IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. MICHAEL AUGUSTINE LOPEZ, *Defendant and Appellant.*	)	S099549 Alameda County Superior Court No. H28492A

APPELLANT'S OPENING BRIEF

On Automatic Appeal from a Judgment of Death
Rendered in the State of California, Alameda County

(HONORABLE PHILIP V. SARKISIAN, JUDGE, of the Superior Court)

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DEATH PENALTY

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PEOPLE OF THE STATE OF CALIFORNIA, *Plaintiff and Respondent,* v. MICHAEL AUGUSTINE LOPEZ, *Defendant and Appellant.*	No. S099549 Alameda County Superior Court No. H-28492A

APPELLANT'S OPENING BRIEF

STATEMENT OF THE CASE

By an information filed on May 3, 2000, appellant and co-defendant Sandra Harris were charged in Alameda County Superior Court case number S099549. Both defendants were charged in Count 1 with the murder of Ashley Demichino[1] (Pen. Code, § 187, subd. (a).)[2] As to

[1] The victim's last name in the information is misspelled as "Dimichino." (5 CT 977.)

[2] All further statutory references are to the Penal Code unless otherwise noted.

appellant Lopez, the information alleged a special circumstance of torture. (§ 190.2, subd. (a) (18).) Count 2 alleged assault resulting in death of a child under the age of 8 (§ 273ab) as to both defendants. As to appellant Lopez only, Count 3 alleged lewd and lascivious acts on a child under 14 (§ 288, subd. (b)) with an enhancement alleging the infliction of great bodily injury (§ 12022.8, subd. (b)). Count 4 alleged as to Harris only a violation of section 273a, subdivision (a), willful harm or injury to a child, with an enhancement under section 12022.95, willful harm and injury resulting in death. Six prior convictions, five of which were charged as prison priors under section 667.5, subdivision (b), were charged against appellant; one non-prison prior was alleged against co-defendant Harris. All of the counts were alleged to have occurred "between May 30, 1999 through June 4, 1999." (5 CT 997-1002.)[3]

Following a joint jury trial, both defendants were found guilty of first degree murder and all other counts and enhancements as charged. The torture-murder special circumstance against appellant was found true. (6 CT 1286-1289; 1290-1300.) Appellant admitted the truth of one prior conviction and the jury found true five others. (67 RT 4417; 6 CT 1296-1300.)

The penalty phase against appellant began on February 21, 2001, with the People's case in aggravation. (6 CT 1446-1447.) The defense case in mitigation started the following day and the case was presented to the jury on March 1, 2001. (6 CT 1455.) After three and a half days of deliberations, the jurors announced they were deadlocked. (6 CT 1459, 1460.) The court sent them back for further deliberations. On the seventh

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[3] "CT" refers to the Clerk's Transcript on appeal; "RT" refers to the Reporter's transcript on appeal.

day of deliberations, the jurors again informed the court that they were deadlocked "with no hope of resolution." (6 CT 1469.) Again, they were sent back to deliberate further. After two more days of deliberations, the jury returned a verdict of death. (6 CT 1471, 1472.)

Appellant's motions for new trial and modification of sentence were denied at a sentencing hearing on July 20, 2001. The court imposed a sentence of death for Count 1; 25 years to life for Count 2; the mid-term of 6 years, plus an additional 5 years for the section 12022.8, subdivision (b) enhancement; 1 year each for four of the prior convictions. The terms for Counts 2 and 3, the section 12022.8 clause and one of the prior convictions were stayed. (6 CT 1543-1546.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a verdict of death and is automatic under Penal Code section 1239, subdivision (b).

INTRODUCTION

Michael Lopez was convicted of battering, sexually assaulting and ultimately killing 21-month-old Ashley Demichino, the granddaughter of his live-in girlfriend and co-defendant, Sandra Harris, who was staying with appellant and Harris for the week before she died. Appellant's convictions and death sentence rest precariously on the word of his jointly charged co-defendant; her daughter, who was with Ashley in the days and hours leading up to her death, and whose own culpability as Ashley's abuser and killer was certainly at issue,[4] and the grudging and belated claim of a five-

[4] Indeed, as the verdicts were being read, appellant shouted: "Laurie did it, Sandra. You know she did it" . . . "Her daughter did this. She brought that child over like that." (72 RT 4729.) Before he was removed from the courtroom, appellant said, "God as my witness, I never touched the little girl" . . . "Your daughter did this, Sandra. Laurie Strodtbeck did this." (72 RT 4731.)

year-old child that she saw appellant assault her younger sister.

Before Ashley came to stay with appellant and Harris, she was with 17-year-old Laurie Strodtbeck, Harris's daughter and a methamphetamine user who spent the days before she left Ashley with appellant and Harris partying with her friends. During the week, while appellant was at work, Ashley was at the apartment with Laurie and Harris while they smoked methamphetamine, just as she was in the hours before she was found comatose in her bed on Friday morning.

Sabra Baroni, Harris's five-year-old granddaughter, and Michael Lopez, Jr., Harris and appellant's three-and-a-half-year-old son, who were also in the apartment that morning, did not say they saw anything happen to Ashley until after they were repeatedly questioned by authorities and family members. Only then did they claim to have seen appellant come into the room where the three children were sleeping and throw Ashley to the floor. At trial, only Sabra stuck to this version of events; Michael Jr. admitted he saw nothing, but was told what to say in court.

The fairness of appellant's guilt trial was irreparably marred by the erroneous admission of highly unreliable and prejudicial statements by and about these two child witnesses. Without this badly tainted evidence, the prosecution had no case against appellant.

At the penalty phase, the jury was allowed to consider inadmissible and highly damaging evidence, including evidence admitted only against Sandra Harris at the guilt phase, in making their penalty determination.

The jury struggled to reach a decision at both phases of trial, deliberating for three days at the guilt phase; at the penalty phase the

deliberations were even longer and more difficult. After deliberating for seven days, the jurors were evenly divided. Twice they announced they were deadlocked, and twice the court sent them back. On the ninth day of deliberations, after one juror's tearful plea to be released because of the stress of the trial was denied and with the vacation of another juror looming, a verdict was rendered. Without the pressure that was exerted upon them, it is unlikely the jury would have reached a penalty verdict. In a case with such tragic and disturbing facts, the jury's difficulty in reaching a verdict must be seen as a reflection of the doubts they harbored about appellant's culpability.

STATEMENT OF FACTS

A. Guilt Phase Evidence

1. Family overview

In May 1999, appellant, who was 41 years old, and Sandra Harris, 46, were living together in an apartment in Hayward with their three-and-a-half year-old son, Michael Lopez, Jr., and five-year-old Sabra Baroni, the daughter of Harris's daughter, Nicole. (60 RT 4082, 4093.) Sabra had been living with Harris and appellant for about a year and a half because Nicole had a drug problem and could not care for her three children. (40 RT 2823; 59 RT 3946, 3953.) Sabra had obviously become a part of the household. She shared a room with Michael Jr., and the two children had matching boy's and girl's toy boxes and bicycles. (46 RT 3265; 51 RT 3533.) Sabra went on a family vacation to Disneyland and appellant took the kids on outings and with him to church on Sundays. (51 RT 3535, 3538; 53 RT 3678; 78 RT 4976.)

In May 1999, Nicole was in jail because of child endangerment allegations involving her son. (59 RT 3955.) Nicole's other daughter, 21-month-old Ashley Demichino, the victim in this case, was living with

Harris's stepfather, 72-year-old Jesse Lopez (no relation to appellant), with whom she shared a bed because she did not have one of her own. (40 RT 2818, 2823, 2829; 58 RT 3901.)

Harris's 17-year-old daughter, Laurie Strodtbeck, split her time between Jesse's house, her mother's apartment and her boyfriend's place. (40 RT 2823; 43 RT 3078; 59 RT 3957.) Laurie was a methamphetamine user who came to Harris and appellant's apartment every day after appellant left for work to smoke meth with her mother. (43 RT 3080-3081; 59 RT 3978-3979; 60 RT 4099, 4102.) According to Harris, appellant was concerned about this because he was afraid if they were caught, Child Protective Services (CPS) would take Michael Jr. away from him. Appellant threatened to take their son and never let Harris see him again if she did not stop using methamphetamine. (60 RT 4100-4101.)

Appellant's relationship with Harris's daughters was strained. According to Laurie, appellant would not allow Nicole in the house because she used drugs, and she and appellant were not close in May 1999. (43 RT 3076-3077.)

Harris was co-manager of the apartment complex and worked in an office adjacent to their apartment. She would start work at 3:00 p.m. when appellant got home from his 6:00 a.m. to 2:30 p.m. shift as a janitor at International Window company in Hayward. (42 RT 3000; 45 RT 3218-3222; 59 RT 3947.)

2. Ashley is left with Laurie

On Wednesday, May 26, 1999, Jesse Lopez was unexpectedly admitted to the hospital and left Ashley with Laurie. He had never trusted Laurie with Ashley before because he knew that Laurie "couldn't stand" taking care of Nicole's children, and he did not think Laurie could handle Ashley. (40 RT 2833.) He gave Laurie $400 to use to take care of Ashley

while he was gone. (40 RT 2830.) His understanding was that Laurie would take care of Ashley for the first couple of days and then take her to Harris's. (40 RT 2820.)

Laurie's plans for a party weekend were threatened by having to take care of Ashley. (43 RT 3082; 59 RT 3958.) She asked her great-aunt, Cindy Jardin, to take Ashley but Jardin refused. (43 RT 3088; 58 RT 3912.) When Laurie asked Harris if she would take Ashley, Harris said they would rather not have to take care of a third child in addition to Michael Jr. and Sabra. (43 RT 3086-3087.) According to Harris, Laurie, who said Ashley was a brat and she could not handle her, threatened to dump Ashley at the police department if Harris refused to take her. (59 RT 3957.) Unable to get anyone to take Ashley, Laurie simply continued with her party plans. Friends of Laurie's – male and female – stayed at Jesse Lopez's house. (40 RT 2841, 2860, 2874-2876; 43 RT 3050; 58 RT 3910.) On Friday night, Laurie and her friend, Kelly Reiss, who was also a methamphetamine user, took Ashley to a pool hall. (44 RT 3129; 58 RT 3911.) Reiss admitted that she and Laurie – and Laurie's mother – had smoked methamphetamine together, but denied that she and Laurie used any meth on Friday. (40 RT 2867.) Laurie admitted she had been using meth in the week before Jesse Lopez went into the hospital and that she used it almost every day in May.[5] (43 RT 3081; 44 RT 3145; 58 RT 3902.)

On Saturday, May 29, Laurie again asked Harris and appellant to take Ashley. At first they said they could not afford to have her but

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[5] According to Harris, who was summoned in the middle of the night on Saturday to help Laurie protect her truck from being vandalized by one of her friends, Laurie and "all of her dope fiend friends" were using methamphetamine at Jesse Lopez's house. (40 RT 2867; 58 RT 3902; 61 RT 4181.)

eventually agreed to take her after Laurie said she would give them what was left of the money from Jesse Lopez, about $200.[6] (43 RT 3053-3054.) Laurie put Ashley's clothes in plastic milk cartons and dropped her at the apartment with appellant and Harris. (43 RT 3089, 3092.)

3. Ashley's physical condition throughout the week

On Friday, June 4, 1999, ten days after she was left with Laurie Strodtbeck and six days after she came to stay with Harris and appellant, Ashley died from a skull fracture. At the time of her death she had bruises and scrapes over her entire body, a laceration to her external genitalia and severe bruising in her diaper area. (39 RT 2755; 47 RT 3289-3290.)

The evidence of Ashley's condition throughout the week that she was at Harris and appellant's apartment came primarily from Harris and Laurie. The prosecution theory was that appellant was responsible for inflicting all of the injuries to Ashley over the course of the week, beginning with the genital injuries on Sunday, and culminating in the fatal head injury early Friday morning. Harris was jointly tried as an aider and abettor to the abuse and murder because she was aware of the abuse, but did nothing to stop it, and failed to seek medical attention for the child. Appellant's culpability, therefore, depended entirely on Sandra Harris and Laurie Strodtbeck's claim that when Laurie dropped Ashley off on Saturday, she was uninjured.[7] According to Harris, when Laurie dropped

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[6] On Sunday, appellant went by the house and got the money from Laurie. (43 RT 3055-3056.) Even though Jesse Lopez was released from the hospital on Monday appellant and Harris agreed to keep Ashley because Jesse was too sick to take care of her. (43 RT 3091.)

[7] The prosecutor argued at the guilt phase: "On Saturday, May 29th of 1999, Ashley was delivered to the defendants with no injuries whatsoever." (68 RT 4468.) He continued: "So that is the first day of hell

Ashley off on Saturday she had a few little bruises on her face that looked like fingerprints, but she had no other injuries. (59 RT 3960; 60 RT 4013-4014.)

The prosecutor's theory was that appellant sexually assaulted Ashley, resulting in the genital laceration, on Sunday, May 30, while Harris was visiting her daughter, Nicole, in jail. (59 RT 3962.) A neighbor, Lupe Murillo, saw Ashley and other children playing outside that morning from about 9:00 or 10:00 a.m. until noon. (41 RT 2913.) According to Murillo, Ashley was walking normally, and did not appear to have anything wrong with her. (41 RT 2914.) Murillo saw the kids playing with a tricycle with no seat. (41 RT 2920-2921; Defendant Lopez Exhibit L.)

When Harris got home around 2:00 o'clock in the afternoon, Ashley was sleeping. (59 RT 3962.) According to Harris, appellant told her that Ashley was red in her diaper area, and when she woke up, Harris noticed she was "walking funny." (59 RT 3963.) Harris took her diaper off and saw she was bruised. (59 RT 3964.) According to Harris, Laurie had mentioned that Ashley had a diaper rash when she dropped her off, but because Harris did not change Ashley's diaper on Saturday, she did not see the condition of the diaper area until she changed Ashley on Sunday. (59 RT 3960; 60 RT 4018.) Laurie told the police she noticed the beginning of a diaper rash on Ashley on Thursday or Friday.[8] (44 RT 3128.)

Aside from this testimony, no evidence was presented about the

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week for little Ashley, a perfectly happy baby girl was delivered to the defendants." (68 RT 4469.)

[8] Laurie's friend, Kelly Reiss, testified she bathed Ashley on Friday night and did not notice any injuries to the genital area or bruises on Ashley's face. (40 RT 2841-2842.) Reiss did not recall if Ashley had a diaper rash. (40 RT 2854.)

condition of Ashley's genital area at the time she was dropped off on Saturday. According to the doctor who examined Ashley on the day she died, the genital injury was anywhere from three to seven days old, meaning that it could have been inflicted on Friday while Ashley was with Laurie. (47 RT 3297.)

Harris told appellant that it was not a diaper rash and asked him what happened. According to Harris, appellant said while Ashley was playing outside the kids took her diaper off and that Michael Jr. kicked her,[9] or she might have hurt herself on the bike.[10] (60 RT 4019-4020.) Harris testified she had hurt herself on a bike when she was a child, and although her injury did not look as bad as Ashley's, Harris felt she could take care of Ashley the way Harris's mother had cared for her.[11] (60 RT 4053.)

Harris had the day off on Monday, May 31, 1999, and did not notice anything happen to Ashley that day. Appellant watched Ashley for about an hour and a half while Harris went to Jesse Lopez's house and Sabra went on a picnic with some of the neighbors. (59 RT 3965, 3966 3967.) Laurie testified she did not see Ashley on Monday. (43 RT 3056.)

Except for Monday, which was a holiday, appellant went to work every day that week. His shift was 6:00 a.m. to 2:30 p.m. with a half hour

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[9] Michael, Jr. was described as "aggressive" and known to hit Sabra and Ashley with his toys. (44 RT 3168; 53 RT 3645.)

[10] A Big Wheels tricycle with no seat was recovered from a dumpster in the apartment complex by police who were directed to it by Sandra Harris who said she threw the bike away to prevent further injury to the children. (48 RT 3384; 55 RT 3766; Defendant Lopez Exhibit L.)

[11] Evidence of the infliction of the genital injuries is discussed in greater detail in Argument III, which addresses the sufficiency of evidence to support the conviction for Count 3.

lunch break which he took at 10:00 a.m. (45 RT 3222.) According to Harris, appellant's daily routine was to wake up at 4:00 a.m., shower, have some coffee and pray, before leaving for work. (59 RT 3974.)

After work on Tuesday, appellant took Sabra, Michael Jr. and Ashley to a doctor's appointment for Sabra. (59 RT 3967.) According to Harris, when they got back and while Harris was in the office, she heard noise coming from the apartment. She went next door and saw appellant standing at the doorway to the kids' bedroom. In the bedroom were boys from the apartment complex, Andrew and Rouslen[12], and Sabra and Michael Jr. Ashley was lying on the floor, crying. (59 RT 3969.) Rouslen was holding a stick. Harris heard appellant say, "Why is this baby on the floor with no diaper and you poking and hitting her with the stick?"[13] (59 RT 3971.) According to Harris, Sabra said Ashley was having a baby and they were helping her. (60 RT 4028.)

Laurie testified that Harris told her on Tuesday when she was at the apartment that Ashley had hurt her private area on a bike, but did not offer to show her the injury. (43 RT 3057.) Laurie asked if Harris was going to take her to the doctor because of the injury. Harris said no, because they did not have medical insurance. One aspect of the prosecution case against

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[12] Rouslen was an 8-or 9-year-old boy who lived in the complex. He was described as "rough, tough and vulgar," by other neighbors and was known to act out sexually, including telling little girls to "suck it." (57 RT 3848-3850; 60 RT 4085.)

[13] The sticks had been fashioned by appellant to lock the sliding windows when they were away at Disneyland. (61 RT 4127; Exhibits 42-45.) They were thrown away when Sandra Harris moved out of the apartment, but Harris told Luz Arzate, the co-manager of the apartment complex, about Rouslen using the sticks to poke Ashley in the genitals and asked Arzate to retrieve them. (61 RT 4128.)

Harris was her failure to take Ashley to the doctor. Harris claimed she believed Ashley's medical insurance lapsed when her mother, Nicole, went to jail. Jesse Lopez testified he told Harris otherwise and other evidence showed that the medical coverage was in force at the time. (40 RT 2799, 2836; 43 RT 3058; 60 RT 4006.) Laurie was at her mother's apartment for about an hour that day and saw Ashley only briefly as she was leaving. Appellant was carrying Ashley who seemed alert and was not crying. (44 RT 3133-3134.)

According to Harris, on Tuesday appellant told her that Ashley had fallen out of the bed while she and Michael Jr. were playing, hit her head on their dresser and got a bruise. (59 RT 4000-4001.) That night, Ashley was vomiting and had diarrhea. (59 RT 3973.) Harris gave her Tylenol and put her to bed. (59 RT 3973-3974.)

On Wednesday, June 2, according to Laurie, when she came to the apartment Harris showed her Ashley's diaper area which was badly bruised, including bruises on the inner thighs. There was a small amount of blood in her diaper. (43 RT 3059-3060.) Ashley was lying down the whole time Laurie was at the apartment. (44 RT 3136.)

Laurie claimed to be "shocked" when she saw Ashley without her diaper and talked to Harris about taking Ashley to the hospital. According to Laurie, Harris said she was going to talk to appellant when he got home. (44 RT 3134.) Laurie was questioned about her statement to Detective Wydler in which she said she heard appellant say that if Ashley was not better "tomorrow" they would take her to the hospital. According to Laurie, she recalled making the statement, but thought it took place on Thursday. (44 RT 3135.) Laurie saw Jesse Lopez during this period of time, and he asked about Ashley. According to Laurie, she did not tell him about the injuries because Harris had said not to because it would upset him. (44 RT

3105-3107.) Laurie did not tell anyone else about the injuries she observed.

The next day, Thursday, June 3, according to Harris, appellant did not come home for lunch. (59 RT 3983.) Laurie testified she came to the apartment after appellant left for work and saw Ashley with her diaper off. She thought the genital area looked the same as it had the day before, but noticed new bruises on the side of her head. (43 RT 3064.) According to Laurie, Harris told her that Ashley had fallen off the bed and hit her head on the dresser. (44 RT 3105.) Ashley was up and walking around, but every once in a while, she would hold on to the wall. (44 RT 3136.)

According to Harris, she bathed Ashley that morning and thought the genital bruises were getting better. Ashley was walking around, playing with dolls and in good spirits. (59 RT 3981.) Harris knew that Ashley had been crying that week, but she attributed it to Ashley's fighting with Michael Jr. and Sabra, and being sick. (59 RT 3982.) That afternoon, after putting the children down for a nap Harris heard Ashley crying. She came in and saw that Sabra had her pinned, was holding her ears and pounding her head into the pillow. (59 RT 3983.)

Other witnesses testified about seeing Ashley during the week and described her injuries. None of them, however, said they witnessed appellant inflict any violence upon the child.

Luz Arzate, co-manager of the apartment complex, worked in the office next door to Harris and appellant's apartment. (42 RT 2991.) Arzate testified she heard Ashley crying off and on all day Tuesday through the wall of the apartment while she was in the office from 9:00 to 3:00.[14] (42

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[14] Arzate claimed to recognize the child crying as Ashley, because when Ashley was staying with appellant and Harris for three weeks during the previous December, she cried then, too. (42 RT 2995.) Arzate testified at trial she can distinguish a child's cry of pain, fear or sickness, but

RT 2994-2995.) On Wednesday and Thursday, Arzate heard even more crying. (42 RT 2996.)

By the time Arzate arrived at the office in the morning, appellant had already left for work. He would come home briefly for lunch, usually for about 15 minutes, and then return at the end of his shift by about 3:30 p.m.[15] (42 RT 3001-3002.) For much of the time that Arzate claimed to hear Ashley crying, Ashley was in the apartment with Laurie Strodtbeck and Sandra Harris while they were smoking methamphetamine. (58 RT 3914, 59 RT 3978, 43 RT 3081, 60 RT 4102.) Arzate did not see Ashley outside the apartment all week. (42 RT 2992.)

On Wednesday evening, 14-year-old Leonora Murillo babysat for Sabra and Ashley.[16] (41 RT 2936, 2939.) Leonora described Ashley, who was in bed, as looking scared and tired, confused and dazed, with bruises on her face. (41 RT 2940, 2953.) When Harris came home and Leonora mentioned the bruises to her, she testified that Harris said the kids had been playing around. (41 RT 2941.) Ashley threw up after Harris came home, but did not cry while Leonora was there. (41 RT 2944.) Leonora did not change Ashley's diaper that night. (41 RT 2953.)

On Thursday, according to Leonora, she asked Harris about the bruises on Ashley's face. Harris said Ashley had rolled over and hit her face on the side of a bureau. (41 RT 2946.) Thursday night Leonora

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admitted that she had changed her testimony from the preliminary hearing at which she said the crying could be consistent with Ashley having the flu. (41 RT 3010.)

[15] As noted, appellant did not come home for lunch on Thursday.

[16] Lupe Murillo and her daughters Leonora and Esmeralda all testified at trial. To avoid confusion, they will be referred to by their first names.

babysat while appellant went out with Michael Jr. to pick up Harris, who had a flat tire. (41 RT 2959.) Ashley looked tired and confused and was not active. (41 RT 2947.) While Leonora was there on Thursday, Harris changed Ashley's diaper and pointed out the bruising on her "bottom area." (41 RT 2944.) Leonora told Harris the bruising did not look normal, but when Leonora suggested Harris should take Ashley to the hospital, Harris said she was afraid people would think she was hurting the child and she did not have medical coverage. (41 RT 2945.)

Esmeralda Murillo, Leonora's sister, was with Laurie on Thursday afternoon and came with her to the apartment after dinner. Ashley was sleeping in bed between appellant and Harris, but woke up as Esmeralda was leaving. (41 RT 2886-2887.) She was wearing a diaper and a shirt, not covered by a blanket and Esmeralda saw bruising on her face. (41 RT 2905.) According to her mother, Lupe, Esmeralda told her that Ashley looked sick and sad. (41 RT 2930.)

According to Harris, on Thursday Ashley vomited while Leonora was there and at around 11:00 p.m. Harris went to the store to get some Pedialyte. When she got home, everyone was asleep. (59 RT 3985.)

4. Friday, June 4, 1999

Harris testified that on Thursday night she was "wired" from meth and not able to sleep, so she stayed up working on stained glass until 4:00 or 4:30 a.m. on Friday morning, June 4. (59 RT 3986; 60 RT 4041, 4044.) She fell asleep, woke up at 5:30 and noticed appellant was still asleep. (61 RT 4159.) According to Harris, appellant overslept that morning because Michael Jr. had broken the alarm clock the day before. Appellant got up, took a shower, and went to work. (60 RT 4044; 61 RT 4160.)

In one of her statements to the police, Harris said Ashley woke up Friday morning around 4:45 a.m. and appellant went in to change her

diaper. She testified at trial that she was confused about the days when she spoke to police and that this happened on Thursday, not Friday morning. (60 RT 4046-4050.) Detective Martinez, who took statements from Harris, wrote in his report that she seemed confused between Thursday and Friday. (67 RT 4408.)

According to Harris, she looked in on Ashley, who did not get up with the other two children, and saw that she was huddled up on the corner of the bed she shared with Sabra. (61 RT 4160, 4161.) Laurie testified that when she arrived at the apartment around 9:00 a.m. on Friday morning, Ashley was still in bed, but the other two children were up and about. (43 RT 3066.) Laurie did not recall whether the two children said that Ashley was still sleeping; neither she nor Harris testified the children said anything at all about Ashley. (58 RT 3916.)

According to Harris, Laurie arrived around 9:00 to 10:00 a.m. (59 RT 3987.) The two of them smoked methamphetamine while Sabra and Michael Jr. watched television in Harris's bedroom. (61 RT 4160, 4161.)

According to Laurie, she looked in on Ashley at around 9:30-9:45 a.m. and thought she was sleeping. (44 RT 3110.) Laurie did not ask her mother why Ashley was still in bed at that time when she usually got up around 7:30 or 8:00 in the morning. (43 RT 3067; 44 RT 3108, 3110.)

Harris went out to the liquor store to get cigarettes and left Laurie with the three children in the apartment. (61 RT 4163.) Harris testified that when Laurie was coming down after having smoked methamphetamine she was very aggressive, and would get irritable and angry. (61 RT 4160-4161.)

According to Harris, when she returned from buying cigarettes, which took about 15-20 minutes, appellant had come home for lunch and was on the phone talking to her daughter, Nicole. (61 RT 4161-4163.)

Appellant asked Harris asked where Ashley was and why she was not up yet. According to Harris, she and appellant and Laurie went into the children's bedroom. (59 RT 3988; 61 RT 4164.) Harris testified she said Ashley's name, and when she did not respond, picked her up and saw that her body was limp. (59 RT 3988.) According to Laurie, this happened at around 10:30 a.m. (44 RT 3108.)

Laurie testified she went into the bedroom when she heard Harris calling Ashley's name and saw Harris pick up the comatose child. (43 RT 3068-3069.) Appellant took Ashley from Harris and shook her, trying to wake her up, and lifted her eyelids, but she did not respond. (43 RT 3069; 44 RT 3112.) According to Laurie, Harris became hysterical and Laurie said they were taking Ashley to the hospital. Harris agreed, but appellant said "You can't take this baby to the hospital, Sandra, they will think you beat the shit out of this baby. They will arrest you, Sandra." (43 RT 3070.) According to Harris, appellant also said that if she did that, CPS would come and take Michael away from them and he was not going to allow that to happen. (61 RT 4164-4165.)

Harris took the child and she and Laurie left for the hospital. (44 RT 3138-3139.) Laurie drove Ashley and Harris to the emergency room at St. Rose Hospital. (43 RT 3070.) Ashley was unconscious and badly bruised over her entire body, especially in the perineal and abdominal areas, and was unresponsive to verbal or painful stimuli. (45 RT 3177-3178.)

From there, Ashley was transported to the ICU at Children's Hospital of Oakland and seen by Dr. James Crawford, a pediatrician and the Medical Director of the Center for Child Protection.[17] When Dr. Crawford

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[17] Dr. Crawford was qualified as an expert in pediatric child abuse and authorized to offer his opinion about injuries involving pain and extreme suffering. (47 RT 3276-3281.)

saw Ashley at around 4:00 to 6:00 p.m., she was wearing a diaper and he could see that she had bruises on virtually every part of her body. (47 RT 3282.) The majority of bruises were non-pattern bruises, caused by multiple events of blunt force trauma, and consistent with being punched by an adult sized fist. (47 RT 3287.) There was a relatively older injury – Dr. Crawford estimated it to be three to seven days old – to the genitalia, a tearing of the tissue of the posterior forchette and extreme swelling and bruising of the labia, the result of massive blunt force trauma. (47 RT 3290-3292, 3297.)

CAT scans of Ashley's brain revealed a large skull fracture and brain injury that ultimately caused her death.[18] (47 RT 3301-3302.) The injury was relatively recent, occurring perhaps as far back as 12-24 hours before she was seen at the hospital, but more likely within a 5-10 hour period. (47 RT 3303.) Apart from the skull fracture, there were over a hundred injuries to Ashley's body, which Dr. Crawford opined occurred over a period of time.[19] (47 RT 3309.)

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[18] Ashley's mother, Nicole, was transported to Children's Hospital from jail where she made the decision to remove Ashley from life support. (59 RT 3992.)

[19] Dr. Crawford's observations were for the most part confirmed by the autopsy performed by Dr. Thomas Rogers on June 5, 1999. (39 RT 2752.) Dr. Rogers described blunt injuries to the body consisting of multiple bruises and scrapes, located over the head and neck, torso, and all four extremities. (39 RT 2755.) There was a laceration of the external genitalia from the opening of the vagina, from the hymen area and extending almost to the rectum. (39 RT 2757.) The bruising and laceration were three or more days old. (39 RT 2766.) Inside the skull, there was subdural hemorrhage – bleeding on the surface of the brain – over the right side of the brain. There was also a skull fracture in the right back side of the brain. (39 RT 2769.) The fracture was approximately three inches long. The subdural hematoma was in a different location from the skull fracture.

Carol Boynton, a nurse at St. Rose's, suspected that Ashley had been abused and filed a child abuse report. (45 RT 3203.) Investigator Detective Frank Daley of the Hayward Police Department came to the hospital and spoke to Sandra Harris and Laurie Strodtbeck. (46 RT 3237-3238.)

Harris was quiet but not upset and gave the officer a description of Ashley's condition during the previous week. (46 RT 3239-3243.)

Detective Daley also spoke to Laurie who did not seem to be upset. (46 RT 3248.) Laurie lied to Daley and told him she had to leave the hospital to give her grandfather his medication, but she really went to Harris's apartment in order to hide the methamphetamine paraphernalia – pipes and the torch – at Harris's request. According to Laurie, by the time she arrived at the apartment, the paraphernalia had already been cleaned up. (44 RT 3115-3118; 3141.)[20]

According to Sandra Harris, when she and Laurie left to take Ashley to the hospital, appellant said he was taking Sabra and Michael, Jr. to the

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They could have been caused by the same blunt force injury or by two different applications. The skull fracture could have been caused by someone smashing the head of the baby on a hard surface like the ground. (39 RT 2770.) The subdural hematoma looked fresh, likely two days or less in age. (39 RT 2771.) The cause of death was multiple blunt force injuries. (39 RT 2774.)

[20] Laurie also lied to Detective Koller when she was interviewed later and told the officer that she did not like drugs because she saw what it had done to her mother and sister, and when she denied that she and her mother were using drugs in June 1999. (44 RT 3119; 55 RT 3758.) When Detective Martinez initially spoke to Laurie Strodtbeck, she denied that she or Sandra Harris were using drugs. (57 RT 3890.) When the detective questioned her again in July, she told him that her mother was using drugs, but she was not. After that, he received a message from Laurie that she wanted to talk about drug usage in the home, and made an appointment to meet with her, but Laurie failed to show up. (57 RT 3892.)

babysitter and going back to work.[21] (60 RT 4004.) At some point that day Sabra was brought her to the Hayward Police station by the girlfriend of appellant's brother. (55 RT 3737.) Sabra told Harris later that appellant took her and Michael Jr. to Kid's Castle. (60 RT 4056-4057.) Appellant and Michael Jr. did not return to the apartment. (60 RT 4057.)

Sabra was questioned that night by Detective Bobbi Koller of the Hayward Police Department.[22] (55 RT 3730, 3733.) In response to the officer's questions, Sabra said she did not see appellant do anything to Ashley. (55 RT 3755.) Michael Jr. was not interviewed until three days later. When he was asked who hurt Ashley, he said his mother had hit her. He said he had never seen his father hit Ashley. (55 RT 3762-3763.)[23]

5. Appellant's actions and the police investigation

Appellant's sister, Patricia Hindman, testified appellant came to her house in Modesto in June 1999, accompanied by his son. (43 RT 3018-3019.) While they were there, their mother called and told Hindman that something had happened to Ashley, although at the time Hindman did not know Ashley was dead. Appellant told Hindman that Ashley had knocked

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[21] According to his employer, appellant came to work as usual on Friday, June 4, starting his shift at 6:00 a.m. and taking a lunch break at 10:00 a.m. (45 RT 3222.) When appellant returned from his lunch break at 10:30 a.m. he had two small children, a boy and a girl, with him. Appellant left, saying he had a family emergency and did not return to work. He was terminated three days later. (45 RT 3223.)

[22] This and subsequent interviews with Sabra and Michael Jr. are addressed in greater detail in Argument I which challenges admission of the children's testimony and statements on the ground they were the product of suggestive and coercive questioning.

[23] Sandra Harris admitted during her testimony that she had been arrested for hitting Michael Jr. with a plastic kitchen implement. (61 RT 4173.)

her head on the bed and gone to sleep. (43 RT 3020-3022.) He stayed for about 30 minutes and asked Hindman how to get to Highway 99. She gave him directions, but did not ask where he was going. (43 RT 3019, 3023-3025.)

Appellant and Michael Jr., stayed in Monte Rio for three or four days with appellant's former brother-in-law, Isaac Corrales. (44 RT 3160-3162.) Appellant told Corrales that Ashley was injured riding on a bike and by Michael Jr. hitting her on the head with a toy box lid. Appellant said he put all three children to bed, and went to work the next morning. When he came back for lunch, he noticed something was wrong with Ashley and suggested she be taken to the hospital, but Sandra Harris did not want to take her in. (44 RT 3163-3164.) When appellant left Corrales's home in Monte Rio he did not say where he was going. (44 RT 3171.) According to Harris, while appellant was gone, he called her at least four times. (60 RT 4057.)

On June 17, 1999, appellant's sister, Christina Corrales, received a manila envelope in the mail. There was no address but the name "Officer Martinez" was written on the front. Officer Daley of the Hayward Police came to her home and opened the envelope which contained a cassette tape and letter, both from appellant. (55 RT 3795-3799.)

On June 24, 1999, appellant was charged with Penal Code section 278.5, child stealing of Michael Jr. (49 RT 3398.) Appellant was arrested in late June 1999, at the apartment he shared with Harris. Michael Jr. was with appellant when he was arrested. (56 RT 3826-3827.) Detective Martinez conducted videotaped interviews with appellant on two different days. (67 RT 4407-4408.) The interviews were not presented as evidence at trial.

Police officers and evidence technicians searched the apartment,

having been given consent by Harris, took photographs and gathered evidence in the days following Ashley's death. (46 RT 3266; 48 RT 3358-3359, 3369-3370 3378-3380, 3383-3387; 60 RT 3996.)

In response to a call from Harris on June 6, officers went to the apartment and collected a gray sleeveless shirt and pair of red shorts that Harris said appellant had worn to bed on May 30. Harris said the clothing was hanging behind the bathroom door.[24] (48 RT 3347-3350, 3370-3371, 3373-3374; 60 RT 3999.)

Two stains which "appeared to be blood" (50 RT 3468) from the gray t-shirt were tested. The positive result "indicate[d]" but did not "confirm" the presence of blood. (50 RT 3467.) The police officer who booked the shirt into evidence said that the stains appeared to be old and to have been washed. (57 RT 3888-3890.) DNA from the smear was tested and compared with samples from Ashley, appellant[25] and Harris. (50 RT 3467-3468.) Of the three, only Ashley could not be excluded as a possible source of the DNA, although it is possible that a sibling could have the same DNA. (50 RT 3472-3473, 3503.) Appellant and Sandra Harris were excluded; Ashley could not be excluded as the donor of the DNA found on the shirt. (50 RT 3467.) The analyst did not see any stains that might be semen, so they did not test for its presence. (50 RT 3489.)

Sandra Harris was interviewed by the police during the investigation

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[24] Leonora Murillo was in the apartment on Saturday, June 5, and saw the t-shirt hanging on a hook in the bathroom. She pointed it out to Harris and said it had blood on it. Harris said she would take care of it and later directed the police to the shirt which had been laid out on Sabra's bed. (41 RT 2948-2949; Peo. Exh. 41-A.)

[25] Appellant was cooperative in giving the blood sample. (48 RT 3368.)

of Ashley's death for extended periods of time on June 4, June 15 and July 1, 1999.[26] (67 RT 4399-4400.) Harris's interviews with Detective Jason Martinez on June 15 and July 1, 1999, were played for the jury, subject to an instruction limiting their consideration to Sandra Harris. (65 RT 4342-4345, 4361, 4364; Peo. Exhs. 60 & 61.) Before the interviews, Harris and Laurie collaborated in preparing notes which Harris referred to during the interviews. (67 RT 4406-4407; 4424-4425.)

Harris was arrested on July 1, 1999, and charged with child endangerment. (60 RT 4034; 61 RT 4170.)

6. Children's Testimony

Sabra Baroni was five years old at the time of Ashley's death, and six and a half when she testified at trial. (51 RT 3513.) Sabra testified that appellant came into the room where all three children were sleeping, Ashley in Sabra's bed with her, and Michael Jr. in his own bed. He held Ashley above his head and threw her on the ground. Ashley was crying before he did this. Sabra was hiding under the covers. Sabra did not see where appellant went after this happened. (51 RT 3521-3523.) Neither Sabra nor any other witness offered an explanation for how Ashley got from the floor, where Sabra claimed to have last seen her, back into the bed, where Sandra Harris said she saw her on Friday morning.[27] (61 RT 4161.)

Sabra also testified that she had seen appellant punch Ashley in "her privates." (51 RT 3517.) When asked if she ever saw appellant "do anything with his privates and with Ashley's privates" she motioned as

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[26] One statement took up three full tapes on both sides. (60 RT 4043.) The content of the interviews is set forth in greater detail below.

[27] According to Dr. Crawford, after having suffered this injury, Ashley would most likely have been unconscious. (47 RT 3304.)

described by the prosecutor: "She took her hands, put her arms up and made a motion going towards her body." (51 RT 3519-3520.) Sabra was impeached with her testimony at the preliminary hearing at which she said she did not see appellant doing this.[28] (51 RT 3552.)

Michael Jr. was three and a half years old at the time of Ashley's death and almost five when he testified. (53 RT 3666.) On direct examination, Michael Jr. said his father came into the room where he and Sabra and Ashley were sleeping, picked up Ashley and "cracked her head" when he threw her on the hard floor. After that, she never got up. (53 RT 3673-3675.) On cross-examination, however, Michael Jr. said he did not see anything that night. He said people had told him that his dad hurt Ashley; that he picked her up and threw her down. (53 RT 3680.)

7. Sandra Harris's defense

Sandra Harris testified in her own defense, describing the events leading up to and following Ashley's death, as set forth above. While Harris did not directly implicate appellant in her testimony, she did so in her statements to police, about which she was questioned extensively at trial.

Harris tried to disavow much of what she told the police, claiming that at the time she was angry at appellant for taking her son, and she was under the influence of methamphetamine during every interview.[29] (61 RT

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[28] In response to the impeachment of Sabra's testimony, the prosecutor was permitted, over defense objection, to introduce evidence of an incident six months earlier when Sabra broke her leg while she was living with appellant and Sandra Harris. This ruling and the subsequent testimony admitted by the trial court are discussed in detail in Argument IV.

[29] After appellant left, Laurie and Nicole moved in with Harris and the three of them were using "a lot" of drugs. (62 RT 4222; 67 RT 4424.) When Harris was arrested after a court hearing regarding Michael Jr. on July 1, 1999, she said she was under the influence of methamphetamine.

4140.) For example, Harris testified she did not remember what she meant when she told the officers that Ashley could not have fallen off the bed and hit her head on the dresser as appellant claimed. (60 RT 4054.) Harris told the police that if appellant did this – meaning murdered Ashley – he deserved to go to jail, but testified at trial that she meant that appellant "or whoever did this should be punished for it." (60 RT 4058.) Harris was asked about other statements she made during the taped interviews, such as saying "I would say that Mike did it," and answering the officer's question when she thought appellant abused Ashley, by saying "I guess, at work or at sleep or I get when he gets up in the morning." (60 RT 4067.)

Harris told police that appellant was using methamphetamine, but testified that she lied about it because she was angry at appellant for taking their son. (60 RT 4042-4043; 4077; 62 RT 4190.) Laurie Strodtbeck testified that appellant was doing an "eightball" of meth a day. Laurie claimed she would buy the drugs for appellant and Harris with money they gave her. (44 RT 3145-3146.) According to Harris, Laurie's testimony was based on Harris's original false statement, of which Laurie had a copy.[30] (60 RT 4042.) Harris said that it was she and Laurie who were using an eightball of meth. (62 RT 4192-4194.)

The prosecutor elicited testimony from Harris that she and appellant both committed perjury during a custody proceeding with her ex-husband. She testified at the hearing that she did not know who Michael Jr.'s father

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(62 RT 4227-4228.) According to Harris, she was tested by CPS and had dirty tests until she stopped using methamphetamine on October 31, 1999. (62 RT 4216.)

[30] Appellant was subject to drug testing at work if drug use was suspected. He had never been tested. (45 RT 3229.)

was, and that she and appellant talked about the perjury beforehand. (60 RT 4069-4071, 4075.) Harris was also asked about a falsified marriage certificate that was used to get medical coverage for her from appellant's employer. (60 RT 4059.)

Finally, Harris presented the testimony of Dr. Jules Burstein, a clinical and forensic psychologist who examined Harris and conducted psychological testing. (61 RT 4109-4113.) Nothing in the test results show an inclination toward any kind of aggression or violence or propensity for tolerating it, were it to be involved in the sphere of her family. (61 RT 4121.)

