IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff/Respondent vs. DAVID LYNN SCOTT, III Defendant/Appellant	No. S068863 Riverside County CR-48638

APPELLANT'S OPENING BRIEF

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DEATH PENALTY

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PEOPLE OF THE STATE OF CALIFORNIA	)	No. 068863
	)	
Plaintiff/Respondent	)	Riverside County
vs.	)	
	)	CR-48638
DAVID LYNN SCOTT, III	)	
	)	
Defendant/Appellant	)	
	)	
	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal from the Judgement of the Riverside County Superior Court, Honorable William Bailey, Judge.

STATEMENT OF THE CASE

An indictment was filed on April 2, 1993 charging appellant with 22 counts of criminal activity, the charged counts are as follows. Count I - the first degree murder of Brenda Gail Kenny on September 12, 1992, under Penal Code section 187, with a personal use of a deadly and dangerous

weapon, a knife, allegation under section 12022(b) and section 1192.7 (c) (23), and a special circumstances allegation that during the commission of the crime set forth in Count I of the indictment, appellant was engaged in the commission of, attempted commission of, and the immediate flight after committing and attempting to commit the crime of burglary in violation of section 459, within the meaning of section 190 (a) (17) (vii), and another special circumstance allegation that during the commission of the crime set forth in Count I of the indictment, appellant was engaged in the commission of, attempted commission of , and the immediate flight after committing and attempting to commit the crime of rape in violation of Section 261, subdivision 2 of the Penal Code, within the meaning of Section 190.2(a) (17) (iii); Count II- a burglary of an inhabited dwelling house at 698 Atwood, Riverside, California on October 1, 1992, under Section 459, with a personal use of a deadly and dangerous weapon allegation under Sections 12022(b) and 1192.7 (c) (23); Count III- being a crime connected in its commission with Count II, an assault with a deadly weapon on October 1, 1992 upon Colleen Cliff, under Section 245(a); Count IV- a burglary of an inhabited dwelling house at 990 Central, Apartment 121, Riverside, California under Section 459; Count V- being a crime connected in its commission to Count IV, a rape of Regina Multari

on November 3, 1992, under Section 261, subdivision 2, with a use of a firearm allegation under Section 12022.3, Subdivision (a), 667 and 1192.7(c); Count VI- being a crime connected in its commission to Counts IV and V, a second rape of Regina Multari on November 3, 1992, under Section 261, subdivision 2, with a use of a firearm allegation under Section 12022.3, Subdivision (a), 667 and 1192.7

(c)); Count VII-a burglary of an inhabited dwelling house at 955 Via Zapata, #24, Riverside, California on November 14, 1992, under Section 459; Count VIII- being a crime connected in its commission to Count VII, a false imprisonment of Linda Gonzales on November 14, 1992 under section 236; Count IX- being a crime connected in its commission to Counts VII and VIII, a kidnaping of Linda Gonzales on November 14, 1992, under Section 207, Subdivision (a); Count X- an assault with a firearm upon Edward Buhr on November 14, 1992, under Section 245, Subdivision (a), Subsection (2), with a personal use of a firearm allegation under Sections 12022.5(a) and 1192 (c) (8); Count XI- being a crime connected in its commission to Count X, an assault with a firearm upon Linda Penas on November 16, 1992, under Section 245, Subdivision (a) Subsection (2) (a), with a personal use of a firearm allegation under Sections 12022.5 (a) and 1192.7 (c) (8); Count XII- a burglary of an

inhabited dwelling house at 920 Via Cartago, #18, Riverside, California on November 16, 1992, under Section 459, with a personal use of a firearm allegation under Sections 12022.5 (a) , 667 and 1192.7(c); Count XIII- being a crime connected in its commission to Count XII, false imprisonment against Regina Griffen under Section 236 on November 16, 1992, with a personal use of a handgun allegation under Sections 12022.5, Subdivision (a), 667 and 1192.7 (c); Count XIV-a disorderly conduct misdemeanor under Section 647 (g) committed on November 23, 1992; Count XV- a rape against Julia K. under Section 261 on December 10,1992, with a use of a firearm and deadly weapon allegation (a handgun and a sword) under sections 12022.3 (a), 667 and 1192.7; Count XVI- being a crime connected in its commission with the crimes set forth in Counts XV and XVII, a second rape against Julia K. under Section 261 on December 10,1992, with a use of a firearm and deadly weapon allegation (a handgun and a sword) under sections 12022.3 (a), 667 and 1192.7; Count XVII- being a crime connected in its commission with the crimes set forth in Counts XV and XVI, a burglary at a dwelling house located at 25620 Santa Barbara, Moreno Valley, under Section 459 on December 10, 1992; Count XVIII- being a crime connected in its commission with the crimes set forth in Counts XV, XVI and XVII, a robbery against Joseph Childley

under Section 211 on December 10, 1992, with the use of a deadly weapon (a sword) allegation under Sections 12022 (b) and Section 1192.7 and with a use of a firearm allegation under Sections 12022.5 (a) and 1192.7 (c) (8); Count XIX- a disorderly persons offense, a misdemeanor, under Section 647 (g) on December 18, 1992;Count XX- an attempted premeditated murder of Phillip Courtney, under sections 187 and 664 on or about January 18, 1993 with an allegation of personal use of a handgun under Sections 12022.5 (a) and 1192.7 (c) (8), with a further allegation of personal use of a deadly weapon (a sword) under Sections 12022 (b) and 1192.7; Count XXI- being a crime connected in its commission with Count XX, an assault with a dangerous weapon upon Allison Schultz under Section 245, Subdivision (a), Subsection (2), on or about January 18, 1993, with an allegation of personal use of a handgun under Sections 12022.5 (a) and 1192.7 (c) (8); Count XXII- being a crime connected in its commission with Counts XX and XXI, and attempted premeditated murder on Howard Long under Sections 187 and 664 on or about January 18, 1993 with a personal use of a handgun allegation under Sections 12022.5 and 1192.7.

On April 8, 1994, the court dismissed Count XI pursuant to a

Section 995 motion.(PRT424-426.)[1] On April 22, 1994, the court dismissed Count XIV pursuant to a Section 995 motion.(PRT473.) On December 16, 1997, the court dismissed Count XXI pursuant to a Section 1118.1 motion. (RT5939-5943.) In addition, the court dismissed the willful, deliberate, and premeditated enhancement from the attempted murder of Howard Long, in Count XXII. (RT5924-5938.)

On December 23, 1997, the jury returned a verdicts of guilt as to Counts III, IV, V, VI, XII, XIII, XV, XVI, XVII and XVIII. In addition, all of the allegations associated with these counts were found true. (CT 6221-6222.) On January 8, 1998, the jury returned verdicts of guilt on Counts I, II, XIX, XX and XXII. In addition, all of the allegations associated with these counts were found true, including both special circumstances under Count I pursuant to Section 190.2 (a).(CT6296-6298.) The jury was not able to reach a verdict on Counts VII, VIII, IX and X and the court dismissed those counts. (CT 6296)

The following table lists the date, offense, victim(s) and disposition of the various counts.

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1. The "PRT" designation refers to the Pre trial Reporter's transcript consisting of seven volumes and including proceeding up until October 31, 1997.

Count	Date	Offense	Victim	Disposition
1	9/12/92	a. Murder with spec. circum. (comm. during course of burg. and rape(PC190. 2 (a) (1) b. Personal use of dead-ly weapon allegation (PC12022 (b))	Brenda Gail Kenny	Jury verdict of guilt; true finding as to both special circum. Jury recommen-dation of death
2	10/1/92	a. Resident. Burg. (PC459) b. Personal use of a deadly weapon allegation (PC12022 (b))	Colleen Cliff	Jury Verdict of guilt and true finding on allegation
3	10/1/92	assault with a deadly weapon(PC 245 (a))	Colleen Cliff	Jury verdict of guilt

4	11/3/92	residential burglary	Regina Multari (Johnson)	Jury verdict of guilt
5	11/3/92	a. rape (PC261) b. use of firearm allegation (PC12022 (b))	Regina Multari (Johnson)	Jury verdict of guilt; true finding as to allegation
6	11/3/92	a. rape (PC261) b.use of firearm allegation (PC12022 (b))	Regina Multari (Johnson)	Jury verdict of guilt true finding as to allegation
7	11/14/92	residential burglary (PC459)	Linda Gonzalez	Jury deadlocked. Dismissed by trial court.
8	11/14/92	false imprison-ment (PC236)	Linda Gonzalez	Jury deadlocked; dismissed by trial court
9	11/14/92	kidnapping (PC207(a))	Linda Gonzalez	Jury deadlocked; dismissed by trial court

10	11/14/92	a. assault with a firearm (PC245(a)) b. use of firearm allegation (PC12022.5 (b))	Edward Buhr	Jury deadlocked; dismissed by trial court
11	11/14/92	a. assault with a firearm (PC245(a) b. personal use of a firearm allegation (PC12022.5 (b))	Linda Penas	Dismissed pursuant to PC995 motion
12	11/16/92	a. false imprison-ment (PC236) b. personal use of firearm allegation (PC12022.5 (b))	Regina Griffen	Jury verdict of guilt and true finding as to allegation
13	11/16/92	a. false imprison-ment (PC236) b. personal use of firearm allegation	Regina Griffen	Jury finding of guilt and true finding as to allegation

14	11/26/92	disorderly conduct mis-demeanor (loitering) PC647(g)		Dismissed pursuant to PC995 motion
15	12/10/92	a. rape (PC261) b. use of firearm and deadly weapon allegation PC12022.3	Julia Karg (Chidley)	Jury verdict and true finding as to allegations
16	12/10/92	a. rape (PC261) b. use of firearm and deadly weapon allegation PC12022.3	Joseph Chidley	Jury verdict of guilt and true finding as to allegation
17	12/10/92	residential burglary	Julia Karg (Chidley) and Joseph Chidley	Jury verdict of guilt

18	12/10/92	a. robbery (PC211) b. use of deadly weapon allegation PC 12022(b) c.use of fireram allegation PC12022.5	Joseph Chidley	Jury verdict of guilt and true finding as to allegations
19	12/18/92	disorderly persons offense (PC647(g))		Jury verdict of guilt
20	1/18/93	a. attempted premed-itated murder PC187,664 b.personal use of a handgun allegation (PC12022.5 (a))	Phillip Courtney	Jury finding of guilt as true finding as to allegation
21	1/18/93	a. assault with a deadly weapon (PC245(a) b. personal use of firearm (PC12022.5 (a))	Allison Schultz	Dismissed pursuant to PC1118.1 motion

22	1/18/93	a. attempted premeditated murder (PC187, 664) b. personal use of handgun allegation (PC12022.5 (a))	Howard Long	Premeditated enhancement dismissed pursuant to PC1118.1 motion Jury verdict of guilt and true finding as to allegation

Penalty phase testimony began on January 20, 1998, with the People presenting five family members as victim-impact witnesses. The People rested that same day. (CT6478.) On January 21 and 22, 1998, the defense presented their penalty phase witnesses and then rested their case. (CT6480-6481, 6499.) On January 27, 1998, counsel presented their arguments to the jury and the jury was instructed and ordered to begin deliberations. (CT6514.) The next day, the jury returned a verdict of death against appellant. (CT6532.) On March 19, 1998, the automatic motion to modify the verdict under Section 190.4 was denied by the court. (CT6581.) The court then sentenced appellant to death for the murder of Brenda Gail Kenny, plus a indeterminate sentence of life with the possibility of parole for the attempted murder of Howard Long, plus a determinate term of 73 years and 8 months. (CT6577-6580.)

STATEMENT OF FACTS

GUILT PHASE TESTIMONY

PEOPLE'S CASE

I. THE DEATH OF BRENDA GAIL KENNY (Count I)

A. Discovery of Body and Crime Scene Evidence

Brenda Gail Kenny[2] was a reference librarian employed by the Riverside Public Library. On September 10, 1992, she was residing at the Canyon Creek Apartments, Apt. 346, in the City of Riverside. (RT5244.) On that day she visited her mother, Maxine Kenny, at Maxine Kenny's home, which was approximately five minutes from Brenda Kenny's apartment. (RT5245.) Brenda arrived a little after noon and left at approximately 10:00 p.m., after telling her parents that she was not feeling well. (RT5247-5248.)

At approximately 6:00 p.m. on September 12, 1992, Maxine Kenny received a call from one of Brenda's co workers at the library who informed Maxine that Brenda had not been to work and had not called in sick. (RT5248) Mrs. Kenny and her husband proceeded immediately to their daughter's apartment to check on Brenda's safety. (RT5249.)

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2. Brenda Kenny was also known as "Gail" to her family.

When they arrived at their daughter's apartment, the Kennys found the outside door locked. Mrs. Kenny used the key that her daughter had given her and entered the apartment. (RT5250.) She smelled what she believed to be decomposition. (RT5251.) Although Brenda Kenny was usually a very neat housekeeper, the apartment was a mess. There was a cup on the floor next to an ironing board and a tea bag and spoon on the iron board itself. (RT5253.) Dresser drawers were open with clothes hanging out. In addition, there were clothes strewn about the floor. (RT5254-5255) The Kennys then saw their daughter lying dead on the floor between the bed and vanity in the bedroom of the apartment. (RT5255.) Mrs. Kenny stated that when she found her daughter in the apartment she was wearing the same clothes she had been wearing two days before, beige slacks and a tee shirt. (RT5258.) Mr. Kenny called 911 and the police arrived 15 minutes later. (RT5256.)

Detective Christine Keers arrived at the Kenny crime scene the evening of March 12th. (RT5368.) She noticed a scuff mark and damage on a wood fence in back of the Kenny apartment where someone may have climbed into or out of the yard. (RT5368.) Upon entering the apartment, Detective Keers discovered a coffee cup and a bowl in the bedroom, as well as a black knotted electrical cord on the nightstand next to the bed.

The cord appeared to have been cut from an iron. (RT5373.) A nightgown was found hanging over a wall mirror in the bedroom. (RT 5374.) A comforter was found over the upper half of Ms. Kenny's body. (RT5375.)

Detective Keers also found a knife under Ms. Kenny's body. (RT5375.) A set of knives was found in the kitchen and it appeared that the knife found in the bedroom was part of this set. (RT 5376.) The knife and apartment were dusted for prints but no comparable prints were obtained. (RT5378,5381.)

Joseph Masewicz lived in the Canyon Creek Apartments in an apartment underneath that of Brenda Kenny and was acquainted with her. (RT5426-5427.) From where Mr. Masewicz lived he was able to hear people going up and down the staircase above him that lead to the Kenny apartment. (RT5429.) Sometime after 10 p.m. on the night of September 10th, Mr.Masewicz heard what sounded like two people going up the steps to Ms. Kenny's apartment. In the early morning hours, approximately 4:00 a.m., he heard a bang and a scream, awakening him out of a sound sleep. Mr. Masewicz started to put on some clothes to investigate but when he heard footsteps across his ceiling he thought that everything was fine and did not go out of his apartment. (RT5430-5432.) A similar incident had happened once before and it turned out that Ms. Kenny had had a seizure.

(RT5432.)

Darryl Luntao testified that he lived in the same apartment complex as Ms. Kenny, his apartment being right next to hers. (RT5233.) At some unspecified point prior to Ms. Kenny's murder he observed appellant passing out some sort of religious literature. (RT5234-5235.) While processing the crime scene, the police recovered a religious pamphlet from the New Wine church in front of Ms. Kenny's front door. (RT5379.) Appellant was a member of that church and used to pass out fliers for them. (RT4408.)

B. The Autopsy

Dr. Robert DiTraglia performed the autopsy. The results revealed that Ms. Kenny had suffered seven stab wounds, five to the neck, one to the left chest, and one to the abdomen. She also suffered defensive cut wounds to her hands and superficial wounds to her cheek. (RT5482-85.) There was a possibility that wound to the face was created to cause pain or torment as it wasnot apparently intended to cause death (RT5486.) Ms. Kenny also had bruises to the back of her left arm. (RT5487.)

The cause of death was multiple stab wounds. One of the neck wounds severed the carotid artery, which would in and of itself cause a

relatively quick death. (RT5493-5494.) The knife found under victim's body was consistent with the knife that caused the stab wounds .. (RT5503.)

Riverside Police Detective Ron San Fillipo attended the Kenny autopsy. He took possession of the tan pants she was wearing at the time of her death, put them in a dryer bag and delivered then to the evidence room. (RT5568-69.) He also collected a sexual assault kit which contained a sample of the victim's pubic hair and swabs from her mouth, anus and vagina. These samples were obtained by Dr. DiTraglia. (RT5568-5571.)

C. Serological Testing

Ricci Cooksey, a criminologist From the Department of Justice Laboratory, was qualified by the court as an expert in serology. (RT5627-5630.) Serology is the area of forensic science that is concerned with the identification of body fluids to garner information about the possible donor or donors of these fluids. (RT5627.) Mr. Cooksey explained that all human beings have a blood type, either A, B, AB or O. In addition, each of these types can be either Rh positive or negative. The blood type of a donor of a blood sample can be ascertained by serological testing. (RT5631.)

In addition, certain persons are "secretors." These are individuals

whose blood type is expressed in body fluids other than blood, fluids such as semen and vaginal secretion. (RT 5632.) Approximately seventy five percent of all individuals are secretors. In addition to the blood type system, there is a system known as "phosphoglucomutase," or "PGM."(RT5632.) As with the ABO blood grouping system, an individual's PGM traits are inherited through his parents and fixed at birth.(RT5632.) In the PGM system there are four common genes which when put together in different combination can create ten different PGM types for an individual. (RT5632.) These PGM types are also expressed in non blood body fluids in individuals who are secretors.

Mr. Cooksey performed testing on a sexual assault kit obtained from appellant. Through the material submitted to him in this kit. (People's Exhibit 84.) Mr. Cooksey was able to determine that appellant was a secretor, of type "O" blood and a PGM type of 2+1+. (RT5633-5634.)

Mr. Cooksey analyzed Ms. Kenny's tan pants that she was wearing at the time of her death to test for the presence of any semen stains. A semen stain was present on the pants. Testing on said stain revealed a profile of an individual who was a secretor with an O blood type and a PGM type of 2+1+. (RT5650.) Mr. Cooksey testified that 14% of the general population has this blood grouping and PGM profile, therefore

could have left the semen stain on the pants. (RT5636-5644.)

D. Statement to Kenya Starr

Kenya Starr worked with appellant at the Canyon Crest Cinema. She testified that appellant once showed her a gun that appeared similar to People's Exhibit 1, which was found during a search of appellant's residence. (RT5552-5556.) In addition, appellant made statements to Ms. Starr about his involvement in criminal activities. At one point he stated, "I shouldn't have done it. I shouldn't have killed her." He further stated that this person was "nice." Ms. Starr told appellant that she did not believe him but he stated he could prove it. A few days after the conversation he showed Ms. Starr a newspaper article about the murder of Brenda Kenny. (RT5556-5557.) She still did not take him seriously. (RT5558.)

On another occasion, he told Ms. Starr that he had broken into a house, tied some people up and robbed them. He stated that in this incident no one was raped. He also stated that the two victims were not married. (RT5558-5559.)

II. THE ASSAULT OF COLLEEN CLIFF (Counts II -III)

On October 1, 1992, Colleen Cliff was temporarily residing at 698 Atwood Street, Riverside. She was sleeping in a guest bedroom when she was awoken by a man straddling her. He wore gloves, had a knife in his hand, and placed his hand around her throat. He said that he would kill her if she screamed. (RT 5600-5604.) The assailant then left the room but soon came back. He seemed very jittery and pulled her out of bed and took her by the arm leading her into the living room. (RT5604.) The assailant appeared to be about 6 feet tall and of medium build. (RT5604.)

The assailant asked Ms. Cliff who was living in the house with her. She told him that she was staying with friends. (RT5605.) The assailant suddenly told Ms. Cliff that there had been a terrible mistake and that he was going to give her the knife back. He handed Ms. Cliff the knife but still had a hold of her. The assailant took Ms. Cliff to the kitchen where he had her put the knife back in a kitchen drawer. (RT5606.) The assailant then told Ms. Cliff that he was a "hit man" and had been hired to killed someone. However, he made a mistake and entered the wrong house. (RT5607.) He apologized to Ms. Cliff, let her go, and ran out the door leading to the garage. (RT5607.)

Ms. Cliff indicated that the assailant was dressed in black, with black

shoes, black gloves and some sort of turtleneck shirt. He also wore a knit ski mask. She did not see any sort of belt or sash around his waist. (RT5610-5611.) She could see some of the assailant's skin through the ski mask and felt that it was the same color as appellant's. (RT5608.) She did not notice anything about his eyes or mouth. (RT5612.)

III. THE RAPE OF REGINA MULTARI JOHNSON (Counts IV-VI.)

On November 3, 1992, Regina Multari, now Regina Johnson[3], was living at 990 Central Ave, Apt. 121, in the Canyon Crest area of Riverside. She awoke that night and became aware that someone had broken into her apartment. She sat up in her bed and saw someone pointing a gun at her. (RT5110-5111.) This person was dressed completely in black. Of his facial features, she could see only his eyes. The person also appeared to be wearing some sort of "mask from his nose down and hat from his forehead up." (RT5111-5112.) Upon seeing the man, Ms. Johnson put her arms up. The intruder told her not to move and made her lie back down. (RT5112.) Ms. Johnson identified the gun in her assailant's hands as being similar in color and shape to a gun later found at appellant's residence.[4] (RT5113.)

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3. This person will henceforth be referred to as "Johnson."

4. The People's Exhibits referred to in the factual summary of the individual counts were seized through a search warrant executed at the house where

The assailant asked whether Ms. Johnson was married. Even though she was not married at the time, she answered that she was in hope the assailant would leave. (RT5114.) However, instead of leaving he told her that he was a hit man who was going to "take care of" Ms. Johnson's husband because the husband had done a bad thing. Further, the assailant stated that he was waiting for his friends to come to help him. (RT5115.)

The assailant spoke very clearly and slowly, with no accent, and had a mild temper when agitated. (RT5116, 5143.) After 10-15 minutes of conversation, the assailant then lay down on the bed next to Ms. Johnson. He still had the gun in his hand. The assailant then heard some sort of noise and jumped out of bed pulling a dart from a holder he wore on his arm. (RT5116.) He soon returned to the bedroom and began rifling through her drawers and closets and once again started to talk to Ms. Johnson about how he was going to "take out" her husband. (RT5117.) He then asked her if she knew what he was doing in her apartment. Ms. Johnson said she guessed he was a burglar. The assailant answered, "No, I am a ninja." (RT5117.)

The assailant left the room once more and opened the refrigerator and freezer but took no food. (RT5118,5156.) He then came back into the

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appellant resided at 11832 Graham St. in Moreno Valley. The details of the execution of the warrant and full description of the property seized are fully discussed in this Statement of Facts.

bedroom and told Ms. Johnson to get out of her bed and strip. (RT5118.) He then went into her closet and found the clothes that Ms. Johnson had worn that day to work. He told her to put on a skirt and blouse that he found in the closet. (RT5118.) However, after a minute or so he told her to take the clothes off. When she did, he then told her to put them back on . He then took her into a closet where he told her to take her clothes off again, spread her legs and sit down. He then ordered her to get back into bed. (RT5119.)

The assailant then told Ms. Johnson that he wasn't going to hurt her. At this time he still had the gun in his pants. (RT5220.) The assailant then got into Ms. Johnson's bed and raped her. He then rolled her over with his penis still inside of her so that she was on top of him. Immediately afterward, he made her get on her hands and knees and entered her from behind. (RT5121.)

The assailant then got up from the bed, pointed to the sheets and said "You made me come." He then told her to strip the sheets and made her wipe herself with a towel where she touched the wet spot on the bed. Ms. Johnson's assailant then forced her to put the bottom sheet in the bathtub and run water over it. The sheet was left in the bathtub. (RT 5122, 5150-5152.) He then had Ms. Johnson put her pajamas on and again laid down

with her on the bed. He told her that his friends were still coming. (RT5122-5123.) Approximately ten minutes later, he took her to the living room. He sat her on the couch and gave her a lecture on safety telling her to make sure to lock the windows and giving her other "safety tips." He also told her not to call the Riverside Police because they were corrupt. (RT5123.)

Ms. Johnson described her assailant as being 5 feet 10 inches to 5 feet 11 inches tall and weighing 140-150 pounds. She said he was a light skinned black person who wore black gloves and a black outfit. She identified the assailant's skin color by the skin around his eyes, which she observed. She also said that appellant's eyes were like the eyes of her assailant and that the eyes looked Asian. (RT5126-5128,5140.) She identified People's Exhibit 49 as the pajama she was wearing the night of the attack. (RT5129.) Forensic analysis revealed the presence of semen on the pajamas. The semen was from a person of the same blood type and PGM typing as the person who deposited the semen found on Brenda Kenny's slacks. Appellant is included in the population that could have deposited this semen. (RT5646-5647.) She also identified People's Exhibit 3, a piece of mail as an item that the assailant took from her home. (RT5129-5130.) This piece of mail was recovered from appellant's

residence. She stated that the shoes the assailant wore were like slippers with all black soles and tops. They did not lace up like shoes. (RT5135-5136.)

Ms. Johnson stated that during the course of the evening she did not see a knife, throwing stars or sword. She saw some sort of red emblem, approximately 1-1 ½ inches in diameter, on his left sleeve that seemed to be part of the uniform. (RT5139.) After the intruder left, Ms. Johnson discovered that the assailant had unplugged both of her phones. (RT5156.)

IV-THE LINDA GONZALEZ INCIDENT (Counts VII-IX)

On November 14, 1992, Linda Gonzalez was living in an upper floor apartment at 935 Via Zapata in the Canyon Crest area of Riverside. (RT5159-5161.) On that evening, she fell asleep on her couch but was awoken by a rustling noise. She saw a figure in black crouched in the frame of her kitchen window behind the sink. (RT5160.) This person was talking to her but she could not hear what he was saying. Ms. Gonzalez jumped up from the couch and repeatedly yelled "what's going on!" The intruder ordered Ms. Gonzalez not to yell or he would kill her. (RT5161.)

Ms. Gonzalez saw that the intruder was dressed in a black outfit with some sort of mask. (RT5162.) He began to look at the dining room

table where there were pictures and candlesticks. The intruder ordered Ms. Gonzalez to stand up so he could look at her. He then told her to turn off the television but she froze. The intruder then turned off the television and then told her "I want you to go outside", at which point, holding her upper arm very tightly, he put his hand over her mouth. (RT5169-5173.) He then pushed her out the front door of the apartment. (RT5163-5165.)

The assailant led Ms. Gonzalez out to the common landing outside of her apartment. He then changed his mind and told her that he did not want her to go out and put his gloved hand over her mouth. Ms. Gonzalez managed to remove the assailant's hand from her mouth and screamed. He tried to quiet her but she managed to scream again. The attacker then let go of her and ran down the outside common stairs that led to the Gonzalez apartment. Ms. Gonzalez went back to her apartment, put her pants on and then went to the apartment manager's office and called the police. (RT5165-5166.)

Ms. Gonzalez described her assailant as very tall and lean. She never saw what he was wearing on his feet but she felt his footwear while they were walking. She said it felt like slippers. The assailant appeared to be a light skinned black man; she identified appellant as having similar skin color to the assailant. (RT5167-5168.) She didn't see any emblems on his

outfit nor did she notice any gun or knife on his person. (RT5169-5173.)

V. THE ASSAULT ON EDWARD BUHR (Counts X and XI.)

On November 16, 1992, Edward Buhr was living with Linda Penas in the Canyon Crest Apartment complex, apartment number 355, in Riverside California. They were asleep in their bed at 3:00 a.m. when Mr. Buhr was awoken by the sound of a tearing screen. (RT5181.) He jumped up and saw a man about to enter through an open window. The intruder was dressed in black with some sort of cap type mask. (RT5183-5184.)

Mr. Buhr yelled at the intruder to get out of his apartment. The intruder had a large aluminum-colored gun, which he pointed at Mr. Buhr and stated "if you move, I'll blow your head off." The gun had an oval housing and looked like a semi-automatic. (RT5184-5185.) Mr. Buhr stated that P-1, the gun found in appellant's residence, looked similar to the gun he saw that night. (RT5185.)

Mr. Buhr moved out of the line of fire and yelled for Ms. Penas to get down. She closed the window on the intruder's arms several times and the intruder retreated not to be seen again. (RT5186.) Mr. Buhr believed that the intruder had the gun in his left hand. After the intruder retreated, Mr. Buhr called 911. (RT5188.) He believed that the intruder was either a dark

skinned white man or a light skinned black man and that he had a skin color similar to appellant. (RT 5188.)

VI. THE REGINA GRIFFEN INCIDENT (Counts XII-XIII)

On November 16, 1992, Regina Griffen and her husband James were living on Via Cartago in the Canyon Crest section of Riverside. Their apartment overlooked a golf course. (RT 5192.) At 2:00 a.m., Ms. Griffen's husband was at work and she was asleep in her apartment bedroom. She awoke to a barking dog and saw a man enter her residence from a sliding glass door leading from a patio that wrapped around her apartment complex. She had left that door ajar the prior evening. (RT 5193-5194.)

The intruder moved to Ms. Griffen's bed and she began screaming. He told her to shut up and then asked her for money. Ms. Griffen told the intruder that she did not have any money and offered the intruder checks and credit cards. The individual pointed a gun at her and told her that he did not want these items and proceeded to lock Ms. Griffen in a bathroom. (RT5194-5195.)

Ms. Griffen indicated that the intruder was dressed all in black and wore a hood so only his mouth and eyes were visible. He had a slim build and stood approximately five feet eight inches tall. His complection was

similar to that of appellant and the gun recovered by the police from appellant's residence looked similar to the gun she saw the night of the crime. (RT5196-5199.) The intruders eyes were "intense" and did not appear Asian. (RT5204.)

Ms. Griffen remained alone in the bathroom for two to three minutes. When she came out the intruder was gone. She later discovered that the screen to the sliding glass door had been cut. (RT 5199.) When she talked to the police immediately following the crime she told them that she had seen two light skinned black males in a Toyota that evening when she was out with her husband. (RT5202-5203,5205.)

VII. THE RAPE OF JULIA KARG CHIDLEY AND RELATED COUNTS (Counts XV-XVIII.)

On December 10,1992, Julia Karg[5] was living at 2520 Santa Barbara Street in Moreno Valley with Joseph Chidley, her husband-to-be. At approximately 7:00 p.m., Mr. Chidley was at work and Mrs. Chidley was alone in their apartment when a man grabbed her.(RT4947-4948.) She tried to get away, but her attacker put a gun to her head and ordered her upstairs. (RT4949-4951.) She identified as similar in color and shape to P-1, the

5.At the time of the trial Ms. Karg was known as Julia Chidley and will be so referred to herein.

gun found in appellant's residence. (RT4952.)

The attacker held the gun to Mrs. Chidley's head and took her upstairs to her bedroom. She thought that he was going to kill her. (RT4952.) It was at that point that Ms. Chidley noticed that the man was dressed entirely in black, his face covered by some sort of mask so that she was only able to see a small amount of skin around his eyes. He was approximately 6 feet tall. (RT4954.)

While in her bedroom, the assailant, still armed with the gun, ordered Mrs. Chidley to take off her clothes. The man became frustrated as she was removing her clothes and ripped at Ms. Chidley's underwear to get her fully undressed. (RT4954.) He then told her to lie down on the floor between the bed and wall where he exposed his penis to her and raped her. (RT4956.)

The attacker got off of Mrs. Chidley, went to the bathroom and came back with a towel and told her to clean herself. (RT4956.) Mrs. Chidley used the towel to wipe blood off of her face and left arm and also wiped between her legs. Ms. Chidley, still naked, was then led downstairs by her assailant. (RT4956.) Once downstairs in the den, Mrs. Chidley told her attacker that she was expecting Mr. Chidley home around 8:30 p.m. Her attacker asked what Mr. Chidley did for a living and whether he was a

of bizarre questions such as if "John" had a step-sister named Celia. (RT5041.) Still armed with a knife, sword, and gun, the assailant led the Chidleys upstairs to the bedroom. He tied Mr. Chidley more tightly to a hanger rod that was in the bedroom closet.(RT4968-70, 4972.) Once Mr. Chidley was tied up, the assailant threw clothes that were in the closet on top of him. (RT4971.)

The assailant kept talking about his friends coming for him. He appeared to be making phone calls but Mrs. Chidley realized that he really was not dialing any numbers because the operator kept coming on the line. (RT4973.) At some point he cut the phone cord with a knife. He then told Mrs. Chidley to put on a red teddy which he had found. (RT4973.)

The assailant then took Mrs. Chidley into a spare bedroom and raped her again. Although the assailant was still wearing a mask she noticed the skin around his eyes was that of a light skinned black person. She also said the eyes looked Asian. (RT4976-4977.) Mrs. Chidley identified the assailant as a racial mixture of black and Filipino. Mrs. Chidley stated that the skin color and eyes of the assailant were the same type was that of the appellant. (RT4983.)

The assailant then told Mrs. Chidley to get off of him and had her move to another part of the room. He then raped her again from behind.

Mrs. Chidley stated that the assailant had worn loose fitting clothes. (RT5008.) She did not remember any scarring on his hands. (RT5013.) The gloves that he wore had duct tape on the fingers and looked similar to People's Exhibit 16, which was found at appellant's residence. She also stated that People's Exhibit 12, also found at appellant's residence, looked similar to the shoes the assailant was wearing on the evening of the crime. (RT5019.) She also stated that by the final sex act, the assailant had become gentler with her. (RT5014.)

During the entire incident, the assailant always spoke in a soft whisper. He was generally polite except when he threatened the victims' safety. In addition to the ninja garb, the assailant carried a gun, a sword and a set of darts attached to his bicep. These darts looked like People's Exhibit 8 found at appellant's residence. The assailant had butterfly type knife with a silver handle attached to his waist. (RT5053-5054.) Mr. Chidley stated that appellant's skin color was identical to the assailant. (RT5059.)

Mrs. Chidley went to the hospital and was treated and released. The Chidleys never lived in their apartment again. (RT5056.) However, Mr. Chidley and a friend did go back to the house a week later to retrieve some furniture. At that time he saw writing on the sliding glass door but could not make it out. In addition, written on the spa cover in dirt he saw writing

that said "I love you, Lady Nin." (RT5056-5058.) The police investigating the scene were able to make out the writing on the sliding glass door as saying "I believe you are a great woman. I wish you were mine."(RT5075.)

Serological Analysis

The towel that Mrs. Chidley used to wipe herself after the rape was analyzed by police forensic examiners. A semen stain was found on the towel with the same PGM type as appellant. (RT5636-5644; RT5070 et seq.)

IX. DISORDERLY PERSONS CHARGE (Loitering)- DECEMBER 17, 1992 (Count XIX)

On December 17, 1992, Scott Clifford was living in an apartment complex at 1009 Via Pintada in the Canyon Crest section of Riverside. In the early evening he was standing on his balcony when he saw someone standing in a dark alleyway. This person appeared to have a flashlight. (RT5271.) The figure moved into a lighted area and Mr. Clifford realized that the person had a sword strapped to his back, and appeared to be "completely hooded." He was also wearing "tabby" type split boots that looked like People's exhibit 12, found at appellant's residence. (RT5274.) The individual then ran away and Mr. Clifford called the police. (RT5275.)

X. ASSAULT ON PHILLIP COURTNEY AND HOWARD LONG (Counts XX-XXII.)

On January 18, 1993, Allison Schultz and Phil Courtney were living together in Apt 16 of the Hidden Springs Apartments on Pearblossom Road in Riverside. (RT4629.) The couple went to dinner that night and returned to their apartment at approximately 9:00 p.m. (RT4630.) Mr. Courtney saw the light over his apartment door was out as he approached his apartment and started to open the door. As he was opening the door he saw some sort of movement out of the corner of his eye. (RT4662-4663.) Mr. Courtney proceeded approximately 10-15 feet into the apartment when he heard a guttural noise and saw a figure dressed in black with a gun in his hand. (RT4664.) He rushed at the figure and grabbed at the gun, which he described as a flat nosed, silver automatic gun like police officers use. (RT4665-4666.) Mr. Courtney stated that the gun was shinier than exhibit P-1 but that the trigger was similar. (RT4666-4667.)

Mr. Courtney struggled with the man who had the gun. Both had their hands on the gun when the assailant attempted to move the gun around to point at Mr. Courtney's stomach to try to shoot him. However, the assailant could not accomplish this. (RT4669-4670.) Mr. Courtney yelled for help but no one came to his aid. (RT4671.)

During his struggle with the attacker, Mr. Courtney saw a pole like object on the attacker's back but could not tell what it was. (RT4675.) He identified People's Exhibit 6, a sword found at appellant's residence, as being similar to the part of the pole that he saw sticking up above the attacker's shoulder. (RT4676.)

Eventually, Mr. Courtney grabbed the gun and struck the attacker in the face with it. Mr. Courtney then pushed his assailant into a planter but in doing so he lost some of the control he had over the gun. (RT4681.) He then felt the sensation of being punched in the back and felt a warm liquid in that area. (RT4683.) It was at this point that a neighbor appeared in the common walkway in front the apartment. He hear the neighbor yell "freeze" and assume a shooter's stance. (RT4684-85.) The assailant then fired at the neighbor.(RT4685.) Mr. Courtney noticed that before the assailant fired, the gun had been cocked. (RT4687.) The assailant ran away after firing the gun. (RT4689.)

Mr. Courtney was taken to the hospital where he stayed for 13 days, suffering from two collapsed lungs as a result of stab wounds. (RT4691-92.)

Howard Long was the neighbor of Ms. Schultz and Mr. Courtney who intervened in an attempt to help them. He heard noise and saw two men scuffling, with a person dressed in black trying to stab another man

who was trying to protect himself. (RT 4804.) Mr. Long had a gun, which he pointed at the two men who were struggling about 20-25 feet from him. The man in black used the other man as a shield and fired a shot in Mr. Long's direction. Mr Long retreated back into his apartment. (RT4808.) He stated that P-1 was the same color as the gun that was fired by the assailant. (RT4808.) Mr. Long later found a bullet hole in the door frame of his apartment. (RT4810.)

Ms. Schultz stated that she thought that the person might have been African-American and that he stood about 6 feet tall and weighed 180 pounds. (RT4646-4647.) She was subsequently shown a photo of appellant but did not recognize his features as being those of the person she saw involved in the fight. (RT4653.) Mr. Courtney identified the assailant as being a light skinned black man with a flat nose. He stated that appellant had a similar skin color to the person who attacked him that evening. (RT4672-4673.) Further, Mr. Courtney, who was six feet tall, stated that his attacker was slightly shorter than he was. When the district attorney had Mr. Courtney stand next to appellant, appellant was the same height as Mr. Courtney. Mr. Courtney also stated that he is 165 pounds and that the assailant weighed less than him but was of a similar build. (RT 4673-4675.) However, immediately following the attack he told the police that the

attacker was 6' 4" - 6' 5". (RT4713.)

Ballistics on Gun

Ballistics

Terry Fickies, a firearms examiner for the California Department of Justice, examined the gun recovered from appellant's residence. (P-1.) He described it as a .45 caliber semiautomatic, in working order. (RT 4844,4848.)

Mr. Fickies testified that he did a comparison test to ascertain whether the bullet fired into the doorjamb was fired from P-1. He stated that there were six lands and grooves in the barrel of P-1 which matched both the bullet fired into the doorjamb and test fires from box of bullets found in appellant's apartment (P-14). Mr. Fickies determined that said bullet was fired from P-1. (RT4855-4859.) However, Mr. Fickies testified that there was a mark on the end of the barrel of P-1 that was not consistent with markings on the recovered bullet. He stated that the mark may not have been present when the recovered bullet was fired. (RT4860-4861.) Mr. Fickies also admitted that his initial comparison test demonstrated only a probability that bullet was fired from P-1. (RT4883.)

Shoe Print Analysis

The day after the assault at the Hidden Springs Apartments, an unusual footprint was found in the dirt. (RT4905.) Three cast impressions were made of this print. (RT4906-4907.) Ricci Cooksey, a state print examiner, later compared these casts to the "tabbie boots" found at appellant's residence (P-12) and found them to be a match. (RT4911-4920.)

Search of Appellant's Residence

A. Events Leading to Search

Ricardo Decker worked with appellant at the Canyon Spring Cinema in Moreno Valley. Appellant's girlfriend, Stephanie Compton was the assistant manager of the theater. (RT5441-5442.) In September, 1992, not long after the death of Brenda Kenny, Mr. Decker had a conversation with Ms. Compton in which she related that she and appellant had been riding by the murder scene when appellant told her that he had the feeling that something terrible had happened there the previous evening. She then told Mr. Decker that appellant related that the evening before he had a dream where he saw the librarian murdered. (RT5443.)

After relating this to Mr. Decker, Ms. Compton called appellant over and repeated what appellant told her. Appellant nodded in the affirmative

when she related the story but said nothing. Mr. Decker was not sure exactly when these exchanges occurred but it was right around the time of the Kenny murder. (RT5444.)

Mr. Decker saw appellant dressed in dark clothing on two separate occasions. (RT5445-5448.) He also stated that appellant told him that he practiced martial arts in the hills of Canyon Crest. (RT5448.)

Subsequent to these incidents, on or about January 21, 1993, Mr. Decker read an article in the newspaper about a couple that had recently been attacked in the Canyon Crest area. It was at that point that Mr. Decker decided to call the police and tell them what has been described above. (RT5455-5456.) Following up on this information that appellant had been dressed as a ninja, the police began to search for him. (RT4518.)

Detective Hector Heredia of the Riverside Police Department was working in the Crimes Against Persons Unit. He was assigned to work the Multari-Johnson and Courtney cases. (RT4461-4462.) On January 21, 1993, he obtained a search warrant to search appellant's residence on 11832 Graham Street in Moreno Valley. When he got to the premises, other police officers were already at the scene. (RT4462,4474.) Appellant shared the Graham Street residence with several other people. He shared a bedroom with David Yearicks, who had moved into the residence in

November,1992. Appellant moved in a short time later. (RT5768, 5775, 5756, 5759.)

The house was a two story residence with three bedrooms upstairs. (RT4473.) The northwest bedroom of the residence appeared to be inhabited by a male in that there was no female clothing or other indication of female habitation. In a closet in that bedroom, Detective Heridia found People's Exhibit 3, a piece of mail from J.C. Penny addressed to Rita Multari Johnson. He also seized a black wallet on the living room couch. (RT4464-4465.) The identification inside the wallet indicated that it belonged to appellant. (RT4467.) Inside the wallet there was a photo of Joseph and Julia Chidley. (RT4468.)

Detective Jerald Theur was assigned to search the garage at the Graham St. residence. He found People's Exhibit 1 (P-1), a handgun, disassembled in a black pouch in a desk in the garage. Two swords (P-6 and P-7) were found near that desk. (RT4485-4887.) In addition, a target tacked to a cardboard backing with darts (P-8) was also found in the garage. A cardboard with paint stains was also discovered in the garage (P-10) along with a knife. (P-13.) (RT4488-90.)

A dart holder (P-11) which could be worn on the wrist was found on the north wall of the garage. (RT4491.) The darts found in the garage fit

into this dart holder (RT4492.) A set of "booties"(P-12) was found in a cardboard box in the garage. In addition, Blazer brand ammunition (P-14) including a disassembled bullet was found in a desk drawer in the garage.(RT4494.) People's Exhibit 15, a fixed blade knife, was found in the same box as the booties. (RT4494-4495.) In addition, Detective Keers found a dart holder with knives in it in the bookshelf in the northwest bedroom. (P-20.)

Detective Keers seized a briefcase located on a mattress in the northwest bedroom. (RT4522.) Inside that briefcase was a newspaper article about a "rape/burglary" in Moreno Valley. (RT4524.) In addition, appellant's drivers license and college transcripts and an identification card bearing the name of Joseph Chidley were also found in the briefcase. (RT4524-4527.)

Several pairs of gloves were also seized from the northwest bedroom. (RT4531-4533.) In addition, two newspaper articles concerning the death of Ms. Kenny, an obituary concerning Ms. Kenny, and another newspaper article about a stabbing were found in the northwest bedroom. At least one of these articles were found inside a college textbook (P-21).[6] (RT 4533-4539.)

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6. The language of the transcripts makes it difficult to ascertain exactly how many of the articles found were found in the textbook.

In addition, Detective Heredia recovered some sort of ninja-type uniform from Stephanie Compton's Topaz car that was parked in front of appellant's residence. This uniform consisted of a black shirt with a emblem on the front and what appeared to be a hood. There was also a black cut-off pair of pants. (RT5459.) In addition, a knit ski cap with holes for eyes and the mouth, a long -sleeved black turtleneck shirt and a second pair of pants were recovered from the car. (RT5461-5462.)

Testimony of Stephanie Compton

After the execution of the warrant, Stephanie Compton was interviewed by the police. At the time of all of the crimes charged in the indictment Stephanie Compton was appellant's girlfriend. Ms. Compton was with appellant on the day he was arrested and saw him being taken into custody. Just a short time prior to his arrest he had placed some clothes in her car so that Ms. Compton could wash them for him. (RT5289.)

Ms. Compton started working at the Canyon Crest Cinema in May, 1991. Appellant started working there approximately a year before his arrest. (RT5292.) She was familiar with his Graham Street residence. She never had seen throwing stars there before but had noticed appellant and David Yearicks playing with P-8, the dart board. (RT5294.) She also saw

the tabbies (P-12) someplace before but she could not remember where. She never saw appellant wear them. (RT5295.) She saw swords at the Graham Street residence. (RT5296.) She identified the small knives in a case, P-20, as items she saw appellant and David Yearicks throw. She also identified P-21, the book in which at least one of the newspaper articles were found, as an item she probably saw at the Graham Street house. (RT5319.)

Ms. Compton identified P-1 as appellant's gun. He had this gun when he lived on Graham Street but she did not remember him having it before that time. He always kept it on a desk in the garage, usually in pieces. She only saw the gun assembled on one occasion. (RT5305-5307.) She never saw appellant practice ninja martial arts. (RT5312.)

Ms. Compton remembered reading about Ms. Kenny's murder in a September 14, 1992, newspaper article. (RT5320.) Prior to her reading this article, appellant told her that he had a dream that he was flying outside a window and saw a woman stabbed. Appellant gave her no details as to the name or occupation of the person he saw stabbed in his dream She tore the article out of the newspaper and showed it to appellant. He looked at it but said nothing. (RT5321-5322.) He told her that he had the same dream several times and when she showed him the article he said that he already

read it. (RT5327.)

Ms. Compton does not remember telling Ricardo Decker about appellant's dream. Nor does she remember telling Wendy, who worked in the projection booth. She also does not remember telling the police that she showed appellant the newspaper article and appellant becoming upset when he discovered where the crime was committed. (RT5356-5358.)

Ms. Compton stated that on the day of the Courtney crime, January 18, 1993, she accompanied appellant to a Big 5 Store in Moreno Valley to buy some bullets. (RT5316.) After they got home from the Big 5 they went to the mall and then hung out together on a hill top. They did not get home until about 11:00 p.m.. (RT5349.)

Ms. Compton stated that appellant had a scar on the back of his left hand. (RT5352.) However she never saw him with scars or scrapes on his face during the two month period prior to his arrest (RT5351.)

