No. S064306

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOHN JOSEPH FAMALARO,

Defendant and Appellant.

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the
County of Orange

HONORABLE JOHN J. RYAN, JUDGE

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STATEMENT OF APPEALABILITY

This is an automatic appeal from a judgment of death. (Pen. Code, § 1239, subd. (b).)[1] The appeal is taken from a judgment which disposes of all issues between the parties.

STATEMENT OF THE CASE

Following grand jury proceedings conducted on September 27, 28, and 29, 1994 (1 CT 4-337), appellant John Joseph Famalaro was charged by indictment with one count of murder of Denise Huber, in violation of section 187, subdivision (a). The indictment also alleged the special circumstances of murder while engaged in the attempted commission and

[1] All further statutory references are to the Penal Code unless otherwise indicated.

commission of kidnaping (§ 190.2, subd. (a)(17)(ii)) and murder while engaged in the commission and attempted commission of sodomy (§ 190.2, subd. (a)(17)(iv)), as well as a serious-felony allegation pursuant to section 1192.7, subdivision (c)(1). (1 CT 340-342.) Appellant was arraigned on October 4, 1994, and entered a plea of not guilty and denied all of the allegations. (1 CT 348.)

Numerous pretrial hearings were conducted, including lengthy ones on appellant's unsuccessful motion for a change of venue due to the publicity about appellant's case in Orange County (5 CT 1459-1483, 1486-1491, 1496, 1558-1559, 1710-1715, 1725-1726; 6 CT 1953), and on his motion to suppress evidence under section 1538.5, which was denied in most respects (5 CT 1497-1510, 1514-1517, 1531-1533, 1560-1565, 1727-1735, 1741-1748).

Jury selection began on April 7, 1997. (5 CT 1776-1778.) The court denied appellant's multiple requests for sequestered "*Hovey*" voir dire (5 CT 1773-1775, 1819) and for additional peremptory challenges (6 CT 1831-1834), his motion to quash the jury venire and to dismiss the jury (5 CT 1814), and his renewed motion for a change of venue, to select a new jury, or to sequester the jury (6 CT 1867), all of which were based upon the jurors' exposure to the massive pretrial and ongoing publicity about the case.

Jury trial began on May 8, 1997. (6 CT 1868-1869.) On May 22, 1997, the jury returned its verdicts finding appellant guilty of first degree murder and finding both special-circumstance allegations true. (6 CT 1948-1949; 8 CT 2689-2691.)

The penalty phase began on May 29, 1997. (6 CT 1956-1957.) On June 18, 1997, the jury returned a verdict of death. (6 CT 2068, 2071-2072;

8 CT 2692.)

Appellant's motions for a new trial and for modification of penalty were filed on August 28, 1997. (6 CT 2120-2138.) On September 5, 1997, the court denied appellant's motion for a new trial and his motion to modify the judgment to life without the possibility of parole, and sentenced appellant to death. (6 CT 2185-2190.)

Appeal is automatic under section 1239.

STATEMENT OF FACTS

Guilt Phase

The defense did not dispute appellant's identity as the perpetrator of Denise Huber's homicide, nor his guilt of murder. The only disputed issues at the guilt phase were the degree of the murder and the truth of the two special circumstances, all of which were vigorously contested. Appellant did not testify.

I. Prosecution Case

A. Denise Huber's Disappearance

On the night of June 2, 1991, Robert Calvert went to a Morrissey concert at the Forum in Inglewood with his good friend Denise Huber. Calvert was not dating Huber, but went with her to the concert at the request of his friend Steve Horrocks, who had been dating Huber "on occasion." Horrocks had gotten tickets to the concert, but could not go because he had to work that night. Huber drove her car and picked up Calvert. They stopped at a liquor store and she bought some vodka, orange juice and pretzels. She had a shot glass in her car. They arrived at the Forum at around 8:00 p.m., then sat in the parking lot and each had four or five shots of vodka with orange-juice chasers. (17 RT 4537-4539, 4553.)

At the concert, they split a large cup of beer containing between 20

and 30 ounces. They left around 11:00 or 11:30 and drove to a restaurant-bar in Long Beach that Huber was familiar with. Huber had two more beers there and they stayed until closing time, at around 1:30 a.m. It was a work day the next day for both of them, and Huber dropped Calvert off in front of his house in Huntington Beach at about 2:05 a.m. (17 RT 4540-4543, 4558, 4567-4568.) Huber was very dressed up that night and was attractive. (17 RT 4544.) Calvert identified the jacket and one-piece dress Huber was wearing that night, as well as her purse, set of keys with a Hawaii key chain, and a photo of her shoes. Calvert testified that the shoes were not in the same condition as shown in the photo (Peo. Exh. 5), i.e., no cap on the heel and an "apparent metal thing" sticking out. (17 RT 4545-4548.)

According to Calvert, neither he nor Huber was intoxicated when they left the bar. (17 RT 4542.) However, Horrocks told the police that Calvert had told him that he and Denise were drunk the night of the concert. Also, Horrocks listened to a taped phone message from Huber and Calvert when he got home from work that night between 10:30 and 11:00, telling him the concert had just ended and asking him about meeting them somewhere later, and Horrocks believed that Huber sounded "pretty well buzzed" on her message, i.e., under the influence of alcohol. He based this opinion on what Huber sounded like previously when she was "buzzed." Horrocks described Huber as a friendly, outgoing person. (19 RT 5068-5079.) Neither Horrocks nor Calvert had ever had vaginal or anal sex with Huber. (17 RT 4544; 19 RT 5067.)

Tammy Brown was best friends with Denise Huber, and knew Huber was dating only Steve Horrocks in the weeks and months prior to June 3, 1991. Rob Calvert was a mutual friend of theirs. Denise's mother called Brown around 6:00 on Monday evening, June 3, to tell her that Denise

never came home from the night before. Brown called Calvert and several other friends trying to track Denise down, and, when that was unsuccessful, went out to look for her car. (17 RT 4597-4599.)

Brown drove up the coast to Huntington Beach, and on the way back home found Denise's car on the 73 freeway southbound, on the right shoulder. She drove past it and stopped at a pay phone and called the Hubers. Then Brown checked her home phone to see if Denise had called, and she had not. Brown went back to Denise's car and saw that it had a right-rear flat tire. As Brown was pulling away, she saw a car flash its lights at her; it was the Hubers. (17 RT 4599-4601.)

When the Hubers arrived at the location of their daughter's car, they opened the doors and found no keys inside. Denise's mother, Ione, could not recall any prior mechanical problems with the car. (18 RT 4627-4628.) Ione confirmed that Denise had gone to a concert at the Forum on the night of June 2, and never returned home. She also identified a series of photographs showing Denise's keys with a Hawaii key chain, shoes, purse, checkbook, credit cards, paper with phone numbers on it in her handwriting, wallet, dress, jacket, and underwear similar to the type Denise wore. (18 RT 4619-4621.) The shoes shown in the photo looked like her daughter's shoes, but not with the damage shown in the photo. Denise would never leave the house with shoes that looked like that, i.e., with tearing on the back of the heels and one tip off. (18 RT 4623-4624, 4626-4627.) Tammy Brown also recognized Denise's shoes from the photo shown to her, but had never seen them in that condition before. (17 RT 4602-4603.)

Ronald Smith, a Costa Mesa police sergeant in charge of missing-person cases, identified a chart showing the location of Denise Huber's car, a silver blue Honda Accord, which was near the intersection of the 405, 55

and 73 freeways, and described the various places in the vicinity where a person could have gone for help. These included a pay phone two-tenths of a mile away, a pay phone a bit farther up, a gas station, several fast-food restaurants, a Residence Inn motel, and pay phones at a strip mall. (17 RT 4572-4577.) There were also various call boxes visible from where Huber's car was parked, and the entire area, both on the freeway and in the adjacent residential areas, is well-lit at night. There was an opening in the cyclone fence running along the freeway, leading down a gravelly slope, which could be seen during nighttime hours from the available light. (17 RT 4578-4582, 4596.) The opening is between one-tenth and two-tenths of a mile from where Huber's car was parked, and the distance from the slope down to the street below is 75 to 100 feet. (17 RT 4587-4590.) The Residence Inn is two-tenths to three-tenths of a mile from the bottom of the slope, and there are apartments and residences near the Residence Inn. (17 RT 4591-4592.)

B. The Discovery of Denise Huber's Body

Denise Huber remained missing for over three years. Then, on July 13, 1994, the Yavapai County (Arizona) Sheriff's Department received information regarding a possible stolen Ryder truck in the Prescott Country Club community in Dewey, Arizona. A deputy sheriff found a 24-foot yellow Ryder truck backed into a big driveway area of a residence at 685 Cochise Drive, and from the VIN number confirmed that the truck had been reported stolen out of Orange County in January of 1994. (18 RT 4640-4643, 4650.) In the back of the truck was a freezer, which was locked and sealed with tape, and an extension cord was plugged in and ran over the back fence into the house identified as appellant's. (18 RT 4645-4647, 4706.) The truck was easily visible from the street, as was the freezer when

the door to the truck was open. There was a garage on the property in which the freezer would have easily fit if one had wanted to hide it there. (18 RT 4651-4652.)

When officers opened the freezer, which was running and cold, they found the nude body of Denise Huber inside a large black plastic garbage bag, and apparent blood and bodily fluids frozen to the bottom of the freezer. The body, which was frozen solid and partially decomposed, was in a fetal position with the hands handcuffed behind the back. (18 RT 4663-4668; 19 RT 4977-4978, 4992-4993, 5042.) There were three small white kitchen-type garbage bags, with cuts or tears in them, covering the head area. Subsequent removal of the bags revealed that there was a piece of duct tape on her face, extending from the upper lip area to the upper eyelid area, and there was a wadded-up cloth in the white bags which appeared to be a gag. (18 RT 4685-4688; 19 RT 4980-4981, 5011.)

C. The Autopsy and Related Forensic Testing

The autopsy on Denise Huber's body determined that there were numerous lacerations on both sides of the head, with bone fractures underneath. After examining the skull and each injury, and doing a skull reconstruction, the medical examiner opined that there were a minimum of 31 blows to the head, including at least 17 glancing blows. (19 RT 4986-4990.) There was no way to know the maximum number of blows, but the head "was basically shattered," with many fractures. (19 RT 4998.) The medical examiner found some of the wounds consistent with having been made by a hammer and a nail puller which were in evidence (19 RT 4992, 5006), and she and two forensic anthropologists believed the nail puller caused most of the injuries (19 RT 5023-5025). There were no apparent defensive wounds, such as tearing or loss of fingernails. (19 RT 5015-

5016.) There were no lacerations of the vagina or rectum, and no internal bruising or external trauma. (19 RT 5008-5009.) Sexual-assault swab collections were conducted in the mouth, vagina and rectum. (19 RT 4978-4983, 5011-5012, 5030-5035.)

A forensic scientist from the Orange County Sheriff's Department crime lab (19 RT 4851) examined the sexual-assault swabs, and found two spermatozoa and two "apparent" spermatozoa in the rectal swabs (19 RT 4863-4877); no spermatozoa were found in the oral or vaginal swabs (19 RT 4877). However, when this criminalist had first looked at the rectal swab, she did not think it was conclusive for any sperm and wrote "apparent sperm" for all four cells. She later changed her mind and decided prior to writing her report that there were two sperm cells, even though nothing had changed in appearance. There is a subjective interpretation as to whether to make the final call that a cell is sperm. (19 RT 4881-4883.) The "sperm" cells she found did not have tails, but she insisted that it is very common for the tails to come off and that sperm can be identified without them. (19 RT 4871-4872.) Although the F.B.I. forensic lab will not allow their scientists to draw the conclusion that a cell without a tail is a sperm cell, her lab's protocol does permit such a call. (19 RT 4892-4893.)

For a living person, sperm can last up to six days vaginally, but only up to two or three days rectally because of the harsher environment. It is too difficult to say how long they can last in a dead person because of a variety of factors, such as bacteria and body temperature, but sperm has been recovered up to 16 days after death. (19 RT 4878-4880, 4905.) The rectal swabs were tested for P30, a protein found in seminal fluid, and the result was negative. (19 RT 4907-4908.) DNA testing was also conducted on the rectal swabs, using the PCR method of analysis. One of the benefits

of PCR is that it gives results on small and degraded samples. Although Denise Huber's DNA was found under the PCR testing, it did not show the existence of sperm cells. (19 RT 4909-4915.)

A criminalist with the Ventura County Sheriff's Department crime lab got the anal swabs from the Orange County lab and concluded that all four slides showed spermatozoa. (19 RT 4943-4946.) He made these calls even though there was a head and no tail on the cells, and he is aware that some other labs with different protocols will not allow such a conclusion to be reached based on heads alone. (19 RT 4946-4947.)

DNA testing by the Orange County lab on the "sperm" samples from Huber's rectum were inconclusive as to the donor. (18 RT 4769-4770.) There is no way for a scientist to know the reason for this result, but it could have been because there was not enough sperm to obtain a type, the sperm was too degraded, the separation process was incomplete or did not work properly, or because there were no male sperm cells present in the sample. (18 RT 4770, 4800-4802.) However, Huber's DNA survived for the three years and showed up on the rectal swabs. (18 RT 4802-4803.)

D. The Searches of Appellant's House and Warehouse

Search warrants were served on the home at 685 Cochise Drive, and the search of the house was conducted over a period of nearly two weeks. The thousands of documents that were located inside showed appellant's residency, and that he apparently lived there alone. (18 RT 4669-4671.) During the course of the searches, the officers found two large cardboard boxes on a shelf in the garage. One of those boxes contained numerous items ultimately identified as belonging to Denise Huber, including her jacket, torn dress, panties, wallet, purse, make-up compact, Honda car keys with a Maui key ring, pen, lipstick, a pair of shoes with drag marks on the

heels, underwear, lipstick pouch, checkbook, credit cards, AAA card, business cards, a small checkbook or credit-card purse, and her driver's license. (18 RT 4672-4677.) There was apparent blood on the dress, key ring, small purse, and one of the shoes. (18 RT 4673, 4678-4680.) The same box contained a pair of jeans similar to ones found in appellant's bedroom, a sweatshirt, and some rags or cloth strips, all with apparent blood on them, a hammer and some rubber surgical gloves which were inside-out. (18 RT 4680-4684, 4696, 4714.)

The other large box found on the shelf had apparent blood on the flaps, and contained some other items with apparent blood on them, including some cloth strips, a white plastic bag similar to the three bags that were over Denise Huber's head, and a tarp. That box also contained a handcuff box, duct tape which matched that found on Huber's face, a nail puller with apparent blood or human tissue on it, and a black plastic garbage bag like the one in the freezer. Near those two boxes in the garage was another tarp found in a different box, and a shirt inside the tarp, both with apparent blood on them. A pair of handcuff keys were found in a desk drawer, and they unlocked the handcuffs which were on Huber. (18 RT 4685-4696, 4714.) Also found in the house was a receipt from Montgomery Ward for the freezer, which shows that it was ordered on June 10, 1991, and scheduled for delivery on June 12, 1991. (18 RT 4698-4699.)

There was an extreme amount of "material" in the house, hundreds of thousands of pieces of paper including documents, receipts, magazines and newspapers, and the police collected over 100,000 items. (18 RT 4707-4708.) They seized around 50 videotapes; one portion of one of them showed a television report about the Huber case. (18 RT 4697, 4708-4709, 4714-4715.) There were also numerous thick stacks of newspapers

throughout the house, three of which, found in three different stacks, contained articles about Denise Huber's disappearance. (18 RT 4699-4704, 4715-4724.) Four or five additional two-foot stacks of newspapers, most from local Arizona papers and none regarding Huber, were found in the garage. (18 RT 4733-4737, 4742-4750.) Numerous other, unpacked boxes containing "a lot of stuff" were also stacked throughout the house and garage. (18 RT 4737-4738.)

In June of 1991, appellant ran a painting business out of a warehouse on Verdugo Street in Laguna Hills, and he also lived there. The office portion had two rooms, one set up as his office and the other as a bedroom. The door leading from the office to his private bedroom was padlocked. (18 RT 4633-4636.) A crime-scene investigator for the Orange County crime lab (18 RT 4752) was sent to that warehouse in 1994 after the discovery of Huber's body. With the use of Luminal, she found presumptive evidence of blood in the southwest corner of the warehouse area of the building. There was an area of presumptive blood between and on the concrete flooring and the wood board of the wall. She also used a cotton swab to take samples from that area, as well as from possibly blood-stained items which had been taken from appellant's house, including a nail puller, hammer, box, tarp, and the blue shirt found wrapped up in that tarp, and sent them all to the Orange County Sheriff's Department crime lab for further analysis by their DNA scientist. (18 RT 4755-4767.)

The rags and cloth strips found in appellant's house were identified as having come from "leftovers" given to appellant by a man who owned an apparel business in the same building as appellant's warehouse. (19 RT 5079-5083.)

DNA testing revealed that the bloodstains from the warehouse wall

and from the nail puller could not have come from appellant, but could have come from Huber. (18 RT 4779-4780.) The same results were found with respect to all of the other items with blood on them found in appellant's Arizona house, except for a weak allele from the men's jeans which could have come from appellant. (18 RT 4780, 4783-4791; see 19 RT 4815-4820.) The frequency of the two types of typing used to identify Huber's DNA are one out of every 30 and one out of every 10 people, respectively. (18 RT 4791-4792.)

II. Defense Case

Costa Mesa police officer Thomas Coute arrived at the location of Denise Huber's car shortly after 1:00 a.m. on June 4, 1991. He saw the 1988 Honda Accord all the way over on the right-hand shoulder of the freeway, with the right-rear tire flat and torn apart. To the right of the car was a gravel area and then an embankment. (20 RT 5131-5134.) Officer Coute saw no obvious signs of a struggle, and nothing he thought might have evidentiary value, such as bodies, weapons, bundles of rope, blood, drag marks, or unusual gouge marks in the dirt alongside or on the surface of the freeway. (20 RT 5136-5138, 5140-5141.)

Costa Mesa police officer Burton Santee was dispatched to the location of Denise Huber's car shortly before midnight on June 3. He directed officers to contact local hospitals, taxicabs, tow companies, and the like. He called for bloodhounds, and he and the other officers walked both shoulders on both sides of the freeway, up and down the freeway, and on the center dirt divider looking for evidence of a crime or anything that would point to the victim. He found no blood, no clothes, no drag marks, or anything that looked like a struggle had taken place. He did see skid marks that led to where the car was parked. He went back to the scene the next

morning to walk the freeway and the surrounding area in the daylight, and again found nothing. (20 RT 5172-5184.)

Cynthia Brown delivers newspapers for the Orange County *Register*. While on her route, at about 2:25 a.m. on June 3, 1991, she was on highway 73 and saw the hazard lights blinking on a blue Honda. She did not see anybody around the car, nor anyone at the call boxes on that freeway. (20 RT 5144-5148.)

On June 1, 1991, Naurbom Perry entered into an agreement with appellant to paint his house. He met with appellant on June 3 to sign the contract and to give appellant a check to start the work. Perry tried to call appellant between June 4 and 7 because he was concerned that there were not enough supplies and that appellant was not supervising his workers enough, but he was unable to reach him. Finally, appellant showed up at Perry's house on June 7 or 8. He looked very ill and said he was ill. Appellant was nervous, looked like he had not slept much, and looked too sick to talk. Perry told appellant he should go to the doctor and maybe the hospital. He later described appellant to the police as having been weak and haggard, and appellant told Perry that he had been in bed sick with pneumonia for the past three or four days. (20 RT 5151-5160.) Medical records showed that appellant visited a doctor at the Mission Internal Medical Group on June 5 and June 12, 1991. (20 RT 5250-5251.) During the first visit, appellant reported a "sore throat," "dizzyness," and being "feverish"; during the second visit, he reported a "persistent cough and congestion, and weakness." (Def. Exh. EE.)

Appellant owned and drove a white pickup truck. He had registered the truck in the name of Nanci Rommel, a woman he had dated in 1991. (18 RT 4633, 4636.) A white Dodge pickup truck was parked next to the

Ryder truck when the Yavapai County sheriff's deputy found it at appellant's Cochise Drive address on July 13, 1994. (18 RT 4661-4662.) A forensic scientist for the Orange County Sheriff's Department crime lab tested for blood inside the white pickup truck on July 21, 1994, and found none. (20 RT 5192-5197.)

The parties stipulated that calls from a freeway call box go directly to the CHP, which determines the best way to assist the motorist. If they receive a call from a stranded woman late at night, their policy has always been to send a unit out to assist as soon as possible. Call boxes have been on the freeways since at least 1990. (21 RT 5403-5404.)

Beth Goss, an investigator in the Orange County Public Defender's Office, conducted an experiment regarding the damage to Denise Huber's shoes. Goss bought a similar pair of shoes and had a woman fairly close to Huber in height and weight, and with the same shoe size as Huber, walk down and back up the embankment near the location her car was found. She walked cautiously, and did not trip or stumble. When she finished her walk and handed the shoes to the investigator, they had damage to the back of the heels as shown in two photos, Defense Exhibits LL and MM. (21 RT 5381-5391.) The damage to those shoes differed in some respects from the damage to Denise Huber's shoes, as depicted in People's Exhibit 5. (21 RT 5396.)

Two expert witnesses called by the defense disagreed with the prosecution experts regarding the presence of sperm in Huber's rectum. Charles Sims, a pathologist at Century City Hospital who founded one of the major sperm banks in the country, could not conclusively identify spermatozoa from the smears derived from the rectal swab because there was no tail or neck piece, it was from contaminated rectal materials, and the

freezing and thawing processes create an irregular cell. (20 RT 5253-5264.) William Collier, a criminalist and consulting forensic scientist, and the former director of the Phoenix, Arizona Crime Lab, also reviewed the slides from the Orange County lab and concluded that there was nothing on them that he could conclusively identify as sperm based on the morphology on the structure and form, including the fact that there were no tails. (21 RT 5310-5320.)

Penalty Phase

I. Introduction

Appellant had no prior felony convictions. Besides the murder of Denise Huber of which appellant was convicted at the guilt phase, the prosecution's penalty case consisted of "factor (b)" evidence that appellant had put handcuffs on two of his girlfriends against their will, and victim-impact evidence presented by Huber's parents.

The defense presentation at the penalty phase revealed that appellant was severely emotionally abused by an essentially crazy and affirmatively destructive mother, who used her religious beliefs and extreme political views as weapons of fear, and who believed that sexuality was the ultimate evil and who did not allow her children to have any sexual feelings. As a result, appellant suffered a dark, frightening, unloved childhood where home was not a safe haven. He was a scared, sad, withdrawn and physically-challenged child who grew up to be an emotionally-disturbed, manic-depressive, obsessive-compulsive and suicidal adult suffering the agony of knowing he was not normal, but unable to take advantage of opportunities that presented themselves to him. His obsessive-compulsive disorder was manifested by his extreme hoarding, as graphically demonstrated by the thousands of old newspapers found in his house and,

most bizarrely and tragically, by his uncontrollable need to keep Denise Huber's body, clothes and the possessions she carried with her on the night of her demise.

In addition, appellant's older brother Warren was a convicted multiple-child molester who may have included appellant among his molestation victims, and who repeatedly attempted to fondle his older sister as well. The woman appellant deeply loved and believed would share his future with him rejected his marriage entreaties after becoming pregnant by him, had an abortion and broke up with him, later came back to him and became pregnant by him again, but then told him that she was going to put up for adoption their child that he desperately wanted to keep, and left him for good; he never saw her or his child again. Although he sought emotional support and spiritual guidance from a Catholic priest, appellant continued to obsess over these losses and his failure to have a normal family life as an adult, and was in a severely-depressed and suicidal state when his mind finally snapped and he committed the previously-unimaginable crimes against Denise Huber in the early morning hours of June 3, 1991.

Despite appellant's wretched childhood and anxiety-ridden adulthood, appellant had a strong sense of duty and tried hard to act normally and be a good, generous person, and for the most part he succeeded. For example, on one occasion, despite the risk to himself, he intervened to save a woman he did not know from a knife-wielding assailant.

Appellant was very remorseful about having killed Denise Huber and became physically ill in the days immediately following that homicide. He again sought spiritual guidance while in county jail awaiting trial, from a Catholic lay worker, as well as assistance in preparing for a full confession

to a priest. Appellant cried at several points at the penalty phase, including during the testimony of Denise Huber's grieving parents.

At the section 190.4, subdivision (e) hearing, the trial court denied appellant's application for modification of penalty and sentenced him to death (27 RT 6813), citing not only the circumstances of the crime and the special circumstances (27 RT 6809-6811), as well as the two handcuffing incidents with appellant's girlfriends (27 RT 6812), but also the fact that "the victim impact evidence in this case was quite substantial for both parents" which "certainly is aggravating" (27 RT 6811). Even though the court denied appellant's application, it did find the existence of considerable evidence in mitigation. For example, the court found that "there were some emotional scars from Mr. Famalaro's mother's behavior during his childhood," that her "control over her children was not normal or healthy," that "her views on sex, pornography and politics were just off the board," and that "neither brother was able to channel their sexual drives within what the law requires," which "is attributable in large part to the mother's treatment." The court found it "quite obvious" "when the brother was testifying that Mr. Famalaro was hurt by what his brother refused to say on the witness stand." (27 RT 6805-6806.)[2]

The court also found that because of "the mother's domination," appellant "moved in with his grandmother," whom he "certainly loved . . . and in return was deeply loved by his grandmother" (27 RT 6806-6807); that appellant "was good to his sister and her children, other children, other people," and "got along well with his business customers" (27 RT 6807);

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[2] The court was referring to Warren's testimonial denial that he had molested appellant when appellant was a child. (See pp. 50-51 and fn. 8, *post*, and Argument IX, *post*.)

and that "he did a lot of help to his grandmother" and "he helped a lot of people in Arizona" (27 RT 6808).

The court further found that the woman appellant loved "was run off," "absconded," and "left Mr. Famalaro because of pressures from her family, and that appears to be based solely on the defendant's mother's conduct. . . . And that lady's abortion hurt the defendant," who "wanted to be the father of the child" and "took steps to try to accomplish that." (27 RT 6807.)

Finally, the court found that "while [appellant] was at school in Los Angeles, a lady [Deborah Worthington] was being accosted, and Mr. Famalaro did a brave thing and did go to that lady's aid and helped her, probably saved her from being injured." (27 RT 6808.)

II. Prosecution Case

Cheryl West dated appellant in 1987. They took a trip to New York City over the July 4th holiday in 1987 to celebrate her birthday and see some plays. On their last morning in New York they were in their hotel room, planning to see one last play in the early afternoon. Appellant had been depressed the previous night, but that morning was exceedingly happy, "kind of playhousing" but "it got too rough." They were in bed and she was wearing a nightgown. She tried to pull away from his more vigorous tickling and her nightgown started ripping off her shoulder. Appellant handcuffed both of her wrists to a bar on the window. She did not even see him do it, and it happened in the blink of an eye. She fought it, appellant was laughing, and she was laughing nervously, hoping it was a joke. (23 RT 5848-5852.) Appellant pulled off her nightgown, opened the curtains, and walked out. He was gone for hours, and they missed their play. Appellant was still laughing when he returned, and he took off the

handcuffs. West went into a fetal position, incapable of speech, and pulled the sheet off the bed and huddled up in it, feeling completely traumatized. Appellant was trying to be amorous, kissing her back and neck and fondling her a bit, but he could see she was really struggling and he stopped playing around and tried to calm her down. She played along with him because all she could think of was getting back to California. (23 RT 5853-5855.) West was physically injured in this incident, suffering scabs circling her wrists from trying to pull her hands out of the cuffs. (23 RT 5856.)

When they returned to California, West told appellant she did not want to see him or speak to him again, and she did not see him again until July of 1991, when she ran into him by chance when she was out taking a walk. He was driving by and stopped and said hello. Because of the incident in the hotel room, West has been unable to have a relationship with a man. She finds it very difficult to trust or open up, so she does not do so. (23 RT 5855-5856.)

On cross-examination, West painted a detailed picture of appellant's personality and habits. She met appellant in 1984 when she worked for a chiropractor friend of his. They first developed a friendship and then began dating in July of 1987. Appellant was very secretive, and she later concluded he was probably paranoid. At his apartment in Irvine he had a locked room where he would take all his calls and check messages. He had "an incredible collection of books," and he also kept newspaper clippings and files on things that interested him. The locked room was overly full of files and shelves, and it seemed that the windows were completely covered by them. (23 RT 5856-5860.)

West enjoyed appellant's company. He was intellectually very engaging, had a very fun, "kind of joie de vivre," attitude toward life, and

seemed hyper, "like a three-ring circus." He had high energy and "fragmentation of focus." She sensed that he had a lot going on in his life, but she was kept out of it, which was one of her complaints. He was very devoted to his painting and maintenance business, and the time he spent working also caused problems for her. He spent money ostentatiously, with front-row-center seats in the theater, limousines to go to restaurants, and huge bouquets of flowers for her. He paid cash for everything, had a lot of hundred-dollar bills, and treated West like a queen. He had "non-stop erratic energy." (23 RT 5860-5862.)

Appellant told West that he had friends, but she only met one, by coincidence, an older man who showed up unannounced when she happened to be with appellant. She did meet everyone in his family. When West first met appellant's sister, she was very different from appellant's description of her. From what appellant had said, West assumed that his sister was very professional and very sophisticated, but the sister did not say a word and seemed like she was holding her breath. West felt there was something else going on behind the scenes that she did not know about. West met appellant's family two other times, at a barbeque and at a skating party for one of his sister's two daughters. Appellant adored his nieces, and it was mutual. West and appellant's mother "really didn't talk," and West felt that she was rather distant and not open to developing a relationship. (23 RT 5863-5865.)

When West cut appellant out of her life upon their return to California, he was devastated, crying and pleading over the phone. They both went into therapy, and appellant even had his therapist call her to try to set up a joint meeting, but she just could not do it. She never physically saw him again that year, and she later moved to Oregon. The break-up with

appellant was difficult for her three sons, and especially on her son Eric, who was 18 in 1987. Appellant had developed a relationship with Eric, who looked at appellant as a role model. In fact, other than the New York incident, West viewed appellant as a model of perfection and almost a role model for her as well. Appellant represented the father Eric never had, and appellant's arrest and conviction have been very difficult for him. The father of West's two older kids had committed suicide at 26, and Eric, her youngest, had always been searching for someone to fill those shoes. Eric turned down scholarships to very prestigious art schools, and worked for appellant during the summer, before deciding he was ready to go to college. Other than the New York incident, West considered appellant to be a caring person. (23 RT 5866-5869.)

When West ran into appellant in July of 1991, they talked and eventually resumed a dating relationship. She was tentative, but he seemed calmer than before. She was in school at the University of Oregon and was in Orange County just for the summer. Appellant helped her financially and in getting her life reestablished in California after she finished school so she could fight some lawsuits her ex-husband was bringing against her. Appellant paid the first month's rent for her house in San Clemente when she moved back from Oregon, but they did not see each other very often. West did not interpret appellant's gifts as trying to win her over, but instead thought he was very generous. Appellant asked her once or twice why such an attractive woman was going out with him. (23 RT 5869-5874, 5879-5880.)

West went to appellant's warehouse in Laguna Hills probably a dozen times, but never saw a freezer there. He was highly secretive, and the place was "locked like a fortress." There were locks all over, and there was

no way to get in without permission. Appellant's personal bathroom was piled to the ceiling with boxes. There was a picture of Jesus and a cross over his bed. Appellant told her she could not stay there because he did not want to expose her to the dirtiness of a warehouse and to his workers coming in early in the morning. Regarding appellant's secretiveness, appellant told her he was afraid people were trying to steal from him; she assumed he meant his workers. It was during this time that she thought he was becoming a little paranoid. She recalled appellant letting her be his driver for his business, but she quit after one day because he would not let her sit in the truck when he was not there. She could not recall telling the police that appellant had explained that this was because there was money in the truck that he did not want anyone to have access to, but that was the kind of thing she referred to when she talked about appellant putting up barriers to their relationship. (23 RT 5874-5879, 5891.)

West thought that appellant first proposed marriage to her in 1987, but he definitely proposed in 1991, after she had moved into her San Clemente house, and he cried when she said no. They had told each other that they loved each other during this time. Appellant wanted children, or was willing to adopt. They had very sporadic contact after that, and remained friends. Appellant eventually moved to Arizona, in the summer of 1992, and he moved some things to a storage area in San Clemente. There was a huge wall of newspapers in that storage area and appellant almost panicked when she tried to throw them away. Appellant had told her he did not even know what was in his files and the newspapers, but he just had to keep them. (23 RT 5885-5886.)

West's son and a group of his friends helped appellant pack up trucks with the last of his stuff in late January of 1994. Appellant had a

Ryder truck, and West saw the freezer. She stopped by to see her son, and offered to help a little bit. She actually stepped on top of the freezer and "used it as a ladder" to reach something on a shelf. When West saw appellant again later that year, she invited him to Eric's graduation from U.S.C., and he attended it. That was the last time West saw appellant until her trial testimony. (23 RT 5882-5885.)

West recalled that people would make fun of appellant behind his back because of his feminine mannerisms. Appellant was closer to his sister Marion than to his brother Warren. West was aware of Warren's problems to a limited degree. (23 RT 5886-5887.)

West denied that she and appellant had consensual sex with the handcuffs on in the New York City hotel room. She also insisted that before this incident she had never had the handcuffs on in a consensual manner with appellant or had ever even seen them, and that the only day she ever had them on was that morning in New York. However, the defense introduced two photos of West in handcuffs fondling appellant's penis. (Def. Exhs. QQ and RR.) They also introduced a photo of West in handcuffs, taken by appellant, while she was standing in the hotel room with the curtains open. (Def. Exh. PP.) (23 RT 5891-5896.)[3]

Nancy Gowan Rommel[4] dated appellant for about a year around 1989. One time in March or April of that year, they were talking in the bedroom of appellant's house in Lake Forest. Rommel told appellant she

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[3] It was stipulated that when the roll of film with the photos of West in handcuffs was discovered, it was undeveloped, and it was subsequently developed by the defense team. (27 RT 6726-6727.)

[4] "Gowan" was her maiden name. Her first name is variously spelled "Nancy" and "Nanci" in the Reporter's Transcript.

was in a hurry and needed to leave, but he pushed her down on the bed and her shoulder and head hit the bookcase the bed was pushed up against. She thought maybe he was just playing around and again told him she had to go, but he held her down with his full body and a struggle began. He put his leg between her legs, unbuttoned and unzipped her shorts, and sat on her chest and pinned her arms with his knees. Then he quickly put her in handcuffs, which she assumed were the ones he kept on the bedpost. He then pushed her shorts off and undid his pants, using force to do something she did not want to do. He had a very intense stare, a look in his eyes she had not seen before. (23 RT 5905-5911.)

When Rommel started to cry and told appellant that when she reported it to the police it would be considered date rape, his demeanor changed instantly. He jumped off her, uncuffed her, refastened his pants, and started to walk away. He yelled things "like you bitch and you are the one that brought this on," she may have yelled a couple of things back at him, and she put her clothes on and left. The struggle lasted 10-to-15 minutes and left Rommel with red marks on her wrists that later scabbed over. (23 RT 5911-5915, 5926-5927.)

After this incident, Rommel did not see appellant for three or four months. Then she got back together with him around his birthday in 1989, though she is not sure why. Appellant told her that the handcuffing incident was just a game, that he had not expected her to take it that way, and that she did not understand mature sex games. At the time of this incident, Rommel had been in a relationship with appellant for about a year, and had been in appellant's bedroom and seen the handcuffs on the bedposts. They had a sexual relationship both before and after this incident, but this was the only time appellant put or tried to put handcuffs on her. (23 RT 5912-5915,

5918-5919.)

Rommel and appellant continued to see each other off and on until 1991. She was concerned throughout their relationship that he was not spending enough time with her because he was working so hard. They became engaged, but broke it off in May or June of 1991. She gave him a birthday card and sent him a present on June 10, and expressed empathy that she knew he was going through a difficult time because of their breakup, and her "wish . . . that you always have happiness, love and laughter." (23 RT 5919-5921, 5913; Def. Exh. AAA.) Also, a four-page letter she sent appellant on September 3, 1989, a few months after the incident she testified about, was admitted into evidence. (23 RT 5921.) In the letter, Rommel told appellant that "I love you very much and I want desperately to be able to show you," and that "[t]he thought of us receiving counselling thrills me"; however, she complained that "[i]t has been a major source of pain for me since we started dating to always be second in your life" to his work, and that "I don't know that even the best counsellor could ever help me to be happy while always waiting for you to make time to spend with me." (Def. Exh. SS.)

Denise Huber's parents, Ione and Dennis Huber, both testified that their world was turned upside down during the three years their daughter was missing. They described their fear and panic when Denise did not come home that night, and feeling like they had been kicked in the stomach when Denise's car was found. They did all they could to find answers, sending out fliers and doing lots of interviews on television shows. Ione Huber at first could not go to work, and had difficulty going back to work after about four months. She was pained walking by Denise's bedroom every day for three years, wondering what to do with the car, and having to

spend holidays and attend weddings without her. Dennis Huber suffered a lot of health problems, which he believes were due to the tremendous stress he experienced. When their daughter's body was discovered, all hope was gone. Ione also feels that the stress she has been under contributed to her cancer. Her life will never be the same because Denise brought so much joy to it and she does not have that anymore. Dennis's long-time bond with his daughter has been broken. He has a note she sent to him a day or two before she disappeared saying, "Hi dad. I love you. Have a great day. Love, Denise," and he would not take a million dollars for that piece of paper. There is a hole inside of him that he does not think will ever fill up. On Denise's headstone in South Dakota, the Hubers inscribed "you'll always be loved." (23 RT 5928-5936.)

III. Defense Case

Several people who had been neighbors or acquaintances of the Famalaro family when appellant was a child described appellant's mother Ann Famalaro's strange and negative behavior, including confrontations they had with her. One witness, Sharon Murphy, lived next to the Famalaros in Santa Ana from 1964 to 1979 or 1980, when the Famalaros moved away. Ann Famalaro reported the Murphys to the city on several occasions, such as when the Murphys put in an upstairs addition without a permit; when they built a backyard playhouse, which was within code; and when they put stucco on their fence to match the rest of their house. Ann told Sharon that the Murphys' upstairs window was ugly, and Ann planted trees to block the view. After Ann's phone call to the city regarding the stucco situation, the city told the Murphys "you got a tiger over there," and advised the Murphys to stop. They did so, then finished the project six months later, after which Ann never talked to Sharon again. According to

Sharon, Ann would call the city "everytime you raise a hammer to do something," and "was the kind of woman who was on top of everything in the neighborhood and what is going on in the world." Ann would sometimes spray Sharon's kids while she was watering the trees. One time, Ann took a photo of Sharon's eight-year-old son Tommy retrieving a basketball from the roof of his own house, for some reason unknown to Sharon. Sharon never saw other kids playing with the Famalaro children in their backyard, and appellant never came over to play with Sharon's son Dan, who went to Santiago Elementary School with appellant. Sharon could see into the Famalaro house from her upstairs window, and all she could see were cardboard boxes lined up against the Famalaros' sliding back door. (24 RT 5941-5953, 5956-5958.)

Daniel Murphy, Sharon's son, confirmed that he knew appellant because he lived behind the Famalaro house. Appellant was a casual acquaintance, but Daniel never played with the Famalaro children. Daniel recalled Ann being unhappy about the Murphys stuccoing the wall, but described her as being very calm about telling the Murphys she did not like what they were doing, she felt it was her wall, and she wanted to put a stop to it. Daniel admitted telling the defense investigator that Ann was screaming, but insisted at trial that Ann was screaming at her husband but calm to the Murphys. Daniel could not remember any other unusual or unpleasant episodes with Ann. (24 RT 6101-6107.)

Jane Dresser went to a Catholic school, St. Joseph's, with appellant for grades one through three, but did not know him well, and she lived four doors down from the Famalaros. Appellant did not play outside with the neighborhood kids; he was very quiet and tended to be a loner. One time, when Dresser was about eight-years old, and was walking her dog down the

street, Ann came out of her house, scolded her and made her clean up her dog's urine from the sidewalk. This was an incident which Dresser remembers so well because it was frightening and traumatizing. (24 RT 5959-5961.)

Sharon Diaz also went to St. Joseph's for grades three through eight. She knew appellant's sister Marion, but saw appellant only in passing. Marion was very quiet, kept to herself, and was "isolated." She was friendly when given the opportunity, but many times was not given the opportunity because she was very tall and her skirts were unusually long. Diaz never met the parents, but saw them in church and school. The Famalaro family, including appellant, was very focused during mass and the children did not look around or try to find other classmates like the other students did. Diaz did not see appellant interact much with his schoolmates. (24 RT 5964-5969.)

Alice Stauffer was a neighbor of the Famalaros, and had several run-ins with Ann. One time, Ann angrily complained about a dog using her yard as a bathroom, and Stauffer told her it was not her dog, but a stray. Another time, Stauffer got an angry phone call from Ann, saying that Stauffer's four-year-old son had touched the wet paint on a chair in Ann's yard and ruined the paint job. Stauffer went over to take a look, and could not find anything that was marked, and tried to tell that to Ann. But Ann told her husband to go inside the house, "proceeded to really give me the riot act," and called Stauffer's son a juvenile delinquent. That really upset Stauffer, and she told Ann "I think you are really a miserable human being" and "I feel sorry for you," and left. For months afterward, every time Ann would see Stauffer, Ann would just turn her head and not even look at Stauffer. On one rainy day, Stauffer stopped and picked up appellant and

gave him a ride to school. Just as Stauffer got home, Ann called her on the phone and told her, "you must be a better person than I am." Stauffer described appellant as being very quiet. The Famalaro children only came over twice, but they were not there for long because Ann would come over and tell them it was time to go home. Stauffer's children would play at other children's houses, and they would play at hers, but she never saw any children playing at the Famalaro house. Stauffer could not recall ever seeing either Mr. or Mrs. Famalaro at any school functions. (24 RT 5970-5976.)

Roger Harvey was in appellant's class at Santiago Elementary School. Appellant was quiet, awkward, and was teased by the other kids, who called him names like "Femalaro" because he was meeker than the others. (24 RT 5978-5982.)

Ingrid Glenn worked with appellant at Mr. Stox restaurant in Anaheim for about three years in the late 1970's; she was a waitress and he was a busboy. She recalled that he was a hard worker, full of humor, fun and laughter, very helpful to everybody, and that all the waitresses and other busboys liked him. Appellant was a student at Santa Ana College when he began working at the restaurant. About two years after he had started working at the restaurant, appellant asked Glenn if he could stay at her house while he was in the process of moving to Glendale to begin chiropractic school. She described appellant as a hyper person, always busy thinking about the future and planning his life. (24 RT 6222-6225.) His mind always seemed to be racing. (24 RT 6233.)

Glenn met appellant's grandmother shortly after he had moved in with Glenn. Appellant was very close to his grandmother, and he asked Glenn if she could help appellant find a place for her to live that was close

to him. When Glenn went with appellant to his former house to pick up his grandmother, Glenn went inside and found it to be a very strange place. There was one room with no furniture in it, and "a pileup of things" covered with sheets. The closets were stacked to the top with paper towels, and there were Bible scriptures on the refrigerator and kitchen wall. The grandmother stayed with them for a week, then Glenn's ex-husband rented her a room. Glenn thinks that appellant and his grandmother later moved to Glendale, but she kind of lost touch with them after they left. (24 RT 6225-6229.)

Glenn met appellant's girlfriend Ruth when appellant and Ruth returned from an outing to the beach or somewhere, and Glenn found her to be "a real natural kind of looking girl" and "real sweet," and she and appellant got along very nicely that day. (24 RT 6229-6230.) Appellant had previously talked to Glenn about Ruth practically every day. He was very open, and shared his feelings and thoughts. (24 RT 6230, 6234-6235.) One time after appellant and his grandmother had moved away, Glenn ran into appellant at the courthouse. Ruth and appellant were no longer together, and appellant was "very concerned." (24 RT 6232-6233).

Glenn recalled that she and appellant had religious discussions, because she was just starting to become a Christian and he had a lot of knowledge about Christian writings and the belief itself. He gave her some good advice about reading religious materials and they went to a seminar together. He was a very deep believer. (24 RT 6230-6231.) Glenn also remembered that appellant bought a Cadillac for his father at some point. (24 RT 6231.) In the three years she knew appellant, he did not try to hurt people in any way and he was not a violent person. She liked him, and so did other people. (24 RT 6233.)

Deborah Worthington-Hall recalled an incident on August 13, 1981, when a stranger probably saved her life. She was waiting for a bus to go to work, at 7:00 a.m. on Melrose Avenue in Los Angeles, when a Hispanic man came up from behind, put her in a chokehold, had a knife in her side and said "give me your money bag." She told him to take the purse, but he put the knife to her neck and said he was going to kill her. When he came down with the knife toward her neck as if to stab her, some people jumped him from behind and tackled him, and she ran into the street. She then saw that two people were sitting on top of her assailant, and one person had gotten the knife away from him. There were three people involved in grabbing her assailant, but she did not know which was the one who had pulled away the man that was holding the knife, and she could not remember if appellant was one of those people. She testified similarly about the incident in court in 1981. (26 RT 6465-6470.)

Mark Murphy met appellant in September of 1980, when they were classmates at the Cleveland Chiropractic College in Los Angeles. They and some other students would usually get to school early and go to the donut shop together before classes started. On August 13, 1981, appellant, Murphy and Richard Salcedo, another classmate, were in the donut shop when a drunk guy with a knife came in and started "carrying on." Murphy was afraid and reacted by jumping over the counter, but appellant confronted the guy and told him to stop. When he did not do so, appellant pulled out a cannister of mace and maced him. When this did not have much effect, the owner came out from the back with a broomstick, and appellant took it and pushed the guy out of the store. Things calmed down, and they got their food and left the donut shop. (26 RT 6471-6474.)

As they walked out of the donut shop, they saw that the same guy

was now across the street, still acting crazy like he was going to harm somebody. Appellant insisted on following him, even though Murphy did not think it was wise for two White guys to chase a Hispanic man through a Hispanic neighborhood. They followed him, and saw him go up to a woman at a bus stop, put his arm around her neck and hold a knife to her. Appellant dropped everything he had and "made a beeline to this guy." Appellant told Murphy to get in front of the guy and distract him. At this point, the woman was hysterical, and when the guy moved the knife from her face-throat area to her stomach area, appellant dove from behind him, wrestled the knife away, pinned him down, and kept him on the ground until the police arrived and arrested him. (26 RT 6474-6477.)

Murphy also recalled that in early 1982, when they were taking their state clinical entrance exam to permit them to see patients, the clinician came out to call appellant in for his exam. Appellant asked to be excused to go to the restroom, then he walked by Murphy and never returned. That was the last time Murphy saw appellant. (26 RT 6479-6480.) Murphy identified a Christmas gift appellant gave him in December of 1981, a religious book with a handwritten inscription from appellant (Def. Exh. CCC), which read:

> "12-81. Dear Mark, I hope that this little volume will bring a source of great spiritual enrichment and strength for you. Refer to it regularly and often, with an open mind and heart, and I assure you that its fruits will be great. Merry Christmas Mark. Love ya, Your friend, John." (26 RT 6478-6479.)

Father Vincent Young, a priest on the staff at the Catholic Seminary in Pennsylvania, met appellant 15 years earlier at the rectory in Los Angeles where Father Young was stationed at the time. Appellant saw Father

Young for a year and a half to two years in the latter's role as priest, friend and counselor. Ruth had recommended Father Young to appellant. She and appellant had just broken up, and appellant, who was still in chiropractic school, was trying to get his life back in order because the breakup had been a very emotional and upsetting experience for him. Also, Ruth had had an abortion during their relationship, and that was very painful and traumatic for him. Appellant was doing very well in school and becoming more open to others. He would come by several times a week on his way to or from school. Appellant was very considerate and would bring Father Young little gifts to show his appreciation for the progress he was making. (26 RT 6485-6489.)

Four-to-six months later, Ruth came back into appellant's life. Appellant was euphoric and would not listen to Father Young's concerns about them getting back together. They were together again for six months to a year, and Father Young counseled them during that time, both together and separately. Ruth got pregnant by appellant again, and appellant wanted to marry her and have the dream family, and to know all about Lamaze and do everything to make the pregnancy and birth go well. Although he was not permitted to relate his conversations with Ruth, Father Young recalled that appellant never wavered in his desire to marry her and have the baby. However, Ruth terminated the relationship while still pregnant, and disappeared. (26 RT 6489-6493.) This was during the holiday season, probably around December of 1983 or early 1984. (26 RT 6501.) Appellant's life was again thrown into a turmoil, and he was very distraught and beside himself with grief. Appellant wanted very much to be responsible for his baby, and he thought he could get the relationship back or at least get custody of the baby and raise it himself. Appellant took steps

to protect his rights if the baby was born in a California hospital, but, to Father Young's knowledge, appellant never had contact with the baby. (26 RT 6493-6494.)

Father Young only saw appellant for about a month or two after Ruth disappeared, because appellant was busy trying to locate Ruth and the baby and he just did not hear from appellant any longer. Father Young had been counseling appellant to leave things in Ruth's hands and not force the issue, but appellant was still obsessed with finding the baby. Father Young found appellant to be a very considerate, polite and kind young man, with a tremendous amount of intellectual and physical energy, and an intense person. Appellant tended to be very melancholic and to brood long and hard about things, but Father Young never thought there was any reason to refer him for psychiatric or psychological help. He felt that appellant was very caring and greatly concerned for the unity of his family and wanted to give stability to his family following his brother Warren's imprisonment. (26 RT 6494-6497.)

Father Young found it difficult to say that appellant was close to his family emotionally, though he was intellectually, as he had a high sense of duty as a son and brother. There was no openness about appellant's family, and he did not talk freely about it or with much excitement; it was much more formal and perfunctory. According to Father Young, appellant's religious beliefs were very sincere and deep, and he was in every way trying to live up to the standards of the faith. (26 RT 6498-6500.)

A letter from Ruth to appellant, dated December 4, 1983, was introduced into evidence. It read:

> "Dear John, *Thank you for the beautiful tree.* It made me realize what this Christmas is all about; *It's our first*

> *Christmas as a family*. I want to save the tree forever. I love you! I love you so much!! All the special time you have spent with me - I truly thank you! God has given me the love of a wonderful man - your concern, your empathy, your support and protection have been wonderful. And now, *I am close to giving birth to your child*. That baby will be able to share all that with you! *I love you both*. Thank you honey!! Love, Ruthie." (Def. Exh. DDD; original emphasis.)

A photo of the smiling couple, Ruth and appellant, was also introduced into evidence. (Def. Exh. EEE.)

Another defense exhibit included a sonogram of the fetus at "26 wks" with "I love you!" written below it (Def. Exh. 000-1); a Certificate of Completion of a "Prepared Childbirth" class awarded to "John Famalaro and Ruth Walsh" by the Mission Community Hospital in Mission Viejo on January 10, 1984 (Def. Exh. 000-3); a Certificate of Completion of a "Preparation for Parenthood" class awarded to "John Famalaro" by the same hospital on January 7, 1984 (Def. Exh. 000-2); and a legal notice regarding "Ruth Ann Walsh" putting the expected baby up for adoption, dated December 27, 1983 (Def. Exh. 000-4).[5]

Laura Becker met appellant in 1984 when she called him in response to his newspaper ad for house-cleaning, and he worked for her in that capacity. The first time he came alone, but the next time he brought along two other people. She did not like the others, told him so, and after that he

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[5] Appellant kept a lengthy diary or journal, containing his innermost thoughts, in 1983. The diary included numerous entries about Ruth, which revealed the depth of his love for her, his distraught reaction to their first breakup ("a tragic loss"), his obsession with renewing their relationship, and his "DESOLATION" upon learning that she had been having an affair with another man. One diary entry, for April 22, 1983, read in its entirety: "Another day spent with my gloomy heart." (See Def. Exh. RRR.)

came by himself. (25RT 6386-6387.)

Becker and appellant developed a good relationship, and she enjoyed having him there. They talked about religion and her family. He also spoke of "Ruthie" and his baby, and Becker sensed that it was a tragedy in his life. She and appellant connected early on, they shared ideas, and he would help her and do whatever she needed, including dropping everything and driving her grandson to an appointment when she was physically unable to do so herself. Testifying at appellant's trial was very difficult and emotional for her "because I care about John [appellant]." (25 RT 6388-6390.)

Becker and appellant became "very close," and their relationship kind of turned into a surrogate-mother situation. She lent him money, which he paid back in full with interest. She considered appellant very intelligent and very academic. (25 RT 6394-6395.)

Appellant cleaned Becker's house for about four years; at the end of that time, he told her he had given up all of his other cleaning jobs and was getting into commercial painting. Even when he stopped cleaning her house, he would call her; one time he called her the night before Mother's Day. The last time he called her was just before Christmas of either 1989 or 1990, to wish her and her family a happy Christmas. He sounded happy and told her that his parents were coming from Arizona for the holidays; it sounded like there was a reconciliation and that he was elated about it. That was the time that he put his parents up at the Ritz-Carlton. (25 RT 6390-6393.)

Marie Ebiner was a full-time adoption social worker for the Children's Home Society when she met appellant at a Catholic singles dance in Orange County in 1986. They eventually struck up a friendly relationship, but not a romantic one. Appellant expressed interest in her

work, and one time sent her flowers and a card there. She socialized with appellant about eight times, going to lunch and the movies, and she went to Palm Springs with him one day to visit his sister and her family, and he went to her brother's wedding. Appellant was nice to her and respectful, and did not push for more out of the relationship because he knew she did not want that. But he was hyper at times and did some things that were unusual. One oddity was that he liked to dress in yellow, and in long sleeves and long pants during the warm weather. (25 RT 6340-6346.)

Ebiner remembered that appellant was trying to make a good impression on her, coming to get her in different cars, including a Porsche one time. On the way back from Palm Springs he made them stop and look for snakes. When they were out of the car, she saw him looking at her in a way that made her think he was evaluating whether he should approach her, but he did not do so, and she was grateful for that. At her brother's wedding, appellant entertained people by sucking helium out of balloons to change his voice, which others thought was amusing but which embarrassed her a little. She had told her family that he was hyper and a little different, but that he was a nice person and that is why he was coming to the wedding. (25 RT 6347-6350.)

When they were on one of their outings, appellant swerved back and forth along the edge of the road trying to swish more gas into the tank so that it would not run out. She had not heard of this before, but it worked and they made it to a gas station, although she was bothered by him not starting out with enough gas. She was also bothered by the fact that he had driven on the shoulder of the freeway during rush hour to get to her place on time. His lack of timeliness on occasions was a problem for her. Ebiner went to appellant's apartment in Irvine several times. At least twice it

seemed normal and orderly; but another time, when she unexpectedly dropped by when he was sick, it was much messier, with a lot of things on the floor, and she was struck by the contrast. (25 RT 6350-6352.) She was also disturbed to see that he had some books about sex in his bookcase; she had thought his faith was important to him and that he was trying to live a chaste life. (25 RT 6357.)

Appellant sent Ebiner some letters (Def. Exh. ZZ) during their relationship, which began right before Easter and ended in July, when she stopped seeing him. One of them was an Easter card which had the prayer of St. Francis on it, and the "J.M.J." on it was something he sometimes signed on his letters and stood for Jesus, Mary and Joseph. He also wrote on it that it was a pleasure meeting someone of "admirable moral values"; that was a theme with him. Another card or letter referred to Ivory soap, because it was "pure and wholesome" like her. Two other cards he sent had clippings concerning the subject of abortion, and another had pictures of babies on them. (25 RT 6352-6356.) However, appellant never mentioned a woman named Ruth or a baby that he had lost to adoption. (25 RT 6357-6358.)

Ebiner could not recall how their relationship ended, but she was concerned that just by doing things together he would get the wrong impression and she did not want to mislead him; he respected her decision. She did not have any contact with appellant after July of 1986. He had the maintenance business and did house-painting jobs at the time, and she wondered how that had worked out for him. Being a social worker, she sometimes worried about him and wondered if there were emotional things he could have used some help on; he seemed isolated from his family. Her lasting recollection of appellant was that he was kind and respected her

wishes, unlike some people, and that his faith was important to him. (25 RT 6358-6360.)

Nancy Rommel returned to the witness stand and identified a birthday card she gave to appellant in June of 1991, in which she acknowledged that "this is not a very happy birthday for you," apologized that she "brought so much pain in your life," and expressed her "wishes that you will always have happiness, love and laughter," signing it "I love you, Nancy" (Def. Exh. AAA). She also testified that appellant had periods of depression that would last a week or two, when he was unable to work or talk to anyone. But there were other times when he was extremely active, working night and day and not stopping to sleep or eat. Rommel also recalled that appellant and his brother Warren were not very close, and that appellant seemed to not want to spend any time around his brother. According to Rommel, she broke up with appellant in part because she was sick of the relationship and in part because appellant was a good manipulator. (25 RT 6375-6379.)

James Nesmith was an electrical contractor and met appellant in approximately 1990. Appellant did painting, and they referred clients to each other and did work for each other on a barter basis. This lasted until appellant moved to Arizona. He and appellant did not have much of a social relationship; they talked about a few things, but not in detail. Appellant was very clean and well-groomed all the time, and was very good about talking to people, but it was hard to get eye contact with him, and Nesmith thought him to be uncomfortable and insecure. (25 RT 6363-6365.)

Nesmith did some work on appellant's Perth Street house before appellant moved into his Verdugo Street warehouse. Appellant did not act

out of the ordinary, but he was always a nervous sort of guy. Appellant did not want Nesmith's workers to go into the master bedroom or the upstairs bathroom. He showed them exactly what to do in the bedroom, and when their work there was finished, they got the impression that it was off limits after that. Nesmith did not see anything unusual in there, but thought that appellant was a little overprotective in not wanting people around his "stuff." "He valued what he had." (25 RT 6365-6368.)

The inside of appellant's house was very cluttered, with boxes stacked upon boxes, but appellant had nice furniture, the bedroom and kitchen were uncluttered, and the outside of the house was clean. Nesmith put up security floodlights for appellant on the outside. This exceeded the normal situation, but appellant wanted to be able "to hit that switch next to his bed right away to see if there was anybody in the yard that shouldn't be." Nesmith also did work on all areas of appellant's warehouse. (25 RT 6369-6371.)

Nesmith described appellant as a smooth talker who could sell a paint job. However, Nesmith saw appellant's business going downhill through the period of 1991; he had to cut his crews and he talked of moving because work was so slow. It seemed like appellant's business problems got worse after he moved into the warehouse. Before that, it seemed like his business was going well. (25 RT 6372-6375.)

Patricia Pina is the executive director of the Hotline Help Center, a volunteer organization in Orange County which started in 1968. They are a hotline for any type of problem, including suicide, domestic-violence abuse, loneliness and depression. When someone calls in, they try to find out what the person's needs are and how they can help or if the caller just needs someone to talk to. The calls range from five minutes to two or three hours,

with the average length probably about a half-hour; the length of calls is determined by how much help the caller needs. The goal is to stay on the line until one is comfortable that the caller has been helped. A Pacific Bell bill (Def. Exh. BBB) shows a 42-minute phone call to the hotline from appellant's phone number on May 27, 1991. (25 RT 6379-6384.)

Angela Thobe is appellant's niece and had just turned 20 at the time of her testimony. She and appellant have always been "very, very close." Her family lived in California from 1980 to 1988, when she was between the ages of 3 and 11,[6] and she spent several days a week and almost every holiday and birthday with appellant. She and her sister Theresa, who is three-years younger, would play games and watch and play basketball with appellant, just the three of them. Appellant gave them horseback-riding lessons for their birthdays, and he went along on their rides. Every time they saw him he would bring them a book, and he gave them books on Arizona when they moved there. (26 RT 6513-6518.)

Appellant visited them more frequently during the time their parents split up. He would often come from California to visit them in Arizona, for holidays and birthdays, and would ask and make sure they were doing well. This helped a lot, because it was a traumatic time for Angela and her sister. (26 RT 6518-6521.) After appellant moved to Arizona, they would see him at least once a week. He would help Angela with her homework, and he was there for her championship basketball game, which meant a lot to her because she knew he was always busy. (26 RT 6522-6523.)

Angela was confirmed when she was 17-years old. She explained

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[6] Angela testified that she "was between the ages of three and nine" during that time period (26 RT 6515), but it was an eight-year period and she would have been 11-years old in 1988.

that confirmation in the Catholic Church involves renewing your baptismal vows. A sponsor for confirmation is a spiritual guide, and she chose appellant to be her sponsor because "he was the logical choice." He was the one who "was always there," was "like a best friend," and "like the brother I never had." She loved appellant then, and she loves him now, "of course." Angela received a note from appellant about her confirmation, and a confirmation-day card he gave her along with a Bible as a present. The note read:

> "My Dearest Angela, I am very proud of you. You have honored me greatly by virtue of naming me your sponsor. It is a duty I will always cherish and take very seriously. I love you very much and am amazed at what a beautiful young woman you have become. Love, John." (Def. Exh. JJJ.)

The card read:

> "My Dearest Angela, I am so very proud of you and happy for you. I pray for you every day. For your health, peace, happiness, and holiness are in God's hands. I will always be there for you no matter what you need. Do not ever hesitate to call upon me. All my love always, John.
> P.S. I was truly honored to be your sponsor. Thank you! God bless you!" (Def. Exh. KKK.)

Angela also identified a birthday card she received from appellant on her thirteenth birthday, on which he wrote, inter alia, "I love you very much" and "God Bless you!" (Def. Exh. GGG); a card from him for another birthday on which he wrote, inter alia, "I love you and God Bless you" (Def. Exh. HHH); a Valentine's Day card from him, on which he wrote, inter alia, "may God Bless you and keep you to his Heart" (Def. Exh. III); and a photograph of appellant with Angela's sister Theresa and mother

Marion (appellant's sister) (Def. Exh. FFF). (26 RT 6523-6528.)[7]

Marion Thobe, appellant's sister, is 3-years older than appellant, and her brother Warren is 18-months older than she. Marion testified that the family moved from New York to California shortly after appellant was born. Their mother had a difficult pregnancy, and was in bed a lot while pregnant with appellant and for the first year afterward. Their grandmother lived with them and helped take care of them during this period. There was not a lot of bonding between appellant and his mother. As a result, Marion at the age of five or six became like a protector and mother figure for appellant, and their grandmother tried to nurture him as well. (24 RT 6110-6113.)

Appellant was sick a lot, weakly, and picked on as a youngster, and Marion became his guardian at school and also protected him from the family dynamics at home. Warren got a lot of attention from his mother because he was in piano recitals and on the debate team, and because their outgoing personalities created a bond between them. Their mother lived through Warren and pushed him to do these extra activities. Marion stayed away from her mother because she learned that the less attention from her mother, the more tranquility she would have in her childhood. (24 RT 6113-6115.)

Their grandmother stayed with them off and on until their grandfather died in 1966, and then full time. Their grandmother was "a great lady" and a very strong person, but cold and not at all affectionate. Their father was "a great man" and a good role model for Marion, but their

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[7] Appellant cried during Angela's testimony, as well as during the testimony of his sister (Angela's mother), the testimony of Father Young, and the testimony of Denise Huber's parents. (See 27 RT 6746.)

mother was the dominant force in the home and he tolerated that to keep the peace, which is where Marion learned her survival skills that allowed her to make it in life. Her mother was verbally abusive and mean to her father. All the kids resented the way she treated him, but when they asked him about it, he "went into the whole Italian Catholic, this is what you do." (24 RT 6115-6118.)

Marion recalled that her mother saved all kinds of things, including newspapers, magazines, laundry and trash. The laundry pile was about four feet high, and the garage was packed with stuff brought from New York 20 years earlier which had never been taken out of the boxes. Her mother went through the trash piece by piece so she would know what the kids were throwing away. She also dressed the kids, and picked out and bought Marion's clothes through high school. The kids did not have friends over because they were embarrassed about all the piles. The kids were forbidden to whisper, and there were multiple occasions when she became upset because the kids were whispering to each other. While the father drove, the mother would sit in the back seat between two of the kids, with one in the front, so they could not converse with each other in the car. She would not take feedback from other people, and would describe them as "whacked" if they thought differently from her. (24 RT 6119-6123.)

Marion described her mother's temperament when they were growing up as "peaks and valleys." She could have "up" days, but she had a short fuse and a low tolerance for anything she did not agree with. When she was angry at one of the kids, she would either have an outburst or give them the cold shoulder, which could last for days. She always used religion to make any normal childhood transgression much more serious than it really was; she was going for behavior modification through fear. An

example was dating, which "was such a no-no" and would show you to be an impure person even though it was only an innocent date. (24 RT 6123-6125.)

Marion's mother would spank the boys with a belt, and Marion's reaction would be to "disappear." Her mother exercised daily control over every aspect of her children's lives, going through their rooms, looking to see what was on their desks and what they were writing, and listening in on their phone calls. Certain things in the house were off limits, such as the parents' bedroom and the living room, and they could not sit on certain items of furniture. In fact, she determined where each of them would sit when watching television or on the rare occasions when they ate at home; they would usually go to their grandmother's house for dinner. The kids could only take a bath once a week, and she would bathe them personally. She continued to physically bathe them until they were "old," though Marion could not remember the exact age. Her mother was a rough person, and the baths were just one more "very rough" event. (24 RT 6125-6128.)

Marion's mother viewed herself as religious, but Marion knows now that this is not true, instead describing her mother as eccentric and an extremist. Her mother related everything back to religion, and if you did anything wrong you were going to Hell. She would say to the kids such things as "I have got to save your souls." Although her mother never pulled her "Hell" routine on Marion, she frequently told appellant and Warren "you can't do this; you are going to Hell." It was the use of religion as punishment, rather than a Christian way of life. Her mother was also an extremist when it came to politics; she was "very right to the right." She threw herself into political campaigns and became obsessed with the outcome. She was also concerned about the demise of society. One day she

told the kids that they were selling their house and moving to the hills because the Russians were coming and they were going to get out before it happened. She hoarded food in order to sustain themselves when somebody bombed them, and she made the kids hoard silver for when the world ended and they would have to barter for food. (24 RT 6129-6131.)

Marion's mother never talked to her about sex. However, she would hover outside the boys' doors at night, listening, and then suddenly barge in and "scare the hell out of [them]." At the time, Marion thought maybe her brothers were playing cards in there, and it was only later that she realized her mother was trying to keep them from masturbating. When Warren reached adolescence and began high school, his mother's focus shifted to him and his relationship with girls. She was very controlling about this, it turned into her new obsession, and she listened in on his phone conversations and followed him. For a time during this period, Marion's mother would go to bed before the kids even got home from school, and they would often go to their grandmother's house for dinner without her. Her mother did not hold her liquor well, and would try to hide it from the kids, but they would joke about her having her "juice." Her father finally called her on it, and she stopped drinking for a long time. (24 RT 6131-6134.)

Turning specifically to appellant's childhood, Marion recalled that, in grammar school, he could not sit still and focus and he got into trouble a lot. Marion would help him with his homework every night. As a child, "he liked to accumulate stuff," such as newspapers and magazines, though not as much as his mother, because he didn't have enough "stuff" to do so. He did not have any close friends, and he was not strong or athletic. Marion started taking the school bus with him because other kids picked on

him a lot. While both Marion and Warren had one good friend in the neighborhood where they would spend as much time as possible because their families "looked so normal," appellant had no one to hang out with like that. He spent weekends with his grandmother, which he really looked forward to, and he would be sad to come home on Sunday night and would retreat to his room. Appellant could be either hyperactive, or down and sad; the norm during those early years, grades one through eight, was "hyper." (24 RT 6134-6138.)

When appellant was hyper, he would do little things to get into trouble, and his mother did not tolerate it very well. She would either get angry or put him in his room so she would not have to deal with it. Sometimes she would tell Marion to "get him out of here," and Marion would take him out of the house. When appellant's mood would swing from hyper to depressed, his mother did not do anything to bring him out of it because she liked him in his depressed state, just sitting around with low energy. (24 RT 6138-6140.) The incident which touched Marion the most from appellant's childhood was when he was seven or eight and "very, very sick." He was lying in bed, with diarrhea and vomiting, and screaming for his mother, but she refused to go to him and she would not let Marion help him either. (24 RT 6159.)

Appellant never had any professional help for any of the symptoms Marion described, but he did see an academic tutor for a while. In Marion's opinion, appellant today would probably be diagnosed with Attention Deficit Disorder; he was a nervous kid who needed entertainment or some organized activity or he would "run amuck." He had a neck and head twitch that seemed to be exacerbated by stress, like his dread over having to go to school on a Monday morning. His mother had a similar, but strictly

facial, twitch that came on "when she was escalating into one of her nervous deals." Appellant also engaged in some ritualistic behavior; for example, if Marion touched his hand while they were playing a game or she was helping him with his homework, he would make her touch his other hand so it would be even. Or if someone brushed his shoulder during a ball game, he would have to do it to his other shoulder to make it even. (24 RT 6139-6142.)

Appellant was not violent as a child; he probably had a few fistfights with Warren, but they were usually initiated by Warren. (24 RT 6142.) Warren did not treat appellant very well; he would ridicule and make fun of him. Warren attempted to fondle Marion on several occasions when she was between 10 and 12, but she was able to verbally and physically stop him. She never told her parents about this. (24 RT 6147-6148.)

Marion moved to Iowa for college when she was 17, got married while she was in Iowa, and returned to California in 1980 after her daughter Theresa was born. Marion's mother went with her when she went off to college, and stayed for "less than a year," returning to California and cutting Marion off when she told her mother "it would be a more normal event in life if I could go to college by myself and she could go take care of John and my father." Marion had contact with appellant and their father through letter-writing during her time in Iowa. When she was back in California, from 1980 to 1988, appellant would frequently come over for dinner, would spend all the holidays with them, and would come over whenever he had a need to see her kids. (24 RT 6149-6151.) Appellant was Marion's daughter Angela's godfather, and Marion identified several photographs showing appellant with Marion's family, including her two daughters. (24 RT 6144-6147.)

Marion felt that appellant was a workaholic as an adult, which caused her concern. (24 RT 6148.) He worked 12-16 hours a day, 7 days a week. He would sometimes disappear for a while, when she assumed he was in one of his depressive periods, and then he would reappear and act like everything was okay. Appellant was very generous with his parents and with Marion. He spent a lot of money on his parents, including buying his father a Cadillac, because he had always wanted one, and, in 1990, he took the whole family to the Ritz-Carlton for Christmas. (24 RT 6151-6153.)

Marion's kids adore appellant. He spent quality time with them that a parent cannot, taking them horseback riding and miniature golfing, and to places like Sea World, and he would always show up with something special for them. He was her older daughter's confirmation sponsor, and her kids would go to him for counseling on things that they might not talk about with her or her husband Dwayne. (24 RT 6145-6146, 6153-6154.)

