incarcerated during this period. (14 RT 1982-1985.) Naomi was acquainted with both appellant Steven Brown and Charlie Richardson. Both had been to her house. (14 RT 2003-2006.)

On Friday, December 3, 1988, Naomi had made plans to visit some friends, specifically, Renee Bailey and her boyfriend, Roger Rummerfield, both of whom lived with Renee's father, Orville Bailey at Orville's house. Orville was a neighbor of Naomi in Matheny Tract. (14 RT 1988-1989, 2025.)

Naomi had also made arrangements for April to stay with friends, Melody Lewis, another of Orville's daughters, and Richard Schnabel, and their six children. Melodye and Richard lived at 2021 South "O" Street in

Tulare. (14 RT 1985-1987, 2026.) Naomi assumed that April would stay with Melody and Richard until Sunday, and do chores and help them with their children. (14 RT 1987, 2026-2028.)

On Friday evening, Naomi in fact dropped April off at Melody's house, then proceeded to Orville's house to visit with Renee and Roger. (14 RT 1987-1988.) On Saturday, she went shopping with Renee and Roger. (14 RT 1990, 1997.) Later Saturday she went to a Tupperware party in Porterville at the invitation of another friend, Jimmy Lee Creel, and a man who was with her. She did not recall if she told Renee and Roger that she was going to Porterville. (14 RT 1991-1993.)

The following day, Saturday, Richard decided that April should be sent home because a $20 bill belonging to one of his daughters apparently turned up in April's purse. (14 RT 2029-2030.) Melody then drove April around Matheny Tract looking for Naomi. (RT 2032.) They first went to April and Naomi's house. Nobody was home. (14 RT 2032.) They then proceeded to a number of other locations where April thought Naomi might

be visiting, but they were unable to locate Naomi. (14 RT 2033-2037.) Over the course of looking for Naomi they went by Naomi and April's house three to five times but each time, no one was home. (14 RT 2037.)

Eventually, due to their inability to locate Naomi, Melody and April went to Orville Bailey's house to pick up Melody's sister, Deanna, so Deanna could watch April at Melody and Richard's house while they went Christmas shopping. (RT 2039-2040.) At about 5 p.m., just as it was getting dark and after Melody picked up Deanna and brought her back to her house, Melody left to go Christmas shopping. (14 RT 2014, 2040.)

Richard's daughters, Theresa Schnabel and her sister, Shannon, were at Richard's house when Melody left to go shopping. Sometime around seven thirty or eight, April made two phone calls. It seemed to Theresa that April was talking to her mother and telling her that she was coming home. When she got off the phone April asked Theresa and Shannon to take her home because a friend was coming over. Theresa and Shannon assumed that April had been talking to Naomi and that Naomi was home. (14 RT

2045-2047.)

In fact, April had been talking to her best friend, Lisa Mathews, also eleven years of age. April invited Lisa to stay the night at her (April's) house. Lisa lived with her grandmother and her house was a ten to twenty-minute walk from the Holley's house. Lisa had visited April often in the past. This time, Lisa's grandmother said she could not go to April's. However, Lisa said that she was going anyway. Ultimately, she changed her mind because it was very dark and foggy outside. (15 RT 2104-2106 .)

Theresa and Shannon agreed to drive April home. When they pulled up to April's house, [Theresa] thought she saw lights and the television on inside the house. As April approached the house, Theresa asked April if she was sure Naomi was home. April said "yeah" and don't worry, I'll be fine". April went around to the back of the house. Theresa and Shannon waited about ten minutes then left, assuming April was in the house because April did not come back, and the Holley's always let their back door unlocked. (14 RT 2049, 2158-2160; 15 RT 2109.)

Early the following morning, Sunday, December 5, at 7:30, Lisa walked over to the Holley's to see April. [She knocked on the door] and no one responded. She then left without going inside.

Later that same morning, Roger Rummerfield was helping Orville Bailey clear away the remains of Mr. Bailey's former residence in Matheny Tract, which had burned down six months earlier. This was an ongoing project and Roger Rummerfield and Orville Bailey worked on it every day. (15 RT 2173.)

At about noon on Sunday, Roger went over to the Holley's house to use their restroom. This was his usual practice. Roger knew the Holley family well; he had gone to school with Tammy and Tammy was a friend of Roger's girlfriend, Renee. Also, Roger had known April since she was two years old and had at times lived at the Holley residence. (15 RT 2223.) Mr. Rummefield approached the Holley's house and noted that the television set was blaring [loudly]. He went around to the back of the house and called for Tammy or Naomi, but no one responded. He entered the residence and

checked the bedrooms but no one was there. He looked in the bathroom and discovered April in the bathtub. She had no pulse. (RT 2230, 2233, 2234.) There was water in the tub, a few inches deep. The drain was plugged with a rag. The water covered about half of April's face, up to her nose. (15 RT 2234.)

Rummerfield became very agitated and ran back to where Orville Bailey was working, yelling for someone to call an ambulance and that something had happened to April. He then ran back to the Holley house and broke down the front door to allow paramedics easier access to April when they arrived. (15 RT 2228-2237.)

Orville and the next door neighbors, Margaret and Donald Thomas, responding to Roger, entered the Holley residence and observed April's body in the tub. April was laying on her right arm, with her left arm folded behind her. (RT 2185.) Her head was at the end of the tub where the drain was located. (15 RT 2185, 2234.) Her legs were doubled up. (15 RT 2183-2185.)

Ms. Thomas called paramedics. (RT 2302-2303.) The first to arrive was Manuel Hernandez, an Emergency Medical Technician and ambulance attendant; and his partner, Kathy Wojtasiewiecz. They were waived down by Rummerfield and directed to Holley's residence. (15 RT 2324-2325.)

Hernandez entered the residence and saw a person in the bathtub. The person was a near-fetal position. She was facing the wall, away from the paramedics as they entered the bathroom. She was lying on her right arm and her left arm was bent behind her back. Her head was at the drain-end of the tub. The drain was plugged by a rag. There were 4-6 inches of water in the tub. Her face was half-covered with water, the water in the tub just reaching the nose-line. (15 RT 2327, 2331-2332.) Mr. Hernandez lifted the person from the tub and placed it in the kitchen. As he was lifting the body he realized the person was deceased because the body was rigid. (15 RT 2329-2330.)

Fireman responded after the arrival of the paramedics, specifically,

Timothy Dutra of the California Department of Forestry and two others from his station. Dutra determined that the person was dead. He then contacted the Tulare County Sheriff's Department, who responded. Those responding included Deputy Robert Kent, who contacted Officer Dutra; Detective Harold Jones; Detective Johnson, Detective Crabtree from the coroner's division; Detective Raborn and Lieutenant Harris. Also responding was Brian Johnson from the county crime lab, who took pictures of the scene, and a pathologist, Dr. Gary Walter. (16 RT 2500

Dr. Walter made contact with law enforcement personnel at the Holley residence, including Detective Jones. Dr. Walter did a cursory examination of the body to determine if there had been a sexual assault, but drew no conclusions. This fact he may have communicated to Detective Jones. At this time there may have been one other law enforcement officer present but there were no civilians (non-emergency personnel) present. (15 RT 2343.)

Dr. Walter attempted to determine the time of death. There was "an

element" of rigor mortis (the stiffening of muscles from chemical changes following death) present. (15 RT 2346. Dr. Walter could not tell exactly what part of the cycle April Holley was in when he examined her. Her condition was consistent with a cause of death of 9:00 p.m. the previous evening, but that estimate was not conclusive. (15 RT 2346-2348.)

Vaginal and rectal swabs were taken at the scene. Semen was found in the rectal swab. None was found in the vaginal swab. (17 RT 2638.)

On December 5, 1988, an autopsy was performed on April Holley by Dr. John McCann, a pediatrician at U.C. Davis Medical Center with a subspecialty in child sexual abuse, and Dr. Leonard Miller, a pathologist under contract with Tulare County. The victim was four-feet six inches tall and weighed around 100 pounds. She had lice. She was not sexually developed. She was healthy except for her small size. (16 RT 2362, 2387.)

The body exhibited numerous petechiae, which are small hemorrhages under the skin. (16 RTR 2364.) The most common cause of petechiae is increased transvascular pressure. The increased pressure

within the vascular system causes the blood to lead from the vessels. (16 RT 2368.) Petechiae may also be caused by an attack of vomiting, a violent coughing fit or a lack of oxygen. (16 RT 2417-2445.) Petechiae only form while the victim is alive. They may form while the victim is unconscious. (16 RT 2444-2445.)

In this case, the victim had petechiae in the whites of her eyes and on her head, face, upper eyelid, neck and chest. (16 RT 2356-2366.) She had petechiae on the lower portion of the left side of her face. (16 RT 2366.) There was a clear line of demarcation along the left jawline. (16 RT 2372.) That is, there were numerous petechiae above this line but none below it. This line of demarcation was just beneath the mandible or jaw. This pattern was consistent with the victim being held down by a human hand on the left side of her neck and face, and suggested a struggle by the victim in trying to get away from the perpetrator. The head and neck petechiae were consistent with the victim losing consciousness. (16 RT 2372-2374.)

There was a bruise on the right ear consistent striking or being struck

by a hard blunt object. It could not be determined whether this bruise was or was not the result of a blow that might have caused the victim to lose consciousness. (16 RT 2376.)

There was a 2 ½ inch bruise on the right lower leg which resulted from a striking (16 RT 2377) and a bruise on the left inner thigh, consistent with someone trying to separate the victim's legs, although there was no corresponding bruise on the other thigh. There were no other significant injuries on the lower extremities. (16 RT 2384.) Dr. McCann thought this unusual because it was inconsistent with his hypothesis that the petechiae on the lower part of the face formed as a result of a struggle. (16 RT 2385-2470.) He explained this discrepancy by suggesting that there was more than one perpetrator, one of whom held the victim's legs while she struggled. (16 RT 2383, 2449.)

Dr. Miller testified that there was a frothy fluid in the victim's lungs suggesting an active inhalation of water and death by drowning. (16 RT 2363-2364, 2471- 2472.) Dr. McCann noted that although there was a line

on the victim's neck following the cut of her garment, there was no indication of strangulation by ligature (e.g., a cord or rope pulled tight around the neck). (RT 2376, 2386.) Rather, the victim suffocated by being held under water or having something held over her face. (16 RT 2386.)

While petechiae can form due to asphyxia and while the victim is unconscious (16 RT 2445-2446), Dr. McCann believed that these explanations did not explain the pattern of petaciae appearing around the jaw, which he believed were caused by a struggle. Nevertheless, it could not be determined to a medical certainty how any of the injuries occurred, or that the petechiae were formed at the same time. (16 RT 2421-2422. 2425.) While both doctors [speculated] that the petechiae on the victim's face were created during a struggle, neither was asked {discounted} whether these could have been formed by a perpetrator drowning the victim by holding her head under water while applying considerable pressure to face and neck, while she was unconscious. Neither discounted the possibility that the victim was first struck unconscious and then drowned. (16 RT

2427-2428, 2463-2466.)

Neither doctor was able to tell if the victim's injuries occurred while she was in the bathtub. (116 RT 2428, 2470.) However, if she had been struggling while in the tub while it contained sufficient water, this would [also] have explained the lack of injuries to the lower extremities. (16 RT 2427.)

The victim had suffered "very serious" injuries to her genitalia. She had a very large laceration to the tissues of the vagina that continued through the back wall of the vagina [and into the muscular tissue]. This injury was probably caused by one large thrust by a large object which could have been a human penis. (16 RT 2433.) The victim was probably on her back when she sustained these injuries. (16 RT 2399.)

The victim had also suffered serious injuries to the anal area. These were caused by a large object that exceeded the limits of the anal opening such that there were lacerations around the circumference of the orifice as well as damage to the underlying muscle tissue. (16 RT 2411.) The object

used could have been a human penis although it was not conclusively determined that this was the case. (16 RT 2413.) It could not be determined what position the victim's body was in when the anal injuries were sustained, nor could it be determined whether the anal injuries occurred before or after the injuries to the genitalia. (16 RT 2414.)

Numerous residents of Matheny tract testified at appellant's trial regarding observations they made on Saturday, December 4, 1988. Lorraine Hughes, a friend of Naomi Holley, occupied a mobile home on a property east of the Holley residence. On three separate occasions on Saturday April Holley came up to Hughes' residence and knocked on the door. Hughes did not answer because she was waiting for a phone call from her husband. The last time April appeared was 7:45 p.m. (15 RT 2208-2216.)

Irene Garcia lived in the mobile home in front of Lorraine Hughes' unit, on the same property. She testified that on two occasions she saw April Holley come to Lorraine's door, but no one answered. Later, at

about 9 p.m., Garcia heard a gunshot, and sometime shortly thereafter, what she described as a "very ugly" scream (as though a person was being strangled) of a young girl. (15 RT 2126-2133.)

Also at Irene's mobile home that day were, her sister, Rufilla Villalobos; Rufilla's boyfriend, Caesar Lopez; her brother, Abel Marquez; and Rafael Del Real, Irene's son. (15 RT 2137, 2161.)

Rufilla heard no screams that night, but she did hear a single gunshot, around 9:30 p.m. Rafael testified that at around 5 p.m., he saw April knocking on Lorraine Hughes' front door. No one answered. April kept knocking. Still. no one answered. April finally left. (15 RT 2163-2164.) At about 8 p.m., he heard three gunshots. (15 RT 2165.) At about 9 p.m., he heard "stressed out" screams, apparently from a female's voice, coming from an easterly direction, which was the general direction of the Holley residence. (15 2166-2167.)

Caesar Lopez testified that at about 9:30 p.m. he was outside and heard screams, and voices that sounded like a man and a woman arguing or

fighting. The voices lasted ten to fifteen seconds and came from the general direction of the Holley residence. (15 RT 2170-2172.)

Abel Marquez was outside with Caesar and heard two gunshots at about 9 or 9:30. The gunshots came from the east. (15 RT 2152.) Then he heard the voices of a man and a woman passing by. It sounded like a man and a woman arguing and swearing, using words like "fuck this" and "fuck you asshole." (15 2152, 21544-2159.)

Irene and the other persons at her house did not discuss the screams and gunshots at all on Saturday evening. The first such discussion occurred on Sunday after they learned that April had been killed. (15 RT 2167.)

Jeremy Johnson was 11 years old in December of 1988. At that time he and his family were living on Beacon Street in Matheny Tract. Jeremy and April were friends and schoolmates. On Friday, December 3, Jeremy saw April on the school bus. April said she was spending the weekend with a friend, Misty Mustin (15 RT 2115.)

On Saturday, December 4, between 9 or 9:30 and 10, Jeremy was outside. His aunt Lou Karnes had been visiting and just left, and Jeremy went to lock the front gate. (RT 2116, 2123.) At that time he heard a scream that lasted for about three seconds, coming from the direction of the Holley residence. He described it as a "fighting, angry" scream, maybe "scared." He identified the voice as April's. However, Jeremy did not bring the scream to anyone's attention that evening, and in fact did not mention it until Sunday when questioned by his parents, after they learned of April's death. (15 RT 2119, 2124.)

At trial, the parties stipulated to the following:

Margaret Thomas, at 8 p.m. on Saturday, December 3, saw headlights on a car that pulled in front of Holley residence. (17 RT 2636-

Regarding the hairs recovered from drain at the Holley residence, all hairs were consistent with the victim, Naomi and Tammy Holley, or inconclusive as to the Holleys and Charles Richardson, except for four pubic hairs consistent with Charles Richardson. As to these four, one characteristic

was unusual (17 RT 2637-2638.)

Swabs were taken from the victim at the scene. As to the swabs, the rectal swab contained sperm; the vaginal swab did not. Excluded as donors of the sperm in the rectal swab were: Charlie Richardson, Bobby Joe Marshall Jr., Joe Mills, James Stubblefield. (17 RT 2638-2640.)

Joe Mills, who was 14 years of age as of December, 1988 and at that time lived in Matheny tract with his grandparents, was a friend of the Holley family and also April's cousin. (17 RT 2643-2644, 2703.) Mills and Bobby Joe Marshall Jr. (herein "Bobby Joe") were very close friends. (17 RT 2623.) Bobby Joe, age 15 at the time, also knew the Holleys and testified that it was well known around Matheny tract that April had a "crush" on him. (17 RT 2723-2726.)

Joe Mills testified that on Saturday, December 3, he and Bobby joe had decided to go hunting for raccoons with Lonnie Howard. Lonnie was much older than Mills and Bobby Joe, about 35-40 years old. (17 RT 2727-2729.) Joe and Bobby Joe walked over to Lonnie's house, which

was located on Beacon Street. (17 RT 2687.) This was a walk of only a few minutes from the Marshall's trailer, which was located on Beacon and East Canal. (17 RT 2688.) Both of the boys had borrowed .22 caliber rifles. (17 RT 2728-2729.) Lonnie had his own guns as well as hunting dogs. (17 RT 2648.) On the walk to Lonnie's, Joe and Bobby Joe fired their guns several times, apparently, at a mound of dirt, and in the direction of the Marshalls' trailer. (17 RT 2651.)

Joe was unsure about the times of various events of that day and evening, but it was nighttime when he and Bobby Joe walked over to Lonnie's house. (17 RT 2649.)

At Lonnie's house, Lonnie and the boys loaded the guns and dogs into Lonnie's yellow station wagon and left to go hunting. They drove toward Corcoran but near the continuation school on Pratt on the western boundry of Matheny Tract, they decided to turn around and come back because it was too foggy to drive and Lonnie nearly swerved off road. (17 RT 2651.) From the time they initially left from Lonnie's to the time they arrived back

took 30-40 minutes.

When they arrived at Lonnie's house, a friend of Joes named Jimmy Rounseval was parked in the driveway. (17 RT 2652.) Joe asked Jimmy if he would buy some beer for himself (Joe) and Bobby Joe. Meanwhile, Bobby Joe started walking home to his trailer located a few minutes to the west by foot. (17 RT 2649.) Jimmy Rounseval declined Joe's request to buy beer. Joe then ran to catch up with Bobby Joe. The two then proceeded to the Marshall residence. (17 RT 2653.) At some point that day after arriving back at Lonnie's house, there was a second incident of the boys firing their rifles. At first, Joe testified that this occurred as they were walking back to the Marshall's trailer, and they fired to scare a pedestrian on the other side of the street whom they did not recognize. (17 RT 2653.) He later corrected himself and testified that the second time they fired their weapons was sometime after they arrived back at the Marshall residence. (RT 2714.) On this second occasion of firing the guns, they could have fired as many as twenty rounds. (17 RT 2716.)

The boys returned to the Marshall residence. After about 15 or 20 minutes they decided to go the Holley's house and see if Tammy was there so they could ask her to buy some cocaine for them. (17 RT 2655-2656.)

At the Holley's Joe knocked on the door and called out to see if anyone was home, but no one responded. Joe observed that the T.V. was on and the sound was turned up loud. After several minutes and repeated unsuccessful attempts to raise someone in the house, the boys left to return to the Marshall's residence. (17 RT 2655-2657.)

On the way they encountered Charles Richardson and Robert Hernandez, both of whom were known to Joe and Bobby Joe. (17 2657-2658.) Richardson was in fact living at the Marshall residence as of December 3. (17 RT 2722 .) Bobby Joe approached Richardson to see if Richardson could obtain any cocaine. (17 RT 2658.) He gave Richardson some money, about $25.Richardson walked across the canal in the direction of the Bailey's house. While Richardson was doing this, Bobby Joe, Joe Mills and Robert Hernandez stayed behind and stood on the bank of

the canal. (17 RT 2662.)

After about 10 to 15 minutes Richardson returned with no drugs. He returned the money to Bobby Joe. (17 RT 2662-2663.) Bobby Joe and Mills then returned to Marshall's residence. Joe did not see what Richardson and Hernandez did thereafter. (17 RT 2663.)

Mills was asked at trial to describe in detail the route he and Bobby Joe took from Lonnie's house to their encounter with Richardson and Robert Hernandez. He stated that they proceeded down Beacon to get to Lonnie's. They went back down Beacon to arrive back at the Marshall's residence. (17 RT 2660.) They then "went down canal south," then went "around to Addie" and turned right, proceeding west. (17 RT 2661.)

After leaving the Holley's they went back down Addie and down west canal. On West Canal even with Beacon, they met up with Charles Richardson and Robert Hernandez. (17 RT 2661.)

At the Marshall's residence, the boys stood around in the front and listened to the radio on Bobby Joe's father's truck. After a short time

appellant drove up, driving a Brown Pontiac Firebird, which belonged to his sister, Lisa Saldana. (17 RT 2680.) Mills described this vehicle as "loud." (17 RT 2664.) Modifying his prior testimony, Mills stated that the second incident of he and Bobby Joe firing their rifles occurred after appellant arrived at the Marshall's. (17 RT 2689, 2714.)

Appellant went inside and was there for about five minutes. When he came back out Bobby Joe asked him if he would take them (Bobby Joe and Joe Mills) to Linnell Camp to buy drugs. (17 RT 2664.) After this conversation, appellant left, driving down canal north, turning onto Wade, and then turning back on West Canal, heading south toward Addie. (17 RT 2665, 2667), on the other side of canal from the Marshall's. (17 RT 2669].

When appellant left, he did not say where he was going or what if anything he was going to do. (17 RT 2687.) Twenty to thirty minutes later, appellant returned to the Marshall's residence. (17 RT 2667-2668.)

After appellant returned, he, Bobby Joe and Mills left in the firebird to go to Linnell Camp. (RT 2668.) On the way they stopped at the "cotton

gin" (Mid-Valley Cotton Growers) where Rhonda Schaub, Billy Joe's cousin and appellant's girlfriend, was working. (17 RT 2669.) Although it was foggy, appellant drove 70 to 80 miles per hour. (17 RT 2670.) It was about 10 p.m. when they arrived at the cotton gin. (17 RT 2671.) They were there 10 to 15 minutes. (17 RT 2668.)

From the cotton gin the three proceeded to one of the malls in Visalia. This particular mall had a Sears store. (RT 2672.) They drove around the mall but did not go inside. From there they proceeded to Linnell Camp and purchased some cocaine. (17 RT 2673-2674.) They then drove for a mile or so, stopped, and snorted some of the cocaine. Prior to that, Mills had taken no drugs that day and had drank probably one beer. (17 RT 2674.) They had taken some beer with them when they left the Marshall's. (17 RT 2675.)

They then drove back to Visalia, to the mall parking lot, where they stayed for 10-15 minutes. (17 RT 2675-2676.) They then returned to the cotton gin. (17 RT 2676.) While the boys stayed in the car, appellant went

inside. (17 RT 2676.) He was inside the cotton gin for ten minutes. (17 RT 2676.)

From the cotton gin, The three then drove to Billy Rummerfield's house in the city of Tulare. Appellant went inside while the boys stayed in the car and snorted a line of cocaine each. Appellant returned after about five minutes and at that time he also snorted a line of cocaine. (17 RT 2676-2677.) From Billy Rummerfield's house they returned to Matheny Tract. (17 RT 2678.) They drove down Pratt to Wade, which is the street Mills lived on, then ran out of gas on Luton Street. (17 RT 2678-2679.) Earlier in the evening appellant had put $6 or $7 worth of gas in the car, which Mills paid for. (17 RT 2678.)

Mills, Bobby Joe and appellant got out of the car and started walking. They stayed together on Wade until they reached the canal streets at which time they split up. Bobby Joe and Mills walked down the "other" [east?] canal street, while appellant proceeded down West Canal towards Addie, and his residence. (17 RT 2679, 2681.)

Bobby Joe and Mills arrived at the Marshall's trailer at about 2 or 3 in the morning. (17 RT 2682.) They snorted some cocaine and had something to eat, then went to sleep. (17 RT 2683.) Mills slept on the floor in the dining room. Bobby Joe's father, Bob Marshall Sr. was asleep on a mattress on the other side of the dining room. (17 RT 2683-2684.)

Mills eventually got up, got dressed and left, arriving home at about 9 a.m. (17 RT 2685, 2704, 2767.) As he was leaving the Marshall's residence an acquaintance, Kim Fleeman, who is Rhonda Schaub's sister, pulled up briefly in a white van. They briefly exchanged greetings; then Fleeman went into the trailer. (17 RT 2685.)

Later that day (Sunday) Mills saw Bobby Joe at his (Mills') residence and learned that April Holley was dead. Joe went to the Holley residence to determine if Bobby Joe was telling the truth. (17 RT 2685-2686.)

Bobby Joe Marshall, Jr., at the time of trial in this case, was in jail for receiving stolen property. Had five felonies as an adult. (17 RT 2719.)

Bobby Joe Marshall, Jr., testified that as of December, 1988, Charles

Richardson had been living at Bob Marshall Sr.'s trailer for about three months. (RT 2722.) On December 3, 1988, Bobby Joe Jr., at this time fifteen years of age, and Mills, had plans to go hunting with Lonnie Howard. Bobby Joe and Mills had borrowed guns. They left in Lonnie's yellow station wagon to buy gas for the trip, but it was too foggy so they decided not to go. They therefore returned to Lonnie's house. (17 RT 2731-2732.) Bobby Joe believed that it was 6 or 7 p.m. when he and Mills set out for Lonnie's from Marshall's (17 RT 2776.)

After Lonnie and the boys arrived back at Lonnie's, Jimmy Rounseval drove up. Joe approached Jimmy and asked him if he would by him and Bobby Joe some beer. As this was going on, Bobby Joe started walking home. (17 RT 2732.) Rounseval ultimately decided not to buy the beer, so Mills ran to catch up with Bobby Joe. As he was catching up with Bobby Joe, Mills started firing his rifle. Bobby Joe did not fire his gun. (17 RT 2653, 2734.)

The boys arrived at the Marshall residence. Bobby Joe got into an

argument with his father, Bob Marshall, Sr., because someone had called Bob Sr. and told him that Bobby was using drugs. (17 RT 2735.) Bobby thereafter, at about 8 p.m. (17 RT 2781), he walked across the street to Rocky Hernandez' house to try to locate Richardson. He hoped that Richardson could purchase some cocaine. Richardson was not there. (17 RT 2736-2737, 2743.) Bobby Joe and Mills then proceeded to the Holley's house to look for Richardson because Richardson sometimes associated with Tammy Holley. (17 RT 2738.)

Originally, Bobby Joe had denied to the police that he had gone to the Holley's that night because Bob Sr. had told him to. (17 RT 2741.) Upon arriving at the Holley's house, Bobby Joe could hear that the television set was on. However, no one answered the door. (17 RT 2740.)

Bobby Joe and Mills started walking back toward the Marshall residence. On the way back, at Canal and Beacon, they saw Richardson and Robert Hernandez. (17 RT 2742, 2777-2778.) This was a little after 8:15 p.m. (17 RT 2781.) Bobby Joe asked Richardson to try and get them

some cocaine. Richardson proceeded to Chester Washington's house. (17 RT 2744-1746.)

Charlie returned shortly without any drugs. He said Chester did not have any. (17 RT 2747-2748.) He returned Bobby Joe's money. Bobby Joe and Joe Mills returned to the Marshall's residence. (17 RT 2748.) Bobby Joe estimated that he and Joe left for the Holley's house at 8:15 p.m. and returned to the Marshall's at 8:45. (17 RT 2748.) Around 8:30 or 9:00 p.m., appellant, whom Bobby Joe and the Marshalls had known "a long, long time," drove up in his sister's brown Pontiac Firebird and pulled into the driveway. (17 RT 2749, 2782.) The Firebird was loud and needed a muffler. Because it was foggy, Bobby Joe did not actually see the car much before it pulled onto his property. (17 RT 2782.)

Bobby Joe was not expecting a visit from appellant that evening. (17 RT 2748-2749.)

Appellant spoke with Bob Marshall, Sr., who had already come outside. Appellant did not get out of the car. He and Bob Sr. had a

discussion about a phone bill or phone card. (17 RT 2782.) According to Bobby Joe, both appeared to be acting normally. Neither appeared agitated or upset. (17 RT 2772-2773.)

Appellant then spoke with Bobby Joe. He told Bobby Joe that Rhonda Schaub, appellant's girlfriend and Bobby Joe's cousin (17 RT 2751) wanted to talk to him. Bobby Joe asked appellant if he had ever been to Linnell Camp and if he wanted to go buy some drugs. Appellant agreed to do so. Bobby Joe did not think appellant had been at the Marshall property previously that evening prior to this visit and subsequent to the boys' return from Lonnie Howard's. (17 RT 2793.)

Bobby Joe, appellant and Joe Mills left the Marshall property in the Firebird and drove to the cotton gin, where Rhonda was working that evening. It was foggy and appellant drove slowly. It took 15 to 20 minutes to get to the cotton gin, and they arrived there at around 9:20 p.m. (17 RT 2753-2754.) Appellant parked the car and the three went inside. They spoke with Rhonda. Rhonda asked appellant to bring her her lunch. They

were inside for 15 to 20 minutes. At about 9:50 p.m. they left the gin and proceeded to Visalia. (17 RT 2754.)

They drove to the shopping mall at Mooney and Caldwell in Visalia. They drove around the parking lot for about 15 minutes. (17 RT 2755.) They then drove through some apartments, then proceeded to Linnell Camp where they purchased some cocaine. (17 RT 2755-2756.) They then bought $3 worth of gas for the car. (17 RT 2756-2757.) They drove to Billy Rummerfield's house, a friend who lived in Tulare. (17 RT 2757.) Rummerfield lived in an upstairs studio apartment. While appellant went upstairs to Billy's, the boys stayed in the car and snorted some of the cocaine. (17 RT 2757-2758.) Appellant returned to the car and snorted some cocaine also. The three then drove back to the cotton gin, arriving shortly after 1 a.m. (17 RT 2758.)

While the boys stayed in the car, appellant went inside to talk to Rhonda in light of the fact that they had not brought Rhonda her lunch as she had requested. (17 RT 2758.) Appellant returned to the car after 10 to 15

minutes and they drove back toward Matheny Tract. On the way they stopped on an isolated country road, near Pleasant and West streets, and snorted some more cocaine. They returned to Matheny Tract. Their vehicle ran out of gas on Wade Street. They were unable to move the car, so they left it where it had stopped. (17 RT 2760.)

The three walked down Wade Street. Bobby Joe and Joe Mills turned on canal and crossed the ditch to go to the Marshall property. Appellant kept going straight. (17 RT 2761-2762.)

Bobby Joe arrived home around 2 a.m. He went into the trailer. Charles Richardson was inside. Bobby Joe then came back outside and he and Joe Mills finished the cocaine. They went back inside the trailer at about 3 a.m. (17 RT 2761-2765.)

Several hours later on that Sunday morning, December 4, Bobby Joe was awakened by Rhonda, who was angry because she and appellant did not bring her lunch to the gin the previous evening. (RT 2766.) By this time, Joe and Richardson had left. Kim Fleeman, Rhonda's sister, was not there.

(RT 2768.) Bobby Joe did not engage in any conversation with appellant and Richardson where it was said that "we got to get our stories straight." (RT 2768.)

The last time Bobby Joe saw Richardson on Sunday the 4th was in the afternoon, when Richardson came back to the Marshall trailer, gathered his belongings, and left. By this time, April's body had been discovered. (17 RT 2771-2772.)

Bobby Joe testified that he knew Raymond Cox, Joe Mills' cousin, and Cox' girlfriend, Victoria Lopez. (17 RT 2768.) Billy Joe and Lopez did not like each other. (17 RT 2769-2770.) The three of them were involved in the possession of stolen parts to a Cadillac, resulting in Cox being sent to jail. Bobby Joe himself was arrested in that case, in March of 1991. (17 RT 2785-2786.)

Bobby Joe knew Lopez to take drugs and she did so with Bobby Joe while Cox was in jail. However, at some point Lopez claimed that Bobby Joe stole from her. At another time while Cox was in jail Bobby Joe called

Lopez names and threw dirt clods at her car. This is probably why she did not like him. (17 RT 2785-2787, 2791.)

At appellant's trial Bobby Joe denied ever telling Lopez that he, Charlie Richardson and one other guy were at April's house the night she was murdered; nor did he tell her that he was drinking with April, listening to music and dancing with her. He did not tell Lopez that he was touching April's body, kissing her and had sex with her. He did not tell Lopez that "everything . . . happened in the bathroom that night." (17 RT 2770.) On March 14, 1991, Bobby Joe was arrested for the murder of April Holley. (17 RT 2770.) On August 21, 1991, he was offered immunity in exchange for his cooperation on the Holley case, but declined. (17 RT 2770-2771.)

As a result of the offer of immunity Bobby Joe did not change anything about the account of events he had previously given to law enforcement authorities, except that he "told them what Charlie told me." However, he was never granted immunity. The charges against Bobby Joe in connection with the Holley case were eventually dismissed. (17 RT

2770.)

On December 3, 1988, Bob Marshall Sr. was at home at his three-bedroom trailer located in Matheny Tract. That evening he had an argument with his son, Bobby Joe Jr., because he had heard that Bobby Joe was on dope. The argument did not last long. After it was over, Bobby Jr. said that was going to go look for Charles Richardson. Richardson had been living at Bob Sr.'s trailer for about 2 to three months. (17 RT 2799.)

Bobby Joe left and returned ten to fifteen minutes later. Subsequently, at about 9 p.m., appellant drove up. Bob Sr. Was inside at this time. Although appellant at one time had lived at the Marshall's trailer, and may have lived there at a time when Richardson was living there, there was apparently some animosity between appellant and Bob Sr. as of December 3 because as soon as Bob Sr. saw the lights of appellant's vehicle through the window, he came outside a nd told appellant to leave Appellant pulled back out onto the road. (17 RT 2803.) Bobby Joe Jr. and Joe Mills got into the car appellant was driving and the three drove off. (17 RT 2804.)

Bob Sr. was unsure whether appellant ever came back that evening; he could have done so later that night after Bob Sr., was asleep, or the following morning. (17 RT 2804, 2806-2807.)

Charlie Richardson did return to the trailer, at about 11:00 p.m. (17 RT 2809.) He watched a movie on T.V. and was very quiet, which was uncharacteristic for him. (17 RT 2809, 2812-2813.) The boys, Bobby Joe and Joe Mills, came in much later, sometime the following morning. (17 RT 2809.)

Bob Sr. learned of April Holley's death on Sunday morning, December 4, at 8:30 or 9:00 a.m. He heard rumors she had been raped and drowned in the bathtub. (RT 2815.) He did not see Kim Fleeman (his wife's niece) or appellant that day. (17 RT 2815-2817.)

Charlie Richardson left the trailer then returned 5:30 6 that afternoon. Per Bob sr., Richardson and "two other guys went up north ." (17 RT 2817.)

At 6 a.m. on Sunday morning the 4th Bob Sr. picked up Rhonda

Schaub at the cotton gin and gave her a ride back to the Marshall trailer. She did not stay long before going home. (17 RT 2819.)

In December of 1988 Victoria Lopez lived with Ray Cox next door to Joe Mills, Cox' cousin. (17 RT 2281-2282) Late one evening (2824) in June of 1989, Bobby Joe Marshall, Jr. came over to her house. At trial she testified that Bobby Joe came over at 10:30 to 11 p.m., although during earlier statements she had given at least three different times, i.e., eight to nine, nine to ten, and 11:30 to 12. (17 RT 2831.) According to her trial testimony, Cox at this time was in jail; however, she had previously testified under oath that Cox was at his mother's house. (17 RT 2832.) At trial Lopez stated that Marshall came over to check up on her and to see if she needed anything, although she had given prior statements indicating that Bobby Joe was actually looking for Ray; and that he "just showed up." (17 RT 2832-2833.)

In any event, Lopez testified at trial that Bobby Joe told Lopez that he, Bobby Joe, was at the Holley house on the night April Holley was killed.

(17 RT 2826.) Bobby Joe said that "Charlie" and "one other guy" were also there that evening. Bobby Joe said he danced with April, kissed her, touched her and "fucked" her. All of this happened in the bathroom, per Bobby Joe. (17 RT 2826-2827.) They all (Bobby Joe, Charlie and the other guy) "fucked" her. (17 RT 2827. He told her he got rid of his tennis shoes. (17 RT 2828.)

Sometime in early 1991 Lopez relayed what Bobby Joe told her to Regina Holdridge. Unbeknownst to Lopez, Holdridge's mother was a police officer in Visalia. (17 RT 2828.) Two to three months after having this conversation with Holdridge, Lopez was contacted by an investigator from the District Attorney's office. (17 RT 2828-2829.) Prior to that time, Lopez never told anyone, including the police, what Bobby Joe told her, except for Holdridge. (17 RT 2829-2830.) She testified that she "didn't want to get involved." (17 RT 2829.)

Lopez was convicted in 1991 of a felony fraudulent check charge. She was subject to outstanding warrants at the time of trial. (17 RT 2831.)

She testified at trial under an out-of-state subpoena which protected her from arrest on any outstanding warrants while she was in California to testify. She received a $400 per diem stipend to testify in this case. (17 RT 2830.)

Lopez denied that she held a grudge against Bobby Joe, although she admitted that she had accused him in the past of stealing from her, claiming that he stole a stereo and a Rottweiler dog for which she had paid $500 (she previously had told the District Attorney investigator that she had paid $300 for the Rottweiler). (17 RT 2833.)

Lopez claimed that she knew nothing of the April Holley case prior to the conversation with Bobby Joe, and denied having previously given a statement that she had heard about it from Cox' cousin. (17 RT 2834.) She claimed that the substance of the statement she attributed to Bobby Joe came from him, and not someone else. (17 RT 2837.)

Lopez denied having testified under oath that it was Holdridge's friend, Stephen Gould, to whom she related Bobby Jr.'s story. (17 RT 2834-2835.) At trial she clarified that she told Holdridge about the story on

the phone while she was at Stephen Gould's house. (17 RT 2837.)

Although she testified that Bobby Joe made the alleged statement in June, she had earlier testified that it was "almost winter." (17 RT 2835.) Lopez testified that Bobby did not tell her that he had had sex with April prior the night she was murdered. She claimed not to remember having twice testified to the opposite. (17 RT 2836.)

Lopez testified that she did not live in Matheny tract when the Holley murder occurred in 1988, but lived there in 1989. (17 RT 2821-2823.) She denied being a drug user while living in Matheny Tract. She denied ever doing drugs with Bobby Joe or obtaining them from Nancy Lee Marshall. (17 RT 2839.) She knew Bobby Joe's brother Mike. She denied ever sleeping with him or lying to Cox about sleeping with him when Cox was in jail in 1989. (RT 2839-2840.) Lopez denied any grudge against the Marshalls. (17 RT 2841.)

Kim Fleeman is Bobby Jr.'s cousin. (18 RT 2886.) In December of 1988 she lived in the city of Tulare. At about 9 or 9:30 Sunday morning,

December 4, she received a call from her cousin Nancy Lee Marshall. Nancy wanted Kim to give her a ride into town. She drove to the Marshall's trailer in Matheny Tract, arriving at about 10 to 10:30 a.m.. When Fleeman arrived but before entering the trailer she saw Bobby Joe and Joe Mills at the Marshall's trailer. (18 RT 2903-2904.)

When Fleeman entered the trailer, a fight of some sort was in progress; i.e., "people were screaming and yelling," but she did not know who. (18 RT 2909.) She sat and talked with her aunt, Nancy Louise, for about fifteen or twenty minutes. Besides Joe Mills and Bobby Joe, she also saw Nancy Lee, Kenneth Marshall, Bobby Joe's brother, Bob Marshall Sr., and Charles Richardson. (18 RT 2890.) At the preliminary hearing she had testified that she also had seen Joe Mills inside. (18 RT 2906.)

After speaking with Nancy Louise, Fleeman went to the back of the trailer to use the restroom. As she walked down the hallway she saw Richardson and Bobby Jr. in one of the bedrooms. She also saw the feet of another person. While she was in the restroom the bedroom door was open

and she heard bits and pieces of a conversation. She heard what she believed to be appellant's voice saying "the little bitch got what she deserved." She heard Bobby Joe say "we got to get our stories straight." At some point she heard the bedroom door close. When she exited the restroom, the bedroom door was closed. (18 RT 2892-2895.)

Fleeman spent a total of about 30-40 minutes at the Marshall's trailer that morning, after which she left. She did not give Nancy Lee a ride because the fight that was in progress when she arrived was still going on. (18 RT 2893.)

Fleeman gave her first statement to District Attorney investigator Diaz on July 19, 1990. (18 RT 2911.) At that time she apparently told him that she saw Steve Brown and Bobby Joe, but only heard Richardson's voice. (18 RT 2911.)

It was about a week later that she told Diaz that her first story was not true. At that time she stated that she did not personally hear any of the conversations she described but had just heard people talking about Bobby

Joe saying where he was the night before. (18 RT 2914.) Then on March 4, 1991, she told Investigator Diaz that the first story was true, but that she did not see actually see Richardson and heard the voices of all three subjects. (18 RT 2912.)

At her testimony on July 6, 1992; December 4, 1991; and during her statement of March 4, 1991, she said nothing about seeing anyone's feet. (18 RT 2912-2913.)

Fleeman testified that the previous evening, around 6:30 or 7 p.m., Bobby Joe Jr. showed up at her house in Tulare. He arrived in a Camaro or Firebird owned by Lisa Saldana. As Bobby Joe came to the door, Fleeman said "If that's Steve Brown in the car, I want him out of here now." (18 RT 2899.) Bobby Joe went back to the car, and the vehicle left. Bobby Joe walked back to Fleeman's house and asked her to lend him some money, but Fleeman declined. (18 RT 2899-2900.)

Fleeman related the information regarding the statements allegedly made in the Marshall's trailer, in June of 1990, during an interview with

District Attorney investigators. (18 RT 2900.) She later retraced her statement after receiving threats on her life. She said the threats began immediately upon her speaking with the District Attorney's office. She knew where some of the threats were coming from, specifically, Nancy Lee Marshall. (18 RT 2900-2901.) Subsequently, she returned to the District Attorney's office and advised authorities that her original statement was true. (RT 2901.) There were also face-to-face threats, although Fleeman did not know the identity of the person or persons who made the face-to-face threats. (18 RT 2915.)

Other than the first interview with Diaz, which she recanted, Fleeman never said that she saw appellant at the Marshall's trailer on the morning of December 4. In subsequent statements she never claimed to have seem appellant at the Marshall's trailer that day. (18 RT 2918-2919.) At trial Fleeman acknowledged that she had given several different reasons for not giving Nancy Lee a ride after arriving at the Marshall trailer. For example, she apparently told Investigator Diaz of the District Attorney's

office that it had been Nancy Louise Marshall, and not Nancy Lee, who had called and asked for a ride to the store.. (18 RT 2903.) At Richardson's trial she testified that Nancy changed her mind and decided not to go. (18 RT 2904.)

Fleeman claimed that she used her husband's company van to drive to the Marshall's on Sunday. However, she told investigator Diaz that at the time she was using her mother's red Volkswagen. (18 RT 2904.) She denied that her husband was out of town with the company van during the weekend of December 3-4, although she acknowledged that that week, Charlie Richardson had come by her house seeking a ride out of town with Fleeman's husband. (18 RT 2904.)

Although Fleeman testified that her aunt Nancy Louise called her to tell her about April Holley's death, she told investigator Diaz during her third interview with him that she called Nancy Louise. (18 RT 2916.)

Fleeman admitted that she had reason to hold grudge against Bobby Joe because he stole "quite a bit of money" from her grandparents.

However, she denied holding a grudge against Bobby Joe. (18 RT 2917.) She did admit to a grudge against Bob Marshall, Sr. at the time of her statements to Mr. Diaz because he once molested her. (18 RT 2919.) Fleeman admitted to having used drugs prior to December, 1988, but denied using drugs on December 3rd and 4th. (18 RT 2919.) She admitted using drugs with Bobby Joe, Rhonda Schaub and Nancy Lee Marshall. (18 RT 2919-2920.)

Investigator Diaz asked her if she was positive she heard Bobby Joe say "we've got to get our stories straight." She said "that's what I keep thinking." (18 RT 2920.)

In December of 1988, Mike Clifton was Lisa Saldana's boyfriend. (18 RT 2925-2926.) He and Lisa lived at a trailer in Matheny Tract at that time. Also living with them was appellant, the brother of Lisa. Appellant's girlfriend, Rhonda Schaub, lived with them occasionally. (18 RT 2926-2927.) Lisa owned a brown 1974 Pontiac Firebird. (18 RT 2927.) The vehicle was equipped with dual exhausts and was "kind of

loud" when accelerating, but otherwise it was quiet. (R18 T 2928.)

On Saturday, December 3, Clifton went to work. When he got home (between 5:30 and 6:00 in the evening), Lisa was home, but the Firebird was not there. (18 RT 2928-2929.) Appellant was not at the residence; nor was Rhonda. (18 RT 2939.) Clifton testified that during the course of the evening, he saw neither appellant nor the vehicle. (18 RT 2929.) The next time he did see appellant was 4:30 a.m. Sunday morning. (18 RT 2929.) At that time appellant knocked on the door and Clifton, who had been asleep, let him in, then went back to bed. Clifton knew it would it was 4:30 a.m. because he looked at a clock before answering the door. (18 RT 2930-2931.)