Testimony of Derrick Lajon

Derrick Lajon lived in the Graham St. residence until the end of 1992. (RT5812-5814.) On occasion he would see appellant dressed in martial arts type black attire. He also saw him in possession of a sword, throwing stars and nunchucks. He also observed a gun that looked similar to

P-1, the gun recovered by the police from the Graham St residence garage. He also saw appellant with a sword as appellant was on the way to work. He told appellant that it was unwise to be walking around in a ninja outfit with a sword. Appellant told Mr. Lajon that he needed the sword for protection. (RT5815-5817.)

DEFENSE CASE

Defendant rested without presenting any evidence. (RT6030,6038.)

PENALTY PHASE TESTIMONY

People's Case

Donald Kenny testified that Brenda Gail Kenny was his daughter. While her first name was Brenda, everyone called her Gail. She was born January 15, 1952 in Wisconsin (RT6411-6412.) Donald Kenny and his wife have two other children, Glenn and Mary. Gail was the middle child of the family (RT6412.) The family lived in several different places because of Mr. Kenny's employment, including Wisconsin, Ohio and Alaska. (RT6412-6414.) Mr. Kenny felt that the family of five was very close knit. (RT6414.) In 1959 the family moved to California so that Mr. Kenny could take his doctorate at Stanford University. Gail started school at the Stanford

University elementary school in the student housing area. (RT 6414-6415.)

After Mr. Kenny received his doctorate from Stanford, the family moved to Tokyo, Japan, where he took a position as principal at an American school. The family spent a year in Japan, after which they moved to Las Vegas where Mr. Kenny had received another principal's position. (RT6416-6417.) Four years after that the family moved to New Mexico, where Mr. Kenny assumed a position of Assistant Superintendent of Schools in Roswell. The family stayed in Roswell for one year before moving to Riverside in 1968, where Mrs. and Mr. Kenny have lived ever since. (RT6417-6418.) Brenda was in 9th grade when the family moved to Riverside, having skipped 8th grade while in Roswell. (RT 6419.)

Gail graduated from Riverside Poly in 1971. She then attended Western State College in Colorado, graduating and working her first job in Denver as an insurance adjuster from 1977-1981. She then returned to school and received a masters degree in library science at the University of Pittsburgh. She then worked for awhile in Pittsburgh and Dallas, moving back to Riverside in 1986. (RT6420-6423.)

While Mr. Kenny felt that he was closer to his daughter when she was a child than after she left home, he stated that he began to grow very close to her again after she came back to Riverside in 1986 and lived with

her parents for two years. (RT6422.) Mr. Kenny stated that his daughter left for college as a girl but came back a beautiful young woman. He related several stories of how their relationship was growing and apparently became very emotional during his testimony. He spent a lot of time with his daughter from his retirement in 1987 up to Gail's murder. (RT6423-6424.) Mr. Kenny indicated that during this period of time he and his daughter would often talk about many things and solve their problems together. (RT6424-6426.)

Mr. Kenny testified as to the events surrounding the discovery of his daughter's body. He stated that he and his wife received a phone call from one of Gail's co workers indicating that Gail had not been at work for the last two days. As it was very unlike Gail to miss work like that, Mr and Mrs. Kenny raced over to her apartment. It was at that point that they found Gail's body. (RT6426.) Mr. Kenny indicated that Gail's death had a great effect on his family. The thing that affects him the most is the idea that the killer was with her for several hours and thinking about what the killer did to her. He closed his testimony by stating that he missed his daughter so much. (RT6427)

During the course of his testimony, Mr. Kenny showed the jury several photos of Gail.. There were two photos of Gail as a young child in

the United States and a third photo of her in the American school in Japan. (People's Exhibits 102-104; RT6415-6416.) In addition, there were two more photos of Gail at a slightly older age taken in Colorado. (People's Exhibits 105,106; RT 6417.) In addition, there were two photos taken of her when she was a teenager, one of which showing her with the family Saint Bernard dog. (People's Exhibits 107, 108; RT 6418,6420.) In addition, there were two photos presented of Gail and her parents at her college graduation (P-109,112; RT 6421, 6425.) Finally, there was a photo of Gail at her father's birthday in 1992, a few months before she was killed. (P-115; RT6425.)

The next witness was Mary Costello, the victim's sister. She is 18 months older than Gail and was very close with her sister. (RT6429.) Gail was a very big part of her life when she was growing up. She graduated high school a year before Gail and Gail followed her to Western State College in Colorado. While attending school Gail lived right across the street from Mary. The two sisters saw each other constantly. (RT 6431-6432.) Gail helped Mary with Mary's newborn child, Charlene, for the year that they lived next to one another in Colorado. Gail also lived with Mary and Mary's husband in Dallas in 1984. The family was still "tight-knit" during that time period. (RT6433.)

Mrs. Costello indicated that Gail's death hit her parents very hard. She testified that after the murder she stayed with her parents for two months because her parents had become "dysfunctional," severely depressed and under psychiatric care and medication. (RT6435.) As no one had been arrested for the murder at this time, the three family members were so afraid that they all slept in the same bed. Mrs. Costello testified that every time she went out of the house and saw someone she wondered whether she was looking at the killer. (RT6436.) She testified that her parents improved somewhat in the years following her sisters death but no one in the family will ever be the same again. Even after Mrs. Costello returned home to Texas after the two months she spent with her parents, she was afraid to go out of the house after dark and could not stay in the her house overnight when her husband was out of town. Mrs. Costello also experienced fear for her nineteen year old daughter who had gone away to college. (RT6437.)

Mrs. Costello stated that the last time that she spoke to her sister was when the Costellos were vacationing in Ireland. Gail was scheduled to go on vacation the first week of October. The two sisters discussed Gail's vacation plans and discussed the bed and breakfast where Gail would be staying as Mrs. Costello had seen the room where Gail would have stayed on vacation. (RT6438-6439.) During the course of her testimony, Mrs.

Costello identified two photos of the three Kenny children when they lived in Alaska (RT6430.)

Robert Costello is the husband of Mary Costello and Gail's brother-in-law. (RT6441.) He restated the close relationship that his wife had with her sister and further stated that Gail was like a sister to him. (RT6441-6443.) He described how he and his wife were in England when they got a call that Gail had been killed He stated that after Gail's cremation, he, Glenn Kenny and one of Glenn's friends went to Gail's apartment to take care of her personal effects and belongings. (RT6444.) Robert Costello said that this experience was very emotional for Glenn but the three men felt that going to the apartment was something that they had to do for Gail. (RT6445.)

Mr. Costello testified that both Mary and their daughter, Charlene, suffered from the lack of Gail's companionship. He thought that they would all grow old together. Further, Charlene appeared bewildered about how such a thing could have happened. (RT6446.) In addition, Mr. Costello stated that as a result of the crime he and his wife got involved in counseling. He stated that after he returned to Texas, for the first time in his life he became afraid of the dark and had to sleep with the light on and that he was scared in his own house. He still is very careful in shopping center

parking lots and has unreasonable fears, thinking about what could happened to his wife and daughter. (RT6447.) He stated that his wife was also very afraid after she returned to Texas. (RT6448.)

Mr. Costello also stated that he now keeps a baseball bat available as a weapon in his house. He reiterated that his daughter is very security conscious and has been "tainted" by her aunt's murder. (RT6448-6449.)

Glenn Kenny testified that he was the youngest of the three Kenny children. He stated that due to the family moving so often, he was very close with his sisters as a child and remained so into adulthood. Even as teenagers, the three siblings stayed together as much as possible . His sisters were his primary friends while they were growing up. (RT6450-6451.)

Glenn stated that he also attended Western State College in Colorado, in part because he wanted to be close to his sisters. (RT6453.) He stated that while at college he and Gailobserved a situation in a dorm where a girl had passed out and a male was fondling her. Other people were standing around watching. However, Gail took it upon herself to grab the boy, throw him out of the room and take care of the girl that night. Glenn stated that this was the type of person that Gail was, that she was a protector. (RT6453.)

Glenn Kenny stated that he has four children, three of whom born

before Gail was killed. He said that Gail loved his children and treated them as she would her own. He identified two photos of Gail with his children. The children were 8, 6 and 4 at the time of her death. (Ex 113-114; RT6453-6455.)

Mr. Kenny also testified about cleaning up Gail's apartment after her death. He stated that he felt Gail would have wanted him to do it but it brought back a flood of memories. Many items essentially brought back the fact she was gone forever. He stated he was glad that his parents did not have to be there. He stated that his mother lost so much weight after Gail's death he did not know whether she was going to survive. (RT6455.)

Mr. Kenny stated that all his three sons felt Gail's death deeply. They could not fully understand what happened but were present at the funeral when their father broke down. Glenn Kenny felt it was scary for his son to see his father cry. (RT6456.) Mr. Kenny stated that even though he lives in a little town where there has not been a murder since at least the time he moved there in 1988 or 1989, he and his wife are still afraid and their children see the fear in them and feel the same fear that they do of going out in the dark. (RT6456-6457.) The issue of Gail's death still comes up amongst their children. Jiselle, who wasn't even born at the time of the murder, at least once cried and said "I want my Aunt Gail. I want my Aunt

Gail." Shea, his 13 year old son, wrote an essay in school about the impact of her death upon the family and stated that "after all these years, I cry every now and then." (RT6458.) Mr. Kenny states that his son's pain is still deep. He also stated that his son cried when he heard about the verdict in this case. (RT6459.)

Even just a week before this testimony, Glenn and his wife had to cancel an engagement because they did not feel comfortable leaving their children at home even though Shea was 13 years old. The parent left the house for their engagement for only a few minutes when they decided they could not be comfortable going out. When they returned Shea was very grateful because he was scared. (RT6459.)

Gail's mother, Maxine Kenny was the last witness to testify for the prosecution. She was asked by the prosecutor what it felt like to lose a child. She stated that no one can really understand it especially when the child dies in such a brutal and senseless way. She felt that part of her heart has been ripped out. Finding Gail dead on the floor is something that she can never forget. (RT6461-6462.) Mrs. Kenny said that she would miss Gail's companionship. They were very close. Mother and daughter would talk to one another all the time about almost anything. Mrs. Kenny learned a lot from Gail's enthusiasm and curiosity. They would discuss religion and

travel. At some point Mrs. Kenny realized that her daughter was becoming her protector. She misses her daughter coming to her door and just saying hello. Mrs. Kenny spoke of all of the things that she and her daughter used to do together and reiterated that she missed her very much. (RT6462-6464.)

Mrs. Kenny then again described her feelings upon seeing her daughter's dead body. She said that it is a mother's first reaction to reach out and comfort their child to heal their wounds. However she could not do that for her dead daughter, there was no way to bring her back. It was as if her own life ended when she found her daughter dead. (RT6464-6465.) Mrs. Kenny then showed the jury a photo of Gail when she was a year old with a band-aid on her arm. (P- 97.) She reiterated that a parent always wants to fix a child's wounds. She stated that you never expect your children to die before you. (RT6467.)

Mrs. Kenny then showed a photo taken of her three children in 1960. (P-101.) She has the most recent photo taken of Gail, the one taken for her passport. She stated that the photo shows a beautiful girl who was always willing to help people, not only professionally but anyone who needed help. She would sit with people, listen to them, comfort them and give them advice. Mrs. Kenny said that talking about her daughter before the jury made her feel a little better. She wanted them to know that she was not a

statistic but a human being. She hoped that the family's testimony today would give some sort of closure. (RT6468.)

Mrs. Kenny showed a final photo taken of her daughter during Christmas time, 1985. (P-110.) She stated that it was very hard to look at these photos but she was grateful to have had her daughter for the 38 years that they did. Mrs. Kenny stated that she brought a lot of happiness into their lives. Mrs. Kenny thought that at the time Gail's death, her daughter was feeling pretty good about her life and her future and that is a good feeling for a mother to have. The witness reiterated that she and her daughter were very good friends and Gail's journal was her last gift to Mrs. Kenny and her husband. She read the last lines from the journal; "I am very in tune with Dad and Mom is my friend" She told the jury "What kind of gift is more precious than that." Mrs. Kenny closed her testimony by telling the jury that she lost her best friend as well as her daughter. (RT6469-6470)

DEFENSE PENALTY PHASE CASE

The first witness called by appellant was Jeanne Petersen Weyers. At the time of her testimony, Ms. Peterson was an area administrator for the San Louis Obispo County Office of Education, supervising special

education cases. Ms. Petersen was appellant's teacher at the Speech and Language and Development Center, a non-public school in Buena Park, California. This was an education facility that served children who had language, learning and behavioral difficulties so severe or specific in nature that they could not be educated in the public school system. The Speech and Language Development Center contracted with the public school system to render these services. (RT6478.)

Appellant was eight years old when the witness first met him. The first day he was very quiet and withdrawn. He was also very troubled, angry and upset. Soon thereafter, appellant did not come to school because his mother had been arrested for prostitution. David was placed in the Albert Sitton Home as a ward of the court. This institution eventually arranged transportation for David to return to school. (RT6479.) When David's mother was first arrested, he was in a terrible rage. In fact, the witness never saw a child so upset. For six weeks he never smiled at all. (RT6489.) In addition, David had scars on his arms and hands. The witness stated she was told that these scars were a result of "being burned by people in his home." (RT6481.)

For the first six weeks or so that he was at the school, he remained very withdrawn. He would do things like cover his face with his jacket.

Eventually, he did begin to respond and with proper reinforcement did better work. His best work was in math.(RT6480-6481.) Art was his favorite activity. (RT6485.) Ms. Petersen stated that when he left his mother to live with his aunt, David began to smile, laugh and participate more. (RT6487.) She stated that she did not know David's relationship with his aunt's husband. (RT6490.)

David slowly came around and fully participated in the program. He could be disruptive due to a great fear of failure which would lead to frustration. Ms. Petersen would have to be careful not to give David work that he could not handle. (RT6482.) Toward the end of her association with David he was smiling and laughing like a normal child. (RT6489.) David did have altercations with other children . However, these had to do more with property than personalities. He was very protective of property. Ms. Petersen felt that for awhile there was tremendous improvement. She feels that the mother was probably a negative influence and that David behaved better when he lived with his aunt. (RT6483-6484.) During periods where David's mother would contact him, David would often have problems with his behavior. Ms. Petersen felt that David was sexually aware at a very early age, probably because of the influence of his mother. She would also hear him making sexual references about things such as oral sex that children his

age should not even know about. (RT6485.)

Ms. Petersen showed the jury a photo of David as a child and a painting he did in art class as a present for her. (RT 6485-6486.) When Ms. Petersen left teaching to go into administration, David would lapse back into angry behavior as he perceived that she was abandoning him. (RT6488.) When David got angry he would refuse to talk and would withdraw from others. (RT6489.)

When David's mother tried to get him back. However, he said that he did not want to go back with her. In the 25 years that she had been an educator, Ms. Petersen never heard another child state that he did not want to go back to his mother regardless how badly the mother had abused him. (RT6489.) David was the only child she's ever known that told the judge "enough"; that he did not want to go back to his mother. (RT6490.)

Ms. Petersen stated that she did not believe that David deserved to be executed. She stated that he was a product of society that allowed him to be abused and neglected to climb up into a cupboard and search for food. He lived in an abusive home for 10 years and did not have a chance. Ms. Petersen said she loves David very much. (RT6490.)

On cross-examination it was revealed that defendant left the school when he was 12 or 13. Ms. Peterson heard that David was doing well in

Junior High School and was on the student counsel. (RT6494.) Ms. Petersen also stated that approximately 10% of the children in California schools are classified as special educational students. (RT6495.) Of all of the students that Ms Petersen taught, appellant was the only one convicted of capital murder. (RT6491-6493.) David was classified as a Severely Emotionally Disturbed Child. The definition of such a child is one who has emotional and behavioral problems which interfere with academic performance to a marked degree over a long period of time. A "marked degree" is defined as a year or more below grade level while "over a long period of time" means more than six months. (RT6495.) The witness stated that Severely Emotionally Disturbed is a severely handicapping condition. (RT6499.) Appellant was not diagnosed as having an organic brain disorder. He was diagnosed as having a language disorder. (RT6495.) Ms. Petersen stated that he had the mental capacity to be in regular classes but for his emotional state. (RT6496.)

Ms. Petersen stated that David was at the Speech and Language Development Center School for 4-5 years. (RT6497.) He was below grade level in everything but better at math than other subjects. She stated that by the time he left the school he had a decent foundation but was not nearly at grade level for reading. However, it would not have surprised her if he had

succeeded in high school. The district attorney then asked whether the witness would be surprised to have learned that appellant received a "B" in reading in the 10th grade. The witness said she would not be surprised. The district attorney then asked whether the witness would be surprised to learn that appellant received a grade of "A" in English in 11th grade. The witness said that she would have been surprised but would be very proud of appellant. She stated that when he put his mind to something, he could do it. (RT6501-6502.) While in school, appellant would destroy both his own and school property. He would not tell her why he was destroying things but she believed that it had to do with frustration with the difficulty of his school work. She also stated that the painting that he gave her was quite sophisticated. She stated that about a half dozen of the kids in her class painted very well. (RT6502-6505.) She also stated that her class ran on a contract system where a child would have to perform certain tasks to get certain things that he wanted. (RT6505.) Ms. Petersen stated that the Learning Center was paid $15-20,000 per year per child for their services. (RT6506.)

The next witness called by appellant was Grace Mary Scott [7]. In the late 1980's appellant did yard work for her. The witness was quite sick at

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7. This witness is not related to appellant.

the time. Appellant was living down the street from her with John Contreras.(RT6510.) She stated that appellant did excellent work for her. He was very concerned that everything was done properly. He was very meticulous and never acted in a bizarre manner in her presence. Appellant was sympathetic when her alcoholic husband was abusing her.(RT6511-6512.) He would say to her "Grace, your husband is not treating you right. Why do you stay?" The witness stated that she and her husband wished their kids could be like David, who was reserved, polite and respectful. (RT6512-6513.)

After appellant moved to Moreno Valley, Ms. Scott would pick him up so that he could work at her house. (RT6512.) He was very courteous and honest. She knew that he was working his way through college. The witness loves him and does not want to see him killed. (RT6513.) On cross-examination, the witness reiterated that in the three years she knew him, she never saw him do anything strange at all. (RT6414-6415.)

Frances Lenore was David's high school teacher when he was a junior at Moreno Valley High School. He was a special education student, one of 16 such students under her charge. Appellant was the best special education student in the class. He did his homework, did what he was supposed to do in class and never disturbed anyone. (RT6516-6517.)

David did not appear to have emotional difficulties. On one occasion he got up out of his seat in class and jumped up and down but immediately got control of himself. (RT6517-6718.) Ms. Lenore stated that she read in David records that he was schizophrenic and kept a close eye on him but she saw no signs of this disease. David was shy, polite and quiet. (RT6518-6519.)

Ms. Lenore would call David's home to see whether he was receiving help with his emotional problems His aunt, Ms. Whittiker indicated that he was getting the proper therapy. (RT6519.) David received "A"s and "B"s. He was not quick to participate in class but would answer when called upon Ms. Lenore said that he was a good student and it would affect her if he was to be executed. (RT6520.)

On cross-examination, the witness stated that David was of normal intelligence but had a communication disorder. (RT6521.) The district attorney showed the witness Exhibit 117 which showed appellant's grades, showing an "A" in English and a "B" in math. (RT6223.) However, all work was modified from grade level expectations due to the student's special education disabilities. (RT6524.) His aunt was concerned about his behavior in school but David was well behaved and much more successful in class than the other special education students. (RT6524-6425.)

Ms. Lenore stated that appellant was well liked by the other students. He was not picked on and there were a lot of handshakes and pats on the shoulders between the students. She feels that she could have succeeded in college. She was surprised that he got into this sort of trouble. (RT6526.)

The witness was then shown a statement that she gave to the district attorney several years before in which she stated that she would not be surprised if David got into trouble. She stated that she did not recall making such a statement although she did allude to having seen appellant dressed all in black on three occasions .(RT6527.)

The next defense witness was Mary Lane. In 1979, Ms. Lane was a staff psychologist for the Court Evaluation and Guidance Unit in Orange County. It was her job to provide evaluations for the juvenile court. (RT6529.) When asked to identify appellant in court, she could not recognize him. (RT6529.) Appellant was also known as David Beane but the witness has no idea why that was the case. (RT6530.)

The purpose of the report that Ms. Lane prepared was a hearing regarding allegations of child endangerment and also decisions about placement. (RT6530.) Primarily, she interviewed the persons involved in appellant's life, including appellant, his sister, his mother, and his aunt, a

Mrs. Hinton[8],and reviewed reports from the Department of Social Services, a psychiatrist, William Loomis, and a teacher, Gene Clark. Appellant's father was not available. (RT6531.) Appellant was 8 years old at the time of the preparation of the report. Appellant's sister was almost five years of age. Appellant's mother was 27 years old. (RT6532.)

Appellant's mother was in custody at the time of the interview and had to be transported to the evaluation. The idea of the evaluation was to evaluate the children's functioning, to review the history of the family, to evaluate the mother's functioning and her interaction with her children, to evaluate the resources available and to make recommendations. (RT6532-6533.) During the interview, appellant's mother was defensive and uncommunicative. She said that there were no problem with appellant and that she was giving him his medication as prescribed. The witness did not recall what type of medication appellant was receiving. However, she had indications through appellant's behavior that he was not being given his medication. (RT6533.)

The witness said that appellant had been hospitalized at Huntington Beach Intercommunity Hospital because of severe behavior problems that had manifested themselves as assaultive behavior against younger children

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8. Appellant's aunt is known both by the last names of "Whittaker" and "Hinton."

at the school. The witness could not say what had caused these problems other than a chaotic home environment. There was an indication that appellant's mother was bringing prostitution clients home. The children also observed fights between their mother and her boyfriends. The witness did not recall if the children ever asked about their father. (RT6533-6535.)

The witness was told by the Department of Human Services that appellant was being hit by his mother and that her boyfriend had shaven David's head to punish him. The mother and her boyfriend believed that whipping was proper punishment and was more effective when carried out by a male. Appellant stated that he did not want to return to live with his mother and tried to distance himself from his mother during the interview process. Appellant's mother would encourage David to sit with her but he would try to avoid her. (RT6536.) Appellant's mother also admitted that she hit David with a belt. (RT6544.)

David cooperated in the testing that was administered during this process. He was very slow and methodical. He also appeared sad and depressed. However, Ms. Lane had no independent recollection of this and was only reading it from the report. (RT6537.) During the meeting it was impossible to get honest information from David as his mother was attempting to present a face of adequate mothering. (RT6538.)

The evaluation process resulted in a recommendation that David remain with his aunt, in the school setting in which he had just been placed and follow the hospital treatment plan. It was felt that this was a critical time in his life and long term stability was critical. However, when pressed for details, the witness could not relate why she thought that this was a critical time for appellant. Any effort to reunite appellant with his mother would be based upon the progress in treatment. (RT6538-6539.)

When the witness was asked why appellant's sister was interviewed, the witness said she was not prepared to discuss Denise. Further, it was not her responsibility to follow up on the report. (RT6539.)

On cross-examination the witness testified that she had done approximately one thousand of these types of evaluations and it was usually a ten hour, one day procedure. Appellant was a little above average on the I.Q. test. However, the witness related that the test given was more of a screening procedure and may not be accurate. She stated that it was his repeated assaultive conduct in first and second grade that led to this evaluation. (RT6541-6544.)

The next witness called by the defense was Eleanor Kniffen who was a school psychologist for the Santa Anna School District who met appellant when he was between five and six years old. He was referred to her because

of severe behavior problems and learning disabilities in class. She did not recognize appellant as he sat in the courtroom. (RT6547.) The witness had to refer to the report she compiled on appellant when he was a child. The witness never met appellant's father and indicated there was an indication in the report that appellant hadn't seen his father since he was three years old. The report indicated that appellant also had a mother and a four year old sister. (RT6548.)

The report indicated that David reached his developmental milestones within normal chronological limits. Appellant's only severe medical illness was meningitis at the age of one year but also had several colds with high fevers. The witness stated that according to the report that she had in her possession, David was diagnosed as "hyperkinetic", or what is now referred to as Attention Deficit Disorder. This condition created memory problems, an inability to attend to what was being said in the classroom, and the inability to sit still. Appellant began kindergarten in the Madison School, in the Santa Anna District, moved to Monte Vista and then went back to the Madison School. From the time appellant first began school he had "great problems" in the classroom, being unable to attend to task, being constantly out of his seat and poking and hitting other children. He had great problems learning in his first years in school because he

couldn't attend to task or learn shapes or colors or anything that was taught to him. The most he was able to do by the end of his kindergarten year was write his name in capital letters. Appellant rarely smiled. (RT6549-6550.)

The witness did a complete psychological evaluation of appellant and a language pathologist also evaluated him. In addition, testing was done on his intelligence as well as any visual or auditory processing disorders. David received a score of 78 of the "verbal portion" of the Intelligence test and a 92 on the "non-verbal" performance portion. (RT6551.) His vocabulary development fell into the retarded range. The language pathologist confirmed that appellant had a very poor ability to define words and express thoughts. He had deficits in semantics, phonology, and pragmatics. Moving from school to school probably hurt him. His performance in one on one teaching situations was better than his performance in class. The report indicated that appellant's problems seemed to get worse when he changed school from Madison to Monte Vista and back. (RT6551-6553.)

Appellant also had scars on his face and arms. His mother said they were from falls and fights with other kids. However, the report indicated that they were scratches that an adult could have given to a child. (RT6553.) The psychological recommendation was that David be put in a special day

class and that the behavior modification program should be extended. (RT6553-6554.)

On cross-examination the witness stated that appellant's behavioral problems involved throwing rocks at teachers and hostility toward other students to the point where he would try to inflict injury upon them. David would hide and wait for other children on their way home from school and then jump out at them or throw rocks at them or try to trip them The police were informed of appellant's conduct. (RT6555-6556.)

Appellant was first evaluated by Ms. Kniffen in February or March, 1997. He was recommended to begin day treatment school in September , 1997. He came back to Madison school in September, 1978, and within a month his behavior had gotten worse. He was then sent to Huntington Beach Community Hospital for six weeks. He was put on medication for ADHD and sent back to school. He remained hostile and would laugh when fellow students would fall and hurt themselves. (RT6557.)

The witness stated that it was her belief that appellant had the mental capacity to succeed in college. It was his behavior problems that interfered in learning more than his learning disabilities. (RT6558.)

The next witness called by appellant's counsel was Dr.Kenneth Finemann, a clinical psychologist who in 1978 was employed as a clinical

and forensic psychologist with a Neuropsychiatric Group, a private practice group in Huntington Beach, California. (RT6542-6543.) One of the hospitals with which he was associated was Huntington Beach Community Hospital, a general acute care hospital with a mental health unit for children. (RT6563-6564.) In 1978, Dr. Finemann was ordered by the attending psychiatrist to provide some psychological screening tests for appellant, then known as David Beene, who was seven or eight years old at the time. At the time of this testing, Dr. Finemann was not Board Certified in any field. (RT6563-6564.)

Dr. Finemann testified that he gave appellant the Wechsler Intelligence Scale, an intelligence test for children. He also gave the Peabody Individual Achievement Test. He also administered "brief screening tests" that he recollected as consisting of the thematic appreciation test, sentence completion test and various projectile drawing for children. (RT6564.) David was oriented during testing and was "extremely tenacious" for a child, sticking to task. (RT6565.)

The admitting diagnosis for David was hyperkenetic reaction of childhood and organic brain syndrome. After the testing, Dr. Finemann concluded that David was struggling with "primitive, impotent, aggressive, and sexual impulses." (RT 6565.) This meant that for a child his age he had

a lot of unusual sexual things going on in his mind with no way to express them. He also had "significant aggressive feelings." (RT6566.) In Dr. Finemann's experience for a child that age to have these impulses and thoughts, they would have come from "significantly problematic backgrounds." Often there would be physical abuse. With the degree of sexual ideation indicated by David, Dr. Finemann believed there was a good possibility that David had been molested or that "he had been subjected to an inappropriate array of sexually related material for a young child." (RT6566-6567.)

Dr. Finemann stated that David lacked the tools to fend off his impulses and was striving toward a stronger masculine identity. The witness stated that David was not identifying strongly with any significant male figures. Dr. Finemann hoped that after David's discharge he would be able to form a closer attachment to a male figure. (RT6567.) At the time of the evaluation David seemed helpless; he did not feel in control of the world in which he lived. It was Dr. Finemann's hope that the psychiatrist and other people that would work with him would try to build up his ego and coping skills so that he would have a feeling of strength. (RT6568.)

The goal of the six week stay at the hospital was primarily treatment, although there was the evaluation component. There was a lot of evaluation

done in the first week or two, observations being made by therapists and nurses. In most situations, a fairly comprehensive battery of tests are done to give the staff the information they need to decide what sort of treatment is necessary. (RT6568-6569.) However in David's case, all that was requested was a screening battery. Dr. Finemann requested more comprehensive testing but this was denied. Dr. Finemann also wanted David to stay in the hospital for a longer period of time, but this was also denied. There was a basic rule at the time that a child could only stay for six weeks. Dr. Finemann could only hope that David would get some sort of treatment when released. (RT6569.)

According to Dr. Finemann's report, David's diagnosis upon discharge from the hospital was organic brain syndrome and childhood schizophrenia. Dr. Finemann stated that while the diagnosis of organic brain syndrome does not exist anymore, it was his recollection that in 1978 the diagnosis referred to "a difficulty in dealing with various situations, in understanding." There are usually cognitive difficulties and difficulties in mood. In addition, the term "organic" indicated that the problem was not simply due to environment but also that there was some organic problem with the brain itself. However, the doctor stated that this was a very broad diagnosis and he only had the discharge diagnosis, not a discharge

summary. In addition, Dr. Finemann stated that if the CAT scan technology was available at the time, David's diagnosis would call for such testing. (RT6570.)

According to Dr. Finemann, the diagnosis of childhood schizophrenia is " a much more problematic diagnosis" because it means that David was psychotic at the time of release from the hospital. This meant that the manner in which David saw the world was different than the manner that "the rest of us would see the world." According to Dr. Finemann, this disease has biological components. (RT6570.) The doctor related that now it is known that there are various factors that seem to cause this ailment. However, in 1978 the only therapy that could help control the disease was antipsychotic medication which often affects the patient's ability to function, cope, perceive and interpret the world around them. (RT6571.)

On cross examination, Dr. Finemann indicated that his testimony was based on a two page report dated October 26, 1978. The doctor was also referring to some information from the school district as well as the discharge summary from the hospital. (RT6571-6572.) Dr. Finemann testified that neither organic brain syndrome nor childhood schizophrenia was his personal diagnosis and that it was not his job to render a diagnosis.

He only wrote the report. (RT6573.)

Dr. Finemann confirmed that there is no such diagnosis of organic brain syndrome in the DSM-IV. Dr. Finemann still believes that it is a disorder but it is not in the DSM-IV. The witness indicated that it was not that the American Psychiatric Association took illnesses out of the manual; rather, they took "parts of it and throw it into other categories." (RT6575.)

While Dr. Finemann could not remember the exact procedure that was used for the evaluation in 1978, he did testify that generally the evaluator would read the file, talk to the staff and then proceed to observe the patient on occasion within the confines of the psychiatric unit. At that point, the evaluation would proceed to the actual testing which would have taken 2-3 hours for the battery of tests given to David. Scoring and interpreting the tests would take another few hours. (RT6576.)

The doctor then further explained what he meant by his statement that David did not feel "in control of his environment." He stated that the average 7-8 year old child knows that their parents and teachers are in charge of them, giving them a certain level of control over their own lives. These children feel that what they say and do will have an impact or reasonable impact on the adults in their environment. This is in comparison with David who felt he had no control over his environment in that he did

not have a tremendous impact on what was going on with those truly in control. (RT6576.)

Dr. Finemann has not seen appellant since the examination. When asked by the prosecutor whether David would have been able to function in school as an older child, he answered that it would depend on whether he had received the appropriate treatment. The doctor stated he did not know if David was capable of success in life as there was testing that was never done and there was insufficient evaluation done at the hospital to fully clarify what David's problems were. The screening tests that were given were insufficient to reach a determination as to whether David could actually function later in life. (RT6576-6577.)

At the end of this testimony, counsel read a stipulation into the record that appellant's mother, Mary Scott, had an extensive history of prostitution, theft and trespass convictions. (RT6579-6580.)

The final witness called by the appellant was his sister, Mary Denise Scott. Ms. Scott currently lives in Houston. She stated that it was difficult for her to return to Riverside because of the bad memories that the place held for her. (RT6590-6591.) She testified that she remembers that as a child she and David lived with her mother, Mary Jo, in Orange County, California. She remembers that there was a father living in the house but

that he had left. Her mother had boyfriends after her father left, but she could only remember the name of one of them, Richard Holmes. He stayed with her mother, David and herself in their home in Orange County. (RT6592.)

Although Ms. Scott found it difficult to speak about Richard, she testified that he was a violent alcoholic. She related an incident where Richard was sitting in a chair watching television. He was too lazy to get up and spit so he called her over and spit in her mouth and told her to spit it out. David saw this happen. (RT6592-6593, 6599.) There was another incident where Richard had taken both children to the bathroom and tried to get Ms. Scott to eat out of the toilet. At some later point , Richard grabbed David and took him into the bathroom, alone. David kicked and screamed and resisted being taken to the bathroom but Richard forced him inside. Ms. Scott does not know what happened inside the bathroom on that occasion. (RT6599-6600.)

Ms. Scott recalls that at some point she and David were removed from her mother's care and placed with her aunt, Ruth Whittiker, also known as Ruth Hinton. In addition to Ms. Scott and her brother, the other people in the Whittiker home was Ruth's sons Jeffrey, Kenny, who lived there on and off, and Howard, who lived there on occasion. In addition,

Ms. Whittiker's daughters, Sherri and Betty, lived there on occasion. In addition, there were two foster children in the house, Brian and Jason. Ms. Scott stated that she moved to the Whittiker home when she was four and stayed until she was fifteen. At that point she went to a group home and then was taken in by her best friend's parents, the Thornburgs, whom she categorized as a very nice family. (RT6600-6601.)

Ms. Scott stated that the relationship that she had at the Thornburg house was different than at the Whittiker house. Ms. Scott stated that she did not find her relationship with Ruth and the other persons who lived in the house to be loving and caring. (RT6600.) Her aunt would receive money from the government to care for David, Denise and the foster children. Ms. Whittiker told Denise that the money was not enough and whenever she wanted the children to leave they would leave. In fact, she threw David out of the house at least eight different times. Ms. Scott remembered one occasion when her aunt and all the children except for David went to Orange County where their aunt's husband worked. She wanted David to "watch the house" while everyone else went out. When Ms. Whittiker returned she discovered that the Chihuahua was missing. David said that it had run away but Ms. Whittiker accused David of doing something to the dog. David was very hurt by the accusation and cried.

The next day, his aunt sent him away to the Charter Growth Hospital. (RT6602-6603.)

On another occasion, the children's pet turtle disappeared. Ms. Whittiker accused David of doing something to it and again sent him to Charter Hospital. Later on the turtle was found in the backyard, where it emerged after hiding itself. (RT6603.) Ms. Scott also remembered Ms. Whittiker sending him away for having a messy room or allegedly stealing from Jeffrey. She sent him to "another place" but Ms. Scott did not know where. (RT6604.) David would try to keep away from Ms. Whittiker as much as possible. He would at times sleep in his closet. Ms. Scott testified that there was not much affection between Aunt Ruth and anyone in the house. (RT6605.)

Ms. Scott also stated that there were social workers that would occasionally visit the Whittiker house to check on the welfare of her and her brother. The visits would occur once every couple of months. One of the social workers was Joanne Royce. The social workers would always give advance notice of their visits which would give Ms. Whittiker time to fix up the house, "get everything straight," and update her paperwork. (RT6605.) She would also tell Denise and David not to tell the social workers anything or she would send them away. (RT6605-6606.)

During this period of time, David was very quiet and withdrawn. When Denise and David lived with their mother, they would often play together. When they lived in the Whittiker house, David would not talk to her at all for a period of time following their placement. However, this relationship changed when their aunt learned that Denise had contracted a venereal disease from being molested while in her home. Ms. Whittiker made Denise take a whole bottle of pills which caused her to vomit. David approached her and asked her what was wrong. She told him and he went out to get her a Sprite. This was significant to her as it was the first time that David showed kindness toward her since they moved to the Whittiker house. (RT6606-6607.)

It was at that point that Ms. Scott revealed to David that Jeffrey had molested her. She did not give David any further details. After that point, the relationship between Ms. Scott and her brother improved and they drew closer. (RT6607.) Although Ms. Scott has not talked to her brother in the past few months, before this she would talk to him twice a week for an hour each time while he was in custody for the instant offenses. Before he was arrested he would visit her at the Thornburgs where they would go to her room and talk for hours about Ms. Whittiker. The would laugh and joke a lot with each other. (RT6608.)

Ms. Scott stated that during the time that David has spoken to her from custody he has asked about her two year old son and her husband. He has been concerned about her life and told her to make sure that she went to church and read the Bible. (RT6608.) She also stated that there were times when she and David lived with Ruth Whittiker that their mother would try to visit them. On one occasion their mother tried to give David money but he would not accept it. She also stated that when David was in the hospital she would visit him. It seemed to Ms. Scott that David was the happiest when he was in the hospital. (RT6609.)

Ms. Scott stated that she believed that David should get life in prison and not death. She said that it was difficult to deal with her emotions now as she loved her brother very much. She still calls him her big brother. (RT6609.)

On cross-examination, Ms. Scott stated that while she was living with her aunt she wanted to see her mother. She doesn't know whether David wanted to see their mother as well. Their aunt would take them to counseling about once a week. The district attorney asked whether she heard that David stabbed Jeffrey with a fork. Ms. Scott stated she never heard this. (RT6610-6611.)

Ms. Scott reiterated that she moved in with the Thornburgs when she

was 15 or 16 years old. She attended Valley View High School and graduated at the age of 18. Her grades improved after she moved in with Thornburgs. After graduation, she moved to Houston, Texas. The Thornburg's daughter was moving to Texas as well. Ms. Scott attended the University of Texas for one year. She is 23 years old now and between the time she attended college and the time of her testimony she has been working full time at places such as Sam's Club and Wal-Mart. (RT6611-6612.)

Ms. Scott stated that she had become good friends with Stephanie Compton. She met her through David. Ms. Scott has not kept in touch with Ms. Compton very often over the last few years. (RT6613.)

Ms. Scott stated that she was in eighth grade when David was forced to leave their aunt's house. David was in eleventh grade at the time. She stated that she could not recall any specific incidents that would have precipitated this decision by her aunt. She said that David was not asked to leave because he was being violent and aggressive to the other members of the Whittiker household. She stated that Jeffrey was very mean and would try to bait David into a fight and her aunt told the two of them "Take it outside and get your anger out." (RT6613-6614.)

When David left Ms. Whittiker's house he had been going to Moreno

Valley High School. He then transferred to Ramona High School in Riverside. Ms. Scott believes that her brother was staying with John Contreras during David's last year in high school. Her brother then moved to a house with about three of his friends. She stated she had never heard of David Yearicks. (RT6615-6616.) Ms. Scott testified that she never saw her brother make Ninja stars but did see him draw them. She stated that this would have been when David was in junior high school when he used to watch a lot of kung fu movies. (RT6616.)

Ms. Scott also said that her brother had been studying martial arts informally for several years but began to study formally when he moved out of their aunt's house. (RT6616-6617.) Ms. Scott also indicated that she was not aware of any occasion where David snuck out at night while living with their aunt. When he did stay out late, Ms. Whittiker would not let him in. (RT6617.) The district attorney then asked Ms. Scott if she ever told "a lady that worked for the attorneys" that David would sneak out of the house through a window when their aunt would not let him go out. Ms. Scott stated that she never said that and that it was she who would sneak out of the house. (RT6617-6618.)

Ms. Scott said that she believed that David had girlfriends other than Ms. Compton but she was not sure. She did not know any of their names.

(RT6618.) She further stated that she really didn't have much of a memory as to what took place when she lived at her mothers house, only memories of certain specific events. (RT6618.) Ms. Scott reiterated that she moved out of their aunt's house about a year after David left. She saw her brother on many occasions in the year leading up to David's arrest on these charges. She would visit him at the movie theater where he worked and he would visit her at the Thornburgs. The would see each other about once a week. David would talk to her about personal things like his church and his relationship with Stephanie. Stephanie would also talk to Ms. Scott. Ms. Scott would try to help them both and give them advice. (RT6619-6620.)

I. THE COURT COMMITTED REVERSIBLE ERROR BY FAILING TO SEVER COUNT I (THE MURDER COUNT) FROM THE BALANCE OF THE INDICTMENT THEREBY DENYING APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual and Procedural Summary

On December 12, 1996, appellant filed a motion and accompanying points and authorities to sever the trial of count I (the Kenny murder) from the trial of all other counts of the indictment. (CT3532 et seq.) Appellant's legal argument was that severance was compelled due to lack of cross-

admissibility of the evidence between count I and the remaining counts, the absence of any public policy justification for joining count I with the remaining counts, and the substantial prejudice to appellant in having to defend the capital murder count if joined with the other counts of the indictment. (CT2536.)

The prosecution filed their opposition to appellant's motion to sever on December 20, 1996. (CT2610 et seq.) The prosecution's position was that the evidence of the non-murder counts was cross-admissible under Evidence Code section 1101(b) for the issues of intent, common plan or scheme and identity. Further, the prosecution argued that even if said evidence was not cross-admissible, appellant did not meet his burden "to clearly establish evidence that there is a substantial danger of prejudice requiring that the charges be tried separately." (CT2612; *People v. Bean* (1988) 46 Cal.3d 919, 938.)

On December 23, 1996, and December 30, 1996, arguments were held on this motion. The trial court ruled that there was sufficient similarity between the non murder counts and count I to establish cross-admissibility on the issues of identity, common plan or scheme or intent. The court stated that it did not have to show the exact nature of the cross-admissibility of the evidence. (RT1983 et seq.) However, the court stated that the common plan

or scheme was the commission of the crimes at night. (RT1985.) The court also stated that there was cross-admissibility as to intent between the murder count and the Regina Multari and Julia Chidley counts. (RT1984.) It further held that there was cross-admissibility as to the issue of identity between the murder count and Chidley, Cliff and "possibly" Multari (Johnson) counts. (RT1985.) The court also ruled that even if there was no cross-admissibility, appellant failed to meet his burden that he would suffer substantial prejudice if the counts were joined. (RT2011.)

B. Statutory Standards for Joinder

Penal Code section 954 provides that "[a]n accusatory pleading may charge ... two or more different offenses of the same class of crimes or offenses, under separate counts, ... provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." If this preliminary statutory requirement is satisfied a defendant can predicate error in denying a motion to sever only upon a clear showing of potential prejudice. (*People v. Bradford* (1997) 15 Cal.4th 1229,1315; *People v. Osband* (1996) 13 Cal.4th

622, 666; *People v. Sandoval* (1992) 4 Cal.4th 155, 172-173.)

There are four factors to which this Court traditionally looks to determine a motion to sever counts. The law concerning these is as follows:

> The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. [Citation.] The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial. [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]

(*People v. Bradford, supra,* 15 Cal.4th at p. 1315 citing to *People v. Sandoval, supra*, 4 Cal.4th 155, 172-173; *People v. Mayfield* (1997) 14 Cal.4th 668, 721; *People v. Memro* (1995) 11 Cal.4th 786, 849-850; *People v. Mason* (1991) 52 Cal.3d 909, 933-934; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454.)

The reviewing court applies the standard of review providing that the trial court's ruling may be reversed only if the court has abused its discretion. (*People v. Mayfield, supra,* 14 Cal.4th at p. 720; *People v. Davis*

(1995) 10 Cal.4th 463, 508; see *People v. Osband, supra*, 13 Cal.4th 622, 666; *People v. Cummings* (1993) 4 Cal.4th 1233, 1284.) An abuse of discretion may be found when the trial court's ruling "falls outside the bounds of reason." (*People v. Osband, supra*, 13 Cal.4th 622, 666.)

As a general proposition, "[T]he first step in assessing whether a combined trial [would have been] prejudicial is to determine whether evidence on each of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is dispelled." (*People v. Bradford, supra,* 15 Cal.4th at p. 1313-1314, quoting *People v. Balderas* (1985) 41 Cal.3d 144, 171-172; see *People v. Mayfield, supra*, 14 Cal.4th at p. 721.) This Court has held that while this cross-admissibility suffices to negate prejudice, it is not necessarily essential for that purpose. "Although we have held that cross-admissibility ordinarily dispels any inference of prejudice, we have never held that the absence of cross-admissibility, by itself, sufficed to demonstrate prejudice. " (*Id.* at p. 1314. quoting *People v. Sandoval, supra,* 4 Cal.4th at p. 173.) This principle is also seen in Penal Code section 954.1 which codified existing case law but "did not materially change the rules of severance." (*People v. Stitely* (2005) 35 Cal.4th 514, 533, fn 9.) Section 954.1 abrogates the judicially created rules on severance only where an

evaluation of joinder is based upon the California Constitution, or rests solely on the lack of cross admissibility. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1284-85.)

Under the above law, the analysis of the motion to sever in this case must begin with the cross-admissibility of the joined counts

C. General Law of Cross-Admissibility

Evidence Code Section 1101 states:

> (a) Except as provided in this section and in Sections 1102 and 1103, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion. (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act. (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

As seen by the wording of the statute, admission of evidence of subsection (b) is essentially an exception to the general law of subsection (a) forbidding evidence of a defendant's general propensity to commit

crimes. In order to fully understand the exceptions of subsection (b), the general law against propensity must be explored.

1. Subdivision (a)

Subdivision (a) of section 1101 prohibits admission of evidence of a person's character, including that in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion.

The rule excluding evidence of criminal propensity is nearly three centuries old in the common law. (1 Wigmore, Evidence (3d ed. 1940) 631 §§ 194, pp. 646-647.) Such evidence is deemed objectionable, "not because it has no appreciable probative value, but because it has too much." It will tempt the jury "to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge." (*Id.* at p. 646; as quoted by *People v. Schader* (1969) 71 Cal.2d 761, 773, fn. 6.)

Evidence Code section 1101(a) codifies this axiomatic rule of American jurisprudence.

> Evidence Code section 1101, subdivision (a) expressly prohibits the use of an uncharged offense if the only theory of relevance is that the accused has a propensity (or disposition)

> to commit the crime charged and that this propensity is circumstantial proof that the accused behaved accordingly on the occasion of the charged offense. [Citations.] Subdivision (a) does not permit a court to balance the probative value of the evidence against its prejudicial effect. The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact. If no theory of relevance can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible. (*People v. Thompson* (1980) 27 Cal.3d 303, 316; See *People v. Bean, supra,* 46 Cal.3d at pp. 935-936.)

In *Thompson* this Court explained the reason for the prohibitions of 1101(a):

> The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. (See *People v. Schader, supra,* 71 Cal.2d at p. 772.) Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given to a jury. (Citations).... Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." [Citation.] "We have thus reached the conclusion that the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (Citation) (*People v. Thompson, supra,* 27 Cal.3d at p. 317, fns. omitted.)

Therefore, evidence must be excluded under section 1101, subdivision (a), if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, or of a particular class. (*Ibid.*)

2. Subdivision (b)

Subdivision (b) of section 1101 creates an exception to the general rule of section 1101(a) by stating that the general rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition, such as motive, intent, common plan or scheme or identity. *(People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

However, the above rationale explains why the the rule of section 1101(b) must be carefully and sparingly applied. "Because other-crimes evidence is so inherently prejudicial, its relevancy is to be examined with care. It is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Sam* (1969) 71 Cal.2d 194, 203 (citations omitted); *People v. Peete* (1946) 28 Cal. 2d 306, 316.)