Dr. Burstein described Harris as being "in a state of massive denial" about Ashley's condition and what was going on in her home as late as the night before Ashley's death. (61 RT 4115.) She exhibited "an astonishing degree of denial," when she described her life with appellant as "perfect," when she had, in fact, told Dr. Burstein that appellant was an alcoholic who beat her, and that she was concerned about his treatment of their son. (61 RT 4115-4117.)

8. Appellant's Defense Case

Detective Bobbi Koller was called by appellant and questioned about the interviews she conducted with Sabra Baroni on June 4, 1999, the day Ashley died, and her subsequent interviews with Sabra and Michael Jr.[31] (55 RT 3733, 3741, 3776-3777; 3788-3790; Def. Exh. JJ.) The tape of the interview of June 4 was played for the jury. (55 RT 3788.)

Dr. Thomas Rogers, who performed the autopsy on Ashley, was recalled by the defense. He testified that he could say nothing about the cause of the bruises on Ashley's body. There are an infinite number of

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[31] See footnote 22.

ways of inflicting blunt force trauma, including a fall, children grabbing each other or being hit with a stick. (56 RT 3807.)

Dr. Rogers also testified that the blunt force trauma in the genital area was only to the external genitalia not to the vagina. The diffuse area of hemorrhage around the pelvic area and lower abdomen could possibly be a secondary hemorrhage from deep bruising that came out later. It is possible there was blunt force trauma applied to external genitalia causing damage and the blood could extravasate or travel outward and form the bigger area of hemorrhage. (56 RT 3809-3810.)

Melissa Herrera and her five children lived in the same apartment complex and knew appellant and Harris and the three children. (57 RT 3844-3855.) She used to see appellant interact with the children, and never saw him hit any of them. (57 RT 3846-3847.) She knew a boy named Rouslen, whom she described as tough, and who made suggestive remarks to the children, including telling little girls to "suck it." (57 RT 3848.)

Herrera saw Ashley being held up by two little girls on a metal bicycle with a missing seat.[32] (57 RT 3852.) She heard Harris tell the children to put the bike away because it was dangerous, but some of the boys, including Rouslen, would hide it under the stairs and take it out when Harris was gone. (57 RT 3852, 3855.)

On June 29, 1999, Herrera saw appellant and Michael Jr. at the apartment complex. She called the police because she knew they had been looking for appellant. (57 RT 3870.) She asked to remain anonymous because she was afraid for the safety of her children, if appellant was responsible for Ashley's death. (57 RT 3873.)

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[32] The bicycle was not the plastic one depicted in Defense Exh. L. (57 RT 3855.)

Detective Martinez testified he received a call from the Tracy Police Department on June 5, 1999, saying they had information that appellant was wanted for murder and was in their city. (57 RT 3881-3883.) Martinez told them appellant was not wanted for any crime at that time, and contacted Harris to tell her to stop giving out misleading information. (57 RT 3885-3886.)

Cynthia Ornate was Michael Jr.'s preschool teacher. (59 RT 3921.) Michael Jr. was thrown out of the preschool after he grabbed another student around his neck and choked him with both hands. The injuries, which included red marks on the child's neck were the worst Ornate had ever seen by a three-year-old. (59 RT 3922-3924.) Ornate heard from Michael Jr.'s reading buddy that he said his uncle had hurt his cousin, his daddy murdered his mother and his cousin, and that his mother was in jail and he missed her. (59 RT 3928-3929.)

Michael Jr.'s foster mother, Linda Roberts, testified that Michael, Jr. kicked another child in the crotch. (59 RT 3936.)

9. Prosecution Rebuttal

Over defense objection, Dr. Crawford was permitted to testify about Sabra's broken leg in November, 1998.[33] (63 RT 4233.)

B. Penalty Phase Evidence

1. Prosecution Evidence in Aggravation

The prosecution presented evidence under factor (b) of five incidents for which appellant was arrested and prosecuted. Two instances – one in 1986 and one in 1992 – involved appellant attempting to shoplift food or alcohol from a store and using force against authorities who tried to arrest him. (74 RT 4766-4794.)

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[33] See footnote 27.

Appellant's ex-wife, Donna Thompson, testified about two incidents. In one, appellant came by her apartment and Thompson claimed he went after her 15-year-old son and her with a knife. The police were called and appellant was arrested. (74 RT 4795-4797.) Years later, Thompson was supposed to make a bank deposit of money after work. While appellant was driving her to the bank, they got in a fight and he opened the door and shoved her out of the car. Appellant left with the money. (74 RT 4798-4803.)

Twelve-year-old Julieta Romero lived in the same apartment complex as appellant and Sandra Harris and knew Ashley, Sabra and Michael Jr. She saw appellant hit Michael Jr. with a stick as punishment for not listening to him. Romero had seen Michael Jr. spanked for acting out. He was "a mean little kid" who would get out of control and hurt people. (75 RT 4825-4831.)

In 1990, appellant was arrested for driving under the influence after he was stopped by a police officer investigating a report of an unauthorized person inside the gate of a plant in Union City. Appellant was belligerent and tried to kick the officer. (75 RT 4834-4844.) Another officer transported appellant to jail and was assaulted by appellant who punched him and broke his false teeth. (75 RT 4846-4853.)

Family members, including Jesse Lopez, Laurie Strodtbeck, and Maria Demichino, offered victim impact testimony about the effect on them of Ashley's death. (76 RT 4857-4875.)

2. Defense Evidence in Mitigation

Nell Riley, a clinical neuropsychiatrist, administered neuropsychological tests to appellant. (77 RT 4877-4887.) His overall IQ score was 66, a score "sometimes associated with people who are mentally retarded," although Riley testified she did not believe appellant is mentally

retarded. (77 RT 4887.) Appellant reads at a 3rd to 6th grade level, does arithmetic at a 4th grade level and identifies words at a 5th grade level. (77 RT 4889.)

Despite the fact that appellant had been in special education classes all through his school career, worked as a janitor – a job which Riley acknowledged did not require a lot of intellectual skills – Riley opined that because appellant had a job, a house and could drive a car, he did not meet the criteria for mental retardation. That, according to Riley, required that a person cannot function very well in the community and appellant could "do pretty much what normal people do." (77 RT 4890.)

Co-workers testified that he brought Michael Jr. and Sabra to work often and described acts of kindness by appellant, like bringing birthday cakes and cards. (78 RT 4963-4970.) Pilar Ford and appellant attended the same church. She saw him there with his son and granddaughter, Sabra. (78 RT 4974-4976.)

Family members described appellant's care for his and other children in the family over the years. The children always seemed happy and to be having fun when they were with appellant. (78 RT 4990-5005.)

In 1983, appellant was in a car accident, as a result of which he was in the hospital for several days and appeared to be comatose. According to his former sister-in-law, Rita Lopez, he seemed changed after the accident. (78 RT 4980-4982.)

Appellant's mother testified that appellant was the sixth of her ten children. (79 RT 5017.) After the car accident, appellant seemed changed. He had a drinking problem. (79 RT 5021-5023.) Both she and appellant's father, who also testified, expressed their love for their son and asked the jury to spare his life. (80 RT 5049-5052.)

3. Prosecution Rebuttal Evidence

Over defense objection, the prosecutor was permitted to present evidence of appellant's admission he collected food stamps and General Assistance payments for seven months and did not report his income from working. (80 RT 5055-5056.)

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I.

APPELLANT WAS DEPRIVED OF HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS BY THE ADMISSION OF UNRELIABLE STATEMENTS AND TESTIMONY BY THE PROSECUTION'S TWO CHILD WITNESSES

A. Introduction

The prosecution case that it was Michael Lopez – and not the other two adults who also had care and custody of Ashley Demichino in the days before her death – who sexually and physically assaulted and killed her is based on the statements and testimony of two very young children: Sabra Baroni was five years old at the time of Ashley's death and Michael Lopez, Jr. was three and a half.[34] At the trial a year and a half later, Sabra was six and a half and Michael was almost five. No other witnesses or physical evidence corroborate the prosecution's claim that Sabra and Michael Jr. saw appellant come into the bedroom where the three children were sleeping, pick up Ashley from the bed she shared with Sabra, and throw her down on the floor. Neither child said they saw anything when they got up the next morning, and both of them denied seeing appellant do anything to Ashley when they were first questioned by the police. It was only after repeated questioning by and exposure to adults who suggested that appellant was responsible for the fatal injuries that Sabra and Michael Jr. changed their stories. Michael Jr. admitted at trial that he did not see anything, but was told that his father had hurt Ashley and that he should say that at trial. Sabra's trial testimony consists primarily of grudging responses to leading

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[34] The children testified at trial. In addition, other witnesses testified to prior consistent and inconsistent statements of both children.

questions by the prosecutor.[35]

Despite the children's repeated denials that they witnessed the assault on Ashley and the unlikely story they eventually told – only after they were repeatedly exposed to flagrantly suggestive questioning by the adults who surrounded them – the trial court failed to properly make the most basic determination of their qualifications to testify, i.e., whether these two children actually saw who assaulted Ashley, before allowing them to testify.

The United States Supreme Court, which has demanded that "fact finding procedures aspire to a heightened standard of reliability" in capital proceedings (*Ford v. Wainwright* (1986) 477 U.S. 399, 411; *Beck v. Alabama* (1980) 447 U.S. 625, 638), has also recognized the "special risks " posed by "unreliable, induced, and even imagined child testimony" in cases like appellant's that rely on such evidence. (*Kennedy v. Louisiana* (2008) __ U.S. __, 128 S.Ct. 2641, 2663). The children's testimony and statements, upon which appellant's convictions and death sentence rest, were so unreliable that admission of this evidence violated appellant's rights to due process and a reliable guilt and penalty trial under the state and federal Constitutions. (U.S. Const., Amends. 5th, 8th, 14th; Cal. Const., article I, §§ 15, 17.)

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[35] As to the allegations of physical or sexual assault, Sabra testified at the preliminary hearing that she did *not* see appellant make the "thrusting"motions that the prosecution claimed were the basis for the sexual assault allegations (4 CT 743), and Michael Jr., who did not testify at the preliminary hearing, did not testify at trial about these allegations.

B. The Trial Court's Rulings Denying Appellant's Motions to Exclude the Children's Testimony Were Erroneous Because of the Court's Failure to Make a Determination of the Witnesses' Personal Knowledge Under Evidence Code Section 702 and Because the Record Does Not Support a Finding of Personal Knowledge

Trial counsel filed pretrial motions challenging admission of the testimony of six-year-old Sabra Baroni, and Michael Lopez, Jr. who was almost five years old, because they were subjected to "brainwashing" by the adults who surrounded them, and as a result, their statements and testimony were not based on their personal knowledge as required under Evidence Code section 702, and moved for a hearing under Evidence Code section 403.[36] (5 CT 1117.1-1117.6 [Sabra]; 5 CT 1140-1144 [Michael Jr.]; 38 RT 2686-2688.) The prosecutor opposed a hearing with Sabra on the ground that the magistrate's finding that she was competent to testify rendered a hearing in the trial court unnecessary, citing, inter alia, *People v. Dennis* (1998) 17 Cal.4th 468. (5 CT 1117.7- 1117.9.)

At a hearing on the motion, counsel argued that Sabra's statements that appellant sexually assaulted and killed Ashley were not based on what

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[36] Evidence Code section 702 provides: "(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter. (b) a witness's personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony."

Evidence Code section 403 provides in relevant part: "(a) The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when . . . "(2) the preliminary fact is the personal knowledge of a witness concerning the subject matter of his testimony . . . ."

she perceived herself, but instead on what she was told by others.[37] Counsel argued that Sabra was subjected to "brainwashing" "to the point that it's no longer testimony from her personal knowledge, but due to her tender age, she's been susceptible to the implications and the input from these people she's been with . . . ." (38 RT 2688.) Counsel for Sandra Harris joined in the request for a hearing, because of the concern that adults caring for Sabra "may have planted suggested [sic] evidence to her that is not from her personal knowledge." (38 RT 2689-2690.)

Trial counsel's objections triggered the trial court's obligation to determine whether Sabra and Michael Jr. had personal knowledge of the events about which they were called to testify. Unlike the determination under Evidence Code section 701,[38] which allows the trial court to reserve challenges to the witness's competence until after he or she testifies, "proof of personal knowledge must be shown *first*, once a party has made an objection that the proffered witness lacks personal knowledge of the facts to which he proposes to testify.'" (*People v. Daniels* (1991) 52 Cal.3d 815, 862, quoting Jefferson, Cal. Evidence Benchbook (1st ed. 1972) § 26.3, pp. 354-355, original italics.) Evidence Code section 702, subdivision (a),

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[37] This argument was made at the hearing on the motion to exclude Sabra's testimony. At the close of the hearing, counsel noted his objection to Michael Jr.'s testimony and subsequently filed a written motion based on the same grounds. (38 RT 2692.

[38] Evidence Code section 701 provides: "(a) A person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth. (b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness."

requires that a witness at trial have "'a present recollection of an impression derived from the exercise of the witness's own senses.' [Citations.] (*People v. Lewis* (2001) 26 Cal.4th 334, 356) . . . Under that section, the trial court must admit the proffered testimony of a witness upon introduction of evidence sufficient to sustain a finding that the witness has personal knowledge of the subject matter of his testimony. [Citation.]" (*People v. Tatum* (2003) 108 Cal.App.4th 288, 297-298.) The trial court's determination of the existence of the preliminary fact of personal knowledge is reviewed under an abuse of discretion standard. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

In ruling on the admissibility of Sabra's testimony, the trial court refused to conduct a hearing and relied instead on the finding made by the magistrate that she was "qualified" under Evidence Code section 701. (38 RT 2693.) The preliminary hearing transcript makes clear, however, that in ruling on the issue of Sabra's competence under Evidence Code section 701, the magistrate did not consider the question of personal knowledge under Evidence Code section 702.

At the magistrate's direction to "ask her a few questions so I get the feeling for her obligation to tell the truth," the prosecutor asked Sabra if she knew the difference between the truth and a lie using illustrations of how many fingers she was holding up and the color of her clothing. Sabra said she would get into trouble if she told a lie. (4 CT 710-713.)

In lieu of administering an oath, the trial court asked Sabra to promise to tell the truth in answering questions and she did. Trial counsel's request to voir dire the witness "to see if she qualifies" was denied by the magistrate who presumed her to be competent and relied on her answers to determine her ability to communicate. (4 CT 713.)

Questions about Sabra's competence to testify and her personal

knowledge of the events she was asked to testify about arose several times at the preliminary hearing. In response to many of the prosecutor's questions, Sabra either refused to answer, shrugged her shoulders, or said she did not remember. (See, e.g., 4 CT 717-722; 740 [magistrate notes that witness has "shrugged her shoulders to at least 80 percent of the questions you've asked in the last 15 minutes"].) After repeated objections by trial counsel to the prosecutor's questions, the magistrate noted its concern "about her [Sabra's] capacity to communicate. Despite the fact that she seems responsive to some questions, she seems very easily confused about others." The magistrate continued, " I'm not convinced that she really is able to understand what it is that is being asked and she may just be shaking her head yes out of – as children do, just to a question to say yes. She did answer no to some and so she does seem responsive to some degree. But I'm really concerned about this." (4 CT 722.)

Trial counsel objected to the prosecutor's method of asking Sabra questions prefaced by "Did you tell . . . ?" in order to set up the introduction of prior statements through other witnesses, arguing that it was not a "proper vehicle with this child." (4 CT 724-725.) He argued that she "probably is not a competent witness" and that "she's kind of saying what somebody wants her to say." (4 CT 725.)

The prosecutor insisted that Sabra had "made a series of statements which are inculpatory towards these defendants," and that it was fear that was making it difficult for her to testify. According to the prosecutor, "She does know what happened. She just is afraid to tell it." (4 CT 725.) Trial counsel disputed this by noting that Sabra told Detective Koller that she did not see anything happen and that another prosecutor had told the defense that he was not sure Sabra was willing to testify. (4 CT 726.)

Counsel was "concerned that pressure was put on her in one form or

another by various people so she comes up with some kind of a story." Counsel saw Sabra with the prosecutor, the foster mother and some other people "hovering" over the child in the hallway and wondered "whether all this pressure hasn't been put on this child to say what these people want her to say." (4 CT 726.) Ultimately, the magistrate ruled that "has nothing to do with what we're talking about here. That goes to credibility, that goes to things you can ask these other people."[39] (4 CT 725-726.)

Counsel for Sandra Harris objected to Sabra's testimony on the ground that her failure to do more than shrug her shoulders in response to most of the questions put to her demonstrated her incompetence to testify. (4 CT 769.) When counsel for appellant argued that the nature of Sabra's responses made it impossible to determine what she "observed or what she saw or what happened," the magistrate did not address counsel's concern over the apparent lack of personal knowledge, but instead simply reiterated its ruling that Sabra was competent under Evidence Code section 701 because she understood her duty to tell the truth and she was capable of expressing herself so as to be understood. (4 CT 771-772.)

The record is clear that both the trial court and the magistrate, upon whose rulings the trial court relied for determining the admissibility of Sabra's testimony, addressed only the issue of her competence under Evidence Code section 701 and not the question of her personal knowledge. The prosecutor's argument, based on this Court's decision in *People v. Dennis*, *supra*, 17 Cal.4th 468, was that the magistrate's finding of competence under Evidence Code section 701 constituted a finding that

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[39] The trial court made similar statements, noting that "in terms of the brainwashing," the issues "are certainly going to be fully explored on cross-examination." (38 RT 2694.)

Sabra was testifying "from her own knowledge." (38 RT 2690-2691.) Not only is this argument a misreading of this Court's decision in *Dennis*, it also fails to recognize the significant procedural differences between *Dennis* and the present case.

In *Dennis*, this Court rejected defendant's claim that the trial court erred in permitting an eight-year-old witness to testify because she was not questioned about her personal knowledge of the subject matter of her testimony – a request that was not made by trial counsel. The trial court conducted a pretrial examination of the witness's competency to testify to events she witnessed when she was four years old and determined that she was competent to testify under Evidence Code section 701. (*People v. Dennis*, *supra*, 17 Cal.4th at pp. 525-526.) The trial court's decision was supported, this Court found, by the voir dire of the young witness which

> showed that she could perceive and recollect, and she understood she should not invent or lie about anything she said in court. She was an eyewitness to the events. Consequently, once the trial court properly determined she was competent to testify under Evidence Code section 701, it had no basis for excluding her testimony for lack of personal knowledge.

(*Id.* at p. 526.)

Unlike the present case, in which trial counsel moved to exclude the children's testimony on the basis of their lack of personal knowledge and the trial court denied appellant the right to establish a record supporting his challenge, in *Dennis*, the defendant's objection to the testimony was made only on the basis of Evidence Code section 701, and the trial court conducted a voir dire of the witness in order to make its competency determination. Further, unlike the present case, in which the record establishes a basis for the claim of lack of personal knowledge, in *Dennis* no similar assertions of a failure to perceive or a basis for finding a lack of

personal knowledge were made by counsel.

Finally, in contrast to *Dennis,* in which the child was an eyewitness, the record of the preliminary hearing does not support a finding that Sabra witnessed the events that lead to Ashley's death. While both the magistrate and the trial court may have assumed that Sabra was an eyewitness because the prosecutor treated her like one, the record does not show that she was present at the time Ashley was assaulted.

Early in the hearing, the prosecutor asked Sabra, "Do you know what happened to Ashley?" Defense counsel's objection based on a lack of foundation was sustained. (4 CT 716.) After that, even though Sabra was on the witness stand for almost two hours, she was asked very few questions about her knowledge of violence committed against Ashley and none directly about whether she saw the fatal assault.[40]

The only remotely relevant testimony consisted of Sabra nodding yes when she was asked by the prosecutor whether she told Evelyn Vereau, a foster parent with whom she was placed after Ashley's death, "that Daddy hit Ashley and she didn't open her eyes anymore." (4 CT 750.) Sabra was not asked if she saw this happen, only whether she told Vereau that it did. On cross-examination, Sabra could not remember if she talked to Vereau about it and shrugged her shoulders in response to counsel's question whether she ever told Vereau that appellant hit Ashley. (4 CT 821.) Evelyn

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[40] Sabra was asked if appellant used to hit Ashley and she nodded yes and pointed to her left temple. (4 CT 730.) She nodded yes in response to a question if appellant spanked Ashley without her diapers on; she shook her head no that it happened more than once and said it was "on the butt." (4 CT 731-732; see also 4 CT 795-796 [Ashley spanked one time by appellant].) Sabra was not asked when these events happened.

Vereau testified at the preliminary hearing[41] that Sabra said she saw, "Daddy hit Ashley, and then she wouldn't open her eyes." (4 CT 888, 889.) Neither Vereau, Sabra, nor any other witnesses were asked when this allegedly occurred.

This testimony is not evidence from which a reasonable trier of fact could find that Sabra had personal knowledge of the circumstances of Ashley's death or the actions alleged to constitute sexual assault.[42] (*People v. Anderson* (2001) 25 Cal.4th 543, 574.) In *Anderson*, this Court upheld the trial court's decision to allow a witness, Baros, to testify at the penalty phase about an uncharged murder committed by the defendant, despite evidence that Baros experienced delusions that included her insistence that a non-existent child of hers was present at the time of the killing. (*People v. Anderson, supra*, 25 Cal.4th at pp. 574-575.) Critical to this Court's holding was evidence of

> many indicia by which a rational trier of fact could conclude that Baros, despite her specific delusions, was actually present during the Mackey robbery and murder, and had accurately perceived and recollected those events. Aside from her insistence that her son Anthony was present, Baros presented a plausible account of the circumstances of Mackey's murder. [Citation omitted.] Baros's description included many details, unlikely to be known by a person not present, that were corroborated by independent evidence. Moreover, as the trial court emphasized, Baros was able, after a long absence from Las Vegas, to direct authorities to the significant locations involved in the crime.

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[41] Vereau did not testify at trial.

[42] As to the sexual assault allegations, Sabra testified at the preliminary hearing that she did *not* see appellant making the "thrusting" motions which were alleged to constitute the sexual assault against Ashley. (4 CT 743.)

(*Id.* at p. 574.)

Similarly, in *People v. Lewis*, *supra*, 26 Cal.4th 334, this Court rejected a challenge on the basis of a lack of personal knowledge to the testimony of a witness who offered details of the crime that were likely known only to someone who was there and that were corroborated by independent evidence; neither can be said about Sabra's testimony. (*Id.* at p. 357.)

Further, in contrast to the witness in *Dennis*, who "understood that she was to testify only as to those matters she knew herself from her memory" (*People v. Dennis*, *supra*, 17 Cal.4th at p. 525), Sabra failed to distinguish between events that she personally witnessed and those she heard about from other people. On direct examination, when Sabra was asked: "Were you sleeping with Ashley when wicked big Mike came in and took her out of bed?" she said yes, and that he did it one time. (4 CT 717.) On cross-examination, she was asked the following questions:

Q [Counsel for appellant, Mr. Giller]: . . . Did he ever come into the room at night, when you were in the bed with Ashley, and take Ashley out of the room?

A: (Witness nods head yes)

Q: And he did that one time?

A: (Witness nods head yes)

Q: Okay. And did that – did you see him come in –

A: (Witness shakes head no)

Q: – into the room or did somebody tell you that he did?

A: (Witness shrugs shoulders)

Q: You don't know. Well, when you say that he came in the room and took Ashley out of the room, how do you know that?

A: (Witness shrugs shoulders)

Q: You don't know how you know. You didn't see him do that?

A: (Witness shakes head no)

Q: Did you see him do that?

A: (Witness shakes head no)

Q: Did you ever tell anybody that you saw him do that?

A: (Witness shrugs shoulders)

(4 CT 783-784; see also 4 CT 787 [witness never saw appellant take Ashley out of the room at night].)

Sabra's exchange with Detective Koller before the preliminary hearing starkly demonstrates her lack of personal knowledge. When the officer told Sabra she wanted to talk about what happened to Ashley, Sabra said, "Big Mike killed her." When she was asked how she knew this, Sabra said, "I don't know." (55 RT 3783.)

Because neither the magistrate nor the trial court made a determination under Evidence Code section 702, the trial court's finding that Sabra was "competent" is not entitled to deferential review on the question of whether she had personal knowledge of the events about which she was called to testify. (*People v. St. Andrew* (1980) 101 Cal.App.3d 450, 460 [trial court's finding of admissibility of victim's statements under Evidence Code section 701 rather than 702 not entitled to deference because of "serious doubts as to whether the trial court exercised its discretion on the basis of applicable legal standards"]; cf. *People v. Lewis*, *supra*, 26 Cal.4th at p. 359 [trial court's statements reflect proper understanding that capacity to perceive and recollect is not an issue relating only to impeachment].)

At the hearing to determine Michael Jr.'s competence, when trial counsel attempted to question the boy about whether he had been told what to say in court, the prosecutor objected that "this doesn't go to

qualifications. This is cross-examination." (53 RT 3669.) The objection was sustained and the court asked counsel if he had any further questions "under [Evidence Code] 701." (*Ibid.*) Counsel said he did not and the court ruled that the witness could testify. (53 RT 3670.)

The trial court's ruling was erroneous because, as to Sabra, the record of the preliminary hearing, upon which the court relied in making its determination that Sabra was qualified to testify, does not contain evidence "from which a rational trier of fact could find that the witness accurately perceived and recollected the testimonial events." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 574, italics omitted.) As noted, Michael Jr.'s admission – that trial counsel attempted to elicit at the pretrial qualification hearing – that he did not see his father assault Ashley, and he been told what to say in court, clearly established his lack of personal knowledge. (53 RT 3680-3631.)

C. Due Process Considerations of Reliability and Trustworthiness of Evidence Require an Adequate Determination by the Trial Court of a Witness's Personal Knowledge Before the Witness Testifies

If the trial court's rulings as to the children's competence are deemed by this Court to encompass a finding of personal knowledge under Evidence Code section 702, there exists another "substantial basis for exclusion" of the children's testimony. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 357.) On the critical issue of whether the children's testimony and statements were based on what they perceived or what they were told by others, the trial court failed to consider the effect of the suggestive questioning to which the children were subjected – the "brainwashing" alleged by trial counsel.

"[R]eliability is the linchpin in determining admissibility" of evidence under the Due Process Clause of the Fourteenth Amendment.

(*Manson v. Brathwaite* (1977) 432 U.S. 98, 114.) The admission of unreliable evidence violates a defendant's due process right to a fair trial under the Fourteenth Amendment. (See *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *United States v. Wade* (1967) 388 U.S. 218, 230.)

The methods used to insure that only reliable evidence is considered by the jury include rules regarding the competency of witnesses and their personal knowledge of the subject matter of their testimony. "[Q]uestions of trustworthiness and reliability are intertwined with the issues of whether the declarant is competent to be a witness and has the required personal knowledge. [Citation.]" (*People v. Tatum*, *supra*, 108 Cal.App.4th at p. 297, citing *Idaho v. Wright* (1990) 497 U.S. 805, 824-825.) Evidence Code section 702 and Federal Rules of Evidence, Rule 602[43], which directly parallels it, limit the testimony of lay witnesses to those matters about which the witness has personal knowledge and embody "one of the most fundamental tenets of a rational system of evidence law; testimony should be reliable and, thus, must be based on the perceptions of the witness rather than conjecture or second-hand information.'" (27 Wright & Gold, Fed. Prac. & Proc.: Evid. (1990) § 6021, p. 187; *United States v. Hoffner* (10th Cir. 1985) 777 F.2d 1423, 1425 ["The perception requirement stems from F.R.E. 602 which requires a lay witness to have first-hand knowledge of the events he is testifying about so as to present only the most accurate information to the finder of fact"].)

The trial court's failure in the present case to comply with the requirement of Evidence Code section 702 to determine whether or not the

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[43] Rule 602 of the Federal Rules of Evidence (28 U.S.C.) provides in pertinent part, "A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."

prosecution's only two purported witnesses to the fatal assault on Ashley were actually present when it happened, or whether their statements and testimony were based on what they were told by others, before allowing them to testify violated this most basic assurance of reliability.

In *People v. Dennis*, *supra*, 17 Cal.4th 468, this Court rejected defendant's argument that the effect of the child witness's exposure to information from outside sources should have been considered as part of the determination of her qualifications to testify:

> The facts that Deanna received therapy to help her cope with her mother's death, that she discussed the events with the prosecutor and others, and that she had gaps in her memories of the evening the crimes occurred, do not disqualify her as a witness. [Citations.] The trier of fact can evaluate these matters, when appropriate and otherwise permissible, in resolving the question of credibility.

(*Id.* at p. 526.)

To the extent that the decision in *Dennis* holds that the effects of suggestive questioning are not part of the determination of a witness's personal knowledge but only an issue of credibility, appellant submits it must be reconsidered in light of well-established research, like that relied upon by the United States Supreme Court in *Kennedy v. Louisiana*, *supra*, 128 S.Ct. 2641 (hereafter *Kennedy*), demonstrating that such testimony may be immune to the traditional means of evaluating credibility, and that its reliability must be established before it is submitted to the jury.

Concern about the reliability of children's testimony was central to the decision in *Kennedy*, in which the United States Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim. The majority opinion cited "the problem of unreliable, induced, and even imagined child testimony," as part of "serious systemic

concerns in prosecuting the crime of child rape," based on studies that conclude that children are highly susceptible to suggestive questioning techniques. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2663.)

According to the authorities submitted by amici curiae, cited by the Supreme Court in *Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2663, citing Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 5-17, "[s]tudies conclude that children are highly susceptible to suggestive questioning techniques like repetition, guided imagery, and selective reinforcement" and there exists within the child-development research community, "an overwhelming consensus that children are suggestible to a degree that . . . must be regarded as significant." (See Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications* (2000) 86 Cornell L.Rev. 33, 36.)

The methods by which information is obtained from children can significantly affect the reliability of their statements. In the present case, many of the most problematic techniques were used during the questioning of Sabra and Michael Jr., who were already more susceptible to suggestion because of their young age. (Myers, et al., *Hearsay Exceptions: Adjusting the Ratio of Intuition to Psychological Science* (2002) 65 Law and Contemp. Probs., No. 1, 29 (hereafter Myers) [young children are often more suggestible than older children].)

In response to the use of suggestive interviewing techniques of child witnesses in the prosecution of a preschool teacher for sexual abuse, the New Jersey Supreme Court implemented a requirement of "taint hearings" in sexual abuse cases. (*State v. Michaels* (N.J. 1994) 642 A.2d 1372 (hereafter *Michaels*).) Citing the court's responsibility to ensure the reliability of evidence admitted at trial, the *Michaels* court observed: "Competent and reliable evidence remains at the foundation of a fair trial,

which seeks ultimately to determine the truth about criminal culpability. If crucial inculpatory evidence is alleged to have been derived from unreliable sources due process interests are at risk. [Citation.]" (*State v. Michaels*, *supra*, 642 A.2d at p. 1380.)

Based on the rationale for, and the model of pretrial hearings used to assess the admissibility of eyewitness identification evidence, the court in *Michaels* set forth a framework for pretrial taint hearings in the trial court to determine whether the pretrial investigatory procedures "were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on a defendant's guilt."[44] (*State v. Michaels*, *supra*, 642 A.2d at pp. 1382-1383.)

The parallels between the investigatory procedures used in cases involving eyewitness identification and those with child witnesses are obvious: both are critical moments in the course of the criminal investigation, fraught with "innumerable dangers and variable factors" (*United States v. Wade* (1967) 388 U.S. 218, 230) that threaten the fairness of a trial; the effects of a coercive or suggestive interrogation, like those of a suggestive identification are "likely to remain corrosive over time," (*State v. Michaels*, *supra*, 642 A.2d at p. 1382); and witnesses in both situations are "likely to be convinced of the accuracy of their recollection." (*Ibid.*)

It is this last concern – the difficulty of overcoming the effects of suggestive pretrial interviewing techniques at trial through cross-

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[44] This echoes the test under *Simmons v. United States* (1968) 390 U.S. 377, 384, which held that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.

examination – that weighs heavily in favor of a pretrial determination by the trial court before submission of the evidence to the jury as an issue of witness credibility.

Generally, it is reasonable to assume that cross-examination and the opportunity to observe witness demeanor put jurors in an adequate position to evaluate witness reliability. Because of the effect on children to suggestive or coercive questioning, however, cross-examination and observing witness demeanor will not help jurors evaluate the reliability problems associated with statements and testimony elicited by these methods. The limitations of cross-examination have been recognized by the United States Supreme Court in eyewitness identification cases: "Even though cross-examination is a precious safeguard to a fair trial, it cannot be viewed as an absolute assurance of accuracy and reliability." (*United States v. Wade*, *supra*, 388 U.S. at p. 236.) And in cases of hypnotically induced testimony, the Court noted that "the subject experiences 'memory hardening,' which gives him great confidence in both true and false memories, making effective cross-examination more difficult." (*Rock v. Arkansas* (1987) 483 U.S. 44, 60.)

Social science research supports a similar finding in the case of suggestive interview techniques. "Leading, suggestive, or coercive questioning can not only result in a child making inaccurate statements, it can cause the child to develop a subjectively real memory for an event that never happened." (Wakefield, *Guidelines on Investigatory Interviewing of Children: What is the Consensus in the Scientific Community*? (2006) 23(3) Am. J. of Forensic Psychology 57.) Once tainted, the distortion of the child's memory can be permanent. (See *State v. Wright* (1989) 116 Idaho 382 [775 P.2d 1224, 1228] ["Once this tainting of memory has occurred, the problem is irredeemable. That memory is, from then on, as real to the

child as any other."].) The corrupting influence of improper interrogation has an even more pronounced effect on young children. (King &Yuille, *Suggestibility and the Child Witness* in Children's Eyewitness Memory (Ceci et al. edits., 1987) p. 29; Ceci, et al. *Age Differences in Suggestibility: Narrowing the Uncertainties in Children's Eyewitness Memory* (1987) p. 82.)

> Careful review of the social science literature indicates that children are susceptible to suggestive interviewing techniques and that such techniques can render children's accounts of abuse unreliable. A number of studies have shown that children will lie when they have a motivation to lie, that they are susceptible to accommodating their reports of events to fit what they perceive the adult questioner to believe, and that inappropriate post-event questioning can actually change a child's cognitive memory of an event. Even the studies that concluded that children are resistant to suggestion found a small percentage of children who were not.

(Younts, *Evaluating and Admitting Expert Opinion Testimony in Child Sexual Abuse Prosecutions* (1991) 41 Duke L.J. 691, 692, footnotes omitted (hereafter Younts).)

The United States Supreme Court cited the intractable nature of memories created by suggestive questioning in *Kennedy* in support of its finding of "serious systemic concerns" in child rape cases. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2663, citing Quas et al., *Repeated Questions, Deception, and Children's True and False Reports of Body Touch* (2007) 12 Child Maltreatment 60, 61-66 [finding that 4-to 7-year-olds "were able to maintain [a] lie about body touch fairly effectively when asked repeated, direct questions during a mock forensic interview"].)

1. A Determination of a Child Witness's Qualification to Testify Under Evidence Code Section 702 Must Include an Assessment of the Effect of Suggestive and Coercive Questioning on the Witness's Personal Knowledge

In order to properly determine whether a child witness has personal knowledge in a given case a trial court must consider the widely-recognized problems with the effect of suggestive and coercive questioning of child witnesses discussed above. Had the trial court in the present case complied with the clear procedural requirement of Evidence Code section 702 and conducted a pretrial hearing to determine the issue of the child witnesses' personal knowledge, such an assessment could have been made.

Based on the record of the preliminary hearing, at which Sabra's personal knowledge of the events leading to Ashley's death was questioned by the magistrate, and trial counsel's claim that both children had been "brainwashed," at such a hearing the concepts that guide a "taint" hearing like the one in *Michaels*, could and should have been applied, as has been done by courts in other jurisdictions.

2. States' Responses to the Issue of Suggestive and Coercive Questioning of Child Witnesses

The concerns expressed by the court in *Kennedy* have been recognized by state courts across the country, which have taken various steps to ensure the presentation of untainted testimony by child witnesses. Appellant submits that as courts in other states, some with analogous criteria for determining witness competency have found, in California a pretrial "competency inquiry include[s] the question of pretrial taint." (*English v. Wyoming* (Wyo. 1999) 982 P.2d 139, 146, citing *Matter of Dependency of A.E.P.* (Wash. 1998) 956 P.2d 297, 304.) The Wyoming Supreme Court agreed with the reasoning of *Michaels* but found no need for

a separate taint hearing based on the existing requirements for a finding of witness competence, specifically the requirement that the witness have "a memory sufficient to retain an independent recollection of the occurrence." (*Id.* at p. 146; see also *Matter of Dependency of A.E.P.*, *supra*, 956 P.2d at pp. 306-308 [same].) The court in *English* did, however "endorse the use of the factors set out in the *Michaels* decision as they relate to the question of independent recollection" at a pretrial hearing on the child witness's competence. (*English v. State*, *supra*, 982 P.2d at p. 146.)

Similarly, in *Commonwealth v. Delbridge* (Pa. 2003) 855 A.2d 27, the Pennsylvania Supreme Court, which agreed with the *Michaels* court about the necessity of considering the effect of suggestive questioning on the admissibility of children's testimony, also held that existing procedures for determining competency were sufficient to explore the possible taint of a child witness. (*Id.* at p. 663-664.)[45] The court in *Delbridge* also made an important distinction between the determination of the competency and credibility of a witness:

> A competency hearing concerns itself with the minimal capacity of the witness to communicate, to observe an event and accurately recall that observation, and to understand the necessity to speak the truth. [Citation.] A competency hearing is not concerned with credibility. Credibility involves an assessment of whether or not what the witness says is true; this is a question for the factfinder. [Citation.] An allegation that the witness's memory of the event has been tainted raises a red flag regarding competency, not credibility.

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[45] The test for competency in Pennsylvania is, (1) The witness must be capable of expressing intelligent answers to questions; (2) The witness must have been capable of observing the event to be testified about and have the ability to remember it; and, (3) An awareness of the duty to tell the truth. An allegation of taint centers on the second element of the test. (*Commonwealth v. Delbridge*, *supra*, 855 A.2d at p. 39, citing *Rosche v. McCoy* (Pa. 1959)156 A.2d 307, 310.)

(*Id.* at p. 40.)[46]

While the court in *State v. Michael H.* (Conn. 2009) 970 A.2d 113, did not rule on the requirement of a taint hearing because the defendant had not made a sufficient showing of suggestive questioning of the child witness, the court acknowledged that statements made under "circumstances so unduly coercive or extreme as to grievously undermine the reliability generally inherent in such a statement, so as to render it, in effect, not that of the witness," must be excluded by the trial court in the exercise of "its gatekeeping function to protect the fairness of the fact-finding process and shield the jury from considering the substance of the unreliable statement." (*Id.* at pp. 121-122; see also *State v. Fulton* (Utah 1987) 742 P.2d 1208, 1218, fn. 15 [court's determination of competence of child witness "may take into account the child's susceptibility to suggestion and whether the child has been intentionally prepared or unconsciously influenced by adults in such a way that it is likely the child is only parroting what others have said about the relevant facts"].)

The Oregon Court of Appeals held in *State v. Bumgarner* (Ore. 2008) 184 P.3d 1143, that the defendant was not entitled to a *Michaels*-type taint hearing to challenge the five-year-old victim's competency to testify because the jury as the trier of fact is in the best position to judge the effect, if any, of suggestive questioning. (*Id.* at pp. 1151-1153.) The court made a point of noting, however, that the defendant did not challenge the trial court's preliminary determination that there was evidence to support a finding that the victim had personal knowledge under the Oregon-statute

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[46] This distinction is one that has been rejected by courts that have held that the question of taint is an issue of credibility, to be determined by the jury. (See, e.g., *State v. Smith* (W.Va. 2010) 696 S.E.2d 8; *State v. Karelas* (Fla. 2010) 28 So.3d 913, 915.)

that is comparable to Evidence Code section 702. (*Id.* at p. 1149, fn. 3, citing Or. R. Rev., Rule 602 ["a witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter"].) Further, unlike in the present case, the trial court in *Bumgarner* did make the requisite finding of personal knowledge. (*Id.* at p. 1149.)

Similarly, the defendant in *Pendleton v. Commonwealth* (Ky. 2002) 83 S.W.3d 522, challenged the personal knowledge of the child sexual abuse victim on the ground that it was the product of suggestive questioning. On appeal, the Kentucky Supreme Court rejected defendant's claim, but analyzed the issue under the Kentucky statute equivalent to Evidence Code section 701, rather than the statute regarding personal knowledge, equivalent to section 702.[47] (*Id.* at pp. 525-526; see also, *State v. Ruiz* (N.M. 2006) 150 P.3d 1003, 1008-1009 [analyzing claim of right to taint hearing under general competency statute, not personal knowledge statute].)

The California Evidence Code requires a pretrial determination of a witness's personal knowledge and provides the procedures necessary for the trial court, in making that determination, to assess the effect of suggestive and coercive questioning on child witnesses. The record in the present case contains ample evidence to demonstrate that the children's statements and testimony were tainted by the suggestive and coercive questioning to which they were both subjected, and which, therefore, justified a pretrial hearing

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[47] Kentucky Rule of Evidence, rule 601, cited by the court, is equivalent to Evidence Code section 701; Kentucky Rule of Evidence, rule 602, which requires personal knowledge, and which was not cited, is the equivalent of Evidence Code section 702. (*Pendleton v. Commonwealth, supra*, 83 S.W.3d at p. 525.)

on the issue of their personal knowledge. (Evid. Code, §§ 702, subd. (a), 403, subd. (a)(2).)

3. The Children Were Subjected to Suggestive and Coercive Questioning Techniques

Beginning the very day Ashley died, Sabra and Michael Jr. were subjected to suggestive questioning by nearly every adult with whom they had contact. When they were first questioned, both children said they did *not* see appellant do anything to Ashley.[48] Their denials were met with skepticism and more questioning until finally they changed their stories to the one they told at trial.[49]

a. Interviewer bias

The bias of the interviewer can have a significant effect on the reliability of information obtained from a child. "Interviewer bias characterizes interviewers who hold a priori beliefs about the occurrence of certain events and, as a result, conduct their interviews so as to obtain confirmatory evidence for these beliefs without considering plausible alternative hypotheses." (Bruck & Ceci, *Forensic Developmental Psychology*: *Unveiling Four Common Misconceptions* (2004) 13 Current Directions in Psychol. Sci. 229, 230.)

