IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. WILLIAM CLINTON CLARK, Defendant-Appellant.	No. S066940 (Orange County Superior Court No. 94CF0821)

APPELLANT'S REPLY BRIEF

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PRELIMINARY STATEMENT

Appellant will respond to portions of the Attorney General's brief where additional comment appears likely to be helpful to the court in deciding this case. To the extent possible and consistent with that objective, repetition of the appellant's earlier briefing will be avoided. Both sides have thoroughly briefed the issues presented, and the appellant continues to rely primarily on that briefing. The absence of additional comment on all aspects of the Attorney General's brief in this reply should not be taken as a concession of any nature or as a lack of confidence in the merits of the matters not addressed. (See *People* v. *Hill* (1992) 3 Cal.4th 959, 995, fn. 3.)

Appellant expressly disavows claims 4, 5, 6, 8, 9, 10, 11, 12, 14, 15, 16, 18, 22, 24, 35, 38, 39, 44, 45, 47, 60 and 62.

All references to the Evidence Code or Penal Code refer to the California Evidence Code and California Penal Code, respectively, unless otherwise stated.

CLAIM 1
APPELLANT'S SIXTH AMENDMENT RIGHT TO COUNSEL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY TELEPHONIC RESTRICTIONS PLACED ON HIS ACCESS TO COUNSEL

On March 23, 1994, the court issued an order denying appellant *all* access to the jail telephone. (1 CT 163.) Co-defendant Antoinette Yancey was allowed calls to her attorney, to be placed by the deputy sheriff. (1 Municipal Court (MC) RT 3 - 7, 11, 15; CT 5.) Immediately prior to issuing the order, appellant's counsel objected, stating that the prosecutor needed to make a further showing. (MC RT 2 - 3.) As an alternative, the court suggested that a sheriff's deputy could monitor appellant's calls. (MC RT 4.) Again, appellant's counsel objected, stating that "the district attorney's office runs into serious problems if they have law enforcement monitoring phone calls between a defendant and a lawyer." Appellant's counsel had no objection to the sheriff deputies placing the call to counsel without monitoring the call. (MC RT 5.) The court appreciated appellant's counsel's concerns: "The problem we have is the 6th Amendment. And if

there is some way to ensure that the defendants are indeed talking to an attorney or asking the attorney to come down and see them, obviously they have a right to do that." (MC RT 5.) Appellant's counsel reiterated his objection to denial of all phone access. (MC RT 10.) Yet in the end, the court issued an order denying appellant *all* access to the jail telephone.

Respondent contends that this "claim is without merit, as Clark forfeited the issue on appeal and, regardless, the order denying him telephone access was reasonably related to legitimate penological interests." (RB 21.) Respondent misconstrues the facts and the law.

Regarding waiver, respondent asserts that "[a]t an April 15, 1994 hearing regarding the order, Clark's counsel expressly declined to challenge it, indicating that he could 'deal with [Clark] on that issue at the preliminary hearing.' (MC RT 41.)" (RB 21.) Respondent conveniently fails to mention trial counsel's repeated objections on March 23 (MC RT 2 - 3, 5) and that the April 15 hearing concerned co-defendant Yancey, who was appearing with her attorney for the first time. Respondent also conveniently fails to mention appellant's counsel's very next sentence: "And I believe it would be okay with the court to work it out with Mr. King, contact with my office, that we can present the court with an order that would be agreeable to both of us. So as to my client I don't mind taking it off calendar to deal with at the preliminary hearing, if need be."

(MC RT 41.) Thus, counsel had not "expressly waived any objection to the order denying him telephone access" (RB 21) since he expressly objected on March 23 and then stated that he would work with the District Attorney's office to craft a mutually agreeable order prior to the preliminary hearing.

As such, respondent's reliance on *In re Horton* (1991) 54 Cal.3d 82, 94 (RB 21) for the proposition that trial counsel has "general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters" is misplaced since counsel repeatedly objected to the denial of phone access. That he did not also object at the April 15 hearing is irrelevant because (1) that hearing concerned Yancey, (2) trial counsel had already objected on March 23, and (3) trial counsel stated that he would work with the District Attorney for a mutually agreeable order.

Even if *In re Horton* was somehow relevant, it is distinguishable. Trial counsel's implied stipulation to a commissioner as a judge in *In Re Horton* is clearly procedural (*Horton, Supra,* 54 Cal.3d at p. 94), while severely curtailing access to counsel is not.

Turning to the merits of the claim, that the trial court initially abused its discretion is evidenced by the fact that the order was modified a year later on March 17, 1995 to permit appellant private calls with his counsel from 3:00 to 6:00 pm. (1 CT 198; SC RT 646.) Yet nothing had changed

in appellant's status in the Orange County jail, indicating that there was no credible basis for the order in the first place. Furthermore, the court should have balanced the competing interests by making the same order regarding appellant that it made regarding Yancey: a sheriff deputy could initiate appellant's calls to his counsel. Thus, it was error to deny appellant telephone access to his counsel and was a violation of his Sixth Amendment right to effective assistance of counsel and to assist in his own defense and Fourteenth Amendment right to due process and a fair trial.

"[T]he deference to which prison administrators are ordinarily entitled has never been construed as requiring judicial abstention . . . ." (*In re Parker* (1984) 151 Cal.App.3d 583, 590.) "[P]rison administrators are in the best position to control inmates but this control cannot violate statutory or constitutional rights." (*In re Jordan* (1972) 7 Cal.3d 930, 934.)

The denial of all phone privileges to appellant impinged on appellant's constitutional right to counsel. "[T]he law jealously guards the right to effective assistance of counsel and the concomitant right to confidential communications with counsel . . ." (*Small* v. *Superior Court* (2000) 79 Cal.App.4th 1000, 1013 [abuse of discretion for court to require prison to install wire mesh screen in attorney visiting room for high security prisoner].) "The right of access to counsel is an essential component of the right of access to the courts." (*In re Grimes*, (1989) 208 Cal.App.3d 1175,

1182, citing *Bounds* v. *Smith* (1977) 430 U.S. 817, 822-823.) In *Procunier* v. *Martinez* (1974) 416 U.S. 396, 419, the United States Supreme Court declared that this right of access requires that inmates be given a "reasonable opportunity to seek and receive the assistance of attorneys," and "[r]egulations and practices that unjustifiably obstruct the availability of professional representation or other aspects of the right of access to the courts are invalid." This right is possessed not only by convicted prisoners, but by pretrial detainees. (*United States* ex rel. *George* v. *Lane* (7th Cir. 1983) 718 F.2d 226, 230.) In assessing and declaring invalid the Humboldt County Jail's collect-call-only phone system, the court observed, "[o]ur evaluation must proceed from the premise that telephone communication is essential for inmate contact with attorneys. (*Johnson* v. *Galli* (D.Nev. 1984) 596 F.Supp. 135, 138.)" (*Grimes*, *supra*, 208 Cal.App.3d 1175, 1182.)

Additionally, appellant had a statutory right to telephone access to counsel. The California Code of Regulations, title 15, sections 1067 and 1060, respectively, provide that prison administrators must "implement a plan which allows reasonable access to a telephone" and "insure the right of inmates to have access to the courts and legal counsel." Finally, jailers must facilitate both correspondence and personal consultation for this purpose. (Cal. Code Regs., title 15, section 3175.)

In cases involving security measures affecting inmate rights, the starting point is Penal Code section 2600, which provided in March of 1994: "A person sentenced to imprisonment in a state prison may, during any period of such confinement, be deprived of such rights, and only of such rights, as is necessary in order to provide for the reasonable security of the institution in which he is confined and for the reasonable protection of the public." The statute was later amended to provide less judicial scrutiny of inmate regulations, but the changes did not go into effect until September of 1994, after the order was issued. Furthermore, equal protection requires that section 2600 be extended to county jail inmates. (*De Lancie* v. *Superior Court* (1982) 31 Cal.3d 865, 872.) Finally, the version of section 2600 in effect at the time of the order provided for the same strict scrutiny regardless of whether the right was protected by the United States Constitution. (*People* v. *Loyd* (2002) 27 Cal.4th 997, 1006.)

The United States Supreme Court has repeatedly embraced the principle that restriction of an inmate's constitutional rights may not extend beyond that which is reasonably necessary for institutional security. (*Pell* v. *Procunier* (1974) 417 U.S. 817; *Bell* v. *Wolfish* (1979) 441 U.S. 520; *Block* v. *Rutherford* (1984) 468 U.S. 576.)

As such, respondent's articulation of a "rational relation" test (RB 21-22) is not the correct standard. "Under Penal Code section 2600

inmates' rights can be abrogated only upon a showing of necessity for reasonable institutional security and reasonable public protection." (*Grimes*, *supra*, 208 Cal.App.3d 1175, 1181, quoting *In re Brandt* (1979) 25 Cal.3d 136, 139.) In explicating the balancing test in light of the showing of necessity for the abrogation, *Grimes, supra,* 208 Cal.App.3d 1175, 1182 looked to *In re Arias* (1986) 42 Cal.3d 667, 689-691: "In *Arias*, the court observed that '[t]he federal prisoner's rights cases utilize a different balancing formula than that required under section 2600. The federal equation does not require prison security measures to be as closely tailored to security objectives as does section 2600.' (*Id.* at 690.) The court explained that the 'rational response' standard employed by some of the federal courts 'permits infringements of liberty whenever they are rationally related to security concerns, and does not require prison officials to search for the least drastic means of addressing those concerns. In contrast, section 2600 permits only such security measures as are 'necessary.' By definition, the 'necessary' standard requires that a security measure be the least intrusive possible of inmates' rights yet flexible enough to satisfy the security need.' (*Id.* at p. 691.)"

The state has not shown that denying all phone calls to appellant was necessary, when calls could have been placed by a sheriff deputy to his attorney without compromising public safety. The state fails to meet the

strict scrutiny test.

In addition to the necessity requirement described above, the relevant factors to be balanced are: (1) whether there are alternative means of exercising the right; (2) how the accommodation of the asserted right will impact guards, other inmates, and the allocation of prison resources; and (3) whether the restriction is an "exaggerated response" to prison concerns." (*Small* v. *Superior Court, supra,* 79 Cal.App.4th 1000, 1011, citing *Turner* v. *Safley* (1987) 482 U.S. 78, 89-91.) The "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but an 'exaggerated response' to prison concerns." (*Safley, supra*, 482 U.S. at p. 90.)

Regarding the nexus between the abrogation of the right and the government interest, respondent baldly states that the order denying all phone access was rationally related to the legitimate government interest of witness safety. (RB 23.) Initially, this is the wrong legal standard. In March of 1994, the strict scrutiny necessity test was operable. Furthermore, respondent is wrong factually: there is no rational relation, let alone a necessity, between the denial of all calls and public safety since appellant sought to call only his counsel, not witnesses, with the added security measure of the calls being placed by a sheriff deputy. Neither below nor on appeal has the government made a showing that appellant's telephone calls

to his attorney somehow jeopardized witness safety.

Regarding the next factor, respondent states that there were alternate means "available to Clark to communicate with his attorney, investigators, and potential witnesses. The order only restricted Clark's telephone access. He was still able to communicate in person, through visitations at the jail, and in writing." (RB 23.) While it is true that such alternate means existed, respondent downplays the realities facing appellant: the jail mail was too slow to be an effective means of communication and his counsel was not able to easily visit with appellant in the county jail since visiting hours corresponded with court hours. "Personal visits with attorneys are permitted, but only during relatively inconvenient hours." (*Grimes*, *supra*, 208 Cal.App.3d 1175, 1182.) The *Grimes* court noted that jail visiting hours are prime time court hours, such that lack of telephone access was "obviously detrimental to [the office's] ability to adequately represent clients." (*Id.* at p. 1179.) Instead, that there were alternate means of protecting public safety (having the sheriff place the calls to appellant's attorney) indicates the denial of all calls was unreasonable.

Respondent does not address the costs to the institution. But requiring a sheriff deputy to initiate a call to appellant's counsel would not be a burden on jail resources or impact other inmates. If appellant had unrestricted access to the phone, a deputy would have still had to have

escorted him to the phone. Nor is it likely that other inmates would bear appellant any ill will for having deputy initiated calls. Neither administrative inconvenience nor lack of resources can provide justification for deprivation of constitutional rights. (*Bounds* v. *Smith*, *supra*, 430 U.S. 817, 825.)

Regarding whether the denial of all calls is an exaggerated response, respondent says that "restriction of Clark's telephone access was a wholly proportionate response to his use of the telephone system to arrange Williams' murder." (RB 23-24.) Again, respondent misstates the factual record and the law. Factually, not even the Deputy District Attorney at the hearing on Yancey's motion had the temerity to allege proof positive that the phones were used to arrange for the murder. The Deputy District Attorney could not point to any specific phone call between appellant and co-defendant Yancey made to facilitate the murder of Ardell Williams. The Deputy District Attorney frankly conceded that the phone calls were "a theory that we have." (1 MC RT 58.) Legally, the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but an 'exaggerated response' to prison concerns." (*Safley*, *supra*, 482 U.S. 78, 90.) The easy alternative, one afforded to co-defendant Yancey, was to require the sheriff deputy to initiate the call to appellant's attorney.

The restriction fails even under the "reasonable relation" test that

was later articulated by the United States Supreme Court. In *Safley, Supra,* 482 U.S. 78, 89, the Court held: "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."

In the instant case, the court order denied appellant *all* access to the telephone and was obviously detrimental to his counsel's ability to adequately represent him. That the trial court initially abused its discretion is evidenced by the fact that the order was modified a year later on March 17, 1995 to permit appellant private calls with his counsel, without any changes in appellant's circumstances. (1 CT 198; RT 646.) Appellant was prejudiced in that year.

During this time, trial strategy and investigation was ongoing. Appellant presented an alibi defense, which required considerable investigation. He was at a recording studio in Burbank shortly before the Comp U.S.A. robbery at a recording session which was supposed to last into the evening. Appellant's input was also critical for other investigation, including his connection to prior computer crimes and his relationships with Ardell Williams, Antoinette Yancey, and his brother Eric. In addition, appellant's entire life history required investigation to prepare for the penalty phase, as well as mitigating the evidence introduced in aggravation. As the first penalty phase demonstrated, the case for death was not

overwhelming. Appellant's first penalty phase jury voted seven to five for death, even after convicting him of two murders. Had counsel been able to investigate more thoroughly, it is reasonably likely that the jury would have rejected a death sentence and sentenced appellant to life in prison.

Reversal is required because respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California* (1967) 386 U.S. 18.)

CLAIM 2
APPELLANT'S RIGHT TO A SPEEDY PRELIMINARY HEARING WAS VIOLATED

On April 28, 1994, on the motion of Yancey and over the objection of appellant, the Court ordered the continuance of both Yancey's and appellant's preliminary hearings on the basis that there was good cause to do so. This order breached appellant's right to a speedy trial as it set the preliminary hearing date outside of both the 10 and 60 day time limits mandated in section 859b of the Penal Code and was therefore an abuse of discretion.

In response, respondent contends that the continuance was proper under Penal Code section 1050.1 since "the court found good cause to continue the preliminary hearing as to co-defendant Yancey and this finding, in turn, established good cause to continue the preliminary hearing as to Clark for the purposes of maintaining joinder." (RB 26). Further,

respondent asserts that appellant failed to demonstrate the requisite prejudice (RB 26-27). In reaching these conclusions respondent has misconstrued sections 859b and 1050.1 of the Penal Code and the case law that has interpreted them.

The Finding of Good Cause

The finding of good cause for the continuance of appellant's preliminary hearing was based solely upon the maintenance of joinder; no other grounds for good cause were enumerated by any party (MC RT 67-72). The Court found that "[a]s far as Mr. Clark is concerned the Court notes the objection of Mr. Early and overrules it and finds good cause to continue it" (MC RT p.71). The prosecutor asserted that Penal Code 1050.1 "allows" the Court to find good cause to continue Mr. Clark because Ms. Yancey was not ready. The prosecutor did not respond to the defense's assertion that appellant was being denied a speedy trial (MC RT 69). In the end, there was no factual showing of why maintaining joinder outweighed the appellant's right to a speedy preliminary hearing.

Penal Code 859b

Penal Code section 859b "is one of a number of statutes 'that are supplementary to and a construction of the constitutional right to a speedy trial." (*Ramos* v. *Superior Court* (2007) 146 Cal.App.4th 719, 730 citing *People* v. *Standish* (2006) 38 Cal. 4th 858, 869.) Section 859b contains two

mandatory time limits within which a preliminary hearing must be conducted for an in-custody defendant: 10 days without good cause and a 60 day outer boundary limit subject only to waiver by the defendant. These time limits are distinct from one another and are subject to different exceptions and remedies. In relation to the 10 day limit, the Court must dismiss the complaint if the preliminary examination is set or continued beyond 10 days unless the defendant waives this right or the Court finds good cause for a continuation beyond the 10 day period. This good cause extension is limited to three additional court days. If the preliminary examination is set outside the 10 day limit pursuant to these two exceptions, the defendant shall be released under his own recognizance unless the matter falls within one of the 6 exceptions. The breach of the 60 day time limit, on the other hand, requires mandatory dismissal unless the defendant personally waives their right to the 60 days. "The magistrate shall dismiss the complaint if the preliminary examination is set or continued more than 60 days from the date of the arraignment, plea or reinstatement of criminal proceedings.., unless the defendant personally waives his or her right to a preliminary examination within the 60 days." (Penal Code section 859b). While respondent's submission deals at length with the 10 day limit and the good cause exception, it entirely ignores the 60 day rule.

Section 1050.1 does not create an exception to section 859b's mandatory 60 day rule

Respondent relies upon Penal Code section 1050.1 and cites *Taipa* v. *Superior Court* (1991) 53 Cal.3d 282, 299; and *In re Samano* (1995) 31 Cal.App.4th 984, 990-993 (RB 26) as authority for the proposition that in multiple-defendant cases the finding of good cause for extension as against one co-defendant is good as against all co-defendants. Yet neither of these cases support respondent's position because neither considers the absolute 60 day time limit. *Taipa* mentions section 1050.1 only once, in the context of retrospective application to crimes committed before it was enacted, and thus does not support respondent's argument.

Nor does *Samano* support respondent's conclusion. In *Samano* the majority decided to construe "defendant" in "section 859b, subdivision (b)(1) (release on own recognizance not required if defendant requests continuance beyond 10 court day limit) to mean all jointly charged defendants" (31 Cal.App.4th 984 at p. 993). The specific reference to subdivision (b)(1) makes it clear that the court in *Samano* did not contemplate any interference with the 60-day rule. Indeed, in justifying their decision the court looked at case law which had carved out exceptions to the 10 day rule, and the good cause exception to the 10 day rule within 859b and stated that these indicated "that the defendant's right to a preliminary examination within 10 court days may be tempered by

constitutional principles and principles affecting the administration of justice." *Samano, Supra,* 31 Cal.App.4th 984 at p. 990. No mention was made of the 60 day rule, and the court's approach cannot be applied to the 60-day rule because it is not subject to a good cause exception. The only remedy for breach of the 60 day limit is dismissal, not release on own recognizance. The only exception to the 60 day rule is a defendant's personal waiver.

Tellingly, respondent fails to discuss the dispositive case, one which conclusively establishes error. The Court in *Ramos* stated that "*Samano* cannot reasonably be interpreted to suggest a defendant who has continually objected to continuances of the preliminary hearing can be deemed to have personally waived the 60-day rule simply because a co-defendant has done so: Any such holding would effectively read the personal waiver requirement out of the statute and eviscerate the 60-day rule". (*Ramos, Supra,* 146 Cal.App.4th 719, 734.)

Ramos makes clear that the 60 day limit of Penal Code section 859b trumps the general statute describing good cause for a continuance at section 1050.1. This is predominantly because "section 859b's 60-day rule is mandatory and not modified by section 1050.1's joinder principals" (*Ramos, Supra,* 146 Cal.App.4th 719, 723). In addition, Penal Code section 1050.1 includes an important reasonableness limitation: "[t]he Court... shall

not cause jointly charged cases to be severed due to the unavailability or unpreparedness of one or more defendants UNLESS (emphasis added) it appears to the Court...that it will be impossible for all defendants to be available and prepared within a reasonable period of time." Although respondent quotes the first half of section 1050.1, they fail to include this reasonableness limitation (RB 26). The extension granted by the Court on April 28, 1994 "was necessarily more than a "reasonable period of time" in light of ...[the appellant's] right to insist on a preliminary hearing within the 60 days mandated by section 859b." (*Id.* at p. 735.)

The 60 day time limit was clearly breached since the good cause exception did not apply and the appellant did not waive his right to compliance. Indeed, he objected to the continuance on a number of grounds including the denial of the right to a speedy trial (MC RT 68- 70). Appellant entered a not guilty plea on April 15, 1994 and the preliminary hearing was continued until July 18, 1994, totaling 94 days between the plea and the preliminary hearing. Yancey's counsel's request for a continuance to assess discovery could have been granted without encroaching on the appellant's preliminary hearing rights by severing the defendants, a decision ultimately made by the trial court a year and a half after the continuance was ordered (SC RT 1860).

The 10-day time limit was also breached as the court, like

respondent, erroneously assumed that maintaining joinder of itself was grounds for good cause, rather than balancing it against the defendant's right to a speedy trial. In *Arroyo* v. *Superior Court* (2004) 119 Cal.App.4th 460 the court found that "while the preference for joint trial...serves judicial economy and the convenience of the court and counsel, such a consideration cannot subordinate the defendant's state constitutional right to a speedy trial without a showing of exceptional circumstances." (*Arroyo, supra,* 119 Cal.App.4th at p. 465 citing *Sanchez* v. *Superior Court* (1982) 131 Cal.App.3d 884, 893.) The Court in *Arroyo* went on to find that the continuance of the defendant's trial was an abuse of discretion as both the prosecutor and the judge relied solely on maintaining joinder as the basis for good cause, rather than considering any competing factors.

Furthermore, the Court's failure to dismiss the case once the 60-day time limit was exceeded, and/or failure to balance the appellant's right to a speedy trial against the benefits of maintaining joinder in deciding to continue the preliminary hearing past the 10-day time limit, deprived appellant of a state created liberty interest and denied him his federal constitutional right to due process of law. (*Hicks* v. *Oklahoma,* (1980) 447 U.S. 343, 346.)

Prejudice analysis does not apply to the 60 day limit because it is mandatory

Lastly, respondent states that the appellant "fails to demonstrate the

requisite prejudice necessary on appeal" (RB 26). However, "as the Supreme Court has recognized, because section 859b itself provides for dismissal of the complaint as the remedy for a violation of the 60-day rule, no prejudice analysis need be performed to invoke its sanction." (*Ramos, supra,* 146 Cal.App.4th 719, 737.)

Under section 859b the only remedy for breach of the 60 day time limit is dismissal. Paragraph (a) of section 1387 of the Penal Code provides that dismissal of a felony pursuant to section 859b is a bar to any other prosecution for the same offense unless subsequent to the dismissal one of the three exceptions can be proven: 1)substantial new evidence was discovered by the prosecution that would not have been known through the exercise of due diligence, or 2) the termination was the result of direct intimidation of a material witness, or 3) the termination was the result of the failure to appear by the complaining witness who had been summoned. In the present case, respondent has stated that the delay was caused by the co-defendant Yancey's need to review a large amount of discovery and the need to maintain joinder between the parties (RB 25). Yet this is not one of the reasons stated in section 1387(a). Section 1387 also provides that a dismissal under section 859b will not be a bar to prosecution if good cause is shown why the preliminary examination was not held within 60 days from the date of arraignment or plea. There was no good cause for the delay

as joinder was not feasible in this case (as seen by the Courts decision to sever the co-defendants) and thus appellant's right to a speedy trial should have been determinative. Therefore had the complaint been dismissed as required under section 859b, the state would have been barred from recommencing any action against appellant.

In the alternative, the breach of both the 10 and 60 day time limits for preliminary hearing caused the appellant significant prejudice. Respondent asserts that because appellant was ultimately tried by a jury and found guilty of the charges it is not reasonably probable that appellant would have obtained a more favorable result had the magistrate not continued the preliminary hearing (RB 27). However, the respondent ignores the prejudice suffered by the appellant in preparing for a joint trial.

As a result of the continuance appellant proceeded with trial preparation for over a year and a half anticipating that his trial would be joined with Ms Yancey's. This was a significant disadvantage because strategy and tactics in preparing for trial with a co-defendant are different than preparing for trial as a sole defendant, especially as here the facts that incriminated Ms. Yancey did not incriminate appellant. The focus of appellant's preparation of his case was skewed by the prospect of a joint trial with Ms. Yancey, especially as appellant was also charged with the Comp U.S.A. crimes. Jury selection began on January 16, 1996, less than

three months after trial severance was ordered by the trial court. If joinder had not driven the decision to continue appellant's preliminary hearing based on Ms. Yancey's counsel's need for additional time, appellant would have had ample time, not less than three months, to prepare for his severed trial. Such prejudice warrants overturning the verdict against appellant and setting aside his sentence.

CLAIM 3
APPELLANT'S VENUE AND VICINAGE RIGHTS BOTH UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND AS IMPLIED IN THE CALIFORNIA CONSTITUTION WERE VIOLATED BY HIS PROSECUTION IN ORANGE COUNTY

The trial court erred in designating venue in Orange County for the prosecution of the Ardell Williams murder charge over defense objection. (6 CT 2092; SC RT 2856; SC RT 2859.) Los Angeles County was the proper venue because Ardell Williams was shot in Los Angeles County, the shooting was investigated by the Los Angeles County Sheriff's Department, all of the witnesses were from Los Angeles County, and her body was found in Los Angles County.

Respondent contends that "venue and vicinage in Orange County were proper because substantial evidence established that a number of preparatory acts occurred in Orange County and there was a reasonable relationship between Orange County and Ardell Williams' murder." (RB

27.) Pointing to Penal Code section 781[1] and *People* v. *Price* (1991) 1 Cal.4th 324,385, respondent argues that venue was proper in the county where the defendant made preparations for the crime. (RB 28.) Respondent argues that the following constituted evidence of preparations for the crime: "The evidence clearly established numerous visits and telephone conversations between Yancey and Clark in the Orange County Jail in the months immediately prior to Williams' murder and the jury could reasonably have concluded that it was during this time that the two planned for Yancey to lure Williams to her death. (60 RT 10157-10158, 10873.) These preparatory acts, performed by Clark at the Orange County Jail, justified his trial in Orange County for the murder of Ardell Williams." (RB 28.)

Respondent states the legal framework as follows: "In reviewing a challenge to a venue determination, an appellate court must consider whether the jury could reasonably have concluded by a preponderance of the evidence, based on all the evidence presented, that venue was proper.

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[1]Penal Code section 790 states that the venue for murder is in the county where the fatal injury was inflicted, the county where the injured party died, or the county in which the body was found. An exception to the general rule is section 781, which states that "When a public offense is committed in part in one jurisdictional territory and in part in another, or the acts or effects thereof constituting or requisite to the consummation of the offense occur in two or more jurisdictional territories, the jurisdiction of such offense is in any competent court within either jurisdictional territory."

(*People* v. *Posey* (2004) 32 Cal.4th 193, 220.)" (RB 28.)

Yet the state has not shown by a preponderance of the evidence that appellant engaged in preparatory acts in Orange County. Specifically, the state has offered not one bit of evidence that the content of the visits of phone calls concerned planning a murder. Instead, the state offered evidence that appellant and Yancey had a romantic relationship. As such, the calls and visits were just as consistent with discussing the romance. Furthermore, respondent conveniently fails to mention that the Deputy District Attorney acknowledged that he had no proof of the content of the communications or that the phones were used to arrange for the murder. The Deputy District Attorney at the hearing on Yancey's motion to allow her greater telephone access from county jail could not point to any specific phone call between appellant and co-defendant Yancey made to facilitate the murder of Ardell Williams. The Deputy District Attorney frankly conceded that the phone calls were "a theory that we have." (MC RT 58.)

Instead, the state produced evidence that all the preparatory acts actually occurred in Los Angeles County. The flower delivery to Williams' house occurred in Los Angeles County and the phone calls from "Janet" were directed to Los Angeles County. (SC RT 1129-1133.) As trial counsel argued during the litigation regarding the Penal Code section 995 motion, the only phone calls made by appellant alleged to be part of the

conspiracy were made to Liz Fontenot in 1992, and at that time appellant was not yet in Orange County. (SC RT 1129-1133.) As such, there is simply no hard evidence that the conversations between Yancey and appellant concerned anything other than their romance. Nor is respondent allowed to commit the logical fallacy of *post hoc ergo propter hoc* that since appellant was convicted of the Williams murder, he must have spoken to Yancey about it at some point. The relevant test is whether the fact finder could have *reasonably* made a determination by the preponderance of the evidence that appellant engaged in preparatory acts in Orange County. No such finding can be made on this record.

The Sixth Amendment to the United States Constitution provides that in all criminal prosecutions "the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. . ." Article I, section 16 of the California Constitution has been construed as implicitly reserving a similar, but not necessarily coextensive, vicinage right. (*Price* v. *Superior Court* (2001) 25 Cal.4th 1046, 1050.)

Even *Posey* recognized that constitutional rights regarding venue and vicinage can trump such statutes extending territorial jurisdiction. "[T]he Legislature may define venue pursuant to statutory provisions,

subject only to such constraints as may be imposed by the United States and California Constitutions, particularly with regard to vicinage and due process of law." (*Posey, Supra,* 32 Cal.4th 193, 209, citing *Price* v. *Superior Court*, *supra,* 25 Cal.4th 1046, 1056.) *Price* states: "The Legislature's power to designate the place for trial of a criminal offense is limited by the requirement that there be a reasonable relationship or nexus between the place designated for trial and the commission of the offense." (*Id*, at p. 1075.) No such reasonable relationship exists with Orange County.

Posey, cited by Respondent (RB 28), is distinguishable. In *Posey*, there was incontrovertible proof of preparatory acts in Marin County, thus properly conferring venue in that county. From San Francisco, Posey called an undercover detective in Marin County, who later purchased cocaine in San Francisco County from Posey. It was indisputable that defendant had "placed several telephone calls–not merely one--to Marin from San Francisco as part of the negotiations leading up to his two sales of cocaine bases." (*Posey, Supra,* 32 Cal.4th 193, p. 221.) These telephonic "negotiations" were undisputed and based on solid evidence, and therefore Marin County was a proper venue. By contrast, here, it was not similarly indisputable that Appellant and Yancey were involved in "negotiations" leading to the commission of the Williams murder.

Price, also relied on by respondent (RB 28), is similarly distinguishable because the state presented solid evidence of a reasonable relationship between the venue and acts surrounding the offense. Humboldt County had territorial jurisdiction to try defendant for a murder in Los Angeles County because:

> The prosecution's evidence showed that defendant was instructed to go to Northern California to procure a weapon or weapons with which to kill Barnes, that defendant went to his former home in Humboldt County a month after his release from prison, and that he returned three months later with a revolver and a sawed-off shotgun. The jury could reasonably infer from these facts that defendant committed acts in Humboldt County that were preparatory to the murder of Barnes. *Price*, *supra*, 1 Cal.4th 324, 386.

Such inference in *Price* was reasonable because the state presented solid evidence that defendant had committed tangible acts obviously related to Barnes's murder. In the instant case, no such solid evidence was ever presented.

Reversal is automatic, since Orange County lacked jurisdiction to prosecute the Ardell Williams murder in Los Angeles County. (*People* v. *Crise* (1990) 224 Cal.App.3d Supp 1 [reversing conviction for trial in improper venue without conducting prejudice analysis]). The denial of the Sixth Amendment right to proper venue is a fundamental structural right not subject to harmless error analysis, mandating reversal. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 310 [the error was a "structural defect affecting the framework within which the trial proceeds, rather than simply

an error in the trial process itself].)

In the alternative, respondent has not demonstrated that the error was harmless beyond a reasonable doubt. (*Chapman v. California, Supra,* 386 U.S. 18.) In the instant case, appellant suffered prejudice. "[S]tatutory enactments that provide for trial in a county that bears a reasonable relationship to an alleged criminal offense also operate as a restriction on the discretion of the prosecution to file charges in any locale within the state that it chooses, an option that, if available, could provide the prosecution with the considerable power to choose a setting that, for whatever reason, the prosecution views as favorable to its position or hostile or burdensome to the defendant's." (*People* v. *Simon* (2001) 25 Cal.4th 1082, 1095.)

Such restriction on the discretion of the prosecution to select a locale where its views would be found more favorably was ignored here. Trial counsel complained that the racial composition of downtown juries in Los Angeles and juries in Orange County were markedly disparate. African-Americans comprised 21.5% of Compton juries and 1.77% of the Orange County population. (SC RT 2853). Trial counsel argued that these discrepancies would be prejudicial to appellant. (SC RT 2856). Opting for venue in Orange County was the kind of manipulation by the prosecution decried by *Simon* as an abuse of its "considerable power" to choose a locale

hostile to defendants like appellant. Reversal is mandated.

CLAIM 7
THE IN-COURT IDENTIFICATION OF APPELLANT BY MATTHEW WEAVER WAS THE RESULT OF UNDULY SUGGESTIVE PROCEDURES IN VIOLATION OF THE FIFTH, EIGHT AND FOURTEENTH AMENDMENTS AND FEDERAL DUE PROCESS AND HEIGHTENED CAPITAL CASE RELIABILITY

Matthew Weaver's identification of appellant as being the driver of the BMW on the night of the homicide (SC RT 8053) was critical to the prosecution's case. Besides Weaver, nobody placed appellant at the scene that night. Prior to trial, the defense moved to suppress Weaver's pre-trial photo line up identification of appellant and any subsequent in-court identification of appellant by Weaver. The legal basis for the motion was that the pre-trial identification procedures were unduly suggestive, thus tainting any subsequent in-court identification. The factual basis for the motion was that appellant was the *only* African American depicted in the photo line up created by Investigator Grasso; the other five photos showed whites or Hispanics. (2 CT 425-434; SC RT 2753.) Remarkably, the trial court denied the motion, stating that the identification was not impermissibly suggestive and that appellant's racial characteristics were not that apparent. (SC RT 2750-2753.)

At trial and on direct examination, Weaver made an in-court identification of appellant (SC RT 8028) and was shown the pre-trial photo

line up, where he again identified appellant. (SC RT 8095-8097.)

The standard of review is *de novo*. "Although the determination of the historical facts, which are reviewed under a deferential standard (*People* v. *Cromer, supra,* 24 Cal.4th at p. 900, 103 Cal.Rptr.2d 23, 15 P.3d 243), may involve a credibility determination, the decision whether those facts demonstrate that the identification procedure was unduly suggestive does not require such a determination. In determining whether a pretrial identification was unduly suggestive, a trial judge does not have a "first person vantage." Pretrial identification procedures, like determinations of reasonable suspicion and probable cause, occur outside of the courtroom. Independent appellate court evaluation of whether an identification procedure was or was not unduly suggestive would also help to develop a defined set of rules by establishing a body of legal precedent that provides guidance. Accordingly, and consistent with "this court's usual practice for review of mixed question determinations affecting constitutional rights" (*People* v. *Cromer, supra,* 24 Cal.4th at p. 901, 103 Cal.Rptr.2d 23, 15 P.3d 243), we conclude that the standard of independent review applies to a trial court's ruling that a pretrial identification procedure was not unduly suggestive." (*People* v. *Kennedy* (2005) 36 Cal.4th 595, 608-609.) Upon *de novo* review, this court should determine that the pre-trial identification procedures were unduly suggestive.

As shown in the AOB and below, the trial court's failure to suppress the pre-trial identification was an abuse of discretion, requiring reversal on the facts of this case. If there were ever a photo lineup that was tainted from the start, it was this one. While the record does not indicate that Investigator Grasso expressly told Weaver to pick appellant's photograph, his six-pack composition stopped just short of telling Weaver whom to choose. From that point on, Weaver's memory was irrevocably tainted, and his subsequent in-court identification was not--and could not have been--reliable under the totality of the circumstances. This violated the Fifth, Eighth, and Fourteenth Amendments of the United States Constitution, as well as appellant's right to federal due process and heightened capital case reliability.

Respondent attempts to argue that the photo line up was not impermissibly suggestive and, regardless, Weaver's subsequent in-court identification of appellant was proper under the totality of the circumstances. (RB 34.) Respondent highlights the trial court's final determination that its initial impression that the lineup was "outrageous just on the face of it" was "destroyed" by the fact that of the 18 photographs shown to Weaver in three six-packs, 12 were "obviously African-American in physical characteristics." (SC RT 2751; RB 35.) The court was referring to the fact that Grasso also showed Weaver a photo line up

including appellant's brother, which contained all African Americans, as well as another line up of Nokkuwa Erwin, which also contained all African Americans. (SC RT 2751-2752, 2635.) Respondent then argues that since Grasso did not draw particular attention to six-pack containing appellant's photo or discuss appellant's racial characteristics, nothing unfairly suggested that appellant was a suspect. (RB 36.)

With regard to the actual composition of the lineup, respondent relies on *People* v. *Brandon* (1995) 32 Cal.App 4th 1033, 1052 for the proposition that there is no requirement a defendant in a lineup be surrounded by others nearly identical in appearance, and that a lineup is not rendered unconstitutional just because a suspect's photograph is much more distinguishable from the others in the lineup. (RB 36.) Respondent further argues that under *People* v. *Johnson* (1992) 3 Cal.4th 1183, 1217, slight shades of variation in the background color of the photographs, as noted by the trial court was the case with appellant's photo (SC RT 2753), do not render the lineup at issue impermissibly suggestive. (RB 36.)

Respondent next asserts that regardless of the pre-trial identification procedures, Weaver's in-court identification was reliable under the totality of the circumstances. (RB 36.) Specifically, respondent asserts that Weaver had a meaningful opportunity to closely observe the person driving the BMW and interacted with him. (RB 37.) While respondent

acknowledges the time lapse of approximately 10 months between the Comp U.S.A. robbery and Weaver's subsequent identification, respondent (falsely) asserts that Weaver never indicated any difficulty in his ability to remember the events. Respondent argues that Weaver was admonished before being shown the three photo six-packs and was merely asked if he recognized anyone. Respondent concludes that based on this record, there is "simply no likelihood" that Weaver misidentified appellant. (RB 37.)

Initially, respondent's reliance on *Brandon* and *Johnson* is fundamentally inapt. While there is no requirement that a defendant be surrounded by others nearly identical in appearance, it does not follow that it is permissible to surround an individual with others who are completely different in appearance because they are of a different race. (See *Brandon*, *supra,* 32 Cal.App.4th at 1052.) Rather, a photo lineup is sufficiently neutral if the persons are similar in age, race, complexion, physical features and build, and if the photo of the accused does not stand out. (*Johnson*, *supra,* 3 Cal.4th 1183, 1217; *People* v. *Holt* (1972) 28 Cal.App.3d 343, 349-350.) Similarly, while minor differences in image size or background do not render a lineup impermissibly suggestive, it does not follow that the cumulative affect of such differences and racial isolation is not impermissibly suggestive. (See *Johnson*, *Ibid.*) Rather than considering characteristics in isolation, reviewing courts look at the "procedure," and in

doing so, the question of whether "anything" could cause a defendant to stand out from others is not limited to separate consideration of lineup characteristics. (See *People* v. *Yeoman* (2003) 31 Cal.4th 93, 124; *People* v. *Ochoa* (1988) 19 Cal.4th 353, 413.)

Neither appellant nor respondent claims that the others in the six-pack were–or needed to be– nearly identical in appearance. But respondent's analysis attempts to downplay the significance of the racial contrast at issue. At the very least, appellant's complexion and by extension, physical features, were dissimilar to the others in the six-pack. (*Johnson*, *supra,* 3 Cal.4th 1183, 1217; *Holt*, *supra,* 28 Cal.App.3d at 349-350.) In fact, of all possible characteristics, appellant's divergent race was most likely to make his photo stand out. Appellant was neither surrounded by individuals who were nearly identical nor was he surrounded by individuals *who were even close* to his appearance. Unlike *Brandon*, where this court held a lineup not unduly suggestive when the defendant's photograph was "very similar to at least two other men's photographs," appellant's photograph was not similar to *any* of the other photos. (*Brandon, supra,* 32 Cal.App.4th 1033, 1052.) It was therefore inevitable that appellant's photo would stand out, rendering the lineup inherently suggestive. (*Ochoa*, *supra,* 19 Cal.4th 353, 412.)

Similarly, while the variation in the shades of background color (SC

RT 2753) in the lineup photographs might not have been impermissibly suggestive on its own, the combination of this and the racial composition of the lineup rendered it unduly suggestive. (See *People* v. *Yeoman*, *supra,* 31 Cal.4th 93, 124.) Coupled with the fact that appellant's photo was the only African-American in the set, appellant's photo therefore stood out from the others in at least two ways, suggesting that Weaver should select him. (See *Yeoman* (*Ibid*).) Respondent's attempts to justify the pre-trial lineup procedures are unpersuasive. Respondent suggests that Grasso "did nothing to draw particular attention to the six-pack containing Clark's photograph as opposed to the others." (RB 36.) Yet the relevant inquiry is whether *the lineup containing appellant's photo* was impermissibly suggestive and thus, caused him to stand out from others in a way that would cause Weaver to select him. (See *Yeoman* (*Ibid*).)

Furthermore, respondent's assertion that Weaver's identification is to be credited because he had no trouble recalling the events is misleading. Initially, Weaver denied any knowledge of the events at Comp U.S.A. when he first spoke to Grasso, indicating either a lack of memory or outright lies. (SC RT 2619.)

Finally, respondent's reply brief fails to include the following facts developed in the hearing on the motion that further indicate the suggestiveness of the pre-trial identification procedures. All three target

suspects–Eric Clark, Nokkuwa Erwin (both of whom were known by Weaver), and appellant–were placed in the Number 3 position in their respective photo line ups. And the trial court knew this. First, at the hearing it was stipulated that appellant was in position Number 3. (SC RT 2615.) Also, the court knew this because it requested that the prosecution produce all three photo line ups. (SC RT 2634.) And the prosecutor produced the original photo line up of appellant, marked Exhibit 17 for the hearing. (SC RT 2636.) The prosecution also produced the photo line up of Nokkuwa Erwin, marked Exhibit 16 for the hearing. (SC RT 2635.) The line up containing Eric Clark was also produced. (SC RT 2637.) Finally, Weaver testified on direct examination that both appellant and his brother were in the Number 3 position, based on his review of People's Exhibits 37 (appellant's photo line up) and 39 (Eric Clark's line up). (SC RT 8095-8097.) Therefore, in addition to discernable differences in race and background color, Grasso's lineup provided Weaver yet another means to focus his attention on appellant's photo.

Based on this record, the trial court abused its discretion in denying the motion to suppress the pre-trial photo identification and then subsequent in-court identification. The trial court's comments in denying the motion illustrate the court's illogic. The trial court concluded that "[w]hen you review these 18 pictures, all together as a group from which Mr. Weaver

was asked if he could identify anyone, that impression is destroyed." (SC RT 2751.) In fact, that the other two six-packs shown to Weaver included all African-Americans underscores the suggestiveness of the six-pack containing appellant's photo, where he was the lone black man. Clearly, since all the other photos were of African Americans in the first two line ups, and Weaver knew that Eric Clark's brother was African American and was told to be the driver of the BMW, by simple logic he was going to pick the lone African American in the third line up. After seeing a lineup composed exclusively of African-American men, in which he picked out one individual as associated with the crime, Weaver would no doubt notice that in the next lineup, there was only one African-American. Given the fact that Weaver told law enforcement that Eric Clark's brother was African-American, the inescapable conclusion is that Weaver was looking to identify an African-American in the six-pack containing appellant's photograph. Grasso's lineup provided Weaver the very means to do that, and it was inevitable that Weaver would then pick the only African-American man in the lineup.

The trial court's conclusion that Clark's "racial characteristics are not outstandingly apparent" (SC RT 2752) is belied by Weaver's testimony at the penalty retrial. First, Weaver testified that he could see the race of all people in the six-pack and that appellant was the only African-American.

Additionally, Weaver testified that both appellant's photo and Eric Clark's photo (which was also chosen by Weaver immediately before viewing the six-pack with appellant's photo) had the darkest backgrounds in their respective six-packs. (SC RT 13626.) Finally, Weaver testified that Grasso both asked him if he could identify the brother of Eric Clark, who was Black, as well as whether he could specifically identify "William Clark," thus suggesting that the lone African American in the third line up was appellant and also giving lie to the court's rationale in denying the motion that Weaver was merely asked if he could identify "anyone." (SC RT 2751; 13619-20.) Thus, the photo line up composition and associated questioning collectively suggest that Grasso did do something to draw Weaver's attention to appellant's photograph.

As such, the trial court abused its discretion in denying the motion to suppress the pre-trial identification. The United States Constitution, through the Due Process Clause, prohibits the use of unnecessarily suggestive identification procedures. (*Stovall* v. *Denno* (1967) 388 U.S. 293, 302.) In *Neil* v. *Biggers* (1972) 409 U.S. 188, the Court identified the relevant question as whether the state court pretrial identification procedures were unconstitutionally suggestive by using the same standard used in cases on direct appeal: "a very substantial likelihood of irreparable misidentification." *Id.*, at 198 (quoting *Simmons* v. *United States* (1968)

390 U.S. 377). A pretrial identification procedure that is unnecessarily suggestive and conducive to mistaken identification constitutes a denial of due process. "[J]udged by the totality of the circumstances, the conduct of identification procedures may be 'so unnecessarily suggestive and conducive to irreparable mistaken identification' as to be a denial of due process of law." (*Foster* v. *California* (1969) 394 U.S. 440, 442.)

Had the trial court determined that the pre-trial identification procedures were unduly suggestive, the burden would have shifted to the prosecution to show that the subsequent in-court identification had been purged of the taint of the prior illegality. In *People* v. *Martin* (1970) 2 Cal.3d 822, 833, this Court stated, "Finally, and most significantly, the trial court must exclude the in-court identification unless it concludes that the People have established by 'clear and convincing evidence' that the identification is purged of the taint caused by the illegal confrontation."

"The phrase 'clear and convincing evidence' has been defined as 'clear, explicit, and unequivocal,' 'so clear as to leave no substantial doubt,' and 'sufficiently strong to demand the unhesitating assent of every reasonable mind.' [Citation omitted.] The prosecution will bear the burden of producing through the witnesses the requisite level of proof. The lineup served to enhance their memories so that they could identify defendant at trial. They must now totally eliminate from recollection all observations at

the lineup and convince 'every reasonable mind' that they distinctly recall defendant from their fleeting impressions during the robbery. As suggested in *Wade*, this may be extremely difficult." (*People* v. *Caruso* (1968) 68 Cal.2d 183, 190.)

The state cannot meet this burden. With regard to Weaver's in-court identification, respondent's over-reliance on the "meaningful opportunity to closely observe [appellant]" ignores other aspects of the "totality of the circumstances" test. (*People* v. *Cunningham* (2001) 25 Cal.4th 926, 989.) In addition to the witness's opportunity to view the suspect at the time of the offense, a reviewing court looks to "the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification." (*Ibid.)* An analysis of the enumerated factors compels the conclusion that Weaver's identification was unreliable. Initially, respondent overstates the extent of Weaver's opportunity to closely observe the driver of the BMW, because Weaver was unsure if he was with the driver of the BMW for 5 minutes or 15 minutes. (SC RT 8061.) Five minutes is a brief period of time to learn the features of another person's face, especially it the other person is of a different race. Furthermore, if Weaver's testimony is to be believed, he was sitting to the right of the driver (SC RT 8049), and thus, at

best, had an extended side profile view of the face. Nor did Weaver testify that he paid any close attention to appellant while they were driving. And if Weaver's testimony is to be credited, he stated that he did not know that a crime was being committed. (SC RT 8062.) Thus, he had no reason to be looking closely at the driver. Finally, Weaver's ability to identify appellant is further called into question by the fact that he could not make an identification of the person in the back seat who drove with him all the way from North Hollywood to Fountain Valley, indicating a high degree of inattention. (SC RT 2613.)

Next, Weaver provided no description of the driver of the BMW prior to viewing the photo line up–no description of his face, hair, anything. (SC RT 2638.) As such, the unduly suggestive photo line up irreparably tainted Weaver's memory of the driver's face and rendered his subsequent identification of appellant suspect. His memory was further tainted by first seeing appellant in the highly suggestive circumstances of the preliminary hearing, where he was in jail clothes and thus obviously the suspect. (SC RT 13632.)

Furthermore, although Weaver made an in-court identification of appellant at the guilt phase (SC RT 8028), thus underscoring the prejudice in the guilt phase due to the trial court's erroneous admission of the identification, Weaver testified in the penalty retrial that he was not entirely

certain of his identification of appellant. Weaver specifically acknowledged his inability to make a positive identification. "I don't know for sure because I really didn't get a–all I did was I looked at him, and that reminds me a lot of him." (SC RT 13620). He further testified that when he made this identification, he was not sure or positive that this was the person driving the gold BMW. (SC RT 13624.) As such, Weaver was not actually certain of his identification of appellant, again showing that under the totality of circumstances, the state cannot show that the pre-trial identification procedures did not taint the subsequent live identification.

Finally, Weaver's in court identification of appellant at trial on April 2, 1996 took place approximately five and a half years after the night of the crime on October 18, 1991. Such a long time between a fleeting view of the driver of the BMW for at most 15 minutes and the in-court identification virtually guarantees that the identification was tainted and the product of the suggestive pre-trial procedures.

For all the foregoing reasons, Matthew Weaver's initial and in-court identifications were unreliable and obtained under unduly suggestive procedures. The unfairness of the six-pack containing appellant's photo was a "demonstrable reality" and thus requires reversal of appellant's conviction. (*People* v. *DeSantis* (1992) 2 Cal.4th 1198, 1222.)

The prejudice to appellant's case was severe, as his defense was that

he was not at the scene or involved in the Comp U.S.A. robbery. The prosecutor used Weaver to identify appellant as being at the scene in closing argument. (SC RT 10844-10846; 10860-10862; 11100-11105; 11109-11112; 11115-11120). Weaver was the sole eyewitness alleging that appellant was present at the scene. Officer Rakitis, the first officer on the scene, also saw the driver, but did not identify appellant as the driver. Rakitis testified that the driver was a twenty to twenty-four year old black man. (SC RT 7956-7962). He did not identify appellant as the driver of the car, even though he was shown the same suggestive six-pack. (SC RT 7970-7976). He testified that the passenger of the BMW was African American (SC RT 7963), thus indicating that Weaver was not in the car as he testified he was.

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra,* 386 U.S. 18.) Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. (*People* v. *Watson* (1956) 46 Cal.2d 818, 836.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck* v. *Alabama* (1980) 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the

Eighth Amendment. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 879; *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 304; *Johnson* v. *Mississippi* (1988) 486 U.S. 578, 584-85.)

CLAIM 13
THE PROSECUTOR COMMITTED PROSECUTORIAL MISCONDUCT BY COMPELLING WITNESS ALONZO GARRETT WITH THREATS OF CONTEMPT CHARGES. THE COMPELLED TESTIMONY VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Alonzo Garrett's testimony and pre-trial interviews were critical to the prosecution's case in establishing consciousness of guilt of the Comp U.S.A. robbery, as well as a motive for the murder of Ardell Williams. No other evidence directly connected appellant in any way to Williams' murder. At the preliminary hearing in 1994, Garrett tried to assert his Fifth Amendment privilege against self-incrimination. (MC RT 971). But he was found in contempt of court. (MC RT 978.) Seeking to avoid further penalty, Garrett testified against appellant at trial in 1996. (SC RT 9662-9716, 9772-9795, 9812-9914, 9928-9930.) His testimony, which asserted that appellant had shown him Ardell Williams' grand jury testimony, suggested appellant's consciousness of guilt in the Comp U.S.A. robbery. Further, the prosecutor introduced previous statements by Garrett, in which he said that appellant referred to Williams as what was keeping him

incarcerated. If the prosecutor had not initiated contempt proceedings in 1994, and if the judge had not held Garrett in contempt, Garrett would not have been unfairly coerced by the prosecutor to testify at trial. Appellant was therefore prejudiced by Garrett's compelled testimony, violating his constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

Respondent's Argument

Respondent asserts that since the privilege against self-incrimination is personal and may only be asserted by the holder of the privilege, Garrett's counsel's assertion of his Fifth Amendment right against self-incrimination was ineffective. (RB 58-59.) Further, respondent argues that since Garrett refused to be sworn as a witness or participate in the preliminary hearing, he did not invoke the privilege and waived any claim of privilege. (RB 59.)

Alternatively, respondent argues that even if Garrett's attorney could have invoked the privilege for him, Garrett failed to meet his burden of showing "that the proffered evidence might tend to incriminate him." (RB 60, citing Evidence Code section 404.) Respondent asserts that the court was "prevented from making any determination as to any possible claim of privilege," and that "the Fifth Amendment does not provide a non-party witness with carte blanche to refuse to participate in any aspect of the court

proceedings." (RB 60.) As a result, respondent argues that in order to assert the privilege, Garrett would have needed to permit the prosecution to question him and assert the privilege in response to specific questions. (RB 60.) Since Garrett did not do so, respondent argues that the prosecution was "without power" to seek immunity for Garrett. (RB 61.)

Respondent also argues that impact of the alleged death threat made against Garrett on his decision not to testify at the preliminary hearing was rendered null by the fact that Garrett had already been placed in protective custody at the Orange County Jail. (RB 60-61.) Respondent ignores the prosecutor's stated concern that showing the letter to Garrett "could impact an allegation of his credibility" despite his being placed in protective custody. (AOB 134.) Respondent further points out that, while Garrett said he had feared being labeled a "snitch," he said he was not afraid of appellant. (RB 60-61.) Taking Garrett at his word, respondent claims that any threat had no impact on Garrett's decision to testify and is thus irrelevant. (RB 61.) Respondent again misses the point. If Garrett had been afraid of appellant, or angry at him for making a threat, he could have easily testified falsely implicating appellant.

Invocation of the Fifth Amendment Privilege Against Self-Incrimination

At the outset, respondent's claim that Garrett's counsel could not assert his Fifth Amendment privilege against self-incrimination clearly

fails. Appellant does not dispute respondent's claim that the privilege against self-incrimination is personal and may only be asserted by the holder of the privilege. (RB 58.) But respondent's selective reading of case law is misguided. Respondent provides no support or justification in case law for its claim that counsel may not assert the claim on behalf of a client.

While the California Supreme Court has not expressly ruled on this issue, the California Court of Appeal has held on multiple occasions that counsel may assert a client's Fifth Amendment privilege against self-incrimination. (*People* v. *Apodaca* (1993) 16 Cal.App.4th 1706, 1715 ["If the lawyer is clearly acting under the authorization of the client, and invokes the client's privilege, there is little point or sense in insisting that the client also personally invoke the privilege"]; *People* v. *Johnson* (1974) 39 Cal.App.3d 749, 758 [upholding counsel's invocation of privilege on behalf of client witness]; accord *Doe ex rel. Rudy Glanzer* v. *Glanzer* (2000) 232 F.3d 1258, 1263-4 [counsel's statement regarding client's Fifth Amendment right was clear indication that privilege against self-incrimination was successfully invoked]; *Bigby* v. *U.S. I.N.S.* (11th Cir. 1994) 21 F.3d 1059, 1062, 1063 n.5 [referring to *Schmidt*'s position, infra, as dicta and holding that on the facts of this particular case, counsel's invocation of the privilege was effective]; *U.S.* v. *Johnson* (6th Cir. 1985)

752 F.2d 206, 211 fn.3 [Fifth Amendment privilege can be invoked on the client's behalf by an attorney].)

Respondent's next contention, that Garrett's refusal to speak and take the judicial oath cannot be considered an invocation of his privilege against self-incrimination, ignores the totality of the circumstances surrounding the preliminary hearing. Before Garrett was brought into the court, his counsel stated he believed Garrett had a Fifth Amendment right to remain silent if asked any questions about the crime. (MC RT 966.) He then stated that it was Garrett's desire to not be in the courtroom and to not say anything. (MC RT 966.) After further discussion, Garrett's counsel reiterated that Garrett said he would not say a word. (MC RT 971.) He also asserted Garrett's Fifth Amendment privilege, which, as discussed above, he was entitled to do. (MC RT 971.)

As soon as Garrett's attorney made this assertion, both the prosecutor and judge were put on notice of the potentially incriminating nature of any testimony by Garrett. It should have been no surprise to the judge and prosecutor when Garrett refused to speak, since his counsel had just asserted Garrett's Fifth Amendment privilege and told the court that Garrett would not speak. (MC RT 971.)