Therefore, even though section 1101(b) enables possible joinder of cross-admissible offenses, the relevance of these offenses to one another must be carefully and fully examined before they are deemed "cross-admissible."

> In ascertaining whether evidence of other crimes has a tendency to prove the material fact, the court must first determine whether or not the uncharged offense serves

"logically, naturally, and by reasonable inference" to establish that fact. (Citation) The court "must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense; it must examine the precise elements of similarity between the offenses with respect to the issue for which the evidence is proffered and satisfy itself that each link of the chain of inference between the former and the latter is reasonably strong." (*People v. Schader, supra*, 71 Cal.2d at p. 775, fn. omitted) If the connection between the uncharged offense and the ultimate fact in dispute is not clear, the evidence should be excluded.(*People v. Thompson, supra,* 27 Cal.3d at p. 316; see also *People v. Durham, supra,* 70 Cal.2d at pp. 186-187; see also *People v. Sam, supra,* 71 Cal.2d at p. 203 .)

The *Thompson* Court further explained:

Wigmore has made the following pertinent observation about the relevance of evidence of uncharged offenses when offered to prove the doing of an act: At the outset of this entire class of inferences, it must be noted that, where the doing of an act is the ultimate [fact to be proved], there can never be a direct inference from an act of *former conduct* to the *act charged*; there must always be a double step of inference of some sort. *I.e.* it cannot be argued: "Because A did an act X last year, therefore he probably did the act X as now charged." Human action being infinitely varied, there is no adequate probative connection between the two. ... Thus, whenever resort is had to a person's past conduct or acts, it always implies *intermediately another inference*. ... The impulse to argue from A's former conduct directly to his doing or not doing of the deed charged is perhaps a natural one. But it will always be found, upon analysis of the process of reasoning, that there is involved in it a hidden intermediary step of some sort, resting on a second inference of character, motive, plan, or the like. This intermediate step is always implicit, and must be brought out. (*People v. Thompson, supra,* 27 Cal.3d at 316 fn 16.)

The federal courts also warn against an overly liberal application of the subsection (b) exception to the general rule. In *Bean v. Calderon* (9th Cir. 1998)163 F.3d 1073, the Ninth Circuit discussed the dangers of joining counts when the evidence was of questionable cross-admissibility:

> We have previously acknowledged that there is "a high risk of undue prejudice whenever ... joinder of counts allows evidence of other crimes to be introduced in a trial of charges with respect to which the evidence would otherwise be inadmissible." *United States v. Lewis*, 787 F.2d 1318, 1322 (9th Cir.1986) (citation omitted). In Lewis, we explained this risk by observing that "[i]t is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial, and by recognizing studies establishing 'that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case." (*Id.* at 1084)

Further, admission of other crimes evidence cannot be justified merely by asserting an admissible purpose. (*People v. Guerrero* (1976) 16 Cal.3d 716, 724. "The question remains as to whether the particular evidence of defendant's other offenses *here* is logically relevant to prove defendant's intent *in this case.*" (*People v. Thompson, supra,* 27 Cal.3d at p.319.) In *Thompson* this Court warned the trial courts against conducting a cursory analysis of the relevance of other crime evidence:

> Courts have been frequently faulted for failing to engage in the analysis of the evidence necessary for a determination of relevancy. Rather, the admissibility of evidence of other offenses is determined by a seemingly mechanical application of such precedent. For example, in the case of most crimes, the defendant's criminal intent is a fact necessary to be proved. The people offer evidence of defendant's prior crimes to prove his intent. The courts seem to reason that evidence of defendant's other offenses is deemed by precedent to be admissible to show intent; here the people offer such evidence to show intent; therefore, the evidence is admissible. In this analysis, the courts appear to omit the most essential step in the proper determination of the admissibility of the evidence offered. They fail to determine whether the particular evidence of defendant's other offenses here offered is logically relevant to prove the defendant's intent in this case. (*Id* at fn. 22.)

This logical relevance:

> depends upon three principal factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence. (Such as Evidence Code section 352). [Citations]. (*People v. Thompson, supra,* (1980) 27 Cal.3d at p. 315 .)

The above law creates two black letter requirements before "other crime" evidence can be admitted under section 1101(b). First, the other crime evidence must be relevant to some issue in the case other than defendant's propensity to commit a crime, such as defendant's intent in committing the act in question, that the act was done as part of as common

plan or scheme, or the defendant's identity. This is a materiality issue. Therefore, before the other crime evidence can even be considered it must be relevant to some *contested* issue. If there is no contested issue as to the point for which the other crimes evidence is to be introduced (e.g. intent, identity, common plan, etc.) it is not admissible. If the other crimes evidence does not relate directly to a contested issue then it is "merely cumulative and the prejudicial effect of uncharged acts would outweigh its probative value..." (*People v. Ewoldt, supra,* 7 Cal.4th 380 at p.406.)

Second, there must a sufficient degree of similarity between the charged offense and the "other crime" to allow the jury to logically draw the permissible inference.

In addition, the admission of this evidence is still subject to the overarching considerations of Evidence Code section 352.

In the instant case, the prosecution claimed that the non-capital crimes should not be severed because they were cross- admissible to prove intent, common plan or scheme and identity. RT1954 et seq; CT2610-2620.) While having their genesis in the same statute, the theory behind the admissibility of other bad acts is different for each of these three types of "facts in issue."

D. Analysis of Instant Case as to Intent

1. There is No Contested Issue of Intent in the Instant Case; Therefore, Other Crime Evidence on the Issue of Intent is Not Admissible

Evidence of intent is admissible under section 1101(b) to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense.

> In proving intent that act is conceded or assumed; what is sought is the state of mind that accompanied it . (Citations omitted.) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant eft the store without paying for certain merchandise, the defendant's uncharged similar acts of theft might be admitted to demonstrate that he or she did not inadvertently neglect to pay for the merchandise, but rather harbored the intent to steal it. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394, fn.2.)

Therefore, before "other crime" evidence can be admitted to prove a defendant's intent, the defendant must have conceded that he did the act in question but that the act was not done with the requisite criminal intent.

As stated above, the analysis of the cross-admissibility of any of the non-murder counts does not have to proceed to whether these crimes were similar enough to the Kenny murder count to permit the allowed inference as to intent. The non-murders counts were inadmissible to prove intent because intent was never a contested issue in the murder count.

There was no questions raised as to the perpetrator's intent. The victim was stabbed several times in the neck and chest. The intent to kill was clear. "Other crime" evidence of intent assumes that the act was done by the defendant and only his intent was in question. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394.) No such assumption can be made in this case. At no time did appellant even suggest that he actually did the act but without a requisite intent, or that he was present at the scene but did not do the act. The prosecution's case focused upon proving the identity of the killer. Neither was there an issue of intent regarding the special circumstances.

The trial court misunderstood and misapplied the law when it accepted the argument that as the prosecution must always prove intent, they are always allowed to present "other crime" evidence that pertains in some way to the issue of intent. (RT1843 et seq, RT1955.) The fact that the prosecution has to prove the element of intent in any special intent crime does not mean that in every special intent crime "other crime" evidence of intent is admissible. It must be an issue directly and affirmatively contested by the defendant. *People v. Tassell* (1984) 36 Cal.3d 77, 88 reiterated this principle of law propounded in *People v. Thompson, supra.*

> The significance of the *Thompson* case lies in its holding that, when evidence is offered that a defendant committed an

> offense other than that for which he is on trial, its *relevancy* to prove some *disputed* fact on a theory in addition to its relevancy as character-trait or propensity evidence - such as intent, motive, or modus operandi - *must* be *substantial* on the theory tendered in order for the probative value of such evidence to be considered as outweighing the manifest danger of undue prejudice, to avoid exclusion under Evid. Code section 352, even though not barred by Evid. Code section 1110(b).

Such other crime evidence is admissible as to intent only "where the proof of defendant's intent is ambiguous, as when he admits the acts and denies the necessary intent because of mistake or accident." (*People* v. *Kelley* (1967) 66 Cal.2d 232, 242-243.) This Court has recognized that admission of other crime evidence poses a great danger of prejudice to defendant, and there is always a great danger that the jury will interpret such evidence to show that defendant had a predisposition to commit crime. Therefore, it is mandatory that before such evidence can even be considered it must be relevant to a truly contested issue.

The type of case in which "other crime" evidence of intent is admissible is typified by *People v. Robbins, supra*, 45 Cal.3d 867. The pertinent facts of *Robbins* are as follows. Six-year-old Christopher Finney disappeared on the way home from his father's store being last seen riding a red motorcycle driven by a blond man wearing shorts. His was found dead from a broken neck, three months later.

Defendant subsequently confessed to picking up Christopher, sodomizing him, and choking him to death. He said that after the sexual activity, Christopher had been angry, and had kicked him and his motorcycle's tires. Defendant became enraged and grabbed Christopher around the neck, killing him.

Defendant was charged with murder with the special circumstances that the murder occurred during the course of a kidnaping and during the course of lewd and lascivious conduct with the child. In addition to confessing to the charged offense, defendant had confessed to a Texas police officer that he had lured a seven-year-old Dallas boy into his truck where he sodomized and strangled him.

At trial, the defense theory was that although defendant had killed Christopher, there had been no sexual activity nor any sexual motive for the killing in that he killed Christopher in a frustrated rage when Christopher kicked his motorcycle.

At his trial for Christopher's murder, the Texas murder was introduced in the prosecution's case-in-chief to establish defendant's intent to engage in lewd and lascivious conduct with, and intent to kill, Christopher. This Court held this evidence admissible in that it created a reasonable inference as to defendant's intent to commit a lewd and

lascivious act against Christopher. The Court ruled that the state had met the threshold requirement in that the issue of intent was both material and contested in the case in that the defendant clearly put his intent into question by his defense and as such intent was a material contested issue. (*People v. Robbins, supra,* 45 Cal.3d at p. 880.)

Unlike in *Robbins*, in the instant case intent was not a contested issue. Appellant did not concede to being at the scene or doing the acts. There was no argument that appellant committed the act that led to the victim's death but did so without the intent required to be convicted of first degree murder or the special circumstances. The entire theory of the defense was that there was insufficient evidence that appellant committed the murder and that the real killer was someone else. In short, the only contested issue was identity, not intent. As there was no issue of intent, there was no legal justification for the admission of the other crime evidence of the non-murder counts to be joined with the murder count to prove appellant's intent. The trial court erred when it permitted the prosecutor to join the counts based upon a theory of cross-admissibility as to the issue of intent.

The above application of *Robbins* to the instant case is supported by other decisions of this Court. In *People v. Cole* (2004) 33 Cal.4th 1158,

defendant was charged with special circumstance of murder with intent to torture and murder during the course of an arson. The trial court admitted evidence of prior abuse of the same person where the injuries inflicted upon the victim were inflicted to cause pain and torture and were substantially similar to the injuries in the murder. This Court held that only because defendant raised the issue as to his intent, such evidence was relevant to a contested issue in the case. (*Id* at p. 1194-1195.)

Similarly, in *People* v. *Pendleton* (1979) 25 Cal.3d 371, 376-378, defendant was charged with burglary and sexual assault. Defendant countered that the victim invite him inside whereupon they had consensual sex. As the defendant admitted his presence at the scene and the act of entering the victim's residence and having sex with her, he put his intent in direct issue. Therefore, this Court upheld the decision of the trial court allowing other crime evidence that defendant had committed similar crimes against two other women. However, the admission of this evidence was predicated on the fact that the defendant admitted the act but denied criminal intent. Once again, this was not the situation in the instant case. (See also *People v. Miller* (2000) 81 Cal.App.4th 1427,1447-1449.)

The above cases make it clear that a defendant's acknowledged presence at the scene, his participation in some sort of act vis a vis the

victim, and defendant's putting his own intention in doing that act into issue are all necessary for the admission of other crime evidence of intent. Otherwise, the other crime evidence is cumulative and of little or no probative value. Such other crime evidence always being prejudicial to defendant, the lack of probative value mandates that Evidence Code section 352 operate to exclude its admission. (See *People v. Thompson, supra,* 27 Cal.3d at p. 318.) Appellant never placed his intent into issue in this case nor did he admit to doing any of the acts in question. Appellant never suggested that he was at the scene and caused the victim's death but somehow did not intend to kill, that he entered the apartment but did not commit a burglary or that he had some sort of sexual contact with the victim but did not intend to commit a rape. Therefore, none of the crimes in the non-murder count could be used to prove appellant's intent as his intent was not a contested issue.

People v. Willoughby (1985) 164 Cal.App.3d 1054, is on-point to the instant case as to when section 1101(b) does not allow other crime evidence as to intent. Defendant was charged with multiple counts of sexual offenses against a child (Kathleen) for whom his wife provided care. This child testified that almost every time she was at the defendant's house, he called her into his bedroom and committed upon her acts of vaginal

intercourse, sodomy and oral copulation. Defendant denied any sexual activity with the child.

The trial court allowed another child (Donna) to testify as to an "other crime" incident, stating that it was relevant to the defendant's intent. Donna related that when she was nine years old, appellant and his wife "babysat" her one night at their house where the defendant engaged her in inappropriate sexual conversation and contact.

The appellate court reversed the judgement of conviction, ruling that the admission of Donna's testimony was prejudicial error in that defendant never raised the issue of intent. In so ruling the court stated:

> The problem with the intent theory is that appellant never placed his intent in issue; he categorically denied any sexual involvement with Kathleen. Evidence of sex offenses with persons other than the victim of the charged crime is admissible only when proof of the defendant's intent is ambiguous, as when he admits the act and denies the necessary intent because of accident or mistake. (See *People v. Thomas* 20 Cal.3d 457, 467; *People v. Cramer* (1967) Cal.2d 126, 129; *People v. Kelley, supra.*, 66 Cal.2d 232, 242-243.) Since the only defense evidence showing that appellant ever touched Kathleen was his admission that he had spanked her, there was no ambiguity in his intent. Thus, it was error for the trial court to admit the evidence of this other offense and to instruct the jury that it could consider the evidence as proof of appellant's intent to molest Kathleen. Because intent was not in issue and because the trial judge failed to admonish the jury not to consider the evidence as proof of appellant's criminal disposition, the evidence could have been considered by the jury only to prove appellant's disposition to sexually molest children-the very purpose

prohibited by Evidence Code section 1101, subdivision (a). (*People v. Willoughby,supra,* at pp. 1063-1064)

Not only does the *Willoughby* case directly support appellant's claim, if anything, there was a stronger prosecutorial argument for admissibility in *Willoughby* than in the instant case. At least in *Willoughby*, the defendant admitted that he was present at the scene of the alleged crime. In the instant case, no such admission was made or even suggested.

2. Even if Intent Was in Issue in the Murder Count, There are Insufficient Factual Similarities Shared by the Kenny Count and the Non- Murder Counts to Create Cross-Admissibility

For there to be a logical and rational connection between the charged crime and "other crime" evidence there must be a degree of similarity between the crimes. Just as evidence of intent, common plan and identity all serve to prove different facets of the charged offense, the degree of similarity between the uncharged act and the charged crime differs for each of the three.

Even if there was a contested issue of intent in count I, the evidence of the other counts is not cross-admissible to prove the perpetrator's intent in count I because of a complete lack of similarity between the Kenny crime and the non-murder counts. The need for sufficient similarity of the

offenses is set forth by this Court in *People v. Robbins.*

> In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbor[ed] the same intent in each instance." [Citations.] (*People v. Robbins, supra,* 45 Cal.3d at p. 879; see also *People v. Ewoldt, supra,* 7 Cal.4th at p. 402.)

The general facts of *Robbins* were discussed in the preceding section. This Court stated that the evidence supported the court's implicit determination that "each link of the chain of inference between [(i) the similarity of the two offenses and (ii) the issue(s) for which the evidence was proffered] is reasonably strong." (*People v. Robbins, supra,* 45 Cal.3d at p. 880 citing to *People v. Schader, supra,* 71 Cal.2d at p. 775; see also *People v.Thompson, supra,* 27 Cal.3d at p. 316.) Therefore, the similarities between the two crimes were sufficient to logically, naturally and by reasonable inference prove the issue of intent on which it was offered. (See *People v. Guerrero* (1976) 16 Cal.3d 719,724.)

In *People v Carter* (1993) 19 Cal. App.4th 1236, defendant was charged with murder of a homosexual man. He did not claim that he did not do the killing but rather that the killing was in self-defense. The appellate court held that the trial court was correct in permitting evidence of an uncharged murder in which defendant killed another homosexual

man. In doing so the court pointed out that both killings were of homosexual men and that defendant met both men at public places and lured them to a more private place to do the killings. Both men were robbed and killed with shots to the head at close range. In both cases, the victim's credit cards were used in an attempt to illegally obtain merchandise. While the crimes were not identical, the court held them sufficient in similarity to be relevant to the issue of whether defendant killed with criminal intent. (*People v. Carter*, *supra,* 19 Cal.App. 4th at pp. 1246-1247.)

Similarly, in *People v Hayes* (1990) 52 Cal.3d 577, defendant was charged with first degree murder of with the special circumstances that the murder occurred during the commission of a burglary and robbery. Defendant claimed that he acted in self defense. The trial court permitted evidence that defendant committed a similar robbery against another victim.This Court upheld the admission of this other crime evidence indicating that there were "striking similarities" between the two crimes. In both the male victims were lured to a motel room that defendant was occupying. The victims were bound hand and foot with coat hangers while the defendant searched the victims' rooms for valuables. These similarities were sufficient to show that in both crimes the defendant acted with the

same intent; to take money and other valuables from the victims.

These are just examples of a long line of cases that illustrate the degree of required similarity between the charged and non-charged crimes before such evidence can be admitted for the purpose of proving intent. (*People v. Gordon* (1990) 50 Cal.3d 1223; *People v. Zepeda* (2001) 87 Cal. App. 4th 1183, *People v. Brandon* (1995) 32 Cal.App. 4th 1033; *People v. Delgado* (1992)10 Cal.App.4th 1837.)

However, this Court has also made it clear that the mere fact that the prosecution claims there are sufficient similarities or that the prosecution advances such a theory, does not mean that the trial court need accept an insufficient showing by the government. (*People v. Guerrero, supra,* 16 Cal.3d 719). In *Guerrero,* defendant was convicted of the first-degree murder of a seventeen-year-old girl. There was no proof of sexual assualt. The prosecution was permitted to introduce the testimony of another seventeen-year-old girl that defendant and two friends had raped her about six weeks earlier.

This Court reversed the conviction holding that it was prejudicial error to admit the evidence of the uncharged offense. It held that the record did not support the People's basic contention that both offenses involved sexual activity, therefore, the evidence of the rape was not properly

admitted to show defendant's intent in the murder count, i.e. that he killed the victim in the course of an attempted rape or that the killing was premeditated. In doing so, this Court warned against trial courts taking in the relevancy equation "common marks" between the uncharged and charged crimes that are so lacking in distinctiveness that regardless of their number are wholly lacking in significance stating, " The sum of zeroes is always zero." (*People v. Guerrero, supra,* at pp.728-729.)

If this Court forbade the admission of the uncharged offense in *Guerrero*, it must necessarily forbid it in the instant case, as well. In *Guerrero,* at least the prosecution was able to prove that the same defendant was involved and that he employed the same car to pick up young girls at night, both times initially traveling with others, while cruising around town. There were at least *some* similarities between the two sets of crimes in *Guerrero* from which a similar intent could conceivably be inferred. There are virtually none in the instant case. The "similarities" claimed by the prosecution and accepted by the court are not based upon any evidence but rather theory and conjecture as to what may have happened prior to the death of Ms. Kenny. (RT6060-6068; RT6878 et seq.)

The murder of Brenda Kenny had virtually nothing at all in common

with the joined counts. It was not a "similar situation" as the non-murder counts nor did the perpetrator "act similarly." Firstly, it was a homicide in which the victim was killed by multiple stab wounds. In addition, there was evidence that the victim was tortured through the infliction of other painful, yet non-fatal injuries. (RT5482-5486.)

With the exception of the Courtney/Hall crimes (Counts XX and XXII) none of the joined crimes involved any injury whatsoever, let alone a murder.[9] As described in the Statement of Facts, in several of these crimes, the perpetrator had the opportunity to injure or kill the victim but did not. Further, no attempt was made to use any weaponry to physically harm any of the other victims.

Further, the Kenny murder involved a form of sexual activity that had nothing at all in common with the rapes perpetrated upon the victims in the rape counts. There was no penetration of Ms. Kenny nor was there any sign of injury commonly associated with rape. The perpetrator ejaculated on Ms. Kenny's clothes, the same clothes she wore home from her mother's house the night of December 10, 1992. There was no evidence of any kind that the killer tried to rape Ms. Kenny. It is just as likely that the murderer ejaculated on the victim post-mortem.

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9. The use of the weapons and injuries suffered by the victims in Counts XX and XXII had absolutely nothing to do with an assault on a woman in her own home.

Even among the non-murder counts, many of the "similarities" urged by the prosecution were either of the most insignificant nature or the result of prosecutorial speculation as opposed to evidence. The prosecution claimed that the similarities were the crimes all took place at night, in *most* of the cases the victims were alone, in *most* of the cases a stainless steel handgun was displayed, in *two* of the cases, there was a sword, in *all but the Kenny case* the perpetrator wore dark clothes, and in *a few* of the crimes "souvenirs" were taken. These "similarities" in the non-murder counts are not even internally consistent with one another let alone with the Kenny case.

Specifically, the fact that the crimes were committed at night is of no account whatsoever, as a great percentage of such type of crimes occur at night. Upon closer examination, that fact that *most* of the women were initially alone is similarly of little probative value. In Counts X and XI (Buhr and Penas victims) the woman was not alone. In Counts XX and XXII (Courtney) not only was the woman not alone but the crime apparently had nothing at all to do with sexual assault. This leaves only five incidents where the evidence indicated that the women were at least initially alone, Cliff (Counts II-III), Multari-Johnson (Counts IV-VI), Griffen (Count XIII), Gonzalez (Counts VII and VIII) and Childley

(Counts XVI-XVIII). It is highly disputable whether or not this percentage of woman initially alone is significantly different than the average number of women who might be alone in an apartment complex at night. In any event, as will be discussed below, there is no evidence that Ms. Kenny was alone in her apartment when the murderer entered.

Further, in three of these five incidents where the woman was alone there is no indication that sexual assault was the motive. In Count II, the perpetrator had every opportunity to commit an assault on Ms. Cliff but apparently had no desire to do so, instead voluntarily leaving the premises. Similarly, in Counts VII-IX, the burglary of the residence of Linda Gonzalez, there was no evidence that rape was the intent of the intruder, who made no attempt to sexually assault the victim even though he had ample opportunity to do so. Further, in Counts IX and X, the Buhr incident, there was no evidence that the intruder intended to commit an assault on the woman of the house. Similarly, in the Griffen incident (Counts XI and XII), the perpetrator had ample opportunity to assault the victim but apparently had no intention of doing so.

Regarding the dress of the perpetrators, while all the perpetrators were dressed predominantly in black, there were also many dissimilarities in the non-murder counts. In the Cliff crimes, the perpetrator was dressed

in black with a knit ski mask but the victim indicated that it was not a uniform nor did she relate that he wore any sort of "tabbies" boots. In the Johnson crimes, the victim stated that the perpetrator was wearing some sort of hat described as a hood. Chidley and Courtney described "ninja garb" and a martial arts costume, respectively.

In addition, the conduct of the perpetrator once inside the victims' residences differed as well. In the Multari-Johnson crimes (Counts IV-VI),, he announced he was a "hit man" and before leaving lectured the victim about safety. In the Chidley counts (XV-XVIII) he lectured the victims on safety as well. In some of the crimes he talked about himself. (Multari-Johnson and Chidley.) In the Gonzalez matter (Counts VII-IX), he attempted to move the victim. In the Courtney/Long matter (Counts XX and XXII), the assault actually took place outside of the apartment.

The reason why these cases have a surface similarity is less a function of true similarities than it is of the prosecution gathering up a series of unsolved crimes that bore what they considered to be some connection and presenting them as a group to the grand jury.

However, whatever similarities there were are among the non-murder counts, in the murder count there were no eyewitnesses as to how the perpetrator dressed, his features, his weaponry, his stature, his dress,

his race or anything else about him. There was no evidence as to the nature of any weapons he carried, whether or not anything was taken from the premises, any conversations between the victim and the perpetrator or anything else for that matter that could establish some similarity between the murder of Ms. Kenny and the perpetration of the other crimes.

What little is known of the method of commission of the Kenny crimes shows many more dissimilarities of a far more significant nature than the few insignificant similarities. In the Kenny murder, there was no indication of forced entry as in the other crimes. In fact, the evidence presented by the state strongly suggests that Ms. Kenny may have known her attacker as their own witness recalled hearing *two* sets of footfalls leading up to Ms. Kenney's apartment at 10:00 p.m. on September 12, 1992, yet he did not hear any sign of struggle until 4:00 a.m. that next morning. (RT 5426 et seq) This strongly suggested that Ms. Kenny knew the killer and voluntarily admitted him or her into her apartment where he or she stayed until 4:00am when the actual attack occurred. Such a scenario is completely unlike any of the other crimes.

Even if we assume that the person who had accompanied Ms. Kenny up the stairs at 10:00 p.m. did not previously know her and was forcibly taking Brenda Kenny into her apartment for some purpose, this scenario is

completely dissimilar to the other counts where the attacker broke into the victims' residence either through a sliding glass door or through a window.

To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbor[ed] the same intent in each instance." (*People v. Robbins, supra*, 45 Cal.3d at p. 879; see also *People v. Ewoldt, supra,* 7 Cal.4th at p. 402.) The similarities between the murder and non-murder counts are completely inadequate to support this inference, therefore, the non-murder counts are not cross-admissible for the purposes of proving the perpetrator's intent in the murder case.

Further, the court only found that the Multari and Chidley counts were cross-admissible as to the issue of intent. (RT1984.) By doing so it implicitly held that the other counts were not cross-admissible. Hence, even accepting the cross-admissibility of these two sets of counts, the other non-murder counts never should have been joined to the murder count.

E. Analysis of the Instant Case as to Common Plan or Scheme

1. There is No Contested Issue Related to Common Plan or Scheme in the Instant Case, Therefore, Other Crime Evidence on This Issue is Not Material

The distinction between uncharged crime evidence employed to

prove a common plan or scheme and that employed to prove intent is "subtle but significant." (*Ewoldt, supra* at p. 394, fn. 2.)

> Evidence of a common design or plan is admissible to establish that the defendant committed the *act* alleged. Unlike evidence used to prove intent, where the act is conceded or assumed, "[i]n proving design, the act is still undetermined ...." (Citation) For example, in a prosecution for shoplifting in which it was conceded or assumed that the defendant was present at the scene of the alleged theft [as opposed to conceded that he actually did the act by taking the items as in the case on intent], evidence that the defendant had committed uncharged acts of shoplifting in a markedly similar manner to the charged offense might be admitted to demonstrate that he or she took the merchandise *in the manner* alleged by the prosecution. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394 fn. 2)

Therefore, the presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done " in the charged crime. (*People v. Ewoldt, supra,* 7 Cal.4th at p.393.) The existence of such a design or plan may be proved circumstantially by evidence that the defendant has performed acts having "such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (*Ibid.* Citations omitted.) Evidence of a common design or plan, therefore, is not used to prove the defendant's intent or identity, but rather to prove that the defendant engaged in the conduct alleged to constitute the charged

offense. (*People v. Ewoldt, supra,* at p. 394.) Such evidence, therefore, is not admitted to establish that the defendant has a criminal disposition or a bad character, but to prove that he or she committed the charged offense pursuant to the same design or plan used in committing the uncharged acts. (*Id.* at p. 399.)

In spite of the theoretical availability of such other crime evidence to prove a common plan or scheme, this Court in *Ewoldt* made it very clear that common plan or scheme evidence serves a very specific and narrow purpose. If that purpose is not fulfilled by the proffered evidence, it is not admissible.

> Our holding does not mean that evidence of a defendant's similar uncharged acts that demonstrate the existence of a common design or plan will be admissible in all (or even most) criminal prosecutions. In many cases the prejudicial effect of such evidence would outweigh its probative value, because the evidence would be merely cumulative regarding an issue that was not reasonably subject to dispute *People v. Schader, supra,* 71 Cal.2d 761, 775.) This is so because evidence of a common design or plan is admissible only to establish that the defendant engaged in the conduct alleged to constitute the charged offense, not to prove other matters, such as the defendant's intent or identity as to the charged offense. (*Ante,* pp. 393-394.) For example, in most prosecutions for crimes such as burglary and robbery, it is beyond dispute that the charged offense was committed by someone; the primary issue to be determined is whether the defendant was the perpetrator of that crime. Thus, in such circumstances, evidence that the defendant committed uncharged offenses that were sufficiently similar to the

> charged offense to demonstrate a common design or plan (but not sufficiently distinctive to establish identity) ordinarily would be inadmissible. Although such evidence is relevant to demonstrate that, assuming the defendant was present at the scene of the crime, the defendant engaged in the conduct alleged to constitute the charged offense, if it is beyond dispute that the alleged crime occurred, such evidence would be merely cumulative and the prejudicial effect of the evidence of uncharged acts would outweigh its probative value. In ruling upon the admissibility of evidence of uncharged acts, therefore, it is imperative that the trial court determine specifically what the proffered evidence is offered to prove, so that the probative value of the evidence can be evaluated for that purpose. (*Ewoldt, supra,* at pp.405-406.)

In the instant case, just as the non-murder counts were not admissible to prove intent, neither are they admissible to prove a common plan or scheme as it was beyond any possible dispute that a homicide occurred. The only issue was the identity of the perpetrator. Therefore, such evidence is merely cumulative and in this case highly prejudicial without any corresponding probative value.

Ewoldt is representative of the general line of cases regarding the common plan or scheme exception of 1101(b) to the general rule of subsection (a). What all of these cases have in common is the indisputable presence of defendant, his *opportunity* to have committed a criminal act (no identity issue),and the lack of any question of the intent behind the crime. The only issue contested was whether defendant actually committed the

charged act itself.

In *Ewoldt*, defendant was charged with several counts of sexual assault on his stepdaughter Jennifer. Jennifer claimed that over a three year period while she was residing in the defendant's home he molested her several times, warning her not to tell her mother, who was then defendant's wife. There was no question as to defendant's identity or intent, only whether he did the acts in question. The trial court allowed the prosecution to admit testimony from Jennifer's sister, Natalie, who stated that when she was Jennifer's age, defendant also molested her in a similar manner, fondling her breasts and vagina. Defendant testified in his own behalf, denying that any of the incidents described by Jennifer had occurred.

This Court held that the evidence of the molestation of Natalie was admissible to prove the existence of a criminal agency in the acts against Jennifer in that they were done pursuant to a plan or scheme that defendant had used on other occasions, that is, the molestation of a step-daughter who was living in his home. The Court held that the common features of the respective molestations,

> indicate(d) the existence of a plan rather than a series of similar spontaneous acts....the plan thus revealed need not be distinctive or unusual. For example, evidence that a search of the residence of a person suspected of rape produced a written plan to invite the victim to his residence and, once alone, to force her to engage in sexual intercourse would be

> highly relevant even if the plan lacked originality. In the same manner, evidence that the defendant has committed uncharged criminal acts that are similar to the charged offense may be relevant if these acts demonstrate circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense. (*Ewoldt*, *supra,* at p.403; See *People v. Ruiz* (1988) 44 Cal.3d 589, 605-606.)

As stated above, in the instant case there is no suggestion in this case that appellant had an opportunity to commit the crime or that he was present at the crime scene but did not commit a criminal act. The only issue in the Kenny murder count was the *identity* of the killer. Therefore, admission of any of the non-murder counts to prove common plan or scheme was error in that they were not material to the contested issue of the murder count.

The line of cases in which this Court has permitted the use of other crime evidence to prove a common plan or scheme presents a totally different factual situation than the instant case and demonstrates why evidence that purports to prove a common plan or scheme is not material to the Kenny murder. In *People v. Lisenba* (1939) 14 Cal.2d 403, the body of the defendant's wife was found drowned in the garden of their home. She

had suffered a snakebite on her foot. Defendant's accomplice testified that he and the defendant had inflicted the snakebite on the victim in an attempt to kill her. When that did not kill her, they drowned the victim in a bathtub. According to the accomplice, the purpose of the killing was to obtain the proceeds of an double indemnity insurance policy. The trial court admitted evidence that three years earlier the defendant's former wife, who also had been insured under a provision providing double indemnity for accidental death, had drowned in a bathtub. This Court held that evidence of the defendant's prior misconduct was admissible to establish a common design or plan to murder his wives for financial gain. (*People v. Lisenba, supra,* 14 Cal.2d 403, 427-428.)

As in *Ewoldt* there was no question of defendant's identity, nor his intent. The only question was whether he actually committed a criminal act against the victim in the charged case and whether said act was committed pursuant to a common plan or scheme employed on other occasions.

Similarly, in *People v. Peete* (1946) 28 Cal.2d 264, 306, the defendant was employed to care for a Mrs. Logan's elderly senile husband (*Id.* at p. 309.) While defendant was so employed, Mrs. Logan disappeared and defendant subsequently committed Mr. Logan to a mental institution. Defendant and her husband then moved into the Logan house and

essentially took control of all of the Logans' property. Nearly seven months after Mrs. Logan disappeared, her body was found buried in the backyard of her home. She had been shot in the back of the neck. (*People v. Peete*, *supra*, 28 Cal.2d at pp. 310-313.)

The trial court permitted the admission of evidence that twenty four years earlier, defendant's landlord, Mr. Denton, had disappeared two weeks after leasing his residence to the defendant. The defendant then treated the Denton residence as her own, both leasing and attempting to sell it, and forging Denton's name to certain documents. More than three months after Denton's disappearance, his body was found buried beneath his residence. He had been shot in the back of the neck in a similar area as was Mrs. Logan. The defendant had been convicted of that murder. This Court held admissible the evidence of the prior murder committed by the defendant:

> Evidence concerning another offense is relevant to prove that a death resulted from the execution of a scheme when in the light of the circumstances of the crime sought to be proved, it indicates the existence of such a scheme. When a defendant's conduct in connection with the previous crime bears such similarity in significant respects to his conduct in connection with the crime charged as naturally to be explained as caused by a general plan, the similarity is not merely coincidental, but indicates that the conduct was directed by design. [Citations.] ... The striking similarity in significant respects between defendant's conduct in the Denton case and her conduct in connection with Mrs. Logan's death strongly indicates a scheme by defendant to acquire the property of a suitable victim by murder. (*People v. Peete*, *supra*, 28 Cal.2d

306, 317-318.)

Once again, the purpose of this evidence was neither to establish the identify of the perpetrator nor his intent. It was to demonstrate that the defendant did a criminal act by allowing a logical inference that defendant was following a plan or scheme he employed on other occasions.(See also *People v. Ing* (1967) 65 Cal.2d 603 (common plan or scheme was a defendant doctor injecting a series of obstetrical patients with a sedative in order to rape them; *People v. Archerd* (1970) 3 Cal.3d 615 (common plan was committing murder by use of injection of insulin.)

Unlike in the above cited cases, the issue of defendant's identity was very much in dispute. This fact alone makes the evidence of common plan or scheme immaterial as evidence of common plan or scheme is only admitted to prove that the *act* itself was done pursuant to the alleged common plan or scheme. Appellant did not present a defense that he knew the victim and had the opportunity to commit the act, yet did not commit the act in question. Further, there is no question of the existence of a criminal agency in the instant case. Therefore, evidence of common plan or scheme is inadmissible as it is not material to any contested issue.

2. Even if the Issue of Common Plan or Scheme is Material the Facts of the Murder and Non-Murder Charges Lack Sufficient Similarities to have a Logical Tendency in Reason to Prove Common Plan or Scheme.

Even if the evidence of common plan or scheme were material to the Kenny murder, the factual similarities between the Kenny murder and the non-murder counts are completely inadequate to allow their use as cross-admissible evidence vis a vis the murder count.

Applying Evidence Code section 1101(b), a greater degree of similarity has been required for the admission of an uncharged act to prove the existence of a common plan or scheme that is required to prove common intent. "Evidence of uncharged misconduct must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally explained as caused by a general plan of which they are individual manifestations." (*People v. Ewoldt, supra,* 7 Cal 4th at pp. 402-403.) "Common features" has been defined a meaning "a high degree of similarity." (*Ibid.*)

While it is impossible to mathematically define the degree of similarity necessary to support the inference that defendant used a common plan in committing the charged offense, the cases cited in the preceding subsection of this brief provide solid guidelines for trial courts. In each and every one of the cases cited, there is clearly evidence of some sort of

commonality of the facts in the charged and non-charged offenses from which a logical and rationale inference can be raised that they were all done as part of a common plan. As discussed earlier in the AOB, in the instant case there are virtually no similarities between the murder and non-murder counts either in their nature or means of commission. Firstly, it is highly questionable that all of the non-murder counts taken alone can be considered be sufficiently similar to be considered to have been committed pursuant to a common plan scheme. However, if it can be said that at least some of the non- murder cases demonstrate a common plan, that common plan would be the perpetrator dressing as a ninja, using "ninja" skills to surreptitiously and illegally gain entrance into the premises of women living alone, and using some sort of weapon to threaten the victims into submission before raping them.[10]

As such, the non-murder counts had virtually nothing in common with the Kenny murder. Again, what the prosecution and the trial court either overlooked or discounted was the overriding difference between the two sets of crimes. Ms. Kenny was murdered. The other female victims were not even injured. The prosecution can speculate all that it chooses

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10. The court's holding that the common plan was that all of the crimes took place at night clearly misinterpreted the above law. *Most* crimes take place at night, therefore, the timing of the these crimes do not create sufficient similarities for cross-admissibility under the above- discussed law.

that the murder was the result of Ms. Kenny rejecting the perpetrator's advances while the other victims did not. However, there is no evidence to support this speculation.

Secondly, there was no sign that Ms. Kenny was penetrated as in the two rape cases. In fact, no semen was found in her vagina, anus or mouth. She was found wearing same clothing as when she left her parents' house two days before her body was discovered. Once again, any argument that the perpetrator intended to rape her but for some reason was prevented from doing so is again nothing more than speculation. As stated above, it is impossible to tell from the evidence whether the ejaculate on Ms. Kenny was deposited before or after her death, or whether the act of ejaculation was the result of a failed attempted rape. The only thing that can be stated with certainty is that the evidence of sexual conduct at the murder scene has nothing at all in common with that of the scenes of the rapes.

Thirdly, there was no sign of forced entry at the Kenny scene. In most of the other crimes, the perpetrator entered the victim's residence through a sliding door or through a window by cutting the window screen. There was no indication that this occurred in the Gail Kenny's house. In fact, the prosecution's own evidence and theory was that the perpetrator accompanied Ms. Kenny up to her apartment at 10:00 p.m. and the actual

assault did not occur until approximately six hours later, strongly indicating Ms. Kenny knew the killer. (RT 5226 et seq.)

Finally, the prosecutorial argument suggesting that this was a "ninja" crime is unsubstantiated speculation. (CT6060 et seq.) There was no eyewitness to the Kenny crime nor was there any circumstantial physical evidence to even suggest that the perpetrator was dressed as a ninja or carried ninja style weapons.

In summary, other than the fact that all of these crimes took place in the same general neighborhood and that they were generally committed against women, the crimes were completely dissimilar. As such, there was no cross- admissibility of the murder and non-murder counts based upon the theory of common plan or scheme.

F. Analysis of the Instant Case as to the Issue of Identity

Where it is conceded or assumed that the charged offense was committed by someone, evidence of identity is admissible to prove that the defendant was the perpetrator. For example, in a prosecution for shoplifting in which it was conceded or assumed that a theft was committed by an unidentified person, evidence that the defendant had committed uncharged acts of shoplifting in the same unusual and distinctive manner as

the charged offense might be admitted to establish that the defendant was the perpetrator of the charged offense. (*Ewoldt, supra,* at p. 394.)

As stated many times in this brief, identity was the only issue in the Kenny case. Therefore, "other crimes" evidence that created an inference that the same person who committed the non-murder offenses committed the Kenny murder would be material under *Thompson.* However, due to the virtual lack of any similarity between the two sets of crimes, no such logical inference can be drawn.

The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*People v. Miller* (1990) 50 Cal.3d 954, 987.) "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.)

In *People v. Thornton*, this Court summed up the law regarding the use of "other crime" evidence to prove identity stating:

> [O]nly common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other-crimes evidence with probative value. The strength of the inference in any case depends upon two factors: (1) the

> degree of distinctiveness of individual shared marks, and (2) the number of minimally distinctive shared marks. (*People v. Thornton* (1974) 11 Cal.3d 738, 756, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684, fn. 12; *People v. Haston* (1968) 69 Cal.2d 233, 246)]

Therefore, to be admissible as modus operandi (identity) evidence there must be common marks which, considered singly or in combination, support the strong inference that defendant committed both crimes. (*People v. Alcala* (1984) 36 Cal.3d 604, 632.) These common marks must be distinctive rather than ordinary aspects of any such category of crime. They must be sufficiently distinctive that they bear defendant's unique "signature." Reaching a conclusion that offenses are signature crimes requires a comparison of the degree of distinctiveness of shared marks with the common or minimally distinctive aspects of each crime. (*Id.* at pp. 632-633; *People v. Guerrero, supra,* 16 Cal.3d at p. 725; *People v. Antick* (1975) 15 Cal.3d 79, 93-94; *People v. Thornton, supra,* 11 Cal.3d 738, 756; *People v. Haston* (1968) 63 Cal.2d 233, 245-247.)

It has already been shown that the degree of similarity is not even close to being sufficient to prove intent or common plan. Therefore, as *Ewoldt* requires even a higher degree of similarity for proof of identity, clearly there is insufficient similarity between the murder count and the non-murder counts to justify cross-admissibility on the ground of identity.

However, a review of certain identity cases will highlight the trial court's error in allowing the joinder of the murder and non-murder counts.

In *Coleman v. Superior Court, supra,* 116 Cal.App.3d 129, the court of appeal ordered severance in a trial involving three separate victims, including one case involving a murder by "ligature strangulation." Semen was found in this victim's vagina and rectal area. Defendant, who denied ever being at the scene of the crime, was tied to the crime by fingerprint identification. The crime was committed near a school.

The second incident involved an 11 year old girl and was also committed near a school. Defendant allegedly told her that he was a school agent, and made her walk with him into an alley on the pretense of asking her some questions. He then told her to take off certain articles of clothing. He touched her and then released the victim.

The final incident also involved a young girl. Defendant posed as a police officer and stopped the victim on the way home from school. He ordered her to take off her pants and when she refused he raped her both vaginally and orally. Afterwards he released her.

Applying the *Thornton* test, the court of appeal held the similarities between the murder and the two sexual crimes to be completely insufficient to allow their inference of identity. The court stated that the only distinctive

features that the crimes shared were that they were all committed during midday or soon thereafter, had some association with schools and were in some way sex related. The court held that these similarities did "very little to suggest that they were all committed by the same person." (*Coleman v Superior Court, supra,* 116 Cal.App.3d at p. 138.; See also *Williams v. Superior Court, supra,* 36 Cal.3d 441 (fact that two joined murder cases both involved gang-related shootings insufficient to allow for joinder.))

The case of *People v. Alcala* (1984) 36 Cal.3d 604 is particularly instructive in that this Court reversed the judgment of conviction in a capital murder case . Twelve-year-old Robin Samsoe left the apartment of her friend. She never arrived at her intended destination. Two weeks later, Robin's remains were discovered in a ravine. Due to the state of decomposition, it was impossible to determine medically the time or cause of death, or whether Robin had been sexually molested. The police learned that shortly before Robin's disappearance she and her friend had been at a beach when they were approached by a man. With their permission, the stranger had taken several photos of the girls including a posed photo of Robin.

The trial court permitted the prosecution to introduce evidence of three prior crimes against minors committed by defendant on the issue of

identity. In the first, defendant offered a ride to an eight year-old girl and took her to his house. The police were alerted and found the young girl lying on the kitchen floor, naked, unconscious with a severe head wound and blood coming from her vagina. There was a steel bar over her neck and the house was full of photography equipment.

In the second "other crime" incident, a thirteen year-old girl accepted a ride from defendant to school. Defendant passed her school and stopped at the cliffs overlooking the same beach where he photographed Robin Samsoe. Defendant forced the victim to smoke marijuana, grabbed her when she tried to leave and gave her a French kiss. He then asked if she "liked boys" and asked inappropriate sexual questions. The victim was released.

In the last of the incidents, defendant picked up a fifteen year old hitchhiker. The two drove to defendant's residence where they engaged in consensual sex. The next morning, they went to some mountains, where defendant took sexually related photos of girl.When the girl grew frightened, defendant beat and raped her. Ultimately, he drove the girl back to a populated area.

The issue in the charged crime was the identity of the killer. The prosecution maintained that the similarities between the three prior offenses and the charged murder were sufficient to created a "signature" which

would be sufficient to allow the inference of identity. The prosecution maintained that defendant's signature modus operandi was " to approach underage girls, engage them in conversation, entice them into his automobile, restrain them by force when they wish to leave, and take them to remote locations, often scenic outdoor settings, where he assaults them and commits forcible sexual acts. In many instances, he uses photography as a ploy to gain the victims' cooperation." (*People v. Alcala, supra* at p. 622.)

This Court reversed the conviction. It held that although all of the crimes apparently involved defendant's approaching young girls to attempt to establish a relationship, the balance of the so called "similarities" were more speculation than fact.

> Monique H. was never restrained in defendant's car by trick, force or fear. Neither outdoor settings nor the use of photography figured in the Tali S. incident (though there was camera equipment in the house). The People's strained theory that defendant supplied those elements by showing Tali a psychedelic poster of forests and trees is not persuasive. There was no element of photography at all in the Julie J. incident. In none of the three cases was photography used as an introductory ploy, and there seems nothing consistent or unusual in the techniques defendant used to ingratiate himself. Despite the People's suggestion that locale was important to defendant, the sites of his offenses were widely scattered and dissimilar. Moreover, defendant's pattern of sexual conduct in the other cases was not consistent or distinctive. He gave Julie J. a "French kiss" but made no

> further physical advances before he was arrested. Monique H. was physically mature, and the acts committed on her occurred only after lengthy sessions of consensual sex. Most importantly, Robin was killed, while the earlier victims were not. (*People v. Alcala, supra,* 36 cal.3d 632-633.)

There were far more similarities between the charged and uncharged offenses in *Alcala* than in the instant case. In *Alcala*, at least all of the crimes involved predatory sexual behavior by the same man upon the same type of victims. The defendant was identified as having a part in all of the incidents. They all involved a grown man attempting to ingratiate himself with juvenile victims in one form or another and all involved removal of the victims to remote areas.

In the instant case, as indicated above, there were virtually no evidentiary similarities between the murder count and the joined non-murder charges. There was no indication that the murder victim was raped as were some of the other victims. There was no indication of forced entry as in most of the other cases, and no proof that the perpetrator of the murder was dressed as a ninja or used so-called "ninja skills" to perpetrate the offense. As in *Alcala,* the prosecution relied more upon speculation and wishful thinking than similarities to create a "signature" out of whole cloth. Most importantly, as in *Alcala*, the most important difference in the

far greater than in the instant case. In *Bean*, at least both victims were killed in their homes which were very close to one another. They suffered blunt trauma injuries and both incidents concluded with theft of the victim's car and abandonment of the car in the same general area. As described above, there were no such similarities in the instant case.

