IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. MICHAEL FLINNER, Defendant and Appellant.	California Supreme Court No. S123813 San Diego County Superior Court No. SCE211301

APPEAL FROM THE SUPERIOR COURT
OF SAN DIEGO COUNTY

Honorable Allan Preckel, Judge

APPELLANT'S OPENING BRIEF

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Under appointment of the
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TOPICAL INDEX

TABLE OF AUTHORITIES vi

Introduction 1

Statement of the Case 3

Statement of the Facts 5

Argument 46

I The prosecutor and the sheriff's department violated appellant's Sixth and Fourteenth Amendment rights by interfering in the attorney-client relationship when they transferred appellant to a distant jail, housed him in administrative segregation, and restricted his access to counsel; and the trial court exacerbated the problem by failing to hold a hearing, ordering counsel to withhold the relevant facts from appellant, and by refusing to lift the restrictions on attorney-client contact. 46

II The trial court violated appellant's Sixth Amendment right to be present, and to counsel at critical stages of the proceedings by conducting private conferences which restricted his ability to prepare a defense. 86

III Appellant was deprived of his Fourteenth Amendment right to due process where he was tried by a biased prosecutor 89

IV Judge Preckel's bias, following appellant's alleged threats to kill him, violated appellant's Fourteenth Amendment right to due process 97

V The trial court violated appellant's right to due process and a fair trial by denying the motion to sever his case from that of his codefendant and the "dual jury"

procedure did not correct the problem 101

VI The trial court improperly admitted irrelevant evidence that would taint the jury, including evidence that appellant attempted to obtain the jurors' home addresses, that he threatened to rape the prosecutor in front of his wife and children, and that others feared that appellant would kill them 115

VII The trial court improperly admitted appellant's alleged derogatory statements about Keck 126

VIII The trial court prejudicially erred by admitting a series of letters and events implicating appellant in Keck's death or his subsequent attempts to implicate others, as no foundation was established to support the introduction of this evidence, and the content was irrelevant and highly inflammatory. 131

IX The trial court prejudicially erred by admitting unreliable hearsay testimony suggesting that appellant admitted killing Keck 141

X The trial court prejudicially erred by admitting evidence that Keck may have been pregnant when she was killed. 148

XI Martin Baker was an incompetent witness and the trial court prejudicially erred by admitting his testimony 153

XII The trial court denied appellant his Sixth and Fourteenth Amendment rights to confrontation by allowing the detective to read his codefendant's statement to appellant's jury. 160

XIII There was insufficient evidence to sustain the finding that the codefendant killed Keck by means of lying-

in-wait either as a theory of first degree murder or a special circumstance. 170

XVI Appellant was denied his right to an impartial jury as evidenced by the fact that, prior to deliberations, a female juror who was attracted to, or obsessed with the lead detective, told appellant that she wanted him to die 198

XVIII The cumulative impact of the errors deprived appellant of his right to a fair trial 220

XIX California's death penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution 223

Conclusion 240

Certificate of Compliance 240

TABLE OF AUTHORITIES

Cases

Andres v. United States
(1948) 333 U.S. 740 . . . . . 192, 202

Apprendi v. New Jersey
(2000) 530 U.S. 466 . . . . . 230-233, 235

Arizona v. Fulminante
(1991) 499 U.S. 279 101

Baxter v. Palmigiano
(1976) 425 U.S. 308 63

Beck v. Alabama
(1980) 447 U.S. 625 . . . . . 120, 128, 144, 150-152, 159

Bell v. Wolfish
(1979) 441 U.S. 520 . . . . . 63, 70

Blakely v. Washington
(2004) 542 U.S. 296 . . . . . 230-232, 235

Bruton v. United States
(1968) 391 U.S. 123. . . . . 101, 113, 144, 151, 159, 167

Bullcoming v. New Mexico
(2011) 564 U.S. ___, ... 136

Caperton v. A.T. Massey Coal Co.
(2009) 556 U.S. ____, ... 98

Chambers v. Florida
(1940) 309 U.S. 227 . . . . . 120, 151

Chapman v. California
(1967) 386 U.S. 18 . . . 115, 124, 130, 140, 147, 151, 153, 160, 166, 168, 169

Crawford v. Washington
(2004) 541 U.S. 36 . . . . . 101, 136, 159, 166-168

Cunningham v. California
(2007) 549 U.S. 270 . . . . . 230, 232, 233, 235

Drope v. Missouri
(1975) 420 U.S. 162 215-217

Duncan v. Louisiana
(1968) 391 U.S. 145 . . . . . 192, 202, 207

Emamoto v. Wright
(1978) 434. U.S. 1052 63

Estelle v. McGuire
(1991) 502 U.S. 62 . . . . . 119, 127, 136, 144, 150, 159

Estes v. Texas
(1965) 381 U.S. 532 220

Godfrey v. Georgia
(1980) 446 U.S. 420 178

Gomez v. United States
(1989) 490 U.S. 858 87

Green v. California
(1970) 399 U.S. 149 159

Gregg v. Georgia
(1976) 428 U.S. 153 178

Hicks v. Oklahoma
(1980) 447 U.S. 343 65

In re Winship
(1970) 397 U.S. 358 110

Jackson v. Denno
(1964) 378 U.S. 368 . . . . . 146, 147

Jackson v. Virginia
(1979) 443 U.S. 307 . . . . . 110, 172

Johnson v. Zerbst
(1938) 304 U.S. 458 78

Kansas v. Marsh
(2006) 548 US.163 223

Katz v. United States
(1967) 389 U.S. 347 139

Kentucky v. Stincer
(1987) 482 U.S. 730 87

Kolender v. Lawson
(1983) 461 U.S. 352 . . . . . 178, 181

Lanza v. New York
(1962) 370 U.S. 139 139

Mantanye v. Haymesi
(1976) 427 U.S. 236 64

Mayberry v. Pennsylvania
(1971) 400 U.S. 455 . . . . . 78, 99

Maynard v. Cartwright
(1988) 486 U.S. 356 228

Meachum v. Fano
(1976) 427 U.S. 215 . . . . . 64, 65

Nix v. Williams
(1984) 467 U.S. 431 83

Ohio v. Roberts

(1980) 448 U.S. 56 166

Olmstead v. United States
(1928) 277 U.S. 438 84

Parham v. J.R.
(1979) 442 U.S. 584 218

Pate v. Robinson
(1966) 383 U.S. 375 . . . . . 214, 215

Perry v. Lynaugh
(1989) 492 U.S. 302 . . . . . 120, 128

Procunier v. Martinez
(1974) 416 U.S. 396 . . . . . 69, 70

Pulley v. Harris
(1984) 465 US. 37 . . . . . 224, 236

Ring v. Arizona
(2002) 536 U.S. 584 230-235

Rochin v. California
(1952) 342 U.S. 165 58

Sandin v. Conner
(1995) 515 U.S. 472 70

Skilling v. United States
(2010) 561 U.S. ___, ... 178

Smith v. Phillips
(1982) 455 U.S. 209 202

Turner v. Louisiana
(1965) 379 U.S. 466 . . . . . 192, 202

United States v. Booker
(2005) 543 U.S. 220 232

United States v. Lovett
(1946) 328 U.S. 303 63

United States v. Zafiro
(1991) 506 U.S. 534 108-110

Upjohn Co. v. United States
(1981) 449 U.S. 383 59

Walton v. Arizona
(1990) 497 U.S. 639 . . . . . 230, 231

Wolff v. McDonnell
(1974) 418 U.S. 539 . . . . . 63, 65

Woodson v. North Carolina
(1976) 428 U.S. 280 . . . . . 110, 136

Zant v. Stephens
(1983) 462 U.S. 862 . . . . . 120, 128

Barber v. Municipal Court
(1979) 24 Cal.3d 742 . . . . . 59, 66, 67, 81, 83

Boulas v. Superior Court
(1986) Cal.App.3d 422 . . . . . 58, 59, 73, 79

Cornell v. Superior Court
(1959) 52 Cal.2nd 99 66

Di Sabatino v. State Bar
(1980) 27 Cal.3d 159 68

Domino v. Superior Court
(1982) 129 Cal.App.3d 1000 . . . . . 173, 180

Donaldson v. Superior Court
(1983) 35 Cal.3d 24 138

Dyer v. Calderon,
(9thCir. 1998) 151 F.3d 970 . . . . . 193, 196, 203, 207

Fakhoury v. Magner
(1972) 25 Cal.App.4th 58 135

Frye v. United States
(D.C. Circuit 1923) 293 F. 1013.) 212

Houston v. Roe
(9th Cir. 1999) 177 F.3d 901 180

In re Davis
(1979) 25 Cal.3d 384 . . . . . 62, 63

In re Grimes
(1989) 208 Cal.App.3d 1175 . . . . . 66, 74, 78

In re Hitchings
(1993) 6 Cal.4th 97 . . . . . 193, 203

In re Hutchinson
(1972) 23 Cal.App.3d 337 64

In re Jordan
(1972) 7 Cal.3d 930 68

In re Moss
(1985) 175 Cal.App.3d 913 78

In re Newbern
(1959) 168 Cal.App.2d 472 78

In re Rider
(1920) 50 Cal.App. 797 67

In re Roark
(1996) 48 Cal.App.4th 1946 68

Inmates of Riverside County Jail v. Clark

(1983) 144 Cal.App.3d 850 63

Milton v. Morris
(9th Cir. 1985) 767 F.2d 1443 79

Morrow v. Superior Court
(1994) 30 Cal.App.4th 1252 . . . . . 58, 73, 81-85

North v. Superior Court
(1972) 8 Cal.3d 301 139

People v. Adcox
(1988) 47 Ca1.3d 207 227

People v. Alvarez
(1996) 14 Cal.4th 155 . . . . . 107, 112

People v. Aranda
(1965) 63 Cal.2nd 51 . . . . . 101, 166, 167

People v. Bacigalupo
(1991) 1 Cal.4th 103 101

People v. Bacigalupo
(1993) 6 Ca1.4th 857 225

People v. Bittaker
(1989) 48 Ca1.3d 1046 227

People v. Blacksher
(2011) 52 Cal.4th 769 86

People v. Boyd
(1990) 222 Cal.App.3d 541 167

People v. Bradford
(1997) 15 Cal.4th 1229 87

People v. Burney
(2009) 47 Cal.4th 203 . . . . . 112, 113

People v. Butler
(2009) 46 Cal.4th 847 . . . . . 86, 87

People v. Carasi
(2008) 44 Cal.4th 1263 . . . . . 108, 109

People v. Cash
(2002) 28 Cal.4th 703 151

People v. Catlin
(2001) 26 Cal.4th 81 179

People v. Ceja
(1993) 4 Cal.4th 1134 179

People v. Clark
(2011) 52 Cal.4th 856 88

People v. Coffey
(1967) 67 Cal.2d 204 168

People v. Collins
(2010) 49 Cal.4th 175 . . . . . 192, 202, 203

People v. Conner
(1983) 34 Cal.3d 141 92

People v. Crittenden
(1994) 9 Cal.4th 83 . . . . . 118, 119, 122, 150

People v. Cummings
(1993) 4 Cal.4th 1233 110

People v. Danielson
(1992) 3 Cal4th 691 216

People v. Dennis
(1998) 17 Cal.4th 468 157

People v. Dillon
(1984) 34 Ca1.3d 441 226

People v. Duarte
(2000) 24 Cal.4th 603 . . . . . 144, 145

People v. Dyer
(1988) 45 Ca1.3d 26 226

People v. Edelbacher
(1989) 47 Cal.3d 983 225

People v. Ervin
(2001) 22 Cal.4th 48 112

People v. Ervine
(2009) 47 Cal.4th 645 . . . . . 83, 85

People v. Estrada
(1998) 63 Cal.App.4th 1090 . . . . . 110, 114

People v. Eubanks
(1996) 14 Cal.4th 580 . . . . . 91, 92

People v. Fairbank
(1997) 16 Ca1.4th 1223 . . . . . 229, 233

People v. Feagley
(1975) 14 Cal.3d 338 . . . . . 192, 202

People v. Flack
(1997) 52 Cal. App.4th 287 181

People v. Floyd
(1970) 1 Cal.3d 694 168

People v. Freeman
(2010) 47 Cal.4th 993 . . . . . 97, 98

People v. Garceau

(1993) 6 Cal.4th 140 119

People v. Gibson
(2001) 90 Cal.App.4th 371 135

People v. Green
(1980) 27 Cal.3d 1 179

People v. Greenberger
(1997) 58 Cal.App.4th 298 108

People v. Hale
(1988) 44 Cal.3d 531 215

People v. Hall
(1986) 41 Cal.3d 826 179

People v. Hardy
(1992) 2 Cal.4th 86 . . . . . 107, 109, 110, 114

People v. Harris
(1989) 47 Cal.3d 1047 110

People v. Hawthorne
(1992) 4 Cal.4th 43 233

People v. Henning
(1993) 20 Cal.App.4th 1066 83

People v. Hill
(1995) 34 Cal. App.4th 984 107

People v. Hill
(1998) 17 Cal.4th 800 220

People v. Hillhouse
(2002) 27 Cal.4th 469 226

People v. Holt
(1984) 37 Cal.3d 436 220

People v. Howard
(1992) 1 Cal.4th 1132 215

People v. Jackson
(1996) 13 Cal.4th 1164 110

People v. Johnson
(1980) 26 Cal.3d 557 . . . . . 172, 173

People v. Jones
(1991) 53 Cal.3d 1115 215

People v. Kelly
(1976) 17 Cal.3d 24 212

People v. Kronemeyer
(1987) 189 Cal.App.3d 314 220

People v. Letner
(2010) 50 Cal.4th 99 . . . . . 111, 112

People v. Lewis
(2001) 26 Cal.4th 334 158

People v. Lewis
(2008) 43 Cal.4th 415 . . . . . 113, 173

People v. Love
(1960) 63 Cal.2d 843 120

People v. Lucas
(1995) 12 Cal.4th 415 135

People v. Lyons
(1956) 47 Cal.2d 311 220

People v. Massie
(1967) 66 Cal.2d 899. 109

People v. McCaslin
(1986) 178 Cal.App.3d 1 138

People v. McCaughan
(1957) 49 Cal.2d 409 158

People v. Minifie
(1996) 13 Ca.4th 1055 . . . . . 127, 150

People v. Moore
(1976) 57 Cal.App.3d 437 81

People v. Moore
(2011) 51 Cal.4th 386 120

People v. Morales
(1989) 48 Cal.4th 527 . . . . . 174, 175, 180

People v. Morganti
(1996) 43 Cal.App.4th 643 107

People v. Musslewhite
(1998) 17 Cal.4th at p. 1265 179

People v. Nesler
(1997) 16 Cal.4th 561 . . . . . 125, 203, 204

People v. Nicolaus
(1991) 54 Ca1.3d 551 227

People v. Olguin
(1994) 31 Cal.App.4th 1355 135

People v. Parsons
(1984) 156 Cal.App.3d 1165 114

People v. Partida
(2005) 37 Cal.4th 428 . . . . . 120, 127

People v. Patino

(1979)'95 Cal.App.3d 11 173

People v. Pennington
(1967) 66 Cal.2d 508 215-217

People v. Reilly
(1970) 3 Cal.3d 421 173

People v. Roberts
(1992) 2 Cal.4th 271 108

People v. Robinson
(2005) 37 Ca1.4th 592 227

People v. Rogers
(2006) 39 Cal.4th 826 . . . . . 216, 217

People v. Roldan
(2005) 35 Cal.4th 646 95

People v. Simpson
(1939) 31 Cal.App.2d 267 69

People v. Snipe
(1975) 49 Cal.App.3d 343 145

People v. Stankewitz
(1982) 32 Cal.3d 80 215

People v. Superior Court (Greer)
19 Cal.3d 255 . . . . . 91, 95

People v. Tafoya
(2007) 42 Cal.4th 147 112

People v. Virgil
(2011) 51 Cal.4th 1210 . . . . . 88, 119

People v. Warren
(1988) 45 Cal.3d 471 114

People v. Watson
(1956) 46 Cal.2nd 818 . . . . . 124, 140, 151

People v. Welch
(1999) 20 Cal.4th 701 216

People v. Williams
(1997) 19 Cal.4th 635 136

People v. Williams
(2010) 49 Cal.4th 405 174

People v. Zapien
(1993) 4 Cal.4th 929 . . . . . 83, 123, 150

Shillinger v. Haworth
(10th Cir. 1995) 70 F.3d 1132 85

Sims v. Brown
(9th Cir. 2005) 425 F.3d 560 . . . . . 193, 194

Smith v. Superior Court
(1968) 68 Cal.2d 547 59

State v. Kinkade
(1984) 140 Ariz. 91 108

Tuilaepa v. California
(1994) 512 U.S. 967 227

United States v. Kennedy
(D. Colo. 1998) 29 F.Supp. 662 85

United States v. Klee
(9th Cir. 1974) 494 F.2d 394 203

United States v. Lin Lyn Trading
(D. Utah 1996) 925 F.Supp. 1507 85

United States v. Solorio
(9th Cir. 1994) 37 F.3d 454 82

United States v. Timmons
(9th Cir. 2002) 301 F.3d 974 218

United States v. Tootick
(9th Cir. 1991) 952 F.2d 1078 109

Statutes

Civil Procedure Code
section 170.4 98

California Code of Regulations
title 15 . . . . . 52, 65, 74
title 15, subchapter 4 65

Evidence Code
section 210 . . . . . 118, 127, 151
section 350 . . . . . 118, 127, 150
section 352 . 119, 120, 123, 126, 127, 129, 138, 143, 144, 146, 149, 150
section 402 154
section 701, subd.(a) 157
section 702, subd.(a) 157
section 801 157
section 1200 . . . . . 127, 143
section 1202 . . . . . 128, 143
section 1230 144
section 1367 . . . . . 159, 215
section 1400 135
section 1401, subd.(a) 135
section 1410 135
section 1421 135

Government Code
section 1255 95
section 12553 95

Penal Code
section 26 101
section 182, subd.(a)(1) 3
section 187 3
section 189 . . . . . 172, 179, 181
section 190.2 . . . . . 225, 228
section 190.2, subd. (a)(1) 3
section 190.2, subds.(a)(15) 3
section 190.2(a)(15) 172, 177, 180, 181
section 190.3 . . . . . 227, 228, 234
section 190.3(a) 226, 228
section 190.4 4
section 266i, subd.(a)(6) 4
section 347, subd.(a) 4
section 653f, subd.(b) 4
section 664 4
section 825 69
section 851.5 65
section 977 86
section 1043 86
section 1098 107
section 1181 202
section 1239, subd.(b) 5
section 2601 138

United States Constitution
Fourth Amendment 139, 140
Sixth Amendment . . 58, 80, 86, 111, 127, 136, 138, 140, 143, 144, 147, 159, 160, 165, 190, 192, 202, 226, 231
Fifth Amendment 226
Eighth Amendment . . 110, 111, 120, 128, 130, 136, 140, 144, 146, 147, 150-152, 159, 177, 225-227
Fourteenth Amendment 46, 58, 86, 89, 91, 97, 111, 119, 120, 127, 130, 136, 140, 144, 147, 150, 152, 160, 178, 192, 202, 226, 231

California Constitution
Article 1, section 7 58
Article 1, section 7(a) 91
Article 1, section 15 . . . . . 58, 59, 86
Article 1, section 16 . . . . . 192, 202

Article 1, section 30(a) 107
Article V, section 13 95

Other Authorities
5 J. Wigmore, Evidence, §1367, p. 20 (3rd ed. 1940 159
CALJIC 8.25 173
CALJIC 8.88 234

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APPELLANT'S OPENING BRIEF

Introduction

Michael Flinner is a really bad guy. Mental health professionals believe his behavioral problems are a function of brain damage following multiple head injuries as a child. Whatever the reason, he seems to go out of his way to do hateful things.

In the present case, he was charged with soliciting the murder of his young fiancé. She was murdered by his coworker and the jury was called to decide whether, and to what extent, he participated.

But Michael Flinner created problems with all relevant parties in the case. He collected the home addresses of, and allegedly threatened to kill, the trial judge and prosecutor. Both hated Michael as a result, and this hatred led to major legal errors which are described in great detail in this brief. Michael also targeted his initial trial counsel, who proclaimed that he wanted to be the person who "put the joy juice" in Michael's arm — this was defense counsel.

The question in the present appeal is whether our system is strong enough to ensure a fair trial for a really unlikable person who stands trial for his life. The system broke down here due to the bias of the judge and prosecutor. For example, once the prosecutor learned of the death threats, he and the sheriff improperly restricted Michael's access to counsel, and the trial court refused to intervene. The court thereafter allowed the admission of volumes of irrelevant and inflammatory evidence that would ensure conviction and a death sentence. The evidence the court admitted included informing the jurors that Michael had sought their home addresses as well. It is hard

to imagine anything more prejudicial than telling jurors the accused was targeting them.

One juror (who dressed provocatively and acknowledged a sexual fixation with the lead detective) told appellant in open court, before deliberations began, that she wanted him to die. Another juror began writing a book about the trial.

In many ways the trial took on a circus atmosphere, and the legal errors committed by the court and the prosecutor were numerous and substantial. Once the prosecutor and the trial judge lost their impartiality, things spun out of control, the trial became grossly unfair and the result inevitable.

Statement of the Case

Appellant was charged by way of an indictment with conspiracy to commit a crime (murder and grand theft) in violation of Penal Code section 182, subd.(a)(1)[1] (count one), one count of murder in violation of section 187, with special circumstance allegations that the offense was committed for financial gain and by lying-in-wait in violation of section 190.2, subds.(a)(1) and (a)(15) (count two), one count of soliciting the

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[1] All further references will be to the California Penal Code unless otherwise specified.

murder of Tamra Keck in violation of section 653f, subd.(b) (count three), one count of attempted pandering in violation of sections 664 and 266i, subd.(a)(6) (count four), one count of poisoning or adulterating food in violation of section 347, subd.(a) (count five), and one count of soliciting the murder of codefendant Ontiveros in violation of section 653f, subd.(b) (count six). (4 CT 802-807.)

Appellant was tried along with codefendant Ontiveros in a joint trial with separate juries.

Appellant's jury could not reach a verdict on the pandering charge in count four or the solicitation to commit murder charged in count six. (65 RT 10863-10864.) However, the jury convicted appellant of all other counts and found the special circumstance allegations to be true. (11 CT 2498-2501, 2583; 65 RT 10863-10864.)

In a subsequent penalty trial, the jury returned a verdict of death. (11 CT 2583.)

The trial court later denied appellant's motion for new trial, and his section 190.4 motion to modify the death verdict. (79 RT 12951-12953; 80 RT 12959-12961.) The court sentenced him to death for the capital murder of Keck. (80 RT 12969-12971.)

The appeal to this court is automatic pursuant to Penal Code

section 1239, subd.(b).

Statement of the Facts

Guilt Phase

Prosecution's Case

In early 1999, 31 year-old Michael Flinner was recently paroled from prison and living in Alpine, California. (38 RT 6686; 46 RT 7826.) He operated a landscaping business. (34 RT 6003; 39 RT 6850.)

In the fall of 1999, appellant met 17 year-old Tamra Keck on an Internet chat line. (46 RT 7826.) Keck lived with her mother, and had just begun her senior year at West Hills High School. (27 RT 4548.) The relationship became romantic, Keck moved into appellant's apartment when she turned 18, and they eventually became engaged to be married.[2] (27 RT 4549, 4552; 32 RT 5559.) She continued to attend school, but later dropped out before graduation. (27 RT 4579.)

On December 29th, 1999, appellant took Keck to his insurance agent's office and purchased a $500,000 policy on her life, naming himself as the sole beneficiary. (25 RT 4063; 26 RT 5069, 5105.) He

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[2] Appellant had previously been married twice. He and his first wife were divorced and the Navy transferred her to Maryland. (68 RT 11341) His second wife died of cancer while he was in prison. (3 CT 536; 9 CT 2014.)

told the agent she had become an integral part of his business, but this was not true as her involvement was minimal and she was not even on the payroll. (25 RT 4065, 4150.) He paid the first quarterly premium in March, and paid the second in April — two months early. (25 RT 4192.)

Appellant's inquiries about having someone killed

While appellant and Keck were living together, he made statements to others suggesting he was looking to have her killed.

Appellant told an employee, Robert Johnson, that he was having second thoughts about marrying Keck. (32 RT 5577.) He referred to her as a "bitch" and said he feared she was after his money. (32 RT 5579.) He asked if Johnson would kill someone for him, but Johnson refused, saying he was not an assassin. (32 RT 5582.) Appellant did not mention Keck's name. (32 RT 5618.)

Appellant had earlier bragged to another coworker, Glen Hogle, that he could have someone killed for $700.00. (28 RT 4757.) After Hogle dug a trench at a work site, appellant commented, "That would be a good place to throw Tammy." (28 RT 4757.) Hogle did not take the comment seriously and believed it was just appellant's "black humor." (28 RT 4762.)

In early 2000, appellant asked Charles Cahoon, another part-time employee about having someone killed and what it might cost. (33 RT 5825.) He told Cahoon that he had Keck insured "for a million dollars." (33 RT 5827.)

Appellant's mounting financial troubles and fraudulent schemes

While appellant generally portrayed himself as a successful businessman, his landscaping business was struggling, and by the spring of 2000, he was deeply in debt. (26 RT 4238, 4240, 4300, 4306, 4308; 35 RT 6147.) His gross revenues in 1999 were just $33,000. (34 RT 6003.) Several loan applications were rejected. (26 RT 4321; 28 RT 4479; 29 RT 4866.) He had financed industrial equipment that he used in the landscaping business but decided to sell the property even though he didn't legally own it. (32 RT 5517, 5477.) When negotiating the sale of a piece of equipment to David Pemberton, appellant sought to justify a higher price by offering him oral sex from Keck. (32 RT 5482.) While Keck confirmed on the phone that she would perform the act, Pemberton bought the equipment, but refused the sexual favor. (32 RT 5482.)

Appellant helped Keck buy a used BMW in April, 2000, but he received a $1,000 "finder's fee" which was added to the purchase price

without her knowledge. (26 RT 4244, 4364; 41 RT 7138.) He submitted a forged W-2 tax form in order to obtain the loan for the car. (34 RT 6004.)

Appellant thereafter leased a Ford Mustang for Keck. (26 RT 4208.) In fact, he bought or leased several vehicles that he later sold or traded — often engaging in fraud. (31 RT 5327, 5354; 39 RT 6864.) For example, he bought a $28,000 Chevrolet Tahoe but reported it stolen within a month. (26 RT 4235; 30 RT 5119, 5145.) Codefendant Ontiveros was later seen driving the Tahoe in Mexico. (33 RT 5750.)

Appellant also bought a new boat but made only one payment after the original downpayment. (34 RT 5968, 5986.) The boat, like many of the vehicles appellant bought, was later repossessed. (34 RT 5996.)

Appellant's disparaging remarks about Keck

Keck's friends believed that appellant was controlling, and witnessed several incidents of verbal abuse. Her best friend, Lanae Fulton, testified that appellant exerted emotional control over Keck. (27 RT 4597.) Keck changed her appearance by losing weight, cutting and coloring her hair, and dressing more provocatively. (27 RT 4596.) A business associate, David Pemberton, saw appellant and Keck at

Chamber of Commerce meetings and noted that appellant referred to her at various times as a "bitch, a cunt or a slut." (32 RT 5487.) Another businessman, Van Arabian, said that he saw appellant treat Keck "very bad." (41 RT 7144.) Randall Rynearson owned a local print shop and once asked appellant to leave his shop because of the language he used toward Keck. (45 RT 7625.)

Codefendant Ontiveros

Beginning in November, 1999, appellant employed codefendant Harron Ontiveros[3] as a site supervisor in his landscaping business. (48 RT 8211.) Ontiveros was a Mexican National, who lived in Tijuana, and traveled to Alpine each work day. (32 RT 5640.) Before appellant provided him a truck, Ontiveros rode the trolley from the border to El Cajon. (32 RT 5640.)

Events leading up to the murder

On June 10th, 2000, the day before the killing, appellant borrowed or rented a white Nissan NX from a used car dealer in Mission Valley. (27 RT 4517, 4520.) On June 11th, 2000, he and Keck had planned to attend a barbeque at his parents' house. (52 RT 8891.)

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[3] While known as Juan del le Torres to appellant and those he worked with, the codefendant's legal name was discovered to be Harron Ontiveros, the name used throughout the trial. (See 3 RT 304.)

That morning, Keck left to go shopping at Walmart, while appellant planned to run errands with his son. (52 RT 8892, 8895.)

At approximately 10:20 a.m., appellant drove his white F-150 Ford pickup truck to a dirt area just north of the Ultramar gas station on Tavern Road where he stopped and made a cell phone call to his answering service. (34 RT 6062; 35 RT 6097.) After placing the call, he drove a short distance south on Tavern Road to a Shell station. (24 RT 3868.) At 10:26, he filled his gas tank and told the clerk to hurry because his friend was waiting up the street. (31 RT 5394.) While filling his tank, the Shell station video showed him waving his arms in the direction of the Ultramar station. (24 RT 3868.) A few minutes later, appellant's truck was captured on video surveillance driving to the same location as the white Nissan NX that had been shown to be at the Ultramar parking lot. (51 RT 8630.) At 10:44 a.m., cameras at the nearby Texaco station showed both appellant's truck and the white Nissan driving into the cul-de-sac where Keck's body would later be found. (48 RT 8135.) The same camera showed the vehicles leaving the cul-de-sac at 11:00 a.m., and turning onto Tavern Road. (48 RT 8142.)

Walmart video showed that Keck was shopping in the store between noon and 12:17 p.m. (26 RT 4230.)

The Texaco and U-Storage videos showed that at noon, while Keck was in Walmart, codefendant Ontiveros drove the white Nissan to the cul-de-sac. (50 RT 8556.) Ontiveros then walked to the Ultramar station at 12:13. (30 RT 3882.)

Keck's cell phone records established that appellant called her twice while she was in Walmart. (34 RT 6059; 50 RT 8025.) She then drove directly to the Ultramar station and her Mustang was observed on the Texaco and Ultramar videos at 12:30. (50 RT 8027.) She drove into the Ultramar station and picked up Ontiveros. (24 RT 3886.) She then drove to the cul-de-sac. (50 RT 8036; 51 RT 8547.) Three minutes later, the video showed the white Nissan driving out of the cul-de-sac, almost colliding with another car. (51 RT 8549.)

Appellant then called Keck several times, but she did not answer her cell phone. (34 RT 6060.) He went back to his parents' house and expressed concern about her whereabouts. (48 RT 8200.) He then called Keck's mother, Debra Berglund, and said he could not reach Keck. (27 RT 4556.) Berglund drove to the Walmart parking lot, could not find Keck's car, and then went to appellant's parents' house. (27 RT 4556.) She and appellant went to his apartment, and to stores where Keck had intended to go, but ultimately called the sheriff's office to

report her as missing. (27 RT 4562; 50 RT 8563.)

The scene of the killing

Shortly before 2:00 p.m., a lost motorist discovered Keck's body lying face-up in front of her Mustang. (26 RT 3999, 4012, 4035.) The car was parked in the middle of a cul-de-sac near Tavern Road and Monterey Place, in Alpine. (25 RT 3997, 3999.) The engine was running, the hood was up, the passenger door was open, and the radio and air conditioner were on. (25 RT 4013; 26 RT 4418.) Keck's purse and its contents were sitting on the front seat. (26 RT 4420, 4439.)

She had been shot once in the back of the head with a .45 caliber firearm. (29 RT 4973; 43 RT 7315-7316.) The bullet entered the back of her head, exited her right cheek and lodged in the firewall of the engine compartment. (26 RT 4424-4425.) There were no bullet casings found at the scene and the murder weapon was never recovered. (27 RT 4440.)

There was no evidence of evasion by Keck, suggesting she never saw it coming. (29 RT 4983.) The medical examiner estimated the shooter was three to four feet away when the shot was fired. (29 RT 5015.) A forensic expert concluded she was shot while the hood was up and she was looking at the engine. (45 RT 7741.) She was turned over

onto her back after being shot. (51 RT 8792-8817.) She died within seconds or perhaps minutes of the shooting. (29 RT 4992.)

An autopsy later revealed a "corpus luteum" in Keck's uterus suggesting she may have been pregnant. (29 RT 4995.) The medical examiner testified that while this was an indication of pregnancy, he could not be sure. (29 RT 5068.) The merchandise found in Walmart bags in Keck's car included a pregnancy test kit. (26 RT 4422.)

Events following the murder

Appellant's statements and actions

Rick Scully, the lead detective in the investigation of Keck's death, told appellant that, in his experience, a person found dead in a remote location was likely the result of a meeting with a secret lover, or a drug deal. (35 RT 6365.) Appellant called the detective the next day and said he and his mother had found some methamphetamine and a syringe among Keck's belongings. (35 RT 6168; 49 RT 8356.) Keck's mother said she had a close relationship with her daughter and never saw any indication that Keck used methamphetamine. (27 RT 4571, 4585.)