The privilege against self-incrimination under the California Constitution protects against compelled disclosures. "[P]ersons may not . . .

be compelled in a criminal cause to be a witness against themselves. . . ." California Constitution, Article I, Section 15. "A witness may assert the privilege against self-incrimination if she has a reasonable cause to apprehend danger from a direct answer. The court may not force a witness to make incriminating statements simply because it believes an actual prosecution is unlikely. The test is whether it might tend to incriminate, not whether it might tend to lead to an actual prosecution." (*People* v. *Seijas* (2005) 36 Cal.4th 291.)

Determination As to Whether The Fifth Amendment Privilege Applied

As this court has noted, "the contempt power should be the last resort of a judge in maintaining control in his courtroom. It should be used with 'great prudence and caution.'" (*Kloepfer* v. *Commission on Judicial Performance* (1989) 49 Cal.3d 826, 858, citing *Furey* v. *Commission on Judicial Performance* (1987) 43 Cal.3d 1297, 1314; see also Rothman, California Judicial Conduct Handbook (California Judges Association 1999) Contempt and Sanctions, section 4.05, p. 102 ["Seasoned judges rarely, if ever, rely on the use of contempt to control their courts. They employ a variety of other means to control the courtroom . . ."].)) Judges deal with recalcitrant witnesses all the time. Rather than abdicate to the prosecutor's will and initiate contempt proceedings against Garrett, the judge should have attempted to assert control with less drastic measures.

If the court had taken initiative, it certainly could have made a "determination as to any possible claim of privilege." (RB 60.) The judge could have told Garrett the issue(s) he would be asked about, namely, a discussion with appellant while housed at the Orange County Jail. Then, without requiring any substantive answers from Garrett, the judge could have asked him whether or not he would assert his Fifth Amendment privilege in response to questions on this subject. In doing so, the judge would have been provided further–albeit unnecessary–confirmation that Garrett was asserting his Fifth Amendment privilege against self-incrimination.

Having asked general questions of Garrett, the judge then should have determined whether the Fifth Amendment privilege applied in this case. Instead, the judge noted that she didn't know what was in the transcripts of the law enforcement interviews of Garrett referred to by counsel, and that as a result of the fact that "the court's going to have to do some reading," she "really didn't know" whether there was a Fifth Amendment issue. (MC RT 972.)

Appellant acknowledges that the burden was on Garrett to show that the evidence might tend to incriminate him. The proffered evidence would have been "inadmissible unless it clearly appear[ed] to the court that the proffered evidence [could not] possibly have [had] a tendency to

incriminate the person claiming the privilege." (Evidence Code section 404). (RB 60.) In making this determination, the court would not have considered the likelihood of an actual prosecution; rather the test is "whether the statement *could*, not *would*, be used against the witness." (*People* v. *Seijas*, *supra*, 36 Cal.4th 291, 305 [emphasis in original].) This determination would be made by the judge, and not by any witness or counsel. (*Roberts* v. *U.S.* (1980) 445 U.S. 552, 560; *Fuller* v. *Superior Court* (2001) 87 Cal.App.4th 299, 305.) Specifically, Garrett's testimony may have subjected him to criminal liability for intimidation of a witness (Penal Code section 136.1(a) (2) ["[k]nowingly and maliciously attempts to prevent or dissuade any witness or victim from attending or giving testimony at any trial, proceeding, or inquiry authorized by law"], further penalty for acting in furtherance of a conspiracy when attempting to dissuade a witness (Penal Code section 136.1 (c) (2)), or for the conspiracy to murder Ardell Williams (Penal Code section 182.)

In this case, Garrett clearly met the burden of showing that his alleged actions could be used against him, and at the very least, possibly had a tendency to incriminate him. (Evidence Code section 404; *People* v. *Seijas*, *supra*, 36 Cal.4th 291, 305.) While the prosecutor claimed that there was "there is nothing I know of...that suggest[s] that the answers that...this witness would give to relevant questions would incriminate him"

(MC RT 968), in his own closing argument he tellingly dispelled this conclusion. The prosecutor, in referring to Garrett's actions, argued to the jury that evidence showed "[h]e gets on the horn and he calls the Williams family, and he talks to a couple of the sisters as well as Ardell, and *makes attempts to prevent them from being involved* in this thing." (SC RT 10895 [emphasis added].)

Further, the prosecutor's assertion at the preliminary hearing was proven wrong by defense counsel's statements and Garrett's subsequent trial testimony. (MC RT 971.) At the preliminary hearing, Garrett's counsel stated that he could "certainly envision Mr. Garrett being charged as part of the conspiracy" to kill Ardell Williams, as an aider and abettor. (MC RT 970.) Specifically, Garrett's counsel referred to a police report, in which Officer Guzman suggested that appellant used Garrett to try and silence Williams. (MC RT 970.) Antoinette Yancey's counsel, who, unlike Garrett's counsel, had been present at prior proceedings in appellant's case, then suggested there was an indication that Garrett told Williams and/or her family members not to testify. (MC RT 971.)

Later, at trial, Garrett specifically testified that he asked Ardell Williams, "Well, what are you doing snitching on somebody?" (SC RT 9791.) Garrett then testified that after Williams told him everything was fine, he told her something along the lines of:

> You know, it's not cool to be snitching on people, because anybody out there can get wind of it, and, you know, find out you're snitching on them. And if you've got any information on them, you're looking over your shoulder 24 hours a day. Just ain't cool to be snitching on nobody. You know. You never know what you're getting yourself into. (SC RT 9791.)

Both the tone of Garrett's initial question to Williams and statement to Williams that snitching was "not cool" clearly demonstrate that at the very least, it was *possible* that Garrett would be subjected to criminal liability for intimidating a witness (Penal Code section 136.1 (a) (2)), or as part of a conspiracy to murder Ardell Williams. (Penal Code section 136.1 (c) (2), 182; Evidence Code section 404; *Seijas*, 36 Cal.4th at 305.) One can certainly envision a prosecutor viewing Garrett's statements as threats.

Respondent's contention that the prosecution was "without power" to seek immunity for any criminal liability Garrett could possibly be subjected to, is misleading. (RB 61.) The judge asked the prosecutor whether he intended to grant immunity, and the prosecutor said no. (MC RT 971.) But as discussed above, both the prosecutor and the judge were on notice that Garrett wanted to assert his Fifth Amendment privilege against self-incrimination. The judge should have determined whether the Fifth Amendment privilege applied; had the judge done so, respondent would clearly have no grounds for asserting that the prosecutor was "without power." (RB 61.) Alternatively, the prosecutor, aware of

Garrett's concern of criminal liability, should have asked the judge to rule on Garrett's assertion of his Fifth Amendment privilege.

Garrett's Coerced and Unreliable Testimony

Even if the prosecutor and judge were not on notice of Garrett's assertion of a Fifth Amendment privilege, their respective decisions to initiate contempt proceedings and to hold Garrett in contempt, demonstrate both that his testimony was coerced and unreliable, and that he may have been dissuaded from asserting his Fifth Amendment privilege at trial. As a result of being found in contempt, Garrett was sentenced to an additional year of incarceration. (SC RT 9695.) Although Garrett claimed at one point during his direct testimony that the contempt charges had nothing to do with his decision to talk (SC RT 9696), he also testified that the criminal charges filed against him for not taking the oath were "one of the reasons" he decided to take the oath at trial. (SC RT 9691-2.) The prosecutor also pushed Garrett further to explain his decision:

> PROSECUTOR: So tell us, why have you changed your mind?
> GARRETT: Why have I changed my mind?
> PROSECTOR: Right.
> GARRETT: Well, for one, you won't leave me alone. You kind of keep calling me down here to – until you get what you want me to come here and to, to testify. The other reason why is because of the contempt of court. My wife asked me not to get any more time. Two, I finally gotten over my anger that I had before the preliminary, before I came in here when I refused to testify. And I would like to get on with my sentencing out at – doing my time out at Calipatria, to get this behind me, and that's about it. (SC RT 9698).

This testimony demonstrates in the strongest way possible (Garrett's own words) that his decision to testify was based on the contempt proceedings.

Garrett's failed experience in attempting to assert his Fifth Amendment privilege at the preliminary hearing, and his resulting sentence for contempt, indicate he had no reason to think he could assert this privilege at trial, and that if he did, his attempts to do so would be futile and would result in additional, improper sanctions. This conclusion is compelled by Garrett's own words ("I don't have a choice") in response to a question about why he was testifying at trial. (SC RT 9690-1.) Garrett also stated that "[t]here has been rumors going around, coming from the D.A.'s team, stating that I can be put in a damned if I do and damned if I don't situation. If I don't come in here and do what is expected of me to do, that I will find myself somewhere in Pelican Bay." (SC RT 9647.) Given these stated threats, as well as the fact that Garrett's attorney was not even present during this portion of his trial testimony, there is nothing to indicate that Garrett had any belief he could successfully assert his Fifth Amendment privilege against self-incrimination at trial.

Death Threat Against Garrett

Respondent's attempts to downplay the significance of the alleged death threat made to Garrett are short-sighted. First, just because Garrett was placed in protective custody at the Orange County Jail, it does not

follow that Garrett would necessarily be placed in protective custody when subsequently housed in prison. Also, nothing in Garrett's testimony suggested that his fear of being labeled a "snitch" would increase or decrease upon his arrival at state prison.

Second, while Garrett stated that he was not fearful of appellant, this is immaterial to an analysis of Garrett's decision to not testify at the preliminary hearing. There is nothing to indicate that Garrett's fear of being labeled a "snitch" and any subsequent problems associated with this would have been limited to potential retaliation from appellant. According to Garrett's testimony, inmates are not happy when somebody goes to court to testify against another inmate, and it doesn't matter whether it's their case or they even know the inmate they are testifying against. (SC RT 9893.) Rather, inmates feel that snitches "can't be trusted" and that if they are willing to testify against one inmate, they may be willing to testify against anybody. (SC RT 9893.) As a result, whether or not an inmate's information is good, bad, or indifferent to a given defendant, he runs a substantial risk of even strangers attacking him if he is called by the prosecution to testify against another inmate. Correctional officers do not like snitches either, and treat them badly. (SC RT 9895.) Therefore, Garrett risked reprisals from both inmates and staff, irrespective of whether they knew or particularly cared about appellant's case. This knowledge

certainly could have affected both Garrett's decision to testify and the character of his testimony.

Due Process and Fairness Issues

Even if this court were to determine that Garrett's invocation of his Fifth Amendment privilege against self-incrimination was not valid, and that both the prosecutor and judge acted properly, appellant should not be penalized for Garrett's failure to exercise proper procedure in asserting his Fifth Amendment privilege. (Cf. *Chambers* v. *Mississippi* (1973) 410 U.S. 284, 302 [". . . where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice"].) As discussed above, Garrett had nothing to gain by testifying at trial, other than to avoid additional contempt liability. In fact, his subsequent trial testimony against appellant demonstrated that he cared only about avoiding additional jail time and his own "snitch" status. (SC RT 9812-4.) Garrett therefore clearly did not have appellant's interests in mind when he testified, nor should he have. Allowing Garrett's failure to properly invoke his Fifth Amendment rights, and his subsequent compelled testimony, to prejudice appellant, violates appellant's right to due process under the Fifth, Eighth, and Fourteenth Amendments. Appellant should not be penalized by Garrett's counsel's failure to advise on the proper procedure for invoking

the Fifth Amendment, nor should appellant be prejudiced by Garrett's failure to testify in the presence of his attorney.

The prejudice to appellant was amply demonstrated by the prosecutor's closing argument, in which Garrett's testimony figured prominently in the purely circumstantial case against appellant. Before and after discussing Garrett's actual testimony, the prosecutor highlighted appellant's alleged death threat to Garrett. (SC RT 10893-4, 11112.) The prosecutor then stated that after appellant showed Garrett documents related to his case, Garrett called the Williams family, spoke with Ardell and some of her sisters, and "ma[de] attempts to prevent them from being involved in this thing." (SC RT 10895.) Lastly, the prosecutor attacked Garrett's credibility and argued that in spite of Garrett's testimony that he had previously lied, appellant had told Garrett that Williams was the "woman right here that could put me away." (SC RT 10895, 11118.)

Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. 18). Alternatively, appellee cannot show that there was no reasonable probability the error affected the verdict adversely to defendant. (*People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck* v.

Alabama, *supra,* 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant* v. *Stephens*, *supra*, 462 U.S. 862, 879; *Woodson* v. *North Carolina*, *supra,* 428 U.S. 280, 304; *Johnson* v. *Mississippi*, *supra* 486 U.S. 578, 584-85).

CLAIM 17
THE TRIAL WAS RENDERED FUNDAMENTALLY UNFAIR WHEN THE COURT ADMITTED EVIDENCE UNDER EVIDENCE CODE SECTION 1223 WHERE AN INSUFFICIENT SHOWING OF A CONSPIRACY WAS MADE. THE ADMISSION OF THIS EVIDENCE VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The trial court erred in admitting hearsay evidence of telephone conversations between Yancey, posing as a woman named Janet Jackson, and members of the Williams family pursuant to Evidence Code section 1223 (Admission of co-conspirator in furtherance of conspiracy).

In response, respondent submits that:

- No objection was made at trial, therefore forfeiting the claim on appeal (RB 71),
- The statements were not hearsay since they were not offered to prove the truth of the matter asserted (RB 71),
- Yancey's statements were admissible under section 1223 since ample evidence of conspiracy was presented to the court (RB 71-72),

- Appellant fails to show prejudice (RB 75).

Section 1223 of the California Evidence Code states that:

> Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if:
> (a) The statement was made by the declarant while participating in a conspiracy to commit a crime or civil wrong and in furtherance of the objective of that conspiracy;
> (b) The statement was made prior to or during the time that the party was participating in that conspiracy; and
> (c) The evidence is offered either after the admission of evidence sufficient to sustain a finding of the facts specified in subdivision (a) and (b) or, in the court's discretion as to the order of proof, subject to the admission of such evidence.

At trial, Nena and Angelita Williams testified to numerous hearsay statements made by Yancey while she was delivering flowers to the Williams home and during telephone conversations with each of them (the Jackson calls). They also testified to what Ardell Williams had said to them about her conversations with Yancey. Yancey's statements are either hearsay or double hearsay, depending on whether Nena or Angelina heard them directly, or though Ardell. Yet these statements do not fit within the section 1223 exception since there was insufficient independent evidence to support a finding of a conspiracy between Yancey and appellant.

Objections on the basis of hearsay were made at trial

Initially, respondent contends that the error was waived for failure to object. (RB 71.) Respondent is wrong. At trial, appellant's counsel clearly objected to the questioning of Nena Williams as to her conversation with

Ardell Williams on hearsay grounds and was overruled by the trial court. (SC RT 9315, 9321 and 9340.) Counsel even asked that the "hearsay be a continuing objection," to which the court agreed. (SC RT 9341.) Angelita Williams testified only after this ongoing hearsay objection had been granted.

The futility of making further objections is also illustrated by what occurred at the preliminary hearing. During the preliminary hearing examination of Nena and Angelita Williams, appellant objected to the admission of Yancey's statements on hearsay grounds. (MC RT 1583, 1613, 2310-2318.) The prosecution sought to have the statements by Yancey admitted against Clark pursuant to section 1223 (MC RT 2313) and the statements by Ardell about her conversations with Yancey admitted against Clark pursuant to section 1250(A)(2). (MC RT 2311). The Court overruled defense hearsay objections to Nena's and Angelita's testimony and allowed the admission of the evidence on these bases. (MC RT 2311-2317). Thus, any additional objection by defense counsel at trial would similarly have been overruled, and defense counsel is not required to make objections where doing so would be futile. The failure to object in these circumstances is not a bar to appellate review. (*People* v. *Hamilton* (1989) 48 Cal.3d 1142, 1184.)

The statements were hearsay since they were offered to prove the truth of the matter asserted

A review of the record also belies respondent's assertion that the statements were not offered to prove the truth of the matter asserted and were thus not hearsay. (RB 71). "'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evidence Code section 1200.) In arguing that the statements were not asserted for their truth, respondent claims that "[t]he truth of Yancey's statements were of no importance to the prosecution's case." (RB 71). Respondent's assertion is belied by the prosecutor's use of the statements and argument to the jury. Initially, at the preliminary hearing the prosecutor conceded that Yancey's statements to Nena and Angelita Williams were hearsay and sought to admit them against Clark pursuant to the section 1223 exception. (MC RT 2312-2314). At the guilt phase of the trial the prosecutor used the statements for their truth content. The prosecutor argued to the jury that Yancey called the Williams family posing as a woman named Janet Jackson in order to obtain more information about Ardell Williams and ultimately offered Williams a job so that she could be lured to the site where she was murdered. (SC RT 10879 - 10882.)

Angelita Williams, Ardell's mother, testified to a number of conversations she had with Yancey, whom she knew as Janet. Supporting the prosecution's theory that Yancey was contacting the family as a way to

elicit information about Ardell's whereabouts, Angelita testified that Yancey said to her:

> ...didn't I tell her that Ardell worked at the Del Amo Mall, at the, I said Torrance Hawthorne Mall. And she said – I told her yes. And she says, well, she was not there. And it just, she was not – she was not there when I went...And I said, she's part time. She's not there all the time. She is working part time, and she is looking for a job now. She said, are you sure it's not the Carson Mall? (SC RT 9463).

In closing argument, the prosecutor used this statement for its truth: that Yancey went to the mall to look for Ardell but could not find her. (SC RT 10880.) The prosecutor argued, "Is that just a coincidence that here we have a checklist with Del Amo Mall, a time being one o'clock, and at the same time in the same case we have Janet telling Angie I went to the Del Amo Mall, after Angie had told her that Ardell worked at the Del Amo Mall? It's a piece of evidence that cries out for you." (SC RT 1088).

The People also used the statements as proof that Yancey had lured Williams to the place of her death. Angelita testified that Yancey called and "... before she asked for Ardell, she said her uncle is the one that got all the details and told her that she was going to tell Ardell that she was going to go with Ardell if she had to go to the job opening." (SC RT 9468). When asked whether Yancey said she would be at the job interview, Angelita testified that, "She said that she would go there so she could let Ardell feel comfortable with her Uncle." (SC RT 9498). Nena Williams testified that Ardell told her that "Mom's friend Janet says she has a job for me, and it's

paying, you know, a little bit more money than what I'm making now" (SC RT 9315) and that "Janet would be calling back on the time of the interview and the setup and where its going to be in a few days." (RT 9316.) She also testified that she was in the room when Ardell was talking on the phone to Yancey and writing down directions for the job interview. After hanging up the phone, Ardell was "... basically reading off this information telling me where it's going to be. And she said if you still want to go, you know, see how the interview goes and I'll let you know the information." (SC RT 9317-9319.) The sisters then discussed the time and date of the interview, noting that it was strange that it was at 6.30 a.m. on a Sunday. (SC RT 9320.)

This evidence was used for the truth of its contents: that Yancey arranged with Ardell to meet at the time and place where she was killed. In closing, the prosecution outlined these phone calls and argued that "...Ardell Williams, unknown to her obviously, is given directions to her death. She is given directions to go to this place on 407 West Compton Boulevard. She is given directions to get there, and she is given directions to be there at a specified time, which was 6:30" (SC RT 10885) "...and that's how you get to the place." (SC RT 10882.)

At the preliminary hearing the prosecutor conceded that the statements were hearsay by seeking to admit them under an exception to the

hearsay rule. (MC RT 2311.)

Arguing that the testimony was not hearsay, respondent states that "[T]he importance of the statements were not their truth, but instead, the fact that they were made at all." (RB 71.) However, in the very next sentence, respondent states that "[t]he statements demonstrated Yancey's role in helping Clark to murder Ardell Williams by luring Williams from her home to the nearby Continental Receiving yard where she was murdered." (RB 71.) This is clearly a hearsay purpose since the statements (the details of the meeting) are asserted to prove their truth.

Statements by Yancey Were Inadmissible Because There Was Insufficient Independent Evidence of a Conspiracy

Next, respondent argues that assuming the testimony was hearsay, it was admissible under Evidence Code section 1223 since there was "ample evidence of a conspiracy between Yancey and Clark to murder Ardell Williams." (RB 72.) Respondent then lists the scant evidence of appellant's involvement in a conspiracy to kill Williams, carefully excluding Yancey's statements to Williams' because, as accepted by the respondent, hearsay statements admitted pursuant to section 1223 are only admissible if the proponent of the evidence presents "independent evidence to establish prima facie the existence of ...[a] conspiracy." (*People* v. *Hardy,* 2 Cal.4th at p. 139). (RB 72) .

"[I]t seems well settled that in order for the extrajudicial statements

of one alleged conspirator to be admitted in evidence against another, as an exception to the hearsay rule, the existence of the conspiracy must be shown by independent evidence." (46 A.L.R.3d 1148). In *Carbo* v. *United States,* (1963) 314 F.2d 718, 735, the court stated that "It is also well established...that such declarations are admissible, over the objection of a co-conspirator who was not present when they were made, only if there is proof independent of the declaration that he is connected with the conspiracy." Moreover, this independent evidence cannot include the statements themselves. "Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence." (*Ibid.*, see also *Glasser* v. *United States*, (1942) 315 U.S. 60, 75.)

Respondent argues that there was sufficient independent evidence to sustain a finding of conspiracy, including: Ardell Williams' Grand Jury testimony related to the Comp U.S.A. robbery, phone calls between Yancey and Clark and Clark's attorney, the "Billy" file discovered by law enforcement in Yancey's residence, voice and fingerprint identification of Yancey, and Yancey's telephone conversation with a friend after the murder. (RB 72). Yet a review of the record discloses no hard evidence of appellant's involvement in a conspiracy to kill Ardell Williams.

Initially, contrary to respondent's insinuation, calls received by an alleged coconspirator's defense team do not comprise acts made to advance

the conspiracy. Further, even if Yancey called appellant in county jail, the state produced no evidence of the content of these calls, such that appellant "was conspiring *with anyone* to kill" Williams. (*People* v. *Morales* (1969) 48 Cal. 3d 527, 551 (Emphasis in original)). Factually, not even the Deputy District Attorney at the hearing on Yancey's motion to lift restrictions on her ability to make calls from county jail after she had been arrested had the temerity to allege proof positive that the phones were used to arrange for the murder. The Deputy District Attorney could not point to any specific phone call between appellant and co-defendant Yancey made to facilitate the murder of Ardell Williams. The Deputy District Attorney frankly conceded that the phone calls were "a theory that we have." (MC RT 58).

Respondent offers evidence of the "Billy" file discovered at Yancey's apartment, containing tax returns and receipts in appellant's name and letters between them. Again, this is not proof of a conspiracy, it is merely evidence of a relationship.

Respondent also cites evidence related to the 'Janet Jackson' calls and flower delivery by Yancey, such as voice and photo identifications of Yancey and her fingerprints on the flower box, as further evidence to "properly conclude that the prosecution had met its burden of establishing prima facie evidence that a conspiracy to murder Ardell Williams existed." (RB 73). However, this evidence is meaningless in the absence of what was

said during the Janet Jackson calls or flower delivery and as discussed above, the prima facie finding of conspiracy must be made in the absence of those statements. That is, while it is undisputed that Yancey went to the Williams' house, there was no independent evidence that appellant had instructed her to do so in furtherance of the conspiracy.

Lastly, respondent cites the evidence that "Yancey spoke to a friend on the phone and told him that she had been arrested because she had delivered flowers to someone who was later found murdered" as independent proof of the conspiracy. (RB 73.) Yet this statement was made after arrest and as such is inadmissible, as it was not made "during the conspiracy and in furtherance thereof." (*People* v. *Sailing* (1972) 7 Cal.3d 844.) In *Sailing,* (*Id.* at p. 843) the Court accepted the position in *Grunewald* v. *United States* (1957) 353 U.S. 391, where the Court refused to "accede to the proposition that the duration of a conspiracy can be indefinitely lengthened...merely because the conspirators take steps to bury their traces, in order to avoid detection and punishment after the central criminal purpose has been accomplished." (*Sailing, supra,* at p. 843). Following this reasoning, this statement clearly cannot be independent support of the conspiracy.

In summary, respondent submits nothing more than evidence of a motive (the Comp U.S.A. testimony) and a relationship (the calls between

Yancey and Clark and the "Billy" file). That Yancey was at the Williams' household means nothing without more to connect appellant to a conspiracy with her, and Yancey's statements to her friend were made only after the conspiracy had concluded. This scant evidence does not establish a conspiracy. "Conspiracies cannot be established by suspicions. There must be some evidence. Mere association does not make a conspiracy." (*People* v. *Long* (1907), 7 Cal.App.27, 33.)

Because there was insufficient evidence of a conspiracy of which appellant was a part, independent of hearsay, the evidence concerning Yancey's conversations with Ardell Williams' family should have been excluded. As such, the admission of the statements deprived the appellant of a state created liberty interest and denied him his federal constitutional right to due process of law. (*Hicks* v. *Oklahoma,* 447 U.S. 343, 346 (1980).

Appellant was prejudiced by the admission of the statements

Respondent asserts that "it is not reasonably probable that Clark would have obtained a more favorable result had the challenged statements not been admitted" because "Yancey's statements while posing as the flower delivery person and as Janet Jackson were really not important for their truth and there was ample evidence of the conspiracy between Yancey and Clark to murder Williams independent of the statements." (RB 75-76). Respondent is mistaken.

The Supreme Court in *Chapman* v. *California* found that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond reasonable doubt." The burden of proving that the error was harmless is on the beneficiary to the error. (*Chapman* v. *California, supra,* 386 U.S. 18, 24.) Reversal is therefore required as the respondent cannot demonstrate that the error was harmless beyond a reasonable doubt.

Respondent cannot meet this burden. The prosecutor made extensive use of the hearsay in closing argument in urging the jury to find Clark responsible for Williams' murder. At the guilt phase of the trial the prosecutor argued to the jury that Yancey called the Williams family posing as a woman named Janet Jackson in order to obtain more information about Ardell Williams and ultimately offered Ms. Williams a job so that she could be lured to the site where she was murdered. (SC RT 10879 - 10882.) The prosecutor argued, "Is that just a coincidence that here we have a checklist with Del Amo Mall, a time being one o'clock, and at the same time in the same case we have Janet telling Angie I went to the Del Amo Mall, after Angie had told her that Ardell worked at the Del Amo Mall? It's a piece of evidence that cries out for you." (SC RT 1088). The prosecution outlined Yancey's phone calls and argued that "...Ardell Williams, unknown to her obviously, is given directions to her death. She is given

directions to go to this place on 407 West Compton Boulevard. She is given directions to get there, and she is given directions to be there at a specified time, which was 6:30" (SC RT 10885) "...and that's how you get to the place." (SC RT 10882.)

Alternatively, respondent cannot show that there was no reasonable probability the error affected the verdict adversely to the defendant. (*People* v. *Watson, supra,* 46 Cal.2d 818, 836.) Under *Watson*, the court must conduct "an examination of the entire cause, including the evidence". (*Ibid.)* If Yancey's statements are excluded from the evidence outlined in the Respondent's brief (RB72-73), the prosecution is left only with evidence of appellant's motive (Williams' grand jury testimony) and evidence of a relationship between Clark and Yancey (calls and visits between the two and the contents of the "Billy" file at Yancey's house). Even considering the Supreme Court's ruling in *Iannelli* v. *United States* (1975), 420 U.S 770 [95 S.Ct, 1284, 43 L.Ed.2d 616] that the conspiratorial agreement "need not be shown to have been explicit...[and] can be instead inferred from the facts and circumstances of the case," these facts and circumstances are hardly "ample evidence" of a conspiracy as asserted by the respondent (RB 72 & 75). Indeed, on these facts any person with whom appellant had a relationship could prima facie be part of a conspiracy to murder Williams. The elements of conspiracy are an agreement between the

parties, an intent to achieve an unlawful act and an overt act in furtherance of the conspiracy. Mere evidence of a relationship and motive cannot of itself prove any of these elements.

Yancey's statements create a link between her and the Williams murder and thus in conjunction with the relationship and motive evidence, could be argued to be circumstantial evidence of a conspiracy. It is reasonably probable that had these challenged statements not been admitted, the prosecution would not have been able to prove a conspiracy. Clark therefore suffered prejudice as a result of the admission of the statements.

CLAIM 21
APPELLANT'S DUE PROCESS AND CONFRONTATION RIGHTS TO PERSONAL PRESENCE AT TRIAL WERE VIOLATED WHEN HE WAS EXCLUDED FROM THE IMMUNITY PROCEEDINGS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Jeanette Moore and Matthew Weaver were critical prosecution witnesses. Without their testimony, appellant could not have been connected to the attempted robbery of the Comp U.S.A. and death of Kathy Lee. (SC RT 7469- 7497.) Matt Weaver was the only witness who identified appellant as having been present at the scene on the night of the homicide. Jeanette Moore provided testimony tending to show that appellant had taken steps to fraudulently rent a U-haul truck used in the

robbery. (SC RT 7660-7663.) In exchange for their testimony, both witnesses were given immunity for any crimes they committed as accomplices to murder. (SC RT 7555, 7999.)

While appellant, his attorney, and the prosecutor were in one courtroom, Weaver and Moore were in another courtroom getting immunity. (SC RT 7592.) Although the trial court expressed concern that neither appellant nor his counsel were present, the prosecutor argued that appellant had no standing to be present since he was "not a party." (SC RT 7592.) Ultimately, the defense was not present at the immunity hearing. Nor was the defense ever provided a transcript of that hearing. (SC RT 7592.)

The exclusion of the defense from the immunity hearing and the trial court's failure to provide a complete record for appeal violated appellant's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution to due process, equal protection, to personal presence, and to confront witnesses, along with rights guaranteed by article I, sections 7, 15, 17, and 24 of the California Constitution, and Penal Code section 190.9, subdivision (a), and rule 34.1(a)(2) of the California Rules of Court.

Respondent contends that appellant's constitutional rights to due process and confrontation were not implicated by his exclusion from the Penal Code section 1324 immunity hearing for Matt Weaver and Jeanette

Moore because such a hearing is not a critical stage of the proceedings implicating a defendant's state and federal constitutional rights and that appellant's exclusion from the hearing "had no reasonably substantial relation to Clark's ability to defend the charges against him." Respondent cites *People* v. *Roldan* (2005) 35 Cal.4th 646, 717-718, for the proposition that personal presence is not required when "presence would be useless, or the benefit but a shadow." (Internal quotations omitted.) (RB 90-1.)

Respondent's analysis is fundamentally flawed in two regards. First, the hearing was substantially related to appellant's ability to defend himself because he needed to know the exact nature of the benefits and immunity provided to the key witnesses, in order to impeach them if they lied while testifying in front of the jury. As a result of the exclusion and lack of a transcript, appellant was severely limited in his ability to cross examine Weaver and Moore about the details of their immunity agreements. It is also for this reason that failure to provide a transcript of the immunity hearing was also prejudicial, because it hinders appellant's ability to prosecute his appeal. (*People* v. *Huggins* (2006) 38 Cal.4th 175, 204.)

Conceding that this Court has never addressed the question of whether an immunity hearing under Penal Code section 1324 is a critical stage of the criminal proceedings, respondent relies on two Court of Appeal cases. (RB 91.) Yet both are distinguishable. Furthermore, neither has

ever been cited ONCE after almost 40 years of being on the books, indicating the weakness of these cases.

People v. *Randolph* (1970) 4 Cal.App.3d 655, 660 held that a section 1324 hearing was not a critical stage of the proceedings because section 1324, on its face, does not concern the defendant and referenced only the prosecutor and the witness refusing to testify, such that the hearing was "not a stage of the proceedings against [the defendant] at all." (*Id.*)

People v. *Boehm* (1969) 270 Cal.App.2d 13, 20 held that a defendant was not prejudiced by his absence from an immunity hearing for a co-defendant because "any possible benefit that the [defendant] might have derived by being personally present at the conference would have been 'but a shadow'." By conducting a prejudice analysis, *Boehm* held that exclusion from an immunity hearing could in fact violate a defendant's right to be present at a critical stage of the proceedings: "circumstances might be presented in which a defendant might be prejudiced by his absence from a conference at which immunity is granted a codefendant." (*Id.*) *Boehm* is easily distinguishable from the instant case because *Boehm's* prejudice analysis hinged on the fact that Boehm was "furnished with a complete transcript of the immunity hearing which he could use for any impeachment value it might have." (*Id.*) In the instant case, appellant was never provided with a transcript. (SC RT 7592.)

Without conducting any analysis, respondent flatly concludes that *Randolph* is the "better view and should be adopted by this Court." (RB 92.) Respondent understandably prefers *Randolph's* explicit holding that a defendant never has a right to be present at an immunity hearing to *Boehm's* tacit recognition of a right to be present. Yet *Randolph's* reasoning is circular; it assumes the very thing it is trying to prove–that section 1324 proceedings are not critical such that a defendant's presence is required by the United States Constitution. This flaw may be based on the faulty premise that a section 1324 hearing "does not, in any way, concern the defendant on trial." (*Randolph*, *supra*, 4 Cal.App.3d 655, 660.) Yet, of course a hearing granting immunity affects a defendant. Without access to the hearing or a transcript, the defense cannot effectively cross examine the immunized witnesses about the precise benefits provided by the prosecution. Even respondent would have to agree with the unimpeachable proposition that a state statute must bow to the demands of the United States Constitution. (*Brooks* v. *Tennessee* (1972) 406 U.S. 605, 611 [state statute requiring defendant to be the first witness to testify if he or she chooses to testify held to be unconstitutional].) Section 1324 must honor the federal constitutional rights to personal presence, to confrontation under the Sixth Amendment, and to due process under the Fourteenth Amendment to be present at any critical stage of the proceedings where his

presence would contribute to the fairness of the trial. (*Kentucky* v. *Stincer* (1987) 482 U.S. 730, 745.) Because Moore's and Weaver's testimony was critical to the prosecution, the hearing where they received immunity for their crimes in exchange for their testimony was thereby a critical stage of the proceedings where appellant's presence would contribute to the fairness of the trial by ensuring that those two witnesses testified truthfully concerning the terms of the immunity and any other benefits they received.

Furthermore, *Randolph* is distinguishable. There, the defense took issue with the immunity proceeding because they were not notified and had not been "allowed to be present to show cause why immunity should not have been granted." (*Randolph*, *supra*, 4 Cal.App.3d 655, 659.) Yet in the instant case, appellant does not question the grants of immunity to Weaver and Moore. Instead, appellant's exclusion from the immunity hearing, together with the failure of the trial court or district attorney to provide a transcript of the hearing, prevented him from being able to confront those witnesses through vigorous cross-examination in violation of the Sixth and Fourteenth Amendments.

Additionally, *Randolph* suffered no prejudice, because trial counsel knew that the witness had been immunized prior to the previous trial, knew what that witness had testified to, and knew that the witness had changed his testimony. (*Randolph*, *supra*, 4 Cal.App.3d 655, 660-1.) Yet in the

instant case, appellant was not informed beforehand of what transpired at the immunity hearing because he was never provided with a transcript.

Respondent's attempts to characterize appellant's presence as being useless because appellant could not object to the granting of the immunity are unavailing (RB 93). Again, appellant does not contend that he was prejudiced by being unable to so object. Instead, appellant was prejudiced by his inability to effectively cross examine Moore and Weaver about the precise nature of the immunity they were granted and any other benefits that they received as a result of being excluded from the proceeding and the failure of the court to provide a transcript to the defense. As such, *People* v. *Samuels* (2005) 36 Cal.4th 69, 127, cited by respondent (RB 92), is irrelevant. Because appellant did not seek to challenge the granting of immunity, it is irrelevant that section 1324 vests in the prosecutor alone a "statutory right, incident to its charging authority, to grant immunity and thereby compel testimony." (*Ibid.*)

Similarly irrelevant is *People* v. *Perry* (2006) 38 Cal.4th 302, 312, cited by respondent (RB 93-94) for the proposition that the defendant can be excluded from proceedings where his or her presence contributes nothing. Each of the instances cited by *Perry* turned on the fact that the defendant could not contribute to the factual or legal discussion that he was excluded from: the competence of a child witness, whether to remove a

juror, jury instructions, routine procedural discussions, and whether to exclude a spectator from the courtroom (the scenario in *Perry*). Respondent concludes that "just like these other analogous circumstances, the immunity proceedings under Penal Code section 1324 similarly involved a purely legal determination in which Clark had no role to play." (RB 94.)

Like *Samuels*, *Perry* is irrelevant because the constitutional right appellant sought to protect by his presence was not just presence *qua* presence, but the right to effectively cross examine the witnesses against him, which could be ensured only by his presence at the immunity hearing or with a transcript of the hearing.

Even apart from the federal constitutional rights that had been violated, appellant is entitled to relief under Penal Code section 190.9. As respondent concedes in a footnote, "it is error to fail to report all proceedings in a capital case as required by Penal Code section 190.9." (RB 91, fn. 21) Appellant even agrees with respondent that appellant is required to show prejudice. (*People* v. *Huggins, supra,* 38 Cal.4th 175, 204.) If any part of the proceedings was not reported as required by section 190.9, subdivision (a), "[e]rror it was; in the absence of prejudice, however, it is not reversible." (*People* v. *Freeman* (1994) 8 Cal.4th 450, 509.) "A criminal defendant is . . . entitled to a record on appeal that is adequate to

permit meaningful review. . . . The record on appeal is inadequate, however, only if the complained-of deficiency is prejudicial to the defendant's ability to prosecute his appeal. [Citation.] It is the defendant's burden to show prejudice of this sort." (*People* v. *Heard* (2003) 31 Cal.4th 946, 969.)

Contrary to respondent's assertion, appellant never contended that there was "no prejudice from . . . the absence of any transcript," (RB 91 at fn. 21), the AOB explicitly alleges prejudice: "At the very least, appellant and his counsel were entitled to a copy of the transcript of the immunity hearing and to cross-examine witnesses based on that transcript." (AOB 250.)

Appellant was clearly prejudiced by his inability to effectively cross examine Moore and Weaver about the precise nature of the immunity they were granted and any other benefits that they received as a result of being excluded from the proceeding and the failure of the court to provide a transcript to the defense. And because of the failure to provide a transcript, appellant cannot now show that their testimony in front of the jury was false. The error was prejudicial under the federal standard articulated in *Chapman* v. *California*, *supra*, 386 U.S. 18, 24 (RB 94) and *Rushen* v. *Spain* (1983) 464 U.S. 114, 118-119.

CLAIM 23
THE ADMISSION OF ARDELL WILLIAMS' STATEMENTS AS NON-HEARSAY VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS, AND A RELIABLE DETERMINATION OF GUILT AND PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Proceedings in the Trial Court

Litigation concerning the admission of Ardell Williams' testimony to the grand jury and her statements to law enforcement spanned many days. (SC RT 1897 et seq.) Ultimately, the trial court erroneously allowed introduction of the entirety of Williams' statements, a remarkable 100-plus pages of testimony, for the non-hearsay purpose of motive and as evidence of the corpus of the witness killing special circumstance. (SC RT 2600-2604.) In ruling, the trial court stated, "Certainly the corpus of the special circumstance as counsel has advanced as one basis for using those, certainly to show that she did in fact testify or offer evidence against Mr. Clark, which reasonably could have been anticipated to have been discovered to him, and provide a motive in this case." The trial court specifically referenced *People* v. *Heishman* (1980) 45 Cal.3d 147 as providing authority for admission. (SC RT 2604-2605.)

Initially, the trial court denied the prosecutor's motion to admit Williams' statements under Evidence Code section 1350 (hearsay exception where defendant causes witness unavailability) because the court found the

statements to be unreliable. In denying the motion, the trial court considered that Williams' testimony was made in circumstances where she likely felt resentful towards appellant. When Williams and appellant were arrested together and appellant was released, he did not bail her out—leaving her to call her family for assistance. The trial court also commented on the lightness of the punishment Williams received for the Las Vegas crime—a reduction of a federal felony to a misdemeanor for theft of interstate mail and passing of fraudulent travelers' checks. Finally, the court found that Williams' trustworthiness was questionable based on her prior criminal conduct. Thus, the court would not admit the statements for their truth because it deemed Williams' statements untrustworthy. (SC RT 2601 – 2605.) But in the end, the court nonetheless admitted ALL of Williams' statements to law enforcement and to the grand jury as non-hearsay. (SC RT 2600-2604.) The admission of over 100 pages of highly prejudicial testimony resulted in a manifest miscarriage of justice, as shown fully below.

Prior to the hearing, the parties filed motions concerning the admissibility of the statements pursuant to Evidence Code section 1350. The prosecution's motion collaterally mentioned admission as non-hearsay evidence of motive for appellant to kill Williams and as evidence of the corpus of the witness killing special circumstance. (5 CT 1744-1760.)

Defense counsel filed a lengthy motion challenging the admission of the statements as non-hearsay. (6 CT 2257-2281.) The defense motion framed the legal landscape correctly, as follows: "(a) Is there a genuine non-hearsay purpose for which the evidence is being offered? (b) If there is a non-hearsay purpose, is the evidence relevant? (c) If the non-hearsay evidence is relevant, is it more prejudicial than probative? Can the evidence be introduced for a limited purpose without the jury being misled or confused?" (6 CT 2264.)

Regarding the first question, "If what the prosecution means to do is use Williams' statements to prove that she was a witness to a crime, this means that the statements will be introduced to prove the truth of the matter asserted—which would mean that the statements are inadmissible hearsay. If what the prosecution means to do is merely prove that Williams was a witness to a crime committed before, and independent of her killing, then this would require only that the prosecution prove that she testified before the grand jury and gave police interviews and was anticipated to give testimony in a preliminary hearing and/or trial. The case law suggests that even if evidence of the fact of and circumstances surrounding her prior testimony can be introduced, the details of the testimony/interviews cannot be." (6 CT 2264.)

To support this latter point, the motion cited *People* v. *Edelbacher* (1989) 47 Cal.3d 983 for the proposition that in a witness killing prosecution, the Court held that the risk of prejudice was not excessive because no evidence regarding the details of the prior charge were admitted, only the fact that the charge had been brought and tried. Trial counsel argued that this "suggests that the fact that the witness testified—and not the substance of the testimony—is what matters." (6 CT 2266.) Counsel rhetorically asked, "Why would the details of Ardell Williams' grand jury testimony and police statements be needed to prove this? The fact that she appeared as a witness in the Comp U.S.A. case. . .. would be sufficient to prove this." (6 CT 2269.)

Trial counsel also cited *People* v. *Brown* (1984) 8 Cal.4th 746, which held that the out-of-court statements of a child molestation victim were relevant for the non-hearsay purpose of showing the fact of and circumstances surrounding those disclosures. But the *Brown* Court cautioned that admission of the details of the statements themselves were inadmissible hearsay, citing *People* v. *Wooden* (1978) 66 A.D.2d 1004, which allowed evidence that an immediate complaint of theft was made, but forbade evidence of the details of that complaint. (6 CT 2269-2270.)

Regarding the prejudice to appellant that would undoubtedly come from admitting the details of Williams' statements, defense counsel cited

Evidence Code section 352 and again cited *Brown*: "Indeed, in the light of the narrow purpose of its admission, evidence of the victim's report of disclosure of the alleged offense should be limited to the fact of the making of the complaint and other circumstances material to this limited purpose. Caution in this regard is particularly important because, if the details of the victim's extrajudicial complaint are admitted into evidence, even with a proper limiting instruction, a jury may well find it difficult not to view these details as tending to prove the truth of the underlying charge of sexual assault [citation omitted], thereby converting the victim's statement into a hearsay assertion. [citation ommitted]." (*People* v. *Brown*, *supra,* 8 Cal.4th 746.) (6 CT 2271-2273.) The defense motion argued that "no instructions would be adequate to prevent the jurors from considering the evidence for non-hearsay purposes." (6 CT 2260-2261.)

Finally, defense counsel argued that Penal Code section 1335 prohibits conditional exams of witnesses in capital cases, and that Williams' uncross-examined statements amounted to a conditional exam. Counsel cited to *Dalton* v. *Superior* Court (1993) 19 Cal.App.4th 1506, upholding the prohibition in capital cases. (6 CT 2274-2281.)

During the trial, the prosecutor argued that the statements and testimony were non-hearsay evidence of motive to prevent Williams from testifying and retaliation for her having spoken to law enforcement. (SC

RT 1900-1901.) The fallacy of the non-hearsay purpose is demonstrated by the prosecutor's statement that the People were only willing to forego the admission of the statements for their truth if the court admitted the exact same evidence for a non-hearsay purpose. His election was "contingent upon the court's ruling of the non-hearsay purpose." (SC RT 1899.)

> THE COURT: If you can get it in for non-hearsay purposes, you're not going to attempt to get it in for the truth of the matter?
> MR. KING: That's right. (SC RT 1900. See also SC RT 1898.)

The court expressed concern about the "full context of the statements" Williams made and asked the prosecutor whether there was "another way that the information she had been a witness adverse to Mr. Clark could be placed before the jury? For example, I'm just thinking out loud now, but for example, someone present at the grand jury proceedings to say that she was called as a witness against Mr. Clark? . . . If you can see my concern . . .What I'm sure the defense would view as the danger that the jurors could not or would not separate the facts she related as it might tend to affect their judgment of his involvement in the" Comp U.S.A. murder." (SC RT 1902-1903.) The prosecutor responded that he wanted the entirety of Williams' statements and testimony to show "how much she incriminated him to fuel the motive . . .[Mr. Clark] knew all of the details of her information. To deny that would take away the legitimate force and effect of what we feel is the motive in the case." (SC RT 1904-1905.)

Trial counsel correctly characterized the prosecutor's argument: "How disingenuous, 'contingent.' We are not concerned about 1350. If you say no to us, we will go full bore ahead; we don't care about charting new material. He [the prosecutor] wants those statements before them for the truth of the matter. . . . Even if you say "No" for that purpose, we want them before the jury because we know -- Just hang the Comp U.S.A. case out the window, Judge, why even have a trial on it? Why don't you make a judicial finding that he is guilty, because Ardell Williams—the statement that's going to come before him is that his brother says he's guilty of it. He's guilty of it. And now you're going to tell the jury, disregard that statement." (SC RT 1906-1907.) Appellant argued that the counts needed to be severed for precisely this reason. (SC RT 1910.) (*See* Claims 9-10, *supra.*) Defense counsel stated that the a trial was becoming one of unsubstantiated hearsay, since every time counsel made a valid hearsay objection, the prosecutor argued admissibility for some non-hearsay purpose. (SC RT 1913.)

The court harbored reservations about admitting the entirety of the evidence. "The court's real problem lies in—is it realistic to believe that such devastating evidence could be disregarded for the jury [sic], by the jury, except for the limited purpose to which you would be asking it be admitted. " (SC RT 1934-1935.) The prosecutor agreed that if the trial

court's ruling was wrong, reversal was required. "We agree with [defense counsel], this is not harmless error. If you are wrong, and offer these statements in for a non-hearsay purpose, the case is getting reversed all right. I'm up front on that. This is not harmless error. This is the gut of the people's case." (SC RT 1919.) Appellant agrees with the prosecutor on this point—reversal is required.

In the end, because of the trial court's erroneous ruling admitting the entirety of the statements as non-hearsay (thereby precluding impeachment), appellant was forced to acquiesce in admitting the statements for their truth, only so that the defense could thereby impeach Williams. (SC RT 2912-2915; SC RT 2600.) There is no waiver where a party elicits evidence defensively, after an objection to its admission is overruled. (*People* v. *Sam* (1969) 71 Cal.2d 194, 207; *People* v. *Venegas* (1998) 18 Cal.4th 47, 94.)

Testimony Presented at Trial

Because the trial court admitted the entirety of the statements, appellant's jury heard the following 100 plus pages of prejudicial information. Investigator Grasso testified to the jury that FBI agent Todd Holliday told Grasso that an informant, Ardell Williams, had been at the Comp U.S.A. prior to the murder and had been involved in "surveilling the location, and that the informant had spoken to the participants after the

crime and had been told by Eric Clark that a woman had been shot." (SC RT 8625.) Grasso testified that he interviewed Williams on the morning of April 1, 1992 and later that evening. (SC RT 8662.) The jury was then played People's Exhibit 72, an edited tape of the interviews. Exhibits 71 and 73, transcripts, were marked but not admitted. (SC RT 8662.) The jury heard that Williams and appellant "cased" the Comp U.S.A. with Eric Clark and then moved a U-Haul truck which was parked a few blocks away, that appellant had stolen expensive Persian rugs, that appellant stole close to $10,000 from Capri Jewelers in an elaborate scheme, and that Eric Clark came over to Williams house upset and nervous and spoke of how the Comp U.S.A. robbery went bad and someone was shot. Grasso then interviewed Williams in person at the District Attorney's Office on May 29, 1992. (SC RT 8669.) A tape of that interview, People's Exhibit 77, was played for the jury. The jury heard again heard the above information, but included the following prejudicial details: that the Persian rug store robbery also included tying up the merchants and the use of big moving vans. The jury also learned that appellant told Williams that he sold his BMW because he was fearful that somebody had seem them when they were eating nachos outside the Comp U.S.A. at Del Taco. Exhibits 76 and 78, transcripts, were marked but not admitted. (SC RT 8671.) Grasso also talked to Williams about the Soft Warehouse burglary. (SC RT 8926.)

Williams' grand jury testimony was also read to appellant's jury and spanned over 60 pages. (SC RT 8731 – 8796.) The most prejudicial parts of the testimony included the following: In the early part of September of 1991, appellant called Williams at night and they went for a 20 minute drive to get food in appellant's sandy or tan colored BMW. (SC RT 8740-8742.) They went to a Del Taco near a large computer store. (SC RT 8746.) Williams testified (at the grand jury) that she said, "I know you didn't bring me out here just to eat nachos. Especially when there is a Del Taco right around the corner from where I stay. He just laughed and kept eating. And then I looked around and noticed a computer store. I looked at him, I said by any chance is this computer store going to be in the news any time soon? And he somewhat laughed, and just kept eating his nachos." Between seven to 10 minutes after that, Marc [Damian Wilson] and Eric pulled up in Eric's Isuzu Trooper, and parked so that Eric, who was driving, could speak to Williams." (SC RT 8747-8748.) It was about 10 p.m. when Eric noticed that there were still people in the Comp U.S.A. and he expressed his displeasure. (SC RT 8752.) Appellant responded that the employees were still probably clocking out. (SC RT 8754.)

They then drove a little way to a residential cul-de-sac and parked in front of a U-Haul truck. Appellant got out and spoke to his brother and Marc while Williams waited in the car. (SC RT 8760-8761.) Appellant

then moved the U-Haul with a key he took from within the BMW. (SC RT 8763.) Next, appellant got back into the BMW and they drove off. Williams asked appellant whether the Comp U.S.A. was his next target, and "he just looks at me and smiles and just keeps driving." (SC RT 8764.) In response to the grand jury prosecutor's question of whether appellant acknowledged the Comp U.S.A. as being the next target, Williams testified, "Yes he did. Yes. As I said, is this going to be your next target, he smiled, made a little head suggestion like, like go back and forth and saying pretty much. You know, doubtful tone, but yet kind of cocky." (SC RT 8765.)

Williams' grand jury testimony about what later happened was also read to appellant's jury. About two weeks after the Las Vegas incident and one month after driving to the Del Taco with appellant, Williams spoke to Eric Clark. (SC RT 8767; SC RT 8777.) Eric called Williams at home and he asked to come over because he needed somebody to talk to. He came over and asked, "Have you been talking to anybody? I said talking to anybody about what? About this Las Vegas thing. I said no, why? Because there is a word out that they think my brother is top dog in this case. And I am like, really, well, no, I haven't been talking to anyone, you know." (SC RT 8779.) "After we had the conversation about Las Vegas we were watching television and videos, and he was somewhat nervous. And I asked him, I was just making small talk with him, and he just

wouldn't loosen up. . . . And I said . . . what ever happened to the computer store. He said it went down bad. I said what do you mean. He said Oh, man, they went in there and they tied up a cashier and a night manager in the bathroom. They handcuffed them to a handicap rail in the bathroom. As they were taking care of business in the front I guess one of the – one of the people's mother came by to say what was taking him so long from closing the store and she surprised him, and he turned around and shot her. And I said what? He said yeah. I said what happened to her? He said I don't know, but they got out of there." (SC RT 8780-8781.) Eric pointed his finger and told Williams to not say anything about the Comp U.S.A. robbery. (SC RT 8781.)

The jury also learned that Williams told FBI agent Holliday about the Comp U.S.A. crimes because "after I talked to Eric and found that someone was shot and that he didn't know what had happened to her, I had wanted to tell someone, because seven years in March one of my sisters was brutally murdered, and we never found the killer. So I was wondering if there was a way I can help bring this crime to a close and close the case for her kids. Then maybe it will help me with my sister." (SC RT 8786.) About a week after she spoke to Eric, Williams asked appellant what happened to his BMW. (SC RT 8790-8791.) He responded, "I sold that puppy. I said Why, I thought you liked it. He said Yeah, but you never

know who may have seen what in it." (SC RT 8791-8792.) "He said he sold it because you never know who could have seen the two of us sitting eating nachos that one night." (SC RT 8793.)

FBI Special Agent Todd Holliday was called by the prosecution to testify about statements made to him by Ardell Williams regarding the Comp U.S.A. robbery and murder. Holliday testified to a December 31, 1991 phone conversation he had with Williams:

> She basically—there were two areas that were discussed. The first area concerned statements that Eric Clark had made to her, and the second concerned a drive she had taken with (appellant).
>
> The first thing she said that Eric Clark had told her, discussed with her how he and (appellant) had been involved in a robbery of a Comp U.S.A. in Fountain Valley.
>
> And from what he said to her, it sounded—she believed from what he said that Eric Clark and (appellant) had set the robbery up, that they had planned the robbery.
>
> Eric Clark told her that the—that there had been two robbers, that they had the people tied up, that something went wrong and a lady was killed . . .
>
> Eric Clark also told her that (appellant's) B.M.W. had been seen. And I don't recall whether she said that Eric Clark told her that they had sold the B.M.W. or they were trying to sell the B.M.W. (SC RT 9104.)

The Entirety of Williams' Statements Were Too Prejudicial to Have Been Admitted

Assuming, *arguendo*, that there truly was a non-hearsay purpose for the foregoing testimony, the trial court was clearly wrong in admitting the

entirety of the Williams' statements, spanning over 100 pages, because (1) there was no way that the jury could fail to use them for their truth regarding the Comp U.S.A. crimes, as the trial court itself recognized, (2) only the fact of and circumstances surrounding the statements and testimony was relevant, and (3) the statements were clearly prejudicial, as all the parties recognized.

Respondent claims that the statements were relevant and that the court properly exercised discretion in admitting them. (RB 97-98.) Tellingly, Respondent never explicitly addresses appellant's prejudice arguments. Respondent merely states that "Clark's reliance on *Edelbacher* is misplaced. The situation in *Edelbacher* was fundamentally different than this case." (RB 99.) Respondent attempts to distinguish *Edelbacher, supra,* 47 Cal. 3d 983 by stating that the contents of the victim's statements were irrelevant in *Edelbacher* since the defendant was tried and acquitted. As such, only the fact of the victim's prior testimony was relevant to show the motive of retaliation. In appellant's case, "in order for the jury to assess the quality of Clark's motive, they would have to know what he believed Williams was going to testify to at trial." (RB 99.) Respondent also attempts to distinguish *Edelbacher* by stating that, "Here, Ardell Williams was murdered not out of revenge for her testimony, but to prevent her from testifying in the first instance." (RB 99.)

Regarding the latter point, Respondent is factually wrong. The prosecutor urged as a ground for admission that that the statements were relevant to show retaliation for her having spoken to law enforcement. (SC RT 1900-1901.) Furthermore, Respondent's logic is specious. Respondent argues that all of Williams' statements were necessary to show the quality of appellant's motive to kill her. Yet the same could be said of *Edelbacher*—that the entirety of the victim's prior testimony was admissible to show exactly why *Edelbacher* would want to kill her. Yet the *Edelbacher* court expressly prohibited the admission of the details of her testimony. There is no principled distinction between *Edelbacher* and the present case. (*People* v. *Edelbacher, supra,* 47 Cal. 3d. 983.)

More fundamentally, respondent does not appreciate, or simply avoids, appellant's dual uses of *Edelbacher* and the other cases cited in the trial court pleadings. Appellant cites *Edelbacher* for the propositions that (1) when proving the motive of retaliation, only the circumstances of the giving of the statements, and not the content, are relevant and (2) limiting admission to the circumstances of the giving of the statements will protect the admission from a successful 352 challenge. (*People* v. *Edelbacher, supra,* 47 Cal. 3d. 983.) Thus, to the extent that the prosecutor urged admission to show retaliation, *Edelbacher* limits admission to the circumstances of the giving of the statements: that Williams spoke to law

enforcement and testified before the grand jury concerning appellant, as suggested by both the trial court and defense counsel. (SC RT 1902-1903.) Nothing beyond the fact of the telling and circumstances of the telling are relevant to show motive, as suggested by both trial counsel in his pleadings and by the trial court itself.