Appellant entered and began looking out the windows as if to see if anyone was outside. (18 RT 2930.) Clifton had no conversation with appellant, who was talking with Lisa when Clifton went back to sleep. (18 RT 2931.) Clifton heard appellant tell Lisa that her car was over Wade Street. (18 RT 2931.)

At 8:00 or 9:00 a.m. that same morning, Clifton got up. At 11:00 or 12:00 that morning, Clifton and a friend, J. D. Rushing, retrieved Lisa's car. (18 RT 2932-2934.) Prior to doing that, they obtained some gas, which they put into the car's tank. Clifton was surprised that the car started right up without his having to prime the carburetor. (18 RT 2930.)

At about 7:30 or 8:00 on Sunday morning, Mary Noel Coelho came to Mike and Lisa's trailer, and stayed for 30 minutes to an hour, at the most. (18 RT 2935-2936, 2938.) Also that morning, Rhonda Schaub returned to the trailer. Rhonda appeared earlier than Mary and had come and gone by the time Mary showed up. By 9:00 a.m. Mary had left also. Clifton did not know where appellant was when she left. In fact, after seeing appellant earlier that morning, he did not see appellant again for the rest of the day. (18 RT 2939.)

At some point that day, Clifton learned that April Holley had been molested, raped and drowned. (18 RT 2937, 2940.) He heard Lisa mention this but it was a neighbor, Bradley Hunter, who came over at about

2:00 p.m., who told Clifton. (18 RT 2937.)

Mary Noel Coelho testified that on Sunday, December 4, 1988, she went Idella Meza to Idella Meza's house on Beacon Street, in Matheny Tract, a little after 7:00 a.m. (18 RT 2943.) Idella is Lisa and appellant's mother. Coelho went to Idella's house to secure some cocaine (18 RT 2944), and in fact purchased a "eight ball" for $150.00. From Idella's house, Coelho went to Lisa trailer "down the road." (18 RT 2944.)

At Lisa's house, Coelho and Lisa sat in the kitchen and talked and snorted some cocaine. Mike Clifton was asleep. (18 RT 2945.) After about 15 minutes appellant came out of the back room and went to the front door. Appellant pushed the curtain and remarked that "there are a lot of cops out there, something had happened." Appellant seemed nervous. (RT 2946.) Coelho testified that when she was in Matheny Tract that morning, she did not see any police officers. (18 RT 2947.)

Coelho was at Lisa's trailer for 20-25 minutes. At some point she learned of April Holley's death, possibly by reading about it in the

newspaper. However, she did not tell anyone about appellant's actions that morning. (18 RT 2948), except for her sister, years after the fact. Coelho said she did not want to get involved, and she had her own problems. (18 RT 2948-2950.)

Coelho testified at trial that in 1989 she suffered a felony conviction for the sale of drugs. (18 RT 2951.)

Rhonda Schaub is Kim Fleeman's sister. (18 RT 2964.) In December of 1988, Schaub lived in Matheny Tract and lived with her boyfriend, appellant, at the trailer of Lisa Saldana, appellant's sister. (18 RT 2965.) For the two weeks prior to moving into Lisa's trailer, Schaub and appellant lived with the Marshall family. (18 RT 2966.)

During December 1988, Schaub worked as a weight master at Mid-Valley Cotton Growers, locally known as the "Cotton Gin", located at Cartmill and Prosperity. Her job was to weigh cotton bales and record the data. (18 RT 2966-2967.) When she worked, her normal shift was 6:00 p.m. to 6:00 a.m. Schaub did not have a regular position at the Gin but substituted for Lisa when Lisa did not go to work. (18 RT 2967.)

ppOn December 3, 1988, the day before April Holley's body was

discovered, Schaub went to work at about 8:00 p.m. She drove Lisa's car to work. Appellant went with her. Schaub clocked in and took Lisa's place. Lisa then left with appellant. (18 RT 2968.)

Some time after 9 p.m., appellant returned to the Gin. Bobby Joe Marshall, Jr., and Joe Mills were with him and came into the Gin. Schaub thought she spoke with appellant and Bobby Joe at that time. She asked appellant to bring her lunch at the Gin. (18 RT 2969-2971.) Appellant returned to the Gin at about 1:30 a.m. but did not bring Schaub's lunch. During this visit she did not know if Bobby Joe and Joe Mills came with appellant, but she did not see them. She did not see appellant again during the early morning hours of Sunday, December 4th. This made Schaub angry because she had asked appellant to pick her up after work because she did not have Lisa's car. When appellant returned to the Gin at around 9:00 p.m. with the boys, he told Schaub that he was taking the boys somewhere, but he didn't say where. When appellant returned at 1:30 a.m. he said he and the boys had been Linnell Camp. (18 RT 3000.)

When appellant did not pick her up, she called her uncle, Bob Marshall, Sr., who came and picked her up at the Gin. (18 RT 2970-2972.) She and Bob Sr. went out for breakfast and coffee, at Lynn's Café south of Tulare, then returned to the Marshall's trailer, arriving home at about 8:00 a.m. (18 RT 2972-2973.)

Schaub was angry because appellant and Bobby Joe Jr. did not bring her lunch and pick her at work. She was at the Marshall's only a few minutes but while she was there she woke up Bobby Joe Jr. to tell him she was angry with him. (18 RT 2973.) She then went home, across the canal to Lisa's trailer, where appellant was asleep. (18 RT 2973-2974.) She asked appellant where he had been all night. Appellant "did not want to talk to me" (18 RT 2987) and "leave me alone" and rolled back over.

Schaub went to sleep at 8:30 or 9:00 a.m. At some point that morning appellant woke up and got out of bed, but she did not know what time it was. She herself woke up around 3:00 p.m. (RT 2975-2976.) Sometime that afternoon, also around 3:00 p.m. (18 RT 2986), Bradley

Hunter came over and said that April Holley had been found dead. (18 RT 2977.) Over time Schaub repeatedly confronted appellant about whether he had had any involvement in April Holley's death. Finally, one morning, at Idella's house (RT 2986), appellant was mad at Schaub and "it came out" that he had killed April, and he would never be caught because he knows how the system works. (18 RT 2977-2978.)

Appellant never told Schaub that he had sex with April. (18 RT 3001.)

The purported confession of appellant allegedly occurred in mid-December, 1988. (18 RT 3000.)

Regarding the day April was killed, appellant told Schaub that he dropped Lisa off at her trailer house Saturday night. He then saw Bobby Joe Jr. and Joe Mills running around, and picked them up. They saw April walking on the canal southbound with Charlie Richardson. (18 RT 2978.)

Appellant and the boys went to April's residence. Charlie and April were there. April got mad at something and appellant, Bobby Joe Jr. and

Joe Mills left in the Firebird. Later, on a different occasion, appellant told Rhonda that Charlie had April's ring. (18 RT 2979.)

After giving this information appellant sent Schaub a few threatening letters saying she would get hers if she told on him. (RT 2979.) Shortly after the April Holley murder, Schaub's relationship with appellant began deteriorating. (RT 2980.)

Schaub gave statements to the police on January 24, 1989 and on June 15, 1990. On neither occasion did she mention appellant's alleged confession. (RT 2980-2981.) She also neglected to mention the alleged confession during an interview with Charles Richardson's investigator, Cliff Webb on July 20, 1990. (18 RT 2981.)

On March 22, 1991, Schaub gave another interview to Cliff Webb and did not mention the alleged confession. (RT (18 RT 2981.)

On August 15, 1991, she gave a statement to DA Investigator Ralph Diaz. She did not mention the alleged confession to Diaz. (RT 2981.) In fact, the first time she mentioned appellant's alleged confession to her was in

October of 1991. (18 RT 2982.)

During the June 15 interview, Diaz "point blank" asked her "when did he [appellant] cop to this", and Schaub replied "he never did, he never did." (18 RT 2982.)

When asked if asked if, during her statement to Webb on July 20, 1990, she stated that Kim Fleeman could not have been at the Marshall's trailer on Saturday morning, Schaub claimed that she did not remember. She claimed she did not recall visiting Charles Richardson in jail after he was arrested in this case (18 RT 2989.) yet she was certain that her sister (Kim Fleeman) did not go visit him. (18 RT 2990.)

When investigator Diaz asked her if she was mistaken about the alleged confession, Schaub stated, "I don't think I am." (18 RT 2990.)

Schaub acknowledged that when she described the alleged confession to Diaz, she omitted the part about appellant Mills and Bobby Joe Jr. going to April's house, even when Diaz asked her that specific question. (18 RT 2992-2993.)

The threats allegedly made to Schaub by appellant occurred after Schaub broke up with appellant and became pregnant with another man's child. The threats were as directed to the other man as they were to Schaub. (18 RT 2993.) The threatening letters made no mention of any confession. (18 RT 2994.)

At appellant's trial, Schaub reiterated that appellant made the alleged confession during a fight with Schaub, and Schaub kept "pushing him until he admitted it." (18 RT 2995.) Indeed, she "pushed him and pushed him and pushed him." (18 RT 2996.) She also characterized her behavior as "nagging" appellant. (18 RT 3008.) Appellant at the time was very tired. (18 RT 2997.) Schaub also reiterated that the question she asked appellant was whether the appellant had anything to do with April's death. (18 RT 2996.) She admitted to Diaz that she wanted appellant to say that he did it. (18 RT 2997.) She acknowledged that she was mad at appellant; and that the alleged confession occurred during a fight. She testified that when she is in a fight, she "gets even." (18 RT 2995-2996.) She knew about

appellant's relationships with other women when she was with appellant. (18 RT 3001.)

Schaub had given conflicting statements as to where the alleged confession was made, i.e., in Idella's house or in a car. She did not recall if she was under the influence of drugs when appellant allegedly confessed. (18 RT 2998.)

The "threats" sited by Schaub were embodied in a letter dated December, 1989. (18 RT 3008.)

Schaub testified that after the murder and before appellant moved out (which was two weeks after the murder) appellant told her what to say regarding his, appellant's, whereabouts and the time of his movements on December 3, 1988. However, she told officers on June 15, 1990 that he merely told her to tell police that he had been out the Gin, and out to Linnell Camp. (18 RT 3000-3003.)

Mike Marshall, one of Bobby Joe Jr.'s brothers, lived at Bob Marshall Sr.'s trailer in 1988. (18 RT 3011.) On the evening of Saturday, December

3, 1988 from 6 p.m. to about 2:30 a.m., Mike and his girlfriend, Carol Burchard (18 RT 3012-3013), or at Danny Creech's mothers house [in Tulare?]. Creech was the boyfriend of Mike's sister, Nancy Lee Marshall. (18 RT 3010.)

Mike left Creech's at a little after 2:00, perhaps 2:30 a.m. (18 RT 3014.) It took 30-40 minutes to drive back to Matheny Tract given the foggy conditions that night. (18 RT 3015.) When he and Carol arrived at the Marshall's trailer, Charlie Richardson was outside, across the street on the canal bank. (18 RT 3015.)

John Richardson is Charlie Richardson's younger brother. (18 RT 3019-3020.) In May of 1990 he was sixteen years old. (18 RT 3019.)

On May 30, 1990, at about 3:00 p.m., John was at Lynn Farmer's house. Farmer was a friend of John and was frequently at his house. (18 RT 3021.) Other friends besides Farmer who are where there on this occasion were Carlos Salas, Chris Allen. (18 RT 3021.)

John Richardson had not previously been acquainted with appellant,

but on this day Farmer introduced him to appellant. (18 RT 3021.) Appellant at the time residing in the Farmer's garage. (18 RT 3022.)

Appellant told John that he had known Charlie for a long time and had done tattoos for him. He said appellant told him he and Richardson were good friends. (18 RT 3027) Appellant offered to give John a tattoo. (18 RT 3023.)

John was in the garage about an hour and 45 minutes. During that time appellant raised the idea of going out and stealing a purse. (18 RT 3026.)

In May of 1990 Lynn Farmer was 14 or 15 years old. He lived in the city of Tulare, about two blocks from his sister, Cindy. (18 RT 3029-3030, 3041.) Cindy at the time was living with appellant's *husband*, Donald Brown. (18 RT 3031.) Appellant was living in Cindy and Donald's garage. (RT 3031.)

On May 30, 1990, Lynn Farmer went over to his sister's house. Appellant was there. A few days prior, Donald had introduced appellant

and Farmer. Donald introduced appellant and Farmer in order to help straighten out Farmer. Farmer was good friends with John Richardson, whose older brother Charles used to babysit Farmer. (18 RT 3027-3028, 3031-3032.)

Farmer looked at tattoo patterns because he want appellant to give him a tattoo. (18 RT 3031-3033.) While they were discussing tattoos, appellant mentioned that he wanted to get a tattoo of April Holley on his chest. (18 RT 3039.) Farmer knew who April Holley was because one of his sisters was April Holley's pen pal, and Farmer had watched April's funeral on TV. (18 RT 3049.)

While they were talking, appellant realized that he did not have a battery pack to power his tattoo gun. Farmer therefore went back to his house to try to locate a battery pack, possibly from his Nintendo video game. However, he was unable to locate a battery pack. Farmer then returned to Cindy's house. (RT 3035.)

At some point, apparently soon after appellant came back to Cindys,

they discussed having a party. Appellant had some beer as did some of friends of Farmer, Chris Allen and Carlos Salas, whom he had encountered in an alley on the way back to Cindys. (18 RT 3035.) Farmer went and got Allen and Salas and they all came back to Cindy's garage. Also present was John Richardson, Farmer's best friend. Richardson was probably two to three years older than Farmer and the other boys. (18 RT 3035.)

The group drank beer, discussed tattoos and looked at tattoo patterns drawn by appellant. (18 RT 3032, 3042.) There were discussions of possibly having a party that evening and of the fact that they would need money to do that. (18 RT 3042.)_

Appellant suggested that the best way to make money was to snatch purses. (18 RT 3040.) Farmer, Allen, Salas and appellant at first to K Mart to try to snatch a purse. John Richardson did not go. Appellant said that the boys should turn their t-shirts inside out because that would hide logos or other identifying characteristics on their shirts. (18 RT 3044.)

At K Mart they split up. They were ultimately not successful in

snatching any purses and regrouped at the Best Western Lodge in Tulare. (18 RT 3046.)

At the motel, Farmer and appellant went upstairs while Salas and Allen were downstairs. As Farmer and appellant were walking down the hall they heard a scream. They looked down and saw two "old ladies" on the ground. They then started walking rapidly back towards the stairs, and in the direction they had come. (18 RT 3056.) According to Farmer, Salas and Allen had snatched a purse and ran off. (18 RT 3047.)

Farmer and appellant were nervous. He and Farmer had drank several beers "we were buzzing pretty good". (18 RT 3048.)

After seeing the two women on the ground, appellant said, "if I get busted for this, they'll hook me up with the old lady in April. (18 RT 3048-50.) Appellant, according to Farmer, said he did the same thing to the "old lady" as he did to April-"fucked her in the ass." (18 RT3049.)

This was as they were walking rapidly back toward the staircase. Both were "in a rush to get down." (18 RT 3050.) Farmer got out ahead of

appellant and was hurrying down the stairs. Appellant purportedly said "come back here or I'll cut your cuts out." Farmer stopped and went back. He was aware that appellant owned a 6-7" knife. They went out the back door of the motel. A woman and a man came out and a woman yelled "stop!". Appellant and Farmer hopped the fence behind the motel. Appellant threw his knife back over the fence. A few minutes later appellant and Farmer were placed under arrest. (18 RT 3050.)

Farmer was subsequently interviewed by police officers following the purse-snatch incident. He changed his story to the police several times and gave numerous false statements to the police. (18 RT 3066.) Although he blamed appellant for his predicament (18 RT 3065), he never mentioned appellant's alleged statements. (18 RT 3064-3066.) The first mention he made of appellant's alleged statements occurred a few weeks after his arrest, to investigator Cliff Webb. Farmer knew Webb to be representing the older brother of his best friend. (18 RT 3064-3066.)

Farmer also was interviewed about the April Holley case on July 3,

1990 (by investigator Diaz); July 24, 1990 (in court under oath) and October 24, 1990 (by defense investigator Ruben Armenta). (18 RT 3057-3058.) During his interview with Diaz and subsequent testimony in July of 1990, Farmer said nothing about appellant mentioning April Holley. (18 RT 3060-3062.) When later interviewed by Armenta, Farmer said that he was not sure appellant made any mention of April. (18 RT 3059.)

He stated that during the time period to which his testimony in this case related, he was suffering from alcohol problems or drug problems, or both. He underwent treatment for alcoholism in a rehabilitation center, but ran away from the treatment center. Farmer had a "problem" with marijuana and later developed a problem with cocaine. (18 RT 3070-3071.) On September 12, 1990, Farmer got drunk and attempted to impersonate the 36-year-old father of his girlfriend, "April." He stated that "April" was bore no relation to April Holley. (18 RT 3070.) Farmer denied that he, not appellant, who wanted to get a tattoo of April on his chest. (18 RT 3070.) At trial Farmer was asked whether after running away from the

treatment center, he told his mother that the statement he made regarding Brown was a lie. He denied making this statement. (18 RT 3069.)]

Lisa Wilson, appellant's sister, also known as Lisa Saldana, lived with her boyfriend, Mike Clifton, in her trailer home in Matheny Tract in December, 1988. Also living at the trailer were appellant and Rhonda Schaub. (18 RT 3084-3086.)

Sometime on Sunday, December 4, Bradley Hunter came by Lisa's trailer. Bradley told those present, Lisa, Mike, appellant and Rhonda, that April Holley had been drowned in a bathtub. He said she had been molested or raped. (18 RT 3102-3103.)

Earlier, on Saturday, December 3, at 5:30 or 5:45 p.m., Lisa loaned her brown Firebird to appellant so he could take Rhonda to work. Lisa worked at Mid-Valley Cotton Growers (the"Cotton Gin"). Rhonda sometime substituted for Lisa at the Cotton Gin. The car had one-half tank of gas in it to appellant. (18 RT 3102.)

Lisa herself did not work that night. (18 RT 3098.) Lisa asserted

that she did not see Rhonda, whom she characterized as a liar who had lied to her in the past, from the time she loaned appellant her vehicle until Schaub arrived home at 6:30 a.m. Sunday morning. (18 RT 3099.) Appellant had arrived home sooner, around 4:30 a.m. (18 RT 3089, 3100.) At that time Lisa was angry with appellant because he left her car out of gas out on the street. (18 RT 3090.)

Appellant, after getting home, went to bed then got up at 8:15 to 8:30 a.m. Appellant seemed paranoid, like someone on drugs. (18 RT 3091, 3100.) He was looking out the window and pacing. Lisa asked what was wrong and appellant nothing, which was normal behavior for him. At some point, he said there was a lot of commotion outside and he saw police cars. Lisa looked out the window but didn't see any police cars. However, due to the configuration and location of her unit, the field of vision from the windows was limited and it was unlikely she would have seen any vehicles from her window even if they had been there. (18 RT 3092, 3095-3098.) Nevertheless, there was a lot of drug activity in Matheny Tract and it was not

uncommon to see police vehicles in the area. Per Lisa, "There's always someone out there." (RT 3098.)

Lisa was personally familiar with the paranoia that drug users may experience, based both on her observations of appellant and her own experience. It is "common" for drug users to become nervous and not want anyone to see them. (18 RT 3101.) What she observed that morning was consistent with appellant's behavior on past occasions when he had been ingesting drugs. (18 RT 3101-3102, 3105.) On this day, appellant repeatedly his unwillingness to leave the trailer, on probably three occasions. Lisa could not determine if appellant's unwillingness to leave the trailer arose before or after Bradley Hunter delivered the news about April Holley's murder. (18 RT 3104.)

**Appellant's Statements to Police Interviewers**

On January 18, 1989, appellant was interviewed by Clyde Raborn of the Tulare County Sheriff's Office. Appellant told Raborn that on Sunday, December 3, 1988, he got together with Bobby Joe Marshall, Jr. and Joe

Mills a little before 11 p.m. (18 RT 2853.) Appellant told the boys he was going to take them to out the cotton gin where his girlfriend (Rhonda Schaub) worked so she could talk to them. Then he would take them out to buy some cocaine. (18 RT 2854.)

They drove to Linnell Camp in appellant's sister's vehicle. His sister was Phyllis Saldana, also known as Lisa Saldana and Lisa Wilson. (18 RT 2854.) At Linnell Camp appellant purchased some cocaine. Appellant, Bobby Joe Jr. and Joe Mills all ingested some of the cocaine. (18 RT 2854.)

The three returned to the cotton gin. Appellant told his girlfriend that he was going to take the boys home, then he would be back to bring her some lunch. (18 RT 2855.)

Appellant and the two boys left the cotton gin and drove around for awhile. They ingested some more cocaine. Appellant said the boys did a lot of cocaine but he couldn't do much because he has a heart murmur. (18 RT 2855.)

As appellant was in route to taking the boys home, the car ran out of gas. This was about a half mile from where appellant lived. The three left the car and split up the car, with Billy Joe Jr. and Mills walking towards the Marshall residence and appellant walking home. (18 RT 2856.)

Upon arriving home appellant woke his sister and told her the car had run out of gas. She became angry and told appellant he had better get some gas and the car back home. Appellant said, find and ask J.D. (Rushing), who was at the residence, for a ride. J.D. was a friend of appellant's sisters' boyfriend and of appellant. (18 RT 2857, 2862.) They left in J.D.'s Ford flatbed truck. Appellant drove because J.D. was drunk. They left at about 4:10 a.m. (18 RT 2857-2858.)

Appellant and J.D. proceeded southbound down Canal Street. As they preceded down Canal Street, 15 feet short of the stop sign on Beacon, they saw an individual known to appellant as "Charlie Tuna", whose real name was Charlie Richardson. (18 RT 2859, 2876.) Richardson ran across the Canal and started running down the canal bank on the other side toward

the Marshall residence. (18 RT 2859.) Richardson was wearing a baseball shirt with cutoff sleeves, a dark vest, faded blue bell bottom jeans and tennis shoes. He was also wearing a dark baseball cap. (18 RT 2860.) He was carrying what looked like a piece of wood or pipefitting, a foot to 18 inches long. (18 RT 2859-2861, 2864.) Where Richardson crossed the canal was about 200 feet from Addie Street. (18 RT 2865.)

Appellant told Raborn that there was another person, known to appellant as James Stubblefield. He was Addie Street. Stubblefield put his head down and tried to hide his face. He ran behind the flatbed truck, and into how Hernandez's yard. J.D. said "Look at those motherfuckers run." (18 RT 2862-2863, 2866.) Appellant was turning left, or east, at the time. (RT 2862-2863.) Appellant could not make out what Stubblefield was wearing. (RT 2866.)

Appellant put gas in his sister's car. He dropped J.D. off at his house, which was near where the car had run out of gas. Appellant drove straight home and went to bed. (18 RT 2867.)

At about 6 a.m. appellant was awakened by his girlfriend, who was angry about appellant not bringing her lunch and not picking her up at work. (18 RT 2868.)

Appellant went back to sleep and woke up between 11:00 and 12:00 a.m. There was a lot of commotion outside. Appellant went outside to investigate. Two friends, Deanna and Renee Bailey told appellant that April Holley was dead. (18 RT 2868-2869.)

At about 5:30 p.m. that evening (December 4), police officers doing a door-to-door investigation of the April Holley case came to appellant's residence. (18 RT 2869.) Officers asked if appellant knew of any suspects. Appellant suggested James Stubblefield as a possible suspect. Appellant claimed that Stubblefield had tried to molest April a couple of times. (18RT 2870-2872.)

After talking to officers [and on a day when appellant had been drinking], appellant called police department witness hotline and suggested that they "check out James Stubblefield" for this reason. (18 RT 2871.)

One incident occurred when Stubblefield and Billy Rummerfield were living at the Holley residence, in August of 1998. Stubblefield tried to force April to sit on his groin. He later pinched April's buttocks. Rummerfield "kicked him [Stubblefield] out of the house. (18 RT 2872-2874.)

April Holley described to appellant another incident in which she was asleep on the floor in her house and Stubblefield tried to feel April's "private areas". (18 RT 2874.) Appellant never told anyone about this incident because April asked him not to because. (18 RT 2874-2875.)

Five days prior to the interview with detective Raborn appellant called Nancy French to talk to her daughter Shawnee, whom the appellant liked. (18 RT 2875.) Nancy's house was the scene of a lot of drug trafficking and drug use. (18 RT 2878-2879.) Nancy told appellant that police officers had been to her house asking questions about James Stubblefield. (18 RT 2875.) Nancy told appellant that Stubblefield had been to her house early Sunday morning, December 4, at 1:00-2:00 a.m.,

with a man a number 74 tattooed on his left wrist. (18 RT 2876.) Appellant believed that the other the other man was Charles Richardson because he had done such a tattoo for Richardson and such tattoo are rare in Tulare county. It stands for 74 cubic inches on a Harley Davidson motorcycle. (18 RT 2876-2877, 2878.) Appellant had charged Richardson $35 or $40 for the tattoo. (18 RT 2879.) Nancy advised appellant that she would support Stubblefield's story that he was no where near the April Holley incident because she was married to Stubblefield's father. (18 RT 2879.)

When asked, appellant told Raborn that he knew a Michael Brown and a Rita Brown. He did not know if Michael Brown knew James Stubblefield or Charlie Richardson. (18 RT 2880.) When asked if he thought J.D. would remember seeing the two guys running, appellant told Raborn that he (J.D.) did not get involved with law enforcement and was afraid of getting a "snitch" jacket. (18 RT 2880-2881.)

Appellant provided Raborn the names of the following persons who

might be able to provide information on James Stubblefield: Leann Stubblefield, his sister; Billy Rummerfield, appellant's best friend; Pamela Rummerfield, Billy's sister; Melody Lewis, James' possessive ex-girl friend, and Shawnee Lewis, Melody's younger sister. (18 RT 2881.)

On September 4, 1990 appellant gave a statement to D.A. investigator Ralph Diaz, and Sergeant Salazar of the Tulare County Sheriffs Department. (19 RT 3127.) Appellant was asked about a prior statement in which he asserted that at about 4:30 a.m. on Sunday, December 4, 1988, he saw Charles Richardson and James Stubblefield running down Addie Street from the direction of the Holley residence. Appellant had been driving his sister's car and had run out of gas. Appellant had borrowed J.D.'s Rushing's truck and appellant and J.D. had gone out to buy gas and recover the vehicle. (19 RT 3134.)

Appellant had told Diaz and Salazar that the part of the prior statement up to and including running out of gas was true, but the remainder of story was "falsified." In fact, he had seen either Richardson or Bradley

Hunter, he wasn't sure which. Bradley was the Bradley Hunter that is who appellant claimed had once tried to rape his sister, Lisa. (19 RT 3135.)

Appellant was asked about the statement he allegedly made to Lynn Farmer. Appellant stated that Farmer did not originally testify to any statements by appellant mentioning April Holley, although he acknowledged Farmer testified concerning appellant allegedly making mention of the "old lady" and that he "fucked her [the old lady] in the ass." Appellant, however, denied making any such statements to Farmer intending that someone put words in Farmer's mouth. (19 RT 3135-3138, 3140.) Appellant stated that "he was not quite stupid enough" to commit a serious or capital crime and then "spread my word to anyone else, especially to a kid that [he just met]." (19 RT 3136-3137.)

Appellant stated that he was with Charles Richardson on the night of April's death; that "I don't hang with the guy . . . he's bad news . . ." (19 RT 3138,3149.) Appellant first met Richardson at Nancy Lee Marshall's "when she lived down the street from Beacon Street." (19 RT 3138-3158)

Richardson was in the bathroom ingesting rock cocaine. (19 RT 3138.) Richardson asked appellant what do you know about the Aryan Brotherhood"? Appellant replied "I don't know what you're talking about." (19 RT 3139.)

The second time appellant met Richardson was at the Marshall's trailer when appellant and Rhonda Schaub moved in for a couple of days and Richardson was living there. After a short time appellant and Rhonda realized "we ain"t gettin' along over here [at the Marshalls] and moved in with appellant's sister Lisa, even though Lisa didn't get along with Rhonda. (19 RT 3139.)

Returning to Farmer's statement, appellant suggested that his statement bringing up appellant's name was an attempt by Farmer to make things easier for himself on the purse-snatch case. Appellant noted that Farmer had lied to the police many times and reiterated that it made no sense for him to kill or rape someone then "go out and tell . . . a 14-year -old kid . . ." Appellant asserted his innocence in the Holley case (19 RT 3140.)

The officers again pressed appellant on his activities on December 3. Appellant stated that he remembered what he did for the most part; but some parts were vague because he was on heavy medication, having been an epileptic "damn near all my life." (19 RT 3142.)

On the evening of the 3rd, appellant took Rhonda to work, at whatever time that was, he believed it was sometime around 6:00, then came back to Matheny Tract and picked up Bobby Joe Marshall, Jr. and Joe Boy (Joe Mills). (19 RT 3142.) He was driving his sister Lisa Brown's Pontiac Firebird. (19 RT 3142.)

Appellant told Schaub that he would be back in a little while, that he was going to take Bobby Joe Jr. and Joe Mills to Linnell Camp to buy some cocaine. The three in fact went to Linnell Camp and purchased some cocaine. They drove around and consumed the cocaine. After they returned to Matheny Tract, they ran out of gas on the Wade Street. Appellant was unsure of what time it was when they returned to Mathany Tract. (19 RT 3143.) Appellant suggested that between the time they left

the trailer at 6:00 to the time when Rhonda clocked into work at 8:00, he and Rhonda were at the Cotton Gin, although he could not remember with certainty because they were both ingesting cocaine during that time period. (19 RT 3144.)

When appellant dropped Rhonda off, he told her he would bring her some lunch later. (19 RT 3145.)

After driving around with the boys and ingesting cocaine with them, appellant ran out of gas on Wade Street. The boys walked to the Marshall trailer and appellant walked home to his sister's trailer home. He was afraid to say anything to his sister about the car running out of gas because he knew she would be angry. (19 RT 3145-3146.) He did in fact tell her, though, and Lisa told him to get the car. Appellant who was "comin" down off the coke," said he would do so, but wanted to lie down first. Appellant went to his room. The next thing he knew, Schaub was yelling at him and calling him names because he never returned to the Gin. (19 RT 3147.) This was about 6:00 a.m. (19 RT 3147.) Appellant went back to sleep and when he

woke up again he saw cars racing down the street and people running towards Canal . Bradley Hunter was on the front porch and advised that April Holley had been murdered. (19 RT 3048.) When informed that Mike Clifton and Lisa had stated that appellant was up early, around 7:30-8:00 a.m., acting "paranoid", appellant claimed that was after he received word of April's death from Bradley. (19 RT 3147-3148.)

Appellant again denied involvement in the Holley case, asserting that he's rather hurt himself than hurt a child. (RT 3149.) Appellant then emphasized that he "wouldn't be caught dead with Charlie Richardson." (19 RT 3149.) He acknowledged that he had given Richardson a "74" tattoo and had fixed it up at Nancy Lee Marshall's house. Appellant had also done tattoo work at the Holley's residence and went over there about once a week, although he had never lived there. It was a "sty." (19 RT 3149-3150.) He stayed one night at Naomi's when Billy Rummerfield, Billy's girlfriend, his sister Pam, Roger Rummerfield and Renee Bailey were all there. (19 RT 3150-3151.) Appellant never got together with Charlie to purchase

cocaine nor did they ever help each other purchase cocaine. (19 RT 3151.)

Appellant was asked how he came to the point of taking Bobby Joe Jr. and Joe Mills to Linnell Camp. Appellant told the investigators that he and Rhonda slept to 5:30 p.m. on Friday afternoon, having worked the previous 12-hour shift. (19 RT 3198.) When appellant woke up, Rhonda went up and went to appellant's mother house. Appellant called the Marshalls' to try to locate Rhonda. Bobby Joe Jr. picked up the phone. In the course of the conversation, Bobby Joe Jr. said he had $25 and asked appellant if he would help himself enjoy and Joe Mills procure some cocaine or take them to get some cocaine. (19 RT 3197, 3254.)

Appellant finally determined that Rhonda was at appellant's mother's house. (19 RT 3155.) Forty-five minutes to an hour after that he took Rhonda to work. (19 RT 3156.)

After dropping Rhonda off, appellant proceeded to the Marshalls. Appellant at the time had no money and ½ tank of gas. (RT 3156.) He picked up the boys, who were waiting outside the Marshalls' residence. (19

RT 3153.) The boys wanted appellant to take them to Linnell Camp to buy drugs, and promised appellant some of the drugs if he would take them. Appellant agreed. (19 RT 3160.) Appellant drove to an Linnell Camp, with the boys, the following route as he described: east on I towards Bardsley, to Mooney out towards Visalia, to Caldwell and out towards Farmersville. (19 RT 3157-3158, 3160.)

It was the boys' idea to go to Linnell Camp. (19 RT 3160, 3169.) Even though appellant's mother sold drugs, he took them to Linnell Camp rather than his mother because he did not want the boys to know that his mother was a drug dealer, which knowledge would have resulted in them constantly hounding her to sell them drugs. Additionally, appellant, while admitting to using drugs to stay awake (19 RT 3160), did not buy drugs from his mother because he did not want her to know that he was a user. Rhonda brought the drugs from appellant's mother and shared those with appellant when appellant wanted to use drugs. (19 RT 3159.)

When they arrived at Linnell Camp, appellant bought cocaine from a

Hispanic subject near a blue dumpster. They paid $10 and the "dope" was no good. "It tasted like baby laxative." They paid $15 for a "quarter" (a quarter of a gram of cocaine) which was good. They left Linnell Camp having been there for only a few minutes because "it was too hot". (19 RT 3161-3162), and drove back to Matheny Tract via Visalia. Along the way they stopped and ingested some of the cocaine. (19 RT 3164.)

Appellant knows Kim Fleeman, Rhonda Schaub's sister, but did not stop at Kim's house that night. Appellant asserted that he and Jim did not get along. Appellant also did not stop at Billy Rummerfield's house-"me and Billy were fightin' at the time." (19 RT 3165.) Appellant had been at Billy's a few days before to pick up his tattooing equipment, but was not there on Friday night. (19 RT 3165-3166.)

The investigators once again asked appellant about his actions of Friday night, beginning with a little after 8:00p.m. (19 RT 3166.) Appellant was at the Cotton Gin for an hour to an hour and one half (he later said an half an hour to an hour; in any event, it was "awhile". (19 RT 3166.)

Rhonda clocked in a little before 8:00 p.m. Using back roads (appellant had no drivers' license), appellant drove back to Matheny Tract, which took him an half an hour to an hour. It was nearly 9:00 when arrived at the Marshalls' trailer and picked up Bobby Joe, Jr. and Joe Mills. (19 RT 3167.) During the course of the evening they bought $2.00 worth of gas at an AM/PM Mini Mart at Mooney and Caldwell. One of the boys or both paid for the gas. (19 RT 3168.)

The officers then told appellant that he said he had ran out of gas at 2:00 a.m., although appellant had not told them this. Then, taking Lisa's statement that appellant had come at 4:15 or 4:30 a.m., they demanded that appellant account for the purportedly missing two hours. (19 RT 3169-3170.) Appellant repeated that after he ran out of gas, he walked down [to Lisas], went in the house, sat down on the couch and told her, Lisa, that the car ran out of gas. (19 RT 3170.)

The officers asked appellant why he wanted to pick up Bobby Joe and Joe Mills that evening. (19 RT 3171.) Appellant repeated that they had

asked him to take them to get some dope. He said he ordinarily did not hang with juveniles. (19 RT 3172.)

Officers again asked appellant why he was reacting to cops being outside when there were no cops outside. (19 RT 3172-3173.) Appellant said Bradley told him April Holley had been murdered. Police officers were conducting interviews door-to-door. It was at that time appellant acted nervous. Appellant emphasized that police officers make him nervous even when he has done nothing wrong. (19 RT 3174.)

The interviewer reiterated that per Lisa, appellant was acting "paranoid" [?] prior to April Holley's body having been discovered. Appellant claimed that he was acting "chicken" because he saw police cars outside and was nervous around police officers; and further," Lisa may have gotten her time zones mixed." (19 RT 3174-3175.)

Regarding "Bradley", the officers asked if it was the same "Bradley" he had seen the night before. Appellant replied that he didn't know if it was Bradley or Charlie Richardson he had seen. When he saw Bradley the

following day, he did not consider it any of his business to inquire why he'd rather not "Bradley" had been out on the canal during the early hours of the morning. (19 RT 3175-3177.) Whoever it was, the person was walking real fast across the canal. (19 RT 3177.) Appellant did not recall what time this occurred. (19 RT 3177-3178.)

Detectives asked appellant why he had provided his earlier, untruthful statement. Appellant replied that "I wasn't going to lie on nobody but . . . I can't really tell you who I seen that night. I don't know who it was. It was like somebody-two people." (19 RT 3183.) Appellant said that the person that he saw could have been Bradley or Charlie or somebody else. Bradley and Charlie wear similar style clothes and their bell-bottom pants are similar. (19 RT 3184.)

Appellant stated that he hated "baby rapers." (19 RT 3212.) He stated that Richardson was not the kind of person he wanted to spend time with, although whenever he was with him, "he was an alright dude." From what he had heard on the news and about Richardson's past convictions,

appellant didn't think he would even bother to hurt a child, although he "[couldn't] put it past any man," including himself. (19 RT 3184.)

Appellant told interviewers that he was not at April Holley's house on the night of her murder. (19 RT 3184-3185.)

Officers' again confronted appellant over the supposed two-hour gap in appellant's statement, between 2:00 and 4:00 a.m., that the officers themselves of course had invented. Officers' asked if appellant had committed the Holley murder during this gap. Appellant denied it. (19 RT 3186.)

Officers' quarried appellant about his seizure disorder. Appellant stated that his seizures lasted 30 seconds to a minute. Sometimes he had grand mal seizures which he considers a black out. "Sometimes I fall down and shake like a fish. Sometimes I just sit there and mumble to myself." (19 RT 3187.)

Appellant was asked if he went to the Holley's house to look for Tammy, Naomi's daughter. (19 RT 3187-3188.) Appellant knew

Tammy and had been in an auto wreck with her "a long time ago." (19 RT 3187-3188.) Sometimes she would have appellant do a tattoo for her . (19 RT 3188.) However, Tammy rarely stated Naomi's and appellant seldom if ever went to Naomi's looking for her. (RT 3188.) The last time he was at Naomis' was about a week prior to the discovery of April's body. (19 RT 3189.) That was to visit Naomi and whomever else was there at the time. (19 RT 3189.)

As of December 1988, appellant had lived with his sister "less than a month or two months." (19 RT 3189.) Prior to that he had lived with the Marshalls for about a week. (19 RT 3190.)

Officers' advised appellant that Cliff Webb, an investigator working for Richardson, was trying to get Richardson a square deal or get off. Appellant acknowledged that Webb had interviewed his mother. The investigators asked what Webb wanted to discuss with Idella, appellant's mother. Apellant replied "me". When asked if his mother was dealing drugs in early December, 1988, appellant repeated, that she was; however,

she stopped when appellant's brother [Jerry?] was arrested for drug-dealing. (19 RT 3192.)

Appellant was asked about his relationship with April Holley. Appellant described her as a happy little girl with lots of friends. (19 RT 3192.) One of her friends was Lisa Mathews who lived with Misty Bailey next to appellant's mother. (19 RT 3193.) Appellant stated that his relationship with Naomi was more important than his relationship with April. Appellant would go to the Holley's to check on Naomi and find out how she was getting around. (19 RT 3193.) If someone was at the house who wanted a tattoo, appellant would do it. (19 RT 3195.)

The interviewers asked appellant to recount his activities of December 3, 1988, "one more time." (19 RT 3197.)

Appellant stated that he and Rhonda woke up at about 5:30 p.m. on December 3rd. Both had worked at the Cotton Gin the previous night, *i.e.*, the 6:00 p.m. to 6:00 a.m. shift, which ended Saturday morning. Lisa woke up Rhonda to see if she wanted to work that night. Appellant got up an took

a shower; in the meantime, Rhonda left. Appellant did not know where she was. He called the Marshalls to try to locate her. Bobby Joe Marshall Jr. answered the phone. Bobby Joe stated that he had $25 and asked appellant to help him purchase some drugs. Appellant complied. Appellant, Bobby Joe and Joe Mills went out, purchased cocaine, drove around and came home. (19 RT 3194.) On the way back they ran out of gas on Wade Street. Appellant walked home and told his sister the car ran out of gas. Lisa, his sister, became very angry and told appellant to go retrieve her car. Appellant said he would do so in a few minutes. He then went to his room and went to sleep. Contrary to his earlier, inaccurate, statement he never did retrieve the car. (19 RT 3198-3202.)

Between 8:00 and 10:00 p.m. on the night of December 3rd, appellant was with Bobby Joe Jr. and Joe Boy (Joe Mills) in Lisa's car. Between 2:00 and 4:00 a.m. appellant was home in bed. Appellant was exhausted because he was "coming down" off of cocaine. Per appellant, cocaine is an "upper", and "when you . . . come off it, you come down hard . . . It takes

everything out of you." (19 RT 3202-3203.) When asked again if he could have been "killing the little girl" between 2:00 and 4:00 a.m., appellant reiterated that he did not know what happened to April and that he could not have been involved; he did not get up, sleep walk to the Holleys and commit the crime. (19 RT 3203.)

At about 6:00 a.m. on the 4th, Sunday, Rhonda showed up at Lisa's trailer and scolded appellant for not bringing her lunch at work. Between 6:00 a.m. and 11:00 a.m. (19 RT 3205), Bradley Hunter arrived with the news that April Holley had been murdered. (19 RT 3204-3205.) Appellant related that although he did not know the exact time, he woke up and went to the front door. Mike Clifton and others were outside. People were running down the canal and cars were screeching around corners. Bradley said "they found April Holley dead." (19 RT 3204.) Investigator Diaz reiterated that as of 11:00 a.m., the victim's body had not been found. Appellant stated "All I know is what Bradley told me." (19 RT 3205.)

Appellant was once again asked about the person he saw walking

across the canal early Sunday morning. Appellant said he saw one individual. (19 RT 3207.)

Appellant was asked to identify his sources for the drugs he used on December 3. He stated that the drugs he used with Bobby Joe Jr. and Joe Boy were purchased by them at Linnell Camp. Otherwise, Rhonda Schaub would typically purchase drugs for appellant and herself from appellant's mother (19 RT 3207-3208.) He did not secure drugs from Chester Washington or anyone else in the neighborhood. Appellant did not buy drugs from Pam, Billy Rummerfield's sister, because she only used heroin. Appellant's mother at time dealt drugs to numerous other persons besides Rhonda Schaub. (19 RT 3208.) [note to emry - move up that last sentence] Appellant at that time was not working. He explained "I was happy the way I was. At that time, I didn't need money." (19 RT 3209.)

Appellant told investigators he decided to implicate Richardson in earlier story after watching April Holley;s funeral. He told Rhonda he was going to tell a lie. Some of it was a lie some of it was the truth. "The part

about Charlie, I don't know." Appellant said if Richardson came within five feet of him, he'd "kick his ass" because "I have a hate . . . for baby rapers." (19 RT 3212.) He said he had no feelings for Richardson, neither compassion nor respect. (19 RT 3212.)

Detectives asked whether appellant went to the Visalia Mall on the night of December 3. Appellant denied this. He said they did pull off at the Caldwell Apartments near the mall to snort some cocaine. Appellant interjected that if he were ever to do a robbery, he would not have juveniles do his "dirty work" or have them there when he did it. (19 RT 3212-3213.) Officers then returned to the allegedly unaccounted-for gap in appellant's activities between 2:00 and 4:00 a.m. on Sunday the 4th. Appellant, as he pointed out that this hiatus originated with the interviewers themselves, surmised that it was possibly Lisa who had her times wrong because she was heavily addicted to cocaine. (19 RT 3213-3215.) Appellant stated that "all her [Lisa's] damn welfare check went to my mom." (19 RT 3213.) Officers asked appellant, if Idella was supplying Lisa, why wasn't she

supplying appellant? Appellant again stated that he didn't want his mother to know he was doing dope. (19 RT 3214.) Appellant was the "baby" of the family and his mother did not want him doing dope, even if she was dealing it. (19 RT 3214.)

Officers turned the discussion to the alleged two-hour hiatus between 6:00 and 8:00 p.m. on Saturday, December 3. Appellant said and Rhonda could have been having sex behind a bale of cotton. (19 RT 3216.) She could have been having sex with someone else. (19 RT 3216.) "You guys want to go out and investigate, that's fine." Appellant stated that the only reason he agreed to this interview was to "get you guys off my family's ass . . . my mom don't deserve the pounding she's getting." (19 RT 3217.)

Officers responded that they haven't talked appellant's mother since her heart attack. (19 RT 3217.) Investigators again asked appellant if he was with Rhonda at the time period between 6:00 and 8:00 p.m. on December 3, appellant could not remember and suggested they ask Rhonda. (19 RT 3218-3220.)

Officers also returned to the hiatus between 2:00 and 4:00 a.m. on December 4, that they had previously invented. Appellant suggested that they discuss this with Lisa. (19 RT 3219-3220.) Appellant indicated that perhaps Lisa was off on her times and/or that the boys (Bobby Joe and Joe Boy) could have been off on their times. (19 RT 3220.)

