IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. JAMES MICHAEL FAYED, Defendant/Appellant.	SUPREME COURT CASE NUMBER: S198132 TRIAL CASE NUMBER: BA346352

AUTOMATIC APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT, STATE OF CALIFORNIA, COUNTY OF LOS ANGELES, CLARA SHORTRIDGE FOLTZ CRIMINAL JUSTICE CENTER, THE HONORABLE KATHLEEN KENNEDY, DEPARTMENT 109

APPELLANT'S OPENING BRIEF

Mark J. Werksman, Esq. (State Bar No.: 120767)
Kelly C. Quinn, Esq. (State Bar No.: 197697)
LAW OFFICES OF MARK J. WERKSMAN
888 W. Sixth Street, Fourth Floor
Los Angeles, California 90017
Tel: (213) 688-0460 / Fax: (213) 624-1942

Attorneys for Appellant
JAMES MICHAEL FAYED

DEATH PENALTY

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

UNITED STATES SUPREME COURT CASES

FEDERAL CASES

CALIFORNIA CASES

OUT OF STATE CASES

UNITED STATES AND STATE CONSTITUTIONS

FEDERAL RULES AND CODES

CALIFORNIA STATUTES AND CODES

CALIFORNIA RULES OF COURT

OUT OF STATE STATUTES

JURY INSTRUCTIONS

SECONDARY SOURCES

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff/Respondent, vs. JAMES MICHAEL FAYED, Defendant/Appellant.	SUPREME COURT CASE NUMBER: S198132 TRIAL CASE NUMBER: BA346352

TO THE HONORABLE PRESIDING JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

I.
STATEMENT OF APPEALABILITY

This is an automatic appeal from a final judgment following trial and a judgment of death which disposes of all issues between the parties and is authorized by Penal Code section 1239(b), and the California Rules of Court, rule 8.600(a).

II.
INTRODUCTION

On July 28, 2008, Pamela Fayed was stabbed to death in a parking structure in Century City, California. Shortly thereafter, the Los Angeles Police Department ("LAPD") determined that: 1) the vehicle used by the killer had been rented by Goldfinger, a company owned by Appellant and

his wife Pamela Fayed; 2) the murder suspect was an individual with a dark complexion; and 3) Pamela Fayed and Appellant were going through a divorce.

Later that evening, after learning of his wife's death, Appellant went with his attorneys to the sheriff's office in Ventura, California to request a welfare check on his young daughter who lived with Pamela Fayed. Although Appellant did not remotely resemble the eyewitness identification of the killer, officers immediately handcuffed him, seized his cell phone, and transported him approximately fifty miles to West Los Angeles. Appellant's attorneys followed the officers to the West Los Angeles police station; yet, the officers refused to let the attorneys into the interrogation room. Despite this tactic, Appellant repeatedly invoked his right to remain silent and his right to counsel. Appellant made no statement, and officers released him the next day.

Frustrated by Appellant's invocation of his rights, and the lack of evidence connecting Appellant to the crime, officers from LAPD embarked on a plan to have Appellant held without bail in federal detention. Officers learned that agents from the Federal Bureau of Investigations ("FBI") had been conducting an investigation into Goldfinger for minor licensing violations. Members of the LAPD then met with an Assistant United States Attorney ("AUSA"); immediately thereafter, FBI agents arrested Appellant on the minor federal charges. The AUSA then successfully —but unlawfully— convinced a federal judge to have Appellant detained in federal custody without bail based solely on the state murder case.

Although Appellant had invoked his right to counsel and right to remain silent on both the federal and state cases, officers equipped Appellant's cellmate, Shawn Smith, with a recording device and directed him to question Appellant about the state murder case. After obtaining

Appellant's statement, the federal government immediately dismissed the federal licensing case.

The investigation and prosecution of the instant case resulted in an astonishing number of errors and instances of misconduct, which, individually and collectively, served to undermine the fair administration of justice, rendering Appellant's case a sheer spectacle. Lost within this spectacle was the fragility and feebleness of the government's case. Despite the extensive evidence introduced at trial —including technologically complex cell phone records, and significant and convoluted testimony regarding the unrelated federal charge and a family law case— Appellant's conviction was ultimately based on nothing more than the deviously recorded statement. To top it off, serious juror misconduct gravely undermined the confidence in the verdict. An outcome based on such decrepit and unfirm grounds cannot stand; thus, Appellant respectfully appeals to this Court for review.

III.
STATEMENT OF THE CASE

On or about September 15, 2008, Appellant and co-defendant Jose Moya were charged via Complaint with one count of Murder, in violation of Penal Code section 187, with special circumstances allegations under Penal Code section 190.2(a)(1), Murder for Financial Gain, and section 190.2(a)(15), Lying in Wait. (1CT 000010.) Appellant was also charged in Count Two with one count of Conspiracy, in violation of Penal Code section 182(a)(1). (1CT 000011.)

On January 29, 2009, Appellant filed Common Law Motion to Suppress Statements; Notice of Motion and Motion to Suppress Statements Pursuant to Penal Code Section 1538.5. (2CT 000273-000311.) On April

16, 2009, the lower court held a hearing on the Motion to Suppress Statements, and the lower court denied the motion. (4CT 000768-000769.)

On October 9, 2009, Appellant filed Notice of Motion and Motion to Traverse Affidavit; Motion to Suppress Evidence Obtained in Violation of Wiretap Provisions; and Motion to Dismiss for Violations of Due Process. (4CT 000851-000865.) On June 10, 2010, the lower court held a hearing and denied the motion. (9CT 002132-002132A.)

On October 9, 2009, Appellant filed Notice of Motion and Motion to Suppress Evidence Pursuant to Penal Code section 1538.5. (4CT 000944.) On June 10, 2010, the lower court held a hearing and denied the motion. (9CT 002132-2134.)

On October 9, 2009, Appellant filed Notice of Motion; Motion to Quash Warrant. (4CT 000901.) On June 10, 2010, the lower court heard and denied the motion. (9CT 002132-2134.)

On, January 25, 2010, a preliminary hearing was held in Los Angeles Superior Court, Department 109, in front of the Honorable Kathleen Kennedy, and Appellant was held to answer. (7CT 001773-001774.) On or about May 7, 2010, Appellant filed Notice of Motion; Motion to Dismiss pursuant to Penal Code section 995. (8CT 001798.) On July 27, 2010, Appellant's Motion to Dismiss pursuant to Penal Code section 995 was heard in the Los Angeles Superior Court, Department 110, in front of the Honorable Lance Ito, and the court took the matter under submission. (9CT 002160.) On August 2, 2010, the court denied the motion. (9CT 002168.) On August 5, 2010, Appellant filed a petition for writ to the Court of Appeal, Second Appellate District, Division Seven. (Supp.1CT 000001.) On August 12, 2010, the Court of Appeal denied the petition.

On August 13, 2010, Respondent filed an Indictment against alleged co-conspirators Gabriel Marquez and Steven Simmons. (6CT 002509.) On

September 8, 2010, Respondent filed Notice of Motion; Motion for Joinder of Defendants. (10CT 002532.) On October 22, 2010, Appellant filed Opposition to Government's Motion for Joinder. (10CT 002549.) On November 19, 2010, Appellant filed Notice of Motion; Motion to Sever Defendants Fayed and Moya. (10CT 002582.) On February 28, 2011, the lower court severed Appellant, and he proceeded to trial alone. (1RT 280.)

On February 8, 2011, the government decided that it would seek death as to Appellant only. (12CT 003184-003185.) Also, on February 8, 2011, Appellant filed Notice of Motion; Motion in Limine to Exclude Defendant James Michael Fayed's Statements or, in the Alternative, to Redact the Statement. (11CT 002727.) On April 18, 2011, the lower court heard and denied Appellant's motion. (13CT 003382-003383.)

On February 8, 2011, Appellant filed Motion In Limine to Exclude any Reference to the Federal Indictment Against Mr. Fayed or Underlying Facts of the Indictment or Investigation. (12CT 003156.) On April 21, 2011, the lower court heard and denied Appellant's motion. (13CT 003422.)

On March 22, 2011, Respondent filed Points and Authorities in Support of Admissibility of Other Crimes Pursuant to Evidence Code section 1101(b). (13CT 003223.) On April 11, 2011, Appellant filed Opposition to People's Points and Authorities in Support of Admissibility of Other Crimes Pursuant to Evidence Code section 1101(b). (13CT 003283.) On April 18, 2011, the lower court heard the motion and excluded the evidence. (3RT 298-300.)

On March 22, 2011, Respondent filed People's Statement of Factors in Aggravation Under Penal Code section 190.3. (13CT 003270A.)

On April 15, 2011, Appellant filed Defendant James Fayed's Motion to Admit Evidence of Third Party Culpability. (13CT 003361.) On April

18, 2011, Appellant's Motion to Admit Evidence of Third Party Culpability was argued; Respondent had no objection, and the evidence was allowed in. (3RT 290-298.)

On April 20, 2011, Appellant filed Motion in Limine to Exclude Any Witness Testimony Concerning Pam Fayed's Statements that She Received Threats from, or was Afraid of, Mr. Fayed. (13CT 003384.) On May 4, 2011, the lower court granted Appellant's motion and excluded the testimony. (6RT 962; see also 13CT 003482.)

On April 20, 2011, Appellant filed a Motion in Limine to Include Statements Made by Mary Mercedes. (13CT 003395.) On April 28, 2011, prior to the start of trial, Mary Mercedes was called to the stand and refused to answer questions. (4RT 458:18-20.) The lower court found that the witness was invoking her Fifth Amendment rights and declared her unavailable. (4RT 458:21-26, 459:3-5.)

On April 21, 2011, Respondent filed Motion to Exclude Evidence of Defendant's Prescription Medication and Testimony of Treating Physicians. (13CT 003405.) On April 21, 2011, the lower court heard and denied the motion. (13CT 003422.)

On May 3, 2011, the guilt phase of the trial commenced in Department 109 of the Superior Court of Los Angeles, Clara Shortridge Foltz Criminal Justice Center. (13CT 003476-003477.) On May 11, 2011, Appellant filed Defendant's Proposed Jury Instructions. (14CT 003521.) On May 13, 2011, the lower court heard arguments concerning jury instructions. (14CT 003581.) On May 13, 2011, Appellant made a Motion pursuant to Penal Code section 1118.1, which the lower court denied. (14CT 003580.)

On May 17, 2011, the jury began deliberations. (14CT 003584.) On May 19, 2011, the jury returned the verdict of guilty on one count of

murder in the first degree, and found true the special circumstances of financial gain and lying-in-wait; and one count of conspiracy. (14CT 003630-003633.) On May 20, 2011, the penalty phase commenced. (14CT 003634.) On May 31, 2011, the jury fixed the penalty as death by execution. (14CT 003705.)

On September 12, 2011, Appellant filed Defendant James Fayed's Motion for Modification of Verdict Pursuant to Penal Code section 190.4; Memorandum of Points and Authorities. (14CT 003730.) On November 16, 2011, Respondent filed People's Opposition to Defendant Fayed's Motion to Modify the Verdict. (15CT 003987.) On November 17, 2011, the lower court heard and denied the motion. (14RT 2908-2909.)

On September 12, 2011, Appellant filed Motion for a New Trial. (14CT 003738.) On November 17, 2011, the lower court heard and denied the Motion for New Trial. (30CT 008263-008264.)

IV.
STATEMENT OF FACTS

The relevant facts from the pretrial motions and a summary of the trial are set forth herein.

A. FACTS FROM PRETRIAL MOTIONS AND HEARINGS

1. FACTS RELEVANT TO APPELLANT'S STATEMENT

Throughout this case, several challenges were made concerning the admission of the conversation between Appellant and Shawn Smith, including: 1) a motion to exclude the statement before the preliminary hearing; 2) an oral motion to exclude at the preliminary hearing; 3) an argument in the Motion to Dismiss pursuant to Penal Code section 995; 4) a writ to the Court of Appeal of the denial of the Motion to Dismiss pursuant

to Penal Code section 995; 5) a motion in limine before trial; and 6) an argument in the New Trial Motion. (2CT 000273; 6CT 001491; 8CT 001798; 13CT 003311; 14CT 003738.)

The primary argument for exclusion of the statement was that it was obtained in violation of Appellant's Fourth, Fifth, Sixth, and Fourteenth Amendment rights. (2CT 000273; 6CT 001491; 8CT 001798; 13CT 003311; 14CT 003738.) As set forth fully below, Appellant had invoked his right to remain silent and right to an attorney when he was arrested on the state murder case.[1] After Appellant was released on the state case, LAPD and the United States Attorney's Office ("USAO") worked together to have Appellant held without bail in federal detention based on the state murder allegations. (2CT 000429-000430.) LAPD then used an informant to question Appellant. (11CT 002744.)

The Motion in Limine included an argument that, even if the statement were admitted, it should be redacted. (See 11CT 002727.) The New Trial Motion added an argument that the tape violated *Crawford* and hearsay rules because the government failed to call Shawn Smith at trial. (11CT 002727; 14CT 003738; *Crawford v. Washington* (2004) 541 U.S. 36.) The facts forming the basis for all exclusion arguments are set forth below.

* * *

[1] As discussed below, there was discrepancy as to whether Appellant was detained, as noted in the police reports, or arrested, as the officers testified at the pretrial hearing on the Motion to Suppress Appellant's phone. (4CT 000952; 2CT 000015:21-23.) Either way, Appellant was "in custody" for purposes of *Miranda* when he was handcuffed and driven from Ventura to West Los Angeles. (2RT 19:26-28, 20:1-6.)

a. FACTS CONCERNING APPELLANT'S FEDERAL CASE

On February 26, 2008, an indictment was filed by the federal government against Appellant and his business, Goldfinger, alleging a single violation of 18 U.S.C. section 1960, Operating an Unlicensed Money Transmitting Business.[2] (2CT 000313.) The indictment was sealed while the government continued its investigation. (2CT 000316.) The government made no effort to obtain an arrest warrant for Appellant or to seek his surrender or cooperation.

b. FACTS CONCERNING THE MURDER INVESTIGATION AND APPELLANT'S INVOCATION OF HIS CONSTITUTIONAL RIGHTS

On July 28, 2008, Appellant and his estranged wife, Pamela Fayed, attended a pre-arranged meeting with their respective attorneys to discuss the ongoing federal investigation into the Goldfinger business. (4CT 000951.) The meeting was held at Appellant's former attorney's office, located at 1875 Century Park East in Century City, California. (4CT 000951.) The meeting lasted from 3:30 p.m. until approximately 6:30 p.m. (4CT 000951.) At the conclusion of the meeting, Pamela Fayed returned to her car, where she was stabbed by a male suspect. (4CT 000951.) Pamela Fayed was transported to Ronald Reagan U.C.L.A. Hospital, where she was pronounced dead. (4CT 000951.)

After learning of his wife's murder, Appellant immediately became concerned about the well-being of his nine-year-old daughter, Jeanette, who resided with Pamela Fayed, in Camarillo, California. Throughout that day

---

[2] Appellant is the owner and founder of Goldfinger Coin & Bullion, Inc., an Internet company that provides money and precious metal transfer services for a fee. (6RT 1052:5-9, 1148:12-25.)

and into the night, Appellant tried in vain to locate his daughter. Finally, in the early morning hours of July 29, 2008, Appellant and his attorneys, Gary Lincenberg and John Rubiner, contacted the Ventura County Sheriff's Office Station, asking the police to conduct a welfare check. (4CT 000952.) The officers requested that Appellant come into the station. The Ventura Sheriff's Department then contacted LAPD Detectives Pelletier and Williams and advised them that Appellant was on his way to the station. (4CT 000952.)

When Appellant arrived at the Ventura County Sheriff's Station, he was immediately handcuffed and his cell phone was seized. (4CT 000952.) LAPD Detective Pelletier then put Appellant in a police car and transported him to the West Los Angeles Police Station for questioning. (4CT 000952.) Appellant's attorneys followed the officers to the West Los Angeles Station. (4CT 000952.) Appellant arrived at the West Los Angeles station at approximately 3:30 a.m. and was advised of his constitutional rights. (4CT 000952.) LAPD Detectives Porsche and Spear attempted to interview Appellant, but Appellant informed them that he would not answer questions without his attorneys being present. (2RT 27:25-25, 28:1-8; 8CT 0002030.) Although Appellant's attorneys arrived at the West Los Angeles station shortly after Appellant, officers refused to allow them into the interrogation room. (2RT 21:27-28, 28:1, 29:3-5, 52:13-15; 4CT 000952.) Eventually, Appellant was released at approximately 6:00 a.m. on July 29, 2008, without charges being filed. (4CT 000952.)

* * *

c. FACTS CONCERNING THE FEDERAL DETENTION BASED ON STATE CHARGES

Later that morning of July 29, 2008, the FBI informed LAPD that Appellant had a sealed federal indictment against him for a white collar licensing crime. (4CT 000952.) On August 1, 2008, detectives from the LAPD met with AUSA Mark Aveis. (4CT 000953.) After that discussion, the FBI arrested Appellant on the Operating an Unlicensed Money Transmitting Business charge. (CT 000321-000328.) On August 4, 2008, the government filed a Notice of Request for Detention, asking that Appellant be detained in federal custody without bail. (3CT 000323.) That same day, a hearing was held before Federal Magistrate Judge Ralph Zarefsky. (3CT 000330-000400.)

The government called as a witness FBI Agent Timothy Swec, who testified that he had no knowledge of the federal investigation and was in court only to transport Appellant to the detention hearing. Swec testified that a few hours before the hearing, he was approached by two LAPD officers. (2CT 000353.) According to Swec, the LAPD officers gave him information about the state murder investigation; Agent Swec had no independent knowledge of any of the facts and testified only to what LAPD officers told him.[3] (2CT 000359.) The government then argued that based on Agent Swec's testimony, there was reason to believe that Appellant had killed Pamela Fayed, and thus, he should be detained without bail. (2CT 000368-000370.) Magistrate Judge Zarefsky found that the federal licensing case was inapposite to the state murder case and concluded that Appellant could not be detained without bail on the federal licensing charge. (2CT 000369, 000389-000391.)

---

[3] The LAPD officers were present at the detention hearing but did not testify. (2CT 000354.)

On August 6, 2008, the government filed an Application for Review, and a hearing was heard the same day before Judge Otis D. Wright II. (2CT 000402-000434.) The government again argued that Appellant should be detained without bail based on the facts of the instant state murder case. (2CT 000429-000430.) Appellant argued that the then uncharged state murder case was unrelated to the federal charge for licensing violations, and Appellant could not be held in federal custody based on the uncharged state case. (2CT 000431.)

The federal court admitted, "I'm not focusing on the license (the federal charge). I could care less about the fact that he was operating a business without a license." (2CT 000415-000416.) The court noted that if it were considering only the federal charges, Appellant would "be home by now, and I think you're aware of that." (2CT 000416.) However, the federal court found that Appellant should be detained without bail, reasoning that the state murder case justified detention. (2CT 000432.)

d. FACTS CONCERNING THE STATEMENT ELICITED FROM APPELLANT

On August 27, 2008, while Appellant was being detained in federal custody without bail based on the instant state murder charges, AUSA Mark Aveis informed the LAPD that Appellant's cell mate, Shawn Smith, had information regarding the murder of Pamela Fayed.[4] (CT 002593.) On September 9, 2008, LAPD Detectives Meyers and Porche met with Smith. (11CT 002744.)

The next day, the LAPD and FBI wired Smith for sound and sent him back to the cell he shared with Appellant. (11CT 002744.) Smith then

[4] Mr. Smith was a purported shot-caller in prison and enjoyed a significant degree of influence on the workings inside the jail. (11CT 002744.)

began questioning Appellant about the murder, saying, "That was the stupidest motherfuckin thing I -- you didn't have anything to do with that, did you? [¶] . . . [¶] Did you tell him to take the Chevy?," and Appellant responded "fuck no." (8CT 001872.) Smith further prodded Appellant, seeking details of the murder: "And what do they do? They take the family station wagon under a camera." (8CT 001875:12-13.) Unsure, Appellant merely responded, "I -- I don't know. I mean, that's what they say has happened." (8CT 001875:14-15.) Smith later asks Appellant "If you had it to do over again, would you do it", and Appellant responds "this way?" (8CT 002003.) Smith states "Well, no, not this way but, you know, dump the funckin' cunt," and Appellant responds affirmatively. (*Id.*) Smith says "Well, fuck it. Then you did the right thing, bro," and Appellant responds "Absolutely. She was destroying my daughter. She never took care of her. She was poisoning me. . . ." (8CT 002004:1-5.) As set forth fully below, a significant portion of the lengthy transcript is Smith trying to convince Appellant to hire a hitman to murder Appellant's co-defendants. (8CT 001868:13-18, 001870:23-25, 001871:1-10.)

Smith later asked to be removed from his cell, at which time he was met by LAPD and FBI, who removed the wire. (11CT 002744.) The following day, September 11, 2008, Moya was arrested and charged with the murder of Pamela Fayed. (11CT 002744.) Four days later, on September 15, 2008, a Felony Complaint for Arrest Warrant was issued against Appellant for murder and conspiracy. (1CT 000010.) *That same day*, AUSA Mark Aveis dismissed the federal indictment against Appellant, and Appellant was released into the custody of the LAPD. (2CT 000428-000439.)

* * *

e. HEARINGS ON THE MOTIONS CONCERNING APPELLANT'S STATEMENT

On January 29, 2009, prior to the preliminary hearing, Appellant a motion to suppress his statement. On April 16, 2009, the lower court heard the Motion. (1CT 000074.) Appellant's counsel argued that the government sent "an informant in to interrogate a man about a case where he has already invoked the right to remain silent, where he is being questioned by the agent of the state, Shawn Smith, and where the state is basically getting evidence they couldn't otherwise get, because the federal government is handing it to them on a silver platter." (1CT 000080:4-14.) Counsel further argued "the law already contemplates that in a case like this where one sovereign, the federal government, uses another sovereign or acts as a pawn for another sovereign, then it can implicate and violate a defendant's 4th, 5th and 6th Amendment rights." (1CT 000076:1-5.) Appellant argued that as soon as they obtained their statement, the federal government dismissed the Indictment, stating:

> In fact, your honor, I was there. I was in Judge Wright's court when the Assistant United States Attorney walked in and said 'Judge, we dismiss. There are detectives here from L.A.P.D. They filed a murder complaint, and they are going to take this man into custody.' And they did, right then and there. It was a setup, your honor, and in the face of this type of set up where one sovereign acts as a sham, tool, pawn . . . of the other you can't ignore the underlying 4th, 5th, or 6th Amendment violation . . . .

(1CT 000079:26-28, 000080:1-8.)

The lower court denied the Motion. (1CT 000089:21.) As to Appellant's argument that the ruse was improper, the lower court noted that Appellant was "stupid enough to fall for it." (1CT 000088:3-5.) The lower court also asserted that in order to suppress the statement there had to be

some kind of coercion and noted that no one was threatening Appellant. (1CT 000088:7-9.) Appellant asked to address the issue of whether coercion was necessary, but the lower court ruled, "I made my ruling. No more." (1CT 000089:24-26.) Counsel for Appellant again asked to speak, and the lower court responded, "No." (1CT 000089:28.) On January 22, 2010, Appellant orally renewed the motion at the preliminary hearing, which was denied. (6CT 001395.)

At the subsequent hearing on the Motion to Dismiss pursuant to Penal Code section 995, the Honorable Lance Ito denied the Motion. (2RT 155:23-24.) The court noted, "[A]lthough it's an interesting issue, I'm going to find that the magistrate exercised her discretion in an appropriate manner. So I'm going to deny the motion." (2RT 155:27-29, 156:1-2.) On August 12, 2010, the Court of Appeal denied Appellant's request to issue a writ. (10CT 002328.)

Before trial, on February 8, 2011, Appellant filed his Motion in Limine to Exclude Defendant James Michael Fayed's Statements or, in the Alternative, to Redact the Statement. (11CT 002727.) In addition to the arguments noted above, Appellant argued that if the court were going to allow the statement in trial, the statement should be redacted to exclude portions that were irrelevant and prejudicial. (11CT 002728.) On April 18, 2011, the lower court discussed Appellant's Motion in Limine, stating, "Now with regard to the defendant's statements, it seems like -- how many times do we have to go up this mountain?" (3RT 300:22-24.) Appellant noted that he had to bring the Motion in Limine concerning admission of the tape at trial, as opposed to the preliminary hearing, and added that the defense was newly seeking to redact Smith and Appellant's discussion of killing co-defendant Moya. (3RT 301:5-11.) Appellant's counsel argued that Smith, rather than Appellant, conjured the idea of killing Moya, and

Smith induced Appellant to talk with him regarding those facts.[5] (3RT 301:14-19.) Appellant also argued that the statements were extremely prejudicial and irrelevant. (3RT 302:1-7.) The lower court ruled that the statement was admissible and should not be redacted, reasoning that "anything that tends to show that the defendant is guilty is prejudicial to the defense. I mean, that's not the test . . . It tends to show the defendant is guilty . . . So I am not redacting that." (3RT 303:17-28.) Then, at the trial, Respondent decided not to call Shawn Smith as a witness, but instead introduced the tape containing his statements. (1RT 1800:4-8, 1847-1861.)

On September 12, 2011, Appellant filed Notice of Motion; Motion for a New Trial. (14CT 003746.) In addition to the arguments concerning the statements, noted above, Appellant included an argument that because Respondent chose not to call Smith, the tape of the conversation between Smith and Appellant was admitted in violation of Appellant's constitutional rights, *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177], and codified state hearsay rules. (14CT 003751.) On November 17, 2011, the lower court heard argument. (14RT 2878.) The court denied the motion, finding that Shawn Smith's statements "were not offered for the truth of the matter."[6] (14RT 2889:16-26.)

* * *

---

[5] On the tape, it is Shawn Smith who urges and entices Appellant to take steps to murder Moya, including telling Appellant, "Don't tell me that mother fucker (referring to Moya) ain't going to fuckin' do you fuckin' wrong. That's a loose end that needs to be snipped. Dude, what do you think?" (See 3CT 000475-000477.)

[6] As set forth below, Appellant contends that Respondent repeatedly argued the truth and veracity of Smith's statement in closing argument.

2. RELEVANT FACTS FROM THE MOTION TO SUPPRESS EVIDENCE DERIVING FROM THE SEARCH AND SEIZURE OF APPELLANT'S CELL PHONE

On, January 22, 2010, a hearing was held on the motion to Suppress evidence derived from the search and seizure of Appellant's cell phone. (6CT 001386.) At that hearing, Respondent called several officers: Pelletier, Spear, Porche, Abdul[7], and FBI Agents Easter and Jensen.[8] The evidence presented at the hearing showed that when Appellant arrived at the Camarillo station, officer Pelletier immediately handcuffed Appellant and took his phone. (See 2RT 19:28, 20:13.) The testimony concerning Appellant's status at the time of the seizure was contradictory. At issue was whether Appellant was "detained" or "arrested" at the time of the search. Pelletier testified that went to the Camarillo station and immediately placed Appellant under arrest, handcuffed him, and transported him to West Los Angeles.[9] (2RT 18:21-23, 19:5-9.) Pelletier was questioned about the police reports in which other LAPD officers stated that Pelletier obtained the phone when he "detained Fayed and conducted a pat down search." (4CT 000952; 2RT 39-41.) Pelletier denied that assertion but conceded that

---

[7] Abdul testified that he spoke with Pamela Fayed's adult daughter, Desiree Goudie, who gave him Pamela Fayed's phone. (2RT 81:20-26.) Abdul downloaded and printed out the information from that phone, including Appellant's phone number. (2RT 81:27-28, 82:1,15-24.)

[8] Agent Jensen testified that he went to the offices of Goldfinger on August 1, 2008. (2RT 79:2-8.) While there, he made contact with Scott Layton and Robert Brooks, and they provided him two phone numbers: 805-797-4583 and 805-797-0908. (2RT 79:14-15,27, 80:3.)

[9] Pelletier admitted that Appellant did not match the physical description of the suspected murderer in any of the surveillance footage. (2RT 34:1-13.)

he did not believe he had a fileable case at the point Appellant was taken to the West Los Angeles station. (2RT 50:5-8.)

Pelletier testified that he arrived at the West Los Angeles police station and placed Appellant's phone on a desk in the detective squad room. (2RT 22:5-6.) Two other detectives, Porche and Spear, then attempted to speak with Appellant. (2RT 22:7-8.) Appellant invoked his constitutional right to remain silent and right to counsel. (2RT 28:1-8.) While Appellant remained in the interview room, Detectives Spear and Porche took the cell phone, "opened it, manipulated it and obtained the phone number from that cell phone." (2RT 53:10-14, 57:17-19.)

There were significant disparities about what happened to the phone after the search. Pelletier claims that at the conclusion of the interview, Appellant's phone was returned to him. (2RT 23:13-15, 24:23-26.) Contrary to Pellettier's testimony, Detective Spear testified that after Appellant was released, Appellant's cell phone remained in police custody, and was handed to Appellant when officers went to Appellant's home to serve a search warrant. (2RT 54:14-18, 61:6-7, 62:1-3.) However, Porche testified that he surreptitiously left the phone on the counter in the living room of the Moorpark Ranch during the service of the second search warrant. (2RT 69:21-28, 70:1-2.) Porche testified that the phone was included in a wiretap, and he wanted Appellant to use the phone so that the police could record his conversations. (2RT 70:16-21.) These discrepancies caused the lower court to note the cell phone has an "interesting history." (2RT 101:27-28, 102:1-4.)

The court also raised serious concerns about the lack of evidence the police had when they arrested Appellant, and their decision to search the phone. (See 2RT 98:22-27, 99:10-12.) However, the court found that

inevitable discovery applied and ruled that the evidence was admissible. (2RT 102:5-22.)

3. RELEVANT FACTS FROM THE MOTION TO QUASH WARRANT

On or about July 29, 2008, officers sought and obtained a search warrant for Appellant's property at 9160 and 9166 Happy Camp Canyon Road. (6CT 001337-001342.) This search warrant was executed by the LAPD, including over thirty heavily armed SWAT officers. (6CT 001384.[10]) Appellant did not move to suppress the items seized during that search.

On or about July 31, 2008, officers requested another search warrant for Appellant's property. (4CT 000917.) To support that warrant, the affiant made an exact copy of the July 29, 2008 affidavit. The affidavit then added the following amendment:

> Based on information obtained during the interview of the victim's daughter, Desiree Fayed, and evidence collected from the suspect's vehicle, License #6CLW5345, your affiant is requesting to amend the affidavit. Desiree Fayed stated that her mother kept records and documentation that incriminates James Fayed on her personal computer. Desiree Fayed advised that the computers that her mother used are in her father's residence and contain valuable information. The vehicle used in the murder was recovered and processed for DNA. During the processing of the suspect's vehicle, physical evidence was collected by LAPD's Scientific Division.

(4CT 000923.) Based only on this information, the affiant asked to search Appellant's "personal computers, laptop computers, hard drives, electronic

[10] Although the report is not dated, it appears to be the SWAT warrant assignment sheet for this initial search.

equipment used to store files or written documentation, thumb drives, locked safes, secured lock boxes, authorization of forced entry into locked safes, financial records, soil samples from outside the residence. . . ." (4CT 000923.) On June 10, 2010, the lower court held a hearing and denied Appellant's motion. (2RT 123:17.)

4. RELEVANT FACTS FROM THE MOTION TO TRAVERSE AFFIDAVIT IN SUPPORT OF SEARCH WARRANT

On or about September 10, 2008, Detective Salaam Abdul swore an affidavit to again search Appellant's home on Happy Camp Road. (5CT 001178.) In the affidavit, Detective Abdul summarized information obtained by the police, including that,

> On August 29, 2008, at 23:16 hours a telephone conversation was intercepted between Jose Moya and Glen LaPalme. LaPalme was asking Moya questions regarding the SUV that was used in the murder of Pamela Fayed. LaPalme asked Moya how the vehicle got back on the ranch after the murder. Moya answered he did not know. LaPalme told Moya that there was no doubt in his mind that the LAPD had the SUV and was forensically checking it for hair and skin. LaPalme also told Moya that there were people who were using the vehicle, so you're going to find everybody's hair and skin there. Moya said right. LaPalme went on to say, but their [sic] still trying, I think their [sic] also looking, LaPalme was interrupted by Moya who said 'Except for Pam.' LaPalme was puzzled and stated, I beg your pardon. Moya then said, 'Except for Pamela.' LaPalme then told Moya he did not hear what he said. Moya repeated, 'No, except for Pam's, it wouldn't be in there, it shouldn't be in there.'

(5CT 001185.)

The affiant then averred that "[i]n a recorded conversation with Glen LaPalme, regarding possible forensic evidence recovered from the Suzuki, Moya makes the statement, 'No, except for Pam's, it wouldn't be in there,

it shouldn't be in there.' This statement in itself proves Moya has knowledge of the murder. Your affiant believes evidence will be recovered from Moya's residence that will link him to the murder of Pamela Fayed." (5CT 001185.) Appellant filed Notice of Motion and Motion to Traverse Affidavit, arguing, *inter alia*, that prior to swearing out the search warrant, LAPD was well aware that Mr. LaPalme was a private investigator working for Appellant and gathering information for the defense. (4CT 000851-000892.) Regardless, LAPD listened in on several of LaPalme's conversations, recorded the communications, included them in the affidavit, and then failed to notify the magistrate that the information was obtained from conversations of Appellant's investigator. (4CT 00851.) On June 10, 2010, the lower court heard and denied the Motion to Traverse. (2RT 114:24-25.)

5. RELEVANT FACTS FROM THE MOTION IN LIMINE TO EXCLUDE FEDERAL INDICTMENT

On February 26, 2008, a federal indictment was filed against Appellant and Goldfinger, alleging a single violation of 18 U.S.C. section 1960, Operating an Unlicensed Money Transmitting Business. (12CT 003174.) The indictment was sealed, and the government made no effort to obtain an arrest warrant for Appellant or seek his surrender.

In seeking to detain Appellant in federal custody (based on the instant state case), the LAPD and the FBI exchanged information about the federal investigation, including that "James Fayed is a level 3 terrorist and is second flagged for airport departure." (12CT 003177.) Further, the FBI disclosed that it had interviewed several witnesses, some of whom gave statements that they believed some investors using Appellant's business were participating in fraudulent activities including Ponzi schemes. (12CT

003181.) As noted above, the federal government dropped the federal licensing case against Appellant. (2CT 000438.)

Appellant filed Notice of Motion in Limine to Exclude Any Reference to the Federal Indictment Against Mr. Fayed or the Underlying Facts of the Indictment or Investigation. (12CT 003156.) The lower court denied the Motion focusing on the fact that it believed that the federal charge went to motive and that the evidence "pales in comparison to the charges in this case." (3RT 325:10-11.) As set forth below, the government referred to this information frequently in the trial. (6RT 989:22-23, 990:1-19.)

6. RELEVANT FACTS CONCERNING TESTIMONY OF PHYSICIANS WHO PRESCRIBED PAIN MEDICATIONS TO APPELLANT IN THE MONTHS LEADING TO THE DEATH OF PAMELA FAYED

Defense counsel raised the issue of introducing two physicians who would provide testimony raising an inference that it was impossible for Appellant to have participated in the murder plot due to his extensive use of pain medication. (3RT 326:19-23, 327:1-6.) Defense counsel argued that this testimony would not be introduced for the purpose of negating intent. (3RT 329:9-10.) Rather, defense counsel argued that the testimony would lead to an inference that Appellant could not physically commit the murder because he was bedridden from the effects of the pain killers. (3RT 329:13-15.)

The lower court found that if the physician testimony encroached on the issue of Appellant's mens rea, the testimony would be admissible. (3RT 336:16-18.) If the testimony did not challenge the intent, but instead was probative of the actus reus, it would be inadmissible. (3RT 336:19-28.) The lower court found that because the physicians' testimonies were not

probative of Appellant's intent, it would not be admissible in the guilt phase of trial. (3RT 337:3-4.)

B. FACTS FROM THE GUILT PHASE

1. THE GOVERNMENT'S CASE

a. TESTIMONY CONCERNING THE BACKGROUND OF APPELLANT AND PAMELA FAYED

At trial, Respondent called witnesses to describe Appellant and Pamela Fayed's relationship and their lives.

i. TESTIMONY OF DESIREE GOUDIE

The government first called Pamela Fayed's daughter, Desiree Goudie, who provided background information on her relationship with Appellant and the role he played in her life. (6RT 1028-1084.) According to Desiree, she first met Appellant when she was about six years old. (6RT 1030:28, 1031:1-4.) Eventually, Appellant and Pamela married and had a daughter, Jeanette Fayed. (6RT 1032:17-19, 1033:8-9,23-27.)

Desiree testified that Appellant and Pamela Fayed started an internet gold trading business. (6RT 1035:14-22, 1043:12-14,26-28.) Appellant was the president of the business and Pamela Fayed "helped out along the way." (6RT 1045:11-12.) Desiree explained that as the business began to grow and become successful, the family became wealthy and were able to live a "comfortable lifestyle." (6RT 1047:21-23, 1048:7-13.) In 2003 or 2004, Desiree's family was able to purchase a home in Camarillo, and a second ranch-style home in Moorpark. (6RT 1049:2-7,17-18.) Joey Moya was hired to help on the ranch, and he lived in a second house on the property. (6RT 1052:11-14,16-23.)

In October of 2007, Appellant and Pamela Fayed began divorce proceedings. (6RT 1056:11-13.) Desiree characterized the relationship between Appellant and Pamela Fayed at the time the divorce began as "distant" and that they were "living separate lives." (6RT 1057:21-25.) As a result, business operations soon became "complicated" and, in October of 2007, Desiree and Pamela Fayed were removed from the company. (6RT 1056:14-15,18-19, 1058:23-27.) At that point, Appellant had moved out of the Camarillo house and had been living on the Moorpark property. (6RT 1059:19-23, 1060:6-11.)

Desiree indicated that she began observing Appellant in physical pain in the beginning of 2006, and when asked whether she observed Appellant take any prescription medications, she answered that she saw him take "a lot of stuff" constantly. (6RT 1071:11-14, 1072:1-8,26-27.) Desiree described Appellant as "very out of it, and almost very drunk" while he was on the medications. (6RT 1072:9-18.) During this time, Appellant was "sleeping for a majority of the time" with his door shut, and was unapproachable and living like a hermit. (6RT 1073:10-18.)

ii. TESTIMONY OF DELILAH URREA

The government next called Delilah Urrea, who testified that she had previously lived in the same condominium complex as Appellant and his family. (6RT 1085:18-19,20-26.) Urrea had a "close, personal relationship" with Pamela Fayed. (6RT 1088:11-14.) Eventually, Pamela Fayed offered Urrea a position with the company as a customer service representative, and Urrea accepted. (6RT 1089:14-24, 1091:8-10.) Urrea testified that between $3 million and $5 million was flowing in or out of the company monthly. (6RT 1093:27-28, 1094:1,13-16.) Urrea stated that Appellant ran the company, that Pamela Fayed would come in a few days a week, and that

Moya was considered the warehouse manager. (6RT 1095:11-12, 1096:8-11, 1097:17-22.) Urrea noted that the warehouse stored large quantities of gold. (6RT 1097:14-16.)

Urrea was aware of Pamela Fayed and Appellant's divorce. (6RT 1100:8-10.) Urrea stated that after Pamela Fayed was served with divorce papers in the fall of 2007, Pamela was no longer allowed at the company. (6RT 1100:25-28.) Urrea revealed that Appellant's reason for banning Pamela Fayed from the company was because Pamela Fayed was accused of embezzling hundreds of thousands of dollars. (6RT 1126:10-13,25-26.)

Urrea testified that "at some point" she was asked to rent a vehicle in the name of Goldfinger. (6RT 1112:17-21.) The car, a red Suzuki SUV, was used by Robert Tokarcik, Appellant's nephew. (6RT 1113:10-12, 1114:5-7.) Approximately, two to three weeks prior to Pamela Fayed's death, Tokarcik stopped using the red Suzuki SUV. (6RT 1114:16-19.) Urrea testified that, to her knowledge, the red Suzuki SUV was not immediately returned to the rental agency, and she saw Moya drive the car a few weeks prior to Pamela Fayed's death. (6RT 1114:20-23,27-28, 1115:1-4.) She did not know who was driving the red Suzuki around the time of Pamela's death. (6RT 1119:17-21.)

iii. TESTIMONY OF CAROL NEVE

Carol Neve testified that she met Pamela Fayed in 1989. (7RT 1312:22-26.) Neve and Pamela Fayed had been neighbors in Orange County, and the two were in frequent contact. (7RT 1313:6-10.)

In 2007 and 2008, Neve was employed by a digital online currency trading business and had familiarity with money transfer licenses. (7RT 1370:4-8,12-20.) Neve was permitted to testify, over defense objection, that she advised Pamela Fayed that her company was at risk, and that she should

get a money transfer license. (7RT 1371:27-28, 1372:24-28.) Neve also testified, over defense objection, that Pamela Fayed intended to obtain the money transmitter licenses. (7RT 1373:17-19.)

iv. TESTIMONY OF MARTY MCCOY

Marty McCoy testified that he had known Pamela Fayed for eleven years. (9RT 1766:5-6.) McCoy and Pamela Fayed developed a close relationship, and Pamela Fayed began working for him in 2000. (9RT 1766:10-19.) When Goldfinger began to become more profitable, Pamela Fayed ended her employment with McCoy. (9RT 1767:5-8.)

On July 4, 2008, McCoy went to a party in Malibu with Pamela Fayed. (9RT 1767:22-24, 1768:1-6.) McCoy testified that the party began at 12:00 p.m. (9RT 1770:22-24.) When the party ended around 9:00 p.m., Pamela Fayed drove McCoy back to his vehicle, which was at her home in Camarillo. (9RT 1769:25-28, 1770:1-9.)

b. TESTIMONY CONCERNING THE DIVORCE PROCEEDINGS

In November of 2007, Pamela Fayed retained Greg Herring to represent her in divorce proceedings. (6RT 1147:21-26.) Herring testified that he needed to determine the amount of assets to be divided between Pamela Fayed and Appellant. (6RT 1153:17-20.) Herring testified that he was "absolutely stonewalled" by "[Appellant] and his attorneys," admitting that he got "some information" but "not nearly everything [he] was looking for." (6RT 1153:21-28, 1154:1-9.)

Pamela Fayed gave Herring a copy of an agreement she made with Appellant in October of 2007. (6RT 1159:10-12.) The agreement provided that Appellant would operate the business while Pamela Fayed would stop working at the company but continue to receive her salary. (6RT

1159:15-21.) Herring testified that under the agreement, Pamela Fayed was to receive $4,000 from the business every two weeks, but Appellant decreased that amount by approximately $1,000 or $2,000 a month. (6RT 1174:3-7,19-18.)

Herring explained that Appellant had accused Pamela Fayed of embezzling $800,000 from the company. (6RT 1161:19-22.) Herring stated that Pamela Fayed had signed a declaration admitting that she made two $400,000 withdrawals. (6RT 1162:3-8,13-16.) She declared that the first transaction was made to take certain legal steps on behalf of the company; however, Herring was unable to recall the purpose of the second $400,000 transaction. (*Id.*)

Eventually, the Goldfinger assets went under the control of a receiver. (6RT 1177:6-11.) Herring testified that the family court set a date of July 29, 2008 to hear motions on the different issues related to the divorce, including Pamela Fyed's motions to obtain $1 million.[11] (6RT 1181:1-12.) Herring explained that he and opposing counsel had a series of deadlines leading up to the hearing on July 29, and that Appellant's counsel had missed a deadline. (6RT 1183:23-28, 1184:4-5,7-9.)

Herring admitted that there was, of course, no certainty that the judge presiding over the July 29, 2008 family law hearing would have found that Pamela Fayed was entitled to the $1 million figure. (6RT 1194:14-20.) Herring also recollected that he received a letter from Appellant's attorney, John Foley, three or four days before the July 29, 2008 scheduled hearing, informing Herring that Appellant intended to shut down and commence liquidation of Goldfinger entities. (6RT 1196:1-4,18-22.) Herring admitted

---

[11] The $1 million figure was comprised of $66,000 per month for prospective and prior child support and alimony, plus $150,000 in legal fees. (6RT 1178:19-25.)

that the decision to liquidate the businesses would have required further hearings. (6RT 1201:21-28.)

c. TESTIMONY CONCERNING THE FEDERAL INVESTIGATION INTO GOLDFINGER

The government presented several witness to discuss the federal investigation and to ascertain what Appellant and Pamela Fayed knew about the investigation.

i. TESTIMONY OF MARK AVEIS

Mark Aveis testified that he is a federal prosecutor. (7RT 1208:8-10; 1209:14-17.) According to Aveis, the USAO began investigating Goldfinger in early 2008. (7RT 1213:18-25.) The FBI and the Internal Revenue Service ("IRS") had a joint investigation of two Ponzi schemes; one called KUM Investments, and the other called Solid Investments. (7RT 1214:23-28.) The government did not believe that Appellant or Goldfinger was involved in the foundation of these schemes; however, records showed that money from these two schemes flowed through Goldfinger. (7RT 1218:17-23, 1219:3-12.)

On February 26, 2008, Aveis filed a sealed indictment against Appellant and Goldfinger for transmitting money without a license. (7RT 1220:3-8, 1224:8-11,19-20; 2CT 000313.) Avis explained that a sealed indictment is not available to the public and is intended to remain secret. (7RT 1224:19-27.) Aveis stated that the purpose of charging Goldfinger and Appellant was because the government wanted to make a deal with Appellant to allow the FBI to place an agent or undercover operative at the business to monitor the flow of money. (7RT 1221:14-23.) Although Aveis admittedly obtained the indictment to pressure Appellant to allow federal

agents to use Goldfinger to establish "a sting operation," Aveis stated that "no contact had been made by the federal government to [Appellant] to ask him to do that." (7RT 1245:1-12.) In fact, Aveis acknowledged that months passed after indictment was issued without anyone approaching Appellant and asking him to assist them in any investigations. (7RT 1264:10-15.)

In May of 2008, Aveis issued a subpoena for accounting records to a forensic accounting firm which had been retained by Pamela Fayed in the divorce case. (7RT 1229:10-19, 1246:14-15.) Thereafter, Aveis was contacted by both Pamela Fayed's attorney and Appellant's attorney concerning the subpoenas.[12] (7RT 1226:1-11,15-21.) Aveis testified that he had a brief conversation with Pamela Fayed's then criminal attorney, David Willingham, in late June of 2008. (7RT 1229:4-14.) Aveis claims that during that conversation Willingham expressed that Pamela Fayed wanted to "come in," which Aveis interpreted to mean that Pamela Fayed wanted to cooperate in the criminal investigation against Appellant. (7RT 1232:24-28, 1233:1, 1234:19-23.) However, Aveis later admitted that Willingham never specifically stated Pamela Fayed wanted to cooperate. (7RT 1251:7-9.) Rather, Willingham only indicated that Pamela Fayed wanted to speak to Aveis. (7RT 1251:10-12.) Aveis did not set up a time for a meeting with Pamela Fayed. (7RT 1250:17-21.) Besides the brief conversation with Willingham, there was no understanding, arrangement, or agreement between the government and Ms. Fayed. (7RT 1259:7-13.)

After reviewing case files, Aveis discovered that Willingham previously worked on the investigation of Goldfinger while formerly

---

[12] Aveis testified that he also spoke with Appellant's lawyer, Gary Lincenberg, and a lawyer representing the accounting firm, John Crouchley, and that neither Lincenberg or Crouchley indicated that they were aware of the sealed indictment. (7RT 1247:3-12, 1248:6-12,21-26.)

serving as a prosecutor for the USAO, and Willingham was removed from the case due to a conflict of interest. (7RT 1251:17-27, 1252:9-15.) Willingham was replaced by Jean Nelson. (7RT 1253:19-27.) Nelson told Aveis that she needed approximately a week or ten days to become acquainted with Pamela Fayed's case, and Pamela Fayed never met or spoke with Aveis during that time. (7RT 1255:1-8.) In fact, Aveis could not recall whether Nelson ever mentioned if Pamela Fayed would be willing to speak with Aveis, and Aveis never asked Nelson whether Pamela Fayed would speak with him. (7RT 1255:16-26, 1256:8-16.)

On cross, Appellant's counsel asked Aveis if he was aware that Appellant's position at the time of the federal investigation was that Goldfinger did not need the federal license, and Aveis testified that he was aware of that defense. (7RT 1261:9-20.) The defense then attempted to ask Aveis a series of questions about Appellant's stated defense on the federal licensing charge, but the lower court excluded the defense evidence. (7RT 1262:6-28, 1263:1-8.)

ii. TESTIMONY OF DAVID WILLINGHAM

David Willingham testified that he is a white-collar criminal defense lawyer who was retained by Pamela Fayed. (7RT 1267:12-17, 1269:3-8, 26-28.) In June of 2008, Willingham was advised that one of the accountants Pamela Fayed had employed in her divorce case had received a subpoena from the USAO. (7RT 1278:22-26, 1300:25-28, 1301:1-2.) Willingham stated that the issuance of the subpoena led him to advise Pamela Fayed that it was possible that either Goldfinger, Pamela Fayed, or Appellant were the subject of an investigation by the USAO, and that they should take steps to determine what was happening. (7RT 1279:11-19.) Willingham was unaware, however, whether any indictment had been filed,

and he also did not believe that Pamela Fayed knew of any indictment. (7RT 1301:20-25, 1302:5-14.) According to Willingham, a joint defense agreement was in place between Pamela Fayed and Appellant stating that the parties had a common interest in jointly defending the investigation, and that they would share information. (7RT 1304:6-14.)

Willingham presented Pamela Fayed with options on how to proceed. (7RT 1278:17-20, 1280:2-8, 1281:5-22.) Willingham testified that he told Pamela Fayed about her options, including: 1) to present the subpoena to Appellant's counsel and deal with the investigation in the context of the joint defense agreement; 2) to call AUSA Aveis and try to ascertain what her "status" was; or 3) do nothing or assert a privilege in response to the subpoena. (7RT 1281:5-23.)

Willingham set out what a "status" means in the context of a federal criminal investigation. The first "status" is a "target," meaning that the USAO is targeting the individual or entity for prosecution. (7RT 1291:24-29, 1292:1-3.) The second "status" is a "subject," meaning an individual or entity is the subject of an investigation and that individual or entity may or may not be prosecuted. (7RT 1292:10-14.) The third "status" is a "witness," meaning that the individual is not being viewed as a target, and that the prosecutor does not intend on indicting or prosecuting the individual. (7RT 1292:26-28, 1293:1-6.) Rather, the government would like to have the witnesses provide information in connection to its investigation. (7RT 1293:11-14.)

After hearing her options, Pamela Fayed decided to have Willingham call Aveis and ask him about her "status" in any investigation, and, to the extent necessary, seek to position her as "witness" status. (7RT 1281:24-27, 1282:3-4.) If Willingham could not ascertain Pamela Fayed's "status," then

Pamela Fayed agreed they would "address" defending against the federal investigation jointly with Appellant. (7RT 1281:24-28, 1282:1-2.)

Willingham called Aveis and informed him that he represented Pamela Fayed, and that he was aware of the subpoena issued to her accountant. (7RT 1282:25-28.) Aveis would not reveal to Willingham Pamela Fayed's "status" in the investigation, or even what he was investigating. (7RT 1283:2-4,7-9,10-13.) Willingham stated that if Goldfinger or Appellant were under investigation, Pamela Fayed should be considered to have "witness status." (7RT 1283:10-13.) Willingham did not "contract" for her to have "witness status," but he did "table it so that it could be discussed in the future." (7RT 1284:18-20,23-25.)

Willingham mentioned that if Pamela Fayed's status was as a "witness," Willingham would have initiated the process of creating an agreement with the government and would have withdrawn from the joint defense. (7RT 1293:26-28, 1294:1-2.) However, because Aveis refused to disclose whether Pamela Fayed was a "target," "subject," or "witness," Willingham made no commitment to have Pamela Fayed do anything for the government. (7RT 1294:5-9.)

Willingham denied Aveis's testimony that Willingham called Aveis to tell him that Pamela Fayed wanted to "come in." (7RT 1290:11-15.) According to Willingham, he never communicated to Aveis that Pamela Fayed would be a cooperating witness in the federal criminal investigation. (7RT 1290:26-28, 1291:1-4.) Willingham explicitly testified that Pamela Fayed never reached any agreement with the government to cooperate against Goldfinger. (7RT 1278:13-16.)

Willingham later received a phone call from Aveis, informing Willingham that he had a conflict of interest in representing Pamela Fayed,

and Willingham terminated his representation in June or July of 2008. (7RT 1297:17-25, 1285:14-17, 1298:1-14.)

iii. TESTIMONY OF JEAN NELSON

Jean Nelson testified that she is a white-collar defense attorney who was retained by Pamela Fayed in June of 2008. (7RT 1374:28, 1375:1, 1376:2-5.) Nelson met with Pamela approximately three times in July of 2008. (7RT 1377:22-27.) Nelson said that, at that time, she did not know there was an indictment filed under seal against Appellant or Goldfinger. (7RT 1385:20-28.) Nelson stated that she knew there was an investigation because of the subpoena that had been issued to the accountants. (7RT 1387:14-20.) Nelson explained to Pamela Fayed all of her options, including doing nothing, approaching the government to determine what is going on, or cooperating. (7RT 1388:2-8.) Nelson recalled speaking with Aveis, but she did not enter into any discussion or agreement on behalf of Pamela Fayed to cooperate with the federal government as a witness. (7RT 1386:17-27.)

On July 28, 2008, Nelson attended a meeting with Pamela Fayed in Century City to meet with Appellant and his attorneys, Gary Lincenberg and John Rubiner. (7RT 1378:12-18, 1379:1-2,17-19.) The meeting lasted several hours and finished at close to 6:30 in the evening. (7RT 1379:10-13.) After the meeting, Nelson and Pamela Fayed parted ways. (7RT 1381:13-16.) Nelson began to look for the parking structure in which her car was parked. (7RT 1382:1-5.) Nelson found the correct structure, and before she entered the elevator, Nelson heard a high-pitched sound that lasted for nearly a minute. (7RT 1382:13-17, 1383:22-25.) Nelson looked across the street and saw a woman pointing up at the parking structure. (7RT 1382:18-20.) As Nelson entered the elevator, a woman outside looked

at her and said, "Don't go in there . . . Don't go up there. Somebody has been stabbed." (7RT 1383:9-14.) Nelson "didn't quite process what the person said" and she went up the elevator, found her car, and then left. (7RT 1383:15-19.) While driving home, Nelson received a phone call from John Rubiner. (7RT 1384:22-25.) Rubiner asked Nelson where she was, and informed her that there was news on the radio reporting that a blonde woman in her forties had been stabbed. (7RT 1384:27-28, 1385:1-2.)

d. TESTIMONY CONCERNING THE DEATH OF PAMELA FAYED

i. TESTIMONY OF MATTHEW GRODE

In 2008, Matthew Grode was an attorney practicing at 1880 Century Park East in Century City, which he described as "directly across" from the Watt Towers parking lot. (8RT 1406:8-14,21-23.) Around 6:30 in the evening on July 28, 2008, Grode was working in his office on the 12th floor. (8RT 1413:15-20.) Grode was on the telephone when he heard noise coming from the street. (8RT 1414:6-10.) According to Grode, noise coming from the street was not uncommon, since there were always protesters; however, the sounds became louder. (8RT 1414:10-15.) Grode hung up the phone, stood up, and turned around to observe through his window what was going on outside. (8RT 1414:20-23.) Grode testified that his attention was drawn to the third floor of the parking garage. (8RT 1415:23-28, 1421:17-19.)

Grode stated that he saw a woman with light-colored hair who was leaning and grabbing onto the rails screaming for help. (8RT 1416:27-28, 1417:1-2.) Grode could see arms flailing, and the woman trying to grab the rail and screaming out "help," or "help me." (8RT 1418:19-22, 1425:21-22.) There was someone behind the woman, but Grode could not

see that individual's face. (8RT 1417:10, 1418:14-17.) Grode was unable to see if the individual was bigger or smaller than the woman, whether the individual was a man or woman, or if the individual had anything in his or her hands. (8RT 1419:14-18, 1424:13-26.) Grode saw blood on the railing and on the ground, but he did not see a knife. (8RT 1419:24-26, 1420:6-8, 1423:20-25.) The whole episode was quick, and once the woman was pulled away from the railing, Grode could no longer hear her. (8RT 1418:20-21, 1424:4, 1426:17-18.) Grode saw the woman again when the paramedics arrived on the scene and transported her on a stretcher into an ambulance. (8RT 1426:22-23, 1427:5-10.)

ii. TESTIMONY OF EDWIN RIVERA

Edwin Rivera testified that he worked as an accountant on the 18th floor at 1875 Century Park East. (8RT 1509:2-10.) On July 28, Rivera parked his car on the third level of the parking structure. (8RT 1510:27-28, 1511:1.) When Rivera finished work at 5:30 in the evening, he noticed a car he described as peculiar because he had never seen it before, and because the person was wearing what he thought was a black sweater in the middle of summer. (8RT 1511:13-18,24-28, 1512:1-5.) Rivera could not tell if this individual was a man or a woman. (8RT 1514:16-18,24-25.) Rivera went to his car, closed his eyes, and waited for the traffic to abate. (8RT 1515:15-19,24-25, 1516:1-3.)

Approximately forty-five minutes later, Rivera heard a woman scream, "No. No." (8RT 1516:12-15.) Rivera got out of his car and yelled, "What the 'F' is going on?" (8RT 1516:16-19.) Rivera was unsure whether the screaming originated from the parking lot or from outside. (8RT 1516:20-24.) Rivera saw a man come out from in between two cars and jump into the red SUV. (8RT 1517:15-18, 1518:2-7.) Rivera described the

man as tall and skinny, wearing a black hooded sweatshirt with the hood up and jeans; Rivera could not see his hands or face. (8RT 1521:22-25.)

Rivera chased after the car and yelled at another man to get the car's license plates. (8RT 1522:22-26.) Rivera then saw a woman in a crouching position. (8RT 1522:18-24.) The woman stood up and took two or three steps towards Rivera and stretched out her arms. (8RT 1522:24-28.) Rivera yelled out for bystanders to call the police and an ambulance, and tried to comfort the woman, telling her to sit down and continue talking to him. (8RT 1523:9-13.) The woman said, "Please help me. Don't let me die." (8RT 1523:23-25.) Rivera did not know how bad the woman had been cut, but her breathing was shallow, and he testified that her left eye looked strange. (8RT 1524:8-16.) The woman eventually laid flat on the floor and stopped breathing. (8RT 1524:26-28, 1525:1-7.)

iii. TESTIMONY OF STEPHEN SCHOLTZ

Doctor Stephen Scholtz testified that he is a forensic pathologist serving as the deputy medical examiner in the Los Angeles County Department of Coroner. (8RT 1530:25-28.) Scholtz performed an autopsy on Pamela Fayed on July 30, 2008. (8RT 1533:6-11.) According to Scholtz, Pamela Fayed suffered numerous sharp force or cutting-type injuries, including a major arterial injury to the right side of the lower neck. (8RT 1538:22-28, 1548:23-25.) In Scholtz's opinion, this was a fatal wound causing substantial blood loss. (8RT 1542:15-28, 1543:1-6.) Pamela Fayed also suffered wounds to the left and right sides of her jaw (8RT 1543:13-17, 1549:1-4), to her left eye socket (8RT 1551:2-5), the back of her neck (8RT 1552:19-21), and her chest (8RT 1554:7-19). Scholtz determined that Pamela Fayed's "manner of death was homicide" at the hands of another person. (8RT 1565:3-28.)

e. TESTIMONY CONCERNING THE INVESTIGATION INTO THE DEATH OF PAMELA FAYED

i. TESTIMONY OF ERIC SPEAR

Eric Spear testified that he is a detective for the LAPD. (8RT 1435:2-3,8-10.) On July 28, 2008, Spear responded to 1875 Century Park East to conduct a murder investigation. (8RT 1435:15-21.) When Spear arrived, he noticed that video surveillance cameras surrounded the parking lot; however, none were located in the section where Pamela Fayed was killed. (8RT 1463:23-28, 1464:1.) Based on witness testimony, Spear had a description of the vehicle suspected to be involved in the murder, and the time that it left. He also reviewed the video tape to try and locate a suspect.[13] (8RT 1464:2-5, 1474:22-23,26-28.)

Spear indicated that one surveillance angle showed the east exit of the parking lot, which requires a prepaid parking pass. (8RT 1472:2-10.) The surveillance recording shows a passenger exit the rear left door of the suspect's vehicle, and attempt to work the magnetometer. (8RT 1472:15-17.) The individual was unable to open the gate, so the car backed up and went toward another exit. (8RT 1472:17-19.) Another surveillance view depicts the suspects' vehicle leaving the parking lot through a toll

---

[13] During trial, the government played the contents of the surveillance video while Spear narrated. The surveillance video depicts the suspects' vehicle, a red SUV, entering the parking structure at 3:48 p.m. (8RT 1467:2-6.) At 6:33 p.m., the surveillance footage shows Pamela Fayed going into the parking garage elevator. (8RT 1467:19-20.) According to Spear, the video shows individuals looking in the direction of the parking structure, presumably when the screaming is heard. (8RT 1471:21-23.) Spear testified that the video shows Appellant looking and walking in the opposite direction. (8RT 1473:24-28, 1474:4-11.)

booth exit. (8RT 1472:21-28.) Spear was able to obtain the license plate of the suspects' vehicle: 6CLW535. (8RT 1479:26-28, 1480:1-7.)

Spear conducted a Department of Motor Vehicles registration search and found that the car was owned by Avis Rent-A-Car. (8RT 1480:12-14.) An Avis employee informed investigators that the car was rented from a Camarillo Avis Rent-A-Car "to an individual, Mr. James Fayed."[14] (8RT 1480:28, 1481:1.) Investigators then contacted Avis, and told them to contact the LAPD when the car was returned. (8RT 1481:4-8.)

Afterward, Spear continued to investigate the crime scene. (8RT 1482:26-28.) While at the parking structure, Spear found a purse behind Pamela Fayed's vehicle. (8RT 1451:8-10, 1455:9-13.) The purse contained a wallet and money, leading Spear to believe that the incident was not a robbery. (8RT 1457:20-23.) Spear also recovered a shirt with a red stain, pants that were cut off of Pamela Fayed by paramedics, and a pair of prescription eyeglasses. (8RT 1458:5-12, 1461:6-10, 1462:23-27.) During Spear's testimony, Respondent showed the witness several photos containing blood or blood stained items, which were admitted over defense objection. (8RT 1458:10-28, 1460:13-15.)

On July 29, Spear drafted a search warrant and searched Appellant's home. (8RT 1483:22-28, 1484:1-7, 1485:5-8.) The car that was seen on the surveillance recording was not at the home. (8RT 1486:12-14.) On July 30, Spear received a phone call from AVIS stating that the car was returned. (8RT 1488:17-22.) Spear arranged for LAPD to bring the vehicle to Los Angeles, where it was examined. (8RT 1488:28, 1499:1-3.) When Spear

---

[14] Spear testified that, in the course of his investigation, he determined that Delilah Urrea from the company had actually arranged to rent the car, and the car was rented under the company, Goldfinger's, name. (8RT 1506:13-21,26.)

examined the car, he noticed that it was completely detailed inside and out, the carpet appeared to be steam cleaned, and the interior was wiped down. (8RT 1489:15-21.) Spear had the car inspected further by a criminalist, and blood was found on the inside of the car. (8RT 1491:18-21.) A DNA analysis was completed on the blood, and it matched Pamela Fayed. (8RT 1492:20-24.)

Spear executed another search warrant returned on August 1. (8RT 1487:18-28, 1488:1-2, 1495:24-28.) Spear found a large amount of cash in Appellant's bedroom. (8RT 1500:9-21.) Spear also found approximately 62 pounds of gold in the safe inside Moya's residence. (8RT 1501:20-21, 1502:6-20.) Appellant provided Spear with the safe combination, and Spear did not know whether Moya knew the combination. (8RT 1504:11-13, 14-21.)

ii. TESTIMONY OF MARK NEWHOUSE

Newhouse testified that he is a Special Agent with the FBI. (8RT 1568:24-25, 1569:1-3.) On August 1, 2008, Newhouse participated in the service of a search warrant at the Happy Camp Ranch and arrested Appellant on the federal indictment. (8RT 1569:4-11.) Newhouse then participated in executing a search warrant at 269 North Aviador in Camarillo on August 1, 2008. (8RT 1569:19-23, 1570:3-6.) There, Newhouse went to a storage unit rented by Pamela Fayed. (8RT 1570:8-11.) Inside, Newhouse recovered four boxes of documents, including emails. (8RT 1571:8-10, 1571:25-28, 1572:1-6.)

iii. TESTIMONY OF STEVE EIDSON

Steve Eidson testified that he was a special agent with the FBI and had specialized training in accounting and asset valuation. (9RT 1584:5-11.) Eidson attempted to aggregate the value of all precious metal

assets that found during the service of the search warrants. (9RT 1588:8-12.) These assets included Canadian gold coins (9RT 1594:3-5), Australian gold coins (9RT 1594:16-20), gold bars (9RT 1597:28; 1598:1-3), and silver bars (9RT 1599:7-11). The total value of all of the metals seized from Appellant and Goldfinger was estimated at $6.3 million. (9RT 1604:25-28, 1605:1-3.)

iv. TESTIMONY OF MIGUEL SANCHEZ

Sanchez testified that in 2007 and 2008, he worked on a ranch in Moorpark, California owned by Appellant. (9RT 1607:2-12.) Sanchez indicated that when he started working at Happy Camp Ranch, Appellant and Pamela Fayed would come to the ranch on weekends. (9RT 1634:9-12.) Roughly six months after Sanchez began working at the ranch, Appellant moved into the main house on the property full time. (9RT 1635:24-28, 1637:2-4.) Appellant's sister, Mary Mercedes, moved in with Appellant, and her son Rob Tokarcik visited shortly thereafter. (9RT 1635:23-28, 1635:1, 1637:2-4.)

One of Sanchez's responsibilities was to unlock an "easement gate" which had to be locked at all times; he then had to unlock a second gate approximately a mile down the road on Appellant's property. (9RT 1613:12-21.) If someone wanted to enter or leave the ranch, both gates would need to be unlocked, opened, and then relocked. (9RT 1613:18-21.) Sanchez would typically open the gates during the daytime, and Moya would open them at night. (9RT 1613:21-26.) On July 28, 2008, Sanchez left work early because he had a doctor's appointment; later, he was at a restaurant eating dinner, and he saw something was happening on the television. He then saw Pamela Fayed's face and LAPD appear on the screen. (9RT 1615:12-18, 1616:7-11,16-21.) At approximately 11:00 p.m.,

Sanchez received a phone call from Mary Mercedes asking if he could open the gates. (9RT 1617:4-16.) When asked whose job it was normally to open the gates in the evening, Sanchez testified, "Well, the night duties of the ranch were Joey [Moya]'s duties." (9RT 1617:21-24.) Sanchez stated that he did not know if Mercedes had tried to contact Moya. (9RT 1642:13-17.)

Sanchez drove 10 or 15 miles from Oxnard back to the ranch and waited at the gate for approximately an hour. (9RT 1618:1-11.) When people arrived, Sanchez unlocked the gate and escorted them up to the house. (9RT 1618:19-27.) Appellant and Mary Mercedes were inside the home. (9RT 1619:3-6.) Sanchez went to the bottom of the driveway and waited four hours for them to come out. (9RT 1620:2-15,17-19.) While waiting, Sanchez went to Moya's residence and knocked on his door, but there was no answer. (9RT 1620:24-28, 1621:1-2, 7-14.)