Regarding prejudice, even the trial court recognized that "the jurors could not or would not separate the facts she related as it might tend to affect their judgment of his involvement in the" Comp U.S.A. murder." (SC RT 1902-1903.) Thus, the trial court's wholesale admission of almost 70 pages of Williams' grand jury testimony (SC RT 8731 – 8796) and even more testimony concerning her statements to the police, was clearly an abuse of discretion under *Edelbacher*, especially given the trial court's appreciation of the prejudice, resulting in a manifest miscarriage of justice. Again, *Edelbacher* held that the risk of prejudice was not excessive because no evidence regarding the details of the prior charge were admitted, only the fact that the charge had been brought and tried. (*People* v. *Edelbacher, supra,* 47 Cal. 3d. 983.) As trial counsel argued at the hearing, some evidence was too difficult for a jury to compartmentalize, which is why, for example, a co-defendant's inculpating statements are sanitized as to the other defendant. (SC RT 1909.) As trial counsel noted, the purported theory of admissibility was relevant only to the murder of Williams, but the

statements themselves were direct evidence of appellant's guilt of the Comp U.S.A. murder. The prosecutor made no attempt to justify admitting the statements as evidence in the Comp U.S.A. murder, as they were clearly inadmissible. Yet the prosecution insisted on a joint trial of the two murders, knowing that the jury would consider the statements improperly as evidence of guilt in the Comp U.S.A. murder. (SC RT 1910-1918.)

Thus, the trial court clearly abused its discretion by allowing the admission of the entirety of Williams' grand jury testimony and statements to law enforcement, especially since the court was aware of the prejudice and even suggested limiting the evidence to the fact of and circumstances concerning her statements. Williams' statements were more prejudicial than probative, and should have been excluded under Evidence Code section 352 The trial court improperly weighed the necessity for the content of the statements against the likelihood that the jurors would consider the statements for the truth or some other impermissible purpose. (Evidence Code section 352.) A statement of past conduct by the defendant carries a great danger of prejudice because the jury, regardless of limiting instructions, may consider the statement as evidence of the facts expressly stated. This danger of undue prejudice may outweigh the probative value of the statements. (*People* v. *Lew* (1968) 68 Cal.2d 774, 783; *People* v. *Gionis* (1995) 9 Cal.4th 1196, 1213.) It is beyond the faculties of any juror

to separate the purpose of certain statements from their highly prejudicial content. (See *United States* v. *Forrester* (2d Cir.1995) 60 F.3d 52, 59 ["The government's identification of a relevant non-hearsay use for such evidence, however, is insufficient to justify its admission if the jury is likely to consider the statement for the truth of what was stated with significant resultant prejudice."] (internal quotation marks omitted)). In such circumstances, limiting instructions are not sufficient. (*People* v. *Scalzi* (1981) 126 Cal.App.3d 901, 907.)

The case cited by the trial court as providing authority for admission of the statements as non-hearsay, *People* v. *Heishman*, *supra,* 45 Cal.3d 147 (SC RT 2604-2605), is easily distinguishable. *Heishman* was also a witness killing prosecution. The contested non-hearsay consisted of (1) the testimony of a police officer that the victim had previously identified the defendant from a series of photos and (2) the testimony of a police officer that the victim had said that she was scared of defendant because he was out on bail. The court held that the identification testimony was relevant to show motive and to prove the witness killing special circumstance. The testimony concerning the victim's fear corroborated other testimony concerning the victim's absence from her abode. (*Heishman*, *supra*, 45 Cal.3d 147, 171-172.)

While *Heishman* seems factually similar to the instant case, the most relevant aspect is absent. The *Heisman* Court was not called upon to evaluate the prejudice of allowing 100 pages of "non-hearsay" testimony that all but amounted to establishing every element of the Comp U.S.A. charges, all under the guise of relevance only to the Williams murder. The contested testimony in *Heisman* was both brief and did not establish every element of the subsequent murder. As such, the trial court was wrong to rely upon *Heishman* because the nature and quality of the contested evidence was so different. Admission of the statements in the instant case was error resulting in a manifest miscarriage of justice.

Federal cases are also in accord that in some instances, the prejudicial content of the non-hearsay is too great for a jury to fail to use it for its truth. Generally, the jury is ordinarily instructed that it may consider such statements for the limited purpose only and, in most circumstances, reviewing courts can safely assume that jurors will follow these instructions and not consider the truthfulness of the out-of-court statements. (See, *e.g.*, *Greer* v. *Miller,* (1987) 483 U.S. 756, 767 fn. 8 ["We normally presume that a jury will follow an instruction to disregard inadmissible evidence...."]; *United States* v. *Kallin,* (9th Cir. 1995) 50 F.3d 689, 694-95 [same].)

In a case strikingly similar to the instant case, *Thomas* v. *Hubbard* (9th Cir. 2001) 273 F.3d 1164 (overruled on other grounds in *Payton* v. *Woodford* (9th Cir. 2002) 299 F.3d 815, 829, fn. 11) held that the general rule must occasionally give way: "There are, however, some cases in which out-of-court statements are so prejudicial that a jury would be unable to disregard their substantive content regardless of the purpose for which they are introduced and regardless of any curative instruction. (See, *e.g.*, *United States* v. *Mayfield*, (9th Cir.1999) 189 F.3d 895, 901-02 [holding that jury could not abide by an instruction to consider an informant's incriminating statements only to show an officer's state of mind while executing a search warrant]; *White* v. *Cohen,* (9th Cir.1981) 635 F.2d 761, 762-63 [holding that the prejudice flowing from references to unrelated charges against the defendant in a tape that was used for impeachment purposes could not be cured by the court's limiting instruction]; *United States* v. *Caldwell* (9th Cir.1972) 466 F.2d 611, 612 [describing the jury's inability to follow instruction to consider informant testimony implicating the defendant in a drug conspiracy only for the purpose of showing the informant's relationship with known drug dealers and not as proof of the defendant's guilt].) In such instances, the effect of the testimony on the jury is the same as it would be if the statements were admitted for the truth of their contents." (*Hubbard*, *supra*, at p. 1173.)

Hubbard is similar to the instant case in that the prosecutor attempted to introduce the statements as non-hearsay evidence of motive. (*Hubbard, supra*, 273 F.3d 1164, 1172-1173.) The court in *Hubbard* rejected this rationale and would have reversed the conviction on this ground alone, even though the trial court sustained a hearsay objection and ordered the testimony stricken (in contrast to the instant case where the court welcomed 100 pages of "non-hearsay" testimony). (*Id*, at pp. 1172-1175.)

In reversing, the court canvassed the prejudicial facts of the "non-hearsay" and stated:

> The [statement] at issue in this case is precisely the type of statement that a jury would be unable to ignore or to consider for a limited purpose only. The statement describing a physical confrontation between Thomas and Luke in which Luke beat up Thomas on the very day that Luke was killed and reporting that Thomas told Luke after the beating that he was going home to "get his knife" provides the only evidence that Thomas had both a motive to kill Luke and access to the type of weapon used to commit the crime. Evidence of motive, if believed, completes the prosecution's theory of the case by explaining the purpose of and reason for the defendant's actions. Because motive provides the jury with a framework within which to analyze the defendant's purported actions, it is extremely difficult to ignore or disregard evidence of motive once it is presented. . . . With no physical evidence implicating Thomas and no murder weapon found, it is unreasonable to assume that the jury would be able to ignore the testimony that, after losing a fist fight with the murder victim, Thomas stated that he would go home and get his knife, and that the victim then directly challenged him to do so. Thus, Fancher's testimony about what Schwab told him that Nick said regarding the purported physical and verbal fight between Thomas and Luke violates the Confrontation Clause regardless of the purpose for

which it was introduced. (*Hubbard*, *supra*, 273 F.3d 1164, 1173-1174.)

Similarly, Williams' statements that she cased the Comp U.S.A. with appellant, who admitted it was his next target, coupled with the double hearsay of Eric Clark's statements that the robbery went wrong and somebody was shot, would no doubt be all that the jury would have needed to convict of the Comp U.S.A. crimes, even though this evidence was not to be used for this purpose. Thus, under state and federal authority, the trial court clearly was in error in admitting the entirety of Williams' statements as non-hearsay.

There were additional problems with FBI Agent Todd Holliday's testimony. First, because he never turned any information over to the defense regarding his conversations with Williams (SC RT 12431-12434), appellant could not have been aware of them. Thus, the statements were not relevant to the non-hearsay purpose of motive or the corpus of the witness killing special circumstance. Furthermore, Holliday's testimony contained double hearsay. Specifically, Eric Clark's statements to Ardell Williams, which she relayed to Holliday, constituted double hearsay. Nor were Eric Clark's statements admissible pursuant to Evidence Code section 1223 as statements of a conspirator since they were made after the conspiracy had ended. (*People* v. *Sailing, supra,* 7 Cal.3d 844, 852.)

The Admission of the Entirety of Williams' Out-of-Court

Statements Violated Appellant's Sixth, Eighth, and Fourteenth Amendment Rights

As a result of the trial court's erroneous admission of the statements for a non-hearsay purpose, appellant was denied several federal Constitutional rights. Respondent claims that because the statements were introduced as non-hearsay, the Confrontation Clause of the Sixth Amendment does not apply. (RB 97.) Generally, respondent is correct. Generally, statements introduced for a limited purpose only, and not for the truth of the matter asserted, do not implicate the Confrontation Clause, *see Crawford* v. *Washington* (2004) 541 U.S. 36, 59 fn. 9 [124 S.Ct. 1354]; *United States* v. *Inadi,* (1986) 475 U.S. 387, 398 fn. 11. But *Hubbard* rejected this exact argument in circumstances which are legally indistinguishable from the instant case: "Thus, whether or not such statements are classified as hearsay, they may violate the Confrontation Clause. (*Hubbard, supra*, 273 F.3d 1164, 1173.) (See also *Lee* v. *McCaughtry,* (1990) 892 F.2d 1318, 1325 [noting that "complicating circumstances" may result in a Confrontation Clause violation when non-hearsay is admitted]; *cf. Tennessee* v. *Street,* (1985) 471 U.S. 409, 414-15 [finding no Confrontation Clause violation, but suggesting that the introduction of non-hearsay statements could violate the Confrontation Clause in some circumstances].) *Hubbard* further held that "Given our conclusion that, regardless of its classification for evidentiary purposes, the

statement had the practical effect of a hearsay statement, we find it unnecessary to determine whether it constituted hearsay or non-hearsay." (*Hubbard*, *supra*, 273 F.3d 1164, 1174, fn 5.) In the instant case, because the jury could not help but use the content of the statements for their truth, regardless of the label attached by the court or prosecutor, the erroneous admission of the statements violated the Sixth Amendment.

A Confrontation Clause violation is not waived for failure to object. The failure to object on *Crawford* grounds "was excusable, since governing law at the time of the hearing afforded scant grounds for objection." (*People* v. *Johnson* (2004) 121 Cal.App.4th 1409, 1411.) (See also *People* v. *Monterroso* (2004) 34 Cal.4th 743, 763 [assuming without deciding that defendant does not forfeit claim based on failure to object].)

Erroneous admission of the statements also denied appellant his Fourteenth Amendment due process rights. Erroneous introduction of the statements "so infected the trial with unfairness" as to constitute a due process violation under *Donnelly* v. *DeChristoforo* (1974) 416 U.S. 637, 643. Furthermore, denial of a state created liberty interest, caused by the court the evidentiary procedures followed by the court, also deprived him due process of law. (*Hicks* v. *Oklahoma,* (1980) 447 U.S. 343, 346.)

Finally, erroneous admission of the statements denied appellant his Eighth Amendment rights to heightened reliability in a capital case (*Beck* v.

Alabama, *Supra*, 447 U.S. 625, 637-638; *Zant* v. *Stephens*, *Supra*, 462 U.S. 862, 879).

Respondent Has Failed to Carry Its Burden of Disproving Prejudice

A federal constitutional violation requires reversal of the conviction unless the government proves that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, (1967) 386 U.S. 18.) This standard "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at 24.) Respondent does not address this issue, nor can he, given the prosecutor's frank assessment during trial. The prosecutor agreed that if the trial court's ruling was wrong, reversal was required. "We agree with Mr. Early [defense counsel], this is not harmless error. If you are wrong, and offer these statements in for a non-hearsay purpose, the case is getting reversed all right. I'm up front on that. This is not harmless error. This is the gut of the people's case." (SC RT 1919.)

The error was clearly prejudicial, as shown by the amount of time that the prosecutor spent describing Williams' statements in closing argument. Rather than argue non-hearsay purposes for which he had purportedly introduced them, the prosecutor repeatedly directed the jurors to believe the truth of Ms. Williams' statements. For instance, he stated:

> This has to do with the out-of-court statements of Ardell Williams as well as her grand jury testimony that was read to you. She is taken by Mr. Clark about a month or so before the Comp U.S.A. to the Del Taco....Ms. Williams indicated, is this store going to be in the news soon? And the defendant smiled. *That's a reliable statement*....So when this statement is made, I mean, Mr. Clark knows what Ardell Williams is talking about, and Ardell Williams knows what Mr. Clark is talking about when he smiles. (SC RT 10842 –10843) (emphasis supplied.)

The prosecutor continued:

> Now, that piece of evidence, that is, the observations by Ardell Williams, as given to you by her recorded statements and her grand jury testimony connects Mr. Clark to the crimes that occurred at Comp U.S.A. Right after they are at Comp U.S.A., Ardell Williams, according to her statements and grand jury [testimony], they go to a location where another U-Haul is parked, The U-Haul is moved. Ms. Williams asks is the computer store your next target and the defendant acknowledges yes. (SC RT 10843)

The prosecutor told the jury directly that Williams' statements prove appellant's guilt:

> [W]e are not asking you to base this conviction of the Comp U.S.A. murders solely on this out of court confession by Ardell Williams, but it's a piece of evidence that we ask you to consider...[T]he pieces of evidence that we have is...the casing of the Comp U.S.A., as indicated by Ardell Williams...and the confession to Ardell Williams. (SC RT 10847-10848)

The prosecutor further argued:

> What did Ardell Williams tell? What did she say? There is no inconsistencies in her taped statements between her first one in April 1st of '92 , March 20, May 27th or 28th of '92, and her Grand Jury [testimony]. It's consistent, it's the same, but the most important thing is what is it that she said. If Ardell Williams wanted to falsely accuse William Clark, she wouldn't have said it by eating nachos at a Del Taco a month before. If Ardell Williams wanted to falsely implicate William Clark, she'd have said the biggest thing that

> nothing could disprove, and that is he confessed to me, he was there. He pulled the trigger. He said I'm going to kill that woman because she's a witness against me. Did she say that? Did she embellish? No. (SC RT 10869)

Given that the state's case concerning the Comp U.S.A. homicide was otherwise circumstantial or based upon the incredible and thoroughly impeached testimony of Matt Weaver, reversal of the conviction for the Comp U.S.A. charges is required given the role the erroneously admitted statements of Williams played.

Alternatively, it is reasonably probable that the error affected the verdict adversely to the defendant. (*People* v. *Watson* 46 Cal.2d 818, 836.) Without the 100-plus pages of Williams' grand jury testimony and statements to the police, there was no solid evidence to connect appellant to the Comp U.S.A. crimes since Matt Weaver was thoroughly impeached and there was no physical evidence. As even the prosecutor stated below, "This is not harmless error. This is the gut of the people's case." (SC RT 1919.)

As such, reversal of all of the Comp U.S.A. convictions and related special circumstances is required. Furthermore, reversal of the convictions concerning the death of Williams and related special circumstances is also required. It is reasonably probable that the voluminous, prejudicial material contained in so many pages of testimony caused the jury to overvalue any purported motive appellant had to kill Williams.

Penalty Phase Retrial Error

Reversal of the death sentence is required. The judge at the penalty phase retrial believed that he was bound by the guilt phase judge's rulings concerning Williams' statements. (SC RT 12336.) As a result, the penalty phase retrial jury heard all of Williams' statements: the tapes of both interrogations by Grasso on April 1, 1992 (SC RT 14160); the tape of the May 29, 1992 interrogation (SC RT 14171; SC RT 14187); and the grand jury testimony (SC RT 14187). Such prejudicial testimony undercut the defense's lingering doubt argument concerning the Comp U.S.A. crimes. (SC RT 16541.) For the reasons outlined above, the state cannot show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman*, *supra*, 386 U.S. at 24.)

CLAIM 25
THE TESTIMONY OF JEANETTE MOORE SHOULD HAVE BEEN EXCLUDED DUE TO OUTRAGEOUS GOVERNMENT CONDUCT WHICH RENDERED THE TESTIMONY UNRELIABLE AND INVOLUNTARY IN VIOLATION OF THE FIFTH, EIGHT AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL, DUE PROCESS, TO CONFRONT WITNESSES, AND A RELIABLE DETERMINATION OF GUILT AND PENALTY

Proceedings Below

At trial, the defense attempted to exclude Jeanette Moore's testimony as the unreliable product of government coercion. (2 CT 547-558; SC RT 2670-2727; SC RT 2755.) At the hearing on the defense

motion, Investigator Grasso testified that in May of 1994 at a home in Chandler, Arizona where Jeanette Moore had been staying but had left the day before, men entered the home with guns looking for somebody. Several rounds were fired and one man said, "Where's the bitch at?" Appellant had no connection to this home invasion, and the person who lived there thought that one of the gunmen was her ex-husband. Yet Grasso never told Moore that the victim of the home invasion thought that the gunman was her ex-husband. (SC RT 2675-2677; SC RT 2682; Defense Exhibit D in support of the motion.) In fact, Grasso falsely told Moore that appellant was involved with the home invasion. (SC RT 2686-2687.)

Grasso testified that when Grasso spoke to Moore on June 8, 1994, he expressed concerns for her safety. She told Grasso that she was scared, and he told her that she had good reason to be scared. Grasso told Moore that she would be safe if he cooperated with him. Grasso implied that if appellant got out of custody, he would kill Moore. (SC RT 2684-2685.)

Testimony from the preliminary hearing also made clear that Grasso gave false information to Moore in order to secure her cooperation in convicting appellant. Grasso told her that "they" [i.e. the gunmen] called her father and left a message on her answering machine saying that her life was in danger, when in fact this had not happened. (MC RT 287.) Grasso repeatedly told Moore that her only option, if she wanted to save herself,

was to cooperate with Grasso to ensure appellant's conviction. (MC RT 354.) He guaranteed her safety through the time she cooperated and testified (MC RT 288), implying that she should testify in a way that would help her. Grasso thus offered Moore the solution to the fear that Grasso himself had engendered–namely to testify in such a way to ensure that appellant was not released from custody.

In arguing the defense motion, trial counsel articulated the correct standard when he stated that "whether or not [Grasso's statements to Moore] are false, made in reckless disregard of the truth, or whether they are just a subject of a representation based on an overactive imagination, is really basically somewhat irrelevant, because it's the effect on the listener that is really important. And Jeannette Moore is now convinced that she is being threatened and the only way that she, as a result of these threats on her life, she's got to come forward and testify. And this is based directly on these misrepresentations made by Grasso." (SC RT 2693.)

In support of the motion and to demonstrate Moore's bias against appellant based upon Grasso's false statements, defense counsel also read into the record excerpts from Moore's testimony at the preliminary hearing:

> And Jeannette Moore, at page 147, told the magistrate flat out that the money was sent to Yuma in order to track her down, those very words are being used. And she also at page 147 was told that the only way to be safe was to be taken into protective custody.
>
> And then at page 148, . . . (Grasso) specifically told Jeannette Moore

> if she didn't come forth and testify Mr. Clark would get out and eliminate her as a witness. And at page 150 she was told about the shooting, and the only reason she was held in custody was for her own safety. . . . As a result we have a witness now who, before she testified, was basically neutral with Mr. Clark, but now she was so concerned about her life that she really believes as a result of these representations made by Grasso to her that Mr. Clark is the one responsible for her life (sic). (SC RT 2694-2695.)

Moore's testimony at the preliminary hearing makes clear that she thought that appellant was behind the home invasion and that she was the target: "At page 134, the girl (in the house) had no enemies. She was in the house, that they–if they were going to kill her, they had her, they would have shot her." (SC RT 2718-2719.)

The defense asked for the total exclusion of Moore's testimony because they could not explore her bias against appellant without "opening up the door to some very prejudicial information, i.e. isn't it true you have a motive and bias against Mr. Clark? And yeah, the obvious reason is because he threatened my life . . ." (SC RT 2695.) Before Grasso poisoned Moore against appellant, "she had not been cooperating in the past, she had been in Arizona. It was apparent she wasn't answering subpoenas, that they wanted this testimony against Mr. Clark. And what better way than to tell somebody here is how we know that your life is in danger? (SC RT 2769-2700.) Because of being hamstrung in their ability to cross examine Moore about her bias, counsel also alleged a violation of the 6th

Amendment right to confront and cross examine Moore, in addition to the due process violation of the unfairness injected into the trial from her coerced testimony. (SC RT 2724.)

In denying the defense motion, the trial court used an erroneous legal standard by requiring a showing that Grasso acted in bad faith. In denying the motion, the trial court stated, "The court, first of all, does not believe that there was any intentional or bad faith action by Officer Grasso in his communicating what he knew about the Chandler incident to Jeannette Moore. I am convinced that Officer Grasso entertained a very real concern for the safety of witnesses or potential witnesses in this hearing. And although the parties agree, and it would appear from the evidence that certainly there was no connection between that home invasion incident in Chandler, and Mr. Clark, that Officer Grasso's discretion was not abused when he related that information to Ms. Moore . . . " (SC RT 2755-2756.) Yet the officer's good faith is not the relevant enquiry. Instead, only the quality of the coercion is relevant.

Respondent's Arguments

Respondent first asserts that "a trial court's decision regarding admission of evidence will not be disturbed on appeal absent an abuse of discretion. (*People* v. *Waidla* (2000) 22 Cal.4th 690, 717-718.)" (RB 104.)

Respondent next argues that "any belief Moore may have had that

she was in danger from Clark was not of the sort that would be reasonably likely to produce false testimony" since providing false testimony would give appellant even more motive for retaliation. (RB 107.)

Finally, citing *People* v. *Jenkins* (2000) 22 Cal.4th 900 respondent focuses solely on those extreme cases that prohibit the use of statements obtained through torture, thus setting up a straw man against appellant. (RB 104, 107.)

Legal Principles

As shown below, each of respondent's arguments fails. As to the correct standard of review, respondent is doubly wrong in proffering an abuse of discretion standard. First, *People* v. *Badgett* (1995) 10 Cal.4th. 330, 350 canvassed state and federal cases and held that "the entire record should be examined to determine whether defendants were actually deprived of due process because of the allegedly coerced testimony of the third party." Thus, *de novo* review is required.

Furthermore, as shown more fully below, since the trial court used the wrong standard (whether Grasso acted in bad faith) to analyze the admission of Moore's testimony, the ruling is entitled to no deference. Although respondent is correct that "a trial court's decision regarding the admission of evidence will not be disturbed on appeal absent an abuse of discretion" (RB 104), "[t]o exercise the power of judicial discretion all the

material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*People* v. *Allen*, *supra*, 65 Cal.App.3d at p. 435.) Thus, all exercises of legal discretion must be grounded in reasoned judgment guided by legal principles and policies appropriate to the particular matter at issue. (*In re Adoption of Driscoll* (1969) 269 Cal.App.2d 735, 737.) "Because decision making, hence discretion, is largely a process of choosing alternatives, a mistake as to the alternatives open to the court affects the very foundation of the decisional process." (*Ibid.*) Judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action. (*In re Carmaleta B.* (1978) 21 Cal.3d 482, 496.) Consequently, a decision "that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is an abuse of discretion. (*City of Sacramento* v. *Drew* (1989) 207 Cal.App.3d 1287, 1297; see also *Penner* v. *County of Santa Barbara* (1995) 37 Cal.App.4th 1672, 1676 [legal conclusions are reviewed de novo] .) As shown more fully below, the trial court's focus on whether Grasso acted in bad faith was wholly misplaced. The focus should have been on whether Moore's testimony was actually coerced based on Grasso's lies and manipulation.

Case law makes clear that whether the officer acted in bad faith is irrelevant; what is relevant is whether there was coercion of a witness that

impacted their trial testimony. Nor must the coercion be pre-trial torture, but can include threats, promises, coercive grants of immunity, and lies by law enforcement. *People* v. *Douglas* (1990) 50 Cal.3d 468, 499, summarized the relevant law as follows, "the federal and California courts have consistently recognized that the admission at trial of improperly obtained statements which results in a fundamentally unfair trial violates a defendant's Fifth Amendment right to a fair trial. [The court ultimately held that there was no error because the coerced statement of a co-defendant was not admitted at trial.] (*Wilcox* v. *Ford* (11th Cir. 1987) 813 F.2d 1140, 1148; see also *United States* v. *Chiavola* (7th Cir. 1984) 744 F.2d 1271, 1273-1274; *United States* ex rel. *Cunningham* v. *DeRobertis* (7th Cir. 1983) 719 F.2d 892, 895-896; *United States* v. *Fredericks* (5th Cir. 1978) 586 F.2d 470, 480; *LaFrance* v. *Bohlinger* (1st Cir. 1974) 499 F.2d 29, 34-35; *People* v. *Leach* (1985) 41 Cal.3d 92, 102-104 [221 Cal.Rptr. 826, 710 P.2d 893]; *People* v. *Varnum* (1967) 66 Cal.2d 808 [59 Cal.Rptr 108, 427 P.2d 772].) But unlike those situations in which a defendant challenges his *own* prior involuntary statements (see *Lego* v. *Twomey* (1972) 404 U.S. 477, 489 [30 L.Ed.2d 618, 627, 92 S.Ct. 619] [the government must prove voluntariness of defendant's confession by preponderance of evidence]; *People* v. *Markham* (1989) 49 Cal.3d 63, 71 [same]), when a defendant seeks to exclude the allegedly involuntary testimony of a witness or

codefendant, the *defendant* bears the burden of proving that the admitted statements were involuntarily obtained (*Leach, supra*, 41 Cal.3d at pp. 102-104)."

In the context of immunity agreements that are coercive, *People* v. *Medina* (1974) 41 Cal.App.3d 438, 455 held that "a defendant is denied a fair trial if the prosecution's case depends substantially upon accomplice testimony and the accomplice witness is placed, either by the prosecution or the court, under a strong compulsion to testify in a particular fashion." In the instant case, Moore was an accomplice and was given immunity for testifying truthfully. Although the requirement of truthful testimony does not seem coercive, it in fact is. Since the agreement did not cover "perjury" which she committed during trial, the agreement required Moore to testify similarly to the coerced statements she initially gave to Grasso after he put fear into her, lest the prosecutor decide that she was no longer being truthful. Thus, if her testimony did not continue to consist of what the prosecution wanted to hear, her immunity agreement would not save her from perjury charges.

In *People* v. *Badgett, supra,* 10 Cal.4th. 330, this Court found that a witness' trial testimony was not the product of coercion. Before doing so, *Badgett* laid out the relevant legal framework as follows: "Thus, only when the evidence produced *at trial* is subject to coercion are defendant's due

process rights implicated and the exclusionary rule we analyzed in *Douglas* applied. When a defendant seeks to exclude evidence on this ground, the defendant must allege that the trial testimony is coerced. (*Douglas*, *supra*, 50 Cal.3d at p. 500) and that its admission will deprive him of a fair trial (*id.* at p. 503.)." (*Badgett*, *supra*, at p. 344.) The Court continued, "Although courts analyzing claims of third party coercion have expressed some concern to assure the integrity of the judicial system (see e.g., *United States* v. *Chiavola, supra,* 744 F.2d 1271, 1273; *United States* v. *Fredericks, supra,* 586 F.2d 470, 481 and fn. 14; *LaFrance* v. *Bohlinger, supra,* 499 F.2d 29, 32-34), the primary purpose of excluding coerced testimony of third parties is to assure the reliability of the trial proceedings as we recognized in *Douglas*, *supra*, 50 Cal.3d 468, 500. There, we explained, the defendant's emphasis on pretrial coercion 'misperceives the limited nature of the exclusion recognized for coerced third party testimony. [Citation.] Because the exclusion is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial, this exclusion necessarily focuses only on whether the evidence actually admitted was coerced . . . . [D]efendant can prevail on his suppression claim only if he can show that the trial testimony given by [the third party] was involuntary at the time it was given.' (Ibid., italics added, italics in original omitted.) The purpose

of exclusion of evidence pursuant to a due process claim such as defendants' is adequately served by focusing on the evidence to be presented at trial, and asking whether *that evidence* is made unreliable by ongoing coercion, rather than by *assuming* that pressures that may have been brought to bear at an earlier point ordinarily will taint the witness's testimony." (*Badgett*, *supra*, p. 347-348 (emphasis in original).)

Like *Douglas*, *People* v. *Jenkins, supra,* 22 Cal.4th 900, 966-967 held that there was no error because the co-defendant, who had made an allegedly coerced statement, never testified at Jenkins' trial and Jenkins complained only of the introduction of other evidence that was the fruit of the allegedly coerced statement.

People v. *Lee* (2002) 95 Cal.App.4th 772 synthesized the foregoing cases as follows in analyzing the police coercion of a witness' statement. *Lee* found that "The police coerced Saxon's statement by making improper threats, misrepresentations, promises of leniency, and exploiting areas of vulnerability." (*Id.* at p. 781.) In answering "whether a defendant seeking to exclude third party evidence of guilt on the ground the evidence was procured by coercion must separately show the coerced evidence was 'unreliable'," the *Lee* court held that "evidence which is produced by coercion is inherently unreliable and must be excluded under the due process clause. [fn. omitted.]" There is nothing earthshaking about our

conclusion. In *People* v. *Badgett* our Supreme Court quite clearly stated the exclusion of coerced testimony of a third party 'is based on the idea that coerced testimony is *inherently unreliable*, and that its admission therefore violates a defendant's right to a fair trial . . . .' [fn. omitted.] Thus there is no 'coercion plus' requirement when, as in the present case, the defendant claims the third party evidence at trial was the direct product of unlawful police coercion. (*Badgett, supra,* 10 Cal.4th. 330, fn. 35.) Nor did *Badgett* break new ground. Earlier, the court had held in *People* v. *Douglas, supra,* 50 Cal.3d 468, 500 the exclusion of third party testimony 'is based on the idea that coerced testimony is inherently unreliable[.]'. The rule is different, however, when the defendant claims the evidence at trial was the end product or 'fruit' of unlawful police coercion of a third party. As the high court explained in *Jenkins*: '[A] defendant may not prevail simply by alleging that the challenged evidence was the fruit of an assertedly involuntary statement of a third person. . . . Rather, the defendant may prevail only by demonstrating fundamental unfairness at trial, normally by establishing *that evidence to be produced at trial was made unreliable by coercion.*' (*People* v *Jenkins*, *supra*, 22 Cal.4th 900, 966, italics added.) The reason why the rule is different is because the purpose of excluding coerced statements by third parties is to protect the defendant's right to due process, not his privilege against self-incrimination." (*Lee*, *supra*, at pp.

786-787.)

Thus, appellant need not show that Moore's statements were unreliable. Appellant must only show that Moore was coerced into giving statements to Grasso, and that her trial testimony was affected by this coercion. Clearly, she was coerced. As in *Lee*, Moore was coerced by statement by misrepresentations, promises of safety, and the exploitation of areas of vulnerability. (*People* v. *Lee, supra,* 95 Cal.App.4th 772.) Grasso led Moore to believe, falsely, that appellant was actively trying to kill her and that cooperation with Grasso was the only way to ensure Moore's own safety. Moore's trial testimony clearly indicates that this was her belief: Moore testified that she was placed in custody for her own protection. (SC RT 7660.) This coercion continued to affect her trial testimony because Moore knew that if she did not testify in conformity with her previous statements, her immunity deal would not protect her because it did not cover perjury.

Respondent's argument that "any belief Moore may have had that she was in danger from Clark was not of the sort that would be reasonably likely to produce false testimony" since providing false testimony would give appellant even more motive for retaliation (RB 107) is both irrelevant and untrue. Irrelevant, because appellant is not required to show the reliability of the statements since coerced statements are inherently

unreliable, according to *Douglas*, *Badgett*, and *Lee*. Furthermore, the argument is false because Grasso assured Moore that cooperating with him was the only way to ensure Moore's own protection from appellant.

Appellant was prejudiced by Moore's testimony. At trial, Moore's testimony was critical in providing proof of the conspiracy and planning that went into the Comp U.S.A. robbery. She was only one of two people who could place appellant as a direct actor in the Comp U.S.A. robbery. Moore testified that appellant helped her to get a fraudulent driver's license. This entailed a trip to the D.M.V., a stop in traffic court to pay Moore's tickets, and a trip back to the D.M.V. for Moore's photo. (SC RT 7649.) Using the fraudulent license, Moore rented a U Haul truck at appellant's request. (SC RT 7664.) The day after she rented the U Haul, appellant paid Moore $100. (SC RT 7679.) Later, when she was living in Arizona, a woman claiming to be appellant's wife called Moore. The woman said that her name was Nina, but appellant had previously told Moore that his wife was named Rhonda. Nina asked Moore if she needed anything. Moore said that she always needed money. Nina wired Moore a Western Union money gram for $100 in the winter of 1993. (SC RT 7694-7697.)

Moore testified to her belief as to why she was in custody–for her protection. She testified that she had been in "P.C."–or protective custody–for 30 days. She testified that "I just wanted to get out of there. I just

wanted to get up out of there. I wanted to get up out of this state." She also testified that she was told that she was in protective custody for over a month at the time of her testimony at the preliminary hearing. (SC RT 7663.) This testimony was significant this testimony telegraphed to the jury that both Moore and the authorities felt that she had to be protected from appellant, lest she meet the same end as Ardell Williams.

Reversal is required because respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California, supra,* 386 U.S. 18.) Alternatively, it is reasonably probable that the error affected the verdict adversely. (*People* v. *Watson, supra,* 46 Cal.2nd 818, 836.)

CLAIM 26
THE ADMISSION OF SEXUALLY EXPLICIT LETTERS FROM APPELLANT TO ANTOINETTE YANCEY VIOLATED THE EVIDENCE CODE AND APPELLANT'S RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS

Appellant will address the relevant parts of respondent's brief in claim 41.

CLAIM 27
THE REFUSAL TO AGREE WITH THE DEFENSE'S MOTION TO STIPULATE TO A CLOSE RELATIONSHIP BETWEEN APPELLANT AND YANCEY VIOLATED

APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A RELIABLE GUILT AND PENALTY DETERMINATION IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant will address the relevant parts of respondent's brief in claim 41.

CLAIM 28
THE ADMISSION OF A LETTER AND NEWSPAPER ARTICLE PURPORTEDLY RECEIVED BY JEANETTE MOORE SHOULD HAVE BEEN EXCLUDED. ITS ADMISSION VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

While in custody, Jeanette Moore received a two-page handwritten letter accompanied by a copy of a newspaper article. (6 CT 2243.) The trial court allowed both documents into evidence. (SC RT 6803-04.) Appellant argues the introduction of the letter and newspaper article was error, because it could not be connected to appellant—and, thus, did not support an inference of consciousness of guilt. Respondent argues that there was sufficient evidence to link appellant to the letter—and to establish its relevance. Respondent also argues that, even if the trial court did improperly admit the documents, any error was harmless.

The letter received by Moore, was authored by a person who identified him or herself as "a friend of Gary's" and was signed, "Outlaw Jack." (6 CT 2243.) The author of the letter stated, "I don't know the folks

the DA want (sic) you too (sic) lie on (sic) personally but I hear they are good folks." The letter goes on to declare that the DA could not make Ms. Moore testify, and that she could exercise her constitutional right against self-incrimination. The author also advised Moore that the District Attorney's threats (that she could become a defendant if she did not testify) were false. Instead, she would be out in a week or shortly thereafter if she refused to testify. (6 CT 2344.) The author related that he or she knew that Ms. Moore did not "want to help these ruthless, unfair and evil white folks convict the innocent." (6 CT 2344.) The accompanying newspaper article described a witness who was released from custody after refusing to testify. (6 CT 2245.) Nothing in the record indicates appellant wrote, authorized, or ever had possession of, the letter or the newspaper article.

Appellant sought to exclude these two documents from evidence, arguing that the state had failed to show appellant had "authorized" any act which would dissuade Ms. Moore from testifying. (SC RT 6794). Repeatedly, appellant maintained that the prosecution could offer nothing more than speculation that appellant had "authorized" another inmate, Sean Birney, to send these items to Ms. Moore. (SC RT 6796-97.) Appellant further argued that other people, including Eric Clark, had the same opportunity and motive to dissuade Ms. Moore's testimony as did appellant. (SC RT 6797.)

The prosecution's offer of proof was that Sean Birney's fingerprint was on the envelope containing the letter, and that Birney was housed in appellant's eight-cell module at the jail. (SC RT 6787.) In fact, Officer Raatz testified that she found Birney's fingerprints on the Moore letter, but not the envelope. (SC RT 8287.) Appellant's fingerprints were not on the documents. (SC RT 8286 – 8293.) Birney's print was also on a different letter, addressed to "Alonso" (Garrett). The "Alonso" letter was confiscated from appellant's cell. The prosecutor claimed a conversation with a jail deputy would reveal that appellant admitted ownership of the "Alonso" letter. (SC RT 6787.) Although no handwriting analysis would be provided, the prosecution claimed the writing on the envelope to Ms. Moore was similar to that in the "Alonso" letter. (SC RT 6786-87.) Therefore, the prosecution claimed, because there was evidence appellant had authorized Birney to write the "Alonso" letter, appellant also authorized Birney to send Ms. Moore the letter and newspaper article.

The trial court erred when it accepted the prosecution's offer of proof and later allowed both documents into evidence, stating only that there was "a sufficient nexus" and that the "probative value outweighed the prejudicial effect." (SC RT 6803-04.)

Clearly, the offer of proof was woefully inadequate to link appellant to the letter and newspaper article. Respondent argues, as did the

prosecutor, that appellant persuaded Birney to mail the letter and article, with the objective of dissuading Moore's testimony against him. (RB 116; SC RT 6784 – 6793, 6797 – 6802.) Yet, no evidence linked appellant to Birney or the distribution of the two documents. Because the prosecution was unable to connect any of Birney's alleged acts to appellant, it was error for the trial court to admit the two documents into evidence.

Applicable Legal Standards

Evidence of third-party efforts to intimidate or dissuade a witness from testifying may be relevant. Where there is evidence that the defendant authorized the threats, the evidence may be admissible to show the defendant's consciousness of guilt. (See, e.g., *People* v. *Hannon*, (1977) 19 Cal. 3d 588, 589; *People* v. *Terry*, (1962) 57 Cal. 2d 538, 565-566.) While circumstantial evidence may be offered to prove authorization, it is well-settled that proof of mere relationship between the defendant and the third party is, as a matter of law, "no proof of authorization." (*Terry, supra,* at 567; *People* v. *Perez* (1959) 169 Cal. App. 2d 473, 478.) Similarly, "proof of a criminal defendant's 'mere opportunity' to authorize a third person's attempt to influence a witness, 'has no value as circumstantial evidence' that the defendant did so." (*People* v. *William*, 16 Cal. 4th at 200, citing *People* v. *Terry*, *supra*, at 566.) Threat evidence cannot be probative of the defendant's consciousness of guilt if the defendant did not make, authorize

or even know of the threat. (*Hannon*, *supra*, at 589.) Hence, absent proof of authorization, the evidence is irrelevant and inadmissible against the defendant. (*Terry*, *supra*, at pp. 565-566; *People* v. *Weiss*, (1958) 50 Cal. 2d 535, 554; *People* v. *Pitts* (1990) 223 Cal. App. 3d 606, 778-781; *People* v. *Perez*, *supra*, 169 Cal. App. 2d 473, 478.)

Evidence of an anonymous threat not connected with the defendant "should at once be suspect as . . . an endeavor to prejudice the defendant before the jury in a way which he cannot possibly rebut satisfactorily because he does not know the true identity of the pretender." (*People* v. *Mason*, (1991) 52 Cal. 3d 909, 946, quoting *People* v. *Weiss*, *supra*, 50 Cal. 2d at 554.)

The Trial Court Erroneously Admitted the Threat Evidence

There was no evidence that the communication was authorized by or attributable to appellant in any way. Therefore, none of the evidence of threats (or of fear out of testifying) was admissible as direct evidence of guilt.

Respondent argues that the "Alonso" letter linked the "Moore" letter to Appellant due to the similarities between the two. Firstly, Sean Birney's fingerprints were found on the envelope and letter to Moore and on the Alonzo letter. Moreover, the Alonzo letter was found in appellant's cell, and appellant admitted to Deputy Desens that the letter belonged to him.

(RB 116.) Respondent states that "Clark's acknowledgment of ownership would enable the jury to conclude that Clark had authorized the creation of the letter to dissuade Garrett, as well as the further inference that, if he had authorized Birney's efforts to dissuade Garrett, he had authorized Birney's efforts to dissuade Moore as well." (RB 116.) Appellant did no such thing.

Deputy Desens testified that:

> [Appellant] asked me if I took anything from his cell. I asked him what he was missing. He told me he was missing a couple of notes. At that time I said, do you mean the kites to Bridges and Rembert? And he said, Yeah. (SC RT 9944.)

The conversation with Desens did not relate to the letter or newspaper article sent to Moore and appellant certainly did not admit ownership of those items. Respondent claims, as did the prosecutor, that the jury could infer from this evidence that appellant "was utilizing Birney to author the letters to dissuade witnesses in the case from testifying at trial." (RB 116; SC RT 6798.) Respondent cites *People* v. *Williams* (1997) 16 Cal. 4th 153, 200-201, to argue that "this was sufficient to establish relevance of the Jeanette Moore letter to show appellant's consciousness of guilt." (RB 116.) Yet, *Williams* is distinguishable.

In *Williams*, the prosecutor introduced evidence that defendant directed intimidation of the state's eyewitness by having guns fired into her occupied home. *(Williams, supra*, 16 Cal. 4th 153, 201.) One witness testified that the defendant ordered him and others to "scare the lady …

who was going to court on him … out of going to court." (*Ibid.)* Another witness testified that while they were in custody together, the defendant stated he was going to "get some witnesses shot" to "beat this case." (*Ibid.*) In affirming the trial court's ruling, the court reasoned that "more than 'mere opportunity' was shown" and that, "in light of the evidence showing that defendant authorized the shooting…the trial court properly admitted evidence on the theory that evidence of attempts to suppress evidence are relevant to show consciousness of guilt." (*Ibid.)*

Unlike *Williams*, all the prosecution offered here by way of evidence of appellant's "authorization" was the theoretical connection to Birney and the fact that two of eight men in a housing module at county jail were seen speaking. At trial, the following exchange occurred between the prosecutor and Deputy Desens in regard to the relationship between appellant and Birney:

> DESENS: … They were housed together in Sector 33, which has eight single –man cells in it.
> PROSECUTION: Did you ever see the two of them together?
> DESENS: Yes. Often when they were having – one or the other was having Day Room. The one who was in the Day Room would be outside the cell door of the other inmate and they would be talking through the door.
> PROSECUTION: Did you ever see them participate in any other activities?
> DESENS: I believe that's it. Talking, maybe playing games at the door. (SC RT 9945)

That exchange was the only evidence the state produced in regard to

the relationship between appellant and Birney. There was no mention of any exchange of letters, or writings between the two men. It was merely that they were seen together talking and perhaps playing checkers. Indeed, this was nothing more than the "mere opportunity" or "mere relationship" proscribed by the *Terry* court more than half a century ago. As such, the trial court's finding that there was a sufficient "nexus" to the letters received by Ms. Moore was clearly erroneous.

The Trial Court Abused Its Discretion When It Held the Threat Evidence More Probative than Prejudicial

Contrary to Respondent's contention that the trial court properly concluded the evidence was not inflammatory (RB 115), simply based upon the content of the documents, it is clear that, even under the most favorable interpretation, there is no conceivable scenario in which the letters' minuscule probative value could substantially outweigh its prejudicial effect in order to survive a 352 balancing test.

For instance, the language in the letter is racially charged. When allowed to be published to the jury, it did little more on an evidentiary basis than connect appellant to someone who refers to "evil white folks." (6 CT 2244.) Moreover, the accompanying newspaper article was based upon a jailed witness who was granted immunity in a gang-related murder of a young teacher's aide and the shooting of his wife. (6 CT 2245.) There was simply no legitimate point to allowing the jury to view these highly

inflammatory writings, and especially so when weighed in conjunction with the extremely weak connection the prosecution made to appellant.

Further, the prejudicial impact was substantially magnified when the prosecution bootstrapped the items received by Moore with the "Alonso" letter; which the prosecutor repeatedly referred to as a "death threat." For example, the prosecutor stated in his closing argument:

> [Appellant] had to come up with something to prevent Alonso Garrett from testifying. And what he did, he recruited a cell buddy of his, Sean Birney, whose print is on this document. And it's a statement to Alonzo...we've read this thing at the opening statement.... But the last couple of words, "From a man to a bitch, you have no integrity, you weak coward. For every action there is an equal reaction. Sleep on it. (SC RT 10893 – 10894.)
>
> Jeanette Moore receives a letter at the Orange County Jail that is of the same...calligraphy, it's of the same writing as the death threat. The envelope has the same kind of printing. On the envelope or the letter, I can't recall which one...Burney's fingerprint is on the death threat, and Burney's fingerprint is either on the letter or the envelope, or both. I just can't recall right now. The important thing is that the calligraphy is the same, and his fingerprints are on both. We know the death threat was in Mr. Clark's cell. He wanted it back. And we know through the testimony of Deputy Desens that Birney and Mr. William Clark were housed together and were seen together during the time that they were housed together at the Orange County Jail. (SC RT 10899.)

Even assuming, *arguendo*, that the threat evidence possessed some probative value, the trial court abused its discretion under Evidence Code section 352 in admitting it. Evidence of third-party threats or witness coercion should be barred if its probative value is substantially outweighed

by danger of prejudice. (Evidence Code section 352.)[2] Where evidence carries a substantial danger of prejudicing the jury and either has minimal probative value or is cumulative of other evidence on the same issue, any doubt should be resolved in favor of its exclusion under section 352. (See, e.g., *People* v. *Balcom*, (1994) 7 Cal. 4th 414, 423 [other crimes].) In the present case, the trial court did exactly the opposite and afforded its favor to admission instead.

Further, evidence of unauthorized third-party threats to witnesses carries a substantial risk of unfair prejudice, as there is a strong likelihood that the jury will attribute the third party's conduct to the defendant—and infer that he is a bad man who is more likely than not guilty of the charged crime. *(Terry, supra,* 57 Cal. 2d at 565-566 [admission of unauthorized third-party threats evidence is prejudicial error]; *Perez, supra,* 169 Cal. App. 2d 473, 477-478 [same]; see also *People* v. *Brooks,* 88 Cal. App. 3d at 187 [evidence regarding threats to witnesses is "extremely prejudicial to defendant"]; *United States* v. *Thomas*, 86 F.3d at 654 ["evidence of threats on witnesses can be highly prejudicial"]; *Ortiz-Sandoval* v. *Gomez* (9th Cir. 1996), 81 F.3d 891, 897 ["the potential of unfair prejudice from the

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[2] "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." In the court's ruling, it merely found the probative value outweighed the prejudicial effect.

introduction of threats is 'severe'"]; *United States v. Guerrero*, (3rd Cir. 1986) 803 F.2d 783, 785-786 [threats evidence "appeals to the jury's sympathies, arouses its sense of horror, provokes its instinct to punish, or otherwise may cause a jury to base its decision on something other than the established portions of the case"].) Such evidence "can amount to an 'evidential harpoon'" which "'becomes so prejudicial to a defendant that no jury could be expected to apply it solely to the question of the credibility of the witness before it and not to the substantial prejudice of the defendant.'" (*Dudley* v. *Duckworth*, 854 F.2d at 970.) Indeed, the evidence is so prejudicial that its admission may deprive the defendant of a fair trial. *Id.*

Respondent Has Failed to Carry Its Burden of Disproving Prejudice

The People must prove the error harmless beyond a reasonable doubt, because the trial court's admission of the letter and newspaper article violated appellant's due process rights of the Fifth and Fourteenth Amendments, compulsory process and confrontation rights under the Sixth Amendment, and right to a reliable sentencing determination under the Eighth Amendment of the United States Constitution. (See *Chapman, supra,* 386 U.S. 18, 24 ; *People* v. *Ashmus* (1991) 54 Cal.3d 932, 965.) The beyond-a-reasonable-doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict

obtained." (*Chapman*, *supra*, 386 U.S. at 24.) Respondent does not meet this burden of persuasion.

CLAIM 29
THE COURT'S RULINGS REGARDING NOKKUWA ERVIN'S STATEMENT "LADY, DON'T DIE" VIOLATED APPELLANT'S RIGHTS TO A FAIR TRIAL, DUE PROCESS, AND A RELIABLE DETERMINATION OF GUILT AND PENALTY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Police Lieutenant Griswold was called as a state's witness at trial. Lt. Griswold was one of the police officers who arrested shooter Nokkuwa Ervin at the Comp U.S.A. crime scene. Prior to defense counsel's cross examination, the prosecutor objected to potential testimony that after handcuffing Ervin at the Comp U.S.A. crime scene (SC RT 8337), Lt. Griswold heard Ervin say, "Oh, my gosh, not a 187, please, lady, don't die." (SC RT 8329.) The prosecutor argued that the statement was hearsay and offered for the truth of the matter asserted, but that it did not fall within any of the hearsay exceptions. (SC RT 8330.)

The court was initially of the opinion that the statement was not hearsay since the defense was not seeking to introduce it for its truth. (SC RT 8330.) The prosecutor argued that the statement was hearsay since it showed the truth of Ervin's intent at the time of the shooting. (SC RT 8330-8331.) The defense argued that the statement did not fall under the

spontaneous statement exception to the hearsay rule since the statement was not hearsay:

> This is not under the same section, it would not be admissible, and it's not for the truth of the matter as the court's indicated. (SC RT 8331.)

Instead, the defense asserted that the statement was a non-hearsay:

> spontaneous declaration that shows state of mind. They are arguing state of mind, the circumstantial evidence. This is just another piece of circumstantial evidence. (SC RT 8332.)

The court found that the evidence was relevant because the intent of the declarant was an issue in the special circumstance. (SC RT 8334). But the prosecutor further objected:

> MR. KING [prosecutor]: I just wanted to make my objection, because Mr. Ervin, so the record is clear, is unavailable, he is a hearsay declarant, and just so I can get the ruling, because as the Court knows, I'm somewhat aggressive in my application of the Evidence Code.
>
> And so I need, if it's okay with the Court, we are objecting on the grounds of hearsay, and I believe that the theory of admissibility is 1240, which is spontaneous declaration, and I'm just asking, and because this could, in the future we may ask that other statements of Mr. Ervin come in under 1202 of the Evidence Code, which allows us to impeach a hearsay declarant.
>
> And so I wanted the record to be clear that this is coming in under 1240 of the Evidence Code as Mr. Ervin is a hearsay declarant.
>
> THE COURT: That's what it's coming in as. Spontaneous declaration. If he chooses to ask it. (SC RT 8334-8335).

In light of the court's ruling that the evidence was hearsay, the defense did not question Lt. Griswold as to Ervin's statement. Lt. Griswold

was then excused, subject to recall. (SC RT 8340.)

Subsequent to this ruling, the defense filed a motion to admit Ervin's statements for a non- hearsay purpose only. (7 CT 2579-2581.) The motion built upon the defense counsel's original objection, citing *People* v. *Ortiz* (1995) 38 Cal.App. 4th 377, discussed more fully below.

At the hearing on the motion, the prosecutor said "We had a hearing. The court ruled it to be admissible under 1240 as a spontaneous declaration. And that's what the court's ruling was." (SC RT 10213.) In response, defense counsel stated:

> We then had a hearing outside the presence of the jury. And it was, and we did have some argument about whether there would be impeachment or not if it came in for those non-hearsay purposes. Rather than dealing with it at that point, I believe I told the court that, and I know I told Mr. King, that I still have my case, I can always call him back. I can do research and determine what are the reasons for admissibility, what are the reasons, rather than try to make it at the heat of the moment. After doing the research I think the case law supports that it can come in also for a non-hearsay reason.
>
> The fact that the court ruled in my favor under the grounds I stated at the time, and then there is, there was at least a, I don't want to call it a threat but the statement by Mr. King that he wants to impeach it, and I decide not to do that because I still have my case and I can always call him back, doesn't foreclose me from then coming up with a theory after I do a little research as to the reason that it's coming in, that it's not for the truth of the matter asserted. (SC RT 10215-10216)

The court agreed with defense counsel's assertion that the matter was not finalized, as it made a fresh ruling "subject to your argument":

> The statement may be received. The court will permit it to be

> received for all purposes, subject to your argument. You may argue it as circumstantial evidence only…But I'm going to let it in, but for other purposes, hearsay, non-hearsay, and if that leads to impeachment, if it is relevant impeachment and, in fact, impeachment, then we will address that issue, also. (SC RT 10217-10218.)

In response to this ruling the defense stated that "[i]f the Court will not limit it to the purpose we are asking, then we are not going to present the evidence." (SC RT 10218) The defense was worried that if they admitted evidence of the statement, the prosecution would impeach Ervin on "the fact of his testimony at trial where he denies being the shooter, his statements to the police department where he talks about pulling the trigger." (SC RT 10214.) The danger of this impeachment was outlined by the court:

> My recollection is that Mr. Ervin totally denied in front of the jury at his trial that he was the shooter. And when that question was at least indirectly submitted to the Ervin jury, they must have placed some credibility in his denial, or at least were not sufficiently persuaded by the weight of the evidence to make a beyond a reasonable doubt finding that he was the shooter. If Mr. Ervin was not the shooter, then the shooter, in this court's opinion, had to be one of the other actors outside. And I just believe that for what relevance as it has to both sides, I'll let you go into it. (SC RT 10218.)

The trial court erred in finding that Lt. Griswold's testimony regarding the statements could be admitted as hearsay. This error requires reversal of appellant's conviction and sentence of death.

Respondent's arguments

Respondent argues that:

1) This issue is waived since appellant failed to challenge the trial court's ruling that the statements were admissible for their truth as spontaneous statements (RB 117-118);

2) The trial court properly ruled that the statements were admissible both for hearsay and non-hearsay purposes (RB 119);

3) In the alternative, appellant suffered no prejudice as a result of the ruling (RB 119-121).

The defense did challenge the court's ruling that the statement was admissible for both hearsay and non-hearsay purposes.

Contrary to respondent's claim of waiver, appellant in fact challenged the trial court's ruling both by oral objection at the first hearing and by filing the motion to admit Ervin's statements for a non-hearsay purpose. (7 CT 2579-2581.) Respondent states that "at the first hearing regarding the admissibility of the statements, Clark's trial counsel expressly characterized the statements as 'a spontaneous declaration that shows state of mind". (RB 117.) However, defense counsel intended this statement to support an *Ortiz (supra,* 38 Cal.App. 4th 377) type argument, not an argument for admissibility pursuant to section 1240. This is shown by the sentence that followed the one quoted by respondent: "They are arguing state of mind, the circumstantial evidence. This is just another piece of circumstantial evidence." This is also shown by the fact that defense counsel maintained that the statement was not hearsay as it was not

admitted for the truth of the matter. (SC RT 8331-8332.) Indeed, it was the prosecutor who asserted that the statement was hearsay and raised section 1240 as a ground for admission. Defense counsel never mentioned section 1240.

Secondly, respondent argues that the motion failed "to challenge the admissibility of Ervin's statements under Evidence Code section 1240, instead attacking the statements under Evidence Code section 1250." (RB 117-118.) However, the fact that the motion did not refer to section 1240 is of little consequence as the motion argued against the admission of the statement as hearsay, and thus by implication, it also argued against the admission of the evidence under any exception to the hearsay rule, including section 1240. The defense sought to admit the statement as non-hearsay only, thus ensuring it would not be subject to impeachment. The motion cited *Ortiz* (*supra,* 38 Cal.App. 4th 377) to argue that the statement was not hearsay because it was not received for the truth of the matter stated, but rather was admissible as circumstantial evidence of the declarant's state of mind (7 CT 2580). *Id.* If the Court accepted the defense's argument that the statement was not asserted to prove its truth, then the statement would not be hearsay, as defined by section 1200 of the Evidence Code.