The Supreme Court in *Idaho v. Wright* affirmed the Idaho Supreme

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[48] "[M]emory research indicates that witnesses are most likely to give accurate and detailed reports at the first interview, especially if the interview is conducted shortly after the incident occurs." (Goodman & Helgeson, *Child Sexual Assault: Children's Memory and the Law* (1985) 40 U. of Miami L.Rev. 181, 195 (hereafter Goodman).)

[49] As previously noted, while he testified on direct that he saw his father throw Ashley on the floor, Michael Jr. admitted on cross-examination that he did not see this happen and that he had been told what to say. (53 RT 3680-3681.)

Court's holding that a child's hearsay statements were unreliable because "blatantly leading questions were used in the interrogation . . . [, and] this interrogation was performed by someone with a preconceived idea of what the child should be disclosing." (*Idaho v. Wright, supra*, 497 U.S. at p. 813, internal quotation marks omitted.)

Detective Bobbie Koller's questioning of Sabra on June 4, 1999, the day Ashley died, sharply illustrates the effect of interviewer bias.[50] As is apparent from her questioning, Detective Koller came to the interview with Sabra armed with information about appellant and harboring suspicions that he was responsible not only for Ashley's death, but for prior abuse of Sabra, including breaking her leg. Detective Koller testified at trial she believed that Sabra had "undergone a significant amount of abuse." (55 RT 3785.)

Sabra told Detective Koller that she lived with her "mama," Sandra, and her "dad," Big Mike. She also lived with her brother, Little Michael.[51] (Def. Exh. HH, p. 2.)[52] She said her brother "get me bruises . . . just like my sister." (Def. Exh. HH, p. 3.) Detective Koller asked her about this:

Q: Why do you think that?

A: Because I heard Ashley hurt her (unintelligible) and I heard it, I was sleeping.

Q: Oh, and who do you think hurt her?

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[50] Detective Koller's status as a police officer may also have influenced Sabra as children are sometimes more suggestible when questioned by an authority figure. (1 Myers, Evidence in Child Abuse and Neglect Cases (3d ed. 1997) § 1.11, p. 37.)

[51] Michael Jr., was, of course, Sabra's uncle and not her brother.

[52] The interview was videotaped. Defense Exhibit HH is a transcript of the audio portion of the interview, prepared by the District Attorney's Office.

A: Her hit herself.

Q: You think she hit herself?

A: Uh-huh.

Q: Cause Michael hits her tummy right there and she has bruises right there.

(Def. Exh. HH, p. 3.)

Detective Koller asked Sabra about Big Mike coming into the children's room "that night" – apparently referring to the time when Ashley was hurt – and changing Ashley's diaper before he went to work. Whether Ashley was fatally injured at night, however, was not information provided by Sabra, nor established by the medical testimony.[53] (Def. Exh. HH, pp. 6-8.)

Q: Ok. And that night did you hear anybody in the room with you and uh, Ashley?

A: Uh-uh. Only Ashley and Michael and me.

Q: Uh-huh?

A: That's all.

(Def. Exh. HH, p. 6.)

After establishing that Ashley slept in Sabra's bed, Detective Koller asked Sabra:

Q: . . . And there's Big Mike, did he come in and change [Ashley's] diapers?

A: Yeah.

Q: And what happened then when he did that?

A: Ashley crier [sic].

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[53] Dr. Crawford estimated the head injuries could have occurred within five hours of the first CAT scan, which was at 1:00 p.m., meaning as late as around 9:00 a.m. (47 RT 3303, 3338.)

Q: And was that, now do you remember when that was?

A: Uh-uh.

Q: Uh-huh? Was that before Big Mike went to work do you know?

A: Yeah.

Q: Was it dark then?

A: Um, uh-uh.

Q: You think it was light?

A: Yeah.

Q: Were you awake or asleep?

A: Um, awake.

Q: Ok. So you don't, [sic] did he ever come in while you were asleep to change Ashley's diapers do you know?

A: Yeah.

Q: You think?

A: I, I (unintelligible) Ashley (unintelligible) I was sleeping (unintelligible) I opened my eyes and he was there.

Q: And what's him [sic] doing there?

A: Um, him eating a sandwich.

Q: Give you a sandwich?

A: Um-hum.

Q: And was it dark out or light?

A: Uh, light.

Q: Ok. So that wasn't at night while you were sleeping?

A: Yeah.

Q: It was? Or do you know?

A: It's dark.

Q: Dark. Not sure. Now do, when he, when he changed Ashley, what does he do when he'd change her diapers?

A: Um, him puts (unintelligible) and him, him change it (unintelligible) that's why Ashley crier [sic].

(Def. Exh. HH.)

As this exchange illustrates, Detective Koller failed to probe the inconsistencies and unusual aspects of Sabra's answers when they did not fit her idea of what happened. For example, Sabra said that appellant was eating a sandwich when he came in, then agreed with Detective Koller's question that he gave Sabra a sandwich. (Def. Exh. HH, p. 8.) Sabra said it was dark, and then said it was light, but was never asked about the contradiction. (Def. Exh. HH, pp. 7-8.)

The detective then asked a series of questions about Sabra's fear of appellant.

Q: . . . Are you scared of Big Mike?

A: No.

Q: You're not?

A: Uh-uh.

Q: Do you like him?

A: Yeah.

Q: Do you like mama?

A: Uh-huh.

Q: And Big Mike is, he's not scary?

A: Uh-uh. Sometimes when (unintelligible) like that.

Q: His leg?

A: Um-hum.

Q: Uh-huh. And then is that a little scary?

A: No.

Q: No?

A: It's funny.

. . . . . .

Q: So does Big Mike ever hit you?

A: No.

Q: Are you sure?

A. Yes.

Q: If he did would you tell me?

A: Um, him don't hit me.

Q: But if he did would you tell me?

A: He doesn't hit me.

Q: I know, but what I'm saying is if he ever did would you tell me about it?

A: Him don't hit me no more.

Q: Oh, he did before?

A: No, him (unintelligible) a little one.

Q: Are you worried about him getting in trouble for hitting you?

A: No.

Q: You sure?

A: He gave me a little one.

Q: He'll give you a little one?

A: Just like this.

Q: Really?

A: Um-hum

Q: That's like a pat, huh?

A: Um-hum.

(Def. Exh. HH, p. 9.)

This type of questioning – criticizing or disagreeing with a child's statement or otherwise communicating that the statement was incomplete, inadequate, unbelievable, dubious or disappointing – was used throughout

the interview with Sabra, and has been identified as a suggestive technique used by interviewers to elicit information from children. (See Schreiber et al., *Suggestive interviewing in the McMartin Preschool and Kelly Michaels daycare abuse cases: A case study* (2006) 1 Social Influence 16, 47.) Children are very responsive to signals from an interviewer about what the interviewer is searching for in an answer. (King & Yuille, *Suggestibility and the Child Witness* in Children's Eyewitness Memory (Ceci et al. edits., 1987) p. 29.) "Because the research shows that a significant percentage of children are responsive to adult preconceived ideas of what has happened to the children, it is crucial to be aware of the common pitfalls of investigative interviews and to recognize that interviewers often give children cues as to what they expect the children to relate through means other than leading questions." Factors that can corrupt the reliability of the interview include the "lack of investigatory independence [and] pursuit of an agenda." (Younts, *supra*, at pp. 729-730.)

During this critical first interview with Sabra, Detective Koller introduced the idea that appellant was responsible for hurting Ashley:

Q: . . . Now did you ever see Big Mike doing anything to Ashley?

A: No.

Q: Did he hurt her that you know?

A: Uh-uh.

Q: You don't know if he did?

A: Uh-uh.

Q: Um, cause Ashley got hurt real bad, did you see her today?

A: Um-hum.

Q: She has, somebody was hitting her.

A: Little Michael.

Q: Did you ever see Little Michael hit her? On the head? Are you

sure?

A: Yes.

Q: Did somebody tell you to say that?

A: My dad tell me Michael hit her.

(Def. Exh. HH, pp.12-13.)

Detective Koller continued to ask Sabra if anyone hit her or Ashley:

Q: Did you ever see anybody hit Ashley?

A: Uh-uh.

Q: No? Ok. Nobody hit you?

A: I want to (unintelligible).

(Def. Exh. HH, p. 17.)

After a pause in the interview to wash Sabra's hands, Detective Koller returned to the questioning:

Q: . . . Now so you [sic] sure nobody hurt you?

A: Um-hum.

Q: Positive?

A: Um-hum.

Q: Would you tell me if somebody did?

A: I said nobody hit me.

Q: Ok. And you didn't see anybody hitting Ashley?

A: Uh-uh.

(Def. Exh. 17-18.)

Researchers have found that the least accurate reports in sex abuse cases are obtained from child witnesses when the interviewer harbors preconceived notions about what happened. (Goodman, *supra*, at pp. 207-208.) Detective Koller's questions make clear that she did not entertain the possibility that anyone other than appellant was responsible for Ashley's injuries, and reveal a stunning lack of interviewer independence. Not only

did Detective Koller fail to ask open-ended questions, as is recommended when interviewing young children, she asked primarily about appellant.

Sabra told Detective Koller early in the interview that Michael Jr. hit her and Ashley, and in response, the officer expressed skepticism, asking Sabra if she was sure or if someone told her what to say. (Def. Exh. HH, pp. 2-3.) When Sabra said that she was also hit and kicked by Newfellen [sic], a boy who lived upstairs, Detective Koller treated the revelation as inconsequential, referring to the boy as "rude," and telling Sabra she "shouldn't play with that bad boy." (Def. HH, p. 10.) Even when Sabra showed her marks on her body from where Newfellen hit her, Detective Koller was dismissive, asking Sabra if she was sure about what she was saying. (Def. Exh. HH, p. 12.) Nor did the detective ask about Sandra Harris and Laurie Strodtbeck, even though Ashley and Sabra were with the two women during the period of time when the fatal injuries may have been inflicted.[54]

Instead, obviously not satisfied with Sabra's denials that *appellant* hit her, Detective Koller persisted, even going so far as to tell Sabra that she had heard a different story from others:

Q: Now one time I heard that you took Daddy's orange juice accidental [sic] and he punched you in the tummy?

A: Uh-uh.

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[54] This was true even when Michael Jr. told Detective Koller when she interviewed him on July 7, 1999, that Sandra and Laurie, but not appellant, hit him and that his mother hit Ashley. (55 RT 3760-3762.) The interview was not recorded by video or audio; Detective Koller summarized the interview in a written report and noted that Michael Jr. was sobbing throughout the interview. (55 RT 3761-3764.) Detective Koller asked if he had ever seen his father hit Ashley and Michael Jr. said he had not. (55 RT 3763-3764.)

Q: Are you sure?

A: Yes.

Q: Are you afraid to tell me? Are you afraid to tell me anything?

A: (Unintelligible)

. . . . . .

Q: . . . are you afraid to tell me if daddy's hitting you?

A: No.

Q: Are you afraid to tell me that? . . .

A: (Unintelligible) what's this right here?

(Def. Exh. HH, p. 14)[55]

In the same interview, Detective Koller questioned Sabra about how she broke her leg six months earlier. The officer made it abundantly clear that she did not believe what Sabra had said consistently for the previous six months – that the injury was an accident – but thought appellant broke the leg and told Sabra to say it happened when she caught it on the bunk bed.

Q: Now what happened to your leg?

A: I broke it on my bunk bed.

Q: Now who told you to say that?

A: Well I broke it right here and here, like here.

(Def. Exh. HH, p. 12.)

Q: . . . And did daddy tell you to say how you hurt your leg?

A: Um-hum, on my bunk bed. I putted [sic] my leg (unintelligible).

(Def. Exh. HH, p. 13.)

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[55] Detective Koller also said she heard that Sabra used to go to her room when appellant came home from work – implying that Sabra was afraid of appellant – but that after appellant talked to her, she stopped doing it. (Def. Exh. HH, p. 17.)

Q: Well how do you think you broke your leg.

A: (Unintelligible)

Q: I know but weren't you doing something crazy when it happened? . . . No, I mean when you broke your leg were you doing crazy stuff?

A: No.[56]

(Def. Exh. HH, p.16.)

This crucial interview was the first of several during which Sabra was questioned using demonstrably suggestive techniques.

b. Repetition of Questions and Repeated Interviews

"Repeated questions may be detrimental to children's accuracy because children may interpret the repetition of a question as an indication that their previous answer was wrong. Thus, children who are asked questions repeatedly may change an answer simply to comply with the perceived wishes of the interviewer." (Ghetti et al., *Issues in Eyewitness Testimony* in Handbook of Forensic Psychology: Resource for Mental Health and Legal Professionals (O'Donahue & Levensky edits., 2004) 507, 536; see Poole & White, *Effects of Question Repetition on Eyewitness Testimony of Children and Adults* (1991) 27 Developmental Psychology 975.)

Detective Koller's repeated questions during the initial interview, in the face of Sabra's continuing denials that she saw what happened to Ashley, that appellant hit her or that appellant broke her leg, clearly led Sabra to believe that the answers she was giving were not what the police

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[56] After she was interviewed by Detective Koller, Sabra changed her story about how her leg was broken and began to blame appellant. The trial court's ruling admitting evidence of Sabra's broken leg is addressed in Argument IV.

officer wanted to hear.

Children may make false allegations after repeated interviews if they believe that authority figures will not accept their denials. After all, children, unlike adults, "are required to continue until the adult decides to terminate." (Ceci & Bruck, Jeopardy in the Courtroom (1999) p. 259.) A young boy from Minnesota falsely accused his parents of abuse after investigators continued to question him despite repeated denials of abuse during several interviews. He later said he finally made the allegations to stop "being badgered" and that he could tell what the interviewers wanted him to say by the way they asked the questions. (See Ceci et al., *Unwarranted Assumptions About Children's Testimonial Accuracy* (2007) 3 Ann. Rev. of Clinical Psychol. 311, 319; see also, *Maryland v. Craig* (1990) 497 U.S. 836, 868 (dis. opn. of Scalia, J.) [referring to the "tragic" investigations in Jordan, Minnesota].)

Five days after the initial interview with Detective Koller, Sabra was interviewed at the Calico center on June 9, 1999.[57] She was again asked about Ashley, who Sabra said was at the hospital because she "can't open her eyes." (Defense Exh. TT, videotape of Calico interview.)

Q: . . . Did you see anything happen to Ashley?

A: No.

Q: Was anybody ever around Ashley when that happened?[58]

A: Nun-huh (shaking head).

Q: Ok. Where was Ashley at? Where did you see her when she

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[57] Calico is a facility used for interviewing juvenile victims of sexual abuse. (55 RT 3791.)

[58] Here, the interviewer ignores Sabra's answer that she did not see what happened to Ashley, and instead suggests that Sabra saw somebody around Ashley when "that happened."

couldn't open her eyes?

A: Up on my bed.[59]

Q: She was up on your bed? Who was there?

A: My mom.

Q: Your mom? Was Amma there?[60]

A: (Nods head)

Q: Was Mike there?

A: (Nods head)

Q: Was little Mike there?

A: (Nods head)

Q: Anybody else there?

A: Me me.

Q: And you. Ok. Do you know how that happened?

A: (Shakes head)

Q: How her eyes got shut and didn't open up?

A: Nuh-huh.

Q: What color were her eyes when they were shut?

A: Maybe green or brown.

Q: Did you see any colors when her eyes were shut on her face?

A: She had bruises on her.

Q: She had bruises on her? How did she get the bruises?

A: I don't know.

(Defense Exh. TT.)

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[59] It appears Sabra is referring here to when the adults found Ashley unconscious on the bed late Friday morning and took her to the hospital.

[60] Sabra sometimes referred to Sandra Harris as Amma. (52 RT 3621.)

The interviewer later returned to these questions.

Q: . . . Remember when you said Ashley couldn't open her eyes and she had bruises on her face? Before Ashley had some bruising on her face and stuff, where were you at, do you remember?

A: Nun-huh.

Q: You don't?

A: I was there.

Q: You were there? Ok. Did you hear anybody around Ashley? Was Ashley crying or anything?

A: No. Only sleeping.

Q: Was she sleeping?

A: No me.

Q: You were sleeping? Ok. On another time, when Ashley was ok, had you ever seen anybody hit Ashley?

A: Nun-huh.

. . . . . .

Q: . . . Is there anything else you remember that you need to tell me about what happened that night with Ashley?

A: Nun-huh.

(Defense Exh. TT.)

During this interview, which was conducted only a few days after Sabra was questioned by Detective Koller, she was asked again about the same subjects, clearly signaling that the authority figures who were questioning her were not getting the answers they wanted.

Detective Koller introduced the idea that Sabra had been sexually molested when she interviewed her on June 4, 1999.

Q: Uh-uh, what? And nobody ever touched your privates?

A: No.

Q: Do you know what your privates are? Where you pee and poo? What your underwear cover. Down here.

A: Hum?

Q: Down here.

A: Uh-uh.

Q: Nobody ever touched there?

A: Uh-uh.

(Def. Exh. HH, pp. 17-18.)

The Calico interviewer repeated this line of questioning, asking Sabra, "Has anybody touched you here (indicating genital area)?" When Sabra answered no, the interviewer reminded her of the importance of telling the truth, suggesting that Sabra was lying when she said no one had touched her inappropriately. (Def. Exh. TT.) Later, Sabra told her foster mother that appellant had touched her "private parts." (52 RT 3614-3615.) Dr. Crawford, who examined Sabra after Ashley's death, found no evidence of sexual abuse. (64 RT 4316-4317.)

The Calico interviewer also repeated the cue first offered by Detective Koller that "it" happened at night. (See Def. Exh. HH, at p. 6 ["And that night did you hear anybody in the room with you and uh, Ashley?"].) As noted, Ashley's injuries could have been inflicted in the morning. "The insidious effects of repeated questioning are even more pronounced when the questions themselves over time suggest information to the children." (Goodman, *supra*, at pp. 184-187.)

c. Informal suggestive questioning

Even when she was not being formally interviewed, Sabra was surrounded by adults asking her questions about Ashley's death and appellant's role in it. "Suggestions may be made by parents, other adults, or other children prior to the first formal investigative interview or between

repeated forensic or clinical interviews." (Warren & Marsil, *Why Children's Suggestibility Remains a Serious Concern* (2002) 65 Law & Contemp. Probs., No. 1, 134.) And while "official investigators may be trained to avoid suggestiveness; most parents and teachers are not." (Ceci & Friedman, *The Suggestibility of Children: Scientific Research and Legal Implications, supra,* at p. 59.)

By the time Sabra was interviewed again by Detective Koller on July 7, 1999, she had been exposed to questioning by social workers, foster parents and family members who were discussing the circumstances of Ashley's death. Indeed, during the period in which Sabra was being questioned by the authorities, she was interacting with Sandra Harris and Laurie Strodtbeck, both of whom were obvious suspects in the abuse of Ashley, and who therefore had a motive to suggest to Sabra that appellant was responsible for hurting Ashley. Laurie Strodtbeck was the source of statements attributed to Sabra that she saw appellant "thrusting" against Ashley, which were allegedly made in response to Laurie's question whether appellant ever hurt Ashley.[61] (52 RT 3624.)

Michelle Love questioned Sabra about Ashley while they were driving back to Love's office from the Calico interview on June 9, 1999.

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[61] Sabra was asked about the "thrusting" during the July 7th interview with Detective Koller who said that Sabra "had no information about that," but told the officer about "one time when Mr. Lopez was alone in his bedroom with Ashley, and he was doing something to her, and then her ordered her [Sabra] to get out." (55 RT 3780.) Without a record of exactly what questions were asked by Detective Koller and Laurie Strodtbeck, and Sabra's exact responses, it is impossible to evaluate the value of their reports of Sabra's statements.

At the preliminary hearing, Sabra denied that she saw appellant making the thrusting motion, and shrugged her shoulders in response to the question whether she had said this to Laurie. (4 CT 743.)

(63 RT 4307.) According to Love, Sabra said appellant took Ashley out of the bed they were sharing three times. The first night he took her out of bed and when she came back she had bruises on her legs and cried so much she threw up. The second night she did not cry. The third night when she returned she had bruises all over her face and would not wake up.[62] Sabra never said when this happened. (63 RT 4282.) In fact, Sabra never even said it happened at night; it was Love's "impression it was sometime in the night since they were both in bed."[63] (64 RT 4318-4319.)

The repetitious and suggestive questioning during the initial interviews with Detective Koller, the Calico staff and others, including family members, had a predictable effect on Sabra: when Detective Koller interviewed her on July 7, 1999, her story had changed. According to Detective Koller, Sabra was "indignant" because she had heard that appellant said that she was responsible for some of Ashley's injuries. (55 RT 3780.)[64] At this second interview, contrary to what she had consistently

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[62] As previously noted, at the preliminary hearing, Sabra denied telling Love appellant took Ashley out of the bed three times. (4 CT 717-7184 CT 717-718.) Sabra testified that on one unspecified date, while she and Ashley were sleeping, appellant came in and took Ashley out of the bed. When he brought her back, she was not throwing up. Sabra denied telling Love that Ashley came back with bruises. (4 CT 718-721.) Later in her testimony at the preliminary hearing, Sabra admitted that she did not see appellant take Ashley out of the room. (4 CT 784.)

[63] This interpretation by Love is an example of an adult misreporting a child's statement, which is discussed in section C.6. of this argument. The children napped in the afternoon, so Love's assumption that Sabra must have been referring to nighttime is not warranted. (59 RT 3983.)

[64] According to Sandra Harris, one day during the week she went into the bedroom and saw Ashley pinned to the bed by Sabra who was pulling Ashley's ears and pounding her head into the pillow. (60 RT 4039.) Sabra's "indignation" at being blamed for Ashley's injuries, for which there

said before, when Detective Koller asked Sabra if she had seen anyone hitting Ashley, she said she had seen appellant hit Ashley several times, pointing to her head, shoulders, chest and lower body area. Sabra said appellant hit Ashley in the chin and threw her into the wall. (55 RT 3778-3779.)

d. Negative characterization of subject

In addition to having been told that appellant had blamed her for hurting Ashley, Sabra acknowledged that "people ha[d] told [her] not to like Big Mike or Emma [sic] anymore." (51 RT 3529.) Such statements can lead a child to fabricate. Children may make false allegations against someone they have heard discussed in a negative light. One frequently cited study found that 11% of five-and six-year-old children, after hearing prejudicial remarks regarding a particular individual, made false allegations against that individual and maintained those allegations even when challenged by the interviewer. (Ceci & Bruck, *Jeopardy in the Courtroom*, *supra*, at p. 131.) The Supreme Court in *Coy v. Iowa* (1988) 487 U.S. 1012, 1020, acknowledged the risk in child abuse cases of, "the false accuser" or "the child coached by a malevolent adult."

Sabra lived with her great-aunt, Cindy Jardin, for several months after Ashley's death until she was removed because of a failure to follow through with Sabra's therapy sessions. (63 RT 4285.) Jardin referred to appellant as "Wicked Mike," and told Sabra to call him that as well. (51 RT 3547.)[65] Jardin's influence was apparent when Sabra referred to

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was clearly a basis in fact, also provided a motive for Sabra to project blame elsewhere.

[65] Jardin claimed Sabra came up with the name herself after Jardin said that anyone who would do what he did had to be wicked. (52 RT 3605.)

appellant as "Wicked Big Mike" throughout her testimony at the preliminary hearing, and the point was reinforced by the prosecutor who echoed the derogatory nickname. (See, e.g., 4 CT 714-717 [Questioning by prosecutor: "Did Wicked Big Mike take Ashley out of bed on three nights?" "Were you ever sleeping with Ashley when Wicked Big Mike came in and took her out of bed?"].)

Sabra was surrounded and questioned by adults who believed that appellant abused Sabra and murdered Ashley. Sabra's foster mother, Deborah Kavarias, talked to Sabra about what happened to Ashley and questioned her about what went on when she was living with appellant and Sandra Harris. (4 CT 794-795.) Kavarias was told by Jardin that appellant had abused Sabra, and she was told by Sabra's attorney that Ashley had been brutally murdered, and that appellant was a "snake." (4 CT 846-848.) "No one familiar with the scientific research ought to doubt that some children could be brought to make false claims of sexual abuse if powerful adults pursue them repeatedly with [suggestive] enjoinders." (Ceci, et. al., *Children's Allegations of Sexual Abuse*: *Forensic and Scientific Issues* (1995) 1 Psychol. Pub. Pol'y & L. 494, 506.)

It is difficult to imagine greater negative influence on a young child than to hear from the important adults with whom she had contact – including the district attorney who questioned her in court – that appellant was "wicked."

e. Suggestive questioning at the preliminary hearing

This negative, suggestive and coercive questioning continued at the preliminary hearing and its effect on Sabra's trial testimony is apparent.

At the preliminary hearing, the prosecutor had difficulty getting Sabra to give the desired testimony, or even to answer her questions. (4 CT

749 [magistrate notes that Sabra "shrugged her shoulders to at least 80 percent of the questions that you've asked in the last 15 minutes"].) In an attempt to set up the testimony of other witnesses who would testify to purported prior inconsistent statements, the prosecutor asked Sabra a series of leading questions, prefaced by: "Did you tell . . .? The following exchange is illustrative:

Q: Do you remember big Mike crashing into you when you were riding on your tricycle?

A: (Witness shrugs shoulders)

Q: Do you remember?

A: No.

The Court: Shaking her head no.

Q: Did you ever tell your Aunt Cindy that?

A: (Witness shrugs shoulders)

The Court: Shrugging her shoulders.

Q: Did big Mike hit you right here in the chin area?

A: (Witness shakes head)

The Court: Shaking her head no.

Q: Did you ever tell your Aunt Cindy that he hit you right there?

A: (Witness shakes head) – (Witness shrugs shoulders)

The Court: Shaking her head no and then shrugging her shoulders.

Q: Did you ever tell your Aunt Cindy about getting a big old swollen place on the chin from where big Mike hit here . . . (indicating)?

A: (Witness shakes head)

(4 CT 747-748.)

It is difficult to overstate the suggestive nature of the questioning of Sabra at the preliminary hearing, and its obvious effect on Sabra's trial testimony. At the preliminary hearing, Sabra was asked if she saw

appellant make a thrusting motion with his body against Ashley's. Even after the prosecutor demonstrated the motion, Sabra continued to deny she had seen anything:

Q: Sabra, did you ever see big Mike holding Ashley like this . . . (indicating) . . . in front of him?

A: (Witness shakes head)

The Court: Shaking her head no.

Q: Did you ever see big Mike moving Ashley's body against him like this . . . (indicating)?

A: (Witness shakes head)

Q: Indicating sort of a back and forth motion –

A: (Witness shakes head)

Q: – in the pubic area?

A: (Witness shakes head)

The Court: Shaking her head no.

Q: You never saw that?

A: (Witness shakes head)

(4 CT 743.)

At trial, however, with substantial prodding from the prosecutor, Sabra reluctantly parroted the gesture made by the district attorney at the preliminary hearing. (51 RT 3519-3520.)

f. Inaccurate reporting by adults

Much of the evidence of Sabra and Michael Jr.'s out of court statements came from adults reporting their conversations with the children. Research has found misinformation from adults – parents and strangers, alike – can, under certain circumstances, distort children's reports. (Myers, *supra*, at p. 29, citing Poole & Lindsay, *Children's Suggestibility, in Memory and Suggestibility in the Forensic Interview* (M. Eisen et al. edits.,

2002).

> A recent study by Maggie Bruck, Stephen J. Ceci, and Emmett Francoeur investigating mothers' reports of their conversations with their children demonstrated that the parents' reports were accurate regarding the gist of what the child said, but imprecise regarding the exact questions asked and whether the questions were open-ended or somewhat leading. There was a tendency to indicate that questioning was more open-ended than it really was. This type of imprecision is not specific to mothers. Michael Lamb and his colleagues showed similar patterns for forensic interviewers. Although adults are quite adept at reporting the gist of what a child said, they may not be as reliable at reporting how the information was elicited.

(Myers, *supra*, p. 28, citing Bruck et al., *The Accuracy of Mothers' Memories of Conversations with their Preschool Children* (1999) 5 J. Experimental Psychol.: Applied 89 and Lamb et al., *Accuracy of Investigators' Verbatim Notes of their Forensic Interviews with Alleged Child Abuse Victims* (2000) 24 Law & Human Behav. 699.)

For this reason, in a case involving child witnesses, videotaping of interviews is important

> so that a court could see fully just how a child's story was elicited – whether there were verbal and behavioral suggestions, whether the child was subjected to repetitive and coercive questioning, and whether the child gave her own account or merely agreed to some of the interviewer's suggestions.

(Younts, *supra*, at p. 739, fn. omitted.)

In the present case, only two of the interviews with Sabra or Michael Jr. – Sabra's June 4, 1999 interview with Detective Koller and the June 9, 1999 interview at Calico – were videotaped. With one exception, in all subsequent interviews and conversations with the children, the adults reported the "gist" of what the children said, but there is no record of how

the information was elicited, or exactly what the children said. Given the suggestiveness of the questioning techniques exhibited in the videotaped interviews, it is reasonable to assume that the same – or worse – methods were used when there was no verbatim record of the questioning.

This assumption is borne out by the testimony of Melissa Ryan, a child welfare worker, who wrote down in her report the questions asked by the prosecutor during an interview of Michael Jr. at his foster home in October 2000. (53 RT 3685, 3688.) In response to a question from the prosecutor, Mr. Anderson, Michael Jr. said he remembered when Ashley would not wake up. Then Anderson asked him, "Do you remember when your dad cracked Ashley [sic] head and didn't wake up?" Michael nodded yes. Anderson asked what happened and Michael answered, "He did what you said." When Anderson asked him to tell the story in his own words, Michael said: "Daddo cracked Ashley's head open. He slammed her then her head got cracked open. He left her there on the floor. Jesus put her in heaven." (53 RT 3690.) Ryan was forced to acknowledge on cross-examination the obvious suggestiveness of the prosecutor's questions to Michael Jr. (53 RT 3697-3699.)

As discussed in section C.3. of this argument, Michelle Love's informal questioning of Sabra immediately following the Calico interview is a clear example of misreporting. Love testified that Sabra was referring to events that occurred at night when in fact it was Love's assumption that it was at night, based on Sabra's description of being in bed. Without the benefit of a verbatim record of the questions asked and answers given at this or any of the other unrecorded interviews, and based on the demonstrably suggestive techniques used during the videotaped interviews, it is a reasonable assumption that the same techniques were used.

g. The prosecutor's use of suggestive techniques to elicit the children's testimony at trial

Despite their initial denials that they saw appellant do anything to Ashley, both Sabra and Michael Jr. were questioned repeatedly and exposed to nearly all of the techniques recognized by child development experts as likely to result in false allegations. Predictably, in response to the influence of the adults surrounding them, their statements changed. Nothing in the record, however, demonstrates that the inculpatory words they uttered at trial were based on their own observations and not the suggestion of the adults who questioned them, and what evidence there is points to the opposite conclusion. By every measure, Sabra and Michael Jr.'s statements and testimony were so unreliable that they should not have been considered by the jury. The trial proceedings, during which the prosecutor continued to use the same suggestive techniques, added significantly to the unreliability of the evidence.

The prosecutor asked leading questions that supplied critical information to the witness and, in Sabra's case, demonstrated exactly what he wanted Sabra to say using a doll meant to represent Ashley.

Q: [By Mr. Anderson]: Now, Sabra, do you remember the night that Ashley never woke up again?

A: Yes.

Q: Did you see Big Mike that night?

A: No.

Q: Well –

Mr. Hove: I'm sorry, what was the answer?

The Court: Answer was "no."

Mr. Anderson: Do you remember if Big Mike came into the room the night that Ashley died?

Mr. Hove: Objection, that's been asked and answered already. She said she didn't see –

The Court: Overruled.

The Witness: Yes.

. . . . . .

Mr. Anderson: Now, do you remember how he held Ashley the night that she died?

Mr. Hove: Objection, that assumes a fact not in evidence.

The Court: Overruled.

The Witness: Yes.

Q: Do you remember? And how did he hold her?

A: (Indicating)

Q: Come here for a second Sabra, okay?

A: (Witness shakes head)

Defendant Harris: She's afraid of him.

The Court: Mrs. Harris. Please.

Mr. Anderson: Sabra, can you stand right here, with Mommy right here?

Mr. Hove: Can the record indicate she is shaking her head in a "no" fashion?

Mr. Anderson: Can you stand right next to Mommy? Pretend this is Ashley.[66] Can you show me how Big Mike held Ashley the night she died? Like that?

A: (Witness nods head)

Q: Did he do something with Ashley?

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[66] As the prosecutor later noted, he was using People's Exhibit 11, a doll that had been previously described as the same size as Ashley. (51 RT 3523.)

A: Yes.

Q: What did he do?

A: (Inaudible response)

Q: He what?

A.: (Inaudible response)

Mr. Hove: I'm sorry, Judge.

Mr. Anderson: What did he do when he held her like this?

A: Threw her on the ground.

Q: Threw her on the ground?

A: (Witness nods head)

The Court: Nodding affirmatively

Mr. Anderson: Did he hold her like that above the head?

A: (Witness nods head)

Q: Did he throw her on the ground?

A: (Witness nods head)

Q: Was it like this?

A: (Witness nods head)

The Court: The witness has nodded affirmatively.

Mr. Anderson: May the record reflect, Your Honor, I took People's No. 11, placed it up on my head and threw it to the ground in a downward thrust?

Mr. Cannady: May the record reflect it was arm's length he held it above his held [sic], the doll? Thank you.

Mr. Anderson: Was Ashley crying before he threw her to the ground?

A: Yes.

Q: What were you doing, Sabra?

A: Hiding under the covers?

Q: You were under the covers?

A: (Witness nods head)

Q: Were you scared?

A: (Witness nods head)

The Court: Nodding yes.

Mr. Anderson: Q: When Big Mike threw her on the ground, did Ashley cry ever again?

A: No.

Q: And where did Big Mike go after he threw her on the ground?

A: I don't know.

(51 RT 3518-3523.)

Until Sabra was confronted by the prosecutor holding the Ashley-doll above his head and asking her to show him "how Big Mike held Ashley the night she died," Sabra had never said that she saw appellant hold Ashley over his head. (51 RT 3521.) Nor had she ever before said that appellant threw Ashley to the ground. (51 RT 3522.)

Michael Jr. testified that before he took the stand, the prosecutor used the Ashley-doll to show him how to throw it. (53 RT 3677.) Michael Jr. testified on direct examination that he saw his father throw Ashley on the floor, but on cross-examination admitted that he did not see anything that night, and that "people had told [him] what to say." (*Ibid.*) He testified on direct:

Q [Mr. Anderson]: Okay. Now, do you remember the night that Ashley never woke up again?

A: Yes

Q: Okay. Were you sleeping in bed at one point in that night?

A: Yes.

Q: Was your bed separate from Ashley's?

A: Yes.

Q: Okay. Did you see your dad come in the room that night?

A: Yes.

Q: Did you see your dad pick up Ashley?

A: Yes.

Q: What did you see him do with Ashley the night that she never woke up again?

Mr. Hove: I'm sorry, I am unable to see the witness.

A: Cracked her head.

Q [Mr. Anderson]: He smacked her head?

A: Yeah.

Q: How did he do that?

A: (Inaudible response)

Q: He what?

A: He threw her.

Q: Threw her where?

A: On the hard floor.

(53 RT 3673-3674.)

But on cross-examination, Michael Jr. admitted he saw nothing.

Q [Mr. Hove]: Michael, the night you say that your dad picked up Ashley, it was dark in your room, wasn't it?

A: Yes.

Q: And you were asleep, weren't you?

A: Yes.

Q: And you didn't see anything, did you?

A: No.

Q: People have told you – people told you that your dad hurt Ashley, didn't they?

A: Yes.

Q: And they told you that your dad picked Ashley up and threw her down, didn't they?

A: Yes.

Q: And they told you to say that in court, didn't they?

A: Yes.

(53 RT 3680-3681.)

The prosecutor made no attempt to rehabilitate his witness on redirect. (53 RT 3684.)

As the foregoing discussion makes clear, the record contains ample evidence of the existence of suggestive and coercive questioning and its undeniable influence on the statements and testimony of the two child witnesses, evidence that should have been considered by the trial court in ruling on the admissibility of the children's testimony.

Appellant submits that the record fails to support the trial court's finding that Sabra and Michael Jr. were qualified to testify and that the error requires reversal of the convictions. If, however, this Court finds the record to not be sufficient to make such a determination, appellant requests that the case be remanded for a hearing on the issue of whether the testimony of Sabra and Michael Jr. was the product of their personal knowledge, at which time the trial court will be given the opportunity to consider, as it should have initially, the effect of the suggestive and coercive questioning. (See *Commonwealth v. Delbridge*, *supra*, 855 A.2d at p. 41.)

D. The Admission of Unreliable Evidence Violated Appellant's Right to Due Process

If this Court finds that the trial court was not required to consider the effect of suggestive or coercive questioning in this case, then appellant submits the existing rules of evidence on witness competence and

credibility, as interpreted by this Court, do not comport with due process because they allow for the introduction of unreliable evidence. (See *Lisenba v. People of State of California* (1941) 314 U.S. 219, 235-236 ["the adoption of the rule of [California's] choice cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law"].)

In the event this Court does not find that appellant was entitled to a pretrial hearing at which the trial court considered the effect of suggestive and coercive questioning, it should nevertheless make an independent determination whether, under the totality of circumstances, the statements and testimony of Sabra and Michael that were obtained as the result of suggestive questioning were reliable. (See *Neil v. Biggers* (1972) 409 U.S. 188, 199; *People v. Badgett* (1995) 10 Cal.4th 330, 351-352.)

Plenary review is appropriate in cases in which the reviewing court is called upon to determine whether a defendant has been deprived of a fair trial based on the improper admission of evidence. (See, e.g., *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643 [whether prosecutor's remarks in closing argument violated due process]; *People v. Badgett*, *supra*, 10 Cal.4th at p. 350 [claim of coerced statements of third party reviewed de novo for due process violation]; *People v. Sully* (1991) 53 Cal.3d 1195, 1216-1218 [whether third party immunity agreement was coercive and admission deprived defendant of fair trial]; *Wilcox v. Ford* (11th Cir. 1987) 813 F.2d 1140, 1148, fn. 15 [same].)

Appellant's convictions, which rest on the unreliable testimony and statements of Sabra and Michael Jr., violate due process. The error is analogous to that first recognized in *People v. Medina* (1974) 41 Cal.App.3d 438, in which the Court of Appeal held that "a defendant is denied a fair trial if the prosecution's case depends substantially upon

accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." (*Medina, supra,* 41 Cal.App.3d at p. 455.) This Court has since observed that when an "accomplice is granted immunity subject to the condition that his testimony substantially conform to an earlier statement given to police [citation], or that his testimony result in the defendant's conviction [citation], the accomplice's testimony is 'tainted beyond redemption' [citation] and its admission denies the defendant a fair trial." (*People v. Allen* (1986) 42 Cal.3d 1222, 1251-1252.)

The reasons for finding the testimony in *Medina* and subsequent cases "tainted beyond redemption," hold true for the present case as well, for while the source of the taint may differ, its effect on the witness's testimony is the same. Because the witness is not a "free agent," due to the compulsion of the immunity agreement, or in this case, the coercive and suggestive questioning, his or her testimony cannot be weighed by the jury because there is "no standard by which his veracity could be tested or estimated." (*People v. Medina*, *supra*, 41 Cal.App.3d at p. 453, quoting *Rex v. Robinson*, 30 B.C. 369, 70 D.L.R., 755.)

The use of such tainted testimony in this case constitutes constitutional error that cannot be found harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23.) Without Sabra's and Michael Jr's statements – their trial testimony and their prior statements which were also admitted through the testimony of other prosecution witnesses – identifying appellant as Ashley's abuser and killer, the prosecution had no case. The erroneous admission of this unreliable testimony was, therefore, manifestly prejudicial and not only violated California law but violated appellant's state and federal constitutional rights to due process and his rights to a fundamentally fair trial and penalty phase

under the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and article I, sections 1, 7, 13, 15, 16 and 17 of the California Constitution. (*Beck v. Alabama* (1980) 447 U.S. 625, 637; *Spaziano v. Florida* (1984) 468 U.S. 447, 456; *Gardner v. Florida* (1977) 430 U.S. 349, 358.) Reversal of the convictions is required.

E. The Evidence of Capital Murder, Which Consists of The Uncorroborated Statements of Two Young Children, Is Too Unreliable Under the Eighth Amendment To Support the Death Sentence

The Eighth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution establish standards for the minimum reliability of evidence upon which a death judgment rests. Because "death is different" (see, e.g., *Gregg v. Georgia* (1976) 428 U.S. 153, 188), imposition of a death sentence cannot rest upon unreliable or highly prejudicial evidence. (*People v. Murtishaw* (1981) 29 Cal.3d 733, 771 & fn. 33; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 (plur. opn. of Stewart, Powell and Stevens, JJ.).) Appellant's conviction for the capital crime of first degree murder in the commission of torture is based on the testimony of two very young children; testimony that is so unreliable that it does not meet the heightened reliability standards under the Eighth Amendment and cannot support a death sentence. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

The "importance of ensuring the reliability of the guilt determination in capital cases," has been a cornerstone of the Court's Eighth Amendment decisions, for without such safeguards there exists the risk that an innocent person might be executed. (*Herrera v. Collins* (1993) 506 U.S. 390, 407, fn. 5; see also, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584.)

The "heightened concerns" about the reliability of evidence in child rape cases cited by the majority in *Kennedy* – the role of the child as the

central narrator of the crime and generally the only witness – are present in this case. (*Kennedy v. Louisiana*, *supra*, 128 S.Ct. at p. 2663.) Indeed, even the dissenting justices – Justice Alito, joined by Chief Justice Roberts and Justices Thomas and Scalia – who disagreed with the majority's conclusion that imposition of the death penalty in child rape cases violates the Eighth Amendment based on concerns about the reliability of the testimony of child victims, acknowledged the problems regarding the reliability of such evidence, but argued that the Eighth Amendment concerns could be addressed by requiring corroboration of child-witness' testimony with independent evidence sufficient to prove all the elements needed for conviction and imposition of a death sentence. (*Id.* at p. 2675, (dis. opn. of Alito, J.).) As has been shown, the testimony of the children in the present case is uncorroborated by any independent evidence, and thus those reliability concerns remain.