Sanchez also testified about the red Suzuki SUV, which he stated was rented for Rob Tokarcik. (9RT 1622:24-25, 1623:1-9.) Sanchez testified that other people drove the vehicle as well, including Appellant, Moya, Mercedes, and even himself. (9RT 1623:12-16.) Sanchez testified that the red SUV was on the ranch for "at least two months" prior to Pamela Fayed's death. (9RT 1640:2-6.) A day or two after the murder, Sanchez saw Moya in the red Suzuki SUV. (9RT 1623:17-23.) Moya asked Sanchez if he could help him return the vehicle because he needed a ride back. (9RT 1624:12-13.) Sanchez agreed and drove in a separate van while Moya followed in the red SUV. (9RT 1624:26-28, 1625:1.) While Sanchez filled up his van with gas, Moya dropped off the red SUV at a car wash. (9RT 1626:16-24.)

While Sanchez was with Moya, Sanchez briefly broached the subject of Pamela Fayed's murder, and mentioned that it was "crazy, whatever is going on." (9RT 1628:18-20.) Sanchez did not inquire further, however,

because "it's not [his] business. [He doesn't] get into anybody else's business." (9RT 1629:2-5.) Once Sanchez and Moya picked up the red SUV from the car wash, they went to Avis in Camarillo to return the car. (9RT 1630:1-4.)

v. TESTIMONY OF ALEJANDRO SAMAYOA

Samayoa testified that he was the manager for Avis Rent-A-Car in Camarillo, California. (9RT 1689:14-15.) According to Samayoa, the red Suzuki XL7, license plate 6CLW535, was rented by a secretary from Goldfinger on June 3, 2008. (9RT 1690:20-28, 1691:7, 1693:11-17, 1695:23-24; 1693:26-28.) Samayoa testified that Goldfinger had an Avis Destination Number, which is a company account that allows the company, not a specific person, to rent vehicles. (9RT 1694:1-8.) A man had picked up the vehicle, but Samayoa could only remember that the person had tattoos around his neck and sleeve tattoos on his arms. (9RT 1695:1-12.)

On July 29, 2008, Samayoa was contacted by LAPD regarding the red Suzuki XL7. (9RT 1690:20-28.) Samayoa informed the officer that the vehicle was not there, and that it was scheduled to be returned the following day. (9RT 1698:9-10.) On July 30th, Samayoa opened the business and saw that the Suzuki XL7 was returned, and the keys were in the night drop box. (9RT 1701:21-24; 1702:1-2.) Samayoa testified that the car was very clean and that no cars were even returned in that condition. (9RT 1702:9-12.) Samayoa called LAPD, who had the vehicle towed immediately. (9RT 1701:24-26.)

vi. TESTIMONY OF TENILLE CHACON

Tenille Chacon testified that she was working as a police officer in the City of Oxnard on June 21, 2008. (9RT 1705:6-14.) Chacon received a

call at 5:30 p.m. for graffiti in progress. (9RT 1705:11-14,19-27.) Dispatch provided Chacon with a description of the suspects, and when she arrived at the market, she saw two individuals, later identified as alleged co-conspirators Gabriel Marquez and Steve Simmons. (9RT 1706:14-16, 1709:12-14, 1710:3-6.) Chacon approached Simmons and Marquez, told them what she was investigating, and they both agreed to speak with her. (9RT 1706:17-26.)

Additional officers arrived, but they did not find any graffiti in the area. (9RT 1708:10-12.) Ultimately, Chacon filled out a field interview card, documenting her contact with Simmons and Marquez. (9RT 1708:13-17.) Chacon described Simmons as six feet tall, 195 pounds, and determined that both men were part of the "LOMA" gang. (9RT 1709:20-21,28, 1710:1-2,15-19.)

vii. STIPULATIONS ENTERED AT TRIAL

The parties stipulated to certain facts concerning the investigation, including that:

> Criminalists from the Los Angeles Police Department chemically processed and photographed certain fingerprints on the green parking ticket that has been previously marked as People's 70, used by the perpetrators in the red Suzuki S.U.V. The forensic analysis revealed that the fingerprint recovered on the green parking ticket was left by Steven Simmons.

(9RT 1797:8-14.)

The parties also stipulated to the testimony of Al Gutierrez, who would have testified that he is married to Emily Gabea, the sister of Jose Moya. (9RT 1797:26-28, 1798:1-5.) If called, Gutierrez would have testified that he and Emily have two daughters, Melissa and Sheila, who are

Moya's nieces. (9RT 1798:6-7.) One of his daughters, Melissa, has a child with Gabriel Marquez. (9RT 1798:6-10.)

The parties also stipulated that Robert Tokarcik drove the red Suzuki SUV from approximately June 3, 2008 to July 19, 2008. (9RT 798:14-17.)

viii. TESTIMONY CONCERNING PHONE RECORDS

The government presented three witnesses to describe information gathered from cell phone providers.

aa. TESTIMONY OF EDWARD DIXON

Edward Dixon testified that he worked at AT&T. (9RT 1712:13-21.) At trial, Dixon was presented with four separate sets of records labeled "805-797-4586, Jose Moya," ("Moya handset") "805-797-4308, James Fayed, Blackberry," ("Fayed Blackberry") "805-857-0120, James Fayed Flip Phone," (Fayed Flip Phone") and "805-797-4325, Mary Mercedes" ("Mercedes handset"). (9RT 1714:6-20.) Dixon testified that Goldfinger was the corporate account holder for the Moya phone. (9RT 1716:7-24.) Dixon testified that Moya handset was reported "lost/stolen equipment" on July 30, 2008. (9RT 1717:15-28.)

Dixon testified that the Moya handset contacted a cell tower that was located in Oxnard, California at 9:51 a.m. on July 28, 2008. (9RT 1727:11-26.) Dixon stated the Moya handset later received a call from the Fayed Flip Phone at 2:58 p.m., and the handset made contact with a tower at 1642 Westwood Boulevard, Suite 2-B, in Los Angeles, California when it received the call. (9RT 1728:8-13,18-22.) On July 28, 2008 at 3:01 p.m., the Moya handset made a phone call to the Fayed Flip Phone and contacted a cell phone tower located at 10390 Santa Monica Boulevard in Los

Angeles. (9RT 1728:27-28, 1729:1-9.) At 3:07 p.m., on the same date, the Moya handset called the Mercedes handset. (9RT 1729:13-19.) The Moya handset made contact with a tower located at 1642 Westwood Boulevard, Suite 2-B, in Los Angeles, California. (9RT 1729:24-27.) At 3:53 p.m., the Moya handset contacted a tower located at 2010 Century Park East, in Los Angeles. (9RT 1731:2-4.) Dixon testified that the Moya handset received an incoming call from the Mercedes handset at 6:00 p.m. on July 28, 2008 and made contact with a tower located at 2010 Century Park East in Los Angeles, California. (9RT 1731:5-7,27-28, 1732:1-6.)

Dixon went on to explain the data regarding text messaging for the Moya handset. (9RT 1736-1739.) Dixon admitted that although the records contained information on whether text messages were sent, the record did not contain the content of the text messages. (9RT 1739:11-14.) Dixon stated that sixteen text messages were sent from the Moya handset to the Fayed Blackberry. (9RT 1740:2-6.) Dixon also testified that there were no text messages sent between the Moya handset and the Mercedes handset. (9RT 1740:7-11.) Dixon then testified that the Moya handset sent text messages to the Fayed Blackberry at throughout the day on July 27, 2008, throughout the evening on July 28, 2008, and at 1:35 a.m. on July 29, 2008. (9RT 1740:15-28, 1741:1-25, 1742:14-18.) Dixon then testified that the Moya handset sent multiple text messages to the Fayed Flip in the evening on July 28, 2008. (9RT 1741:26-28, 1742:1-12.)

Dixon next testified about the text messages in the phone record for the Fayed Blackberry. (9RT 1742:24-26.) The Fayed Blackberry handset sent multiple text messages to the Moya handset throughout July 27, 2008 and in the evening of July 28, 2008, and at 1:30 a.m. on July 29, 2008. (9RT 1743:1-6,25-28, 1744:1-12.)

Dixon then testified about the phone records associated with the Fayed Flip Phone. (9RT 1744:20-28.) According to Dixon, the Fayed Flip Phone handset called the Moya handset at 2:58 p.m. on July 28, 2008, and made contact with a cell phone tower located at 2010 Century Park East in Los Angeles. (9RT 1744:25-28, 1745:1-6.) The Fayed Flip Phone handset received a call from the Moya handset at 3:01 p.m. on that same day, and the Fayed Flip Phone made contact with the same tower. (9RT 1745:13-28.) Dixon also testified that a series of text messages were sent from the Fayed Flip Phone to the Moya handset during the evening of July 28, 2008. (9RT 1745:27-28, 1746:1-18.)

Lastly, Dixon testified to the phone records associated with the Mercedes handset. (9RT 1746:27-28.) Dixon testified that no text messages were sent from the Mercedes handset to the Moya handset from July 28, 2008 through August 5, 2008. (9RT 1747:15-23.) Dixon indicated that the Mercedes handset called the Moya handset on July 28, 2008. (9RT 1747:24-28, 1748:1-2.) At the time of this call, the Mercedes handset was contacting a cell tower in Moorpark, California. (9RT 1748:17-20.) The Mercedes handset called the Moya handset again on July 28, 2008 at 10:25 p.m. (9RT 1748:26-28, 1749:1.) Dixon stated that the only telephone contact between the Mercedes handset and the Moya handset before July 28, 2008 was a "push-to-talk" contact at 3:50 p.m. for zero minutes on July 25, 2008. (9RT 1750:4-9.)

Dixon conceded that he did not know what words were communicated in the text messages or during the phone calls. (9RT 1750:16-24.) Dixon also admitted that he did not know whether any calls lasting less than one-minute were picked up or sent to the handset's voicemail. (9RT 1750:25-28, 1751:1.) Dixon reiterated that he did not know whether the Moya handset was in fact used by Jose Moya. (9RT

1751:6-10.) Dixon also stated he did not know who made any of the phone calls or sent the text messages for any of the handsets. (9RT 1751:18-22.) Dixon agreed that the text messages that were sent between the Moya handset, the Fayed Flip Phone, and Fayed Blackberry occurred at all times of the day and night over many days in July of 2008. (9RT 1762:20-25.)

bb. TESTIMONY OF DAN JENSEN

Dan Jensen testified that he works for Sprint Nextel. (9RT 1776:13-16.) Jensen was presented with two sets of records entitled "Gabriel Marquez Sprint Records" ("Marquez records") and "Steven Simmons Sprint Records" ("Simmons records"). (9RT 1776:24-26, 1777:13-15, 1778:3-6, 1786:9-12.)

According to Jensen, the subscriber name and address of the Marquez Records was Gabriel Marquez, at 790 West Fresca Drive, in Oxnard, California. (9RT 1778:19-26.) Jensen testified that the records show incoming and outgoing phone calls from and to the phone number "805-223-9763." (9RT 1779:9-12.) Jensen testified that a call was made using the handset associated with "805-223-9763" that began at 3:57 p.m. and lasted until 6:29 p.m. on July 28, 2008. (9RT 1782:2-4.) That call made contact with a cell tower located on Avenue of the Stars. (9RT 1783:16-20.) Jensen also stated that the "805-223-9763" handset made contact with a "4586" handset, presumably the 805-797-4586 Moya handset, throughout the afternoon and evening on May 29, 2008. (9RT 1784:11-15,20-23.) Jensen testified that the "805-223-9763" handset made contact with a "4586" handset, presumably the Moya handset, again on June 1, 2008 at 2:27 p.m., on June 4, 5, 7, 14 and 15, 2008. (9RT 1785:1-24.)

According to Jensen, the subscriber of Simmons records was Steven Simmons and the record was associated with the phone number

"805-861-6419" ("6419 handset"). (9RT 1785:25-28, 1786:1-4.) Jensen testified that the 6419 handset placed calls throughout the day on July 28, 2008, and contacted a cell tower located at 2070 Century Park East in Los Angeles, California. (9RT 1789:16-19, 1790:25-27, 1791:12-28, 1792:4-7.) Jensen testified that 6419 handset contacted two cell towers. (9RT 1792:9-10.) The handset first contacted a tower at 1470 East 4th Street in Los Angeles, and then contacted a tower at 1701 East Cesar E. Chavez Avenue in Los Angeles. (9RT 1792:11-19.)

At the conclusion of Jensen's testimony, the parties stipulated that Appellant's phone number for his Blackberry is 805-797-4308. (9RT 1796:11-15.) This phone was the one initially seized from Appellant on August 1, 2008. (9RT 1796:16-19.) The phone contained no messages to or from Jose Moya. (9RT 1796:20-23.) The phone contained two emails, marked people's exhibit 134 and 135. (9RT 1976:24-28.)

cc. TESTIMONY OF SALAAM ABDUL

Abdul testified that he became the investigating officer on this case on August 26, 2008. (9RT 1802:24-26, 1803:12-13.) At trial, Abdul testified about the phone records for Steven Simmons, Gabriel Marquez, Jose Moya, and Appellant.

Abdul looked at Moya's AT&T phone records and tried to determine which cell phone tower he used when he received incoming calls at 2:52 p.m. and 3:07 p.m. on the day of Pamela Fayed's death. (9RT 1806:9-17.) Abdul determined that the phone call utilized a cell phone tower on "Little Santa Monica, a short distance away from where the murder was, at 3:01 p.m. on the day of the murder." (9RT 1806:24-28, 1807:1.) Abdul also testified that two additional calls were placed at 3:53 p.m. and 6:00 p.m., and utilized a cell phone tower located approximately 300 feet from the location of the murder. (9RT 1807:2-10.)

Abdul testified that calls were made from Appellant's flip phone and utilized a cell phone tower that was 300 feet from the murder scene. (9RT 1807:22-26,27-28, 1808:1-9.) Abdul testified that at 2:58 p.m., Appellant called Moya.[15] (9RT 1808:21-23.)

Two years after Moya and Appellant were arrested, Abdul investigated the fingerprint that was left on the parking ticket from the murder scene. (9RT 1811:4-6.) The fingerprint came back to Steven Simmons; based on Officer Chacon's field observation card, Abdul also looked into Gabriel Marquez. (9RT 1811:18-19,27-28, 1812:1-4.) Abdul subsequently investigated Simmons' and Marquez's phone records. (9RT 1812:19-23.) Looking over Simmons' cell phone records, Abdul was able to determine that Simmons' handset made three communications with a cell phone tower located at 2070 Century Park East in in Century City at 12:03 p.m., 3:01 p.m., and at 5:41 p.m. on the date of Pamela Fayed's death. (9RT 1813:2-21.)

Abdul then looked into Marquez's phone records, and he was able to plot out Marquez's movement from Oxnard down to Century City and back up to Oxnard on the same day. (9RT 1815:22-25.) The cell phone handset made contact with a cell site that was a few feet from the murder at the time Pamela Fayed was killed. (9RT 1815:12-16.) Abdul also determined that Jose Moya's handset had contact with Gabriel Marquez's handset.[16] (9RT 1814:24-27.)

---

[15] Abdul was questioned about two phone calls: Who Appellant called at 2:58 p.m. and who he received a call from at 3:01 p.m. (9RT 1808:19-22.) Abdul only responded that Appellant called Moya. (9RT 1808:23.) Abdul did not clarify if it was Moya who had called at 3:01 p.m.

[16] While further investigating Marquez, Abdul recovered a photograph of Marquez from the Oxnard P.D., presumably police department, posing with the Lomas Gang. (9RT 1815:26-28, 1816:7-11.)

Abdul also investigated Appellant's Motorola flip phone, ending in 0120, which was seized in a search warrant on August 22, 2008. (9RT 1816:12-17,27-28, 1817:1-2.) According to Abdul, Appellant's Motorola flip phone contained outgoing text messages sent to Moya's handset, but when he searched through Appellant's Motorola flip phone, he determined that the messages were deleted. (9RT 1817:8-18.) Although Appellant's phone records contained text messages from his daughter, Abdul testified there were no text messages to anyone else. (9RT 1817:19-28, 1818:1-10.) Abdul also admitted that he did not know why there were no text messages from May 2008 through August 2008. (10RT 1862:24-28.) Abdul conceded that there was no way of knowing how or why the text messages were deleted. (10RT 1864:7-10.) Abdul also testified that he was never able to recover Moya's phone that was reported lost or stolen, despite searching Appellant's ranch, where Moya was living. (9RT 1818:18-24.)

ix. ADMISSION OF THE RECORDED STATEMENT AT TRIAL

On March 11, 2011, Respondent informed the court and counsel that they would not be calling Shawn Smith to testify. (9RT 1800:4-6.) Instead, Respondent relied on the testimony of Abdul. Abdul testified that on September 9, 2008, he spoke with Smith, who was in federal custody, and verified that he was Appellant's cell mate. (9RT 1819:13-17, 1820:1-5; 10RT 1843:23-27, 1844:9-22.) On September 10, 2008, Abdul attached a recording device to Smith's body and sent him back to his cell to obtain information from Appellant. (10RT 1844:25-28, 1845:10-13.) Smith returned to the agents at 3:20 p.m., and the contents of the recording were transferred onto a C.D. at 6:00 p.m. (10RT 1847:1-4,8-10.) Although the recording revealed a discussion between Appellant and Smith concerning a

map and some writings, a search of Appellant's cell found no map or writing. (10RT 1876:5-11.)

Abdul admitted that he knew of Smith's extensive criminal history: Smith had been convicted of conspiracy to distribute cocaine in 1987 and served 18 months in federal prison; in 1990, Smith was convicted of transporting and possession for sale of a controlled substance; in 1995, Smith was convicted of possession of a controlled substance with the intent to sell; in 2003, Smith was convicted of driving under the influence and hit and run; and in 2006, Smith was convicted of hit and run. (10RT 1868:26-28, 1869:1-28.) At the time of the recorded conversation, Smith was in the Metropolitan Detention Center on federal charges that he sold cocaine and a firearm to an undercover agent. (10RT 1870:2-6,13-17.) Abdul was aware that Smith was facing a fairly substantial federal prison term. (10RT 1872:5-9.) Additionally, Abdul knew that five weeks after Smith taped the conversation, Smith was released on an unsecured bond, and he was never sent back to prison on that case. (10RT 1872:21-28, 1873:2-4.)

x. STATEMENTS FROM THE TAPE

Respondent played the entire tape for the jury. Relevant portions of the tape show that, once inside the cell, Smith immediately began asking Appellant questions:

Shawn Smith:	Well, I don't know if he did it on purpose, bro. But you know what I'm saying? That was the stupidest mother fuckin' thing I -- you didn't have nothing to do with that, did you?
Appellant:	No.
Shawn Smith:	Did you tell him to take the Chevy?

Appellant:	Fuck no. . . . [¶] . . .
Shawn Smith:	What the fuck was that? That was a -- I -- I -- I've been up all night thinking how fucked you got, seriously fucked. You paid -- how much did you say? 30, 40, 50 grand?
Appellant:	No, well.
Shawn Smith:	A shit pile; right?
Appellant:	Yeah.
Shawn Smith:	And what do they do? They take the family station wagon under a camera.
Appellant:	I -- I don't know. I mean, that's what they say has happened.
Shawn Smith:	Well, fuck, I believe it. Do you?
Appellant:	Yeah . . . [¶] . . . Well, I haven't seen it. [¶] . . . [¶]
Shawn Smith:	You think Joey [Moya] drove?
Appellant:	Yeah.
Shawn Smith:	What a fuckin' moron, man.
Appellant:	Fuckin' idiot.
Shawn Smith:	Fuck.
Appellant:	Yeah, I think so, but I don't know (inaudible).

(3CT 000480:8-14, 000483:5-19, 000527:15-19.)

Later in the recording, the conversation again turned to the instant offense:

Shawn Smith: Was there any malice aforethought to that, or did he just go?

Appellant: It sure wasn't the way that I would've wanted things taken care. You know what I mean?

Shawn Smith: Didn't you tell him how? Did he go rogue on you?

Appellant: Yeah, yeah, after missing the target four times.

Shawn Smith: Whoa.

Appellant: You know how many clean situations I had set up for him, and they didn't follow through?

Shawn Smith: They just didn't do it?

Appellant: Yeah.

Shawn Smith: Why? Chicken?

Appellant: I guess or too fucked up or something. Who knows?

Shawn Smith: How long did this go on for?

Appellant: It was about four --

Shawn Smith: Months?

Appellant: Yeah, months, months.

Shawn Smith: No shit?

Appellant: Yeah. There was four different other occasions where I had it so it was perfectly clean.

Shawn Smith: Such as? No cameras?

Appellant: Yeah, such as walking out of a July 4th party down in Malibu at a friend's house with 100 other people.

Shawn Smith: They fuckin' could've just fuckin' done it then or --

Appellant: Yeah, it was a rural area. I even had the times, dates, everything, location. All he had to do was sit there, wait for her to get in the car, and jack it. And everybody at the party would've said, oh, yeah, she went home. Maybe she was a little tipsy blah-blah-blah. You know what I mean? [¶] There were four different other occasions that I physically made sure that it was pre-checked and cleared with, you know -- and there's no -- no cameras, none. But they pick the day before my fuckin' court hearing at the busiest place in LA.

Shawn Smith: Under a camera --

Appellant: Yeah.

Shawn Smith: -- with a light in your ride.

Appellant: Instead -- instead of -- yeah, in my ride.

Shawn Smith: Excuse me.

Appellant: Can you believe that shit?

Shawn Smith: Yeah, you're killing me.

Appellant: When I had it set up so nobody could see. It was a rural area. It was Malibu. It's in the fuckin' canyon.

Shawn Smith: I'm sorry.

Appellant: But they do this.

Shawn Smith: You're killing me.

Appellant: That's -- the other time I had when she was over at the ranch.

Shawn Smith: All by herself?

Appellant: Yeah.

Shawn Smith: And he was there with her?

Appellant: Yeah, all they had to do was go.

Shawn Smith: Sounds like he's involved.

(3CT 000581-000584.)

On the tape, Appellant made several statements that he withdrew from any participation in the charged crimes before they were committed. For example, Appellant told Smith:

Appellant: I said, "Fuck you. Go get my fuckin money back" [¶] . . . [¶] I said, "Fuck no. This is the Fourth fuckin' time" . . . "You're not gonna go do this." I said, "Get my fuckin' money back." [¶] . . . [¶] I told him, "Give me my fuckin' money, or I'm gonna -- you're gonna take me up there, and we're gonna bring them back here." I said, "They are fuckin' trash. They fucked up four times. There ain't gonna be a fifth." And all of sudden all this shit comes down. [¶] . . . [¶] Fuck this. Morons -- these guys are morons. Fuck'em. I want my money back. I don't fuckin' -- tell him they're morons.

(3CT 000584:11-17, 000591-000592, 000598-000599.)

Referring to Moya, Appellant told Smith:

Appellant:	It's too I kept saying, fuck it. It's too late, man. I'm going to court anyway. Fuck it. Too late. I'll take my chances in divorce court. You know what I mean?
Shawn Smith:	What court were you going to?
Appellant:	Divorce court. I was going between divorce lawyers. That's what I told them. I said, "Fuck this, man. You know, look, it's too . . . I told you days ago." I said, " Forget it. It's too late. You guys had your chance. You missed it. It's too late. It's done. Forget it." He was supposed to come get my money that day.

(3CT 000599:2-13.)

Appellant also spoke with Smith about his purported conversations with Moya:

Appellant:	He was supposed to go get my money, because I told him, "Forget it." [¶] . . . [¶] I told him, "Forget it. You guys had your chance. Fuckin' forget it. You blew it. Tell them they blew it. I want my money back." I said, "They blew it. It's too late. I'm going to fuckin' court tomorrow." I said, "Forget it. It's gone."
Shawn Smith:	So they rushed her?
Appellant:	Yeah, I guess. You see what I'm saying? I said, "Forget it, man. You can't -- this has to be – this" -- I said, "It's either, you know, clean or nothing. Forget it. I'm going to court tomorrow. You blew it. Get my money back." [¶] And then I get home after the one meeting, and I get the call from the lawyers saying she was

taken out in the garage while I'm in a meeting.

Shawn Smith: You really didn't know, huh?

Appellant: No, no.

(3CT 000599:19-28, 000600:1-13.)

Later, Appellant, again explains to Smith:

Appellant: I told him forget it, you moron, you fuckin' incompetent dip shit. I said --

Shawn Smith: What an idiot.

Appellant: Yeah. But then I -- on the day that they're fuckin' -- he's supposed to come and get the money, I tell him, "Fuck you. Fuckin' forget it, man. You guys blew it. You know, forget it. Just give me my money back. I'll -- I'll take my -- I'll go to court. I'll go to divorce court. Fuck it."

(3CT 000633:3-5, 000634:10-16.)

2. DEFENSE WITNESSES

Patricia Taboga testified that she is Appellant's older sister. (10RT 1886:1-9.) According to Taboga, Appellant married Pamela Fayed in the late 1990's, and she and Pamela Fayed were friendly and spoke regularly. (10RT 1893:11-14,25-26, 1894:1-3.) Taboga testified that she and Appellant have an older sister, Mary Mercedes. (10RT 1886:24-28, 1887:1-6.) According to Taboga, she and Mercedes were not estranged but were also not close. (10RT 1900:24-28, 1901:1.)

Taboga testified that in May of 2008, she had an unusual conversation with Mercedes concerning Pamela Fayed. (10RT 1903:12-19.) Mercedes had called Taboga, who is married to a police officer, and asked,

"Do you think that you could ask Kurt (Taboga's husband) to murder Pamela for $200,000?" (10RT 1904:19-21.) Mercedes further explained that "money was running out and Pamela had to go." (10RT 1905:8-10.) Taboga told Mercedes that she was "out of her mind and that . . . she lost her senses, and what would even begin to make her think to call [her] with such a horrible request." (10RT 1906:4-6.) Taboga continued, "Did you forget what side of the law my husband is on . . . Why would you call and even ask such an insane thing of us?" (10RT 1904:23-27.) Taboga told Mercedes "to leave California, go back to Maryland and get out of their divorce proceedings and the business, that she was just exacerbating things." (10RT 1907:13-17.) Mercedes told Taboga not to tell anyone and explained that she "lost her senses."[17] (10RT 1908:6-9.)

Taboga stated that she did not tell Pamela Fayed what Mary Mercedes said because she believed that Mercedes had temporarily lost her senses during that conversation. (10RT 1933:16-22.) However, in ensuing conversations Taboga told Pamela Fayed to "watch herself and be careful." (10RT 1932:12-17.)

In August 2008, Mercedes called Taboga to tell her that Pamela Fayed had been murdered. (10RT 1908:12-15.) Although Mercedes did not say whether she had anything to do with Pamela Fayed's death, she told Taboga not to mention what Mercedes had asked of her.[18] (10RT

---

[17] Taboga reiterated that she did not tell anyone about her conversation with Mercedes because Mercedes said that she did not mean it, and Taboga believed her. (10RT 1930:20-22.)

[18] Mercedes told Taboga not to say anything about her request on two occasions: once over the phone (the August 2008 conversation) and later in December of 2009. (10RT 1910:6-11.) Additionally, in December of 2009, Taboga asked Mercedes if Appellant knew of her phone call, and Mercedes told her that he did not. (10RT 1946:11-14.)

1909:8-10, 1909:27-28, 1910:1-2.) At some time after Pamela Fayed's murder, Taboga confronted Mercedes regarding her request to have Pamela Fayed killed. (10RT 1937:27-28, 1938:1-8.) According to Taboga, Mercedes sent her a note telling Taboga not to talk and that she "had it under control."[19] (10RT 1938:12-19.) Taboga eventually learned that Appellant was accused of arranging Pamela Fayed's murder. (10RT 1910:12-14.) Taboga left a voice message for Appellant's attorneys. (10RT 1910:19-22.) However, Appellant's attorney told Taboga to speak to Mercedes if she had any questions concerning the case.[20] (10RT 1911:1-3.) As a result, Taboga did not communicate her information to the police or any of the attorneys until a month prior to trial. (10RT 1911:4-11.)

Taboga was eventually contacted by Holly Jackson, a mitigation specialist who worked for Appellant's counsel. (10RT 1912:22-27.) Taboga and Jackson developed rapport, and Taboga actually sent Jackson a letter which included information about Mercedes' request. (10RT 1913:13-16.) After Taboga sent this letter, she received a phone call from Appellant's counsel, and she agreed to be a witness at the trial. (10RT 1916:8-15.)

Appellant attempted to question Taboga on several issues, including Mercedes's animus toward Pamela Fayed. (10RT 1901:10-12.) Respondent objected, and the lower court excluded the defense evidence. (10RT 1901:12-13.)

---

[19] Taboga did not know whether she still had the note. (10RT 938:24-28.)

[20] Mercedes was the only individual who conveyed information to Taboga regarding the case, and Mercedes told Taboga that the district attorney's office would be in contact with her. (10RT 1933:6-10, 1934:26-28, 1941:8-14,21-23.) Taboga testified that no one from the district attorney's office had contacted her to discuss the letter and explained that if the district attorney's office had contacted her, she would have spoken with them. (10RT 1949:14-22,26-28.)

3. GOVERNMENT'S REBUTTAL EVIDENCE

At the conclusion of Taboga's testimony, Respondent sought to introduce a rebuttal witness, Detective Abdul, to lay a foundation for a tape recording of a conversation between Mary Mercedes and members of the prosecution, in which Mercedes denies Taboga's allegations. (10RT 1993:1-13, 2044:2-4.) Appellant objected, arguing that the tape was real evidence which had not been turned over to the defense prior to trial. (10RT 1996:1-2.) The lower court overruled the objection and admitted the evidence which had been withheld from the defense. (*Id.*) A portion of the tape was then played for the jury. (10RT 2043:22-24.)

D. PENALTY PHASE EVIDENCE

1. PROSECUTION EVIDENCE

The government called several witnesses in the penalty phase of trial, including Pamela Fayed's sisters Dawn Opoulos and Greta Vaught, her brother Scott Goudie, her sister-in-law Renee Goudie, and her daughter Desiree Goudie. (12RT 2459:21, 2501:11.)

Each of Pamela Fayed's siblings testified to their early upbringing. Scott Goudie explained that he had maintained a good relationship with Pamela before her death. (12RT 2505:14-17.) Scott Goudie also testified that he and his wife are caring for Pamela Fayed and Appellant's young daughter, Jeanette. (12RT 2520:8-11.) Pamela Fayed's sister-in-law, Renee Goudie, identified photographs and a video of Pamela Fayed, which were shown to the jury. (13RT 2588-2592.) Pamela's sister, Dawn Opoulos, testified that she and Pamela were estranged, but that the news of her death was difficult. (12RT 2479:5-9.) According to Opoulos, her chance to reconcile with Pamela Fayed was "stolen from her." (12RT 2477:15-17.) Another sister, Greta Vaught, testified that she had seen Pamela about once a year since they became adults. (12RT 2551:15-18.) Greta explained that

she and Pamela had a good relationship and that Pamela's death was hard on her. (12RT 2547:17-28, 2552:13-22.)

Desiree Goudie, Pamela Fayed's daughter, testified about her life with her mom. (13RT 2599:10-25.) Desiree described Pamela Fayed as someone who was always liked the holidays and would hard to make them festive. (13RT 2600:24-28, 2601:18-28.) She explained that her mother was involved in her life, often participating in school events. (13RT 2604:16-17.) Desiree testified that losing her mother was difficult and that she is worried for her sister Jeanette. (13RT 2612:1-13)

The government also called Pamela Fayed's friends to testify. Christine Holland testified that Pamela was a good person who often bought gifts for her children. (12RT 2491-2492.) Shelbi Hamilton also testified about her friendship with Pamela Fayed. (12RT 2527:16-28.)

The government repeatedly asked its witnesses similar questions, eliciting their emotions and deep feelings, including how hard it was to watch the trial. (12RT 2460:24-28, 2479:23-28, 2522:8-13; 13RT 2595:23-27.) The government questioned the witnesses about how they were affected by listening to the details of Pamela Fayed's final moments. (12RT 2482:24-28, 2483:1-4, 2620:18-28.) The government also asked its witnesses to recount where they were and how they heard of Pamela Fayed's death. (12RT 2477:18-28, 2496:1-18, 2514:1-7, 2552:23-28, 2553:1-4, 2593:25-28, 2594:1-10, 2613:23-28, 2614:1-4.) Furthermore, the government asked the witnesses to testify about the impact of Pamela Fayed's death on them, and how her death will continue to affect them. (12RT 2479:2-5, 2480:2-4, 2499:23-28, 2523:6-28, 2524:1-11, 2554:11-23, 2555:12-28, 2556:1-20, 2594:11-14, 2596:12-19.)

Additionally, the government asked some of the witnesses even more pointed questions, focusing on specific details from the trial and the

feelings those details evoked. Referring to Edwin Rivera's testimony concerning the state in which he found Pamela Fayed, the government asked Opolous, "Is that a visual you will have for the rest of your life?" (12RT 2483:21-22.) The government also asked Hamilton if she knew that Pamela had a photograph of her on her keychain at the time of her death. (12RT 2538:18-20.) The government then showed Hamilton the keychain, asking her: "Do you see, running down the middle of this key chain, blood?" (12RT 2538:15-17,23-24.) The government followed this by asking: "What does that make you feel?" (12RT 2538:26-27.)

The defense objected to the admission of over thirty photographs of Pamela Fayed. (12RT 2426:10-11.) The defense also objected to photographs from Pamela Fayed's funeral, including a photograph of Desiree kneeling over and kissing the casket of her mother. (13RT 2578:18-23, 2618:11-22, 2620:7-12.) The government also, over defense objection, had Desiree Goudie read an emotional letter to the jury that Pamela Fayed had left with her will. (13RT 2427:18-22, 2428:15-17, 2622:14-28, 2623:1-6.)

2. DEFENSE EVIDENCE

a. TESTIMONY OF JAMES SADLER AND JAMES TYLER

The defense called James Sadler, a friend of Appellant, and James Tyler, Appellant's former coworker. (13RT 2643:1-5, 2662:23.)

Sadler testified that he and Appellant were friends in school, and had worked together at a car dealership. (13RT 2644:19-22, 2645:14-15.) Sadler described Appellant as a hardworking man and a great friend. (13RT 2651:24-27, 2652:2-7.)

Tyler explained that had worked with Appellant at the Marine Corps Air Station in El Toro. (13RT 2664:14-16.) According to Tyler, Appellant

was "quiet-spoken" and "mellow." (13RT 2667:3.) Tyler testified that there was a high level of criminality at the base, and that Appellant had reported the theft of $20,000 of high-voltage line.

b. TESTIMONY OF MELANIE JACKMAN

The defense also called Melanie Jackman, who testified that Appellant is one of her best friends. (13RT 2677:20,28.) Jackman testified that she grew up in Maryland, where she met Appellant while in high school. (13RT 2679:8-18.) Jackman described Appellant as kind and generous. (13RT 2679:25-28.) She also testified that she, her husband, and Appellant would go on vacations together. (13RT 2681:28, 2682:1-3.) After Appellant moved to the West Coast, he would send photographs of his family. (13RT 2691:24-25, 2692:2-3.) According to Jackman, Appellant was a stable and loving person. (13RT 2693:28, 2694:1-3.)

During Jackman's testimony, defense counsel attempted to ask her about her conversations with Appellant wherein Appellant asked Jackman what he could do to make Pamela Fayed happy. (13RT 2695:12-19.) The government made a hearsay objection. (13RT 2695:20.) Appellant argued that the statement was admissible under Evidence Code section 1250, as circumstantial evidence of the declarant's state of mind. (12RT 2695:22-23.) The defense continued, "[F]rom a mitigation perspective, mitigation being the full picture of what was going on in the household, the marriage was crumbling, how Jim [Appellant] felt about it. [¶] He's been portrayed as a heartless, cold-blooded killer. There was a time in his life that he loved Pam and he was very upset with the break-up of the marriage and he told Melanie about that. I was to get that in to show that, the full scope of the family's life." (13RT 2696:22-28, 2697:1-2.) The lower court, however, would not admit the testimony. (13RT 2698:7-10.) Jackman testified that she learned that Appellant and Pamela Fayed had separated,

that Appellant was "depressed" about the separation, and that she worried that he might be suicidal. (13RT 2698:23-25, 2699:6-23.)

E. FACTS CONCERNING THE JURY MISCONDUCT

The trial was rife with instances of misconduct committed by members of the jury or persons pretending to be members of the jury. The full extent of the misconduct is described in detail in the argument section. Among the instances of misconduct include anonymous improper communications made to the court by a juror (9RT 1577:18-22, 1582:7-18, 1652:2-5), jurors alleging other jurors discussed the case prior to deliberations (9RT 1678:7-10, 1678:11,17-25, 1852:19-28, 1853:9-10), and jurors making improper contact with Appellant's counsel. (10RT 1824:24-28, 1825:15-26, 1841:15-20; 11RT 2376:12-16.)

V.
ARGUMENT

A. THE LOWER COURT IMPROPERLY ADMITTED A RECORDED STATEMENT IN VIOLATION OF APPELLANT'S FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS

"It is a truism of the modern world that when sufficient pressures are applied most persons will confess, even to events that are untrue." (*People v. Andersen* (1980) 101 Cal.App.3d 563, 574 [161 Cal.Rptr. 707].) More persuasive evidence than the defendant's own words admitting the illegal act can scarcely be imagined. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 311 [111 S.Ct. 1246, 113 L.Ed.2d 302] (conc. opn. of Kennedy, J.).) Because of the great evidentiary significance of confessions, the zeal with which police act to obtain this evidence must be closely scrutinized. (See *People v. Hinds* (1984) 154 Cal.App.3d 222, 237, fn. 3 [201 Cal.Rptr. 104]; *Collazo v. Estelle* (9th Cir. 1991) 940 F.2d 411, 416-418.) Thus, a confession or statement of a

defendant must comport with the Fourth, Fifth, Sixth, and Fourteenth Amendments in order to be admissible. (See U.S. Const., 4th, 5th, 6th & 14th Amends.; see also Cal. Const., art. I, §§13 & 15.)

Appellant made several challenges to the admission of his recorded conversation with Smith. The Motion to Exclude Statement, and all subsequent motions addressing the statement, argued primarily that the statement was obtained in violation of Appellant's above-referenced rights. (11CT 002727.) As to Appellant's argument that the statement was obtained through a government ploy designed to circumvent Appellant's constitutional rights, the lower court retorted that Appellant was "stupid enough to fall for it." (1CT 000088:3-5.) The court then stated its belief that in order to qualify for exclusion, the statement had to be the result of coercion by the government. (1CT 000088:7-9.) Specifically, the lower court noted, "The kind of coercion that is an improper interrogation that this whole area of the law is defined to protect is police-type coercive interrogation. Here, the defendant has no idea that he is talking to anybody from the police. There is nobody threatening him." (1CT 000088:7-12.) The lower court again reiterated its belief that there needed to be coercion, stating, "He was not coerced into making the statements and attempting to further the conspiracy of killing the witnesses and killing the co-defendant and so forth. And I don't see that there are violations, constitutional violations that would justify this court in suppressing those statements." (1CT 000089:15-20.) As set forth herein, the lower court erred when it denied Appellant's motion based on its mistaken belief that direct police coercion was a requirement.

Moreover, Appellant renewed his motion to exclude the statement at trial and in his new trial motion. In his renewed motions to exclude, Appellant additionally argued that the statement should have been redacted

to remove irrelevant, inflammatory sections, and that Appellant's right to confrontation and hearsay rules were violated when the government failed to produce Smith at trial. (See U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §15; *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]; Evid. Code, §1200.) As set forth herein, the lower court also erred in denying these motions.

1. STANDARD OF REVIEW

A trial court's admission of a defendant's statement is reviewed de novo. (*People v. Clair* (1992) 2 Cal.4th 629, 678 [7 Cal.Rptr.2d 564, 828 P.2d 705] [arguments that a statement violated the Sixth Amendment is subject to independent review]; *People v. Jones* (1998) 17 Cal.4th 279, 296 [70 Cal.Rptr.2d 793, 949 P.2d 890] [the voluntariness of a confession is subject to independent review]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1092 [40 Cal.Rptr.3d 118, 129 P.3d 321], overruled on another ground in *People v. Harris* (2013) 57 Cal.4th 804 [161 Cal.Rptr.3d 364, --- P.3d ----] [a statement that violates *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 10 Ohio Misc. 9] is subject to independent review].) Any factual findings by the trial court as to the circumstances surrounding an admission or confession are subject to review under the substantial evidence standard. (*People v. Clair, supra*, 2 Cal.4th at p. 657 [the underlying facts concerning whether the right to counsel attached is reviewed for substantial evidence]; *People v. Williams* (1997) 16 Cal.4th 635, 659-660 [66 Cal.Rptr.2d 573, 941 P.2d 752] [addressing factual findings concerning voluntariness].)

* * *

* * *

2. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL

A defendant's constitutional right to counsel is rooted in the Fifth, Sixth, and Fourteenth Amendments. (U.S. Const. 4th, 5th, 6th & 14th Amends.; see also *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 436, 444 [Fifth Amendment right to counsel]; *Brewer v. Williams* (1977) 430 U.S. 387, 398 [97 S.Ct. 1232, 51 L.Ed.2d 424] [Sixth Amendment right to counsel].) Each of these amendments ensures that a defendant has the benefit of this fundamental right; however, the cornerstone of the right to counsel is found in the Sixth Amendment. (U.S. Const., 6th Amend.; Cal. Const., art. I, §15.) If the police, or their agents, initiate questioning after the right to counsel has attached, "any statements obtained are inadmissible as substantive evidence at trial." (*People v. Frye* (1998) 18 Cal.4th 894, 987 [77 Cal.Rptr.2d 25, 959 P.2d 183], disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390 [87 Cal.Rptr.3d 209, 198 P.3d 11]; *Michigan v. Harvey* (1990) 494 U.S. 344, 350 [110 S.Ct. 1176, 108 L.Ed.2d 293].) "The [Sixth Amendment] right to counsel is 'self-executing'; i.e., the defendant need make no request for counsel in order to be entitled to legal representation." (*People v. Robinson* (1997) 56 Cal.App.4th 363, 395 [65 Cal.Rptr.2d 406]; *Carnley v. Cochran* (1962) 369 U.S. 506, 513 [82 S.Ct. 884, 8 L.Ed.2d 70].) The right to counsel persists unless the defendant affirmatively waives that right. (*Johnson v. Zerbst* (1938) 304 U.S. 458, 464-465 [58 S.Ct. 1019, 82 L.Ed. 1461]; *People v. Marshall* (1997) 15 Cal.4th 1, 20 [61 Cal.Rptr.2d 84, 931 P.2d 262].)

Contrary to the ruling of the lower court in the instant case, a Sixth Amendment violation does not require that the defendant show that the statement was coerced or involuntary. (See *People v. Whitt* (1984) 36

Cal.3d 724, 739, fn. 11, 742 [205 Cal.Rptr. 810, 685 P.2d 1161], abrogated on another ground by *People v. Marquez* (1992) 1 Cal.4th 553 [3 Cal.Rptr.2d 710, 822 P.2d 418]; *People v. Harper* (1991) 228 Cal.App.3d 843, 853 [279 Cal.Rptr. 204].) Rather, a Sixth Amendment violation requires only that the defendant show that police, or their agents, obtained statements after the right to counsel attached. (See *Brewer v. Williams, supra,* 430 U.S. at 398.)

As set forth herein, the government used an agent to elicit statements after Appellant's Sixth Amendment right to counsel had attached. As such, Appellant's statement should have been suppressed.

a. THE INFORMANT WAS A GOVERNMENT AGENT

Obtaining statements by the use of informants or through eavesdropping violates a defendant's Sixth Amendment right if the informant acted "under the direction of the government." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1247 [69 Cal.Rptr.2d 784, 947 P.2d 1321]; *In re Neely* (1993) 6 Cal.4th 901, 915 [26 Cal.Rptr.2d 203, 864 P.2d 474]; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [119 Cal.Rptr.2d 679]; see also Pen. Code, §4001.1(b).) Thus, the defendant must show that the informant "was acting as a government agent, i.e., under the direction of the government pursuant to a preexisting arrangement, with the expectation of some resulting benefit or advantage." (*In re Neely, supra,* 6 Cal.4th at p. 915.) A preexisting arrangement between an informant and the government need not be explicit or formal, but may be "inferred from evidence that the parties behaved as though there were an agreement between them, following a particular course of conduct." (*Id.*, citing *United States v. York* (7th Cir. 1991) 933 F.2d 1343, overruled on another ground as recognized by *Wilson v. Williams* (7th Cir. 2001) 182 F.3d 562.) Specific direction

from government agents can establish an implicit agreement. (*Id.* at p. 1358; see also *United States v. Henry* (1980) 447 U.S. 264, 270-273, fn. 8 [100 S.Ct. 2183, 65 L.Ed.2d 115]; *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1241 [275 Cal.Rptr. 729, 800 P.2d 1159], superseded by statute on another ground as recognized in *Barnett v. Superior Court* (2010) 50 Cal.4th 890 [114 Cal.Rptr.3d 576, 237 P.3d 980].) An agency relationship may also be established by evidence of government officials directing the informant "to focus on a specific person, such as a cell mate, or having instructed the informant as to the specific type of information sought by the government." (*In re Neely*, *supra*, 6 Cal.4th at p. 915; *People v. Martin* (2002) 98 Cal.App.4th 408, 420 [119 Cal.Rptr.2d 679].) Furthermore, a defendant must demonstrate that the "informant took some action, beyond merely listening, that was deliberately designed to elicit incriminating remarks." (*Kuhlmann v. Wilson* (1986) 477 U.S. 436, 459 [106 S.Ct. 2616, 91 L.Ed.2d 364].)

In the instant case, the LAPD and FBI placed a wire on Smith and sent him to ask Appellant questions about the death of Pamela Fayed. Detective Abdul even instructed Smith regarding how he should talk to Appellant. (See 10RT 1845:15-21.) After meeting with Detective Abdul, Smith went to his cell and asked Appellant numerous, pointed questions about the murder of Pamela Fayed. (3CT 000467-000701.) Thus, Smith was clearly acting as an agent of the police when he asked Appellant questions.

b. THE RIGHT TO COUNSEL HAD ALREADY ATTACHED WHEN THE GOVERNMENT AGENT QUESTIONED APPELLANT

As set forth herein, before Smith asked Appellant questions, Appellant's Sixth Amendment right to counsel had already attached on the

instant state case. (*Massiah v. United States* (1964) 377 U.S. 201, 205-207 [84 S.Ct. 1199, 12 L.Ed.2d 246]; *In re Neely, supra,* 6 Cal.4th at p. 915; see also U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §15.) Additionally, because of the unique facts of the case, commencement of the federal case prohibited questioning on the instant state case. Either way, Appellant's right to counsel had attached, and questioning by the government agent violated Appellant's Sixth Amendment rights.

i. APPELLANT'S RIGHT TO COUNSEL HAD ATTACHED ON THE STATE CASE

Historically, the right to counsel applied only at trial. (See *United States v. Ash* (1973) 413 U.S. 300, 309 [93 S.Ct. 2568, 37 L.Ed.2d 619].) As Sixth Amendment jurisprudence developed, the Supreme Court extended the right to apply at earlier "critical" stages of the criminal proceedings. (*United States v. Wade* (1967) 388 U.S. 218, 224 [87 S.Ct. 1926, 18 L.Ed.2d 1149].) When, precisely, the right to counsel attaches under *Massiah* has been the subject of copious debate. As one court noted, "Given 50-plus jurisdictions, each with its peculiar rules of criminal procedure, the determination of when the protections of *Massiah* attach may be the most difficult problem posed by that case." (*People v. Viray* (2006) 134 Cal.App.4th 1186, 1195 [36 Cal.Rptr.3d 693], noting *Massiah v. United States, supra*, 377 U.S. at p. 206.) "Cases following *Massiah* have suggested a variety of principles or formulas for determining at what point under a state's criminal procedures its agents are precluded by the Sixth Amendment from interrogating the defendant." (*Ibid.*) Most courts say the right attaches "after the onset of formal prosecutorial proceedings." (*Kirby v. Illinois* (1972) 406 U.S. 682, 690 [92 S.Ct. 1877, 32 L.Ed.2d 411].) Federal courts typically use the filing of the indictment, while California

cases usually use the filing of the complaint as the start of proceedings. (See *People v. Viray*, *supra*, 134 Cal.App.4th at pp. 1194-1195.)

Although the filing of formal charges by way of an indictment or complaint is plainly sufficient for the Sixth Amendment right to counsel to attach, it is not the only way to trigger *Massiah*.[21] *Massiah* applies when a defendant is put in an adversarial position to the government. (*Moran v. Burbine* (1986) 475 U.S. 412, 431 [106 S.Ct. 1135, 89 L.Ed.2d 410].) Once the government's activity surpasses merely gathering information, and advances to confronting the defendant with the force of its office, the defendant needs his own champion to level the playing field. (See *Kirby v. Illinois*, *supra*, 406 U.S. at pp. 688-690.) Thus, the Sixth Amendment right to counsel attaches when a defendant "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." (*Id.* at p. 689; see *Moran v. Burbine*, *supra*, 475 U.S. at p. 430.)

In this case, Appellant had to defend himself against the instant state murder charges before the complaint was filed. On August 1, 2008, LAPD detectives met with AUSA Mark Aveis to "discuss the Fayed investigation," and the FBI arrested Appellant that same day. (4CT 000953.) Appellant was then taken to two federal detention hearings; at

---

[21] For example, if a defendant is arrested by federal authorities before an indictment is filed, and he is brought to court for a bail hearing, his right to counsel attaches before the filing of formal charges. (See Fed. Rules Crim. Proc., rules 4, 5, 6 & 7; see also Bail Reform Act, 18 U.S.C. §3142; *Lavallee v. Justices in Hampden Superior Court* (2004) 442 Mass. 228 [812 N.E.2d 895]; *Rothgery v. Gillespie County, Texas* (2008) 554 U.S. 191 [128 S.Ct. 2578, 171 L.Ed.2d 366] ["proceedings between an individual and agents of the State (whether 'formal or informal, in court or out,') that amount to 'trial-like confrontations,' at which counsel would help the accused 'in coping with legal problems or . . . meeting his adversary,'" are "critical stages"].)

both hearings, the government requested that Appellant be detained without bail based on information concerning Pamela Fayed's death. (2CT 000353-000359, 000368-000370.) Without question, the focus of both detention hearings was the state murder case. (*Ibid.*) Furthermore, as set forth below, LAPD literally provided the "script" to the federal government to argue in support of Appellant's detention. Thus, at the detention hearings, Appellant was specifically required to defend himself against the state murder allegations. (See *ibid.*)

To be clear, the facts of the state murder case were not merely *a factor* in the federal bail proceedings; they were the *only* factor used to detain Appellant without bail. (See *id.*) Once Appellant was required to defend himself on the state murder allegations, a formal adversarial relationship between Appellant and the State of California had begun, and Appellant's Sixth Amendment rights attached.

ii. APPELLANT'S RIGHT TO COUNSEL HAD ATTACHED ON THE FEDERAL CASE, PRECLUDING QUESTIONING ON THE INSTANT CASE

Even if this Court does not find that adversarial proceedings had begun on the instant state murder case when the statement was made, adversarial proceedings unquestioningly began on the federal charges because Appellant had been indicted, arrested, and held without bail. As set forth herein, Appellant's arrest and detention on the federal case prohibited questioning on the instant state murder case.

* * *

* * *

aa. THE FEDERAL AND STATE CASES WERE INEXTRICABLY INTERTWINED

The Sixth Amendment right to counsel, though normally "offense specific," is invoked when the pending charge is so "'inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense.'" (*People v. Wader* (1993) 5 Cal.4th 610, 654, fn. 7 [20 Cal.Rptr.2d 788, 854 P.2d 80], quoting *United States v. Hines* (9th Cir.1992) 963 F.2d 255, 257.)

In the instant case, the federal money laundering charge was "inextricably intertwined" factually with the state murder charge. As set forth *infra*, at the time of Appellant's arrest, the State of California had not yet charged Appellant with murder, and the federal government could not hold Appellant without bail based on the minor federal licensing charge. Thus, the State of California and the federal government worked collectively to have Appellant detained in federal custody without bail based on the facts of the instant state murder case.[22] The arguments in the detention hearing, by both the government and Appellant's counsel, were almost exclusively concerning the state murder allegations. (2CT 000429-000430.) In charging Appellant with the federal licensing case, but detaining him without bail based on the instant state murder case, the State of California and the federal government inextricably intertwined their cases. Appellant's resulting right to counsel on the federal case could not be "constitutionally isolated" from the state case. (See *People v. Wader*, *supra*,

[22] This tactic worked, and at the bail hearings, the federal court made clear that it was not detaining Appellant based on the federal charges. The court stated, "I'm not focusing on the license [the federal charge]. I could care less about the fact that he was operating a business without a license." (2CT 000415-000416.)

5 Cal.4th at p. 654, fn. 7.) Thus, Appellant's right to counsel, which had undeniably attached on the federal case, was applicable to the instant state murder case.

bb. THE FEDERAL ARREST AND DETENTION WAS A SHAM PROSECUTION

An additional exception to the "offense specific" requirement of the Sixth Amendment is where one case is used as a sham for gaining an advantage on another case. (See *United States v. Coker* (1st Cir. 2005) 433 F.3d 39, 45.) This exception originated in the context of the dual sovereignty exception to double jeopardy. (See *Bartkus v. Illinois* (1959) 359 U.S. 121 [79 S.Ct. 676, 3 L.Ed.2d 684].) Under *Bartkus* and its progeny, courts have held that where one jurisdiction is "merely a tool" of the other or brings its prosecution as "a sham and a cover" for the other, the dual sovereignty exception to double jeopardy does not apply. (See *id.* at pp. 124-125; see also *Kunstler v. Britt* (4th Cir. 1990) 914 F.2d 505 [noting that where one sovereign is acting as the "tool of the same authorities," double jeopardy applies].)

"It is clear that the *Bartkus* exception does not bar cooperation between prosecuting sovereignties." (*United States v. Bernhardt* (9th Cir. 1987) 831 F.2d 181, 182.) However, the exception applies where there is more than mere cooperation or where one sovereign is, in essence, acting as an agent or pawn of another sovereign. (See *United States v. Richardson* (9th Cir. 1978) 580 F.2d 946, 947; see also *United States v. Raymer* (10th Cir. 1991) 941 F.2d 1031, 1037; *United States v. Certain Real Property and Premises Known as 38 Whalers Cove Drive, Babylon, New York* (2d Cir. 1992) 954 F.2d 29, 38; *United States v. Guzman* (1st Cir. 1996) 85 F.3d 823, 827; *United States v. Baptista-Rodriguez* (11th Cir. 1994) 17 F.3d 1354, 1361; *United States v. Liddy* (D.C. Cir. 1976) 542 F.2d 76, 79.) Thus,

Bartkus "stands for the proposition that federal authorities are proscribed from manipulating state processes to accomplish that which they cannot constitutionally do themselves. To hold otherwise would, of course, result in a mockery of the dual sovereignty concept that underlies our system of criminal justice." (*United States v. Liddy, supra,* 542 F.2d at p. 79.)

These concerns are no less applicable in the context of the Sixth Amendment right to counsel. (See *United States v. Coker, supra,* 433 F.3d at p. 45; *United States v. Guzman, supra,* 85 F.3d at p. 827.) Courts have found that the *Bartkus* exception "applies with equal force in the Sixth Amendment context," where "it appears that one sovereign is controlling the prosecution of another merely to circumvent the defendant's Sixth Amendment right to counsel."[23] (See *United States v. Coker, supra,* 433 F.3d at p. 45.) The *Coker* Court found that applying the sham exception in the Sixth Amendment context "will help prevent law enforcement officials from making an end run around the right to counsel." (*Ibid.*)

In the instant case, on August 8, 2008, LAPD detectives met with AUSA Aveis; immediately thereafter, FBI arrested Appellant, ostensibly for the minor federal licensing violation. (7RT 1259:25-27, 1260:2-7.) However, as noted above, the arguments at the bail hearings focused on the state murder case. (2CT 000429-000430.) In fact, Timothy Swec, the FBI Agent who testified in support of detaining Appellant without bail, admitted that he had no knowledge of either the federal or state investigation. (2CT 000352:13-19.) When Swec arrived at the federal

---

[23] In *McNeil v. Wisconsin, supra,* 501 U.S. at 181, the Supreme Court discussed the meaning of "offense" for Sixth Amendment purposes. In doing so, the Court defined "offense" with reference to the Court's double jeopardy decision in *Blockburger v. United States* (1932) 284 U.S. 299, 304 [52 S.Ct. 180, 76 L.Ed. 306]. Thus, using the same definition of "offense" for both concepts.

courthouse to escort Appellant to the hearing, he was met by two LAPD officers who told him information concerning the state murder case. (2CT 000353:4-8.) Swec was then called to the stand at the federal detention hearing and merely parroted the facts as told to him by the LAPD officers. (2CT 000349-000350.) LAPD literally prepared a "detention script" detailing facts and argument to be used at the federal detention hearing, and Swec merely recited LAPD's words to the court. (4CT 00759-00760.) Swec could answer no substantive questions about the evidence or about the qualifications of the state officers who gave him the information. (2CT 000352-000360.)

Thus, the federal arrest, bail hearings, and detention without bail, were not undertaken to prosecute the federal case; they were a pretense to detain Appellant while the State of California conducted its investigation. *The same day* that the State of California decided that it had sufficient evidence to charge Appellant in the instant case, the federal government dropped the federal licensing case against Appellant. (2CT 000438-000439.) Since the federal arrest and detention were a sham to hold Appellant without bail while the state case was investigated, Appellant's Sixth Amendment rights on the federal case attached to the state case.

iii. DUE PROCESS PROTECTIONS PROHIBIT ADMISSION OF APPELLANT'S STATEMENT

Even if this Court declines to find that the cases are inexorably intertwined or apply the *Bartkus* exception for sham prosecutions, general concepts of due process and fundamental unfairness should dictate that Appellant's Sixth Amendment right to counsel had attached.[24] In many

[24] Fundamental fairness is the essence of due process and requires that the government conduct conform to the community's sense of justice, decency,

ways, what occurred in the instant case is akin to conduct referred to as the "silver platter doctrine," wherein state officers would illegally seize evidence which could be lawfully used in federal cases. In disallowing this practice, the Supreme Court observed that "free and open cooperation" between state and federal officers is "hardly promoted by a rule that implicitly invites federal officers . . . at least tacitly to encourage state officers in the disregard of constitutionally protected freedom." (*Elkins v. United States* (1960) 364 U.S. 206, 221-222 [80 S.Ct. 1437, 4 L.Ed.2d 1669].) The Supreme Court predicted that if evidence unlawfully seized by state agents is off limits in a federal trial, "there can be no inducement to subterfuge and evasion with respect to federal-state cooperation in criminal investigation." (*Id.* at p. 222.) In *Elkins,* the Supreme Court also recognized that courts should refrain from assisting others in disregarding constitutional mandates and criticized courts for playing a role in "willful disobedience of a Constitution they are sworn to uphold." (*Id.* at p. 223.)

The same principles are applicable in the instant case. At the behest of the State of California, the federal government arrested Appellant on the federal licensing case, but detained him based purely on the state murder case. Even though Appellant repeatedly asserted his Fifth and Sixth Amendment rights to counsel, the state and federal authorities used an agent to aggressively elicit statements from Appellant.[25] After deliberately

---

and fair play. (See U.S. Const., 14th Amend.; Cal. Const., art. I, §15.) "In determining applicable due process safeguards, it must be remembered that 'due process is flexible and calls for such procedural protections as the particular situation demands.'" (*People v. Ramirez* (1979) 25 Cal.3d 260, 268 [158 Cal.Rptr. 316, 599 P.2d 622], citing *Morrissey v. Brewer* (1972) 408 U.S. 471, 481 [92 S.Ct. 2593, 33 L.Ed.2d 484].)

[25] This tactic was, *at a very minimum*, a deliberate violation of Appellant's Fifth Amendment rights (discussed, *infra*) on the federal case.

violating Appellant's rights, the federal government delivered Appellant's incriminating statements on "a silver platter" to the State of California for use in the instant case. This is the exact conduct denounced by the Supreme Court in *Elkins*. As such, the evidence violates basic due process protections and should have been suppressed.

3. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT RIGHTS

The statements elicited from Appellant also violate his Fifth Amendment rights. The Fifth Amendment provides two discrete protections: the right not to incriminate oneself, and the right to have counsel present during any questioning.[26] (U.S. Const., 5th Amend.; Cal. Const., art. I, §15; see also *Dickerson v. United States* (2000) 530 U.S. 428 [120 S.Ct. 2326, 147 L.Ed.2d 405].) These are "'concrete constitutional guidelines for law enforcement agencies and courts to follow.' [Citation.]" (*Id.* at p. 436.) As set forth herein, both provisions were violated in the instant case.

a. APPELLANT'S FIFTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED

"[T]he right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege." (*Miranda v. Arizona, supra,* 384 U.S. at p. 469.) The Fifth Amendment right to counsel attaches "when the individual is first subjected to police

---

[26] The Fifth Amendment requires that once "the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda v. Arizona, supra,* 384 U.S. at pp. 473-474.) Further, "[i]f the individual states that he wants an attorney, the interrogation must cease until an attorney is present." (*Id.* at p. 474.)

interrogation while in custody at the station or otherwise deprived of his freedom in any significant way."[27] (*Id.* at p. 477.) In *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378], the Supreme Court found that when an accused asks for counsel, he cannot be subjected to further interrogation until counsel has been made available to him. *Edwards* establishes a constitutional rule which provides clear and unequivocal guidelines to officers. (See *ibid.*) Further, while the Sixth Amendment right to counsel is offense specific (discussed *supra*), Fifth Amendment protections are not. Thus, the Fifth Amendment right to counsel applies regardless of why the suspect is in custody or why he is being subjected to interrogation. (*Mathis v. United States* (1968) 391 U.S. 1, 4-5 [88 S.Ct. 1503, 20 L.Ed.2d 381]; *People v. Underwood* (1986) 181 Cal.App.3d 1223, 1231 [226 Cal.Rptr. 840].)

In the instant case, Appellant invoked his Fifth Amendment right to counsel after he was taken into custody on the federal case. Appellant had also invoked his Fifth Amendment right to counsel on the instant case. (See 4CT 000952.) As such, any subsequent questioning of Appellant while he was in custody, even concerning the state case, violated his Fifth Amendment right to counsel.

b. APPELLANT'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT WAS VIOLATED

The Fifth Amendment guarantees citizens the right against self-incrimination, which has been called "the hallmark of our democracy."

---

[27] In contrast to the Sixth Amendment right to counsel, which is self-executing, a defendant must invoke his Fifth Amendment rights, which Appellant repeatedly did. (*Miranda v. Arizona, supra,* 384 U.S. at p. 504; see 2RT 39:24-26, 56:22-25.)

(U.S. Const., 5th Amend.; see *Miranda v. Arizona, supra,* 384 U.S. at p. 460, quoting *United States v. Grunewald* (2d Cir. 1956) 233 F.2d 556, 582, fn. 28, (dis. opn. of Frank, J.), revd. *sub nom. Grunewald v. United States* (1957) 353 U.S. 391 [77 S.Ct. 963].) This right is premised on the fundamental notion that the government must prove that the accused has committed the wrong, rather than forcing the accused to incriminate himself. (See *Miranda v. Arizona, supra,* 384 U.S. at p. 460.)

When the police elicit a confession in violation of *Miranda*, or as the result of coercion by any government agent, they violate the self-incrimination and due process clauses of the Fifth Amendment. (See *Bram v. United States* (1897) 168 U.S. 532, 557 [18 S.Ct. 183, 42 L.Ed. 568]; *Miranda v. Arizona, supra,* 384 U.S. at p. 467; *Dickerson v. United States, supra*, 530 U.S. at p. 433.) Thus, an incriminating statement can be suppressed if it is coerced or otherwise obtained in violation of *Miranda*. (*Dickerson v. United States, supra,* 530 U.S. at p. 433.)

Miranda applies when a defendant is in custody and subject to interrogation. (See *Miranda v. Arizona, supra,* 384 U.S. at p. 444.) A suspect is in custody when he is "deprived of his freedom of action in any significant way or is led to believe, as a reasonable person, that he is so deprived." (*People v. Taylor* (1986) 178 Cal.App.3d 217, 225 [223 Cal.Rptr. 638]; see also *Berkemer v. McCarty* (1984) 468 U.S. 420, 441-442 [104 S.Ct. 3138, 82 L.Ed.2d 317]; *Oregon v. Mathiason* (1977) 429 U.S. 492, 495 [97 S.Ct. 711, 50 L.Ed.2d. 714] *Miranda v. Arizona, supra,* 384 U.S. at p. 444.) Appellant was undeniably in custody on the federal case once he was arrested on August 1, 2008 and held without bail.

The second relevant question under *Miranda* is whether the suspect was interrogated. (See *Miranda v. Arizona, supra,* 384 U.S. at p. 444.) "Interrogation consists of express questioning or of words or actions on the

part of police officers that they should have known were reasonably likely to elicit an incriminating response." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1224 [14 Cal.Rptr.2d 702, 842 P.2d 1], noting *Rhode Island v. Innis* (1980) 446 U.S. 291, 300-301 [100 S.Ct. 1682, 64 L.Ed.2d 297].) Under *Miranda*, interrogation includes not only direct questions, but also their "functional equivalent," that is, "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis, supra,* 446 U.S. at pp. 300-301.)

If an agent of the state employs coercion, the Fifth and Fourteenth Amendment analysis is the same as if the police had done so because "[t]he cajoled confession is no less obnoxious because the person who procured it is one step removed from the police or the prosecutor. It is no defense that the authorities only threw a figurative arm around the cajoler but did not make him an official agent." (*People v. Brown* (1961) 198 Cal.App.2d 253, 263 [17 Cal.Rptr. 884]; see also *Spano v. New York* (1959) 360 U.S. 315, 323-324 [79 S.Ct. 1202, 3 L.Ed.2d 1265]; *People v. Rogers* (1943) 22 Cal.2d 787, 806 [141 P.2d 722].) In *Arizona v. Fulminante, supra,* 499 U.S. 279, the Supreme Court held that a prisoner's incriminating statement to another inmate who was acting as a government agent was coerced and therefore inadmissible under the Due Process Clause of the Fourteenth Amendment. (See also *People v. Califano* (1970) 5 Cal.App.3d 476, 483 [85 Cal.Rptr. 292] [finding no Fifth Amendment violation where officers listened in on codefendant's conversation, and there was "no suggestion, nor [was] there any basis for a suggestion, that [the codefendant] was acting as an agent of the police or that it was his purpose to cooperate with the police in securing evidence against appellant"].)

In the instant case, Appellant had retained counsel on both the federal and state cases, and he repeatedly asserted his right to remain silent on each case. When the government placed an agent in Appellant's cell to pointedly question him about the instant case, it violated Appellant's Fifth Amendment right to remain silent.