Further, at the hearing on the motion, all parties obviously

understood the motion as a response to the introduction of hearsay evidence under any relevant exception, including 1240, 1250, or 1251. The prosecutor discussed all these sections while maintaining that the court's original ruling under section 1240 was correct. (SC RT 10212 - 10215.) Given that the court read the defense's motion, listened to these submissions by the prosecution and ultimately ruled on the issue, it is clear that the court understood and ruled on the issue presented. An objection is sufficient if the record shows the court understood the issue presented. (*People* v. *Scott* (1978) 21 Cal 3d 284, 290.)

The trial Court properly held that Ervin's statement was admissible for the non-hearsay purpose of demonstrating his state of mind.

Appellant agrees with respondent that the statement was admissible as non-hearsay circumstantial evidence demonstrating that Lee's death was neither intentional nor committed with reckless disregard. (RB 119.) The motion filed by the defense was centered around this issue and relied upon *Ortiz, supra* 38 Cal. App. 4th 377 (7 CT 2579-2581).

Ortiz found that a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. (*Ortiz, supra,* 38 Cal. App.4th 377, 389.) The relevant state of mind in the present case is Ervin's intent "when he pulled the trigger." (See prosecutor's statement SC RT 10214.) The statement "Lady, don't die"

cannot directly declare Ervin's intent at the time of the shooting since it was made after the shooting. As such, it is circumstantial evidence that tends to shows that Ervin was shocked and afraid once Lee was shot and by implication, that he did not intend to shoot her. Under the *Ortiz* reasoning this evidence is clearly non-hearsay. (*Id*, 377.)

The trial court erred by admitting the testimony for a hearsay purpose.

The "determination that the required facts exist to permit admission of a spontaneous declaration as a hearsay exception is vested in trial court and its ruling should not be disturbed unless those facts are not supported by a preponderance of the evidence". (*People* v. *Jones* (1984) 155 Cal.App.3d 653, 660.)

The facts are not supported by a preponderance of the evidence and admission pursuant to section 1240 was improper. Firstly, as discussed above, the statement was not hearsay since it did not directly declare Ervin's intent at the time of the shooting; it was merely circumstantial evidence of that intent. Secondly, the prosecution never established that the statement narrated, described or explained an act as required pursuant to Evidence Code section 1240[3]. Respondent now seeks to argue that Ervin's

[3] Evidence Code section 1240: Evidence of a statement is not made inadmissible by the hearsay rule if the statement: (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and (b) Was made spontaneously while the declarant was under the stress

reference to "a 187" constitutes an explanation of what happened to Lee and indicates his identity as the perpetrator. (RB 119.) Because the prosecutor failed to raise this issue at trial, the court did not determine whether the subject statement even contained a reference to "a 187." The defense motion quotes the statement as "Lady, don't die! Lady don't die." (7 CT 2579-2581). Throughout the transcript the statement is sometimes expressed to include "oh my god/gosh" (SC RT 8329-8330), it sometimes includes reference to "a 187" (SC RT 8329, 10213, 10214, 10215) and sometimes it does not (SC RT 8330). Even on respondent's "187" version of the statement, it does not purport to describe anything, since it was merely an expression of Ervin's fear and his hope that the woman would not die. At most, the declarant's use of "187" refers to the possibility of a future charge under that section of the Penal Code, not a past event (i.e. the shooting) perceived by the declarant and causing the stress of excitement as required by section 1240.

People v. *Morrison* 34 Cal. 4th at pp. 718-719, relied on by respondent (RB 119), is not relevant to the instant case. *Morrison* merely holds that "statements purporting to name or otherwise identify the perpetrator of a crime may be admissible where the declarant was the victim of the crime and made the identifying remarks while under the stress

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of excitement caused by such perception.

of excitement caused by experiencing the crime." *(Ibid.) Morrison* clearly does not apply to the current circumstances, firstly because the statement does not purport to name or otherwise identify the perpetrator of a crime, and secondly because Ervin is not a victim of a crime. Respondent's argument that the reference to "187" identifies Ervin as the perpetrator is unsupportable. It improperly imports into "187" a world of meaning that includes describing the act of shooting Kathy Lee, explaining why she was bleeding nearby and indicating Ervin's identity as the perpetrator. (RB 119).

The Court' s ruling should be set aside because the facts relevant to the admission of the statement, namely that it seeks to assert the truth of its contents and that it describes an event perceived by the declarant, are not supported by the preponderance of evidence.

The admission of the testimony for a hearsay purpose violated appellant's confrontation clause rights.

The trial court's ruling allowing the statement to be received "for all purposes" (SC RT 10217) violated appellants Sixth Amendment right to confrontation. Where testimonial evidence is at issue and the declarant is unavailable, the evidence may only be admitted if the defense has had a prior opportunity for cross-examination. (*Crawford* v. *Washington, supra,* 541 U.S. 36.)

Lt. Griswold went to Comp U.S.A. after receiving a radio

transmission asking for back up (SC RT 8324). When he arrived he saw Officer Rakitis and his canine partner standing some distance away from Ervin, who was lying on the ground. (SC RT 8325-8338.) Lt. Griswold then went over to Ervin and handcuffed him. Lt. Griswold searched Ervin and found a gun containing one casing. (SC RT 8337-8339.) Lt. Griswold states that during the period he was with Ervin, he was able to observe his demeanor and hear him speak (SC RT 8339.) It was during this period that Lt. Griswold heard Ervin make the statement. Given that the statement was made post-arrest to a police officer, the statement was testimonial in nature. (*Davis* v. *Washington* 547 U.S. 813.) Further, Ervin was an unavailable declarant as he asserted his Fifth Amendment privilege (SC RT 2869.) The defense had no prior opportunity to cross-examine Ervin. As such, even if the statement satisfied some California Evidence Code exception to the hearsay rule, the statement was still not admissible under the Sixth Amendment.

Since the trial occurred prior to the decision in *Crawford*, the defense's failure to raise a Sixth Amendment confrontation clause objection at trial does not forfeit the claim on appeal. (*People* v. *Johnson* (2004) 121 Cal. App. 4th 1409, 1411, fn 2.)

Appellant was prejudiced by the courts ruling that the statements could be admitted for a hearsay purpose subject to impeachment

The Supreme Court in *Chapman* found that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond reasonable doubt." The burden of proving that the error was harmless is on the beneficiary to the error. (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24.) Reversal is therefore required as respondent cannot demonstrate that the error was harmless beyond a reasonable doubt.

Respondent asserts that "it is not reasonably probable that Clark would have obtained a more favorable result had the statements been admitted and limited to their non-hearsay purpose" because the killing took place during an armed robbery, and such a crime by its very nature involves a grave risk of death. (RB 120-121.) Respondent argues that due to this, the jury's finding as to reckless indifference to human life would not have been altered by admission of Ervin's statements. (RB 121.) Respondent's analysis is untenable since it mandates a finding of reckless indifference to human life in all armed robberies. The jury was instructed that "A defendant acts with reckless indifference to human life when that defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (SC RT 16696.) The circumstances of the Comp U.S.A. case show that the participants did not anticipate a risk of death. Ervin entered the Comp U.S.A. and placed all of the Comp U.S.A. employees

handcuffed in the bathroom. (SC RT 8347.) Ervin asked for and received keys to open the warehouse door. (SC RT 8348.) Kathy Lee arrived during the attempted robbery in search of her son who worked at Comp U.S.A.. (SC RT 8343.) Ervin discovered Lee at the back entrance and accidently pulled the trigger resulting in Lee's death. Ervin's statement tends to show that the shooting was accidental, and is clearly relevant the question of whether he was subjectively aware that his actions involved a grave risk of death.

Alternatively, respondent cannot show that there was no reasonable probability the error affected the verdict adversely to the defendant. (*People* v. *Watson, supra,* 46 Cal.2d 818, 836.) Given the importance of Ervin's subjective knowledge as to "a grave risk of death" involved in the commission of the crime, appellant was obviously adversely affected by the ruling on Ervin's statement, as the threat of impeachment effectively deprived him of evidence that tended to show that Ervin did not appreciate the risk and that the shooting was accidental. Under Watson, the court must conduct "an examination of the entire case, including the evidence." (*Ibid.*) Such a survey shows that the defendant was unable to introduce evidence of Ervin's state of mind through the presentation of any other evidence.

The court's decision to allow the statement to be admitted as hearsay

and therefore subject to impeachment, violated appellant's federal constitutional rights to present a defense and witnesses as guaranteed by the Sixth and Fourteenth Amendments. (*Crane* v. *Kentucky* (1986) 476 U.S. 683, 690-91; *Washington* v. *Texas* (1967) 388 U.S. 14, 22-23; *Chambers* v. *Mississippi, supra,* 410 U.S. 284, 302.)

CLAIM 30
THE COURT ERRED IN ALLOWING THE ADMISSION OF THE TAPED PHONE CALL FROM APPELLANT TO LIZ FONTENOT. THE ADMISSION VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS, A FAIR TRIAL, RIGHT TO COUNSEL AND HEIGHTENED CAPITAL CASE RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant will address the relevant parts of respondent's brief in claim 31.

CLAIM 31
THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO SUPPRESS LIZ FONTENOT'S TAPE RECORDING OF HER CONVERSATIONS WITH APPELLANT BECAUSE THE TAPING VIOLATED APPELLANT'S RIGHTS TO PRIVACY AND DUE PROCESS, IN CONTRAVENTION OF PENAL CODE SECTION 631[4].

The trial court erred in denying appellant's motion to suppress the tape recordings of five conversations between appellant and Liz Fontenot, as the taping was illegal under section 631(a) of the Penal Code and was therefore inadmissible pursuant to Penal Code section 631(c). Contrary to respondent's submissions, the circumstances of the taping did not meet the requirements of the Penal Code section 633 exception. The tape allegedly recorded the appellant questioning Fontenot about what her sister Ardell Williams had told the police in relation to the Comp U.S.A. robbery (SC RT 10856- 10860) and giving Fontenot instructions on how Ardell could avoid giving evidence. (SC RT 10860.) This information was prejudicial to appellant as it showed that he was worried that Ardell may give the police information about his involvement in the Comp U.S.A. robbery and therefore supported the prosecution's theory that appellant had Ardell killed

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[4]The AOB divided the wiretap issue between claims 30 and 31 according to appellant's constitutional rights. The RB re-categorized the claims, dealing with the federal wiretap statute in claim 30, and the state wiretap statute in claim 31. For the convenience of the court, the ARB follows the Attorney General's categorization and claim 31 considers only the state statute.

to prevent her from testifying against him. In addition to the tapes, the prosecution also introduced transcripts and a call register from Fontenot's phone

The facts, established at the preliminary hearing and at the hearing of the defense motion, establish an illegal violation of appellant's right to privacy, in contravention of Penal Code section 631. At the preliminary hearing, Fontenot testified that Investigator Grasso telephoned her in 1992 to ask her if he could give her some equipment so that she could tape telephone conversations between herself and appellant. (MC RT 912.) He then came to her home to give her the recording equipment and a tape and showed her how to use it.[5] (MC RT 1144.) Investigator Grasso told her

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[5]Footnote 28 on page 123 of the RB states that the recording should be categorized as eavesdropping rather than wiretapping because Fontenot's recording did not involve the connection of the recording equipment to the transmission line. However, there is conflicting testimony on this issue. Fontenot testified at the preliminary hearing that a microphone was installed in the mouthpiece of the telephone and she hit a button to turn it on. (MC RT 1156 - 1157.) This description of the recording device would fit within the wiretapping provisions because it interferes with the "instrument of ...[an] internal telephonic communication system." (Penal Code section 631(a).) However Investigator Grasso's testimony at trial (prior to the determination of defense counsel's motion) describes the recording equipment as being a small hand held cassette tape recorder, which would fall under the eavesdropping provisions. (SC RT 2788.) Given that both the wiretapping and eavesdropping provisions contain almost identical remedies barring the admission of illegally obtained evidence in judicial proceedings and are subject to the section 633 exception, the effect under both is the same. (Penal Code sections 631(c) and 632 (d).) Due to the conflicting evidence as to what category the recording instrument fits under and for the sake of simplicity, this claim

that he wanted her to record calls from appellant, "because of a case that Ardell was going through in Las Vegas." (MC RT 0992.) She didn't ask any questions about why he wanted her to record the conversations, but she assumed it had something to do with her sister, and she was willing to do it to keep her sister out of trouble. (MC RT 1145- 1147.) Fontenot recorded a total of five conversations over a two or three month period, all of which were admitted into evidence. (MC RT 1149-150, MC 916.) Within a year of making the first recording Investigator Grasso contacted Fontenot and Fontenot told him that she had recorded a telephone conversation between herself and appellant in which they discussed Ardell. (MC RT 1000-1002.) Investigator Grasso did not ask her any further questions about the conversation and nor did he make any arrangements to pick up the tape[6]. (MC RT 1003.) Fontenot misplaced the tape recorder between December of 1993 and June of 1994. (MC RT 1005.) In March of 1994, after the death of Williams, Fontenot spoke to the police and informed them that she had letters that appellant had written to her from prison, however she failed to inform the police of the existence of the tape. (MC RT 1117-1118.)

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will continue to use the wiretapping provisions rather than the eavesdropping provisions.

[6] This differs significantly from the trial testimony given by Investigator Grasso, who says that he called Fontenot in approximately 1992 to follow up on the taping and she told him that she had not recorded any conversations. (SC RT 2792.)

Approximately a month later, she informed the police of the existence of the tape. (MC RT 118.)

At the preliminary hearing Investigator Grasso testified that he gave Fontenot a telephone, a tape recorder, a tape and some batteries at the end of May 1992, or the beginning of June, 1992. (MC RT 2167-2168.) At that time he identified himself as a member of law enforcement (MC RT 2168), but he did not specify the particular law enforcement agency he was working with[7]. At trial, prior to the determination of the defense motion, Investigator Grasso testified that he asked Fontenot to record any conversations that she had with appellant and she agreed to do so. (SC RT 2788.) He did not tell her when she should report back to him. (SC RT 2792.) Investigator Grasso did not become aware of the existence of the tape until 1994 when police officers Guzman and Anderson told him about it. (SC RT 2790.)

Defense counsel moved to exclude the tape recorded phone calls between Fontenot and appellant. That objection is contained within appellant's reply to the prosecution's response to his motion to suppress

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[7]Although Investigator Grasso did not testify to this explicitly, it can be inferred from his trial testimony that he did not tell her that he was investigating the Comp USA incident, (SC RT 2791) and that he did not provide any time parameters nor did he give her any guidelines in terms of what conversations he was interested in recording. (SC RT 2791.) More importantly, at the preliminary hearing Fontenot testified that Investigator Grasso told her that he wanted her to record calls from appellant, "because of a case that Ardell was going through in Las Vegas." (MC RT 0992.)

statements to Investigator Grasso. (5 CT 1987 -1990.) The way in which the tape recording issue became intertwined with the Investigator Grasso interview evidence is convoluted and requires explanation. The defense originally filed a Fifth Amendment objection to the admission of evidence obtained during a meeting between Investigator Grasso and appellant on June 22, 1992. (5 CT 1672-1682.) The People's response argued that the Fifth Amendment did not bar the admission of non-testimonial evidence showing consciousness of guilt. Specifically, the interview between Investigator Grasso and appellant contained no reference to Ardell. However, in the taped conversations between appellant and Fontenot, appellant said that Investigator Grasso told him that Ardell had spoken to police. Therefore, the prosecution argued, the only reason appellant would know that Ardell was the one supplying information to police was through his involvement with the Comp U.S.A. crime. (5 CT 1835-1836.) It was in response to this argument that the defense raised an objection to the admission of the taped material. (SC RT 2779.) The People filed no written response to this motion. (SC RT 2778.)

The defense motion referred only to the federal wiretap legislation, although this was broadened to include the state wiretap statute during the oral hearing of the motion. (SC RT 2784.) Specifically, defense counsel argued that the People had not satisfied their burden to show that

Investigator Grasso's instructions to Fontenot in relation to the taping were done in the ordinary course of the officer's duty or that he was acting within the scope of his authority, as required under both Federal and State wiretap statutes. (SC RT 2814.) The Court denied the motion to suppress the tapes because the court was satisfied that a sufficient foundation had been given at the hearing. (SC RT 2818.) At trial, Fontenot's phone records for 1992 (SC RT 9246), and the tapes and transcripts of the conversations between appellant and Fontenot in 1992 was admitted into evidence. (SC RT 9248.)

The trial court abused its discretion in admitting the tapes because the taping was done in violation of chapter 1.5 of the Penal Code, which was intended by the Legislature to "protect the right of privacy of the people of this state." (Penal Code section 630.) The state wiretapping laws, like their federal equivalent, provide that "[e]xcept as expressly authorized...all interceptions of wire and oral communications are flatly prohibited." (*Gelbard* v. *United States* (1972) 408 U.S. 41, 46.) Penal Code section 631 "imposes a more restrictive rule [than the federal statute] in requiring the consent of all parties to a communication for its interception." (*People* v. *Conklin* (1974) 12 Cal. 3d 259, 272.) Contravention of section 631 is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment not exceeding one year (section

631(a)) and evidence obtained in violation of section 631 is inadmissible in judicial proceedings (section 631(c).)

Contrary to respondent's claims, the wiretapping evidence does not fit within any Penal Code exceptions. Penal Code section 633 creates an exception to section 631 for (1) police officers "or any person acting pursuant to the direction of "a police officer, (2) "acting within the scope of his or her authority." Yet the vague directions provided by Investigator Grasso and his total lack of supervision do not reach a level that constitutes the "direction of a police officer." By not identifying the nature of his investigation or ensuring compliance with evidentiary safeguards, Investigator Grasso was acting outside the scope of his duties.

In *Rattray* v. *City of National City*, (1994 9th Cir.) 51 F.3d 793 the United States Court of Appeals held that the section 633 exception did not extend to the taping of one police officer by another in relation to a matter of internal discipline. The ruling was based on their examination of the legislative history of Chapter 1.5 of the Penal Code, which is relevant to the instant case:

> ...The statement of purpose in § 630 strongly indicates that § 633 was intended solely to permit law enforcement officers to continue to use electronic devices in criminal investigations. Section 630 first explains that in the view of the California legislature, technological advances necessitated a new statute to protect the important privacy rights of California citizens. In enacting this protective statute, however, the legislature "recognize[d] that law enforcement agencies have a legitimate need to apply modern listening devices and

> techniques in the investigation of criminal conduct and the apprehension of law breakers," and therefore exempted legitimate law enforcement activity from the statute's reach. " See Penal Code § 630 (emphasis added.)

The predecessor to section 633, California Penal Code section 653(h), further clarifies the proper scope of the modern statute:

> Any person who ... installs ... a dictograph in any ... room ... without consent of the occupant ... is guilty of a misdemeanor; provided that nothing herein shall prevent the use and installation of dictographs by a regular salaried peace officer expressly authorized thereto ... when such use and installation are necessary in the performance of their duties in detecting crime and in the apprehension of criminals.

This legislative history shows that section 633 was not intended to cover every recording either performed by or in some way connected to a police officer. The section contains important and express limitations, which Investigator Grasso ran afoul of.

The first limitation on this exception is that the private individual must be acting pursuant to police direction. At trial, appellant's attorney argued that because Investigator Grasso provided no direction or guidelines to Fontenot, the taping did not fit within the exception (SC RT 2813.) In *People* v. *Towery* (1985) 174 Cal. App.3d 1114 the California Court of Appeal considered the meaning of the words "pursuant to the direction of" in section 633. The *Towery* court found that an informer who was told by police to tape all calls received at his home in relation to stolen oil was acting pursuant to police direction. In making this determination the court considered the scope of the instructions to tape, that the equipment was

owned by the informer rather than police, that the tapes were supplied by the police, that it was not reasonable for the informer to conduct the taping at the police station and that the tapes were returned on a regular basis (usually within a day of recording and never more than three days from when the tape was completed) and "punched out" by the police so that they could not be altered. (*Towery*, supra 1126-1130.)

Respondent submits that "the directions provided by Investigator Grasso to Liz Fontenot in tape recording her conversations with appellant were even more specific than those received in *Towery*" since Investigator Grasso asked Fontenot to record "any" conversations she had with Appellant. (RB 126.) The description of Investigator Grasso's instructions as "specific" is laughable; the instruction to tape "any" calls, is the antithesis of specificity. Fontenot's understanding was that Investigator Grasso told her "just to record calls." (SC RT 9245.) No guidelines were provided as to the period of time in which she was to record, when she was to check back in with police or what issue the police were interested in a recording of (SC RT 2791-2793.) Further illustrating the total lack of police oversight, Investigator Grasso made only one attempt to follow up in regard to the tape (SC RT 2792) and there was a two year gap between the taping and the hand over of the tape. This differs radically from *Towery* where the tapes were handed in within days of being recorded. (*Towery*, *supra*, 174

Cal. App.3d 1114, 1127.) Obviously the direction and oversight was non-existent. The direction given by Investigator Grasso was in fact so minimal, and the supervision so lacking, that it is disingenuous to say that the tape resulted from Investigator Grasso's investigation of criminal conduct. Indeed he was totally unaware of the tape until 2 years after the recordings were completed. (SC RT 2790.)

Respondent relies on the dicta in *Towery* that evidence of police direction goes more to the weight to be given to the recordings rather than their initial admissibility. (RB 126.) This part of the Court of Appeal decision is not well reasoned as it ignores the plain text of section 633's requirements for legality. The express authorization in section 633 requires that the recording be done "pursuant to the direction" of the police. Where the language of the act makes its meaning clear, as in section 633, "and... the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms". (*Caminetti* v. *United States* (1917) 242 U.S. 470, 485.) The language of section 633 could not be any clearer, yet the subject paragraph in *Towery* runs counter to that language by construing the limitations in section 633 as issues going to the weight of the evidence, rather than to its admissibility.

The second limitation on the 633 exception is that the police must be acting within the scope of their authority. At trial, defense counsel argued that Investigator Grasso acted outside the scope of his authority because the instructions for taping were indiscriminate and without limits (SC RT 2783.) Respondent asserts that the trial court's conclusion that Investigator Grasso was acting within the scope of his authority as a law enforcement officer when he requested that Fontenot tape record her telephone conversations with appellant is "fully supported by the record." (RB 126.) However, according to the record, Investigator Grasso told Fontenot that he wanted her to record the calls because he was investigating the Las Vegas case. (MC RT 1145 and SC RT 9992.) Given that Grasso was an Orange County District Attorney Investigator, the investigation of a Las Vegas case did not fall within his duties in detecting crime and the apprehension of criminals.

Furthermore, inherent in a police officer's performance of their duties in detecting crime and in the apprehension of criminals is the due process duty to assure that the evidence is preserved. In *U.S.* v. *Bryant* (1971) 439 F.2d 642, 652 the court found that:

> the duty of disclosure is operative as a duty of preservation" because "only if evidence is carefully preserved during the early stages of investigation will disclosure be possible later." The court further found that: "...sanctions for non-disclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith

> to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation...By requiring the discretionary authority of investigative agents be controlled by regular procedures for preserving evidence, we intend to ensure that rights recognized at one stage of the criminal process will not be undercut at other, less visible, stages.

Bryant has been overruled on the issue of the burden and the showing necessary for a finding of due process violation, however this does not obviate the initial duty of the government to preserve discoverable evidence. (*Arizona* v. *Youngblood*, (1988) 488 U.S. 51 [109 S.Ct. 333, 102 L.Ed.2d 281]. *People* v. *Superior Court of Guam* (2001) WC 1725750.)

As a police officer, it was Investigator Grasso's duty to ensure that all discoverable evidence gathered in the course of a criminal investigation was preserved. He made no attempt to comply with this duty. He failed to inform Fontenot about the importance of following practices such as recording the entire conversation, recording every conversation from appellant, keeping a log of calls and informing the police promptly when a recording was made. He also failed to follow up to see if any recordings had been made, or to take steps to preserve the recordings. This absolute failure to comply with his duties took Investigator Grasso's actions outside his scope of authority.

The federal wiretap laws[8] provide further guidance as to the scope of Investigator Grasso's duties and clearly show that he acted beyond his authority. "Congress legislated in considerable detail in providing for applications and orders authorizing wiretapping and evinced the clear intent to make doubly sure that the statutory authority be used with restraint." (*United States* v. *Giordano*, (1975) 416 U.S. 505, 515.) "[T]he protection of privacy was an overriding congressional concern in enacting Title III." (*Gelbard* v. *United States*, *supra,* 408 U.S. 41, 48.) The Act requires that the application for an order authorizing a wiretap satisfy a number of procedural requirements, including: a full and complete statement of the facts relied upon to justify the order including details of the offense, the location targeted, the types of communications sought and the identity of the person; details about the other investigative procedures tried and why they are insufficient; the time frame for which the order is sought; and details of any previous wiretaps of the same person. (18 U.S.C.A. Section 2518.) These procedural steps "require strict adherence, and utmost scrutiny must be exercised to determine whether wiretap orders conform with title III." (*United States* v. *Blackmon* (2001), 273 F.3d 1204, 1207 [internal quotation marks and citations omitted].) Although the circumstances of the

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[8] Title III of the Omnibus Crime Control and Street Safety Act of 1968

present interception fit within an exception to the federal wiretap laws, the legislature's intention to limit the use of wiretaps should always guide a police officer's conduct in carrying out wiretaps. Investigator Grasso's vague instructions, lack of oversight and failure to follow up with Fontenot were an abuse of the exception provided for by Congress, and thus outside the scope of his duties.

Respondent asserts that even assuming the trial court improperly admitted the tape recordings, any error was harmless since it was not reasonably probable that the defendant would have received a more favorable result had the evidence not been admitted. (RB 127). The prejudicial impact of the taped material cannot be overstated. Indeed, the prosecutor twice referred to it as "an incredible piece of evidence" in his closing comments. (SC RT 10855 and 10861.) The prosecutor also said that the tapes showed that "the motive to kill Ardell Williams was started...when [he] realized that his fears, his fears as expressed to Liz about Ardell were coming true." (SC RT 10861.) Contrary to respondent's claim, there is not "ample evidence" of appellant's motive to murder Williams, independent of these tapes. (RB 127.) Therefore it is reasonably probable that the defendant would have received a more favorable result had the evidence not been admitted.

In the alternative, the admission of the taped material deprived the appellant of a state created privacy interest and denied him his federal constitutional right to due process of law. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) As such, the error in admitting the tapes requires reversal under *Chapman*.

CLAIM 32
TODD HOLLIDAY'S TESTIMONY INCLUDED INADMISSIBLE DOUBLE HEARSAY.

Appellant will address the relevant parts of respondent's brief in claim 23.

CLAIM 34
APPELLANT'S RIGHTS TO COMPULSORY PROCESS AND CONFRONTATION WERE VIOLATED BY ERRONEOUS APPLICATION OF THIRD PARTY CULPABILITY PRINCIPLES IN VIOLATION OF DUE PROCESS AND HEIGHTENED RELIABILITY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The trial court erroneously refused to permit appellant to introduce third-party culpability evidence to support an alternative theory as to who killed Ardell Williams. Appellant offered evidence that Tony Mills, the father of William's child, was in a heated custody battle with Williams, had run her off the road with his car, had threatened to slit her throat, and was

present in Williams' home just days before she was killed. Affidavits from family members declared that the Williams family suspected Mills was the killer.

The Proceedings

The defense proffer of third party culpability included the following: The defense first highlighted the sworn affidavits by the Williams family, stating that they believed Mills was responsible for Ardell Williams' death, including the fact that Mills was in a custody dispute with Ardell and the fact that he was in the house immediately after Yancey delivered the flowers. (SC RT 6750.) The Williams family was prepared to testify that on the day of the flower delivery, Mills arrived shortly after Yancey had left and asked to use the bathroom. (SC RT 6752--6753.) The Williams family found this suspicious because it was unusual for Mills to enter the Williams home, yet that day he used the bathroom right after Yancey. Adding to the weight of the circumstantial evidence linking Mills to Yancey, the Williams family later discovered a dollar bill in the bathroom, which may have been a covert communication between the Mills and Yancey. (SC RT 6754--6756.) The defense argued that this evidence showed motive, because Mills wanted to resolve the custody dispute, and that "the circumstantial evidence that they say points towards Mr. Clark...points also towards Tony Mills." (SC RT 6758--6749.)

In response, the court described the defense's burden, but clearly overstated what was required by *People* v. *Hall* (1986) 41 Cal.3d 826, 834:

> as the *Hall* case says, someone who gets murdered may have a lot of enemies out there. They may not be a beloved person, there may be a lot of people with grudges. And that's fine and good. It may be relevant. But a particular grudge that in and of itself is not enough. The *Hall* case specifically says, also, that threats of violence are not enough...What the court must look at is on the day of the death, at the time of the killing, what do we have, if anything, in terms of proximity, opportunity. (SC RT 6750.)

The defense responded that the strength of the evidence against Mills was no weaker than the People's case against appellant. (SC RT 6752.) The defense added to their proffer that Mills lived a very short distance away from the scene, thus meeting *Hall's* proximity prong, and had no alibi other than someone saying, "well, when we woke up, he was home." (SC RT 6753.)

The defense also proffered the testimony of Kevin Hardeman, Williams' boyfriend. Hardeman would have testified that Mills "tried to take her [Williams'] life on prior occasions." (SC RT 6764.) He was in the car with Williams when Mills tried to run her off the road with his car. (SC RT 6764.) He also heard the heated exchange between Mills and Williams, where Mills threatened to slit Williams' throat. (SC RT 6762--6766.)

The prosecutor argued that "there is no direct, nor is there any circumstantial evidence connecting Mr. Mills to the murder of Williams. There is merely evidence of a child custody dispute which is evidence of

motive." (SC RT 6787.) The prosecutor also argued that the evidence is "unduly prejudicial ...because that allows the jury to speculate that Tony Mills is responsible for the murder of Ardell Williams because he's trying to get the kid back." (SC RT 6768.) Ultimately, the court ruled that the Williams family's affidavits "are not coming in" because they "are pure hearsay." (SC RT 6775.)

At a later date, defense counsel made an offer of proof concerning the testimony of Kevin Hardeman. (SC RT 10355-10366.) The Court again found that the evidence did not rise to the *Hall* standard and excluded Hardeman's testimony:

> Well, the case law on third party liability, as I understand it, requires considerably more than simply motivation or a murdered victim who a lot of people didn't like. ..And if I understand correctly, the totality of what you have is that some two months prior to Ardell Williams' murder there was an altercation between her and her baby's father relating to their custody and paternity disputes. (SC RT 10359.)

The court also found that the evidence of the confrontation between Williams and Mills "did not rise to the level of permitting it in for insinuations of Mr. Mills being the murderer of Ardell Williams. Without more that offer of proof is rejected." (SC RT 10364.)

Defense counsel then renewed the motion to have the affidavits by the Williams family admitted. (SC RT 10365.) The court found that an adequate showing had not been made to give the affidavits relevance and

that they lacked the probative value to outweigh possibly confusing the jury. The court thus excluded the affidavits. (SC RT 10366.)

The excluded evidence raised a reasonable doubt about appellant's guilt and therefore satisfied California's standard for the admission of third party culpability evidence.

Initially, Respondent argues that reversal is not required unless the trial court "exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice," citing to *People* v. *Ochoa*, *supra,* 19 Cal.App.4th 353, pp. 437-438. (RB 136.)

As a general matter, Respondent is correct. This court typically reviews a trial court's determination of the admissibility of evidence of uncharged offenses for an abuse of discretion. (See *People* v. *Catlin* (2001) 26 Cal.4th 81; Evidence Code Sections 350, 352.) However, "[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*People* v. *Allen* (1977) 65 Cal.App.3d 426, 435.) Thus, "all exercises in legal discretion must be grounded in reasoned judgment guided by legal principles and policies appropriate to the particular matter at issue." (*In re Adoption of Driscoll, supra,* 269 Cal.App.2d 735, 737.) Because decision making, hence discretion, is largely a process of choosing alternatives, a mistake as to the alternatives open to the court affects the very foundation of the decisional

process." (*Ibid.*) Judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action. (*In re Carmaleta B., supra,* 21 Cal.3d 482, 496.) Consequently, a decision "that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is thereby an abuse of discretion. *(City of Sacramento* v. *Drew, supra,* 207 Cal.App.3d 1287, 1297; see also *Penner* v. *County of Santa Barbara, supra,* 37 Cal.App.4th 1672, 1676 [legal conclusions are reviewed *de novo*].)

De novo review is required because, as shown fully below, the trial court used an unconstitutionally high standard to evaluate admissibility and failed to consider the totality of the facts, which clearly satisfied the *Hall* standard. *People* v. *Hall*, *supra,* 41 Cal. 3d 826 established the standard for admitting defense evidence of third party culpability:

> To be admissible, the third-party 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. *Hall*, *supra,* 41 Cal. 3d 826, 833-834 (emphasis added).)

Respondent acknowledges this as the relevant standard. (RB 137.) In defining "reasonable doubt" in this context, the *Hall* court stated:

> Evidence of mere motive or opportunity to commit the crime in another person, *without more*, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or *circumstantial* evidence linking the third person to the actual perpetration of the crime. (*People* v. *Hall*, *supra,* 41 Cal. 3d 826, 833. (emphasis added.))

Further, the *Hall* Court stated that trial courts should simply treat third-party culpability evidence like any other evidence: if relevant, it is admissible (Evidence Code section 350), unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion. (*People* v. *Hall*, *supra,* 41 Cal. 3d 826, 834 [rejecting any previous distinction between the evaluation of evidence of third-party culpability and all other evidence].) "The test of relevance is whether the evidence tends logically, naturally and by reasonable inference to establish material facts such as identity, intent, or *motive*." (*People* v. *Garceau* (1993) 6 Cal. 4th 140, 177.)

That the proffered evidence clearly met the Hall standard of relevance is shown by the following: First, the evidence provided circumstantial proof of the killer's identity--a disputed issue. It linked Mr. Mills--by his hostility, threats to kill, prior violent act, and the suspicious behavior at the Williams' home--to the commission of the murder with which appellant was charged. (See *People* v. *Hall*, *supra,* 41 Cal. 3d at 833 ["there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime"].) This evidence did not simply point to another person's theoretical motive, but identified a particular individual with an actual specific motive to kill Williams. (See *People* v. *Sandoval* (1992) 4 Cal. 4th 155, 176 [to be relevant, evidence of third-party

culpability must establish actual motivation on the part of another, not just the idea that others might have wanted to kill the victim.])

Second, the evidence of Mills' threats, motive, and use of violence was close in time and proximity to the murder: Mills ran Williams off the road two months prior to the killing (SC RT 6762--6766.); Mills acted suspiciously by following Yancey into the Williams' bathroom, days before the murder (SC RT 6750--6755.); Mills lived within walking distance of the murder scene (SC RT 6753.); and Mills did not have an alibi for the time of the murder. (SC RT 6753.) (See *People* v. *Robinson* (2005) 37 Cal. 4th 592, 624 [proffered third-party evidence must be close in time and link the third-party to the crime].) Notably, the trial court in the instant case used a standard for proximity that was far too restrictive: "What the court must look at is on the day of the death, at the time of the killing, what do we have, if anything, in terms of proximity, opportunity. " (SC RT 6750.) Yet not one case requires evidence of proximity at the time of the killing, a standard that the prosecution could not have satisfied with his evidence, given that the only hard proof of Yancey's whereabouts at that time was that she was visiting at the county jail. Finally, the relevance of motive evidence is "particularly significant" where, as here, there is "absence of physical evidence linking defendant to the ... killings." (*People* v.

Garceau, supra, 6 Cal. 4th 140, 176.)[9] The evidence relating to Mills was precisely the kind of evidence that is capable of raising a reasonable doubt as to appellant's guilt, because it shows the motive, opportunity and willingness of a third person to have committed the murder of Williams. (*People* v. *Hall, supra*, 41 Cal. 3d 826, 833.)

De novo review is required because the court erred by failing to follow *Hall's* mandate to consider all of the evidence against Mills in determining the probative value of the disputed evidence. Instead, the court failed to consider Mills' possible connection to Yancey as shown by the suspicious same day use of the Williams' bathroom, his proximity to the crime, and his of motive. The trial court considered only the Hardeman evidence and the domestic file. Indeed, when the totality of the evidence is considered, the case against Mills becomes similar in strength to that against appellant.

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[9] Because appellant's proffered third-party culpability evidence has a "tendency in reason" to disprove the prosecution's theory of motive and inferentially to disprove its theory that appellant killed Williams, the excluded evidence did not ask the jury to draw "speculative inferences." (*People* v. *De La Plane* (1979) 88 Cal. App. 3d 223, 244.) Evidence is not rendered "speculative" and thus "irrelevant" simply because it may be subject to various interpretations. (*People* v. *Kraft* (2000) 23 Cal. 4th 978, 1034.) As long as one of the interpretations has a tendency to prove the fact for which the proponent offers it, the evidence is relevant. *Id.*

Although, as pointed out by respondent, "Clark's counsel did not challenge the trial court's summary of Clark's offer of proof," this omission was excusable. (RB 137.) All of the omitted information was contained in the affidavits by the Williams family, which the court had previously ruled inadmissible. (SC RT 6777.) Moreover, immediately after the court's summary of appellant's offer of proof and the related order, defense counsel again sought the admission of the affidavits and was again denied. (SC RT 10365.) Given the court's previous rulings regarding the Williams' affidavits, it would have been futile for counsel to argue that the contents of those affidavits should be included in the courts summary of the offer of proof. A lack of objection is not a waiver where objection would have been futile. (*People* v. *Hamilton, supra,* 48 Cal.3d 1142, 1189, fn 27.)

Trial courts were expressly cautioned in *Hall* not to be unduly restrictive in assessing the relevance of third-party culpability evidence offered by the defense: "[Trial courts] should avoid a hasty conclusion...that evidence of [defendant's] guilt was incredible. Such determination is properly the province of the jury." (*People* v. *Hall*, *supra,* 41 Cal. 3d 826, 834.) In other words, the defendant's proffered evidence must be considered truthful by the trial court while assessing its admissibility. The *Hall* court further advised that when assessing the competing risks of undue prejudice, jury confusion or consumption of time

(Evidence Code section 352), trial courts should resolve any doubts in favor of the defense.

> Furthermore, *courts must focus on the actual degree of risk* that the admission of the relevant evidence may result in undue delay, prejudice, or confusion. As Wigmore observed: 'If the evidence is really of no appreciable value no harm is done in admitting it; but if the evidence is in truth calculated to cause the jury to doubt, *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 doubt. (citation).' (People* v. *Hall, supra,* 41 Cal. 3d 826, 834 (emphasis added.)

De novo review is required for the additional reason that the trial court erroneously weighed the credibility of the defense proffered witnesses. The trial court erred in finding that the excluded evidence consisted of "exaggerations" and "lies", instead of leaving the issue of credibility to the jury to decide. (SC RT 6775-6776, SC RT 9075-9082) Showing its crabbed and flawed analysis that failed to take into account the totality of the defense proffer, the trial court stated:

> The court believes that the additional information that some two months prior Mr. Hardeman had been present where there had been the face-to-face confrontation between Mr. Mills and Ms. Williams does not rise to the level of permitting it in for *insinuations* of Mr. Mills being the murderer of Ardell Williams. ... The court, again, does not believe an adequate showing has been made to give these particular pieces of offered evidence relevance, enough probative value to outweigh just confusing the jury. And without more, the court's not going to allow the contents of that domestic file to be entered in the criminal proceedings. (SC RT 10364–10366.) (emphasis added.)

Contrary to Respondent's position that the defense proffer was nothing more than "mere motive or opportunity to commit the crime" (RB 137), appellant proffered that Mills was close to Williams on the day of the crime by virtue of his residence and that he engaged in unusual behavior right before the crime. Arguably, this showing was no weaker than the state's case against appellant. Thus, even under the *Hall* standard, the trial court's analysis was flawed and an abuse of discretion. It was error to exclude the defense evidence.

The *Hall* Standard in Unconstitutionally High in Light of United States Supreme Court Precedent

United States Supreme Court and other federal cases make clear the federal Constitutional dimension of erroneous exclusion of third party culpability evidence and that the *Hall* standard is unconstitutionally high. In *Thomas* v. *Hubbard, supra,* 273 F.3d 1164 (overruled on other grounds in *Payton* v. *Woodford* (9th Cir. 2002) 299 F.3d 815, 829, fn. 11), the Ninth Circuit reversed a state murder conviction where a trial court excluded similar evidence of third-party culpability. The defendant was prejudiced when the trial court improperly truncated the cross-examination of the lead investigating officer regarding the attempts of the purported eyewitness (who, according to the defense's theory, was the actual killer) to evade the police. The trial court erroneously refused to allow the proposed cross-examination, in part because it found the defense theory too speculative and

thus not relevant. In reversing, the court held, "Evidence that someone other than the defendant may have committed the crime is critical exculpatory evidence that the defendant is entitled to adduce. (*Hubbard*, *supra*, at p. 1177.) (See also *United States* v. *Crosby* (9th Cir. 1996) 75 F.3d 1343, 1347 ["[F]undamental standards of relevancy . . . require the admission of testimony which *tends to prove* that a person other than the defendant committed the crime that is charged" (emphasis added) (citations omitted)."]) The court held that the defendant was denied his Fifth Amendment due process right to a fair trial and the Sixth Amendment right to present a defense, citing *DePetris* v. *Kuykendall* (2001), 239 F.3d 1057, 1062, *Chambers* v. *Mississippi, supra,* 410 U.S. 284; and *Washington* v. *Texas*, *supra,* 388 U.S. 14. (*Hubbard*, *supra*, at p. 1178.)

Similarly, here, the trial court excluded all of the third-party culpability evidence, because it did not believe "an adequate showing [was] made to give [the] evidence relevance." (SC RT 10366.) The evidence regarding Tony Mills, including cross-examination of the Williams family regarding the child custody dispute, was excluded because there was not "enough probative value to outweigh just confusing the jury." (*Ibid.*) It is difficult to comprehend how the jury would be confused by a theory proposing an alternate killer, given that appellant was arguing his

innocence. The decision was particularly preposterous given how convoluted the People's case was.

Furthermore, United States Supreme Court precedent casts doubt on the rigorous standard articulated in *Hall*. Unlike the *Hall* standard--which only looks at the defense proffer and requires evidence of more than just motive and opportunity—*Holmes* v. *South Carolina,* (2006) 547 U.S 319 requires that the trial court also examine the weaknesses in the state's case. "[B]y evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." (*Id*, at 331.) While the proffered defense evidence here met the *Hall* standard as shown above, *a fortiori* the third-party culpability evidence additionally comports with the standard articulated in *Holmes.*

In *Holmes* v. *South Carolina,* the Supreme Court found that, under the rule applied by the South Carolina Supreme Court, the trial judge did not focus on the probative value or the potential adverse effects of admitting the defense evidence of third-party guilt. Instead, the trial court's inquiry erroneously concerned only the strength of the prosecutor's case: If the prosecutor's case was strong enough, the evidence of third-party guilt was excluded; even if that evidence, viewed independently, would have had great probative value, and even if it would not have posed an undue risk of

harassment, prejudice, or confusion of the issue. The state court rule seemed to call for little, if any, examination of the credibility of the prosecution's witness or reliability of its evidence. (*Holmes* v. *South Carolina, supra*, 547 U.S. 319, 329.) The Court held that the state's rule did not rationally serve the end that the legitimate rule was design to promote, i.e. to focus the trial on the central issues by excluding evidence that had very weak relevance. Nor had the State identified any other legitimate end that the rule served. (*Id.* at 330.) Therefore, the rule as applied in the case violated defendant's right to have a meaningful opportunity to present a complete defense, in violation of the Compulsory Process or Confrontation Clauses of the Sixth Amendment. (*Ibid.*)

The Court disapproved the trial court's logic that "where (1) it is clear that only one person was involved in the commission of a particular crime and (2) there is strong evidence that the defendant was the perpetrator, it follows that evidence of third-party guilt must be weak." (*Holmes*, Supra, 547 U.S. at 330.) The Court explained:

> But this logic depends on an accurate evaluation of the prosecutor's proof, and the true strength of the prosecutor's proof cannot be assessed without considering challenges to the reliability of the prosecutor's evidence. Just because the prosecutor's evidence, if credited, would provide strong support for a guilt verdict, it does not follow that evidence of third-party guilt has only weak logical connection to the central issues in the case. *(Ibid.)*

Similarly, in the instant case the *Hall* standard unconstitutionally fails to assess the strength of the state's case in determining the relevance of the proffered evidence of third-party guilt. Had the trial court made such an assessment, it would have been clear that the state's case against appellant was no stronger than the proffered evidence of Mills' culpability. The prosecutor's theory was that appellant killed Williams both in retaliation for testimony Williams gave at police interrogation and grand jury proceedings, and to prevent testimony against appellant at trial. (SC RT 1900-1902.) Yet the prosecutor's case against appellant rested solely on weak circumstantial evidence since there was no physical or other evidence linking appellant or Yancey to the crime. (SC RT 1900-1902.) The prosecutor could rely only upon tenuous inferences to link appellant to the killing. For example:

> And at some time [while Mr. Clark was in jail for the Comp U.S.A. charge], Mr. Clark has a transcript and he goes up to Alonso Garrett and he says I want you to read this. And Alonso Garrett starts to read it, and Mr. Clark is behind him, and as he reads it he sees the name, he being Alonso Garrett, sees the name of Ardell Williams. And Mr. Clark points to the name and says words to the effect that this is the only thing keeping me in here. Alonso Garrett, upon hearing this statement from Mr. Clark, and knowing Ardell Williams and the rest of her sisters, becomes very concerned. Being in jail, and knowing the ramifications, whatever, of testifying, he does not contact a person from law enforcement. Instead, he places a call to the family of Ardell Williams, and makes contact with the sisters and Ardell, and he doesn't know what it is about, but he says don't have her be involved in this. And

> this is before Ardell Williams was murdered. (SC RT 7539 – 7540.)

The prosecutor also was forced to rely upon appellant's "intense" romantic connection to Yancey to link him to the killing.

Defense counsel countered that the same kind of circumstantial evidence that connected appellant to Yancey, connected Tony Mills to Yancey. (SC RT 6753.) Defense counsel argued:

> So what we are saying is that you allow motive, opportunity and the same circumstances say that there is enough to have [Mr. Clark] go before the jury, certainly there is enough to say that we should be allowed to introduce the same type of factors and circumstances as to Tony Mills ... . [W]hen you take the facts that say that it points toward Mr. Clark, and you say what are the reasons for those facts, and you make the same list with Tony Mills, it's funny, what we have all the same thing... . [W]hen you look at Tony Mills' involvement with what you would say with Mr. Clark ... and say what do you have for Mr. Clark and Antoinette Yancey as a team, because that seems to be the approach, and see what you have with Mr. Mills, and you have the exact same evidence for both of them. Now, [the prosecutor says] that points toward guilt toward Mr. Clark and Ms. Yancey. And I'm saying if it does for them, because of the strong motive he has for testimony, how can you say [Mr. Clark] has a strong motive? [Mills] has the exact same acts, exact same kind of thing, but it doesn't matter for him; that's not strong enough to bring him up as even a suspect to the jury, but it's enough to convict [Mr. Clark]. (SC RT 6753 – 6757.)

The court responded to this argument by examining the holes in the case against Mills, flying in the face of *Hall's* mandate to allow the jury to assess the credibility of the testimony. The trial court made no mention of the defense challenges to the prosecutor's case, except to say that Yancey's

fingerprint of the flower box strengthened the People's case against Clark. Defense counsel correctly countered that the fingerprint implicated Yancey, not appellant, and that this evidence was just as capable of linking Mills to Yancey, as it to prove a conspiracy between Yancey and Appellant. The court was obviously skeptical of this argument:

> You're saying the fact that Tony Mills and Ms Yancey both had to use the bathroom on the day of the flower delivery and there is a dollar bill in there has some mysterious significance...You tell me that you said their case is built of circumstantial evidence, and I threw out they got a fingerprint, that it was Yancey there...You are suggesting to me, I believe, that the fact that both of these individuals use the Williams bathroom, and that somebody drops a dollar bill in there suggests a link between Tony Mills and Antoinette Yancey, the dollar bill is a signal or a go ahead or stop and go home. (SC RT 6754 – 6755.)

The trial court unconstitutionally focused only on the totality of the unchallenged state evidence without weighing the weakness in the state's case--such as the tenuousness of appellant's connection to the killing given that he was in county jail at the time. Here, the tenuous connection between appellant and the Williams murder makes the third-party evidence all the more relevant. The court denied the defense the opportunity to present evidence that was at least as persuasive as that of the prosecution. The third party evidence should not have been excluded, because it had as strong a logical connection to the identity of the killer as did the state's case. As *Holmes*, *supra*, 547 U.S. 319, 330 states, "The rule applied in this case is no more logical than its converse would be, i.e., a rule barring the

prosecution from introducing evidence of a defendant's guilt if the defendant is able to proffer, at a pretrial hearing, evidence that, if believed, strongly supports a verdict of not guilty . . . It would make no sense, however, to hold that this proffer precluded the prosecution from introducing its evidence . . ."

The trial court's exclusion of appellant's proffered evidence of third party culpability violated not only state law, but the federal Constitution as well. The compulsory process and confrontation clauses of the Sixth Amendment and the due process clause of the Fourteenth Amendment to the United States Constitution, guarantee every criminal defendant "a meaningful opportunity to present a complete defense." (*Crane* v. *Kentucky*, *supra,* 476 U.S. 683, 690, quoting *California* v. *Trombetta*, (1984) 467 U.S. 479, 485). As the Supreme Court explained forty years ago: "The right to present a defense is ... a fundamental element of due process of law." (*Washington* v. *Texas*, *supra,* 388 U.S. 14, 19). Moreover, a state court's erroneous admission or exclusion of evidence may violate the federal constitution by causing fundamental unfairness to the criminal defendant. (*See Kealohapauole* v. *Shimoda* (9th Cir. 1986), 800 F.2d 1463, 1466 ; *Batchelor* v. *Cupp*, (1982) 463 U.S. 1212.)

The Trial Court's Ruling Denied Appellant His Eighth Amendment Right to a Reliable Sentencing Determination

Evidence of third-party culpability was also relevant in the penalty phase to show lingering doubt. (See *People* v. *Terry* (1964) 61 Cal. 2d 137, 145--146 [jury may determine that guilt proven beyond reasonable doubt but still demand greater degree of certainty for imposing of death penalty].)

Yet the trial court also excluded the evidence of lingering doubt at the penalty phase re-trial. (SC RT 12259--12262, 13055 – 13064.) Again, the trial court refused to allow inquiry into Mills' third-party culpability during Angelita Williams' testimony. (SC RT 14585–14589.) The court also precluded the defense from asking Anthony Miller, the security person from Disney who fired Ardell Williams, the identity of the person who had given him the information that Ardell was stealing. Mills was the source of the information. The court said that it was third-party culpability evidence and excluded it. (SC RT 15545–15548.)

The failure to permit appellant to introduce this evidence effectively removed his ability to present a mitigating factor in violation of the Eighth and Fourteenth Amendments. (See *Sullivan* v. *Louisiana*, (1993) 508 U.S. 275 ; *Eddings* v. *Oklahoma*, (1982) 455 U.S. 104, 110 .)

Prejudice

A federal Constitutional violation requires reversal of the conviction unless the government proves that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, 386 U.S. 18 (1967).) The

beyond-a-reasonable-doubt standard of *Chapman* "requir[es] the beneficiary of a [federal] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Chapman, supra*, at 24.) Tellingly, Respondent does not even attempt to address the *Chapman* standard, alleging no Constitutional violation (RB 138), presumably because he cannot. The state's case was weak, consisting solely of circumstantial evidence of appellant's motive, alleged attempts to dissuade witnesses, and "intense" relationship with Yancey. Such quantum of evidence would not even meet the *Hall* standard, if the state was required to make a proffer similar to the defense. If the defense was allowed to introduce solid evidence that Williams' family believed that Mills was the killer, that Mills had repeatedly threatened Williams, that he was in her house just days before the crime, and that he lived close to her, the verdict would have been different.

Even under the standard articulated in *People* v. *Watson*, *supra*, 46 Cal.2d 818, 836-837 [reasonable probability of more favorable result had the evidence been admitted], reversal is still required. The obvious importance of the excluded evidence to appellant's defense, combined with the weakness in the prosecutor's case, differentiates this case from those in which this Court found trial error in rejecting evidence of third-party culpability to be harmless. For instance, in *Hall, supra*, 41 Cal. 3d at 835,

the error was held to be harmless because evidence directly linking the third-party to the crime was amply placed before the jury in other ways, and the proffered evidence did not exonerate the defendant. Similarly, in *People* v. *Cudjo* (1993) 6 cal. 4th 585, 612 – 613, the Court concluded that the error was harmless because both prosecution and defense evidence conclusively placed the defendant at the crime scene; there was overwhelming evidence that only one person was at the crime scene at the pertinent time; and there was strong evidence impeaching the defense theory.

The excluded evidence related to the third-party culpability in this case was far more crucial to the defense than the excluded evidence in *Hall* or *Cudjo*. Here, the prosecutor neither adequately presented nor rebutted evidence of third-party culpability. Moreover, the prosecutor supplied only tenuous circumstantial evidence of appellant's involvement. It was certainly no more substantial than the evidence of Tony Mills' involvement. Without the third-party culpability evidence, appellant was entirely precluded from presenting his defense to the capital murder. Reversal of the convictions concerning the killing of Ardell Williams is required.

CLAIM 36
THE TRIAL COURT ERRED BY ADMITTING INTO EVIDENC E A TAPE RECORDING AND TRANSCRIPT OF AN OUT-OF-COURT INTERVIEW BETWEEN MATTHEW WEAVER AND INVESTIGATOR GRASSO. SECTION 356 WAS NOT APPLICABLE IN THIS SITUATION AS NO PART OF THE TAPE AND TRANSCRIPT HAD PREVIOUSLY BEEN ENTERED INTO EVIDENCE. THIS ERROR VIOLATED APPELLANT'S RIGHTS TO CONFRONTATION, DUE PROCESS AND A RELIABLE DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEEN AMENDMENTS.

Matthew Weaver's testimony was critical to the prosecutor's case since he was the only witness who could place appellant at the scene of the Comp U.S.A. crime. His importance is shown by the fact that he was called as a witness at the Grand Jury, the trial of Eric Clark, the preliminary hearing of appellant and Antoinette Yancey, and at the trial of appellant. (SC RT 8171-8176.) In essence, his testimony was that he was a good kid who was duped into being present at the Comp U.S.A. crimes by Damian Wilson and Eric Clark, with whom he played basketball. (SC RT 8099-8169). He agreed to help Eric Clark move computers for his brother, appellant, in return for $100. (SC RT 8000-8098.) On October 18, 1991, he was present at the Fountain Valley Comp U.S.A. store with Damian Wilson, Eric Clark, appellant, and a man in a silk shirt. (SC RT 8045-8047.) He did not suspect he was involved in anything illegal until the gold BMW he was traveling in (allegedly driven by appellant) pulled into the

Comp U.S.A. car park and he saw a lady laying on the ground[10] and two police cars appear. (SC RT 8054-8053.) Appellant then drove the car away from the scene and dropped Weaver and the man in the silk shirt off at a car-dealership about 10 - 15 minutes drive from Comp U.S.A. (SC RT 8050-8064.)

Weaver's testimony was inherently unreliable. As expressed by the trial judge:

> He [Weaver] admitted he had perjured himself at prior hearing. He admitted he had lied...to many people, investigators, his family, girlfriend, father et cetera...and he has had an amazing history of I can't remembers, both in my court and in prior statements attributed to him...it would seem to me that Mr. Weaver's motives from day one have been to protect his own skin. (SC RT 8190-8191.)

During cross-examination, defense counsel questioned Weaver about the conversations he had with Inspector Grasso in which he confessed to his involvement in the Comp U.S.A. crime. Based on this cross-examination, the prosecutor sought to have the tape of Investigator Grasso's interrogation of Weaver admitted pursuant to section 791(b).The prosecutor argued that the tape was admissible because the defense alleged that the prosecution of appellant was racially motivated. (SC RT 8206.) The court denied this request and the prosecutor then sought to have the material admitted under

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[10] The first time Weaver testified to seeing the lady on the ground was at appellant's trial. He said that he did not testify to this in the previous occasions because "I had no involvement of it, and I didn't want people to think that I was involved in it and in fact that I'm not". (SC RT 8178)

section 356 of the Evidence Code. (SC RT 8245-8246.) The prosecutor argued that the transcript belied repeated inferences by the defense that the police had spoon-fed Weaver the information on which his testimony was based, and that pursuant to section 356 the whole of the interview should be admitted to show that the information in fact came from Weaver himself. (SC RT 8440-8441.) In response, defense counsel argued that their sole reason for introducing parts of the conversation during cross-examination was to refresh Weaver's recollection as to events and that section 356 was not intended to encompass such a usage. (SC RT 8443.) Ultimately, the court admitted the taped evidence pursuant to section 356, finding "that once in a while you showed him the transcript and said does that refresh your memory, but there are many more references to the conversation where it was more, far more than that. And the court believes section 356covers this." (SC RT 8445.) This ruling was an abuse of discretion as it ignored the plain wording of section 356 which requires the act, declaration, conversation or writing be "given in evidence" before section 356 can be applied.