On June 12th, 2000, appellant left a voice mail for Robert Pitman providing certain details of the killing. (39 RT 6857.) A few days later,

appellant denied mentioning any of the details, although he said he had gone to the crime scene with detectives on the day of the murder. (39 RT 6860-6861.) An employee of the medical examiner's office later described a policy of not releasing homicide details (including location of gunshot wounds) to the public. (29 RT 5082.)

Before Keck's death, appellant told Tiffany Faye, who worked in her mother's floral shop, that he wanted to date her. (26 RT 4383.) In fact, he bought her a pair of earrings for Christmas. (26 RT 4388.) After Keck's death, he ordered flowers for the funeral, and when Faye asked if appellant wanted to include a card, he said, "Tammy is fucking dead. It's not like she can read anymore." (26 RT 4384.) Appellant laughed while making the statement. (26 RT 4383.)

Kim Milan, an acquaintance who saw appellant at a pool hall, asked if he knew that the police thought he killed Keck. (48 RT 4827.) He did not directly deny this, but said "she was pregnant with my baby and we were about to be married." (28 RT 4827.) He told Melissa Henderson, another woman he met online, that he was unhappy Keck was pregnant and did not want to marry her. (27 RT 4638.) He said Keck had been abducted outside of a Walmart. (27 RT 4631.)

David Stanley, a business associate, testified about appellant's

act of crying and bemoaning Keck's death at a job site. (27 RT 4784.) Stanley said that he believed appellant was just "putting on an act." (27 RT 4784.)

Appellant told a hostess from Viejas casino, who had also known Keck, that he had been fishing with his son when Keck was killed. (27 RT 4752.)

Monica Locke was the girlfriend of appellant's employee and roommate, Gil Lopez. (27 RT 4459.) Less than a week after the killing, the three of them were celebrating Lopez's birthday at a restaurant and after several drinks, appellant became "tipsy" and said he was "sorry he had her killed." (27 RT 4489, 4492.) She later told an investigator appellant said, "I shouldn't have killed her." (27 RT 4493.)

The insurance claim

On June 23rd, and again on the 26th, appellant contacted the Allstate Insurance Company and made a claim for Keck's life insurance proceeds after obtaining the death certificate. (26 RT 4408.) He later told an Allstate representative, "They know I didn't kill her. They did ballistics tests and everything." (25 RT 4124.)

He told the president of the homeowner's association of the condo he was renting that Keck had been murdered, and indicated an interest

in buying the condo (although he was told the owners were not interested in selling). (27 RT 4744.) He also told the owner of a car dealership that he wanted to buy a new truck with the life insurance proceeds. (41 RT 7185.) And he told someone at Blue Porpoise Marine that he wanted to use the insurance proceeds to "upgrade" from his Boston Whaler to a larger boat that cost over $100,000. (34 RT 5791.)

Shortly after Keck's death, appellant also asked Donald Landon to find a buyer for the insurance policy at a discounted price, and Landon provided several names. (53 RT 8972.)

Appellant's arrest

On July 25th, 2000, sheriff's deputies arrested appellant at his apartment for violating his parole. (35 RT 6180; 45 RT 7581.) While searching the apartment, the deputies found a prepaid calling card and a blank check inside a bathroom light fixture. (35 RT 6180.) An AT&T employee testified that on June 14th, 2000, the card was used to place two calls from the 619 area code (San Diego) to Mexico. (35 RT 6202.)

Appellant's attempts to frame others

Charles Cahoon

Charles Cahoon lived in an apartment next to appellant and worked for him at one time. (33 RT 5816-5817.)

One day in June of 2000, when Cahoon was getting out of the shower, he saw appellant inside of his apartment, saw him walk out the door, and then heard appellant's apartment door close. (33 RT 5839.) Cahoon confronted appellant, but appellant denied having been in the apartment. (33 RT 5846.) Cahoon filed a police report, but later admitted in testimony that at the time he filed the report, he told police he had seen a "Mexican gentleman" in his apartment. (33 RT 5842.)

Deputy Sheriff David Sutherland responded to Charles Cahoon's apartment when Cahoon reported an intruder. (54 RT 9274.) At that time, Cahoon informed the deputy that the person he saw in his apartment was a male Hispanic. (54 RT 9278, 9283.)

A couple of weeks after Keck was killed, Cahoon reported that someone had tampered with his car (one that appellant had sold him). (33 RT 5831-5832.) While cleaning the car, he found a rolled up sock containing two bullet casings and a live round. (33 RT 5832.) Cahoon turned the items over to Detective Scully. (45 RT 5936.) The projectile and casings were .45 caliber. (41 RT 7323; 43 RT 7496.) The sock was also examined and found to contain a mixture of appellant's and Keck's DNA. (48 RT 8263, 8270.)

On June 29th, 2000, a San Diego police officer found a letter on

the windshield of his patrol car. (33 RT 5796.) The letter was anonymous but claimed that Charles Cahoon had killed Keck. (33 RT 5813.)

Also on June 29th, appellant's father found a live round and an expended casing in a small container in his yard. (45 RT 7594.) The casing had "Tammy" written on it while the live round had "Mike" written on the side. (48 RT 8205.) Appellant's father turned these over to the sheriff's department the next day. (45 RT 7594.)

Martin Baker

On July 13th, 2000, appellant had part-time employee Martin Baker over to his apartment for dinner after Baker did some landscaping work for appellant. (50 RT 8392.) Baker had never been there before. (50 RT 8392.) Appellant served Baker a bowl of chili and then ordered a pizza. (50 RT 8393.) Baker began to feel drowsy about 15 minutes after eating the chili. (50 RT 8394.) He then passed out on appellant's couch only to be awakened by sheriff's deputies a short time later. (50 RT 8395-8396.)

Appellant called the sheriff's department and informed them that Baker had killed Keck, and that he was asleep on appellant's couch. (27 RT 4674.) Appellant said he received a phone call from a woman

who said she had heard at a party that Baker was the killer. (27 RT 4675.) She also said that Baker had discarded the murder weapon in Pine Valley, near Interstate 8. (27 RT 4675, 4765.) The deputies looked at appellant's cell phone to get the anonymous woman's phone number, but the number was traced to an Arco station pay phone. (27 RT 4704.) The surveillance cameras at the station showed that appellant's truck was parked at the Arco station at the time the call was made to appellant's cell phone. (40 RT 7008-7009.)

The sheriff's deputies took Baker to the Alpine substation and contacted detectives. (27 RT 4678.) He appeared to be under the influence of drugs, and later tested positive for methamphetamine, THC and Xanax. (27 RT 4676; 48 RT 8154, 8159, 8187.) Appellant later came to the station and said Baker had been calling and threatening to kill him. (27 RT 4703; 40 RT 7011.) The message system on appellant's phone contained no threats. (39 RT 7026.)

Baker's testimony at trial was rambling and bizarre as he spoke of reincarnation and Adolph Hitler. (50 RT 8412, 8415.) He said he hadn't taken any drugs before going to appellant's house for dinner, but he had used methamphetamine within the preceding few days. (50 RT 8399, 8401.) Dr. Clark Smith is a psychiatrist who specializes in drug

abuse treatment. (54 RT 9177.) He reviewed the reports regarding Martin Baker. (54 RT 9181.) He testified that Baker had a severe psychosis, experienced hallucinations and psychotic delusions, and had a long history of being admitted to the county mental health facility. (54 RT 9183.) Baker once told staff members that the mafia had killed everyone in his family and was about to kill him. (54 RT 9184.) He was a chronic schizophrenic, which is a permanent condition, and had been prescribed multiple anti-psychotic medications. (54 RT 9185.)

Codefendant Ontiveros

Within a month of the killing, appellant forged a $7,000 check that he issued to Ontiveros. (27 RT 4650, 4654; 28 RT 4669.) Ontiveros' father deposited the check at a Wells Fargo ATM but was notified one week later that the bank would not honor it. (33 RT 5743, 5746; 41 RT 7146.)

On August 16th, 2000, about one month after issuing the bad check to Ontiveros, and after being returned to Donovan State Prison for parole violations, appellant told a correctional counselor that he would not provide any information regarding Keck's murder unless he was given immunity from prosecution and his parole violations were dismissed. (42 RT 7392.) He also wrote letters to the district attorney's

office offering to provide information regarding the killing in exchange for immunity and a new identity. (38 RT 6579, 6582.)

On July 24th, 2001, appellant told a sheriff's deputy that Ontiveros was a member of a gang and had offered a contract on his life. (38 RT 6604.) This conversation coincided with an anonymous letter sent to Ontiveros in the county jail a month earlier where the author identified Ontiveros as the murderer and noted that appellant was to be killed by the "border brothers." (38 RT 6604; 42 RT 7369-7345.) Appellant cut his wrists while in protective custody at Donovan, and expressed concern that the killer would target his parents and son. (42 RT 7391.) He later told a deputy that Ontiveros was responsible for the threat. (38 RT 6604.)

On February 26th, 2002, appellant's mother received an anonymous letter (in cut-out magazine lettering) sent from New York City threatening appellant and urging her to "keep him quiet." (38 RT 6670-6671.)

Appellant wrote many letters suggesting that Ontiveros murdered Keck. He wrote various religious organizations claiming that Ontiveros and Keck had an affair which resulted in her pregnancy, and that was the reason Ontiveros killed her. (46 RT 7856.) He also wrote

Congressman Duncan Hunter claiming that Ontiveros killed Keck, and once solicited him to kill her. (24 RT 3931; 44 RT 7430.)

James Theodorelos

Appellant met prison informant James Theodorelos, at Donovan in 2001. (35 RT 6236.) Theodorelos had been a "snitch" since 1986. (35 RT 6249.) He claimed appellant had solicited him to kill Ontiveros, who was "talking too much." (35 RT 6239.) Theodorelos quoted a price of $10,000 and appellant agreed, saying he wanted him to put a bullet in Ontiveros' head "just like that fucking bitch." (35 RT 6240.)

Theodorelos also said appellant told him that he planted ballistics evidence on his parents' property, including a spent casing with Keck's name on it, and a live round with appellant's name. (35 RT 6240.)

Theodorelos passed the information on to a prison official and said appellant's father was to make the $10,000 payment. (39 RT 6733-6734.) After Theodorelos was released from prison, he notified officials that appellant had sent him threatening letters, and the authorities found appellant's fingerprints on the letters. (39 RT 6755; 46 RT 7875.)

Theodorelos had previously been stabbed and beaten by inmates who learned that he was an informant. (39 RT 3790.) When appellant

later saw him at the jail, he recited Theodorelos's home address and asked if he still lived there. (35 RT 6243.)

Rick Host

Rick Host was a semi-retired Alpine resident and inventor who appellant befriended, and with whom he actively sought a business relationship. (33 RT 5730.) Host died within weeks of Keck's murder. (32 RT 5671.) At various times, appellant attempted to implicate Host in the murder, even though he did not mention Host at the time of his arrest. (39 RT 7033.)

In October of 2002, the prosecution received an anonymous letter written in broken English, and apparently sent from Mexico, where the writer claimed to have witnessed Keck's shooting at the direction of Rick Host. (38 RT 6695-6701.)

Host died in July of 2000, and appellant told Host's wife at the memorial service that he had loaned Host $20,000 in cash a few days before he died. (33 RT 5725.) After appellant's arrest, he wrote Host's wife and asked about the money and whether she had heard from South Korean President Kim regarding a potential casino business he and Host had discussed with Kim. (33 RT 5688.) Mrs. Host searched the house and found no cash, thereafter suspecting this was a scam.

(33 RT 5689.) Host's telephone records showed that no international calls had been made or received. (33 RT 5691.) Appellant said in the letter that he was not seeking repayment. (33 RT 5689.)

Threats to the prosecutor, the judge, and other parties in the case

While in custody, appellant wrote a letter to his mother where he referred to prosecutor, Rick Clabby, as "a little maggot." (38 RT 6678.)

He also wrote another inmate and provided Clabby's home address, suggesting the inmate later "visit" Clabby at his house for a sex party. (42 RT 7408.) In another letter, appellant threatened to sodomize Clabby in front of his wife and children. (42 RT 7407.)

Appellant met Gregory Sherman, another inmate informant, in the county jail in March of 2002. (37 RT 6330.) Sherman had "pro per status" at the jail, which provided him access to unmonitored phone calls, a copy and fax machine, and the Internet. (37 RT 6433.) When appellant learned that Sherman could obtain personal information on-line, including residence addresses, appellant give him a list of people and asked him to gather all of the information he could. (37 RT 6443.) The list included Rick Clabby and his wife, the detectives investigating the case, Judge Alan Preckel (the trial judge) and appellant's former trial counsel, Edwin Crabtree. (37 RT 6441, 6463.) Appellant also told

Sherman he intended to "sabotage" his case by sending "improper" information to the state's 110 witnesses (the information would be allegedly sent by one of the prosecutor's investigators) in an attempt to taint their testimony. (37 RT 6443-6444.) Appellant also told Sherman that he intended to get as many property owners on the jury as possible so that he could use records from the county recorder's office to contact the jurors at home. (37 RT 6446.) He planned to flood the jurors with improper information but had not decided whether to make it appear that the letters were sent by the bailiff, or his former counsel, Edwin Crabtree. (37 RT 6447.)

Catherine McLarnan dated and worked for appellant in 1999. (38 RT 6615-6616.) He phoned her on June 11th, 2000 and said that Keck had been murdered. (38 RT 6618.) She moved to San Jose later that year and eventually started receiving letters from appellant. (38 RT 6623.) She visited appellant at the jail while in San Diego for Labor Day in 2002. (38 RT 6625.) He then sent her a letter with a long list of names and addresses, and a cover letter he wanted her to mail for him. (38 RT 6626.) The names included Rick Clabby and Judge Preckel. (38 RT 6638.) The letters would have the return address of a post office box in Rancho Santa Fe which belonged to former counsel, Crabtree.

(38 RT 6627, 6637.) He instructed her to wear gloves and mail them from North Park in San Diego. (38 RT 6627-6628.)

McLarnan did not send the letters and provided them instead to a defense investigator. (38 RT 6641.)

Defense Case

The defense argued that appellant had nothing to do with Keck's murder. They had a good relationship. The theory that he wanted to kill her to collect the insurance policy did not make sense, because to believe that, one would have to believe that appellant had planned the killing six months earlier when he bought the policy, and the two of them had just started living together.

The defense also discredited much of the state's evidence.

Appellant's son, Jonathan, reviewed the events of the morning Keck was killed. (52 RT 8888.) Appellant arrived at his parents' house driving his Ford pickup truck, while Keck came in her Mustang. (52 RT 8888.) They had planned a family barbeque for later that day. (52 RT 8891.) Appellant, Keck and Jonathan played video games, and Keck and appellant were "acting normal." (52 RT 8890.) Keck left to go grocery shopping, while Jonathan and appellant went clothes shopping at the mall. (52 RT 8895.) They had the truck washed before going

shopping. (52 RT 8895.)

Appellant's mother testified that he moved in with his parents when he was paroled from prison in 1999. (53 RT 8921.) Keck was 18 when appellant's mother met her, and his mother was concerned when she learned that Keck had not graduated from high school. (52 RT 8922.) Appellant's mother saw the couple at family gatherings and they always acted in a "loving way" toward each other. (53 RT 8923.) Appellant treated Keck well. (53 RT 8926.)

Appellant's friend, Robert Hatch, testified that he met Keck in 1999, and saw her several times, but never saw appellant act abusively toward her. (55 RT 9459, 9460.)

A defense investigator confirmed that Baker had been prescribed Xanax after receiving treatment at the county mental health hospital. (57 RT 9624.)

At the time of the trial, he was living in an assisted care facility and was taking several anti-psychotic medications. (50 RT 8432, 8438.)

Prison inmate, James Bagget, met appellant at Donovan in the spring of 2001. (54 RT 9233.) He also knew James Theodorelos, who told Bagget that he intended to fabricate statements from appellant regarding Keck's murder. (54 RT 9298.) In fact, other inmates

contacted the prosecution seeking a benefit in exchange for information about the murder. (58 RT 9953.)

Detective Scully testified on cross-examination about statements made by reporters at the Alpine Sun regarding the claim that appellant told them Keck had been shot in the head. (55 RT 9371, 9374, 9383.) Two of the reporters later recanted the claim. (55 RT 9384, 9386.) Billie Jean Sheppard, a Sun reporter who wrote an article about the murder, disputed the prosecution's claim that appellant told her Keck had been shot in the head. (57 RT 9680.) Yvonne Sanchez, another Sun reporter, also disputed the claim. (58 RT 9796-9797, 9804.) The custodian of records for Channel 8 television in San Diego produced a recording of the news broadcast from June 11th, 2000, where it was reported that Keck had been shot in the head. (55 RT 9397, 9401.) The information may have come from someone at the nearby VFW post, who could see a pool of blood around Keck's head from a camera that was set up by the media. (55 RT 9444.)

Forensic accountant James Neilson reviewed appellant's financial records from the time of the killing and concluded the prosecution had exaggerated the amount of appellant's debt. (57 RT 9554, 9558.) The prosecution suggested appellant was $194,000 in debt at the time of the

murder, but Neilson concluded the actual amount was less than $100,000. (57 RT 9567.)

Jon Lane, a defense investigator, reviewed the video tapes from the Tavern Road service stations. (57 RT 9641, 9643.) He determined it was not possible to see the driver of the Ford F-150 pickup truck from the Arco station surveillance tape. (57 RT 9691.) Moreover, the truck which the prosecution claimed belonged to appellant, never stopped as it drove through the station. (57 RT 9691.)

Lane also provided evidence disputing the prosecution's claims regarding telephone calls appellant made in mid-June of 2000. (57 RT 9706-9715.) He noted that the records of the calling card found in appellant's apartment showed that a call was made from Rick Host's house to Mexico on July 7th, 2000. (58 RT 9837, 9841.) He described other calls using the same card. (58 RT 9847, 9853.)

An investigator with the public defender's office provided photographs of the crime scene near Tavern Road. (57 RT 9745.) The photographs show there was a tunnel nearby (large enough for an adult to pass through) that ran beneath Interstate 8. (57 RT 9753.) A Caltrans worker verified that people used the culverts as passageways under the highway. (58 RT 9812.)

Gil Lopez testified that when he and Marie Locke saw appellant at the restaurant shortly after the murder, appellant was intoxicated. (58 RT 10004.) Appellant said "I shouldn't have killed her" and made a similar comment later at his apartment. (58 RT 10017.) But Lopez did not interpret the statements to mean that appellant actually killed her, or was responsible for her death. (58 RT 10095.)

Sheriff's deputy, Gary Haigh, responded to the Keck crime scene on June 11th, 2000. At trial, he played a recorded conversation he had with a dispatcher where he referred to the victim having suffered a gunshot wound to the head, and noted that the media was present when he arrived. (52 RT 8857, 8862, 8864.)

Rick Host was with a business partner, Donald Landon, at the same Walmart where Keck shopped the morning she was killed. (53 RT 8951.) Landon testified that on the weekend of Keck's murder, appellant had asked to borrow Host's Mitsubishi truck but he refused. (53 RT 8970.)

Sterling Thomas was a service writer for Alpine Auto Repair. (53 RT 8987.) He said that appellant's statements about wanting someone to steal his Chevy Tahoe were only made in jest. (53 RT 9005, 9011.) Thomas denied telling police that appellant told him he wanted to get

rid of his girlfriend, or that appellant had "hit on" his fiancé. (53 RT 9015.)

Detective Scully testified he could not determine where the white Nissan had been parked on the night of June 10th, 2000. (53 RT 9064.) He also said that when Detective Frank interviewed Keck's mother on June 11th, 2000, he told her Keck had been shot in the head. (53 RT 9087.)

D.A. investigator Nick Saraceni was asked by Clabby to attend informant Theodorelos's parole hearing, and reported a man named Troy Bottle had left a knife at Theodorelos's house, which his parole officer found and used to violate his parole. (54 RT 9168.)

Linton Mohammed, the prosecution's handwriting expert, was recalled and impeached about his opinion that appellant's handwriting was on certain documents. (54 RT 9246, 9257, 9264.)

Deputy David Sutherland responded to a call regarding an intruder at Charles Cahoon's apartment. (54 RT 9274.) At that time, Cahoon described the person he saw in his apartment as a male Hispanic. (54 RT 9278, 9283.)

Several sheriff's deputies testified regarding their surveillance of appellant on June 20th, June 21st, July 11th, July 21st, July 22nd and

July 23rd, 2000. (54 RT 9310, 9324.)

Scott Nichols, the custodian of records for television Channel 8 in San Diego, produced a recording of the news broadcast from June 11th, 2000, which stated that Keck had been shot in the head. (55 RT 9397, 9401.)

Benny Cope was at the Alpine VFW Post on June 11th, 2000. Using a camera set up by the media, he could see a pool of blood of around Keck's head, indicating where she had been shot. (55 RT 9444.)

Robert Hatch was appellant's friend who performed landscaping and irrigation work. (55 RT 9448.) He once worked at Rick Host's house. (55 RT 9453.) He met Keck in 1999, saw her several times and never saw appellant act abusively toward her. (55 RT 9454, 9460.)

Two experts examined appellant's desktop computer. (56 RT 9487, 9506.) They found files indicating appellant's roommate, Gil Lopez, had used the computer several times. (56 RT 9520, 9525.)

A ballistics expert said that it was not possible to match the casings as claimed by the prosecution's expert. (58 RT 9785.) Moreover, it was not possible to determine whether the casing found on appellant's parents' property had the name "Tammy" written on it before or after it was fired. (58 RT 9787.)

Larry Davis, the prosecution's investigator, said that informant Jeffery Atkinson contacted the district attorney's office in July, 2000, seeking a "benefit" for information regarding Keck's murder. (58 RT 9952.) Atkinson said that he had read through "stacks and stacks" of police reports regarding the case. (58 RT 9953.)

The prosecution's rebuttal evidence

Theodorelos told a Donovan security guard on March 29th, 2001, that appellant had confided in him regarding the murder of his "wife." (60 RT 10189.) The guard noted in his report that Theodorelos wanted to inform on appellant. (60 RT 10189.) Theodorelos claimed that appellant had offered him $10,000 to kill Ontiveros, because he thought Ontiveros was cooperating with police. (60 RT 10191.) Appellant told him that he had his "wife" killed because an overseas business venture had gone bad and she was spending too much money. (60 RT 10191.) Appellant also told him that on the day of the murder, he had intentionally gone to stores with video surveillance and bought things using a credit card to establish an alibi. (60 RT 10192.) Appellant confided that he had also taken steps to impede the investigation, including planting notes and ammunition, some with his and Keck's names on it. (60 RT 10192.)

Patrick Lim, the prosecution's computer expert, was recalled to confirm certain files and partial files he had found on the computer seized from appellant's apartment. (60 RT 10211.)

D.A. investigator Larry Davis, listed Ontiveros' height as 5'9", based on DMV records, and took measurements to determine whether a person that size could see inside various pickup trucks. (60 RT 10225, 10232.)

Appellant's mother, Carol Flinner, recalled finding certain bank checks in a day planner on appellant's desk, two days after Keck's death. (61 RT 10251.) Tom Dyke, long-time owner of property where Keck was murdered, described the surrounding area and conditions affecting pedestrian access. (61 RT 10314.)

Ian Fitch, a police criminalist in the forensic biology unit, testified about the DNA found on the sock containing bullets, discovered by Cahoon in his car. (61 RT 10354.)

Appellant's surrebutal evidence

Deputy Don Parker identified vehicles he observed at Marie Locke's house on July 12th, 2000, when called to "preserve the peace" as Cahoon was moving back in. (61 RT 10370.)

Defense investigator Jon Lane recalled an interview he conducted

with Gil Lopez regarding appellant's alleged confessions that he killed Keck. (61 RT 10376.) Lopez told him he understood appellant's statements to suggest that appellant was remorseful for not having somehow prevented Keck's death, rather than being directly responsible for it. (61 RT 10377.)

Verdicts

The jury returned guilty verdicts for conspiracy to commit murder and grand theft, first degree murder, mingling a harmful substance with food or drink, and solicitation of murder. (65 RT 10863.) The jury also made true findings on the special circumstance allegations of committing murder for financial gain, and by means of lying-in-wait. (65 RT10863.)[4]

The Penalty Phase

The prosecution's penalty phase case consisted of seven witnesses, including family members who described the impact of losing Keck, and four women, including appellant's former wife, who described assaults and sexual abuse by appellant. The defense

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[4] Codefendant Ontiveros was convicted of conspiracy to commit murder and first degree murder; true findings were returned as to the special circumstance allegations of committing murder for financial gain and by means of lying-in-wait. (65 RT 10858.)

presented members of appellant's family, others who he had helped in various ways, and medical experts who described appellant's damaged brain.

Prosecution's Case

The prosecution called Keck's grandfather, James Blecher. (68 RT 11245.) He told of his involvement in Keck's life when she was young, after her parents had separated. (68 RT 11245.) He was a member of the Freemasons, and Keck joined Job's Daughters (a Masonic youth organization), eventually becoming an "Honored Queen." (68 RT 11251.)

Keck became a member of the local Explorers program hoping to become a firefighter and paramedic. (68 RT 11258.) She became interested in boys in the twelfth grade and her grades suffered. (68 RT 11255.)

Blecher spoke of his feelings when he first heard of Keck's murder, the difficulty in telling his wife, and the circumstances of Keck's funeral. (68 RT 11256.)

Keck's mother, Debra Berg, talked about Keck's birth, and how she and her husband divorced when Keck was young. (68 RT 11263.) Keck helped teach Sunday school. (68 RT 11264.) Berg spoke about

learning of her daughter's death and the affect it had on her life. (68 RT 11267.) Keck's brother, Keith, talked about the close relationship they had as children. (68 RT 11272.) He also described the impact her murder had on him. (68 RT 11272.)

Prior Offenses

Annette Tucker met appellant in 1990, and the two went out on a date. (68 RT 11304.) He told her he had forgotten his wallet and took her to his house. (68 RT 11304.) He rented a movie and gave her some cheesecake and hot chocolate. (68 RT 11306.) She became drowsy, vomited, and then passed out. (68 RT 11307.) The next morning she woke up in bed, naked. (68 RT 11307.) She could not recall going to bed and never told appellant he could undress her. (68 RT 11308.) When she asked appellant why she was naked, he laughed and told her she had removed her own clothes. (68 RT 11310.) She was bruised and had a puncture wound near her pelvic area. (68 RT 11309.) He drove her home and she fell asleep again. (68 RT 11310.)

Tucker went to the hospital and contacted police. (68 RT 11311.) Later, a detective showed her two photos found in appellant's apartment. (68 RT 11311.) She was dressed in one, and naked in the other. (68 RT 11311.) She telephoned appellant and accused him of

drugging her. (68 RT 11312.) Appellant laughed and said she must have gotten food poisoning from the cheesecake. (68 RT 11312.) She could not say for sure whether they had intercourse. (68 RT 11314.)

Tonia Knisley met appellant at a La Jolla nightclub in 1990. (68 RT 11316.) They danced and had drinks, including three shots of Jack Daniels. (68 RT 11317, 11326.) She later agreed to have breakfast with appellant but, when they couldn't find an open restaurant, he bought soup and took her to his apartment. (68 RT 11319.) The soup tasted bitter. (68 RT 11320.) She began to feel strange, and remembered sitting on appellant's waterbed, but could not recall how she got there. (68 RT 11321.) The next thing she remembered was appellant waking her up in the morning. (68 RT 11321.) She was naked and groggy, with her "head spinning" as she stumbled into the shower. (68 RT 11322.)

Knisley believed she had been drugged and raped. (68 RT 11323.) She found a rip in the back of the her pants. (68 RT 11323.) Appellant drove her home and it took two days before she felt normal. (68 RT 11324.) He called her and tried to talk her into going out with him again. (68 RT 11324.) When she refused, he said, "I'm going to kill you, you fucking bitch." (68 RT 11324.) She did not report the incident

to police until a year later, when she read a report in the newspaper about two other women being assaulted. (68 RT 11325.)

In 1990, Christina Daniels was in the Navy, stationed in San Diego. (68 RT 11132.) She met appellant at a club, they dated and were married about a year later. (68 RT 11335.)

Appellant became extremely abusive. (68 RT 11336.) He kept a loaded gun in their condo. (68 RT 11336.) When she told him she was pregnant, he became furious, threw some money on the bed and demanded that she get an abortion. (68 RT 11336.) He hit her on the hand with a pistol and threw her against a door when she tried to leave. (68 RT 11366.)

One day, during a heated argument, she became frightened and called 9-1-1. (68 RT 11337.) Appellant became even more furious, retrieved his gun and called her a stupid bitch. (68 RT 11337.) He entered the bathroom where she was hiding carrying his gun and a pair of handcuffs. (68 RT 11338.) He told her to remove her clothes because that was how he wanted the police to find her. (68 RT 11338.)

He was controlling and possessive throughout their relationship. (68 RT 11339.) He wanted her to stay in the house. (68 RT 11339.) She once tried to go to the hospital to help her best friend who was in

labor, but appellant would not allow her to leave and choked her until she fell to the floor. (68 RT 11339.)

Daniels tried to end the relationship, but appellant refused to let her go. (68 RT 11339.) She became depressed and suicidal. (68 RT 11343.) When she told appellant she was leaving him, he followed her with his gun. (68 RT 11340.) She climbed over a counter to escape. (68 RT 11340.) In 1992, the Navy transferred her to Maryland and the two were divorced. (68 RT 11341.)

Erika Johannes also met appellant in 1990, while working as a waitress. (68 RT 11345.) They went out for dinner and drinks, then went to his apartment to watch a movie. (68 RT 11346.) She drank several beers and fell asleep, fully clothed, during the movie. (68 RT 11347.) She recalled waking up and being taken to the bedroom where appellant gave her three white pills he said were aspirin. (68 RT 11348.) When she woke up late the next morning, she was naked and "groggy." (68 RT 11349.) Appellant told her she had removed her own clothes. (68 RT 11350.)

Appellant drove her home. (68 RT 11350.) She ignored his calls, and he left messages calling her a slut, and saying she would be raped. (68 RT 11350.) She later found that she was bleeding from her rectum

and had a vaginal discharge. (68 RT 11351.) She told a male friend she had been drugged and raped. (68 RT 11352.) He took her to the police station where she filed a report and went to the hospital for a sexual assault examination. (68 RT 11352.) Appellant was arrested and charged, and Johannes testified at the preliminary examination. (68 RT 11352.)

The prosecution rested after introducing evidence of appellant's prior felony convictions for forgery, possession of stolen property, rape by a foreign object, and three counts of grand theft. (68 RT 11356.)

The Defense Case

Appellant's mother, Carol Flinner, explained how she was involved in a serious automobile accident in 1967, while pregnant with appellant. (69 RT 11360.) She was hospitalized for 10 days, but the records had been destroyed. (69 RT 11360.) She had a daughter two years later who had severe developmental disabilities and died at the age of nine months. (69 RT 11362.)

Appellant was hyperactive throughout his youth and was prescribed Ritalin.[5] (69 RT 11365, 11367.) When he reached puberty,

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[5] Ritalin is a stimulant, which actually mitigates hyperactivity in children.

he was taken off Ritalin and prescribed Mellaril, which is a moderate psychotropic drug. (69 RT 11369.) In 1971, when he was four years old, appellant fell from a bunk bed and suffered a head injury which required hospitalization. (69 RT 11365, 11368.)

At age 15, he exhibited behavioral problems and began to steal. (69 RT 11371.) By 16, he was having severe problems and threatened suicide. (69 RT 11373.) He was admitted to several children's psychiatric hospitals, staying an average of 90 days. (69 RT 11373.) At 17, he suffered a head injury in a motorcycle accident. (69 RT 11374.) Shortly thereafter, he joined the Army, but soon went AWOL and was arrested for stealing a credit card. (69 RT 11376.) He later married Pamela Nickel and they had a son, Jonathon. (69 RT 11378.)

Mrs. Flinner said that if appellant was given a life sentence, she would continue to love and support him. (69 RT 11380.)

Appellant's father, John Flinner, served in the Navy during appellant's childhood and was away from home much of the time. (69 RT 11396.) He described how appellant's hyperactivity caused him to act out, often "throwing screaming fits." (69 RT 11396.) When appellant returned home from a hospital stay, he would immediately resume the activity which had caused his previous injuries. (69 RT

11399.) After being discharged from the Army, appellant began stealing and having trouble with the law. (69 RT 11402.)

Dr. Ricardo Wienstein, a neuropsychologist, evaluated appellant and concluded that he suffers from a "significant brain dysfunction." (69 RT 11414.) He believed that the injury appellant's mother suffered in pregnancy, appellant's long term cocaine use and numerous head injuries, all contributed to his criminal behavior and failure to recognize its consequences. (69 RT 11425, 11442.) He concluded that appellant's brain is damaged, particularly in the frontal lobe, which controls problem-solving, memory, and judgment. (69 RT 11416, 11443.) The problem often results in socially unacceptable behavior. (69 RT 11419.)