When asked why appellant said anything to Lynn Farmer about April Holley, appellant again denied unaqivitively maintained he made any mention of April Holley to Farmer. (19 RT 3221.) Appellant stated that the only time he said anything about April Holley or Charles Richardson after the death of April Holley was, to Terry Bobbitt in Cindy's garage, when he told her what he thought should be done to someone who harms a child; and to John Richardson when he was talking to him without knowing he was talking to Charlie's younger brother. When some of the other boys brought that up, appellant told John send his respect to his brother. (19 RT 3223.) Possibly Farmer was around on one or both occasions and learned enough to come up with the statement that he attributed to appellant. (19 RT 3223.)

Or perhaps Farmer, the best friend of Richardson's brother whom Charlie Richardson used to baby-sit, was put up to it. (19 RT 3226-3227.) Maybe Farmer felt that appellant "set him up" on the purse-snatch case (19 RT 3224).4 Appellant again rhetorically asked why he would be so stupid as to mention any involvement in a capital case on his part, "to a 14-year-old kid [he] had barely even met]." (19 RT 3225.)

Appellant, when asked why he was "even around them [the juveniles], replied that was simply "trying to set that one juvenile [Farmer] right." The purse snatch was essentially the boys doing. At K-Mart, appellant was shopping for an adaptor for his tattoo gun. "Him [Farmer] and little buddies went their way." Appellant left K-Mart and crossed the street. Farmer came running up appellant saying that Carlos and Chris had snatched a purse and Farmer wanted appellant to give him an alibi. (19 RT 3225-3226.)

Appellant again acknowledged that his earlier statement to

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4 It will be recalled that Charles Richardson used to babysit Farmer, and Richardson's brother John was Farmer's best friend. (18 RT 3027-3028.)

investigators was false; that it brought attention to himself, and his reasons for doing it were "stupid"; but that his current statement was accurate. (19 RT 3228.)

Officers asked appellant with whom Bradley Hunter associated. (19 RT 3228.) Appellant replied, Mike, Lisa's boyfriend. (19 RT 3228-3229.) "A long time ago" Mike tried to rape Lisa. (19 RT 3229.) Appellant found out about this from his, appellant's mother. (19 RT 3229.)

Regarding his contact with Bradley and Mike on the morning of the 4th of December, appellant woke up, could not say what time, put his pants on, walked into the living room and heard a screeching noise. (19 RT 3230.) Appellant looked outside and Bradley and Mike were standing there. With Mike there, Bradley said that April Holley had been found murdered. That was the first appellant heard of the murder. (19 RT 3230.) Appellant went to work that night, then went Billy Rummerfields. (19 RT 3230.) Billy, appellant's best friend, was crying. Appellant reiterated that he did not go to Billys on the 3rd. (19 RT 3231.) He did recall going to

Billys during the early morning hours of the 4th. (19 RT 3232-3234.) This was on the way home to get lunch for Rhonda. Renee Bailey was there. It was an upstairs apartment in Tulare off an alley with a fire house behind it. (19 RT 3233.)

Appellant went to Billy's after work on Monday the fifth. (19 RT 3230, 3234), appellant went by himself. Present at Billy's house were Missy Latrell, now Missy Rummerfield; Billy Rummerfield, and Renee Bailey. Roger Rummerfield was under arrest based upon the warrant that was discovered when he found April Holley's body. (19 RT 3235.)

Appellant stated that he had been at work earlier that day (Monday the 5th) with Rhonda. When interviewers told him that Rhonda was not at work that day, appellant responded that he thought it was Monday that he went to Billy's. (19 RT 3236.) When he went there, nobody knew anything about who might have committed the murder. (19 RT 3237.)

When asked, appellant said that Charlie Richardson had never been in Lisa's car, and stated further that "he's never been near my sister's house."

(19 RT 3237.)

Appellant repeatedly denied going over to Marshall's house on Sunday the 4th. He stayed in the house because there were too many police officers outside and "I'm afraid of cops." (19 RT 3237-3238.) He was 'paranoid" because of this and because he "was on dope." (19 RT 3238.)

Appellant insisted that Rhonda went to work on Sunday night. She tried to get a ride from Bob Marshall, Sr., who pulled into the driveway. (19 RT 3239.) This was the same night that the police officers were going door-to-door, interviewing neighborhood residents. (19 RT 3238-3239.)

Officers questioned Mike and Bradley while the two were outside, drinking beer. Appellant was inside. Appellant saw this and said, "Man, if they're [the police] here for me, tell them I don't live here." (19 RT 3239.)

Detectives in fact came to the door and asked what kind of a person April Holley was. Appellant said she was a pretty happy little girl. (19 RT 3240.) Also present were Lisa, her daughter Chaci and one George Lucio. (19 RT 3240.) Bradley and Michael remained outside drinking beer.

Rhoda was outside securing a ride to work because it was about 6 p.m. (19 RT 3240.) Appellant stated that that both he and Rhonda went to work that night. (19 RT 3241.)

Officers claimed they spoke with Rhonda and Rhonda said that she started to go to work, and went to Bob Sr.'s house to secure a ride, then changed her mind about going in. (19 RT 3241-3242.) Appellant replied that Rhonda told Lisa that she was going in until 12 and Lisa had to go to work at 12. Appellant and Rhonda took the car and went to work. They came back at midnight which was lunch time. Lisa was drunk. Appellant went to his mother's house and contacted his Aunt Rusty to she if she could work. (19 RT 3242.)

Officers told appellant that they pulled the company time sheets, and they reflected that Rhonda went to work on the third but not on the fourth. Appellant replied that whatever the time sheets said, he knew that he and Rhonda went in on Sunday. (19 RT 3242-3243.) Because of the officers' persistence, however, appellant offered that theoretically it might have been

a different day in the same general time frame, perhaps Monday, that he was referring to. His recollection that it was Sunday remained, however. (19 RT 3243-3244.)

Officers again sought to discuss Bradley Hunter. They asked appellant why he said he saw Bradley from the direction of the crime scene early Sunday morning. Appellant replied that he was not certain that it was Bradley or Charlie Richardson that he saw. The officers then stated, it was appellant. "Just like you're sayin' it was them." (19 RT 3244.) Appellant said that was something someone would have to prove, and asked, "did you ever get my shoes?" Appellant asked if officers found his footprints in the area of the crime scene. Officers replied that those wouldn't prove much because appellant had been to the residence in the past. Appellant said, "you can tell fresh footprints, can't you?" The officer replied, "OK." (19 RT 3245.)

Officers indicated that they had completed the interview. Appellant reiterated that he was innocent. The interview then ended. (19 RT 3244-3245.)

**Defense**

Steven Gould went out with Vicki Lopez for a short time in 1989. He knows Regina Holdridge. Gould could not recall Vicki Lopez calling Regina and making a statement to her about something she had heard from Bobby Joe Marshall. Gould testified that Lopez is a liar who falsely accused him of attempting to rape her. (19 RT 3251-3253.) He believes Holdridge is an honest person. (19 RT 3256.)

Nancy Lee Marshall is the sister of Bobby Joe Marshall Jr. and the daughter of Bob Marshall Sr. (19 RT 3257.) In December 1988 she lived at her father's trailer home in Matheny Tract, on Canal Street. (19 RT 3257.)

During the morning of December 4, 1988, Nancy Lee was not at her parents' home, but she was there at 3 p.m. that afternoon. She did not see Kim Fleeman any time any time that day. (19 RT 3259-3260.)

Around July of 1990 Nancy Lee became aware of statements made by Fleeman involving Bobby Joe Jr. However, she never threatened Fleeman. (19 RT 3260.) In fact, although she did not particularly like Fleeman because she had once accused her father of molesting her (19 RT 3260-3261), she had done drugs with her during the time she was doing drugs. Also, she had seen Fleeman and Rhonda Schaub do drugs together.

(19 RT 3261.) In those days, Nancy Lee also did drugs with Vicki Lopez, although she did not know her well enough to conclude she was an honest person. (19 RT 3265.)

She did call Fleeman on the phone that day. However, Fleeman called Nancy Lee and wanted to know if Nancy Lee could get some drugs. Nancy Lee said no and Fleeman hung up. Fleeman did not ask Nancy Lee for a ride anywhere. The call was initiated by Fleeman. Nancy Lee did not call her. (19 RT 3264-3266.)

Bob Marshall Sr. lived in a double-wide trailer in Matheny Tract during December of 1988. (19 RT 3268.) [see Kenneth Marshall for address, 19 RT 3278] There is a restroom of the master bedroom. A person who is in that restroom generally cannot hear conversations either in the second bedroom or in the southernmost bedroom unless the persons are speaking very loudly, nearly to the point of yelling. (19 RT 33268-3269.)

Bob Marshall Sr. denied having committed any sexual molestation against his niece, Kim Fleeman. Although such allegations were made, no charges were ever brought, to his knowledge. (19 RT 3267-3268, 3270.)

Mike Marshall, having previously testified on behalf of the prosecution that he was out Saturday evening and returned to the Marshall's trailer at 3 or 3:30 Sunday morning (19 RT 3274), testified on behalf of the

defense that he went to bed woke up at 10 or 11 on Sunday morning, possibly a little later. (19 RT 3271, 3274, 3276.) He never saw Kim Fleeman or appellant at the Marshall's trailer on Sunday from that time forward. (19 RT 3271.)

After he had been up for thirty or forty-five minutes, he walked to a nearby store before he remembered that lit was Sunday and the store was closed. (19 RT 3275.) He was away from the Marshall's trailer for about ten minutes. (19 RT 3275-3276.) As he was coming back from the direction of the store, he noted an ambulance and Sheriff's vehicles around the Holley residence. (19 RT 3275.)

Mike knew Vicki Lopez. He had done drugs with her and had a sexual relationship with her while Lopez' boyfriend, Raymond Cox, was in jail. He would not exactly call her [Lopez] an "honest person." (19 RT 3272.)

Kenneth Marshall is another son of Bob Marshall Sr. and the brother of Mike, Bobby Joe and Nancy Lee Marshall. He is also a cousin of Kim Fleeman. (19 RT 3277.)

In December of 1988 hi was living at his parents' trailer, located at 3630 Canal Street in Matheny Tract. The cross street to the north is Wade. (19 RT 3278.)

On the evening of Saturday, December 3, Kenneth was out all night with friends. On Sunday morning he went with his friends to Denny's restaurant for breakfast. He returned to the Marshall's trailer 11 a.m. or noon on Sunday after April Holley's body was discovered. He did not recall seeing Kim Fleeman at the Marshall's trailer on Sunday, (19 RT 3280.)

Kenneth had known Fleeman to drive a white van and had seen the fvan at the Marshall's residence, although not on Sunday. He could not have seen Kim at the trailer any time prior to 11 that day. (19 RT 3284.)

As of December 3, besides Kenneth, Michael and his girlfriend Carol, Bobby Joe Jr., and Kenneth's parents were living at the Marshall's trailer. (19 RT 3280.) Mike and Carol were staying in the back room on the west side of the trailer. (19 RT 3280.) Theirs was the one on the end of the trailer, on the corner bedroom. (19 RT 3821.)

In December, 1988, Jessie Bradley lived in Matheny Tract at 3825 South Canal Street. (19 RT 3285.) Sometime around 9:30 p.m. on December 3, Jessie dropped Charlie Richardson off at Barney Bradley's house. Barney is Jesse's father. (19 RT 3287.) The house is a two-story structure located on canal street just south of Wade, on the next block from Jesse's house. (19 RT 3289-3290, 3295-3296.)

Jessie saw Richardson at 7 or 7:30 p.m., land they drove around for two hours prior to his dropping Richardson off. (19 RT 3286-3288, 3292.) Within the year and a half prior to testifying, Jessie had suffered a very serious head injury requiring lengthy hospitalization. As a result, some of his recollections of events were rendered somewhat cloudy. (19 RT 3291.)

Much or most of the two hours' driving was spent trying to locate Jesse's pit bull dog, which had run away. (19 RT 3293.) [Barney lived at the two-story house along with Robert Hernandez, his girlfriend Eva Romero, and Barney's son, Steve Hernandez. (19 RT 3303.)

Jesse does not remember if they stopped at a person named Donna Lynch's house when they were driving around. He vaguely remembered Richardson taking some tires with him when Jesse dropped him off, but he could not say for sure. (19 RT 3294.) Jesse had suffered a serious head injury within the last year and a half, which made his recollection of events cloudy. (19 3291.)

Eva Romero was Robert Hernandez' girlfriend and lived at the two-story house located on Canal near Wade. (19 RT 3297.) At about 8 or 9 p.m. on December 3, she saw Charles Richardson, who she did not know at the time, at her house. (19 RT 3296, 3300.) Barney, Steve Hernandez and Robert were also at the house at the time. (19 RT 3300.) Eva was pregnant

and was in bed in the upstairs bedroom. (19 RT 3299-3300, 3302.)

She saw Richardson bring four automobile tires upstairs and into her bedroom. (19 RT 3301.) Robert and Steve helped him. (19 RT 3301.) Richardson was in the house about ten minutes. (19 RT 3298.) He then left in a car with Robert. They took one tire with them (19 RT 3302.)

Eva saw Richardson in the living room of Barney's house the following day. She noticed that he had blood on his elbow. (19 RT 3303.) Robert asked him why he was bleeding and Richardson said he had been "shooting up." (19 RT 3304-3305.) This occurred in the morning, although Romero could not remember what time. (19 RT 3305.)

Gale Watson, a senior investigator with the Tulare County Sheriff's Department, interviewed Lynn Farmer on May 30, 1990. Farmer seemed calm and not under the influence of anything. (19 RT 3323.)

Watson was unsure of Farmer's truthfulness because he gave multiple differing accounts of the same incident. (19 RT 3320-3321, 3326.) For example, Farmer told Detective Buttram that the purse snatched at the Best Western Motel had occurred outside room 127. (19 RT 3321.) Yet he initially told Watson that he was not at the motel at all, but had been with appellant "at some point." Per Watson, he admitted being at the motel but gave varying accounts of what he did. (19 RT 3326.) He told Watson he

had been smoking marijuana that day. (19 3320.) He eventually stated that he had gone to the upstairs hallway with appellant, .

Two other suspects, Chris Allen and Carlos Salas, were on the lower level. (RT 3324-3325.) He heard a scream and fled through a parking lot and into an open field, west of the motel. (19 RT 3324-3325.) He said the purse snatch was appellant's idea. Farmer gave this latter account after his mother was brought in for the latter portion of the interview, at Farmer's request. Watson believed this account to be "more truthful." (19 RT 3323, 3326, 3327

Investigator Ralph Diaz testified on appellant's behalf. Diaz interviewed Joe Mills on March 15, 1991. (19 RT 3327.) During that interview Mills told Diaz he didnot recall seeing Kim Fleeman at the Marshall residence on December 4, 1988. (19 RT 3327-3328.)

Diaz also interviewed Mills on March 28, 1991. At that time Mills told Diaz that after he and Bobby Joe Jr. returned to the Marshall's from the Holley's on December 3, Bobby Joe grabbed a six-pack of beer out of the refrigerator. He drank two of the beers before appellant arrived and took a third with him when they went to the cotton gin. (19 RT 3328.)
Diaz interviewed Victoria Lopez on March 6, 1991. Regarding Bobby Joe Marshall Jr.'s visit to her house during which he made the statement to her

statement to her about his being involved in the April Holley incident on December 3, Lopez told Diaz that Bobby Joe came to her house at 11:30 p.m. or 12. (19 RT 3329.) Also on March 6, Lopez told Diaz that that Bobby Joe Jr. had stolen a dog from her, and that the value of the dog was $300. (19 RT 3329.)

On March 12, 1991, Diaz again interviewed Lopez. During this interview Lopez told Diaz that Bobby Joe had told her that he had sex with April Holley. (19 RT 3330.)

On July 26, 1991 Diaz interviewed Kim Fleeman. (19 RT 3331.) Fleeman told Diaz that when she went out to Matheny Tract on Sunday, December 4, she went by herself, and she had her mother's red Volkswagen. (RT 3333:) She "blew up" her truck, the white Mazda. (19 RT 3333.)

At an interview with Diaz on March 4, 1991, Fleeman told Diaz that she learned of April Holley's death when she made a call out to Matheny Tract, but she did not know why she called out there. She drove out to Matheny Tract on Sunday the 4th between 3 and 4 p.m. (19 RT 3335), although she eventually testified at trial that this occurred at 10:30 a.m. (18 RT 2888.) In that statement, she said that when she arrived at the Marshall's residence, she saw Bobby Joe Jr. sitting on his bed. Then she said she "did not remember actually seeing them (Bobby Joe Jr., Richardson

and appellant) in there." (19 RT 3333.) But she went on to say that she heard the voices of all three. (19 RT 3333.) She heard appellant say "Well, the bitch deserved everything she got." She did not say that appellant said "*the little* bitch." (19 RT 3334.) However, during one of her statements she told Diaz that "she never heard the conversation herself." (19 RT 3334.)

Also during the July, 1990 statement, she said she overheard so much, she couldn't sort anything out . . . "And I just don't know." (19 RT 3335.)

When asked during the March 4, 1991 interview, whether she heard somebody say "we've got to get our stories straight," she replied "that's what I keep thinking, we got to get our story together, get it straight where everybody was." (19 RT 3336.)

Investigator Diaz interviewed Rhonda Schaub on several different occasions, including October 1, 1991. (19 RT 3336.) During that interview, Diaz asked Schaub if she was mistaken when she said that appellant said "yeah" when she asked him if he killed April Holley. Schaub replied, "I don't' think I am, no." (19 RT 3337.) Also on October 1, 1991, Schaub, when asked where she and appellant were when appellant made his alleged statement to her, said they were in a car. Then she said they might have been in a camping trailer owned by appellant's mother. (19 RT 3338.)

Diaz also interviewed Schaub on June 15, 1990. He asked her if

appellant had ever aksed to "cover up" for him on the Holley murder. (19 RT 3338.) Schaub replied, "Well, I know there was like times he said, well, tell them that I was here at this time and tell me–and that me and Bobby or that Bobby Joe, like he told me the second time they come out there. Well, tell them that Bobby Joe and Joe Mills were with me. Tell them that I was there. He just always got real funny when I asked him. I asked him and I asked him and I asked him, because I don't know, for some reason I had a feeling." (19 RT 3339.)

Cliff Webb, an investigator with the Public Defender's office working on behalf of Charles Richardson, interviewed Rhonda Schaub on July 20, 1990. Schaub lived across the street from the Marshalls. (19 RT 3349.)

Schaub told Webb that "there is no way" Kim Fleeman heard Bobby Joe Marshall, Jr., Richardson and/or appellant make incriminating statements at the Marshall residence on the morning of December 4, 1988 because she was not there. Schaub also told Webb that appellant was home all morning and thus never went to the Marshall's on the morning of the 4th. (19 RT 3349.)

Debra Beavers is the office manager at Mid-Valley Cotton Growers. It is a cotton gin located at 626 West Cartmill in Tulare. (19 RT 3350.) She checked the time sheets of Phyllis Saldana and Rhonda Schaub.

According to the time sheets, Saldana did not work December 3 or December 4. Rhonda Schaub worked on December 4 and 5. Specifically, Schaub clocked in at 8:14 p.m. on December 3 and clocked out at 6:07 a.m. on December 4. She clocked in at 6:10 p.m. on December 4 and clocked out at 6:10 a.m. on Monday, December 5. (19 RT 3352-3353.)

Scott Dinkins was in investigator working for the defense in appellant's case. After Lynn Farmer testified at appellant's trial, Mr. Dinkins twice went to the Best Western Motel in Tulare. There, he inspected the first and second floors, took photographs of the second floor and diagramed the hallways. (19 RT 3355-3356, 3362-3363.)

Based on his examination of the premises, Mr. Dinkins determined that there are three areas of the upstairs hallway where one can look down and see the first floor. (19 RT 3356-3358, 3365.) One is in the area of the stairwell leading to the main lobby. The second is a balcony Dinkins termed the "foyer," which offers a balcony that one can look over and see below. The third is a slightly smaller foyer designated by Dinkins the "western foyer," which offers a more limited view. (19 RT 3356-3358.) Neither the foyer nor the western foyer offers a view of the front of room 127. (19 RT 3359.) The stairwell at the far west end of the upper hallway does not offer a view of the first floor. (19 RT 3365.)

On cross-examination, Dinkins stated that he did not know if any remodeling had been done to the relevant area of the motel since 1988. He also stated that he did not know when the fence along he back side o he motel was built. (19 RT 3060-3061.)

Dinkins was asked on cross-examination abut the acoustics of the hallways. The foyers are open-air locations. (19 RT 3363.) The foyers are tiled and the hallways are carpeted. Dinkins said that it was "probably possible" for noise to travel up and down between the hallways, although the area struck him as a "fairly well insulated environment." (19 RT 3363.)

The former testimony of Victoria Lopez was read into the record. On December 5, 1991, Lopez testified that Bobby Joe Marshall, Jr., came over to her house "about eight o'clock, nine o'clock" on the night he made his statement to her about his involvement in the April Holley incident. (19 RT 3366.) On that same date she testified that he came over "9, 10 o'clock."

On November 18, 1992, she said that he came over looking for Raymond Cox. (19 RT 3367.)

Again on December 5, 1991, she testified that she had heard "bits and pieces" abut the April Holley case prior to Bobby Joe Jr.'s statement. Her source of information was Raymond Cox's cousin. (19 RT 3368.)

Also on December 5, 1991, Lopez testified that the first person she told abut Bobby Joe Jr.'s statement was her friend, Steven Gould. (19 RT 3368.)

On July 8, 1992, Lopez testified that Bobby Joe Jr. told her that he ahd "been with" April and that everyone in the Tract had slept with her. Lopez took his statement that he had "been with" April Holley to mean that he had had sex with her. (19 RT 3368-3369.)

Former testimony of Kim Fleeman was read into the record. On July 6, 1992, Fleeman testified as follows: "I talked for a few minutes [at the Marshall's residence on Sunday, December 4, 1988], and Nancy had decided she didn't want ot go back into town." At the same proceeding, Fleeman testified that she then left the house because Nancy Lee had changes her mind and didn't want a ride to the store after all. (19 RT 3369.)

At appellant's preliminary hearing, Fleeman testified that the time of the call to Matheny Tract to the time she arrived at the Marshall's covered the period from 9:30 to 10 a.m., and that she arrived at the Marshall's between 9:30 and 10 a.m. (19 RT 3370.)

On July 6, 1992, Fleeman testified that when she arrived at the Marshall's residence, she saw Joe Mills and Bobby Joe Jr. outside. And after she went inside, they also came inside. (19 RT 3370.)

On December 4, 1991, Fleeman testified that on her way back to the rear part of the trailer, she saw Bobby Joe Jr. Go into the bedroom and saw Bobby Joe Jr. and Charles Richardson sitting on the bed. (19 RT 3370-3371.)

Former testimony of Rhonda Schaub was also read into the record. On July 17, 1992, Schaub was asked if she went to work on Sunday, December 4, 1988. In response, she testified that she started to go to work, but she was sick, so she came back. (19 RT 3371.)

On July 19, 1990, John Johnson, chief investigator with the Tulare County District Attorney's Office, interviewed Kim Fleeman. Fleeman told Johnson that at about 8:30 or 9 a.m. on Sunday, December 4, 1988, her aunt Nancy called. She also said that on that date at the Marshall residence she heard someone who sounded like "Charlie."

When asked if she actually saw "Charlie," she replied, "No, but Steven and Bobby were sitting on the bed." (20 RT 3431-3433.)

On July 5, 1990, District Attorney Investigator Ralph Diaz questioned Lynn Farmer in the presence of Farmer's mother and Sergeant Salazar of the Tulare County Sheriff's department. Farmer told Diaz and Salazar that on the day of the purse snatch committed in May of 1990, appellant threatened to cut his nuts off with a knife he was carrying. (20 RT 3433-3434.)

When pressed by Diaz for the truth, Farmer said appellant had not

said he would cut his nuts off, but that he was going to cut his guts out. (20 RT 3433-3434.)

This conversation with Farmer lasted less than a minute. Farmer's demeanor seemed cooperative. The officers were "pointed" and "emphatic" that they wanted the truth. (20 RT 3434-3435.)

The former testimony of Tammy Faye Petrea, now deceased, was read into the record. (20 RT 3435.)

Ms. Petrea was a former cocaine addict. She used cocaine for about two years but as of her current testimony, she had been off drugs for five years. (20 RT 3460.) Petrea had suffered a prior felony conviction for passing a forged check. That occurred in Texas. (20 RT 3436-3437.) Ms. Patrea testified at the preliminary hearing in the Charles Richardson case, then was relocated by the District Attorney's Office to Texas. (20 RT 3438.) She returned to California to visit her mother, Virginia Petrea, but was then relocated to Texas. (20 RT 3438-3439.)

In December of 1988 Petrea lived, at various times, with one Louise Mason at the Nicholas Motel in Tulare; and with her mother on K Street. (20 RT 3439, 3486.) Petrea at that time supported herself by engaging in prostitution. (20 RT 3461.)

Petrea knew April Holley, Tammy Holley and Charles Richardson.

She had done drugs with Richardson a couple of times. (20 RT 3440, 3484.)

At 11 p.m. on December 3, 1988, Petrea saw Richardson in Matheny Tract. At the time she was at Jimmy Rounseval's residence, which was a blue and white bus situated on a parcel on East Beacon Street. She described Rounseval as a friend; his sister was married to Petrea's mother's brother. (20 RT 3506-3507.) On the same parcel as the bus was a house occupied by Rounseval's father. (20 RT 3441.)

Richardson knocked at the door of Jimmy's bus. Petrea recalled that she was watching the "Friday the 13th" television series at the time. (RT 3474.) Richardson was alone. He was wearing a green jacket, a dark shirt, and a round hat. (20 RT 3496-3497.) He was let inside and offered Patrea some cocaine. They used cocaine, Petrea snorting hers and Richardson injecting his in the fold of his right arm with a syringe he took out of a red bandana. Petrea had not previously used cocaine that day. The last time she had used cocaine was a couple of days prior (20 RT 3499), although as of December 3, 1988, Petrea was a frequent user of cocaine. (20 RT 3461.)

After they finished using the cocaine, Rounseval left to go to the restroom inside the main house. Petrea and Richardson were the only persons left at the bus. (20 RT 3443.)

After Rounseval left, Richardson put his hand on Petrea's leg. Petrea

felt scared and got up and went outside. Richardson followed her outside. (20 RT 3449-3502.)

After they were outside, Richardson asked Petrea if she had heard about April Holley getting killed, and she said she had not. This conversation was in fact the first she had heard of the Holley murder. (20 RT 3486.) Richardson asked her if he told her something, would she not say anything; and she said yes. (20 T 3450.) Richardson then said that he had done it. He said, "He fucked her and drowned her." He drowned her in a bathtub plugged up with a rag. (20 RT 3449-3451.)

He said he killed her because she had something on him and he did not want her to get on the witness stand and testify against him. He said if she testified against him he would go to jail. (20 RT 3450-3451.) Richardson told Petrea that if she told anybody, he'd "take care of her or somebody else will." This scared Petrea. Richardson then walked off in the direction of the main house, then turned around and came back after he reached the mailbox at the road. (20 RT 3452.) He asked Petrea if she knew where he could get some more cocaine. Petrea said she didn't know. (20 RT 3503.)

Richardson then said someone had something of his, mentioning a name that sounded like Stumblefield or something like that, and that he could

get more coke. He then walked off. As he was doing so he said "payback is a motherfucker." Petrea deemed this to be a threat and it frightened her. (20 RT 3453-3454.)

Petrea testified that she knew both Bobby Joe Marshall Jr. And Joe Mills, but was not with either of them on December 3, 1988. She did not see them at all on Saturday. (20 RT 3455.)

Petrea stated that she had used cocaine prior to December 3, and since; and that while it made her "active," it did not affect her perception of events. (20 RT 3456.)

Because she was scared, Petrea at first did not mention the above information about Richardson to the police when she was interviewed by them regarding the Holley case. Subsequently, the District Attorneys' Office said it would protect her. (20 RT 3454-3455.)

Ultimately, Petrea gave officers two or three taped statements to law enforcement, though she never listened to any of the tapes. (20 RT 3470-3471.) She first discussed the Holley case with the police around December 15, 1988, when she was interviewed in a patrol car outside the Nicolas Hotel. (20 3468, 3472.) On January 17, 1989, she was contacted at the Nicolas, possibly by Detective Raborn. (20 RT 3473.) On February 26, 1989, she was contacted by the District Attorney's Office. (20 RT

3475.) On March 2, 1989, she testified at the Richardson preliminary hearing. (20 RT 3480.) She was then relocated to Texas for her protection. (20 RT 3438.)

Thereafter she "snuck" back to California to visit her mother. In July, 1989, District Attorney investigators Johnson and Diaz appeared at her door at the Nicolas Hotel and told her she should not be in California. (20 RT 3466, 3476.)

On November 27, 1991, she again came to California from Texas to testify in the Holley case. (20 RT 3483.)

Petrea testified that at the time of her current testimony, she was still living out of state. Detectives brought her back to testify. They provided a bus ticket and expenses. (20 RT 3458-3459.)

Regarding that appearance, she was given expense money and clothes to wear to court. (20 RT 3459-3460, 3462.)

When she came to California to visit her mother prior to her earlier court appearance, Investigators Diaz and Salazar from the District Attorney's Office told her that she shouldn't be in California while court was in session. She did not know how the officers knew she was in California or located her; they just showed up at her door. (20 RT 3466.)

Petrea herself did not feel safe being in California. Therefore, after

about a week and a half, she called her dad and had him send her a bus ticket back to Texas. (20 RT 3462-3463, 3466-3467.)

While she was in California she had one law-enforcement contact involving a shoplift. (20 RT 3463, 3481-3483.)

Following her relocation to Texas, she suffered two felony convictions, at least one of which involved forged checks. Both of these occurred in Texas. (20 RT 3437, 3462.) She did not know at the time of her testimony if she had charges pending in the Pixley Justice or Tulare Municipal Courts. (20 RT 3464.) She did not know if she had any outstanding warrants but thought she might because as of December of 1988 she had been a runaway from a group home for juveniles. (20 RT 3464, 3467.) She was informed that she could not be arrested for any pending California charges while she was in the state to testify. (20 RT 3464.)

**Rebuttal**

Regina Holdridge testified on behalf of the prosecution in rebuttal. Holdridge knew Victoria Lopez, having been introduced to her by a friend, Steven Gould. This occurred in 1991. (20 3508, 3510.)

Holdridge testified that during her first telephone conversation with Lopez, the two began discussing the April Holley case. Lopez related to Holdridge what Bobby Joe Marshall Jr. had told her about his involvement in

the case. (20 RT 3510.)

Holdridge then contacted her mother, Sherry Holdridge, who was a Detective with the Tulare Police Department and related the information Lopez had provided to her. (20 RT 3510-3511.) This occurred the day after her conversation with Lopez, at the latest. Regina gave a taped statement to District Attorney investigators on March 4, 1991. (20 RT 3511.)

The night after her first contact with Lopez, she met Lopez in person, along with Gould, at Charlie's, a bar in the Porterville area. This, and the initial phone conversation, were the only contacts Regina ever had with Lopez. (20 RT 3512.)

**Penalty Phase**

The prosecution presented eight witnesses during the penalty trial. These witnesses were: Debbie Nell (21 RT 3739-3748); Dorothy Tarbet (21 RT 3748-3753); Elizabeth Atherton (21 RT 3754-3759); Margaret Allen (21 RT 3760-3775); Lynn Farmer (21 RT 3775-3778); Gale Watson (21 RT 3780-3782); Joseph Lyle Brown (21 RT 3783-3790); and Billy William Rummerfield. (21 RT 3796- 3802)

Debbie Nell testified she lived at 711 East Noble in Visalia, California, in September of 1988. At that time, she was acquainted with

Angie Matta, who introduced her to Steven Brown on September 25, 1988. On that date, Angie and Debbie went to meet with Steven Brown. Debbie used cocaine with Steven, out in a field. (21 RT 3739-3741) Also present at this time were Angie's two young children. Steven had arrived at this location alone in a vehicle which Debbie thought was a truck. The others had traveled in Angie's vehicle. (21 RT 3741- 3743) Later, after ingesting cocaine, Angie's vehicle failed to start. Steven tried to jump-start Angie's vehicle, but it would not start. Steven said he knew someone in Tulare, and he and Debbie left together to go get a tow truck to help start Angie's car. It was late in the evening, and as they drove Steve asked if Debbie wanted to use more cocaine. Debbie said she did and Steve pulled the truck over to the side of the road near an orchard, where they each ingested a line of cocaine. (21 RT 3743)

After ingesting the cocaine, Steve said something was wrong with his vehicle. Hhe asked Debbie to step out and check the tires of his vehicle by kicking them. She did so, and then Steve locked the doors as Debbie tried to get back in the vehicle. He started to drive away leaving Debbie alone. She was in an unfamiliar place with no people or houses were nearby. She started to cry. (21 RT 3743-3745)

Steven then got out of his vehicle and while behaving "real scary he

told Debbie she was going to have sex with him. Debbie said no and started to cry. He told her if she did not have sex with him he would tie her up, kill her and throw her in the ditch. She remembered there was a ditch in that area and she was concerned Steven was going to kill her. (21 RT 3745) Mr. Brown then made her suck his penis and then he had intercourse with her. During these acts Debbie was scared and crying. Steve told her then that she better not tell anyone or he would kill her. She was bruised by the assault, and later she was examined at a hospital but complied with Steve Brown's warning not to tell anyone what had happened. (21 RT 3746) After the assault, they got back in the vehicle and Steve told her to tell no one and he took her back to her friend Angie's car. When they arrived at Angie's car Steve told her before she got out, "You better not tell her." Steve then took off and said he would go get a jump or tow truck for them but he never came back. (21 RT 3747)

Debbie told Angie what had happened with Steve when she got back to Angie's car, but she did not tell her boyfriend until later, because she was scared. She reported the assault to the police eight or nine hours after the incident. The defense did not cross-examine Debbie Nell and then stipulated that the Steve Brown she referred to in her testimony was the defendant. (21 RT 3747-3748)

On May 30, 1990, Dorothy Tarbet of Seattle, Washington, was in Tulare, California, with her husband and her 84-year-old mother. They were en route from Yuma, Arizona to Seattle, Washington. They had stopped at dusk and registered at the Best Western Motel in Tulare. Dorothy Tarbet had broken her ankle, and was in a heavy cast, having to use a walker to get around. She was in excruciating pain. (21 RT 3749-3750) Dorothy and her mother headed down the hallway to their room while Dorothy's husband went back to the car to get the luggage. As they walked, two young men passed them in the hall, one blond, the other brunette. Dorothy looked at the brunette and thought he was the most sinister looking person she had ever seen. (21 RT 3750-3751) When they were about two feet from the door of their room, the key was in her hand ready to insert in the door; she heard loud whispers behind her and thought the men were going to get their purses. The two men came running and the brunette pushed Dorothy's mother to the floor and grabbed her purse, while the blond man grabbed Dorothy's purse, although Dorothy was not thrown out of her walker. The men then ran down the hallway. (21 RT 3751-3752) Dorothy and her mother were not physically damaged, but it was an emotionally difficult incident for both of them. (21 RT 3751-3752) No identification of Mr. Brown was made by Dorothy.

Eunice Atherton lived in Visalia, California, in December of 1988. On December 13, 1988 she was in Fresno to attend a business meeting at the Holiday Inn Civic Center, for the Woodlake School District. (21RT 3754-3755) She arrived alone in her vehicle about 8:20 a.m., and parked on the side of the hotel. At the time she pulled in she noticed a man towards the front of the Holiday Inn who wore a red, bright sports jacket. She collected her things, got out of her vehicle and locked the car. She had her purse, which had everything she needed, and she headed towards the side door of the Holiday Inn. She described the distance to the side door by reference to features in the courtroom; the court estimated her description at between 30 and 35 feet. (21 RT 3755-3756)

As she started towards the door, she noticed the man in the red jacket, who she identified as Steven Brown. He had worked his way back from the front of the hotel to the side entrance she was approaching. She thought nothing of it, and started to go in the door with her purse on her arm and her sweater over her shoulder, when the man started towards her and said, "Ma'am, do you have the time?" She raised her arm up to check and told him the time. Very quickly, the man was around her back, pushed her down, and jerked her purse and sweater off her arm. (21 RT 3756-3757)

She was on the ground and it took a while for her to get oriented. By

then the man was getting into the passenger side of a yellow-brownish Firebird vehicle being driven by someone she thought was a woman. The car sped away. She believed the car went toward Highway 99. She had no broken bones, but her ankle and foot were sprained from being knocked down and twisted. (21 RT 3758) She entered the Holiday Inn and told someone at the counter desk clerk what happened. She called the police and they came to the hotel to make a report. The defense stipulated that the Steven Brown referred to by Mrs. Atherton was the defendant. (21 RT 3759)

Margaret Allen lived alone at 259 North "N", Tulare, California in May of 1990. She was 74 years old and had lived in Tulare her entire life, except for a nine-year period. (21 RT 3760-3761)

On May 28, 1990 she went to bed between 10:00 and 11:00 p.m. The house, including doors and windows, was locked, as was her habit when inside the house. She also closed and locked the bedroom door when she went to bed. (21 RT 3761) She read until midnight and fell asleep with her magazine over her face. Later she awoke with a light in her face and the magazine over away from her. She then turned over in bed and turned off the light to go to sleep. (21 RT 3762) She was under the sheets and blankets, in her double bed, when there was a click and a rushing sound, and someone was holding down her shoulders. She had been on her side in bed, when a

man came and pushed her shoulders down so she was on her back looking up. The man was partly on top of her. (21 RT 3763)

She then started yelling as loud as she could and also started kicking. The man had her right shoulder pinned down, but her left one was free, so she was hitting him with her left hand. (21 RT 3763-3764) She was hitting him on his face, and believed he had a two-day growth of beard. She pinched his nose and scratched at him. He told her to stop it. (21 RT 3764)

He then hit her three or more times on the left side of her head, with a very hard stick of some kind. She did not lose consciousness at that time. She continued to struggle with him and he pulled a pillow over her face and pressed it down. (21 RT 3764-3765) She stopped struggling because she thought she was going to lose her breath. However, with her left hand she was able to turn the pillow over a little bit so that she got air into her nose. (21 RT 3765)

The man then took off the pillow and started to choke her with his fingers on her neck. She tried to get his fingers off and started to lose consciousness when he took his fingers off of her neck. (21 RT 3765) She then turned over and was completely flat with him on her legs. He was no longer holding her shoulders. She felt something hard enter her rectum and then three times in her vagina. It was very painful and she yelled loudly,

hoping someone would hear through the open window. (21 RT 3766)

She was wearing her nightgown. The man then dragged her around to the bathroom next to the bedroom, threw her in the bathtub, closed the drain and turned on the water. (21 RT 3766.) She sat up and turned the water off. He said, "Don't do that" and he turned it on again. She said, "No, you don't want to do that." She turned off the water again, but forgot to open the drain, and this left her lying in water with her head away from the faucets. (21 RT 3767) The man left the room, but soon returned. There was no light in the bathroom and she could not see, except for a dim outline. He came back in with what looked like a chef's knife from her kitchen and a stick in the other hand. He said, "if you recognize me, know me, I'll use this," as he gestured with the knife. He had a stick in the other hand, which she could not see well enough to describe. (21 RT 3767- 3768)

He came into the bathroom three times. After he left again, she could raise herself up to see him in the hall and in her room collecting things, which he put on a square piece of what looked like white cloth on the rug in the hall. (21 RT 3768) Then he shut the door and was gone, and she was able to raise herself up, reach up, and lock the door. (21 RT 3768-3769)

She then began to shudder and she felt dizzy, so she could hardly get up. She felt as if she was being thrown backwards. She did not realize it then,

but she was bleeding. It was very cold and she tried to get some towels. She had waited long enough and was afraid he would try to re-enter the bathroom. Finally, she was able to get up and reach the bathroom window. She pulled the shade up and put her head out the window and yelled, "Fire, fire" instead of "Help" because she thought that would get more attention. (21 RT 3769) She could see a neighbor's lights on, so she yelled, "Help, help, call 911." The neighbor came to the window and said, "Yes, I've called 911." (21 RT 3770)

Emergency vehicles arrived and she was given oxygen and was taken to the hospital, where she remained until she insisted on leaving. She was then transferred to Merritt Manor Convalescent Hospital where she remained for five days. As a result of the assault, her left hand was broken and one finger on her right hand was cracked. She also received twelve stitches to her head. Her rectum and vagina were very torn up by the assault. She had been a virgin prior to this assault. (21 RT 3770-3771)

When she returned home eleven days later she discovered certain property was missing. She was missing her jewelry box, camera, wristwatch, and business papers, including deeds. Two purses were also taken, including a bankbook, a small address book, and everything else that was in her purse. A chef's knife was also missing. (21 RT 3772-3773)

About two years later, some of the missing items were shown to her, and she recognized them. There were also items shown to her that did not belong to her. (21 RT 3773) At first she did not remember the pillowcase had been taken from her home, but after having her recollection refreshed with her prior testimony, she remembered that she had previously identified the pillowcase. (21 RT 3773-3774) She also identified a medallion taken from her jewelry box. There was no cross examination of this witness by the defense. (21 RT 3774)

Lynn Farmer testified for the prosecution about the conversation, described in his guilt phase testimony, he had with Steven Brown in the garage where Steven resided. (21 RT 3775-3776.)

He described the garage where the conversation took place, which was attached to his sister's house,. He also explained who lived at that house with Steven. His sister's house was at 310 North "N" Street in Tulare,across the street from Margaret Allen's house.

When Farmer was at the Tulare Western Lodge with Steven Brown, Farmer knew something had happened to Margaret Allen in May of 1990 but he did not know any details at that time. The defense did not cross-examine Farmer during the penalty phase. (21 RT 3776-3778)

Gale Watson, a detective with the Tulare Police Department, for

twenty-six years, was involved in the investigation of an assault on Margaret Allen on May 29, 1990. She went to the Allen residence at 4:30 a.m. that day. She arrived with an evidence technician. (RT 3780-3781) She described the condition of the premises and the location of blood in certain portions of the Allen home. (21 RT 3781) She also described a piece from a broken pool cue that was seized from the area between the headboard and the mattress in Margaret Allen's bedroom. There was no cross-examination of this witness by the defense. (21 RT 3782)

Joseph Lyle Brown, was assigned as the parole agent for Steven Brown in May of 1990. His first personal meeting with Steven Brown was on May 30, 1990. However, on May 29, 1990 Steven Brown telephoned this parole agent to tell him he could not report in because he had stayed up too late. (21 RT 3783-3784)

Nonetheless, they did have their first meeting at the Visalia parole office on May 30, 1990. The purpose of the meeting was to obtain basic information from Steven Brown, as was the custom whenever anyone was released from prison. (21 RT 3784)

When Joseph Brown met with Steven Brown on May 30, 1990 the parole agent noticed a scratch above Steven's left eyebrow, and another scratch alongside Steven's nose. (21 RT 3785) During this meeting, as part

of a standard parole interview, they discussed all of the conditions of parole, including condition five, which described the types of things a parolee is not allowed to have, such as firearms or knives or any weapons listed in Penal Code section 12020. (21 RT 3785) During this discussion Steven told his parole agent that the garage area where he resided had a pool table, various cue sticks, and possibly some broken cue sticks. Steven asked if a pool cue stick was considered a weapon. Steven stated the garage where he lived was located at 303 North "N" Street in Tulare. (21 RT 3785-3786)

The next day, Agent Brown, along with police officers, conducted a parole search of Steven's garage area. The search was part of the investigation of the beating and rape of Margaret Allen. Many items were seized from the garage area during this search. (21 RT 3786-3787)

The seized items included a broken pool cue stick laying on the pool table. There was also a checkbook with the name Margaret Allen printed on the checks, hidden in a glass lens of a lamp. A small camera with Margaret Allen's name inside the case, was also found in the garage inside a barrel. There was a burned address book in the garage are near the bed. A butcher-type knife with a chrome blade and a brown handle was found in the rafters above the bed. Finally, a pillowcase with reddish-brown stains that appeared to be blood, and which contained two purses, was also located and

seized from the garage area. There was no cross-examination of this witness by the defense. (21 RT 3787-3790)

The final prosecution witness was Bruce William Rummerfield, also known as "Billy". He was the brother of Roger Rummerfield. He lived at 325 North "M" Street in Tulare. (21 RT 3796) In November of 1986 he was living in Tulare, and his brother lived at 321 South "I" Street, Apt. A., also in Tulare. In 1986 Billy was at his brother's apartment frequently. (21 RT 3796-3797) In November of 1986 Billy knew a Linda Bates, also was known as Annette Bates. During this same time period Billy was a close friend of Steve Brown, and Billy also knew Donald Brown, Steve's brother. (2 RT 3797)

On November 5, 1986, around 9:00 p.m., after it was dark, Billy was watching television at his residence with Annette and Curtis. Billy saw a shadow go by his window, but not by the second window so he knew someone was by his door. He was about to get up and answer the door when it burst open. (21 RT 3798-3799) Then Steve Brown came running in carrying a baseball bat. Steve hit Billy in the side with the bat and then he pulled the bat back and hit Billy in the head, busting Billy's head open. (21 RT 3800-3801) Billy then grabbed Steve and they wrestled around and Billy got the bat from Steve and he hit Steve with the bat. Then Steve jumped into

the corner and pulled a knife out of his boot. Billy told Steve he better get out of there or Billy would hit him with the bat. Steve left, while saying something about Steve's brother thinking Billy was messing around with Annette, who was the girl friend of Steve's brother. Billy had no personal conflict with Steve at this time. (21 RT 3801)

As a result of the assault by Steve, Billy went to the hospital and had stitches for his head wound. When he testified, Billy still had a scar as a result of this incident. (RT 3802) The defense had no questions on cross-examination for Billy Rummerfield. The defense stipulated that, as to Billy Rummerfield's testimony, and the previous testimony of Parole Agent Joe Brown, the Steven Brown they referred to was the defendant in this case. The prosecution then rested their penalty phase case. (21 RT 3802).