> Evidence Code 356 reads in pertinent part:
>
> Where part of an act, declaration, conversation, or writing is *given in evidence* by one party, the whole on the same subject may be inquired into by an adverse party... (Emphasis added.)

Respondent concedes that the transcripts were used only to refresh

Weaver's recollection on cross-examination and that no portion of the transcripts was ever put into evidence. (RB 144.) Therefore, neither the transcript nor the tape were "given in evidence" pursuant to section 356. However respondent argues that this is not fatal to the admission of the transcripts pursuant to section 356 since that section expressly applies to conversations as well as writings: "It was not Clark's counsel's use of the transcripts of the interviews to refresh Weaver's recollection that justified the admission of the entire tape recorded conversations under Evidence Code section 356, but his repeated references in his cross-examination to selected portions of those conversations." This is an obvious misstatement as to the breadth of section 356 as it implies that the admission of a part of one type of evidence (statements about the contents of a conversation between Grasso and Weaver) opens up the possibility of admitting into evidence another type of evidence on the same subject (the tapes and transcripts of the conversation.) This is clearly not the result anticipated by section 356, which is sometimes referred to as "the statutory version of the common law rule of completeness." (*People* v. *Parrish* (2007) 152 Cal.App.4th 263, 269.) "According to the common-law rule: ""[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the

utterance.'" (*Ibid*, quoting *Beech Aircraft Corp.* v. *Rainey* (1988) 488 U.S. 153, 171 quoting 7 J. Wigmore, Evidence in Trials at Common Law s2113, p. 653.) Clearly, the part and the remainder must be part of the same utterance, otherwise the original rule of completeness would be broadened beyond recognition. Section 356 itself distinguishes between four different types of "utterances": acts, declarations, conversations and writings (such as a transcript.)

Respondent cites *People* v. *Sanders* (1995) 11 Cal.4th 475, 520 as authority in support of their argument that the tape recording was properly admitted since parts of the "conversation" had already been admitted into evidence. (RB 144-145). Respondent summarizes *Sanders* as follows: "where defense counsel elicited portions of investigative interview with witness, prosecution not foreclosed from inquiring into context of statements on redirect examination of witness and cross-examination of investigator." (RB 145.) However, what Respondent does not state is that the prosecutor in *Sanders* was limited solely to inquiring into the context of statements on redirect examination, and "was not entitled to review any portion of the tape or transcript under Evidence Code 356[11]." (*Sanders*,

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[11] *Sanders* was prior to proposition 115 and thus the defense was not required to disclose the tape or transcript of the defense investigator's interview to the prosecution. The issue was then whether section 356 allowed the defense counsel access to review to the tape and transcript (for the purpose of re-examination) rather than whether the tape and transcript

supra, p. 520.) This was because, like in the present case, defense counsel "expressly did not seek to have any portion of the recording or transcript entered into evidence. Indeed, she agreed not to read any portion of the transcript." (*Sanders, supra*, p. 519.*)* Following the reasoning in *Sanders*, the prosecutor should have been limited to questioning the witness on re-examination as to the contents of the conversation, but should not have been entitled to admit any portion of the tape or transcripts that recorded that conversation into evidence because the transcript was not admitted into evidence.

There was no question that the prosecution was free to question Weaver about his conversations with Investigator Grasso. Indeed on both direct and redirect examination the prosecutor asked Weaver about his conversations with Grasso (SC RT 8086-8098, 8178, 8223-8224) without objection by the defense. The issue in the present case is whether section 356 allows the admission of tapes and transcript of a conversation where those tapes and transcript are not admitted into evidence. Following the

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should be admitted into evidence. This does not however effect the reasoning of the court and to the application of section 356, as shown by the court's treatment of *People v. Zapien* (1993) 4 Cal.4th 929, a case in which section 356 was used to admit into evidence the transcript of a witness's testimony in a prior hearing. *Sanders* distinguished *Zapien* on the grounds that the defense in *Zapien* introduced portions of a transcript into evidence, meaning that the prosecutor could therefore use section 356 to introduce the remainder of that transcript. *Sanders*, *supra*, 11 Cal.4th 475, 520, fn 12.

decision in *Sanders*, there is no doubt that the tapes and transcript should have been excluded.

Respondent asserts that the facts in the present case are "precisely the situation evidence code 356 is designed to address" (RB 144) and cites *People* v. *Arias* (1996) 13 Cal.4th 92, 156 in support. In *Arias* the court considered whether section 356 allowed the defense to cross-examine a witness about a conversation that had previously been admitted into evidence by the prosecution. As quoted by respondent, the court stated that "[t]he purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression of the subjects addressed." (*Ibid.*) (RB 143.) However, this finding does little to advance respondent's position. At trial the prosecution was free to correct any misleading impressions they believed had been created by the defense during cross-examination by further questioning the witness on the details of the conversation during re-examination. The defense did not object to the prosecutor's reexamination of Weaver about the conversations he had with Investigator Grasso. However, the subject conversation in *Arias* was unrecorded, and thus the admission of a tape recording or transcript of a conversation was not discussed. The facts in the present case are therefore not "precisely the situation" anticipated in *Arias*. (*People* v. *Arias*, *supra,* 13 Cal.4th 92.)

Similarly, Respondent quotes *People* v. *Harris* (2005) 37 Cal.4th 310 (RB 143) which outlines a broad approach to section 356. The quoted portion states that the remainder of the evidence is properly admitted were it has "some bearing upon, or connection with, the admission or declaration in evidence." (*People* v. *Zapien*, (1993) 4 Cal.4th 929, 959.) (RB 143)[12]. However, as in *Arias* above, this approach relates solely to the scope of cross-examination or re-examination allowed pursuant to section 356. (*People* v. *Arias, supra*, 13 Cal.4th. 92.) This is made clear from the fact that the quotation is directly preceded by the statement that "A witness may be cross-examined on any matter within the scope of direct examination."[13] (*Harris, supra*, p. 334.) Yet *Harris* does not provide authority for

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[12]Respondent cites this quotation as *People v. Harris* quoting *People v. Zapien*. In fact the quote in *Zapien* is in fact a quote taken from *People v. Hamilton* (1989) 48 Cal. 3d 1142, 1174, and that quote, which quoted from *Rosenberg v. Wittenborn* (1960) 178 Cal.App.2d 846. The original quote is taken from 20 American Jurisprudence, section 551, p 463. (*People* v. *Harris, supra,* 37 Cal.4th 310.)

[13]In addition, none of the cases in the string of precedent that use the quote address the admission of a tape recording under section 356 where only testimony of that conversation has previously been admitted. In *Harris* the discussion related to the examination of a witness in relation to an unrecorded telephone conversation. (*Harris, supra*, 37 Cal.4th 310, 334.) In *Zapien* the issue was the scope of cross-examination by the defense in relation to an unrecorded conversation between defendant and his mother. (*Zapien*, *supra*, 4 Cal.4th 929, 958-961.) In *Hamilton* the defense admitted into evidence portions of a tape recording of a witness's prior confession. The prosecution was then allowed to play the whole of the tape pursuant to section 356. *Hamilton*, *supra* p. 1174. In *Wittenborn*, the court considered the scope of re-examination by the prosecution where the defense had cross-examined a police officer about the unrecorded statements made to him by the defendant.

respondent's contention that the admission of testimony about a conversation allows the admission of a taped recording of that conversation pursuant to section 356. As discussed above, the scope of the cross-examination or re-examination is not at issue here.

Confrontation Clause

The admission of the tape and transcript violated the Confrontation Clause of the Sixth Amendment, as construed in *Crawford* v. *Washington, supra,* 541 U.S. 36. Respondent states that appellant forfeited any objection on Confrontation Clause grounds by failing to object under the Confrontation Clause to the admission of the tape recordings at trial, citing *People* v. *Burgener*, (2003) 29 Cal.4th 833. (RB 142 fn 34.) However given that the subject trial preceded *Crawford*, the case on which the Confrontation Clause objection is based, the general rule as outlined in *Burgener* is irrelevant. Respondent acknowledges this by citing *People* v. *Johnson, supra,* 121 Cal.App.4th 1409 in which the Confrontation Clause objection was not forfeited where trial occurred before the decision in *Crawford.* In *Johnson* the Court of Appeal found that the failure to object on *Crawford* grounds "was excusable, since governing law at the time of the hearing afforded scant grounds for objection." (*People* v. *Johnson, supra,* 121 Cal.App.4th 1409, 1411.)

Crawford changed the basis for objection under confrontation

clause grounds. In *Crawford* the United States Supreme Court held that out-of-court statements by witnesses that are testimonial, are barred, under the confrontation clause, unless witnesses are unavailable and defendants had a prior opportunity to cross-examine witnesses, regardless of whether such statements are deemed reliable by the court. This abrogated the previous standard as formulated in *Ohio* v. *Roberts* (1980) 448 U.S. 56; that admission of evidence that bears "the indicia of reliability" (that is, it "falls within a firmly rooted hearsay exception" or exhibits "particularized guarantee[s] of trustworthiness") "comports with the 'substance of the constitutional protection'." (*Roberts*, *supra*, p. 66.) Further, *Crawford* rejected the view that the confrontation clause applied only to in-court testimony, stating that it applies to all testimonial evidence, including "statements taken by police officers in the course of interrogations." (*Crawford*, *supra*, 541 U.S. 36, 52.)

Following the reasoning in *Crawford*, the record of interviews between Weaver and Inspector Grasso should have been barred as they were out-of-court testimonial evidence. It could not be admitted firstly because Weaver was available to testify and secondly, there was no opportunity for the defense to cross-examine during the interviews. "We similarly excluded accomplice confessions where the defendant had no opportunity to cross-examine." (*Crawford*, *Id*, 57.)

Reversal is required

Reversal is required because respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra*, 386 U.S. 18.) Alternatively, respondent cannot show that there was no reasonable probability the error affected the verdict adversely to appellant. (*People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck* v. *Alabama, supra,* 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens, supra*, 462 U.S. 862, 879; *Woodson* v. *North Carolina*, *supra,* 428 U.S. 280, 304; *Johnson* v. *Mississippi* , *supra,* 486 U.S. 578, 584-85.)

CLAIM 37
THE PROSECUTOR COMMITTED MISCONDUCT BY CIRCUMVENTING THE TRIAL COURT'S EXPLICIT RULING PROHIBITING INTRODUCTION OF EVIDENCE OF APPELLANT'S PRIOR THEFTS OF COMPUTERS

Trial Court's Ruling and Applicability of Evidence Code Section 1101(a)

The prosecution made a pre-trial motion requesting admission under Evidence Code section 1101(b), of evidence of five computer store thefts in Los Angeles County in 1989. (6 CT 2008.) The prosecution argued that

these thefts were relevant to show that appellant was "in the business of stealing computers. This is relevant and probative evidence of the motive defendant William Clark had in recruiting Matt Weaver, Jeanette Moore, and possibly Ardell Williams for their role in the intended burglary of the Comp U.S.A. store in Fountain Valley. It also explains why defendant William Clark was at the scene of the Comp U.S.A. and driving a getaway car." (6 CT 2016.) The prosecution's motion made no mention of the 1990 computer store thefts.

At the hearing on the motion, both defense counsel (SC RT 2831) and the trial court (SC RT 2834, SC RT 2835) specifically and repeatedly asked the prosecution to list the prior crimes it sought to introduce. In no uncertain terms, the prosecution twice stated that it only intended to introduce evidence of the 1989 prior thefts. (SC RT 2833-2835.) The trial court then stated its understanding that it was only considering the 1989 thefts. "We are only looking at the 1989 computer burglaries, the series on which the defendant was bound over in one prelim . . ." In framing the issue, the court stated as the possible 1101(b) grounds for admissibility, motive, opportunity, intent, preparation, plan, and knowledge. (SC RT 2836, RT 2838.) The court stated that the crimes did not have the requisite level of similarity to show identity. (SC RT 2841.)

The trial court denied the prosecution's motion to introduce their

proffered evidence (and only computer theft proffered evidence) of the 1989 computer store thefts pursuant to Evidence Code section 1101(a). "The motion to bring in specific evidence concerning the walk-in computer thefts in Los Angeles is denied." (SC RT 2946.) The trial court reasoned, "(W)hy is the fact that computers were taken for money or profit has any particular relevance in this case? . . .This is a man who is out to steal. He will steal anything. He's out to steal jewelry. He's out to steal traveler's checks. He's out to steal one computer at a time or a warehouse full of computers. So why do the specifics of the five walk-in computers in Los Angeles have anything in particular to do–other than to show bad character and a propensity to steal?" (SC RT 2927.) The trial court took pains to reach the correct decision, stating "I spent quite a bit of time in 1101(b) annotations looking for something to support the People's theory. And if you want some time and want to try and find me a case, I can see why you want the evidence, Mr. King, but no matter how I look at it and no matter how I apply the cases that I started reviewing when I left the bench yesterday and continued this morning, I don't see anything that supports the admission." (SC RT 2933.) The trial court carefully analyzed each listed ground for admission in Evidence Code section 1101(b), including motive (SC RT 2331-2332) and concluded, "But I just don't see the relevance of particulars of five walk-out computer thefts to 1101(b)." (SC RT 2936.)

In its analysis, the trial court made clear that its ruling applied to ALL prior walk-in thefts of computers. Speaking to the prosecutor, the court asked, "(W)hich of those prongs do you believe specific testimony about four or five or however many walk-in computer thefts in preceding years fall into those categories? And which category, motive? His motive is to steal in taking those, it's to make money. And that just shows he is a person of bad character. Opportunity, there is nothing about the Los Angeles thefts, so far as I know or you have argued or given me evidence of, that relates to his opportunity to commit the crime in question, which is the Cal Comp. His intent. That practically blends into motive in this case." And so on. (SC RT 2931-2932.)

The prosecutor repeatedly stated their rationale that the evidence was relevant to show appellant's interest in computers. (SC RT 2928, 2930, 2933, 2935.) In a last ditch effort, the prosecution presaged respondent's argument (RB 149) that the walk-in computer thefts were relevant to show appellant's closeness with Ardell Williams and motive to have her killed. (SC RT 2938.) But the trial court specifically rejected this rationale, holding that while this theory supports the admission of the Las Vegas traveler's check prior crimes (which was introduced in the guilt phase), it does not support admission of the walk-in computer thefts. (SC RT 2938-2939.)

Prophetically and knowing the prejudicial nature of such prior crimes evidence, the trial court stated, "I am not going to risk an entire trial on 1101(b) evidence. The cases tell us that. And I'm not going to risk this case for the wrong ruling on that . . . I'm not going to add a new category of interest to 1101(b) to justify this man loves to take computers and this was a computer rip off. I agree, it certainly does tend to show his disposition to commit crimes, but that's exactly what we're not supposed to use 1101(b) for." (SC RT 2934.)

Trial Testimony and Subsequent Hearing

Disregarding the court's ruling, the prosecution called Richard Highness as a witness. Highness testified that on November 1, 1990, he was working as an employee of Soft Warehouse in Torrance, CA. Soft Warehouse later changed its name to Comp U.S.A. On November 1, a person who identified himself as Tom Jones, came into the store. In response to the prosecutor's blatantly misleading question ("You see the person that's sitting with the sweater on between the two individuals who have the tie on?"), Highness identified appellant as Tom Jones. Highness testified that Ardell Williams had let the man take about $10,000 worth of computer equipment out of the store without ringing up the transaction. (SC RT 8585-8594.)

The day after Highness testified, the trial court expressed its

concerns to the prosecutor. First, the trial court pointed out that 1990 Soft Warehouse theft was not addressed in the prior 402 hearing. The trial court also stated that "the other thing that concerns me about it was I was unprepared for the fact that he was going to make an in-court identification of Mr. Clark. . . . Nevertheless, there was an in-court identification of Mr. Clark as a – as the most active participant in the incident. The court had no reason to know that was coming, and had no reason to give any kind of a limiting instruction on the use to which that testimony may be put. My recollection on the 402 hearings on the other wrongful acts by Mr. Clark is that those signature ones were admissible, the individual walk-in, carry-outs were not." (SC RT 8604.) The defense complained that he had specifically asked at the 402 hearing for a list of 1101(b) crimes that the state planned to introduce. The defense cogently stated, "They gave a list of crimes they planned to introduce as to Mr. Clark. This was not included." (SC RT 8605.) As respondent later does (RB 146), the prosecutor illogically attempted to rationalize his misconduct by reiterating that the 1990 crime was not part of the 402 hearing. (SC RT 8606.) Such a response totally misses the point that the state was asked to list ALL the crimes it planned to introduce, and failed to mention the 1990 crime, referring only to the 1989 thefts.

Respondent's Argument

Respondent argues that appellant "forfeited this claim by failing to object and seek an admonition in the trial court and, in any event, no prosecutorial error occurred because the evidence was admissible and not the subject of the trial court's earlier ruling excluding evidence of certain 1989 computer thefts." (RB 146.) Respondent further argues that there was no prosecutorial misconduct since the prosecutor did not knowingly elicit testimony that was inadmissible in the present proceedings, as the evidence of the 1990 Soft Warehouse theft was different in character from the 1989 computer thefts which the trial court had previously ruled inadmissible and was not the subject of the prior ruling." (RB 147.) Respondent argues that the "Soft Warehouse theft was independently relevant to show Clark's prior relationship with Ardell Williams, as well as his motive and intent to murder her." (RB 149.) Respondent relies on *People* v. *Douglas, supra,* 50 Cal.3d 468, 510 for this proposition. (RB 149.)[14]

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[14]Respondent's argument contains other irrelevancies. For instance, Respondent implies that the issue is somehow waived because the prosecutor referred to the Soft Warehouse robbery, without objection, during opening statement. (SC RT 7471; SC RT 8606; RB 148.) Yet counsel's arguments are not evidence. *Maudlin* v. *Pacific Decision Sciences Corp.* (2006) 137 Cal.App.4th 1001, 1015. Respondent also argues that appellant abandoned his objection to Ardell Williams' prior statements being offered for their truth. (SC RT 2915-2922; RB 148.) Yet the abandonment of that objection does not mean appellant abandoned his objection to the introduction of otherwise inadmissible prejudicial prior crimes evidence, especially that of another Comp USA burglary.

Respondent misleads this Court, both factually and legally. Taking each misstatement in turn, let's begin with the forfeiture argument. A defendant will be excused from the necessity of either a timely objection and/or a request for admonition if either would be futile. (*People* v. *Hamilton, supra,* 48 Cal.3d 1142, 1189, fn. 27; *People* v. *Hill* (1998) 17 Cal.4th 800, 820, citing *People* v. *Arias*, *supra,* 13 Cal.4th 92 and *People* v. *Noguera* (1992) 4 Cal.4th 599, 638.) An objection would have been futile in this instance because the trial court had previously ruled that all prior walk-in computer thefts were inadmissible, but the prosecutor chose to blatantly disregard this ruling by calling as a witness Mr. Highness. When a prosecutor chooses to disregard a binding ruling, any objection would be futile because the trial court has already ruled in the defense's favor. Likewise, failure to request the jury be admonished does not forfeit the issue for appeal if "an admonition would not have cured the harm caused by the misconduct." (*People* v. *Bradford* (1997) 15 Cal.4th 1229, 1333, quoting *People* v. *Price*, *supra,* 1 Cal.4th 324, 447; *People* v. *Green* (1980) 27 Cal.3d 1; *People* v. *Pitts, supra,* 223 Cal.App.3d 606.) In this case, the harm was done, and could not be undone, when Highness identified appellant in front of the jury in response to the prosecutor's improper, leading question.

Next, respondent attempts to justify the misconduct as not

knowingly perpetrated, by illogically arguing that evidence of the 1990 prior walk-in computer store thefts were "not the subject of the trial court's earlier ruling excluding evidence of certain 1989 computer thefts." (RB 146-147.) Yet the evidence concerning the 1990 thefts was not subject to the trial court's ruling because the prosecutor sandbagged the court. Both the defense attorney (SC RT 2831) and the trial court (SC RT 2834, SC RT 2835) specifically and repeatedly asked the prosecutor to list the prior crime evidence he sought to introduce. His oral responses and pleadings only mentioned the 1989 crimes. As such, the trial court had no occasion to rule on the admissibility of the 1990 crimes because the prosecutor never gave the court a chance to so rule.

Next, respondent argues that evidence of the 1990 crimes would have been admissible because it was "relevant to show Clark's prior relationship with Ardell Williams, as well as his motive and intent to murder her." (RB 149.) Respondent relies on *People* v. *Douglas, supra,* 50 Cal.3d 468, 510 for this proposition. This argument fails for many reasons. First, *Douglas* is inapt since it concerned identity, not motive, as the 1101(b) grounds for admission. Yet all the parties below conceded that the prior walk in computer thefts could not come in to prove identity. (SC RT 2841.) Second, the trial court specifically considered and rejected motive as a grounds for admission of the 1989 walk-in thefts, and there is

nothing to distinguish the 1990 thefts so as to justify admission. At trial, the prosecution made the same argument that the walk-in computer thefts were relevant to show appellant's closeness with Ardell Williams and motive to have her killed. (SC RT 2938.) But the trial court specifically rejected this rationale, holding that while this theory supports the admission of the Las Vegas traveler's check prior crimes (which was introduced in the guilt phase), it does not support admission of the walk-in computer thefts. (SC RT 2938-2939.) Furthermore, the trial court's holding was explicit that NONE of the walk in thefts were admissible. In light of this record, it is inconceivable that the prosecutor did not know that calling Highness as a witness was misconduct, even though the defense need not show knowing misconduct.

To constitute a violation of the federal Constitution, prosecutorial misconduct must "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." (*Darden* v. *Wainwright* (1986) 477 U.S. 168, 181; *People* v. *Prieto* (2003) 30 Cal.4th 226, 260.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People* v. *Earp* (1999) 20 Cal.4th 826, 858; *People* v. *Price, supra,* 1 Cal.4th 324, 447.) Yet bad faith is not necessary to prevail on a

claim of prosecutorial misconduct. "But the defendant need not show that the prosecutor acted in bad faith or with appreciation for the wrongfulness of the conduct, nor is a claim of prosecutorial misconduct defeated by a showing of the prosecutor's subjective good faith." (*Price*, *supra*, 1 Cal.4th 324, 447.)

A prosecutor engages in misconduct by intentionally eliciting inadmissible testimony. (*People* v. *Smithey* (1999) 20 Cal.4th 936, 960.) "The deliberate asking of questions calling for inadmissible and prejudicial answers is misconduct." (*People* v. *Fusaro* (1971) 18 Cal.App.3d 877, 886.) It is misconduct to elicit or attempt to elicit inadmissible evidence in violation of a court ruling. (*Price*, *supra*, 1 Cal.4th 324, 451.)

As the United States Supreme Court stated many years ago, "While this Court has never held that the use of prior convictions to show nothing more than a disposition to commit crime would violate the Due Process Clause of the Fourteenth Amendment, our decisions exercising supervisory power over criminal trials in federal courts, as well as decisions by courts of appeals and of state courts, suggest that evidence of prior crimes introduced for no purpose other than to show criminal disposition would violate the Due Process Clause. Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged. A jury might punish an accused for being guilty of a

previous offense, or feel that incarceration is justified because the accused is a 'bad man, without regard to his guilt of the crime currently charged.' Of course it flouts human nature to suppose that a jury would not consider a defendant's previous trouble with the law in deciding whether he has committed the crime currently charged against him. As Mr. Justice Jackson put it in a famous phrase, '(t)he naive assumption that prejudicial effects can be overcome by instructions to the jury all practicing lawyers know to be unmitigated fiction.' (*Krulewitch* v. *United States* (1949), 336 U.S. 440, 453 (concurring opinion), *United States ex rel. Scoleri* v. *Banmiller*, (1962) 310 F.2d 720 .) Mr. Justice Jackson's assessment has received support from the most ambitious empirical study of jury behavior that has been attempted..." (*Spencer* v. *Texas* (1967) 385 U.S. 554, 573 et seq.) The *Spencer* Court then went on to hold that using evidence of prior crimes only to illustrate bad character violates due process.

In this case, the prosecutor's knowing disregard of the trial court's ruling prohibiting evidence of ALL prior walk-in computer thefts violated the Due Process clause because Highness's testimony infected the entire trial with unfairness. Alternatively, the misconduct constituted deceptive or reprehensible methods to attempt to persuade the jury. Highness's testimony was especially prejudicial, since the Soft Warehouse where the 1990 crime occurred later became a Comp U.S.A. (48 RT 8585-8594.), thus

suggesting to the jury that appellant must have been responsible for the subsequent Comp U.S.A. botched robbery that he was charged with committing. The evidence was also prejudicial because it suggested appellant's criminal connection with Ardell Williams. "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely carful analysis'." (*People* v. *Ewoldt* (1994) 7 Cal.4th 380, 404.) Any subsequent limiting instruction (7 CT 2671) could not undo the harm and any belief to the contrary is "unmitigated fiction."

Reversal is required because respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra,* 386 U.S. 18). Alternatively, respondent cannot show that there was no reasonable probability the error affected the verdict adversely to appellant. (*People* v. *Watson*, *supra*, 46 Cal.2d 818, 836.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense (*Beck* v. *Alabama*, *supra*, 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant v. Stephens, supra,* 462 U.S. 862, 879; *Woodson* v. *North Carolina*, *supra,* 428 U.S. 280, 304; *Johnson* v. *Mississippi, supra,* 486 U.S. 578, 584-85).

CLAIM 41
THE TRIAL COURT ERRED WHEN IT ADMITTED PREJUDICIAL DOCUMENTS FOUND IN YANCEY'S APARTMENT IN CONTRAVENTION OF EVIDENCE CODE SECTIONS 1101(a) AND 352. THIS ERROR WAS A VIOLATION OF APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

This claim incorporates relevant parts of respondent's brief as contained in claims 26, 27 and 41.

Proceedings in the Trial Court

Before trial, the People submitted a "laundry list" of documents that they sought to enter into evidence. (SC RT 3024.) The list contained documents that were seized pursuant to a search of Yancey's apartment. The search was conducted by consent and without a warrant. At trial, Judge Rheinheimer ruled that the consent was involuntary and therefore called for the suppression of the evidence in respect of Yancey. However, as appellant lacked standing under the Fourth Amendment to challenge the search, the documents were admissible as against him. The trials were then severed, and the evidence was offered against appellant. (SC RT 12276-12277.) The defense objected to the admission of three categories of documents:

1. Ten handwritten letters authored by appellant and addressed to Yancey (SC RT 3038);
2. The "Billy file," which was a file folder marked "Billy" containing various letters and an inventory of expenses, all in appellant's

handwriting (SC RT 3048);

3. A letter dated March 9, 1994 from appellant to Yancey that says "Baby, I will be in bed with you in a few weeks. Stay strong, and be careful." (SC RT 3051.)

The prosecutor argued that the documents were relevant to show the relationship between appellant and Yancey and to establish the existence of a conspiracy. (SC RT 3042 - 3046.) The prosecutor argued that it was "extremely important for the People's case to show the relationship between Clark and Yancey" because appellant had an ironclad alibi on the Williams murder due to his incarceration. (SC RT 3043.) Further, the prosecutor argued that "[t]he only thing that we have [to prove that relationship]...is [the letters]...That is it." (SC RT 3044.) The People argued that the letters showed that appellant and Yancey were "very close," not just because of the contents, but because they spanned a period of two years, over which time Yancey had moved houses but kept the letters with her when she moved. (SC RT 3044- 3046.) The prosecutor also argued that the Billy file was relevant to show "some planning of economic dimensions between Mr. Clark and Ms Yancey...and again, it's offered to show the intense relationship between the two. I mean they are discussing their finances together." (SC RT 3049.) Finally, the prosecutor argued that the letters should be admitted in their entirety "because to edit

the letters, to delete any of the letters will take away from the legitimate force and effect of the probative value of this evidence." (SC RT 3046 & 3038.)

In response, defense counsel objected to the admission of the letters and the Billy file on Evidence Code section 352 grounds, since the language and description of specific acts contained in the letters was highly prejudicial. (SC RT 3038.) The prejudice caused by the letters is indisputable. They contain explicit sexual fantasy, in which appellant writes at length about such things as having sex in public, having sex for two to four days without stopping, anal sex, oral sex, watching other men with his woman or lesbians having sex, bondage, incest, group sex and videotaping sex. In addition, the tone and language of some of the letters is highly prejudicial:

> Nina, you fuck me so good I can't believe it. Your pussy is incredible. I can't live without it. But, your pussy has nothing on your mouth. I need you to suck a dick for me. Find somebody who all you do is suck their dick. No pussy bitch. Just suck their dick. Get them sprung on your mouth and take their money. Suck some dick for me bitch. I need you to suck dick as well as sell pussy hoe. Suck a dick by Sunday asshole. Fuck you forever! Billy. (Exhibit 97, p 2632.)

The defense also argued that the probative value of the letters was low because appellant did not dispute that he had a close personal relationship with Yancey (SC RT 3053), and in any event the relationship could be proven by alternative methods, such as visitation and telephone

records. (SC RT 3053.) Appellant also objected that the documents mentioned other crimes, thereby creating the risk that the jury would use them for "...character evidence, for honesty and veracity," rather than for the limited purpose of showing a relationship between Yancey and appellant. (SC RT 3055.) Lastly, appellant complained that the letters lacked context, as many were undated, or referred to other letters that were not in evidence. (SC RT 3054.)

The prosecution argued that the March 9, 1994 letter was relevant to show appellant's intention to be with Yancey in a few weeks, even though he was in prison and his case was stayed at the time. (SC RT 3052.) Appellant objected on the grounds that this was pure speculation and was likely to be misinterpreted by the jury, which would not understand the details of appellant's previous case. (SC RT 3056-3057.)

The court ruled that all the contested documents were admissible. Specifically, the court found that the documents had sufficient probative value to prove that a relationship existed between the alleged conspirators, and were "... not so inherently prejudicial that weighing under 352 that, except for perhaps some areas I'm going to look at more specifically, there is any reason to exclude them on that basis." (SC RT 3062.) However, the court did express concern in relation to specific pages and reserved the right to hear further submissions and objections from counsel on these issues.

The next day, appellant's counsel argued that the letters were "disgusting" and could not be edited "where the jury isn't looking at an edit and saying what's going on here, because there is just no way of doing that." (SC RT 3159.) Defense counsel agreed to admit some of the letters that "are not as bad as the others" while instructing the "jury that there is more letters, that the jury is not being given them all because they don't have to be exposed to the same kind of language over and over again, and they will get all the flavor of their relationship." (SC RT 3159.) Counsel then specifically sought the exclusion of a number of letters within Category One because they contained sexual references, disgusting language, and descriptions of offensive acts such as drinking urine. (SC RT 3164-3165.)

In relation to the bad language, the court said: "I think the jurors are going to say this is how Mr. Clark talks, this is part of Mr. Clark, and I don't know how much I can clean up his act, so to speak, without depriving the people of evidence that they believe is critical to their burden." (SC RT 3161.) The court requested that counsel segregate specific letters that the defense objected to so that it could rule on those objections. (SC RT 3163.) In response, Counsel objected to exhibit 22, pages 2605-2610, 2611-2619, 2627-2632, 2653 -2654, 2671-2674, 2675, 2682 and 2689-2690, based on the disgusting language or sexual references contained in those pages. (SC RT 3164-3166.) The People consented to the exclusion of pages 2671-2674 as it was a letter not authored by Clark, but wished to offer the remainder of the letters. (SC RT 3166.) The Court ruled that pages 2675-2681, 2605-2610, 2659-2664 were to be omitted. (SC RT 3171-3176.) It admitted the remainder of the pages. The court made no comment on the Evidence Code section 352 balancing requirement when making these specific orders, except to say that page 2659 did not add anything much to the overall relevancy and so was not admissible. (SC RT 3175-3176.)

Regarding the Billy file, appellant sought exclusion of pages 2699 and 2698. Before defense counsel could articulate the grounds on which the objection to page 2699 was based, the court asked "I suppose this is 1101(b) type objection?" to which counsel responded "yes." (SC RT 3167.)[15] Page 2699 reads:

> Here's the people we MUST have on our team.
> TRW - person who can access credit profiles
> Bank – names, drivers license numbers, SSN #'s, addresses, etc
> D.M.V. – I.D's etc
> Social Security Administration – SSI cards, names, etc.
> Printer – one who can duplicate checks, ID, etc. "Post office employee - credit cards, etc.[16]

Defense counsel objected that the evidence did not tend to prove a disputed fact since it bore "nothing of the earmarks of Jeanette Moore," including the absence of any mention of renting a van. (SC RT 3168.) The prosecution responded that the document did not even show a crime or bad act, and thus did not come within section 1101's ambit, and that in the alternative the words "D.M.V. ID's etc" went to Moore's credibility. (SC RT 3167 - 3168.)

The court's response to the prosecutor's assertion that page 2699 did

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[15] Given counsel's objection, the reference should have in fact been based on section 1101(a) rather than 1101(b). Nonetheless, the record reflects that the parties all understood the exact nature of the objection

[16] Appellant did not contradict the People's assertion that page 2699 was written by appellant to Yancey. (SC RT 3167.)

not concern criminality suggests the inherent prejudice in the letter, prejudice the court nonetheless failed to consider. The court stated, "Gee, it looks to me that they are going to get somebody inside TRW who will fink on our credit profiles, somebody at the post office who can grab credit cards that are in the mail, somebody at the bank who can pilfer my name, address, et cetera. And looks to me he's looking for one, two, three, four, five, six individuals who are willing to join up and participate in a major scam. That to me is a bad act." (SC RT 3167-3168.)

Nonetheless, the court admitted page 2699, but as shown more fully below, used the incorrect standard. The court stated that page 2699 is "circumstantial evidence, which might be open to reasonable interpretations." (SC RT 3168.) In the end, the court's prejudice analysis was backwards. Instead of carefully weighing the prejudice, the court in effect reasoned that there was plenty of other prejudicial evidence admitted against appellant, so page 2699 was not too bad. The court stated, "as to the here is the list of people we'll need, I do believe that that has relevance in view of the role of Jeanette Moore and other people played in this. I'm going to let that one in. I believe its probative value exceeds any prejudicial. There is enough prejudicial in and of itself in terms of offensive language, of course, and the connotation is certainly that they are up to, or he at least is up to something less than legal." (SC RT 3170.)

Appellant challenged this ruling because "section 1101(b) evidence is not admissible to bolster or corroborate a witness's credibility." (SC RT 3176-3177.) Defense counsel supported this proposition by reference to his earlier response to the People's motion to offer evidence under section 1101(b)[17], and a citation to *People* v. *Bunyard* (1988) 45 Cal.3d 1189, 1207, fn. 7 and the cases discussed therein. (SC RT 3177 & 6 CT 2124-2129.)

In response to this challenge, the prosecutor concocted a ground for admissibility beyond corroboration of Moore. The prosecutor asserted that the evidence showed that appellant was involved in the Comp U.S.A. plan because he had talked about "D.M.V.-ID's etc" in the letter to Yancey: "So absent Jeanette Moore, when you take this evidence that's in People's 23, and you take that certified copy of the D.M.V., and you take the rental, the U-Haul rental slip that we are going offer . . . the inference is drawn that the defendant participated in obtaining a bogus C.D.L. that was used to rent the U-Haul that was found at the crime scene at Comp U.S.A.. So there are two theories. One, that it's substantive and it shows the defendant being

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[17]The prior litigation under section 1101(b) concerned the prosecutor's attempt to introduce appellant's prior computer related crimes. In fact, the People's motion to offer evidence under section 1101(b) of the Evidence Code also acknowledged that evidence of other crimes used to corroborate a witness's testimony is inadmissible unless there are other grounds of admission under section 1101(b), such as motive. (6 CT 2022.) See claim 37 of the AOB.

involved in the plan, absent Jeanette Moore. And number two, it corroborates Jeanette Moore." (SC CT 3180.)

In response, defense counsel stated that the prosecutor's alleged ground for admission was "sliding into identity now, and my argument then would be there is insufficient marks of similarity to be admissible for identity purposes." (SC RT 3180.) Defense counsel also stated that page 2699 did not support the prosecutor's purported ground for admission–common plan–because 2699 does not have "anything about a bogus driver's license. I have D.M.V and I.D.'s et cetera. But that's not obtaining a bogus driver's license." (SC RT 3188.) Defense counsel also objected that the two and a half years between Moore obtaining the fraudulent ID and the letter seized in Yancey's apartment "detracts from the tendency in reason to prove a disputed fact." (SC RT 3188.) Ultimately, the court stood by its earlier ruling and held that page 2699 was admissible to show common plan and to corroborate Moore. (SC RT 3190.)

Appellant's counsel then objected to page 2698 in the Billy file, again based on section 1101[18]. Page 2698 states: "Baby, When you get the ID for Quesha Jackson open an account at Long Beach Bank. I'll explain to you what the benefits are. I'm really looking forward to coming home[19]."

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[18]Defense Counsel stated that page 2698 raises "more 1101(b) stuff, misconduct not charged."

[19]Appellant did not challenge the People's assertion that he had

Appellant objected that the letter suggested that he and Yancey were opening a false bank account, but this inference was contradicted by the statements Yancey made to the police (that were unavailable to the jury) that she did not believe that it was illegal because she had Jackson's permission to open the bank account. The court ruled that page 2698 was also admissible. (SC RT 3193.)

At trial, the People sought permission to distribute copies of the letters and the Billy file to each of the jurors during the examination of Detective Anderson, and an order allowing the jurors time to read the material in court. (SC RT 9534-9535.) Appellant's counsel objected that the letters "are probably the most prejudicial part of this case" and that this prejudice was increased by allowing the jury to read the letters in court, rather than providing them with copies to consider in the jury room once all the other evidence in the case had been heard. (SC RT 9535.)

The court again ruled in favor of the People, finding that it had previously ruled on the admissibility and relevance of the documents and that "the court further will not interfere in the order in which the people present their evidence." (SC RT 9537.) The copies were distributed during the examination of Investigator Anderson. (SC RT 9569-9570.) The court provided an admonition that the letters were only to be used for the "limited

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authored the letters in the Billy file. (SC RT 3048.)

purpose of tending to show the nature of the relationship between Mr. Clark and Ms. Yancey. Such evidence is not being received and may not be considered by you to show that defendant is a person of bad character or bad morals. These letters are not received and may not be considered by you in any way to show how he treats women in general or Yancey in particular, nor may they be considered by you as showing any criminal predisposition." (SC RT 9568-9569.) The People then asked Investigator Anderson general questions about the discovery of the letters in Yancey's apartment. (SC RT 9573.)

At the second penalty phase, defense counsel filed a motion in limine to exclude the letters and to enter a stipulation that appellant and Yancey had a close and intimate relationship. (SC CT 4475-4487.) The motion argued that "in light of defendant's proposal to stipulate to this fact [the relationship], and the fact that this is a retrial of the penalty phase of the trial, such evidence is irrelevant and the prejudicial impact of exposing the jury to the contents of the letters would substantially outweigh any probative value that it may have." (SC CT 4476.) Defense counsel requested an order compelling the prosecution to accept the stipulation and preventing the introduction of correspondence between appellant and Yancey without first obtaining the courts permission. (SC CT 4476.)

At the hearing of that motion, defense counsel argued that the sexual letters between Yancey and appellant do not fit within the 190.3 "factors of a through k in the penalty phase of the trial." (SC RT 12264.) The people sought to admit only 10 letters found in Yancey's apartment, letters that had been sanitized by the trial court. (SC RT 12265-12268.) The People again argued that the letters were admissible to show "an intimate and close relationship between the defendant and Miss Yancey which is relevant on the conspiracy to commit murder." (SC RT 12266.) The People rejected the defense offer to stipulate because it did not amount to a stipulation to an element of the offense. (SC RT 12266.) Ultimately, the court allowed admission of the letters. (SC RT 12399-12428.) However, it is clear that the court considered only the stipulation issue, and not the Penal Code section 190.3 or Evidence Code 352 admissibility issues:

> THE COURT: Would you like to be heard on the letters, Mr. Reed?
> MR. REED (defense counsel): No, Your honor. Well, other than what I filed-
> THE COURT: I read that stuff a long time ago. I don't – I am not going to reread it right now because if there was anything that I should be alerted to I think would you bring it to my attention. Let me see what I have here. See what my notes say. And these were being offered also for a limited purpose I believe and that was done to show not only the relationship or really a control or dominance that Mr. Clark may have had on this other person –
> MR. KING: Yes
> ...
> THE COURT: I am a little rusty. I have been doing other things, you know. And I did peruse the letters, actually read them and agree with Mr. King on the letter issue. I mean, he is inside; he is in jail and he is getting somebody to do an awful deed. And the stipulation is just

> not going to do what the people think they have to prove. So I have to agree with Mr. King on that...That it is offered for a limited purpose. (SC RT 12427-12428.)

The court later agreed to let the People distribute copies of the letters and the Billy file to each juror. (SC RT 14833.) Defense counsel indicated that they had previously objected to the admission of the documents and that that objection was continuing. (SC RT 14834.) Defense counsel also objected to the method of distribution, arguing that giving the jury individual copies as it served to highlight the evidence. (SC RT 14835-14836.) Counsel also made a specific objection to page 2699 of the Billy file, on Evidence Code section 1101(b) grounds. (SC RT 14837.) Appellant's objection was again overruled and the evidence was admitted for the "limited" purpose of showing the relationship between Clark and Yancey. (SC RT 14834-14835.) In relation to page 2699 the Court found: "So since it is for a limited purpose and they are going to be told that they can't consider it for any other purpose, I don't see how you're prejudiced, and it is relevant for that purpose." (SC RT 14839.) Copies of the letters and the Billy file were then distributed to the jury for the second time. (SC RT 14846.) The same admonition was provided that the jury should only use the documents for the limited purpose of establishing a relationship between appellant and Yancey. (SC RT 14845.) The March 9, 1994 letter was also distributed to the jury with no limiting instruction. (SC RT 14849.)

Respondent's Argument

The letters

In Claim 26, respondent argues that the letters were correctly admitted because "[t]he sexual content, though perhaps distasteful to some jurors, was essential to show how close Yancey was to Clark and how he used sexuality to manipulate her into conspiring with him to murder Williams. This could only be shown by the letters themselves." (RB 110.)

The Billy File

Respondent rehashes the prosecutor's arguments, and adds another ground for admission not considered by the trial court–that page 2698 was relevant to show appellant's identity of the mastermind of the Comp U.S.A. crime. Respondent argues that page 2698 was relevant because it was "[e]vidence of virtually identical activity [to that outlined in Moore's testimony], wherein Clark had instructed another woman, Antoinette Yancey, to obtain false identification in order to open a bank account and lay the groundwork for a scheme of which Clark would inform her of the benefits later..., tended to show Clark's modus operandi of obtaining false identification for individuals in order for them to take necessary preliminary steps for his criminal enterprises, such as renting U-Hauls or opening bank accounts, that would be more difficult to later trace than if

they had used their real names, in order to avoid identification and detection was part of his modus operandi." Respondent concludes that the evidence was therefore admissible under Evidence Code section 1101(b) to prove identity and modus operandi. (RB 164.)

Respondent also argues that page 2698 was admissible to corroborate Moore's testimony under Evidence Code section 1101(c). (RB 164.) Further, respondent states that the court was within its discretion to admit the evidence under Evidence Code section 352. (RB 164-165.) Finally, if the trial court did err, respondent claims that any such error was harmless, and so should not be reversed on appeal, citing *People* v. *Cole* (2004) 33 Cal.4th 1158, 1195, citing *People* v. *Watson, supra,* 46 Cal.2d at p.836. Respondent fails to address page 2699 of the Billy file.

Standard of Review

This court typically reviews a trial court's determination of the admissibility of evidence of uncharged offenses for an abuse of discretion. (See *People* v. *Catlin, supra,* 26 Cal.4th 81; Evidence Code Sections 350, 352.) However, "[t]o exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision." (*People* v. *Allen, supra,* 65 Cal.App.3d 426, 435.) Thus, "all exercises in legal discretion must be grounded in reasoned judgment guided

by legal principles and policies appropriate to the particular matter at issue." (*In re Adoption of Driscoll, supra,* 269 Cal.App.2d 735, 737.) Because decision making, hence discretion, is largely a process of choosing alternatives, a mistake as to the alternatives open to the court affects the very foundation of the decisional process." (*Ibid.*) Judicial discretion can only truly be exercised if there is no misconception by the trial court as to the basis for its action. *In re Carmaleta B., supra,* 21 Cal.3d 482, 496. Consequently, a decision "that transgresses the confines of the applicable principles of law is outside the scope of discretion" and is thereby an abuse of discretion. *(City of Sacramento* v. *Drew, supra,* 207 Cal.App.3d 1287, 1297; see also *Penner* v. *County of Santa Barbara, supra,* 37 Cal.App.4th 1672, 1676 [legal conclusions are reviewed *de novo*].)

In relation to the Billy file, *de novo* review is required because the trial court abused its discretion when it applied the wrong test to determine the probative value of the disputed evidence. The court stated the disputed pages were "circumstantial evidence, which might be open to reasonable interpretations." (SC RT 3168.) Furthermore, the court's prejudice analysis was backwards. Instead of carefully weighing the prejudice, the court in effect reasoned that there was plenty of other prejudicial evidence admitted against appellant, so the uncharged bad acts evidence was not too bad. The court stated, "as to the here is the list of people we'll need, I do

believe that that has relevance in view of the role of Jeanette Moore and other people played in this. I'm going to let that one in. I believe its probative value exceeds any prejudicial. There is enough prejudicial in and of itself in terms of offensive language, of course, and the connotation is certainly that they are up to, or he at least is up to something less than legal." (SC RT 3170.)

The correct standard for admission of uncharged bad act evidence, which was not applied by the trial court, is as follows: "Since 'substantial prejudicial effect [is] inherent in [uncharged bad act] evidence,' uncharged offenses are admissible only if they have substantial probative value.'" (*People* v. *Ewoldt, supra,* 7 Cal.4th 380, 404, quoting *People* v. *Thompson* (1980) 27 Cal. 3d 303, 318.) Thus, the court's finding that the evidence "might be open to reasonable interpretation" was insufficient to meet the substantial probative value standard. Furthermore, the trial court was required to undertake an "extremely careful analysis" of the evidence given the highly prejudicial nature of uncharged offense evidence. (*People* v. *Ewoldt, supra*, p 404 quoting *People* v. *Smallwood* (1986) 42 Cal.3d 415, 428.) Yet the court turned the prejudice analysis on its head, and found that since the court was already admitting a lot of prejudicial evidence, the bad acts contained in the Billy file were not too bad compared to the letters. The court simply failed to weigh the prejudice that it itself had recognized

when it stated, "Gee, it looks to me that they are going to get somebody inside TRW who will fink on our credit profiles, somebody at the post office who can grab credit cards that are in the mail, somebody at the bank who can pilfer my name, address, et cetera. And looks to me he's looking for one, two, three, four, five, six individuals who are willing to join up and participate in a major scam. That to me is a bad act." (SC RT 3167-3168.) *De novo* review is thus required.

Pages 2698 and 2699 of the Billy File Should Not Have Been Admitted Pursuant to Section 1101(b) of the California Evidence Code

Prevailing Law

Section 1101 of the Evidence Code provides that:

> (a)...evidence of a person's character...is inadmissible when offered to prove his or her conduct on a specified occasion.
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident...) other than his or her disposition to commit such an act.
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

Evidence Code section 1101(a) required the exclusion of pages 2698 and 2699 of the Billy file because they were nothing more than character evidence used to prove appellant's involvement in the identity fraud alleged by Moore. The evidence of appellant's description of his ideal team of identity thieves and instruction to Yancey to open a putatively fake bank account amounted to nothing more than appellant's propensity to

do something "less than legal," as the trial court described it. (SC RT 3170.)

Nor should the evidence been admitted pursuant to any 1101(b) exception to the blanket prohibition of character evidence. The prosecutor's freshly minted 1101(b) exception of modus operandi is supported by neither the law nor the facts.

"When evidence of other crimes is offered to prove a fact in issue pursuant to section 1101(b), its admissibility depends on '1) the *materiality* of the fact sought to be proved or disproved; 2) the *tendency* of the uncharged crime to prove or disprove the material fact; and 3) the existence of any *rule* or *policy* requiring the exclusion of relevant evidence." ...[citation]" *People* v. *Pertsoni* (1985) 172 Cal.App.3d 369, 373. The fact is material if it is "an ultimate fact in the proceeding, such as the defendant's specific intent..." *Ibid.* However, if it is an intermediate fact, materiality is only established where the charged and uncharged crimes have a tendency to prove an ultimate fact which is in dispute. (*People* v. *Thompson, supra,* 27 Cal.3d 303, 315 fns. 13 & 14.)

To decide whether evidence of other crimes has the tendency to prove the material fact in dispute, the Court must first determine if the uncharged offense serves logically, naturally and by reasonable inference to establish that fact. (*People* v. *Gallego* (1990) 52 Cal.3d 115 .) To this end,

the courts have looked to the degree of similarity between the uncharged and charged offenses. Where identity is the fact at issue, the highest level of similarity is required. "The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature" (*People* v. *Ewoldt, supra,* 7 Cal. 4th 380, 403)[20], or as expressed by respondent, "the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity," citing *People* v. *Roldan, supra,* 35 Cal.4th 646. (RB 163.)

To show modus operandi, a somewhat lesser degree of similarity is required. (*People* v. *Roldan, supra,* 35 Cal.4th 646, 705.) However, the standard is still high, as the "evidence of uncharged misconduct must demonstrate not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which the they are the individual manifestations." *(People* v. *Balcom, supra,* 7 Cal. 4th, 414, 402.) The facts of *Balcom* are instructive to show the level of similarity needed to support a introduction of prior bad act evidence to show modus operandi. In *Balcom*, (*Id,* p. 424), the similarities included the clothing worn by defendant, that the victim was a lone woman unknown to the defendant, the time of the offense, the use of a gun, the defendant's stated intention to rob rather than

[20]Quoting with approval 1 McCormick section 190, pp 801-803

rape, the forcible removal of clothing and a single act of intercourse, the theft of the victim's ATM card and pin number, and the defendant's escape in victim's car.

In the instant case, the disputed bad character evidence did not have the requisite degree of similarity to allow its admission to prove modus operandi. As pointed out by defense counsel at trial, page 2699 bore "nothing of the earmarks of Jeanette Moore," including the absence of any mention of renting a vehicle. (SC RT 3168.) Page 2699 merely notes that appellant's team should include someone at the D.M.V. to do some unspecified act with I.D.'s. Page 2699 makes no explicit reference to the type of ID, who the ID was for, or how it was to be obtained. Nor does page 2699 describe the purpose for obtaining the ID. As pointed out by trial counsel, page 2699 does not have "anything about a bogus driver's license. I have D.M.V and I.D.'s et cetera. But that's not obtaining a bogus driver's license." (SC RT 3188.) Defense counsel also objected that the two and a half years between Moore obtaining the fraudulent ID and the letter seized in Yancey's apartment "detracts from the tendency in reason to prove a disputed fact." (SC RT 3188.)

Likewise, page 2698 contains no instruction to obtain a false identification and makes no mention of obtaining a vehicle. Furthermore, page 2698 instructs Yancey to open a bank account, but does not specify

for what purpose. As such, there was no concurrence of common features such that the Moore incident and the information in pages 2698 and 2699 could be explained as being "caused by a general plan of which they are the individual manifestations." (*People* v. *Balcom*, *supra,* 7 Cal. 4th, 414, 402.) At most, the charged and uncharged crimes could be said to belong to a common family of identity theft.

Even on Respondent's exaggerated view of the evidence (contrasted with the prosecutor's argument that the pages constituted an admission by appellant that he had "attempted to obtain bogus California driver's licenses"), the similarities between the charged and uncharged crimes are limited to appellant instructing another to obtain false identification in order to lay the groundwork for a scheme. Respondent argues that the pages tend "to show Clark's modus operandi of obtaining false identification for individuals in order for them to take necessary preliminary steps for his criminal enterprises..." (RB 164.) Yet these preliminary steps do not rise to the levels of the specific similarities found in *Balcom, supra,* 7 Cal. 4th, 414. Instead, they are general characteristics of most identity fraud, and do not tend to logically, naturally and by reasonable inference, establish the existence of a common scheme. (*People* v. *Gallego, supra,* 52 Cal.3d 115.)

Given that the similarities between the charged and uncharged crimes did not rise to the level required for modus operandi, *a fortiori* they

cannot possibly meet the even higher standard necessary to prove identity, an 1101(b) exception never explicitly raised by the prosecutor at trial. Nonetheless, respondent states that the "evidence of virtually identical activity" outlined in the letter "was relevant to identifying Clark as the mastermind of the robbery..." (RB 163-164.) But as shown above, the level of similarity between Moore's testimony and the purported admissions in pages 2698 and 2699 come nowhere close to being a signature, despite respondent's attempt to characterize them as "virtually identical." (RB 164.) *People* v. *Haston* (1968) 69 Cal.2d 233, 248 is instructive. The court found that similarities in the charged and uncharged robberies, including the time, the physical description of the robbers, the method of entry and the treatment of the bank employees were not of "that distinctive nature necessary to raise a logical inference" of identity. Rather, they were marks shared by very many armed robberies. Likewise, the similarities between Moore's testimony and the admissions on pages 2698-2699 are far less distinctive than those described in *Haston (Ibid)*. At most, they share the general hallmarks of identity theft, which obviously does not meet the high standard necessary to establish identity.

At trial, the prosecutor's primary purpose in admitting the Billy file was to corroborate Moore's testimony. The purported theory of admissibility–to prove modus operandi–was a sham. This was shown by

the fact that the prosecutor only argued modus operandi as a basis when pushed by the court for an alternate grounds for admission. (SC RT 3186.) In response to the defense's initial objection to page 2699, the prosecutor said, "call me a nut, but I think the defense is viciously going to attack the credibility of Jeanette Moore, and they are going to attack her to a point that her entire story about the defendant trying to get a bogus...California Driver's license is something that is in Jeanette Moore's head and is not a fact. This corroborates Ms. Moore." (SC RT 3168.) The court agreed and then admitted the evidence. (SC RT 3170.)

The prosecutor had to hatch the modus operandi theory because corroboration evidence cannot be admitted pursuant to section 1101(c) unless it is attached to a tenable theory of admissibility, such as common scheme or identity. (*People* v. *Thompson* (1980) 98 Cal.App.3d 467, 481)[21]. In support of this proposition, defense counsel at trial cited to *People* v. *Bunyard, supra,* 45 Cal.3d 1189, 1207, fn. 7 and the cases discussed therein. (SC RT 3177 & 6 CT 2124-2129.) Section 1101 is not "concerned with evidence of character offered on the issue of the credibility of a witness; the admissibility of such evidence is determined under Section 786-790." (The Law Revision Commission comment to Evidence Code

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[21]See fn. 17 and discussion ante regarding the People's motion to offer evidence under section 1101(b) of the Evidence Code (6 CT 2008-2024) and appellant's response to that motion. (6 CT 2124-2129.)

section 1101 [Cal. Law Revision Com. com., 29B pt. 3 West's Ann. Pen. Code (1995) foll. section 1101, p. 438], cited with approval in *People* v. *Stern*, (2003) 111 Cal.App.4th 283.) Evidence that corroborates the witness through evidence of defendant's character will therefore fall afoul of section 1101(a) of the Evidence Code, unless it is also proof of an issue in dispute pursuant to a section 1101(b) exception. Respondent's bald claim that corroboration evidence can be admitted pursuant to section 1101(c) (RB 164) is thus not a full statement of the law. Respondent relies on *People* v. *Douglas, supra,* 50 Cal.3d 468, 510 to support the admissibility of the evidence on corroboration grounds. (RB 164.) However in *Douglas*, the contested evidence was relevant to identity, a disputed fact, as well as to corroboration.

But as shown above, the disputed evidence did not bear sufficient similarities to Moore's testimony to be admitted as proof of either identity or modus operandi. Instead, the disputed evidence only achieved a prohibited purpose: it solely showed that appellant had the propensity to commit the identity fraud alleged by Moore. Indeed, the notation "D.M.V.-- I.D.'s etc" on page 2699 provides no independent proof of Moore's testimony. Because of the trial court's erroneous rulings, the People succeeded in bootstrapping this inadmissible evidence to the modus operandi theory of admissibility. Thus, the evidence of the uncharged

crimes should not have been admitted pursuant to section 1101(b) because it lacked materiality and did not tend to prove an issue in dispute.

