SUPREME COURT COPY

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No. S049741

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

WILLIAM LESTER SUFF,

Defendant and Appellant.

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of Death of the
Superior Court for the County of Riverside

Honorable W. Charles Morgan, Judge

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DEATH PENALTY

No. S049741

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)
Plaintiff and Respondent,	)
vs.	)
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APPELLANT'S REPLY BRIEF

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INTRODUCTION

In this brief, appellant does not reply to respondent's arguments which are adequately addressed in his opening brief. The failure to address any particular argument or allegation made by respondent, or to reassert any particular point made in the opening brief, does not constitute a concession, abandonment or waiver of the point by appellant (see *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3), but rather reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

ARGUMENT

I
THE TRIAL COURT'S REMOVAL OF COUNSEL VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS AND REQUIRES AUTOMATIC REVERSAL OF HIS CONVICTION

In his opening brief, appellant argued that the trial court's removal of his appointed counsel, Riverside County Deputy Public Defender Floyd Zagorsky, over his objection, violated his constitutional rights and requires reversal of his conviction. (AOB 140-174.)[1] Specifically, appellant alleged that the court abused its discretion by determining that Zagorsky had a conflict of interest (AOB 146-156), by permitting the prosecutor to participate in proceedings to determine who would serve as his counsel (AOB 156-165), by refusing to accept his offer to waive any conflict of interest (AOB 165-167), and by failing to consider reasonable alternatives to removal. (AOB 168-169.) Appellant also alleged that the prosecutor's participation in the removal proceedings was, under the circumstances of this case, misconduct. (AOB 156-165.)

Respondent asserts that appellant has forfeited any claim of prosecutorial misconduct, and the prosecutor nonetheless acted properly in moving for removal based on a claim of actual conflict of interest (RB 158, 173-177); that appellant could not waive the attorney-client privilege held by the deceased victims, their family members, or the single surviving victim (RB 158, 177-179); and that the trial court properly exercised its discretion in removing Zagorsky after finding a conflict of interest based on his

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[1] In this brief, "AOB" refers to Appellant's Opening Brief, "RB" refers to Respondent's Brief, "CT" refers the Clerk's Transcript, and "RT" refers to the Reporter's Transcript.

office's prior representation of victims and potential witnesses in this case. (RB 158-159, 166-173.) All of respondent's contentions are meritless.

A. Appellant's Counsel, Floyd Zagorsky, Had Neither an Actual Nor a Potential Conflict of Interest

Zagorsky represented to the trial court that he was unaware of any confidential information relating to his office's prior representation of the individuals specified in the prosecutor's motion; that he had not personally represented any of those individuals; and that he had not reviewed - nor would he review - any of their case files. (2 RT 144-147.) He swore under penalty of perjury that he was satisfied his office's present and future representation of appellant breached no ethical duty to appellant or any other person. (2 CT 478.) He pledged not to use, disclose, or rely on any confidential information, if it existed, from any other case. (2 RT 156-157.) He was extremely confident that he had neither an actual nor a potential conflict of interest. (Cf. *People v. Jones* (2004) 33 Cal.4th 234, 242 [the possibility of a conflict of interest was "very troublesome" and had the potential of "creating problems"].)

These representations establish that Zagorsky had neither an actual nor a potential conflict of interest in this case. The conflicts of interests of one deputy public defender are not, as the trial court believed (2 RT 173-175) and respondent asserts (RB 171, 173), imputed to other deputies such as to require disqualification of the entire office. In cases where a prosecution witness has been previously represented by the public defender's office, "a rule of automatic disqualification is unnecessary, and would hamper the ability of public defenders' offices to represent indigents in criminal cases." (*People v. Daniels* (1991) 52 Cal.3d 818, 843, reversed on other grounds in *Daniels v. Woodford* (9th Cir. 2005) 428 F.3d 1181; see

also *People v. Cox* (2003) 30 Cal.4th 916, 947-951.) "[W]hen the attorney has not received any pertinent confidential information from the witness, ordinarily there is no actual or potential conflict of interest." (*People v. Cornwell* (2005) 37 Cal.4th 50, 75, citing *People v. Cox, supra*, 30 Cal.4th at p. 950.)

The trail court's position that the potential conflicts of one deputy public defender automatically disqualify the entire public defender's office was addressed in *Rhaburn v. Superior Court* (2006) 140 Cal.App.4th 1566. *Baez v. Superior Court*, a case decided with *Rhaburn*, involved facts virtually identical to those in the case at bar.[2] The trial court granted the district attorney's motion to disqualify the deputy public defender assigned to the case because the public defender's office had represented the complaining witness on felony charges some 12 years earlier. The deputy stated that his office's prior representation of the witness would not affect his trial performance or strategy, and he subsequently executed a declaration stating that he had not reviewed any of the witnesses' criminal files. The trial court found that his office's previous representation of a prosecution witness created an inherent conflict of interest and removed the public defender as counsel. (*Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at pp. 1571-1572.)

The Court of Appeal found that the trial court "erred in applying a rigid rule of vicarious disqualification." (*Id.* at p. 1581.) "[C]ounsel's former representation of a prosecution witness does not compel the assumption that confidential information was acquired from the witness."

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[2] The judge in *Baez* was the same judge who removed Zagorsky in this case.

(*Id.* at pp. 1578-1579.) Unless trial counsel has a "direct and personal" relationship with the witness, "the direct acquisition of confidential information need not (and should not) be presumed." (*Id.* at p. 1581.) Also, "in a case that does not involve 'direct and personal' representation of the witness, the courts should normally be prepared to accept the representation of counsel, as an officer of the court, that he or she has not in fact come into possession of any confidential information acquired from the witness and will not seek to do so." (*Ibid.*)

The trial court applied the same rigid rule of vicarious disqualification rejected by the Court of Appeal in this case. It refused to credit any of Zagorsky's representations that he had no knowledge of privileged information relating to the witnesses and that he *would not* seek any such information. Instead, the trial court merely assumed there had been "confidences, numerous and replete, by the public defender's office with these various potential witnesses" (2 RT 173) which automatically disqualified the entire office.

In contrast, courts routinely accept representations such as Zagorsky's. In *People v. Clark* (1991) 5 Cal.4th 950, for example, this Court accepted defense counsel's representation that his cross-examination of a prosecution witness would not be affected by his previous *personal* representation of that witness. The Court also accepted counsel's representations that he possessed no confidential information about three other prosecution witnesses whom he had previously represented in his capacity as head of the public defender's office. This Court refused to presume the existence of confidential information and found that "no actual or potential conflict resulted from the representation of [the witnesses] by the public defender's office." (*Id.*, at p. 1001.)

Similarly, in *People v. Lopez* (1984) 155 Cal.App.3d 813, the defendant had been represented in a prior case by an attorney who subsequently joined the district attorney's office. The attorney "declared he had not and would not discuss Lopez' strategy with anyone in the DA's office, nor had he or would he divulge any client confidences or cooperate in the prosecution of the case." The prosecutor assigned to the case declared he had not communicated with the defendant's former attorney about the case and neither had nor would seek any cooperation from him in prosecuting the case. Relying on these representations, the court found it unnecessary to recuse the entire district attorney's office. (*People v. Lopez, supra*, 155 Cal.App.3d at p. 819.)

In *People v. Hernandez* (1991) 235 Cal.App.3d 674, the defendant was a victim-witness in another case who was being prosecuted for stabbing the defendant in that case during trial. The trial court recused the entire Los Angeles County District Attorney's office and appointed the California Attorney General to prosecute the case because the district attorney's office would be required simultaneously to rely upon the defendant as a witness in the first case and to prosecute him in the second. (*Id.* at pp. 676-677.) The court of appeal concluded that recusing the entire district attorney's office was erroneous, in part because the defendant had not adequately shown that "the ongoing prosecutions were [in]adequately insulated from any prior confidential communications or influences to eliminate the danger of bias or unfairness." (*Id.* at p. 680.)[3]

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[3] In reaching this conclusion, the court noted that evidence was presented in *People v. Lopez, supra*, 155 Cal.App.3d, at pp. 819, 827, and *Chadwick v. Superior Court* (1980) 106 Cal.App.3d 108, 112, 123, that "deputy district attorneys who had formerly represented the defendants had

There is not a shred of evidence that Zagorsky's representations in this case were untrue. He was "in the best position professionally and ethically" to determine whether a conflict of interest existed in this case. (*People v. Hardy* (1992) 2 Cal.4th 86, 137; *People v. Clark, supra*, 5 Cal.4th at p. 1001; *People v. Belmontes* (1988) 45 Cal.3d 744, 776; *United States v. Crespo de Llano* (9th Cir. 1987) 838 F.2d 1006, 1012.) The trial court should have given his representations the weight "commensurate with the grave penalties risked for misrepresentation." (*Holloway v. Arkansas* (1978) 435 U.S. 475, 485-486, fn. 9.) As an officer of the court, he swore that he had not received any pertinent confidential information from or about prosecution witnesses and that he did not intend to disclose any confidences in the course of defending appellant. Accordingly, there was no actual or potential conflict of interest in this case. (*People v. Cornwell, supra*, 37 Cal.4th at p. 75.)

B. Removing Zagorsky Because Other Deputy Public Defenders Might Have Had a Conflict of Interest Was an Abuse of Discretion.

The prosecutor argued below that Zagorsky had an actual conflict of interest with respect to Rhonda Jetmore, who had been represented by the public defender's office on seven previous occasions, because he would

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not discussed the defendants' cases with the deputies prosecuting them, and had sworn not to do so. The reviewing courts were thus able to conclude that the ongoing prosecutions were adequately insulated from any prior confidential communications or influences to eliminate the danger of bias or unfairness." By contrast, in *People v. Lepe* (1985) 164 Cal.App.3d, 685, 689, the court found that the district attorney's office could not be effectively sanitized from considerations barring the District Attorney's own personal participation in the case where the District Attorney evaluated, promoted, and fired the deputies in his office. (*People v. Hernandez, supra*, 235 Cal.App.3d at p. 680.)

have to "attack that witness's ability to identify the defendant" and "to recall and recollect the circumstances of the events wherein she was attacked." (2 RT 124-125, 128-129.) In addition, the public defender's office had previously represented seven or eight of the homicide victims, some on more than ten separate occasions, on prostitution charges which emanated from the same area where appellant was alleged to have picked up his victims. The prosecutor believed Zagorsky had a conflict of interest with respect to these victims because the prosecution theorized that appellant was a serial killer who selected prostitutes to kill and Zagorsky was ethically prohibited from attacking the counts involving his office's former clients when it knew they were, in fact, prostitutes. (2 RT 126-127.)

The trial court found that 38 deputy public defenders, at least 25 of whom were still with the office, had represented individuals identified by the prosecutor as victims and witnesses, and it removed Zagorsky because "It appears that there has [sic] been confidences, numerous and replete, by the public defender's office with these various potential witnesses." It refused to entertain appellant's offer to waive any conflict:

> [T]here are a number of conflicts that exist and there are multiple holders. Mr. Suff who is willing and with advise [sic] of independent counsel willing to waive his potential conflict with his present attorney, he would still be faced with a proposition of Ms. Jetmore, the other witnesses, or at least ones co-counsel has represented, and that appears by virtue of the declarations there's no evidence to deem otherwise, refused to waive that confidential relationship.

(2 RT 173.)

1. Rhonda Jetmore

Respondent argues that Zagorsky's removal as appellant's counsel was required to preserve the appearance of fairness and "public trust in the

scrupulous administration of justice and the integrity of the bar" (RB 173) because "the legal proceedings would hardly seem fair if the same *office* which had represented [Rhonda Jetmore and Joan Payseur] on drug charges then cross-examined [them] about drug use in this case." (RB 171, emphasis added.)

Respondent's concerns are misplaced. There was no need to cross-examine Jetmore with respect to her drug habits at all. One of the first things she told the jury (beginning on the second page of her direct examination) was that she began using drugs in 1987 and that she worked as a prostitute to support her drug habit. (20 RT 3816.) She freely admitted that she was working as a prostitute on the night in question, that she was under the influence of cocaine, and that she was hoping to conduct an act of prostitution to get money for more drugs. (20 RT 3819-3821.)

Furthermore, fairness, public trust in the justice system, and the integrity of the bar are threatened far more by a prosecutor tampering with an indigent defendant's constitutional rights to representation, as occurred here, than they are by a deputy public defender cross-examining a witness his *office* had previously represented.

It is true, as the prosecutor asserted, that Zagorsky might have had to attack Jetmore's "ability to identify the defendant" and "to recall and recollect the circumstances of the events wherein she was attacked." (2 RT 124-125, 128-129.) Respondent, though, claims that the proceedings would have been unfair "if the same *office* which had represented [Jetmore] on drug charges then cross-examined [her] about drug use in this case." (RB 171, emphasis added.) To underscore the obvious, Jetmore was not going to be cross-examined by an *office*, but by Zagorsky, who had no more information about Jetmore than did the attorneys the court appointed to replace him.