The defense began its penalty phase case by calling Steven Brown to testify in his own behalf. (21 RT 3803) At the outset of the penalty phase appellant had advised the court that he wanted to receive the death penalty and did not want any evidence in mitigation presented on his behalf. He then took the stand, denied involvement in the present case as well as the other offenses described by the prosecution's penalty phase witnesses, and scolded the jury for finding him guilty. He challenged the jurors to impose the death penalty if they had a "clear conscience" after their guilt phase

verdict. (21 RT 3813.)

Appellant confirmed knowing Debbie Nell and he agreed that on September 25, 1988, they were together in the evening, ingesting cocaine in Rhonda's truck, out in the country. (RT 3803-3804) Steve testified that, on that occasion, he and Debbie engaged in consensual sex. He testified he did not force Debbie to have sex, nor did he threaten her in any way. He did not ever injure or hit her. After they had consensual sex he took her to her home and left her there. (RT 3804-3805) Steven denied being at the Tulare Best Western Motel on May 30, 1990. He also denied involvement in any way in the purse snatch from Dorothy Tarbet. Steve remembered the testimony of Lynn Farmer, but Steve denied that he was at that motel with Lynn Farmer. Steve testified he had been with Lynn earlier, but at the time of the Dorothy Tarbet incident, Steve was at the K-Mart looking at a speed control adaptor for a tattoo machine. (21 RT 3805-3806)

Steve denied stealing a purse from Eunice Atherton or anyone else, early on the morning of December 13, 1988 near the Holiday Inn in Fresno. He was not present at the Holiday Inn at that time, but he knew who did steal the purse from Eunice Atherton. Steve testified that Danny Owens and Rhonda Schaub stole the purse and they used Steve's sister's vehicle of, during the theft. (21 RT 3806-3807)

In further testimony, Steve agreed he was living at 303 North "N" Street, Tulare on May 28th and 29th, 1990, in the garage at the home of Cynthia Doyer, his brother's fiancée; Ms. Doyer and Steve's brother were both living in the house. (2 RT 3808) Steve denied being involved in an attack and burglary against Margaret Allen. He was aware that incident had occurred, and that Margaret Allen lived across the street. He denied being in her house the evening of the attack or early the next morning. (21 RT 3807-3808)

Steve admitted knowing Billy Rummerfield, whose real name was Bruce, in November of 1986. Steve admitted that on November 5,1986, he had broken into Billy's apartment and had attacked Billy with a baseball bat, hitting him in the head and then fighting Billy after dropping the bat. (21 RT 3809) Steve stated that Billy had been "messing" with his brother's girlfriend at the time. Steve testified he attacked Billy because his brother asked him to do so; he did it out of love for this brother. (21 RT 3809-3810)

Steve then denied killing April Holley on December 3rd or 4th of 1988. He denied helping anyone kill April. He denied having sexual intercourse with April Holley on either of those dates. Steve denied sodomizing April Holley on either of those dates, nor was he present when anybody raped, sodomized or harmed April Holley. (21 RT 3810) He denied being at the

residence of April Holey on December 3rd or 4th, 1988. (21 RT 3810-3811)

Steve agreed he took Rhonda Schaub to the Cotton Gin, where she worked, at about 8:00. He then left the Cotton Gin, went to pick up Bobby Joe Marshall and Joe Bobby Mills and he then took them back to the Cotton Gin around 9:00 p.m. He agreed he had taken Bobby Joe and Joe Bobby to Linnell Camp, obtained cocaine, and then shared some cocaine with them. Steve testified that from around 9:00 p.m. to about 2:00 a.m., he was out cruising around. However, he did return to the Cotton Gin one other time that night, to see Rhonda (21 RT 3811-3812) Steve denied returning to the Matheny Tract, between the time he left there earlier with Bobby Joe and Joe Bobby to go to the Gin and the time he returned there at about 2:00 a.m. (21 RT 3812)

Steven explained that he understood the purpose of the penalty phase. For his own reasons he preferred that this jury recommend a sentence of death rather than life without parole. He stated he hoped the jurors had a clear conscience and that they knew they had convicted an innocent man. Steve maintained his innocence in the April Holey and Margaret Allen incidents because he had nothing to do with either. Steve testified that the people that should be looked at were the Richardson's and Lynn Farmer. (21 RT 3812-3813)

On cross-examined, Steve admitted he would injure somebody for the love of his brother. Steve admitted it was worth causing somebody else pain, suffering, stitches, and a lasting scar, all for the love of his brother. Steve said he would do anything he was asked to do for his brother. (21 RT 3813-3814)

Steve denied having been involved in the robbery of Eunice Atherton, but acknowledged he had been convicted of that robbery when he entered a guilty plea in that case. (21 RT 3814) He agreed he had been convicted in the Margaret Allen case. He stated he was present when convicted of the April Holley crimes by the jury a few days earlier. The prosecutor had no further questions. (21 RT 3814-3815)

On redirect examination, Steven explained why he pled guilty in the Eunice Anderson case. Steve explained his involvement with Rhonda Schaub, describing a party he attended with Rhonda and another woman in Pixley, where he became intoxicated. On that day, the other woman told Steve that she was pregnant, but Steve was not the father. He stated he pled guilty to that case only because the other woman was going to be picked up and questioned about the circumstances. As a result Steve decided to enter a plea regardless of whether he was actually guilty. (21 RT 3815-3816) Neither the defense, nor the prosecutor, had any further questions for Mr. Brown. The defense called no other penalty phase witnesses. (21 RT 3816.)

## ARGUMENT

### Errors Affecting the Guilt Phase

### I

### APPELLANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WERE VIOLATED BY THE ADMISSION OF EXPERT TESTIMONY UTILIZED TO ESTABLISH THE TRUTH OF THE CHARGED FELONY MURDER SPECIAL CIRCUMSTANCES.

#### A. Introduction.

In the guilt phase of appellant's capital trial the prosecution was allowed to present expert testimony which was not only misleading but amounted to a directed verdict of guilt. Three special circumstances were charged pursuant to Penal Code section 190.2, subdivision (a)(17), alleging that the homicide was committed either, "*in the commission of*," or "*during the course of*," rape, sodomy, or a lewd act on a child under the age of 14. Over defense objections prosecution expert witness, pathologist, Leonard Miller, M.D., was allowed to describe the cause of death as "drowning *in association with sexual assault*." With this testimony, the jurors had no need to evaluate the evidence to determine whether the relationship, if any, between the homicide and the sexual assaults established the truth of the special circumstances beyond a reasonable doubt.

For all of the reasons discussed below, the trial court's refusal to

exclude this evidence was error under California law and denied appellant his state and federal constitutional rights. Reversal is required.

**B. Background.**

1. The anticipated medical testimony and the defense motion in limine.

Two physicians collaborated in performing the autopsy on April Holley. John McCann, M.D., was a pediatrician and medical director of the Child Protection Center at the University of California Davis Medical Center. (16 RT 2352.) Dr. McCann was called in to participate in this autopsy because his area of specialization was child abuse and childhood sexual abuse. (16 RT 2353.) The other doctor was Leonard Miller, M.D., a pathologist who authored the autopsy report. (16 RT 2458-2481; 1 CT 267.) In the autopsy report, Dr. Miller had described the cause of death as "drowning *in association with a sexual assault.*" (Id. [emphasis added].)

Defense counsel filed a pre-trial motion *in limine* seeking, *inter alia*, to have the "in association with sexual assault" language redacted from the written autopsy report. In addition, the defense asked the court to issue a ruling preventing Dr. Miller from describing the manner of death this way in his trial testimony. (1 CT 267.)

2. The arguments of counsel and the trial court's ruling.

At the motion hearing, defense counsel argued that it would be inappropriate for Dr. Miller to testify that the cause of death had been "drowning in association with sexual assault." Defense counsel did *not* challenge the relevance of Dr. Miller's testimony to establish the cause of death; and the fact that the victim had been sexually assaulted *at some time* was undisputed. Dr. Miller, however, should not testify (either directly or impliedly) that the sexual assault and the drowning were temporally connected. As defense counsel noted, the medical cause of the victim's death had been drowning and not sexual assault. [5] Dr. Miller's inclusion of sexual assault in connection with the cause of death was, therefore, not relevant and was likely to mislead the jury. (8 RT 109-110.) [6]

Defense counsel pointed out the likelihood of a due process violation if Dr. Miller were permitted to describe the cause of death as "drowning *in association with sexual assault*." (8 RT 109-110; 112-113.) If the witness stated as a matter of professional medical opinion that the drowning and the

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On cross-examination Dr. Miller confirmed that death was caused solely by drowning. (16 RT 2478-2479.)

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Defense counsel additionally noted that, as a pathologist, Dr. Miller's area of expertise was determining the cause of death and not in assessing evidence of sexual assault. (8 RT 109 [transcript of Motion hearing, October 12, 1995].)

sexual assault were connected, this would effectively prevent the jury from determining the truth of the Section 190.2, subdivision (a)(17), special circumstance. The "in association with" language was, as defense counsel noted, too close to the phrasing of the special circumstance finding, i.e., whether the victim had been murdered "in the commission of" a sexual assault. [7] (1 CT 267-268; 8 RT 102-103; 109;112-114.) The function of the jury would be usurped because jurors would be inclined to adopt the expert's conclusion rather than determining the truth of the special circumstance according to their own evaluation of the evidence. (*Id.*)

The prosecutor contended that defense counsel's concerns were overstated. He noted that Dr. Miller had been questioned in this area at the

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At the time of the crimes, Penal Code section 190.2 (a) (17) provided in relevant part:

> The murder was committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit the following felonies:
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> ***
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> (iii) Rape in violation of Section 261;
> (iv) Sodomy in violation of Section 286;
> (v)The performance of a lewd or lascivious act upon the person of a child under the age of 14 in violation of Section 288.

Penal Code section 190.2 (1988).

preliminary hearing. During his cross-examination there, the doctor explained that he considered the sexual assault to have been "an attributary cause" [sic] of the victim's death. Dr. Miller had testified that, in the parlance of his profession, "in association with" was understood to mean a contributing factor in the victim's death. (8 RT 110-111.) According to the prosecutor, the testimony and cross-examination would clarify for the jurors the distinction between "in association with" as used by a pathologist in a medical context and the wording of the special circumstances. (8 RT 110-112.) [8] To demonstrate his point, the prosecutor read excerpts of the direct and cross-examination from the preliminary hearing into the record:

"Did you form an opinion as to the cause of death in this case?

A Yes, I did, drowning in association with sexual assault.

"Q Can you explain what you mean by drowning in association of [sic] sexual assault?

"A The drowning I have covered. But in addition, this was significant trauma to a young person. And this is, in my opinion, and in Dr. McCann's opinion, an attributary cause, so hence the parlance 'in association with.'" [sic]

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At the hearing, the trial court and counsel refer to the special circumstance language as "in the course of," or "during the course of. " (See 8 RT 113, 114.)

During the cross-examination it continued.

Question by Mr. Thommen:

"Q Sexual assault didn't cause death, right?

"A It's considered to be an attributary cause. This is a very traumatic experience and it is considered contributory to the death, in association with.

"Q Would that be like saying the man that walked in the liquor store and shoots a clerk while he is holding him up, the cause of death is gunshot wound associated with robbery?

"A I don't think it's quite analogous, because there's some significant physiology involved. And the literature, forensic literature, will utilize it's not strictly parlance. We are trying to portray a total picture and this is the way it's phrased. For example, if I had multiple stab wounds and evidence of sexual assault, it would be written multiple stab wounds in association with sexual assault. It's our nomenclature."

That was Dr. Miller's testimony regarding his opinions as to the cause of death. (8 RT 110-112.)

The trial court ruled that it would allow this aspect of Dr. Miller's testimony, provided that the prosecutor's questions did not track the precise statutory language of the Section 190.2, subdivision (a) (17) special circumstance allegations. The trial judge based the ruling in part on the expectation that in his testimony Dr. Miller would obviate defense counsel's concerns about juror confusion by sufficiently distinguishing the phrase "in

association with," as it was used on the autopsy protocol, from the "in the course of," or "in the commission of " language stated in the special circumstances.

> THE COURT:I'm going to allow it, because I do think the doctor should be given an opportunity to explain what he means by "in association with," just as it was done in that [preliminary hearing] transcript that was read. What I don't want to happen is that he's asked a question with the wording "in the course of a sexual assault" – What was the terminology in the special circumstance?

(8 RT 113-114.) The trial court continued, emphasizing the basis for its holding:

> THE COURT: But since he's testified that this is nomenclature that's used in the medical profession, I will allow it. And I'm citing the case of People versus Gomez, 1991, 286 – excuse me, 235 Cal App 3d, 957. [9] And the heading there is, "So long as an expert [sic] testimony assists the trier of fact, it is proper, even though it provides evidence of the allegations charged." The allegation charged here is the special circumstance. But it does assist the trier of fact in determining the cause of death, as this doctor has indicated. It's a contributory factor. (RT 114.)

3. The trial testimony of Doctors McCann and Miller.

The two physicians testified at appellant's trial; Dr. McCann testified first followed immediately by Dr. Miller. (See 16 RT 2352-2457.)

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9 The trial court gave the correct citation, but the case name was either misstated or misspelled in the Reporters Transcript. The case relied upon was *People v. Gamez* (1991) 235 Cal.App.3d 957 [286 Cal.Rptr. 894].

According to Dr. McCann the victim's injuries were all recent, meaning that they were sustained within 24 to 48 hours before death. (16 RT 2444.) However, it was not medically possible to be more precise as to the time, or to determine the order, i.e., whether the bruising and the head and neck injuries had occurred before or after the sexual assaults. (16 RT 2444-2445.) During the course of defense counsel's cross-examination Dr. McCann indicated that, in his opinion, the sexual assaults and the drowning had not been simultaneous:

> A. If indeed she was unconscious at the time that she was raped and sodomized, yes, I think that she might not have shown any injuries to her extremities.
>
> Q. This presupposes that she was raped and sodomized in the tub. *That's not what you suspect, is it?*
>
> A. *No.*

(16 RT 2427-2428 [emphasis added].) [10]

Dr. Miller's testimony was largely in agreement with Dr. McCann's. He also concluded that the victim had struggled against her attacker. [11] Dr.

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10 Dr. McCann testified at length about his examination of the victim's genital and anal areas. (16 RT 2387-2414.) Based on the severity and extent of the injuries, Dr. McCann concluded that more than one attacker had committed the sexual assaults. (16 RT 2414; 2449.) He conceded, however, that a single attacker was "within the realm of possibilities." (16 RT 2441-2442.)

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Miller could not, however, state that the only time she had struggled was in the tub.

> Q. Did you form an opinion as to whether there would have been a struggle involved?
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> A. I think there was. And this is in context with the petechiae on the face. I think this individual – this is not a frail individual. She was a wiry little girl. I don't think she was just passively lying there. And with struggling the face gets red and petechiae can develop, as I've already outlined. *If all the struggling was occurring in the tub or it occurred in other places, I can't tell you that.*

(16 RT 2478 [emphasis added].) [12]

In conclusion, the prosecutor posed a series of questions which, either by accident or by design, allowed Dr. Miller to expressly connect the sexual assaults with the cause of death.

> Q. Based on – strike that.
> Based on your observations, did you form an opinion as to the cause of death in this particular case?
>
> A. Yes.

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The presence of a substantial quantity of water in the victim's lungs was consistent with "active inhalation" of water. Dr. Miller interpreted this finding to mean that the victim had not been unconscious at the time. (16 RT 2472-2473.)

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Defense counsel objected and moved to strike this testimony. The trial court overruled the objection. (16 RT 2478.)

Q. And what was that?

A. Drowning, and it was stated in the [autopsy] protocol "in association with sexual assault."

Q. And when you used the terminology "in association with sexual assault," what exactly do you mean by that?

A. One can drown by falling into a lake. This implies and denotes that there was trauma involved in producing the drowning, and further verified by the findings of the bruising on the neck, which I've already discussed. In brief, this individual was forcibly held under the water and drowned.

(16 RT 2477-2478.) Defense counsel objected and moved to strike on the grounds that this was a lay opinion and not an expert, medical opinion. (16 RT 2478.) The court overruled the objection. (Id.)

Dr. Miller's testimony at trial differed from his testimony at the preliminary hearing. At trial, Dr. Miller did not explain his use of the phrase "in association with" when referring to the sexual assault in connection with the drowning. Contrary to the trial court's expectations based on the witness's preliminary hearing testimony, at appellant's trial Dr. Miller never defined the phrase "in association with" as it would be used in the nomenclature of pathology. The jury received no evidence or testimony cautioning them not to apply their ordinary understanding of the "in association with" language.

Defense counsel tried, without success, to get the witness to clarify

the distinction as he had done at the preliminary hearing. On cross-examination, Dr. Miller acknowledged that the victim's death was caused by drowning and *not* by sexual assault. (16 RT 2478-2479.) Defense counsel then challenged the pathologist's basis for associating the two crimes in the autopsy report.

Q. Drowning is why she died, right?

A. That's correct.

Q. And then you looked at your report, and then you read off your report what you wrote seven years ago?

A. That's correct.

Q. She didn't die from the sexual assault, did she? That's not what you meant when you added that?

A. No.

Q. Actually, as far as your observations go and your abilities as a pathologist, just from your observations and nothing more, you can't really tell that the two were really associated, can you, except that you noticed – you saw the symptoms at the same time on the same table?

A. It's not an extrapolation of going beyond the facts, that what I observed occurred in a fairly concurrent fashion.

Q. When you give that response, you're adding to the calculus what you were told, the observations of other people that were at the scene, aren't you?

A. This is the way we always do autopsies.

Q. Well, I'm asking maybe another question. In a

hypothetical, you come upon an eleven-year-old victim, the same objective symptoms, on a table. And this is all you know. And you make your observations. From what you could see at this point you understand we're eliminating what you've been told. Could you say as a physician that the sexual assault happened even at the same time as the drowning?

A. I think the – that's not the way I perform my autopsies. And this is not the way I conduct myself professionally. Whenever an autopsy is performed, I need all the help I can get. And I want all the information. This is why we gather information prior even to going near the body. That's the way it is and that's the way it's going to be.

In answer to your question, the objective signs would be reasonable for a pathologist to look and determine that this all occurred within a reasonable length of time, or as I stated, concurrently.

(16 RT 2479-2480.) Shortly thereafter, defense counsel ended the cross-examination. The prosecutor had no further questions, and the witness was excused. (16 RT 2481.)

4. The jury instructions.

Appellant's jury received instructions on the special circumstances and underlying felony charges which used slightly different phrasing to describe the temporal element. The jury was instructed with: CALJIC 8.80, Special Circumstances - Introductory [pre-1990] (20 RT 3678); CALJIC 8.81.17, Special Circumstances - Murder in Commission of Rape (20 RT

3679); CALJIC 8.81.17, Special Circumstances - Murder in Commission of Sodomy (RT 3679-3680); and, CALJIC 8.81.17, Special Circumstances - Murder in Commission of Lewd Act on a Child Under 14 (RT 3680). CALJIC 8.80 referred to a finding that the murder was "committed *during the course of* a rape, sodomy or forcible lewd act on a child under 14." (20 RT 3678 [emphasis added].) CALJIC 8.81.17 was given three times, modified slightly to fit each different special circumstance allegation. This group of instructions described the necessary findings as murder "committed while the defendant was *engaged in the commission of or the attempted commission of*," either rape by force, sodomy by force, or a lewd and lascivious act by force on the person of a child under the age of 14. (20 RT 3679-3680 [emphasis added].)

**C. Overview Of Legal Arguments.**

Dr. Miller's testimony stating the cause of death as "drowning in association with a sexual assault" could only be understood to mean that, in the opinion of a medical expert, the homicide was committed in the course of the rape. (Section E, *infra*.) The trial court's refusal to exclude this portion of Dr. Miller's testimony was erroneous under California law for several reasons. Because this testimony was presented as an expert opinion, it admission depended upon satisfying certain preconditions. As discussed

below, this aspect of the witness's testimony did not meet the statutory requirements. First, Dr. Miller did not have the particular expertise needed to opine on the temporal connection between the drowning and the sexual assaults. (Evid. Code § 720; Section F, *infra.*) Second, even if the witness had been properly qualified, the record does not indicate the basis for his opinion. In order to assist rather than mislead the trier of fact, an expert's opinion must be based on reliable evidence. (Evid. Code § 801, subd. (b); Section F, *infra.*) Third, this was not an area in which an expert's opinion was needed. The jurors were equally capable of evaluating the facts and the evidence, and did not benefit from expert guidance. (Evid. Code § 801, subd. (a); Section G, *infra.*) Fourth, this aspect of Dr. Miller's testimony infringed on areas reserved for the judge and jury. California law has long held that expert opinion regarding legal issues, definitions and interpretations of statutory law, or the guilt or innocence of a criminal defendant are irrelevant and inadmissible as they do not assist the trier of fact. (Evid. Code §§ 801, subd. (a), 805; Section H, *infra.*) Finally, any marginal relevance or usefulness in this aspect of Dr. Miller's testimony was vastly outweighed by the resulting prejudice. (Evid. Code § 352; Section I, *infra.*)

The trial court's admission of this expert opinion testimony was plainly contrary to established California law, and deprived appellant of

fundamental constitutional guarantees. This portion of Dr. Miller's testimony allowed the jury to simply adopt the expert's opinion, thereby denying appellant his Eighth and Fourteenth Amendment rights to reliable jury fact findings in a capital case. (U.S. Const., Amends. VIII and XIV; Cal.Const., Art. I, §§ 7, 15 and 17; *Caldwell v. Mississippi* (1985) 472 U.S. 320.) Dr. Miller's conclusion also relieved the jurors of their duty to determine the truth of the special circumstance allegations, effectively reducing the prosecution's burden to prove beyond a reasonable doubt every fact necessary to constitute the charged crime and every element of the criminal offense. (*In re Winship* (1970) 370 U.S. 358, 364; *Sandstrom v. Montana* (1979) 442 U.S. 510.)

The erroneous admission of this evidence was highly prejudicial, and the error affected both the guilt and penalty phases of the capital trial. As a result, appellant was denied his state and federal constitutional rights to due process of law, to a fundamentally fair trial by jury and to a reliable determination of guilt and of the facts underlying a penalty verdict of death. (U.S. Const., Amends. V, VI, VIII and XIV; Cal.Const., Art. I, §§7(a), 15 and 17; *Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393]; *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Ford v. Wainwright* (1986) 477 U.S. 399.) The trial court's

actions in contravention of California law also deprived appellant of a state created liberty interest and denied him equal protection of the law as guaranteed by Fifth and Fourteenth Amendments. (*Hicks v. Oklahoma* (1980) 447 U.S. 343 [100 S.Ct. 2227, 65 L.Ed.2d 175]; *Lambright v. Stewart* (9th Cir. 1999) 167 F.3d 477.)

**D. Standard Of Review.**

The California Supreme Court typically reviews a trial court's ruling on the admissibility of expert testimony for abuse of discretion. (*People v. Watson* (2008) 43 Cal.4th 652 [76 Cal.Rptr.3d 208, 182 P.3d 543]; *People v. Wallace* (2008) 44 Cal.4th 1032 [81 Cal.Rptr.3d 651, 189 P.3d 911]; *People v. Catlin* (2001) 26 Cal.4th 81[109 Cal.Rptr.2d 31, 26 P.3d 357].) Appellant contends that heightened scrutiny is appropriate and necessary because these claims involve constitutional error in the context of a capital case. (*Gardner v. Florida, supra*, 430 U.S. 349, 357-58.) Therefore, this Court should independently examine the record to determine whether the trial court's erroneous admission of this prejudicial evidence was harmless beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

**E. The Jurors Surely Understood Dr. Miller's Testimony to Be an Expert Opinion Establishing the Truth of the Charged Special Circumstances.**

At the hearing on the defense motion in limine, the trial judge recognized the risk of juror confusion given the close similarities in the language of the special circumstance allegations and the proposed testimony. The trial court refused to exclude Dr. Miller's statement that death occurred "in association with a sexual assault" based on the expectation that the meaning of this testimony would be clarified for the jury. At the motion hearing, the prosecutor represented that Dr. Miller would explain the meaning of the phrase "in association with," as it was used in the field of pathology. Armed with this information, the trial court reasoned that the jurors could then distinguish Dr. Miller's testimony that the death occurred "in association with" sexual assault, from the phrases "in the commission of," or "in the course of" used in the special circumstances. (See 8 RT 113-114.) In this context, the court believed that Dr. Miller's testimony was far less likely to be construed as an expert's opinion on the truth of the special circumstances. (*Id.*) Unfortunately, as events unfolded at trial these expectations were not realized.

Dr. Miller's trial testimony differed markedly from his testimony at the preliminary hearing. At trial, the witness did not clarify or explain his conclusion that death resulted from "drowning in association with sexual assault." Neither Dr. Miller nor any other witness explained what was

meant by including after stating the cause of death, the modifying phrase "in association with sexual assault." Defense counsel tried without success to draw out a fuller explanation during cross-examination. (See 16 RT 2477-2478.) Given these circumstances, the jurors had no reason to interpret "in association with" differently from the "in the commission of," or "during the course of," phrases used in the special circumstances. On the contrary, other factors encouraged the jurors to view the language as synonymous.

1. The plain meaning of the language, and its usage in this instance.

Dr. Miller's testimony inextricably linked the homicide and the sexual assaults. The definition of "association" as a noun has been stated as follows. "An associating or state of being associated; *union; connection, whether of persons or things*." (Webster's New International Dictionary [emphasis added].) [13] According to commonly understood meaning, "in

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As used in the testimony and in the autopsy protocol, "association" functions as the transitive verb, "associate," which derives from the Latin, *ad + sociare*, meaning "to join or unite as a friend, companion, partner or confederate; as, to *associate* others with us in business, or in an enterprise."

association with" is synonymous with the language of the special circumstances, "in the commission of," or "in the course of." Commission used in its transitive verb form, i.e., "in the commission of," is understood to mean "the act of committing, doing or performing; act of perpetrating." (Webster's New International Dictionary.) Similarly, "in the course of" connotes "in the process or during the progress of." (Id.)

Not only the choice of language but its placement is significant. Using this phrase in the conclusion of the autopsy report reveals that Dr. Miller considered the death and sexual assaults to be connected and concurrent events. If this were not so, the stated cause of death would simply have been "forcible drowning." Dr. Miller's inclusion of the modifying phrase "in association with sexual assault" plainly implies a causal connection to the homicide. Otherwise, the phrase is superfluous and irrelevant to the determination of the cause of death. If Dr. Miller had viewed the sexual assault as a noteworthy but coincidental finding, such as the victim's poor hygiene and dental problems, he would have stated it elsewhere on the autopsy report. [14]

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(Webster's New International Dictionary.)

[14] "Words . . . must owe their powers to association." Samuel Johnson.

2. The jury instructions on the special circumstances.

The instructions given to appellant's jury reinforced the idea that Dr. Miller's testimony was an expert opinion proving the charged special circumstance allegations. The special circumstance instructions themselves used different phrases to convey the same idea.[15] The introductory instruction on special circumstances, CALJIC 8.80, referred to murder "committed *during the course of* a rape, sodomy or forcible lewd act on a child under 14." (20 RT 3678 [emphasis added].) The jurors heard CALJIC 8.81.17 three times, once for each of the special circumstance allegations. This group of instructions described the necessary findings as murder "committed while the defendant was *engaged in the commission of or the attempted commission of*," either rape by force, sodomy by force, or a lewd and lascivious act by force on the person of a child under the age of 14. (20 RT 3679-3680 [emphasis added].) Against this background Dr. Miller's use of the "in association with" language to connect the murder and the sexual assault would not stand out. It would instead be understood as

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The jury received: CALJIC 8.80, Special Circumstances - Introductory [pre-1990] (RT 3678); CALJIC 8.81.17, Special Circumstances - Murder in Commission of Rape (20 RT 3679); CALJIC 8.81.17, Special Circumstances - Murder in Commission of Sodomy (20 RT 3679-3680); and, CALJIC 8.81.17, Special Circumstances - Murder in Commission of Lewd Act on a Child Under 14 (20 RT 3680).

another way to express the same conclusion, i.e., that the murder and the sexual assault were contemporaneous events.

### F. The Prosecution Failed to Establish That Dr. Miller Was Qualified to Testify on the Relationship of the Sexual Assaults and the Drowning, or That Reliable Evidence Supported this Opinion.

California Evidence Code, section 720 states the standard which must be met for a witness to testify as an expert. (Evid. Code § 720.) The expert witness is "one who has special knowledge, skill, experience, training, or education sufficient to qualify as an expert on the subject to which his or her testimony relates." (*People v. Killibrew* (2002) 103 Cal.App.4th 644, 651 [82 Cal.Rptr.2d 876].) Where a foundational objection is raised, the proponent of the expert testimony has the burden of proving its admissibility. (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 219 [6 Cal.Rptr.2d 900].) Moreover, that burden will not be met simply by establishing that the witness has credentials in the general field. The proponent of the testimony must affirmatively show that the witness's expertise is directly and specifically related to the subject of the opinion he or she plans to offer. (See *Salasguevara v. Wyeth Laboratories, Inc.* (1990) 222 Cal.App.3d 379 [271 Cal.Rptr. 780][reversing grant of summary judgment in favor of the defense in a medical malpractice action where the defendants relied on the deposition

testimony of the plaintiff's own doctor because nothing in the record demonstrated that the doctor was a specialist qualified to render an opinion on the precise issues involved in the action]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1319 [88 Cal.Rptr.3d 41].)

Even where an expert is qualified to opine on a subject, the opinion is inadmissible unless it may be shown to be based on competent evidence. (Evid. Code § 801, subd. (b); *People v. Price* (1991) 1 Cal.4th 324, 416 [3 Cal.Rptr.2d 106, 821 P.2d 610] [expert may not rely upon incompetent hearsay]; *People v. Coleman* (1985) 38 Cal.3d 69, 92 [211 Cal.Rptr.2d 102, 695 P.2d 89].) The purpose of Evidence Code section 801, subdivision (b) is to ensure that expert opinions are premised upon valid information and proven methodologies. The expert's testimony "[m]ust be based on reliable 'matter' (facts, data, and such matters as a witness' knowledge, experience, and other intangibles upon which an opinion may be based." (Witkin, Cal. Evidence § 476, citing Evidence Code, Division 7, Introductory Comment.)

If the expert is not restricted to "generally accepted scientific techniques," there is too great a danger of the jurors being misled by "unproven and ultimately unscientific methods." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 390 [249 Cal.Rptr. 886].) [16]

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[16]Cases involving *Kelly* rule determinations are equally applicable in

> Expert opinion is most useful where the jurors are given an explanation of the process leading to the witness's conclusion. The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed . . . Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value . . . *When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based on improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence.*

(*Pacific Gas & Elec. Co. v. Zuckerman* (1987) 189 Cal.App.3d 1113, 1134 [234 Cal.Rptr. 630] [emphasis added]; *In re Marriage of Hewitson* (1983) 142 Cal.App.3d 874 [191 Cal.Rptr. 392].)

The trial court is the "gatekeeper" tasked with preventing unqualified testimony and unreliable evidence from reaching the jury. (See *United States v. Hankey* (9th Cir. 2000) 203 F.3d 1160, 1168-1169 [discussing trial court's duty to evaluate the reliability of the proffered evidence]; *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137 [119 S.Ct. 1167, 143

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view of subsequent law. (See Kaye, et al., New Wigmore Treatise on Evidence (2004) Expert Evidence § 9.3.3, pp. 323-325 [discussing reliability requirement following the United States Supreme Court's decision in *Kumho Tire Co., Ltd. v. Carmichael* (1999) 526 U.S. 137 [119 S.Ct. 1167, 143 L.Ed.2d 238].)

L.Ed.2d 238].) As a general matter the trial court has broad discretion to admit or exclude evidence, including expert testimony. (*People v. Prince*, (2007) 40 Cal.4th at p. 1222; *People v. Robinson* (2004) 37 Cal.4th 592, 630 [36 Cal.Rptr.3d 760, 124 P.3d 363].) However, the record must show that the court's discretion was actually employed. The California Supreme Court recently commented on the adequacy of the record in this respect; rejecting the defendant's claim that the trial court abused its discretion by allowing unqualified expert testimony. In *People v. Prince*, *supra*, the California Supreme Court observed: "The trial court obviously exercised its discretion in the present case; it gave very careful attention to the issue, holding an extensive hearing, engaging in discussion with counsel, and ultimately excluding any testimony concerning the perpetrator's probable state of mind, motive, or intent." (*People v. Prince*, *supra*, 40 Cal.4th at p. 1222.) The record in appellant's case is not comparable.

In appellant's case, the trial court did not treat the defense motion *in limine* with the careful attention necessary for its ruling to be deemed a valid exercise of judicial discretion.

Defense counsel specifically challenged the pathologist's qualifications to opine that the death occurred "*in association with a sexual*

*assault.*" [17] The prosecutor never addressed the objection, and the trial court did not insist that an appropriate foundation be laid before allowing this aspect of Dr. Miller's testimony. The court was equally lax in its approach to the evidence underlying the expert's opinion. When the court asked what testimony he expected to elicit from Dr. Miller, the prosecutor stated: "A review of the autopsy report, as defense counsel has claimed, Dr. Miller states in that report that the cause of death was drowning in association with sexual assault. He based that on the examination of the body. Again, the injuries observed as such." (8 RT 110.)

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The defense objections were narrowly focused. Dr. Miller's expertise in the general area of pathology was conceded. Defense counsel did not object to Dr. Miller testifying about the autopsy process and the victim's injuries, and did not seek to prevent Dr. Miller from opining as to the circumstances of the drowning which, according to both physicians, was the medical cause of the victim's death. (See 8 RT 109-114; 1 CT 267.) At the motion hearing, counsel stated: "Again, the doctor doesn't know. He wasn't there. *He doesn't know whether the sexual assault was in association with it or not. That's beyond his expertise.* He's supposed to be testifying about the cause of death. (8 RT 109.)

At this point in the motion hearing, the prosecutor read a portion of Dr. Miller's preliminary hearing testimony to demonstrate that the witness would be able to explain exactly what was meant by "drowning in association with sexual assault," so the jurors would not mistake this testimony for an expert opinion on the special circumstance. The essence of Dr. Miller's testimony in this regard was that the "in association with" language was his nomenclature for cases presenting with some type of traumatic injury in addition to the cause of death. (8 See RT 110-112.)

The prosecution did not meet its burden under Section 720 to establish the qualifications of its expert witness. Dr. Miller's preliminary hearing testimony arguably shed some light on the expert's thought processes. It was not, however, relevant to the threshold questions of expert qualification under Section 720 and the reliability of the underlying evidence needed to satisfy Section 801. Even with this representation by the prosecutor, the trial court did not have enough information to determine whether Dr. Miller was qualified to opine in this area, or whether his opinion was based on reliable evidence. Under these circumstances, the trial court's decision to admit this aspect of the expert's testimony was an abuse of its discretion.

### G. Dr. Miller's Testimony Failed to Meet the Criteria Set by Evidence Code Section 801, Because Expert Opinion on this Point Was Unnecessary and Did Not Assist the Jury.

The basic preconditions for admitting an expert's testimony into evidence are set forth in California Evidence Code, section 801.[18] The expert's opinion must in be a specialized area beyond the common experience of the jurors. (Evid. Code § 801, subd. (a); *People v. Prince* (2007) 40 Cal.4th 1179, 1222 [57 Cal.Rptr.3d 543, 156 P.2d 1015]; *People v. Torres* (1995) 33 Cal.App.4th 37, 45-46 [39 Cal.Rptr.2d 103].) "[E]xpert testimony is generally inadmissible on topics so common that jurors of ordinary knowledge and education could reach a conclusion as intelligently as the expert." (*People v. Lindberg* (2008) 45 Cal.4th 1, 45 [82 Cal.Rptr.3d 323, 190 P.3d 664] [citations omitted].)

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[18] Evidence Code section 801 provides:

> If a witness is testifying as an expert, his testimony in the form of an opinion is limited to such an opinion as is: (a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; and (b) Based on matter (including his special knowledge, skill, experience, training, and education) perceived by or personally known to the witness or made known to him at or before the hearing, whether or not admissible, that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject to which his testimony relates, unless an expert is precluded by law from using such matter as a basis for his opinion.

The field need not be a complex branch of science or an obscure academic topic for the trier of fact to have the benefit of an expert's knowledge. It is not necessary that the jurors be completely ignorant of the subject area of the testimony. California law traditionally follows Professor Wigmore's analysis, under which the crucial factor is whether the expert's opinion will be of appreciable help to the jury. (See *People v. McAlpin* (1991) 53 Cal.3d 1289, 1299-1300 [283 Cal.Rptr. 382, 812 P.2d 563]; *People v. Hopper* (1956) 145 Cal.App.2d 180, 191 [302 P.2d 94].) The California Supreme Court's formulation of the test has remained essentially unchanged for over 50 years:

> [T]he decisive consideration in determining the admissibility of expert opinion evidence is whether the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness or whether, on the other hand, the matter is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact.

(*People v. Cole* (1956) 47 Cal.2d 99, 103 [301 P.2d 834].) In sum, the expert's testimony must "add to the jury's common fund of information." (*People v. Farnam* (2002) 28 Cal.4th 107, 162-163 [121 Cal.Rptr.2d 106, 47 P.3d 988] [citations omitted].)

Where expert testimony does not advance the fact finder's understanding it is not relevant and should not be admitted. (See *People v.*

*Champion* (1995) 9 Cal.4th 879, 924 [39 Cal.Rptr.2d 547, 891 P.2d 93]; *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567 [34 Cal.Rptr.2d 607, 882 P.2d 298].) Moreover, the fact that a topic has been deemed suitable for expert testimony does not allow the witness to state any opinion he or she has on the subject. (*People v. Killibrew, supra,* 103 Cal.App.4th 644, 654.) "Expert opinion is not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46 [39 Cal.Rptr.2d 103].)

The Court of Appeal's decision in *People v. Killibrew, supra,* 103 Cal.App.4th 644 (hereinafter "*Killibrew*"), is instructive and demonstrates the consequences of a trial court's failure to limit one aspect of otherwise useful and appropriate expert testimony. The defendant in *Killibrew* was charged with conspiracy to possess a handgun by an active member of a criminal street gang. (Id.; Pen. Code §§ 182, 12031, subd. (a)(2)(C).) The prosecution presented extensive testimony from an expert on street gangs, and on appeal the defendant challenged the admission of the testimony on several grounds. The Court of Appeal upheld the trial court in most respects, relying on a considerable body of California authority addressing gang evidence. (*Killibrew, supra,* at pp. 656-658 [collecting cases].) The topic

was an appropriate area for expert testimony based on the California Supreme Court's decision in *People v. Gardeley* (1996)14 Cal.4th 605, 617, holding that "the subject matter of the culture and habits of criminal street gangs" was sufficiently beyond the common experience and thus a proper topic for expert testimony under Section 801. (*Killibrew, supra*, 103 Cal.App.4th at pp. 653-654.) The expert could testify about gang culture and psychology, and could even opine that the defendant gang member could have been motivated by desire to retaliate after a recent incident with a rival gang. (Id at p. 652.) The Court of Appeal concluded, however, that one aspect of the expert's testimony in *Killibrew* had exceeded the authorization of Evidence Code section 801. The expert went too far when he opined that if one gang member in a car possesses a gun, every other gang member in the car will know about it and will constructively possess the gun.

The Court of Appeal noted that expert testimony does not necessarily exceed its permissible scope simply because the witness testifies to inferences drawn from the evidence. (*Killibrew*, *supra*, at p. 655, discussing, *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1371 [37 Cal.Rptr.2d 596].) The problematic aspect of the testimony in *Killibrew* was the expert's opinion on the subjective knowledge and intent of the defendant and his companions. This testimony in was improper for two

reasons. First, the expert witness opined on a topic where he had no supporting evidence and none appeared in the record. Second, the subject "was not one for which expert testimony is necessary." (*Killibrew*, *supra*, at p. 658.) The Court of Appeal concluded "[the expert] simply informed the jury of his belief of the suspects' knowledge and intent on the night in question, issues properly reserved for the jury." (*Id.*)

In appellant's case the jurors did not need an expert's opinion to determine the connection, if any, between the death and the sexual assaults. Dr. Miller had no special expertise which would allow him to draw different or more accurate inferences from the evidence. The jurors had all of the relevant evidence, and Dr. Miller's statement added nothing to their knowledge of the facts or their understanding of the evidence. As defense counsel pointed out at the motion hearing, it would have been a simple matter to exclude the "in association with sexual assault" language from Dr. Miller's conclusion on the cause of death. This limitation would have accurately stated the expert's opinion, *i.e*, that death resulted from forcible drowning, and would not have diminished the legitimate force of the evidence. The failure to exclude this phrase, however, gave the jury an inaccurate and misleading picture of the evidence.

## H. This Aspect of Dr. Miller's Testimony Constituted an Improper Expert Opinion on a Matter of Law Which Was Not Made Admissible By Evidence Code Section 805.

California follows the modern approach to evidentiary matters, and therefore does not prohibit expert testimony simply because it embraces the ultimate issue before the trier of fact. (See 31A Cal.Jur. 3d Evidence §587; Evid. Code § 805; *People v. Reynolds* (2006) 139 Cal.App.4th 111 [42 Cal.Rptr.3d 761]; *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 972 [105 Cal.Rptr.2d 88].) "However, the admissibility of opinion evidence that embraces an ultimate issue in the case does not bestow upon an expert carte blanche to express any opinion he or she wishes." (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1178 [82 Cal.Rptr.2d 162], citing *Nieves-Villanueva v. Soto-Rivera* (1st Cir. 1997) 133 F.3d 92, 100.) An expert overreaches by stating an opinion on a matter reserved for the judge, or a conclusion which must be determined by the jury. A qualified expert may opine on a subject in his or her field, but may ***not*** "testify to legal conclusions in the guise of expert opinion." (*Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841 [199 Cal.Rptr. 830].)

The difficulty of drawing bright line rules to delimit the proper scope of expert opinion has long been acknowledged. (See, e.g., Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1901) 15

Harv.L.Rev. 40, 55; 1 Witkin, Cal. Evidence (4th ed. 2000) Opinion Evidence §§ 88-97, pp. 634-646; 1 McCormick on Evidence (5th ed. 1999) § 12, pp. 51-57.) California law has evolved some rules in this area to separate the respective provinces of the court, the jury, and the expert witness. For the reasons discussed below, Dr. Miller's testimony was clearly improper because it communicated to the jury an expert conclusion on the interpretation and application of the law - the truth of the special circumstances.

1. An expert witness cannot opine on the defendant's guilt or innocence.

The defendant in a criminal case is unquestionably entitled to have a jury determine his or her guilt beyond a reasonable doubt. (*In re Winship* (1970) 370 U.S. 358, 364; *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [99 S.Ct. 2781, 61 L.Ed.2d 560].) As the policy of the law in California has long held, "the evidence should be examined with a view to preserving the integrity of the *jury* as the finder of facts . . ." (*People v. Russel* (1968) 69 Cal.2d 187, 196 [70 Cal.Rptr. 210] [emphasis added].) Consistent with this principle, a witness may not express an opinion on the defendant's guilt or innocence. (*People v. Coffman and Marlowe* (2004) 34 Cal.4th 1, 77 [17 Cal.Rptr.3d 710, 96 P.3d 30].) Although the opinion at issue in that case was stated by a lay witness who was also a co-defendant, the California Supreme

Court's reasoning applies equally to expert witnesses testifying in criminal proceedings:

> A consistent line of authority in California as well as in other jurisdictions holds a witness cannot express an opinion concerning the guilt or innocence of the defendant. As explained in *Brown* and *Clay*, the reason for employing this rule is not because guilt is the "ultimate issue of fact" to be decided by the jury. Opinion testimony often goes to the ultimate issue in the case. Rather, opinions on guilt or innocence are inadmissible because they are of no assistance to the trier of fact. To put it another way, the trier of fact is as competent as the witness to weigh the evidence and draw a conclusion on the issue of guilt.