4. THE STATEMENT WAS OBTAINED IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHTS

When the government elicits incriminating statements from a suspect by exploiting an unlawful search, seizure, detention, or arrest, it violates the Fourth Amendment. (*Wong Sun v. United States* (1963) 371 U.S. 471, 485 [83 S.Ct. 407, 9 L.Ed.2d 441]; see also U.S. Const., 4th & 14th Amends.; Cal. Const., art. I, §§13 & 15; Pen. Code, §1538.5.) As set forth below, the detention of Appellant in federal custody without bail was a plain violation of the Bail Reform Act; thus, Appellant was being unlawfully held when the statement was made. (See 18 U.S.C. §3142(f).) Contrary to the findings of the lower court in this case, suppression on Fourth Amendment grounds does not require a showing that the statement was involuntary; even a voluntary statement must be suppressed if it is the tainted fruit of a Fourth Amendment violation. (See *Taylor v. Alabama* (1982) 457 U.S. 687, 690 [102 S.Ct. 2664, 73 L.Ed.2d 314]; *Dunaway v. New York* (1979) 442 U.S. 200, 216-219 [99 S.Ct. 2248, 60 L.Ed.2d 824]; *Brown v. Illinois* (1975) 422 U.S. 590, 601-604 [95 S.Ct. 2254, 45 L.Ed.2d 416]; *United States v. Davis* (9th Cir. 2003) 332 F.3d 1163, 1170-1171; *People v. Jenkins* (2004) 122 Cal.App.4th 1160, 1177-1178 [19 Cal.Rptr.3d 386].)

* * *

a. DETENTION OF APPELLANT WITHOUT BAIL VIOLATED THE BAIL REFORM ACT

The Bail Reform Act sets forth the process for bail and detention in federal criminal cases. (See 18 U.S.C. §3142(f).) "[T]he structure of [§3142(f)] and its legislative history make it clear that Congress did not intend to authorize preventative detention unless the judicial officer first finds that one of the §3142(f) conditions" exist. (*United States v. Ploof* (1st Cir. 1988) 851 F.2d 7, 11.) The statute specifically lists the types of cases for which a defendant can be held without bail.[28] Appellant was not charged with any of the enumerated federal crimes. (See *United States v. Giorando, supra,* 370 F. Supp. 2d 1256 at p. 1260.)

As noted above, the magistrate who originally set bail in Appellant's federal case refused to hold Appellant without bail finding that, even though the government had presented evidence concerning the instant state

---

[28] "It is uniformly accepted [that] . . . there are only six instances that permit a court to convene a detention hearing: 1.) cases involving crimes of violence; 2.) cases involving a maximum sentence of life imprisonment or death; 3.) cases involving serious drug offenses (those involving maximum sentences of ten years or more); 4.) cases involving recidivist offenders (those with two or more relevant felonies); 5.) cases involving a serious risk of flight; or 6.) cases involving a serious risk that a defendant will obstruct justice." (*United States v. Giordano* (S.D. Fla. 2005) 370 F. Supp. 2d 1256, 1260; see also *United States v. Himler* (3d Cir. 1986) 797 F.2d 156, 160, noting *United States v. Salerno* (1987) 481 U.S. 739, 747 [107 S.Ct. 2095, 95 L.Ed.2d 697]; *United States v. Himler, supra,* 797 F.2d at p. 160; *United States v. Ploof, supra,* 851 F.2d at p. 10; *United States v. Friedman* (2d Cir. 1988) 837 F.2d 48, 49; *United States v. Byrd* (5th Cir. 1992) 969 F.2d 106, 109.) "The legislative history of the [Act] makes clear that to minimize the possibility of a constitutional challenge, the drafters aimed toward a narrowly-drafted statute . . . addressed to the danger from 'a small but identifiable group of particularly dangerous defendants.'" (*United States v. Giorando, supra,* 370 F. Supp. 2d at p. 1260, citing *United States v. Himler, supra,* 797 F.2d at p. 160.)

murder case, the Bail Reform Act did not allow detention without bail when a defendant was charged with a minor federal licensing case. (2CT 000369, 000389-000391.) The federal government then sought review of the magistrate judge's ruling.

At the second detention hearing, the government again argued that Appellant should be detained without bail, not because of the minor federal licensing charge, but because of the instant state murder case. (2CT 000429-000430.) The second judge noted that Appellant would certainly be released based on the federal license charge. (2CT 000416.) However, the court found that the evidence of the uncharged, instant state offense sufficient to detain Appellant without bail. (2CT 000432.) The court reasoned that because of the instant state murder case, Appellant posed a danger to the community. However, that finding was woefully insufficient under the Bail Reform Act to warrant detention without bail.[29]

Pursuant to statute, detention without bail cannot be based on a finding that Appellant is a danger to the community unless the defendant is charged with an enumerated offense.[30] Appellant was not charged with an enumerated offense. (See *id.*) Thus, Appellant's detention without bail

---

[29] On or about August 25, 2008, Appellant filed a Federal Rule of Appellate Procedure, rule 9(a) appeal in the Ninth Circuit, arguing that his detention in federal custody, based solely on state charges, was unlawful. Before the Ninth Circuit was able to rule on the rule 9(a) appeal, the federal government dismissed the charges against Appellant. (2CT 000438-000439.)

[30] Title 18 United States Code section 3142(f)(2)(B) allows detention on a non-enumerated offense *only* where there is a serious risk that such person will "obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror." Thus, a defendant can be detained for dangerousness only if he specifically poses a danger *to a prospective witness or juror*. (See

could not be based on a finding that Appellant was a danger to the community, and Appellant's detention without bail was unlawful.[31]

Additionally, even if the proper guidelines had been used, all arguments made in the federal court to detain Appellant without bail were based on the instant state murder case. An allegation of dangerousness unrelated to the federal charges is not a sufficient basis for detention. (See *United States v. Ploof, supra,* 851 F.2d at p. 7[32]; *United States v. Byrd,*

United States v. Ploof, supra, 851 F.2d at p. 11; see also *United States v. Himler, supra,* 797 F.2d 156.)

[31] The AUSA submitted findings which asserted that detention was warranted because "the government has presented a preponderance of evidence" that Appellant is a flight risk. (2CT 000412-000413.) However, 18 United States Code section 3142(f) sets forth a higher burden, greater than by a "preponderance of evidence" of flight, which is a factor under 18 United States Code section 3142(g) (and would only be applicable if Appellant had committed an enumerated offense under section 3142(f) or posed a danger of obstruction of evidence). Thus, again, the wrong standard was applied.

[32] In *Ploof*, the court addressed whether the defendant could be detained under 18 U.S.C. section 3142(f)(2)(B) based on a likelihood that he would obstruct justice in an unrelated state case. The court found:

> [I]t may be, as the government argues, that defendant has shown himself ready to influence a witness to testify falsely and otherwise to manufacture evidence against the girlfriend's husband in order to influence the state divorce and custody proceedings . . . . Such activities may indeed constitute obstruction of justice in the state cases. *But we do not think that the preventive detention provisions of the Bail Reform Act were meant to be invoked in order to safeguard a state domestic relations proceeding unconnected to the federal proceeding that has given rise to defendant's bail hearing.*

(*United States v. Ploof, supra,* 851 F.2d at p. 11, italics added.) Similarly, courts have found that "[m]embership in, and leadership of, a Mafia Family

supra, 969 F.2d 106.) Yet, Appellant was held in federal custody based solely on the instant state allegations. Thus, the federal government violated Appellant's constitutional and statutory rights when it unlawfully detained him for the purpose of providing the State of California time to gather evidence on the instant case.[33]

To be sure, the instant argument is not just that Appellant was unlawfully detained by the federal government. The argument is that at the behest of, or in conjunction with, the State of California, Appellant was arrested and unlawfully detained without bail by the federal authorities, based solely on the state accusations. While Appellant was being unlawfully held in federal custody, the State of California deliberately capitalized on his unlawful detainment by using an agent to elicit statements from Appellant concerning the state case.

As a result, all statements that were obtained during the unlawful detention should have been suppressed.

* * *

---

are undoubtedly 'highly relevant considerations' in the pretrial detention analysis." (*United States v. Patriarca* (1st Cir. 1991) 948 F.2d 789, 795.) However, when not relevant to the case, evidence concerning uncharged, unrelated participation in the Mafia was "insufficient, in itself, to carry the day for the government." (*Id.*; see also *United States v. Tortora* (1st Cir. 1990) 922 F.2d 880, 885, fn. 10; *United States v. DiGiacomo* (D.Mass. 1990) 746 F. Supp. 1176, 1182.)

[33] Holding a defendant in custody while gathering evidence sufficient to justify the detention was expressly condemned in *County of Riverside v. McLaughlin* (1991) 500 U.S. 44, 56 [111 S.Ct. 1661, 114 L.Ed.2d 49] [finding that any delay in arraignment violates the Fourth Amendment, where it is "for the purpose of gathering additional evidence to justify the arrest."]

5. ADMISSION OF APPELLANT'S STATEMENT WAS PREJUDICIAL

Instead of parsing out Appellant's separate arguments that his discrete constitutional rights were violated, the lower court found that the statement should not be suppressed because Appellant did not prove that it was obtained by coercion. (1CT 000088:7-9, 000089:15-20.) However, as set forth above, the issue of governmental coercion is only applicable in the Fifth Amendment context. It has no application to Appellant's other arguments, which plainly do not require that Appellant prove coercion. Appellant's counsel attempted to address the issue, and the lower court refused to allow further argument. (1CT 000089:24-26,28.) Thus, the lower court erred in admitting the statement based on its mistaken belief that coercion was required in order to suppress the statement.

The harmless error test of prejudice applies to confessions and admissions. (*Milton v. Wainright* (1972) 407 U.S. 371, 373 [92 S.Ct. 2174, 33 L.Ed.2d 1] [a violation of *Massiah* is subject to harmless error test]; *Arizona v. Fulminante, supra,* 499 U.S. at p. 297; *People v. Bey* (1993) 21 Cal.App.4th 1623, 1626 [27 Cal.Rptr.2d 28] [*Miranda* violations subject to harmless error analysis test].) In the seminal case *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705], the United States Supreme Court found that constitutional error requires reversal unless the government can "prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Id.* at p. 24.) The Supreme Court further noted, "[A]bsent the constitutionally forbidden comments, honest, fair-minded jurors might very well have brought in not-guilty verdicts. Under these circumstances, it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt,

that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions." (*Id.* at p. 26.)

"Harmless-error review looks . . . to the basis on which 'the jury actually rested its verdict.'" (*Id.*, citing *Yates v. Evatt* (1991) 500 U.S. 391, 404 [111 S.Ct. 1884, 114 L.Ed.2d 432], disapproved of on another ground by *Estelle v. McGuire* (1991) 502 U.S. 62 [112 S.Ct. 475, 116 L.Ed.2d 385].) "The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182].)

Here, Appellant's statement was the crux of the government's case. The significance of the erroneous admission of Appellant's incriminating statements cannot be overstated, and the government certainly cannot show that the guilty verdict was unattributable to the error.

6. APPELLANT'S STATEMENT WAS ADMITTED IN VIOLATION OF APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION

At trial, the government chose not to call Smith as a witness. As set forth herein, Smith's statements were admitted in violation of Appellant's constitutional rights and codified state hearsay rules. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§7, 14 & 15; *Crawford v. Washington, supra,* 541 U.S. 36; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 [89 Cal.Rptr.2d 847, 986 P.2d 182].)

* * *

a. STANDARD OF REVIEW

This Court has held that the de novo or independent standard of review is applicable to claims that implicate a defendant's constitutional right to confrontation. (See *People v. Seijas* (2005) 36 Cal.4th 291, 304 [30 Cal.Rptr. 493, 114 P.3d 742]; *People v. Sweeney* (2009) 175 Cal.App.4th 210, 221 [95 Cal.Rptr.3d 557].)

b. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHTS BY ADMITTING SMITH'S STATEMENT

A defendant has a constitutional right to confront witnesses against him. (U.S. Const., 6th Amend.; Cal. Const., art. I, §15.) The right of a defendant to examine a witness's credibility is central to the Confrontation Clause. (*Davis v. Alaska* (1974) 415 U.S. 308, 316 [94 S.Ct. 1105, 39 L.Ed.2d 347].) Thus, "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' [Citation.]" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674]; see also Evid. Code, §780.)

In *Crawford*, the Supreme Court declared, "Where testimonial evidence is at issue . . . the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Crawford v. Washington, supra,* 541 U.S. at p. 68.) For purposes of *Crawford*, "testimonial" includes "statements that were made under

circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." (*Id.* at p. 52.)

In the instant case, Smith, who was acting in concert with law enforcement, made statements under circumstances that would lead an objective witness to reasonably believe the statement would be used at trial: Smith knew he was wired, he knew that he would elicit incriminating statements from Appellant, and he knew he would give the tape to the government. Thus, Smith certainly knew that his statements would later be used at trial. Consequently, those statements were testimonial.

At trial, the lower court found that Smith's statements were admissible because they were not being admitted for the truth of the matter asserted. (10RT 1840:10-12.) A statement which is not admitted for its truth is admissible because "[o]ne of the principal goals of the hearsay rule is to exclude declarations when their veracity cannot be tested through cross-examination. When a declarant does not intend to communicate anything, however, his sincerity is not in question and the need for cross-examination is sharply diminished." (*People v. Morgan* (2005) 125 Cal.App.4th 935, 944 [23 Cal.Rptr.3d 224], citing *United States v. Long* (D.C. Cir. 1990) 905 F.2d 1572, 1580.) Thus, statements which are not offered for their truth are permitted because neither the accuracy of the declarant's perception nor the credibility of their recollection is important in assessing their relevance.

Although the government admitted the statement for a non-hearsay purpose, it repeatedly used Smith's statements for the truth of the matter by arguing that the jury should find Smith's taped statements to be credible.[34]

---

[34] This Court has found that discussing non-hearsay evidence in closing argument for the truth "was error, and error of the most serious nature." (*People v. Hamilton, supra,* 55 Cal.2d at p. 900.)

For example, the government argued in closing: "But is there anything that makes you suspect that Shawn Smith is not being truthful? No because you can hear every syllable that comes out of his mouth."[35] (11RT 2317:28, 2318:1-3.)

The government again vouched for Smith's credibility and truthfulness, arguing:

> And why exactly is [Smith] the scumbag? Why exactly is he all of these names that he was called by the defense? Because he helped solve a murder? Because he reached out to the authorities when he saw something that was wrong with the -- what was going on? When he saw that James Fayed was trying to solicit the murders of other people, he reaches out to the authorities? That makes him the bad guy? . . . So he is not the scumbag here. And I am not asking you to take Shawn Smith's word for anything. I am not saying yeah, Shawn Smith says that James Fayed said this. You can hear for yourself on the DVD, on the tape. You can hear exactly what it is in all of its glory.

(11RT 2316:21-28, 2317:1-4.[36])

The government similarly and repeatedly argued to the jury that prior to making the recording, Smith made statements to agents detailing Appellant's involvement in the murder; then, the government told the jury that Smith's previous statements to agents were corroborated by what Appellant said on the tape. (See 11RT 2224:21-28, 2225:16-19,

---

[35] Additionally, the jury in the instant case was never instructed that it should not consider Smith's statements for their truth.

[36] As set forth below, the lower court refused to instruct the jury under CALJIC No. 223, which would have instructed the jury that it could consider Smith's prior felony record to determine his believability. (See 10RT 2067-2068.) Thus, the jury was permitted to hear the government's arguments concerning Smith's veracity; yet, the jury was not instructed that it could consider Smith's priors.

2236:13-25.) However, the government did not introduce evidence concerning what Smith specifically told the police regarding Appellant previous statements, and as set forth below, references to facts not in the record constitutes misconduct.[37] Furthermore, the government's use of Smith's alleged prior statements to bolster his credibility on the tape was another way for the government to vouch for Smith's truthfulness. (See 11RT 2319:9-17.)

The government used Smith's statements for more than just building his credibility. The government also affirmatively argued to the jury that Smith did not intimidate Appellant, that Smith did not instigate any criminal discussions, that Appellant made statements to Smith through his own free will, and that Appellant did not make any statements out of any fear or a need to build up his reputation in custody. (See 11RT 2316:12-17, 2318:4-6, 2318:22-27, 2319:2.)

By telling the jury to consider the evidence and to consider the reliability of Smith, the government told the jury to consider the statement for the truth of the matter asserted. Yet, Appellant was not permitted to cross-examine Smith concerning the purported unrecorded conversation, his truthfulness, nor about the government's assertions that Smith was non-threatening during the recorded statements. Without affording Appellant his constitutionally protected right to cross-examine the witness,

---

[37] The government argued, "And that's when [Smith] met James Fayed. He was housed with Appellant, and that's when Appellant began talking about Pamela Fayed's murder and the fact that he had solicited that murder; that he was responsible for that murder." (11RT 2224:23-28.) The government also argued, "Mr. Shawn Smith then turned around and told the authorities, 'Hey, you know what? This guy that's in a cell with me. He is blathering on about a murder that he committed.'" (11RT 2225:1-5.) However, Detective Abdul never testified about what Smith told him in that previous conversation. (See 10RT 1845:8-13.)

the admission of this evidence violated Appellant's Sixth Amendment rights. (See *Crawford v. Washington, supra,* 541 U.S. at p. 36; U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art I, §15.)

c. THE *CRAWFORD* VIOLATION PREJUDICED APPELLANT

The admission of an extrajudicial statement in violation of *Crawford* and a defendant's rights under the confrontation clause is subject to the harmless error analysis of *Chapman v. California, supra,* 386 U.S. at 18. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140 [119 S.Ct. 1887, 144 L.Ed.2d 117]; *People v. Harrison* (2005) 35 Cal.4th 208, 239 [25 Cal.Rptr.3d 224, 106 P.3d 895].) As noted above, the standard in *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman v. California, supra,* 386 U.S. at p. 24.)

Smith's statements were the force majeure of the government's case. Without the statements, the government had no evidence to implicate Appellant other than the fact that Appellant and Pamela Fayed were involved in a divorce and that the murder suspects used phones and a car tied to Appellant's and Pamela Fayed's business. No reasonable argument can be made that admission of the tape did not seriously prejudice Appellant.

7. ADMISSION OF THE UNREDACTED STATEMENT VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS

While a trial court generally has broad discretion to admit proffered evidence, it has no discretion to admit irrelevant evidence. (Evid. Code, §350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681 [248 Cal.Rptr. 69, 755 P.2d 253].) "Relevant evidence" includes "evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason

to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §210.) "Evidence which produces only speculative inferences is *irrelevant* evidence." (*People v. Babbit, supra,* 45 Cal.3d at p. 682.) Admission of irrelevant, prejudicial, hearsay evidence violates a defendant's right to confront witnesses, right to a fair trial, and right to due process. (U.S. Const., 6th & 14th Amends.; see *People v. Partida* (2005) 37 Cal.4th 428, 439, fn.6 [35 Cal.Rptr.3d 644] [the admission of evidence that makes a trial fundamentally unfair violates federal due process since the defendant is denied a fair trial]; *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1380-1381, 1385-1386; see also *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175] [addressing defendant's right to fundamental fairness in criminal trial].)

On February 8, 2011, Appellant filed Motion in Limine to Exclude the Statements. (11CT 002727.) In addition to the arguments discussed above, Appellant argued that, even if the statement were admitted, it should be redacted. On April 18, 2011, the lower court heard the motion and found:

> Right. I know. I heard the tape; I read the transcript. I am familiar with, you know, the contents of it, and I believe it is admissible. It should not be redacted. [¶] Anything that tends to show that the Defendant is guilty is prejudicial to the defense. I mean, that's not the test. Its probative value -- clearly there is probative value in it. It tends to show the defendant is guilty. [¶] Now you can make your argument that it is an Oscar award-winning performance and it was not worth anything, but I think the people are entitled to bring that, in all of its glory, in front of the jury. So I am not redacting that. [¶] So that request is denied and my previous ruling with regard to this -- the statements remains in effect.

(3RT 303:15-28, 304:1-3.)

As set forth herein, the lower court's ruling was in error.

a. THE PORTIONS OF THE STATEMENT CONCERNING APPELLANT'S PURPORTED THREAT AGAINST CO-DEFENDANT MOYA SHOULD HAVE BEEN REDACTED

Appellant was not charged with any post-offense conduct toward co-defendant Moya. However, a substantial portion of the conversation between government informant/agent Smith and Appellant concerns a discussion about Smith finding someone to kill Moya. This conversation was instigated and heavily directed by Smith.

In ruling on the admissibility of evidence of uncharged acts, a trial court must determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose. (*People v. Ewoldt* (1944) 7 Cal.4th 380, 406 [27 Cal.Rptr.2d 646, 867 P.2d 757].) A careful evaluation of the evidence pertaining to the alleged uncharged threats against Moya shows that it was offered to try and convince the jury that Appellant has a "propensity" to engage in certain behavior, a purpose for which it is altogether inadmissible. "The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact. If no theory of relevancy can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible." (*People v. Thompson* (1980) 27 Cal.3d 303, 317 [165 Cal.Rptr. 289, 611 P.2d 883]; see also Evid. Code, §1101(a).)

Moreover, even if the government did not seek to introduce the evidence for an improper purpose, in order for it to be admissible, the evidence "must not contravene other policies limiting admission, such as those contained in Evidence Code section 352." (*People v. Balcom* (1994) 7 Cal.4th 414, 426 [27 Cal.Rptr.2d 666, 867 P.2d 777].) Thus, even if the relevancy threshold was met, the lower court was required to determine if

otherwise relevant evidence should be excluded. As set forth below, the evidence should have been excluded under Evidence Code section 352.

i. REGARDLESS OF ANY PROFFERED THEORY OF ADMISSIBILITY, ANY STATEMENT CONCERNING MOYA SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352

"The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314 [97 Cal.Rptr.2d 727].) Courts have recognized the extraordinary prejudicial impact of other crimes evidence, noting that "'[e]vidence of uncharged offenses is so prejudicial that its admission requires extremely careful analysis. Since substantial prejudicial effect [is] inherent in [such] evidence, uncharged offenses are admissible only if they have *substantial* probative value.'[Citation.]" (*People v. Balcom, supra,* 7 Cal.4th at p. 422, quoting *People v. Ewoldt, supra,*7 Cal.4th at p. 404.) Accordingly, admissibility must be "examined with care," and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Guerrero* (1976) 16 Cal.3d 719, 724 [129 Cal.Rptr. 166, 548 P.2d 366].)

aa. THE EVIDENCE HAD LIMITED PROBATIVE VALUE

"On the issue of probative value, materiality and necessity are important. The court should not permit the admission of other crimes until it has ascertained that the evidence tends logically and by reasonable inference to prove the issue upon which it is offered, that it is offered on an issue material to the prosecution's case, and is not merely cumulative."

(*People v. Harris* (1998) 60 Cal.App.4th 727, 739-740 [70 Cal.Rptr.2d 689].) When reviewing the value of evidence of other acts offenses, a court must consider: "(1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence." (*People v. Thompson, supra*, 27 Cal.3d at p. 315.)

Courts have a long history of admitting evidence of post-offense threats where there is evidence which shows that a witness was afraid to testify or feared retaliation for testifying and the evidence is relevant to the credibility of that witness. (See *People v. Malone* (1988) 47 Cal.3d 1, 30 [252 Cal.Rptr. 525, 762 P.2d 1249]; *People v. Warren* (1988) 45 Cal.3d 471, 481 [247 Cal.Rptr. 172, 754 P.2d 218]; see generally Evid. Code, §780.) Courts also have permitted evidence of post-offense threats where the evidence shows a defendant's consciousness of guilt. (See *People v. Brooks* (1979) 88 Cal.App.3d 180, 187, fn. 4 [151 Cal.Rptr. 606], disapproved of on another ground by *People v. Mendoza* (2011) 52 Cal.4th 1056 [132 Cal.Rptr.3d 808, 263 P.3d 1].)

However, there is no evidence that the purported threats by Appellant to kill Moya in this case dissuaded any witness, nor was the evidence relevant to show any witness's hesitation to testify. Further, even assuming that the government sought to introduce Appellant's threats against Moya for the purpose of showing Appellant's consciousness of guilt in the murder of Pamela Fayed, the evidence was cumulative. The government already had the taped conversation of Appellant discussing Pamela Fayed's murder. Thus, evidence of Appellant's thoughts on killing Moya, for the purpose of showing Appellant's consciousness of guilt as to the instant murder allegation, was cumulative, and, as set forth below, highly prejudicial.

Moreover, the value of the evidence in showing Appellant's consciousness of guilt was insubstantial and undependable. Although Appellant ultimately joined in the conversation with Smith, it was clearly Smith who encouraged and prodded Appellant into the conversation concerning using a hitman Smith knew to kill Moya:

SHAWN SMITH:	Well, you're going to help me. We're going to have [Smith's purported hitman] here this weekend.
APPELLANT:	You think?
SHAWN SMITH:	I know. Cause we're going to do something tricky. That's what we -- we is tricky, brother. I want you to know I was, frickin', up most of the night thinking about you.
APPELLANT:	Why?
SHAWN SMITH:	I don't know. Just the bullshit. . . .
APPELLANT:	Fuck, yeah. . . .
SHAWN SMITH:	Last night I was thinking . .
APPELLANT:	Absofuckinglutely.
SHAWN SMITH:	What do you think, big boy?
APPELLANT:	Yeah, absofuckinglutely.
SHAWN SMITH:	No fuckin' body knows. You haven't talked to upstairs about what we talked about; right?
APPELLANT:	No.

SHAWN SMITH: I mean, for sure? Cause this is --

APPELLANT: For sure.

SHAWN SMITH: -- this is loose ends time.

APPELLANT: Yeah. I haven't told anybody anything.

SHAWN SMITH: You positive?

APPELLANT: I'm positive.

SHAWN SMITH: Cool as that. Well, it's time –

APPELLANT: I don't even know what's going on anymore.

SHAWN SMITH: It's time -- well, he's there, ain't he? Joey is still home, ain't he?

APPELLANT: I assume. Yeah, I assume.

SHAWN SMITH: You don't know?

APPELLANT: I think so.

SHAWN SMITH: That fuck.

(3CT 000475-000477.)

SHAWN SMITH: But I was laying there last night, and I'm thinking, man, goddamn, you know, don't hink up. Don't do nothing. I just want to run this to you, and then you tell me what you think. ¶ But I was up -- I got my radio on from 4:00 on. I'm thinking, a man hands 30, 40 G's to fuckin' Joey. This punk, fuckin', God knows what he's thinking. I'm thinking woman,

Jesus. Goes out, takes the family ride to a place that the fuckin' cameras are looking at it and leaves you fuckin' here. ¶ Don't tell me that mother fucker ain't going to fuckin' do you fuckin' wrong. That's a loose end that needs to be snipped. Dude, what do you think?

APPELLANT: I don't know. I gotta think about it

SHAWN SMITH: Huh?

APPELLANT: I have to think on it. Hum.

SHAWN SMITH: You -- well, you don't want to?

APPELLANT: No, no, no, that's not it. I'm just -- I don't know.

SHAWN SMITH: Huh? Here's the plan. . . .

(3CT 000477-000479.)

APPELLANT: True but they can't prove it. That's what I'm wondering if this might stir things up worse or not. What would you do?

SHAWN SMITH: Hit him.

APPELLANT: Clean up -- clean up the fuckin' mess.

SHAWN SMITH: Hit him.

APPELLANT: Yeah, clean it up so they can't --

SHAWN SMITH: I would. I -- then -- you'll --

APPELLANT: -- so it can't ride you 10 years.

SHAWN SMITH: Dude, you're riding the beef now.

APPELLANT: So it can't ride you 10 years from now or 15 years from now, cause there's no fuckin' statute of limitations.

SHAWN SMITH: Yeah, well, if they're fuckin' history --

APPELLANT: I know.

SHAWN SMITH: And this is what's cool about this. My hitter is gonna die. Tony's gone. And I'm going on your word that you'll take care of Rosie.

(3CT 000558-000559.)

APPELLANT: And I don't want to do anymore time.

SHAWN SMITH: -- the Homicide detectives are going to go he--he--he's killing people. They're going to. You're good -- it's going to get worse. But you know what? They can't fuckin' prove it. How could this --

APPELLANT: I don't want to do --

SHAWN SMITH: -- have possibly happened?

APPELLANT: -- a whole lot more time.

SHAWN SMITH: How can this have happened? How? You tell me how.

APPELLANT: Well, I don't want to go to the death chamber. I don't want to go

	do more time. I want to get out of here.
SHAWN SMITH:	Yeah, but if they're fuckin' -- if they're all gone, they can't prove shit. Eventually, they're going to have to cut you loose, have to. Bro, right now they're fuckin' doing this shit. We think.
APPELLANT:	Uh-huh.
SHAWN SMITH:	Okay.
APPELLANT:	Exactly.
SHAWN SMITH:	And if they go out there to get their 'we think' and their 'we think' is gone, I mean, gone, he must have fled to Mexico.

(3CT 000561.)

The transcript clearly reveals that government informant/agent Smith (who undoubtedly received reward for his efforts) goads and encourages Appellant to go along with his plan to harm Moya, persuading Appellant that this is the way he can get out of custody. This evidence is not at all indicative of Appellant's consciousness. Rather, this duplicative, dubious evidence has little true probative value.

bb. THE UNCHARGED CONDUCT WAS HIGHLY PREJUDICIAL

Evidence creates "undue prejudice" when it "uniquely tends to evoke an emotional bias against a party as an individual," *People v. Robinson* (2005) 37 Cal.4th 592, 632 [36 Cal.Rptr.3d 760, 124 P.3d 363], or if it would cause the jury to "prejudge[] a person or cause on the basis of extraneous factors." (*People v. Zapien* (1993) 4 Cal.4th 929, 958 [17

Cal.Rptr.2d 122, 846 P.2d 704].) In assessing the prejudicial effect of uncharged conduct under Evidence Code section 352, this Court set forth several distinct factors to consider: 1) the likelihood the jury will consider evidence for improper purpose such as propensity; 2) the remoteness in time of the uncharged conduct; 3) whether the charged and uncharged conduct would tether a weak case to a strong one; 4) whether the source of the evidence is independent of the source of the charged offense; 5) whether the uncharged conduct resulted in criminal convictions; and 6) whether the evidence is duplicative and unnecessary in light of strong evidence going to the same disputed issue. (See generally *People v. Ewoldt, supra,* 7 Cal.4th 380; *People v. Balcom, supra,* 7 Cal.4th 414.)

These factors weigh heavily in favor of finding that Appellant was prejudiced. First, although the jury heard Smith instigate the conversation concerning a "hit" on Moya, it is very likely that the jury considered Appellant's statements as evidence of Appellant's propensity to commit murder for hire. Even though the facts of the charged offense against Pamela Fayed and the uncharged offense against Moya are different, it is difficult to hazard that the jury made that distinction. Second, the information concerning Moya did not come from a source independent of the state murder charge.[38] Third, Appellant was not charged with or

---

[38] In *Ewoldt*, the court explained the significance of the circumstance in which uncharged conduct presented in a case does not come from an independent source, noting:

> The probative value of evidence of uncharged misconduct also is affected by the extent to which its source is independent of the evidence of the charged offense. For example, if a witness to the uncharged offense provided a detailed report of that incident without being aware of the circumstances of the charged offense, the risk that the witness's account may have been influenced by knowledge of

convicted of the subsequent offense; courts have found that "the prejudicial effect of this evidence is heightened by the circumstance that defendant's uncharged acts did not result in criminal convictions. This circumstance increased the danger that the jury might have been inclined to punish defendant for the uncharged offenses, regardless of whether it considered him guilty of the charged offenses, and increased the likelihood of 'confusing the issues.'" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 405.) Further, the evidence concerning the threats against Moya was stronger and more inflammatory than the evidence concerning the instant case. The recorded statements in the instant case cover approximately 237 pages. (3CT 000464-000701.) A review of the transcript reveals that only a small portion of the conversation concerns the facts of the instant case; a much larger portion concerns the details of the purported threat against Moya. Finally, as noted above, if the evidence was admitted for the purpose of showing Appellant's consciousness of guilt, it was duplicative on that issue. Ultimately, this evidence was overly prejudicial and should have been excluded.

> the charged offense would be eliminated and the probative value of the evidence would be enhanced. The probative value of such evidence would increase further if independent evidence of additional instances of similar misconduct, committed pursuant to the same design or plan, were produced. These factors are of limited significance in the present case, however, because it was only after learning that (complaining witness) Jennifer had made a similar accusation that (complaining witness) Natalie accused defendant of molesting her. The source of Natalie's testimony, therefore, is not wholly independent of the evidence of the charged offenses.

(*People v. Ewoldt, supra*, 7 Cal.4th at pp. 404-405.)

ii. SHAWN SMITH'S INFLAMMATORY STATEMENTS CONCERNING EXTRANEOUS MATTERS SHOULD HAVE BEEN REDACTED

Smith makes several other inflammatory statements during the taped conversation which should have been excluded. For example, Smith makes statements about conversations he purportedly had with various "hitmen." Smith goes into graphic detail about other, wholly unrelated murders, and discusses knowing someone who committed "hundreds" of murders. (3CT 000553.) Moreover, Smith recounts being present when a man was shot and cremated. (3CT 000549.) Smith boasts about his hitman killing an individual by blowing-up that person using dynamite in a golf cart. (3CT 000553.) Smith also discusses his involvement in a murder in which the killer "had rats eat their [victim's] face off while [Smith] ran video tape for the guy. . . . [T]hey put some [man] in the cabin and left him there and let rats eat him." (3CT 000554.)

Additionally, Smith makes several offensive racial statements on the tape. For example, when asked about who will be at the ranch, Appellant states that all of his workers are "Mexicans." Smith then makes statements such as "Mexicans are Mexicans," and "I hope he don't hit the wrong Mexicans." (3CT 000547.) Smith later says, "Yeah, but see what you get for hiring Mexicans." (3CT 000581.) Smith also says, "And if I know my typical MA Mexican like this guy's supposed to be, he's gonna squeal all over his fuckin' (sic) companion. It sounds to me like he's involved. Probably he's one of- either the driver or the stabber. I don't know. . . . They're greedy." (3CT 000590.) Smith also makes inflammatory statements about women, including, "She's a woman. They don't listen. That's what they do best, tell their men, no." (3CT 000577.)

These statements had no probative value on a material issue in the instant case and only served to inflame the jury and prejudice them against Appellant. Thus, the lower court erred when it refused to exclude them.

iii. APPELLANT'S STATEMENTS CONCERNING EXTRANEOUS MATTERS SHOULD HAVE BEEN REDACTED

A few portions of the conversation involved a discussion of the sexual relationship between Appellant and Pamela Fayed. (3CT 000614.) Appellant also made statements concerning meetings with the National Security Agency ("NSA") (3CT 000603-000604), and Smith and Appellant also have a discussion about Appellant committing prior forgeries:

SHAWN SMITH:	How? You can do that? You? With those finger? Fuck you. You're a forger?
APPELLANT:	If I want to be.
SHAWN SMITH:	Shut up.
APPELLANT:	Yeah, I can do it. Did hundred dollar bills before.
SHAWN SMITH:	What?
APPELLANT:	Did hundred dollar bills before.
SHAWN SMITH:	You have?
APPELLANT:	Yeah, yeah, I can do it.
SHAWN SMITH:	You're fuckin' kidding?
APPELLANT:	Yeah, I just need a press.
SHAWN SMITH:	You're kidding?

APPELLANT:	No, I can make dyes and all that shit.
SHAWN SMITH:	Well, how you forging hands?
APPELLANT:	It wasn't a forged note. It was -- it was --
SHAWN SMITH:	Redone? Touched?
APPELLANT:	Yeah, it was -- it's actually -- how's the word? It's okay. The note -- the will is fine.
SHAWN SMITH:	Huh?
APPELLANT:	What now?
SHAWN SMITH:	Well, I need to know this in case I'd like to do this some day.
APPELLANT:	A holographic will is basically like I told you. It's in her own handwriting. Okay? It was in her possession. It's dated. I can write a holographic will right now. Handwriting experts have proved it. There's no doubt that it's her handwriting, that it's her will, that those are her wishes, you know?
SHAWN SMITH:	But you changed the date?
APPELLANT:	It wasn't just the date. The date was fine. Let's get rid -- let's get this done first, and then we'll -- we'll visit that another day.
SHAWN SMITH:	Alright.
APPELLANT:	And I'll tell you --

SHAWN SMITH:	You promise?
APPELLANT:	Yeah.
SHAWN SMITH:	You'll tell me?
APPELLANT:	Yeah, I know what you want to do. I already know -- I already know what you're thinking. I already know where you're going.
SHAWN SMITH:	Can you do it for me?
APPELLANT:	Sure. Yeah, we can get -- so I already know where you're going. Now, let's -- look, let's --
SHAWN SMITH:	Cool.
APPELLANT:	-- let's just deal with one (Inaudible) at a time.
SHAWN SMITH:	Okay. Okay. Okay.
APPELLANT:	But I know where you're going. I know what you want to do.
SHAWN SMITH:	Yeah, man.

(3CT 000578-000580.)

Discussions of Appellant's sex life, any meetings with NSA, and his purported involvement in forgeries were improper character evidence, irrelevant to the instant charges, and should have been redacted.

b. THE INTRODUCTION OF EXTRANEOUS MATTERS WAS PREJUDICIAL

The jury listened to the entire recorded conversation between Appellant and Smith, a significant portion of which contained inflammatory

statements not directly relevant to the instant case. Furthermore, the government used this extraneous, inflammatory information in its closing argument, and a significant portion of the government's argument focused on the parts of the tape recording where Smith and Appellant are discussing Moya. (11RT 2224-2230, 2236-2239.) The government also argued about the language Appellant used during irrelevant parts of the taped conversation:

> During the taped conversation he calls Pamela Fayed every name in the book. . . .And he calls his slain wife every name in the book. [¶] Why is that important? Because if you didn't do it, you might actually be devastated by the death of your wife. And you might not call her a 'dumb, fucking cunt.' That is so despicable. . . . [¶] But those aren't my words; those are his words. He calls her a terrible mom, destroying the kids, trying to poison him.

(11RT 2231:6-22.) The government similarly argued, "And then to avoid sitting in this chair for the murder of his wife, what did he do? He tried to kill Moya; he tried to kill Marquez; he tried to kill Simmons. Heck, he even tried to kill the dog. Do you remember that? 'Well, I don't care if the dog gets in the way. Whatever.'" (11RT 2301:10-15.) Thus, the jury heard, and the government relied on, numerous inflammatory facts which prejudiced Appellant.

B. THE JURY MISCONDUCT IN THE INSTANT CASE WARRANTS REVERSAL

As set forth herein, there was significant jury misconduct, the lower court failed to properly investigate the misconduct, and the lower court improperly denied Appellant's Motion for a New Trial based on the misconduct.

* * *

1. FACTS CONCERNING THE JURY MISCONDUCT

The first instance of jury misconduct was reported on May 9, 2011 when the lower court received a voicemail from an unnamed juror stating that he/she saw a juror and two alternate jurors communicating outside of court. (9RT 1577:18-22.) Unsettlingly, the court immediately expressed its belief that the communication might not have come from a juror. (9RT 1579:18-22.) The court then sent its clerk out of the courtroom to ask the jurors who left the message; the clerk reported that no juror admitted making the call. (9RT 1578:3-4,20-21.) Counsel for Appellant asked that the jurors be questioned individually, but the lower court denied the request. (9RT 1580:14-18, 1581:8-11.) The court then asked the jury, as a group, whether any of them left the voicemail; the court stated for the record that the jurors were "shaking their heads no." (9RT 1582:7-18.)

On May 11, 2011, the lower court received a note from Juror No. 5, stating that he had left the voicemail on May 9, 2011, and informing the court that he had observed Juror No. 11 and Alternate Jurors Nos. 1 and 4 discussing "at length" the testimony of one of the government witnesses. (9RT 1652:13-24.) The court noted that it had "ask[ed] the juror, just in passing, how come he didn't acknowledge that that was his message left on the voicemail, and he basically said that he felt embarrassed to have to raise his hand in front of everybody and decided to write the note instead." (9RT 1652:27-28, 1653:1-3.) The court then brought Juror No. 5 into the courtroom, and Juror No. 5 disclosed, inter alia, that the other jurors "talked about the defendant and how his actions up to this point, in their opinion, had led to his wife's death and how cruel it was and how, you know, they -- their opinion of him so far in the trial to date." (9RT 1654:23-27.)

The court then questioned Juror No. 11 and Alternate Jurors Nos. 1 and 4, and all three steadfastly denied any outside communication. (9RT

1658-1660.) The court then noted: "[Y]ou know, Juror no. 5 says what he says, and the other jurors say what they say." (9RT 1660:18-19.) The lower court then asked for suggestions from counsel on how to proceed. (9RT 1660:17-21.) The government asked that the court simply admonish the jury and continue with the trial. (9RT 1660:24-25.) Appellant's counsel requested the trial court "excuse or to find that there's been a corruption of Jurors No. 11, Alternate 1 and Alternate 4." (9RT 1664:12-14.) Further, counsel for Appellant vehemently objected to the court allowing the trial to resume under the status quo, arguing:

> Your honor, I'm afraid that the fairness of these proceedings now is jeopardized. We have either juror No. 5 is a complete liar, who totally made up a malicious story that's not true about three other jurors and perjured himself to this court, or the three jurors that the court questioned, No. 11, alternate 1 and alternate 4, are complete and total liars, and they just looked the court in the face and totally lied about a conversation they had in the hallway. Either way, we have a bad situation here. . . . [¶] Just to simply gloss over it, admonish them all and move on I think would be a miscarriage of justice for my client. [¶] It appears that at least three of those jurors, No. 11, alternates 1 and 4, have formed opinions. They are negative towards the defendant. They talked about him being guilty and having a motive to do what they thought he did. . . . These people need to be removed from the jury. [¶] I'm asking the court to excuse jurors No. 11, alternate 1 and alternate 4 after making inquiry of the rest of the panel to ensure that this malignancy hasn't spread, but I don't think that we can just move on and let three jurors who just -- who just lied to the court remain on the Panel after they've been reported to have expressed the opinions they expressed.

(9RT 1660:27-28, 1661:1-28, 1662:1-9.)

The lower court noted:

> You know, it's -- I'm in a tough spot in the sense that it's really difficult for me to know who is telling the truth and

> who is lying here. I mean, Juror No. 6 -- alternate No. 6, who was with Juror No. 5, didn't hear any conversation about the case from these individuals, which kind of lends support to those individuals. [¶] However, Juror No. 5's account was pretty specific about the details and opinions and so forth that he claims, you know, were stated.

(9RT 1662:10-19.) The lower court then found that misconduct "had not been established." (9RT 1663:18-19.) The lower court stated, "At this point I don't see the need to inquire about the remaining jurors." (9RT 1664:4-9.) Appellant's counsel again objected, asking to court to, at least, question the jurors who may have seen the misconduct. (9RT 1664:10-17.) After further discussion, government counsel conceded that the remaining jurors should be questioned to preserve the record for appeal. (9RT 1665:16-24.)

The trial court then relented and questioned the remaining jurors and alternate jurors. The trial court's discussion with Alternate Juror No. 3 proceeded as follows:

The Court:	Have you heard any of the other jurors, alternates or regular jurors discussing any of the evidence or forming or expressing any opinion about the evidence or the guilt or innocence of the defendant?
Alternate Juror No. 3:	Yes
The Court:	Okay. And what have you heard?
Alternate Juror No. 3:	They didn't officially say not guilty or guilty, but it was clear from what was said that they had an opinion, and they said, 'once I make up my mind, I don't change it.'
The Court:	Okay. And so who was it that was saying that?

Alternate Juror No. 3:	I am not positive of the juror's number.
The Court:	Is it one of the regular jurors or an alternate juror?
Alternate Juror No. 3:	It's a regular juror. [¶] . . . [¶]
The Court:	And you feel that she's made up her mind that -- from what she said that the defendant is guilty, or the defendant is not guilty, or you are not sure, only that she's made up her mind already?
Alternate Juror No. 3:	No, I think she has made up her mind that the defendant is guilty.
The Court:	Okay. And was she talking to you when she said that, or was she talking to someone else, or was she just sort of talking to anybody that might hear what she had to say?
Alternate Juror No. 3:	There was the two of us, and we were both alternates.

(9RT 1678:7-23, 1679:12-23.) Based on this exchange, it was not entirely clear which jurors or alternate jurors were engaging in the improper conduct. (9RT 1681-1686.) Appellant requested that the court dismiss Juror No. 11, and Alternate Jurors Nos. 1 and 4, noting that "they obviously lied to your honor and covered up what they heard." (9RT 1682:5-7.) The lower court stated that it was possible that the disclosing juror mixed up the alternate jurors, and Appellant responded, "Your honor, I just wanted to act in an abundance of caution. My client is on trial for his life." (9RT 1682:22-23.) The court subsequently excused Alternate Juror No. 1 and Juror No. 11, but refused to excuse Alternate Juror No. 4. (9RT 1685:1-28.)

On May 12, 2011, counsel for Appellant's brought into court an anonymous e-mail, which was sent to counsel's e-mail address. The e-mail read:

> 'Counsel, I notified judge however wanted to state you you [sic] and state, that I believe [Appellant] deserves fair trial'. . . . 'Please continue to express concern about jurors speaking opinion. Even after today's juror questions, many jurors continued to express opinion and statements among each other [sic] including viewing websites about trial. Just please express the concern. Thank you.'

(10RT 1824:24-28, 1825:15-26.) Counsel for Appellant noted that the e-mail was disturbing not only because it asserted that jurors were talking about the case, but because it showed that a juror checked counsel's law firm website to get his e-mail address. (10RT 1826:19-22.)

The government countered that the event was "not at all disturbing" and called the instance "ridiculous." (10RT 1827:21, 1829:16.) The government then argued that asking the jury if they sent the note would harm cooperation and trust among the jurors. (10RT 1830:2-9.) Appellant's counsel reminded the court that when the jurors were previously asked questions as a panel, they denied any misconduct, but when questioned individually, the misconduct was confirmed. (10RT 1834:1-10.) Appellant's counsel asked to have Juror No. 5, the juror who previously sent a note to the court reporting misconduct, brought into the court and asked if he sent the e-mail. (10RT 1832:23-25.) The government argued it would ostracize the juror, asserting that Appellant "doesn't care if Juror No. 5 becomes a social pariah in the deliberation room, of course he doesn't, of course he doesn't . . . . [T]hat redounds to Mr. Fayed's benefit. That is unnecessary." (10RT 1834:18-23.) The government argued that to question the juror about the communication would somehow be "patently unfair to the prosecution." (10RT 1835:25.) Ultimately, the trial court brought the

jurors into the courtroom and told them that if they had sent an e-mail to counsel, they should contact the bailiff at the break. (10RT 1841:15-20.) Predictably, no juror approached the bailiff to admit misconduct. (10RT 1853:11.)

That same day, the court heard a voicemail, sent the night before, from a female juror, who did not identify her number. (10RT 1852:19-28, 1853:1-8.) The court noted that the woman who left the voicemail "says she's one of the jurors on Fayed and that there are jurors and they are talking about the case. There are jurors that are making reference to looking up things on the internet and that they are discussing this and that there were discussions between jurors on the way to the parking lot last night. [¶] And she mentioned specifically Juror No. 6 and Juror No. 9." (10RT 1852:23-28, 1853:1-2.) Based on the voice, the lower court said, "[I]t's either Juror No. 7 or Juror No. -- I think it's Juror No. 10 . . . [¶] In my opinion, it's from one of those two jurors, if it's from a juror." (10RT 1856:21-22,24-25.)

On May 13, 2011, the court noted that it received a note from Juror No. 3 that morning. (10RT 1960:4-6.) The court read the note into the record:

> Your honor, good morning and thank you for taking the time to read this note. In it I'm speaking only for myself, and I do not presume to speak for my fellow jurors. [¶] I am somewhat concerned that the admonitions from the court yesterday in talking amongst ourselves about the case, sending e-mails, et cetera, have created an air of suspicion and doubt among the jurors as we near deliberations. I'm not sure this is the best atmosphere to have. [¶] Would it be possible to clear the air somehow questioning the jurors individually briefly, as I know time is precious, to ascertain if one of us did sent an e-mail? [¶] Personally, I would feel more confident in my fellow jurors if I knew the truth regarding the e-mail or discussions about the case. [¶] I have neither seen nor heard

> any discussion of the details of the case during breaks, at lunch, or when walking to the parking garage. [¶] Again, thank you for your time and consideration. Juror No. 3.

(10RT 1960:7-28, 1961:1-10.)

The court then read into the record the voicemail it received on the evening of May 11, 2011:

> Hello, Judge Kennedy. I'm a juror in Department 109 in the case against Mr. Fayed. I just thought that I would go ahead and bring this to your attention. [¶] After, you know, the morning questioning about making sure that we aren't speaking or making any -- or expressing any opinions, I thought that I would bring it to your attention that after court today, there's specific jurors, a few guys -- I believe this is Juror No. 6 and Juror No. 9 -- were talking about reading articles online and the things that they are investigating themselves and with regards to the case. [¶] And I just want it to be known -- because I don't want this to factor in as being, you know, stated to other jurors and myself, and I do not want this to factor into the case or deliberation when it comes down to the point of if we have to deliberate. [¶] I just want it to be known that even after, you know, the morning where we were all stating not to express or form an opinion, that it seemed to kind of perhaps make everyone -- not everyone, but make certain jurors decide to discuss it more. [¶] I don't know if they are being cautious, but it's definitely being discussed between people primarily after we were excused from the courtroom and are released the following day. [¶] The discussions happened on the way to the parking garage. In regards to the opinions on that case, court case trials, and I just thought that I would let you know that it's very concerning to me if I'm going into deliberation with these people who have already made a verdict in their mind. I just thought I would let you know. Thank you.

(10RT 1961:16-28, 1962:1-28, 1963:1-9.)

The lower court then asked Juror No. 10 if she left a message. (10RT 1965:9-10.) The juror admitted to calling the court but claimed that she hung up without leaving a message. (10RT 1965:7-8.) The court similarly

questioned Juror No. 7, who also denied phoning the court or sending the e-mail. (10RT 1966:12-14.) The court then asked Juror No. 3 if he was aware of any jurors sending e-mails to any of the attorneys' offices, and he responded, "No." (10RT 1970:2-4.) The court then asked Juror No. 4 if she left the voicemail or sent the e-mail, and she denied it. (10RT 1970:23-26.) The court then questioned the remaining jurors, and all denied leaving the message. (10RT 1970-1984.)

The government then asked the court to find that the e-mail and phone call were a hoax, and asked that the court inform the jury about the communications and tell the jury they were a hoax. (10RT 1987:3-15.) Appellant asked the court not to make such specific findings, noting that there was not sufficient evidence that the communications were a hoax. (10RT 1988:1-7.) Appellant's counsel argued that it was not proven that the e-mail and phone call did not come from a juror, and pointed out that it had been determined that jurors had previously lied to the court about outside communications. (10RT 1988:10-17.) Regardless, the lower court decided to tell the jury that there was insufficient evidence for the court to conclude that the communications came from a juror. (10RT 1988:25-28.) Appellant's counsel again objected, stating, "I don't think the court can make [those] findings." (10RT 1989:11-22.) The lower court stated that counsel's objections were "noted" and then called the jury in and gave them the following speech:

> You folks are probably wondering, why is the judge asking us all these questions? And I just want to indicate to you that whenever there's some suggestion that's made somewhere in any trial, not just this case, but any trial that there's maybe some – something going on with jurors that's not right, that the court has to make an investigation of that because, obviously, the most important part of this case is that the defendant and the prosecution receive a fair trial and that this case is decided based on the evidence that's presented in the

> court, not by anything else, not what someone might see on the internet or hear people talking about or anything like that because that's not right and that's not fair to either side. [¶] The court had received a voicemail, an anonymous voicemail from somebody. One of the attorneys' offices had received an anonymous e-mail from someone that seemed to suggest that jurors were involved in some sort of improper activity or conduct. [¶] I have conducted an inquiry of every one of you, and, to my mind, there's not sufficient evidence to give credence to either that voicemail -- anonymous voicemail or anonymous e-mail that were sent, and I'm satisfied, after talking to all of you, that you are all still prepared to decide this case on the evidence that's presented and to make sure that both sides receive a fair trial.

(10RT 1991:20-28, 1992:1-17.)

An additional instance of juror misconduct occurred just days later. On May 17, 2011, a letter was brought to the court by Appellant's counsel which read, "Dear Mr. Werksmen [sic] . . . Several jurors have received the letter and attached materials from the D.A. in your case. Does the court allow this? Is this right?" (11RT 2376:12-16.) Attached to the letter was a campaign mailer from the "Alan Jackson for District Attorney" campaign. (11RT 2376:19-28, 2377:1-28.) The name of the person who received the mailer was blanked out. (11RT 2376:26-27.) Deputy District Attorney Jackson, who was running for political office, told the court that the mailers had been sent out in February, and that none had gone out during the pendency of Appellant's trial. (11RT 2378:1-7.) The government opined that the jury did not need to be questioned about the communication. (11RT 2379:10-13.)

Appellant's counsel noted, "My only concern is that we have had some unusual occurrences and accusations with regard to this panel, and I don't want to highlight for them the fact that there is a campaign; that Mr. Jackson is running for D.A. and certainly I think it is clear he didn't even

become counsel on this case until I think after this mailer would have come out. [¶] So, again, I am not questioning his representations about how this came about. But I think -- I would request that the court inquire of the jurors if there has been any influence or if anybody has been contacted or received any communications of any kind about the case that would affect their impartiality." (11RT 2379:22-28; 2380:1-7.)

The government argued that this was "the straw that broke the camel's back" and asked the sheriff's department to launch a formal investigation.[39] (11RT 2381:6-10.) The lower court responded, "I mean, I agree; I have never had a case where there have been so many outside influences. There could be one outside influence that's doing everything." (11RT 2382:27-28, 2383:1-2.) The lower court continued, "You know, I have been on the bench for twenty-two years, almost twenty-three years. And I have just never experienced anything like this." (11RT 2382:4-6.) Appellant's counsel agreed there should be an investigation but also reiterated that the jury should be questioned, noting, "I want to do what's right. I want a fair proceeding. I want to make sure nobody has been influenced. I think the best way is to ask the jurors, and so that's my request at this time." (11RT 2384:6-17.)

The lower court then made a general inquiry to the jury asking whether any of them received correspondence from any party, which they denied. (11RT 2386:12-28.) The court then told the jury:

> Now, you know, as you know, there have been some suggestions made that things are happening or jurors are being contacted or jurors are engaging in certain conduct. And we received another anonymous tip today, and I am not going to go into the specifics about it. But, you know, I have been a judge for close to twenty-three years, and I have never

[39] The court later noted that the sheriff's department did not do much of an investigation. (14RT 2922:16-22.)

> had a situation like the one in this case. [¶] And so I want to ask you folks, please, to be extremely vigilant if anybody tries to contact you in any way in connection with this case. [¶] And I know that you are doing your utmost to do your job, and I appreciate the efforts that all of you are making. But there is someone out there that's trying to cause trouble, and I don't know who that someone is. [¶] So just be vigilant. And if anybody tries to contact you, you get any anonymous, you know, correspondence or information or anything like that, just please let us know right away. Because we will do what we need to do to follow up. [¶] So I just wanted to just leave you with that. And of course, you know my admonition about not forming or expressing any opinion or discussing this matter, and you know that by heart. And I know you are all adhering to that.

(11RT 2386:22-28; 2387:1-21.)

2. STANDARD OF REVIEW

An appellate court must undertake a de novo review to determine whether there was juror misconduct, and, if so, whether that misconduct prejudiced the defendant and requires reversal. (*People v. Cumpian* (1991)1 Cal.App.4th 307, 311 [1 Cal.Rptr.2d 861].) Additionally, where a defendant appeals the denial of a new trial motion because of juror misconduct, the appellate court must independently review that decision as a mixed question of law and fact. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1255 [17 Cal.Rptr.3d 302, 95 P.3d 523].)

3. JURY MISCONDUCT OCCURRED IN THE INSTANT CASE

A defendant has a constitutional right to have the charges against him or her determined by a fair and impartial jury. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§15 & 16; *People v. Blackwell* (1987) 191 Cal.App.3d 925, 929 [236 Cal.Rptr. 803] [referencing numerous

supporting cases therein].) The rule, "which affords a criminal defendant a fair and impartial jury, is of constitutional dimension firmly planted in this nation's heritage, and is indisputably compelling." (*People v. Meza* (1987) 188 Cal.App.3d 1631, 1645 [234 Cal.Rptr. 235].) An impartial jury is one in which no member has been improperly influenced (*People v. Nesler* (1997) 16 Cal.4th 561, 578 [66 Cal.Rptr.2d 454, 941 P.2d 87]; *People v. Hollowav* (1990) 50 Cal.3d 1098, 1112 [269 Cal.Rptr. 530, 790 P.2d 1327], disapproved of on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1 [38 Cal.Rptr.2d 394, 889 P.2d 588]), and every member is "capable and willing to decide the case solely on the evidence before it." (*McDonough Power Equipment. Inc. v. Greenwood* (1984) 464 U. S. 548, 554 [104 S.Ct. 845, 78 L.Ed.2d 663].)

Jurors commit serious misconduct when they converse among themselves about the trial or express any opinion about the matter until the case is finally submitted to them. (*In re Hitchings* (1993) 6 Cal.4th 97, 117-118 [24 Cal.Rptr.2d 74, 860 P.2d 466]; see also Pen. Code, §1122(b).) "'The theory of the law is that a juror who has formed an opinion cannot be impartial.'" (*Irvin v. Dowd* (1961) 366 U.S. 717, 722-723 [81 S.Ct. 1639, 6 L.Ed.2d 751], quoting *Reynolds v. United States* (1878) 98 U.S. 145, 155 [25 L.Ed. 244].) Even a single conversation by a juror about pending court proceedings has been held to constitute serious misconduct. (See *In re Hitchings, supra,* 6 Cal.4th at p. 117; *People v. Pierce* (1979) 24 Cal.3d 199, 20 [155 Cal.Rptr. 657, 595 P.2d 91].)

"'[W]hen misconduct of jurors is shown, it is presumed to be injurious to defendant, unless the contrary appears.' [Citation.]" (*People v. Holloway, supra,* 50 Cal.3d at p. 1108.) Thus, once misconduct is shown, "'prejudice is presumed; the state must then rebut the presumption or lose the verdict. [Citation.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1178

[36 Cal.Rptr.2d 235, 885 P.2d 1], quoting *People v. Marshall* (1990) 50 Cal.3d 907, 949 [269 Cal.Rptr. 269, 70 P.2d 676].) The presumption can only be rebutted by affirmative proof that "no prejudice *actually* resulted." (*People v. Pierce, supra,* 24 Cal.3d at p. 207, italics added; see also *People v. Honeycutt* (1977) 20 Cal.3d 150, 156 [141 Cal.Rptr. 698, 570 P.2d 1050].) If the presumption of prejudice is not rebutted by affirmative evidence proving that no prejudice actually resulted, "the accused is entitled to a new trial" regardless of the strength of the evidence against him. (*People v. Sassounian, supra,* 182 Cal.App.3d at p. 399; see also *People v. Pierce, supra,* 24 Cal.3d at pp. 206-207; *People v. Diaz* (1984) 152 Cal.App.3d 926, 935 [200 Cal.Rptr. 77].)

The facts stated above show a startling number of instances of misconduct. Jurors were communicating out of court, lying to the lower court about the communications, and sending *ex parte* communications to the court and counsel. As a result, Appellant has shown misconduct and prejudice is presumed.[40]

* * *

[40] Additionally, at the conclusion of the guilt phase, Appellant requested a new, untainted jury for the penalty phase. (12RT 2404-2405.) Penal Code section 190.4, subdivision (c), states that "the same jury shall consider the penalty as considered the guilty verdict, unless good cause is shown for separate juries." (*People v. Lucas* (1995) 12 Cal.4th 415, 483 [48 Cal.Rptr.2d 525, 907 P.2d 373].) The applicable standard for good cause is the jury's inability to perform its function. (*People v. Superior Court (Brim)* (2011) 193 Cal.App.4th 989, 993 [122 Cal.Rptr.3d 625].) All of the misconduct described above occurred during the guilt phase of the trial. The numerous instances of reported juror misconduct show that the jury was tainted by prejudice and improperly formed opinions regarding Appellant's guilt, rendering that jury incapable of giving "fair and due consideration" to the penalty issues. (*People v. Brown* (1976) 61 Cal.App.3d 476, 478, fn.1 [132 Cal.Rptr. 217].) Thus, *at a minimum*, the misconduct warranted a new jury at the penalty stage of the trial.

4. THE LOWER COURT FAILED TO PROPERLY INVESTIGATE THE MISCONDUCT

"A trial court must conduct a sufficient inquiry to determine facts alleged as juror misconduct 'whenever the court is put on notice that good cause to discharge a juror may exist.'[Citation.]" (*People v. Davis* (1995) 10 Cal.4th 463, 547 [41 Cal.Rptr.2d 826, 896 P.2d 119], quoting *People v. Burgener* (1986) 41 Cal.3d 505, 519 [224 Cal.Rptr. 112, 714 P.2d 1251].) Courts have repeatedly emphasized the need to properly question jurors before the trial court can exercise its discretion. (See *People v. Price* (1991) 1 Cal.4th 324, 400 [3 Cal.Rptr.2d 106, 821 P.2d 610] [trial court may discharge the juror "if, after examination of the juror, the record discloses reasonable grounds for inferring bias"]; *People v. Compton* (1971) 6 Cal.3d 55, 60 [98 Cal.Rptr. 217, 490 P.2d 537] [error to dismiss based on ambiguous extrajudicial remark without questioning juror], abrogation on another ground recognized by *People v. Fuiava* (2012) 54 Cal.4th 622, 711 [137 Cal.Rptr.3d 147, 269 P.3d 568]; *People v. Barber* (2002) 102 Cal.App.4th 145, 152-153 [124 Cal.Rptr.2d 917] [error to dismiss juror without questioning both sides in dispute over adequacy of juror's deliberations]; see also *Remmer v. United States* (1954) 347 U.S. 227 [74 S.Ct. 450, 98 L.Ed. 654].)

A perfunctory investigation into the purported misconduct is insufficient; the trial court has a duty to make whatever inquiry is necessary to determine whether a juror should be discharged. (*People v. Espinoza* (1992) 3 Cal.4th 806, 821 [12 Cal.Rptr.2d 682, 838 P.2d 204]; see also *People v. Guzman* (1977) 66 Cal.App.3d 549 [136 Cal.Rptr. 163].) The investigation and hearing must be thorough enough to determine whether good cause exists. (See *People v. Huff* (1967) 255 Cal.App.2d 443, 448 [63 Cal.Rptr. 317]; *People v. Cowan* (2010) 50 Cal.4th 401, 506-507 [113

Cal.Rptr. 850, 236 P.3d 1074]; *People v. Adcox* (1988) 47 Cal.3d 207, 253 [253 Cal.Rptr. 55, 763 P.2d 906].) Thus, any decision of the trial court must be the product of a complete investigation and a sufficient hearing in which the trial court reached an informed and intelligent decision. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1117 [74 Cal.Rptr.2d 121, 954 P.2d 384]; *People v. Williams* (1997) 16 Cal.4th 153, 230-231 [66 Cal.Rptr.2d 123, 940 P.2d 710]; *People v. Hardy* (1992) 2 Cal.4th 86, 174 [5 Cal.Rptr.2d 796, 825 P.2d 781].) Moreover, when a trial court fails to fully investigate alleged jury misconduct, a reviewing court must reverse the judgment unless the court is "able to declare the error to be harmless beyond a reasonable doubt [under] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]." (*People v. Tuggle* (2009) 179 Cal.App.4th 339, 387 [100 Cal.Rptr.3d 820].)

As noted in the facts above, the lower court was repeatedly reluctant to conduct the requisite investigation. The lower court was hasty to disbelieve that the communications were coming from jurors, loath to question the jurors individually, and quick to believe that the jurors were not committing misconduct. (See 9RT 1578:3-21, 1660:27-28, 1661:1-28, 1662:1-9, 1663:18-19, 1664:4-9, 1665:16-24.) The lower court's disinclination to conduct full and complete investigations into these instances of misconduct was particularly troubling in the instant case since it had been proved that Juror No. 5 and Alternate Juror No. 3 lied about observing misconduct when questioned as a group. (9RT 1582:7-18.) Amazingly, one juror even sent the court a note asking that the court stop general questioning and question the jurors individually about witnessing or participating in misconduct. (10RT 1960:7-28, 1961:1-10.) Even though the jurors, through words and actions, demonstrated that, in order to be candid, they needed to be questioned individually, the lower court repeatedly

refused to do so; thus, failing to conduct the requisite investigations into the misconduct.

5. THE LOWER COURT ERRED IN NOT GRANTING THE NEW TRIAL MOTION BASED ON THE JURY MISCONDUCT

Under Penal Code section 1181, subdivision (3), a trial court may grant a new trial "[w]hen the jury has . . . been guilty of any misconduct by which a fair and due consideration of the case has been prevented." As this Court has noted, when the issue of misconduct is raised in a motion for new trial, the lower court must utilize the same test noted above: first, determine if there was misconduct; if so, prejudice is presumed and the government must rebut that presumption. (*People v. Davis, supra,* 10 Cal.4th at p. 547.)

On appeal from the denial of a New Trial Motion, the court must "accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citations.]" (*People v. Majors* (1998) 18 Cal.4th 385, 417 [75 Cal.Rptr.2d 684, 956 P.2d 1137], citing *People v. Nesler, supra,* 16 Cal.4th at p. 582.) The court then independently reviews whether those facts constitute misconduct and whether the misconduct was prejudicial. (*Ibid.; People v. Nesler, supra,* 16 Cal.4th at pp. 582-583.)

"'Substantial evidence' is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651 [51 Cal.Rptr.2d 907, 917], citing *Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633 [29 Cal.Rptr.2d 191].) "Substantial evidence . . . is not synonymous with 'any' evidence"; it is "'substantial' proof of the essentials which the law requires." (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871–872 [269 Cal.Rptr. 647]; *Kruse v. Bank of America* (1988) 202 Cal.App.3d 38, 51 [248 Cal.Rptr. 217].) "The focus is on the

quality, rather than the quantity, of the evidence. 'Very little solid evidence may be "substantial," while a lot of extremely weak evidence might be 'insubstantial.'" (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 651, citing *Toyota Motor Sales U.S.A., Inc. v. Superior Court, supra,* 220 Cal.App.3d at pp. 871–872.) Furthermore, "inferences may constitute substantial evidence, but they must be the product of logic and reason. Speculation or conjecture alone is not substantial evidence." [41] (*Roddenberry v. Roddenberry, supra*, 44 Cal.App.4th at p. 652, citing *Louis & Diederich, Inc. v. Cambridge European Imports, Inc.* (1987) 189 Cal.App.3d 1574, 1584–1585 [234 Cal.Rptr. 889]; *Marshall v. Parkes* (1960) 181 Cal.App.2d 650, 655 [5 Cal.Rptr. 657].)

On September 12, 2011, Appellant filed Motion for a New Trial and argued, inter alia, that a new trial should be granted based on juror misconduct. (14CT 003738, 003778-003783.) The lower court held a hearing on the motion on November 17, 2011. (14RT 2883.) On the issue of juror misconduct, the lower court stated:

> I never in all my years had a case like this where there were outside forces which are associated with the defense. Not defense counsel, but somehow associated with the defense creating mischief and attacking our very, you know, heart of

---

[41] "Substantial evidence is therefore not merely an appellate incantation designed to conjure up an affirmance. To the contrary, it is essential to the integrity of the judicial process that a judgment be supported by evidence that is at least substantial." (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 652.) Furthermore, "[a]n appellate court need not 'blindly seize any evidence . . . in order to affirm the judgment. The Court of Appeal "was not created . . . merely to echo the determinations of the trial court. A decision supported by a mere scintilla of evidence need not be affirmed on review."'" (*Ibid.*, citing *Kuhn v. Department of General Services, supra,* 22 Cal.App.4th at p. 1633, quoting in part *Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937, 944 [202 Cal.Rptr. 505].)

> our criminal justice system and trying to derail the jury in this case.