Obviously, there are some situations where the joined offenses are so similar as to create the "signature" required by *Thornton*. In *People v. Medina* (1995) 11 Cal 4th 694, the charged and uncharged crimes each involved robbery- murder of an employee working alone in a convenience store. The victims were each shot in the head at close range, suggesting an execution murder. Ballistic reports indicated the *same* .22-caliber handgun, later traced to defendant, was used in all three murders. In both uncharged offenses, witnesses saw an old Maverick resembling defendant's car at the crime scenes at the time of the offenses. Each offense occurred within a two-and-one-half-week period and the scenes of all of the offenses were located along the route between defendant's sisters' homes, where he stayed during the time the various offenses were committed.

This Court held that while standing alone none of the "common marks" were particularly distinctive, "in the aggregate, the similarities become more meaningful, leading to the reasonable inference that

defendant was the person who committed all three crimes." (*Id.* at p.749 .)

The gap between the similarities in *Medina* and the instant case is vast. Not only was there no evidence that the two sets of crimes were committed in the same manner, there was no evidence that even the same *type* of crime was committed nor that the motivation for committing the crimes were the same. There was no identification of any kind of a perpetrator in the instant murder count except for the scientific testimony that appellant fell into a group of thousands upon thousands that could have committed the crime. Unlike in *Medina*, the "similarities" between the two sets of crimes are not the product of actual evidence but rather of prosecutorial theory. (See also *People v. Rogers* (1985) 173 Cal.App.3d 205.)

Further, the court only found that the Cliff, Chidley and "possibly" Multari counts were cross-admissible as to the issue of intent. (RT1984.) By doing so it implicitly held that the other counts were not cross-admissible. Hence, even accepting the cross-admissibility of these three sets of counts, the other non-murder counts never should have been joined to the murder count.

Therefore, it is clear that the non-murder counts were not cross-admissible to the Kenny capital murder count for any purpose; intent,

common plan or scheme nor identity. Therefore the next step of the analysis is to examine whether appellant suffered substantial prejudice from the joinder of the counts.

G. The Trial Court Committed Reversible Error in Joining the Non-Cross-Admissible Counts in that Appellant Suffered Substantial Prejudice From the Joinder

As stated in *People v. Bradford* cited previously in this brief:

> Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. (Citations.) (*People v. Bradford, supra,* 15 cal.4th at p. 1315, citing to *People v. Sandoval, supra*, 4 Cal.4th 155, 172-173; *People v. Mayfield*, (1997), 14 Cal.4th 668, 721; *People v. Memro* (1995) 11 Cal.4th 786, 849-850; *People v. Mason* (1991) 52 Cal.3d 909, 933-934; *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452-454 .)

1. Public Policy Considerations Regarding Judicial Economy

The above stated burden on the party seeking joinder arises from certain policy factors that favor joinder. "Joinder of related charges...ordinarily avoids needless harassment of the defendant and the

waste of public funds which may result if the same general facts were to be tried in two or more separate trials." (*Williams v. Superior Court, supra,* 36 Cal.3d at p.451 citing to *Coleman v. Superior Court, supra,* 116 Cal.App.3d at p. 138.) This Court has indicated that a ruling on a motion to sever is based on a weighing of the prejudice to the non-moving party versus the probative value of the joined counts. The beneficial policy effects are added to the probative side favoring joinder. (*Id* at p. 451 citing to *People v. Matson* (1974) 13 Cal.3d 35, 39.)

The only policy issue to be taken into account is the waste of public funds if the case were to be tried in two or more trials. The "waste of public finds" occurs when there would be a duplication of evidence presented due to the fact that the crimes joined were "joined together in their commission." (*Ibid,* see *People v. Brock* (1967) 66 Cal.2d 645,655.) Regarding this "waste of public funds," simply put, the joint trial of the Kenny count with the non-murder count saved virtually no time or court resources. If appellant had not been charged with any other crimes, the prosecution's evidence submitted to prove appellant's guilt in count I consisted of appellant's statements to other parties about his "involvement" in the crime, the forensic evidence as to the semen found on Ms. Kenny's clothes, and his presence in the general neighborhood of the crime for an

undetermined time before its commission.

None of the other victims in any of the other incidents knew anything about the Kenny murder and as such would not have been called as witnesses. As such, these witnesses would not have to be subjected to the trauma of reliving their experience more than once. Therefore, as the murder count and the other counts were not connected together in their commission, there was no significant savings of time in their joinder. (*People v. Brock*, *supra,* 66 Cal.2d at p.655; *Williams v. Superior Court, supra*, at p. 451.)

Appellant acknowledges that some of the police testimony regarding appellant's statements and the search, the testimony of forensic expert, Ricci Cooksey, and the testimony of some of appellant's roommates and acquaintances regarding appellant's statements and actions would have to be repeated. However, none of this testimony was particularly lengthy or emotionally trying for the witness. In fact, it is highly unlikely that this testimony would have taken more than an additional day or two to present.

The saving a day or two of testimony is not the *sine qua non* of the law of joinder. As stated by this Court, "Although there is inevitably some duplication in cases where the same defendant is involved, it would be error to permit this concern to override more important and fundamental

issues of justice. Quite simply, the pursuit of judicial economy and efficiency may never be used to deprive a defendant his right to a fair trial." (*Williams v. Superior Court, supra,* 36 Cal.3d 451 citing to *In re Anthony T.* (1980) 112 Cal.App.3d 92, 102; see *People v. Smallwood* (1986) 42 Cal.3d 415, 426.)

The type of judicial efficiency to be gained by joinder was discussed by this Court in *People v. Mason, supra,* 52 Cal.3d 909, in which this Court held that the public policy of judicial efficiency favored joinder when two capital cases were joined together and the severance of cases would require selection of two juries at a cost of several months of court time and a delay of a much longer time to get both cases tried. However, in the instant case, there was only one capital crime and the jury selection for the non-murder case would have taken only a day or two.

The reality of the matter is that a second jury would not have been necessary for the trial of the severed cases. A death qualified jury could have been selected for the trial of count I. The murder case could have been then tried to guilt verdict. If the jury found appellant guilty, then the trial could have proceeded to the penalty phase. As each and every non-murder felony charged in the indictment would have qualified as a (b) factor aggravation, the penalty phase of count I could also have served as a

guilt phase for the non-murder counts. There would have been no downside to either party nor the prompt administration of justice in such an arrangement. With the exception of a very few witnesses, this arrangement would have allowed most of the witnesses to testify once. The jury would not have needed to hear the highly prejudicial and non-cross-admissible non-murder count *unless and until* they had determined that appellant was guilty of Ms. Kenny's murder. In such a manner, the joined non-murder crimes could not have possibly had any effect on the jury's determination of appellant's guilt in the capital count. It would not be necessary for any of the victims to have come forward during this phase of the trial, yet, the prosecution would have been deprived of neither the opportunity to try appellant for the other crimes he allegedly committed nor to use those crimes as aggravating factors in the penalty phase. Therefore, any public policy consideration of judicial efficiency are, upon closer examination, illusory.

However, instead of employing such a eminently fair procedure as described above, the trial court embarked upon the unnecessarily dangerous process of allowing the jury deciding appellant's life or death fate to hear the evidence of otherwise inadmissible other crime evidence *before* they determined his guilt of the capital murder. As discussed earlier

in this Argument, the danger of such a process has long been a concern of this Court.

"Because other-crimes evidence is so inherently prejudicial, its relevancy is to be examined with care. It is to be received with 'extreme caution' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Sam, supra,* 71 Cal.2d at p. 203.) This Court has often stated its concern as to the likelihood that a jury not otherwise convinced beyond a reasonable doubt of the defendant's guilt of one or more of the charged offenses might permit the knowledge of the defendant's other criminal activity to tip the balance and convict him. If the court finds a likelihood that this may occur, severance should be granted. (See *Williams v. Superior Court, supra,* 36 Cal.3d at p. 451.)

It is within the context of these overarching concerns that the four "*Bradford*" factors must be considered.

2. Discussion of the Four "*Bradford* Criteria

a. Cross-Admissibility of Counts

The first of the four criteria outlined in *Bradford* has already been fully discussed in this brief. The evidence in the non-murder counts is not cross- admissible as to any contested issue in the capital murder. As stated, the issues of intent and common plan or scheme were not even contested

and the similarities between the murder and the non-murder counts are insufficient to allow an inference of similar intent, let alone an inference of common plan or identity. Therefore, this criterion most definitely favors appellant.

b. One of the Crimes is Punishable by Death

The final of the four criteria is indisputable and similarly favors appellant's motion to sever in that count I charged a crime punishable by death. In formulating such a fact specific criterion, this Court clearly recognized the unique nature of death penalty cases and the necessity of keeping them as free of prejudice against defendant as possible without violating basic public policy. As stated in *Williams*, "since one of the charged crimes is a capital offense, carrying the gravest possible consequences, the court must analyze the severance with a higher degree of scrutiny and care than is normally applied in a non-capital case." (*Williams v. Superior Court, supra*, 36 Cal.3d at 454.) Therefore, the first and last of the criteria outlined by this Court in *Bradford* clearly favor severance of the murder and non-murder counts.

c. Inflammatory Nature of Crimes

The second of the four criteria is an analysis of whether certain of the charges are unusually likely to inflame the jury against the defendant. The

analysis of this issue often revolves around whether a defendant's actions in one set of the charges were substantially more morally egregious than in the other charge or charges. This was the courts reasoning in this case. (RT2011.) However, such a subjectively based analysis is largely dependent upon what the individual judge believes is a "worse crime" and as such is neither reliable nor consistent.

The true meaning of "inflammatory" charges in this context rests less upon whether one set of crimes is "worse" than the other and more upon the foundational issue of predisposition. The overarching concern of joinder of non-cross-admissible crimes is that evidence of these other crimes "could produce an overstrong tendency to believe the defendant guilty of the charges merely because he is a likely person to do such acts." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 quoting *People v Thompson, supra,* 27 Cal.3d at 317.) Stated otherwise, "it may be error to consolidate an 'inflammatory offense' with one that is not under circumstances where the jury cannot be expected to try both fairly." (*People v. Mason , supra,* 52 Cal.3d at p.934.) Therefore, the analysis must focus not upon some inevitably arbitrary and subjective assignment of relative heinousness to each set of offenses. Rather, there must be a highly individualized evaluation of whether or not the joint trial of the two sets of

charges would have produced in *this particular jury* a tendency to convict appellant of the murder because the joint trial of all of the crimes unfairly preyed upon the jury's emotions by convincing them that appellant is the type of evil person that would commit murder.

In the instant case, the sheer number of non-murder counts brought against appellant could have had no other effect than to convince the jury that appellant was a very dangerous criminal capable of virtually any type of violent crime. By joining all of the counts, the prosecution was allowed to present to the jury eight separate non-murder incidents, including multiple burglaries, multiple rapes, an attempted kidnapping and two attempted murders. Therefore, the jury deciding the capital murder count was bombarded with inflammatory evidence that appellant was essentially a terribly dangerous, immoral serial predator. In no other reported case where joinder was not based upon cross-admissibility was there even close to *nine separate sets* of crimes involved. (See *People v. Crosby* (1988) 197 Cal.App.3d 853 (2 incidents); *People v. Sandoval* (1992) 4 Cal.4th 155 (2 incidents); *People v. Mendoza* (2000) 24 Cal.4th 130 (4 incidents) ; *People v. Balderas* (1985) 41 Cal.3d 144 (2 incidents); *People v. Bean* (1988) 46 Cal.3d 919 (2 incidents) ; *People v. Musselwhite* (1998) 17 Cal.4th 1216 (2 incidents).)

This type of assault on the jury's ability to make a logical dispassionate decision as to appellant's guilt in the capital count far exceeds the prejudice in cases reversed for improper joinder of counts for this very reason. In *Williams,* this Court issued a writ to set aside a trial court order denying defendant's motion to sever two unrelated murder counts which apparently involved gang membership. This Court held that the introduction of evidence of two seemingly "senseless, gang-related shootings" would create the forbidden "overstrong tendency to believe defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 citing to *People v.Thompson, supra,* 27 Cal.3d at p. 317.) In addition, the *Williams* Court cited to the fact that gang activity was a "highly publicized phenomena" which also encouraged the jury to convict on something other than the evidence presented. (*Ibid.)*

Similarly, in *Coleman v. Superior Court, supra,* 116 Cal.App. 3d 129, the court of appeal issued a writ to set aside a trial court order denying defendant's motion to sever two counts of sex crimes against minors from an unrelated murder case. The court of appeal held that defendant was prejudiced by the presentation of evidence of the sex crimes in the same trial as the murder count. The court stated "evidence of sex crimes with

young children is especially likely to inflame a jury. When confronted by direct evidence from two minor victims concerning petitioner's propensity to commit sex crimes, the jury would be hard pressed to decide the murder case exclusively upon evidence related to that crime. That difficulty would be exacerbated by the fact that the murder case consisted primarily of circumstantial evidence..." *(Id.* at p. 138.)

The *Coleman* court did not engage in the ultimately fruitless exercise of determining which crime was "worse," the sexual assaults or the murder, as there is no way to ever answer such a question without engaging in moral hairsplitting. The court simply stated that the introduction of other crimes of an emotionally inflammatory nature would invariably cause the jury to factor into its murder deliberation the "fact" that defendant is a reprehensible person.

Further, this Court has indicated that in judging whether a crime or series of crimes was "inflammatory" for the purposes of a consolidation analysis, the trial court should inquire as to the nature of the victim. In *People v. Sandoval, supra,* 4 Cal.4th at p.173, this Court held that the joinder of two sets of murder cases was not inflammatory because the victims in one of the sets of murders were gang members, as was the defendant. In the instant case, the situation was completely opposite. The

victims of the joined counts were not unsympathetic criminals, but were the most sympathetic individuals imaginable. They were all ordinary, law abiding citizens, victimized in or on the doorsteps of their homes. They were subjected to traumatic experiences and were in no conceivable way at personal fault for what happened to them. It is hard to imagine any type of crime that would inflame a jury more than an extended series of home invasions that culminated in rapes, attempted murder, gunfire and a series of terrified women.

In the instant case, the joinder of eight other sets of non-cross-admissible crimes to the murder count created the impression in the jurors' minds that they were dealing with the worst possible sort of predator. As such, the joinder created an inflammatory atmosphere in which they could not possibly judge the murder count solely upon the relevant evidence presented as to that particular count only. Therefore, there is no question that the joinder of the unrelated, non-cross-admissible counts to a capital murder count inflamed the jury. Therefore, at least three of the four *Bradford* factors are on the side of severance.

d. Joinder of "Weaker" and "Stronger" Cases

The final "*Bradford*" factor involves a "weak" case having been

joined with a "strong" case, or with another "weak" case, so that the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges. The rationale behind this factor is that the jury would be unable to decide one case exclusively on the evidence relating to that crime and that it would be difficult for jurors to maintain doubts about the weaker case when presented with stronger evidence as to the other. (*Williams v. Superior Court, supra,* 36 Cal.3d at p. 453 citing to *Coleman v. Superior Court, supra,* 116 Cal.App. 3d at p. 138.) This Court has stated its concern that the jury "would aggregate all of the evidence, though presented separately in relation to each charge and convict on both charges." (*Ibid.*)

No precise standard has ever been formulated for determining whether one case is indeed "weaker" that the other for purposes of the joinder issue. This is because this Court has recognized that such a determination is an individualized process dependent upon the totality of facts and circumstances of each case. (*People v. Bradford, supra,* 15 Cal.4th at p.1315.) As indicated above, the instant case presents a highly individualized set of facts and circumstances in that the prosecution sought and was granted joinder of eight separate sets of crimes to the murder count. The relative strengths and weaknesses cannot be measured by

comparing the evidence in the murder case to each of the other counts separately. As the prosecution urged conviction on the premise that all of the cases were so similar that the same person must have committed all of them, the measuring stick must be the relative weakness of the murder case vis a vis *all* of the remaining joined counts.

There was very little evidence connecting appellant to the Kenny murder. There were no eyewitnesses, no property taken from the Kenny apartment that was found in actual or constructive possession of appellant, nor any indication as to exactly what happened in the apartment the night of the murder. The only scientific evidence against appellant is the testimony of Ricci Cooksey that appellant fell in the 14% of the population that could have deposited the semen stains on Ms. Kenny's pants. (RT5636-5644.) The only other evidence was appellant's statement to Kenya Starr that he killed Ms. Kenny, a statement that Ms. Starr did not even believe. (RT5552-5557.) In addition, Stephanie Compton remembered reading about Ms. Kenny's murder in a September 14, 1992, newspaper article. (RT5320.) Prior to her reading this article, appellant told her that he had a dream that he was flying outside a window and saw a woman stabbed. Appellant gave her no details as to the name or occupation of the person he saw stabbed in his dream She tore the article out of the

newspaper and showed it to appellant. He looked at it but said nothing. (RT 5321-5322.) He told her that he had the same dream several times and when she showed him the article he said that he already read it. (RT 5327.)

Considering that even the prosecutor described appellant in his summation as "looney" (RT 6142) and that Ms. Starr thought so little of the statement that she didn't even bother to report it to the police upon hearing it, these statements hardly represent strong evidence against appellant. Appellant's statement to Ms. Compton that he dreamt he was "flying" outside of a window is hardly the kind of statement that inspires confidence as to its veracity.

In short, the entire array of evidence against appellant was testimony that fourteen hundred of every ten thousand male residents in a region of millions of people could have deposited the semen and two statements from a man that even the prosecutor admitted was mentally unstable.

In comparison, the evidence in at least several of the non-murder counts was much stronger. In most of these counts, there was at least some eyewitness identification of the perpetrator, indicating that he was a light-skinned black male of roughly the same height, weight and build as appellant. In two of the non-murder counts (Multari-Johnson and Chidley) there was very strong evidence against appellant in that property belonging

to the victims were found in his possession. (RT4464 and RT4468 respectively.) In the Courtney counts (XX-XXII), a shoe print matching up to the tabbie boot found in appellant's possession was found at the scene of the crime. (RT 4911.) In these counts, the bullet discharged at the crime scene matched up to a gun found in appellant's residence. (RT 4855-4859.) In several of the non-murder counts, witnesses identified the gun and sword found at appellant's residence as similar to those used by the perpetrator. (RT 5113, 4962, 4665, 4676, 4485-4487.) Further, in one of the cases in which victim's property was subsequently found in appellant's residence (Multari-Johnson), the perpetrator identified himself as a "hit man"(RT 5114.) He did the same thing in the Cliff incident (RT5607), tying these two crimes together.

Therefore, taken as a group, the evidence in the non-murder counts is very strong in comparison to the evidence in the capital murder count. In fact, in Childley, Courtney and Multari-Johnson, there is tangible evidence, in the form of the stolen identification material and the bullet found at the scene to tie appellant to the crimes. Therefore, the joinder of the murder count with the stronger non-murder counts placed all four of the *Bradford* factors on the side of severance.

Much as in the case of the joinder of inflammatory counts, the

concern addressed in this factor is that joinder would make it difficult for the jury not to view the evidence cumulatively. "One danger in joining offenses with a disparity of evidence is that the state may be joining a strong evidentiary case with a weaker one in hope that overlapping consideration of the evidence will lead to a conviction on both." (*Bean v. Calderon, supra,* 163 F.3d at 1085 citing to *Lucero v. Kirby* (10th Cir) 133 F3d 1299, 1315)

Considering the evidence presented in the respective counts as stated above, this danger clearly existed in this case.

e. Additional Criteria to Be Considered

Several decisions from the federal courts discuss what may be called a fifth criterion to consider in making the judgment of whether or not to sever. In *Bean v. Calderon* , supra, 163 F.3d at p. 1085, the Ninth Circuit recognized that there is far less danger of prejudice from joinder "when the evidence of each crime is simple and distinct, even in the absence of cross admissibility." In *United States v. Johnson* (9th Cir 1987) 820 F2d 1065, 1071, the Ninth Circuit framed the issue in terms of whether or not *with proper instruction,* the jury can "compartmentalize" each count. (*See also Bean* v. *Calderon, supra,* 163 F.3d at p. 1085.) In concluding that the district court did not abuse its discretion in denying a motion to sever, the

Ninth Circuit cited to the "relative simplicity of the issues and the straightforward manner of presentation"of the separate counts, stating that with the *instruction* that the trial court gave the jurors, the jury was able to compartmentalized each count. (*Ibid.*)

However, the federal courts have expressed skepticism about the efficacy of such instructions on at least one prior occasion: "To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities." (*United States v Lewis* (9th Cir 1985) 787 F.2d 1318, 1323, quoting *United States v. Daniels* (D.C. Cir. 1985)770 F.2d 1111, 1118.)

Even where the federal courts have accepted that proper jury instructions can have a prophylactic effect against prejudice, they have emphasized the necessity of giving adequate instructions to the jury to ameliorate the prejudicial impact of joined counts. In *Bean v. Calderon, supra,* 163 F.3d at p. 1085, the court stated that such an instruction must specifically tell the jury that "it could not consider evidence of one set of offenses as evidence to establish the other." Further, such instruction should be given at the outset of the evidence as to delay this instruction until the "waning moments of the trial" diminishes its impact. (*United*

States v. Lewis, supra, 787 F.2d at p. 1323.)

This additional criteria of "compartmentalization" was also discussed by this Court in *People v. Mendoza, supra,* 24 Cal.4th at p.162, which held that the degree of prejudice due to the inflammatory nature of the joined counts is related to whether the evidence of the joined counts is distinct from one another. The Court stated that if the consolidated offenses were factually separable there would be "minimal risk of confusing the jury or of having the jury consider the commission of one of the joined crimes as evidence of defendant's commission of the other." (*Id* at p. 163.)

The concerns stated in the above cases resonate with particular force in the instant case. Not only did the trial court join counts for which the evidence was not cross-admissible, but the prosecution repeatedly encouraged the jury to consider the two sets of charges in concert, as reflecting the modus operandi characteristic of appellant's criminal activities. Thus, the jury could not "reasonably [have been] expected to 'compartmentalize the evidence' so that evidence of one crime [did] not taint the jury's consideration of another crime," *United States v. Johnson, supra,* 820 F.2d at p. 1071, when the prosecution's closing argument urged it to do just the opposite. Further, the court rendered no such admonition to the jury instructing them to decide each count on its own merits as required

by the above-cited decisions of *Lewis* and *Bean*. (*United States v. Lewis, supra,* 787 F.2d at p. 1323; *Bean v. Calderon, supra,* 163 F.3d at p. 1085.)

It is absolutely incontrovertible that absolutely no effort was made to compartmentalize the separate courts. In fact, the prosecution's entire theory of the case was that of the charged crimes were so similar that there was an inference that they were all committed by the same person. By pursuing and winning the court's approval to join all of the counts on the grounds that they were cross-admissible, the prosecution can not divorce itself from the prejudice it caused. Further, the prosecution's guilt summation was replete with comparisons between the non-murder counts and the murder count and urgings to find appellant guilty of the murder count as the same person who committed the non-murder counts committed the murder. (RT 6055, 6058, 6060, 6065, 6066-6069.) In fact, the final point the prosecutor made in his rebuttal summation ties all of the crimes together with the following statement. "Ladies and gentlemen, over and over again I can't accentuate how out of the ordinary, how strange, how bizarre, how goofy, how tragic, how deadly Mr. Scott has been. But ladies and gentlemen, I can't give you a reason why. But, ladies and gentlemen, there is no other ninja running around out there. And what you look at how the defendant was acting, how he would dress, how he would be bizarre,

you could see why he was trying to say what he was saying by this dream." (RT 6142.)

H. Even if the Trial Court Did Not Abuse Its Discretion in Denying the Motion to Sever, Joinder of the Counts Actually Impacted the Trial to the Extent that Appellant Suffered Substantial Prejudice

This Court has long stated that in applying the rules of joinder the trial court must consider the matter on the basis of the evidence before the court at the time of its ruling. (*People v. Brawley* (1969) 1 Cal.3d 277, 292.) However, even when it can be concluded that the trial court did not abuse its discretion in denying the pretrial motion for severance, when the issue is raised on appeal we must also consider the actual impact at trial of the joinder. (*Ibid* citing to *Pointer v. United States* (1894) 151 U.S. 396, 403-404 [14 S.Ct. 410]; *People v. Kelly* (1928) 203 Cal. 128, 134.) The reviewing court must look to the evidence actually introduced at trial to determine whether "a gross unfairness has occurred such as to deprive the defendant of a fair trial or due process of law." (*People v. Turner* (1984) 37 Cal.3d 302, 313.) The question in the instant case is whether it was it reasonably probable that the jury was influenced in its verdict of guilt on the Kenny murder by its knowledge of his possible involvement in non-capital counts. (See *United States v. Bagley* (1985) 473 U.S. 667, 682 [105

S.Ct. 3375].) This is often described as the "spillover effect."

Appellant continues to maintain that the trial court erred in its denial of the motion to sever. However, even if this Court should find that the trial court ruled properly considering only the information before it at the time of the motion, review of the entire record of the trial establishes that the joinder of the counts did indeed prejudice appellant. As stated above, the prosecutor's entire theory that all of the charged crimes were committed by the same person. The improper joinder of the counts clearly facilitated this theory immeasurably. Even more prejudicially, the joinder of the non-murder counts indelibly stamped the mark of a serial predator upon appellant who was on trial for his life. Not only did the improper joinder of the counts greatly increase the chances for appellant's conviction on the murder count, but the joinder provided the only evidence of special circumstances rape that the prosecutor had at his disposal. (See Argument VIII, *infra.*) Therefore, the "actual impact" of the joinder on the trial was pervasive and manifest.

I. Appellant Was Substantially Prejudiced by the Joinder of the Non Murder Counts with the Murder Count

While it is true that cross-admissibility is not the sine qua non of joinder and the burden is on the moving party to show substantial prejudice, that burden was met through the prosecution's yoking itself to the mistaken and illogical legal theory that all of the crimes were cross-admissible as to each other. The pursuance of this theory and the court's error in allowing the prosecution to do so destroyed any expectation that the jury could properly compartmentalize each set of crimes and judge appellant's guilt on the murder count on the evidence as to that count, alone. The prejudice to appellant was manifest. The jury that decided his fate on the capital murder count was not only exposed to evidence that suggested that appellant was a serial rapist and stalker of defenseless women but was encouraged by prosecution argument to improperly believe the evidence showed that the person who committed the non-murder counts also committed the capital murder. The fact is that there was insufficient evidence upon which the jury could find the special circumstance of murder in the course of a rape or attempted rape. (See Argument VIII , *infra.*) The only way the jury could have made this finding was to have considered that appellant may have committed two other rapes, thereby

supplying an intent that could not be otherwise proven. This created the forbidden "overstrong tendency to believe defendant guilty of the charge merely because he is a likely person to do such acts." (*Williams, supra,* 36 Cal.3d at p. 453 citing to *People v. Thompson, supra,* 27 Cal.3d at p. 317.)

As indicated above, the improper joinder of the murder and non-murder counts substantially prejudiced appellant and violated his right to due process of law and a fair trial under the Fifth and Fourteenth Amendments to the United States Constitution. (*Bean v. Calderon* , *supra,* 163 F.3d at p. 1084.) A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) Considering the above-described overwhelming prejudice suffered by appellant, the prosecutor cannot carry this burden.

The entire judgment must be reversed.

FACTUAL AND PROCEDURAL HISTORY REGARDING ISSUES RELATING TO SUPPRESSION OF STATEMENTS OF APPELLANT[11]

(ISSUES II-V)

On September 24, 1993, appellant filed a Motion to Suppress the Statements of Defendant. The gravamen of the motion was that the January 21, 1993, arrest of appellant was made without probable cause, and that any subsequent statements he made while in custody were the illegal fruits of that arrest. (CT 2151.)

Specifically, appellant's arrest was based virtually entirely upon the accusations of an informant, subsequently identified as Ricardo Decker, in his anonymous phone tip to Detective Heredia and in his subsequent interview with Detective Keers. Appellant argued that as Decker's information was uncorroborated and unreliable due to various discrepencies, it did not provide probable cause for arrest. (CT 2154.)

In their opposition to the motion, filed on October 7, 1993, the prosecution claimed that there was sufficient probable cause to arrest appellant based upon the information received from Decker. (CT 2304 et

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11. There are several independent, related issues concerning the police misconduct in obtaining appellant's January 21st,1993 statement. Because the factual and procedural history is so interrelated, it will be presented before the actual issues are addressed so as to minimize repetition and cross-reference in the arguments..

seq.) On October 15, 1996, a hearing was held on this motion. (CT2278.) The court held that there was probable cause to arrest appellant and the motion to suppress the January 21, 1993, statements was denied. (PRT 1601-1602)

On January 9, 1997, appellant filed another motion to suppress the statement he gave to the police authorities on January 21, 1993. The gravamen of this motion was that the statement was involuntarily obtained from appellant, as well as being obtained in contravention of *Miranda v. Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602. (CT2992.) Appellant maintained that the first portion of the statement taken by Detectives Theur and Heredia was taken prior to the administration of the *Miranda* warnings and should be suppressed for this reason. Secondly, appellant claimed that the *Miranda* waiver was involuntary as it was the product of police coercion. Thirdly, appellant argued that the post-*Miranda* statements were the product of coercive police conduct, including promises of leniency in exchange for the statement, and the statements were not the product of appellant's free will. (*Ibid.*)

The facts as set forth in the motion are as follows. Due to information received from Ricardo Decker, in the early morning and early

afternoon hours of January 21, 1993[12], two Moreno Valley Police detectives arrived at appellant's residence at approximately 4:00 p.m. that day. Approximately an hour later, these detectives received word that the Riverside Police Department wanted appellant arrested, immediately. The detectives waited for appellant to come out of his house and arrested him without a warrant, handcuffing him. Riverside Police officers then transported appellant to a Riverside Police station. (CT2994.)

Appellant was in custody at the police station for approximately three hours before questioning was commenced. Questioning by Riverside Detectives Theur and Heredia began at approximately 8:14 p.m. During that pre-*Miranda* questioning, incriminating statements were elicited from appellant, specifically admissions that he was involved in martial arts and ninja training. However, it was not until 8:30 p.m. that Detective Heredia read appellant his *Miranda* rights. These detectives continued questioning appellant for a substantial period of time at which point Detective Keers replaced Detective Heredia. Questioning continued for another hour, after which time Detective Bender from Moreno Valley Police Department questioned appellant for an additional extended period of time. (CT2994.)

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12. Mr. Decker originally called police with an anonymous tip that appellant was responsible for certain "ninja" crimes. Later in the day, but before appellant's arrest, the police ascertained Mr. Decker's identity and took a statement from him.

The prosecution did not file a written response to the motion. (RT2404.) On January 16, 1997, the court heard the motion. At the outset it ruled that non-biographical information contained in the first sixteen pages of the statement were obtained in violation of *Miranda,* and excluded this information. (RT2406 et seq.)

However, the trial court rejected appellant's argument that appellant's *Miranda* waiver was not voluntary. The court indicated that up until the point that the warnings were given the police were "just having a chat" with appellant but when the talk turned to the crimes themselves, the tenor of the conversation changed and the police gave the warning. (RT 2445.)

After holding that the *Miranda* warnings were properly administered and appellant voluntarily waived his right to counsel (RT 2447), the court took up the issue of voluntariness of the statement itself. It indicated that the promises of leniency made by the police were a source of concern. (RT2485.) It also stated that the question of voluntariness was "close," but taken as a whole it could not be said that the statement was involuntary. Hence, the motion was denied. (RT2560.)

II. APPELLANT'S JANUARY 21, 1993 STATEMENT TO POLICE DETECTIVES OF THE MORENO VALLEY AND RIVERSIDE POLICE DEPARTMENTS WAS THE FRUIT OF HIS ILLEGAL ARREST, THEREFORE THE ADMISSION OF THE STATEMENT[13] VIOLATED APPELLANT'S RIGHTS AGAINST ILLEGAL SEARCH AND SEIZURE, AGAINST SELF-INCRIMINATION, TO DUE PROCESS OF LAW AND TO A FAIR TRIAL UNDER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Appellant's Arrest Was Without Probable Cause, Hence, Illegal

The only "probable cause" for appellant's warrantless arrest was the information provided to Detective Heredia directly or indirectly from Richard Decker. (CT2159.) The prosecution claimed, and the court agreed, that the informant (Decker) referenced in the January 21, 1993, warrant[14] to search appellant's premises was a "citizen-informant," therefore presumptively reliable. (PRT1603-1605.) Both the prosecution and the court were wrong.

Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest

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13. The January 21, 1993, statement was a single statement given to both the Moreno Valley and Riverside police who questioned appellant one after the other at the same station house during the same period of time.

14. After appellant was arrested a warrant was executed to search his Graham St. residence. The affidavit in support of this warrant was largely based upon Decker's information. The contents of the warrant and accompanying affidavit are discussed in detail in Argument V, *infra.*

and strong suspicion that the person arrested is guilty of a crime. (*People v. Celis* (2004) 33 Cal.4th 667, 673; *People v. Price* (1991) 1 Cal.4th 324, 410; *People v. Harris* (1975) 15 Cal.3d 384, 389.) Otherwise stated, relative to warrantless arrests and searches, probable cause is said to exist when the circumstances within the officer's knowledge are sufficient to warrant a prudent man in believing that the defendant has committed an offense. (*People v. Hogan* (1969) 71 Cal.2d 927, 930.)

It is well accepted that a precise articulation of the meaning of "probable cause" is not possible. It is a "commonsense, non-technical" conception that encompasses "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." (*Ornelas v. United States* (1996) 517 U.S. 690, 696 quoting *Brinegar v. United States,* (1949) 338 U.S. 160, 175; see also *Illinois v. Gates* (1983) 462 U.S. 213, 231[103 S.Ct 2317.])

However, there are some widely accepted standards for determining when an informer's statement suffices to create probable cause. This Court has stated that it is sufficient only if the officer has some corroborating knowledge of the informant's or information's reliability. (*People v. Lara* (1967) 67 Cal.2d 365, 374, *People v. Talley* (1967) 65 Cal.2d 830, 835,836; *People v. Barrett* (1969) 2 Cal.App.3d 142, 147.) The United

States Supreme Court requires that the credibility, reliability and basis of information of each informant must be weighed under a "totality of circumstances" test. (*Illinois v. Gates, supra,* 462 U.S. at pp. 231-232.) As stated above, the prosecution claimed and the court agreed that the informant referenced in the January 21, 1993, search warrant and affidavit was a "citizen-informant," therefore presumptively reliable. (PRT1603-1605.)

> A "citizen informant" is a citizen who purports to be the victim of or to have been the witness of a crime who is motivated by good citizenship and acts openly in aid of law enforcement. (Citations.) It is reasonable for police officers to act upon the reports of such an observer of criminal activity. (Citation.) A "citizen informant" is distinguished from a mere informer who gives a tip to law enforcement officers that a person is engaged in criminal conduct.(Citations.) Thus, experienced stool pigeons or persons criminally involved or disposed are not regarded as "citizen informants" because they are generally motivated by something other than good citizenship. (*People v. Smith* (1971) 7 Cal.3d 845, 850-851; see also *People v. Schulle* (1975) 51 Cal.App.3d 809, 814-815.)

However, the designation of citizen informant cannot simply be based upon police conclusions. It must be supported by facts showing the reliability required by the above law. (*People v. Smith, supra,* 7 Cal.3d at p.851, *People v. Hill* 12 Cal.3d 731,760-761.) Stated otherwise, while an untested citizen- informant's information is presumptively reliable, this

status as a citizen-informant cannot attach if the affiant is silent thereon. The affidavit must affirmatively set forth the circumstances from which the existence of the status can be reasonably be inferred by a neutral and detached magistrate (*Smith, supra* at p. 852, *Hill, supra,* at p. 761.)

There were no hard facts from which the police could have reached the conclusion that this informant was a "citizen-informant," therefore reliable. The information provided by the informant to Detective Heredia through the January 21, 1993, phone tip is contained in Exhibit "A" of appellant's Motion to Suppress dated September 24, 1996. (CT 2159.) Exhibit "A" is transcript of the telephone message. It reflects that this anonymous individual, later that day identified as Ricardo Decker, gave Detective Heredia a very general physical description and social security number of the individual he identified as David Scott. The informant stated that this individual dressed like a ninja and carried certain ninja weapons. He also stated that David Scott related to him that Scott had an "out of body" experience where he either killed "the librarian" (presumably Ms. Kenny) or dreamt that he killed her. (*Ibid.*)

The same day, but prior to appellant's arrest, Detective Keers of the Riverside Police Department ascertained that the anonymous phone informant was Ricardo Decker and interviewed him. The substance of this

interview is contained in Exhibit "B" of the same motion. (CT2161.) This report differs in material aspect from Exhibit "A" in that Decker told Detective Keers that it was Stephanie Compton, not appellant, who related the "dream." Further, according to Decker, Ms. Compton told him the dream was that he saw someone else stab Ms. Kenny. (*Ibid.*)

The only information that the police had prior to appellant's arrest was information from Terry Delatorre, an employee of the theater where David Scott worked. She stated that the talk around the theater was that appellant may be responsible for the "ninja crimes." While she had no personal knowledge as to any facts that would substantiate this speculation, she related that she had heard that certain employees saw him wearing a ninja outfit. Further, another employee told her that appellant had stated that he had been chased in the Canyon Crest area by Riverside Police. (CT2309.)

The above-stated information did not amount to probable cause. The information from Ricardo Decker was unverified and from an untested or unreliable informant and as such was generally unreliable. It did not establish probable cause because it was not "corroborated in essential respects by the facts, sources or circumstances." (*People v. Gottfried* (2003) 107 Cal.App.4th 254, 263-264; *People v. Fein* (1971) 4 Cal.3d 747, 752;

People v. Maestas (1988) 204 Cal. App.3d 1208, 1220.)

In fact, the only concrete information provided by Decker as to any specific crime was that a few days prior to the anonymous tip, appellant told the informant that he had recently stabbed somebody. However, there was no further information about whether such a "stabbing" had occurred and no specifics of such a crime were given. Further, Decker gave the police two entirely different versions of the same incident. In the anonymous tip, Decker said that appellant personally told him that he personally stabbed "the librarian." In the interview with Detective Keers, Decker stated that *Stephanie Compton* told him that appellant had a dream that someone else stabbed the woman.

Therefore, not only was there no independent information to corroborate Decker's tip and statements, but the indisputable internal inconsistencies in his information affirmatively destroyed his credibility. The police knew this but decided to proceed with appellant's arrest nevertheless. Therefore, Decker's tip and statements to the police cannot be counted upon to establish probable cause. Discounting Decker's unreliable statements, all that was left for police to rely upon was the interview of Terry Delatorre, who had absolutely no personal knowledge of appellant's activities and whose awareness of the information she related to the police

was nothing more than office scuttlebutt and speculation.

Therefore, appellant's arrest was without probable cause and illegal.

B. Appellant's Subsequent Statement to the Police Was the Fruit of the Illegal Arrest and Should Be Suppressed

When a defendant is arrested illegally at home and taken to a station house and a statement is obtained from him, the statement is considered an "indirect" result of the Fourth Amendment violation. (*New York v. Harris* (1990) 495 U.S. 14, 19.) The indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality. (*New York v. Harris* (1990) 495 U.S. 14, 19; *People v. Williams* (1988) 45 Cal.3d 1268,1299.)

This so-called "fruit of the poisonous tree" evidence is only admissible if the doctrine of inevitable discovery applies, the evidence was obtained by an independent source or "if the connection between the source [of the taint] and the evidence has been sufficiently attenuated." [15](*People v. Superior Court (Sosa)* (1983) 145 Cal.App.3d 581, 587-588.) In order for the government to prove that the confession was not the fruit of

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15.Neither the inevitable discovery nor independent source doctrine applies in this case

the illegal arrest, they must show that not only was the statement voluntarily made, but also that it was an act of free will sufficient to purge the primary taint. (*Anderson v. Calderon, supra*, 232 F.3d 1071; *Wong Sun v. U.S.* (1963) 371 U.S. 471, 488, 83 S. Ct. 407, 417.) Stated otherwise, the test is whether the confession was obtained by exploitation of a Fourth Amendment violation or "by means sufficiently distinguishable to be purged of the primary taint." (*Ibid.*)

According to the Supreme Court, a totality of circumstances analysis must be employed to determine whether there was such an attenuation. The factors to be considered include the temporal proximity of the arrest to the statements, the nature of the *Miranda* warnings given, the intervening circumstances and "the purpose and flagrancy of the official misconduct." (*Brown v. Illinois* (1975) 422 U.S. 599, 603-604.)

There was no attenuation of the taint in the instant case. Appellant was illegally seized at his home and immediately transported to the station house, where he was held incommunicado for hours until the police began their pre-*Miranda* interrogation a few hours later. (See Argument III, infra.) There was essentially no temporal break between the illegal arrest and the statement and as is fully discussed in Arguments III and IV, *infra.*, when appellant was questioned it was without the benefit of *Miranda*

warnings. Therefore, the state cannot show that the statement was purged of the primary taint of the illegal arrest.

C. Appellant Suffered Prejudice by the Court's Failure to Suppress the Statements and the Judgement of Guilt Must Be Reversed

Appellant was substantially prejudiced by the violation of his right against illegal search and seizure, to due process of law, and to a reliable determination of guilt. Appellant's illegal arrest provided the police with unconstitutionally admitted statements that formed the greatest part of the evidence against him in the capital crime and convicted him out of his own mouth. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Considering that the statement[16] provided evidence of appellant's association with ninja activities as well as his "dream" about the death of Ms. Kenny, the prosecution cannot meet this burden.

This entire judgement must be reversed.

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16. Appellant's statement to the police is described fully in Argument IV, *infra.*

III. BECAUSE OF THE PRE-*MIRANDA* INCULPATORY STATEMENTS, ALL OF APPELLANT'S SUBSEQUENT STATEMENTS TO THE POLICE WERE OBTAINED IN VIOLATION OF APPELLANT'S RIGHT AGAINST SELF-INCRIMINATION, TO DUE PROCESS OF LAW, TO A FAIR TRIAL AND TO A RELIABLE DETERMINATION OF GUILT PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Argument

After appellant's arrest at his home, he was placed in custody and taken to a police station. At the station house, appellant was extensively interrogated prior to being given his *Miranda* rights. This questioning was clearly intended to and did in fact elicit inculpatory statements from appellant. The police eventually informed appellant of his *Miranda* rights and continued the questioning, obtaining more incriminating statements. The police deliberately employed improper tactics to secure the pre-waiver incriminating statements and the taint of those tactics infected the subsequent post-*Miranda* statements. Therefore, all of appellant's statements, both before and after the *Miranda* warnings and waiver, should have been suppressed.

B. Discussion of Pertinent Facts

As discussed in the introductory section to Arguments II-IV, appellant was arrested by the police and transported to the station house. Before the police administered any *Miranda* warnings, they questioned appellant. (8th CT[17] 1-16.) While some of the questioning was to elicit "booking" type information, much of it focused upon getting defendant to admit that he was a practitioner of the martial arts in general, and was involved in ninja training in particular.

These admissions were produced by a "softening up" process by which the police ingratiated themselves to appellant, pretending to be his friend and interested in his life. After obtaining the biographical booking information, the police ingratiated themselves with appellant by asking about his school work. (8th CT1-6.) Appellant readily informed the police that he was an above average student with interest in becoming a teacher or a lawyer. (8th CT5.) Knowing full well that appellant's admission to engaging in ninja activities would be a substantial step toward obtaining further inculpatory statements, Detective Heredia then subtly turned the conversation toward eliciting incriminating statements about appellant's

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17. This citation refers to the CT Volume prepared by the Riverside County Superior Court and designated as " Eighth Supplemental Clerk's Transcript on Appeal."

every individual that, if taken into official custody, he shall be informed of important constitutional rights and be given the opportunity knowingly and voluntarily to waive those rights before being interrogated about suspected wrongdoing. (*Miranda v. Arizona, supra,* 384 U.S. at p. 475.) This guarantee embodies our society's conviction that "no system of criminal justice can, or should, survive if it comes to depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights." *(Escobedo v. Illinois* (1964) 378 U.S. 478, 490, 84 S.Ct. 1758.)

In *Oregon v. Elstad* (1984) 470 U.S. 298 [105 S.Ct. 1285] the Supreme Court considered when *Miranda* requires the suppression of statements obtained after the suspect initially makes an incriminating statements without *Miranda* warnings, then, thereafter receiving a belated *Miranda* warning, makes additional incriminating statements. The *Elstad* Court held that the further statement, obtained after the warning has been given, should be suppressed when the first statement was given in response to "deliberately coercive or improper tactics" and the "coercive impact" of the first statement was not dissipated by factors such as the passage of an appreciable time, change in location of the interrogation, or change in identity of the police interrogators. (*Elstad, supra,* 470 U.S. at p.

310.)

The High Court held that the suppression of the post-*Miranda* statement in *Elstad* was not mandated by the Fifth and Fourteenth Amendments to the United States Constitution in that the police did not employ deliberately improper tactics in obtaining the first statements. Further, the defendant's initial pre-*Miranda* statement was made in his mother's kitchen, which ameliorated the coercive aspect of that initial statement. (*Elstad, supra,* 407 U.S. at p. 307-309.)

However, the rule is different when, as in this case, the police not only violated *Miranda* in obtaining the first set of incriminating statements, but used deliberately improper tactics while doing so. In such a situation, the second set of inculpatory statements is admissible only "if the taint caused by the coercive impact of the deliberately improper tactics has been dissipated." (*United States v. Orso* (9th Cir 2000) 234 F.3d 436, 441; see *Pope v. Zenon* (9th Cir.1995) (amended 1996) 69 F.3d 1018, 1024; *United States v. Carter* (8th Cir. 1989) 884 F.2d 368, 373-374.) Here, the taint was not dissipated.

The facts in *Orso* are in many respects very similar to those of the instant case. Defendant was suspected of robbing a United States Postal worker. A federal warrant was issued for her arrest and she was arrested

by local police on unrelated charges. Federal authorities were subsequently notified to effect a transfer of custody to the postal inspectors for a formal interview. The federal inspector took custody of defendant, handcuffed her, and placed in the back seat of a Postal Inspector's vehicle for the 25-35 minute drive to the Postal Inspection Office. It was undisputed that Orso was in custody during that time and that she was not informed of her Miranda rights at any time before or during the car ride. (*United States v. Orso, supra,* 234 F.3d at p.439)

At the outset of the car ride, the inspectors engaged defendant in general conversation unrelated to the crime in question. However, after about fifteen minutes of this unrelated discussion, one of the inspectors turned the conversation to the robbery, attempting to elicit incriminating statements from the defendant. Defendant eventually stated "Well, if the letter carrier said it's me, it must be me." At this point, the defendant was given her *Miranda* rights. Upon arriving at the postal inspection station, defendant was questioned again and made further incriminating statements (*United States v. Orso, supra,* 234 F.3d at p. 439.)

The government conceded that the statements made in the car were taken in violation of *Miranda* and should be suppressed. The defendant argued that the statements at the postal station should also be suppressed,

not because they were involuntary but because they were tainted by the earlier *Miranda* violation. The trial court denied this motion to suppress.