On cross-examination, Dr. Weinstein acknowledged that despite appellant's brain dysfunction, he nevertheless exercises free will, and "is not insane." (69 RT 11468, 11481.) Appellant was also examined by Dr. Katherine Di Francesca, a psychologist, who concluded that he was not suffering from a major mental disorder. (69 RT 11472.)

Dr. Jay Jackman, a psychiatrist, consulted with Dr. Weinstein and agreed with the conclusions regarding appellant's brain damage and dysfunction. (70 RT 11564, 11567-11571.) Appellant repeatedly

demonstrated that he cannot recognize cause and effect, or anticipate the consequences of his actions. (70 RT 11568.)

Appellant's acting out was worse when his father was away from home with the Navy. (70 RT 11575.) Appellant had a history of being prescribed medications for depression and brain dysfunction. (70 RT 11573, 11580, 11596.) Dr. Jackman disagreed with the diagnosis of antisocial personality disorder, as appellant failed to exhibit symptoms before age 15. (70 RT 11582.)

Dr. Jackman believed that appellant's brain dysfunction does not cause him to lie, manipulate or blame others for his actions. (70 RT 11614.) Rather, it made him think he could do things without being caught, even though his actions were transparent and ineffectual. (70 RT 11615.)

Kevin Desmond and Bob Brownyard were appellant's high school friends. (70 RT 11496, 11506.) Brownyard is now a San Diego Harbor Patrol officer. (70 RT 11505.) One night, they were passengers in appellant's car which struck a car stalled in a freeway lane. (70 RT 11497, 11507.) They were both injured and appellant removed them from the wrecked car. (70 RT 11498, 11509.)

William Vargas, a former inmate at Donovan Prison was in a

medication line when he began to choke on a piece of apple. (69 RT 11407.) Only appellant came to his aid, performing the Heimlich maneuver, which saved his life. (69 RT 11409.)

Daniel Vasquez, the former warden at San Quentin and Soledad prisons, testified as a correctional consultant. (70 RT 11511.) He said that appellant would be confined in a maximum security "Level IV" facility, if sentenced to life without the possibility of parole. (70 RT 11514.) He described the security measures in effect at Level IV prisons, including electric fences, armed guards on the perimeter and inside the walls. (70 RT 11515.)

He agreed appellant's history demonstrates that he is highly manipulative. (70 RT 11522.) However, he emphasized that prison officials deal with "far worse" inmates, including those who kill staff, other inmates, and lead violent gangs. (70 RT 11522.)

Other prison officials testified about being called to appellant's cell on August 22nd, 2000, where they observed him on the floor with a deep, self-inflicted arm laceration. (70 RT 11544, 11548, 11554.) That night, Dr. Reid Abrams from the UCSD medical center operated on appellant's arm, repairing the laceration. (71 RT 11653.) The wound was approximately eight inches long. (71 RT 11658.)

Jonathan Flinner, appellant's son, said he and appellant had stayed in contact since appellant's arrest, writing letters and talking on the telephone. (71 RT 11648.) He said he loves his father and would continue to love him if appellant was sent to prison for life. (70 RT 11652.)

Argument

I

The prosecutor and the sheriff's department violated appellant's Sixth and Fourteenth Amendment rights by interfering in the attorney-client relationship when they transferred appellant to a distant jail, housed him in administrative segregation, and restricted his access to counsel; and the trial court exacerbated the problem by failing to hold a hearing, ordering counsel to withhold the relevant facts from appellant, and by refusing to lift the restrictions on attorney-client contact.

Introduction

An informant in the jail, seeking a reduced sentence in his case, told the prosecutor that appellant had obtained the home addresses of the prosecutor, the trial judge, and other parties to the trial. He also said appellant had threatened to kill the prosecutor and the judge.

After receiving that information, the prosecutor worked with jail officials to punish appellant by restricting his access to defense counsel.

The trial judge later supported these illegal restrictions and simply claimed he would not tell the sheriff how to run the jail. All of this was done without any evidentiary hearing, as the trial court simply took the prosecutor's word about the threats.

Restricting counsel's access to appellant was a serious due process violation that interfered with counsel's ability to prepare a proper defense for a defendant facing the death penalty.

Background

In January, 2002, appellant asked that he continue to be held at the downtown jail in order to facilitate visitation by members of the defense team. (3 RT 387.) The court granted the request and issued a minute order requiring that the sheriff's department "continue to house defendant Flinner at the Central Detention Facility to facilitate the preparation of his defense." (3 RT 387; 15 CT 3342.)

In January, 2003, prior to trial, and at a time when appellant had just been appointed new counsel, the prosecutor approached the court, *ex parte,* and informed the judge that he had evidence showing appellant was engaged in a scheme to disrupt his trial and had gathered the home addresses of the judge, the prosecutor, the bailiff, many of the state's witnesses, and he intended to get the addresses of

the jurors who would sit on the case. (8 RT 1129.)

The prosecutor received the information from an informant in the jail who was seeking a four year reduction in his own 11 year sentence, after recently providing information in another case which resulted in his life term being reduced to 11 years. (36 RT 6429.) The informant made uncorroborated claims to the prosecutor that appellant had made threats to kill Judge Preckel and Clabby.

On January 24th, 2003, appellant was summarily transferred to the Vista Detention Facility, in north San Diego county, and placed in administrative segregation. (8 RT 1122.) On January 28th, 2003, appellant wrote a letter to Sergeant Bandick at the Vista jail, asking why he had been transferred and placed in administrative segregation. (12 RT 1530.) The sergeant replied only that appellant was "appropriately housed." (12 RT 1530.) Defense attorney, Sandra Resnick, complained to the court about the burden this placed on the defense. (8 RT 1122.) She also advised the court on January 31st, 2003, that a phone call she had with appellant had been disconnected. (8 RT 1122.) When she next visited appellant, she was told by a jail captain and a lieutenant, that appellant's phone access and visitation were being restricted pursuant to an order from Judge Preckel, and

that Paul Morely[6] was at that moment calling to ensure the restrictions were being implemented. (8 RT 1122.)

Counsel advised jail officials that she believed phone calls between a defendant and counsel could not be restricted. (8 RT 1122.) She nonetheless arranged a "call schedule" so that appellant could call her three times a week at a prearranged time. (8 RT 1122.) Jailers informed her that those calls would be limited to 20 minutes. (8 RT 1122.) Under the restrictions, appellant was unable to call other members of the defense team. (8 RT 1123.)

On February 4th, 2003, counsel contacted the court and was told by the clerk, that the judge had not signed, and was not aware of, any order restricting appellant's privileges at the jail. (8 RT 1123.) However, the court had previously issued an order, under seal, that appellant's counsel not advise him, or other members of the defense team, of the reasons for his transfer, i.e., the evidence obtained by the prosecution that appellant was plotting to contact (or kill) the prosecutor, the judge and other prosecution witnesses, and communicate with members of his jury, as well as his other alleged

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[6] Paul Morely was the Division Chief of the Special Operations Unit of the district attorney's office. (8 RT 1132.)

efforts to suppress and fabricate evidence in order to taint the prosecution's case against him. (8 RT 1142-1143. And see sealed order filed as Court Exhibit No. 112.)

Ms. Resnick was unable to reach Morely and was told that Rick Clabby would be calling her to explain the situation. (8 RT 1123.) Clabby sent her an e-mail stating that he had no control of the conditions at the jail and they "would deal with it at the February 28th [2003] hearing." (8 RT 1123.)

Counsel emphasized that "All of these events have and continue to interfere with our relationship with our client and our ability to prepare this case in the way we expected." (8 RT 1123.) Counsel requested that the court ask the prosecutor to explain the situation. (8 RT 1124.)

The court replied:

> First of all, the court has entered no orders, written or otherwise, respecting Mr. Flinner's custodial status other than those orders which have already been entered at the request of his counsel.
>
> The court is not prepared at this time, nor is it willing to enter any order on the record purporting to direct the sheriff's personnel as to how to properly house Mr. Flinner within any of the detention facilities. Nor am I prepared to dictate or request of sheriff's personnel that the present restrictions in some manner be changed.

I have spoken to Lieutenant Nyman myself. I did so last week so that I could know from him directly what Mr. Flinner's situation is at present so as to be able to better understand and appreciate what I anticipated would be remarks of counsel along the lines of those just made by Ms. Resnick. And I'm going to state in summary form, for the benefit of counsel for the parties, the information imparted to me in that conversation with Lieutenant Nyman at the Vista Detention Facility, [in] a phone conversation that I had with him on February 19th of this year.

Lieutenant Nyman advised me as follows: That Mr. Flinner is housed in an isolation cell and is permitted no contact whatever with other inmates; That he is permitted three collect phone calls per week. I believe it was Sunday, Tuesday and Thursday were the days specifically referenced. Permitted three collect phone calls to Attorney Resnick's private number, that those calls can be placed only by Lieutenant Nyman or other authorized lieutenant at the Vista Detention Facility; That the lieutenant in placing the call confirms that Ms. Resnick is on the line and then Mr. Flinner is permitted a 20-minute conversation unmonitored. After 20 minutes the call is terminated. No other phone privileges are presently allowed to Mr. Flinner.

Lieutenant Nyman further advised me that Mr. Flinner is permitted 45-minute personal contact visits with his attorneys of record Ms. Resnick and/or Mr. Mitchell once they provide a day's notice of any intended visit. The visit is visually monitored only. Additionally, as I've already referenced, Mr. Flinner is permitted personal contact visits with defense investigator Jon Lane.

Lieutenant Nyman further went on to say that Ms. Resnick has advised him that she wishes other attorneys working on Mr. Flinner's behalf other than herself and Mr. Mitchell to be permitted visits with Mr. Flinner. And Ms. Resnick has been informed that will require a written order of the court.

And parenthetically, I am prepared to entertain and execute such an order or orders as they are presented to me.

Lieutenant Nyman further went on to say and conclude his

remarks by stating that the restrictions placed upon Mr. Flinner by the sheriff's department had been reviewed by the sheriff's legal counsel who have rendered an opinion that those conditions of his incarceration meet the requirements of Title 15, Administrative Regulations[7], governing such matters.

I thanked Lieutenant Nyman for his information, and without meaning to be flip, but I did wish to impress upon him the court's standard operating procedure, if you will, generally speaking when it comes to matters impacting upon custodial conditions, and that is to say, that the court's attitude and approach is not to tell the sheriff how to run his detention facilities, and conversely, I appreciate the sheriff not suggesting how I run my courtroom. And that's not to suggest that the sheriff has in any way endeavored to do anything along that line, but that remark was meant to emphasize the delineation in authority, if you will, that the court has authority over its courtroom operations, and similarly, the sheriff has the authority over custodial conditions vis-a-vis particular inmates, including Mr. Flinner.

So that is the status of the matter from the court's perspective and what the court understands to be the conditions or restrictions placed upon Mr. Flinner.

(8 RT 1123-1127.)

Defense counsel suggested the restrictions would impair the ability of the defense team to prepare a proper defense. (8 RT 1127.)

The court replied:

I understand your concerns. I certainly appreciate them, and I'm willing to work with you, and that's not to say I am going

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[7] Title 15 of the California Code of Regulations, contains the administrative regulations governing the operation of California's state prisons and local detention facilities.

> to run interference on your behalf with the sheriff's personnel. But I know Lieutenant Nyman personally and professionally from years gone by, and I'm confident that if you and Mr. Mitchell and those involved in Mr. Flinner's representation work in a reasonable manner with Lieutenant Nyman and his counterparts, that hopefully difficulties can be resolved to the mutual satisfaction, maybe not the perfect satisfaction, of everyone involved. But if you work with them — and I know you have, Ms. Resnick, and I would certainly encourage that — I'm confident the sheriff will seek to accommodate your legitimate needs, and I'm certainly prepared to at least listen to further concerns if and as those arise.

(8 RT 1128.)

Clabby responded that "I have absolutely no control over what the jail does. And so what they do is between counsel and the sheriff's department and not the D.A.'s office." (8 RT 1133.)

On March 11th, 2003, defense attorneys John Mitchell and Sandra Resnick asked for a conference with the court in chambers. (8 RT 1138.) The parties first discussed evidence coming from the jailhouse informant suggesting he had assisted appellant in obtaining information, i.e., home addresses, financial and personal information regarding the sheriff's lead investigators, his former counsel, Clabby, and was seeking similar information on other principals in the case, including Judge Preckel, key prosecution witnesses and future jurors. (8 RT 1140.) Defense counsel complained that the court accepted this information at face value. (8 RT 1140.) Mitchell surmised this

evidence was the cause of appellant's transfer to the Vista jail, his placement in administrative segregation and the restrictions on his ability to communicate with his defense team. (8 RT 1141.)

Mitchell also complained about an order the court had issued which said,

> [B]asically, Resnick, Mitchell, you can talk to each other. You can't talk to [defense investigator] Lane and you can't talk to your client or anybody else about this. Well, what that really means in terms of this situation it requires me to lie to my client, at least by omission and possibly by commission, and I'll represent to Your Honor the last time I saw him amazingly this came up, but only in a peripheral fashion and he wasn't particularly interested. In that regard in terms of you know what's going on, John, what's happening, what on Earth are they doing, but he didn't – contrary to what he's done in the past, he didn't push in that regard, but at some point in time – and it may be within the next week or so – he's going to ask Sandy [Resnick] or myself about this and I don't see how I can represent someone if I'm lying to them and particularly in a case like this. I mean, I'm not even allowed to tell him, as I remember [the order], that there is an order, and so we haven't even talked about that in that respect. So that concerns me."

(8 RT 1142-1143.)

Attorney Resnick then told the court that appellant had recently asked her to explain why he was transferred to Vista. (8 RT 1143.) At that point, she was lying to her client by omission. (8 RT 1144.) Mitchell expressed similar concerns, emphasizing the hardship to the defense following appellant's transfer to the Vista jail, and the fact that

the move would destroy the trust that had been built between counsel and appellant. (8 RT 1144.) He noted that appellant was an especially difficult client. (8 RT 1145.)

Mitchell emphasized:

> "I'm concerned about the lying. I'm concerned about the timeliness of the situation. I'm really concerned about the location and, Judge, in terms of visiting at the jail. Hell, they're searching my briefcase. 'What's this extra pair of drawers in here?' I say, 'Hey, I've got something called a problem in terms of continence that normally is under control,' But you know, what the Hell is this all about?"

(8 RT 1146-1147.)

Mitchell continued to detail the problems created by appellant being held in Vista. (8 RT 1147.)

The court refused to take any action. (8 RT 1149.) Judge Preckel believed the information provided by the jailhouse informant, "He's provided a lot of detail, and at least in material part what he has to say rings true." (8 RT 1149.) The court repeated that it would not interfere with jail operations. (8 RT 1150.)

The court stated it would schedule an in-chambers meeting so the parties could explain their positions on the record, noting the matter would likely be reviewed on appeal. (8 RT 1151.)

On March 14th, 2003, the court conducted a second ex parte

meeting, at defense counsel's request. (8B RT 1160.)

Based upon documents recently received, Mitchell complained that it was now clear that "counsel for the prosecution seems to be in bed with counsel for the codefendant in an attempt to assure the conviction of Mr. Flinner in this case, or at least bring to the jury's attention all of the facts concerning their — what I will call in using Mr. Clabby's language, 'manipulation defense.'" (8B RT 1162.)

The court suggested it might be open to relaxing some of the restrictions relating to the ability of the defense team to share information. (8B RT 1165.) The court repeated it would have an in-chambers meeting with the parties' counsel to discuss the situation. (8B RT 1166.) Mitchell said he had "no interest" in participating in a "good ol' boys meeting" with the prosecutor whose actions might end up helping his client due to the continued interference with appellant's fundamental rights. (8B RT 1166.)

The court stated that "We are going to have that type of meeting this morning, and it will be understood that it's being done with the exceptions or objections that you just stated as being noted for the record." (8B RT 1167.)

The court then convened the meeting with all counsel but neither

defendant present. (8B RT 1170.) The court summarized the events leading up to the meeting, including Mitchell's concerns regarding the restrictions placed on his ability to communicate with appellant, and his being forced to lie to his client. (8B RT 1171.)

The court emphasized that the meeting was only to address "the umbrella of security which takes a number of forms . . . connected to this case . . ." (8B RT 1172.) The restrictions were imposed by the sheriff without any input from the court. (8B RT 1173.) The court said it would remove the previously imposed restrictions as to defense counsel sharing information with appellant or other members of the defense team. (8B RT 1173.) The prosecutor asked that appellant not be informed for a few days in order to protect the jailhouse informant, and the court agreed. (8B RT 1179.)

On March 19th, 2003, the court held a third in-chambers meeting. (8C RT 1181.) Clabby informed the court that appropriate security measures regarding the jailhouse informant had been enacted. (8C RT 1181.) The court also removed the restrictions regarding defense counsel sharing information with other members of the team, including appellant. (8C RT 1181.)

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Applicable Law

The right to due process is guaranteed to a defendant in a criminal case by both the Fourteenth Amendment to the United States Constitution, and article 1, sections 7 and 15 of the California Constitution. The right to counsel is guaranteed by the Sixth Amendment to the United States Constitution and article 1, section 15 of the California Constitution.

The power of a court to dismiss a criminal case for outrageous government conduct arises from the due process clause of the United States Constitution. (*Rochin v. California* (1952) 342 U.S. 165, 168.)

In *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, the court found the prosecutor's interference in the attorney-client relationship (eavesdropping on privileged communications) constituted outrageous government conduct, and the due process violation required a per se dismissal of the charges. (*Id.* at p. 1263.)

Likewise in *Boulas v. Superior Court* (1986) Cal.App.3d 422, the court found that dismissal of charges was an appropriate sanction following the prosecutor's intentional interference with the attorney-client relationship (contacting the defendant outside the presence of his counsel and suggesting that the defendant fire counsel.) (*Id.* at p. 435.)

The court noted the attorney-client relationship involves "an intimate process of consultation and planning which culminates in a state of trust and confidence between the client and his attorney." (*Id.* at p. 430.) "This is particularly essential, of course, when the attorney is defending the client's life or liberty." (*Ibid,* citing *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561.) "In order to provide effective assistance of counsel, it is essential that a defendant have full confidence that his attorney is representing the defendant's interests with all due competence." (*Ibid,* citing *Upjohn Co. v. United States* (1981) 449 U.S. 383, 389.) In *Barber v. Municipal Court* (1979) 24 Cal.3d 742, the court found the right to communicate in absolute privacy with one's attorney, guaranteed by article 1, section 15 of the California Constitution, was violated when a government agent was present at confidential attorney-client meetings while preparing the defense. (*Id.* at p. 756.) The court determined the only appropriate remedy was dismissal of the underlying charges. (*Id.* at p. 760.)

Legal Analysis

In the present case, there was a significant interference with the attorney-client relationship involving the jailer, the prosecutor, and the trial court. While the judge was not part of the initial decision to

interfere with appellant's access to counsel, his delegation of decision-making in the matters affecting restriction of attorney-client access and private communications, resulted in the unlawful interference in the sacred relationship between appellant, who was facing a death sentence, and his counsel.

A.

The sheriff's improper actions

Judge Preckel had initially ordered that appellant be housed in the San Diego downtown jail even though trial would take place in El Cajon, at the East County courthouse. (3 RT 387.) Judge Preckel made this order in January of 2002 because it was more convenient for appellant's lawyers and defense team, and would help him prepare his defense. (3 RT 387; 15 CT 3342.)

However, approximately one year later, the prosecutor revealed that appellant had become involved in a scheme seeking to contact the prosecutor, Judge Preckel and others, possibly even jurors, at their homes. (8B RT 1172.) The jailhouse informant who revealed this alleged scheme, seeking a reduction of his own sentence, also said that appellant had threatened to kill Clabby and Judge Preckel. (39 RT 6440, 6456.)

Appellant was summarily transferred to the Vista jail, in North County San Diego, and placed in administrative segregation. (8 RT 1122.) This jail was nearly 42 miles away from downtown San Diego.[8]

When appellant wrote the sergeant and asked for an explanation for his new location and status, he was simply told he was "appropriately housed." (12 RT 1530.)

Without explanation, the sheriff, in addition to placing appellant in an isolation cell, imposed several restrictions on his contacts with his legal team. (8 RT 1122.) The restrictions included a limit of three prearranged telephone calls per week, not to exceed 20 minutes per call, and a prohibition of contact between appellant and other members of the defense team. (8 RT 1122-1123.) Attorney Resnick objected to the new restrictions and was told by the sheriff's department that Judge Preckel had approved them. (8 RT 1122.) When she complained to the court about the new restrictions, the judge said that he had made no such order. (8 RT 1122-1123.)

The sheriff's department also limited appellant's visits with his attorneys to non-contact visits of 45 minutes, and required that counsel give 24-hour notice; and only Attorney John Mitchell and Attorney

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[8] The mileage was calculated by Mapquest.com driving directions.

Resnick were permitted to visit the appellant. Counsel had to submit to searches of their belongings, and all visits would be viewed, from outside the visiting room, by sheriff's deputies. (8 RT 1123-1127.)

Counsel eventually learned that the department had imposed these restrictions, after consulting with the prosecutor.

The sheriff's arbitrary decisions greatly interfered with the preparation of appellant's defense by requiring a time-consuming 82 mile round trip for each visit, barring visits from members of the defense team other than appointed counsel, and sharply limiting the time counsel had to confer with their client.

The restrictions unlawfully interfered with the attorney-client relationship.

Administrative Segregation

The sheriff's first constitutional violation involved the placement of appellant in administrative segregation – solitary confinement away from the general population with limited access to the telephone or visits. Administrative segregation in the state prison is done for both disciplinary and security purposes. (See *In re Davis* (1979) 25 Cal.3d 384, 388.) Inmates have procedural due process rights including a notice of the reasons for such a placement, a timely hearing where the

inmate may dispute the charges, and a written decision based on the evidence presented at the hearing. (*In re Davis, supra,* 25 Cal.3d at p. 391; see also *Wolff v. McDonnell* (1974) 418 U.S. 539, 571-572, fn. 19, and *Emamoto v. Wright* (1978) 434. U.S. 1052.)

Unlike a convicted prisoner, a pretrial detainee is presumed innocent, and may not be subjected to restrictions that amount to "punishment" without violating the Due Process Clause. (*Bell v. Wolfish* (1979) 441 U.S. 520, 537; and see *United States v. Lovett* (1946) 328 U.S. 303, 317-318.) A restrictive condition of pretrial confinement is considered punitive absent evidence to show it is necessary to meet a legitimate penalogical goal, and that it is not arbitrary or an excessive restriction. (*Bell v. Wolfish, supra,* 441 U.S. at 540; *Inmates of Riverside County Jail v. Clark* (1983) 144 Cal.App.3d 850, 858.) Before restrictive conditions are imposed on a pretrial detainee, he is entitled to basic procedural due process which includes a notice of administrative charges, a hearing, an opportunity to review the evidence against him and present evidence on his behalf, and a decision based on the evidence. (*Wolff v. McDonnell, supra,* 418 U.S. at pp. 559-560; *Baxter v. Palmigiano* (1976) 425 U.S. 308, 322; *In re Davis, supra,* 35 Cal.3d at p. 389.) While jail officials may place an inmate in

administrative segregation without a hearing during an emergency, they must provide the hearing when the emergency ends. (*In re Hutchinson* (1972) 23 Cal.App.3d 337, 341.)

The sheriff violated appellant's due process rights by providing none of the protections that must accompany placement in administrative segregation. Appellant asked why he was given the new restricted placement and he was told simply it was "appropriate." In fact, Judge Preckel would later advise counsel to lie to appellant regarding the reasons for the changed status. The arbitrary imposition of the restrictions, imposed without the required procedural due process, limited appellant's access to counsel and his ability to prepare a defense.

The transfer to the Vista jail

In *Meachum v. Fano* (1976) 427 U.S. 215, 225, the United States Supreme Court held that absent a state-created limit on inmate transfers, no hearing was required for a transfer to a different facility even if conditions were more burdensome at the new facility. (See also *Mantanye v. Haymesi* (1976) 427 U.S. 236.) But Judge Preckel ordered that appellant be housed at the downtown jail in order to facilitate the preparation of his defense. This order created the liberty interest

mentioned in *Meachum* as an exception to its general rule that no hearing was required. In *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346, the court found that if a state liberty interest is created by statute, regulation, or other means, due process protections apply. The procedural protections are necessary to make sure "the state-created right is not arbitrarily abrogated." (*Wolff v. McDonnell, supra,* 418 U.S. at p. 571.)

By arbitrarily transferring appellant from the downtown jail near counsels' offices to the Vista facility without notice or a hearing, the sheriff deprived appellant of the procedural rights guaranteed to him under the Due Process Clause.

Restrictions on phone calls

California Code of Regulations, title 15, subchapter 4, provides the Minimum Standards for Local Detention Facilities. Section 1067 of Title 15, provides that the "facility administrator shall develop written policies and procedures which allow reasonable access to a telephone beyond those required by section 851.5 of the Penal Code.[9] Based upon this regulation and a defendant's constitutional right to communicate

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[9] Section 851.5 requires that an arrestee be permitted to make three completed phone calls within three hours of arrest.

with counsel, jailers are required to provide inmates with reasonable access to a telephone. (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1183.)

In the present case, the sheriff denied appellant a reasonable opportunity to communicate with his attorneys. The restrictions that the sheriff may ordinarily make in the name of jail security can become unconstitutional when they infringe upon a pretrial detainee's right to counsel, and to prepare and participate in his defense. Despite defense counsel's protestation to the sheriff, that the phone restrictions were unlawful and impaired her ability to prepare a defense, no hearing was conducted and the sheriff made no changes.

Restricting personal and private consultation with counsel

The sheriff's restrictions of attorney visits included a limit of 45 minutes per visit, search of counsel's belongings and visual monitoring of the visits by the sheriff. The sheriff also restricted visits by any attorney other than Mitchell or Resnick.

California courts have repeatedly struck down jailers' attempts to interfere with a defendant's right to privately consult with his attorney. "The right to consultation with his counsel means the right to private consultation without the presence of other law enforcement officers." (*Cornell v. Superior Court* (1959) 52 Cal.2nd 99, 103.) In *Barber v.*

Municipal Court, *supra*, 24 Cal.3d at p. 756, the court found dismissal of the underlying charges was the only appropriate remedy following the state's due process violation in having an officer present at confidential attorney-client meetings while preparing the defense. The court emphasized, "The right to confer privately with one's attorney is one of the fundamental rights guaranteed by the American criminal law — a right that no legislature or court can ignore or violate." (*Id.* at p. 760, citing *In re Rider* (1920) 50 Cal.App. 797, 799.) The court further found the state's purpose for intruding on attorney-client communication was irrelevant and would have a chilling effect on full and free disclosure by the client. (*Id.* at p. 753.) While the facts in *Barber* (the physical presence of an officer during attorney-client meetings) may be more egregious than the intrusion in the present case, the entire scheme of restrictions and intimidation of appellant and counsel here demonstrate the magnitude of the constitutional error.

The sheriff in the present case ordered deputies to view attorney-client communications through a window. Even though deputies could not hear the conversations, their presence could well reveal information protected by the attorney-client privilege and prevent appellant from

speaking freely to his attorneys. Their presence also sent the message to appellant that he was being watched by law enforcement during attorney-client visits.

The order that counsel have their briefcases searched, and answer questions about the contents, before every visit was also unlawful. There was no evidence that any member of the defense team had engaged in misconduct. In order to impose intrusive procedures involving visiting attorneys, jailers must have a particularized suspicion that *these attorneys* were involved in conduct representing a threat to institutional security. (*In re Roark* (1996) 48 Cal.App.4th 1946, 1956.)

This court has held that communications between inmates and attorneys pose no particular threat to institutional security. (*In re Jordan* (1972) 7 Cal.3d 930, 936.) Attorneys are officers of the court. (*Di Sabatino v. State Bar* (1980) 27 Cal.3d 159, 162.) As such, they are entitled to respect.

Appellant's attorneys were longstanding members of the bar. According to the official California Bar Association website, Ms. Resnick has been practicing law in California since 1979 and Mr. Mitchell since 1962, and there is no record of any disciplinary actions

involving either. John Mitchell is a former federal prosecutor. He is a former United States Marine and has an AV rating according to Martindale-Hubbell — a peer ranking indicating the highest level of professional excellence.[10] And despite the respect John Mitchell has earned for his professionalism, he had to suffer the indignity of a search of his briefcase and answer questions from sheriff's deputies about why he carried an extra pair of underwear. This is embarrassing to a highly distinguished attorney, and was completely unnecessary.

The sheriff also erred by refusing to allow appellant to consult with any attorney other than Mitchell or Resnick. Penal Code section 825 provides that after arrest, *any* licensed attorney may visit the prisoner upon request of the prisoner or a family member. Violation of the provision is a misdemeanor and applies to willful or negligent denial of an attorney visit. (*People v. Simpson* (1939) 31 Cal.App.2d 267, 270.)

An inmate's right of access to the courts and counsel are intertwined and fundamental. (*Procunier v. Martinez* (1974) 416 U.S. 396, 419.) Therefore, restrictions "and practices that unjustifiably

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[10] All biographical information is taken from the Martindale-Hubbell legal directory.

obstruct the availability of professional representation. . . are invalid." (*Ibid.*) Finally, as a pretrial detainee, rather than a convicted prisoner, appellant could not be subjected to any conditions at the jail that were punitive in nature. (*Sandin v. Conner* (1995) 515 U.S. 472, 484; *Bell v. Wolfish, supra*, 441 U.S. at p. 561.)

After consulting with the prosecutor regarding appellant's attempt to access the home addresses of certain parties including the prosecutor and the trial judge (and unconfirmed threats to kill both), the sheriff imposed arbitrary restrictions that punished appellant and interfered with the attorney-client relationship as he prepared to go on trial for his life. When informed that the restrictions were improper, the sheriff refused to make adjustments.

Appellant's transfer to the Vista jail, his placement in administrative segregation, the limits on his access to counsel or other members of the defense team were all made without notice or a hearing to determine their necessity, and they all violated applicable regulations, statutes and constitutional guarantees.

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B.

The prosecutor's role in the sheriff's improper restrictions

When attorney Resnick complained to a jail captain and a lieutenant that the new restrictions were improper and impaired her ability to defend her client, she was told that the restrictions were put in place at the urging of the district attorney's office, and that Judge Preckel had signed an order authorizing the new restrictions. (8 RT 1122.) In fact, as she was speaking with the jailers, they informed her that Paul Morley, who was the Division Chief of the Special Operations Unit of the office was on the phone, and had called to verify that all of the conditions his office apparently requested were being implemented at the jail. (8 RT 1122, 1132.)

Judge Preckel would later say that the jailer's statement to Resnick was not true, and that he had not authorized the new restrictions, at least not at that time. (8 RT 1123.) The only court order in effect at that time was Judge Preckel's January 2002 order requiring that appellant be housed at the downtown San Diego jail to facilitate the defense team in preparing his defense. (3 RT 387.)

When Resnick called Morley seeking an explanation for the new restrictions impacting her ability to defend appellant, she was told that

the trial prosecutor, Clabby, would be calling her to fully explain the situation. (8 RT 1123.) But Clabby did not call, and sent an e-mail instead stating that he had no control of the conditions at the jail, and that they would address the situation at the hearing scheduled for February 28th, 2003. (8 RT 1123.)

At the hearing, Resnick complained that the sheriff's restrictions had interfered with the relationship between appellant and his counsel, and reduced counsels' ability to prepare the defense. (8 RT 1123.) She then asked the court to demand an explanation from Clabby. (8 RT 1124.) After lengthy comments from the court, Clabby would only say that, "I have absolutely no control over what the jail does. And so what they do is between counsel and the sheriff's department and not the DA's office." (8 RT 1133.)

This, of course, was not true as the new restrictions followed appellant's personal threats against Clabby. (43 RT 7404.) And not only was the district attorney's office involved in punishing appellant for his actions, jail officials told Resnick the measures were taken and monitored by Paul Morley, the Chief of the Special Operations Unit. This was a "special operation" being conducted by the district attorney's office intending to punish the recalcitrant appellant and interfere with

his right to prepare a defense.[11]

In *Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1263, the court found the district attorney's interference with the attorney-client relationship (by eavesdropping on confidential communications) amounted to outrageous government conduct in violation of the defendant's due process rights and required a per se dismissal of the charges. Likewise, in *Boulas v. Superior Court, supra,* 188 Cal.App.3d at p. 435, the court dismissed the charges where the prosecutor interfered with the attorney-client relationship by telling the defendant he should fire his counsel.

There can be little doubt that the prosecutor instigated, or consulted with the sheriff regarding the new restrictions, and that Clabby was being untruthful when he insisted his office had no control over conditions imposed at the jail.