(14RT 2895:27-28, 2896:1-28, 2897:27-28.)

The lower court continued to baselessly point the blame for the misconduct at Appellant, stating:

> And it was someone else that was creating the mischief, somebody associated with the defendant. If the defendant is willing to pay somebody $25,000 to kill his wife, then why wouldn't the defendant be willing to try to subvert the jury process in this case by having someone, you know, send anonymous letters and emails and make anonymous phone calls to the court? I mean, that just is, I think, to be expected.

(14RT 2898:1-10.)

Appellant's counsel asked to address this point, and the lower court stated, "No, I have made my ruling." (14RT 2898:28.) Appellant's counsel then interjected, arguing, "there has never been a shred of evidence that any of these issues came from the defendant. I know your honor didn't include the defense attorneys in that; we had nothing to do with this. . . . [¶] I would just ask the court to reconsider whether it is fair to characterize the jury issues as having been associated with the defense when there is really no evidence of it, and in fact, they could just as easily have been perpetrated, mischievously, in order to embarrass one of the deputy D.A.'s, who is at this time running for District Attorney." (14RT 2899:9-23.)

The lower court stated, "Basically the way I looked at that was, the only one that stood to benefit from this jury trial being derailed or there being some kind of a mistrial or the jury being dismissed somehow, was the defendant. The prosecution did not stand to benefit from that. [¶] And I am just saying, I -- I don't know for a fact, but my suspicions are that it is associated with the defendant." (14RT 2889:24-28, 2900:1-4.) Appellant responded, "I would only invite the court to take the converse view; that the

one who had the most to gain for getting lousy corrupted jurors off the panel was the defense. We didn't benefit from creating mischief and causing mistrials. We would have benefited from knocking off jurors who were talking in the hallway and conspiring to rig a verdict. [¶] So I would ask the court to view it in that perspective." (14RT 2900:6-15.) Regardless, the lower court denied the Motion for New Trial based, in part, on its unsupported assumptions. (14RT 2898:15-25.)

As noted above, once misconduct is shown, prejudice should have been presumed, and the government should have been required to rebut that presumption. (*People v. Pierce, supra,* 24 Cal.3d at p. 207.) Instead, the lower court bypassed those well-established requirements by stating that it was the defense who committed the misconduct. (14RT 2895:27-28, 2896:1-28, 2897:27-28, 2898:1-10.) As set forth above, this Court gives deference to the lower court on findings of fact if supported by "substantial evidence." (*People v. Nesler, supra,* 16 Cal.4th at p. 582.) However, "[s]peculation and conjecture alone is not substantial evidence." (*Roddenberry v. Roddenberry, supra,* 44 Cal.App.4th at p. 651.) The lower court's assumption that Appellant was responsible for the misconduct was nothing more than sheer speculation. (14RT 2889:24-28, 2900:1-4.) It was not rooted in any actual fact and should not be given any deference.

Furthermore, the evidence in the record actually contradicts the lower court's assumption. The communications the court and counsel referenced events occurring in the courtroom; thus, it could be reasonably inferred that if the communications had come from someone not a juror, the person or persons sending the communications were in attendance, or were informed by someone in attendance, of what was happening during the trial. However, during the trial, Appellant was held in custody without bail, in isolation (K-10 status); thus, he had absolutely no ability to send emails,

leave phone messages on the court's voicemail (without someone accepting the collect call), or access political mailers. (1CT 000031:27-28, 000041:24-27.) Additionally, there was absolutely no evidence in the record that Appellant *had any supporters at all* in the courtroom during the trial. Thus, there was no evidence that anyone "associated" with Appellant could have, or in fact did, send those communications. Consequently, the lower court erred in denying the Motion for New Trial.

C. THE TRIAL COURT COMMITTED NUMEROUS ERRORS IN INSTRUCTING THE JURY IN VIOLATION OF APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Among the most fundamental rights guaranteed by the United States Constitution is the right to a fair trial. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 61 [109 S.Ct. 333, 102 L.Ed.2d 281] (dis. opn. of Blackmun, J.) ["The Constitution requires that criminal defendants be provided with a fair trial, not merely a 'good faith' try at a fair trial"]; see also *Kentucky v. Whorton* (1979) 441 U.S. 786, 789 [99 S.Ct. 2088, 60 L.Ed.2d 640].) Indeed, the guarantee of a fair trial is of paramount importance; it is the cornerstone of due process. (See Michael T. Fischer, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process than the Bottom Line* (1988) 88 Colum. L.Rev. 1298, 1299, fn.4.) Because the death penalty is unique in both its severity and finality, capital cases require heightened due process requirements. (See *Gardner v. Florida* (1977) 430 U.S. 349, 358 [97 S.Ct. 1197, 51 L.Ed.2d 393]; *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973] [the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed"].)

"At a minimum, it is the court's duty to ensure the jury is adequately instructed on the law governing all elements of the case submitted to it to the extent necessary for a proper determination in conformity with the applicable law." (*People v. Iverson* (1972) 26 Cal.App.3d 598, 604-605 [102 Cal.Rptr. 913], disapproved of on another ground by *In re Earley* (1975) 14 Cal.3d 122 [120 Cal.Rptr. 881, 534 P.2d 721].) Of the various types of errors that appellate courts are asked to review, "nothing results in more cases of reversible error than mistakes in jury instructions." (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252 [240 Cal.Rptr. 516].)

As set forth herein, the trial court committed multiple errors when it instructed the jury, violating Appellant's right to a fair trial, due process, and equal protection. (See e.g. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175]; see also *Estelle v. McGuire, supra,* 502 U.S. 62; *Hernandez v. Ylst* (9th Cir. 1991) 930 F.2d 714, 716.)

1. THE LOWER COURT IMPROPERLY REFUSED TO INSTRUCT ON APPELLANT'S THIRD-PARTY CULPABILITY DEFENSE

A basic principle of due process and a fair trial is the right of a criminal defendant to present a defense. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§7 & 15.) It is not enough that the jury is permitted to hear the defense's evidence in support of a theory; the jury must also be instructed on how to evaluate each defense theory. (*People v. Wickersham* (1982) 32 Cal.3d 307, 323-324 [185 Cal.Rptr. 436, 650 P.2d 311], disapproved of on another ground by *People v. Barton* (1995) 12 Cal.4th 186, 200 [47 Cal.Rptr.2d 569, 906 P.2d 531]; *Mathews v. United States* (1988) 485 U.S. 58, 63 [108 S.Ct. 883, 99 L.Ed.2d 54].) Further, instructions on a defense

theory are necessary to ensure that the jurors do not improperly shift the burden of proof to the defendant to prove the defense.[42]

A trial court must provide an instruction for a defense when "it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case." (*People v. Sedeno* (1974) 10 Cal.3d 703, 716 [112 Cal.Rptr. 1, 518 P.2d 913], overruled on another ground by *People v. Breverman* (1998) 19 Cal.4th 142 [77 Cal.Rptr.2d 870, 960 P.2d 1094].) In deciding whether to instruct the jury on a defense, the trial judge must accept as true the evidence favorable to the defendant, disregard conflicting evidence, and draw only those inferences from the evidence which are favorable to the defendant. (See *People v. Flannel* (1979) 25 Cal.3d 668, 684-685 [160 Cal.Rptr. 84, 603 P.2d 1], superseded on another ground by statute as stated in *In re Christian* (1994) 7 Cal.4th 768 [30 Cal.Rptr.2d 33, 872 P.2d 574]; *see also United States v. Bailey* (1980) 444 U.S. 394, 398 [100 S.Ct. 624, 62 L.Ed.2d 575].) Moreover, even if the evidence in support of the instruction is "incredible," the reviewing court must proceed on the supposition that the evidence is entirely true. (*People v.*

---

[42] Appellant's counsel repeatedly stressed this point, arguing:

> It was important to us in drafting the instruction to make sure that we didn't state it in such a way that the defense assumed a burden which the case law does not place on us. [¶] . . . [¶] it's not required that the defendant prove this fact beyond a reasonable doubt; otherwise, the evidence that we solicited --that we put on about Mary Mercedes, the jury could assume that we have a burden to prove something to a certain level that we don't. [¶] . . . [¶] I think to not give it at all, when third-party culpability was the defense in the form of one witness, would be problematic.

(10RT 2089:8-11, 2090:23-28, 2093:23-24.)

Burnham (1986) 176 Cal.App.3d 1134, 1143 [222 Cal.Rptr. 630].) "[T]he trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'[citations.]" (*People v. Salas* (2006) 37 Cal.4th 967, 982-983 [39 Cal.Rptr.3d 624, 127 P.3d 40].)

Measured against these standards, the record contains sufficient evidence that the lower court should have given Appellant's third-party culpability instruction.[43] At trial, the government conceded that Appellant should be allowed to present third-party culpability evidence. (3RT 293-294.) Thereafter, Patty Taboga testified that Mary Mercedes had previously asked if Taboga's husband would kill Pamela Fayed. (10RT 1904:19-21.) Mercedes told Taboga that "money was running out and Pamela had to go." (10RT 1905:8-10.) Although the government agreed that the evidence should be admitted, it bristled at allowing a jury instruction,

---

[43] The defense proposed the following jury instruction:

> You have heard evidence that other persons, among them Mary Mercedes, committed the crimes charged. It is not required that the defendant prove this fact beyond a reasonable doubt. Defendant is entitled to an acquittal if the evidence raises a reasonable doubt in your mind as to the defendant's guilt. Such evidence may itself raise a reasonable doubt as to the defendant's guilt. However, its weight and significance, if any, are matters for your determination. If after consideration of this and all of the other evidence, you have a reasonable doubt that the defendant committed the offenses or any of them, you must give the defendant the benefit of the doubt and find him not guilty of any offense you think he did not commit.

(14CT 003524, citing *People v. Davis, supra,* 10 Cal.4th at p. 501; *People v.Cudjo* (1993) 6 Cal.4th 585, 609 [25 Cal.Rptr.2d 390, 863 P.2d 635]; *People v. Alcala* (1992) 4 Cal.4th 742 [15 Cal.Rptr.2d 432, 842 P.2d 1192]; *People v. Hall* (1986) 41 Cal.3d 826 [226 Cal.Rptr. 112, 718 P.2d 99].)

arguing that an instruction would improperly "highlight" defense evidence.[44] (10RT 2093:2.)

Despite the extensive precedent requiring an instruction on a defense theory,[45] the lower court refused to give the instruction, noting, "Here's the way I look at it: there's no stock instruction on third-party culpability in either CALCRIM or CALJIC, so there's never been a feeling on the part of the people that draft these instructions that such an instruction is necessary." (10RT 2095:26-28, 2096:1-2.)

---

[44] The government objected to the instruction, arguing:

> I think that what the court is struggling with is certainly what I'm struggling with, that the defense is asking that the court almost direct the deliberations on how they should weigh and balance that particular piece of evidence, that piece of evidence, which happens to be the defense's only piece of evidence, they're asking that we draw it up and put a bright light on it and have the court actually highlight that singular piece of evidence to the jurors.

(10RT 2091:11-19.) Respondent later argued again that the court should "not allow the defense to highlight their evidence over the prosecution's evidence." (10RT 2093:1-3.)

[45] The function of a third-party culpability instruction is analogous to instructions on other defense theories. (See, e.g., CALJIC No. 2.91 [identity]; CALJIC No. 4.50 [alibi]; CALJIC No. 4.30 [unconsciousness]; and CALJIC No. 5.15 [self-defense].) These instructions inform the jury that the defense does not have to "prove anything" but that the defense can be used to "merely raise a reasonable doubt." (Com. to CALJIC No. 4.50.) These instructions also comply with Evidence Code section 502, which requires a burden of proof instruction "on *each issue* and as to whether that burden requires that a party raise a reasonable doubt." (Evid. Code, §502, italics added; see *People v. Simon* (1995) 9 Cal.4th 493, 500-501 [37 Cal.Rptr.2d 278, 886 P.2d 1271] [noting that as to defense theories, the trial court is required to instruct on who has the burden and the nature of that burden].)

However, the jury instructions in CALCRIM and CALJIC were plainly not meant to be an exhaustive list of instructions. In fact, California Rules of Court, rule 2.1050, specifically provides, "Whenever the latest edition of the Judicial Council jury instructions does not contain an instruction on a subject on which the trial judge determines that the jury should be instructed . . . the instruction given on that subject should be accurate, brief, understandable, impartial, and free from argument." Further, this Court, as well as at least one court of appeal, has reaffirmed the proposition that CALCRIM and CALJIC are not meant to be the lone source of jury instructions. (See, e.g., *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464 [251 Cal.Rptr. 904] ["Although the CALJIC pattern instructions perform an invaluable service to the bench and bar, that those instructions are not sacrosanct is apparent from their treatment by the appellate courts"]; see also *People v. Morales* (2001) 25 Cal.4th 34, 48, fn. 7 [104 Cal.Rptr.2d 582, 18 P.3d 11] ["[W]e caution that jury instructions, whether published or not, are not themselves the law, and are not authority to establish legal propositions or precedent. They should not be cited as authority for legal principles in appellate opinions. At most, when they are accurate, as the quoted portion was here, they restate the law"].)

Consequently, the lower court erred in finding that Appellant was not entitled to an instruction on his third-party culpability defense theory merely because such an instruction was not enumerated in CALJIC or CALCRIM, and the error was prejudicial.[46] (*United States v. Zuniga, supra,* 6 F.3d at pp. 571-572.)

---

[46] Under California law, a defendant's conviction should be reversed unless the government can show that the failure to provide the instruction was harmless beyond a reasonable doubt. (See *People v. Flood* (1998) 18 Cal.4th 470, 479-480 [76 Cal.Rptr.2d 180, 957 P.2d 869] [failure to instruct on self-defense is subject to *Chapman* review]; but see *People v. Salas,*

2. THE LOWER COURT ERRONEOUSLY USED CALJIC

On August 26, 2005, the Judicial Council withdrew its endorsement of CALJIC and adopted the new CALCRIM instructions. (*California Judicial Branch* <http://www.courts.ca.gov/partners/312.htm>; see *People v. Thomas* (2007) 150 Cal.App.4th 461, 465 [58 Cal.Rptr.3d 581].) The purpose of the new instructions were to "accurately state the law in a way that is understandable to the average juror." (Cal. Rules of Court, rule 2.1050(a).) The Judicial Council "endorse[d] these instructions for use and makes every effort to ensure that they accurately state existing law." (Cal. Rules of Court, rule 2.1050(b).) "CALCRIM instructions are now 'viewed as superior' to CALJIC instructions. [Citation.]" (*People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1188 [67 Cal.Rptr.3d 871].) Use of CALJIC over CALCRIM may be improper if the instructions used mis-state "the law, were hopelessly confusing to the jury, or were otherwise erroneous or inadequate." (*People v. Thomas, supra,* 150 Cal.App.4th at p. 466.)

In the Motion to Dismiss pursuant to Penal Code section 995, Appellant argued that the CALCRIM jury instructions set forth the

---

supra, 37 Cal.4th at p. 984 [it is unsettled which harmless error standard applies when the court fails to instruct on an affirmative defense].) However, some federal courts have found that under the Sixth and Fourteenth Amendment: "[t]he right to have the jury instructed as to the defendant's theory of the case is one of those rights 'so basic to a fair trial' that failure to instruct where there is evidence to support the instruction can never be considered harmless error. [Citation.]" (*United States v. Zuniga* (9th Cir. 1993) 6 F.3d 569, 571-572; accord, *United States v. Unruh* (9th Cir. 1987) 855 F.2d 1363, 1372, cert. denied *sub nom. Forde v. United States* (1988) 488 U.S. 974 [109 S.Ct. 513, L.Ed.2d 548] ["'If the Sixth Amendment right to have a jury decide guilt and innocence means anything . . . , it means that the facts essential to conviction must be proven beyond the jury's reasonable doubt, not beyond ours.' [Citations.]"]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1201-1202.)

appropriate standards, and Respondent argued that the CALJIC instructions should apply. (8CT 001826; 9CT 002033.) At the start of trial, the lower court stated "I do intend to use CALJIC rather than CALCRIM. I am not brave enough to use CALCRIM on a death penalty case." (8RT 1575:14-16.) However, as set forth below, the CALJIC instructions for withdrawal from aiding and abetting set forth a heightened standard for Appellant which has been properly revised in CALCRIM. Thus, use of the CALJIC in this case was improper.

a. THE LOWER COURT ERRONEOUSLY USED THE CALJIC INSTRUCTION FOR WITHDRAWAL FROM AIDING AND ABETTING

At trial, the lower court read instructions concerning withdrawal from aiding and abetting using the CALJIC instruction:

> Before the commission of the crime charged in Count One, an aider and abettor may withdraw from participation in that crime and thus avoid responsibility for that crime by doing two things: First, he must notify the other principals known to him of his intention to withdraw from the commission of that crime; second, *he must do everything in his power to prevent its commission*. [¶] The People have the burden of proving that the defendant was a principal in and had not effectively withdrawn from participation in that crime. If you have a reasonable doubt that he was a principal in and participated as an aider and abettor in a crime charged, you must find him not guilty of that crime.

(11RT 2133:13-28, 2134:1-4 [using CALJIC No. 3.03], italics added.)

However, the corresponding CALCRIM instruction, No. 401, provides:

> To withdraw, a person must do two things: [¶] 1. He or she must notify everyone else he or she knows is involved in the commission of the crime that he or she is no longer participating. The notification must be made early enough to

> prevent the commission of the crime. [¶] AND [¶] 2. He or she must do *everything reasonably within his or her power* to prevent the crime from being committed. He or she does not have to actually prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you may not find the defendant guilty under an aiding and abetting theory.

(CALCRIM No. 401, italics added.) Significantly, in drafting CALCRIM No. 401, the Judicial Counsel deliberately used the phrase "everything reasonably within his or her power" instead of the previously used "everything in his power." Thus, CALCRIM No. 401 describes a different, lower, standard to satisfy withdrawal compared to CALJIC No. 3.03.

As noted above, courts are not prohibited from using CALJIC, but the instruction must accurately state the law.[47] (See *People v. Beeman* (1984) 35 Cal.3d 547, 555-558 [199 Cal.Rptr. 60, 674 P.2d 1318].) As set forth herein, the instruction given in this case, CALJIC No. 3.03, does not provide an accurate statement of the law.

i. CALJIC 3.03 DOES NOT ACCURATELY STATE THE LAW OF WITHDRAWAL

The law on withdrawal was discussed in *People v. Norton* (1958) 161 Cal.App.2d 399 [327 P.2d 87] (hereafter *Norton*), wherein the court approved an instruction requiring the defendant to do "everything *practicable*" to prevent the crime from being committed in order to withdraw from the crime. (*Id.* at p. 403, italics added.) The *Norton* Court found that the instruction "accurately and correctly recites the law

---

[47] Additionally, any instruction that lowers the government's burden of proof or improperly shifts the burden of proof to the defendant is improper. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 514 [99 S.Ct. 2450, 61 L.Ed.2d 39]; see also U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.)

delineated in *People v. King* (1938) 30 Cal.App.2d 185, 204 [85 P.2d 928] [hereafter *King*] and *People v. Ortiz* (1923) 63 Cal.App. 662 [219 P. 1024] [hereafter *Ortiz*]." (*Ibid.*) In *King*, *supra*, 30 Cal.App.2d. 185, the court found that an aider and abettor was liable for the crime "unless within time to prevent the commission of the contemplated act he has done everything *practicable* to prevent its consummation. It is not enough that he may have changed his mind, and tries when too late to avoid responsibility. He will be liable if he fails within time to let the other party know of his withdrawal, and does everything in his power to prevent the commission of the crime." (*Id.* at p. 204, italics added.) Additionally, in *Ortiz, supra,* 63 Cal.App. 662, the court noted, "Responsibility of an accessory 'does not cease simply because, after starting the ball, he changes his mind, and tries, when too late, to stop it. To emancipate him from the consequences, not only must he have acted in time, and done everything *practicable* to pre[v]ent the consummation, but the consummation, if it takes place, must be imputable to some independent cause.'(Wharton's Criminal Law, 11th ed., sec. 267)." (*Id.* at p. 670, italics added.)

In contrast to *Norton*, *King*, and *Ortiz*, the standard to satisfy the defense of withdrawal was inexplicably mischaracterized in *People v. Shelmire* (2005) 130 Cal.App.4th 1044 [30 Cal.Rptr.3d 696] (hereafter *Shelmire*). In *Shelmire*, the court characterized the second element of withdrawal, under CALJIC No. 3.03, as requiring the defendant to do "everything in his power to prevent the crime or crimes from being committed." (*Id.* at p. 1055.) However, the *Shelmire* Court cited *Norton*, *supra*, 161 Cal.App.2d 399, which only required the defendant to do only everything "practicable." (Compare *id.* at p. 1055 with *Norton*, *supra*, 161 Cal.App.2d at p. 403.) Moreover, no other court interpreting CALJIC No. 3.03 or CALCRIM No. 401 has never established a standard greater than

requiring defendant to do what was "practicable" or "reasonable." Thus, CALJIC No. 3.03, which states that a defendant must co "everything in his power," does not accurately state the law, and its use was improper.

The import of this instructional error is evident in the record. As discussed more fully below, the government repeatedly stressed that Appellant had to do *everything within his power* to withdraw, even telling the jury that Appellant was required by law to notify either the police or Pamela Fayed. (11RT 2342:15-18, 2343:4-6.) Thus, the jury was erroneously instructed, and that error resulted in prejudice.

3. THE LOWER COURT IMPROPERLY INTERMINGLED CALJIC AND CALCRIM

The CALCRIM User's Guide instructs trial courts to not intermingle CALCRIM and CALJIC instructions:

> The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Trying to mix the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion that could severely compromise clarity and accuracy.

(*Guide for Using Judicial Council of California Criminal Jury Instructions ("CALCRIM")* p. 2, <http://www.courts.ca.gov/partners/documents/calcrim_juryins_guide.pdf.> (as of Nov. 1, 2013).)

In the instant case, although the lower court refused to use the CALCRIM instruction for aiding and abetting, the court used CALCRIM No. 521 for first degree murder, instructing the jury:

> The defendant is being prosecuted in count 1 for the crime of murder in the first degree under two separate theories. [¶] No. 1. The murder was willful, deliberate and premeditated. [¶] No. 2. The murder was committed by lying in wait. [¶] Each theory of murder in the first degree has different

> requirements. I already have instructed you as to each theory. [¶] You may not find the defendant guilty of murder in the first degree unless all of you agree that the people have proved beyond a reasonable doubt that he committed that crime; however, all of you need not agree on the same theory.

(10RT 2082:3-22.) In doing so, the lower court noted CALJIC does not have such an instruction for multiple theories. (10RT 2083:2-3.)

Thus, the court used CALJIC No. 3.03, which contains significantly unfavorable and inaccurate language for Appellant concerning withdrawal, and CALCRIM No. 521, which contains language detrimental to Appellant concerning multiple theories of murder. Choosing these instructions à la carte from CALJIC and CALCRIM to Appellant's detriment rendered the trial fundamentally unfair. (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.)

4. THE JURY WAS NOT PROPERLY INSTRUCTED CONCERNING WITHDRAWAL FROM CONSPIRACY

The lower court erred by providing the jury with improper instructions concerning withdrawal from a conspiracy. Specifically, the jury was not informed that it needed to unanimously decide which overt act was committed before it determined that Appellant could no longer withdraw from the conspiracy. At trial, the lower court read the jury the following instruction on withdrawal from a conspiracy:

> A member of a conspiracy is liable for the acts and declarations of his co-conspirators until he effectively withdraws from the conspiracy or the conspiracy has terminated. [¶] In order to effectively withdraw from a conspiracy, there must be an affirmative and good faith rejection or repudiation of the conspiracy which must be communicated to the other conspirators of whom he has knowledge. [¶] If a member of a conspiracy has effectively withdrawn from the conspiracy he is not thereafter liable for any act of the co-conspirators committed after his withdrawal

from the conspiracy, but he is not relieved of responsibility for the acts of his co-conspirators committed while he was a member.

(11RT 2139:13-28, 2140:1-7; CALJIC No. 6.20.)

During closing argument, the government argued:

> [C]an you withdraw from a conspiracy as charged in Count Two? Well, conspiracy is complete upon the commission of an overt act. What does that mean? You know, that's more legalese. [¶] That means if you conspire with somebody, which is you make an agreement, and then that person or any member of the conspiracy does an overt act, they try to get it done, they take one step to try to get it done, the conspiracy is done. The agreement and the overt act. You are guilty of conspiracy. [¶] So how would that apply to this case? [¶] He enters into the conspiracy with Jose Moya, Marquez and Simmons. They all have an agreement. [¶] Those guys get in the car to come down to do the deed, and on the way down here on the 405 they get stuck in traffic. They get in a wreck. They get hit by a truck. Whatever. And the murder never happens. [¶] Fayed is still guilty, and the other men are still guilty of conspiracy to commit murder. Why? Because they agreed upon it. They put their plan in motion. They took overt -- they took steps to get it completed. *And that's when it is done.* [¶] *So he can't say he withdrew from this conspiracy.*

(11RT 2343:14-28, 2344:1-12, italics added.)

Although some courts have found that the jury is not required to unanimously decide which overt acts underlie the conspiracy itself, see, e.g., *People v. Lopez* (1993) 20 Cal.App.4th 897, 904 [24 Cal.Rptr.2d 649], unanimity is required when the issue of withdrawal arises. (See *People v. Russo, supra,* 25 Cal.4th 1124.) In *Russo*, this Court noted, "In some cases, the trial court may have to give some form of a unanimity instruction [on a conspiracy count]. For example, . . .if evidence existed that the defendant had withdrawn from the conspiracy, the court might have to require the jury to agree an overt act was committed before the withdrawal." (*Id.* at p. 1137, fn. 2.) Thus, in *Russo*, this Court noted that the jury should be given a

unanimity instruction, and the jury must unanimously agree on which overt act occurred, before the jury can find that withdrawal is no longer available. (*Ibid.*)

In the instant case, the jury was not instructed that it needed to unanimously determine which overt act(s) occurred before it could find that withdrawal was no longer an option. Further, as set forth in the section on prosecutorial misconduct below, the jury was repeatedly told by the government that the jury could not and should not consider withdrawal at all as a defense to conspiracy.[48] As a result, the lower court erred, and the error warrants reversal.

5. THE LOWER COURT IMPROPERLY REFUSED TO GIVE CALJIC No. 2.23

At trial, Appellant requested that the lower court give the instruction under CALJIC No. 2.23:

> The fact that a witness has been convicted of a felony, if this is a fact, may be considered by you only for the purpose of determining the believability of that witness. The fact of a conviction does not necessarily destroy or impair a witness's believability. It is one of the circumstances that you may consider in weighing the testimony of that witness.

There is no sua sponte duty to give this instruction; however, the instruction should be given on request. (*People v. Kendrick* (1989) 211 Cal.App.3d 1273, 1278 [260 Cal.Rptr. 27] [the instruction "need be given only upon request"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1051–1052 [16 Cal.Rptr.3d 880] ["although a court should give a limiting instruction on request, it has no sua sponte duty to give one"] disapproving

---

[48] A defendant has an absolute right to present a defense. (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.) Thus, the government's repeated argument that it should not consider Appellant's withdrawal argument was improper.

People v. Mayfield (1972) 23 Cal.App.3d 236 [100 Cal.Rptr. 104] [finding a sua sponte duty exists to give a limiting instruction].)

In the instant case, Appellant asked for this instruction to impeach Smith, but the lower court denied the request. (10RT 2067:13, 2068:5-12, 26-28.) The lower court found that Appellant was not entitled to the instruction because, although Smith's lengthy statement came in at trial, he did not actually testify; thus, the court reasoned, he was not a "witness" to be impeached. (10RT 2068:26-28.) The defense made the same argument in the penalty phase, and the lower court made the same ruling. (12RT 2751:1-18.)

However, the lower court's definition of "witness" was narrow and unsupported. The Penal Code provides various definitions of "witness." (E.g., Pen. Code, §679.01 ["'Witness' means any person who has been or is expected to testify for the prosecution, or who, by reason of having relevant information, is subject to call or likely to be called as a witness for the prosecution, whether or not any action or proceeding has yet been commenced"]; Pen. Code, §136(2) ["'Witness' means any natural person, (i) having knowledge of the existence or nonexistence of facts relating to any crime, or (ii) whose declaration under oath is received or has been received as evidence for any purpose, or (iii) who has reported any crime to any peace officer, prosecutor, probation or parole officer, correctional officer or judicial officer, or (iv) who has been served with a subpoena issued under the authority of any court in the state, or of any other state or of the United States, or (v) who would be believed by any reasonable person to be an individual described in subparagraphs (i) to (iv), inclusive"].) Additionally, Penal Code section 1321 describes "competent witnesses" in criminal actions, noting that the rules for determining the competency of witnesses in civil actions are applicable to criminal actions and proceedings. The Code of Civil Procedure section 1878 provides, "A witness is a person whose

declaration under oath is received as evidence for any purpose, whether such declaration be made on oral examination, or by deposition or affidavit."

Regardless of which standard is used, it is clear that the government treated Smith as a witness when it bolstered Smith's credibility at trial. As explained in the prosecutorial misconduct section below, the government argued Smith's credibility to the jury during closing, stating, "But is there anything that makes you suspect that Shawn Smith is not being truthful? No because you can hear every syllable that comes out of his mouth." (11RT 2317:28, 2318:1-3.) The government again vouched for Smith's credibility and truthfulness, arguing that Smith is not a "scumbag" and in fact "reached out to the authorities when he saw something that was wrong." (11RT 2316:21-28, 2317:1-4.)

Thus, the government introduced the lengthy statement of Smith, their star "witness," and then made several statements to bolster Smith's credibility; whereas the lower court refused an instruction which would have allowed the defense to challenge Smith's credibility. This error rendered the trial fundamentally unfair, in violation of Appellant's federal and state constitutional rights. (See U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.)

6. THE LOWER COURT IMPROPERLY GAVE CALJIC No. 2.06

"Proposed instructions which are argumentative and misleading should not be given. [Citation.] Instructions should not draw the jury's attention to particular facts. It is error to give . . . an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition. [Citations.] . . . Repetitious reference, in the instructions, that under the circumstances related the jury 'must find in favor

of [a particular party]' . . . has been condemned. [Citation.]" (*Dodge v. San Diego Electric Ry. Co.* (1949) 92 Cal.App.2d 759, 764 [208 P.2d 37].)

Over objection of Appellant's counsel, the lower court instructed the jury on CALJIC No. 2.06, which provides:

> If you find that a defendant attempted to suppress evidence against himself in any manner, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(11RT 2177:19-28.)

The lower court had already determined that the jury would be instructed on circumstantial evidence with CALJIC No. 2.00 (Direct and Circumstantial Evidence) and No. 2.02 (Sufficiency of Circumstantial Evidence to Prove Specific Intent). (13RT 2732:7-17, 2747:9-10.) These instructions informed the jurors that they may draw inferences from the circumstantial evidence, i.e. that they could infer facts tending to show Appellant's guilt from the circumstances of the alleged crimes. There was no need to repeat this general principle under that guise of permissive inferences of consciousness of guilt, particularly since the trial court did not similarly instruct the jury on the permissive inferences of reasonable doubt about guilt. This unnecessary benefit to the government violated Appellant's rights to both due process and equal protection under the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 479 [93 S.Ct. 2208, 37 L.Ed.2d 82] [holding that state law requiring defendant to reveal his alibi defense without gaining discovery of prosecution's rebuttal witness gives unfair advantage to prosecution in violation of due process].)

* * *

D. THE LOWER COURT ERRED BY ADMITTING EVIDENCE OBTAINED IN VIOLATION OF APPELLANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNLAWFUL SEARCH AND SEIZURE

The Fourth Amendment of the United States Constitution protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures. . . ." (U.S. Const., 4th Amend.; see also Cal. Const., art. I, §13.) The United States Supreme Court has interpreted the Fourth Amendment as requiring both state and federal courts to exclude evidence obtained in violation of the Fourth Amendment's protections. (*Mapp v. Ohio* (1961) 367 U.S. 643, 655 [81 S.Ct. 1684, 6 L.Ed.2d 1081].)

As set forth herein, the government violated Appellant's Fourth Amendment rights when it: 1) seized and searched Appellant's cell phone, 2) obtained a warrant after improperly recording conversations of Appellant's investigator (September 10, 2008 warrant), and 3) obtained a warrant without probable cause (July 31, 2008 warrant).

1. STANDARD OF REVIEW

Appellate review of the trial court's denial of a motion to suppress is governed by well-established principles. (*People v. Glaser* (1995) 11 Cal.4th 354, 362 [45 Cal.Rptr.2d 425, 902 P.2d 729].) An appellate court must uphold the trial court's express and implied factual findings if supported by substantial evidence. (*Ibid.*) However, the trial court's legal conclusions as to the reasonableness of the challenged search and seizure are subject to de novo review. (*Ibid.*) "[T]he ultimate responsibility of the appellate court [is] to measure the facts as found by the [trial court], against the constitutional standard of reasonableness." (*People v. Lawler* (1973) 9 Cal.3d 156, 160 [107 Cal.Rptr. 13, 507 P.2d 621].)

2. THE LOWER COURT IMPROPERLY ALLOWED IN EVIDENCE AT TRIAL OBTAINED THROUGH AN IMPERMISSIBLE SEARCH OF APPELLANT'S PHONE

On October 9, 2009, Appellant filed a Motion to Suppress evidence obtained from his person, including evidence obtained from the seizure and search of his cell phone. (4CT 000944.) In the police reports, officers had asserted that Appellant was detained, not arrested, at the time his cell phone was seized and searched. (4CT 000952.) In the Opposition to the Motion to Suppress and at the hearing on the Motion, the government changed its position, arguing that Appellant was under arrest when the cell phone was seized and searched. (2RT 101:27-28, 102:1-4; 6CT 001386.)

On June 10, 2010, a hearing was held in the lower court. (2RT 11.) At that hearing, the lower court stated, "A rose is a rose is a rose. Is it a detention or is it an arrest? I don't know that it really makes a whole lot of difference." (2RT 98:12-14.) Ultimately, the lower court found that the search of the cell phone was unlawful, but upheld the admission of the evidence based on the doctrine of inevitable discovery. (2RT 102:5-22.)

As set forth herein, the evidence obtained from the cell phone was not admissible through the doctrine of inevitable discovery. Furthermore, the ability of officers to search and seize is, of course, greatly affected by Appellant's status as a detainee or an arrestee. Thus, Appellant was either detained, as stated in the police reports, and the search of his cell phone was unlawful, or Appellant was unlawfully arrested. Either way, any evidence derived from the unlawful search and seizure should have been suppressed.

* * *

a. IF APPELLANT WAS DETAINED, AS STATED IN THE POLICE REPORTS, THEN THE SEIZURE OF HIS PHONE WAS UNLAWFUL

"No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (*Union Pac. R. Co. v. Botsford* (1891) 141 U.S. 250, 251 [11 S.Ct. 1000, 35 L.Ed. 734].) Even a temporary detention of a person constitutes a "seizure," and a "frisk" constitutes a search. (See *Terry v. Ohio* (1968) 392 U.S. 1, 16 [88 S.Ct. 1868, 20 L.Ed.2d 889].) In order to lawfully seize property from a person who is detained, the following requirements must be met: 1) the detention must justified; 2) a pat-down is permitted only if the officer has "reason to believe that he is dealing with an armed and dangerous individual"; and 3) the pat-down must be limited to a search for weapons. (*Id.* at pp. 19, 26-27; see *People v. Avila* (1997) 58 Cal.App.4th 1069, 1074 [68 Cal.Rptr.2d 432].) As set forth herein, the government violated each of these safeguards.

i. APPELLANT'S DETENTION WAS UNLAWFUL

A person "may not be detained even momentarily without reasonable, objective grounds for doing so." (*Florida v. Royer* (1983) 460 U.S. 491, 498 [103 S.Ct. 1319, 75 L.Ed.2d 229].) A detention is unreasonable unless the "detaining officer can point to specific articulable facts that, considered in the light of the totality of circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231 [36 Cal.Rptr.2d 569,

885 P.2d 982]; *Reid v. Georgia* (1980) 448 U.S. 438, 440 [100 S.Ct. 2752, 65 L.Ed.2d 890].) The Supreme Court has noted, "When such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits." (*Brown v. Texas* (1979) 443 U.S. 47, 52 [99 S.Ct. 2637, 61 L.Ed.2d 357].)

In addition to being justified, the encounter must also be "limited in duration, scope, and purpose." (See *In re James D.* (1987) 43 Cal.3d 903 [239 Cal.Rptr. 663, 741 P.2d 161]; *Wilson v. Superior Court* (1983) 34 Cal.3d 777 [195 Cal.Rptr. 671, 670 P.2d 325].) Whether the officers had sufficient evidence to detain or arrest Appellant is discussed fully *infra*. However, even assuming there was sufficient evidence for a detention, the detention in the instant case vastly exceeded the constitutionally permissible scope.

A detention must be temporary and must not last longer than is necessary. (*Florida v. Royer, supra,* 460 U.S. at p. 500.) A detention "becomes illegal when it extends beyond the time reasonably necessary under the circumstances for the police to wind up their investigation." (*People v. Paz* (1981) 118 Cal.App.3d 332, 334 [173 Cal.Rptr. 272].) A key factor in determining whether the detention has become unlawful is to assess "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." (*United States v. Sharpe* (1983) 470 U.S. 675, 686 [105 S.Ct. 1568, 84 L.Ed.2d 605].) In doing so, the police may not use methods that are more intrusive than reasonably required under the circumstances. (*Id.* at p. 690; *People v. Bowen* (1987) 195 Cal.App.3d 269, 273 [240 Cal.Rptr. 466].) Thus, handcuffing and moving a detainee from one location to another will typically render a detention unlawful. (See *Hayes v. Florida* (1985) 470 U.S. 811, 813-815 [105 S.Ct. 1643, 84 L.Ed.2d 705].)

In the instant case, Appellant went to the sheriff's department in Ventura with his attorneys to ask police to conduct a welfare check on his young daughter. (4CT 000952.) If officers believed that they had sufficient cause to detain Appellant, they could have kept him at the Ventura Sheriff's station (where LAPD officers had already arrived) and questioned him. Yet, they did not. Instead, officers handcuffed Appellant and transported him, without his attorneys, approximately fifty miles from Ventura to West Los Angeles. These actions far exceeded what is permissible during a valid detention, and, thus, the detention was unlawful.

ii. THE PAT-DOWN OF APPELLANT WAS UNJUSTIFIED

Even assuming that the officers had sufficient cause to detain Appellant, and that the detention did not become unlawful when Appellant was handcuffed and transferred from Ventura to Los Angeles, the officers still could not have conducted a pat-down on Appellant. *Some* detentions allow for a pat-down search. (See *Terry v. Ohio, supra,* 392 U.S. at p. 16.) However, such a search is justified only by "specification and articulation of facts supporting a reasonable suspicion that the individual detained is armed." (*Cunha v. Superior Court* (1970) 2 Cal.3d 352, 356 [85 Cal.Rptr. 160, 466 P.2d 704]; see also *People v. Lawler, supra,* 9 Cal.3d at p. 161; *Santos v. Superior Court* (1984) 154 Cal.App.3d 1178, 1185 [202 Cal.Rptr. 6].) "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." (*Terry v. Ohio, supra*, 392 U.S. at p. 27; see also *In re Marcellus L.* (1991) 229 Cal.App.3d 134, 151, fn.2 [279 Cal.Rptr. 901]; *United States v. Thomas* (9th Cir. 1988) 863 F.2d 622, 628.)

Not a single, articulable fact disclosed at the suppression hearing justified a finding that any of the officers thought Appellant was armed and

dangerous when they conducted a pat-down on him. (See 2RT 14-90.) Thus, the pat-down was unlawful.

iii. EVEN IF OFFICERS COULD HAVE CONDUCTED A PAT-DOWN OF APPELLANT, THEY FAR EXCEEDED THE SCOPE OF THE PAT-DOWN WHEN THEY SEIZED THE CELL PHONE

Even if an officer may lawfully conduct a pat-down, that action is limited to a search for weapons. (*Minnesota v. Dickerson* (1993) 508 U.S. 366 [113 S.Ct. 2130, 124 L.Ed.2d 334].) As the United States Supreme Court noted in *Terry*, the frisk must "be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." (*Terry v. Ohio, supra,* 392 U.S. at p. 29.) This allows for officers to pat-down the detainee's outer layer of clothing. (*Ibid.*)

An officer may only reach into a detainee's clothing if he feels a weapon. (*Sibron v. New York* (1968) 392 U.S. 40, 62-65 [88 S.Ct. 1889, 20 L.Ed.2d 917].) However, the identification of an item as a weapon must be "immediately apparent" to the officer conducting a lawful pat-down search. (*Minnesota v. Dickerson, supra,* 508 U.S. at pp. 375-376 [officer exceeded permissible scope of search where he "squeeze[ed], slid[], and otherwise manipulate[ed] the contents of the defendant's pocket."].) (*Id.* at p. 378.) When the "protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed." (*Minnesota v. Dickerson, supra,* 508 U.S. at p. 373; *Sibron v. New York, supra,* 392 U.S. at p. 65.)

Certainly, when the officers retrieved Appellant's cell phone they knew it was not a weapon; yet, they continued to search it by opening the phone, manipulating it, and recording its contents. As a result, *even if* the

pat-down was permissible, and *even if* the officers legitimately believed Appellant was armed and dangerous, they *still* could not have seized and searched the phone. Thus, the phone, and all fruits derived from that unlawful seizure, should have been suppressed.

b. IF APPELLANT WAS ARRESTED, THE ARREST WAS UNLAWFUL

At the suppression hearing, the government asserted that Appellant was arrested, despite police reports stating that Appellant was merely detained, and that the seizure of the cell phone was executed as a search incident to his arrest. (6CT 001386; 2RT 18:21-23, 19:5-9.) Even if the government were correct that the officers' encounter with Appellant was meant to be an arrest, contrary to the police report indicating Appellant was detained, the fruits of that arrest must still be suppressed because the arrest was effectuated without the requisite probable cause.

An officer may arrest a person without a warrant: 1) whenever probable cause exists to believe the person has committed a felony; or 2) whenever probable cause exists to believe a misdemeanor has been committed in the officer's presence. (Pen. Code, §836; *In re Thierry S.* (1977) 19 Cal.3d 727, 734 [139 Cal.Rptr. 708; 566 P.2d 610].) Probable cause to arrest exists if facts known to the arresting officer would lead a person of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime. (*People v. Ingle* (1960) 53 Cal.2d 407, 412 [2 Cal.Rptr. 14, 348 P.2d 577]; *People v. Bowen*, *supra*, 195 Cal.App.3d at p. 274.) Additionally, the knowledge supporting probable cause had to be possessed by the officers at the time of the arrest. (See *People v. Richards* (1977) 72 Cal.App.3d 510, 513-515 [140 Cal.Rptr. 158].) When an arrest is illegal, all evidence the police secure which is tainted by that illegality must be suppressed. (*Brown*

v. Illinois, supra, 422 U.S. at pp. 598-599; *People v. Williams* (1988) 45 Cal.3d 1268, 1299 [248 Cal.Rptr. 834, 756 P.2d 221], abrogation on another ground recognized by *People v. Abilez* (2007) 41 Cal.4th 472 [61 Cal.Rptr.3d 526, 161 P.3d 58].)

Here, when officers encountered Appellant, they had information that Pamela Fayed was killed by an unknown male at a parking structure. (2RT 34:1-10.) Officers had a statement from a witness that she saw what appeared to be a black male wearing a black hooded sweatshirt stabbing Pamela Fayed. (See 8RT 1516-1521.) The witness stated that she saw the man enter a red sports utility vehicle. (8RT 1517:15-18, 1518:2-7.)

At the hearing on the Motion to Suppress, Detective Pelletier agreed that Appellant is "very light-skinned" and admitted that Appellant did not match the physical description of the suspected murderer. (2RT 34:1-13.) Pelletier also conceded that he did not believe he had enough evidence to file a case against Appellant at the point Appellant was handcuffed and taken to West Los Angeles. (2RT 50:5-8.) The lower court stated:

> The question is, did the police have the right to seize the information from that phone? [¶] You know, I think it is a real close question whether there was probable cause to arrest Appellant at the time that they did because basically what they had, they had a murder; they had a divorce; and they had a description, a general description that generally didn't fit [Appellant].

(2RT 98:12-19.)

The lower court further noted that the government argued that the arrest was justified by the fact that the officers determined that the red SUV was rented by Goldfinger; however, the court found, "I don't think it is clear that on that night that [Appellant] personally rented the car. He may have rented the car, or the business may have rented that car; I don't think it is clear. The record is not clear on that point." (2RT 99:5-9.) The lower

court then noted, "The document itself was not -- the rental document was not in the possession of the police and it is not part of the record here." (2RT 99:10-12.) Thus, based on the information provided at the hearing, the officers had insufficient evidence to arrest Appellant, and all evidence derived from the phone should have been suppressed.

c. EVEN IF APPELLANT WAS LAWFULLY ARRESTED, THE SUBSEQUENT SEARCH OF HIS CELL PHONE WAS UNLAWFUL

The lower court had serious concerns about the events which occurred between the time Appellant's cell phone was seized and the time the phone was searched. The court explained:

> But let's just -- let's even go further; let's say that for the sake of argument for the moment that they did have probable cause to arrest him; is the search of the -- of a cell phone that was seized from him at the time of his arrest incident to the arrest when it is now in the possession of the police, not in the possession of the suspect any longer? Are they free at that point to manipulate it -- it was described as being manipulated; whether that means turning it on or somehow accessing the data within the phone that was already on to obtain the phone number -- is that a search incident to arrest when the suspect is in another room, and the phone is in a property bag on a detective's desk? I don't know. [¶] When you search incident to an arrest with the idea of protecting the evidence from destruction from the person that you are arresting, once you have that evidence in your possession safely at the station house, can you then go through it in some fashion? Open it, unlock it, access it? I don't think any of the cases that are cited by anyone exactly spoke to that specific issue, whether that would be a search incident to an arrest.

(2RT 98:20-27, 99:14-28, 100:1-8.)

After that hearing, this Court decided *People v. Diaz* (2011) 51 Cal.4th 84 [119 Cal.Rptr.3d 105, 244 P.3d 501], and determined that the delayed warrantless search of the defendant's cell phone was a valid search

incident to a defendant's lawful custodial arrest. (*Id.* at p. 93.) However, *Diaz* is distinguishable. First and foremost, *Diaz* concerned a search incident to a valid arrest. As noted above, the instant case presents either an unlawful detention or an unlawful arrest. Either way, the search of the cell phone was impermissible, and *Diaz* does not change that analysis. Furthermore, should this Court determine that the search of the cell phone was made pursuant to a valid arrest, for the reasons set forth herein, this Court should reconsider its opinion in *Diaz*.

i. EVEN IF *DIAZ* IS APPLICABLE, THIS COURT SHOULD RECONSIDER THAT OPINION IN LIGHT OF SUPREME COURT PRECEDENT

In *Diaz*,[49] this Court considered three United States Supreme Court cases on search incident to arrest: *United States v. Robinson* (1973) 414 U.S. 218 [94 S.Ct. 467, 38 L.Ed.2d 427] [allowing search of cigarette package found on the defendant's person at the time of arrest]; *United States v. Edwards* (1974) 415 U.S. 800 [94 S.Ct. 1234, 39 L.Ed.2d 771] [upholding search of defendant's clothing several hours after arrest]; and *United States v. Chadwick* (1977) 433 U.S. 1 [97 S.Ct. 2476, 53 L.Ed.2d 538][50], abrogated in part by *California v. Acevedo* (1991) 500 U.S. 565

---

[49] The officer in *Diaz* saw the defendant buy drugs in a controlled drug purchase. (*People v. Diaz, supra,* 51 Cal.4th at pp. 88-89.) The officer then arrested the defendant and seized his cell phone. (*Ibid.*) Approximately ninety minutes after the arrest, the officers "looked at the cell phone's text message folder and discovered a message" that was incriminating, at which point the defendant confessed. (*Id.* at p. 99.)

[50] In *Chadwick*, the Court found that "once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a

[111 S.Ct. 1982, 114 L.Ed.2d 619] [discussing search of closed container in a vehicle]. (*See Diaz, supra,* 51 Cal.4th at pp. 91, 93.)

The defendant in *Diaz* urged this Court to view the cell phone as similar to the footlocker discussed in *Chadwick, supra,* 433 U.S. 1, instead of the cigarette package discussed in *Robinson, supra,* 414 U.S at 220. (*Id.* at p. 94.) The *Diaz* defendant argued that the "character" of cell phones is more like a footlocker because cell phones are not always on the person and contain immense amounts of information. (*Ibid.*) In rejecting the defendant's claims, this Court held that the character of the evidence was irrelevant and focused only on the fact that the cell phone was found on the defendant's person when he was arrested. (*Id.* at pp. 94-95.)

This Court concluded that the cell phone "was like the clothing taken from the defendant in *Edwards* and the cigarette package taken from the defendant's coat pocket in *Robinson*, and it was unlike the footlocker in *Chadwick*, which was separate from the defendants' persons and was merely within the 'area' of their 'immediate control.'"[51] (*Id.* at p. 93, citing *United States v. Chadwick, supra,* 433 U.S. at p. 15.) "Because the cell phone was immediately associated with defendant's person, [the officer] was entitled to inspect its contents without a warrant . . . at the sheriff's

---

weapon or destroy evidence, a search of that property is no longer an incident of the arrest." (*United States v. Chadwick, supra,* 433 U.S. at p. 15.) *Chadwick's* boundaries are not defined clearly because the Court did not discuss or resolve whether a search would be permissible had the agents immediately searched the footlocker. Instead, the Court focused on the fact that the search was delayed. (See *ibid.*)

[51] Characterizing a cell phone as "on the person" is unfitting. Most cellphones are merely a tool to access information on servers or on the "cloud." Thus, a cell phone is more akin to a key which can be used to access information stored elsewhere.

station 90 minutes after defendant's arrest, whether or not an exigency existed." (*Ibid.* [fn. omitted] [citations omitted].)[52]

However, in *Diaz*, this Court failed to consider the United States Supreme Court's recent and significant search incident to arrest case: *Arizona v. Gant* (2009) 556 U.S. 332 [129 S.Ct. 1710, 173 L.Ed.2d 485].[53] In *Gant*, the United States Supreme Court discussed the history and rationale for the search incident to arrest doctrine. Although the notion of search incident to arrest has been around for nearly a century, its modern incarnation is commonly recognized as being set forth in *Chimel v. California* (1962) 395 U.S. 752 [985 S.Ct. 2034, 23 L.Ed.2d 685], abrogated in part by *Davis v. United States* (2011) – U.S – [131 S.Ct. 2419, 180 L.Ed.2d 285]. In *Chimel*, officers searched an arrestee's home under the guise of a search incident to arrest. (*Id.* at pp. 754-755.) In finding the search impermissible, the Supreme Court set forth the rationale underlying the search incident to arrest exception: 1) the need to "remove any weapons that [an arrestee] might seek to use in order to resist arrest or effect his

---

[52] In response to *Diaz*, the California Legislature unanimously passed a bill to overturn this Court's decision. (S.B. 914 §1(a)-(b), 2011-2012 Reg. Sess. (Cal. 2011).) The bill noted the importance and prevalence of cell phones, specifically noting that cell phones have the ability to store vast amounts of personal and private data, and can be used to access information stored on servers. Furthermore, once confiscated, cell phones no longer pose a threat to officers. (*Id.*) However, Governor Brown vetoed the bill. (See Letter from Edmund G. Brown, Jr., Governor of Cal., to Members of the Cal. State Senate (Oct. 9, 2011) *available at* http://gov.ca. gov/docs/SB_914_Veto_ Message.pdf.)

[53] On January 17, 2014, the United States Supreme Court granted cert in three cases concerning the search of a cell phone obtained pursuant to a search incident to arrest: *Riley v. California* 2013 WL 3938997; *Lane v. Franks* 2013 WL 5675531; and *United States v. Wurie* 2013 WL 4402108.

escape," and 2) the need to "seize any evidence on the arrestee's person in order to prevent its concealment or destruction." (*Id.* at p. 763.)

The Supreme Court subsequently moved away from an individual determination of a search using *Chimel's* two pronged rationale. (See *United States v. Robinson, supra,* 414 U.S. 218.) In *Robinson*, the Court found that, contrary to *Chimel*, an officer's ability to search incident to arrest was not dependent on a belief that the arrestee possessed weapons or destructible evidence: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed."[54] (*Id.* at p. 236.) The dissent gave an impassioned argument against this change, noting that the "majority's approach represents a clear and marked departure from our long tradition of case-by-case adjudication of the reasonableness of searches and seizures under the Fourth Amendment." (*Id.* at p. 239 (dis. opn. of Marshall, J.).)

In *New York v. Belton* (1981) 453 U.S. 454 [101 S.Ct. 2860, 69 L.Ed.2d 768], abrogation recognized by *Davis v. United States* (2011) 131 S.Ct. 2419 [180 L.Ed.2d 285], the Supreme Court applied *Chimel* in the automobile context, allowing officers to search the "grab area" of an arrestee in a vehicle. *Belton* was read expansively, and in subsequent cases officers were allowed to search a vehicle's passenger compartment, and any containers found in it, even after the vehicle's occupants were already lawfully arrested in police custody. (See e.g. *Thornton v. United States* (2004) 541 U.S. 615 [124 S.Ct. 2127, 158 L.Ed.2d 905]; *United States v.*

[54] Further, in *Chimel v. Californa, supra,* 395 U.S. at p. 752, the Supreme Court originally required the search to occur contemporaneously with the arrest. However, just five years later, the Supreme Court allowed for a delayed search (ten hours after arrest) of the arrestee's clothing for evidence in *United States v. Edwards, supra,* 415 U.S. at p. 800.

Doward (1st Cir. 1994) 41 F.3d 789; *United States v. Porter* (4th Cir. 1984) 738 F.2d 622.)

However, in *Arizona v. Gant, supra,* 556 U.S. 332 , the United States Supreme Court explicitly returned to evaluating the search based on the rationale established in *Chimel.* In doing so, the Supreme Court expressed that an interpretation of *Belton* which gave police the right to automatically search the passenger compartment of a vehicle is "anathema to the Fourth Amendment" and would "untether the rule from the justifications underlying the *Chimel* exception." (*Id.* at pp. 343, 347.) The Court noted that "[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." (*Id.* at p. 339.)

Pursuant to the Supreme Court's *Gant* decision, this Court should reconsider *Diaz* under the two part rationale of *Chimel.* Furthermore, under these considerations, the subsequent search of Appellant's cell phone in the instant case was impermissible. (See *Arizona v. Gant, supra,* 556 U.S. 332.)

d. THE LOWER COURT ERRED IN FINDING INEVITABLE DISCOVERY

The exclusionary rule bars the use of "the fruit of the poisonous tree." (*Nardone v. United States* (1939) 308 U.S. 338, 341 [60 S.Ct. 266, 84 L.Ed. 307].) Courts have found certain exceptions to this requirement allowing the government to use illegally seized evidence. (See *People v. Thierry* (1998) 64 Cal.App.4th 176, 180 [75 Cal.Rptr.2d 141] [discussing the exceptions to exclusionary rule].)

At the hearing, the lower court found:

> My feeling is that this was an illegal search of a cell phone, even if it was incident to a valid arrest. However, I do think

> that it is inevitable that the police would have obtained this information through the many different sources that Mr. Harmon presented evidence of, particularly from Pamela Fayed's . . .contacts in her phone. And clearly, even though the police did not think that they had a fileable case, they thought that Appellant was the one responsible for her death, and they just wanted to get more evidence before they submitted the case. So they certainly were going to leave no stone unturned in terms of obtaining evidence that implicated him. [¶] And I think it is -- the evidence is abundantly clear that they would have obtained that information. So on the inevitable discovery doctrine, the Court is going to rule that this evidence is admissible in this criminal proceeding.

(2RT 102:4-22.)

Under the inevitable discovery exception, the burden is on the government to show proof that the evidence would have been lawfully and inevitably discovered. (*Nix v. Williams* (1984) 467 U.S. 431, 444 [104 S.Ct. 2501, 81 L.Ed.2d 377].[55]) The exception requires proof that the prosecution *would*—not *might* or *could*—have obtained the challenged evidence in a proper manner. (See *People v. Burola* (Colo.1993) 848 P.2d 958, 963–964 [848 P.2d 958]; *State v. Lopez* (Hi.1995) 78 Hawai'i 433, 451 [896 P.2d 889].) "[I]nevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification." (*Nix v. Williams, supra,* 467 U.S. at pp. 444-445, fn. 5.) Thus, the government must show there is a "reasonably strong probability" the evidence would have been discovered anyway. (*People v. Superior Court* (*Tunch*) (1978) 80 Cal.App.3d 665, 681 [80 Cal.App.3d 665]; *People v. Robles* (2000) 23 Cal.4th 789, 800-801 [79 Cal.Rptr.2d 914, 3 P.3d 311].)

---

[55] For example, in *Nix*, police officers discovered the location and condition of the victim's body through an unlawful interrogation of the defendant, but the court concluded that a simultaneous independent search would have inevitably led to discovered of the evidence. (*Nix v. Williams, supra,* 467 U.S. at pp. 449-450.)

In making this determination, courts can only look to facts gained legally to determine whether the evidence would have been inevitably discovered. (*Hernandez v. Superior Court* (1980) 110 Cal.App.3d 355, 361 [185 Cal.Rptr. 127].) "The doctrine requires that the fact or likelihood that makes the discovery inevitable arise from circumstances other than those disclosed by the illegal search itself." (*United States v. Boatwright* (9th Cir. 1987) 822 F.2d 862, 865.)

Additionally, courts are cautioned "to prevent application of the inevitable discovery exception from subverting the safeguards of the exclusionary rule. . . . There is much danger that a mechanical application of the doctrine will encourage unconstitutional shortcuts." (*People v. Superior Court* (*Tunch*), *supra,* 80 Cal.App.3d at p. 681.) As noted in *Tunch*, inevitable discovery may be limited by considering the purpose and flagrancy of the official misconduct. (*Id.* at p. 682, noting *Brown v. Illinois*, *supra,* 422 U.S. at p. 604 [finding that "the purpose and flagrancy of the official misconduct" are among the factors for judicial consideration in the suppression of evidence]; *United States v. Bacall* (9th Cir. 1971) 443 F.2d 1050 ["Where that conduct is particularly offensive the deterrence ought to be greater and, therefore, the scope of exclusion broader"].)

In the instant case, the government did not show a "reasonably strong probability" that the evidence would have been discovered anyway. Furthermore, in searching and seizing the phone, the government engaged in several violations of Appellant's Fourth Amendment rights. At the time of the seizure, the officers' themselves had categorized the encounter with Appellant as a detention and pat-down. Based on this classification, officers flagrantly violated Appellant's constitutional rights when they handcuffed Appellant, transported him, and subsequently searched his cell phone. No reasonable officer, who has any familiarity with *Terry*, would think he/she

could detain a suspect, handcuff him, seize items on his person, and then transport him from fifty miles. Moreover, even though Appellant's attorneys followed police to the West Los Angeles station, the officers refused to allow Appellant access to his attorney's. After Appellant invoked his rights and refused to answer questions, officers then retrieved the previously seized phone and searched its contents. Those actions were well beyond the permissible scope of the Fourth Amendment and must be considered flagrant violations. Those actions, in conjunction with the other Fourth Amendment violations discussed below, are sufficiently egregious as to discourage use of the inevitable discovery doctrine.

3. THE LOWER COURT ERRED IN ALLOWING IN EVIDENCE DERIVED FROM THE UNLAWFUL RECORDING OF APPELLANT'S INVESTIGATOR QUESTIONING A WITNESS

The work product privilege protects the "rights of attorneys to prepare cases for trial with that degree of privacy necessary to encourage them to prepare their cases thoroughly and to investigate not only the favorable but the unfavorable aspects of those cases," and to "[p]revent attorneys from taking undue advantage of their adversary's industry and efforts." (Code Civ. Proc., §2018.020; see also Pen. Code, §1054.6.) This privilege applies to agents of the attorney, and specifically, to investigators. (*United States v. Nobles* (1975) 422 U.S. 225, 238 [95 S.Ct. 2160, 45 L.Ed.2d 141] ["It is therefore necessary that the [work-product] doctrine protect material prepared by agents for the attorney"]).) The work product privilege is essential to the framework of our system of jurisprudence, allowing attorneys to "promote justice and to protect their clients' interests." (*Hickman v. Taylor* (1947) 329 U.S. 495, 511 [67 S.Ct. 385, 1947 A.M.C. 1].) Absent protection of the work product privilege, "[t]he

effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served." (*Ibid.*)

The United States Supreme Court has addressed the need for the work-product privilege to extend beyond the work-product of attorneys, and to reach those who work closely with the attorney, reasoning:

> At its core, the work product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case. But the doctrine is an intensely practical one, grounded in the realities of litigation in our adversary system. One of those realities is that attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.

(*United States v. Nobles, supra,* 422 U.S. at pp. 238-239.)

In *People v. Coddington* (2000) 23 Cal.4th 529, 603-606 [97 Cal.Rptr.2d 528, 2 P.3d 1081], overruled on another ground as noted in *Price v. Superior Court* (2001) 25 Cal.4th 1046 [108 Cal.Rptr.2d 409, 25 P.3d 618], this Court held that the government committed misconduct and violated the work-product privilege when it learned of the identity of defense experts "through jail sign-in sheets and social contacts." (*Id.* at p. 603.) This Court found that "[r]egardless of how the information is obtained (by simply viewing the sign in sheets), . . . if a party were permitted to use information about pretrial investigation that reveals opposing counsel's thought processes and reasons for tactical decisions, thorough investigation would be discouraged." (*Id.* at p. 606.)

Government interference with the defense investigative function is also an improper invasion of the "defense camp." Such action derails the defense effort and undermines confidence in the attorney's ability to prepare a defense. In *Barber v. Municipal Court* (1979) 24 Cal.3d 742, 756

[157 Cal.Rptr. 658, 598 P.2d 818], this Court stated that when the government listens to defense strategy, the defense is "prejudiced in their ability to prepare their defense. They no longer feel they can freely, candidly, and with complete confidence discuss their case with their attorney." In addition, when the government interferes with the defense investigation, it interferes with the defendant's right to have access to witnesses, which violates the defendant's right to due process under the Fifth and Fourteenth Amendments. (See *People v. Coffman* (2004) 34 Cal.4th 1, 52 [17 Cal.Rptr.3d 710, 96 P.3d 30]; *In re Martin* (1987) 44 Cal.3d 1, 29-30 [241 Cal.Rptr. 263, 744 P.2d 374].)

Here, the government obtained several wiretaps, one of which intercepted and recorded twelve conversations of Glenn LaPalme. (2RT 104:7-14.) There is no question that LAPD knew that LaPalme was an investigator working for the defense. (See 5CT 000882.) The government was also aware that LaPalme was attempting to obtain witness interviews of Moya to use in Appellant's defense. (See 5CT 000884:22-26.) Knowing this, the LAPD still listened in to LaPalme's interviews, recorded those conversations, and used that information in the September 10, 2008 search warrant affidavit, while neglecting to inform the magistrate that LaPalme was part of the defense team. (See 4CT 000867.) Before trial, Appellant filed a Motion to Traverse Affidavit; Motion to Suppress Evidence Obtained in Violation of Wiretap Provisions; and Motion to Dismiss for Violations of Due Process. (4CT 000851-000865.) As set forth herein, the lower court erred in denying all three arguments in Appellant's Motion.

a. THE LOWER COURT IMPROPERLY DENIED THE MOTION TO TRAVERSE

The Fourth Amendment mandates that "a warrant may not issue except on probable cause, supported by oath or affirmation, particularly

describing the place to be searched and the persons and things to be seized." (U.S. Const., 4th Amend.; Cal. Const., art. I, §13; see also Pen. Code, §1525.) "[W]hen the Fourth Amendment demands . . . 'probable cause,' the obvious assumption is that there will be a truthful showing" of evidence. (*Franks v. Delaware* (1978) 438 U.S. 154, 164-165 [99 S.Ct. 2674, 57 L.Ed.2d 667].)

In *Franks*, the Supreme Court held that a defendant has the right to a hearing to challenge the truth and veracity of statements contained in an affidavit in support of probable cause. (See *Franks v. Delaware, supra,* 438 U.S. at pp. 171-172; see also *People v. Bradford, supra,* 15 Cal.4th at p. 1297.) A defendant is entitled to a hearing under *Franks* when he makes a showing that: (1) the affidavit contains assertions which are false or made with a reckless disregard for the truth[56]; and (2) the statements were material to the magistrate's finding of probable cause. (*Franks v. Delaware, supra,* 438 U.S. at pp. 155-156; *People v. Benjamin* (1999) 77 Cal.App.4th 264, 267-268 [91 Cal.Rptr.2d 520].) If after the hearing, "statements are proved by a preponderance of the evidence to be false or reckless, they must be considered excised." (See *People v. Bradford, supra*, 15 Cal.4th at p. 1297.) "If the remaining contents of the affidavit are insufficient to establish probable cause, the warrant must be voided and any evidence seized pursuant to that warrant must be suppressed." (*Ibid.*; see also *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 99 [104 Cal.Rptr. 226, 501

[56] In *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 90, 100-101 [104 Cal.Rptr. 226, 501 P.2d 234], this Court pointed out that the magistrate's inference-drawing process would be as hindered by mis-statements if the affiant were permitted to "edit" his informant's allegations by omitting unfavorable facts. (See also *People v. Barger* (1974) 40 Cal.App.3d 662, 668 [115 Cal.Rptr. 298].) Even immaterial omissions can result in quashing a warrant if the affiant omitted facts with the intent to deceive the magistrate. (See *People v. Kurland* (1980) 28 Cal.3d 376, 400 [168 Cal.Rptr. 667, 618 P.2d 213].)

P.2d 234].)

The lower court acknowledged that LaPalme was working on behalf of Appellant's defense, but refused to accept his work as being privileged, asserting, "[T]he investigator should have gone personally to speak to these people as opposed to using the telephone." (2RT 106:15-18, 107:24-26, 114:7-8.) However, there is certainly no requirement that an investigator go to personally speak with a witness, and use of a phone does not vitiate privilege.

Additionally, the lower court found that there was not a "material omission of the information from the magistrate judge." (2RT 114:7-13.) The lower court reasoned that the judge who was monitoring the wiretaps, Judge Fidler, was aware of the fact that the defense investigator was being recorded. (*Id.*; see also 4CT 000884-000896.) Yet, the judge who signed the search warrant at issue here was Judge Melvin Sandvig. (See 5CT 001178.) There was no evidence that Judge Fidler's knowledge was passed on to Judge Sandvig. Thus, the fact that Judge Fidler knew the information is irrelevant. Furthermore, the affidavit itself "must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist." (Pen. Code, §1527.) It is not to be guessed what outside information each judge may have; the facts, if relevant, must be laid out in the affidavit. The fact that LaPalme was conducting interviews for Appellant's defense was a material fact which was not set forth in the affidavit. As such, the warrant should have been quashed, and all evidence derived as a result of the illegal search suppressed.

* * *

* * *

b. THE LOWER COURT IMPROPERLY DENIED THE MOTION TO SUPPRESS FOR FAILURE TO COMPORT WITH MINIMIZATION REQUIREMENTS

"Wiretaps are extraordinary investigative means. Their intrusiveness mandates that courts, in authorizing them, exercise great care in protecting individual privacy." (*United States v. Leavis* (4th Cir. 1988) 853 F.2d 215, 221.) Electronic surveillance is to be allowed only when "judicially authorized under the most precise and discriminating circumstances." (*United States v. Bobo* (4th Cir. 1973) 477 F.2d 974, 979; see also *United States v. Smith* (9th Cir. 1990) 893 F.2d 1573, 1582.) As such, stringent safeguards are in place to ensure wiretaps comport with constitutional requirements. (See 18 U.S.C. §2518; see also Pen. Code, §629.50.)