Moreover, this Court routinely permits defense counsel to cross-examine witnesses they or their firms have previously represented. In *People v. Cox*, for example, defense counsel were permitted to cross-examine witnesses who previously had been represented by their firms. (*People v. Cox, supra*, 30 Cal. 4th at pp. 947-948.) Likewise, defense counsel in *People v. Clark* had *personally* represented a witness and was in possession of attorney-client information when his co-counsel cross-examined the witness. (*People v. Clark, supra*, 5 Cal.4th at pp. 1001-1003.)

In *People v. Friend*, the Alameda County Public Defender's Office had previously represented a prosecution witness in a hit-and-run case. A warrant was still outstanding for the incident when the witness was taken into custody by the police and gave statements about the defendant's involvement in a capital crime. Defense counsel was permitted to cross-examine the witness, with any reference to the hit-and-run case being forbidden. (*People v. Friend, supra*, 47 Cal.4th at p. 45.) Thus, despite respondent's claim, the appearance of fairness and public trust in the scrupulous administration of justice and the integrity of the bar do not preclude a deputy public defender's representation of a prosecution witness whom his or her office previously represented, or even whom the deputy has previously *personally* represented.

Respondent claims that the trial court used the "appropriate level of caution for a capital case by recusing the public defender and appointing counsel who would have no ethical restrictions to cross-examining Jetmore about her drug habits." (RB 173.) The trial court found that the "enormity" of Zagorsky's conflict with Jetmore was "staggering." (2 RT 173.) Jetmore, however, had a legitimate interest only in preventing the disclosure of her *confidential communications* with an attorney (*People v. Carasi* (2008) 44

Cal.4th 1263, 1302, emphasis added), not in precluding her cross-examination by any and all deputies in the public defender's office. Zagorsky's removal did nothing to advance Jetmore's legitimate interests because he had no "ethical restrictions" with respect to cross-examining her about her drug habits. He had never personally represented her and had never reviewed her case file, and he did not intend to use confidential information, if it existed, in her cross-examination. (2 RT 144-147, 156-157.) In fact, he had precisely the same information about her as did the attorneys next appointed to represent appellant.

Put simply, Zagorsky had no conflict of interest in this case.[4] Permitting Jetmore to force his recusal "on such a minimal showing and over the [appellant's] objection, simply because [she] does not want to be cross-examined by a different deputy from an office which once represented [her]" (*Vangsness v. Superior Court* (1984) 159 Cal.App.3d 1087, 1091) "would hamper the ability of public defenders' offices to represent indigents in criminal cases." (*People v. Daniels, supra*, 52 Cal.3d at p. 843.) "The public paid for [Jetmore's] previous encounters with the law; it need not suffer [her] to add to the bill in a case where [she] is merely a witness and not a party. [Her] function is only to tell the truth on the stand, whomever the cross-examiner happens to be." (*Vangsness v. Superior Court, supra*, 159 Cal.App.3d at p. 1091.)

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[4] Respondent repeatedly points out that Zagorsky actually appeared on behalf of one of the potential witnesses (RB 167, 172), but each time *fails* to also mention that the potential witness did not appear and the file Zagorsky had at that time included no confidential information. (2 RT 146-147)

2. The Deceased Victims

Respondent also argues that Zagorsky had a conflict of interest with respect to the victims who previously had been represented by the public defender's office. (RB 169-170.) The prosecutor argued below that Zagorsky was ethically prohibited from attacking the counts involving these victims because his office had represented them on prostitution charges and it knew they were in fact prostitutes. (2 RT 126-127.) Once again, it is impossible for an *office* to know anything. The deputies who personally represented these victims might have had a conflict of interest but, as demonstrated above, those conflicts are not imputed to the entire office. (*People v. Carasi, supra*, 44 Cal.4th at p. 1302; *People v. Cornwell, supra*, 37 Cal.4th at p. 75.) Zagorsky had no "ethical prohibitions" whatsoever with respect to these victims. He had never represented any of them, was not privy to any confidential communications between them and their attorneys, and did not intend to seek or disclose confidential communications in the course of defending appellant. (2 RT 144-147, 156-157.)

Even if these victims had communicated confidentially with Zagorsky, their communications were no longer confidential because their attorney-client privileges were never properly invoked. As respondent correctly observes (RB 170, fn. 25), the United States Supreme Court has noted that statutes like California's Evidence Code sections 954 and 957 "do not expressly address the continuation of the privilege outside the context of testamentary disputes" and therefore "do not refute or affirm the general presumption in the case law that the privilege survives" outside that context. (*Swidler & Berlin v. United States* (1998) 524 U.S. 399, 405, fn. 2.)

In *HLC Properties, Ltd. v. Superior Court* (2005) 35 Cal.4th 54, however, this Court decided that "the attorney-client privilege of a natural

person transfers to the personal representative after the client's death, and the privilege thereafter terminates when there is no personal representative to claim it." (*Id.* at p. 65.) *HLC Properties, Ltd.*, like *Swidler & Berlin*, involved a testamentary dispute and its general holding does nothing to refute or affirm the general presumption in the case law that the privilege survives. But, in reaching its decision, the Court stated:

> It is well settled that '[t]he privileges set out in the Evidence Code are legislative creations; the courts of this state have no power to expand them or to recognize implied exceptions.' *(Wells Fargo Bank v. Superior Court* (2000) 22 Cal.4th 201, 206, 91 Cal.Rptr.2d 716, 990 P.2d 591, and cases cited.) This rule precludes judicial expansion of the attorney-client privilege. . .

(*HLC Properties, Ltd. v. Superior Court, supra*, 35 Cal.4th at p. 67.)

California's legislature has declared that, if the client is dead, the holder of the attorney-client privilege is his or her personal representative. (Evidence Code § 953.)[5] The legislature chose not to limit the application of

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[5] Evidence Code § 953 provides as follows:

> As used in this article, "holder of the privilege" means:
>
> (a) The client, if the client has no guardian or conservator.
>
> (b) A guardian or conservator of the client, if the client has a guardian or conservator.
>
> (c) The personal representative of the client if the client is dead, including a personal representative appointed pursuant to Section 12252 of the Probate Code.
>
> (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization,

this rule to civil cases. This Court, therefore, lacks the power to recognize an implied exception to the statute in criminal cases. In this case, therefore, the attorney-client privilege could have been claimed by each victim's personal representative or not at all. (*HLC Properties, Ltd. v. Superior Court, supra*, 35 Cal.4th at p. 65.) There is no evidence that any of the victims' personal representatives asserted the attorney-client privilege on their behalf. To the extent the trial court's removal of Zagorsky was based on an unauthorized family member's assertion of the attorney-client privilege (2 RT 173), it was an abuse of discretion.

3. Zagorsky's Removal Was an Abuse of Discretion

The trial court failed to evaluate the totality of the circumstances and determine whether there was a reasonable possibility that Zagorsky was privy to confidential information and that he would have to use that information in the course of defending appellant. *(Rhaburn v. Superior Court, supra*, 140 Cal.App.4th at p. 1581.) Instead, it applied a "rigid rule of vicarious disqualification" and merely presumed there were "confidences, numerous and replete, by the public defender's office with these various potential witnesses" which automatically disqualified the entire office. (*Ibid.*; 2 RT 172.)

This is perhaps best-illustrated by the court's concern that Zagorsky's former co-counsel, Toni Healy, had formerly represented a prosecution witness and "pled this individual to a series of misdemeanor offenses not related to this at all." (2 RT 172.) The court did not stop to inquire whether, during the course of that representation, Healy had acquired pertinent

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partnership, business trust, corporation, or public entity that is no longer in existence.

confidential information from the witness which she needed to disclose in order to properly defend appellant. Instead, it presumed that a conflict of interest existed merely by virtue of the fact that a confidential relationship existed. (*Ibid.*)

Healy unarguably had confidential *relationships* with both appellant and her prior client. The nature of her relationships with these clients, however, is largely beside the point. The appropriate questions are whether confidential *information* existed, whether Zagorsky was privy to it, and whether he needed to breach the confidence to properly defend appellant. (*People v. Clark, supra*, 5 Cal.4th at p. 1001.) By the court's own admission, the charges against Healy's prior client were "misdemeanor offenses not related to this at all." (2 RT 172.) Thus, it is unlikely that Healy received any "pertinent confidential information" from the witness. (See *People v. Cornwell, supra* 37 Cal.4th at p. 75.) Moreover, the confidential relationship was between the client and Healy. Zagorsky did not acquire any confidential information about the witness from Healy during their joint representation of appellant (2 RT 144-147), and he pledged not to acquire any from her, if any existed, in the future. (2 RT 156-157.)

One can only conclude from the trial court's concern with Healy and other deputy public defenders and not Zagorsky that it was blinded by its "rigid rule of vicarious disqualification" to the fact that any conceivable conflict of interest in this case was between the victims and witnesses and the deputy public defenders who previously represented them, not between the victims and witnesses and appellant's counsel, Zagorsky. As a result, the trial court found neither that any of these deputies, particularly Zagorsky, possessed any confidential information as a result of their representation, nor that the information (if it existed) remained confidential because it had never

been disclosed to unnecessary third parties. Absent these findings, neither Zagorsky nor the Riverside County Public Defender had an actual or potential conflict of interest and removal was an abuse of discretion. (*People v. Cornwell, supra*, 37 Cal.4th at p. 75.)

Respondent claims that Zagorsky's removal did not violate appellant's right to counsel under the state Constitution because the trial court was seeking to protect his right to competent, conflict-free counsel. (RB 173; *People v. Jones, supra*, 33 Cal.4th 234.) *Jones*, however, is distinguishable both on the facts and the law. Defense counsel in *Jones* was "very uneasy" due to the nature of the relationship his office - and he himself - had with a potential third-party culprit, a relationship he found "very troublesome." He admitted that he might be caused to "flinch in this case" by the possibility of the former client suing him. (*Id.* at p. 239.) This Court upheld the trial court's authority to remove appointed counsel over a defendant's wishes if it is necessary to do so to protect the client's Sixth Amendment right to conflict-free counsel. (*Id.* at pp. 244-245.)

Here, unlike counsel in *Jones*, Zagorsky swore under penalty of perjury that he was satisfied his office's present and future representation of appellant breached no ethical duty to appellant or any other person. (2 CT 478.) He expressed no discomfort whatsoever at the prospect of continuing to serve as appellant's attorney. Thus, there was no conflict of interest and no need to remove him as appointed counsel. Moreover, the defendant in *Jones* did not claim that the trial court abused its discretion. (See *Id.* at p. 244, fn. 2.) Here, of course, appellant does.

Respondent faults appellant for not filing a petition for writ of mandate seeking pre-trial review of Zagorsky's removal (RB 168), but cites no authority for the proposition that such a petition is required to preserve

the issue for appeal. Indeed, the pertinent cases appear to hold otherwise. The United States Supreme Court reversed the judgment in *United States v. Gonzalez-Lopez* (2006) 548 U.S. 140, without a finding of prejudice, despite the fact that no pre-trial petition had been filed. Similarly, this Court reversed judgments in *People v. Crovedi* (1966) 65 Cal.2d 199 and *People v. Courts* (1985) 37 Cal.3d 784, without finding prejudice, even though no pre-trial petitions had been filed.

Moreover, respondent fails to specify who should have been responsible for filing such a petition. Appellant, who is unlearned in the law, could not be expected to protest its application. (See, e.g., *Halbert v. Michigan* (2005) 545 U.S. 605, 610-611, 621-622.) The public defender had been disqualified and was no longer authorized to file pleadings on appellant's behalf.[6] And newly-appointed counsel surely had an inherent conflict of interest in arguing for their own removal from the case. In short, the parties who might have a duty to seek pre-trial review of Zagorsky's removal were deterred from doing so by the trial court's ruling. Appellant should not be barred from review of the issue by circumstances over which he had no control.

C. Permitting the Prosecutor to Participate in Proceedings Concerning Appellant's Representation Was an Abuse of Discretion.

Respondent argues that appellant has waived his right to contest the prosecutor's participation in proceedings to determine who would serve as his counsel because he failed to seek appropriate sanctions in the trial court.

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[6] Even if such authority existed, the public defender could not be faulted for choosing to allocate the office's s scarce resources to clients it did, in fact, represent.

(RB 174.)

Zagorsky objected to the prosecutor's participation in the proceedings:

> I think when it gets down to a court making a determination as to whether counsel for a particular client should be recused or disqualified, that is a matter that should be done in camera outside of the presence of both the public and the District Attorney.

(2 RT 90.)

He also objected to serving the prosecutor with his responsive pleadings:

> I have a question of whether Mr. Zellerbach should be served with that. . . . Once he raises the issue, I am not sure that Mr. Zellerbach is a party to that particular process. It is the Court's determination as to whether the attorney-client relationship that presently exists should continue or should be severed. I do not believe that once he has raised the issue, that Mr. Zellerbach is in fact a party to that particular action, and I'm not sure that he should be served with those particular documents.

(2 RT 91-92.)