Had there been a need for new conditions in light of appellant's actions, the prosecutor should have requested a hearing to establish the facts and address the propriety of any changes. What happened

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[11] Noteworthy here is that other members of the district attorneys office were also involved in the special operation, including Paul Acevedo, and DA investigator, Charles Gouge, who debriefed the informant at the jail. (See interview of Gregory Sherman, p. 1, December 5th, 2002, Court Exhibit 112, item 4.)

instead was surreptitious communication between the sheriff and prosecutor which resulted in the imposition of new and unlawful conditions.

C.

Judge Preckel's order to counsel and refusal to remedy the unlawful restrictions imposed by the sheriff

The record contains no indication that Judge Preckel was involved in the transfer of appellant from downtown San Diego to Vista, or the new restrictions on his access to counsel. Judge Preckel denied the sheriff's claim that he had ordered the new conditions. (8 RT 1123.)

However, at the hearing where defense counsel complained about the new location and restrictions on counsel's access to appellant, Judge Preckel decided to act and took the position that he would not intervene with decisions made by the sheriff, just as he would not allow the sheriff to tell him how to run his courtroom. (8 RT 1127.)

The judge's ruling and reasoning were incorrect. The "courts' traditional deference to administrative expertise in prison matters does not foreclose judicial intervention to remedy statutory or constitutional violations." (*In re Grimes* (1989) 208 Cal.App.3d 1175, 1179.)

Appellant and his attorneys were preparing for a trial in the most

serious charges, carrying the potential for a penalty of death, and he was denied fundamental constitutional and statutory rights by the denial to his counsel of tools necessary to prepare his defense.

Judge Preckel informed the parties at the hearing on February 19th, 2003, that he had an ex parte conversation with the sheriff's representative (Lieutenant Nyman) regarding appellant's restricted access to counsel. (8 RT 1123-1127.) Nyman confirmed in this conversation that appellant was housed in isolation and had a limited ability to confer with counsel, including three 20 minute phone calls to Ms. Resnick per week, and 45 minute contact visits with Ms. Resnick or Mr. Mitchell with a day's notice — the visits being visually monitored. (8 RT 1124-1126.) Nyman told Judge Preckel the restrictions had been reviewed by the sheriff's legal counsel who concluded they met the Title 15 requirements. (8 RT 1129.) The judge repeated that the sheriff was in charge of "custodial conditions vis-a-vis particular inmates, including Mr. Flinner." (8 RT 1129.)

When Resnick complained that the conditions impaired the ability of the defense team to prepare an effective defense, the judge replied that he personally knew Lieutenant Nyman, and he believed specific problems could be worked out between counsel and Lieutenant

Nyman, and that the court was willing to work with counsel, but "that's not to say I am going to run interference on your behalf with sheriff's personnel." (8 RT 1128.)

On March 11th, 2003, defense counsel requested another meeting to discuss the problems, and information counsel had learned that a jailhouse informant claimed to have assisted appellant in obtaining personal information, including the home address of Rick Clabby and Judge Preckel. (8 RT 1140-1141.)

Attorney John Mitchell complained about the lack of a hearing on the allegations and the fact that the court had accepted the information at face value. (8 RT 1140.) Mitchell further complained about a new order from Judge Preckel prohibiting defense counsel from discussing with appellant the reasons for the new restrictions on his confinement. (8 RT 1142-1143, And see sealed order filed as Court Exhibit 112.)

Mitchell complained that the order would force him to lie to his client and that would create problems with trust between attorney and client. (8 RT 1142-1144.) This was important since appellant was such a difficult client. (8 RT 1145.) Mitchell continued that he was concerned with all of the conditions accompanying appellant's transfer, including the search of his briefcase where he was forced to explain the

presence of an additional pair of underwear. (8 RT 1146-1147.) He asked, "What the hell is this all about?" (8 RT 1147.)

Judge Preckel responded that the informant provided substantial detail and much of what he said "rings true." (8 RT 1149.) The judge repeated that he would not interfere with jail operations. (8 RT 1150.)

The judge then proposed another meeting so that parties could put their positions on the record recognizing that this would become an issue on appeal. (8 RT 151.)

The parties met again on March 14th, and Mitchell complained about new information showing that counsel for the codefendant was now "in bed" with the prosecution. (8B RT 1162.) The court said it would have an in-chambers meeting to discuss the restrictions at the jail, but Mitchell said he had no interest in participating in a "good ol' boys meeting" with the prosecutor, whose involvement in the restrictions might end up helping appellant on appeal. (8B RT 1166.) The judge summarized some of Mr. Mitchell's concerns regarding the restrictions on his ability to consult with appellant and the fact that he was being forced to lie to him. (8B RT 1171.)

Judge Preckel repeated that the restrictions were imposed by the sheriff without any input from him. (8B RT 1173.) The court removed

the restrictions regarding counsel's sharing information with appellant or other members of the defense team. (8B RT 1179.) The court agreed to Clabby's request to delay notification to appellant until they took measurers to protect the jailhouse informant. (8B RT 1179.)

In short, Judge Preckel endorsed drastic actions taken by the sheriff (following consultation with the prosecutor) based solely on the untested allegations of a jailhouse informant seeking a reduction in his own sentence in exchange for providing information against appellant. (See 37 RT 6449.) The court's actions constituted a gross violation of basic procedural due process.

Trial "integrity" mandates that a judge take measures to ensure due process is met. (*Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 468 (Berger, J. Concurring. See also *Johnson v. Zerbst* (1938) 304 U.S. 458, 465; *In re Moss* (1985) 175 Cal.App.3d 913, 926; and *In re Newbern* (1959) 168 Cal.App.2d 472, 476.)

Judge Preckel erred by simply deferring to the jailer's imposition of substantial restrictions that interfered with the attorney-client relationship, as the judge must ensure that the restrictions do not violate the defendant's fundamental constitutional rights. (*In re Grimes, supra,* 308 Cal.App.3d at p. 1179.)

A jailer's interference with a defendant's right to counsel and to prepare a defense is a violation of due process even without a showing that it was done for the specific purpose of impeding those rights. (See *Milton v. Morris* (9th Cir. 1985) 767 F.2d 1443, 1445.) Due process required that the judge conduct a hearing to determine the necessity of each restriction. Instead, Judge Preckel spoke privately with Lieutenant Nyman (who the judge believed to be a good person) and accepted Nyman's representations. Not only did the judge do this outside the presence of counsel and appellant, he specifically ordered the defense team to lie to appellant regarding the reasons for the restrictions. The order lacked any regard for the "trust and confidence" which is essential to the attorney-client relationship. (See *Boulas v. Superior Court, supra,* 188 Cal.App.3d at p. 435.)

Judge Preckel abandoned his role as a neutral arbiter and his duty to safeguard the rights of an accused who was facing the death penalty. Instead, he assisted the prosecution by allowing the unlawful restrictions that interfered with the attorney-client relationship. And he became an advocate for the prosecution by agreeing to help the informant and order counsel to lie to the accused. The court should have conducted an in-camera hearing with the informant to assess his

credibility rather than taking the prosecutor's word for it.

Contrary to the judge's claim, he *was* obligated to tell the sheriff how to run the jail in circumstances where the jailer imposed restrictions on the defendant's fundamental constitutional rights. It *was* his job to "run interference" on appellant's behalf. The jailer's assertion that his own legal counsel approved the restrictions does not affect the court's constitutional obligations.

While the court eventually relaxed one restriction regarding defense counsel's ability to speak freely with appellant, the other restrictions remained in place until appellant was tried, convicted, sentenced to death, and transferred to state prison.

The state's interference in the attorney-client relationship requires reversal of his convictions.

The Sixth Amendment requires a showing of prejudice from law enforcement's interference in the attorney-client relationship before a defendant may receive a remedy or sanction against the prosecution. (*United States v. Morrison*(1987) 449 U.S. at p. 366; *People v. Tribble* (1987) 191 Cal.App.3d 1108.)

However, under the California Constitution, this court has held that outrageous misconduct by the prosecution and/or law enforcement officials interfering with the attorney-client relationship, may require

dismissal or other sanctions as a deprivation of due process of law. (*Barber v. Municipal Court, supra,* 24 Cal.3d at p. 759. And see *People v. Moore* (1976) 57 Cal.App.3d 437; and *Boulas v. Superior Court, supra,* 188 Cal.App.3d at p. 429.)

In most cases where the defendant claims an intrusion into the attorney-client relationship, the government has improperly learned of privileged information as a result of the intrusion. That is not the case here. This case involves a unique situation where the sheriff's department, at the direction of, and in conjunction with, the prosecutor's office, imposed unlawful restrictions upon appellant and his counsel which impaired his ability to prepare a defense and likely adversely affected his relationship with counsel. The trial court, aware of these impediments, not only refused to help, but aggravated the problem by imposing restrictions on defense counsel as to what information counsel could share with appellant.

Courts are entitled to expect the prosecutor will maintain and exercise high ethical standards when prosecuting a criminal case. (*Morrow v. Superior Court* (1994) 39 Cal.App.4th 1252, 1262.) "This is because of the unique function he or she performs in representing the interests, and exercising the sovereign power of the State." (*Ibid.*)

The same is true of law enforcement. "Law enforcement agents are entrusted with awesome power. But with that power comes a responsibility to guard against its abuse, a responsibility that the government in this case abdicated. Were we to tolerate the government's conduct in this case, we would participate in that abuse." (*United States v. Solorio* (9th Cir. 1994) 37 F.3d 454, 461, quoted in *Morrow v. Superior Court, supra,* 30 Cal.App.4th at p. 1262.)

That is precisely what happened here. The prosecutor contacted the sheriff, and together they concocted and implemented a scheme whereby appellant would be transferred to a distant jail, placed in administrative segregation and subjected to unlawful restrictions which interfered with the attorney-client relationship and appellant's ability to prepare his defense. His counsel was subjected to what can only be termed harassment and unduly burdensome measures. And the defense had to discover for itself why the restrictions were imposed, although the prosecutor informed codefendant's counsel.

The trial court, rather than remedy this situation, participated in the abuse by refusing to hold the sheriff or the prosecution accountable, and issuing a sealed order restricting defense counsel's ability to discuss relevant facts with appellant or other members of the defense

team.

These acts and omissions constitute outrageous conduct violative of due process of law. Cases of outrageous conduct and the appropriate sanctions are *sui generis*. While outright dismissal may be too drastic a remedy here, reversal of the judgment and retrial is appropriate. The sheriff and prosecutor must not be allowed to engage in such conspiratorial misconduct without consequence. This court has observed that, "There must be an . . . incentive for state agents to refrain from such violations." (*Barber v. Municipal Court, supra,* 24 Cal.3d at p. 759, quoted in *Morrow, supra,* at p. 1262.)

Appellant having established these violations, "the burden falls upon the People to prove, by a preponderance of the evidence, that sanctions are not warranted because the defendant was not prejudiced by the misconduct. [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 967. See also, *Nix v. Williams* (1984) 467 U.S. 431, 444; *People v. Henning* (1993) 20 Cal.App.4th 1066, 1077.) "The People also have the burden to show that there was not a substantial threat of demonstrable prejudice." (*Morrow v. Superior Court, supra,* 30 Cal,App.4th 1253, 1258. Cf., *People v. Ervine* (2009) 47 Cal.4th 645, 767.)

The prosecution cannot meet this burden because the damage

cannot be measured. Who can say what defenses may have been overlooked or otherwise hampered as a result of the state's illegal actions, the trial court's refusal to remedy them, and its own order interfering in the attorney-client relationship? Certainly, appellant learned that he could not depend on his counsel to be truthful with him. There is a "substantial threat" that this affected his relationship with counsel and diminished the preparation of his defense.

Reversal of the entire judgment must be imposed as a clear indication that such misconduct will not be tolerated.

"Our government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." (*Olmstead v. United States* (1928) 277 U.S. 438, 485 (dis. opn. of Brandeis, J.), quoted in *Morrow v. Superior Court, supra,* 30 Cal,App.4th at p. 1262.)

As observed in *Morrow,* that same court had warned prosecutors against this type of misconduct in the past. "Yet some prosecutors do not seem to be listening." (*Id.* at p. 1262.) "The judiciary should not tolerate conduct which strikes at the heart of the Constitution, due

process of law, and basic fairness." (*Ibid.*)

The Tenth Circuit has held that, in some circumstances, an intrusion into the attorney-client relationship may constitute a "structural error" when it affects "the framework within which the trial proceeded, rather than simply an error in the trial process itself." (*Shillinger v. Haworth* (10th Cir. 1995) 70 F.3d 1132, 1141, followed in *United States v. Kennedy* (D. Colo. 1998) 29 F.Supp. 662; and, *United States v. Lin Lyn Trading* (D. Utah 1996) 925 F.Supp. 1507.)

In *People v. Ervine, supra,* 47 Cal.4th at p. 767, this court discussed *Shillinger,* but did not directly address whether intrusions into the attorney-client relationship may constitute "structural error." The facts and nature of the intrusions here place this case in that extremely rare category requiring a *per se* reversal.

Reversal is also required to provide appellant with a new and fair trial, one unencumbered with the illegal restrictions suffered in the first trial and free from prosecutorial interference in the attorney-client relationship and the ability to prepare a defense. Basic fairness demands nothing less.

II

The trial court violated appellant's Sixth Amendment right to be present, and to counsel at critical stages of the proceedings by conducting private conferences which restricted his ability to prepare a defense.

Background

In the preceding argument, appellant has detailed the conferences that discussed the attorney-client restrictions. He was absent for all of these conferences and was never asked to waive his right to be present. Other conferences took place without the presence of defense counsel.

Applicable Law

A criminal defendant's right to be personally present at trial is guaranteed under the federal Constitution by the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment. (*People v. Blacksher* (2011) 52 Cal.4th 769, 799.) It is also guaranteed by section 15, of article 1 of the California Constitution and Penal Code sections 977 and 1043. (*Ibid.*)

Under the Sixth Amendment, a defendant has the right to be personally present at any proceeding in which his appearance is necessary to prevent the interference with his opportunity for effective cross-examination. (*People v. Butler* (2009) 46 Cal.4th 847, 861 *quoting*

Kentucky v. Stincer (1987) 482 U.S. 730, 744-745.), fn. 17.) "Due process guarantees the right to be present at any stage... that is critical to the outcome and where the defendant's presence would contribute to the fairness of the procedure." (*People v. Butler, supra,* 46 Cal.4th at p. 861.) The state constitutional right to be present is generally coextensive with the federal due process right but no provision requires defendant's appearance at proceedings where his presence bears no reasonable, substantial relation to his opportunity to defend the charges against him. (*Id.* at p. 861.) A defendant has the burden of demonstrating that his absence prejudiced his case or denied him a fair trial. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1357.)

A defendant also has a right to counsel at all critical stages of a prosecution. (*Gomez v. United States* (1989) 490 U.S. 858, 873.)

Legal Analysis

The trial court conducted several conferences that dealt with restrictions on appellant's access to counsel, and where it was decided that counsel would have to lie to appellant at the limited opportunities that were available. Defense counsel stressed that the restrictions prevented them from being able to prepare a defense to the capital murder charges. There were other conferences where defense counsel

was not present, including the court's discussion with Lieutenant Nyman, and another meeting on January 17th, 2003, attended by the prosecutor, Judge Preckel, and various members of the sheriff's department. (Court's Exh. No. 114.)

The question is whether these discussions took place during a "critical stage" of the proceedings, and the answer has to be "yes," as his absence reduced his ability to defend against the charges.

In *People v. Virgil* (2011) 51 Cal.4th 1210, 1234, this court recently held that the defendant's absence from sidebar conferences during voir dire was not improper because he failed to show how his presence at such conferences bore a substantial relationship to his opportunity to defend himself.

In *People v. Clark* (2011) 52 Cal.4th 856, 1004, the court found there was no error in conducting certain sidebar conferences in defendant's absence where the conferences involved minor administrative matters or questions of law.

The present case is qualitatively different since appellant was not absent from a discussion regarding an administrative matter or a legal issue on which he could offer little assistance. Instead, he was kept away from hearings that were conducted for the specific purpose of

restricting his access to counsel — restrictions which defense counsel emphasized prevented them from preparing a proper defense in a capital murder trial.

Appellant's presence would have contributed to the fairness of the proceedings, and his exclusion violated his right to be present at a critical stage of the proceedings. The same is true for the meetings where defense counsel was excluded. The trial court conducted these discussions after accepting, at face value, claims that appellant was creating dangerous conditions from the jail. These facts should all have been addressed at a hearing where the relevant witnesses were questioned and cross-examined. The error was prejudicial for the reasons set forth in the preceding argument.

III

Appellant was deprived of his Fourteenth Amendment right to due process where he was tried by a biased prosecutor.

Background

The relevant facts are discussed at length in the first argument. Appellant met an inmate in the jail who was able to provide the home address and personal contact information for Deputy D.A. Rick Clabby. Appellant sent letters to various people demeaning Clabby, threatening

to rape him and making racially offensive comments to Clabby who was married to a black woman. The inmate who provided the information to appellant turned out to be a professional jailhouse informant; as part of a bid for a reduction in his own sentence he told authorities that appellant said he planned to kill Clabby.

Once Clabby learned that appellant had obtained his home address and made threats, the district attorney's office arranged for appellant's transfer to the Vista jail where he was isolated and his access to his own attorneys was substantially curtailed. (See Argument I.) While the sheriff told defense counsel the restrictions had been ordered by the judge, Judge Preckel denied making any such order. (8 RT 1123.) The fact that the chief of the special operations unit of the D.A.'s office was on the telephone confirming the restrictions were in place at the very moment that defense counsel was protesting the new restrictions, demonstrates the involvement of Clabby's office following the events described.

Once Judge Preckel was informed of the events, he refused to interfere with the constitutional violations that followed the sheriff's and district attorney's actions (except to say that he would listen to future complaints) and made no attempt to address the fact that

Clabby had become partial and therefore unqualified to prosecute the case.

Applicable Law

Trial of an accused by a prosecutor who lacks impartiality violates the defendant's due process right to a fair and impartial trial. (*People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 266; U.S. Constitution, Fourteenth Amendment; California Constitution, article 1, section 7(a).)

The prosecutor is the representative of the "sovereignty whose obligation is as compelling as its obligation to govern at all..." (*Berger v. United States* (1935) 295 U.S. 78, 88.) It is imperative to the public as well as the individuals accused of crimes that the prosecutor exercise his discretionary functions "with the highest degree of integrity and impartiality, and with the appearance thereof..." (*People v. Eubanks* (1996) 14 Cal.4th 580, 589, citing *People v. Superior Court (Greer)* (1977) 19 Cal.3d 255, 267.)

While the district attorney has a duty of zealous advocacy, the public and the accused have a legitimate interest to expect that "his zeal... will be born of objective and impartial consideration of each individual case." (*People v. Superior Court (Greer), supra,* 19 Cal. 3d at

p. 267.)

The prosecutor need not be disinterested on the issue of guilt and may urge his view of guilt "by any fair means." (*People v. Eubanks, supra,* 14 Cal.4th at p. 590.) "It is a bit easier to say what a disinterested prosecutor is not than what he is. He is not disinterested if he has... an axe to grind against the defendant." (*Ibid.*)

In *People v. Conner* (1983) 34 Cal.3d 141, the court found there was an actual or apparent conflict giving rise to the reasonable possibility that the prosecutor might not exercise his discretionary function in an evenhanded manner, where he was both a witness to and arguably a victim of the defendant's assaultive conduct. (*Id.* at p. 148.) The court did not doubt the honesty or integrity of the prosecutor, but found that his emotional involvement in the case (and communication of the information to the other prosecutors in his office) supported the finding that he might use his discretionary powers in a way that could render it unlikely that the defendant would receive a fair trial. (*Id.* at p. 149.) The court noted that it would be "difficult, if not impossible, to prove that a bias of the D.A.'s office will definitely affect the fairness" of the trial. (*Ibid.*)

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Legal Analysis

The present facts demonstrate that Clabby had a real or apparent conflict giving rise to the reasonable possibility that he might not exercise his discretionary functions in an evenhanded manner. It is probably not uncommon for a criminal defendant to make statements expressing personal animus toward the prosecutor — especially in a situation like this where the prosecutor seeks the defendant's execution. So under most circumstances, a rude comment, or even an impotent threat made by a defendant "mouthing off" in court is not sufficient to render the prosecutor biased.

The present situation is qualitatively different because appellant not only made death threats, but managed to obtain the prosecutor's home address and other personal information. Appellant was standing trial for soliciting the murder of his fiancé and it was reasonable to assume he knew dangerous people outside the prison, and might be able to carry out the threats against the prosecutor and his family. And while we cannot know whether Clabby exercised many of his functions in an evenhanded way, we know that he immediately interfered with appellant's access to counsel following private communications with the sheriff.

Once Clabby became aware of the facts, he should have informed the trial court, counsel, and perhaps the sheriff, to determine how to proceed. Means were available to disable appellant from further threatening behavior without interfering with his communications with his attorneys. Appellant could have been housed at the downtown jail in a way that separated him from the inmate (Sherman) whose computer access and skills produced Clabby's personal information. Even if a transfer was necessary, the restrictions on appellant's access to counsel were uncalled for, since no evidence was presented showing appellant's contacts with his defense team were in any way improper or that appellant had used them to obtain information or facilitate his misconduct. Those restrictions, imposed with no showing of need, were gratuitous and an unconstitutional interference with appellant's right to counsel.

It was Clabby, along with Paul Morley (Chief of the Special Operations unit of the D.A.'s office) who engineered the plan that restricted appellant's access to counsel. That Morley was on the phone checking on the new conditions at the time defense counsel was complaining about them conclusively demonstrates the D.A.'s involvement.

Respondent may argue that appellant should not benefit from his own intransigence, as that would open the door to regular threats against prosecutors whom defendants seek to relieve. (See *People v. Roldan* (2005) 35 Cal.4th 646, 675, where the court held there was no disabling conflict of interest with a defense lawyer who had been threatened by the accused...) But the present situation is different, effective steps were taken to prevent any real threat of harm to the prosecutor. And the prosecutor demonstrated his bias by going farther, imposing punitive restrictions designed to interfere with appellant's ability to work with his counsel and prepare his defense. There is no authority to support the proposition that a biased prosecutor will be tolerated where the defendant's actions caused the bias.

Once charges are filed, the proceedings become a judicial responsibility, and it is up to the court to make the appropriate decisions that might include the removal of a biased prosecutor. (*People v. Superior Court (Greer)*, *supra*, 19 Cal.3d at p. 265, California Constitution article V, section 13; Government Code sections 1255, 12553.)

The facts here show that appellant was prosecuted in a capital case by a deputy district attorney who had an axe to grind. While no

one is challenging the prosecutor's integrity or honesty generally, his emotional involvement, and his overreaction to appellant's acts, support the conclusion that he had become biased and subject to a conflict that denied appellant's right to a fair trial.

While it is often difficult or impossible to determine whether the prosecutor was actually biased, the record here shows he immediately acted to punish appellant by restricting his access to counsel. This action had become a "special operation" in the district attorney's office and Deputy D.A. Morley, as chief of that division, advised defense counsel to discuss it with Clabby who was obviously involved. But he neglected to speak with counsel when given the opportunity, and would only later falsely claim to counsel and the court that the district attorney's office had no control over operations at the jail. That was simply not true and the misrepresentation adds to the showing of bias.

The prosecutor's personal bias violated appellant's right to due process and reversal of the judgment is required.

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IV

Judge Preckel's bias, following appellant's alleged threats to kill him, violated appellant's Fourteenth Amendment right to due process.

Background

Judge Preckel was informed before trial, that appellant had enlisted a pro per inmate with computer privileges at the jail, to collect the home addresses of certain parties in the trial. (8 RT 1129.) In the course of this activity, appellant obtained Judge Preckel's address. (8 RT 1129.) The inmate, a jailhouse informant, also informed the prosecutor that appellant had said he would have the judge killed if necessary. (Item 1, Court's Exhibit No. 112, dated October 1, 2002.) It is also noteworthy that counsel for Ontiveros had already used the single defense peremptory challenge against Judge Hanoian, who was originally assigned to try the case, so appellant had lost his ability to challenge Judge Preckel. (3 RT 319.)

Applicable Law

The due process clause of the Fourteenth Amendment guarantees a criminal defendant the right to a fair and impartial trial judge. (*People v. Freeman* (2010) 47 Cal.4th 993, 1000.) The operation of the due process clause in the realm of judicial impartiality is designed to

protect the accused's right to a fair trial, unlike the statutory disqualification scheme (Code of Civil Procedure section 170.4) which is intended to ensure public confidence in the judiciary. (*Ibid.*)

By contrast, the United States Supreme Court's due process case law focuses on actual bias. This does not mean that actual bias must be proven to establish a due process violation. (*Id.* at p. 1001.) Rather, consistent with its concern that due process guarantees an impartial adjudicator, the court has focused on those circumstances where, even if actual bias is not demonstrated, the probability of bias on the part of a judge is so great as to become constitutionally intolerable. (*Ibid.*, citing *Caperton v. A.T. Massey Coal Co.* (2009) 556 U.S. ____, 129 S.Ct. 2252, 2262.)

In *Freeman*, Justice Moreno, writing for the majority, used *Caperton* to establish when judicial bias violates due process.

> "While a showing of actual bias is not required for judicial disqualification under the due process clause, neither is the mere appearance of bias sufficient. Instead, based on an objective assessment of the circumstances in the particular case, there must exist 'the probability of actual bias on the part of the judge or decision maker that is too high to be constitutionally tolerable.' (Citation omitted.) Where only the appearance of bias is at issue, a litigant's recourse is to seek disqualification under the state disqualification statutes: 'Because the codes of judicial conduct provide more protection than due process requires,

> most disputes over disqualification will be reserved without resort to the Constitution.' (Citation omitted.) Finally, the court emphasized that only the most 'extreme facts' would justify judicial disqualification based on the due process clause." (*Id.* at p. 996.)

Legal Analysis

The question is whether this case involves "extreme facts" that would objectively support a claim of actual bias. One can hardly imagine a fact that would more probably result in actual bias than a threat on the judge's life.

Again, this was a case where appellant faced the death penalty based on charges that he had his innocent fiancé murdered for his personal financial gain. The charges and the evidence showed that he was dangerous and perhaps mentally unstable. He had access to people outside of the prison and he was not afraid to be bold.

In *Mayberry v. Pennsylvania* (1971) 400 U.S. 455, 465, the court found the judge had become biased following the defendant's personal attacks on his character. The court noted that no one so "cruelly slandered is likely to maintain the calm demeanor necessary for fair adjudication." (*Ibid.*)

The facts here are qualitatively worse. Appellant was alleged to have hired the cold-blooded murder of an innocent young woman, and

while facing trial, obtained the judge's home address, putting the life of the judge, and any family living in the home, in jeopardy. And he expressly discussed the possibility of killing the judge.

Who could act impartially under such circumstances? This would be too much of a burden on anyone, and Judge Preckel was no exception. Soon after discovering the problem, he refused to become involved in the unconstitutional restrictions the prosecutor and jailer had arranged, which improperly limited appellant's access to his counsel. The judge, who likely feared appellant, reacted by limiting appellant's ability to defend against the capital charges. Judge Preckel refused to conduct a hearing and, instead, took the allegations at face value. He thereafter took the position that he would not tell the sheriff how to run his jail — abrogating his duty to remedy any constitutional violations created by the sheriff's restrictions.

The trial court's subsequent discretionary decisions relating to the admission of irrelevant and highly inflammatory evidence enhance the claim of bias. The court's lack of objectivity was demonstrated by the many decisions he made to admit inadmissible evidence.

The error was prejudicial.

Trial by a biased judge is one of the few errors considered to be

structural in nature, requiring automatic reversal of a judgment. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 310.)

V

The trial court violated appellant's right to due process and a fair trial by denying the motion to sever his case from that of his codefendant and the "dual jury" procedure did not correct the problem.

Introduction

Appellant and codefendant Ontiveros were tried together for the capital murder of Tamra Keck. Although the trial court ordered separate juries for the defendants, the circumstances required separate trials. The defendants presented conflicting defenses, with appellant claiming no involvement in the killing, and Ontiveros arguing that he shot Keck acting under duress from appellant — even though duress is not a defense to murder.[12] Moreover, the single trial presented *Aranda-Bruton*[13] and *Crawford*[14] issues. And the most serious problem might have been that the joint trial permitted Ontiveros' counsel to act like a

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[12] Penal Code section 26 (Six); *People v. Bacigalupo* (1991) 1 Cal.4th 103, 125.

[13] *People v. Aranda* (1965) 63 Cal.2nd 518, *Bruton v. United States* (1968) 391 U.S. 123.

[14] *Crawford v. Washington* (2004) 541 U.S. 36.

second prosecutor, asking questions that the prosecutor could not.

Background

Appellant's original trial counsel informed the court that he would be seeking a severance of the defendants' cases. (5B RT 922.) Counsel then filed a severance motion. (2 CT 354.) When John Mitchell assumed representation, he filed another pretrial motion to sever. (8 CT 1710.) Mitchell noted that in the prosecution's opposition to the original motion, it focused on the *Aranda-Bruton* issues relating to severance, and argued that hostile defenses did not require a severance. (8 CT 1711.) But the defense position for severance was now focused on hostile defenses, with Ontiveros arguing that appellant hired him to kill Keck, and appellant claiming he had nothing to do with the murder. (6 RT 952.)

At the hearing on the severance motion, Ontiveros insisted that they be tried together. (6 RT 952.)

> Our joinder position on this case has been the same all the way through . . . And essentially our anti-severance position has been the same all the way through . . . which was that this should be a joint trial. . . Basically, without Mr. Flinner in the trial, it's our belief that the trial will change significantly in terms of the evidence the prosecution will put on, and that it will change tremendously in terms of the evidence that the defense may need to put on.

> We can't prove what we want to prove, which is our third party culpability evidence. We can't prove that Flinner connived and manipulated and schemed this whole thing on his own using Mr. Ontiveros without Mr. Flinner and without all the evidence that the prosecution has against Mr. Flinner.

(Codefendant's counsel, Jacqueline Crowle (6 RT 952).)

Ontiveros' counsel later emphasized that they intended to demonstrate that appellant exercised "substantial domination" over him. (10 RT 1294.)

The trial court denied appellant's pretrial severance motion and ordered one trial with two juries. (11 RT 1412.) And counsel twice argued for severance during trial, but the motions were again denied. (16 RT 2020; 34 RT 5990.)

Appellant complained that Ontiveros' counsel "has joined forces" with the district attorney, against appellant. (8B RT 1162.) This was repeatedly demonstrated throughout the trial as Ontiveros' counsel introduced damaging evidence against appellant that helped Ontiveros' case — evidence the prosecution did not seek to admit.

In cross-examining prosecution witness Sterling Thomas, who worked as a service manager at an Alpine auto repair shop, Ontiveros' counsel repeatedly questioned whether appellant had asked him to

steal a Chevy SUV so that he could file an insurance claim, even though Thomas denied the conversation ever took place or, if it did, was only in jest. (53 RT 9009.) Similarly, Ontiveros' counsel asked Thomas if appellant had "hit on" his fiancé, even though Thomas said he did not recall such an event. (53 RT 9011.) Counsel followed with questions about appellant having told Thomas he wanted to "get rid of" his girlfriend, even though, again, Thomas denied this ever occurred. (53 RT 9015.)

Ontiveros' counsel also asked Robert Pittman whether he had heard that appellant's first wife "had died mysteriously," which Pittman denied. (39 RT 6889.)[15] Ontiveros was thus permitted to present damaging "innuendo" evidence against appellant without any supporting facts.

Under cross-examination by Ontiveros' counsel, Marie Locke testified that shortly after Keck's death she and her boyfriend, Gil Lopez, had gone to a restaurant to celebrate his birthday. (27 RT 4489.) Appellant joined them and he was "distraught and depressed" over Keck's death. (27 RT 4489-4490.) Appellant drank heavily and

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[15] As indicated above, appellant's wife died of cancer while he was in prison. (3 CT 536; 9 CT 2014.) Ontiveros' counsel was likely aware of this.

became intoxicated and "emotional." (27 RT 4491.) She said that Lopez told her that appellant had said something to the effect that he was "sorry he had killed her." (27 RT 4492.)

After an objection, the court denied appellant's mistrial motion but agreed to strike Locke's testimony. (27 RT 4496, 4498.) The court then directed the jury "to disregard the testimony that you have heard just prior to the recess respecting any and all purported statements made or heard on June 16th of 2000 at Chevy's restaurant in La Mesa . . . concerning who may have said what to whom or what may have been heard or not heard between and amongst the three of them . . ." (27 RT 4499.)

Gil Lopez, appellant's former roommate, was also called to testify by Ontiveros. (59 RT 9995.) Lopez said that he heard appellant say, "I shouldn't have killed her," or "I shouldn't have killed Tammy." (59 RT 10005.) Appellant was "very emotional." (59 RT 10091.) Lopez did not believe appellant's statements regarding Keck's death as he often talked "a lot of trash" when he was drinking. (59 RT 10093, 10095.) Ontiveros' counsel also elicited testimony that appellant had asked Lopez to go to a public pay phone, call appellant's number, and then leave the phone off the hook as part of a scheme to mislead

investigators. (59 RT 10017.)