This Court has rejected the argument that a death sentence based on children's testimony is not sufficiently reliable under the Eighth and Fourteenth Amendments because the defendant "was fully afforded the protections of the procedures constitutionally required to ensure reliability in the factfinding process." (*People v. Dennis*, *supra*, 17 Cal.4th at p. 526; see also *People v. Mincey* (1992) 2 Cal.4th 408, 445, and *People v. Cudjo* (1993) 6 Cal.4th 585, 621-622.)

Because the procedures used to determine the admissibility of the children's statements and testimony in this case failed to consider the effect of suggestive questioning, they cannot be deemed constitutionally adequate. (*Ford v. Wainwright*, *supra*, 477 U.S. at p. 411; *Spaziano v. Florida*, *supra*, 468 U.S. at p. 456.) Further, unlike the present case, in *Dennis*, *Mincey* and *Cudjo*, the evidence of the defendant's guilt of capital murder did not rest exclusively on the testimony of a young child. Appellant is unaware of any

case in which a conviction for capital murder rests on testimony comparable to that of Sabra and Michael Jr. This Court should not permit appellant's death sentence to stand.

F. Conclusion

The evidence of appellant's guilt, which is based on the statements and testimony of Sabra and Michael Jr., lacks the reliability demanded by the due process and the Eighth Amendment and as a result, this Court should reverse the convictions and death sentence.

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II.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE FIRST DEGREE MURDER CONVICTION OR THE SPECIAL CIRCUMSTANCE FINDING OF TORTURE MURDER

A. Introduction and Factual Background

Appellant was charged with murder and the special circumstance allegation of torture murder. The prosecutor argued to the jurors that they could choose between three theories of first degree murder: premeditated and deliberate murder, murder by torture, and felony murder based on the theory that the killing was committed during the course of the felony of lewd and lascivious conduct. (68 RT 4507, 4521.) The jury was instructed on the murder theories with CALJIC Nos. 8.20, 8.21 and 8.24. (6 CT 1353-1355; 71 RT 4697-4699.)

Appellant has argued in Argument III that the record lacks sufficient evidence to prove that he sexually assaulted the victim. Here, appellant argues that there is insufficient evidence to sustain the first degree murder conviction based on theories of premeditated and deliberate murder, torture murder, or felony murder, and that there is insufficient evidence of the torture-murder special circumstance.

In assessing a claim of insufficiency of evidence, this Court must review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence – 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. Kipp* (2001) 26 Cal.4th 1100, 1128.) The test is the same under the Fourteenth Amendment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 ["the test is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt"] original italics.)

As this Court has repeatedly held, it is the exclusive province of the fact finder to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. If the verdict is supported by substantial evidence, the court must accord due deference to the trier of fact and not substitute its evaluation of a witness's credibility for that of the fact finder. (*People v. Barnes* (1986) 42 Cal.3d 284, 303; *People v. Johnson* (1980) 26 Cal. 3d 557, 578.) If, however, the evidence in support of the convictions is not "of ponderable legal significance . . . reasonable in nature, credible and of solid value," (*Johnson, supra*, 26 Cal.3d at p. 576), it is the responsibility of the reviewing court to set aside the verdicts, for, as the United States Supreme Court recognized in *Jackson v. Virginia, supra*, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." (443 U.S. at p. 317.)

Only if a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., Amends. 5th, 6th, 8th, 14th; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia, supra*, 443 U.S. at p. 319; *Herrera v. Collins* (1993) 506 U.S. 390, 401-402.)

The standard of review for sufficiency of the evidence with regard to a finding of special circumstances is the same. (*People v. Ochoa* (1998) 19 Cal.4th 353, 413; *People v. Alvarez* (1996) 14 Cal.4th 155, 224-225; *People v. Clair* (1992) 2 Cal.4th 629, 670.) No substantial evidence of either first degree murder or the special circumstance can be found in this record.

B. Lack of Substantial Evidence of Deliberate Premeditated Murder

"A finding of first degree murder which is merely the product of conjecture and surmise may not be affirmed." (*People v. Rowland* (1982) 134 Cal.App.3d 1, 8-9.) In addition, the reviewing court "does not . . . limit its review to the evidence favorable to the respondent." Instead, it "must resolve the issue in light of the *whole record* – i.e., the entire picture of the defendant put before the jury – and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." (*People v. Johnson* (1980) 26 Cal.3d 557, 577, original italics, internal quotations omitted; *see Jackson v. Virginia, supra,* 443 U.S. at p. 319 ["*all of the evidence* is to be considered in the light most favorable to the prosecution"], original italics.) In other words, "[m]ere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof." (*People v. Terry* (1962) 57 Cal.2d 538, 566.)

An unjustified killing of a human being is presumed to be second, rather than first, degree murder. (*People v. Anderson* (1968) 70 Cal.2d 15, 25.) In order to support a finding that the murder is first degree, the prosecution bears the burden of proving beyond a reasonable doubt that the defendant premeditated and deliberated the killing. (*Ibid.*; see also *In re Winship* (1970) 397 U.S. 358, 362-363; *Apprendi v. New Jersey* (2000) 530 U.S. 466, 488-490 [state must prove every element that distinguishes a lesser from a greater crime].)

Deliberate and premeditated murder requires more than an intent to kill. (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.) The People also must show that the killing was deliberate (i.e., the result of a careful weighing of considerations) and premeditated (i.e., thought of in advance). Deliberate and premeditated murder arises out of a cold, calculated judgment, rather

than a rash impulse. (*Ibid.*)

The *Anderson* case identified three categories of evidence to be considered in assessing the presence or absence of premeditation and deliberation: (1) planning activity prior to the killing; (2) motive, usually established by a prior relationship or conduct with the victim; and (3) manner of killing. (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) Typically, this Court will sustain a verdict of first degree murder on a theory of premeditation and deliberation when there is evidence of *all three factors*; otherwise, absent other significant factors outside the rubric of *Anderson*, there must be "at least extremely strong" evidence of planning activity, or some evidence of planning activity in conjunction with either motive evidence or an exacting manner of killing. (*Id.* at p. 27.) The record in the present case contains insufficient evidence of planning, motive and manner of killing.

A review of the guilt phase closing argument reveals that the prosecutor never offered a theory of premeditated deliberate murder and never discussed facts supporting a finding of premeditation and deliberation. While it is true that the prosecutor's argument is not evidence and that the jury may consider theories other than those put forth in the argument, as this Court noted in *People v. Perez* (1992) 2 Cal.4th 1117, 1162, it is also true that the prosecution theory is a logical place to look for an explanation for a finding of premeditation. (*Id.* at p. 1144, disn. opn. of Mosk, J.) The prosecutor's complete inability to articulate a theory of premeditation and deliberation speaks volumes.

1. Insufficient evidence of planning

Planning activity – "facts about how and what defendant did prior to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the killing" (*People*

v. Anderson, *supra*, 70 Cal.2d at p. 27) – is the most important of the three *Anderson* guidelines. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1018.) The record here contains no evidence that appellant planned an attack on Ashley, and indeed, the prosecutor never once mentioned planning in his closing arguments.

A defendant's actions just prior to the murder are often utilized to demonstrate the steps taken toward the act of killing the victim. Examples of planning activity have included the fact that defendant did not park his car in the victim's driveway, he surreptitiously entered her house, and he obtained a knife from the kitchen before attacking her as she entered (*People v. Perez*, *supra*, 44 Cal.3d at p. 1126); defendant's act of retrieving the murder weapon from the garage (*People v. Wharton* (1991) 53 Cal.3d 522, 547); defendant's actions before crashing through living room window of victim's house demonstrate he planned his entry. (*People v. Young* (2005) 34 Cal.4th 1149, 1183.)

Here, there are no comparable actions by appellant. And while, because appellant lived with Ashley it was not necessary to take measures that could be interpreted as planning to gain access to the victim as in the cases cited, the fact that under the prosecutor's theory of the case Ashley was killed in front of two witnesses and within earshot of Sandra Harris, instead of at a time when she was alone with appellant, strongly militates against a finding that the killing was planned.

2. Insufficient evidence of motive

There is insufficient solid, credible evidence that appellant harbored a motive to kill Ashley. Motive evidence consists of "facts about the defendant's prior relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill." (*People v. Anderson*, *supra*, 70 Cal.2d at pp. 26-27.)

The motive offered by the prosecutor was that appellant killed Ashley because he resented having her stay at the apartment and considered her a financial burden. Reading from the transcript of a video taped interview with Sandra Harris, the prosecutor quoted Harris's answer to Officer Martinez's question why she thought appellant assaulted Ashley: "Because he didn't want her there. I think he took it out on her because he didn't want her there. That's exactly why I think he did this. And I think he thought he was going to hit her and get away with it." (68 RT 4524.) The prosecutor's argument that this testimony provides evidence of a motive to kill does not withstand scrutiny. (70 RT 4675-4676.)

Laurie Strodtbeck testified that when she tried to get her mother and appellant to take Ashley so that she could be free for the weekend, *both* of them said it would be too great a financial hardship for them to do so. (43 RT 3053.) Despite Laurie's unequivocal testimony that both Harris and appellant objected to taking Ashley, the prosecutor argued that such resistance did not constitute a motive for Harris to kill: "This motive is related to Mr. Lopez only, not Sandra Harris. She had no motive to kill that child." (70 RT 4675.) Moreover, according to Laurie, at appellant's request she gave him some of the money she got from Jesse Lopez to take care of Ashley. (43 RT 3056.) There is nothing in the record to suggest that this did not eliminate appellant's objection to taking Ashley and, thus, any conceivable motive to kill her based on financial concerns. The sad reality was that no one wanted Ashley, but appellant agreed to take care of her, even after Jesse Lopez was released from the hospital. (43 RT 3091.) Even if it could plausibly be argued that appellant continued to harbor resentment about having to care for Ashley, nothing in the record suggests that his feelings were strong enough to lead him to kill her.

The prosecutor also cited as evidence of motive a statement

attributed to appellant's neighbor, Pilar Ford, that if appellant inflicted the injuries to Ashley, they were done not with a sexual purpose, but as a way of punishing Sandra Harris for allowing Ashley to stay at the apartment. (70 RT 4648-4649.) Ford denied making the comment. (53 RT 3640.) Detective Wydler's testimony, offered to impeach Ford, demonstrates that if the statement was made, it was utter speculation. Detective Wydler testified: "[W]e were asking if it was possible that – that the injuries were caused by Mike Lopez, and she said that if they were, that they weren't done for a sexual purpose but as a way of punishing Sandra for having taken Ashley into the house and, you know, allowing her to stay at the home." (54 RT 3716.)

Nor is there substantial evidence that Ashley was killed to cover up sexual abuse – a motive not mentioned by the prosecutor. As demonstrated in Argument III, there is no credible evidence that appellant sexually assaulted Ashley, but assuming, arguendo, appellant had a motive to kill a witness to his sexual abuse of Ashley, the likely victim would have been Sabra, not Ashley. According to Laurie Strodtbeck, Sabra claimed to have seen appellant assaulting Ashley one night in the adults' bedroom and being ordered to "get the hell out of here" by appellant. (52 RT 3621-3622.) Sabra was a far more threatening informant than Ashley, who was only 21 months old and not yet talking. (59 RT 3964.)

Further, any speculation that appellant would kill to eliminate a witness is dispelled by the fact he made no attempt to harm the two alleged eyewitnesses to his killing Ashley – Sabra and Michael, Jr.

In addition, appellant's actions in the week leading up to Ashley's death, during which he followed his regular work schedule, took Ashley with him to a doctor's appointment for Sabra, and left the children in the care of babysitters and family members, are completely inconsistent with

someone who was trying to cover up sexual abuse.

Even if the record suggests appellant had a motive to kill Ashley, under the *Anderson* analysis, motive evidence alone is insufficient to support a finding of premeditation and deliberation. It must be supported by facts of planning or the nature of the killing which would "support an inference that the killing was the result of a 'pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.) That evidence is not present in this record.

3. Insufficient evidence of manner of killing

Nothing about the manner of killing in this case reveals forethought and reflection. This Court in *Anderson* described the manner-of-killing factor as facts about the nature of the killing from which the trier of fact could infer that the manner of killing was so particular and exacting as to be accomplished according to a preconceived design "to take [the] victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of [planning or motive]." (*People v. Anderson, supra*, 70 Cal.2d at pp. 26-27.)

The only evidence of how Ashley died was the testimony of Sabra and Michael Jr., that they saw appellant hold Ashley, who was crying, over his head and throw her to the ground. While this action may demonstrate intent to kill, it in no way supports a finding of premeditation and deliberation. Indeed, except for when he read the jury instruction defining first degree murder, the prosecutor never mentioned premeditation and deliberation. He argued only that there was evidence of intent to kill: "What do you think the intent is, what do you think the intent is when a person takes an infant a little over one and a half years old, lifts her above

his head, lifts the baby above his head, flings her, slams the baby to the ground? . . . If that conduct doesn't define intent to kill, then we better redefine the norms of our society." (68 RT 4509-4510.) Intent to kill does not equal premeditation. First degree murder requires a premeditated and deliberate intent. (*People v. Bender* (1945) 27 Cal.2d 164, 181, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.)

This case is distinguishable from *People v. Whisenhunt* (2008) 44 Cal.4th 174, in which this Court found the methodical infliction of burn wounds to an incapacitated child victim, along with evidence of continuing and escalating acts of abuse prior to the murder, supported a finding of premeditation and deliberation. Here, there is no behavior remotely similar to that of the perpetrator in *Whisenhunt* who "methodically poured hot cooking oil onto various portions of [the victim's] body, repositioning her body so as to inflict numerous burns throughout her body, including her genital region." (*Id.* at p. 201.)

This Court in *Whisenhunt* also relied on the defendant's actions in taking advantage of being alone with the victim to inflict the most extreme abuse as evidence of premeditation and deliberation. Here, of course, the fatal wounds were allegedly inflicted while others were within earshot in the apartment and even in the same room.

The actions depicted in the record in no way suggest the killing "was the result of careful thought and weighing of considerations, as a deliberate judgment or plan, carried on coolly and steadily, especially according to a preconceived design." (*People v. Rowland, supra,* 134 Cal.App.3d at p. 7, citing *Anderson, supra*, 70 Cal.2d at p. 26.)

C. Lack of Substantial Evidence of Murder by Torture

First degree torture murder is murder "perpetrated by means of . . . torture" (Pen. Code, § 189), and there must be a causal relationship between

the torturous acts and the victim's death. (*People v. Crittenden* (1994) 9 Cal.4th 83, 141-142; *People v. Cole* (2004) 33 Cal.4th 1158, 1207; *People v. Pensinger* (1991) 52 Cal.3d 1210, 1239; *People v. Davenport* (1986) 41 Cal.3d 247, 267.) The elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. (*People v. Cook* (2006) 39 Cal.4th 566, 602.)

The prosecutor had only this to say about murder by torture: "The main differences between this and deliberate murder is (1) the intent to inflict prolonged pain on another, and (2) this law does not require an intent to kill, even though our evidence shows that intent. [¶] If you believe that this father of the year did not intend to murder Ashley when he slammed her to the ground, he is still guilty of first-degree murder if you find that he intended to cause prolonged pain to her. That was the testimony of Dr. Crawford." (68 RT 4511.)

The prosecutor's theory was that the abuse Ashley suffered throughout what he called, "hell week," while she was with appellant and Sandra Harris, constituted torture. (68 RT 4507.) He asked the jury: "Remember the words 'extreme and prolonged pain?' Where did we first hear that? Dr. Crawford, as he testified how that little girl felt during that hell week." (68 RT 4508-4509.) By Thursday, the prosecutor argued, "the torture and abuse of this baby . . . is starting to take its toll." (68 RT 4479.) Later in the argument, the prosecutor stated, "I'll tell you why she was crying [before she was thrown down]. You recall the testimony of Ms. Harris herself? The vaginal injuries are getting worse and worse. The way

she described it, getting uglier and uglier."[67] (68 RT 4510.)

Murder by means of torture is "murder committed with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*People v. Steger* (1976) 16 Cal.3d 539, 546.) "Because the requisite element of first degree torture murder is the deliberate and premeditated intent to inflict torture, the issue is whether there is sufficient evidence of planning, motive, or method to inflict torture." (*People v. Mincey* (1992) 2 Cal.4th 408, 435.)

It must be emphasized that there is no substantial, reliable evidence that appellant caused *any* of the injuries to Ashley. (See Arguments I and III.) Moreover, just as there is insufficient evidence of planning, motive and method of killing for a finding of premeditated and deliberate murder, there is also insufficient evidence of planning, motive and method to cause extreme and prolonged pain to support a finding of torture murder.

The determination of a defendant's wilful, deliberate and premeditated intent to inflict extreme and prolonged pain may be inferred from the circumstances surrounding the killing. Viewing the record in the light most favorable to the judgment, the fatal head injury cannot be deemed torturous. According to the testimony of Sabra and Michael Jr., Ashley was picked up out of bed and thrown to the ground. While such actions may demonstrate an intent to kill, there is simply no way it can be said that the killing was committed "with a 'sadistic intent to cause the victim to suffer pain in addition to the pain of death.'" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1136, quoting *People v. Bermore* (2000) 22 Cal.4th 809, 841.) In *People v. Bender*, *supra*, 27 Cal.2d 164, the victim was

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[67] This statement is contrary to the medical evidence, however, which was that the vaginal injuries were in the process of healing at the time of Ashley's death. (47 RT 3315.)

strangled and beaten by the defendant in a fit of anger. This Court found insufficient evidence of torture, noting, "the killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer." (*Id.* at p. 177.) The act of throwing a young child to the ground, similarly, does not suggest an intent to make the victim suffer.

Nor can the other injuries suffered by Ashley be considered sufficient evidence of the requisite sadistic intent. Preliminarily, as discussed above, there is no evidence that appellant inflicted the injuries. If, however, this Court were to find there was evidence to implicate appellant in inflicting the injuries: "While the prosecution focused on the resulting injuries, they failed to establish the requisite intent. There is no evidence that defendant acted for some vengeful, persuasive, or sadistic purpose, extortion, persuasion, or another sadistic purpose. [Citations.]" (*People v. Cook*, *supra*, 39 Cal.4th at p. 602.)

Dr. Rogers testified that the cause of death was blunt force trauma. When asked by counsel for Sandra Harris whether he was referring only to the head injuries he stated:

> Well, the cause of death are all of the blunt injuries on the body taken together in their totality. The most serious, of course, are the head injury. We can take out and discuss in and by themselves these individual bruises to the skin and they, of course, by themselves, are not life-threatening. But in their own little way, they contributed to the death.

(39 RT 2790.)

Dr. Rogers' unsupported and unexplored assertion that the non-fatal injuries "contributed" to Ashley's death "in their own little way," is not

sufficient to establish that the injuries were inflicted with the requisite intent to torture.

Dr. Crawford testified unequivocally that "the injury that killed her was the brain swelling the hours before her death." (47 RT 3319.) Dr. Crawford also testified "the constellation of injuries that she has . . . represent a systematic and ongoing brutal assault, series of assaults on this child, ultimately resulting in her death." (47 RT 3306.) But he offered no support for his opinion that the assault was "systematic," nor does his testimony provide evidence of intent to torture. Dr. Bernice Rodrigues, who saw Ashley at St. Rose's Hospital, described the pattern of bruises on her body as "random." (45 RT 3189.) The bruising to Ashley's chest was probably caused by a "very common mechanism" of someone grabbing her and squeezing, leaving fingerprint pattern bruises, actions which suggest anger or frustration, but not the methodical infliction of pain. (47 RT 3288-3289.)

The tragic reality is that Ashley was an abused child, but there is no evidence that she was tortured. The distinction between a child abuser and torturer has been made in several cases.

In *People v. Steger*, *supra*, 16 Cal.3d 539, this Court reversed the defendant's conviction for first degree murder by means of torture. The three year-old victim in that case was beaten repeatedly in the month preceding her death by her stepmother, who was frustrated by her inability to discipline the child. The child suffered multiple injuries to all parts of her body, including a subdural hematoma and lacerations and bruises covering her body from head to toe.

In *Steger,* the court distinguished murder by means of torture from other types of murder. "It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve

significant pain. [Citation.] Rather, it is the state of mind of the torturer the cold-blooded intent to inflict pain for personal gain or satisfaction." (*People v. Steger*, *supra*, 16 Cal.3d at p. 546.) The court found that while the defendant severely beat her stepdaughter, "there is not one shred of evidence to support a finding that she did so with cold-blooded intent to inflict extreme and prolonged pain." (*Id.* at p. 548.)

The severity of the victim's wounds is one circumstance to be considered, however, "undue weight should not be given to such evidence, 'as the wounds could in fact have been inflicted in the course of a killing in the heat of passion rather than a calculated torture murder.'" (*People v. Walkey* (1986) 177 Cal.App.3d 268, 274, quoting *People v. Steger*, *supra*, 16 Cal.3d at p. 546; see also, *People v. Morales* (1989) 48 Cal.3d 527, 559; *People v. Pensinger*, *supra*, 52 Cal.3d at p. 1239.) *Walkey* is another case involving the torture-murder conviction of a child abuser. The two-year-old victim had suffered severe abuse, including abrasions and bruises, a severe penetrating blow to the abdomen, fractured rib, bite marks and multiple blunt trauma injuries. (*People v. Walkey*, *supra*, 177 Cal.App.3d at pp. 272-273.) Relying on the decision in *Steger*, the court found insufficient evidence that the defendant inflicted the injuries with the requisite intent to inflict extreme and prolonged pain. "Although evidence was presented [the child's] injuries had been inflicted over a period of several months, this does not lead to the conclusion [the child] was tortured. Rather, the fact [the child] was beaten on numerous occasions shows only 'that several distinct "explosions of violence" took place, as an attempt to discipline a child by corporal punishment . . . .' [Citation.]" (*Id.* at p. 275.)
The manner in which Ashley was killed is far more suggestive of an explosion of rage, not a deliberate infliction of "nonfatal wounds . . . in an attempt to increase her suffering." (*People v. Mungia*, *supra*, 44 Cal.4th at

p. 1138.)

Where the record contains evidence to establish the intent requirement, courts have upheld torture convictions. In each case the evidence showed that the defendants' actions went far beyond any misguided attempt at discipline or outbursts of frustration, and was intended to inflict cruel pain and suffering upon a helpless child. (See, e.g., *People v. James* (1987) 196 Cal.App.3d 272, 293-294 [defendant acted in sadistic and humiliating manner and forced the child to ingest 151 proof rum and cigarettes]; *People v. Mills* (1991) 1 Cal.App.4th 898, 914-917 [substantial evidence of cruel, tormenting acts intended to cause the child pain over period of months preceding her death].)

This Court upheld a torture murder finding in *People v. Mincey*, *supra*, 2 Cal.4th 408, based on the severity of the victim's injuries, which go well beyond those suffered by the victim in the present case:

> the physical evidence relating to the killing of five-year-old James included blood throughout the bedroom, belts and a board with blood and feces, and a large clump of brown hair consistent with James's hair. Dr. Irving Root, the physician who performed the autopsy, testified that James had incurred hundreds of injuries within 24 to 48 hours of death; that he had been beaten with hands, belts, and a board; that the beating lasted hours; that James might have lost the ability to feel any sensation of pain for as much as an hour before his death; that the shearing of the tissues in James's buttocks was caused by a substantial force being applied with a straight edge; that the tear two to three inches inside James's rectum was not caused by the application of force outside the rectum but was consistent with a tear caused by a fingernail; and that there were puncture marks behind both of James's knees.

(*Id.* at p. 435.)

Moreover, in finding substantial evidence of murder by torture in *Mincey*, this Court cited "the length of time over which the beatings

occurred, the number of injuries inflicted, the variety of objects with which the injuries were inflicted, and the fact that the victim was made to eat his own feces," as establishing "planning and a preconceived design to inflict cruel pain and suffering." (*People v. Mincey*, *supra*, 2 Cal.4th at p. 435.) There are no facts in the present case that are remotely similar.

While the injuries suffered by Ashley were indisputably severe and, according to Dr. Crawford's testimony, caused her pain (47 RT 3308-3309), there is simply no evidence of the requisite intent to torture, that is, that the injuries were inflicted with the intent to cause pain and suffering for a sadistic purpose. The fact that Ashley experienced pain is not enough to prove torture. The assailant's intent must be "to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity. The test cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death." (*People v. Tubby* (1949) 34 Cal.2d 72, 77.)

The record in the present case contains no evidence that if appellant inflicted the injuries on Ashley, he did so with a wilful, deliberate and premeditated intent to inflict extreme and prolonged pain, and thus the torture-murder allegation must fail.

D. Lack of Substantial Evidence of Felony Murder

Murder committed in the perpetration of certain felonies constitutes murder of the first degree. (Pen. Code, § 189.) Under the felony-murder doctrine, the jury must find that the perpetrator had the specific intent to commit one of the felonies enumerated in section 189. The killing need not occur in the midst of the commission of the felony, so long as the felony is not merely incidental to, or an afterthought, to the killing. (*People v. Proctor* (1992) 4 Cal.4th 499, 532.) The only criminal intent required is the

specific intent to commit the particular felony. The killing is first degree murder "regardless of whether it was intentional or accidental." (*People v. Coefield* (1951) 37 Cal.2d 865, 868.)

The prosecutor's theory was that the killing was felony murder because it occurred during the commission of a lewd act in violation of Penal Code section 288, subdivision (b)(1).[68] (6 CT 1354, 1369; CALJIC 10.42.) Because the record lacks any evidence that such an act occurred at the time the fatal head injuries were inflicted, there is no basis for a finding of felony murder.[69]

The prosecutor argued the issue two different ways: either the forcible lewd and lascivious act occurred when appellant was allegedly changing Ashley's diaper on Friday morning when she was fatally injured (68 RT 4482; 69 RT 4571), or the lewd act happened the previous Sunday while Sandra Harris was at Santa Rita. Either way, the felony-murder finding cannot stand.

In order to sustain a conviction under a felony-murder theory, the elements of the underlying felony must be proved. (See *People v.*

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[68] The elements of Penal Code section 288, subdivision (b)(1) are: 1) a person touched the body of a child; 2) the child was under 14 years of age; 3) the touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and 4) the touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful injury on the child or another person.

[69] The information charged appellant with murder under Penal Code section 187, the special circumstance of torture murder (section 190.2, subd. (a)(18)) and the substantive crime of Penal Code section 288, subdivision (b)(1). (5 CT 997.) The information alleged that the violation of Penal Code section 288, subdivision (b)(1) occurred between May 30 and June 4, 1999. (*Ibid.*) Appellant was not charged with the special circumstance of murder in the commission of a lewd act. (Pen. Code, § 190.2, subd. (a)(17)(E).)

Whitehorn (1963) 60 Cal.2d 256, 264.) In the present case, however, the record contains insufficient evidence that appellant changed Ashley's diaper on Friday morning, or if he did, that while doing so, he committed a violation of section 288, subdivision (b)(1).

The only evidence that appellant ever changed Ashley's diaper came from Sandra Harris, who testified that during the week Ashley stayed with them, appellant would change the diapers of Ashley and Michael Jr. in the morning before he left for work, but that he did not change Ashley's diaper on Friday morning. (60 RT 4002.)

Harris testified that on the evening of Thursday, June 3, 1999, Ashley vomited several times. At about 11:00 p.m., Harris left the apartment to get some Pedialyte and when she returned everyone was asleep. Harris could not sleep because she had been using methamphetamine so she stayed up working on a stained glass project until 4:00 or 4:30 a.m. She fell asleep and woke up at about 5:30 a.m., and discovered that appellant had overslept. She woke him and he left for work without changing Ashley's diaper. (59 RT 3985-3987; 60 RT 4041, 4044, 4049.)

Harris was impeached with a statement she gave to police on the day of Ashley's death in which she said appellant got up at 4:00 a.m. to go to work. Harris heard Ashley crying at about 4:30 a.m. and appellant said he was changing her diaper because she was wet. (60 RT 4044-4050.)

Harris explained at trial that when she initially spoke to the police she was confused about the days of the week. When she said appellant changed Ashley's diaper at 4:30 a.m., she meant that he changed the diaper on Thursday morning, not Friday. (60 RT 4048-4050.) Officer Martinez confirmed that during the interview Harris confused the days Thursday and Friday. (67 RT 4408.)

Thus, while Harris's statement to police provides some evidence that appellant changed Ashley's diaper on Friday morning, according to the alleged eyewitnesses, Sabra and Michael Jr., he did not. Sabra testified that appellant entered the room, picked up Ashley and threw her on the floor. (51 RT 3523.) Michael Jr.'s testimony, which he recanted on cross-examination, made no mention of appellant changing Ashley's diaper. (53 RT 3673-3675.)

Even if there is sufficient evidence that appellant changed Ashley's diaper on Friday morning, the prosecutor was never able to point to any fact that showed appellant committed a violation of Penal Code section 288, subdivision (b)(1) at the time that Ashley sustained the fatal head injury. Ashley did not have any recent injury to her genital area and no blood or semen was found on her. There was no foreign DNA found on the vaginal swabs taken Friday at the hospital. (50 RT 3473; see *People v. Granados* (1957) 49 Cal.2d 490, 497 [evidence insufficient to sustain conviction for first degree murder under felony-murder theory, where only evidence of molestation was defendant asked victim prior to murder if she was a virgin, and the victim's body was found with her skirt hiked considerably above her private parts].)

In fact, the prosecutor was reduced to arguing that, "only God and Michael Lopez know what he was doing to that baby under the guise of changing her diaper."[70] (68 RT 4510.) The prosecutor posed the question –

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[70] In another passage, the prosecutor appears to confuse the theories of first degree murder when he referred to appellant changing the children's diapers: "What do you think he was doing those three straight mornings around 4:00 o'clock or so? Being a loving, caring guardian? He was showing the intent to kill, and also showed express malice to kill a human being. What else can you call slamming a one-and a half year old to the ground . . . That is first degree murder with express malice, intent to kill."

"I ask you to think, again, what was he doing those three mornings when he was quote 'changing her diaper'?" – but offered no evidence in response. (68 RT 4511.) Instead, he referred to the testimony of Dr. Rogers, who, responding to a question by the prosecutor, said it was a "possibility" that "somebody might have been causing additional injury" to the labia by squeezing or pinching. (68 RT 4512.) This argument is nothing more than sheer speculation, and "speculation is not substantial evidence." (*People v. Killebrew* (2002) 103 Cal.App. 4th 644, 661.)

The prosecutor failed to prove the commission of an act under Penal Code section 288, subdivision (b)(1) at the time the fatal injuries were inflicted on June 4, 1999. If the underlying felony was not committed on June 4, i.e., "in the perpetration of" the murder, then the crime is not felony murder under Penal Code section 189. A finding of felony murder requires that the homicide and the forcible lewd act be parts of one continuous transaction. (*People v. Mason* (1960) 54 Cal.2d 164, 169; *People v. Sakarias* (2000) 22 Cal.4th 596, 624.)

The prosecutor argued to the jury that the fatal head injury occurred sometime after 4:00 a.m. on Friday. (70 RT 4653.) The medical evidence showed that Ashley died from blunt force trauma to the head, which likely occurred on Friday, June 4, 1999. Two CAT scans on that day, one at 1:00 p.m. and another at 4:00 p.m. showed the fatal head injury to be relatively recent, as old as 24 hours, but more likely 5 to 10 hours old. (47 RT 3301-3304.) It was the prosecutor's theory that the genital injury was inflicted on the previous Sunday. (68 RT 4471, 4476, 4494.)

While the underlying felony and the killing need not be part of one continuous act, they must be part of the same transaction. For example, the

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(68 RT 4511.)

defendant in *People v. Thompson* (1990) 50 Cal.3d 134, 171-172, was convicted of felony murder based on the commission of a lewd act and murder of the victim during the course of the same evening, probably within an hour or two of each other. During the entire period, the victim was under the defendant's control, and for much of the time was either bound, locked in a trunk, or both. Similarly, in *People v. Fields* (1983) 35 Cal.3d 329, the defendant robbed the victim, then drove her some distance from his home to kill her. The felony-murder verdict was upheld based on the fact that the crimes were linked not only by defendant's motive (which may have included preventing the victim from identifying him to the police), but also by his "continued control over the victim." (*Id.* at p. 368.)

The circumstances in the present case stand in stark contrast to both *Thompson* and *Fields*. Here, the lewd act was alleged to have occurred five days before Ashley was killed, and in the interim, she was not under appellant's control. While appellant went to work and was in and out of the apartment all week, Ashley had contact with Sandra Harris, Laurie Strodtbeck, multiple neighbors from the apartment complex, and several children. She played outside of the apartment and was seen by people in the apartment complex. She had multiple care givers other than appellant, including non-family members. Under no circumstances can the alleged genital injury of May 30 and the June 4 head injury be properly deemed a continuous transaction for purposes of the felony-murder rule.

Similarly, the allegations by Sabra, to which she testified at trial, and which were related by Cindy Jardin and Laurie Strodtbeck, of appellant making contact with Ashley's "private parts" do not establish that this contact occurred at the time of the fatal head injury. Jardin testified that Sabra told her that at an undefined point in time, appellant entered a room where she and Ashley were lying in bed. Sabra claimed that appellant

punched her as hard as he could in the chest, and then took Ashley to another room where he took Ashley's diaper off and punched her violently between the legs. (52 RT 3584-3485, 3595.) This is in no way consistent with Sabra's trial testimony about the circumstances surrounding the infliction of the fatal head injury.

Laurie testified that Sabra told her that she woke up in the middle of the night because Ashley was screaming. Sabra said she walked to the doorway of Harris and appellant's bedroom and saw appellant thrusting himself against Ashley. (52 RT 3621.) Sabra claimed Harris was not at home when she saw the thrusting. (52 RT 3626.) Again, Sabra did not say when she allegedly saw this happen, but it obviously was not at the time Ashley sustained the fatal head injury.[71]

Given this passage of time and nature of the intervening circumstances between the two events, under no plausible theory could the jury have properly found the events to be part of one continuous transaction.[72]

E. The Record Contains Insufficient Evidence to Support a True Finding of the Torture-Murder Special Circumstance

The standard of review for sufficiency of the evidence with regard to a finding of the torture-murder special circumstance is the same as the

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[71] As previously discussed, Sabra told her foster mother, Deborah Kavarias, that appellant had "used" his "private part" against Ashley, but Sabra also admitted she did not observe this herself. (52 RT 3613-3614.)

[72] Indeed, after hearing the prosecutor's theory of when the alleged lewd and lascivious act occurred, trial counsel objected when the prosecutor argued the felony-murder theory: "I am going to object. I think the evidence shows this argument is not plausible as to what he has argued to the jury." Counsel's objection was overruled. (68 RT 4510.)

standard for the substantive crime of torture murder. (*People* v. *Ochoa supra,* 19 Cal.4th at p. 413; *People v. Alvarez, supra,* 14 Cal.4th at pp. 224-225; *People* v. *Clair, supra,* 2 Cal.4th at p. 670.) The special circumstance requires that a murder be "intentional and involve[ ] the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18); *People v. Elliot* (2005) 37 Cal.4th 453, 479 ["the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose"].)

In order to prove the special circumstance of torture murder, the prosecution is not required, however, to prove that the acts of torture inflicted upon the victim were the cause of her death. (*People v. Crittenden, supra*, 9 Cal.4th at pp. 141-142.)

For the reasons set forth in section C., the record contains insufficient evidence to support the special circumstance of torture murder because the prosecution failed to prove that if appellant was responsible for the injuries inflicted on Ashley, it was done with the requisite mental state.

This Court recently found insufficient evidence of intent to torture to sustain a torture-murder special circumstance in *People v. Mungia, supra*, 44 Cal.4th 1101, noting the lack of evidence the defendant inflicted nonfatal wounds or deliberately exposed the victim to prolonged suffering, and contrasting the facts with those from a long list of cases in which such evidence was present. (*Id.* at pp. 1137-1138.) None of the methods employed or injuries inflicted in the present case are in any way comparable to those typically relied upon in upholding a finding of torture murder.

F. Conclusion

Viewed in the light most favorable to the judgment, the evidence presented at trial does not support a finding that appellant premeditated and deliberated the killing, nor that the murder was committed by means of

torture, nor during the commission of a felony, and thus, the first degree murder conviction was a violation of state law. (*People v. Anderson, supra*, 70 Cal.2d at pp. 34-35.) The improper conviction also violated appellant's federal rights to due process of law (*Jackson v. Virginia, supra*, 443 U.S. at pp. 313-314 [the "due process standard . . . protects an accused against conviction except upon evidence that is sufficient fairly to support a conclusion that every element of the crimes has been established beyond a reasonable doubt"]), to present a defense (*id.* at p. 314 ("[a] meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude the case in favor of the accused") and to a reliable guilt and penalty verdict. (U.S. Const., Amends. 6th, 8th, 14th; Cal. Const., art. I, §§ 7, 15, 16 & 17.) Thus, the first degree murder conviction must be vacated.

The jury's finding that the torture-murder special circumstance is true was not supported by substantial evidence. To hold otherwise would violate appellant's right to due process under the state and federal Constitutions. Moreover, to construe the torture-murder special circumstance in a manner which would encompass the facts of this case would result in a special circumstance that is vague and overbroad in violation of the Eighth and Fourteenth Amendments. Accordingly, the finding of the special circumstance must be set aside and the death sentence must be vacated.

III.

THE PROSECUTION FAILED TO ADDUCE SUFFICIENT CREDIBLE, RELIABLE EVIDENCE TO SUPPORT THE CONVICTION FOR FORCIBLE LEWD AND LASCIVIOUS ACTS ON A CHILD UNDER 14 AND THE GREAT BODILY INJURY ENHANCEMENT

A. Introduction

Appellant's conviction for Count 3, a violation of Penal Code section 288, subdivision (b)(1),[73] and the accompanying enhancement under section 12022.8, for the infliction of great bodily injury[74], violated his right to due process as guaranteed by Article I, § 7 of the California Constitution and the Fourteenth Amendment to the federal Constitution (*In re Winship* (1970) 397 U.S. 358), and thus, the conviction and sentence enhancement must be reversed.

As set forth in Argument II, a conviction will be sustained on appeal only when a review of the entire record discloses substantial evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.) In deciding a challenge to the sufficiency of the evidence, the reviewing court

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[73] The elements of section 288 subdivision (b)(1) are: 1) a person touched the body of a child; 2) the child was under 14 years of age; 3) the touching was done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child; and 4) the touching was done by the use of force, violence, duress, menace, or fear of immediate and unlawful injury on the child or another person.

[74] Penal Code section 12022.8 provides in pertinent part: Any person who inflicts great bodily injury, as defined in Section 12022.7, on any victim in a violation of . . . subdivision (b) of Section 288 . . . shall receive a five-year enhancement for each violation in addition to the sentence provided for the felony conviction.

must evaluate the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same. (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419.) However, it is the jury's duty to avoid fanciful theories and unreasonable inferences and not to resort to imagination or suspicion. (*People v. Holt* (1944) 25 Cal.2d 59, 83-90.) "Mere conjecture, surmise, or suspicion is not the equivalent of reasonable inference and does not constitute proof." (*People v. Bender, supra,* 27 Cal.2d at p. 186, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) Only if a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt are the requirements of due process, a fair trial and reliable guilt and penalty determinations satisfied. (U.S. Const., Amends. 5th, 6th, 8th, 14th; Cal. Const., art. I, §§ 1, 7, 15, 16 & 17; *Jackson v. Virginia*, *supra*, 443 U.S. at p. 319; *Herrera v. Collins*, *supra*, 506 U.S. at pp. 401-402.)

At the time of her death, Ashley had a severe injury to her genital area, the infliction of which the prosecutor alleged as the basis for Count 3, and which he asserted happened on Sunday, May 30, 1999, the day after Ashley was dropped off at appellant and Harris's apartment.[75] There was,

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[75] The information alleged that the offense in Count 3 occurred between "May 30, 1999 through June 4, 1999" (5 CT 991-996), but the prosecution's theory was that the injury was sustained on May 30.

however, no physical evidence, nor credible witness testimony presented at trial that appellant was the person who inflicted the injury. Interpreting the facts most favorably to the prosecution, the evidence is insufficient to support the finding that Ashley's genital injury was a result of a lewd and lascivious act committed by appellant.

B. Evidence of the Injury to the Genital Area is Insufficient to Support a Finding that Appellant Committed a Lewd and Lascivious Act

The medical evidence showed that at the time of her death, Ashley had a relatively older injury to the genitalia, a tearing of the tissue of the posterior forchette, and severe swelling and bruising of the labia. (47 RT 3290, 3292.) Evidence of injury to the genital area was offered as proof of the lewd and lascivious act charged in Count 3 and as the theory of first degree felony murder.[76] Because there was conflicting medical evidence about whether the genital tear and bruising were the result of more than one incident of violence (see section B.2), the two injuries will be addressed separately.

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[76] As discussed in detail in Argument II, the prosecutor's theory of felony murder was that it was a killing during the commission of a violation of Penal Code section 288, subdivision (b)(2), based on appellant changing Ashley's diaper in the morning before he went to work. (See, e.g., 68 RT 4511 ["only God and Michael Lopez know what he was doing to that baby under the guise of changing her diaper"].) Because a great bodily injury enhancement was alleged as to Count 3, and there is no evidence of an injury other than the laceration to and bruising of the genital area that would arguably constitute great bodily injury, appellant has addressed the sufficiency of evidence for Count 3 based on that injury and not on the unspecified actions during the diaper changing.

1. Genital laceration

It was the prosecutor's theory that during the few hours that Sandra Harris was at Santa Rita jail visiting her daughter Nicole on Sunday, May 30, 1999, appellant tried to force his erect penis into Ashley's vagina, resulting in the laceration to the genitalia.[77] No substantial evidence supports a finding that appellant inflicted the genital injury then – or ever – and the medical evidence indicates that Ashley sustained the injury before she came to stay with appellant and Harris the day before.