The court of appeal reversed the denial of the motion to suppress the post-*Miranda* statements. The court of appeal ruled that the deliberately improper tactics used by the police prior to the *Miranda* warnings allowed them to elicit "breakthrough" incriminating information from the suspect prior to advising her of her rights, "in order to use that information as a 'beachhead' to later undermine the effect of the *Miranda* warning and to compel the suspect to confess in spite of them." (*Orso, supra,* at 441; *Pope v. Zenon, supra,* 69 F.3d at p. 1023.) The *Orso* court held that the only way to avoid suppression of the post-*Miranda* statements would be for the government to show that the taint had somehow been attenuated in the manner described by *Elstad.* However, considering the *Elstad* factors for attenuation (length of time between the two statements, any change of identity of the interrogators, any change in location in interrogation, and the purpose and flagrancy of the misconduct, there was no indication of a break in the chain of events arising from the original pre-*Miranda* statements. (*Orso, supra,* at p. 442; see *United States v. Jenkins* (9th Cir 1991) 938 F2d 934,941, *United States v. Patterson* (9th 1987) 812 F.2d 1188,1192.)

This police tactic of intentionally attempting to establish pre-*Miranda* "breakthrough" incriminatory statements to establish a "beachhead" from which to obtain additional post-*Miranda* incriminatory statements has also been condemned by this Court. In *People v. Honeycutt* (1977) 20 Cal.3d 150, this Court disapproved the use of pre-waiver police conduct, such as ingratiating themselves to the suspect or disparaging the victim, which had the intended effect of "softening up"the suspect into persuading him to talk to the police, therefore to waive his *Miranda* rights when they are eventually given. (*Id.* at pp.156-158.)

Whether this "preliminary interrogation-warning-post-waiver interrogation" process is referred to as "establishing a beachhead" or "softening up", the fundamental constitutional violation is the same. It is not enough for a post-waiver statement to be voluntary, the *waiver itself* must be voluntary as well, that is, an intentional relinquishment of a known right. (*Miranda, supra,* 384 U.S. at p.475, citing to *Johnson v. Zerbst* (1938) 304 U.S. 458.) The purpose of *Miranda's* requirement of express advisement of rights is "to dispel the coercion inherent in an environment of incommunicado, police-dominated interrogation." (*People v. Hinds* (1984) 154 Cal. App.3d 222, 233-234.) As stated in *Miranda*, "lengthy interrogation or incommunicado incarceration before a statement is made is

strong evidence that the accused did not waive his rights...moreover any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive the privilege." (*Miranda v. Arizona*, *supra* 384 U.S. at 476.)

Honeycutt held that such a softening up procedure vitiated any waiver of the suspect's right to remain silent.

> We...conclude that in making his decision to waive, a suspect must have that knowledge of his rights afforded to him by *Miranda*. The self-incrimination sought by the police is more likely to occur if they first exact from an accused a decision to waive and then offer the accused an opportunity to rescind that decision after a *Miranda* warning , than if they afforded an opportunity to make the decision in the first instance with full knowledge of the *Miranda* rights. (Citation) The police by applying practices condemned in *Miranda* cannot be heard to contend that they should benefit because they only violated the spirit of *Miranda*. It must be remembered that the purpose of *Miranda* is to preclude police interrogation unless and until a suspect has voluntarily waived his rights or has his attorney present. When the waiver results from a clever softening-up of a defendant through disparagement of a victim and ingratiating conversation, the subsequent decision to waive must be deemed to be involuntary for the same reason that an incriminating statement made under police interrogation without a *Miranda* warning is deemed to be involuntary. *(People v. Honeycutt,* 20 Cal.3d at pp. 160-161.)

In the instant case, the police placed appellant under arrest and transported him to the station house where they spent a substantial amount of time attempting to extricate incriminating statements from him without

the benefit of a *Miranda* warning. As indicated in subsection B of this Argument, *supra,* on several occasions Detectives Heredia and Theur employed the tactic of ingratiating themselves with appellant by asking him seemingly innocuous questions about his school, his roommates, his hobbies, while in fact they were constantly probing for incriminatory statements concerning appellant's involvement with ninja arts and his familiarity with the area in which the crimes were committed. The police succeeded in extricating this incriminatory information before any *Miranda* warnings were given.

The trial court recognized the illegality of these pre-*Miranda* statements and promptly suppressed them. (RT 2406.) However the court failed to take into account the law of *Elstrad, Orso,* and *Honeycutt.* The pre-*Miranda* statement was given in response to the "deliberately coercive or improper tactics" of the police in holding appellant incommunicado and subjecting him to an interrogation whose intent was to establish a "beachhead" for obtaining further inculpatory statements. The "coercive impact" of the pre- *Miranda* statement was in no way dissipated by factors such as the passage of an appreciable time, change in location of the interrogation, or change in identity of the police interrogators. In fact, the questioning of appellant immediately following the belated *Miranda*

warning was virtually identical to the questioning prior to it; a long series of questions and answers about appellant's martial arts training, uniforms, and weapons, all of which was very incriminatory. (5th CT[18]164-173.) The police used the pre-warning admissions to establish the type of "beachhead" forbidden by the above-discussed law that undermined the effect of the *Miranda* warning and to compel the suspect to continue to make inculpatory statements in spite of them. (*United States v. Orso*, *supra,* 234 F.3d at p.441.) Once the police propelled appellant down the slippery slope by illegally obtaining the initial pre-warning statements, it was an easy trip to push him the rest of the way to a more complete set of inculpatory post-waiver statements. (See Argument IV, *infra*.)

As such, the police conduct in coercing the initial statement from appellant without the benefit of a *Miranda* warnings or waivers and the subsequent obtaining of the post-waiver statements was a violation of appellant's right against self incrimination, to due process of law, to a fair trial and to a reliable guilt phase determination under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

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18. This citation refers to the CT Volume prepared by the Riverside County Superior Court and designated as "Fifth Supplemental Clerk's Transcript on Appeal."

D. Appellant Suffered Prejudice by the Court's Failure to Suppress the Statements and the Judgement of Guilt Must Be Reversed

Appellant was substantially prejudiced by the violation of his rights against self incrimination, and to a fair trial, due process of law, and a reliable determination of guilt. Appellant's unconstitutionally admitted statement[19] provided the greatest part of the evidence against him in the murder case and convicted him out of his own mouth. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The remaining evidence of appellant's involvement in the instant crimes is extremely limited. Regarding the Kenny murder, the only evidence left to associate appellant with the crime are forensic test results that put him in a group of many thousands in the Riverside area that could have committed the crime and a few belatedly reported comments by appellant to civilians that they did not even believe. Considering that it was appellant's statement that provided the evidence of appellant's association with ninja activities as well as his "dream" about the death of Ms. Kenny, the prosecution cannot meet this burden of proving that the error was harmless beyond a reasonable doubt.

19.The statement is fully described and discussed in Argument IV, *infra.*

(*Arizona v. Fulminante* (1991) 499 U.S. 279 [113 L.Ed.2d 302, 111 S.Ct. 1246.]

This entire judgement must be reversed.

IV. APPELLANT'S JANUARY 21, 1993 POST -*MIRANDA* WAIVER STATEMENT WAS INVOLUNTARY IN THAT IT WAS THE PRODUCT OF POLICE COERCION THAT OVERBORE APPELLANT'S FREE WILL; THEREFORE ITS ADMISSION INTO EVIDENCE VIOLATED HIS RIGHT TO DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

A. Summary of Argument

As discussed in Arguments II and III, *supra,* upon appellant's illegal arrest he was taken to the police station where he was improperly questioned by the police without benefit of his *Miranda* rights. As such, any and all statements given to the police should be suppressed. However, in addition to these constitutional violations, appellant's January 21, 1993, post-waiver statement to Detective Keers concerning his "dream" of a man stabbing a woman was itself the involuntary product of impermissible police coercion. This provides yet a *third* reason to suppress appellant's January 21, 1993, statement to both the Moreno Valley and Riverside police.

B. Discussion of Facts

In addition to the facts set forth herein, appellant relies upon the facts in the introductory section dealing with all of the statement suppression issues. (See also Arguments II and III, *supra.*) The discussion set forth below, therefore, commences with the police conduct after appellant was given his *Miranda* warnings.

The police questioning after the *Miranda* warnings continued along the same general lines as that prior to the warnings. It focused upon appellant's "ninja" training, weaponry and uniforms. Appellant responded to the questioning by admitting that he did train as a ninja in the "art of invisibility" and did carry weapons with him when he trained. He also admitted to being in people's backyards in his ninja uniform but only as part of his training. (5th CT164-177.)

It was at this point that the police informed appellant that they were investigating "some things a bit more serious than prowling" such as "break-ins and stuff like that." (5th CT182.) Appellant admitted that his prowling might have scared people and that while he may have joked about seeing people sleeping in their houses, he had never committed a burglary. (5th CT183-185.)

After the police volunteered that people have been "hurt" during these

crimes, appellant yet again denied any involvement. (5th CT187.) After these multiple denials from appellant, the police pursued their questioning and obtained further information about the weaponry owned by appellant, including an admission that he owned a gun. Appellant further admitted that he wore "tabbie boots" in his training. (5th CT190-197.) The police then informed appellant that a ninja broke into an apartment in the Canyon Crest area and had committed a rape. Appellant immediately denied any involvement, stating that he would never do a thing like that. (5th CT199.)

The police then told appellant that the person who committed these crimes was not a "mad dog" because the victim was not really hurt. (5th CT 201.) However, one of the officers advised appellant to "come clean" so "I can hear it from you here, and not let me find out after the fact that it was you, in fact you, and you're lying to me, okay?" (5th CT201.) Appellant once again repeatedly denied any involvement. Ignoring appellant's denials, the police again continued to pressure him, this time suggesting that they needed to hear his side of the story, and suggesting that maybe the rape victim invited him into her house for consensual sex. Appellant again firmly denied that such a thing ever happened. (5th CT203.)

Ignoring appellant's denials, the police continued to hammer at him, asking him whether he ever had thoughts of raping women. Under obvious

stress, appellant denied any such ideation, but indicated that he had "thought about" blowing planes up "like in the movies" at a place like March Air Force Base. (5th CT203-204.) The police then accused appellant of having of molesting a child when appellant was a juvenile. Appellant explained that he didn't do anything wrong, but was accused by a member of John Contreras' household so that John would throw him out of the house. There was no indication that any police agency ever charged appellant with any offense. (5th CT205-206.) The police then asked appellant what he thought of women in general. He stated that he respected them and would not commit crimes against them. (5th CT206.) Detective Heredia then stated that the woman in question said that appellant forced sex upon her, and spuriously claimed that she had identified him. The officer then suggested that appellant's "male urges" may have gotten the better of him and the police deal with that all of the time. Detective Heredia then told appellant that they only have the woman's side at this point and it is the job of the police to make sure that they get both sides of the story. Appellant yet again denied any involvement and told the police that he didn't know the woman, had never been in her house and didn't know what the police were talking about. (5th CT206-207.)

After failing to extract an admission of guilt from appellant, the

police embarked upon a new tactic, suggesting more lenient treatment if he told them what "really" happened:

> We want you to level with us okay. It's very important that you level with us. Now you know, and we know, how that test (DNA) is going to come out. Now it's going to be a whole lot better, you're going to feel a lot better about yourself, you're going to be a lot more, you're going to be more like a man if you fess up to what you did. It's very very important that you be truthful with us and tell us exactly what happened, it'll make things go much better, cuz we both know what happened. (5th CT207.)

Appellant again passionately denied any involvement, stating "from [his] heart" he can tell the police that he had nothing to do with any such crime. (5th CT207.) The police then threatened appellant with a DNA test, which appellant agreed to take to prove his innocence. In response to this the police stated that it is appellant's "obligation...and responsibility as a man to come forward and act like a man, or do we have to do it the hard way" by going through all the tests. The police then suggested that putting the victim through these tests would "hurt her." (5th CT208.) Sighing in exhaustion or frustration, appellant again denied involvement. (*Ibid.*)

Once again, meeting with no success in getting appellant to implicate himself, the police continued to pressure appellant, stating that he was lying and telling him "it was time to own up to this as a man and say, yeah, I screwed up."(5th CT209.) The police then once again implied that

if he talked things would go easier on him. "It might not be as bad as she told us, and then we get on with this, with, with, you can get on with your life. It's very important that you tell the truth." (*Ibid.*) Appellant unequivocally continued to deny his involvement several more times. (*Ibid.*)

As appellant emotionally continued to emotionally deny his involvement, the police told him "you have to tell us what happened," to which appellant replied "I don't know what to tell you anymore because you won't believe me." (5th CT209) A few seconds later the following took place:

THEUR: You have to tell us that night. If you tell us the truth, what happened that night, why you did it , how you did it...

APPELLANT: I'm trying to tell you...

THEUR: ...then we'll get this over with. Well, look, we'll get it over with.

APPELLANT: I don't, I don't want it. I don't wanna. (5th CT 211.)

The police then once again attacked appellant's manhood, taunting him to "act like a man." (5th CT210.) Appellant again emotionally told the

police that he is a man and that he is not going to jail for something someone else did. (*Ibid.*)

By this time appellant was emotionally distraught, breathing heavily and panting. The police offered to give him a drink of water and again told him that he had to tell the truth. Appellant again denied involvement and then broke down into sobs. (5th CT211.) In spite of appellant's distraught condition, the police continue to press, informing appellant of the crime committed on Martin Luther King Day (Courtney and Hall) and asking him questions about where he was at the time of this crime. In spite of this lengthy interrogation, appellant continued to deny involvement in this crime as well. (5th CT212-227.)

Not having received what they wanted from appellant, the police once again fell back upon the tactic of making promises that if appellant confessed, it would be in his penal interest.

THEUR:	Now if you want to drag this poor school teacher through the muck of having to testify against you and going through all of that, and not face up to your responsibility and not be honest, I guess we can do that, we can go the hard way. That's that's fine, we can do that, but if you want to be a man about this then tell me what really happened. I think maybe we can get some results here. I think maybe I can help you out.
APPELLANT:	I, I told you what really happened...I, I get, I'm not going to lie, I mean you'll, you'll believe me

when...after everything's over.

THEUR: You know how many times that I, that I talk to people that try to deceive me, it happens every day I have people try to deceive me, and you have a good reason to try and deceive me, you really do. These are serious charges, I will not..., just listen to me for a minute, just listen. I won't deny that you're facing some serious charges here. I mean you really are. But, by your being honest with me and telling me what really happened here, and by saving us a whole lot of trouble down the line, we're going through the court processing, going through all of the garbage, you're going to save yourself because you're gonna, you know why, because you're gonna admit it, you're going to be able to get on with your life, you're gonna be able to put this behind you, but if we sit here and we drag this on through the courts for years or how long it takes to go through there, it's going to take forever to finally come to the end of all of this, then you start your sentence. See what I'm saying. I'm just saying be truthful with me, tell me what really happened. We can get this stuff, I can finally help you out here. But, I can't help you if you won't help yourself. If you won't be honest with me and tell me what happened, because I have physical evidence, I have witness statements, I have all of these things to show you're (sic) guilt here, and I want you to be honest with me, that's all. I want, be a man, own up to your responsibilities. That's all I'm asking. Two, two lousy incidents is all we're talking about here. Now, if we wanted to really get into it and get all those prowling incidents and stuff. I'm ....forgetting the prowling and all that , and all that prowling things, I just wanna know about the rape of that young lady and I wanna know about this last incident that happened Monday night. That's all I want to know, if you can just tell me what happened, the truth, we can get on with it, you can get on with your life.

APPELLANT: I'm telling you, my answer has not changed because I

didn't do it. (5th CT227-228)

The police then told appellant to take a break and to "kick back and relax" (5th CT228.) The police left the interrogation room but the tape machine was left on. After a long pause appellant began to talk to himself in a whispering voice.

APPELLANT: Oh my God, oh my God, (sigh) please God, don't let them do this to me. Don't let them destroy me like this. I'm telling them I didn't do it, make them believe me. What more can I say Lord, what more can I say my God, Please, please convince them, please help me, Lord. All the miracles you've done for me Lord help me. They're so hard headed Lord, they don't wanna believe anything, they don't wanna believe nothing, they don't wanna believe in you, they don't wanna believe in nothing, what are they like that, why? If I were to read a scripture for them out of the Bible, they wouldn't believe it. Oh my dear God, oh God. (5th CT229.)

After another long pause, appellant whispered "I grow weak." (5th

CT229.)

It was at this point that Detective Keers entered the interrogation room, introduced herself and began to take part in the interrogation.(5th CT229.) After another period of questioning about ninja weapons and training (5th CT127-130), Detective Keers told appellant that he is such a good ninja that she believes he can have out of body experiences (5th CT131.) In response to additional questioning, appellant stated that he had had a dream where he saw a man stabbing a woman. For several minutes, in response to questioning, appellant gave substantial details as to what he saw in this dream, details that corresponded in certain respects to the actual details of the Kenny killing. (5th CT132-143.)

The police then took another break and left the room with the tape machine running. Once again, a very upset appellant was heard to ask the Lord to help him. (5th CT143.) After the break, Detective Keers continued to question appellant about his dream. She also suggested to appellant that he had been abused in the past by "bad" and vicious women. (5th CT144-147.) Detective Keers finally dropped the pretense of being interested in appellant's dreams and accused him of committing the Kenny murder. (5th CT149.) Once again, appellant emotionally denied any involvement. (*Ibid.*) Detective Keers pressed on with more questions about appellant's dream.

(5th CT149-150.)

Detective Keers then asked appellant whether he ever imagined being someone else or having imaginary friends. Detective Keers also tried to ingratiate herself with appellant by suggesting that he really had a bad childhood, in part due to his mistreatment by women. (5th CT154-156) Detective Keers then turned the subject to appellant's religious beliefs, confirming that appellant would often talk to God to ask for forgiveness. (5th CT157-158.)

Detective Keers then suggested to appellant that the murder victim may have degraded him or in some way been responsible for her own murder. (5th CT158.) The detective then asked appellant whether he "wants forgiveness" and again appellant denied doing anything wrong. (*Ibid.*) Detective Keers then told appellant that she believed that he did rapes and "a lot of other things" and the reason why she was talking to appellant instead of just putting him in jail was because she knew he had been mistreated by "bitches" in the past. (5th CT160.) Once again, Detective Theur entreated appellant to let the police "help him". (*Ibid*) Appellant adamantly denied any culpability and told the police that he would continue to do so. (5th CT161.)

C. General Law of Voluntariness

The use in a criminal prosecution of a confession, admission or statement from the defendant which was obtained by fear, force, promise of leniency, or other psychological coercion is a denial of the protections of the Due Process Clause of both the federal and state constitutions. (*People v. Esqueda* (1993) 17 Cal.App.3d 1450,1484 citing to *Malloy v. Hogan* (1964) 378 U.S. 1, 7[84 S.Ct. 1489].) Convictions based upon such coercive police conduct cannot stand "not because such confessions are unlikely to be true but because the methods used to extract them offend an underlying principle in the enforcement of our criminal law; that ours is an accusatorial and not an inquisitorial system..." (*Rogers v. Richmond* (1961) 365 U.S. 534, 540-541[81 S.Ct. 735.]) A confession is considered voluntary "if and only if, it was, in fact, voluntarily made...a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion." (*Miranda v. Arizona, supra,* 384 U.S. at p 462.)

For any defendant's confession to be admissible it must have been made voluntarily and without coercion. (*Jackson v. Denno* (1964) 378 U.S. 368, 385[84 S.Ct. 1174.]; *People v. Benson* (1990) 52 Cal 3rd 754,778.) A confession is considered coerced if the defendant's will had been

overborne so that the statement was "not the product of the rational intellect and free will." (*People v. Sanchez* (1969) 70 Cal 2nd 562,572; *Blackburn v. Alabama* (1960) 361 U.S. 199, 208 [80 S.Ct. 274.]) Stated otherwise, defendant statements must be the product of defendant's free will and not the product of a will overborne by threats of physical force or psychological coercion. *(People v. Hinds* (1984) 154 CA 3d 222, 237.)

In making this determination of voluntariness, the court must look at "all of the surrounding circumstances, both the characteristics of the accused and the details of the interrogation." (*Schneckclothe v. Bustamonte* (1973) 412 U.S. 218, 226[93 S.Ct.2049] cited in *In re Shawn D.* (1993) 20 Cal.App. 4th 200, 208-209.) The characteristics of an accused that should be examined are his age, sophistication, emotional state and prior experience with the judicial system. (*Ibid.*) The details of the interrogation include threats or promises made to the defendant to induce his testimony, lies or other deceptions communicated to the defendant, threats to prosecute friends or family and intentional exploitation of a defendant's emotional state. *(People v. Esqueda* (1993) 17 Cal. App. 4th 1450, 1484-1487); *In re Shawn D., supra*, 20 Cal.App.4th at pp. 210-212.)

The analysis of the statement takes place according to the following general principle:

> Instead of isolated sentences and phrases, we must analyze the interview as a whole with its attendant circumstances to determine whether the confession was coerced by threats or false promises , or whether it was a product of the defendant's own volition in light of his then feelings and circumstances. (*People v Anderson* (1980) 101 CA 3rd 563, 579.)

The People have the burden of showing, by the preponderance of evidence, that the confession is voluntary. (*People v. Markham* (1989) 49 Cal 3rd 63.)

D. Application of the Law to the Instant Case

In the instant case, the police combined intense psychological pressure, repeated accusations, expressions that appellant was lying, coercive appeals to his "manhood," and most importantly, multiple direct and implied promises of leniency to extract from appellant the involuntary inculpatory statement about his "dream." Exacerbating this coercion, appellant's entire post-*Miranda* statement was tainted by the extraction of inculpatory statements from him prior to the *Miranda* warning. (See Argument III, *supra.*) The use of statements tainted by an earlier *Miranda* violation is a factor that argues against the voluntariness of any post-wavier statement. (See *People v. Esqueda* , *supra,* 17 Cal.App.4th 1450, 1484.)

Looking at the issue of voluntariness of appellant's statement through the "totality of circumstances" prism as is required by the above cited law, the overall picture is one of a recently arrested defendant, never given his *Miranda* rights until after the police extricated inculpatory statements about his martial arts and ninja activities. By the time the police saw fit to read appellant his rights, they had already established, out of appellant's own mouth, evidence of his possible involvement in the crimes.

However, this illegally obtained beachhead was simply the jumping off spot for further unconstitutional governmental coercion. The police embarked upon a pattern of accusing appellant of criminal acts, over and over again. Appellant met each accusation with an unequivocal denial. These accusations over an extended period of time took their toll on appellant who became distraught.

Failing to extricate further inculpatory statements, the police then resorted to challenging appellant's "manhood" telling him that if he were a real man he would "fess up." At the same time they stated that if appellant told them what "really" happened "it would make things go much better," implying that a confession would somehow lessen the penalty for the crimes. (5th CT207.) In addition, appellant was told that the victims of these crimes would undergo additional suffering if he did not end the matter by

confessing, even falsely suggesting that the DNA testing done on the victim would be physically painful. (5th CT208, 227.) This was followed up with the police again implying leniency with the statement that what appellant tells them "may not be as bad" as what the rape victim said and if he told the truth appellant "can get on with your life" and "we'll get this over with." (5th CT 209, 211.) In addition, the police told appellant over and over again that he "had to tell us what happened."(*Ibid.*) Appellant's candid comments when the police left him alone in the room makes it clear that these statements had their desired effect: to instill in appellant the belief that the police weere not going stop questioning him until they obtained a confession. (5th CT229.)

Any question as to the meaning of these implied promises was resolved by the subsequent direct promises of leniency given by the police to appellant if only he would "tell the truth." Having reduced appellant to sobs and still not having obtained the confession they sought, the police now directly told him if he would be a man and tell them what happened "I think maybe we can get some results here. I think maybe I can help you," repeating this several times. (5th CT227-228.) It was after these direct and unequivocal promises of leniency that Detective Keers entered the room and was able to extract appellant's statement about his dream.

Having failed to obtain a complete confession from appellant, the detectives seized upon appellant's religious beliefs to urge him to obtain forgiveness through his confession and implied that the whole situation was caused by appellant's mistreatment by "bad" and "vicious" women and "bitches" as a child. (5th CT 144-147,154-160.)

Setting aside the repeated aggressive questioning, refusal to take multiple denials for an answer, sending out the message that appellant "had to tell the truth" or the interrogation would not end, and exploiting what the police obviously knew was appellant's scarred childhood, the multiple promises of leniency, alone, are enough to render appellant's statement involuntary. The case law recognizes that the line between a permissible exhortation to tell the truth and an impermissible promise of leniency is often a fine one. Perhaps the best definition of how that line is to be drawn was reiterated in *People v. Cahill* (1994) 22 Cal App. 4th 296, 312 and originally stated in *People v. Hill*, supra, 66 Cal 2nd at 549:

> The line to be drawn between permissible police conduct and conduct deemed to induce or to tend to induce an involuntary statement does not depend on the bare language of the inducement but rather upon the nature of the benefit to be derived by a defendant if he speaks the truth, as represented by the police... When the benefit pointed out by the police to a suspect is merely that which flows naturally from a truthful and honest course of conduct, we can perceive nothing improper in such police activity. On the other hand , in

> addition to the foregoing benefit, or in the place thereof, the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible. The offer or promise of such benefit need not be expressed, but may be implied from equivocal language not otherwise made clear.

In the instant case, the police were not simply pointing out the "natural consequences of honesty" nor were their simply exhorting appellant to tell the truth for the truth's own sake. (*People v. Hill* (1967) 66 Cal.2d 536,549.) Nor were the authorities merely telling appellant that the truth would make him "feel better" in that the truth has salving properties of its own. (*People v. Jackson* (1980) 28 Cal. 3d 264,298-300.) Instead, the police told appellant that if he told the truth, they could get him "some results" and would be "able to help him" and he could "get on with his life." In essence, the police implied to appellant that he would be released and allowed to "get on with his life" if he told the police what they wanted to hear but would be prosecuted he did not. This is clearly impermissible. (See *In re J. Clyde K.* (1987) 192 Cal.App.3d 710,713-722.)

Further, the police suggested to appellant that all they really wanted was confessions to "two lousy" incidents, a rape and the January 18, 1993

crimes (5th CT 227-228), when they knew fully well that appellant was suspected of a capital murder. The clear import of this statement was that if appellant confessed to the "minor" crimes, there would be leniency for the other crimes. This is the same factual scenario disapproved of in *People v. Cahill, supra,* 22 Cal.App.4th at p. 312. It is after this particular ploy that appellant made his admissions about his dream to Detective Keers, indicating a direct connection between these promises and his admission.

The law does not require that these promises of leniency be formalized or set forth in plea bargain type language before they render a confession involuntary. Statements are deemed involuntary if obtained by "any direct or implied promises, however slight." (*Bram v. United States* ((1897) 168 U.S. 532,542-543.) The reason behind this venerated axiom of American jurisprudence is "not because the promise [of the police] was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them [is] too great to ignore and too difficult to assess." (*Brady v. United States* (1970) 397 U.S, 742,754.)

These direct and implied promises of leniency permeated the entire interrogation process. While sufficient to overbear appellant's will by themselves, the impact of these promises upon appellant could only have been exacerbated by the other coercive police behavior described above. (See *In re Shawn D.* (1993)

20 Cal.App.4th 200.)

In *Shawn D.*,the court made clear that the characteristics of the interviewee must be considered in determining whether the confession was a product of his free will.(*Id.* at p. 212-213 citing to (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at p. 226; *People v. Hogan*, *supra*, 31 Cal.3d at p. 841; *People v. Spears* (1991) 228 Cal.App.3d 1, 27-28.) At the time he was questioned, Shawn was 16 years old. He had prior contact with the police but was described as "unsophisticated" and "naive" in the probation report. He suffered from posttraumatic stress disorder. He had a difficult childhood which included witnessing his younger brother being hit and killed by a speeding car. His parents blamed him for the accident. (*Ibid.*)

The court took all of this into account in their decision to suppress Shawn's confession due to involuntariness. The factual situation is quite similar to the instant case. The police were apparently fully aware that appellant had a very troubled life. They made multiple references how the women in his life abused him and that they were "bitches." They preyed upon appellant's victimization by women to extract statements from him about his involvement in crimes against women. This is exactly the type of coercive conduct that has been condemned by this Court in that appellant's particular vulnerability was directly related to the police tactics. (*People v.*

Kelly (1990) 51 Cal. 3d 931, 989.)

The improper police conduct did not stop with the promises of leniency and exploitation of appellant's troubled past. They continually attacked his manhood, appealed to the concern he might have for the victims, exploited his religious beliefs, continued with the interrogation despite repeated emotional denials from appellant and lied about having evidence tying him to the crimes. This conduct is very similar to the conduct that the court of appeal deemed "outrageous" in *People v. Esqueda supra,* 17 Cal.App.4th at p. 1483-1487. In *Esqueda*, the court of appeals suppressed as involuntary a confession that was obtained by the police by pre-*Miranda* softening up, lies about inculpatory evidence that the police said they had in their possession, overt appeals to defendant's manhood and statements that implied that the police were not going to stop the interrogation until they got the statement they wanted. This myriad of coercive techniques only served to exacerbate the implied promises of leniency made to defendant. Influences brought to bear upon the accused were "such as to overbear [the defendant's] will to resist and bring about [statements or admissions] not freely self-determined. [Citation.]" *People v. Esqueda, supra,* 17 Cal.App.4th at 1483 citing to *People v. Hogan* (1982) 31 Cal.3d 815,841.)

From the illegal arrest, to Detective Keers' attempts to convince appellant that it was really the fault of the "bitches," the police did everything they could to break down the will of appellant and extract a involuntary confession from him. All of appellant's statements were involuntary and should be suppressed.

E. Appellant Suffered Prejudice by the Court's Failure to Suppress the Statements and the Judgement of Guilt Must Be Reversed

Appellant was substantially prejudiced by the violation of his right against self incrimination, to a fair trial, to due process of law, and to a reliable determination of guilt. Appellant's unconstitutionally admitted statements provided the greatest part of the evidence against him and thus convicted him out of his own mouth. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The remaining evidence of appellant's involvement in the instant crimes is extremely limited. Regarding the Kenny murder, the only evidence left to associate appellant with the crime are forensic test results that put him in a group of many thousands in the Riverside area that could have committed the crime and a few belatedly reported statements to civilians that even these civilians did

Appellant's last statement to the police was an invocation of his right to remain silent. By pressing forward in contravention of this invocation, the police violated appellant's right against self-incrimination pursuant to the Fifth and Fourteenth Amendments to the United States Constitution.

B. Discussion of the Law

As stated in *Miranda v. Arizona, supra,* 384 U.S. at 574, "Without the right to cut off questioning, the setting of an in-custody interrogation operates in the individual to overcome free choice in producing a statement after the privilege [against self incrimination] has been invoked." The interrogation must cease immediately upon invocation and the defendant right to cut off questioning must be "scrupulously honored." (*Michigan v. Mosely* (1975) 423 U.S. 96, 103-104.)

The People had the burden of demonstrating that the challenged confession meets the constitutional test of admissibility; and to contend as they do, that the refusal under the circumstances should not be considered an invocation of the privilege, they must affirmatively demonstrate that defendant "was not thereby indicating a desire to remain silent." (*People v. Randall* (1970) 1 Cal.3d 948, 957.)

This Court has held that "any words or conduct which 'reasonably appears inconsistent with the present willingness to discuss his case freely and completely with the police at that time' [citation omitted] must be held...an invocation." (*People v. Burton* (1971) 6 Cal.3d 375, 382.)

If defendant invocation of his right to remain silent is ambiguous, the police may continue questioning but only for the limited purpose of clarifying whether the defendant has indeed invoked his right to remain silent. However, they may not persist in repeated efforts to wear down [the defendant] and make him change his mind [about the invocation.](*People v. Peracchi* (2001) 86 Cal.App.4th 353, 360 citing to *Michigan v. Mosely, supra,* 423 U.S. at pp. 105-106.).\

C. Application of the Law to the Instant Case

Appellant's statement "I don't, I don't want it. I don't wanna." as stated above, and taken in the context of his entire statement (See Argument IV, *supra*) was at the very least an ambiguous invocation of his right to remain silent and a request to terminate the questioning. However, the police ignored this invocation. Instead of attempting to resolve any ambiguity, the police pressed on, ignoring appellant's apparent invocation to persist in their repeated attempts to wear down appellant as fully detailed

in Argument IV. These illegal attempts bore fruit in the extraction of appellant's statement about his "dream." (See Argument IV, *supra.*)

Therefore, the police conduct violated appellant's right against self incrimination pursuant to the Fifth and Fourteenth Amendments to the Untied States Constitution.

D. Defendant Suffered Prejudice Due to the Violation of His Constitutional Right to Remain Silent

The violation of appellant's constitutional right to remain silent led directly to his later statement about his "dream." The prejudice of the admission of this statement was fully discussed in Argument IV. Appellant respectfully incorporates said discussion into this Argument

ISSUES RELATED TO JANUARY 21, 1993, SEARCH WARRANT (ARGUMENTS VI-VIII)

VI. THE JANUARY 21, 1993 SEARCH WARRANT WAS ISSUED WITHOUT SUFFICIENT PROBABLE CAUSE THEREBY VIOLATING APPELLANT'S RIGHT AGAINST ILLEGAL SEARCH AND SEIZURE UNDER THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. Procedural and Factual History

On January 21, 1993, after the arrest of the appellant, a search warrant was issued for appellant's residence at 11832 Graham Street, Moreno Valley, California. The application for the warrant was accompanied by an affidavit by Detective Hector Heredia. (CT2203.) The warrant was executed on the date of its issuance and various items were seized . (see Statement of Facts pp. 41 er seq.)

Appellant claimed that the alleged probable cause was contained in paragraphs one, two and four of page nine of the affidavit. (CT2189, 2211.) The offer of probable cause consisted of affiant's declaration that on January 21, 1993, he received an anonymous phone call from "a citizen" (See Arguments II and III, *supra*) who stated that appellant was responsible for the "ninja" cases that had appeared in the newspaper.[20] The informant stated that appellant dressed as a "ninja" and "frequently traveled on foot between the Canyon Crest area of the City of Riverside and Moreno

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20 As stated in Argument II, *infra,* this informant was later identified as Ricardo Decker.

Valley." He also stated that he last saw appellant on January 17, 1993, dressed as a ninja and carrying a gun and a sword. The informant identified appellant as being slightly over six feet tall with a racial composition of "half black and half Japanese." (CT 2211.)

The affiant proceeded to state that on January 21, 1993, he received information from Detective Keers of the Riverside Police Department that she had been in contact with the person who had made the anonymous phone call to the affiant. Detective Keers indicated to affiant that this individual was an adult and appeared "to be a responsible and credible person" and was "neither in custody nor a suspect." Further, Detective Keers related that the informant was appellant's fellow employee who saw appellant in a "ninja" uniform while at work. She also conveyed to the affiant that the informant told her the appellant related that he had "recently stabbed someone."(CT2211.)

The affiant then indicated that after receiving the above information, he interviewed appellant at the Riverside Police Department. The affiant stated that appellant informed him that he lived at 11832 Graham Street and that he did possess a "ninja" uniform and a "sword, 'ninja' dart and homemade throwing stars." (CT2211)

On September 24, 1996, appellant filed his Motion to Quash

Warrant and to Suppress Evidence Under Penal Code Section 1538.5. (CT 2187.) The gravamen of appellant's motion was that the warrant was defective in that the affidavit in its support did not contain probable cause for its issuance because the informant who provided the information to the police was not reliable. It was appellant's position that the phone call from the informant was an uncorroborated tip and the affidavit did not supply facts sufficient to permit a neutral magistrate to determine whether or not the informant was truly a "citizen informant," thereby worthy of belief without additional corroboration. (CT 2190-94, PRT1501 et seq; Argument II, *supra.*)

In addition to the above argument, appellant argued that appellant's statement related in the affidavit could not be used to establish probable cause it was the fruit of the arrest of appellant which was without probable cause. (CT 2196; see Argument II ,*supra.*)

The prosecution responded that because appellant had failed to establish standing, the motion should be denied. It further claimed that there was sufficient probable cause based upon the information given by the informant to justify the issuance of the warrant. (CT2298-2299.) The prosecution further requested that before reaching a final decision on this motion, the court hold a hearing to determine the validity of appellant's

arrest, which the prosecution claimed was valid, as well. Finally, the prosecution stated that even if there was no probable cause for issuance of the warrant, the "good faith exception" of *United States v. Leon* (1983) 468 U.S. 897 would apply and validate the warrant. (CT2300-2301.)

On October 10, 1996, the court heard the motion. While indicating that it was a "close case" as to whether the warrant should be quashed, the court made a tentative ruling, pending the hearing on the motion to suppress. (PRT1516-1517.) The court subsequently denied both motions on January 16, 1997, stating that the informant was "citizen informant," therefore, there was sufficient probable cause for the issuance of the warrant. (PRT1603-1604.) The trial court also ruled that appellant lacked standing to challenge the warrant. (PRT1605-1611.)

B. Appellant Had Standing to Contest the Legality of the Warrant.

Under the Fourth Amendment to the United States Constitution, people are protected from unreasonable governmental intrusions into areas where there are legitimate expectations of privacy. (*United States v. Chadwick* (1977) 433 U.S. 1, 7.) The Fourth Amendment "pointedly guards" against police intrusion into persons' homes. (*People v. Thompson* (1996) 43 Cal. App. 4th 1265,1269; *People v. Ybarra* (1991) 233 Cal.App.3d

1353,1360.) The definition of "home" for Fourth Amendment purposes extends to all residences, rooms in boarding houses. (*McDonald v. United States* (1948) 335 U.S. 451,452-455[69 S.Ct. 191.])

In determining whether a defendant has standing to contest a search, the foundational question is whether the defendant has a legitimate expectation of privacy in the place invaded. (*United States v. Salvucci* (1980) 448 U.S. 83, 92-93 [100 S.Ct. 2547]; *Rakas v. Illinois* (1978) 439 U.S. 122, 134[99 S.Ct. 421].) A defendant has the burden to show that he indeed does have that expectation of privacy. (*People v. Ybarra , supra,* 233 Cal.App.3d at p. 1360; *People v. Thompson, supra,* 43 Cal.App. 4th 1270.) The factors to be considered in making the determination of the legitimacy of the expectation of privacy are whether a defendant has the right to exclude others from the place that was searched; whether he had a property or item seized; whether he showed a subjective expectation that the area searched would remain free from governmental intrusion; whether he was legitimately on the premises that were searched; and whether the individual took normal precautions to maintain his privacy. (*People v. Thompson, supra,* 43 Cal.App. 4th 1269-1270 citing to *Rawlings v. Kentucky* (1980) 448 U.S. 96,104 [100 S.Ct. 2556.].) Stated more succinctly, the question whether the individual "[has] an expectation that

society is prepared to recognize as reasonable." (*People v. Thomas* (1995) 38 Cal.App. 4th 1331,1334; *People v. Camacho* (2000) 23 Cal.4th 824,831; *Kyllo v. United States* (2001) 533 U.S. 27, 33.)

Using the above criteria to determine the legitimacy of appellant's expectation of privacy, it is manifestly clear that he did indeed have a expectation of privacy in the place that was searched. There was no question that appellant resided at the Graham Street residence. This fact was proved by the affiant's own sworn statement. (CT2211.) The fact that others may have shared the premises with him does not strip him of his Fourth Amendment rights against illegal police intrusion. (*McDonald v. United States, supra,* 335 U.S. at pp. 452-455.)

The case law makes clear that a defendant does not have to meet any stringent test of ownership or even leasehold before society is prepared to recognize his expectation of privacy. Even in the case where there is a restraining order preventing a defendant from staying on a certain premises, if he had the right to leave his property on the premises pursuant to a rental agreement he still retained certain possessory rights, and therefore had standing to challenge the search. (*People v. Thompson, supra*, 27 Cal.3d at p. 338.) Further, as long as a lodger pays his rent for his hotel room, he has a legitimate expectation of privacy from police intrusions in that room.

(*People v. Satz* (1998) 61 Cal.App. 4th 322; see *United States v. Allen* (6th Cir. 1997) 106 F.3d 695,699.)

In the instant case, in the preliminary hearing transcript Detective Keers swore under oath that the premises searched was appellant's residence. (CT62-63, 217.) She also stated that many of the items seized, such as newspaper articles, the obituary notice, and identifying information belonging to Mr. Chidley and Ms. Multari, were found in appellant's bedroom. Further, they were found in places where appellant would have every expectation of privacy such as his textbooks and briefcase. (CT63-63, 181-182.) There was further evidence from the person that shared the bedroom with appellant that the above items seized were not this person's nor was the briefcase in which the Multari and Chidley identification were found. (CT254-256.)

For the trial court to state that appellant did not meet his burden to establish standing is simply incorrect. There is no case that holds that a defendant must affirmatively call witnesses to establish standing. The prosecution never suggested that appellant did not have a reasonable expectation in the premises searched. It only rested on a non-existent procedural rule that appellant had to call a witness to establish standing. Based upon the preliminary hearing testimony and the warrant and

affidavit, it is indisputable that appellant had standing to contest the search.

C. The Affidavit to the Search Warrant Lacked Probable Cause in that there was No Information in the Warrant that Would Lead a Neutral and Detached Magistrate to Conclude that the Informant Was Reliable

The United States Constitution and the statutes forbid the issuance of a warrant "except on probable cause." In *People v. Cook* (1978) 22 Cal.3d 67, 84, this Court restated the standard of such probable cause as follows: for the purpose of issuing a search warrant the standard of probable cause is "whether the affidavit states facts that make it substantially probable that there is specific property lawfully subject to seizure presently located in the particular place for which the warrant is sought." (See also *Illinois v. Gates* (1983) 462 U.S. 213 [103 S.Ct. 2317].)

Probable cause is a particularized suspicion based upon facts that "would lead a man of ordinary caution ... to entertain a strong suspicion that the object of the search is in the particular place to be searched." (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564, *People v. Tuadles* (1992) 7 Cal.App.4th 1777, 1783.) There must be a fair probability that the property specifically sought would be found in the particular place described in the warrant. (*People v. Ramirez* (1984) 162 Cal.App.3d 70,74.)

For the information contained in the affidavit to be sufficient for a neutral magistrate to reach a determination of the existence of probable cause, it naturally must be reliable. The prosecution claimed that the informant referenced in the warrant was a "citizen-informant, therefore presumptively reliable." (CT2269 et seq.)

There is nothing in the affidavit from which a neutral magistrate can determine that the informant qualified as a "citizen-informant" and therefore reliable. (See Argument II, *supra.*) The information provided by the informant is contained in the first and second paragraphs of page 9 of the affidavit. (CT 2211.) The only information related in the affidavit concerning the informant consists of the fact that Detective Heredia received an anonymous phone call from an individual who said he knew the individual responsible for the twenty-nine separate ninja cases listed in the affidavit. This individual gave Detective Heredia a very general physical description of the individual he identified as David Scott, stating that this individual dressed like a ninja and carried certain ninja weapons. (CT 2211 paragraph 1.)

The affiant also indicated that he had spoken to Detective Keers who had just interviewed this informant. She indicated to the affiant that the informant "appeared to be a responsible and credible person" who was

"neither in custody, nor a suspect." Detective Keers further stated to affiant that the informant spoke to appellant on January 17, 1993 and that appellant informed him that "he had recently stabbed someone." (CT2211.)

Other than the unverified, subjective and conclusory police statements that the informant "appeared" reliable, there are no objective circumstances set forth that would lead a neutral magistrate to believe that the informant was indeed a reliable citizen informant. Unverified information from an untested or unreliable informant is generally unreliable and does not establish probable cause unless "it is corroborated in essential respects by the facts, sources or circumstances." (*People v. Gottfried* (2003) 107 Cal.App.4th 254,263-264; *People v. Fein, supra,* 4 Cal.3d at 752. *People v. Maestas* (1988) 204 Cal. App.3d 1208,1220.)

The only concrete information provided by the informant as to any specific crime was that a few days prior to the anonymous tip, appellant confessed to the informant that he had recently stabbed somebody. However, there was no information contained in the affidavit that even suggests that such a "stabbing" took place. Further, there is no information contained in the affidavit that indicated that the informant observed any sort of crime committed by appellant. In addition, while there was some mention of appellant having a gun in his possession, there was no verifying

information as to what type of gun the informant saw, nor was there any additional information as to how the informant reached the conclusion that it was a real gun and not simply part of a costume.

In summary, there was no proof that the informant was a citizen informant under the above law. Further, the affidavit presents unconfirmed, unverified, uncorroborated information that was at least in part wrong in a very material sense. Therefore, all of the property seized at the Graham Street residence should be suppressed.

D. The Good Faith Exception of *United States v. Leon* Does Not Apply

In *United States v. Leon* (1983) 468 U.S. 897, 919[104 S.Ct. 3405]), the Supreme Court held that the evidence cannot be suppressed if the police officer executing the warrant relies in good faith on said warrant which was issued by a neutral magistrate even though the warrant is later determined to invalid. "Application of the good faith exception requires a factual presentation of the officers' activity, which is then measured against a standard of objective reasonableness."(*People v. Gottfried, supra,* 107 Cal.App.4th at p. 265 citing to *Higgason v. Superior Court* (1985) 170 Cal.App.3d 929, 944.)

However, this objective standard requires that the executing officers have "a reasonable knowledge of what the law prohibits." (*Leon, supra* at 923) In this vein, "any rookie officer knows uncorroborated, unknown tipsters cannot provide probable cause for an arrest or search warrant." (*Higgason v. Superior Court, supra,* 170 Cal.App.3d at p. 944.) Further, "where...neither the veracity nor the basis of the knowledge of the informant is directly established, the information is not so detailed as to be self-verifying and there is no logical or other reason verification from other sources cannot be achieved, ... the failure to corroborate may be indicative that it was objectively unreasonable for the officer to believe in the existence of probable cause." (*People v. Maestras*, supra, 204 Cal.App. 3d at pp. 1220-1221; *People v. Johnson* (1990) 220 Cal.App.3d 742, 749.)

In the instant case, there was no corroboration that the informant, Ricardo Decker, was reliable. His information was not verified by independent sources. He did not witness the commission of any crimes and did not in any way explain his allegation that appellant was responsible for the "ninja crimes that were in the paper." All the executing officer, Detective Heredia, knew was that Decker stated that he saw appellant dressed as ninja and that appellant allegedly told him that he "recently stabbed somebody." However, there was no information in the affidavit

that indicated that the police had information that there had been a "recent" stabbing. This should have led Heredia to question the reliability of the informant. Further, Detective Heredia was in possession of information that Decker gave inconsistent statements regarding a "dream" that appellant said he had about the murder. (See Argument VI *infra.*) Therefore, Detective Heredia should have been even more aware that Decker was not a reliable informant.

Therefore, it was incumbent upon Detective Heredia to corroborate Decker's allegation and his failure to do so made it "objectively unreasonable for [him] to believe in the existence of probable cause." As such, the good faith exception does not apply.