The federal regulation for interception of communications is known as Title III of the Omnibus Crime Control and Safe Streets Act ("OCCSSA"), codified at 18 U.S.C. section 2510 et seq., and provides a "comprehensive scheme for the regulation of wiretapping and electronic surveillance." (*Gelbard v. United States* (1972) 408 U.S. 41, 46 [93 S.Ct. 2357, 33 L.Ed.2d 179].) The OCCSSA establishes the minimum standards for the admissibility of evidence procured through electronic surveillance, and state law cannot afford lesser protections. (18 U.S.C. §2516(2).)

Title 18 United States Code section 2518(5) requires that surveillance be conducted in such a manner as to "minimize" the interception communications not subject to interception. (*Scott v. United States* (1978) 436 U.S. 128, 140 [98 S.Ct. 1717, 56 L.Ed.2d 168]; *United States v. Hull* (3d Cir. 2006) 456 F.3d 133, 142-143.) In order to comply with OCCSSA, the government must take particular care to avoid intercepting privileged communications, and courts have also found that even when the conversation is not between an attorney and a client, the government must

minimize interception of discussions relating to matters of defense in an ongoing criminal prosecution. (See *United States v. Curcio* (D.Conn. 1985) 608 F. Supp. 1346, 1356-1358; *United States v. O'Connell* (8th Cir. 1988) 841 F.2d 1408, 1416-1417.) Under federal and state law, information obtained in violation of wiretap provisions is subject to suppression. (See 18 U.S.C. §2518(10)(a); see also Pen. Code, §631(c).) Failure to adhere to the federal requirements can also result in the dismissal of charges. (See *United States v. Orozco* (S.D. Cal. 1986) 630 F. Supp. 1418, 1529-1530.)

In addition to the statutory provisions, the order for the wiretap in the instant case states that "[t]he intercept . . . shall be executed in such a way as to minimize the interception of communications not otherwise subject to interception." (See 4CT 000889.) Yet, the government continued to record Appellant's investigator interviewing witnesses for Appellant's defense. These calls should have been minimized, or, *at least*, the calls should have been subject to court review before they were used in an affidavit.

c. THE LOWER COURT IMPROPERLY DENIED APPELLANT'S MOTION TO DISMISS FOR DUE PROCESS VIOLATIONS

"Under the Due Process Clause of the [Fifth and] Fourteenth Amendment[s], criminal prosecutions must comport with prevailing notions of fundamental fairness." (*California v. Trombetta* (1984) 467 U.S. 479, 485 [104 S.Ct. 2528, 81 L.Ed.2d 413].) "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." (*Chambers v. Mississippi* (1973) 410 U.S. 284, 293 [93 S.Ct. 1038, 35 L.Ed.2d 297].) Both the United States Supreme Court and the California Supreme Court have recognized that overbearing and unconstitutional actions on the part of law enforcement officials can violate an accused's rights to secure property and/or due

process of law under the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, sections 13 and 15, of the California Constitution. (See *Hampton v. United States* (1975) 425 U.S. 484, 490-491 [96 S.Ct. 1646, 48 L.Ed.2d 113]; *Rochin v. California* (1952) 342 U.S. 165, 172 [72 S.Ct. 205, 96 L.Ed. 183]; *People v. McIntire* (1979) 23 Cal.3d 742, 745 [153 Cal.Rptr. 237, 591 P.2d 527].) Moreover, a trial court may impose the sanction of dismissal to redress a criminal defendant's inability to effectively challenge such constitutional violations.[57] (*People v. Brophy* (1992) 5 Cal.App.4th 932, 937-938 [7 Cal.Rptr.2d 367]; *People v. McGee* (1977) 19 Cal.3d 948, 967-68, fn. 9 [140 Cal.Rptr. 657, 568 P.2d 382]; *Stanton v. Superior Court* (1987) 193 Cal.App.3d 265, 271 [239 Cal.Rptr. 328].)

When the government actively procures privileged information, a due process violation occurs. For example, in *Morrow v. Superior Court* (1994) 30 Cal.App.4th 1252, 1263 [36 Cal.Rptr.2d 210], the court dismissed the defendant's case after the district attorney had told her investigator to listen in on a conversation between the defendant and his attorney. In the context of using privileged information in a search warrant, the court in *People v. Navarro* (2006) 138 Cal.App.4th 146 [41 Cal.Rptr.3d 164], held that a due process violation occurs when the government obtains a search warrant based on privileged lawyer-client information, if the defendant can show: "(1) the government objectively knew a lawyer-client relationship existed between the defendant and its informant; (2) the government deliberately intruded into that relationship; and (3) the defendant was prejudiced as a result." (*Id.* at p. 160.)

---

[57] A trial court may also exercise its power under Penal Code section 1385 to dismiss an action if the court deems that the misconduct of the government officials is such as to deny a defendant a fair trial. (See Pen. Code, §1385.)

The requirements set forth in *Navarro* were met in the instant case. Despite knowing that LaPalme was part of the defense team, officers recorded at least twelve of his calls. This was not a passive invasion into the "defense camp," but, instead, was a deliberate and prolonged intrusion. The government then used this information to get a search warrant, and, most egregiously, the government failed to inform the magistrate that LaPalme was part of the defense team. As result of the government's actions, Appellant's due process rights were violated, and dismissal was warranted.

d. THE ADMISSION OF THE EVIDENCE WAS PREJUDICIAL

As noted above, evidence seized in violation of the Fourth Amendment is governed by the test for reversal found in *Chapman v. California*, *supra*, 386 U.S. 18. (*People v. Minjares* (1979) 24 Cal.3d 410, 424 [153 Cal.Rptr. 224, 591 P.2d 514].) Under the *Chapman* test, reversal is required unless the government proves the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

In the instant case, the September 10, 2008 search warrant yielded harmful and prejudicial pieces of evidence which were introduced at trial. (4CT 000879-000880.) Significantly, the search produced three phones: a black flip phone, a grey cell phone, and a black Motorola Nextel phone. (4CT 000880-000881.) At trial, the government introduced significant evidence concerning cell phones,[58] and this evidence was crucial to the

[58] Unsettlingly, however, the government was unable to provide a clear record of how each phone was obtained or where each phone was obtained, and it was unable to provide a clear distinction between the seized phones. (See e.g. 2RT 20:2-14, 24:1-26, 25:19-28, 26:1-11, 54:1-15, 55:1-3.) Adding to the confusion is the fact that the returns on multiple search warrants reveal that several phones were seized. Yet, the returns do not

government's theory of the case. (9RT 1712-1750.) Specifically, Edward Dixon provided testimony concerning phone records for a flip phone that was associated with Appellant's phone records. (9RT 1714:6-20.) Dixon testified that the flip phone associated with Appellant's phone record

contacted a cell phone that was associated with Moya on the day Pamela Fayed was murdered. (9RT 1728:27-28, 1729:1-9, 1741:26-28, 1742:1-12.) Additionally, those phones made contact with cell-phone towers located close to the location where Pamela Fayed was murdered. (9RT 1744:25-28, 1745:1-6.) Thus, it cannot be said that admission of this evidence was harmless beyond a reasonable doubt, and reversal is required.

4. THE LOWER COURT ERRED IN DENYING APPELLANT'S MOTION TO QUASH SEARCH WARRANT

Throughout the instant case, officers sought and received several warrants, including a warrant on July 29, 2008 and a warrant on July 31, 2008. (See 3CT 000717; 4CT000935.) These warrants are distinct from the warrant issued on September 10, 2008, which is discussed *supra*. (4CT 000867.) In the warrant issued on July 31, 2008, officers copied the affidavit from the July 29, 2008 warrant—without referencing that the home had just been searched pursuant to the July 29, 2008 warrant — and added a short addendum. (See *id.*) As set forth below, the July 31, 2008 warrant failed to set forth probable cause and was overly broad.

* * *

---

indicate where the phone was found, or any distinct characteristics of the cell phones, such as the serial numbers.

a. THERE WAS NO PROBABLE CAUSE TO ISSUE THE JULY 31, 2008 SEARCH WARRANT

The Fourth Amendment to the United States Constitution commands that "a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." (U.S. Const., 4th Amend.; Cal. Const., art. I, §13; see also Pen. Code, §1525.) Pursuant to Penal Code section 1538.5, a defendant may move to suppress as evidence any tangible or intangible thing obtained as a result of an unlawful search or seizure of his or her dwelling with a search warrant. (See *Franks v. Delaware, supra,* 438 U.S. 154; *People v. Luttenburger* (1990) 50 Cal.3d 1, 11 [265 Cal.Rptr. 690, 784 P.2d 633]; *Hoffa v. United States* (1966) 385 U.S. 293 [87 S.Ct. 408, 17 L.Ed.2d 374]; Pen. Code, §§1538.5.)

The affidavit in support of the warrant "must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist." (Pen. Code, §1527.) Probable cause to issue a search warrant exists when, based on the totality of circumstances described in the affidavit, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." (*Illinois v. Gates* (1983) 462 U.S. 213, 238 [103 S.Ct. 2317, 76 L.Ed.2d 527].)

The affidavit in the instant case consists of two parts: 1) the information in the amendment; and 2) the recitation of the affidavit from the July 29, 2008 warrant. These two parts are discussed below.

* * *

* * *

i. THE INFORMATION IN THE AMENDMENT WAS INSUFFICIENT TO ESTABLISH PROBABLE CAUSE

When officers served the July 31, 2008 search warrant, Appellant's property had already been previously searched, and the vehicle sought by the police had been recovered. Aside from the information copied from the July 29, 2008 warrant, discussed *infra,* the only new information in the July 31, 2008 affidavit was the amendment, which states:

> Based on information obtained during the interview of the victim's daughter, Desiree Fayed, and evidence collected from the suspect's vehicle, License #6CLW535, your affiant is requesting to amend the affidavit. Desiree Fayed stated that her mother kept records and documentation that incriminates James Fayed on her personal computer. Desiree Fayed advised that the computers that her mother used are in her father's residence and contain valuable information. The vehicle used in the murder was recovered and processed for DNA. During the processing of the suspect's vehicle, physical evidence was collected by LAPD's Scientific Division.

(4CT 000923.)

Thus, the new information used to justify the second search was the affiant's statement that the victim's daughter told the affiant that Pamela Fayed had "incriminating" evidence on her computer in Appellant's home. This "new evidence" was woefully insufficient to establish probable cause.

As stated by this Court in *People v. Cook* (1978) 22 Cal.3d 67, 84, fn. 6 [148 Cal.Rptr. 605, 583 P.2d 130], an affidavit must state "*facts* that make it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought." (*Id.*, italics added; see also *People v. Frank* (1985) 38 Cal.3d 711, 727 [214 Cal.Rptr. 801, 700 P.2d 415].) In order to provide

probable cause, the affidavit must not merely recite opinions or conclusions. (*Illinois v. Gates, supra,* 462 U.S. at p. 239.) "A mere conclusory statement . . . gives the magistrate virtually no basis at all for making a judgment regarding probable cause." (*Ibid.*; see also *Nathanson v. United States* (1933) 290 U.S. 41, 44 [54 S.Ct. 11, 78 L.Ed. 159].) "The magistrate must be presented facts and not conclusory statements if he is to perform his detached function and not become a rubber stamp for the police." (*People v. Pellegrin* (1977) 78 Cal.App.3d 913, 916 [144 Cal.Rptr. 421].)

During the hearing on the Motion to Quash, the lower court focused on the fact that Desiree was a citizen informant, thus presumed to be believable.[59] While it is correct that Desiree was likely a citizen informant, and thus entitled to some believability, she still had to provide *facts* that support probable cause. (Pen. Code, §1527.) A blanket statement that there will be "incriminating documents" at a location is woefully insufficient to meet this requirement. There is no explanation as to what the purported evidence is, how the evidence is purportedly "incriminating," or for what crime it purportedly incriminated Appellant; thus, this information could not support probable cause.

ii. THE INFORMATION FROM THE INITIAL AFFIDAVIT WAS STALE AND MOOT

A basic tenet of Fourth Amendment law is the "one warrant, one search" rule. (See *People v. James* (1990) 219 Cal.App.3d 414, 418 [268

---

[59] The court also noted that the second warrant authorized a search of the safes. (2RT 122:18-22.) Although it is correct that the second warrant requests to search locked safes, the affiant included *no facts* in the affidavit to state that the officers were unable to unlock any safes during the execution of the initial warrant. (4CT 000923.)

Cal.Rptr. 105].) Specifically, that rule mandates that a warrant justifies a single search of property, and no additional search can be made on the warrant. (*Ibid.*) Beyond the "amendment" to the July 31, 2008 search warrant discussed *supra*, the only other information in the affidavit was a recitation of the exact same affidavit which was used in the July 29, 2008 warrant. As set forth herein, the information in this portion of the affidavit was stale and moot and, even if it provided probable cause for the first search, the information no longer justified probable cause for the second search.

aa. THE NEED TO SEARCH APPELLANT'S PROPERTY FOR THE VEHICLE WAS MOOT

The information in the initial July 29, 2008 affidavit, which was copied into the July 31, 2008 affidavit, focused primarily on the need to search Appellant's property for the rental car. The affidavit sets forth why the officer believed there would be evidence in the rental car. Specifically, the affiant writes:

> Based on the aforementioned information, your affiant believes that the crime of Murder was committed by a suspect who utilized a vehicle with license plate #6CLW535. A record check of this vehicle revealed that the victim's estranged husband, James Fayed, rented this vehicle in an attempt to conceal the identity of the suspect's (sic) who murdered Pamela Fayed. Your affiant further believes that the vehicle used in these crimes is at James Fayed's residence, which is 9160 Happy Camp Road. Based on my conclusions of my investigation your affiant believes the vehicle(s) is at his residences [illegible] has no other documented address. The crime scene investigation revealed that the suspect left foot prints with blood outlining the outside of his tennis shoes. Your affiant believes that blood from the crime scene is on the suspect's shoes which would have been transferred to the vehicle when the suspect entered after the murder.

(4CT 000935.)

Thus, the initial affidavit established probable cause to search the vehicle and, arguably, to search the home for information about the location of the vehicle. However, on July 30, 2008, after service of the July 29, 2008 warrant, but before issuance of the July 31, 2008 warrant, LAPD retrieved and searched the vehicle. (8RT 1488:17-28, 1499:1-3.) Therefore, at the time of officers requested the July 31 warrant, there was no longer any cause to search Appellant's home for information concerning the vehicle.

bb. THE INFORMATION IN THE INITIAL AFFIDAVIT BECAME STALE AFTER THE FIRST SEARCH

Additionally, even if there was probable cause to search the home pursuant to the initial warrant, that did not justify a second search based on the same facts. To establish probable cause, an affidavit must establish that there is a "fair probability" that contraband or evidence is located in a particular place. (*Illinois v. Gates, supra,* 462 U.S. at p. 246; see also *People v. Fernandez* (1989) 212 Cal.App.3d 984, 986 [261 Cal.Rptr. 29]; *People v. Terrones* (1989) 212 Cal.App.3d 139, 147 [260 Cal.Rptr. 355].) There also must be probable cause to believe that the material "to be seized is *still on the premises* when the warrant is sought." (*People v. McDaniels* (1994) 21 Cal.App.4th 1560, 1564 [27 Cal.Rptr.2d 245], italics added, citing *Sgro v. United States* (1932) 287 U.S. 206, 210 [53 S.Ct. 138, 77 L.Ed. 260].) Thus, "the element of time is crucial" to determine if the items would still be on the premises. (*Ibid.*)

"As a general rule, information is stale, and hence unworthy of weight in the magistrate's consideration of an affidavit, unless the information consists of 'facts so closely related to the time of the issue of

the warrant so as to justify a finding of probable cause at that time.'" (*Alexander v. Superior Court* (1973) 9 Cal.3d 387, 393 [107 Cal.Rptr. 483, 508 P.2d 1131], citing *Sgro v. United States, supra,* 287 U.S. at p. 210.) "'The length of the time lapse alone is not controlling since *even a brief delay may preclude an inference of probable cause in some circumstances.*'" (*Ibid.*, italics added, quoting *Durham v. United States* (9th Cir. 1968) 403 F.2d 190, 194, fn. 6.) No clear cut rule establishes when the time span is too attenuated, and the issue of staleness turns on the facts of each particular case. (*Ibid.*; see *People v. Hernandez* (1974) 43 Cal.App.3d 581, 586 [118 Cal.Rptr. 53] [finding information in a search warrant affidavit for a narcotics investigation that was 12 days old to be "on the fringe of unreasonableness"]; see also *Hemler v. Superior Court* (1975) 44 Cal.App.3d 430, 433 [118 Cal.Rptr. 564] [finding that evidence of a drug sale 34 days before the warrant request was too stale to establish probable cause].)

Here, if any evidence was in the home when LAPD and the SWAT Team executed the warrant on July 29, 2008, it should have been seized pursuant to the initial warrant. There were *no facts* in the July 31, 2008 affidavit to support a finding that new evidence had materialized after the first search and before the second search. As such, the information in the initial affidavit, which was followed by a search, was too stale to justify the subsequent search.

b. THE WARRANT WAS OVERLY BROAD

"The scope of the warrant, and the search, is limited by the extent of the probable cause." (*In re Grand Jury Subpoenas Dated Dec. 10, 1987* (9th Cir. 1991) 926 F.2d 847, 857, noting *United States v. Whitney* (9th Cir. 1980) 633 F.2d 902, 907 [finding that "[t]he command to search can never

include more than is covered by the showing of probable cause to search"].) "[P]robable cause must exist to seize all the items of a particular type described in the warrant." (*Id.*, noting *United States v. Spilotro* (9th Cir.1986) 800 F.2d 959, 963.) "[T]his requirement prevents a 'general, exploratory rummaging in a person's belongings.'" (*Ibid.*; see also *Warden v. Hayden* (1967) 387 U.S. 294, 311 [87 S.Ct. 1642, 18 L.Ed.2d 782] (conc. opn. of Fortas, J.) [noting that general searches "were one of the matters over which the American Revolution was fought"]; *Harris v. United States* (1947) 331 U.S. 145, 159 [67 S.Ct. 1098, 91 L.Ed. 1399], disapproved of on another ground by *Chimel v. California, supra,* 395 U.S. 752.) "Courts have repeatedly invalidated warrants authorizing a search which exceeded the scope of the probable cause shown in the affidavit." (*In re Grand Jury Subpoenas Dated Dec. 10, 1987, supra,* 926 F.2d at p. 857.)

In the instant case, even if the affiant's statement that "incriminating evidence" could be found on Appellant's computer sufficed to establish probable cause, the probable cause would limit the government to search only for that computer. However, the affidavit in the instant case was not so narrowly tailored. Instead, the affiant requested to search for all "personal computers, laptop computers, hard drives, electronic equipment used to store files or written documentation, thumb drives, locked safes, secured lock boxes, authorization of forced entry into locked safes, financial records, soil samples from outside the residence as items to be searched on the premises." (4CT 000923.) The language in this affidavit effectively allowed officers to search for anything anywhere on the premises. Consequently, the warrant was overly broad and invalid on its face.

* * *

c. ADMISSION OF THE EVIDENCE CONSTITUTES PREJUDICIAL ERROR

Evidence seized in violation of the Fourth Amendment is governed by the test for reversal found in *Chapman v. California, supra,* 386 U.S. 18. (*People v. Minjares, supra,* 24 Cal.3d at p. 424.) Under the *Chapman* test, reversal is required unless the government proves the error is harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The execution of the July 31, 2008 search warrant on Appellant's home yielded several gold bars. (4CT 000925.) At trial, the government exhibited the gold found on Appellant's property through photographs and even produced a gold bar for the jury to handle, while arguing that the gold fueled Appellant's greed and his desire to eliminate anyone who would stand in his way. (See 8RT 1498-1502, 1597-1599; 11RT 2187:7-8, 2189:20-22, 2208:14-16.)

Additionally, during service of the July 31, 2008 warrant, officers obtained two stacks of currency totaling $24,900 and $36,000. (4CT 000925.) The government relied heavily on this evidence in closing to argue that Appellant had plans to kill others:

> Then we find $25,000--well actually it is $24,980. It is a $20 bill shy of twenty-five grand. Not kept in a bank, not kept in a safe; it is kept in a drawer, in a Ziploc plastic bag. What do you think that money was earmarked for? We know ultimately that Mr. Fayed wanted Mr. Moya dead. He wanted to tie up that loose end. Do you think maybe he had had time to put together another 25,000 bucks to find yet another hit man to kill moya? 20 bucks shy of $25,000. Forgot to go to the ATM one day. Needed some dinner. Snatched a $20 bill out of that plastic bag. That's 25,000 bucks, and then another 30,000 found in a briefcase. Who has the means to commit this kind of crime? James Fayed.

(9RT 2208:24-28, 2209:1-7.)

Ultimately, as a result of the unlawful search and seizure, the government was able to present damaging evidence to the jury. Consequently, the government cannot show that lower court's error in admitting this evidence was harmless beyond a reasonable doubt.

E. THE LOWER COURT'S RULINGS PERTAINING TO SEVERAL PIECES OF EVIDENCE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHT TO A FAIR TRIAL

As noted above, the right to a fair trial is one of the most fundamental and cherished rights. (See *Arizona v. Youngblood* (1988) 488 U.S. 51, 61 [109 S.Ct. 333, 102 L.Ed.2d 281] (dis. opn. of Blackmun, J.) The United States Supreme Court has repeatedly declared that courts in capital cases must be vigilant in ensuring procedural fairness and accurate fact-finding. (See, e.g., *Monge v. California* (1998) 524 U.S. 721, 731-732 [118 S.Ct. 2246, 141 L.Ed.2d 615].) "Execution is the most irremediable and unfathomable of penalties; . . . death is different." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411 [106 S.Ct. 2595, 91 L.Ed.2d 335].) Consequently, every possible procedural protection must be provided to defendants in capital cases.

Improper admission or exclusion of evidence can violate a defendant's right to confront witnesses, right to a fair trial, and right to due process. (U.S. Const., 6th & 14th Amends.) The right to a jury trial requires that the jury find a defendant guilty based only on competently admitted evidence. (U.S Const., 5th & 6th Amends.; Cal. Const., art. I, §16; see also *Turner v. Louisiana* (1965) 379 U.S. 466, 472 [85 S.Ct. 546, 13 L.Ed.2d 424].) As set forth herein, several errors occurred in the admission and exclusion of evidence in the instant case.

1. THE LOWER COURT IMPROPERLY ADMITTED GOVERNMENT EVIDENCE

As set forth below, the trial court improperly admitted several pieces of evidence, including 1) a piece of real evidence which had been withheld from the defense before trial; 2) highly prejudicial facts concerning the indictment and investigation of the un-adjudicated federal case; 3) evidence in violation of Appellant's right to confrontation and hearsay rules; and 4) highly prejudicial photographs.

a. THE LOWER COURT ERRONEOUSLY ADMITTED PREVIOUSLY UNDISCLOSED EVIDENCE IN VIOLATION OF APPELLANT'S RIGHT TO COUNSEL AND RIGHT TO A FAIR TRIAL

On April 20, 2011, Appellant filed Notice of Motion; Motion in Limine to Include Statements Made by Mary Mercedes. (13CT 003395.) In that Motion, Appellant sought to introduce testimony from Appellant's sister, Patricia Taboga, indicating that in May of 2008, Appellant's other sister, Mary Mercedes, asked Patricia Taboga if her husband, Curt Taboga, would kill Pamela Fayed for $200,000. (13CT 003397.) On April 21, 2011, the lower court ruled to allow the evidence. (3RT 294-300.)

A significant amount of time was spent on the logistics of admitting this testimony. On April 21, 2011, Appellant's counsel informed the court that it would call Mercedes to the stand out of the presence of the jury, and it anticipated that Mercedes would invoke her Fifth Amendment right against self-incrimination and become unavailable; thus allowing the evidence to be admissible as a statement against penal interest. (4RT 456:1-13; see also Evid. Code, §1230.) The government discussed the possibility of granting Mercedes immunity, thereby prohibiting her from invoking the Fifth Amendment: "There are other avenues to ensure that

people who have --who want to give testimony but have a privilege can be permitted by the court, and-- I am dancing around it; there is immunity that can be conferred." (3RT 296:2-6.) Later, the government stated, "We are going to consider [immunity] strongly. We are also going to run it up our chain of command to make sure it is okay. And then that alters the complexion of it a bit because if she is not available, because she has been given immunity, then she would be required to testify first in front of the jury and either admit to soliciting murder or deny it and then be impeached by Patty Taboga later, and not the other way around." (3RT 339:16-24.)

On April 28, 2011, prior to the start of trial, Mercedes was called to the stand. (4RT 456:17.) Mercedes, who was represented by counsel, took the stand and invoked her rights under the Fifth Amendment. (4RT 458:18-20.) The government refused to offer Mercedes immunity. (See 4RT 461:5-10.) The lower court then found that Mercedes was unavailable. (4RT 458:21-26, 459:3-5.)

On May 12, 2011, the defense called Patricia Taboga. As noted above, Taboga testified that during a phone conversation with Mercedes, Mercedes asked Taboga if her husband would kill Pam for $200,000. (10RT 1904:19-21.) Mercedes further explained that "money was running out and Pamela had to go." (10RT 1905:8-10.)

In rebuttal, the government, for the first time, revealed that it had made a tape recording of Mercedes wherein she denies Taboga's allegations. (10RT 1993:1-13, 2044:2-5, 2046:1-5.) Counsel for Appellant objected to the use of the previously undisclosed tape, arguing:

> We brought this woman [Mary Mercedes] in almost three weeks ago to assert the Fifth. They've known for six weeks I was going to call Patty, and this morning, literally while jury is present at side-bar, they want to start playing a tape of Mary Mercedes where I've had no notice, we haven't had an opportunity to litigate this issue, and I suspect that now she is

> available because of her willingness to have this conversation, so this is a game change with regards to Mary Mercedes. It's not fair that it be sprung like this. [¶] . . . [¶] But do you see the fundamental unfairness, your honor, in that I -- we're not evenly matched parties in this equation where I can as easily as they can make a witness unavailable by threatening to prosecute that witness. [¶] . . . [¶] They get to silence her from the witness stand and make [her] unavailable by a threat of prosecution, which they could alleviate with the stroke of the pen. And then using her unavailability, they can come in here now with a tape recorded interview and say, because she is unavailable, this is all we've got. [¶] Your honor, this is so fundamentally unfair. If she's available, bring her in. If she's unavailable, make her available if they want to put that evidence on, but this is - - this is a double-whammy. [¶] What's even worse, your honor, is that they already interviewed her when she asserted the Fifth, and they knew - - they sat there with a --

(10RT 2004:7-15, 2009:16-28, 2010:1-3.)

The court asked if this interview was conducted before the witness took the Fifth, and Appellant's counsel responded:

> That's right, you honor, and then after she asserted the Fifth, this court proceeded as if she were an unavailable witness. [¶] They made objections to my inquiry of the witness about matters which they deemed to be inadmissible hearsay knowing all along that they had a thorough interview of Mary Mercedes. [¶] . . . [¶] In fact, we talked about that in court, your honor. We inquired if they were going to immunize her, and the district attorney said at the time, knowing that they'd already interviewed her and had in their hands a secret transcript they were going to spring on the last day of trial, they said, well, we're not sure if we want to immunize her or not, creating an impression that she was unavailable through no cause of their own, and they weren't going to take any position or do anything to make her unavailable, when all along they expected to just step into court here on the last day and say, oh, by the way, she's unavailable. We interviewed her. We're going to play a tape and now you don't get to cross-examine her. This is a problem.

(10RT 2010:6-12,27-28, 2011:1-12.)

However, the lower court allowed the government to play the previously undisclosed tape to the jury, reasoning: "Okay. Well, this is impeachment testimony, so they don't have to give it to you in advance." (10RT 1996:7-8.) As set forth herein, admission of the withheld tape was error.

i. STANDARD OF REVIEW

Generally, review of a trial court's ruling on matters regarding discovery falls under an abuse of discretion standard. (*People v. Ayala* (2000) 23 Cal.4th 225, 299 [96 Cal.Rptr.2d 682, 1 P.3d 3].) However, issues of law are reviewed de novo. (*People v. Lawler, supra,* 9 Cal.3d at p. 160; *People v. Cromer* (2001) 24 Cal.4th 889, 894, fn.1 [103 Cal.Rptr.2d 23, 15 P.3d 243].) Here, the legal issue —whether an item of discovery that is used for impeachment, but is also real evidence, must be turned over prior to trial— is one of law which should be reviewed de novo.

ii. RELEVANT LAW CONCERNING THE GOVERNMENT'S BURDEN TO DISCLOSE EVIDENCE

A "criminal defendant's right to discovery is based on the 'fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information.'" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84 [260 Cal.Rptr. 520, 776 P.2d 222]; see also U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art I, §15.) Further, "[p]rosecutors have a special obligation to promote justice and the ascertainment of truth. . . . 'The duty of the district attorney is not merely that of an advocate. His duty is not to obtain convictions, but to fully and fairly present . . . the evidence.'

[Citations.]" (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378 [66 Cal.Rptr.2d 494].)

Discovery in criminal cases must be produced when disclosure is required under the reciprocal discovery statutes detailed in Penal Code sections 1054-1054.10, other express statutory provisions,[60] or as mandated by the United States Constitution.[61] (See *Verdin v. Superior Court* (2008) 43 Cal.4th 1096, 1116 [77 Cal.Rptr.3d 287, 183 P.3d 1250], superseded by statute in part as stated in *Sharp v. Superior Court* (2012) 54 Cal.4th 168 [141 Cal.Rptr.3d 486, 277 P.3d 174].) One such obligation is that the government must disclose all relevant "real evidence seized or obtained as part of the investigation of the offenses charged." (Pen. Code, §1054.1.) "Real evidence" has been defined as "[e]vidence furnished by things themselves, on view or inspection, as distinguished from a description of them by the mouth of a witness." (Black's Law Dictionary (5th ed. 1979) at p. 449.) "Real evidence" has also been found to refer to physical objects used in evidence, as opposed to testimony. (See, e.g., *People v. Sanchez* (2001) 26 Cal.4th 834, 838 [111 Cal.Rptr.2d 129, 29 P.3d 209] [finding that guns and bullet casings were real evidence]; *Izazaga v. Superior Court*, *supra*, 54 Cal.3d 356, 364, fn. 1 [discussing trial court's order, which defined real evidence as tangible or physical evidence].)

There is no express requirement in the discovery statutes concerning impeachment evidence. Thus, courts have found that the government does

---

[60] See Pen. Code, §1054(e); see, e.g., Pen. Code, §1127a (c).

[61] Discovery that is compelled constitutionally must be provided whether specified in the statutes or not. (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378 [285 Cal.Rptr. 231, 815 P.2d 304] ["The . . . duties of disclosure under the due process clause are *wholly independent* of any statutory scheme . . . . The due process requirements are self-executing and need no statutory support to be effective."].)

not have to disclose *information* that is merely used to impeach a defense witness. (See, e.g., *People v. Tillis* (1998) 18 Cal.4th 284, 292 [75 Cal.Rptr.2d 447, 956 P.2d 409].[62]) In *Tillis*, this Court noted that "[s]ection 1054, subdivision (e), precludes us from broadening the scope of discovery beyond that provided in the chapter or other express statutory provisions, or as mandated by the Federal Constitution." (*Ibid.*) The Court continued: "[I]f none of those authorities requires disclosure of a particular item of evidence, we are not at liberty to create a rule imposing such a duty." (*Ibid.*; see also *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215] [Due process clause of the Fourteenth Amendment requires prosecution to disclose to the defense any material, exculpatory evidence]; accord, *In re Sassounian* (1995) 9 Cal.4th 535, 543-554 [37 Cal.Rptr.2d 446, 887 P.2d 527].) The key to *Tillis* and its progeny is that the government is not required to disclose impeachment evidence *that is not otherwise required to be disclosed.*[63] (See *People v. Tillis, supra,* 18 Cal.4th at p. 287.)

Had the government intended only to use information it learned from the conversation with Mercedes to impeach Taboga at trial, then disclosure

---

[62] In *Tillis*, the defendant called an expert witness concerning the effects of heroin. (*Tillis, supra,* 18 Cal.4th at p. 288.) During cross-examination, the government asked the witness whether he had taken drugs himself as "research" and whether he had been arrested for drugs. (*Id.* at p. 289.) The defense argued that it was not informed by the government before trial that the witness had ever been arrested. (*Ibid.*) The trial court ruled that the questions were based on information which was merely impeaching the witness; thus, the information concerning the arrest was not required to be disclosed. (*Ibid.*)

[63] In fact, in *Tillis*, the government argued at trial that the questions were "cross-examination material. It doesn't come [under] Section 1054(b). It's not real evidence." (*People v. Tillis, supra,* 18 Cal.4th at p. 292.)

may not have been required. However, that is not what occurred in the instant case. Instead, the government intended to, and in fact did, admit *the tape itself.* The tape itself, as opposed to information on the tape used to question a witness, is real evidence that was required to be disclosed. (See Pen. Code, §1054.1.)

This precise issue was addressed in *Jordan v. Haunani-Henry* (9th Cir. 1999) 199 F.3d 1332 [nonpub. opn.], attached as Exhibit A. In *Jordan*, the defendant failed to produce evidence it intended to use in trial to impeach a witness, specifically a journal and records it sought to introduce as exhibits. (*Id.* at p. 1.) The defendant in *Jordan* made the same argument as the government made at trial in the instant case, namely that *Tillis* stands for the proposition that impeachment evidence does not have to be disclosed. The *Jordan* Court found that *Tillis* was inapposite, distinguishing the evidence in *Tillis* as *information*, not real evidence. Thus, like *Tillis*, the *Jordan* court made the distinction between *information* which is impeaching, and "real evidence" which contains impeaching evidence, and—per statute—must always be disclosed. (Pen. Code, §1054.1; see also *People v. Zambrano* (2007) 41 Cal.4th 1082, 1133 [63 Cal.Rptr.3d 297, 163 P.3d 4][64], disapproved on another ground by *People v. Doolin, supra,* 45 Cal.4th 390.)

Here, the lower court allowed the government to introduce the evidence, finding it was "impeachment testimony" which did not have to be

---

[64] In *Zambrano*, this Court noted "the reciprocal discovery statute independently requires the prosecution to disclose to the defense, in advance of trial or as soon as discovered, certain categories of evidence 'in the possession of the prosecuting attorney or [known by] the prosecuting attorney . . . to be in the possession of the investigating agencies[]'[citation] . . . include[ing] '[a]ll relevant real evidence seized or obtained as a part of the investigation of the offenses charged'[citation] and '[a]ny exculpatory evidence' [citation]." (*People v. Zambrano, supra*, 41 Cal.4th at p. 1133.)

disclosed. (10RT 1996:7-8.) In doing so, the lower court missed the first and most important step in the *Tillis* analysis: *you start with the discovery statute*. If something is specifically listed in the statute, it must be disclosed. (*People v. Tillis, supra,* 18 Cal.4th at pp. 293-294.) Because the discovery statute unambiguously required the government to produce real evidence, the government violated discovery mandates by deliberately failing to disclose the tape, and then springing it on the defense as rebuttal evidence.

The prejudice resulting from the government's failure to disclose this evidence is unmistakable. The government knew well in advance of trial that Appellant would be presenting a third-party culpability defense. (13CT 003395-003401.) The government then created and concealed a piece of real evidence which went to the heart of this defense. The government then revealed the real evidence in rebuttal, gutting Appellant's defense.

b. THE LOWER COURT ERRED IN ADMITTING EVIDENCE CONCERNING THE FEDERAL INDICTMENT

On February 26, 2008, a federal indictment was filed against Appellant and Goldfinger Coin & Bullion, Inc., alleging a single violation of 18 U.S.C. section 1960. (2CT 000313.) The indictment was sealed, and the government made no effort to obtain an arrest warrant for Appellant or seek his surrender.

When the LAPD met with the FBI, it learned: 1) information concerning the federal indictment; 2) that the FBI classified Appellant as "a level 3 terrorist and is second flagged for airport departure" (12CT 003177); and 3) that the FBI had statements from witnesses detailing their beliefs that some investors using Appellant's business were participating in fraudulent activities including Ponzi schemes. (12CT 003181.) As noted

above, the federal case concerning the money license was never adjudicated, and no additional charges were filed based on information learned from the federal investigation. (2CT 000438.)

On April 21, 2011, the lower court held a hearing on Appellant's Motion in Limine to Exclude Any Reference to the Federal Indictment Against Mr. Fayed or the Underlying Facts of the Indictment or Investigation. (3RT 312:3-5.) Appellant's counsel set forth that the government had not provided evidence that either Appellant or Pamela Fayed knew about the federal indictment. (3RT 314-315.) Further, there was no evidence that Pamela Fayed had any intention of cooperating with the government. (*Id.*) Appellant's counsel also expressed that although the sealed indictment alleged a relatively minor offense, evidence concerning the investigation would show that the federal government suspected that Goldfinger was deeply involved in laundering money for Ponzi schemes and other illegal activity. (3RT 312:13-26.) Appellant's counsel argued that disclosure of the indictment and federal investigation would be "terribly prejudicial" and could confuse the jury and cause them to convict Appellant based on unproven, uncharged conduct. (3RT 314:2-13.)

The government responded that the federal indictment provided evidence of a motive to kill Pamela Fayed. (3RT 319:25-27.) The government alleged that it could prove that Pamela Fayed intended to testify against Appellant. (3RT 316-317.) The government also proclaimed that it could prove that Appellant knew that Pamela Fayed was going to cooperate, declaring: "this is the reason he decided to kill her."[65] (3RT 318:4.)

---

[65] The government also argued that because Appellant was in federal custody at the time of the statements to Smith, the evidence of the federal case was "inextricable intertwined" with the instant case. (13CT 0003254.)

The lower court found that the indictment was "relevant to motive." (3RT 324:18-21.) The lower court also focused on the fact that it believed that evidence about the federal indictment and investigation "pales in comparison to the charges in this case." (3RT 325:10-11.) The court noted that it did not "think that 352 would dictate that that some how (sic) should be excluded because of the inflammatory nature of the alleged conduct." (3RT 325:10-14.) The court then denied Appellant's motion. (*Id.*; 13CT 003383.)

As set forth below, the government used this information frequently in the trial. In its opening statement, the government referenced facts from the federal investigation which were not even part of the indictment:

> Mr. Fayed, according to the investigation, was helping Ponzi schemes transfer money. Ponzi schemes are like pyramid scheme[s] where people take advantage of others. Mr. Fayed was also, the evidence will show, transferring money around the globe without a money license which is a violation of federal law. Secret emails recovered later on demonstrate that Mr. Fayed knew of these illegal Ponzi schemes. This one from 2005, James Michael Fayed, as his initials depict there on the bottom says 'in other words, Rob has found places he can go to kind of gage the pulse on when these yahoos fit the profile of getting ready to cut and run.

(6RT 989:22-23, 990:1-8.) The government also argued, "The evidence will show that it was to his benefit to entertain the Ponzi schemes because customers flocked to there [sic] knowing it was anonymous . . . he wanted to know when they are getting ready to bail out, Mr. Fayed did. Something this big could literally go on for years, but no one talks about it. It is kind of like fight club." (6RT 990:19.) As set forth herein, the lower court erred in allowing in this evidence.

* * *

i. STANDARD OF REVIEW

A trial court's ruling admitting other crimes evidence is reviewed for abuse of discretion. (*People v. Spector* (2011) 194 Cal.App.4th 1335, 1373 [128 Cal.Rptr.3d 31].)

ii. THE UNCHARGED CONDUCT WAS INADMISSIBLE CHARACTER EVIDENCE

Evidence Code section 1101 subdivision (a) prohibits, inter alia, the admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion. (*People v. Ewoldt, supra*, 7 Cal.4th at 393; Evid. Code, §1101(a).) Under section 1101 subdivision (b), evidence of a person's uncharged criminal act is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge . . .) other than his or her disposition to commit such an act." (Evid. Code, §1101(b).) Evidence Code section 1101 subdivision (b) recognizes that the fact "that a defendant previously committed a similar crime can be circumstantial evidence tending to prove his identity, intent, and motive in the present crime." (*People v. Roldan* (2005) 35 Cal.4th 646, 705 [27 Cal.Rptr.3d 360, 110 P.3d 289], overruled on other grounds as stated in *People v. Doolin, supra,* 45 Cal.4th at p. 421.) "Like other circumstantial evidence, admissibility depends on the materiality of the fact sought to be proved, the tendency of the prior crime to prove the material fact and the existence *vel non* of some other rule requiring exclusion." (*Ibid.*, noting *People v. Catlin* (2001) 26 Cal.4th 81,116 [109 Cal.Rptr.2d 31, 26 P.3d 357].) "In order to satisfy the requirement of materiality, the fact sought to be proved must be either an ultimate fact in the proceeding (such as identity of the perpetrator, or an

element of the offense), or an intermediate fact (such as modus operandi or motive) 'from which an ultimate fact . . . may be presumed or inferred.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315.)

aa. THE UNCHARGED CONDUCT DID NOT SHOW MOTIVE

As noted above, the lower court allowed in the evidence of the federal case and investigation, finding that it went to Appellant's motive to commit the instant crime. (See 3RT 324:18-21.) "The probativeness of other-crimes evidence on the issue of motive does not necessarily depend on similarities between the charged and uncharged crimes, so long as the offenses have a direct logical nexus." (*People v. Demetrulias* (2006) 39 Cal.4th 1, 15 [45 Cal.Rptr.3d 407, 137 P.3d 229], noting *People v. Daniels* (1991) 52 Cal.3d 815, 857 [277 Cal.Rptr. 122, 802 P.2d 906].) In *Daniels*, the defendant was charged with the murder of two policemen. (*People v. Daniels*, *supra*, 52 Cal.3d at p. 837.) The government sought to introduce evidence that two years before the murders, the defendant had robbed a bank, fled the scene, and been shot by the same two officers, rendering the defendant a paraplegic. (*Id.* at p. 856) The government's theory of the case was that the defendant killed the officers as revenge, and the court found that the evidence of the prior and uncharged robbery was a direct logical nexus to show the defendant's motive. (*Id.* at p. 857.)

Similarly, in *People v. Pertsoni* (1985) 172 Cal.App.3d 369 [218 Cal.Rptr. 350], the defendant was charged with the murder of a purported member of the Yugoslav secret police and claimed he had acted in self-defense. (*Id.* at p. 372.) The government sought to introduce evidence of an uncharged prior act where the defendant had attended a protest against the Yugoslav government during which he shot at a man he believed to be the Yugoslav Ambassador. (*Id.* at pp. 372-373.) The court

found that although the acts were dissimilar in the circumstances of their commission, the other-crimes evidence was admissible to show that the defendant's had a "passionate hatred of anyone connected with the Yugoslav government." (*Id.* at p. 374.) This motive evidence was used to show that the defendant had acted "to kill an agent of the detested government, rather than to protect himself against perceived danger." (*Id.* at p. 375.)

In this case, the government offered no similarity of motive or direct connection between the unlicensed money transmitting operation and the instant murder charges. As noted above, at the Motion in Limine, the government claimed that it could show that Pamela Fayed was going to testify against Appellant in the federal case and that Appellant knew Pamela Fayed was going to testify against him. (3RT 316-318.) The government asserted that it would show that Pamela Fayed's cooperation was the reason Appellant decided to kill her. (3RT 318:4.) However, at trial, the government was unable to keep those promises.

Instead, Pamela Fayed's first attorney, Willingham, testified that he did not know about the sealed federal indictment, and that there was never an agreement for Pamela Fayed to cooperate in the federal case. (7RT 1278:13-16, 1301:20-25, 1302:5-14.) Pamela Fayed's subsequent attorney, Nelson, also testified that she did not know about the sealed federal indictment, and that there was never any discussion or agreement with the government about Pamela Fayed cooperating in the federal case. (7RT 1385:20-28, 1386:17-27.) Further, Willingham testified that Pamela Fayed had a defense agreement with Appellant, and, thus, she had a joint interest in defending the federal allegations against Goldfinger. (7RT 1304:6-14.) As a result, the government did not show that the federal allegations were

the motive in the instant case, and the evidence should not have been admitted.

iii. THE EVIDENCE SHOULD HAVE BEEN EXCLUDED UNDER EVIDENCE CODE SECTION 352

Even if this Court determines that the evidence was admissible under Evidence Code section 1101 subsection (b), "[i]n order to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352.'" (*People v. Balcom*, *supra*, 7 Cal.4th at p. 426, citing *People v. Thompson* (1988) 45 Cal.3d 86, 109 [246 Cal.Rptr. 245, 753 P.2d 37].) "The weighing process under section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the mechanical application of automatic rules." (*People v. Jennings*, *supra*, 81 Cal.App.4th at p. 1314.)

Because evidence of uncharged crimes can be so damaging "[i]f the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded." (*People v. Thompson*, *supra*, 27 Cal.3d at p. 316.) Courts have recognized the extraordinary prejudicial impact of other crimes evidence, noting that "[e]vidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' . . . 'Since substantial prejudicial effect [is] inherent in [such] evidence, uncharged offenses are admissible only if they have substantial probative value.' [Citation.]" (*People v. Balcom*, *supra*, 7 Cal.4th at p. 422, quoting *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 404.) Accordingly, admissibility must be "examined with care," and all doubts about its connection to the crime charged must be resolved in the accused's favor. (*People v. Guerrero*, *supra*, 16 Cal.3d at p. 724.)

When reviewing the admissibility of other crimes evidence, a court may consider: (1) the materiality of the fact to be proved or disproved; (2)

the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring exclusion even if the evidence is relevant. (*People v. Thompson*, *supra*, 27 Cal.3d at p. 315; see generally *People v. Ewoldt*, *supra*, 7 Cal.4th 380 [noting other factors to consider in assessing the prejudicial effect of uncharged conduct under Evidence Code section 352]; *People v. Balcom*, *supra*, 7 Cal.4th 414 [same].)

In this case, these factors weighed heavily toward a finding of prejudice. First, as noted above, the evidence did not have any direct relevance to a fact to be proved or disproved, and seemingly has no relevance at all, except as improper character evidence. Further, there was a high likelihood that the jury used the bad conduct evidence for an improper purpose. Juries impose a much harsher standard on defendants with a criminal past, and the complicated allegations in the white collar federal case likely confused the jury.[66] Yet, the lower court allowed the evidence, twice noting that the federal case "pales in comparison" to the state murder charges. (3RT 324:27-28, 325:10-11.)

That the federal case "pales in comparison" to the murder charge is plainly not the standard. Certainly, the federal case was "less serious" than the state murder case. However, that fact alone does not support its

---

[66] The Chicago Jury Project concluded that, as a practical matter, the presumption of innocence operates only for an accused without a criminal history. (See Kleven, Jr. and Zeisel, *The American Jury* (1971) pp. 160-161, 178-179.) The National Science Foundation Law and Social Science Project sponsored an empirical investigation of the prejudicial impact of various types of evidence. The type of evidence most consistently rated damning was "evidence suggesting immoral conduct by the defendant." (Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence* (1983) 1983 Wis. L.Rev. 1147, 1162.)

admission. Capital murder is the most serious offense under California law. (See *People v. Rountree* (2013) 56 Cal.4th 823, 837 [157 Cal.Rptr.3d 1, 301 P.3d 150]; *People v. Fauber* (1992) 2 Cal.4th 792, 818 [9 Cal.Rptr.2d 24, 831 P.2d 249].) If the lower court's reasoning is correct —and evidence of a "less serious" crime cannot be prejudicial— then any defendant charged with murder with special circumstances would have no protection against this type of evidence, as all other cases would be deemed "less serious." Such a conclusion is untenable, and the lower court erred in admitting the evidence.

iv. APPELLANT WAS PREJUDICED BY ADMISSION OF THE FACTS FROM THE FEDERAL CASE

A violation of Appellant's right to a fair trial is subject to harmless error review. (See *Rose v. Clark* (1986) 478 U.S. 570 [106 S.Ct. 3101, 92 L.Ed.2d 460].) In the instant case, the government presented witnesses and made extensive arguments concerning the federal allegations. In doing so, the government argued that the un-adjudicated federal allegations were true, namely that Goldfinger needed a federal license but did not have one; the government also argued that Appellant was terrified of the repercussions of these federal charges. (7RT 1226:22-28, 1260:8-14; 11RT 2191-2192.) The government went even further arguing unsupported assertions that were not even part of the dismissed federal charges. In addition to the government's arguments in their opening statement, discussed above, the government similarly argued facts from the federal investigation in closing argument, including that the federal government believed that Goldfinger "had a role in several multimillion-dollar internet schemes." (11RT 2188:15-17.) These unsupported allegations alone insurmountably tainted the jury against Appellant.

c. THE LOWER COURT IMPROPERLY ALLOWED THE GOVERNMENT TO PRESENT HEARSAY TESTIMONY IN VIOLATION OF APPELLANT'S RIGHT TO CONFRONT WITNESSES

Hearsay evidence used to convict a defendant must be sufficiently reliable to be admissible under the Confrontation Clause. (See *Lily v. Virginia* (1999) 527 U.S. 116, 138 [119 S.Ct. 1887, 144 L.Ed.2d 117]; see also U.S. Const., 6th Amend.; Cal. Const., art. I, §15.)

During direct examination of government witness Carol Neve, the government elicited information that Neve told Pamela Fayed that it would be in the best interest of Goldfinger to obtain a money transmitting license. (7RT 1371:11-14.) Appellant's counsel objected to this question as leading, irrelevant, and on the basis that it called for hearsay. (7RT 1371:14-16.) The lower court overruled the objection, stating, "I don't think it is offered -- being offered for the truth of the matter; just that that's what Miss Fayed was advised." (7RT 1371:17-19.) The government continued in its line of questioning, asking Neve whether Pamela Fayed suggested that she would act on Neve's advice. (7RT 1373:8-10.) Appellant's counsel objected to this question as hearsay. (7RT 1373:12.) The lower court, however, ruled that the statement was admissible through an exception under California Evidence Code section 1250, for existing mental state of declarant. (7RT 1373:13-14.)

Evidence Code section 1250 provides an exception for "evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health)." This exception applies when the statement was not made under circumstances indicating a "lack of trustworthiness" (Evid. Code, §1252), and the statement must be offered

either "to prove the declarant's state of mind, emotion, or physical sensation," or to "prove or explain acts or conduct of the declarant." (Evid. Code, §1250(a); *People v. Kovacich* (2011) 201 Cal.App.4th 863, 884 [133 Cal.Rptr.3d 924].) The state of mind exception, however, requires that the "declarant's mental state be factually relevant; that is, that it be, . . . 'itself an issue in the action.'" (*People v. Noguera* (1992) 4 Cal.4th 599, 621 [15 Cal.Rptr.2d 400, 842 P.2d 1160], citing Evid. Code, §1250(a).)

In *People v. Noguera, supra,* 4 Cal.4th at p. 621, the trial court admitted hearsay statements from witnesses concerning the murder victim's fear of the defendant. There, the government argued that although the statements were hearsay, they were offered for the purpose of establishing the victim's state of mind at the time she was murdered. (*Ibid.*) Upon review, the court of appeal found that the statements were not within the exception to the hearsay rule embodied in Evidence Code section 1250. (*Id.* at p. 622.) The court reasoned that neither the victim's state of mind, or her conduct, was relevant to any part of the government's case; "nor did the defense raise any issue concerning her state of mind or behavior at or before the night she was murdered." (*Ibid.*)

Similarly, Neve's hearsay testimony concerning Pamela Fayed's intent to obtain a money transmitting license does not fall within the exception for evidence of declarant's then existing state of mind, emotion, or physical sensation. At trial, Pamela Fayed's belief that Goldfinger required a license to operate was not in issue. Rather, the government's case focused primarily on Appellant's state of mind, and whether he believed Pamela Fayed would cooperate with the federal government in their federal investigation against him. Appellant could have held this belief regardless of whether Pamela Fayed believed Goldfinger required a money transmitting license. Further, defense counsel never argued that Pamela

Fayed did not believe Goldfinger required a license. Consequently, because Pamela Fayed's intent was not an issue in the case, the lower court erred by admitting Neve's testimony concerning Pamela Fayed's intent.

Additionally, the lower court erred by admitting Neve's hearsay testimony advising Pamela Fayed that it would be in the best interest of Goldfinger to obtain a money transmitting license. The lower court overruled Appellant's hearsay objection on the ground that Neve's statement was just "what Miss Fayed was advised." (7RT 1371:17-19.) Evidence Code sections 1220 through 1390 enumerate several exceptions to the hearsay rule, none of which provide an exception for "what the listener was advised." Further, even assuming that the statement was admitted as evidence of its effect on the listener (*People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [179 Cal.Rptr. 61]), the statement still fails to meet the threshold element of relevance. As indicated above, Pamela Fayed's state of mind as to whether or not she believed Goldfinger required a money transmitting license was not an issue in the case. The government's case centered on Appellant's state of mind—Appellant's belief as to whether Pamela Fayed would cooperate with federal investigators as a witness against him. As a result, the lower court erred in admitting Neve's hearsay testimony concerning her advice to Pamela Fayed.

d. THE LOWER COURT ERRED IN ALLOWING THE GOVERNMENT TO ADMIT PREJUDICIAL PHOTOGRAPHS IN THE GUILT PHASE

Generally, the admissibility of victim and crime scene photographs is governed by the same rules of evidence used to determine the admissibility of evidence: only relevant evidence is admissible. (*People v. Lewis* (2001) 25 Cal.4th 610, 654 [106 Cal.Rptr.2d 629, 22 P.3d 392].) Here, any evidence

was relevant which tended to prove that Appellant killed Pamela Fayed, that the killing was committed with malice aforethought, that the killer was lying in wait, or that the killing was willful, deliberate, and premeditated. (Pen. Code, §§187, 188, 189.) Even if this requirement is met, relevant evidence is inadmissible when its probative value is clearly outweighed by its prejudicial effect or where the evidence is merely cumulative to other evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 18 [65 Cal.Rptr.2d 348, 939 P.2d 748]; Evid. Code, §352; see *People v. Evers* (1992) 10 Cal.App.4th 588 [12 Cal.Rptr.2d 637].) 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" is prejudicial within the meaning of Evidence Code section 352. (*People v. Smithey* (1999) 20 Cal.4th 936, 974 [86 Cal.Rptr.2d 243, 978 P.2d 1171], citations omitted.)

When a trial court's ruling admitting prejudicial evidence renders a trial fundamentally unfair, the ruling violates the due process clause of the Federal and Constitutions. (U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§1 & 15.) As set forth herein, the lower court improperly admitted into evidence cumulative, irrelevant and highly prejudicial evidence consisting of graphic and gruesome photographs of bloody items found at the crime scene and numerous photographs of Pamela Fayed while she was alive.

i. PHOTOGRAPHS OF BLOODIED ITEMS FOUND AT THE MURDER SCENE SHOULD HAVE BEEN EXCLUDED

Courts are often "asked to rule on the propriety of the admission of allegedly gruesome photographs." (*People v. Gurule* (2002) 28 Cal.4th 557, 624 [123 Cal.Rptr.2d 345].) "'[M]urder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant.' [citation.]" (*People v. Pierce, supra,* 24 Cal.3d at p. 211.) However, in

order to be admissible such photographs must be relevant to a disputed fact. (Evid. Code, §210.)

During Detective Eric Spears' testimony, the government displayed several gruesome photos depicting items recovered at the murder scene. (8RT 1458:20-21,25-26.) Spear described the items: "This is a shirt which was white at one time that is obviously soaked in blood . . . you see the white shirt soaked in the blood." (8RT 1458:20-27.) Appellant's attorney objected on the grounds that the probative value of the evidence was outweighed by the resulting undue prejudice. (8RT 1459:8-9.) Appellant's counsel explained that there was no dispute that Pamela Fayed was "stabbed to death, but to continue now to parade one bloody item after another, I think, serves only to inflame and to prejudice the jury." (8RT 1459:10-11.) The defense offered to stipulate that the items in the photographs were recovered and that they belonged to Pamela Fayed, and argued "[T]here just doesn't seem to be any evidentiary purpose, beyond being simply over dramatic, having the bloody nature of the crime. [¶] The stabling is not an issue here." (8RT 1459:17-21.) The government declined to stipulate arguing that "the degree of blood that was found on each of the[] items" made "the murder, premeditation, the deliberation, the intent to kill much more *real to the jury*." (8RT 1460:6-12, italics added.) The lower court admitted the evidence, and the government proceeded to introduce photographs of Pamela Fayed's bloodied pants, purse, and glasses. (8RT 1461:23, 1462:7-8,27-28.)

While the death may have appeared more "real to the jury" by showing them graphic images, the photographs did not relate to a fact at issue. Contrary to the government's argument, the bloody photographs taken after the crime did nothing to establish premeditation and deliberation. Further, the argument that the evidence was necessary to show how Pamela Fayed

was killed was disingenuous. There was other, significant information introduced as to the manner of the death, which was admitted through less prejudicial means. The government's witness, Edwin Rivera, testified in graphic detail to the condition in which he found Pamela Fayed. (8RT 1522-1525.) Testimony from forensic pathologist Stephen Scholtz included a voluminous amount of meticulous details on the wounds sustained by Pamela Fayed. (8RT 1530-1566.) Furthermore, on the issue of premeditation and deliberation, the government relied on testimony from Edward Dixon and Dan Jensen concerning the cell phone records of Appellant and Moya. Photographs of bloody clothes did nothing to further prove those issues.

In *People v. Smith* (1973) 33 Cal.App.3d 51, 69 [108 Cal.Rptr. 698], rejected on another ground by *People v. Wetmore* (1978) 22 Cal.3d 318 [149 Cal.Rptr. 265, 583 P.2d 1308], the court condemned admission of this type of photographs: "[T]here were ample descriptions of the positions and appearances of those two bodies. There was autopsy testimony regarding the precise location and nature of the wounds, which needed no clarification or amplification. . . . They supplied no more than a blatant appeal to the jury's emotions." (*Ibid.*) Similarly, the gruesome photographs of the bloodied items found at the crime scene of the instant case served no purpose but to enflame the passions of the jury and to appeal to their emotions. The photographs were superfluous and prejudicial, and the lower court erred by admitting them.

* * *

* * *

ii. THE LOWER COURT ERRED WHEN IT ADMITTED OVERLY SENTIMENTAL AND EMOTIONAL PHOTOGRAPHS OF PAMELA FAYED WHEN SHE WAS ALIVE

Likewise, courts often rule on the propriety of the admission of emotional and sentimental photographs. (See *People v. Hamilton* (2009) 45 Cal.4th 863, 930-931 [89 Cal.Rptr.3d 286, 200 P.3d 898].) Although the admission of evidence is within the discretion of the trial court, a trial court has *no* discretion to admit irrelevant evidence. (*People v. Poggi* (1988) 45 Cal.3d 306, 323 [246 Cal.Rptr. 886, 753 P.2d 1082]; *People v. Turner* (1984) 37 Cal.3d 302, 321 [208 Cal.Rptr. 196, 690 P.2d 669]; Evid. Code, §350.) "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." (*People v. Hall* (1980) 28 Cal.3d 143, 152 [167 Cal.Rptr. 844, 616 P.2d 826], overruled on another ground by *People v. Newman* (1999) 21 Cal.4th 413 [87 Cal.Rptr.2d 474, 981 P.2d 98].) This Court has "repeatedly cautioned against the admission of photographs of murder victims while alive unless the prosecution can establish the relevance of such items." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1230 [9 Cal.Rptr.2d 628, 831 P.2d 1210].) "Otherwise, there is a risk that the photograph will merely generate sympathy for the victims." (*Ibid.*)

Here, the lower court permitted the government to admit numerous sentimental and emotional photographs during the guilt phase of trial. The government introduced photographs of Pamela Fayed with her daughter, Desiree Goudie, as well as photographs of Desiree going to prom (6RT 1036), of Pamela Fayed's daughter, Jeanette, with the family dog (6RT 1039), and of Disneyland passes and a keychain (8RT 1433-1434).

While it is possible that in some cases such photographs may be necessary to identify a victim, identity was not an issue in the instant case. Even if identity were an issue, the government's use of several photographs was superfluous because Pamela Fayed could have easily been identified by her daughter in a single photograph. Thus, the photographs were irrelevant. Further, these photographs invoked specific emotional responses from the jury: sympathy for the victim and antipathy for Appellant. Consequently, the lower court erred by admitting these photographs.

2. THE TRIAL COURT IMPROPERLY HINDERED APPELLANT'S CROSS-EXAMINATION RIGHTS

"There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Indeed, [the Supreme Court has] expressly declared that to deprive an accused of the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." (*Pointer v. Texas* (1965) 380 U.S. 400, 405 [85 S.Ct. 1065, 13 L.Ed.2d 923]; see also *Brookhart v. Janis* (1966) 384 U.S. 1, 3 [86 S.Ct. 1245, 7 Ohio Misc. 77]; *Bruton v. United States* (1968) 391 U.S. 123, 136-137 [88 S.Ct. 1620, 20 L.Ed.2d 476] [holding that a defendant's right to confrontation was violated when there was no opportunity to cross-examine co-defendant whose confession was used to convict him].)

As set forth herein, Appellant's cross-examination rights were impermissibly hindered.

* * *

a. STANDARD OF REVIEW

A trial court's decision to limit the scope of cross-examination is reviewed for abuse of discretion. (*United States v. Dudden* (9th Cir. 1995) 65 F.3d 1461, 1469; *United States v. Manning* (9th Cir. 1995) 56 F.3d 1188, 1197.) Whether limitations on cross-examination violated a defendant's Sixth Amendment right to confront their accusers is reviewed de novo, and the question on appeal is whether the error was harmless beyond a reasonable doubt. (*United States v. Marbella* (9th Cir. 1996) 73 F.3d 1508, 1513; *United States v. Ortega* (9th Cir. 2000) 203 F.3d 675, 682; *United States v. Harris* (9th Cir. 1999) 185 F.3d 999, 1008.)

b. THE LOWER COURT IMPROPERLY LIMITED THE CROSS-EXAMINATION OF WITNESS MARK AVEIS

At trial, AUSA Aveis provided testimony concerning the federal government's investigation of Appellant and Goldfinger. On cross-examination, Appellant attempted to question Aveis concerning the strength of the federal case. Appellant's counsel elicited testimony from Aveis that he was aware of Appellant's defense in the federal investigation, namely that Appellant did not believe his business required a license. (7RT 1261:16-20.) When defense counsel attempted to elicit from Aveis the source of this information, the government interposed a hearsay objection, which the lower court sustained. (7RT 1261:22-28, 1262:13-14,18.) Appellant's counsel also asked Aveis whether he knew that there would have to be litigation concerning whether Goldfinger was required to have a license. (*Id.*) The lower court again sustained the government's hearsay objections to these questions. (RT 1262:7-13, 1263:3-8.)

However, as noted above, Evidence Code section 1250 provides an exception to hearsay for "evidence of a statement of the declarant's then

existing state of mind, emotion, or physical sensation." The "declarant's mental state [must] be factually relevant; that is, that it be, . . . 'itself an issue in the action.'" (*People v. Noguera, supra,* 4 Cal.4th at p. 621, citing Evid. Code, §1250(a).)

Here, the statements were admissible as an exception under Evidence Code section 1250 because they were offered as circumstantial evidence of Appellant's state of mind, revealing that he did not believe he needed a money transmitting license. Appellant's state of mind was undoubtedly an issue at trial. The government's theory of the case was that Appellant murdered Pamela Fayed because he was tremendously worried about the federal licensing case, and he believed that Pamela Fayed would cooperate with federal investigators. In fact, in closing argument, the government argued that Appellant believed that Pamela Fayed's cooperation in the federal case "would be his demise. It is as simple as that." (11RT 2193:8-10.) In discussing Appellant's motive, the government also argued that Appellant "had the problem of Pamela Fayed cooperating with the federal government in their case against James Fayed. [¶] And make no mistake about it. It is not the [sic] feds were investigating maybe something that Goldfinger did incorrectly; James Fayed is named in that indictment as the person responsible for not having these money transference licenses. He is the person that's on the hook." (11RT 2304:27-28, 2305:1-10.)

Additionally, as set forth above, the government called Carol Neve who testified, over objection, that she told Pamela Fayed that Goldfinger was at risk because they did not have a license, and that Pam needed to get a money transmitting license. (7RT 1371:23-28, 1372:19-28.) Thus, during the course of Appellant's trial, the government was permitted to elicit

testimony concerning the validity of the federal licensing allegations, and argue to the jury that Pamela Fayed's potential cooperation in the federal case would be Appellant's "demise"; yet, Appellant was precluded from asking AUSA Aveis any questions about the relative strength of the government's allegations or about whether Appellant had expressed his belief that he had a legitimate defense in the federal case. As such, Appellant's right to confront and cross-examine witnesses was unduly hindered. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.)

3. THE LOWER COURT IMPROPERLY EXCLUDED DEFENSE EVIDENCE

A defendant has a fundamental right to present evidence on his own behalf. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15; *People v. Schroeder* (1991) 227 Cal.App.3d 784, 787 [278 Cal.Rptr. 237]; *Davis v. Alaska, supra,* 415 U.S. at p. 317.) A criminal defendant's due process and Sixth Amendment right to present a defense under the United States Constitution includes the right to present all relevant and material evidence favorable to his or her theory of defense. (*Washington v. Texas* (1967) 388 U.S. 14, 23 [87 S.Ct. 1920, 187 L.Ed.2d 1019]; *Chambers v. Mississippi, supra,* 410 U.S. at p. 302; *People v. Babbitt, supra,* 45 Cal.3d at p. 684; *People v. Jennings, supra,* 53 Cal.3d at p. 372; see also *People v. Burrell-Hart* (1987) 192 Cal.App.3d 593, 596-600 [237 Cal.Rptr. 654] [trial court improperly excluded evidence in a rape case that the victim had falsely accused another person of rape]; Evid. Code, §351.)

Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, §210.) Under the hearsay rule, subject to several exceptions, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the

matter stated" is generally inadmissible. (Evid. Code, §1200.) However, "[t]he hearsay rule may not be applied mechanistically to defeat the ends of justice." (*Chambers v. Mississippi, supra,* 410 U.S. at p. 302.) Even when evidence is excluded on the basis of a valid application of the hearsay rules, such exclusion may violate due process if the evidence is sufficiently reliable and crucial to the defense. (See *United States v. Lopez-Alvarez* (9th Cir. 1992) 970 F.2d 583, 587.)

a. THE LOWER COURT IMPROPERLY EXCLUDED EVIDENCE PERTAINING TO APPELLANT'S STATE OF MIND DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO MOUNT A DEFENSE

Greg Herring gave testimony concerning the divorce proceedings between Pamela Fayed and Appellant. (6RT 1146-1204.) Herring testified that there was to be a significant hearing on July 29, 2008 in the divorce case. (6RT 1181:1-12.) During cross-examination, Herring testified that he received a letter from Appellant's divorce attorney, John Foley, three or four days before the July 29, 2008 scheduled hearing, informing Herring that Appellant intended to shut down and commence liquidation of Goldfinger. (6RT 1196:1-4,18-22.) Appellant's counsel then attempted to elicit from Herring testimony concerning statements in the letter explaining Appellant's state of mind in liquidating the business. (6RT 1199:28, 1200:1.) Before Herring could testify on that matter, the lower court sustained the objection, and Appellant was not permitted to introduce those portions of the letter as evidence. (6RT 1200:18, 1201:4-5; see also 10RT 2101-2102.)