The prosecutor referred to the genital tear as the "horrific injury to Ashley's genitals," and argued that "she got this [injury] the very morning Sandra went to Santa Rita." (68 RT 4471, 4476, 4494.) According to the prosecutor's theory, the injury occurred between noon and 2:00 p.m. on Sunday, May 30. Lupe Murillo saw Ashley playing outside on Sunday from about 9:00 or 10:00 a.m. until noon and said she was walking normally and did not appear to have anything wrong with her. (41 RT 2913.) Harris got home from Santa Rita at 2:00 p.m. and noticed Ashley was "walking funny."[78] Appellant said she was red "down there." (59 RT 3963.) When Harris took off Ashley's diaper, she noticed redness and bruising. (*Ibid.*) Laurie Strodtbeck mentioned that Ashley had a rash when she dropped her off on Saturday, May 29, but because Harris did not remember if she changed Ashley's diaper on Saturday, she may not have seen Ashley's diaper area before this. (59 RT 3960.)

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[77] Dr. Crawford was asked by the prosecutor: "Could an erect male penis being forced into her genitalia cause that tear?" and he responded, "Absolutely . . . ." (47 RT 3293.)

[78] The prosecutor misstated the record when he said that Harris returned from Santa Rita at 3:30 (68 RT 4470); Harris testified it was around 2:00 p.m. (60 RT 4016.)

According to Harris, appellant told her that Ashley had been playing outside with her diaper off and that she might have hurt herself on a bike. (60 RT 4020.) A Big Wheels tricycle with no seat was recovered from a dumpster in the apartment complex by police who were directed to it by Harris who said she threw the bike away to prevent further injury to the children. (48 RT 3384; 55 RT 3766; Defendant Lopez Exhibit L.)

A scenario in which the injury occurred on Sunday – the only one offered by the prosecutor – is contrary to the medical evidence. Dr. Crawford testified that when the injury happened it would "absolutely" cause bleeding and would be quite painful. (47 RT 3296-3297.) There was no evidence that Ashley was crying, complaining of pain or, most significantly, bleeding when she woke up from her nap on Sunday afternoon. Harris's observations that Ashley was "walking funny" and that she was red and bruised in her diaper area were completely inconsistent with a young child having sustained within the previous hour or two as severe an injury as the one described by Dr. Crawford.

The prosecutor attempted to argue that blood from the wound was accounted for by small stains on a t-shirt found in the apartment. He argued, "So if she was bleeding from that area of the body, and that's the only area of the body she was wounded, a physical wound tear through the skin which would present blood, and that bloodstain is on the back of his [appellant's] shirt, I don't even want to venture a guess how that occurred. I don't even want to venture a guess." (70 RT 4674.)

DNA from the smear on the shirt that "appeared to be blood," was tested and compared with samples from Ashley, appellant and Harris. (50 RT 3467-3468.) Of the three, only Ashley could not be excluded as a possible source of the DNA, although it is possible that a sibling could have the same DNA. (50 RT 3472-3473, 3503.) There was no way to date the

stain (50 RT 3498), and no evidence that appellant was wearing the shirt on Sunday afternoon.[79] The police officer who booked the shirt into evidence said that the stains appeared to be old. (57 RT 3888-3890.)

Dr. Crawford testified that the laceration was three to seven days old (47 RT 3297), meaning that the latest it could have been inflicted was on Wednesday, June 2. Under the prosecution theory, therefore, the window of time during which appellant had to have committed the offense was between Sunday at noon and Wednesday. While Laurie Strodtbeck (see 43 RT 3059) and Leonora Murillo (see 41 RT 2945) both claim to have seen Ashley's genitals look the way they were depicted in the photograph taken at the time of her death (People's Exhibit 7) on Wednesday, neither they nor any other witness saw Ashley in the kind of severe pain and distress that Dr. Crawford claimed such an injury would cause. None of the people who changed Ashley's diaper during that period of time reported seeing severe, or even moderate, bleeding.

Given the absence of physical evidence connecting appellant to Ashley's injury, the prosecution's case was based entirely on Sabra's claim that, at some unspecified time, she saw appellant making thrusting motions with his "privates" against Ashley's "privates." (68 RT 4492, 4505-4506.)

Sabra testified at trial as follows:

Q [Mr. Anderson]: Now, did you ever see Big Mike do anything with his privates and with Ashley's privates?

A: Yes.

Q: What did he do?

A: (No response)

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[79] Harris told police that appellant wore the shirt to bed Saturday night. When she left for Santa Rita in the morning, he was still in bed. (48 RT 3349-3350.)

Q: You can tell me, hon.

A: (No response)

Q: What did he do, Sabra?

A: (Witness indicating)

Q: Want to come over here for a second?

A: (Witness shakes head)

Q: Okay. Can you tell me what he did with his private with respect to Ashley's private?

A: (Inaudible response)

Q: Real slowly. What did he do with his private? It's okay. Is it embarrassing to talk about this?

A: (Witness nods head)

Q: Just say it this one time and you won't have to say it again, okay? What did he – [objection overruled]

. . . . . .

Mr. Anderson: May the record reflect – I don't know the jury can see – she took her hands, put her arms up and made a motion going towards her body.

Q: Is that what you did, Sabra?

A: (Witness nods head).

(51 RT 3519-3520.)

This testimony – untethered to any time period – was contradicted by other prosecution evidence, including the medical evidence and Sabra's own prior testimony.[80] Sabra was never asked when she saw what she

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[80] As discussed in Argument I, at the preliminary hearing Sabra said she did not see this happen.

Q [Ms. Horn, prosecutor]: Sabra, did you ever see big Mike holding Ashley like this . . . (indicating) . . . in front of him?

described at trial – the prosecutor asked if she "ever" saw appellant do anything with his "privates" to Ashley. (51 RT 3519.) The record does not show that Sabra was even at the apartment when the act allegedly occurred; Harris said Ashley and Michael Jr. were there when she got home from Santa Rita. (59 RT 3962.) According to Laurie Strodtbeck, who claimed that on the day of Ashley's funeral Sabra told her about seeing appellant making thrusting motions with Ashley, Sabra said it happened "in the middle of the night." (52 RT 3621.)

While discussing the genital injury in his closing argument, the prosecutor also cited the testimony of Debra Kavarias, Sabra's foster mother from January to July 2000. (68 RT 4501-4504.) Kavarias asked Sabra if appellant "used his private part to your private part and that's when she said, no, he only did that to Ashley." (52 RT 3615.) The prosecutor quoted this testimony in his argument, but left out the rest of Kavarias's testimony in which she admitted that Sabra "never told me – she didn't tell me that she observed" this happening. (52 RT 3613-3614.)

As long as the circumstances reasonably justify the jury's findings, a

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A: (Witness shakes head)
The Court: Shaking her head no.
Q: Did you ever see big Mike moving Ashley's body against him like this . . . (indicating)?
A: (Witness shakes head)
Q: Indicating sort of a back and forth motion –
A: (Witness shakes head)
Q: – in the pubic area?
A: (Witness shakes head)
The Court: Shaking her head no.
Q: You never saw that?
A: (Witness shakes head)

(4 CT 743.)

judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1129.) This is not a case, however, in which the jury chose to believe one reasonable version of events over another. Rather, there were no reasonable circumstances in which the jury could find, based solely on Sabra's testimony, that appellant was the person who inflicted the genital injury. It is not simply that Sabra's testimony is unspecific as to time or details[81], for under the rules governing claims of insufficiency of evidence, the jurors are the exclusive judges of the credibility of witnesses and the weight to be given their testimony. (See *People v. Johnson* (1960) 187 Cal.App.2d 116, 121.) Instead, it is the lack of evidence in the record that is consistent with appellant having inflicted as serious an injury as that described by Dr. Crawford. The physical evidence of the injury to Ashley simply cannot be reconciled with Sabra's vague, disjointed, and confused claim that she saw appellant make some sort of generalized thrusting motion towards Ashley.

2. Bruising to diaper area

The prosecutor's theory was that the bruising of the labia and surrounding area was a separate injury from the laceration that was caused by appellant punching Ashley with his fist. This scenario was also based entirely on Sabra's statements. (See, e.g., 68 RT 4501.)

Sabra testified as follows:

Q: Did you ever see Big Mike punch Ashley?

A: Yes.

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[81] For example, is it not even possible to discern from the vague statements attributed to Sabra or the gestures she made at trial whether or not appellant and Ashley were clothed when she allegedly saw the "thrusting."

. . . . . .

Q: . . . Where did you see Big Mike punch Ashley?

A: In her privates.

Q: How did he do that? Can you show me with your fists how he did that?

A: (Indicating.)

. . . . . .

Mr. Anderson: may the record reflect she took her right fist and thrust it in a downward position?

(51 RT 3517-3518.)

It is not clear from the record if the prosecutor relied on this alleged incident as proof of a lewd and lascivious act. During his closing argument, the prosecutor simply re-read the testimony of Dr. Crawford regarding the fact that the bruising of Ashley's genital area could have been the result of a punch to that area. (68 RT 4490.)

There was a difference of medical opinion about the cause of the bruising of the labia and surrounding area. Dr. Crawford believed that the laceration and the bruising were caused by at least two separate incidents: one penetrating event which caused the laceration, and blunt force trauma to the outside which caused the bruising. (47 RT 3300.) But he also acknowledged that the traumatic injury to the genital area caused hemorrhaging in the nearby organs, which is consistent with the assessment of Dr. Rogers, who performed the autopsy, and testified that the diffuse area of hemorrhage around the pelvic area and lower abdomen could possibly be a secondary hemorrhage from deep bruising that came out later from the laceration. (47 RT 3314-3315; 56 RT 3809-3810.)

Dr. Rogers noted a prominent yellow-green ecchymotic discoloration of the skin in the vaginal area and said he used the word ecchymosis

because "the break or the laceration in the skin, one cause of the hemorrhage or the discoloration that I saw could be due to the blood going out into the surrounding area beneath the skin. [¶] *The possibility is it's not really a bruise but something from the laceration itself.*" (39 RT 2787, italics added.) The uniform appearance of the bruising, which looks like the outline of a diaper, strongly suggests that bleeding into the adjacent tissues from the laceration, rather than blunt force trauma, caused the swelling and bruising in the genital area.[82]

If the genital bruising was intended to constitute a basis for the conviction for Count 3, there is insufficient evidence of the required specific intent to sustain such a conviction. Penal Code section 288, subdivision (b)(1) requires that the touching of a child be done with the specific intent to arouse, appeal to, or gratify the lust, passions, or sexual desires of that person or the child. (CALJIC 10.42; 6 CT 1369.) Although the touching itself need not be sexual in nature, it must be committed with the specific intent to sexually arouse either the defendant or the child. (See *People v. Martinez* (1995) 11 Cal.4th 434, 442.)

It is common knowledge that children are routinely cuddled, disrobed, stroked, examined, and groomed as a part of a normal and healthy upbringing. At the same time, any of these intimate acts may also be undertaken for the purpose of sexual arousal. As a result, depending on the actor's motivation, innocent or sexual, such behavior may fall within or without the protective purposes of Penal Code section 288. The only way to determine whether a particular touching is permitted or prohibited is by reference to the actor's intent as inferred from all the circumstances of the

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[82] The prosecutor referred to it as the "diaper bruise" in his penalty phase closing argument. (81 RT 5079.)

alleged crime. (*People v. Martinez*, *supra*, 11 Cal. 4th at p. 450.)

Certainly, the opposite must also be true – children can be the targets of severe forms of punishment and acts of violence. A touching of a child that is violent, even in the genital region, does not as a rule establish a violation of Penal Code section 288. The circumstances of the act must be evaluated in order to establish whether or not the perpetrator had the specific intent to sexually arouse himself or the victim. It is the union of the act and the intent that constitutes the offense. (See *People v. Marquez* (1994) 28 Cal.App.4th 1315, 1324.)

The only evidence that appellant punched Ashley in the genital area came from the fragmented testimony of Sabra, who could provide no detail other than the fact that appellant hit Ashley in the "privates" with his closed fist. (See 51 RT 3517-3518.) As with her statement about seeing "thrusting" motions, Sabra never said when she made these alleged observations. The prosecutor cited the hearsay testimony of Cindy Jardin, who claimed that Sabra said appellant "punched her [Sabra] as hard as he could in the chest and then punched Ashley in the belly and then he grabbed her [Ashley] and then he took her in the other room and she was by then already crying, and she said he – I don't know, threw her down on something and just went like this, and ripped the diaper off of her and started just beating, beating, beating her vaginal area . . . ." (52 RT 3584-3585.) Jardin did not say when Sabra allegedly saw this happen.

Viewing the evidence, which consists solely of Sabra's statements, in the light most favorable to the prosecution, there is insufficient evidence that appellant struck Ashley with the specific intent to arouse his sexual desires. If anything, Sabra described a violent act, not a sexual one. There is no evidence that appellant said anything to indicate he had a sexual motive; no evidence that he exposed himself before, during, or after the

alleged assault; and no evidence that he had ever formed or exhibited a sexual intent toward Ashley or any other minor prior to this incident. Sabra described an incident in which appellant was violent to both her and Ashley, but the mere fact that he allegedly punched Ashley in the diaper area as well as the belly does not render the act sexually motivated.

The scenario described by Sabra is in stark contrast to *People v. Levesque* (1995) 35 Cal.App.4th 530, 543, where substantial circumstantial evidence supported the inference that appellant performed the charged act with the requisite sexual intent. The defendant in *Levesque* was convicted of a violation of Penal Code section 288 for placing a minor victim over his knees, pulling her pants down, and displaying her bare buttocks to a video camera. The court cited the following details as support for the defendant's specific intent to arouse his own sexual desires: earlier in the day the defendant bought the children ice cream and allowed them to see his penis protruding from his shorts; he brought the children to his home and showed them a pornographic film; and the defendant bared his buttocks and directed the children to look at him. These acts culminated in the defendant placing the victim over his knee and displaying her bare buttocks before instructing the other children not to say anything to their parents. (*Ibid.*) There is no remotely similar evidence, circumstantial or otherwise, in appellant's case to suggest that the actions towards Ashley described by Sabra were sexually motivated.

The only evidence that the genital injury was the result of a sexual assault by appellant are Sabra's vague, inconsistent, contradictory, and wholly uncorroborated statements, which are not sufficient to support the conviction.

C. The Record Contains Insufficient Evidence That Appellant Inflicted Ashley's Genital Injuries

This Court has found sufficient evidence that a defendant committed a lewd and lascivious act when the evidence presented conclusively established when the victim's injuries were inflicted and that the defendant was the only person with access to the victim during that time frame. In *People v. Earp* (1999) 20 Cal.4th 826, the defendant was convicted of killing the victim during the commission or attempted commission of rape, lewd conduct, and sodomy. The victim, an infant, died from multiple sharp impacts to the head coupled with severe shaking, but also had severe vaginal and rectal injuries. An autopsy revealed that some of the injuries were consistent with blunt force trauma by a human penis either inside the rectum or inside the vagina, while others indicated sexual penetration. The vaginal and rectal injuries preceded the injuries causing the victim's death by no more than six to eight hours, but could have occurred within a much shorter time. The prosecution evidence established that the defendant was alone with the victim during the entire eight-hour period in which she was sexually assaulted and sustained the fatal injuries. The defendant was also the only adult present with the victim when emergency services responded and took her to the hospital. (*Id.* at pp. 888-889.)

Contrary to *Earp*, in appellant's case the medical evidence could not conclusively establish a time frame in which Ashley's genital injury happened, rather the injury could have occurred as long ago as seven days before her death – which would predate Ashley coming to stay with appellant and Harris.[83] There were any number of people who had access to

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[83] Indeed, the medical evidence is far more consistent with the genital injury having occurred before Ashley came to stay with Sandra Harris and appellant. Given Dr. Crawford's estimate that the injury was as

Ashley while she was in the custody and care of Laurie Strodtbeck. The prosecution's theory that the injury was inflicted during the two hour window on Sunday, May 30, while Harris was at Santa Rita – is not supported by either the medical evidence nor by descriptions of Ashley's behavior that day. Additionally, Harris offered an innocent explanation for Sabra's testimony. On Tuesday night, Ashley had diarrhea and was vomiting. Harris came into the apartment and saw Sabra watching appellant as he was holding Ashley at arms' length, moving around while trying to keep her away from his body. (60 RT 4034-4035.)

D. Conclusion

The record contains insufficient evidence to support the conviction for Count 3 and the section 12022.8 enhancement and reversal of both is required.

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much as seven days old when he saw Ashley on Friday, June 4, 1999, it could have happened as early as the previous Friday, while Ashley was with Laurie Strodtbeck. (47 RT 3297.) By Sunday, the laceration would have started to heal, with hemorrhaging into the surrounding tissue causing the bruising in the diaper area. (47 RT 3297.) By riding a tricycle with no seat and without a diaper, as appellant allegedly reported to Harris, Ashley could have easily reinjured the laceration. This would account for her symptoms on Sunday – "walking funny" and a red, bruised appearance – and would also explain why the symptoms were not more severe.

IV.

THE ERRONEOUS ADMISSION OF IRRELEVANT AND INFLAMMATORY EVIDENCE THAT APPELLANT BROKE SABRA BARONI'S LEG AND THREATENED TO KILL HER RENDERED APPELLANT'S TRIAL FUNDAMENTALLY UNFAIR AND REQUIRES REVERSAL OF THE CONVICTIONS AND DEATH SENTENCE

A. Introduction

The trial court erred in allowing the prosecutor to present extensive testimony that six months before Ashley was killed appellant broke Sabra Baroni's leg and threatened to kill her and Sandra Harris if she told anyone. At the time of the injury, Sabra said she caught her leg in the bunk bed, rushing out of her room to join appellant and Michael Jr. to go to the video store. The incident was investigated by Child Protective Services and the juvenile court ordered Sabra returned to the custody of appellant and Harris.

On the day Ashley died, Sabra was questioned by Detective Bobbi Koller and said she did not see appellant do anything to Ashley. Detective Koller also asked Sabra about how she broke her leg. The tenor of the questions suggests that someone had told Detective Koller that the injury was not an accident and that appellant was responsible. Detective Koller asked Sabra who broke her leg and whether appellant told Sabra to say that it was an accident.[84] Sabra told the officer that it was an accident. (Def. Exh. HH, pp. 12, 13.)

A few days later, after Ashley's funeral, Sabra allegedly told her aunt, Laurie Strodtbeck, that appellant broke her leg and threatened to kill her and Harris if she told anyone. Sabra told several other people the same thing, and testified at the preliminary hearing that appellant broke her leg by

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[84] See Argument I regarding the suggestive nature of the questioning by Detective Koller.

throwing her on the floor.

At trial, Sabra testified on direct that she saw appellant making thrusting motions with his body against Ashley. She was cross-examined by trial counsel on this point and confronted with her testimony from the preliminary hearing at which she said she did not see any such motions. Thereafter, over objection, the trial court allowed the prosecutor to present the testimony of several witnesses to prove that appellant was responsible for Sabra's broken leg and for threatening her.

Despite its initial ruling that the broken leg and threat evidence was not admissible under Evidence Code section 1101, the court's subsequent evidentiary rulings allowed the prosecutor to do precisely that which the court had ruled he could not, namely, to present devastating propensity evidence. Admission of this evidence unquestionably rendered the guilt trial fundamentally unfair, and violated appellant's rights under the California and federal constitutions, thus requiring reversal of the convictions.

B. Factual Background

Citing Evidence Code sections 1101, subdivision (b), and 352, counsel for appellant and Sandra Harris moved pretrial to exclude evidence regarding Sabra Baroni's allegation that appellant broke her leg in December 1998, and threatened to harm her or other family members if she told anyone that he did it. (5 CT 1101.1-1101.3 [Lopez]; 1048.26-1048.29 [Harris]; 38 RT 2701-2705.)

At the hearing on the motion, the prosecutor stated that the "evidence of the broken leg, the uncharged criminal conduct . . . is not being offered as an 1101(b) similar type conduct. This incident is being – would be used to show the reason why she did not come clean, for lack of a better term, when she told about the broken leg to the C.P.S. personnel and other

treating personnel when it first occurred." (38 RT 2700-2701.) The prosecutor argued that the evidence was admissible on the issue of Sabra's credibility. (38 RT 2701-2702.) He repeated his assertion that the evidence was not "offered for similar conduct under 1101(b) but for her motivation of testifying the way she did." (38 RT 2702.)

Trial counsel argued that the evidence was "highly prejudicial" because it constituted evidence of an uncharged offense and noted that the prosecutor "can't get the information in as a similar under 1101. It's pretty clear," to which the court responded, "[w]e all agree." (38 RT 2707.) Trial counsel argued that the prosecutor was trying to get the evidence in "under the guise of going to motive . . . back doors the whole thing from the very beginning. And if it shouldn't be admitted at all in the case-in-chief, I don't think it will come in whatsoever." (38 RT 2707-2708.)

The trial court ruled that the prosecutor could not refer to the incident in his opening statement and could not question the witness about it on direct examination. After that, however, the court stated, "We'll just wait and see what the cross-examination is, and it may well be – I don't mean to prejudge this – it may be likely that the evidence would come in, if there is evidence of inconsistencies in her testimony. It just depends. We'll have to hear the cross-examination." (38 RT 2716.)

On cross-examination, Sabra was confronted with her preliminary hearing testimony that contradicted her claim on direct that she saw appellant making a thrusting motion with his body against Ashley. (51 RT 3552.)

Sabra was also asked by trial counsel about her interview with Detective Koller.

> [Mr. Hove] Q: And she asked you if you ever saw Big Mike hit Ashley, didn't she?

A: Yes.

Q: And, Sabra, did you tell – do you remember Bobbi asking you, did you ever see Big Mike do anything to Ashley and you telling her, no? Do you remember her asking you that and you answering no?

A: I don't remember.

Q: You don't remember. Okay. Well, when you – did you remember, did you remember Bobbi talking to you about whether or not you saw Little Michael, Little Michael hitting Ashley?

A: No.

Q: Well, do you remember – see if this kind of helps you, if whether you remember or not. Do you ever remember Bobbi asking you: did you ever see Little Michael hit her on the head? And your saying, yeah. And did somebody tell you to say that" You said, my dad told me that, that Michael hit her. Do you remember anything about that?

A: (Witness shakes head)

The Court: Shaking her head, no.

Q: Well, do you remember her asking you: Ashley got hurt real bad. Did you see her today? And you said, Um-hmm. And she asked you: she has – somebody was hitting her? And you told Bobbi, Little Michael. Do you remember that?

A: No.

(51 RT 3548-3550.)

Trial counsel did not, at that time, confront the witness with the videotape of her interview with Detective Koller.

On redirect, over repeated objections by trial counsel, the prosecutor asked a series of questions – about Sabra's fear of appellant, how she broke her leg, whether she told Laurie and others that appellant was responsible for the break – many of which Sabra refused to answer, or said she did not remember.[85]

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[85]Q: Are you afraid up here this morning, Sabra? Are you kind of nervous and afraid?

A: Yes.

Q: Are you afraid of Big Mike?

Mr. Hove: I'm going to object to that, Your Honor.

The Court: Overruled.

Q: Are you afraid of Big Mike?

A: (No response)

Q: Are you thinking?

A: (No response)

Q: Are you afraid of him?

A: (No response)

Q: You don't want to answer that question, do you?

A: I don't.

Q: Well, did Big Mike ever do anything to you, Big Mike?

Mr. Hove: I'm going to object to this.

The Court: I'm going to allow it. This is limited strictly to the witness's state of mind, not for the truth of any answer the witness might give. You may answer the question.

Q: Did you ever get a broken leg?

A: Yes.

Mr. Cannady: Going to object to that, Your Honor.

Mr. Chettle: We're going to object.

Q: Who broke your leg, Sabra? You can tell us.

A: (No response)

Q: Who broke your leg, sweetie?

Mr. Hove: Object, Your Honor. There's been no response to the last question. There was a lengthy pause.

The Court: Overruled.

Q: Do you remember?

Defendant Lopez: She did.

A: (No response)

Q: Are you thinking?

A: (No response.)

Q: Are you thinking?

A: (No response)

Q: You can tell us. What happened to your leg, honey?

Mr. Cannady: Could we have a continuing objection to this line of questioning?

The Court: Again, I will emphasize to the jury, if there is an answer, it's admissible solely to show her state of mind as to other statements she may have made and to other questions on cross-examination. You can answer the question, honey.

Q: You can answer the question. Who broke your leg?

A: (No response)

Q:Are you going to answer the question for me, Sabra?

A: (No response)

Q: Okay. Let me ask you another. Did you ever tell anybody that Big Mike broke your leg?

Mr. Hove: I would object to that.

The Court: Overruled. You may answer.

Q: Did you?

A: (No response)

Q: When you broke your leg, do you remember breaking your leg? Do you remember?

A: (Witness shakes head)

Q: Ever tell Aunt Laurie that Big Mike broke your leg?

A: (Shakes head)

Q: No, you don't remember telling her that?

A: No.

Q: Remember telling Debbie, your former foster mother, that Big Mike broke your leg?

A: (No response)

Q: Do you remember telling her that?

A: (No response)

Q: Do you?

A: (No response)

Q: You don't remember?

A: I don't remember.

. . . . . .

Q: Do you remember one day when I went over to your house when you were living with Debbie, and me with you and Detective Bobbi, do you remember the very first time we met?

Trial counsel requested a recess and when that was denied, moved for a mistrial, which was also denied without prejudice. (51 RT 3563.) On recross, trial counsel attempted to ask Sabra about the broken leg, but she would not respond to most of his questions. (51 RT 3565-3569.) Out of the jury's presence, counsel renewed his mistrial motion, which was denied. (51 RT 3570.)

The prosecutor then presented extensive testimony from several

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A: No.

Q: Do you remember one time when we went over to your house, me and my inspector, Mr. Jeff, and there was a doll there, a Barbie doll that we showed you, do you remember that?

A: No.

Mr. Hove: Judge, I'm going to object, this is beyond the scope.

The Court: Overruled.

Q: [Mr. Anderson] Remember that?

A: Yes.

Q: Yes? Now, do you remember when I asked you to hold the Barbie doll and show me how big Mike held you when you broke your leg, do you remember that?

A: Yes.

Q: And did you pick up the Barbie doll at that time?

A: Yes.

Q: And what did you do with the Barbie doll, do you remember?

A: (Witness shakes head

Q: Did you pick up the Barbie doll and throw it on the ground? Do you remember that?

A: (Witness shakes head)

The Court: Shaking her head.

Mr. Hove: May the record reflect the witness is shaking her head?

The Court: Yes.

Q [Mr. Anderson]: Remember you told me that Big Mike picked you up and threw you on the ground, that's how you broke your leg, do you remember that?

A: (Witness shakes head)

(51 RT 3557-3562.)

witnesses about Sabra's broken leg.

- After Ashley's funeral, Laurie Strodtbeck and Sabra were alone in the garage at Laurie's grandfather's house when Sabra told her that appellant had broken her leg. The reason she had said nothing before is that he threatened to kill her and Sandra Harris if she did. (52 RT 3621.)
- Cindy Jardin, Sandra Harris's half sister, was granted temporary custody of Sabra after Ashley's death. (52 RT 3580.) When Jardin picked her up at the foster home in July 1999, Sabra walked to the fence and said, "Michael broke my leg." (52 RT 3583.) Within a week of Sabra coming to stay with Jardin, Sabra said she had not said anything earlier about the broken leg because appellant threatened to kill her. (52 RT 3584.)
- Debra Karavias, Sabra's foster mother for about seven months from January to July 2000, testified that Sabra showed her the screws in her leg from where it was broken and said that appellant threw her down and broke her leg. (52 RT 3610-3612.)
- Beth Hanson, who at the time of trial was Sabra's foster mother and acted as the support person on the witness stand with Sabra, testified that Sabra came to live with her in August 2000. (64 RT 4326.) She had nightmares for the first month; once she said, "Big Mike is chasing me, he's gonna kill me," and another time she woke up crying and screaming that "Big Mike is gonna hurt me." (64 RT 4329-4330.) Sabra was playing with Hanson's daughter who asked her about the scar on her leg. Sabra said, "That's when Big Mike broke my

leg." (64 RT 4327.)

- On cross-examination in the defense case, Detective Koller testified that during their second interview, Sabra said appellant threw her to the ground and broke her leg, then threatened to hurt her if she told anyone. (55 RT 3780-3781.)
- Dr. James Crawford was called by the prosecutor in rebuttal. (63 RT 4233.) Because of the nature of the break and bruises on Sabra's body, Dr. Crawford was asked to examine Sabra when she was admitted to Children's Hospital. (63 RT 4235.) Dr. Crawford did not believe Sabra's explanation that she broke her leg by catching it on her bed.[86] (63 RT 4249.)

In addition, during Sandra Harris's case, she testified on direct examination about the circumstances of Sabra's broken leg, and was cross-examined by the prosecutor. (59 RT 3959; 60 RT 4008-4010.)[87]

C. The Trial Court Abused Its Discretion In Admitting Evidence of Sabra's Broken Leg

1. The threat evidence did not explain any aspect of Sabra's testimony and was, therefore, irrelevant and inadmissible

The prosecutor offered, and the trial court admitted, evidence of Sabra's broken leg and threats by appellant on the ground that it was relevant to her credibility. (38 RT 2701-2703.) Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. (*People v. Burgener* (2003) 29

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[86] Dr. Crawford's testimony is discussed at greater length in section C. 3.

[87] The importance of this evidence to the prosecutor is made clear by the fact that he started his cross-examination of Sandra Harris by asking her about Sabra's broken leg, even before asking her about Ashley.

Cal.4th 833, 869; see generally Evid. Code, § 780.)[88] Evidence of a witness's fear is also admissible to explain inconsistencies in her testimony. (*People v. Malone* (1988) 47 Cal.3d 1, 30.) An explanation of the basis for the witness's fear is likewise relevant to her credibility and is well within the discretion of the trial court to admit. (*People v. Feagin* (1995) 34 Cal.App.4th 1427, 1433.)

In *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, three witnesses gave statements to the police identifying defendant as the shooter. By the time of trial all three witnesses either recanted their prior statements, claimed loss of memory, or claimed their earlier testimony was tainted, and none was willing to identify the defendant as the shooter. The prosecutor presented evidence of threats made to the witnesses by defendant's brother. On appeal, the court held that evidence of threats was admissible to inform the jury of possible reasons for the witnesses' changed versions of what they saw or did not see that morning in order to accurately assess their credibility at trial. (*Id.* at pp. 1587-1588.)

The prosecutor in *People v. Avalos* (1984) 37 Cal.3d 216, 232, was permitted to question a witness about her fear of testifying after she hesitated before identifying the defendant in the courtroom. Her testimony made clear that her fear stemmed from the gravity of her role as a trial

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[88] Evidence Code section 780, provides in pertinent part: Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: [¶] . . . (f) The existence or nonexistence of a bias, interest, or other motive. . . . (j) His attitude toward the action in which he testifies or toward the giving of testimony.

witness and not from any threats connected with the defendant. The fact that she felt fear was deemed relevant to her credibility. (Accord, *People v. Warren* (1988) 45 Cal.3d 471, 481 [prosecutor properly asked about witness's fear to explain inconsistent statements].)

In *People v. Olguin* (1995) 31 Cal.App.4th 1355, a prosecution witness was permitted to testify on redirect to threats made by a third person to explain why he left the scene of the shooting and did not voluntarily provide information to the police. (*Id.* at pp. 1368-1369, citing *People v. Malone, supra,* 47 Cal.3d at p. 30.)

In each case the aspect of the witness's testimony that bore on their credibility – hesitation in answering, inconsistency between statements, recantation of a previous identification, or the failure to come forward with information – was explained by the witness's fear. But in order for evidence of a witness's fear to be admissible "the prosecution must first establish the relevance of the witness' state of mind by demonstrating that the witness' testimony is inconsistent or otherwise suspect." (*People v. Yeats* (1984) 150 Cal.App.3d 983, 986, citing *People v. Brooks* (1979) 88 Cal.App.3d 180.)

In *Brooks*, a witness, Blount, who had initially identified the defendant as the person who robbed the bakery where she worked, retracted her identification at trial. On appeal, the court held that evidence of threats made to the witness by defendant's girlfriend was properly admitted because the witness's retraction of her earlier identification created a credibility issue "on which the jury was entitled to hear evidence in order to resolve or understand the cause of her inability to make the identification in court." (*People v. Brooks, supra,* 88 Cal.App.3d at p. 187.) As to a second witness, Harris, whom the prosecutor questioned about threats made to her, the court was "unable to overcome the initial relevancy hurdle," because

"no inconsistent testimony had preceded the prosecutor's questioning of Harris; there was no issue of credibility (or 'state of mind' as the trial court termed it). Hence, the 'threat' evidence was immaterial to any issue and irrelevant to the case . . . ." (*Ibid.*)

In the present case, at the time the court ruled the prosecutor could question Sabra about the broken leg and threat evidence and present witnesses to testify about Sabra's statements, there was no aspect of Sabra's testimony that was explained by her fear of appellant. Thus, evidence of her fear was irrelevant and inadmissible.

The prosecutor initially argued the threat evidence was relevant to explain why Sabra did not "come clean" with authorities at the time she broke her leg. (38 RT 2701.) The proper focus, however, was not on whether the threat evidence was probative of Sabra's reluctance to reveal the circumstances of her broken leg, but whether it was probative on the issue of the credibility of her trial testimony. Evidence of the broken leg and threats had relevance only if it explained some aspect of Sabra's trial testimony.

The court admitted the evidence based on an erroneous determination that it was relevant to explain the inconsistencies between Sabra's preliminary hearing testimony and her trial testimony.[89] Sabra's

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[89] When trial counsel asked what he had done on cross-examination to open the door to testimony about the broken leg, the court stated: "I don't recall the precise question and answer but, generally, she was asked about her testimony at the preliminary hearing, and I believe her testimony on cross-examination at one point at the PX is that she didn't see the things that she testified she saw here." The court continued, "It seems to me, at that point, you get into the witness's state of mind why she might have done that, why she might have feared Mr. Lopez." (51 RT 3571, see also 51 RT 3572-3573 ["her possible fear of Mr. Lopez would be an explanation for her prior *testimony*"] italics added.)

testimony at the preliminary hearing that she did not see appellant sexually assault Ashley was clearly *not* motivated by fear of retribution by appellant, for by the time she testified she had told several people that appellant was responsible for her broken leg and she testified to that at the preliminary hearing. Because fear did not explain the inconsistencies between her preliminary hearing testimony and her trial testimony, evidence of the broken leg and threats was not admissible.

The prosecutor also argued that evidence of Sabra's fear became relevant "when counsel impeached [Sabra] with the cross-examination – strike that, on cross-examination of Detective Koller and the testimony at the preliminary hearing" (51 RT 3572), referring presumably to the questions counsel asked Sabra about her statements to Detective Koller. Sabra's responses to all of counsel's questions – that she did not remember the questions asked by Detective Koller, or her answers to them – did not create a credibility issue that could legitimately be explained by Sabra's fear of appellant. While the prosecutor may have anticipated that the defense would bring in the videotaped interview with Detective Koller to show that Sabra did not initially identify appellant as Ashley's killer, at the time the court ruled on the admissibility of the broken leg evidence that evidence had not been presented. All that was before the jury were counsel's questions and Sabra's "I don't remember" responses, which were not explained by evidence that Sabra was fearful. Just as in *Brooks*, the prosecutor here "jumped the gun . . . in his production of such evidence." (*People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187.)

Because none of Sabra's testimony was explained by her alleged fear of appellant, evidence of the broken leg and threats was irrelevant and

should not have been admitted.

2. If the Threat Evidence is Deemed Relevant, the Trial Court Erred in Not Excluding it Under Evidence Code Section 352 As More Prejudicial Than Probative

If this Court finds the threat evidence was relevant to explain Sabra's inconsistent testimony or her failure to name appellant as the killer when she was first questioned by Detective Koller, the question then becomes whether the trial court should have excluded the evidence as more prejudicial than probative under Evidence Code section 352, as argued by trial counsel. (38 RT 2705-2707.)

In the present case the record does not affirmatively show that the trial court exercised its discretion by weighing the probative value of the broken leg evidence as evidence of Sabra's credibility against its undeniable prejudicial effect. (*People v. Clair, supra,* 2 Cal.4th at pp. 660-661; *People v. Mickey* (1991) 54 Cal.3d 612, 656.)

Instead, the record makes apparent the trial court's belief that *any* impeachment of the witness by trial counsel would trigger admission of the broken leg evidence without regard to its prejudicial effect. The trial court expressed the opinion that the evidence would likely come in on redirect examination if Sabra was cross-examined about inconsistent statements. (38 RT 2703; see also, 38 RT 2706 ["It's hard for me to imagine, if she's cross-examined, it won't come up in redirect"]; 38 RT 2716 ["We'll just wait and see what the cross-examination is, and it may well be – I don't mean to prejudge this – it may be likely that the evidence would come in, if there is evidence of inconsistencies in her testimony. It just depends. We'll have to hear the cross-examination"].) Indeed, that was the prosecutor's understanding. During argument on the mistrial motion following redirect, the prosecutor addressed the court: "Your ruling pretrial was if there is any

impeachment, it can be gone into as a result of her state of mind and/or fear. Once there was impeachment done, the barn door was opened." (51 RT 3572.)[90] When trial counsel protested that the court's ruling had the effect of precluding any cross-examination with prior inconsistent statements, the court agreed: "It puts you in a very difficult position, I agree, and I'm sure it was a difficult decision for you to decide whether you were going to go into that area or not." (51 RT 3573.) A ruling that admission of the threat evidence was virtually automatic if Sabra was cross-examined is inconsistent with the exercise of discretion.[91] A meaningful analysis of the evidence under Evidence Code section 352 would have resulted in exclusion of the threat evidence. The trial court's failure to conduct such an analysis was an abuse of discretion and resulted in the admission of inadmissible and highly prejudicial evidence.

Even assuming the trial court did conduct an adequate analysis under Evidence Code section 352, the probative value of the broken leg evidence

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[90] The prosecutor was clearly anticipating the likelihood of presenting this evidence. Before Sabra testified, in response to counsel's reiterated objection to evidence of violence against her by appellant, the prosecutor said he would abide by the trial court's ruling, but "if, on cross-examination, things come out indicating the fear factor or anything like that, the Pandora's box is wide open and I'm jumping in with both feet." (51 RT 3511.)

[91] An example of the requisite analysis and weighing required before admission of threat evidence is found in *People v. Feagin*, *supra*, 34 Cal.App.4th 1427. There, the prosecutor offered evidence that the defendant had tried to kill a witness two years before the trial and threatened and assaulted the witness's brother who was in custody before the trial. (*Id.* at p.1432.) The trial court, after a thorough review of all the proffered evidence, ruled that it was "highly relevant to all sides" to explain the witness's state of mind and his demeanor in court. (*Id.* at pp. 1433-1434 & fn. 1.) The record in the present case does not reflect a comparable exercise by the trial court.

was far outweighed by its prejudicial effect and the court therefore erred in admitting the evidence. Under Evidence Code section 352, the court has discretion to exclude relevant evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time, or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Here, the evidence had limited probative value with regard to the only issue for which it was arguably relevant, namely to explain why Sabra did not immediately name appellant as the killer. On the other hand, the prejudice from the broken leg evidence was enormous.

"We have described the 'prejudice' referred to in Evidence Code section 352 as characterizing evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues." (*People v. Crittenden, supra,* 9 Cal.4th at p. 134, citing *People v. Garceau* (1993) 6 Cal.4th 140, 178.)

The prejudicial effect of evidence that six months before appellant was charged with murdering a young child in his custody by throwing her to the ground, he did the same thing to another child, is obvious.

> The prejudice that 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. [Citation.]' [Citation.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958.) In other words, evidence should be excluded as unduly prejudicial when it is of such nature as to inflame the emotions of the jury, motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.

(*Vorse v. Sarasy* (1997) 53 Cal.App.4th 998, 1009.)

It is difficult to imagine evidence more likely to inflame the emotions of the jury and to obscure its relevance than the testimony the trial court admitted in this case. Because the probative value of the evidence was clearly outweighed by its prejudicial effect, the trial court committed reversible error in admitting the broken leg evidence.

3. The Trial Court Erred in Admitting Extensive Evidence to Prove the Truth of Sabra's Allegations

Evidence of Sabra's statements accusing appellant of breaking her leg and threatening her was ostensibly admitted as non-hearsay evidence relevant to her credibility.[92] Testimony admitted for a proper credibility purpose under Evidence Code section 780 is deemed non-hearsay and is not admitted for the truth of the matter asserted. (See *People v. Brooks*, *supra*, 88 Cal.App.3d at p. 187.)

When evidence of threats is admitted on the issue of credibility, the focus of the inquiry is properly on the witness's state of mind, not the defendant's conduct. (See *People v. Yeats, supra,* 150 Cal.App.3d at p. 986, citing *People v. Brooks*, *supra*, 88 Cal.App.3d 180.) "It is not necessarily the source of the threat – but its existence – that is relevant to the witness's credibility." (*People v. Burgener*, *supra*, 29 Cal.4th at p. 870.) Thus, evidence of third party threats is admissible, even when there is no evidence linking the defendant to the threats (*People v. Olguin*, *supra*, 31 Cal.App.4th at pp. 1368-1369 [threats made by third persons admissible]), or when the witness's fear has nothing to do with threats.

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[92] The jury was admonished at various times that the evidence was received only on the issue of Sabra's "state of mind," and not for its truth. (51 RT 3558, 3559; 52 RT 3583; 63 RT 4234.) The ineffectiveness of the court's limiting language is addressed below.

(See *People v. Avalos*, *supra*, 37 Cal.3d at p. 232 [witness's fear stemmed from the gravity of her role as a trial witness].)

In *People v. Gutierrez*, *supra*, 23 Cal.App.4th 1576, the defendant argued on appeal that the trial court erroneously limited his cross-examination of the prosecutor's investigator to establish that he did not investigate the alleged threats against the prosecution witness in order to show that he did not think the threats were credible. On appeal the court found no error because the relevant issue was "whether the witnesses believed the threats credible and whether the witnesses' testimony was affected because of that belief." (*Id.* at p. 1588, fn. 8.)

While the truth of the threat is not the relevant inquiry, some evidence of the reasons for a witness's fear may be admissible. "Regardless of its [the threat's] source, the jury would be entitled to evaluate the witness's testimony *knowing* it was given under such circumstances. And they would be entitled to know not just that the witness was afraid, but also, *within the limits of Evidence Code section 352*, those facts which would enable them to evaluate the witness's fear." (*People v. Olguin*, *supra*, 31 Cal.App.4th at p. 1369, first italics in original.)