E. Appellant Was Prejudiced by the Trial Court's Failure to Suppress the Evidence Seized Via the Illegal Search Warrant

Appellant was substantially prejudiced by the violation of his right against unreasonable search and seizure, to a fair trial, to due process of law, and to a reliable determination of guilt pursuant to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The evidence seized in the execution of the illegal warrant tied appellant

directly to several of the charged crimes. Without the admission of this evidence, the only evidence against appellant in the murder count would be his own unreliable admissions (See Argument III and IV, *supra*) and a few remarks made to Kenya Starr and Stephanie Compton. Ms. Starr found appellant's remarks to be unworthy of belief and did report them to the police. (RT5556-5558.) The statement made to Ms. Compton was ambiguous and certainly did not amount to an admission of guilt to any offense. (RT5320 et seq.)

A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Due to the importance of this illegally seized evidence, the error cannot be considered harmless.

This entire judgement must be reversed.

VII. THE TRIAL COURT COMMITTED PREJUDICIAL ERROR BY FAILING TO ORDER A HEARING TO TRAVERSE THE SEARCH WARRANT PURSUANT TO *FRANKS V. DELAWARE* IN VIOLATION OF APPELLANT'S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE, RIGHT TO DUE PROCESS, RIGHT TO A FAIR TRIAL AND RIGHT TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Procedural and Factual History

On September 24, 1996, appellant filed his Motion to Traverse Warrant and to Suppress Evidence under Penal Code section 1538.5. Appellant claimed that the police withheld material information from the magistrate who issued the January 21, 1993 warrant. Specifically, the warrant affidavit mentioned nothing about the citizen informant's knowledge about appellant's "dream" about the murder of Brenda Kenny. Appellant alleged that no such mention was made of this significant fact because, in relating to the police what he knew about this "dream", the informant "contradicted himself in a way that undermines the reliability of everything that he told the police." (CT2167.) Appellant further alleged that "Had the issuing magistrate been informed [of these contradictions], he would have had serious cause to doubt the veracity/reliability of the unnamed person [the informant] whose information was essential to a

finding of probable cause for the issuance of the warrant." (CT2167)

Specifically, in his phone tip to Detective Heredia, the informant claimed that appellant himself had told him about the dream. However, in his interview with Detective Keers, the informant stated that appellant had related the story about his dream to Stephanie Compton who then related it to the informant. (CT2167)

In their opposition to the motion, the prosecution argued that appellant had not established standing. (CT2289.) In addition, the prosecution maintained that appellant did not offer specific proof that the affiant made statements which were deliberately false or made with reckless disregard to the truth, and that without such a showing, appellant is not entitled to a hearing on his motion.(*Ibid.*)

On October 15, 1996, the trial court ruled that defendant had no standing to challenge the warrant in that he did not prove that he had a reasonable expectation of privacy in the premises searched. In addition, the court denied the motion to traverse on the merits, indicating that the discrepancies in the two different statements of the informant were not material omissions. (CT2277, PRT1628.)

B. Appellant Had Standing to Contest the Warrant

This issue of standing was fully discussed in AOB Argument V, section B,

supra.

C. The Law of *Franks v. Delaware*

According to the United States Supreme Court,

> [W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit. (*Franks v. Delaware* (1978) 438 U.S. 154, 155-156[98 S.Ct. 2674.])

The High Court proceeded to state, "There is...a presumption of validity with respect to the affidavit supporting the search warrant. To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof."(*Franks, supra.* at p171.) Further "[t]he deliberate falsity or reckless disregard whose impeachment is permitted ...is only that of the

affiant, not of any non-governmental informant." (*Ibid.*)

Omissions of fact must be deemed material if there is a substantial possibility that the omission would have altered a reasonable magistrate's probable cause determination. (*People v. Kurland* (1980) 28 Cal.3d 376, 385.) A reviewing court must add to the affidavit any intentional or reckless omissions and re-evaluate the determination of probable cause. (*People v. Maestas* (1988) 204 Cal.App.3d 1208,1216; *People v. Sousa* (1993) 18 Cal.App.4th 549, 562.) Evidence obtained pursuant to a search warrant must be suppressed if the affidavit, supplemented by the omissions, would not be sufficient to support a finding of probable cause. (*United States v. Stanert* (9th Cir. 1985) 762 F.2d 775, 782.)

D. Application of the Law to Instant Case

Decker's contradictory statements as to how he became aware of appellant's "dream" clearly alerted the affiant to the fact that Decker's credibility was seriously in question. However, the affiant omitted this material fact from the affidavit. As stated above, omissions of fact must be deemed material if there is a substantial possibility that the omission would have altered a reasonable magistrate's probable cause determination.

(*People v. Kurland, supra* 28 Cal.3d at p. 385.) Evidence obtained pursuant to a search warrant must be suppressed if the affidavit, supplemented by the omissions, would not be sufficient to support a finding of probable cause. (*United States v. Stanert , supra,* 762 F.2d at p. 382.) The inclusion of this discrepancy would have destroyed the informant's credibility, therefore eliminating the probable cause for the issuance of the warrant.

Decker's credibility was the critical factor in determining probable cause for the issuance of the warrant. He was an untested informant, who provided unverified information that was "not corroborated in essential respects by the facts, sources or circumstances." (*People v. Fein* (1971) 4 Cal.3d. 747, 752; see Argument II, *supra.*) Further, the information from Decker was virtually the sole basis for the issuance of the warrant. (See Argument V, *supra.*) Decker's mutually exclusive stories as to how he obtained the information that supported the affidavit would have directly undermined the credibility of all the information he provided to the police that formed the basis for the issuance of the warrant. Therefore, the magistrate should have been informed of this information and failure to do so was either a deliberate falsehood or reckless disregard of the truth.

Therefore, the trial court erred in stating that the discrepancies in the informant's statements to the police were immaterial and in denying

appellant a hearing to attempt to traverse the warrant under the law of *Franks*.

E. Appellant Was Prejudiced by the Trial Court's Failure to Suppress the Evidence Seized Via the Illegal Search Warrant

Appellant was substantially prejudiced by the violation of his right against unreasonable search and seizure, to a fair trial, to due process of law, and to a reliable determination of guilt and penalty pursuant to the Fourth, Fifth, Sixth , Eighth, and Fourteenth Amendments to the United States Constitution. The evidence seized under the illegal warrant tied appellant directly into several of the charged crimes. Without the admission of this evidence, the only evidence against appellant would be his own unreliable admissions and statements. (See Arguments III and IV, *supra.*) A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Due to the importance of this illegally seized evidence, the error cannot be considered harmless.

This entire judgement must be reversed.

VIII. THERE WERE NO SPECIFIC FACTS IN THE WARRANT AFFIDAVIT TO ESTABLISH PROBABLE CAUSE FOR THE SEIZURE OF IDENTIFICATION MATERIAL OF REGINA MULTARI-JOHNSON AND JOSEPH CHIDLEY, THEREFORE THE FAILURE TO SUPPRESS THIS MATERIAL VIOLATED APPELLANT'S RIGHT AGAINST UNREASONABLE SEARCH AND SEIZURE, TO DUE PROCESS OF LAW, TO A FAIR TRIAL, AND TO A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

A. Procedural and Factual History

The warrant authorized seizure of a number of items to which the affidavit made no reference. These items included the paramedic card in the name of Joseph Chidley and mail that belonged to Regina Johnson. (CT 2516.) Both items were introduced at the trial. (RT5031,5130.)

On December 11, 1996, appellant filed a Motion to Suppress Evidence Under Penal Code section 1538.5. The gravamen of the motion was that the affidavit in support of the warrant to search appellant's residence did not set forth probable cause for the seizure of certain items seized. Therefore, the warrant was overbroad as to these items and they should be suppressed as evidence. (CT2509 et seq.) After a hearing, the trial court denied the motion, finding that probable cause did exist. (RT1905.)

B. General Law

Both the federal constitution and California statutes forbid the issuance of a warrant "except on probable cause." In *People v. Cook* (1978) 22 Cal.3d 67, 84, this Court said that for the purpose of issuing a search warrant, the standard of probable cause is "whether the affidavit [1] states facts [2] that make it substantially probable [3] that there is specific property [4] lawfully subject to seizure [5] presently located [6] in the particular place for which the warrant is sought."

This Court has held that, "The first of these requirements is a precondition of all the others, and has been separately codified in our statutes: 'The affidavit or affidavits must set forth the facts tending to establish the grounds of the application, or probable cause for believing that they exist.'" (*People v. Franks* (1985) 38 Cal.3d 711,727 citing to Pen. Code, § 1527; see *Thompson v. Superior Court* (1977) 70 Cal.App.3d 101, 110; *Griffin v. Superior Court* (1972) 26 Cal.App.3d 672, 694; *Burrows v. Superior Court* (1975) 13 Cal.3d 238.)

Probable cause is considered "facts that would lead a man of ordinary caution ... to entertain a strong suspicion that the object of the search is in the particular place to be searched." (*Wimberly v. Superior Court* (1976) 16 Cal.3d 557, 564; *People v Tuadle, supra,* 7 Cal. App. 4th 1777, 1783.)

Stated otherwise, there must be a fair probability that the property specifically sought would be found in the particular place described in the warrant. (*People v. Ramirez* (1984) 162 Cal.App.3d 70,74; *see Illinois v. Gates, supra,* 462 U.S. at p. 233.)

C. Application of General Law to the Instant Case

There are no facts in the affidavit to lead a neutral magistrate to believe that these two specific items would be found at appellant's residence. Nowhere in the affidavit was there any mention of either Joseph Childley or Regina Johnson. While the affidavit lists 29 separate possible crimes for which this "ninja" prowler might be responsible, there are no facts contained the affidavit that would lead the neutral magistrate to believe that either Mr. Chidley or Ms. Johnson were the victims of any of these 29 crimes.

The trial court held that the magistrate was correct in inferring from the affidavit the existence of these two items at the Graham Street residence. (RT1904.) The court was incorrect. There was no mention of these two victims in the affidavit. The only way to ascertain whether they were indeed the victims of any of the 29 crimes set forth in the affidavit, hence whether their property could conceivably be found in appellant's

residence, would be to go outside of the four corners of the affidavit to the indictment, preliminary hearing and/or other documentation to obtain the knowledge necessary to make this connection. Neither the preliminary hearing nor the indictment even existed at the time of the issuance of the warrant.

The facts upon which the magistrate bases his probable cause determination must appear within the four corners of the warrant affidavit; the warrant cannot be supported by outside information. (*U.S. v Rubio* (9th Cir.1983) 727 F.2d 786,795.) The four corners of the warrant affidavit simply did not provide the information necessary for the magistrate to reasonably reach the requisite belief that these two items would be at appellant's residence.

In reviewing the issuance of a search warrant the reviewing court is only asked to decide is whether the magistrate acted properly. (*Jones v. United States* (1960) 362 U.S. 257, 271-272 [80 S.Ct. 725], overruled on other grounds in *United States v. Salvucci* (1980) 448 U.S. 83, 84 100 S.Ct. 2547].) There was no probable cause within the four corners of the affidavit from which the magistrate could find probable cause for these two items. Therefore, the issuance of the warrant for these particular items was without probable cause and the failure to suppress these items by the

superior court constituted a violation of appellant's right against unlawful search and seizure, to due process of law, to a fair trial ,and to a reliable determination of guilt under the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

D. Appellant Was Prejudiced by the Trial Court's Failure to Suppress the Evidence Seized Via the Illegal Search Warrant

Appellant was substantially prejudiced by the violation of his right against unreasonable search and seizure, to a fair trial, to due process of law, and to a reliable determination of guilt, pursuant to the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution. The unconstitutionally admitted evidence tied appellant directly to the scene of two of the charged crimes. Given the prosecution's theory that all the crimes were committed by the same person, the illegally seized and admitted evidence had the effect of tying him to all of the charged crimes, including the capital count.

A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Considering the highly probative, and prejudicial nature, of the evidence in question, the error cannot be considered harmless.

This entire judgement must be reversed.

IX. THERE WAS INSUFFICIENT EVIDENCE FOR A TRUE FINDING OF THE SPECIAL CIRCUMSTANCE OF MURDER COMMITTED DURING THE COMMISSION OF A RAPE OR AN ATTEMPTED RAPE; THUS THE FINDING VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A RELIABLE DETERMINATION OF PENALTY UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION

A. General Law of Sufficiency of Evidence

When the sufficiency of evidence of a given count is challenged on appeal, the reviewing court reviews the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence, that is evidence that is reasonable, credible and of solid value, from which a reasonable trier of fact could find that the defendant is guilty beyond a reasonable doubt. (*People v. Welch* (1999) 20 Cal.4th 701,758.) In the support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence, including reasonable inferences based upon the evidence but excluding inferences based upon speculation and conjecture, is presumed. (*People v. Tran* (1996) 47 Cal.App. 4th 759,771-772.) When the reviewing court determines that no reasonable trier of fact could have found the defendant guilty, it must

afford the appellant relief. (*People v. Guiton* (1993) 4 Cal.4th 1116,1126-1127.)

The Due Process Clause of the United States Constitution requires "proof beyond a reasonable doubt of every fact necessary to constitute the crime with which[the defendant] is charged." (*In re Winship* (1970) 397 U.S. 358, 364, 90 S.Ct. 1068.) The federal standard for sufficiency of evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319, 99 S.Ct. 2781.)

B. Specific Law as to Sufficiency of Evidence as to the Special Circumstance

Appellant was not charged with the crime of rape pursuant to Penal Code section 261. However, one of the special circumstances that made Count I punishable by the death penalty was that the murder was committed in the course of a rape or attempted rape. (Penal Code section 190.2 (a) (17) (c).)[21] As such, the prosecutor was required to present

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21.Penal Code section 190.2 (a) (17) (c) reads "The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing or attempting to commit...rape."

sufficient evidence under the above-described standard to permit the jury to conclude beyond a reasonable doubt that appellant committed a rape or an attempted rape. (Penal Code section 190.4 (a).)

Rape is a general intent offense (*People v. Osband* (1996) 13 Cal.4th 622,685) and is defined as "an act of sexual intercourse accomplished with a person not the spouse of the perpetrator...where is it accomplished against a person by means of force, violence, duress, menace, or fear of immediate unlawful bodily injury on the person or another." (Penal Code section 261 subd. (a) (2).)

The crime of rape requires penetration, no matter how slight. (*People v. Ray* (1960) 187 Cal.App. 2d 182, 189.) The crime of attempted rape requires an ineffectual attempt of penetration. (*People v. Marshall* (1997) 15 Cal.4th 1, 36.) Therefore, to prove the special circumstance that the murder was committed in the course of a rape, it is necessary to prove the element of penetration.

Like any other crime, the elements of rape need not be proven by direct testimony from the victim. Evidence of penetration may be circumstantial. However, the jury's power to make such inferences of guilt is limited by the parameters of reasonableness. In *People v. Williamson*

(1984) 161 Cal.App. 3d 336, the victim testified that she was raped by defendant. However, her statements were internally inconsistent and there was substantial proof as to her bias against defendant and other indicia of her lack of credibility. Further there were no signs of rape--no bruising, no semen or other signs of violence that logically had to be present considering the victim's testimony. The court of appeal ruled that there was insufficient evidence to sustain defendant's conviction in that no reasonable trier of fact could have found defendant guilty beyond a reasonable doubt.

This is not to say that element of penetration cannot be found circumstantially. (*People v. Holt* (1997) 15 Cal.4th 619, 668-669 (evidence of redness in vaginal area in absence of an infection that might account for it); *People v. Gibbs* (1983) 145 Cal. App. 3d 794 (testimony from the victim that before she lost consciousness the defendant attacked her, fondled her against her will and climbed on top of her. When she regained consciousness, she experienced severe pain in her vagina.)

There was no evidence that Ms. Kenny was raped. There was absolutely no indication from the pathologist who performed the autopsy, nor from any other witness, that there was any evidence of intercourse on Ms. Kenny's person. There was no sign of trauma to her private areas, nor

was there any indication that the assailant attempted to remove her clothes. When Ms. Kenny's body was found she was wearing the same clothes that she had been wearing when her parents last saw her, two days before the discovery of her body. (RT5248.) There was no seminal fluid anywhere on her body. The only evidence of any sexual activity was the ejaculate found on her pants.

Unlike in the cases cited above, there was no circumstantial evidence that penetration occurred. That semen was found on clothes that the victim had been wearing the day before her murder does not lend itself to an inference of penetration. In fact, the only logical and reasonable inference can be that the victim's clothes were never removed at all, making vaginal penetration impossible.

Further, there was no evidence that appellant even attempted to rape the victim. As a general proposition, the inchoate crime of attempt has two elements: the intent to commit a crime and a direct but ineffectual act toward its commission. (*People v. Carpenter* (1997) 15 Cal 4th 312, 387.) Stated otherwise, the act "must not be mere preparation but must be a direct movement after the preparation that would have accomplished the crime if not frustrated by extraneous circumstances." (*Ibid.* citing to *People v Memro* (1985) 38 Cal.3d 658, 698.) Therefore, as rape requires penetration,

attempted rape must include an attempt to penetrate the victim, coupled with an act, albeit ineffectual, toward the commission of penetration. (*People v. Marshall, supra,* 15 Cal.4th at p.36; *People v. Ray, supra,* 187 Cal.App. 2d at p. 189.) This ineffectual act must "reach far enough toward the accomplishment of the desired result to amount to the commencement of the consummation." (*People v. Miller* (1935) 2 Cal.2d 527,530.)

Intent to commit the rape may be inferred from the circumstances. "Whenever the design of a person is clearly shown, slight acts done in furtherance of that design will constitute an attempt." (*People v. Fratiano* (1955) 132 Cal.App. 2d 610,627.) In the instant case, there was no reasonable inference that could be drawn by the jury that appellant attempted to penetrate Ms. Kenny. There was no statement by appellant that would allow for an inference that he intended to rape the victim. Further, there was no circumstantial evidence at the scene that rape was the intended offense. The only evidence that even suggested a sexual crime was the ejaculate found on Ms. Kenny's pants. Further, there was no evidence that Ms. Kenny's clothes had been taken off and put back on, nor that any attempt was made to remove them as the stained pants were the ones that the victim wore home from her mother's house on September 10, 1992. The only reasonable inference that can be drawn from these facts is

that there was no attempt at penetration, therefore no attempted rape.

Even discounting the legally improper joinder, factually, there is little in common to connect the rapes of Ms. Johnson and Mrs. Chidley. The prosecutor argued that the rape of Ms. Kenny could be proven because in the two other rape cases the appellant did not ejaculate inside the victim but outside of her and then had them put their clothes back on. This is factually incorrect. Both Ms. Chidley and Ms. Johnson were penetrated. (RT4954-4956, RT4974-4976, RT5220-5221.) Further, in both of these cases, the perpetrator made an attempt to dispose of any semen stains.(RT4956, RT5122, 5150-5152.) There was no such evidence in the Kenny count. Ultimately, there was no attempt to harm the other two victims, whereas Ms. Kenny was murdered.

Therefore, there was insufficient evidence to find the allegation of special circumstances rape to be true.

C. Appellant Was Prejudiced By the Jury's Consideration of this Invalid Aggravating Factor

In California, aggravating factors play a specified role in the jury's penalty decision in that the jury decides the penalty by formally weighing aggravating and mitigating factors. (Penal Code section 190.3.) Therefore, California is a "weighing" state. Where the jury considers invalid

aggravating factors in a weighing state and puts invalid factors on death's side of the scale, Eighth Amendment error has occurred. (*Sochor v. Florida* (1992) 504 U.S. 527, 532, [112 S.Ct. 2114].) Even when other valid aggravating factors exist, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." (*Clemons v. Mississippi* (1990) 494 U.S. 738, 752, [110 S.Ct. 1441].)

The invalid special-circumstance was the driving force behind the death verdict. The jury was told that they could consider it as a factor in aggravation. (CT6519.) Although there was an additional special circumstance that would have qualified appellant for the death penalty, the emphasis of prosecution as to the rape (RT6065 et seq) and the egregious nature of a rape special circumstance, itself, tipped the balance of the weighing process toward death. This improper consideration had a "substantial and injurious effect or influence" on the jury's verdict of death. (*Brecht v. Abrahamson* (1993) 507 U.S. 619, 113 S.Ct. 1712.). Therefore the death penalty should be reversed.

X. THE ADMISSION OF EVIDENCE THAT NON-TESTIFYING DEFENSE EXPERTS EXAMINED THE BALLISTICS AND SHOE-PRINT EVIDENCE VIOLATED APPELLANT'S RIGHT TO A FAIR TRIAL AND TO THE ASSISTANCE OF COUNSEL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of Argument

The jury was allowed to hear that a defense ballistics expert examined the bullet and shoe print casts that were recovered from the scene of the Courtney crimes (Counts XX, XXII.) This in turn allowed the improper inference that the defense expert agreed with the prosecution that the bullet was fired from the gun that was found at appellant's residence (P-1) and the shoe prints found matched the tabbie boots (P-12) found in appellant's residence. This testimony of the government witness violated appellant's right to assistance of counsel and to a fair trial in that it improperly revealed defense work product to the jury. Further, this evidence was irrelevant and prejudiced appellant by unfairly bolstering the credibility of the prosecution expert's testimony in two vital areas of the case.

B. Factual Summary

1. Ballistics Evidence

Terry Fickies, a firearms examiner for the California Department of Justice, examined the gun recovered from appellant's residence (P-1). He described AS a .45 caliber semiautomatic, in working order, with normal trigger pressure. (RT 4844,4848) The gun's clip had the capacity for seven bullets, with capacity for one more in the chamber. (RT4851.)

Mr. Fickies testified that he received the bullet fired into the doorjamb during the assault on Phillip Courtney and Howard Long (P-34). (RT4853.) He did a comparison test to ascertain whether that bullet was fired from P-1. He stated that there were six lands and grooves in the barrel of P-1 which matched both the bullet fired into the doorjamb and test-fired bullets from the appellant's apartment (P-14). After doing comparison examination of the bullet recovered from the doorjamb and the test fires done from P-1, Mr. Fickies determined that bullet from the doorjamb was fired from P-1. (RT4855-4859.) However, Mr. Fickies testified that there was a mark on the end of the barrel of P-1 that was not consistent with markings on the recovered bullet. He stated that the mark may not have been present when the recovered bullet was fired. (RT4860-4861.) Mr. Fickies also admitted that his initial comparison test demonstrated only a probability that the bullet was fired from P-1. (RT4883.)

During the direct examination of Mr. Fickies the following question was asked by the prosecutor:

QUESTION: Were you aware that defense experts looked at that bullet

ANSWER: That is my understanding, yes.

QUESTION: So other people other than yourself have been examining the bullet since then; is that correct?

ANSWER: Yes. (RT4854.)

On re-direct exam, the prosecutor asked, "Do you know a person by the name of Luke Haag?" (RT 4887.) Defense counsel objected, informing the court that Mr. Haag was the defense ballistics expert that looked at the bullet and that the defense did not intend to call him as a witness. The prosecutor informed the court that it was his intention to put in evidence that a test-fired bullet from the gun was transferred to Mr. Haag as an expert to the defense. The prosecutor stated that he was then going to "leave it at that," and that Luke Haag was not on the witness list. (*Ibid.*)

At that point defense counsel stated, "That's the basis of the objection. If we are not going to call him, I don't believe the prosecutor has the right to ask-- create that insinuation that our expert's would be otherwise or were [sic] consistent with their expert's testimony." (RT 4887-

4888.) Counsel stated that he was not going to call any firearms expert. (RT4888.)

The court expressed a concern that there was a mark on the inside of the gun that was not there when the people's expert first examined it; therefore, it would be relevant that another person may have handled the gun. However, the prosecutor informed the court that this was not the case and that the mark was on the gun when it was first examined by Mr. Fickies. (RT 4890.) Defense counsel then reiterated his objection, stating that the name of his examiner was work product and should not be revealed. (RT 4890.) The court rejected this objection and informed counsel that he would allow the prosecutor to ask the limited questions whether Mr. Fickies knew Mr. Haas and if he knows he was a firearms expert. (RT4891) In the presence of the jury the prosecutor asked these questions and received the answer that the witness did indeed knew Mr. Haas and that Mr. Haas was a private firearms examiner, in business for himself, who did not work for the California Department of Justice. (RT 4891-4892.)

After the jury heard this testimony, the prosecutor announced his intention to call Investigator Bruce Rouse for the purpose of testifying that he turned over the handgun and bullet described above to Luke Haag.

(RT5090.) Defense counsel objected on the grounds that it would cause the jury to speculate as to why the defense did not call Mr. Haag to testify. Further objection was made on Evidence Code section 352 grounds, that the testimony sought by the prosecution was irrelevant.. (RT5091-5092.) The prosecutor responded by claiming that defense counsel raised certain questions on cross-examination about the reliability of Mr. Fickies' testing. (RT5092-5093.)

The court ruled that the proferred testimony was admissible both to counter the cross-examination challenging Mr. Fickies and to explain the markings or lack thereon on the expended bullet. (RT5103-5104.) Bruce Rouse then testified that he delivered the gun (P-1) and expended bullet (P-34) to Luke Haag, appellant's firearm expert. (RT5107.)

2. Shoe Print Evidence

The day after the assault on Courtney and Long at the Hidden Springs Apartments, an unusual footprint was found in the dirt in a common area. (RT4905.) Three cast impressions were made of this print.(RT4906-4907.) Ricci Cooksey, a state print examiner, later compared these casts to the "tabbie boots" found at appellant's residence (P-12) and found them to be a match. (RT4911-4920.)

The following additional testimony was elicited as to the shoe prints.

MR RUDDY: Mr. Cooksey, the shoes and the casts, did you give those to any experts hired by the defense?

MR. COOKSEY: Yes, sir

MR. RUDDY: Who did you give them to?

MR. COOKSEY: I was requested and instructed to give this evidence to Carole Hunter.

MR. RUDDY: Do you – excuse me. Go ahead.

MR. COOKSEY: Carol Hunter is a – she's a private criminalist who has her own operation.

MR. RUDDY: Did you know her personally?

MR. COOKSEY: Yes, sir.

MR. RUDDY: Have you met with her at your lab?

MR. COOKSEY: Yes.

MR. RUDDY: In fact, haven't you met at your lab with Carol Hunter and attorneys working for Mr. Scott?

MR. COOKSEY: Yes, sir.

MR. RUDDY: Okay. And you gave those casts and those shoes to her; is that correct?

MR. COOKSEY: Yes, sir.

MR. RUDDY: Did you have any notes when you gave her the shoes and casts?

MR. COOKSEY: Yes.

MR. RUDDY: When?

MR COOKSEY: I gave these to Carol Hunter on October 13th 1994. And she returned them to our laboratory on September 4, 1996. That's almost 2 years later.

MR. RUDDY: Okay. So an expert and consultant –

MR. CHANEY: I am going to object at this time, your Honor, and ask to approach.

THE COURT: Well, the objection to this further question?

MR. CHANEY: Yes.

THE COURT: Let's hear the question. Then I'll hear the objection.

MR. CHANEY: That's – yes, I'd like to approach before we get there.

THE COURT: Well, let Mr. Ruddy ask the question.

BY MR. RUDDY: So this Carol Hunter had them for almost 2 years; is that correct?

MR. COOKSEY: Yes, sir.

BY MR. RUDDY: Now –

THE COURT: Okay. What is the objection?

MR. CHANEY: Object to this line of questioning ask to approach.

THE COURT: Okay. Well, I am going to, on my own, exclude it under 352. He has testified that he gave it to her. I don't see anything further at this point – there's–

MR. RUDDY: One other point I want to bring out.

THE COURT: – probative value. You may ask a specific question, and that will be it. I will see if there's an objection.

BY MR. RUDDY: Now, Carol Hunter, to your knowledge, does she actually have a whole laboratory system, a laboratory facility, set up to do criminalistics work?

MR. COOKSEY: Yes, sir. She's a private criminalist.

MR. RUDDY: So it just isn't one person working out of a garage?

MR. COOKSEY: No.

MR. RUDDY: She had a laboratory; is that correct?

MR. COOKSEY: Yes, sir.

MR. RUDDY: And she had people working with her?

MR. COOKSEY: Yes.

MR. RUDDY: You ever been to her lab?

MR. CHANEY: Object, your Honor. Ask to approach.

THE COURT: Has he been to the lab? It's not relevant to his examination. So –

MR. RUDDY: Okay.

THE COURT: I think that concludes the questions.

MR. RUDDY: I have no more questions, your Honor. Thank you.

C. Discussion of the Law

The Sixth Amendment of the United States Constitution guarantees

"[i]n all criminal prosecutions, the accused shall [have] the right ... to have the [a]ssistance of [c]ounsel for his defense." (*Gideon v. Wainwright* (1963) 372 U.S. 335, 339 [83 S.Ct. 792].)

Effective assistance of counsel includes effective assistance during preparation of a case for trial. (*Barber v. Municipal Court* (1979) 24 Cal.3d 742, 751.) "If the right of defense exists, it includes and carries with it the right of such freedom of action as is essential and necessary to make such defense complete. In fact, there can be no such thing as a legal trial, unless both parties are allowed a reasonable opportunity to prepare to vindicate their rights." (*Ibid.* citing to *In re Rider* (1920) 50 Cal. App. 797,799-800.) This includes the assistance of experts in preparing a defense. (*Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320) and communication with them in confidence. (*Jones v. Superior Court* (1962) 58 Cal.2d 56, 61.)

The constitutional requirement that the defense team be able to investigate their case without the government peering over its shoulder is directly related to the "work product doctrine." As' stated by the United States Supreme Court,

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper

> preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways--aptly though roughly termed by the Circuit Court of Appeals in this case as the "Work product of the lawyer." Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served. (*United States v. Noble* (1975) 422 U.S. 225, 237 quoting *Hickman v. Taylor* (1947) 329 U.S. 495, 510-511.)

D. Application of the Law to the Instant Case

It is clear from the above stated law that the examination of the bullet and the shoe-print by any defense expert who was not called as a witness in the trial was protected by appellant's Sixth Amendment right to prepare a case and by the general "work-product" doctrine. Appellant's counsel availed himself of the protections of the "work-product" doctrine by employing experts to consult with him. The court's order revealing the

nature and identity of such *non-witness* experts violated appellant's right to effective assistance of counsel as described above in *Nobles*. The fact that the defense availed itself of its constitutionally guaranteed Sixth Amendment right to cross-examine Mr. Fickies does not extinguish their concomitant Sixth Amendment right to confidentially prepare its case. (See *Prince v. Superior Court* (1992) 8 Cal.App.4th 1176,1180.) Further, this is not a situation in which appellant waived his work-product privilege by calling his own witness to testify. (*United States v. Nobles, supra,* 422 U.S. at p. 240; see, e.g., *McGautha v. California* (1971) 402 U.S. 183, 215, 91 S.Ct. 1454, 1471.)

In addition, the admission of this evidence before the jury was irrelevant. Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, that has any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210.) The concept of relevancy has two distinct dimensions of probative value. The first is the tendency of the evidence in reason to prove or disprove a fact in question. The second is that it is material to the fact to be proven, that is, it has a relationship to a matter to be proven in the action. (*People v Hill* (1992) 3 Cal.App.4th 16, 29.)

The test of relevance is whether the evidence tends logically, naturally, and by reasonable inference to establish material facts such as identity, intent, or motive. (*People v. Heard* (2003) 31 Cal.4th 946, 972-973.) While the trial court has broad discretion in determining relevance of evidence, it lacks discretion to admit irrelevant evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.) Evidence has been deemed to be irrelevant if it leads only to speculative inferences. (*People v. Morrison* (2004) 34 Cal.4th 698, 711.)

The fact that appellant retained an expert did nothing to prove any material facts in the case. The jury was presented the material facts through the state's witnesses and the appellant cross-examined them as permitted by law. The fact that a defense expert was handed this evidence does not assist in resolving its probative nature. All that it does is to encourage the jury to speculate as to why there was no testimony from such experts. This speculation could only lead to two impermissible lines of consideration: that the defense expert fully confirmed the prosecutor's theory, or worse, that the defense was trying to hide something from the jury and was acting in an unethical manner.

The prosecutor's actions in eliciting the fact that Carol Hunter ran her own lab and was not some sort of one-woman operation only served to

emphasize to the jury that the defense had a highly qualified expert look at the evidence, who did not come to court to dispute the prosecution's interpretation of it.

Even if there was some marginal relevance under Evidence Code section 352, the trial court is required to weigh the probative value of the evidence in question against the danger of prejudice. When this danger substantially outweighs the probative value, the evidence should not be admitted. (*People v. Jenkins* (2000) 22 Cal.4th 990,1006.)

For purposes of the rule excluding relevant evidence if its probative value is substantially outweighed by danger of undue prejudice, "prejudice" refers to evidence that tends to evoke emotional bias against defendant. (*People v. Crew* (2003) 31 Cal.4th 822,841.) Evidence is substantially more prejudicial than probative if, broadly stated, it poses an intolerable risk to the fairness of the proceedings or the reliability of the outcome. (*People v. Waidla* (2000) 22 Cal.4th 690,724.) Improper admission of evidence over a Section 352 objection violates the guarantees of due process of law under the state constitution. (*People v. Partida* (Nov. 21, 2005) S127505, slp. Opin. Pg 10.)

The facts of this case make it clear that there was no real probative value to the fact that a defense expert examined the evidence, as what that

examination revealed would be a matter of pure speculation for the jury. The prejudice however, is clear. Allowing the jury to hear that defense experts examined the government evidence, combined with the fact that no such defense experts testified, placed the unjustified stamp of infallibility on the prosecution experts. In addition, it created confusion and encouraged speculation as to what the defense expert would have testified to and whether his non-appearance reflected a lack of forthrightness on the part of the defense.

Further, the argument that the jury needed to hear that Mr. Haag handled the bullet (P-34) to explain the markings or lack thereon is specious. Mr. Fickies never testified that he was certain that he put his initials on the bullet, so testimony was not needed to explain why they were not there. Further, the jury could have been instructed to disregard any other markings on the bullet as being artifactual and irrelevant. Testimony of this type that contravenes a constitutional right to prove such a minor point is the very essence of the evidence that section 352 is meant to exclude.

E. Appellant Suffered Prejudice by the Above-Stated Errors

As the court's error is of constitutional magnitude, the prejudicial

effect of the error must be measured against the standard of *Chapman v. California, supra,* 386 U.S. at p.24, where reversal is required unless the error was harmless beyond a reasonable doubt. The court's error allowed the jury to infer that even the defense experts acknowledged that appellant was essentially guilty. The state cannot prove this error harmless beyond a reasonable doubt.

Even under *People v. Watson, supra,* 46 Cal.2d at p.836 , the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

XI. THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE PREJUDICIAL EVIDENCE THAT APPELLANT WAS ASKED TO LEAVE HIS PRIOR RESIDENCE, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual Summary

During the direct examination of Todd Wolf, the prosecutor elicited testimony that in 1991 and 1992, appellant was living in his apartment with him. (RT4402-4403.) The apartment was located on Elsworth Street in Moreno Valley. (RT4403). Appellant stayed in the apartment for 6-11

months. (RT 4404.) The prosecutor then asked whether at some point Mr. Wolf asked appellant to leave. Defense counsel objected on relevancy grounds, stating that the appellant left the apartment in question months before the first of the crimes charged, therefore "what he was doing in the months preceding the first event giving rise to an allegation is irrelevant in this action." (RT 4405.)

Upon inquiry by the court, the prosecutor stated that the testimony was being elicited to establish appellant's "habit and custom" as well as the prowling charge. The prosecutor added "Plus, the theory–part of the theory of the People's case is that this guy went out wandering around. And by his own admission, he said he would be out wandering around." (RT 4405.)

The court held that the testimony could be admitted for this limited purpose and the witness subsequently testified that he asked appellant to leave the apartment because "he was staying out to late," "repeatedly", and when asked to "not to do that" he continued to do so.(RT4407.)

B. Discussion of Argument

Relevant evidence is defined as "evidence, including evidence relevant to the credibility of a witness or hearsay declarant, that has any

tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evidence Code section 210; see Argument X, *supra,* for a more detailed discussion of relevancy.)

By these criteria, the evidence that months before the Kenny murder appellant would stay out late was irrelevant. This conduct occurred months before any of the crimes charged in this indictment. Further, there was no evidence to connect it with any criminal behavior.

Even if there was some marginal relevance under Evidence Code section 352, the trial court is required to weigh the probative value of the evidence in question against the danger of prejudice, confusion and undue consumption of time. Unless those dangers substantially outweigh the probative value, the evidence should be admitted. (*People v. Jenkins* (2000) 22 Cal.4th 990.) This weighing process is not a mechanical application of an automatic standard but depends upon the trial court's consideration of the unique facts of each case. (*People v Jennings* (2000) 81 Cal.App.4th 1301.)

The obvious purpose of this improper inquiry was to create the impression in the minds of the jurors that appellant was predisposed to violence. This is inference is clearly impermissible under the law of Evidence Code section 1101 subdivision (a).

Evidence Code section 1101, subdivision (a) expressly prohibits the use of an uncharged offense if the only theory of relevance is that the accused has a propensity (or disposition) to commit the crime charged and that this propensity is circumstantial proof that the accused behaved accordingly on the occasion of the charged offense. Subdivision (a) does not permit a court to balance the probative value of the evidence against its prejudicial effect. The inference of a criminal disposition may not be used to establish any link in the chain of logic connecting the uncharged offense with a material fact. If no theory of relevance can be established without this pitfall, the evidence of the uncharged offense is simply inadmissible. (*People v. Thompson, supra,* 27 Cal.3d at p.316; see *People v. Bean* (1988) 46 Cal.3d 919, 935-936.) Improper admission of evidence over a Section 352 objection violates the guarantees of due process of law under the state constitution. (*People v. Partida* (Nov. 21, 2005) S127505, slp. Opin. Pg 10.)

In *Thompson* this Court explained the reason for the prohibitions of 1101(a):

> The primary reasoning that underlies this basic rule of exclusion is not the unreasonable nature of the forbidden chain of reasoning. (See *People v. Schader, supra,* 71 Cal.2d at p. 772.) Rather, it is the insubstantial nature of the inference as compared to the "grave danger of prejudice" to an accused when evidence of an uncharged offense is given

> to a jury. (Citations) As Wigmore notes, admission of this evidence produces an "over-strong tendency to believe the defendant guilty of the charge merely because he is a likely person to do such acts." (Citation) It breeds a "tendency to condemn, not because he is believed guilty of the present charge, but because he has escaped unpunished from other offenses ...." (Citation) Moreover, "the jury might be unable to identify with a defendant of offensive character, and hence tend to disbelieve the evidence in his favor." (Citation.) "We have thus reached the conclusion that the risk of convicting the innocent ... is sufficiently imminent for us to forego the slight marginal gain in punishing the guilty." (Citation) (*People v. Thompson, supra,*27 Cal.3d at p. 317, fns. omitted.)

Therefore, evidence must be excluded under section 1101, subdivision (a), if the inference it directly seeks to establish is solely one of propensity to commit crimes in general, or of a particular class. (*Ibid.*)

Subdivision (b) of section 1101creates an exception to the general rule of 1101(a) by stating that the general rule does not prohibit admission of evidence of uncharged misconduct when such evidence is relevant to establish some fact other than the person's character or disposition such as motive, intent, common plan or scheme or identity. *(People v. Ewoldt* (l994) 7 Cal.4th 380, 393.)

However, section 1101(b) must be carefully and sparingly applied. "Because other-crimes evidence is so inherently prejudicial, its relevancy is to be 'examined with care.' It is to be received with 'extreme caution,' and

all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People v. Sam, supra,* 71 Cal.2d at p. 203; *People v. Peete, supra,* 28 Cal. 2d at p.316.)

C. Appellant Was Prejudiced by the Court's Error

A complete analysis of the application of section 1101(b) appears in Argument I of the AOB. Suffice it to say that Wolf's testimony does not even remotely satisfy any of the criteria for admissibility under this sub-section. This testimony was completely irrelevant and highly prejudicial to appellant. Using either the *Chapman* harmless error standard or under *People v. Watson, supra,* 46 Cal.2d at p.836 , the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

XII. THE TRIAL COURT ERRED BY ALLOWING INADMISSIBLE PREJUDICIAL EVIDENCE OF THE ALLEGED ASSAULT ON MATTHEW TEXAR, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Factual Summary

The prosecution called Matthew Texar, a employee of the movie theater where appellant worked prior to his arrest. He was asked, "Now at

some point in time did anything unusual happen between you and Mr. Scott?" (RT4437). Counsel objected to the question on the grounds of relevance and asked for a side bar. (RT4438.) Upon inquiry by the court, the prosecutor revealed that he sought to elicit testimony from the witness that one time while the witness was at work appellant took "a swipe at him with a knife." (RT4438-4439.) The prosecutor stated that the evidence was relevant in that it showed that appellant had access to a knife. Further, the prosecutor stated that Mr. Texar reported the incident to Stephanie Compton and she did nothing about it, indicating that Stephanie Compton would be providing an alibi for appellant and this testimony would go to her credibility. (RT4439)

The court noted that this evidence also indicated "his ability to come behind someone with stealth, so to speak." The court further stated that there was no undue prejudice with regard to Evidence Code 352, and overruled counsel's objection. (RT4439.) However, upon re-objection by defense counsel, the court ruled that the witness was incompetent to testify that Ms. Compton "did nothing" in response to his complaint. (RT4440.)

The witness then testified before the jury as follows;

MR RUDDY: [W]hile you were at work one time, did anything unusual happen between you and Mr. Scott?

MR. TEXAR: Yes.

MR. RUDDY: What was that?

MR. TEXAR: Do you want me just to describe the whole thing?

MR. RUDDY: Yeah. Just describe it.

MR. TEXAR: Okay. I was standing behind the snack bar talking to somebody, I believe. And I turned around and I saw him come–like swing at me with a fist. And I put my hand up to block. And he had a knife in his other hand and he slashed the back of my hand.

MR. RUDDY: Did you know he was behind you before it happened?

MR. TEXAR: I don't–I don't think so, no. (RT 4441.)

The witness then proceeded to explain to the jury that he reported the incident to Ms. Compton. (RT 4442.)

B. Legal Argument

The above testimony was both irrelevant to any issue in the case and of highly prejudicial impact. The legal discussion of relevancy presented in AOB Argument X , Subsection B is equally applicable to this issue, as is the discussion of the application of Evidence Code section 352. The court's holding that this evidence was relevant to the fact that appellant "had access" to a knife and that he had the capability of sneaking up on people is not borne out by the testimony or logic. Virtually everyone has access to some sort of knife. Further, the witness's testimony made it clear that the

appellant was not at all adept at sneaking up on him as he was able to turn to see appellant before the attack.

In any event, even if there was some minor degree of relevance to this testimony, the prejudice far outweighed the probative value. The prohibition of Evidence Code section 1101(a), which was also fully discussed in AOB Argument XI , subsection B, is directed at this potential for prejudice. The effect of this testimony was not to prove any contested issue in this case but rather to improperly indicate to the jury that appellant had the predisposition to use knives, hence, was a violent person who may have killed Ms. Kenny. A full discussion of the prohibition against prior offenses to prove predisposition to commit crimes was presented in Argument I, *supra.*

Improper admission of evidence over a Section 352 objection violates the guarantees of due process of law under the state constitution. (*People v. Partida* (Nov. 21, 2005) S127505, slp. Opin. Pg 10.)

C. Appellant Was Prejudiced by the Court's Error

The incident with Mr. Texar has absolutely nothing in common with the charged crimes and certainly no similarities sufficient to allow the application of Evidence Code section 1101(b). Allowing the jury to hear

that appellant used a knife on prior occasion only served to prejudice appellant by creating the completely improper inference that if he would use a knife against Mr. Texar, he is more likely to have used a knife against a victim in the charged crimes. Using either the *Chapman* harmless error standard or under *People v. Watson, supra,* 46 Cal.2d at p.836 , this error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached.

XIII. THE TRIAL COURT ERRED BY PERMITTING THE INTRODUCTION OF IRRELEVANT AND PREJUDICIAL EVIDENCE THAT A RAPE VICTIM RECENTLY HAD A BABY, IN VIOLATION OF APPELLANT'S RIGHT TO DUE PROCESS OF LAW AND A FAIR TRIAL PURSUANT TO THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION

A. Factual Summary

Julia Chidley was the victim of the rape charged in Counts XV and XVI. Immediately prior to her testimony, the prosecutor informed the court that she had just given birth and had just been discharged the night before, her baby still being in the hospital. The prosecutor indicated that the witness was still in a great deal of discomfort and he wanted the witness to be able to explain this to the jury so that they did not misinterpret her discomfort "as having a poor attitude toward the proceedings." (RT4941.)

When the court asked specifically what sort of question the

prosecutor wanted to ask, the prosecutor replied that he wanted to ask the witness whether she was just discharged from the hospital and whether the baby was still in the hospital. (RT 4942.) The court then suggested that the prosecutor ask the following question. "You still have a continuing concern about the child but you wanted to testify anyway." The prosecutor agreed to this suggested line of questioning because "in case she [Mrs.Childely] starts getting fidgety or nervous, I don't want the jury to think she is maybe not being responsive to defense counsel or me, in terms of the questions." (*Ibid*)

Defense counsel objected to this line of questioning concerning the witness recently giving birth on the grounds that it elicits sympathy or identification between the victim and the jury. The court "agreed with [counsel's] position" but "I think it's also relevant and I think it could be harmful to either side that the jury feels that she is not being forthright or doesn't want to answer questions or she is not able to." (RT 4952-4953.) The court then agreed that it would be appropriate for the court to advise the jury that they should evaluate the testimony without any sympathy for the witness but that the testimony was provided to explain her present medical condition. (RT 4943.) The court allowed limited questioning concerning the witness's condition but indicated that it would "probably"

give the jury a "fair and neutral" instruction after her testimony. (RT 4943-4944.)

In the presence of the jury, the following exchange took place

MR. RUDDY: Ms. Chidley, did you recently have a baby about three days ago?

MS. CHIDLEY: Yes

MR. RUDDY: Okay. And were you just discharged from the hospital last night?

MS. CHIDLEY: Yes

MR. RUDDY: Okay. Ms. Chidley, is your baby still in the hospital?

MS. CHIDLEY: Yes

MR. RUDDY: Okay. You wanted to just get this over with this morning; is that correct?

MS. CHIDLEY: Yes. (RT 4946.)

The witness was then questioned on the crime committed against her. The trial court never gave the warning instruction at the end of her testimony.

B. Legal Argument

The fact that Mrs. Childley recently gave birth and her baby was still in the hospital is of absolutely no relevance to any issue in the trial. (See

Argument X, *supra,* for discussion of relevance.) Improper admission of evidence over a Section 352 objection violates the guarantees of due process of law under the state constitution. (*People v. Partida* (Nov. 21, 2005) S127505, slp. Opin. Pg 10.)

The prosecutor maintained that such testimony was necessary to explain any apparent discomfort that the witness may have on the stand, ostensibly to dispel any unwarranted inference that the witness was uncomfortable because she disrespected the proceedings. The court recognized the danger of this line of questioning yet allowed it, stating that it felt that it would be harmful to both sides if the jury misperceived the reason for the witness's discomfort.

In reality, this line of questioning could only be harmful to one side: the appellant's. Its effect was to engender sympathy for the witness in the eyes of the jury by creating an almost heroic aura around a witness who would come to court to face her accused assailant in spite of the fact that she had just given birth and her apparently sick baby was still hospitalized. The actual line of questioning in this vein had nothing to do with any physical discomfort that the witness may be suffering that might be obvious to the jury. It was simply a flat statement that she had a sick newborn baby in the hospital, yet she wanted to come to testify against appellant.