He objected again to the prosecutor's involvement:

> I think the basic premise of the law is, your honor, that the prosecution can raise an issue with the Court when it relates to an attorney-client relationship. However, by law basically I believe the District Attorney has no particular interest in who represents a criminal defendant. So once the issue is raised to the Court, in essence it is then for the Court to make this determination. ¶ At this particular point in time, the prosecution no longer has any particular interest in terms of who should be the attorney for the defendant. [¶] It's the same as when the Court does a *Marsden*[7] hearing the prosecution

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[7] *People v. Marsden* (1970) 2 Cal. 3d 116

does not usually -

(2 RT 92-93.)

Finally, he requested that he be permitted to respond to the allegations in camera, out of the prosecutor's presence:

> [W]e understand that the prosecution has a right to raise the issue of a potential conflict of interest in a case. . . ¶ However, basically, what the law does find once that issue is raised is that the Court must conduct an inquiry. However, at that particular point in time the prosecutor no longer has a particular interest in who the attorney is for that particular client. ¶ It would be my request at this particular junction to ask the Court to go in camera on this issue. I would suggest to the Court this is an issue of the continued representation of myself on behalf of Mr. Suff as a deputy public defender of Riverside County Public Defender's Office, and since that issue is similar or analogous to what is raised typically in *Marsden* hearings, that it would be our request that the Court then go in camera for purposes of relating to that particular issue.

(2 RT 134-135.) Respondent does not specify the additional "appropriate sanctions" Zagorsky should have sought. Under the circumstances he did all he could to prevent the prosecutor's participating in the proceedings. Accordingly, he has preserved the issue for review.

Respondent also claims that appellant failed to question the prosecutor's interaction with former public defender clients. (RB 174-175.) But, as respondent concedes elsewhere, the prosecutor himself noted and responded to appellant's objection to the prosecution's contact with former public defender clients. (RB 161; 2 RT 129-130.) Appellant has therefore adequately preserved this issue for appeal.

Respondent attempts to frame appellant's misconduct argument as one involving the prosecutor's standing to bring a recusal motion. (RB 174.)

Appellant has acknowledged the prosecutor's limited authority to file such a motion. (See AOB 158-159.) His complaint is the extent of the prosecutor's efforts to secure counsel's removal in these proceedings to protect appellant's right to counsel. (*People v. Jones* (2004) 33 Cal.4th 234, 244-245.) Persuading victims and witnesses to refuse to waive their attorney-client privileges (2 CT 371-434) had nothing to do with protecting appellant's right to counsel. By doing so, the prosecutor assumed legal and ethical obligations which were inconsistent with his duties and essentially represented the interests of third parties to an underlying criminal prosecution. (See *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1043-1046 [district attorney prosecuting underlying criminal case has no standing in a *Pitchess*[8] motion because he represents neither the custodian of records nor their subject and therefore has no direct stake in the outcome in what is "essentially a third party discovery proceeding"]; *Bullen v. Superior Court* (1988) 204 Cal.App.3d 22, 32-33 [district attorney recused for appearing on behalf of a third party to an underlying criminal prosecution in mandate proceedings seeking to compel the superior court to vacate its order allowing the defense access to the third party's home for discovery purposes].)

The prosecutor's representations during the proceedings were also inconsistent with any intent to protect appellant's right to counsel. In his effort to secure Zagorsky's removal, the prosecutor swore under penalty of perjury that "the People fully intend on presenting victim impact evidence during the penalty phase portion of this trial." (2 CT 365.) Yet, over eight months later he argued that he had no obligation to provide discovery of the victims' convictions to appellant because he had not yet determined if victim

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[8]*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

impact testimony would be presented. (3 RT 397-398.) One of these statements is not true. The prosecutor also represented that Joan Payseur was a "very relevant, highly relevant witnesses in this case." (2 RT 167-168; see 2 CT 500-509.) Payseur, though, was far from the highly relevant witness the prosecutor made her out to be. In fact, the controversy over an alleged conflict of interest was the only time her name was even mentioned in the entire reporter's transcript of the proceedings.

Respondent argues that the Court should not consider these facts, that the trial court's ruling should be reviewed based on the evidence before it at the time of the ruling. (RB 175.) The trial court denied Zagorsky's repeated requests to respond to the allegations in camera, then refused to hear and consider what Zagorsky had to say because the prosecutor, who had been assigned the burden of proof, "has the last say." (2 RT 171.) Zagorsky explained, to no avail, that one of the issues he wanted to address was the fact that he had not had the opportunity to review minute sheets concerning "witness" Joan Payseur which the court had judicially noticed. (2 RT 171.) It seems incongruous, at best, in proceedings designed to protect a defendant's right to counsel, to assign the prosecutor the burden of proof and then refuse to hear evidence which might shed some light on how best that right might be protected. Respondent should not be permitted to have it both ways and now argue that appellant's claims lack evidentiary support.

> A prosecutor is held to a standard higher than that imposed on other attorneys because of the unique function he or she performs in representing the interests, and in exercising the sovereign power, of the state. [Citation.] . . . . [T]he prosecutor represents a 'sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.'

[Citation.]

(*People v. Hill* (1998) 17 Cal.4th 800, 820.) The prosecutor's efforts to secure Zagorsky's removal in this case breached this higher standard and infected appellant's trial with such unfairness as to make his conviction a denial of due process.

Respondent claims that the trial court gave Zagorsky ample opportunity to make his point and that he provided no reasonable basis to warrant an in camera response to the prosecutor's argument. (RB 176.) Zagorsky informed the court that the issue of continued representation was "similar or analogous to what is raised typically in *Marsden* hearings," and he requested to "go in camera for purposes of relating to that particular issue." (2 RT 135.) The "issue" to which Zagorsky was referring, of course, is the disclosure of information in open court which might "conceivably lighten the burden of proof which the prosecution bears in bringing about a conviction." (*People v. Dennis* (1986) 177 Cal. App.3d 863, 871, 874.)

The trial court clearly understood that, by referring to *Marsden*, Zagorsky was asking to provide information outside the prosecutor's presence in order to avoid giving him information about his defense strategy:

> [A]t this point in time, I'm going to deny that request. There is a great and vital need to keep confidences in dealing with the law. . . . It is sometimes a very fragile thing. But . . . every occasion that the courts allow something to be done in secret, it subjects that procedure to ridicule, and people - everyone has a right to know what happens. And I agree that sometimes we have to do those things, but I want you to respond in open court as you have done with your points and authorities to Mr. Zellerbach's contentions as well as his arguments.

(2 RT 135.)

Given its "rigid rule of vicarious disqualification" (*Rhaburn v.*

Superior Court, supra, 140 Cal.App.4th at p. 1581), the trial court surely believed there was little need to exclude the prosecutor from proceedings designed to protect appellant's right to counsel or, for that matter, to permit Zagorsky to respond in full to the prosecutor's allegations, because nothing Zagorksy could say would change the fact that the public defender's office had represented prosecution victims and witnesses and, in the court's view, the potential conflicts of other deputy public defenders resulting from this representation automatically disqualified Zagorsky.

Zagorsky's request to "go in camera for purposes of relating to that particular issue" (2 RT 135) provided more than an ample basis to warrant an in camera response to the prosecutor's argument. As appellant argued in his opening brief, there is no principled basis upon which to distinguish between a defendant's and a prosecutor's requests for the removal of defense counsel. (AOB 164-165.) The need for confidence is paramount in both situations. When the prosecutor seeks to have defense counsel removed, the defendant should be permitted to convey information to the court in confidence, just as he would be permitted to do in a *Marsden* hearing, without risking the exposure of his defense strategy and giving the prosecutor a significant advantage. The trial court's refusal to permit Zagorsky to do so was an abuse of discretion.

D. The Trial Court's Refusal to Accept Appellant's Offer to Waive Any Conflict of Interest and its Failure to Consider and Implement Reasonable Alternatives to Removal Were Abuses of Discretion.

"'[T]he involuntary removal of any attorney is a severe limitation on a defendant's right to counsel and may be justified, if at all, only in the most flagrant circumstances of attorney misconduct or incompetence when all other judicial controls have failed.' (*Cannon v. Commission on Judicial*

Qualifications (1975) 14 Cal.3d 678, 697 [122 Cal.Rptr. 778, 537 P.2d 898]; see *Maxwell v. Superior Court* (1982) 30 Cal.3d 606, 615 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333]; *Smith v. Superior Court* (1968) 68 Cal.2d 547, 561 [68 Cal.Rptr. 1, 440 P.2d 65].)" (*People v. Daniels, supra*, 52 Cal.3d at p. 846.)

> [T]hat action should be taken with great circumspection and only after all reasonable alternatives . . . have been exhausted. Failure to observe these standards . . . will compel a reversal of the ensuing judgment; and this result will follow regardless of whether the defendant's substituted counsel was competent or whether the defendant received a "fair trial" with respect to the guilt-determining process. (*People v. Crovedi* (1966) 65 Cal.2d 199 [53 Cal.Rptr. 284, 417 P.2d 868].) The value in issue, we said in *Crovedi*, is "the state's duty to refrain from unreasonable interference with the individual's desire to defend himself in whatever manner he deems best, using every legitimate resource at his command." (*Id.* at p. 206.)

(*Smith v. Superior Court, supra*, 68 Cal.2d at p. 559.)

Zagorsky proposed that the trial court appoint backup counsel for the limited purpose of cross-examining witnesses who had been previously represented by the public defender, or that the court appoint second "outside" counsel who would have no access to confidential information, were reasonable alternatives to removal. (2 RT 159-163.) The prosecutor responded that such a procedure,

> puts the Courts and defense counsel on thin ice. It dictates that we have to jump through these legal hoops and go through these legal machinations to kind of ensure that they'll get some information but not other information. It seems to me that the more appropriate remedy, if the Court determines there is a conflict, is to simply relieve the public defender. Why create inherent problems down the road in a case such as this when in fact what's customarily done in every other case- I don't know why it's such a big deal in this case - is the Court relieves the

> public defender. That's all the People are asking this Court to do.

(2 RT 170.)

The court refused to permit Zagorsky to respond (2 RT 171), then removed him as appellant's counsel:

> There is a potential conflict of interest that is so replete, that is so staggering, that I think I would be remiss in not granting the motion. . . . I think the only fair and just thing . . . is to recuse your office at this early stage and not at any later date . . . so this trust and confidence [between appellant and his new attorneys] can be built and so we can in fact go forward.

(2RT 174-175.)

Respondent claims the court's comments establish that it adequately considered alternatives to removing Zagorsky as appellant's counsel and that its refusal of appellant's offer to waive any conflict of interest was appropriate. (RB 177-179.) According to respondent, the trial court had little choice but to remove Zagorsky, in order to ensure that the proceedings appeared fair to all who observe them, so that Jetmore would not be cross-examined by the "public defender as to the same drug habits that the public defender had previously represented her." (RB 177.)

As noted above, there was no need to cross-examine Jetmore with respect to her drug habits at all. Furthermore, appointing second counsel who was insulated from any confidential communications would have accommodated both Jetmore's interest in preventing the disclosure of her confidential attorney-client communications and appellant's equally valid interest in continuous representation by an attorney he trusted. (See, e.g., *People v. Clark, supra,* 5 Cal.4th at pp. 1001-1002.) Accepting appellant's waiver of any conflict of interest would have ensured that appellant could not pursue the issue on appeal. The trial court was also obligated to exhaust

these reasonable alternatives before removing Zagorsky. (*Smith v. Superior Court, supra*, 68 Cal.2d at p. 561 *People v. Daniels, supra*, 52 Cal.3d at p. 846.) Its failure to do so was an abuse of discretion.

E. Appellant Is Entitled to an Automatic Reversal [9]

Like the erroneous deprivation of the right to counsel of choice, the consequences of removing appointed counsel without cause are necessarily unquantifiable and indeterminate, and unquestionably qualify as structural error. (*United States v. Gonzalez-Lopez, supra,* 126 S.Ct. at p. 2564.)

> Different attorneys will pursue different strategies with regard to investigation and discovery, development of the theory of defense, selection of the jury, presentation of the witnesses, and style of witness examination and jury argument. And the choice of attorney will affect whether and on what terms the defendant cooperates with the prosecution, plea bargains, or decides instead to go to trial. In light of these myriad aspects of representation, the erroneous denial of counsel bears directly on the "framework within which the trial proceeds," *Fulminante, supra,* at 310 - or indeed on whether it proceeds at all. It is impossible to know what different choices the rejected counsel would have made, and then to quantify the impact of those different choices on the outcome of the proceedings. Many counseled decisions, including those involving plea bargains and cooperation with the government, do not even concern the conduct of the trial at all. Harmless-error analysis in such a context would be a speculative inquiry into what might have occurred in an alternate universe.

(*Id.* at pp. 2564-2565.)

"[O]nce counsel is appointed to represent an indigent defendant, whether it be the public defender or a volunteer private attorney, the parties

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[9] This issue is currently before the Court in *People v. Noriega*, No. S160953. The cause was argued and submitted on January 7, 2010.

enter into an attorney-client relationship which is no less inviolable than if counsel had been retained." (*Smith v. Superior Court, supra*, 68 Cal.2d at p. 562.) "[A]n indigent criminal defendant who is required to undergo a trial with an attorney from whom he believes he is receiving inadequate representation, or with whom he is locked in an irreconcilable conflict, is just as certainly deprived of the effective assistance of counsel as his nonindigent counterpart." (*People v. Ortiz* (1990) 51 Cal.3d 975, 984.)