However, the proposed evidence fell under an exception to the general rule prohibiting hearsay because it is a statement of the "declarant's then existing state of mind, emotion, or physical sensation." (Evid. Code,

§1250.) As explained above, Evidence Code section 1250 requires that the "declarant's mental state be factually relevant; that is, that it be, . . . 'itself an issue in the action.'" (*People v. Noguera, supra,* 4 Cal.4th at p. 621, citing Evid. Code, §1250.)

Here, Appellant's state of mind was undoubtedly an issue. A significant portion of the government's case centered on Appellant's state of mind and whether he believed Pamela Fayed would cooperate with the federal government in its investigation into Goldfinger's licenses. Evidence of Appellant's desire to wind down the business rather than purchase the money transmitting licenses would have negated the government's theory that Appellant murdered Pamela Fayed to prevent her from purchasing money transmitting licenses and cooperating with federal investigators.

Furthermore, the evidence directly negated the government's argument that Appellant was up against a hard, looming deadline in the divorce case which caused him to kill Pamela Fayed. Herring stated that the decision to liquidate Goldfinger would have required another hearing in the divorce case. (6RT 1201:21-28.) Thus, this evidence showed there was not a devastating deadline that had Appellant terrified.

b. THE LOWER COURT IMPROPERLY EXCLUDED TESTIMONY CRITICAL TO APPELLANT'S THIRD PARTY CULPABILITY DEFENSE DEPRIVING HIM OF HIS CONSTITUTIONAL RIGHT TO MOUNT A DEFENSE

As noted above, the defense called Patricia Taboga who testified as to Mary Mercedes' attempt to solicit Taboga's husband to kill Pamela Fayed. (10RT 1904:19-21.) As set forth herein, the lower court improperly excluded crucial parts of Taboga's testimony and related evidence.

i. THE LOWER COURT IMPROPERLY EXCLUDED RELEVANT PORTIONS OF TABOGA'S TESTIMONY

During Taboga's testimony, Appellant attempted to ask her questions about Mercedes' animus toward Pamela Fayed. (10RT 1901:10-12.) The government subsequently objected, based on hearsay. (10RT 1901:12.) Appellant's counsel proffered that "the witness is going to describe Mary savaging Pam and laying a foundation for her subsequent request that this witness assist in the killing of Pam." (10RT 1901:22-25.) The lower court sustained the objections finding that the statements could only come in if they were a statement against penal interest. (10RT 1901:20-28, 1902:1-18.) However, as noted above, under Evidence Code section 1250 the statement could be offered either "to prove the declarant's state of mind, emotion, or physical sensation," or to "prove or explain acts or conduct of the declarant." (Evid. Code, §1250(a); *People v. Kovacich, supra,* 201 Cal.App.4th at p. 884.)

Here, Appellant set forth a third-party culpability defense that Mercedes had tried to solicit Pamela Fayed's murder. Thus, Mercedes' mental state was relevant. Yet, the lower court denied Appellant the ability to ask proper questions to establish Mercedes' animus towards Pamela Fayed. The government greatly capitalized on the exclusion of this evidence. The government told the jury that Mercedes did not have the "same motive" as Appellant to kill Pamela Fayed. (See 11RT 2207:1-2; see also 11RT 2190:5-7, 2206:12-13, 22.) The government maintained: "Nowhere, nowhere in the weeks of testimony, did we hear one thing about Mary Mercedes' motive and her hatred of Pam Fayed that was anywhere near what we just heard . . . [¶] Show me somewhere, if this is to be believed in this evidence, where Mary Mercedes says anything near that." (11RT 2306:24-28, 2307:1-4.) The government continued to argue that

Appellant had not shown a reason for Mercedes to have wanted Pamela Fayed dead, arguing, "She didn't have a motive close to what Jim Fayed had." (11RT 2307:5-6.)

The government became impassioned about this issue, chastising Appellant's counsel for arguing that Mercedes committed the offense without showing motive: "I am sorry if you sense some fight in my voice. Now is the time to stand up, and now is the time to speak for what's right. And I am going to expect you, when you go in the jury room, to have that same level of fight. [¶] It means no disrespect to Mr. Werksman at all if you sense sarcasm in my voice. But you can't come into this courtroom and try to pull the wool over your eyes with a story that doesn't make any sense, which diverts attention away from the person who is responsible." (11RT 2307:7-17.)

Thus, the lower court excluded relevant, admissible evidence, and Appellant was undoubtedly prejudiced by the error.

ii. THE LOWER COURT ERRED IN EXCLUDING QUESTIONS TO TABOGA CONCERNING APPELLANT'S LACK OF KNOWLEDGE OF MERCEDES' PRIOR SOLICITATION

After Taboga testified that Mercedes had previously tried to solicit Taboga's husband to murder Pamela Fayed, Appellant's counsel asked, "Did Mary suggest to you whether or not [Appellant] was involved in her request to you?" (10RT 1906:14-15.) The government objected, and the lower court sustained the objection. (10RT 1906:16-17.) Taboga testified that she asked Mercedes if Appellant knew she made the call. (10RT 1906:20-22.) The government again objected, the lower court again sustained the objection, and the answer was stricken. (10RT 1906:23-25.) Appellant also attempted to ascertain from Taboga whether she had later

discussed Pamela Fayed's death with Mercedes. (10RT 1909:14-19.) The government objected as hearsay, and the lower court sustained the objection. (10RT 1909:20-21.)

The lower court erred by sustaining the government's hearsay objections. Any answer to these statements would be admissible as a statement against Mercedes' interest pursuant to Evidence Code section 1230. Mercedes was unavailable as a witness and a statement implicating her as being involved in a murder would be against both her penal and social interests. Thus, the evidence should have been admitted.

iii. THE LOWER COURT IMPROPERLY EXCLUDED TABOGA'S PRIOR CONSISTENT STATEMENT

During Taboga's testimony, Appellant's counsel established that she had sent a letter, meant for Appellant, concerning Mercedes' statements to her. (10RT 1913:6-16.) The letter was marked as an exhibit but not immediately moved into evidence. (10RT 1913:16-20.) As set forth above, after Taboga's testimony, the government entered into evidence a tape recording of Mercedes wherein she denies soliciting Pamela Fayed's murder. (10RT 1993:1-13.) Appellant's counsel subsequently attempted to move into evidence the letter that Patty Taboga wrote concerning Mercedes' statements to her. (10RT 2051:20-24.) Appellant's counsel argued that the evidence was admissible under Evidence Code sections 1236 and 1237. (10RT 2051:24.) The government countered that the evidence was "not a prior consistent statement because [the prosecutor] never questioned her and alleged that what was in there was somehow inconsistent or consistent with what she's saying here today." (10RT 2052:4-7.) Appellant's counsel argued that the government had accused Taboga of making the whole story up; thus, her previous statement was a

prior consistent statement. (10RT 2052:8-11.) The lower court sustained the objection, reasoning:

> The letter is dated March 9th, 2011. And to be a prior consistent statement, it would have to be some statement that preceded the statement where she alleges that Mary Mercedes solicited her, and I don't think – [¶] It is a prior inconsistent statement because this is dated March 9th, 2011. Now, if it were something that was -- something that was from 2008 or 2007 or, you know, somewhere in there, yeah, but this is -- I don't see any exception to the hearsay rule.

(10RT 2052:14-22, 2053:1-2.[67]) The lower court erred because it improperly misstated the exception to the hearsay rule provided by Evidence Code section 1236.

Evidence Code section 1236 provides an exception to the hearsay rule for evidence of a statement previously made by a witness if the statement is consistent with the testimony at the hearing. Evidence of a prior consistent statement is admissible to support the declarant's credibility if it is offered after "[a]n express charge has been made that his testimony at the hearing is recently fabricated . . ., and the statement was made before the . . . motive for fabrication." (Evid. Code, §791.)

Taboga testified in court that Mercedes made the solicitation. (10RT 1904:19-21.) The government expressly challenged that testimony by introducing the tape recording of Mercedes, made on March 30, 2011, in which Mercedes denies the solicitation. (See 10RT 1958, 2041:24-27.) The letter dated March 9, 2011 was a prior statement consistent with the trial statement. (10RT 2052:14.) Thus, Taboga's statement in her letter was both prior to, and consistent with, her testimony at trial and should have been admitted.

---

[67] Appellant also attempted to enter into evidence Exhibit C, a cover letter from Taboga to the defense team, but the cover letter was also excluded. (10RT 2053:4-13.)

c. THE LOWER COURT ERRED WHEN IT EXCLUDED EVIDENCE OF APPELLANT'S PHYSICAL INABILITY TO COMMIT THE CRIME

On April 21, 2011, the lower court held a hearing to discuss the admissibility of testimony by two physicians who prescribed pain medications to Appellant in the months leading up to the murder. (3RT 311, 326:19-23, 328:3-8.) That evidence would have shown that Appellant was physically incapable of participating in the conspiracy because he was under the effect of the pain medication and bedridden. (3RT 327:9-14, 329:13-15.) Moreover, witness Desiree Goudie corroborated this theory of defense when she testified that Appellant would retreat to his bedroom and that he "was always comatose on his drugs, and he didn't really come out much. When [Desiree] would see him, he was obviously in a stupor . . . ." (13RT 2630:8-11.) However, citing Penal Code section 22, the lower court erroneously ruled that the testimony would not be admissible unless it challenged Appellant's intent. (3RT 336:16-28, 337:1-4.)

F. THERE WAS INSUFFICIENT EVIDENCE OF THE SPECIAL CIRCUMSTANCES

A criminal conviction that is not supported by substantial evidence violates a defendant's constitutional right to due process. (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §15; *People v. Johnson* (1980) 26 Cal.3d 557, 578 [162 Cal.Rptr. 431, 606 P.2d 738]; *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *In re Winship* (1970) 397 U.S. 358, 364 [90 S.Ct. 1068, 25 L.Ed.2d 368]; *People v. Thompson* (2010) 49 Cal.4th 79, 122 [109 Cal.Rptr.3d 549, 231 P.3d 289].) "The rules governing sufficiency of the evidence are as applicable to challenges aimed at special circumstance findings as they are to claims of alleged deficiencies

in proof of any other element of the prosecution's case." (*People v. Morris* (1988) 46 Cal.3d 1, 19 [249 Cal.Rptr. 119, 756 P.2d 843].)

In the instant case, the government alleged two special circumstances: Penal Code section 190.2, subdivision (a)(1), murder for financial gain, and section 190.2, subdivision (a)(15), lying in wait. As set forth herein, there was insufficient evidence to support a finding of either special circumstance.

a. THERE WAS INSUFFICIENT EVIDENCE OF FINANCIAL GAIN

The jury found true the special allegation under Penal Code section §190.2(a)(1). (14CT 003630-003633.) This special circumstance requires the government to prove beyond a reasonable doubt that the murder was "carried out for financial gain." (Pen. Code, §190.2(a)(1); see, e.g., *People v. Noguera* (1992) 4 Cal.4th 599, 636 [15 Cal.Rptr.2d 400, 842 P.2d 1160]; *People v. Howard* (1988) 44 Cal.3d 375, 413 [243 Cal.Rptr. 842, 749 P.2d 279] [the financial gain special circumstance requires proof that defendant harbored "the intent to thereby obtain some financial gain."].)

Even assuming that the evidence was sufficient to prove beyond a reasonable doubt that Appellant aided and abetted in the killing of Pamela Fayed, there was inadequate proof that the murder was carried out for financial gain as alleged in the charged special circumstance. In the instant case, the government repeatedly argued that it only had to show that Moya received financial gain.[68] (See 11RT 2177:1-4.) To support its position, the government cited to *People v. Bigelow* (1984) 37 Cal.3d 731, 750 [209 Cal.Rptr. 328, 691 P.2d 994] and *People v. Freeman* (1987) 193 Cal.App.3d

[68] The government also speculatively argued that Appellant would personally benefit from the death of his wife because "this is the community property state." (11RT 2176:16-17.)

337 [238 Cal.Rptr. 257]. (11RT 2177:26-28.) However, neither case directly supports the government's assertion.

In *Bigelow*, this Court explained, "We write with little to guide us in the construction of the financial gain special circumstance. No legislative history illumines the adoption of this special circumstance. The ballot arguments and other materials concerning the 1978 initiative do not address the subject." (*People v. Bigelow, supra,* 37 Cal.3d at p. 751.) Consequently, this Court opted for a narrow construction, and held that the financial gain circumstance "applies only when the victim's death is the consideration for, or an essential prerequisite to, the financial gain sought by the *defendant*." (*Ibid.* (italics added).)

Subsequently, in *Freeman*, the Court of Appeal for the Second District found that this Court's use of the word "defendant" was not intended to be read plainly. The *Freeman* Court noted, "We do not agree that the court's use of the word 'defendant' was intended to require financial gain by each aider and abettor." (*People v. Freeman, supra,* 193 Cal.App.3d at p. 339, citing *People v. Bigelow, supra,* 37 Cal.3d at p. 751.) Instead, the *Freeman* Court of Appeal found that the special circumstance does not require that the financial motivation be entertained by a defendant who hires a third person to commit the murder. (See *id.* at p. 339-340.) In doing so, the court in *Freeman* improperly interpreted *Bigelow* by failing to give the term "defendant" its ordinary meaning.

Even assuming that *Freeman*'s interpretation of *Bigelow* is correct, the *Freeman* Court held only that a hiring defendant could be subject to the financial gain special circumstance where there was significant evidence that *the actual killer* acted for his own financial gain. (*Id.*) In *Freeman*, the parties stipulated that the killer carried out the murder for his own financial gain. (*Id.* at 338.) The court found "one who intentionally aids or encourages a person

in the deliberate killing of another *for the killer's own financial gain*" is subject to the special circumstance. (*Id.* (emphasis added).) Here, the government only presented some evidence that Appellant gave Moya $25,000 but did not present any evidence that Moya was the actual killer. Although the government argued that it only had to show that the intermediary, Moya,[69] received financial gain, no case supports its position.[70] Thus, even if the *Freeman* court is correct, the government did not present sufficient evidence that the actual killer carried out the murder for his own financial gain.[71] Consequently, the jury's finding that the government satisfied its burden of proof for the special circumstance of murder for financial gain violated Appellant's right to due process.[72]

---

[69] Specifically, the government argued, "If you find that Mr. Moya was going to gain financially to the tune of $25,000, then that is enough to establish the special circumstance for financial gain." (10RT 2018:14-17.)

[70] Appellant's argument is distinct from other arguments made in *People v. Singer* (1990) 226 Cal.App.3d 23 [275 Cal.Rptr. 911] and *People v. Battle* (2011) 198 Cal.App.4th 50, 82 [129 Cal.Rptr.3d 828].) In those cases, the defendants argued that they used an intermediary to communicate with the actual killer; thus, they argued that because they did not communicate with the actual killer, they did not aid and abet the killer. In contrast, Appellant's argument is that under *Freeman*, the government must produce sufficient evidence that the actual killer, rather than the intermediary, was motivated by financial gain. (See *People v. Freeman, supra,* 193 Cal.App.3d at p. 339; see also *People v. Padilla* (1995) 11 Cal.4th 891, 993 [47 Cal.Rptr.2d 426, 906 P.2d 388], overruled on another ground by *People v. Hill* (1998) 17 Cal.4th 800 [72 Cal.Rptr.2d 656, 952 P.2d 673] [discussing aiding and abetting killer's financial gain].)

[71] Further, the government not to seek the death penalty against Moya or the actual killer, and persisted in seeking death against Appellant only. (12CT, 003184-003185.)

[72] Additionally, the jury instruction was similarly flawed in the instant case. It provided: "Each of the following facts must be proved: Number One, the murder was intentional; number two it was carried out for financial gain; and

b. THERE WAS INSUFFICIENT EVIDENCE OF LYING IN WAIT

The jury also found true the special allegation under Penal Code section 190.2, subdivision (a)(15), murder by means of lying in wait. (14CT 003630-003633.) This special circumstance provides that the government must prove that "the *defendant* intentionally killed the victim by means of lying in wait." (Pen. Code, §190.2(a)(15) (italics added).) As set forth herein, there was no evidence that Appellant was personally lying in wait, and the aiding and abetting language in Penal Code section 190.2, subdivision (c), is either inapplicable or inoperable.

i. THE GOVERNMENT DID NOT SHOW THAT APPELLANT WAS LYING IN WAIT

Penal Code section 190.2 sets forth a list of special circumstances. These can be separated into two categories: circumstances related to the defendant, and circumstances related to the offense. This is evident in the fact that some of the special circumstances specifically describe the status of the defendant by using the term "defendant." (See, e.g., Pen. Code, §190.2(a)(2) [requiring that the defendant have a prior murder conviction in the first or second degree]; Pen. Code, §190.2(a)(3) [requiring that the defendant, in this proceeding, be convicted of more than one offense of murder in the first or second degree]; Pen. Code, §190.2(a)(15) [requiring that the defendant intentionally killed the victim by means of lying in wait].[73]) The remaining circumstances are written to describe the nature of

---

number three, the defendant believed the death of the victim would result in the desired financial gain." (11RT 2155:6-16; CALJIC No. 8.81.1.) The jury was not informed as to who had to gain financially.

[73] The lower court instructed the jury using CALJIC No. 8.81.15.1, which provides: "To find that the special circumstance referred to in these

the murder, or the victim. (See, e.g., Pen. Code, §190.2(a)(1) [the murder was intentional and carried out for financial gain]; Pen. Code, §190.2(a)(4) [the murder was committed by means of destructive device]; Pen. Code, §190.2(a)(5) [the murder was committed for the purpose of avoiding a lawful arrest].)

When a special circumstance is described in terms of "the murder" or "the victim," then the circumstance would apply to both the actual killer and an aider and abettor. (See *People v. Malone* (1985) 165 Cal.App.3d 31, 37 [211 Cal.Rptr. 210], disapproved of on another ground by *People v. Hendricks* (1987) 43 Cal.3d 584 [238 Cal.Rptr. 66, 737 P.2d 1350].) Yet, in the special circumstances that specifically use the word "defendant," the special circumstance must be interpreted to apply specifically to the particular defendant. (See *Flannery v. Prentice* (2001) 26 Cal.4th 572, 577 [110 Cal.Rptr.2d 809, 28 P.3d 860] [noting that the words of the statute are to be given "a plain and commonsense meaning."].)

In *People v. Bonilla* (2007) 41 Cal.4th 313, 331 [60 Cal.Rptr.3d 209, 160 P.3d 84], this Court, in discussing an earlier version of Penal Code section 190.2, noted, "We decline to attach special significance to the choice of the words 'the defendant,' as opposed to 'the killer' or 'the murderer,' where to do so would negate in whole or in part another statutory provision. Had murder by lying in wait been intended to be omitted from the list of

---

instructions as murder by means of lying in wait is true, each of the following facts must be proved: number one, the defendant intentionally killed the victim, and number two, *the murder was carried out by means of lying in wait.*" (11RT 2155:17-24 (italics added).) In contrast, the CALCRIM instruction, which was not read to the jury, mirrors the statute and provides that, in addition to the intentional murder, the government must show "the *defendant* committed the murder by means of lying in wait." (CALCRIM No. 728 (italics added); see Pen. Code, §190.2(a)(15) [using the term "the defendant" in reference to the lying-in-wait special circumstance].)

special circumstances that could extend to aiders and abettors, former subdivision (a)(15) would have been excluded from the list in former subdivision (b), just as the prior-murder-conviction special circumstance (Pen. Code, §190.2, subd. (a)(2)) was." (*Id.*, discussing Pen. Code, §190.2, former subd. (b) (1978).) However, when the Legislature, or more correctly the voters, revised Penal Code section 190.2, it did so for a specific purpose. In 1987, section 190.2, subdivision (b), provided:

> Every person whether or not the actual killer found guilty of intentionally aiding and abetting . . . murder in the first degree shall suffer death or confinement in state prison for a term of life without the possibility of parole in any case in which one or more of the special circumstances enumerated in paragraphs (1), and (3) thru (19) has been found true.

In *People v. Anderson* (1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306], superseded by statute as stated in *People v. Mil* (2012) 53 Cal.4th 400 [135 Cal.Rptr.3d 339, 266 P.3d 1030], this Court addressed the felony-murder special circumstance and found that when the defendant is an aider and abettor "rather than the actual killer, intent must be proved before the trier of fact can find the special circumstance to be true." (*Id.* at p. 1147.) In response, California voters approved Proposition 115 in 1990, which expanded the scope of section 190.2 by adding two sections, (c) and (d), which added an intent requirement for an aider and abettor.[74] Accordingly, a person other than the actual killer is now subject to the death penalty or life imprisonment without the possibility of parole if that person intended to kill and was a major participant in the underlying felony or acted with reckless indifference to human life. (Pen. Code, §190.2(d) &(d); see *People v. Estrada* (1995) 11 Cal.4th 568, 575 [46 Cal.Rptr.2d 586, 904 P.2d 1197].)

---

[74] See Ballet Pamp., Gen. Elec. (June 5, 1990) text of Prop 115, available at http://librarysource.uchastings.edu/ballot_pdf1990p.pdf.

Thus, the purpose of section 190.2, subdivisions (c) and (d), was specifically to provide an intent requirement for aiders and abettors. The language of the new provisions demonstrates that the amendment was focused on the intent requirement and not concerned with what special circumstances could be contributed to a specific aider and abettor. To read the statute as applying 190.2 subdivision (c) to all of the special circumstances listed under 190.2 subdivision (a), without a limitation on the word "defendant," would mean that all of the special circumstances –even the subsection specifically allowing the death penalty for a defendant who has committed prior murders– would vicariously apply to a defendant *even if he did not have any prior murder convictions*. To read Penal Code section 190.2, subdivision (c) in such a way is untenable. The use of the word "defendant" in certain subsections must be given its plain meaning.

The plain language of the statute describes a sequential process to determine whether the death penalty can be imposed on a defendant: first, the defendant was convicted of aiding and abetting first-degree murder; second, one or more of the special circumstances is true as to the defendant; and third, if the jury has found a special circumstance true against a defendant who is convicted of aiding and abetting a first-degree murder, the jury must find an intent to kill pursuant to subdivision section 190.2, subdivision (c).

The confusion as to who had to "lay in wait" is even more disconcerting in the instant case. Here, the government argued that it only needed to show that "any co-principal, and aider and abettor was lying in wait."[75] (11RT 2178:23-28, 2179:1-18.) The government argued that any of "the three folks in the parking garage, Simmons, Marquez, and Moya. They were the ones lying in wait." (11RT 2179:11-13.) Thus, because of the

[75] As noted below, the government also improperly argued that Appellant was lying in wait when he was in a meeting with Pamela Fayed and did not tell her of the murder. (11RT 2179:14-18.)

ambiguity of the statute, the government was permitted to argue that it had met this requirement by showing that any of the co-defendants, not the Appellant and not the actual killer, were lying in wait.

ii. ALLOWING A DEATH SENTENCE FOR A DEFENDANT WITH NO MENS REA OR ACTUS REUS REQUIREMENT VIOLATES DUE PROCESS PROTECTIONS

Assuming Penal Code section 190.2, subdivision (c), provides that an aider and abettor who specifically intended to kill—but who did not intend to lay in wait, actually lay in wait, or aid and abet the lying in wait of another— qualifies for the death penalty, then that statute, which allows a defendant to be put to death based on the lying-in-wait special circumstance without satisfying any mens rea or actus reus requirement, violates due process. (See *Lambert v. People of the State of California* (1957) 355 U.S. 225, 227 [78 S.Ct. 240, 2 L.Ed.2d 228] [finding registration requirement violated due process].)

Except for strict liability offenses, every offense has two components: (1) an act or omission (actus reus); and (2) a necessary mental state (mens rea). (Pen. Code, §20; see generally 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, §§1, 21, pp. 198-199, 227-228.) Generally, the notion of aiding and abetting provides that "[a]ll persons concerned in the commission of a crime, . . .whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (Pen. Code, §31; see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122-1123 [77 Cal.Rptr.2d 428, 959 P.2d 735]; *People v. Prettyman* (1996) 14 Cal.4th 248, 259-260 [58 Cal.Rptr.2d 827, 926 P.2d 1013].) As this Court has noted, "the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the

direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 [108 Cal.Rptr.2d 188, 24 P.3d 1210].) The requirement of act and intent "applies to aiding and abetting liability as well as direct liability. An aider and abettor must do something *and* have a certain mental state." (*Ibid.*) "[O]utside of the natural and probable consequences doctrine, an aider and abettor's mental state must be at least that required of the direct perpetrator." (*Id.* at p. 1118.) Thus, "[w]hen the offense charged is a specific intent crime, the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' [Citation.]" (*Ibid.*, quoting *People v. Prettyman, supra,* 14 Cal.4th at p. 259.)

Courts have addressed the issue of vicariously applying a special circumstance to a defendant who does not actually aid and abet the special circumstance. In *Tison v. Arizona* (1987) 481 U.S. 137 [107 S.Ct. 1676, 95 L.Ed.2d 127], the four dissenting justices noted the majority "expressed no view on the constitutionality of Arizona's decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings." (*Id.* at p. 146, fn. 2 (dis. opn. of Brennan, J.) "On its face . . . that decision would seem to violate the core Eighth Amendment requirement that capital punishment be based on an 'individualized consideration' of the defendant's culpability." (*Ibid.*) Additionally, other courts have held or strongly implied that personal liability is required to vicariously impose aggravating circumstances. (See, e.g., *Thacker v. State* (Ind. 1990) 556 N.E.2d 1315 [lying-in-wait aggravating circumstance requires something more than vicarious liability]; see also *Omelus v. State* (Fla. 1991) 584 So.2d 563 [heinous, atrocious, or cruel factor could not be applied vicariously to

defendant because "[t]here is no evidence that (the defendant) directed (the killer) to kill (the victim) in the manner in which this murder was accomplished"]; *Hopkinson v Shillinger* (10th Cir. 1989) 866 F.2d 1185, 1214 (10th Cir. 1989) ["We assume arguendo that the Eighth Amendment forbids imposing the death penalty against a mere accomplice as punishment for the cruel nature of a killing, without proof beyond a reasonable doubt that the accomplice intended the killing be cruel"], overruled on another ground by *United States v. Dago* (10th Cir. 2006) 441 F.3d 1238.)

Thus, even assuming that an aider and abettor could be liable for a special circumstance, that, on its face, is only applicable to "the defendant," due process requires that the aider and abettor actually aid and abet the special circumstance itself in order to be liable. Vicarious application of a special circumstance to a non-killer defendant who has not aided or encouraged the manifestation of facts underlying the special circumstance plainly violates a defendant's rights to due process. (See *Omelus v. State, supra,* 584 So.2d 563; *Perez v. State* (Fla. 2005) 919 So.2d 347; see also *Williams v. State* (Fla. 1993) 622 So.2d 456 [error in finding heinous, atrocious and cruel aggravating factor where defendant who ordered killings did not order a particular manner to be used]; *Archer v. State* (Fla. 1993) 613 So.2d 446 [error to instruct jury on heinous, atrocious and cruel factor where defendant who contracted the murder knew a gun would be used but did not know that the victim would die begging for his life].)

In the instant case, the evidence did not show that Appellant aided and abetted, or directed and controlled, the murderer's specific acts underlying the lying-in-wait special circumstance. This is evident in the taped conversation between Appellant and Smith, wherein Appellant stated, "It sure wasn't the way that I would've wanted things taken care. You know what I mean?" (3CT 00581:20-22.) Appellant further indicated that the

murderers did not act under his direction, when Smith asked, "did [the killer] go rouge on you?" and Appellant responded, "Yeah, yeah." (*Id.*)

Thus, there was insufficient evidence to satisfy the lying-in-wait special circumstance or to support a finding that Appellant aided and abetted another in lying in wait. Ultimately, permitting the jury to find that this special circumstance is satisfied under these facts is a violation of Appellant's due process rights.

G. THE GOVERNMENT COMMITTED NUMEROUS INSTANCES OF MISCONDUCT IN THE GUILT PHASE DEPRIVING APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL

A prosecutor is the representative of a sovereignty whose interest in a criminal prosecution is "not that it shall win a case, but that justice shall be done." (*Berger v. United States*, *supra*, 295 U.S. at p. 88.) As such, a prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. (*People v. Kelley* (1977) 75 Cal.App.3d 672, 690 [142 Cal.Rptr. 457].) A defendant need not show the prosecutor acted in bad faith or with appreciation of wrongfulness of conduct. (*People v. Bradford, supra,* 15 Cal.4th at p. 1333.) "What is crucial to a claim of prosecutorial misconduct is not the good faith *vel non* of the prosecutor, but the potential injury to the defendant." (*People v. Benson* (1990) 52 Cal.3d 754, 793 [276 Cal.Rptr. 827, 802 P.2d 330].)

Prosecutorial misconduct can occur in two distinct but related ways, it "may abridge a specific right conferred by the Bill of Rights, or may constitute a denial of due process generally, thus constituting a 'generic substantive due process' violation." (*Foy v. Donnelly* (5th Cir. 1992) 959

F.2d 1307, 1316.) As set forth herein, the government committed serious, prejudicial misconduct throughout the trial. In addition to violations of specific rights, discussed below, the culmination of this error "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; see U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.)

1. THE GOVERNMENT'S INFLAMMATORY STATEMENTS IN CLOSING ARGUMENT OF THE GUILT PHASE WERE MISCONDUCT

It is misconduct to appeal to the passions of the jury by urging them to consider the suffering of the victim. (See *People v. Fields* (1983) 35 Cal.3d 329, 362 [197 Cal.Rptr. 803, 673 P.2d 680]; see also U.S. Const., 5th, 6th &14th Amends.; Cal. Const., art. I, §15.) It is also misconduct to invite the jury to put themselves in the place of the victim. (See *People v. Simington* (1993) 19 Cal.App.4th 1374, 1378-1379 [23 Cal.Rptr.2d 769]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1407 [58 Cal.Rptr.3d 368, 157 P.3d 973].) In fact, courts have called it the "Golden Rule" of trial advocacy that counsel is not permitted to ask the jury to imagine what the victim experienced. (See *People v. Vance* (2010) 188 Cal.App.4th 1192, 1193 [116 Cal.Rptr.3d 98].) The justification for this policy is that it deals with a subject that is inherently emotional, exhibiting an extraordinarily potent power to sway juries. (*Ibid.*) Such conduct is highly improper because the government invites the jury to depart from their duty to view the evidence objectively.

An example of such improper conduct can be found in *People v. Stansbury* (1993) 4 Cal.4th 1017 [17 Cal.Rptr.2d 174, 846 P.2d 756], reversed on unrelated grounds in *Stansbury v. California* (1994) 511 U.S.

318 [114 S.Ct. 1526, 128 L.Ed.2d 293], where the prosecutor improperly appealed to the passions of the jury, by arguing: "[the victim] was degraded, violated, raped, evidence of oral sex. [¶] Think what she must have been thinking in her last moments of consciousness during the assault. [¶] Think of how she might have begged or pleaded or cried." (*Id.* at p. 1057; see also *People v. Fields, supra,* 35 Cal.3d at p. 362 [finding misconduct where the government asked the jury to view the crime from the victim's perspective and to consider what the victim was thinking during her final moments].)

In the instant case, the government argued:

> And remember what the doctor said about this time. [¶] She had time. She had time. Her spine wasn't severed; she wasn't unconscious. She was very much alive, very much conscious, very much aware. And she had time. [¶] What do you think she might have been thinking? Those two or three or even four minutes when she had time to think? Time to feel? Time to realize what was happening? [¶] She would never again touch the hand of her daughter, never kiss the cheek of G.G., never see their smiling faces. And she had time. [¶] How long do you think a minute is? She had three or four. While all this is going through her mind, how long do you think that minute lasted? An eternity. [¶] Think about what she was going through. [¶] And I am going to ask you just to think for one minute, starting now.[76]

(11RT 2240:28, 2241:1-20.)

Accordingly, the government's statements during the guilt phase were improper because they called the jury to view the crime from the perspective of the suffering victim. The government discussed the final minutes before Ms. Fayed died, proclaiming, "What do you think she might have been thinking?" (11RT 2241:6-7.) The government went on to appeal

---

[76] Counsel for Appellant objected to the comments, but the objection was overruled. (11RT 2241:21-22, 2242:10-11.)

to the jury's sympathy for the victim, asking, "How long do you think a minute is? She had three or four. While all this is going through her mind, how long do you think this lasted? An eternity." (11RT 2241:13-17.) The government specifically asked the jury to picture themselves in the victim's place: "Think about what she was going through. And I am going to ask you just to think for one minute, starting now." (11RT 2241:18-20.) The government then solidified its violation of the Golden Rule by remaining silent for a minute while the jury could reflect on the terror Pamela Fayed felt in her final minute of life. (11RT 2242:17-19.) The government further compounded this misconduct by blaming Appellant for making them do it: "Do you think we take great satisfaction in making you feel what a minute is like to Pamela Fayed? Who chose her final minute? Who chose Pamela Fayed's final minute on that filthy floor in Century City? He did. Not us. Now we have to do our job." (11RT 2302:13-19.)

The jury was subject to a high likelihood of prejudice in determining guilt because of the government's emotional appeal to view the crime from the perspective of the victim in her last minutes. This conduct patently violated the "Golden Rule" and prejudiced Appellant.

2. THE GOVERNMENT MISSTATED KEY ELEMENTS OF LAW

Although a "prosecutor has a duty to prosecute vigorously, [and] may strike hard blows, he is not at liberty to strike foul ones." (*People v. Pitts* (1990) 223 Cal.App.3d. 606, 691 [273 Cal.Rptr. 757], quoting *Berger v. United States, supra,* 295 U.S. at p. 88.) As the Supreme Court has noted, government counsel has "as much [a] duty to refrain from improper methods calculated to produce a wrongful conviction as . . . to use every legitimate means to bring about a just one." (*Berger v. United States, supra,* 295 U.S. at p. 88.) Thus, "it is improper for the prosecutor to misstate the

law generally . . . and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements." (*People v. Marshall* (1996) 13 Cal.4th 799, 831 [55 Cal.Rptr.2d 347, 919 P.2d 1280], citing *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1215 [275 Cal.Rptr. 729, 800 P.2d 1159], superseded by statute on another ground as noted in *In re Steele* (2004) 32 Cal.4th 682, 691 [10 Cal.Rptr.3d 536, 85 P.3d 444], and *People v. Bell* (1989) 49 Cal.3d 502, 538 [262 Cal.Rptr. 1, 778 P.2d 129].)

a. THE GOVERNMENT MADE MISSTATEMENTS OF THE LAW CONCERNING WITHDRAWAL

In closing argument, the government repeatedly misstated the law on withdrawal, arguing:

> The second thing he has to do is, he has to do *everything in his power, everything in his power, everything in his power to prevent the commission of the murder.* [¶] . . . [¶] [I]f he truly was conspiring and wanted to withdraw, you can think many things that he could have done that would have been effective. [¶] Sitting in the room with the woman. 'Pam, I did something really terrible, and I am going to prevent its commission right now. I plotted your murder, and you need to be escorted out of here by security. We are going to go straight to the police station.' [¶] He needs to pick up the phone and call the police and tell them exactly what it is that he has done to prevent the commission of this crime.

(10RT 2342:15-28, 2343:1-6, italics added.) As noted above, the CALJIC instruction is not an accurate statement of the law. Regardless, no case supports the government's argument that Appellant was required to call the police and the victim to report the conspiracy. Thus, the government repeatedly misstated what was required under the law.

Further, the government repeatedly misstated the defense's burden of production for withdrawal. A defendant has the burden of producing

evidence of withdrawal, but the government has the burden of proving non-withdrawal beyond a reasonable doubt. If there is substantial evidence of a withdrawal, the court has a sua sponte duty to instruct that the prosecution must prove non-withdrawal beyond a reasonable doubt. (*People v. Fiu* (2008) 165 Cal.App.4th 360, 386 [81 Cal.Rptr.3d 32].) Thus, once the defendant has shown sufficient evidence to warrant the instruction for withdrawal, the burden shifts to the government to prove beyond a reasonable doubt that withdrawal did not occur. (*See ibid.*) Withdrawal in this context is therefore not a defense upon which the defendant bears the burden of proof; it is rather a defense upon which defendant has the burden of producing or going forward with evidence. (*Id.* at p. 384.)

However, the government repeatedly told the jury that Appellant had to meet a high burden to show withdrawal, stating, "Well, there is a pretty demanding legal standard that you have to meet before you can escape responsibility for a crime if you are saying you engaged in a conspiracy but then withdrew."[77] (11RT 2341:16-19.) The government further argued: "So even as a legal standard, he has no business telling you that he withdrew from this crime. No business." (11RT 2343:9-11.) By telling jurors that Appellant had to *prove* something, the government misstated the legal requirements and created a serious risk that the jury misunderstood the burden of production to be one of persuasion. Consequently, the government's misstatements caused the jury to mistakenly shift to Appellant a greater burden than he was legally compelled to carry.

* * *

[77] Even though the government used the term "conspiracy," counsel was reading the requirements for withdrawal from aiding and abetting. (11RT 2342:2-25.)

b. THE GOVERNMENT MADE MISSTATEMENTS OF THE LAW CONCERNING AIDING AND ABETTING

California Courts have also found it error for the government to use "real life" examples which do not accurately state the law. (See *People v. Nguyen* (1995) 40 Cal.App.4th 28, 36 [46 Cal.Rptr.2d 840]; *People v. Johnson* (2004) 115 Cal.App.4th 1169, 1172 [9 Cal.Rptr.3d 781].) In the instant case, the government attempted to give a real life example of the law of aiding and abetting, stating:

> Think about the super bowl, all right? You have got a team -- who won last year's super bowl? Green Bay. Thank you. All right. [¶] So you have got a Super Bowl winning team. Green Bay shows up on the field, and they have got a starting quarterback. Every team has one, but they have also got a backup quarterback who sits on the bench. And that backup quarterback never takes a snap. Never throws a touchdown pass or hands the ball off, never gets on the field. But he is in uniform ready to go. He is encouraging, he is promoting, facilitating the win of that game because he is there. He is ready. He has agreed. He is part of the team. Even though he doesn't take part in the actual win; he is part of the team. [¶] Who gets the Super Bowl ring at the end of the day? Well, he gets one just like everybody else.

(11RT 2182:17-28, 2183:1-2.)

Thus, the government told the jury that mere presence or knowledge, namely the act of sitting on the bench and doing nothing, is sufficient to constitute aiding and abetting. This is, of course, an incorrect statement of law. Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime. (See *People v. Durham* (1969) 70 Cal.2d 171, 181 [74 Cal.Rptr. 262, 449 P.2d 198].) Furthermore, knowledge of another's criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the

crime. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) As a result, the government again misstated the law to the jury.

c. THE GOVERNMENT MADE MISSTATEMENTS OF THE LAW CONCERNING LYING IN WAIT

Both CALJIC No. 8.25 (first degree murder) and No. 8.82 (special circumstances) provide:

> 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 be substantial, that is, an amount of time that shows the killer had a state of mind equivalent to premeditation or deliberation.

Paramount to this definition is that the killer has to be the one "lying in wait." There is no support for the proposition that a third party who is not at the scene of the crime is "lying in wait" because they know the crime will occur. (See *People v. Bonilla* (2007) 41 Cal.4th 313, 332 [60 Cal.Rptr.3d 209, 160 P.3d 84] [allowing the lying-in-wait special circumstance for an aiding and abetting third party, but noting that "the issue is . . . whether the actual killers killed [the victim] while (or immediately after) lying in wait"].)

The government's theory at trial was that Appellant paid someone to kill Pamela Fayed. However, in closing the government argued, "There is an argument that Mr. Fayed was actually lying in wait; he was sitting in a room, not five feet from Pamela Fayed thirty seconds before she was killed. So certainly he was concealing his purpose as well." (11RT 2179:14-18.) Such a statement wholly misstates the lying-in-wait requirement. The government had to prove, both as an element of first degree murder and an

element of the special circumstance, that the killer was "lying in wait." The government's argument that it met this requirement because Appellant sat in a room with Pamela Fayed before the murder, and did not tell her about it, plainly misstated the government's burden of proof and misled the jury.

3. THE GOVERNMENT COMMITTED MISCONDUCT BY REFERENCING FACTS OUTSIDE OF THE RECORD AND/OR MISSTATING THE EVIDENCE IN CLOSING ARGUMENTS

Statements of fact not in evidence because they were not offered, or because they were excluded or stricken, are a highly prejudicial form of misconduct and a frequent basis for reversal. (See *People v. Hill, supra,* 17 Cal.4th at p. 829; *People v. Stankewitz* (1990) 51 Cal.3d 72, 102 [270 Cal.Rptr. 817, 793 P.2d 23].) This conduct is impermissible because it "tend[s] to make the prosecutor his own witness-offering unsworn testimony not subject to cross-examination. It has been recognized that such testimony, 'although worthless as a matter of law, can be "dynamite" to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.' [Citations.]" (*People v. Villa* (1980) 109 Cal.App.3d 360, 365 [167 Cal.Rptr. 265]; *People v. Benson, supra,* 52 Cal.3d at p. 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"].)

Additionally, courts have similarly found that "[t]he argument of the district attorney, particularly his closing argument, comes from an official representation of the People. As such, it does, and it should, carry great weight. It must therefore, be reasonably objective. . . . The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded

a fair trial." (*People v. Talle* (1952) 111 Cal.App.2d 650, 677 [111 Cal.App.2d 650, 245 P.2d 633].) Thus, the government may not misstate the evidence that was presented at trial.

As set forth herein, the government made several statements concerning facts which were not in the record, and misstated the evidence presented to the jury.

a. THE GOVERNMENT MADE STATEMENTS CONCERNING THE FEDERAL SUBPOENA BASED ON FACTS NOT IN EVIDENCE AND/OR MISSTATED THE RECORD

At trial, the government called as a witness AUSA Mark Aveis who testified that he issued a subpoena for accounting records to a forensic accounting firm which was working on the Fayed divorce matter. (7RT 1229:10-28.) In closing argument, the government argued:

> It was May 27th, 2008. [The subpoena] came to the accountant. The accountant then showed it to the divorce attorneys, and then everyone ended up know about it. [¶] What happened then? If you look through the phone records that we went over so carefully. What happened? [¶] Well, on May 29th, Jose Moya talks to -- this is days after the federal subpoena was leaked. He talks to who? Gabriel Marquez. . . . Who does Marquez call? If you go to those, records, you will see that he calls, on May 29, at 7:07 p.m. . . . Steven Simmons. [¶] Then Jose Moya calls that man, James Fayed at 9:18 and 9:19 p.m. [¶] The next series of calls immediately following calling James Fayed and talking with James Fayed days after the subpoena is leaked, what does he do? He blows up the phone of Gabriel Marquez. Every one, two, three, four, five, six, seven, calls after he talks with Fayed.

(11RT 2314:1-21.) The government continued:

> Moya then calls. After that, the next morning, hours later, he calls Gabriel Marquez. [¶] Marquez then calls, hours after that, Steven Simmons. Hours after that, Jose Moya talks with James Fayed, and then he [immediately] calls Gabriel

> Marquez. And then at 2:44 a.m., 2:44 a.m. and 2:46 a.m., he sends a text message to James Fayed. All of these, within 48 hours of getting word that that subpoena has leaked." [¶] And Steven Simmons reaches out to his little homie -- I am sorry, Gabriel Marquez reaches out to his little homie, Steven Simmons. And the chain keeps going. On and on. [¶] You get the idea that in the hours after the subpoena is leaked, these guys communicate and talk with each other by way of text message and phone to let each other know.

(11RT 2314:24-28, 2315:1-14.)

Thus, the government argued that Appellant became aware of the subpoenas on or about May 27, 2008 and then engaged in a slew of activity. However, the government's argument was not supported by facts on the record. Attorney Greg Herring testified that he was told of the subpoena but did not state specifically when; he also testified that at some time later, he had a conversation with Pam Fayed about the subpoena, but, again, no exact date is given. (6RT 1164:27-28, 1165:1-14.) David Willingham testified that he became aware of the subpoena in early June of 2008. (7RT 1278:21-26.) Mark Aveis testified that he heard from an attorney for the accounting firm in late June, about thirty days after the subpoena was issued. (7RT 1248:3-8.) Thus, the government's argument that the parties found out about the "leaked"[78] subpoena on the 27th, then engaged in a slew of phone calls and text messaging within forty-eight hours of learning of the subpoena, and the government's arguments that these actions were evidence of conspiracy, was not supported by the facts presented at trial.[79]

---

[78] In closing argument, the government also repeatedly and deceptively describe the subpoena served on that accountant as being "leaked." (11RT 2314:16-19, 2315:5-6.)

[79] The government also argued in opening statement that it would prove that "[t]he evidence is going to show that on May 29th, 2008, [Mrs.] Fayed discovers the fact that there was a grand jury investigation and possibly an

b. THE GOVERNMENT MADE STATEMENTS CONCERNING THE FEDERAL CASE BASED ON FACTS NOT IN EVIDENCE AND/OR MISSTATED THE RECORD

At trial, the government presented evidence about a sealed federal indictment against Appellant. The government did not present any evidence that Appellant knew of the actual indictment in May of 2008. Yet, the government repeatedly argued that the evidence showed Appellant knew about the federal indictment. The government declared, "So these two people [Jim and Pamela Fayed] knew exactly what was going on as early as May of 2008. [¶] 154 days before her murder, the indictment comes out." (11RT 2311:23-28.) Yet, the government's argument that the indictment "came out," was contradicted by the evidence presented at trial.[80]

Next, the government misstated the evidence by arguing that Pam Fayed was going to cooperate in that federal prosecution. The government argued, "[W]hat does David Willingham, the lawyer who made that phone

---

indictment issued against Goldfinger. The way she finds out about it is that a subpoena is issued by the United States Attorney to her accountants. [¶] Her accountants and lawyers bring it to her attention, and they say, 'Pamela, Goldfinger is under investigation.' So the evidence will show she had some thinking to do at that point." (6RT 995:27-28, 996:1-8.) However, the government did not actually produce that evidence at trial.

[80] At trial, the government questioned Mr. Willingham on his and Pam Fayed's knowledge of the indictment. The government asked, "But fixing your attention to the period when you represented Pam Fayed in connection with Mark Aveis' investigation, did you have any idea at that time that there had been an indictment filed against [Appellant] or against Goldfinger?" (7RT 1302:5-9.) Willingham replied, "Absolutely not." (7RT 1302:10.) The government followed by asking, "Did you, in your conversation with Pam, determine whether Pam knew if there was in indictment?" (7RT 1302:11-13.) Willingham replied, "I don't believe she knew." (7RT 1302:14.)

call, say? Pamela wanted to be cooperative. If she were a witness, I am sure that it would resolve itself. [¶] Well, this is on page 1283: I think she should be a witness. [¶] It is pretty clear that, like anybody else, she wanted to be a witness."[81] (11RT 2313:7-14.) The government argued that Pamela Fayed wanted to be a "witness," implying that Willingham testified that Pamela Fayed wanted to be a "witness" against Goldfinger, or Appellant. However, that argument similarly misstates the evidence. Willingham testified that in federal practice there are three types of status that a person can have when they are facing a criminal investigation: a target, subject, or witness. (7RT 1291:17-23, 1292:10-14, 26.) Under these categories, a "witness" is a person involved in a case who the government does not intend to prosecute. (7RT 1292:26-28, 1293:1-14.) Willingham's testimony that Pamela Fayed *wanted* to be a witness (as that term is used in a federal investigation) did not support the government's argument to the jury that Pamela Fayed *would* be a witness (as that term is commonly used), meaning that she wanted to give evidence against Appellant.

The government also continuously and mistakenly argued that the evidence showed that Appellant believed that Pamela Fayed was cooperating with the federal government's investigation and possible prosecution of him. Specifically, the government argued,

> [Appellant] finds out that Pamela wants to cooperate with the authorities. He knows that she wants to cooperate with the authorities. He knows that if she does, he is going to be implicated, in violation of several federal laws, and he stood to

---

[81] The government similarly argued in the penalty phase that Pam Fayed "wasn't just risking her own safety in cooperating; she was offering a very direct and concrete benefit to the community in her willingness to cooperate with the federal authorities." (12RT 2449:24-27.) Yet, there was no evidence presented at trial that Pamela Fayed had agreed to cooperate with the federal government. In fact, the evidence from her attorney's contradicted that assertion. (7RT 1290:26-28, 1291:1-4, 1386:17-27.)

> lose everything. [¶] . . . [¶] He thought she was going to cooperate, and he thought she would be his demise. It is as simple as that. [¶] . . . [¶] He had the problem of Pamela Fayed cooperating with the federal government in their case against James Fayed. [¶] . . . [¶] The fact of the matter is, Jim Fayed knew. . . he knew that she was participating and contemplating in the participation of this investigation. [¶] . . . [¶] [Appellant] didn't wait around for Miss Fayed to sign on the dotted line. He killed her. That was one of the reasons he killed her. He feared that she would either be cooperative or was already in the works, cooperating. It was the idea that she had the goods on him, the idea that she was going to run her mouth and 'tear shit down,' in his words.

(11RT 2192:13-18, 2193:8-10, 2305:2-5,14-18, 2313:17-24.) Yet, the government presented no evidence to support this assertion.

c. THE GOVERNMENT MADE STATEMENTS ABOUT APPELLANT'S MENTAL STATE BASED ON FACTS NOT IN EVIDENCE AND/OR MISSTATED THE RECORD

The government also made several references to facts outside of the record concerning Appellant's mental state. For example, the government argued that "Appellant was infuriated," and repeatedly stated that Appellant was "boiling over with rage." (11RT 2191:9-19, 2191:26-28.) The government told the jury, "The $400,000 absolutely infuriated James Fayed. 'How dare you go behind my back? How dare -- this is my company. How dare you'?" (11RT 2190:13-15.) The government further asserted that Appellant "was enraged at the fact that [Pamela Fayed] was going to take half his money, half his business, she was -- he was enraged at the fact that she had the audacity to act on her own, to go out and get that money license and possibly was going to cooperate with the feds against him." (11RT 2206:16-21.) The government similarly stated, "And that growing greed is what established the foundation for the split between him

and Pamela. It is what established the foundation for his rage against Pamela Fayed." (11RT 2186:28, 2187:1-3.) In discussing the money transmitting license, the government argued, "James Fayed was infuriated at this point, he was absolutely furious." (11RT 2191:16-17.) The government then discussed the federal indictment,[82] arguing, "What do you think his temperament is doing now? Where do you think he is temperament wise now? He was enraged before; now he is apoplectic." (11RT 2192:10-12.) Yet, there was no testimony at trial to support these statements concerning Appellant's rage or his "apoplectic" feelings.

Similarly, the government also made incorrect statements about the testimony concerning Appellant's withdrawal from his family life. The government argued, "According to the witness statement and the witness testimony that you heard, James Fayed was so obsessed with his profit margin and gold that it started to take over from his family life. He started to distance himself from Pamela, ultimately distancing himself from Desiree who also worked at the company." (11RT 2187:4-10.) However, that was not the testimony. Desiree testified that Appellant started to distance himself because 1) he suspected Pamela Fayed of having an affair, (6RT 1061:1-2), and 2) that he had injured himself, began taking pills, and became "unapproachable." (6RT 1071-1073.) Thus, the government's comments plainly misstated the record.

* * *

* * *

[82] As set forth above, there was no evidence at trial that Appellant actually knew about the sealed indictment.

d. THE GOVERNMENT MADE STATEMENTS ABOUT CAROL NEVE BASED ON FACTS NOT IN EVIDENCE AND/OR MISSTATED THE RECORD

The government called witness Carol Neve. The government had initially sought to ask this witness a variety of questions, and Appellant objected. The parties argued for approximately 55 pages in the transcript about what Neve could testify to, and the lower court limited Neve's testimony. (See 7RT 1271-1274, 1315-1369.) Because the lower court placed limitations on what evidence could be elicited, the government asked the witness very few questions.

Yet, in closing, the government argued that Neve testified to things that were undoubtedly not a part of her testimony. For example, the government argued that Neve testified that "her company became a focus of federal investigation, and her company got shut down. Why? Because they didn't follow the federal guidelines and have money transfer licenses. You have to have one for each state, according to Carol. And James Fayed didn't have any." (11RT 2187:25-28, 2188:1-2.) Those facts are invented by the government. Neve did not testify about her business being shut down, nor did she testify about what you have do have in each state. That evidence is wholly derived from facts outside the record. Yet, the government used these non-existent facts to argue that the federal allegations were serious business. (11RT 2188:3-13.)

Similarly, the government argued, "Well, why wouldn't [Appellant] go out and get a license? Why not? According to Carol Neve, because they are extraordinarily expensive. Literally hundreds of thousands of dollars. And that's how the federal government regulates this industry and keeps it from going off the rails and keeps Madoff-type things from happening." (11RT 2188:3-9.) Neve did not testify as to an actual price for the licenses,

nor did she testify about the kind of Ponzi scheme concerns which were the foundation of "Madoff-type" cases. The government continued, "You remember the evidence that Carol Neve told you, that Pamela Fayed wanted to get a money transference license, and she was intending upon doing that and did so in the early part of 2008, 293 days before her murder. She wrote the check, the fateful check that we now know caused the -- Mr. Fayed to go into a downward spiral." (11RT 2307:21-27.) Neve did testify that Pamela Fayed intended to get a money license, but she did not testify as to the timing, nor the check. (11RT 1373:17-20.)

e. THE GOVERNMENT MADE OTHER STATEMENTS TO THE JURY BASED ON FACTS NOT IN EVIDENCE AND/OR MISSTATED THE RECORD

In arguing that Appellant did not prove third-party culpability, the government argued, "Mary doesn't have any money. She doesn't have enough money to pay Jose Moya the required fee to do what Mr. Fayed paid him to do." (11RT 2335:7-9.) The government further stated, "So Jose Moya is not going to go out and kill on Mary's behalf when he doesn't know Mary and he doesn't think that she can pay up." (11RT 2335:24-26.) However, facts about Mercedes' money situation or what Moya knew about Mercedes' finances were not in the record. Thus, the government discredited the third party defense by referring to facts which were wholly outside of the record.

The government also made up what Moya was doing, and invented conversations between Moya and Appellant, and then argued them to the jury: "What do you think Moya is doing at this point? Moya is trying to get rid of the murder weapon. Moya is trying to get rid of the other two people that he has contracted the killing with. Moya is trying to clean up the car or

figure out how to clean up the car. Moya is getting rid of the hoody. Moya is getting rid of all the stuff inside the car. Moya is busy, and Fayed is texting him over and over and over and over until finally at 1:35 in the morning, Moya texts Fayed one last time, probably in an effort to say, 'Stop texting me. I am getting rid of this phone.'" (11RT 2205:17-28, 2206:1-3.) The government similarly invented the conversation of a phone call between Moya and Appellant, stating, "So what is Moya doing a mile and a half away calling? He is saying, 'where are you? Where is the best entrance? What's the best way in? Give me directions since you are already there.'" (11RT 2198:20-23.) There was no evidence at trial to support the inference that Appellant was giving these instructions to Moya.

f. THE GOVERNMENT MISCONDUCT REQUIRES REVERSAL

The United States Supreme Court has recognized that the cumulative effect of improper remarks magnifies the prejudice; further, a "single misstep on the part of the prosecutor may be so destructive of the right of the defendant to a fair trial that reversal must follow." (*United States v Smith* (6th Cir. 1974) 500 F.2d 293, 297.) Reversal is required unless the reviewing court is able to declare a firm belief that misconduct is harmless beyond a reasonable doubt. (*Boyde v. California* (1990) 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316]; *Eberhardt v. Bordenkircher* (6th Cir. 1979) 605 F.2d 275, 278.)

In this case, the government misconduct was pervasive. The government patently violated the "Golden Rule" by having the jury put itself in the place of the victim, misstated the law, and repeatedly argued facts that were not in the record. Based on these acts of misconduct, considered individually and collective, it cannot be stated that the government misconduct was harmless beyond a reasonable doubt.

H. APPELLANT WAS DENIED DUE PROCESS AND A FAIR TRIAL BY THE ADMISSION OF IMPROPER EVIDENCE AT THE PENALTY PHASE

The United States Supreme Court has made it clear that capital jurisprudence gives rise to "a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case. [Citations.]" (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [108 S.Ct. 1981, 100 L.Ed.2d 575].) Consequently, the evidence used to select death over life must be reliable and non-arbitrary. (See *Gardner v. Florida* (1977) 430 U.S. 349, 359-361 [97 S.Ct. 1197, 51 L.Ed.2d 393]; *Godfrey v. Georgia* (1980) 446 U.S. 420, 428 [100 S.Ct. 1759, 64 L.Ed.2d 398].) This Court has cautioned against the admission of "irrelevant information or inflammatory rhetoric" that "invites an irrational, purely subjective response" or "diverts the [sentencer's] attention from its proper role" in violation of the Due Process Clause. (*People v. Edwards* (1991) 54 Cal.3d 787, 836 [1 Cal.Rptr.2d 696, 819 P.2d 436]; U.S. Const., 5th, 6th, 8th & 14th Amends.; Cal. Const., art. I, §§1 & 15.)

The government's case in aggravation is confined to the factors listed in Penal Code section 190.3.[83] (*People v. Boyd* (1985) 38 Cal.3d 762, 773-775 [215 Cal.Rptr. 1, 700 P.2d 782].) Thus, under state law, evidence concerning the impact of a crime is relevant and admissible only if falls within the ambit of one of the listed factors. (See *People v. Kelly* (2007) 42 Cal.4th 763, 798 [68 Cal.Rptr.3d 531, 171 P.3d 548] ["[E]vidence offered in aggravation must be excluded if not relevant"].)

In *People v. Edwards, supra,* 54 Cal.3d at p. 833, this Court determined that under Penal Code section 190.3, subdivision (a), some evidence concerning the impact of a crime may be admissible as

---

[83] Appellant's challenges to the procedural and substantive provisions of California's death penalty statute are discussed *infra*.

"circumstances of the crime of which the defendant was convicted in the present proceeding." The *Edwards* Court held that section 190.3, subdivision (a) "allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim." (*Id.* at p. 835.) The *Edwards* Court's holding is limited to "evidence that logically shows the harm caused by the defendant." (*Ibid.*) Further, in *Edwards*, this Court warned, "We do not now explore the outer reaches of evidence admissible as a circumstance of the crime, and we do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne v. Tennessee* (1991)] 501 U.S. 808 [115 L.Ed.2d 720, 111 S.Ct. 2597]." (*Id.* at pp. 835-836.)

In *People v. Robinson* (2005) 37 Cal.4th 592, 645 [36 Cal.Rptr.3d 760, 124 P.3d 363], the government introduced evidence concerning the impact of the crime. This evidence included four witnesses, who testified about the effects of the murders on the witnesses and their families. The government also introduced twenty-two photographs of the victims during their life. (*Id.* at pp. 644-649.) This Court declined to reach the merits of whether the prosecution had exceeded the limits of victim impact evidence because there was no objection to the evidence at trial. However, the *Robinson* Court suggested that the government may have exceeded the limits on the emotional evidence and argument. (*Id.* at pp. 651-652.) Citing it as an "extreme example" of excessive victim impact evidence violating due process, the *Robinson* Court favorably quoted *Salazar v. State* (Tex.Crim.App. 2002) 90 S.W.3d 330:

> '[*W*]*e caution that victim impact and character evidence may become unfairly prejudicial through sheer volume.* Even if not technically cumulative, an undue amount of this type of evidence can result in unfair prejudice. . . . Hence, *we encourage trial courts to place appropriate limits upon the*

amount, kind, and source of victim impact and character evidence.'

(*Id.* at p. 336, italics in original.)

Thus, when determining the admissibility of evidence in a penalty phase, several factors are important, including: (1) whether the evidence violates due process and a defendant's right to a fair trial; (2) whether the evidence is relevant to one of the considerations under Penal Code section 190.3; (3) whether the evidence meets hearsay and reliability requirements; and (4) whether the evidence meets the requirements of Evidence Code section 352. (See Evid. Code, §§210, 350 & 352.)

In the instant case, Appellant objected to the victim impact in this case on several grounds.[84] (12RT 2411:17-28, 2412:4-28, 2413-2416.) Following discussion on the matter, the trial court declined to impose any meaningful restrictions on the prosecution's victim impact evidence. (12RT 2425:21-22.) However, as set forth herein, a significant portion of the victim impact evidence presented by the government was irrelevant, unduly prejudicial, and violated Appellant's rights under the Fifth, Eighth, and Fourteenth Amendments.

* * *

---

[84] The defense argued that the due process clause of the Fourteenth Amendment prohibits the introduction of unduly prejudicial victim impact evidence. (12RT 2416:1-4.) Additionally, the defense argued that the scope of victim impact evidence under Penal Code section 190.3, subdivision (a), is limited to the victim's personal characteristics known to the defendant at the time of the offense, and that a more expansive interpretation of Penal Code section 190.3 would render the statute unconstitutionally vague under the Eighth Amendment of the United Sates Constitution and article I, section 17, of the California Constitution. (12RT 2412-2414.) The defense also argued that the government's proposed victim impact evidence should be excluded under Evidence Code section 352 as more prejudicial than probative. (12RT 2424:16,25-28, 2425:1-15.)

1. THE STANDARD OF REVIEW

A trial court's erroneous admission of victim impact evidence is analyzed under the harmless error standard for federal constitutional error set forth in *Chapman v. California, supra,* 386 U.S. at p. 24. (See *People v. Kelly, supra,* 42 Cal.4th at p. 799; *People v. Gonzalez* (2006) 38 Cal.4th 932, 960-961 [44 Cal.Rptr.3d 237, 135 P.3d 649].)

2. THE LOWER COURT IMPROPERLY ADMITTED A LETTER WRITTEN BY PAMELA FAYED

In the instant case, the government sought to have Desiree read an emotional letter from her mother, which Desiree had not seen before her mother's death. (13RT 2622:14-28.) The letter read:

> To my dear sweet baby girls. Please hear me and know that am forever with you. You are the fruit of my labor in this life, and I am so proud of you both. [¶] Listen for my voice to guide you. I want so much to hold you in my arms and kiss your sweet faces for eternity. [¶] Please keep my family together with gentle love and understanding. [¶] You are all that exists for me now. Never abandon. [¶] Family is truly the only thing that is important. Protect each other at all costs. Love you with all my being. [¶] Mamma.

(12RT 2429:3-21.)

Appellant's counsel objected, arguing that the document was hearsay, not relevant, and lacked foundation. (12RT 2428:15-21.) The government initially argued, "It was clearly intended for her girls upon her demise, were she to leave this earth. That has now happened. [¶] Desiree would be the person that I would show this letter to. No, Desiree has not seen it. She has never had access to it. It has never been shown to her. I am not going to show it to her until she is on the stand." (12RT 2430:10-17.)

The lower court asked, "How do you get over the fundamental hearsay objection," (12RT 2430:21-22) and the government responded,

"Because it is not offered for the truth of the matter asserted. It is offered for the impact that it has on Desiree and the loss of her mother. And these are her mother's final words on earth which never would have been uttered to her if James Fayed had not murdered her." (12RT 2430:23-28.) The lower court found that the letter was more prejudicial than probative, reasoning, "It has never been shown to her before. You want to get a huge emotional reaction from her in front of the jury." (12RT 2431:9-11.) Thus, the court initially excluded the letter. (12RT 2432:8-18.) However, the government later asked to be heard again on this issue, arguing that Desiree had read the letter and specifically assuring the court that the letter would only be admitted to show the impact it had on Desiree. (13RT 2576:2-5.) The government then cited three cases to support its position: *United States v. Fulks* (4th Cir. 2006) 454 F.3d 410, *People v. Valencia* (2008) 43 Cal.4th 268 [74 Cal.Rptr.3d 605, 180 P.3d 351], and *People v. Russell* (2010) 50 Cal.4th 1228 [117 Cal.Rptr.3d 615, 242 P.3d 68]. Consequently, the lower court overruled its earlier decision and admitted the evidence.

However, the cases cited by the government are inapposite. (13RT 2577:4-10.) In *United States v. Fulks, supra,* 454 F.3d at p. 435, the federal court allowed a witness to read a letter from the victim in the penalty phase. The defendant objected to the evidence as violating due process and hearsay. (*Id.* at pp. 435-436.) The court noted that the rules of hearsay do not apply in federal capital sentencing proceedings and analyzed the evidence only as to whether it violated due process. (*Id.* at p. 436.) However, that is not the rule in California. This Court has concluded that the hearsay rule applies, with some exceptions, at the penalty phase of a capital trial. (See *People v. Weaver* (2001) 26 Cal.4th 876, 980 [111 Cal.Rptr.2d 2, 29 P.3d 103]; *People v. Harris* (1984) 36 Cal.3d 36, 68-71, 75 [201 Cal.Rptr. 782, 679 P.2d 433] (plur. opn. of Broussard, J. and dis. opn. of Kaus, J.), disapproved of on

another ground by *People v. Bell* (1989) 49 Cal.3d 502 [262 Cal.Rptr. 1, 778 P.2d 129]; *People v. Ray* (1996) 13 Cal.4th 313, 371 [52 Cal.Rptr.2d 296, 914 P.2d 846] (conc. opn. of Mosk, J.); see *People v. Nye* (1969) 71 Cal.2d 356, 372 [78 Cal.Rptr. 467, 455 P.2d 395] [under the then applicable death penalty law, "[o]bjectionable hearsay evidence is no more admissible at the penalty phase than at the guilt phase"].)

The two California cases cited by the government, *People v. Valencia, supra,* 43 Cal.4th 268 and *People v. Russell, supra,* 50 Cal.4th 1228, are similarly inapposite. Both cases allowed witnesses to read letters, which they had received from the victims before their deaths, and were relevant under 190.3, subdivision (a), as victim impact evidence. Those courts did not address the hearsay evidence, and there was no evidence that the government in those cases attempted to use that evidence for a non-hearsay purpose.

In the instant case, Desiree had not received the letter before Pamela Fayed's death; thus, the letter was not relevant to show the relationship with the witness before death. However, even if the letter was relevant under Penal Code section 190.3, subdivision (a), it was still hearsay, and the government did not use it only for a non-hearsay purpose. That is, the government did not offer the letter solely to show the impact it had on Desiree. Instead, in closing arguments, the government read the letter to the jury as a piece of evidence, making no reference to its limitations. (13RT 2808:20-28, 2809:1-5.) Similar to the government's discussion of the substantive statements of Shawn Smith discussed above (evidence which the government similarly purported it would only use for a non-hearsay purpose), the government here, again, admitted this evidence ostensibly for a non-hearsay purpose, and then used the emotional letter as substantive evidence in closing arguments. Such action deprived Appellant of his due process rights under the Fifth and Fourteenth Amendments to the United

States Constitution, as well as his Sixth Amendment right to confront witnesses. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§1 & 15; see also *Woodson v. North Carolina* (1976) 428 U.S. 280, 305 [96 S.Ct. 2978, 49 L.Ed.2d 944]; *Gilmore v. Taylor* (1993) 508 U.S. 333, 334 [113 S.Ct. 2112, 124 L.Ed.2d 306]; *Johnson v Mississippi, supra,* 486 U.S. at pp. 584-585; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

3. THE LOWER COURT IMPROPERLY ADMITTED PHOTOGRAPHS OF THE GRAVE SITE

As noted above, the government introduced numerous photographs of Pamela Fayed and her family in the guilt phase. In the penalty phase, the defense objected to the quantity of these photos as cumulative, prejudicial, and irrelevant. (12RT 2414-2415, 2420-2421; 13RT, 2640.) Over the objections of Appellant's counsel, the government admitted over thirty additional photographs and a video of Pamela Fayed. (12RT 2426:10-11; 13RT, 2578:18-23, 2618:11-22, 2620:7-12.) This evidence included a distressing photograph of Desiree kneeling down kissing her mother's coffin. (13RT 2620:7-12.) The defense argued that the photographs were cumulative and inflammatory, stating, "We . . . know that the girls buried their mother. Everybody knows that the girls buried their mother. [¶] Pictures from the funeral, graveside pictures . . . should not come in as victim impact evidence. They are inflammatory. They are potentially incendiary, and it is -- I think it is over the top. [¶] There have been elements of the people's case that, you know, sort of did read like a second funeral for Pam, and the people have been able to skillfully and very clearly bring across the tremendous loss that Pam's family feels. [¶] But I think the pictures from the funeral are inappropriate . . . ." (12RT 2578:27-28, 2579:1-12.)