The relevant fact that the prosecutor sought to prove – that Sabra was afraid – was established by Laurie Strodtbeck's testimony about Sabra's alleged revelations at the funeral. Abetted by the trial court's erroneous rulings, the prosecutor went well beyond that, however, and sought to prove the truth of Sabra's allegations.

As previously noted, Cindy Jardin, Debra Karavias, Beth Hanson, and Detective Koller all testified about Sabra's statements accusing appellant of breaking her leg by throwing her on the ground, and threatening to kill her and Sandra Harris. In addition, Michelle Love, the social worker who was involved in the investigation of Sabra's broken leg

as well as Ashley's death, testified that after Sabra was placed in foster care, "she clearly felt she was safe enough . . . to tell what happened to her. She began to tell of previous incidences of abuse, that her leg had been broken by big Mike, and things like that." (63 RT 4284.)

Dr. James Crawford, the child abuse expert who examined Ashley when she was brought to Children's Hospital, offered extensive and devastating opinion testimony about what he believed was abuse suffered by Sabra. Dr. Crawford was called in to examine Sabra when she was admitted to the hospital in November 1998 because of the nature of the break to her femur and because of the "very large number of bruises on her body in very unusual places for a four-year-old." (63 RT 4236.) Dr. Crawford was "highly suspicious" that the leg injury happened the way Sabra claimed it did. (63 RT 4257, 4270.) Sabra's reaction to the injury – crawling into the hallway – was not what a child of her age would normally do, unless she was trying to escape from a burning building. (63 RT 4244-4245.)

During his testimony, Dr. Crawford referred to a diagram showing the bruises and gave a description of each one, nearly identical to those which he used to describe the bruises on Ashley's body. (63 RT 4236-4237; compare 47 RT 3284-3290.) Over a hearsay objection, Dr. Crawford testified about statements made by Sandra Harris to a social worker that "the bruise on the left side of [Sabra's] face is from a fall onto a bedpost approximately four days ago. Sandra says the patient and Mike, Jr. were jumping on their beds when the patient fell." (63 RT 4246-4247.) It is unlikely the comparison to Harris' testimony regarding the injuries to

Ashley was lost on the jury.[93]

If there was any doubt about the purpose of Dr. Crawford's testimony, it was removed by the prosecutor's use of People's Exhibit No. 11, a doll designated as Ashley and used by witnesses to demonstrate how she was killed, while he questioned the doctor about the plausibility of Sabra's version of events.[94] (63 RT 4241-4242.)

Dr. Crawford also examined Sabra in June 1999, after Ashley's death and testified that she "persisted in having an unusual distribution of bruises" that "in the context of what I had seen before and certainly in the context of what happened to Ashley" made him "highly suspicious in [sic] concerning inflicted trauma." (63 RT 4248-4249.) The testimony of Dr. Crawford was essentially an expert opinion that Sabra's leg was intentionally broken and that she was physically abused while in the care of appellant and Sandra Harris. Any suggestion that the testimony was offered for a purpose other than to prove that appellant had previously inflicted grievous physical harm upon a child in his care is ludicrous.

Over defense objection, the trial court admitted the medical records of Sabra's broken leg, after the prosecutor argued that they were admissible to corroborate Dr. Crawford's testimony and impeach Sandra Harris' testimony about how Sabra broke her leg. (68 RT 4444-4446; People's Exh. 55.)

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[93] Sandra Harris testified that appellant told her that Ashley got one of the bruises when she and Michael, Jr. were playing. Ashley fell of the bed sideways and hit her head on the dresser. (60 RT 4001.)

[94] In a telling slip of the tongue, when he posed a hypothetical to the witness using the doll, the prosecutor referred to "the baby," as witnesses had been referring to Ashley, and then corrected himself to say "the child," referring to Sabra. (63 RT 4242.)

Finally, over defense objection, the trial court admitted People's Exhibit 23, a document entitled "Suspected Child Abuse Report," which was identified by Carol Boynton, the emergency room nurse at St. Rose Hospital who first had contact with Sandra Harris when she brought Ashley into the hospital. (45 RT 3203.) At trial counsel's request, Boynton's testimony was limited to Sandra Harris. (45 RT 3199.) Despite this, Exhibit 23 was admitted without limitation. (68 RT 4440-4441.) One section contains the following instruction: "5. Explain known history of similar incident(s) for this child." Boynton wrote: "None known for this child [Ashley]. Sister Sabra has had a broken leg. Brother Joseph has already been taken from the home." (People's Exhibit 23.)

D. The Trial Court's Error In Admitting Evidence Of Uncharged Criminal Conduct Was Prejudicial And Requires Reversal Of Appellant's Convictions and Death Sentence

Despite the agreement by all parties that the broken leg evidence constituted uncharged criminal conduct that was inadmissible under Evidence Code section 1101, subdivision (b), after hearing all of this evidence, there was no way for the jury to make use of Sabra's statements against appellant other than to accept them for the truth of the matter stated, i.e., that appellant broke Sabra's leg and threatened to kill her, and therefore, it was inadmissible propensity evidence.

The trial court's error in admitting the broken leg evidence cannot be ignored because there was a limiting instruction. "A limiting instruction warning jurors they should not think about the elephant in the room is not the same thing as having no elephant in the room." (*People v. Fritz* (2007) 153 Cal.App.4th 949, 962.)

The trial court's admonition to the jury that the evidence was admissible only as it pertained to Sabra's state of mind and not for the truth

was rendered meaningless by the nature and sheer volume of evidence. "When evidence is this prejudicial, we can hardly expect the jury to be entirely successful in compartmentalizing its thinking." (*Id.* at p. 962.)

> It is the essence of sophistry and lack of realism to think that an instruction or admonition to a jury to limit its consideration of highly prejudicial evidence to its limited relevant purpose can have any realistic effect. It is time that we face the realism of jury trials and recognize that jurors are mere mortals. We live in a dream world if we believe that jurors are capable of hearing such prejudicial evidence but not applying it in an improper manner.

(*People v. Gibson* (1976) 56 Cal.App.3d 119, 130.)

Moreover, the prosecutor made it clear in his closing argument exactly how the jury ought to view the evidence of Sabra's broken leg when he referred to Sabra as "another victim of Michael Lopez." (68 RT 4483.) In his rebuttal argument, the prosecutor quoted testimony from Detective Wydler, attributing to Pilar Ford observations that Sabra sustained frequent injuries during the times that appellant was babysitting. The prosecutor referred to this testimony as "evidence who the killer is." (70 RT 4648.)

Under the guise of discussing the injuries to Ashley as described by Dr. Crawford, the prosecutor read extensive excerpts from the testimony of several prosecution witnesses. (68 RT 4500 [Cindy Jardin]; 68 RT 4501-4502 [Debbie Kavarias]; 68 RT 4504 [Laurie Strodtbeck].) With each witness, he gratuitously included their testimony about Sabra's statements about her broken leg – testimony that was unrelated to Ashley's injuries, but critical to the prosecutor's goal of making the connection between the two incidents.

Admission of this propensity evidence violated appellant's right to due process under the Fourteenth Amendment, which "protects the accused against conviction except upon proof [by the state] beyond a reasonable

doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship*, *supra*, 397 U.S. at p. 364.) The trial court's erroneous admission of the evidence lightened the prosecution's burden of proof, improperly bolstering the credibility of witnesses and permitting the jury to find appellant guilty in large part because of his criminal propensity. (See, e.g., *Sandstrom v. Montana* (1979) 442 U.S. 510, 520-524.) The introduction of such evidence so infected the trial as to render appellant's convictions fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 67; see also *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385-1386.)

Respondent cannot show that the erroneous admission of this evidence is harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The evidence against appellant was extremely thin. Proof that appellant was the killer depended entirely upon Sabra's claim that she saw him throw Ashley to the floor, the insubstantial and unreliable nature of which is discussed in Argument I. Evidence that appellant threw Sabra to the floor, broke her leg and threatened to kill her undoubtedly overwhelmed any reasonable doubt a juror might entertain about the strength of the evidence against appellant.

In addition, the admission of this evidence violated appellant's due process rights by arbitrarily depriving him of a liberty interest created by Evidence Code section 1101 not to have his guilt determined by propensity evidence. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.) By ignoring well-established state law that prevents the state from using evidence admitted for a limited purpose as general propensity evidence and excludes the use of unduly prejudicial evidence, the trial court arbitrarily deprived appellant of a state-created liberty interest.

Reversal is also warranted even if this Court utilizes the state court standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836. There is

simply no question that a result more favorable to appellant would have been reached in the absence of the erroneous admission of the broken leg evidence. The emphasis placed on this evidence by the prosecutor, as evidenced by the sheer number of witnesses called to prove the allegations, amply demonstrates its importance to his case against appellant.

E. Conclusion

The erroneous admission of this evidence requires reversal of the convictions and death judgment.

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V.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON THE THEORY OF FIRST DEGREE MURDER

A. Introduction

The trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 6 CT 1353), on first degree murder perpetrated by torture (CALJIC No. 8.24; 6 CT 1355) and on felony murder. (CALJIC No. 8.21; 6 CT 1354.) However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder before convicting appellant.

The failure to require the jury to agree unanimously on a theory of first degree murder deprived appellant of his rights under Sixth, Eighth and Fourteenth Amendments and their state constitutional analogs to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, to a verdict of a unanimous jury, and to a fair and reliable determination that he committed a capital offense.

Appellant acknowledges that this Court has rejected the claim that a jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony murder. (See *People v. Cole, supra,* 33 Cal.4th at p. 1221; *People v. Kipp, supra,* 26 Cal.4th at p. 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) Appellant submits the issue deserves reconsideration in light of the charges and facts of this case.

B. Felony Murder and Torture Murder Do Not Have the Same Elements as Premeditated and Deliberate Murder

Due process requires that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime with which the defendant has been charged. (*In re Winship, supra,* 397 U.S. at p. 364.) Although each state has great latitude in defining what constitutes a crime, once it has set forth the elements of a crime, it may not remove from the prosecution the burden of proving every element of the offense charged. (See *SSandstrom v. Montana, supra,* 442 U.S. at p. 524; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.)

In *Schad v. Arizona* (1991) 501 U.S. 624, the defendant challenged his Arizona murder conviction where the jury was permitted to render its verdict based on either felony murder or premeditated and deliberate murder. The Supreme Court reaffirmed the general principle that there is no requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict. (*Id.* at p. 632, citing *McKoy v. North Carolina* (1990) 494 U.S. 433, 439.) *Schad* acknowledged, however, that due process does limit the states' capacity to define different courses of conduct or states of mind as merely alternative means of committing a single offense. In finding that Schad was not deprived of due process the Court relied on Arizona's determination that under their statutory scheme "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element." (*Schad, supra*, 501 U.S. at p. 637.) "If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, *rather than independent elements of the crime*, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." (*Id.* at p.

636, italics added.) Thus, where a state has determined that the statutory alternatives are independent elements of the crime, *Schad* suggests that due process is violated if there is not unanimity as to all the elements.

California has followed a different course than Arizona. The various forms of first degree murder are set out in Penal Code section 189. These include not only felony murder but also murder perpetrated by torture, as well as murder by other means.[95]

This Court has consistently held that the elements of first degree premeditated murder and first degree felony murder are not the same. In *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) The Court then declared that "in this state the two kinds of murder [felony-murder and malice-murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23.) The Court further observed:

> It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with

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[95] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

> respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . .

(*Id.*, at pp. 476-477, fn. omitted.)

In subsequent cases, this Court retreated from the conclusion that felony murder and premeditated murder are not the same crime (see, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712 [holding that felony murder and premeditated murder are not distinct crimes]), but it has continued to hold that the elements of those crimes are not the same. Thus, in *People v. Carpenter*, *supra*, 15 Cal.4th at page 394, this Court explained that the language from footnote 23 of *People v. Dillon*, *supra*, quoted above, "meant that the *elements* of the two types of murder are not the same" (original emphasis). Similarly, this Court has declared that "the elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony-murder] have different elements." (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 819.) One consequence "is that a jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element." (*Ibid.*) The analysis is different for facts which are not elements in themselves but rather theories of the crime – alternative means by which elements may be established. The Supreme Court in *Richardson v. United States*, *supra*, 526 U.S. at p. 817, explained this distinction and also showed why *Schad* is inapplicable in the present case. In *Richardson*, the Court cited *Schad* as an example of a case involving *means* rather than *elements*:

> The question before us arises because a federal jury need not

> always decide unanimously which of several possible sets of underlying brute facts make up a particular element, say, which of several possible means the defendant used to commit an element of the crime. *Schad v. Arizona*, 501 U.S. 624, 631-632, ... Where, for example, an element of robbery is force or the threat of force, some jurors may conclude that the defendant used a knife to create the threat; others might conclude he used a gun. But that disagreement -- a disagreement about means -- would not matter as long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force.

(*Richardson v. United States*, *supra*, 526 U.S. at p. 817.)

Comparison of the elements of the crimes at issue is the traditional method used by the United States Supreme Court to determine if the crimes are different or the same. The question first arose as an issue of statutory construction in *Blockburger v. United States* (1932) 284 U.S. 299, when the defendant asked the Court to determine if two sections of the Harrison Narcotic Act created one offense or two. The Court concluded that the two sections described different crimes, and explained its holding as follows:

> Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not.

(*Id.* at p. 304, citing *Gavieres v. United States* (1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and

Fourteenth Amendment rights to proof beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[96] see *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.):)

By contrast, and as shown above, this case involves three forms of murder which California has determined are not merely separate theories of murder, but contain separate elements. Felony murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that felony; malice murder does not. (Pen. Code, §§ 187, 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.) Torture murder under section 189 has different elements than premeditated and deliberate murder. For torture murder, "the elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose." (*People v. Cook, supra,* 39 Cal.4th at p. 602.)

For first degree malice murder the prosecution must prove premeditation *and* deliberation, whereas torture murder does not require a

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[96] "The fundamental distinction between facts that are *elements* of a criminal offense and facts that go only to the *sentence* provides the foundation for our entire double jeopardy jurisprudence – including the 'same elements' test for determining whether two 'offence[s]' are 'the same,' see *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932), and the rule (at issue here) that the Clause protects an expectation of finality with respect to offences but not sentences. The same distinction also delimits the boundaries of other important constitutional rights, like the Sixth Amendment right to trial by jury and the right to proof beyond a reasonable doubt." (*Monge v. California*, *supra*, 524 U.S. at p. 738 (dis. opn. of Scalia, J.), original italics.)

premeditated intent to kill, but requires that the intent to inflict extreme and prolonged pain be the result of calculated deliberation. (*People v. Steger, supra,* 16 Cal.3d at p. 546.)

Therefore, it is incongruous to say, as this Court did in *People v. Carpenter*, *supra*, that the language in *People v. Dillon*, *supra*, on which appellant relies, "*only* meant that the *elements* of the two types of murder are not the same." (*People v. Carpenter*, *supra*, 15 Cal.4th at p. 394, first italics added.) If the elements of malice murder and felony murder are different, as *Carpenter* acknowledges is true for felony murder, then malice murder and felony murder are different crimes. (*United States v. Dixon*, *supra*, 509 U.S. at p. 696.)

Examination of the elements of a crime is also the method used to determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California*, *supra,* 524 U.S. at p. 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.) Moreover, the right to trial by jury attaches even to facts that are not "elements" in the traditional sense if a finding that those facts are true will increase the maximum sentence that can be imposed. "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476, 490.)

When the right to jury trial applies, the jury's verdict must be unanimous. The right to a unanimous verdict in criminal cases is secured by the state Constitution and state statutes (Cal. Const., art. I, § 16; Pen. Code, §§ 1163, 1164; *People v. Collins* (1976) 17 Cal.3d 687, 693), and protected from arbitrary infringement by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Vitek v. Jones* (1980) 445 U.S. 480,

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Because this is a capital case, the right to a unanimous verdict is also guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (See *Schad v. Arizona* (1991) 501 U.S. 624, 630-631 (plur. opn.) [leaving this question open].) The purpose of the unanimity requirement is to ensure the accuracy and reliability of the verdict (*Brown v. Louisiana* (1980) 447 U.S. 323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352), and there is a heightened need for reliability in the procedures leading to the conviction of a capital offense. (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638). Therefore, jury unanimity is required in capital cases.

This conclusion cannot be avoided by recharacterizing premeditation and the facts necessary to invoke the felony-murder rule as "theories" rather than "elements" of first degree murder. (See, e.g., *People v. Millwee* (1998) 18 Cal.4th 96, 160, citing *Schad v. Arizona*, *supra*.) There are three reasons why this is so.

First, in contrast to the situation reviewed in *Schad*, where the Arizona courts had determined that "premeditation and the commission of a felony are not independent elements of the crime, but rather are mere means of satisfying a single mens rea element" (*Schad v. Arizona*, *supra*, 501 U.S. at p. 637), the California courts have repeatedly characterized premeditation as an element of first degree premeditated murder. (See, e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder]; *People v. Gibson* (1895) 106 Cal. 458, 473-474 [premeditation and deliberation are necessary elements of first degree murder]; *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony has

likewise been characterized as an element of first degree felony murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258, 1268 (conc. opn. of Kennard, J.).)

Moreover, this Court has recognized that it was the intent of the Legislature to make premeditation an element of first degree murder. In *People v. Steger* (1976) 16 Cal.3d 539, the Court declared:

> We have held, "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill. [Citation.]"

(*Id.* at p. 545, emphasis added, quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[97]

As the United States Supreme Court has explained, *Schad* held only that jurors need not agree on the particular means used by the defendant to

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[97] Specific intent to commit the underlying felony, the mens rea element of first degree felony murder, is not specifically mentioned in Penal Code section 189. However, ever since its decision in *People v. Coefield* (1951) 37 Cal.2d 865, 869, this Court has held that such intent is required (see, e.g., *People v. Hernandez* (1988) 47 Cal.3d 315, 346, and cases there cited; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), and that authoritative judicial construction "has become as much a part of the statute as if it had written [*sic*] by the Legislature." (*People v. Honig* (1996) 48 Cal.App.4th 289, 328; see also *Winters v. New York* (1948) 333 U.S. 507, 514; *People v. Guthrie* (1983) 144 Cal.App.3d 832, 839) Furthermore, section 189 has been amended and reenacted several times in the interim, but none of the changes purported to delete the requirement of specific intent, and "[t]here is a strong presumption that when the Legislature reenacts a statute which has been judicially construed it adopts the construction placed on the statute by the courts." (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 433, citations and internal quotation marks omitted.)

commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder, not the means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (Pen. Code, §§ 189, 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 302-305]; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

Third, at least one indisputable "element" is involved. First degree premeditated murder does not differ from first degree felony murder solely because the former requires premeditation while the latter does not. The crimes also differ because first degree premeditated murder requires malice while felony murder does not. "'The mental state required [for first degree premeditated murder] is, of course, a deliberate and premeditated intent to kill with malice aforethought. (See . . . §§ 187, subd. (a), 189.)'" (*People v. Hart*, *supra*, 20 Cal.4th at p. 608, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1085; accord *People v. Visciotti* (1992) 2 Cal.4th 1, 61.) Thus, malice is a true "element" of murder.

Accordingly, it was error for the trial court to fail to instruct the jury that it must agree unanimously on whether appellant had committed a premeditated murder, torture murder, or a felony murder. Because the jurors were not required to reach unanimous agreement on the elements of first degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to so instruct was a structural error, and reversal of the entire judgment is therefore required. (See *Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

Furthermore, this was not simply an abstract error. There was not compelling evidence supporting any of the three forms of murder over the others, and reasonable jurors could have credited evidence supporting one form while rejecting evidence supporting the others. As argued in Argument II, there are legitimate arguments establishing that there was insufficient evidence to find any of the three theories of murder beyond a reasonable doubt. There is nothing to suggest that the jury unanimously agreed the crimes were either premeditated murder or felony murder or torture murder. In fact, the prosecutor specifically told the jury that they did not need to be unanimous with regard to the theory of murder: "There are three different theories under the law how you can arrive at first-degree murder." (68 RT 4507.) He went on to say,

> The evidence is overwhelming he did this to the kid, and it's first-degree murder, no matter what theory you use. ¶ And you don't have to decide, all of you, the theory for first-degree murder. Six of you can decide the deliberate and premeditated, three of you can decide the murder by torture, and three of you can decide the felony-murder. But all of you can decide it's first-degree murder. ¶ The evidence is overwhelming he committed the murder of that child. It's first degree, no matter what theory you use.

(68 RT 4521.)

The prosecutor repeated this in his rebuttal argument in response to trial counsel's argument that the prosecutor's urging the jury to pick and choose among the theories of murder was an indication that he could not prove any of them. The prosecutor stated: "I also explained three theories of how Mr. Lopez could be found guilty of murder in the first degree. So accord to Mr. Hove, I'm unsure or uncertain of what the evidence in my own case is . . . You know, if Mr. Lopez did those acts which falls [sic] within the three theories of first-degree murder, don't blame me for that, blame the California Supreme Court or the state legislature." (70 RT 4636.)

The prosecution presented evidence in support of three different forms of murder, and argued each form to the jury. The court should have required the jurors to unanimously agree, if they could, on one of the three forms in order to convict appellant. Because the court failed to do so, the first degree murder conviction must be reversed.

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VI.

THE TRIAL COURT PREJUDICIALLY ERRED, AND VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, IN INSTRUCTING THE JURY ON FIRST DEGREE PREMEDITATED MURDER AND FIRST DEGREE FELONY-MURDER BECAUSE THE INFORMATION CHARGED APPELLANT ONLY WITH SECOND DEGREE MALICE-MURDER IN VIOLATION OF PENAL CODE SECTION 187

At the conclusion of the guilt phase of the trial, the court instructed the jury trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 6 CT 1353), on first degree murder perpetrated by torture (CALJIC No. 8.24; 6 CT 1355) and on felony murder. (CALJIC No. 8.21; 6 CT 1354.) The jury found appellant guilty of murder in the first degree. (6 CT 1293.)

Appellant contends that the instructions on first degree murder were erroneous, and the resulting convictions of first degree murder must be reversed. It is appellant's contention that the information did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder, thus he could not be convicted of first degree murder.[98]

Count 1 of the information accused appellant and Harris of: "a felony, to wit: MURDER, in violation section 187 of the Penal Code of California, in that between May 30, 1999 through June 4, 1999 in the County of Alameda, State of California, said defendants did then and there murder ASHLEY DIMINCHINO [sic], a human being." (5 CT 997.) Both

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[98] Appellant is not contending that the information was defective. On the contrary, as explained hereafter, Count 1 of the information was an entirely correct charge of second degree malice-murder in violation of Penal Code section 187. The error arose when the trial court instructed the jury on the separate uncharged crimes of first degree premeditated murder, first degree felony-murder, and first degree murder by torture in violation of Penal Code section 189.

the statutory reference ("section 187 of the Penal Code") and the description of the crime ("murder") establish that appellant was charged exclusively with second degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[99]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[100] Penal Code "[s]ection 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated felonies." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[101]

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[99] The information also alleged a torture-murder special circumstance in connection with Count 1. (5 CT 997.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

[100] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

[101] At the time of the alleged murder in appellant's case, section 189 read as follows: "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under section 286, 288, 288a, or 289, or any murder which is perpetrated by

Because the information charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense. (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon].)

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are defined by Penal Code section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, 107-108, this Court declared:

> Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165,

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means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death is murder of the first degree. All other kinds of murders are of the second degree."

> "The information is in the language of the statute defining murder, which is 'Murder is the unlawful killing of a human being with malice aforethought.' (Pen. Code, sec. 187.) Murder, thus defined, includes murder in the first degree and murder in the second degree.[102] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence."

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree

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[102] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344, citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472, emphasis added, fn. omitted.)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter, supra,* 15 Cal.4th at p. 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be Penal Code section 189.

No other statute purports to define premeditated murder, murder during the commission of a felony, or murder while lying in wait, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by Penal Code section 189, and the information did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara, supra,* 30 Cal.4th at p. 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart, supra,* 20 Cal.4th at pp. 608-609 [discussing the differing elements of those crimes]; *People v. Bradford, supra,* 15 Cal.4th at p. 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[103]

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[103] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though

The greatest difference is between second degree malice-murder and first degree felony murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Watson*, *supra*, 30 Cal.3d at p. 295; *People v. Dillon*, *supra*, 34 Cal.3d at p. 475), but malice is not an element of felony murder. (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189, and declared that "[i]t is immaterial whether second degree murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense." (*Id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal constitution requires more specific pleading in this context. In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt." (*Id.* at p. 476, emphasis added, citation omitted.)[104]

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different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.), original emphasis.)

[104] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. Therefore, those facts should have been charged in the information. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony murder and the instruction on torture murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict appellant of murder without finding the malice which was an essential element of the crime alleged in the information. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's convictions for first degree murder must be reversed.

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expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

VII.

THE TORTURE-MURDER SPECIAL CIRCUMSTANCE FAILS TO PERFORM THE NARROWING FUNCTION REQUIRED BY THE EIGHTH AMENDMENT AND FAILS TO ENSURE THAT THERE IS A MEANINGFUL BASIS FOR DISTINGUISHING THOSE CASES IN WHICH THE DEATH PENALTY IS IMPOSED FROM THOSE IN WHICH IT IS NOT

A. Introduction

The torture-murder special circumstance (Pen. Code, § 190.2, subd. (a)(18)), as interpreted by this Court, violates the Eighth Amendment by failing to genuinely narrow the class of persons eligible for the death penalty or reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder. (*Zant v. Stephens* (1983) 462 U.S. 862, 876.)

B. The Torture-Murder Special Circumstance Does Not Narrow the Class of Death-Eligible Defendants and Is Overbroad

Murder "perpetrated by means of . . . torture" is murder of the first degree. (Pen. Code, § 189.) A defendant convicted of first-degree murder in California is rendered death eligible if a special circumstance is found. (See Pen. Code, § 190.2.) At the time of appellant's crime and trial, one such special circumstance was that "[t]he murder was intentional and involved the infliction of torture." (Pen. Code, § 190.2, subd. (a)(18).) Based on this Court's interpretation of the torture-murder special and changes made by Proposition 115, there is little, if any difference to distinguish the torture- murder special circumstance from first degree murder by torture.

Murder perpetrated by torture is "'murder committed with a willful, deliberate and premeditated intent to inflict extreme and prolonged pain.'" (*People v. Pensinger, supra,* 51 Cal.3d at p. 1239, quoting *People v. Steger,*

supra, 16 Cal.3d at p. 546.) The law requires the same proof of deliberation and premeditation for first degree torture murder as it does for other types of first degree murder. There must be "careful consideration and examination of the reasons for and against" the torturing of the victim. (*People v. Steger*, *supra*, 16 Cal.3d at p. 545.) In addition, the requisite intent to cause pain must have as its goal either "revenge, extortion, persuasion or any other sadistic purpose." (*People v. Wiley* (1976) 18 Cal.3d 162, 168.)

The torture-murder special circumstance, section 190.2, subdivision (a)(18), was enacted by initiative in 1978, making a defendant death-eligible where "the [first degree] murder was intentional and involved the infliction of torture. For the purpose of this section torture requires proof of the infliction of extreme physical pain no matter how long its duration." This Court construed the special circumstance, as originally enacted, as requiring proof of first degree murder, proof that the defendant intended to kill and to torture the victim, and proof of the infliction of an extremely painful act upon a living victim. (*People v. Cole, supra,* 33 Cal.4th at pp. 1227-1228; *People v. Davenport, supra,* 41 Cal.3d at p. 271.) In contrast to murder by torture, no proof is required that defendant had a premeditated intent to inflict prolonged pain. (*People v. Cole*, *supra*, 33 Cal.4th at pp. 1227-1228; *People v. Davenport*, *supra*, 41 Cal.3d at pp. 269-270.)

Proposition 115 amended the special circumstance by deleting its language regarding the infliction of extreme physical pain. (*People v. Elliot, supra,* 37 Cal.4th at p. 477.) The post-Proposition 115 special circumstance, which applied in this case, provides that "[t]he murder was intentional and involved the infliction of torture," without providing further explanation of what constitutes the "infliction of torture" for purposes of the

special circumstance. (*Ibid.*)

In *People v. Elliot*, *supra*, 37 Cal.4th 453, this Court rejected the appellant's argument that this change in the statutory provision was intended to give "torture" under the special circumstance the same meaning afforded that term for purposes of proving a murder by torture under section 189; i.e., requiring a "wil[l]ful, deliberate and premeditated intent to inflict extreme and prolonged pain for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose." (*Id.* at p. 477.) The Court held that "[c]onsistent with decisions interpreting section 190.2, subdivision (a)(18) prior to its 1990 amendment, we conclude that for an intentional murder to involve "the infliction of torture" under this section, as amended by Proposition 115, the requisite torturous intent is an intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any other sadistic purpose. A premeditated intent to inflict prolonged pain is not required." (*Id.* at p. 479.)

In *People v. Leach* (1985) 41 Cal.3d 92, 110, this Court recognized that the electorate which enacted this special circumstance intended to incorporate into it the established judicial meaning of torture. However, by not requiring a "willful, deliberate and premeditated intent to inflict extreme and prolonged pain," the special circumstance is unconstitutionally overbroad in that it encompasses essentially any murder in which the victim suffers "great bodily injury" as long as the jury infers an intent to inflict cruel and extreme pain, which as described above is itself an unconstitutionally vague term. Characterizing this special circumstance without requiring a premeditated and deliberate intent to inflict torture "redefine[s], and minimize[s], the gruesome and sadistic nature of torture, which has long been recognized as among the most heinous of human conduct . . . ." (*People v. Jung* (1999) 71 Cal.App.4th 1036, 1049 (dis. opn.

of Armstrong, J.).)

Furthermore, the only arguable difference between torture murder and the torture-murder special circumstance is an illusory one: While the special circumstance requires intent to kill (CALJIC 8.81.18), torture murder does not, although it requires that the murder be committed with a willful, premeditated and deliberate intent to inflict extreme and prolonged pain. (*People v. Steger*, *supra*, 16 Cal.3d at p. 546; see CALJIC No. 8.24.) It is difficult to imagine based on the wording of CALJIC No. 8.24, how a murder can be committed with premeditated and deliberate intent to inflict torture but without an intent to kill.

Given that proof of intent to torture is already required for first degree torture murder, as a practical matter, the additional requirement of intent to kill is a narrowing factor that is almost universally only theoretical. As this Court observed in *People v. Davenport,* "a special circumstance which requires only an intentional killing in which the victim suffered extreme pain would be capable of application to virtually any intentional, first degree murder with the possible exception of those occasions on which the victim's death was instantaneous." (*People v. Davenport*, *supra*, 41 Cal.3d at p. 265.)

A capital sentencing scheme "must genuinely narrow the class of persons eligible for the death penalty." (*Zant v. Stephens, supra*, 462 U.S. at 877.) In the context of torture murder, as the jury was instructed in this case, the special circumstance did no such thing.

In appellant's case, the jury was instructed that for first degree murder by torture, the intent to torture must be premeditated while for torture special circumstance, all that was required was that the torture be intentional. Second, the jury was told that for first degree murder, the extreme pain intended to be inflicted must be "prolonged," but that for

torture special circumstance, the intent must be to inflict extreme "cruel" pain and as long as the extreme pain is inflicted its duration does not matter. (6 CT 1355, 71 RT 4699 [CALJIC No. 8.24]; 6 CT 1363, 71 RT 4702 [CALJIC No. 8.81.18].) Thus, the torture special circumstance, particularly under the facts of this case broadened, rather than narrowed, the death eligibility of those who commit murder by torture.

For example, assuming without conceding that the jury could have found under the instructions given that appellant intended to kill Ashley and intended to inflict extreme pain and suffering upon her (CALJIC No. 8.81.18, 6 CT 1363), it could have at the same time rejected a guilty verdict on torture murder by finding that the intent to inflict torture, while intentional, was not "willful, deliberate and premeditated" or there was no intent to inflict "prolonged pain." (CALJIC No. 8.24, 6 CT 1355.)

The intentionality requirement of the torture special circumstance does not, in practice, narrow the class of torture murders that are death eligible; it does not provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." (*Furman v. Georgia* (1972) 408 U.S. 238, 313.) Indeed, particularly as applied in this case, the torture-murder special circumstance instructions broadened, rather than narrowed, the class of convicted murderers who were eligible for the death penalty by making persons death eligible under the torture-murder special circumstance when they could not have been convicted of first degree torture murder. Thus, the statute, and its application to appellant's case through the CALJIC instructions cited above, violated appellant's Eighth and Fourteenth Amendment rights to a reliable penalty determination.

Even assuming this Court has provided some theoretical distinction between the special circumstance and murder by torture, California juries,

and certainly appellant's jury have not been provided adequate guidance from which they can distinguish the class of death-eligible defendants. (See *Wade v. Calderon* (9th Cir. 1994) 29 F.3d 1312, 1321-1322; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439, 1444.)

The torture-murder special circumstance is unconstitutional as written and applied and must therefore be vacated.

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VIII.

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 violate the United States Constitution. This Court consistently has rejected a number of arguments pointing out these deficiencies. In *People v. Schmeck* (2005) 37 Cal.4th 240, this Court held that what it considered to be "routine" challenges to California's punishment scheme will be deemed "fairly presented" for purposes of federal review "even when the defendant does no more than (I) identify the claim in the context of the facts, (ii) note that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask us to reconsider that decision." (*Id.* at pp. 303-304, citing *Vasquez v. Hillery* (1986) 474 U.S. 254, 257.)

In light of this Court's directive in *Schmeck*, appellant briefly presents the following challenges to urge their reconsideration and to preserve these claims for federal review. These claims of error are cognizable on appeal under Penal Code section 1259, even when appellant did not seek the specific instruction or raise the precise claim asserted here. Should the Court decide to reconsider any of these claims, appellant requests the right to present supplemental briefing.

A. Penal Code Section 190.2 Is Impermissibly Broad

To meet constitutional muster, a death penalty law must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023, citing *Furman v. Georgia* (1972) 408 U.S. 238, 313, conc. opn. of White, J.) Meeting this criteria requires a state to

genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. (*Zant v. Stephens* (1983) 462 U.S. 862, 878.) California's capital sentencing scheme does not meaningfully narrow the pool of murderers eligible for the death penalty. At the time of the offense charged against appellant, Penal Code section 190.2 contained 21 special circumstances.

Given the large number of special circumstances, California's statutory scheme fails to identify the few cases in which the death penalty might be appropriate, but instead makes almost all first degree murders eligible for the death penalty. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing. (*People v. Stanley* (1995) 10 Cal.4th 764, 842-843.) This Court should reconsider *Stanley* and strike down Penal Code section 190.2 and the current statutory scheme as so all-inclusive as to guarantee the arbitrary imposition of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

B. The Broad Application Of Section 190.3, 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." (See CALJIC No. 8.85; 6 CT 1494-1495; 83 RT 5172.) Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Of equal importance is the use of factor (a) to embrace facts which cover the entire spectrum of circumstances inevitably present in every homicide; facts such as the age of the victim, the age of the defendant, the method of killing, the motive for the killing, the time of the killing, and the location of the killing.

This Court never has applied any limiting construction to factor (a). (*People v. Blair* (2005) 36 Cal.4th 686, 7494 ["circumstances of crime" not required to have spatial or temporal connection to crime].) Instead, the concept of "aggravating factors" has been applied in such a wanton and freakish manner almost all features of every murder can be and have been characterized by prosecutors as "aggravating." As 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 the particular set of circumstances surrounding the instant murder were sufficient, by themselves and without some narrowing principle, to warrant the imposition of death. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 363; but see *Tuilaepa v. California* (1994) 512 U.S. 967, 987-988 [factor (a) survived facial challenge at time of decision].)

Appellant is aware that the Court has repeatedly rejected the claim that permitting the jury to consider the "circumstances of the crime" within the meaning of section 190.3 in the penalty phase results in the arbitrary and capricious imposition of the death penalty. (*People v. Kennedy* (2005) 36 Cal.4th 595, 641; *People v. Brown* (2004) 33 Cal.4th 382, 401.) He urges the Court to reconsider this holding.

C. The Death Penalty Statute And Accompanying Jury Instructions Fail To Set Forth The Appropriate Burden Of Proof

1. Appellant's Death Sentence is Unconstitutional Because it is Not Premised on Findings Made Beyond a Reasonable Doubt

California law does not require that a reasonable doubt standard be used during any part of the penalty phase, except as to proof of prior criminality. (CALJIC Nos. 8.86, 8.87; see *People v. Anderson* (2001) 25

Cal.4th 543, 590; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty phase determinations are moral and not "susceptible to a burden-of-proof quantification"].) In conformity with this standard, appellant's jury was not told that it had to find beyond a reasonable doubt that aggravating factors in this case outweighed the mitigating factors before determining whether or not to impose a death sentence. (CALJIC No. 8.85; 6 CT 1494-1495; CALJIC No. 8.88; 6 CT 1510.)

Apprendi v. New Jersey (2000) 530 U.S. 466, 478, *Blakely v. Washington* (2004) 542 U.S. 296, 303-305, *Ring v. Arizona* (2002) 536 U.S. 584, 604, and *Cunningham v. California* (2007) 549 U.S. 270, require any fact that is used to support an increased sentence (other than a prior conviction) be submitted to a jury and proved beyond a reasonable doubt. In order to impose the death penalty in this case, appellant's jury had to first make several factual findings: (1) that aggravating factors were present; (2) that the aggravating factors outweighed the mitigating factors; and (3) that the aggravating factors were so substantial as to make death an appropriate punishment. (CALJIC No. 8.88; 6 CT 1510; 83 RT 5181.) Because these additional findings were required before the jury could impose the death sentence, *Ring, Apprendi, Blakely*, and *Cunningham* require that each of these findings be made beyond a reasonable doubt. The court's failure to so instruct the jury and thus failed to explain the general principles of law "necessary for the jury's understanding of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 715; see *Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

Appellant is mindful that this Court has held that the imposition of the death penalty does not constitute an increased sentence within the meaning of *Apprendi* (*People v. Anderson, supra,* 25 Cal.4th at p. 589, fn.

14), and does not require factual findings (*People v. Griffin* (2004) 33 Cal.4th 536, 595). This Court has rejected the argument that *Apprendi*, *Blakely*, and *Ring* impose a reasonable doubt standard on California's capital penalty phase proceedings. (*People v. Prieto* (2003) 30 Cal.4th 226, 263.) Appellant urges this Court to reconsider its holding in *Prieto* so that California's death penalty scheme will comport with the principles set forth in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*.

Setting aside the applicability of the Sixth Amendment to California's penalty phase proceedings, appellant contends that the sentencer of a person facing the death penalty is required by due process and the prohibition against cruel and unusual punishment to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence. This Court previously has rejected the claim that either the Fourteenth Amendment due process or the Eighth Amendment requires that the jury be instructed that it must decide beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors and that death is the appropriate penalty. (*People v. Blair* (2005) 36 Cal.4th 686, 753.) Appellant requests that the Court reconsider this holding.

2. Some Burden of Proof is Required, or the Jury Should Have Been Instructed That There Was No Burden of Proof

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, § 520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly,

appellant's jury should have been instructed that the 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.

CALJIC Nos. 8.85 and 8.88, the instructions given here (6 CT 1494-1495, 1510; 83 RT 5172, 5181), fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This 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.) This Court also has rejected any instruction on the presumption of life. (*People v. Arias* (1996) 13 Cal.4th 92, 190.) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

3. Appellant's Death Verdict was Not Premised on Unanimous Jury Findings

a. Aggravating Factors

Imposing a death sentence violates the Sixth, Eighth, and Fourteenth Amendments when there is no assurance the jury, or even a majority of the jury, ever found a single set of aggravating circumstances that warranted the death penalty. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749.) The Court reaffirmed this holding after the decision in *Ring v. Arizona, supra*, 536 U.S. 584. (See *People v. Prieto, supra*, 30 Cal.4th at p. 275.)

Appellant asserts that *Prieto* was incorrectly decided, and that application of *Ring*'s reasoning mandates jury unanimity under the overlapping principles of the Sixth, Eighth, and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).)

The failure to require that the jury unanimously find the aggravating factors true also violates the equal protection clause of the federal constitution. In California, when a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., Pen. Code § 1158a.) Since capital defendants are entitled to more rigorous protections than those afforded noncapital defendants (see *Monge v. California* (1998) 524 U.S. 721, 732; *Harmelin v.*

Michigan (1991) 501 U.S. 957, 994), and since providing more protection to a noncapital defendant than a capital defendant violates the equal protection clause of the Fourteenth Amendment (see, e.g., *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the equal protection clause of the federal Constitution and by its irrationality violate both the due process and cruel and unusual punishment clauses of the federal Constitution, as well as the Sixth Amendment's guarantee of a trial by jury.

Appellant asks the Court to reconsider *Taylor* and *Prieto* and require jury unanimity as mandated by the federal Constitution.

b. Unadjudicated Criminal Activity

Appellant's jury was not instructed that prior criminality had to be found true by a unanimous jury; nor is such an instruction generally provided for under California's sentencing scheme. In fact, the jury was instructed that unanimity was not required. (6 CT 1497-1498 [CALJIC 8.87].) Consequently, any use of unadjudicated criminal activity by a member of the jury as an aggravating factor, as outlined in Penal Code section 190.3, factor (b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [overturning death penalty based in part on vacated prior conviction].) This Court has routinely rejected this claim. (*People v. Anderson* (2001) 25 Cal.4th 543, 584-585.) Here, the prosecution presented extensive evidence of appellant's alleged

prior criminal activity under factor (b) (74 RT 4765-4819; 75 RT 4820-4855) and substantially relied on this evidence in his closing argument (81 RT 5079-5089).

The United States Supreme Court's recent decisions in *Cunningham v. California*, *supra*, 549 U.S. 270, *Blakely v. Washington*, *supra*, 542 U.S. 296, *Ring v. Arizona*, *supra*, 536 U.S. 584, and *Apprendi v. New Jersey*, *supra*, 530 U.S. 466, confirm that under the due process clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a unanimous jury. In light of these decisions, any unadjudicated criminal activity must be found true beyond a reasonable doubt by a unanimous jury.