(*People v. Coffman and Marlowe, supra,* 34 Cal.4th at p. 77, quoting *People v. Torres, supra,* 33 Cal.App.4th at p. 47, citing *People v. Brown* (1981) 116 Cal.App.3d 820 [172 Cal.Rptr. 221]; *People v. Clay* (1964) 227 Cal.App.2d 87, 98 [38 Cal.Rptr. 431].) For the jurors in appellant's case, Dr. Miller's testimony opining that the homicide occurred "in association with sexual assault" could only have been construed as an expert opinion establishing appellant's guilt. This testimony was improper for all of the same reasons discussed by the California Supreme Court in *People v. Coffman and Marlowe, supra,* and its admission in appellant's capital trial requires reversal of the guilt and penalty phase verdicts.

2. Experts may not testify to conclusions of law, and may not advise the jury concerning the law's application to the facts.

Exclusion is not reserved for expert testimony blatantly stating an opinion as to the proper outcome. In the course of testifying the expert should not connect the dots, so to speak, between the evidence he or she evaluated and the applicable law. "The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (*Downer v. Bramet, supra*,152 Cal.App.3d at p. 841.)

A classic example is shown by the medical testimony in a civil case, *Ferreira v. Workman's Comp. Appeals Bd.* (1974) 38 Cal.App.3d 120, 124 [112 Cal.Rptr. 232]. There a doctor retained by the defendant insurance company filed a report stating that, in his professional opinion, the plaintiff's hernia was not work-related. Instead, he concluded that the injury had happened at home when the plaintiff lifted a heavy battery out of his truck. The doctor further opined that the plaintiff was responsible for the injury rather than the employer and the worker's compensation insurer. The Court of Appeal held the doctor's report inadmissible: "[T]hese statements are clearly legal conclusions and not medical opinions and do not constitute substantial evidence. The manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion." (*Ferreira v. Workman's Comp. Appeals Bd., supra,* 38 Cal.App.3d at pp. 125-126.)

*Ferreira* presents a clear cut example of expert overreaching, but the principle also applies to instances in which the expert opinion's was presented more subtly but to the same effect. The court of appeal in *Summers v. A.L. Gilbert Co., supra,* 69 Cal.App.4th 1155, commented on the insidious effects of expert testimony which, although not containing a direct statement of opinion, impliedly resolves jury determinations.

> Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided * * * It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it *would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses*; and in any event it is wholly without value to the trier of fact in reaching a decision.

(*Summers v. A.L. Gilbert Co., supra,* 69 Cal.App.4th at pp. 1182-1183, citing and quoting,1 McCormick on Evidence (4th ed. 1992) § 12, p. 47, fn. omitted.)

3. Expert witnesses may not testify concerning the interpretation or application of a statute.

California law has long held that the meaning of a statutory term is a question of law and not a proper area for expert opinion testimony. (See e.g., *People v. Carroll* (1889) 80 Cal.153, 158; *People v. Rose* (1890) 85 Cal. 378, 382; *People v. Gosset* (1892) 93 Cal. 641, 645-646.) The policy rationales for this general prohibition were recently summarized by the

Second District Court of Appeal, where the court held that the same principles which prevent an expert witness from expressing an opinion on the defendant's guilt or innocence apply to statutory interpretation.

> There are two reasons why opinion evidence on the meaning of a statute is inadmissible. First, as noted in *People v. Carroll,* leaving the definition of statutory terms to be proved or disproved in every case would lead to great uncertainty in the administration of justice. Second, it is the duty of the trial judge to instruct the jurors on the general principles of law pertinent to the case; therefore the jury has no need for such opinion evidence from the witness.

(*People v. Torres* (1995) 33 Cal.App.4th 37, 45-46 [39 Cal.Rptr.2d 103] [hereinafter "*Torres*"], citing *People v. Carroll, supra,* 80 Cal.153, 158; *People v. Daniels* (1991) 52 Cal.3d 815, 885 [277 Cal.Rptr. 122, 802 P.2d 906].) The trial judge alone instructs the jury on the legal principles. (See *People v. Daniels, supra,* 52 Cal.3d at p. 885.) The fact finder then must apply those principles to the facts of the case without expert assistance. (See *Towns v. Davidson* (2007) 147 Cal.App.4th 461 [54 Cal.Rptr.3d 568].) California courts have been vigilant in this area, reversing criminal convictions where an expert witness's testimony has established the elements of a crime. (See *People v. Torres, supra,* at pp. 46-47; citing *People v. Brown* (1981) 116 Cal.App.3d 820, 827-828 [172 Cal.Rptr. 221]; *People v. Clay* (1964) 227 Cal.App.2d 87, 98 [38 Cal.Rptr. 431] [expert may not

testify as to what constitutes burglary or larceny].)

In appellant's case, Dr. Miller testified in essence that the felony murder special circumstance was true as a matter of medical fact. Whether a death occurred in furtherance of an underlying felony is a question reserved for the jury. (See 40 C.J.S. Homicide § 56 [collecting cases].) *People v. Torres* is of particular interest because, as in appellant's case, the improper expert opinion expressed there related specifically to a felony murder special circumstance.

In *People v. Torres* the defendant was a gang member charged with one count of first-degree murder with robbery as a special circumstance, and two counts of attempted robbery. A police officer specializing in gang crimes testified as an expert witness for the prosecution. The witness opined that, based on his experience, the defendant's acts of "collecting rent" for his gang constituted robbery rather than extortion. The *Torres* court found the testimony was improper on several grounds. (See *Torres*, *supra*, at pp. 43-47.) Among these, the court of appeal held that the expert should not have opined on the relationship of the facts and the necessary elements of the charges.

> Although we have found no California case directly on point, we believe the same rationale which prohibits the witness from expressing an opinion on the meaning of statutory terms or the guilt of the defendant also prohibits the

> witness from expressing an opinion as to whether a crime has been committed.

(*People v. Torres*, *supra*, at p. 47.) The *Torres* court further noted the enormously prejudicial effect of the testimony. The court of appeal observed that the expert testimony was "tantamount to expressing the opinion defendant was guilty of [the special circumstance] and the first degree felony murder." (Id. at p. 48.)

Dr. Miller's testimony had the same effect as the improper expert opinion the Court of Appeal considered in *People v. Torres*. In both cases, the expert's testimony was more than simply *relevant* to the special circumstance finding. (Compare, *People v. Lindberg*, *supra*, 45 Cal.4th 1, 45-46 [expert could give his opinion that defendant was a white supremacist where hate-murder special circumstance was charged]; and, *People v. Prince*, *supra*, 40 Cal.4th at pp. 1226-1227 [expert on crime scene analysis and "signature" killings could testify that six murder scenes appeared to be the work of a single killer].) Just as the expert opinion in *Torres* had done, Dr. Miller's conclusion that the cause of death had been homicide "in association with sexual assault" determined the truth of the special circumstance. The trial court's admission of this testimony was a violation of California law, and denied appellant fundamental rights guaranteed by the state and federal constitutions.

## I. The Trial Court Abused its Discretion by Failing to Exclude this Aspect of Dr. Miller's Testimony Pursuant to Evidence Code Section 352.

Dr. Miller's testimony stating the cause of death as drowning "in association with sexual assault" was not relevant and admissible evidence under California law. Even assuming, *arguendo*, that this evidence had been admissible, the trial court's refusal to limit this aspect of the expert's testimony was an abuse of its discretion under Evidence Code section 352. A trial court is justified in excluding evidence which is speculative, of low probative value, and may tend to confuse the jury. (*People v. Alcala* (1992) 4 Cal.4th 742, 778-779 [15 Cal.Rptr.2d 432, 842 P.2d 1192].) In addition to being irrelevant for all of the reasons previously discussed, this aspect of Dr. Miller's opinion was misleading and unfairly prejudicial. (Evid. Code § 352; *People v. Clark* (1980) 109 Cal.App.3d 88; *People v. Roscoe* (1985) 168 Cal.App.3d 1093.) The trial court's decision to allow this testimony in a capital case was a particularly egregious abuse of its discretion under Section 352.

### 1. The testimony was highly misleading.

The defense motion *in limine* made the trial court aware that this testimony could mislead the jurors. At the motion hearing the court seemed

to recognize the problem with the linguistic similarity between the special circumstances and the phrasing of the expert's conclusion. If Dr. Miller described the cause of death as "drowning in association with sexual assault," the jurors were likely to interpret his testimony to be an expert opinion on the truth of the special circumstances. The court ultimately decided that the risk had been obviated because Dr. Miller was expected to clear up any confusion by explaining that "in association with" was a term used in the pathology nomenclature. As it transpired, Dr. Miller did not explain his choice of language in stating the cause of the victim's death. The expert's opinion was admitted into evidence without qualification or explanation and was, as a result, completely misleading.

The trial court should exercise its discretion to exclude proffered evidence which it knows to be inaccurate or capable of misleading the jury. (*People v. Siripongs* (1988) 45 Cal.3d 548, 573–574 [247 Cal.Rptr. 729, 754 P.2d 1306] [recordings may be excluded if so inaudible or unintelligible that their probative value is outweighed by risks of confusion]; *People v. Miley* (1984) 158 Cal.App.3d 25, 36 [204 Cal.Rptr. 347] [transcripts of tape-recorded conversations may be excluded if shown to be "so inaccurate that the jury might be misled"].) The trial judge should be particularly proactive in this regard where the testimony pertains to a key issue and the

state of the evidence is such that the jury might easily adopt the expert's conclusion without the need to consider countervailing evidence. Where the court has concerns about the reliability of the information relied on by the expert, it may properly hold that the probative value is outweighed by the risk that the jury might improperly consider the expert's opinion as independent proof. (*People v. Coleman* (1985) 38 Cal.3d 69, 91 [211 Cal.Rptr.2d 102, 695 P.2d 89]; *People v. Montiel* (1993) 5 Cal.4th 877, 919 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; see also, *People v. Milner*(1988) 45 Cal.3d 222, at pp. 239-240 [videotape showing doctor interviewing defendant under hypnosis (offered to show the basis for the expert's opinion) was properly excluded because it posed dangers of "unduly distracting" the jury causing it to "lose sight of the main issues."]

In appellant's case, it was entirely predictable that jurors would be misled if Dr. Miller described the cause of death as "drowning in association with sexual assault." By using a phrase which was nearly indistinguishable from the language in the special circumstance Dr. Miller's testimony left the impression that expert, medical opinion supported the truth of the allegation. This testimony was not only misleading, but relieved the jurors of the responsibility for determining the truth of the special circumstance allegations. Under these circumstances, the balance of interests under

Section 352 clearly favored excluding this segment of Dr. Miller's testimony.

2. The prejudice inherent in expert opinion.

Even expert testimony which is relevant and competent remains subject to exclusion if unduly prejudicial. (3 Witkin, Evidence (3d ed. 1986) Introduction of Evidence at Trial § 1681, p. 1642.) The potential for undue prejudice arising from expert opinion is widely acknowledged. (See *People v. Bowker, supra,*203 Cal.App.3d 385, 390 [249 Cal.Rptr. 886] ["Even the most casual observer of the legal scene is aware of the crucial and often determinative weight an expert's opinion may carry.") California courts have recognized the unique danger created by expert witnesses testifying on issues central to the case's outcome. Where an expert applies his or her specialized knowledge to the facts of the case, the jurors may be misled by the "aura of infallibility." (*People v. Bowker, supra,* 203 Cal.App.3d at p. 390.) The analysis of undue prejudice does not turn on the quantity of the prejudicial testimony or the existence of other testimony on the same point. Thus, even where an expert's opinion is briefly stated and cumulative of other testimony, the prejudice resulting from that evidence may be "devastating," especially when considered in combination with other

errors. (See *Smith v. AC and S, Inc.* (1994) 31 Cal.App.4th 77, 92 [37 Cal.Rptr.2d 457]; *Maben v. Lee* (1953) 260 P.2d 1064 [1953 OK 139].)

In a criminal case the jurors may be particularly inclined to endorse the opinion of an expert whose conclusions appear to be scientifically based and empirically verifiable. (See *People v. Hill* (1998) 17 Cal.4th 800, 845 [72 Cal.Rptr.2d 656, 952 P.2d 673] [discussing "syndrome" testimony], citing *People v. Wein* (1958) 50 Cal.2d 383, 423, dis.opn., Carter, J.) Understandably this tendency may increase where, as in appellant's case, the subject matter of the expert's testimony is unpleasant and disturbing. California courts recognize that jurors are likely to simply adopt the expert's opinions and conclusions rather than rely on their own analyses when applying the facts to the law according to the trial court's instructions. (See *People v. Vichroy* (1999) 76 Cal.App.4th 92 [90 Cal.Rptr.2d 105].) 19 Trial courts, therefore, must be especially careful where the need for an expert opinion is questionable and, on the other hand, the jury's finding in that area

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19 Appellant emphasizes that there was evidence from which a jury could have concluded that the murder in this case was not committed during the commission of a sexual assault. For example, Dr. McCann stated that he did not think the sexual molestation occurred in the bathtub (16 RT 2428.) Dr. Miller testified that there was a struggle, but he could not tell if it occurred in the bathtub. (16 RT 2470.) The offending expert testimony in this case provided the jurors with a convenient "proxy or substitute for proof" (*e.g., People v. Vichroy, supra,* 76 Cal.App.4th 92, 99) by which it could find the special circumstances to be true without the necessity of considering the difficult factual questions raised by other testimony.

depends upon a "credibility contest" between defense and prosecution witnesses. (*People v. Clark, supra*, 109 Cal.App.3d 88 [error to admit testimony of rape expert that the victim's conduct was reasonable where the case was a close contest on credibility and the trial court had questioned the need for any expert opinion]. See also, *People v. Roscoe, supra,* 168 Cal.App.3d 1093 [probative value of psychologist's testimony regarding specific responses of the victim in that case was far outweighed by the prejudicial effect].)

California case law and the policies expressed in Evidence Code section 352 overwhelmingly favored the exclusion of this portion of Dr. Miller's testimony. The defense request was narrowly tailored and precise, seeking to exclude only the six words following the pathologist's conclusion. There was no question that Dr. Miller could legitimately opine that the victim died by forcible drowning. The witness was also entitled to testify about his autopsy findings and observations, including the injuries from the sexual assaults. Excluding the misleading and unsupported modifying language, "in association with sexual assault," would have ensured the integrity of the proceedings without hampering the parties in their presentation of the evidence. (See *People v. Halvorsen* (2007) 42 Cal.4th 379, 410-412 [64 Cal.Rptr.3d 721, 165 P.3d 512] [trial court properly

restricted direct examination of expert witness with regard to a hypothetical question which assumed a fact not in evidence].) Under these circumstances, the trial court's ruling on the defense motion in limine was an abuse of its discretion.

## II

## THE TRIAL COURT ERRONEOUSLY PERMITTED THE PROSECUTION TO PRESENT UNFAIRLY PREJUDICIAL AND INFLAMMATORY "OTHER ACTS" EVIDENCE, THEREBY VIOLATING APPELLANT'S STATE AND FEDERAL RIGHTS TO DUE PROCESS, A FUNDAMENTALLY FAIR TRIAL AND TO BE FREE OF THE ARBITRARY AND CAPRICIOUS IMPOSITION OF A JUDGMENT OF DEATH (CAL CONST., ART I , SECS. 7, 15, 17; U. S. CONST., AMENDS. V, VIII, XIV)

At trial, the prosecution sought to introduce "other crimes" evidence in the form of the so-called "Margaret Allen" incident. The victim in that case, Margaret Allen, was an elderly (age 74) female. She was sodomized in her home with a foreign object, a pool cue, by a single male intruder. She was then placed in her bathtub by the perpetrator. She survived the incident. (1 CT 259-263; 8 RT 151, 153, 161, 181-186.)

Additionally, the prosecution sought to introduce the testimony of Lynn Farmer, to the effect that appellant told Farmer, following a "purse snatch," that he [appellant] after a "purse snatch" that "If I get busted for this they'll hook me up with April [Holley] and the old lady [Allen]. He said he did the same thing that he did to April as he did to the old lady. He said he fucked the old lady in the ass." (8 RT 194-195; 17 RT 2571- 2773, 2775-2577.)

The prosecution's theory of admissibility was that the uncharghed crimes or "other acts" evidence showed a "common design or plan" on

appellant's part as between the charged and uncharged acts. (Evidence Code section 1101, subdiv. (b).) (8 RT 145-147, 185.)

Defense counsel repeatedly and strenuously objected to both items of evidence pursuant to Evidence Code sections 1101, subdiv. (a) and 352, and due process grounds, contending that evidence of the "Margaret Allen" incident was inadmissible evidence of criminal disposition and propensity and extremely inflammatory and unfairly prejudicial; and that the proposed Farmer testimony was merely a mechanism for admitting evidence of this incident. (1 CT 258-265; 8 RT 161-162, 195; 17 RT 2573, 2577.) Counsel argued that if appellant were convicted in this case, it would be because evidence of the Allen incident was admitted. (8 TY 161-162.)

The trial court correctly concluded that the proposed evidence of the Allen incident was nonprobative and highly prejudicial and would be excluded. (8 RT 190.) However, the court then overruled appellant's objection to the proposed Farmer testimony, on the ostensible ground that such testimony was admissible as an admission by a party (appellant) (17 RT 2573, 2581-2582), but without any showing of an independent theory of relevancy. Thus, the court allowed the prosecution to present evidence which the court itself had just acknowledged to be prejudicial and inadmissible, because such prejudicial and (otherwise) inadmissible

evidence was an "admission."

Lynn Farmer subsequently testified to the objected-to statement in question. (18 RT 3049.)

Appellant contends that the court's ruling permitting the presentation of this "other acts" evidence was erroneous and deprived him of his state and federal rights to due process, to a fundamentally fair trial, to reliability in the guilt finding that supports a death sentence, and to be free of an arbitrary and capricious imposition of a judgment of death. (U.S. Const., Amends. V, VIII, XIV; Cal. Const., Art. I, secs. 7, 15, 17.) Appellant asserts that such testimony was not admitted for any lawful purpose and that it was only "relevant" for the *im*proper purpose of demonstrating that appellant was a violent person, and that he had a propensity or disposition to commit violent acts, especially violent sex acts. It was inevitable that the jury would conclude, for these reasons alone, that appellant was probably guilty of the charged offenses in the present case. As such, the evidence was not only inadmissible but highly inflammatory and created reversible error under any standard of prejudice (*People v. Watson* (1956) 46 Cal.2d 818, 834; reasonable probability of a different result in the absence of the error [state court error]; *Chapman v. California* (1967) 386 U.S. 18, 24.;

error harmless beyond a reasonable doubt [federal constitutional error].)20

Traditionally, evidence of uncharged criminal acts has been considered so inherently prejudicial that courts have deemed it is inadmissible unless probative of some issue other than the defendant's criminal disposition. (*McKinney* v. *Rees* (9th Cir. 1993) 993 F.2d 1378, 1380 ["The use of 'other acts' evidence as character evidence is ... contrary to firmly established principles of Anglo-American jurisprudence ."])

Indeed, The Due Process Clause of the Fourteenth Amendment precludes the admission of evidence that is so unduly prejudicial that it renders a trial fundamentally unfair. (*Payne* v. *Tennessee* (1991) 501 U.S. 808, 825.) Further, strong support, in both federal and state authority, exists for the proposition that admission of other acts evidence for the sole purpose of proving criminal disposition, violates due process. (See *Spencer* v. *Texas* (1967) 385 U.S. 554, 572-574, conc. and dis. opn. of Warren, C.J. ["While this Court has never [so] held ..., our decisions ... as well as decisions by the courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause"]; *Michelson* v. *United States* (1948) 335 U.S. 469, 475-476; *McKinney* v. *Rees*, *supra*; *People* v. *Alcala* (1984) 36 Cal.3d 604, 631 ["The rule excluding evidence of criminal propensity is nearly three centuries old in the common law."]; *People* v. *Guerrero* (1976)

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20 As articulated in this argument, appellant asserts that the error herein is federal constitutional error, implicating the *Chapman* standard.

16 Cal.3d 619, 724 ["It is well established that evidence of other crimes is inadmissible to prove the accused had the propensity or disposition to commit the crime charged"]; *People* v. *Terry* (1970) 2 Cal.3d 362, 396; *People* v. *Kelley* (1967) 66 Cal.2d 232, 238; *Williams* v. *Superior Court* (1984) 36 Cal.3d 441, 448-449; *People* v. *Smallwood* (1986) 42 Cal.3d 415, 428-429; *People* v. *Tassell* (1984) 36 Cal.3d 77, 83-89; *People* v. *Garceau* (1993) 6 Cal.4th 140, 186.)

The reasoning behind the rule against disposition evidence and the rule's common-law tradition were described by the United States Supreme Court in *Michelson* v. *United States, supra.*

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, [citation], but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the *practical experience* that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."

(*Id.*, 335 U.S. at pp. 475-476, footnotes omitted, italics added. See also *Old Chief* v. *United States* (1997) 519 U.S. 172 [136 L.Ed.2d 574, 588] ["Although ... 'propensity evidence' is relevant, the risk that a jury will

convict for crimes other than those charged -- or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment -- creates a prejudicial effect that outweighs ordinary relevance."]; and *People* v. *Alcala*, *supra*, 36 Cal.3d 604, 631 [propensity evidence "is [deemed] objectionable, not because it has no appreciable probative value, but because it has too much[, and inevitably tempts] the tribunal ... to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."], quoting 1 Wigmore, Evidence (3d ed. 1940) § 194, pp. 646-647.)

In *People* v. *Smallwood*, *supra*, this Court summarized the law as follows:

The harm which flows from allowing the jury to hear evidence of other crimes is too well known to require much restatement. In *People* v. *Thompson* (1980) 27 Cal.3d 303 [165 Cal.Rptr. 289, 611 P.2d 883], this court rigorously enforced the rule that evidence of other crimes may *never* be admitted to show the accused's criminal propensity. [¶] As *Williams* stated, "In *Thompson*, we explained the rationale behind this rule thusly: 'The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. [Citation.] Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given to a jury. [Citations.] As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." [Citation.] It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses ...." [Citation.] Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." [Citation.] ....'" (*Williams*, *supra*, 36 Cal.3d at pp. 448-449, fn. 5.) [¶] Since *Williams*, this court has continued to acknowledge that evidence of other crimes is so prejudicial that its admission requires extremely careful analysis. [Citations.] *Whenever an inference of the accused's criminal disposition forms a "link in the chain of logic*

*connecting the uncharged offense with a material fact*" (*Thompson, supra,* 27 Cal.3d at p. 317) *the uncharged offense is simply inadmissible, no matter what words or phrases are used to "bestow[] a respectable label on a disreputable basis for admissibility — the defendant's disposition.*" (*People* v. *Smallwood, supra,* 42 Cal.3d at pp. 428-429, quoting *People* v. *Tassell, supra,* 36 Cal.3d at p. 84 [emphasis added, footnotes omitted].)

In California, this rule is codified in Evidence Code section 1101.[21] (*People* v. *Alcala, supra,* 36 Cal.3d 604, 631.)

The policy embodied in section 1101 is that a criminal defendant is not to be convicted because the prosecution can prove he is "a bad man." (*People v. Thomas* (1978) 20 Cal.3d 457, 464. The problem with criminal propensity evidence is that it produces an

> *"over-strong tendency* to believe the defendant guilty of the charge merely because he is likely a person to do such acts." (1 Wigmore, Evidence, sec. 194, p. 650.) (*People v. Thompson* (1980) 27 Cal.3d 303, 327, emphasis added.)

As the Court noted in *People v. Harris* (1998) 60 Cal.App.4th 727,

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[21] Evidence Code section 1101 provides in pertinent part as follows: (a). . . evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. [¶] (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.

737, citing *United States v. Myers* (5th Cir. 1977) 550 F.2d 1036, 1044, "other acts" evidence may impermissibly encourage the jury to find appellant guilty not for what he *did*, but for what he *was*.

Moreover, the jury may be improperly induced to punish the defendant for the uncharged acts, without regard for the evidence in the actual case before it. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.) This creates the risk that the defendant's right to have the case against him proved beyond a reasonable doubt could be impinged. (*In re Winship, supra,* 397 U.S. 358, 361-364.)

Thus, "[t]he inference of criminal disposition "may not be used to establish any link in the chain of logic connecting the defendant with the charged offense." (*People v. Thompson*, supra, at p. 316.)

In *Harris*, *supra*, the Court noted that where "other acts" evidence is purportedly offered under section 1101 and not for purposes of disposition, the evidence must be carefully analyzed pursuant to section 352 to determine whether its prejudicial effect outweighs any probative value "under all the circumstances," notwithstanding the ostensible lawful purpose for which it is offered. (*People v. Harris*, *supra*, 60 Cal.App.4th at p. 737.) This "safeguard" of section 352 must be meaningful and effective due to the inherently prejudicial nature of "other acts" evidence. (*Harris*, at p. 737.)

In performing the section 352 analysis it is crucial that it be established that the evidence is truly relevant to the proposition it is sought to prove. (*Harris*, *supra*, at p. 739-740.) On this question, courts will look to the similarity between the uncharged act and the charged offense.

In *People v. Kelly* (2007) 42 Cal.4th 763, 783, this Court stated "[I]n establishing a common design or plan, evidence of uncharged conduct must demonstrate 'not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally explained as caused by a general plan of which they are the individual manifestations.' (2 Wigmore [Evidence] (Chadbourne rev. ed. 1979), sec. 304, p. 240)."

Thus, where the theory of admissibility is section 1101, a single common feature is inadequate. This is consistent with the proposition that care must be taken that the jury will not be inclined to conclude that appellant is guilty of the charged offense simply because he committed a prior offense of the same class of crimes which is likely to occur where the "other acts" evidence is simply a prior offense of the same class of crimes, with no further details indicating "similarity." (*See, e.g., People v. Felix* (1993) 14 Cal.App.4th 997, 1006-1007 [robbery case; jury could conclude from prior robbery "if [he] did it once, [he] probably did it again.")

Moreover, if there are substantial *dis*similarities, that fact may be fatal

to any theory of admissibility under section 1101(b). (*See, e.g., People v. Kelly, supra*, 42 Cal. 4th at p. 784, requiring that the evidence "demonstrate . . . similarity in the results. . . ")

Finally, if the case presents a close issue on the question of the admissibility of the uncharged act, the evidence should be excluded. (*People v. Thompson* (1980) 27 Cal.3d 303, 318; *Felix, supra*, at p. 1007.)

*Harris, supra,* in fact presents a situation in which other crimes evidence was found inadmissible because such evidence did not pass muster under section 352.

In *Harris*, the defendant was a mental health nurse accused of sexually preying on two psychologically vulnerable female patients. The first victim, who had a history of hallucinating, alleged that appellant had licked and fondled her breasts and genitalia while she was sedated. The second victim was a married woman who had had consensual adulterous relations with appellant on his boat shortly after her release from the hospital. She alleged that, about a week later, appellant visited her at her home where, despite her refusals of his advances, he mouthed and fingered her breasts and vagina, eventually stopping when her crying became "almost hysterical." Both women alleged that appellant had made guttural, growling noises while molesting them. (*Id.* at pp. 731-732.)

Pursuant to Evidence Code section 1108,[22] the court admitted

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*Harris* was a case arising under Evidence Code section 1108, which had not been

evidence that, 23 years earlier, appellant had entered a young woman's apartment at night, stabbed her in the chest with an ice pick, and mutilated her genitalia with a sharp instrument. (*Id.* at pp. 732-733.) The prior offense was described to the jury in a redacted, "misleading" fashion, as a vicious sexual assault; but the parties stipulated that appellant had been convicted of first degree burglary with the infliction of great bodily injury. (*Id.* at pp. 733-735.)

The court of appeal reversed the defendant's convictions, holding that the trial court should have excluded the evidence of the defendant's prior sex offense pursuant to section 352. (*Id.* at p. 730 ["the safeguard [of section 352] failed"].) In reaching its holding, the court provided important guidance for how courts should apply section 352 to "other acts" evidence offered by the prosecution.

Noting that a trial court's decision whether or not to exclude evidence pursuant to section 352 is reviewed for abuse of discretion (*id.* at pp. 736-737, citing *Bailey* v. *Taaffe* (1866) 29 Cal. 422, 424; and *City of Sacramento* v. *Drew* (1989) 207 Cal.App.3d 1287, 1297-1298), the court explained that the inquiry into whether such an abuse occurs must focus on whether the evidence causes "undue prejudice," i.e., prejudice that interferes with the accused's right to be "tried *for the current offense*." (*Harris* at pp. 736-737 [emphasis in original].)

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enacted when this issue was litigated in the superior court; but the court drew its analysis from cases litigated under section 1101. (*Harris*, at p. 737.)

> The prejudice which [section 352] is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.] 'Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause on the basis of extraneous factors. (*Id.* at p. 737, quoting *People* v. *Zapien* (1993) 4 Cal.4th 929, 958.)

The court noted that these factors were "derived from the text of section 352 and the cases which have arisen in the context of the use of prior conduct admitted under section 1101." (*Id.* at p. 737.) The court also explained that, even in those cases (i.e., where prior conduct evidence is admitted for a *non*dispositional purpose), the evidence must be analyzed with caution, given its inherently prejudicial nature:

> In a case addressing the use of other-crimes evidence under sections 1101 and 352, the California Supreme Court has stated that "because other-crimes evidence is so inherently prejudicial, its relevancy is to be 'examined with care.' [¶] ... [I]t is inadmissible if not relevant to an issue expressly in dispute [citation], if 'merely cumulative with respect to other evidence which the People may use to prove the same issue' [citation], or if more prejudicial than probative under all the circumstances." (*Id.* at p. 737, quoting *People* v. *Alcala*, *supra*, 36 Cal.3d at pp. 631-632.)

In analyzing the inflammatory nature of the evidence of the prior sexual offense, the court explained that the analysis will favor exclusion if the prior acts evidence is "stronger and ... more inflammatory than the testimony concerning the charged offenses." (*Id.* at p. 738, quoting *People* v. *Ewoldt* (1994) 7 Cal.4th 380, 405.) Under this analysis, the court found that the prior offense evidence was not merely inflammatory, but inflammatory "*in the extreme.*" (60 Cal.App.4th at p. 738, emphasis in

original.) The court made note of the fact that "the version [of the prior offense] that the jury heard, while not as gruesome as the actual incident, was an *incomplete and distorted description* of an event that did not actually occur [and thus] must have caused a great deal of speculation [by the jury] as to the true nature of the crime." (*Ibid.*, emphasis added.)

Additionally, the court in *Harris* found it necessary to carefully scrutinize the *probative value* of the prior sexual offense admitted in that case:

> On the issue of probative value, materiality and necessity are important. The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case . . . (*Harris*, *supra*, 60 Cal.App.4th at pp. 739-740, quoting *People* v. *Stanley* (1967) 67 Cal.2d 812, 818-819, fns. omitted.)

Using this approach, the court found the evidence of the prior sexual offense was *not* probative of Harris's culpability for the current offenses, as it did not bear any "meaningful similarity" to the current offenses. (*Harris*, 60 Cal.App.4th at p. 740.)

The court concluded that the trial court's error was prejudicial under *Watson*. "Absent the evidence of this 23-year-old act of unexplained sexual violence, it is 'reasonably probable' that the jury would have acquitted the defendant." (*Harris*, *supra*, at p. 741, citing *People* v. *Watson* (1956) 46 Cal.2d 818.)

Applying the above reasoning to appellant's case, evidence of the "Margaret Allen" incident was clearly inadmissible "other

crimes" evidence.23

In this case, the prosecutor's theory of admissibility was that evidence of the Allen incident demonstrated a "common design or plan," that is, to sexually assault the victim and then drown her in a bathtub. (8 RT 145-147.)

In support of this theory, there were only two arguably material points of similarity, *i.e.*, the fact that both victims were sexually attacked, and the utilization of a bathtub.

Unfortunately, the common element of a bathtub did not support the prosecution's "common design or plan" theory because there was no evidence that the perpetrator of the Margaret Allen incident attempted to drown the victim or ever intended to, although the opportunity was there. (8 RT 182-184.) The trial court

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23 Appellant's contention is that the trial court's ruling that evidence of the Margaret Allen incident was inadmissible was supported by the evidence and should not be disturbed on appeal. (*See, People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) That the trial court found the evidence to be inadmissible to the detriment of the prosecution as opposed to the defense, is of no moment: What is "sauce for the goose is sauce for the gander." *(United States v. Bay* (9th Cir. 1995) 762 F.2d 1314, 1315.) Indeed, to revisit this issue at this time would deprive appellant a state-created in the continuing validity of rulings well within the discretion of the trial court, in violation of his federal due process rights. (*Hicks v. Oklahoima* (1980) 477 U.S. 343, 346; U.S. Const., Amend. XIV.)

Nevertheless, because of the significance of this ruling in appellant's case, appellant goes to some length here to demonstrate that the court's ruling was correct; and, therefore, that its ruling on the Lynn Farmer testimony was necessarily erroneous and that the error was prejudicial.

expressly acknowledged this flaw in the reasoning of the prosecutor. (8 RT 177-180, 185-186.)24

This leaves the sole material "similarity," the fact of the crimes themselves. However, even this is not a true similarity for purposes of admissibility of evidence under a "common scheme or plan" theory since one offense was perpetrated with a foreign object and one was not.

Furthermore, even assuming for the sake of argument that the fact that both offenses were forcible sex acts may be deemed a "similarity" for purposes of application of relevant case law, the

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24 At one point during the hearing on the motion to exclude evidence of the Allen incident, the prosecutor referred to utilization of a bathtub as a "signature [common] feature" between that incident and the present case (8 RT 146), although he did not argue that this so-called "signature" by itself was so distinctive that by itself it tended to identify appellant as the perpetrator of both offenses. (*E.g., People v. Kelly, supra*,42 Cal.4th at p. 784, citing *People v. Ewoldt, supra*, 7 Cal.4th at pp. 401-403.) This is understandable because the instrumentality of a bathtub is not uncommon and is in fact present in numerous criminal cases . (*E.g., In re Lawrence* (2008) 44 Cal.4th 1181, 1207; *People v. Poggi* (1988) 45 Cal.3d 306, 316; *People v. Sims* (1993) 5 Cal.4th 405, 423; *People v. Bolden* (2009) 46 Cal.4th 216, 220; *People v. Lisenba* (1939) 14 Cal.2d 403. 420; *In re Criscione* (2009) 2009 Cal.App. LEXIS 2119.)

Appellant has previously proffered that it would be inappropriate to revisit this issue at this stage. (Fn. 5, *supra*.) It would be particularly inappropriate to do so on the basis of the proposition that the bathtub was a common "signature" since this was not argued below and the defense was not afforded the opportunity to litigate this issue. (See, *Bailon v. Superior Court* (2002) 98 Cal.App.4th 1331, 1349, citing *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

argument in favor of a "common scheme or plan" evaporates and the issue devolves into an attempt to use the fact of a "similar" uncharged act to prove the charged offense based on the criminal disposition or propensity of the accused rather than based on legally defensible criteria. That is, absent additional facts, the prosecution argument becomes identical to the argument rejected by the court in *People v. Felix, supra,* 14 Cal.3d at pp. 1006-1007, to wit: "they did it before, they probably did it this time."

The clear import of cases such as *Felix* and *Kelly, supra,* is that a finding of a "common design or plan" cannot be based solely on the fact of a vaguely "similar" prior act.

Additionally, the *dis*similarities between the "other acts" evidence and the charged offense are so numerous and material as to overwhelm the minimal similarities and extinguish any inference of a "design or plan" common to the two offenses .

A number of these dissimilarities have been held to be of a type to engender such a risk of undue prejudice that they militate against admission of the "other acts" evidence.

For example, the victim in the "other acts" case was an elderly woman apparently attacked in her home by a single perpetrator, who was an intruder. (8 RT 182-184.) In the charged offense, the victim was very young (eleven years of age), and multiple perpetrators were allegedly involved. (8 RT 178; 14 RT 1984.) Also, the record strongly suggests that the perpetrators were "partying" with the victim

prior to the attack on her, and, at a minimum, were on the premises consensually. (*E.g.*, 17 RT 2827.) Additionally, in the Allen incident, in sharp contrast to the present case, the single perpetrator remained on the premises after the attack and looked for items to steal. (8 RT 183.) These facts suggest fundamentally different motives underlying the two incidents.

In the Allen case the victim was attacked with a foreign object, to wit: the blunt end of a pool cue (8 RT 153), whereas there was no evidence of this in the Holley case. The use of a blunt object to sodomize the victim in the Allen incident, but not in the charged offense, arguably renders the sexual attack in the Allen case more aggravated than the charged offense, as does the fact that the victim in the Allen case was an elderly female. (*People v. Boyd* (1979) 95 Cal.App;.3d 577, 589.) In the Allen case, the expert witness described the injuries as the worst he had seen, while there was no analogous testimony in the Holley case. (1 CT 262.)

Under the *Harris* analysis, these facts favor exclusion of the proffered evidence as unduly prejudicial render because they render the "other crime" more inflammatory than the charged offense. (*Harris, supra*, 60 Cal.App.4$^{th}$ at p. 738, quoting *People* v. *Ewoldt* (1994) 7 Cal.4th 380, 405.) The same is presumably true of the fact that in the Allen case, a single perpetrator was involved, indicating predation, in marked contrast to the present case, where there is evidence of consensual contact preceding the offense.

Additionally, as previously suggested, the difference in result between the charged and uncharged offenses (one victim was killed, the other, was not) is, by itself, probably fatal to any theory of admissibility for purposes of establishing a common design or plan, as noted by the trial court. (*People v. Kelley, supra*, 42 Cal.4th at p. 784 [suggesting that a similarity in result is a prerequisite of admissibility evidence of uncharged conduct where the theory of admissibility is the presence of a common design or plan]; 8 RT 177-180, 185-186, 190.)

Indeed, this case is analogous to *People v. Guerrero* (1976) 16 Cal.3d 719, 729, in which insufficient "similarity" was found for purposes of admitting the uncharged act to prove intent, let alone common design or plan (*see, Kelly, supra*, 42 Cal.4th at p. 783 [the *least* degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent . . ." (emphasis added)]):

> The asserted similarities between the Lopez and Santana offenses add up to little more than zero. And the dissimilarities are substantial, highlighted by the facts that Miss Lopez was raped and Miss Santana was not; Miss Santana was killed and Miss Lopez was not; and defendant was accompanied by two friends in the Lopez rape, while he was charged with acting alone in the Santana offense. We therefore conclude that the evidence of the Lopez rape was inadmissible to show intent to rape Miss Santana.

In sum, the trial court was correct in concluding that evidence of the Margaret Allen incident was inadmissible "other acts" (and, inferentially, "propensity" or "criminal disposition") evidence.

At a minimum, this ruling was well within the trial court's discretion and should not be disturbed by this Court on appeal. (Fn. 5, *supra.*)

Subsequent to this ruling, trial counsel requested that the proposed statement of Lynn Farmer referring to the Margaret Allen incident, be excluded. Counsel pointed out that the trial court has already ruled that the Margaret Allen evidence was inadmissible "other acts" evidence. Thus, the Lynn Farmer testimony, which exposed the jury to the Allen incident, was necessarily inadmissible. (17 RT 2572-2677.) In requesting that the proposed witness not refer to inadmissible material, counsel was making a seemingly reasonable request; in the course of the trial counsel successfully secured admonitions that prosecution witnesses not refer to the Allen incident. (18 RT 3037-3039.)

In response, the trial court acknowledged its ruling on the Allen incident and importantly, did not purport to reconsider, let alone reverse, its prior ruling, although it was certainly authorized to do so, for example, if presented with new facts or otherwise convinced that its prior ruling was incorrect. (*E.g., People v. Riva* (2003) 112 Cal.App.4$^{th}$ 981, 993.) Rather, the court, even as it reaffirmed its ruling on the Allen evidence, found the Farmer testimony to be admissible on grounds that it was an "admission" by a party (appellant). (17 RT 2572-2677.)

While this conclusion may have rebutted any potential hearsay issue, it did not address the real problem with the evidence, which was

its legal relevancy. That is, the mere fact that a statement is made by a party does not render such statement admissible; the statement must also be *legally relevant,* and admissible under the balancing required by section 352. (*People v. Allen* (1976) 65 Cal.App.3d 426, 433-436.)

Here, beyond its statement that appellant "connect[ed] the two [the charged and uncharged acts] together" (17 RT 2578), the trial court articulated no independent theory of relevancy beyond the fact that the statement was an "admission." This cursory analysis did not solve the fundamental problem--that the only relevance of the reference in the proposed Farmer testimony to the Allen incident was as improper "propensity and criminal disposition" evidence.

This is readily seen from an analysis of the proposed Farmer statement.

Referring first to the "Holley" component of the Farmer statement, that statement, if made, and made by appellant, was an admission of an act of anal intercourse with April Holley at some undermined time and under undermined circumstances. From the context in which it was allegedly made (appellant not wanting to get caught for a "purse snatch" because it might cause him to be "hooked up" with April in some undetermined way), it could be fairly inferred that this contact with Holly involved some unlawful activity, although not *necessarily* nonconsensual or forcible activity, and not necessarily connected with the charged offenses, in view of the fact that it was

also a fair inference that appellant was acquainted with Holley before the acts leading to the charged offenses. (19 RT 3150.) The nature of the contact referenced in appellant's alleged statement to Farmer, and whether it was connected to the charged offenses, were, of course issues for the jury to decide from other evidence.

Factoring in the reference to the Margaret Allen incident, the statement, if believed, had appellant admitting to an act of anal intercourse (and no more) with the "old lady," conceded by the parties below to be Margaret Allen, and that he did the same thing to each subject. (Presumably, this is what the court meant when it stated that appellant "connect[ed] the two [the charged and uncharged acts] together" (17 RT 2578).)

Again, from the surrounding context it could be fairly inferred that this contact somehow involved unlawful activity, although exactly how is not disclosed or apparent from the four corners of the statements. Whether the nature of the unlawful component, and the exact mechanism by which appellant might be "hooked up" with Allen were he caught for a "purse snatch," could have been determined from further details relating to the Allen incident is beside the point because such details were never presented to the jury (and if fact were inadmissible and not to be considered by the jury). (8 RT 190.) Thus, the question whether the jury could draw inferences relating to appellant's alleged statements based on the details of the Allen incident, was not before the trial court.

In sum, considering the separate components of the challenged statement together, appellant allegedly committed an act of anal intercourse with each subject, and did the same to each.

However, the reference to the Allen incident contained no articulable *fact* which clarified, qualified or explained the Holley statement, or appellant's alleged involvement in it, or rendered it more likely that the accompanying reference to Holley referred to the charged offenses.

That said, that reference raised improper *inferences* which implicated exclusionary criteria applicable to inadmissible "other acts" evidence. For example, the statement raised the inference that the speaker had a propensity to commit acts of anal intercourse. This is a textbook example of improper "he did it before, he probably did it this time" reasoning. (*People v. Felix, supra*, 14 Cal.App.3d at pp. 1006-1007.) Importantly, the factual assumption underlying this inference is inaccurate; that is, Allen, per the prosecution's own investigation and theory of the case, was *not* the victim of an act of anal intercourse, she was the victim of sodomy with a foreign object. The distinction is highly material because it is the supposed identity of actions in both situations that gives rise to the inference detrimental to appellant. Thus, appellant was subjected to unfairly prejudicial inferences on the basis of "facts" that never took place.25 The risk of

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25 Appellant acknowledges that if he were found to have actually made this statement, the choice of words was his. Nevertheless, the fact remains

a jury drawing unfair and unwarranted inferences based on incomplete or inaccurate information has been recognized by the case authority (*People v. Harris* , supra, 60 Cal.App;.4th at p. 738), and was realized here.

Additionally, in this case, the jury might have speculated that the nonexistent act of anal intercourse referenced in connection with Allen, was a *forcible* act, given that she was an "old lady," although appellant admitted to nothing of the sort and the circumstances did not dictate this conclusion. From this "fact," the jury might have concluded that the reference to Holly involved a forcible act also, thus rendering it more likely, at least in a juror's mind, that appellant was involved in the charged offense. Again, such an inference would be based on nonexistent "facts," but nevertheless highly detrimental to appellant, both because of the danger that the jury would find appellant guilty based on a perceived propensity or disposition to commit forcible acts of anal intercourse, and because of the inherently inflammatory nature of such an act committed on an elderly female. (*People v. Boyd, supra,* 95 Cal.App;.3d 577, 589.)

Thus, the depiction of the uncharged act was an *incomplete and distorted description* of an event *that did not actually occur.*

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the mere fact that a phrase comes out of a defendant's mouth, by itself, does not render that phrase factually relevant or immune from the provisions of section 352. Moreover, as defense counsel argued below (17 RT 2577), the fact that the alleged Farmer statement misdescribed the uncharged act renders that statement inherently unreliable and cast grave doubt on whether the statement was ever made.

(*People v. Harris*, *supra*, 60 Cal.App.4th at p. 738 (emphasis added).)

Worse, the phrase "He did the same thing to April as he did to the "old lady," begs the question, "what happened to Margaret Allen?" This is exactly the type of incomplete information that invites speculation on the part of the jury. ("[T]the version [of the prior offense] that the jury heard . . . was an *incomplete and distorted description* of an event that did not actually occur [and thus] must have caused a great deal of speculation [by the jury] as to the true nature of the crime." (*People v. Harris, supra*, 60 Cal.App.4th at p. 738, emphasis added; see also, *People v. Massey* (1987) 192 Cal.App.3d 819, 825; *People v. Sandoval* (1992) 4 Cal.4th 155, 178 ["sanitizing" priors to mere "felony convictions "may invite jurors to speculate that the prior offenses were more heinous than they actually were.)