Furthermore, the evidence should also have been excluded pursuant to Evidence Code section 352. Yet the trial court's analysis was fundamentally flawed. Instead of carefully weighing the prejudice, the court in effect reasoned that there was plenty of other prejudicial evidence admitted against appellant, so the uncharged bad acts evidence was not too bad. The court stated, "as to the here is the list of people we'll need, I do believe that that has relevance in view of the role of Jeanette Moore and other people played in this. I'm going to let that one in. I believe its probative value exceeds any prejudicial. There is enough prejudicial in and of itself in terms of offensive language, of course, and the connotation is certainly that they are up to, or he at least is up to something less than legal." (SC RT 3170.)

Instead of discounting the prejudice and limited probative value of the evidence as happened here, the trial court was required to undertake an "extremely careful analysis" of the evidence given the highly prejudicial nature of uncharged offense evidence. (*People* v. *Ewoldt, supra,* 7 Cal. 4th 380, 404, quoting *People* v. *Smallwood, supra,* 42 Cal.3d 415, 428.) It was also "imperative that the trial court determine specifically what the proffered evidence is offered to prove so that its probative value can be

evaluated for that purpose." (*People* v. *Ewoldt, supra*, p 406. As shown above, because the evidence did not support a tenable theory of modus operandi, it could not be admitted for corroboration. The court erred in failing to carefully consider the probative value of the evidence or the substantial prejudice that is inherent in evidence of prior crimes. (*People* v. *Sam, supra,* 71 Cal. 2d 194.)

Pursuant to section 352 of the Evidence Code, the First and Third Categories of Letters Should Not Have Been Admitted.

Contents of the letters

At trial, the letters between Yancey and Clark found in Yancey's apartment were sanitized, as outlined above, and admitted as Exhibit 138, which included the following: (SC RT 9577.)

Page 2688 (undated)

--Letter from appellant to Yancey. It discusses appellant's love and devotion to Yancey and his frustration with prison life. It also contains explicit sexual language: "My most important desire is to keep my dick inside your pussy. I also want to have my mouth glued to your pearl tongue."

Page 2690-2689 (undated and incomplete.)

--Letter from appellant to Yancey. Appellant complains that Yancey is not charging for sex and thus not making enough money for either of them. He says "Bitch I am a pimp you're my bitch, when I get out you'll

only fuck for free if I authorize it." He repeatedly says that when he gets out of prison he will kick her ass.

Page 2686 dated 1-15-92

--Letter from appellant to 'sis'. Appellant says he has been transferred to Tracey, CA. He asks her and Shauna to come and see him. He asks her to send photos and some of her friend Toni "She is sexy as hell. I sure would like to fuck her and lick her and suck her clitoris."

Pages 2675-2680 Stamped 2-28-92

--Letter from appellant to Yancey, which discusses their financial affairs: "[h]ad you talked to me the way you did in your letter, I not only would have left you in a better position I would have left you in a house or apartment we both lived in." There is also a handwritten note at the top of the page that says "I'll let you know about financial help in my next letter or when I call. I think we can work something out to help you."

The remainder of the four page typed letter is very graphic sexual fantasy. It instructs Yancey to masturbate. It talks at length about appellant's sexual preferences, including having sex in public, having sex for two to four days without stopping, anal sex, oral sex, watching other men with his woman or lesbians having sex, bondage, group sex and videotaping sex.

Pages 2653-2664 dated 1-14-93

--Letter from appellant to Yancey. In the first page appellant expresses his love for Yancey and his belief that they are soul mates. The remainder of the four page letter is sexual fantasy. First appellant fantasizes about seeing Yancey having sex with another man. Then he tells her his fantasies including an experience when he was 14 years old where he would watch his math's teacher and her mother get dressed through their window. Then he describes a fantasy where Yancey attends the doctors, and first engages in sexual activity with the nurse and then also the doctor.

--Pages 2659-2664 are newspaper excerpts or personal columns and an add for a dateline service.

Pages 2611- 2619 dated 1-12-93

--Letter from appellant to Yancey. Appellant is pleased because Yancey sent him a letter after previously cutting off communication with him. He apologizes for not telling her earlier "how desperately I loved you, how hopelessly I needed you, and how passionately I desired you." He says he wants to marry her and have children together and that if she marries anyone other than him he will "make you totally disrespect him and treat him like he doesn't exist." He spends almost a page talking about how much he loves her mouth: "Your mouth is THE most addictive, satisfying, emotionally captivating thing I have Ever experienced." He says: "I need you to write to me. I get letters from two other girls but they're traditional

letters with traditional themes. I need kinky, raunchy, freaky, honest, pornographic letters otherwise I'm bored."

Appellant also includes a two page questionnaire for Yancey to complete. The survey includes questions such as, "My sister tells me she's sexually attracted to you. Would you fuck and suck my sister? Yes or No or Maybe."

Pages 2620-2636 dated 1-25-92

--Letter from appellant to Yancey. The letter is address "What's up hooker!" and on the first page appellant says "Did you know that you were my bitch! Well get it inside your mind, your heart, your body and your soul that you're my bitch." However, it is also obvious that this language and the tone of the letters is part of the sexual experience: " What did you think of my last couple of letters? Did they turn you on? Did your pussy get wet? Did you let someone read them? Did whoever let you read them get turned on? Did you fuck and suck em? Let me know bitch!...I can't believe I'm so open with you...I know you think it's sick, immoral and disgusting. You don't want to marry a man who's sick, immoral and disgusting do you? What would your friends and family think? Would they approve of a man like me? Like you really give a motherfuck!! I sure talk bad don't I? It's terrible, I'll stop." Appellant describes a sexual fantasy of her giving him oral sex and her watching him receive oral sex from a white woman. He

says: "I want us to find a white woman, a prejudiced white bitch for us to fuck. You think we could do that?"

He then tells her about his business ideas, including working on sports books and going into the film industry. Appellant boasts about his business success: "Everything that I do businesswise works, makes money, is successful." He says that he knows the business formulas necessary to make money and that he intends to teach them to Yancey. He advises her to use sex as the motivating factor in her life.

Pages 2627-2630 dated 6-22-93

--Letter from appellant to Yancey. It starts by saying that he just got off the telephone with her and describes how she "fucked yourself with the can." The tone of the letter is agitated and disjointed:

"Nina, please, please, please hurt me over my dick. Nina, please please please kill me if I fuck anyone other than you...Did you get that pussy sold for me. I don't want you to disobey me anymore...Nina, please give my pussy away. Bitch, where are my photos. I need to see you so desperately I am going crazy...I will give you my blood for your beauty. Here is some on this line [black smudge]. Bitch, I am crazy and I won't hide it anymore. I worship you. Your pussy is my GOD...Try to understand my phenomenal addiction. Your mouth is better than your pussy. I need it even more. Please don't make me kill you over either one because I will

take your life before I let you take your pussy or your mouth from me."

Appellant says that "your pussy is going to pay our bills" and describes how he will get her to "sell pussy four nights a week, 11pm until the sun comes up."

In the last paragraph he says "Since you begged me I'm sending you some cum." He signs off "Get my money bitch!!! Baby"

Pages 2631-2632 (Undated)

--Letter from appellant to Nina (Yancey.) Appellant says "I have such an addiction to what you did with the Mexican I need you to go out today and do something like that again...I have never met a woman who would just go out and find a Mexican and fuck him in public."

He then says that he wants her to have sex with her cousin and he wants to have sex with her mother and that he knows she wants to have sex with his father. It also discusses the fact that he wants her get his money by prostituting herself and contains more graphic sexual details of oral sex.

Page 2682-2684 dated 3-9-98

--Letter from appellant to Yancey. Appellant says that he was disrespectful in his last letter because he was annoyed that Yancey's phone was disconnected. He then expresses his annoyance that she has not sent him any photos and asks her to send them as soon as possible. He says: "I can't believe I talked to you the way I do but I have to be honest with you it

makes me love you more. I've always wanted a woman who I could demean and disrespect yet who I loved incredibly." Appellant signs off "Love your pussy juice."

Page 2605 (undated)

--This is a request for Yancey to take sexually explicit photographs and send them to Clark.

The letters dated March 9, 1994 from Appellant to Yancey, found in Yancey's apartment, were admitted separately from the other letters. The letter expresses appellant's love and devotion to Yancey. It contains sexually explicit details. The last sentences are: "Babe, I will be in bed with you in a few weeks. Stay strong and be careful." (Exhibit 72.)

Prevailing Law

Section 352 of the Evidence Code provides that:

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

Respondent argues that the letters were properly admitted as they were "essential to show how close Yancey was to Clark and how he utilized sexuality to manipulate her into conspiring with him to murder Williams." (RB 110.) However, this statement is misleading as the letters contain no mention of a conspiracy to murder Williams and therefore lack

any probative value except to show that appellant and Yancey were in a sexual relationship, which (as pointed out by defense counsel) could have been proven by alternate evidence such as telephone records, visiting logs and stipulations. Instead, the evidence served primarily to inflame the passions of the jurors.

In *Love*, the court found that "[e]vidence that serves primarily to inflame the passions of the jurors must ...be excluded, and to ensure that it is, the probative value and the inflammatory effect of the proffered evidence must be carefully weighed." (*People* v. *Love (1960) 53 Cal. 2d 843, 856.)* In determining the probative effect of the evidence the court should consider "the availability of less inflammatory methods of imparting to the jury the same or substantially the same information." (*Ibid.)* The court found that photographs of the deceased showing her expression and a recording of a conversation she had prior to death should not have been admitted due to their high prejudicial value and low probative value. "The recorded conversation dealt with the basic facts of the shooting, which had already been admitted by defendant and established at the trial. The sole purpose of playing the recording, therefore, was to let the jury hear the failing voice and the groans of the deceased as she was dying." (*Id, 854 - 855.)* Similarly, in the present case, the endless, explicit, and offensive

details of appellant's sexual fantasies were irrelevant, and served only to inflame the passions of the jury.

There is no doubt that the letters were highly prejudicial. In fact, defense counsel stated: "I feel that the letters are probably the most prejudicial part of the case." (SC RT 9534-9535.) They were likely to inflame the passions of the jury because they contained details of sexual practice that would appear highly deviant to the average jurors. The sexual fantasies included incest, public sex, group sex, oral sex, anal sex and prostitution. For example, in one letter, appellant writes:

> Will you please go out and give your pussy to a total stranger today...I'll do anything you tell me to do if you go give my pussy to a total stranger. I know this is going to sound crazy but I want/need you to fuck your cousin Danny. If you can I want you to fuck him...If you can accomplish that and tell me about it I will go crazy with excitement. We're crazy aren't we? Also I have to fuck your mom. Please, please tell her I want to fuck her. Can you talk to her? Please tell her that I want to fuck and suck the pussy that made you. I'm sure you understand. Just like you want to fuck my father I need to fuck your mother. (Exhibit 97, p2632.)

This language, and the content's of the letters was likely to prejudice the jury against appellant.

Furthermore, the letters had no probative value. Despite respondent's assertions, the letters do not show that appellant "utilized sexuality to manipulate her [Yancey] into conspiring with him to murder Williams." (RB 110), he letters contain no mention of Williams, or a plot to kill a witness or anything else that could be attributable to the killing. Nor

do they show a level of control and domination that would drive Yancey to murder at appellant's request. Although the letters contain themes of both appellant's sexual domination and submission, this is merely part of a sexual fantasy that is common to prison life. Thomas Yandall, a prisoner at Orange County Jail, testified for the defense at the first and second penalty trials. At the second penalty trial, he spoke about the common practice of writing sexually explicit letters to women outside of jail. (SC RT 16020-16026.) He testified that as part of that practice it was normal to construct fantasies "that you would be home in maybe a year or so or like six months from now or eight months. So you kind of like throwing fantasies at her…You are trying to tell the truth, but you are lying at the same time." (SC RT 16023.) That then led to sexually explicit fantasies; "then you talk to her about, you know what I am saying, make her fantasize and everything. You know what I am saying? She – you just – she starts – you know what I am saying? She gets intimate in her letters. You know what I am saying?" (SC RT 16024.) Yandall testified that the final stage in the writing relationship is that she goes "ballistic":

> A:…Ballistic is when she starts doing everything for you.
> Q: In a letter form?
> A: I am talking about not only in a letter. She is going to come and visit you, and – you know what I am saying? You don't ask for nothing. All you is trying to do – if she sends you money, that is on her own. She sends you money. She will send like pornographic pictures with lingeries. She will doing (sic) anything you say like,

> okay, babe, you are going to come see me this weekend...She is all out for you. She is crazy. (SC RT 16024-16025.)

In the context of this evidence, the letters and frequent visits and telephone calls between appellant and Yancey are understandable as a normal type of relationship between a prisoner and his "pen-pal." Although Yancey may have been "ballistic" for appellant, this is far from the level of control required to force her to murder another person at appellant's request.

Moreover, the admission of 50 pages of letters between appellant and Yancey was cumulative. In *People* v. *Ewoldt, supra,* 7 Cal.4th 380, 405-406, the Supreme Court emphasized that cumulative evidence may be inadmissible under Evidence Code section 352. In *People* v. *Williams* (2009) 170 Cal.App.4th 587, 611, the court found that it was an abuse of discretion to admit cumulative evidence concerning issues not reasonably subject to dispute. The relationship between appellant and Yancey could have been shown by the admission of one of the letters. As outlined above, the majority of the 50 pages admitted were nothing more than sexual fantasy which had no probative value and very high prejudicial effect. The admission of so many pages of material was cumulative and heightened the prejudicial effect.

As stated by respondent, "[a] reviewing court will only disturb a trial court's ruling under Evidence Code section 352 upon a showing of an

abuse of discretion. (*People* v. *Waidla*, (2000) 22 Cal.4th p 734)." (RB 165.) An abuse of discretion exists where the court's ruling was "arbitrary, whimsical or capricious as a matter of law." (*People* v. *Branch* (2001) 91 Cal. App. 4th 274, 282.) The admission of cumulative evidence with very limited probative value and extreme prejudicial effect was an abuse of discretion.

In addition, when applying the 352 balancing test, the court failed to consider each letter individually. Rather it made a general ruling that the contested documents had sufficient probative value to prove that a relationship existed between the alleged conspirators, and were "... not so inherently prejudicial that weighing under 352 that, except for perhaps some areas I'm going to look at more specifically, there is any reason to exclude them on that basis." (SC RT 3062.) When considering the individual objections to specific letters, the court did not explicitly consider the section 352 weighing process. (SC RT 3175-3176.) The failure to consider the prejudicial effect of individual letters was an abuse of discretion. As discussed above, the content of the letters varied widely and thus their prejudice could not be considered across the group. Similarly, the probative value was not uniform, for example it is unclear whether page 2686 was even written to Yancey. The decision to consider the letters as a group was capricious and arbitrary and led to an abuse of discretion.

(*People* v. *Branch, supra,* 91 Cal. App. 4th 274, 282.) *De novo* review is therefore required. (*Penner* v. *County of Santa Barbara, supra,* 37 Cal.App.4th 1672, 1676.)

The letters were erroneously admitted at the Penalty Stage

Evidence admitted at the penalty phase is subject to three restrictions: "the evidence must not be incompetent; it must not be irrelevant, that is, of such a nature that its prejudice to defendant outweighs its probative value; and it must not be directed solely to an attack on the legality of the prior adjudication." (*People* v. *Terry, supra,* 61 Cal.2d 137, 144-145; accord, *People* v. *Gay* (2008) 42 Cal.4th 1195.)

For the reasons given above, the evidence should also have been excluded at the penalty phase retrial. Additionally, because appellant had been convicted of being in a conspiracy with Yancey, the letters were no longer relevant to prove this point.

The Error was Prejudicial

The letters were highly prejudicial for a number of reasons. Most importantly, they contained graphic description of almost every sexual deviancy imaginable: anal sex, oral sex, group sex, sex with objects (a can), sex in public, and bondage. (Exhibit 138, p 2690.) Lastly, the letters contained foul language and suggested that appellant treated women badly. All these factors were likely to "inflame the emotions of the jury,

motivating them to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose." (*People* v. *Branch, supra,* 91 Cal. App. 4th 274, 286 quoting *Vorse* v. *Sarasy* (1997) 53 Cal.App.4th 998, 1008-1009.)

Pages 2698 and 2699 of the Billy file were highly prejudicial as they suggested that both appellant and Yancey had the disposition to commit unlawful acts because they had been involved in unlawful acts in the past. This prejudice was magnified because the case against appellant was entirely circumstantial. In *People* v. *Alcala* (1984) 36 Cal.3d 604, 635, the court found that the admission of evidence in contravention of section 1101 was not harmless, because the evidence against the defendant was "fairly strong, but not overwhelming, and it was largely circumstantial." The importance of the disputed evidence is demonstrated by the fact that the People created two opportunities for the jury to read the evidence in court.

Furthermore, the admonition given by the court was irrelevant in relation to pages 2698 and 2699 of the Billy file because these pages did not relate to the relationship between appellant and Yancey (the proscribed purpose) and related only to bad acts engaged in by appellant and Yancey. Likewise, the instruction concerning the letters at the guilt phase told the

jury to consider the letters for the limited purpose of showing the nature of the relationship between Yancey and appellant, but at the same time they were told not to consider the evidence to show how appellant treated Yancey in particular. (SC RT 9568-9569.) These two statements were inconsistent and thus likely caused confusion for the jury.

In *People* v. *Thompson, supra,* 98 Cal. App.3d 467, 482, the court found that "[s]ince there was no legitimate way for the jury to follow the court's instruction and use this evidence for the [stated legitimate] purpose...we can only conclude that the jury used this evidence for the inadmissible purpose..."

In closing, the prosecutor emphasized the letters and the Billy file. He stressed that the letter dated March 9, 1994 is "so important" because "[t]here was no legal vehicle, no legal vehicle that was going to allow Mr. Clark to be a free man in two weeks. No legal vehicle." (SC RT 10884.) This was highly prejudicial because the jury was led to believe that the only possible interpretation of the letter was that it was an admission that Clark knew that Yancey would kill Williams, when in fact there were other lawful explanation for the statements. (SC RT 3055.)

In relation to the sexually explicit letters between appellant and Yancey he said: "I'm not going to read them. I mean they are graphic, they are sexually explicit. The purpose, and I think it's pretty evident...we don't

have pictures of them at the prom together. Okay. We don't have pictures of them holding hands at Disneyland. And it's important to show the intense, close, personal relationship." (SC RT 10871.) By again mentioning the sexually explicit nature of the letters, the prosecutor was again inflaming the emotions of the jury, motivating them to use the information to punish appellant. (*People* v. *Branch, supra,* 91 Cal. App. 4th 274, 286.) The prejudice of these letters is also shown by the substantial time defense counsel spent in his closing remarks trying to explain the sexual nature of the letters. (SC RT 16577- 16579.) Defense counsel said:

> I believe as one of the inmates suggested, I mean you can either get your sex inside by getting involved with one of them fags or you can get involved in writing sexually graphic letters to pen pals out there. And it sounds like – and I am not condoning it and I am not demeaning it, but when you are locked up in prison, sometimes it is nice to have a little bit of family support. And if you lose that, at least some female companionship out there that you can write to. (SC RT 16578.)

As outlined in claims 27 and 41 of Appellant's Opening Brief, the admission of the evidence discovered in Yancey's apartment violated appellant's constitutional rights including his right to federal due process; a fair trial and reliable determination of guilt and penalty; and the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense. (AOB 310, 440-441.) Reversal is required.

CLAIM 42
THE JURY INSTRUCTIONS ON CIRCUMSTANTIAL EVIDENCE UNDERMINED THE REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT, VIOLATING APPELLANT'S SIXTH AMENDMENT RIGHT TO A TRIAL BY JURY, HIS EIGHTH AMENDMENT RIGHT TO A RELIABLE CAPITAL TRIAL AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The jury was instructed that appellant was "presumed to be innocent until the contrary is proved" and that "[t]his presumption places upon the People the burden of proving him guilty beyond a reasonable doubt." (7 CT 2696.) The jury was also given four interrelated instructions - CALJIC Nos. 2.01, 2.02, 8.83, and 8.83.1 - that discussed the relationship between the reasonable doubt requirement and circumstantial evidence. They were directed at different evidentiary points, and advised that if one interpretation of the evidence "appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable." (7 CT 2660, 2661, 2755, 2756.)

These instructions essentially informed the jurors that if appellant reasonably appeared to be guilty, they could find him guilty - even if they entertained a reasonable doubt as to guilt. This four times-repeated directive undermined the reasonable doubt requirement in separate but related ways, violating appellant's constitutional rights to due process (U.S. Const, Amend. 14; Cal. Const.,art. I, 7 & 15), trial by jury (U.S. Const., Amends. 6

and 14; Cal. Const., art. I, 16), and a reliable capital trial (U.S. Const., Amends. 8 and 14; Cal. Const., art. I, 17). (*Sullivan* v. *Louisiana, supra,* 508 U.S. 275, 278; *Carella* v. *California* (1989) 491 U.S. 263, 265; *Beck* v. *Alabama, supra,* 447 U.S. 625, 638.)

Respondent argues that, while this Court has noted that there has been strong criticism of CALJIC No. 2.90, it has held the instruction to be a constitutionally sound description of reasonable doubt. (RB 167.) Respondent then notes that this Court has rejected the argument that the circumstantial evidence instructions reduce or weaken the prosecution's burden of proof, citing *People* v. *Koontz*, (2002) 27 Cal.4th 1041, 1084-1085.

The problem with the instructions lies in the fact that they required the jury to accept an interpretation of the evidence that was incriminatory but only "appear[ed]" to be reasonable. This instruction is constitutionally defective for at least two reasons. First, telling jurors that it "must" accept a guilty interpretation of the evidence as long as it "appears to be reasonable" is blatantly inconsistent with proof beyond a reasonable doubt; it allows a finding of guilt based on a degree of proof below that required by the Due Process clause. (*See, Cage* v. *Louisiana* (1990) 498 U.S. 39 (*per curiam*). In addition, the instructions require the jury to draw an incriminatory inference when such an inference appeared to be "reasonable". The jurors

were told that they "must" accept such an interpretation. Thus, the instruction operated as an impermissible mandatory conclusive presumption of guilt upon a finding that a guilty interpretation of the evidence "appears to be reasonable." (See *Sandstrom* v. *Montana* (1979) 442 U.S. 510.)

Cage v. *Louisiana, supra,* emphasizes the requirement that jury instructions must not subtly compromise the fundamental concept of proof beyond a reasonable doubt. In *Cage,* the jury was instructed to find the defendant not guilty if it "entertain[ed] a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt..." (I*d.*, 488 U.S. at 40, 111 S. Ct. at 329.) The instructions went on to equate reasonable doubt with "such doubt as would give rise to a grave uncertainty" and "an actual substantial doubt," and stated that "[w]hat is required is not an absolute or mathematical certainty, but a moral certainty." (*Id.*; emphasis omitted.) The Supreme Court looked to "how reasonable jurors could have understood the instruction," and concluded it was unconstitutional:

> It is plain to us that the words 'substantial' and 'grave', as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause. (*Id.*, 498 U.S. at 41, 111 S.Ct. at 329-330 (footnote omitted).)

If, as the Supreme Court held in *Cage,* due process of law is violated by an instruction informing the jury that only a "substantial doubt" or "grave uncertainty" will amount to a reasonable doubt, then it violates due process to effectively instruct a jury that no reasonable doubt exists where a guilty interpretation of the evidence merely "appears to be reasonable."

Appellant claims that each one of the challenged instructions violated appellant's federal constitutional rights, but acknowledges that this Court has repeatedly rejected constitutional challenges to the instructions discussed here. (*See, e.g., People* v. *Crittenden* (1994) 9 Cal.4th 83, 144; *People* v. *Noguera, supra,* 4 Cal.4th 599, 633-634 [addressing CALJIC Nos. 2.01, 2.02, 2.21, 2.27)].) While recognizing the shortcomings of some of the instructions, this Court consistently has concluded that the instructions must be viewed "as a whole," rather than singly; that the instructions plainly mean that the jury should reject unreasonable interpretations of the evidence and should give the defendant the benefit of any reasonable doubt; and that jurors are not misled when they also are instructed with CALJIC No. 2.90 regarding the presumption of innocence. Appellant respectfully requests this Court to reconsider those rulings and hold that in this case delivery of the aforementioned instructions was error.

First, what this Court has characterized as the "plain meaning" of the instructions is not what the instructions say. (*See People* v. *Jennings,* 53

Cal.3d at p. 386.) The question is whether "there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard"[22] of proof beyond a reasonable doubt. (*Victor* v. *Nebraska,* 511 U.S. at p. 6.)

Second, this Court's essential rationale -- that the flawed instructions were remedied by the language of CALJIC No. 2.90 (*e.g., People* v. *Crittenden, supra,* 9 Cal.4th 83, 144) -- requires reconsideration: An instruction that dilutes the standard of proof beyond a reasonable doubt on a specific point is not cured by a correct general instruction on proof beyond a reasonable doubt. (*United States* v. *Hall* (5th Cir. 1976) 525 F.2d 1254, 1256; *see also Francis* v. *Franklin,* (1985) 471 U.S. 307, 322 ["Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity"]; *People* v. *Kainzrants* (1996) 45 Cal.App.4th 1068, 1075 [if an instruction states an incorrect rule of law, the error cannot be cured by giving a correct instruction elsewhere in the charge]; *People* v. *Stewart* (1983) 145 Cal.App.3d 967, 975 [specific jury instructions prevail over general ones].) "It is particularly difficult to overcome the prejudicial effect of a misstatement when the bad instruction

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[22] *In re Winship*, (1970) 397 U. S. 358: "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."

is specific and the supposedly curative instruction is general." (*Buzgheia* v. *Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 395.)

Furthermore, nothing in the circumstantial evidence instructions given in this case explicitly informed the jury that those instructions were qualified by the reasonable doubt instruction. It is just as likely that the jurors concluded that the reasonable doubt instruction was qualified or explained by the other instructions which contain their own independent references to reasonable doubt.

Even assuming that the language of a lawful instruction somehow can cancel out the language of an erroneous one -- rather than vice-versa -- the principle does not apply in this case. The allegedly curative instruction (CALJIC No. 2.90) was overwhelmed by the unconstitutional ones. Appellant's jury heard several separate instructions, each of which contained plain language that was antithetical to the reasonable doubt standard. This Court has admonished "that the correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." (*People* v. *Wilson* (1996) 3 Cal.4th 926, 943.) Under this principle, it cannot be maintained that a single instruction such as CALJIC No. 2.90 is sufficient, by itself, to serve as a counterweight to the mass of contrary pronouncements given in this case. The effect of the "entire

charge" was to misstate and undermine the reasonable doubt standard, eliminating any possibility that a cure could be realized by a single instruction inconsistent with the rest.

Because the erroneous instructions permitted conviction on a standard of proof less than proof beyond a reasonable doubt, delivery of the instructions was structural error and is reversible per se. (*Sullivan* v. *Louisiana*, 508 U.S. 275, 280-282.) Even if not reversible per se, because all of the instructions violated appellant's federal constitutional rights, reversal is required unless the state can show that the errors were harmless beyond a reasonable doubt. (See *Victor* v. *Nebraska, supra,* 511 U.S. at p. 6.) The People have made no attempt to make that showing.

CLAIM 49
APPELLANT WAS NOT ELIGIBLE FOR THE DEATH PENALTY UNDER *ENMUND* v. *FLORIDA* AND THE EIGHTH AMENDMENT REQUIREMENT THAT A DEATH SENTENCE BE PROPORTIONATE TO THE DEFENDANT'S PERSONAL CULPABILITY

Appellant alleges that the evidence presented against him was insufficient to render him death eligible because he was not the actual killer of either Ardell Williams or Kathy Lee, he harbored no intent to kill, he was not a major participant in those crimes, and he did not act with reckless indifference to human life. The Eighth Amendment disavows the imposition of the death penalty for a murder committed by another person,

when the person did not himself kill, or attempt to kill, or intend that a killing take place or that lethal force be employed. (*Enmund* v. *Florida* (1982) 458 U.S. 782, 797.) (AOB 502 et seq.) Appellant additionally raised the issues in his motion to set aside the Information pursuant to Penal Code section 995 (2 CT 399-403), and the trial court should have dismissed the robbery-murder, burglary murder and multiple murder special circumstance allegations prior to trial.

Respondent argues appellant was a major participant in the Comp U.S.A. crimes who acted with reckless indifference to human life. Respondent also argues that appellant intended to kill Ardell Williams. (RB 188.) Respondent ignores the factual circumstances of the Comp U.S.A. incident. Prosecution testimony established that Nokkuwa Ervin entered Comp U.S.A., and ordered the remaining employees into the bathroom and handcuffed each person to a bathroom stall. (SC RT 8347). There were no injuries to the employees.

The robbery was designed to reduce the possibility of injury. It took place after closing time when the store was almost empty. (SC RT 8533). Instead of holding employees at gun point, handcuffs were utilized to decrease the possibility of injury. The employees inside the store were handcuffed, indicating that no violence was contemplated. Eric Clark apparently told Ardell Williams that there weren't supposed to be any

bullets in the only gun carried by any of the robbers. (SC RT 2073-74.) The victim, Kathy Lee, happened to be standing just outside the warehouse door when the burglars exited, apparently startling Ervin, who reflexively shot her.

Respondent acknowledges that the jury was instructed at both the guilt trial according to CALJIC No. 8.80.1. The penalty phase retrial jury was given a modified version of 8.80.1. That instruction provides in relevant part that, as to the murder of Kathy Lee at Comp U.S.A., the defendant must have, with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested or assisted in the commission of the crime of burglary and attempted robbery which resulted in her death. Reckless indifference to human life is defined in the instruction as being "when the defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (7 CT 2747, 13 CT 4854.) The instructions only applied to the death of Kathy Lee. The jury was not so instructed as to the death of Ardell Williams.

The guilt and penalty phase 8.80.1 instructions were insufficient, given that the killing of Kathy Lee was accidental and Clark was not the shooter. Although the instructions appear on their face to comply with *Tison* and *Enmund*, they allow a jury to consider imposing death on an

aider and abettor who had no intent to kill. (*Tison* v. *Arizona*, (1987) 481 U.S. 137, *Enmund* v. *Florida*, *supra.*, 458 U.S. 782.) As appellant argues, *infra,* this is in violation of *Kennedy* v. *Louisiana*, (2008) ___ U.S. ___ [128 S.Ct. 2641], which demands an intentional killing for death eligibility.

Respondent argues that petitioner, as a getaway driver, was a 'major participant.' "Principals and aiders and abettors whose conduct is integral to the crime, e.g., a lookout or getaway driver, are major participants. (*People* v. *Hearn* (2002) 95 Cal.App.4th 1164, 1176.)"(RB 190.) Yet, *Hearn* was depublished on direction of this Court by order dated May 1, 2002. (*Ibid.)* Respondent cites no other authority for this principle.

Similarly, respondent argues that, while petitioner did not fire the fatal shot, "the crimes literally could not have occurred without Clark's participation and this is sufficient to support the jury's finding that he was a major participant in the underlying offenses. (See *People* v. *Marshall, supra,* 50 Cal.3d at p. 938. ["ringleader" of burglary/robbery properly found to be major participant, *even though not actual killer*].)" RB 191. (Emphasis supplied.) The citation to *Marshall* for this principle is misleading since. *Marshall* was the actual killer who "after planning and in cold blood executed a helpless woman". He was not the ringleader. *Id:*

> We recognize that arguably defendant is not the most heinous murderer and that his crime is not the most abominable murder. But there is no blinking the fact that after planning and in cold blood he executed a helpless woman in order to eliminate a witness. In view

> of that fact, we cannot conclude that death is disproportionate to defendant's personal responsibility and moral guilt. *(Ibid.)*

There was no discussion of whether Marshall was a major participant. He clearly was. The reference by respondent refers to a comment by the court regarding the intracase disproportionality of the death sentence when compared to a co-defendant, the ringleader, whose death sentence was subsequently set aside by the trial court. *(Ibid.)*

The United States Supreme Court's recent decision in *Kennedy* v. *Louisiana* makes unmistakably clear that appellant's death sentence, imposed for felony murder simpliciter, is a disproportionate penalty under the eighth amendment

Appellant challenges his death sentence as unconstitutionally rendering him death-eligible based on the commission of a felony murder *simpliciter*. As he demonstrates in the AOB, the lack of any requirement that the prosecution prove that he, not an actual killer, had a culpable state of mind with regard to the killing violates the proportionality requirement of the Eighth Amendment, as well as international human rights law governing use of the death penalty. (AOB 502.) More specifically, appellant argues that *Tison* v. *Arizona*, *supra,* 481 U.S. 137, established a minimum mens rea of acting with reckless indifference to human life for actual felony murderers as well as their accomplices. (AOB 506.)

The United States Supreme Court's recent decision in *Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641], not only underscores that

California's outlier practice of imposing the death penalty for felony murder *simpliciter* is disproportionate under the Eighth and Fourteenth Amendments, but also calls into question whether *Tison* itself remains good law and instead strongly suggests that the death penalty is unconstitutional for any unintentional murder.

In *Kennedy*, the high court held that the Eighth and Fourteenth Amendments prohibit the death penalty for the rape of a child because the penalty is disproportionate to the crime. (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641 pp. 2646, 2651].) Although *Kennedy* addressed the ultimate penalty for a person who raped, but did not kill, a child, and this case involves a killing by a co-defendant, the Court's proportionality analysis applies with equal force here.

In *Kennedy*, the high court applied its two-part "evolving standards of decency" test to determine whether death is disproportionate to the crime of child rape. The Court first considered whether there is a national consensus about the challenged penalty by looking at penal statutes and the record of executions (*Kennedy* v. *Louisianna, supra*, _U.S._ [128 S.Ct. 2641, 2651-2658]), and then brought its own judgment to bear on the question of the constitutionality of the penalty, i.e. whether either of the social purposes of the death penalty - retribution or deterrence - justifies capital punishment for the crime (*Id.* at pp. 2650, 2658-2664). However, the

Court prefaced its traditional analysis with a discussion of the cruel and unusual punishments clause. This introduction is not a pro forma recitation of the law. Rather, the Court delineated essential principles that animate its proportionality jurisprudence.

The Court began with a reminder that the Eighth Amendment's prohibition of cruel and unusual punishments proscribes all excessive punishments and "flows from the basic 'precept of justice that punishment for [a] crime should be graduated and proportioned to [the] offense." (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2649]), quoting *Weems* v. *United States* (1910) 217 U.S. 349, 367.) The court emphasized that the standards for determining whether the Eighth Amendment proportionality requirement is met are "the norms that 'currently prevail[,]" since the measure of excessiveness or extreme cruelty "necessarily embodies a moral judgment." (*Kennedy* v. *Louisiana, supra*, at p. 2649.) The court did not stop there. It cautioned that retribution, as a justification for punishment, "most often can contradict the law's own ends," particularly in capital cases. The high court was blunt: "When the law punishes by death, it risks its own sudden descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Id.* at p. 2650.)

To guard against this danger, the high court admonished that capital

punishment must "be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.' " (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2650], quoting *Roper* v. *Simmons* (2005) 543 U.S. 551, 568, (internal quotation marks omitted).) The Court forthrightly acknowledged that the more crimes that are subject to capital punishment, the greater the risk that the penalty will be arbitrarily imposed. (*Id.* at pp. 2658-2661.) Thus, under the Eighth Amendment, "the Court insists upon confining the instances in which the punishment can be imposed." (*Id.* at pp. 2650; see *id.* at p. 2659 [repeating the point].) The Court's message is unmistakable: the use of capital punishment must be restricted. This mandate informs the Court's ensuing Eighth Amendment analysis.

The proportionality analysis in *Kennedy* confirms the correctness of appellant's argument that imposing the death penalty for felony murder *simpliciter* is unconstitutional. The evidence regarding a national consensus against imposing the death penalty for child rape was nearly identical to the showing appellant presents about the national consensus against imposing death for felony murder *simpliciter*. Only six states authorized the death penalty for child rape, and 44 states did not. (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2651].) The high court repeatedly drew an analogy between this six-state showing and that in *Enmund* v. *Florida*, *supra.*, 458

U.S. 782, where eight states imposed death on vicarious felony murderers, and 42 states did not. (*Kennedy, supra,* pp. 2653, 2657.) In *Kennedy*, as in *Enmund*, the exceedingly lopsided tally established a national consensus against the death penalty for the crimes considered in those cases. (*Id.* at p. 2653.)

As appellant demonstrates, the evidence of a national consensus against executing even actual felony murderers when there has been no proof of a culpable mental state with regard to the killing is just as stark as that presented in *Kennedy*. At most six states, including California, permit the death penalty for such felony murders, and 44 states and the federal government do not. (See Shatz, *The Eighth Amendment, The Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study* (2007) 59 Fla.L.Rev. 719, 761 [adding Idaho to the list of states that along with California, Florida, Georgia, Maryland, and Mississippi authorize death for felony murder *simpliciter*].) Under the analysis used in *Kennedy* and the high court's other recent proportionality cases, *Atkins* v. *Virginia* (2002) 536 U.S. 304 and *Roper* v. *Simmons*, *supra*, 543 U.S. 551, the death penalty for felony murder *simpliciter* is inconsistent with our society's national standards of decency and justice.

The high court's decision on the second part of the "evolving standards of decency" test further supports appellant's claim. In

determining that, in its own independent judgment, the death penalty is excessive for the crime of child rape, the Court drew a clear distinction between "intentional first-degree murder on the one hand and non-homicide crimes against individual persons, even including child rape, on the other." (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2660].) The Court repeated this distinction between "intentional murder" and child rape in comparing the number of reported incidents of each crime. (*Ibid.*) These references cannot be considered inadvertent or incidental. They build upon the Court's understanding in *Hopkins* v. *Reeves* (1998) 524 U.S. 88, 99, that there must be a finding that even an actual killer had a culpable mental state with respect to the killing before the death penalty may be imposed for felony murder, and the Court's decision in *Tison* v. *Arizona, supra*, 481 U.S. 137, 157-158, in which the Court drew no distinction between the mental state required to impose death on actual killers and accomplices for a felony murder. They also are consonant with the understanding of individual justices about the limits of the death penalty for murder. (See *Graham* v. *Collins* (1993) 506 U.S. 461, 501 [conc. opn. of Stevens, J., stating that an accidental homicide, like the one in *Furman* v. *Georgia* (1972) 408 U.S. 238, may no longer support a death sentence]; see also *Lockett* v. *Ohio* (1978) 438 U.S. 586, 621; [conc. & dis. opn. of White, J., stating that "the infliction of death upon those who had no intent to bring

about the death of the victim is . . . grossly out of proportion to the severity of the crime"].) Just as the death penalty is excessive for child rape, it is excessive for felony murder *simpliciter.*

The decision in *Kennedy* not only supports appellant's challenge to felony murder *simpliciter*, but goes further and signals that the death penalty is disproportionate for any unintentional murder. The high court's repeated references to intentional murder indicate another step toward "confining the instances in which the punishment can be imposed." (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2650].) As *Kennedy* reveals, the high court now considers intentional murder as the constitutional norm for capital punishment. The decision pointedly suggests that under the Eighth Amendment, *Tison*'s requirement of reckless disregard for human life is no longer sufficient. To impose a death sentence, there must be proof that the defendant, whether the actual killer or an accomplice, acted with an intent to kill.

Under the traditional Eighth Amendment analysis used in *Kennedy*, there is now a national consensus that the death penalty may not be applied to unintentional robbery felony murderers. As discussed above, at most six states, including California, make a defendant death-eligible for felony murder *simpliciter.* Only seven other jurisdictions - Arkansas, Delaware, Illinois, Kentucky, Louisiana, Tennessee, and the United States military -

authorize the death penalty for a robbery felony murderer who acts with a mental state less than intent to kill. (See Shatz, *supra*, at pp. 761-762.)[23] Thus, only 13 jurisdictions of a total 52 jurisdictions (the 50 states, the United States military, and the United States government) impose the death penalty without requiring proof of intent to kill.[24] Of the remaining 39 jurisdictions, 14 jurisdictions do not use capital punishment at all.[25] The remaining 25 death penalty jurisdictions (1) do not make robbery murder or attempted robbery murder - appellant's crime - a capital crime,[26] do not make felony murder a death-eligibility circumstance,[27] or do not permit the prosecution to use the robbery to prove both the murder and death eligibility,[28] or (2) require proof of an intent to kill.[29] In this way, at least

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[23] See Shatz, *supra*, at p. 770, fn. 248, citing Ark. Code Ann. §5-10-101(a)(1) (2006); Del. Code Ann. tit. 11, § 4209(e) (2007); 720 Ill. Comp. Stat. Ann. 5/9-1(6)(b) (West 2007); Ky. Rev. Stat. Ann. §§ 532.025, 507.020 (West 20067); La. Rev. Stat. Ann. § 14:30(A)(1) (20067); Tenn. Code Ann. §§ 39-13-202, 39-13-204(I)(7) (2007); Manual for Courts-Martial, United States, R.C.M. 1004©) (2005).

[24] The District of Columbia, which does not have the death penalty, is excluded from this list.

[25] As of March 1, 2009, these states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New York, North Dakota, Rhode Island, West Virginia, Vermont, and Wisconsin. http:// www.deathpenaltyinfo.org/FactSheet.pdf.

[26] See, Shatz, *supra*, at p. 770, fn. 249 citing Mo. Rev. Stat. § 565.020 (2007) as an example.

[27] See Shatz, *supra*, at p. 770, fn. 250, citing Ariz. Rev. Stat. Ann. § 13-703(F) (2006); S.D. Codified Laws § 23A-27A-1 (2006) as examples.

[28] See Shatz, *supra*, at p. 770, fn. 251, citing *McConnell v. State* (Nev. 2004) 102 P.3d 606, 620-24; *State v. Gregory* (N.C. 1995) 459

39 jurisdictions (38 states and the federal government) - three-quarters of all jurisdictions - do not follow California's practice of subjecting to execution a defendant who unintentionally kills during a robbery or attempted robbery. This showing reflects a substantially stronger "national consensus against the death penalty" than the high court found in striking down the death penalty as disproportionate for mentally retarded murderers in *Atkins* v. *Virginia* (2002) 536 U.S. 304, 314-316 (30 states and the federal government) and for juvenile murderers in *Roper* v. *Simmons*, *supra,* 543 U.S. 551, 664 (30 states and the federal government). In short, the national consensus, as evidenced by state and federal legislation, establishes that the death penalty for an unintentional murder is a cruel and unusual punishment under the Eighth and Fourteenth Amendments.

In addition, exacting death for an unintentional murder is excessive to both the deterrence and retribution justifications for capital punishment. To be sure, in *Tison* v. *Arizona, supra*, 481 U.S. 137, 156-157, the high court held that being a major participant and acting with reckless indifference to human life, rather than with an intent to kill, was enough to impose a death sentence on a felony murder accomplice. But more than 20 years have passed since *Tison*. As noted above, in *Kennedy* the high court

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S.E.2d 638, 665 as examples.

[29] See Shatz, *supra*, at p. 770, fn. 252, citing Ohio Rev. Code Ann. § 2903.01(D) (West 2007); Tex. Penal Code Ann. § 19.03(a)(2) (Vernon 2007) as examples.

appears to have raised the death-eligibility bar to intentional murder, which is wholly consistent with its emphasis on the need to restrain the reach of the ultimate penalty.

With regard to the deterrence rationale, common sense dictates that fear of execution will not deter a person from committing a murder he did not intend to commit. Precisely because of the unintentional nature of the murder, executing appellant for a co-defendant's act will not likely deter others from engaging in similar crimes. Indeed, in *Enmund*, the high court concluded that "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation [.]' " (*Enmund* v. *Florida, supra*, 458 U.S. 782, 798-799, quoting *Fisher* v. *United States* (1946) 328 U.S. 463, 484 (dis. opn of Frankfurter, J.).)

In *Enmund*, the high court went further. It found the death penalty for felony murder had no deterrent value with regard to the underlying felony. The Court posited that the deterrent value of the death penalty might be different if the likelihood of a killing in the course of a robbery were substantial. (*Enmund* v. *Florida, supra*, 458 U.S. 782, 799.) But the empirical data refuted this hypothesis. Both historical data and then-recent data from 1980 "showed that only about one-half of one percent of robberies resulted in homicide." (*Id,* pp. 799-800 & fn. 23 & 24.) As a result, the high court concluded "there is no basis in experience for the

notion that death so frequently occurs in the course of a felony for which killing is not an essential ingredient that the death penalty should be considered as a justifiable deterrent to the felony itself." (*Id,* p. 799.)[30]

Moreover, as a general matter, the validity of the deterrence rationale is questionable. As Justice Stevens has observed, "[d]espite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders. In the absence of such evidence, deterrence cannot serve as a sufficient penological justification for this uniquely severe and irrevocable punishment." (*Baze* v. *Rees* (2008) ___ U.S. ___, [128 S.Ct. 1520, 1547] (conc. opn. of Stevens, J.); see also Shatz, *supra*, at p. 767 & fn. 275 [noting the scholarly debate and empirical data on the deterrence question].) Even assuming that capital punishment may deter some murders, its deterrent value is lost when, as Justice White noted in *Furman*, the penalty is seldomly imposed. *(Furman* v. *Georgia, supra*, 408 U.S. at p. 312.) As an empirical matter, in California the death penalty is rare for robbery felony murder. Only five percent of death-eligible robbery felony murderers (who had no more aggravating special circumstances) are

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[30] In *Tison*, the Court glossed over the deterrence justification and minimized *Enmund's* discussion of the deterrence data, including its conclusion that the death penalty did not deter robberies or robbery murders. (See *Tison v. Arizona,* (1987) 481 U.S. 137, 148; and p. 173, fn. 11 (dis. opn. of Brennan, J.)

sentenced to death. (Shatz, *supra*, at p. 745.)[31] Consequently, the deterrence rationale cannot justify executing an aider and abettor like appellant.

With regard to the retribution rationale, *Tison*'s conclusion that intent to kill was "a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous murderers" (*Tison* v. *Arizona* (1987), 481 U.S. 137, 157) has been called into question by *Kennedy*'s assumption that intentional murder is the sine qua non for imposing capital punishment for crimes against individuals. The heart of the retribution rationale is that the criminal penalty must be related to the offender's personal culpability (*Id.*, p. 149), which is determined by the acts he committed and the mental state with which he committed them. Notwithstanding *Tison*, intentional and unintentional murderers are not similarly culpable. As the high court previously had noted, "[i]t is fundamental that 'causing harm intentionally must be punished more severely than causing the same harm unintentionally.' " (*Enmund* v. *Florida, supra*, 458 U.S. 782, 798, quoting H. Hart, Punishment and Responsibility 162 (1968); see *Tison, supra*, p. 156 ["Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and,

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[31] This very infrequent use of the death penalty for robbery felony murder death penalty raises both risk of arbitrariness and proportionality concerns and suggests that the imposition of the death penalty even for an intentional robbery felony murder is barred by the Eighth Amendment. (See, Shatz, *supra*, at pp. 745-768.)

therefore, the more severely it ought to be punished."].) Moreover, the high court's Eighth Amendment narrowing jurisprudence already holds that not all murders can be classified as "the most serious of crimes" (*Kennedy v. Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2650]) so as to warrant the death penalty. (See *Penry* v. *Lynaugh* (1989) 492 U.S. 302, 327 [to avoid arbitrary and capricious sentencing, the states must limit the death penalty to those murders "which are particularly serious or for which the death penalty in particularly appropriate"].)

Certainly, an unintentional murder is a very serious crime calling for a very serious penalty. But there is neither logic nor justice in punishing a person who, like appellant, does not personally kill during an attempted robbery with the same penalty as a person who kills intentionally. An unintentional aider and abettor does not exhibit the kind of "extreme culpability" that makes him among "the most deserving of execution." (*Kennedy* v. *Louisianna, supra,* _U.S._ [128 S.Ct. 2641, 2650].) Rather, unintentional felony murderers can be adequately "repaid for the hurt he caused" by a lesser punishment. (*Ibid.*) Retribution "does not justify the harshness of the death penalty here." (*Id.* at p. 2662.)

In sum, the death penalty is disproportionate to the crime of felony murder *simpliciter*. The national consensus is overwhelmingly against imposing the death penalty for an unintentional felony murder, and there is

no constitutional justification for inflicting the death penalty for that crime. To uphold appellant's death sentence risks California's "descent into brutality, transgressing the constitutional commitment to decency and restraint." (*Kennedy* v. *Louisianna, supra*, _U.S._ [128 S.Ct. 2641, 2650].) This Court should reverse his death judgment.

CLAIM 52
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT TRUE FINDINGS FOR THE ROBBERY-MURDER, BURGLARY-MURDER, AND MULTIPLE-MURDER SPECIAL CIRCUMSTANCES, VIOLATING APPELLANT'S RIGHT TO DUE PROCESS AND HEIGHTENED RELIABILITY UNDER THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Appellant argues that the trial court erred in denying his motion under Penal Code section 1118.1, as there was insufficient evidence to support true findings for the special circumstances of robbery-murder, burglary-murder, and multiple- murder. (AOB 539-544.)

Defense counsel brought the 1118.1 motion at the close of the People's guilt case. Penal Code section 1118.1 provides that the court:

> shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading if the evidence then before the court is insufficient to sustain a conviction of such ...offenses on appeal.

The 1118.1 motion was argued on two grounds: first, that the prosecutor had failed to prove that appellant had the necessary intent; and second, because the special circumstance alleged that appellant was merely an aider and abettor to the robbery, it was unconstitutional to subject him to the death penalty[32]. (SC RT 10570.) In response, the People argued that the

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[32]This related Constitutional argument is discussed in Claim 49. Appellant incorporates by reference the arguments made in this brief regarding Claim 49, *ante*, including his arguments relating to *Kennedy* v.

section 1118.1 motion should be denied because there was sufficient evidence to prove that appellant was an active participant in the robbery and that he had displayed reckless indifference to human life. (SC RT 10570-10571.) The court denied the motion, stating that the Constitutional challenge was "contrary to established law" and that "I believe it becomes a question of fact for the jury, and...there is sufficient evidence to allow it to go to the jury for that determination." (SC RT 10572.) Neither the People nor the court outlined the evidence relied upon.

Outline of Respondent's Arguments

Respondent simply incorporates their arguments concerning Claim 49 into this Claim. (RB 201-202.) Appellant has not adopted respondent's approach, as the subject matter of the two claims is distinct, albeit with some factual and legal cross-over. Claim 49 is a Constitutional challenge that under the Eighth Amendment, appellant is not death eligible because he did not harbor an intent to kill or other requisite *mens rea*. This Claim relates to the denial of appellant's Penal Code section 1118.1 motion at trial. The thrust of respondent's combined claim is that there was "ample evidence" to support the findings that appellant was a major participant in the attempted burglary at the Comp U.S.A. store and that he acted with

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Louisianna, Supra, _U.S._ [128 S.Ct. 2641].

reckless indifference to human life. (RB 190.)

Respondent's statement that "Clark was unquestionably a major participant" vastly exaggerates the strength of the evidence against appellant. (RB 190.) Respondent seeks to support their contention that appellant was a "mastermind and driving force behind the crimes" with a list of allegations as to appellant's activities, which, as shown below, are largely unsupported by the record. (RB 190-191.) In the alternative, respondent argues that even if appellant was merely a getaway driver, this "would be a sufficient basis for concluding he was a major participant because that role would be integral to the crime." (RB 190.)

The Evidence Adduced at Trial.

Casing the store

Respondent alleges appellant "cased the comp U.S.A. store" by studying the numbers and movements of employees and their activities around closing time. (RB 190-191.) Yet, the only evidence given to support this, was the readily impeached statements made by Ardell Williams. Specifically, Williams' statements were presented to appellant's jury via her Grand Jury testimony (which was read to the jury) and the testimony of Todd Holiday, FBI agent. At the Grand Jury, Williams testified that at appellant's request she accompanied him whilst he went to get some food at the Del Taco adjacent to the Comp U.S.A. store. (SC RT

8739-8745.) She said appellant's brother Eric and Cousin Marc also arrived at the Del Taco, and they all sat in their cars eating tacos and speaking to each other through the open windows. (SC RT 8747- 8752.) At one point Eric looked at the Comp U.S.A. building and said, "Damn they are still in there." (SC RT 8752.) Appellant responded, "yeah, they are probably just clocking out..." (SC RT 8754.) Yet none of this conversation related to any future plans to rob the Comp U.S.A. store. According to the Grand Jury transcript, when Williams asked appellant whether he intended to rob the Comp U.S.A. store, he laughed or made a back and forth head movement. (SC RT 8747 and 8764.) A back and forth head movement is more consistent with the answer "no," while an up and down movement is more consistent with "yes." FBI Agent Holliday also testified and recalled a conversation with Ardell about casing the Comp U.S.A. Without the benefit of any notes, Holliday recalled a conversation that he had had with Ardell approximately 3 and a half years prior. Holliday said Ardell told him that appellant "kept looking at the Comp U.S.A." and made some statement to her which indicated that there was something planned for the Comp U.S.A.. (SC RT 9106.) Williams also said that after eating they drove to another suburban mall where a U-Haul truck was parked on a side street. Appellant then moved that truck down the street a little. (SC RT 8760-8764.)

Thus, whether appellant cased the store depended on the solidity of the following evidence: Williams' statements that she went to a restaurant next to Comp U.S.A. with appellant and her subjective interpretation of his non-verbal responses to her questions; Eric Clark's statement that the employees of the store were still inside; and Agent Holiday's recollection of his conversation with Williams. Whilst this evidence does raise a suspicion of appellant's guilt, this is not sufficient to meet the legal standard, especially in light of all the other evidence adduced at trial, including the trial court's finding that Williams was untruthful, the inconsistencies in her story, and the immunity she received in return for her cooperation with police.

In ruling that her statements could not be admitted pursuant to the hearsay exception in Evidence Code section 1350, the trial court found that Williams was not trustworthy. (SC RT 2602.) In making this determination, the court found that Williams had reason to feel resentful towards appellant since he had bailed himself out in Las Vegas but left her there, forcing her to send for her family to bail her out. (SC RT 2602-2603.) Secondly, "obviously she was given some inducement, promises, for her cooperation" given the "extremely light" sentence she received in Las Vegas–a reduction of a felony to a misdemeanor. (SC RT 2603.) Thirdly, "[h]er own trustworthiness is, of course, questionable to the court, based on

her own prior criminal conduct. The facts fully establish she's a thief." (SC RT 2604.) Lastly, "[s]he lied on occasions to persons who first interviewed or talked to her." (SC RT 2604.)

Furthermore, Williams' testimony itself suggests that she was shaping her story to fit facts she was fed by law enforcement. For example, she says that Clark had possession of a U-Haul truck on the day they went to Del Taco together, which was in late August or early September, 1991. (15 CT 5495.) This could not have been the truck that was involved in the Comp U.S.A. robbery because according to the testimony of Moore and Goolsby the U-Haul found near the Comp U.S.A. was hired on October 31, 1991, approximately 2 months after Williams said she saw appellant in possession of the U-Haul. Further, Ardell did not tell FBI Agent Holiday about the U-Haul when she first spoke to him about the Del Taco conversation with appellant. (SC RT 10917.) That Ardell shaped her story to fit what the police wanted to hear is further supported by appellant's recorded telephone conversations with Liz Fontenot. Appellant said:

> A: ...me and her went and ate some food one time you know, and that's it.
> Q: Yeah.
> A: You know, but I was thinking she was making up to me - cause the lawyer - I see what's happening now, the lawyer - the police made that up, okay, I know what's going on now. (15 CT 5773.)

As stated by the court, it is obvious that Williams received 'a good deal' on her Las Vegas case in exchange for her cooperation against

appellant. (SC RT 10913.) The special relationship between Ardell and law enforcement is further shown by the fact that Detective Grasso did various favors for Williams, including giving her child a pair of pajamas, contacting her probation officer to explain why she could not attend court for a probation hearing, and writing a letter of support for her in her child custody case. (SC RT 2157.)

Nor should Agent Holliday's recollection be credited. Agent Holliday testified over 4 years after the conversation with Williams allegedly took place. Because he did not take notes regarding the contents of the call, he relied upon only his memory. (SC RT 9103.) In other instances during his testimony, he was forced to look at notes to refresh his recollection. (SC RT 9181.) Williams testified for the Grand Jury in September of 1992, approximately 9 months after the purported telephone conversation with Holliday. Thus, inconsistencies should be resolved in favor of Williams' version. For example, Agent Holiday testified that Ardell told him that appellant made admissions regarding "some future criminal activity" regarding Comp U.S.A., and that appellant kept looking at the Comp U.S.A. building. This should be disregarded as it inconsistent with Williams' testimony that appellant shook his head from side to side, indicating that he did not plan any future criminal activity. (SC RT 9106.)