This Court "must not speculate as to the prejudicial effect of 'injecting an undesired attorney into the proceedings' (*People v. Courts* (1985) 37 Cal.3d 784, 796 [210 Cal.Rptr. 193, 693 P.2d 778]) . . . . ¶ In fact, any standard short of per se reversal would 'inevitably erode the right itself' (*People v. Courts, supra*, 37 Cal.3d at p. 796, fn. 11), by relegating appellate review of a constitutional right to mere speculation." (*People v. Ortiz, supra*, 51 Cal.3d at p. 988.) Accordingly, appellant is entitled to an automatic reversal.

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II
THE TRIAL COURT'S REFUSAL TO GRANT A CHANGE OF VENUE VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND TO A FAIR TRIAL BY AN UNBIASED JURY

Appellant argued in his opening brief that the trial court's refusal to grant a change of venue violated his constitutional rights to due process and to a fair trial by an unbiased jury. (AOB 175-193.) Respondent contends that appellant's failure to exercise all available peremptory challenges undermines his claim (RB 182-183), that the trial court properly denied his venue motion (RB 182-188), and that any error was harmless. (RB 188-189.)

A. The Claim Has Been Preserved for Appeal

The failure to exhaust one's peremptory challenges can sometimes bar appellate review of the trial court's denial of a motion for change of venue. "In the absence of some explanation for counsel's failure to utilize his remaining peremptory challenges, or any objection to the jury as finally composed, we conclude that counsel's inaction signifies his recognition that the jury as selected was fair and impartial." (*People v. Daniels, supra,* 52 Cal.3d at p. 854.)

As respondent observes, appellant's counsel did not exercise all his peremptory challenges. Counsel did, however, provide a reason for their failure to do so. They also objected to the final composition of the jury. Appellant challenged alternate juror number 6 for cause. (18 RT 3478-3480.) Alternate juror number 6 observed appellant before trial, during a jail tour, sleeping in his cell. He was"singled out" by jail officials as an inmate who had been accused of "murdering several women." (18 RT 3445- 3448.) Appellant's challenge of this juror is evidence that he believed the jury was

biased. (*Beck v. Washington* (1962) 369 U.S. 541, 557-558; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1127-1128.)

Appellant also moved to have the jury panel dismissed (15 RT 2738-2739), and he renewed his venue motion at the conclusion of voir dire, explaining that the defense was not satisfied with the composition of the jury, but quit exercising peremptory challenges because "the mix [of jurors] was as good as we were going to get." (6 CT 1872-1873, 1892-1893; 19 RT 3603-3607.) These objections to the final composition of the jury support a reasonable inference that the defense believed pretrial publicity had prejudiced the seated jurors and rendered them unable to afford defendant a fair trial. (*People v. Prince* (2007) 40 Cal.4th 1179, 1215-1216.) Accordingly, counsels' failure to utilize all of appellant's peremptory challenges should not bar review of the trial court's venue ruling in this case.

Furthermore, exhaustion of one's peremptory challenges is not required in order to preserve a federal Constitutional claim. (*Daniels v. Woodford, supra*, 428 F.3d 1181 [due process violation found even though the defendant failed to exhaust his peremptory challenges], see *United States v. Martinez-Salazar* (2000) 528 U.S. 304, 314 [defendant not required under federal law to use a peremptory challenge to strike a juror who should have been removed for cause in order to preserve claim that the for-cause ruling impaired the defendant's right to a fair trial].)

B. A Reasonably Fair Trial Was Unlikely to Be Had in this Case in Riverside County and a Reasonably Fair Trial Was Not, in Fact, Had

> "Both the trial court's initial venue determination and our independent evaluation are based on a consideration of five factors: '(1) nature and gravity of the offense; (2) nature and extent of the media coverage; (3) size of the community; (4) community status of the defendant; and (5) prominence of the

> victim.'" (*People v. Leonard* (2007) 40 Cal.4th 1370, 1394, 58 Cal.Rptr.3d 368, 157 P.3d 973 (*Leonard*).) "On appeal, a defendant challenging a trial court's denial of a motion for change of venue must show both error and prejudice: that is, that at the time of the motion it was reasonably likely that a fair trial could not be had in the county, and that it was reasonably likely that a fair trial was not had. [Citations.]" (*People v. Davis* (2009) 46 Cal.4th 539, 578, 94 Cal.Rptr.3d 322, 208 P.3d 78).)

(*People v. Farley* (2009) 46 Cal.4th 1053, 1082.) Consideration of these factors leads inescapably to the conclusion that a reasonably fair trial was unlikely to be had in this case in Riverside County and that a reasonably fair trial was not, in fact, had.

1. Nature and Gravity of the Offense

Respondent appropriately acknowledges that the nature and gravity of the charged offenses in this case weigh in favor of granting a change of venue. (RB 183.)

2. Nature and Extent of the Media Coverage

The nature and extent of the media coverage connected with the case also weighs in favor of a change of venue. The case was covered extensively by Riverside County's largest newspaper, the Press Enterprise; by many small-circulation, local papers in the Lake Elsinore area where many of the homicides occurred; and by all the major television networks in Southern California. When the change of venue motion was filed, before trial began, the coverage included over 200 articles, front page pictures, feature stories, in-depth analyses, editorials, letters to the editors, and photographs of 19 prostitutes whose deaths were attributed to appellant." [10]

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[10] Appellant was never charged with five of these alleged murders. (7 CT 1855-1870, 1873; 19 RT 3547-3548.) The prosecutor subsequently

(5 CT 1199-1215.) Headlines and articles repeatedly labeled appellant as a serial killer. (7 RT 1341-1342.)

The pre-trial publicity included innumerable references to inadmissible evidence. Many articles, for example, mis-reported that appellant had confessed to the crimes. (7 RT 1344-1345.) The fact that he had been convicted in Texas of "beating his infant daughter to death" became part of his standard media description. Details about this incident were widely disseminated, including reports that he hit his infant daughter with a blunt instrument until her liver ruptured; that he broke 12 of her ribs and her wrist; that there were dozens of bruises on her body; that her foot had been burned all the way to the bone with a cigarette; and that jurors believed he had tortured her to death. (7 RT 1346-1347.) Many of these and other articles focused on the fact that appellant had served only ten years of a 70-year sentence in Texas before his parole to California. This could only have evoked one of the real concerns of jurors in capital cases, that life in prison does not really mean life in prison. (7 RT 1348-1349.)

The District Attorney himself held a press conference before trial and pointed out that some of the 19 victims had been sexually mutilated; that semen had been found on all the bodies; that several bodies had been posed in lewd positions; and that some had bite marks.[11] His remarks about bite marks were made even more prejudicial by media reports that bite marks had also been found on appellant's daughter in Texas. Many articles also

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claimed there was a "misconception" that the five uncharged deaths had ever been "characterized as victims of the serial killer." (3 RT 434; RB 206.)

[11] Again, appellant was never charged with five of these alleged murders. (See Fn. 10.)

reported appellant's alleged recent abuse of his three-month-old daughter which left her near death. (7 RT 1350.)

In *People v. Ramirez* (2006) 39 Cal.4th 398, this Court upheld the trial court's denial of the defendant's motion for a change of venue even though media coverage of the murders and of the defendant's arrest saturated Los Angeles County.[12] The Court found that the media coverage was not unprecedented in Los Angeles County. Nor had the defendant shown the media coverage to be unfair or slanted against him or that it revealed incriminating facts that were not introduced at trial. (*Id.* at pp. 434.) Furthermore, although the defendant's confessions were publicized, they were ultimately admitted into evidence. (*Id.* at pp. 436.)

Like *Ramirez*, media coverage of the murders and of appellant's arrest in this case saturated Riverside County. A pre-trial survey showed that almost three-quarters of the community (73.2%) was aware of the case, most overwhelmingly so. Nearly 50% of all those surveyed - and roughly 67% of those who recognized the case - believed that appellant was guilty. Of those who recognized appellant's case, 74.8% opted for the death penalty as punishment. (7 RT 1374-1433.)

Unlike *Ramirez*, however, the publicity attending appellant's arrest, incarceration, and prosecution was unprecedented in Riverside County. In defense counsel's words, the case was "the most sensational multi-victim case in Riverside County history." (5 CT 1202.) The publicity also revealed incriminating facts that were not introduced at trial. For example, over half of the survey respondents knew that appellant had been convicted of

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[12] The trial court described the media coverage as "saturation, as much as they possibly can give." (*People v. Ramirez, supra*, 39 Cal.4th at p. 434.)

"beating his daughter to death" in Texas. (7 RT 1345-1346.) And the false reports of appellant's confession were about "the most prejudicial kind of stuff there is." (7 RT 1344-1345.) This unfair, slanted, and inflammatory publicity was sufficient to and did sway public opinion. (*People v. Hart* (1999) 20 Cal.4th 546, 599.)

Respondent attempts to minimize the prejudicial nature of the publicity by pointing out that there was both television and newspaper coverage of a sympathetic and positive nature with regard to appellant, and that there was considerable press coverage during the year prior to jury selection of the arrest and indictment of then-Sergeant Christine Keers, the head of the Homicide Task Force, which reportedly led to her being fired from the Riverside Police Department. (RB 183-184.) With due respect, media portrayals of appellant as an "average guy" were anything but sympathetic and positive. The media pointed to appellant's exterior "average guy" appearance as covering a dark, evil side. These stories fueled the public's concern and morbid curiosity about how many other apparently "average guys" hiding a frightening dark side were living in their midst.

Similarly, media coverage of Keers' arrest and indictment did nothing to mitigate the harmful pretrial publicity about appellant's case. Keers' case was extensively covered by the media, as was the trial of appellant's brother who previously had been convicted of a sex crime and was charged with another. Their connections to appellant were noted regularly in the media. Claims were also published that investigation of the charges was not being pursued aggressively because the victims were prostitutes. (5 CT 1199-1215.) This publicity did nothing to lessen the prejudicial impact of the pretrial publicity in appellant's case.

The media coverage in this case was far from neutral. Instead, it was

invidious and inflammatory and tended to arouse ill will and vindictiveness. (See *Murphy v. Florida* (1975) 421 U.S. 794, 800, fn. 4; *Beck v. Washington* (1962) 369 U.S. 541, 556.) Although it decreased over time, it tended to be so prejudicial as to create a climate where the presumption of innocence changed to a presumption of guilt. (7 RT 1340-1341.) Accordingly, the nature and extent of the media coverage connected with the case weighs in favor of a change of venue

3. Size of the Community

This Court has held that Riverside County's size does not weigh in favor of a change of venue. *(People v. Hart, supra,* 20 Cal.4th at pp. 598-599.) However, as appellant's venue expert, Dr. Bronson, explained, Riverside County's population density was relatively small at the time. Only two of its cities, Moreno Valley and Riverside, had populations over 100,000. Media coverage of this case therefore projected the sense of a small town. Furthermore, publicity about the murders focused the nation's attention on the area and permanently changed the community.[13] People who had moved to Riverside County to escape these kind of "urban" problems now questioned whether it really was a place they could be safe. Under the circumstances, despite its size, Riverside County was saturated by news coverage of the case. The atmosphere of fear and terror this

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[13] The media reported that Riverside County was plagued by a "reign of terror" and that Lake Elsinore and Riverside residents were in a general state of panic over the "specter of a serial killer running amok." (7 RT 1342-1344.) One of the top stories of the year was a newspaper article about the case entitled "Nation Focuses on Lake Elsinore." (7 RT 1368.) Another article speculated that a recent vote to double the number of sheriff's deputies was in large part due to the serial killer. (7 RT 1363-1368.)

inflammatory and prejudicial coverage helped to create riveted the public's attention on appellant and the killings. For these reasons Riverside County's size should weigh in favor of a change of venue in this case.

4. Community Status of the Defendant and Prominence of the Victims

Neither appellant nor his victims were prominent members of the community. However, as Dr. Bronson explained, a redemptive process occurred in the media wherein the victims were turned into "posthumous celebrities." (7 RT 1358, 1360-1361.) Additionally, public interest in and media coverage of the case increased dramatically over a period of several years. At the time of appellant's arrest, the killings were a hot topic. There was "kind of a buzz about it everywhere." (32 RT 6469.) While it may be true that "some degree of juror identification with the victims would occur in any venue" (*People v. Farley, supra,* 46 Cal.4th 1053, 1084), it is unlikely that Riverside County jurors, who had been deluged with unfavorable, inflammatory publicity about this unprecedented case, could see past the victims and consider sympathetic features about appellant and the case. (*People v. Webb* (1993) 6 Cal.4th 494, 515.)