Marion recalled that appellant went to the police or sheriff's academy, to Thomas Aquinas College, and to a chiropractic college in Glendale, but he did not complete any of them. She moved with Dwayne from California to Prescott, Arizona in 1988, and lived next door to her parents, who were already living there. (24 RT 6155-6156.) They made the move to California because her mother had been working on Dwayne with her "survivalist" beliefs. In her mother's mind, when California fell off into the ocean, Arizona would be the place to live. Also, there were survivalist people in Arizona who would be able to survive when the end of the world came. (24 RT 6192.)

Appellant moved to Arizona sometime after Marion separated from Dwayne in June of 1990, and he moved in with Dwayne after she moved

out. Appellant worked day and night, and their contact was more sporadic. There was one time when she saw appellant in Arizona that he looked like he was ill and not taking care of himself. (24 RT 6158-6159.)

In June of 1991, Marion had a phone conversation with appellant which disturbed her. He was very emotional and crying, and the subject matter of the conversation had to do with things that had happened years earlier.[8] Marion was concerned about appellant's emotional state after talking to him, but she did not talk to him further about it because she was concerned for her own mental health because she needed to stay okay for her kids. (24 RT 6156-6157.)

Warren Famalaro, appellant's older brother, testified that he was a chiropractor until the early 1980's, but was arrested in 1980 and ultimately convicted for having oral copulation with a 10-year-old boy and unlawful sexual intercourse with a 17-year-old girl; he spent 2-1/2 years at Patton State Hospital as a Mentally Disordered Sex Offender. (25 RT 6243-6244, 6315.) This was a devastating event in his life; he lost his license to practice, and he suffered serious humiliation. He acknowledged trying to fondle his sister Marion several times when he was in the seventh grade, but

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[8] The trial court sustained the prosecutor's hearsay objection when defense counsel asked Marion whether appellant had ever reported to her "Warren doing anything like that to him [referring to Warren's attempted fondling of Marion]." (24 RT 6148.) Subsequently, outside the jury's presence, defense counsel made an offer of proof that in a telephone call to Marion in 1991, a tearful, emotional appellant told her for the first time that Warren had molested him when they were children. Defense counsel proffered evidence of this statement for the non-hearsay purpose, inter alia, of showing how appellant was affected by committing "this horrible act" against Denise Huber, "and he is trying to get in touch with what would cause him to do that." The court refused to admit the proffered evidence. (24 RT 6160-6163; see Argument IX, *post.*)

he "didn't get too far." However, he denied beating, teasing, molesting, or engaging in any sexual activity with appellant. (25 RT 6298-6304.) There was an incident at the seminary he attended which "was termed as sexual," but Warren insisted that he only "used a groin shot" to keep another guy from beating him up. (25 RT 6313-6314.) He agreed that he lied under oath at his trial when he testified that the oral copulation charge was untrue. He was "in complete denial" at the time, which also accounted for his similar insistence on his innocence when he was interviewed by the probation officers after trial. He was convicted of both orally copulating the boy, and the boy orally copulating him. His wife helped him get into counseling to repair the damage from his childhood. (25 RT 6315-6317.)

Warren described his relationship with his father as very close. His father was very loving and kind, and he stood by the kids as best he could, but there was a lot of pressure on him to do what his wife wanted him to do. Warren feels kindly but sorry for his mother. He felt that her intentions were good, and that she tried to do the best she could, but she did not have the skills or capacity to pull it off. He has no contact with his parents any longer; they moved away without leaving an address or phone number. "They just disappeared." (25 RT 6244-6245.)

Warren recalled that his Catholic school was conservative, with a very controlled environment, though not controlled enough for his mother. She was very active in the curriculum, especially about morals, discipline and the like, and she tried to tell the nuns and priests how to do their jobs. At home, Warren and his siblings were in a "very insulary" environment, a "test tube situation." They were not out of the home much without their mother being there, and friends did not come over because it was "like a fort" and an embarrassing environment. There was overcontrol and

domination, and the kids probably would not have been left alone with them. Also, the house was messy, with "stacked up stuff." When the kids reached puberty, their mother would tell them not to venture out and not to talk family business; "it's us against them." At first when the kids were young, they wanted to believe that religion, the Catholic Church, and doing the right thing would get them into Heaven and keep them from going to Hell. However, "as it got more and more to the right, conservative, it had to be Latin. It had to be a certain way. The Pope didn't know what he was doing anymore. And we started to know it was not a normal situation." This realization came to Warren when he was around 11- to 13-years old. (25 RT 6246-6249.)

Warren's mother had an "overly meticulous" way of doing things, such as continual washing of her hands, and hand-washing each article of laundry because it wouldn't have been clean enough in the washer and drier; even though they had a new washer and drier, Warren never saw it used. She would also talk about the Russians coming, and told the kids that they would wind up going to Hell if they did not share her views. She was hysterical and manic, and there was a lot of pressure to do things her way. "You could feel the energy coming at you." She would grant conditional love; if you were the exact clone of what you were supposed to be for her ideal, she was very loving. If not, you would feel the pull-back and the abandonment and total isolation; she would ignore the kids, just "brush them off." Warren would do everything he was supposed to do trying to be the good son, and got all kinds of rewards and lots of love from it; but when that got yanked away, he did not know what to do. Marion coped by withdrawing internally and not putting up any opposition. Appellant went the other way and tried to do what Warren did to please his mother, but he

struggled to find his own way because he saw that Warren's and Marion's methods did not work. (25 RT 6250-6253.)

Warren's mother picked the kids' classes and teachers to ensure that they never got any sex education. They only got the message in the home that if you are "doing it," you are in deep trouble both in the family and spiritually later in life. She would not let them see anything that was sexually-related; she would have them shield their eyes or put their heads down during television and movies in order to avoid seeing anything more than hand-holding. The church was used as a club, to be the enforcement mechanism. Their father was the mediator and peacekeeper. But he "checked out," because he did not know what to do with his wife and leaving or divorce was not an option. Their grandmother came to live with them early on and did a lot of household chores. She knew how to push their mother's buttons and put her over the edge. Their mother would physically threaten grandma, but there was "only one time of struggling and then [the grandmother] was pushed down the stairs." (25 RT 6253-6257.)

Sunday night was bath night at the Famalaro house. Their mother would put them in the tub individually and scrub them to make sure they were clean. Warren remembered her bathing him until he was 9, 10 or 11. When she would scrub their genitals, "she got different." When Warren started to feel that this behavior was "off" and would say something about it to her, she would respond that it was a very sensitive area and she wanted to make sure it was cleaned right. Her breathing would change when she was scrubbing their genitals, and it felt like she got an energy surge from it. (25 RT 6257-6259.)

Warren did not realize as a child that his mother's vigilance and spying, "midnight runs into the bedroom," were about masturbation. She

would make sure where their hands were and that they were not touching themselves. (25 RT 6284-6285.) Warren started getting interested in girls around the seventh or eighth grade, and because of the stigma his mother had placed on relationships with girls, it became larger than life and made him want to go do that. One time, he tried to hold a girl's hand at a school assembly and got humiliated for it by the priests and nuns in front of everybody. Later, he got the idea that his mom wanted him to be a priest, so he went to the seminary, but he only lasted two years and nearly had a nervous breakdown and had to get out. His mother pulled back emotionally and was never the same with him again because he hadn't followed through; that was when Warren realized he was on his own. Warren believes that he was his mother's favorite in terms of attention. Appellant received less and less attention from her when she became depressed, deflated and despondent from having been worn out by Warren and Marion not conforming to her plans for them. The kids had to try to develop their own coping skills by having an inner life that cannot be shared. But appellant was the weakest of the three kids, emotionally and physically. (25 RT 6259-6263.)

According to Warren, appellant was "infantized" longer than his siblings. "He was on that conveyor belt . . . the incubator the longest taking all of what he took" from his mother and grandmother. By the time appellant came along, "there wasn't a lot left." The house was real quiet; everyone was walking on egg shells trying to please their mother, because if you didn't, there would be fights, blow-ups. Their father had fully withdrawn and "checked out." Appellant did not fit his father's profile; he was not healthy, robust, good at sports. He was sickly, "ill with something all the time." He had a hard time; things were slower coming to him. Their

mother would take out her frustrations with Warren on appellant, "hammer on him," and he did not get the love from his father that he would want. Warren feels really bad about how things were for appellant in that household; "it was very tough on him." Warren felt like he tried to "pave the way" for his siblings by standing up to his tyrannical mother, but he felt a little betrayed that they did not see what he was trying to do and "kind of sold me down the river to just have a peaceful life." Warren and appellant were not close; the whole emotional context for the family was not encouraging them to be connected. There wasn't much the three of them could do together without their mother's control. Warren admitted that he might have teased and picked on appellant, such as calling him a "pansy ass wimp," but he denied beating him. (25 RT 6263-6266.)

Warren recalled that appellant had headaches, twitchiness, and bleeding colitis, a lot of "colon stuff," as a kid. Warren cannot imagine appellant ever starting a fight. He was very thin and frail, and kind of bent over, and was always getting beat up; Warren and Marion tried to protect him on the bus. Appellant eventually became somewhat more defiant of his mother, but his defiance was more low-key than Warren's; appellant had the hope of pleasing her longer than did Warren. Appellant continued to hold out hope that he could someday be loved and accepted by his mother. (25 RT 6267-6271.)

Warren met Ruth; appellant was very much in love with her, talked about her all the time in favorable terms, and was really close to her. (25 RT 6270-6271.) Appellant was absolutely crushed and devastated when Ruth left him. Warren thinks that appellant got "dumped" by Ruth not because of himself, but because his mother scared Ruth and her family with her behavior. Appellant wanted to marry and have a family and a normal

life with Ruth, and to just fit in and be a normal guy. Appellant did not have that in his life; he struggled to receive his parents' acceptance, to be successful in a career, and to have a long-term relationship resulting in marriage and a child. At some point, both appellant and Warren turned their goals more toward finances, as a way to show that they were "okay" and demonstrate to their parents that they had made something of themselves even if they were flops in their parents' eyes. (25 RT 6273-6276.)

Appellant started his business, "The Maintenance Doctor," in the mid-1980's, and Warren would see him around town. Warren saw mood swings in appellant, "highs" and "low lows." At times he would be "beyond type A," "very top end manic," high energy and spending generously on his girlfriends; and then, in his lows, he could barely breathe or keep his eyes open, was worn out, frazzled, not taking care of himself, scrawny, and "just not there." Warren would tell appellant to take care of himself and get rest, but appellant would always say it was exhaustion from work. The family always attributed appellant's "messed up" or depressed condition to his working too much and to Ruth having left him. (25 RT 6276-6279.)

Warren met Nancy Gowan, Cheryl West, and maybe a few other girls his brother dated. Appellant had employees in those days, but not really male friends. Appellant would initially get excited about relationships, then sabotage them by working too much and not nurturing them. Although appellant, like his siblings, was shy about sex as a kid, in the mid-to-late 1980's he became a little flamboyant with it. He would tell dirty jokes, buy sexual books, and give sexual gag gifts; he was "very open about sexual comfort." (25 RT 6279-6282.)

Appellant lived with his grandmother for years, and his mother did not approve. It was not a normal relationship, but they got what they needed from each other. It was an attempt by appellant to get affection and tenderness from his grandmother that was not there from his mother. Warren did not personally see appellant's rat-pack behavior because he was not around much, but he heard stories from Marion or other people about it. In the late 1980's Warren became concerned about appellant's mental state and advised him to get counseling and chemical treatment to stabilize himself, but appellant bought into his own story that it was exhaustion from overwork and excitement. Warren had no contact at all with his family in the years in the 1990's leading up to appellant's arrest in 1994, other than with Marion and his two nieces. His parents and appellant went away, and Warren did not even know where they lived. (25 RT 6282-6286.)

Mary Willhoite Martin had a romantic relationship with appellant's brother Warren at Palmer College of Chiropractic in Iowa around 1971 or 1972, when they were both about 19-years old. Warren's mother Ann would call at odd hours of the night, accusing her of being Warren's paramour, and angrily telling her not to have a relationship with him. This became an issue in their relationship, and Mary eventually dropped out of Palmer to help put Warren through school because Ann threatened to stop funding Warren's college career because of her. She and Warren became engaged and were together until 1974. After Warren returned to California to study for his boards, she broke off the engagement when she started seeing someone else. (24 RT 6204-6207.)

Mary renewed the relationship with Warren in February of 1975, and came out to California to see if they were going to get back together. Warren made arrangements for her at the Aqua Motel near his home, and

she stayed there for two weeks. One night, she and Warren had gone out to dinner with Ron and Jenny Berman; Warren and Ron were in practice together at this point. Mary and Warren went back to the motel and had a few drinks, then he left. About a half-hour later, there was a knock on the door from a woman saying she was Jenny Berman and to let her in quickly because someone was after her. When Mary opened the door a crack, Ann Famalaro barged in, looked around the room, and told Mary: "You love to fuck my son. You love to suck my son." Then Ann slapped Mary in the face, and told Mary that she was going to die that night. Ann also said that she had had a long life and didn't care whether she lived or not, but that she (Mary) wasn't going to have her son. Ann told Mary that she shouldn't leave the room because, if she did, she had already paid someone across the street to shoot her. Then Ann mentioned the Virgin Mary and got off on a religious tangent, going from sex to religion. Mary asked Ann what she wanted her to do, and offered to catch a plane to Iowa tonight and never see her son again, but Ann replied: "No, it is too late for you. You are going out tonight, sister. There is nothing you can do at this point. You are going to die tonight." Mary believed her, thinking she was 23-years old and was going to die in a motel and nobody would know. Mary sat there for a while, then asked Ann, "how are you going to do this?," whereupon Ann lunged at Mary, got on top of her and began to choke her. Mary was having trouble breathing, but finally managed to push Ann off of her and ran towards the door. Ann grabbed Mary's nightgown, but Mary broke loose and ran down the stairs and into the motel office. She told the family that ran the motel, "my God, my God, someone is trying to kill me" and to "call the police." The motel owner said "No, no, your mother is here, and she wanted to know what room you were in. Your mother was here to visit you." Mary replied:

"No. My God, that is not my mother. She is trying to kill me." (24 RT 6207-6211.)

Ann stayed outside the motel-office door, pacing back and forth, then the police arrived, as did Warren and his father. Mary told the police that she wanted to press charges against Ann. However, a week later Warren asked her to please drop the charges as a favor to his father because it would drag down the family name, and she did so. (24 RT 6212-6213.)

Mary never met appellant during her trip to California. She remained in the relationship with Warren until July of 1976. She considered Warren to be a sociopath, which to her means not having a great sense of right and wrong or a true conscience. They went to a counselor and both took psychological tests. After that, their relationship ended.[9] Mary did meet appellant at Warren's graduation, and found him to be very quiet and subdued. (24 RT 6213-6216.)

At the time of her testimony, 22 years after this "terrifying," "emotional and scary" incident with Ann, Mary was still feeling "an emotional terror" from that night which has never gone away. She had an unlisted phone number for years because of Ann's attack on her, and only in the last few years did she have her number listed, but it is under her married name. "And to this day, I would fear for my life around that woman." (24 RT 6217-6219.)

Ann Famalaro, appellant's mother, was called by the defense and testified at great length. She was asked when appellant was born, and replied: "June 10, 1957 or '8." Her husband is Angelo A. Famalaro; when

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[9] The trial court sustained a prosecution hearsay objection regarding what the counselor told Mary after the testing. (24 RT 6214.)

asked if he was still alive, she responded: "Barely." At the time she became pregnant with appellant, she had two other children, Warren and Marion. When asked Warren's age at the time appellant was born, she replied: "It was from between 1952 to '57 or '58, I think it is." Angelo had two sisters, Josephine, who was 80-years old at the time of Ann's testimony, and Mary, who had died about five years earlier. Ann was an only child, but her mother was still alive when Ann became pregnant with appellant. (24 RT 5985-5986.)

In response to a question asking if, when she was pregnant with appellant, anything happened to her physically which caused her some concern, Ann volunteered: "One thing I try to go through my mind so not to bore the jury; I am embarrassed they have to listen to all this stuff. I figured there was one thing, though, they would be interested in." She proceeded to describe a time when she was four- or five-months pregnant and had been "very, very sick" for three months. She was feeling guilty about her other children "not getting out at all with their mother and doing various things," so she "got the little family together" one day, "and my mother and I was going out the door and I splattered all over the ground with John," falling face front. She then went to bed and "hoped the whole thing would be all right." (24 RT 5986-5987.)

Ann testified that the family was living in Long Island, New York when John was born, and they moved to Santa Ana, California when he was "I think a year old." They "migrated here" because her husband was going to set up a manufacturing plant in Garden Grove. They moved into a home they had built on Victoria Drive; this was about 1959. Ann volunteered that "I became very involved in Santa Ana and just gave a lot of my life to it."

Ann described appellant in his pre-kindergarten years as being "very

hyper" or "excitable," and he "seemed a little different" from her other children. Ann was a stay-at-home mom during this time period. Like her older children, appellant started school at St. Joseph's parochial school in Santa Ana. According to Ann, her children had a "little group" of friends in the neighborhood who her kids would play with in the street and bring home; Ann and her husband "would take them everywhere," including Knott's Berry Farm, Disneyland, and movies. (24 RT 5989-5991.)

Ann was asked if appellant had any major illnesses or injuries during this pre-kindergarten period, and she replied that "I don't recall anything other than that terrible fall which I took which always remained in my mind." Appellant stayed at St. Joseph's until "he got kicked out" in "I think it was the fourth or fifth grade." This broke Ann's heart "because I had tried so hard to make St. Joseph's work, and Warren and Marian [*sic*][10] had gone through and everything was swell. And Warren was a great speaker, and he did all these wonderful things. I was so shocked." Ann never asked what appellant did to be thrown out of school by Mrs. Gleason; she "just felt that if she threw him out, he had to do really something." (24 RT 5991-5992.) Ann could not remember the name of the private school in Anaheim appellant went to after being kicked out of St. Joseph's. (24 RT 5996.)

Ann said that she "read books with him [appellant] and read books with him. I think I am known as the book reading mom, and they all became great readers, every one of them." All of her kids "read constantly." Appellant would try to read in between "these little periods"

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[10] Appellant's sister's name is variously spelled "Marion" and "Marian" throughout the Reporter's Transcript; however, when she testified she gave the spelling to the court reporter as "M-A-R-I-O-N." (24 RT 6110.)

when he would engage in "strange behavior," meaning he was "kind of moody" and "sulked." He "didn't seem right," and was different from the gregarious and outgoing Warren. Marion was quiet and reserved, and seemed to fit in with the two of them all right, though Ann does not know what was going on in Marion's head. (24 RT 5992-5993.)

Ann's parents lived with them up until their deaths, which brought on some problems. Ann's mother would override her decisions, which caused some friction, but Ann loved her with her whole heart. Ann's mother singled out appellant because he was the baby, and her father called him "Honey Boy." Her mother could not be around appellant enough, so she relinquished a lot of her powers to her mother regarding appellant. (24 RT 5993-5994.)

Ann was very proud of Warren, who played the piano really well and would win all the talent shows in high school. She became "very captivated" with her children, and now realizes she was "overly absorbed with them." She has found out "that you don't save anyone's soul. The person has to save their own soul." She "was trying to save their souls" by getting them involved in speaking, reading books, and "getting superlative at their studies," so they would not get into sinful areas. She was trying to protect them from doing things "their contemporaries" were doing that she knew were not right. (24 RT 5994-5995.)

Ann's children were raised in the Catholic Church, and "they were all very good till about 15, and then it exploded." By "very good," she meant they would go to church and would pray, and every evening the family would have "a little play," and "of course, Warren was the ring leader." He would "do his little acts," and lead "this little group that we had. It was a nice family at that time." They went to church every Sunday,

and every day during Lent. After they would spend three hours in church on Friday afternoon, she felt she had to reward them for "how wonderful they were," so she took them to a restaurant and got them "a little treat" to encourage that behavior. (24 RT 5995-5996.)

Ann volunteered to explain how her community activity began. She was busy raising her family, building a house, and "doing all these wonderful things," so "I didn't know our country had a problem." Then she went to hear Commander Syler, the father of the Polaris missile, and he said "some startling things" about such things as the Federal Reserve, the budget, the "stripping down of the military," that made her realize "things are going really bad" and "we're losing our country." She was 30 and "very impressionable" at the time. When she told her husband about these things and that she wanted to bring this man to her house, he said "no way, . . . we have always been Democrats." But she finally prevailed on him and they had about 500 people in their backyard to hear Commander Syler. What those people heard from him "made their heads swim," her husband became a convert, and she became "a real advocate." She decided she was Joan of Arc and was "going to save the world," but "of course, it doesn't work that way." She realized crime was a very serious thing, helped get Brad Gates elected sheriff, and would go to court to give moral support to prosecutors. Then she ran for councilwoman in Santa Ana, calling her campaign "Enough is Enough" and intending "to clear up all these things." However, on the same front page with her candidacy being announced, "here is my first born in terrible trouble." Although she realized that "you don't win a campaign with your first born in deep trouble," she "put the campaign on

anyway because that is the way I am."[11] She tried to close down "that whole Mitchell Brother [*sic*] pornography, that terrible theater in Honer Plaza," bringing out 400-500 pickets "fighting the pornography," and she thought they would elect her and she could eventually "straighten out a lot of these things." She found out as she went along that things aren't that simple, that these were "fantasies." (24 RT 5998-6000.)

Ann described the nature of her political views at the time. She was "absolutely" concerned about Communism. It was one of the "issues" that "we should have been fighting," and it was "an orchestration" then and still is today that "we are getting along so well with them." She made a lot of converts, like journalists and people on the radio, "who knew that I was right." She came to understand that Communism was "only a small part of it, . . . meaning that there are structures all over the world all working together that we don't realize." (24 RT 6001.)

Warren and Marion helped her with her political work, and "that was wonderful what I was doing at that time." It is only since they became "sophisticated" and got out into the world that "the world has shown them that their mother was wrong." Appellant, however, helped her out of "sincerity" and "really wanted to do it." For example, when she had a thousand people picket against abortion in front of the Anaheim Convention

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[11] According to Ann, the very same day that she announced her "Enough is Enough" political campaign, her son Warren was arrested for molesting a boy in his office; "that just about killed me." Appellant was aware of what was going on, and was very hurt. The family was just "dragging around" and "hardly making it," and appellant was part of this. When Ann tried to go to court during Warren's trial, he told her to "go home, little girl" and never come back. He ended up going to prison. (24 RT 6050-6053.)

Center, "he was fighting for life." "Of course, I know that his picture wasn't shown in this courtroom or anyplace else that he was fighting for life because this is a death culture here. . . . He had saved the unborn with his grandmother on the front page of *The Register*. He did that out of his heart. He didn't do it because I wanted him to." (24 RT 6002.)

Ann tried to warn her children about threats to the American way of life, which she felt was a threat to them. "I was doing it in my heart for them." She told them that everything they read in the paper was far from true, that people were being "brainwashed," and that you had to look at all sides and keep an open mind. To prepare for an invasion Ann saved food, a 30-day supply "like the Mormons talked about." "Of course, it hasn't happened yet," but "it is very, very close now." Her kids went to lectures with her, and appellant, who was in his high school years, would introduce her speakers. He was very charming, and very nice in between his sulking moods. He made more sense than some of the speakers, which "was okay because he was learning what was going on." Appellant had his heart in it, more so than Warren. All of their money went to bankrolling these speakers and renting the club for the speeches. (24 RT 6002-6005.)

Ann stated her belief, which existed both "now and then," that "the assault on Christianity is terrible" and "is coming from every direction," and she "fought that with everything I had in my body because I thought that is what God would have me do." She was "arrogant enough" to think that she could hold off this assault. In fact, she got into politics because of religion. As for her children, it wasn't as important to her that they be good Catholics as it was that "they loved Jesus with all their heart. For this I am called a radical." But then she found out that "the hormones click in and all those things happen and Mom becomes very irrelevant." (24 RT 6006-6007.)

Ann was "bothered" by sex back then. "The free love thing really got to me. . . . Go pass out a condom and here: have a good time." She tried to keep her kids immune from getting into that, and try to reward them in other ways if they felt they were missing something. She knew that some of their "allies" at school were into what she is describing. Everything was "rosy" in this regard until Warren went to high school. Some of the speakers she had invited talked about how sex was "a tool" that was being used to "get . . . our young men captivated." (24 RT 6009-6010.)

Ann expressed her belief that "violent acts are being caused by the water." Also, the "contamination" and the "violent acts" are coming from pornography; the pornographers are "taking our people." She paraphrased "Bundy" as saying, before he was executed, that "it was pornography who [*sic*] got him into it." "No one is immuned [*sic*] from this" and "pretty soon all of you will be up on the [witness] stand" because pornography "is getting everyone into this." She is "up here brokenhearted" and "broken in every kind of way," and she knows that pornography "was the thing that did it" to appellant. She finds it ironic that she picketed the Mitchell Brothers "for days and days," and then pornography got into her family and "hit me with my own bullet." She found out later that "you don't save a person's soul," and that when the kids leave their parents, "society is creating these people to kill them." (24 RT 6010-6012.)

Ann acknowledged that she would monitor her children's television shows, and she saw to it that they did not go to very many movies. This was because at that time "this whole thing was trying to corrupt the American people which is pretty much 90 percent done now." She denied putting her hands over appellant's eyes when a kissing scene came on, but she might have done it if a "bad scene" came on. As she explained, "oh,

gosh, I am bats, but I am not that bats." (24 RT 6011-6012.)

Ann started having problems with Warren when he was 15; he was a "chronic liar." He told his parents he "didn't want any part of" parochial school; Ann was "of course" disappointed because she thought she was "shielding him . . . under the philosophy I had of the save the soul for the person." Warren transferred to Santa Ana High School and "became the toast of the town." Appellant was about 9 or 10 at the time. Ann revealed that she caught Warren masturbating when she walked in on him. So she became agreeable to Warren coming home from his Catholic school because "we can't do any worse" if "this is what we are getting out of this." Ann didn't know what to do about Warren's masturbating. "Now, I am told it is an everyday occurrence, and then it was isolated." She believes that "this comes out of this pornography again. What you put in the sewer comes out of the sewer." Before this time of his life, she and Warren had been good friends; in fact, she was good friends with all of her children. "All buddies; America's super family, uh-huh." Ann could not handle it when Warren began getting girlfriends, and they fought over it. One night, she even "hid right in the back of his car," intending to "catch [him] red-handed." But that did not happen, so she did not do it again. (24 RT 6013-6017.)

Appellant stayed in the house until he was about 13 or 14, and then went away to St. Michael's, a boarding school which was preparatory for priest training; he wasn't there with the idea of being a priest, but Ann thought "a lot of that would rub off on him." He came home on weekends. She thought he did very well there, and she never had any bad reports on him. Prior to appellant leaving for school, their home had become "a chaotic environment," and appellant and Warren were "caught in the middle

of that." As one "sad" example, appellant and Marion got together to celebrate their parents' anniversary, baking a ham and doing some other things. But Ann left to look for Warren, and appellant and Marion told Ann that they were never going to do anything for them again because all she cared about was Warren. Ann explained that she was just looking for "the lost sheep" to ask him, "won't you come and please also have an anniversary with us?" At the time, Marion was going to Santa Ana High School, always obeying the rules, and never causing any problems; Ann was "always proud" of her. But Ann knew that her constant arguing with Warren, "to try to walk the straight and narrow with everything that was coming up," got on both Marion's and appellant's nerves. (24 RT 6017-6020.) Appellant was living the problems they were having with Warren, and was a victim of it as much as was Ann and her husband. (24 RT 6022.)

According to Ann, she would have Warren's and appellant's entire school classes come over for parties, the kids on the block would come over to play after school "every day," and her kids would go over to the neighbors' houses. But a lot of the neighbors did not like Ann "because of my political persuasion." (24 RT 6021-6022.)

Ann described Warren as a "karate expert" and a "great speaker," and he also played the piano. Marion was "that saint I had been looking for"; she "walked the straight and narrow," was a "superb" and "very wonderful" person, and "maybe my little bit of a favorite at that time." Appellant was always doing things for others, like at Christmastime going to the mall and giving gifts to people from "all the little money he would have made on his various jobs" when he was in high school. As a kid, like Ann he "saved a lot of things." He seemed very interested about a lot of things that he seemed very intelligent about, but he was very nervous and

sulky, which worried her. He had a tick where he would pull his whole head and shoulder. But she kept putting off "tak]ing] care" of his problems; "I guess poor John got caught up in all this and never got any help." She never took him to a doctor or anything, and "I should have." He was always hyper, and she just accepted that "that is the way he is." She did not realize you could "go down to the doctor's office and probably find some help," but as she looks back, she knows that she should have done something about it. "Isn't retrospection wonderful?" (24 RT 6023-6026.)

Appellant went to St. Michael's for four years, and graduated. Ann does not know if he had any problem with the curriculum there, but "I didn't have any problem." Ann borrowed a lot of money and took him to Europe as a graduation present, and "it was a great experience. I love John with all my heart." When appellant was in high school he had "about 20 goals," including being a chiropractor, a journalist, or a mortician; "he really meant well." He made very good friends at St. Michael's, and he observed his religion there. After St. Michael's, he went to St. Thomas Aquinas, a parochial liberal arts college "in L.A. somewhere." (24 RT 6026-6030.)

Ann recalled that Marion went to Palmer Chiropractic College in Davenport, Iowa, which "I think was to please me," and then Ann described "the most embarrassing thing in my life." She went to Davenport to be with Marion, who was "the saint" and "our prize," but that "blew up" within six months. "No mother should have gone to school with her daughter, and I know that now. That is the worst thing I can think of." They actually moved into an apartment together, which initially "worked very wonderfully," but then "the world got in again" when "some guy" became attracted to Marion and whom Marion "had eyes for." When this guy asked

"is that your mom?," "that was my death now." Marion moved out, Ann returned to California "broken hearted," and she realized then that she had done "a terrible thing." Once Marion "got [Ann] out of there," she got married within a year, at the age of 19. Marion dropped out of that school, but went on to become "a very successful nurse." (24 RT 6031-6033.)

Ann also recalled that Warren went to the same chiropractic college as Marion, but "he was free-loving in Davenport and I was trying to break that up." When Warren later moved back in with his parents, he would lie to Ann, which had been "a pattern" for a long time, starting when he returned from the seminary at the age of 15. As with her other children, Ann had been "great pals" with Warren before then; "it's crushed me the way things have gone." (24 RT 6037-6038.) Ann was upset with Warren over his "free loving," which she "hadn't gotten over." She explained that "it takes me a while to recover from these things. Blow after blow after blow." When asked what she did when she found out that Warren was (in defense counsel's words) "free loving with some woman in a motel," Ann replied that "you're really trying to make me look like a fool," and that "I might not have caught him the night I went in the car, but there they were, and of course Warren double talks everything, but he couldn't double talk that." Once inside the motel room, Ann "took a clock and banged it down." She "thought . . . time might stand still that way." She said they called the police even though she made no threats or assaulted anyone, but they "had enough conscience to tell the police I didn't do anything." (24 RT 6057-6058.)

Ann related some of the jobs appellant had as a youngster, such as gardening work in the neighborhood when he was about 13, then a busboy, and finally a "very first class waiter." One of the reasons she encouraged

her children to work was to keep them out of temptation's way, but this was "another dumb thing" on her part because while she was "getting them away from the temptations of school," she forgot there were "people on the job too" who could get them into "different temptations that may be even bigger ones." As a result, "their little jobs backfired" on her in that, by meeting older people, her children "probably became more worldly than with the little junky things these other kids were doing." (24 RT 6039-6040.)

When appellant went to St. Thomas Aquinas, she told him she hoped he would meet "a nice Catholic girl." "I sound like a Jewish mother." But appellant not only met a "really nice" Catholic girl, "he became obsessed with her." This was Ruth, whom appellant met during his first year there. Ann's feeling that appellant was obsessed with Ruth was substantiated when appellant quit St. Thomas Aquinas after Ruth "had dumped him." This "kept going on and on. She'd come back to him and dump him." One time, when appellant found out Ruth was moving to Texas, appellant was "beside himself"; Ann "started to shake all over" because she had a feeling that "this was going to impact John's life and, boy, was my feeling right." In all, appellant's on-and-off relationship with Ruth lasted two or three years. (24 RT 6040-6042.)

Eventually appellant went to chiropractic school in Glendale, where he lived with Ann's mother. As Ann described this relationship between appellant and his grandmother, "the two went off in the sunset together. She went to Glendale with him to be with her honeyboy." They were happy together, but it made Ann "sad." Her mother needed medication during this time, and appellant "was very good about it" and took her to the doctor every time she had to go; "he was very caring." After about a year,

though, Ann's mother called and asked Ann if she could "come back if I have to sit in a corner." Ann welcomed her back into her home, but Ann does not know why her mother left, or what or if anything "went wrong" in Glendale. (24 RT 6044-6046.) However, Ann subsequently acknowledged that appellant had actually lived with his grandmother for about five or six years. (24 RT 6094.)

At some point, Ann found out that Ruth was pregnant. Appellant showed up at the front door and asked his parents and grandmother to go to court to help him get the baby. This "got to my heart" because she thought about all the men who get girls pregnant and say "get rid of the baby. I'll give you the money." But her son, by contrast, wanted the baby. Appellant wanted to marry Ruth "more than anything in the world." He "would have done anything to marry her . . . and have the baby in a normal fashion and make it a decent home. He's very sensitive." When Ann and her husband went to court to try to help appellant gain custody of the baby, Ann saw something which she "can't get off of my mind." When "things were going against John" at the hearing, appellant "was sobbing on the stand begging for the baby. Begging." After appellant lost the case, he again showed up at Ann's door and asked "what will I do?" Ann told him to "take every penny you ever earned and find the baby," and that "I'll help you find the baby." As Ann saw it, "this is the story that changed his life." Appellant "was never decent after that. He was muddled, confused, always thinking where is this baby, why did this happen to me. It just wasn't the same. It was over then." When asked if she ever saw her grandchild, Ann replied: "No, I think what they did was cruel." The baby was put up for adoption. (RT 6046-6048.)

Ann and her husband eventually moved to Arizona. They made the

move because Ann was "sick of trying to save the world because the world doesn't want to be saved"; to get away from "the embarrassment of Warren," which "just about put me in a state of collapse"; and because she was concerned about the quality of life in southern California. (24 RT 6054-6055.) They moved to a house in the Prescott Country Club. After Ann's mother died in 1988, Marion and her husband also moved to Arizona and lived in a house next door which was also owned by Ann and her husband. Appellant had contributed some of the money to buy the property in Arizona as an investment for the future. Ann also recalled that appellant, for his grandmother's funeral, had bought "the lovely thing that covers the top of the casket," and paid her funeral bill as well. Ann had not called appellant to tell him his grandmother was near death because Ann "didn't know that," but "to this day" appellant thinks she purposely did not call him. (24 RT 6058-6061.)

Ann recalled that appellant would buy her presents, and that once he even bought his father a Cadillac. (24 RT 6053.) Ann identified a series of family photographs, including ones of appellant "with his arm around his mother" (Def. Exh. TT-5); with him "loving his grandmother in her coffin," and "the spray" he had bought for it (Def. Exh. TT-6); and "with the Cadillac scenario with my husband acting happy" (Def. Exh. UU-2). There was also a photo of a protest demonstration Ann was participating in, "about Christians being enslaved by the Russians" (Def. Exh. TT-8). (24 RT 6061-6064.)

Appellant ultimately moved to Arizona, and lived in the house previously occupied by Marion and her husband Dwayne and "my two grandchildren" after Marion had "abandoned her family." Marion left because "she found another man," but Dwayne continued to live in the

house after appellant moved in. As Ann explained, "everything turned around when her [Marion's] physiology changed or whatever it was, and nothing was any good anymore. Everything changed overnight, including me." (24 RT 6064-6065.) Later, Dwayne moved out of that house as well. (24 RT 6067.)

Ann's relationship with Warren ended when he was going to bring "the little grandson" to see her and her husband, at a time when Warren was no longer married. They were to meet in Phoenix, but when Warren said he and "his lady friend were going to sleep in the same room as the baby," Ann "hung up on him and that was the last hangup I ever made on Warren." Ann emphasized that she and her husband had visited Warren in "jail" every Saturday morning and at Christmastime and Thanksgiving; "in other words, I just hung in there, but I was dumb then." (24 RT 6065-6067.)

Appellant lived in the Arizona house next door to his parents for a couple of years before he was arrested. He was working very hard during that time, and would come home in the evening "dragging just like he was holding together by a thread." Appellant had come to Arizona primarily because his father was in the hospital, and "he loves his father very much." Ann explained that "no one is as crazy about the person who cracks the whip and makes them obey as the one who acquiesces more, so my husband I think he loved more than me, but that was okay with me." Appellant visited his father in the hospital every day, and would take Ann there every morning at 8:00 a.m., go to work, and come back and pick her up at 5:00 p.m. The last day appellant visited his father, "whether he had a premonition, whatever it was," appellant wrote him a beautiful love letter telling him how he cared for him, and brought him a beautiful plant. They

drove away from the hospital that day, "with me [*sic*] to never be with my husband again or my husband to be with him again. Every sheriff's car in the county pulled him out and took him away from me as they left me standing in the middle of the street not able to drive a car." (24 RT 6067-6068.)

During those last months, appellant "just looked like the picture of death," but he was "very faithful," coming in every night to see his father after working so hard during the day. There was a time when appellant dug out an area of the basement of Ann's house to store all of his paint, because the neighbors had complained about all the paint cans in the driveway and various other places. At some point "the Ryder truck shows up" and Ann didn't think anything of it at first. After it had been there a while, appellant's father subtly asked him "don't you think you ought to try the motor," hoping it would prod appellant to do something because he and Ann thought it was costing appellant a lot of money. "That seemed to go over his head," so Ann told appellant she had seen three people "out there looking at that truck today, not that I know anything is wrong with his truck but, my God, let's get rid of the truck." This had no effect on appellant, so Ann came back and again told him there were a couple of people looking at the truck, but "it was like he didn't hear us." Ann also saw appellant exhibit some "strange actions" during that time. He would come home so tired she thought he might be drinking or "maybe on dope which of course we know that wasn't true." She would tell him he looked very tired and should do something about it, but all he did was listen. (24 RT 6068-6071.)

Ann either denied, explained away, or could not recall doing most of the peculiar behaviors attributed to her by Marion and Warren. (See 24

RT 6075-6090.) She did, however, acknowledge telling the boys that masturbation would make them go crazy, "because that's what I heard all my life." She added, regarding the "old wives tales . . . that masturbation can drive you mad," that "maybe we have some evidence of it all around town." Also, she "might have" put her hands over her kids' faces to prevent them from seeing commercials with scantly-clad women, though turning off the t.v. altogether "would seem more like me." (24 RT 6084-6085.) Ann also acknowledged that she continued to send appellant religious materials and discuss religious beliefs with him when he was an adult (24 RT 6072-6075, 6100), and that she attempted to have influence over what he thought up to the day he was arrested (24 RT 6100). Ann offered the opinion that, since she was "very active for Christ, for Church, for Country," it would be "logical" that "if anyone was going to come after anyone it would be me." She mentioned this concern to her children, but hoped that it "didn't give them a phobia." (24 RT 6087.)

Ann recalled that, when appellant was a child, a friend of hers who was married to a doctor suggested that someone should "look at" appellant because he was so "hyper," but "I guess it went through my head." In fact, this friend actually suggested that appellant might need lithium or some other drug because she thought he was "manic." Ann was so busy "chasing Warren around and doing the work and just trying to raise three kids that probably like Scarlett O'Hara, I would have taken care of it tomorrow and I guess I never did, obviously." (24 RT 6094-6096.)

When the prosecutor on cross-examination apologized to Ann that "you know this is a difficult thing for me to do," she replied: "No one should be in this position, no one." (24 RT 6098.)

Gregorio Martinez, the Hispanic Coordinator for the California

Detention Ministry, provides religious services for people incarcerated in Orange County jails. He is a lay worker, not a priest, but he speaks to inmates about religious matters. Martinez started visiting appellant about three or four months after he was first incarcerated, and they discussed religious-oriented materials that would be able to help appellant in his spiritual life. They have discussed the writings of St. Augustine which deal with the processes of repentance, reconciliation, and loving God with all your heart and soul. They have also discussed "The Little Flower of the St. Francis of Assisi" dealing with the same situation, and also that St. Francis becomes the universal brother of everyone and everything. In this way, the book reflects the peace and joy of Jesus after he was converted to become a Catholic. (26 RT 6506-6509.)

Martinez believes that appellant is 100-percent sincere in his Catholic beliefs. Appellant asked him for books and other materials to help him in the process of reconciliation through the Catholic Church. Martinez helped appellant prepare to do a full confession to a priest. (26 RT 6509-6511.)

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ARGUMENT

I

THE TRIAL COURT'S DENIAL OF APPELLANT'S INITIAL AND RENEWED MOTIONS FOR A CHANGE OF VENUE DEPRIVED HIM OF A FAIR TRIAL BY AN IMPARTIAL JURY AND A RELIABLE PENALTY DETERMINATION IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND REQUIRES REVERSAL OF THE ENTIRE JUDGMENT

A. Introduction

If a change of venue was not legally required in the instant case, that procedural and constitutional protection for criminal defendants is a virtual dead letter in California. This is a case in which the victim, Denise Huber, essentially vanished from the face of the earth for more than three years, and her disappearance remained prominently in the public consciousness of Orange County during that entire period of time--not only via many hundreds of heart-rending newspaper articles and television reports, but also with a large banner with the victim's photo on it displayed on a building along a well-travelled freeway near where the victim's car was found, and with tens of thousands of widely-distributed posters, fliers, bumper stickers and pins with her photo on it, all focusing on the plight of the victim's parents and appeals from her family for help in finding her.

When Huber's body was finally found inside a freezer in appellant's rented truck in Arizona, the local newspapers and media outlets widely reported and editorialized upon appellant, terming him a monster and an animal and labelling him with other sub-human pejoratives. Numerous articles and television reports falsely speculated that he had other victims and was even a serial killer, revealed that he had refused to talk to the

police and had requested an attorney upon his arrest in Arizona--with the videotape of that interrogation session repeatedly shown on television--and focused on family and community demands that he receive the death penalty--including the victim's father's televised remarks expressing the "hope that he fries." Emotional memorial services for the victim and her subsequent funeral received widespread coverage, both in print and on television.

It came as no surprise, then, that pretrial polling showed the recognition rate in Orange County for appellant's case to be an astronomical 83%. Surveys also showed abnormally high rates of belief both in appellant's guilt and that he should receive the death penalty, and the prospective jurors' questionnaires reflected the same rate of recognition of the case as did the pretrial surveys.

After appellant's initial venue motion was heard and inexplicably denied, the trial court over defense objection conducted a non-*Hovey* voir dire of prospective jurors which not only confirmed the effects of the widespread publicity, including the prejudgment of and hostility toward appellant, but predictably served to further prejudice appellant by exposing the relatively few venirepersons not previously familiar with the case to other prospective jurors' detailed descriptions of their knowledge of the facts, and by exposing all of the prospective jurors to their fellow prospective jurors' extremely derogatory comments and opinions directed toward appellant.

In light of these factors, the composition of appellant's trial jury was inevitable. After a lengthy voir dire in which appellant used all of his statutory peremptory challenges and was rebuffed in his requests for additional challenges, and after defense counsel expressed their

dissatisfaction with the jury and unsuccessfully renewed their motion for a change of venue, appellant wound up standing trial for his life with a jury with a higher recognition rate regarding the case (at least 10 of the 12 trial jurors) than that of the venire as a whole (approximately 82%). Several of the jurors had undergone lifestyle changes in direct response to news of the crime in this case, and one of the jurors "internalized" the "information" about "the desperate search by the parents for their daughter." Three of the jurors were familiar with the banner with the victim's picture on it, and one of them who drove by it a couple of times a week had a personal reaction to it, wishing she had the power to find Denise Huber and "bring her home." One trial juror's husband had told her to "fry him [appellant]" when he found out that she was called for jury duty in the case, and workplace friends of another trial juror told him the same thing.

There was much more than a reasonable likelihood, both at the time of the initial venue motion and, especially, during and after jury selection, that appellant could not receive a fair trial due to the massive and negative publicity about, and widespread knowledge of, his case in Orange County. Although any doubt regarding the need for a change of venue is legally required to be resolved in the defendant's favor, here it was resolved *against* appellant, primarily on the basis of the size of the county--a factor which not only is not to be deemed a dispositive one in general, but here became essentially irrelevant given the actual, case-specific showing of recognition rates and emotionalism, extending to the time of trial, when sitting jurors were urged by co-workers to "hang him," and when the local newspaper ran a public phone-in poll in which 99% of the callers responded that appellant should be sentenced to death; and even right up to and including the jury's penalty deliberations, when the local newspaper ran an

editorial cartoon chastising and ridiculing defense counsel for their representation of appellant. In short, the record relating to appellant's venue motions plainly establishes that, as a result of the massive publicity surrounding this case, the prejudice to appellant not only must be *presumed* as a matter of law, but is *actual* as a matter of fact, requiring reversal of the entire judgment.

B. Factual and Procedural Background

1. The Venue Hearing

Appellant filed his initial motion for a change of venue on November 12, 1996. (5 CT 1459-1483.) The prosecution filed its opposition to that motion on January 30, 1997. (5 CT 1536-1557.) The hearing on appellant's motion began on February 14 and concluded on February 28, 1997. (5 CT 1710-1711, 1714-1715, 1725-1726; 7 RT 2000-9 RT 2503.) Numerous exhibits in support of the motion were admitted into evidence at the hearing. (See 8 RT 2231; 9 RT 2456-2462.)

Defense Exhibit A contained two reports regarding a defense survey of 401 potential jurors in Orange County conducted in September of 1996. (See CT "Supplemental Record" 25-64.) The results showed that 83.3% of the respondents recognized appellant's case;[12] 70.4% of those who recognized the case believed that appellant was either probably or definitely guilty, and 72.2% of those who recognized the case believed that appellant should receive the death penalty if convicted. In addition, 53.9% of those who recognized the case remembered something about a large banner, with Huber's picture on it and asking for information, which was hung from an

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[12] The recognition rate in Costa Mesa was 100%. In Anaheim, it was 86.5%; and in Santa Ana and Irvine, 86%. The lowest figure was in Garden Grove, at 73%. (7 RT 2153.)

apartment building near the scene of her disappearance and could be seen from the Corona del Mar Freeway, and 55.9% of those people actually saw that banner; 49.1% of those who recognized the case had read, seen or heard that the police found some of Huber's clothing in appellant's home in Arizona; and 35.6% of those who recognized the case had read, seen or heard that the police suspected that appellant might have killed other people in addition to Huber. (Exh. A, Report I, pp. 3a, 5-6.) Exhibit B contained eight video cassettes and one audio cassette of coverage of the case by local television and radio stations--including approximately 4-1/2 hours of excerpts and hundreds of stories from television stations KNBC Channel 4, KTLA Channel 5, KABC Channel 7, KCAL Channel 9, KTTV Channel 11, KCOP Channel 19, and O.C.N. (the Orange County Network).[13] Exhibit C initially (i.e., before it was later supplemented with additional newspaper publicity) contained over 270 original newspaper stories regarding the case, numbered in chronological order, and Exhibit D contained duplicate copies of Exhibit C. The newspaper articles submitted at the venue hearing consisted of 394 pages, numbered sequentially. (7 RT 2002-2003.) Nearly all of the articles were from three local newspapers: the Orange County *Register*, the Orange County edition of the Los Angeles *Times*, and the Newport Beach-Costa Mesa *Daily Pilot*. (See Exhs. C and D.)

The parties stipulated that the population of Orange County in 1995 was 2,563,971, the third largest county by population in California, and the

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[13] Two defense memos briefly summarizing some of the content of the videotapes provided by six of the seven television stations (Channel 5 was not included) were provided to the trial judge, not as exhibits, but as "guides" to assist him in his review of Exhibit B. (See 5 CT 1486-1491; 1 RT 142-143.)

fifth largest county by population in the United States. (7 RT 2003-2004.) Defense counsel also submitted "Trial Brief No. 1" (filed on February 13, 1997), dealing with the retroactive admissibility of victim-impact testimony (5 CT 1690-1703), and asked the court to rule on that ex-post-facto issue as part of the venue motion (7 RT 2008-2010). The prosecution filed a written response to appellant's "Trial Brief No. 1" on February 27, 1997. (5 CT 1718-1723.)

Three expert witnesses testified at the hearing on appellant's venue motion: Dr. Edward Bronson was called by defense counsel; Dr. Ebbe Ebbesen was called by the prosecution to rebut aspects of Bronson's testimony; and Dr. Ronald Dillehay was then called by the defense to rebut Ebbesen's testimony.

Dr. Bronson is a professor of political science at Cal State-Chico, who had qualified as an expert witness in superior court on venue and jury voir dire issues approximately 80 times. (7 RT 2006, 2013-2014.) Though he is most frequently consulted by the defense, he has testified 2 or 3 times for the prosecution, and he has recommended against a change of venue over 70 times, including in 3 Orange County cases. (7 RT 2014-2016, 2086-2087.) He was initially reluctant to advise defense counsel regarding pretrial publicity in this case, given the size of Orange County and the period of time since the victim's disappearance and since appellant's arrest, but after reviewing the publicity he thought that at least a survey needed to be done. (7 RT 2016-2017.) The survey was written by Bronson and carried out by his colleague Professor Robert Ross. (7 RT 2017.)

Bronson also prepared Defense Exhibit F, a log of the newspaper articles contained in Exhibits C and D, and Exhibit G, a content analysis of the compiled material. (7 RT 2017-2020.) Exhibit G contains a section in

which the media characterizes its own coverage with such terms as "media blitz," "media frenzy," "storm of publicity," and "like O. J. Simpson." (7 RT 2025; see Exh. G, p. 2.)[14]

Bronson divided Exhibit G into several analytical categories. In Section I, "Extent of Publicity" (pp. 1-3), Bronson noted some unique qualities to the media coverage that he had never seen before, including the unusual length of the articles, and the unusual number of people who worked on the articles; some articles were as long as 5 pages, and 73 articles had multiple authors, including 14 contributors to one article. He also found significant the high percentage of articles that appeared on the front page, which indicates a professional judgment by the newspaper of the importance of the topic to the community and the community's interest in it, and also makes it more likely that the stories will be read. (7 RT 2022-2024, 2088-2089.)

Section II of Exhibit G, "Nature of the Publicity" (pp. 3-22), contains a "Hierarchy of Prejudice" which reflects the nature and impact of the pretrial publicity in the case. Inflammatory words contained in the publicity, like "horror," "hideous," "monster," "terror," "evil," "grisly," and "mutilate," are emotional and powerful and of the type that grabs people, affects their verdicts, and tends to be undiluted by the passage of time. The publicity also contained inadmissible and inaccurate materials. (7 RT 2025-2027.)

One of the sub-categories in this section of Exhibit G, "The Disappearance of Denise Huber" (pp. 5-11), reflected the use of emotional

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[14] Exhibit G references the page numbers of the newspaper articles contained in Exhibit C which correspond to the respective sections, categories and sub-categories in Exhibit G.

and perhaps inflammatory language. Bronson believed that Huber's disappearance created some tension and fear in the community, especially among women, and thus a special ability to remember the case, an internalization he called "salience." For example, there were articles addressed to women and how they should protect themselves, one of which reported that "many are not driving on the freeways because they are afraid." (7 RT 2027-2028.)

Another sub-category in the same section of Exhibit G, "The Search" (pp. 7-9), shows the community involvement in and awareness of the case, including fliers, posters, bumper stickers, pins with Huber's picture on them, the banner displayed near the freeway with her picture and asking for help, and even a banner airplane, all of which provided a way to continually pique people's interest and keep the story alive. (7 RT 2029.)[15]

"The Body is Found" sub-category in the same section (pp. 9-11) reflected the way in which the discovery of Huber's body was described--nude, decomposed, frozen, handcuffed and bludgeoned--which degraded her and in a sense killed her twice, and also created emotional responses of anger and hostility toward appellant which became part of people's ultimate opinion, but are difficult for prospective jurors to retrieve on voir dire. (7 RT 2029-2031.)[16]

The "Possibly Inadmissible Material" sub-category in Section II of

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[15] The banner was described by the media as 6 feet tall and 30 feet long, and there were numerous articles about it. The media also reported that over 100,000 fliers were distributed in the county, and that even the police cars sported the bumper stickers with Huber's picture. (See Exh. G, pp. 7-9.)

[16] One article in the *Register* termed the freezer in which Denise Huber's body was found as the "now notorious freezer." (Exh. C, p. 270.)

Exhibit G (pp. 11-13) includes television coverage of an interrogation session in Arizona police headquarters showing appellant invoking his Fifth and Sixth Amendment rights, with big subtitles at the bottom of the page showing what appellant was saying to the police. (7 RT 2031-2032.) "The Possibly Inaccurate Material" sub-category in the same section of Exhibit G (pp. 13-15) contained elements which overlap with the preceding category, including "huge" early speculation about other victims, strongly suggesting that this was not an isolated killing, and references to appellant being a serial murderer. For example, there were numerous stories describing the authorities digging under appellant's house in Arizona. (7 RT 2032-2033.)

The "Presumption of Guilt" sub-category in Section II of Exhibit G (pp. 15-22) shows that statements from officials indicated there was certainly no question as to appellant's guilt, including numerous stories specifically describing the mountains of evidence found by the police such as bloody boxes and a police uniform suggested as having been used to lure the victim. Even if accurate, such reporting is very damning in its reach. (7 RT 2033-2035.) As in a few other very high-profile cases, this one brought forth instant psychologists eager to assume guilt and theorize on appellant's motivations. Thus, there were stories suggesting that appellant "might be a necrophiliac," or that he had committed "displaced matricide" or a "disorganized sexual homicide," with "a lot of rage." Pictures of appellant on a leash in court in Arizona, both in print and on television, contributed to his dehumanization. (7 RT 2035-2036.)

Section III of Exhibit G, the "Nature of the Crime" (pp. 23-25), contained a "Characterizations" sub-category referencing descriptions which distinguished this defendant's case from, and made it worse than, other capital crimes, including references to "the worst," "heinous" and

"depraved," and comparisons to other notorious cases like Jeffrey Dahmer. Bronson also found colorful media characterizations, such as "I feel like throwing up" and "Creatures who once lurked in the darkest corners of Edgar Allen Poe's imagination now live among us." (7 RT 2037-2038.)[17] Bronson further listed the sexual aspect of the publicity surrounding the case, which went from the early titillation stage to the later necrophilia stage. (7 RT 2042-2043.)

Under the "Gravity of the Crime" section in Exhibit G (Section IV, pp. 26-27), Bronson discussed the problems the pretrial publicity will create for the penalty phase, where the standards are normative and relatively amorphous, and concepts like mercy are more difficult to deal with and control. He found 179 references to the death penalty in the media reports, with very strong calls from the victim's relatives and others for appellant's death as the only just penalty, including statements such as "I hope they fry him." (7 RT 2043-2045.)

Under the "Status of the Defendant" section in Exhibit G (Section V, pp. 28-30), Bronson noted references to appellant as, for example, "an animal," "sick," "depraved killer," and as having "no human compassion." Even appellant's own brother, a convicted multiple-child molester, described him as "the black sheep of the family." (7 RT 2045-2046.)

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[17] The "worst" characterization and the "feel like throwing up" remarks were provided by a private investigator hired by the Huber family shortly after Denise's disappearance, while describing his reaction to the discovery of the body: "I feel like throwing up. I've done cases where people have been stabbed 42 times, slaughters and satanic cults, but this was the worst. This girl is what every mother and father would want. She was as American as apple pie. She was fun and full of life." (Exh. C, p. 83.)

By stark contrast, under the "Status of Victim" section (Section VI, pp. 30-36), Bronson noted how Denise Huber was extremely personified, which may be the strongest criterion in favor of a venue change. She was not anonymous, but was visually depicted while still alive as a vivacious, charming, attractive, engaging person whom everyone could easily identify with, the proverbial "girl next door." There were repeated showings on television of her at her 23rd birthday party. Her parents were similarly very personalized, shown on television night after night in their travails, and therefore were not abstract parents.[18] The community knew them and could identify with them, and carried out a vigil for them. (7 RT 2046-2047.) Bronson emphasized that victim-impact testimony is very powerful, particularly when it comes from people with whom we can identify, and is particularly prejudicial. Such victim and family publicity creates feelings and biases which are very difficult to set aside even with one's best good-faith efforts to do so. The publicity in this case included coverage of a series of memorials, funerals and dedications that were deeply touching and sad.[19] At one such memorial service, the police chief of Costa Mesa was

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[18] Her father was quoted in the *Register* as saying: "People need to know she was a total victim. That she was a beautiful person who was taken away by this animal." (Exh. C, p. 100.)

[19] For example, there were dozens of articles on the public memorial service for Denise Huber in Newport Beach, on other memorial services for her, and on her subsequent funeral in South Dakota. (See Exh. G, pp. 32-34.) The three local newspapers sent reporters to Herreid, South Dakota, to cover the funeral and ran front-page stories, which included interviews with the townspeople the day before the funeral as well as coverage of the funeral itself. Both the *Times* and *Register* articles carried photos showing Denise's parents in front of her casket; the *Times* photo showed them, and described them as, weeping. (See Exh. C, pp. 276-277, 279-280, 282, 286-

(continued...)

shown crying while delivering a eulogy for Denise. (7 RT 2048-2049.)

Although some sympathy for the victim and her family would be present wherever the case was tried, the disappearance itself would make a trial in Orange County different. This is the "salience" factor, how people relate the story to their own lives--unlike, for example, prison murders--which impacts their ability to remember it and increases the potential for prejudice. This case had a very high salience index in Orange County because people there lived through it, which is different than just learning of it for the first time in court, as would be the situation if the case were tried in a different county. (7 RT 2050-2052, 2105-2106.)

Despite its population, Bronson saw Orange County acting like a smaller community in many respects when the publicity was reviewed. Evidencing such qualities was the response of the community to Denise Huber's disappearance, the care for her and her family, and the search. The communication and publicity about the case was, to a large extent, more informal and more like a small town rallying around this event, such as the posters, fliers, fundraisers held for the family, the involvement of the Boy Scouts and the police. The case even emotionally affected police officers, one of whom had a picture of her on his dashboard and on his dresser at home; this was not just a case seen on the Six O'Clock News. (7 RT 2052-2053.) Also, Orange County--at the time largely a white suburban, middle-class county with traditional Republican conservative values--is much more homogenous than other large urban areas, like San Francisco or Alameda County. (7 RT 2054-2056, 2109-2110.)

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[19](...continued)
288, 291-296.)

Despite these factors, Bronson initially had serious questions about whether people would remember the case given the size of the county and the time lapse, but he was "just plain wrong." The recognition rate was extraordinarily high; all but two of the respondents who recognized the case did so on the first recognition question he used. There was the 70% prejudgment rate, with only 1 of 334 people who recognized the case saying "probably not guilty." (7 RT 2063-2066.) In response to some concerns by the trial court regarding the wording of the first survey, Bronson commissioned another survey which was conducted in February of 1997, six months after the first survey and shortly before the start of jury selection in appellant's trial. The slightly-differing results of this survey were statistically insignificant from the first survey. There was approximately 81% recognition, 68% prejudgment of guilt among those who recognized the case, and 73% in favor of death over life without parole. (See Exh. M, pp. 7, 9; 9 RT 2456-2462.)[20]

According to Bronson, surveys tend to be far more accurate than voir dire, because people are more honest about their beliefs when responding to anonymous surveys than when being asked questions in front of other people, including other jurors, in the courthouse. Further, voir dire is a very weak tool to ferret out prejudice, because it only takes one person in the jury pool to affect the rest of the jury. (7 RT 2073-2074.) There is also the

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[20] In response to concerns expressed in the prosecutor's cross-examination of him (see 7 RT 2112-2114), Bronson had done a recalculation of his original survey numbers to correct the overrepresentation and underrepresentation of certain cities in proportion to their respective populations in the county. The recognition rate increased slightly to 84.1%, while prejudgment decreased slightly to 69.65%. (8 RT 2179-2182.)

problem of delayed recall, where something at trial suddenly triggers a recollection of previous knowledge of the case. Also, even in anonymous-reporting situations people do not want to give socially-unacceptable responses, and they will also exaggerate their accomplishments, such as registering to vote or reading certain books when they really have not done so. In a social or public situation, such exaggeration is even more prominent. (7 RT 2074-2075, 2103-2104, 2132-2136.)

Bronson noted that although general support for the death penalty in the most egregious cases is overwhelming, when people are asked about a particular case the numbers are far lower even in the worst cases; typically, the percentage is "in the fifties." (7 RT 2131-2132.) Bronson revealed that of the 15 or so surveys he has done in capital cases where he has asked about prejudgment as to penalty, this case is the second highest in terms of penalty prejudgment. That figure is strikingly high because he is comparing it only with cases where an attorney thought there was a problem and where Bronson was willing to participate in the venue motion. (7 RT 2078-2080.) In Bronson's opinion, there was not a reasonable likelihood that appellant could get a fair trial in Orange County. (7 RT 2081.) The court found Dr. Bronson to be a candid and credible witness. (7 RT 2082.)

Prosecution witness Ebbe Ebbesen is a professor of psychology at U.C.-San Diego, specializing in scientific methodology as applied to social psychology. (8 RT 2232-2233.) He has consulted with prosecutors on venue cases approximately 40 times, and did not believe that a change of venue was necessary in any of them. This included both the Richard Allen Davis (Polly Klaas) case in Sonoma County, and *People v. Nguyen*, which was a crime arising from a hostage situation at a Good Guys store in Sacramento which was televised live, resulting in 97% of the surveyed

respondents in the county recognizing the case. Venue was ordered changed in both cases. (8 RT 2292-2296, 2297-2298.)

When asked in previous testimony what criteria he believed important in considering a venue change, Ebbesen responded that he would be very concerned if there were a number of people outside on the courtroom steps demanding death for the defendant. Ebbesen insisted that the transcript of his testimony in *Nguyen* erroneously quoted him as saying "I think the jury should have to run a gauntlet" before a change of venue is granted; however, he acknowledged that this would be a criterion to be considered. (8 RT 2288-2292.)

Ebbesen criticized Bronson's methodology in several respects (see 8 RT 2234-2270), and specifically questioned the recognition rate found by the Bronson survey (8 RT 2234-2240). However, Ebbesen conceded that actually seeing the banner next to the freeway would be relevant to the likelihood of prejudging the defendant's guilt because it personally happened to the juror. (8 RT 2274-2276.) He acknowledged that people with knowledge of the banner and of the clothing found in the defendant's house could have been so emotionally affected that they were more likely to say, independent of the facts, that the defendant was guilty. (8 RT 2356-2357.)

Ebbesen agreed with the notion that a higher prejudgment rate would exist in places where the media penetration was higher. (8 RT 2323-2324.) He also agreed that there are risks in asking prospective jurors whether they can set aside their opinions, because they do not know how they will respond to the evidence, and they want to look fair. In short, simply asking jurors if they can set aside their opinions is not an effective way of controlling opinion-bias created by the media. (8 RT 2329-2330.)

Although Ebbesen offered to poll or survey for the prosecution in this case (8 RT 2314), the prosecution did not present any survey results.

Ronald Dillahey, a professor of psychology and director of the justice studies center at the University of Nevada-Reno, has qualified in California courts as an expert witness on venue and voir dire issues, and has recommended against venue changes. (9 RT 2391, 2417.) Dillehay's studies have found that normally between 15 and 22% of the people surveyed believe that a particular defendant brought to trial is probably guilty. (9 RT 2417-2418, 2423.) With respect to the death penalty, surveys have shown that the percentage of people who support the death penalty in California is approximately 77%; but when offered the LWOP option, that figure statewide goes down to 63%. Here, however, 72% of the people who recognized the defendant's case, when given the choice between LWOP and death, chose the death penalty for him. (9 RT 2424-2426.)

Dillehay noted that the Ross/Bronson studies show an extremely high awareness level that should be of concern, and he explained why he believed that to be a valid finding in the survey. He added that the prejudgment figures should also be taken seriously, because they show that there is some strength of feeling on the part of a substantial number of potential jurors in this case. (9 RT 2429-2431.) Dillehay opined that, where there has been substantial publicity about a case, voir dire is not very effective in identifying and weeding out prospective jurors who are biased and prejudiced because of high levels of awareness and prejudgment. (9 RT 2427-2429.) Further, it is difficult for jurors to set aside their opinions and base it on something other than publicity, especially where opinions or beliefs are held with some intensity. (9 RT 2440-241.) Where people recognize more damaging information or information that might be

associated with other damaging information, the strength of their prejudgment increases. (9 RT 2438-2439.) The data indicates that people who have a high level of exposure are likely to prejudge at some levels of guilt, and therefore there is concern about such people being fair and impartial. In such cases, one cannot be confident that assurances that they could be fair jurors would be true. (9 RT 2453-2454.)

Following argument by counsel, the court denied appellant's motion for a change of venue. (9 RT 2464-2501.)

2. The Questionnaires and Voir Dire of Prospective Jurors, and Post-Jury-Selection Proceedings

a. The Publicity Questionnaires

The publicity questionnaires filled out by the prospective jurors who were called for appellant's trial showed a recognition rate which validated Bronson's pretrial survey. Specifically, at least 387 out of the 474 jurors who filled out publicity questionnaires recognized the case from pretrial publicity--a rate of 81.6%. (See III JQCT 735-892, 895-967; IV JQCT 1205-1240; VI JQCT 2341-2616.)[21] In addition, 10 of the 12 prospective

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[21] "JQCT" refers to the eight volumes of the Clerk's Transcript (Vols. I-V, V-A and V-B, and VI) labelled "Jury Questionnaires." In the interest of brevity, appellant has not specifically enumerated the 387 clerk's-transcript pages supporting his described rate of recognition; he is confident that the Court and respondent can and will make their own counts. However, appellant's counsel is prepared to provide the Court with specific page citations if the Court requests him to do so.

Appellant has used the term "*at least* 387" jurors because there are 5 other prospective jurors whose publicity questionnaires are ambiguous regarding whether the juror in question recognized the case. (See III JQCT

(continued...)

jurors who ultimately sat as trial jurors and decided appellant's fate recognized the case from pretrial publicity, a recognition rate of 83.3%--virtually identical to the rate found by Bronson in his pretrial survey of Orange County potential jurors. (See 8 CT 2531, 2537, 2543, 2549, 2561, 2567, 2573, 2579, 2585, 2591 [recognized]; 8 CT 2555, 2597 [did not recognize].)[22]

b. The Voir Dire of Prospective Jurors

The jury-selection proceedings not only validated the previously-cited data with respect to the prejudicial effect of the massive pretrial publicity, but it predictably served to seriously exacerbate the pre-existing prejudice to appellant's ability to obtain a fair trial. In order to accurately capture the atmosphere in which the non-sequestered voir dire was conducted, as well as to demonstrate the depth and breadth of the publicity and in-court exposure problems which irremediably poisoned the well even before appellant's trial for his life began, appellant provides herein a summary of the voir dire of those prospective jurors who had knowledge of the case from pre-trial publicity and from exposure to their fellow venirepersons and other people.

Following the conclusion of the venue hearing, and before jury

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[21](...continued)
747, 753, 788, 904, 960.) However, even if all of these jurors were added to the recognition total, the recognition rate would only rise 0.2%, to 81.8%.

[22] Three out of the four alternate jurors also recognized the case, for a total of thirteen of the sixteen trial and alternate jurors--a recognition rate of 81.25%. (See 8 CT 2603, 2609, 2621 [recognized]; 8 CT 2615 [did not recognize].)

selection began, appellant filed a written motion requesting a *Hovey*-type,[23] individualized, sequestered voir dire of prospective jurors in order to avoid prejudicing those prospective jurors who had not heard of the case from exposure to those who had. (5 CT 1773-1775 [defendant's "Trial Brief No. 2 (Motion for Sequestered Voir Dire)]".)[24] Defense counsel noted, inter alia, the high rates of recognition and predisposition toward guilt and death among the venirepersons, the indispensability of specific questioning in order to elicit the publicized details known to prospective jurors, and this Court's recognition that sequestered voir dire minimizes "any danger that that examination at voir dire will itself serve to publicize the [press] reports." (*Odle v Superior Court* (1982) 32 Cal.3d 932, 946.) Appellant's motion posed the rhetorical question that if this is not a case where it is manifestly not "practicable" to conduct voir dire "in the presence of the other jurors" (Code Civ. Proc., § 223), then "in what case would the caveat--'if practicable'--. . . ever be relevant?" (5 CT 1775.)

Subsequently, on the first day of jury-selection proceedings, April 7, 1997, but two weeks before the commencement of voir dire, defense counsel cited the publicity questionnaires which revealed a detailed knowledge of the case by many of the prospective jurors, and warned the

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[23] *Hovey v. Superior Court* (1980) 28 Cal.3d 1.

[24] Prior to the filing of this motion, the court had indicated to counsel that "on the Hovey issue, . . . my feeling is, if a juror has something to say that could result in information going out that we don't want other jurors to hear, we would call a halt to it and do that privately." (9 RT 2567-2568.) The court also promised that "I will not let a juror say something that might have an effect on, detrimental effect on any of the other listening jurors." The prosecutor agreed with this procedure, but defense counsel informed the court that "we will put it in writing and file a formal motion." (9 RT 2568.)

trial court that "it is going to be hard to question these people about the effect of the information on any predisposition they might have without asking them about the information." (9 RT 2650.) Defense counsel further warned the court that, with the high recognition and disposition figures, "there is going to be a serious problem with these jurors, and it is going to be hard to get at with them in front of everybody else." (9 RT 2651-2652.) The court nevertheless indicated its intent to deny sequestered voir dire, adding that "if we have to" use a "modified *Hovey*," "we will," but "if we don't, we won't." (9 RT 2652; see 9 RT 2650.) The court did not explain what "if we have to" would mean. At the same hearing, the court--which had already informed eight separate groups of the prospective jurors that there had been considerable publicity about the case and that there would continue to be, and had cautioned them not to read, view or listen to any of such publicity (see 9 RT 2606, 2617, 2622, 2626, 2632-2633, 2637, 2642, 2647-2648)--acknowledged to counsel that "we are still going to have people who watch tv and look at the paper, and we'll have to inquire during voir dire as to what they read, heard or talked about and what impact it might have" (9 RT 2653).

Two court days later, on the morning of April 16, 1997, defense counsel moved "to challenge every juror who filled out a questionnaire for cause who knows something about this case." (10 RT 2686.) The parties thereafter stipulated to the excusal for cause of approximately 120 prospective jurors based upon their questionnaire answers alone (10 RT 2696-2743); two of these excused jurors knew members of the victim's family (10 RT 2712-2713, 2718). The parties also stipulated to the excusal of several jurors who wrote letters to the court asking to be removed because of their knowledge of the case. For example, prospective juror

Ann Dulaney indicated "a very strong bias" (10 RT 2688-2692; see 8 CT 2469 [letter from juror to court]); prospective juror Joseph Duarte had read or heard a lot about the case and had a strong opinion (10 RT 2706); prospective juror Jack Hall expressed a "high probability" that the defendant was guilty (10 RT 2709); prospective juror John Moffitt had read about the case, and had "a lot of information" (10 RT 2738).