In short, without any indication that the witness was actually in some visible discomfort, her testimony was prefaced by introductory comment that virtually excused any possible inconsistencies or flaws in her testimony by rationalizing them in light of her alleged emotional physical or emotional discomfort. This testimony virtually inoculated the witness against aggressive impeachment, as no defense counsel would want to be perceived as attacking a woman in her "condition."

Further, there was no evidence that the witness was so physically uncomfortable that her testimony would have been affected, nor that any concern for her baby would have caused her testimony to be less reliable than otherwise. In fact, there was nothing presented to indicate the condition of the baby, whose stay in the hospital may have been for relatively benign reasons.

There were any number of ways that the prosecutor's concerns could have been ameliorated with taking such a drastic step. The most obvious one would be to allow the witness to testify and if there was some obvious problem the court could have given some sort of neutral, noninflammatory instruction to the jury that did not specifically address the witness's particular condition but simply informed the jury that the witness had recently undergone a medical procedure that may make her uncomfortable.

In the alternative, the court could have given the witness frequent and extended breaks during her testimony.

C. Appellant Was Prejudiced by the Error of the Trial Court

While appellant does not concede that the complained-of testimony had any probative value, whatever relevance it did have was substantially outweighed by the prejudice suffered by appellant. (Evidence Code section 352.) This unnecessary line of questioning virtually assured that anything that this witness would later testify to would be accepted as the gospel truth. The court's error greatly exacerbated the ever-present danger that a sympathetic rape victim's testimony will always be given the presumption of credibility because of the horrible nature of the crime.

As with Arguments XI and XII, improper admission of evidence over a section 352 objection is a violation of due process, therefore the harmless error rule of review prevails. Further, under *People v. Watson, supra,* 46 Cal.2d at p.836 , the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached

PENALTY PHASE ISSUES

XIV. THE TRIAL COURT ERRED BY PERMITTING THE PROSECUTOR TO PRESENT "VICTIM IMPACT" EVIDENCE THAT FAR EXCEEDED THE LIMITS SET BY THIS COURT, THEREBY DENYING APPELLANT THE RIGHT TO A RELIABLE PENALTY DETERMINATION UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Summary of the Argument

In the penalty phase of a capital trial, the prosecutor is allowed to present evidence concerning the character of the victim and the effect of the victim's death upon her family, friends and society. This evidence is generally known as "victim-impact" evidence. However, there are limits to this evidence. This Court has held that the emotional impact of this evidence may not hold sway over reason and must not divert the jury from its task: to determine a defendant's penalty based upon a rational evaluation of the evidence and law.

The prosecutor presented victim impact evidence that exceeded those limits, causing the jury's emotion to hold sway over reason and denying appellant a reasoned determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

B. Procedural Summary

On July 17, 1994, the prosecution filed a Notice of Evidence to be Introduced in Aggravation during the penalty phase. Said evidence included "the nature and circumstances of the offenses charged in the instant prosecution." (CT 1068.) On November 10, 1997, defense counsel filed a motion to exclude victim impact during the penalty phase. (CT 6145.) The gravamen of the motion was that such evidence would unduly prejudice appellant and could be excluded by the trial court under the law of *People v. Edwards* (1991) 54 Cal.3d 781, 833.

On January 15, 1997, the trial court ruled that it would allow testimony from members of Brenda Kenny's family as victim impact evidence. The court indicated that the family members could testify as to the impact of Ms. Kenny's death upon them. (CT 6475.)

On January 20, 1997, the trial court reviewed several photos of Brenda Kenny that the prosecutor indicated he intended to introduce in the penalty phase. The court allowed the introduction of the majority of the photos, excluding only a few in that they would be cumulative. (RT 6393-6403.) The court again recognized the defense objection to the introduction of victim impact evidence and restated that the prosecution was entitled to present such evidence under the law of *Payne v. Tennessee.*

(RT 6403-6404.)

C. Discussion of Law

In *Payne v. Tennessee* (1991) 501 U.S.808, 827 [111 S.Ct. 2597], the United States Supreme Court held that "if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed." (*Id.* at p. 824.)

A few months later, in *People v. Edwards* (1991) 54 Cal.3d. 787, this Court reacted to the *Payne* decision. In *Edwards*, this Court held that factor (a) of section 190.3 allows evidence and argument on the specific harm caused by the defendant, including the impact on the family of the victim. (*People v. Edwards, supra*, 54 Cal.3d at p. 836.)

However, *Edwards,* like *Payne* did place limitations upon this sort of evidence. The Court recognized the *Payne* admonition that this sort of evidence may be "so unduly prejudicial that it renders the trial fundamentally unfair," so as to violate the Due Process Clause of the Fourteenth Amendment. (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825;

People v. Edwards, supra, 54 Cal.3d 835.) Therefore, this Court limited its holding stating that permissible victim-impact evidence "only encompasses evidence that logically shows the harm caused by the defendant. We do not now explore the outer reaches of evidence admissible as a circumstance of the crime and do not hold that factor (a) necessarily includes all forms of victim impact evidence and argument allowed by *Payne*." (*People v. Edwards, supra*, 54 Cal.3d at pp. 835-836.)

This Court continued:

> Our holding does not mean there are no limits on emotional evidence and argument. In *People v Haskett* [citation], we cautioned "Nevertheless, the jury must face its obligations soberly and rationally, and should not be given the impression that emotion may reign over reason."[Citation] In each case, therefore, the trial court must strike a careful balance between the probative and prejudicial. [citations] On one hand, it should allow evidence and argument on emotional though relevant subjects that could provide legitimate reasons to sway the jury to show mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury away from its proper role or invites an irrational or purely subjective response should be curtailed. (*People v. Edwards*, supra, 54 Cal.3d at p.836.)

In *People v. Howard* (1992) 1 Cal.4th 1132,1191, this Court confirmed that there are two related yet separate tests for the admission of this sort of evidence: one using a state standard and the other a federal constitutional standard. Under state law the argument and evidence

presented to the jury under the "victim impact" rationale should not be so inflammatory so as to "divert the jury's attention from its proper role." *(People v. Edwards, supra*, 54 Cal.3d, *supra,* at pp. 835-836.) Under the federal test, the argument and evidence must not be "so unduly prejudicial that it render[s] the trial fundamentally unfair." *(Payne v. Tennessee, supra,* 501 U.S. at p. 825.)

This Court has also set forth some more specific limitations under which the prosecutor must operate in the use of "victim impact" evidence. In *People v Thomas* (1992) 2 Cal.4th 489, 536, the prosecutor is instructed that exhortations for sympathy and concern for the victim's family be "brief." This Court also restated that to be legally appropriate, prosecutorial comments must not be so inflammatory to invite an irrational or purely subjective response from the jury. (*Ibid.*)

One recent case from this Court addressing victim impact evidence is *People v. Taylor* (2001) 26 Cal.4th 1155. There, this Court held that victim impact evidence must not be "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." (*Id.* at p. 1172.) In doing so, this Court cited to a decades old death penalty decision, *People v. Love* (1960) 53 Cal.2d 843, pp. 854-857, where this Court held the prosecutor exceeded the limits of proper

evidence and comment.

In *Love,* the defendant objected to a photo of the victim in the hospital taken immediately following her death and to a tape of the victim's final moments, replete with the painful groans of a dying person in extreme pain. The doctor that attended to her already testified as to the fact that this pain was as extreme as a human being could suffer.

This Court held the photo and the tape to be the type of evidence that serves primarily to inflame the passions of the jury and should have been excluded. It further indicated that the trial judge should have considered that there are less inflammatory ways to present evidence of the victim's suffering and because the doctor had already testified as to her pain, "there was no need to show the jurors the expression on her face or to fill the court room with her groans." (*People v. Love, supra,* 53 Cal.2d at p. 857.)

D. Application of Law to Instant Case

The evidence presented by the prosecution made it impossible for the jury to "face its obligations soberly and rationally", and clearly allowed emotion to reign over reason. It further diverted the jury from its proper role of weighing the statutory factors in a logical and rational manner to

reach the penalty verdict.

While some testimony of the family is allowed to demonstrate that the victim was a unique individual who will be missed by her family, the evidence in this case was repetitive, cumulative and emotionally crushing. The prosecutor called five family members who all gave emotionally charged evidence that diverted the jury from its duty to act in a rational manner and rendered the penalty phase fundamentally unfair.

Describing his daughter's life history, the victim's father became emotionally overwhelmed not long after he was called to the stand. (RT6423) He further was questioned about the scene at the victim's apartment when he and his wife found their daughter's body. (RT 6426). Further, with prodding by the prosecutor, the witness gave heart-breaking testimony as to the fact that "I know that evening he [appellant] was there for several hours. And I heard the testimony of the girls that he also spent several hours with, and I can't–what he did to her, I can't imagine. It goes through my mind so often." (RT 6426-6427.) This sort of testimony related neither to the unique character of the victim nor how much she would be missed. Instead, it is analogous to the emotionally overwrought testimony criticized by this Court in *People v. Love,* discussed earlier in this argument. It was the tortured ruminations of a grief-stricken father:

testimony that diverted the jury from its role in rationally evaluating the penalty.

The next witness was Mary Costello, the victim's sister. After she essentially repeated Gail Kenny's life history, Ms. Costello related in detail how her aging parents were severely depressed by their daughter's death and that she had to leave her own family to help take care of her parents. She related how everyone was so scared that they all slept in the same bed. (RT 6434-6435.) She related that even after she returned home to her own family, she was still very frightened and could not go out by herself for several years. (RT6436.) She also related how she became obsessed with the safety of her own daughter who was 19 years old. (RT 6437) Ms. Costello's testimony ended with her relating the last conversation that she and her late sister had as to a vacation that Gail Kenny was intending to take on October 3, 1992. (RT6437-6438.)

Similar to that of Mr. Kenny, Ms. Costello's testimony was largely irrelevant to the permissibly relevant areas of inquiry: the unique character to the victim and how much she will be missed by her family. Instead, it emphasized, in starkly emotional terms, the collateral psychological consequences of the victim's extended family in a manner which invited a purely emotional response from the jury.

In the same vein, responding to the prosecution's specific and directed questioning, Robert Costello, Mary Costello's husband, testified that after the family learned of Gail's death, he went to her apartment with Glenn Kenny, Gail's brother, to "take care of her business."(RT 6444.) He described at length how difficult and emotional this was for Glenn Kenny. The witness further related that Gail's father could not bring himself to go to the apartment and further testified that there was still blood in the apartment (RT6445.) He further testified that "Gail would have wanted us to take care of her business" and how it was a "strange day," with Glenn having a very hard time with it all. (*Ibid.*) This testimony was not only cumulative but again irrelevant to the issues made pertinent by *Payne* and *Edwards*.

Mr. Costello then repeated his wife's testimony that after the murder his family became very fearful, especially at night. He stated that the fear is now "a constant thing," "Sometimes unreasonable fears that come about for me, thinking about a wife and daughter–of my own because I think of what happened." (RT6446-6448) He further related that he now keeps a baseball bat handy for protection and that his wife had to see a therapist. (RT 6448.) In response to a direct question from the prosecutor about the Costello's only daughter, Mr. Costello said he had become "tainted" by concern and

fear for her safety. (RT 6449.) Once again, this testimony was not only cumulative but strayed far afield from the above stated legal purpose of victim-impact evidence.

Glenn Kenny repeated Robert Costello's testimony about the scene at Gail's apartment. (RT 6455.) He also went into great detail about his own three children and the loss that they suffered due to their aunt's death. (RT 6453-59.) Once again, the emphasis was the fear that his children now felt as opposed to the character of the victim. In response to a question from the prosecutor as to whether the Costello children "exhibit fear" or "worry about things," the witness testified that even though his family lives in a small, relatively safe town, the children sense the fear their parents feel and they feel the same fear. (RT6456-6457.) Mr. Kenny related that his children see that their father is afraid to go out at night and this makes them similarly fearful. (RT 6457.)

The prosecutor asked Mr. Kenny to relate an incident regarding his son, Shea, and an essay he wrote about his aunt's death. The witness then actually read from the essay, which the prosecutor produced. (RT6458.) In addition, he related his son is still scared and does not like to be left alone in the house. The witnesses related yet another incident where he and his wife went out to a party a few houses down but left early because they were

afraid to leave their children alone for even a short period of time. (RT6458-6459.) In response to a direct inquiry from the prosecutor, the witness also related how his daughter, Jiselle, who had not even been born at the time of the murder, cries for her aunt. (RT6457.) The witness further related that he now knows that monsters are not just in stories; that there are "monsters out there."(RT6455-6456.)

The deep, psychological fears of the victim's extended family as to the existence of real "monsters" can only be described as an emotional plea to the jury to slay such "monsters" and to use the inadmissible fears of children to do so. By this point in the testimony, the prosecution had strayed completely from the character of Brenda Kenny or her worth as a human being, instead favoring an unabashedly emotional appeal to the jury about "monsters."

This overwhelming emotional attack on the sensibilities of the jury culminated in the testimony of Maxine Kenny, the victim's mother. One of the prosecution's first questions to her was " Mrs. Kenny, had you ever heard of the statement 'there's nothing worse than losing a child.'" (RT6461.) When she answered in the affirmative, the prosecutor invited her to explain "what's it like losing a child." (*Ibid.*) Mrs. Kenny responded:

> Unless you really experience it, you can't really understand it. You're- you know, the depth of the loss. I don't think anyone can. Especially if you lose a child in such a brutal and senseless way. And I really felt that a part of my heart had been ripped out of me. And finding Gail lying on the bedroom floor, seeing the stab wounds and her face in death, will be an image that will haunt me the rest of my life. (RT6461-6462.)

Not being satisfied with this emotionally wrenching imagery from a distraught and anguished mother, the prosecutor returned to questioning guaranteed to provoke a heart rending response:

MR RUDDY: Miss Kenny, just –just some tough questions. Bear with me. You've already testified–the circumstances of finding your daughter. Okay. What was it about finding your daughter, as a mother, that is just so hard for you to take in this situation.

MRS. KENNY: Well, it's -I think any parent's first instinct as your child is growing up, that when they get hurt, you rush to them. You pick them up. You comfort them. You fix their wounds and you make it better for them. The day I found Gail, there I stood as a parent. And I looked at her. I was helpless. There was nothing iIcould do. There was no way to bring her back. That's pretty tough to take when you've raised your kids and been there for them and you can't do that. And it was just as though I didn't want to believe it. It was like my own life had ended as well at that moment. (RT6464-6465.)

All of the above testimony was accompanied by the witnesses

identifying 21 photos of Brenda Kenny during various times in her life. The great majority of these photos were admitted into evidence and viewed by the jury. (RT6392,6427,6459,6470.)

The type of testimony intentionally elicited by the prosecutor violated the Court's mandate in *People v. Taylor*, supra. 26 Cal.4th at p. 1172 where this Court held that victim impact evidence must not be "so voluminous or inflammatory as to divert the jury's attention from its proper role or invite an irrational response." The above victim impact testimony went far beyond the scope allowed by the above-cited law. The prosecutor was not content to simply employ the family to talk about the kind of person that Gail was or to discuss the general impact of her loss. Instead, the prosecutor went far beyond this, asking questions designed to elicit the most emotionally-charged testimony possible. The focus was upon such inflammatory matters as the horror Gail's parents felt when they found her body and the collateral long-term psychological fears of the victim's extended family. Mr. Kenny was encouraged to relate to how he cannot get out of his mind the possible atrocities that the murderer visited upon his daughter, thereby,providing the jury access to the most vivid nightmares of the victim's father.

This type of testimony that went outside of the scope of permissible

victim impact evidence continued with all of the witnesses. They were questioned as to the emotionally wrenching scene at Gail's apartment where Glenn Kenny and Robert Costello were compelled to sift through Gail's things in an apartment still stained with her blood. Testimony was intentionally elicited about how badly depressed and traumatized the Kenny and Costello children were, even Jiselle who did not even know Gail. Finally, the prosecutor twice pointedly asked Mrs. Kenny to relate how it felt to lose a child. All of this was exacerbated by constant references and viewing of photos of the victim, hand-picked to maximize the emotional impact.

If this Court's prohibition against overly emotional victim impact evidence is to have any meaning at all, the evidence elicited in this case should have been barred. The admission of this testimony made it impossible for the jury to focus upon their duty to logically consider the facts of the case before reaching a penalty verdict. The admission of said evidence therefore violated appellant's right to due process of law, a fair trial and an reliable penalty phase determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

E. Appellant was Prejudiced by the Admission of the Complained of Victim-Impact Testimony

The admission of victim impact evidence complained of above was of constitutional magnitude as it violated appellant's right to a fair trial, due process of law and a reliable determination of penalty. A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) Based the highly inflammatory nature of the evidence, it cannot be shown that the errors were harmless beyond a reasonable doubt. The death judgment must be reversed.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Many features of this state's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presents these arguments here in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal

constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have expanded the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code §190.2, the "special circumstances" section of the statute – but that section was specifically passed for the

purpose of making every murderer eligible for the death penalty. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few victims for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the state will kill dominates the entire process of applying the penalty of death.

XV. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE 190.2 IS IMPERMISSIBLY BROAD.

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death penalty. The death penalty is imposed randomly on a small fraction of those who are death-eligible. The statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. As this Court has recognized:

> To avoid the Eighth Amendment's proscription against cruel and unusual punishment, a death penalty law must provide a 'meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not.' (*Furman v. Georgia* (1972) 408 U.S. 238, 92 S.Ct. 2726, 2764, 33 L.Ed.2d 346 [conc. opn. of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427, 100 S.Ct. 1759, 1764, 64 L.Ed. 2d 398 [plur. opn.].)

(*People v. Edelbacher* (1989) 47 Cal.3d 983, 1023.) In order to meet this constitutional mandate, the states must genuinely narrow, by rational and objective criteria, the class of murderers eligible for the death penalty:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

(*Zant v. Stephens*, *supra,* 462 U.S. 862, 878.)

The requisite narrowing in California is accomplished in its entirety by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law, . . . the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v Bacigalupo* (1993) 6 Cal.4th 857, 868.)

The 1978 death penalty law came into being, however, not to narrow those eligible for the death penalty but to make all murderers eligible. This initiative statute was enacted into law as Proposition 7 by its proponents on November 7, 1978. At the time of the offense charged against appellant the statute contained 26 special circumstances, some of which with multiple

subparts[22] purporting to narrow the category of first degree murders to those murders most deserving of the death penalty. These special circumstances are so numerous and so broad in definition as to encompass nearly every first-degree murder, per the drafters' declared intent.

In the 1978 Voter's Pamphlet, the proponents of Proposition 7 described certain murders not covered by the existing 1977 death penalty law, and then stated: "And if you were to be killed on your way home tonight simply because the murderer was high on dope and wanted the thrill, the criminal would not receive the death penalty. Why? Because the Legislature's weak death penalty law does not apply to every murderer. Proposition 7 would." (See 1978 Voter's Pamphlet, p. 34, "Arguments in Favor of Proposition 7" [emphasis added].)

Section 190.2's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function at the stage of legislative definition: the circumscription of the class of persons eligible for the death penalty. In California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental

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22. This figure does not include the "heinous, atrocious, or cruel" special circumstance declared invalid in *People v. Superior Court (Engert)* (1982) 31 Cal.3d 797. The number of special circumstances has continued to grow, and is now thirty-two.

and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance, which the Court has construed so broadly as to encompass virtually all intentional murders. (See *People v. Hillhouse* (2002) 27 Cal. 4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-58, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death.

A comparison of section 190.2 with Penal Code section 189, which defines first degree murder under California law, reveals that section 190.2's sweep is so broad that it is difficult to identify varieties of first degree murder that would not make the perpetrator statutorily death-eligible. One scholarly article has identified seven narrow, theoretically possible categories of first degree murder that would not be capital crimes under section 190.2. (Shatz and Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L.Rev. 1283, 1324-26 (1997).)[23]

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23. The potentially largest of these theoretically possible categories of noncapital first degree murder is what the authors refer to as "'simple' premeditated murder," i.e., a premeditated murder not falling under one of section 190.2's many special

It is quite clear that these theoretically possible noncapital first degree murders represent a small subset of the universe of first degree murders (*Ibid.*). Section 190.2, rather than performing the constitutionally required function of providing statutory criteria for identifying the relatively few cases for which the death penalty is appropriate, does just the opposite. It culls out a small subset of murders for which the death penalty will not be available. Section 190.2 was not intended to, and does not, genuinely narrow the class of persons eligible for the death penalty.

Regarding the specific special circumstance of felony murder present in the instant case, the California Penal Code (section 189) defines first degree murder quite broadly, as all murder perpetrated by certain means (e.g., poison, explosives); "any other kind of willful, deliberate, and premeditated killing "; and felony murder-that is, any killing, whether intentional or not, committed in the course of any of the statutorily specified felonies.

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circumstance provisions. (Shatz and Rivkind, *supra,* 72 N.Y.U. L.Rev. at 1325.) This would be a premeditated murder committed by a defendant not convicted of another murder, and not involving any of the long list of motives, means, victims, or underlying felonies enumerated in section 190.2. Most significantly, it would have to be a premeditated murder not committed by means of lying in wait, i.e., a planned murder in which the killer simply confronted and immediately killed the victim, or, even more unlikely, advised the victim, in advance of the lethal assault, of his intent to kill – a distinctly improbable form of premeditated murder. (*Ibid.*)

As construed by this Court in *People v. Anderson* (1987) 43 Cal.3d 1104, the felony-murder special circumstance, like the felony murder rule itself, does not contain an intent element for the actual killer. Thus, this special circumstance permits an accidental or unintentional killing to form the basis for a death sentence, despite the United States Supreme Court's repeated emphasis that an evaluation of the accused's mental state is "critical" to a determination of his suitability for the death penalty. (See e.g. *Enmund v. Florida* (1982) 458 U.S. 782,800, 102 S.Ct. 3368 [the appropriateness of the death penalty depends on the accused's culpability and "American criminal law has long considered a defendant's intention- and therefore his moral guilt- to be critical" to the degree of his culpability.] It should follow from the High Court's concern that special care would be taken in administering the California death penalty scheme to ensure that genuine narrowing criteria apply to felony-murder offenses, and that death eligibility would be limited to the most reprehensible murders and the most blameworthy felony murders.

But in fact, the death penalty scheme as applied to felony murder sweeps in a broad and arbitrary fashion. While all willful, deliberate and premeditated killings are first degree murder under the California statute, not all such killings are subject to the death penalty. On the other hand, any

perpetrator of a felony murder, by virtue of even an unintended killing, may be sentenced to die. Such a sorting cannot be other than arbitrary and capricious, in violation of the Eighth Amendment.

The issue presented here has not been addressed by the United States Supreme Court. This Court routinely rejects challenges to the statute's lack of any meaningful narrowing, and does so with very little discussion. In *People v. Stanley* (1995) 10 Cal.4th 764, 842, this Court stated that the United States Supreme Court rejected a similar claim in *Pulley v. Harris* (1984) 465 U.S. 37, 53 [104 S.Ct. 871.] Not so. In *Harris*, the issue before the court was not whether the 1977 law met the Eighth Amendment's narrowing requirement, but rather whether the lack of inter-case proportionality review in the 1977 law rendered that law unconstitutional. Further, the high court itself contrasted the 1977 law with the 1978 law under which appellant was convicted, noting that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. at p. 52, n. 14.)

The U.S. Supreme Court has made it clear that the narrowing function, as opposed to the selection function, is to be accomplished by the legislature. The electorate in California and the drafters of the Briggs Initiative threw down a challenge to the courts by seeking to make every

murderer eligible for the death penalty. This Court should accept that challenge, review the death penalty scheme currently in effect, and strike it down as so all-inclusive as to guarantee the arbitrary imposition of the death penalty, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, and prevailing international law.[24] (See Argument XXI *infra.*)

XVI. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE § 190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Section 190.3(a) violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost all features of every murder,

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24. In a habeas petition to be filed after the completion of appellate briefing, appellant will present empirical evidence confirming that section 190.2 as applied, as one would expect given its text, fails to genuinely narrow the class of persons eligible for the death penalty. Further, in his habeas petition, appellant will present empirical evidence demonstrating that, as applied, California's capital sentencing scheme culls so overbroad a pool of statutorily death-eligible defendants that an even smaller percentage of the statutorily death-eligible are sentenced to death than was the case under the capital sentencing schemes condemned in *Furman v. Georgia* (1972) 408 U.S. 238, 33 L.Ed.2d 346, and thus that California's sentencing scheme permits an even greater risk of arbitrariness than those schemes, and, like those schemes, is unconstitutional.

even features squarely at odds with features deemed supportive of death sentences in other cases, have been characterized by prosecutors as "aggravating" within the statute's meaning.

Factor (a), listed in § 190.3, directs the jury to consider in aggravation the "circumstances of the crime." Having at all times found that the broad term "circumstances of the crime" met constitutional scrutiny, this Court has never applied a limiting construction to this factor. Instead, the Court has allowed extraordinary expansions of this factor, approving reliance on the "circumstance of the crime" aggravating factor because defendant had a "hatred of religion,"[25] or because three weeks after the crime defendant sought to conceal evidence,[26] or threatened witnesses after his arrest,[27] or disposed of the victim's body in a manner that precluded its recovery.[28]

The purpose of § 190.3, according to its language and according to

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25. *People v. Nicolaus* (1991) 54 Cal.3d 551, 581-82, 817 P.2d 893, 908-09, *cert. den.*, 112 S. Ct. 3040 (1992).

26. *People v. Walker* (1988) 47 Cal.3d 605, 639 n.10, 765 P.2d 70, 90 n.10, *cert. den.*, 494 U.S. 1038 (1990).

27. *People v. Hardy* (1992) 2 Cal.4th 86, 204, 825 P.2d 781, 853, *cert. den.*, 113 S.Ct. 498.

28. *People v. Bittaker* 48 Cal.3d 1046, 1110 n.35, 774 P.2d 659, 697 n.35(1989), *cert. den.*, 496 U.S. 931 (1990).

interpretations by both the California and United States Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Although factor (a) has survived a facial Eighth Amendment challenge (*Tuilaepa v. California* (1994) 512 U.S. 967, 987-988), it has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment

Prosecutors throughout California have argued that the jury could weigh in aggravation almost every conceivable circumstance of the crime, even those that, from case to case, reflect starkly opposite circumstances. Thus, prosecutors have been permitted to argue that "circumstances of the crime" is an aggravating factor to be weighed on death's side of the scale:

a. Because the defendant struck many blows and inflicted multiple wounds,[29] or because the defendant killed with a single execution-style wound.[30]

b. Because the defendant killed the victim for some purportedly aggravating motive (money, revenge, witness-elimination,

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29.See, e.g., *People v. Morales*, Cal. Sup. Ct. No. [hereinafter "No."] S004552, RT 3094-95 (defendant inflicted many blows); *People v. Zapien*, 28. (cont.)No. S004762, RT 36-38 (same); *People v. Lucas*, No. S004788, RT 2997-98 (same); *People v. Carrera*, No. S004569, RT 160-61 (same).

30.See, e.g., *People v. Freeman*, No. S004787, RT 3674, 3709 (defendant killed with single wound); *People v. Frierson*, No. S004761, RT 3026-27 (same).

avoiding arrest, sexual gratification)[31] or because the defendant killed the victim without any motive at all.[32]

c. Because the defendant killed the victim in cold blood[33] or because the defendant killed the victim during a savage frenzy.[34]

d. Because the defendant engaged in a cover-up to conceal his crime,[35] or because the defendant did not engage in a cover-up and so must have been proud of it.[36]

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31. See, e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 968-69 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-60 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3543-44 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge).

32. See, e.g., *People v. Edwards*, No. S004755, RT 10,544 (defendant killed for no reason); *People v. Osband*, No. S005233, RT 3650 (same); *People v. Hawkins*, No. S014199, RT 6801 (same).

33. See, e.g., *People v. Visciotti*, No. S004597, RT 3296-97 (defendant killed in cold blood).

34. See, e.g., *People v. Jennings*, No. S004754, RT 6755 (defendant killed victim in savage frenzy [trial court finding]).

35. See, e.g., *People v. Stewart*, No. S020803, RT 1741-42 (defendant attempted to influence witnesses); *People v. Benson*, No. S004763, RT 1141 (defendant lied to police); *People v. Miranda*, No. S004464, RT 4192 (defendant did not seek aid for victim).

36. See, e.g., *People v. Adcox*, No. S004558, RT 4607 (defendant freely informs others about crime); *People v. Williams*, No. S004365, RT 3030-31 (same); *People v. Morales*, No. S004552, RT 3093 (defendant failed to engage in a cover-up).

e. Because the defendant made the victim endure the terror of anticipating a violent death[37] or because the defendant killed instantly without any warning.[38]

f. Because the victim had children,[39] or because the victim had not yet had a chance to have children.[40]

g. Because the victim struggled prior to death,[41] or because the victim did not struggle.[42]

h. Because the defendant had a prior relationship with the

37.See, e.g., *People v. Webb*, No. S006938, RT 5302; *People v. Davis*, No. S014636, RT 11,125; *People v. Hamilton*, No. S004363, RT 4623.

38. See, e.g., *People v. Freeman*, No. S004787, RT 3674 (defendant killed victim instantly); *People v. Livaditis*, No. S004767, RT 2959 (same).

40. See, e.g., *People v. Zapien*, No. S004762, RT 37 (Jan 23, 1987) (victim had children).

40.See, e.g., *People v. Carpenter*, No. S004654, RT 16,752 (victim had not yet had children).

41.See, e.g., *People v. Dunkle*, No. S014200, RT 3812 (victim struggled); *People v. Webb*, No. S006938, RT 5302 (same); *People v. Lucas*, No. S004788, RT 2998 (same).

42.See, e.g., *People v. Fauber*, No. S005868, RT 5546-47 (no evidence of a struggle); *People v. Carrera*, No. S004569, RT 160 (same).

victim,[43] or because the victim was a complete stranger to the defendant.[44]

These examples show that absent any limitation on the "circumstances of the crime" aggravating factor, different prosecutors have urged juries to find this aggravating factor and place it on death's side of the scale based on squarely conflicting circumstances.

Of equal importance to the arbitrary and capricious use of contradictory circumstances of the crime to support a penalty of death is the use of the "circumstances of the crime" aggravating factor to embrace facts which cover the entire spectrum of facets inevitably present in every homicide:

a. The age of the victim. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was a child, an adolescent, a young adult, in the prime of life, or elderly.[45]

43.See, e.g., *People v. Padilla*, No. S014496, RT 4604 (prior relationship); *People v. Waidla*, No. S020161, RT 3066-67 (same); *People v. Kaurish* (1990) 52 Cal.3d at 717, 802 P.2d at 316 (same).

44. e.g., *People v. Anderson*, No. S004385, RT 3168-69 (no prior relationship); *People v. McPeters*, No. S004712, RT 4264 (same).

45. e.g., *People v. Deere*, No. S004722, RT 155-56 (victims were young, ages 2 and 6); *People v. Bonin*, No. S004565, RT 10,075 (victims were adolescents, ages 14, 15, and 17); *People v. Kipp*, No. S009169, RT 5164 (victim was a young adult, age 18); *People v. Carpenter*, No. S004654, RT 16,752 (victim was 20), *People v. Phillips*, (1985) 41 Cal.3d 29, 63, 711 P.2d 423, 444 (26-year-old

b. The method of killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was strangled, bludgeoned, shot, stabbed or consumed by fire.[46]

c. The motive of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the defendant killed for money, to eliminate a witness, for sexual gratification, to avoid arrest, for revenge, or for no motive at all.[47]

d. The time of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in the middle of the night, late at night, early

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victim was "in the prime of his life"); *People v. Samayoa*, No. S006284, XL RT 49 (victim was an adult "in her prime"); *People v. Kimble*, No. S004364, RT 3345 (61-year-old victim was "finally in a position to enjoy the fruits of his life's efforts"); *People v. Melton*, No. S004518, RT 4376 (victim was 77); *People v. Bean*, No. S004387, RT 4715-16 (victim was "elderly").

46. e.g., *People v. Clair*, No. S004789, RT 2474-75 (strangulation); *People v. Kipp*, No. S004784, RT 2246 (same); *People v. Fauber*, No. S005868, RT 5546 (use of an ax); *People v. Benson*, No. S004763, RT 1149 (use of a hammer); *People v. Cain*, No. S006544, RT 6786-87 (use of a club); *People v. Jackson*, No. S010723, RT 8075-76 (use of a gun); *People v. Reilly*, No. S004607, RT 14,040 (stabbing); *People v. Scott*, No. S010334, RT 847 (fire).

47. e.g., *People v. Howard*, No. S004452, RT 6772 (money); *People v. Allison*, No. S004649, RT 969-70 (same); *People v. Belmontes*, No. S004467, RT 2466 (eliminate a witness); *People v. Coddington*, No. S008840, RT 6759-61 (sexual gratification); *People v. Ghent*, No. S004309, RT 2553-55 (same); *People v. Brown*, No. S004451, RT 3544 (avoid arrest); *People v. McLain*, No. S004370, RT 31 (revenge); *People v. Edwards*, No. S004755, RT 10,544 (no motive at all).

in the morning or in the middle of the day.[48]

e. The location of the killing. Prosecutors have argued, and juries were free to find, that factor (a) was an aggravating circumstance because the victim was killed in her own home, in a public bar, in a city park or in a remote location.[49]

The foregoing examples of how the factor (a) aggravating circumstance is actually being applied in practice make clear that it is being relied upon as an aggravating factor in every case, by every prosecutor, without any limitation whatever. As a consequence, from case to case, prosecutors have been permitted to turn entirely opposite facts – or facts that are inevitable variations of every homicide – into aggravating factors which the jury is urged to weigh on death's side of the scale.

In practice, § 190.3's broad "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

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48. e.g., *People v. Fauber*, No. S005868, RT 5777 (early morning); *People v. Bean*, No. S004387, RT 4715 (middle of the night); *People v. Avena*, No. S004422, RT 2603-04 (late at night); *People v. Lucero*, No. S012568, RT 4125-26 (middle of the day).

49. e.g., *People v. Anderson*, No. S004385, RT 3167-68 (victim's home); *People v. Cain*, No. S006544, RT 6787 (same); *People v. Freeman*, No. S004787, RT 3674, 3710-11 (public bar); *People v. Ashmus*, No. S004723, RT 7340-41 (city park); *People v. Carpenter*, No. S004654, RT 16,749-50 (forested area); *People v. Comtois*, No. S017116, RT 2970 (remote, isolated location).

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.])

XVII. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY AND CAPRICIOUS SENTENCING, AND DEPRIVES DEFENDANTS OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME; IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

As shown above, California's death penalty statute effectively does nothing to narrow the pool of murderers to those most deserving of death in either its "special circumstances" section (§ 190.2) or in its sentencing guidelines (§ 190.3). A defendant, like appellant, convicted of felony-murder is automatically eligible for death, and freighted with a potential aggravating circumstance to be weighed on death's side of the scale. Section 190.3(a) allows prosecutors to argue that every feature of a crime that can be articulated is an acceptable aggravating circumstance, even features that are mutually exclusive.

Furthermore, there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as

to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances are proved, that they outweigh the mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior convictions, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required; it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire process of making the most consequential decision a juror can make – whether or not to impose death.

A. Beyond a Reasonable Doubt Is the Appropriate Burden of Proof for Factors Relied on to Impose a Death Sentence, for Finding that Aggravating Factors Outweigh Mitigating Factors, and for Finding that Death Is the Appropriate Sentence.

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.[50] Only

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50. Ala. Code § 13A-5-45(e) (1975); Ark. Code Ann. § 5-4-603 (Michie 1987); Colo. Rev. Stat. Ann. § 16-11-103(d) (West 1992); Del. Code Ann. tit. 11, § 4209(d)(1)(a) (1992); Ga. Code Ann. § 17-10-30(c) (Harrison 1990); Idaho Code § 19-2515(g) (1993); 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); *State*

California and four other states (Florida, Missouri, Montana, and New Hampshire) fail to statutorily address the matter.

Three states require that the jury must base any death sentence on a finding beyond a reasonable doubt that death is the appropriate punishment.[51] A fourth state, Utah, has reversed a death judgment because that judgment was based on a standard of proof that was less than proof beyond a reasonable doubt. (*State v. Wood* (Utah 1982) 648 P.2d 71, 83-84.) California 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.

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v. Stewart (Neb. 1977) 250 N.W.2d 849, 863; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 888-890; 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. 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(c) (1989); Conn. Gen. Stat. Ann. § 53a-46a(c) (West 1985).)

51. Ark. Code Ann. § 5-4-603(a)(3) (Michie 1991); Wash. Rev. Code Ann. § 10.95.060 (West 1990); and *State v. Goodman* (1979) 257 S.E.2d 569, 577.

This Court has reasoned that, because the penalty phase determinations are "moral and . . . not factual" functions, they are not "susceptible to a burden-of-proof quantification." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 79.) The moral basis of a decision to impose death, however, does not mean that a decision of such magnitude should be made without rationality or conviction. Nor is it true that the penalty phase determinations mandated by section 190.3 do not involve fact finding.

Section 190.3 requires the "trier of fact" to find that at least one aggravating factor exists and that such aggravating factor (or factors) outweigh any and all mitigating factors, as a prerequisite to the imposition of the death penalty. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), "an aggravating factor is any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC 8.88.) 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 outweigh mitigating factors. These determinations are

essential elements of a death-worthy crime.

The fact that under the Eighth Amendment, "death is different" cannot be used as a justification for permitting states to relax procedural protections provided by the Sixth and Fourteenth Amendments when proving an aggravating factor necessary to a capital sentence. *Ring v. Arizona* (2002) 122 S.Ct. 1428, 1443. No greater interest is ever at stake than in the penalty phase of a capital case. (*Monge v. California* (1998) 524 U.S. 721, 732 ["the death penalty is unique in its severity and its finality"].) In *Monge*, the U.S. Supreme Court expressly found the *Santosky* statement of the rationale for the burden of proof beyond a reasonable doubt requirement[52] applicable 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. (*Bullington v. Missouri* (1981) 451 U.S. 435, 441 [quoting *Addington v. Texas* (1979) 441 U.S. 418, 423-424 [99 S.Ct. 1804, 1807-1808, 60 L.Ed.2d 323].)" (*Monge v. California*, *supra*, 524 U.S. at p.

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52. "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." (*Santosky v. Kramer* (1982) 455 U.S. 745, 755 [internal citations omitted].)

732 [emphasis added].)

In *Apprendi v. New Jersey* (2000) 530 U.S. 466, the U.S. Supreme 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 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

Under California's capital sentencing scheme, the "trier of fact" may not impose a death sentence unless it finds (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) In *Ring v. Arizona, supra*,122 S.Ct. 1428, the high court held that the Sixth and Fourteenth Amendment's guarantees of a jury trial means that such determinations must be made by a jury, and must be made beyond a reasonable doubt.

Before *Ring* was decided, this Court rejected the application of *Apprendi* to the penalty phase of a capital trial. In so doing, the Court relied in large part on *Walton v. Arizona* (1990) 497 U.S. 639, and its conclusion

that there is no constitutional right to a jury determination of facts that would subject defendants to a penalty of death. (*People v. Ochoa* (2001) 26 Cal.4th 398, 453 [*Walton* "compels rejection of defendant's instant claim [that he was entitled to a finding beyond a reasonable doubt of the applicability of a particular section 190.3 sentencing factor]".)

In *Ochoa*, this Court stated that a finding of first degree murder in Arizona was the "functional equivalent" of a finding of first degree murder with a section 190.2 special circumstance in California: "both events narrowed the possible range of sentences to death or life imprisonment . . . a death sentence is not a statutorily permissible sentence until the jury has found the requisite facts true beyond a reasonable doubt. In Arizona, the requisite fact is the defendant's commission of first degree murder; in California, it is the defendant's commission of first degree murder with a special circumstance. Once the jury has so found, however, there is no further *Apprendi* bar to a death sentence." (*People v. Ochoa, supra*, at 454; See also, *People v. Anderson* (2001) 25 Cal.4th 543, 589, fn. 14.)

This contention was specifically rejected by the high court in *Ring*, which (1) overruled *Walton* to the extent *Walton* allowed a sentencing judge, sitting without a jury to make factual findings necessary for imposition of a death sentence, and (2) held *Apprendi* fully applicable to all

such findings whether labeled "sentencing factors" or "elements" and whether made at the guilt or penalty phases of trial: "Arizona's enumerated aggravating factors operate as `the functional equivalent of an element of a greater offense'. . . .". (*Ring,* 122 S.Ct. At 2443, quoting *Apprendi*, 530 U.S. at 494, n. 19 (2000).

In light of *Ring*, this Court's holdings, made in reliance on *Walton*, that there is no need for any jury determination of the presence of an aggravating factor, or that such factors outweigh mitigating factors, because the jury's role as factfinder is complete upon the finding of a special circumstance, are no longer tenable. California's statute requires that the jury find one or more aggravating factors, and that these factors outweigh mitigating factors, before it can decide whether or not to impose death. These findings exposed appellant to a greater punishment than that authorized by the special circumstances finding alone. "Capital defendants, no less than non-capital defendants are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment. The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death." (*Ring*, 122 S. Ct. at 1443.)

In *People v. Snow* (2003) 30 Cal.4th 43,126,fn 32., this Court stated that *Aprendi v. New Jersey* (2000) 530 U.S. 466, which held that a jury must find beyond unanimously and beyond a reasonable doubt any fact that increases the maximum sentence possible for a defendant, does not affect California's death penalty process, because once a special circumstance has been found beyond a reasonable doubt the defendant is death eligible and jury findings as to aggravating circumstances do not expose a defendant to a higher maximum penalty.

However, a careful look at California's death penalty procedures shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial and these steps are subject to the mandates of *Ring*.

California utilizes a bifurcated process in which the jury first determines guilt or innocence of first-degree murder and whether or not alleged "special circumstances" are true. If a defendant is found guilty and at least one special circumstance is found to be true, a "penalty phase" proceeding is held, wherein new witnesses may be called and new evidence presented by the prosecution and defense to establish the presence or absence of specified "aggravating circumstances," as well as any mitigating circumstances. The jurors are instructed that they are to weigh aggravating

versus mitigating circumstances and that they may impose death only if they find that the former substantially outweigh the latter. If aggravating circumstances do not outweigh mitigating circumstances, the jury must impose life without possibility of parole, or "LWOP." Even if aggravating circumstances do outweigh mitigating circumstances, the jury has the discretion to exercise mercy and impose LWOP instead of death. (See sections 190-190.9; CALJIC Nos. 8.84-8.88; *People v. Allen* (1986) 42 Cal.3d 1222, 1276-1277; *People v. Brown (Brown I),* (1985) 40 Cal.3d 512, 541.)

In California, the penalty for first-degree murder is 25 years to life unless at least one of a statutorily enumerated list of "special circumstances" is found. This special finding is made during the guilt phase by the jury, unanimously and beyond reasonable doubt. Prior to *Ring*, this Court held that "there is no right under the Sixth or Eighth Amendments to the United States Constitution to have a jury determine the existence of all of the elements of a special circumstance." (*People v. Odle* (1988) 45 Cal.3d 286, 311.) However, in *People v. Prieto,* the Court acknowledged the error of that holding. (*People v. Prieto* (2003) 30 Cal.4th 226, 256.)

Only if a special circumstance is found does the trial proceed to the penalty phase where the jury hears additional evidence and argument from

the prosecution and defense and determines whether the penalty will be LWOP or death.

California's scheme in the eligibility phase is directly parallel to Arizona's as recognized by *Ring*. (Compare Ariz. Rev. Stat. Ann. § 13-703(E) & (F) to Cal. Pen. Code §§ 190.2 & 190.3.) The Arizona statute, like section 190.3, lists the specific circumstances which can be considered as aggravating or mitigating the offense. (Ariz. Rev. Stat. Ann. § 13-703(F).) Some of these are similar to some of the special circumstances found in California's section 190.2 (compare § 190.2(3) with Ariz. Rev. Stat. Ann. § 13-703(F)(8); and § 190.2(2) with Ariz. Rev. Stat. Ann. § 13-703(F)(1); and § 190.2(7) with Ariz. Rev. Stat. Ann. § 13-703(F)(10); others, however, are equivalent to section 190.3's aggravating circumstances. (Compare § 190.3, subds.(c)), (a), (i), (h), (g), & (k), with Ariz. Rev. Stat. Ann. §§ 13-703(F)(2), (F)(6),(9)&(3), (F)(5)&(9), (G)(1), (2), and 13-703(G), respectively.)

Like a first-degree murder conviction under the Arizona statutory scheme invalidated by this Court in *Ring*, a jury verdict of guilt with a finding of one or more special circumstances in California, "authorizes a maximum penalty of death only in a formal sense." (*Ring, supra*, 536 U.S. at pp. 602-605.) In California, death is the maximum penalty for *all* murder

convictions. (See § 190.1, subds. (a), (b) & (c).) Section 190(a) provides that the punishment for first-degree murder is 25 years to life, life without the possibility of parole, or death. The penalty to be applied "shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5" (Ibid.)

Section 190.3 requires the jury to impose LWOP unless the jury finds the existence of at least one additional aggravating factor above and beyond what was found during the guilt phase, and then finds that the factors in aggravation outweigh any factors in mitigation. According to California's "principal sentencing instruction" (*People v. Farnam* (2002) 28 Cal.4th 107, 177), an aggravating factor is "any fact, condition or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself." (CALJIC No. 8.88.) In the context of a California capital murder conviction, "elements of the crime" can only be interpreted to mean the elements necessary to prove both the first degree murder and whatever special circumstance or circumstances were found during the guilt phase.

Only then is the defendant truly "eligible" for death. The jury then

engages in the final, purely normative stage of determining whether a particular defendant should be sentenced to death. Even if the jury concludes that aggravation outweighs mitigation, as noted, it may still impose LWOP.

To summarize, then, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder and at least one of the of the "special circumstances" enumerated in section 190.2 must be found; (2) at least one of a *different* list of "aggravating factors" from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if and only if aggravating factors are found to outweigh mitigating factors present, the jury must choose between death and LWOP.

Of these four steps only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, Steps 2, 3, and 4 occur during the penalty phase. Although occurring in the penalty phase, in actuality steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa* (1992) 4 Cal.4th 569, rather than the *selection*

determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a "formal sense" only (*Ring, supra,* 536 U.S. at pp. 602-605); death cannot be imposed until Steps 2 and 3 have occurred.

It is here that California's scheme runs afoul of *Ring* because Steps 2 and 3 do not require juror unanimity or findings beyond reasonable doubt. Yet they do involve factual determinations above and beyond those made in the guilt phase of the trial necessary for the imposition of death. Therefore, under *Ring*, these factual determinations must be made unanimously and beyond a reasonable doubt. A special circumstance findings pursuant to section 190.2 is not the same as an aggravating factor; it can even serve as a mitigating factor. (See e.g., *People v. Hernandez* (2003) 30 Cal.4th 835 [financial gain special circumstance of section 190.2, subd. (a)(1) can be argued as mitigation if murder was committed by an addict to feed addiction].)

In effect, the California legislature has extended steps of the eligibility phase into the penalty phase of the trial. The selection phase does not begin until Step 4, where the jury considers all of the circumstances of

the case and defendant, and determines whether to impose death.