Were the jury to have speculated that Margaret Allen was or even may have been killed, the jury would have found appellant guilty of the charged offense simply out of an abundance of caution and so as to not risk releasing a man who may have brutalized and killed an elderly woman, whether or not he killed an 11-year old girl (although the possibility that he killed Margaret Allen improperly rendered it

more likely that he killed April Holley).

The egregious nature of this risk has been noted repeatedly: "In ascertaining the effect of the trial court's error, we consider the potentially devastating impact of other-crimes evidence that permits the jury to conclude that a capital defendant has a propensity to commit murder. Such evidence invites the jury to be swayed by speculation that, because the defendant previously has murdered, he also committed the charged murder. (*People v. Garceau* (1993) 6 Ca;.4th 140, 186, citing *Michelson v. United State, supra,* 335 U.S. 469, 475-476 and *People v. Smallwood, supra,* 42 Cal.3d 415, 428.)

Related to the above concern is the likelihood that the jury will convict the defendant in the charged case, based on his involvement in the uncharged case, and for other crimes unknown which he probably committed or will commit if given the chance, in view of his criminal disposition and propensity to commit criminal, and violent, acts. (*See, People v. Smallwood, supra*, at pp. 428-429.)

Thus, the Allen incident as depicted in the Farmer testimony was not made "relevant" simply by virtue of the fact that it was an admission, and, in fact, carried a far greater risk of undue prejudice than the more detailed evidence of the Allen incident previously

found to be inadmissible.

The result was that blatantly prejudicial and inflammatory material was conveyed to the jury. As articulated above, the offending evidence was not only inflammatory and unfairly prejudicial in a general sense because it was lacking in probative value and invited the jury to convict appellant of the charged offense based on his status as a "bad man" deserving punishment (*People v. Thomas, supra*, 20 Cal.3d 457, 464) and because it depicted appellant as having a propensity to commit the type of crime charged, but also because it was also the type of incomplete and inaccurate "evidence" that invited the jury to speculate that the uncharged act was more heinous that it actually was (*People v. Massey* (1987) 192 Cal.App.3d 819, 825; *People v. Sandoval* (1992) 4 Cal.4th 155, 178, leading to a "potentially devastating impact." (*People v. Garceau* (1993) 6 Ca;.4th 140, 186, citing *Michelson v. United State, supra,* 335 U.S. 469, 475-476 and *People v. Smallwood, supra,* 42 Cal.3d 415, 428.)

The effect of this evidence on the verdict is manifest. This was not a strong case. Appellant was essentially found guilty in this case based on this evidence (see, 8 RT 162; counsel argues that if appellant is convicted, it will be because of evidence of the Allen incident);

the highly suspect testimony of Rhonda Schaub (Argument II, *supra*) and inconclusive DNA evidence. The prosecution's own witnesses gave appellant an alibi for the most likely time of the victim's death as provided by other prosecution witnesses. (*Id.*) Thus, "[t]he inference of criminal disposition"

Importantly, the jury attached considerable significance to the Farmer testimony; it requested a re-read of his testimony in its entirety, and in particular, the statement allegedly made to him by appellant, at issue here. (2 CT 410.)

This in addition to the numerous aspects of unfair prejudice which were clearly " used to establish [a] link in the chain of logic connecting the defendant with the charged offense" (*People v. Thompson, supra,* at p. 316) and invited the jury to improperly decide appellant's guilt on the charged offenses on the basis of the uncharged acts (*People v. Vichroy* (1999) 76 Cal.App.4$^{th}$ 92, 99 [improper for the jury to use uncharged acts as a convenient "proxy" for deciding that the defendant was guilty beyond a reasonable doubt of the charged offense]) and without reference to the other, lawfully admitted, evidence (*see, People v. Reliford* (2003) 29 Cal.4$^{th}$ 1007, 1014-1017). At a minimum, the jury was invited to decide the case without fully

and fairly evaluating the relative strengths and weaknesses of the facts presented in support of and in opposition to the charged offenses.26 Indeed, the improper inferences in this case were based on and inaccurate "facts," thus exacerbating the asserted due process

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26 Appellant is mindful that with the advent of Evidence Code section 1108, "other acts" evidence used to prove criminal propensity in cases involving sex offenses are now admissible subject to section 352; and thus, the admission into evidence of such offenses is not necessarily deemed *unfairly* prejudicial.

First, appellant is entitled to have his case decided on the basis of the standards for prejudice existing at the time of his trial and arising under section 1101 because any other conclusion would violate *ex post facto* provisions (U.S. Const., Art. I, Ssec. 10, cl. 1; Cal.Const., Art. I, sec. 9.)

Further, appellant never had the opportunity to litigate this issue under standards later promulgated; thus, those standards cannot serve as a basis for upholding the trial court's ruling as to the Farmer testimony. (Fn. 6, *supra,* citing *Bailon v. Superior Court* (2002) 98 Cal.App.4th 1331, 1349, and *Lorenzana v. Superior Court* (1973) 9 Cal.3d 626, 640.)

Additionally, cautionary instructions calculated to avoid undue prejudice in section 1108 cases and admonishing the jury decide appellant's case on its own merits and not on the basis of a purported criminal disposition or propensity (*see, People v. Reliford* (2003) 29 Cal.4th 1007, 1014-1017) were not given. Finally, as demonstrated elsewhere in this argument, the challenged evidence was prejudicial even under section 1108 standards, to a great extent because the inferences the jury was allowed to draw herein were based on "factual" information which was inaccurate and misleading. (*See, People v. Harris, supra*, 60 Cal.App.4th 727, 738.)

Thus, even section 1108 is subject to section 352, and a proper section 352 analysis would have still resulted in the exclusion of any reference to the highly ambiguous and devastatingly prejudicial Allen incident.

violation and increasing the likelihood that the jury would be misled and its verdict, tainted. Reversal of the judgment is thus required under any standard. (*People v. Watson, supra*, 46 Cal.2d at p. 834; *Chapman v. California*, *supra*, 386 U.S. 18, 24.

## III

## THE ADMISSION INTO EVIDENCE OF RHONDA SCHAUB'S TESTIMONY, PURPORTING TO RELATE APPELLANT'S CONFESSION TO THE CHARGED MURDER, WAS ERRONEOUS, VIOLATED APPELLANT'S STATE AND FEDERAL DUE PROCESS RIGHTS, RIGHT TO BE FREE OF CRUEL AND UNUSUAL PUNISHMENTS AND RIGHT TO BE FREE OF AN ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, COMPELLING REVERSAL OF THE JUDGMENT IN IS ENTIRETY

In this case, defense counsel vigorously objected to the testimony of Rhonda Schaub, appellant's then-girlfriend, to the effect that appellant confessed to her that he killed April Holley. Citing *Chambers v. Mississippi* (1973) 93 S.Ct. 1038, 1040, 1047, and the due process clause of the Fourteenth Amendment, counsel asserted that such proposed testimony was so inherently unreliable and untrustworthy that appellant's rights to federal due process would be violated if such testimony were allowed. (1 CT 271.)[27] The objection was overruled. (8 RT 140.) Appellant now contends that the admission of the Schaub testimony denied appellant his state and federal constitutional rights to due process and to be free of cruel and unusual punishments and to an arbitrary and capricious imposition of a judgment of death. (U.S. Const., Amends. VIII; XIV; Cal.Const., Art. I, secs. 15, 17.)

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27 Fairly summarized, Schaub claimed that on the morning of December 4, 1988, appellant, in the course of an argument with her and in response to her continued badgering, said that he killed April and would not be caught because he knew how the system worked. (18 RT 2977-2978.)

Certain types of evidence have by their very nature, have been deemed too inherently unreliable to support a judgment of conviction. (*See, e.g., People v. Ayala* (2000) 23 Cal.4th 255, 268 [most types of hearsay absent an exception]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1123 [polygraph evidence, absent a stipulation from both parties]; Evidence Code section 351.1 [same]; *People v. Shirley* (1982) 32 Cal.3d 18, 56 [testimony restored by hypnosis, absent procedural safeguards].)

One such category of evidence is a statement made under circumstances so inherently conducive to perjury that a criminal conviction based upon such testimony cannot be allowed to stand. (*People v. Medina* (1974) 41 Cal.3d 438, 452 [strong inducements to government informant to testify in particular fashion; deal with informant required that informant testify consistent with prior recorded statements]; *People v. Green* (1954) 102 Cal.App.2d 831, 834 [same; deal required informant testimony secure a holding order against the defendant]; *People v. Hudson* (1934) 137 Cal.App.729, 730 [child molestation case; new trial appropriate where evidence shows coaching of and tampering with complaining witness].)

The objected-to testimony of Rhonda Schaub falls within the category of evidence so inherently unreliable and untrustworthy that a criminal conviction based on such testimony cannot be allowed to stand.

This is especially true given that the present case is a capital case subject to extraordinarily high standards of reliability. (*See, Simmons v. South Carolina* (1994) 512 U.S. 154, 172, Souter, J., concurring [noting heightened standard of reliability appropriate in a capital case]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118, O'Connor, J., concurring (". . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.").)

Here, Rhonda Schaub initially gave at least six statements to various police officers and investigators, all with no mention of appellant's purported confession to her. She first gave a statement to the police on January 10, 1989. She made no mention of appellant's purported confession to her during this interview, nor did she mention it during her next police interview of January 24, 1989. She twice denied the existence of any such statement during her interview by Detective Diaz on June 15, 1990. She did not mention the alleged confession when she was interviewed by Clifton Webb, Charlie Richardson's investigator, on July 20, 1990, and again on March 22, 1991. She did not mention it during another interview with Detective Diaz on August 15, 1991. In fact, the first mention of the

"confession" was during her *seventh* interview, also with Detective Diaz, in October of 1991. (18 RT 2980-2982.)

When she finally did mention the "confession," her statements were tainted by inconsistency and equivocation. Schaub was a habitual drug user during December 3 and 4, which by itself calls her recollection of events into question. She first said that the confession was made in a car, then denied this. Incredibly, she said that she "did not think she was mistaken" about appellant's statement. (18 RT 2990.)

By Schaub's own admission, the purported statement was made as a result of Schaub relentlessly badgering appellant to confess, at a time when appellant was extremely tired. At the time, Schaub was angry at appellant and wanted to get him to confess to "get even." She told Detective Diaz that she wanted to hear appellant confess. (18 RT 2995-2997.)

Thus, there grave doubts as to whether the statement in question was made by appellant at all, and even if such a statements was made, there are grave doubts as to its trustworthiness. In addition to all of the other indicia of unreliability, Schaub was, by her own admission, highly motivated to testify in a particular fashion, for reasons not related to the truth of her statement (*i.e.*, that appellant confessed to her).[28]

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28 Significantly, and as discussed in greater detail in Argument IV,

Thus, the circumstances surrounding Schaub's statement render that statement extraordinarily unreliable and untrustworthy, both on the question of whether the statements attributed to appellant were ever made, and if they were, whether they were true. At the same time, as this Court has noted, a confession is "a kind of evidentiary bombshell which shatters the defense." (*People v. Neal* (2003) 31 Cal.4th 63, 86.) Use of evidence of this type, *i.e.*, a "confession," the very existence of which was highly questionable, if not completely implausible, makes a mockery of the heightened standards of reliability peculiarly applicable to a capital case. The evidence should not have gone to the jury in the first instance. The fact that it did rendered appellant's trial fundamentally unfair (*see*, this Court's discussion of the use and effect of unreliable confessions in *People v. Neal,*

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*infra*, this is *not* a situation in which the prosecution's case was strong and reliable corroboration existed for Schaub's statement so as to bolster the reliability of that statement. The prosecution's own witnesses (Joe Mills and Bobby Joe Marshall Jr.), gave appellant an alibi which was contrary to the prosecution's own theory of the case – that the time of death of the victim was 9 p.m. on Saturday, December 3. This was the time of death relied upon by the prosecution, and no other evidence of a time of death was presented at trial. Yet Mills, touted by the prosecution as a reliable witness, and Marshall Jr., placed appellant at Linnell Camp between 9 p.m. Saturday evening and 2 a.m. Sunday morning. If anything, the facially inconsistent prosecution theory and extraordinarily questionable "confession" discredited each other and emphasized the weakness of both. (Argument IV, *infra*, at p. 233, citing *Davis v. Woodford* (9th Cir. 2003) 384 F.3d 628, 642 and *Kyles v. Whitley* (1995) 514 U.S. 419, 461, Scalia, J., dissenting.)

*supra*, 31 Cal.,4th at p. 86) and cannot be deemed harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Reversal of the judgment is therefore required.

## IV
## THE PROSECUTION'S EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN THE VERDICTS

It is by now axiomatic that a conviction unsupported by substantial evidence constitutes a denial of due process in violation of both the federal and state constitutions. (*Jackson v. Virginia, supra,* 443 U.S. 307, 317-320; U.S. Const., Amend. XIV; Cal. Const., Art. I, sec. 15.) Substantial evidence is defined as evidence that is "reasonable, credible and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." *People v. Johnson* (1980) 26 Cal.3d 557, 578. In determining whether the record is sufficient in this respect, the reviewing court must give credit only to "substantial" evidence, that is, evidence that reasonably inspires confidence and is of "solid value." (*People v. Redmond* (1969) 71 Cal.2d 745, 755, 756.)

As stated in the previous argument, certain types of evidence have, by their very nature, been deemed too inherently unreliable to meet the above standards. *(See, e.g., People v. Ayala* (2000) 23 Cal.4th 255, 268 [most types of hearsay absent an exception]; *People v. Fudge* (1994) 7 Cal.4th 1075, 1123 [polygraph evidence, absent a stipulation from both parties]; Evidence Code section 351.1 [same]; *People v. Shirley* (1982) 32 Cal.3d 18, 56 [testimony restored by hypnosis, absent procedural safeguards].) Included

in this category are cases in which the evidence in support of the verdicts is so inherently improbable that a verdict based upon such evidence simply cannot be allowed to stand. (*See People v. Barnes* (1986) 42 Cal.3d 284, 306 [reviewing court may not uphold a verdict based upon evidence that is inherently improbable or physically impossible]; see also *People v. Hall* (1964) 62 Cal.2d 104, 106-112; *People v. Reyes* (1974) 12 Cal.3d 486, 497-498.)

Where such evidence is at issue, a claim of lack of sufficiency of evidence is not defeated by an allegation that the testimony in question, if true, would be sufficient to sustain the judgment. (*E.g., People v. Green*, at p. 834.) It is the *reliability of the trial* that is at issue, not the question whether the facial content of the testimony technically fulfills the elements of the charged offense:

> "As we view the cause now engaging our attention the question squarely presented is whether the verdict rendered therein is, "reasonably" justified by the facts and circumstances disclosed by the evidence. In determining that question, while we may not weigh the evidence we must of necessity consider it." *People v. Carvallo* (1952) 112 Cal.App.2d 482, 488-489, citing *People v. Newland* (1940) 15 Cal.2d 678, 681.)

In appellant's case, none of the evidence purporting to implicate appellant met the criteria of *Jackson, Johnson*, etc., and all of it fell into one

or more of the above categories of inherently unreliable or improbable evidence. Accordingly, the verdicts herein violate of appellant's state and federal rights to due process and to have his case proved to a jury beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 317-320; *In re Winship* (1970) 397 U.S. 358, 361-364; U.S. Const., Amend. XIV.)

Here, the prosecution's theory of the case, supported by the evidence, was that the death of the victim occurred at about 9 p.m. on the evening of Saturday, December 3. Multiple prosecution witnesses testified that they heard what sounded like the screams of a young girl at around 9 or 9:30 p.m. that evening, shortly after they heard gunshots. The gunshots, according to prosecution witnesses, occurred around 8 p.m. when Joe Mills and Bobby Joe Marshall, Jr., who had gone hunting for raccoons, shot at some mounds of dirt. (15 RT 2132-2133, 2152, 2165-2167; 17 RT 2713.)

This evidence was summarized by the prosecutor during his opening statement, clearly for purposes of establishing when the offenses in this case took place. (14 RT 1935.)

Dr. Gary Walter, the prosecution pathologist who provided the only medical testimony on the time of death of the victim, stated that the victim's state of rigor mortis was consistent with a time of death of 9 p.m. on the evening of Saturday, December 3. (15 RT 2347.) While this was not

conclusive (15 RT 2347), *the 9 p.m. estimate was the only medical or scientific evidence offered regarding the time of death.*

Unfortunately for the prosecution, its own witnesses, Mills and Bobby Joe Marshall, Jr., provided an alibi for appellant, establishing that the three were together from 9 p.m. to 2 a.m., and were not in Matheny Tract during that period but instead were in Linnell Camp. (17 RT 2669-2682, 2752-2763.)

Chief prosecution witness Rhonda Schaub supported this. Schaub testified that appellant and his sister, Lisa Saldana, took Schaub to work at the cotton gin at about 8 p.m.. According to Schaub, the three returned to the cotton gin at 9 p.m. Between 9 p.m. and 2 a.m. it was undisputed that appellant and the two boys were in Linnell camp. (18 RT 2968-2971, 3003; 19 RT 3352-3353.)

In effect, on its face, the prosecution's case was inherently improbable if not impossible. (*People v. Barnes, supra,* 42 Cal.3d 284, 306; *People v. Hall, supra,* 62 Cal.2d 104, 106-112 [same]; *People v. Reyes, supra,* 12 Cal.3d 486, 497-498 [same].) The only evidence, medical or otherwise, offered on the time of death was that death occurred at 9 p.m. on Saturday (15 RT 2347), yet the prosecution's own witnesses established that

appellant was not even in Matheny tract at that time.29

Acknowledging this, and in response to the alibi evidence, the prosecutor argued that Marshall Jr. had been impeached by statements he had made to Victoria Lopez to the effect that he had been at the Holley's residence and participated in the sexual assault. (2 CT 505.) However, Marshall Jr.'s statements to her as to when he had been at the Holley's was unspecific as to time. (*E.g.*, 17 RT 2824, 2826.) Additionally, the prosecutor vouched for Joe Mills as a credible witness. (20 RT 3545.)

As a result of the alibi evidence, the prosecutor was forced to change his theory of the case and argue that the time of death could have been between 2 and 4 a.m. on Sunday morning, to conform to the jury's verdicts, even though there was no evidence to support this.30 That is, in his opposition to appellant's motion for a new trial, the prosecutor argued that appellant's whereabouts were not completely accounted for during the late evening hours and early morning hours of December 3 and 4, and that he had no alibi for the hours of 2 a.m. to 4 a. m. on the morning of Sunday,

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29 Appellant acknowledges that the 9 p.m. time estimate was not conclusive. (15 RT 2347.) But the fact remains that it was the only specific time offered on the issue; and that the prosecution's theory of the case at the outset was that the time of death was 9 p.m. (14 RT 1935; 15 RT 2132-2133, 2152, 2165-2167; 17 RT 2713.)

30 In fact, this was a time frame invented by police investigators apparently, to circumvent appellant's alibi. (19 RT 3169-3170.)

December 4. (2 CT 505.)

It is true that the facial invalidity of the prosecution's theory of the case, and its evidentiary inconsistencies, do not, by themselves, render the evidence insufficient to sustain the verdicts. For example, the jury was not required to believe the whole of Schaub's, Mills' and Marshall Jr.'s testimonies in this regard. But the fact remains, while the prosecutor was forced to acknowledge a possible time of death after 2 a.m., there was no *substantial evidence* to support this; the only evidence on the topic, substantial or otherwise, had the time of death about 9 p.m. There was no *substantial evidence* that appellant was in Matheny Tract during that time of death, i.e., approximately 9 p.m. and shortly thereafter. At the same time, there was credible evidence presented by three prosecution witnesses that appellant was not in Matheny Tract during at the true time of death.

Appellant readily acknowledges that the jury in this case must have had some reason, whether legally viable or otherwise, to find appellant guilty of the crimes charged and to find the special circumstances to be true. Indeed, the bases for the jury's verdicts can be readily identified: The testimony of Lynn Farmer; the testimony of Kim Fleeman and the purported

confession of appellant to Rhonda Schaub.[31] As will be shown, none of these, whether considered singly or in combination, amount to any substantial evidence of appellant's guilt in this case.

**Kim Fleeman**

On Sunday morning, December 4, while at the Marshall's trailer, Fleeman claimed to have overheard appellant state words to the effect that, "the little bitch deserved everything she got." (18 RT 2984.) This suggests that appellant may have had knowledge of the Holley murder, which he obviously could have obtained after the fact from the individuals who were involved in it. Nothing in this statement, if it occurred at all, implicates appellant in anything except possibly associating him with those persons who killed the victim.

**Lynn Farmer**

Farmer testified that appellant stated that he did the same thing to the "old lady" (Margaret Allen) that he did to April: "... fucked her in the ass.", This evidence was highly inflammatory and blatantly inadmissible by the trial court's own initial ruling, yet the court permitted such testimony

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31 It was these items of evidence, and the fact that appellant had the "opportunity" (apparently between 2 and 4 a.m. on Sunday, December 4) to commit the crimes charged that the prosecution relied upon in its opposition to the defense motion for a new trial, and in support of its position that the evidence was sufficient to sustain the verdicts. (2 CT 505.)

anyway on grounds that it was an "admission." This error is discussed in detail in Argument II, *supra*, and will not be belabored here. Certainly, this testimony was by any measure a highly significant reason for appellant to have been convicted of the charged offenses. But this was not because it implicated appellant in the charged offenses. Rather, this evidence could have led to the guilty verdicts because of its highly inflammatory character. That is, even if the Farmer testimony were somehow deemed to have been properly admitted at trial, the mere mention of having anal intercourse with the victim was not specific as to when the contact with Holley occurred, and did not admit to any violent behavior as part of that contact. Thus, while the Farmer testimony surely contributed to the verdict, it did not do so in a legally cognizable manner.

**Rhonda Schaub**

This testimony, the substance of which was that appellant purportedly confessed to Schaub that he killed the victim in this case, has been discussed in detail in Argument II, *supra*. In sum, appellant has argued that due to the circumstances surrounding this evidence (Schaub underwent six interviews prior to mentioning appellant''s "confession" and even then was equivocal as to whether it had even occurred; she was unclear as to the setting and circumstances of the "confession," *e.g.*, whether it

occurred in a car and whether she was under the influence of drugs when it allegedly occurred; she badgered the sleep-deprived appellant until he confessed because she was angry and wanted to get even with him; see, Argument III, *supra.*) Such evidence was so inherently unreliable and untrustworthy that it should not have been allowed to go to the jury, particularly in view the inflammatory nature of the evidence ("a kind of evidentiary bombshell which shatters the defense." (*People v. Neal* (2003) 31 Cal.4th 63, 86) and the extraordinarily high standard of reliability applicable to capital cases, as previously discussed. (See Argument III, *supra,* at p. 220, citing (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172, Souter, J., concurring; and *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118, O'Connor, J., concurring .)

Even if the Schaub testimony were somehow deemed to have been properly admitted, such fact would not render the evidence sufficient to sustain the verdict under the standards set forth above. By any measure the Schaub "confession" was extraordinarily weak from an evidentiary standpoint, and it became even weaker upon its admission into evidence. In this connection it will be recalled that the prosecution's theory of the case was, on its face, internally inconsistent inasmuch. The prosecution's theory was that the victim was murdered at around 9 p.m. on December 3, but the

prosecution's own witnesses gave appellant an alibi for that time frame. (15 RT 2347; 17 RT 2669-2682, 2752-2763; 18 RT 3003, 19 RT 3352-3353.) Thus, the prosecution's case as presented was impossible or at least inherently improbable, *by its own terms*.

Accordingly, this was not a situation in which a shaky confession was shorn up or corroborated by a strong prosecution case. If anything, the inconsistent prosecution theory and the highly questionable and untrustworthy confession weakened and discredited each other. (See, *Davis v. Woodford* (9th Cir. 2003) 384 F.3d 628, 642 [allegation that presenting identification defense in a non-ID case made defense look "desperate" and allowed prosecution to take "potshots" at the defense; *Kyles v. Whitley* (1995) 514 U.S. 419, 461, Scalia, J., dissenting [prospect that jury would accept multiple improbable propositions was "infinitesimal"].)

In sum, while the prosecution asserted that appellant was found guilty on the basis of the testimony of Kim Fleeman, Lynn Farmer and Rhonda Schaub (2 CT 505), appellant respectfully contends that the case really came down to the testimony of Farmer and Schaub. And from an evidentiary standpoint, Farmer's testimony did not implicate appellant in the charged offenses.

Setting aside for a moment the unduly prejudicial nature of the

Farmer testimony, the Schaub testimony is simply too insubstantial, unreliable and untrustworthy to support a finding of guilt beyond a reasonable doubt. This would be true in any case, but is especially true in a capital case.

It is not an exaggeration to state that, in view of the weakness of the prosecution case, indeed, its *failure* on the question of the time of death (the statements of the prosecution's own witnesses placing appellant out of the area during the purported time of death), appellant was found guilty of capital crimes and special circumstances, and thus, subjected to a judgment of death, on the basis of Rhonda Schaub's testimony. The circumstances surrounding that testimony bear repeating, albeit in summary fashion: Schaub underwent six interviews prior to mentioning appellant's "confession" and even then was equivocal as to whether it had even occurred; she was unclear as to the setting and circumstances of the "confession," *e.g.*, whether it occurred in a car and whether she was under the influence of drugs when it allegedly occurred; she badgered appellant until he confessed because she was angry at appellant and wanted to get even with him.

Conviction of capital crimes based on such testimony simply cannot be reconciled with settled notions of due process in any case, but particularly,

in a capital case. To say the least, Schaub's testimony was not "reasonable, credible and of solid value–such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson, supra,* 26 Cal.3d 557, 578.) And to assert that such evidence is of a type which "reasonably inspires confidence' and is of "solid value." (*People v. Redmond* (1969) 71 Cal.2d 745, 755, 756) is, patently, indefensible and wrong. The judgment must be reversed in its entirety.

## Errors Affecting the Penalty Phase

## V

## APPELLANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS OF LAW, TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS, AND TO RELIABILITY IN THE DETERMINATION TO IMPOSE A SENTENCE OF DEATH WERE VIOLATED BY VIRTUE OF TRIAL COUNSEL'S FAILURE TO EXERCISE REASONABLE PROFESSIONAL JUDGMENT IN FAILING TO PRESENT MITIGATING EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL

### A. Introduction and Summary of Claim

Trial counsel in appellant's case declined to present mitigating evidence at the penalty phase of the trial, based on appellant's representation that he, appellant, wished to receive the death penalty. (21 RT 3720.) Counsel acknowledged that he had performed a full-fledged mitigation investigation and was prepared to present the resulting mitigating evidence at the penalty phase. Nonetheless, he declined to do so only because he mistakenly believed he was ethically bound by appellant's desire to be sentenced to death. Counsel stated for the record that his decision not to present this mitigating evidence was not the result of any tactical decision. (21 RT 3720-3721.) Appellant then waived his right to be personally present at the penalty trial (21 RT 3733), and purported to waive his right to present mitigating evidence, with counsel's approval. (21 RT 3728.)

Subsequently, notwithstanding this waiver and appellant's stated

desire to obtain the death penalty, appellant took the stand and himself offered evidence in mitigation, under counsel's questioning, while simultaneously expressing his pique at the jury's verdicts of "guilty" in his case and "true" findings as to the special circumstances. (21 RT 3812-3813.) Neither the court nor counsel sought to question or reexamine the validity of appellant's purported waiver of his right to present mitigating evidence; the vast bulk of the fruits of counsel's mitigation investigation was omitted from the penalty phase trial based on appellant's purported waiver. (21 RT 3721-3722.)

Appellant contends, in sum, that he was denied due process of law, effective assistance of counsel, his right to be free of cruel and unusual punishments and the arbitrary imposition of the death penalty, and his right to reliability in the determination to impose a sentence of death, under the state and federal constitutions (Cal. Const., Art. I, secs. 7, 15, 17; U.S. Const., Amends. V, VI, VIII, XIV), by virtue of trial counsel's failure to exercise reasonable professional judgment in not presenting mitigating evidence on appellant's behalf. Indeed, counsel here exercised *no* professional judgment in making this decision, wrongly believing he was obligated to defer to the wishes of his client. This, by itself, was deficient performance on counsel's part.

As discussed in detail below, while there is indeed a "duty of loyalty" to the client, such duty is not limited to honoring the personal requests of the client, if there are any; but also includes other factors, such securing the best results in the litigation at hand ("winning the case"); and doing so while preserving trust and the attorney-client relationship, if possible.

Counsel's omission was prejudicial because it denied appellant a crucial defense at the penalty phase and undermined the reliability of the resulting death judgment, especially in light of substantial evidence in the record that appellant, notwithstanding his demands to the contrary, in fact did *not* want to be sentenced to death, thus calling into grave question the validity of his purported "waivers." In particular, in *People v. Lang* (1989) 49 Cal.3d 991 [counsel not ineffective for acquiescing in defendant's desire that mitigation not be presented; defendant effectively stopped from arguing counsel's ineffectiveness by doctrine of "invited error" because counsel was responding to defendant's demand that mitigating evidence not be presented] this Court did not address the issues presented in this claim. *Lang* pertained only to the context of an attorney who recognized the discretion to either defer to the client's wishes, or to present available mitigating evidence despite the desires of the client. In *Lang*, counsel

understood the range of discretion and made a tactical decision to defer to the wishes of the client.32 Here, counsel would have made a tactical choice to present the available mitigating evidence over the client's objection, if counsel had understood he had the discretion to make such a decision. Thus, *Lang* did not decide the issue presented here. *Lang,* did not address the issues presented in this claim; and, in any event, excluded the fact pattern presented here.

**B. Relevant Proceedings Below**

At the outset of the penalty phase of appellant's trial, the following exchanges occurred between and among the court, defense counsel and appellant:

THE COURT: Good morning. The record will reflect we're meeting outside the presence of the jury in order to take up some in limine matters before we start the penalty phase of the trial.

Mr. Cross?

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32 For example, in an appropriate case counsel might determine that it is better to acquiesce in the client's preference for no mitigation, in order to secure the cooperation of the client in regard to other matters, especially in a case where a thorough investigation discloses minimal mitigating evidence. But in the present case, counsel's comments indicated that significant mitigating evidence was available to present, and that counsel would have wanted to present it., even over the client's objection, if counsel had only realized that the decision was ultimately his to make, rather than the client's.

MR. CROSS: Your Honor, what I'd like the record to reflect is that last Friday, on the 12th, that I had a meeting with this Court and Counsel in chambers to inform the Court just of the procedures that we were going to be following. And for the purpose of scheduling, I informed the Court that the defendant had chosen not to put on any mitigation.

We're having this hearing this morning because I want to make a record of it. But I think the record should also reflect that we did have a meeting out of the presence of the jury, the defendant, and with no court reporter present. But all that was discussed there was what was going to happen this morning and now we're making a formal record of.

. . .

The purpose for being here this morning, because the way we are going to proceed is a little unusual, it's not the ordinary that a penalty phase in a capital trial proceeds, we are not going to put on any mitigating evidence. I am not going to cross-examine any of the prosecutor's witnesses this morning, any witnesses as to aggravation.

And the reason for this is because the defendant has made a choice to proceed this way because he intends to testify, and because he will inform the jury that he wants to receive the death penalty. He does not want to receive a penalty of life without the possibility of parole. That is an intolerable penalty as far as he is concerned.

I want to make it perfectly clear that in my opinion this is an informed choice. I have spoke to the defendant on three occasions, on at least three other occasions, and other times my paralegal, Scott Dinkins, has also spoken to the defendant about this subject. And the time span for these discussions has been over a week.

The last time I spoke to Mr. Brown was yesterday, yesterday morning. So we've spoken to him enough times that I am convinced that this clearly is his choice. He's not depressed because of the verdict whether he agrees with it or not. That's not what is causing him to make this decision. It's an informed choice because in detail I informed Mr. Brown about the potential mitigation that could be put on on his behalf. And in essence, he's giving up the right to present this mitigation.

This is not a case where no investigation was done or really just making a

tactical choice not to put on mitigation. An extensive background investigation has been undertaken and completed in Mr. Brown's case. It started in 1992, if I remember correctly. I have in my office 1600 pages of documents. Many of those are duplications. But even if all of them are, there's still 800 pages of documents that have been compiled which form the basis for presenting mitigating circumstances.

They involve a background investigation. His family members have been interviewed. We have selected medical records, school records, records from the Youth Authority, prison, schools, and the probation department, his juvenile file we have. And so his background and history have been documented.

However, in this regard, Mr. Brown does not want to put his family through the ordeal of having to testify here. That's part of the basis for the decision. He's also been tested and interviewed by two psychologists, one several years ago, and another actually during the course of this trial.

There are mitigating facts that could have been presented that come from his background in the form of abuse and neglect. The psychologist has mitigating facts that she could present, Dr. Martha Kiersch, K-I-E-R-S-C-H, a Fresno neuropsychologist. Another theme that could have been pursued is institutional failure. I think there were signs in his background that give hints of certain things that were essentially ignored.

I've gone over all of these things and a few others with Mr. Brown. I've gone over everything that would have comprised the mitigating facts. These are mitigation factors that could have been presented. And I think Mr. Brown understands them thoroughly. But because he prefers to receive the death penalty, it's his choice to forego putting these mitigating factors on at this trial.

One of the other options he has, and he understands this, is for me to cross-examine the prosecution's witnesses at this trial. But that could be counterproductive to the end, that is, the penalty that he wants to receive in this case. So there's no point in doing that. We discussed that. We discussed that. He's made an informed choice about whether or not to have me cross-examine those witnesses.

He also wishes to be absent from these proceedings, knowing full well that

he has a right to be present throughout the proceeding. The only time he wants to be here is when he testifies.

In this regard, the District Attorney has informed me that there are four witnesses who he would have make an in-court identification of Mr. Brown: Billy Rummerfield, Debbie Nell, Eunice Atherton, and Joe Brown. Because he does not want to be present, we will stipulate that when these witnesses testify, that the Steven Brown that they testify about is the defendant in this case. So there will be no need for an in-court identification or bring Mr. Brown into the courtroom for that purpose.

He wants to be absent during any opening and closing remarks of the prosecutor also, not just during the presentation of evidence. So those are the reasons why we're going to proceed as we are.

THE COURT: Mr. Brown, you've heard your attorney; is that correct?

THE DEFENDANT: Yes, sir.

THE COURT: And you've met with him and his investigator regarding the penalty phase of this trial?

THE DEFENDANT: Yes, sir.

THE COURT: And is it your desire not to put on any evidence in mitigation, as Mr. Cross represented to the Court?

THE DEFENDANT: Yes, sir.

THE COURT: Is it also your desire for him not to cross-examine any witnesses that might be put on by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: It is also your desire not to be present during the penalty phase, except when you testify?

THE DEFENDANT: Yes, sir.

THE COURT: Now, by doing those things, obviously that's going to be or

could be an advantage to the prosecution. You're aware of that?

THE DEFENDANT: Yes, sir.

THE COURT: When I say "advantage to the prosecution," by not putting on any evidence in mitigation and by not challenging the evidence in aggravation, there's a good likelihood that the jury's going to come back with a recommendation of the death penalty; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: I assume you've given this a lot of thought. Have you?

THE DEFENDANT: Yes, sir.

THE COURT: Do you want to tell the Court, you don't have to, but do you want to tell the Court why you wish to proceed in this fashion?

THE DEFENDANT: I'd rather do a death sentence than do life in prison.

THE COURT: Okay. Whether or not you plan to appeal–let's say the sentence–the recommendation that comes down from the jury, based on the representations made here as to how this case has progressed, let's say they come back with a verdict or recommendation of death. Without prejudging that, let's say the Court does not change that recommendation and that is the sentence of the Court, the death sentence. And then later you wish to appeal that, not only the sentence of guilt, but the penalty phase.

It's going to be difficult, if not impossible, for you to raise those issues on appeal that–those issues being that no evidence was offered in mitigation, that the evidence that was offered in aggravation was never challenged by you or your attorney, the fact that you were not present in court.

If you knowingly give up your right to proceed as normal, I say "normal," where you present evidence in mitigation and challenge that evidence in aggravation, it would be difficult, if not impossible, for you to raise those issues on appeal, because you're giving up those issues now; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: Do you feel in any way that your mental capacity to think clearly, rationally, is impaired in any way right now? Would you like to put this over to give yourself more of an opportunity to think about it and converse more with your attorney before you make such a decision?

THE DEFENDANT: If I may say something. I've been thinking about this since 1992, either bad or good deciding what I was going to do if I was convicted of this crime. I made that decision with my attorney that I would accept that. I would much rather have a death sentence that a life sentence.

THE COURT: Are you presently taking any type of medication that you feel impairs your ability to think clearly or rationally?

THE DEFENDANT: No.

THE COURT: Are you suffering now from any type of cold, flu that you think's impairing your ability now to think clearly?

THE DEFENDANT: No.

THE COURT: Discussing what we discussed, is it still your desire, first of all, to not present any evidence in mitigation?

THE DEFENDANT: Yes, sir.

THE COURT: Is it still your desire for your attorney not to cross-examine any witnesses that may be presented by the prosecution in aggravation?

THE DEFENDANT: Yes, sir.

THE COURT: And is it still your desire not to be present during the penalty phase except for your testimony?

THE DEFENDANT: Yes, sir.

THE COURT: The Court does find that the defendant's wishes regarding the penalty phase are informed, they're voluntary, and they're given intelligently. (21 RT 3719-3728.)

. . .

THE COURT: Okay. Now, Mr. Brown, do you want to be present when we start the penalty phase?

THE DEFENDANT: No, sir.

THE COURT: You have a right to be here, do you understand that?

THE DEFENDANT: I understand that.

THE COURT: By not being here, I'm going to inform the jury that obviously you're not present and you've made an informed decision not to be present. They're not to consider that factor in any way in making their decision. But by you not being here, that could very likely result in them subjectively considering that, even though they're not supposed to under the law. And that may make them return a verdict of death.

THE DEFENDANT: That's fine.

THE COURT: Do you understand that?

THE DEFENDANT: Yes, your honor.

THE COURT: Knowing that, you still wish not to be present?

THE DEFENDANT: Yes, sir.

MR. CROSS: One other thing, if I could have a moment.

Your honor, the defendant understands that I have an opportunity to make opening remarks to the jury at the beginning of the trial and also to make a closing statement. I may not. I will make a short opening statement. I may not make a closing statement. He understands that, and it's with his approval, if that's the choice that comes out. It's going to be with his approval.

So in a sense he's waiving the right for me to make a closing statement in his behalf. This is going to be a tactical decision that I make. He's actually now waiving the right to have me make a closing statement.

THE COURT: Is that true?

THE DEFENDANT: Yes, sir.

THE COURT: You understand that you have a right to have your attorney make a closing argument in your behalf? That closing argument would obviously be urging the jury to find that the most appropriate sentence should be life imprisonment without possibility of parole rather than the death sentence; do you understand that?

THE DEFENDANT: Yes, sir.

THE COURT: And by having your attorney not make such a closing argument, that, once again, could benefit the prosecution. As I say "benefit the prosecution," it could make the jury more likely to render a verdict of the death sentence, do you understand that?

THE DEFENDANT: That's fine.

THE COURT: Understanding that, you still with to have your attorney not make a closing argument?

THE DEFENDANT: Yes, your honor.

MR. CROSS: Let's make this perfectly clear. We're not waiving it at this point. If that is what ultimately is done, I want to make record of that now that we've discussed that. I'm not necessarily waiving it right now. But it might be waived. He knows before we even start the trial that's a possibility, and he agrees with it.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. That is true?

THE DEFENDANT: Yes, sir. (21 RT 3732-3735.)

. . .

THE COURT: Also, I should tell Mr. Brown and Mr. Cross that the holding cell that you're being held in does have the capability of having the audio of

this proceeding. In other words, you can hear what's going on while you're in the holding cell. Do you want that?

THE DEFENDANT: No, sir.

THE COURT: Also, if at any time you wish to reconsider your positions on any issue, let the Court know immediately and we'll take that up, whether it's you wish to now introduce evidence in mitigation or you wish to have Mr. Cross cross-examine any witness, or if you want to be present at any of the times, just inform Mr. Cross and my bailiff will bring you out immediately and we'll discuss that issue or issues, do you understand that?

THE DEFENDANT: Yes, sir. (21 RT 3735-3736.)

Brown later testifies he would rather receive the death penalty than "life without." "I have my own reasons why."

A: I just hope they all have a clear conscience, and I hope they know that they convicted an innocent man. I maintain my innocence in this case and also the Margaret Allen. I had nothing to do with either.

I think the people you should be looking at is the Richardsons and Mr. Lynn Farmer himself. I had nothing to do with this. If you guys got a clear conscience, then I'm asking you to give me death. (21 RT 3813.)

At the penalty phase defense counsel gave the following closing argument:

MR. CROSS: . . . It's a very difficult thing for me to do, to ask you to find a death verdict for my client. I have–however, I have an ethical obligation to my client. I have a duty of loyalty to him, to be his advocate. He's taken the stand and he's told you that he does not want the penalty of life without the possibility of parole, so he has asked you for the death penalty.

Just as I have an obligation to stand here to do this, you have an obligation, too, to follow the law. At the end of the guilt phase of this trial I asked you to do that.

One last time I'm asking you to do the same thing, because under the law you only have one choice. So I'm just asking you to follow the law. (21 RT

3832-3833.)

**C. Counsel's Performance Was Deficient**

In order to establish ineffectiveness of trial counsel, it must be shown (1) that counsel's performance was deficient; that is, that counsel's performance fell below an objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's errors. Prejudice occurs if as a result of counsel's unprofessional errors, the reliability of the outcome is undermined. (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391, citing *Strickland v. Washington* (1984) 466 U.S. 668.) This Court has observed that prejudice has been shown if counsel's omissions deprived the defendant of a crucial defense. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) California applies the *Strickland* factors to claims involving failure to present mitigating evidence. *In re Avena* (1996) 12 Cal.4th 694, 721,)

In any case in which alternate remedies may be sought (such as a capital case), the client is entitled to the attorney's reasonable professional judgment for purposes of securing a result as favorable to the client as the law and the rules of professional ethics permit. (*Parker v. Morton* (1981) 117 Cal.App.3d 751, 755, fn. 1, 759, citing *Norton v. Hines* (1975) 49 Cal.App.3d 917, 922-923; *In re Lucas* (2004) 33 Cal.4th 682, 722.)

Courts have long recognized a distinction between matters that are

within the control of counsel and matters that remain in the control of the defendant in a criminal case. Defendants retain control over decisions affecting fundamental rights, such as deciding what plea should be entered, and when a defendant decides to enter a plea of not guilty, counsel cannot override that decision by refusing to present any evidence or cross-examine any prosecution witnesses. (*Brookhart v. Janis* (1966) 384 U.S. 1; *People v. Frierson* (1985) 39 Cal.3d 803, 812; *Foster v. Strickland* (11th Cir. 1983) 707 F.2d 1339, 1343.) Defendants also retain control over the fundamental decision whether to testify or not. (*People v. Robles* (1970) 2 Cal.3d 205, 214-215.) However, in other respects, counsel is in control of the court proceedings, including such decisions as which witnesses to call or what evidence to present. (*People v. Hill* (1967) 67 Cal.2d 105, 114-115; *People v. Merkouris* (1956) 46 Cal.2d 540, 554-555; *People v. Frierson , supra,* 39 Cal.3d at p. 818, fn. 8; *People v. Murphy* (1972) 8 Cal.3d 349, 365-367; *People v. Beagle* (1972) 6 Cal.3d 441, 458.)

In a *capital penalty trial,* where a defendant states a desire to be sentenced to death in a capital case, "[i]*t is ineffective assistance of counsel* to simply acquiesce to such wishes [to be executed, be it for punishment or to avoid life in prison], which usually reflect overwhelming feelings of guilt or despair rather than a rational decision." (ABA Guidelines for the Appointment and Performance of Counsel in Death

Penalty Cases, Commentary to Guideline 10.5; emphasis added.)

Thus, in California, trial counsel is not bound, ethically or otherwise, by a client's stated desire that mitigating evidence not be presented at his penalty trial. That "call" is a tactical decision to be made by the attorney. (*People v. Deere* (1985) 41 Cal.3d 353, 364 (*"Deere I"*) [trial counsel ineffective as a matter of law, requiring reversal of the death sentence, for simply acceding to his client's wishes that no mitigation be presented, without making an independent tactical judgment about the presentation of mitigating evidence].)33

In making this decision, the attorney, as with any other tactical decision potentially affecting the outcome of the case, is obliged to exercise reasonable professional judgment. (*In re Lucas, supra*, at p. 722; *Parker v. Morton, supra*; *Norton v. Hines, supra*.) This rule is reflective of the extraordinarily heightened standards for reliability required to support a

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It is true that the defendant may exercise ultimate control over the case by dismissing his counsel (*Faretta v. California* (1975) 422 U.S. 806 ) and thereafter acting as his own counsel or retaining counsel of his choice. (*Mason v. Vasquez* (9th Cir. 1993) 5 D.3d 1220, 1223 [federal habeas corpus proceeding; ". . . Mason as the petitioner is entitled to guide the course of the litigation, including dismissing his action either on his own or through an attorney of his choice, provided he is mentally competent to do so . . ." ].)