On the next court day, Monday, April 21, 1997, just before the first jury panel was brought into court for questioning, defense counsel apprised the trial judge of "a big story," two pages in length, that had appeared in the Orange County *Register* "on Saturday," and of another story on the front page of the Los Angeles *Times* "today," both regarding appellant's trial. The judge replied that they would get to that because, although he had told jurors not to read anything about the case, "you know there will be some that did." (10 RT 2816-2817.)

The judge then began bringing into the courtroom panels of prospective jurors, addressing them about the case, and questioning some of them regarding requested excusals. (See, e.g., 10 RT 2817-2848.) During the early stages of this process, prospective juror Barbara Schultze declared that she could not give appellant a fair trial because, inter alia, "I see her [Denise Huber's] face in front of me all the time now, and it is so scary." She was excused for cause. (10 RT 2875-2876.) Prospective juror Frank Ivanovich was excused for cause after telling the court that he had "formed the opinion a long time ago that . . . I don't think it would change." (10 RT 2876-2877.) Prospective juror Ron Heiman was likewise excused after saying he could not give the defendant a fair trial based in part upon the publicity in the case. (10 RT 2882-2884.)

Shortly thereafter, defense counsel informed the court, outside the

jurors' presence, that the *Register* had published an article on the first day of jury selection revealing that a venireperson was "going around yelling, 'hang him' to other jurors"; and that today in court juror number 138 had said, loudly enough for the immediate group of jurors around him to hear, "I don't want to sit up front and look at that piece of scum." Defense counsel expressed the belief that those were not isolated incidents, but that jurors "don't want to rat on each other." Defense counsel also informed the court that they would probably renew the venue motion at some point, and that they would present the court with the appropriate newspaper articles they had accumulated in the past few weeks. (10 RT 2894-2898.)

On the next court day, April 23, 1997, the court addressed a group of prospective jurors, and warned them that "there has [*sic*] been recent articles" about this case. (10 RT 2913.)

The following court day, April 28, 1997, defense counsel reminded the court of appellant's earlier request for *Hovey* voir dire, and noted that there had been four "incidents" of which he was aware since April 7 (the date jury selection began). Defense counsel again referenced the *Register* article regarding a female juror urging a male juror to "hang" the defendant, and a prospective juror, a Mr. Bryant, making his "piece of scum" comment despite having professed neutrality in the publicity questionnaire. In addition, he noted that prospective juror Richard Sorensen had written on his publicity questionnaire that another "prospective juror just said the defendant is guilty as hell or guilty as sin"; and that another prospective juror who works in the courthouse reported getting "all kinds of flack about this case" from his co-workers. (11 RT 2930-2933.) Defense counsel Leonard Gumlia reminded the court that one reason for venue change is community pressure, and he suspected that such statements and reactions

expressed to jurors by friends and co-workers were "fairly widespread." He argued that they should not be getting such statements in open court, and that therefore he would renew appellant's motion for individual voir dire, and maybe appellant's venue motion as well if they got a substantial enough percentage of jurors exposing this problem in the voir dire. (11 RT 2933-2934.) He also referred to having heard a juror, after the court had told a panel not to read recent articles, say under his breath, "what if we already read it." (11 RT 2935.)

The court then summoned prospective juror Bryant for questioning outside the presence of the other jurors, and Bryant admitted having made the "piece of scum" remark, referring to appellant, in the hallway where it "probably could have been" overheard by other people. (11 RT 2937-2938.) Bryant was excused for cause. (11 RT 2955.)

A prospective juror in a subsequent group called into the courtroom, juror number 345,[25] stated that he could not be fair to appellant on guilt because he had formed his opinion three years ago when he read about the murder in the newspaper. (11 RT 2990-2992.) When defense counsel asked if anyone in this group had formed an opinion that appellant was guilty based on what they had read in the paper, four additional jurors raised their hands (226, 280, 310 and 314). (11 RT 2998.) Jurors 310 and 314 stated that their belief was "very strong," based upon what they had read.

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[25] The prospective jurors, including the jurors who were ultimately selected to serve, were identified only by number on the questionnaires and during jury-selection proceedings. Appellant will hereafter dispense with using the word "number" preceding the prospective jurors' numbers, and with using the word "prospective" before "juror." Those prospective jurors who were ultimately chosen as actual trial jurors or alternates will be so identified.

(11 RT 2999, 3001-3002.) Juror 280 remembered being "overwhelmed" by the case upon reading about it approximately three years earlier, and also had a strong opinion regarding guilt, which was also partially based on the belief that appellant would not have been arrested if he were not guilty, and stated that he could not be impartial on guilt. (11 RT 3000-3001.)

After excusing juror 121 on defense motion based on that juror's answers on the publicity questionnaire which demonstrated a fixed opinion of the defendant's guilt (11 RT 3019-3020), the court called in a new group of jurors, informed them that there had been reports of jurors discussing their opinions, and asked if anyone had heard any juror say anything about the case. Nine jurors (18, 105, 126, 128, 131, 170, 178, 202 and 338) responded in the affirmative. (11 RT 3021-3023.) When the court asked if anyone had read or heard things about the case since the first time they were in court, 26 jurors indicated that they had. (11 RT 3023-3026.) The court then excused the rest of the panel until the afternoon session, and then individually questioned each of the jurors who had answered either of the court's questions in the affirmative to determine what they had heard or seen:

Juror 105 informed the court that "a lady out there" said she had read an article about the case, but that this woman had not raised her hand in response to the court's inquiry in that regard. (11 RT 3029-3030.)

Juror 202 revealed that this morning in the hallway, she heard one juror in a group of three women say that appellant "is just obviously guilty" and "he should fry"; and heard another say that the questionnaires were "kind of like trick questions" and that she thought appellant "should definitely be put to death," but that she was Catholic and that would make her hypocritical. Juror 202 described one of the women for the court, but

did not think it fair to have to identify them. Juror 202 also reported having read an article in the past Saturday's newspaper and an article at the time of the discovery of the victim's body, and stated that she did not think she could be objective or fair. (11 RT 3031-3033.)

Juror 338 revealed that an unidentified fellow juror had said something about a freezer, and that juror 378, a priest, had stated that he had "tried to get out of it" and "thought he shouldn't be here." (11 RT 3036.)

Juror 170 reported that on the first day, juror 138 went into a tirade in the hallway about defendants in general, juror 170 asked him to please stop and got up and walked away, and then juror 138 "moved to the next lady who was sitting next to me and started the same thing on her," with several people "within range," and this other woman juror nodded in agreement with what juror 138 was saying. (11 RT 3037-3039.)

Juror 131 reported that, on April 14, an unidentified fellow juror had told him in the hallway that he thought appellant was guilty and that "I really don't want to be on this." (11 RT 3039-3043.)

Juror 287 informed the court that another juror "today" stated, with other jurors around, that she was unfamiliar with the case because she was from out of the state, but that if something like this were to happen to her daughter, he would "get the ax." Maybe two other people heard this statement. Juror 287 could not identify this juror by name or number, but did describe her for the court. Juror 287 also had seen some publicity about the case, including a banner over the 73 freeway, felt that the defendant appeared guilty based on media reports and would have to prove that he was not guilty, and was excused by stipulation because she had doubts that she could be fair. (11 RT 3043-3050.)

Juror 126 was sitting with four or five other prospective jurors on April 21, when one said something about the victim's head being cut open or gashed, and another mentioned that the graphic photos would be shown to the jury. Juror 126 told the court that she might recognize the woman who made the "gashed" comment and would give the court her number if she saw her over the lunch hour. (11 RT 3051-3053.)

Juror 128 reported that "on Monday" the juror with whom the court had talked this morning said, in the courtroom, "I don't want to have to sit up here and have to look at this scum bag." Although juror 128 felt it was "very stupid" for the juror to say this because the court had admonished them not to talk about the case in court, it might be appropriate outside the courtroom and such a statement might reflect juror 128's own feelings about appellant. Juror 128 acknowledged knowing a lot about the case and having formed an opinion that appellant was guilty. (11 RT 3053-3057.)

The court then announced that it would bring into the courtroom all of the other jurors in this group and question them "generally" about what they had read or heard about the case since they first came to court. (11 RT 3059-3060.) The court then questioned each one individually, in the presence of the others:

Juror 361 reported that when her husband asked her what case it was, she told him "Denise," and that she did not know if she could handle it emotionally because they have a daughter in her early 20's. She also revealed that she had heard on the radio that jury selection was in process for the Denise Huber case, "so I changed it." (11 RT 3062-3063.)

Juror 320 stated that when she told her employer that there was a possibility that she would be on this case, everyone at work started talking about the newspaper article on Saturday, and they went into great detail

about what had been in it and about the case; this juror "certainly heard more than I knew." She had briefly read about the case "initially" and then three years later just briefly. (11 RT 3063-3065.)

Juror 259 stated that, like the previous juror, she mentioned it to her employer, and the people in the office "did clip the press for me." However, she read only "the headlines and the lead-in line." A friend also had heard about it, and gave her opinion on the case, but it was "nothing that I didn't already know." (11 RT 3065.)

Juror 116 went home "the very first day," his wife was watching the news, and he saw a little bit of the defendant and his house in Arizona and the truck. His colleagues at work found out he was called for jury duty on the case and offered all their opinions, "absolutely" negative to the defendant. He revealed that he also had rather strong feelings himself, but volunteered that he would do his best to stay focused. (11 RT 3066-3067.)

Juror 239 said "just the same issue," i.e., people at work were willing to share information. Although he told them he could not discuss the case, he heard some co-workers talking about someone dating appellant's older brother in 1973. Juror 239 was new to California and therefore had not known anything about the case. (11 RT 3067-3068.)

Juror 428 reported accidentally walking into a "hot and heavy" conversation in gym class, and everybody had definite negative opinions. Juror 428 did not know much about the case or have much of an opinion "up to that point," and certainly learned a lot more in that brief conversation, but could "hopefully" give appellant a fair trial. (11 RT 3068-3069.)

Juror 227, who had no prior information about the case, went home "the first day" and saw a story on the television news about picking the jury.

(11 RT 3069-3070.)

Juror 432 reported having heard a comment by the juror's father three years earlier that this case was "still open." (11 RT 3070.)

Juror 371 stated that fellow employees shared their opinions, which were pretty much all negative to appellant, and also overheard a public conversation between two people about the case, but could still be objective. (11 RT 3071.)

Juror 174 read the two-page article in the *Register* the Saturday before the jurors came in on April 21st. The court then interrupted to tell this group of jurors that they were spending so much time with "this issue" because "it is so hard for us who are in this business to discriminate where data comes from," i.e., "to distinguish what we may have read in the paper and what we may have heard from a witness. . . . It is a difficult thing to do. Our memory is an amazing thing, and it plays tricks with us." (11 RT 3072-3073.)

Juror 353 read that the delay in jury selection "last week" was due to a family member of appellant's attorney. (11 RT 3073.)

Juror 227 did not know about the admonition originally and spoke to some friends regarding their opinions about the death penalty. They shared their opinions about the case, most of them negative. Also, "last night," a friend gave juror 227 an opinion negative to appellant. (11 RT 3074.)

Juror 427 "saw it" on the television, and also saw "the big thing on the front page" of the Los Angeles *Times*, and the headlines "in big print," but looked at only "the front part" and did not read the whole article. This juror volunteered that "it was not anything that I didn't know before." (11 RT 3075.)

The daughter of juror 250 started guessing which case her mother

was on, then suddenly mentioned this case, and juror 250's husband then said "that's the one." Juror 250 has not discussed the case with her husband and she has been hiding newspapers from herself and putting them in the den, but her daughter made some very negative comments about appellant. Juror 250 insisted that although she originally had a strong opinion about how this case should be resolved, she has changed that opinion somewhat and can follow the law. (11 RT 3075-3076.)

Juror 146 read the two-page spread in the *Register* on Saturday. Before that, only a fellow employee had told her about the case, but "I feel he is guilty already based upon what I read," and that appellant should get the death penalty. (11 RT 3077.) She added that it was hard not to go by her emotions because something similar had happened to her; she was attacked when she was alone, though not in a car. (11 RT 3087.)

Juror 346 read the newspaper articles about jury selection, and co-workers tried to draw her into conversation about the evidence in the paper. She told them she was not supposed to talk about the case, but she heard conversations about it outside her office. Everybody seemed very convinced that appellant was guilty, and she thinks so as well. She also discussed with her husband the emotional responsibility and drain of being part of a jury in this type of case. (11 RT 3077-3079.)

Juror 284 read the Saturday article, and had read information about the case previously and had seen the signs on the freeway. Juror 284 had a pretty strong opinion regarding how the case should be resolved if appellant were found guilty with special circumstances, but could follow the law and evaluate the evidence objectively. (11 RT 3079-3080.)

Juror 230 read the article in the *Register*, but could not recall reading anything about the case before, perhaps due to having been in Europe then.

(11 RT 3080-3081.)

Juror 102's girlfriend gave him some gruesome details that he had never heard. (11 RT 3081.) He explained that when he had told her he was on the "Denise Huber" case, she told him "oh yeah, . . . that was about the girl that was found in the freezer all chopped up." (11 RT 3083-3084.)

Outside the presence of the prospective jurors, the court, at defense counsel's request, indicated that it would "revisit" during regular voir dire how many of them had heard such comments from friends, relatives and co-workers, and, if necessary, question them "individually to prevent information that may be poisonous to go out." Defense counsel also noted that none of the jurors whom other jurors had reported as having improperly discussed the case had so informed the court. Thus, according to counsel, unless they had viewed the court's question as not including them, "we have at least seven liars out there." (11 RT 3088-3089.)

Following the lunch recess, defense counsel Denise Gragg made a motion to quash the venire based on the answers to the questions that morning. She noted that there were at least six separate conversations testified to by prospective jurors, and that not everyone involved in those conversations had divulged that to the court. For example, the jurors who, respectively, said appellant should "fry" and should "get the ax" did not come forward to discuss that. She further noted that all such conversations were taking place during the jury-selection process, either inside the courtroom or in the corridor, i.e., in places where more than one juror could hear. Gragg complained that there is no way to precisely determine how many people heard these various conversations, "so we can't get at the taint that way." She added that the fact that all of the conversations were very detrimental to appellant indicates an atmosphere of community expectation

that the defendant should be convicted and "fried." Also noting the "hang him" remark placed on the record that morning, defense counsel Gragg, an experienced public defender, stated that she had never before experienced "these vitriolic sort of exchanges in the jury pool" and concluded that they could not confidently pick 12 jurors from this pool who had not been affected by that atmosphere. (11 RT 3090-3092.)

The prosecutor and the court disagreed with Gragg's characterizations and conclusions, opining that there were a relatively small number of such conversations out of all of the venirepersons who had been called. Gragg countered that they had to rely on the good faith of the jurors to report what they had heard and how they were affected, and emphasized that she had never had a jury pool in which anyone, much less multiple groups of prospective jurors, were actively talking about how much appellant deserved to "fry." (11 RT 3092-3095.)

Finally, Gragg informed the court that "this is not technically a venue motion," and the court agreed but noted that "in essence it is," and denied the defense motion to quash the venire. (11 RT 3095.)

The court then moved into the next phase of jury selection, calling 12 of the prospective jurors into the box for group and individual voir dire by counsel, with all of the other remaining venirepersons in the courtroom as well. (See 11 RT 3095-3099.) First, however, the court gave the jurors a lengthy introduction to the case. Five jurors responded to the court that they had seen appellant's face in the newspaper and on television. (11 RT 3100.) The judge told the jurors that he did not know anything about the evidence in the case, but that, "like some of you, I have read news articles." (11 RT 3116.) Then, during a lengthy soliloquy regarding appellant's right not to testify (11 RT 3124-3129), the court informed the jurors that "he

[appellant] is charged with the worst of the worst" and that "this is as serious as it can get" (11 RT 3128).

Later, outside the presence of the jury, defense counsel Gumlia cited to the court its "worst of the worst" comment, which he said "hit all of us like a sledge hammer here." Gumlia complained that the court had basically resolved the issue of penalty for the jury by making that statement to them. He explained the problem to the court as follows:

> "Historically in all capital cases two things happen. One is that the prosecution argues this crime, makes it worthy of the death penalty. The defense among other things argues that at least in some kind of moral scale the particular crime or charges in this case don't make him -- and specifically we argued repeatedly, the worst of the worst, that very special few that get the death penalty from the many who either have special circumstances charged or murder." (11 RT 3142.)

Defense counsel asked the court to dismiss the venire or clarify its remarks with them. The court responded that it would tell the jurors what it meant by those remarks, i.e., that it was a capital case, and denied the defense motion to dismiss the venire. (11 RT 3141-3145.)

The court then explained to the jurors that it meant by its "worst of the worst" remark that appellant was charged with "a very serious offense and special circumstances making this a capital case," and that the court "meant no more than that." The court reiterated to the jurors that it knew nothing about the case and had formed no opinion about the case nor how "either phase" should be resolved, but again told them that "I have read some of the articles." The court asked the jurors if any of them thought it was indicating its belief regarding guilt or penalty, and apparently received no response. (11 RT 3146-3147.)

The attorneys then began their voir dire of the prospective jurors

who were in the box. Defense counsel Gragg asked how many of the group of 12 had prior knowledge of the case, and 8 of them raised their hands; 4 had gotten most of their information from reading either the *Register* or the *Times*; 3 had gotten their information primarily from television; 7 recalled media coverage when Denise Huber was reported missing in 1991; and 6 recalled coverage of appellant's arrest and of Huber's body being found in 1994. (11 RT 3148.)[26] Gragg then questioned individual jurors in the box:

Juror 423 had formed an opinion based on the coverage he/she had read, assumed most of what he/she had read was true (11 RT 3149, 3150), had an "emotional reaction" to one of the articles, and "of course" considered the case to be "very bizarre" (11 RT 3155).

Juror 347 read some media coverage, and the crime struck him as "very, very bizarre and very heinous"; he had formed an "emotional opinion" on that. (11 RT 3156-3157.)

Juror 319 had read some *Register* articles about the victim's disappearance in 1991, and about the finding of her body and appellant's arrest in 1994. (11 RT 3158.)

Juror 187 remembered some of the coverage, and had emotional feelings which included compassion for the victim and her family (11 RT 3161-3162), and did not know if he/she could set aside his/her opinion because of the crime itself (11 RT 3172-3173). In all, 8 of the 12 jurors in this group recalled having that emotional feeling of compassion for the

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[26] Two jurors who had not initially raised their hands in response to Gragg's question regarding knowledge of the case nevertheless answered affirmatively that they had gotten their information primarily from television coverage, and one of them also recalled coverage of appellant's arrest and the finding of the body in 1994. (11 RT 3148.)

victim and her family while reading or looking at the coverage. (11 RT 3162.)

Juror 411 (an eventual trial juror) briefly saw a "tv blurb" about the case and thought "that poor family." (11 RT 3169.)

Juror 400 remembered driving along the freeway and seeing the banner. This juror had an emotional response based on having a daughter about the same age as the victim and being "just glad that she was safe." (11 RT 3171.)

At the beginning of the court session the following day, April 29, 1997, the court reported that a juror had told the bailiff about having overheard two female jurors (154 and 136) talking about making a phone call and one of them saying: "who is going to know if we talk?" The court said it would discuss this with the jurors in question when their numbers were called. (12 RT 3191-3193.)

Defense counsel Gumlia then resumed individual questioning of the same 12 jurors in the box:

Juror 347 recalled, when first reading about the case in the paper, someone telling him that he was going to get a cell phone for his wife and daughter "just in case that happened." Juror 347 also remembered at the time feeling "I wish I could get ahold of that guy, or something like that," and he or someone else he talked to about the case might have made such a statement. (12 RT 3221-3222.) Specifically, this juror recalled hearing that the victim had trouble with her car, waited for help and then was never heard from again, and he assumed she was kidnapped. (12 RT 3232-3233.)

Juror 411 (the eventual trial juror) lived "very . . . close to where the sign was hung on the building at the 55" freeway. She recalled a conversation with her boyfriend (now husband) regarding how scary it was

not to have a cell phone if something were to happen. That thought would cross her mind every time she passed the banner. (12 RT 3223.) This (eventual trial) juror also revealed that her husband's reaction to hearing that she was called for appellant's jury was to say "fry him"; she "laughed because it was a joke." She insisted that she was not affected by the "fry him" remark, nor by what she knew about the case. (12 RT 3237.) She recalled having seen the case on t.v. and wondering why someone would keep a body. (12 RT 3234.)

Juror 117 told her husband what case she was on, and he commented that he couldn't understand keeping a body for a period of time and wondered what kind of person would do something like that. (12 RT 3228-3229.)

Juror 209's supervisor, upon learning that juror 209 had been called for jury duty, said "it must be the Huber case." (12 RT 3223-3224.)

Juror 274 was familiar with the banner, mainly through t.v. news. (12 RT 3231.)

Juror 187 felt "outraged" by this crime upon reading about it, and that therefore the burden would probably be on appellant at the penalty phase to persuade the juror that he should live. (12 RT 3274.)

Following lengthy voir dire of this panel by defense counsel and then by the prosecutor on both publicity and applicable legal principles, including death-qualification, defense counsel reminded the court that the defendant has "an ongoing Hovey type request for sequestered voir dire." However, when defense counsel Gumlia tried to update the basis for this request with references to what had transpired during the jury-selection proceedings, the court interrupted Gumlia and said: "You're starting to get boring." (12 RT 3348.) The court reiterated its earlier ruling regarding the

motion for *Hovey* voir dire that "if and when I think it's required I'll do it," and that "other than the instances where we have done it [I] haven't seen the necessity for it, but I'm willing to do it in the appropriate case or cases. . . . As soon as I see a red flag I'll call a halt and I'll do it." (12 RT 3348-3349.)

Defense counsel Gumlia then made a motion "to challenge all of the jurors who know something about this case." (12 RT 3349.) He cited nine specific jurors by number (including juror 411, the eventual trial juror). With respect to juror 347, he noted for the record that when this juror mentioned wanting to get his hands on appellant, he "actually put his hands in a twisting motion like strangling." The court acknowledged seeing juror 347 move his hands, but not a strangling motion, and the prosecutor stated that he did not see a strangling motion either, but Gumlia insisted that the juror "put his hands together like he was grabbing the throat." When the court replied that they cannot create a record because counsel is "the only one that remembers that," Gumlia said "we can always ask him if he did it." (RT 3350.) He then gave more specific reasons for challenging juror 187 and two of the other cited jurors (12 RT 3351-3354), and expressly challenged both jurors 187 and 274 as being "a Witt juror substantially impaired as a combination of publicity and death penalty views" (12 RT 3352). The court denied the defense motion to excuse the cited "publicity" jurors, but did grant the defense motion to excuse juror 187. (12 RT 3357-3359.)

Juror 177 was then called to replace juror 187. This juror recalled hearing about the case on either radio or television, "probably radio," when the body was found, specifically that "Ms. Huber was found in a rental truck and left there." (12 RT 3361-3363.)

Returning to juror 347, the court noted that "on the strangling motion he may very well have done what you [defense counsel] said," since the court's "view" of the jurors is "somewhat different" than counsel's and "it's also possible that I was blocked because of the angle." (12 RT 3357-3358.) The court permitted defense counsel to examine juror 347 further on this point, and this juror stated that he did not recall clasping his hands, denied mentioning in court that he himself had made a statement about wanting to get ahold of the defendant, and insisted that it was only someone else at his "shop" who had done so. (12 RT 3369-3370.) Defense counsel subsequently acknowledged that these responses by juror 347 eliminated the "strangling" issue, but reiterated that "I think he did it and I think even a juror behind me caught it," and the court deemed the defense publicity challenge to this juror to be preserved. (12 RT 3381-3382; see 12 RT 3351.)

The parties began exercising peremptory challenges against prospective jurors in the box (see 12 RT 3382), and questioning those jurors who replaced the challenged jurors. Juror 134 (an eventual trial juror) had not heard about the case prior to being called, but since then had heard about the case from fellow jurors and co-workers. (12 RT 3386-3387.)

Juror 387 had stated on the questionnaire a belief that "they have the right man." On voir dire, he acknowledged that he had "probably formed an opinion" as to appellant's guilt. (12 RT 3400-3401.)

Juror 212 was "aware of the situation" when it first happened, read newspaper articles about the case before the body was found, knew it was a Costa Mesa case, and believed in the death penalty for appellant based on the facts and type of the case. Specifically, juror 212 recalled that the truck was found at appellant's home, that appellant was a painter, and that there

were paint cans at the site where the body was found. She did not actually see the freeway sign about the victim's disappearance, but read about it in the paper and found it heartbreaking, and got a good feeling about the victim from the publicity. (12 RT 3402-3406.)

At this point, the court excused the rest of the venire for the evening, and resumed the voir dire of juror 212 alone. She recalled reading something to the effect that the victim's parents stated that they could not believe their daughter would get into the car with somebody; her assumption at the time was that the victim must have trusted and felt comfortable with the person she left with or she would not have gotten into the car. The juror remembered reading that the body was found in a freezer and that an extension cord had kept the freezer running, and thought that keeping the body for three years was "sick." She attached a sexual connotation to the case. She formed the opinion that appellant was guilty because the body was found in a freezer in a rental truck at his or his mother's home in Arizona. She accepted these facts as probably true, and thought it was "very strange." She concluded that appellant was probably guilty of sexual assault and kidnapping. She acknowledged that it might be difficult to start from a neutral spot as a trial juror because of what she had read and heard about the case. (12 RT 3407-3414.)

Then, in juror 212's absence, the court informed counsel that it had mistakenly put this juror's publicity questionnaire "in the wrong stack" (12 RT 3414), and that she should have been in the stack for stipulations because "we were trying to avoid a problem by just eliminating jurors who had heavy exposure to news articles" (12 RT 3416-3418). The court explained that "it's one thing to read the news and it's another thing to read it and form opinions about it, then come here to discuss it." The parties

then discussed juror 212 off the record and stipulated to her excusal. (12 RT 3419.)

On the same day, April 29, 1997, prospective juror 391 wrote a letter to the court asking to be excused from further service in the case. (8 CT 2454.) Among the reasons cited by the juror for this request were the following two:

> "I previously have read a great deal about this case in the Los Angeles Times and I have a fairly good memory. I have been a Times reader for over 30 years and have some degree of faith in the honesty and integrity of the Times news reporting. While I do understand that you cannot believe everything you read, I fear that if selected for this jury, I will inadvertently begin comparing facts presented in the case with material I read in the paper.
>
> "Strong sympathy for the family of the victim. While I understand, as explained, that sympathy is a factor that can be considered in a penalty but imposition of the death penalty cannot be used to help a family (for lack of a better term) 'gain closure,' I fear that I would be strongly tempted to do so should the victim's family members indicate during the trial that they desire that closure." (8 CT 2455.)

Yet another factor cited by this juror in his request for excusal was the fact that a classmate of his son "yesterday . . . brought a picture from a newspaper to school. The picture (originally taken two years ago and apparently reprinted recently) was of several Costa Mesa PD officers, including Larry, unloading the freezer recovered from Mr. Famalaro's residence." The classmate was the son of "a friend/acquaintance, Larry Hicks, who is a training and personnel officer for the Costa Mesa Police Department. Our sons are classmates and friends." The juror added that if Larry were to testify at trial, "I would tend to believe his testimony completely." (8 CT 2455-2456.)

The following day, April 30, 1997, voir dire of jurors replacing those who had been peremptorily challenged resumed. (See 13 RT 3426.) Juror 338 believed that he may have sat next to Denise Huber's father on an airplane about a year earlier, but did not converse with him. Since being called for jury duty, this juror heard two details about the case on the radio that he had not previously heard, i.e., the former occupations of both the victim and appellant. Although this juror had only a vague memory of the media report of appellant's arrest, he had seen the banner on the 73 freeway several times and therefore knew that some kind of search for the victim was going on. (13 RT 3428-3431.) He remembered the victim being a young woman and maybe a student, had a vague image of what she looked like from the banner, and may also have seen a photo of her when she disappeared. In fact, this juror saw the freeway banner four-to-eight times a year, and seemed to recall that it was there for several years. Whenever he saw the banner, it would evoke an emotional response of compassion for the victim and the hope that she would turn up. He was sure that this would have some impact on him as a juror, but he insisted that he had much greater emotions about his responsibility as a juror, i.e., that he shouldn't be doing the wrong thing. (13 RT 3445-3450.)

Juror 377 stated in court that he had minimal knowledge of the case through the newspaper only. (13 RT 3462.) However, he acknowledged stating in his questionnaire that he believed the victim was bludgeoned to death in Lake Forest, and that is his present recollection as well. He also remembered in court having read something in the paper about a funeral, and seeing a picture regarding the original search. He also saw an article in the paper saying that the victim had been taken from the freeway, and he discussed that with his children. (13 RT 3468-3470.)

Juror 318 stated in her questionnaire that she got some information about the case from television, but that she didn't think she could form an opinion as to guilt or innocence yet because she didn't know the details. However, listening to the voir dire of the other jurors brought back to her more details of the case: "Once you hear it, your mind goes on the subject, then you go back to think, what else did I read or hear about it?" She revealed that she lived two minutes from the banner and saw it almost every day, and was sure that she got an emotional reaction from seeing it because it would mean that they didn't find her. This juror has a daughter that age, so she could feel for the family. She recalled the body being found, and remembers reading that it was found in a locked freezer, that it was nude, and that they also found her clothes, purse, credit cards, and "all of her stuff," as well as blood on the wall. She also remembered appellant's occupation, and that there were lots of paint cans. She remembered that the freezer was found hidden in a Ryder rental trailer, and that there was a cord going to the house or somewhere connected to appellant keeping the freezer running. She believed that they may have dug up appellaant's basement to see if they could find anything else, but did not recall reading any results of that. She probably had some conversations about the case with her neighbors and more with her family. She was sure she talked to her daughter about taking more precautions or being more afraid regarding the freeway. Also, her husband talked to her about being out at night by herself, and she probably did go out less at night by herself as a result. Remembering all the details, she was leaning toward the defendant probably having done it, and did not think she could be as unbiased as someone who "hasn't heard anything or knows very little. . . . Being truthful, I don't see how you could. I have heard it, and I have seen it. How can I shut it off? I

don't think I can compared to somebody who has heard [*sic*] something or not lived in Orange County and not lived so close. It is still there." (13 RT 3475-3482.)

Juror 256 started off by saying that he did not think he could serve "with everybody that is on this jury at the moment," and the court had him come to the side bar to explain this statement. He stated that "there has been such a rush for people wanting to be on this jury so badly for some reason." He expressed his disappointment in the jurors: "People are changing their testimony. . . . They want to know what the right thing to do is so they can stay." He added that this opinion stemmed from what the jurors wrote on their questionnaires and from observing the answers from the jurors in the box, and not from hearing anybody in the box saying something in the hallway or expressing a sentiment different from what they said in court. (13 RT 3486-3492.) Juror 256 has three daughters about the victim's age, and his wife used to go by the banner and tell him about it, although he personally could not recall ever seeing it himself. (13 RT 3498.)

A discussion between court and counsel ensued, regarding excusing juror 256, during which defense counsel expressed the belief that this was only the third juror who had been honest, and agreed with this juror that the vast majority were lying. The court denied a prosecution *Witt*[27] challenge to this juror even though, according to the court, the juror may have difficulty voting for death and "was acting somewhat irrationally." The prosecutor then informed the court that he wanted to do further *Witt* questioning, but "I don't want to create other problems where I am making this guy say weird

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[27] *Wainwright v. Witt* (1985) 469 U.S. 412.

things in front of the venire." In response, the court allowed the prosecutor to question juror 256 in chambers, after which the court again denied the prosecution's *Witt*-based challenge though finding it a "close" question. (13 RT 3505-3516.)

Juror 174 was then questioned and revealed that between April 7, when he first came in, and April 21, when the court first admonished his group to avoid publicity, he read some articles and saw some television reports about the case. This juror remembered hearing about "the girl" being missing, and later them finding her and the circumstances, and he "almost made a conclusion" at that time. The juror told defense counsel that he would vote for death if appellant were found guilty of all charges. Then, when the prosecutor apparently attempted to rehabilitate him or at least clarify the process for him, the juror interrupted the prosecutor and said, in open court and in the presence of the other prospective jurors: "I do believe if the man is found guilty of all the charges, like the lady said before, fry him." This comment produced laughter in the courtroom. (13 RT 3518-3520.)

Juror 204 knew of the kidnapping, used to drive by the sign or banner, and read something about "the situation" in the *Daily Pilot* that explained why the sign was there. This juror recalled reading about the arrest, that it was made in some other state, and that the body was found in a freezer inside a rental truck. (13 RT 3533-1-3534.) This juror "got" a "comment" at home that "gee, that will be a high profile case." (13 RT 3536.) This juror volunteered that "until today I have never heard that some people might have speculated there was [*sic*] additional crimes committed or whatever." (13 RT 3537.) When reading about the Huber family in the paper, this juror felt compassion for them because of "for a long period of

time not knowing," which is "a terrible situation to be in." (13 RT 3548-3549.)

Juror 353 (an eventual trial juror) probably drove by the banner a couple of times a week, had a personal reaction to it, "a feeling like I wish I had the power to know where she is so I could find her and bring her home." (13 RT 3563-3564.) A number of people who were familiar with the case commented on it to him, including friends at work who said "fry him." (13 RT 3569-3570.)

Juror 171, who was excused by stipulation as an automatic-death juror, had thought that she knew nothing about the case, but from listening to the voir dire in the courtroom she recalled that her sister had gotten a cell phone for the juror's niece because of this crime. (13 RT 3574-3578.)

Juror 296 heard, on television or radio, both about the victim missing and then the body being found, including such details as her disappearing off the Costa Mesa Freeway, the broken-down car, and the Arizona location of the body. This juror also read that appellant had been charged with the murder. (13 RT 3631-3635.)

Before excusing the jurors for the remainder of the week, the judge told them that "I can promise you there will be something someplace in the paper on tv or in the news" during their four days off. (13 RT 3643.) Then, after the jurors had left, the court placed on the record the fact that there was a continuing defense objection for cause, on pretrial-publicity grounds, to any juror whose questionnaire indicated having received any pretrial information about the case; that the parties had agreed that this could be submitted without further argument; and that, unless there was something in addition to what appeared on the publicity "form," it was going to be denied by the court. Defense counsel clarified that this was the situation "unless

we bring it to the court's attention different, which we did one time"; and the court interjected "or I may have one time," and then added: "That will be the standing order." The court further noted that it had "tried with counsel to eliminate those [venirepersons] who have formed or may have formed an opinion as to how this case should be resolved based on pretrial publicity," and then warned: "But there will be more." (13 RT 3651.)

Jury selection resumed at the next court session, on May 5, 1997. Juror 348 had previously known nothing about the case, but when he first got called, a co-worker left the newspaper on his desk and mentioned that it happened three or four years ago. Also, this juror's sister-in-law "pretty much kept up on it," and said she wouldn't want to be here. (14 RT 3671-3672.)

Juror 165 only remembered, probably from television a couple of years ago, forming a mental image of a body being found in a truck. This juror has three daughters, and would have a hard time showing any leniency at all on penalty if the defendant were found guilty. Even though this juror indicated in the questionnaire that life imprisonment without the possibility of parole is a just punishment in some circumstances, and still feels that way, the juror's attitude toward penalty in this particular case is based on "what I know about this case as presented here in the courtroom." (14 RT 3684-3686.)

Juror 225 (an eventual trial juror) saw the banner and read part of an article describing the finding of the victim's body, but she thought she could be impartial. (14 RT 3688-3689.) When she told her supervisor what case she was on, the supervisor did not offer any detail or opinions, but said "oh, that is a big case." (14 RT 3687-3692.)

Juror 367 read a lot of publicity about the case, including the original

abduction or disappearance, the family's search, when the body was found in a freezer and appellant was arrested for it, and also saw the victim's picture. This juror denied having an emotional reaction to any of the media coverage, but he did talk to his younger daughter at the time and tell her that "when this kind of circumstance arises, you don't get out of your car. You wait for help." (14 RT 3712-3714.)

Juror 180 remembered the state of the body when found, something about somebody being arrested, and hearing the victim's approximate age. When this juror told a supervisor at work that he/she was going to be on this case, the supervisor expressed a very strong opinion about what should happen both to appellant and in general to people who "do things like this," i.e., commit "violent acts." (14 RT 3728-3730.)

Juror 359 read articles about both the disappearance and the arrest. Her initial thought was that they had arrested the guilty person, and she indicated on the questionnaire that she was not certain that she could set aside that opinion. This juror also would vote for death if appellant were found guilty as charged. (14 RT 3740-3749.)

Juror 148 recalled reading "some stuff" about the case, and what especially stayed in his mind is that the body was found in a U-Haul rented truck or freezer, which he thought was in Arizona. (14 RT 3753-3754, 3758.)

Juror 324 formed an opinion based on *Register* articles three years earlier, and was inclined toward the death penalty for appellant based on what little he knew about the case from the newspapers and on the charges. (14 RT 3771-3772.) The court excused this juror on defense motion, noting his questionnaire statement that "I have two daughters, and I can't help but consider the terrible suffering the girl's parents have gone through all this

time." (14 RT 3783-3785.)

A co-worker of juror 235 told her she had heard that some jurors were excused because of the comments of co-workers, "so she said does that mean if we all say guilty, guilty, guilty around you you'll be able to get off." This same co-worker told her she had heard this was "the OJ case of Orange County," and that she had a predisposed opinion about the defendant's guilt. When this juror's husband heard she had been called, he read "stuff" about the case in the paper, but she told him not to tell her about it. He told her he didn't know anything about the case before reading it, but when she finds out, "it's just really bizarre." He also recently said something to her about the victim's family and their religious persuasion. This juror saw the banner, driving by it a few times; the first time was shortly after Denise Huber disappeared, and the juror kind of felt sad that she was missing and hoped she would be found. When the juror, a young woman about the same age as the victim, saw the banner she hoped her car never broke down on the freeway at night. She also discussed the banner with her sister-in-law, who said "it's pretty sad." This juror remembered the body being found in Arizona, and that it had something to do with a truck and a refrigerator. (14 RT 3788-3797.)

Juror 162 read some articles about the case, saw things about it on television, saw the banner probably less than once a week, had a vague recollection of seeing bumper stickers about it, and knew the victim was a young woman. This juror saw a news report when the victim's body was located, and recalled that it was found in a freezer and rental truck in Arizona. The juror also recalled that appellant had lived and worked in Lake Forest, and when arrested was living at a parent's house or something to that effect. (14 RT 3823-3825.)

Juror 269 had heard very little about the case, just when "the girl" was first missing and then when "the person" was "picked up on murder" and her husband "mentioned the name." (14 RT 3843-3844.)

Juror 140, upon hearing the brief description of the case in court, remembered back to a time when there was "a young girl" missing and people speaking of a banner on a freeway. Since being called, this juror has been told that it's a "high profile" case. (14 RT 3857.)

From reading about the case, juror 363 believed they did have the right person, and this juror did read and hear "an awful lot," and would vote for death if appellant were found guilty. (14 RT 3872-3873.)

Juror 384 (an eventual trial juror and foreperson at both phases) was aware, from reading the newspaper, that Denise Huber was coming home from a social event and disappeared in the early morning. This juror originally read two or three articles, and then, when they found the body, "didn't spend too much time with it" because "it was creepy." She saw the truck on television. The victim was similar in age to this juror's daughter, and "at the time" they "kind of went over the security things," like staying in the car, and her daughter "does have a cell phone"; those conversations were in response to the victim's disappearance or discovery. The juror read about the body being found in a freezer or something. She felt at the time of her voir dire that there must be enough evidence already at hand to tie appellant to this crime, but didn't have a preconceived notion that he is guilty. (14 RT 3878-3883.) This juror's father is a retired Long Beach police officer, her former husband is a "senior deputy D.A." in Orange County, and she was "currently dating" a retired Long Beach police officer who was "currently employed as a special investigator for the Long Beach City Prosecutor's Office." (14 RT 3875.) She also revealed that she and

juror 162 are "very close friends" and have been friends for 17 or 18 years. (14 RT 3889.) Defense counsel's motion to excuse juror 384 based on her exposure to publicity and close ties to law enforcement was denied. (14 RT 3890-3893.)

The next day, May 6, 1997, juror 101 was called into the box and expressed surprise at not being excused based on her questionnaire responses that the publicity in the case made her think the defendant was guilty. Although she had been mistaken about some of the publicity, she informed the court: "I recall now. Just like you said things would trigger our mind, it has." (15 RT 3909-3912.) She was excused on defense motion after her voir dire. (15 RT 3923.)

Juror 218 (an eventual trial juror) mentioned, in open court, the expense of "appeals and different things." (15 RT 3928.) Later, in objecting to a question of this juror by defense counsel, the prosecutor stated, also in front of all of the remaining venirepersons, that "closure could be part of the victim impact under the 'A' factor." (15 RT 3930.)

Juror 127 revealed that a co-worker had said "he is guilty." Also, her husband and co-workers told her that it "may be a long case." (15 RT 3942-3943.)

Juror 154 had heard only sketchy details of the case, but did have a reaction of sympathy towards the Huber family from reading newspapers. (15 RT 3957-3959.)

Outside the presence of the jury, defense counsel advised the court that they wanted to renew their venue motion at some point, and inquired about the correct procedure; the court assured them they could do it anytime before the alternates were sworn when jeopardy would attach, and that the 12 regular jurors would not be sworn until the alternates were picked.

Defense counsel then informed the court that "to be honest, there isn't a juror on here that we are happy about." (15 RT 3975-3978.)

Resuming voir dire, juror 239 reported hearing a co-worker saying that she used to date appellant's brother when they were teenagers, but had not seen or heard from anyone in that family since then. This juror also heard the same co-worker make an allegation about appellant's brother, but thought it would be "unfair" to say it "in front of everyone here because they might begin to speculate." Then, in chambers, this juror informed the court and counsel that this co-worker had expressed the belief that appellant's brother molested or abused children. (15 RT 3980-3982.) Later during this juror's in-chambers voir dire, the court told the juror that "you are not going to hear any evidence about any brother or about anybody else doing anything for obvious reasons." When defense counsel interjected, "at least at the guilt phase," the court replied: "At least -- probably ever." (15 RT 3986.)

Back on voir dire in open court, juror 128 stated that he/she had formed an opinion based upon what he/she had read before, and that "the more I listen and the more I consider what I have known about the case from reading, and the more I think about my convictions about the death penalty, I am not sure I can actually give Mr. Famalaro a fair trial." (15 RT 4002.)

Juror 294 recalled "hearing it or reading it" in the newspaper. This juror remembered that the victim was missing and assumed that they were looking for her. The juror also heard something about the body being found, in Arizona and in a van, "like most everybody else" (15 RT 4004-4006), as well as the fact that they found appellant in Arizona (15 RT 4011). The only co-worker reaction to his being on this case was to say:

"oh, that one." (15 RT 4012.)

Juror 114 remembered reading that the victim was missing and when the body was found, and also seemed to recall something about appellant having a mother and a brother. When reading about the body being found, this juror formed the opinion that appellant was guilty. (15 RT 4036-4037.) This juror agreed with defense counsel that no prospective juror, based on what they know of the case, had offered the opinion that appellant was innocent or stated that they have already decided that appellant shouldn't get the death penalty, i.e., the juror has been hearing "one-sided opinions" so far. (15 RT 4047-4048.)

After filling out her questionnaire stating that she had not heard or read anything about the case, juror 252 saw "on tv about some Orange County girl that disappeared and very briefly," but not too much about it. (15 RT 4053-4055.)

Juror 170, a volunteer for the Orange County Police Department's detective unit, knew almost nothing about the case. However, a couple of people have approached him and tried to talk about it. This juror agreed with defense counsel that those prospective jurors who had formed opinions had been pretty uniformly negative against appellant. He also agreed that this is a case where there is more community knowledge and interest than in the average case. (15 RT 4081-4085.)

Juror 232 was excused for being an automatic-death juror "in this case." (15 RT 4094-4095.)

Juror 259 recalled some "very general" publicity from the time period in which the body was found and appellant was arrested. (15 RT 4100.) Specifically, he read about it in both the *Register* and the *Times* and "saw it on OCC in the whole clip and what have you." He also knew that

appellant was a painter. (15 RT 4108-4109.) As someone who once ran for the Costa Mesa City Council and now works for Congressman Dana Rohrabacher, this juror would say that this is an important case for the Costa Mesa Police Department. (15 RT 4095-4096, 4100-4101.)

Juror 186 could not be fair to appellant because "the alleged crime deserves the death penalty." This juror formed this opinion based on what he had read in the newspaper and heard on television. (15 RT 4122-4123.)

Juror 219 (an eventual trial juror) thought he had read most of what "everybody else" has read in the newspapers about this case, the victim, and appellant. On his questionnaire, he said that based upon what he had read, including the body being found on appellant's premises, he had formed the opinion that appellant was probably guilty of something. This juror knew that the victim had disappeared in Orange County and turned up in Arizona, recalled the parents' "desperate search," and noted that he has a 21-year-old daughter who was in high school when the victim disappeared and now is about the same age as was the victim at the time. This juror, who lived five or six miles from the area of the disappearance, felt some emotional bond toward the Hubers, then clarified that it was empathy and sympathy for them more than a bonding experience. Although he internalized the information he derived from reading the stories about the case, he did not think this would impair his ability to serve on the jury impartially. Despite stating in his questionnaire that based on what he had read he formed the opinion that appellant was guilty, he stated in court that he had not made up his mind that appellant was guilty, and that he was open to either penalty. A co-worker of his told him that appellant was guilty. (15 RT 4123-4132.)

Juror 399 was questioned in chambers at her request, and revealed, inter alia, that in the hallway here she had been told that "I look an awful lot

like Denise Huber." (15 RT 4138.) More specifically, other potential jurors said in the hallway that there was quite a resemblance to the victim's photos, which might bother her in this trial. (15 RT 4143-4144.) She was also told the same thing in 1991 when it was in the paper, and she has also been told that many times recently since the victim's picture has been in the papers. She is "the exact same age" as the victim, and "I don't know if that's fair to everyone involved." (15 RT 4138.)

Juror 394 did not remember a whole lot regarding publicity, but did vaguely remember hearing something about the banner. (15 RT 4149-4150.)

The next day, May 7, 1997, juror 288 was questioned and recalled hearing about the body being found. This juror's first thought at the time was "oh, my God, if I were her parents, I don't know if I could live." Also, "to see her [the victim's] parents in the courtroom, I don't know how much bearing that would have on having some empathy where it would be hard for me to be fair to both sides." This juror has a daughter about the same age as the victim, and would find it difficult to be impartial. (16 RT 4156-4160.)

Juror 208 referred to the victim by her first name on the questionnaire because he/she followed the case enough where she became "Denise" to this juror. The juror remembered reading about the arrest, and remembered appellant's name because the juror had never heard it before. (16 RT 4162-4163.)

Juror 222 (an eventual trial juror) had prior knowledge of the case as stated in her questionnaire; specifically, she said she recalled seeing a news article many months ago and then just one t.v. news broadcast. This juror remembered, from the news coverage, that the crime had "a brutal aspect."

She also remembered that the arrest occurred out of state. (16 RT 4173-4175.)

Juror 316 described in the questionnaire reading, in the *Times*, only about the discovery of the body. However, "after listening to some of the details here," this juror "might remember" having read another article about the case in the *Times* and listening "to the radio or to the news." This juror also read "the original of this case" in the *Times*. (16 RT 4188-4190.)

At this point, outside the presence of the jury, the court informed defense counsel that they had used all 20 of their allotted peremptory challenges. In response, defense counsel Gumlia expressed "dissatisfaction with all 12 jurors based upon publicity, stated that "there is nobody up there who did not know about this case," and requested additional peremptory challenges. The prosecutor disagreed that every juror knew about the case, explaining that, "I think there may be one or two that don't know anything or very much at all" about the case, and arguing that "there are many up there, most of them, in fact all of them, can put it aside," and that nobody equivocated in saying so. The court agreed with the prosecutor's "observations," and asked Gumlia if he thought any of the 12 jurors should have been excused for cause. He replied, "all 12," and reiterated that the court should excuse for cause "anybody who has had a worker say something to them at work, who has ever read a newspaper article." The court denied this defense request, and announced that they would have four alternate jurors, with four peremptory challenges per side. (16 RT 4204-4206.)

Back in open court, selection of the 12 jurors resumed, and the prosecutor exercised a peremptory challenge. Juror 334 was then placed in the box, and revealed that she was "pretty sure" that she had read, in the

Times, "about everything there was," though she may not have remembered everything. She probably heard about it on the t.v. news as well. This juror's neighbor, a retired F.B.I. agent, had told her he hoped it wasn't "the Huber trial" she was on, the juror said that it was, and the neighbor replied that "he had done some previous business with the defendant." As usual, this colloquy was recited in the presence of the other prospective jurors. On her questionnaire, as she affirmed in open court, juror 334 had stated her opinion that appellant was guilty and that, if found guilty, the "defendant has earned the death penalty," and explained that she had formed her opinion of appellant's guilt because "there is too much evidence for me not to believe that John wasn't involved with the murder." Also on her questionnaire, as she likewise affirmed in court, juror 334 had described in detail what she knew about the case from all of the publicity she had read or heard: The victim became missing after returning home from a concert, after dropping off a friend. The victim's friends and family placed many posters and banners around the Costa Mesa area; the juror believed she may have seen one in a storefront, and she occasionally drove by the banner. Many years later, appellant was accused of "Denise's murder" when the Ryder truck was found in the driveway of his mother's house in Arizona. In the *Times*, this juror saw a photo of the truck at the end of the driveway with an extension cord going up the driveway. That truck and its contents were traced back to a storage company in south Orange County. In court, she stated that she had no reason to disbelieve this publicity. (16 RT 4211-4219.)

Following further voir dire of juror 334, defense counsel at side bar unsuccessfully challenged her for cause based on the degree of publicity she had been exposed to. Counsel also complained that the jurors could hear

the court chastising him at the bench while denying the defense challenge. Counsel described juror 334 as "a dream juror for appeal," and asked for an extra peremptory challenge. The court responded that counsel did not have to keep asking for additional peremptory challenges in order to preserve their record, and denied the request. (16 RT 4234-4237.)

Back before the prospective jurors, the prosecutor passed (with 5 peremptory challenges unused), ostensibly resulting in the final jury of 12. (RT 4237.) This would later, and quite predictably, prove not to be the case, but in the meantime, the court proceeded with the selection of 4 alternates, in the presence of all of the remaining prospective jurors as well as the 12 just selected. (See 16 RT 4237.)

Juror 315 expressed the belief that he knew "significantly more about this case" than the other jurors, and was "fairly well read" on it. (16 RT 4238.)

Juror 422 (an eventual trial juror, after initially being selected as an alternate) thought that he had either read or seen something on television about the disappearance, and "kind of sort of" remembered the body being found in Arizona and the arrest being made there. (16 RT 4244.) Also, some of his co-workers asked him if he was going to be on "the Huber case"; one of them advised the juror that if he wanted to "get off that trial, you can tell them that my wife might know one of the Huber family." (16 RT 4263.) He "learned more potential facts about this case going through this process" than he did reading about it in the paper. (16 RT 4290.)

Juror 200 didn't know very much about the case before coming in, and "learned more probably sitting here than I knew when I walked in." (16 RT 4246-4247.)

Juror 375 was told by a co-worker that her husband had hired

appellant to do some work for them, but the co-worker had made no other comment regarding the case or appellant. (16 RT 4247-4248.) This juror also recalled reading something about the Huber family having moved out of state, maybe to "the Midwest" or to "one of the Northern states." (16 RT 4270.)

Juror 158 only read that the victim was missing and then "showed up" a few years later. Some people suggested to this juror that he could get out of it just by saying "guilty," but nobody said to say "innocent." (16 RT 4252-4253.)

Just before the lunch recess, the court reaffirmed outside the presence of the jurors that the 12 jurors would not be sworn until after the alternates had been selected and defense motions had been heard. (16 RT 4280-4281.) Then, the court informed counsel that "we have received numerous requests for extended media coverage [for] [e]verything imaginable." Citing the venue issues in the case and the reactions the prospective jurors had been getting from the community, defense counsel opposed television coverage, warning that televising anything increases the likelihood of tainting the jurors from family members or co-workers, and puts additional pressure on jurors when they are aware that something is getting that kind of extensive media coverage. The prosecutor agreed with the defense regarding "continuous tv coverage," and the judge agreed that defense counsel's position "does make sense," but added that "I have to balance." Defense counsel responded that t.v. coverage is usually limited to snippets and is more likely than newspaper articles to be out of context. The court then announced that it was denying "continuous coverage throughout the trial" for the t.v. cameras, but that it was debating whether to allow t.v. coverage for "opening statements and argument." The court

added that it did not have a problem with audio, and the prosecutor and defense counsel both responded "okay." (16 RT 4284-4289.)

Voir dire of potential alternates then resumed. Juror 357 knew about the disappearance and the body being found. A co-worker of this juror said she thought she had figured out the case and that there was not much doubt; although she didn't specify guilt or innocence, the juror suspected that the co-worker probably thought "the person" was guilty. (16 RT 4296-4297.)

Juror 289 (an eventual trial juror, after initially being selected as an alternate) had read about the case and talked to her husband about it, including the freeway it happened on because she shopped in that area off and on at the time the victim disappeared. This juror remembered a little bit about the publicity when the body was found and the defendant arrested, including that appellant lived at his mother's house or one she rented to him. This juror also knew that the victim was a student and her approximate age. When the juror stated on her questionnaire that there seemed to be a great deal of evidence against appellant, that did not mean she thought he was probably guilty, but rather that she knew about "the freezer and the location of it and that sort of thing." (16 RT 4339-4341.)

Juror 236 read about the car being found along the freeway and then the body being found in Arizona, and saw the banner in the paper. "One gentleman" told this juror that he had been following the case "from the very first to the present" and started to say what he thought, but the juror told him not to. (16 RT 4348-4349.)

After the defense had used the last of its four peremptory challenges to the alternates (16 RT 4347) and the prosecution then passed (16 RT 4362), thereby ostensibly concluding jury selection, the court conducted a conference with counsel at the bench. In order to "preserve" appellant's

venue motion, defense counsel Gumlia expressed his dissatisfaction with the first 12 jurors and the alternates, and again requested additional peremptory challenges, "making the same argument I made earlier." The court summarily denied this renewed request. (16 RT 4362-4363.)

The court then thanked the unselected jurors for their service and began to excuse them. (16 RT 4363.) However, apparently realizing that she had been selected as an alternate, juror 200 suddenly announced, in the presence of all of the other jurors, that she did not think she could sit as a juror. The court described her as "very upset right now," and the juror responded that "this has been getting worse as I sit here" and that "I'm not truly sure I can be fair." The parties then stipulated to her excusal, but, at the behest of the prosecutor to "inquire very briefly," the court asked her "what's the nature of the problem you're having right now other than the fact it's emotional." Juror 200 replied, still in the presence of all of the jurors: "No, that's not it. I'll be honest, I'm having a hard time even looking at the defendant." She was then excused by the court. (16 RT 4363-4365.)

Selection of the alternates resumed, and juror 132 was excused on defense motion without being questioned, based on his expression of "a very strong opinion" on his questionnaire which had not changed. (16 RT 4365-4366.)

Juror 192 remembered the recovery of the body and appellant being a painter, and he also "would drive on the 55 freeway on occasion so I would see the painting on the building." (16 RT 4366-4367.)

When family and friends heard that juror 331 was being called, they said "it's going to be a long case." (16 RT 4380.)

At this point, the prosecutor passed, and once again it appeared that

the four alternates had been selected. (16 RT 4382.) Defense counsel Gumlia again requested additional peremptory challenges, and expressed particular dissatisfaction with a juror "who has had a religious conversion in the last two weeks." He explained that in the questionnaire this juror expressed a belief in "an eye for an eye in the Bible and no longer believes in that. . . . I know she's been on the Damascus Road and has seen a new light and she now is Paul instead of Saul. . . ." (16 RT 4383-4384.) The court disagreed with counsel, finding this juror to be "quite candid in her responses to me and counsel." (16 RT 4384.)

Then the judge announced that two different jurors had informed the clerk that juror 154 and juror 236, an alternate, "have talked about the case," and that he would question the jurors who provided this information and then the allegedly offending jurors if necessary. (16 RT 4384-4385; see 8 CT 2423 [letter from juror 432 to court].)

In chambers, juror 432 described overhearing the two jurors talking and added that they are "old time friends." Juror 432 heard them mention "John's name [appellant]" and some fact about the case, maybe the truck, and juror 432 just walked away. On a subsequent morning, another juror told juror 432 that these two "older ladies" had been talking about the case; later, juror 432 and this second juror were together and again heard the two others talking about the case and saying "we'll never be on the case because they know we'll talk too." (16 RT 4386-4389.)

Then juror 285 was also called into chambers and described overhearing two jurors talking about the case on the day the prospective jurors had come in to fill out their questionnaires. Specifically, juror 154, in front of about seven prospective jurors, asked another prospective juror who had been dismissed if he knew that the woman had been "bludgeoned," and

also stated that she heard that "Denise's parents were going to be here today," and that "definitely the family needs closure." Juror 285 also overheard this same juror say to another juror, a friend of hers, that "no one would know if we talked on the phone." Juror 285 further revealed that the conversations between the two jurors about the case were "endless," "just little quips here and there." (16 RT 4389-4391.)

The judge then informed counsel that he was ready to excuse the two offending jurors without even talking to them, but that he supposed he should talk to them. Defense counsel said "we need to talk to them because we know there are other people sitting there," and the court noted that "we had other jurors tell us they overheard things." (16 RT 4392-4393.)

Juror 154 was then called into chambers and informed by the court of the allegations that she had talked about the case with other jurors. At first, juror 154 asserted that she was not aware of having done so, but added that "if it's been reported, obviously I have been remiss." The court then specifically asked her if she had been speaking with alternate number one regarding anything involving the case, and she replied that "there could have been some conversation," but that she did not recall "asking or discussing anything about Mr. Famalaro or what I think about the case." When the court asked "anything at all about the case?," she replied that "I could have made a remark" and "maybe I haven't been clear in your instructions about not to discuss something offhand." The court then asked "you don't remember what you may have said to her?," and she said "well, I don't really." Just before leaving chambers to return to the jury room, she told the court that "if I have been indiscrete, I apologize." (16 RT 4393-4395.)

Juror 236 was then called into chambers and told by the court that it

had been reported that she and another juror had talked about the case. She replied that she had "absolutely not" done so, and denied discussing the truck in Arizona or agreeing to talk on the phone. She acknowledged knowing juror 154 for about 23 years, but denied talking about the case to her, aside from discussing the jurors who had and had not been excused. She also stated that she did not even have juror 154's phone number "because she's unlisted." She "absolutely" denied mentioning anything about knowing that Denise Huber had been bludgeoned, although she did know about the body being found in Arizona, nor about closure with the family. (16 RT 4395-4397.)

Defense counsel then moved to excuse both jurors, the prosecutor agreed, and the court ordered them excused, noting that "you just can't violate a court order." (16 RT 4397-4398.) Defense counsel asked the court to ask "a group question" whether any of the jurors had heard these two women talking in the hallway or among themselves about the case, the court added "how about anybody talking about the case?," and defense counsel agreed, adding: "Clearly, people aren't necessarily obeying." (16 RT 4400-4401.)

Voir dire of prospective jurors then resumed in open court. Juror 277 (an eventual alternate juror) knew about what she thought was "a billboard, but I find out it was a banner," which she knew was "off the freeway." (16 RT 4404.) Juror 402 vaguely recalled "the girl" missing on the freeway, through television; otherwise, "everything I've heard has basically been here." (16 RT 4405.) Both jurors were then asked by defense counsel if they had overheard any conversations about the case out in the hallway, and both replied in the negative. (16 RT 4406-4407.)

Then, at the bench, the court announced that although it had granted

defense counsel's request that each party receive two extra peremptory challenges for choosing the alternates (see 16 RT 4400, 4419), because "the complexion of the original jury" had "changed," counsel could use one of the two additional peremptories on "the original jury" if they chose to do so (16 RT 4415). Defense counsel then excused juror 334, a regular juror. (16 RT 4416; see 16 RT 4422.) The prosecutor subsequently passed as to the regular trial jurors, and that jury of 12 was finally selected. (16 RT 4423.) Selection of the alternates then resumed. (See 16 RT 4423.)

Juror 122 met appellant in 1991, when appellant did some work for him, and stated that he could not be an objective juror in this case. After this juror was excused, the court read from his questionnaire on which he wrote that appellant "performed a job for me and did a good job"; the judge informed the jury that he had read this to them because he thought "some people may have gotten the wrong impression." (16 RT 4429-4430.)

Juror 393 revealed, in open court, that on either the first or second day of jury selection, a female prospective juror said "I can't believe I was in the same room breathing the same air as him," and then "another gentleman" said "yeah, I can't believe we're here." Those comments did not affect juror 393, except that "the severity it kind of hit me this must be pretty big." (16 RT 4436.) This juror had previously known nothing about the case, having lived in Texas at the time, but "I guess I've been educated also while I've been here." (16 RT 4431-4432.)

Juror 113 was excused per stipulation after stating that he/she had four daughters, two of them in their 20's, "so the ages are kind of close and I feel quite emotional about that." (16 RT 4442.)

Juror 103 saw the "banner" about three times, passing by it, and felt no emotional connection to it; "it was more wondering where is this girl at."

This juror also probably saw a photo of the banner in the newspaper once and on the news twice, remembered someone talking about putting out fliers, and remembered seeing a flier probably at a 7-Eleven door. (16 RT 4444-4445.)

Juror 175 informed the court that he/she used to see the "sign" once in a while driving down the freeway, and hadn't heard "a whole lot" about the case, just "a little bit" when they found the body, which tended to make him feel that the person they arrested was guilty. However, upon defense counsel's voir dire, this juror revealed having heard "a little more about . . . the physical evidence" than he had written about on the questionnaire, like the truck and refrigerator, explaining that the discussion of the case in court "jogged my memory." Specifically, he now recalled that the truck was rented in Orange County, that the refrigerator was transported from Orange County to Arizona in the truck, and that the Huber family had left the state. (16 RT 4447-4449.) This juror's initial reaction to the information in the media was that appellant was guilty, but realized that making a judgment on what he "saw" in the media was "not realistic." (16 RT 4452.) This juror also got the impression from the media that "the poor would be sentenced to death and the rich would get life, . . . then get out in seven years"; that was his "general feeling about the death penalty, the way it was handed out . . . before." (16 RT 4453.)

Juror 346 did not feel he/she was "the right person" for this jury because of having a teenage daughter who is the juror's only child, "and crimes of this type have a serious impact on me and make me worry about her security and worry about the people out there in society." (16 RT 4455-4456.)

Juror 231 first heard about the case on t.v. in 1994, and also "learned

a lot sitting here." (16 RT 4457.)

Juror 105 only saw a 30-second "clip" on t.v. regarding somebody being arrested in this case. (16 RT 4463.)

Juror 255 (an eventual alternate juror) read a little bit about the case, "but everything has been discussed here, same thing," and he has "even learned a little more here." (16 RT 4470.) This juror did not think having three teenage daughters and somebody's daughter being the victim here would affect his ability to be fair, but "I do have concern about my daughters." (16 RT 4470-4472.)

When this last juror was passed for cause, the four alternate jurors were selected because both parties were out of peremptory challenges. (16 RT 4475.) Then, at the bench, defense counsel renewed his request for more peremptories "based on the same arguments I made in the past." The court noted that "I gave you two extras," and denied the request. After the court assured defense counsel that they would not "waive the issue" if the jury were sworn now, and obtained a stipulation from the prosecutor and defense counsel that "we'll waive jeopardy if that's the problem" (16 RT 4475-4476), the 12 jurors and 4 alternates were sworn (16 RT 4476-4477). The court then gave the jurors the following admonition, inter alia:

> "There's going to be publicity, ladies and gentlemen. Absolutely no doubt about it. There will be stuff on radio, on tv. There will be things in the press.
>
> "And I know, we all know how tempting it is to glance at it. Please don't. As soon as people know you're actually sitting on this trial, you've seen what's happened with other jurors, and some of you have also been contacted. Just hands up, shut your ears. Say please don't, I can't talk about it. Can you do that?

"And if anything comes to your attention you still have to tell me and we have to talk about it. Will you all do that for me?" (16 RT 4477-4478.)

c. Post-Jury-Selection Proceedings

On May 8, 1997, the first day of trial, the court filed its order that audio coverage of the trial by the media would be permitted, but that "tv cameras/recorder and still cameras" would be permitted only for opening statements, closing arguments, pronouncement of verdict, and sentencing; and that television stations would be required to "pool" t.v. cameras, i.e., one t.v. camera at a time would be allowed in the courtroom. (6 CT 1837.) Attached to this order were previous media requests for television camera and/or audio coverage of either the entire trial or portions of it, from the following organizations or individuals: KCAL-TV in Hollywood; the Orange County *Register*; freelance author-journalist Donald F. Lassiter of Anaheim, who had been asked by Kensington Publishing Company in New York "to potentially write a book about this case"; two reporters from the Los Angeles *Times*; the Newport Beach-Costa Mesa *Daily Pilot*; KCBS-TV in Los Angeles; OCN television in Santa Ana; KNBC-TV in Burbank; KNX Newsradio in Hollywood; KFI radio in Los Angeles; KFWB radio in Santa Ana; and Media One Cable Channel 3 in Costa Mesa. (6 CT 1838-1865.)

On that same day, shortly before the start of the guilt phase, defense counsel made a motion to (1) change venue, (2) select a new jury, or (3) sequester this jury. (6 CT 1867; 17 RT 4493-4504.) At the hearing on this motion, defense counsel Gumlia noted that, by his calculations, approximately 175 jurors had been excused at least in part based on publicity, and another 30 to 40 were excused for bias against appellant

because of their views on the death penalty,[28] for a total of "roughly" 210 to 215, i.e., "way, way over half the jurors who were called" were excused for bias against appellant. (17 RT 4493-4494.) Counsel argued that these figures demonstrate that "we have passed into the danger zone, and we are at the point where venue should be changed." (17 RT 4495.) He cited, as an example, "Mr. Bonin's case, in this courthouse" (a noted venue case),[29] where only 39 out of 240 prospective jurors called were excused for bias; by comparison, although "we had a bigger pool to start with," in appellant's case "we are somewhere between two and three times percentage wise the number of jurors excused for cause in Bonin." (17 RT 4496.)

Defense counsel Gumlia further noted that several of the jurors sworn to try appellant's case made "lifestyle" changes or had "the lifestyle discussion" with loved ones based on the facts of this crime; that actual trial jurors "have been approached by someone at work" regarding the case, with

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[28] Appellant has counted 37 prospective jurors who were excused for bias against appellant because of their views on the death penalty, as opposed to publicity and other grounds. (See 11 RT 2956-3020; 13 RT 3486; 14 RT 3687, 3709, 3870; 15 RT 3923, 3969, 4001, 4002, 4094, 4121; 16 RT 4303, 4337, 4347.) According to their questionnaires, 27 of these 37 excused jurors also had knowledge of the case due to pretrial publicity. (See III JQCT 745, 752, 759, 761, 771, 784, 786, 792, 811, 822, 838, 840, 851, 857, 898, 906, 913, 916, 917, 923, 950, 966; IV JQCT 1207, 1208, 1217, 1229, 1240.) As to two other prospective jurors who were excused, numbers 351 and 382, it cannot be determined if the juror was exposed to pretrial publicity because these are apparently two of the many prospective jurors whose publicity questionnaires are not identified by number. (See III JQCT 900; IV JQCT 1215; VI JQCT 2341-2616.) Another excused prospective juror is one of those five whose publicity questionnaires are ambiguous regarding whether he or she recognized the case. (See III JQCT 747; fn. 21, at pp. 94-95, *ante.*)

[29] *People v. Bonin* (1988) 46 Cal.3d 659.

some of the comments "benign," and some not; that "we have some jurors ranging from close relatives saying fry him, all the way to workers just saying he is definitely guilty, he should die, to people just saying it should be an interesting trial." Again, according to Gumlia, "there has never been a published opinion in California that has had to deal with that ever." Moreover, also unlike any other published opinion, "this is the first case of these kinds of numbers in which all of it was done in front of each other, which means Mr. Evans [the prosecutor] got the benefit of not just the 25 or 30 jurors who came up and said I have read about this case, he is guilty and he should die, or some combination of that. . . . You never see this kind of numbers where people say I know about the case from having read about it and he is guilty. So Mr. Evans got the benefit of not just 30 who did that in front of everybody else. He got the benefit of their friends at home telling them they were guilty, so he got a geometric addition to that." On top of all of that, "we had laughter from jurors when a juror said the defendant should fry." (17 RT 4496-4498.)

While saying that the court was "extremely fair in allowing us to ask the questions we did with this jury," and adding that "I believe in your rulings almost across the board in here," Gumlia complained about "the system itself, allowing them to talk like that in front of each other, allowing jurors to say look at him and say I . . . get sick looking at him; he is guilty; he should die, time after time the friends saying that if that happens in the hallway, we excuse the jurors. I don't know how it suddenly becomes okay because they do it on the stand. We would freak out if that wasn't this case. I thought we got desensitized to that." (17 RT 4498-4499.)

For the cited reasons, defense counsel asked the court to "relook at this record and reconsider this record and change venue now." He also

made two "alternative requests," explaining them as follows:

> "One, is that it is a related but separate issue, that given all the jurors who spoke in front of each other in this case about how they hated the defendant and he should die, that you could start over and just quash this jury finding that venue doesn't need to be changed, but the procedure in this case made it unfair for Mr. Famalaro, and just start with the new venire under different rules. That is my second request.
>
> "And then my third request, if you deny the first two, we sequester the jury for obvious reasons. In voir dire they are all being approached at home, at work, they are -- can see the cameras out there, and the pressure is obvious." (17 RT 4499.)

The prosecutor in response did not dispute any of defense counsel's factual assertions, instead arguing that "there is no one in that jury box when this trial starts with a fixed opinion," that everyone was "very careful about excluding jurors like that," and "we excluded dozens and dozens like that." The prosecutor also claimed that defense counsel "were permitted at any time to suggest to the court that we should go in camera" or "into chambers and do it individually at any time." The prosecutor also conceded that "in terms of the people laughing in the audience about that comment made by the juror, . . . a significant amount of the people [prospective jurors] laughed." However, he noted that when he raised that point with the next juror (see 17 RT 3550-3551), "more people out in the audience agreed with me that it wasn't funny, and there was an outburst that it wasn't funny. So I think that equals out to be a nothing." (17 RT 4500-4501.)