When viewed in its totality, there is little solid evidence to show that appellant cased the Comp U.S.A.

The U-Haul Truck Rental

Respondent next alleges that appellant helped Moore obtain the false driver's license with which to rent the truck. The only evidence the jury heard to support this claim was the immunized testimony of Moore. (SC RT 7641.) She testified that appellant told her that "he had a hookup" and he could get her a false driver's license. (SC RT 7650.) Moore believed that appellant was helping her to obtain a license for her benefit, so that she could drive despite having no valid license. (SC RT 7659.) Moore testified that she and appellant went to the D.M.V and completed the process to obtain a license in Deana Cary's name. (SC RT 7654-7655.) Moore testified that appellant told her to write down his address on the form. (SC RT 7653.)

However, Moore's testimony is belied by D.M.V. records that show Moore applied for the license twice, the first time with one address and the second time with appellant's address. (SC RT 10943.) The official record contradicts Moore's testimony that appellant told her to use his address when they attended the D.M.V. to get the license for the first time.

Moore further testified that sometime later appellant called her and said, "Jeanette, I need you to do a favor. I need you to rent a U-Haul truck.

Because he was leaving his girlfriend, going back to his wife. And he said that his brother would be over there is a little while to pick me up to take me to get the U-Haul truck." (SC RT 7670.) Eric Clark then came to Moore's house and drove her to a U-Haul truck office. (SC RT 7671-7672.) Moore went into the office by herself and filled out some forms using Cary's license. (SC RT 7673.) Once Moore had paid for the U-Haul, Eric drove the truck and Moore drove Eric's car back to L.A. (SC RT 7675 - 7677.) Eric parked the truck and drove Moore home. (SC RT 7678.)

The jury also heard Leon Goolsby's testimony, yet it belied aspects of Moore's testimony. (SC RT 7879.) The general manager of the Glendale U-Haul store, he testified that the truck rented in the name of Dena Carey was the same truck found near the Comp U.S.A. site. (SC RT 7895-7897.) He also testified that on October 9th, a black man came into the store and said that "they would need the truck for a longer time." (SC RT 7891.) Significantly, at trial he could not identify appellant as that man. (SC RT 7891.) In fact he described the man as five-eight, whereas appellant was stipulated to be six-five. (SC RT 7892.) Thus Goolsby greatly undermines Moore's testimony that appellant was involved in the hire of the truck.

In addition, Moore's testimony was also contradicted by that of her former boyfriend, Gary Jackson. Jackson testified at the preliminary

hearing but because he was unavailable at trial, the videotape of his testimony was played to the jury. (SC RT 8554.) He testified that Moore asked him if she could use his address for the fake driver's license, but he refused. (MC RT 826.) He then heard her ask appellant if she could use his address for the driver's license. (MC RT 828.) Appellant agreed to allow Moore to use his address. (MC RT 828.) Jackson said that Moore could not use her own address because "she was staying between two places and she owed them money." (MC RT 827.) Thus, Moore was actively obtaining the license, without any prompting by appellant, in order to drive again and to obtain clothes using false credit cards, which she then traded for cocaine and money. (MC RT 841.) Moore's testimony that appellant was urging the license on her is not to be credited.

Jackson further undermined Moore's self-serving testimony. Jackson also testified that he was present when a man named Ricky offered $100 worth of cocaine and $100 cash for anybody who'd rent a truck for him. (MC RT 832.) Moore agreed to rent the truck. (MC RT 832.) Jackson saw Ricky and Moore around the U-Haul truck in LA in October 1991. (MC RT 833 and 900.) He never saw appellant or any of his relatives around the truck. (MC RT 834.) Jackson's testimony was in fact corroborated by Moore's statements to Grasso in an early recorded interview. She told Grasso that Ricky had paid her $100 to rent the truck.

(MC RT 320.) When asked about this statement at the preliminary hearing and at trial, she denied knowing who Ricky was, and said that she must have meant Eric. (MC RT 320 & SC RT 7914.) Ricky drove a grey BMW and was black with a light-skinned complexion. The description given by Officer Rakitis of the car and the driver more closely matched the description of Ricky than it did appellant.

Jackson also testified that Moore was using her status as a witness against appellant to try to obtain money from Yancey. (MC RT 867.) He said that Moore told him that she was tired of going to the Western Union office and finding that there was no money there for her. She said 'they don't know who they are fucking with' and by this Jackson understood that she meant that if she didn't get her $100 she would testify against appellant. (MC RT 880.)

Even without Jackson's testimony, it was clear that Moore was not a truthful witness. In fact, she received a second grant of immunity after perjuring herself at the preliminary hearing. At the preliminary hearing, Moore was granted immunity in relation to obtaining the false driver's license, and denied using the false identification to obtain credit. She subsequently admitted to obtaining credit, and was granted a second grant of immunity to cover the fraudulent credit cards prior to testifying at appellant's trial. (SC RT 7631, 10911, 13047-13048.) Also, Moore denied

getting a second license, although the D.M.V. records show that the first false license was sent to one address and the second to Clark's address. (SC RT 10943.) Moore also stood to benefit from cooperating with police because she was linked to the Comp U.S.A. murder by the rental of the U-Haul, yet was uncharged in relation to that offense, and also escaped prosecution for her admitted credit card fraud.

In summary, Moore used a license in Dena Cary's name to hire the U-Haul truck that was found near the Comp U.S.A. However, Moore's testimony that appellant was the mastermind behind the hire of the truck is contradicted by the D.M.V. records, Goolsby's testimony, and Jackson's testimony that Ricky hired Moore to rent the truck. Finally, Jackson's testimony is supported by Moore's early statement to inspector Grasso. Add to this the immunity Moore received from testifying, and the strength of Moore's testimony is all but destroyed.

Comp U.S.A.

Respondent next alleges that appellant "assembled a number of individuals at the Del Taco store, who would assist in removing the merchandise from the store," then fled when the police arrived. (RB 191.) Respondent refers to Matthew Weaver's testimony in support of this claim. Weaver, like Moore, testified at the trial only after receiving a grant of

immunity, indicating that he was rewarded for his cooperation with law enforcement. (SC RT 7999.)

Weaver testified that Eric Clark approached him and asked if he "would be interested in helping move some computers for his brother." (SC RT 8010.) Eric said that Weaver would be paid $100 for the work. (SC RT 8012.) Weaver drove to a house with Damian Wilson, one of his basketball teammates. (SC RT 8008- 8016.) He then got into a U-Haul moving van with Eric. (SC RT 8018.) They then drove to a Comp U.S.A. with a Del Taco next to it. (SC RT 8022.) Eric told Weaver that "he had to wait until his brother closed the computer store, and so it would be a little while. (SC RT 8023.) Weaver went to the Del Taco to get something to eat at approximately 9 p.m. (SC RT 8026-8027.) He left the restaurant and met appellant, Wilson, Eric, and another man. (SC RT 8028.) Appellant then said "that the store was closed and we could go ahead and start moving computers now." (SC RT 8048.) Wilson told Weaver to ride with appellant over to the store. (SC RT 8049.) As they came into the Comp U.S.A. paring lot, Weaver saw someone laying on the ground and then an unidentified person trying to dive into the driver's window of the car. (SC RT 8054-8055.) They then drove away.

Weaver's testimony was unreliable and incredible on many fronts. Initially, the trial court found that Weaver was untruthful:

> He admitted he had perjured himself at prior hearings. He admitted he had lied, which is not perjury, but he had lied to many people, investigators, his family, girlfriend, father, et cetera. He lied to many people on many occasions. So he said I am a liar. I'm also a perjurer...he has had an amazing history of I can't remembers, both in my court and in prior statements attributed to him...it would seem to me that Mr. Weaver's motives from day one have been to protect his own skin...a second motive may be...if I tell it the way they want to hear it, then my skin will be saved by immunity. "That's how I see Mr. Weaver. (SC RT 8190-8191)

Furthermore, his story at trial was incredible. He said that between 9 and 10.30 p.m. he was in Del Taco eating, although Rakitis testified that Del Taco closed at 10 p.m. (SC RT 10938.)

More importantly, Officer Rakitis' testimony flatly contradicts that of Weaver. Weaver testified that he was in the front passenger seat of the BMW driven by appellant with a passenger in back. (SC RT 8050.) However, Rakitis stated that he saw two black men in their twenties, or mid-twenties in the front seat of the car and that the back seat was empty. Weaver was white. When asked whether he could identify appellant as the driver of the car, Officer Rakitis testified that he could not. (SC RT 471-475.) Officer Rakitis also testified that he had ample opportunity to observe the car because the car-park was well-lit, he was about 15-20 yards away from the car and he could see clearly through front windshield. (SC RT 7934-7965.) Also, due to the situation and his training, he was carefully watching the passengers in the car. (SC RT 7969.) Given these circumstances it seems impossible that he would have misidentified

Weaver as black, and failed to notice the third black man in the back seat, as testified to by Weaver. Further, Officer Rakitis described the car as a silver colored 500 or 600 series BMW, whereas the car that Weaver said he was traveling in was a 700 series BMW, variously described as gold or tan. (SC RT 7929-7930, 7972.) Even the prosecutor in closing argument said that "Matt Weaver has got a huge discrepancy between officer Rakitis and himself. He's not being entirely truthful." (SC RT 10866.)

Clark's connection to Nokkuwa Ervin

Lastly, respondent alleges that appellant was connected to Nokkuwa Ervin, as demonstrated by the fact that Ervin tried to jump in appellant's car to evade the police. Officer Rakitis testified that he saw a silver BMW reversing and a man come running from the back of the Comp U.S.A.. (SC RT 7929-7930.) The man then twice tried to climb in the driver's window and then tried to get in the right front passenger door. The BMW then started eastbound and the man ran. (SC RT 7934.) Officer Rakitis said that it appeared to him that the passenger was trying to prevent Ervin from entering the car: "It looked to me, yeah, that he didn't want him in the car." (MC RT 471.) Firstly, Officer Rakitis was unable to identify appellant as the driver of the car and in fact described the driver as in his mid 20's, when appellant was in his late 30's at that time. Officer Rakitis also described the car as a silver BMW, when appellant drove a gold BMW. Therefore,

Officer Rakitis' testimony does nothing to connect appellant to Ervin and flatly contradicts Weaver's testimony, which was the only evidence linking appellant being at Comp U.S.A. on the night of the homicide.

Evidence to support a finding of reckless indifference to human life

In relation to the finding of reckless indifference to human life, respondent argues that "[b]ased on Clark's meticulous planning of every aspect of the Comp U.S.A. robbery, the jury could only conclude that he was subjectively aware of how Ervin was to subdue the store employees in order to gain access to the merchandise inside, namely with the gun and handcuffs." (RB 192.) Respondent provides no other evidence in support of the finding that appellant displayed reckless indifference to human life. As discussed above, the evidence connecting appellant to the Comp U.S.A. robbery was very tenuous and in no way supports a finding that Clark was involved in "meticulous planning of every aspect" of the crime.

Moreover, uncontroverted evidence shows that the robbery was designed to reduce the possibility of injury. The robbery occurred when the store was closed and thus relatively empty. (SC RT 8533.) The employees were handcuffed in the bathroom, rather than being held under gun point. (SC RT 8534.) Williams said that Eric Clark told her that the gun carried by the robber wasn't supposed to contain any bullets. (SC RT 2074.) The gun was in fact loaded with only one bullet. (SC RT 8380.) No employees

were harmed during the robbery. The victim, Kathy Lee, happened to be standing just outside the warehouse door when the burglars exited, apparently startling Ervin, who reflexively shot her. The fact that the robbery was supposed to be conducted without the use of deadly force was shown by Ervin's statement: "Please lady don't die." (SC RT 8329.)

Relevant Law

The special circumstances of robbery-murder and burglary-murder are described in section 190.2(a)(17) of the Penal Code. Further, section 190.2(d) provides that a person who is not the actual killer, but who is found guilty of both the crime and the related murder in a paragraph 17 offense, shall be punished by death or life without parole if they are shown to have acted "with reckless indifference to human life and as a major participant" in the crime.

The special circumstance of multiple-murder is described at Penal Code section 190.2(a)(3). Obviously, if the People are unable to prove the elements of the Lee murder (the robbery-murder, burglary-murder special circumstances outlined above), then the multiple-murder special circumstance must likewise fail.

At trial, the jury was given an amended version of CALJIC 8.80.1. The relevant section of that instruction was as follows:

> If you find that a defendant was not the actual killer of a human being, you cannot find the special circumstance to be true unless you

> are satisfied beyond a reasonable doubt that such defendant with reckless indifference to human life and as a major participant, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted in the commission of the crime of burglary or the attempted commission of the crime of robbery which resulted in the death of a human being, namely Kathy Lee. (7 CT 2746-2747.)

The Test for Determining Sufficiency of Evidence

In determining whether there is sufficient evidence to support a criminal conviction, the appellate court must "determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt." (*People* v. *Reilly* (1970) 3 Cal.3d 421, 425.) Whilst the appellate court must consider the evidence "in the light most favorable to respondent," the burden is nonetheless high. "The trier of fact must be reasonably persuaded to a near certainty." *(People* v. *Redmond* (1969) 71 Cal.2d 745, 756, quoting *People* v. *Hall* (1964) 62 Cal.2d 104, 112.) In *Bassett*, the court adopted a two stage approach to this analysis:

> First we must resolve the issue in the light of the *whole record* - i.e., the entire picture of the defendant put before the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding... (*People* v. *Bassett* (1968) 69 Cal.2d 122, 138.)

Substantial evidence is "evidence that reasonably inspires confidence and is 'of solid value.'" *(People* v. *Redmond, supra,* 71 Cal.2d

745, 756, quoting *People* v. *Hall, supra,* 62 Cal.2d 104, 112.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People* v. *Redmond, supra,* p 755.)

In the present case, the above test must be used to determine whether there was sufficient evidence on the record to support the special circumstances of robbery-murder, burglary-murder and multiple-murder. The reviewing court must therefore determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proof, by establishing beyond reasonable doubt, that defendant acted "with reckless indifference to human life and as a major participant" in the crime.

Reckless Indifference to Human Life

"In order to support a finding of special circumstance murder, based on murder committed in the course of robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony." (*People* v. *Proby* (1998) 60 Cal.App.4th 922, 927.) In *Tison*, the court stated that reckless indifference was shown where the defendant "knowingly engag[es] in criminal activities know to carry a grave risk of death." *(Tison* v.

Arizona, supra, 481 U.S. 137, 157, cited with approval in *People* v. *Estrada* (1995), 11 Cal.4th 568, 577.)

To bolster their case that appellant was aware of the grave risk of death, respondent cites *People* v. *Bland* (1995) 10 Cal.4th 991, 996: "[potential for death or injury results from the very presence of a firearm during the commission of a crime]." This reference is misguided, firstly because it concerns Penal Code section 12022, not section 190.2, and secondly because in the facts of that case the defendant had the gun underneath his bed. There is no analogy between that case and the present, where there is no evidence that appellant was ever in possession of a firearm or even spoke about one. Indeed, respondent does not point to any evidence on the record that appellant even knew that Ervin was carrying a weapon, other than that it could be implied from his "meticulous planning," a finding of which is unsupported by the record. (RB 191.)

Major Participant

The term "major participant" has not been defined by the courts, however in *People* v. *Proby, supra,* 60 Cal.App.4th 922, 933, the Court of Appeals held that such a classification did not require that the person be of greater importance than the others, but merely that they be "one of the larger or important members." (*Ibid.*) (RB 190.)

Respondent relies on *People* v. *Marshall, supra,* 50 Cal.3d at p. 938

to support the argument that appellant's role was sufficient for a categorization of major participant: "['ringleader' of burglary/robbery properly found to be major participant, *even though not actual killer*].)" (RB 191.) (Emphasis added.) The citation to *Marshall* for this principle is misleading since Marshall was the actual killer who "after planning and in cold blood executed a helpless woman." (*Ibid*). There was no discussion of whether *Marshall* was a major participant because he clearly was. The court referred to the ringleader in considering the intracase disproportionality of the death sentence when compared to a co-defendant, the ringleader, whose death sentence was subsequently set aside by the trial court. *Id. Marshall* is the only case cited by respondent to support the argument that appellant's actions elevated him to a position as "major participant."

Respondent also cites *People* v. *Hearn*, *supra*, 95 Cal.App.4th 1164, 1176, as authority in support of the argument that even if appellant was found to be merely the driver of a getaway car, that would be sufficient to make him a major participant. The *Hearn* court held that: "Principals and aiders and abettors whose conduct is integral to the crime, e.g., a lookout or getaway driver, are major participants." (RB 190.) However, *People* v. *Hearn* was depublished on direction of this court by order dated May 1, 2002. Respondent cites no other authority for this principle.

The evidence does not support a finding that appellant was a major participant in the Comp U.S.A. robbery.

"Not every surface conflict of evidence remains substantial in light of other facts." (*People* v. *Holt* (1944) 25 Cal.2d 59, 70, quoted in *People* v. *Bassett, supra,* 69 Cal.2d 122, 138.) In light of the "whole record," the findings of reckless disregard for life cannot be sustained.

Respondent argues that based on the testimony of Moore, Weaver and Williams, there was "ample evidence" to support the jury's finding that appellant was a major participant in the Comp U.S.A. robbery. (RB 190.) However, there is more evidence to support a finding that Ricky arranged for the hire of the truck, than there is to find that appellant was responsible. "Implicit in our duty to determine the legal sufficiency of evidence to sustain a verdict is our obligation, in a proper case, to appraise the sufficiency and effect of admitted or otherwise indubitably established facts as precluding or overcoming as a matter of law, inconsistent inferences sought to be derived from weak and inconclusive sources." (*People* v. *Reyes* (1974) 12 Cal.3d 486, 499, quoting *People* v. *Holt, supra,* 70.)

Furthermore, the D.M.V. record indubitably establishes that Moore's version of how the license was obtained was wrong. Moreover, the tape recording of the conversation between Moore and Grasso records Moore's early statement that Ricky had paid her to get the truck. In light of these facts and Moore's incentive to lie to curry police favor, Moore's statements

connecting appellant to the truck should be disregarded. Further, given the inconsistencies between the testimonies of Officer Rakitis and Weaver, one must overcome the other. Officer Rakitis' description of the passenger in the BMW as black cannot logically be reconciled with Weaver's statement that he was in the front passenger seat of the car. Clearly, Officer Rakitis is the more credible witness. The court found that Weaver lacked truthfulness. He obviously also had an incentive to lie in order to escape prosecution. If Weaver's evidence is disregarded, then there is absolutely no evidence that places appellant at the Comp U.S.A. store on the day of the robbery. Williams' testimony, which indirectly links appellant to the Comp U.S.A. robbery, does nothing more than raise a suspicion of guilt.

Taken as a whole, the evidence lacks the strength to persuade a reasonable trier of fact to a near certainty that the prosecution had sustained its burden of proving beyond a reasonable doubt that appellant was involved in the Comp U.S.A. robbery, let alone being a major participant.

The evidence does not support a finding that appellant acted with reckless indifference to human life.

Given that the evidence is insufficient to support a finding that appellant was a major participant in the Comp U.S.A. robbery, *a fortiori*, it cannot be sufficient to prove that appellant meticulously planned of every aspect of the Comp U.S.A. robbery, from which "the jury could only conclude that he was subjectively aware of how Ervin was to subdue the

store employees in order to gain access to the merchandise inside, namely with gun and handcuffs." (RB 192.)

Moreover, uncontroverted facts establish that the robbery was conducted in a way that would minimize the risk of harm. The heist was conducted at night when there were a minimum of people in the store. The employees were handcuffed in the bathroom rather than being held continuously at gunpoint, and none of the employees were injured. Further, Williams stated that there were not supposed to be bullets in the gun. (SC RT 2074.) Finally, that the homicide was the result of an accidental, reflexive shooting is shown by Ervins' statement, "Please lady don't die." (SC RT 8329.)

In *People* v. *Bustos* (1994) 23 Cal.App.4th 1747, 1754, the court considered whether defendant had exhibited reckless indifference to human life by applying the *Tison* test: did defendant "knowingly engage[] in criminal activities know to carry a grave risk of death?" The circumstances relied upon were that defendant had admitted to planning the robbery, to robbing and hitting the victim, knowing that his accomplice was armed, and he failing to prevent his accomplice from stabbing the victim. He then fled with his accomplices and the robbery loot, leaving the victim to die. *(People* v. *Bustos, supra*, p 1754-1755.) The facts in the present case are easily distinguishable from *Bustos*. Appellant denied any involvement in

the robbery, and there was no physical evidence linking appellant to the robbery. There was limited circumstantial evidence that appellant was involved in the planning of the crime and even less evidence that he knew Ervin was armed. Officer Rakitis' testimony completely belies Weaver's testimony that appellant was at the scene during the heist, thus nullifying the only evidence that appellant was even there.

Taken as a whole therefore, the evidence lacks the strength to persuade a reasonable trier of fact to a near certainty that the prosecution had sustained its burden of proving beyond a reasonable doubt that appellant exhibited reckless indifference to human life.

Given the insufficiency of the evidence to prove the necessary elements of the special circumstances pursuant to Penal Code section 190.2(a)(17) (reckless indifference to human life and defendant's role as a major participant), the trial court erred by denying appellant's motion under Penal Code section 1118.1. Thus, the burglary-murder, robbery-murder, and multiple murder special circumstances should have been stricken. With only the witness killing special circumstance remaining, penalty reversal is required because an invalid sentencing factor (multiple murder) rendered the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process and no other sentencing factor enabled the jury to give aggravating weight to the same

facts and circumstances of multiple murder. *Brown* v. *Sanders* (2006) 546 U.S. 212, 220. Thus, the penalty verdict must be reversed.

CLAIM 53
THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE LYING IN WAIT SPECIAL CIRCUMSTANCE, THEREBY VIOLATING APPELLANT'S RIGHT TO HEIGHTENED RELIABILITY AND A DETERMINATION OF PENALTY BASED ON PERSONAL CULPABILITY.

The trial jury found appellant to be guilty of first degree murder in relation to Lee and Williams. (SC RT 11235-11242.) They also found each of the special circumstances to be true, including the special circumstance of murder while lying in wait in relation to the Williams murder. (SC RT 11243.) There was insufficient evidence on the record to support this finding of murder while lying in wait. The finding was therefore a violation of appellant's constitution rights.

Respondent argues that there was ample evidence to support the three essential elements for a finding of murder lying in wait:

> 1) A concealment of purpose
> 2) A substantial period of watching and waiting for an opportune time to act, and
> 3) Immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. (*People* v. *Dickey* (2005) 35 Cal.4th 884, 903.) (RB 203.)

Respondent's case

Respondent argues that the first element of concealment of purpose was satisfied by the evidence relating to Yancey's use of the Janet Jackson

ruses to conceal her purpose in luring Williams to the Continental receiving lot. (RB 202.) Respondent also argues that the evidence regarding the flower delivery by Carolyn is relevant to this element. However, this second claim is clearly incorrect as the flower delivery was unconnected to the job interview and thus was not the means by which the murder was achieved. In addition, there was a "cognizable interruption" of over a month between the flower delivery and the murder. (*Domino* v. *Alameda* (1982) 129 Cal.App.3d 1000, 1010.) At trial, the evidence of the Janet Jackson calls was produced through the testimony of Nena Williams, Ardell's sister, and Angelita Williams, Ardell's mother. Nena and Angelita testified that they received a number of phone calls from a woman who identified herself as Janet Jackson. (SC RT 9449-9450, SC RT 9310-9311.) According the Angelita's testimony, Jackson first called asking to talk to her daughter Liz Fontenot. (SC RT 9450.) After that, Janet called back a number of times to talk to Angelita. They discussed "mother-daughter things", for example that Angelita was fighting with her daughter Liz and that Janet's daughter, also named Ardell, had been in an accident. (SC RT 9452- 9456.) On the fourth or fifth call Jackson asked Angelita if she knew anybody who needed a job in design. (SC RT 9465.) Angelita then handed the phone over to Ardell, and she heard Ardell discussing her interest in the job. (SC RT 9466-9467.) When she got off the phone Ardell told her mother that

Jackson said that she would get back to Ardell with more details about the job. (SC RT 9467.) Nena testified that she was in the room whilst Ardell was speaking to Jackson and saw Ardell write down the details for the job interview at Continental Receiving building. (SC RT 9319.) Nena and Angelita identified Yancey's voice as being that of Jackson. Angelita testified that she last saw her daughter alive at 6.15-6.30 on the Sunday morning of her death when she said goodbye to her on her way to the job interview. (SC RT 9471-9472.)

Respondent argues that the second element in the special circumstance of lying in wait, a substantial period of watching and waiting for an opportune time to act, was satisfied by evidence that Yancey engaged in watchful waiting while Williams filled in the job application. (RB 202.) There was no direct evidence linking Yancey to the murder scene. There were no fingerprints or DNA evidence found at the scene that matched Yancey. There were no witnesses to the murder. Respondent's argument is entirely based on the partially completed job application form that was found at the murder scene. At trial, detective Anderson testified that when she attended the crime scene she saw two job application forms. (SC RT 9513 & 9523.) One was on the trunk of the car, and one was on the ground. (SC RT 9524.) The one on the ground was partially completed, with the date, name, street address, city, state and one number of the zip code was

filled out. (SC RT 9531.) Anderson also testified that Ardell's body was found near her parked car. (SC RT 9549.) In Anderson's opinion, from the patterns in the dust on the trunk of the car it appeared that "an arm was resting on the hood" and you could see the square outline where a paper had been laying. (SC RT 9528.) The People argue that "[t]he jury could infer from the recovery of the partially completed job application forms near William's body [citation] that some substantial period of time elapsed while Williams filled out the forms, during which time Yancey waited for an opportune moment to strike." (RB 204.) However this version of events is contradicted by the physical evidence. The employment application was dated March 8, 1994, however the date on which the murder occurred was March 14, 1994. (SC RT 9531.) This suggests that Ardell started filling out the application prior to attending the interview.

Appellant relies on *Richards,* where the court held that there was insufficient evidence of lying in wait because there was "no evidence in the record showing the precise manner in which the murder occurred", and hence no basis for satisfying elements one and two: concealment and watchful waiting. Respondent argues that this "ample evidence of a period of watchful waiting" distinguishes it from the case of *Richards* v. *Superior Court* (1983) 146 Cal.App.3d 306. (RB 204.) However, the evidence in support of watching and waiting in *Richards* is similar to that in the present

case. In *Richards*, there was the testimony from one of the accomplices that defendant lured the victim to the garage by asking for a tour of the victim's automobiles. That is equivalent to the testimony regarding the Janet Jackson ruse and the job application found at the site, both of which support a finding that a ruse was employed to lure the victim to the site of their death. Similarly, in *Richards* the victim was struck while standing next to the Porsche, providing circumstantial evidence that the victim was giving a tour of his cars when murdered. This is similar to the evidence of the imprint on the hood of William's car that suggested that William's was filling in the application at the time of her death. Lastly, there was evidence in both cases that the victim was killed from behind. Respondent argues that the evidence in both cases was not equivalent because "the discovery of the partially completed job application forms near William's body permitted the inference that she spent some period of time at Continental Receiving filling out the forms while Yancey positioned herself behind Williams to deliver the fatal shot." (RB 204.) However the completion of four lines of the job application does not suggest a substantial period of time elapsed. Indeed, it is equivalent to the evidence in the *Richards* case showing the victim was murdered by the Porsche rather than near the door, suggesting that he was not killed immediately. Thus, Respondent cannot consistently argue that the evidence shows a period of watchful waiting in

one case but not the other. In both cases there was an "absence of *any* period of watchful waiting on the defendants' part."[33]

Lastly, respondent argues that the third element was proven by the fact that Williams had been shot from behind, as this suggests "a surprise attack on an unsuspecting victim from a position of advantage." (RB 202-204.) There is no direct evidence as to how the shooting occurred. Respondent relies on the evidence of Riley, deputy medical examiner with the office of the LA County Coroner. (SC RT 9750-9754.) According to Riley, Williams died as a result of a gunshot wound to the left side of the back of the head. (SC RT 9753.) He further testified that it was a contact wound, meaning that it was a "wound sustained with the muzzle making contact with the target at the time of discharge." (SC RT 9753.) In essence, respondent's argument is that if the victim is shot from behind, element three of the special circumstance is established.

Respondent does not respond to appellant's argument that there was no evidence of appellant's knowledge of the job application ruse. "Of the many letters and telephone calls [between appellant and Yancey] intercepted by law enforcement, none addressed this issue." (AOB 547.) At trial, the prosecutor, in his closing statement said that appellant's intent to

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[33] *People v. Morales*, (1989) 48 Cal.3d 527, 556, confirming the finding in *Richards* regarding watchful waiting.

kill was proven by his telephone calls with Fontenot in which he expresses concern that Williams would testify against him (SC RT 10859-10863.) The People incorporated aiding and abetting into the offer of proof for conspiracy between appellant and Yancey. The conspiracy between appellant and Yancey to kill Williams was evidenced by the letters, visiting records and telephone calls between them. (SC RT 10872-10874.) The prosecutor also argued that appellant's statement to Yancey: "Will be in bed with you in a few 6 weeks. Stay strong and be careful", showed knowledge of the planned murder. (SC RT 10885.)

The Relevant Law

The special circumstance of lying in wait is described in section 190.2(a)(15) of the Penal Code: "The defendant intentionally killed the victim by means of lying in wait." As appellant was incarcerated at the time of the murder and so could not be the shooter, Penal Code section 190.2(c) is also relevant.

At trial, the jury was given an amended version of CALJIC 8.80.1. (7 CT 2751-2752.)

The test for determining insufficiency of evidence

In determining whether there is sufficient evidence to support a criminal conviction, the appellate court must "determine whether a reasonable trier of fact could have found the prosecution sustained its

burden of proving the defendant guilty beyond a reasonable doubt." (*People* v. *Reilly, supra,* 3 Cal.3d 421, 425.) Whilst the appellate court must consider the evidence "in the light most favorable to respondent", the respondent's burden is high. "The trier of fact must be reasonably persuaded to a near certainty." (*People* v. *Redmond, supra,* 71 Cal.2d 745, 756, quoting *People* v. *Hall, supra,* 62 Cal.2d 104, 112.) In *Bassett*, the court adopted a two stage approach to this analysis:

> First we must resolve the issue in the light of the *whole record* - i.e., the entire picture of the defendant put before the jury - and may not limit our appraisal to isolated bits of evidence selected by the respondent. Second, we must judge whether the evidence of each of the essential elements constituting the higher degree of the crime is *substantial*; it is not enough for the respondent simply to point to "some" evidence supporting the finding... (*People* v. *Bassett, supra,* 69 Cal.2d 122, 138.)

Substantial evidence is "evidence that reasonably inspires confidence and is 'of solid value.'" (*People* v. *Redmond, supra,* 71 Cal.2d 745, 756, quoting *People* v. *Hall, supra,* 62 Cal.2d 104, 112.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People* v. *Redmond, supra*, 755.)

Lying in wait

The lying in wait special circumstance is comprised of three elements. The prosecution must prove "an intentional murder, committed

under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter a surprise attack on an unsuspecting victim from a position of advantage." (*People* v. *Morales, supra,* 48 Cal. 3d 527, 557.) There cannot be any "cognizable interruption" between the period of time consisting of the concealment and watchful waiting, and the killing. (*Domino* v. *Alameda, supra* 129 Cal.App.3d 1000, 1010.) The "immediacy requirement," which distinguishes the lying in wait special circumstance from the lying in wait form of first degree murder, requires that "the killing must take place during the period of concealment and watchful waiting." (*Ibid.*)

As outlined in the AOB, in *Richards* v. *Superior Court, supra,* 146 Cal.App.3d 306, the court dismissed a lying in wait special circumstance where the victim was lured to a location and then killed by a blow to the back of his head. (AOB 546.) The court held there was insufficient evidence of lying in wait because there was "no evidence in the record showing the precise manner in which the murder occurred", and hence no basis for satisfying elements one and two: concealment and watchful waiting. *Richards* v. *Superior Court, supra,* 146 Cal.App.3d 306, 314. As discussed above, respondent contends that appellant's reliance on *Richards* was misplaced, because it is factually distinguishable. (RB 204.) In

addition, respondent states that the court in *Morales* disapproved of *Richards* "to the extent it would require an actual physical concealment as an element of lying in wait." (*People* v. *Morales*, *supra,* 48 Cal.3d 527, 557.) (RB 204.) However, as discussed above, even without the requirement for physical concealment, the decision in *Richards* is instructive because the facts are legally identical and the court found that there was no evidence to support a finding of watchful waiting.

The issues around section 190.2(c), which makes the special circumstances applicable to persons who are not the actual killer, was considered by the court in *Bonilla*[34]. The court rejected the argument that the phrasing of Penal Code section 190.2(a)(15) ("*the defendant* intentionally *killed* the victims by means of lying in wait") nullified the application of aiding and abetting section (section 190.2(c) to the special circumstance of lying in wait. "We decline to attach special significance to the choice of words 'the defendant,' as opposed to 'the killer' or 'the murderer,' where to do so would negate in whole or part another statutory provision." (*People* v. *Bonilla* (2007) 60.Cal. Rptr.3d 209, 223-224.)

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[34] In *Bonilla* the court considered the predecessor to section 190.2(c), the now repealed Penal Code section 190.2(b). Section 190.2(b) was very similar to the present 190.2(c), except that it listed the special circumstances, including lying-in-wait, that could be applicable to a person who was not the actual killer.

Therefore, where the special circumstance of lying in wait is alleged against a person who is not the actual killer, the prosecution bears the additional burden of proving that appellant is guilty as an aider and abettor and that he acted with intent to kill. (*People* v. *Anderson* (1987) 43 Cal. 3d 1104, 1142.)

The facts on the record were insufficient to support a finding of the special circumstance of lying in wait.

In the present case, the test for determining insufficiency of evidence, as discussed above, must be used to determine whether there was sufficient evidence on the record to support the special circumstances of lying in wait. The reviewing court must therefore determine whether a reasonable trier of fact could have found the prosecution sustained its burden of proof, by establishing beyond reasonable doubt that defendant: 1) Aided or abetted Yancey to kill Williams; and 2) had the intent to kill Williams. The People must also prove that the shooting involved the following elements; a) a concealment of purpose; and b) a substantial period of watching and waiting for an opportune time to act; and c) Immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage.

The evidence relied upon by respondent to prove appellant aided and abetted Yancey to carry out the murder merely raises a strong suspicion of the defendant's guilt and is thus not of solid value. Appellant does not deny

that he was in an intimate relationship with Yancey, as demonstrated by the telephone calls, visits and letters between the two. However, none of the correspondence seized by law enforcement personnel alludes to, let alone refers to, Williams. The People seek to create an inference that appellant knew about the murder through his statement "Will be in bed with you in a few 6 weeks." (SC RT 10885.) However, this statement is just as easily attributable to an innocent inference (i.e. appellant being confident about his case, or trying to reduce the angst of being separated from his lover), than it is to the illegal purpose ascribed by the People. Based on this evidence, no reasonable trier of fact could have found that the prosecution sustained its burden of proving the defendant aided and abetted in the shooting of Williams.

Similarly, the evidence in relation to appellant's intent to kill Williams, merely raises suspicions, rather than being of solid value. Whilst the Fontenot tapes show appellant's concern about Williams testifying against him and his desire that she get selective amnesia, it does not show an intent to kill. Moreover, the inference of intent must be tested against the whole of the evidence on the record. "Not every surface conflict of evidence remains substantial in light of other facts." (*People* v. *Holt, supra,* 25 Cal.2d 59, 70, quoted in *People* v. *Bassett, supra,* 69 Cal.2d 122, 138.) The evidence given by Williams at the Grand Jury was not damning

by any means. It did not place appellant at the scene of the Comp U.S.A. robbery, nor did it contain any express admissions of an intent to rob the Comp U.S.A. store. (SC RT 8731 – 8797.) Therefore, whilst the evidence supports a finding that appellant tried to influence Williams not to testify, it is pure speculation to infer from this evidence an intent to kill.

In order to fulfill the requirements for the special circumstance of lying in wait, the People characterize the time spent whilst Williams filled in the first 4 lines of the job application as watching and waiting, as required by the second element in the special circumstance of lying in wait. Whilst the presence of the job application supports the theory that Williams was lured to Continental Receiving by the job ruse, it does not demonstrate that a substantial period of watchful waiting elapsed. As in *Richards*, there is insufficient evidence to support a finding of watchful waiting.

Given the insufficiency of the evidence to prove the necessary elements of the special circumstance of lying in wait, the trial court erred by failing to strike out that special circumstance. Penalty reversal is required because an invalid sentencing factor (lying in wait) rendered the sentence unconstitutional by reason of its adding an improper element to the aggravation scale in the weighing process and no other sentencing factor enabled the jury to give aggravating weight to the same facts and

circumstances of lying in wait. (*Brown* v. *Sanders, Supra,* 546 U.S. 212, 220.) Thus, the penalty verdict must be reversed.

Unconstitutionality of California's Lying-in-Wait Special Circumstance

The special circumstance of lying-in-wait, fails to provide a meaningful basis for imposition of the death penalty and thus violates the Eighth Amendment of the U.S. Constitution. (*Furman* v. *Georgia*, *supra*, 408 U.S. 238.) The elements of waiting, watching, and concealment are the functional equivalent of premeditation and deliberation, see Perkins, Criminal Law 91 (2d ed. 1969), and as such fail to reasonably justify the imposition of a more severe sentence as compared to other forms of premeditated and deliberate murder. (*Zant* v. *Stephens*, (1983)462 U.S. 862, S.Ct. 2733, 77 L.Ed.2d 235.)

Whether or not the elements of waiting, watching, and concealment would provide a constitutionally rational basis for determining death-eligibility, lying-in-wait, as defined by California law, section 190.3(a)(15), fails constitutional muster. Under California law, as embodied by instructions given appellant's jury, lying-in-wait requires only waiting and watching; the element of concealment is satisfied by a mere undisclosed felonious intent. This construction of lying-in-wait does not require physical concealment and therefore constitutes an arbitrary and irrational basis for distinguishing intentional murders that are subject to the death

penalty from those that are not. Under this expansive definition, virtually every first degree murder -- and many second degree murders -- become capital crimes.

The special circumstance instruction fails to provide the sentencer with identifiable criteria to distinguish a capitally eligible crime from non-capital first degree murder. The instruction fails to guide the sentencer because it lacks any reference to facts that would rationally distinguish capital murder from other intentional killings. The instruction therefore fails to provide notice, guidance or any principled method by which the jury can identify a class of murderers that are more deserving of death. The instruction given by the trial court articulated a standard that casts a lying-in-wait net over every premeditated murder, and does not genuinely narrow the class of persons eligible for the death penalty. As such, the instruction does not satisfy Eighth Amendment standards.

CLAIM 56
THE INTRODUCTION OF EVIDENCE OF THE SOFT WAREHOUSE BURGLARY AT THE PENALTY PHASE RETRIAL WAS IMPROPER AND VIOLATED PENAL CODE SECTION 190.3 AND APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Claims 56, 57 and 58 concern the same subject matter and have been combined for the ease of the court.

During the penalty phase re-trial, the trial court erred by allowing the prosecutor to introduce evidence of appellant's involvement in the Soft Warehouse burglary in his case-in-chief. The ruling was an abuse of discretion since it allowed the introduction of evidence of non-violent conduct, contrary to the express prohibition in Penal Code 190.3, paragraph two. In addition, the court should have upheld the earlier, guilt phase exclusion of the evidence pursuant to Evidence Code section 1101 as irrelevant to motive or intent. Lastly, the evidence should have been excluded pursuant to Evidence Code section 352, because it was more prejudicial than probative.

The Proceedings at Trial

During the penalty phase re-trial, defense counsel filed a motion in limine to exclude appellant's prior convictions and bad acts. (12 CT 4386-4391.) The motion sought to exclude evidence of the Soft Warehouse burglary as irrelevant. (12 CT 4388.) The motion also argued that the crime was not violent and thus was not admissible pursuant to Penal Code section 190.3, subdivision (b). (12 CT 4390.) And because appellant was not convicted for any role in the crimes, the evidence was not admissible pursuant to 190.3, subdivision (c). (12 CT 4388.) In response, the prosecution filed a motion which merely stated that the evidence was previously admitted at the guilt phase. (12 CT 4543.)

At the hearing on these motions, the prosecutor stated that they were not seeking to admit the Soft Warehouse evidence pursuant to 190.3(b) or (c), conceding that "unless it was force and unless it was a felony conviction, we could not offer it under (b) and (c) factors." (SC RT 12284.) Instead, the prosecution offered the evidence under 190.3, subsection (a), the facts and circumstances of the crime to show motive. Notably, the prosecutor did not seek to introduce the evidence as rebuttal to defense lingering doubt evidence. (SC RT 12279-12286.) The prosecution argued that the past criminal relationship between appellant and Williams explained appellant's motive in killing Williams, because he knew that if she testified against him, evidence of his other computer related thefts would be revealed. (SC RT 12280-12285.) The court ruled that the Soft Warehouse evidence was not admissible pursuant to section 190.3, subdivisions (b) or (c). (SC RT 12281.) The court also stated: "I do have some concern as to how much of this motive stuff is going to come in under (a), if any. Motive, that is something to do with the crime. But the facts of the other non-violent crimes, I think that would be bootlegging (sic) to say those are (a) factors." (SC RT 12286.)

Subsequently, defense counsel filed further points and authority to exclude references to the Soft Warehouse burglary in response to the People's assertion that the evidence should be admitted pursuant to Penal

Code section 190.3(a). (12 CT 4557 - 4590.) The defense argued that the evidence was irrelevant to the issues presented at the penalty phase retrial because guilt had already been established. (12 CT 4560.) Secondly, the evidence did not withstand the gauntlet of Evidence Code section 352, because it was more prejudicial than probative. (12 CT 4562.) Specifically, the defense argued that the probative value of the evidence to prove the criminal relationship between appellant and Williams was low because evidence of this relationship was already before the jury in the form of the Capri Jewelers theft and the Las Vegas casino theft. (12 CT 4560.) However, evidence of "yet another non-violent crime in which William Clark suffered no conviction would" be highly prejudicial. (12 CT 4560.) Finally, the admission of the evidence of the Soft Warehouse crimes would deny appellant his right under the Eighth Amendment to a reliable guilt and penalty determination in a capital case. (12 CT 4565.)

On September 3, 1997 there was yet another hearing on the admissibility of the Soft Warehouse evidence. (SC RT 12411-12420.) To avoid a finding that the evidence would be cumulative, the People offered to exclude evidence of the Capri jewelry theft in order to have the Soft Warehouse evidence admitted. (SC RT 12412-12414.)

The court refused to admit the evidence pursuant to Penal Code section 190.3(a): "I don't believe that that [subdivision (a)] was intended to

include other acts which were admitted for a limited purpose." (SC RT 12415.) The court told the prosecutor that it would not "let you bootstrap it into an (a) factor which is clearly aggravating. It may be relevant to lingering doubt." (SC RT 12416). The court then admitted the evidence for a limited purpose, without specifying neither what the limited purpose was nor what subsection of section 190.3 the evidence was being admitted pursuant to:

> THE COURT: I am not saying that it was not appropriate as to lingering doubt. I think it is. But to bring it in as another crime whereas that is not what it is being brought in for. It is being brought in for a specific limited purpose. I think we should leave it at that.
> MR KING: As a limited -
> THE COURT: For the limited purpose.
> MR. KING: Oh, well, the people have no objection if the evidence is allowed for the jurors to be told that it is coming in for a limited purpose.
> THE COURT: That is my thought.
> MR. KING: Oh, I am sorry. I misunderstood the court.
> THE COURT: It would be nice to say I don't think it is not relevant; it is not coming in. One, I would be wrong. It is relevant. My concern is, is it an (a) factor. And I know that if you look at the language, "circumstances of the crime," of course motive is. But when motive is really the relationship, and then the knowledge, well, it is less important than it was in another crime. So I think it may be relevant for certain purposes but not under (a). And it may be relevant under (a), but I would be more comfortable in fashioning a limiting instruction for the jury that I believe they can follow. (SC RT 12416-12418.)

Pursuant to the ruling, the prosecutor stated his intention to introduce "both the actual witness who was there and the statement by Ardell Williams." (SC RT 12420.)

On September 23, 1997, defense counsel asked the court to give the jury a limiting instruction in relation to the Soft Warehouse evidence. (SC RT 14087-14097.) The exchange that ensued further demonstrated the court's confusion surrounding the admission of the evidence. The court rejected the People's offer of motive and instead found that the evidence was being offered to prove a relationship between appellant and Williams. (SC RT 14090.) The court stated "I am not sure whether motive is the proper limited purpose because motive involved in Soft Warehouse is not the motive involved in the Comp U.S.A.." (SC RT 14089.) The court then gave the following limiting instruction:

> I wanted to give you an admonition concerning Soft Warehouse evidence before we proceed, however. You are going to get other instructions at the conclusion of the case which will help guide you in your deliberation process. The evidence concerning the alleged theft from the Soft Warehouse, if believed, is being offered by the people for a limited purpose to show a criminal relationship, if any, between Mr. Clark and Ardell Williams. Okay? And is that clear to everybody?
>
> So limited purpose, that means that is all you are allowed to consider it for if you believe it and accept it. If not, then it is not evidence to be considered. Fair enough? (SC RT 14097.)

No further limiting instructions in relation to the Soft Warehouse evidence were given. (13 CT 4817-4867.)

Pursuant to the court's ruling, the jury heard testimony from Neil Mauskapf and Richard Highness, employees at Soft Warehouse at the time of the burglary. (SC RT 14032- 14040, SC RT 14040-14052.) Mauskapf

testified that Ardell Williams and Eric Clark worked at Soft Warehouse, as cashiers. (SC RT 14032-14033) He also testified that Williams had been caught participating in stealing computers. (SC RT 14039.) Highness identified appellant in court and said that on November 1st, 1990, he had assisted him with a computer purchases totaling approximately $10,000 and then left him to pay. (SC RT 14045 - 14048, 14052.) Later that afternoon, he checked with the cashiers to see whether the transaction went through and when he found that it had not, and that the merchandise was no longer in the store, he reported it to the operations manager. (SC RT 14048-14051.) The police were called and they searched Williams' car and found some paperwork relating to the missing equipment and Williams was subsequently arrested. (SC RT 14051-14052.)

The People also called Investigator Grasso, who testified that on January 13, 1993 he had a conversation with Ardell Williams in which she said that appellant, Warren Canada, and Tony Williams were involved in the Soft Warehouse burglary. (SC RT 14274- 14287, 14279.) The defense objected to this evidence on hearsay and 352 grounds. (SC RT 14277.) The court overruled the objection but confirmed that the statement was only to be used for a non-hearsay purpose. (SC RT 14278.)

The prosecutor discussed the Soft Warehouse burglary in both his opening and closing statements. In the opening statement, the prosecutor

argued: "As the evidence is going to show, he was in the business, part of it illegal, in 1989-1990 of selling computers." The prosecutor then went on to discuss the Soft Warehouse burglary in detail. (SC RT 13090-13093.) In closing, the prosecutor said:

> Again, if you want to consider this concept of lingering doubt, you ask yourself is there any question in your mind that the defendant in the mid 80's to early 90's was in the business of like (sic) computers? Okay...Then you had the Soft Warehouse people who came in and one of them identified the defendant as Tom Jones. You know Tom Jones, Janet Jackson. You know Tom Jones as being one of the people that was involved in the scam with Ardell. (SC RT 16488.)

In closing, the prosecutor also addressed the defense evidence of lingering doubt and said: "Okay. Look at these pieces of circumstantial evidence. Because this is the case against William Clark. He was I.D'd at the Soft Warehouse theft. Is Highness in on this conspiracy?" (SC RT 16519.)

> **The admission of the Soft Warehouse evidence contravened the prohibition against the admission of evidence of non-violent conduct in Penal Code section 190.3 paragraph 2.**

Paragraph two of Penal Code section 190.3 creates a blanket prohibition against the admission of evidence in the penalty phase of criminal activity not involving violence:

> No evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence.

Notably, the statute expressly states that rebuttal evidence is not subject to the notice requirement[35]. Yet the statute does not state that rebuttal evidence is not subject to the blanket prohibition on non-violent, non-convicted criminal activity. This distinction indicates that the legislature meant to exclude rebuttal evidence from the notice requirement, but not the prohibition on non-violent, non-convicted criminal activity.

The wording of the statute clearly shows that rebuttal evidence is subject to the prohibition against the admission of evidence regarding non-violent activity. It is a basic cannon of statutory interpretation that if the language of the statute is plain and unambiguous, it must be given effect. (*Newhall* v. *Sanger* (1875) 92 U.S. 761.) Furthermore, when a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (*People* v. *Garcia* (1999) 21 Cal.4th 1, 10; *People* v. *Gardeley* (1996) 14 Cal.4th 605, 622.)

Despite this clear statutory prohibition, respondent asserts that because the evidence was admitted as rebuttal it was "not subject to the strictures of Penal Code section 190.3" (RB 211.) Respondent cites *People* v. *Haskett* (1990) 276 Cal.Rptr 80 as authority for the admissibility of

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[35] Paragraph four of Penal Code section 190.3 requires that the prosecution provide the defense with notice of the evidence they intend to admit in aggravation.

rebuttal evidence in reply to lingering doubt evidence. (RB 210.) In *Haskett*, the Court found that the prosecution could rebut the alibi evidence admitted by the defense in order to raise lingering doubt. (*Id,* p 242.) However, this case did not address the section 190.3 prohibition. Further, other cases in which rebuttal of character evidence has been used to admit evidence of non-violent crimes also never addressed the statutory prohibition against the admission of such evidence. (See, *People* v. *Carter* (2003)135 Cal.Rptr.2d 553; *People* v. *Riel* (2000) 22 Cal.4th 1153.) Given the inconsistency between these cases and the clear language of the statute, the statute takes precedence. (*Hamilton* v. *Rathbone* (1899), 175 US 414.)

In the absence of any supporting authority for their position, respondent purports to look to the policies underpinning section 190.3 for support. Respondent argues that the 190.3 prohibition is focused on "evidence offered in aggravation...[as] demonstrated by the policies recognized by this court as underlying the subdivision: (a) that nonviolent misdemeanors are not important enough to be given any weight in deciding whether to impose a death penalty." (RB 212.) However, respondent's claim is nothing more than an unsupported conclusion that flies in the face of the plain language of the statutory prohibition of non-violent criminal activity.

The Soft Warehouse burglary evidence was an invalid aggravating factor since it was admitted in contravention of the section 190.3 prohibition. The U.S. Supreme Court in *Brown* v. *Sanders*, *Supra*, 546 U.S. 212, found that "[a]n invalidated sentencing factor (whether an eligibility factor or not) will render the sentence unconstitutional by reason of adding an improper element to the aggravation scale in the weighing process [footnote omitted] *unless* one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances." (*Id.* p 220.) Yet no part of section 190.3 allowed introduction of evidence concerning the Soft Warehouse burglary. Indeed, the prohibition regarding evidence of non-violent conduct prevents the evidence of the Soft Warehouse burglary from being given any aggravating weight.

The Soft Warehouse evidence was not admissible to show criminal relationship and motive

Respondent argues that the Soft Warehouse evidence was admissible "to rebut Clark's argument of lingering doubt." (RB 211.) The asserted, yet tenuous, basis of this rebuttal argument was not the basis of the court's ruling and should thus not form the basis of this Court's ruling. Respondent asserts that the Soft Warehouse evidence established a criminal relationship between appellant and Williams, which in turn bolstered the credibility of Williams' statements to the police and the grand jury. (RB 209, 214.) Yet the trial court never gave rebuttal of lingering doubt as the

ground for admission. Although the court said the evidence was relevant to lingering doubt, the court ruled that the evidence was admissible to prove the criminal relationship between appellant and Williams. Nor did the prosecutor ever argue rebuttal of lingering doubt as a grounds for admission. (SC RT 12411-12420 &14090-14092.) As such, this Court should not rely upon this as a basis for admissibility, since it was not part of the trial court's calculus.

Furthermore, this asserted basis is riddled with problems. Firstly, the evidence was not relevant to show a criminal relationship between appellant and Williams because there was no dispute as to this fact and thus rebuttal was not required. In defense counsel's opening remarks he explicitly stated that a criminal partnership existed between Williams and appellant. (SC RT 13189.) Further, respondent's contention that the evidence boosted William's credibility is hard to swallow given that on respondent's version, the evidence shows that Williams was involved in the burglary, lied to the police about the identity of her accomplices, failed to correct this deception over four years of contact with her probation officer and only revealed appellant's identity in order to obtain a reduction in her sentence.

Moreover, evidence admitted at the penalty phase is subject to three restrictions: "the evidence must not be incompetent; it must not be

irrelevant, that is, of such a nature that its prejudice to defendant outweighs its probative value; and it must not be directed solely to an attack on the legality of the prior adjudication." (*People* v. *Terry, supra,* 61 Cal.2d 137, 144-145.)

Evidence of earlier crimes is incompetent where it fails to "meet the rules of admissibility governing proof of that crime or...[is not] otherwise admissible in the penalty proceedings." (*People* v. *Terry, supra,* 61 Cal.2d 137, 145 quoting *People* v. *Purvis* (1961) 56 Cal. 2d 93, 97.) For example, evidence that was not admissible at the guilt phase cannot be reintroduced to relitigate the issue of guilt. (*People* v. *Miller* (1990) 50 Cal.3d 954, 1005-1006.) In *Miller*, the defendant sought to admit statements made by the attempted murder victim whilst under hypnosis in the penalty phase. (*Ibid.*) The victim's statements indicated that a black man and a white man had taken him to an apartment and attacked him. At the guilt phase trial the court found that the statements were unreliable and ruled them inadmissible. The defendant sought to admit the statements at the penalty phase, for the purpose of raising doubts regarding his guilt. The court in *Miller* held that they were required to uphold the findings of the lower court that "the statements [were] unreliable for that purpose [lingering doubt]", because those findings were supported by substantial evidence. (*Ibid.*) Subsequent cases have agreed that evidence proffered on the issue of

lingering doubt may be excluded because the evidence in question is otherwise inadmissible as hearsay or unreliable. (*People* v. *Blair* (2005) 36 Cal.4th 686, 750, citing *People* v. *Kaurish* (1990) 52 Cal.3d 648.)

Similarly, in the present case, the evidence should have been excluded at the penalty phase because a ruling had previously been made that the evidence was irrelevant to both motive and intent. As discussed in Claim 37, the trial court denied the People's motion to allow evidence concerning the walk-in computer thefts, which included the Soft Warehouse burglary. (SC RT 2946.) The trial court in the guilt phase reasoned:

> (W)hy is the fact that computers were taken for money or profit has any particular relevance in this case? . . .This is a man who is out to steal. He will steal anything. He's out to steal jewelry. He's out to steal traveler's checks. He's out to steal one computer at a time or a warehouse full of computers. So why do the specifics of the five walk-in computers in Los Angeles have anything in particular to do– other than to show bad character and a propensity to steal?"... His motive is to steal in taking those, it's to make money. And that just shows he is a person of bad character... His intent. That practically blends into motive in this case. (SC RT 2927-2932.)

At the guilt phase, the prosecutor disregarded this order and introduced evidence of the Soft Warehouse crime. The trial court's finding was well reasoned and the trial court took pains to reach the correct decision, stating "I spent quite a bit of time in 1101(b) annotations looking for something to support the People's theory. And if you want some time and want to try and find me a case, I can see why you want the evidence,

Mr. King, but no matter how I look at it and no matter how I apply the cases that I started reviewing when I left the bench yesterday and continued this morning, I don't see anything that supports the admission." (SC RT 2933.)

The evidence of the Soft Warehouse burglary was incompetent because it was found to be inadmissible at the guilt phase. The court therefore erred in admitting it at the penalty phase.

Finally, Respondent argues that appellant failed to object to the admission of the evidence on this basis and has therefore forfeited the claim on appeal. (RB 214.) However, lack of objection is not a waiver where objection would have been futile. (*People* v. *Hamilton, supra,* 48 Cal.3d 1142, 1189.) The penalty phase re-trial judge clearly stated that he was bound by the guilt phase judge's rulings: "The first phase of this trial is still viable. I mean its alive, and I think I am bound by all of my peer's decisions in that matter...My concern was that that phase is over, and even though you are still entitled to the penalty phase to introduce this jury to the circumstances of the offense and the special circumstances, some of what occurred in the first trial may not be relevant in this hearing. That is all. No more, no less than that." (SC RT 12313-12314.) Therefore, any objection defense counsel could have made to the admission of the evidence at the

penalty phase re-trial would have been futile because the objection was previously sustained in the guilt phase.