On cross-examination by Ontiveros' counsel, Charles Cahoon said appellant bragged that he was going to be a millionaire, and that he often cheated on Keck. (34 RT 5920.) Cahoon repeatedly said he was afraid for his life because of appellant. (34 RT 5921, 5936, 5951, 5954.) While speaking highly of Ontiveros, Cahoon told the jury that appellant "is a very bad man and should be stopped. And I think he doesn't deserve to be with us here on Earth." (34 RT 5922.) Cahoon said he had spoken to a friend to determine what he could do to get appellant "off the street and away from the public so he couldn't hurt or kill anyone else. He's an evil man." (34 RT 5956.)

It was Ontiveros' counsel who had a police sergeant read a portion of an anonymous letter found on the windshield of his patrol car, clearly implying that the letter was written by appellant in an effort to incriminate Charles Cahoon. (33 RT 5802, 5813.)

The trial court admitted Ontiveros' incriminating statements to police before both Ontiveros' and appellant's juries, including the fact that appellant provided him with the white Nissan. (38 RT 6597.)

Ontiveros' counsel established on cross-examination of the state's forensic computer examiner, that he had found evidence that appellant

had used his computer to print checks on other people's accounts. (41 RT 7302.)

Ontiveros also attempted to impeach the mental health expert whom appellant called to challenge Martin Baker's competency. (54 RT 9192, 9201.)

Applicable Law

Under Penal Code section 1098, a joint trial is the preferred method of trying codefendants. (*People v. Alvarez* (1996) 14 Cal.4th 155, 190.) Pursuant to this statute, a severance may be granted where there is "an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." (*People v. Hardy* (1992) 2 Cal.4th 86, 167.)

Joint trials are generally preferred, and the state constitution cannot be construed to prevent joint trials prescribed by the Legislature. (Calif. Const. article 1, §30(a); Penal Code section 1098; *People v. Morganti* (1996) 43 Cal.App.4th 643, 672.) However, that provision does not abrogate a trial court's power under existing case law to consider a severance "in the interest of justice." (*People v. Hill*

(1995) 34 Cal. App.4th 984, 991.)

A reviewing court examines a severance ruling for an abuse of discretion. (*People v. Roberts* (1992) 2 Cal.4th 271, 328.) The issue is decided on the facts as they appear at the time of the hearing on the motion. But the reviewing court may later reverse a conviction where, because of the consolidation, a gross unfairness occurred which deprived the defendant of a fair trial or due process of law. (*People v. Greenberger* (1997) 58 Cal.App.4th 298, 343.)

The appellate court looks to the evidence actually introduced at trial in making this latter determination. Thus, there are two levels of review when a defendant alleges prejudicial error in the denial of a severance motion. (*Ibid.*) The court first determines whether the trial court abused its discretion in denying the motion. If there was no abuse of discretion, the court looks to see if the joint trial resulted in gross unfairness which denied the defendant a fair trial. (*Ibid.*)

Codefendants have mutually antagonistic or exclusive defenses where the acceptance of one defense "precludes the other['s] acquittal." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1296; see also *United States v. Zafiro* (1991) 506 U.S. 534, 542 (Stevens, J., conc.), citing *State v. Kinkade* (1984) 140 Ariz. 91, 93 [680 P.2d 801] [defining "mutually

exclusive" defenses].) A joint trial "is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor .... [J]oinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary." (*United States v. Zafiro, supra,* at pp. 543-544 (Stevens, J., conc.).) A danger exists that the trier of fact will resolve the logical inconsistency of mutually exclusive defenses by crediting the state's case, which it might otherwise question, because the state's theory is the only coherent and consistent one presented. (*United States v. Tootick* (9th Cir. 1991) 952 F.2d 1078, 1082.)

This court considers conflicting defenses a factor that might require severance of otherwise properly-joined defendants. (*People v. Carasi, supra,* 44 Cal.4th at p. 1296; *People v. Massie* (1967) 66 Cal.2d 899.) A joint trial is prohibited where "'the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty.'" (*People v. Hardy, supra,* 2 Cal.4th 86, 168.) Stated differently, complete severance is required "if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence."

(*United States v. Zafiro, supra,* 506 U.S. at p. 539.)

This court has approved the use of dual juries. (*People v. Harris* (1989) 47 Cal.3d 1047, 1071; *People v. Jackson* (1996) 13 Cal.4th 1164, 1207.) However, the court has emphasized that the propriety of this "solution" must be judged by determining whether it resulted in "gross unfairness" or "identifiable prejudice" in violation of due process. (*People v. Harris, supra,* 47 Cal.3d at p. at p. 1075; *People v. Cummings* (1993) 4 Cal.4th 1233, 1287.)

Misconduct or improper questioning of witnesses by a codefendant's counsel may, like that of a prosecutor, violate a defendant's right to due process of law requiring reversal of the conviction. (See, *People v. Hardy, supra,* 2 Cal.4th at p. 157; *People v. Estrada* (1998) 63 Cal.App.4th 1090, 1095.)

Whether presented by a prosecutor or a hostile codefendant, evidence adduced in a capital trial must meet the "heightened reliability" requirement of the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) And the government's evidence must establish a defendant's guilt beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 310; *In re Winship* (1970) 397 U.S. 358, 364.)

Legal Analysis

The defendants in this case presented irreconcilable defenses. Appellant claimed no involvement in Keck's death while Ontiveros admitted killing Keck for $25,000, but claimed to have acted under pressure from appellant. For a jury to accept Ontiveros' claims, it had to believe that appellant was involved in the murder — something he adamantly denied. (*People v. Letner* (2010) 50 Cal.4th 99, 151.)

The dual jury option also subjected appellant to trial with three prosecutors, including the deputy district attorney and Ontiveros' two lawyers. This violated his Sixth and Fourteenth Amendment due process rights to present a defense and have *the prosecution* prove his guilt beyond a reasonable doubt, his Sixth Amendment right to have the jury decide if the state had carried its burden, and his Eighth Amendment right to a reliable guilt and penalty determination.

And, inherent within the use of dual juries, was the real possibility that appellant's jury would speculate about the evidence it missed when it left the courtroom but Ontiveros' jury remained. Moreover, the codefendant used the single peremptory challenge granted to joint defendants in order to dismiss the original judge. (3 RT 319.) So appellant could not use a peremptory challenge against Judge

Preckel, even after it became clear that he hated/feared appellant.

This court has been reluctant to reverse convictions based on the fact that the defendants presented conflicting defenses, but were denied severance, even in capital cases. (See, e.g., *People v. Alvarez* (1996) 14 Cal.4th 155, 190; *People v. Ervin* (2001) 22 Cal.4th 48, 69; *People v. Tafoya* (2007) 42 Cal.4th 147, 162; *People v. Burney* (2009) 47 Cal.4th 203, 236; and, *People v. Letner, supra*, 50 Cal.4th at p. 151.)

But reversal is necessary here. The defendants' theories were contradictory. Ontiveros' counsel emphasized that a joint trial was key to their defense strategy, and only in a joint trial could they introduce evidence incriminating appellant to support their defense. And that is exactly what they did: codefendant's counsel attacked appellant at every opportunity with evidence the prosecution did not seek to use against appellant.

Throughout the trial, Ontiveros' counsel acted as a "second prosecutor" against appellant, sometimes resorting to highly questionable tactics and improper questioning. Calling Gil Lopez as a witness for Ontiveros proves the point. Lopez gave no testimony relating to Ontiveros, but rather described appellant's incriminating statement that he "shouldn't have killed" Keck. The jury had to be

influenced by the fact that both the prosecutor and codefendant's counsel presented evidence incriminating appellant, while appellant presented a different strategy.

Perhaps most significant, was the inadmissible evidence brought out by Ontiveros regarding appellant's alleged confession at the restaurant. While the court instructed the jury to disregard this evidence as to Marie Locke (but not as to the subsequent testimony of Lopez), the courts have recognized the residual impact such evidence can have on a jury.

> In *Bruton*, the United States Supreme Court held that the admission into evidence at a joint trial of a nontestifying codefendant's confession implicating the defendant violates the defendant's right to cross-examination guaranteed by the confrontation clause, even if the jury is instructed to disregard the confession in determining the guilt or innocence of the defendant. (*Bruton v. United States, supra,* 391 U.S. at pp. 127-128.) The high court reasoned that although juries ordinarily can and will follow a judge's instruction to disregard inadmissible evidence, "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." (*Id.* at p. 135.) Such a context is presented when the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial."

(*People v. Burney, supra,* 47 Cal.4th at p. 231, quoting *People v. Lewis*

(2008) 43 Cal.4th 415, 453.)

It is misconduct for a prosecutor to ask questions about facts it cannot prove. (See *People v. Warren* (1988) 45 Cal.3d 471, 480, and *People v. Parsons* (1984) 156 Cal.App.3d 1165, 1170.) The same principle applies not only where the codefendant's inadmissible incriminating statement is introduced, but also where an inadmissible incriminating statement by the defendant is improperly presented to the jury by the codefendant. (*People v. Hardy, supra,* 2 Cal.4th at p. 157; *People v. Estrada, supra,* 63 Cal.App.4th at p. 1095.) That is precisely what Ontiveros did here.

Having successfully opposed a severance at the guilt phase, Ontiveros could portray appellant as an aggressive, manipulative and evil person at every opportunity. Ontiveros *had* to present this evidence at the guilt phase, since the court had already ruled that each defendant would receive a separate penalty trial. (5 RT 849.) Ontiveros laid a foundation for his penalty phase case that, even though he shot Keck, appellant was the evil person who dominated and coerced him into committing the murder. He claimed to be another of appellant's victims. And, his strategy worked as appellant was sentenced to death while he was not.

This is the rare case where the denial of a severance resulted in gross unfairness and identifiable prejudice, depriving appellant of a fair trial and due process of law.

A reversal of the judgment is required by this constitutional error as the state will not be able to establish beyond a reasonable doubt that it did not affect the fairness of the trial. (*Chapman v. California* (1967) 386 U.S. 18, 22.)

VI

The trial court improperly admitted irrelevant evidence that would taint the jury, including evidence that appellant attempted to obtain the jurors' home addresses, that he threatened to rape the prosecutor in front of his wife and children, and that others feared that appellant would kill them.

Background

Over the objections of defense counsel, the prosecutor was erroneously permitted to present irrelevant testimony with the sole purpose of portraying appellant to the jury as a bad person.

In March of 2002, Gregory Sherman was a county jail inmate housed in the same area as the appellant. (37 RT 6431.) The trial court had granted Sherman's "pro per status" which provided him access to unmonitored phone calls, a copy and fax machine, and a

computer with Internet access. (37 RT 6433.) Sherman informed appellant that he could obtain home addresses for certain people using a public records search on the county recorder's web site. (37 RT 6436, 6438.) Appellant then requested that Sherman obtain the home addresses of various people involved in his case including the prosecutor (Rick Clabby), Judge Preckel, and the bailiff. (37 RT 6439.) Sherman thereafter obtained and provided that information. (37 RT 6439.) Appellant then requested the personal information regarding others including his former counsel, Edwin Crabtree, the detectives investigating his case, and various prosecution witnesses. (37 RT 6331.)

Appellant told Sherman that he intended to sabotage his trial by "flooding" prosecution witnesses with letters containing improper information that would taint their testimony. (37 RT 6444.) He said he would make it appear as though the information came from Crabtree or one of the prosecution's investigators. (37 RT 6444.) And once he decided who to blame, he would then have that person killed by someone he knew would do the job. (37 RT 6446.)

He also told Sherman that when selecting jurors, he intended to seek home owners so that he could obtain their addresses and personal

information. (37 RT 6466.) He would find jurors with uncommon names to facilitate the search. (37 RT 6446.) He said that once he had this data, he would mail jurors information that would sabotage his trial. (37 RT 647.)

Threats against the prosecutor

Additional testimony was presented that appellant had animosity towards prosecutor, Rick Clabby, who appellant wrote to his mother was "a little maggot," informed another pen pal was a "sorry piece of shit" and told yet another inmate he intended to rape in front of his wife and children. (38 RT 6677; 42 RT 7337; 43 RT 7407.)

Witnesses who expressed fear of appellant

Charles Cahoon, appellant's former employee and neighbor, testified that he saw appellant inside his apartment one day, even though when he reported the incident to police, he described the intruder as a "Mexican gentleman." (33 RT 5839, 5842, 5893.) Cahoon did not report appellant because he was "afraid for my life." (33 RT 5921.) "I've been afraid of Mr. Flinner for three years. . . I think he's a very bad man and should be stopped. And I think he doesn't deserve to even be with us here on Earth." (33 RT 5922.) He said he was afraid appellant would kill him, and he was trying to figure out "What I could

do to go ahead and get this person off the street and away from the public eye and so he couldn't hurt or kill anybody else. He's an evil man. . . and I don't believe he should be with us here. He's a disgusting man. . . I'm still scared of him. . . And I think what he's doing to [codefendant Ontiveros] is ridiculous." (33 RT 5935, 5956-5957.) On cross-examination, Cahoon said he was afraid appellant would hurt him or his family. (33 RT 5951.) Cahoon described Ontiveros as "a very good man" who was "manipulated by Flinner." (33 RT 5927.)

Ronald Millard had also worked for, and expressed fear of, appellant described him as "a very intimidating man." (33 RT 6107, 6125.)

Catherine McLarnan dated and worked for appellant in 1999, and originally agreed to help with his covert plan to mail letters to the prosecution witnesses. (38 RT 6615, 6626.) But she changed her mind and decided not to participate, and then testified that she feared what appellant might do to her once he found out. (38 RT 6643.)

Applicable Law

Evidence Code section 350 provides that only relevant evidence is admissible. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Relevant evidence is defined in Evidence Code section 210 as "having any

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." The test of relevance is whether the evidence tends "logically, naturally and by reasonable inference to establish material facts." (*People v. Garceau* (1993) 6 Cal.4th 140, 177.) The trial court has no discretion to admit irrelevant evidence. (*People v. Crittenden, supra,* 9 Cal.4th at p. 132.)

Under Evidence Code section 352, the trial court must examine proffered evidence to determine whether its probative value outweighs any prejudicial effect it might have on the jury. Section 352 provides:

> The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

In the context of section 352, unduly prejudicial evidence is 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. Virgil, supra,* 51 Cal.4th at p. 1248, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 133-134.)

The introduction of inflammatory and prejudicial evidence can also violate due process under the Fourteenth Amendment if it renders the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62,

70.) A trial objection on Evidence Code section 352 grounds preserves the argument that admitting the evidence violated the defendant's due process rights under the Eighth and Fourteenth Amendments. (*People v. Moore* (2011) 51 Cal.4th 386, 407 fn.6, citing *People v. Partida* (2005) 37 Cal.4th 428, 436-438.)

Moreover, the Eighth Amendment and the due process clause of the Fourteenth Amendment entitle a capital defendant to a "tribunal free of prejudice and passion. . ." (*Chambers v. Florida* (1940) 309 U.S. 227, 236-237.) The Eighth Amendment imposes a "heightened reliability" requirement as to the evidence introduced at a capital trial. (*Beck v. Alabama* (1980) 447 U.S. 625, 637.) Trial courts must therefore take extra precautions to ensure that a jury's decisions are not influenced by "irrelevant" considerations, or are the product of an "unguided emotional response" to the evidence. (*Zant v. Stephens* (1983) 462 U.S. 862, 885; *Perry v. Lynaugh* (1989) 492 U.S. 302, 328.) Accordingly, evidence in a capital case "that serves primarily to inflame the passions of the jurors must. . . be excluded." (*People v. Love* (1960) 63 Cal.2d 843, 856.)

Legal Analysis

The trial court erred by allowing the jurors to receive evidence

that appellant had obtained the home addresses of the prosecutor, the trial judge, the bailiff, the investigating detectives, his former counsel and the state's witnesses who would be testifying against him at trial. The jurors then learned that appellant also intended to use his source in the jail to obtain their addresses. In fact, appellant's jury selection strategy included a search for homeowners, with unusual last names who would be easy to contact.

While appellant told his source that he would use the addresses of the state's witnesses and the jurors to "sabotage" his trial, the evidence also showed that he would act with great vengeance against those who would assist in his prosecution. He spoke disparagingly of the prosecutor, Rick Clabby, saying he would rape Clabby's in front of his wife and children. He said he would have the letters distributed in a way that suggested someone else had sent them, perhaps his former attorney Edwin Crabtree, and he would then have that person killed. And the trial court allowed multiple witnesses to testify that even as appellant sat in jail facing capital charges, they were afraid of what he might do to them. Charles Cahoon, for instance, testified that he was afraid that appellant would kill him or somebody else, and would do what he could to keep appellant off the street. (33 RT 5935.) He said

appellant was an "evil man" who no longer deserved to live. (33 RT 5922, 5956-5957.)

Catherine McLarnan testified that she decided not to help appellant mail letters to the state's witnesses, and said she was afraid of what appellant would do to her when he discovered that she had changed her mind.

And all of this evidence was presented in a trial where appellant was charged with having his innocent fiancé murdered in cold blood to collect on her life insurance policy.

None of this evidence was relevant or admissible at trial. The question at the guilt phase (at least the question presented to appellant's jury) was whether he had the codefendant kill Tamra Keck on his behalf, or whether Ontiveros acted on his own.

That appellant was collecting the personal information of many people associated with the trial had no tendency in reason to prove or disprove any significant fact that was in dispute at trial. The trial court had no discretion to admit this evidence. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 132.) The prosecution argued the evidence was relevant to show consciousness of guilt and an attempt to suppress evidence. However, there is no support for such a claim in the

record.

Even if the state could show that any of this evidence was marginally relevant, its admission would violate section 352 as it was unduly prejudicial, that is it would evoke an emotional response and cause the jury to hate appellant based on "extraneous factors." (See *People v. Zapien, supra,* 4 Cal.4th at p. 958.)

The evidence was so poisonous that it rendered appellant's trial unfair and violated his right to due process. The jury was told that this evil man, who did not deserve to live, had actively pursued and, in some cases successfully obtained the home addresses of those involved in his prosecution. He spoke with great hatred toward Rick Clabby. Charles Cahoon feared appellant would kill him, and there was the suggestion that he had contacts willing to punish his enemies.

This information would be chilling to the jurors (and Judge Preckel who was also a victim of this plan) and they would almost certainly fear personal reprisal. While the jurors earlier had been determined in voir dire to be sufficiently impartial and capable of reaching a conclusion based on the evidence and law, that changed when they learned that appellant intended to find out where they lived. It would be asking too much of any person to remain impartial under

these circumstances.

The court's failure to shield the jury from this information also violated appellant's right to the additional or heightened due process that must be provided defendants in capital cases. Trial courts in capital cases must take additional precautions to make sure the jurors' decision is not influenced by irrelevant considerations or evidence targeting an emotional response. But that is exactly what happened here where the jurors were informed that appellant had the intent and ability to find them and perhaps inflict great harm.

The error was prejudicial.

Evidentiary errors are usually reviewed for prejudice under the *Watson* test (*People v. Watson* (1956) 46 Cal.2nd 818, 836) requiring the defendant to show that he would have obtained a more favorable result absent the error. However, where the evidentiary error results in an unfair trial, it is evaluated under the *Chapman* test (*Chapman v. California* (1967) 386 U.S. 18, 24) and is determined to be prejudicial unless the prosecution can show beyond a reasonable doubt that the error did not contribute to the verdict.

And the error must also be considered "structural" requiring automatic reversal where the erroneous introduction of evidence leads

to jury bias because "no matter how convinced we might be that an unbiased jury would have reached the same verdict. . . a biased adjudicator is one of the few structural trial defects that compel reversal without application of a harmless error standard." (*People v. Nesler* (1997) 16 Cal.4th 561, 579; and see *Arizona v. Fulminate* (1991) 499 U.S. 279, 290.)

Assuming the error in admitting the erroneous introduction of the evidence is subject to review for harmless error, it requires reversal as it is an extreme example of inflammatory evidence rendering a trial fundamentally unfair. While the state presented other evidence of guilt, most notably the surveillance tapes showing appellant's car in the area before the killing, it cannot show beyond a reasonable doubt that the instant error did not contribute to the verdict. Instead, once the jurors learned that appellant intended to personally target them, the guilt phase and death verdicts were a foregone conclusion.

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VII

The trial court improperly admitted appellant's alleged derogatory statements about Keck.

Background

Shortly after Keck's death, appellant visited Tiffany Faye who worked in her mother's floral shop in Alpine. (26 RT 4383.) He liked Faye and was there to buy flowers for the funeral. (26 RT 4383.) Faye testified that when a blonde woman drove by the shop, appellant yelled, "Hey baby, I'm single now." (26 RT 4384.) When Faye asked if appellant wanted her to prepare a card for the funeral, appellant responded, "Tammy is fucking dead. It's not like she can read it anyway." (26 RT 4384.)

David Pemberton remodeled homes in the Alpine area and often saw appellant at the local Chamber of Commerce meetings. (32 RT 5475, 5478.) He testified that appellant regularly referred to Keck as a "bitch, slut or cunt." (32 RT 5487.) The defense had objected to the introduction of these derogatory comments arguing that they were irrelevant and violated Evidence Code section 352, but the court admitted the evidence. (1 CT 194; 4 RT 658-661.)

Applicable Law

Only relevant evidence is admissible. (Evidence Code section

350.) Relevant evidence is evidence "having a tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.)

Evidence Code section 352 provides that a trial court may exclude evidence when its probative value is outweighed by the prejudicial effect the evidence might have on the jury. Evidence is unduly prejudicial in this context if it tends to evoke an emotional response against the defendant. (*People v. Minifie* (1996) 13 Ca.4th 1055, 1070-1071.)

The introduction of inflammatory and prejudicial evidence also violates due process under the Fourteenth Amendment if it renders the trial fundamentally unfair. (*Estelle v. McGuire, supra*, 502 U.S. at p. 70.) An objection based on Evidence Code section 352 also preserves the issue of a due process violation. (*People v. Partida, supra*, 37 Cal.4th at p. 436.)

Evidence Code section 1200 codified the hearsay rule and makes inadmissible "Evidence of a statement that was made other than by a witness while testifying at the hearing and that was offered to prove the truth of the matter stated." The hearsay rule is grounded in the confrontation clause of the Sixth Amendment and seeks to ensure that

reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. (See Evidence Code section 1202 Law Review Comm. Comment.)

The Eighth Amendment imposes a "heightened reliability" requirement as to the evidence admitted against a defendant at a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at p. 637.) The trial court in capital cases must take extra precautions to make sure that the jury's decisions are not influenced by "irrelevant" considerations or are the product of an "unguided emotional response" to the evidence. (*Zant v. Stephens, supra,* 462 U.S. at p. 885; *Perry v. Lynaugh, supra,* 492 U.S. at p. 328.)

Legal Analysis

The trial court erred in several ways by admitting appellant's out-of-court statements that Keck was a "slut" or a "cunt," his statements denying the offer of a sympathy card because "she's fucking dead now" and the gratuitous comment to a blonde woman in a car, "Hey baby, I'm single now."

The statements were irrelevant and therefore inadmissible. They had no tendency to prove or disprove any disputed fact at trial. And

even if there was some marginal relevance, the statements were so inflammatory that they should have been excluded under Evidence Code section 352. These callous statements would almost certainly influence a fair-minded person sitting on the jury, and subjecting the jurors to this insensitive and denigrating language rendered the trial unfair. It is simply too much to ask jurors who are reviewing appellant's potential involvement in the devastating and senseless murder of an innocent young woman, to ignore his indifference and disapproving remarks, as well as the foul language he used towards her.

There was no hearsay exception that would have justified the admission of the statements.

And while this evidence would not be admissible against a defendant in any criminal trial, the court had an added duty in this case where appellant faced the ultimate penalty, to ensure that only the most reliable evidence was introduced to the jury. There was nothing reliable about any of this evidence. It did not tend to show appellant was involved in the killing, and only served to ensure that the jury hated him.

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The error was prejudicial.

Introduction of this evidence impacted the fairness of the trial and therefore violated the Eighth and Fourteenth Amendments. As such, the error is reviewed for prejudice under the *Chapman* standard of review.

The state will not be able to show the error was harmless beyond a reasonable doubt as the improperly admitted evidence made it difficult for the jurors to perform their function when weighing the facts and the law.

Honest human experience cannot support an argument that the jurors ignored the gratuitous and derogatory comments at issue here. They were admitted without regard for the impact they would have on the jurors and the decision to admit them was prejudicial error. The error added to the cumulative impact of similar errors resulting in an unfair trial.

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VIII

The trial court prejudicially erred by admitting a series of letters and events implicating appellant in Keck's death or his subsequent attempts to implicate others, as no foundation was established to support the introduction of this evidence, and the content was irrelevant and highly inflammatory.

Background

The trial court permitted the introduction of several letters allegedly written by appellant in an attempt to implicate others, but without establishing that he wrote them. The letters were highly prejudicial and portrayed appellant as evil and callous.

The first letter was found on the windshield of the police car driven by officer Shaun Donelson of the San Diego Police Department. (33 RT 5794.) That evening, Donelson had parked his patrol car in a lot adjacent to the Western Division substation. (33 RT 5795.) When he entered the car, he found an envelope on the windshield. (33 RT 5798.) Inside the envelope was an anonymous letter describing the details of Keck's murder, and blaming the death on a third person. (33 RT 5798.) Officer Donelson turned the letter over to the sheriff's homicide division. (33 RT 8799.)

The letter lacked foundation as there was no evidence to show

that appellant wrote it, caused another person to write it, placed it on the patrol car, or was even aware of it before his arrest. And codefendant's counsel exploited the letter by having Officer Donelson (Sergeant Donelson at the time of trial) read a critical portion of the letter to the jurors. (33 RT 5813.)

Appellant's mother testified about another anonymous letter she had received on February 28th, 2002, that was postmarked in New York. (38 RT 6670.) But again, the prosecution presented no evidence showing that appellant had anything to do with the letter, which had been mailed while he was in custody. Nevertheless, the prosecution used the letter, admitted without any foundation or showing of reliability, to bolster its theme that appellant was attempting to inhibit the police investigation, and then argue he demonstrated a consciousness of guilt. (63 RT 10615)

Larry Davis, an investigator with the district attorney's office described a third anonymous letter. (38 RT 6695.) It was written in broken English, and noted the author saw Ontiveros shoot Keck, that Ontiveros did so on behalf of Rick Host, and that appellant had nothing to do with the killing. (38 RT 6695.) There was no evidence connecting this letter to appellant.

In June of 2001, after Ontiveros had been arrested, he received a letter written by a "Deputy Peace" which had been intercepted by sheriff's deputies at the jail. (42 RT 7373.) The letter indicated that Ontiveros had been previously advised not to reenter the United States, referred to an earlier meeting with "Kwan" and "Eli" in New York City, and suggested that Detective Scully was providing information to appellant. (42 RT 7374.) The letter was analyzed by forensic experts but there was no indication that appellant had anything to do with it. (49 RT 8296.)

During trial, the prosecution played a tape recording of a phone call. (40 RT 7057.) The call was made by an anonymous female Hispanic woman to the sheriff's department and included details of the case. (40 RT 7057.) Ontiveros later admitted that he arranged the call, in which the caller claims "Ernesto" was responsible for the murder and that it was committed for revenge, as Ernesto had previously had a problem with appellant several years earlier. (40 RT 7057, 7061.) There was no evidence connecting appellant to the call.

The prosecutor also presented one spent .45 caliber shell casing with the name "Tammy" written on it and a live round with the name "Mike" written on it. (45 RT 7594.) These items were found on

appellant's parents' property and delivered to the sheriff's department. (45 RT 7594.)

Detective Scully testified about various letters he received from Martin Baker that appellant allegedly wrote. (50 RT 8567.) The letters included advice for Martin as to what he should do if contacted by police after learning that John Theodorelos ("the Greek") had implicated him. (50 RT 8569.) Scully read the letters to the jury. (50 RT 8572.) The only foundation to support the introduction of the letters was inadmissible hearsay – Scully's testimony about what Baker had told him regarding the origin of the letters.

The prosecution also presented a letter that appellant had written to his congressman where he complained that police were attempting to frame him for Keck's murder. (42 RT 7430.) This letter had been intercepted by sheriff's deputies at the jail and was read to the jury. (42 RT 7430.)

Before trial, the defense objected to these letters based on the lack of authentication. (4 RT 679; 5 RT 863; 12 RT 1536.) The defense also made a blanket objection that all such evidence was inadmissible as irrelevant and more prejudicial than probative. (4 RT 683.) The court found that the evidence could be properly authenticated by the

prosecution and was therefore admissible. (12 RT 1557.)

Applicable Law

A document is not presumed to be what it purports to be. (*Fakhoury v. Magner* (1972) 25 Cal.App.4th 58, 65.) Authentication of a writing is required before it is admitted into evidence. (Evidence Code section 1401, subd.(a).) "Authentication" means "a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is, or b) the establishment of such facts by any other means provided by law." (Evidence Code section 1400.) A trial court's finding that sufficient foundational facts have been presented to support its admissibility is reviewed for abuse of discretion. (*People v. Lucas* (1995) 12 Cal.4th 415, 466.)

Evidence Code sections 1410 through 1421 list various methods of authenticating documents — i.e. by the testimony of a subscribing witness or a handwriting expert – but these methods are not exclusive. (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1372.) Circumstantial evidence, content and location are all valid means of authentication. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 383.) A videotape or audiotape is the equivalent of a "writing" and thus must comply with the statutory authentication requirements for admission into evidence.

(*People v. Williams* (1997) 19 Cal.4th 635, 663.)

Moreover, a defendant has a right under the Sixth Amendment to confront the witnesses against him. (*Crawford v. Washington* (2004) 541 U.S. 36.) This right applies to a witness called to authenticate evidence. (See *Bullcoming v. New Mexico* (2011) 564 U.S. ___, 131 S.Ct. 62.) Moreover, evidence that renders a trial fundamentally unfair violates a defendant's right to due process under the Fourteenth Amendment. (*Estelle v. McGuire*, supra, 502 U.S. at p. 70.) And the Eighth Amendment requires heightened reliability in the procedures involved in a capital trial. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

Legal Analysis

The trial court improperly admitted the letters, the phone call from the anonymous Hispanic female and the bullets with appellant's and Keck's names inscribed, because the state failed to connect appellant to any of these items.

There was no evidence showing appellant's involvement in the letter placed on the windshield of the police car. Officer Donelson's testimony that he found the letter was not proper authentication. And while the letter contained details of Keck's murder (blaming a third

person), it was not information that was only known by appellant, which might satisfy the authentication requirements.

Likewise, the letter written to appellant's mother and sent from New York (following his arrest), which threatened appellant, was not self-authenticating and the prosecution made no attempt to provide a foundation. Instead, the prosecutor merely argued the evidence helped establish appellant's guilt.

The same is true of the anonymous letter sent to Judge Preckel where the author claimed to have witnessed Ontiveros shoot Keck on behalf of Rick Host.

And there was no foundation for the admission of the letter to Ontiveros, the recorded phone call from the anonymous Hispanic woman blaming "Ernesto," or the shell casings. While the prosecution argued these items all helped establish guilt, there was no showing that they were what the prosecutor claimed they were – writings authored by appellant, or at his direction.

These things could have been prepared by anyone seeking to implicate appellant as they would obviously be interpreted by jurors as acts by appellant intended to direct the attention of the authorities elsewhere.

The introduction of the evidence also violated Evidence Code section 352 as it was only minimally relevant, especially where the author was unknown, but highly prejudicial. Admitting this evidence rendered the trial fundamentally unfair and violated appellant's right to due process. Moreover, because no witness was called to authenticate the writings, appellant was deprived of his Sixth Amendment right to confront the state's witnesses. Finally, this was yet another example of the trial court admitting unreliable evidence in a capital case, where the law requires enhanced reliability procedures.

The letter to Congressman Hunter

The letter appellant wrote to Congressman Duncan Hunter was intercepted by jailers, copied and introduced at trial. Pursuant to Penal Code section 2601, letters written by an incarcerated defendant to elected public officials are privileged and not be to read by jailers. Since Penal Code section 2601 does not contain an exclusionary remedy, evidence obtained in violation of the provision is not subject to suppression, based on the statute alone. (*People v. McCaslin* (1986) 178 Cal.App.3d 1, 11.) But that does not end the inquiry.

It is generally recognized that prisoners have little or no reasonable expectation of privacy while in jail. (*Donaldson v. Superior*

Court (1983) 35 Cal.3d 24, 30; *Lanza v. New York* (1962) 370 U.S. 139, 143-144.)

However, in *North v. Superior Court* (1972) 8 Cal.3d 301, this court found that the secretly-recorded conversation between a suspect and his wife taking place in a police station was illegally obtained. First, the act of leaving the two in a detective's office and closing the door created a reasonable expectation of privacy. Moreover, the conversation between the defendant and his wife was privileged under California law. (*Id.* at p. 310.) The court relied on *Katz v. United States* (1967) 389 U.S. 347. In *Katz*, the High Court held that, in order for privacy rights to be upheld against a Fourth Amendment intrusion, the person(s) must have exhibited an actual (subjective) expectation of privacy and, second, that expectation must be one that society is prepared to recognize as "reasonable." (*Id.* at p. 361.)