The court also acknowledged, regarding prospective jurors laughing at the "fry him [appellant]" remark, "it absolutely did happen" and "we all heard it," but noted that "there were negative head shakes that went on with the laughter, and the laughter was kind of a shock laughter at a juror saying

that." The court also thought that "we went overboard in eliminating people who may possibly have a fixed opinion on the case" and "eliminated far more than we have to." Therefore, the court told defense counsel, "your numbers are probably not accurate, and I am not saying they are invalid, they are not accurate, nor could any one of you come up with an accurate figure." The court added that "we also excused other persons for different reasons." (17 RT 4501.)

In response to the prosecutor's argument regarding individualized voir dire, defense counsel asked for clarification that the defense did have "a standing Hovey request," and that "if the court believed we were getting to a red flag area, the court was taking the assumption of the risk"; both the court and the prosecutor agreed with counsel's representation, and that in fact they did go into chambers at times to talk to individual jurors. The court also observed that "I didn't see anything from any of the jurors that that would have a negative impact or bias on the other prospective jurors." (17 RT 4502-4503.)

After defense counsel introduced into evidence some "final newspaper articles" about the case as an addendum to Exhibit C to their venue motion, the court denied all three of appellant's alternative motions. (17 RT 4503.)[30]

Finally, alluding to the court's previous comments about the "shock" nature of some prospective jurors' laughter at the "fry him" remark by

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[30] Defense counsel did not specify for the record which articles were introduced at this point, but Exhibit C contains 5 articles sequentially numbered beginning where the previously-admitted 394 pages left off (nos. 395-399), and an additional approximately 20 unnumbered items--including articles, columns, letters to the editor, and graphics--which were published prior to this May 8, 1997, hearing.

another prospective juror, defense counsel stated that "I want to make it clear for the record that the interpretation from counsel table was whatever facial expressions some of the jurors did, there was enough of the laughter that sounded genuine and deep to us that there was a concern," and that "I am just offering a mixed opinion for the record in that regard." In response, the court once again acknowledged that "there was laughter," and told defense counsel "how you interpret that is, of course, up to you." (17 RT 4503-4504.)

On May 12, 1997, during the guilt phase, one of the trial jurors (225) informed the court and counsel that her supervisor had called her on the previous Friday (May 9, 1997, the day after the trial began) and said she had some information pertaining to the trial, and that she had told the supervisor that she did not want to, and could not, discuss it with her, but that, at the supervisor's request, the juror gave her the trial judge's name. The supervisor then called the judge's clerk and told her (the clerk) that the supervisor's husband was the owner of the Ryder rental company from which the Ryder truck was leased and not returned. On the judge's instruction, his clerk informed the caller not to say anything to the juror. Further, according to the judge, "[a]ctually the lady wanted to call the prosecutor, and we shut it down there." The caller left the clerk her name, a "Mrs. Hobbs," but would not give the clerk her phone number. (18 RT 4653-4655.)

On May 28, 1997, following the conclusion of the guilt phase and prior to the beginning of the penalty phase, the court granted defense counsel's request to file newspaper articles about the case that had run since the guilt verdict was returned on May 23 (23 RT 5776), and ordered them incorporated as part of the record on the venue motion. (See unnumbered

addenda to Exhibit C.) Regarding those "clippings," counsel specifically noted the following:

> "Of particular interest is that the 'Orange County Register' had a phone-in poll. Readers were to call in Friday and then the results were published Saturday. The poll was whether or not the defendant should be sentenced to death. The results on Saturday showed that 99 percent of the callers thought he should. There was some 1300 respondents, certainly not a scientific poll, but certainly an unseemly polling to be running in the middle of a case." (23 RT 5776; see unnumbered addenda to Exhibit C.)

On August 28, 1997, following the conclusion of the penalty phase, defense counsel filed a motion for new trial and modification of penalty, arguing, inter alia, that the trial court had erred in denying the motion to change venue. (See 6 CT 2120-2124.) Besides referencing some of the damaging remarks made by and to prospective jurors during voir dire and outside the courtroom (6 CT 2122), appellant's motion noted that "several jurors were subjected to comments about the case while the trial proceeded," and that "[w]hile the jury was deliberating, the Orange County Register ran an editorial cartoon ridiculing the defense" (6 CT 2123; see unnumbered addenda to Exhibit C, June 18, 1997 *Register* editorial cartoon).

Attached to appellant's motion for a new trial were declarations from three of the trial jurors. These declarations read, in pertinent part, as follows:

> "I served as a juror on the case of People v. John Famalaro.
>
> "Some of my coworkers were a bit hostile about my jury service because I was going to be away from work for so long. I heard maybe a half dozen comments from people at

work who said that the defendant, Mr. Famalaro, was guilty. I told these people that he [*sic*] did not want to hear any of their comments or about anything that they had read about Mr. Famalaro's case.

"During the course of Mr. Famalaro's trial, my 21 year old daughter passed by the flowers that were left at the site of Ms. Huber's disappearance to mark the sixth anniversary of the event. My daughter had been driving to her place of employment at Fashion Island in Newport Beach. She told me about this on the day that she saw the flowers. I told her that I did not want to hear anything about it. This incident did not affect me as a juror in any way." (6 CT 2136 [declaration of Gregory Griffiths].)

"I served as a juror on the case of People v. John Famalaro.

"While I was serving as a juror, 3 of my co-workers made comments to me, like 'Hang 'em.' They would ask me how I was going to vote. They tried to read me things from the newspaper on the case. I told them to stop and I went into the other room. I told them I didn't want to hear anything they had to say about the case . . . they weren't in the courtroom and they weren't hearing the evidence." (6 CT 2137 [declaration of Anna Brown].)

"I served as a juror on the case of People v. John Famalaro.

"I heard several unsolicited comments from a person sitting at the lunch table at my place of work, following the announcement of the guilty verdict on this case. These comments were to the effect of 'Hang 'em.'" (6 CT 2138 [declaration of Candi Griffin].)[31]

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[31] Defense counsel made it clear that these declarations were not attached to the motion for a new trial in order to impeach the verdicts, since

(continued...)

At the hearing on appellant's motion for a new trial, on September 5, 1997, defense counsel Gumlia augmented the record for the new trial motion by submitting additional "newspaper venue exhibits," consisting of newspaper articles "since basically the start of the trial up until the present." (27 RT 6780; see unnumbered addenda to Exhibit C.)[32] He also asked for and obtained the court's and prosecutor's permission to subsequently submit, for the same purpose, "the editorial from the Register that was written on the day of the verdict"[33] which counsel did not previously have in their file. (27 RT 6780-6781; see unnumbered addenda to Exhibit C.) The three juror declarations were also received on the new-trial motion. Gumlia also noted for the record that, as shown by the newspaper-article exhibits, "Mr. and Mrs. Huber and maybe others and the press went to the scene of

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[31](...continued)
"the listed comments would *appear* to relate directly to juror thought processes and, thus, would be inadmissible under Evidence Code section 1150 for the purpose." (6 CT 2125; original emphasis.) Rather, they were included "simply as support for the power given to this court to reconsider the verdicts." (*Ibid.*)

[32] Once again, defense counsel did not specifically identify for the record the additional newspaper exhibits, but Exhibit C contains more than 100 unnumbered items published after the conclusion of the venue hearing, stretching from March 1, 1997, through September 6, 1997--the day after appellant was sentenced to death. These additional materials primarily consist of newspaper stories about the case, but also include editorials, columns, letters to the editor, public-opinion polls, and the aforementioned derogatory editorial cartoon. This is in addition to the 399 numbered pages of materials previously admitted into evidence as part of Exhibit C. Altogether, by appellant's count, there are 531 pages of newspaper publicity about appellant's case contained in Exhibit C (399 numbered pages, and 132 unnumbered pages).

[33] The death verdict was returned on June 18, 1997. (8 CT 2692.)

Denise Huber's disappearance on the 73 Freeway . . . to honor the date of her disappearance, and that occurred during the penalty phase of this trial, I believe." This representation was made to place into context one of the juror declarations which referred to knowledge of that incident. Finally, Gumlia emphasized that one of the newspaper exhibits, from June 18, 1997 (the day of the death verdict), was of a type that neither he nor anyone he talked to had ever seen before during a criminal trial, i.e., "a cartoon that ridiculed the defense as the jury was deliberating." He explained that "I have never seen an editorial about anything that actually happened in a trial picking [on] the attorneys, paraphrasing what was said, things like that." Counsel added that "the Register was so gutless they wouldn't present our response to it. We wrote a nice reasoned response." (27 RT 6781-6783.)

After hearing from the prosecutor (27 RT 6784-6786) and making some lengthy legal and factual comments regarding the appropriateness of a change of venue in this case (27 RT 6787-6795), and discussing the other issues raised in the motion for a new trial (27 RT 6796-6804), the court denied the motion (see RT 27 6804).

C. The Trial Court Erroneously Denied Appellant's Motions for Change of Venue

1. Governing Legal Principles

The right to be tried by an impartial jury, including a capital-sentencing jury, is the cornerstone of our criminal justice system and is protected by the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (*Morgan v.* Illinois (1992) 504 U.S. 719, 728; *Duncan v. Louisiana* (1968) 391 U.S. 145; *Irvin v. Dowd* (1961) 366 U.S. 717, 727-728.) Changes of venue are designed to protect that fundamental right. (*Groppi v. Wisconsin* (1971)

400 U.S. 505; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363; *Rideau v. Louisiana* (1963) 373 U.S. 723, 726-727; *Maine v. Superior Court* (1968) 68 Cal.2d 375, 383-384; *People v. Bonin* (1988) 46 Cal.3d 659, 672; *Coleman v. Kemp* (9th Cir. 1985) 778 F.2d 1487, 1489; *Nevers v. Killinger* (E.D. Mich. 1997) 990 F.Supp. 844, 853-854.) Thus, "[b]ecause a criminal defendant has the right to an impartial jury, a court must grant a motion to change venue 'if prejudicial pretrial publicity makes it impossible to seat an impartial jury.'" (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1210 [citation omitted].)

Derived from *Sheppard* and *Maine*, the California standard governing a change of venue is codified in Penal Code section 1033, which in relevant part states that "the court shall order a change of venue . . . to another county when it appears that there is a reasonable likelihood that a fair and impartial trial cannot be had in the county." Whether the issue is raised by a pretrial writ or on appeal from a judgment of conviction, a reviewing court must make its own determination of whether a venue change should have been granted. (*People v. Williams* (1989) 48 Cal.3d 1112, 1125; *Maine v. Superior Court, supra*, 68 Cal.2d at pp. 382-383; see *Sheppard v. Maxwell, supra*, 384 U.S. at p. 362.) "The phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*Martinez v. Superior Court* (1981) 29 Cal.3d 574, 578.) Actual prejudice to the defendant need not be shown. (*People v. Tidwell* (1970) 3 Cal.3d 62, 69.) Further, when the issue is raised before trial, any doubt as to the necessity of a venue change should be resolved in favor of a venue change. (*Martinez v. Superior Court, supra*, 29 Cal.3d at p. 578.)

Because no single factor is controlling, each case must be approached on an individual basis. (See, e.g., *Martinez, supra*, 29 Cal.3d at

p. 585; *Maine, supra*, 68 Cal.2d at pp. 384-385.) This Court has recognized a number of salient factors that may be relevant to determining the reasonable likelihood of an unfair trial:

> "Factors to be considered include the extent and kind of the publicity, as well as the size of the community in which the crime occurred. The nature and gravity of the crime serves as an important factor. We also consider the standing of the victim and the accused in the community." (*Martinez, supra*, 29 Cal.3d at p. 578.)

When the denial of a change of venue is challenged on appeal, the review is retrospective. Reviewing courts look to what actually transpired during voir dire to determine whether the "reasonable likelihood" standard warranting a change of venue was met. (*People v. Harris* (1981) 28 Cal.3d 935, 949.)

> "Whether ruling on a motion to change venue well before trial or during the voir dire, the standard remains the same – the reasonable likelihood of a fair trial in view of the pretrial publicity. The additional evidence in a determination at voir dire is the jury panel itself. What had been a matter of speculation at the earlier motion – i.e., the actual extent of exposure of those who are potential jurors – becomes, on a later motion, subject to more precise measurement and evaluation.
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> . . .
>
> "Resolution of the venue question requires consideration of the responses of jurors who do not ultimately become members of the trial panel as well as those who do. [Citations.]" (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 943-944.)

Upon application of these legal principles to the instant case, it is readily apparent that even prior to jury-selection proceedings, there was far more than a reasonable likelihood that appellant could not obtain a fair trial

in Orange County; *following* jury selection, when there was no longer any need for speculation, it was overwhelmingly clear that appellant could not and did not receive a fair trial on the guilt, special-circumstance, and penalty determinations. The effect of the extraordinary pretrial publicity was actually shown to have prejudicially permeated the jury venire, and the trial court's insistence on conducting voir dire largely in the presence of all of the prospective jurors dramatically increased the already widespread exposure of the jury panel to the massive and prejudicial pretrial publicity.

Since, on appeal, both the extent and effect of the publicity in appellant's case is "subject to more precise measurement and evaluation" based on the voir dire of "the jury panel itself" (*Odle v. Superior Court, supra*, 32 Cal.3d at pp. 943-944), rigid or inflexible application of the "factors" often employed by this Court would be unrealistic and unproductive of a just result. Instead, analysis of these factors must be malleable to reflect the peculiar circumstances of this case, which demonstrate, as an undeniable *reality*, the exposure to publicity of both the venire and the trial jury. Especially is this true with respect to the "size of community" factor, which will be discussed in some detail below.

2. The "Five Factors" Considered by California Courts in Deciding Whether the "Reasonable Likelihood" Standard Has Been Met Required a Change of Venue

a. The Nature and Gravity of the Offense

This factor requires little discussion or analysis in appellant's case. The "nature" of an offense refers to the "peculiar facts or aspects of a crime which make it sensational, or otherwise bring it to the consciousness of the community." Its "gravity" refers to "its seriousness in the law and to the possible consequences to an accused in the event of a guilty verdict."

(*People v. Hamilton* (1989) 48 Cal.3d 1142, 1159; *Martinez, supra*, 29 Cal.3d at p. 582.) When a change of venue is requested in a capital case, the gravity of the offense and the severity of potential penalty are factors that weigh "heavily" in favor of granting the defendant's motion. (*Williams v. Superior Court* (1983) 34 Cal.3d 584, 593; *Martinez, supra*, 29 Cal.3d at p. 583; see also *Fisher v. State* (Miss. 1985) 481 So.2d 203, 220 ["where the accused is on trial for his life, venue should be changed 'when it is doubtful' that a fair and impartial jury may be impaneled in the county where the crime occurred"].)

Here, in addition to the fact that appellant was facing the death penalty, the facts and circumstances of the case could not have been more unfathomable, bizarre and shocking. The victim's mysterious and inexplicable disappearance for three years was followed by the discovery of her nude, frozen, bludgeoned, handcuffed body in a freezer on a Ryder truck sitting in an Arizona residential driveway, with a lengthy extension cord extending from the freezer into appellant's house. Not only was the victim preserved intact three years after her disappearance, but all of the clothing she was wearing and the possessions she was carrying on the night of her disappearance had been retained and were found at appellant's residence.

The more "spectacular" the facts of a case, the more likely it is that jurors will notice, remember, and be prejudiced by the publicity. (See, e.g., *Corona v. Superior Court* (1972) 24 Cal.App.3d 872, 877-878.) It would be an understatement to call Denise Huber's three-year disappearance and the subsequent discovery of her body and surrounding circumstances sensational, as well as grave and peculiar.

The nature and gravity of the offense were graphically illustrated by

the extensive publicity and negative characterizations of appellant described by Dr. Bronson in the "Disappearance of Denise Huber," "The Search," "The Body is Found," the "Nature of the Crime" and the "Gravity of the Crime" sections in Exhibit G at the venue hearing. (See, e.g., 7 RT 2025-2045; Exh. G.) And, of course, the questionnaires and voir dire of the prospective jurors reflected their recognition of and reaction to the nature and gravity of appellant's alleged crimes. (See, e.g., 11 RT 3081, 3083 [girlfriend gave her some "gruesome details," including that "the girl . . . was found in the freezer all chopped up"], 3157 ["very, very bizarre and very heinous"]; 12 RT 3228-3229 [husband wondering what type of person would keep a body for a period of time], 3409-3410 [keeping body for three years was "sick"]; 13 RT 3468 ["bludgeoning this woman"], 3478 [nude body found in locked freezer, and they found her clothes, purse, credit cards, her blood on the wall, and "all of her stuff"], 3534 [body found inside freezer inside rental truck]; 14 RT 3753-3754, 3758 [body found in U-Haul rented truck or freezer], 3791 [husband said "it's just really bizarre"], 3825 [body found in freezer and rental truck], 3878 ["it was creepy"]; 15 RT 4124-4126 [recalled parents' "desperate search" and "internalized that information"]; 16 RT 4174 [crime had "a brutal aspect"].)

Clearly, the "nature and gravity of the offense" factor weighed overwhelmingly in favor of a change of venue. In a capital case, the apparent snatching of a vulnerable young woman off a freeway in the middle of the night, bludgeoning and perhaps sexually assaulting her, shoving her nude body into a freezer and keeping it frozen there for three years, all the while hiding her whereabouts from her desperate family and friends, ensured that a large segment of the public--and particularly the jury pool--familiar with the case would internalize the crimes, respond in a

hostile fashion, and yearn for revenge or at least "closure" for the victim's family. And that is precisely what happened, as demonstrated by the evidence at the venue hearing, the jury questionnaires, and the voir dire of the prospective jurors.

b. The Nature and Extent of News Coverage

The "extent" of news coverage is quantitatively measured by items like the number of articles (and electronic coverage), their pattern, their prominence, and other factors such as the number of pictures, editorials and letters to the editor. The "nature" of publicity is qualitatively measured. A venue change is more likely to be granted where coverage has been inflammatory or productive of outright hostility. (See *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 877.) But even where such circumstances are not present, if "a spectacular crime has aroused community attention and a suspect has been arrested, the possibility of an unfair trial may originate in widespread publicity describing facts, statements and circumstances which tend to create a belief in his guilt." (*Ibid.*; accord, e.g., *People v. Jennings* (1991) 53 Cal.3d 334, 362; *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 580.) Coverage that has contained detailed descriptions of the crime using graphic language about the circumstances and the defendant weighs in favor of a change of venue. (See *Martinez, supra*, 29 Cal.3d at p. 582.) The same is true when there have been editorials about the crime and its ramifications. (See *Frazier v. Superior Court* (1971) 5 Cal.3d 287, 290; *People v. Hamilton, supra*, 48 Cal.3d at p. 1156.) Coverage that contains inaccurate reporting of facts, or reporting of facts that would be inadmissible at trial, weighs in favor of a change of venue. (See *Marshall v. United States* (1959) 360 U.S. 310, 312-313; *Corona, supra*, 24 Cal.App.3d at p. 878.) Extensive publicity, even if it is

factual in nature and non-inflammatory, can also weigh in favor of a change of venue. (See *Jennings, supra*, 53 Cal.3d at p. 362; *Martinez,* 29 Cal.3d at pp. 580-581.)

Both the nature and extent of the media coverage of the instant case weighed overwhelmingly in favor of a venue change--to a nearly unprecedented degree--as appellant has shown in Section B of this Argument, *ante*. Briefly summarized, at the venue hearing and later, appellant presented nearly 400 newspaper articles stretching from Denise Huber's disappearance right up to and including the time of the jury's death verdict and the court's sentencing (see Exhs. C and D), as well as a nine-cassette exhibit reflecting the substantial television and radio coverage of the case (see Exh. B). Among the numerous television news clips and stories were those featuring law-enforcement authorities opening and showing the contents of the freezer in which the victim's body was found; appellant requesting an attorney immediately after the interrogating officer had pleaded with him to "be honest" and tell the officer "what's going on" because "I don't know who it [the body] is or anything about it," with the words typed in on the screen (see Exh. B;[34] 9 RT 2500 [trial court's

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[34] The interview was conducted on July 13, 1994, shortly after appellant's arrest in Arizona, by Yavapai County Sheriff's Lieutenant Scott Masters, at a time when the identity of the body was still unknown. The full interview, as it appeared *in writing on the television screen*, was as follows:

> "[Masters]: The reason I want to talk to you is a pretty serious problem. We have a stolen truck there at your home, ok? That Ryder truck. And, uh, John, there's a body in the truck. We did recover it as a stolen vehicle, and while we were taking these things out of the back of the truck, the freezer you had in there, which was plugged in, has a body in

(continued...)

description of defendant's televised interview with police]); local memorial services for Denise Huber, and her subsequent funeral in South Dakota; and interviews of her parents regarding punishment in this case. (See Exh. B; 2 CT 632-633 [declaration of defense counsel regarding publicity].) The pretrial surveys[35] showed extraordinarily-high recognition and prejudgment rates, as to both guilt and penalty. Indeed, Dr. Bronson had seen only one capital case with a higher penalty-prejudgment rate.

Dr. Bronson found newspaper coverage about the case to be unique in terms of the unusual length of the articles, the unusual number of people who worked on them, and the high percentage of articles that appeared on the front page (compare, e.g., *People v. Edelbacher* (1989) 47 Cal.3d 983, 1001)--all of which shows the importance of the case to the community and the likelihood that the stories would be read. The coverage of the case constituted a veritable media "blitz," "frenzy" or "storm" (7 RT 2025), and

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[34](...continued)
it. I don't know who it is, or anything about it, John, but please! All I'm asking at this time is that you be honest and tell me what's going on because I know you know what's going on." [Television reporter, in voiceover, says: "But Famalaro had no comment."]

"[Famalaro]: After you told me my rights, I think I want an attorney.

"[Masters]: Ok, you don't want to talk to me about it at all? [Television reporter: "The questioning ended."] (Exh. B.)

[35] Qualified public-opinion surveys or opinion testimony offered by individuals may properly be employed as adjuncts to the venue determination. (*Maine v. Superior Court, supra*, 68 Cal.2d at p. 383; *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 882.)

its nature was inflammatory and contained inadmissible and inaccurate material. (See *Sheppard v. Maxwell, supra*, 384 U.S. at pp. 360-361; *Daniels v. Woodford, supra*, 428 F.3d at pp. 1211, 1212.) Numerous newspaper articles compared appellant to such notorious figures as the cannibalistic mass murderer Jeffrey Dahmer, and the infamous Ted Bundy and "Jack the Ripper." (See Exh. G, pp. 23-24.)

The coverage of Denise Huber's disappearance created tension and fear in the community, especially among women,[36] and thus a special ability to remember the case, an internalization Dr. Bronson called "salience." People related this crime to their own lives, unlike for example, a prison murder, or a crime committed in another county where people had not previously heard of it or lived through the victim's disappearance. Even the prosecution expert, Dr. Ebbesen, acknowledged that seeing the banner on the freeway would increase the likelihood of prejudging appellant's guilt. (8 RT 2355-2356.) The search for Denise Huber included community involvement and awareness, ongoing searches, fliers and the like, and, of course, the prominent highway banner, all of which served to keep the story alive in the community for years. When the body was found, nude and frozen, handcuffed and bludgeoned, it evoked an emotional response both because it was gruesome and because the victim was degraded, in effect killed twice. The result was widespread anger and resentment toward appellant.

Inadmissible material in the media coverage included television coverage of the videotape in which appellant asserted his Fifth and Sixth

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[36] A *Register* article on June 7, 1991, about Denise's disappearance, included four specified "tips to anyone whose car breaks down on the freeway at night." (See Exh. C, p. 7.)

Amendment rights, and the revelation that "pornographic magazines" and "nearly a dozen guns and rifles" were found in appellant's residence (see Exh. B), print stories about the finding of massive weaponry, drug paraphernalia, and sadism-related sexual materials in his home (see Exh. G, p. 12), and television videos and photos of appellant being transported with a leash around his neck (see Exh. B; Exh. C, p. 141); inaccurate material such as persistent reports that appellant may be a serial killer (see Exh B; Exh. C, pp. 72-73, 75, 78, 85, 87, 89-90, 98, 102, 106, 114, 117-119, 123, 124-125, 130-132, 136, 138, 141, 142-143, 146-148, 152, 156, 157, 164, 166, 167-168, 180, 192, 205, 219, 220, 222, 304-306);[37] and speculation that appellant was a necrophiliac (see Exh. C, pp. 127, 135, 203), and that he wore a police uniform to induce the victim to go with him (see Exh. G, pp. 17-18, 20).

There were televised reports that appellant had an "extensive [videotape] library of bizarre and sometimes horrid material," including clips of Jeffrey Dahmer and Charles Manson, and videos of Dahmer and Manson were displayed on the screen during these reports. Costa Mesa Police Detective Ron Smith initially even compared the case to that of mass murderer John Wayne Gacy, remarking that "if he [Famalaro] could do something this horrendous once, maybe he could do it again and again." Another detective called it "the most bizarre case I've ever worked."

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[37] One of the venirepersons expressly referenced having been exposed, for the first time during jury-selection proceedings, to speculation that there were "additional crimes committed" by appellant. (13 RT 3537.) Numerous television excerpts in Exhibit B showed authorities digging underneath and around appellant's Arizona residence looking for women's bodies, i.e., suspected additional victims of appellant. These excerpts also depicted the use of dogs "trained to smell cadavers."

Assistant District Attorney John Conley, in qualitatively describing this case, said: "on a scale of 1 to 10, it's a 10." One report noted that Denise Huber "was not the only woman followed, harassed or frightened by" appellant. There was an interview with a former neighbor of appellant who reported frequently seeing "young boys" going in and out of appellant's Lake Forest house at "all hours of the night," and that "they spent the night with him." There were reports that the bomb squad had to be called in because "a hand grenade simulator," with "live ammunition" and "dangerous," had been found in a bedroom closet of the same house after appellant had moved out. A forensic psychiatrist theorized that appellant kept the victim's body as "a totem, an object of worship," and used it to "practice sexual fantasies and sexual behavior," thereby permitting him to "feel total control," in reaction to his childhood experiences where "his mother was in control." He likened this case to lurking predators who enjoy the kill; "they're like sharks," sense weakness, then "move in for the kill." (See Exh. B.)

Specifically with respect to punishment, Dr. Bronson found 179 references to the death penalty in the media reports, including very strong and graphic calls from the victim's relatives and others for appellant's execution as the only just penalty. For example, in a television interview Denise's father made the fervent plea "I hope that he fries," and, at a press conference with the Hubers following the memorial service in Newport Beach, Costa Mesa Police Chief Snowden stated that "the only thing that's closure will be when . . . somebody flips the switch on him." (*Ibid.*)

It should have come as no surprise, therefore, that such sentiments as "fry him" figured prominently in the jury-selection proceedings. First, however, the publicity questionnaires wholly validated the pretrial surveys--

and to an astonishing degree, as the recognition and prejudgment rates of the venire were nearly identical to the surveys. Some of the prospective jurors went so far as to state, in their questionnaires, such things as appellant should be "shot" (VI JQCT 2356), appellant should be subjected to "castration" and "then death by firing squad" (VI JQCT 2381), and "I would flip the switch myself" (VI JQCT 2538).

Likewise, the surveys accurately predicted the prospective jurors' responses during voir dire, both quantitatively and qualitatively. Further, thanks to the trial court's stubborn and misguided refusal to conduct a *Hovey*-type voir dire, even those minority of prospective jurors who had previously known little or nothing about the massive and highly prejudicial publicity surrounding the case themselves gained substantial knowledge of it, and all of the prospective jurors were exposed to their fellow jurors' damaging remarks about appellant and opinions regarding his ultimate fate.

Appellant has detailed the knowledge and effect of the publicity on the prospective jurors (see Section B, *ante*), and will not repeat all of that extensive evidence here. However, it bears repeating that many, or most, or in some cases all, of the prospective jurors were exposed to such comments from their fellows as "hang him"; "I don't want to sit up front and look at that piece of scum" or "this scum bag"; appellant is "guilty as hell" or "guilty as sin"; "he should fry"; appellant "should definitely be put to death"; he would "get the ax" if it happened to the juror's daughter; a fellow employee saying "I feel he is guilty" and should get the death penalty; an eventual trial juror's husband saying "fry him" to her; a juror mentioning wanting to get his hands on appellant, while apparently using a "strangling" motion; "I do believe if the man is found guilty of all the charges, like the lady said before, fry him," producing laughter from other

prospective jurors; friends at work saying "fry him"; a supervisor expressing a very strong opinion about what should happen to appellant; "the alleged crime deserves the death penalty"; an F.B.I. agent friend saying "he had done some business with the defendant" in the past; if found guilty, "the defendant has earned the death penalty"; a would-be alternate juror announcing, in the presence of all the jurors who ultimately sat on appellant's jury and decided his fate, "I'm having a hard time even looking at the defendant"; and, later, a prospective juror, again in the presence of all the trial jurors, quoting another prospective juror as having said "I can't believe I was in the same room breathing the same air as him."

Significantly, the media coverage of appellant's case did not end after the discovery of Denise Huber's body and appellant's arrest. (Compare, e.g., *Murphy v. Florida* (1975) 421 U.S. 794, 802; *People v. Jenkins* (2002) 22 Cal.4th 900, 944.) The numerous requests by media organizations--including five television stations, three radio stations, and three newspapers--and individuals to cover the pretrial (see 2 CT 344-347, 353; 4 CT 1108, 1136; 5 CT 1513, 1704-1705, 1736) and trial (see 6 CT 1837) proceedings alone demonstrate this truism.[38] Further, there were numerous admonitions by the court to the prospective jurors--as well as to the actual trial jurors (16 RT 4477-4478)--that there would be ongoing media coverage and to avoid it, the court acknowledged to defense counsel that it was unavoidable that prospective jurors would nevertheless be exposed to such coverage, and numerous prospective jurors revealed to the court on voir dire that they had been so exposed since being called. In

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[38] As the court informed counsel during jury selection: "We have received numerous requests for extended media coverage [for] [e]verything imaginable." (16 RT 4284.)

addition to the hundreds of articles presented at the venue hearing itself, the defense updated and supplemented Exhibit C with approximately 100 newspaper articles published shortly before and during trial (and 9 more published at the time of sentencing), letters to the editor calling for the defendant's execution and/or criticizing the defense presentation, a mid-trial poll of over 1300 Orange County residents in which 99% voted for appellant to be executed, and an editorial cartoon lampooning the defense tactics during trial and containing unflattering caricatures of both defense counsel Leonard Gumlia and appellant. (See *Daniels v. Woodford, supra*, 428 F.3d at pp. 1211-1212.)[39]

Clearly, the nature and extent of the publicity in this case permeated and infected Orange County as a whole, and the courthouse and courtroom where appellant unfairly stood trial for his life.

c. The Size of the Community

This factor weighed most heavily in the trial court's refusal to change venue--perhaps understandably, if this factor is viewed in the abstract, given that Orange County was the third largest county in the state and fifth largest in the country by population. However, such reliance on this factor was clearly misplaced in this case. This Court and other appellate courts have repeatedly declared that the relatively large population

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[39] Although Dr. Bronson summarized the pretrial publicity in his testimony at the venue hearing, his testimony does not begin to capture the visceral effect of that publicity. Since appellant is constrained by page limitations from detailing each newspaper article and television clip contained in the venue exhibits, he urges this Court to review all of those exhibits itself. Only upon such review of every piece of publicity contained in Exhibits B and C can the extremely-prejudicial nature and overwhelming cumulative impact of the media publicity in this case be truly appreciated and evaluated.

of the county is not determinative of whether venue should be changed where it has not been demonstrated that the impact of the adverse publicity has been overcome by the size of the community. (See, e.g., *People v. Proctor* (1992) 4 Cal.4th 499, 525; *People v. Jennings* (1991) 53 Cal.3d 334, 363; *Lansdown v. Superior Court* (1970) 10 Cal.App.3d 604, 609.) Specifically, "the *critical* factor is whether it can be *shown* that the size of the population is large enough to neutralize or dilute the impact of adverse publicity." (*People v. Proctor, supra*, 4 Cal.4th at p. 525; emphasis added.)

No such showing was made here. Indeed, the prosecution presented no such evidence at all. To the contrary, the evidence at the venue hearing, and the questionnaires and voir dire of the prospective jurors, overwhelmingly demonstrated that there were preconceptions and prejudices about the case and the defendant which had become deeply embedded in the Orange County public's consciousness to an extent rarely seen in a large county in California. The extraordinarily-high recognition and prejudgment rates--apparently higher than in any venue case decided by this Court (see Subsection 4, *post*)--revealed by the pretrial surveys alone demonstrated that the size of Orange County was insufficient to neutralize or dilute the impact of the adverse publicity. The virtually identical recognition rates of the venire both buttressed and confirmed this conclusion. (Compare, e.g., *People v. Fauber* (1991) 2 Cal.4th 792, 819 ["Few of the 186 prospective jurors had any recollection of the media coverage."]; *People v. Jennings, supra*, 53 Cal.3d at p. 362 [media coverage "had no lasting effect on those summoned for jury duty"].)

Moreover, as Dr. Bronson noted, the communication and publicity about the case was more informal and more like a small town rallying around the event, such as posters, fliers, bumper stickers and pins,

fundraisers held for the family, and the involvement of Boy Scouts and the police, who even became emotionally affected by Denise Huber's fate (7 RT 2052-2053)--all of which contributed to the high recognition rates and high rates of prejudgment as to both guilt and penalty.[40] And then, of course, there was the banner, which was a frequent, visual, graphic reminder to many residents of the county of the crime, which served to keep the case alive for years and contributed to the salience factor described by Dr. Bronson which did not exist elsewhere.[41] Again, the prosecution's own expert, Dr. Ebbesen, acknowledged that the banner itself produced guilt predisposition and perhaps an emotional effect on the denizens of Orange County. (8 RT 2355-2357.) In short, despite the large population of the county, the news coverage of the facts of the case and other constant reminders pervaded the county and engendered countywide hostility toward appellant and a desire that he be put to death for his misdeeds. And, as predicted by the defense experts, appellant and defense counsel were in fact irremediably stuck with a venire which perfectly reflected this countywide attitude.

Venue changes have been ordered from Los Angeles County--an even larger county by population than Orange County--both by the trial court and upheld on appeal, and by the Court of Appeal itself. (See *Powell*

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[40] One television report, aired shortly after Huber's body was found, announced that "the community [had] rallied to find her, but to no avail." (See Exh. B.)

[41] As one televison reporter stated, while standing in front of, and glancing back at, the banner: "For almost three years, cars on the northbound 73 passed by this sign, 'Have You Seen Denise Huber?' Now [following discovery of the body] the sign can finally come down." (See Exh. B.)

v. Superior Court (1991) 232 Cal.App.3d 785; *Smith v. Superior Court* (1969) 276 Cal.App.2d 145.) Indeed, the Court of Appeal in *Powell* expressly and firmly rejected the notion that the largest county is somehow immune to a change of venue:

> "'Carried to its logical conclusion, the district attorney's argument, if valid, would require that all motions for a change of venue in Los Angeles County must be denied because of its population, regardless of the amount of pretrial publicity which surrounds a notorious criminal case. This contention is disposed of by the court in *Maine* in the following language: "We do not intend to suggest, however, that a large city may not also become so hostile to a defendant as to make a fair trial unlikely."' (*Smith v. Superior Court* (1969) 276 Cal.App.2d 145, 150 [80 Cal.Rptr. 693], quoting *Maine v. Superior Court, supra*, 68 Cal.2d at p. 387, fn. 13.)" (*Powell v. Superior Court, supra*, 232 Cal.App.3d at p. 795.)[42]

Likewise in the instant case, and notwithstanding its large population, Orange County became "so hostile" to appellant because of the adverse publicity surrounding the case stretching over several years "as to make a fair trial unlikely," and the prosecution most certainly made no contrary showing. (Compare, e.g., *Odle v. Superior Court, supra*, 32 Cal.3d at p. 939 ["the reporting on the whole was not inflammatory, sensational, or hostile"].) The prejudicial pretrial publicity in Orange County made it literally "impossible to seat an impartial jury." (*Daniels v. Woodford, supra,* 428 F.3d at p. 1210 [internal quotation marks omitted].)

Indeed, since the operative question upon "retrospective" appellate review is "whether, in light of the failure to change venue, it is reasonably

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[42] *Powell*--"the Rodney King case"--is the only reported California case appellant has found (where a change of venue was requested and surveys were conducted) which had higher county rates of both recognition and predisposition than exist in appellant's case.

likely a fair trial was not had" in fact (*People v. Douglas* (1990) 50 Cal.3d 468, 495)--rather than as a matter of pretrial speculation--such pre-jury-selection considerations as size of the county are essentially rendered irrelevant, or at least insignificant when compared to what the jury questionnaires and voir dire *actually* revealed regarding the effect upon the venire of the publicity in the case. Thus, the "size of the community" factor cannot logically be applied mechanistically to uphold the denial of a change of venue here. If anything, the evidence supportive of a change of venue has effectively rendered the size of Orange County a non-factor.[43]

d. The Status of the Victim and the Accused

(i) The Victim

The popularity and prominence of the victim weighs in favor of a change of venue in this case. A victim can become "popular" and "prominent" within the meaning of the law in two ways: first, and obviously, by notoriety before death; second, by notoriety *from* death, "a posthumous celebrity." (*Odle v. Superior Court, supra*, 32 Cal.3d at p. 940; accord, *People v. Daniels* (1991) 52 Cal.3d 815, 852; *Daniels v. Woodford, supra*, 428 F.3d at pp. 1210-1212 [holding that trial court in *People v. Daniels, supra*, erroneously and unconstitutionally denied defendant's motion for change of venue].) Under the peculiar circumstances of this

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[43] In the event that, as appears to be the case, this Court's precedents establish a strong presumption against venue changes from populous counties, even where the record otherwise discloses a reasonable likelihood that the defendant could not or did not receive a fair trial (see, e.g., *People v. Coffman, supra*, 34 Cal.4th at p. 46 ["Venue changes are seldom granted from counties of this size."], such a presumption would be violative of the Sixth and Fourteenth Amendment guarantees to a fair trial and an impartial jury. (See, e.g., *Groppi v. Wisconsin, supra*, 400 U.S. 505; *Brecheen v. Oklahoma* (1988) 485 U.S. 909 (Marshall, J., dis. from den. of cert.).)

case, the victim qualifies under *both* categories.

Numerous stories profiled Denise Huber and the plight of her family beginning almost immediately after her disappearance. (See, e.g., Exh. C, pp. 1-4.)[44] There were stories in the local newspapers carefully chronicling the circumstances of her disappearance, efforts to locate her, rewards offered for information leading to her whereabouts, family press conferences, and efforts to find her generally. (E.g., 6-16, 19, 23-27.) A large banner with her smiling picture and asking for help in finding her was hung near the freeway where her car was found. (E.g., 17-20.) Stories appeared on each anniversary of her disappearance (31-38a, 55, 58-64), and on her birthdays (e.g., 28-29, 56-57). Even a poem about her disappearance was presented in the media (56-57), as well as an article just before her discovery that described the family's planned move to North Dakota (e.g., 58-61). The same publicity was graphically and repeatedly presented by numerous local television stations. (See Exh. B.) Prominently featured on television were numerous interviews with Denise's desperate parents, which included pleas to the responsible party "to have some compassion and break your silence" and tell them what happened to her; "you don't have to say who you are." As Denise's mother put it, "the fact we don't know what happened makes it worse [than the disappearance alone]." Thus, Denise Huber was very prominent in Orange County even before her death was discovered in July of 1994.

Following the discovery of her body, numerous stories either chronicled her plight or profiled her life. There were more than 200 such

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[44] Appellant will hereafter dispense with specifically citing "Exh. C" and using the "pp." abbreviation for pages, and simply cite the number of the particular page contained in Exhibit C on his venue motion.

newspaper stories regarding her death contained in the defense exhibits which created an extremely positive and sympathetic portrait of her. Of special significance was the mass coverage--both in print (including a five-page article in the Los Angeles *Times*) and on television--of a *public* memorial service in Newport Beach (e.g., 193-194, 207-213), in which heart-rending eulogies were delivered--including one in which "even the seasoned police chief wept openly" (see Exh. B)--and people in the audience can be seen crying (see Exh. B);[45] the profiles of her entire life in both major newspapers, including multiple pictures at various ages of her life (e.g., 187-190, 193-194, 271-273) which were also shown on television (see Exh. B);[46] and the extensive written and televised coverage of her funeral in South Dakota (e.g., 279-280, 282-283, 286-288, 291-296; see Exh. B). Both the *Times* and the *Register* sent reporters and photographers 2000 miles for that event. The television coverage and the photos that were taken were emotional, showing the casket (286-287, 291, 293-295) and hearse (292) that carried her body, and the casket being put into the hearse (see Exh. B). (See *In re Miller* (1973) 33 Cal.App.3d 1005, 1012 [description of articles about victim's funeral, including references to open

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[45] The week before this memorial service, the Hubers revealed that they had "received tremendous emotional and moral support from people throughout Orange County" since the discovery of their daughter's body, terming the outpouring of community support "amazing." (Exh. C, p. 75.)

[46] The television coverage featured numerous showings of a tape of Denise at her last birthday party before her death, including blowing out the candles. She was shown in cap and gown at her college graduation, holding a basketball and in her baseball uniform with glove, and as a little girl. She was shown smiling, talking, and eating an ice cream cone. A photo of Denise with a big smile was shown on nearly every television report about the case. (See Exh. B.)

casket, and plight of the survivors, as contributing to "reasonable likelihood" test being met].) The *Register* eventually became so confident of her notoriety throughout the county that she was referred to, in front-page and other headlines, simply as "Denise." (E.g., 45a, 213, 254, 271.)

That notoriety was expressly recognized in articles and columns that appeared in the local papers once the trial started. For example, a *Times* article on April 21, 1997 (the first day of jury selection), described Huber's disappearance as "the most baffling missing person case in Orange County history, in part because so many could identify with the young motorist, alone and frightened by the side of the road, and the grief-stricken Huber family." The same article also described the "massive publicity campaign pleading for the public's help [which] turned Denise Huber into a household name," as "Orange County residents would come to think of her as the girl-next-door who disappeared without a trace." Specifically, "[f]or months, a 30-foot banner with her likeness hung on the side of a building overlooking the spot on the freeway where she vanished, asking 'Have you seen Denise Huber?' There were fliers, messages on freeway billboards, bumper stickers, even a rental plane towing a banner – all urging the public's help. The family raised a $10,000 reward." Also, "[c]ountless newspaper articles, television newscasts and programs including 'America's Most Wanted' and 'Inside Edition' profiled the case." (See unnumbered addenda to Exhibit C.)

A prospective juror who had been excused wrote a letter to the *Register* while jury selection was ongoing, in which she described herself as "completely biased on this case and would have extreme difficulty setting aside my biases," because she was "a mother of two girls, . . . read all of the Register's stories on Denise's disappearance and eventual discovery, and

thought of Denise Huber every time I drove past the spot where her car was found." (*Ibid.*)

A May 25, 1997 editorial in the *Register*, entitled "A death we shared," stated: "This identification with a woman – this uncanny sense of personal connection – gave Denise Huber's tragic fate a jarring immediacy and intimacy. [¶] John Donne wrote that 'No man is an island' – that with the death of any individual the community dies a little. How much more true when that individual has so clearly walked in shoes, and along paths, well known to everyone. [¶] The rough shoulder of the 73 Freeway near where her tire went flat, and where a murderous stranger offered help, is no distant locale, but a place most residents have driven by over the years. [¶] But collective sorrow springs from something deeper as well. The smile that illuminates her photographs attests that Denise Huber was one of the world's 'points of light.' Her family's strength of character throughout the years has been an inspiration, evident to all who have observed them through the trial of her murderer, which ended last week in a conviction. [¶] Our guess would be that Denise Huber gave a larger, lasting gift, too – we more often make that extra call of consideration saying we're on our way; some of us bought a cell phone to tuck in the glove box; we say good-bye and tell each other to 'take care.'" The editorial concluded: "Beyond whatever satisfaction the operations of justice can provide them, the Hubers should know they also have the community's heartfelt consolation and support." (*Ibid.*)

On June 16, 1997, after penalty-phase closing arguments had concluded, a *Register* columnist described "the trial we know about," where the 120-seat courtroom was packed with spectators. He continued: "You know the case. Famalaro, the Freezer Guy. The man who kidnapped 23-

year-old Denise Huber on the 73 Freeway in 1991 and bludgeoned her to death with a hammer and then stored her body in a freezer for the next three years. [¶] You couldn't help but know of it. Huber's disappearance, the grotesque discovery of her body and the trial of Famalaro all generated enormous publicity. The Register alone has published 175 articles on the case." He described it as "the sensational Famalaro case." (*Ibid.*)

In sum, even though Denise Huber had not been a "celebrity" and had essentially been anonymous prior to June 3, 1991, she (and her family) became extremely well-known and "notorious" and the subject of widespread public sympathy in Orange County immediately thereafter--both before and after her death was discovered.[47] (Compare, e.g., *People v. Edwards* (1991) 54 Cal.3d 787, 808 [sympathy evoked by victims' "status" would not change because of "the locale of trial"].) Similarly, any contention that Orange County did not act like a much smaller community, was not inundated with coverage of this case, and did not collectively share Denise Huber's disappearance and death with her parents is thoroughly demolished by such media recitations as those quoted above and by the record as a whole.

(ii) The Defendant

Although appellant may have been "anonymous" in Orange County prior to 1994, following the discovery of Denise Huber's body and his arrest he certainly became "notorious" in the county as well--albeit in the

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[47] The community's familiarity with Denise Huber is notably reflected by the fact that one of the prospective jurors was told by other prospective jurors that there was quite a resemblance between her and Denise Huber's photos, and that she had been told the same thing many times back in 1991 and recently by other people who had seen Denise's picture in the papers. (15 RT 4138, 4143-4144.)

most negative manner imaginable--as the comments by and to numerous prospective jurors attest. In addition, appellant could properly be considered "an outsider" (see *People v. Williams, supra*, 48 Cal.3d at p. 1129) since he had moved to Arizona in 1992 and thus was a non-resident of Orange County as of 1994.

On the other hand, appellant was not "associated with any organization or group that aroused community hostility." (E.g., *People v. Fauber* (1992) 2 Cal.4th 792, 818.) Indeed, he was characterized by the media as an "obsessive loner" (201, 275), "the man no one knew" (202). But the publicity did repeatedly tie him to his mother and a very conservative Catholic religious conviction (e.g., 76, 86, 94); such extreme and out-of-the mainstream views could well have offended many residents even in a relatively conservative area like Orange County.

Appellant was also described as "cheating his way through life" (263), and being "strange," "secretive," and "shady" (86, 306, 307), as well as a "misfit" and "shyster" (94). He was also called "nuts" (202), "this animal" (100), and "depraved killer" (167), not to mention the brother of a convicted child molester (e.g., 76, 140, 201), who nevertheless called appellant the "black sheep" of the family (201). One headline read, "Clues Sifted for Mind-set of a Killer" (134) and, as previously noted, several stories compared him to other notorious killers such as Jeffrey Dahmer or Ted Bundy or "Jack the Ripper" (e.g., 93, 201, 231). One creative observer was quoted as saying: "It seems as if the creatures who once lurked in the darkest corners of Edgar Allan Poe's imagination have stepped off the page and now live among us." (93.) Television coverage showed Denise's father describing appellant as "an animal" and "not human." (See Exh. B.) It was even reported on television that fellow inmates at the Orange County

Jail were "plotting to attack" appellant, and that he "continues to get death threats from the inmates at Orange County Jail, so he is kept in isolation" (*ibid.*); similar stories about inmate threats to appellant also appeared in print (e.g., 332, 340; see Exh. G, p. 29). One previous article had reported that Orange County authorities planned to keep secret appellant's "pending transportation" from Arizona to Orange County "out of fear for his safety" because he "has easily become Orange County's most reviled murder suspect." (324.)

In short, although appellant's status in the community prior to his arrest would appear to be a non-factor, or at least a "neutral" (*People v. Odle, supra*, 32 Cal.3d at p. 942) factor in the instant venue-change equation, he certainly became "notorious" in Orange County in the years following arrest--so much so that the above-described characterizations of him in the media were subsequently reflected in the disparaging remarks of so many of the venirepersons at trial.

3. The Reasonable Likelihood That a Fair Trial Could Not Be Had Applied to Both the Guilt and Penalty Determinations

The evidence of guilt of the defendant does not figure in the analysis of whether a change of venue should be ordered. (See, e.g., *Irvin v. Dowd, supra*, 366 U.S. at p. 722 ["'A fair trial in a fair tribunal is a basic requirement of due process' . . . regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies."]; *People v. Williams, supra*, 48 Cal.3d at p. 1126 ["A showing of actual prejudice 'shall not be required.'"]; *People v. McKay* (1951) 37 Cal.2d 792, 798 ["Regardless of their guilt, [the defendants] were entitled to a fair and impartial trial."]; *Coleman v. Kemp, supra*, 778 F.2d at p. 1541 [the fact that there was "overwhelming evidence of the petitioner's guilt

adduced at trial . . . cannot be dispositive in assessing petitioner's change of venue claim"]; see also *Daniels v. Woodford, supra*, 428 F.3d at p. 1212, fn. 31 ["the same publicity that tainted the penalty phase would also have infected the guilt phase"].)

With respect to the effect of publicity on the penalty phase, moreover, the reasonable likelihood that a fair trial cannot be had is not lessened by the fact that the defendant's guilt is no longer in issue. (See, e.g., *Fain v. Superior Court* (1970) 2 Cal.3d 46, 52-53.) Indeed, "'a fair and impartial jury is no less essential at the penalty phase than at the guilt phase.'" (*People v. Tidwell, supra*, 3 Cal.3d at p. 75, quoting *Fain, supra*, 2 Cal.3d at p. 52.) The pretrial surveys here showed that 72.2% of the respondents who recognized appellant's case believed appellant should get the death penalty if convicted, a far higher percentage than the typical percentage "in the fifties" for specific cases (7 RT 2131-2132), and the second highest penalty-prejudgment rate Dr. Bronson had found in all of his capital-case surveys (7 RT 2078-2080). Even in a case involving the killing of a police officer in a conservative county "up north," a survey conducted by Dr. Bronson in the previous year had found that only 37 percent of the respondents "took the death penalty option." (7 RT 2132.)

Dr. Bronson also cited numerous inflammatory words from the publicity of the emotional type that grab people, affect their verdicts--especially the penalty verdict--and tend to be undiluted by the passage of time, such as "horror," "hideous," "monster," "mutilate," "terror," "evil," and "grisly." (7 RT 2027.) Similarly, such references to appellant as "animal," "sick," and "depraved" (7 RT 2045) would tend to dehumanize him in a penalty juror's eyes. And, of course, there were the direct comparisons to notorious killers such as Jeffrey Dahmer, Ted Bundy, and

"Jack the Ripper." (Compare, e.g., *People v. Hamilton, supra*, 48 Cal.3d at p. 1157 [publicity "not inflammatory," descriptions of the crime "neither detailed nor graphic," and "[n]one of the reporting depicted defendant as a danger to the general public"].)

More specifically, the 179 references to the death penalty found by Dr. Bronson in the media reports, including strong calls from the victim's family and others for appellant's death (7 RT 2044-2045), would directly impact penalty jurors (and their friends and family members) who read or heard such publicity, and certainly would account for such desired outcomes of the trial as "fry him," "castration," "get the ax," and strangling the defendant, and such depersonalized opprobriums as "piece of scum," "scum bag," "having a hard time even looking at the defendant," and "can't believe I was in the same room breathing the same air as him." Moreover, appellant was the subject of such legally inadmissible and inaccurate, but highly prejudicial, speculation in the media as him possibly being a serial killer and a necrophiliac (7 RT 2032-2035), and the expressed opinion that he was "the black sheep" in a family that included a crazy mother and a child-molesting brother (7 RT 2045-2046).

Last but not least, is the "salience" factor described by Dr. Bronson--which, significantly and dispositively, would not have been present outside of Orange County--i.e., the community's sense of *shared* experience with Denise Huber and especially her family. (See Exh. G, pp. 34-36.) As defense counsel detailed in appellant's original motion for change of venue (see 5 CT 1459-1483), this strong, media-driven sense of community involvement in the Huber case began with the reporting of her disappearance; continued through the missing years just as the family experienced them, with rewards, banners, press conferences, private

investigators, pain and anguish; and then, with the discovery of the body, an entirely new wave of personalized experiences with the Hubers.[48] These

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[48] Articles from each of the local newspapers provide just a few examples of the many vivid descriptions of this "salience" factor peculiar to Orange County:

A front-page article in the *Daily Pilot* commemorating the third anniversary of Denise's disappearance noted: "By now, the poignant tale of Denise Huber has affected the lives of nearly every Newport Beach and Costa Mesa resident." (Exh. C, p. 58.)

Upon the discovery of her body, the *Register* ran a story, titled, inter alia, "Even strangers mourn Denise Huber," which begins:

> "The crime cut deep because it was something everyone could understand; a flat tire, an abandoned car, a beautiful girl. [¶] For three years Orange County saw Denise Annette Huber's smile on posters and fliers and banners, learned to feel the grief of her parents as they launched a high-profile search, and earnestly hoped for the best while fearing, ever so silently, the worst. Few thought the worst could be this bad."

Following a description of the finding of "[t]he frozen remains of Denise Huber," the story continued:

> "From Mollies Country Café – next to Lake Forest's City Hall and the safe and orderly trappings of power – to the sparkling coves of Laguna Beach and the tidy shopping malls of Mission Viejo, people who didn't know Huber mourned Sunday for more than the passing of someone who could have been a sister, daughter or friend. They mourned for a culture that to them seems poisoned." (Exh. C, p. 93.)

In a front-page story in the Orange County edition of the *Times* about a month after the body was found, Costa Mesa Police Chief Snowden was quoted as saying: "In the case of Denise Huber, I don't know anybody of sound mind who was not touched." (Exh. C, p. 311.)

(continued...)

included stories speculating on how, where, and how quickly Denise died (e.g., Exh. C, pp. 97, 102, 221, 226, 233); the family, police, and newspapers cooperating in a joint venture to ask the public for help in reconstructing the defendant's movements in the past (e.g., 100, 120); open letters in the media from the public expressing to the Hubers how their

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[48](...continued)

An editorial in the *Register* following the death verdict provided a cogent summary of the case from the Orange County perspective:

> "The death of Denise Huber did indeed gain a measure of notoriety beyond that of most murder cases. . . . [T]here were 155 murders in Orange County in 1991. Most didn't get so much as a news story while others were covered in a paragraph or two. [¶] Denise Huber, though, lodged in our minds and hearts almost from the moment she disappeared from the side of the 73 freeway on June 3, 1991. There were bumper stickers on police squad cars that asked Have You Seen Denise?, and the big sign on a building near the 73 freeway spot where her car was found, posing the same question. Fliers were distributed around the county. Denise Huber's heartbroken family, hoping their daughter might yet be found alive, created and attracted public interest and involvement. [¶] When her body was found in a freezer at John Famalaro's house in Dewey, Arizona three years later, the grisly nature of the discovery revived and intensified our attention. The heterogenous group of people who had come together to support the Huber family during the long years of uncertainty stepped forward to be with them during the trial."

The editorial concluded with the following two paragraphs: "On the more personal question of solace or balm for a saddened community, *a community drawn to this murder in a singular way*, there are few if any heartening words. [¶] *We found Denise; we're not likely to soon forget her.*" (See unnumbered addenda to Exhibit C, editorial entitled "The Famalaro Verdict"; emphasis added.)

plight had affected each author (e.g., 187-190); a *public* memorial for Denise in Newport Beach, open to the public because the Hubers openly acknowledged the public's relationship to the case,[49] with the *Times* printing a phone number for the public to call for information on attending (e.g., 78, 99, 110); Costa Mesa Police Department officials openly admitting how they had lost detachment in the case (e.g., 77, 80, 109), their chief tearfully speaking at the Huber memorial (e.g., 210-211), and a lead investigator publicly stating that "This guy [appellant] deserves the death penalty for what he did" (77), and that "what's important is a conviction and death-penalty sentence" (114); open discussions in the media about whether to try the case in California or Arizona based on where it might be easier to obtain the death penalty (e.g., 77, 108, 126, 177, 229); extensive coverage, including photos, of the Huber family's pain and anguish (e.g., 81, 87, 88, 207, 208, 212); the victim's family calling for the death penalty (e.g., 68, 82, 229), including the father saying "I hope they fry [her killer]" (68);[50] delays in the funeral because of forensic investigation and jurisdictional dispute (e.g., 234, 240, 249, 254, 256); and, in the surest recognition of the community's personal involvement in this case, an open letter to the public from Denise's parents thanking Orange County for all of

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[49] In emphasizing that the service would be open to the public, Denise's father, Dennis Huber, explained: "This whole thing was a part of their lives too." (Exh. C, p. 99.)

[50] A letter to the *Register* from a Huntington Beach resident expressed not only the "hope the murderer is put to death," but that it be accomplished "not mercifully." Specifically, the writer desired the following method of execution, which tracked the manner in which the victim's body was found: "Put him in a freezer alive; lock it up, and seal it with duct tape." The writer concluded: "I wish justice was swift. The Hubers have been through enough." (Exh. C, p. 214.)

its support (319). Virtually all of this publicity was likewise featured in the persistent television coverage of the case. (See Exh. B.)

Two lengthy television reports on the memorial service in Newport Beach, seen on OCN (the Orange County Network), demonstrated the emotional hold this case had on residents throughout Orange County for years. In his eulogy delivered while standing next to a large photo of a smiling Denise Huber, the pastor said: "family and friends, perfect strangers, total strangers, brought close together in something so compelling, so overwhelming." Following excerpts of additional, highly emotional eulogies by three of Denise's friends, also standing next to her photo, the television reporter announced that "Denise's life and death even became a matter of life and death for the Costa Mesa Police Department." Police Chief Snowden was then seen eulogizing Denise: "Her picture has been my constant companion. It's on my desk at work, it's on the visor of my car, it's on our dresser at home. There's not a day goes by where either myself or my officers doesn't ask what's going on with Denise." (See Exh. B.)

The other report was titled "Friends She Didn't Know," and featured Jeff and Maria Brown, who, as announced by the television reporter, "didn't know Denise Huber, but that didn't stop them and others who didn't know the Huber family from coming to the Mariners Church. They followed her case from the beginning. As parents of a four-year-old girl, they feel a special bond to Dennis and Ione Huber." Holding her daughter in her arms, Maria Brown termed what had happened to Denise "my greatest fear in the whole wide world." Then the reporter pondered the effect of Denise's disappearance and death on the community: "So what is it about Denise Huber? Why is it people who don't know her or her family came out to say

goodbye? People are killed in violent crimes in this county almost every day. And yet there was something different, something special about Denise. What was it? Maybe it was the banner which asked for the public's help and hung from the Costa Mesa building since right after she disappeared." Costa Mesa resident Ralph Rollins, who was at the memorial, then offered his own explanation: "Driving down the Costa Mesa Freeway as often as I do, which is almost every day, you see the sign on the roof, it's just compelling, it just kind of touches you." Denise's brother Jeff's observation followed: "I think maybe she's just one of those all-American girl [*sic*], a good person, you couldn't help falling in love with her." Then the reporter: "Or maybe it's because it could have happened to anybody. It made one police officer question how safe his own family was." Costa Mesa Police Officer Darryl Freeman: "[I] made sure all the tires were good on my kids' cars, got a cellphone for the wife, I changed a lot of my personal habits." Then Mrs. Brown again: "I guess Chief Snowden said it the best. Hold your children close to your heart, 'cause you don't know how long you're gonna have 'em" (as she starts crying). Finally, the reporter again: "Whatever the reason, they all had something in common: they cared about Denise Huber as much as anyone who didn't know her can, and they gave a family still coping with the loss of a child the reassurance that she won't be forgotten." This report then concluded with a view of the audience at the memorial, and then of the photograph of a smiling, attractive Denise Huber in life. (*Ibid.*)

When *all* of the media reports contained in Exhibit C are read in sequence, and when the hundreds of television excerpts contained in Exhibit B are viewed, the reader and viewer can *feel* this case and fully understand that it was not merely witnessed by Orange County, but *shared*

with its citizens. Little wonder then, that even in a county of more than two-million people, and two and three years after appellant's arrest, the recognition factor was so high and the feelings regarding the appropriate verdicts and punishment so extraordinary and intense. Following jury selection, trial, and sentencing, these are no longer matters of mere speculation; they are established fact. In short, "it is self-evident that, in its role as arbiter of the punishment to be imposed, this jury fell woefully short of that impartiality to which [appellant] was entitled under the Sixth and Fourteenth Amendments." (*Fain v. Superior Court, supra*, 2 Cal.3d at p. 53.)

4. The Passage of Time Had No Effect on the Reasonable Likelihood That a Fair Trial Could Not Be Had

The fact that appellant's trial took place approximately three years after Denise Huber's body was found and he was arrested, and approximately six years after her initial disappearance, is wholly irrelevant to the appellate de novo determination of whether a venue change was improperly denied in this highly unusual case. (See *Daniels v. Woodford, supra*, 428 F.3d at pp. 1210-1212; compare, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 448; *People v. Weaver* (2001) 26 Cal.4th 876, 906; *People v. Welch* (1999) 20 Cal.4th 701, 744; *People v. Dennis* (1998) 17 Cal.4th 468, 524 ["the passage of time appears to have had the expected effect in this instance"].) Had the events in question happened 5, 10, or even 20 years earlier, it would have been of no moment to the "reasonable likelihood" analysis if the venire had the same extraordinarily high levels of recalled media coverage and juror recognition and prejudgment as demonstrated in the instant case. (See, e.g., *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 681 ["since the time of petitioner's arrest the repeated republication of

information relating to these prior events must have served to freshen, incite and rekindle community interest in and intensify and enhance an all-pervasive knowledge of this highly prejudicial information"].) Those levels not only are significantly higher than in any case in which this Court has affirmed a trial court's denial of a venue change (see, e.g., *People v. Panah, supra*, 35 Cal.4th at p. 448 [18 newspaper articles submitted by the defendant]; *People v. Vieira, supra*, 35 Cal.4th at p. 279 [66-72-percent recognition rate, 21-29 percent prejudgment rate, in surveys]; *People v. Coffman* (2004) 34 Cal.4th 1, 45 [more than 150 articles and some videos; 71-percent recognition rate]; *People v. Welch, supra*, 20 Cal.4th at p. 744 [62-percent recognition rate, 50-percent predisposition rate, in potential jury pool; but "less than" 10-percent recognition rate in venire]; *People v. Weaver, supra*, 26 Cal.4th at pp. 905-907 [12 newspaper articles; 53-percent recognition rate, 17-percent predisposition rate, in survey]; *People v. Proctor, supra*, 4 Cal.4th at p. 524 [approximately 26 articles and more than 60 television or radio broadcasts; 80-percent recognition rate, 31-percent predisposition rate, in survey]; *People v. Fauber, supra*, 2 Cal.4th at p. 819 [7 newspaper articles and several media news broadcasts]; *People v. Jennings* (1991) 53 Cal.3d 334, 359, 361 [6 newspaper articles, 72-percent recognition, 31-percent predisposition]; *People v. Kelly* (1990) 51 Cal.3d 931, 955 [4 newspaper and 5 radio and television reports]; *People v. Douglas, supra*, 50 Cal.3d at pp. 495-496 [52 newspaper articles; no prospective jurors had heard of the defendant]; *People v. Hamilton, supra*, 48 Cal.3d at pp. 1157-1158 [20 newspaper articles]; *People v. Coleman* (1989) 48 Cal.3d 112, 135 [46-percent recognition, 31-percent predisposition]; *People v. Anderson* (1987) 43 Cal.3d 1104, 1130 [15 newspaper articles]), but they are even higher than in the seminal case in

which this Court reversed the entire judgment in an automatic appeal due to the erroneous denial of a venue motion where the recognition rates of the prospective and trial jurors were deemed to have demonstrated "[t]he pervasiveness of the news coverage" (see *People v. Williams, supra*, 48 Cal.3d at pp. 1127-1128 [52 percent of the prospective jurors, and 8 of the 12 trial jurors had heard or read of the case; "more than 50 newspaper and radio reports appeared during the 9-month period between defendant's arrest and motion"]; see also *Martinez v. Superior Court, supra*, 29 Cal.3d at p. 579 [apparently no polling; 97 newspaper articles submitted by petitioner].)

In September of 1996, approximately 83% of the respondents in Dr. Bronson's survey recognized appellant's case, and approximately 70% of those who recognized the case believed that appellant was either probably or definitely guilty--and the prosecution did not even attempt to conduct a countervailing survey. Thus, while it may normally be the case that "time soothes and erases" (*Patton v. Yount* (1984) 467 U.S. 1025, 1034; *People v. Bonin, supra*, 46 Cal.3d at p. 677) and "its passage serves to attenuate the likelihood that early extensive publicity will have any significant impact at the time of trial" (*People v. Odle, supra*, 32 Cal.3d at p. 943), the record clearly shows, *as a demonstrable reality*, that the passage of time from the events in question had no such effect in this particular case--nor should this be surprising in view of the community-wide inundation of media coverage spanning many years (see *Steffen v. Municipal Court* (1978) 80 Cal.App.3d 623, 628 ["long-term publicity . . . so permeated that part of the county in which the trial would take place" that a change of venue was required]).

Quite to the contrary, the rates of recognition in both the survey respondents and the jury venire, as well as the degree and specificity of

recalled facts and the strongly-held and strongly-felt personal beliefs and feelings regarding what should be done to appellant as a result of his crime entertained by the venirepersons (see Subsection 5, *post*), still permeated the prospective jurors at the time of trial just as they had when the pretrial surveys were conducted. Indeed, the publicity and intense media interest continued up to and including arraignment (see 1 CT 344-347; Exh. C, pp. 355-356), pretrial hearings (see 1 CT 353; 4 CT 1108, 1136; 5 CT 1513; Exh. C, pp. 360-361, 387-394), including the change-of-venue hearing (see 5 CT 1704-1705; Exh. C, p. 394; unnumbered addenda to Exhibit C), jury selection (see Section B.2.b, *ante*), the trial itself (see 6 CT 1837; unnumbered addenda to Exhibit C),[51] and the sentencing proceedings (see unnumbered addenda to Exhibit C). (Compare, e.g., *People v. Weaver, supra*, 26 Cal.4th at p. 907 ["Because the record does not indicate additional articles were published [since the survey was conducted more than a year before jury selection began], we assume the public's recollection of the case diminished over time."].) In the present case, as a matter of record, the *Register* and the *Times* ran articles shortly before, and during,

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[51] The trial court predicted as much, telling the just-sworn jurors: "There's going to be publicity, ladies and gentlemen. Absolutely no doubt about it. There will be stuff on radio, on tv. There will be things in the press." (16 RT 4477.)

Later, during the penalty-phase closing arguments, the court was still warning the jurors not to listen to any of "the news programs" about the case. (22 RT 5664.) Even after the jury had retired to deliberate on penalty, the court told the alternate jurors that "there are going to be things on tv and things in the papers" and not to "pay any attention to that," "read anything," "listen to anything," or "watch anything on tv," adding that "you are going to be hounded by co-workers and people at home." (22 RT 5749.)

jury selection which some of the prospective jurors had read--including one quoting a venireperson "going around yelling, 'hang him' to other jurors." (Compare, e.g., *People v. Hamilton, supra*, 48 Cal.3d at p. 1158 ["The record contains no evidence of publicity during the two months just preceding jury selection."].)

In addition, one of the newspaper articles in Exhibit C, an April 8, 1997, *Times* story about the calling of the jury pool, quoted an excused juror as saying: "Everyone's heard of that case. It's pretty hard to forget a guy keeping her in a freezer. Pretty brutal." A *Register* article on April 19, 1997, two days before the start of trial, used a large graphic summarizing the history of the case which featured a box listing items "ALSO FOUND IN [APPELLANT'S] HOUSE," including: "6 pistols, 3 semiautomatic rifles, shotgun, combat knife"--all inadmissible at trial. On the following Monday, April 21, 1997, the first day of trial, the *Times* ran three articles on the case: a three-page article featuring a large photograph of the Hubers holding a picture of their smiling, attractive daughter, a reference to the case being "the most baffling missing person case in Orange County history, in part because so many could identify with the young motorist, alone and frightened by the side of the road, and the grief-stricken Huber family"; a two-page article entitled "For the Hubers, Agony of Waiting Goes On"; and another three-page article entitled "A Spotlight on Famalaro's Secretive Life." The same edition of the *Times* also featured another large graphic, which included photos of a smiling Denise Huber and of the banner; references to defendant's attorneys "succeed[ing] in having Famalaro's trial delayed at least a year" to go through the evidence and interview potential witnesses and "lobby[ing] to suppress evidence"; and a large photo showing "[t]he freezer in which Denise Huber's body was

found [being] unloaded at the Costa Mesa police station in 1994." The very next day, April 22, 1997, the *Times* ran an article describing a delay in the jury-selection proceedings due to the death of defense counsel Denise Gragg's sister, which included a reference to a venireperson saying, as he entered the courtroom: "I don't want to sit up front and look at that piece of scum." (See unnumbered addenda to Exhibit C.)

Lest there be any remaining doubt that the passage of time from the events in question had no significant effect on the publicity and community interest in the case, and on the continued hostility toward appellant, the *Register* ran a phone-in poll *during trial*--between the guilt and penalty phases--in which 99 percent of the 1312 callers expressed the opinion that appellant should receive the death penalty. (*Ibid.*) Also *during trial*, actual sitting jurors were being subjected to the usual "guilty" and "hang him" exhortations from co-workers, and exposed to reports of yet another memorial to Denise Huber. (6 CT 2136-2138.) And there was even the editorial cartoon in the *Register* ridiculing the defense *while the jury was deliberating their penalty determination* (see unnumbered addenda to Exhibit C [June 18, 1997, editorial carton lampooning defense counsel Gumlia and the defendant]). (See *Frazier v. Superior Court, supra*, 5 Cal.3d at p. 290 [lengthy description of newspaper editorial regarding the crime]; *People v. McKay, supra*, 37 Cal.2d at p. 800 [intensity of local feeling about case shown, inter alia, by letter printed in local paper which "attacked the good faith of defense counsel"]; *Lansdown v. Superior Court, supra*, 10 Cal.App.3d at p. 609 [venue-change ordered where, inter alia, "[t]he attorney appointed to represent petitioner was publicly upbraided for permitting his client to exercise a constitutional right"]; *Daniels v. Woodford, supra*, 428 F.3d at p. 1212 ["The press accounts . . . included

editorials and letters to the editor calling for Daniels's execution."]; *Ainsworth v. Calderon* (9th Cir. 1998) 138 F.3d 787, 795 [primarily-factual media accounts "tend to be less prejudicial than inflammatory editorials or cartoons"]; compare *People v. Hamilton, supra*, 48 Cal.3d at p. 1157 ["None of the local newspapers ran editorials about the case."] In short, this is hardly a case involving "'[v]ague recollections of news reports by a few jurors'" (*People v. Jenkins, supra*, 22 Cal.4th at p. 945, quoting *People v. Howard* (1992) 1 Cal.4th 1132, 1169), but rather one that is 180 degrees removed from such a scenario (compare, e.g., *People v. Hayes* (1999) 21 Cal.4th 1211, 1252 ["the record does not establish prejudicial juror exposure to publicity either before or during trial"]).