The testimony, photographic, and video evidence described above should have been excluded because it was partially irrelevant, largely cumulative, and "so unduly prejudicial that it render[ed] the trial fundamentally unfair" (*Payne v. Tennessee, supra,* 501 U.S. at p. 825) and/or constituted "'irrelevant information or inflammatory rhetoric that divert[ed] the jury's attention from its proper role or invite[d] an irrational, purely subjective response . . . .'[citation.]" (*People v. Edwards, supra,* 54 Cal.3d at p. 836; see also *People v. Roldan* (2005) 35 Cal.4th 646, 732–733 [27 Cal.Rptr.3d 360, 110 P.3d 289], disapproved of on another ground by *People v. Doolin* (2009) 45 Cal.4th 390 [87 Cal.Rptr.2d 209, 198 P.3d 11]; *People v. Panah* (2005) 35 Cal.4th 395, 494-495 [25 Cal.Rptr.3d 672, 107 P.3d 790]; *People v. Taylor* (2001) 26 Cal.4th 1155, 1172 [113 Cal.Rptr.2d 827, 34 P.3d 937].) Regardless, the lower court allowed the evidence, and its admission prejudiced Appellant.

I. THE LOWER COURT VIOLATED APPELLANT'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY EXCLUDING MITIGATING EVIDENCE IN THE PENALTY PHASE

Under the Eighth and Fourteenth Amendments, a defendant in a capital case must be permitted to present all relevant mitigating evidence to demonstrate that he deserves a sentence of life rather than death. (See *Lockett v. Ohio* (1978) 438 U.S. 586, 604 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-114 [102 S.Ct. 869, 71 L.Ed.2d 1].) "The jury 'must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." (*People v. Frye* (1998) 18 Cal.4th 894, 1015 [77 Cal.Rptr.2d 25, 959 P.2d 183], disapproved of on other grounds by *People v. Doolin* (2009) 25 Cal.4th 390 [87 Cal.Rptr.3d 209, 198 P.2d 11], quoting *Jurek v.*

Texas (1976) 428 U.S. 262, 271 [96 S.Ct. 2950, 49 L.Ed.2d 929].) "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio*, *supra*, 438 U.S. at p. 604, italics in original; see also Pen. Code, §190.3.)

The standard for what constitutes relevant mitigating evidence is low: "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Tennard v. Dretke* (2004) 542 U.S. 274, 284 [124 S.Ct. 2562, 159 L.Ed.2d 384]; *New Jersey v. T.L.O.* (1985) 469 U.S. 325, 345 [105 S.Ct. 733, 83 L.Ed.2d 720].) Once the minimal threshold for relevance is met, the Eighth Amendment requires that the jury be able to consider the defendant's mitigating evidence. (*Boyde v. California* (1990) 494 U.S. 370, 377-378 [110 S.Ct. 370, 108 L.Ed.2d 316].)

As noted above, the government repeatedly argued that Appellant had contentious feelings for Pamela Fayed, telling the jury that Appellant called her a "dumb, fucking cunt" and "a terrible mom, destroying the kids, trying to poison him." (11RT 2231:6-22.) Yet, in the penalty phase, Appellant's counsel sought to elicit testimony from Melanie Jackman concerning Appellant's feelings for Pamela Fayed. Specifically, counsel was trying to elicit testimony concerning Appellant's statements to Jackman asking what he could do to make Pamela Fayed happy. (13RT 2695:12-19.) The government made a hearsay objection, arguing that there were multiple layers of hearsay. (13RT 2695:20, 2697:6-8.) The government then argued that there was no exception for the "statements" from Pamela Fayed to Appellant. (13RT 2697:16-20.) The lower court

agreed with the government's analysis and sustained the hearsay objection. (13RT 2698:7-10.) As set forth below, the trial court's hearsay ruling was erroneous.

Hearsay is an out-of-court statement offered to prove the truth of the matter stated. (Evid. Code, §1200.) A statement is an "oral or written verbal expression" or "nonverbal conduct of a person intended by him as a substitute for oral or written verbal expression." (*Id.* at §225.) However, "[n]on-assertive conduct is not hearsay." (*People v. Fields, supra,* 61 Cal.App.4th at p. 1068, citing Cal. Law Revision Com. com., Deering's Ann. Evid.Code, §1200 (1986) p. 339.)

In *People v. Snow* (1987) 44 Cal.3d 216, 237 [242 Cal.Rptr. 477, 746 P.2d 452], a witness testified that he told an individual, in the presence of the defendant, about the victim's death. The witness further stated that the defendant did not seem surprised nor did the defendant have any emotional reaction upon hearing the news. (*Ibid.*) The defendant objected to this testimony as hearsay. (*Ibid.*) This Court upheld the admission of the testimony on the basis that defendant's passive response was non-assertive, thus, not within the proscriptions of the hearsay rule. (*Ibid.*)

This Court should similarly find that any conduct by Pamela Fayed was non-assertive conduct. Jackman never testified that Appellant stated that Pamela Fayed told Appellant she was unhappy. Instead, Appellant concluded that Pamela Fayed was unhappy based on her conduct. Thus, Pamela Fayed's state of unhappiness was non-assertive conduct. As a result, Appellant was improperly denied the ability to present mitigating evidence in violation of his Eighth and Fourteenth Amendment rights. (U.S. Const., 8th & 14th Amends.)

* * *

J. THE GOVERNMENT VIOLATED APPELLANT'S EIGHTH AMENDMENT RIGHTS AND HIS RIGHT TO DUE PROCESS AND RIGHT TO A FAIR TRIAL BY IMPROPERLY APPEALING TO THE PASSION AND PREJUDICE OF THE JURY DURING THE CLOSING ARGUMENTS OF THE PENALTY PHASE

Appeals to the passions and prejudice of the jury by the government in a capital case violates "the Eighth Amendment principle that the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on the specific factors it is considering." (*Sandoval v. Calderon* (9th Cir. 2000) 231 F.3d 1140, 1150, opinion amended and superseded on denial of rehearing (9th Cir. 2000) 241 F.3d 765, citing *Godfrey v. Georgia*, 446 U.S. at p. 428.) The Eighth Amendment requires that a verdict of death must be a "reasoned moral response to the defendant's background, character and crime," not "an unguided emotional response." (*Penry v. Lynaugh* (1989) 492 U.S. 302, 328 [109 S.Ct. 2934, 106 L.Ed.2d 256], abrogated on another ground by *Atkins v. Virginia* (2002) 536 U.S. 304 [122 S.Ct. 2242, 153 L.Ed.2d 335].) "[D]ramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." (*Hance v. Zant* (11th Cir. 1983) 696 F.2d 940, 952, overruled by *Brooks v. Kemp* (11th Cir. 1985) 762 F.2d 1383.)

In *Lesko v. Lehman* (3rd Cir. 1990) 925 F.2d 1527, the government told the jury that it could not stop them from showing sympathy to the defendants. Then argued: "So I'll say this: Show them sympathy. If you feel that way, be sympathetic. Exhibit the same sympathy that was exhibited by these men . . . No more. No more." (*Id.* at p. 1540.) The *Lesko* Court found these comments were "directed to passion and prejudice rather than to an understanding of the facts and of the law." (*Id.* at p. 1541.) "[T]he prosecutor exceeded the bounds of permissible advocacy by

imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned [their victims]." (*Ibid.*)

Similarly, in *State v. Bigbee* (1994) 885 S.W.2d 797, 812, the Supreme Court of Tennessee found that "the prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there has been no one there to ask for mercy for the victims of the killings . . . , and encouraging the jury to give the defendant the same consideration that he had given his victims." The *Bigbee* Court held that the government's argument was improper because it "encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the evidence." (*Ibid.*)

In the instant case, during closing argument in the penalty phase the government argued:

> Sympathy is what it really comes down to and pleas for leniency, that is what it comes down to. Requests for mercy. Make no mistake about it, you can give him mercy and that's withholding the punishment that he deserves even when justice demands it. You can give him that. You can be that jury who does that, or you can give the appropriate penalty in the case, that's justice. What kind of jury do you want to be? Do you want to be the jury that gives mercy to a man when he gave none? You can do that. You can give mercy to him, but you can't give justice to them and mercy to him. It's your choice. It's the fork in the road for you. Mr. Fayed has had a trial. He's had a judge. He's had a jury of his peers . . .and he's going to ask you for mercy when Pam Fayed had none of these? . . . Don't you think Pam Fayed would have liked the opportunity to say, I'm sorry, objections Steven Simmons. Before you kill me, I'd like to interpose the - - -a very strict legal - - don't you think she would have liked that. . . .and he's going to ask you for mercy?

(13RT 2807-2808.)

Here, by urging the jury to give Appellant the mercy that he gave Pamela Fayed, and telling the jury that justice and mercy are incompatible, the government improperly appealed to the passions and prejudice of the jury. The government essentially asked the jury to ignore the guided discretion of California's death penalty law and decide Appellant's fate based on emotion and vengeance rather than the reasoned response required by the Eighth Amendment. The government went further by stating that Pamela Fayed did not have the right to object or to have a jury or judge decide her fate; thus, the government implied that Appellant should not be entitled to "strict legal" objections and niceties. Ultimately, the government's arguments, which appealed to the passion and prejudices of the jury, were improper, and Appellant was prejudiced.

K. THE GOVERNMENT COMMITTED MISCONDUCT BY ARGUING FACTS NOT IN EVIDENCE IN THE PENALTY PHASE DEPRIVING APPELLANT OF HIS RIGHT TO A FAIR TRIAL

As noted above, government misconduct in closing argument may violate due process and the right to a fair trial. (See *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; see also U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §15.) Additionally, the United States Supreme Court has made clear that capital cases require heightened due process, absolute fundamental fairness, and a higher standard of reliability. (See *Beck v. Alabama* (1980) 447 U.S. 625 [100 S.Ct. 2382, 65 L.Ed.2d 392]; *Lockett v. Ohio* (1978) 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973]; *Monge v. California* (1998) 524 U.S. 721 [118 S.Ct. 2246, 141 L.Ed.2d 615]; see also U.S. Const. 8th Amend; Cal.Const., art. I, §17.)

As set forth herein, similar to the guilt phase, the government again referenced facts outside of the record in the penalty phase.

a. THE GOVERNMENT MADE ARGUMENTS CONCERNING JANETTE BASED ON FACTS NOT IN EVIDENCE

On May 23, 2011, the government made a motion to preclude the defense from arguing sympathy for Appellant's family in closing arguments at the penalty phase, and the lower court explained, "No, he can't -- you cannot argue for the -- sympathy or pity for the family of the defendant. I think that's clear." (13RT 2729:13-15.) The government noted that the defense had made that argument in a mitigation letter previously submitted to the District Attorney's office and argued, "I just don't want it to be -- I don't want to be confronted tomorrow with a situation where . . . Mr. Meister, is talking about sympathy for poor baby Jeanette, because I think that that is improper." (13RT 2729:27-28, 2730:1-3.) Counsel for Appellant stated, "I wouldn't plan to argue that." (13RT 2730:18-19.)

True to his word, counsel for Appellant never made such an argument in front of the jury. Yet, in closing, the government proceeded to tell the jury that Appellant had made the improper argument. The government first argued the law, stating, "It's not your job to decide what's best for Jeanette. And it will say it in the instructions, and you can read it. You can't consider -- cannot consider sympathy for Appellant's family." (13RT 2788:18-21.) The government then argued, "Well, [Appellant] cannot come in here and use as his last remaining card his daughter and sympathy for her as a human shield. It doesn't work that way." (13RT 2788:27-28; 2789:1.) The government continued, "You can't kill the child's mother and then say, don't make her an orphan because if you kill me, she doesn't have anybody left." (13RT 2789:2-4.) The government

then proceeded as if Appellant had made the improper argument, stating, "He didn't think about [Jeanette] before. He had a cold, calculated, deliberate, brutal, vicious plan that he set into motion. *And now to hide behind her is more cowardly than it was to dispatch your two-bit assassins to ambush your wife in that parking lot.*" (13RT 2789:8-12, italics added.)

While Appellant made arguments concerning Jeanette in a pre-trial letter to the District Attorney's Office, that argument was *never* made to the jury. Consequently, the government's remarks during closing argument referenced facts outside of the record. Furthermore, the government's attacks on Appellant, calling Appellant a coward and berating Appellant for arguments he never made to the jury, was completely improper.

b. THE GOVERNMENT MADE OTHER ARGUMENTS BASED ON FACTS NOT EVIDENCE

Additionally, in penalty phase argument, the government stated that Pamela Fayed "wasn't just risking her own safety in cooperating; she was offering a very direct and concrete benefit to the community in her willingness to cooperate with the federal authorities." (12RT 2449:24-27.) This statement was outside the record. As noted above, the government did not present evidence in the guilty phase that Pamela Fayed was cooperating with the federal government. In fact, her two criminal attorneys testified that she had not agreed to cooperate. (7RT 1284:18-20,23-25, 1386:17-22.) Moreover, there was absolutely no evidence presented, let alone in existence, that Pamela Fayed was offering a "concrete benefit" to the community.

Additionally, the government argued other facts that were not part of the record, including that Pamela Fayed's final thoughts were: "[Appellant] won. He won. That's what she's thinking. He won. He got me." (13RT 2795:11-12.) Nothing in the record supports this assertion.

L. CUMULATIVE ERROR REQUIRES REVERSAL

Reversal may be based on grounds of cumulative error, even where no single error standing alone would necessitate such a result. (See *People v. Ramos* (1982) 30 Cal.3d 553, 581 [180 Cal.Rptr. 266, 639 P.2d 908], reversed on another ground by *California v. Ramos, supra,* 463 U.S. 992.) In *People v. Williams* (1971) 22 Cal.App.3d 34 [99 Cal.Rptr. 103], the court summarized the multiple errors committed at the trial level, concluding, "Some of the errors reviewed are of constitutional dimension. Although they are not of the type calling for automatic reversal, we are not satisfied beyond a reasonable doubt that the totality of error we have analyzed did not contribute to the guilty verdict, or was not harmless error." (*Id.* at pp. 58-59.)

As the Court of Appeals for the Ninth Circuit has similarly recognized, "The cumulative effect of multiple errors can violate due process even where no single error rises to the level of a constitutional violation or would independently warrant reversal." (*Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 927 [finding the California Court of Appeal's conclusion that cumulative errors were harmless was objectively unreasonable]; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, n.6.) "[W]here the combined effect of individually harmless errors renders a criminal defense 'far less persuasive that it might [otherwise] have been,' the resulting conviction violates due process." (*Parle v. Runnels, supra,* 505 F.3d at p. 927, citing *Chambers v. Mississippi, supra,* 410 U.S. at pp. 294, 302-303.) Thus, the fundamental inquiry in determining whether the combined effect of trial errors violated a defendant's due process rights is "whether the combined effect of multiple errors rendered a criminal defense 'far less persuasive' and had a 'substantial and injurious effect or influence' on the jury's verdict." (*Parle v. Runnels, supra,* 505 F.3d at p. 928, citing

Strickland v. Washington (1984) 466 U.S. 668, 696 [104 S.Ct. 2052, 80 L.Ed.2d 674].) In making this determination, the court should look at both the strength of the prosecution's case—because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by error"—and the effect of the error on the defense case. (*Parle v. Runnels, supra*, 505 F.3d at p. 928.)

As set forth above, Appellant's trial was rife with error and misconduct. Despite Appellant's repeated objections, the trial court erroneously admitted several pieces of evidence, tipping the scales of justice in favor of the government. In addition to the admission of Appellant's statement, obtained via inter-agency collusion designed to circumvent Appellant's right to counsel and right to remain silent, there were several other pieces of evidence obtained by overzealous, indecorous searches of Appellant's person and property in violation of his Fourth Amendment rights. The government also introduced significant, and highly prejudicial, pieces of evidence from the federal criminal case, which was never adjudicated, and the state divorce case. Further, jurors—the very same individuals who were to decide Appellant's fate—defied the trial court's admonitions and discussed the case amongst themselves prior to deliberation, forming opinions and influencing their peers, to Appellant's detriment. While Appellant contends that each of these errors alone warrants reversal, the impact of each of these errors in the aggregate reveals a severe imbalance in the scales of justice. On a macroscopic level, it is apparent that these errors did more than preclude Appellant from introducing or excluding significant evidence. These errors affected the very nature of Appellant's trial, creating a stigma of guilt around him, while diminishing his presumption of innocence. Thus, denying him of a fair trial.

M. THE SUBSTANTIVE PROVISIONS OF CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED AND APPLIED, CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

The Eighth Amendment to the United States Constitution proscribes cruel and unusual punishment. (U.S. Const., 8th & 14th Amends.; see also Cal. Const., art. I, §17 [proscribing cruel *or* unusual punishment].) Over one hundred and thirty years ago, the United States Supreme Court observed that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted." (*Wilkerson v. Utah* (1879) 99 U.S. 130, 135-136 [25 L.Ed. 345].) Indeed, nearly one hundred years later, Justice Brennan expressed, "The Cruel and Unusual Punishments Clause . . . is not susceptible of precise definition." (*Furman v. Georgia* (1972) 408 U.S. 238 [92 S.Ct. 2726, 33L.Ed.2d 346] (conc. opn. of Brennan, J.).) Not surprisingly, there is scant case law squarely addressing the meaning of cruel and unusual punishment.

In *Furman v. Georgia, supra,* 408 U.S. 238, the United States Supreme Court reviewed the death penalty statutes of Georgia and Texas and determined that they violated the Eighth Amendment's prohibition against cruel and unusual punishment. Each of the five Justices in the majority wrote separate opinions. Justices Brennan and Marshall concluded that the cruel and unusual clause of the Eighth Amendment prohibited the further imposition of the death penalty. Justices Douglas, Stewart, and White were unwilling to hold the death penalty per se unconstitutional; however, they concluded that discretionary sentencing, unguided by sufficiently defined standards, violates the Eighth Amendment. (*Id.* at pp. 240-257,

306-314.) The commonality in each of the justices' opinions was their concern with the arbitrary imposition of the death penalty.[85]

However, Justice Brennan set forth a comprehensive four part test to determine whether the continued use of the penalty of death is cruel and unusual. (*Id.* at p. 281.) In addition to a determination of whether the specific statute "is inflicted arbitrarily," Justice Brennan considered whether the punishment is: 1) unusually severe; 2) "rejected by contemporary society"; and 3) serves the "penal purpose more effectively than some less severe punishment." (*Id.* at pp. 282, 285-286.) As Justice Brennan noted, the test is meant to "be a cumulative one." (*Id.* at p. 282.) Thus, Justice Brennan proposed that these considerations, taken together, should be used to determine if the continued use of death as a penalty violates the prohibition against cruel and unusual punishment. (*Id.*)

As set forth herein, Appellant argues that, in accord with the majority of Justices in *Furman*, the current death penalty scheme in California, as written and applied, is unconstitutional because it results in an arbitrary imposition of the death penalty. Additionally, Appellant herein asks this Court to utilize the four considerations set forth in Justice Brennan's concurring opinion in *Furman* and determine whether continued use of death as a penalty violates the Eight Amendment.

* * *

---

[85] (See *id.* at p. 310 (conc. opn. of Stewart, J.) [noting that the death penalty was "wantonly and . . . freakishly imposed"]; *id.* at p. 313 (conc. opn. of White, J.) [noting that existing death penalty schemes allowed the death penalty to be imposed with "great infrequency" and afforded "no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not"].)

a. CALIFORNIA'S DEATH PENALTY SCHEME, AS WRITTEN AND APPLIED, IS ARBITRARY

The unifying idea in the concurring opinions of *Furman*, and one of the factors in Justice Brennan's test, is that an arbitrary death penalty statute constitutes cruel and unusual punishment. "Indeed, the very words 'cruel and unusual punishments' imply condemnation of the arbitrary infliction of severe punishments." (*Id.* at p. 274 (conc. opn. of Brennan, J.).) This consideration contemplates two issues: 1) whether the statute is sufficiently narrow, limiting those who are eligible for the death penalty; and 2) whether the statute is used in so few cases as to be arbitrarily applied.[86] (See also *Godfrey v. Georgia, supra,* 446 U.S. at p. 428; see also *Gregg v. Georgia* (1976) 428 U.S. 153, 189 [96 S.Ct. 2909, 49 L.Ed.2d 859].) These two factors are herein applied to California's current death penalty scheme.

i. CALIFORNIA'S DEATH PENALTY SCHEME DOES NOT SUFFICIENTLY NARROW THE CLASS OF DEFENDANTS ELIGIBLE FOR THE DEATH PENALTY

To comport with the Eighth Amendment, a state must "genuinely narrow the class of defendants" in a way that "reasonably justif[ies] the imposition of a more severe sentence on the defendant compared to others found guilty of murder." (*Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235].) "The issue in analyzing a narrowing device is not whether the defendant deserves the death penalty, but whether the

---

[86] That is, of the cases in which the death penalty is available as punishment, in how many cases does the government seek a death sentence? If the number of cases that qualify is great, but the number of cases for which death is sought is few, then the death penalty is being utilized arbitrarily. (See *Furman v. Georgia, supra,* 408 U.S. 238; see also *Godfrey v. Georgia* (1980) 446 U.S. 420 [100 S.Ct. 1759, 64 L.Ed.2d 398].)

narrowing device is both genuinely narrowing the class of death-eligible defendants, and doing so in a way that identifies those defendants most deserving of death." (Richard A. Rosen, *Felony Murder and the Eighth Amendment Jurisprudence of Death* (1990) 31 B.C. L.Rev. 1103, 1124-1125, discussing *Furman v. Georgia, supra,* 408 U.S. 238 and *Maynard v. Cartwright* (1988) 486 U.S. 356, 361–362 [108 S.Ct. 1853, 100 L.Ed.2d 372].)

For nearly one hundred years, every first-degree murder in California was eligible for death. (See *In re Anderson* (1968) 69 Cal.2d 613, 622 [73 Cal.Rptr. 21, 447 P.2d 117]; Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem For Furman?* (1997) 72 N.Y.U. L.Rev. 1283, 1306 (hereafter *Requiem For Furman?*).) A flurry of court decisions in the 1970's, including *Furman* and this Court's decision in *People v. Anderson* (1972) 6 Cal.3d 628 [100 Cal.Rptr. 152, 493 P.2d 880],[87] temporarily eliminated the death penalty in California. The core of the current death scheme emerged through a ballot initiative in 1978 titled Proposition 7, also commonly referred to as the Briggs Death Penalty Initiative. (See Ballot Pamp., Gen. Elec. (Nov. 7, 1978) text of Prop. 7, p. 32 et seq., available at http://librarysource.uchastings.edu/ballot_pdf/1978g .pdf.)

The stated goal of Proposition 7 was to give Californians "the protection of the nation's toughest, most effective death penalty law." (*Id.* at p. 34.) Proponents sought the "toughest death penalty law" in order to inflict death on the maximum number of defendants. (See *id.*) Proposition 7 more than doubled the number of special circumstances enacted by the California Legislature the previous year. (See Pen. Code, §190.2 (1977).)

---

[87] Superseded by constitutional amendment as stated in *Strauss v. Horton* (2009) 46 Cal.4th 364, 429 [93 Cal.Rptr.3d 591, 207 F.3d 48].

Since the passage of Proposition 7, the death penalty scheme has been relentlessly expanded. Remarkably, the bulk of the to the death penalty statute have not been the result of well-debated legislation by elected officials or case law. Instead, the expansion of the capital scheme has primarily been the result of voter initiatives in 1990 (Proposition 115), 1996 (Proposition 195), and 2000 (Propositions 18 and 21). (See Judge Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle* (2011) 44 Loy. L.A. L.Rev S41 (hereafter Alarcón & Mitchell).)

Presently, there are twenty-one categories of first-degree murder, divided into two groups: eight categories of malice-murder (including murder committed by means of "lying in wait"), and thirteen categories of felony-murder. (See Pen. Code, §§187, 189.) There are thirty-three separately enumerated special circumstances which render a first-degree murderer death-eligible, including a murder committed by means of "lying-in-wait" and twelve felony-murder special circumstances. (See Pen. Code, §190.2.) As a result, California is widely believed to have the broadest death penalty statute in the nation. (See, e.g., *Tuilaepa v. California* (1994) 512 U.S. 967, 994 [114 S.Ct. 2630, 129 L.Ed.2d 750] (dis. opn. of Blackmun, J.) [noting that California's special circumstances create "an extraordinarily large death pool"].)

Of California's numerous special circumstances, two are particularly problematic: 1) lying-in-wait, and 2) felony-murder. (See Steven F. Shatz, *The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla. L.Rev. 719, 727-729 (hereafter *A California Case Study*).) The extensive reach of these two special circumstances is discussed below.

aa. THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE IS OVERLY BROAD

Most premeditated murders are death-eligible because of California's interpretation of the "lying-in-wait" special circumstance. (See Steven F. Shatz & Naomi R. Shatz, *Chivalry Is Not Dead: Murder, Gender and the Death Penalty* (2012) 27 Berkeley J. Gender, Law & Just. 64, 90 (hereafter *Chivalry Is Not Dead*).) Based on a study of cases from 1988 to 1992, seven out of every eight first-degree murder cases qualify for the death penalty under the current interpretation of this special circumstance. (*Requiem For Furman?, supra,* 72 N.Y.U. L.Rev. at p. 1332.)

Murder committed by lying-in-wait has been "anciently regarded . . . as a particularly heinous and repugnant crime." (Note, *Murder Committed by Lying in Wait* (1954) 42 Cal. L.Rev. 337.) "Lying in wait, as a principle in criminal law, began as a 14th-century statute denying to the Crown the right to pardon any person who killed 'while lying in wait' for his victim. This statute apparently arose as a reaction by the Norman conquerors of England against the subjugated Anglo-Saxons' practice of killing the Normans by ambush." (*People v. Stevens* (2007) 41 Cal.4th 182, 217-218 [59 Cal.Rptr.3d 196, 158 P.3d 763], citing Note, *Murder Committed by Lying in Wait, supra,* 42 Cal. L.Rev. at 337.) Thus, historically the term "lying-in-wait" carried the idea of an ambush from a place of hiding. Although early case law presented "no California case precisely defining the phrase 'lying in wait,'" see *People v. Tuthill* (1947) 31 Cal.2d 92, 101 [187 P.2d 16]), Justice Traynor noted in *People v. Thomas* (1953) 41 Cal.2d 470 [261 P.2d 1] (conc. opn. of Traynor, J.), that "the gist of 'lying in wait' is that the person place himself in a position where he is waiting and watching and concealed from the person

killed with the intention of inflicting bodily injury upon such person or of killing such person."

When the death penalty was revived by the legislature in 1977, Penal Code section 190.2 did not have a special circumstance for "lying-in-wait." (See Pen. Code, §190.2 (1977).) The "lying-in-wait" special circumstance was added in 1978 by Proposition 7. (See Ballot Pamp., Gen. Elec. (Nov. 7, 1978) text of Prop. 7, p. 32 et seq.) Since the passage of Proposition 7, two key parts of the "lying-in-wait" requirement have accounted for its expanded usage: 1) the relationship of the "lying-in-wait" to the crime, and 2) the meaning of concealment.

In the 1978 statute, "Penal Code section 190.2, subdivision (a)(15) provided that the special circumstance applied if '[t]he defendant intentionally killed the victim *while* lying in wait.'" (*Id.* (italics added); see *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 305 [129 Cal.Rptr.2d 324].) Significantly, the word "while" indicated a close, temporal proximity. (See *Domino v. Superior Court* (1982) 129 Cal.App.3d 1000 [181 Cal.Rptr. 486].) For example, in *Domino*, the defendants had lain in wait for the victim, shot and killed the victim's friend, beat the victim, then drove the victim to a secondary location. Later the victim was shot and dumped into the river. (*Id.* at pp. 1003-1005.) The court found that the murder occurred hours after the defendants were "lying-in-wait," and, therefore, concluded that the special circumstance was not applicable. (*Id.* at p. 1012.) In doing so, the court distinguished "'while' lying-in-wait," for purpose of the special circumstance, from the term "'perpetrated by means of' lying-in-wait" necessary for first degree murder, reasoning: "The killing must take place during the period of concealment and watchful waiting, or the lethal acts must begin at and flow continuously from the moment concealment and watchful waiting ends. If a cognizable interruption

separates the period of lying in wait from the period during which the killing takes place the circumstances calling for the ultimate penalty do not exist." (*Id.* at pp. 1007-1012.) However, pursuant to Proposition 18, in 2000, the language of the lying-in-wait special circumstance was changed, and it now mirrors the temporal proximity language of the first-degree statute for lying-in-wait: "by means of" lying-in-wait.[88] (See Pen. Code, §§189, 190.2.)

The scope of the "lying-in-wait" special circumstance was expanded again in 1989, this time concerning the notion of concealment. In *People v. Morales* (1989) 48 Cal.3d 527 [257 Cal.Rptr. 64, 770 P.2d 244], the defendant was sitting in the back seat of a car when he killed the victim who was sitting in the front seat. The defendant argued that the victim was aware of his presence in the car and sitting in the back seat was not concealment as required for "lying-in-wait." (*Id.* at pp. 554-555.) This Court then set forth that physical concealment was not required, reasoning, "It is sufficient that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*Id.* at p. 555, citing *People v. Sassounian* (1986) 182 Cal.App.3d 361, 406-407 [226 Cal.Rptr. 880]; see *People v. Webster* (1991) 54 Cal.3d 411 [285 Cal.Rptr. 31, 814 P.2d 1273] [although victim was walking with defendant and aware of his presence, defendant's act of

---

[88] Some courts have recognized that there remains only the slightest difference between the "lying-in-wait" for first-degree murder and "lying-in-wait" as a special circumstance, which concerns the requisite intent to kill. (See Pen. Code, §§189, 190.2; see also *People v. Stevens* (2007) 41 Cal.4th 182, 204 [59 Cal.Rptr.3d 196, 158 P.3d 763].) Additionally, the current definition of "lying-in-wait" as a special circumstance is essentially the same as what constitutes premeditation and deliberation for first-degree murder. (See *People v. Stevens, supra,* 42 Cal.4th at p. 213 (conc. opn. of Werdegar, J.); *People v. Edelbacher* (1989) 47 Cal.3d 983 [254 Cal.Rptr. 586, 766 P.2d 1] (emphasis omitted), quoting CALJIC No. 8.25.)

walking behind victim before killing him was sufficient for "lying-in-wait"].)

Justices of this Court have expressed concern that the "lying-in-wait" special circumstance has become interpreted too broadly. Justice Mosk noted that the "lying-in-wait" special circumstance "is so broad in scope as to embrace virtually all intentional killings. Almost always the perpetrator waits, watches, and conceals his true purpose and intent before attacking his victim; almost never does he happen on his victim and immediately mount his attack with a declaration of his bloody aim." (*People v. Morales, supra,* 48 Cal.3d at p. 575 (conc. & dis. opn. of Mosk, J.); see *People v. Stevens, supra,* 41 Cal.4th at p. 213 (conc. & dis. opn. of Werdegar, J.) ["the concept of lying in wait threatens to become so expansive as to eliminate any meaningful distinction between defendants rendered eligible for the death penalty by the special circumstance and those who have 'merely' committed first degree premeditated murder"]; *id.* at p. 225 (dis. opn. of Moreno, J.) ["the lying-in-wait special circumstance . . . does not provide a principled basis for dividing first degree murderers eligible for the death penalty from those who are not, and is therefore not consistent with the Eighth Amendment"]; see also *People v. Webster, supra,* 54 Cal.3d at pp. 461-462 (conc. & dis. opn. of Mosk, J.); *id.* at p. 466 (conc. & dis. opn. of Broussard, J.).)

Indeed, under the current interpretation of the "lying-in-wait" special circumstance, it would be difficult to find a first-degree, non-felony-murder, offense that would not fall under this classification. It is a rare murderer who will announce his intention to kill to his prospective victim. (See *People v. Morales, supra,* 48 Cal.3d at p. 575 (conc. & dis. opn. of Mosk, J.).) Yet, even in those unusual cases where the defendant makes his intentions known, this Court has found that the victim was "taken unawares." (*People v.*

Hillhouse (2002) 27 Cal.4th 469, 501 [117 Cal.Rptr.2d 45, 40 P.3d 754] [upholding the "lying-in-wait" special circumstance, even when the defendant, whose presence was known to the victim, stated "I ought to kill you" before stabbing the victim]; *People v. Arellano* (2004) 125 Cal.App.4th 1088 [23 Cal.Rptr.3d 172] [upholding the "lying-in-wait" special circumstance where the defendant warned his former wife for months that he was going to kill her].)

Undoubtedly, murders committed while "lying-in-wait" have historically been considered particularly heinous. (See Note, *Murder Committed by Lying in Wait*, *supra*, 42 Cal. L.Rev. at 337.) However, the current interpretation of what constitutes "lying-in-wait" bears little relationship to its original definition. No longer does the statute cover only those murders where a defendant is hiding and waiting to ambush an unsuspecting enemy. Rather, a defendant who even announces his presence and declares his desire to kill the victim is now found to be "lying-in-wait." Thus, the "lying-in-wait" special circumstance, as interpreted by this Court, fails to provide the requisite meaningful distinction between murderers.[89]

* * *

[89] Furthermore, it is illuminating that almost no other state has included "lying-in-wait" murder as deserving of eligibility for the ultimate sanction of death. Post-*Furman*, only four states have allowed for "lying-in-wait" as a special circumstance: California, Indiana, Colorado, and Montana. (See H. Mitchell Caldwell, *The Prostitution of Lying in Wait* (2003) 57 U. Miami L.Rev. 311, 324.) "Of these four states, only California continues to incorporate both a statute defining murder by lying in wait as first degree murder, and an additional statute listing murder by lying in wait as a special circumstance warranting the death penalty." (*Ibid.*)

bb. THE FELONY-MURDER SPECIAL CIRCUMSTANCE IS OVERLY BROAD

One study determined that from 1988-1992, the special circumstance of felony-murder accounted for 74% of the cases in which defendants were found eligible for the death penalty. (*Requiem For Furman?, supra,* 72 N.Y.U. L.Rev. at p. 1343.) This is primarily because California's felony-murder special circumstance is so broad.

As initially contemplated by Proposition 7, felony-murder as a special circumstance was defined as murder which "'was willful, deliberate and premeditated and was committed during the commission or attempted commission' of robbery, kidnapping, rape, the performance of lewd or lascivious acts upon a child under the age of 14, and burglary." (Former Cal. Pen. Code, §190.2(b)(3) (1979).) Subsequent Propositions, including Proposition 195, significantly expanded this definition.[90] Currently, the list of qualifying felonies has grown from the original five to twelve. (Pen. Code, §190.2.) The scope of this special circumstance has become so expansive not only because of the number of qualifying felonies, but also because of changes in the time period during which the death can occur,[91] and, controversially, in the mens rea requirement.[92]

---

[90] See Ballot Pamp., Gen. Elec. (Mar. 26, 1996) text of Prop. 195, p. 57, http://librarysource.uchastings.edu/ballot_pdf/ 1996p.pdf.

[91] Post-Proposition 7, the statute permitted the death penalty under the felony-murder special circumstance when the death was committed "during the commission or attempted commission" of the enumerated felony. (Former Pen. Code, §190.2 (West 1978).) Pursuant to Proposition 115 in 1990, the law changed, permitting the imposition of the death penalty if the death occurred "while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit" an enumerated felony. (Pen.

Additionally, California's death penalty statute permits the dual use of the circumstances of the crime by permitting the facts which establish first-degree murder under Penal Code section 189 to then establish the felony-murder special circumstance under Penal Code section 190.2, subdivision (a)(17). That is, the California scheme allows for the same factors that satisfy the elements of first-degree murder (most notably felony-murder and lying-in-wait) to also qualify a defendant for death as a special circumstance. Some courts have noted an infinitesimal distinction between felony-murder for first-degree murder and felony-murder as a special circumstance—namely that the special circumstance requires a finding that the defendant committed the act resulting in death in order to advance an independent felonious purpose, whereas first degree felony murder requires that the killing be "committed during the perpetration of, or attempt to perpetrate" the underlying felony. (See *People v. Mendoza* (2000)

Code, §190.2; see also Ballet Pamp., Gen. Elec. (June 5, 1990) text of Prop 115, available at http://librarysource.uchastings.edu/ballot_pdf1990p.pdf.)

[92] Under the 1977 death penalty law, which was actually drafted and passed by the legislature, a murder had to be "willful, deliberate and premeditated" to qualify as a felony-murder special circumstance. (See Former Pen. Code, §190.2 (West 1977).) Thus, the "state had to prove that a murderer possessed the intent to kill before he or she could be eligible for the death penalty, and that an accomplice was personally present and physically aided the death-causing acts before he could be eligible for the death penalty." (Ellen Kreitzberg, Cal. Comm'n on the Fair Admin. of Justice, The Death Penalty in California (Jan. 7, 2008) p. 16.) Post-Proposition 115, "[t]here is no requirement of intent to kill for either the felony-murder offense or the robbery felony-murder special circumstance (unless the special circumstance is applied to an aider and abettor)." (*People v. Andreasen* (2013) 214 Cal.App.4th 70, 81 [153 Cal.Rptr.3d 641], citing Pen. Code, §§190.2 (b)-(c); *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1140-1141 [124 Cal.Rptr.2d 373, 52 P.3d 572].) As a result, California is one of only a handful of states that allows for the death penalty when the defendant did not have a specific intent to kill. (See *A California Case Study, supra,* 59 Fla. L.Rev. at p. 735.)

24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150]; see also *People v Navarette* (2003) 30 Cal.4th 458, 505 [133 Cal.Rptr.2d 89, 66 P.3d 1182].) "That is, the felony-murder special circumstance applies 'when the murder occurs during the commission of the felony, not when the felony occurs during the commission of a murder.'" (*People v. Andreasen, supra*, 214 Cal.App.4th at p. 81, citing *People v. Mendoza* (2000) 24 Cal.4th 130, 182 [99 Cal.Rptr.2d 485, 6 P.3d 150].)

Pursuant to this extraordinary distinction, death may be an appropriate punishment under the felony-murder special circumstance when a defendant intended to rob, yet unintentionally murdered the victim. However, death could be an inappropriate punishment when the defendant intended to kill someone, but the robbery was incidental. Such a peculiarity is nonsensical and presents no meaningful distinction as required by the Eighth and Fourteenth Amendment to the United States Constitutional. (See *Zant v. Stephens, supra,* 462 U.S. at p. 877.)

In fact, a consistent theme in death penalty reform is that no felony-murder should qualify for the death penalty. (See *A California Case Study, supra,* 59 Fla. L.Rev. at p. 720; see also Cal. Comm'n on the Fair Admin. of Justice, Report and Recommendations on the Administration of the Death Penalty in California (June 30, 2008) pp. 62-71 (hereafter CCFAJ Report), available at http://www.ccfaj.org/documents/reports/dp/official/FINAL%20REPORT%20Death%20PENALTY.pdf.; The Constitution Project, *Mandatory Justice: The Death Penalty Revisited* (2005) pp. xxiv-xxv [recommending that felony-murder should be excluded as a basis for death penalty eligibility].) Even in the few states that allow felony-murder to qualify as a special circumstance, California broadens application of the statute even further by allowing for the imposition of the death penalty when there is no intent to kill. (See *A California Case Study,*

supra, 59 Fla. L.Rev. at p. 735.) Consequently, the felony-murder special circumstance as currently used fails to narrow the use of the death penalty to those individuals who are most deserving of death.

ii. THE DEATH PENALTY IS ARBITRARY BECAUSE IT IS USED DISPROPORTIONATELY COMPARED TO THE POOL OF DEATH ELIGIBLE-CASES

The rate at which the death penalty is used also determines whether its practice is arbitrary. As Justice Douglas noted, "There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature." (*Furman v. Georgia, supra,* 408 U.S. at p. 242 (conc. opn. of *Douglas*, J.) Thus, when a severe punishment is sought in a fraction of the cases for which it is available, "there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily." (*Id.* at p. 277 (conc. opn. of Brennan, J.).)

In *Furman v. Georgia, supra,* 408 U.S. 238, all five of the majority Justices focused on the infrequency in which the death penalty was imposed. (See *id.* at p. 248, fn. 11 (conc. opn. of Douglas, J.); *id.* at pp. 291-295 (conc. opn. of Brennan, J.); *id.* at pp. 309-310 (conc. opn. of Stewart, J.); *id.* at p. 313 (conc. opn. of White, J.); *id.* at p. 354, fn.124, 362-363 (conc. opn. of Marshall, J.).) The principle concern is that when the death penalty is imposed in so few cases, the determination of who receives death is not based on legislative determinations; instead, it is

"dependent on the whim of one man or of 12." (*id.* at p. 253 (conc. opn. of Douglas, J.).)

Due to the broad scope of California's death penalty scheme, the death penalty is a possible punishment for most defendants charged with first-degree murder. As set forth in the CCFAJ Report, the panel determined that "[u]nder the death penalty statute now in effect, 87% of California's first degree murders are 'death eligible,' and could be prosecuted as death cases." (CCFAJ Report at p. 18.) Thus, the arbitrary nature of the death penalty scheme is based on a determination of in what portion of the death-eligible cases—the 87% of California's first-degree murder cases—has the government actually sought the death penalty.

At the time of *Furman*, the death penalty imposition ratio in the considered states—the ratio of cases in which the government actually sought to impose the death penalty compared to the total number of death-eligible cases—was estimated to be between 15 and 20 percent. (*Furman v. Georgia, supra,* 408 U.S. at p. 436, fn. 19 (dis. opn. of Powell, J.).) Under that scheme, Justice Stewart noted that being selected to receive the death penalty was cruel and unusual "in the same way that being struck by lightning is cruel and unusual." (*Id.* at p. 310 (conc. opn. of Stewart, J.).) Similarly, Justice Brennan described that being selected to receive the death penalty under the challenged statutes "smacks of little more than a lottery system." (*Id.* at p. 294 (conc. opn of Brennan, J.).) Despite the Justices acknowledgment in *Furman* that the imposition of the death penalty at that time was problematically arbitrary, defendants in California today are even less safe.

There have been several studies sampling the death ratio in California. For example, the "Alameda County Study," conducted by Steven F. Shatz,

reviewed 803 murder cases in that county from 1978-2001.[93] (See *A California Case Study, supra,* 59 Fla. L.Rev. at p. 737; see also Steven F. Shatz & Terry Dalton, *Challenging the Death Penalty with Statistics: Furman, McCleskey, and a Single County Case Study* (2013) 34 Cardozo L.Rev. 1227 (hereafter *Challenging the Death Penalty with Statistics*).) According to the study, because the Alameda County District Attorney's Office is "aggressive about seeking and obtaining death judgments," it would likely produce a death ratio greater than a statewide study. (*Challenging the Death Penalty with Statistics, supra,* 34 Cardozo L.Rev. at p. 1259.) However, the death sentence rate overall was still only 12.8%.[94] (*Ibid.*)

Another study conducted by Shatz, referred to as the "The Statewide Study," was based on appellate murder cases from 1988-1992, and sought to "determine the percentage of persons convicted of first-degree murder who were death-eligible under the 1997 version of §190.2." (*A California Case Study, supra,* 59 Fla. L.Rev. at p. 738.) That percentage was "then applied to the overall statewide death-sentence rate for first-degree murderers (the percentage of first-degree murderers sentenced to death during the five-year

---

[93] The cases in the study were identified from a list of all murder cases produced by the Alameda County District Attorney's Office. (*A California Case Study, supra,* 59 Fla. L.Rev. at p. 737.) The 803 cases studied are estimated to constitute more than 96% of the cases during the period, and are presumed to be representative of the missing 4% of cases.

[94] The caveat of this result is that this number actually overstates the actual death rate because it does not include defendants who could have received first-degree murder, with special circumstances but were allowed to plead to a lesser crime. (*Challenging the Death Penalty with Statistics, supra,* 34 Cardozo L.Rev. at p. 1259, fn. 208.) The researchers use as an example the fact that there were seventy-five defendants who could have been eligible for the death penalty for felony-murder robbery/burglary, but were permitted to plead to second-degree murder. (*Id.*)

period) to calculate a death-sentence rate for death-eligible defendants." (*Ibid.*) "[A]n average of 346 persons per year were convicted of first degree murder in California. An average of 33.2 persons per year convicted of first degree murder were sentenced to death. Thus, during the period of this study, approximately 9.6% of those convicted of first degree murder were sentenced to death." (*Requiem For Furman?, supra,* 72 N.Y.U. L.Rev. at p. 1328.)

In another study, Steven Shatz and Naomi Shatz reviewed 1,299 cases from 2003 to 2005 in which defendants were convicted of first-degree murder. (*Chivalry Is Not Dead, supra,* 27 Berkeley J. Gender, L. & J. at p. 93.) Of the 1,299 cases, 1,182 cases involved a defendant who was death-eligible.[95] (*Ibid.*) Based on presentence reports ("PSR") in those death-eligible cases, researchers were able to determine whether special circumstances were alleged. The study found that in 182 of the cases there was not substantial evidence to uphold a special circumstance finding. (*Ibid.*) Of the remaining 1000 cases, special circumstance allegations were admitted or found true in 509 cases, and, based on the facts available, could have been found in 491 other cases. (*Ibid.*) "Thus, 84.6% of the adult first degree murder cases were factually capital cases. In 55 of the 1000 (5.5%), the defendant was sentenced to death." (*Ibid.*)

As one of the commentator noted, "The different death sentence rates reported in the several California studies reflect the difference in the case samples studied—all cases, only appellate cases, only Alameda County cases; whether the study covered only defendants convicted of first-degree murder or included those convicted of lesser homicides; and the versions(s) of the death penalty in effect for the cases studied. Nevertheless, regardless

---

[95] 117 cases were not death-eligible because the defendant committed the murder while a juvenile.

of the methodology, the studies all found that the death sentence rate in California is, and always has been, substantially below the 15-20% pre-*Furman* death sentence rate." (*Challenging the Death Penalty with Statistics, supra,* 34 Cardozo L.Rev. at p. 1278, fn. 304.)

Currently, there may not be any way to definitively know why a specific defendant is chosen by the government to receive the death penalty. Some common factors among the few cases which are chosen may be enlightening. In *Furman*, Justices Douglas and Marshall worried that the few cases selected for death sentences were based on race/ethnicity of the defendant. (*Furman v. Georgia, supra,* 408 U.S. at pp. 249-250 (conc. opn. of Douglas, J.); *id.* at p. 365-366, fn. 155 (con. opn. of Marshall, J.).) Studies specifically in California show that the race/ethnicity of the victim also accounts for some of the disparity, noting that "homicides involving non-Hispanic white victims are 3.7 times as likely to result in a death sentence than those with non-Hispanic African American victims." (Glenn L. Pierce & Michael L. Radelet, *Impact of Legally Inappropriate Factors on Death Sentencing for California Homicides, 1990-1999, The Empirical Analysis* (2005) 46 Santa Clara L.Rev. 1, 19 (hereafter Pierce & Radelet).) Thus, it is recognized that race is a continuing factor in the selection of certain defendants to receive the death penalty.

Another factor determining whether a defendant will receive the death penalty in California is the jurisdiction in which the defendant is prosecuted. Simply put, a defendant who commits an offense in Riverside County is irrefutably more likely to receive the death penalty than a defendant who commits the exact same offense in San Francisco. (See Cal. Dept. of Corrections & Rehabilitation Division of Adult Operations, Death Row Tracking System Condemned Inmate Summary List (Dec. 2, 2013) Sentencing County, p. 3 (hereafter Condemned Inmate Summary List).)

Certain counties are consistently aggressive in seeking death, even if they have a lower overall percentage of murder cases. For example, of the 747 total condemned inmates, Riverside County accounts for 80, or 10.62%, whereas San Francisco County only accounts for 1 inmate, or 0.13%. (*Ibid.*) Further, even comparing the proportion of death sentences to actual homicide cases that occurred in the county during the years 1990-1999, Riverside is among California's harshest counties, sentencing .0244 of homicide defendants to death. During that same period, Orange County had a death ratio of .0161 for the 1,433 murders that occurred, Los Angeles had a death ratio of .0058 for the 16,113 murders that occurred in the county, and San Francisco had a death ratio of 0.00 for the 910 murders that occurred. (Pierce & Radelet, *supra,* 46 Santa Clara L.Rev. at p. 27.)

As noted above, a death penalty scheme is meant to narrow the number of persons eligible for the death sentence to only those most deserving of death. When broad guidelines as to who is eligible for death are set out by the Legislature, (or, in California, by voter initiatives) and when the government requests death in only a small fraction of the cases in which it is available, the decision of who will actually receive a death sentence is not based on legislative factors. (See *Furman v. Georgia, supra,* 408 U.S. at p. 256.) Instead, the determination of who receives the death penalty becomes an ad hoc decision based on impermissible factors such as the race of the victim or where in California a defendant lives. (See CCFAJ Report at p. 6 [noting California has a death penalty in "name only, and not in reality. [¶] We currently have a dysfunctional system"].)

The *Furman* Court found that when the government seeks death in only 15-20% of statutorily death-eligible murderers, the risk of arbitrariness is constitutionally unacceptable. (See *Furman v. Georgia, supra,* 408 U.S. at p. 256.) Given that the death ratio in California is significantly less, there is a

grave risk that the death penalty is arbitrarily imposed in this State. As a result, the current death penalty scheme in California is unconstitutional under *Furman*. (See *id.*)

b. THE PUNISHMENT OF DEATH IS UNUSUALLY SEVERE

In addition to the argument that California's current death penalty scheme is unconstitutionally arbitrary, discussed above, Appellant further sets forth that the continued use of death as a penalty is per se unconstitutional under the remaining three factors used by Justice Brennan in *Furman*.

The next factor in Brennan's test is to consider whether the punishment is unusually severe. (*Furman v. Georgia, supra,* 408 U.S. at pp. 282, 285-286 (conc. opn. of Brennan, J.).) Punishment that results in death is certainly severe. "Death is . . . an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. [¶] . . . [¶] Death is truly an awesome punishment." (*Id.* at p. 287 (conc. opn. of Brennan, J.).)

Undoubtedly, the Framers knew that death was to be a possible punishment; it is specifically noted in the Bill of Rights. (See U.S. Const. 5th & 14th amends.) Thus, its use is not necessarily too severe; yet, neither can the court "make the further inference that [the Framers] intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishment Clause." (*Id.* at 283, citation omitted (conc. opn. of Brennan, J.).) As a result, the use of death as a punishment is subject to the same limitations of as any other punishment. (See *id.*)

At its essence, the Eighth Amendment requires that the government, "even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity." (*Id.* at p. 270 (conc. opn. of Brennan, J.).) "The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power be exercised within the limits of civilized standards." (*Ibid.*, citing *Trop v. Dulles* (1958) 356 U.S. 86, 99 [78 S.Ct. 590, 2 L.Ed.2d 630].) "[E]ven the vilest criminal remains a human being possessed of common human dignity." (*Furman v. Georgia, supra,* 408 U.S. at pp. 272-273 (conc. opn. of Brennan, J.).)

Furthermore, in determining if a punishment comports with civilized standards, the Supreme Court has recognized that the meaning of the cruel and unusual punishment, ". . . is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[96] (*Trop v. Dulles, supra,* 356 U.S. at p. 100 [finding that the loss of citizenship as a result of court martial violated the prohibition against cruel and unusual punishment].) Thus, as Justice Brennan explained, "Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century." (*Furman v. Georgia, supra,* 408 U.S. at p. 269 (conc. opn. of Brennan, J.).) "The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the

---

[96] This is a separate consideration from whether contemporary society supports the notion of the death penalty, which is discussed below. Instead, this consideration examines whether the punishment itself comports with current notions of human dignity.

judicial task is to review the history of a challenged punishment and to examine society's present practices with respect to its use." (*Id.* at p. 279 (conc. opn. of Brennan, J.).)

The notion of what constitutes cruel and unusual punishment has certainly evolved. In arguing against adding the cruel and unusual punishment provision to the Bill of Rights, one proponent worried that the Clause might, in the future, prohibit then firmly accepted punishment, stating, "it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off, but are we in the future to be prevented from inflicting these punishments because they are cruel?" (*Id.* at p. 244 (conc. opn. of Douglas, J.), citing 1 Annals of Cong. 754 (1789).) Of those once easily accepted punishments, only one remains: death. In fact, many punishments which were once considered commonplace are now considered too severe, and "[s]ince the discontinuance of flogging as a constitutionally permissible punishment, [citation], death remains as the only punishment that may involve the conscious infliction of physical pain." (*Id.* at p. 287 (conc. opn. of Brennan, J.).)

Even in the continued use of death as a punishment, there have been significant changes to what society considers appropriate. At one time, states punished many felonies with death. (See Michael Higgins, *Is Capital Punishment for Killers Only?* (1997) 83 ABA J. 30.) However, the crimes for which the death penalty is an acceptable form of punishment have since abated. (See Pallie Zambrano, *The Death Penalty Is Cruel and Unusual Punishment for the Crime of Rape-Even the Rape of A Child* (1999) 39 Santa Clara L.Rev. 1267, 1269.) In *Kennedy v. Louisiana* (2008) 554 U.S. 407 [128 S.Ct. 2641, 171 L.Ed.2d 585], the United States Supreme Court held that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in death of the victim.

In doing so, the Supreme Court noted the evolving views of society as to the severity of death as a punishment for non-homicide offenses. (*Id.* at p. 420-421; see also *Coker v. Georgia* (1977) 433 U.S. 584 [97 S.Ct. 2861, 53 L.Ed.2d 982] (plur. opn. of White, J.) [unconstitutional to execute an offender who had raped an adult woman].)

Additionally, how the death penalty has been implemented has changed. At one time, executions in this country "were public affairs." (John D. Bessler, *Revisiting Beccaria's Vision: The Enlightenment, America's Death Penalty, and the Abolition Movement* (2009) 4 Nw. J. L. & Soc. Pol'y 195, 218.) Earlier implementations of the death penalty were accomplished by a defendant being "hanged, disemboweled, or drawn and quartered." (*Id.* at p. 219.) The last public execution in the United States occurred in Kentucky in 1936 in front of 10,000 to 20,000 spectators. (*Id.* at p. 220.) Yet, the government no longer executes the citizenry for public sport; sensibilities of what comports with human dignity have evolved.

In determining whether the continued use of the death penalty is too severe "Pain, certainly, may be a factor in the judgment." (*Furman v. Georgia, supra,* 408 U.S. at p. 271 (conc. opn. of Brennan, J.).) There are unquestionably concerns about the amount of pain inflicted during implementation of the death penalty. (See Brenton Schick, *Lethal Injection, Cruel and Unusual? Establishing A Demonstrated Risk of Severe Pain: Morales v. Cate, 623 F.3d 828 (9th Cir. 2010)* (2011) 38 Western St.U. L.Rev. 173, 179; see also Deborah W. Denno, *Getting to Death: Are Executions Constitutional?* (1997) 82 Iowa L.Rev. 319, 355 [comparing the different methods of execution].) However, the infliction of physical pain is not the only inquiry. Another consideration under the Eighth Amendment is the emotional toll of a punishment. (See *Trop v. Dulles, supra,* 356 U.S. at p. 102 (plur. opn. of Warren, C.J.) [holding that the punishment of

expatriation was cruel and unusual, reasoning that banishment "subjects the individual to a fate of ever-increasing fear and distress"].)

In fact, in the early part of United States history, defendants were often "not informed that they would be spared death until the last moment, giving the simulation greater drama and terror." (Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" Versus "Symbolic" States in the United States* (2006) 84 Tex. L.Rev. 1869 (hereafter *A Tale of Two Nations*); Stuart Banner, *The Death Penalty: An American History* (2003) pp. 54-70.) This terrifying type of punishment recognized the severe emotional toll placed on a defendant when sentenced to death, and this allowed the government to "reap much of the benefit of the death penalty without actually having to kill." (*A Tale of Two Nations, supra,* 84 Tex. L.Rev. 1869.) This Court has also previously acknowledged that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." (*People v. Anderson* (1972) 6 Cal.3d 628, 649 [100 Cal.Rptr. 152, 493 P.2d 880], superseded by constitutional amendment as stated in *Strauss v. Horton* (2009) 46 Cal.4th 364, 429 [93 Cal.Rptr.3d 591, 207 F.3d 48].) In fact, "[t]he onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." (*Solesbee v. Balkcom* (1950) 339 U.S. 9, 14 [70 S.Ct. 457, 94 L.Ed. 604] (dis. opn. of Frankfurter, J.).)

To comport with society's changing notions of propriety, the penalty of death studiedly changed from a public spectacle involving a show of torture and mutilation to a private affair accomplished by a needle. Despite the sanitization of the current implementation of death, the result is the same, and Appellant asks this Court to determine that the continued use of death as a penalty, with its accompanying physical and psychological pain,

no longer comports with contemporary notions of human dignity and is, thus, too severe a punishment.

c. CONTEMPORARY SOCIETY DISFAVORS CAPITAL PUNISHMENT

In *Furman*, Justices Brennan and Marshall agreed that in determining the constitutionality of a punishment, a court must consider whether "popular sentiment abhors it." (*Furman v. Georgia, supra,* 408 U.S. at pp. 332 (conc. opn. of Marshall, J.); *id.* at p. 278 (conc. opn. of Brennan, J.).) Again the Justices noted that the court "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 101.)

"From the beginning of our Nation, the punishment of death has stirred acute public controversy. . . . The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death." (*Furman v. Georgia, supra,* 408 U.S. at p. 296 (conc. opn. of Brennan, J.).) In making the determination of how society as a whole now views the death penalty, "'[t]he climate of international opinion concerning the acceptability of a particular punishment' is an additional consideration which is 'not irrelevant'." (*Enmund v. Florida* (1982) 458 U.S. 782, 796, fn. 22 [102 S.Ct. 3368, 73 L.Ed.2d 1140].)

From a global perspective, when the United Nations ("U.N.") was founded in 1945, only eight of the fifty-one U.N. member states had abolished the death penalty. (Amnesty International, *UN: Support for a Moratorium on the Death Penalty Grows* (Nov. 19, 2012), available at http://www.amnesty.org/en/for-media/press-releases/un-support-moratoriu

m-death-penalty-grows-2012-11-19.) When *Furman* was decided in 1972, approximately seventy countries had abolished the death penalty. (See Lindsey S. Vann, *History Repeats Itself: The Post-Furman Return to Arbitrariness in Capital Punishment* (2011) 45 U. Rich. L. Rev. 1255, 1266 (hereafter Vann); see *Furman v. Georgia, supra,* 408 U.S. 238.) By 2012, the number of countries which had abolished the death penalty jumped to nearly one hundred, accounting for more than two-thirds of the world. (Amnesty International, *UN: Support for a Moratorium on the Death Penalty Grows* (Nov. 19, 2012).) Even of the countries that still have the death penalty, many do not use it. (See *id.*) Further, in 2012, the United Nations General Assembly passed a nonbinding resolution, 110 to 39, that called for "a moratorium on executions with a view to abolishing" the death penalty. (United Nations General Assembly, *General Assembly Will Call for Moratorium on Executions, with View to Abolishing Death Penalty, Under Terms of Resolution Approved by Third Committee* (Nov. 19, 2012), available at http://www.un.org/News/Press/docs/2012/gashc4058.doc.htm.)

In contrast to the practices of numerous international communities, the United States is the only G7 country to still execute its citizens. Currently, the only countries which kill more of its own citizens than the United States are China, Iran, North Korea, and Yemen. (Vann, *supra,* 45 U. Rich. L. Rev. at p. 1278.) As one commentator noted of imposing death sentences: "[W]hat was once an unproblematic institution, universally embraced, is fast becoming a violation of human rights, universally prohibited." (*Ibid.*)

In accord with contemporary world views, local views have also changed. Overall, eighteen states and the District of Columbia have abolished the death penalty. (See Death Penalty Information Center, *States With and Without the Death Penalty* (last visited Dec. 30, 2013), available

at http://www.deathpenaltyinfo.org/states-and-without-death-penalty.) Notably, several states have abolished the death penalty within the last seven years. (See *id.*; *People v. LaValle* (N.Y. 2004) 817 N.E. 2d 341, 359 (New York); N.J. P.L. 2007, c. 204 (New Jersey); 2009 N.M. Laws, ch. 11, §§ 5-7 (New Mexico); Act of Mar 9, 2011, ch. 725, 2010 Ill. Legis. Serv. 96-1543 (effective July 1, 2011) (Illinois); see also Conn. SB 290 (Connecticut); Joe Sutton, *Maryland Governor Signs Death Penalty Repeal* (May 2, 2013) (Maryland).[97]) Of the remaining thirty-two states, some states have not used their death penalty, while others have used it so infrequently as to effectively be a moratorium. (See Death Penalty Information Center, *State by State Database* (last visited Dec. 30, 2013), available at http://www.deathpenaltyinfo.org/state_by_state.)

The attitude towards the death penalty in California has also changed. In 1978, 71% of voters voted to re-instate the death penalty. (California Secretary of State Debra Bowen, Approval Percentages of Initiatives Voted into Law (2013) p. 2.) In 2012, Proposition 34, which sought to abolish the death penalty, was defeated with only 53% of the vote against it. (See Ed Walsh, *Nov 6, 2012 Election: California Proposition Results*, Examiner (Nov. 7, 2012), available at http://www. examiner. com/article/nov-6-2012-election-california-proposition-results.) The numbers become even more telling when reviewing the counties with high use of the death penalty. (*Id.*) Los Angeles County sends more of its citizens to death than any other county in the nation (229 of the state's 736 death row inmates were sentenced in L.A. County). (See Paula Mitchel, Verdict, California Voters' Shifting Views on the Death Penalty, at http://verdict.justia.com/2013/09/11/california-voters-shifting-views-on-the-death-penalty#sthash.mFz1IyXV.dpuf.) In Los Angeles, 54.5% of voters

[97] Available at http://www.cnn.com/2013/05/02/us/maryland-death-penalty

voted to repeal the state's death penalty, which was higher than the state average. (*Id.*) In Alameda County, ranked ninth in the nation for the number of persons sentenced to death, voters voted to repeal the death penalty by an even wider margin, with 62.5% in favor of repeal and 37.5% against. (*Id.*)

Moreover, attitudes against the continued use of the death penalty are also exhibited by some national organizations. In 1997, the American Bar Association adopted a resolution urging a halt to executions until concerns about capital punishment are addressed. (American Bar Association, Death Without Justice: A Guide for Examining the Administration of the Death Penalty in the United States (June 2001) p. 1.) Traditionally conservative voices have also joined in to request that the death penalty be abolished. (See Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States* (2002) 73 U. Colo. L.Rev. 1, 21-97 (hereafter Kirchmeier) [discussing reasons for, and evidence of, public doubts about the death penalty and support among even conservatives for death penalty reform]; Ronald J. Tabak, *Finality Without Fairness: Why We Are Moving Towards Moratoria on Executions, and the Potential Abolition of Capital Punishment* (2001) 33 Conn. L.Rev. 733 [same]; Claudia Kolker, *Death Penalty Moratorium Idea Attracts Even Conservatives; Concept Gains Favor Over Outright Abolition*, L.A. Times (Aug. 29, 2000) p. A5.)

The reasons behind the swell of support against the death penalty vary. Many are not necessarily against the death penalty per se. (See Kirchmeier, *supra,* 73 U. Colo. L.Rev. at p. 21.) While some still abhor the thought of their government killing its citizens, many others have come to see this punishment as an unjustified and costly financial expense in a time where government entities are struggling financially. Others agree with the

punishment in principle, but believe that the system is unfairly imposed and hopelessly broken. Whatever the justification, the result is the same: society's opinion on killing prisoners is changing. Now, more than thirty years since the enactment of California's current death penalty scheme, it is evident that sentencing a defendant to his death has fallen out of domestic and international society's favor.

d. THE DEATH PENALTY IS NOT MORE EFFECTIVE THAN LIFE IMPRISONMENT

The final consideration under Justice Brennan's test is whether a death sentence is more effective than a sentence of life in prison. "Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment." (*Furman v. Georgia, supra,* 408 U.S. at p. 280 (conc. opn. of Brennan, J.).) Thus, even if a punishment is proportionate to the crime, it can still constitute cruel and unusual punishment if the goals of punishment can be achieved through lesser means. (See *ibid.*)

The United States Supreme Court has identified the two penal objectives of the death penalty: deterrence and retribution. (*Gregg v. Georgia, supra,* 428 U.S. at p. 183.) "The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment." (*Furman v. Georgia, supra,* 408 U.S. at p. 303 (conc. opn. of Brennan, J.).) Thus, the consideration is whether the dual purposes of deterrence and retribution can be met by a defendant remaining in prison for the rest of his/her life without the possibility of parole. "This argument cannot be appraised in the abstract.

We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today." (*Id.* at pp. 301-302.)

i. THE DEATH PENALTY IS NOT A BETTER DETERRENT THAN A SENTENCE OF LIFE IN PRISON

The issue of deterrence is really two-fold: deterrence of the individual defendant ("special deterrence") and deterrence of other potential defendants ("general deterrence"). As to special deterrence, a defendant sentenced to life imprisonment would be kept in prison until death, effectively safeguarding polite society. Further, in considering whether individuals sentenced to life in prison will commit further crimes while incarcerated, Justice Brennan noted that "Techniques of isolation can eliminate or minimize the danger while he remains confined." (*Furman v. Georgia, supra,* 408 U.S. at p. 301 (conc. opn. of Brennan, J.).)

The secondary consideration is whether a sentence of death serves as a greater deterrent to other potential defendants who may commit crimes. (*Id.* (conc. opn. of Brennan, J.).) "It is important to focus upon the precise import of this argument. It is not denied that many, and probably most, capital crimes cannot be deterred by the threat of punishment. Thus the argument can apply only to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal, under this argument, must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a

capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible." (*Furman v. Georgia, supra,* 408 U.S. at p. 301 (conc. opn. of Brennan, J.).)

Because of the inherent difficulty in measuring any general deterrent effect on others, there are conflicting studies. (Compare Jongmook Choe, *Another Look at the Deterrent Effect of the Death Penalty* (2010) 1 J. Advanced Res. L. & Econ. 12 [finding that the death penalty does not have a homicide reducing effect] and Tomislav Kovandzic et al., *Does the Death Penalty Save Lives?* (2009) 8 Criminology & Pub. Pol'y 803 [finding no empirical support for the argument that the existence or application of the death penalty deters prospective offenders from committing homicide]; with Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Post-Moratorium Panel Data* (2003) 5 Am. L. & Econ. Rev. 344, 344 [arguing the existence of a deterrent effect].)