The highest courts of Colorado, Missouri, Nevada, Connecticut, Arizona, and Maryland have concluded that steps wholly analogous to Step 2 of California's process involve factual determinations and are therefore subject to the requirements of *Ring*, and all but Maryland have further concluded that steps analogous to Step 3 of California's process — the determination of whether aggravation outweighs mitigation — is also a factual determination that must be made beyond a reasonable doubt. (See *Woldt v. People* (Colo. 2003) 64 P.3d 256, 263-267; *State v. Whitfield* (Mo. 2003) 107 S.W.3d 259; *Johnson v. State* (Nev. 2002) 59 P.3d 450, 460; *State v. Rizzo* (Conn. 2003) 833 A.2d 363, 406-407; *State v. Ring* (Ariz. 2003) 65 P.3d 915, 942-943; *Oken v. State* (Md. 2003) 835 A.2d 1105, 1122.) California is alone among the states in holding that the determination of whether aggravating factors are present need not be made by the jury unanimously and beyond reasonable doubt. Yet in *Prieto*, this Court stated that the high court's reasoning in *Ring* does not apply to the penalty-phase determination in California. (See also *People v. Snow*, *supra,*. 30 Cal.4th at p.126, fn. 32.) In *Prieto*, this Court recognized that a California sentencing jury is charged with a duty to find facts in the penalty phase: "While each juror must believe that the aggravating circumstances

substantially outweigh the mitigating circumstances, he or she need not agree on the existence of any one aggravating factor. This is true *even though the jury must make certain factual findings* in order to consider certain circumstances as aggravating factors." (*Prieto*, *supra*, 30 Cal.4th 226 at p. 263, emphasis added.)

Thus, California's statutory law, jury instructions, and this Court's previous decisions leave no doubt that facts must be found, and fact-finding must occur, before the death penalty may be considered. Yet, this Court has attempted to avoid the mandates of *Ring* by characterizing facts found during the penalty phase as "facts which bear upon but do not necessarily determine which of these two alternative penalties is appropriate." (See *People v. Snow, supra*; *People v. Anderson* (2001) 25 Cal.4th 543, 589-590, fn. 14.) This is a meaningless distinction. There are no facts either in Arizona's scheme or in California's scheme 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. The jury's role in the penalty phase of a California capital trial requires that it make factual findings regarding aggravating factors that are a prerequisite to a sentence of death. *Ring* clearly applies. California's statute, as written, applied, and interpreted by this Court, is unconstitutional

and must fall.

B. Even If Proof Beyond a Reasonable Doubt Was Not the Constitutionally Required Burden of Persuasion For Finding (1) that an Aggravating Factor Exists, (2) that the Aggravating Factors Outweigh the Mitigating Factors, and (3) that Death is the Appropriate Sentence, Proof by a Preponderance of the Evidence Would be Constitutionally Compelled as to Each Such Finding.

A burden of proof of at least a preponderance is required as a matter of due process because that has been the minimum burden historically permitted in any sentencing proceeding. Judges have never had the power to impose sentence without the firm belief that whatever considerations underlie their sentencing decisions have been at least proved to be more likely than not. They have never had the power that a California capital sentencing jury has been accorded, which is to base "proof" of aggravating circumstances on any considerations they want, without any burden at all on the prosecution, and sentence a person to die based thereon. The absence of any historical authority for a sentencer to impose sentence based on aggravating circumstances found with proof less than 51% – even 20%, or 10%, or 1% – is itself ample evidence of the unconstitutionality of failing to assign a burden of proof. (See, e.g., *Griffin v. United States* (1991) 502 U.S. 46, 51 [112 S.Ct. 466, 116 L.Ed.2d 371] [historical practice given

great weight in constitutionality determination]; *Murray's Lessee v. Hoboken Land and Improvement Co.* (1855) 59 U.S. (18 How.) 272, 276-277 [due process determination informed by historical settled usages].)

California does impose on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal. R. Ct. 420(b) [existence of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's guarantee to a trial by jury. (See e.g., *Mills v. Maryland*, *supra*, 486 U.S. at p. 374; *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421; *Ring v. Arizona, supra,* 122 S.Ct at 1443.)

Evidence Code section 520 provides: "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.

Section 520 is a legitimate state expectation in adjudication, and is thus constitutionally protected under the Fourteenth Amendment. (*Hicks v. Oklahoma* (1980) 447 U.S.343, 346.)

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes* (1990) 52 Cal.3d 577, 643.) Appellant respectfully suggests that *People v. Hayes* – in which this Court did not consider the applicability of section 520 – is erroneously decided. The word "normative" applies to courts as well as jurors, and does not apply at all to the finding of the existence of aggravating factors. There is a long judicial history of requiring that decisions affecting life or liberty be based on reliable evidence that the decision-maker finds more likely than not to be true. For all of these reasons, appellant's jury should have been instructed that the state had the burden of proof beyond a reasonable doubt regarding the existence of any factor in aggravation, and the burden of persuasion regarding the propriety of the death penalty. Sentencing appellant to death without adhering to the procedural protection afforded by state law violated federal due process. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The failure to articulate a proper burden of proof is constitutional error under the Fifth,Sixth, Eighth and Fourteenth Amendments, and is

reversible *per se*. (*Sullivan v. Louisiana, supra.*) That should be the result here, too.

C. The Trial Court's Failure To Instruct The Jury on Any Penalty Phase Burden of Proof Violated Appellant's Constitutional Rights To Due Process And Equal Protection Of The Laws, And To Not Be Subjected to Cruel And Unusual Punishment.

Appellant's death sentence violates the Fifth, Eighth and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that death is the appropriate sentence beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In re Winship* (1970) 397 U.S. 358.)

Appellant has argued above that the appropriate burden of proof for the requisite findings that one or more aggravating factors are present, and that such factors outweigh the mitigating factors, is beyond a reasonable doubt, and that the prosecution has the burden of persuasion in all sentencing proceedings. (See, Section A, *ante*.) In any event, some burden of proof must be articulated to ensure that juries faced with similar evidence

will return similar verdicts and that the death penalty is evenhandedly applied, and capital defendants treated equally from case to case. "Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 112; emphasis added.) 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, 279-281.) 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 the burden should be on the defendant to prove mitigation in penalty phase would continue to believe that. Such jurors do exist.[53] 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 Fifth, Sixth, Eighth and Fourteenth Amendments, because the instructions given fail to

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53. See, e.g., *People v. Dunkle*, No S014200, RT 1005, cited in Appellant's Opening Brief in that case at p. 725.

provide the jury with the guidance legally required for administration of the death penalty.

This Court has held that a burden of persuasion is inappropriate given the normative nature of the determinations to be made in the penalty phase. (*People v. Hayes, supra,* 52 Cal.3d at 643.) However, even with a normative determination to make, 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 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) – the "height of arbitrariness" (*Mills v. Maryland* (1988) 486 U.S. 367, 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. Such chaos is not allowed for factual findings in non-capital cases, or even in sentencing proceedings before a judge after all essential foundational factors have been

found by a jury.

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.*) In cases in which the aggravating and mitigating evidence is balanced, or the evidence as to the existence of a particular aggravating factor is in equipoise, it is unacceptable under the Eighth and Fourteenth Amendments that one man should live and another die simply because one jury assigns the burden of persuasion to the state, and another assigns it to the defendant.

D. California Law Violates The Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require Unanimous Jury Agreement On Aggravating Factors.

Jury Agreement

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor* (1990) 52 Cal.3d 719, 749; *accord, People v. Bolin* (1998) 18 Cal.4th 297, 335-336; *People v. Miranda* (1988) 44 Cal.3d 57, 99.) Consistent with this construction of California's capital sentencing scheme, no instruction was given requiring jury agreement on any particular aggravating factor.

Here, there was not even a requirement that a majority of jurors

agree on any particular aggravating factor, let alone agree that any particular combination of aggravating factors warrants the sentence of death. Indeed, on the instructions and record in this case, there is nothing to preclude the possibility that each of 12 jurors voted for a death sentence based on a perception of what was aggravating enough to warrant a death penalty which would have lost by a 1-11 vote, had it been put to the jury as a reason for the death penalty.

It is inconceivable that a death verdict would satisfy the Eighth and Fourteenth Amendments if it were based on (i) each juror finding a different set of aggravating circumstances, (ii) the jury voting separately on whether each juror's individual set of aggravating circumstances warrants death, and (iii) each such vote coming out 1-11 against that being an appropriate basis for death (for example, because other jurors were not convinced that all of those circumstances actually existed, and were not convinced that the subset of those circumstances which they found to exist actually warranted death). Nothing in this record precludes such a possibility. The result here is thus akin to the chaotic and unconstitutional result suggested by the plurality opinion in *Schad v. Arizona* (1991) 501 U.S. 624, 633 [111 S.Ct. 2429][plur. opn. of Souter, J.].

With nothing to guide its decision, there is nothing to suggest the

jury imposed a death sentence based on any agreement on reasons therefor -- including which aggravating factors were in the balance. The absence of historical authority to support such a practice in sentencing makes it further violative of the Fifth, Sixth, Eighth and Fourteenth Amendments. (E.g., *Murray's Lessee, supra*; *Griffin v. United States, supra.*) And it violates the Fifth, Sixth, Eighth and Fourteenth Amendments to impose a death sentence when there is no assurance the jury, or a majority of the jury, ever found a single set of aggravating circumstances which warranted the death penalty. A death sentence under those circumstances would be so arbitrary and capricious as to fail Fifth, Eighth and Fourteenth Amendment scrutiny. (See, e.g., *Gregg v. Georgia, supra,* 428 U.S. at pp. 188-189.)

Under *Ring v. Arizona, supra,* 122 S. Ct. 1428, it would also violate the Sixth Amendment's guarantee of a trial by jury. The finding of one or more aggravating factors, and the finding that such factors outweigh mitigating factors, are critical elements of California's sentencing scheme, and a prerequisite to the weighing process in which normative determinations are made. The U.S. Supreme Court has held that such determinations must be made by a jury, and cannot be somehow attended with fewer procedural protections than decisions of much fewer consequences. See Section A, ante.

For all of these reasons, the sentence of death violates the Fifth, Sixth, Eighth and Fourteenth Amendments.

Jury Unanimity

Of the twenty-two states like California that vest the responsibility for death penalty sentencing on the jury, fourteen require that the jury unanimously agree on the aggravating factors proven.[54] California does not have such a requirement.

Thus, appellant's jurors were never told that they were required to agree as to which factors in aggravation had been proven. Moreover, each juror could have relied on a factor which could potentially constitute proper aggravation, but was different from the factors relied on by the other jurors, i.e., with no actual agreement on why appellant should be condemned.

The United States Supreme Court decision in *Apprendi v. New Jersey*, *supra*, confirms that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantees of the Sixth Amendment, all of the

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54. See Ark. Code Ann. § 5-4-603(a) (Michie 1993); Colo. Rev. Stat. Ann. § 16-11-103(2) (West 1992); 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); 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).

findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (*Id.*, 530 U.S. at 478.) In *Apprendi* the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved to the jury's satisfaction beyond a reasonable doubt. Under California's capital sentencing scheme, a death sentence may not be imposed absent findings (1) that one or more aggravating factors exist and (2) the aggravating factor or factors outweigh any mitigating factors. (Penal Code § 190.3.) Accordingly, these findings had to be found beyond a reasonable doubt by a unanimous jury.

This Court "has held that unanimity with respect to aggravating factors is not required by statute or as a constitutional procedural safeguard." (*People v. Taylor*, *supra*, 52 Cal.3d at 749.) This holding was overruled by *Ring v. Arizona, supra*, which held that any factual findings prerequisite to a death sentence must be found beyond a reasonable doubt by a unanimous jury. (See Section A, *ante*.)

The U.S. Supreme Court has held that the verdict of a six-person jury must be unanimous in order to "assure . . . [its] reliability." (*Brown v.*

Louisiana (1980) 447 U.S. 323, 334 [100 S.Ct. 2214, 65 L.Ed.2d 159].) Particularly given the "acute need for reliability in capital sentencing proceedings" (*Monge v. California, supra,* 524 U.S. at p. 732;[55] *accord Johnson v. Mississippi, supra,* 486 U.S. at p. 584), the Fifth, Sixth, Eighth, and Fourteenth Amendments are likewise not satisfied by anything less than unanimity in the crucial findings of a capital jury.

The finding of an aggravating circumstance is such a finding. An enhancing allegation in a non-capital case is a finding that must, by law, be unanimous. (See, e.g., Pen. Code, §§ 1158, 1158a.) Since capital defendants are entitled, if anything, to more rigorous protections than those afforded non-capital defendants (see *Monge v. California, supra,* 524 U.S.

55..The *Monge* court developed this point at some length: "The penalty phase of a capital trial is undertaken to assess the gravity of a particular offense and to determine whether it warrants the ultimate punishment; it is in many respects a continuation of the trial on guilt or innocence of capital murder. `It is of vital importance' that the decisions made in that context `be, and appear to be, based on reason rather than caprice or emotion.' *Gardner v. Florida* 430 U.S. 349, 358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977). Because the death penalty is unique `in both its severity and its finality,' *id.*, at 357, 97 S.Ct., at 1204, we have recognized an acute need for reliability in capital sentencing proceedings. See *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (opinion of Burger, C.J.) (stating that the `qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed'); see also *Strickland v. Washington,* 466 U.S. 668, 704, 104 S.Ct. 2052, 2073, 80 L.Ed.2d 674 (1984) (Brennan, J., concurring in part and dissenting in part) (`[W]e have consistently required that capital proceedings be policed at all stages by an especially vigilant concern for procedural fairness and for the accuracy of factfinding')." *(Monge v. California, supra,* 524 U.S. at 731-732.)

at p. 732; *Harmelin v. Michigan* (1991) 501 U.S. at 957, 994), and certainly no less (*Ring*, 122 S.Ct. at 24 2248), and since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst*, (9th Cir 1990) 897 F.2d 417, 421), it follows that unanimity with regard to aggravating circumstances is constitutionally required.[56]

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated.[57] To apply the requirement to findings carrying a maximum punishment of one year in the county jail – but not to factual findings that often 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 violate both the due process and cruel and unusual punishment clauses of the state and

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56.Under the federal death penalty statute, it should be pointed out, a "finding with respect to any aggravating factor must be unanimous." (21 U.S.C., § 848, subd. (k).)

57.The first sentence of Article 1, section 16 of the California Constitution provides: "Trial 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 *People v. Wheeler* (1978) 22 Cal.3d 258, 265 [confirming the inviolability of the unanimity requirement in criminal trials].)

federal Constitutions.

This Court has said that the safeguards applicable in criminal trials are not applicable when unadjudicated offenses are sought to be proved in capital sentencing proceedings "because [in the latter proceeding the] defendant [i]s not being tried for that [previously unadjudicated] misconduct." (*People v. Raley* (1992) 2 Cal.4th 870, 910.) The United States Supreme Court has repeatedly pointed out, however, that the penalty phase of a capital case "has the 'hallmarks' of a trial" on guilt or innocence." (*Monge v. California*, *supra*, 524 U.S. at p. 726; *Strickland v. Washington*, 466 U.S. at pp. 686-687; *Bullington v. Missouri* (1981) 451 U.S. 430, 439 [101 S.Ct. 1852, 68 L.Ed.2d 270].) While the unadjudicated offenses are not the only offenses the defendant is being "tried for," obviously, that trial-within-a-trial often plays a dispositive role in determining whether death is imposed.

This Court has also rejected the need for unanimity on the ground that "generally, unanimous agreement is not required on a foundational matter. Instead, jury unanimity is mandated only on a final verdict or special finding." (*People v. Miranda*, *supra*, 44 Cal.3d at p. 99.) But unanimity is not limited to final verdicts. For example, it is not enough that jurors unanimously find that the defendant violated a particular criminal statute;

where the evidence shows several possible acts which could underlie the conviction, the jurors must be told that to convict, they must unanimously agree on at least one such act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 281-282.) It is only fair and rational that, where jurors are charged with the most serious task with which any jury is ever confronted – determining whether the aggravating circumstances are so substantial in comparison to the mitigating as to warrant death – unanimity as to the existence of particular aggravating factor supporting that decision, and as to the fact that such factors outweigh the mitigating factors, likewise be required. These "foundational factors" of the sentencing decision are precisely the types of determinations for which appellant is entitled to unanimous jury verdicts beyond a reasonable doubt. (See *Ring v. Arizona, supra.*)

The error is reversible *per se*, because it permitted the jury to return a death judgment without making the findings required by law. (See *Sullivan v. Louisiana*, *supra*, 508 U.S. at pp. 278-281; *United States v. Gaudin*, *supra,* 515 U.S. at pp. 522-523 [aff'g 28 F.3d at pp. 951-952.]) In any event, given the difficulty of the penalty determination, the State cannot show there is no reasonable possibility (*Chapman v. California*, *supra,* 386 U.S. at p. 24; *Satterwhite v. Texas, supra,* 486 U.S. at pp. 258-259.) that the failure to instruct on the need for unanimity regarding aggravating

circumstances contributed to the verdict of death. It certainly cannot be found that the error had "no effect" on the penalty verdict. (*Caldwell v. Mississippi*, *supra*, 472 U.S. at 341.) As a result, the penalty verdict must be set aside.

E. California Law Violates The Fifth, Sixth, Eighth And Fourteenth Amendments To The United States Constitution By Failing To Require That The Jury Base Any Death Sentence On Written Findings Regarding Aggravating Factors.

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 195.) And especially given that California juries have total discretion without any guidance 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 without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316 [83 S.Ct 745.])

This Court has held that the absence of such a provision does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859.) Ironically, such findings are elsewhere

considered by this Court to be an element of due process so fundamental that they are even required at parole suitability hearings. A convicted prisoner who believes that he or she was improperly denied parole must proceed via a petition for writ of habeas corpus, and is required to allege with particularity the circumstances constituting the state's wrongful conduct and show prejudice flowing from that conduct. (*In re Sturm* (1974) 11 Cal.3d 258.) The parole board is therefore required to state its reasons for denying parole: "It is unlikely that an inmate seeking to establish that his application for parole was arbitrarily denied can make necessary allegations with the requisite specificity unless he has some knowledge of the reasons therefor." (*Id.*, 11 Cal.3d at 267.)[58] The same reasoning applies 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).)

In a non-capital case, the sentencer is required by California law to state on the record the reasons for the sentence choice. (*Ibid.*; section 1170,

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58. A determination of parole suitability shares many characteristics with the decision of whether or not to impose the death penalty. In both cases, the subject has already been convicted of a crime, and the decision-maker must consider questions of future dangerousness, the presence of remorse, the nature of the crime, etc., in making its decision. See Title 15, California Code of Regulations, section 2280 et seq.

subd. (c).) Under the Fifth, Sixth, Eighth and Fourteenth Amendments, capital defendants are entitled to more rigorous protections than those afforded non-capital defendants (*Harmelin v. Michigan, supra,* 501 U.S. at p. 994). Since providing more protection to a non-capital defendant than a capital defendant would violate the equal protection clause of the Fourteenth Amendment (see generally *Myers v. Ylst* (9th Cir. 1990) 897 F.2d 417, 421), the sentencer in a capital case is constitutionally required to identify for the record in some fashion the aggravating circumstances found.

Written findings are essential for a meaningful review of the sentence imposed. In *Mills v. Maryland*, 486 U.S. 367, for example, the written-finding requirement in Maryland death cases enabled the Supreme Court not only to identify the error that had been committed under the prior state procedure, but to gauge the beneficial effect of the newly implemented state procedure. (See, e.g., *id.* at 383, n. 15.) The fact that the decision to impose death is "normative" (*People v. Hayes, supra*, 52 Cal.3d at 643) and "moral" (*People v. Hawthorne* (1992) 4 Cal.4th 43,79) does not mean that its basis cannot be, and should not be, articulated.

The importance of written findings is recognized throughout this country. Of the thirty-four post-*Furman* state capital sentencing systems,

twenty-five require some form of such written findings, specifying the aggravating factors upon which the jury has relied in reaching a death judgment. Nineteen of these states require written findings regarding all penalty phase aggravating factors found true, while the remaining six require a written finding as to at least one aggravating factor relied on to impose death.[59]

Further, written findings are essential to ensure that a defendant subjected to a capital penalty trial under Penal Code section 190.3 is afforded the protections guaranteed by the Sixth Amendment right to trial by jury. As *Ring v. Arizona* has made clear, the Sixth Amendment guarantees a defendant the right to have a unanimous jury make any factual findings prerequisite to imposition of a death sentence – including, under Penal Code section 190.3, the finding of an aggravating circumstance (or

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59. See Ala. Code §§ 13A-5-46(f), 47(d) (1982); Ariz. Rev. Stat. Ann. § 13-703(d) (1989); Ark. Code Ann. § 5-4-603(a) (Michie 1987); 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(e) (1987); 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. § 46-18-306 (1993); Neb. Rev. Stat. § 29-2522 (1989); 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); 42 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. § 37.071(c) (West 1993); Va. Code Ann. § 19.2-264.4(D) (Michie 1990); Wyo. Stat. § 6-2-102(e) (1988).

circumstances), and finding that these aggravators outweigh any and all mitigating circumstances. In some cases, the jury may rely upon aspects of a special circumstance found at the guilt phase trial as a penalty phase aggravating circumstance and conclude that it outweighs the mitigating circumstances, but there is no requirement that the jury treat a special circumstance finding as a penalty phase aggravating factor or that the jury accord such a factor any particular aggravating weight. Thus, absent a requirement of written findings as to the aggravating circumstances relied upon, the California sentencing scheme provides no way of knowing whether the jury has made the unanimous findings required under Ring and provides no instruction or other mechanism to even encourage the jury to engage in such a collective fact finding process. The failure to require written findings thus violated not only federal due process and the Eighth Amendment, but also the right to trial by jury guaranteed by the Sixth Amendment.

F. California's Death Penalty Statute As Interpreted By The California Supreme Court Forbids Inter-Case Proportionality Review, Thereby Guaranteeing Arbitrary, Discriminatory, Or Disproportionate Impositions Of The Death Penalty.

The Eighth Amendment to the United States Constitution forbids punishments that are cruel and unusual. The jurisprudence that has emerged applying this ban to the imposition of the death penalty has required that death judgments be proportionate, and reliable. 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 (plurality opinion, alterations in original, quoting *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).)

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review – a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the high court, while declining to hold that comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there

could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review." California's 1978 death penalty statute, as drafted and as construed by this Court and applied in fact, has become such a sentencing scheme. The high court in *Harris*, in contrasting the 1978 statute with the 1977 law which the court upheld against a lack-of-comparative-proportionality-review challenge, itself noted that the 1978 law had "greatly expanded" the list of special circumstances. (*Harris*, 465 U.S. 52, n. 14.)

As we have seen, that greatly expanded list fails to meaningfully narrow the pool of death-eligible defendants and hence permits the same sort of arbitrary sentencing as the death penalty schemes struck down in *Furman v. Georgia*, *supra*. (See section A of this Argument, *ante*.) Further, the statute lacks numerous other procedural safeguards commonly utilized in other capital sentencing jurisdictions (see section C of this Argument), and the statute's principal penalty phase sentencing factor has itself proved to be an invitation to arbitrary and capricious sentencing (see section B of this Argument). The lack of comparative proportionality review has deprived California's sentencing scheme of the only mechanism that might have enabled it to "pass constitutional muster."

Further, it should be borne in mind that the death penalty may not be imposed when actual practice demonstrates that the circumstances of a particular crime or a particular criminal rarely lead to execution. Then, no such crimes warrant execution, and no such criminals may be executed. (See *Gregg v. Georgia*, *supra*, 428 U.S. at 206.) A demonstration of such a societal evolution is not possible without considering the facts of other cases and their outcomes. The U.S. Supreme Court regularly considers other cases in resolving claims that the imposition of the death penalty on a particular person or class of persons is disproportionate – even cases from outside the United States. (See *Atkins v. Virginia* (2002) 122 S.Ct. 2248, 2249; *Thompson v. Oklahoma* (1988) 487 U.S. at 821, 830-31; *Enmund v. Florida* (1982) 458 U.S. 782, 796 n. 22 [102 S.Ct. 3368]; *Coker v. Georgia* (1977) 433 U.S.584, 596 [97 S.Ct. 2861].)

Thirty-one of the thirty-four states that have reinstated capital punishment require comparative, or "inter-case," appellate sentence review. By statute, Georgia requires that the Georgia Supreme Court determine whether ". . . the sentence is disproportionate compared to those sentences imposed in similar cases." (Ga. Stat. Ann. § 27-2537(c).) The provision was approved by the United States Supreme Court, holding that it guards ". . . further against a situation comparable to that presented in *Furman* [*v.*

Georgia (1972) 408 U.S. 238, 33 L.Ed 346, 92 S.Ct. 2726] . . ." (*Gregg v. Georgia* (1976) 428 U.S. 153, 198.) Toward the same end, Florida has judicially ". . . adopted the type of proportionality review mandated by the Georgia statute." (*Profitt v. Florida* (1976) 428 U.S. 242, 259 [96 S.Ct. 2960.]) Twenty states have statutes similar to that of Georgia, and seven have judicially instituted similar review.[60]

Section 190.3 does not require that either the trial court or this Court undertake a comparison between this and other similar cases regarding the relative proportionality of the sentence imposed, i.e., inter-case

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60. 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, 03, 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. § 39-13-206(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).

Also 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. 1981) 417 N.E.2d 889, 899; *State v. Pierre* (Utah 1977) 572 P.2d 1338, 1345; *State v. Simants* (Neb. 1977) 250 N.W.2d 881, 890 [comparison with other capital prosecutions where death has and has not been imposed]; *State v. Richmond* (Ariz. 1976) 560 P.2d 41,51; *Collins v. State* (Ark. 1977) 548 S.W.2d 106,121.

proportionality review. (See *People v. Fierro*, *supra*, 1 Cal.4th at p. 253.) The statute also does not forbid it. The prohibition on the consideration of any evidence showing that death sentences are not being charged or imposed on similarly situated defendants is strictly the creation of this Court. (See, e.g., *People v. Marshall* (1990) 50 Cal.3d 907, 946-947.)

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 – a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* – and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment. Categories of crimes that warrant a close comparison with actual practices in other cases include the imposition of the death penalty for felony-murders or other non-intentional killings, and single-victim homicides. See Article VI, Section 2 of the International Covenant on Civil and Political Rights, which limits the death penalty to only "the most serious crimes".[61] Categories of criminals that warrant such

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61. Judge Alex Kozinski of the Ninth Circuit has argued that an effective death penalty statute must be limited in scope: "First, it would ensure that, in a world of limited resources and in the face of a determined opposition, we will run a machinery of death that only convicts about the number of people we truly have the means and the will to execute. Not only would the monetary and opportunity

a comparison include persons suffering from insanity (*Ford v. Wainwright* (1986) 477 U.S. 399) or mental retardation; see *Atkins v. Virginia*, *supra*.

Furman raised the question of whether, within a category of crimes or criminals for which the death penalty is not inherently disproportionate, the death penalty has been fairly applied to the individual defendant and his or her circumstances. California's 1978 death penalty scheme and system of case review permits the same arbitrariness and discrimination condemned in *Furman*, in violation of the Eighth and Fourteenth Amendments. (*Gregg v. Georgia*, *supra*, 428 U.S. at p. 192, citing *Furman v. Georgia*, *supra*, 408 U.S. at p. 313 (White, J., conc.).) The failure to conduct inter-case proportionality review also violates the Fifth, Sixth, Eighth and Fourteenth Amendment prohibitions against proceedings conducted in a constitutionally arbitrary, unreviewable manner or which are skewed in favor of execution.

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costs avoided by this change be substantial, but a streamlined death penalty would bring greater deterrent and retributive effect. Second, we would insure that the few who suffer the death penalty really are the worst of the very bad – mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more that we can possibly execute, and then pick those who will actually die essentially at random." (Kozinski and Gallagher, *Death: The Ultimate Run-On Sentence*, 46 Case W. Res.L.Rev.1, 30 (1995).)

G. The Prosecution May Not Rely in the Penalty Phase on Unadjudicated Criminal Activity; Further, Even If It Were Constitutionally Permissible For the Prosecutor to Do So, Such Alleged Criminal Activity Could Not Constitutionally Serve As Factor In Aggravation Unless Found to Be True Beyond a Reasonable Doubt By A Unanimous Jury.

Any use of unadjudicated criminal activity by the jury during the sentencing phase, as outlined in § 190.3(b), violates due process and the Fifth, Sixth, Eighth, and Fourteenth Amendments, rendering a death sentence unreliable. (See, e.g., *Johnson v. Mississippi* (1988) 486 U.S. 578 [108 S.Ct.1981]; *State v. Bobo* (Tenn. 1987) 727 S.W.2d 945.)

The United State's Supreme Court's recent decisions in *Ring v. Arizona, supra,* and *Apprendi v. New Jersey, supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective entity. (See Section A, ante.) The application of *Ring* and *Apprendi* 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 Section A, ante. Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged

criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

H. The Use of Restrictive Adjectives in the List of Potential Mitigating Factors Impermissibly Acted as Barriers to Consideration of Mitigation by Appellant's Jury.

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland* (1988) 486 U.S. 367[108 S.Ct. 1860]; *Lockett v. Ohio* (1978) 438 U.S. 586[98 S.Ct. 2954.])

I. The Failure to Instruct That Statutory Mitigating Factors Were Relevant Solely as Potential Mitigators Precluded a Fair, Reliable, and Evenhanded Administration of the Capital Sanction.

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or mitigating depending upon the jury's appraisal of the evidence. As a matter of state law, however, each of the factors introduced by a prefatory

"whether or not" – factors (d), (e), (f), (g), (h), and (j) – were relevant solely as possible mitigators (*People v. Hamilton* (1989) 48 Cal.3d 1142, 1184; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1034; *People v. Lucero* (1988) 44 Cal.3d 1006, 1031 n.15; *People v. Melton* (1988) 44 Cal.3d 713, 769-770; *People v. Davenport* (1985) 41 Cal.3d 247, 288-289). The jury, however, was left free to conclude that a "not" answer as to any of these "whether or not" sentencing factors could establish an aggravating circumstance, and was thus invited to aggravate the sentence upon the basis of non-existent and/or irrational aggravating factors, thereby precluding the reliable, individualized capital sentencing determination required by the Eighth and Fourteenth Amendments. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 304; *Zant v. Stephens* (1983) 462 U.S. 862, 879; *Johnson v. Mississippi* (1988) 486 U.S. 578, 584-85.)

It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-existent factors and did so believing that the state – as represented by the trial court – had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, as well,for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying upon . . . illusory

circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

Even without such misleading argument, the impact on the sentencing calculus of a defendant's failure to adduce evidence sufficient to establish mitigation under factor (d), (e), (f), (g), (h), or (j) will vary from case to case depending upon how the sentencing jury interprets the "law" conveyed by the CALJIC pattern instruction. In some cases the jury may construe the pattern instruction in accordance with California law and understand that if the mitigating circumstance described under factor (d), (e), (f), (g), (h), or (j) is not proven, the factor simply drops out of sentencing calculus. In other cases, the jury may construe the "whether or not" language of the CALJIC pattern instruction as giving aggravating relevance to a "not" answer and accordingly treat each failure to prove a listed mitigating factor as establishing an aggravating circumstance.

The result is that from case to case, even with no difference in the evidence, sentencing juries will likely discern dramatically different numbers of aggravating circumstances because of differing constructions of the CALJIC pattern instruction. In effect, different defendants, appearing before different juries, will be sentenced on the basis of different legal standards. This is unfair and constitutionally unacceptable. Capital sentencing procedures must protect against "'arbitrary and capricious

action,'" *Tuilaepa v. California* (1994) 512 U.S. 967, 114 S.Ct. 2630, quoting *Gregg v. Georgia*, 428 U. S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), and help ensure that the death penalty is evenhandedly applied. (*Eddings v. Oklahoma*, *supra*, 455 U.S. at 112.)

J. California Law that Grants Unbridled Discretion to the Prosecutor Compounds the Effects of Vagueness and Arbitrariness Inherent on the Face of the California Statutory Scheme.

Under California law, the individual prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox* (1988) 47 Cal.3d 207, 275-276, this creates a substantial risk of county-by-county arbitrariness. There can be no doubt that under this statutory scheme, some offenders will be chosen as candidates for the death penalty by one prosecutor, while other offenders with similar qualifications in different counties will not be singled out for the ultimate penalty. Moreover, the absence of any standards to guide the prosecutor's discretion permits reliance on constitutionally irrelevant and impermissible conditions, including race and economic status. Further, under *People v. Morales* (1989) 48 Cal.3d 527, the prosecutor is free to seek the death penalty in almost every murder case.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme-in charging, prosecuting and submitting a case to the jury as a capital crime- merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California st6atutory scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodson v. North Carolina, supra,* 428 U.S. 280, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia, supra,* 408 U.S. 238.

XVIII. THE DIRECTIVE OF CALJIC NO. 8.84.1 AND 8.85 TO THE JURY TO DETERMINE THAT FACTS FROM THE EVIDENCE RECEIVED DURING THE ENTIRE TRIAL VIOLATED APPELLANT'S STATUTORY AND CONSTITUTIONAL RIGHTS TO LIMIT THE AGGRAVATING CIRCUMSTANCES TO SPECIFIC LEGISLATIVELY-DEFINED FACTORS

A. Factual and Procedural Background

The trial court instructed the jury in the language of CALJIC No. 8.84.1 that "you must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise." (CT6518.) In addition, the court also instructed the jury in the language of CALJIC No. 8.85 that "in determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been

received during any part of the trial of this case." (CT6519.)

B. The Use of the Above Stated Language was Constitutionally Improper

There is no statutory basis for the mandate given the jury to determine the facts under CALJIC Nos. 8.84.1 and 8.85. What the jury may consider at the penalty phase is dictated by section 190.3, as construed to meet constitutional requirements. Section 190.3 sets forth specific aggravating and mitigating factors which must be considered by the jury. CALJIC No. 8.84.1 contravenes the requirements of section 190.3.

In *People v. Boyd* (1985) 38 Cal.3d 762, this court held that pursuant to section 190.3. the "prosecution's case for aggravation is limited to evidence relevant to the listed factors exclusive of factor (k)" (*People v. Boyd, supra,* 38 Cal.3d at p. 775.) The directive to the jury in CALJIC No. 8.84.1 violated section 190.3 by permitting the jury to interpret anew guilt phase evidence as factors in aggravation although the evidence failed to fit into any of the specific statutory factors. For instance, under the sweeping mandate of CALJIC No.8.84.1 that the jury "must determine what the facts are from the evidence received during the entire trial unless you are instructed otherwise," the jury was required to consider:

Evidence that appellant would often stay out late at night;

Evidence that appellant would dress like a ninja to get attention at his place of work;

Evidence that appellant was alleged by police to have engaged in child abuse;

Evidence that appellant stated he wanted to "blow up" airplanes;

All of which was constitutionally impermissible (*Zant v. Stephens* (1983) 462 U.S. 862 [103 S.Ct. 2733]); unconstitutionally vague (*People v. Sanders* (1990) 51 Cal.3d 471); and irrelevant with respect to the jury's determination of penalty.

This Court held in *People v. Boyd, supra,* 38 Cal.3d 762, that non-statutory factors in aggravation cannot be considered by the jury. *Boyd* necessarily implies that the wholesale incorporation of the guilt phase evidence into the record for the jury's consideration at the penalty phase is improper. Even without *Boyd*, however, constitutional safeguards would preclude consideration of such evidence.

In *Zant v. Stephens*, *supra,* 462 U.S. at pp. 873-880, the United States Supreme upheld Georgia penalty phase jury instructions which allowed the jury to consider nonstatutory aggravating circumstances, provided at least one statutory aggravating circumstance was found to be

true. In so ruling, however, the High Court specifically held that a "constitutionally necessary function" of statutory aggravating circumstances is to "circumscribe the class of persons eligible for the death penalty." (*Id.* At p. 878.) Under *Zant,* a statute which fails "to create any 'inherent restraint on the arbitrary and capricious infliction of the death sentence," remains unconstitutional. *(Ibid.)* Such a defect exists in CALJIC No. 8.84.1, which allows a jury to consider nonstatutory aggravating factors. by allowing the jury to consider, as in this case nonstatutory aggravating factors and to consider in its total discretion, as coffered by CALJIC No. 8.84.1 any or all guilt phase evidence as circumstances warranting the death penalty.

A similar conclusion was drawn by the Supreme Court of Washington in *People v. Bartholomew* (Wash. 1984) 683 P.2d 1079, which held, as a matter of both state and federal constitutional law, that nonstatutory aggravating circumstances cannot be given the same weight as specifically listed statutory factors. (*Id.* at p. 1089.)

At the very least, the trial court was obligated to reassess the balance of prejudice and probative value of evidence adduced at the guilt phase before placing it wholesale before the jury for its mandatory consideration at the penalty phase pursuant to CALJIC No. 8.84.1. The California

instruction was erroneous precisely because it permitted the jury to sentence appellant to death even if it considered the nonstatutory aggravating circumstances or evidence introduced during the guilt trial. (See *Simmons v. South Carolina* (1994) 512 U.S. 154[114 S.Ct. 2187]; *Stringer v. Black* (1992) 503 U.S. 222[112 S.Ct. 1130].)

For these reasons, instruction of the jury in the vague, unmodified language of CALJIC No. 8.84.1 in this case was erroneous as a matter of statutory construction and as a matter of state and federal constitutional law. Appellant was denied his right to due process under the Fifth and Fourteenth Amendments and his right to a reliable determination of penalty under the Eighth Amendment. (*Woodson v. North Carolina* (1976) 428 U.S. 280[96 S.Ct. 2978.])

XIX. THE CIRCUMSTANTIAL EVIDENCE JURY INSTRUCTIONS UNDERMINE THE CONSTITUTIONAL REQUIREMENTS OF PROOF BEYOND A REASONABLE DOUBT

In accordance with CALJIC No. 2.90, the trial court instructed the jury at appellant's trial that appellant was presumed to be innocent until the contrary was proved and that this presumption placed upon the state the burden of proving him guilty beyond a reasonable doubt. In addition, the jury was also instructed on the meaning of reasonable doubt in interrelated

instructions which discussed the relationship between proof beyond a reasonable doubt and circumstantial evidence and which addressed proof of specific intent and/or mental state. (CT6335.). Except for the fact that they were directed at different evidentiary points, each of these three 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 to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." [62]

This repealed directive was contrary to the requirement that appellant may be convicted only if guilt is proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781.) As a result, appellant's federal and state rights to due process of law, to a jury trial, and to a reliable determination of guilt and penalty were violated. (*Hicks v. Oklahoma, supra,* 447 U.S. at p. 346.)

The problem lies in the fact that the instructions required the jury to accept an interpretation of the evidence that was incriminatory, but only "appear[ed]" to be reasonable. These instructions are constitutionally

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62. The issue of the erroneous circumstantial evidence instructions has not been waived. Penal Code section 1259 provides that "The appellate court may also review any instruction given, refused, or modified even though no objection was made in the lower court, if the substantial rights of the defendant were effected, thereby." (See *People v. Hannon* (1977) 19 Cal.3d 588,600.)

defective in that telling jurors that they "must" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt and allows for a finding of guilt based on a degree of proof less than that required by the Due Process Clause. (See, *Cage v. Louisiana* (1990) 498 U.S. 39 ,111 S.Ct. 328 (per curiam) .)

These instructions given in appellant's case were also unconstitutional because they required the jury to draw an incriminatory inference when such an inference merely appeared to be reasonable. The jurors were told that they "Must" accept such an interpretation. Thus, the instructions operated as an impermissible mandatory, conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (*Carella v. California* (1989) 491 U.S. 263, 109 S.Ct. 2419.)

The erroneous reasonable doubt/circumstantial evidence instructions require reversal of appellant's conviction. The error is reversible without any inquiry into trial evidence, both because it involved the basic standard to be applied at trial, and ths undermined the verdicts in this case, and because the error operated as an improper mandatory, conclusive presumption. (See *Carella v. California, supra,* 491 U.S. at pp. 267-273

(conc. opn of Scalia, J).)

Even if this Court does not find that this error is reversible per se, it is of constitutional magnitude, hence, the state must prove the error harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)

The errors in the instructions' explanation of reasonable doubt/circumstantial evidence require reversal of the judgment.

XX. EVEN IF THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*Monge v. California, supra,* 524 U.S. at pp. 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-

capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

Equal protection analysis begins with identified the interest at stake. In 1975, 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 United States Constitutions." (*People v. Olivas* (1976) 17 Cal.3d 236, 251 (emphasis added). "Aside from its prominent place in the due process clause, the right to life is the basis of all other rights...It encompasses in a sense, 'the right to have rights.'" (*Trop v. Dulles* (1958) 356 U.S. 86, 102.)

If the interest identified is "fundamental", then the courts have "adopted an attitude of active and critical analysis, subjecting the classification to strict scrutiny." (*Westbrook v. Milahy* (1970) 2 Cal.3d 765, 784-785.) A state may not create a classification scheme which affects a fundamental interest without showing that it has a compelling interest which justifies the classification and that the distinctions drawn are necessary to further that purpose. (*People v. Olivas, supra, Skinner v. Oklahoma* (1942) 316 U.S. 535, 541.)

The state cannot meet this burden. In this case, the equal protection guarantees of the state and federal constitutions must apply with greater

force, the scrutiny of the challenged classification be more strict, and any purported justification by the People of the discrepant treatment be even more compelling because the interest at stake is not simply liberty, but life itself. To the extent that there may be differences between capital defendants and non-capital felony defendants, those differences justify more, not fewer, procedural protections designed to make a sentence more reliable.

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution therefore requires that capital defendant receive at very least the same procedural protections of proof beyond a reasonable doubt as do non-capital felons. By not so requiring, the California death penalty scheme is in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

XXI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS; IMPOSITION OF THE DEATH PENALTY NOW VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

"The United States stands as one of a small number of nations that regularly uses the death penalty as a form of punishment. . . . The United States stands with China, Iran, Nigeria, Saudi Arabia, and South Africa [the former *apartheid* regime] as one of the few nations which has executed a large number of persons. . . . Of 180 nations, only ten, including the United States, account for an overwhelming percentage of state ordered executions." (*Soering v. United Kingdom: Whether the Continued Use of the Death Penalty in the United States Contradicts International Thinking* (1990) 16 Crim. and Civ. Confinement 339, 366; see also *People v. Bull* (1998) 185 Ill.2d 179, 225 [235 Ill. Dec. 641, 705 N.E.2d 824] [dis. opn. of Harrison, J.].) (Since that article, in 1995, South Africa abandoned the death penalty.)

The nonuse of the death penalty, or its limitation to "exceptional crimes such as treason" – as opposed to its use as regular punishment – is particularly uniform in the nations of Western Europe. (See, e.g., *Stanford*

v. Kentucky (1989) 492 U.S. 361, 389 [109 S.Ct. 2969, 106 L.Ed.2d 306] [dis. opn. of Brennan, J.]; *Thompson v. Oklahoma, supra,* 487 U.S. at p. 830 [plur. opn. of Stevens, J.].) Indeed, all nations of Western Europe have now abolished the death penalty. (Amnesty International, "The Death Penalty: List of Abolitionist and Retentionist Countries" (Dec. 18, 1999), on Amnesty International website (www. amnesty. org)[63]

Although this country is not bound by the laws of any other sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895)159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292 [8 S.Ct. 461, 31 L.Ed. 430]; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L.Ed. 997].)

63.These facts remain true if one includes "quasi-Western European" nations such as Canada, Australia, and the Czech and Slovak Republics, all of which have abolished the death penalty. (*Id.*)

Due process is not a static concept, and neither is the Eighth Amendment. "Nor are 'cruel and unusual punishments' and 'due process of law' static concepts whose meaning and scope were sealed at the time of their writing. They were designed to be dynamic and gain meaning through application to specific circumstances, many of which were not contemplated by their authors." (*Furman v. Georgia, supra,* 408 U.S. at p. 420 [dis. opn. of Powell, J.].) The Eighth Amendment in particular "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles, supra,* 356 U.S. at p. 100; *Atkins v. Virginia*, 122 S.Ct. at 2249-2250.) It 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 antithetical to our own. In the course of determining that the Eighth Amendment now bans the execution of mentally retarded persons, the U.S. Supreme Court relied in part on the fact that "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. (Brief for The European Union as *Amicus Curiae* in *McCarver v. North Carolina,* O.T.2001, No. 00-8727, p. 4.)

Thus, assuming *arguendo* capital punishment itself is not contrary to international norms of human decency, its use as *regular punishment* for substantial numbers of crimes – as opposed to extraordinary punishment for extraordinary crimes – is. Nations in the Western world no longer accept it. The Eighth Amendment does not permit jurisdictions in this nation to lag so far behind. See *Atkins v. Virginia*, *supra*, 122 S.Ct. at 2249. Furthermore, inasmuch as the law of nations now recognizes the impropriety of capital punishment as regular punishment, it is unconstitutional in this country inasmuch as international law is a part of our law. (*Hilton v. Guyot* (1895) 159 U.S. 113, at p. 227[16 S.Ct. 139]; see also *Jecker, Torre & Co. v. Montgomery* (1855) 59 U.S. [18 How.] 110, 112 [15 L.Ed. 311.]

Very recently, the United States Supreme Court in *Roper v. Simmons* (2005) 125 S.Ct. 1185,1194, struck down the death penalty for defendant's who committed the capital crime as juveniles. In doing so, the Court made reference to the international communities disfavor of the death pena lty of juveniles, signaling the High Court's inclination to bring this country more into line with international standards vis a vis capital punishment. (*Id.* at p. 1194.)

Thus, the very broad death scheme in California, and death's use as regular punishment randomly imposed, violate the Eighth and Fourteenth

Amendments. Appellant's death sentence should be set aside.

XXII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt phase errors that may not otherwise be prejudicial as to the guilt phase may nevertheless improperly and adversely impact the jury's penalty determination. (See, for example, *In re Marquez* (1992) 1 Cal.4th 584,605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488 ; *People v. Holt* (1984) 37 Cal.3d 436,459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief in respect to various guilt phase errors, appellant's rights were violated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of the errors was prejudicial.

It is both reasonably probable and likely that both the jury's guilt and penalty determination were adversely affected by the cumulative errors. (*Chapman v. California, supra,* 386 U.S. at p. 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

CONCLUSION

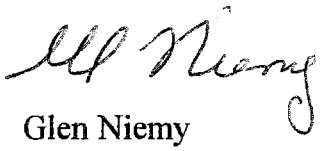
By reason of the foregoing, appellant David Lynn Scott respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter remanded to the trial court for a new trial.

Appellant was denied his Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of guilt and a reliable determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

Dated: December 3, 2005

Respectfully submitted,



Glen Niemy
Attorney for Appellant

CERTIFICATION UNDER RULE 36

Pursuant to Rule 36 of the California Rules of Court, I hereby certify that Appellant's Opening Brief in the matter of *People v. David Lynn Scott,* S068853, contains 82,759 words.

December 3, 2005

Glen Niemy

DECLARATION OF SERVICE

re: People v. David Lynn Scott, III
S068863

I, Lesley Niemy, declare that I am over 18 years of age, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief** on each of the following by placing the same in an envelope addressed (respectively)

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Each said envelope was then, on December 5, 2005, sealed and placed in the United States Mail, mailed priority, at Bridgton, Maine, County of Cumberland, the county in which I am employed, with the postage thereon fully prepaid. I declare under the penalty of perjury and laws of Maine and California that the foregoing is true and correct this December 5, 20065, at Bridgton, ME.

Glen Niemy