5. Retrospective Review on Appeal Clearly Demonstrates a Reasonable Likelihood That Appellant Did Not In Fact Receive a Fair Trial

As noted above, appellate review of the denial of a motion to change venue is "retrospective, . . . 'for the matter may then be analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected.' (Citation.) The question then is whether, in light of the failure to change venue, it is reasonably likely a fair trial was not had." (*People v. Douglas, supra*, 50 Cal.3d at p. 495, quoting *People v. Williams, supra*, 48 Cal.3d at pp. 1125-1126.) Here, such retrospective review, based entirely on the "evidence" rather than "conjecture" (*People v. Bonin, supra*, 46 Cal.3d at p. 678), clearly shows that the trial court's denial of appellant's venue motion was erroneous.

The jury selection of the "actual, available jury pool" confirmed, with uncanny accuracy, the recognition and predisposition rates found in the pretrial surveys conducted by appellant's expert witnesses. The jury questionnaires revealed that about 82 percent of the venire recognized the

case from pretrial publicity, and that about 83 percent of the eventual trial jurors (10 of 12) recognized the case from pretrial publicity. In addition, one of the two trial jurors who had not heard of the case prior to being called (juror 134) subsequently, i.e., *during jury selection*, heard about it from co-workers and fellow jurors outside the courtroom. (12 RT 3386-3387.)[52] Specifically, this juror heard "That some lady was found frozen after being missing for the last 3 yrs." (8 CT 2555.) Thus, fully 11 of the 12 jurors who sat and ultimately decided appellant's fate had knowledge of the case from sources *outside the courtroom* due to the massive publicity surrounding the case--a remarkable and intolerable 92-percent recognition rate among "the actual jury panel selected."[53] (See *Daniels v. Woodford, supra*, 428 F.3d at pp. 1211-1212 [erroneous denial of change of venue where, inter alia, "[t]wo-thirds of those empaneled remembered the case from the press accounts"].)

The *degree* to which some of the actual trial jurors recognized the case was also remarkable. (Compare, e.g., *People v. Proctor, supra*, 4 Cal.4th at p. 527 ["minimal pretrial exposure"]; *People v. Bonin, supra*, 46 Cal.3d at p. 678 [same].) For example, juror 384, the eventual foreperson, recounted in her questionnaire several specific details of Denise Huber's disappearance and discovery--noting that there was "lots of news coverage"

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[52] The other trial juror who had heard nothing about the case prior to being called was "not from California originally" and had only "been here three years," so she was not in the area when Denise Huber disappeared. (12 RT 3336-3337.)

[53] Even the prosecutor, in disagreeing with defense counsel that every trial juror knew about the case, was reduced to lamely arguing: "I think there may be one or two that don't know anything or much at all. . . ." (16 RT 4205.)

and "pleas" for help in finding her--(8 CT 2549), and again recounted some of those recollections during voir dire (14 RT 3878-3880). She also expressed her feeling "that there must be enough evidence already at hand to tie Mr. Famalaro to this crime." (14 RT 3882.) She and her daughter even underwent lifestyle changes regarding "security things" in specific response to the nature of the events in this case. (14 RT 3879-3880.) Nevertheless, the defense motion to excuse this prospective juror based on her exposure to publicity (and close ties to law enforcement) was denied by the court. (14 RT 3890-3893.) Juror 225 recalled such specific details as the victim being "missing for a long period of time" and the body being "discovered . . . inside the truck inside the freezer," which "ended the efforts of Denise's family to locate her." This same juror also recalled seeing "some type of advertisement asking for the knowledge or whereabouts of Denise." (8 CT 2567.) Juror 411 heard that the victim was "abducted," saw the "sign" next to the freeway, and "saw on t.v. that her body had been found in a freezer in Arizona." (8 CT 2573.) This is the juror who revealed on voir dire that she had a conversation with her then-boyfriend (now husband) regarding how scary it would be not to have a cell phone if something were to happen and that thought crossed her mind every time she passed the banner, and whose by-then husband reacted to her being called for appellant's jury by saying--supposedly jokingly--"fry him." (12 RT 3223, 3227.) The court denied the defense motion to excuse this juror made on exposure-to-publicity grounds. (12 RT 3349, 3357.) Juror 219 recalled, inter alia, "the desperate search by the parents for their daughter," and "internalized that information" because "I have a daughter about the same age." (15 RT 4126.) This juror had also formed the opinion that appellant was guilty because "The body was found on his premise [*sic*].

Obviously he has in possesion [*sic*] of it for some time." (8 CT 2591.) Similarly, juror 289, while professing to not having formed an opinion as to appellant's guilt, added: "But there did seem to be a great deal of evidence against him." (8 CT 2585.) She was familiar with some details of the case and the site of the disappearance. (16 RT 4340-4341.)

Moreover, and also of extreme significance, the voir dire of the "actual" venire confirmed beyond cavil that the passage of time had not erased or even diminished the knowledge and impact of the case on the prospective jurors. (Compare, e.g., *People v. Proctor, supra*, 4 Cal.4th at pp. 526-528, and cases there cited.)[54] Numerous prospective jurors recited chapter and verse regarding the facts surrounding Denise Huber's sudden and mysterious disappearance from the face of the earth, and the facts surrounding the discovery of and condition of her body, the location, and appellant's arrest. Numerous prospective jurors had an emotional and/or empathetic reaction to the circumstances under which she disappeared and to the parents' heart-rending search for their daughter over a three-year period. Many were aware of the banner along the freeway, many drove by it regularly or occasionally, and many others were aware of, saw, and/or received the fliers, posters, and bumper stickers regarding Huber's disappearance.

Again of especial significance, at least 3 of the 12 actual trial jurors were familiar with the banner/billboard/sign overlooking the freeway from

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[54] Indeed, this Court in *Proctor* emphasized that "in renewing the motion upon completion of jury selection, defendant did not rely upon the substance of the answers actually given in voir dire to contend the jurors had formed opinions based upon pretrial publicity." (4 Cal.4th at pp. 527-528.) Even at that, this Court concluded that "a venue change might have been desirable" since the issue was so close. (*Id.* at p. 526.)

which Denise Huber disappeared. (8 CT 2561, 2567, 2573.) Juror 353 "drive[s] the 73 regularly and prior to the discovery of Ms. Huber's remains . . . often passed by a large banner off Bristol Street asking for help or information in finding her" (8 CT 2561); juror 255 knew about the case from the "billboard" as well as from the *Register* (8 CT 2567); and juror 411 "lived of[f] the 55/73 freeways and saw a sign on a building close to where it supposedly happened," and described it as saying "'Have You Seen Denise' (or something like that)" (8 CT 2573). During voir dire, juror 353 specified that she probably drove by the banner a couple of times a week and had a personal reaction to it, wishing she had the power to find Denise Huber and "bring her home." (13 RT 3563-3564.) Friends of this juror at work told him to "fry him." (13 RT 3569-3570.)

In short, all but 1 juror on "the actual jury panel" (*People v. Douglas, supra*, 50 Cal.3d at p. 495)--i.e., 11 of the 12 "actual . . . jurors" (*Daniels v. Woodford, supra*, 428 F.3d at p. 1212)--knew about the case from sources outside the courtroom because of the publicity about the crime, the victim and her parents and friends, the discovery of the body, and the defendant, and 2 of them even had their husband or friends tell them to "fry" the defendant.[55] Regardless of the nature of the crime, the evidence of the defendant's guilt, the size of Orange County, or the passage of time from

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[55] In addition to the actual jurors' knowledge of this case, the questionnaires reveal that three of them had previously had their lives touched by murder: Juror 384 (the foreperson at both phases) had "a close friend whose son (adult) was murdered." (8 CT 2547.) The husband of juror 134's cousin "beat her to death with a baseball bat." (8 CT 2553.) And the ex-husband of juror 411 "killed his sister" and "left my daughter without a father." (8 CT 2577.) Defense counsel unsuccessfully moved to excuse jurors 384 and 411. (See 14 RT 3890; 12 RT 3349.)

the disappearance and from the recovery of the body, there is much more than a reasonable likelihood that a fair trial could not be, and was not in fact, had, and the venue motions therefore were erroneously denied. Likewise, the trial court's denial of appellant's motions for change of venue violated his "right to a fair and impartial jury and thus, his right to due process." (*Daniels v. Woodford, supra*, 428 F.3d at p. 1212.)

6. Juror Assurances of Impartiality Do Not Justify the Trial Court's Refusal to Change Venue, Either Factually or Legally

It is true that, as in every case, jurors ultimately selected to try the case assured both the court and counsel, in one way or another, that they could give both sides a fair trial. (See 12 RT 3337, 3385; 13 RT 3561, 3579-3580; 14 RT 3688, 3876; 15 RT 3924-3925, 4123; 16 RT 4173, 4245, 4339.)[56] Such assurances, both generally and in this particular case, do not legally support a trial court's decision to deny a motion to change venue. Nor can they *logically* be deemed supportive of a denial of such a motion;

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[56] However, it does appear that one of the actual trial jurors, juror 8 (prospective juror 411) was never specifically asked, and never stated, whether she could be fair and/or impartial. (See 11 RT 3169; 12 RT 3201-3202, 3222-3223, 3227-3228, 3234, 3236-3238, 3246, 3251, 3256, 3272, 3273, 3281-3282, 3315-3317.) In addition, juror 4 (prospective juror 384) qualified her previous assurance of fairness by saying "I would do the best I could as far as being objective" at the guilt phase, acknowledging that it is "absolutely" hard to predict (14 RT 3886); and juror 11 (prospective juror 219)--the juror who volunteered having "internalized that information" about Denise Huber's disappearance because of "having a daughter about that age" (15 RT 4126)--said he "would try" not to attempt to cure the Huber family's pain based on his prior exposure to information about the case, and would "try and be impartial" (15 RT 4128-4129). This juror had stated in his questionnaire that he could *not* "set aside the knowledge [he has] of this case." (8 CT 2591.)

since any prospective juror acknowledging an inability to be fair would of course be excused, no venue motion could ever be successful if mere assurances of fairness were deemed sufficient to deny such a motion. (See *Daniels v. Woodford, supra*, 428 F.3d at p. 1211 [venue motion held improperly denied despite defendant's concession "that the record contains no findings that any jurors demonstrated partiality or prejudice that could not be laid aside"].)

Cases are legion, from virtually every jurisdiction, that juror assurances of impartiality are entitled to little weight, and certainly are not dispositive. (See e.g., *Irvin v. Dowd, supra*, 366 U.S. at p. 728; *Smith v. Phillips* (1982) 455 U.S. 209, 221-222 (conc. opn. of O'Connor, J.) ["Determining whether a juror is biased or has prejudged a case is difficult, partly because the juror may have an interest in concealing his own bias and partly because the juror may be unaware of it."]; *People v. Vieira* (2005) 35 Cal.4th 264, 282, fn. 5 ["'[a] juror's declaration of impartiality . . . is not conclusive,'" quoting *People v. Williams, supra*, 48 Cal.3d at p. 1129; *People v. Howard, supra*, 1 Cal.4th at p. 1168 ["To be sure, the jurors' assertions of impartiality do not automatically establish that defendant received a fair trial."]; *People v. Daniels, supra*, 52 Cal.3d at p. 853 ["the fact that the jurors declared they could decide the case impartially on the evidence does not preclude the necessity of a change of venue"]; *People v. Williams* (1981) 29 Cal.3d 392, 410 ["subtle or unconscious bias . . . makes a general proclamation of fairmindedness untrustworthy"]; *People v. Tidwell, supra*, 3 Cal.3d at p. 73 [juror's claim of ability to sit impartially "is of course not conclusive"]; *People v. McKay, supra*, 37 Cal.2d at p. 798 ["In view of the prevailing atmosphere in the community, the fact that from 251 persons it was possible to select 14 who thought they could try the case

fairly does not sustain the conclusion that a fair trial could be had."]; *Powell v. Superior Court, supra*, 232 Cal.App.3d at pp. 801-802 ["'Many will sincerely try to set aside their preconceptions and give assurance of impartiality, yet unconsciously bend to the influence of initial impressions gained from the news media,'" quoting *Corona v. Superior Court, supra*, 24 Cal.App.3d at p. 879]; *Coleman v. Kemp, supra*, 778 F.2d at p. 1542; *Nevers v. Killinger, supra*, 990 F.Supp. at p. 864 ["adverse pretrial publicity can create such a presumption of prejudice that the jurors [*sic*] claims that they can be impartial should not be believed"]; *United States v. Davis* (5th Cir. 1978) 583 F.2d 190, 197 ["a juror . . . exposed to potentially prejudicial pretrial publicity . . . is poorly placed to make a determination as to his own impartiality"]; *United States v. Williams* (5th Cir. 1978) 568 F.2d 464, 471, fn. 16 ["continual protestations of impartiality from prospective jurors are best met with a healthy skepticism from the bench"]; *Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 639 ["whether a juror can render a verdict based solely on evidence adduced in the courtroom should not be adjudged on that juror's own assessment of self-righteousness without something more"]; *People v. Botham* (Colo. 1981) 629 P.2d 589, 599 ["Where a defendant demonstrates the existence of a pattern of deep and bitter prejudice throughout the community where he is to be tried, a juror's assurance that he will be fair and impartial is not conclusive."]; *Ruiz v. State* (Ark. 1979) 582 S.W.2d 915, 923 [although "the jurors were being honest when they stated they thought they could give the appellants a fair and impartial trial . . . it would be almost impossible for any person to completely remove these materials from his mind while serving as a juror in this case"].)

Not only is this the clear state of the law, but it is also confirmed by

the undisputed evidence in this case. Dr. Bronson testified that surveys tend to be far more accurate than voir dire because people are more honest about their beliefs when responding to anonymous surveys than when being asked questions in front of other people, including fellow jurors. (7 RT 2073-2074.) Dr. Dillehay testified that one cannot be confident about juror assurances of fairness and impartiality where they have a high level of exposure to pretrial publicity about the case (9 RT 2453-2454); indeed, voir dire is not very effective in identifying and weeding out prospective jurors who are biased and prejudiced because of high levels of awareness and prejudgment (9 RT 2427-2429). Even prosecution expert Dr. Ebbesen acknowledged that there are risks in asking prospective jurors whether they can set aside their opinions, because they do not know how they will respond to the evidence, and they want to look fair; thus, simply asking jurors if they can set aside their opinions is not an effective way of controlling opinion-bias created by the media. (8 RT 2329-2330.) As one of the prospective jurors astutely observed, after her memory of certain details of the case had been jogged by hearing the voir dire of others, she did not think she "could be as unbiased as somebody who hasn't heard anything or knows very little . . . . Being truthful, I don't see how you could. I have heard it, and I have seen it. How can I shut it off? I don't think I can compared to somebody who has [not] heard something or not lived in Orange County and not lived so close. It is still there." (13 RT 3482.)[57] The trial judge himself correctly recognized the difficulty in

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[57] Another prospective juror also expressly acknowledged that the voir dire process had resulted in her recalling details about the case she had forgotten. As she told the court: "Just like you said things would trigger

(continued...)

"distinguish[ing] what we may have read in the paper and what we may have heard from a witness," because "our memory is an amazing thing, and it plays tricks with us." (11 RT 3072-3073.)

In the present case, given the massive county-wide publicity, spanning nearly six years, with its consistently sympathetic portraits of Denise Huber and her parents, and the extremely adverse depiction of appellant and his crime, and with the extraordinarily-high recognition and predisposition rates, an exposed juror's mere assurance of impartiality and fairness--however sincere and well-intentioned--is not credible in the least, much less conclusive or dispositive--particularly in light of the trial court's refusal to conduct a *Hovey*-type voir dire (see Argument II, *post*):

> "No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, 'You can't forget what you hear and see.'" (*Irvin v. Dowd, supra*, 366 U.S. at p. 728.)

Although, as this Court has recognized, "perfection is not required" and "some knowledge of the case on the part of the jurors is often unavoidable" (*People v. Williams, supra*, 48 Cal.3d at p. 1129), because in

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[57](...continued)
our mind, it has." (15 RT 3910-3911.) Another had stated in her questionnaire that she knew nothing about the case, but while sitting through jury selection "I realized that because of this case, my sister went out and got a cell phone for my niece." (13 RT 3575.) Yet another "remember[ed] another article in the *L.A. Times*," in addition to what the prospective juror had stated in the questionnaire, "after listening to some of the details here." (16 RT 4188-4189.) And still another revealed on voir dire that the discussion of the case in court "jogged my memory," and detailed the facts belatedly recalled. (16 RT 4447-4449.)

this case "a brutal murder had obviously become deeply embedded in the public consciousness," there is "more than a reasonable possibility that the case could not be viewed with the requisite impartiality" (*ibid.*). The further fact that the trial court insisted on conducting voir dire on publicity collectively, rather than individually, rendered that conclusion an extreme probability.

The same conclusion is compelled under federal law. Whether or not appellant can show "actual prejudice" from the seating of any particular juror or jurors, he has certainly made a showing "sufficient for a presumption of prejudice" because "the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." (*Daniels v. Woodford, supra*, 428 F.3d at p. 1211 [internal quotation marks omitted].)

7. The Facts That Defense Counsel Exhausted Their Allotted Peremptory Challenges, Requested Additional Peremptory Challenges, Expressed Dissatisfaction with the Composition of the Trial Jury, and Expressed Dissatisfaction with the Entire Venire Due to the Extraordinary Media Coverage of This Case, in and of Themselves Show That Appellant Was Not Tried by a Fair and Impartial Jury

This Court, in affirming trial court refusals to change venue, has repeatedly emphasized, in partial support of its conclusion, the fact that defense counsel either did not exercise all of the defendant's peremptory challenges, or did not object to the jury as finally composed, or both. (See, e.g., *People v. Panah, supra*, 35 Cal.4th at p. 449; *People v. Coffman, supra*, 34 Cal.4th at p. 46; *People v. Hayes, supra*, 21 Cal.4th at p. 1252, fn. 5; *People v. Dennis* (1998) 17 Cal.4th 468, 524; *People v. Sanders* (1995) 11 Cal.4th 475, 507; *People v. Fauber, supra*, 2 Cal.4th at pp. 819-820;

People v. Price (1991) 1 Cal.4th 324, 393; *People v. Cooper* (1991) 53 Cal.3d 771, 807; *People v. Daniels, supra*, 52 Cal.3d at pp. 853-854; *People v. Coleman* (1989) 48 Cal.3d 112, 136; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1002; *People v. Hernandez* (1988) 47 Cal.3d 315, 336; *People v. Balderas* (1985) 41 Cal.3d 144, 180; *People v. Sommerhalder* (1973) 9 Cal.3d 290, 303; *People v. Welch* (1972) 8 Cal.3d 106, 114.) Indeed, this Court has gone so far as to specifically say, on numerous occasions, that the fact the defendants did not exhaust their peremptory challenges "strongly suggests" or "strongly indicates" that "the jurors were fair" and that the defense itself so concluded. (E.g., *People v. Coffman, supra*, 34 Cal.4th at p. 46; *People v. Sanders, supra*, 11 Cal.4th at p. 507; *People v. Balderas, supra*, 41 Cal.3d at p. 180.)

Significantly, in *People v. Daniels, supra*, this Court expressly distinguished that case from its holding in *People v. Williams, supra*, 48 Cal.3d 1112, on the ground, inter alia, that "in this case, unlike *Williams*, defendant did not exhaust his peremptory challenges," and emphasized that "[t]his last factor is decisive." (52 Cal.3d at pp. 853-854, denial of motion to change venue reversed in *Daniels v. Woodford, supra*, 428 F.3d at p. 1212; accord, *People v. Dennis, supra*, 17 Cal.4th at p. 524; see also *People v. Tidwell, supra*, 3 Cal.3d at p. 67.)

Here, defense counsel not only used all of their peremptory challenges--including the additional one voluntarily given by the court for each side to use on "the original jury" after three jurors had to be excused after jury selection twice appeared to be complete--and expressed their dissatisfaction with the final jury as constituted, but they had earlier expressed their dissatisfaction with the entire venire, asked that all jurors exposed to publicity be excused, and expressed their dissatisfaction with the

first 12 jurors and 4 alternates selected before, in the court's words, "the complexion of the original jury" had "changed" (16 RT 4415). Moreover, when defense counsel renewed their venue motion shortly before the start of the guilt phase, they also alternatively moved to select a new jury and/or sequester the jury (see *Sheppard v. Maxwell, supra*, 384 U.S. at p. 363), noting that well over half the original venire had been excused for bias against the defendant, including approximately 175 who had been excused based at least in part on publicity.[58] If failure to exhaust peremptory challenges or complain about the jury "strongly indicates" a fair trial was had and is even a "decisive" factor at times, the logical and inescapable corollary is that exhaustion of challenges and requests for additional ones, and numerous expressions of dissatisfaction with both the venire as a whole and the jury as finally constituted, strongly indicate that a fair trial was *not* in fact had and that this factor is "decisive"--especially where the record of the voir dire of prospective and actual trial jurors overwhelmingly supports trial counsel's "recognition that the jury as selected" was *not* "fair and impartial." (*People v. Daniels, supra*, 52 Cal.3d at p. 854.) As Justice Traynor cogently noted for a unanimous Court in *People v. McKay, supra*, 37 Cal.2d 792: "In view of the prevailing atmosphere in the community, the fact that from 251 persons it was possible to select 14 who thought they could try the case fairly does not sustain the conclusion that a fair trial could be had. *Because they had exhausted all of their peremptory challenges defendants were forced to go to trial before jurors who were familiar with the publicity that had been given to the case.*" (*Id.* at p. 798; emphasis

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[58] Compare, e.g., *People v. Bonin, supra*, 46 Cal.3d 659, a notorious Orange County case in which 39 out of 240 prospective jurors were excused for bias. (See *id.* at p. 675; 17 RT 4496.)

added.)

After exhausting their peremptory challenges, including the additional one the court awarded each side when the original composition of the jury had changed due to late dismissals of jurors, defense counsel and appellant were stuck with an unsatisfactory and unfair actual trial jury. As noted previously, 10 of the 12 jurors recognized the case from pretrial publicity--many of them having considerable knowledge of and exposure to various aspects of the facts--and another learned about it before filling out the jury questionnaire. Several female jurors and/or their daughters actually altered their lifestyles in response to Denise Huber's disappearance, one of whom "internalized that information" (15 RT 4126) and felt an "emotional bond toward the Hubers" (15 RT 4125); at least three of the jurors saw the banner on the freeway, two of them frequently, and one recalled having an emotional reaction to it (see subsection 5, *ante*); two jurors had friends or co-workers tell them to "fry" the defendant (12 RT 3227; 13 RT 3569-3570); two other jurors had co-workers tell them, *during trial*, to "hang" the defendant (6 CT 2137, 2138); yet another was informed by his daughter *during trial* that she had seen the flowers left at the site of Denise Huber's disappearance to commemorate the sixth anniversary of that notorious event (6 CT 2136; see 27 RT 6781).

Two of the trial jurors had been the subject of unsuccessful challenges for cause by the defense (see *Rideau v. Louisiana, supra*, 373 U.S. at p. 725; compare *People v. Hayes, supra*, 21 Cal.4th at pp. 1251-1252 [the defendant "did not challenge any of the jurors who sat at the guilt phase for cause"]): One was a juror who lived near the banner, and discussed with her then-boyfriend and future husband how scary it was not to have a cell phone if something were to happen--a thought that crossed

her mind every time she passed the banner--the same husband who later told her to "fry" the defendant. The other, the eventual foreperson at both phases of trial, had considerable knowledge of the case from the pretrial publicity, "went over the security things" with her daughter in response to Denise Huber's disappearance and discovery, felt that there must be enough evidence to tie the defendant to them, was then dating a retired Long Beach police officer who was currently a district attorney's investigator in Long Beach, was formerly married to an Orange County senior deputy district attorney, and was the daughter of a retired Long Beach police officer. (See Subsection 5, *ante.)*[59]

Appellant is aware of no trial in California where the actual trial jurors had such inherently prejudicial personal exposure to pervasive, widespread publicity about the case, including even "fry him" and "hang him" comments from family, friends and co-workers, resulting in emotional reactions to and internalization of the facts and even in lifestyle changes to the jurors and their families in response to the publicity. (Compare, e.g., *People v. Staten* (2000) 24 Cal.4th 434, 450 [only 1 trial juror had heard of

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[59] Had it not been for the additional peremptory challenge fortuitously awarded at the eleventh hour (see 16 RT 4414-4415), the defense would also have been stuck with juror 334 (see 16 RT 4416), who related, in open court and in the presence of the other prospective jurors, that she had read "about everything there was" about the case, had been told by a retired F.B.I. agent (a neighbor) that "he had done some previous business with the defendant," had stated in her questionnaire that she believed appellant was guilty and, if found guilty, "has earned the death penalty," and detailed with remarkable accuracy virtually all of the significant facts she had learned from the pretrial publicity, which she stated she had no reason to disbelieve. The court denied the defense challenge for cause to this prospective juror based on the degree of publicity to which she had been exposed. (16 RT 4211-4219.)

the case]: *People v. Jenkins, supra*, 22 Cal.4th at pp. 944-945 [3 trial jurors had heard of the case, all with "minimal" exposure to pretrial publicity]; *People v. Williams* (1997) 16 Cal.4th 635, 655-656 [trial jurors were either "unaware" of pretrial publicity or had only "vague recollections" of it]; *People v. Fauber, supra*, 2 Cal.4th at p. 819 [3 trial jurors reported "minimal exposure" to media coverage]; *People v. Howard, supra*, 1 Cal.4th at p. 1169 [voir dire demonstrated that 10 of the jurors had "no recollection whatever" of the publicity and "the barest possibility of exposure" for the other 2]; *People v. Jennings, supra*, 53 Cal.3d at p. 361 [trial jurors either had "no recollection" or "vague memory" of the case]; *People v. Kelly, supra*, 51 Cal.3d at pp. 955-956 [6 jurors had not been exposed to any pretrial publicity, and 5 others only vaguely recalled the incident]; *People v. Douglas, supra*, 50 Cal.3d at p. 496 [no juror had heard of the defendant]; *People v. Edelbacher, supra*, 47 Cal.3d at p. 1002 [3 jurors had "vague recollections of media accounts" of the case]; *People v. Hernandez, supra*, 47 Cal.3d at p. 336 [4 jurors "had heard something" about the case]; *People v. Anderson, supra*, 43 Cal.3d at p. 1131 [3 jurors had heard or read "only a little" about the case, and a fourth "recalled the matter generally but none of its details"].) If this is not a case in which retrospective review "of what actually occurred at trial" establishes a reasonable likelihood "that a fair trial was not in fact had" (*People v. Howard, supra*, 1 Cal.4th at p. 1168), or establishes that "there was such a degree of prejudice against the [defendant] that a fair trial was impossible" (*Daniels v. Woodford, supra*, 428 F.3d at p. 1210 [internal quotation marks omitted]), it is inconceivable that any case would meet those de novo standards. Here, to say that "[t]he pervasiveness of the news coverage was corroborated during jury selection" (*People v. Williams, supra*, 48 Cal.3d at

p. 1128) would be a gross understatement.

When the trial court's inexplicable and devastatingly prejudicial insistence on conducting primarily collective voir dire of the prospective jurors is added to the equation (see Argument II, *post*), the denial of appellant's Sixth and Fourteenth Amendment rights to trial by a fair and impartial jury, and to due process, and of his Eighth and Fourteenth Amendment rights to a reliable penalty determination, is, if possible, even more evident.

D. The Erroneous Denial of Appellant's Motions for a Change of Venue Requires Reversal of the Entire Judgment

The erroneous denial of a motion for a change of venue requires reversal of the entire judgment. (*Irvin v. Dowd, supra*, 366 U.S. at p. 728; *People v. Williams, supra*, 48 Cal.3d at pp. 1131-1132.) "Whether raised on petition for writ of mandate or on appeal from a judgment of conviction, however, the standard of review is the same. *A showing of actual prejudice shall not be required.* . . . On appeal after judgment, the defendant must show a reasonable likelihood that a fair trial was not had. In either case, the phrase 'reasonable likelihood' denotes a lesser standard of proof than 'more probable than not.'" (*People v. Vieira, supra*, 35 Cal.4th at p. 278, quoting *People v. Williams, supra*, 48 Cal.3d at pp. 1125-1126; emphasis added [internal quotation marks and citations omitted].)

Here, when the entire record on the venue issue is thoroughly reviewed and, especially, when "the matter [is] analyzed in light of the voir dire of the actual, available jury pool and the actual jury panel selected" (*Williams, supra*, at p. 1125), it is impossible to fairly conclude that "it is reasonably likely that the defendant in fact received a fair trial" (*id.* at p. 1126). Quite to the contrary, appellant has demonstrated far more than a

"reasonable likelihood"--indeed, beyond any reasonable doubt--that he received a constitutionally-unfair jury trial. The Ninth Circuit could have been describing the present case in recently disagreeing with the conclusion of this Court in *People v. Daniels, supra*, that the defendant's venue motion had been properly denied (52 Cal.3d at pp. 849-854):

> "The nature and extent of the pre-trial publicity, paired with the fact that the majority of actual and potential jurors remembered the pretrial publicity warranted a change of venue. The trial court's denial of this motion for a change of venue violated Daniels's right to a fair and impartial jury and thus, his right to due process." (*Daniels v. Woodford, supra*, 428 F.3d at p. 1212.)

The entire judgment must be reversed.

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II

THE TRIAL COURT'S REFUSAL TO CONDUCT AN INDIVIDUALIZED, SEQUESTERED VOIR DIRE OF THE PROSPECTIVE JURORS REGARDING THEIR EXPOSURE TO PUBLICITY ABOUT THE CASE INDEPENDENTLY DENIED APPELLANT HIS RIGHTS TO TRIAL BY A FAIR AND IMPARTIAL JURY AND TO A RELIABLE PENALTY DETERMINATION, EXACERBATED THE REASONABLE LIKELIHOOD THAT A FAIR TRIAL WAS NOT HAD FROM THE REFUSAL TO CHANGE VENUE ALONE, AND CREATED ACTUAL PREJUDICE TO APPELLANT

"[W]hen pretrial publicity is great, the trial court must exercise correspondingly great care in all aspects of the case relating to publicity which might tend to defeat or impair the rights of the accused." (*Silverthorne v. United States* (9th Cir. 1968) 400 F.2d 627, 637-638.) The trial court in this case failed miserably in this constitutional duty to assure that appellant was afforded a fair trial by an impartial jury and a reliable penalty determination (U.S. Const., 6th, 8th and 14th Amends.)--not only by refusing to change venue (see Argument I, *ante*), but also by refusing to conduct individualized, sequestered voir dire of the venire on their exposure to and the effects of the massive publicity in this case. (See Argument I.B.2.b, *ante*, at pp. 95-97; *Sheppard v. Maxwell* (1966) 384 U.S. 333, 363 [trial judge had "duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom"; "the cure lies in those remedial measures that will prevent the prejudice at its inception"].)

The high court's recognition that conducting voir dire in the presence of fellow jurors is far less productive of honest answers regarding bias (see

Irvin v. Dowd (1961) 366 U.S. 717, 728; Argument I.C.6, *ante*) has been echoed in subsequent decisions of that and other courts. (See, e.g., *Patton v. Yount* (1984) 467 U.S. 1025, 1034, fn. 10 [specifically noting the "significant difference" and "not insubstantial distinction" in the voir dire procedures where veniremen were brought into the courtroom alone for questioning]; *Coleman v. Kemp* (11th Cir. 1985) 778 F.2d 1487, 1542.) In *Coleman*, the Eleventh Circuit reversed a state murder conviction, holding that the trial court had erroneously denied the defendant's motion for change of venue. The appellate court emphasized that the voir dire was "subject to question" because, inter alia, "prospective jurors were examined in the presence of prospective jurors who had not yet been examined." (*Ibid.*) The court noted that "[i]n light of the significant possibility of prejudice" from this procedure, "preferable voir dire procedures would have followed the ABA Guidelines" (*ibid.*):

> "'If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors.'" (*Ibid.*; quoting ABA Standards for Criminal Justice, § 8-3.5(a) (2d ed. 1980).)[60]

As the Eleventh Circuit has noted, in language especially apropos of the instant case: "Individual voir dire allows the trial court to probe the effect of any adverse publicity on the juror and insulates the jurors from one another's prejudicial comments." (*Cummings v. Dugger* (11th Cir. 1989) 862 F.2d 1504, 1508; see also *Berryhill v. Zant* (11th Cir. 1988) 858 F.2d 633, 642 (conc. opn. of Clark, J.) ["By being forced to ask such pointed

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[60] This exact language remains in the subsequent ABA Standards for Criminal Justice (3d ed. 1992).

questions [about what each prospective juror knew about the case from the media or other exposure] in front of the *entire* jury venire, . . . [defense] counsel risked contaminating those prospective jurors who had not read or heard about the case with the responses of those who had"; original emphasis]; *United States v. Giese* (9th Cir. 1979) 547 F.2d 1170, 1183 [where pretrial publicity is "great," the trial court "should conduct a careful, individual examination of each prospective juror, preferably out of the presence of the other jurors"]; *Margoles v. United States* (7th Cir. 1969) 407 F.2d 727, 735 [any juror who admits exposure to pretrial publicity "must then be examined, individually and outside the presence of the other jurors, to determine the effect of the publicity"]; *United States v. Davis* (5th Cir. 1978) 583 F.2d 190, 197, fn. 9, quoting *United States v. Schrimsher* (5th Cir. 1974) 493 F.2d 848, 854 ["'The safer practice in situations involving possible prejudice from newspaper articles or other sources is to interrogate each juror separately and out of the presence of the other jurors.'"]; *United States v. Perrotta* (1st Cir. 1977) 553 F.2d 247, 250 ["once the court has actually determined that one or more of the jurors has been exposed to prejudicial publicity, its further investigation of the matter should be conducted on an individualized basis so that jurors will be encouraged to speak freely and will not repeat prejudicial information in one another's presence"]; *United States v. Addonizio* (3d Cir. 1971) 451 F.2d 49, 67 [citing A.B.A. Standards with approval]; *United States v. Colabella* (2d Cir. 1971) 448 F.2d 1299, 1303-1304 [same]; *Patriarca v. United States* (1st Cir. 1968) 402 F.3d 314, 318 ["In cases where there is, in the opinion of the court, a significant possibility that jurors have been exposed to potentially prejudicial material, and on request of counsel, we think that the court should proceed to examine each prospective juror apart

from other jurors and prospective jurors," citing A.B.A. Standards with approval]; *Coppedge v. United States* (D.C. Cir. 1959) 272 F.2d 504, 507-508 [had juror admitted before his fellow jurors that he had been influenced by inflammatory newspaper articles regarding the defendant, "the damage to the defendant would have been spread to the listening other jurors"].)

Thus, for example, the Ninth Circuit has held that "under the peculiar and difficult facts of this case," the trial court had prejudicially abused its discretion in denying defense counsel's request to examine the prospective jurors individually regarding the voluminous publicity antedating the defendant's trial, concluding that the court's voir dire examination should have been directed to each individual juror involved "out of the presence of the remaining jurors, as to the possible effect of the articles." (*Silverthorne v. United States, supra*, 400 F.2d at pp. 639-640; see also *Mach v. Stewart* (9th Cir. 1997) 137 F.3d 630 [reversible error to expose jury panel to potential juror's expert-like statements regarding veracity of children claiming sexual abuse].)[61]

Under the peculiar circumstances of this case, the trial court likewise abused its discretion and violated appellant's fundamental constitutional rights by refusing to conduct the requested individualized voir dire of the entire venire. Appellant recognizes, as did defense counsel in the superior court, that Code of Civil Procedure section 223 provides that in criminal

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[61] As in *Mach v. Stewart, supra*, here there was at least one instance of non-publicity-related exposure of the jury panel to harmful statements by a fellow venireperson due to the failure to conduct an individualized voir dire. Juror 218, an eventual *trial* juror, mentioned in front of the other venirepersons that she had heard that the death penalty could possibly cost even more than life imprisonment, "with appeals and different things." (15 RT 3928; see *Caldwell v. Mississippi* (1985) 472 U.S. 320.)

cases, "including death penalty cases," voir dire of prospective jurors "shall, where practicable, occur in the presence of the other jurors." Although this Court has apparently never precisely defined what the term "if practicable" means in this context (if, indeed, such precise definition is possible), this is the case where such collective voir dire was manifestly *not* "practicable" by any reasonable and fair interpretation of that language. At a minimum, once the trial court refused to change venue, the extraordinarily-high rates of recognition and predisposition toward guilt and death among the venirepersons, as referenced in the defense motion for sequestered voir dire, required the granting of that motion in order to minimize "any danger that that examination at voir dire will itself serve to publicize the [press] reports." (*Odle v. Superior Court* (1982) 32 Cal.3d 932, 946; see 5 CT 1773-1775 [defendant's "Trial Brief No. 2 (Motion for Sequestered Voir Dire)"]; *People v. Caldwell* (1980) 102 Cal.App.3d 461, 473 [permitting detailed questioning of jurors who apparently had no recollection of the details of the publicity "would have presented the absurdity of exposing the prospective jurors to potentially prejudicial pretrial publicity in order to determine whether they had been exposed to such publicity"].)

This Court has, however, recognized that "[a] trial court that altogether fails to exercise its discretion to determine the practicability of group voir dire has not complied with its statutory obligation," and that "[o]ur cases have suggested that group voir dire may be determined to be impracticable when, in a given case, it is shown to result in actual, rather than merely potential, bias." (*People v. Vieira* (2005) 35 Cal.4th 264, 287; see also *Covarrubias v. Superior Court* (1998) 60 Cal.App.4th 1168, 1180-

1184.)[62] This is just such a case. Appellant has been unable to find any reported California case in which collective voir dire of the jury venire has elicited such vehement disparagement of an accused by prospective jurors in open court, both quantitatively and qualitatively. From the numerous "fry him" references, including one which elicited outright laughter from the venire, to numerous prospective jurors saying they thought the defendant was guilty and/or should die (some perhaps in a non-"frying" manner) because of what they had previously heard about the case, to the "I'm having a hard time even looking at the defendant" remark by an alternate juror in front of all of the others immediately after jury selection had apparently concluded for the first time, the entire venire and the eventual actual trial jurors were exposed to a poisonous environment which

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[62] Even though the trial court at one point correctly recognized that "it's one thing to read the news and it's another thing to read it and form opinions about it, then come here to discuss it" (12 RT 3419), the record as a whole strongly suggests that the court here did in fact "altogether fail[] to exercise its discretion to determine the practicability of group voir dire." For example, when defense counsel attempted to update the basis for their previous request for a *Hovey*-type voir dire, the court interrupted counsel with the curt, rude, injudicious and legally inappropriate response: "You're starting to get boring." (12 RT 3348.)

Later, when again discussing the *Hovey* issue immediately following the selection of the trial jury, the court made the astoundingly inapt observation that "I didn't see anything from any of the jurors that that [non-individualized, non-sequestered voir dire] would have a negative impact or bias on the other prospective jurors." (17 RT 4503.) This statement alone betrays a judicial decision not to take the defense's continuing request for *Hovey*-type voir dire seriously--i.e., an outright abdication of "its discretion." (See *Covarrubias v. Superior Court, supra,* 60 Cal.App.4th at p. 1184 ["the trial court failed to exercise its discretion to determine the practicability in petitioner's case of conducting voir dire in the presence of the other jurors"].)

inundated them for several weeks before they ever heard or saw a real piece of evidence in the case (see Argument I.B.2.b, *ante*). (Compare, e.g., *People v. Vieira, supra*, 35 Cal.4th at p. 287.)

Appellant's complaint thus is not simply that collective voir dire prevented him "from uncovering juror bias" (*People v. Stitely* (2005) 35 Cal.4th 514, 539; see also *People v. Roldan* (2005) 35 Cal.4th 646, 691-692), but, additionally and critically, that the exposure of prospective jurors to the widespread publicity about the case known to their fellow venirepersons and the court's failure to insulate them from each other's prejudicial comments made a fair trial literally impossible (compare *People v. Cleveland* (2004) 32 Cal.4th 704, 736 ["The comments here did not give the other prospective jurors information specific to the case. . . ."]). Even if it could somehow be said that the assurances of fairness by prospective jurors are worthy of any deference as a general proposition, such an assumption cannot reasonably obtain here, in light of the extremely negative atmosphere inside and outside the courtroom during jury-selection proceedings: "Even these indicia of impartiality might be disregarded in a case where the general atmosphere in the community or courtroom is sufficiently inflammatory." (*Murphy v. Florida* (1975) 421 U.S. 794, 802.)[63]

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[63] As defense counsel cogently and accurately noted, because of the non-*Hovey* voir dire, the prosecutor got the benefit of not only the prejudicial remarks by prospective jurors themselves made in front of the others, but also the prejudicial remarks by friends and family members of jurors, "so he got a geometric addition to that." (See 17 RT 4496-4498.) Defense counsel also accurately predicted that they would not be able to confidently pick 12 jurors from the venire who had not been affected by the poisonous atmosphere during the jury-selection proceedings. (See 11 RT

(continued...)

Although Code of Civil Procedure section 223 effectively abrogated *Hovey v. Superior Court* (1980) 28 Cal.3d 1, the purpose of the new statute most certainly was not, and constitutionally could not have been, to permit the trial court in all or most cases to conduct non-individualized voir dire regardless of its effect on an accused's right to an unbiased jury. Instead, "by enacting [that statute], the voters in California sought to prevent voir dire abuses, such as undue delay, that are more likely to occur in criminal cases" than in civil cases, which "abuses had been previously recognized by California cases." (*Leung v. Kernan* (N.D.Cal. 1995) 1995 WL 150087, p. 3 [rejecting equal-protection challenge to statute].) Thus, the observation in *Hovey*, as with those in the numerous cases cited above, that sequestered voir dire allows the prospective jurors to be "insulated from the influences which the voir dire of their fellow venirepersons may exert" (28 Cal.3d at p. 80, fn. 134), remains valid today. (See also *Odle v. Superior Court, supra*, 32 Cal.3d at p. 946.)

Whether or not individualized, sequestered voir dire is constitutionally required--and appellant is not aware of any court so holding--it is clear that reversal is required if the voir dire procedure used by the trial court involved "'such a probability that prejudice will result that it is deemed inherently lacking in due process.'" (*Reiger v. Christensen* (9th Cir. 1986) 789 F.2d 1425, 1434, quoting *Estes v. Texas* (1965) 382 U.S. 532, 542-543.) The instant case involves more than a mere "probability" that prejudice "will result"; instead, that such prejudice did in fact result from the collective-voir dire procedure employed here is graphically

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[63](...continued)
3090-3092.)

revealed by a review of the record of the jury-selection proceedings.[64] Even if California is somehow deemed to have *statutorily* provided more protection for civil litigants than for criminal defendants, and even *capital* defendants, in preventing exposure of potential jurors to the effects of damaging extrajudicial publicity about the case, such a situation cannot be countenanced as a matter of federal constitutional law. In that regard, a federal appellate court has sounded the following highly-relevant warning in the process of finding that the death-selection proceedings in that particular case--unlike the jury-selection proceedings in the case at bench--comported with due process:

> "While the trial court has broad discretion in conducting voir dire, we do not blithely affirm the death-qualification process used by the trial court here. This broad discretion is 'limited by the requirements of due process.' *United States v. Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981). Although every criminal trial must conform to constitutional standards, our scrutiny in capital trials must be particularly sensitive. Capital trials are unique and ponderous occurrences, distinct from any other exercise of state power. When the machinery of the state seeks to extinguish a life, we must especially ensure that the process employed to accomplish that end complies with the defendant's right to a fair trial by an impartial jury.
>
> "An exercise of discretion to deny sequestered voir dire in a civil trial or noncapital criminal trial may comport quite easily with due process under the specific circumstances, whereas that same exercise of discretion may offend notions of fairness in the context of a capital trial.

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[64] Dr. Bronson testified at the venue hearing that voir dire is a very weak tool to ferret out prejudice, because it only takes one person in the jury pool to affect the rest of the jury. (7 RT 2073-2074; see *Mach v. Stewart, supra*, 137 F.3d at pp. 632-634.)

> There may be a case where *en masse* death-qualifying voir dire may be so egregious and may so taint the jury that the process denies the defendant his constitutional right to an impartial jury. We simply conclude, after a careful review of the record, that the death-qualifying voir dire in panels of five complied with the dictates of due process." (*Trujillo v. Sullivan* (10th Cir. 1987) 815 F.2d 597, 606-607.)

This is precisely that case referred to in *Trujillo*. The collective, non-individualized jury-selection procedure employed by the trial court here, over the vehement and persistent objections of defense counsel, was "so egregious" and "so taint[ed] the jury" (*id.* at p. 607) that it, in itself, deprived appellant of his due process rights to trial by a fair and impartial jury and to a reliable penalty determination. (U.S. Const., 6th, 8th & 14th Amends.) Further, even if the trial court's initial refusal to change venue could somehow be deemed proper, the end result of the court's insistence on an "en masse" jury-selection procedure was not merely a "reasonable likelihood," but a virtual certainly, that a fair trial could not be, and was not in fact, had, and that he suffered "actual prejudice" (*Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181, 1211) from the jury-selection proceedings and the subsequent trial conducted in Orange County.

This error may well have affected the outcome of the guilt phase as well as the penalty determination. Although the defense did not dispute the evidence that appellant killed Denise Huber, his guilt of *capital murder* was in serious doubt. Even if it is assumed (arguendo) that there was *legally* sufficient evidence of first degree murder and of the two special circumstances, the lack of evidence regarding how the events leading to Denise Huber's death unfolded certainly raised substantial questions as to whether appellant kidnapped and sodomized her--the two special-circumstance allegations and the bases for the felony-murder theory of first

degree murder (see 8 CT 2643, 2646 [first degree felony-murder instructions]; 8 CT 2652-2653 [special-circumstance instructions]; 8 CT 2654-2660 [kidnapping and sodomy/attempted sodomy instructions])--and whether the killing was premeditated and deliberate (see 8 CT 2645 [instruction on "wilful, deliberate and premeditated" theory of first degree murder]; *People v. Anderson* (1968) 70 Cal.2d 15, 32 ["the killing resulted from a 'random,' violent, indiscriminate attack rather than from deliberately placed wounds inflicted according to a preconceived design"].) The poisonous atmosphere in the courtroom during the unsequestered, non-individualized voir dire of the venire could well have tipped the balance, in the trial jurors' minds, in favor of verdicts of first degree murder with special circumstances, as well as of death. The People cannot establish beyond a reasonable doubt that it did not do so. (See *Chapman v. California* (1967) 386 U.S. 18, 24.)

The entire judgment must therefore be reversed. (See *People v. Williams* (1989) 48 Cal.3d 1112, 1131-1132.)

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III

THE TRIAL COURT VIOLATED APPELLANT'S FUNDAMENTAL CONSTITUTIONAL RIGHTS AND COMMITTED PREJUDICIAL ERROR BY DELIVERING CALJIC NO. 2.06

A. Introduction

At the guilt phase, the trial court delivered a modified version of CALJIC No. 2.06 (Efforts to Suppress Evidence). This instruction erroneously and unfairly permitted the jury to draw critically adverse inferences against appellant with respect to the alleged offense of first degree murder and the special-circumstance allegations. It was particularly harmful because the evidence on both theories of first degree murder and of both special-circumstance allegations was so minimal.

The instructional error discussed herein deprived appellant of due process, a fair jury trial, and reliable jury determinations on guilt, special circumstances and penalty. (U.S. Const., 6th, 8th & 14th Amends.) Accordingly, it requires reversal of the entire judgment.

B. On the Facts of This Case, the Trial Court Prejudicially Erred by Giving CALJIC No. 2.06

At the prosecution's request,[65] the trial court gave the following

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[65] The trial court informed defense counsel moments before the start of the closing arguments that "the People requested 206 [*sic*]." Since the judge "did not include that" instruction in its original "packet of jury instructions," he asked defense counsel to "look at it and see if there is any objection." After briefly "look[ing] at it," defense counsel responded: "We will submit it." The court then announced: "It is being given as requested." (22 RT 5461.)

Appellant's accession, or failure to object, to this instruction does (continued...)

version of CALJIC No. 2.06:

> "If you find that a defendant attempted to suppress evidence against himself in any manner, such as by concealing evidence, 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."
> (8 CT 2631; 22 RT 5725-5726.)

On the facts of appellant's case, the consciousness-of-guilt instruction unconstitutionally embodied improper permissive inferences. For a permissive inference to be constitutional, there must be a rational connection between the facts found by the jury from the evidence and the facts inferred by the jury pursuant to the instruction. (*County Court of Ulster County v. Allen* (1979) 442 U.S. 140, 157; *United States v. Gainey* (1965) 380 U.S. 63, 66-67.) The Due Process Clause of the Fourteenth Amendment "demands that even inferences--not just presumptions--be based on a rational connection between the fact proved and the fact to be inferred." (*People v. Castro* (1985) 38 Cal.3d 301, 313; see also *People v.*

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[65](...continued)
not waive the instant claim: "The appellate court may also review *any instruction given*, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." (*People v. Brown* (2003) 31 Cal.4th 518, 539, fn. 7, quoting § 1259 [emphasis the Court's]; see also *People v. Prieto* (2005) 30 Cal.4th 226, 268 ["because courts may review instructional errors that affect 'the substantial rights of the defendant' (§ 1259), defendant did not waive these errors by failing to object"].) The instant instructional error clearly affected appellant's substantial rights, since it unfairly made it easier for the jury to convict appellant of capital murder.

Hannon (1977) 19 Cal.3d 588, 597 ["It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference."].) In this context, a rational connection is not merely a logical or reasonable one; rather, it is a connection that is "more likely than not." (*County Court of Ulster County v. Allen, supra,* 442 U.S. at pp. 165-167, and fn. 28.) This test is applied to judge the inference as it operates under the facts of each specific case. (*Id.* at pp. 157, 162-163.)

CALJIC No. 2.06 created such a constitutionally-improper permissive inference in this case. Although not articulated by the prosecutor or the court at the time the court decided to give the instruction, the prosecutor's purported evidentiary basis for it was revealed during closing argument when he specifically addressed the language of the instruction with the jurors:

> "Let me switch gears one more time to something completely different, and that is what do you do, *what does a jury do with a defendant who has suppressed evidence against himself*? You probably know what I am talking about in this case. What do you do with a defendant like that? What do you do with that information? What do you do with a defendant that has taken some real material evidence in the case and suppressed it? That is what was going on. One of the two things that was going on with him *keeping that body*, one of the two things.
>
> "Well, this is a rule that just makes common sense. You can use it to show, that is, that person had a consciousness of guilt. What does that mean? He was conscious of his guilt. All right?
>
> "We are going to talk about which particular guilt he

was conscious of when we get down to the facts of this case. *If you find that a defendant attempted to suppress evidence against himself in any manner, such as, by concealing evidence, this attempt may be considered by you as a circumstance tending to show a consciousness of guilt.*

"However, this conduct in and of itself is not sufficient to prove guilt. You are the ones to give it the weight and significance under all the facts of this case. All right?" (22 RT 5486-5487; emphasis added.)

The issue of identity in this case was not disputed. Rather, the only contested issues were the degree of the crime and the special-circumstance allegations. Not only were both the prosecution and defense closing arguments entirely focused on those specific issues (see 22 RT 5469-5718), but the prosecutor at one point expressly so told the jurors:

"Now, they [defense counsel] are going to concede he did this killing, okay? I may be wrong. Call me a nut if I am wrong on that. I think they are going to concede this killing. Not the murders, the way I am telling you, but they are going to concede that he killed her. I think that the evidence shows that.

"So why is this important? Because these facts are very important to everything else that is left in this case.

"*And everything else that is left in this case is the reason you are here. Those special circumstances and that first degree murder. That is what this case is about.*" (22 RT 5496-5497; emphasis added.)

Thus, when the jury was told, at the prosecution's request, that it could consider appellant's attempts to suppress evidence "as a circumstance tending to show a consciousness of guilt," the "guilt" necessarily referred to the sole offense for which the prosecutor was vigorously pursuing a conviction, i.e., *first degree* murder. The two theories of first degree

murder for which appellant was being tried were willful, premeditated and deliberate murder and felony-murder (kidnapping and sodomy/attempted sodomy). However, there was no rational connection--much less one more likely than not--between appellant's "keeping that body" and an inference that he premeditated and deliberated the homicide or that he kidnapped, sodomized or attempted to sodomize Denise Huber. All that it logically shows is that he killed her and did not dispose of her body (or her possessions); it cannot be reasonably be deemed to constitute evidence that he had the requisite mental state for a first degree murder, as opposed to a second degree murder, or that the special-circumstance allegations were true. Indeed, this Court has expressly recognized that while consciousness-of-guilt evidence in a murder case may bear on a defendant's state of mind *after* the killing, it is irrelevant to his state of mind immediately prior to or during the killing:

> "[E]vidence of defendant's cleaning up and false stories . . . is highly probative of whether defendant committed the crime, but *it does not bear upon the state of the defendant's mind at the time of the commission of the crime."* (*People v. Anderson* (1968) 70 Cal.2d 15, 33; emphasis added.)

Thus, consciousness of guilt merely establishes fear of apprehension (*ibid.*), not premeditation, deliberation, or specific intent to sodomize or kidnap. A jury instruction nevertheless permitting a jury to arbitrarily infer guilt therefrom would--and in this case did--constitute a clear denial of due process. (U. S. Const., 14th Amend.)

Appellant is well aware that this Court has repeatedly rejected such constitutional challenges to CALJIC No. 2.06 (see, e.g., *People v. Coffman* (2004) 34 Cal.4th 1, 102-103; *People v. Crandell* (1988) 46 Cal.3d 833,

870-871),[66] but he respectfully asks this Court to reconsider and overrule those rulings. Even if this Court is not inclined to do so as a general proposition, the delivery of that instruction on the peculiar facts of appellant's case must be deemed improper and unconstitutional.

This Court has asserted that "[a] reasonable juror would understand 'consciousness of guilt' to mean 'consciousness of some wrongdoing' rather than 'consciousness of having committed the specific offense charged.'" (*People v. Crandell, supra*, 46 Cal.3d at p. 871.) Even accepting the correctness of this dubious assumption, it would render the instruction irrelevant in appellant's case, where the defense acknowledged that appellant killed the victim, i.e., that he was guilty of "some wrongdoing." If the defendant has not disputed killing the victim, and has even conceded doing so, and the jury could not reasonably infer from CALJIC No. 2.06 a particular requisite mental state for murder, then it must rhetorically be asked: Why is the instruction given at all? If the jury logically will apprehend the instruction not to refer to consciousness of guilt of either a particular offense or a particular mental state and, in addition, there is little probative value where the defendant has conceded committing the homicide, then there is no rational reason to give the instruction at all.

In short, the delivery of CALJIC No. 2.06 lessened the prosecution's

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[66] This Court has, however, recently held that the trial court's inclusion of non-theft offenses like rape or murder in CALJIC No. 2.15 (inference of guilt from possession of recently-stolen property) is erroneous. (*People v. Prieto* (2003) 30 Cal.4th 226, 248-249.) The analytical basis for this holding--i.e., that a defendant's conscious possession of recently-stolen property "'simply does not lead naturally and logically to the conclusion the defendant committed' a rape or murder" (*id.* at p. 249; citation omitted)--is logically indistinguishable from appellant's instant argument regarding the impermissible inferences allowed by CALJIC No. 2.06.

burden of proof and allowed the jury to draw impermissible inferences of guilt in violation of appellant's constitutional rights to due process and a fair jury trial (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16) and his right to reliable guilt and special-circumstance determinations in a capital case (U.S. Const., 8th & 14th Amends.).

In addition to the vices described above, CALJIC No. 2.06 in its standard form is impermissibly argumentative and, as such, is unconstitutionally one-sided in the prosecution's favor. This Court has repeatedly held that trial courts must refuse to give argumentative instructions. (See, e.g., *People v. Sanders* (1995) 11 Cal.4th 475, 560.) Such instructions present the jury with a partisan argument disguised as a neutral, authoritative statement of the law. (See *People v. Wright* (1988) 45 Cal.3d 1126, 1135-1137.)

Argumentative instructions are defined as those which "'invite the jury to draw inferences favorable to one of the parties from specified items of evidence.'" (*People v. Mincey* (1992) 2 Cal.4th 408, 437 [citations omitted]; accord, e.g., *People v. Hughes,* (2002) 27 Cal.4th 287, 361.) Even if they are neutrally phrased, instructions which "ask the jury to consider the impact of specific evidence" (*People v. Daniels* (1991) 52 Cal.3d 815, 870-871) or "imply a conclusion to be drawn from the evidence" (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 105, fn. 9) are argumentative and therefore must be refused (*ibid.*).

Judged by this standard, CALJIC No. 2.06 is an improperly argumentative instruction, contrary to this Court's past conclusions on this issue. There is no discernible difference between an instruction which "merely instruct[s] the jury on the use of such evidence should it be found to exist" (*People v. Crandall, supra*, 46 Cal.4th at p. 870 [approving

CALJIC Nos. 2.03 and 2.06]) and an argumentative instruction which "improperly implies certain conclusions from specified evidence" (*People v. Wright, supra*, 45 Cal.3d at p. 1137). The former holding, one of many cases decided by this Court approving the delivery of consciousness-of-guilt instructions, operates to a criminal defendant's substantial detriment. The latter pronouncement is reflective of, and consistent with, numerous such holdings also operating to a criminal defendant's substantial detriment--even though the two analyses and results are logically inconsistent with each other.

By permitting such pinpoint instructions in the prosecution's favor, while deeming functionally-equivalent defense pinpoint instructions to be impermissibly argumentative, this Court denies criminal defendants the fundamental fairness required by the Due Process Clause of the Fourteenth Amendment. (See *Wardius v. Oregon* (1973) 412 U.S. 470, 475-476.)

In this case, where there was minimal evidence of either theory of first degree murder, an instruction arbitrarily and unfairly permitting the jury to infer guilt of *first degree* murder from appellant's mere possession of the body cannot conceivably be deemed harmless beyond a reasonable doubt. (See *Chapman v. California* (1967) 386 U.S. 18, 24.) Even if viewed only as a violation of state law, it is at least reasonably probable that this instructional error would have made the difference in such a demonstrably close case. (See *People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

Besides unconstitutionally embodying improper permissive inferences, the delivery of the consciousness-of-guilt instruction here was also clearly erroneous because it permitted the jurors to find that appellant had "attempted to suppress evidence against himself" despite the fact that

there was no evidence of any such suppression or attempted suppression of evidence. (See, e.g., *People v. Hannon, supra*, 19 Cal.3d at p. 597.) It is simply ludicrous to suggest that appellant's "keeping [the victim's] body" and all of her belongings--rather than disposing of them in some manner that would assure or at least make it far more likely that they would never be found--constitutes an attempt to "suppress" evidence and, worse, permits a jury to find that this shows a "consciousness of guilt" on appellant's part. Apparently under the prosecution's theory, with the trial court's imprimatur, the only way appellant could have avoided a consciousness-of-guilt instruction would have been by leaving the victim's body in plain view for everyone to see, or perhaps by personally delivering it to the police station, rather than putting it inside the freezer where it was inevitably found.

The absence of evidence to support the instruction further demonstrates the irrational and unconstitutional nature of the permissive inference embodied in this particular consciousness-of-guilt instruction. In a case in which it is *undisputed* that *identity was not at issue*, it is again preposterous to suggest that appellant's failure to either dispose of the victim's body and possessions so that he would never be caught and held responsible for the homicide, or put them on public display or turn them over to the authorities,[67] somehow constitutes a "suppression" or "attempted suppression" of evidence evincing a "consciousness" of having committed a capital murder rather than a second degree murder--*the only contested issue in the case*. Yet, by the delivery of CALJIC No. 2.06 in this case, the very

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[67] Indeed, the prosecutor during closing argument specifically told the jurors that appellant "made this choice thinking of himself, I can't turn this body over, I will be caught, I am suppressing evidence; he couldn't turn that body over." (22 RT 5704.)

act which assured that appellant would ultimately be implicated as the guilty party--i.e., "keeping that body" inside a stolen rental truck on his driveway in plain view from a public thoroughfare--was used to demonstrate a *consciousness* of such guilt.

"It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference." (*People v. Hannon, supra*, 19 Cal.3d at p. 597.) More specifically, with respect to the type of error committed in the present case, this Court has warned:

> "Whether or not any given set of facts may constitute suppression or attempted suppression of evidence from which a trier of fact can infer a consciousness of guilt on the part of a defendant is a question of law. Thus *in order for a jury to be instructed that it can infer a consciousness of guilt from suppression of adverse evidence by a defendant, there must be some evidence in the record which, if believed by the jury, will sufficiently support the suggested inference.*" (*Ibid.*; emphasis added.)

No such evidence supporting the suggested inference of "a consciousness of guilt from suppression of adverse evidence by" appellant exists on the instant record. There is no evidence from which a rational juror could find that appellant suppressed or attempted to suppress evidence against him. And there is most certainly no evidence that any even arguable attempt to suppress evidence--i.e., by "keeping that body" (22 RT 5487)--rationally tends to show that appellant was conscious of being guilty of first degree murder with special circumstances, as opposed to simply being guilty of having committed a criminal homicide by killing Denise Huber. (See *Hannon, supra*, 19 Cal.3d at pp. 598-602.) Under such factual

circumstances, the delivery of CALJIC No. 2.06 denied appellant his fundamental due process rights to a fair jury trial (U.S. Const., 6th & 14th Amends.) and to reliable guilt and special-circumstance determinations in a capital case (U.S. Const., 8th & 14th Amends.); and constituted an arbitrary and unfair deprivation of a state-created liberty interest in legally-correct and applicable jury instructions, in violation of the Due Process Clause of the Fourteenth Amendment (see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346). These federal constitutional violations cannot be deemed harmless beyond a reasonable doubt (see *Chapman v. California, supra*, 386 U.S. at p. 24) where the instruction directly impacted the only contested and disputed issues in the case: whether appellant was guilty of first degree murder with special circumstances or, instead, of second degree murder.

Even if (arguendo) the error in giving CALJIC No. 2.06 is only one of state law, it must be deemed prejudicial. Because "the jury was instructed and the prosecutor was permitted to argue that" (*Hannon, supra*, 19 Cal.3d at p. 603) "keeping that body" (22 RT 5487 [prosecutor's closing argument])[68] "could be considered as a circumstance from which a consciousness of guilt on the part of the defendant could be inferred, an impermissible impact may have resulted in the minds of the jurors." (*Hannon, supra*, 19 Cal.3d at p. 603.) Further, "[b]ecause this was a close case" on the only issues the jury had to decide, it is "reasonably probable that a verdict more favorable to the defendant might have resulted if the error had not occurred." (*Ibid.*, citing *People v. Watson, supra*, 46 Cal.2d at p. 836.)

The entire judgment must be reversed.

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[68] "The likely damage is best understood by taking the word of the prosecutor . . . during closing arguments. . . ." (*Kyles v. Whitley* (1995) 514 U.S. 419, 444.)

IV

A SERIES OF GUILT-PHASE INSTRUCTIONS IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT

A. Introduction

"The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364; accord, *Cage v. Louisiana* (1990) 498 U.S. 39, 39-40; *People v. Roder* (1983) 33 Cal.3d 491, 497.) "The constitutional necessity of proof beyond a reasonable doubt is not confined to those defendants who are morally blameless." (*Jackson v. Virginia* (1979) 443 U.S. 307, 323.) The reasonable-doubt standard "provides concrete substance for the presumption of innocence--that bedrock 'axiomatic and elementary' principle 'whose enforcement lies at the foundation of the administration of our criminal law'" (*In re Winship*, *supra*, 397 U.S. at p. 363; citation omitted) and at the heart of the right to trial by jury (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 278 ["the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt"]). Jury instructions violate these constitutional requirements if "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard" of proof beyond a reasonable doubt. (*Victor v. Nebraska* (1994) 511 U.S. 1, 6.)

The trial court in this case gave a series of standard CALJIC instructions, each of which violated the above principles and enabled the jury to convict appellant on a lesser standard than is constitutionally

required. Because the instructions violated the United States Constitution in a manner that can never be "harmless," the judgment in this case must be reversed. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 275.)

Although defense counsel did not challenge the prosecution evidence that appellant killed Denise Huber, they vigorously disputed the two prosecution legal theories of first degree murder--felony-murder based on the underlying offenses of kidnapping and sodomy/attempted sodomy, and a deliberate and premeditated killing--as well as the kidnapping and sodomy special-circumstance allegations.[69] Thus, the fundamental instructional errors discussed herein affected the first degree murder conviction and the true special-circumstance findings, rather than the jury's determination that appellant killed Denise Huber.

B. The Instructions on Circumstantial Evidence Undermined the Requirement of Proof Beyond a Reasonable Doubt

The jury was given two interrelated instructions on the meaning of reasonable doubt which discussed the relationship between proof beyond a

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[69] Defense counsel Denise Gragg's entire closing argument at the guilt phase focused on the failure of the prosecution to prove beyond a reasonable doubt that there was a kidnapping or a premeditated killing. (See 22 RT 5570-5623.) For example, she argued: "Mr. Famalaro, the facts may well tell you and I will not argue otherwise, is guilty of murder. He's guilty of murdering Denise Huber. But he did not kidnap her." (22 RT 5622-5623; see also 19 RT 5109-5115 [argument on § 1118.1 mtn. re: kidnapping special circumstances].)

Defense counsel Leonard Gumlia's entire guilt-phase closing argument focused on the failure of the prosecution to prove either kidnapping or sodomy (see 22 RT 5623-5644), with primary emphasis on the failure to prove that appellant had committed or attempted to commit sodomy (see 22 RT 5625-5641).

reasonable doubt and circumstantial evidence, and addressed proof of specific intent and/or mental state.[70] Except for the fact that they were directed at different evidentiary points, each of these instructions informed the jury, in essentially identical terms, that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation appears to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (8 CT 2629, 2630; 22 RT 5724, 5725.)

This twice-repeated directive was contrary to the due process requirement that the defendant may be convicted only if guilt is proved beyond a reasonable doubt. (*In re Winship, supra*, 397 U.S. 358; *Jackson v. Virginia, supra*, 443 U.S. 307.)

These instructions misled the jury into believing that it could find appellant guilty if he reasonably appeared guilty, even when jurors still entertained a reasonable doubt of his guilt. This is constitutionally defective for at least two reasons. First, telling jurors that their duty was to accept a guilty interpretation of the evidence as long as it "appears to you to be reasonable" is inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the Due Process Clause. (See *Cage v. Louisiana, supra*, 498 U.S. 39.)

In addition, the instructions required the jury to draw an incriminatory inference when such an inference appeared to be "reasonable." The jurors were told that they "must" accept such an

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[70] The court gave one instruction combining CALJIC Nos. 2.01 and 8.83 [circumstantial evidence re: guilt of murder and truth of special circumstances] (8 CT 2629; 22 RT 5723-5724), and another circumstantial-evidence instruction combining CALJIC Nos. 2.02 and 8.83.1 [specific intent or mental state re: murder and special circumstances] (8 CT 2630; 22 RT 5724-5725).

interpretation. Thus, the instruction operated as an impermissible mandatory conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (See *Sandstrom v. Montana* (1979) 442 U.S. 510.)

The CALJIC Nos. 2.01/8.83 instruction also misled the jury by stating that if there are two reasonable interpretations, one pointing to guilt and the other to innocence (or one pointing to the truth of a special circumstance and the other to its untruth), it must accept the one pointing to innocence (or the one pointing to the untruth of the special circumstance). (8 CT 2629; 22 RT 5724.) The prosecution's burden of proof beyond a reasonable doubt means that a defendant is not required to put forward any theory of innocence in order to be entitled to an acquittal, or to explain the incriminating evidence; a juror could therefore appropriately conclude from the prosecution's evidence that only incriminatory inferences "appear" to be reasonable, and yet also conclude that a conviction is unwarranted because there were insufficient incriminating inferences to establish guilt beyond a reasonable doubt. However, under the facts of this case, this instruction had the effect of reversing the burden of proof, since it required the jury to find appellant guilty, and to find the special circumstances true, unless he came forward with evidence explaining the incriminatory evidence put forward by the prosecution. Given the prosecution's total reliance on circumstantial evidence to prove both theories of first degree murder and the two special-circumstance allegations, the erroneous instructions were prejudicial with regard to guilt, special circumstances, and the death sentence.

The jury was further confused and misled by the CALJIC Nos. 2.01/8.83 instruction because it characterized the jury's choice as "guilt" or "innocence." (8 CT 2629; 22 RT 5724.) The use of such terminology

undercut the prosecution's burden of proof because the issue is not one of guilt or innocence, but rather whether there is a reasonable doubt as to the prosecution's evidence. This error encouraged the jurors to find appellant guilty because it had not been proven that he was "innocent."[71]

C. Other Instructions Also Vitiated the Reasonable-Doubt Standard

The trial court gave several other standard instructions that individually and collectively diluted the constitutionally-mandated reasonable-doubt standard: CALJIC No. 2.21.2, regarding willfully false witnesses (8 CT 2635; 22 RT 5728); CALJIC No. 2.22, regarding weighing conflicting testimony (8 CT 2635; 22 RT 5728); CALJIC No. 2.27, regarding sufficiency of evidence of one witness (8 CT 2632; 22 RT 5726); CALJIC No. 2.51, regarding motive (8 CT 2636; 22 RT 5729); and CALJIC No. 8.20, regarding premeditation and deliberation (8 CT 2645; 22 RT 5734-5735). Each of these instructions, in one way or another, urged the jury to decide material issues by determining which side had presented relatively stronger evidence. In so doing, the instructions implicitly

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[71] As one court has stated:

> "We recognize the semantic difference and appreciate the defense argument. We might even speculate that the instruction will cleaned up eventually by the CALJIC committee to cure this minor anomaly, for we agree that the language is inapt and potentially misleading in this respect standing alone." (*People v. Han* (2000) 78 Cal.App.4th 797, 809; original emphasis.)

Han concluded that there was no harm because the other standard instructions made the law on the point clear enough. (*Ibid.*) The same cannot be said in this case.

replaced the "reasonable doubt" standard with the "preponderance of the evidence" test, thus vitiating the constitutional protections that forbid convicting a capital defendant upon any lesser standard of proof. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275; *Cage v. Louisiana*, *supra*, 498 U.S. 39; *In re Winship*, *supra*, 397 U.S. 358.)