However, even if there were some way to conclude that a proper, flawlessly functioning death penalty[98] had a deterrent effect, that is not what exists in California today. As explained above, the government seeks death in less than 10% of cases. (*Chivalry Is Not Dead, supra,* 27 Berkeley J. Gender, L. & J. at p. 93.) The infrequency with which the death penalty is imposed certainly diminishes any general deterrent effect. "Proponents of [the] argument [that the death penalty has a deterrent effect] necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of

---

[98] That is, a death penalty that imposed a death sentence in each case that was death-eligible. Thus, if the government sought the death penalty in each first-degree murder where permitted by the death penalty statute, the deterrent effect may well be different.

course, satisfies neither condition." (*Furman v. Georgia, supra,* 408 U.S. at p. 302 (conc. opn. of Brennan, J.).) Justice White also questioned the deterrent effect of a death penalty when it is used so infrequently, "Most important, a major goal of the criminal law-to deter others by punishing the convicted criminal-would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others." (*Furman v. Georgia, supra,* 408 U.S. at p. 312 (conc. opn. of White, J.).) "The death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system." (*Id.* at p. 311 (conc. opn. of White, J.).)

Further, the deterrent effect of the death penalty is also affected by the lengthy delay between crime and execution. Justice Brennan explained,

> A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

(*Furman v. Georgia, supra,* 408 U.S. at p. 302 (conc. opn. of Brennan, J.).)

The current time between conviction and execution in California exceeds that of every other state. (CCFAJ Report at p. 2, citing Later & Cauthern, *Justice Delayed? Time Consumption in Capital Appeals: A Multistate Study* (John Jay College of Criminal Justice, 2006).) Over the

past twelve years, only five capital defendants have been executed in California; each defendant spent over twenty years on death row. (See Alarcón & Mitchell, *supra,* 44 Loy. L.A. L.Rev. S41, citing http://www.cdcr.ca.gov/Capital_ Punishment /Inmates_Executed.html (last visited Apr. 9, 2011).) In fact, as one commentator aptly noted, "there have been fewer executions in California than deaths by lightning strike." (Sara Colón, Capital Crime: *How California's Administration of the Death Penalty Violates the Eight Amendment* (2009) 97 Cal. L.Rev. 1377.) Thus, the fact that the death penalty is not carried out swiftly weakens its deterrent effect.

In addition to the infrequency of use, as noted above, California has significant regional disparities in the use of the death penalty. (Pierce & Radelet, *supra,* 46 Santa Clara L.Rev. at p. 27.) Consequently, there can be little successful general deterrence when defendants have little to no fear of the death penalty based upon their location.

Under this consideration, the argument is not just whether the death penalty serves as a deterrent. Rather, the question is whether the death penalty serves as a *greater deterrent* than life imprisonment. Due to the death penalty's infrequent use, the lengthy delay between conviction and execution, and the regional disparities, there is no basis to believe that, under the current system, the death penalty serves as a greater deterrent than a sentence of life imprisonment.

ii. THE DEATH PENALTY DOES NOT FURTHER THE GOAL OF RETRIBUTION BETTER THAN A SENTENCE OF LIFE IN PRISON

The second inquiry is whether the death penalty furthers the penal system's goal of providing victims with retribution more effectively than life

imprisonment. (*Gregg v. Georgia, supra,* 428 U.S. at p. 183.) "Shortly stated, retribution in this context means that criminals are put to death because they deserve it." (*Furman v. Georgia, supra,* 408 U.S. at p. 304 (conc. opn. of Brennan, J.).)

In the context of retribution, the infrequent use of the death penalty and the delay between conviction and execution, discussed above, are also applicable considerations. (*Id.* at p. 303 (conc. opn. of Brennan, J.) ["If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes"].) As Justice White explained, "[W]hen imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said . . . that community values are measurably reinforced by authorizing a penalty so rarely invoked." (*Id.* at p. 312 (conc. opn. of White, J.).)

Further, "[t]he failures in the administration of California's death penalty law create cynicism and disrespect for the rule of law, increase the duration and costs of confining death row inmates, weaken any possible deterrent benefits of capital punishment, increase the emotional trauma experience by murder victims' families, and delay the resolution of meritorious capital appeals." (CCFAJ Report at 4 (footnote omitted).) As one commentator noted, "The death penalty's inability to achieve the penological goals its advocates identify can be blamed on three features of modern capital punishment. First, the death penalty is very rarely imposed, and when it is imposed, death sentences are very rarely carried out. Second, even when a death sentence is both imposed and carried out, the typical period of delay between sentencing and execution is so great that it

undermines many of the stated purposes of capital punishment. Third, regardless of whether death sentences ultimately are carried out, residual uncertainty about the prisoner's guilt, combined with substantial opposition to the use of the penalty, greatly dilutes the punishment's efficacy and distracts the public from what is intended to be a powerful and expressive 'teaching moment.'" (Covey, *supra,* 28 Ga. St. U. L.Rev. at p. 1089-1090.) Consequently, California's death penalty scheme, along with its incidental repercussions, does not more effectively accomplish the goal of retribution than a sentence of life imprisonment.

As set forth above, Appellant asserts that this Court should, in accordance with the concurring opinions in *Furman*, find that the death penalty scheme in California is impermissibly arbitrary. Further, the four factors proposed by Justice Brennan, taken together, show that the continued imposition of the death penalty "violates the command of the Clause that the State may not inflict inhuman and uncivilized punishment upon those convicted of crimes." (*Furman v. Georgia, supra,* 408 U.S. at pp. 275, 282, 285-286 (conc. opn. of Brennan, J.).) Thus, Appellant asks this Court to find that the continued use of death as a punishment constitutes cruel and unusual punishment.

N. THE PROCEDURAL PROVISIONS OF CALIFORNIA'S DEATH PENALTY STATUTE, ALONE OR CUMULATIVELY, CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT

In addition to the violations of the Eighth Amendment's prohibition against cruel and unusual punishment inherent in the substantive death penalty law, California's death penalty scheme is also constitutionally infirm due to its failure to provide proper safeguards. (See U.S. Const., 5th, 6th, 8th, & 14th Amends.; see also Cal. Const. art. I.) When a defendant's

life is at stake, the United States Supreme Court "has been particularly sensitive to insure that every safeguard is observed." (*Gregg v. Georgia* (1976) 428 U.S. 153, 187 [96 S.Ct. 2909, 49 L.Ed.2d 859], citing *Powell v. Alabama* (1932) 287 U.S. 45, 71 [53 S.Ct. 55, 77 L.Ed. 158].)

This Court has considered most of California's capital sentencing scheme features, identified below, in isolation, without considering their cumulative impact. This analytic approach is constitutionally defective, as the United States Supreme Court has warned, "The constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6 [126 S.Ct. 2516, 165 L.Ed.2d 429]; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [104 S.Ct. 871, 79 L.Ed.2d 29].) As set forth herein, California's death penalty scheme, alone or cumulatively, as interpreted or applied, violates constitutional protections.

1. PENAL CODE SECTION 190.3, SUBDIVISION (a), IS OVERLY BROAD, ALLOWING FOR THE ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

The purpose of Penal Code section 190.3 is to inform the jury what factors it should consider in assessing the appropriate penalty. Specifically, section 190.3, subdivision (a), provides that the jury should consider the "circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1." Section 190.3, subdivision (a), however, has been used so arbitrarily and capriciously that it violates both the federal guarantee of due process of law and the Fifth, Sixth, Eighth and Fourteenth

Amendments.[99] (See *Furman v. Georgia, supra,* 408 U.S. at p. 242 (conc. opn. of Douglas, J.) ["There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with . . . irregular application of harsh penalties and . . . to forbid arbitrary and discriminatory penalties of a severe nature"].)

This Court has allowed for an extraordinarily expanded application of Penal Code section 190.3, subdivision (a), permitting aggravating factors based on remarkably attenuated facts. (See, e.g., *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10 [253 Cal.Rptr. 863, 65 P.2d 70], cert. den. (1990) 494 U.S. 1038 [110 S.Ct. 1500, 108 L.Ed.2d 635] [allowing aggravating factors based upon the defendant having sought to conceal evidence three weeks after the crime]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-582 [286 Cal.Rptr. 628, 817 P.2d 893], cert. den. (1992) 505 U.S. 1224 [112 S.Ct. 3040, 120 L.Ed.2d 908] [allowing aggravating factors based upon the defendant having had a "hatred of religion"]; *People v. Hardy, supra,* 2 Cal.4th at p. 204 [allowing aggravating factors based upon the defendant threatening witnesses after defendant's arrest]; *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn.35 [259 Cal.Rptr. 630, 774 P.2d 659], cert. den. (1990) 496 U.S. 931 [110 S.Ct. 2632, 110 L.Ed.2d 651] [allowing aggravating factors based upon the defendant disposing of the victim's body in a manner that precluded its recovery].) In fact, prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. (*Tuilaepa v. California, supra,* 512 U.S. at pp. 986-988 (dis. opn. of Blackmun, J.) ["Prosecutors

[99] Penal Code section 190.3, subdivision (a), has survived a challenge under the Eighth Amendment for vagueness. (See *Tuilaepa v. California* (1994) 512 U.S. 967, 980 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

have argued . . . that 'circumstances of the crime' constitutes an aggravating factor because the defendant killed the victim for some purportedly aggravating motive . . . or . . . for no motive at all; because defendant killed in cold blood, or in hot blood; because defendant attempted to conceal his crime, or made no attempt to conceal it . . . ."].) Thus, it is apparent that section 190.3, subdivision (a), is used to embrace facts which are inevitably present in every homicide, and allows any conceivable circumstance of a crime—even circumstances directly opposed to each other—to justify the imposition of the death penalty. (See *id.* at pp. 987-988.)

Over the past decade, this Court has repeatedly refuted and summarily denied the argument that section 190.3, subdivision (a), results in the arbitrary and capricious imposition of death. (See *People v. Dykes, supra,* 46 Cal.4th at p. 813; *People v. Williams* (2008) 43 Cal.4th 584, 648 [75 Cal.Rptr.3d 691, 181 P.3d 1035]; *People v. Robinson* (2005) 37 Cal.4th 592, 655 [36 Cal.Rptr.3d 760, 124 P.3d 363]; *People v. Brown* (2004) 33 Cal.4th 382, 401 [15 Cal.Rptr.3d 624, 93 P.3d 244]; *People v. Prieto* (2003) 30 Cal.4th 226, 276 [133 Cal.Rtpr.2d 18, 66 P.3d 1123]; *People v. Lewis* (2001) 26 Cal.4th 334, 394-395 [110 Cal.Rptr.2d 272, 28 P.3d 34].) This Court's reasoning underlying the denial of this argument was set out in *People v. Jenkins* (2000) 22 Cal.4th 900, 1050-1053 [95 Cal.Rptr.2d 377, 997 P.2d 1044]:

> It is not appropriate, however, that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. . . . [¶] . . . [Section 190.3, factor (a)] is not so vague as to risk 'wholly arbitrary and capricious action' [citation]; the jury is engaged in an individualized sentencing process [citation] and the jury appropriately has very broad discretion in determining whether the death penalty should be imposed. A jury should consider the circumstances of the crime in determining penalty [citation],

> but this is an individualized, not a comparative function. The jury may conclude that the circumstances that a murder was committed with cold premeditation is aggravating in a particular case, while in another case another jury may determine that the circumstance that a murder was committed in a murderous frenzy is an aggravating factor.

(*Id.* at pp. 1052-1053.)

This analysis focuses on the fact that defendants have argued that the "circumstances of the crime" factor is improper because it encompasses facts that are inherently contradictory. However, this analysis—which has been used as the basis of denying this argument for over a decade—ignores the fact that the "circumstances of the crime" factor is now used so broadly by the government that it encompasses facts that are tangentially related to the actual crime. Section 190.3, subdivision (a), has been interpreted so expansively as to serve as the basis for admitting evidence under the rubric of "victim impact," which allows the victim's relatives to present highly emotional and inflammatory testimony about the grief they have suffered as a result of the crime. (See, e.g., *People v. Robinson, supra*, 37 Cal.4th at 592.) Essentially, under section 190.3, subdivision (a), almost every aspect of murder—even those at the brink of relevance to the actual crime—have been characterized by prosecutors as "aggravating" within the statute's meaning. Moreover, this Court has never required a limiting instruction for section 190.3, subdivision (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 Cal.3d 26, 78 [246 Cal.Rptr. 209, 753 P.2d 1]; see *People v. Adcox, supra,* 47 Cal.3d at p. 270; see also CALJIC No. 8.88 (2006).)

In practice, the broad "circumstances of the crime" provision of section 190.3 permits indiscriminate imposition of the death penalty based

upon nothing other than "a particular set of [attenuated] facts surrounding a murder," as though those facts "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, supra,* 486 U.S. at p. 363, discussing the holding in *Godfrey v. Georgia, supra,* 446 U.S. 420.) Viewing section 190.3, subdivision (a), in the context of how it is actually used, it is evident that any fact that is part of a murder, even a fact that is on the outer periphery of relevance to the crime, can be an "aggravating circumstance." As used, the term "aggravating circumstance" is devoid of any meaning, and its use allows arbitrary and capricious death sentences, in violation of the Federal Constitution.

Ultimately, Penal Code section 190.3, subdivision (a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because it has been applied in an uneven and arbitrary manner. Thus, Appellant's sentence of death should be overturned.

2. THE DEATH PENALTY STATUTE AND ACCOMPANYING JURY INSTRUCTIONS FAIL TO SET FORTH THE APPROPRIATE BURDEN OF PROOF

The right to due process "entitle[s] a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." (See *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].) As set forth below, the California death penalty scheme deprives Appellant of his fundamental right to due process because California's death penalty fails to require the essential burden of proof.

* * *

a. THE CALIFORNIA DEATH PENALTY STATUTE IS UNCONSTITUTIONAL IN THE WAKE OF *APPRENDI, RING, BLAKELY*, AND *CUNNINGHAM*

In *People v. Fairbank, supra,* 16 Cal.4th at p. 1255, this Court explained, "[n]either 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 . . . ." Consistent with the *Fairbank* Court's explanation, Appellant's jury was not told that it had to unanimously find any aggravating factor true beyond a reasonable doubt, except for Penal Code section 190.3, subdivision (b), concerning prior criminality. (See 13RT 2748:21-25, 2755-2790.) Further, the jurors were not told that they needed to unanimously find beyond a reasonable doubt that aggravating factors outweighed mitigating factors before determining whether or not to impose a death sentence, nor were they told they must find that death is the appropriate sentence. (See *id.*)

The United States Supreme Court, however, has squarely rejected the type of procedure applied in California capital cases. (*Apprendi v. New Jersey, supra,* 530 U.S. 466, 490 ["any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"][100]; *Ring v. Arizona, supra,* 536 U.S. at p. 609 ["Because Arizona's enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,'

---

[100] In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi v. New Jersey, supra,* 530 U.S. at p. 490.)

[citation], the Sixth Amendment requires that they be found by a jury"][101]; *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] [applying the rule expressed above in *Apprendi* to the trial court's imposition of a sentence that was thirty-seven months greater than the possible maximum sentence][102]; and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] [applying the rule expressed in *Apprendi* to California's determinate sentencing law ("DSL")].[103]) Further, the high court has reaffirmed its rule that "[a]ny fact (other than a prior

---

[101] In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring v. Arizona, supra,* 536 U.S. at pp. 596-597.)

[102] In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." (*Blakely v. Washington, supra,* 542 U.S. at p. 299.) The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the aggravating factors was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Ibid.*) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at p. 313.) In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that, other than a prior conviction, any fact that increases the penalty 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." (*Id.* at p. 304.)

[103] In *Cunningham*, the high court rejected this Court's interpretation of *Apprendi*, and found that California's DSL requires a jury finding beyond a reasonable doubt of any fact used to enhance a sentence above the middle range spelled out by the legislature. (*Cunningham v. California, supra,* 549 U.S. 270.)

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." (*United States v. Booker* (2005) 543 U.S. 220, 244 [125 S.Ct. 738, 160 L.Ed.2d 621].[104])

As set forth herein, the California death penalty statute, as interpreted by this Court, fails to comport with the precedent set forth by the United States Supreme Court in *Apprendi*, *Ring*, *Blakely*, and *Cunningham*. Thus, California's death penalty scheme is unconstitutional, and its imposition on Appellant is in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments.

i. THE DEATH PENALTY FAILS TO REQUIRE THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT

Under the decisions of this Court, California law does not require that any aggravating factor in Penal Code section 190.3 be found true beyond a reasonable doubt during the penalty phase of a defendant's trial, except as to proof of prior criminality. (*People v. Fairbank, supra,* 16 Cal.4th 1223; see *People v. Hawthorne, supra,* 4 Cal.4th at p. 79 [penalty phase

---

[104] In *United States v. Booker, supra,* 543 U.S. 220, the nine justices split to write two different majority opinions. Justice Stevens, writing for a 5-4 majority, found that the United States Sentencing Guidelines were unconstitutional because they set mandatory sentences based on judicial findings made by a preponderance of the evidence. *Booker* reiterates 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." (*Id.* at p. 244.)

determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

This Court has repeatedly rejected the applicability of *Apprendi*, *Ring*, *Blakely*, and *Cunningham* by comparing the capital sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Demetrulias, supra,* 39 Cal.4th at p. 41; *People v. Dickey* (2005) 35 Cal.4th 884, 930-931 [28 Cal.Rptr.3d 647, 111 P.3d 921]; *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32 [132 Cal.Rptr.2d 271, 65 P.3d 749]; *People v. Prieto, supra,* 30 Cal.4th at p. 275.) In *People v. Black* (2005) 35 Cal.4th 1238, 1244 [29 Cal.Rptr.3d 740, 113 P.3d 534], judg. vacated and cause remanded for further consideration in light of *Cunningham v. California, supra,* 549 U.S. 270, this Court addressed the issue of whether a defendant is constitutionally entitled to a jury trial on the aggravating factors that justify an upper term sentence or a consecutive sentence. This Court held that a defendant has no constitutional right to a jury finding as to the facts relied on by the trial court to impose an aggravated, or upper-term sentence, notwithstanding *Apprendi*, *Blakely*, and *Booker*. The DSL "simply authorize[s] a sentencing court to engage in the type of factfinding that traditionally has been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range." (*Id.* at p. 1254.)

However, the United States Supreme Court explicitly rejected this reasoning two years later in *Cunningham v. California, supra,* 549 U.S. 270.[105] In *Cunningham*, the United States Supreme Court applied to the

---

[105] In *Cunningham*, the United States Supreme Court cited, with approval, language from Justice Kennard's concurring and dissenting opinion in *People v. Black*: "Nothing in the high court's majority opinions in *Apprendi, Blakely*, and *Booker* suggests that the constitutionality of a state's sentencing scheme turns on whether, in the words of the majority

California DSL the rule that any fact which exposed a defendant to a greater potential sentence must be found by a jury to be true beyond a reasonable doubt. "[T]he very inquiry *Apprendi's* bright-line rule was designed to exclude" is whether a defendant's basic jury-trial right is preserved, even though some facts essential to punishment are not found by a jury beyond a reasonable doubt. (*Id.* at p. 291.) After reviewing California's DSL, the United States Supreme Court held that *Black's* interpretation of the DSL "violates *Apprendi's* bright-line rule: Except for a prior conviction, 'any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and found beyond a reasonable doubt.' [citation omitted]." (*Id.* at pp. 288-289.)

Thus, in the wake of *Cunningham*, it is manifest that in determining whether or not *Apprendi*, *Ring*, and *Blakely* apply to the penalty phase of a capital case in California, the relevant questions are: (1) whether death is the statutory maximum penalty for an individual convicted of first degree murder; and (2) whether or not factual findings are required to increase the penalty to death.

aa. DEATH IS NOT THE MAXIMUM PENALTY FOR A DEFENDANT CONVICTED OF FIRST-DEGREE MURDER

This Court has held that since the maximum penalty for one convicted of first-degree murder with a special circumstance is death (see Pen. Code, §190.2(a)), *Apprendi* does not apply. (*People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14 [106 Cal.Rptr.2d 575, 22 P.3d 347].)

---

here, it involves the type of factfinding 'that traditionally has been performed by a judge.'" (*Cunningham v. California, supra,* 549 U.S. at p. 289, citing *People v. Black, supra,* 35 Cal.4th at p. 1253 (conc. & dis. opn. Kennard, J.).)

This pronouncement, however, fails to comport with the actual scheme of California's sentencing law.

Penal Code section 190, subdivision (a), prescribes three types of punishments for individuals guilty of first-degree murder: death, imprisonment in the state prison for life without the possibility of parole ("LWOP"), or imprisonment in the state prison for a term of 25 years to life. These punishments conform to the DSL regime, which similarly prescribes three terms of imprisonment—a lower, middle, and upper term sentence. In *Cunningham*, the United States Supreme Court recognized that the middle term was the most severe penalty that could be imposed by the sentencing judge without further factual findings. "In sum, California's DSL, and the rules governing its application, direct the sentencing court to start with the middle term, and to move from that term only when the court itself finds and places on the record facts—whether related to the offense or the offender—beyond the elements of the charged offense." (*Cunningham v. California, supra,* 549 U.S. at p. 279.)

Similarly, Penal Code section 190.3 mandates that the trier of fact "shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances."[106] That

---

[106] On the other hand, a sentence of life imprisonment cannot be imposed unless the trier of fact finds the existence of mitigating circumstances and that those mitigating circumstances outweigh aggravating circumstances. (Pen. Code, §190.3.) California's death penalty statute, however, is silent on a defendant's penalty when the trier of fact fails to find that aggravating circumstances do not outweigh mitigating circumstances and when mitigating circumstances do not outweigh aggravating circumstances (i.e., situations where the trier of fact may find neither any aggravating nor mitigating circumstances, or when the aggravating and mitigating circumstances are equally balanced). (See *id.*) In this respect, California's death penalty statute is unconstitutionally ambiguous. Unlike death penalty statutes in other states, Penal Code section 190.3 has provided no contingency for these types of circumstances. (Compare Pen. Code, §190.3

is, the trier of fact must first find an aggravating circumstance exists, and then weigh the aggravating circumstances against the mitigating circumstances. Without the existence of an aggravating circumstance, the trier of fact cannot impose a sentence of death.

Thus, it is apparent that death is not the maximum penalty that may be imposed. A defendant found guilty of first-degree murder with a special circumstance is merely *eligible* for death or life imprisonment. An aggravating circumstance must be found to exist and outweigh any existing mitigating circumstances before a death sentence can be imposed; thus, the death penalty is not automatically applied and is not the maximum penalty.

bb. CALIFORNIA'S DEATH PENALTY STATUTE REQUIRES FINDINGS OF AGGRAVATING FACTORS TO IMPOSE DEATH

After the United States Supreme Court decided *Ring v. Arizona, supra,* 536 U.S. 584, this Court determined that *Ring*'s holding did not invalidate California's death penalty law. "Because any finding of aggravating factors during the penalty phase does not 'increase[] the penalty for a crime beyond the prescribed statutory maximum' [citation],

---

with Ariz. Rev. Stat. §13-752 ["If the trier of fact unanimously finds that an aggravating circumstance has not been proven, the defendant is entitled to a special finding that the aggravating circumstance has not been proven. If the trier of fact unanimously finds no aggravating circumstances, the court shall then determine whether to impose a sentence of life or natural life on the defendant"]; Ark. Code Ann. §5-4-603 ["If the jury does not make any finding . . . the court shall impose a sentence of life imprisonment without parole"]; 11 Del. Code §4209 [if the existence of at least one statutory aggravating circumstance has not been found beyond a reasonable doubt by the judge or jury, "the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life"].)

Ring imposes no new constitutional requirements on California's penalty phase proceedings." (*People v. Prieto, supra,* 30 Cal.4th at p. 263.)

This Court's explanation that a finding of aggravating factors during the penalty phase will not increase the penalty for first-degree murder beyond the prescribed statutory maximum, however, is imprecise. This argument was similarly advanced in *Ring v. Arizona, supra,* 536 U.S. 584.[107] As a preliminary, Ring was convicted of felony murder occurring in the course of an armed robbery. (*Id.* at p. 591.) "[T]he evidence admitted at trial failed to prove, beyond a reasonable doubt that [Ring] was a major participant in the armed robbery or that he actually murdered [the victim]." (*Ibid.*) After Ring's sentencing hearing, the trial judge sentenced him to death based on the court's findings in aggravation that Ring committed the offense in expectation of receiving something of pecuniary value, and that the offense was committed in a heinous, cruel or depraved manner. (*Id.* at p. 594.) Ring appealed, challenging the constitutionality of Arizona's capital sentencing scheme, and the State responded that the United States Supreme Court previously upheld Arizona's death penalty scheme in *Walton v. Arizona* (1990) 497 U.S. 639 [110 S.Ct. 3047, 111 L.Ed.2d 511], overruled by *Ring v. Arizona, supra,* 536 U.S. 584.[108] Understanding that it was

---

[107] In *Ring*, the United States Supreme Court explained the death sentence procedure in Arizona. (*Ring v. Arizona, supra,* 536 U.S. at p. 587.) Similar to when a defendant is found guilty of first-degree murder and a special circumstance in California, Penal Code section 190.2, in Arizona, once a jury has found the defendant guilty of all the elements of an offense which carries death as a maximum penalty, a defendant only has two sentencing options: life imprisonment or death. (*Ibid.*) Such a defendant cannot receive the death sentence unless a judge makes a critical factual determination that a statutory aggravating factor exists. (*Ring v. Arizona, supra,* 536 U.S. at p. 587.)

[108] In *Apprendi*, the United States Supreme Court asserted that it could reconcile its decision with *Walton*. "The key distinction . . . was that a

bound by the Supremacy Clause to apply *Walton*, the Arizona Supreme Court rejected Ring's constitutional claim. (*Id.* at p. 596.)

In order to reconcile its decision with the contradictory reasoning in both *Walton* and *Apprendi*, the Arizona Supreme Court reasoned that, because Arizona law specifies death or life imprisonment as the only sentencing options for the first-degree murder of which Ring was convicted, he was sentenced within the range of punishment authorized by the jury verdict. (*Id.* at p. 604.) The United States Supreme Court rejected this argument, explaining that the "'relevant inquiry is one not of form, but of effect.'" (*Ibid.*, citing *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) The *Ring* Court reasoned, "In effect, 'the required finding [of an aggravating circumstance] expos[ed] [Ring] to a greater punishment than that authorized by the guilty verdict.'" (*Id.* at p. 604.) "The Arizona first-degree murder statute 'authorizes a maximum penalty of death only in a formal sense,' [citation], for it . . . require[s] the finding of an aggravating circumstance before the imposition of the death penalty." (*Ibid.*)

Similar to Arizona's death penalty statute in *Ring*, a conviction in California of first-degree murder with a finding of one or more special circumstances "authorizes a maximum penalty of death only in a formal sense." (*Id.* at p. 604, citing *Apprendi v. New Jersey, supra,* 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) Section 190, subdivision (a), provides that the punishment for first-degree murder is 25 years to life, LWOP, or death. Neither death, nor LWOP, can be imposed unless the jury finds a special circumstance under Penal Code section 190.2. That is, death is not an

---

conviction of first-degree murder in Arizona carried a maximum sentence of death. '[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, *rather than a lesser one*, ought to be imposed.'" (*Ring v. Arizona, supra,* 536 U.S. at p. 602.)

available option unless the jury makes further findings that one or more aggravating circumstances exists, and that the aggravating circumstances substantially outweigh the mitigating circumstances. (See Pen. Code, §190.3; CALJIC No. 8.88.) "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona, supra,* 536 U.S. at pp. 585-586.) "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 v. Washington, supra,* 42 U.S. at p. 328 (dis. opn. Breyer, J.).)

The issue of the Sixth Amendment's applicability hinges on whether, as a matter of effect, the trier of fact must make additional findings during the penalty phase before determining whether or not the death penalty can be imposed. (*Apprendi v. New Jersey, supra,* 530 U.S. 466; *Cunningham v. California, supra,* 549 U.S. 270.) In California, the trier of fact must make additional findings during the penalty phase before a death sentence can be imposed. (Pen. Code, §190.3.) The California death penalty statute, however, fails to require the trier of fact to find aggravating factors beyond a reasonable doubt. Consequently, the death penalty statute contravenes the rule set forth by the United States Supreme Court in *Apprendi.*

ii. THE DEATH PENALTY IS UNCONSTITUTIONAL BECAUSE IT FAILS TO REQUIRE FINDINGS BEYOND A REASONABLE DOUBT

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 [118 S.Ct. 2246, 141 L.Ed.2d 615] ["the death penalty is unique 'in both its severity

and its finality'"].) As discussed above, before sentencing to death a defendant convicted of first-degree murder with a finding of a special circumstance, a jury must first decide whether any aggravating circumstances exist in the case before it. (Pen. Code, §190.3; CALJIC No. 8.88.) If aggravating circumstances exist, the jury must then weigh them against proffered mitigating circumstances. (Pen. Code, §190.3.)

Despite the great magnitude of the interest at stake—a human life—California's death penalty statute fails to require that the trier of fact find beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, and that death is the appropriate sentence. (See *id.*) This final step in California's capital sentencing procedure is a moral and a normative decision, and this Court has used this fact to reject the claim that failing to require the jury to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors deprives Appellant of due process. (*People v. McKinzie* (2012) 54 Cal.4th 1302, 1366 [144 Cal.Rptr.3d 427, 281 P.3d 412] ["[u]nlike the guilt determination, 'the sentencing function is inherently moral and normative, not factual' . . . and, hence, not susceptible to a burden-of-proof quantification"].)

This Court's refusal to require the trier of fact to find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate penalty is not without consequence. As it stands, the basis for a defendant's death sentence is uncertain, and the significance and accuracy of the trier of fact's findings in aggravation are disputable. (*People v. Jackson, supra,* 28 Cal.3d at p. 337 (dis. opn. of Mosk, J.) ["the jury may condemn the defendant to die without even being able to agree on which aggravating factors were proved—some jurors basing their verdict on one factor, other jurors on another"].) Further,

by failing to require the trier of fact to find beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances and that death is the appropriate sentence, the California death penalty scheme contravenes the United States Supreme Court's precedent set forth in *Apprendi*, and violates Appellant's rights under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A determination that the aggravating factors outweigh the mitigating factors is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *Ring v. Arizona, supra,* 536 U.S. 584; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253, 257 (en banc); *State v. Ring* (Az. 2003) 65 P.3d 915 (en banc); *Woldt v. People* (Colo.2003) 64 P.3d 256, 263 (en banc); see also Bryan A. Stevenson, *The Ultimate Authority on the Ultimate Punishment: The Requisite Role of the Jury in Capital Sentencing* (2003) 54 Ala L.Rev. 1091, 1126-1127 [noting *Ring* applies not only to the finding that an aggravating circumstance is present, but also to whether aggravating circumstances outweigh mitigating circumstances, since both findings are essential predicates for a sentence of death].) Thus, before a sentence of death may be imposed, the trier of fact must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors set forth in Penal Code section 190.3.

In accordance with the Supreme Court's decision in *Ring*, "[c]apital defendants, no less than non-capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (*Ring v. Arizona, supra,*

536 U.S. at pp. 589, 609.) For the reasons stated, this Court should find that the death penalty scheme in California violates Appellant's Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution.

aa. IF NO BURDEN OF PROOF IS REQUIRED, THE JURY SHOULD HAVE BEEN INSTRUCTED ON THE LACK OF A BURDEN

State law provides that the prosecution always bears the burden of proof in a criminal case. (Evid. Code, §520.) Evidence Code section 520 creates a legitimate state expectation as to the way a criminal prosecution will be decided, and therefore appellant is constitutionally entitled under the Fourteenth Amendment to the burden of proof provided by that statute. (Cf. *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [100 S.Ct. 2227, 65 L.Ed.2d 175][defendant constitutionally entitled to procedural protections afforded by state law].) Accordingly, Appellant's jury should have been instructed that the prosecution had the burden of persuasion regarding the existence of any factor in aggravation, whether aggravating factors outweighed mitigating factors, and the appropriateness of the death penalty, and that it was presumed that life without parole was an appropriate sentence.

CALJIC Nos. 8.85 and 8.88, the instructions given here (13RT 2755-2765), fail to provide the jury with the guidance required for administration of the death penalty to meet constitutional minimum standards and consequently violate the Sixth, Eighth, and Fourteenth Amendments. This Court has held that capital sentencing is not susceptible to burdens of proof or persuasion because the task is largely moral and normative, and thus is unlike other sentencing. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1136-1137 [12 Cal.Rptr.3d 592, 88 P.3d 498].) This Court

also has rejected any instruction on the presumption of life, discussed below. (*People v. Arias* (1996) 13 Cal.4th 92, 190 [51 Cal.Rptr.2d 770, 913 P.2d 980].) Appellant is entitled to jury instructions that comport with the federal Constitution and thus urges the Court to reconsider its decisions in *Lenart* and *Arias*.

Even presuming it were permissible not to have any burden of proof, the trial court erred prejudicially by failing to articulate that fact to the jury. (Cf. *People v. Williams* (1988) 44 Cal.3d 883, 960 [245 Cal.Rptr. 336, 75 P.2d 395][upholding jury instruction that prosecution had no burden of proof in penalty phase under 1977 death-penalty law].) Absent such an instruction, there is the possibility that a juror would vote for the death penalty because of a misallocation of a nonexistent burden of proof.

bb. THE JURY SHOULD HAVE BEEN INSTRUCTED THAT THERE IS A PRESUMPTION OF LIFE

The presumption of innocence is a core constitutional and adjudicative value essential to protect the accused in a criminal case. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503 [965 S.Ct. 1691, 48 L.Ed.2d 126].) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1993) 507 U.S. 272 [113 S.Ct. 1222, 122 L.Ed.2d 620].) The trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated Appellant's right to due process of law (U.S. Const., 14th Amend.), his right to be free from

cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends.), and his right to equal protection of the laws (U.S. Const., 14th Amend.).

In *People v. Arias, supra,* 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this brief demonstrate, California's death penalty law is remarkably deficient in the protections needed to ensure the consistent and reliable imposition of capital punishment. Therefore, a presumption of life instruction is constitutionally required in all cases.

3. CALIFORNIA'S DEATH PENALTY REQUIREMENTS ARE CONSTITUTIONALY INFIRM BECAUSE THERE IS NO REQUIREMENT FOR WRITTEN FINDINGS BY THE JURY

Pursuant to California's death penalty law, the jury was not required to provide written or other specific findings regarding aggravating factors, depriving Appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543 [107 S.Ct. 837, 93 L.Ed.2d 934]; *Gregg v. Georgia, supra,* 428 U.S. at p. 195.) Given that California juries have complete discretion without any guidance on how to weigh potential aggravating and mitigating circumstances (*People v. Fairbank, supra,* 16 Cal.4th at p. 1255, citing *Tuilaepa v. California, supra,* 512 U.S. at p. 979), the failure to require written findings makes it impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83

S.Ct. 745, 9 L.Ed.2d 770], overruled on another ground by *Keeney v. Tamayo-Reyes* (1992) 504 U.S. 1 [112 S.Ct. 1715, 118 L.Ed.2d 318].)

This Court has repeatedly and summarily denied the argument that the absence of written findings by the jury renders the California death penalty scheme unconstitutional. (See *People v. Mendoza, supra,* 52 Cal.4th at p. 1097; *People v. Russell* (2010) 50 Cal.4th 1228, 1274 [117 Cal.Rptr.3d 615, 242 P.3d 68]; *People v. Geier* (2007) 41 Cal.4th 555, 620 [61 Cal.Rptr.3d 580, 161 P.3d 104]; *People v. Stitely* (2005) 35 Cal.4th 514, 574 [26 Cal.Rptr.3d 1, 108 P.3d 182]; *People v. Davenport* (1995) 11 Cal.4th 1171, 1232 [47 Cal.Rptr.2d 800, 906 P.2d 1068]; *People v. Fauber* (1992) 2 Cal.4th 792, 859 [9 Cal.Rptr.2d 24, 831 P.2d 249]; *People v. Belmontes* (1988) 45 Cal.3d 744, 805 [248 Cal.Rptr. 126, 755 P.2d 310]; *People v. Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People v. Jackson* (1980) 28 Cal.3d 264, 315-319 [168 Cal.Rptr. 603, 618 P.2d 149], cert. den. (1981) 450 U.S. 1035 [101 S.Ct. 1750, 68 L.Ed.2d 232].) The basis for this Court's rejection of this argument is found in *People v. Frierson* (1979) 25 Cal.3d 142, 179 [158 Cal.Rptr. 281, 509 P.2d 587].

In *Frierson*, this Court explained that the death penalty law in California contains adequate alternative safeguards for assuring careful appellate review. (*Ibid.*) "First, under the California law, in determining whether special circumstances exist to justify the death penalty, the trier of fact must make a special finding of the truth of each alleged special circumstance, and in case of any reasonable doubt as to a particular alleged special circumstance, the defendant is entitled to a finding that it is not true.[109] In addition, the trial court, in ruling upon the automatic application

[109] The fact that the trier of fact must make a special finding of the truth of each alleged special circumstance does not dispose of the argument that

for modification of verdict, must review the evidence, consider the aggravating and mitigating circumstances, make its own independent determination as to weight of the evidence supporting the jury's findings and verdict, and state on the record the reasons for its findings." (*Ibid.*)

In *People v. Guerra, supra,* 37 Cal.4th at p. 1161, this Court elaborated on the duties of a trial court when ruling on an automatic application for modification of the verdict. "[T]he trial judge 'shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances . . . and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented." (*Ibid.*, citations omitted.) The trial judge does not make an independent and de novo determination. (*Ibid.*) Instead, the trial judge independently reweighs the evidence of aggravating and mitigating circumstances, and then independently determines whether the weight of the evidence supports the jury verdict. (*Ibid.*) The *Guerra* Court's explanation reveals a fatal puncture in the reasoning of the decision in *Frierson*, raising the pivotal question of how a trial court is to review a jury's findings that the aggravating circumstances outweigh the mitigating circumstances, given that the jury is not required to make written findings.

---

there are inadequate safeguards on the arbitrary and capricious imposition of the death penalty. A special finding of the truth of each alleged special circumstance is a safeguard available to defendants during the guilt phase of trial, where the finding or non-finding of a special circumstance determines whether a defendant will be eligible for death or life imprisonment. In contrast, written jury findings would be a safeguard applicable after a defendant has been found eligible for death or life imprisonment. Thus, special findings on special circumstances protect a defendant from being *eligible* for death or life imprisonment; written findings would provide a safeguard to a death sentence.

Written findings are essential for a meaningful review of the sentence imposed. (See *Mills v. Maryland* (1988) 486 U.S. 367, 383, fn. 15 [108 S.Ct. 1860, 100 L.Ed.2d 384].) Even where the decision to impose death is "normative" (*People v. Demetrulias*, *supra*, 39 Cal.4th at pp. 41-42) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [14 Cal.Rptr.2d 133, 841 P.2d 118]), its basis can, and should be, articulated. The importance of written findings is recognized throughout this country; post-*Furman* state capital sentencing systems have repeatedly required written findings.[110]

---

[110] See, e.g., Ark. Code Ann. §5-4-603 [jury must submit written findings]; Colo. Rev. Stat. Ann. §18-1.3-1201 [jury must be unanimous and make written findings]; Ga. Code Ann. §17-10-30 [if jury imposes death, it must designate in writing the aggravating circumstance or circumstances which it found beyond a reasonable doubt]; Ind. Code 35-50-2-9 [jury must provide a special verdict form for each aggravating circumstance alleged]; Kan. Stat. Ann. 21-661742 [the jury shall designate in writing the statutory aggravating circumstances it found beyond a reasonable doubt]; Ky. Rev. Stat. §532.025 [the jury shall designate in writing the aggravating circumstances which it found beyond a reasonable doubt]; La. Stat. Ann. Code Crim. Proc. Art. 905.7 [the form of a jury determination requires the jury to enumerate the aggravating circumstances found]; Miss. Code Ann. §99-19-101 [for the jury to impose a death sentence, it must make a unanimous and written finding]; N.H. Rev. Stat. §630:5 [the jury shall return special findings identifying any aggravating factors which are found to exist]; N.C. Gen. Stat. Ann. §15A-2000 [the foreman of the jury shall sign a writing showing the statutory aggravating circumstances found beyond a reasonable doubt]; 21 Okl. Stat. Ann. §701.11 [the jury shall designate in writing the statutory aggravating circumstances which it unanimously found beyond a reasonable doubt]; Pa. Code Stat. Ann. §9711 [the jury must set forth in such form as designated by the court the findings upon which the death sentence is based]; Code of L. S.C. 1976 §16-3-20 [the jury shall designate in writing the statutory aggravating circumstances found beyond a reasonable doubt]; S.D. Codified L. §23A-27A-5 [the jury shall designate in writing the aggravating circumstances which it found beyond a reasonable doubt]; Wyo. Stat. 1977 §6-2-102 [the jury shall designate in writing the aggravating circumstances which it unanimously found beyond a reasonable doubt].

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury.

Paradoxically, even convicted prisoners in parole hearings receive the benefit of a written finding as a procedural safeguard. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the State's wrongful conduct and show prejudice flowing from that conduct. (See generally *In re Sturm* (1974) 11 Cal.3d 258 [113 Cal.Rptr. 361, 521 P.2d 97].) The parole board is therefore required to state its reasons for denying parole. "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) The same analysis applies to the far graver decision to put someone to death.[111]

In non-capital cases, courts are required by California law to state on the record the reasons for the sentence choice. (Pen. Code, §1170(c).) It is well settled that capital cases require heightened due process.[112] (See *Beck v. Alabama, supra,* 447 U.S. 625; *Lockett v. Ohio, supra,* 438 U.S. 586;

---

[111] A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. (See Cal. Code Regs., tit. 15, §2280 et seq.)

[112] Further, as noted below, providing greater protections to a non-capital defendant than to a capital defendant would violate the equal protection clause of the Fourteenth Amendment. (See generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 536 U.S. at 584.)

Monge v. California, supra, 524 U.S. 721.) Thus, this Court should mandate that the trier of fact in a capital case is constitutionally required to identify for the record the aggravating circumstances found and the reasons for the penalty chosen.

There are no other procedural protections in California's death penalty system that would somehow compensate for the unreliability inevitably produced by the failure to require an articulation of the reasons for imposing death. The failure to require written findings thus violated not only Appellant's right to federal due process and rights under the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

4. THE LOWER COURT FAILED TO INSTRUCT THE JURY THAT THE ABSENCE OF STATUTORY MITIGATING FACTORS IS NOT AN AGGRAVATING FACTOR

As a matter of state law, factors (d), (e), (f), (g), (h), and (j) under Penal Code section 190.3 are relevant solely as possible mitigating factors. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184 [259 Cal.Rptr. 701, 774 P.2d 730]; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034 [254 Cal.Rptr. 586, 766 P.2d 1]). The jury, however, was left free to conclude that the absence of one of these sentencing factors could establish an aggravating circumstance. Thus, the jury was invited to impose a sentence of death based upon the non-existence of mitigating factors, and thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 304 [96 S.Ct. 2978, 49 L.Ed.2d 944]; *Zant v. Stephens* (1983) 462 U.S. 862, 879 [103 S.Ct. 2733, 77 L.Ed.2d 235].) Further, without proper instruction and guidance, the jury was able to erroneously

utilize a mitigating factor (for example, evidence establishing a defendant's mental illness or defect) as an aggravating factor and impose a sentence of death, in violation of both state law and the Eighth and Fourteenth Amendments.

This Court has repeatedly rejected the argument that the death penalty lacks adequate safeguards because of courts' failure to instruct that the absence of a mitigating factor is not an aggravating factor. (See *People v. McKinnon* (2011) 52 Cal.4th 610, 692 [130 Cal.Rptr.3d 590, 259 P.3d 1186]; *People v. Riggs* (2008) 44 Cal.4th 248, 328 [79 Cal.Rptr.3d 648, 187 P.3d 363]; *People v. Coddington, supra,* 23 Cal.4th at p. 639. In *People v. Livaditis* (1992) 2 Cal.4th 759, 784 [9 Cal.Rptr.2d 72, 831 P.2d 297], this Court explained that "a specific instruction to that effect is not required, at least not unless the court or parties make an improper or contrary suggestion. 'A jury properly advised about the broad scope of its sentencing discretion is unlikely to conclude that the *absence* of such unusual factors . . . is entitled to significant aggravating weight.' [Citation.]"

This assertion is incorrect. Evidence to the contrary can be found in *People v. Morrison* (2004) 34 Cal.4th 698, 730 [21 Cal.Rptr.3d 682, 101 P.3d 568]. In *Morrison*, the trial judge mistakenly believed that section 190.3, subdivisions (e) and (j), constituted aggravating factors, rather than mitigating factors. (*Id.* at pp. 727-729.) On appeal, this Court recognized that the trial court erred, but found the error to be harmless. (*Id.* at p. 729.) If an experienced judge could be misled by the language at issue, jurors can undoubtedly be expected to make the same mistake. Further, other trial judges and prosecutors have been similarly misled. (See, e.g., *People v. Montiel* (1994) 5 Cal.4th 877, 944-945 [21 Cal.Rptr.2d 705, 855 P.2d 1277]; *People v. Carpenter* (1997) 15 Cal.4th 312, 423-424 [63 Cal.Rptr.2d 1, 935 P.2d 708], superseded by statute on another ground as stated in

People v. Cottone (2013) 57 Cal.4th 269 [159 Cal.Rptr.3d 385, 303 P.3d 1163]; *People v. Cruz* (2008) 44 Cal.4th 636, 982 [80 Cal.Rptr.3d 126, 187 P.3d 970].)

A very real possibility exists that Appellant's jury imposed a death sentence based on identifying mitigating factors as potentially aggravating factors. Thus, imposition of a death sentence deprived Appellant of an important state-law created procedural safeguard and liberty interest—the right not to be sentenced to death except upon the basis of statutory aggravating factors (*People v. Boyd* (1985) 38 Cal.3d 765, 772-775 [215 Cal.Rptr. 1, 700 P.2d 782])—and violated Appellant's Fourteenth Amendment right to due process. (See *Hicks v. Oklahoma, supra,* 447 U.S. 343; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295, 1300 [holding that Idaho law specifying manner in which aggravating and mitigating circumstances are to be weighed created a liberty interest protected under the Due Process Clause of the Fourteenth Amendment]; *Campbell v. Blodgett* (9th Cir. 1993) 997 F.2d 512, 522 [same analysis applied to state of Washington].)

The likelihood that the jury in Appellant's case would have been misled as to the potential significance of the mitigating sentencing factors—Penal Code section 190.3, subdivisions (d), (e), (f), (g), (h), and (j)—was heightened by the trial court's failure to instruct that the absence of any of those factors is not a basis for imposing the death sentence. It is thus likely that Appellant's jury imposed the death sentence upon the basis of what were, as a matter of state law, mitigating factors. This violated not only state law, but the Eighth Amendment, for it made it likely that the jury treated Appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235 [112 S.Ct. 1130, 117 L.Ed.2d 367].)

From case to case, even with no difference in the evidence, sentencing juries will discern dramatically different numbers of aggravating circumstances because of differing constructions of the pattern jury instruction. Thus, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. Yet, "[c]apital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112 [102 S.Ct. 869, 71 L.Ed.2d 1].) Whether a capital sentence is to be imposed cannot be permitted to vary from case to case according to different juries' understandings of how many factors on a statutory list weigh on death's side of the scale.

5. THE DEATH PENALTY STATUTE FAILS TO REQUIRE UNANIMITY REGARDING AGGRAVATING FACTORS

At the conclusion of the penalty phase of trial, the jury was instructed to "consider, take into account, and be guided by the . . . factors" enumerated under Penal Code section 190.3. (13RT 2756-2760.) Significantly, the trial court did not instruct, nor did section 190.3 require, the trier of fact to unanimously find the existence of any aggravating factor. (See *id.*; Pen. Code, §190.3.) Because the California death penalty statute fails to require a unanimous, or even majority, decision by the jury, the possibility and likelihood exists that Appellant was sentenced to death based on an aggravating factor found by a single juror. (See *People v. Jackson, supra,* 28 Cal.3d at p. 337 (dis. opn. of Mosk, J.).) Such a sentence would be in violation of Appellant's constitutional rights to a non-arbitrary sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Gregg v. Georgia, supra,* 428 U.S. at p. 192; *Godfrey v. Georgia, supra,* 446 U.S. at pp. 428-429; *Zant v. Stephens, supra,* 462 U.S. at p. 865.)

For over three decades, this Court has repeatedly and summarily denied claims that California's death penalty statute is unconstitutional for failing to require juror unanimity. (See *People v. Tate* (2010) 49 Cal.4th 635, 712 [112 Cal.Rptr.3d 156, 234 P.3d 428]; *People v. Friend* (2009) 47 Cal.4th 1, 89 (97 Cal.Rptr.3d 1, 211 P.3d 520]; *People v. Abilez, supra,* 41 Cal.4th at p. 533; *People v. Gray* (2005) 37 Cal.4th 168, 236 [33 Cal.Rptr.3d 451, 118 P.3d 496]; *People v. Weaver* (2001) 26 Cal.4th 876, 992 [111 Cal.Rptr.2d 2, 29 P.3d 103]; *People v. Kipp* (1998) 18 Cal.4th 349, 381 [75 Cal.Rptr.2d 716, 956 P.2d 1169]; *People v. Bradford* (1997) 14 Cal.4th 1005, 1059 [60 Cal.Rptr.2d 225, 929 P.2d 544]; *People v. Crittenden* (1994) 9 Cal.4th 83, 152-153 [36 Cal.Rptr.2d 474, 885 P.2d 887]; *People v. Bacigalupo* (1993) 6 Cal.4th 457 [24 Cal.Rptr.2d 808, 862 P.2d 808]; *People v. Cox* (1991) 53 Cal.3d 618, 692 [280 Cal.Rptr. 692, 809 P.2d 351].) The basis underlying the rejection of this claim can be found in *People v. Rodriguez, supra,* 42 Cal.3d at p. 777, wherein this Court reasoned that the death penalty statute provides adequate safeguards against arbitrary death judgments and ensured the "guided" sentencing discretion required by the Eighth Amendment. (*Id.*, citing *People v. Jackson, supra,* 28 Cal.3d at pp. 315-319.)

This argument overlooks the cumulative effect of the absence of numerous safeguards in the California death penalty statue. Contrary to this Court's opinion in *Rodriguez*, an examination of California's death penalty statute as a whole reveals that several safeguards are wanting. California's death penalty statute not only fails to require jurors to unanimously find the existence of aggravating factors, but also fails to require jurors to find those factors beyond a reasonable doubt, or to even provide written findings. Further, jurors are not instructed as to which factors in section 190.3 are mitigating or aggravating.

When considering the numerous shortcomings of California's death penalty statute, this Court cannot continue to hold that the death penalty statute contains adequate safeguards against arbitrary death judgments. Requiring a jury to unanimously find an aggravating factor in favor of the death penalty will reduce the risk "that the jury may condemn the defendant to die without even being able to agree on which aggravating factors were proved—some jurors basing their verdict on one factor, other jurors on another." (*People v. Jackson, supra,* 28 Cal.3d at p. 337 (dis. opn. of Mosk, J.).) Otherwise, to permit a jury to find an aggravating factor under existing circumstances would violate Appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

6. PENAL CODE SECTION 190.3, SUBDIVISION (a) IS UNCONSTITUTIONAL BECAUSE IT FAILS TO REQUIRE INTER-CASE PROPORTIONALITY

Appellant briefly asserts that Penal Code section 190.3, subdivision (a), unconstitutionally fails to require inter-case proportionality.

In California, there is no meaningful mechanism that allows an appellate court to review whether Appellant's death penalty punishment is disproportionate to the punishment imposed on other individuals convicted of first-degree murder, with special circumstances of lying in wait and murder for financial gain. (See Pen. Code, §190.3.) This failure creates the possibility that a defendant convicted of first-degree murder with special circumstances may suffer the more severe punishment of death, whereas another defendant with the same conviction may be granted the more lenient penalty of life imprisonment. Without inter-case proportionality review, punishments may be imposed inconsistently. Consequently, the failure to require inter-case proportionality violates Appellant's right to due

process, equal protection, a fair trial, and his constitutional rights under the Eighth and Fourteenth Amendments.

7. THE USE OF ADJECTIVES "EXTREME" AND "SUBSTANTIAL" IN SECTION 190.3, SUBDIVISIONS (d) AND (g), IS UNCONSTITUTIONAL

Appellant briefly asserts that the use of the adjectives "extreme" and "substantial" in section 190.3, subdivisions (d) and (g), is unconstitutional.

Penal Code section 190.3, subdivisions (d) and (g), provide:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant: [¶] . . . [¶] (d) Whether or not the offense was committed while the defendant was under the influence of *extreme* mental or emotional disturbance. [¶] . . . [¶] (g) Whether or not defendant acted under *extreme* duress or under the *substantial* domination of another person.

(Pen. Code, §190.3(d) & (g), italics added.) The use of "extreme" and "substantial" as modifiers for potential mitigating factors serve as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

8. THE DEATH PENALTY SCHEME IS UNCONSTITUTIONAL BECAUSE IT ALLOWS RELIANCE BY THE GOVERNMENT ON UNADJUDICATED CRIMINAL ACTIVITY

Appellant briefly asserts that California's death penalty scheme unconstitutionally allows the prosecution to rely on unadjudicated criminal activity.

Inherent in any capital case is the "'special need for reliability in the determination that death is the appropriate punishment.'" (*Johnson v. Mississippi* (1988) 486 U.S. 578, 585 [108 S.Ct. 1981, 100 L.Ed.2d 575],

citing *Gardner v. Florida, supra,* 430 U.S. at pp. 363-364.) The decision to impose death must not be predicated on "factors that are constitutionally impermissible." (*Ibid.*, citing *Zant v. Stephens, supra,* 462 U.S. at pp. 884-885.) One such constitutionally impermissible factor used to impose the death penalty can be found in Penal Code section 190.3, subdivision (b), which allows the jury to consider unadjudicated criminal activity. Consequently, the use of unadjudicated criminal activity by the jury as an aggravating circumstance violated Appellant's right to due process and his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. (See *id.* at p. 586 ["indeed, it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance"]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 955.)

9. THE CALIFORNIA SENTENCING SCHEME VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION

Appellant briefly asserts that California's death penalty scheme violates his right to equal protection of the laws, in violation of the United States Constitution.

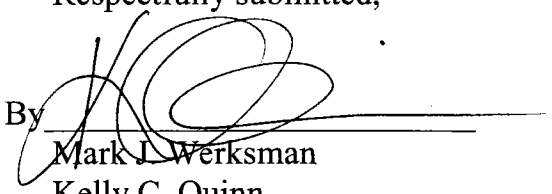
"Because the death penalty is unique 'in both its severity and its finality,' . . . an acute need for reliability in capital sentencing proceedings" is required. (*Monge v. California, supra,* 524 U.S. at p. 732, quoting *Gardner v. Florida, supra,* 430 U.S. at p. 358.) Despite this mandate, the California death penalty scheme provides significantly fewer procedural safeguards for persons facing a death sentence than are afforded to persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws under the Fourteenth Amendment.

VI.
CONCLUSION

Thus, for the foregoing reasons, Appellant James Michael Fayed respectfully requests reversal of his convictions and the judgment of death.

January 21, 2014

Respectfully submitted,



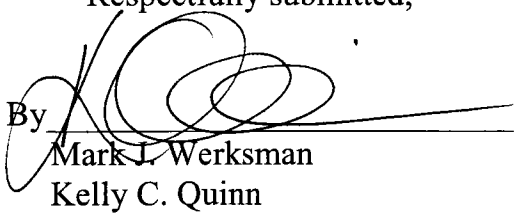
By _____
Mark J. Werksman
Kelly C. Quinn
Defendant/Appellant
JAMES MICHAEL FAYED

CERTIFICATE OF COUNSEL

Pursuant to California Rule of Court 8.204, the undersigned certifies that this brief contains 96,803 words, according to the Word word count program. The word count includes footnotes but excludes the table of contents and table of authorities.

January 21, 2014

Respectfully submitted,



By _____
Mark J. Werksman
Kelly C. Quinn
Defendant/Appellant
JAMES MICHAEL FAYED

199 F.3d 1332
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
(The Court's decision is referenced in a "Table of Decisions Without Reported Opinions" appearing in the Federal Reporter. Use FI CTA9 Rule 36-3 for rules regarding the citation of unpublished opinions.)
United States Court of Appeals, Ninth Circuit.

Michael Patrick JORDAN, Petitioner-Appellant,
v.
I.C. HAUNANI-HENRY, Respondent-Appellee.

No. 98-15844. | D.C. No. CV-96-20776-RMW. | Argued and Submitted May 11, 1999. | Decided Oct. 22, 1999.

Appeal from the United States District Court for the Northern District of California Ronald M. Whyte, District Judge, Presiding.

Before LAY,[2] PREGERSON, and HAWKINS, Circuit Judges.

Opinion

MEMORANDUM[1]

*1 Michael Patrick Jordan ("Jordan") appeals the district court's denial of his petition for a writ of habeas corpus. A jury convicted Jordan of three counts of child molestation involving his stepdaughter, Miranda. Jordan argues that the following errors occurred during his state court trial: (1) violation of his Sixth Amendment right of confrontation through the exclusion of evidence by which Jordan intended to impeach Miranda's credibility; (2) violation of his constitutional right to present evidence on his own behalf through the exclusion of evidence that Miranda had been previously molested by her uncle; and (3) violation of his due process rights through admission of the family babysitter's testimony that Jordan had molested her. For the reasons set forth below, we AFFIRM.

I. Standard of Review

Filed after April 24, 1996, this case is subject to the review provisions of the Antiterrorism and Effective Death Penalty Act ("AEDPA"). Under AEDPA, we must affirm unless the state court's ruling

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or, (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d).

"A state court decision may not be overturned on [post-AEDPA] habeas review ... because of a conflict with Ninth Circuit-based law, but rather a writ may issue only when the state court decision is contrary to, or involved an unreasonable application of, an authoritative decision of the Supreme Court." *Moore v. Calderon,* 108 F.3d 261, 264 (9th Cir.1997) (internal quotation marks omitted).

A state court ruling is "unreasonable" under AEDPA if it is "so clearly incorrect that it would not be debatable among reasonable jurists." *Drinkard v. Johnson,* 97 F.3d 751, 769 (5th Cir.1996), *cited in Jeffries v. Wood,* 114 F.3d 1484, 1500 (9th Cir.1997) (en banc).

Additionally, we must find that the state court's error "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (quoting *Kotteakos v. United States,* 328 U.S. 750, 776 (1946)).

II. Exclusion of Impeachment Evidence

The state court excluded three items of evidence, all of which were intended to impeach Miranda's credibility, as sanctions against the defense for improper conduct. The court found that the defense violated the discovery provisions of California Penal Code § 1054.3(b) [3] by failing to provide the prosecution with certain evidence it intended to use (a journal entry and day care records), and violated California Welfare & Institutions Code (presumably § 827(a)) by failing to obtain permission from the juvenile court to use a statement made by

Miranda to her social worker. The court suggested that Jordan would not be significantly prejudiced by the exclusions.

*2 Jordan argues that the state court applied the discovery rules incorrectly, and that he was not required to produce the evidence in question. In a habeas proceeding, we may not review a state court's application of state law. *See Estelle v. McGuire,* 502 U.S. 62, 67-68 (1991). Here, however, whether or not the defense committed a discovery violation is inextricably linked to the question of whether the state court violated the Sixth Amendment by excluding evidence. This is because the Sixth Amendment ordinarily will not tolerate exclusion of impeachment evidence, and a showing of specific circumstances-such as the defendant's violation of discovery rules-is required in order to make exclusion tolerable.

The state court did not err in its application of the law. The cases cited by Jordan, *People v. Tillis,* 18 Cal.4th 284 (Cal.1998), and *Hubbard v. Superior Court,* 66 Cal.App. 4th 1163 (Cal.Ct.App.1997), are inapposite. In both cases, one party speculated that another party's strategy *might* require it to introduce certain evidence not produced during discovery. Such evidence does not clearly fall under section 1054.3. The evidence here was real evidence that Jordan intended to use, and the statute unambiguously required Jordan to produce it.

Nor did suppressing the evidence as a sanction "result[ ] in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). Although suppressing the evidence restricted Jordan's Sixth Amendment right to confront adverse witnesses, the Supreme Court has specifically upheld the constitutionality of suppressing impeachment evidence as a sanction. *See, e.g., Michigan v. Lucas,* 500 U.S. 145 (1991); *Taylor v. Illinois,* 484 U.S. 400 (1988); *United States v. Nobles,* 422 U.S. 225 (1975).

III. Prior Molestation

Jordan sought to introduce evidence that Miranda was molested by her uncle six or seven years earlier. He offered the evidence to show that: (1) Miranda, who testified that her stepfather was a harsh disciplinarian, knew that accusations of abuse would result in his being removed from her life, as her uncle had been; (2) to impeach the credibility of her statement that she delayed telling anyone about what Jordan had done because she thought no one would believe her; and (3) to provide an explanation for Miranda's sexual knowledge. The state court held an *in limine* hearing according to the provisions of California Evidence Code § 782 [4] and decided not to admit the evidence.

Jordan again asserts that the court misapplied state law in a manner that resulted in a deprivation of his constitutional rights. The right at issue is the established constitutional right to present evidence in one's own defense, which derives from due process and the Sixth Amendment's Compulsory Process Clause. *See Taylor,* 484 U.S. at 408-09; *Washington v. Texas,* 388 U.S. 14, 19 (1967).

*3 It does appear that the state court erred by applying section 782 to the evidence in question. *See People v. Franklin,* 25 Cal.App. 4th 328 (1994) (holding that evidence relating to sexual conduct is admissible if the sexual conduct itself is not the fact from which the jury is asked to draw a credibility inference). It is possible, as well, that the exclusion of this evidence was in violation of the Supreme Court's jurisprudence in this area. *See Coy v. Iowa,* 487 U.S. 1012 (1988) (holding that the defendant's right to confront witnesses trumps the state's interest in preventing trauma among sexual abuse victims); *Davis v. Alaska,* 415 U.S. 308 (1974) (holding that the defendant's right to confront witnesses trumps the state's interest in protecting the privacy of juvenile offenders).

We need not resolve whether excluding this evidence violated established federal law, however, because it is unlikely that the exclusion "had substantial and injurious effect or influence in determining the jury's verdict." *Brecht,* 507 U.S. at 637. No prior experience of molestation is necessary for a thirteen-year-old to guess that accusing her stepfather of molestation would result in his being removed from her presence. Moreover, Miranda's uncle was *not* completely removed from her presence, as she testified in the *in limine* hearing. Nor did the prior molestation make it unlikely that Miranda delayed reporting the second molestation for fear that she would not be believed. As an expert in child molestation testified in the *in limine* hearing, the earlier molestation might make her *more* hesitant to reveal a later episode. Finally, Miranda's knowledge of sexual acts was not so precocious for a thirteen-year-old that the jury would think it could only have come from experience.

Because it is not likely to have affected the verdict, the exclusion of evidence of the prior molestation is not grounds for habeas relief.

IV. Admission of Babysitter's Testimony

At trial, a former babysitter and family friend testified that Jordan had molested her three or four years before the alleged molestation of Miranda. Jordan moved to exclude the testimony as violating California Evidence Code § 1101(a)'s prohibition against character evidence. The state court found that the evidence was relevant to show a design or plan and thus admissible under § 1101(b).[5] The court of appeals upheld this ruling, finding several points of similarity to indicate a common plan: the age of the girls (fourteen and twelve), the site of the molestations (the couch in Jordan's home), the circumstances (at night with the television on), the initiation of the molestation (casual sex talk and play), and the method (reaching inside their clothes to touch their bodies).

The state court's holding was not contrary to established federal law. The Supreme Court has never held that admission of "common plan or scheme" evidence was error and that the error resulted in a denial of due process.[6] In fact, the Court's language in *Dowling v. United States*, 493 U.S. 342, 352-54 (1990), suggests that the Court did not think that evidentiary rulings regarding 404(b)-type evidence implicated due process concerns. Nor has the Ninth Circuit interpreted the Supreme Court's due process jurisprudence to preclude admission of prior acts in cases similar to this one. *See Walters*, 45 F.3d at 1357-58 (evidence of prior kidnapping and rape was admissible to show intent and did not violate due process); *United States v. Sneezer*, 983 F.2d 920, 924 (1992) (prior rape admissible under Rule 404(b) to show motive, intent, plan, knowledge and identity); *Featherstone v. Estelle*, 948 F.2d 1497, 1501-02 (9th Cir.1991) (evidence that defendant raped another woman in a similar way was admissible to show identity and did not violate due process); *United States v. Hadley*, 918 F .2d 848, 850-52 (9th Cir.1990) (prior acts of sexual abuse admissible under Rule 404(b) to show intent). Admission of the babysitter's testimony thus cannot support Jordan's claim for habeas relief.

V. Conclusion

***4** The state court's evidentiary rulings did not violate federal law as established by the Supreme Court, with the possible exception of its exclusion of evidence relating to the prior molestation, which was, in any event, harmless. We therefore affirm the decision of the district court to deny the petition for a writ of habeas corpus.

AFFIRMED.

Parallel Citations

1999 WL 974178 (Table)

Footnotes

2 The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Cir. R. 36-3.

3 California Penal Code § 1054.3 states in full:

> The defendant and his or her attorney shall disclose to the prosecuting attorney:
>
> (a) The names and addresses of persons, other than the defendant, he or she intends to call as witnesses at trial, together with any relevant written or recorded statements of those persons, including any reports or statements of experts made in connection with the case, and including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the defendant intends to offer in evidence at the trial.
>
> (b) Any real evidence which the defendant intends to offer in evidence at the trial.

4 Section 782 sets forth a procedure to be followed where the defendant seeks to introduce evidence of the complaining witness's sexual conduct in order to attack her credibility: Following a written motion and offer of proof by the defense, the court shall hold an *in limine* hearing out of the jury's presence, during which the complaining witness may be questioned. If the court concludes that the evidence is relevant and is more probative than prejudicial, the court may allow the evidence.

5 Section 1101(a) states that "evidence of a person's character ... [including] evidence of specific instances of his or her conduct ... is inadmissible when offered to prove his or her conduct on a specified occasion." Section 1101(b) allows evidence of prior bad acts

"when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident ...) other than his or her disposition to commit such an act."

6 Jordan cites *Old Chief v. United States,* 519 U.S. 172 (1997), to support his claim. *Old Chief* is inapposite for a number of reasons. Most important of these is that *Old Chief* discussed only whether the admission of evidence was an abuse of discretion under Federal Rule 403- not whether the trial was fundamentally unfair by due process standards.

End of Document

CERTIFICATE OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 888 West Sixth Street, Suite 400, Los Angeles, California 90017.

On January 21, 2014, I served the foregoing documents described as APPELLANT'S OPENING BRIEF on interested parties in this matter by placing a true copy in a sealed envelope addressed as follows:

Honorable Kathleen A. Kennedy Clara Shortridge Foltz Criminal Justice Ctr. Los Angeles Superior Court Central District Department 109 210 West Temple Street Los Angeles, CA 90012	Eric Harmon, DDA Alan Jackson, DDA LA District Attorney's Office Major Crimes Division 210 W. Temple St., 17th Floor Los Angeles, CA 90012
Bertha Magana California Appellate Project 101 Second Street, Suite 600 San Francisco, CA 94105	Joseph P. Lee Deputy Attorney General Office of the Attorney General Ronald Reagan State Building 300 So. Spring Street Los Angeles, CA 90013
James Michael Fayed CDC # AK3340 CSP - San Quentin 1-AC-57 San Quentin, CA 94974	

(BY MAIL) ✓ I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service made pursuant to C.C.P. ' 1013(a) should be presumed invalid if postal cancellation date of postage meter date is more than one day after date of deposit for mailing in affidavit.

(STATE) ✓ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on this 21st day of January 2014 in Los Angeles, California.

Martha Rodriguez