C. Denial of Appellant's Motion for a Change of Venue Was an Abuse of Discretion

The trial court denied appellant's venue motion largely because it believed a "huge percentage" of the jury knew nothing about the case. (19 RT 3603-3607.) Respondent concedes that only six of 20 jurors and alternates did not know about the case. (RB 188.)[14] Assuming for the sake

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[14] In his opening brief, appellant identified five jurors who had no knowledge of the case. (AOB 188-189.) Respondent does not specify which additional juror it contends had no such knowledge. (RB 185-186.)

of argument that six jurors had no knowledge of the case, 14 of the jurors and alternates had been exposed to pre-trial publicity about the case. (See AOB 188, fn. 28 and 29.) Less than half is hardly the "huge percentage" the trial court cited. Respondent argues that over seven of these 14 jurors knew "little [or] nothing" about the case. (RB 188.) Again, assuming this to be true for the sake of argument, the remaining seven jurors might have known a lot about the case. And the little the seven others knew might have been extremely prejudicial. In fact, given the extensive pretrial publicity of appellant's prior conviction and his parole, it is likely that all 14 of the jurors were made aware of inadmissible evidence. (See Fn. 16, *infra*, at p. 58.) Expecting jurors to disregard this inflammatory, irrelevant information is simply unrealistic. Instead, this is a case which falls "within the limited class of cases in which prejudice would be presumed under the United States Constitution." *(People v. Prince, supra*, 40 Cal.4th at p. 1217.) The pre-trial publicity was extremely prejudicial and inflammatory, and it was never established that the vast majority of the jury recalled nothing of the case or remembered few details. (*People v. Farley, supra,* 46 Cal.4th 1053, 1087.)

The trial court's denial of appellant's motion to change venue rendered the proceedings structurally defective. Accordingly, appellant's conviction must be reversed. (*People v. Coffman, supra*, 34 Cal.4th at p.44, *People v. Edwards* (1991) 54 Cal.3d 787, 807.)

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III.
APPELLANT'S MOTION TO SUPPRESS EVIDENCE WAS ERRONEOUSLY DENIED

Appellant argued in his opening brief that the trial court's refusal to suppress evidence seized as a result of his warrantless detention and arrest violated his federal and state constitutional rights. (AOB 194-233.) Respondent argues that the detention was reasonable because Officer Orta, had reasonable suspicion to stop appellant and to "briefly detain him for the purpose of a limited investigation, at the very least to determine . . . whether Suff had engaged in solicitation for prostitution, in violation of Penal Code section 647, subdivision (b)." Respondent argues, also, that Officer Orta's detention of appellant was a valid traffic stop for appellant's failure to signal his intention to turn. (RB 199-201.)

A. Officer Orta's Belief That the Van He Saw Matched the Van Described in Detective Keers' Bulletin

Officer Orta testified that he "kind of suspected" the van he observed, a silver, Mitsubishi (4 RT 492, 581), might be the one the task force was looking for because it was a "mini van type of vehicle . . . medium blue or gray" which appeared to be similar to the one described in Detective Keers' bulletin. (4 RT 500, 502-504.) The bulletin specifically described the serial killer suspect's vehicle as a two-tone, medium-gray over blue, Chevy Astro van. (4 RT 502, 533, 624-626.)

Orta was only generally aware of Detective Keers' bulletin and had not seen it in five or six months. (4 RT 533.) In addition, although he knew there was a suspected serial prostitute killer on the loose, he had no reason to suspect that the van's presence in the University Avenue area connected it in any way to the prostitute's murders because he was not aware that several of the prostitutes who had been killed were from the University Avenue area.

(4 RT 500.) While he professed to believe that the van was similar to the van described in Keers' bulletin, in reality the only similarity between the two vehicles is that both are vans. In all other respects the van Orta saw was distinctly dissimilar to the vehicle Detective Keers described in her bulletin. His observations of the van provided no reasonable suspicion to justify appellant's warrantless detention.

B. Officer Orta's Belief That the Woman He Saw Was a Prostitute

Orta testified that he suspected the woman he saw was a prostitute who was involved in prostitution-related activity because of her mannerisms and her dress. (4 RT 558.) Orta, however, had no expertise in the identification of either prostitutes or prostitution activity. He claimed to know how prostitutes dress and how they approach their customers because he had seen prostitutes or prostitution activity "probably close to the thousands" of times during the five years he had patrolled the University Avenue area. (4 RT 487-489.) He admitted, though, that his primary duty was traffic enforcement, that he had only occasionally made contact with a woman he suspected was a prostitute (4 RT 489), and that he had never personally arrested a woman for soliciting an act of prostitution. (4 RT 538.)

Orta was unable to articulate anything specific about the woman's appearance which caused him to reasonably suspect that she was a prostitute. She was a 25-year-old Hispanic or dark-complected Caucasian female, about five feet, five inches tall and 120 pounds, with brown, straight shoulder-length hair. She was not wearing a mini-skirt or mini-dress, short-shorts or hot pants, or platform shoes or any kind of exotic footwear. In fact, she was wearing blue jean pants and a blouse, like "a lot of females . . . up and down University [Avenue]." (4 RT 535.) Nothing about her blouse distinguished

her as a prostitute. (4 RT 535-536, 556-557.) All Orta could say was that the woman did not have a "real neat or upkept look." (4 RT 557.) He described it as "street-person type dress" (4 RT 536.)

Orta was also unable to articulate anything specific about the woman's behavior to justify a reasonable suspicion that she was a prostitute. He testified that she glanced at him as she walked in front of the van's headlights, then hurriedly walked away. (4 RT 498, 504-505.) It is well-established, however, that "[l]ooking at a police officer and then looking away does not provide the officer with a 'particularized and objective basis for suspecting . . . criminal activity.'" (*United State v. Davis* (10th Cir. 1996) 94 F.3d 1465, 1468, citing *Ornelas v. United States* (1996) 517 U.S. 690.) "'[T]he suggestion that an apparent effort to avoid a police officer may justify a detention has been refuted in numerous decisions of [the California Supreme Court]. [Citation.]' (*People v. Aldridge* (1984) 35 Cal.3d 473, 479.) Where an officer makes no observation of conduct objectively suggesting criminal activity, the mere avoidance of police officers by a citizen cannot justify a detention. (*Ibid.*) A fortiori, the citizen's avoidance of officers cannot justify a warrantless search. (See *Terry v. Ohio* (1968) 392 U.S. 1, 22 [20 L.Ed.2d 889, 906, 88 S.Ct. 1868]; *In re Tony C.* (1978) 21 Cal.3d , 888, 892.)" (*People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091.)

There are no specific and articulable facts which render Orta's suspicions, based on his characterization of the woman as a prostitute, objectively reasonable. This characterization impermissibly sweeps many ordinary citizens into a generality of suspicious appearance. (See, e.g., *United States v. Hernandez-Alvarado* (9th Cir. 1989) 891 F.2d 1414, 1418.)

C. Officer Orta's Belief That the Woman He Saw Was Engaged in Prostitution-Related Activity

Orta was unable to see inside the van the woman approached and could not tell if its driver was male or female. Nor could he tell if there were children or other passengers in the van. (4 RT 506, 537-538, 542.) He witnessed no verbal or non-verbal communication between the woman and the van's driver. (4 RT 537-538.) If the van's driver had been female, Orta's suspicion that prostitution-related activity was occurring would surely have been unreasonable. The suspicion is just as unreasonable when the driver's gender is unknown.

Even if Orta believed he had a rare ability to distinguish prostitutes at a glance from the innumerable, innocent citizens engaged in the legitimate business of daily life at the markets, gas stations, motels, homes, and various other shops in the area (4 RT 491-492, 558-560), that ability had never been tested. (4 RT 489, 538.) His training and experience alone cannot make his otherwise unreasonable belief reasonable. (*United States v. Rojas-Millan* (9th Cir. 2000) 234 F.3d 464, 468-469 [an officer may rely on his training and experience in drawing inferences from the facts he observes, but "those inferences must also be grounded in objective facts and be capable of rational explanation"].

Solicitation for prostitution requires "personal petition," not simply "waving to a passing vehicle, nodding to a passing stranger, or standing on a street corner in a mini-skirt." (*People v. Superior Court* (1979) 10 Cal.3d 338, 345-346.) Orta observed a woman who was dressed like other women in the area hurriedly walk away from a van she was approaching. (4 RT 498, 504-505.) This conduct, like waving to a passing vehicle or nodding to a passing stranger, is not personal petition and therefore was not solicitation

for prostitution.

D. Officer Orta's Belief That Failure to Signal an Intent to Turn at a Red Light Violates the Vehicle Code

Respondent does not dispute appellant's contention that his conduct was governed by Vehicle Code section 21453, not Vehicle Code section 22107, and that there was nothing illegal about his failure to signal his intention to turn because section 21453 contains no requirement of a signal of any kind. Instead, citing *Damiani v. Albert* (1957) 48 Cal.2d 15, 18, respondent asserts that appellant cannot make the argument on appeal because he did not raise it below. (RB 199.)

Appellant argued in the trial court that his conduct did not violate the Vehicle Code. (4 RT 674-676.) Moreover, "whether the rule shall be applied is largely a question of the appellate court's discretion." (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1173, citing *Bayside Timber Co. v. Board of Supervisors* (1971) 20 Cal.App.3d 1, 5.) A constitutional question can properly be raised for the first time on appeal, especially when the enforcement of a penal statute is involved. (*People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn. 1.) Furthermore, "A matter normally not reviewable upon direct appeal, but which is . . . vulnerable to habeas corpus proceedings based upon constitutional grounds may be considered upon direct appeal." (*People v. Norwood* (1972) 26 Cal.App.3d 148, 153.) Here of course, appellant seeks to vindicate his rights under the Fourth Amendment to the United States Constitution and Article 1, section 13 of the California Constitution. Under these principles, appellant is not barred from making this claim on appeal.

As set forth in more detail in appellant's opening brief (see AOB 207-215), his conduct was authorized by a specific statute, Vehicle Code section

21453, which regulates motorists' behavior at red lights. The provision contains no requirement that a signal of any kind be given before turning at a red light. Vehicle Code sections 22107 and 22108, on the other hand, govern a driver's obligation to signal his or her intention to turn in moving traffic. Section 22108 requires a driver to continuously signal an intent to turn left or right during the last 100 feet traveled by the vehicle before the turn. When a driver forms the intent to turn after coming to a complete stop at a red light, as appellant did here (4 RT 555), it is physically impossible to comply with the provisions of section 22108 by giving a continuous signal during the last 100 feet traveled by the vehicle. Under these circumstances, there is simply no obligation under California law to give a signal of any kind. Accordingly, appellant's failure to signal his intent to turn provided no cause for his warrantless detention and arrest.

E. Officer Orta Lacked Reasonable Suspicion to Detain Appellant

Orta did not, as respondent claims, detain appellant to investigate whether he had engaged in solicitation for prostitution. Orta testified that he surmised there might be prostitution-related activity afoot when he saw a woman he believed to be a prostitute approach a van in a liquor store parking lot. (4 RT 498-500.) He decided to "circle the block and sit up on the vehicle and watch their activity." If the woman got into the van and it drove off, he intended "to follow the vehicle and effect a traffic stop on it." (4 RT 503-504.) The woman did not get into the van. Instead, when she saw Orta she turned and walked away. (4 RT 499-500, 505, 539.) Orta decided to stop the van anyway, to get field information for Detective Keers.[15] (4 RT

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[15] At the time, the Riverside Police Department was indiscriminately targeting any and all prostitution activity in the city in an effort to

505-507, 541-542, 554-555.) The relevant inquiry, therefore, is not whether Orta reasonably suspected that the driver of the van was engaged in the solicitation of prostitution, as respondent asserts, but rather whether he had cause to detain appellant because he reasonably suspected that the van and/or its driver were involved in the prostitute murders Detective Keers was investigating.

Any suspicions Orta entertained that the van and/or its driver were involved in the prostitute murders Detective Keers was investigating were patently unreasonable. Orta had no reason to suspect that the van's presence in the area connected it to the murders because he was not aware that the murders were connected to the University Avenue area. (4 RT 500.) He had not seen the bulletin describing the suspect and his vehicle in five or six months. (4 RT 533.) The van, a silver Mitsubishi, was not remotely similar to the blue-gray Chevy Astro described in the bulletin. (4 RT 492, 502, 533, 581, 624-626.) He could not see into the van and did not know if its driver was male or female. Nor could he determine if there were children or other passengers in the van. (4 RT 506, 537-538, 542.) He therefore had no idea, *prior* to stopping the van, if its driver fit the description of the suspect in the bulletin. (See *United States v. Hensley* (1985) 469 U.S. 221, 224 [officer relied on a "wanted flyer" supported by reasonable suspicion and the

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apprehend the individual or individuals responsible for the prostitutes' deaths. Operation Apprehension, a concerted effort to catch the killer, began on January 8, 1992, the night before appellant's warrantless detention and arrest. The city was divided into three or four sections and a two-man team was assigned to canvas each section. Officers "inundated" the city taking photographs and collecting field information, looking for "individuals that best fit the composite we had." (4 RT 565-567, 590, 613-614.) Orta knew about but was not part of Operation Apprehension. (4 RT 521, 532-533.)

officer's specific, objective observations supported that reasonable suspicion]; *United States v. Rodriguez* (5th Cir. 1988) 835 F.2d 1090, 1093 [agent's verification of the caller's information provided the requisite reasonable suspicion to stop the vehicle]; *Washington v. Lambert* (1996) 98 F.3d 1181, 1194 [officer's reliance on a police-issued bulletin did not give rise to the reasonable suspicion necessary to make an investigatory stop where few similarities existed between the bulletin and the individuals stopped].)