For example, CALJIC No. 2.21.2 lessened the prosecution's burden of proof. It authorized the jury to reject the testimony of a witness "willfully false in one material part of his or her testimony" unless "from all the evidence, you believe the *probability of truth* favors his or her testimony in other particulars." (8 CT 2635; 22 RT 5728; emphasis added.) The instruction lightened the prosecution's burden of proof by allowing the jury to credit prosecution witnesses by finding only a mere "probability of truth" in their testimony. (*See People v. Rivers* (1993) 20 Cal.App.4th 1040, 1046 [instruction telling the jury that a prosecution witness's testimony could be accepted based on a "probability" standard is "somewhat suspect"].)[72] The essential mandate of *Winship* and its progeny--that each specific fact necessary to prove the prosecution's case be proven beyond a reasonable doubt--is violated if any fact necessary to any element of an offense can be proven by testimony that merely appeals to the jurors as more "reasonable" or "probably true." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

Furthermore, the jurors were instructed:

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[72] The court in *Rivers* nevertheless followed *People v. Salas* (1975) 51 Cal.App.3d 151, 155-157, wherein the court found no error in an instruction which arguably encouraged the jury to decide disputed factual issues based on evidence "which appeals to your mind with more convincing force," because the jury was properly instructed on the general governing principle of reasonable doubt.

> "You are not bound to decide an issue of fact in accordance with the testimony of a number of witnesses which does not convince you, as against the testimony of a lesser number or other evidence which appeals to your mind with more convincing force. You may not disregard the testimony of the greater number of witnesses merely from caprice, whim or prejudice, or from a desire to favor one side against the other. You must not decide an issue by the process of counting the number of witnesses who have testified on the opposing sides. The final test is not in the relative number of witnesses but in the convincing force of the evidence." (CALJIC No. 2.22; 8 CT 2635; 22 RT 5728-5729.)

This instruction informed the jurors, in plain English, that their ultimate concern must be to determine which party has presented evidence that is comparatively more convincing than that presented by the other party. It specifically directed the jury to determine each factual issue in the case by deciding which group of witnesses, or which version, was more credible or more convincing than the other. In so doing, the instruction replaced the constitutionally-mandated standard of "proof beyond a reasonable doubt" with something that is indistinguishable from the lesser "preponderance of the evidence" standard, *i.e.*, "not in the relative number of witnesses, but in the convincing force of the evidence." As with CALJIC No. 2.21.2, discussed above, the *Winship* requirement of proof beyond a reasonable doubt is violated by instructing that any fact necessary to any element of an offense could be proven by testimony that merely appealed to the jurors as having somewhat greater "convincing force." (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 277-278; *In re Winship*, *supra*, 397 U.S. at p. 364.)

CALJIC No. 2.27, regarding the sufficiency of the testimony of a single witness to prove a fact (8 CT 2632; 22 RT 5726), likewise was

flawed in its erroneous suggestion that the defense, as well as the prosecution, had the burden of proving facts. The defendant is only required to raise a reasonable doubt about the prosecution's case; he is not required to establish or prove any "fact." CALJIC No. 2.27, by telling the jurors that testimony by one witness "concerning any fact" which they believed is "sufficient for the proof of that fact" and that they "should carefully review all of the evidence upon which the proof of that fact depends"--without qualifying this language to apply only to *prosecution* witnesses--permitted reasonable jurors to conclude that (1) appellant himself had the burden of convincing them that he was innocent of capital murder, and (2) that this burden was a difficult one to meet. Indeed, this Court has "agree[d] that the instruction's wording could be altered to have a more neutral effect as between prosecution and defense" and "encourage[d] further effort toward the development of an improved instruction." (*People v. Turner* (1990) 50 Cal.3d 668, 697.) This Court's understated observation does not begin to address the unconstitutional effect of CALJIC No. 2.27, and this Court should find that it violated appellant's Sixth and Fourteenth Amendment rights to due process and a fair jury trial.

CALJIC No. 2.27 further violated due process by using the "which you believe" language, thereby allowing proof based on mere "belief" that a single witness was telling the truth, rather than the constitutionally-required proof beyond a reasonable doubt. For example, the instruction clearly implied to the jurors that if they simply "believe[d]" either of the two expert witnesses who opined that there was sperm in the victim's rectum, even if they were not convinced beyond a reasonable doubt that either witness's opinion was credible, they could find that the defendant committed sodomy on that basis alone. The instruction also erroneously suggested to the jurors

that they need not "carefully review" the testimony of two or more such prosecution witnesses, thereby likewise unconstitutionally lessening the prosecution's burden of proof.

The delivery of CALJIC No. 2.51 also diminished the prosecution's burden of proof as to the murder charge by telling the jury that "[m]otive is not an element of the crime charged and need not be shown." (8 CT 2636; 22 RT 5729.) This instruction conflicted with other instructions regarding criminal intent for finding felony-murder (CALJIC No. 8.21; see 8 CT 2646; 22 RT 5735-5736)[73]--a substantial factual issue in this case (see, e.g., 22 RT 5573-5574, 5577-5598, 5600-5603, 5615-5617, 5622-5623, 5624-5644 [defense closing argument]--by improperly suggesting to the jurors that they need not find that appellant intended to commit kidnapping or sodomy in order to convict him of first degree murder. (See *People v. Hart* (1999) 20 Cal.4th 546, 608; but see *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098.) Even though a reasonable juror could have understood the contradictory instructions to require such specific intent, there is simply no way of knowing whether any, much less all 12, of the jurors so concluded. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

Finally, the instruction defining premeditation and deliberation--another substantial factual issue in this case (see, e.g., 22 RT 5574, 5598-5600, 5603-5608, 5617-5618, 5621-5622 [defense closing argument])--misled the jury regarding the prosecution's burden of proof by instructing that deliberation and premeditation "must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition

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[73] The court instructed that "[t]he specific intent to commit kidnapping and sodomy . . . must be proved beyond a reasonable doubt." (8 CT 2646; 22 RT 5736.)

precluding the idea of deliberation. . . ." (CALJIC No. 8.20; 8 CT 2645; 22 RT 5734-5735; emphasis added.) The use of the word "precluding" could be interpreted to require the defendant to absolutely preclude the possibility of premeditation--as opposed to requiring the prosecution to prove premeditation beyond a reasonable doubt. (*See People v. Williams* (1969) 71 Cal.2d 614, 631-632.)

"It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned." (*Winship*, *supra*, 397 U.S. at p. 364.) Each of the disputed instructions here individually served to contradict and impermissibly dilute the constitutionally-mandated standard that requires the prosecution to prove each necessary fact of each element of each offense and special circumstances "beyond a reasonable doubt." Taking the instructions together, no reasonable juror could have been expected to understand--in the face of so many instructions permitting conviction upon a lesser showing--that he or she must find appellant not guilty unless every element of first degree murder and the special circumstances was proven by the prosecution beyond a reasonable doubt. The instructions challenged herein violated the constitutional rights set forth in section A of this argument, *ante*.

D. This Court Should Reconsider Its Prior Rulings Upholding the Defective Instructions

Although each one of the challenged instructions violated appellant's federal constitutional rights by lessening the prosecution's burden and by operating as a mandatory conclusive presumption of guilt, this Court has repeatedly rejected constitutional challenges to many of the instructions discussed here. (See e.g., *People v. Riel* (2000) 22 Cal.4th 1153, 1200

[addressing false testimony and circumstantial-evidence instructions]; *People v. Crittenden* (1994) 9 Cal.4th 83, 144 [addressing circumstantial-evidence instructions]; *People v. Noguera* (1992) 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)]; *People v. Jennings* (1991) 53 Cal.3d 334, 386 [addressing circumstantial-evidence instructions].) While recognizing the shortcomings of some of the instructions, this Court has consistently concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. The Court's analysis is flawed.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (See *People v. Jennings, supra*, 53 Cal.3d at p. 386.) The question is whether there is a reasonable likelihood that the jury applied the challenged instructions in a way that violates the Constitution (*Estelle v. McGuire* (1991) 502 U.S. 62, 72), and there certainly is a reasonable likelihood that the jury applied the challenged instructions according to their express terms.

Second, this Court's essential rationale--that the flawed instructions were "saved" by the language of CALJIC No. 2.90--requires reconsideration. (See *People v. Crittenden, supra*, 9 Cal.4th at p. 144.) An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States v. Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; see generally *Francis v. Franklin, supra*, 471 U.S. at p. 322 ["Language that merely contradicts and does not explain a constitutionally

infirm instruction will not suffice to absolve the infirmity."]; *People v. Kainzrants* (1996) 45 Cal.App.4th 1068, 1075, citing *People v. Westlake* (1899) 124 Cal. 452, 457 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People v. Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "'It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction is *specific* and the supposedly curative instruction is *general*.'" (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395, quoting 7 Witkin, *Cal. Procedure* (3d ed. 1985) Trial, § 319, p. 364; original emphasis.)

Furthermore, nothing in the challenged instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable-doubt instruction.[74] It is just as likely that the jurors concluded that the reasonable-doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one--rather than vice-versa--the principle does not apply in this case. The allegedly curative instruction was overwhelmed by the unconstitutional ones. Appellant's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable-doubt standard. Yet the charge as a whole contained only one countervailing expression of the reasonable-doubt standard: the oft-criticized and confusing language of CALJIC No. 2.90.

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[74] A reasonable-doubt instruction also was given in *People v. Roder*, *supra*, 33 Cal.3d 491, but it was not held not to cure the harm created by the impermissible mandatory presumption. (See *id.* at pp. 496, 504-505.)

(8 CT 2641; 22 RT 5732.)[75] This Court has admonished "'that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.'" (*People v. Wilson* (1992) 3 Cal.4th 926, 943; citations omitted.) Under this principle, it cannot seriously be maintained that CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire charge" was to misstate and undermine the reasonable-doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

E. Reversal Is Required

Because the erroneous instructions required conviction on a standard of proof less than proof beyond a reasonable doubt, their delivery was a structural error which is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 280-282.) If the erroneous instructions are viewed only as burden-shifting instructions, the error is reversible unless the prosecution can show that the giving of the instructions was harmless beyond a reasonable doubt. (*Carella v. California* (1989) 491 U.S. 263, 266-267.) Here, that showing cannot be made. On the contrary, in a case in which the questions of appellant's purported guilt of first degree murder and of the truth of the special circumstances were so demonstrably close because of the complete absence of evidence as to how the events in question may have

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[75] The oral version of CALJIC No. 2.90 delivered by the court in the present case was misread by the court to say, at the end of the instruction, "an abiding conviction *to* the truth of the charge" (22 RT 5732; emphasis added) rather than the correct language "an abiding conviction *of* the truth of the charge" (see 8 CT 2641; emphasis added).

unfolded, this dilution of the reasonable-doubt requirement by the guilt-phase instructions must be deemed reversible error no matter what standard of prejudice is applied. (*See Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-282; *Cage v. Louisiana*, *supra*, 498 U.S. at p. 41; *People v. Roder*, *supra,* 33 Cal.3d at p. 505.)

The guilt-phase conviction, the special-circumstance findings, and the death judgment must be reversed.

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V

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

After the trial court instructed the jury that appellant could be convicted of first degree murder if he committed a deliberate and premeditated murder (CALJIC No. 8.20; 8 CT 2645; 22 RT 5734-5735) or killed during the commission of kidnapping or during the commission or attempted commission of sodomy (CALJIC No. 8.21; 8 CT 2646; 22 RT 5735-5736), the jury found appellant guilty of murder in the first degree (8 CT 2689). The instructions on first degree murder were erroneous, and the resulting conviction of first degree murder must be reversed, because the indictment did not charge appellant with first degree murder and did not allege the facts necessary to establish first degree murder.[76]

The indictment alleged that "on or about June, 1991, JOHN JOSEPH FAMALARO, in violation of Section 187(a) of the Penal Code (MURDER), a FELONY, did willfully and unlawfully and with malice aforethought murder Denise Huber, a human being." (1 CT 340.) Both the statutory reference ("Section 187(a) of the Penal Code") and the description

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

of the crime ("did willfully and unlawfully and with malice aforethought murder") establish that appellant was charged exclusively with second degree malice-murder in violation of Penal Code section 187, not with first degree murder in violation of Penal Code section 189.[77]

Penal Code section 187, the statute cited in the information, defines second degree murder as "the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Hansen* (1994) 9 Cal.4th 300, 307.)[78] "Section 189 defines first degree murder as all murder committed by specified lethal means 'or by any other kind of willful, deliberate, and premeditated killing,' or a killing which is committed in the perpetration of enumerated

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[77] The indictment also alleged kidnapping and sodomy special circumstances. (1 CT 340.) However, these allegations did not change the elements of the charged offense. "A penalty provision is separate from the underlying offense and does not set forth elements of the offense or a greater degree of the offense charged. [Citations.]" (*People v. Bright* (1996) 12 Cal.4th 652, 661.)

Also, the allegation of a felony-murder special circumstance does not allege all of the facts necessary to support a conviction for felony-murder. A conviction under the felony-murder doctrine requires proof that the defendant acted with the specific intent to commit the underlying felony (*People v. Hart* (1999) 20 Cal.4th 546, 608), but a true finding on a felony-murder special circumstance does not (*People v. Davis* (1995) 10 Cal.4th 463, 519; *People v. Green* (1980) 27 Cal.3d 1, 61).

[78] Subdivision (a) of Penal Code section 187, unchanged since its enactment in 1872 except for the addition of the phrase "or a fetus" in 1970, provides as follows: "Murder is the unlawful killing of a human being, or a fetus, with malice aforethought."

felonies. . . ." (*People v. Watson* (1981) 30 Cal.3d 290, 295.)[79]

Because the indictment charged only second degree malice-murder in violation of section 187, the trial court lacked jurisdiction to try appellant for first degree murder. "A court has no jurisdiction to proceed with the trial of an offense without a valid indictment or information" (*Rogers v. Superior Court* (1955) 46 Cal.2d 3, 7) which charges that specific offense (*People v. Granice* (1875) 50 Cal. 447, 448-449 [defendant could not be tried for murder after the grand jury returned an indictment for manslaughter]; *People v. Murat* (1873) 45 Cal. 281, 284 [an indictment charging only assault with intent to murder would not support a conviction of assault with a deadly weapon]).

Nevertheless, this Court has held that a defendant may be convicted of first degree murder even though the indictment or information charged only murder with malice in violation of section 187. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 368-370; *Cummiskey v. Superior Court* (1992) 3 Cal.4th 1018, 1034.) These decisions, and the cases on which they rely, rest explicitly or implicitly on the premise that all forms of murder are

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[79] In 1991, when the murder at issue allegedly occurred, Penal Code section 189 provided in pertinent part:

> "All murder which is perpetrated by means of a destructive device or explosive, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Sections 286, 288, 288a, or 289, is murder of the first degree; and all other kinds of murders are of the second degree."

defined by section 187, so that an accusation in the language of that statute adequately charges every type of murder, making specification of the degree, or the facts necessary to determine the degree, unnecessary.

Thus, in *People v. Witt* (1915) 170 Cal. 104, this Court declared:

> "Whatever may be the rule declared by some cases from other jurisdictions, it must be accepted as the settled law of this state that it is sufficient to charge the offense of murder in the language of the statute defining it, whatever the circumstances of the particular case. As said in *People v. Soto*, 63 Cal. 165, 'The information is in the language of the statute defining murder, which is "Murder is the unlawful killing of a human being with malice aforethought" (Pen. Code, sec. 187). Murder, thus defined, includes murder in the first degree and murder in the second degree.[80] It has many times been decided by this court that it is sufficient to charge the offense committed in the language of the statute defining it. As the offense charged in this case includes both degrees of murder, the defendant could be legally convicted of either degree warranted by the evidence.'" (*Id.* at pp. 107-108.)

However, the rationale of *People v. Witt*, *supra*, and all similar cases was completely undermined by the decision in *People v. Dillon* (1983) 34 Cal.3d 441. Although this Court has noted that "[s]ubsequent to *Dillon*, *supra*, 34 Cal.3d 441, we have reaffirmed the rule of *People v. Witt*, *supra*, 170 Cal. 104, that an accusatory pleading charging a defendant with murder

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[80] This statement alone should preclude placing any reliance on *People v. Soto* (1883) 63 Cal. 165. It is simply incorrect to say that a second degree murder committed with malice, as defined in section 187, includes a first degree murder committed with premeditation or with the specific intent to commit a felony listed in section 189. On the contrary, "Second degree murder is a lesser included offense of first degree murder" (*People v. Bradford* (1997) 15 Cal.4th 1229, 1344; citations omitted), at least when the first degree murder does not rest on the felony-murder rule. A crime cannot both include another crime and be included within it.

need not specify the theory of murder upon which the prosecution intends to rely" (*People v. Hughes*, *supra*, 27 Cal.4th at p. 369), it has never explained how the reasoning of *Witt* can be squared with the holding of *Dillon*.

Witt reasoned that "it is sufficient to charge murder in the language of the statute defining it." (*People v. Witt*, *supra*, 170 Cal. at p. 107.) *Dillon* held that section 187 was *not* "the statute defining" first degree felony-murder. After an exhaustive review of statutory history and legislative intent, the *Dillon* court concluded that "[w]e are therefore required to construe *section 189* as a statutory enactment of the first degree felony-murder rule in California." (*People v. Dillon*, *supra*, 34 Cal.3d at p. 472; emphasis added [fn. omitted].)

Moreover, in rejecting the claim that *Dillon* requires the jury to agree unanimously on the theory of first degree murder, this Court has stated that "[t]here is still only 'a single statutory offense of first degree murder.'" (*People v. Carpenter* (1997) 15 Cal.4th 312, 394, quoting *People v. Pride* (1992) 3 Cal.4th 195, 249; accord, *People v. Box* (2000) 23 Cal.4th 1153, 1212.) Although that conclusion can be questioned, it is clear that, if there is indeed "a single statutory offense of first degree murder," the statute which defines that offense must be section 189.

No other statute purports to define premeditated murder (see § 664, subd. (a) [referring to "willful, deliberate, and premeditated murder, as defined by Section 189"]) or murder during the commission of a felony, and *Dillon* expressly held that the first degree felony-murder rule was codified in section 189. (34 Cal.3d at p. 472.) Therefore, if there is a single statutory offense of first degree murder, it is the offense defined by section 189, and the indictment did not charge first degree murder in the language of "the statute defining" that crime.

Under these circumstances, it is immaterial whether this Court was correct in concluding that "[f]elony murder and premeditated murder are not distinct crimes." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712.) First degree murder of any type and second degree malice-murder clearly *are* distinct crimes. (See *People v. Hart* (1999) 20 Cal.4th 546, 608-609 [discussing the differing elements of those crimes]; *People v. Bradford* (1997) 15 Cal.4th 1229, 1344 [holding that second degree murder is a lesser offense included within first degree murder].)[81]

The greatest difference is between second degree malice-murder and first degree felony-murder. By the express terms of section 187, second degree malice-murder includes the element of malice (*People v. Dillon*, *supra*, 34 Cal.3d at p. 475; *People v. Watson*, *supra*, 30 Cal.3d at p. 295), but malice is not an element of felony-murder (*People v. Box*, *supra*, 23 Cal.4th at p. 1212; *People v. Dillon*, *supra*, 34 Cal.3d at pp. 475, 476, fn. 23). In *Green v. United States* (1957) 355 U.S. 184, the United States Supreme Court reviewed District of Columbia statutes identical in all relevant respects to Penal Code sections 187 and 189 (*id.* at pp. 185-186, fns. 2 & 3) and declared that "[i]t is immaterial whether second degree

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[81] Justice Schauer emphasized this fact when, in the course of arguing for affirmance of the death sentence in *People v. Henderson* (1963) 60 Cal.2d 482, he stated that: "The fallacy inherent in the majority's attempted analogy is simple. It overlooks the fundamental principle that even though different degrees of a crime may refer to a common name (e.g., murder), *each of those degrees is in fact a different offense, requiring proof of different elements* for conviction. This truth was well grasped by the court in *Gomez* [*v. Superior Court* (1958) 50 Cal.2d 640, 645], where it was stated that 'The elements necessary for first degree murder differ from those of second degree murder. . . .'" (*People v. Henderson*, *supra*, at pp. 502-503 (dis. opn. of Schauer, J.); original emphasis.)

murder is a lesser offense included in a charge of felony murder or not. The vital thing is that it is a distinct and different offense" (*id.* at p. 194, fn. 14).

Furthermore, regardless of how this Court construes the various statutes defining murder, it is now clear that the federal Constitution requires more specific pleading in this context. In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the United States Supreme Court declared that, under the notice and jury-trial guarantees of the Sixth Amendment and the due process guarantee of the Fourteenth Amendment, "'*any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged* in an indictment, submitted to a jury and proved beyond a reasonable doubt.'" (*Id.* at p. 476; emphasis added [citation omitted.])[82]

Premeditation and the facts necessary to bring a killing within the first degree felony-murder rule (commission or attempted commission of a felony listed in section 189 together with the specific intent to commit that crime) are facts that increase the maximum penalty for the crime of murder. If they are not present, the crime is second degree murder, and the maximum punishment is life in prison. If they are present, the crime is first degree murder, special circumstances can apply, and the punishment can be life imprisonment without parole or death. (§ 190, subd. (a).) Therefore, those facts should have been charged in the indictment. (See *State v. Fortin* (N.J. 2004) 843 A.2d 974, 1035-1036.)

Permitting the jury to convict appellant of an uncharged crime

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[82] See also *Hamling v. United States* (1974) 418 U.S. 87, 117: "It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.' [Citation.]"

violated his right to due process of law. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 & 15; *DeJonge v. Oregon* (1937) 299 U.S. 353, 362; *In re Hess* (1955) 45 Cal.2d 171, 174-175.) One aspect of that error, the instruction on first degree felony-murder, also violated appellant's right to due process and trial by jury because it allowed the jury to convict him of murder without finding the malice which was an essential element of the crime alleged in the indictment. (U.S. Const., 6th & 14th Amends.; Cal. Const., art. I, §§ 7, 15 & 16; *People v. Kobrin* (1995) 11 Cal.4th 416, 423; *People v. Henderson* (1977) 19 Cal.3d 86, 96.) The error also violated appellant's right to a fair and reliable capital guilt trial. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17; *Beck v. Alabama* (1980) 447 U.S. 625, 638.)

These violations of appellant's constitutional rights were necessarily prejudicial because, if they had not occurred, appellant could have been convicted only of second degree murder, a noncapital crime. (See *State v. Fortin*, *supra*, 843 A.2d at pp. 1034-1035.) Therefore, appellant's conviction for first degree murder must be reversed.

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VI

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND DENIED APPELLANT HIS CONSTITUTIONAL RIGHTS, IN FAILING TO REQUIRE THE JURY TO AGREE UNANIMOUSLY ON WHETHER APPELLANT HAD COMMITTED A PREMEDITATED MURDER OR A FELONY-MURDER BEFORE RETURNING A VERDICT FINDING HIM GUILTY OF MURDER IN THE FIRST DEGREE

As previously noted (see Argument V, *ante*), the trial court instructed the jury on first degree premeditated murder (CALJIC No. 8.20; 8 CT 2645; 22 RT 5734-5735) and on first degree felony-murder predicated on kidnapping or sodomy/attempted sodomy (CALJIC No. 8.21; 8 CT 2646; 22 RT 5735-5736). However, the court did not instruct the jury that it had to agree unanimously on the same type of first degree murder.

The failure to require the jury to agree unanimously as to whether appellant had committed a premeditated murder or a first degree felony-murder was erroneous, and the error deprived appellant of his right to have all elements of the crime of which he was convicted proved beyond a reasonable doubt, his right to the verdict of a unanimous jury, and his right to a fair and reliable determination that he committed a capital offense. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16 & 17.)

Appellant acknowledges that this Court has rejected the claim that the jury cannot return a valid verdict of first degree murder without first agreeing unanimously as to whether the defendant committed a premeditated murder or a felony-murder. (See, e.g., *People v. Nakahara* (2003) 30 Cal.4th 705, 712-713; *People v. Kipp* (2001) 26 Cal.4th 1100, 1132; *People v. Carpenter* (1997) 15 Cal.4th 312, 394-395.) However,

appellant submits that this conclusion should be reconsidered, particularly in light of recent decisions of the United States Supreme Court.

This Court has consistently held that the elements of first degree premeditated murder and first degree felony-murder are not the same. In the watershed case of *People v. Dillon* (1983) 34 Cal.3d 441, this Court first acknowledged that "[i]n every case of murder other than felony murder the prosecution undoubtedly has the burden of proving malice as an element of the crime." (*Id.* at p. 475.) It then declared that "in this state the two kinds of murder [felony-murder and malice-murder] are not the 'same' crimes and malice is not an element of felony murder." (*Id.* at p. 476, fn. 23; see also *id.* at pp. 476-477.)[83]

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

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[83] "It follows from the foregoing analysis that the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all. . . . [This is a] profound legal difference. . . ." (*People v. Dillon*, *supra*, at pp. 476-477; fn. omitted.)

elements of the two kinds of murder differ" (*People v. Silva* (2001) 25 Cal.4th 345, 367) and that "the two forms of murder [premeditated murder and felony-murder] have different elements" (*People v. Nakahara*, *supra*, 30 Cal.4th at p. 712; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1131).

"Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817.) Examination of the elements of the crimes at issue is the method used both to determine whether crimes that carry the same title are in reality different and distinct offenses (see *People v. Henderson* (1963) 60 Cal.2d 482, 502-503 (dis. opn. of Schauer, J.), quoted in fn. 81, at p. 250, *ante*) and also to determine to which facts the constitutional requirements of trial by jury and proof beyond a reasonable doubt apply (see *Jones v. United States* (1999) 526 U.S. 227, 232). Both of those determinations are relevant to the issue of whether the jury must find those facts by a unanimous verdict.

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

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact that the other does not." (*Id.* at p. 304, citing *Gavieres v. United States*

(1911) 220 U.S. 338, 342.)

Later, the "elements" test announced in *Blockburger* was elevated to a rule of constitutional dimension. It is now the test used to determine what constitutes the "same offense" for purposes of the Double Jeopardy Clause of the Fifth Amendment (*United States v. Dixon* (1993) 509 U.S. 688, 696-697), the Sixth Amendment right to counsel (*Texas v. Cobb* (2001) 532 U.S. 162, 173), the Sixth Amendment right to trial by jury, and the Fifth and Fourteenth Amendment right to proof beyond a reasonable doubt (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.);[84] see also *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 111 (lead opn. of Scalia, J.)).

Malice-murder and felony-murder are defined by separate statutes and "each . . . requires proof of an additional fact that the other does not." (*Blockburger v. United States*, *supra*, 284 U.S. at p. 304.) Malice-murder requires proof of malice and, if the crime is to be elevated to murder of the first degree, proof of premeditation and deliberation; felony-murder does not. Felony-murder requires the commission or attempt to commit a felony listed in Penal Code section 189 and the specific intent to commit that

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

felony; malice-murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.)

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

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

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

488).

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

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

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

degree murder].) The specific intent to commit the underlying felony has likewise been characterized as an element of first degree felony-murder. (*People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

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

> "We have held, 'By conjoining the words "willful, deliberate, and premeditated" in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require *as an element of such crime* substantially more reflection than may be involved in the mere formation of a specific intent to kill.' [Citation.]" (*Id.* at p. 545 [emphasis added], quoting *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.)[85]

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

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

commit the crime or the "underlying brute facts" that "make up a particular element," such as whether the element of force or fear in a robbery case was established by the evidence that the defendant used a knife or by the evidence that he used a gun. (*Richardson v. United States*, *supra*, 526 U.S. at p. 817.) This case involves the elements specified in the statute defining first degree murder (§ 189), not means or the "brute facts" which may be used at times to establish those elements.

Second, no matter how they are labeled, premeditation and the facts necessary to support a conviction for first degree felony-murder are facts that operate as the functional equivalent of "elements" of the crime of first degree murder and, if found, increase the maximum sentence beyond the penalty that could be imposed on a conviction for second degree murder. (§§ 189 & 190, subd. (a).) Therefore, they must be found by procedures that comply with the constitutional right to trial by jury (see *Blakely v. Washington* (2004) 542 U.S. 296, 301-307; *Ring v. Arizona* (2002) 536 U.S. 584, 603-605; *Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 494-495), which, for the reasons previously stated, include the right to a unanimous verdict.

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

Malice is a true "element" of murder in anyone's book.

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

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VII

THE ADMISSION OF VICTIM-IMPACT EVIDENCE VIOLATED EX POST FACTO PRINCIPLES AND APPELLANT'S RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

On February 13, 1997, the day before the hearing on appellant's initial venue motion began (see Argument I, *ante*), defense counsel filed "Trial Brief No. 1," which asked the trial court to exclude victim-impact evidence from the penalty phase on the grounds that the admission of such evidence was barred by ex post facto principles (U.S. Const., art. I, § 9; Cal. Const., art. I, § 9) and the Due Process Clause of the Fourteenth Amendment, because victim-impact evidence was constitutionally prohibited at the time of the commission of the instant offense. (5 CT 1690-1703.) The next day, just prior to the commencement of the venue hearing, defense counsel asked the court to rule on the victim-impact issue as part of the venue motion because of the widespread publicity about the effect of Denise Huber's disappearance on her parents, including "the pictures of the caskets and hearses, the banners, the fliers, the searches" and, as the court itself interjected: "the statements by mother, father, probably at the memorial--." (7 RT 2008-2010.)

The prosecution filed a written response to appellant's "Trial Brief No. 1" on February 27, 1997, arguing that ex post facto principles do not apply to the admissibility of evidence (5 CT 1718-1723), and the court ultimately agreed and denied appellant's motion to exclude victim-impact evidence, finding that "this [change in the law] is procedural and not ex post facto" (9 RT 2495). At the conclusion of the guilt phase, defense

counsel renewed their motion to exclude victim-impact testimony at the penalty phase. The court recognized that defense counsel was referring to "your expost [*sic*] facto argument," and then announced: "The ruling remains. And I believe the objection is preserved." (23 RT 5775-5776.)

Pursuant to this ruling, Denise Huber's parents, Ione and Dennis Huber, testified at the penalty phase regarding the impact on them of their daughter's disappearance and death (see Statement of Facts, *ante*, at pp. 25-26), as the very last evidence presented in the prosecution's case-in-chief. (23 RT 5928-5936.) Appellant submits that the admission of this evidence violated appellant's fundamental constitutional rights, including his Sixth and Fourteenth Amendment rights to due process and a fair jury trial, his Eighth and Fourteenth Amendment right to a reliable penalty determination, and his privilege against ex post facto laws under Article I, section 9 of the United States Constitution, and article I, section 9 of the California Constitution.

B. The Admission of the Victim-Impact Evidence Was Erroneous, Unconstitutional and Prejudicial, Especially Given the Massive Publicity Regarding the Victim's Parents Extending over Many Years Which Even Touched the Actual Trial Jurors

Ex post facto laws are prohibited by the federal and state constitutions. (U.S. Const., art. I, § 9, cl. 3; Cal. Const., art. I, § 9.) Although these provisions specifically refer only to retroactive legislative enactments, principles of due process provide similar restrictions on retroactive *judicial* decisions. (U.S. Const., 14th Amend.; Cal. Const., art. I, §§ 7 and 15; *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354; *People v. Davis* (1994) 7 Cal.4th 797, 811-812.)

At the time of the commission of the crime in this case, victim-

impact evidence was inadmissible under both the federal Constitution and California law. (*Booth v. Maryland* (1987) 482 U.S. 496; *People v. Gordon* (1990) 50 Cal.3d 1223, 1266-1267.) In *Booth, supra*, the United States Supreme Court held that the admission of such victim-impact evidence as the victim's personal characteristics and the emotional impact of the crime on the victim's family violated the Eighth Amendment. In *South Carolina v. Gathers* (1989) 490 U.S. 805, 810-812, the high court extended the constitutional prohibition of victim-impact references to argument by counsel. (See also *People v. Gordon, supra*, 50 Cal.3d at pp. 1266-1267.) In *Gordon*, this Court held that, under the state-law interpretation of *Booth* and *Gathers*, "the effect of the crime on the victim's family is not relevant to any material circumstance. Nor is sympathy for the victim." (*People v. Gordon, supra*, 50 Cal.3d at p. 1267.)

Appellant's crime occurred on June 3, 1991. As of that date, victim impact was totally barred, as a matter of federal constitutional and state law, from any aspect of a criminal trial. Then, on June 27, 1991, the United States Supreme Court overruled *Booth* and *Gathers* to the extent that evidence of the personal characteristics of the victim or the emotional impact on the victim's family had been deemed per se inadmissible. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827.) Five months later, this Court overruled *Gordon*, holding that victim-impact evidence was admissible in aggravation as "a circumstance of the crime" under section 190.3, factor (a). (*People v. Edwards* (1991) 54 Cal.3d 787, 835.)[86]

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[86] One of the articulated bases for the holding in *Payne* was that the state "'has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in. . . .'" (*Payne, supra*, 501 U.S. at p. (continued...)

The "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." (*Kaiser Aluminum & Chemical Corp. v. Bonjorno* (1990) 494 U.S. 827, 855 (conc. opn. of Scalia, J.).) This principle, as well as appellant's constitutional rights, were violated by the admission of victim-impact evidence at the penalty phase of his trial. Appellant is well aware that this Court has expressly rejected the ex post facto argument advanced here. (See, e.g., *People v. Roldan* (2005) 35 Cal.4th 646, 732; *People v. Stitely* (2005) 35 Cal.4th 514, 565; *People v. Brown* (2004) 33 Cal.4th 382, 394-395.) In so doing, this Court has concluded that "*Payne* did no more than remove a judicially created obstacle that had withdrawn a type of evidence that could have proved a material fact." (*Roldan, supra*, 35 Cal.4th at p. 732, citing *Brown, supra*, 33 Cal.4th at pp. 394-395; see also *Neill v. Gibson* (10th Cir. 2001) 278 F.3d 1044, 1052.) Appellant respectfully submits that this Court's analysis is flawed and erroneous.

First, to the extent that this Court is suggesting that a *judicial* alteration of existing law does not implicate ex post facto concerns, it is clearly mistaken. As noted above, judicial changes of law operate in the same manner as statutory changes for purposes of the Ex Post Facto Clause: "If a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due

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[86](...continued)
825; citation omitted.) This rationale does not, of course, apply in California in light of the holding in *Edwards* that victim-impact evidence is now deemed admissible as "circumstance of the crime" evidence in *aggravation.*

Process Clause from achieving precisely the same result by judicial construction." (*Bouie v. City of Columbia, supra*, 378 U.S. at pp. 353-354; *In re Baert* (1988) 205 Cal.App.3d 514, 518.)

Second, the sudden and radical change in the constitutional status of victim-impact evidence can hardly be characterized as the mere removal of an obstacle to "a type of evidence that could have proved a material fact." Not only does this Court's blithe reference to the purported materiality of such evidence ignore its own previous assertions that victim-impact evidence was "*not relevant* to any *material* circumstance" (*People v. Gordon, supra*, 50 Cal.3d at p. 1267, emphasis added; see also *People v. Boyd* (1985) 38 Cal.3d 762, 775 ["the jury can only consider evidence that bears upon a listed factor" in aggravation]), but its equally superficial apparent assumption that a change in admissible "evidence" does not implicate ex post facto concerns wholly ignores the United States Supreme Court's contrary holding and underlying constitutional analysis in *Carmell v. Texas* (2000) 529 U.S. 513. Indeed, appellant submits that *Carmell*, although not involving victim-impact evidence, is dispositive in appellant's favor on the instant ex post facto issue. "Whether a state law is properly characterized as falling under the *Ex Post Facto* Clause . . . is a federal question we determine for ourselves." (*Id.* at p. 544, fn. 31.)

The high court in *Carmell* expressly reaffirmed the principle that changes in *evidentiary rules* that impact the trial of a criminal defendant can violate the Ex Post Facto Clause. In discussing the application of the ancient prohibition against ex post facto laws, the *Carmell* opinion discussed at length the classic statement, in *Calder v. Bull* (1798) 3 Dall. 386, 390, of what constitutes an ex post facto law, quoting with approval Justice Chase's language recognizing the fourth type of ex post facto law:

"Every law that alters the legal rules of evidence, and receives less, or *different testimony*, than the law required at the time of the commission of the offense." (*Carmell, supra*, 529 U.S. at p. 522; emphasis added.) As Justice Chase emphasized, "All these, and similar laws, are manifestly unjust and oppressive." (*Calder v. Bull, supra*, 3 Dall. at p. 390.) Consistent with this two-centuries-old interpretation of the law, the high court specifically held that laws which alter legal rules of evidence and require less evidence to obtain conviction are ex post facto laws; and, accordingly, that a state statutory amendment authorizing conviction of certain sexual offenses on the victim's testimony alone, where conviction was not previously permitted, was such a prohibited ex post facto law. (529 U.S. at pp. 530, 552; see also *State v. Mauchley* (Utah 2003) 67 P.3d 477, 492-493 [ex post facto violation to retroactively apply the "trustworthiness" standard for admission of confessions because it requires "less or different evidence" than did the corpus delicti rule].)

While it is of course true that the evidentiary change at issue here involves the penalty phase of a capital trial rather than technically a "conviction" of a criminal offense, the principles enunciated in *Carmell* apply with equal--if not greater--logical force to the instant situation. As the Court in *Carmell* emphasized, the fourth category described by Justice Chase "resonates harmoniously with one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice." (529 U.S. at p. 531; see also *In re Melvin J.* (2000) 81 Cal.App.4th 742, 760.) The Court explained that "[t]here is plainly a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty *or life*." (529 U.S. at p. 533; emphasis added.) Where, as here,

"the government refuses, afer the fact, to play by its own rules, altering them in a way that is *advantageous only to the State*" (*ibid.*; emphasis added), not "to facilitate an easier conviction" (*ibid.*), but, even worse, to obtain a death verdict--i.e., "to deprive a person of his . . . life" (*ibid.*)--ex post facto principles bar such a procedure and result.

The judicial change at issue here certainly did not implicate an "ordinary" rule of evidence which would not violate the Ex Post Facto Clause. (*Id.* at p. 533, fn. 23; see also *Thompson v. Missouri* (1898) 171 U.S. 380, 386-388.) "Rules of that nature are ordinarily evenhanded, in the sense that they may benefit either the State or the defendant in any given case." (*Carmell, supra*, 529 U.S. at p. 533, fn. 23; see also *id.* at p. 546; *Thompson v. Missouri, supra*, 171 U.S. at pp. 387-388.) Rules permitting the introduction of victim-impact evidence, by stark contrast, benefit *only* the *prosecution*, and they do so by permitting the introduction of a new and emotional class of aggravating evidence that is uniquely likely to inflame the passions of the jurors and result in a death verdict, and to prevent a rational determination of the appropriate penalty. (See *Booth v. Maryland, supra*, 482 U.S. at pp. 506-508; *People v. Love* (1960) 53 Cal.2d 843, 856-857.)

Thus, changing the rules "after the fact" to permit victim-impact evidence, where such evidence was inadmissible when the crime was committed, must be deemed to constitute an impermissible ex post facto law and a denial of due process, even though sentencing rather than conviction was implicated, to the defendant's detriment. (See *State v. Odom* (Tenn. 2004) 137 S.W.3d 572, 582-583, and fn. 9.) "The net effect" of the change in the law permitting victim-impact evidence at the penalty phase "was to make it possible for a jury to impose a harsher sentence than

previously could have been imposed based solely on evidence that was *not relevant* to the inquiry at all under the previous version" of the law. (*State v. Metz* (Or. 1999) 986 P.2d 714, 721; original emphasis [admitting victim-impact evidence under amended statute violated state constitution's ex post facto provision and was not harmless error].)

The admission of victim-impact evidence in this particular case was especially egregious and harmful, as defense counsel warned in joining their motion to exclude such evidence to appellant's motion to change venue. As has been well-documented (see Argument I, *ante*), there were extraordinarily-high recognition and prejudgment rates in this case, due in large measure to the successful efforts of Denise Huber's parents to keep the case very much alive in the Orange County public's collective consciousness for many years. They put up the banner alongside the freeway where their daughter disappeared, and it became a familiar landmark in the years following her disappearance. There were also the posters, fliers, bumper stickers and pins, fundraisers held for the family, public appeals by the parents--including well-covered press conferences--and the continuous coverage of the long-suffering parents' pain and anguish and their move to North Dakota to try to get away from it all; and then, with the discovery of their daughter's body, a whole new wave of personalized experiences with the parents, including the highly-publicized memorial services after her body was found, and the funeral, replete with newspaper photos and television shots of the hearse and casket, and of the grieving parents. Then there were the calls by the family for the death penalty, including the father saying "I hope they fry" appellant, as well as the open letter from the parents thanking Orange County for all of its support. (See

Argument I.C, *ante*.)[87]

The actual trial jurors were exposed to much of this publicity. One of them expressly referenced "the efforts of Denise's family to locate her," and recalled seeing "some type of advertisement asking for the knowledge or whereabouts of Denise." Another trial juror saw the "sign" next to the freeway saying "Have You Seen Denise?," and thought about how scary it would be not to have a cell phone every time she passed the banner; when this juror had seen a "tv blurb" about the case, she thought "that poor family." Another juror recalled "the desperate search by the parents for their daughter," and "internalized that information" and felt an "emotional bond toward the Hubers." Yet another juror drove by the banner regularly and had a personal reaction to it, even wishing she had the power to find Denise and "bring her home." Two of these jurors had a friend or family member say "fry him" to them. On top of all of that, a juror was informed by his daughter *during trial* that she had seen the flowers left at the site of Denise Huber's disappearance to commemorate the sixth anniversary of that event; and two other jurors were told by co-workers, *during trial*, to "hang" appellant. (See Argument I.B.2.c, *ante*.)

It was in this emotionally-charged, and already highly-personalized and internalized atmosphere that Denise Huber's parents took the witness stand at the penalty phase. Her mother, Ione, was first asked by the prosecutor to describe "what your life was like from the night Denise Huber

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[87] The effect of all of this publicity on the jury venire was predictable. For example, during jury-selection proceedings, one of the prospective jurors stated, in front of about seven other prospective jurors, that she heard that "Denise's parents were going to be here today," and that "definitely the family needs closure." (16 RT 4390.)

disappeared to the night Mr. Famalaro was arrested July 15, 1994, those three years?" (23 RT 5928.) In response, she talked about initially being "very much afraid," "panicked," "frantic with worry," and feeling "very helpless," with "my world turned upside down." Later, she and her husband did "everything we could to try to find answers," including sending out fliers to "lots of business places" and to newspapers "all over the country," and "had lots of interviews on tv." (23 RT 5928-5929.) It was "very difficult and painful" to go back to work four months later, and she felt she "could never be happy again." She and her husband did not know what to do with Denise's room, where all of her belongings remained, nor with her car. Thanksgiving and Christmas were "very painful" and "hollow" without their daughter, and they did not have a Christmas tree for three years. (23 RT 5929.) They would think about Denise whenever they went to a wedding and saw "these young ladies walk down the aisle" and wonder if they would ever see Denise do that. (23 RT 5929-5930.)

Then Ione was specifically asked by the prosecutor how Denise's death "has impacted your life." (23 RT 5930.) Ione replied that when she found out Denise had died, "so many of my dreams for her died." Denise also "had dreams of her own," and Ione brought along Denise's 1995 class-reunion packet, which included a letter that Denise, like the other students, had written just before her graduation "that they would receive on their ten year reunion." (23 RT 5930.) Denise had written in her letter that "some of [her] dreams were that she would be married one day, that she would have a career, and that she would have a family, and she was never able to do those things." Ione described having a lot of memories of things she did with Denise that they "can't do anymore," like go out for lunch, to the beach and to the pool, cook together, including their "special meal," chicken chow

mein. Denise's death "just devastated us so much emotionally, physically," and Ione even felt that the stress she has been under contributed to her "several surgeries in the past years, including cancer surgery." After saying that "our lives will never be the same," Ione showed the jurors "a picture of the real Denise," "with her smile, her sense of humor." Denise "brought so much joy to my life," but "I don't have that joy anymore." Ione described Denise as "sensitive, caring and compassionate," and she misses "her companionship and laughter" and "everything about her." (23 RT 5931.) Ione could not "adequately" tell the jurors what Denise's impact has been on her life, "but I know my life will never be the same again." (23 RT 5931-5932.)

The prosecutor asked Denise's father Dennis: "What was your life like before June Third, '91 when Denise disappeared and July 15, 1994 when you finally learned what happened to Denise?" (23 RT 5932-5933.) In response, Dennis said his world "was totally turned upside down" when she disappeared, and they went three years looking for her and not knowing what happened to her. He and his wife felt like they had been "kicked in the gut"; he "couldn't even get a breath," "couldn't eat, couldn't think of anything but Denise." It got worse every time a body or bones were found; "you just got sicker" and "never got well. You were just always sick." (23 RT 5933.) He described the stress as "so tremendous," two of his doctors described him as "a walking time bomb," and there were a lot of health problems. "I'm certainly not anything like I used to be." He has not "had focus" for six years, thinks of Denise every day, and cannot think of business or of "a lot of things but that." (23 RT 5934.)

Then the prosecutor specifically asked Dennis: "How has her murder impacted your life?" (23 RT 5934.) Dennis responded that "all

hope went out" when his daughter's body was found. (23 RT 5934-5935.) "Daddy's little girl was never going to come home. It was final. It was over." Some of the things about her life flashed before his eyes, including the night when she was born, when he was "so happy" and "I looked down and there was that immediate love and I was so proud and I had so much hope and that hope was gone. It was gone forever." He remembered coaching her in softball, "things like that, this growing up." They had a breakfast date every Friday, just the two of them, "and sit and talk about things and I will never forget that hour." (23 RT 5935.) But now "the bond" is "broken." (23 RT 5935-5936.) Denise had the ability to cheer up Dennis; her smile would make things better. The last thing Dennis can remember was a note Denise sent him at his office a day or two before her disappearance, in which she said "Hi dad. I love you. Have a great day. Love, Denise," with "a nice happy face that she always signed." Dennis "wouldn't take a million dollars for that little two by two piece of paper. I'll guarantee you that. I'll cherish that always." Dennis has a feeling inside of him "like this hole" and does not think it will ever "get filled up"; "that pain" is "there." Dennis concluded his testimony by saying that he and his wife inscribed on Denise's headstone, "Denise, you'll always be loved," and "that's true." (23 RT 5936.) Then, immediately afer defense counsel stated that they had no questions of Dennis Huber, the prosecutor announced: "Your Honor, the People rest our case in chief." (23 RT 5936.) At that point, approximately 2:30 p.m. on Thursday, May 29, 1997, the court recessed and sent the jurors home for a long weekend, until the following Monday, June 2. (23 RT 5937; see 24 RT 5938.)

The powerful emotional effect on a penalty jury of such painful, heart-rending personal testimony by the grieving parents of the deceased

victim is so inevitable and obvious that the prosecutor need not have said a word about it in his closing argument in order to achieve the desired impact of that evidence. Indeed, at least four and perhaps as many as six of the jurors were crying during the Hubers' testimony. (24 RT 5938-5940.)[88] Nevertheless, he did refer to the Hubers' testimony several times in argument to the jury. (See 27 RT 6584, 6592, 6616-6617, 6640-6641.) At two different points, he engaged in the clever rhetorical device of "paraleipsis," i.e., "suggesting exactly the opposite." (See *People v. Wrest* (1992) 3 Cal.4th 1088, 1107.) First, he told the jurors: "So you can't say to yourself, well, you know, he wasn't remorseful about this murder. *He kept the Hubers looking for their child.* That is an aggravating factor. In and of itself it is not, you can't do that. I won't be asking you to do that. And every time I talk in my argument about that period of time when he had her body, I am not saying that that is an aggravating factor. I need you to remember that. I am not saying that is an aggravating factor." (27 RT 6592; emphasis added.) Later in his argument, the prosecutor rhetorically asked the jurors whether the defendant had had "some type of [remorseful] conversion" after the crime and asked himself, "my God, what have I done?" (27 RT 6616.) Instead: "Nothing. . . . *Hubers looking for their daughter*; the articles he kept. That doesn't mean that lack of remorse can be used as an aggravating factor. I want to be really clear on that. But when you look at what their [defense counsel's] argument was about the [defendant's] sickness and about remorse, that certainly should weigh in

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[88] The trial court and counsel agreed on these numbers, and also that these jurors were "crying" in the sense that they had tears in their eyes (as opposed to audible sobbing or other noise). (*Ibid.*) According to the court, there was also "tearing in the audience." (24 RT 5939.)

there." (27 RT 6617; emphasis added.)

Finally, very near the end of his penalty-phase summation to the jury, the prosecutor more explicitly discussed and even quoted from the victim-impact testimony:

> "And then there is impact on the family. Not that we have to go any farther, we don't. That crime alone is enough.
>
> "I have tried to have words for this, and I am unable to do it, so I am not going to try, but I can just remind you of this, what Mr. Huber, what Dennis Huber said, and what Ione Huber said.
>
> "Ione Huber said: 'Our lives will never be the same. I know you have seen pictures of Denise, but I want to show you a picture of the real Denise. This is my daughter with her smile and her sense of humor. She brought so much joy to my life. I don't have that joy anymore. Denise was sensitive, caring and compassionate, and I miss her companionship and her laughter. I miss everything about her. And there is no way I can really just adequately tell you. I think I have only just touched on what impact it has been on my life, but I know my life will never be the same again.'
>
> "And Mr. Huber said: 'I have a feeling inside of me that there is like this hole that I don't think that is ever going to get filled up. It is just that pain. It is there.
>
> "'We inscribed on her headstone in South Dakota, we put there, "Denise, you will always be loved," and that is true.'
>
> "That is the impact. That is some of the impact." (27 RT 6640-6641.)

This closing argument was delivered by the prosecutor on June 16, 1997 (see 27 RT 6568, 6571), less than two weeks after the anniversary commemoration of Denise Huber's disappearance, of which at least one

trial juror learned from his daughter during appellant's trial. (See 6 CT 2136.)[89]

Regarding the inevitable effect of such victim-impact evidence, Justice O'Connor succinctly observed in *Payne, supra*--referencing a "brief statement" by a victim's relative--that "I do not doubt that the jurors were moved by this testimony--who would not have been?" (501 U.S. at pp. 831-832 (conc. opn. of O'Connor, J.).) But such an emotional impact would be far more pronounced here because of the community involvement in and awareness of the case--largely fed by the effective persistence of the Hubers themselves--including fliers, posters, bumper stickers, pins with Denise's picture on them, the banner near the freeway with her picture and asking for help, and even a banner airplane, all of which served to continually pique people's interest and keep the story alive. Denise and her parents were very personalized by the media, and the community knew them and essentially carried out a vigil for them.

Dr. Bronson emphasized in his testimony at the venue hearing that victim-impact testimony is very powerful, particularly when it comes from people with whom we can identify, and is particularly prejudicial. Such

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[89] The penalty instructions delivered to the jurors two days later expressly informed them that "[i]n determining which penalty is to be imposed on the defendant, . . . [y]ou shall consider, take into account and be guided by the following factors if applicable: (A) . . . The impact of the crimes on the family of the victim. . . ." (27 RT 6762-6763.)

Both the oral version of this instruction, quoted above, and the written version subsequently given to the jurors inexplicably used the plural of "crime" in describing this factor that they could consider in determining the penalty to be imposed on the defendant, even though he was charged with and convicted of only a single crime: ". . . the impact of the *crimes* on the family of the victim. . . ." (8 CT 2679; emphasis added.)

victim and family publicity creates feelings and biases which are very difficult to set aside even with one's best good-faith efforts to do so. He noted that the publicity in this case included coverage of a series of memorials, funerals and dedications that were deeply touching and sad; at one such memorial service, the police chief of Costa Mesa was shown crying while delivering a eulogy for Denise. (7 RT 2048-2049.) Dr. Bronson cogently and accurately predicted that, although some sympathy for the victim and her family would be present wherever the case was tried, the disappearance itself would make a trial in Orange County different. This is what he termed the "salience" factor, how people relate the story to their own lives which impacts their ability to remember it and increases the potential for prejudice. This case had a very high salience index in Orange County because people there lived through it, which is different than just learning of it for the first time in court, as would be the situation if the case were tried in a different county. (7 RT 2050-2052, 2105-2106.)

The victim-impact testimony by Denise Huber's parents predictably dovetailed with what so much of the venire and the actual trial jurors themselves had heard, knew, and--most importantly--*felt* about the case before they were called to serve. A juror who already knew about the parents' efforts to find their daughter, or one who was reminded about her fears for her own safety every time she passed the banner, or who had an emotional bond with the Hubers because of their desperate search and had internalized that information, or who even felt such a strong personal reaction to the banner that she wished she had the power to actually find Denise and bring her home, would quite naturally be especially receptive to and influenced by the emotionally-charged testimony of the parents with whom they were already so empathetic. Their latent or overt feelings of

outrage and frustration, if not outright hatred and desire for vengeance, would likely have inhibited their ability to dispassionately arrive at their penalty determination. In short, such an improper resort to emotion would make for an arbitrary penalty judgment. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358 ["It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion."].) The victim-impact evidence presented here, in the context of the widespread publicity about, and resultant county-wide sympathy for, the unfortunate parents of the victim, capriciously biased the penalty jury in favor of those who happened to grieve the most, or best, in the eyes of the community and the trial jurors. (See *State v. Carter* (Utah 1995) 888 P.2d 629, 652; *Livingston v. State* (Ga. 1994) 444 S.E.2d 748, 760-761 (dis. opn. of Benham, P.J.).)

The trial court itself recognized that the victim-impact testimony in this case was, indeed, much more emotionally affecting than would exist even in the normal family-empathy situation. At the penalty-modification hearing, the court summarized that evidence as follows:

> ". . . Under 190.3(A) the victim impact evidence in this case, and we have other cases to compare it with, the victim impact evidence in this case was *quite substantial* for both parents. There was panic when the daughter did not return home. Phone calls were made. A search conducted, the car was found without the daughter. Both parents testified they were in shock. They described it differently, but shock is a fair adjective or word to describe their feelings.
>
> "It is without argument that *they made extraordinary efforts to locate their daughter*. Both parents had difficulty with their work, eating, sleeping, but they always had hope. They went though years of not knowing. These were years of

> worry and hope. That certainly is aggravating." (27 RT 6811; emphasis added.)

Then, after defense counsel, like the court, characterized the victim-impact evidence here as "substantial" (27 RT 6811-6812), the court expressed its agreement by making the following unarguable observation about that evidence: "It was substantial, and we are not minimizing the impact that any death would have on any parent. I know nobody is doing that. *But extraordinary in this case*." (27 RT 6812; emphasis added.)

Both the "extraordinary" victim-impact evidence and the "extraordinary" victim-impact pretrial publicity were extraordinarily prejudicial to appellant. Whether considered separately or together, he was denied a fair trial and a reliable penalty determination. (See *Payne v. Tennessee, supra*, 501 U.S. at p. 825 ["In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."].)

Here, the very rationale for the ex post facto prohibition as articulated in *Carmell v. Texas, supra*, was realized to appellant's substantial detriment. The state's after-the-fact refusal to play by its own rules, and its alteration of them in a way advantageous only to them, was grossly unfair and undeniably made it much easier to obtain a death judgment than if they had proceeded without the devastatingly emotional victim-impact testimony of Denise Huber's grieving parents. Whether or not there is technically a burden of proof upon the prosecution to obtain a death verdict, the penalty jurors did have to find that the aggravating circumstances were so substantial in comparison to the mitigating circumstances that death was warranted. (See 8 CT 2687; 27 RT 6769

[penalty instructions]; CALJIC No. 8.88.) In this inherently "moral" and "normative" determination (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1037), the retroactive change in the law to permit victim-impact evidence at the penalty phase most certainly "reduce[d] the quantum of evidence necessary to meet" (*Carmell, supra*, 529 U.S. at p. 541) that subjective standard. This ex post facto violation undercut the reliability of the penalty determination and requires reversal of appellant's death judgment under any appropriate standard of appellate review. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 447-448.)

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VIII

THE TRIAL COURT ERRONEOUSLY, UNCONSTITUTIONALLY AND PREJUDICIALLY FAILED TO INSTRUCT THE JURY ON THE APPROPRIATE USE OF VICTIM-IMPACT EVIDENCE

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. (*People v. Murtishaw* (1989) 48 Cal.3d 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct sua sponte on those principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

In this case, the trial court breached its instructional obligation by failing to instruct the jury on the proper use of victim-impact evidence. The victim's parents--Ione and Dennis Huber--testified for the prosecution as victim-impact witnesses in the most gut-wrenching manner imaginable. (23 RT 5928-5936.) Taken together, their testimony inevitably had a strong emotional effect on the jury, especially in light of the massive pretrial publicity about the Hubers and their daughter, and the knowledge of it by actual trial juror themselves. This evidence has been previously described in detail (see Statement of Facts, *ante*, at pp. 25-26, and Argument VII, at pp. 270-273, *ante*, both incorporated herein by this reference), and need not be repeated here. Suffice it to say that the trial judge--with no disagreement from defense counsel or the prosecutor--characterized the victim-impact evidence in this case as not only "quite substantial" when compared to other

cases, but in fact "extraordinary." (27 RT 6811-6812.)

Given the emotional and extraordinarily heart-rending testimony of the victim's parents, it is a gross understatement to say that there was a very real danger that emotion would overcome the jurors' reason, preventing them from making a rational penalty decision, unless--assuming arguendo that *anything* could reasonably have presented that result--the trial court gave them guidance on how the victim-impact evidence should be used. An appropriate limiting instruction was necessary for the jury's proper understanding of the case, and therefore it should have been given on the court's own motion. (See generally *People v. Koontz*, *supra*, 27 Cal.4th at p. 1085; *People v. Breverman*, *supra*, 19 Cal.4th at p. 154; *People v. Murtishaw*, *supra*, 48 Cal.3d at p. 1022.)

"Because of the importance of the jury's decision in the sentencing phase of a death penalty trial, it is imperative that the jury be guided by proper legal principles in reaching its decision." (*Turner v. State* (Ga. 1997) 486 S.E.2d 839, 842.) "Allowing victim impact evidence to be placed before the jury without proper limiting instructions has the clear capacity to taint the jury's decision on whether to impose death." (*State v. Hightower* (N.J. 1996) 680 A.2d 649, 661.) "Therefore, a trial court should specifically instruct the jury on how to use victim impact evidence." (*State v. Koskovich* (N.J. 2001) 776 A.2d 144, 181.)

The highest courts of Oklahoma, New Jersey, Tennessee, and Georgia have held that, in every case in which victim-impact evidence is introduced, the trial court must instruct the jury on the appropriate use, and admonish the jury against the misuse, of the victim-impact evidence. (*Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 829; *State v. Koskovich*, *supra*, 776 A.2d at p. 181; *State v. Nesbit* (Tenn. 1998) 978

S.W.2d 872, 892; *Turner v. State*, *supra*, 486 S.E.2d at p. 842.) The Supreme Court of Pennsylvania has recommended delivery of a cautionary instruction. (*Commonwealth v. Means* (Pa. 2001) 773 A.2d 143, 159.)

Although the language of the required instruction varies in each state, depending upon the role victim-impact evidence plays in that state's statutory scheme, common features are an explanation of how the evidence can properly be considered and the admonition not to base a decision on emotion or the consideration of improper factors. An appropriate instruction for California would read as follows:

> "Victim impact evidence is simply another method of informing you about the nature and circumstances of the crime in question. You may consider this evidence in determining an appropriate punishment. However, the law does not deem the life of one victim more valuable than another; rather, victim impact evidence shows that the victim, like the defendant, is a unique individual. Your consideration must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence. Further, you must not consider in any way what you may perceive to be the opinions of the victim's survivors or any other persons in the community regarding the appropriate punishment to be imposed."

The first four sentences of this instruction duplicate the instruction suggested by the Supreme Court of Pennsylvania in *Commonwealth v. Means*, *supra*, 773 A.2d at page 159. The last sentence is based on *State v. Koskovich*, *supra*, 776 A.2d at page 177.[90] It is difficult to conceive of a

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[90] In *State v. Koskovich*, *supra*, the New Jersey Supreme Court held:

> "We are mindful of the possibility that some jurors will assume that a victim-impact witness prefers the death penalty when otherwise silent on that question. To guard

(continued...)

factual situation in which this instruction would have been more appropriate, and necessary, than in the instant case.

This Court addressed a different proposed limiting instruction in *People v. Ochoa* (2001) 26 Cal.4th 398, 445, and held that the trial court properly refused that instruction because it was covered by the language of CALJIC No. 8.84.1, an instruction which was also given in this case (8 CT 2670; 27 RT 6756).[91] However, CALJIC No. 8.84.1 does not cover any of the points made by the instruction proposed here. It does not tell the jurors why victim-impact evidence was introduced. It does not caution the jurors against an irrational decision. Nor does it warn the jurors not to consider

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[90](...continued)
against that possibility, trial courts should instruct the jury that a victim-impact witness is precluded from expressing an opinion on capital punishment and, therefore, jurors must draw no inference whatsoever by a witness's silence in that regard." (776 A.2d at p. 177.)

[91] The version of CALJIC No. 8.84.1 given to appellant's jury read as follows:

> "You will now be instructed as to all of the law that applies to the penalty phase of this trial.
>
> "You must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise. You must accept and follow the law that I shall state to you. Disregard all other instructions given to you in other phases of this trial.
>
> "You must neither be influenced by bias or prejudice against the defendant, nor swayed by public opinion or public feelings. Both the People and the Defendant have a right to expect that you will consider all of the evidence, follow the law, exercise your discretion conscientiously, and reach a just verdict." (8 CT 2670; 27 RT 6756.)

what they may perceive to be the opinions of the victim-impact witnesses--a clearly improper factor.[92] (*Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2; *People v. Pollock* (2004) 32 Cal.4th 1153, 1180; *People v. Smith* (2003) 30 Cal.4th 581, 622.) Nor does it admonish them not to employ the improper--but, in this case, likely-employed--factor of vengeance in their penalty determination. (See, e.g., *Drayden v. White* (9th Cir. 2000) 232 F.3d 704, 712-713 [prosecutor's "role is to vindicate the public's interest in punishing crime, not to exact revenge on behalf of an individual victim"].)

CALJIC No. 8.84.1 does contain the admonition: "You must neither be influenced by bias nor prejudice against the defendant, nor swayed by public opinion or public feelings," but the terms "bias" and "prejudice" evoke images of racial or religious discrimination, not the intense anger or sorrow that victim-impact evidence is likely to produce. The jurors would not recognize those entirely natural emotions as being covered by the reference to bias and prejudice. Nor would they understand that the admonition against being swayed by "public opinion or public feeling" also prohibited them from being influenced by the private opinions of the victim's relatives, or by any exhortation to seek vengeance on behalf of the victim's family or society as a whole.

In every capital case, "the jury must face its obligation soberly and

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[92] Here, the prosecutor stated during voir dire, in front of all of the eventual trial jurors, that "closure could be part of the victim impact under the 'A' factor." (15 RT 3930.)

Also, one of the originally-selected trial jurors stated, in the presence of about seven other prospective jurors when they were filling out the questionnaires, that she had heard that "Denise's parents were going to be here today," and that "definitely the family needs closure." (16 RT 4390.)

rationally, and should not be given the impression that emotion may reign over reason." (*People v. Haskett* (1982) 30 Cal.3d 841, 864.) The limiting instruction proposed here would have conveyed that message to the jury; none of the instructions given at the trial did. Consequently, there was nothing to stop raw emotion and other improper considerations, including vengeance and the both publicized and clearly-implicit wishes of the victim's family, from tainting the jury's decision. The failure to deliver an appropriate limiting instruction violated appellant's right to a decision by a rational and properly-instructed jury, his due process right to a fair trial, and his right to a fair and reliable capital penalty determination. (U.S. Const., 6th, 8th & 14th Amends.; Cal. Const., art. I, §§ 7, 15, 16, & 17.)

The violations of appellant's federal constitutional rights require reversal unless the state can show that they were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The violations of appellant's state rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) In view of the substantial and extraordinarily emotional nature of the victim-impact evidence presented in this case--in the wake of the extraordinary victim-impact pretrial and even in-trial publicity--the trial court's instructional error cannot be considered harmless, and therefore reversal of the death judgment is required.

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IX

THE TRIAL COURT COMMITTED REVERSIBLE ERROR, AND VIOLATED APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A RELIABLE PENALTY DETERMINATION, BY ERRONEOUSLY SUSTAINING THE PROSECUTION OBJECTION TO MITIGATING EVIDENCE RELATING TO THE CHILDHOOD MOLESTATION OF APPELLANT BY HIS OLDER BROTHER

A. Introduction

No principle of capital jurisprudence is more zealously and consistently protected than a defendant's right to present mitigating evidence. Under the Eighth and Fourteenth Amendments, "the sentencer . . . [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." (*Lockett v. Ohio* (1978) 438 U.S. 586, 604, original emphasis [fns. omitted]; accord, e.g., *Green v. Georgia* (1979) 442 U.S. 95, 97; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 113-114; *Skipper v. South Carolina* (1986) 476 U.S. 1,4; *Penry v. Lynaugh* (1989) 492 U.S. 302, 318; *Boyde v. California* (1990) 494 U.S. 370, 377, 378; *McKoy v. North Carolina* (1990) 494 U.S. 433, 441; *Tennard v. Dretke* (2004) 542 U.S. 274, 284-285.) "'[V]irtually no limits are placed on the relevant mitigating evidence a capital defendant may introduce concerning his own circumstances." (*Tennard, supra*, 542 U.S. at p. 285, quoting *Payne v. Tennessee* (1991) 501 U.S. 808, 822, and *Eddings, supra*, 455 U.S. at p. 114.)

The United States Supreme Court recently emphasized that, in addressing the relevance standard applicable to mitigating evidence in

capital cases, it has spoken "in the most expansive terms." (*Tennard, supra*, 542 U.S. at p. 284.) This "low threshold for relevance" (*id.* at p. 285) is satisfied by "evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value" (*id.* at p. 284 [internal quotation marks omitted]; *Smith v. Texas* (2004) 543 U.S. 37, 44). Mitigating evidence includes evidence that raises inferences which "would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.'" (*Skipper, supra*, 476 U.S. at pp. 4-5, citing *Lockett, supra*, 438 U.S. at p. 604.)

In the instant case, the trial court sustained the prosecutor's hearsay objection when defense counsel asked appellant's sister Marion, after she had testified that their older brother Warren (a convicted child molester) had attempted to fondle her: "Did John Famalaro [appellant] ever report to you Warren doing anything like that to him?" (24 RT 6147-6148.) This ruling, which was clearly erroneous under California law, resulted in the exclusion of relevant and critical mitigating evidence, and violated appellant's rights to due process and an individualized and reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and their California counterparts (Cal. Const., art. I, §§ 7, 15 & 17), as well as California statutory law, and requires reversal of the death judgment. (See, e.g., *Skipper, supra*, 476 U.S. at pp. 8-9.)[93]

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[93] The record strongly suggests that the trial court had improperly pre-judged this evidentiary issue long before it actually arose at trial. During jury selection, the court informed a prospective juror who had mentioned having heard that appellant's brother may have molested or abused children that "you are not going to hear any evidence about any

(continued...)

B. The Proffered Testimony of Appellant's Sister Was Admissible for Relevant Non-Hearsay Purposes As Critical Mitigating Evidence, Both As an Affirmative Part of Appellant's Penalty Case and to Rebut or Forestall the Prosecution's Case in Aggravation

The only prosecutorial objection to defense counsel's question to Marion Thobe was "calls for hearsay" (24 RT 6148), and the trial court immediately "sustained" that specific objection (*ibid.*). No objection was made on any other grounds--e.g., lack of relevance, Evidence Code section 352, improper mitigating evidence--nor could any such grounds reasonably have been invoked. Thus, in terms of California law, the only appellate issue regarding the propriety of the court's exclusionary ruling is whether defense counsel's question called for inadmissible hearsay. Clearly, it did not.

Shortly after this ruling by the court sustaining the prosecutor's objection, defense counsel elicited testimony from Marion that her brother (appellant) had made a phone call to her one time in June of 1991 "that disturbed me"; that his demeanor during that call was "very emotional, very tearful" and he was crying; that the subject matter of the conversation had to do with things that had happened years earlier; and that she was concerned about her brother's emotional state after talking to him. (24 RT 6156-6157.) At the first subsequent break in the proceedings, and in the jury's absence, defense counsel reiterated that the statement she had attempted to elicit from Marion was "made by Mr. Famalaro to his sister in

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[93](...continued)
brother or about anybody else doing anything for obvious reasons." Then, when defense counsel interjected, "at least at the guilt phase," the court replied:
"At least--*probably ever*." (15 RT 3986; emphasis added.)

a telephone call in 1991." (24 RT 6160.) Defense counsel then made an "offer of proof . . . that the answer to that question would be that Mr. Famalaro in a tearful, emotional state told his sister for the first time that his brother, Warren Famalaro had molested him when they were children." (*Ibid.*) Defense counsel argued that this evidence was being offered for "nonhearsay reasons." (24 RT 6161.) Analogizing to *People v. Brown* (1994) 8 Cal.4th 746, "a fresh complaint case," defense counsel explained that one non-hearsay purpose for the statement "is to let the jury know that he [appellant] reported it, and when he reported it and the emotional state in which he reported it because I think it is of importance given it was the month of this killing." (24 RT 6161.) When the court noted that "this is in 1991," defense counsel acknowledged that "it is not a fresh complaint, and I am not saying that it is," and then, in response to another inquiry by the court as to "the nonhearsay purpose" (*ibid.*), further explained that purpose:

> "To indicate that in a period of time very close to or within the same month when he committed this murder he is having an emotional conversation with his sister in which for the first time he says something to his sister about him being molested as a child.
>
> "It is an indication that the killing affected him. It is evidence that he was not--you know, the picture that has been painted is that this was an enjoyable experience for him. He went and faced the world the way he always had. He had this trophy at home, and that is not what is happening." (24 RT 6161-6162.)

After hearing this explanation, the court told defense counsel that "the problem with your offer is that the statement Warren molested him doesn't do any more than the rest of the conversation without that statement has already done. He was emotional--" (24 RT 6162.) Defense counsel

responded by offering a second, albeit related, purpose for the proffered evidence:

> "Well, I think it indicates that he--I mean, I think what I would argue is that it indicates the fact that he is bringing this issue up to Marion, that he never talked to her about it before means that he has committed this horrible act, he realizes he has committed this horrible act, and he is trying to get in touch with what would cause him to do that.
>
> "I don't think it is coincidence that he makes this statement to her around this same period of time. It would have--if it were made five years earlier or five years later, I think I would be hard pressed to argue the relevance." (*Ibid.*)

The court replied that "that is one way I suppose of proving that Warren had molested your client, but there are other ways of proving it. The emotional part is already in." After noting that it understood the *Brown* case and "the difference between hearsay and nonhearsay," and that it admits statements "with an admonition to the jury when appropriate," the court found that "this is not an appropriate request," and "denied" the defense proffer. (24 RT 6162-6163.)