In this case, of course, appellant was neither acting as his own attorney nor through retained counsel. Counsel here was appointed to safeguard and protect appellant's rights as a defendant in a death penalty prosecution.

judgment of death in a capital case. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 172, Souter, J., concurring [noting heightened standard of reliability appropriate in a capital case]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118, O'Connor, J., concurring (". . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.").)

Accordingly, if a defendant demands that no mitigation be presented at his penalty phase, it does not satisfy the attorney's duty to his client to merely determine if the demand reflects the client's true wishes and is knowing, intelligent and voluntary, and thereafter to simply "blindly follow " that request. (*E.g., Mitchell v. Kemp* (11th Cir. 1985) 762 F.2d 886, 890.) To the contrary, such a demand is but one factor *among many* affecting the decision whether to present mitigating evidence. Limitation of counsel's exercise of professional judgment to a single factor to the exclusion of other relevant factors, as occurred in appellant's case, is deficient performance under *Strickland.*[34] (*Deere I, supra*, at p. 364; *see*

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34 Superficially, *People v. Galan* (1989) 213 Cal.App.3d 864 appears to undercut the present argument. However, a closer examination demonstrates that *Galan* never considered the precise claim made in this argument. In *Galan*, the defendant wanted a particular witness to be called.

*also, People v. Williams* (1988) 44 Cal.3d 1127, 1151 (citing *Deere I* for this proposition.)

In the present case, based on counsel's review of his canvassing of appellant in anticipation of appellant's waivers, counsel's discussions with appellant were directed entirely towards determining whether appellant's purported waivers were "informed" choices; *i.e.,* did appellant know what he was waiving and did he understand the consequences of those choices. (*E.g.*, 21 RT 3720-3721 [" I want to make it perfectly clear that in my opinion this is an informed choice. I have spoke to the defendant on three occasions, on at least three other occasions, and other times my paralegal,

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Defense counsel noted that there were potential benefits and potential detriments. Balancing these, counsel determined that it would be best not to call the witness. Nonetheless, he did call the witness because the client wanted the witness called. The witness proved harmful and, on appeal, it was contended that trial counsel was ineffective because he called a witness who gave damaging testimony. (*Galan, supra,* at pp. 868-869.)

The Court of Appeal rejected this claim, concluding only that no authority supported the contention that defense counsel was obligated to overrule his client's position. (*Id.*, at pp. 869-870.) But in the present case, the claim is not that trial counsel was obligated to overrule appellant's desire to forego the presentation of mitigating evidence. Instead, the present claim is that trial counsel here failed to recognize that he had the power to overrule his client, and counsel therefore failed to exercise his own professional judgment before acceding to the wishes of his client. That claim might have been viable in *Galan*, but it was neither raised nor discussed in that case. "'It is axiomatic,' of course, 'that cases are not authority for propositions not considered.'" (*People v. Jones* (1995) 11 Cal.4th 118, 123, fn. 2, quoting *People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7.)

Scott Dinkins, has also spoken to the defendant about this subject. And the time span for these discussions has been over a week." ].)

Not only do no other considerations appear on the record, the record without equivocation or contradiction shows that the decision to not present mitigating evidence was not the result of any tactical decision on the part of counsel. ("This is not a case where no investigation was done or really just making a tactical choice not to put on mitigation." (21 RT 3721.)

Additionally, refusal to object to admission of evidence of the "Margaret Allen" incident as evidence in aggravation, even as he knew that appellant denied involvement in these offenses and intended to take the stand and deny them (essentially, contradicting his stated desire that no mitigation be presented), leaves no doubt that in counsel's mind, appellant's demands, once made and deemed to be the products of an informed choice, were the *only* considerations driving counsel's performance in this case:

MR. CROSS: Under ordinary circumstances I would be arguing against its admission. Because my client's position is he wants to receive the death penalty, anything in aggravation would help his position.

However, he maintains to this day that he's not guilty of that offense. It's kind of–in one sense it's counterproductive for me to argue to let it in, and in another way if you let in in for factor B and C, I would have no objection whether it's legal or not. I wouldn't object because it helps my client–enhances my client's position. The more aggravation there is, the more likely it is that he's going to get the death penalty, which is what he wants, even though he denies that he was involved in that. That's part of what he's going to tell the jury too, that he did not harm Margaret Allen. So I would submit it. (21 RT 3730-3731.)

Of similar import was counsel's opening statement at the penalty phase, which also served as a closing argument inasmuch as no closing argument was given by the defense (21 RT 3816), during which counsel advised the jury that he was asking for a death verdict for appellant because that's what appellant said he wanted:

> MR. CROSS [DEFENSE COUNSEL]: It's a very difficult thing for me to do, to ask you to find a death verdict for my client. I have–however, I have an ethical obligation to my client. I have a duty of loyalty to him, to be his advocate. He's taken the stand and he's told you that he does not want the penalty of life without the possibility of parole, so he has asked you for the death penalty.
>
> Just as I have an obligation to stand here to do this, you have an obligation, too, to follow the law. (21 RT 3739.)

Counsel's mistake was in believing that he was bound by appellant's request and "blindly follow[ing]" that request, to the exclusion of all other considerations. This was ineffective assistance of counsel and subject to prejudice analysis, compels reversal of the death judgment. (Commentary to ABA Guideline 10.5, *supra,*)

A contrary result is not suggested by *People v. Lang, supra,* 49 Cal.3d 991, and like cases. In *Lang,* defense counsel acquiesced to Lang's request that his grandmother, who would have testified about Lang's difficult upbringing and nonviolent personality, not be called during the penalty phase. As counsel described it for the record, the decision was

based on Lang not wanting to put his grandmother through the emotional ordeal of appearing and testifying on his behalf. (*Id.*, at p. 1029.)

On appeal, Lang contended that his attorney's performance was deficient due to counsel's acquiescence in his demand and failure to present mitigating evidence (assertions not presented in the instant claim, albeit in a subsequent claim (*see,* Argument VII, *infra*).) (*Lang*, at p. 1029.)

This Court found that counsel was not *required* to present mitigation over his client's objection. The Court found that any other result would seriously compromise the attorney's duty of loyalty to his client and the need to maintain trust between attorney and client; and encourage defendants to deprive themselves of legal protection by exercising their rights under *Faretta v. California* (1975) 422 U.S. 806) to proceed without counsel. (*Lang*, at pp. 1030-1031.) The Court also noted that Lang's decision was based on personal rather than tactical reasons, and suggested in dictum that such reasons were entitled to "defer[ence]." *Lang,* at p. 1030.) But nothing in *Lang* stated that counsel was required to **not** present mitigating evidence, merely because the client preferred a death sentence. That is, *Lang* permits counsel to make a reasoned decision in favor of respecting the client's preferences in an appropriate case, but nothing in *Lang* precludes counsel from considering the client's preferences and deciding that, notwithstanding the desires of the client, available

mitigating evidence is compelling and should be presented. In short, defense counsel still retains discretion. The error in the present case was counsel's mistaken belief that he had no discretion to exercise.35

Additionally, the Court found that Lang in any event was estopped, under the doctrine of invited error, to argue counsel's ineffectiveness in acquiescing in his demands and forswearing mitigation, given that his claim was based on conduct that he himself demanded that his attorney carry out. (Id., at pp. 1031-1032.) Finally, the Court emphasized that in the case presented to it, the defendant predicated his ineffective assistance claim solely on trial counsel's action in yielding to his demand, and *not* on any antecedent act or omission by counsel. (*Lang*, at pp. 1032-1033), thus effectively excluding cases in which there is such a claim of antecedent ineffectiveness from the ambit of its holding. (See, *People v. Alvarez* (2002) 27 Cal.4th 1161, 1176 [cases are not authority for matters not considered].)

Importantly, *Lang* did not affect the holdings of *Deere I* that the ultimate decision whether or not to present mitigating evidence rests with counsel, and that blind acquiescence in such client demands is deficient

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35 By analogy, when a trial court fails to exercise discretion because of a mistaken belief that it has no discretion, serious error occurs. (*People v. Bigelow* (1984) 37 Cal.3d 731, 743.) That rationale should apply fully in the context of defense counsel's failure to exercise discretion as a result of a mistaken belief that there is no discretion to exercise.

performance.36

Moreover, *Lang, by its own terms*, does *not* hold that acquiescence to a client's request to not present mitigating evidence at a penalty trial is *always* within the realm of competent representation, and can *never* amount to deficient performance. Rather, the Court merely stated that such omission does not necessarily amount to deficient performance (*id.*, at p. 1031; see, fn. 1, *supra*), and allowed for ineffectiveness claims even in incidents of acquiescence to such client requests, where, as here there is an

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36 In *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1013, the Court cited *Lang* for the proposition that "A defendant may choose to spare his or her relatives the ordeal of testifying in a capital trial."

Appellant would respectfully point out that *Lang* did not so hold. Rather, the Court in *Lang* stated that ". . . it does not *necessarily* follow that that an attorney acts incompetently in honoring a client's request not to present certain evidence for nontactical reasons," (*Lang*, at p. 1031, emphasis added.)

Moreover, in *Kirpatrick*, the defendant had been granted cocounsel status. (*Kirkpatrick*, at p. 1012.) Thus, *Kirpatrick* did not address any potential conflict between attorney and client regarding a choice of strategy or tactics because the defendant in that case was *both* attorney and client.

At most, *Kirkpatrick* may have carved out a limited exception to *Deere* I, so as to designate the defendant as the party who ultimately decides whether relatives will or will not be to subjected to the ordeal of testifying at a capital trial. Although appellant disputes this interpretation of *Kirkpatrick*, inasmuch as it is itself dictum, it does not materially affect the instant claim, since the case in mitigation counsel was poised to present in appellant's case went far beyond the proposed presentation of testimony of family members. (21 RT 3721-3722.)

antecedent incident of ineffectiveness. (*Lang,* at pp, 1032-1033.) This is consistent with prevailing federal authority on the issue. (*E.g., Silva v. Woodford,* 9th Cir. 2002) 279 F.3d 825, 847 [counsel complied with client demands that family members not be contacted and called as mitigation witnesses, without conducting adequate investigation so as to ensure that client is fully informed as to the consequences of his decision. *Held*, trial counsel was ineffective].)

Importantly, the *Lang* Court was not called upon to, and did not purport to, define the limitations or parameters of the exceptions to its holdings alluded to in the opinion, referring merely to "antecedent acts[s] or omissions[s] of counsel." (Id. At p. 1032.) In particular, the Court did not exclude from its exceptions, nor did it address, the situation in which the client's waiver of the right to present mitigation is knowing, intelligent and voluntary. Thus, nothing in the *Lang* opinion precludes a claim of trial counsel ineffectiveness based on acquiescence in a knowing, intelligent and voluntary waiver of the right to present mitigation, where such waiver is the product of an antecedent incident of trial counsel ineffectiveness.

Specifically, in the present case, trial counsel, after concluding that appellant's request was knowing, intelligent and voluntary "blindly follow[ed]" (*Mitchell v. Kemp, supra,* 762 F.2d 886, 891) appellant's demand without further analysis or exercise of professional judgment,

simply because he believed he had no other choice. But nothing in *Lang* would preclude a finding that counsel's performance was deficient, where counsel abdicates his own tactical judgment due to a mistaken belief that he had no power to override his client's preferences in regard to what evidence should be presented.

This is essentially a restatement of the settled principle, previously discussed, that the decision whether or not to present mitigating evidence is like any other strategic and/or tactical decision respecting the conduct of the client's case, one to be made by counsel based on the exercise of sound professional judgment and in aid of the best interests of the case. This, in essence, is the holding of *Deere* I. As noted above, *Lang* does not quibble with this aspect of *Deere I.* The aspect of Deere I that Lang did disapprove was the former's holding that counsel had an *obligation* to present mitigation over the client's objection. This proposition, not at issue in the present case, is no longer the law. What is left is the principle that the decision to present mitigation during the penalty phase, or not, remains a matter of trial tactics and strategy, in the end resting with the attorney, subject to the attorney's obligation to exercise his best professional judgment in making that decision. The obverse of this principle is that counsel's obligation is not met if counsel does not exercise his best professional judgment, e.g., simply blindly acquiesces in the client's

demand.

Counsel in appellant's case did not exercise such sound professional judgment because he believed that he was bound to carry out appellant's stated wishes over all other competing considerations, and he acted accordingly. Counsel was wrong. This was deficient performance and, subject to the "prejudice" prong of *Strickland*, ineffectiveness of counsel.

Appellant acknowledges that requests made by the client for "personal" reasons respecting the tactics and defenses to be employed in the case are, per *Lang* dictum, entitled to "defer[ence]." (*Lang*, at p. 1031.)37 In the context of an ineffectiveness of counsel claim, this does not mean blind capitulation but rather, "courteous regard or respect" (Webster, Your Dictionary.com). That is, where a claim of trial counsel ineffectiveness has been made, the fact that an attorney's tactical decisions are entitled to deference (*e.g., In re Lucas, surpa*, 33 Cal.4th at p. 722), does not mean that they are immune from review, since they may be unreasonable. (*E.g., Silva v. Woodford, supra*, at p. 847

As with any other decision that might affect the outcome of the case upon which he is duty bound to represent his client, the decision to

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37 See, footnote 36, *supra*.

honor such a request, or not, is a tactical judgment, like any other, to be made by the attorney.

As demonstrated, this aspect of the law (and of *Deere* I), is not abrogated by *Lang*. As to such a decision, the client is entitled to the attorney's sound professional judgment.

True, where the client's personal reasons are interjected into the decision making process, the calculus may change in the sense that counsel may give heightened consideration to the effect of those desires on factors such as maintaining client trust, and the attorney's duty of loyalty to his client. (*Lang*, at p. 1031). Counsel could reasonably conclude, for example, that the client is better off represented by counsel and not presenting mitigation, than he would be unrepresented pursuant to *Faretta*, and not presenting mitigation, if the client is leaning toward self-representation. For any number of reasons, the attorney may reasonably decide, in his judgment, that the deference due the client's personal reasons may be so compelling as to justify a decision to not present mitigating evidence. On the other hand, *he may reasonably decide that it is not*. Indeed, the "duty of loyalty" to the client is not limited to honoring the personal requests of the client, if there are any; but also includes other factors, such securing the best results in the litigation at hand ("winning the case"); and doing so while preserving trust and the attorney-client

relationship, if possible.

To the extent the various factors implicating the attorney's duty of loyalty to the client are or appear to be in conflict, the attorney must weigh them all. After doing so, counsel may properly conclude that mitigating evidence not be presented (*e.g.*, *Lang,* at p. 1031); *but not before.* (*Deere I, at p. 364; see also, People v. Williams* (1988) 44 Cal.3d 1127, 1151, quoting *Deere I* on this proposition.) Whether or not the request of the defendant to forswear mitigation is the product of case-related strategy or personal considerations, the defendant is entitled to the exercise of the attorney's sound professional judgment. Nothing in *Lang* purports to abrogate this right.

In sum, the core holding of *Lang*, that agreeing to forego mitigation at the client's request is not necessarily ineffectiveness of counsel, is not challenged in the present case. Nothing in *Lang* purports to hold that a request by a client in a capital case that mitigating evidence not be presented, absolves the attorney of his duty to exercise professional judgment or serves as a license to abandon the client in this respect. The Court in *Lang* was not asked to decide, except in a most general way, the parameters of the professional judgment required or the scope of possible exceptions to its holding. Specifically, it was not presented with a situation in which counsel acceded to the client's wishes solely because the client

made the request, and *Lang* did not hold or even imply that an attorney who does so may never be guilty of ineffectiveness of counsel. This issue was not even presented in *Lang*. Thus *Lang* does not reach the claim here presented.

Numerous cases in addition to *Deere I* illustrate the principle that the decision whether to acquiesce in a client's wish that no mitigation be presented is a tactical decision to be made by the attorney, and is essentially no different from any other such decision.

Significantly, many of these cases deny claims alleging ineffective assistance of counsel (IAC) on the grounds that the decision to not present mitigating evidence was, under the circumstances, a defensible trial tactic. These authorities thus demonstrate the analysis that pertains in cases such as the present case, in which the issue (not presented in *Lang*) of the tactical or strategic predicate of the decision to not present mitigation is raised.

For example, in *Jeffries v. Blodgett* (1993) 5 F.3d 1180, the defendant insisted that he was innocent of the offenses charged and did not want his relatives and friends put through the rigors of testifying because there was no valid reason for him to do so. In compliance with the defendant's stated wishes, counsel presented no mitigation witnesses (*Id.* at p. 1197.)

The defendant's counsel stated:

Mr. Sowa and myself both believe that our client is perfectly competent and

that [it]is his personal decision after a weekend of soul searching, which has caused him to elect this course of actions. While we may not join in it, we believe that the decision is personal enough and made knowingly, voluntarily and intelligently that, as his counsel, we have no choice but to adhere to his wishes.

On appeal, Jeffries argued that his counsel was ineffective for acquiescing in his "unknowing and uninformed" decision not to present any mitigating evidence.

The claim was rejected. The Court conceded that appellant's claim that counsel should have presented mitigation notwithstanding his request to the contrary, found some support in the ABA Guidelines. (*Id.* at p. 1198; see, ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Guideline 10.5 and Commentary thereto, *supra.*)

However, defendant's decision to not present mitigation was deemed to be a logical trial strategy in view of his denial of involvement in the charged crimes. Counsel's decision was supported by this valid trial strategy, and thus, was not IAC. (*Jeffries v. Blodgett*, at p. 1198.)

*Jeffries* illustrates the principle that the decision to present mitigation, even in the face of a request by the client to the contrary, is in the end a strategic trial decision like any other. In *Jeffries* the decision to not present mitigation was found to be supported by, and to constitute, sound trial strategy. Thus, the IAC claim was rejected.

Significantly, the court was not asked to determine if counsel's

statement that he had "no choice" but to adhere to Jeffries' wishes, was indicative of ineffective assistance of counsel, and it did not decide this question; additionally, the Court did not rely on this statement to deny the IAC claim, even though it could easily have done so *had* that statement been dispositive of the claim to Jeffries's detriment. That it did not, and instead analyzed the merits of the strategic decision not to present mitigation, *notwithstanding* that this was appellant's personal decision as to how to proceed, illustrates the principle of *Deere I* that defendant's wishes in this regard, while entitled to "deference," are not binding on counsel; but are instead *dependent on the validity of the trial strategy underlying the decision.*

Appellant emphasizes that this Court in *Lang* was not called upon to engage in such analysis and in fact did not do so. That is, it was not called on to decide whether *Lang's* decision to not present mitigation, in addition to being entitled to "defer[ence]," was *also* a valid trial strategy. In the present case, of course, of course, the record is uncontradicted that the decision not to present mitigation was *not* the result of any underlying a trial strategy. (21 RT 1321.)

Of further note is that to whatever extent *Jeffries* were construed to be unsupportive of appellant's position, its holding would indefensible because its only cited authority relative to the specifics of the case is *Mitchell v.*

*Kemp, supra,* 762 F.2d 886, which supports appellant's position. In *Mitchell v. Kemp*, counsel conducted no investigation of Mitchell's background except for questioning Mitchell, and two phone calls to Mitchell's father. At trial, he did not offer any members of Mitchell's family for purposes of presenting mitigating character evidence.

Counsel's stated reasons for not conducting a thorough background investigation were threefold: First, Mitchell continually discouraged counsel from involving his family in a background investigation. Second, counsel thought Mitchell's father was "the only avenue into the attorney situation." Third, counsel believed, based on his conversations with Mitchell, that "the possibility of finding anything that might be helpful in [Mitchell's] defense was nil." Counsel never presented any witnesses to address Mitchell's character because he concluded that this type of evidence would have been thoroughly rebutted by Mitchell's prior conviction.

The Eleventh Circuit denied relief:

> When a defendant preempts his attorney's strategy by insisting that a different strategy be followed, no claim of ineffectiveness can be made. [citations]." Nonetheless, *'informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel . . .*" (Emphasis added.) [citations.]

The Court then stated

> *It is important to note that Mitchell's attorney did not blindly follow Mitchell's command to leave his family out of it.* Although it appears the attorney did not probe deeply into Mitchell's reasons for not wishing to

involve his family, the attorney made an independent evaluation of the usefulness of character witnesses by an in-depth conversation with Mitchell. Even Mitchell complained that the attorney acted more like a 'socialist' than a lawyer. Considering all the circumstances, including the information the attorney learned from Mitchell, Mitchell's directions, and Mitchell's father's indifference, the attorney acted reasonably when he decided not to pursue an investigation independent of Mitchell or his father. Strategic choices made after less than complete investigation are reasonable precisely to the extent that treasonable professional judgment support the limitations on investigation. (*Mitchell*, at p. 890, citing *Strickland v. Washington* (104 S,Ct. at p. 2066; emphasis added.)

The *Mitchell* opinion demonstrates the principle that counsel may not simply "blindly follow [defendant's] command" and at the same time remain true to his obligation to provide effective assistance of counsel. Instead, counsel must exercise professional discretion and make a reasoned decision to not present mitigating evidence, before an IAC claim will fail.

Of similar import is *Silva v. Woodford, supra,* 279 F.2d at p. 847. There, counsel did not investigate defendant's background based on defendant's directive that no such investigation be conducted. The court held that counsel was ineffective for not pursuing such an investigation notwithstanding his client's wishes, so as to ensure that the client's decision to forgo such evidence was fully informed and that he was fully aware of the consequences of his decision.

Together, the above authorities illustrate the principle that simply "blindly follow[ing]" the client's directives does not satisfy the attorney's obligation to render effective assistance on the client's behalf. Instead, such

a decision, like any decision potentially affecting the outcome of the case, requires the exercise of the attorney's professional judgment, beyond the mere determination that that the client's directives are knowing and informed.38 Such judgment is *a fortiori* lacking if the attorney's decision is based solely on the mistaken belief that counsel must always accede to the apparent wishes of the client, rather than being based on a full consideration of trial tactics and strategy.

In the present case, as demonstrated, trial counsel acquiesced in appellant's wishes to refrain from presenting mitigation, solely on the basis of appellant's demand that he do so. *Here, it can be determined from the record* that there was no tactical predicate for counsel's decision. Instead, counsel mistakenly believed that he was required to follow the wishes of the client, without regard to any overall tactical or strategic factors. (21 RT 3721.) This was deficient performance because it violated the most basis duty of the attorney to his client: To exercise sound professional judgment.

Since the determination whether blind acquiescence in a defendant's

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38 In a similar vein is *Deere II*, (People v. Deere (1991) 53 Cal.3d 705, 716, notably a post-*Lang* decision, in which the defendant's IAC claim based on a failure to present mitigating evidence was rejected, in part, because substitute counsel presented "a "credible case in mitigation." Consistent with the other cited authorities, this conclusion demonstrates that even in the post-*Lang* milieu, consideration of the potential effect of the attorney decision *on the outcome of the case (there, the question whether or not to impose death )* is and always has been highly relevant to the IAC determination.

demand was neither raised by the facts in *Lang* nor forwarded as a ground for relief in that case, *Lang* and its line of authority does not suggest, let alone compel, a contrary conclusion.

**A. Prejudice**

As noted previously, where counsel's omissions constitute deficient performance prejudice occurs if, as a result of counsel's unprofessional errors, the reliability of the outcome is undermined. (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391, citing *Strickland v. Washington, supra,* 466 U.S. 668.) This Court has observed that prejudice has been shown if counsel's omissions deprived the defendant of a crucial defense. (*People v. Pope* (1979) 23 Cal.3d 412, 425.)

Appellant here asserts that counsel's deficient performance was prejudicial, compelling reversal of the death judgment, because it both undermined the reliability of the death judgment and deprived appellant of a crucial defense, e.g., mitigating evidence. Here, counsel's act of "blindly follow[ing]" (*Mitchell v. Kemp, supra,* 886 F.2d 889-890) appellant's request that no mitigation be presented was certainly the reason that no mitigation was in fact presented. Stated another way, had counsel exercised the sound professional judgment to which appellant was entitled, counsel, counsel clearly would have presented mitigating evidence. Counsel made it clear that there was mitigating evidence he personally believed

should have been presented. The only reason it was not presented was that counsel mistakenly believed he was mandated to acquiesce in the wishes of his client, no matter how much he personally disagreed with those wishes. As is demonstrated below, the fact that no mitigation was presented both undermined the reliability of the result and deprived appellant of a crucial defense. The judgment of death must therefore be reversed.

In this case, trial counsel performed an extensive mitigation investigation and a great deal of mitigating evidence was developed, involving many topics. As counsel advised the court:

> This is not a case where no investigation was done or really just making a tactical choice not to put on mitigation. An extensive background investigation has been undertaken and completed in Mr. Brown's case. It started in 1992, if I remember correctly. I have in my office 1600 pages of documents. Many of those are duplications. But even if all of them are, there's still 800 pages of documents that have been compiled which form the basis for presenting mitigating circumstances.
>
> They involve a background investigation. His family members have been interviewed. We have selected medical records, school records, records from the Youth Authority, prison, schools, and the probation department, his juvenile file we have. And so his background and history have been documented. (21 RT 3721-3722.)

The extensive mitigation developed included but was not limited to evidence of abuse and neglect, institutional failure, and testimony from mental health experts, and other information relating to appellant's background:

There are mitigating facts that could have been presented that come from his background in the form of abuse and neglect. The psychologist has mitigating facts that she could present, Dr. Martha Kiersch, K-I-E-R-S-C-H, a Fresno neuropsychologist. Another theme that could have been pursued is institutional failure. I think there were signs in his background that give hints of certain things that were essentially ignored. (21 RT 3722.)

Counsel's mitigation investigation, obviously, was performed for the purpose of presenting mitigating evidence at appellant's penalty trial, and counsel was clearly prepared and even eager to do so. He failed to do so, not based on any tactical decision on his (counsel's) part (21 RT 3721) but, solely because *appellant* chose that such evidence not be presented. But for appellant's choice, mitigation would have been presented; indeed, counsel put *on the record* that the mitigating evidence described, but for appellant's decision not to present it, "*would have comprised mitigating facts*:"

I've gone over all of these things and a few others with Mr. Brown. I've gone over everything that would have comprised the mitigating facts. These are mitigation factors that could have been presented. And I think Mr. Brown understands them thoroughly. But because he prefers to receive the death penalty, it's his choice to forego putting these mitigating factors on at this trial. (21 RT 3723.)

Additionally, while counsel during his penalty phase opening argued that his client should be sentenced to death, he did so only with the greatest of reluctance:

MR. CROSS: . . . It's a very difficult thing for me to do, to ask you to find a death verdict for my client. I have–however, I have an ethical obligation to my client. I have a duty of loyalty to him, to be his advocate. He's taken

the stand and he's told you that he does not want the penalty of life without the possibility of parole, so he has asked you for the death penalty.

Just as I have an obligation to stand here to do this, you have an obligation, too, to follow the law. At the end of the guilt phase of this trial I asked you to do that.

One last time I'm asking you to do the same thing, because under the law you only have one choice. So I'm just asking you to follow the law. (21 RT 3832-3833.)

Clearly, this was an attorney who desperately wanted to present mitigating evidence, and was visibly saddened by the perceived mandate that he not do so. There can be no question that appellant's directions were the reason no mitigation was presented, and that absent these directions, such mitigation surely would have been presented.

Separate and apart from proof of what this particular counsel would have done in this particular case, prejudice is apparent from an analysis of what *any* reasonably competent attorney would have done at the penalty phase under the circumstances presented, assuming *arguendo* there had been no affirmative evidence that counsel would have presented his case in mitigation absent the defendant's request that he not do so.

Specifically, had counsel chosen to exercise his professional judgment as required, he had myriad options available to him. He could have moved to have appellant examined to determine his competence to enter the contemplated waiver (Penal Code section 1367, *et. seq.*); he could

have requested additional time to ensure that appellant's demands were not the result of frustration or anger at the verdict of guilty *(e.g., People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [waiver of counsel pursuant to *Faretta v. California,* (1975) 422 U.S. 806 must be unequivocal and is not if it is the result of temporary whim or out of annoyance or frustration]); he could have attempted to dissuade appellant from following his stated course, since a "volunteer" for the death penalty is frequently motive by (ABA Guideline 10.5 and commentary thereto, *supra*); 39 counsel could have

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39 A short continuance to explore (1) changing appellant's mind or (2) the likelihood that his demands were motivated by anger or frustration would have been a reasonable option, notwithstanding the fact that appellant claimed to have been thinking about this issue "since 1992." (21 RT 3727.) Prior to the guilt phase verdicts, appellant held out hope that the jury would return verdicts of not guilty, a fact obvious from his penalty phase testimony. (21 RT 3813.) The eleven days between the guilt-phase verdicts and the commencement of the penalty trial was not a great deal of time to come to terms with fact, not to mention the magnitude, of the devastating personal blow dealt him by the jury.

Moreover, in the time available to him, counsel *never* attempted to dissuade appellant from choosing the death penalty over LWOP and forswearing the presentation of mitigation. Although he was afforded the opportunity at trial to set forth any efforts he had made in that regard, it is clear from his statements that his efforts were directed to determining if appellant's choices were knowing and "informed." (21 RT 3720.) Thus, the time frame between the guilt phase verdicts and the commencement of the penalty trial casts no light on the question whether appellant could be dissuaded from his choices by the device of a further, limited continuance.

Additionally, compelling evidence came to light during the taking of evidence at the penalty phase that indicated that appellant's demands may well have been products of anger and frustration. If so, his "waivers"

decided to present mitigating evidence over appellant's objection (*see, e.g., People v. Deere* (*Deere I*), *supra*, 41 Cal.3d 353, 364); counsel could have explored methods of presenting mitigating evidence without violating his perceived duty of loyalty to appellant (*e.g., People v. Deere* (*Deere II*) (1991) 53 Cal.3d 705 [second counsel appointed to investigate mitigation]), and could have advised appellant of his intention to do so and advised him of his options in that event; or counsel could have moved to withdraw. (*Zagorski v. State* (1998) 983 S.W.2d 654, 659.)

*Or,* counsel may have proceeded as he did in this case, *but* with an eye toward questioning, on an ongoing basis, whether appellant's supposed decision was in fact knowing, intelligent and voluntary, and unequivocal, or instead, motivated by anger or frustration at the guilty verdict. Appellant's waivers in this case were tantamount to a waiver of counsel for the purpose of presenting mitigation and seeking a judgment less that death, and in that context, any waiver must be not just knowing, intelligent and voluntary, but unequivocal also. A waiver out of annoyance or frustration is not the product of a rational thought process and is not unequivocal. (*People v. Stanley* (2006) 39 Cal.4$^{th}$ 913, 932-933.)

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were invalid and the presentation of mitigating evidence would not have violated any ostensible duty of loyalty to the client. In sum, it is conceivable that a short continuance would ultimately have resulted in the presentation f a full-fledged case in mitigation.

In this regard, competent counsel would have been alert to any evidence of some suggesting equivocation on appellant's part, and to any evidence that appellant's demands were equivocal, not the product of a rational thought process did not reflect his true wishes or were otherwise invalid. (ABA Guideline 10.5 and commentary thereto, *supra.*)

If such indications had arisen, any competent counsel would have brought them to the attention of the trial court and at least sought to revisit his client's waivers, inasmuch as there is clearly no "duty of loyalty" to the client to carry out or defend an *invalid* waiver. Depending on the strength of the evidence, this would likely have resulted in the court's withdrawal of its approval of appellant's waivers.40

Unfortunately, counsel did not take *any* of the foregoing actions. Indeed, given his mistaken belief that he was bound by his duty to carry out his client's stated wishes, he did not even *consider* any of these actions. As demonstrated in the previous section, counsel became wedded to appellant's demands, to the exclusion of all other considerations, once he determined that such demands were "knowing" and "informed."

Had counsel not considered himself bound by appellant's demands,

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40 The trial court in appellant's case stated its desire to not be complicit in a death sentence, and its willingness to entertain any change of position appellant may have wanted to voice on any of his purported waivers. (21 RT 3731, 3736.)

he would have considered one or more of the foregoing options. Had this occurred, it is clear that mitigating evidence would have been presented, be it as a result of a change of position on appellant's part, or a determination by counsel that, in the circumstances of the present case, the available mitigating evidence should be presented despite the contrary wishes of the client. The result would have been the presentation of a full and complete case in mitigation.

Particularly with regard to the option of vigilantly monitoring appellant's actions for signs of equivocation on appellant's part, counsel's failings were particularly egregious because there were substantial indications that arose during the course of the penalty trial that appellant's waivers were in fact not unequivocal and therefore were invalid. (*Stanley*, supra, at pp. 932-933.) These omissions are not speculative, e.g., there is absolutely no question that counsel did not respond to these events by withdrawing his endorsement of appellant's waivers or otherwise bringing such events to the attention of the court. And in light of the strength of the signs of equivocation on appellant's part, it is more than conceivable that a proper response by counsel would ultimately have generated the presentation of a full-fledged case in mitigation.

Appellant in a separate claim asserts that this failure to adequately respond was ineffective assistance of trial counsel regardless of the cause

(Argument VII, *infra*); but in this claim appellant specifically contends that counsel's omission was directly attributable to his initial mistaken belief that he was legally and ethically bound by appellant's demands, resulting in counsel from that point forward defending, rather than questioning, those demands.

Indications that appellant's waivers were less than unequivocal and rather were the product of frustration and anger are both glaring and numerous.

Specifically, appellant took the stand and stated:

"A: I just hope they all have a clear conscience, and I hope they know that they convicted an innocent man. I maintain my innocence in this case and also the Margaret Allen. I had nothing to do with either.

I think the people you should be looking at is the Richardsons and Mr. Lynn Farmer himself. I had nothing to do with this. If you guys got a clear conscience, then I'm asking you to give me death." (21 RT 3812-3813.)

This scolding of the jurors clearly demonstrated anger and frustration on appellant's part, at the jury's guilty verdict. This is symptomatic of a lack of a rational thought process, which in turn, indicates an invalid waiver. (*See, Stanley, supra*, at pp. 932-933.) Counsel was duty-bound to respond to this. (ABA Guideline 10.5 and commentary thereto, *supra.*)

Additionally, Appellant's affirmative testimony denying complicity in the Holley and 190.2(b) offenses was utterly and categorically incompatible with appellant's directive that no mitigation be presented, and statement that he wanted to be sentenced to death; and as such amount to affirmative evidence that appellant did not want to forswear mitigation and did not in fact want to be sentenced to death. (*See, People v. Stanley, surpa*, 39 Cal.4th at pp. 932-933 [subsequent conduct inconsistent with prior *Faretta* motion indicative that desire for self-representation was not unequivocal].)

Lest it be argued that appellant's desire to affirmatively deny involvement in the present case and 190.2(b) offenses was compatible with appellant's stated desire to forswear mitigation, perhaps because appellant wanted to clear his name prior to being executed,41 such argument ignores the fact that appellant desired that counsel perform no cross-examination of the 190.2(b ) witnesses, presumably so as to not jeopardize his chances of receiving the death penalty. (21 RT 3723.) Thus, appellant knew or believed that a failure to challenge his substantive guilt would assist him in securing the death penalty. Yet during his penalty phase testimony he *denied* complicity in the Holley and Allen offenses, presumably armed with

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41 Appellant acknowledges that there is no evidence whatsoever of this in the record.

this knowledge, to wit: that such denials would *hinder* his chances at receiving the death penalty. Thus, his waivers, effectively, of the right to seek a judgment less than death, were, at best, equivocal. If they were equivocal, they were invalid. (*People v. Staney, supra*, 39 Cal.4th at pp. 932-933.)

Clearly, appellant's denials were completely incompatible with appellant's stated desire to be sentenced to death. If appellant truly wanted a death sentence, offering lengthy statements in elocution denying his involvement in all offenses constituting the prosecution's case in aggravation, was not the way to do this. If, on the other hand, appellant's desire to clear his name was more important than his desire for the death penalty, then the unequivocal nature of appellant's "waivers" of his rights to present mitigation and to seek a sentence less than death is called into question. By any measure, appellant's penalty phase testimony subverted his stated motive, to receive a sentence of death, which fact undermines the validity of that stated motive.

To the extent this testimony is taken at face value and treated as a demand for the death penalty, its confrontational tone and underlying hostility directed to the jurors for finding him guilty, may clearly be seen as a product of frustration, anger, and despair at the jurors' guilt phase verdicts. As stated, if appellant's "waivers" were the product of such emotions, they were not the product of a rational thought process, were equivocal, and therefore, invalid, notwithstanding appellant's demands or their purported knowing and informed nature. (*People v. Stanley, supra*, 39 Cal.4th at pp. 932-933.)

It bears emphasis that appellant's statements to the jury were made against the backdrop of his choosing to absent himself from the proceedings—an unmistakable sign of contempt for the proceedings generally and for jury and its verdicts, in particular. (Argument VI, *infra*.) Appellant's waiver of his presence at the penalty phase simply underscores the fact that his actions were motivated by anger and frustration and not necessarily by clear-headed analysis.42

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42 For this reason, there is no merit to the argument that appellant's "waivers" must have been unequivocal because he claimed to have been considering his position "since 1992." (21 RT 3727.) It seems reasonable to assume that one cannot know how he/she will react to the prospect of being sentenced to death until it the prospect becomes and reality as opposed to a theoretical possibility. Here, the time span between the guilt phase verdicts and the commencement of the penalty trial was eleven days. (21 RT 3719, 3729 .) Prior to the guilt phase verdicts appellant presumably

These are all substantial indications of this, and red flags calling for follow-up [from counsel] that never came. Add to that the equivocation of appellant on his *motive* for wanting to die—counsel stated that protecting family members from the court process was "part of it" --but there was a marked lack of passion or conviction behind this rationale (*cf. Deere II, People v. Deere* (1991) 53 Cal.3d 705, 714-715 [counsel stated that presentation of mitigating evidence "would violate his relationships with everybody [the defendant] holds dear . . . [defendant] would object to presentation of mitigating evidence from the depth of his soul . . . "]) and appellant *did not even mention it when given the opportunity.* In fact, appellant chose to remain *silent* as to his motives for demanding to be put to death. He then, in effect, scolded the jury for finding him guilty at the guilt phase and challenged them to put him to death but only if their collective

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appellant presumably held out considerable hope that he would receive the "not guilty" verdicts to which he believed he was entitled. By any measure eleven days is a very limited amount of time to adapt to the devastating and, to say the least, life-altering, reality of a guilty verdict with special circumstances, and with the very real prospect of being executed that comes along with that. Appellant here had obviously not overcome his anger and frustration at the jury's verdicts in the time available to him, as demonstrated by his abandonment of the proceedings and his "clear conscience" lecture to the jury.. (21 RT 3813.)

conscience was clear, which, appellant suggested, it could not be.

Given these facts, any competent lawyer, that is, a lawyer exercising independent judgment, would have challenged the validity of appellant's prior waiver and withdrawn his or her endorsement thereof and demanded that the subject of presentation of mitigating evidence be revisited. (*See, People v. Stanley, surpa*, 39 Cal.4th at pp. 932-933 [subsequent conduct inconsistent with prior *Faretta* motion indicative that desire for self-representation was not unequivocal].)

At this point, counsel may have exercised the other options available to him or her, including the presentation of mitigating evidence (*Deere I, supra*), a request for second counsel to do so (*Deere II, supra*), advising appellant that he was considering withdrawal or actually moving to withdraw. (*see, Zagorski v. State , supra,* 983 S.W.2d 654, 659.)

By itself, the withdrawal of counsel's endorsement of the waiver would likely have caused the court to withdraw its approval of appellant's waivers. (See, fn. 6, *supra.*) This notwithstanding continuing demands by appellant, had he voiced them, that he continued to desire that no mitigation be presented and that he counsel work to in aid of a death sentence. (*People v. Stanley, supra*, 39 Cal.3d at pp. 932-933 [defendant's stated desire for self-representation does not necessarily signal an unequivocal request, even if the request is knowing, intelligent and

voluntary].)

But counsel in *this* case did not so act. What distinguishes this otherwise competent counsel from other attorneys is that in this case, counsel misread *Lang* and erroneously believed that he was bound to defend appellant's demands above all other considerations. This duty of loyalty trumped all else; it took other considerations "off the table," including the separate but perhaps more compelling duty to protect the clients rights—in this case, the rights to present mitigation and to seek a sentence less than death—from being extinguished by an invalid waiver.

In this case there were, and remain, unmistakable indications that such an abandonment in fact is what occurred. For example, in addressing the defense position on the admissibility of evidence of the Margaret Allen offenses as part of the prosecution's case in aggravation, counsel readily noted the conflict between appellant's counsel's position that he was not involved in the Margaret Allen offenses and his desire to be sentenced to death.

MR. CROSS: Under ordinary circumstances I would be arguing against its admission. Because my client's position is he wants to receive the death penalty, anything in aggravation would help his position.

However, he maintains to this day that he's not guilty of that offense. It's kind of–in one sense it's counterproductive for me to argue to let it in, and in another way if you let it in for factor B and C, I would have no objection whether it's legal or not. I wouldn't object because it helps my client–enhances my client's position. The more aggravation there is, the

more likely it is that he's going to get the death penalty, which is what he wants, even though he denies that he was involved in that. That's part of what he's going to tell the jury too, that he did not harm Margaret Allen. So I would submit it. (21 RT 3730.)

At this point counsel knew that appellant intended to take the stand and affirmatively deny the Allen offenses, and that this would be "counterproductive" to his position that he wanted the death penalty. But rather than viewing this as a reason to question the legal validity of appellant's position (and waivers), counsel viewed it as an irritation that must be harmonized. Any attorney who understood he was not in thrall to the defendant's demands would not have made such statements.

This fact became even more clear after appellant took the stand and denied not only the Holley and Allen offenses, and complicity in the other 190.2(b ) offenses, but also made his ostensible plea for a death sentence (very arguably an attempt to shame the jury into returning an LWOP sentence), *and* denied the other uncharged offenses offered in aggravation.

If appellant truly wanted the death penalty, this testimony was entirely gratuitous. As demonstrated above, even a desire to clear his name from complicity in these offenses (not even raised below but raised here assuming *arguendo* it is deemed relevant) does not explain appellant's testimony.

Counsel did not pick up and act upon this obvious conflict because he believed, incorrectly, that he was ethically powerless to do so. What remains is a death judgment grounded upon waivers that are or could be invalid. At a minimum, the bases for such apparent invalidity were never explored, due to counsel's substandard performance. Such a judgment cannot be allowed to stand.

Appellant emphasizes that in order to be entitled to relief, he is not required to show beyond all doubt that, absent counsel's omission, mitigating evidence would, in fact, have been presented. (*In re Jones* (1996) 13 Cal.4th 552, 567 [trial counsel was found to be ineffective, and relief was granted, where trial counsel made no attempt to locate a witness who "*conceivably* could have offered testimony relevant to the defense"] (emphasis (added); *see also, Silva v. Woodford, supra,* 279 F.3d 825, 847 [Ninth Circuit reverses a judgment of death because trial counsel followed the defendant's request that his family not be contracted in connection with a mitigation investigation] wherein no showing was or could have been presented of exactly what the omitted mitigation was because the investigation had not yet been performed.)

Appellant's position here (setting aside trial counsel's statements

indicating he would have presented mitigating evidence absent appellant's demands, previously discussed), is that crucial mitigating evidence was not presented at the penalty trial and that this omission was attributable to counsel's blind acquiescence to appellant's demand at the outset. (*In re Jones, supra,* at p. 567.) Practically speaking, the events occurring at the penalty phase of the trial raise grave doubts as to the validity of appellant's waivers of his rights to present mitigation and to seek a life sentence. Given the seriousness of the indications that they were not, and the implications of sentencing a defendant to death where there are strong indications of a faulty waiver of these rights, the threshold for a finding of harmless error is and should be extraordinarily high. ((*Simmons v. South Carolina, supra,* 512 U.S. 154, 172, Souter, J., concurring; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118, O'Connor, J., concurring.)

Appellant contends that a lack of reliability in the death judgment within the meaning of the Eighth Amendment, is shown because crucial mitigating evidence was omitted. (*Deere I,* at p. 364.) Further, even under the formulation for determining Eighth Amendment reliability set forth in *People v. Bloom (*1989) 48 Cal.3d 1194, lack of reliability is present. The Court in *Bloom,* held that the Eighth Amendment is satisfied if three elements were met: first, that the prosecution met its burden of proof during both phases of the trial; second, that the verdict was imposed "under

proper instructions and procedures," and third, that the "trier of fact has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*Id.* at pp. 1227-1228.)

In appellant's case, at least two of the three elements of the *Bloom* test for Eighth Amendment reliability are unsatisfied. First, the death penalty was not imposed under "proper instructions and procedures" because the failure of the defense to present crucial mitigating evidence was very likely attributable to trial counsel's ineffectiveness. Second, it cannot be concluded with confidence that the jury duly considered the relevant mitigating evidence appellant chose to present because it cannot be concluded with confidence that what was presented was the sum total of the mitigating evidence appellant truly sought to present. Any conclusion that is was presupposes that appellant's "waivers" of his desire to present mitigation and to seek a sentence less than death, were unequivocal and otherwise valid. As demonstrated, the record on this point is, generously construed, highly ambiguous at best. At worst, it shows waivers that were equivocal, and thus, invalid, a conclusion substantially supported by appellant's own conduct taken subsequent to his "waivers," which contradicted the strict letter of his demands. (*People v. Stanley, supra*, 39 Cal.3d at pp. 932-933.)