Appellant was an incarcerated constituent petitioning his congressman, with a letter describing the state's improper conduct in this case. His expectation of privacy was a product the Legislature's guarantee that his communication to Congressman Hunter would not be read by the jailers. And, this expectation was certainly one that "society is prepared to recognize as 'reasonable,'" where the Legislature

memorialized it in a penal statute.

Accordingly, the interception of appellant's letter to Congressman Hunter was seized in violation of the Fourth Amendment and should have been suppressed.

The error was prejudicial.

While errors regarding the admission of evidence are typically reviewed for prejudice under the *Watson* standard, the simultaneous violation of the federal constitutional rights under the Fourth, Sixth, Eighth and Fourteenth Amendments requires that prejudice be analyzed under the *Chapman* standard.

The state presented harmful evidence without establishing any foundation required by the Evidence Code.

And the prosecutor made good use of the inadmissible evidence as he emphasized it during closing argument. When describing the evidence showing appellant's consciousness of guilt, he referred to the anonymous letter sent to Judge Preckel (63 RT 10615), the call by the Hispanic woman (63 RT 10618), the letter sent to his mother and the shell casings. (63 RT 10622, 10635.)

The present error is serious and involves a substantial amount of improperly admitted evidence. The error, standing alone, or considered

with the other improperly admitted evidence, requires reversal of the judgment.

IX

The trial court prejudicially erred by admitting unreliable hearsay testimony suggesting that appellant admitted killing Keck.

Background

Marie Locke was the girlfriend of appellant's former roommate, Gil Lopez. (27 RT 4459.) She testified under cross-examination from codefendant's counsel that five days after Keck was killed, she went out to dinner with Lopez and appellant to celebrate Lopez's birthday. (27 RT 4489.) She said appellant was "distraught and depressed" over Keck's death. (27 RT 4490.) He drank heavily, and became drunk and emotional. (27 RT 4491.) She testified that Lopez told her something suggesting he was "sorry he had killed her." (27 RT 4492.)

Appellant's counsel objected to the statement on hearsay grounds, but the trial court overruled the objection. (27 RT 4492.) Following Locke's testimony, and outside the presence of the jury, appellant's counsel renewed his hearsay objection and moved for a mistrial. (27 RT 4495.) The trial court denied the motion after suggesting that appellant should have made a timely objection, rather

than "anyone on Mr. Flinner's behalf should just sit on your hands and not take any action." (27 RT 4495.) Counsel immediately reminded the court that he had made a proper objection which the court had overruled. (27 RT 4496.)

After additional argument, the trial court agreed Locke's testimony regarding the statements Lopez made to her were inadmissible hearsay. (27 RT 4498.) The trial court then admonished the jury to disregard the testimony regarding the statement made at the restaurant "concerning who may have said what to whom or what may have been heard between and amongst the three of them." (27 RT 4499.)

Gil Lopez was later called to testify by the codefendant's trial counsel. (59 RT 9995.) He said that while they were at the restaurant on June 16th, appellant drank some "large Margaritas" and became intoxicated. (59 RT 10004.) At one point, Lopez thought he heard appellant say, "I shouldn't have killed her" or "I shouldn't have killed Tammy." (59 RT 10005.) Appellant was "very emotional at the time, and Lopez said he did not believe that appellant killed Keck, because he often talked "a lot of trash" when he got drunk. (59 RT 10093, 10095.) He suggested that appellant might have felt responsible for

Keck's death and perhaps could have done something to prevent it. (59 RT 10130.)

Appellant's trial counsel objected to the admission of the statement on hearsay and relevance grounds, as well as under Evidence Code section 352. (59 RT 9966-9967.) Defense counsel also noted that Lopez's testimony was being used by the codefendant to enhance the stricken testimony of Marie Locke. (59 RT 9966.)

Applicable Law

Evidence Code section 1200 renders inadmissible as hearsay "evidence of a statement that was made other than by a witness while testifying at the hearing and that was offered to prove the truth of the matter stated." The hearsay rule is grounded in the Sixth Amendment confrontation clause and seeks to ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversarial proceeding before the trier of fact. (See Evidence Code section 1202 Law Rev. Comm. Comment.)

Evidence Code section 352 provides that a trial court may exclude evidence when its probative value is outweighed by its prejudicial effect.

The introduction of unduly inflammatory evidence also violates

due process where it renders a trial fundamentally unfair. (*Estelle v. McGuire, supra,* 502 U.S. at p. 70; *Bruton v. United States, supra,* 391 U.S. at p. 31, fn.6.) The Eighth Amendment requires a heightened reliability as to the evidence admitted against a defendant in a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at p. 637.)

Legal Analysis

Admitting into evidence the hearsay statement appellant allegedly made to Gil Lopez violated the prohibition against hearsay statements, appellant's Sixth Amendment confrontation clause rights, Evidence Code section 352, appellant's Fourteenth Amendment due process right, and the Eighth Amendment right to enhanced reliability in the evidence presented in a capital case.

Respondent will likely argue as the trial court determined, that the statement was admissible as a declaration against penal interest under Evidence Code section 1230[16]. In *People v. Duarte* (2000) 24

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[16] Evidence Code §1230 provides: Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, was so far contrary to the declarant's pecuniary or proprietary interest, or so far subjected him to the risk of civil or criminal liability, or so far tended to render invalid a claim by him against another, or created such a risk of making him an object of hatred, ridicule, or social disgrace in the community, that a reasonable man in his position would not have made the statement

Cal.4th 603, 610-611, this court found that to qualify for admission under the declaration against penal interest exception to the hearsay rule, "the proponent of such evidence must show that the declarant is unavailable, that the declaration was against the declarant's penal interest when made and that the declaration was sufficiently reliable to warrant admission despite its hearsay character." In *Duarte*, the court found the declarant's statement admitting to a shooting, although at the wrong house, was not sufficiently against his penal interest because it was not specifically disserving of his interests (as it was part exculpatory). (*Id.* at p. 612.) Such a statement must be distinctly against one's penal interest. (*Ibid.*, citing *People v. Snipe* (1975) 49 Cal.App.3d 343, 354.) The court further found that the statement was not sufficiently reliable where the declarant, who, like appellant, was drunk, was attempting to pass the blame onto others. (*Id.* at pp. 614-617.) The court concluded that the erroneous admission of the hearsay statement required reversal of the defendant's conviction without regard to the defendant's federal constitutional claims. (*Id.* at p. 620.)

In the present case, the error was more egregious than in *Duarte*. Here, it is not even clear what appellant said. Lopez said that while

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unless he believed it to be true.

they were both drinking heavily, he thought he heard appellant say "I shouldn't have killer her" or "I shouldn't have killed Tammy." (59 RT 10005.) But Lopez, who was appellant's friend and knew how appellant talked "trash" when he got drunk, did not interpret the statement to mean that appellant shot Keck. (59 RT 10093, 10095.) Instead, he suggested appellant may have been feeling guilty for failing to do something to prevent Keck's death. (59 RT 10130.)

So the statement was admitted because of the interpretation the prosecution gave it even though the person who heard that statement and knew appellant best, believed it had another meaning. Under the circumstances, the statement was neither sufficiently disserving of appellant's interest, nor reliable.

Assuming the statement qualified under an accepted hearsay exception, the trial court abused its discretion under Evidence Code section 352 by admitting it as an admission of guilt. No single piece of evidence makes a stronger impression on a juror than a confession. (*Jackson v. Denno* (1964) 378 U.S. 368, 388.)

For the same reason, admitting the statement rendered the trial fundamentally unfair in violation of appellant's right to due process, and violated the Eighth Amendment's requirement for enhanced

reliability in a capital case.

The error was aggravated by the court's initial decision to allow the statement when first described by Lopez's girlfriend, Marie Locke. While the court later told the jurors to disregard the improper hearsay statement, the jury had been informed that appellant admitted killing Keck, and this was a bell that could not be unrung. (See *Jackson v. Denno, supra,* 378 U.S. at p. 388, where, after the confession was improperly admitted, the court questioned whether the jury could "disregard the confession in accordance with its instructions.")

The error was prejudicial.

While the improper admission of the alleged confession would require reversal under any standard, appellant suggests that it should be reviewed under the *Chapman* standard in light of the violation of the Sixth, Eighth and Fourteenth Amendments.

The prosecution will not be able to show the improper admission of the alleged confession was harmless beyond a reasonable doubt. The state can present no stronger piece of evidence than a defendant's words acknowledging that he committed the charged crime — here the murder of his teenage fiancé. This is especially problematic where appellant did not expressly admit the act. He and Lopez were drinking

and the senses of both were impaired. If Lopez did not interpret the statement as a confession, then how can the state take the contrary position?

This is yet another strong example of the trial court's failure to require enhanced reliability in the admission of evidence in a case where the state was seeking death.

X

The trial court prejudicially erred by admitting evidence that Keck may have been pregnant when she was killed.

Background

The prosecutor argued to the court that Keck's possible pregnancy, and appellant's negative reaction to it, was relevant to counter the defense claim that appellant loved Keck. (4 RT 660.)

The prosecutor first informed the jury about Keck's possible pregnancy during his opening statement. He noted that appellant told others he dreaded Keck being pregnant. (24 RT 3860.) He referred to the medical examiner's finding suggesting that Keck was pregnant when killed, and a pregnancy test kit which Keck had just purchased at Walmart. (24 RT 3862, 3891.)

The medical examiner testified that he discovered a "corpus

luteum" in Keck's ovary while performing the autopsy. (29 RT 4995.) This, and the condition of her uterus, "suggested a possible early pregnancy." (29 RT 4995-496.) But the doctor could not say for sure that Keck was pregnant. (29 RT 5068.)

Melissa Henderson met appellant on an Internet chat line shortly after the murder in June of 2000. (27 RT 4630-4631.) He told her that Keck had been abducted outside of Walmart. (27 RT 4631.) He said she was pregnant, that he was not happy about it, and that he was not going to marry her. (27 RT 4633.)

The prosecutor emphasized Keck's pregnancy during his argument to the jury, and again in rebuttal. He said Keck was pregnant "at the time she was murdered. There's no question about that." (63 RT 10534, 10539, 10692.)

The defense at first objected to the evidence on grounds of lack of foundation and prejudice under Evidence Code section 352, which the court overruled. (14 RT 1688.) The court later denied the motion to reconsider the ruling, and still later noted that it had previously found the testimony regarding the possible pregnancy to be admissible. (16 RT 2030; 28 RT 4662.)

The court also overruled defense objections challenging the

relevance and prejudicial impact of testimony and letters concerning the pregnancy test kit found in Keck's car. (28 RT 4753; 46 RT 7857.)

Applicable Law

Evidence Code section 350 provides that only relevant evidence is admissible. A trial court has no discretion to admit irrelevant evidence. (*People v. Crittenden, supra*, 9 Cal.4th at p. 32.)

Even if evidence has some marginal relevance, section 352 provides that it may be excluded if the probative value is outweighed by its prejudicial effect. The evidence is prejudicial for purposes of section 352 if it is the type of evidence that would evoke an emotional response against the defendant or if it might cause jurors to prejudge the defendant based on extraneous factors. (*People v. Minifie, supra*, 13 Cal.4th at p. 1070-1071; *People v. Zapien, supra*, 4 Cal.4th at p. 958.)

The introduction of inflammatory and prejudicial evidence also violates a defendant's right to due process under the Fourteenth Amendment if it renders the trial fundamentally unfair. (*Estelle v. McGuire, supra*, 502 U.S. at p. 70.)

Moreover, the Eighth Amendment requires enhanced reliability regarding the evidence introduced at a capital trial. (*Beck v. Alabama, supra,* 447 U.S. at p. 673.) And the Eighth and Fourteenth

Amendments entitle a capital defendant to a "tribunal free of prejudice and passion. . ." (*Chambers v. Florida, supra,* 309 U.S. at pp. 236-237.)

Legal Analysis

In *People v. Cash* (2002) 28 Cal.4th 703, 729, the defendant was charged with capital murder and attempted murder. Over defense counsel's objection, the prosecutor asked the attempted murder victim whether she was pregnant, and she responded that she was four months pregnant. (*Ibid.*) The defendant argued the pregnancy evidence was irrelevant (Evid. Code section 210), so inflammatory that it violated due process (*Bruton v. United States* (1968) 391 U.S. 123, 131, fn.6), and that it violated the reliability standards imposed by the Eighth Amendment as set forth in *Beck v. Alabama, supra,* 447 U.S. at p. 638. (*Ibid.*) The court found the evidence was "clearly irrelevant" to any issue in the case, and the trial court erred by admitting it. (*People v. Cash, supra,* 28 Cal.4th at 729.) However, it determined the error was harmless under either the *Watson* or *Chapman* standard in light of the other multiple acts of violence the defendant committed against the victim. (*Ibid.*)

The evidence of Keck's pregnancy in this case, like the evidence in *Cash* was not relevant to any issue in dispute and was therefore

inadmissible. Even if relevant, the medical examiners's testimony that the pregnancy was only a possible reason for the presence of the corpus luteum was too weak to present to the jury, in light of the inflammatory nature of the inference that Keck might have been pregnant when she was killed. Such a "suggestion" cannot meet the enhanced reliability standards of the Eighth Amendment. (*Beck v. Alabama, supra,* 447 U.S. at p. 638.)

And informing the jurors that appellant's young fiancé was pregnant was inflammatory in the extreme. Not only did the evidence present Keck as a more sympathetic victim, but it allowed the prosecutor to argue that there was another victim — appellant's unborn child. What could be more prejudicial than informing the jurors that the appellant killed his unborn child in addition to his fiancé, just to collect money on an insurance policy?

The error violated not only state law, but appellant's right to due process and the enhanced reliability standards of the Eighth Amendment.

The error was prejudicial.

Inasmuch as the trial court's ruling violated appellant's rights under the Eighth and Fourteenth Amendments, it should be reviewed

for prejudice under the *Chapman* test.

The state will not be able to show the error was harmless beyond a reasonable doubt. The suggestion that appellant killed his own child would prevent many jurors from reviewing the facts and the law in a rational manner. While the trial court improperly allowed the prosecutor to admit many types of evidence that would appeal to the jurors' emotions and distract them from the serious required analysis, perhaps nothing would provoke a more visceral response than the evidence of Keck's pregnancy, especially where pregnancy was not established.

XI

Martin Baker was an incompetent witness and the trial court prejudicially erred by admitting his testimony.

Background

Martin Baker was a part-time employee in appellant's landscaping business. (50 RT 8392.) The prosecution called Baker as a witness to testify that appellant had tried to frame him for Keck's death, and to establish the independent poisoning charge. (49 RT 8372.)

Defense counsel objected, arguing that Baker was an incompetent

witness. (49 RT 8372.)

The trial court thereafter conducted a brief Evidence Code section 402 hearing. At the hearing, Baker said that he was born near the nonexistent city of Calmia, that he went to junior high school at Borrego Springs High, and that he was "dumpster diving" for his food. (49 RT 8373-8376.) When asked the ages of his siblings, he refused to answer and said "I plead the Fifth..." (49 RT 8377.)

Defense counsel attempted to question Baker about his ability to testify, but the trial court truncated the hearing, finding that he was "different" but mentally competent. (49 RT 8372-8381.)

On July 13th, 2000, sheriff's deputies were dispatched to appellant's apartment where they found Martin Baker asleep on the couch. (28 RT 4673.) Appellant told the deputies that Baker was responsible for Keck's death. (27 RT 4674.) He said he received the information during an anonymous call from a woman who had learned of Baker's involvement in the killing, and the fact that he had discarded the weapon near a bridge in Pine Valley, just off Interstate 8. (27 RT 4675; 40 RT 7009.)

Baker testified that he was working on a landscaping job for appellant one day, and later accepted appellant's invitation for dinner

at appellant's apartment. (50 RT 8391, 8393.) He said that shortly after eating a bowl of chili, he began to feel drowsy. (50 RT 8394.) He then passed out on the couch where he remained until he was awakened by the deputies. (50 RT 8396.) The deputies took him to the sheriff's substation where he provided a blood sample and answered questions. (50 RT 8397.) He tested positive for methamphetamine, THC and Xanax. (48 RT 8154, 8157, 8187.)

Baker testified that he did not feel normal for several days after the incident. (50 RT 8398.) "It was like a reoccurring of a myth is what I felt like. . . something like a previous livelihood specting [sic] him reincarnated, some getting reincarnated in a certain fashion. It would never work, say, for instance, Adolph Hitler, he would never want to come back to life. But people would want him to come back to life, so people would have to use certain individuals. . ." (50 RT 8398.) He said he had not taken any drugs before going to appellant's house that evening, but he had used methamphetamine within the previous few days. (50 RT 8399, 8401.) While he could not recall the day or month of the dinner at appellant's house, he believed it was in 2001. (50 RT 8400.)

When asked about his history of mental problems, he responded,

"It put me in a state of mind like they wanted my backbone for this. It started off like as a quote of price, like it started off at $35,000. And as my ride went into [County Mental Health], after sedation you could hear they were going for like a bid. But it was like a music box going off. You know, it was premeditated. So I went along with it. The highest price was like 97 million dollars. I just went with it." (50 RT 8405.)

Defense counsel moved to strike Baker's testimony as being given by an incompetent witness. (50 RT 8448.) The court replied, "So noted and absolutely denied. . . That's opposed to simply denied." (50 RT 8448.)

Dr. Clark Smith, a psychiatrist specializing in illicit drug use reviewed Baker's medical records and concluded that Baker suffered from severe psychiatric problems including psychosis, hallucinations, and psychotic delusions. (54 RT 9175, 9181, 9183.) He concluded people in Baker's condition would be "severely impaired" in their ability to accurately perceive what is happening around them, or to recall events at a later date. (54 RT 9186.)

Baker had been described by other witnesses at trial as a "tweaker" and a "crack head", and tested positive for

methamphetamine, THC and Xanax after being taken to the sheriff's substation. (39 RT 6889; 48 RT 8154, 8159, 8187.)

Applicable Law

Evidence Code section 701, subd.(a) provides, "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."

Section 702, subd.(a) addresses the personal knowledge of a witness.

It provides:

> "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."

In order to have personal knowledge, a witness must have the capacity to perceive and recollect. (*People v. Dennis* (1998) 17 Cal.4th 468, 525.) The capacity to perceive and recollect is a condition for the admissibility of a witness's testimony on a certain matter, rather than a prerequisite for the witness's competency. (*Ibid.*) The capacity to perceive and recollect is only preliminarily determined by the trial

judge, and a trial court should allow the testimony "unless no jury could reasonably find that he has such personal knowledge." (*People v. Lewis* (2001) 26 Cal.4th 334, 356.) A witness's mental defect or insane delusions does not necessarily reflect that the witness lacks the capacity to perceive or recollect. (*Ibid.*, citing *People v. McCaughan* (1957) 49 Cal.2d 409, 420.)

Unlike a witness's personal knowledge, his or her competency to testify is determined exclusively by the trial court. (*People v. Lewis, supra,* 26 Cal.4th at p. 360.) The burden of proof is on the party who objects to the proffered witness, and a trial court's determination of witness competency will be upheld absent a clear abuse of discretion. (*Ibid.*) And again, evidence of a mental defect, does not by itself establish incompetence. (*Ibid.*)

Legal Analysis

Martin Baker presented incoherent testimony that was likely a function of his diagnosed psychosis. His testimony was delusional and direct questions regarding the present case were answered with incoherent ramblings about reincarnation and Adolph Hitler.

The state relied on Baker's testimony to support its theory that appellant had tried to frame Baker for Keck's death, and to establish its

charge that appellant had poisoned Baker — a charge which resulted in a conviction. But Baker's psychosis prevented him from perceiving and recalling relevant information, and rendered him incompetent to testify.

Because of Baker's incompetence, appellant was denied his Sixth Amendment right to cross-examine the witness. (*Crawford v. Washington, supra,* 541 U.S. 36, 43-44.) Baker was unable to coherently respond to counsel's questions, preventing him from testing Baker's claims with the "greatest legal engine ever invented for discovering the truth." (*Green v. California* (1970) 399 U.S. 149, 158, quoting 5 J. Wigmore, Evidence, §1367, p. 20 (3rd ed. 1940).)

Moreover, the introduction of his testimony rendered the trial fundamentally unfair in violation of appellant's right to due process. (*Estelle v. McGuire, supra,* 502 U.S. at p. 70; *Bruton v. United States, supra,* 391 U.S. at p. 131, fn.6.) And admitting this incoherent testimony violated appellant's Eighth Amendment right to enhanced reliability in the admission of evidence in a capital case. (*Beck v. Alabama, supra,* 447 U.S. at p. 637.)

The error was prejudicial.

In light of the federal constitutional violations, the error must be

reviewed for prejudice under the *Chapman* standard. The state will not be able to show the error was harmless beyond a reasonable doubt. This is especially true when combined with the many other flawed discretionary rulings.

XII

The trial court denied appellant his Sixth and Fourteenth Amendment rights to confrontation by allowing the detective to read his codefendant's statement to appellant's jury.

Background

On June 7th, 2001, Detective Scully met with Ontiveros near the Mexican border. (38 RT 6594, 6597.)[17] Scully questioned Ontiveros about Keck's murder. (38 RT 6597.)

Appellant argued the introduction of these statements at his trial would violate his confrontation clause rights, but the court found the statements were admissible. (1 CT 199; 5 CT 1108-1109.)

During his examination of Detective Scully at appellant's trial, the prosecutor read portions of the transcript of the interview aloud, asking Scully to confirm Ontiveros' answers. The excerpts thus read to the jury included the following:

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[17] At 38 RT 6594, Scully says the meeting took place on June 10th, 2001.

Q. On June 7th of the year 2001 did you question Mr. De La Torre[18] near the border of San Diego and Mexico?

A. Yes.

Q. Did Mr. De La Torre provide the following answers to your questions on the white Nissan NX: "Question: You're driving the little white car? It's a Nissan NX with a sunroof?

"Answer: White car.

"Question: Little white car?

"Answer: Yes.

"Question: At any time during that day was there any other person in the car you were driving? Was anyone with you?

"Answer: No."

Was this the questions and answers that were given to Mr. De La Torre on June 7th, 2001?

A. Yes, sir.

Q. Also on June 7th, 2001, did you question Mr. De La

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[18] As indicated previously, most acquaintances previously knew the codefendant as Juan De La Torre. However, it was later learned that his true name was Ontiveros and the charging documents were changed to reflect this. Here, Deputy District Attorney Clabby reverted to referring to Mr. Ontiveros as De La Torre.

Torre regarding whether Tamra Keck picked him up on June 11th, 2000, and whether he got into her car?

A. Yes, I did.

Q. Did he provide the following answers to your questions on this subject.

"Question: She figured you got in the car with her? [Sic.]

"Answer: Yes.

"Question: Was there anybody in Tamra's car?

"Answer: No.

"Question: Just you, right?

"Answer: Just me."

Were those the questions and answers that Mr. De La Torre provided you on June 11th – excuse me – June 7th, 2001?

A. Yes sir.

Q. On June 7th, 2001, did you draw a picture for Mr. De La Torre of the cul-de-sac?

A. Yes, I did.

Q. Displaying now what's earlier labeled as People's Exhibit 51, is this particular exhibit that you drew for Mr. De La Torre?

A. Yes, it is.

Q. Now, to be clear on this, did you draw this part here trying to depict the cul-de-sac?

A. Yes, sir.

Q. And is this your signature there?

A. Yes, it is.

Q. Did you use this picture to ask Mr. De La Torre a series of questions about how he parked in the cul-de-sac in relation to Miss Keck?

A. Yes, sir.

Q. Did Mr. De La Torre provide answers to these questions?

A. Yes, he did.

Q. Did you ask the following questions and receive the following answers from Mr. De La Torre:

"Question: I'm going to draw a picture of that cul-de-sac.

"Answer: Um-huh.

"Question: Show me where you parked and your car. Show me.

"Answer: Right here.

"Question: Draw the car.

"Answer: Right here.

"Question: Okay.

"Answer: This is the front end.

"Question: Okay.

"Answer: And her car was here.

"Question: Okay.

"Answer: This is the car.

Did you ask those series of questions and get those series of answers from Mr. De La Torre regarding People's Exhibit 51 that was just displayed?

A. Yes, I did.

Q. Did you ask Mr. De La Torre to clarify the positioning of the cars using the diagram displayed in Exhibit 51?

A. Yes, sir.

Q. Did you receive the following answers to a series – to these series of questions and answers in relation to Exhbit 51:

"Question: So your car is parked right here?

"Answer: Yeah.

"Question: Hood to hood?

"Answer: Yes.

"Question: Nose to nose.

"Answer: But not too close.

"Question: Not close?

"Answer: Yeah.

"Question: About how far away?

"Answer: Well, I made the turn like this.

"Question: So you're able to just whip out?

"Answer: Yeah.

"Question: Without backing up?

"Answer: Without backing up."

Was that the series of questions and answers that were exchanged between you and Mr. De La Torre on June 7th of the year 2001?

A. Yes, sir.

(38 RT 6597-6600.)

These statements were summarized by the prosecution in PowerPoint slides collectively marked as Court Exhibit 107 and used in their presentation to the jury.

This evidence was the subject of several defense *in limine* motions to exclude based on the Sixth Amendment right to

confrontation, and under *Aranda-Bruton*.[19] (1 CT 199; 4 RT 651. See also, 2 CT 264, 5 CT 1094.)

The United States Supreme Court issued its decision in *Crawford v. Washington* (2004) 541 U.S. 36, after the verdicts, but before sentencing. Appellant immediately filed a second motion for a new trial, alleging that Ontiveros' statements, as read by Detective Scully, were inadmissible under *Crawford*, and required a new trial. (13 CT 2868.)

The prosecutor impliedly conceded that *Crawford* applied, but argued the error was harmless under *Chapman v. California, supra*, 386 U.S. at p. 24. (14 CT 3208, 3223.) The trial court agreed admission of the statements was *Crawford* error, but found it to be harmless, and denied the motion for new trial. (79 RT 12951.)

Applicable Law

Prior to *Crawford*, the controlling case on the admissibility of hearsay statements in criminal cases was *Ohio v. Roberts* (1980) 448 U.S. 56. In *Roberts*, the court held that incriminating hearsay statements may be admitted against a defendant if the witness is

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[19] *People v. Aranda* (1965) 63 Cal.2d 518, and *Bruton v. United States* (1968) 391 U.S. 123.

unavailable to testify at trial and, either the defendant had a prior opportunity to cross-examine the declarant or, the statements bore "sufficient indica of reliability" such as coming within a "firmly rooted exception to the hearsay rule." (*Id.* at p. 66.) In *Bruton*, the court held that the "statement against penal interest" principle was not a "deeply rooted hearsay exception." (*Bruton v. United States, supra,* 391 U.S. at p.123. And see similarly, *Lilly v. Virginia* (1999) 116, 134 (plurality opn).)

In *Crawford,* the court examined the history of the confrontation clause and adopted a straightforward interpretation, finding that a defendant enjoys a right to confront the witnesses against him. The only exception is where the defendant had a prior *opportunity* to cross-examine the witness.

In *Aranda* and *Bruton*, the courts held that where the prosecution intends to introduce a non-testifying codefendant's incriminating statement, either separate trials must be granted (as requested here), or the statement must be "sanitized" or excluded. Under Proposition 8, the California rule is coextensive with the federal rule. (*People v. Boyd* (1990) 222 Cal.App.3d 541, 562.)

The *Aranda-Bruton* rule applies at both phases of a capital trial.

(*People v. Floyd* (1970) 1 Cal.3d 694, 719.)

Legal Analysis

There is no dispute that reading Ontiveros' statements to Detective Scully to appellant's jury violated the confrontation clause under *Crawford*. The prosecutor and the trial court conceded the point. (79 RT 12947.) The only remaining question is whether the error was prejudicial. (79 RT 12954.)

The error was prejudicial.

Under *Chapman, supra*, 380 U.S. at p. 24, a federal constitutional error entitles a criminal defendant to a new trial unless the court "is able to declare a belief that it was harmless beyond a reasonable doubt." Stated differently, the prosecution must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Ibid.*) This court has agreed that such an error may be deemed harmless only "if the likelihood of material influence is not within the realm of reasonable possibility." (*People v. Coffey* (1967) 67 Cal.2d 204, 220.) Reversal is required if "it appears reasonably possible that the error might have materially influenced the jury in arriving at its verdict." (*Id.* at p. 219.)

The codefendant's theory of the case was that appellant hired and

pressured him to kill Keck. Appellant argued that he had nothing to do with Keck's murder.

The erroneous introduction of Ontiveros' statements established that 1) he was the lone driver of the Nissan NX; 2) he was the only passenger in Keck's car when they drove from the gas station to the cul-de-sac; and, 3) he had Keck park her car "hood-to-hood" in front of the Nissan.

These untested statements, containing information that at the time could be known only by someone involved in the killing, greatly enhanced Ontiveros' credibility regarding his version of the murder, and therefore his claim that appellant hired him to kill Keck. This evidence was devastating to appellant's defense that he was not involved in the murder.

It cannot be said, even given the evidence of appellant's involvement in Keck's death, that Ontiveros' improperly admitted statements were "harmless" under *Chapman*. The state did not meet its burden when responding to the new trial motion. (14 CT 3208; 79 RT 12938-12944.) And it will not be able to make the necessary showing here.

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XIII

There was insufficient evidence to sustain the finding that the codefendant killed Keck by means of lying-in-wait either as a theory of first degree murder or a special circumstance.

Background

The prosecution presented evidence showing that appellant and Ontiveros conspired to murder Keck in order to collect the proceeds from a life insurance policy.

On June 10th, 2000, appellant rented a white Nissan from a dealer in Mission Valley. (27 RT 4517, 20.)

On June 11th, 2000, at approximately 10:45 a.m., appellant, driving his F-150 pickup, and Ontiveros, driving the White Nissan rented by appellant, met at a gas station near the cul-de-sac where Keck was later killed. (51 RT 8630.) They then drove to the cul-de-sac in separate cars, and drove away a few minutes later. (48 RT 8135, 8142.) During this time, Keck was shopping at Walmart. (26 RT 4230.)

The Texaco and U-Storage videos showed that at noon, while Keck was in Walmart, Ontiveros drove the white Nissan to the cul-de-sac. (50 RT 8556.) He then walked to the Ultramar station at 12:13. (30 RT 3882.)

Keck's cell phone records established that while she was in

Walmart, appellant called her twice. (34 RT 6059; 50 RT 8025.) She then drove directly to the Ultramar station — her Mustang was captured on the Texaco and Ultramar videos at 12:30. (50 RT 8027.) She picked up Ontiveros at the Ultramar station and then drove to the cul-de-sac. (24 RT 3886; 50 RT 8036; 51 RT 8547.) Three minutes later, the white Nissan was shown on the video tape leaving the cul-de-sac. (51 RT 8549.)

Shortly before 2:00 p.m., a lost motorist discovered Keck's body lying face-up on the ground in front of her Mustang. (26 RT 3999, 4012, 4035.) The car was parked in the middle of the cul-de-sac near Tavern Road. (25 RT 3997, 3999.) The engine was running, the hood was up, the passenger door was open, and the radio and air conditioner were on. (25 RT 4013; 26 RT 4418.) Keck's purse was sitting on the front seat. (26 RT 4420, 4439.)

She had been shot once in the head with a .45 caliber firearm. (29 RT 4973; 43 RT 7315-7316.) The bullet entered the back of her head, exited her right cheek and lodged in the firewall of the engine compartment. (26 RT 4424-4425.)

There was no evidence of evasion by Keck. (29 RT 4983.) The medical examiner estimated the shooter was three to four feet away

when the shot was fired. (29 RT 5015.) A forensic expert concluded she was shot while the hood was open and she was looking at the engine. (45 RT 7741.) She was turned over onto her back after being shot. (51 RT 8792-8817.) She died shortly after the shooting. (29 RT 4992.)

Appellant was charged with, and convicted of, first degree murder "by means of lying-in-wait," even though he was not the actual killer. (Penal Code section 189.) The jury also found true the lying-in-wait special circumstance allegation described in Penal Code section 190.2(a)(15)[20].

Applicable Law

When a defendant claims there is insufficient evidence to sustain a conviction, "the relevant question 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." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Johnson* (1980) 26 Cal.3d 557, 576.)

> The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. [Citation omitted.] The appellate court must determine whether a

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[20] Appellant next challenges the special circumstance statute as being unconstitutionally vague.

> reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt.

(*People v. Reilly* (1970) 3 Cal.3d 421, 425, quoted in *People v. Johnson, supra,* 26 Cal.3d 557, 576.)

> "Evidence," to be "substantial" must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*Ibid.*) The substantial evidence test is to be applied to each element of the offense(s) charged. (*People v. Patino* (1979) 95 Cal.App.3d 11, 26.)