The court's ruling was erroneous. Despite its assertion that "I understand the difference between hearsay and nonhearsay" (24 RT 6162), the court betrayed its misunderstanding of the defense proffer by assuming that the evidence was being offered for the hearsay purpose "of proving that Warren had molested your client" (*ibid.*). As can readily be seen from the above-quoted excerpts from the hearing on this evidentiary issue, defense counsel could not have made it clearer that the evidence was being offered for "nonhearsay reasons" (24 RT 6161), which she proceeded to detail in understandable language (see 24 RT 6161-6162). Defense counsel was legally correct in asserting that the proffered evidence was admissible for

relevant non-hearsay purposes, as critical evidence both in mitigation and to rebut and forestall the prosecution's case in aggravation.

Appellant's "tearful, emotional" (24 RT 6160) statement to his sister was non-hearsay circumstantial state-of-mind evidence. It was "a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind," and therefore "not hearsay." (*People v. Ortiz* (1995) 38 Cal.App.4th 377, 389; see also *People v. Cox* (2003) 30 Cal.4th 916, 963; *People v. Melton* (1988) 44 Cal.3d 713, 740, fn. 9; *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 591; *People v. Nealy* (1991) 228 Cal.App.3d 447, 451-452; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098, 1131, disapproved on other grounds in *People v. Brown, supra*, 8 Cal.4th 746 [3-year-old girl's statements that her father had molested her held admissible as non-hearsay circumstantial evidence of her belief that he had hurt her and a dislike and fear of him based on that belief, where her state of mind with regard to her father was relevant to the issues in the case; "[w]hether the statement is true or not is irrelevant to this use of the statement"]; 1 Witkin, *Cal. Evidence* (4th ed. 2000) Hearsay, §§ 37-39, 198, pp. 719-721, 915.) Marion's testimony would have described appellant as sounding "emotional" and "tearful," and crying, rather than quoting appellant as "directly declar[ing]" his "mental state." (*People v. Ortiz, supra*, 38 Cal.App.4th at p. 389.) As such, it was being offered *not* "to prove the truth of the matter stated" (Evid. Code, § 1200), "but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind" at the time it was made (*Ortiz, supra*, 38 Cal.App.4th at p. 389).

The evidence was offered, first, to show how, "very close" to the time "when he committed this murder[,] . . . the killing affected him." (24

RT 6161.) In turn, it strongly tended to rebut or forestall the prosecution theory that, because appellant kept the victim's body--"this trophy at home" (24 RT 6161-6162)--and "went and faced the world the way he always had," "this was an enjoyable experience for him" (24 RT 6161).[94] Thus, the proffered evidence was highly relevant because appellant's state of mind "was clearly at issue in this trial." (*People v. Cox, supra*, 30 Cal.4th at p. 963 ["nonhearsay circumstantial evidence of [a prosecution witness's] state of mind" held admissible because "[t]he defense heavily attacked her credibility"].) Given this defense-rebuttal purpose of the proffered evidence, it mattered not at all whether appellant had in fact been molested by his brother. He was distraught, i.e., "the killing affected him" (24 RT 6161), at least in part because his mind had conjured up the memory of having been molested by his own brother as a child. While the court's observation that "the emotional part is already in" without the content of the statement may be true, as defense counsel acknowledged (24 RT 6162), without that content and context the jury would have no way of knowing *why* appellant was so emotional in his phone call to his sister. For all the jury would have known, appellant might have been so upset because his business was failing--a scenario which was in evidence (see 25 RT 6372-6375)--or perhaps because he had been rejected by yet another girlfriend (see Statement of Facts, *ante*, at pp. 19-22, 24-25, 33-35). Without the context of and explanation for appellant's emotional and tearful state, there would be no *mitigating* effect to such evidence of his emotional state, i.e., that appellant's retention of the body and his business-as-usual behavior did

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[94] The prosecutor had introduced this "trophy" theory to the jury during his guilt-phase summation. (See 22 RT 5515, 5703-5705.)

not--as the prosecution maintained--show that the killing was "an enjoyable experience for him" or at least one that did not adversely affect him emotionally. Thus, the excluded evidence could not plausibly be characterized as "cumulative" (*Skipper, supra*, 476 U.S. at pp. 7-8), if that is what the court was in fact ruling. In any event, the fact that "the emotional part is already in" was completely irrelevant to a determination of whether the proffered testimony called for *hearsay*, or whether it was admissible for that *non-hearsay purpose*.

But even if (arguendo) the court's "the emotional part is already in" rationale passes logical muster with respect to the defense-rebuttal non-hearsay purpose, it certainly would not do so with respect to defense counsel's other stated non-hearsay purpose. Besides the irrelevance of this consideration to a ruling on a *hearsay* objection, the fact that appellant "realizes he has committed this horrible act" and "is trying to get in touch with what would cause him to do that" (24 RT 6162) could not conceivably be conveyed to the jury merely by telling them that he had made an emotional phone call to his sister shortly after he had committed the crime. The potential mitigating effect, upon a jury deciding whether to extinguish appellant's life, of evidence that the defendant was engaged in self-analysis, trying to come to grips with having committed such a horrific act and, by implication, remorseful, is obvious and substantial. Again, the "truth" of whether appellant was in fact molested by his brother was not essential to the viability of this defense theory and to "serv[ing] as a basis for a sentence less than death." (*Skipper, supra*, 476 U.S. at pp. 4-5.) By excluding plainly relevant and affirmatively mitigating evidence, the court barred the consideration of evidence which the sentencer could reasonably have found "'warrants a sentence less than death.'" (*Tennard, supra*, 542 U.S. at p.

285, quoting *McKoy, supra*, 494 U.S. at p. 441.) Similarly, by excluding clearly relevant evidence which would have both directly and indirectly rebutted the prosecution's case in aggravation, the court barred the consideration of evidence which tended logically to "prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value." (*Ibid.*; *Smith v. Texas, supra*, 543 U.S. at p. 44.)

Finally, the evidence of appellant's statement, if properly admitted for its non-hearsay purpose as circumstantial evidence of his mental state, would not have unfairly prejudiced the prosecution's penalty case because--as the trial court apparently recognized (see 24 RT 6162)--it would have been accompanied by a limiting instruction, i.e., that "the declaration is not received for the truth of the matter stated and can only be used for the limited purpose for which it is offered." (*Ortiz, supra*, 38 Cal.App.4th at p. 389, citing Evid. Code, § 355).[95]

In sum, because the proffered evidence was plainly admissible under the California Evidence Code, and because, as a result of the trial court's erroneous ruling, the penalty jurors were not "'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 [emphasis added], quoting *Jurek v. Texas* (1976) 428 U.S. 262, 271), the exclusion of appellant's proffered evidence violated appellant's fundamental constitutional rights as well as state law.

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[95] Section 355 in pertinent part provides that "[w]hen evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly."

C. Appellant Had a Federal Constitutional Right to Present the Proffered Evidence in Mitigation

Even if (arguendo) it could somehow be said that the prosecution's hearsay objection was well-taken under California law, the proffered testimony of appellant's sister Marion was erroneously excluded as a matter of federal constitutional law. "'[T]he hearsay rule may not be applied mechanistically to defeat the ends of justice.'" (*Green v. Georgia* (1979) 442 U.S. 95, 97, quoting *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see, e.g., *Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997, 1006; *People v. Weaver* (2001) 26 Cal.4th 876, 980-981.) Thus, "[r]egardless of whether the proffered testimony comes within [the state's] hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment" because "[t]he excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." (*Green, supra*, 442 U.S. at p. 97.)

In *Green v. Georgia, supra*, the United States Supreme Court held that a capital defendant had been denied a fair trial by the exclusion of proffered defense evidence which was deemed relevant to a critical issue at the punishment phase of the trial and where "substantial reasons existed to assume its reliability." (*Ibid.*) This decision is rooted in an accused's Sixth and Fourteenth Amendment rights to present a defense and to confront the evidence and witnesses against him. (See *Chambers v. Mississippi, supra*, 410 U.S. 284; *Washington v. Texas* (1967) 388 U.S. 14, 23; *Newman v. Hopkins* (8th Cir. 2001) 247 F.3d 848, 853; *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062.) Simply put, "the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, quoting *California*

v. Trombetta (1984) 467 U.S. 479, 485; *Chia v. Cambra, supra*, 360 F.3d at p. 1003.) To this end, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." (*Chambers, supra*, 410 U.S. at p. 302; *Taylor v. Illinois* (1988) 484 U.S. 400, 408.)

Additionally, the mandate of the Eighth and Fourteenth Amendments that "the sentencer in a capital case not be precluded from considering any relevant mitigating evidence . . . contemplates the introduction of a broad range of evidence mitigating imposition of the death penalty." (*People v. Frye, supra*, 18 Cal.4th at p. 1015, quoting *Lockett v. Ohio, supra*, 438 U.S. at p. 604; citing, inter alia, *Payne v. Tennessee* (1991) 501 U.S. 808, 820-821.) Further, the Due Process Clause of the Fourteenth Amendment "prohibits a defendant from being sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'" (*Frye, supra*, 18 Cal.4th at p. 1017, quoting *Gardner v. Florida* (1977) 430 U.S. 349, 362.)

Here, in excluding the evidence of appellant's tearful, emotional statement to his sister, the court applied its understanding of California's evidentiary rules unfairly to prevent appellant from presenting evidence critical to his efforts to avoid a death verdict. Appellant has previously detailed both the relevance and importance of the proffered evidence to him, both as affirmative evidence in mitigation and to rebut or forestall the prosecution's case in aggravation (see Section B, *ante*), and appellant will not repeat that discussion. Suffice it to say that the court's ruling undeniably precluded the jury from hearing and considering "all relevant evidence" as to "why a death sentence . . . should not be imposed" (*Frye, supra*, 18 Cal.4th at p. 1015) and, specifically, "relevant mitigating evidence" (*ibid.*) and evidence designed "to counter the prosecution's

argument[s]" (*id.* at p. 1017). In short, since appellant was "precluded from introducing evidence rebutting the prosecution's argument in support of the death penalty, fundamental notions of due process [were] implicated" (*ibid.*). In the absence of the proffered evidence, the prosecution was free to make the unencumbered argument to the penalty jurors that appellant had no remorse or even misgivings about his behavior or appreciation for the horrific nature of his crime, went about his business as usual after the crime, kept the victim's body as a "trophy," and similar arguments--which, unsurprisingly, is precisely what the prosecutor did (see Section D, *post*).

Further, "substantial reasons existed to assume the reliability" of the proffered but excluded evidence. (*Green, supra*, 442 U.S. at p. 97.) Clearly, appellant did not make the statement to, for example, prepare for litigation, manufacture evidence, or for some other self-serving purpose. (See, e.g., *People v. Escobar* (2000) 82 Cal.App.4th 1085, 1104 ["Nothing in the circumstances of [the eventual murder victim's] conversation with [her friend] suggested a motive to misrepresent or manufacture evidence"].) Instead, he was "confiding in" *(ibid.)* his own sister, and made the phone call to his sister shortly after the crime was committed--i.e., "within the same month" (24 RT 6161)--and therefore at a time when he was neither suspected of having committed it nor had any reasonable prospect of being apprehended, much less arrested or tried for it. He made the call in such a highly emotional state that it "disturbed" his sister (24 RT 6156-6157), and he was describing a painful recent revelation which, in his mind, may have accounted for his otherwise inexplicable horrific actions committed "very close" to the time of the phone call (24 RT 6161). As such, reasons to assume the reliability of his statement revealing his brother's childhood molestation of him are similar in nature to the rationale underlying the

"spontaneous statement" and "prior consistent statement" exceptions to the hearsay rule. (See Evid. Code, §§ 1240 [a statement which "purports to narrate, describe, or explain an act, condition, or event perceived by the declarant" and which was "made spontaneously while the declarant was under the stress of excitement caused by such perception"] and 1236.) Stated differently, appellant had no apparent motive to fabricate such a revelation at that time (see Evid. Code, § 791(b); *People v. Bolin* (1998) 18 Cal.4th 279, 321; *People v. Cannady* (1972) 8 Cal.3d 379, 388), and the highly emotional state in which it was made undermines any conceivable speculation that there was any such motive (see, e.g., *People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Farmer* (1989) 47 Cal.3d 888, 902-905.) In short, "there was no reason to believe that [appellant] had any ulterior motive in making it." (*Green, supra*, 442 U.S. at p. 97.)

Moreover, when one rationally "balance[s] the importance of the evidence to the defense against the interests the state ha[d] in excluding the evidence" (*Ellis v. Mullin* (10th Cir. 2003) 326 F.3d 1122, 1128), the erroneous and unconstitutional nature of the court's ruling becomes even more evident (see *id.* at pp. 1128-1130). First of all, had the proffered evidence properly been admitted for its described non-hearsay purposes, it would not even have been considered for its truth, and thus appellant could not have argued that appellant was actually molested by his brother as a child. But even assuming it could be deemed hearsay evidence under California law, what significant or substantial--much less legitimate--interest would the prosecution have had in keeping the jury from hearing the evidence that appellant had been molested by his brother and, upon deciding that appellant's statement to his sister was true and that it was revealed to her while he was in a highly emotional state, considering it on

the question of whether appellant should live or die? And what legitimate interest would the state of California have in executing someone whose jury was denied such obviously and extremely relevant mitigating evidence? Appellant submits that these questions answer themselves. Conversely, having his jurors consider such information in their penalty determination just as obviously would have permitted them to "'reasonably find that it warrants a sentence less than death'" (*Tennard, supra*, 542 U.S. at p. 285, quoting *McKoy, supra*, 494 U.S. at p. 441), and to do so even if appellant could not have established "a nexus" between the childhood molestation by his brother and appellant's crime itself (see *Smith, supra*, 543 U.S. at p. 45; *Tennard, supra*, 542 U.S. at p. 287).[96] In short, "California's interest in excluding [the] statements was minimal, while the importance of the evidence to [appellant] was immense." (*Chia v. Cambra, supra*, 360 F.3d at p. 1006.) For this reason and the others discussed above, the trial court violated appellant's due process rights by excluding the proffered evidence, even if it were properly deemed otherwise inadmissible hearsay under state law.

D. The Exclusion of the Proffered Evidence Requires Reversal of the Death Judgment

The fundamental constitutional command that capital sentencing be individualized and reliable can be accomplished only if the jury is presented with "all possible relevant information about the individual defendant whose fate it must determine." (*Jurek v. Texas, supra*, 428 U.S. at p. 276

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[96] The trial court, at the penalty-modification hearing, expressly acknowledged the harm to appellant from the jury not learning that he had been sexually molested by his brother: "We could tell that when the brother was testifying that Mr. Famalaro was hurt by what his brother refused to say on the witness stand. Quite obvious." (27 RT 6805-6806.)

[opn. of Stewart, Powell and Stevens, JJ.].) As this Court has emphasized, Eighth Amendment reliability requires that "the trier of penalty has duly considered the relevant mitigating evidence, if any, which the defendant has chosen to present." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1228.) Accordingly, a death judgment cannot stand if the trier of penalty has not fully considered all mitigating circumstances. (E.g., *Smith v. Texas, supra*, 543 U.S. at p. 48; *Penry v. Johnson* (2001) 532 U.S. 782, 804; *Penry v. Lynaugh, supra*, 492 U.S. at pp. 327-328; *Mills v. Maryland* (1988) 486 U.S. 367, 384; *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399; *Skipper v. South Carolina, supra*, 476 U.S. at p. 8; *Eddings v. Oklahoma, supra*, 455 U.S. at pp. 105, 113-117; *Lockett v. Ohio, supra*, 438 U.S. at pp. 608-609; see also *People v. Lucero* (1988) 44 Cal.3d 1006, 1031-1032; *Armstrong v. Dugger* (11th Cir 1987) 833 F.2d 1430, 1436.) In the instant case, the exclusion of the above-described proffered testimony prevented the penalty phase from functioning reliably and therefore requires reversal of the death judgment under the Eighth Amendment.

The same result is required even upon application of a harmless-error standard. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Lucero, supra*, 44 Cal.3d at pp. 1026-1027, 1032.) The prosecution introduced evidence of only minimal prior criminal activity under factor (b), and no prior convictions or arrests, and appellant "offered a substantial showing in mitigation" (*id.* at p. 1032) which the trial court recognized in its comments at the penalty-modification hearing (see 27 RT 6805-6809). Appellant's case in mitigation included considerable evidence of his childhood experiences of rejection and isolation both from his family and his peer group, and severe psychological abuse from his mother, with her "just off the board" attitudes regarding "sex, pornography and politics"

(27 RT 6805 [court's words] as well as religion, which were heavy-handedly and insensitively imposed upon appellant and resulted in "mental and emotional scars" to him (*ibid.*). It also included evidence of many acts of kindness toward family, friends, and strangers. (See 27 RT 6806-6808 [court's findings].) Although the jurors were aware that appellant's brother was a convicted child molester, and that such behavior was unsurprising in view of their mother's obsessive and destructive sexual attitudes, they had no idea that shortly after appellant had committed "this horrible act" for which the prosecution was asking the jurors to extinguish his life, he was "trying to get in touch with what would cause him to do that" (24 RT 6162); and that, contrary to the prosecution's theory, "the killing affected him" in a very emotional way rather than him having the cavalier attitude about it as depicted by the prosecution (24 RT 6161-6162). And, if (arguendo) the proffered evidence is properly deemed hearsay but admissible under the principles of *Green v. Georgia, supra*, the jurors would additionally have been able to consider the "sexual molestation" evidence (see *Wiggins v. Smith* (2003) 539 U.S. 510, 535) for its truth and therefore directly for its likely psychological effect on the adult John Famalaro--whether or not he could "establish 'a nexus to the crime.'" (*Smith v. Texas, supra*, 543 U.S. at p. 45; see also *Wiggins, supra*, 539 U.S. at p. 537 ["Had the jury been able to place petitioner's excruciating life history on the mitigating side of the scale, there is a reasonable probability that at least one juror would have struck a different balance."].) Thus, there is at least a reasonable doubt whether the jurors, had they heard the evidence at issue here, and whether or not it was admitted for its truth, would have returned a death verdict.

Where federal constitutional error occurs at the penalty phase of a capital trial, this Court must proceed with special caution in evaluating the

consequences of the error because of the broad discretion given to the jury. (See, e.g., *Hendricks v. Calderon* (9th Cir. 1995) 70 F.3d 1032, 1044.) In this case, given the substantial and compelling nature of the mitigating evidence, and the importance of the excluded evidence to the jury's understanding of that mitigating evidence, the exclusion of the proffered testimony by Marion Thobe cannot be found harmless. (See *People v. Lucero, supra*, 44 Cal.3d at p. 1032.)

But this Court need not take appellant's word for it. Instead, the prejudicial effect of the exclusion of this evidence can best be seen by reviewing the prosecutor's closing argument to the jury, in which he took splendid advantage of this evidentiary lacuna. First, as noted previously (see Argument VII.B, *ante*), the prosecutor used the clever rhetorical device of "paraleipsis," i.e., "suggesting just the opposite" (see *People v. Wrest* (1992) 3 Cal.4th 1088, 1107), by telling the jurors that they could not use as an aggravating factor "lack of remorse," such as "that period of time when he had her body." (27 RT 6591-6592.) Later, after noting that appellant had kept a photo of a handcuffed woman fondling his erect penis, the prosecutor rhetorically asked: "Do you think those were kept to remember the good times? It tells you a lot about the trophy in this case, doesn't it?" (27 RT 6602.) Then he specifically referenced Denise Huber, again rhetorically asking: "Was she kept as a trophy? Does he like to remember the good times? . . . You take pictures like that, you take pictures to remember the good times. That was a good time for this defendant. That evening was a good time for this defendant, June 2nd/June 3rd. *No other aggravating factor is required other than the enormity of this crime.*" (27 RT 6641-6642; emphasis added.)

Thus, the prosecutor did exactly what defense counsel warned he

would do, arguing that appellant kept his victim's body as "a trophy" to remember the good times--and essentially telling the jurors that is all they needed to know to vote to kill appellant--and defense counsel was helpless to answer or rebut this argument with the best available evidence to the contrary, because of the trial court's erroneous evidentiary ruling. (See *Skipper, supra*, 476 U.S. at p. 5, fn. 1.) Given this effective use of the court's ruling in the prosecution's favor, it is beyond dispute that "the excluded testimony was highly relevant to a critical issue in the punishment phase of the trial." (*Green, supra*, 442 U.S. at p. 97.)[97]

In sum, the exclusion of appellant's proffered mitigating evidence essentially crippled his case, and violated his rights to due process (U.S. Const., 6th & 14th Amends.) and an individualized and reliable penalty determination (U.S. Const., 8th & 14th Amends.). The court's ruling also illegally and unfairly restricted proper defense rebuttal evidence--an especially egregious error at the penalty phase of a capital case. (See, e.g., *Simmons v. South Carolina* (1994) 512 U.S. 154, 164.) It also unfairly skewed the evidence in the prosecution's favor on one of the most critical issues in the case, in itself a violation of appellant's Fourteenth Amendment right to due process. (See *Wardius v. Oregon* (1973) 412 U.S. 470.) The court also violated appellant's due process rights by arbitrarily depriving him of his state-created liberty--and *life*--interest in presenting to the penalty jurors statutorily relevant and admissible evidence in mitigation. (See, e.g., *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346; *Fetterly v. Paskett* (9th Cir.

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[97] The prosecutor's argument also smacks of unfairness because it was his own successful objection that "prevented the defense from proving that fact" which would have strongly undermined his argument. (*People v. Varona* (1983) 143 Cal.App.3d 566, 570.)

1993) 997 F.2d 1295, 1300.)

Since the trial court's erroneous exclusion of "relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record" of appellant, "[t]he resulting death sentence cannot stand." (*Skipper, supra*, 476 U.S. at p. 8.) The death judgment must be reversed.

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X

THE DELIVERY OF CALJIC NO. 2.27 AT THE PENALTY PHASE IMPERMISSIBLY AND UNCONSTITUTIONALLY UNDERMINED AND DILUTED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT AS TO THE ALLEGED FACTOR (B) CRIMINALITY

CALJIC No. 2.27, which was delivered at the guilt phase (8 CT 2632; 22 RT 5726; see Argument IV.C, *ante*), was again given at the penalty phase, as follows:

> "You should give the testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends." (8 CT 2674; 27 RT 6759-6760.)

This instruction, repeated in the identical form as given in the guilt phase, suffered from the same defects previously discussed in Argument IV.C., at pp. 237-239, *ante*.

The prosecution presented evidence of two prior alleged acts of criminality by appellant, pursuant to factor (b), each of which was based entirely and exclusively on the testimony of a single witness: (1) the alleged false imprisonment of Cheryl West in July of 1987, based solely on West's testimony regarding that incident (see Statement of Facts, *ante*, at pp. 18-19, 23); and (2) the alleged assault and false imprisonment of Nancy Rommel in March or April of 1989, based solely on Rommel's testimony regarding that incident (see Statement of Facts, *ante*, at pp. 23-24). As the jury was instructed, each individual juror must be satisfied beyond a reasonable doubt that the defendant committed such alleged factor (b) criminality before that juror may consider it as an aggravating circumstance,

and the prosecution has the burden of proving such alleged criminal activity beyond a reasonable doubt. (See 8 CT 2684, 2682; 27 RT 6766, 6765; see, e.g., *People v. Boyd* (1985) 38 Cal.3d 762, 778; *People v. Robertson* (1982) 33 Cal.3d 21, 53-55.)

However, as noted previously (see Argument IV.C, *ante*), CALJIC No. 2.27 violates due process (U.S. Const., 14th Amend.) by using the "which you believe" language, thereby allowing proof based on a mere "belief" that a single witness was telling the truth, rather than the requisite proof beyond a reasonable doubt. Thus, the erroneous instruction permitted each penalty juror to consider the alleged incident involving Cheryl West and/or the alleged incident involving Nancy Rommel as a factor in aggravation in determining the penalty to be imposed upon appellant if that particular juror merely *believed* such "single witness" was telling the truth as to the respective alleged instances of criminal activity. Further, even though, as noted above, the jurors were also given reasonable-doubt instructions as to proof of the alleged prior criminality, and therefore a reasonable juror could have understood the contradictory instructions to require application of the reasonable-doubt standard rather than a mere belief in the truth of the West and Rommel testimony, there is simply no way of knowing whether any of the jurors so concluded. (See, e.g., *Francis v. Franklin* (1985) 471 U.S. 307, 322.)

The instructional error must be deemed prejudicial. The prosecution presented no evidence that appellant had "any prior felony conviction" (§ 190.3, factor (c)), and the testimony of West and Rommel was the only prosecution evidence of any other "criminal activity by the defendant" (§ 190.3, factor (b)). Thus, those two witnesses provided the *only* evidence in aggravation against appellant aside from the crime of which he was

convicted at the guilt phase. Especially given the substantial evidentiary question as to whether the instant offense was even a capital murder--i.e., first degree murder with special circumstances as opposed to a second degree murder, because of the extreme paucity of evidence regarding the actual events leading to Denise Huber's demise--the instruction permitting the individual jurors to find the only "other" criminal activity upon a mere belief in its truth could well have tipped the scales in favor of a death verdict by appellant's penalty jury. (See *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

The death judgment must therefore be reversed.

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XI

THE ADMISSION AND USE OF EVIDENCE OF UNADJUDICATED CRIMINAL ACTIVITY VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, REQUIRING REVERSAL OF THE DEATH JUDGMENT

A. Introduction

At the penalty phase of appellant's trial, the prosecution introduced in aggravation evidence of two incidents of alleged prior criminality under factor (b) of section 190.3: evidence of false imprisonment of Cheryl West in July of 1987; and evidence of assault and false imprisonment of Nancy Rommel in March or April of 1989.

Appellant submits that reliance on such unadjudicated criminal activity during the penalty phase deprived him of his rights to due process, a fair and speedy trial by an impartial and unanimous jury, the presumption of innocence, effective confrontation of witnesses, effective assistance of counsel, equal protection, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, even if (arguendo) a jury may properly rely upon this type of evidence in determining penalty, the jury's reliance on the particular evidence of unadjudicated criminal activity in this case was particularly unreliable and therefore violative of appellant's rights to due process and a reliable penalty determination. Appellant's death judgment must therefore be reversed.

B. The Use of Factor (b) Violated Appellant's Constitutional Rights, Including His Sixth, Eighth and Fourteenth Amendment Rights to Due Process and a Reliable Penalty Determination[98]

Factor (b), which tracks section 190.3, subdivision (b), permitted appellant's jury to consider in aggravation "[t]he presence or absence of criminal activity by the defendant, other than the crime for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (8 CT 2679; 27 RT 6762-6763.) Pursuant to that factor, the prosecution in this case presented evidence of two incidents of alleged prior criminal activity by appellant, and the jury was expressly told to consider the presence or absence of this alleged criminal activity. (8 CT 2679, 2684; 27 RT 6762-6763, 6766.) The admission of evidence of previously unadjudicated criminal conduct as an aggravating factor justifying a capital sentence violated appellant's rights to due process and a reliable determination of penalty under the Eighth and Fourteenth Amendments. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-587; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945, 954-955; *State v. McCormick* (Ind. 1979) 397 N.E.2d 276.) Admission of the unadjudicated prior criminal activity also denied appellant the rights to a fair and speedy trial (indeed, there was no meaningful "trial" of the prior "offenses") by an impartial and unanimous jury, and to effective confrontation of witnesses, under the Sixth and Fourteenth Amendments, and to equal protection of the

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[98] Although the United States Supreme Court, in *Tuilaepa v. California* (1994) 512 U.S. 967, 977, determined that factor (b) was not unconstitutionally vague, that opinion did not address the issues raised herein.

law under the Fourteenth Amendment. An instruction expressly permitting the jury to consider such evidence in aggravation violates these same constitutional rights.

Factor (b), as written and as it has been interpreted by this Court, is an open-ended and vague aggravating factor that fosters arbitrary and capricious application of the death penalty in violation of the Eighth Amendment requirement that a rational distinction be made "'between those individuals for whom death is an appropriate sanction and those for whom it is not.'" (*Parker v. Dugger* (1991) 498 U.S. 308, 321, quoting *Spaziano v. Florida* (1984) 468 U.S. 447, 460.)

This Court has interpreted the section in such an overly-broad fashion that it cannot withstand constitutional scrutiny. Although the United States Supreme Court has repeatedly concluded that the procedural protections afforded a capital defendant must be *more* rigorous than those provided noncapital defendants (see *Ake v. Oklahoma* (1985) 470 U.S. 68, 87 (conc. opn. of Burger, C.J.); *Eddings v. Oklahoma* (1982) 455 U.S. 104, 117-118 (conc. opn. of O'Connor, J.); *Lockett v. Ohio* (1978) 438 U.S. 586, 605-606), this Court has turned this mandate on its head, singling out capital defendants for *less* procedural protection than that afforded other criminal defendants. For example, this Court has ruled that, in order to consider evidence under factor (b), it is not necessary for the 12 jurors to unanimously agree on the presence of the unadjudicated criminal activity beyond a reasonable doubt (see *People v. Caro* (1988) 46 Cal.3d 1035, 1057); it has held that the jury may consider criminal violence which has occurred "at any time in the defendant's life," without regard to the statute of limitations (*People v. Heishman* (1988) 45 Cal.3d 147, 192); and it has held that the trial court is not required to enumerate the other crimes that the

jury should consider or to instruct on the elements of those crimes (*People v. Hardy* (1992) 2 Cal.4th 86, 205-207). This Court has ruled that unadjudicated criminal activity occurring subsequent to the capital homicide is admissible under subdivision (b), but that felony convictions, even for violent crimes, rendered after the capital homicide are not admissible (*People v. Morales* (1989) 48 Cal.3d 527, 567); and it has ruled that a threat of violence is admissible if, by happenstance, the words are uttered in a state that has made such threat a criminal offense (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1258-1261). Juvenile conduct is admissible under this factor (*People v. Burton* (1989) 48 Cal.3d 843, 862), as is an offense dismissed pursuant to a plea bargain (*People v. Lewis* (2001) 25 Cal.4th 610, 658-659).

In sum, this Court has indeed treated death differently by *lowering* rather than heightening the reliability requirements in a manner that cannot be countenanced under the federal Constitution.

In addition, the use of the same jury for the penalty-phase adjudication of other-crimes evidence deprives a defendant of an impartial and unbiased jury and undermines the reliability of any determination of guilt, in violation of the Sixth, Eighth and Fourteenth Amendments. Under the California capital-sentencing statute, a juror may consider evidence of violent criminal activity in aggravation only if he or she concludes that the prosecution has proven a criminal offense beyond a reasonable doubt. (*People v. Davenport* (1985) 41 Cal.3d 247, 280-281.) As to such offense, the defendant is entitled to the presumption of innocence (see *Johnson v. Mississippi, supra*, 486 U.S. at p. 585) and the jurors must give the exact same level of deliberation and impartiality as would have been required of them in a separate criminal trial, for when a state provides for capital

sentencing by a jury, the Due Process Clause of the Fourteenth Amendment requires that such jury be impartial.[99] (Cf. *Groppi v. Wisconsin* (1971) 400 U.S. 505, 508-509 (1971) [where state procedures deprive a defendant of an impartial jury, the subsequent conviction cannot stand]; *Irvin v. Dowd* (1961) 366 U.S. 717, 721-722; *Donovan v. Davis* (4th Cir. 1977) 558 F.2d 201, 202.)

In appellant's case, the jurors charged with making an impartial, and therefore reliable, assessment of his guilt of the previously-unadjudicated offenses were the same jurors who had just convicted him of capital murder. It would seem self-evident that a jury which already has unanimously found a defendant guilty of capital murder cannot be impartial in considering whether unrelated but similar violent crimes have been proved beyond a reasonable doubt. (See *People v. Frierson* (1985) 39 Cal.3d 803, 821-822 (conc. opn. of Bird, C.J.).) Moreover, the unadjudicated offenses appellant's jurors were asked to impartially evaluate involved alleged handcuffing and assaulting and/or falsely imprisoning young women, making it impossible for the jury that had just convicted appellant of capital murder containing similar behaviors to fairly evaluate the evidence.

Even in the unlikely event that only a single juror was impermissibly prejudiced against him, appellant's rights would still be violated. (See

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[99] The United States Supreme Court has consistently held that a capital-sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant. (See *Caspari v. Bohlen* (1994) 510 U.S. 383, 393; *Strickland v Washington* (1984) 466 U.S. 668, 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 446.) Similarly, due process protections apply to a capital-sentencing proceeding. (See, e.g., *Gardner v. Florida* (1977) 430 U.S. 349, 358.)

People v. Pierce (1979) 24 Cal.3d 199, 208 ("[A] conviction cannot stand if even a single juror has been improperly influenced."]; *United States v. Aguon* (9th Cir. 1987) 813 F.2d 1413, 1421, mod. (en banc 1988) 851 F.2d 1158 ["The presence of even a single partial juror violates a defendant's rights under the Sixth Amendment to trial by an impartial jury."].)

A finding of guilt by such a biased fact-finder clearly could not be tolerated in other circumstances. "[I]t violates the Sixth Amendment guarantee of an impartial jury to use a juror who sat in a previous case in which the same defendant was convicted of a similar offense, at least if the cases are proximate in time." (*Virgin Islands v. Parrott* (3rd Cir. 1977) 551 F.2d 553, 554, relying, inter alia, on *Leonard v. United States* (1964) 378 U.S. 544 [jury panel will be disqualified even if it is inadvertently exposed to the fact that the defendant was previously convicted in a related case].)

Independent of its effect on the impartiality of the jury, the use of the same jury at both the guilt and penalty phases of trial forced appellant to make impossible and unconstitutional choices during jury selection. Voir dire constitutes a significant part of a criminal trial. (*Pointer v. United States* (1894) 151 U.S. 396, 408-409; *Lewis v. United States* (1892) 146 U.S. 370, 376.) The ability to probe potential jurors regarding their prejudices is an essential aspect of a trial by an impartial jury. (*Dyer v. Calderon* (9th Cir. en banc 1998) 151 F.3d 970, 973.) In this case, counsel for appellant understandably did not question potential jurors during jury selection about the unadjudicated crimes introduced at the penalty phase. Such evidence was not admissible during the guilt phase of the trial, and questioning the potential jurors about other violent crimes unquestionably would have tainted the impartiality of the jury that was impaneled. Counsel could not adequately examine potential jurors during voir dire as to their

biases and potential prejudices with respect to the prior unadjudicated crimes without forfeiting appellant's constitutional right not to have such subjects brought before the jurors. Requiring appellant to choose between these two constitutional rights violated his rights to assistance of counsel, a fair trial before an impartial jury, and a reliable and non-arbitrary penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

Further, because California does not allow the use of unadjudicated offenses in noncapital sentencing, the use of this evidence in a capital proceeding violated appellant's equal protection rights under the Fourteenth Amendment. It also violated appellant's Fourteenth Amendment right to due process because the state applies its law in an irrational and unfair manner. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346-347.)

Finally, as shown elsewhere (see Argument XIV.D, *post*, and Section C of this argument, *post*), the failure to require jury unanimity with respect to such unadjudicated conduct not only exacerbated this defect, but itself violated appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, a jury trial, and a reliable determination of penalty. (See *Apprendi v. New Jersey* (2000) 530 U.S. 466.)

C. The Alleged Criminal Activity Was Improperly Considered in Aggravation Because It Was Not Required To Be Found True Beyond a Reasonable Doubt by a Unanimous Jury

The application of the *Apprendi* line of cases to California's capital-sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See *Blakely v. Washington* (2004) 542 U.S. 296,

313; *Ring v. Arizona* (2002) 536 U.S. 584, 609; *Apprendi v. New Jersey, supra.*) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity in aggravation, such alleged criminal activity would have to be found beyond a reasonable doubt by a unanimous jury. Although the jury in appellant's case was instructed that the prosecutor had the burden of proving the other-crimes evidence beyond a reasonable doubt (8 CT 2684; 27 RT 6766), the jury was *not* instructed on the need for a unanimous finding; nor is such an instruction required under California's sentencing scheme. The jurors' consideration of this evidence thus violated appellant's rights to due process of law, to trial by jury, and to a reliable capital-sentencing determination, in violation of the Sixth, Eighth and Fourteenth Amendments.

D. The Unadjudicated Prior Criminal Activity Alleged Against Appellant Was Outside Applicable Statutes of Limitations and Therefore Was Improperly Introduced As Evidence in Aggravation

At the time of the indictment in appellant's case (September 29, 1994), substantive criminal charges could not have been brought against appellant based on either instance of prior criminal conduct alleged against him as aggravation. (See 8 CT 2684-2686; 27 RT 6766-6768 [penalty instructions on factor (b) evidence].) With respect to the July, 1987, Cheryl West incident, the statute of limitations had long since expired on the alleged violation of section 236;[100] with respect to the 1989 Nancy Rommel incident, the statute of limitations had also long since expired on the alleged

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[100] Section 236, if the offense was "effected by violence" (§ 237; see 8 CT 2685), carried a potential prison sentence of 16 months, 2 or 3 years, and thus had a maximum statute of limitations of three years. (See Stats. 1987, §§ 18, 237, 801.)

violations of sections 240 and 236.[101] The admission of such stale evidence of criminal conduct at the penalty phase violated appellant's due process rights to effectively confront and rebut aggravating evidence presented against him and the constitutional requirement of heightened reliability in a capital trial. (U.S. Const., 6th, 8th & 14th Amends.; see *Gardner v. Florida* (1977) 430 U.S. 349, 362.)

A statute of limitations is not a mere technicality. Time bars exist to ensure a level of reliability required in any criminal case and heightened in capital proceedings. As this Court has observed, such statutes recognize the "difficulty faced by both the government and a criminal defendant in obtaining *reliable* evidence (or any evidence at all) as time passes following the commission of a crime." (*People v. Zamora* (1976) 18 Cal.3d 538, 546; emphasis added.) Limitation periods "provide predictability by specifying a limit beyond which there is an irrebuttable presumption that a defendant's right to a fair trial would be prejudiced." (*United States v. Marion* (1971) 404 U.S. 307, 322; see *Stogner v. California* (2003) 539 U.S. 607, 615-616.)

Appellant is aware that this Court has held that because there is no statute of limitations for murder, the expiration of the statute of limitations for any other substantive crime does not constrain the prosecution from introducing evidence of such a crime at the penalty phase of a capital trial. (*People v. Heishman, supra*, 45 Cal.3d at p. 192; accord, e.g., *People v. Medina* (1995) 11 Cal.4th 694, 772.) *Heishman*, however, relied on *People*

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[101] Section 240, a misdemeanor, had a maximum statute of limitations of one year. (See Stats. 1989, §§ 240, 802, subd. (a).) Section 236 still had a maximum statute of limitations of three years. (See Stats. 1989, §§ 18, 237, 801.)

v. Terry (1969) 70 Cal.2d 410, a capital case decided prior to *Furman v. Georgia* (1972) 408 U.S. 238, the case that inaugurated modern capital-punishment jurisprudence. Since that time, the United States Supreme Court has explicitly held that the Eighth Amendment's guarantee of a reliable penalty determination requires that the procedures governing a capital sentencer's consideration of "other crimes" evidence must conform to the constitutional standards governing proof of the substantive offense. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 585-586 [invalidating a death judgment because one of the aggravating circumstances was based on a prior conviction that had been found constitutionally defective by a state appellate court].)

In light of *Johnson*, this Court's focus on capital murder as the predicate offense which renders the statute of limitations inapplicable to any other crimes alleged at the penalty phase is misdirected. The jury's consideration of evidence of other violent crimes committed by the defendant is likely to have "an ascertainable and 'dramatic' impact'" (*Zant v Stephens* (1983) 462 U.S. 862, 903 (conc. opn. of Rehnquist, J.), and even to prove "decisive" in the choice of penalty (*Gardner v. Florida, supra*, 430 U.S. at p. 359). Therefore, allowing the prosecution to litigate time-barred offenses necessarily creates an unacceptable risk of unfairness and introduces unreliable evidence into the penalty determination.

Where the passage of time has irrebuttably prejudiced a defendant's right to a fair trial on a substantive offense (see *Stogner v. California, supra*, 539 U.S. at pp. 615-616; *United States v. Marion, supra*, 404 U.S. at p. 322), the state can no longer overcome the defendant's presumption of innocence in a manner that satisfies the minimum federal constitutional guarantees. Allowing the jury to consider such a charge denies the

defendant a fair penalty trial, and thus a death sentence based even in part on such evidence is fatally defective. (See *Johnson v. Mississippi, supra*, 486 U.S. at pp. 586, 590; *Gardner v. Florida, supra*, 430 U.S. at pp. 359, 362.)

E. Conclusion

For all the foregoing reasons, use of the evidence of unadjudicated criminal activity against appellant requires reversal of the judgment of death. (See *Johnson v. Mississippi, supra*, 486 U.S. at p. 590; *Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Brown* (1988) 46 Cal.3d 432, 448.)

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XII

THE INSTRUCTIONS ABOUT THE MITIGATING AND AGGRAVATING FACTORS IN PENAL CODE SECTION 190.3, AND THE APPLICATION OF THESE SENTENCING FACTORS, RENDER APPELLANT'S DEATH SENTENCE UNCONSTITUTIONAL

The jury was instructed on Penal Code section 190.3 pursuant to a modified version of CALJIC No. 8.85, the standard instruction regarding the statutory factors that are to be considered in determining whether to impose a sentence of death or life without the possibility of parole (8 CT 2679-2680; 27 RT 6762-6764), and pursuant to a modified version of CALJIC No. 8.88, the standard instruction regarding the weighing of these aggravating and mitigating factors (8 CT 2687; 27 RT 6768-6770). These instructions, together with the application of these statutory sentencing factors, render appellant's death sentence unconstitutional. First, the application of section 190.3, factor (a) resulted in arbitrary and capricious imposition of the death penalty on appellant. Second, the failure to instruct that statutory mitigating factors are relevant solely as mitigators precluded the fair, reliable and evenhanded application of the death penalty. Third, the failure of the instruction to require specific, written findings by the jury with regard to the aggravating factors found and considered in returning a death sentence violated appellant's federal constitutional rights to meaningful appellate review and equal protection of the law. Fourth, even if the procedural safeguards addressed in this argument are not necessary to ensure fair and reliable capital sentencing, denying them to capital defendants violates equal protection. Because these essential safeguards were not applied to appellant's penalty trial, his death judgment must be

reversed.

A. The Instruction on Penal Code Section 190.3, Factor (a), and Application of That Sentencing Factor, Resulted in the Arbitrary and Capricious Imposition of the Death Penalty

Section 190.3, factor (a) violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, because it is applied in such a wanton and freakish manner that almost all features of every murder have been found to be "aggravating" within that statute's meaning, even ones squarely at odds with others deemed supportive of death sentences in other cases. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1984) 512 U.S. 967, 975-976), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law (U.S. Const., 14th Amend.) and the Eighth Amendment.

Factor (a) directs the jury to consider as aggravation the "circumstances of the crime." Because this Court has always found that the broad term "circumstances of the crime" meets constitutional scrutiny, it has never applied a limiting construction to factor (a). Instead, it has allowed an extraordinary expansion of that factor, finding that it is a relevant "circumstance of the crime" that, e.g., the defendant: had a "hatred of religion";[102] sought to conceal evidence three weeks after the crime;[103] threatened witnesses after his arrest;[104] disposed of the victim's body in a

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[102] *People v. Nicholas* (1991) 54 Cal.3d 551, 581-582.

[103] *People v. Walker* (1988) 47 Cal.3d 605, 639, fn. 10.

[104] *People v. Hardy* (1992) 2 Cal.4th 86, 204.

manner precluding its recovery,[105] or had a mental condition that compelled him to commit the crime.[106]

California prosecutors have argued that almost every conceivable circumstance of a crime should be considered aggravating, even circumstances starkly opposite to others relied on as aggravation in other cases. (See *Tuilaepa v. California*, *supra,* 512 U.S. at pp. 986-987 (dis. opn. of Blackmun, J.).) The examples cited by Justice Blackmun in *Tuilaepa* show that because this Court has failed to limit the scope of the term "circumstances of the crime," different prosecutors have urged juries to find squarely conflicting circumstances aggravating under that factor.

In practice, the overbroad "circumstances of the crime" aggravating factor licenses indiscriminate imposition of the death penalty upon no basis other than "that a particular set of facts surrounding a murder . . . were enough in themselves, and without some narrowing principles to apply to those facts, to warrant the imposition of the death penalty." (*Maynard v. Cartwright* (1988) 486 U.S. 356, 363 [discussing the holding in *Godfrey v. Georgia* (1980) 446 U.S. 420].) It is, therefore, unconstitutional as applied. (*Ibid.*)

B. The Failure to Instruct That Statutory Mitigating Factors Are Relevant Solely As Mitigators Precluded the Fair, Reliable and Evenhanded Application of the Death Penalty

Despite appellant's request therefor, the trial court did not give the jury any instructions indicating which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or

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[105] *People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, fn. 35.

[106] *People v. Smith* (2005) 35 Cal.4th 334, 352.

mitigating depending upon the evidence.[107] Yet, as a matter of state law, each of the two factors introduced by a prefatory "whether or not"--i.e., factors (d) and (h)--was relevant solely as a possible mitigator. (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034.)

Without guidance as to which factors could be considered solely as mitigating, the jury was left free to conclude that a "not" answer to either of those "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate appellant's sentence upon the basis of non-existent or irrational aggravating factors, which precluded the reliable, individualized capital-sentencing determination required by the Eighth and Fourteenth Amendments. (*Zant v. Stephens* (1983) 462 U.S. 862, 879; *Woodson v. North Carolina* (1976) 428 U.S. 280, 304.) Failing to provide appellant's jury with guidance on this point was reversible error.

C. The Failure to Require the Jury to Base a Death Sentence on Written Findings Regarding the Aggravating Factors Violated Appellant's Constitutional Rights to Meaningful Appellate Review and Equal Protection of the Law

The instructions given in this case under CALJIC Nos. 8.85 and 8.88

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[107] Appellant requested an instruction informing the jurors, inter alia, that "[e]vidence received under all of the remaining factors [aside from factors (a), (b and i)--i.e., factors (d), (h) and (k); see 8 CT 2679] can only be mitigating," and that "[t]he absence of evidence under these factors cannot be used in aggravation." (6 CT 1992, 1920; see 6 CT 1990-1991.) This request was refused by the court. (See 26 RT 6542-6544; 6 CT 1992, 1920.) Although the court did instruct that "[t]he absence of evidence as to any mitigating factor cannot be used as an aggravating circumstance" (8 CT 2680; 27 RT 6764), it did not specify *which* factors were mitigating ones (see 8 CT 2679; 27 RT 6762-6764).

did not require the jurors to make written or other specific findings about the aggravating factors they found and considered in imposing a death sentence. The failure to require such express findings deprived appellant of his Fourteenth Amendment due process and Eighth Amendment rights to meaningful appellate review, as well as his Fourteenth Amendment right to equal protection of the law. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) Because California juries have total, unguided discretion on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California, supra*, 512 U.S. at pp. 979-980), there can be no meaningful appellate review unless they make written findings regarding those factors, because it is impossible to "reconstruct the findings of the state trier of fact" (see *Townsend v. Sain* (1963) 372 U.S. 293, 314).

Written findings are essential for a meaningful review of the sentence imposed. Thus, in *Mills v. Maryland* (1988) 486 U.S. 367, the requirement of written findings applied in Maryland death cases enabled the Supreme Court to identify the error committed under the prior state procedure and to gauge the beneficial effect of the newly-implemented state procedure. (*Id.* at p. 383, fn. 15.)

While this Court has held that the 1978 death-penalty scheme is not unconstitutional in failing to require express jury findings (*People v. Fauber* (1992) 2 Cal.4th 792, 859), it has treated such findings as so fundamental to due process as to be required at parole-suitability hearings. A convicted prisoner who alleges that he was improperly denied parole must proceed by a petition for writ of habeas corpus and must allege the state's wrongful conduct with particularity. (*In re Sturm* (1974) 11 Cal.3d 258.) Accordingly, the parole board is required to state its reasons for

denying parole, because "[i]t is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.* at p. 267.) The same reasoning must apply to the far graver decision to put someone to death. (See also *People v. Martin* (1986) 42 Cal.3d 437, 449-450 [statement of reasons essential to meaningful appellate review].)

Further, in noncapital cases the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; § 1170, subd. (c).) Under the Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than noncapital defendants. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 994.) Since providing more protection to noncapital than to capital defendants violates the Equal Protection Clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

The mere fact that a capital-sentencing decision is "normative" (*People v. Hayes* (1990) 52 Cal.3d 577, 643), and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79), does not mean that its basis cannot be articulated in written findings. In fact, the importance of written findings in capital sentencing is recognized throughout this country. Of the 34 post-*Furman* state capital-sentencing systems, 26 require some form of written findings specifying the aggravating factors the jury relied on in reaching a death judgment. Nineteen of those states require written findings regarding all penalty aggravating factors found true, while the remaining seven require a written finding as to at least one aggravating factor relied on to

impose death.[108] California's failure to require such findings renders its death-penalty procedures unconstitutional.

D. Even If the Absence of the Previously-Addressed Procedural Safeguards Does Not Render California's Death-Penalty Scheme Constitutionally Inadequate to Ensure Reliable Capital Sentencing, Denying Them to Capital Defendants Like Appellant Violates Equal Protection

The United States Supreme Court has repeatedly asserted that heightened reliability is required in capital cases and that courts must be vigilant to ensure procedural fairness and accuracy in fact-finding. (See, e.g., *Monge v. California* (1988) 524 U.S. 721, 731-732.) Despite this directive, California's death-penalty scheme affords significantly fewer procedural protections to defendants facing death sentences than to those charged with noncapital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws. (U.S., Const., 14th

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[108] See Ala. Code, §§ 13A-5-46(f) and 47(d) (1982); Ariz. Rev. Stat. Ann., § 13-703.01(E) (2002); Ark. Code Ann., § 5-4-603(a) (Michie 1987); Colo. Rev. Stat., § 18-1.3-1201(2)(b)(II) and § 18-1.3-1201(2)(c) (2002); Conn. Gen. Stat. Ann., § 53a-46a(e) (West 1985); *State v. White* (Del. 1978) 395 A.2d 1082, 1090; Fla. Stat. Ann., § 921.141(3) (West 1985); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(8)(a)-(b) (2003); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1988); La. Code Crim. Proc. Ann., art. 905.7 (West 1993); Md. Ann. Code art 27 § 413(i) (1992); Miss Code Ann., § 99-19-103 (1993); Mont. Code Ann., § 46-18-305 (1993); Neb. Rev. Stat. § 29-2521(2) and § 29-2522 (2002); Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.H. Rev. Stat. Ann., § 630:5 (IV) (1992); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Okla. Stat. Ann., tit. 21, § 701.11 (West 1993); 41 Pa. Cons. Stat. Ann., § 9711 (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann., § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann., § 37.07(c) (West 1993); Va. Code Ann., § 19.2-264(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

Amend.).

Equal protection analysis begins with identifying the interest at stake. Chief Justice Wright wrote for a unanimous Court that "personal liberty is a fundamental interest, second only to life itself, as an interest protected under both the California and the United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251.) "Aside from its prominent place in the due process clause itself, the right to life is the basis of all other rights. . . . It encompasses, in a sense, 'the right to have rights. . . .'" (*Commonwealth v. O'Neal* (Mass. 1975) 327 N.E.2d 662, 668, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 102.)

In the case of interests identified as "fundamental," courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme affecting a fundamental interest without showing that a compelling interest justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas*, *supra*, 17 Cal.3d at p. 251; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet that burden here. In the context of capital punishment, the equal protection guarantees of the state and federal Constitutions must apply with greater force, the scrutiny of the challenged classification must be strict and any purported justification of the discrepant treatment must be even more compelling, because the interest at stake is not simply liberty, but life itself. The differences between capital defendants and noncapital felony defendants justify more, not fewer, procedural protections, in order to make death sentences more reliable.

This Court has most explicitly responded to equal protection

challenges to the death-penalty scheme by rejecting claims that failure to afford capital defendants the disparate-sentence review provided to non-capital defendants violates equal protection. (See *People v. Allen* (1986) 42 Cal.3d 1222, 1286-1288.) This Court's reasons were a more detailed version of the rationale used to justify not requiring any burden of proof in the penalty phase of a capital trial, or unanimity as to the aggravating factors justifying a sentence of death, i.e., that death sentences are moral and normative expressions of community standards. However, that rationale doesn not support denying those sentenced to death procedural protections afforded other convicted felons.

In holding that it was rational not to provide capital defendants the disparate-sentence review provided to noncapital defendants, *Allen* distinguished death judgments by pointing out that the primary sentencing authority in California capital cases is normally the jury, "[a] lay body [which] represents and applies community standards in the capital-sentencing process under principles not extended to noncapital sentencing." (*People v. Allen*, *supra*, 42 Cal.3d at p. 1286.)

But jurors are not the only bearers of community standards. Legislatures also reflect community norms, and a court of statewide jurisdiction is best situated to assess the objective indicia of community values reflected in a pattern of verdicts. (*McCleskey v. Kemp* (1987) 481 U.S. 279, 305.) Principles of uniformity and proportionality are manifested in death sentencing by prohibiting death penalties that flout a societal consensus as to particular offenses (*Coker v. Georgia* (1977) 433 U.S. 584), or offenders (*Enmund v. Florida* (1982) 458 U.S. 782; *Ford v. Wainwright* (1986) 477 U.S. 399). Juries are not immune from error, and may stray from the larger community consensus as expressed by statewide sentencing

policies. Disparate-sentence review is designed to enforce these values of uniformity and proportionality by weeding out aberrant sentencing choices.

While the state cannot preclude a sentencer from considering any factors that could cause it to reject the death penalty, it can and must provide rational criteria to narrow the sentencer's discretion to impose death. (*McCleskey v. Kemp, supra*, 481 U.S. at pp. 305-306.) No jury can violate the societal consensus embodied in the statutory criteria that narrow death eligibility, or the flat judicial prohibitions against imposing the death penalty on certain offenders, or for certain crimes.

Moreover, jurors also are not the only sentencers. A verdict of death is always subject to independent review by the trial court, which not only can reduce a jury's verdict, but must do so under some circumstances. (See § 190.4, subd. (e); *People v. Rodriguez* (1986) 42 Cal.3d 730, 792-794.) Thus, the lack of disparate-sentence review cannot be justified on the ground that reducing a jury's verdict would interfere with its sentencing function.

A second reason *Allen* offered for rejecting the equal protection claims was that the range available to a trial court is broader under the Determinate Sentencing Law ("DSL") than for persons convicted of first degree murder with one or more special circumstances: "The range of possible punishments narrows to death or life without parole." (*Allen, supra*, 42 Cal.3d at p. 1287.) That rationale cannot withstand scrutiny, because the difference between life and death is not in fact "narrow"; and particularly not when contrasted with that between sentences of two years and five years in prison.

The notion that the disparity between life and death is "narrow" not only violates common sense, it also contradicts specific pronouncements by

the United States Supreme Court: "Th[e] especial concern [for ensuring that every possible procedural protection is provided in capital cases] is a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." (*Ford v. Wainwright* (1986) 477 U.S. 399, 411). "Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two." (*Woodson v. North Carolina, supra*, 428 U.S. at p. 305 (opn. of Stewart, Powell, and Stephens, JJ.); see also *Reid v. Covert* (1957) 354 U.S. 1, 77 (conc. opn. of Harlan, J.); *Kinsella v. United States* (1960) 361 U.S. 234, 255-256 (conc. and dis. opn. of Harlan, J., joined by Frankfurter, J.); *Gregg v. Georgia, supra*, 428 U.S. at p. 187 (opn. of Stewart, Powell, and Stevens, JJ.); *Gardner v. Florida, supra*, 430 U.S. at pp. 357-358; *Zant v. Stephens, supra*, 462 U.S. at pp. 884-885; *Harmelin v. Michigan, supra*, 501 U.S. at p. 994; *Monge v. California, supra*, 524 U.S. at p. 732.) The qualitative difference between a prison sentence and a death sentence militates for, not against, requiring disparate review in capital sentencing.

Finally, this Court in *Allen* said that the additional "nonquantifiable" aspects of capital sentencing, as compared to noncapital sentencing, support treating felons sentenced to death differently. (42 Cal.3d at p. 1287.) This perceived distinction between the two sentencing contexts is insufficient to support the challenged classification, because it is one with very little difference. A trial judge may base a sentence choice under the DSL on a set of factors that includes precisely those considered as aggravating and mitigating circumstances in a capital case. (Compare § 190.3, factors (a) through (j), with Cal. Rules of Court, rules 421 and 423.) It is reasonable to assume that the Legislature created the disparate-review mechanism

discussed above because "nonquantifiable factors" permeate all sentencing choices.

This Court has also said that the fact that a death sentence reflects community standards justifies denying capital defendants the disparate-sentence review provided all other convicted felons. (*Allen, supra*, at p. 1287.) But that fact cannot justify depriving capital defendants of this procedural right, because that type of review is routinely provided in virtually every state that applies the death penalty, as well as by the federal courts in considering whether evolving community standards permit the imposition of death in a particular case.

Nor can the fact that a death sentence reflects community standards justify refusing to require written jury findings, or accepting a verdict that may not be based on a unanimous agreement that particular aggravating factors are true. Those procedural protections are especially important in meeting the acute need for reliability and accurate fact-finding in death-sentencing proceedings (see *Monge v. California, supra*, 524 U.S. at pp. 731-732); withholding them on the basis that a death sentence is a reflection of community standards demeans the community as irrational and fragmented, and cannot withstand the close scrutiny that should apply when a fundamental interest is affected.

The denial of equal protection in not affording California capital defendants the procedural safeguards described above violated appellant's Eighth and Fourteenth Amendment rights and requires reversal of his death judgment.

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XIII

THE INSTRUCTION DEFINING THE SCOPE OF THE JURY'S SENTENCING DISCRETION, AND THE NATURE OF ITS DELIBERATIVE PROCESS, VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS, AND REQUIRES REVERSAL OF THE DEATH JUDGMENT

A. Introduction

The trial court's concluding instruction in this case, a modified version of CALJIC No. 8.88, read in pertinent part as follows:

> "It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.
>
> "After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> "An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself.
>
> "A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty. You may also consider any other facts relating to the character and background of the defendant as well as any pity, compassion, or mercy for the defendant as mitigating circumstances.
>
> "The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of

> factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." (8 CT 2687; see 27 RT 6768-6769.)

The above-quoted instruction, which formed the centerpiece of the trial court's description of the sentencing process, was constitutionally flawed. The instruction did not adequately convey several critical deliberative principles, and was misleading and vague in crucial respects. Whether considered singly or together, the flaws in this pivotal instruction violated appellant's fundamental rights to due process (U.S. Const., 14th Amend.), to a fair trial by jury (U.S. Const., 6th & 14th Amends.), and to a reliable penalty determination (U.S. Const., 8th & 14th Amends.), and require reversal of his sentence. (See, e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 383-384.)

B. The Instruction Caused the Jury's Penalty Choice to Turn on an Impermissibly Vague and Ambiguous Standard That Failed to Provide Adequate Guidance and Direction

The sentence of the foregoing instruction that purported to guide the jurors' decision on which penalty to select told them they could vote for death if "persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it [*sic*] warrants death instead of life without parole." (8 CT 2687; 27 RT 6769.) Thus, the

decision whether to impose death hinged on the words "so substantial," an impermissibly vague phrase which bestowed intolerably broad discretion on the jury.

To meet constitutional muster, a system for imposing the death penalty must channel and limit the sentencer's discretion in order to minimize the risk of arbitrariness and capriciousness in the sentencing decision. (*Maynard v. Cartwright* (1988) 486 U.S. 356, 362.) In order to fulfill that requirement, a death-penalty sentencing scheme must adequately inform the jurors of "what they must find to impose the death penalty. . . ." (*Id.* at pp. 361-362.) A death-penalty sentencing scheme which fails to accomplish those objectives is unconstitutionally vague under the Eighth Amendment. (*Ibid.*)

The phrase "so substantial" is so lacking in any precise meaning that it did not inform the jurors what they were required to find to impose the death penalty, and so varied in meaning, and so broad in usage, that it is virtually incapable of explication or understanding in the context of deciding between life and death. It suggests a purely subjective standard, and invites the sentencer to impose death through the exercise of "the kind of open-ended discretion which was held invalid in *Furman v. Georgia*. . . ." (*Maynard* v. *Cartwright*, *supra*, 486 U.S. at p. 362.) In short, the words "so substantial" provided the jurors with no guidance as to "what they must find to impose the death penalty." (*Id.* at p. 361-362.)

The Georgia Supreme Court found that the word "substantial" causes vagueness problems when used to describe the type of prior criminal history jurors may consider as an aggravating circumstance in a capital case. *Arnold v. State* (Ga. 1976) 224 S.E.2d 386, held that a statutory aggravating circumstance which asked the sentencer to consider whether the accused

had "a substantial history of serious assaultive criminal convictions" did "not provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty. [Citations.]" (*Id.* at p. 391; see *Zant v. Stephens* (1983) 462 U.S. 862, 867, fn. 5.)[109]

In analyzing the word "substantial," the *Arnold* court concluded:

> "Black's Law Dictionary defines 'substantial' as 'of real worth and importance'; 'valuable.' Whether the defendant's prior history of convictions meets this legislative criterion is highly subjective. [fn.] While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of the death penalty compels a different result." (224 S.E.2d at p. 392.)

It is true that this Court has opined, in discussing the constitutionality of using the phrase "so substantial" in a penalty-phase concluding instruction, that "the differences between [*Arnold*] and this case are obvious." (*People v. Breaux* (1991) 1 Cal.4th 281, 316, fn. 14.) However, *Breaux's* summary disposition of *Arnold* does not specify what those "differences" are, or how they impact the validity of *Arnold*'s analysis. Of course, *Breaux*, *Arnold*, and this case, like all cases, are factually different, but appellant submits that their differences are not constitutionally significant, and do not undercut the Georgia Supreme Court's reasoning.

First, all three cases involve claims that the language of an important penalty-phase jury instruction is "too vague and nonspecific to be applied evenly by a jury." (*Arnold, supra*, 224 S.E.2d at p. 392.) The instruction in

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[109] The Georgia Supreme Court seems to have analyzed the vagueness issue in *Arnold* under the Due Process Clause of the Fourteenth Amendment. (224 S.E.2d at p. 391; compare *Maynard v. Cartwright*, *supra*, 486 U.S. at pp. 361-362.)

Arnold concerned an aggravating circumstance which used the term "*substantial* history of serious assaultive criminal convictions" (*ibid.*; emphasis added), while this instruction, like the one in *Breaux*, uses that term to explain how jurors should measure and weigh the "aggravating evidence" in deciding on the correct penalty. Accordingly, while the three cases are different, they have at least one common characteristic: they all involve penalty-phase instructions which fail to "provide the sufficiently 'clear and objective standards' necessary to control the jury's discretion in imposing the death penalty." (*Id.* at p. 391.)[110]

In fact, using the term "substantial" in CALJIC No. 8.88 gives rise to more severe problems than those the Georgia Supreme Court identified in the use of that term in *Arnold.* The instruction at issue here governs the very act of determining whether to sentence the defendant to death, while the instruction at issue in *Arnold* only defined an aggravating circumstance, and was at least one step removed from the actual weighing process used in determining the appropriate penalty.

In sum, there is nothing about the language of this instruction that "implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." (*Godfrey v. Georgia* (1980) 446 U.S. 420, 428.) The words "so substantial" are far too amorphous to guide a jury in deciding whether to impose a death sentence. (See *Stringer v. Black* (1992) 503 U.S. 222, 235-236.) It is constitutionally impermissible to base the decision to

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[110] Significantly, the United States Supreme Court has noted with apparent approval *Arnold*'s conclusion that the term "substantial" is impermissibly vague in the context of determining whether a defendant had a "substantial history of serious assaultive criminal convictions." (See *Zant v. Stephens, supra,* 462 U.S. at p. 867, fn. 5.)

impose death on such unspecific and subjective criteria. Because the instruction rendered the penalty determination unreliable (U.S. Const., 8th and 14th Amends.), the death judgment must be reversed.

C. The Instruction Did Not Convey That the Central Determination Is Whether the Death Penalty Is Appropriate, Not Merely Authorized under the Law

The ultimate question in the penalty phase of any capital case is whether death is the appropriate penalty. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1037.) Indeed, this Court has consistently held that it would mislead jurors to say that the deliberative process is merely a simple weighing of factors, in which the appropriateness of the chosen penalty should not be considered. (*People v. Brown* (1985) 40 Cal.3d 512, 541 [jurors are not required to vote for the death penalty unless, upon weighing the factors, they decide it is the appropriate penalty under all the circumstances]; *People v. Milner* (1988) 45 Cal.3d 227, 256-257; *People v. Champion* (1995) 9 Cal.4th 879, 947-948 [instruction may not properly lead the jury to believe that the process of weighing factors in aggravation and mitigation is a "mere mechanical counting of factors"]; see also *Murtishaw v. Woodford* (9th Cir. 2001) 255 F.3d 926, 962-963.)

Here, the instruction under CALJIC No. 8.88 told the jurors they could "return a judgment of death [if] . . . persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole." In addition to infecting the deliberative process with ambiguity by using the term "so substantial," this instruction also failed to inform the jurors that the central inquiry was not whether death was "warranted," but rather whether

it was appropriate.

Those two determinations are clearly not the same; a rational juror could find in a particular case that death was warranted, but not appropriate, because the meaning of "warranted" is considerably broader than that of "appropriate." Webster's Third New International Dictionary, Unabridged (1976 ed.) defines the verb "warrant" as, inter alia, "to give authority or power to for doing or forebearing to do something," or "to serve as or give sufficient ground or reason for" doing something. (*Id.* at p. 2578.) By contrast, "appropriate" is defined as "specially suitable" or "belonging peculiarly." (*Id.* at p. 106.) Thus, a verdict that death is "warrant[ed]" might mean simply that the jurors found, upon weighing the relevant factors, that such a sentence was legally or morally permitted. That is a far different finding than the one the jury is actually required to make: that death is a "specially suitable," fit, and proper punishment, i.e., that it is appropriate.

Because the terms "warranted" and "appropriate" have such different meanings, it is clear why the Supreme Court's Eighth Amendment jurisprudence has demanded that a death sentence must be based on the conclusion that death is the appropriate punishment, not merely that it is warranted. To satisfy "[t]he requirement of individualized sentencing in capital cases" (*Blystone v. Pennsylvania* (1990) 494 U.S. 299, 307), the punishment must fit the offender and the offense; i.e., it must be appropriate. To say that death must be warranted is essentially to return to the standards of that earlier stage in our statutory sentencing scheme in which death eligibility is established.

Jurors decide whether death is "warranted" by finding that special circumstances authorize the death penalty in a particular case. (See *People*

v. Bacigalupo (1993) 6 Cal.4th 457, 462, 464.) Thus, just because death may be warranted or authorized does not mean it is appropriate. Using the term "warrant" at the final, weighing stage of the penalty determination risks confusing the jury by blurring the distinction between the preliminary determination that death is "warranted," i.e., that the defendant is eligible for execution, and the ultimate determination that it is appropriate to execute him or her.

The instructional error involved in using the term "warrants" here was not cured by the trial court's earlier passing reference to a "justified and appropriate" penalty. (8 CT 2687; 27 RT 6769 ["In weighing the various circumstances, you determine under the relevant evidence which penalty is justified and appropriate. . . ."].) That sentence did not tell the jurors they could return a death verdict only if they found it appropriate. Moreover, the sentence containing the "justified and appropriate" language was prefatory in effect and impact; the operative language, which expressly delineated the scope of the jury's penalty determination, came at the very end of the instruction, and told the jurors they could sentence appellant to death if they found it "warrant[ed]."

The deliberative instruction violated the Eighth and Fourteenth Amendments by allowing the jury to impose a death judgment without first determining that death was the appropriate penalty as required by both state law and the federal Constitution. The death judgment is thus constitutionally unreliable (U.S. Const., 8th & 14th Amends.), denied appellant due process (U.S. Const., 14th Amend.; see *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346), and must be reversed.

D. The Instruction Did Not Tell the Jury That a Life Sentence Is Mandatory If the Aggravating Factors Do Not Outweigh the Mitigating Ones

A capital-sentencing jury which finds that death is not an appropriate punishment is required to return a sentence of life without the possibility of parole. (§ 190.3; see *People v. Brown*, *supra*, 40 Cal.3d at pp. 540-542, and fn. 13.) The jury is also required to return a life verdict if it finds that the factors in aggravation do not outweigh those in mitigation. (See § 190.3; *People v. Duncan* (1991) 53 Cal.3d 955, 978.) The sentencing instruction given in this case was additionally flawed because it did not include a clear statement of those principles.

Although this Court has previously held that CALJIC No. 8.88 is valid even though it fails to advise the jury concerning these principles (see *People v. Kipp* (1998) 18 Cal.4th 349, 381; *People v. Duncan*, *supra*, 53 Cal.3d at p. 978), those holdings should be reconsidered. *Duncan* reasoned that, because the instruction directs the jurors to impose the death penalty only if they find that the aggravating circumstances outweigh the mitigating circumstances, it is unnecessary "to additionally advise [them] of the converse (i.e., that if mitigating circumstances outweighed aggravating, then life without parole was the appropriate penalty)." (53 Cal.3d at p. 978; see also *People v. Jackson* (1996) 13 Cal.4th 1164, 1243.)

However, *Duncan* cited no authority for that position, and appellant submits that it conflicts with numerous opinions disapproving instructions which emphasize the prosecution's theory of the case while minimizing or ignoring the theory of the defense. (See, e.g., *People v. Moore* (1954) 43 Cal.2d 517, 526-529; *People v. Kelley* (1980) 113 Cal.App.3d 1005, 1013-1014; *People v. Mata* (1955) 133 Cal.App.2d 18, 21; see also *People v. Rice* (1976) 59 Cal.App.3d 998, 1004 [trial court should instruct on every aspect

of the case and avoid emphasizing either party's theory]; *Reagan v. United States* (1895) 157 U.S. 301, 310.)[111]

People v. Moore, *supra*, 43 Cal.2d 517, is particularly instructive on this point. In that case, this Court explained as follows why a set of one-sided self-defense instructions was erroneous:

> "It is true that the four instructions . . . do not incorrectly state the law . . . , but they stated the rule negatively and from the viewpoint solely of the prosecution. To the legal mind they would imply [their corollary], but that principle should not have been left to implication . . . *There should be absolute impartiality as between the People and the defendant in the matter of instructions, including the phraseology employed in the statement of familiar principles.*" (*Id.* at pp. 526-527; emphasis added [internal quotation marks omitted].)