Appellant is aware that this Court has rejected this very claim. (*People v. Ward* (2005) 36 Cal.4th 186, 221-222.) He asks the Court to reconsider its holdings in *Anderson* and *Ward*.

4. The Instructions Caused the Penalty Determination to Turn on an Impermissibly Vague and Ambiguous Standard

The question of whether to impose the death penalty upon appellant hinged on whether the jurors were "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (CALJIC No. 8.88; 6 CT 1510.) The phrase "so substantial" is an impermissibly broad phrase that does not channel or limit the sentencer's discretion in a manner sufficient to minimize the risk of arbitrary and capricious sentencing. Consequently, this instruction violates the Eighth and Fourteenth Amendments because it creates a standard that is vague and directionless. (See *Maynard v. Cartwright* (1988) 486 U.S. 356, 362.)

This Court has found that the use of this phrase does not render the

instruction constitutionally deficient. (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) Appellant asks this Court to reconsider that opinion.

5. The Instructions Failed to Inform the Jury that the Central Determination is Whether Death is the Appropriate Punishment

The ultimate question in the penalty phase of a capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina*, *supra*, 428 U.S. at p. 305.) Yet, CALJIC No. 8.88 does not make this clear to jurors; rather it instructs them they can return a death verdict if the aggravating evidence "warrants" death rather than life without parole. These determinations are not the same.

To satisfy the Eighth Amendment "requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offense and the offender, i.e., it must be appropriate. (See *Zant v. Stephens*, *supra*, 462 U.S. at p. 879). On the other hand, jurors find death to be "warranted" when they find the existence of a special circumstance that authorizes death. (See *People v. Bacigalupo* (1993) 6 Cal.4th 457, 462, 464.) By failing to distinguish between these determinations, the jury instructions violate the Eighth and Fourteenth Amendments to the federal Constitution.

The Court has previously rejected this claim. (*People v. Arias*, *supra*, 13 Cal.4th at p. 171.) Appellant urges this Court to reconsider that ruling.

6. The Instructions Failed To Inform The Jurors That If They Determined That Mitigation Outweighed Aggravation, They Were Required To Return A Sentence Of Life Without The Possibility Of Parole

Penal Code section 190.3 directs a jury to impose a sentence of life imprisonment without parole when the mitigating circumstances outweigh the aggravating circumstances. This mandatory language is consistent with

the individualized consideration of a capital defendant's circumstances that is required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.) The court instructed the jury with CALJIC No. 8.88, which only informs the jury of the circumstances that permit the rendition of a death verdict. (6 CT 1510; 83 RT 5181.) By failing to conform to the mandate of Penal Code section 190.3, the instruction violated appellant's right to due process of law. (See *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.)

This Court has held that since the instruction tells the jury that death can be imposed only if it finds that aggravation outweighs mitigation, it is unnecessary to instruct on the converse principle. (*People v. Duncan* (1991) 53 Cal.3d 955, 978.) Appellant submits that this holding conflicts with numerous cases disapproving instructions that emphasize the prosecution theory of the case while ignoring or minimizing the defense theory. (See *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelly* (1980) 113 Cal.App.3d 1005, 1013-1014; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [instructions required on every aspect of case].) It also conflicts with due process principles in that the nonreciprocity involved in explaining how a death verdict may be warranted, but failing to explain when an LWOP verdict is required, tilts the balance of forces in favor of the accuser and against the accused. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 473-474.)

7. The Instructions Violated The Sixth, Eighth And Fourteenth Amendments By Failing To Inform The Jury Regarding The Standard Of Proof And Lack Of Need For Unanimity As To Mitigating Circumstances

The failure of the jury instructions to set forth a burden of proof impermissibly foreclosed the full consideration of mitigating evidence

required by the Eighth Amendment. (See *Brewer v. Quarterman* (2007) 550 U.S. 286, 292-296; *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Woodson v. North Carolina, supra*, 428 U.S. at p. 304.) Constitutional error occurs when there is a likelihood that a jury has applied an instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Boyde v. California, supra,* 494 U.S. at p. 380.) That occurred here because the jury was left with the impression that appellant bore some particular burden in proving facts in mitigation.

A similar problem is presented by the lack of instruction regarding jury unanimity. Appellant's jury was told in the guilt phase that unanimity was required in order to acquit appellant of any charge or special circumstance. In the absence of an explicit instruction to the contrary, there is a substantial likelihood that the jurors believed unanimity was also required for finding the existence of mitigating factors.

A requirement of unanimity improperly limits consideration of mitigating evidence in violation of the Eighth Amendment of the federal Constitution. (See *McKoy v. North Carolina, supra*, 494 U.S. at pp. 442-443.) Had the jury been instructed that unanimity was required before mitigating circumstances could be considered, there would be no question that reversal would be required. (*Ibid.*; see also *Mills v. Maryland, supra*, 486 U.S. at p. 374.) Because there is a reasonable likelihood that the jury erroneously believed that unanimity was required, reversal is also required here. In short, the failure to provide the jury with appropriate guidance was prejudicial and requires reversal of appellant's death sentence since he was deprived of his rights to due process, equal protection and a reliable capital-sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

8. The Penalty Jury Should be Instructed on the Presumption of Life

The presumption of innocence is a core constitutional and adjudicative value that is essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., Amend. 14), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., Amends. 8th, 14th), and his right to the equal protection of the laws. (U.S. Const., Amend, 14th.)

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

D. Failing to Require That The Jury Make Written Findings Violates Appellant's Right To Meaningful Appellate Review

Consistent with state law (*People v. Fauber* (1992) 2 Cal.4th 792, 859), appellant's jury was not required to make any written findings during the penalty phase of the trial. The failure to require written or other specific findings by the jury deprived appellant of his rights under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution, as well as his right to meaningful appellate review to ensure that the death penalty was not capriciously imposed. (See *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has rejected these contentions. (*People v. Cook* (2006) 39 Cal.4th 566, 619.) Appellant urges the court to reconsider its decisions on the necessity of written findings.

E. The Instructions To The Jury On Mitigating And Aggravating Factors Violated Appellant's Constitutional Rights

Many of the sentencing factors set forth in CALJIC No. 8.85 were inapplicable to appellant's case. The trial court failed to omit those factors from the jury instructions (6 CT 1494-1495; 83 RT 5172), likely confusing the jury and preventing the jurors from making any reliable determination of the appropriate penalty, in violation of defendant's constitutional rights. Appellant asks the Court to reconsider its decision in *People v. Cook*, *supra*, 39 Cal.4th at p. 618, and hold that the trial court must delete any inapplicable sentencing factors from the jury's instructions.

F. The Prohibition Against Inter-Case Proportionality Review Guarantees Arbitrary An Disproportionate Impositions Of The Death Penalty

The California capital sentencing scheme does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed,

i.e., inter-case proportionality review. (See *People v. Fierro* (1991) 1 Cal.4th 173, 253.) The failure to conduct inter-case proportionality review violates the Fifth, Sixth, Eighth, and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or that violate equal protection or due process. For this reason, appellant urges the Court to reconsider its failure to require inter-case proportionality review in capital cases.

G. California's Capital-Sentencing Scheme Violates The Equal Protection Clause

The California death penalty scheme provides significantly fewer procedural protections for persons facing a death sentence than are afforded persons charged with non-capital crimes in violation of the Equal Protection Clause. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections for capital defendants.

In a non-capital case, any true finding on an enhancement allegation must be unanimous and beyond a reasonable doubt, aggravating and mitigating factors must be established by a preponderance of the evidence, and the sentencer must set forth written reasons justifying the defendant's sentence. (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 325; Cal. Rules of Court, rule 4.42, (b) & (e).) In a capital case, there is no burden of proof at all, and the jurors need not agree on what aggravating circumstances apply nor provide any written findings to justify the defendant's sentence. Appellant acknowledges that this Court has rejected these equal protection arguments (*People v. Manriquez* (2005) 37 Cal.4th 547, 590), but he asks the Court to reconsider its ruling.

H. California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms

This Court has rejected the claim that the use of the death penalty at all, or, alternatively, that the regular use of the death penalty violates international law, the Eighth and Fourteenth Amendments, or "evolving standards of decency." (*Trop v. Dulles* (1958) 356 U.S. 86, 101; *People v. Cook*, *supra*, 39 Cal.4th at pp. 618-619; *People v. Snow* (2003) 30 Cal.4th 43, 127; *People v. Ghent* (1987) 43 Cal.3d 739, 778-779.) In light of the international community's overwhelming rejection of the death penalty as a regular form of punishment and the United States Supreme Court's decision citing international law to support its decision prohibiting the imposition of capital punishment against defendants who committed their crimes as juveniles (*Roper v. Simmons* (2005) 543 U.S. 551, 554), appellant urges this Court to reconsider its previous decisions.

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IX.

THE TRIAL COURT IMPROPERLY COERCED A DEATH VERDICT BY REFUSING TO ADDRESS MULTIPLE ASSERTIONS OF DEADLOCK AND FAILING TO DISMISS A JUROR WHO COULD NO LONGER FUNCTION PROPERLY AND IMPARTIALLY

A. Introduction and Factual Background

At two different junctures during the penalty deliberations of appellant's trial, the jury reported that it was deadlocked. Despite the fact that the jury had already deliberated a significant amount of time in light of the relatively short penalty phase, the trial court simply ordered the jury to continue their deliberations without providing any additional instruction or clarification. During the course of these stalled deliberations the trial court also failed to address the expressed concerns of both a juror who had an upcoming pre-paid vacation, and an alternate who was adversely affected by the length of the deliberative process. The deliberation process remained so intense that a juror approached the court and asked to be taken off of the case due to the extreme amount of mental stress it was causing her. Her request was denied. Only hours later, despite having been deadlocked for nine days, the jury returned a verdict of death. (6 CT 1472.)

The trial court's insistence that the jury continue to deliberate despite its assertions of deadlock, in conjunction with its failure to address juror concerns, and ultimate refusal to discharge a juror who represented that she was under so much mental stress and anguish that she asked to be taken off the jury, resulted in a coerced verdict and violated appellant's state and federal constitutional rights, including his rights to due process, to a jury trial, to a fair adversarial proceeding, and to an independently determined unanimous verdict. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16.) Reversal of the death judgment is therefore required.

The jury began deliberating at 10:05 a.m. on Thursday, March 1, 2001. They deliberated until 4:10 p.m., with an hour and a half break for lunch. (6 CT 1455.) Deliberations resumed after the weekend on Monday, March 5, 2001, with the jury deliberating from 9:35 a.m. to 4:00 p.m., with an hour and forty minute break for lunch. (6 CT 1456.) At some point on that day, the jury requested "all evidence from both trials." (6 CT 1457.) The jury reconvened on Tuesday, March 6, 2001, and deliberated from 9:20 a.m. until 4:00 p.m., with an hour and a half break for lunch. (6 CT 1458.)

On Wednesday, March 7, 2001, the fourth day of deliberations, the jury deliberated from 9:30 a.m. until 12:00 p.m., broke for lunch until 1:30 p.m., and then resumed deliberations until 3:00 p.m. At that point the jury submitted a note to the court which read "jury is deadlocked." (6 CT 1459-1460.) The court informed counsel of its plan to tell the jury to take a break for the rest of the day and return the next day for further deliberations. Defense counsel argued that because the jurors conveyed that they were deadlocked, the court should make an inquiry into whether they believed further deliberations would be beneficial. When the court refused, the defense moved for a mistrial. (83 RT 5190-5192.) The prosecution argued that such an inquiry was premature because the jury had not used the "magic" words of "hopelessly deadlocked." The court refused to make any inquiry, stating that if it did so "the matter will take on a life of itself." The court denied the defense motion for mistrial, stating that it would not declare a mistrial at this point in "an attempted auto burglary, let alone the penalty phase in a capital trial." (83 RT 5191-5192.) Instead, the court instructed the jury to go home and continue deliberations the next day. (83 RT 5192.)

On Thursday, March 8, 2001, the jury deliberated from 9:15 a.m. to 12:00 p.m., and sent the court a question at 11:20 a.m., inquiring whether or

not any act of violence could be considered as an aggravating circumstance, or if they were limited by the acts of violence listed in jury instruction 8.87. The court and counsel conferred at 1:40 p.m., and sent the jury a written response. The jury continued to deliberate until retiring for the day at 3:30 p.m. (6 CT 1461-1463.)

On Monday, March 12, 2001, the jury deliberated from 9:08 a.m. to 3:10 p.m., with a break at 10:50 a.m. and an hour and forty minute break for lunch. (6 CT 1464.) On Tuesday, March 13, 2001, the jury began deliberations at 9:20 a.m. At 10:15 a.m., the jury sent the court a note that stated: "This jury is a deadlocked jury, with no hope of resolution! Juror #5 has a prepaid trip to Arizona planned for the week of 3-19 to 3-25-01. #5 Juror will not be available." (6 CT 1469.) Another note was sent from the jury that read: "May the alternates be allowed to return to work until explicitly needed? This ordeal is adversely affecting my career growth. Juror #15." (6 CT 1466.) It is unclear from the record when the note from Juror 15 was sent, because it is not dated and the court did not address it on the record.

At 11:03 a.m., the jury and parties convened and the court asked the foreperson how many votes had been taken. The foreperson reported that there was not an exact count, but the best approximation was that there had been eight votes, with the first vote on Monday, March 5, and the second on Tuesday, March 6. The foreperson said that after the second vote the dates started "running together." The foreperson was able to verify that there was a vote on Wednesday, March 7, and Thursday, March 8, another on Monday, March 12, and another on March 13, which was Tuesday. The first vote was 5 to 7; the vote on Tuesday, March 6, was 6 to 6; the vote on Monday, March 12, was 6 to 6; and the vote on Tuesday, March 13, was 6 to 6. The foreperson reported that if the court were to ask for further

deliberation there was not a reasonable probability that they might arrive at a verdict. The foreperson said additional instructions or guidance may be of assistance, but that there was no confusion in the mind of any of the jurors. The foreperson's definitive position was that the jury was "hopelessly deadlocked." When asked by the court Juror 1 agreed that the jury was hopelessly deadlocked. Juror 3 was asked the same thing and said "I'm not sure that I do." The court did not question any of the other jurors, or give any further instructions, rather it simply instructed the jury to "go upstairs and continue your deliberations." (83 RT 5199-5203.)

The jury continued deliberating from 11:10 a.m. until they broke for lunch at 12:25 p.m. At 2:03 p.m., the court and counsel convened outside the presence of the jury to address a written request from the jury asking for additional definitions of extreme duress and lingering doubt. Specifically, the note asked whether duress could be caused by "internal (self-inflicted) and/or external forces" and whether lingering doubt could be tied to the "defendant's frame of mind at the time of the crime, and also defendant's mental capacity." (6 CT 1467.) The court sent a written response to the jury which stated that "[d]uress exists when a person is forced or compelled by another person to do some act that he otherwise would not have done." In addressing the jury's concern over the concept of lingering doubt, the court simply referred them back to the instruction previously given. The jury resumed deliberations until 3:35 p.m. (6 CT 1465-1468; 83 RT 5203-5205.)

On Wednesday, March 14, 2001, the jury deliberated from 9:20 a.m. to 4:04 p.m., with short breaks in the morning and afternoon and a two hour break for lunch. (6 CT 1470.)

On Thursday, March 15, 2001, the jury resumed its deliberations at 9:20 a.m. At 9:45 a.m., the court and counsel convened in chambers and

met with Juror 8, who had called the court that morning and asked to speak privately with the court. (6 CT 1471; 83 RT 5208.) Juror 8 unequivocally asked to be dismissed from the jury. She stated:

> I have reached a level of intolerable stress at this point, which I reached last weekend. And I am trying to live with it every day. Yesterday I felt as though I was going to snap, you know, during the day. I don't want that to happen. I think I am a fairly stable person, and the – it's just affecting every part of my life at this point, my job, my health. I feel like I'm just getting more and more tense every day. My job, my work has piled up. This has gone on much longer than we originally thought. You said six to eight weeks or longer. This has gone into four months. I go into work every day after here and try to do a day's work in an hour, hour and a half. It's not working. My boss asked me the other day if I did something and I was totally blank. I didn't know what he was talking about. I looked through my pile of stuff that is there and I had done it and I don't even remember doing it. You know, that's kind of scary. I don't know what else to say. I'm just like – I wake up crying at night because of the gravity of this case, and how I take it seriously, and I just wanted to ask to be taken off the case.

(83 RT 5209-5210.)

The court did not ask the juror any questions or permit either party to ask the juror any questions. The court did not discuss the issue with counsel. Rather, the court simply acknowledged that the jury had been working very hard and asked Juror 8 to continue to participate in the deliberation process. The court told her that if after further deliberation, Juror 8 still felt as though it was too stressful and interfering with her health, she should tell the bailiff and the court would talk to her again. The court asked if Juror 8 was willing to continue and she responded, "I'll try," and returned to the jury room. (83 RT 5210.)

After the juror left the court permitted counsel to address the record. The prosecutor stated that he believed the juror should be removed because

her mental health was "clearly affected by further participation." The court replied that if the juror had expressed a reluctance to continue, the request would have been granted. The prosecutor said that the juror did indicate reluctance and almost broke down in tears, and he reiterated his belief that the juror was mentally stressed to the point where she was unable to perform her duties as a juror. The court did not disagree with the prosecutor's statements, but rather said that it was made clear to the juror that she just needed to "let the bailiff know and we'll bring her down." The court said that if the juror notified the bailiff she would be excused, but dismissal was not going to happen "at this point." (83 RT 5211.) Defense counsel expressed concern that they would be losing Juror 5 because of a pre-paid vacation set to begin on Monday of the next week. The court said:

> I expect something to happen today, at least as far as Juror 8 is concerned. If she asks to be excused again for the reasons she's indicated, I'm going to grant her request. Obviously, I'll notify counsel if I hear anything further from her. I believe after hearing about this other juror having to leave, something is going to happen today. Let's just stay tuned.

(83 RT 5211-5212.)

Despite the court's ruling, the prosecutor continued to express his concern over Juror 8's mental state, saying that someone who wakes up crying in the middle of the night because of the stress has the "mental makings of somebody under immense stress and medically unqualified to keep continuing." The court said, "[w]e've dealt with it. If she requests to be excused at any later point, I'm going to excuse her." (83 RT 5212.)

The jury broke for lunch at 12:00 p.m. and at 2:20 p.m. returned with a death verdict. (6 CT 1471.)

B. The Trial Court Must Not Unduly Pressure the Jury Into Reaching a Verdict

A trial court must discharge the jury without its having reached a verdict where both parties consent or where "at the expiration of such time as the court may deem proper, it satisfactorily appears that there is no reasonable probability that the jury can agree." (Pen. Code, § 1140.) If a reasonable probability of agreement exists, a trial court may take appropriate action to encourage agreement in accordance with sound legal discretion. (*People v. Carter* (1968) 68 Cal.2d 810, 817.) This can include making an inquiry as to the numerical division of the jury without asking how many are for conviction and how many are for acquittal. (*People v. Morris* (1991) 53 Cal.3d 152, 227.)

The court may also direct further deliberations only upon its reasonable conclusion that a reasonable probability of agreement exists and such direction would be perceived as a means of enabling the jurors to enhance their understanding of the case. However, the court is not entitled to pressure the jury into reaching a verdict on the basis of matters already discussed and considered. (*People v. Proctor, supra,* 4 Cal.4th at p. 539; *People v. Bell* (2007) 40 Cal.4th 582, 616-617.) In the event that the trial court decides to instruct the jury to continue deliberating, the court must be careful to exercise its power "without coercion of the jury, so as to avoid displacing the jury's independent judgment 'in favor of considerations of compromise and expediency'." (*People v. Rodriguez* (1986) 42 Cal.3d 730, 775; quoting *People v. Carter*, *supra*, 68 Cal.2d at p. 817.) The goal of reaching an unanimous verdict does not lessen the principle that all parties are entitled to the individual judgment of each juror. (*People v. Gainer* (1977) 19 Cal.3d 835, 848.)

Jury coercion can exist even where the message to the jury is not that

it must return a *particular* verdict, but rather that the trial court expects a verdict, one way or another. (*People v. Carter*, *supra*, 68 Cal.2d at p. 817; accord *People v. Gainer, supra,* 19 Cal.3d at p. 850.) The relevant inquiry is not as to the trial judge's subjective intent in insisting on further deliberations, but rather what a reasonable juror could understand from the judge's refusal to accept the jury's assertion of deadlock. (*People v. Crossland* (1960) 182 Cal.App.2d 117, 119 [although "the able and experienced trial judge did not intend such coercion, . . . our concern must be what the jury of laymen may have understood him to mean"].) A claim that the jury was pressured into reaching a verdict depends upon the particular circumstances of each case. (*People v. Pride, supra,* 3 Cal.4th at p. 265.)

C. The Trial Court's Responses and Failure to Respond to the Jurors' Multiple Declarations of Deadlock and Concerns About Their Personal Circumstances Were Coercive

It is the court's duty to aid the jury the best it can, and certainly to do more than figuratively throw up its hands and tell the jury it cannot help. (*People v. Beardslee* (1991) 53 Cal.3d 68, 96-97.) However, this is exactly what the trial court here did. At critical junctures during the course of penalty phase deliberations the court insinuated to the jurors that a unanimous verdict was expected of them and they would not be discharged before reaching one. This was done by not only sending the jury back twice for further deliberations, despite their declarations of impasse, but also by providing the jury with a misleading instruction and twice completely ignoring their communications about personal circumstances.

1. The First Declaration of Deadlock

After deliberating for approximately 18½ hours over the course of a five-day period, the jury sent a written note to the court declaring that they

were deadlocked. Without conducting any inquiry to determine whether there was a reasonable probability that the jury could reach a verdict, the court simply ordered them to retire for the evening and then continue deliberating the next day.

The jury had already spent a significant amount of time in deliberation, especially given that the entire penalty phase lasted a total of *seven* hours over the course of five days,[105] before informing the court that they were deadlocked. It was clear at that point that the jurors – who were in the best position to determine whether they had reached the point where further deliberations were not appropriate – had come to the honest and thoughtful judgment that a unanimous verdict could not be reached. The record here indicates, without any evidence to the contrary, that at the time the jury sent the first note indicating they were deadlocked, they had deliberated in good faith on the matter for four days, had extensively reviewed the evidence, and had no questions concerning the applicable law. In fact, they had deliberated for almost three times longer than the entire

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[105]The jury was present on February 21, 2001, for a total of one hour and 40 minutes. The jury convened at 9:40 a.m. for opening statements and testimony and was present until 11:30 a.m. The jury reconvened at 1:40 p.m. until they were dismissed at 2:30 p.m. The jury was present on February 22, 2001, for a total of one hour and 50 minutes. The jury convened at 9:40 a.m. for testimony and was present until 10:10 a.m. The jury reconvened at 1:30 p.m. until they were dismissed at 2:50 p.m. The jury was present on February 26, 2001, for a total of two hours and 25 minutes. The jury convened at 9:45 a.m. for testimony and was present until 11:35 a.m. The jury reconvened at 1:40 p.m. until they were dismissed at 2:15 p.m. The jury was present on February 27, 2001, for a total of only 40 minutes. The jury convened at 10:00 a.m. for testimony and was present until 10:40 a.m. The jury was present on February 28, 2001, for a total of two hours and 50 minutes. The jury convened at 9:40 a.m. for closing statements and was present until 10:50 a.m. The jury reconvened at 11:10 a.m., deliberated until 11:45 a.m., and then again from 1:20 p.m. to 2:35 p.m. (6 CT 1447-1454.)

penalty phase lasted without request for clarification, instruction, or testimony to be read back. Yet, the court disregarded the expression of the judgment of the jurors and ordered them to continue deliberating, without offering any additional instruction or clarification.

The trial court's sole basis for ordering the jury to deliberate further was its own experience that "once I start asking questions, it seems to me that the matter will take on a life of itself." The court said that it would not declare a mistrial at that point in any trial, even "an attempted auto burglary let alone the penalty phase in a capital trial." (83 RT 5191-5192.) The court never had any intention of determining whether or not there was a reasonable probability that a verdict could be reached because, in its opinion, the deliberations had not gone on long enough. This was an improper basis upon which to order further deliberations because "[s]tanding alone, the period of deliberations is not determinative; the judge must make his assessment of reasonable probability of the jury reaching a verdict on a number of factors, of which the period of deliberation is just one." (*People v. Caradine* (1965) 235 Cal.App.2d 45, 50.) Here the trial court drew a line in the sand and arbitrarily decided that not only was more than 18 hours of deliberation not enough in this case, it would not be enough in *any* case. This position is completely at odds with a court's exercise of discretion based on consideration of all the factors before it and the determination of a reasonable probability of agreement on a case-by-case basis. (See *People v. Rojas* (1975) 15 Cal.3d 540, 546.)

The practical result of the court's failure to determine whether there was a reasonable probability that the jury would be able to reach a verdict is that when the jury was told to continue deliberating, despite its assertion of impasse, the pressure to reach a verdict was coercive. Coercion has been found where the trial court, by insisting on further deliberations, expressed

an opinion that a verdict should be reached. (*People v. Crossland, supra,* 182 Cal.App.2d at p. 119; *People v. Crowley* (1950) 101 Cal.App.2d 71, 75.) A trial court's opinion that a verdict should be reached can be also be implied by the court's refusal to discharge the jury in the face of the jury's report of impasse, especially when a trial is relatively short and simple and further deliberations appear to be unnecessary for purposes of enabling the jury to understand the evidence. Under these circumstances, a refusal to discharge can be deemed intended to coerce the minority into joining the majority jurors' view of the case. (See *People v. Rodriguez, supra,* 42 Cal.3d at pp. 775-776.) By informing the jury on March 6 that they must continue to deliberate, despite the fact that they had been deliberating for a significant period of time in light of the short penalty phase, the court put pressure on the jurors to reach a verdict on the basis of matters already discussed and considered.

2. Events Leading Up To and Including the Second Declaration of Deadlock

Following the first declaration of deadlock, and on the fifth day of deliberations, the jurors asked for clarification of which acts of violence could properly be considered as aggravating circumstances. (6 CT 1462.) The court's response, which is addressed in Argument X did not bring about a verdict.

The jury deliberated for two more days before sending the court a note on March 13 that stated: "This jury is a deadlocked jury, with no hope of resolution! Juror #5 has a prepaid trip to Arizona planned for the week of 3-19 to 3-25-01. #5 Juror will not be available." (6 CT 1469.) Another note was sent by Juror 15 asking that the alternates be allowed to return to work until explicitly needed because the "ordeal" was "adversely affecting" his career growth. (6 CT 1466.)

The jury was brought into the courtroom and asked about the progress of deliberation. The foreperson said that approximately eight votes had been taken thus far and at the time of the second assertion of deadlock, the vote was six to six. The foreperson said that additional instructions might be helpful if the court had any to give them, but he did believe that there was no confusion on the part of any juror and as a whole they were hopelessly deadlocked. The court began polling individual jurors to determine if they believed the jury was in fact hopelessly deadlocked. Juror 1 agreed they were hopelessly deadlocked. Juror 3 said he was not sure if he agreed that the jury was hopelessly deadlocked. The court did not conduct any further inquiry of Juror 3 or any other juror, but rather stopped all inquiry and sent the jury back to deliberations. (83 RT 5199-5203.) The court provided no additional instructions or guidance. Under these circumstances, the order to continue deliberating could only be interpreted as a message to the jury that half of them were expected to change their votes in order to reach a unanimous decision.

This Court has expressly disapproved the practice of instructing the jury that it must work towards unanimity. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 852.)[106] Instead, when a jury indicates it has reached an impasse, a trial court that directs further deliberations must exercise great care to avoid giving the impression that jurors should abandon their

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[106] In *Gainer*, this Court rejected the practice of giving an *Allen* charge, which is a supplemental instruction by the court encouraging a minority of the jurors to reexamine their views in light of the views expressed by the majority, and conveying to the jury that the case must at some point be decided. (See *Allen v. United States* (1896) 164 U.S. 492, 501.) The *Gainer* court found that it is error to give any instruction that either encourages jurors to consider the numerical division or majority opinion of the jury in forming or reexamining their own views on issues, or states or implies that if the jury fails to agree the case will necessarily be retried. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 852.)

independent judgment in favor of compromise and expediency. (See *People v. Miller* (1990) 50 Cal.3d 954, 994.) While the court in the present case did not make any verbal or written statements expressly conveying that the jury must work towards unanimity, that was undeniably the impression that the jury was left with. At no time did the court indicate to the jury that they were under no legal obligation to return with a unanimous verdict, and at no time did the court explain to the jurors that it was not trying to pressure them in any way to reach a unanimous verdict. In fact, the jury was left with the opposite perception, i.e., that they would be forced to deliberate until a verdict was reached.

This is especially evident in light of the fact that two additional communications from the jury were completely ignored by the court. The first coincided with the note expressing the hopeless deadlock and informing the court that Juror 5 had a pre-paid vacation scheduled for the next week. When the court ordered further deliberations it failed to even acknowledge this part of the note, leaving the jury to reasonably believe that even a juror with a pre-paid, prior commitment was not going to be excused until the jury reached a verdict. Similarly, the court completely ignored the note from an alternate, Juror 15, who requested that he be permitted to return to work until needed, given the fact that the length of the deliberations were negatively affecting his career. The jury could justifiably believe that nothing short of reaching a verdict would end the deliberations.

When a reviewing court considers a claim of coercion based on a supplemental instruction (e.g., an *Allen* charge) from the trial court it must look at the additional charge in context and under all of the circumstances. (*Lowenfield v. Phelps* (1988) 484 U.S. 231, 236.) While there was no supplemental instruction given here, the *lack* of guidance and failure to

acknowledge the jurors' concerns in the instant case should be similarly considered. In light of all of the circumstances, including the fact that the court had already refused to accept the jury's first declaration of impasse, the jury had no choice but to continue deliberating under the impression that they were required to reach a verdict.

D. The Trial Court's Refusal to Discharge a Juror Who Had Become Incapacitated and Requested to Be Taken Off of the Case Denied Appellant His Right to Trial By a Fair and Impartial Jury

Compounding the coercive effect of the court's refusal to discharge the jury, despite every indication that they could not reach a unanimous verdict, the court also erroneously refused to discharge a juror who requested dismissal from the case. On the ninth day of deliberations Juror 8 met with the court and counsel in chambers and asked to be discharged from the jury. She explained to the court that serving on the jury had caused an intolerable amount of stress in her life and she felt as though she was going to "snap." She said that she was usually a stable person, but the case was affecting her job and her health. Specifically, she was under a tremendous amount of pressure from her employer to get done in a few hours what would normally be a full day's work. She gave the court an example of the effect of the pressure that she found extremely disturbing: her boss asked about a task that she discovered she had done, but of which she had no recollection. She also revealed that due to the stress and gravity of the case she would wake up crying at night. (83 RT 5209-5210.)

A juror may be substituted at any time if the juror requests a discharge and good cause appears. (Pen. Code, § 1089.) When a trial court is put on notice that good cause to discharge a seated juror may exist, it is required to make whatever inquiry is reasonably necessary to determine if the juror should be discharged. (*People v. Farnam* (2002) 28 Cal.4th 107,

141.) In reviewing a trial court's decision to excuse or retain a juror, the abuse of discretion standard is used[107], whether the decision was made before or after submission of the case, and the trial court's decision will be upheld unless it is outside the bounds of reason. (*People v. Burgener* (1986) 41 Cal.3d 505, 520; *People v. Earp* (1999) 20 Cal.4th 826, 892.)

If a court denies a juror's request for discharge, it must be satisfied that the juror could continue to serve impartially and properly. (*People v. Turner* (1994) 8 Cal.4th 137, 205, overruled on another ground in *People v. Griffin* (2004) 33 Cal.4th 536, 555.) For example, in *Turner*, this Court found there was no error in denying a juror's request for discharge based on his employer's refusal to continue him to pay his salary. After a full inquiry of the juror, and based on the juror's declaration that his employer's decision would have no effect on his ability to be fair and impartial or cause him to rush a decision, the trial court was satisfied the denial would not affect his ability to serve. Similarly, in *People v. Hart* (1999) 20 Cal.4th 546, 597, when a juror expressed concern that the case might not conclude within the court's time estimates, this Court found the juror was properly retained because the record supported the trial court's determination that a denial of discharge would not affect his ability to perform his duties as a juror.

Alternatively, in *People v. Beeler* (1995) 9 Cal.4th 953, before the trial began, a juror left a tearful phone message for the court clerk

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[107]In *People v. Cleveland* (2001) 25 Cal.4th 466, 474, this Court determined that a trial court's decision to remove a juror should be examined under the more stringent "demonstrable reality" standard, rather than an abuse of discretion standard. However, this stricter standard is not applicable here because there was no juror misconduct alleged, rather the juror in question herself requested discharge for good cause. (See also *People v. Wilson* (2008) 44 Cal.4th 758, 821; *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.)

requesting dismissal. The juror said she was not sure that she could fulfill her duties as a juror and the nature of the case itself was very upsetting to her. The juror was brought before the court and counsel and she apologized for her emotional state and stated that she had a change of heart and believed that she was able to properly serve on the jury. The court questioned the juror extensively to determine if the juror could be fair and impartial and listen to all of the evidence presented. Based on the juror's answers to its questions, the court was satisfied that she could serve properly and impartially. (*Id.* at pp. 972-975.)

Both trial-related and non-trial-related stress can provide good cause for discharging a juror. (See *People v. Fudge* (1994) 7 Cal.4th 1075, 1099-1100.) Here, despite the representation by Juror 8 that she was under an intolerable amount of stress and having a difficult time functioning, the court failed to make even the most basic inquiry as to whether she believed that, despite the stress she was experiencing, she could continue to deliberate impartially and properly. Instead, after telling her she would be asked to continue to deliberate, the court merely asked if she was *willing* to continue. (83 RT 5210.) Having already been told by the judge that she would be asked to continue, it is unlikely that the juror would feel as though she could tell the judge no.

Moreover, simply because the juror was willing to continue does not mean that she was *able* to continue to deliberate impartially and properly and, in fact, the court's belief that Juror 8 was *unable* to continue to perform a juror's functions is evidenced by the fact that the court told counsel that if she made the request to be discharged again, her request would be granted. The court did not say that it would require any additional showing in order for a subsequent request to be granted, rather the court simply stated, "[i]f she asks to be excused again *for the reasons she's indicated*, I'm going to

grant her request." (83 RT 5212, italics added.) After both the prosecutor and defense counsel expressed concern over the juror's stress level, the court stated, "[w]e've dealt with it. If she requests to be excused at a later point, I'm going to excuse her." (83 RT 5212.) Clearly, the court determined that the juror had provided a sufficient basis for being discharged, but denied her request because it believed that something would happen that day – a Thursday – in light of the fact that another juror was scheduled to leave on a pre-paid vacation on Monday.[108] (83 RT 5212.)

After conducting a limited inquiry of Juror 8, the court, without giving either party the opportunity to address the court or the juror, ordered her to return to the jury room to continue deliberating. It was only after she had left the courtroom and resumed deliberations that the court permitted either party to address the record. The prosecution argued vehemently that the juror was in no condition to continue deliberating and should be discharged. The court did not disagree, but rather asserted that if the juror asked to be discharged again, the court would do so, but dismissal was not going to happen "at this point." (83 RT 5211.) Only then was trial counsel given the opportunity to be heard. (83 RT 5212.) While counsel did not specifically join in the prosecutor's strong objections to the court's actions in retaining Juror 8, he did not disagree with the prosecutor's argument that Juror 8 was no longer fit to serve on the jury, nor did he advocate that she be retained. Counsel's failure to join in the prosecutor's strong objection cannot in any way be deemed an acquiescence in the court's refusal to discharge the juror.

There is no reason to believe that the trial court would have ruled differently if the defense had objected in the same way as the prosecution to

[108]Deliberations did not take place on Fridays and so Thursday was the last day of the week and the last day that Juror 5 would theoretically be present to deliberate.

the court's decision to retain Juror 8. The court made its decision to keep the juror before objection by consulting with counsel and had sent her back to deliberate even before allowing the parties to address the record. The court's denial of the juror's request to be discharged without allowing either side to address the record and the court's failure to change its ruling in the face of the prosecutor's strenuous objections clearly show that any additional objection by trial counsel would have been futile. (*People v. Hill* (1998) 17 Cal.4th 800, 820-821 [a defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile]; *People v. Arias* (1996) 13 Cal.4th 92, 159 [same].)

The trial court's decision to deny Juror 8's request, despite having found good cause to discharge her, was outside the bounds of reason and denied appellant his right to a fair and impartial jury.

E. The Cumulative Effect of the Court's Continued Pressure on the Jury Resulted in a Coerced Verdict

The court's refusal to discharge Juror 8 despite having found good cause to do so, especially in light of the jury's two declarations of deadlock, was undeniably coercive. It is no coincidence that after nine days of deliberations and two assertions of deadlock, the jury reached a verdict on the very day that one juror was denied her request to be dismissed due to the emotional and mental toll the trial was taking on her, and another was scheduled to leave on a pre-paid vacation. The long deliberations had to have taken both a physical and psychological toll on each one of the jurors and their continued expression of deadlock had fallen on deaf ears. The jury reminded the court in the note they sent on March 13 that because of a pre-paid vacation, Juror 5 was unavailable beginning March 19. (6 CT 1469.) But, when the court addressed the jury's assertion of deadlock, no mention was made of Juror 5's vacation and the possibility that she would

have to be replaced. Given these circumstances it is reasonable that the jurors would believe that there was no way the court was going to declare a mistrial because of their inability to reach a verdict and certainly was not going to dismiss individual jurors, no matter what their extenuating circumstances might be.

The court was aware it would likely have to replace Juror 5 because of her vacation and deliberations would have to begin anew. Instead of discharging Juror 8 when she requested dismissal (and the court found good cause to discharge her), the court hedged its bets that sending Juror 8 back to deliberations would cause the jury to reach an agreement before Juror 5 also had to be replaced, and deliberations would have to re-start a second time. The court said as much: "I expect something to happen today, at least as far as Juror 8 is concerned . . . I believe after hearing about this other juror having to leave, something is going to happen today. Let's just stay tuned." (83 RT 5212.) A reasonable juror would have taken the return of Juror 8 as an unambiguous message that a verdict had to be reached before the jury would be discharged. At that point, two assertions of deadlock had been rejected, the jury note reminding the court of Juror 5's upcoming vacation had been ignored[109], the jury's request to allow the alternates to return to work until needed had also been ignored, and the court was unmoved by Juror 8's tearful plea to be discharged.

The jury had also been deliberating for nine days on a penalty phase

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[109]Although the attorneys seemed to be under the impression that the court would allow Juror 5 to be dismissed and replaced by an alternate in time for her pre-paid vacation, this sentiment was never conveyed to the jury and in fact, the jury note reminding the court of the vacation was ignored by the court. It is more than reasonable to presume that Juror 5 was under the impression that she was not going to be dismissed given the fact that by the last court day before her vacation was set to begin the issue still had not been addressed by the court in front of the jury.

that lasted only seven hours. Under all reasonable circumstances, it seems unlikely that Juror 8 would have made such a request for dismissal if the jury was close to reaching a unanimous verdict, knowing that if she was discharged deliberations would have to begin anew. It is far more probable that deliberations had continued to stall (just two days earlier the vote had remained at 6–6) and she simply could not take the stress of potentially many more days or even weeks of deliberations. The events following Juror 8's request for dismissal support the assertion that the entire jury believed that they had to return a verdict, one way or another. Approximately three and a half hours after Juror 8's request to be taken off the case was denied, the jury arrived at a verdict.[110] The swift resolution of the issues in the face of prior indications of hopeless deadlock at the very least give rise to serious questions in this regard. (See *United States v. U.S. Gypsum Co.* (1978) 438 U.S. 422, 462.)

It is *not* the jury's job to reach a verdict and the trial court may never insinuate to a jury that a case must at some time be decided. (*People v. Gainer*, *supra*, 19 Cal.3d at p. 845.) But this is exactly what the court did here when it failed to communicate its intentions to the jurors and left them, with good reason, to assume that they would be forced to continue to deliberate until a verdict was reached. Ultimately, the concern is not with what the court intended to convey or thought it was conveying, but rather with what the jurors could reasonably have understand the court's

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[110]Appellant is not suggesting that Juror 5 would sentence a man to death simply so as not to miss out on his vacation, or that Juror 8 would sentence a man to death purely out of self preservation – it is unknown from the record which side of the life-versus-death debate each was on at the time of the vote immediately preceding Juror 8's phone call to the court. Rather, based on the court's responses to all of the jurors' concerns up to that point, the jury could very reasonably have believed that nothing but a final verdict was going to be acceptable to the court and one or more of the jurors would have to abandon their firmly held convictions.

statements to mean. (*People v. Crossland, supra*, 182 Cal.App.2d at p. 119.) The independent judgment of the jury was displaced in favor of considerations of compromise and expediency, i.e., the jurors' reasonable belief that they were not going anywhere until a verdict was reached, and the result was a coerced verdict. (See *People v. Carter, supra*, 68 Cal.2d at p. 817.)

F. Due to the Cumulative, Coercive Nature of the Court's Conduct, Penalty Reversal is Required

The court's refusal to dismiss Juror 8 for good cause improperly interfered with the jury's deliberative process, thus violating appellant's federal constitutional rights, including his rights to due process, to a jury trial, to a fair adversarial proceeding, and to an independently determined unanimous verdict. (U.S. Const., 6th, 8th, and 14th Amends.; Cal. Const., art. I, §§ 1, 7, 15, 16.) Because at the time of Juror 8's request it was not known what the numerical division among the jurors was, respondent cannot prove the failure to remove Juror 8 was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Furthermore, the trial court's order to the jury to continue to deliberate further, in light of the totality of the circumstances surrounding their two declarations of impasse, put undue pressure on the jurors to return a unanimous verdict and undermined the requirement of independently achieved jury unanimity. (*People v. Gainer, supra*, 19 Cal.3d at p. 849.) Any criminal defendant, and especially a capital defendant being tried by a jury, is entitled to the uncoerced verdict of that body. (*Lowenfield v. Phelps, supra*, 484 U.S. at p 241.) It cannot be denied that by the time the jury sent the first note indicating that they were deadlocked, they had deliberated in good faith for an extended period of time, especially given the brevity of the penalty phase. The jury had already deliberated longer

than they had at the guilt phase – where the arguments and testimony had lasted well over two months and had involved two defendants.[111] The court's refusal to even consider the jury's assertion of deadlock demonstrated to the jury that the failure to agree on a verdict was not an option.