The jury here was instructed with CALJIC No. 8.25, as follows:

> Murder which is preceded by lying-in-wait is also murder of the first degree. The term "lying-in-wait" is defined as a waiting and watching for an opportune time to act, together with a concealment by ambush or by some other secret design to take the other person by surprise, even though the victim is aware of the murderer's presence. The lying-in-wait need not continue for any particular period of time, provided that its duration is such as to show a state of mind equivalent to premeditation or deliberation.

(63 RT 10523.)

The court gave the same definition for the lying-in-wait special circumstance allegation. (63 RT 10524-10525; And see *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000, 1007, cited with approval in *People v. Lewis* (2008) 43 Cal.4th 415.)

The "lying-in-wait" cases are concerned primarily with the elements of concealment and watchful waiting. (*Domino v. Superior*

Court, supra, 129 Cal.App.3rd at 1008.) Actual physical concealment is not necessary. "The concealment which is required, is that which puts the defendant in a position of advantage, from which the factfinder can infer lying-in-wait was part of the defendant's plan to take the victim by surpise." (*People v. Morales* (1989) 48 Cal.4th 527, 555, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

Legal Analysis

The prosecutor never addressed the lying-in-wait issues, either the murder theory or the special circumstance allegation, during closing arguments. And the evidence supported neither.

The evidence showed that Ontiveros parked the Nissan in the cul-de-sac, then walked to the gas station, and waited for Keck to arrive. When she did, he got into the front passenger seat of the car and the two of them drove to the cul-de-sac. He apparently shot her in the back of the head shortly thereafter. He then sped away in the Nissan.

While actual physical concealment from the victim is not necessary, this court has nevertheless observed:

> [W]e do not mean to suggest that a mere concealment of purpose is sufficient to establish lying-in-wait — many "routine" murders are accomplished by such means, and the constitutional considerations raised by defendant might

> well prevent treating the commission of such murders as a special circumstance justifying the death penalty.[21] But we believe that an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage, presents a factual matrix sufficiently distinct from "ordinary" premeditated murder to justify treating it as a special circumstance. The question of whether a lying-in-wait murder has occurred is often a difficult one which must be made on a case-by-case basis, scrutinizing all the surrounding circumstances.

(*People v. Morales, supra,* 48 Cal.4th at pp. 557-558.)

Clearly, Ontiveros concealed his purpose from Keck when he summoned her to the gas station. However, there was no evidence to show that he engaged in "a substantial period of watching and waiting for an opportune time to act" or that he shot her "from a position of advantage."

The surveillance videos showed that three minutes elapsed from the time Keck's Mustang entered the cul-de-sac to the time Ontiveros drove away. (50 RT 8036; 51 RT 8547, 8549.)

That he shot her in the back of the head does nothing to distinguish this case from any other such "ordinary premeditated

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[21] Morales had argued that a lying-in-wait statute not requiring an actual physical concealment would be arbitrary and unconstitutional. (*People v. Morales, supra,* 48 Cal.4th at 557.)

murder." That Keck was taken by surprise does not establish the position of advantage element. Such an interpretation would only encourage future actors to confront a victim head-on by shooting them in full view with knowledge they were about to be killed, thereby causing them unnecessary terror and suffering immediately before their death.

Ontiveros clearly concealed his purpose from Keck when he summoned her to the gas station, and then he rode with her to the cul-de-sac. But there was no "substantial period of watching and waiting."

These circumstances do not establish that he committed the murder "by means of lying-in-wait." The theory was never argued to the jury and no rational jury could reach that conclusion. The findings of first degree murder while lying-in-wait and the lying-in-wait special circumstance allegation must be reversed.

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XIV

The modified version of the of the lying-in-wait special circumstance provision described in Penal Code section 190.2(a)(15) is now indistinguishable from the lying-in-wait theory of first degree murder and is therefore unconstitutionally vague, and creates an arbitrary and capricious application of the death penalty by failing to narrow the class of death-eligible defendants.

Background

On March 7th, 2000, California voters passed Proposition 18, which modified the lying-in-wait special circumstance statute. The amendment became effective on March 8th, 2000. The special circumstance is now proven by showing that the defendant intentionally killed the victim "by means of" lying-in-wait. The prosecution no longer has to prove the murder was committed "while" lying-in-wait.

Appellant was charged with, and convicted of, first degree murder "by means of lying-in-wait," along with a true finding of the lying-in-wait special circumstance, even though he was not the actual killer.

Applicable Law

The Eighth Amendment prohibits the death penalty from being "imposed under sentencing procedures that create a substantial risk

that the punishment will be inflicted in an arbitrary and capricious manner." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) Instead, "A capital sentencing scheme must . . . provide a 'meaningful basis for distinguishing' " the few cases where it is imposed from the cases where it is not. (*Ibid.*, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 188.)

California is therefore obligated to "define the crimes for which the death penalty may be the sentence in a way that obviates 'standardless [sentencing] discretion.' " (*Godfrey v. Georgia, supra,* 446 U.S. at p. 428, quoting *Gregg v.Georgia, supra,* 428 U.S. at p. 196, n.7.)

"As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited in a manner that does not encourage arbitrary and discriminatory enforcement." (*Kolender v. Lawson* (1983) 461 U.S. 352, 357 [defining and applying the void-for-vagueness doctrine under the Fourteenth Amendment], most recently cited with approval in *Skilling v. United States* (2010) 561 U.S. ___, 130 S.CT 2896, 2904.)

Legal Analysis

Appellant argues that by amending the lying-in-wait special circumstance, the Legislature made the statute identical to the crime of

first degree murder by means of lying-in-wait found in Penal Code section 189. The only remaining substantive difference is that the special circumstance requires an intentional killing. However, because lying-in-wait first degree murder must be committed intentionally, there is no meaningful difference. Where a defendant who did not personally commit the homicide is convicted of first degree murder, a specific intent to kill must be proven. (*People v. Musslewhite* (1998) 17 Cal.4th at p. 1265.)

Accordingly, the amendment to the lying-in-wait special circumstance rendered it unconstitutional in that it is now impermissibly vague, creates a substantial risk of arbitrary and capricious application of the death penalty, and fails to narrow the class of death-eligible defendants. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1147 (conc. opn of Kennard, J.); *People v. Green* (1980) 27 Cal.3d 1, 61 (overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 n.3); *People v. Catlin* (2001) 26 Cal.4th 81, 90; *People v. Musslewhite, supra,* 17 Cal.4th 1216, 1265.)

Prior to the statute's 2000 amendment, Justice Mosk recognized that the lying-in-wait special circumstance must be sufficiently distinctive so as to 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. [Citations omitted.]" (*People v. Morales* (1989) 48 Cal.4th 527, 575, Mosk, J., con. and dis. opn.)

In *Houston v. Roe* (9th Cir. 1999) 177 F.3d 901, 906-907, the court addressed the issue before the statute was amended. The court found that the only reason the section 190.2(a)(15) special circumstance was not void for vagueness, was that there was a subtle, but important difference between the first degree murder lying-in-wait statute and the lying-in-wait special circumstance. The difference was between the meaning of "while" lying-in-wait and "by means of" lying-in-wait. The court distinguished the two phrases finding that the special circumstance "while lying-in-wait" requires a continuous temporal relationship between the concealment and the act, while the first degree murder language "by lying-in-wait" does not. (*Id.* at p. 907; and see, *Domino v. Superior Court, supra,* 29 Cal.App.3d at p. 1006 [discussing the definition of "lying-in-wait"].)

But Proposition 18 removed the distinction. In doing so, it removed the definite guidelines needed to prevent arbitrary and discriminatory enforcement of the law. The statute no longer defines the special circumstance offense with sufficient precision that ordinary

people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. (*People v. Flack* (1997) 52 Cal. App.4th 287, 293; *Kolender v. Lawson, supra,* 481 U.S. 352, 357.)

By removing the distinction, the statute allows prosecutors and juries to make an identical finding without any statutory guidance. There is no longer any direction set forth in the statute to assist in determining if an intentional first degree murder by means of lying-in-wait should also subject a person to the death penalty based on the same finding.

The amended version of section 190.2(a)(15), and the first degree murder qualification of section 189, created an unconstitutionally vague statutory scheme which allowed for standardless sentencing discretion by the jury and the court, resulting in arbitrary and discriminatory enforcement of the death penalty.

This court should find that the amendment included in Proposition 18, and used in this case, renders section 190.2(a)(15) unconstitutional and requires reversal of the special circumstance finding.

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XV

Appellant was denied his right to a trial by an impartial jury where a juror decided early in the case that she would write a book about the case exaggerating many details in the process.

Introduction

On the first day of trial, Juror No. 1 decided to write a book. She then acted on this desire to profit from jury service. She took notes for the book, wrote a manuscript, solicited other jurors to contribute, and sought funds to pay publication costs.

Juror No. 1's literary ambition raised major doubts about her impartiality. She took innocent facts about other jurors and wove them into stories of egregious misconduct, and she stretched the truth when taking notes to make the book more entertaining. Her "creative" behavior established a bias and requires reversal.

Background

On November 21st, 2003, appellant's jury (the "Red Jury") reached its penalty verdict. (72 RT 11741-11744.) The verdict was sealed for 11 days until the codefendant's jury (the "Green Jury") reached its verdict. (72 RT 11751-11754.)

The court later received an e-mail from members of the Green jury communicating allegations of juror misconduct by members of

appellant's jury. (Court's Exh. 506.) On January 6th, 2003, the court provided the e-mail to counsel. (72 RT 11763-11765.)

The e-mail read, in relevant part:

> On 2 December, the day the penalty verdict was read, I chatted with Red Juror number 1, [redacted], on the way to the parking lot. She stated that she and two other Red Jurors were considering writing about their experiences during this trial. She asked if I was interested in joining the writing group. . . .
>
> The next day, 3 December, I was speaking to Green Juror #11, [redacted], about the writing ideas and about the conversation with [redacted]. [Redacted] then told me [redacted] had already called her and discussed several "angles" for writing ideas. During that conversation, [redacted] revealed several things to [redacted] that indicated a rift between her ([redacted]) and some of the other jurors. [Redacted] said [redacted] was referring to other jurors as a "bunch of blondes" (a phrase I heard her make to the UT reporter in the courtyard) and then told [redacted] she "almost flipped the jury during deliberations in the guilt phase." She went on to explain to [redacted] that other jurors (# 10 & 12) "had made trips to the crime scene and to Flinner's apartment and were doing their own investigating." Both those jurors were openly discussing their activities with the rest of their jury.
>
> I was quite surprised to hear this and was concerned for several reasons. First, the violation of the admonitions, then the indication that more than one juror had participated, and that [redacted] or other jurors had not reported it, but, most of all, how something so seemingly minor might put the whole case at risk. During this experience I have come to appreciate the tremendous amount of work and taxpayer resources involved in a trial of this type. I am angry that anyone put that effort at risk. As [redacted] and I discussed the implications we were concerned that, if true, we wanted nothing further to do with those individuals, or, if not true, [redacted] was being malicious and not a credible source for a joint writing effort. Either way, we decided not to collaborate on any writing ventures with

> [redacted]. After that conversation [redacted] and I decided that was the end of it. However, since then, I've been bothered by the thought that if one of their number blurted this out on day one after the trial, it surely would come out later from others on their team, especially if they are writing anything. If it is to come out, and if there is any reason for concern, better it come out to you in your chambers where you can take any appropriate "early intervention" before it escalates into a Pandora's Box. . . . (Court's Exh. 506.)

The court asked all of the attorneys to respond to the issue. (72 RT 11769-11772.)

Defense counsel filed a motion for new trial alleging 14 instances of juror misconduct. (72 RT 11780-11782.) The motion claimed:

1) Juror No. 1 failed to report misconduct during the trial.

2) Juror No. 1 was contemplating writing a book and may have entered an agreement for consideration within 90 days of discharge.

3) Juror No. 1 contacted an alternate juror and an excused alternate and discussed the case during the trial.

4) Juror No. 1 overheard sidebar conversations, receiving in camera information.

5) Juror No. 10 visited the appellant's home and the murder site.

6) Juror No. 10 exhibited a bias by dressing provocatively to gain the defendant's attention and mouthing the words "I want to kill

you."

7) Jurors discussed the case in the hallway and at lunch prior to deliberations.

8) The foreperson failed to write a note to the court concerning Juror No. 1's wish to be removed from the jury.

9) Jurors prematurely determined guilt.

10) Jurors discussed the case with the victim's grandmothers.

11) Jurors hugged the grandmothers.

12) Jurors read newspaper articles.

13) One juror hugged a police officer and talked to him during the trial.

14) One alternate juror failed to report misconduct after overhearing the jury discussing testimony in the hallway. (14 CT 2626)

The court scheduled a three day hearing to begin on March 16th. (72 RT 11795-11799.) At the hearing, the court first found that appellant made a prima facie showing of juror misconduct. (73 RT 11843.)

On the first day, the defense called Juror No. 1, Green Juror No. 4, Green Juror No. 11, and Alternate Juror No. 1. (73 RT 11847, 11949,

11961, 11982.)

On the following days, the prosecution called the remaining jurors. (74 RT 12180, 12206, 75 RT 12280, 12322, 12379, 76 RT 12476, 12588, 77 RT 12628, 12722, 12774, 12780.)

The prosecutor also called Alternate Juror No. 2 and Alternate Juror No. 4, Vince Hartman, a dismissed alternate juror, and Green Juror No. 10. (75 RT 12424, 74 RT 12257, 77 RT 12803, 77 RT 15754.)

The prosecutor called several non-juror witnesses as well, including Robert Hatch, a prosecution witness at trial (75 RT 12307), Rita Berglund, the step-grandmother of the victim (76 RT 12608), Gloria Castelli and Marge Gagnon, acquaintances of the defendant and the victim (76 RT 12615, 12620), Joseph Sprecco, a deputy sheriff assigned as plainclothes security during trial (77 RT 12818), and the bailiff, Daniel Vengler. (77 RT 12844.)

Juror No. 1's writing efforts

Juror No. 1 acknowledged that she sought to write a book about the trial. (74 RT 11865-11866.) She admitted that she got the idea when listening to opening statements at the guilt phase. (74 RT 12030-12031.)

She acknowledged taking notes for the book during trial. (74 RT

11865-11866.) She had six notebooks and a Microsoft Word document containing notes on the trial. (74 RT 11904-11905.) She invited other jurors to contribute to the project. (74 RT 11895-11896.)

In September, she solicited a loan to help with publishing costs, and she later she received the loan. (74 RT 12041-12044.)

Other jurors corroborated Juror No. 1's testimony. Juror No. 6 learned about Juror No. 1's plans before the guilt phase deliberations. (77 RT 12742-12745.) Juror No. 1 discussed her plans with Juror Nos. 7 and 10 during guilt phase deliberations. (75 RT 12334-12335, 77 RT 12640-12641.) Two Red jurors had agreed to collaborate on the project before the trial ended. (Court's Exh. 506, redacted e-mail to Judge Preckel.) Juror No. 1 also solicited contributions from two Green jurors immediately after the penalty phase verdict. (74 RT 11876, 11951, 11961.)

And she continued to pursue the book after trial. (73 RT 12041-12043.) By December 13th, 2003, she had completed a *third* draft of her book. (74 RT 11895-11896.) She began working with an online publisher. (74 RT 12041-12043.) She contacted other jurors, and told them she had secured a publisher and an advance. (74 RT 11895-11896, 11911.) She explained during cross-examination that she asked

for a loan to self-publish, but never filled out an application, received any money, or settled on a loan amount. (74 RT 12041-12044.) However, she did secure a verbal agreement to provide cash to cover publishing costs. (74 RT 12041-12044.)

Juror No. 1's book project ended on January 20th, 2004 following an incident at Parkway Plaza in El Cajon, where a man approached her and threatened her life. (74 RT 11909.) He demanded that she stop "testifying." (74 RT 11909.) She did not understand what he meant — she was not testifying in any proceeding at that time. (74 RT 11909.) Likewise, she did not know who he was, or why he threatened her. (74 RT 11909.) She only knew that "everyone was after" her notes. (74 RT 11926.) After repeated attempts to contact the court, Juror No. 1 destroyed her notes and papers. (74 RT 11919.)

Juror No. 1 exaggerated instances of misconduct.

Juror No. 1 dedicated one of her notebooks to documenting multiple acts of misconduct by the other jurors. (75 RT 12380-12382.) At the hearing, the allegations were largely "rejected or innocently explained" by the testimony of the remaining jurors. (79 RT 12909-12910.) The trial court found that Juror No. 1's allegations consisted of "hyperbole, gross exaggeration, and speculation." (79 RT 12910-12911.)

She first alleged that Juror No. 10 visited the crime scene. (74 RT 11873-11874.) Juror No. 10 admitted that she drove by the appellant's apartment but she explained that she did so during a wild fire emergency. (76 RT 12538-12539.)

Next, Juror No. 1 claimed that other jurors discussed the case during breaks. (74 RT 11864-11865, 11880, 12017-12019.) Juror No. 10 admitted that she repeatedly commented on various witnesses in the hallway, but clarified that she only discussed their clothing. (77 RT 12637-12640.) Eleven other jurors agreed the hallway conversations were limited to personal matters. (74 RT 12137-12138, 12186-12187, 12210-12212, 12264-12267, 75 RT 12281-12282, 12380-12382, 76 RT 12481-12482, 12589-12592, 77 RT 12724-12729, 12774-12776, 12781-12782.) The jurors who had lunch together—Juror Nos. 2, 4, 7, 8, 9, and 10—all agreed that they never discussed the case during breaks. (74 RT 12093-12095, 12180-12183, 12210-12212, 75 RT 12323-12325, 77 RT 12631-12636, 12724-12729, 12774-12776.)

Third, Juror No. 1 alleged that the foreperson refused to send a note to the judge during deliberations. (74 RT 12031-12035.) Juror No. 1 explained that she saw Juror Nos. 10 and 3, the foreperson, whispering during deliberations. (74 RT 11890-11891.) The foreperson

admitted there had been a shouting match over the misunderstanding. (76 RT 12594-12596.) But Juror No. 1 did not request that a note to be sent, nor did the foreperson prevent Juror No. 1 from sending a note. (76 RT 12594-12596.)

Fourth, Juror No. 1 alleged that Juror No. 8 hugged one of the "grandmothers" in the audience. (74 RT 12075-12076.) Juror No. 8 admitted she saw a crying woman in the bathroom, and hugged her. (74 RT 12091-12092.) But the juror did not speak to the woman. (74 RT 12091-12092.)

Fifth, Juror No. 1 alleged that Juror No. 2 read numerous newspaper articles about the trial. (74 RT 11885.) Juror No. 2 admitted to reading one article, but it contained nothing new and she did not discuss it with other jurors. (74 RT 12183-12185.)

Sixth, Juror No. 1 alleged that Juror No. 12 discussed the case with an undercover sheriff's deputy. (74 RT 11881-11883.) She claimed Juror No. 12 hugged the man every day. (74 RT 11881-11883.) She said the deputy told Juror No. 12 information about the codefendant's jury. (74 RT 12021-12022.) Juror No. 12 admitted that she spoke with a sheriff's deputy three times. (76 RT 12545-12549, 12549-12550, 12551-12552.) She knew the deputy through a mutual

acquaintance and first met during trial. (76 RT 12492-12495.) But they never spoke about the case. (76 RT 12496-12499.)

Seventh, Juror No. 1 claimed that Juror No. 10 engaged in salacious behavior. She alleged Juror No. 10 dressed provocatively to get appellant's attention so she could tell him she wanted him to die. (73 RT 11883-11884.) She alleged Juror No. 10 brought photos of her breast augmentation to show the other jurors, and made inappropriate sexual comments about male witnesses and court personnel. (74 RT 11866-11867, 11939.) Juror No. 10 denied the allegations. (77 RT 12637-12640, 12669-12674.)

Juror No. 1 concealed that she was the subject of a restraining order.

Juror No. 1 admitted on cross-examination that she had a restraining order against her sister's ex-boyfriend. (74 RT 12161-12163.) The man appeared twice in a neighboring courtroom during trial. (74 RT 12161-12163, 78 RT 12847-12850.) Juror No. 1 did not mention the restraining order on her juror questionnaire. (78 RT 12870-12874.)

The bailiff revealed that Juror No. 1 contacted him twice during the trial regarding the restraining order, but he did not notify the court. (78 RT 12847-12850.)

The trial court's ruling

The court found that Juror No. 1 appeared to be "glib, intelligent, determined to tell her story," and described her testimony as "hyperbole, gross exaggeration, and speculation." (79 RT 12910-12911.) The court found it obvious that Juror No. 1 fabricated some of her testimony "to further her personal agenda." (79 RT 12910-12911.) The court concluded that she lacked credibility and denied the new trial motion. (79 RT 12912-12913.)

Applicable Law

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, guarantees the right to trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155; *Turner v. Louisiana* (1965) 379 U.S. 466.) The Sixth Amendment also requires a unanimous verdict. (*Andres v. United States* (1948) 333 U.S. 740, 748.) The California Constitution additionally requires a jury verdict in a criminal trial be unanimous. (Cal. Const., Art. I, 16; *People v. Feagley* (1975) 14 Cal.3d 338, 360, fn. 10.)

A trial court may grant a new trial if the jury "has been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (*People v. Collins* (2010) 49 Cal.4th 175, 241; Pen.

Code § 1181, (3.) Adequate proof of juror misconduct "raises a presumption of prejudice." (*In re Hitchings* (1993) 6 Cal.4th 97, 119.) On appeal, the presumption may be rebutted by a determination that "no reasonable probability of actual harm" exists. (*Ibid.*)

The issue of whether a juror writing a book constitutes prejudicial misconduct is one of first impression in California. In *Dyer v. Calderon*, (9thCir. 1998) 151 F.3d 970, the Ninth Circuit explained that writing a book may create an implied bias. The court noted that "an excess of zeal" such as "the hope of writing a memoir . . . introduces the kind of unpredictable element into the jury room that the doctrine of implied bias is meant to keep out." (*Id.* at p. 982.) Thus, if a juror writes or hopes to write a book, there is an implied bias. (*Id.* at p. 981.) No further inquiry is necessary regarding actual bias or the juror's motivation. (*Ibid.*)

In *Sims v. Brown*, (9th Cir. 2005) 425 F.3d 560, the court found that a *communication* between a juror and non-juror about writing a book was misconduct. The misconduct involved the discussion about writing a book after the trial. (*Id.* at p. 577.) There was no evidence that the juror had a financial interest in any particular outcome. (*Ibid.*) And there was no evidence the communication impacted the juror or

anyone else. (*Ibid.*) On those facts, the court held the misconduct was not prejudicial. (*Ibid.*)

Legal Analysis

The trial court's ruling focused solely on Juror No. 1's extensive allegations of misconduct by other jurors. It made no mention of Juror No. 1's own misconduct.

The trial court made factual findings regarding Juror No. 1. It found she (1) lacked credibility, (2) fabricated parts of her testimony, and (3) had a personal agenda. (79 RT 12910-12913.) Accepting the trial court's factual findings, this court must decide whether Juror No. 1's misconduct prejudiced appellant. Because Juror No. 1's testimony established that she worked on a book during trial, solicited contributions from other jurors, and sought financial backing for the project, her misconduct was prejudicial.

Juror No. 1 sought to profit by serving on appellant's jury.

The trial court found that Juror No. 1 had a personal agenda and took several steps to profit from her jury service. Juror No. 1's testimony established that she was writing a book *during* trial and that she had a financial interest in the outcome.

During the hearing, she admitted that she got the idea during

opening statements. (74 RT 12030-12031.) She then took the notes for the book and began converting them into a manuscript. (74 RT 11865, 11904.)

She researched paths to publication, solicited loans to pay for the publication costs, and entered into a verbal agreement for payment of the costs. (74 RT 12041-12044.) Juror No. 1 would not likely have sought a loan agreement unless she expected to make money from the book.

The trial court also found that Juror No. 1's testimony consisted of "hyperbole and gross exaggeration." (79 RT 12910-12911.) Thus, her literary project compromised her objectivity. She kept extensive notes during trial, many focusing on the perceived misconduct of other jurors. (75 RT 12380-12382.) Many of the notes referred to facts that were fabricated or exaggerated.

For instance, she alleged that Juror No. 10 visited and examined a crime scene. In fact, Juror No. 10 only drove by appellant's former apartment during a wild fire emergency. (76 RT 12538-12539.) She alleged that other jurors discussed witnesses' testimony during breaks in the proceedings, but the discussions only involved the witnesses' clothing. (77 RT 12637-12640.) Juror No. 1 consistently used

"hyperbole and gross exaggeration" to sensationalize various events.

In sum, Juror No. 1 decided to use the trial to write and sell a book. She exaggerated various claims of juror misconduct, and for the same reason would likely have exaggerated the evidence.

Juror No. 1 concealed facts to get on the jury.

During voir dire, Juror No. 1 never disclosed that she had an active restraining order against her sister's ex-boyfriend. (78 RT 12870-12874.) She brought it to the bailiff's attention during trial, but he failed to inform the court. While the existence of the restraining order does not, by itself, raise an issue of bias, the fact that she concealed it from the court shows a lack of honesty and objectivity. As in *Dyer*, Juror No. 1's concealment shows an "excess of zeal" and an "unpredictable factor." (*Dyer v. Calderon, supra,* 151 F.3d at p. 982.)

Juror No. 1 sought to influence the proceedings.

Juror No. 1 did not keep her plans to herself, but openly discussed her ideas with the other jurors. She even solicited contributions from other jurors. (74 RT 11895-11896.) Giving other jurors a stake in her book aligned their interests in the outcome.

Further, while Juror No. 1 tried to document every perceived act of misconduct, she did nothing to report it to the court. If she believed

her fellow jurors were committing misconduct, she violated the court's admonitions by not notifying the court, thereby taking the outcome of the trial into her own hands.

Juror No. 1's misconduct requires reversal.

Juror No. 1 used her jury service for fame and fortune. She had a clear expectation of financial gain or recognition. And a sensational book would further her goals. She concealed a restraining order, engaged other jurors in her plan, and ignored the court's admonition.

She had an actual or implied bias while serving on the jury and reversal of the judgment is required.

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XVI

Appellant was denied his right to an impartial jury as evidenced by the fact that, prior to deliberations, a female juror who was attracted to, or obsessed with the lead detective, told appellant that she wanted him to die.

Introduction

During the hearing on appellant's motion for new trial, Juror No. 1 raised salacious allegations of outrageous conduct by Juror No. 10. The allegations were confirmed by other jurors.

The jurors' testimony establishes that Juror No. 10 was biased against appellant. She dressed provocatively to get appellant's attention and told him "I want you to die." She exposed herself to Detective Scully and made sexual comments about him on a daily basis.

The trial court found that no other jurors corroborated the allegations regarding Juror No. 10's conduct. But as explained below, the record shows that other jurors' did support the allegations regarding Juror No. 10.

Alternatively, if the court accepts the trial court's finding that Juror No. 1 fabricated the allegations, then Juror No. 1 committed perjury which shows a lack of respect for the law, the legal process and her oath to tell the truth. Such conduct creates an implied bias

requiring reversal.

Background

Juror No. 10 threatened appellant.

Juror No. 1 alleged that Juror No. 10 dressed provocatively to attract appellant's attention and told him she wanted him dead. (73 RT 11883-11884.) Juror No. 10 told her about this plan during the guilt phase. (74 RT 11883-11884.) She testified that she witnessed Juror No. 10 successfully capture the appellant's attention, and quietly mouth "I want you dead." (74 RT 11943-11944, 11993-11994.)

Juror No. 10 denied the statement. (77 RT 12637-12640.) But the testimony of other jurors supports the claim of misconduct.

Green Juror No. 11 saw Juror No. 10 mime an oral sex act.

Green Juror No. 11 witnessed Juror No. 10 use a water bottle to mime oral sex acts during trial. (74 RT 11979-11981.) Green Juror No. 11 testified that she and Green Juror No. 10 saw the feigned sex act. (74 RT 11975-11977.) Green Juror No. 11 believed that Juror No. 10 directed her behavior toward him, and he reciprocated the act. (74 RT 11975-11977.) Both Juror No. 10 and Green Juror No. 10 denied the allegations. (77 RT 12698-12699, 78 RT 12809.) But if she wasn't directing the sex act to Juror No. 11 as he believed, or another Green

juror, then she was likely taunting appellant.

Other Jurors believed Juror No. 10 dressed inappropriately.

Juror No. 10 denied dressing inappropriately. (77 RT 12669-12674.) Some of the other jurors agreed with Juror No. 10. (74 RT 12186-12187, 12219-12222, 75 RT 12282-12284, 12362-12363, 12388, 12428-12429, 76 RT 12499-12501, 77 RT 12739-12742, 12786-12789.)

But Juror No. 3 corroborated Juror No. 1, and testified that the jurors discussed Juror No. 10's dress in a "mostly joking" way. (76 RT 12605-12606.) Juror No. 3 believed the buttons on Juror No. 10's shirts were too low and her skirts too high. (76 RT 12605-12606.)

Members of the Green Jury also found Juror No. 10's dress inappropriate. (78 RT 12809.) During his testimony, Green Juror No. 10 explained that the Green jury had nicknamed Juror No. 10 "buttons" because of the strain on the buttons of her shirts. (78 RT 12810-12812.) Green Juror No. 10 found Juror No. 10's dress so enticing that he and another male Green juror approached her after the trial and asked about her breasts. (76 RT 12535-12537, 78 RT 12813-12816.)

Juror No. 10 admitted to a sexual fixation with Detective Scully.

Juror No. 1 also raised allegations that Juror No. 10 discussed Detective Scully, a prosecution witness, in an inappropriate, sexual

manner. (74 RT 11879.) Green Juror No. 10 testified that Juror No. 10 parted her legs to allow Detective Scully to see up her skirt. (78 RT 12809.)

Juror No. 10 denied the flashing incident. (77 RT 12705-12707.) However, she and Juror No. 12 admitted to daily, sexual discussions about Detective Scully, but claimed that she was joking. (76 RT 12485-12486, 77 RT 12637-12640.)

Juror No. 12 acknowledged taking part in discussions, and described similar conversations with Juror Nos. 10, 8, and 7 about the bailiff and the court reporter. (76 RT 12485-12486, 12570-12575.)

The trial court's ruling

The trial court denied the new trial motion based largely on its determination that Juror No. 1 was not credible. (79 RT 12903, 79 RT 12909-12910, 12912-12913.)

The court focused solely on the allegations of misconduct made by Juror No. 1 regarding Juror No. 10 and the other jurors. (79 RT 12909-12913.) It found the testimony of the other jurors either controverted or innocently explained all of Juror No. 1's allegations. (79 RT 12909-12910.) Further, the court found that the alleged misconduct was of such an obvious and flagrant character that the court, the courtroom

staff, and the attorneys would have observed it. (79 RT 12912-12913.)

Applicable Law

The Sixth Amendment to the United States Constitution, applied to the states through the Fourteenth Amendment, guarantees the right to trial by an impartial jury. (*Duncan v. Louisiana* (1968) 391 U.S. 145, 155; *Turner v. Louisiana* (1965) 379 U.S. 466.) The Sixth Amendment also requires a unanimous verdict. (*Andres v. United States* (1948) 333 U.S. 740, 748.) The California Constitution additionally requires a jury verdict in a criminal trial be unanimous. (Cal. Const., Art. I, 16; *People v. Feagley* (1975) 14 Cal.3d 338, 360, fn. 10.)

The United States Supreme Court has held that due process requires "a jury capable and willing to decide the case *solely on the evidence before it*, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." (*Smith v. Phillips* (1982) 455 U.S. 209, 217, italics added.) A trial court may grant a new trial if the jury "has been guilty of any misconduct by which a fair and due consideration of the case has been prevented." (*People v. Collins, supra,* 49 Cal.4th at p. 241; Pen. Code § 1181, par. 3.)

Adequate proof of juror misconduct "raises a presumption of

prejudice." (*In re Hitchings* (1993) 6 Cal.4th 97.) The presumption may be rebutted "by evidence that no prejudice exists." (*Id.* at p. 119.) On appeal, the presumption may be rebutted by a determination that "no reasonable probability of actual harm" exists. (*Ibid.*) "The test is whether or not the misconduct has prejudiced the defendant to the extent he has not received a fair trial." (*United States v. Klee* (9th Cir. 1974) 494 F.2d 394, 396.) The presence of a single biased juror cannot be harmless and "requires a new trial without a showing of actual prejudice." (*Dyer v. Calderon, supra,* 151 F.3d at p. 973, fn. 2.)

When reviewing claims of juror misconduct, the court "accept[s] the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence." (*People v. Nesler, supra,* 16 Cal.4th at p. 582.) Whether the facts determined by the trial court constitute misconduct is a legal question, reviewed independently. (*People v. Collins, supra,* 49 Cal.4th at p. 242.) Finally, whether misconduct is prejudicial is a "mixed question of law and fact subject to an appellate court's independent determination." (*People v. Nesler, supra,* 6 Cal.4th at p. 582.)