Orta had no expertise in identifying prostitutes and/or prostitution activity. His primary duty was traffic enforcement. He had never personally arrested a woman for soliciting an act of prostitution. (4 RT 538.) He had only occasionally even made contact with a woman he suspected was a prostitute. (4 RT 489.) The woman he saw was dressed like "a lot of females . . . up and down University [Avenue]." (4 RT 535.) He was unable to articulate anyhing specific about her appearance, dress, or mannerisms which distinguished her from the many law-abiding citizens in the area. (4 RT 535-536, 556-557.) He saw no verbal or non-verbal communication between the woman and the van's driver, so he could not say if the van's driver even saw the woman. (4 RT 537-538.) All he could say was that he believed the woman saw him as she walked in front of the van's headlights, then hurriedly walked away. (4 RT 498, 504-505.) This conduct does not justify a warrantless search. (*People v. Huntsman* (1984) 152 Cal.App.3d 1073, 1091.) Even if it did, it would support the detention and warrantless search of the woman, not of the van's driver.

"'The officer must be able to articulate more than an "inchoate and unparticularized suspicion or 'hunch'" of criminal activity. [Citation.] [¶] . . . An individual's presence in an area of expected criminal activity, standing

alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime." (*People v. Huggins* (2006) 38 Cal.4th 175, 241-242; see also *United States v. Arvizu* (2002) 534 U.S. 266, 273-274; *United States v. Sokolow* (1989) 490 U.S. 1, 7; *United States v. Cortez* (1981) 449 U.S. 411, 417; and *Terry v. Ohio* (1968) 392 U.S. 1, 9.) Likewise, a mere hunch or "gut feeling" that a person is involved in criminal activity is insufficient to create the reasonable suspicion necessary to justify an investigatory stop. (*People v. Durazo* (2004) 124 Cal.App.4th 728, 735-736, citing *United States v. Sokolow*, *supra*, 490 U.S. at p. 7, and *People v. Bennett* (1998) 17 Cal.4th 373, 387.) "'A hunch may provide the basis for solid police work; it may trigger an investigation that uncovers facts that establish reasonable suspicion, probable cause, or even grounds for a conviction. A hunch, however, is not a substitute for necessary specific, articulable facts required to justify a Fourth Amendment intrusion.'" (*People v. Pitts* (2004) 117 Cal.App.4th 881, 889, citing *United States v. Thomas* (9th Cir. 2000) 211 F.3d 1186, 1192).)

Orta's suspicions that the van and/or its driver were involved in the prostitute murders Detective Keers was investigating were objectively unreasonable. His warrantless detention of appellant in this case was "predicated on mere curiosity, rumor, or hunch" and was therefore violative of the Fourth Amendment. (*In re Tony C.* (1978) 21 Cal.3d 888, 893; see also *Terry v. Ohio* (1968) 392 U.S. 1, 22.)

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IV
DISCOVERY VIOLATIONS DEPRIVED APPELLANT OF A FAIR TRIAL AND AN INTELLIGENT DEFENSE IN LIGHT OF ALL RELEVANT AND REASONABLY ACCESSIBLE INFORMATION

Appellant argued in his opening brief that the trial courts' denial of his requests for evidence gathered in relation to seven uncharged prostitute murders and, also, of serial killer profile evidence, violated his rights to a fair trial and an intelligent defense. (AOB 234-266.) Respondent argues that the trial court properly exercised its discretion by balancing appellant's general claims against the government's interest in protecting the integrity of the ongoing investigations and the risk of undue delay and confusion. Furthermore, respondent contends, the court's ruling with respect to the serial killer profile was proper because appellant failed to demonstrate the relevance of the evidence. (RB 205.)

A. Discovery of Uncharged Prostitute Murders

Respondent claims that appellant's discovery claim with respect to the uncharged prostitute murders is barred because he makes it for the first time on appeal. (RB 217.) Defense counsel argued that "these types of reports and the specific situations of these killings could be relevant in the defense, to say that . . . these killings are so similar, and yet there is clearly an exclusion, perhaps, of Mr. Suff from them." (3 RT 433-434.) Counsel also explained that,

> there are . . . other people who were potential suspects in some of the 14 [charged murders] that either matched descriptions or [were] in a [sic] area at a particular time of a murder. If those people in one or two of Mr. Suff's - once [sic] he is charged in happen to be in these other five, I mean that's a potential defense for us. Defense may end up being something like that, that he didn't do all these -

(3 RT 436-437.) Appellant, therefore, clearly argued below that the fact of

murders which could not be excluded from the alleged serial pattern, and which appellant could not have committed, disproved the prosecutor's theory of guilt. Even if he had not so argued, a constitutional question can properly be raised for the first time on appeal, especially when the enforcement of a penal statute is involved. (*People v. Allen* (1974) 41 Cal.App.3d 196, 201, fn. 1; see page 41, *infra*.) Appellant argues herein that his right to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article 1, sections 7 and 15 of the California Constitution. This claim has therefore been properly preserved for review.

Respondent argues that discovery of the uncharged murders was properly denied because evidence of a third party's culpability for the charged murders might not have been admissible at trial. (RB 213-214.) Appellant, however, was not required to establish that evidence of the murders was relevant or admissible in order to compel discovery. All he had to show was that the "requested information" would "facilitate the ascertainment of the facts and a fair trial." (*People v. Kaurish* (1990) 53 Cal.3d 648, 686.) Respondent asserts that appellant nonetheless must demonstrate "better cause for inspection than a mere desire for the benefit of all the information which has been obtained by the People in their investigation of the crime." (RB 213, citing *Lemelle v. Superior Court* (1978) 77 Cal.App.3d 148, 162.) Indeed, as respondent notes, "The trial court . . . stated that a 'greater need, more specificity' was required than simply 'because they were prostitutes killed during the same time frame.'" (RB 218; 3 RT 435.)

Respondent, however, mis-characterizes appellant's showing of need.

Appellant specifically alleged that "the manner of death, cause of death, the areas where the bodies were dumped, [and] the fact that the bodies were dumped" were similarities between the charged and uncharged murders which warranted discovery. (5 RT 1033-1034.) The information he requested would have facilitated the ascertainment of the facts and a fair trial by permitting appellant to determine whether the uncharged murders, particularly those that occurred after his arrest, could be excluded from the alleged serial pattern.

Respondent claims that *People v. Littleton* (1992) 7 Cal.App.4th 906, and *People v. Jackson* (2003) 110 Cal. App.4th 280, not *City of Alhambra v. Superior Court* (1988) 205 Cal.App.3d 1118, are applicable to this case. *City of Alhambra* involved multiple-murders and, like this case, defense counsel asked for the information "to determine the type of murder involved, the description of the victim, the location, the time, and other sufficient indicia to allow a comparison to be made between the facts of defendant's case and of the different cases." (*City of Alhambra v. Superior Court, supra*, 205 Cal.App. at p. 1136.) Neither *Littleton* nor *Jackson* indicate that the prosecutor theorized the defendant was guilty because he was a serial offender. The discovery sought in those cases could therefore not support an inference that the fact of the new crimes refuted the prosecutor's theory of guilt. In this case, like *City of Alhambra*, the evidence appellant sought was relevant and the trial court should have ordered its discovery.

Even if *Littleton* and *Jackson* do apply to this case, the trial court was nonetheless obligated to decide whether the government's interest in confidentiality outweighed appellant's need for disclosure. (*People v. Walker* (1991) 230 Cal.App.3d 230, 260.) The requested discovery was the only way appellant could refute the prosecutor's theory that he was a serial

killer. On the other hand, the government's interests in protecting the integrity of the murder investigations and the victims' rights was minimal. The investigations in question were quite old. As time passes and an investigation lapses or is abandoned, the need for confidentiality in police files wanes. (*County of Orange v. Superior Court* (2000) 79 Cal.App.4th 759, 764.) Also, the government had already waived much of its claim to confidentiality by disseminating many of the facts related to these cases to the press before appellant's trial. (5 CT 1199-1215; 7 RT 1341-1350.)

After divulging all this information about these cases, the government had little interest in protecting either the integrity of these aged investigations or the privacy rights of the victims, their families, and the witnesses. It had even less interest with respect to appellant's discovery request concerning Cheryl Clark. Clark, a known prostitute, was killed after appellant's arrest. Her body was found in a trash receptacle in the La Sierra area of Riverside on March 17, 1992. She reportedly had been strangled and stabbed before her body was dumped. (3 CT 662-663, 4 CT 1043.) On June 15, 1994, despite his defense that appellant killed her, Mark Spencer was convicted of killing Clark. According to the prosecutor, body fluid analysis excluded appellant as a semen donor in that case. (4 CT 1062.) The trial court denied appellant's request for discovery of the Clark murder because,

> it has been litigated, and there has been someone that has been convicted of that beyond a reasonable doubt. . . Why not make that discoverable so that - see if that person is the one who's been doing these - this sort of activity and is responsible for the alleged victims in this case. Well, that could very well be. And I'm going to throw the ball back in your court. . . . [Y]ou have available to you a great deal of information already about that particular case by virtue of it being litigated in open court.

> There's a transcript. I'm not suggesting you have to buy it. You can just talk to counsel involved, if not - whether or not a breast was removed, things of that nature that have been divulged.

(5 RT 1034-1035.)

Respondent argues that it was not unreasonable for the trial court to suggest that the defense first examine the considerable amount of information which was already available by virtue of the matter having been litigated in open court. (RB 219.) Respondent, however, omits to mention that the court knew counsel had already examined this "information" but needed more details. (5 RT 1035-1036.) Furthermore, "the government's interest in maintaining confidentiality in a case of ongoing investigation is far greater than in a case where a suspect has been charged and the matter has entered the public view through the court system." (*People v. Jackson, supra*, 110 Cal. App.4th at p. 288.) A suspect been charged and convicted In the Clark case and the matter had both entered and exited the court system. The government's interest in maintaining confidentiality in the investigation was therefore minimal. Appellant was not obligated to sift through reams of information available to anyone on the street before he obtained police reports which could establish his defense. At the very least, he was entitled to examine the body fluid analysis which excluded him but included Spencer, to determine if it was of any evidentiary value in his case. (4 CT 1062.)

Respondent also asserts that the denial of discovery was appropriate because the prosecutor had and acknowledged a duty to produce relevant exculpatory evidence to the defense. (RB 218-219.) This duty, however, as respondent notes, is "*wholly independent* of any statutory scheme of reciprocal discovery." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356,

378, original italics.) Having established that the Clark discovery would facilitate the ascertainment of the facts and a fair trial, appellant had a right under Penal Code section 1054.1 to the information, irrespective of whatever duties the prosecutor might have had.

Respondent argues that the trial court properly exercised its discretion in declining to review the investigative documents in camera. (RB 224.) In *People v. Jackson* (2003) 110 Cal. App.4th 280, respondent conceded that, before denying discovery of police files relating to uncharged similar crimes, a trial court must conduct an in camera review of the documents. (*Id.* At p. 284; see AOB 254.) It now claims that, based on the facts of a case, it is entitled to take conflicting legal positions in California's courts. (RB 224.)

The doctrine of judicial estoppel applies when: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.) "Judicial estoppel is especially appropriate where a party has taken inconsistent positions in separate proceedings." (*Id.* at p. 181.)

> "The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions, is invoked to prevent a party from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process. . . . "The policies underlying preclusion of inconsistent positions are "general consideration[s] of the orderly administration of justice and regard for the dignity of judicial proceedings." " ... Judicial

> estoppel is "intended to protect against a litigant playing 'fast and loose with the courts.'" (*Russell v. Rolfs* (9th Cir. 1990) 893 F.2d 1033, 1037.) "It seems patently wrong to allow a person to abuse the judicial process by first [advocating] one position, and later, if it becomes beneficial, to assert the opposite." (Comment, *The Judiciary Says, You Can't Have It Both Ways: Judicial Estoppel - A Doctrine Precluding Inconsistent Positions* (1996) 30 Loyola L.A. L.Rev. 323, 327 (hereafter *You Can't Have It Both Ways*).)

(*Ibid.*) Having conceded that the denial of discovery of police files relating to uncharged similar crimes is improper without first conducting an in camera review of the documents, respondent should not be permitted to now play fast and loose with this Court and argue exactly the opposite.

The trial court refused to review the documents in camera, as requested by defense counsel, because it believed it would,

> have to read every single report . . . in those homicides. And then I'd have to read all the reports in your case. . . .I'd have to read everything, because maybe that is the sole thing . . . shoe print in one place, shoe print in the other place. . . . I have to read through all the reports to come to that understanding. Then I'm going to have to see those photographs. ¶ You understand my problem? Let's say there's a hair fiber. Fine. What am I going to do? Send that out for analysis? Comes up there was a prostitute was killed; body was found in an open area. But there is some hair and fiber found. We know that there's some hair and fiber here because of the process we've gone through in DNA and getting those things up to the Department of Justice. . . . Am I supposed to, now that I know there is, have that order made that those be analyzed to compare?