Similarly, under the totality of the circumstances, the court's conduct at the second expression of deadlock, including ignoring the valid and legitimate concerns of two jurors regarding their personal circumstances, resulted in coercive and undue pressure upon the jury to reach a verdict, whatever its nature, rather than no verdict at all. Because this is a capital case, there is a heightened scrutiny for potential errors in the oversight of the deliberative process of the jury. "[A]lthough not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of any colorable claim of error." (*Zant v. Stephens, supra,* 462 U.S. at p. 885.)

As a result, the death verdict violated California law as well as appellant's right to due process and to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution, and the state constitutional right to a unanimous verdict. (Cal. Const. art. I , § 16; *People v. Collins* (1976)17 Cal.3d 687, 692; *People v. Gainer*, *supra*, 19 Cal.3d at pp. 848-849.) Reversal of the death judgment is required.

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[111]During the guilt phase the jury deliberated over the course of four days for a total of approximately 17 ½ hours. The only request that was made during the deliberations was for a copy of the instructions. (6 CT 1283-1287.)

X.

THE TRIAL COURT'S RESPONSE TO THE DELIBERATING JURORS' QUESTION ABOUT EVIDENCE OF ACTS OF VIOLENCE COUPLED WITH THE PROSECUTOR'S ARGUMENT ALLOWED THE JURORS TO CONSIDER IN THEIR PENALTY DETERMINATION EVIDENCE THAT WAS NOT ADMISSIBLE AS AGGRAVATION AND WHICH THEY WERE NOT REQUIRED TO FIND TRUE BEYOND A REASONABLE DOUBT IN VIOLATION OF APPELLANT'S STATE AND FEDERAL RIGHTS

A. Introduction and Factual Background

At the penalty phase of trial, the prosecutor introduced evidence of five incidents of unadjudicated violent criminal activity under Penal Code section 190.3, factor (b) (hereafter factor (b)) and the jury was instructed by CALJIC No. 8.87 that they could not consider evidence of any other criminal activity as an aggravating circumstance.[112] (83 RT 5174.) In addition, however, there was evidence in the record from both phases of trial of other unadjudicated acts of violent and nonviolent misconduct, including evidence that was admitted at the guilt phase only against Sandra Harris, which was not offered by the prosecutor as aggravation under Penal Code section 190.3, but which he argued the jurors should consider in

[112] The five incidents listed in CALJIC No. 8.87 were: "1. The October 1992 incident at Savemart involving alleged assault and resisting arrest. 2. The May 1986 incident at Alpha Beta and the jail involving alleged assault and resisting arrest. 3. The August 1991 incidents involving Donna Thompson and her son, alleging assault with a deadly weapon. 4. The June 1999 incident involving the alleged assault on Michael Lopez, Junior. 5. The December 1990 incident at the sanitation plant and later at the jail involving alleged assault and resisting arrest." (6 CT 1497.) Incident numbers 1, 2, 3, and 5, which resulted in felony convictions, were also admitted as evidence in aggravation under Penal Code section 190.3, factor (c), having been proved at the guilt phase. (Peo. Exh. 64 [incident 2]; Exh. 66 [incident 1]; Exh. 68 [incident 3].)

making their penalty determination.

In an attempt to reconcile what they perceived as a contradiction between the two directives, on the fifth day of deliberations at the penalty phase, the jurors sent out a note:

> Can any acts of violence be considered as an aggravating circumstance or are we limited to the 5 acts of violence listed on 8.87 of the jury instructions? "A juror may not consider any evidence of any other criminal acts as an aggravating circumstance" vs. C8841 [sic] "you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise."

(6 CT 1462.)[113]

Trial counsel's request that the court respond by simply answering "no" to the question whether the jury can consider any acts of violence as aggravating factors, and "yes" to the question whether they are limited to considering only the five acts of violence listed in CALJIC No. 8.87 was rejected. (81 RT 5195-5196.)

The court prepared a response, which was shown to counsel before it was sent to the jury, and which read as follows:

> You have asked if *any* acts of violence may be considered as an aggravating circumstance, or, are you limited to the 5 acts of violence listed in 8.87 of the jury instructions.
>
> Under instruction 8.85, you are limited to the 5 acts of violence alleged to have occurred and listed in instruction 8.87 *as aggravating circumstances*. Before a juror may consider any such criminal act as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant did in fact commit the criminal act.
>
> Under instruction 8.85, you shall consider all the evidence which was received during both the guilt and penalty trials in

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[113] The jury was also instructed with CALJIC No. 8.85 that they "shall consider all of the evidence which has been received during any part of the trial of this case." (83 RT 5172.)

> determining which penalty is to be imposed on the defendant. You shall consider, take into account and be guided by all the factors in that instruction which you find to be applicable.

(6 CT 1463, original italics.)

Trial counsel's objection to the third paragraph of the response was overruled by the trial court which felt it should "remind[] them they can receive all of the evidence that was received in both phases in determining the appropriate punishment . . . ." (83 RT 5195-5196.)

The court's response to the jury's question, coupled with the prosecutor's argument, misled the jury as to the permissible use of evidence of uncharged acts of violence, and the standard of proof of that evidence, in violation of appellant's state and federal constitutional rights and requires reversal of the death judgment.

B. The Trial Court's Response to the Jury's Question and the Prosecutor's Argument Were Misleading and Erroneous

The jury's question was undoubtedly prompted by the prosecutor's statements, made first in his penalty phase opening statement in which he told the jurors that in reaching their penalty determination they could "consider anything you heard in the first part of the trial in arriving at your verdict" (74 RT 4760), and then again in his closing argument. Referring to the testimony of witnesses who testified about the factor (b) crimes, including appellant's wife, Donna Thompson, the prosecutor argued:

> In case you doubt the testimony of Donna Thompson about the threats she got from Michael Lopez[114], *that's not the only testimony you have before you.* That's not the only testimony about Donna Thompson. You remember the video of his lovely partner, Sandra Harris? I believe it was People's Exhibit 61. It was June 15th of 1999. It was the last three

[114] The prosecutor was referring to Thompson's testimony, discussed below, that appellant threatened to have the Mexican Mafia kill her son and her brother. (81 RT 4086.)

> tapes you saw at the end of the guilt phase. ¶ There was one portion about that, that tells volumes about Mr. Lopez. Volumes. This was a question put to her by Detective Wydler, okay? This is from that People's 61, that videotape of the June 16th interview.

(81 RT 5084, italics added.)

Trial counsel objected to the argument on the ground that the evidence the prosecutor referred to was limited to Sandra Harris when it was admitted at the guilt phase. (See 65 RT 4343-4344 [limiting instruction by court]; 6 CT 1317 [CALJIC No. 2.08 Statement Limited to One Defendant Only].) Before the court could rule, the prosecutor stated, "I believe they are instructed they can consider all the evidence from the initial part of the trial, your Honor." The court overruled the objection and the prosecutor continued reading from a portion of Harris's statement which included a reference to a restraining order by Thompson against appellant and quoted him as saying "I never loved her. I just used her and abused her." (81 RT 5084-5085.)

The prosecutor's argument that the jury could and should consider all of the guilt phase evidence, which was reinforced by the trial court's ruling on trial counsel's objection and its response to the jury's question, allowed the jury to consider substantial evidence presented at the guilt phase of trial that was neither admitted nor admissible as aggravating evidence under Penal Code section 190.3. The evidence included allegations against appellant that he physically assaulted and threatened Sabra Baroni, abused drugs, physically and verbally abused Sandra Harris, that he feared "losing control" when caring for his son, hit Harris's grandson, Joseph, and escaped from jail. In addition, the prosecutor's argument for death relied on evidence presented at the penalty phase that appellant assaulted and stole money from Donna Thompson and threatened

to have the Mexican Mafia kill Thompson's son and brother. Neither incident was listed in CALJIC No. 8.87.

By their question, the jurors zeroed in on the issue of whether this evidence – acts of violence other than the five acts listed in CALJIC No. 8.87 – could be used as a basis for deciding penalty. The court's response told the jurors that while they could not use the evidence of "any acts of violence," i.e., evidence other than the five incidents listed in CALJIC No. 8.87 *as an aggravating factor*, they were not foreclosed from considering the evidence as a basis for deciding in favor of the death penalty. The distinction made by the court – between consideration of evidence as "an aggravating circumstance" which the jurors were told was limited to the five acts listed in CALJIC No. 8.87, and consideration of evidence "in determining which penalty is to be imposed on the defendant," for which they "shall" consider all the evidence from both phases of trial – was reinforced by the prosecutor's question to the jury: "What is the appropriate penalty for the evidence you have before you *and* the factors in aggravation and mitigation?" (81 RT 5117, italics added.)

The trial court's response to the jury's question, coupled with the prosecutor's argument, improperly permitted the jury to consider non-statutory aggravating evidence, and to use evidence of unadjudicated criminal activity without finding it true beyond a reasonable doubt.

C. The Jury's Penalty Determination Was Not Properly Confined to Consideration of Aggravating Evidence Under the Statutory Factors and Instances of Violent Criminal Activity that Were Proved Beyond a Reasonable Doubt

The prosecution may not present aggravating evidence showing the defendant's bad character unless the evidence is admissible under one of the factors listed in Penal Code section 190.3. (*People v. Avena* (1996) 13

Cal.4th 394, 439.) "Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and [would] therefore [be] irrelevant to aggravation." (*People v. Boyd* (1985) 38 Cal.3d 762, 774.) "Thus, [aggravating] evidence irrelevant to a listed factor is inadmissible . . . ." (*Id.* at p. 775.)

Pursuant to factor (b), the existence of other violent criminal activity by the defendant may be considered as an aggravating circumstance in the penalty determination only if a juror is convinced beyond a reasonable doubt that the alleged conduct occurred and that it constituted a crime. (*People v. Michaels* (2002) 28 Cal.4th 486, 539; *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-774.) The trial court must instruct sua sponte on this standard of proof. (*People v. Robertson* (1982) 33 Cal.3d 21, 53-54; *People v. Phillips* (1986) 41 Cal.3d 29, 83; *People v. Yeoman* (2003) 31 Cal.4th 93, 132.) In addition, such an instruction must be given even when the other violent crimes evidence to be considered by the jury was introduced during the guilt phase of the trial. (*People v. Robertson*, *supra*, 33 Cal.3d at p. 53; *People v. Champion* (1995) 9 Cal.4th 879, 948.) The instruction is "vital to a proper consideration of the evidence" (*People v. Stanworth* (1969) 71 Cal.2d 820, 841), as application of the "reasonable doubt standard ensures reliability; and the evidence [of other crimes] is thus not improperly prejudicial or unfair" (*People v. Balderas* (1985) 41 Cal.3d 144, 205, fn. 32).

The issue raised by the jury's question is precisely the one that prompted this Court's directive in *People v. Robertson*, *supra*, 33 Cal.3d at pp. 53-54, that the prosecution should request an instruction enumerating the particular other crimes which the jury may consider as aggravating circumstances in determining penalty. The reasonable doubt instruction can

then be directly addressed to these designated other crimes, and the jury instructed not to consider any additional other crimes in fixing the penalty. Without such a limiting instruction, "there is no assurance that the jury will confine its consideration of other crimes to the crimes that the prosecution had in mind, because . . . the jury is instructed at the penalty phase that in arriving at its penalty determination it may generally consider evidence admitted at all phases of the trial proceedings. [Citation.]" (*Id.* at p. 55, fn. 19.)

In this case, although the jury was given CALJIC No. 8.87, the trial court's response to their question about the apparent contradiction between that instruction and CALJIC No. 8.85 undid any possible limiting effect because it allowed the jury to consider all of the guilt phase evidence, even if it did not constitute statutory aggravation. Further, by distinguishing "other acts of violence" from the five incidents listed in CALJIC No. 8.87, the court also eliminated the requirement in that instruction that uncharged acts of violence be proved beyond a reasonable doubt.

The trial court's actions, coupled with the prosecutor's argument which told the jurors they could consider all of the guilt phase evidence without limitation allowed the prosecutor to circumvent the requirements for admission of aggravating evidence and resulted in the consideration by the jury of the following evidence, unconstrained by any relation to the statutory aggravating factors, and without proof beyond a reasonable doubt.

1. Allegations of violent acts against Sabra from the guilt phase

During the prosecutor's argument at the penalty phase, in the course of contrasting the evidence in aggravation with appellant's case in mitigation, he argued that the jury should consider as aggravation evidence of violence against Sabra Baroni:

> Let's review the defense evidence, this mitigating evidence they produced, and they will use it in argument to try to save the life of this baby torturer and murderer. ¶ Ask yourself this: Does the sexual assault of the baby, the torture and murder of the baby, *assaults against Sabra*, little Michael, against the police, against the store clerk's eye-gouging, attacking a woman with a knife, and being a five-time felon even compare with being an artist, a cartoon drawer, a bearer of flowers, and one who was nice to his family?

(81 RT 5093-5094, italics added.)

Since no evidence of "assaults against Sabra" was presented at the penalty phase as aggravation, the prosecutor's reference was to allegations made at the guilt phase that appellant broke Sabra Baroni's leg and threatened to kill her and Sandra Harris if she told anyone, and to testimony that when she was admitted to the hospital with the broken leg she had bruises all over her body. This evidence, which was admitted at the guilt phase only as circumstantial evidence of Sabra's fear of appellant to explain inconsistencies in her testimony and not for its truth, was not admissible under Penal Code section 190.3, factor (a) (hereafter factor (a)) as a circumstance of the crime. (51 RT 3558, 3559; 52 RT 3583; 63 RT 4234; 6 CT 1318 [CALJIC 2.09 Evidence Limited as to Purpose]; see Argument IV.)[115]

Nor was the evidence admissible under factor (b). The trial court may "not permit the penalty jury to consider an uncharged crime as an aggravating factor unless a 'rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Johnson, supra,* 26 Cal.3d at p. 576, quoting *Jackson v. Virginia* (1979) 443

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[115] While this evidence was admitted at the guilt phase subject to limiting instructions, the jury was told to disregard those limitations at the penalty phase. (83 RT 5165-5166; CALJIC No. 8.84.1 ["disregard all other instructions given to you in other phases of this trial"].)

U.S. 307, 318-319, *People v. Boyd*, *supra*, 38 Cal.3d at p. 778.) The allegations made at the guilt phase that appellant was responsible for Sabra's broken leg – which consisted of nothing more than contradictory hearsay statements attributed to Sabra and speculation by Dr. Crawford that the injury was not accidental – fell far short of proof beyond a reasonable doubt that a crime was committed or that appellant was responsible.

The same is true of other evidence from the guilt phase regarding "assaults against Sabra." Pilar Ford, appellant's neighbor, saw bruises on Sabra's head and body "all the time." (53 RT 3636-3637.) Ford's denial that she told Detective Wydler that the bruises appeared after Sabra had been alone with appellant was impeached with the detective's testimony that Ford told him she saw bruises on Sabra almost daily and thought they occurred during times when appellant was babysitting. (54 RT 3716.) This testimony, admitted over appellant's relevance objection at the guilt phase, does not constitute "substantial evidence from which a jury could conclude beyond a reasonable doubt that violent criminal activity occurred." (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 587; *People v. Phillips* (1985) 41 Cal.3d 29, 72.) Yet, under the court's instructions, the jury was told they could consider the evidence in making their penalty determination.

The prosecutor made no attempt to comply with the requirements for admission of evidence of alleged "assaults against Sabra" under Penal Code section 190.3. Nevertheless, aided by the trial court's instructions, he was improperly permitted to argue to the jury that they should consider it as aggravating evidence.

2. Evidence of Sandra Harris's allegations from the guilt phase

The prosecutor told the jurors, and the trial court reinforced the point by overruling trial counsel's objection to the prosecutor's statements, that

they should consider evidence admitted at the guilt phase related solely to the case involving Sandra Harris. This evidence was not admissible under either factor (a) or factor (b) and should not have been considered by the jury at the penalty phase.

The prosecutor argued that if the jurors doubted Donna Thompson's testimony they could rely on Sandra Harris's taped statements from the guilt phase, which was "testimony you have before you." (81 RT 5084.) As previously noted, trial counsel's objection to the prosecutor's statements were overruled by the trial court. (*Ibid.*)

The videotapes of Harris's lengthy[116] statements to police are filled with accusations against appellant of drug use (60 RT 4042, 4077), verbal abuse of Harris and her daughter, Laurie, (60 RT 4064) and speculation by Harris that appellant was responsible for Ashley's death (60 RT 4067).

Telling the jury they could consider as part of their penalty determination against appellant evidence that was admitted at the guilt phase solely in connection with Harris's case was clearly error, and distinguishes this case from *People v. Coffman* (2004) 34 Cal.4th 1. In *Coffman*, defendant Marlow argued that CALJIC No. 8.85 improperly allowed the jury to consider evidence of unadjudicated acts of violence that were admitted at the guilt phase solely for purposes of co-defendant Coffman's defense. (*Id.* at pp. 121-122.) This Court held that the instructions given properly guided the penalty determination because the jury was instructed, inter alia, that evidence had been admitted against one defendant and not the other (CALJIC No. 2.07), and that evidence had been admitted for a limited purpose (CALJIC No. 2.09). (*Id.* at p. 122.) As previously noted, while the jury in appellant's case was similarly instructed

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[116] The videotaped statements were made on three days, June 4 and 15 and July 1, 1999, and lasted for several hours. (67 RT 4406.)

at the guilt phase, at the penalty phase these instructions were not given, and the jury was told to disregard the guilt phase instructions. (83 RT 5165-5166; CALJIC No. 8.84.1 ["disregard all other instructions given to you in other phases of this trial"].)

Similarly, in *People v. Burney* (2009) 47 Cal.4th 203, this Court found no harm to defendant at the penalty phase from the codefendants' statements admitted at guilt phase because there, in contrast to appellant's case, the prosecutor did not refer at the penalty phase to the statements, which were not admitted into evidence against defendant, and the jury was instructed not to consider the statements against defendant at the penalty phase. (*Id.* at pp. 256-257.)

Having been instructed to consider evidence from the guilt phase, it is reasonable to assume that the jury considered all of the evidence introduced as part of Harris's case. This included the testimony of Dr. Jules Burstein, who was called by Harris to testify about his interviews with her. Dr. Burstein testified that Harris told him appellant was a substance abuser who physically and verbally abused her and that she was "quite concerned about his treatment of her younger son Mike, when she asked him to take care of him, he said he was afraid of losing control." (61 RT 4117.)[117] Harris herself testified that appellant hit her grandson, Joseph, on the head (60 RT 4068), and that appellant and his brother escaped from Santa Rita jail (60 RT 4062-4063).

None of the evidence of violent acts admitted in connection with Harris's case should have been considered by the jurors in their penalty determination because they were not instructed, and could not find beyond a

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[117] The jury was reminded of Dr. Burstein's testimony when the prosecutor read extensively from the guilt phase transcript to impeach the penalty phase testimony of defense expert Nell Riley and expressed his opinion that Dr. Burstein was "pretty reliable." (81 RT 5102-5105.)

reasonable doubt, that the alleged conduct occurred and that it constituted a crime. (*People v. Carrington* (2009) 47 Cal.4th 145, 193, citing *People v. Michaels* (2002) 28 Cal.4th 486, 539; *People v. Boyd, supra*, 38 Cal.3d at pp. 772-774.) Again, instead of complying with the requirements of Penal Code section 190.3, the prosecutor simply argued that, because this evidence was part of the guilt phase evidence, the jury could consider it as aggravation, and the court's response to the jury reinforced the prosecutor's erroneous statements.

Because the court was squarely presented with the question, and because of the existence in the record of "extraneous aggravating evidence not falling within any of the statutory factors," the court was required to instruct the jury that non-statutory aggravating evidence – here, the allegations of "violence against Sabra" and those made in the course of Sandra Harris's case at the guilt phase – could not be considered as a basis for imposing the death penalty. (*People v. Espinoza* (1992) 3 Cal.4th 806, 827, citing *People v. Sully* (1991) 53 Cal.3d 1195, 1242; *People v. Williams* (1988) 45 Cal.3d 1268, 1324.)

Instead, by its erroneous and misleading response to the jury's question, the trial court left the jurors free to factor highly prejudicial aggravating circumstances into their penalty determination. In addition, because the prosecutor specifically referred to the guilt phase evidence as evidence in aggravation, the court had a sua sponte duty to instruct the jury that they may not consider such evidence unless such crimes are proved beyond a reasonable doubt. (*People v. Robertson, supra*, 33 Cal.3d at pp. 54-55; *People v. Phillips, supra,* 41 Cal.3d at p. 72; cf. *People v. Pinholster* (1992) 1 Cal.4th 865, 967, disapproved on another ground in *People v. Williams* (2010) 49 Cal.4th 405, 459 [no reasonable doubt instruction required when guilt phase evidence not referred to at penalty trial].) As

discussed below with regard to Donna Thompson's testimony, the trial court's response eliminated this requirement and allowed the jury to improperly consider as aggravation evidence of uncharged violent conduct that was not proved beyond a reasonable doubt.

Because appellant was entitled under state law to have the aggravating evidence introduced against him in the penalty trial limited to the factors enumerated in section 190.3 (*People v. Boyd, supra,* 38 Cal.3d at p. 775), the admission of evidence unrelated to the statutory factors in aggravation violated his right to due process under the Fourteenth Amendment of the United States Constitution. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; see also *Clemons v. Mississippi* (1990) 494 U.S. 738, 746 ["[c]apital sentencing proceedings must of course satisfy the dictates of the Due Process Clause"].) This error further violated appellant's federal constitutional rights under the Fifth, Eighth, and Fourteenth Amendments to a fundamentally fair and reliable penalty trial based on a proper consideration of relevant sentencing factors and undistorted by improper, nonstatutory aggravation. (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584-585, quoting *Zant v. Stephens* (1983) 462 U.S. 862, 884-885 [death penalty cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process"].)

3. Violent Acts Against Donna Thompson Not Listed in CALJIC No. 8.87

In addition to the five factor (b) crimes, the prosecutor's argument for death also relied on two instances of violent conduct testified to by Donna Thompson that were not listed in CALJIC No. 8.87. By its response to the jury's question, the court erroneously instructed the jury that these instances were excluded from the requirement that the jury find beyond

reasonable doubt that appellant committed the criminal acts.

In addition to testifying about an August 1991 incident involving her son, which was listed in CALJIC No. 8.87, Donna Thompson also testified that in January 1994 appellant, who was drunk, pushed her out of her car while he was driving, and took her purse which contained money she was going to deposit from her job at the Salvation Army[118] (74 RT 4798-4799), and that appellant threatened to have her son and brother killed by the Mexican Mafia. (81 RT 4086.) Even though these two incidents were not included in the list of crimes in CALJIC No. 8.87, the prosecutor argued that the jurors should consider both incidents in their penalty determination. Referring to "the crimes we showed you in factor (b)," the prosecutor argued "and then there was the other incident about the Salvation Army," and "to top that off, this woman [sic], there was yet another threat." (81 RT 5079-5084.)

Because neither the 1994 incident nor the alleged Mexican Mafia threat was listed in CALJIC No. 8.87, the acts necessarily fell within the rubric of "other acts of violence" referred to in the jury's note. By distinguishing these acts from the five factor (b) crimes, the court's response impermissibly eliminated the requirement of CALJIC No. 8.87 that the jury find the acts true beyond a reasonable doubt in violation of *People v. Robertson, supra*, 33 Cal.3d at pp. 54-55.

Because appellant had a right under state law to sua sponte

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[118] Before the penalty phase began, the prosecutor told counsel about the 1994 incident with Thompson, which he claimed to have only recently learned of from speaking with the witness. (73 RT 4745.) Trial counsel objected to its admission under factor (b) because the prosecutor believed, but was not certain, that appellant had struck Thompson during the incident. The trial court deferred a ruling, stating that they could have a hearing with the witness before she testified "to see if it would qualify." (73 RT 4750-4752.) The record contains no further discussion and Thompson testified as noted.

instructions on the requirement that other crimes evidence be proven beyond a reasonable doubt, and precluding aggravation of sentence upon the basis of alleged violent criminal activity unless proven to that level of certainty, the failure to so instruct violated his right to due process under the Fourteenth Amendment of the United States Constitution. (*Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 346.) Further, appellant's right to a fundamentally fair proceeding under the Due Process Clause of the Fourteenth Amendment, his right to a trial by jury under the Sixth Amendment as well as his right to a reliable penalty determination under the Eighth Amendment were violated by the failure to instruct on the "reasonable doubt" requirement.

D. The Jury's Improper Consideration of Nonstatutory Aggravating Evidence and the Trial Court's Failure to Give a Reasonable Doubt Instruction As to Incidents of Alleged Criminal Activity Constitute Prejudicial Error

Based on the trial court's response to the jury's question, especially considered in light of the prosecutor's argument, there is a reasonable likelihood that the jury misunderstood to appellant's detriment both the permissible evidence in aggravation as well as the scope of the reasonable doubt instruction. (*People v. Welch* (1999) 20 Cal.4th 701, 766.) Respondent cannot establish that the error in allowing the jury to consider this evidence, or to evaluate it under the incorrect standard of proof, was harmless beyond a reasonable doubt (*Chapman v. California, supra,* 386 U.S. at p. 24) or that there is no reasonable possibility that it affected the death verdict (*People v. Brown* (1988) 46 Cal.3d 432, 448). In this case, where the unauthorized evidence considered by jurors who were unguided by the correct standard of proof was so substantial and so damaging, and in which the jurors clearly struggled with the penalty decision, the error cannot be considered harmless.

This Court has held that the admission of nonstatutory aggravating evidence and the failure to instruct the jury that unadjudicated criminal activity must be proved beyond a reasonable doubt are subject to a harmless error analysis, specifically, whether it is "reasonably possible" the failure to instruct affected the verdict. (*People v. Brown*, *supra*, 46 Cal.3d at pp. 446-449.)[119] As this Court has noted, "the potential for prejudice [i]s particularly serious" when the error "affect[s] the jury's consideration of 'other crimes' evidence." (*People v. Robertson*, *supra*, 33 Cal.3d at p. 54.)

Before the jurors asked the court whether they could consider acts of violence other than those presented by the prosecutor at the penalty phase, they had been unable to reach a decision on penalty after five days of deliberation. Thus, having considered the evidence in aggravation which consisted of the circumstances of the crime under factor (a), the five enumerated offenses under factor (b), four of which also constituted the evidence under factor (c), the jurors had not reached a verdict. The court's response, coupled with the prosecutor's argument, added significant and devastating evidence to the equation. This evidence was not only highly damaging on its own, but also served to undermine the case in mitigation, which included lingering doubt of appellant's guilt of the murder.

In contrast to the manner in which appellant was portrayed by the penalty phase defense witnesses, as a caring family man who doted on his children, the jury was told to consider evidence of, inter alia, appellant's violence against children, threats of violence against women, and substance abuse. The unauthorized evidence the jury was permitted to consider was,

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[119] This test is "the same, in substance and effect" as the test used to analyze errors of federal constitutional dimension, i.e., the state must prove the error harmless beyond a reasonable doubt. (*People v. Jones, supra,* 29 Cal.4th at p.1264, fn. 11; see *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

in fact, far worse than the aggravation evidence properly admitted. The incidents in aggravation consisted primarily of aggressive and vulgar acts committed by appellant when he had been drinking.

The only incident in aggravation involving violence toward a child was the testimony of Julieta Romero, a 12-year-old neighbor who testified she saw appellant hitting his son. Romero admitted that it appeared Michael Jr. was being punished and that based on his prior "mean" behavior, he may have deserved it. (75 RT 4831.) This testimony was a far cry from the accusations of physical abuse of Sabra that were made at the guilt phase and improperly admitted as aggravation evidence.

Donna Thompson's claim that appellant shoved her out of her car and stole the Salvation Army money was disputed by the defense. The police officer who took the report from Thompson testified appellant told her to get out of the car and when she did, the money bag fell out. (78 RT 4953.) Thompson's claim that appellant threatened to have the Mexican Mafia kill her family members was uncorroborated. Had the jury been properly instructed that they had to find these incidents true beyond a reasonable doubt before they could consider them as aggravating evidence, it is unlikely they would have done so, given the questionable nature of Thompson's accusations.

Similarly, while the allegations of misconduct made by Sandra Harris at the guilt phase of trial were wide-ranging and prejudicial, it is highly unlikely a juror would have found them to be true beyond a reasonable doubt. Without such an instruction, however, the jurors were free to use Harris's accusations in making their penalty decision.

The penalty determination in this case was obviously extremely difficult for the jurors, who declared a deadlock twice before finally reaching a verdict after nine days of deliberation. Because consideration of

improper aggravating evidence undoubtedly affected the jury's decision, the death judgment must be reversed.

E. Conclusion

The trial court's response to the jury and the prosecutor's argument permitted the jury to consider inadmissible evidence in aggravation and failed to require that incidents of violent conduct be proved beyond a reasonable doubt. The errors were prejudicial and require reversal of appellant's death judgment.

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XI.

THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT AT THE PENALTY PHASE WHEN HE IMPROPERLY REFERRED TO APPELLANT'S LACK OF REMORSE AND FAILURE TO TESTIFY

A. The Prosecutor Impermissibly Commented on Appellant's Failure to Testify at the Penalty Phase

The prosecutor committed misconduct by improperly referring to appellant's failure to testify at the penalty phase. The prosecutor's comments violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, against self-incrimination, to a fair trial, and to a reliable, individualized sentencing determination.

The prosecutor commented on appellant's failure to testify and to express remorse for the killings. Referring to the witnesses who testified in mitigation, the prosecutor argued: "Other than the fact Michael Lopez was kind to them, brought them flowers, drew cards and cartoons for them, babysat for them, I didn't hear any of them say Michael Lopez had any remorse for this crime. Not one." (81 RT 5110.) In the course of commenting on the universality of a mother's love for her child ("I'm sure Osama Bin Laden's mother loves him. I'm sure Timothy McVeigh's mother loves him. Probably even Saddam Hussein's mother loves him"), the prosecutor asked the jury, "Did you ever hear Mr. or Mrs. Lopez say: Michael told me, sorry, Mom, for breaking your heart. Sorry, Mom, for putting you through this all these years. Sorry, Mom, for having you come to court and having you beg for my life. Sorry, Mom, for –" Trial counsel interrupted with an objection, which was sustained. (81 RT 5111.) In response to counsel's request that the prosecutor be admonished, the trial court told the prosecutor to move on. Instead, however, the prosecutor asked the jurors: "Did you ever hear one word of remorse from him?" Trial

counsel objected, citing *Griffin* (*Griffin v. California* (1965) 380 U.S. 609) error. The trial court told the prosecutor to move on and denied counsel's motion for a mistrial. (81 RT 5111.)

The prosecutor's comments regarding appellant's failure to testify and argument on lack of remorse constituted error pursuant to *Griffin* because they focused on appellant's exercise of his privilege against self-incrimination, as reflected in his failure to testify at the penalty phase and express remorse. While it is true that the prosecutor is free to make "a logical comment on the defendant's lack of remorse" based on the state of the evidence, a "reference to a defendant's failure to testify" is improper. (*People v. Breaux* (1991) 1 Cal.4th 281, 313; *People v. Crittenden, supra,* 9 Cal.4th at p. 147.) "Prosecutorial comment which draws attention to a defendant's exercise of his constitutional right not to testify, and which implies that the jury should draw inferences against defendant because of his failure to testify, violates defendant's constitutional rights." (*People v. Murtishaw* (1981) 29 Cal.3d 733, 757, overruled on other grounds in *People v. Boyd* (1985) 38 Cal.3d 762.).

Such comments are particularly inappropriate where appellant has denied participation in the offense. (*People v. Coleman* (1969) 71 Cal.2d 1159, 1168-1169, overruled on other grounds in *Garcia v. Superior Court* (1997) 14 Cal.4th 953.) Thus, "a prosecutor may not urge that a defendant's failure to take the stand at the penalty phase, in order to confess his guilt after having been found guilty, demonstrates a lack of remorse." (*People v. Crittenden*, *supra*, 9 Cal.4th at p. 147.)

Here, the prosecutor did not comment on appellant's lack of remorse based on inferences from the evidence, but clearly and unequivocally commented on the fact that appellant did not testify at the penalty phase to say he was sorry.

B. The Prosecutor's Comments Violated Appellant's Constitutional Rights and Were Prejudicial

The prosecutor's deliberate and pointed reference to appellant's failure to testify at the penalty phase violated appellant's privilege against self-incrimination and his rights to due process and a reliable capital guilt and penalty determination. (U.S. Const., 5th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 17.) Respondent cannot prove that the error was harmless beyond a reasonable doubt under *Chapman v California, supra,* 386 U.S. 18.

Missing from the present case are factors on which this Court has relied in finding *Griffin* error harmless: the evidence of appellant's guilt was not overwhelming; the court gave no admonition to the jury regarding the burden of proof, nor did the court instruct the jury not to draw any adverse inference from defendant's decision not to testify at the penalty phase. (See, e.g., *People v. Carter* (2005) 36 Cal.4th 1215, 1267; *People v. Rundle* (2008) 43 Cal.4th 76, 195.) On the contrary, the court refused trial counsel's request to admonish the prosecutor and did nothing more than urge the prosecutor to "move on."

Nor was there any ambiguity to the prosecutor's comment, as this Court found in *People v. Brasure* (2008) 42 Cal.4th 1037. There, the prosecutor asked the jury when the defendant would "stand up and take responsibility," which this Court found, in context, did not necessarily refer to testifying. (*Id.* at p. 1060.) The prosecutor's question in the present case "Did you ever hear one word of remorse from him?" leaves no room for interpretation.

In the absence of an admonition to the jury to disregard the prosecutor's comment and not to discuss appellant's failure to testify, this Court must find the error prejudicial. (Cf, *People v. Brasure*, *supra*, 42

Cal.4th at p. 1060 [court's direction not to consider the comment was immediate, unequivocal and repeated and cured any possible harm].)

C. Conclusion

The prosecutor's misconduct at the penalty phase requires reversal of the death judgment.

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XII.

THE ADMISSION OF EVIDENCE THAT APPELLANT COMMITTED WELFARE FRAUD WAS IMPROPER REBUTTAL AND VIOLATED APPELLANT'S STATE AND FEDERAL RIGHTS TO A FAIR TRIAL AND REASONABLE PENALTY DETERMINATION

Over defense objection, the prosecutor was permitted to present as rebuttal evidence that appellant committed welfare fraud by failing to report his income while he was receiving General Assistance and Food Stamps from 1995-1996. (80 RT 5039-5041 [objection]; 5052 [witness].) Jennifer Hazeltine, a welfare fraud inspector with the District Attorney's office, testified that in June 1996 she received a referral regarding appellant, and determined that he unlawfully received $2,705 over the course of approximately eight months. (80 RT 5053-5056.)

The prosecutor's position was that because appellant put his good character in issue, rebuttal evidence was admissible to show additional factors which would rebut that character. (80 RT 5039-5040.) Alternatively, the defense argued that no evidence was presented during the defense case regarding appellant's reputation for honesty, therefore any evidence regarding alleged welfare fraud was outside the scope of rebuttal. (80 RT 5040-5041.)

The evidence was inadmissible because it did not "relate directly to a particular incident or character trait defendant offer[ed] in his own behalf." (*People v. Rodriguez, supra,* 42 Cal.3d at p. 790 -792.) The mitigation evidence consisted of the testimony of a mental health expert regarding appellant's low IQ score, co-workers' testimony that appellant sometimes brought Sabra and Michael, Jr. to work with flowers and birthday cakes and that they seemed happy, and testimony from family members who described appellant as "different" after a serious car accident in 1983 which

resulted in head injuries. While family members described appellant as having positive qualities, including having a good relationship with his son and Sabra, none offered an opinion about a character trait for honesty, or any other incident that would be properly rebutted by evidence of welfare fraud.

In rejecting the same argument made by the prosecutor in *People v. Ramirez* (1990) 50 Cal.3d 1158, this Court stressed the importance of a passage from the *Rodriguez* decision which states, "Nothing in our discussion is meant to imply that any evidence introduced by defendant of his 'good character' will open the door to any and all 'bad character' evidence the prosecution can dredge up." (*Id.* at pp. 1192-1193, citing *People v. Rodriguez*, *supra*, 42 Cal.3d at p. 792, fn. 24.)

Evidence that appellant committed welfare fraud was not responsive to any of the mitigation evidence presented by appellant and should not have been admitted. During his closing argument the prosecutor specifically cited the fact that appellant "conned the welfare department" as evidence that appellant was deceitful and conned others for personal profit, which were indicative of appellant's "anti-social personality or psychopathic disorder." (81 RT 5105.) The trial court's erroneous ruling permitted the jury to consider additional irrelevant and prejudicial evidence in making their penalty determination. The erroneous admission of this testimony was manifestly prejudicial and not only violated California law but violated appellant's state and federal constitutional rights to due process and his rights to a fundamentally fair trial and penalty phase under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and article 1, sections 1, 7, 13, 15, 16 and 17 of the California Constitution.

XIII.

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS

Assuming that none of the errors in this case is prejudicial by itself, the cumulative effect of these errors nevertheless undermines the confidence in the integrity of the guilt and penalty phase proceedings and warrants reversal of the judgment of conviction and sentence of death. Even where no single error in isolation is sufficiently prejudicial to warrant reversal, the cumulative effect of multiple errors may be so harmful that reversal is required. (*See Cooper v. Fitzharris* (9th Cir. 1987)(*en banc)* 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; *Greer v. Miller* (1987) 483 U.S. 756, 764.) Reversal is required unless it can be said that the combined effect of all of the errors, constitutional and otherwise, was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24; *People v. Williams* (1971) 22 Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors].)

The admission of the testimony of two young children as the sole basis for the murder conviction should result in reversal alone. Moreover, the insufficiency of the evidence of first degree murder also requires reversal. In addition, the admission of inflammatory evidence of other crimes was highly prejudicial. The cumulative effect of these errors so infected appellant's trial with unfairness as to make the resulting conviction a denial of due process. (U.S. Const. amend. 14th; Cal. Const. art. I, §§ 7 & 15; *Donnelly v. DeChristoforo*, *supra*, 416 U.S. at p. 643. Appellant's

conviction, therefore, must be reversed. (*See Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439 [holding cumulative effect of the deficiencies in trial counsel's representation requires habeas relief as to the conviction]; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476 [reversing heroin convictions for cumulative error]; *People v. Hill*, *supra*, 17 Cal.4th at pp. 844-845 [reversal based on cumulative prosecutorial misconduct]; *People v. Holt* (1984) 37 Cal.3d 436, 459 [reversing capital murder conviction for cumulative error].)

In addition, the death judgment itself must be evaluated in light of the cumulative error occurring at both the guilt and penalty phases of appellant's trial. (See *People v. Hayes* (1990) 52 Cal.3d 577, 644 [court considers prejudice of guilt phase instructional error in assessing that in penalty phase].) In this context, this Court has expressly recognized that evidence that may otherwise not affect the guilt determination can have a prejudicial impact on the penalty trial. (See *People v. Hamilton* (1963) 60 Cal.2d 105, 136-137; *see also People v. Brown, supra*, 46 Cal.3d at p. 466 [error occurring at the guilt phase requires reversal of the penalty determination if there is a reasonable possibility that the jury would have rendered a different verdict absent the error]; *In re Marquez* (1992) 1 Cal.4th 584, 605, 609 [an error may be harmless at the guilt phase but prejudicial at the penalty phase].)

In addition to the coercive conduct of the trial court in refusing to declare a mistrial after the jury announced twice that they were deadlocked, and refusing to discharge a juror after finding good cause to do so, the errors committed at the penalty phase of appellant's trial include, inter alia,

the introduction of nonstatutory aggravating evidence, and prosecutorial misconduct which undermine the reliability of the death sentence. In addition, the death sentence in this case cannot be based on the unreliable testimony of two small children who were the only alleged witnesses to the killing. Reversal of the death judgment is mandated here because it cannot be shown that these penalty errors, individually, collectively, or in combination with the errors that occurred at the guilt phase, had no effect on the penalty verdict. (See *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina*, *supra*, 476 U.S. at p. 8; *Caldwell v. Mississippi* (1975) 472 U.S. 320, 341.)

Accordingly, the combined impact of the various errors in this case requires reversal of appellant's convictions and death sentence.

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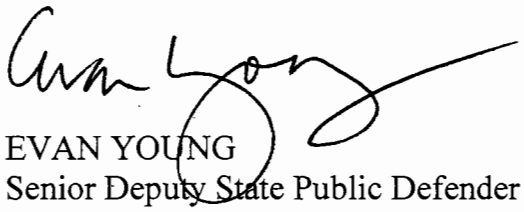
CONCLUSION

For all of the reasons stated above, both the judgment of conviction and sentence of death in this case must be reversed.

DATED: September 13, 2010

Respectfully submitted,

MICHAEL J. HERSEK
State Public Defender



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CERTIFICATE OF COUNSEL
(CAL. RULES OF COURT, RULE 36(B)(2))

I, Evan Young, am the Senior Deputy State Public Defender assigned to represent appellant, Michael Lopez, in this automatic appeal. I conducted a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 71,005 words in length excluding the tables and certificates.

Dated: September 13, 2010

Evan Young

DECLARATION OF SERVICE

Re: People v. Michael Augustine Lopez

Alameda County Sup. Ct.
No. H28492A

Cal. Sup. No. S099549

I, Andrew Losh, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California 94105; that I served a copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

Michael A. Lopez
(Appellant)
P.O. Box T-24622
San Quentin, CA 94974

Bethany O'Neill
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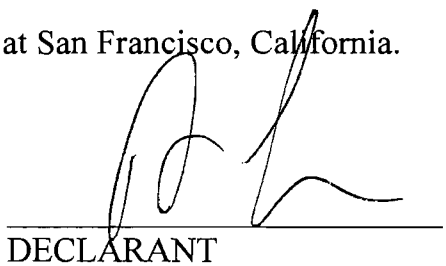
Superior Court of Alameda County
Attn: Honorable Philip Sarkisian
1225 Fallon St.
Oakland, CA 94612

Each said envelope was then, on September 13, 2010, sealed and deposited in the United States mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 13, 2010, at San Francisco, California.



DECLARANT