In *Dyer v. Calderon, supra,* 151 F.3d 970, the Ninth Circuit held a juror commits prejudicial misconduct by committing perjury. In that

case, a juror perjured herself to get on the jury. (*Id.* at p. 979.) The court presumed the juror was biased because committing perjury "treats with contempt the court's admonition[s]" and casts doubt on whether the juror "can be expected to treat her responsibilities as a juror–to listen to the evidence, to not consider extrinsic facts to follow the judge's instructions–with equal scorn." (*Id.* at p. 983.) Furthermore, such a juror "may believe that the witnesses also feel no obligation to tell the truth and decide the case based on her prejudices rather than the testimony." (*Ibid.*) The court reasoned that lying to get impaneled shows an "excess of zeal" that "introduces the kind of unpredictable element into the jury room that the doctrine of implied bias is meant to keep out." (*Id.* at p. 982.)

Legal Analysis

This court must accept the trial court's factual findings if supported by substantial evidence. (*People v. Nesler*, *supra*, 16 Cal.4th at p. 582.) Here, the trial court made limited factual findings. It found that Juror No. 1's allegations of misconduct by other jurors were either rejected or innocently explained. (79 RT 12909-12910.) But the finding is not supported by the record. Instead of rejecting or innocently explaining Juror No. 1's allegations, other jurors' testimony *supported*

them. Because of the egregious nature of these allegations, including threats made against appellant, the misconduct is prejudicial and requires reversal.

Alternatively, if this court accepts the trial court's factual finding that Juror No. 1 fabricated her testimony, it must reverse because of Juror No. 1's perjury. Her perjury is a crime, an act of dishonesty, a violation of her admonitions as a juror, and blatant disregard for her oath to tell the truth. The perjury shows she was unfit to serve as a juror and creates an implied bias requiring reversal.

Juror No. 1's allegations are supported by other jurors' testimony.

The testimony of the other jurors supports Juror No.10's allegations. Specifically, the record shows that Juror No. 10 dressed provocatively, told appellant she wanted him dead, and that she admitted to being infatuated with Detective Scully.

The allegation that Juror No. 10 taunted appellant was supported by the testimony of other jurors. First, Green Juror No. 10 testified that he saw Juror No. 10 staring at appellant throughout the trial. (78 RT 12813-12816.) Green Juror No. 11 testified that she saw Juror No. 10 mime an oral sex act while looking at appellant. (74 RT 11975-11977.) This taunting of the accused was wholly improper. Next, Juror

No. 3 and two Green jurors testified that Juror No. 10 dressed provocatively, to the point of distraction. They testified that Juror No. 10 wore blouses so tight the buttons appeared ready to pop. (76 RT 12605-12606; 78 RT 12810-12812.) Juror No. 10's dress was so provocative, the others felt comfortable asking about her breasts after the trial. (76 RT 12535-12537.) The testimony of these jurors largely supports the conduct described by Juror No. 1.

Juror No. 10 also showed a prosecutorial bias by her infatuation with Detective Scully. Other jurors supported the allegation that Juror No. 10 talked about Scully in an inappropriate, sexual manner. First, Juror No. 10 admitted to making regular inappropriate comments about Scully. (77 RT 12637-12640.) Next, Juror No. 12 admitted to engaging in conversations about Scully. They also talked inappropriately about the bailiff and a court reporter. (76 RT 12485-12486, 12570-12575.) Third, Green Juror No. 10 testified to seeing Juror No. 10 flashing Scully while he was on the witness stand. (78 RT 12809.) This can only reasonably be considered a prosecutorial bias.

Juror No. 10's bias requires reversal.

The presence of a single biased juror requires reversal of the conviction because a defendant has the right to an *impartial* jury.

(*Duncan v. Louisiana, supra,* 391 U.S. at p. 155.) Juror No. 10 exhibited a clear bias by telling appellant she wanted him dead and by her personal infatuation with the lead detective.

The trial court's contrary finding was not supported in the record.

Alternatively, Juror No. 1's perjury created an implied bias.

If this court accepts the trial court's factual findings, it must acknowledge that Juror No. 1 lied to further her personal agenda. (79 RT 12911.) She therefore committed perjury in the same court where she sat as a juror.

Perjury by a juror constitutes an implied bias requiring reversal. (*Dyer v. Calderon, supra,* 151 F.3d at pp. 982-983.) Although the juror in *Dyer* committed perjury during voir dire, that fact was not essential to the court's reasoning. (*Id.* at pp. 981-982.) Instead, it reasoned that perjury renders the juror "unfit to serve even in the absence of [a] vindictive bias" because it shows contempt for the court's admonitions, the oath to tell the truth, and the responsibilities of a juror. (*Id.* at p. 983.)

Juror No. 1 took an oath to speak truthfully to the court. If she violated that oath, she showed an implied bias against the appellant.

Juror No. 1's perjury constitutes misconduct and an implied bias.

Her disregard for the trial court's admonitions, the oath to tell the truth, and her responsibilities as a juror, require a reversal of the judgment.

XVII

The trial court deprived appellant of his right to due process by failing to order a competency hearing after his suicide attempt before the penalty phase began.

Background

On October 16th, 2003, appellant's jury returned the guilt phase verdicts. (65 RT 10812-10813.) The trial court sealed the verdicts pending the decision of the codefendant's jury. (65 RT 10812-10813.)

On October 19th, jail personnel found appellant lying on the floor of his cell "in an apparent state of physical distress." (65 RT 10823.) He had a seizure and lost consciousness for thirty seconds. (65 RT 10837.) Sheriff's deputies moved him to UCSD Medical Center. (65 RT 10816, 10825.)

On October 20th, jail staff informed the trial court that appellant had been hospitalized. (65 RT 10825.) Court personnel then told trial counsel that appellant had attempted suicide and counsel requested a competency hearing suggesting that "the actions of [appellant] raise a question as to his present competency." (65 RT 10837; 10 CT 2410,

2412.)

On October 21st, the hospital discharged appellant and he was returned to his cell. (65 RT 10825.)

The next day, attorneys Mitchell and Resnick attempted telephone conversations with appellant but in each case the contact "was unsatisfactory." (65 RT 10824.) Counsel later met with appellant in person. (65 RT 10824.)

The prosecutor opposed the competency hearing. (11 CT 2486.) His motion described appellant's history of suicide attempts: "[Appellant] has a documented history of suicide 'attempts' that have all failed. These attempts are contained in both his civilian and prison medical histories. These attempts are numerous." (11 CT 2487.) The prosecutor argued that the instant suicide attempt did not raise competency concerns. (CT 2490.) Rather, it was an act consistent with his "criminal history . . . of manipulation and deceit." (11 CT 2487, 2490.)

On October 23rd, the trial court discussed appellant's motion for a competency hearing. (65 RT 10816.) That morning, trial counsel provided the medical records from UCSD Medical Center, and the sheriff's department delivered a two inch thick file of medical and

psychiatric records from the jail. (65 RT 10817.) The court marked the hospital and jail records as Court Exhibits 450 and 451. (65 RT 10817, 10819.)

The court quickly scanned the records, and pulled the most recent entries. (65 RT 10818-10819.) Resnick noted certain documents were missing, including the discharge summary from appellant's recent hospitalization, and results of a drug screen following the suicide attempt. (65 RT 10821.)

The court took a short recess for further review but acknowledged the need for a medical expert to interpret the records. (65 RT 10820-10822,10835.)

Defense counsel argued that the suicide attempt raised "a serious question" about appellant's *present* competency. (65 RT 10828-10829.) Counsel also pointed to missing or unintelligible documents that raised more doubt. (65 RT 10828.) For example, appellant had been prescribed numerous medications over the past year — enough to fill a twenty-seven page report. (65 RT 10819-10820.) Also, UCSD medical professionals ordered blood work after the suicide attempt, but the blood results were missing. (65 RT 10821.) And neither counsel nor the court could understand the medical records. (65 RT 10822, 10830.)

Mitchell had scheduled a psychiatric examination for the following day and told the court he was "very concerned" about appellant's competency. (65 RT 10830.)

The prosecutor responded that appellant had not attempted suicide. (65 RT 10832-10833.) The October 19th medical reports indicated that appellant's pulse rate and blood pressure were elevated but both indicators were within the normal range for a man his age during vigorous exercise. (65 RT 10832.) The prosecutor concluded that appellant did not attempt suicide because his vitals were not "off the scales." (65 RT 10832.)

The prosecutor also pointed to a statement recorded by a sheriff's department employee on October 21st. (65 RT 10832-10833.) The employee said appellant denied having suicidal thoughts and did not know what caused his October 19th collapse. (65 RT 10833.)

Based on these two facts, and ignoring the remaining medical records, the prosecutor concluded there was "no evidence right now before the court, absent any toxicology results — that [appellant] even attempted to commit suicide." (65 RT 10833.) And without evidence of a suicide attempt, there was no reasonable doubt regarding appellant's competency. (65 RT 10833.)

The court had previously been shown evidence of two earlier suicide attempts, and appellant's preexisting cognitive dysfunction. (65 RT 8984, 10378; 11 CT 2428.)

Appellant had attempted suicide many times before. (11 CT 2487.) On September 16th, 2003, the court learned that the defense intended to call a witness regarding a suicide attempt that occurred at Donovan State Prison in 2000. (65 RT 8984-8985.) On October 1st, 2003, the court heard evidence of a third suicide attempt. (65 RT 10378.) Before his arrest, appellant tried to kill himself by overdosing on sleeping pills. (65 RT 10378.)

The court also had before it a report from a defense expert documenting appellant's brain dysfunction. (65 RT 10848.) On October 22nd, the day before the hearing, the prosecutor filed a motion to exclude the expert's opinion under *Kelly-Frye*.[22] (11 CT 2415.) The prosecutor attached the defense expert's report to the motion. (11 CT 2427-2428.) Based on twenty-six cognitive and neurological tests, the expert concluded that appellant "suffers from brain dysfunction . . . affect[ing] his cognitive abilities to foresee the consequences of his acts

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[22] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Circuit 1923) 293 F. 1013.)

and fully understand social cues and constraints." (11 CT 2428.) The prosecutor challenged just one of the tests. (11 CT 2415.)

The court ruled after briefly reviewing the medical records — without waiting for the toxicology results or discharge summary, and without waiting for the planned psychiatric evaluation. (65 RT 10834-10836.) It began by ironically noting the lack of an expert opinion on the competency issue. (65 RT 10835.)

It then adopted the prosecutor's claim that there was "not much, if any concrete evidence to support" the claim that appellant attempted suicide. (65 RT 10835.)

The court then described its own observations. (65 RT 10835.) While "not pretending to be a medical or mental health professional," the court observed that appellant had engaged in conversation with counsel throughout the trial. (65 RT 10835.) Further, the court described appellant's appearance on the morning of the hearing:

> "He in no way appears at all disoriented or lacking cognizance of his present surroundings and these proceedings. And I have further observed [appellant] to be in repeated conversation both with [counsel and cocounsel] in a manner altogether consistent with my observations of such contacts and conversations occurring over the course of the [trial]."

(65 RT 10836.)

The court concluded that it did not find "any doubt whatever,

reasonable or unreasonable, concerning [appellant's] present mental competence." (65 RT 10836.) The court then denied the request for a competency hearing. (65 RT 10836.)

Defense counsel responded that neither the court nor counsel had the expertise to comment on appellant's competence based on in-court observations. (65 RT 10837.) He argued the court had improperly acted as a mental health expert by comparing past and present in-court observations. (65 RT 10836-10837.)

Mitchell asked the court to consider appointing a mental health professional to examine appellant before ruling on the motion. (65 RT 10838.) He noted he could not waive the attorney-client privilege to explain the content of his conversations with appellant and neither could he provide a psychiatric opinion to rebut the court's observations and conclusions. (65 RT 10838.)

The court denied the request, finding "this is not a close call at all." (65 RT 10838.)

Applicable Law

Trial courts have a sua sponte duty to order a competency hearing when there is reasonable doubt concerning a defendant's competency to stand trial. (*Pate v. Robinson* (1966) 383 U.S. 375, 377;

People v. Pennington (1967) 66 Cal.2d 508, 518.) The United States Supreme Court has long held that the failure to observe adequate procedures to protect against the trial or conviction of an incompetent defendant constitutes a denial of due process, requiring reversal of his conviction. (*Pate v. Robinson, supra,* 383 U.S. at p. 377; *Drope v. Missouri* (1975) 420 U.S. 162, 171; *People v. Hale* (1988) 44 Cal.3d 531, 539.)

Section 1367 establishes the standard for determining whether a defendant is competent to stand trial: "A defendant is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the defendant is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." A court must hold a competency hearing when presented with substantial evidence of incompetence. (*People v. Stankewitz* (1982) 32 Cal.3d 80, 91-92.) "Substantial evidence" is evidence that raises a reasonable doubt about the defendant's competence. (*People v. Jones* (1991) 53 Cal.3d 1115, 1152.) The trial court must consider all evidence before it, *whatever the source.* (*People v. Howard* (1992) 1 Cal.4th 1132, 1164.)

A court must hold a competency hearing when substantial

evidence of incompetence exists, *no matter how persuasive evidence to the contrary may be.* (*People v. Welch* (1999) 20 Cal.4th 701, 737-738 emphasis added; *People v. Pennington, supra,* 66 Cal.2d at pp. 516-518.) Even if the court "personally has no doubt," it must hold a hearing when presented with substantial evidence. (*People v. Pennington, supra,* 66 Cal.2d at p. 519.)

Whether substantial evidence exists is reviewed for sufficiency of the evidence. (*People v. Danielson* (1992) 3 Cal4th 691, 727.)

Any one factor standing alone — including bizarre behavior, defendant's demeanor, prior medical opinions, and suicidal tendencies — may create a reasonable doubt regarding defendant's competency. (*Drope v. Missouri, supra,* 420 U.S. at p. 180.)

A defendant's suicide attempt during trial may establish reasonable doubt, because it "suggests a rather substantial degree of mental instability contemporaneous with trial." (*Id.* at p. 181.) This court has held that if a suicide attempt does not create reasonable doubt by itself, additional factors may contribute to meet the standard. (*People v. Rogers* (2006) 39 Cal.4th 826, 848.) In fact, trial counsel's decision to seek a competency hearing, is particularly significant because of counsel's interactions with the defendant. (*Drope v.*

Missouri, *supra*, 420 U.S. at p. 177, fn. 13; *People v. Rogers*, *supra*, 39 Cal.4th at p. 848.)

In *Drope*, the United States Supreme Court found substantial evidence of incompetence where (1) the defendant attempted suicide, (2) trial counsel expressed concern regarding his competency, and (3) the defendant exhibited prior irrational behavior. (*Drope v. Missouri*, *supra*, 420 U.S. at pp. 177-180.) The court warned that trial courts "must always be alert to circumstances suggesting a change" regarding the defendant's competence, such as suicide attempts. (*Id.* at p. 181.)

Legal Analysis

Five factors established evidence of appellant's incompetence: (1) the recent suicide attempt; (2) his "long history" of suicide attempts; (3) his preexisting cognitive dysfunction; (4) his thirty second loss of consciousness; and (5) trial counsel's expressed doubt regarding his competency. Given these facts, the trial court should have ignored evidence to the contrary and ordered a competency hearing. (*People v. Pennington*, *supra*, 66 Cal.2d at p. 518.)

Appellant's suicide attempt on October 19th suggests a "a rather significant degree of mental instability." (*Drope v. Missouri*, *supra*, 420 U.S. at p. 180.) But the court dismissed evidence of the suicide attempt

relying on evidence to the contrary. This was strong evidence of incompetency, especially when considered along with the other factors noted.

The Supreme Court has made clear that trial courts should not engage in the business of medical or psychiatric diagnosis, "Although we acknowledge the fallibility of medical and psychiatric diagnosis, we do not accept the notion that the shortcomings of the specialist can always be avoided by shifting the decisions from a trained specialist using the traditional tools of medical science to an untrained judge or administrative hearing officer in a judicial type hearing." (*Parham v. J.R.* (1979) 442 U.S. 584, 608.)

Here, the court placed great weight on its own observations and essentially diagnosed appellant. (65 RT 10835-10836.) And the judge admitted he could not hear the "conversations" between appellant and trial counsel. Without knowing how well — or even *if* — appellant was communicating with trial counsel, these observations were meaningless.

The trial court also prematurely terminated its inquiry into appellant's competency. (See *United States v. Timmons* (9th Cir. 2002) 301 F.3d 974, 981.) It was a mistake to rely on the prosecutor's

observations, rather than consult with a mental health professional. The court had two sets of medical records, one of which was two inches thick, but reviewed only the most recent records and spent less than 15 minutes doing so. (65 RT 10818, 10822.) The court admitted it did not understand the records and needed professional help to make sense of them. (65 RT 10821.)

The judge's process of reviewing the records was fatally flawed. He ignored the majority of appellant's medical records believing only the most recent entries were relevant, and he did not understand the records he did read. The review was meaningless.

So the court ignored the evidence of the present and prior suicide attempts as well as the evidence of appellant's brain dysfunction and counsel's genuine concern about his mental competence. It heard no expert opinion, and accepted the prosecutor's position after diagnosing the appellant himself, and did not understand the records it reviewed.

The trial court violated appellant's right to due process by failing to conduct a competency hearing. The suicide attempt took place before the penalty phase began, and at the very least, the death judgment must be reversed. But this evidence also shows appellant may have been incompetent during the guilt phase trial. And the present issue is

further proof that the trial was flawed in substantial ways and that Judge Preckel was not protecting appellant's right to a fair trial.

XVIII

The cumulative impact of the errors deprived appellant of his right to a fair trial.

The due process clauses of the federal and state constitutions guarantee every criminal defendant the right to a fair trial. (*People v. Lyons* (1956) 47 Cal.2d 311, 319; *Estes v. Texas* (1965) 381 U.S. 532.) The cumulative impact of errors which by themselves are not sufficient to warrant reversal, may in a particular case require reversal. (*People v. Hill* (1998) 17 Cal.4th 800, 847; *People v. Holt* (1984) 37 Cal.3d 436, 458-459.) "The litmus test is whether defendant received due process and a fair trial." (*People v. Kronemeyer* (1987) 189 Cal.App.3d 314, 349.)

Appellant did not receive a fair trial in this case — not even close. The decisions leading to this flawed trial began the moment the jailhouse informant disclosed to the prosecutor that appellant sought the home addresses and personal contact information of the trial judge, the prosecutor, the bailiff, his former counsel, the lead investigator and others.

Following the disclosure, the prosecutor and trial judge lost their

ability to remain impartial. They permitted the sheriff to isolate appellant in a distant jail, and restrict his access to counsel and other members of the defense team. The restrictions allowed the visual monitoring of visits and subjected counsel to needless personal intrusions when entering the jail.

When defense counsel complained, the prosecutor feigned ignorance, and Judge Preckel declared it was not his job to become involved in these matters at the jail. In taking this position, the judge abandoned his constitutional duty to ensure the sheriff's restrictions did not interfere with appellant's rights to prepare a defense and obtain a fair trial.

When the trial began, the court permitted the introduction into evidence of dozens of items that were inadmissible and highly inflammatory. The court allowed the jurors to learn, among other things, that appellant attempted to obtain their home addresses, that the victim was pregnant (which was possible but never established), that appellant referred to her as a "slut" or a "cunt," and that he tried to frame many other people for her murder.

The court refused to sever appellant's trial from that of his codefendant despite conflicting defenses, and codefendant's counsel's

role as a second prosecutor. And it allowed an incompetent witness to testify against appellant despite his delusions which rendered effective cross-examination impossible.

The trial court also allowed a detective to read to the jury statements of the codefendant that incriminated appellant. This was the same detective upon whom one of the jurors had developed a sexual fixation.

There were other acts of misconduct by the jury. The juror who developed the crush on Detective Scully lost her ability to remain impartial at one time taunting appellant by letting him know that she wanted him dead. And another juror had decided to write a book about the trial, and solicited the participation of other jurors.

Our justice system does not require that a defendant receive a perfect trial, but he must be treated fairly. The legal errors described in this brief are not mere imperfections that can be rationalized or overlooked. Individually and collectively they show that appellant was deprived of his right to a fair trial. This trial was an embarrassment to all of those who work so hard to ensure that our criminal justice system is fair, even for recalcitrant defendants.

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XIX

California's death penalty statute, as interpreted by this court and applied at appellant's trial, violates the United States Constitution.

Many aspects of California's capital sentencing scheme, individually and in combination with each other, violate the United States Constitution. Because challenges to most of these have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional basis, and requests the Court's reconsideration of each claim in the context of California's entire death penalty system.

Appellant further requests the Court to consider their cumulative impact on the functioning of California's capital sentencing scheme. As the US. Supreme Court has stated, "[t]he constitutionality of a state's death penalty system turns on review of that system in context." *Kansas v. Marsh* (2006) 548 US.163, 178, fn. 6.[23] See also,

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[23] In *Marsh*, the high court considered Kansas's requirement that death be imposed if a jury deemed the aggravating and mitigating circumstances to be in equipoise and on that basis concluded beyond a reasonable doubt that the mitigating circumstances did not outweigh the aggravating circumstances. This was acceptable, in light of the overall structure of" the Kansas capital sentencing system," which, as the court noted, " is dominated by the presumption that life

Pulley v. Harris (1984) 465 US. 37,51.

When viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a constitutionally adequate basis for selecting the relatively few defendants to be subjected to capital punishment. In short, California's special circumstances are now so numerous and so broadly construed as to be chargeable in virtually every non-vehicular homicide.

Nor are there adequate penalty phase safeguards that ensure the reliability of the verdict. Instead, jurors are not required to agree with each other at all as far as the existence of aggravating factors, and jurors are not required to find that evidence of aggravating factors meets any burden of proof at all. The result is truly a "wanton and freakish" system that arbitrarily imposes the death penalty on a handful of unfortunate defendants from among the thousands of murderers in California annually.

A. *Appellant's Death Penalty Is Invalid Because Penal Code § 190.2 Is Impermissibly Broad.*

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imprisonment is the appropriate sentence for a capital conviction." 548 US. at 178.

To avoid the Eighth Amendment's proscription against cruel and unusual punishment, 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. (Citations omitted.)" (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.)

In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty. According to this Court, the requisite narrowing in California is accomplished by the "special circumstances" set out in section 190.2. (*People v. Bacigalupo* (1993) 6 Ca1.4th 857,868.)

The 1978 death penalty law was drafted *not* to *narrow* those eligible for the death penalty but to *expand* liability to make virtually *all* murderers eligible. (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7.") Since 1978, the legislature has increased the number of special circumstances from 19 to 22, and both the legislature and the judiciary have expanded the scope of many of them.

Virtually all felony-murders are ostensibly special circumstance eligible, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or during a mental

breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Ca1.3d 441.)

Section 190.2's reach has been extended to virtually all intentional murders by this Court' s construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all such murders. (See *People v. Hillhouse* (2002) 27 Ca1.4th 469, 500-501, 512-515.

B. *Penal Code § 190.3(a) As Applied Allows Arbitrary And Capricious Imposition Of Death In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.*

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder, even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation the "circumstances of the crime." This Court has never applied a limiting construction to factor (a) other than to agree that an aggravating factor based on the "circumstances of the crime" must be some fact beyond the elements of the crime itself. *(People v. Dyer* (1988)

45 Ca1.3d 26, 78; *People v. Adcox* (1988) 47 Ca1.3d 207,270) The Court has approved numerous expansions of factor (a), approving reliance upon it to support aggravating factors based upon the defendant's having sought to conceal evidence three weeks after the crime, (*People v. Walker* (1988) 47 Cal.3d 605,639) or having had a "hatred of religion, (*People v. Nicolaus* (1991) 54 Ca1.3d 551,581-582) or threatened witnesses after his arrest, *(People v. Hardy* (1992) 2 Ca1.4th 86, 204) or disposed of the victim's body in a manner that precluded its recovery. (*People v. Bittaker* (1989) 48 Ca1.3d 1046, 1110, fn.35.) It also is the basis for admitting evidence under the rubric of "victim impact." (See, e.g., *People v. Robinson* (2005) 37 Ca1.4th 592, 644-652, 656-657.)

The purpose of section 190.3 is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge, *Tuilaepa v. California* (1994) 512 U.S. 967, it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

In practice, section 190.3's broad "circumstances of the crime" provision licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder,

. . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363.)

C. *California's Death Penalty Statute Contains No Safeguards To Avoid Arbitrary And Capricious Sentencing And Deprives Defendants Of The Right To A Jury Determination Of Each Factual Prerequisite To A Sentence Of Death, In Violation Of The Sixth, Eighth, And Fourteenth Amendments To The United States Constitution.*

As shown above, California's death penalty statute does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (section 190.2) or in its sentencing guidelines (section 190.3). Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other

criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make - whether or not to condemn a fellow human to death.

1. *Appellant's death verdict was not premised on findings beyond a reasonable doubt by a unanimous jury that one or more aggravating factors existed and that these factors outweighed mitigating factors; his constitutional right to jury determination beyond a reasonable doubt of all facts essential to the imposition of a death penalty was thereby violated.*

Except as to prior criminality, appellant's jury was not told that it had to find any aggravating factor true beyond a reasonable doubt. The jurors were not told that they needed to agree at all on the presence of any particular aggravating factor, or that they had to find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence. 534 All this was consistent with this Court's previous interpretations of California's statute. *People v. Fairbank* (1997) 16 Ca1.4th 1223, 1255,

stated that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors . . .". But this position has been squarely rejected by the U.S. Supreme Court ' s decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296; and *Cunningham v. California* (2007) 549 U.S. 270.

Apprendi held that a state may not impose a sentence greater than that authorized by the jury' s simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

Ring struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.*, at 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law, *Walton v. Arizona* (1990) 497 U.S. 639, it had held that aggravating factors were sentencing

considerations guiding the choice between life and death, and not elements of the offense. (*Id.*, at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding that increases the possible penalty is the functional equivalent of an element of the offense, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

Blakely considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 299.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) *Blakely* ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.)

The governing rule since *Apprendi* is that other than a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the

maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings." (*Blakely*, at p. 304.)

United States v. Booker (2005) 543 U.S. 220, 224 reiterated the Sixth Amendment requirement that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Cunningham rejected this Court's interpretation of *Apprendi*, and found that California's Determinate Sentencing Law ("DSL") requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the mid-term specified by the legislature. *Cunningham v. California, supra.* In so doing, it explicitly rejected the reasoning used by this Court to find that *Apprendi* and *Ring* have no application to the penalty phase of a capital trial.

In the wake of *Apprendi*, *Ring*, *Blakely*, and *Cunningham*, any jury finding relied onto impose the death penalty must be found true beyond a reasonable doubt. However, California law as interpreted by this Court does not require that a reasonable doubt standard be used

during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance — and even in that context the required finding need not be unanimous. (*People v. Fairbank, supra*; see also *People v. Hawthorne* (1992) 4 Ca1.4th 43,79 [penalty phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden of-proof quantification"].)

In the wake of *Cunningham*, it is crystal-clear that in determining whether or not *Ring* and *Apprendi* apply to the penalty phase of a capital case, the sole relevant question is whether or not there is a requirement that further factual findings must be made before a death penalty can be imposed.

Under California law, the maximum punishment that may be imposed upon a *guilt* verdict of first degree murder with special circumstances, the death penalty may be imposed *only* upon a *further* factual finding that is *not* encompassed within the guilt verdict or the penalty procedure.

Arizona argued in *Ring* that a finding of first degree murder in Arizona, like a finding of one or more special circumstances in California, leads to only two sentencing options: death or life

imprisonment. *Ring* was therefore sentenced within the range of punishment authorized by the jury's *guilt* verdict. The Supreme Court squarely rejected that argument:

> This argument overlooks *Apprendi's* instruction that "the relevant inquiry is one not of form, but of effect." 530 U.S., at 494, 120 S.Ct. 2348. In effect, "the required finding [of an aggravated circumstance] exposed] [*Ring*] to a greater punishment than that authorized by the jury's guilty verdict." *Ibid.*; see 200 Ariz., at 279, 25 P.3d, at 1151. *Ring*, 124 S.Ct. at 2431.

Just as when a defendant is convicted of first degree murder in Arizona, a California conviction of first degree murder, even with a finding of one or more special circumstances, "authorizes a maximum penalty of death only in a formal sense." (*Ring*, *supra*, 530 U.S. at 604.) Section 190, subd. (a) provides that the punishment for first degree murder is 25 years to life, life without possibility of parole ("LWOP"), or death; the penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4 and 190.5."

Even where the jury finds a special circumstance true under section 190.2, a death verdict is not an available option unless the jury makes *further* findings that one or more aggravating circumstances exist, *and* that the aggravating circumstances substantially outweigh the mitigating circumstances. (Section 190.3; CALJIC 8.88 (7th ed.,

2003).) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt." (*Ring*, 530 U.S. at 604.) *Blakely*, made it clear that, as Justice Breyer complained in dissent, " a jury must find, not only the facts that make up the crime of which the offender is charged, but also all (punishment-increasing) facts about the way in which the offender carried out that crime." (*Blakely*, *supra*, 124 S.Ct. at 2551; emphasis in original.)

The issue of the Sixth Amendment's applicability hinges on whether as a practical matter, the sentencer must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. In California, as in Arizona, the answer is "Yes." That, according to *Apprendi* and *Cunningham*, is the end of the inquiry as far as the Sixth Amendment's applicability is concerned. California's failure to require the requisite fact finding in the penalty phase to be found unanimously and beyond a reasonable doubt violates the United States Constitution.

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2. *This Court's interpretation of the capital sentencing provisions in a manner as to preclude intra-case or inter-case proportionality review in either the trial court or this court results in arbitrary, discriminatory, or disproportionate impositions of the death penalty.*

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review — a procedural safeguard this Court has not adopted. *In Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, noted the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the appropriateness of the death penalty, either intra-case or

inter-case proportionality review. (See *People v. Fierro, supra,* 1 Ca1.4th at p. 253.) Those common sense comparisons are essential to an equitable and constitutional capital sentencing mechanism, and are lacking in California.

D. *California's Use Of The Death Penalty As A Regular Form Of Punishment Falls Short Of International Norms Of Humanity And Decency And Violates The Eighth And Fourteenth Amendments; Imposition Of The Death Penalty Now Violates The Eighth And Fourteenth Amendments To The United States Constitution.*

The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. (*Soering v. United Kingdom*: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking (1990) 16 Crim. and Civ. Confinement 339,366.) The non use of the death penalty, or its limitation to "exceptional crimes such as treason" — as opposed to its use as regular punishment — is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky* (1989) 492 U.S. 361, 389 [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist

Countries" (Nov. 24, 2006), on Amnesty International website [www.anmesty.org].)

Although California is not bound by the laws of any other sovereignty in the administration of its criminal justice system, both the federal and state governments have relied on the customs and practices of other parts of the world as relevant reference points. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, ' subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.' " (1 Kent 's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. ofFi e ld, J.]; *Hilton v. Guyot, supra,* 159 U.S. at p. 227.)

In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved." *(Atkins v. Virginia, supra,* 536 U.S. at p. 316, fu. 21, citing the Brief for The European Union as Amicus Curiae.)

Thus, assuming arguendo capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes — as opposed to extraordinary punishment for extraordinary crimes — is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Atkins v. Virginia, supra,* 536 U.S. at p. 316.)

Categories of crimes that particularly warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. (See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes.") Categories of criminals that warrant such a comparison include persons suffering from mental illness or developmental disabilities. *(Cf. Ford v. Wainwright* (1986) 477 U.S. 399; *Atkins v. Virginia, supra.)* Thus, the very broad death scheme in California and death's use as regular punishment violate both international law and the Eighth and Fourteenth Amendments. Appellant's death sentence must be set aside.

Conclusion

Some trials are more fair than others, and some aren't fair at all. That appellant was a bad guy who upset the judge and prosecutor explains why he didn't get a fair trial. But the purpose of our state and federal constitutions is to make sure that even disruptive defendants receive a fair trial — especially when they are on trial for their life.

What's at stake here is nothing less than a man's life and the credibility of our justice system.

The judgment must be reversed and a new trial granted.

Date: 6/13/16

Respectfully submitted,

Patrick Morgan Ford
Attorney for Appellant

Certificate of Compliance

I, Patrick Morgan Ford, certify that the within brief consists of 47,685 words, as determined by the word count feature of the program used to produce the brief.

Dated: 6/13/16

PATRICK MORGAN FORD

People v. Michael Flinner CASE No. S123813

DECLARATION OF SERVICE

I, Esther F. Rowe, say: I am a citizen of the United States, over 18 years of age, and employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject case. My business address is 1901 First Avenue, Suite 400, San Diego, CA 92101. I served a *Appellant's Opening Brief*, of which a true and correct copy of the document filed in the case is affixed, by placing a copy thereof in a separate envelope for each addressee respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Executed on June 14, 2012, at San Diego, California.

Esther F. Rowe