Thus, it is far from certain that such mitigating evidence as was

presented by the defense in fact represented all the mitigation appellant truly sought to present, or would have presented has his decision whether or not to present mitigation and to seek the death penalty had been made "temperately and not in the heat of passion . . . (*Deere II*, at p. 715.) A determination as grave as one that finds that the defendant has effectively waived his right to present mitigating evidence and to seek an LWOP sentence cannot rest on such a record. Rather, *there must be no doubt as to the validity of such waivers*, or as little doubt as humanly possible. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118, O'Connor, J., concurring (". . . this Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake.").)

Whatever else this record communicates, it communicates, at the very best, equivocation on this point; and thus, ambiguity, which counsel himself recognized even as he endorsed appellant's waivers. Accordingly, counsel's errors render the judgment in appellant's case unreliable under any standard, including that set forth in *Bloom*.

Appellant would note in passing that relief is not precluded on the basis of an inadequate showing of the nature of the omitted mitigation. (*Cf., People v. Williams* (1988) 44 Cal.3d 1127, 1153-1154 [even if trial

counsel rendered constitutionally ineffective assistance by not presenting character evidence, no prejudice shown because the record contained no indication of what, if anything, defendant's "mitigating character " evidence would have disclosed].)

In this case, trial counsel was specific as to the nature of mitigating evidence that was being forsworn:

This is not a case where no investigation was done or really just making a tactical choice not to put on mitigation. An extensive background investigation has been undertaken and completed in Mr. Brown's case. It started in 1992, if I remember correctly. I have in my office 1600 pages of documents. Many of those are duplications. But even if all of them are, there's still 800 pages of documents that have been compiled which form the basis for presenting mitigating circumstances.

They involve a background investigation. His family members have been interviewed. We have selected medical records, school records, records from the Youth Authority, prison, schools, and the probation department, his juvenile file we have. And so his background and history have been documented.

However, in this regard, Mr. Brown does not want to put his family through the ordeal of having to testify here. That's part of the basis for the decision. He's also been tested and interviewed by two psychologists, one several years ago, and another actually during the course of this trial.

*There are mitigating facts that could have been presented that come from his background in the form of abuse and neglect. The psychologist has mitigating facts that she could present, Dr. Martha Kiersch, K-I-E-R-S-C-H, a Fresno neuropsychologist. Another theme that could have been pursued is institutional failure. I think there were signs in his background that give hints of certain things that were essentially ignored.* (21 RT 3722.)

In any event, it is questionable whether *Williams* controls appellant's case on this point because there, like *Lang, supra,* and unlike the

present case, the death penalty was arrived at in a procedurally proper manner (*People v. Bloom, supra,* 48 Cal.3d at p. 1228, fn. 9.)

Where there *are* procedural defects, *e.g.*, a predicate claim of ineffectiveness resulting in the omission of mitigating evidence, it appears that no showing need be made on the record of the exact nature of the omitted mitigation; all that need be shown is that mitigation was omitted and that proper procedures were not followed (or, that appellant did not present all of the mitigation he wanted to present; or the prosecutor did not meet his burdens of proof at the guilt and penalty phases.) (*Bloom, supra,* at p. 1228; *see also, Silva v. Woodford, supra,* 279 F.3d 825, 847 [judgment of death reversed because trial counsel followed the defendant's request that his family not be contracted in connection with a mitigation investigation] wherein no showing was or could have been presented of exactly what the omitted mitigation was because the investigation had not yet been performed.)

In the present case, there is an antecedent claim of trial counsel ineffectiveness, (section C, *supra*), which would position this case under the rubric of *Bloom, Lang* and *Silva* on this issue; and in any event, there is an on-the-record showing of the nature and import of the missing mitigation such as was missing in *Williams*.

Finally, appellant notes that he is not precluded from raising the

issue of trial counsel ineffectiveness under the "invited error" rule announced by this Court in *People v. Lang, supra*, at pp. 1031-1032.) First, in applying the invited error doctrine, *Lang* was addressing a straightforward claim of alleged deficient performance based on counsel's failure to present mitigating evidence. This is not the claim here. Rather, appellant asserts that counsel's performance was deficient because, due to a misunderstanding of the law, counsel failed to exercise the professional judgment to which appellant was entitled.

The distinction is material. In *Lang*, the Court stated that "the doctrine of invited error operates to estop a party from asserting an error when the party's own conduct has induced its commission." (Id. at pp. 1031-1032, citing *People v. Perez* (19790) 23 Cal.3d 545, 549-550, fn. 3.)

In *Lang*, the defendant clearly induced the commission of the alleged error, which was the failure of trial counsel to present mitigating evidence. In the present case, there is no evidence that appellant contributed to counsel's ignorance of the law or his failure to exercise his reasonable professional judgment. While appellant, by virtue of his demands, may have created a requirement on counsel's part that judgment be exercised, appellant did nothing to prevent counsel's exercise of judgment and had no part in such failure. Accordingly, appellant did not "invite" the error claimed here.

For the same reason, this is not a case calling for the application of the "invited error" doctrine because appellant is not "claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own request [footnote omitted]" or is not "claiming to have been denied a fair trial by circumstances of [his]own making." (*Lang,* at p. 1032, citing *People v. Simmons* (19436) 28 Cal.2d 699, 722 [at defendant's insistence and against counsel's better judgment, counsel asked questions of police officer, called co-participant of robbery as a witness, and had statement of co-participant admitted into evidence, all of which operated to defendant's detriment]; *People v. Linden* (1959) 52 Cal.2d 1, 28-29 [defendant created a courtroom disturbance and thereafter urged resulting prejudice as grounds for a mistrial]; *People v. Gomez* (1953) 41 Cal.2d 150,l 162; *People v. Wilkes* (1955) 44 Cal.2d 679, 684 [defendant volunteered information during testimony and claimed error in the admission of volunteered statements].) Second, the *Lang* opinion creates an exception to its holding where there is an antecedent claim of counsel ineffectiveness apart from the mere failure to present mitigation. (*Lang*, at pp. 1032-1033.)

In the present case, unlike the above cases, appellant neither induced nor was complicit in the "acts or omissions" forming the basis of the claim; nor were the circumstance denying appellant a fair trial of

appellant's "own making," since appellant was not complicit in the ignorance of the law and failure to exercise professional judgment leading to those circumstances.

Second, where it is the alleged ineffectiveness of counsel that induces the conduct of the defendant which allegedly invites the error, or counsel's ineffectiveness is alleged to have tainted or somehow rendered invalid the conduct of the defendant supposedly inviting the error, the invited error rule does not apply to estop the defendant from raising such ineffectiveness as a ground for relief.

Stated another way, the invited error doctrine applies to acts or conduct resulting from strategic or tactical decisions but not to those based on mistake, fraud or neglect. (*See, People v. Williams* (2008 ) 43 Cal.4th 584, 629.) This principle was acknowledged by this Court in *Lang* when it carved out the exception to its holding in cases involving predicate or antecedent claims of counsel ineffectiveness, such as the situation in *Silva v. Woodford, supra*, in which Silva was permitted to raise the issue of counsel's ineffectiveness for failure to conduct a background investigation, even though counsel's faailure to conduct such investigation was simply in compliance with appellant's request.

Silva's claim was entertained because counsel had not taken the necessary steps to ensure that Silva was fully and knowledgeably informed

of the consequences of his demand. (*Silva v. Woodford,* 279 F.3d at p. 847 .) In effect, his claim of trial counsel ineffectiveness was not foreclosed by estoppel or by the "invited error" doctrine because his demand (that is, his waiver of his right to have counsel perform a background investigation) was invalid due to "mistake" and "neglect." i.e., counsel's failure to properly advise Silva of the consequences of his demand (waiver).

Indeed, any other result would jeopardize the right of a defendant who challenges an invalid guilty plea based on incorrect advice from his attorney. (*People v. McCary* (1985) 166 Cal.App.3d 1, 9.) Absent the "mistake, fraud or neglect" exception to the invited error doctrine, the defendant, facially at least, should be "estopped" to challenge his plea since it was the defendant himself who entered the plea and thus "invited" the error. However, in such a case, the plea (error) is induced by mistake or neglect. Thus, the defendant may attack the plea as not having been knowing, intelligent and voluntary. Where the alleged invalidity of the plea is the result of incorrect advice on counsel's part, the defendant may raise ineffectiveness of counsel as a claim for relief. (*McCary, supra.*) Indeed, any other conclusion would deny the defendant his federal due process rights.

There is absolutely no basis for concluding that this Court in *Lang*

intended to change existing law in this area. As stated repeatedly, the Court acknowledged an exception to its own holding grounded on the inapplicability of the invited error and estoppel doctrines in cases involving antecedent or predicate claims of ineffectiveness (*i.e.*, cases in which the asserted error, which otherwise would be barred, is grounded in fraud, mistake or ignorance).

Moreover, *none* of the cases relied upon by the Court in support of its application of the invited error and estoppel doctrines involved demands of the defendant induced by counsel's ineffectiveness. For example, there was no suggestion whatsoever that trial counsel in *Linden* (*People v. Linden, supra*), advised or otherwise induced the defendant to disrupt the courtroom, or that counsel did not properly advise Simmons of the risks inherent in his evidentiary trial strategies. (*People v. Simmons, supra*, at p. 722.)

In sum, nothing in the *Lang* holding suggests an intention on the Court's part to extend the invited error doctrine to cases in which the error invited is grounded in mistake, ignorance or fraud. Thus, even if it could be argued in the present case that appellant was "claiming ineffective assistance of counsel based on counsel's acts or omissions in conformance with the defendant's own request" or was "claiming to have been denied a fair trial by circumstances of [his]own making" (*Lang,* at p. 1032), the

invited error doctrine would not be applicable. Here, with respect to the "prejudice" prong of appellant's ineffectiveness claim, appellant contends that counsel, as a result of his ignorance of the law, permitted and perpetuated waivers and *de facto* waivers of appellant's rights to present mitigation and generally to attempt to secure a judgment less than death, and personally acted upon and permitted the trial court to act upon those waivers and *de facto* waivers, which were not valid or properly cognizable for purposes of sustaining a judgment of death.

In short, the conduct of the defendants allegedly "inviting" error in appellant's case and cases such as *Silva* and *McCary* were based on fraud, mistake or neglect, i.e., trial counsel's alleged ineffectiveness. In contrast, in *Lang, Simmons, Linden, Wilkes*, and like cases, no such underlying taint was present. Thus, the rationale for the application of the invited error doctrine in the latter cases would not apply to the present case. (*People v. Williams, supra,* 43 Cal.4$^{th}$ at p. 629.)

To conclude, appellant did not induce or participate in the error complained of herein. Alternatively, even if he had, appellant's claim involves allegations of mistake and neglect, removing this case from the ambit of the invited error rule as reiterated in *Lang*. (*Williams, supra,* at p. 629.)

Stating the identical principle (and result) in alternative fashion,

appellant contends that his demands that mitigation not be presented, and that an LWOP sentence not be pursued, even if such demands were the basis of the claim herein, were induced by antecedent claims of ineffectiveness within the meaning of the specific holding of Lang (i.e., counsel's ignorance of the law resulting in his mistaken belief that he was required to slavishly follow the client's demands). Thus, appellant's case falls within the stated exception to the "invited error" bar of *Lang*. (*Silva, supra,* 279 F.3d at p. 847; *McCary, supra*, 166 Cal.App.3d at p. 9.) Accordingly, appellant's claim is not barred by the invited error doctrine or by estoppel. Counsel's performance here was deficient and prejudice resulted in that the outcome here (a judgment of death) was unreliable within the meaning of *Strickland, Pope* and especially *Bloom*. The judgment of death must therefore be reversed.

## VI

## APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, RELIABILITY IN THE DETERMINATION OF FACTS UNDERLYNG A DEATH JUDGMENT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS WERE VIOLATED BY THE TRIAL COURT'S ACT OF PERMITTING APPELLANT TO BE ABSENT DURING THE PENALTY TRIAL.

Appellant prior to the penalty trial purported to "waive" his presence at that trial. (21 RT 3725.) As a result, he was physically present during the penalty phase. (21 RT 3735 .) Appellant, however, had no right to be absent from his penalty phase trial. (*People v. Majors* (1985) 18 Cal.4th 385, 415-416.) Accordingly, the purported waiver was invalid, and appellant was improperly absented from the penalty trial. This violated appellant's federal constitutional rights to due process, confrontation, to reliability in the determination of facts underlying a death judgment, and to be free from cruel and unusual punishments. (U.S. Const., Amends. V, VI, VIII, XIV; *United States v. Gagnon* (1985) 470 U.S. 522, 526.)43

Under the circumstances of this case, it cannot be assumed that the error could not possibly have affected verdict. First, this was not a strong

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43 This error cannot be deemed invited. Appellant was not was not absented from the proceedings based on disruptive behavior or threat of same. (*See, e.g., People v. Majors, supra,* at p. 415.) Moreover, his attempted waiver of the right to be present, in addition to being invalid *ab initio*, was not the product of a rational decision but rather, was the result of pique, frustration and anger at the jury's guilty verdict, for the reasons discussed in detail in Argument V, *supra.* (*People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [waiver resulting from anger or frustration at the guilty verdict is not a valid waiver].)

proceeds . . . [so that] a criminal trial cannot reliably serve its function . . . " (*Arizona v. Fulminante* (1991) 499 U.S. 279, 309-310.) Such errors affect the "entire conduct of the trial" and thus are not amenable to harmless error analysis. (*Id.*)

Even if not structural error *per se*, under the circumstances of this case, it cannot be assumed that the error could not possibly have affected verdict. First, this was not a strong prosecution case on the question of guilt. This was a factor weighing in favor of a verdict of life without parole (LWOP), notwithstanding appellant's protests that he wished to be sentenced to death. (*See, People v. Lewis* (2009) 46 Cal.4th 1255, 1314.)

Additionally, this was a case in which it may be fairly stated that appellant, while testifying at the penalty trial, in effect scolded the jury for returning a verdict of guilty on the evidence presented, and invited them to return a sentence of death if they could do so with a "clear conscience." (21 RT 3813; Argument V, *supra*.)

Under normal circumstances the jury would have seen this tirade for what it was, a product of anger and frustration on appellant's part, and been uninfluenced by it. Given the closeness of the case, the jury might have returned an LWOP verdict had appellant been present during the penalty trial. However, the fact that appellant purportedly "chose" to be absent, whether a rational choice or not, could have been interpreted as an egregious

act of disrespect for the proceedings (and, inferentially, for the jurors) which could have the effect of infusing appellant's berating of the jury with invective that would not otherwise have been present. In sum, appellant's diatribe, and his absence from the proceedings, exacerbated each other and could have tipped the balance in the direction of a death verdict.

Accordingly, the error cannot be deemed harmless under *Chapman*, and the judgment of death must be reversed.

## VII

## APPELLANT'S RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL, DUE PROCESS, RELIABILITY IN THE DETERMINATION OF FACTS UNDERLYNG A DEATH JUDGMENT, AND TO BE FREE FROM CRUEL AND UNUSUAL PUNISHMENTS WERE VIOLATED BY VIRTUE OF TRIAL COUNSEL'S ACT OF PERMITTING APPELLANT TO WAIVE HIS RIGHT TO PRESENT MITIGATING EVIDENCE, AND THEREAFTER FAILING TO WITHDRAW HIS SUPPORT OF THAT WAIVER EVEN IN THE FACE OF COMPELLING EVIDENCE THAT SUCH WAIVER WAS EQUIVOCAL AND THUS, INVALID

An attorney has a duty to protect the rights of his client. This duty includes preventing the client from waiving valuable rights without knowledge and understanding of all of the relevant circumstances. (*E.g. People v. Barnum* (2003) 29 Cal.4th 1210, 1218-1219.) Failure to properly advise the client, resulting in the entry of an invalid waiver of the client's rights, is ineffective assistance of counsel. (*People .v McCary* (1985) 166 Cal.App.3d 1, 9.) Trial counsel fell below this standard of care in the present case, to appellant's prejudice, compelling reversal of the judgment of death.

In a previous argument (Argument V, *supra*), in connection with the "prejudice" prong of *Strickland*, appellant asserted that effective counsel would not have sat idly by and allowed appellant to waive his right to present mitigating evidence and to pursue a sentence less than death at the penalty phase of his capital trial, and thereafter, aggressively defend and support those waivers, in the face of substantial and compelling evidence that those waivers were *equivocal*, and thus, that appellant, contrary to his stated desires and demands, did not in fact want or intend to forswear the

presentation of mitigating evidence, and did not truly want a sentence of death44, or that his stated desires in that regard were not the product of a rational thought process. (Arg. V *supra.*)

Counsel was aware of appellant's desire to present mitigation prior to appellant's purported waiver of the right to present mitigation. (21 RT 3730.) Thereafter, appellant's obvious expression of pique and frustration at the jury's guilt phase verdicts, and his challenge to its collective "conscience" (21 RT 3812-3813, together with his protestations of innocence, would have alerted any constitutionally effective counsel that appellant's stated desires to waive mitigation, and to seek the death penalty, were the products of such pique and frustration, rendering them equivocal and therefore, invalid. Appellant's intentions, at best, were ambiguous. Because there was no unequivocal waiver on appellant's part, there was no *valid* waiver on appellant's part. (*People v. Stanley* (2006) 39 Cal.4th 913, 932-933.)

Notwithstanding the foregoing, counsel permitted appellant to waive the presentation of mitigating evidence; and thereafter failed to challenge the validity of appellant's waivers once it became obvious that such waivers were invalid. (Argument V, *supra.*)

Appellant now contends, as a related but distinct claim of trial counsel

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44 Notwithstanding stated desire that no mitigation be presented, appellant thereupon presents mitigation in the form of denials of involvement in the present case and alleged 190.2(b) offenses; appellant, after claiming to want the death penalty, in effect suggests to the jury that its conscience should not permit it to render a death verdict where proof of guilt is so flimsy.

ineffectiveness, that by virtue of these failings and omissions, counsel's performance was deficient. (ABA standards 10.5; *People v. Stanley, supra,* at pp. 932-933.*)* And for the reasons set forth in Argument V, *supra,* incorporated herein by reference, these failings and omissions prejudiced appellant, necessitating reversal of the judgment of death.

Finally, it bears repeating that this claim is not foreclosed by the "invited error" doctrine of *People v. Lang, supra,* 49 Cal.3d at pp. 1031-1032, because the assertion here that counsel improperly failed to present mitigating evidence rests on a predicate or antecedent claim of ineffectiveness, *i.e.*, counsel's initial and subsequent failures to recognize that appellants' purported waivers were invalid. (Lang, supra, 49 Ca.3d 1032-1033; Argument V *supra.*)

For the above reasons, and for the reasons set forth in Argument V, the judgment of death must be reversed.

## VIII

## TRIAL COUNSEL WAS INEFFECITVE BY VIRTUE OF HIS FAILURE TO PRESENT AVAILABLE MITIGATING EVIDENCE AT THE PENALTY PHASE OF APPELLANT'S TRIAL.

As an argument separate from, but related to the foregoing arguments, appellant asserts his trial counsel was ineffective for failing to present available mitigating evidence, to wit: the background and character evidence, including evidence of abuse and institutional failure, not presented pursuant to appellant's request that such evidence not be presented. Trial counsel's failure to present this evidence denied appellant his federal and state rights to effective assistance of counsel and due process of law, and his right to a reliable death judgment. (U.S. Const., Amends. VI, VIII, XIV; Cal. Const., Art. I, secs. 15, 17; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *Lockett v. Ohio* (1978) 438 U.S. 586, 604-605; *People v. Deere* (*Deere I*) (1985) 41 Cal.3d 353, 364.)

In effect, appellant here raises the claim, not raised in the previous arguments and rejected by *Lang* and its progeny, that trial counsel has a duty to present available mitigation at the penalty phase of a capital trial, over the defendant's objection, if necessary. The failure to perform that duty here deprived appellant of effective assistance of counsel. (*Deere I, People v. Deere* (1985) 41 Cal.3d 353, 364.) Appellant contends that *Lang* and cases relying thereon are wrongly decided and operate to violate a capital

defendant's constitutional rights as set forth above, and that the reasoning of *Deere I* is both persuasive and correct:

> "Since 1976 the United States Supreme Court has repeatedly recognized that the qualitative difference between death and all other penalties demands a correspondingly higher degree of reliability in the determination that death is the appropriate punishment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305[49 L.Ed.2d 944, 961, 96 S.Ct. 2978] (plur. opn.).) And since 1978 the high court has insisted that the sentencer must be permitted to consider any aspect of the defendant's character and record as an independently mitigating factor. (*Lockett v. Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed. 2d 973, 989-990, 98 S.Ct. 2954 (plur. opn. of Burger, C.J.).)

To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant himself was prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.

> In *People v. Frierson* (1979) 25 Cal.3d 142, 164-167 (158 Cal. Rptr. 281, 599 P,2d 587], we held *when mitigating testimony can be produced with due diligence, failure to call witnesses to give such evidence in the penalty phase of a capital trial deprives the defendant of effective assistance of counsel.*" (emphasis added.) (*Deere I, supra*, 41 Cal.3d 353, 364.)

Finally, if *Deere I* is correct and the presentation of available mitigating evidence is a constitutionally-mandated component of a valid death judgment (and therefore, in effect, *nonwaivable* by the defendant (see, *Deere, supra*, at p. 364), then it necessarily follows that the "invited error"

rule referenced in *Lang* is inapplicable to the claimed error here.

Accordingly, the judgment of death must be reversed.

## IX

## APPELLANT WAS DENIED COUNSEL AT THE PENALTY PHASE OF HIS TRIAL, REQUIRING PER SE REVERSAL OF THE JUDGMENT OF DEATH

Appellant has previously asserted that trial counsel was ineffective by virtue of acts and omissions permitting and perpetuating appellant's waiver of the presentation of mitigating evidence, the right to cross-examine witnesses in aggravation, and the right to a penalty phase closing argument, which waiver appellant asserts was, in effect, a waiver of the right to counsel for purposes of seeking a judgment less than death. (Argument VII, *supra.*) Appellant contended that such waiver was invalid because it was equivocal. Furthermore, any effective attorney would have recognized this prior to appellant's waivers, and/or as the penalty trial progressed, and would have acted accordingly. (Arguments V, VII, *supra.*)

Appellant now asserts that, as a result of appellant's invalid waiver of the right to counsel, he was denied his right to counsel at a critical stage of the proceedings, *i.e.*, the penalty phase of his capital trial; and also was denied his rights to due process and to be free from the arbitrary imposition of the death penalty. (U.S. Const., Amends. VI, VII, XIV.) The denial of counsel was reversible error per se. (*United States v.* Cronic (1984) 466 U.S. 648, 659.)

A criminal defendant has a right to counsel at critical stages of the proceedings unless that right is waived pursuant to a valid waiver. (*Faretta v. California* (1975) 422 U.S. 806; *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445; also *People v. Stanley* (2006) 39 Cal.4th 913, 932-933 [waiver must be unequivocal to be valid].)

Because there was no valid waiver of the right to penalty phase counsel in this case (Argument V, *supra)*, appellant's right to counsel was denied, compelling reversal of the judgment of death. (*Cronic, supra,* 466 U.S. at p. 659.)

Additionally, whether or not appellant waived his right to counsel, he was denied his right to counsel at the penalty phase by virtue of his counsel arguing to the penalty jury that appellant should be sentenced to death.

In this case, with reference to the penalty trial, appellant purported to waive his right to have counsel give a closing argument or to object to statements counsel might make during closing argument. (21 RT 3734.) For reasons discussed previously (Argument V, *supra*), appellant contends that this waiver was invalid, whether or not appellant's statements amounted to a blanket waiver of counsel at the penalty trial.

Subsequent to this invalid "waiver" and at the conclusion of the taking of evidence at the penalty phase, counsel gave the following closing

argument, during which asked the jury, albeit reluctantly, to impose a sentence of death:

> MR. CROSS [DEFENSE COUNSEL]: It's a very difficult thing for me to do, to ask you to find a death verdict for my client. I have – however, I have an ethical obligation to my client. I have a duty of loyalty to him, to be his advocate. He's taken the stand and he's told you that he does not want the penalty of life without the possibility of parole, so he has asked you for the death penalty.
>
> Just as I have an obligation to stand here to do this, you have an obligation, too, to follow the law. (21 RT 3832-3833.)

Closing argument is a critical stage of the proceedings, and an attorney who argues against his client and in support of the prosecution's case at that stage, absent appropriate waivers, thereby denies his client the right to counsel. (*King v. Superior Court* (2003) 107 Cal.App.3d 929, 950; *In re Lucas* (1995) 12 Cal.4th 415, 446.) Appellant at all times had a right to counsel who did *not* argue in support of the prosecution's position, unless and until entered a valid waiver of that right. He never did so. His various purported waivers of this and other rights enabling him to seek a judgment less than death were demonstrated, by accompanying and subsequent events to be equivocal, not the product of rationally thought and, therefore, invalid. (Argument V, *supra*; *People v. Stanley, supra*, (2006) 39 Cal.4th 913, 932-933.)

Absent appropriate waivers (or a valid tactical reason)45, counsel was duty bound to argue that appellant should be sentenced to life without parole. (ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, Commentary to Guideline 10.5.)

Counsel argued against this position. (21 RT 3832-3833.) This denied appellant his right to counsel, necessitating reversal of the death judgment. (*King v. Superior Court, supra*, 107 Cal.App.3d at p. 950.)

Finally, appellant's claims under *Cronic* are not subject to the invited error rule of *People v. Lang, supra,* 41 Cal.3d, at pp. 1031-1032.) Appellant has found no case in which application of that doctrine has been employed as a substitute for a knowing, intelligent and voluntary (and unequivocal) waiver of the Sixth Amendment right to counsel, and since a criminal defendant enjoys this right until such a waiver is entered (*e.g., Faretta v. California* (1975) 422 U.S. 806; *Miranda v. Arizona, supra,* 384 U.S. 436, 444-445), any purported use of the "invited error" rule as a proxy for a knowing, intelligent and voluntary (and unequivocal) waiver of counsel particularly where the defendant has never even been advised of the right purportedly waived, would probably run afoul of the defendant's rights

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45 As demonstrated (Argument V, supra), there was no valid tactical reason for counsel to argue in favor of a death judgment because such decision was grounded on the erroneous assumption that counsel was duty-bound to assist appellant in securing a judgment of death.

under the Sixth and Fourteenth Amendments.

Thus, if appellant's statements and purported waivers were effectively a waiver of the right to counsel, the waiver was invalid and the invited error rule does not apply. If on the other hand appellant's statements and demands were not a *de facto* waiver of the right to counsel, the invited error rule is inapplicable, for the reasons stated in Argument V, *supra*.

For the above reasons, the judgment must be reversed.

## X

## THE TRIAL COURT ERRONEOUSLY ACCEPTED APPELLANT'S WAIVERS OF THE RIGHT TO PRESENT MITIGATION, AND RIGHT TO CROSS-EXAMINE WITNESSES IN AGGRAVATION, AND HIS *DE DFACTO* WAIVER OF THE RIGHT TO COUNSEL FOR PURPOSES OF SEEKING A SENTENCE LESS THAN DEATH

As a separate claim, related to but distinct from the previous claims, appellant asserts that the trial court erred in allowing appellant to forswear his right to present mitigation and right to cross-examine the prosecution witnesses in aggravation. Such failure on the court's part denied appellant his federal and state constitutional rights to due process, to a fundamentally fair trial, to confront and cross-examine the witnesses against him, and to a reliable, non-arbitrary death judgment. (U.S. Const., Amends. VIII, XIV; Cal. Const., Art. I, secs. 15, 17.)

The law is clear that the defendant in a criminal case has a right to a fundamentally fair trial (*O'Neal v. McAninich* (1995) 513 U.S. 432, 443) and that the trial court has a duty to protect this right, with or without the active participation of the defendant's counsel. (*Cuyler v. Sullivan* (1980) 446 U.S. 335, 351 [attorney conflict case – "The court cannot delay until a defendant or attorney raises a problem, for the Constitution . . . protects defendants whose attorneys fail to consider, or choose to ignore, potential . . . problems. 'Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused . . . *Glasser*

*v. United States* (315 U.S. 60, 71 (1942)].) Particular solicitousness is required where the defendant has waived his right to counsel. (*Westbrook v. Alabama* (1966) 384 U.S. 150 ["the constitutional right of the accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused — whose life and liberty are at stake — is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." *Johnson v. Zerbst*, 304 U.S. 458, 465; *Carnley v. Cochran* , 369 U.S. 506"].)

In the present case, appellant purported to waive his rights to present mitigating evidence and to cross-examine prosecution witnesses in aggravation. These were the only mechanisms available to him for purposes of seeking a sentence less than death. (21 RT 3724-3728, 3732-3735.) Whether or not these waivers and relinquishments are deemed a formal waiver of the right to counsel for purposes of seeking a sentence less than death, it is beyond dispute that appellant, in practical effect at least, waived his right to counsel for purposes of having counsel assist him in availing himself of these mechanisms. Based on the foregoing authorities, the trial court had a duty, *sua sponte* if necessary, to ensure that appellant's relinquishment of rights and effective waiver of counsel, were valid and properly made. This included a duty to ensure that they were *unequivocal.*

(*People v. Stanley, supra,* 39 Cal.4th 913, 932-933.) [equivocal waiver is invalid].)

As the penalty trial in appellant's case progressed, it became increasingly apparent that appellant's supposed desire to forswear the presentation of mitigating evidence and be sentenced to death was in fact not genuine but rather was the result of pique, anger and frustration, rendering his purported waivers invalid. (*Stanley,* at pp. 932-933.)

The court, at the very least, should have been querulous when counsel advised that appellant wanted the death penalty yet intended to take the stand and proclaim his innocence in the present case and in the uncharged offenses. Furthermore, appellant's lecture to the jury, in effect challenging the jury's collective conscience for returning a guilty verdict based on such flimsy evidence, should have caused the trial court to withdraw its approval of appellant's "waivers," with or without the approval of appellant or his counsel, and to direct counsel to proceed with the presentation of the defense case in mitigation. The court's failure to do so prevented the presentation of mitigating evidence on the defendant's behalf and thus undermined the reliability of the death judgment, in violation of appellant's due process rights and proscriptions against cruel and unusual punishments, regardless of the standard employed. (U.S. Const., Amends. VIII, XIV; Cal. Const., Art. 1, secs. 15, 17; *People v. Deere, supra,* 41 Cal.3d at p. 364, citing

*Woodson, supra*, 428 U.S. 280, 285 and *Lockett, supra*, 438 U.S. 586, 604-605 [judicial ruling preventing defendant from presenting mitigating evidence violates Eighth Amendment]; *People v. Bloom, supra*, 53 Cal.3d 705, 716 [death judgment arrived at via use of improper procedures does not meet reliability requirements of Eighth Amendment].)

Finally, the "invited error" doctrine obviously has no application to the instant claim. (*People v. Lang, supra*, 41 Cal.3d at pp. 1031-1032.) As indicated in Argument V, *supra*, this Court's rulings have demonstrated no indication of any intent to abrogate such holdings as *People v. McCary, supra*, 166 Cal.App.3d 1, 9; *Boykin v. Alabama* (1969) 395 U.S. 238, 243-244; *In re Tahl* (1969) 1 Cal.3d 122, 130) *Tahl*, permitting a defendant to withdraw an invalid waiver. In any event, a contrary conclusion would violate federal due process standards.

For the foregoing reasons, the judgment of death must be reversed.

## XI

## CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION AND INTERNATIONAL LAW.

Many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the court's reconsideration of each claim in the context of California's entire death penalty system.

In *People v. Schmeck* (2005) 37 Cal.4th 240,303-304, this court held that what it considered to be "routine" challenges to California's capital punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (i) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." In light of this court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. Should the court decide to

reconsider any of these claims, appellant requests the opportunity to present supplemental briefing. The California Supreme Court has considered each of the defects identified below in isolation, without considering their cumulative impact or addressing the functioning of California's capital sentencing scheme as a whole. This analytic approach is constitutionally defective. "The constitutionality of a state's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163,179 n. 6 [165 L.Ed.2d 429, 126 S.Ct. 2516].)

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. California's death penalty statute potentially sweeps virtually every murderer into its grasp. There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, who may not agree with each other, and who are not required to make any findings. Paradoxically, the fact that "death is different" has been turned on its head to mean that procedural

protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims to put to death.

### A. Penal Code Section 190.2 Is Impermissibly Broad.

A constitutionally valid death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313 [conc. opn. of White, J.].) To satisfy this requirement, a state must genuinely narrow, by rational and objective criteria, the class of murderers eligible for death. (*Zant v. Stephens, supra,* 462 U.S. at p. 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty.

According to the California Supreme Court, the requisite narrowing in this state is accomplished by the "special circumstances" set out in Penal Code section 190.2. (*People v. Bacigalupo* (1993) 6 Cal.4th 857, 868.) However, the special circumstances found true in this case served no

meaningful narrowing function. [46] Penal Code section 190.2 (a) (17) encompasses almost every imaginable form of felony murder. These categories are joined by so many other categories of special-circumstance murder that the statute now comes close to making every murderer eligible for death. The California Supreme Court should reconsider and overrule its prior precedent and hold Section 190.2(a) is so broad that it fails in violation of the Eighth and Fourteenth Amendments properly to narrow the set of death eligible defendants.

### B. The Broad Application of Section 190.3, Factor (a), Violated Appellant's Constitutional Rights.

Penal Code Section 190.3, factor (a), directs the jury to consider in aggravation the "circumstances of the crime." Prosecutors can weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. In this case

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Two special circumstances were found to be true pursuanat to Penal Code section 190.2, subsection (a) (17), applying to murder which is committed while the defendant was engaged in or was an accomplice in the commission of, attempted commission of, or the immediate flight after committing or attempting to commit specified crimes: (iv) murder in the commission of sodomy in violation of Section 286; and, (v) murder in the commission of a lewd or lascivious act upon the person of a child under the age of 14 in violation of Section 288. (1 CT 101-102.)

the prosecution relied solely on factor (a) in support of its call for death. It relied on the circumstances of the homicide, [and the victim impact evidence which the California Supreme Court has said comes within the ambit the circumstances of the crime. ] (*People v. Zamudio* (2008) 43 Cal.4th 327, 324-325.) The California Supreme Court has not applied a limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 749.) The "circumstances of the crime" factor, however, can hardly be called "discrete." (*Brown v. Sanders* (2006) 546 U.S. 212, 222.) The concept of "aggravating factors" has been applied so loosely that almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As a result, California's capital sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it permits the jury to assess death upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [rejecting challenge to factor (a)].)

Appellant is aware the California Supreme Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of

the crime" within the meaning of section 190.3, subdivision (a), results in the arbitrary and capricious imposition of the death penalty. (See, e.g., *People v. Kennedy* (2005) 36 Cal.4th 595, 641.) However, appellant respectfully urges the Court to reconsider its previous holdings.

### C. The Jury Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard.

The question of whether to impose the death penalty on appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that death was warranted rather than a sentence of life without the possibility of parole." (CALJIC 8.88; 2 CT 489-490.) The phrase "so substantial" is a vague and impermissibly broad descriptor and does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright*, *supra*, 486 U.S. at p. 362.) The California Supreme Court has found that the use of the "so substantial" language does not render the instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant

asks this court to reconsider.

### D. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" and "substantial" (see Pen. Code §190.2, factors (d) and (g)) act as barriers to the meaningful consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.) Appellant is aware that the California Supreme Court has previously rejected this argument (*People v. Avila* (2006) 38 Cal.4th 491, 614), but respectfully urges reconsideration.

### E. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

As a matter of state law, each of the factors introduced by a prefatory "whether or not" - factors (d), (e), (f), (g), (h), and (j) - are relevant solely as possible mitigators. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.) The jury, however, was left free to conclude that a "not" answer to any of these "whether or not"

sentencing factor queries could establish an aggravating circumstance. The jurors were thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable,

individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879.) Further, the jury was also left free to aggravate the sentence based on an affirmative answer to one of these questions. The jurors were thus permitted to convert mitigating evidence (for example, evidence establishing a defendant's mental illness or defect) into a reason to aggravate a sentence in violation of both state law and the Eighth and Fourteenth Amendments. (But see *People v. Morrison* (2004) 34 Cal.4th 698, 730.) The very real possibility that appellant's jury aggravated his sentence on the basis of non-statutory aggravation deprived him of an important state-law generated procedural safeguard and liberty interest - the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 762, 772-775), and thereby violated appellant's Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating

circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; and *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].) It is highly likely that appellant's jury aggravated his sentence on the basis of what were, as a matter of state law, non-existent factors and did so believing that the State - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. For example, the trial court permitted testimony attacking appellant's character under the guise of relevant evidence admitted to give "context" to other alleged statements and events. (17 RT 2581.) Particularly in this case where ***no*** mitigation evidence was presented on appellant's behalf, the jurors could only be expected to treat the information as aggravating and use it to impose a death sentence for the instant crime. This violated not only state law but the Eighth Amendment by encouraging the jury to treat appellant "as more deserving of the death penalty than [he] might otherwise be by relying upon ... illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) Whether a capital sentence is to be imposed cannot be permitted to

vary from case to case according to different juries understandings of how many factors on a statutory list the law permits them to weigh on death's side of the scale.

### F. Appellant's Death Sentence is Unconstitutional Because it Was Not Premised on Findings Made Beyond a Reasonable Doubt.

California law does not require the use of a reasonable doubt standard during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25 Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255.) Appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. But the United States Supreme Court's decisions require that *any* fact used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. (*Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856]; *Blakely v. Washington* (2004) 542 U.S. 296; *Ring v. Arizona* (2002) 536 U.S. 584; and *Apprendi v. New Jersey* (2000) 530 U.S. 466.) In *Ring*, the Court struck down Arizona's death penalty 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. (*Ring v. Arizona, supra,* 536 U.S. at p. 593.)

Any factual finding which increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt. In *Cunningham*, the United States Supreme Court rejected the California Supreme Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law (hereinafter "DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range set by the sentencing statute. The high court explicitly rejected the reasoning used by the California Supreme Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial. (See *Cunningham v. California, supra,* 549 U.S. 270.) California law as interpreted by the California Supreme Court does not require that a reasonable doubt standard be used during any part of the penalty phase of a defendant's trial relied on as an aggravating circumstance, except as to prior criminality- and even in that context the required finding need not be unanimous. (See *People v. Hawthorne* (1992) 4 Cal.4th 43, 79.)

California's 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. CALJIC No. 8.88 is California's "principal sentencing instruction." (*People v. Farnam* (2002) 28 Cal.4th 107, 177.) Appellant's jury received this instruction, which stated in pertinent part: "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." (CALJIC No. 8.88; 2 CT 489-490.) 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 verdict; the jury can still reject death as the appropriate punishment notwithstanding these factual findings.

In *People v. Loker* (2008) 44 Cal.4th 691, 755, this court held that, notwithstanding *Cunningham*, *Apprendi*, and *Blakely*, a capital defendant has

no constitutional right to a jury finding on the facts supporting a death sentence. In the wake of *Cunningham*, however, it is clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that any factual findings be made before a death penalty can be imposed. Under California law, once a special circumstance has been found true life without possibility of parole is the default sentence. Death is not an available option unless the jury makes further findings that one or more aggravating circumstances exist, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (Pen. Code §190.3.) "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*, *supra*, 530 U.S. at p. 604.) The issue of the Sixth Amendment's applicability hinges on whether, as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." *Ring* and *Cunningham*, require the requisite fact-finding in the penalty phase to be made unanimously and beyond a reasonable doubt.

California law violates the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. Appellant urges this court to reconsider its decisions holding that California law is consistent with *Cunningham*, *Ring*, *Blakely*, and *Apprendi*. Appellant further urges the California Supreme Court to reconsider its holdings that the Eighth and Fourteenth Amendments do not require the trier of fact to be convinced death is the appropriate penalty and that the factual bases supporting the penalty are true beyond a reasonable doubt.

### G. California Law Violates the Sixth, Eighth, and Fourteenth Amendments by Failing to Require That the Jury Base Any Death Sentence on Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal Sixth, Eighth, and Fourteenth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries have discretion without significant guidance on how to weigh potentially aggravating and mitigating circumstances (see *People v. Fairbank, supra,* 16 Cal.4th at p. 1255), there can be no meaningful appellate review without written findings. It is impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.) The California Supreme

Court has held that the absence of written findings by the sentencer does not render the death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) Ironically, such findings are otherwise considered by this court to be an element of due process so fundamental that they are even required at parole suitability hearings and routinely in administrative law proceedings. A convicted prisoner who believes that he or she has been improperly denied parole must proceed by filing a petition for writ of habeas corpus and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (Id. at p. 267.) Similarly, administrative decisions must be supported by written findings. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-515.) The same analysis applies to the far graver decision to put someone to death.

In a *non-capital* case, the sentencer is required by California law to

state on the record the reasons for the sentence choice. (Pen. Code § 1170, subd. (c).)[47] Capital defendants are entitled to more rigorous protections than those afforded non-capital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to a non-capital defendant or a civil litigant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona*, *supra*), the sentencer in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen. Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15.) Even where the decision to impose death is "normative" and "moral" its basis can be, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems commonly require them. Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Section 190.3

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A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Title 15, Cal. Code Regs., §§ 2280 et seq.)

is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. (See *Kansas v. Marsh, supra,* 548 U.S. at p. 179 [statute treating a jury's finding that aggravation and mitigation are in equipoise as a vote for death held constitutional in light of a system filled with other procedural protections, including requirements that the jury find unanimously and beyond a reasonable doubt the existence of aggravating factors and that such factors are not outweighed by mitigating factors].) The failure to require written findings in appellant's case thus violated not only federal due process and the Eighth Amendment but also the right to trial by jury guaranteed by the Sixth Amendment. The California Supreme Court has rejected these contentions in other cases. (See, e.g., *People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant respectfully urges this court to reconsider.

### H. The Death Verdict Was Not Premised on Unanimous Jury Findings.

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jurors, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234;

*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) "Jury unanimity ... is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 [conc. opn. of Kennedy, J.].) The California Supreme Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.)

The failure to require jury unanimity also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his or her sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158(a).) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see e.g., *Myers v. Ylst*, *supra*, 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.

To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" violates the right to equal protection and by its irrationality violates both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury. Appellant respectfully urges this court to reconsider.

## I. Some Burden of Proof Is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof.

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code § 520.) Section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided. Appellant, therefore, is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) Accordingly, the jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate

sentence.

The California Supreme Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137.) The court has also rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges this court to reconsider these decisions.

### J. California's Use of the Death Penalty as a Regular Form of Punishment Falls Short of International Norms of Humanity and Decency and Violates the Eighth and Fourteenth Amendments; Imposition of the Death Penalty Now Violates the Eighth and Fourteenth Amendments to the United States Constitution.

The California Supreme Court has rejected the claim that the use of the death penalty (or, alternatively, that the *regular* use of the death penalty) violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (See *Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook* (2006) 39 Cal.4th 566, 618-619; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) Standards of decency are never static. (*Trop v. Dulles, supra,* 356 U.S. at p. 101.) In light of the international community's overwhelming rejection of the death penalty as a regular form of

punishment, and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant respectfully urges this court to reconsider its previous decisions and hold the death penalty unconstitutional because, among other things, it violates the "evolving standards of decency that mark the progress of a maturing society" and constitutes a violation of international law. (*Trop v. Dulles, supra,* at p. 101.) "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy v. Louisiana* (2008) _ U.S. _ [ 171 L.Ed.2d 525, 128 S.Ct. 2641, 2650].)

## CONCLUSION

For all of the many witnesses presented, the prosecution's case against appellant was, to say the least, not strong; and, in fact, the items of evidence argued by the prosecution as sufficient to sustain the verdict (2 CT 505) were, at worst, inadmissible and extraordinarily inflammatory; unreliable as a matter of federal Constitutional law, or, at best, of negligible (if any) probative value. Additionally, trial court error irretrievably prejudiced the trial as to the special circumstance allegations. Finally, trial

counsel's ineffectiveness resulted in the failure of the defense to present mitigating evidence at the penalty phase of the trial. *On the record*, this failure was not attributable to any tactical decision or judgment on counsel's part.

In sum, Eighth Amendment reliability standards, and federal and state due process proscriptions, forbid a judgment of death, and, indeed, a judgment of conviction, based on the evidence presented, and the errors occurring, at appellant's trial.

For the above reasons, the judgment must be reversed in its entirety.

DATED: April 3, 2010

Respectfully submitted,

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Attorney for Appellant

**CERTIFICATION OF WORD COUNT**

I, Emry J. Allen, hereby declare that I prepared the attached Appellant's Opening Brief in *People v. Steven Allen Brown* (S052374) on a computer using Word Office 2007. According to that program, the word count of said brief, excluding tables, cover, attachments and this certificate, is 69,873 words.

Dated: April 2, 2010

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EMRY J. ALLEN