(19 RT 3638-3639; see 3 RT 439.) Counsel pointed out, though, that the process of reviewing the material would not be nearly so onerous: "I don't think it has to be that much evidence. Just have to have some that would point towards him." (19 RT 3628-3639.) Counsel could also have guided

the judge's inquiry by proposing specific questions to be asked and/or answered at the in camera hearing. (*Torres v. Superior Court* (2000) 80 Cal.App.4th 867, 874.) Refusing to examine the documents on the grounds that they could not effectively be reviewed was an abuse of discretion.

Respondent argues that appellant failed to provide justification for inspection of the materials sufficient to outweigh the government's interest in protecting the integrity of the open murder investigations and the privacy rights of the victims, their families, and the witnesses identified in the reports. (RB 215, 223.) Appellant alleged that discovery of the uncharged murders was warranted by the similarities in the "the manner of death, cause of death, the areas where the bodies were dumped, [and] the fact that the bodies were dumped" between the charged and uncharged murders. (5 RT 1033-1034.) The discovery was one of the only ways he could challenge the prosecutor's theory that he was a serial killer. The government, on the other hand, had no great need for confidentiality in its investigations. The investigations in question were old and many of the facts related to the cases were already public knowledge. (See Fn. 16, *supra*, at p. 58; (5 CT 1199-1215; 7 RT 1341-1350.) The record contains no evidence that the trial court engaged in the process of considering these factors in an effort to balance appellant's interests against those of the government. Its failure to perform this duty and weigh this evidence was an abuse of discretion.

B. Discovery of Serial Profile Evidence

Respondent argues that the prosecutor's refusal to provide profile evidence to the defense did not violate appellant's due process rights. (RB 228.) Notably, respondent does not deny appellant's charge that the prosecutor untruthfully represented to the trial court that no "profile" was created by the FBI in this case. Nor could it. On May 27, 1994, appellant

requested discovery of profiles generated by "Mr. Prodan . . . of the DOJ." (5 RT 925.) The trial court responded, "I have down here that there are none. That's my notes." (*Ibid.*) The prosecutor replied, "None were prepared by the FBI. (5 RT 926.) He also confirmed defense counsel's "understanding . . . from the prosecution there was no profile set up by the FBI; that there may be an individual later on . . . from the Department of Justice who was trained by the FBI that may have done some work in that area." (5 RT 905, see also 5 RT 798-799, 927-928.) Then, on the 34th day of trial, the prosecutor sought to introduce expert evidence of serial murder linkage. (8 CT 2088-2121.) He revealed for the first time that the FBI's National Center for Analysis of Violent Crime (NCACV) was involved in the case before appellant's arrest. According to the prosecutor, NCACV helps local agencies investigate and prosecute serial murder cases "*by developing a profile of the perpetrator based on evidence that has been gathered and by suggesting various techniques to apprehend the suspect.*" (8 CT 2090-2091.)

The prosecutor represented that the FBI expert's testimony about serial murder linkage (e.g., "organized activity" outside of a "comfort zone," and "unusual inputs" into the killings [activities that go beyond that necessary to render the victim lifeless] (8 CT 2091-2092)), would show that each of the charged murders was committed by the same person. (8 CT 2098.) This testimony is unarguably the evidence appellant sought by way of discovery: a profile employed by law enforcement to help analyze or just to come to some general agreement in their professional view of what person might be the suspect in this general category. (3 CT 660; 3 RT 424.)

Respondent argues that appellant has forfeited his right to appellate review of the prosecutor's misconduct by virtue of his failure to object and

timely seek appropriate sanctions. (RB 224-225.) Under the circumstances of this case, any objection would have been futile. The trial court had already denied appellant's request for discovery of this information. In fact, respondent now argues that the prosecutor had no obligation to turn the discovery over because the trial court had denied appellant's discovery requests for the information. (RB 228.) Defense counsel surely agreed and believed that objecting to the belated disclosure of this evidence would have been pointless. The general rule barring appellate review does not apply when it appears that an objection would have been futile. (*People v. Johnson* (2004) 119 Cal.App.4th 976, 984-985; *People v. Hill* (1998) 17 Cal.4th 800, 822.)

Moreover, even if appellant has forfeited the right to raise the claim on appeal, this Court is not precluded from considering the issue. (*People v. Johnson, supra*, 119 Cal.App.4th at pp. 984-985; see *People v. Marchand* (2002) 98 Cal.App.4th 1056, 1061 [appellate court has discretion to adjudicate important question of constitutional law despite party's forfeiture of right to appellate review].) Here, nothing less fundamental is at stake than the denial of appellant's due process protection "against conviction except upon proof beyond a reasonable doubt." (*People v. Johnson, supra*, 119 Cal.App.4th at pp. 984-985.)

Appellant established that the profile discovery he requested might lead to some admissible evidence (3 CT 425) and that it could be valuable to the defense in analyzing the other evidence of potential suspects and violence against the victims. (5 RT 927-928.) Whether or not a report was prepared, disclosure of the information would have facilitated the ascertainment of the facts and a fair trial. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 536.) Accordingly, it was discoverable.

The prosecutor's duty to provide this discovery was not limited to the time before trial. It was an ongoing responsibility which extended throughout the duration of the trial. (*In re Pratt* (1999) 69 Cal.App.4th 1294, 1312.) Moreover, the prosecutor was obligated to provide the serial murder linkage discovery to appellant 30 days before trial. (Pen. Code, § 1054.7.) His failure to comply with this duty violated the reciprocal discovery provisions of Penal Code section 1054 et seq. and deprived appellant of his right to the names and addresses of prosecution witnesses and his right to an opportunity to interview those witness if they were willing to be interviewed. (*People v. Panah* (2005) 35 Cal.4th 395, 458.) Concealing the evidence violated the prosecutor's duty to "further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth" (*United States v. Agurs* (1976) 427 U.S. 97, 110-111; *In re Ferguson* (1971) 5 Cal.3d 525, 531) and deprived appellant of his fundamental rights to a fair trial and to present an intelligent defense in light of all relevant and reasonably accessible information. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 960-962.)

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V.
THE TRIAL COURT'S EXCLUSION OF EVIDENCE VIOLATED APPELLANT'S RIGHTS TO PRESENT A DEFENSE, TO A FAIR TRIAL, AND TO A RELIABLE GUILT AND PENALTY DETERMINATION

Appellant argued in his opening brief that his constitutional rights were violated by the trial court's exclusion of evidence of three prostitute murders which occurred after appellant's arrest, and of pending criminal charges involving a crime of moral turpitude against Detective Keers. (AOB 267-289.) Respondent contends that there was no error because the evidence of subsequent prostitute murders was irrelevant, and that evidence of Detective Keers' pending charges was properly excluded under Evidence Code section 352 because the benefit to appellant did not outweigh the amount of time a "mini-trial" of the charges would consume. (RB 230-231.))

A. Evidence of Three Subsequent Prostitute Murders

Several prospective jurors believed that the serial prostitute killings stopped after appellant's arrest and incarceration. Prospective juror Carl Barbaro, for example, admitted in his juror questionnaire that he had formed an opinion about appellant's guilt or innocence as a result of what he had seen or heard about the case: "He's in custody and the murder spree stopped which doesn't make him guilty but definitely doesn't rule in his favor." (15 Supp. CT 3823.) When questioned by the trial court, he explained:

> While the fact that he's in custody does not constitute guilt, in my mind, we have the killing spree that once was and is no longer. He may in fact be guilty. Possibly he just coincidentally happens to fit into being a prime suspect. And another possibility is the fact that he may have been framed. I doubt that he was framed. I doubt that he is just coincidentally here. I think that, more than likely, they have got some pretty solid stuff against him. The killings quit. Doesn't necessarily

mean he did it. All I know is that they are not happening anymore, and the man is in custody.

(15 RT 2854-2859.)[16]

Appellant argued that he was entitled to inform the jury, as part of his right to establish a defense, that the prostitute killings had not stopped.[17] "My request is simply get before the jury that three more prostitutes have died since he's been arrested. . . . Wigmore says 'The Court should not attempt to decide for the jury that this doubt is purely speculative and fantastic, but should afford the accused every opportunity to create that

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[16] See, also, 33 Supp. CT 8660-8661 [appellant was guilty because of the way the cases were tied together and because the murders stopped when he was arrested]; 24 Supp. CT 6124 [appellant was guilty because, "There have not been anymore body's [sic] found since his arrest"]; 29 Supp. CT 7412 ["Glad that murder chain had stopped"]; 18 Supp. CT 4565; 16 RT 2961-2962 [appellant was guilty because the murders stopped]; 11 Supp. CT 2652 ["They caught the serial killer and they had enough evidence to convict him"]; 13 Supp. CT 3120 [relieved that no one else would be hurt or killed]; 19 Supp. CT 4682-4683 ["Due to multiple charges, bodies involved I believe Suff is probably guilty."]; 19 Supp. CT 4721 ["was glad they had caught him"]; 21 Supp. CT 5265 [a number of women were killed by a serial killer - felt sorry for the women and wondered how anyone could do these things]; 21 Supp. CT 5343 [women's bodies were found and the murders may have been connected]; 24 Supp. CT 6084-6085 ["I would say most likely he's guilty due to the number of people involved"]; 33 Supp. CT 8621 ["They finally caught him!"].

[17] Three murders similar to those with which appellant was charged were committed after his arrest and incarceration. Cheryl Clark, a known prostitute, died of strangulation and stabbing. Her body had been dumped in a trash receptacle in the La Sierra area of Riverside on March 17, 1992. Mark Spencer was convicted of her homicide on June 15, 1994. Stephanie Shepard, a prostitute, was found on May 3, 1994, dumped in a dirt alley in Lake Elsinore. Her death was the subject of an ongoing investigation. A third prostitute murder also occurred. (3 CT 662; 4 CT 1043-1049, 1060-1070; 7 CT 1874-1879; 19 RT 3624-3641, 3634-3635.)

doubt.'" (7 CT 1876; 19 RT 3624, 3638-3639.) The trial court found the evidence to be irrelevant. (7 CT 1893, 1939; 19 RT 3660-3662.)

Respondent claims that the evidence appellant sought to introduce, when evaluated under the rules relating to the admission of evidence of third-party culpability, was irrelevant because rather than raising a reasonable doubt as to appellant's guilt it merely afforded a possible ground of suspicion. (RB 234-238.) To be admissible, such evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. (*People v. Harris* (2005) 37 Cal.4th 310, 340, citing *People v. Hall* (1986) 41 Cal.3d 826, 834.) The "definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843; *see also People v. Williams* (1997) 16 Cal.4th 153, 249.) "[A] trial court's authority to exclude relevant evidence must yield to a defendant's right to a fair trial." (*People v. Williams* (1996) 46 Cal.App.4th 1767, 1777.)

One of the prosecutor's theories of guilt was that the charged murders were committed by one person as part of a serial pattern. (2 RT 126-127.) The trial court lacked any factual basis for determining that the charged and uncharged murders were dissimilar. Instead, it found that they were dissimilar because the prosecutor had examined the reports to "see if there's anything whatsoever that would be used in any fashion to help exculpate Mr. Suff" and he had found nothing that would indicate "they were of such a similar nature to the one's he's accused of [that] third party culpability could have come into view." (19 RT 3636-3637.) The prosecutor might have believed the crimes were dissimilar, but all the information the court had tended to show that the murders were similar. In fact, the prosecutor did not

even know whether all three of the murders were similar or not, because he had only spoken to investigators about two of the murders. (*Ibid.*)

Evidence of subsequent, similar prostitute murders tends logically, naturally, and by reasonable inference to establish a material fact in this case (*People v. Garceau* (1993) 6 Cal.4th 140, 177), that appellant could not be the serial killer responsible for the deaths of the victims, as the prosecutor alleged, because the pattern of deaths had not stopped after his arrest. Presentation of this crucial evidence would have caused little delay, prejudice, or confusion. Counsel asked only that he be allowed to mention the three murders in his opening statement and to call the investigating officers as witnesses and ask questions which would establish that fact. (19 RT 3625-3626, 3639.) The evidence was indisputably relevant to rebut the prosecutor's theory that appellant was a serial killer of prostitutes and to corroborate appellant's defense, regardless of who might have committed the crimes. The court's decision to keep this evidence from the jury was an abuse of discretion.

B. Evidence of Pending Charges Involving a Crime of Moral Turpitude Against Detective Keers

Respondent argues that the trial court's decision to exclude Detective Keers' testimony pursuant to Evidence Code section 352 was appropriate. (RB 238-242.) Keers was arrested on or about August 14, 1994, and she was immediately placed on administrative leave. On or about October 13, 1994, a grand jury indicted her for violation of Penal Code sections 496, subdivision (a) (misdemeanor), and 653f, subdivision (a), solicitation to commit burglary.[18] She was fired by the police department on or about

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[18] The prosecutor described the crime as an "attempted receiving of stolen property violation." (8 CT 1974-1981.)

December 16, 1994. (7 CT 1884.) The Riverside County District Attorney's office was prosecuting her case and an estimated two-week trial was scheduled to begin on April 12 1995. (25 RT 4814-4815.)