In other words, contrary to *Duncan*'s apparent assumption, the law does not rely on jurors to infer a rule from the statement of its opposite. The instruction at issue here stated only the conditions under which a death

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[111] There are due process underpinnings to these holdings. In *Wardius v. Oregon* (1973) 412 U.S. 470, the United States Supreme Court warned that "state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial" violate the defendant's due process rights under the Fourteenth Amendment. (*Id.* at p. 473, fn. 6; see also *Green v. Bock Laundry Machine Co.* (1989) 490 U.S. 504, 510; *Washington v. Texas* (1967) 388 U.S. 14, 22; *Gideon v. Wainwright* (1963) 372 U.S. 335, 344; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 372-377; cf. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure* (1960) 69 Yale L.J. 1149, 1180-1192.) Noting that the Due Process Clause "does speak to the balance of forces between the accused and his accuser," *Wardius* held that "in the absence of a strong showing of state interests to the contrary," there "must be a two-way street" as between the prosecution and the defense. (*Wardius v. Oregon*, *supra*, 412 U.S. at p. 474.) Though *Wardius* involved reciprocal-discovery rights, as a matter of due process the same principle should apply to jury instructions.

verdict could be returned, and not those under which a life verdict was required.

Because it failed to inform the jurors of the specific mandate of Penal Code section 190.3, CALJIC No. 8.88 arbitrarily deprived appellant of a right created by state law and thus violated his Fourteenth Amendment right to due process of law. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) In addition, the instruction improperly reduced the prosecution's burden of proof below that required by section 190.3. An instructional error that misdescribes the burden of proof, and thus "vitiates *all* the jury's findings," can never be harmless. (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 281; original emphasis.)

The defective instruction also violated appellant's Sixth Amendment rights. Slighting a defense theory in instructions not only violates due process, but also the right to a jury trial, because it effectively directs a verdict as to certain issues in the case. (*Zemina v. Solem* (D.S.D. 1977) 438 F.Supp. 455, 469-470, affd. and adopted in *Zemina v. Solem* (8th Cir. 1978) 573 F.2d 1027, 1028; see *Cool v. United States* (1972) 409 U.S. 100 [disapproving an instruction placing an unauthorized burden on the defense].)

For all of these reasons, reversal is required.

E. The Instruction Did Not Tell the Jury That If They Determined That Mitigation Outweighed Aggravation, They Were Required to Return a Sentence of Life without the Possibility of Parole

Penal Code section 190.3 directs that, after considering aggravating and mitigating factors, the jury "shall impose" a sentence of confinement in state prison for a term of life without the possibility of parole if "the mitigating circumstances outweigh the aggravating circumstances."

(§ 190.3.)[112] The United States Supreme Court has held that this mandatory language is consistent with the individualized consideration of the defendant's circumstances required under the Eighth Amendment. (See *Boyde v. California* (1990) 494 U.S. 370, 377.)

This mandatory language is not included in CALJIC No. 8.88. CALJIC No. 8.88 only addresses directly the imposition of the death penalty and informs the jury that the death penalty may be imposed if aggravating circumstances are "so substantial" in comparison to mitigating circumstances that the death penalty is warranted. While the phrase "so substantial" plainly implies some degree of significance, it does not properly convey the "greater than" test mandated by section 190.3. The instruction by its terms would permit the imposition of a death penalty whenever aggravating circumstances were merely "of substance" or "considerable," even if they were outweighed by mitigating circumstances.[113]

By failing to conform to the specific mandate of section 190.3, the instruction violated the Fourteenth Amendment. (See *Hicks v. Oklahoma, supra*, 447 U.S. at p. 346.) Additionally, it suffers from all of the

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[112] The statute also states that if aggravating circumstances outweigh mitigating circumstances, the jury "shall impose" a sentence of death. This Court has held, however, that this formulation of the instruction improperly misinformed the jury regarding its role, and disallowed it. (See *People v. Brown* (1985) 40 Cal.3d 512, 544, fn. 17.)

[113] In order to fill this lacuna, appellant requested the following additional sentence in the CALJIC No. 8.88 instruction: "If, in your judgment, you conclude that the mitigating circumstances outweigh the aggravating circumstances, you must return a verdict of life without parole." (6 CT 1995.) This language was not included in the final instruction. (See 25 RT 6455-6458; fn. 114, at p. 344, *post.*)

constitutional defects described in Section D, *ante*.

F. The Instruction Did Not Tell the Jury It Could Impose a Life Sentence Even If Aggravation Outweighed Mitigation

CALJIC No. 8.88 was also defective because it implied that death was the *only* appropriate sentence if the aggravating evidence was "so substantial in comparison with the mitigating circumstances. . . ." However, it is clear under California law that a penalty jury may always return a verdict of life without the possibility of parole, even if the circumstances in aggravation outweigh those in mitigation. (*People v. Brown*, *supra,* 40 Cal.3d at pp. 538-541.) Thus, the instruction in effect improperly told the jurors they had to choose death if the evidence in aggravation substantially outweighed that in mitigation. (Cf. *People v. Peak* (1944) 66 Cal.App.2d 894, 909.)

The failure to instruct on this crucial point[114] was prejudicial because it deprived appellant of his right to have the jury given proper information concerning its sentencing discretion. (*People v. Easley* (1983) 34 Cal.3d 858, 884.) Moreover, since the defect in the instruction deprived appellant of an important procedural protection that California law affords capital defendants, delivery of the instruction deprived appellant of due process (U.S. Const., 14th Amend.; *Hicks v. Oklahoma*, *supra*, 447 U.S. at p. 343, 346; see *Hewitt v. Helms* (1983) 459 U.S. 460, 471-472), and made the resulting verdict unreliable (U.S. Const., 8th & 14th Amends.; Cal. Const.,

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[114] Appellant requested that the jury be instructed on this principle (see 6 CT 1995), but it was refused by the court (see 25 RT 6454-6456). Defense counsel then informed the court that it would withdraw its request for an instruction on the principle argued in Section E, *ante*, if the instant requested modification was not given (see 25 RT 6455-6456).

art. I, § 17; *Furman v. Georgia* (1972) 408 U.S. 238). The death judgment must therefore be reversed.

G. The Instruction Did Not Tell the Jury That Appellant Did Not Have to Persuade Them That the Death Penalty Was Inappropriate

CALJIC No. 8.88 was also defective because it failed to inform the jurors that neither party in a capital case bears the burden to persuade the jury of the appropriateness or inappropriateness of the death penalty. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.)[115] That failure was error, because no matter the nature of the burden, and even where no burden exists, a capital-sentencing jury must be clearly informed of the applicable standards, so it will not improperly assign that burden to the defense.

As stated in *United States ex rel. Free v. Peters* (N.D.Ill. 1992) 806 F.Supp. 705, revd. *Free v. Peters* (7th Cir. 1993) 12 F.3d 700:

> "To the extent that the jury is left with no guidance as to (1) who, if anyone, bears the burden of persuasion, and (2) the nature of that burden, the [sentencing] scheme violates the Eighth Amendment's protection against the arbitrary and capricious imposition of the death penalty. [Citations omitted.]" (*Id.* at pp. 727-728.)

Illinois, like California, does not place the burden of persuasion on either party in the penalty phase of a capital trial. (*Id.* at p. 727.) Nonetheless, the district court in *Peters* held that the Illinois pattern sentencing instructions were defective because they failed to apprise the jury that no such burden is imposed.

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[115] This argument alleges that the instruction was deficient under the rules of law currently applied by this Court. In Argument XIV, *post*, appellant argues that there must be a burden of proof at the penalty phase of a capital case and that the instructions should inform the jury that it is the prosecution which bears that burden.

The instant instruction, taken from CALJIC No. 8.88, suffers from the same defect, with the result that capital juries in California are not properly guided on this crucial point. The death judgment must therefore be reversed.

H. Conclusion

The state and federal constitutions require capital sentencing juries to be carefully advised in order to avoid arbitrary and capricious application of the death penalty. (U.S. Const., 8th & 14th Amends.; Cal. Const., art. I, § 17.) Because CALJIC No. 8.88, the main sentencing instruction given to the penalty jury, failed to comply with that requirement, appellant's death judgment must be reversed.

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XIV

THE CALIFORNIA DEATH-PENALTY STATUTE AND INSTRUCTIONS ARE UNCONSTITUTIONAL BECAUSE THEY FAIL TO SET OUT THE APPROPRIATE BURDEN OF PROOF

The California death-penalty statute fails to provide any of the safeguards common to other death-penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. As discussed herein and elsewhere in this brief, they do not have to find beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is intercase proportionality review not required; it is not permitted. (See Argument XV, *post.*) Under the rationale that a decision to impose death is "moral" and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make--whether or not to impose death. These omissions in the California capital-sentencing scheme, individually and collectively, run afoul of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A. The Statute and Instructions Unconstitutionally Fail to Assign to the State the Burden of Proving Beyond a Reasonable Doubt the Existence of an Aggravating Factor, That the Aggravating Factors Outweigh the Mitigating Factors, and That Death Is the Appropriate Penalty

In California, before sentencing a person to death, the jury must be persuaded that "the aggravating circumstances outweigh the mitigating circumstances" (§ 190.3) and that "death is the appropriate penalty under all the circumstances" (*People v. Brown* (1985) 40 Cal.3d 512, 541; see also *People v. Cudjo* (1993) 6 Cal.4th 585, 634). Under the California scheme, however, neither the aggravating circumstances nor the ultimate determination of whether to impose the death penalty need be proved to the jury's satisfaction pursuant to any delineated burden of proof.[116] The failure to assign a burden of proof renders the California death-penalty scheme unconstitutional, and renders appellant's death sentence unconstitutional and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

This Court has consistently held that "neither the federal nor the state Constitution requires the jury to agree unanimously as to aggravating factors, or to find beyond a reasonable doubt that aggravating factors exist, [or] that they outweigh mitigating factors. . . ." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1255; see also *People v. Stanley* (1995) 10 Cal.4th 764, 842; *People v. Ghent* (1987) 43 Cal.3d 739, 773-774.) However, this

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[116] There are two exceptions to this lack of a burden of proof. The special circumstances (§ 190.2) and the aggravating factor of unadjudicated violent criminal activity (§ 190.3, factor (b)) must be proved beyond a reasonable doubt.

Court's reasoning has been squarely rejected by the United States Supreme Court's decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Ring v. Arizona* (2002) 536 U.S. 584, and *Blakely v. Washington* (2004) 542 U.S. 296.

Apprendi considered a New Jersey state law that authorized a maximum sentence of 10 years based on a jury finding of guilt for second degree unlawful possession of a firearm. A related hate-crimes statute, however, allowed imposition of a longer sentence if the judge found, by a preponderance of the evidence, that the defendant committed the crime with the purpose of intimidating an individual or group of individuals on the basis of race, color, gender, or other enumerated factors. In short, the New Jersey statute considered in *Apprendi* required a jury verdict on the elements of the underlying crime, but treated the racial-motivation issue as a sentencing factor for determination by the judge. (*Apprendi v. New Jersey*, *supra*, 530 U.S. at pp. 471-472.)

The United States Supreme Court found that this sentencing scheme violated due process, reasoning that simply labeling a particular matter a "sentence enhancement" did not provide a "principled basis" for distinguishing between proof of facts necessary for conviction and punishment within the normal sentencing range, on one hand, and those facts necessary to prove the additional allegation increasing the punishment beyond the maximum that the jury conviction itself would allow, on the other. The high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring v. Arizona*, *supra*, the Court applied *Apprendi's* principles in

the context of capital-sentencing requirements, seeing "no reason to differentiate capital crimes from all others in this regard." (536 U.S. at p. 607.) The Court considered Arizona's capital-sentencing scheme, which authorized a judge sitting without a jury to sentence a defendant to death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Id.* at p. 593.) Although the Court had previously upheld the Arizona scheme in *Walton v. Arizona* (1990) 497 U.S. 639, the Court found *Walton* to be irreconcilable with *Apprendi.*

While *Ring* dealt specifically with statutory aggravating circumstances, the Court concluded that *Apprendi* was fully applicable to all factual findings necessary to put a defendant to death, regardless of whether those findings are labeled sentencing factors or elements of the offense. (*Ring v. Arizona*, *supra*, 536 U.S. at p. 609.)[117] The Court observed: "The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. We hold that the Sixth Amendment applies to both." (*Ibid.*)

In *Blakely v. Washington*, *supra*, the Court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding

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[117] Justice Scalia distinctively distilled the holding: "[A]ll facts essential to imposition of the level of punishment that the defendant receives--whether the statute calls them elements of the offense, sentencing factors, or Mary Jane--must be made by the jury beyond a reasonable doubt." (*Ring, supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.).)

of "substantial and compelling reasons." (542 U.S. at pp. 299-300.) The state of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. (*Id.* at p. 300.) The Supreme Court ruled that this procedure was invalid because it did not comply with the right to a jury trial. (*Id.* at pp. 313-314.)

In reaching this holding, the high court stated that the governing rule since *Apprendi* is that other than a prior conviction, *any* fact that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely*, *supra*, 542 U.S. at pp. 303-304; original emphasis.)

Twenty-six states require that factors relied on to impose death in a penalty phase must be proven beyond a reasonable doubt by the prosecution, and three additional states have related provisions.[118] Only

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[118] See Ala. Code, § 13A-5-45(e) (1975); Ark. Code Ann., § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann., § 16-11-104-1.3-1201(1)(d) (West 2002); Del. Code Ann. tit. 11, § 4209(c)(3)a.1. (2002); Ga. Code Ann., § 17-10-30(c) (Harrison 1990); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(f) (Smith-Hurd 1992); Ind. Code Ann., §§ 35-50-2-9(a), (e) (West 1992); Ky. Rev. Stat. Ann., § 532.025(3) (Michie 1992); La. Code Crim. Proc. Ann. art. 905.3 (West 1984); Md. Ann. Code art. 27, §§ 413(d), (f), (g) (1957); Miss. Code Ann., § 99-19-103 (1993); Neb. Rev. Stat., § 29-2520(4)(f) (2002) ; Nev. Rev. Stat. Ann., § 175.554(3) (Michie 1992); N.J.S.A. 2C:11-3c(2)(a); N.M. Stat. Ann., § 31-20A-3 (Michie 1990); Ohio Rev. Code, § 2929.04 (Page's 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann., § 9711(c)(1)(iii) (1982); S.C. Code Ann., §§ 16-3-20(A), (C) (Law. Co-op (1992); S.D. Codified Laws Ann., § 23A-27A-5 (1988); Tenn. Code Ann. §, 39-13-204(f) (1991); Tex.

(continued...)

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

California law as interpreted by this Court does not require that a reasonable-doubt standard be used during any part of the penalty phase of a defendant's trial, except as to proof of prior criminality relied upon as an aggravating circumstance--and even in that context the required finding need not be unanimous. (*People v. Fairbank*, *supra*, 16 Cal.4th at p. 1255; see also *People v. Hawthorne* (1992) 4 Cal.4th 43, 79 [penalty-phase determinations are "moral and . . . not factual," and therefore not "susceptible to a burden-of-proof quantification"].)

California statutory law and jury instructions, however, do require fact-finding before the decision to impose death or a lesser sentence is finally made. As a prerequisite to the imposition of the death penalty, section 190.3 requires the "trier of fact" to find that at least one aggravating

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[118](...continued)
Crim. Proc. Code Ann., § 37.071(c) (West 1993); *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1348; Va. Code Ann., § 19.2-264.4(C) (Michie 1990); Wyo. Stat., §§ 6-2-102(d)(i)(A), (e)(i) (1992).

Washington has a related requirement that, before making a death judgment, the jury must make a finding beyond a reasonable doubt that no mitigating circumstances exist sufficient to warrant leniency. (Wash. Rev. Code Ann. § 10.95.060(4) (West 1990).) And Arizona and Connecticut require that the prosecution prove the existence of penalty-phase aggravating factors, but specify no burden. (Ariz. Rev. Stat. Ann. § 13-703 (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).) On remand in the *Ring* case, the Arizona Supreme Court found that both the existence of one or more aggravating circumstances and the fact that aggravation substantially outweighs mitigation were factual findings that must be made by a jury beyond a reasonable doubt. (*State v. Ring* (Ariz. 2003) 65 P.3d 915.)

factor exists and that such aggravating factor (or factors) substantially outweigh any and all mitigating factors.[119,120] As set forth in California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), which was given to appellant's jury, "[a]n aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88; 8 CT 2687; 27 RT 6768.)

Thus, before the process of weighing aggravating factors against mitigating factors can begin, the presence of one or more aggravating factors must be found by the jury. And before the decision whether or not to impose death can be made, the jury must find that aggravating factors substantially outweigh mitigating factors. These factual determinations are essential prerequisites to death-eligibility, but do not mean that death is the inevitable verdict; the jury can still reject death as the appropriate

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[119] In *Johnson v. State* (Nev. 2002) 59 P.3d 450, the Nevada Supreme Court found that under a statute similar to California's, the requirement that aggravating factors outweigh mitigating factors was a factual determination, and not merely discretionary weighing, and therefore "even though *Ring* expressly abstained from ruling on any 'Sixth Amendment claim with respect to mitigating circumstances,' we conclude that *Ring* requires a jury to make this finding as well: 'If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt.'" (*Id.* at p. 460; fns. omitted.)

[120] This Court has acknowledged that fact-finding is part of a sentencing jury's responsibility, even if not the greatest part; its role "is not merely to find facts, but also – and most important – to render an individualized, *normative* determination about the penalty appropriate for the particular defendant. . . ." (*People v. Brown, supra*, 46 Cal.3d at p. 448; original emphasis.)

punishment notwithstanding these factual findings.[121]

In *People v. Anderson* (2001) 25 Cal.4th 543, 589, this Court held that since the maximum penalty for one convicted of first degree murder with a special circumstance is death (see § 190.2, subd. (a)), *Apprendi* does not apply. After *Ring*, the Court repeated the same analysis. (See e.g., *People v. Prieto* (2003) 30 Cal.4th 226, 263 ["Because any finding of aggravating factors during the penalty phase does not 'increase the penalty for a crime beyond the prescribed statutory maximum' [citation omitted], *Ring* imposes no new constitutional requirements on California's penalty phase proceedings."]; see also *People v. Snow* (2003) 30 Cal.4th 43, 126, fn. 32.)

This holding in the face of the United States Supreme Court's recent decisions is simply no longer tenable. Read together, the *Apprendi* line of cases renders the weighing of aggravating circumstances against mitigating circumstances "the functional equivalent of an element of [capital murder]." (See *Apprendi v. New Jersey*, *supra*, 530 U.S. at p. 494.) As stated in *Ring*, "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact--no matter how the State labels it--must be found by a jury beyond a reasonable doubt." (*Ring v. Arizona*, *supra*, 536 U.S. at pp. 585-586.) As Justice Breyer, in explaining the holding in *Blakely*, points out, the Court made it clear that "a jury must find, not only the facts that make up the crime of which the offender is charged,

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[121] This Court has held that despite the "shall impose" language of section 190.3, even if the jurors determine that aggravating factors outweigh mitigating factors, they may still impose a sentence of life in prison. (*People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown, supra*, 40 Cal.3d at p. 541.)

but also (all punishment-increasing) facts about the *way* in which the offender carried out that crime." (*Blakely v. Washington*, *supra*, 542 U.S. at p. 328 (dis. opn. of Breyer, J.); original emphasis.)

Thus, as stated in *Apprendi*, "the relevant inquiry is one not of form, but of effect--does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" (*Apprendi*, *supra*, 530 U.S. at p. 494.) The answer in the California capital-sentencing scheme is "yes." In this state, in order to elevate the punishment from life imprisonment to the death penalty, specific findings must be made that (1) aggravation exists, (2) aggravation outweighs mitigation, and (3) death is the appropriate punishment under all the circumstances.

Under the California sentencing scheme, neither the jury nor the court may impose the death penalty based solely upon a verdict of first degree murder with special circumstances. While it is true that a finding of a special circumstance, in addition to a conviction of first degree murder, carries a maximum sentence of death (§ 190.2), the statute "authorizes a maximum punishment of death only in a formal sense." (*Ring, supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 541 (dis. opn. of O'Connor, J.).) In order to impose the increased punishment of death, the jury must make additional findings at the penalty phase--that is, a finding of at least one aggravating factor, plus findings that the aggravating factor or factors outweigh any mitigating factors and that death is appropriate. These additional factual findings increase the punishment beyond "'that authorized by the jury's guilty verdict'" (*Ring*, *supra*, 536 U.S. at p. 604, quoting *Apprendi*, *supra*, 530 U.S. at p. 494), and are "essential to the imposition of the level of punishment that the defendant receives" (*Ring supra*, 536 U.S. at p. 610 (conc. opn. of Scalia, J.)). They thus trigger the

requirements of *Blakely-Ring-Apprendi* that the jury be instructed to find the factors and determine their weight beyond a reasonable doubt.

This Court has recognized that fact-finding is one of the functions of the sentencer; California statutory law, jury instructions, and the Court's previous decisions leave no doubt that facts must be found before the death penalty may be considered. This Court has held, however, that *Ring* does not apply because the facts found at the penalty phase are "facts which bear upon, but do not necessarily determine, which of these two alternative penalties is appropriate." (*People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32, citing *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590, fn. 14.) This Court has repeatedly sought to reject *Ring*'s applicability by comparing the capital-sentencing process in California to "a sentencing court's traditionally discretionary decision to impose one prison sentence rather than another." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 275; *People v. Snow*, *supra*, 30 Cal.4th at p. 126, fn. 32.)

The distinction between facts that "bear on" the penalty determination and facts that "necessarily determine" the penalty is a distinction without a difference. There are no facts in Arizona or California that are "necessarily determinative" of a sentence. In both states, the sentencer is free to impose a sentence of less than death regardless of the aggravating circumstances. In both states, any one of a number of possible aggravating factors may be sufficient to impose death; no single specific factor must be found in Arizona or California. And, in both states, the absence of an aggravating circumstance precludes entirely the imposition of a death sentence. And *Blakely* makes crystal clear that, to the dismay of the dissent, the "traditional discretion" of a sentencing judge to impose a harsher term based on facts not found by the jury or admitted by the

defendant does not comport with the federal Constitution.

In People v. *Prieto*, *supra*, this Court summarized California's penalty-phase procedure as follows:

> "Thus, in the penalty phase, the jury *merely* weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.' (*Tuilaepa v. California* [, *supra*, 512 U.S. at p. 972]). No single factor therefore determines which penalty – death or life without the possibility of parole – is appropriate." (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263; emphasis added.)

This summary omits the fact that death is simply not an option unless and until at least one aggravating circumstance is found to have occurred or be present; otherwise, there is nothing to put on the scale in support of a death sentence. (See *People v. Duncan* (1991) 53 Cal.3d 955, 977-978.)

A California jury must first decide whether any aggravating circumstances, as defined by section 190.3 and the standard penalty-phase instructions, exist in the case before it. Only after this initial factual determination has been made can the jury move on to "merely" weigh those factors against the proffered mitigation. Further, the Arizona Supreme Court has found that this weighing process is the functional equivalent of an element of capital murder, and is therefore subject to the protections of the Sixth Amendment. (See *State v. Ring* (Ariz. 2003) 65 P.3d 915, 943 ["Neither a judge, under the superseded statutes, nor the jury, under the new statutes, can impose the death penalty unless that entity concludes that the mitigating factors are not sufficiently substantial to call for leniency."]; accord, *State v. Whitfield* (Mo. 2003) 107 S.W.3d 253; *Woldt v. People*

(Colo. 2003) 64 P.3d 256; *Johnson v. State* (Nev. 2002) 59 P.3d 450.)[122]

It is true that a sentencer's finding that the aggravating factors substantially outweigh the mitigating factors involves a mix of factual and normative elements, but this does not make this finding any less subject to the Sixth and Fourteenth Amendment protections applied in *Apprendi*, *Ring*, and *Blakely*. In *Blakely* itself, the state of Washington argued that *Apprendi* and *Ring* should not apply because the statutorily-enumerated grounds for an upward sentencing departure were illustrative only, not exhaustive, and hence left the sentencing judge free to identify and find an aggravating factor on his own--a finding which, appellant submits, must inevitably involve both normative ("what would make this crime worse") and factual ("what happened") elements. The high court rejected the state's contention, finding *Ring* and *Apprendi* fully applicable even where the sentencer is authorized to make this sort of mixed normative/factual finding, as long as the finding is a prerequisite to an elevated sentence. (*Blakely*, *supra*, 542 U.S. at p. 305.) Thus, under *Apprendi*, *Ring*, and *Blakely*, whether the finding is a Washington state sentencer's discernment of a non-enumerated aggravating factor or a California sentencer's determination that the aggravating factors substantially outweigh the mitigating factors, the finding must be made by a jury and must be made

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[122] See also 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 that all features that the Supreme Court regarded in *Ring* as significant apply not only to the finding that an aggravating circumstance is present, but also to whether mitigating circumstances are sufficiently substantial to call for leniency, since both findings are essential predicates for a sentence of death).

beyond a reasonable doubt.[123]

The appropriate questions regarding the Sixth Amendment's application to California's penalty phase, according to *Apprendi*, *Ring* and *Blakely*, are: (1) what is the maximum sentence that could be imposed without a finding of one or more aggravating circumstances as defined in

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[123] In *People v. Griffin* (2004) 33 Cal.4th 536, in this Court's first post-*Blakely* discussion of the jury's role in the penalty phase, the Court cited *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, 432, 437, for the principle that an "award of punitive damages does not constitute a finding of 'fact[ ]': "imposition of punitive damages" is not "essentially a factual determination," but instead an "expression of . . . moral condemnation." (*People v. Griffin*, *supra*, 33 Cal.4th at p. 595.) In *Leatherman*, however, before the jury could reach its ultimate determination of the quantity of punitive damages, it had to answer "Yes" to the following interrogatory:

> "Has Leatherman shown by clear and convincing evidence that by engaging in false advertising or passing off, Cooper acted with malice, or showed a reckless and outrageous indifference to a highly unreasonable risk of harm and has acted with a conscious indifference to Leatherman's rights?" *Leatherman*, *supra*, 532 U.S. at p. 429.)

This finding, which was a prerequisite to the award of punitive damages, is very much like the aggravating factors at issue in *Blakely*. *Leatherman* was concerned with whether the Seventh Amendment's ban on re-examination of jury verdicts restricted appellate review of the amount of a punitive-damages award to a plain-error standard, or whether such awards could be reviewed de novo. Although the court found that the ultimate amount was a moral decision that should be reviewed de novo, it made clear that all findings that were prerequisite to the dollar-amount determination were jury issues. (*Id.* at pp. 437, 440.) *Leatherman* thus supports appellant's argument that the findings of one or more aggravating factors, and that aggravating factors substantially outweigh mitigating factors, are prerequisites to the determination of whether to impose death in California, and are protected by the Sixth Amendment to the federal Constitution.

CALJIC No. 8.88? The maximum sentence would be life without possibility of parole; and (2) what is the maximum sentence that could be imposed during the penalty phase based on findings that one or more aggravating circumstances are present? The maximum sentence, without any additional findings, namely that aggravating circumstances substantially outweigh mitigating circumstances, would be life without possibility of parole.

Finally, this Court has relied on the undeniable fact that "death is different" as a basis for *withholding* rather than extending procedural protections. (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) In *Ring*, Arizona also sought to justify the lack of a unanimous jury finding beyond a reasonable doubt of aggravating circumstances by arguing that "death is different." This effort to turn the high court's recognition of the irrevocable nature of the death penalty to its advantage was rebuffed:

> "Apart from the Eighth Amendment provenance of aggravating factors, Arizona presents 'no specific reason for excepting capital defendants from the constitutional protections . . . extend[ed] to defendants generally, and none is readily apparent.' [Citation.] The notion 'that the Eighth Amendment's restriction on a state legislature's ability to define capital crimes should be compensated for by permitting States more leeway under the Fifth and Sixth Amendments in proving an aggravating fact necessary to a capital sentence . . . is without precedent in our constitutional jurisprudence.'" (*Ring*, *supra*, 536 U.S. at p. 606, quoting with approval *Apprendi, supra*, 530 U.S. at p. 539 (dis. opn. of O'Connor, J.).)

No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1988) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) As the high court stated in *Ring*:

> "Capital defendants, no less than noncapital defendants, . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. . . . The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death." (536 U.S. at pp. 589, 609.)

The final step of California's capital-sentencing procedure, the decision whether to impose death or life, is a moral and a normative one. This Court errs greatly, however, in using this fact to *eliminate* procedural protections that would render the decision a rational and reliable one and to allow the findings that are prerequisite to the determination to be uncertain, undefined, and subject to dispute not only as to their significance, but as to their accuracy. This Court's refusal to accept the applicability of *Ring* to any part of California's penalty-phase proceedings violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

B. The State and Federal Constitutions Require That the Jury Be Instructed That They May Impose a Sentence of Death Only If They Are Persuaded Beyond a Reasonable Doubt That the Aggravating Factors Outweigh the Mitigating Factors and That Death Is the Appropriate Penalty

1. Factual Determinations

The outcome of a judicial proceeding necessarily depends on an appraisal of the facts. "[T]he procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important must be the procedural safeguards surrounding those rights." (*Speiser v. Randall* (1958) 357 U.S. 513, 520-521.)

The primary procedural safeguard implanted in the criminal justice

system relative to fact assessment is the allocation and degree of the burden of proof. The burden of proof represents the obligation of a party to establish a particular degree of belief as to the contention sought to be proved. In criminal cases, the burden is rooted in the Due Process Clause of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) In capital cases, "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." (*Gardner v. Florida* (1977) 430 U.S. 349, 358; see also *Presnell v. Georgia* (1978) 439 U.S. 14.) Aside from the question of the applicability of the Sixth Amendment to California's penalty-phase proceedings, the burden of proof for factual determinations during the penalty phase of a capital trial, when life is at stake, must be beyond a reasonable doubt. This is required by both the Due Process Clause of the Fourteenth Amendment and the Eighth Amendment.

2. Imposition of Life or Death

The requirements of due process relative to the burden of persuasion generally depend upon the significance of what is at stake and the social goal of reducing the likelihood of erroneous results. (*In re Winship*, *supra*, 397 U.S. at pp. 363-364; see also *Addington v. Texas* (1979) 441 U.S. 418, 423.) The allocation of a burden of persuasion symbolizes to society in general, and to the jury in particular, the consequences of what is to be decided. In this sense, it reflects a belief that the more serious the consequences of the decision being made, the greater the necessity that the decision-maker reach "a subjective state of certitude" that the decision is appropriate. (*Winship*, *supra*, 397 U.S. at p. 364.) Selection of a constitutionally-appropriate burden of persuasion is accomplished by weighing "three distinct factors": "the private interests affected by the

proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure." (*Santosky v. Kramer* (1982) 455 U.S. 745, 754; see also *Matthews v. Eldridge* (1976) 424 U.S. 319, 334-335.)

Looking at the "private interests affected by the proceeding," it is impossible to conceive of an interest more significant than human life. If personal liberty is "an interest of transcending value" (*Speiser v. Randall*, *supra*, 375 U.S. at p. 525), how much more transcendent is human life itself? Far less valued interests are protected by the requirement of proof beyond a reasonable doubt before they may be extinguished. (See *Winship*, *supra*, 397 U.S. 364 [adjudication of juvenile delinquency]; *People v. Feagley* (1975) 14 Cal.3d 338 [commitment as mentally disordered sex offender]; *People v. Burnick* (1975) 14 Cal.3d 306 [same]; *People v. Thomas* (1977) 19 Cal.3d 630 [commitment as narcotic addict]; *Conservatorship of Roulet* (1979) 23 Cal.3d 219 [appointment of conservator]. The decision to take a person's life must be made under no less demanding a standard. Due process mandates that our social commitment to the sanctity of life and the dignity of the individual be incorporated into the decision-making process by imposing upon the state the burden to prove beyond a reasonable doubt that death is appropriate.

As to the "risk of error created by the State's chosen procedure" (*Santosky v. Kramer*, *supra*, 455 U.S. at p. 754), the United States Supreme Court reasoned:

> "[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants. . . . When the State brings a

> criminal action to deny a defendant liberty or life, . . . 'the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.' The stringency of the 'beyond a reasonable doubt' standard bespeaks the 'weight and gravity' of the private interest affected, society's interest in avoiding erroneous convictions, and a judgment that those interests together require that 'society impos[e] almost the entire risk of error upon itself.'" (*Id.* at p. 755, quoting *Addington v. Texas*, *supra*, 441 U.S. at pp. 423, 424, 427 [citations omitted].)

Moreover, there is substantial room for error in the procedures for deciding between life and death. The penalty proceedings are much like the child-neglect proceedings dealt with in *Santosky*. They involve "imprecise substantive standards that leave determinations unusually open to the subjective values of the [jury]." (*Santosky v. Kentucky*, *supra*, 455 U.S. at p. 763.) Nevertheless, imposition of a burden of proof beyond a reasonable doubt can be effective in reducing this risk of error, since that standard has long proven its worth as "a prime instrument for reducing the risk of convictions resting on factual error." (*Winship*, *supra*, 397 U.S. at p. 363.)

The final *Santosky* benchmark, "the countervailing governmental interest supporting use of the challenged procedure," also calls for imposition of a reasonable-doubt standard. Adoption of that standard would not deprive the state of the power to impose capital punishment; it would merely serve to maximize "reliability in the determination that death is the appropriate punishment in a specific case." (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.)

The need for reliability is especially compelling in capital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 637-638.) No greater interest is

ever at stake. (See *Monge v. California*, *supra*, 524 U.S. at p. 732.) In *Monge*, the Supreme Court expressly applied the *Santosky* rationale for the beyond-a-reasonable-doubt burden-of-proof requirement to capital-sentencing proceedings: "[*I*]n *a capital sentencing proceeding*, as in a criminal trial, 'the interests of the defendant [are] of such magnitude that . . . they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.'" (*Monge v. California*, *supra*, 524 U.S. at p. 732, quoting *Bullington v. Missouri* (1981) 451 U.S. 430, 441 (quoting *Addington v. Texas, supra*, 441 U.S. at pp. 423-424); emphasis added.) The sentencer of a person facing the death penalty is required by the Due Process Clause and Eighth Amendment constitutional guarantees to be convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

This Court has long held that the penalty determination in a capital case in California is a moral and normative decision, as opposed to a purely factual one. (See, e.g., *People v. Griffin* (2004) 33 Cal.4th 536, 595.) Other states, however, have ruled that this sort of moral and normative decision is not inconsistent with a standard based on proof beyond a reasonable doubt. This is because a reasonable-doubt standard focuses on the degree of certainty needed to reach the determination, which is something not only applicable but particularly appropriate to a moral and normative penalty decision. As the Connecticut Supreme Court recently explained when rejecting an argument that the jury determination in the weighing process is a moral judgment inconsistent with a reasonable-doubt standard:

> "We disagree with the dissent of Sullivan, C.J., suggesting that, because the jury's determination is a moral

> judgment, it is somehow inconsistent to assign a burden of persuasion to that determination. The dissent's contention relies on its understanding of the reasonable doubt standard as a quantitative evaluation of the evidence. We have already explained in this opinion that the traditional meaning of the reasonable doubt standard focuses, not on a quantification of the evidence, but on the degree of certainty of the fact finder or, in this case, the sentencer. Therefore, the nature of the jury's determination as a moral judgment does not render the application of the reasonable doubt standard to that determination inconsistent or confusing. On the contrary, it makes sense, and, indeed, is quite common, when making a moral determination, to assign a degree of certainty to that judgment. Put another way, the notion of a particular level of certainty is not inconsistent with the process of arriving at a moral judgment; our conclusion simply assigns the law's most demanding level of certainty to the jury's most demanding and irrevocable moral judgment." (*State v. Rizzo* (Conn. 2003) 833 A.2d 363, 408, fn. 37.)

In sum, the need for reliability is especially compelling in capital cases. (*Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Monge v. California*, *supra*, 524 U.S. at p. 732.) Under the Eighth and Fourteenth Amendments, a sentence of death may not be imposed unless the sentencer is convinced beyond a reasonable doubt not only that the factual bases for its decision are true, but that death is the appropriate sentence.

C. The Sixth, Eighth and Fourteenth Amendments Require That the State Bear Some Burden of Persuasion at the Penalty Phase

In addition to failing to impose a reasonable-doubt standard on the prosecution, the penalty-phase instructions failed to assign any burden of persuasion regarding the ultimate penalty-phase determinations the jury had to make. Although this Court has recognized that "penalty phase evidence may raise disputed factual issues" (*People v. Superior Court (Mitchell)* (1993) 5 Cal.4th 1229, 1236), it has also held that a burden of persuasion at

the penalty phase is inappropriate given the normative nature of the determinations to be made. (See *People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant urges this Court to reconsider that ruling because it is constitutionally unacceptable under the Sixth, Eighth and Fourteenth Amendments.

First, allocation of a burden of proof is constitutionally necessary to avoid the arbitrary and inconsistent application of the ultimate penalty of death. "Capital punishment must be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112.) With no standard of proof articulated, there is a reasonable likelihood that different juries will impose different standards of proof in deciding whether to impose a sentence of death. Who bears the burden of persuasion as to the sentencing determination also will vary from case to case. Such arbitrariness undermines the requirement that the sentencing scheme provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many in which it is not. Thus, even if it were not constitutionally necessary to place such a heightened burden of persuasion on the prosecution as reasonable doubt, some burden of proof must be articulated, if only to ensure that juries faced with similar evidence will return similar verdicts, that the death penalty is evenhandedly applied from case to case, and that capital defendants are treated equally from case to case. It is unacceptable under the Eighth and Fourteenth Amendments that, in cases where the aggravating and mitigating evidence is balanced, one defendant should live and another die simply because one jury assigned the burden of proof and persuasion to the state while another assigned it to the accused, or because one juror applied a lower standard and found in favor of the state and another applied a higher standard and found in favor

of the defendant. (See *Proffitt v Florida* (1976) 428 U.S. 242, 260 [punishment should not be "wanton" or "freakish"]; *Mills v. Maryland* (1988) 486 U.S. 367, 374 [impermissible for punishment to be reached by "height of arbitrariness"].)

Second, while the scheme sets forth no burden for the prosecution, the prosecution obviously has some burden to show that the aggravating factors are greater than the mitigating factors, as a death sentence may not be imposed simply by virtue of the fact that the jury has found the defendant guilty of murder and has found at least one special circumstance true. The jury must impose a sentence of life without possibility of parole if the mitigating factors outweigh the aggravating circumstances (see §190.3), and may impose such a sentence even if no mitigating evidence was presented (see *People v. Duncan* (1991) 53 Cal.3d 955, 979).

In addition, the statutory language suggests the existence of some sort of finding that must be "proved" by the prosecution and reviewed by the trial court. Section 190.4, subdivision (e), requires the trial judge to "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3," and to "make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented."[124]

A fact could not be established--i.e., a fact-finder could not make a finding--without imposing some sort of burden on the parties presenting the evidence upon which the finding is based. The failure to inform the jury of

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[124] As discussed below, the Supreme Court has consistently held that a capital-sentencing proceeding is similar to a trial in its format and in the existence of the protections afforded a defendant.

how to make factual findings is inexplicable.

Third, in noncapital cases, the state of California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. (See Cal. Rules of Court, rule 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence]; Evid. Code § 520 ["The party claiming that a person is guilty of crime or wrongdoing has the burden of proof on that issue."].) There is no statute to the contrary. In *any* capital case, *any* aggravating factor will relate to wrongdoing; those that are not themselves wrongdoing (such as, for example, age when it is counted as a factor in aggravation) are still deemed to aggravate other wrongdoing by a defendant. Evidence Code section 520 is a legitimate state expectation in adjudication and is therefore constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.)

The failure to articulate a proper burden of proof is constitutional error under the Sixth, Eighth and Fourteenth Amendments. In addition, as explained previously, to provide greater protection to noncapital than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments. (See e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421.)

It is inevitable that one or more jurors on a given jury will find themselves torn between sparing and taking the defendant's life, or between finding and not finding a particular aggravator. A tie-breaking rule is needed to ensure that such jurors--and the juries on which they sit--respond in the same way, so that the death penalty is applied evenhandedly.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma*, *supra*, 455 U.S. at p. 112.) It is unacceptable--"wanton" and "freakish" (*Proffitt v. Florida*, *supra*, 428 U.S. at p. 260), and the "height of arbitrariness" (*Mills v. Maryland*, *supra*, 486 U.S. at p. 374)--that one defendant should live and another die simply because one juror or jury can break a tie in favor of a defendant and another can do so in favor of the state on the same facts, with no uniformly-applicable standards to guide either.

If, in the alternative, it were permissible not to have any burden of proof at all, the trial court erred prejudicially by failing to articulate that to the jury.

The burden of proof in any case is one of the most fundamental concepts in our system of justice, and any error in articulating it is automatically reversible error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275.) The reason is obvious. Without an instruction on the burden of proof, jurors may not use the correct standard, and each may instead apply the standard he or she believes appropriate in any given case.

The same is true if there is no burden of proof but the jury is not so told. Jurors who believe that the burden should be on the defendant to prove mitigation in the penalty phase would continue to believe that. Such jurors do exist. This raises the constitutionally-unacceptable possibility that a juror would vote for the death penalty because of a misallocation of what is supposed to be a nonexistent burden of proof. That renders the failure to give any instruction at all on the subject a violation of the Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to provide the jury with the guidance legally required for administration of the death penalty to meet constitutionally-minimum standards. The error in failing to

instruct the jury on what the proper burden of proof is, or is not, is reversible per se. (*Sullivan v. Louisiana*, *supra*, 508 U.S. 275.)

D. The Instructions Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Require Juror Unanimity on Aggravating Factors

The jury was not instructed that its findings on aggravating circumstances needed to be unanimous. The trial court failed to require even that a simple majority of the jurors agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warranted a death sentence. As a result, the jurors in this case were not required to deliberate at all on critical factual issues. Indeed, there is no reason to believe that the jury imposed the death sentence in this case based on any form of agreement, other than the general agreement that the aggravating factors were so substantial in relation to the mitigating factors that death was warranted. As to the reason for imposing death, a single juror may have relied on evidence that only he or she believed existed in imposing appellant's death sentence. Such a process leads to a chaotic and unconstitutional penalty verdict. (See, e.g., *Schad v. Arizona* (1991) 501 U.S. 624, 632-633 (plur. opn. of Souter, J.).)

Appellant recognizes that this Court has held that when an accused's life is at stake during the penalty phase, "there is no constitutional requirement for the jury to reach unanimous agreement on the circumstances in aggravation that support its verdict." (See *People v. Bacigalupo* (1991) 1 Cal.4th 103, 147; see also *People v. Taylor* (1990) 52 Cal.3d 719, 749 ["unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard"].) Nevertheless, appellant asserts that the failure to require unanimity as to

aggravating circumstances encouraged the jurors to act in an arbitrary, capricious and unreviewable manner, slanting the sentencing process in favor of execution. The absence of a unanimity requirement is inconsistent with the Sixth Amendment jury-trial guarantee, the Eighth Amendment requirement of enhanced reliability in capital cases, and the Fourteenth Amendment requirements of due process and equal protection. (See *Ballew v. Georgia* (1978) 435 U.S. 223, 232-234; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305.)[125]

With respect to the Sixth Amendment argument, this Court's reasoning and decision in *Bacigalupo*--particularly its reliance on *Hildwin v. Florida* (1989) 490 U.S. 638, 640--should be reconsidered. In *Hildwin*, the Supreme Court noted that the Sixth Amendment provides no right to jury sentencing in capital cases, and held that "the Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury." (*Id.* at pp. 640-641.) This is not, however, the same as holding that unanimity is not required. Moreover, the Supreme Court's holding in *Ring, supra,* makes the reasoning in *Hildwin* questionable, and undercuts the constitutional validity of this Court's ruling in *Bacigalupo.*[126]

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[125] The absence of historical authority to support such a practice makes it further violative of the Sixth, Eighth and Fourteenth Amendments. (See e.g., *Murray's Lessee* (1855) 59 U.S. (18 How.) 272; *Griffin v. United States* (1991) 502 U.S. 46, 51.)

[126] Appellant acknowledges that this Court has held that *Ring* does not require a California sentencing jury to unanimously find the existence of an aggravating factor. (*People v. Prieto, supra*, 30 Cal.4th at p. 265.) Appellant raises this issue to preserve his rights to further review. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under (continued...)

Applying the *Ring* reasoning here, jury unanimity is required under the overlapping principles of the Sixth, Eighth and Fourteenth Amendments. "Jury unanimity . . . is an accepted, vital mechanism to ensure that real and full deliberation occurs in the jury room, and that the jury's ultimate decision will reflect the conscience of the community." (*McKoy v. North Carolina* (1990) 494 U.S. 433, 452 (conc. opn. of Kennedy, J.).) Indeed, the Supreme Court has held that the verdict of even a six-person jury in a non-petty criminal case must be unanimous to "preserve the substance of the jury trial right and assure the reliability of its verdict." (*Brown v. Louisiana* (1977) 447 U.S. 323, 334.) Given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732; accord, *Johnson v. Mississippi* (1988) 486 U.S. 578, 584; *Gardner v. Florida, supra*, 430 U.S. at p. 359; *Woodson v. North Carolina, supra*, 428 U.S. at p. 305), the Sixth and Eighth Amendments likewise are not satisfied by anything less than unanimity in the crucial findings of a capital jury.

In addition, the Constitution of this state assumes jury unanimity in criminal trials. The first sentence of article I, section 16 of the California Constitution provides that "[t]rial by jury is an inviolate right and shall be secured to all, but in a civil cause three-fourths of the jury may render a verdict." (See also *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming inviolability of unanimity requirement in criminal trials].)

The failure to require that the jury unanimously find the aggravating factors true also stands in stark contrast to rules applicable to noncapital

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[126](...continued)
state law must be reasserted to preserve the issue for federal habeas corpus review].)

cases in California.[127] For example, in cases where a criminal defendant has been charged with special allegations that may increase the severity of his sentence, the jury must render a separate, unanimous verdict on the truth of such allegations. (See, e.g., § 1158a.) Since capital defendants are entitled to *more* rigorous protections than those afforded noncapital defendants (see *Monge v. California*, *supra*, 524 U.S. at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. 957, 994)--and, since providing more protection to a noncapital defendant than a capital defendant would violate the Equal Protection Clause of the Fourteenth Amendment (see e.g., *Myers v. Y1st*, *supra*, 897 F.2d at p. 421)--it follows that unanimity with regard to aggravating circumstances is constitutionally required. To apply the requirement to an enhancement finding that may carry only a maximum punishment of one year in prison, but not to a finding that could have "a substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764), would by its inequity violate the Equal Protection Clause and by its irrationality

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[127] The federal death-penalty statute also provides that a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C. § 848(k).) In addition, at least 17 death-penalty states require that the jury unanimously agree on the aggravating factors proven. (See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Ariz. Rev. Stat., § 13-703.01(E) (2002); Colo. Rev. Stat. Ann. § 18-1.3-1201(2)(b)(II)(A) (West 2002); Del. Code Ann., tit. 11, § 4209(c)(3)b.1. (2002); Idaho Code, § 19-2515(3)(b) (2003); Ill. Ann. Stat. ch. 38, para. 9-1(g) (Smith-Hurd 1992); La. Code Crim. Proc. Ann. art. 905.6 (West 1993): Md. Ann. Code art. 27, § 413(i) (1993); Miss. Code Ann. § 99-19-103 (1992); Neb. Rev. Stat., § 29-2520(4)(f) (2002); N.H. Rev. Stat. Ann. § 630:5(IV) (1992); N.M. Stat. Ann. § 31-20A-3 (Michie 1990); Okla. Stat. Ann. tit. 21, § 701.11 (West 1993); 42 Pa. Cons. Stat. Ann. § 9711(c)(1)(iv) (1982); S.C. Code Ann. § 16-3-20(C) (Law. Co-op. 1992); Tenn. Code Ann. § 39-13-204(g) (1993); Tex. Crim. Proc. Code Ann. § 37.071 (West 1993).)

violate both the due process and cruel and unusual punishment clauses of the state and federal constitutions, as well as the Sixth Amendment's guarantee of a trial by jury.

In *Richardson v. United States* (1999) 526 U.S. 813, the Supreme Court interpreted 21 U.S.C. section 848(a), and held that the jury must unanimously agree on which three drug violations constituted the "'continuing series of violations'" necessary for a continuing criminal enterprise [CCE] conviction. (*Id.* at pp. 815-816.) The high court's reasons for this holding are instructive:

> "The statute's word 'violations' covers many different kinds of behavior of varying degrees of seriousness. . . . At the same time, the Government in a CCE case may well seek to prove that a defendant, charged as a drug kingpin, has been involved in numerous underlying violations. The first of these considerations increases the likelihood that treating violations simply as alternative means, by permitting a jury to avoid discussion of the specific factual details of each violation, will cover up wide disagreement among the jurors about just what the defendant did, and did not, do. The second consideration significantly aggravates the risk (present at least to a small degree whenever multiple means are at issue) that jurors, unless required to focus upon specific factual detail, will fail to do so, simply concluding from testimony, say, of bad reputation, that where there is smoke there must be fire." (*Id.* at p. 819.)

These reasons are doubly applicable when the issue is life or death. Where a statute (like California's) permits a wide range of possible aggravators and the prosecution offers up multiple theories or instances of alleged aggravation, unless the jury is required to agree unanimously as to the existence of each aggravator to be weighed on death's side of the scale, there is a grave risk (a) that the ultimate verdict will cover up wide disagreement among the jurors about just what the defendant did and did

not do, and (b) that the jurors, not being forced to do so, will fail to focus upon specific factual detail and simply conclude from a wide array of proffered aggravators that where there is smoke there must be fire, and on that basis conclude that death is the appropriate sentence. The risk of such an inherently unreliable decision-making process is unacceptable in a capital context.

The ultimate decision of whether or not to impose death is indeed a "moral" and "normative" decision. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79; *People v. Hayes, supra*, 52 Cal.3d at p. 643.) However, *Ring* and *Blakely* make clear that the finding of one or more aggravating circumstances, and the finding that the aggravating circumstances outweigh mitigating circumstances, are prerequisite to considering whether death is the appropriate sentence in a California capital case. These are precisely the types of factual determinations for which appellant was entitled to unanimous jury findings beyond a reasonable doubt.

E. The Penalty Jury Should Also Have Been Instructed on the Presumption of Life

In noncapital cases, where only guilt is at issue, the presumption of innocence is a basic component of a fair trial, a core constitutional and adjudicative value that is essential to protect the accused. (See *Estelle v. Williams* (1976) 425 U.S. 501, 503.) In the penalty phase of a capital case, the presumption of life is the correlate of the presumption of innocence. Paradoxically, however, although the stakes are much higher at the penalty phase, there is no statutory requirement that the jury be instructed as to the presumption of life. (See Note, *The Presumption of Life: A Starting Point for Due Process Analysis of Capital Sentencing* (1984) 94 Yale L.J. 351; cf. *Delo v. Lashley* (1983) 507 U.S. 272.)

Appellant submits that the trial court's failure to instruct the jury that the law favors life and presumes life imprisonment without parole to be the appropriate sentence violated appellant's right to due process of law (U.S. Const., 14th Amend.; Cal. Const. art. I, §§ 7 & 15), his right to be free from cruel and unusual punishment and to have his sentence determined in a reliable manner (U.S. Const., 8th and 14th Amends; Cal. Const. art. I, § 17), and his right to the equal protection of the laws (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7).

In *People v. Arias* (1996) 13 Cal.4th 92, this Court held that an instruction on the presumption of life is not necessary in California capital cases, in part because the United States Supreme Court has held that "the state may otherwise structure the penalty determination as it sees fit," so long as state law otherwise properly limits death eligibility. (*Id.* at p. 190.) However, as the other sections of this argument demonstrate, this state's death-penalty law is remarkably deficient in the protections needed to insure the consistent and reliable imposition of capital punishment. Therefore, a presumption-of-life instruction is constitutionally required.

F. Conclusion

As set forth above, the trial court violated appellant's federal constitutional rights by failing to set out the appropriate burden of proof and the unanimity requirement regarding the jury's determinations at the penalty phase. Therefore, his death sentence must be reversed.

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XV

THE FAILURE TO PROVIDE INTERCASE PROPORTIONALITY REVIEW VIOLATES APPELLANT'S CONSTITUTIONAL RIGHTS

A. Introduction

California does not provide for intercase proportionality review in capital cases, although it affords such review in noncapital criminal cases. As shown below, the failure to conduct intercase proportionality review of death sentences violates appellant's Eighth and Fourteenth Amendment rights to be protected from the arbitrary and capricious imposition of capital punishment.

B. The Lack of Intercase Proportionality Review Violates the Eighth Amendment Protection against the Arbitrary and Capricious Imposition of the Death Penalty

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate and reliable. The notions of reliability and proportionality are closely related. Part of the requirement of reliability, in law as well as science, is "'that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.'" (*Barclay v. Florida* (1976) 463 U.S. 939, 954 (plur. opn.; alterations in original), quoting *Proffitt v. Florida* (1976) 428 U.S. 242, 251 [opn. of Stewart, Powell, and Stevens, JJ.]).)

The United States Supreme Court has lauded comparative proportionality review as a method for helping to ensure reliability and

proportionality in capital sentencing. Specifically, it has pointed to the proportionality reviews undertaken by the Georgia and Florida Supreme Courts as methods for ensuring that the death penalty will not be imposed on a capriciously-selected group of convicted defendants. (See *Proffitt v. Florida*, *supra*, 428 U.S. at p. 258; *Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Thus, intercase proportionality review can be an important tool to ensure the constitutionality of a state's death-penalty scheme.

Despite recognizing the value of intercase proportionality review, the United States Supreme Court has held that this type of review is not necessarily a requirement for finding a state's death-penalty structure to be constitutional. In *Pulley v. Harris* (1984) 465 U.S. 37, the United States Supreme Court ruled that the California capital-sentencing scheme was not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Id.* at p. 51.) Accordingly, this Court has consistently held that intercase proportionality review is not constitutionally required. (See *People v. Farnam* (2002) 28 Cal.4th 107, 193.)

As Justice Blackmun observed, however, the holding in *Pulley v. Harris* was premised upon untested assumptions about the California death-penalty scheme:

> "[I]n *Pulley v. Harris*, 465 U.S. 37, 51, the Court's conclusion that the California capital sentencing scheme was not 'so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review' was based in part on an understanding that the application of the relevant factors '"provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty,"' thereby '"guarantee[ing] that the jury's discretion will be guided and its consideration deliberate."' *Id.* at 53, quoting *Harris v. Pulley*, 692 F.2d 1189, 1194, 1195 (CA9

1982). As litigation exposes the failure of these factors to guide the jury in making principled distinctions, the Court will be well advised to reevaluate its decision in *Pulley v. Harris*." (*Tuilaepa v. California* (1994) 512 U.S. 967, 995 (dis. opn. of Blackmun, J.); alternate citations omitted.)

The time has come for *Pulley v. Harris* to be reevaluated, since the California statutory scheme fails to limit capital punishment to the "most atrocious" murders. (*Furman v. Georgia* (1972) 408 U.S. 238, 313 (conc. opn. of White, J.).) Comparative case review is the most rational--if not the only--effective means by which to ascertain whether a scheme as a whole is producing arbitrary results. Thus, the vast majority of the states that sanction capital punishment require comparative or intercase proportionality review.[128]

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[128] See Ala. Code § 13A-5-53(b)(3) (1982); Conn. Gen. Stat. Ann. § 53a-46b(b)(3) (West 1993); Del. Code Ann. tit. 11, § 4209(g)(2) (1992); Ga. Code Ann. § 17-10-35(c)(3) (Harrison 1990); Idaho Code § 19-2827(c)(3) (1987); Ky. Rev. Stat. Ann. § 532.075(3) (Michie 1985); La. Code Crim. Proc. Ann. art. 905.9.1(1)(c) (West 1984); Miss. Code Ann. § 99-19-105(3)(c) (1993); Mont. Code Ann. § 46-18-310(3) (1993); Neb. Rev. Stat. §§ 29-2521.01, 29-2522(3) (1989); Nev. Rev. Stat. Ann § 177.055 (d) (Michie 1992); N.H. Rev. Stat. Ann. § 630:5(XI)(c) (1992); N.M. Stat. Ann. § 31-20A-4(c)(4) (Michie 1990); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Ohio Rev. Code Ann. § 2929.05(A) (Baldwin 1992); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(iii) (1993); S.C. Code Ann. § 16-3-25(c)(3) (Law. Co-op. 1985); S.D. Codified Laws Ann. § 23A-27A-12(3) (1988); Tenn. Code Ann. § 13-206(c)(1)(D) (1993); Va. Code Ann. § 17.110.1C(2) (Michie 1988); Wash. Rev. Code Ann. § 10.95.130(2)(b) (West 1990); Wyo. Stat. § 6-2-103(d)(iii) (1988).

Many states have judicially instituted similar review. See *State v. Dixon* (Fla. 1973) 283 So.2d 1, 10; *Alford v. State* (Fla. 1975) 307 So.2d 433, 444 ; *People v. Brownell* (Ill. 1980) 404 N.E.2d 181, 197; *Brewer v. State* (Ind. 1980) 417 NE.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345 ; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890

(continued...)

The capital-sentencing scheme in effect at the time of appellant's trial was the type of scheme that the high court in *Pulley* had in mind when it acknowledged that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." (*Pulley v. Harris*, *supra*, 465 U.S. at p. 51.) Penal Code section 190.2 immunizes few kinds of first degree murderers from death eligibility, and Penal Code section 190.3 provides little guidance to juries in making the death-sentencing decision. In addition, the capital-sentencing scheme lacks other safeguards as discussed in Arguments XI-XIV, *ante*, which are incorporated here. Thus, the statute fails to provide any method for ensuring that there will be some consistency from jury to jury when rendering capital-sentencing verdicts. Consequently, defendants with a wide range of relative culpability are sentenced to death.

California's capital-sentencing scheme does not operate in a manner that ensures consistency in penalty-phase verdicts, nor does it operate in a manner that prevents arbitrariness in capital sentencing. Therefore, California is constitutionally compelled to provide appellant with intercase proportionality review. The absence of intercase proportionality review violates appellant's Eighth and Fourteenth Amendment right not to be arbitrarily and capriciously condemned to death, and requires the reversal of his death sentence.

(...continued)
(comparison with other capital prosecutions where death has and has not been imposed); *Collins v. State* (Ark. 1977) 548 S.W.2d 106, 121.

XVI

APPELLANT'S DEATH SENTENCE VIOLATES INTERNATIONAL LAW AND THE EIGHTH AND FOURTEENTH AMENDMENTS

The United States is one of the few nations that regularly use the death penalty as a form of punishment. (See *Ring v. Arizona* (2002) 536 U.S. 584, 618 (conc. opn. of Breyer, J.); *People v. Bull* (Ill. 1998) 705 N.E.2d 824, 846-847 (conc. & dis. opn. of Harrison, J.).) And, as the Supreme Court of Canada recently explained:

> "Amnesty International reports that in 1948, the year in which the Universal Declaration of Human Rights was adopted, only eight countries were abolitionist. In January 1998, the Secretary-General of the United Nations, in a report submitted to the Commission on Human Rights (U.N. Doc. E/CN.4/1998/82), noted that 90 countries retained the death penalty, while 61 were totally abolitionist, 14 (including Canada at the time) were classified as abolitionist for ordinary crimes and 27 were considered to be abolitionist *de facto* (no executions for the past 10 years) for a total of 102 abolitionist countries. At the present time, it appears that the death penalty is now abolished (apart from exceptional offences such as treason) in 108 countries. These general statistics mask the important point that abolitionist states include all of the major democracies except some of the United States, India and Japan. . . . According to statistics filed by Amnesty International on this appeal, 85 percent of the world's executions in 1999 were accounted for by only five countries: the United States, China, the Congo, Saudi Arabia and Iran." (*Minister of Justice v. Burns* (2001) 1 S.C.R. 283 [2001 SCC 7], ¶ 91.)

The California death-penalty scheme violates the provisions of international treaties and the fundamental precepts of international human rights. Because international treaties ratified by the United States are binding on state courts, the imposition of the death penalty is unlawful. To

the extent that international legal norms are incorporated into the Eighth Amendment determination of evolving standards of decency, appellant raises this claim under the Eighth Amendment as well. (See *Atkins v. Virginia* (2002) 536 U.S. 304, 316, fn. 21; *Stanford v. Kentucky* (1989) 492 U.S. 361, 389-390 (dis. opn. of Brennan, J.).)

A. International Law

Article VII of the International Covenant of Civil and Political Rights ("ICCPR") prohibits "cruel, inhuman or degrading treatment or punishment." Article VI, section 1 of the ICCPR prohibits the arbitrary deprivation of life, providing that "[e]very human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life."

The ICCPR was ratified by the United States in 1992, and applies to the states under the Supremacy Clause of the federal Constitution. (U.S. Const., art. VI, § 1, cl. 2.) Consequently, this Court is bound by the ICCPR.[129] The United States Court of Appeals for the Eleventh Circuit has

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[129] The Senate attempted to place reservations on the language of the ICCPR, including a declaration that the covenant was not self-executing. (See 138 Cong. Rec. S4784, § III(1).) These qualifications do not preclude appellant's reliance on the treaty because, inter alia, (1) the treaty is self-executing under the factors set forth in *Frolova v. U.S.S.R.* (7th Cir. 1985) 761 F.2d 370, 373; (2) the declaration impermissibly conflicts with the object and purpose of the treaty, which is to protect the individual's rights enumerated therein (see Riesenfeld & Abbot, *The Scope of the U.S. Senate Control Over the Conclusion and Operation of Treaties* (1991) 68 Chi.-Kent L. Rev. 571, 608); and (3) the legislative history indicates that the Senate only intended to prohibit private and independent causes of action (see 138 Cong. Rec. S4784) and did not intend to prevent defensive use of the treaty (see Quigley, *Human Rights Defenses in U.S. Courts* (1998) 20 Hum. Rts. Q. 555, 581-582).

held that when the United States Senate ratified the ICCPR "the treaty became, coexistent with the United States Constitution and federal statutes, the supreme law of the land" and must be applied as written. (*United States v. Duarte-Acero* (11th Cir. 2000) 208 F.3d 1282, 1284; but see *Beazley v. Johnson* (5th Cir. 2001) 242 F.3d 248, 267-268.)

Appellant's death sentence violates the ICCPR. Because of the improprieties of the capital-sentencing process challenged in this appeal, the imposition of the death penalty on appellant constitutes "cruel, inhuman or degrading treatment or punishment" in violation of Article VII of the ICCPR. Appellant recognizes that this Court has previously rejected international-law claims directed at the death penalty in California. (See, e.g., *People v. Hillhouse* (2002) 27 Cal.4th 469, 511.) Still, there is a growing recognition that international human-rights norms in general, and the ICCPR in particular, should be applied to the United States. (See *United States v. Duarte-Acero*, *supra*, 208 F.3d at p. 1284; *McKenzie v. Daye* (9th Cir. 1995) 57 F.3d 1461, 1487 (dis. opn. of Norris, J.).) Thus, appellant requests that this Court reconsider its prior stance on this issue and, in the context of this case, find that appellant's death sentence violates international law. (See *Smith v. Murray* (1986) 477 U.S. 527 [holding that even issues settled under state law must be reasserted to preserve the issue for federal habeas corpus review].)

B. The Eighth Amendment

As noted above, the abolition of the death penalty, or its limitation to exceptional crimes such as treason--as opposed to its use as a regular punishment for ordinary crimes--is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford v. Kentucky, supra*, 492 U.S. at p. 389 (dis. opn. of Brennan, J.); *Thompson v. Oklahoma* (1988) 487 U.S. 815, 830

(plur. opn.).) Indeed, *all* nations of Western Europe--plus Canada, Australia, and New Zealand--have abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (as of August 2002) at <http://www.amnesty.org> or <http://www.deathpenaltyinfo.org>.)[130]

This consistent view is especially important in considering the constitutionality of the death penalty under the Eighth Amendment because our Founding Fathers looked to the nations of Western Europe for the "law of nations" as models on which the laws of civilized nations were founded and for the meaning of terms in the Constitution. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (*Miller v. United States* (1870) 78 U.S. 268, 315 (dis. opn. of Field, J.), quoting 1 Kent's Commentaries, 1; see also *Hilton v. Guyot* (1895) 159 U.S. 113, 163, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292.) Thus, for example, Congress's power to prosecute war is, as a matter of constitutional law, limited by the law of nations; what civilized Europe forbade, such as using poison weapons or selling prisoners of war into slavery, was constitutionally forbidden here. (*Miller v. United States*, *supra*, 78 U.S. at pp. 315-316, fn. 57 (dis. opn. of Field, J.).)

"Cruel and unusual punishment" as defined in the federal Constitution is not limited to whatever violated the standards of decency

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[130] Many other countries including almost all Eastern European, Central American, and South American nations also have abolished the death penalty either completely or for ordinary crimes. (See Amnesty International's "List of Abolitionist and Retentionist Countries," *supra*.)

that existed within the civilized nations of Europe in the 18th century. The Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 100.) And if the standards of decency as perceived by the civilized nations of Europe to which our Framers looked as models have evolved, the Eighth Amendment requires that we evolve with them. The Eighth Amendment thus prohibits the use of forms of punishment not recognized by several of our states and the civilized nations of Europe, or used by only a handful of countries throughout the world--including totalitarian regimes whose own "standards of decency" are supposed to be antithetical to our own. (See *Atkins v. Virginia*, *supra*, 536 U.S. at p. 316, fn. 21 [basing determination that executing mentally-retarded persons violated Eighth Amendment in part on disapproval in "the world community"]; *Thompson v. Oklahoma*, *supra*, 487 U.S. at p. 830, fn. 31 ["We have previously recognized the relevance of the views of the international community in determining whether a punishment is cruel and unusual."].)

Assuming arguendo that capital punishment itself is not contrary to international norms of human decency, its use as regular punishment for substantial numbers of crimes--as opposed to extraordinary punishment for extraordinary crimes--is contrary to those norms. Nations in the Western world no longer accept the death penalty, and the Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. (See *Hilton v. Guyot*, *supra*, 159 U.S. 113; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. 110, 112 [municipal jurisdictions of every country are subject to law-of-nations principle that citizens of warring nations are enemies].) Thus, California's use of death as a regular punishment, as in

this case, violates the Eighth and Fourteenth Amendments, and appellant's death sentence must therefore be set aside.

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XVII

REVERSAL IS REQUIRED BASED ON THE CUMULATIVE EFFECT OF ERRORS THAT UNDERMINED THE FUNDAMENTAL FAIRNESS OF THE TRIAL AND THE RELIABILITY OF THE DEATH JUDGMENT

The erroneous denial of appellant's motions for change of venue is reversible per se as to the entire judgment. (See Argument I, *ante*.) However, numerous other errors, many of federal constitutional dimension, also occurred at appellant's trial. Appellant has explained why each of those errors was prejudicial. Assuming arguendo that this Court rejects appellant's venue arguments, and that none of the other errors identified by appellant is deemed prejudicial by itself, their cumulative effect undermines any confidence in the integrity of the proceedings which ultimately resulted in a death judgment against appellant. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 877-878; *People v. Hill* (1998) 17 Cal.4th 800, 844-845; *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Buffum* (1953) 40 Cal.2d 709, 726; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795; *Alcala v. Woodford* (9th Cir. 2003) 334 F.3d 862, 893; *Cargle v. Mullin* (10th Cir. 2003) 317 F.3d 1196, 1206-1208; *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204, 1211; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985-986; *Harris v. Wood* (9th Cir. 1995) 64 F.3d 1432, 1438-1439; *Mak v. Blodgett* (9th Cir. 1992) 970 F.2d 614, 622; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1475-1476.)

In dealing with a federal constitutional violation, an appellate court must reverse unless satisfied beyond a reasonable doubt that the combined effect of all the errors in a given case was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Williams* (1971) 22

Cal.App.3d 34, 58-59 [applying the *Chapman* standard to the totality of the errors when errors of federal constitutional magnitude combined with other errors]; see *People v. Brown* (1988) 46 Cal.3d 432, 446-448 ["reasonable-possibility test" for state-law penalty-phase errors]; *People v. Ashmus* (1992) 54 Cal.3d 932, 965 [reasonable-possibility test and *Chapman* standard "are the same in substance and effect"].) In assessing prejudice, errors must be viewed through the eyes of the jurors, not the reviewing court, and the reasonable possibility that an error may have affected a single juror's view of the case requires reversal. (See, e.g., *Parker v. Gladden* (1966) 385 U.S. 363, 366; *People v. Pierce* (1979) 24 Cal.3d 199, 208.) Here, it certainly cannot be said that the errors identified by appellant had "no effect" on any juror. (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 341.)

The erroneous and prejudicial refusal of the trial court to conduct an individualized, sequestered voir dire of the prospective jurors alone rendered the guilt-phase verdicts so unreliable that they cannot stand. (See Argument II, *ante*.) This error likewise contributed to the death verdict by similarly prejudicing the jurors against appellant with respect to the penalty determination. (See *ibid.*) In addition to this error, the erroneous admission of victim-impact evidence (see Argument VII, *ante*), and the erroneous exclusion of appellant's proffered evidence regarding the content of the phone call to his sister (see Argument IX, *ante*), the trial court also failed to fully and appropriately instruct the jury with respect to the evaluation of the victim-impact evidence (see Argument VIII, *ante*), and on other fundamental aspects of the guilt and penalty determinations (see Arguments III-VI and X-XIV, *ante*).

Given the severity of the errors in this case, their cumulative effect

was to deny appellant due process, a fair trial by jury, and a fair and reliable penalty determination, in violation of the Sixth, Eighth and Fourteenth Amendments. Appellant's death sentence must therefore be reversed.

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CONCLUSION

For the foregoing reasons, the entire judgment must be reversed.

DATED: March 16, 2006

Respectfully submitted,

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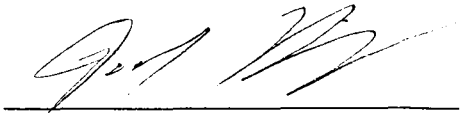
CERTIFICATE OF COUNSEL
(Cal. Rules of Court, rule 36(b)(2))

I, JOEL KIRSHENBAUM, am the Deputy State Public Defender assigned to represent appellant JOHN JOSEPH FAMALARO in this automatic appeal. I directed a member of our staff to conduct a word count of this brief using our office's computer software. On the basis of that computer-generated word count, I certify that this brief is 118,200 words in length.



JOEL KIRSHENBAUM
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Famalaro No. S064306

I, Victoria Morgan, declare that I am over 18 years of age, and not a party to the within cause; my business address is 221 Main Street, 10th Floor, San Francisco, California, 94105; that I served a true copy of the attached:

APPELLANT'S OPENING BRIEF

on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

MARILYN L. GEORGE
Deputy Attorney General
P.O. Box 85266
110 W. "A" Street, Ste. 1100
San Diego, CA 92186-5266

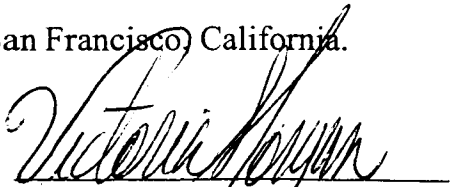
Orange County Clerk
(for Delivery to the Trial Judge)
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

John Joseph Famalaro
(Appellant)

Each said envelope was then, March 16, 2006, sealed and deposited in the United States Mail at San Francisco, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 16, 2006, at San Francisco, California.



DECLARANT