Appellant argued that Keers' credibility was in issue and that evidence of her arrest and termination from the police department was relevant because it involved dishonest conduct constituting moral turpitude. Prohibiting the trier of fact from knowing these facts would cloth her with a false aura of veracity. (8 CT 1982-1984; 25 RT 4824-4827.) The prosecutor argued that Keers' arrest and indictment were "highly tangential" and irrelevant. (8 CT 1975, 1978; 25 RT 4820-4821.) Virtually every fact she would relate had a second percipient witness who could provide the same testimony. (8 CT 1977; 25 RT 4818-4819, 4823.) Furthermore, the primary witness in Keers' case was dead and multiple witnesses would be required to prove her misconduct. (25 RT 4821-4822.) The court found that evidence of Keers' misconduct was irrelevant and that the benefits the defense would derive from impeaching her veracity were outweighed by the undue consumption of time. He granted the prosecutor's motion and excluded the impeachment testimony. (8 CT 1988-1989; 25 RT 4830-4832.)
Before she testified, counsel sought once again to obtain permission to at least put evidence of Keers' termination before the jury. (8 CT 1995; 26 RT 4977-4979.) The court refused (26 RT 4981), based in part on the prosecutor's assurances that he intended "on bringing up, asking her if she is no longer working for the police department." (26 RT 4979-4980.)

The jury was entitled to know that the same office prosecuting appellant was charging Keers with crimes which showed her willingness to lie. (*People v. Wheeler* (1992) 4 Cal.4th 284, 295.) This evidence has some tendency in reason to suggest not only that her testimony in this case might

be tailored so as to achieve a favorable outcome for herself in her case, but that both her employer and the prosecutor had reason to question her veracity. Although the court had broad latitude under Evidence Code section 352 to exclude the evidence in order to prevent the trial from "degenerating into nitpicking wars of attrition over collateral credibility issues" (*People v. Wheeler, supra,* 4 Cal.4th at p. 296), permitting Detective Keers to testify while cloaked with a false aura of veracity was an abuse of discretion. The benefit to appellant of establishing her willingness to lie was not outweighed by the negligible time that would have been required to establish the fact of her arrest, indictment, and termination. (*Id.* at p. 295.)

C. Respondent Has Not Shown That the Errors Were Harmless Beyond a Reasonable Doubt

Respondent has not proven beyond a reasonable doubt that the errors did not contribute to the verdict and were therefore harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The jury never learned that the prostitute murders had not stopped after appellant's arrest. Instead, despite his assurances that he would not argue to the jury that appellant was guilty because the killings stopped upon his arrest (19 RT 3639), the prosecutor argued, "We're talking about the murder of 13 separate human beings, the taking of 13 separate lives by one man: Mr. Suff, who is, and was for many years, a serial killer. (41 RT 9033.)[19] At the penalty phase he argued,

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[19] See also 41 RT 8864 ["consistent pattern in many respects in these cases"]; 41 RT 8901 ["It's this cross-association of evidence . . . . we see continual patterns that repeat themselves with respect to many different types of evidence"]; 41 RT 9048-9049 ["There is no one else in the world that committed all of these murders except for Mr. Suff"]; 41 RT 8944 ["It doesn't take a rocket scientist to figure out he's the murderer. He is the serial killer."]

> he'd still be out there doing it, folks, but for the fortuitous events that took place on the evening of January 9th 1992. . . . He was terrorizing this entire community for three or four years. Is that someone who is worthy of sympathy and mercy?

(46 RT 10291-10293.) All these arguments served to reinforce the jury's predisposition to believe that appellant was guilty because the serial killings stopped upon his arrest and that he should be put to death because he was a serial killer who would otherwise "still be out there doing it."

Nor did the prosecutor ever establish, as he promised he would (26 RT 4980), that Detective Keers had been terminated from the police department. Instead, Keers told the jury that she had been a police officer for approximately 15 years in December 1991. She had been a homicide investigator for five of those years and had investigated or assisted in the investigation of over a hundred homicides. Moreover, she was a member of the Riverside County Homicide Task Force that was been created to investigate the murders with which appellant was charged. (26 RT 5043-5044.) The jury never learned that Keers had been arrested and indicted for conduct involving moral turpitude which suggested her willingness to lie, that she was then being prosecuted by an office which had reason to question her veracity but nonetheless proffered her testimony in this case, or even that she had been terminated by the police department. The jury should have known that she no longer worked for the law enforcement agency on whose behalf she was testifying because that employer believed she was dishonest.

Keers' credibility was far from the "minor collateral issue" respondent makes it out to be. (RB 240-243.) Knowledge of her termination could have caused the jury to question Keers' account of her interaction with Kelly Whitecloud, which included preparation of the artist's sketch of the "serial killer" suspect and the bulletin describing the suspect

and the van he was driving. (24 RT 4720-4721; 26 RT 5050-5051, 5062-5065, 5071-5072, 5079-5080; 28 5606, 5628.) The bulletin, of course, served as the basis for appellant's detention and arrest. Her interview of Whitecloud on University Boulevard, after Hammond's body was discovered, and their trip to look at vans were uncorroborated by any third party. (24 RT 4718-4719, 4745; 26 RT 5048-5052, 5064-5073.) Her interview of Whitecloud in the Contra Costa County Jail, after appellant's arrest, during which Whitecloud identified appellant as her assailant wasa also uncorroborated. (24 RT 4721-4724; 26 RT 5074-5080.) Whitecloud was an admitted prostitute, drug abuser, and felon whose intent on the night Hammond disappeared was to "rip off" the man in the van "if it would have come down to that." (24 RT 4747-4749.) The jury had more than enough reason to doubt her veracity. Had it also known there was reason to suspect Keers' veracity, it would have viewed both Whitecloud's testimony and evidence of the bulletin in a much different light.

Exclusion of the evidence deprived appellant of the ability to present the only defense he had, that he did not commit any of the charged offenses, by disproving the prosecutor's serial killer theory. The error violated his rights to present defense evidence, a fair trial, and a reliable guilt and penalty determination in violation of his Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

* * * * *

VI.
APPELLANT UNEQUIVOCALLY INVOKED HIS *MIRANDA*[20] RIGHTS DURING THE SECOND INTERROGATION; THE TRIAL COURT ERRONEOUSLY CONCLUDED THAT HE DID NOT DO SO UNTIL THE THIRD INTERROGATION

Appellant argued in his opening brief that he invoked his right to counsel at the beginning of the second interrogation, not during the third interrogation, as the trial court found. (AOB 290, 297-307.) Respondent argues that there was no error because appellant's request for a lawyer during the second interrogation was equivocal. (RB 244-255.)

At the outset of the second interrogation session appellant told Detective Keers, "I want to know if I'm being charged with this, then I think I need a lawyer." (31 RT 6191, 6207-6208, 6218-6219.) Appellant acknowledged in his opening brief that this Court has determined a similar statement to be insufficient to invoke a suspect's *Miranda* rights. (See AOB 297.) In *People v. Gonzalez* (2005) 34 Cal.4th 1111, the defendant agreed to take a lie detector test, but said "one thing I want to ask you to that, if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." (*Id.* at p. 1119.) *Gonzales*, however, is distinguishable because, although the detectives there were not required to ascertain whether, when the defendant used the word "charged," he actually meant "arrested" or "booked," they gave him the opportunity to clarify this point when they explained to him the difference between those terms. (*Id.* at pp. 1126-1127.) In contrast, Detective Keers resorted to deceit and trickery to convince appellant to continue talking by telling him that he was not being charged." (31 RT 6201.)

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[20] *Miranda v. Arizona* (1966) 384 U.S. 436

Respondent contends that appellant's request was similar to the request in *Davis v. United States* (1994) 512 U.S. 452, where the defendant stated "Maybe I should get a lawyer." (*Id.* at p. 462, see RB 252-253.) Appellant did not ask Detective Keers anything, as the defendant in *Davis* did. Instead, he conveyed as clearly as he could that he wanted the assistance of counsel if he was the target of Keers' investigation. A request for counsel need not be a model of eloquence and clarity in order to qualify as an unequivocal invocation. "[A] suspect need not speak with the discrimination of an Oxford don." (*Davis v. United States, supra,* 512 U.S. at p. 459.) The words of the request will be "understood as ordinary people would understand them." (*Connecticut v. Barrett* (1987) 479 U.S. 523, 530.) "Invocation of the *Miranda* right to counsel 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.' *Id.* (citations omitted); see also, *United States v. de la Jara* , 973 F.2d 746, 750 (9th Cir.1992) (noting that a suspect's words must be taken "as ordinary people would understand them")." (*Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, 997-998.)

"Ordinary people" would reasonably construe appellant's words to be an expression of a desire for the assistance of an attorney.

> Indeed, it is difficult to imagine how much more clearly a layperson . . . could have expressed his desire to remain silent. See *Barrett,* 479 U.S. at 529, 107 S.Ct. 828 (explaining that the words of a request for counsel will be "understood as ordinary people would understand them.") Concluding that [the defendant's] statement was ambiguous and equivocal would suggest that a suspect never invokes his right to silence unless he intones some sort of talismanic phrase, such as "I invoke my right to silence under the Fifth Amendment."

(*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 866.)

The inquiry whether a suspect has unequivocally asserted his *Miranda* rights is an objective one. (*Davis United States, supra*, 512 U.S. at p. 459.) Any reasonable officer who knew what Keers knew in this case could only have construed appellant's statements as an invocation of his right to counsel. Keers had evidence linking appellant to one murder and, by the line of questioning she pursued over the next several hours, it is obvious that she was deliberately buying time in an effort to keep him talking so she could get more evidence. To do that, she responded deceptively to appellant's request to speak to a lawyer "if I am being charged with this" by telling him that he was not under arrest and was not being charged "at this time." This deceptive response tends to show that Keers in fact knew that appellant wanted to speak with an attorney.

Respondent claims that this Court has rejected a "similar argument which accused an officer of misleading a defendant." (RB 253; *People v. Smith* (2007) 40 Cal.4th 483, 503-504.) In *Smith*, however, the Court found that, "Contrary to defendant's contention that Detective Kimura 'lied' about the availability of counsel, Detective Kimura did not actively mislead defendant." (*Id* at p. 503.) Detective Kimura made no affirmative misstatements, instead letting the defendant answer his own question about how long he might have to wait before consulting with an attorney. (*Ibid.*) In contrast, Keers made a representation that, while perhaps technically correct with the addition of "at this time," was at least disingenuous, if not dishonest.

Whether a suspect has validly waived *Miranda* is examined in the totality of the circumstances surrounding the interrogation:

> [T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice

> rather than intimidation, coercion, or deception . . . the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]

(*Moran v. Burbine* (1986) 475 U.S. 412, 421.) Appellant's choice was not uncoerced in this case. Detective Keers' deceptive response was designed to and did prevent appellant from obtaining the "requisite level of comprehension" of his role in the investigation: namely, that he was the primary suspect in the murder investigation and that, in all probability, charges would be filed against him. The withholding of critical information rendered his *Miranda* waiver involuntary and unknowing. His statement, "I want to know if I'm being charged with this, then I think I need a lawyer" (31 RT 6191, 6207-6208, 6218-6219) at the outset of the second interrogation must be deemed a clear articulation of a desire to speak to counsel at that time.

Respondent has not demonstrated "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403; *People v. Johnson* (1993) 6 Cal. 4th 1, 32-33; *Chapman v. California* (1967) 386 U.S. 18.) The only non-circumstantial evidence the jury received which placed appellant at the scene of any of these crimes were his own words. (37 RT 7971-7974.) The government's circumstantial case was strengthened significantly by appellant's own statements which placed him at the scene of one of the crimes. (See *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1166 [statement taken in violation of *Miranda* was the "most compelling evidence

of defendant's guilt" introduced at trial].) On this record it cannot be said that introduction of the statements was "unimportant . . . to everything else the jury considered" on the issue of appellant's guilt. (*Yates v. Evatt, supra*, 500 U.S. at pp. 402-403.) Reversal is therefore required.

* * * * *

CONCLUSION

For the foregoing reasons, as well as those stated in Appellant's Opening Brief, including claims of cumulative error, the entire judgment must be reversed.

DATED: February 16, 2010

Respectfully submitted,

JEFFREY J. GALE
Attorney at Law

Attorney for Appellant

CERTIFICATION OF WORD COUNT
(Cal. Rules of Court, Rule 8.360(b))

I certify that the attached appellant's reply brief uses a 13 point Times New Roman font and contains 21, 957 words.

DATED: February 16, 2010

Jeffrey J. Gale
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. SUFF

No. S049741

I, COLLEEN GALE, declare that I am over 18 years of age, and not a party to the within cause; my business address is 5714 Folsom Blvd., No. 212, Sacramento, CA 95819. I served a copy of the attached:

APPELLANT'S REPLY BRIEF

on each of the following, by placing same in an envelope addressed respectively as follows:

ERIKA HIRAMATSU
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Each said envelope was then, on February 18, 2010, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 18, 2010, at Sacramento, California.

Colleen Gale

COLLEEN GALE