The prejudice of the Soft Warehouse evidence outweighed its probative value

As discussed above, the court in *Terry* found that irrelevant evidence was inadmissible at the penalty phase. Irrelevant evidence is "of such a nature that its prejudice to defendant outweighs its probative value." (*People* v. *Terry, supra,* 61 Cal.2d 137, 144-145; accord, *People* v. *Gay, supra,* 42 Cal.4th 1195.) The admission of the evidence of the Soft Warehouse burglary was irrelevant, and contrary to Evidence Code section 352.

Respondent argues that appellant has forfeited this claim by his failure to raise this objection at the hearing of the motion. (RB 210 f/n 49.) However, as acknowledged by respondent, this basis was outlined in full in defendant's written motion. (12 CT 4562 -4563) (RB 210 f/n 49.) Given the hearing was based on the written motion, the court clearly understood all the basis relied upon in the defense's objection to the evidence. An objection is sufficient if the record shows the trial judge understood the issue presented. (*People* v. *Scott, supra,* 21 Cal. 3d 284, 290.)

"Evidence of defendant's background, character, or conduct which is not probative of any specific listed factor would have no tendency to prove or disprove a fact of consequence to the determination of the action, and is

therefore irrelevant to aggravation." (*People* v. *Boyd* (1985) 38 Cal.3d 762, 774 [215 Cal. Rptr. 1, 700 P.2d 782].) Thus, the Soft Warehouse crimes should not be attributed any probative weight since it was not relevant to any factor listed in 190.3. (*People* v. *Wright* (1991) 52 Cal.3d 367, 425 [evidence which does not fall within aggravating evidence set forth in Penal Code section 190.3, subdivisions (a) - (k) cannot be considered in aggravation at the penalty phase]; *People* v. *Burton* (1989) 48 Cal.3d 843, 859.) On the other hand, the prejudicial value of the evidence was high, as shown by the prosecutor's use of the evidence in his opening and closing statement to show appellant's bad character and predisposition to criminal enterprise via his prior uncharged bad acts. (SC RT 13090-13093, 16488.)

Prejudice

Lastly, respondent submits that even if the evidence was improperly admitted, such an error was harmless as "[t]here is simply no reasonable likelihood that, absent admission of the evidence of the Soft Warehouse burglary, Clark would have enjoyed a more favorable outcome" (RB 210.) To support this argument, respondent states that "the evidence relating to the Soft Warehouse burglary was limited to the testimony of one witness and amounted to a brief reference in an otherwise lengthy penalty phase retrial" and further argues that the prosecutor never mentioned the Soft Warehouse burglary in argument. (RB 210, 213.) Both these statements are

factually incorrect. Firstly, there was not just one witness who testified in relation to the Soft Warehouse burglary. In arguing the motion for admission of the evidence, the People ensured that it related to "both the actual witness who was there and the statement by Ardell Williams." (SC RT 12419.) Thereafter the prosecution produced two employees of Soft Warehouse (SC RT 14032- 14040, SC RT 14040-14052) and Investigator Grasso, to testify about the Soft Warehouse burglary. A tape and transcript of the conversation between Williams and Investigator Grasso's was also admitted into evidence. (SC RT 14274- 14287, 14279.) In response, the defense called Brent Scott, the police officer who attended the Soft Warehouse burglary, and Myron Grigsby, Williams' probation officer. (SC RT 16107 -16114.) The testimony of five witnesses cannot be characterized as "a brief reference in an otherwise lengthy penalty phase retrial." (RB 210.) Respondent also claims that Soft Warehouse was never mentioned by the prosecutor in argument. (RB 210.) In fact, the prosecutor used the Soft Warehouse burglary in both his opening and closing statements as aggravating evidence regarding appellant's criminal propensity. (SC RT 13090-13093 & 16488 & 16519.) This emphasis shows the importance of the evidence to the People's case. Given the flimsy circumstantial evidence against appellant it was critical for the People to show appellant's bad

character and for the jury to infer from this evidence that he was capable of the bad deeds alleged by the People.

Respondent argues that the limiting instruction provided in relation to the Soft Warehouse evidence prevented the jury from considering the evidence as a factor in the imposition of Clark's death sentence." (RB 213). However, the limiting instruction made no mention of rebuttal of lingering doubt, and stated instead that the jury should use the evidence for the limited purpose of showing a criminal relationship between appellant and Williams. It also said nothing about not using the evidence in aggravation. (SC RT 14097.)

The admission of the evidence violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights, as outlined in the AOB. (AOB 561-563, 566, 575-577.) Reversal of the death verdict is required on this record.

CLAIM 57
EVIDENCE REGARDING THEFT AT SOFT WAREHOUSE SHOULD HAVE BEEN EXCLUDED FROM THE PENALTY PHASE RETRIAL, AND THE FAILURE TO DO SO VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Appellant will address the relevant parts of respondent's brief in claim 56.

CLAIM 58
THE COURT ERRED WHEN IT ALLOWED THE PROSECUTION TO INTRODUCE PRIOR BAD ACTS IN THE CASE IN CHIEF DURING THE PENALTY PHASE.

Appellant will address the relevant parts of respondent's brief in claim 56.

CLAIM 59
THE COURT ERRED IN PRECLUDING APPELLANT FROM PRESENTING A VALID MITIGATING FACTOR IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Trial Proceedings

During the first penalty phase trial, the prosecutor in his closing statements raised appellant's future dangerousness:

> And I ask you to ask yourself this basic, basic question, what do we do with William Clark now? You've heard testimony that since November 1st of 1991 he has been incarcerated. You have heard testimony that he was brought down here to Orange County in September of 1992, and he was in jail. He was in a concrete building with guards, he was not out in society he was in custody, and these inmates talked about the calming influence of Mr. Clark. Well, it's one thing to talk about calming influence over at the Orange County Jail, but what about the community. What about outside? (SC RT 11911.)

At the second penalty phase trial, defense counsel attempted to rebut the prosecutor's use of such an argument by calling Norman Morein, a sentencing consultant. Prior to Morein taking the stand and outside the

presence of the jury, the prosecutor made an oral motion in limine. The motion objected to "any questions...asked about the nature of the confinement that Mr. Clark may receive, in other words, classification, et cetera, et cetera." (SC RT 16344.) The People cited *People* v. *Thompson* (1988) 45 Cal.3d 86, 139 as authority for the exclusion of evidence regarding the future incarceration conditions of the defendant, on the basis that such evidence was merely speculation. (SC RT 16344.) Defense counsel argued that such evidence did not invite speculation. (SC RT 16346.) In response the court said:

> Adaptability of prison may be acceptable, but the conditions that an LWOP prisoner will be serving under is not...In *Thompson* and in other cases the court talks about the irrelevance of telling how a death penalty is carried out and also what conditions life without possibility will be serving on sentences. That is speculative and not mitigating. It has nothing to do with defendant's character adjusting inside an institution. One is relevant and the other is not. (SC RT 16346.)

The court then went onto quote from *Thompson*:

> What conditions in prison might be for a person serving a sentence of life without possibility of parole was not, as defense counsel candidly admitted, offered as mitigating evidence...It is not admissible. Possibility of parole involves speculation as to what future officials in another branch of government will or will not do. (SC RT 16347.)

In the end, the court stated: "You listened to the objection. It is based on the law, and that is how I am going to rule. If you don't ask an objectionable question, I don't have to rule." (SC RT 16347.)

Morein took the stand and testified as to his extensive experience in sentencing. (SC RT 16348-16350.) The court overruled a prosecution objection to Morein's testimony regarding the different levels of security in institutions across California. He testified that there were four levels of security: from level one (minimum security institutions) to level 4 (maximum security institutions.) (SC RT 16350-16351.) Morein then testified regarding the differences in physical security and the degree of supervision between the 4 levels. (SC RT 16350-16353.) The court sustained a prosecution objection to testimony regarding other differences between the security levels. (SC RT 16353.) Morein next discussed how prisoners are classified, stating that the decision regarding the level of security in which to house a prisoner depended on the length of sentence and other factors. (SC RT 16354.) He also discussed the work programs available within the California Department of corrections and how such programs resulted in a saving for the taxpayer. (SC RT 16356-16358.) As part of this discussion, Morein stated that the prisoner's age is considered in the classification of prisoners to work programs because "[i]t is generally the case that an older person will be a more responsible individual and more likely will exert a beneficial influence on other inmates." (SC RT 16358.)

The court erroneously declined to admit pertinent element's of Morein's testimony:

> [MR HARLEY]: And based on your background, training and experience, where do LWOP prisoners end up going?
> MR KING: Objection, relevancy
> THE COURT: Overruled
> THE WITNESS: Well, they go to level 4 institutions to begin with. And if they do well enough for a long enough period of time, they would be able to go to a level 3 institution. (SC RT 16364.)
> MR HARLEY: Can a LWOP prisoner ever get down to a level 2 or level 1 institution?
> MR KING: Objection, speculation.
> THE COURT: Sustained
> MR HARLEY: Based upon your background, training and experience in the California Department of Corrections system, have you ever known of a LWOP prisoner making his way down to level 2 or level 1 institutions?
> MR KING: Same objection, relevancy
> THE COURT: Sustained. (SC RT 16365.)

In the closing statements at the second penalty phase, the prosecution again raised appellant's future dangerousness, as they had done at the first penalty phase:

> What do we do with Bill Clark? What do we do? This second murder he was across the street, you know, in these big thick concrete walls with bars. And you have heard testimony about how he is going to adapt to prison, about how he is a calming influence. What do we do? What do we as a society do? He has demonstrated that he has the ability – not only the ability, it happened, to orchestrate, to create, to enter into an agreement to murder somebody when he is in custody. And the person who got murdered was out of custody. And what is the punishment of life without [the] possibility of parole, how is the California Department of corrections going to stop that that the Orange County Jail could not? Phone calls. Visits with other inmates, kites, what? (SC RT 16533-16534; AOB 579.)

Respondent's Arguments

Respondent argues that "the trial court properly excluded the evidence as irrelevant and speculative, since it was impossible to know the security conditions of Clark's future incarceration and no evidence was offered that such security conditions would inhibit Clark from communicating with the outside world to plan and execute another murder like that of Ardell Williams." (RB 216.) However in asserting that appellant had made "no effort to offer any [such] evidence" respondent ignores the fact that defense counsel was precluded from this very line of inquiry. (RB 219-220.) Defense counsel stated that they intended to have Morein testify as to the security classification given to LWOP prisoners. (SC RT 16217.) During Morein's testimony defense counsel elicited evidence concerning differences in physical security (fences, walls, guns) and the degree of supervision between the 4 levels of security. Specifically, Morein stated that in maximum security "[t]here isn't anything an inmate can do where he is not being observed." (SC RT 16351-16352.) Defense counsel then asked "[i]s there any other difference between the levels…?", a line of inquiry that would predictably produce evidence regarding the restrictions on "communication with the outside world, such as prohibiting mail phone access, or visitation", which respondent claims is "conspicuously absent." (RB 219-220.) However, the court upheld the prosecutor's objection to this

line of inquiry, thereby preventing the admission of any such evidence. (SC RT 16354.) The evidence was clearly mitigating and relevant, and thus it was error not to allow its admission pursuant to section 190.3 of the Penal Code. (AOB 583-587.)

Respondent, like the prosecution at the second penalty phase, relied on *People* v. *Thompson, supra,* 45 Cal.3d 86, 139. Respondent argues that two of the findings in *Thompson* are determinative in this case: Firstly, that evidence of the conditions in prison for an individual sentenced to life without the possibility of parole is irrelevant to mitigation and thus inadmissible at the penalty phase. Secondly, that evidence describing future conditions of confinement for an individual sentenced to life without the possibility of parole is speculative and thus not admissible. (RB 218-219.) Proceeding from this, respondent states that the disputed evidence regarding the security classification for an individual sentenced to life without the possibility of parole was inadmissible, because it was speculative.

Lastly, respondent submits that any error in excluding the evidence was harmless beyond a reasonable doubt. (RB 220.)

The Law

In *Lockett* v. *Ohio* the United States Supreme Court concluded that, "the Eighth and Fourteenth Amendments require that the sentencer…not be

precluded from considering as *a mitigating* factor, any aspect of defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (*Lockett* v. *Ohio*, *supra,* 438 U.S. 586, 604.) The Supreme Court in *Eddings* v. *Oklahoma, supra,* 455 U.S. 104, 114, further found that "[j]ust as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."

The United States Supreme Court in *Skipper* v. *South Carolina* (1986) 476 U.S. 1, found that where the trial court had excluded mitigating evidence that "the defendant would not pose a danger if spared (but incarcerated)", "[t]he resulting death sentence cannot stand." (*Id.*, p 5-9.) In that case, the defendant sought to introduce testimony of two jailers and one "regular visitor" to the jail to the effect that petitioner had "made a good adjustment" during his time in jail. The trial court ruled that such evidence was irrelevant and hence inadmissible. In closing, "the prosecutor contended that petitioner would pose disciplinary problems if sentenced to prison and would likely rape other prisoners." (*Id.* p 3.) The Supreme Court found that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating... Where the prosecution specifically relies on a prediction of future dangerousness in

asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.' *Gardner* v. *Florida* (1977), 430 U.S. 349, 362." (*Skipper, supra,* p 5.)

Skipper renders the rationale in *People* v. *Thompson, supra,* 45 Cal. 3d 86, 139, the case relied on by respondent, suspect. In any event, *Thompson* can be distinguished from both *Skipper* and the present case. In *Thompson*, the defendant "sought to introduce evidence as to how he would be housed", not as mitigation, but rather to "dispel any notion on the part of the jury that a sentence of life without possibility of parole was somehow a lenient sentence." The court found that that the rule in *Skipper* and *Eddings*, (which required that the defendant be allowed to introduce all mitigating evidence) was not applicable, because the evidence was not offered in mitigation. This limitation is pointed out in *People* v. *Ray* (1996) 13 Cal.4th 313, 352-353. In that case, the court found that *Thompson* only excluded evidence concerning the conditions of confinement where it had "no bearing on the character or background of the individual offender or the circumstances of the capital offense...However, the same prohibition does not apply where a capital defendant seeks to inform the sentencer of his

good behavior as an inmate or his suitability as a life prisoner." (*People* v. *Ray, supra.*, 353.)

The *Thompson* court further relied on *Ramos* in holding that "[d]escribing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do." (*People* v. *Thompson, supra,* 45 Cal. 3d 86, 139.) In *People* v. *Ramos* (1984) 37 Cal.3d 136, the Supreme Court of California considered the issue of speculative evidence in relation to the "Briggs instruction", a former paragraph in section 190.3 of the Penal Code that read:

> The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in the future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California. (*Thompson, supra,* 150.)

The *Ramos* court concluded "that the Briggs Instruction violated the due process clause of the California Constitution both because it is misleading and because it invites the jury to consider speculative and impermissible factors in reaching its decision." (*People* v. *Ramos, supra,* 37 Cal.3d 136, 159.) In discussing the speculative nature of the inquiry the court stated: "One principal difficulty, of course, lies in attempting to predict what a particular defendant is likely to be like some 10, 15, 20 or more years in the future when commutation may be considered...In the present context,

moreover, the problems of prediction are of an entirely different, and greater, magnitude. Here, the jury must attempt to determine not only what a particular defendant will be like in the future but also what some presently unknown person – a future Governor - will do in response to the defendant's then condition." (*Id.*, pp 156-157.) However, neither *Thompson* nor *Ramos* concerned mitigating evidence and thus their reasoning is not controlling.

In *Simmons* the state raised a "speculation" argument very similar to that raised by respondent in the present case. The defendant in *Simmons* attempted to raise evidence that he was 'parole ineligible' to rebut the People's argument of future dangerousness. Essentially, the attorney general argued that the trial court correctly excluded evidence that defendant was parole ineligible, because "future exigencies such as legislative reform, commutation, clemency, and escape might allow petitioner to be released into society." (*Simmons* v. *South Carolina* (1994) 512 U.S 154, 166.) The United States Supreme Court dismissed this argument by saying:

> To the extent that the State opposes even a simple parole-ineligible instruction because of hypothetical future developments, the argument has little force. Respondent admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate. Certainly, such an instruction is more accurate than no instruction at all, which leaves the jury to speculate whether "life imprisonment" means life without parole or something else. (*Ibid.*)

The court reversed the trial court's decision to exclude the mitigating evidence that rebutted the assertion of future dangerousness. Of particular importance was the fact that the prosecutor had relied on future dangerousness in the closing remarks. The court found that "[t]he State may not create a false dilemma by advancing generalized arguments regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." (*Id.*, p 171.)

The case law provides numerous examples where defendant has been allowed to admit evidence to rebut an argument of future dangerousness: *People* v. *Elliot* (2006) 37 Cal.4th 453, 464; [Defendant called a former program administrator who "described defendant's likely placement in the California prison system if he were to be sentenced to life without parole, [and] the security precautions taken at these prisons."] *People* v. *Stitely* (2005) 35 Cal. 4th 514, 531; ["The parties stipulated that inmates imprisoned for life without the possibility of parole (LWOP) receive the highest security available outside of death row."] *People* v. *Earp, supra* 20 Cal.4th 826, 894; [An assistant warden testified that "I cannot see that he would be a danger under any condition in the high security prison."] *People* v. *Carter* (2006) 36 Cal.4th 1215, 1276 [Court ruled that an expert in prison operations could testify regarding defendant's

adjustment and "danger to staff or to prisoners". Defense elected not to call him due to the risk of cross-examination on his history of violence and criminal behavior.] *People* v. *Boyette* (2003) 29 Cal.4th 381, 463; [The court found that the defendant could have admitted evidence to rebut the assertions as to future dangerous. However, it was reasonable to prevent defense counsel's unsupported statements about the security standards of the prison, because they were unsupported by evidence.]

Application of law to facts

The preclusion of mitigating evidence submitted in order to rebut the prosecutor's assertion of future dangerousness was a violation of appellant's Eighth and Fourteenth Amendment rights. (*Lockett* v. *Ohio*, *supra,* 438 U.S. 586, 604.) The trial court erred in applying *Thompson*, because in the present case the evidence was clearly mitigating as it went to show that "the defendant would not pose a danger if spared (but incarcerated)". (*Skipper* v. *South Carolina, supra,* 476 U.S. 1, 5.) Therefore, as a matter of law, the sentencer could not refuse to consider it. (*Eddings* v. *Oklahoma, supra,* 455 U.S. 104,114.) Further, as the prosecution specifically relied on a prediction of future dangerousness in asking for the death penalty, it was a breach of elemental due process not to afford appellant the opportunity to deny or explain this allegation. (*Gardner*

v. *Florida*, *supra,* 430 U.S. 349, 362 and *Simmons* v. *South Carolina, supra,* 512 U.S 154.)

Given these constitutional considerations, respondent's argument that the evidence was speculative has "little force." (*Simmons* v. *South Carolina, supra,* 512 U.S 154, 166.) However, the trial court prevented Morein's testimony on conditions of confinement, such as the very small likelihood of a LWOP prisoner being assigned to a level one or two institution. Such evidence would have rebutted the future dangerousness argument. It was not therefore offered as opinion testimony regarding future events. The jury was free to use the evidence as they sought fit to determine the security conditions appellant may have been subjected to in the future and thus to asses his risk of dangerousness. As in *Simmons*, such information would have been more accurate than no information at all, which leaves the jury to speculate as to the conditions of appellant's future confinement. (*Ibid.*) This information is all the more critical where the state raises "the specter of petitioner's future dangerousness". In these circumstances, the state "may not mislead the jury by concealing accurate information" relevant to appellant's future dangerousness. (*Ibid.*) The admissibility of such evidence is shown by its use in numerous cases; *People* v. *Elliot, supra,* 37 Cal.4th 453, 464; *People* v. *Stitely, supra,* 35 Cal. 4th 514, 531; *People* v. *Earp, supra,* 20 Cal.4th 826, 894.

Respondent further argues that the disputed evidence was not relevant as it did not show how being housed in a level 4 institution as an LWOP prisoner would prevent appellant from continuing to engage in the acts of violence he was alleged to have committed from prison. (RB 219-220.) However, in asserting that appellant had made "no effort to offer any [such] evidence" respondent ignores the fact that defense counsel was precluded from this very line of inquiry.

Finally, respondent contends that "any error in excluding the evidence was harmless beyond a reasonable doubt" because the question of Clark's future dangerousness was a relatively minor issue and Morein's evidence was not relevant in rebuttal. As discussed above, Morein's evidence was highly probative to the issue of future dangerousness and any criticisms as to the scope of the evidence elicited are attributable to the trial court's erroneous rulings on admissibility. Moreover, the prosecutor in his closing argument used very strong language in regard to appellant's future dangerousness:

> He has demonstrated that he has the ability – not only the ability, it happened, to orchestrate, to create, to enter into an agreement to murder somebody when he is in custody. And the person who got murdered was out of custody. And what is the punishment of life without [the] possibility of parole, how is the California Department of corrections going to stop that that the Orange County Jail could not? (90 RT 16533-16534; AOB 579.)

Throughout his argument as to future dangerousness, the prosecutor asked the question "What do we do with Bill Clark?", seeking to lead the jury to the determination that the only appropriate penalty was death. (SC RT 16533-16534.) The People's assertion that appellant was likely to kill again if given LWOP is similar to the assertion in *Skipper* that the defendant in that case would likely rape other prisoners if sentenced to LWOP. (*Skipper* v. *South Carolina, supra,* 476 U.S. 1, 3.) In *Skipper*, the court highlighted the prosecutor's closing statements regarding future dangerousness and in particular the fact that they "went so far as to assert that petitioner could be expected to rape other inmates." The court then found that "[u]nder these circumstances, it appears reasonably likely that the exclusion of evidence bearing upon petitioner's ...likely future behavior in prison...may have affected the jury's decision to impose the death sentence. Thus, under any standard, the exclusion of the evidence was sufficiently prejudicial to constitute reversible issue." (*Id.*, p 8.) In the present case, the prosecutor went even further than that in *Skipper*, by asserting that appellant was likely to murder someone in the community if given LWOP. (SC RT 16533-16534.) The question of penalty was a close one in the present case; the first penalty hearing could not reach a unanimous decision. Given the strong language of the prosecutor, it is likely that appellant's inability to call evidence to rebut the allegation of future dangerousness was

sufficiently prejudicial. Reversal is required because appellee cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California, supra,* 386 U.S. 18.)

The error undermined the reliability required by the Eighth and Fourteenth Amendment for the conviction of a capital offense. (*Beck* v. *Alabama, supra,* 447 U.S. 625, 637-38), and deprived appellant of the reliable, individualized capital sentencing determination guaranteed by the Eighth Amendment. (*Zant* v. *Stephens* (1983) 462 U.S. 862, 879.) (AOB 588.)

CLAIM 61
THE COURT VIOLATED APPELLANT'S RIGHTS BY REJECTING SPECIAL INSTRUCTIONS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

Claim 61 B. The Trial Court Erred In Denying A Proposed Instruction Which Would Have Informed The Jury That It Needed to Consider Whether An Alleged Unadjudicated Crime Had Actually Involved A Threat of Force or Violence

The Instruction, As Given, Permitted An Unconstitutional Presumption Of An Element Of An Aggravating Factor

The prosecution offered a letter found in appellant's jail cell as evidence of a prior uncharged crime which involved the use or threat of force or violence, and which could be considered an aggravating circumstance, pursuant to Penal Code Section 190.3(b). The prosecution

argued that the letter was a "death threat" against Alonzo Garrett to prevent him from testifying. (SC RT 16515.)

The trial court instructed the jury pursuant to CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that the defendant has committed the following criminal activity: *An attempt to prevent or dissuade a witness, Alonzo Garrett, from attending or giving testimony, which involved a threat or use of force or violence.*
>
> Before a juror may consider any such criminal activity as an aggravating circumstance in this case, a juror must be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.
>
> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that such criminal activity occurred, that juror may consider that activity as a factor in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose. (13 CT 4861, emphasis added.)

The instruction, as written, presumed a fact not proven. It defined the alleged criminal activity—a letter written to Alonzo Garrett as an attempt to intimidate a witness—as one that necessarily involved a threat of force or violence. As discussed more fully below, this presumption was an impermissible violation of appellant's due process rights under the Fourteenth Amendment.

Appellant's proposed instruction would have corrected this error, by informing the jury that it would have to find force or violence. Defense counsel requested the following instruction (SC RT 16339-16440):

> Evidence has been introduced for the purpose of showing that the defendant WILLIAM CLINTON CLARK had committed the criminal acts read to you elsewhere in these instructions.
>
> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that the defendant WILLIAM CLINTON CLARK did in fact commit such criminal acts.
>
> You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by Mr. Clark unless you first determine beyond a reasonable doubt (1) the [sic] Mr. Clark committed the acts; (2) the acts involved the use of or attempted use of force or violence or the expressed or implied threat of force or violence; (3) the acts were criminal. (13 CT 4762.)

This instruction would have prevented the jury from presuming that force or violence were involved. Because this error was not harmless and was prejudicial, this court should overturn the death judgment.

Moreover, as discussed more fully below, even if the question of whether the letter involved a threat of force or violence is a legal issue, which this court stated in *People* v. *Nakahara*, (2003) 30 Cal.4th 705, 720, the trial court never made a legal determination on that issue. Thus, appellant's constitutional rights were violated.

Force or violence is a question of fact that should be considered by the jury

The prosecution must prove beyond a reasonable doubt unadjudicated acts offered as aggravation under Penal Code Section 190.3(b). (*People* v. *Morales, supra,* 48 Cal.3d 527, 565.) The jury must decide each factual element of a crime. (*See People* v. *Figueroa* (1986) 41 Cal.3d 714, 734.) The question of whether a threat of force or violence occurred in connection with an unadjudicated crime—an aggravating factor under Penal Code Section 190.3(b)—has repeatedly been discussed in this court as a factual issue for the jury to decide. (*People* v. *Sapp* (2003) 31 Cal.4th 240, 314 ["These instructions...properly told the jurors that they could consider any of the specified unadjudicated criminal acts as factors in aggravation only if they found beyond a reasonable doubt that defendant had committed the act or activity, *and that it involved the use or attempted use or express or implied threat to use force or violence.*"][emphasis added][36]; *People* v. *Mason, supra,* 52 Cal.3d 909, 957 ["whether a particular instance of criminal activity involved the express or implied threat to use force or violence (section190.3, factor(b)) can only be determined by looking to the facts of the particular case"]; *People* v.

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[36] *Sapp* directly supports appellant's case. There, the jury was instructed with CALJIC No. 8.87, and was provided with the additional instruction: "You must not consider any aggravating circumstance which did not involve the use or attempted use of force or violence or which did not involve the use of threat or implied...use [of] violence." (*People v. Sapp, supra,* at 314.) Similarly, appellant requested an additional instruction that would have clarified this point.

Williams, *supra*, 16 Cal.4th 153, 238 ["the jury" could reject or "accept defendant's explanation" whether he possessed the shank for violent purposes.") Similarly, the issue of whether a criminal threat occurred is normally considered an issue of fact that should be put before the jury. (See, e.g., *People* v. *Benitez* (2001) 105 Cal.Rprt. 2d. 242, 247[question was put before the jury]; *In re George T* (2004) 33 Cal.4th 620, 631[court refers to finding of whether criminal threat occurred as an "issue of fact"]; CALJIC 9.94; CALCRIM 1300.) Thus, the question of whether the prosecution had proven beyond a reasonable doubt that the letter to Alonzo Garrett involved a threat or use of force or violence should have been put before the jury.

The instruction created a mandatory presumption which violates appellant's due process rights

The instruction told the jury that the attempt to dissuade Alonzo Garrett was one "which involved a threat or use of force or violence." (13 CT 4861.) Where an instruction "tells the trier that he or they *must* find the elemental fact upon proof of the basic fact," it creates a mandatory presumption.[37] (*Ulster County Court* v. *Allen* (1979) 442 U.S. 140, 157.) The jury instruction here clearly created a mandatory instruction. As given, the instruction told the jury that if it found that appellant made an attempt to

[37] A permissive presumption on the other hand permits, but does not require the jury to infer the ultimate fact from the predicate fact. (*Francis* v. *Franklin, supra*, 471 U.S. 307, 314.)

prevent or dissuade a witness from attending or giving testimony, it must presume that that attempt had involved a threat or use of force or violence. (See *Sandstrom* v. *Montana, supra,* 442 U.S. 510, 515.)

Jury instructions that relieve a state of its burden to prove beyond a reasonable doubt every element of a crime charged violate a defendant's right to due process and trial by jury as guaranteed under the Fifth, Sixth, and Fourteenth Amendments. (*Carella* v. *California, supra,* 491 U.S. 263, 265-266; *People* v. *Herndandez* (1989) 46 Cal.3d 194, 211 [finding a due process violation where an instruction "effectively removed...the issue...from the jury"]; *United States* v. *Caldwell*(9th Cir. 1993) 989 F.2d 1056, 1060-1061 [failing to instruct on essential element violates Sixth Amendment right to findings by jury.]) Instructions that create a mandatory presumption relieve the state of its burden. (*Carella* v. *California, supra,* at 266.) Because the instructions in this case created a mandatory presumption on the issue of whether the alleged attempt of witness intimidation involved a threat of force or violence, appellant's constitutional rights were violated.

Even if the question of whether a threat of force or violence occurred was a legal issue for the judge, the judge did not make this determination

In *People* v. *Nakahara*, this court held that the question of whether a threat of force or violence occurred in the context of a 190.3(b) allegation,

is a legal issue for the court to decide. (*People* v. *Nakahara*, *supra,* 30 Cal.4th 705, 720 ["The question whether the acts occurred is certainly a factual matter for the jury, but the *characterization* of those acts as involving an express or implied use of force or violence, or threat thereof, would be a legal matter properly decided by the court."]) This holding is inconsistent with prior decisions of this court that regarded this issue as a factual issue for the jury to decide, as cited above in section (b). (*People* v. *Sapp*, *supra*, 31 Cal.4th 240, 314; *People* v. *Mason, supra,* 52 Cal.3d 909, 957; *People* v. *Williams*, *supra*, 16 Cal.4th 153, 238; *People* v. *Benitez* (2001) 105 Cal.Rprt. 2d. 242, 247; *In re George T*, *supra*, 33 Cal.4th 620, 631; CALJIC 9.94; CALCRIM 1300.)

However, even if this issue was a legal question for the judge to decide, this court never made that determination. A hearing before the penalty phase pursuant to Evidence Code section 402 and *People* v. *Phillips* (1985) 41 Cal.3d 29 would have been the appropriate forum for this inquiry. In *Phillips,* this court suggested that "a preliminary inquiry before the penalty phase to determine whether there is substantial evidence to prove each element of [Section 190.3(b)] criminal activity" would have prevented error that arose from the jury's improper consideration of evidence that was not relevant to commission of a section 190.3(b) crime. (*Phillips, supra,* at 72-82 and FN 25.) In the present case, if the trial court

believed that threat of force or violence issue was a legal one, it should held a *Phillips* hearing to make this determination. Thus, if it had not found that the letter involved a use of force or violence, the jury would not have been permitted to review the letter at all. Considering the evidence, as discussed more fully in Section 2 below, the court would not have been able find that the threat of force or violence was involved.

Without this determination, the jury was permitted to consider evidence that did not involve a threat of violence or force. Penal Code section 190.3 explicitly provides that "no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence." Thus, without a determination that the letter involved the use or threat of force or violence, the jury was permitted to consider evidence that is not permitted under section 190.3.

Evidence that does not fall within the aggravating evidence set forth in Penal Code Section 190.3 subdivisions (a)-(k) cannot be considered in aggravation at a penalty phase of a capital trial. (*See, e.g. People* v. *Wright* (1991) 52 Cal.3d 367, 425; *People* v. *Burton*, *supra,* 48 Cal.3d 843, 859; *People* v. *Boyd, supra,* 38 Cal.3d 762, 774.) Since the jury was permitted to review evidence which neither the jury nor the judge determined

involved force or violence, the jury was erroneously permitted to consider non-statutory aggravating evidence.

Appellant's proposed instruction would have prevented this error

This instruction would have informed the jury that the issue of whether "the acts involved the use or attempted use of force or violence or the expressed or implied threat of force or violence" was a distinct issue for the jury to decide. The jury would not have believed it was required to presume this factual issue. Thus, the court erred in denying the request for this instruction, as it would have protected appellant's Due Process rights.

Reversal is required under federal and state standards of prejudice

Due Process requires reversal, without a showing of prejudice, where a jury is permitted to consider an invalid sentencing factor "by reason of its adding an improper element to the aggravation scale in the weighing process," unless "one of the other sentencing factors enables a sentencer to give aggravating weight to the same facts and circumstances." (*Brown* v. *Sanders*, *supra*, 546 U.S. 212, 220-221.) In the present case, the jury was permitted to consider an improper sentencing factor: that appellant committed an act of witness intimidation that involved a threat or use of force or violence, where no determination was ever made that the act in fact

involved a threat or use of force or violence. Because Penal Code section 190.3 only permits a jury to consider evidence which involved the use or threat of force or violence as aggravating evidence, the jury could not consider the letter as evidence in support of *any* section 190.3 factor. Thus, reversal is required.

Even if this issue required a showing of prejudice, the courts error did result in prejudice. (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24; *People* v. *Wright, supra,* 52 Cal.3d 367, 425 [harmless error applies where a jury is permitted to consider evidence which does not fall within aggravating evidence set forth in Penal Code Section 190.3]; *People* v. *Lewis* (2008) 43 Cal.4th 415, 522 [applying harmless error analysis where jury relied on improper special circumstance].) State law requires that the judgment be reversed if there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People* v. *Brown* (1988) 46 Cal.3d 432, 448.) This court has recognized that the potential for prejudice stemming from "other crimes evidence" is "particularly serious." (*People* v. *Robertson* (1982) 33 Cal.3d 21, 54.) There is a reasonable possibility that, had the proposed instruction been provided, directing the jury to determine beyond a reasonable doubt whether an express or implied threat of force or violence was used, the jury's decision would have been different.

Only evidence of unadjudicated crimes that involved "the attempted use of force or violence" or "the express or implied threat to use force or violence" could be admitted as aggravating circumstances under Section 190.3(b). As discussed more fully in Section 2(b) of this claim, the jury could not have determined that the letter involved a threat of force or violence, because the letter did not support that finding. Since Penal Code Section 190.3(b) only permits the jury to consider as an aggravating circumstance those crimes that involve force or violence, the jury could not have considered the letter as an aggravating circumstance. Thus, if the instruction had been provided, the jury would have found one less aggravating circumstance existed.

The prosecution also used the supposed "death threat" to support the special circumstance allegation that appellant had orchestrated the murder of Ardell Williams. While a previous jury had found appellant guilty of this special circumstance, the present jury was instructed that, if it had lingering doubt as to this charge, it could consider this as mitigation.[38] (13 CT 4858.)

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[38] The full instruction was: "Although the jury has found the defendant guilty of two counts of murder in the first degree, and found the special circumstances burglary, attempted robbery, lying in wait, *killing a witness* and multiple murders, to be true, by proof beyond reasonable doubt, *the jury may demand a greater degree of certainty of guilt for the imposition of the death penalty. It is appropriate to consider in mitigation any lingering doubt you may have concerning the defendant's guilt.*

In support of this allegation, the prosecution relied on the "threatening" nature of the letter as its primary evidence of appellant's character. The prosecution theorized that appellant wanted to have Williams killed because he knew she had testified before the grand jury in his case, he believed she was a credible witness, and he either did not want her to testify at trial, or he sought retribution for her grand jury testimony. (SC RT 16497-16500; 16487.) By referring to the letter as a "death threat," the prosecution suggested to the jury that if appellant was willing to threaten Garrett with violence to prevent him from testifying, he would be willing to commit murder to prevent Ardell Williams from testifying.

Since the "Comp U.S.A." homicide was a case of accidental felony murder, it had not involved premeditation, and thus did not suggest that appellant had the character to commit intentional murder for the purpose of saving himself from a higher penalty. Without a threatening letter, the jury would have been required to make a considerable leap to find that appellant planned the end of a person's life simply because he did not want her to testify. Thus, if the jury or the judge had found that the Alonzo Garrett letter was not threatening, the prosecution's theory that appellant committed the murder would have been severely undermined.

Lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt." (SC CT 4858, emphasis added.)

If it was determined that no "death threat" existed, the prosecution would also have lost its most persuasive evidence in support of the theory that appellant orchestrated the Williams murder. All of the prosecution's evidence in support of the allegation was circumstantial, and no other evidence showed that appellant had the capacity to use lethal violence towards a witness.

The prosecution presented evidence that appellant and Alonzo Garrett had a discussion in which appellant handed Garrett a copy of the grand jury transcript for his case and stated, "This is what is keeping me in here." (SC RT 15030.) While the prosecution hoped to show that appellant was referring specifically to Ardell Williams, since she had testified at the grand jury, this general statement may well have referred to the grand jury proceeding as a whole.[39]

The prosecution argued that Alonzo Garrett had phoned Ardell's sister, Nina "saying something was going on." (SC RT 16514.) Yet there was conflicting testimony about what he actually said to Nina (SC RT 15609-15053; RT 15176), and the prosecution provided no direct evidence showing that appellant had instructed Garrett to make that phone call.

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[39] Alonzo Garrett testified that appellant didn't mention Ardell Williams when he made the statement, (SC RT 15030), and Detective Anderson, who interviewed Alonzo about the events, testified that Alonzo stated that he read a page or two before he saw Ardell Williams' name. (SC RT 15205.)

The prosecution argued at length that appellant had knowledge that Ardell Williams was planning to testify against him at trial. (SC RT 16493-16498.) But without additional evidence to suggest that this information would cause the defendant to react with a severe vengeance, it was a vast logical leap to suggest that appellant would *use* this information to orchestrate a murder.

If the jury had been permitted to decide for itself whether the letter was threatening, there is a reasonable possibility that the jury would have found it was not threatening, and in turn, that the jury would have had lingering doubt as to whether appellant planned the murder of Ardell Williams. The murder of Ardell Williams was quite possibly the weightiest aggravating factor, since the prosecution presented it as appellant's attempt to evade and manipulate the justice system. (SC RT 16527-16528.) Without such a significant aggravating circumstance, the jury would like have found that the aggravating circumstances did not substantially outweigh the mitigating circumstances.

Had the jury been properly instructed, there is a reasonable possibility that it would have found that one less aggravating factor existed —witness intimidation involving a threat of force or violence—and that one crucial mitigating factor existed: lingering doubt as to the murder of Ardell Williams. The combination of these two factors would very likely have

caused the jury to render a different penalty decision. Because this court erred in denying defense counsel's request for an instruction on the elements of other crimes alleged under Section 190.3(b), and because there is a reasonable possibility that the jury would have come to different decision at the penalty phase, this court should reverse the penalty verdict.

The Jury Was Permitted To Consider An Unconstitutional Aggravating Factor Which Did Not Include Involve Force Or Violence

The evidence does not support a finding that the letter to Alonzo Garrett involved a threat of force or violence. Since Penal Code Section 190.3 only permits a jury to consider evidence which involved the use or threat of force or violence, and, as discussed more fully below, the letter to Alonzo Garrett did not involve the use or threat of force or violence, the jury should not have considered this letter at all. As a result, the trial court erred, and reversal is required.

A jury may not consider evidence which does not involve use or a threat of force or violence

Penal Code Section 190.3 outlines the aggravating and mitigating factors that jurors may consider in deciding whether to impose the death penalty. Evidence which does not fall within that section cannot be considered as aggravation at the penalty phase of a capital case. (*People* v. *Wright*, *supra*, 52 Cal.3d 367, 425; *People* v. *Burton, supra,* 48 Cal.3d 843,

859; *People* v. *Boyd, supra,* 38 Cal.3d 762, 774.) Under that statute, "no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the express or implied threat to use force or violence."

Appellant had a right to instructions under state law that would prevent the jury from considering non-statutory aggravating factors. Because state law created this right, the trial court's arbitrary deprivation of this right violated appellant's right to due process. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346.) Moreover, appellant's Eighth Amendment right to the reliability of a penalty verdict was also implicated in these instructions. (*Johnson* v. *Mississippi*, *supra,* 486 U.S. 578.)

The evidence offered by the prosecution did not involve force or violence

The prosecution argued that appellant possessed a letter to Alonzo Garrett which was a "death threat" intended to prevent him from testifying. (SC RT 16515.) The jury was to consider this as witness intimidation, with an express or implied threat of force or violence, in violation of Penal Code Section 136.1(c). (*See* SC CT 4862.) The text of the letter is as follows:

> Alonzo! [Crossed out.] We just wanted to let you know that the secret meetings you've been having with those folks from Orange County aren't so secret. They have put your business all in the street. Also, your friends in Gardena are recording

> your phone calls. And turning them over to those folks. Thought you were smarter. You know it never pays to make a deal with the devil. But from all the reports and calls we see you are trading, we never thought you would go out backwards. From a man to a bitch. You have no integrity, you weak coward. For every action there is a equal reaction. Sleep on it!!
>
> Low down. (SC CT 4522).

Penal Code section 137(b) defines a threat of force in this context "a credible threat of unlawful injury to any person or damage to the property of another...." (Cal. Penal Code section 137(b).) A criminal threat generally requires "an expression of an intention of being carried out" that conveys a "gravity of purpose and immediate prospect of execution to the victim." (*People* v. *Bolin* (1998) 18 Cal.4th 297, 339 and 442.) Force requires "physical power against the victim or [threatening] to physically overpower the will of the victim during the commission of the crime." (*People* v. *Raley* (1997) 2 Cal.4th 870, 907). There is no suggestion in the letter that the writer intended to exert physical power over a victim. Nor is there evidence of intent to commit future harm whatsoever. Viewed on its own, in the absence of a suggestion that force and violence were involved, the letter amounted to insulting disparagement and a comment on the subject's reputation in the community. It contained

no actual reference to harm, or any future actions whatsoever toward Alonzo Garrett.

Because there was no evidence of a threat of force, the jury was permitted to consider inadmissible evidence – a letter to Alonzo Garrett— as an aggravating factor. This was impermissible under state law, and thus the court erred.

Appellant's proposed instruction would have cured this error

Had the jury been instructed that the threat of force or violence was a separate element under consideration, it would have understood the need to determine whether the letter included a threat of force or violence. Thus, it would only have considered the letter as aggravating evidence if it had determined that it had involved a threat of force. On the other hand, if it had determined that the letter had not involved a threat of force or violence, it would *not* have improperly considered the evidence as an improper aggravating factor.

Reversal is required under federal and state standards of prejudice.

As argued above, due process requires reversal where a jury is permitted to consider an invalid sentencing factor "by reason of its adding an improper element to the aggravation scale in the weighing process," unless "one of the other sentencing factors enables a sentencer to give aggravating weight to the same facts and circumstances." (*Brown* v.

Sanders, *supra,* 546 U.S. 212, 220-221.) Because the jury was permitted to consider an improper sentencing factor, reversal is required.

Moreover, even if the harmless error standard applies (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24; *People* v. *Wright, supra,* 52 Cal.3d 367, 425; *People* v. *Lewis, supra,* at 522), error here was not harmless. There is a reasonable possibility that, had the proposed instruction been provided, directing the jury to determine beyond a reasonable doubt whether an express or implied threat of force or violence was used, the jury's decision would have been different. As argued more fully in the previous section, had the jury been properly instructed, there is a reasonable possibility that it would have found that one less aggravating factor existed —witness intimidation involving a threat of force or violence—and that one crucial mitigating factor existed: lingering doubt as to the murder of Ardell Williams.

For all of these reasons, this court should reverse the penalty verdict under federal and state standards of prejudice.

Claim 61 C. The Trial Court Erred In Denying Appellant's Request for Proposed Instructions That Specified Which Factors Could Be Considered Aggravating and Which Factors Could Be Considered Mitigating

Defense counsel requested Special Instruction 4, which defined aggravation and mitigation and specified which factors were aggravating

and which were mitigating only. The instruction provided, in pertinent part:

> ...[T]he circumstances of the crime itself can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal—ranging, for example, from the most intentional of willful, deliberate, and premeditated murders to the most accidental of felony murders.
>
> Other violent criminal activity is similar. Its [presence] is aggravating, suggesting as it does that the capital offense is the product more of the defendant's basic character than of the accidents of his situation. Its absence is obviously mitigating, carrying the opposite suggestion.
>
> This is also the case with prior felony convictions. Their existence is aggravating. They reflect on the relatively greater contribution of character than situation. Moreover, they reveal that the defendant had been taught, through the application of formal sanction, that criminal conduct was unacceptable—but had failed or refused to learn his lesson. By contrast, the non-existence of such convictions is plainly mitigating.
>
> The age of the defendant can also be either aggravating or mitigating.
>
> *The existence of any of the following circumstances, however, is mitigating and mitigating only*: extreme mental or emotional disturbance; victim participation or consent; reasonable belief in moral justification or extenuation; extreme duress or substantial domination; impairment through mental disease or defect or through intoxication; status as an accomplice and minor participant; *and any other extenuating fact.* By contrast, the nonexistence of any of these circumstances is not and cannot be aggravating. The absence of mitigation does not amount to the presence of aggravation. (13 CT 4769-4770, emphasis added.)

The court rejected the proposed instruction, stating it was "argumentative, somewhat vague, and covered by 8.88." (SC RT 16442.)

The instruction was clearly not "argumentative." Instead, it was a correct statement of the law. (*See People* v. *Hillhouse* (2002) 27 Cal.4th 469, 509 [a majority of the 11 Penal Code Section 190.3 factors can only be mitigating][citing *People* v. *Gallego, supra,* 52 Cal.3d 115, 200 [section 190.3, factors (e), (f), (g) and (j) can only be mitigating] and *People* v. *Whitt* (1990) 51 Cal.3d 620, 654 [section 190.3, factors (d), (e), (f), (h) and (k) can only be mitigating]]*; see also People* v. *Gurule* (2002) 28 Cal.4th 557, 659 [court instructed the jury that factors (d) through (k) "can only be considered by you to be mitigating factors" and that factors (a) through (c) of that section "are the only factors that can be considered by you as aggravating factors."].) It did not "invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Mincey*(1992) 2 Cal.4th 408, 437.) It contained no references to the facts of the case, and thus, there was no suggestion that the jury draw particular inferences from the evidence. Instead, it merely clarified important principles of law.

Nor was it "covered by 8.88." CALJIC No. 8.88, which was provided to the jury, instructed the jury more generally as to how it should

weigh aggravating and mitigating factors. The instruction provided is as follows:

> It is now your duty to determine which of the two penalties, death or confinement in the state of prison for life without possibility of parole, shall be imposed on [the] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition, or event attending the commission of a crime which increases its guilt or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition, or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of the factors on each side of the imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determent under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
> You shall now retire to deliberate on the penalty. In order to make a determination of the penalty, all twelve jurors must agree.

> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return it to this courtroom." (13 CT 4867.)

The given instruction did not specify which factors could be aggravating and which could be mitigating. More importantly, it did not specify that certain mitigating factors can only be mitigating. While the first portion of the requested instruction suggested an alternate definition of aggravation and mitigation, the court should not have thrown out the entire proposed instruction as duplicative of CALJIC 8.88, when most of the instruction addressed additional principles of law. Nor is the instruction duplicative of CALJIC 8.85, which simply laid out the aggravating and mitigating factors without specifying which were aggravating and which were mitigating. (*See* 13 CT 4855.)

Instead, the trial court should have permitted this proposed instruction, because it clarified for the jury which factors under Section 190.3 may be considered aggravating, and which may be considered mitigating. "A majority of the 11 statutory factors can only be mitigating." (*People* v. *Hillhouse*, *supra,* 27 Cal.4th 469, 509) Extenuating facts provided for under 190.3(k) can only be mitigating.[40] (*People* v. *Whitt* ,

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[40] Penal Code Section 190.3(k), and CALJIC 8.85 as given in this case, provides that the following shall be considered by the jury at the penalty phase: "Any other circumstance which extenuates the gravity of the

supra, 51 Cal.3d 620, 654.) Proposed Instruction Number 4 would have clarified this point.

Respondent correctly cites case law that suggests that, under California law, courts ordinarily do not need to instruct a jury as to which factors are aggravating and which are mitigating. (Respondent's Brief, 232.) This is because "the aggravating or mitigating nature of the factors is self-evident within the context of each case." (*Hillhouse, supra,* 27 Cal.4th 469, 509 [citing *People v. Musselwhite* (1998) 17 Cal.4th 1216].) On the other hand, where, as here, the jury is "misled into believing it could consider as an aggravating factor an aggravating factor that can only mitigate," (*Ibid)* the aggravating or mitigating nature of the factors is *not* self-evident. As a result, there is a "reasonable likelihood the jury interpreted the instructions as allowing it to consider as aggravation evidence the defendant presented [as mitigation]." (*See Hillhouse, supra,* 27 Cal.4th 469, 510.)

At closing argument, the prosecution repeatedly addressed the testimony of appellant's family that appellant presented as mitigation evidence. Rather than merely urging the jury to give little weight to this evidence, the prosecution discussed the evidence as if it was aggravating evidence. Specifically, the prosecution characterized testimony of

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crime even though it is not a legal excuse for the crime."

appellant's family concerning sympathetic elements of his character and background ("factor (k)" evidence), as aggravating evidence:

> And I ask you when you go in there and you are considering this—these pictures of these kids and you are considering the testimony of [Clark's] mother, who is obviously struggling, the testimony of his aunt, the testimony of that young girl who was raped and Mr. Clark counseled her 15 years ago, I want you to ask yourself, *why are these people up here? Why? And the reason for that is because of the defendant.* And does he deserve the pity from them and transform it to him?...
>
> What you have to ask yourself is should the defendant get the benefit of his family's pity, and we ask you that he should not. *They came in here not because they wanted to be here. They came here because the defendant has placed them there through crimes he has committed.*" (SC RT 164977- 16478, *emphasis added.)*

With these statements, the prosecution distorted the defense's mitigation evidence, using it to emphasize that the defendant had committed bad acts, and suggesting appellant's friends and family were compelled to testify on his behalf to save his life. The prosecution turned the mitigation evidence on its head so that the jury would only view it as fallout from the defendant's commission of crimes.

"While the prosecutor could properly point to the absence of mitigating evidence in [this] categor[y], he could not argue that such deficiency was itself aggravating." (*People* v. *Whitt, supra,* 51 Cal.3d 620, 654.) By discussing the evidence in this manner, the prosecution improperly distorted mitigating evidence so that the jury would perceive it

as aggravating evidence. Thus, pursuant to *People* v. *Hillhouse*, *supra,* 27 Cal.4th 469, 509, it was *not* self-evident from the circumstances of the case as to which factors were aggravating and which factors were mitigating. In the absence of a clarifying instruction, the court erred.

Respondent also cites *People* v. *Vieira* (2005) 35 Cal.4th 264, 299, for the proposition that "it is generally the task of defense counsel in its closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty phase evidence or circumstances should be considered extenuating under factor k." Defense counsel in appellant's case *did* argue before the jury that defendant's character and background were mitigation evidence. Defense counsel reviewed the evidence of appellant's background, and told the jury to use that evidence in favor of life without parole. (SC RT 16663.) The problem, however, was that the prosecution skewed the mitigation evidence so that it appeared to be aggravating. The defense instruction would have given the jury a vehicle to consider the mitigation.

Vieira is further distinguishable. There, the appellant argued that the jury, without clarifying instructions, would presume that the absence of mitigating factors could be considered as an aggravating factor. In finding that this was not the case, the court noted that "nothing in the prosecution's argument noting the absence of various mitigating factors would have

misled the jury to consider them as aggravating factors." (*Vieira, supra,* 35 Cal.4th 264, 299.) In contrast to *Vieira,* appellant here argues that the jury was prompted to consider a mitigating factor as aggravating, due to the prosecution's arguments. Furthermore, it was the prosecution's arguments that made it more likely that the jury would consider this evidence incorrectly.

The instructions, as given, were also ambiguous under federal constitutional law, preventing the jury from considering relevant evidence. (*See People* v. *Boyde* (1990) 494 U.S. 370, 380 [finding that CALJIC 8.84.1 was "at worst ambiguous"). Reversal is required where there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. (*Ibid.*) By failing to define which factors are aggravating and which are mitigating, the instructions left the prosecution open to "attach[ing] the 'aggravating' label to factors that...should actually militate in favor of a lesser penalty..." (*Zant* v. *Stephens, supra,* 462 U.S. 862, 885.) As explained above, the prosecution took advantage of this opportunity, and improperly argued that a mitigating factor was aggravating. While the U.S. Supreme Court has rejected claims of constitutional error where "the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence" (*Buchanan* v. *Angelone* (1998)

522 U.S. 269; *see also People* v. *Boyde, supra,* at 383), the context of this case was such that the prosecution prevented the jury from considering mitigation evidence, by directing the jury to incorrectly consider mitigating evidence as aggravating evidence.

To uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett* v. *Ohio, supra,* 438 U.S. 586, 605.) Appellant had a due process right under the Fourteenth Amendment to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly* v. *Paskett* (1993) 997 F.2d 1295, 1300.) Appellant's Eighth Amendment right to reliability of the penalty verdict was also implicated in these instructions. (*Johnson* v. *Mississippi, supra,* 486 U.S. 578.)

Accordingly, the failure to instruct on this issue was a substantial error, and the judgment should be reversed under federal and state standards of prejudice.

Claim 61 D. The Trial Court Erred in Rejecting Appellant's Request for Proposed Instructions Which Clarified That The Jury Need Not Impose Death In The Absence Of Mitigating Circumstances

Appellant proposed the following instruction:

> You have the discretion to decide the appropriate penalty by weighing all the relevant evidence.
>
> You may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death. (13 CT 4774.)
>
> The court rejected the instruction, stating that it was "adequately covered by [CALJIC No.] 8.88." (SC RT 16445.)

Appellant's proposed instruction was not "covered" by CALJIC No. 8.88. CALJIC No. 8.88 informs the jury that it should weigh aggravating and mitigating circumstances, stating, in pertinent part:

> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account, and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed....
>
> In weighing the aggravating circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.... (13 CT 4867.)

CALJIC Instruction No. 8.88 does not inform the jury that it may reject death even in the absence of mitigation evidence. Meanwhile, this court has held that the jury may do so. (*People* v. *Duncan* (1991) 53 Cal.3d 955, 979 ["The jury may decide, even in the absence of mitigating evidence, that the aggravating evidence is

not comparatively substantial enough to warrant death."].) CALJIC No. 8.88 only informs the jury that it must find substantial evidence of aggravating evidence. This leaves open the inference that if no mitigating evidence exists, aggravating evidence will always carry more weight and the jury must therefore choose death.

While respondent cites *People* v. *Ray*(1996) 13 Cal.4th 313, 355-356, which held that a court does not have a sua sponte duty to provide an instruction similar to appellant's proposed Number 6, appellant does not argue that a sua sponte instruction was required. Appellant simply requested an instruction that clarified a correct statement of law, and the court rejected it, even though it was not explicitly covered in the instruction.

A jury should be given "unbridled discretion" in determining penalty under the federal constitution. (*See Buchanan* v. *Angelone, supra,* 522 U.S. 269, 276-77.) Defense Special Instruction No. 6 ensured that the jury was aware of the extent of its discretion.

Appellant had a due process right under the Fourteenth Amendment to be sentenced under California's statutory guidelines that require the jury to determine the applicable aggravating and mitigating factors. (*Hicks v. Oklahoma, supra,* 447 U.S. 343, 346; *Fetterly v. Paskett*, *supra*, 997 F.2d 1295, 1300.) Appellant's Eighth Amendment right to reliability of the

penalty verdict was also implicated in these instructions. (*Johnson* v. *Mississippi, supra,* 486 U.S. 578.)

Because the error here violated Fourteenth and Eighth Amendment standards, it requires reversal unless the state can show the error is harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24.) The harmless error standard is akin to the question of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Id.,* at 23.) Under state law, the judgment will be reversed if there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People* v. *Brown, supra,* 46 Cal.3d 432, 448.)

There is a reasonable possibility that the jury in this case would have rendered a different verdict, had the court permitted it to hear appellant's proposed instruction. The prosecutor went to great lengths to minimize the mitigation evidence to such a degree, that the jury likely found no mitigating evidence existed. The prosecution characterized mitigation evidence concerning appellant's character and background as aggravating evidence (*see* Claim 61(B), *supra*). In response to testimony by Dr. Wu about brain damage to appellant, the prosecution argued that this damage did not affect appellant's abilities ("You have evidence from defendant that

his grades were very average and what got him to U.C.L.A. were his S.A.T. scores") or choices ("[D]id it prevent him from making those kinds of choices that everybody has to make? And the answer to that is no.") (SC RT 16529.) The prosecution also argued against the notion that the defendant's mental illness diagnosis was a mitigation factor:

> The thing I leave you with...that [Dr. Woods'] diagnosis of the defendant that he is bipolar, something that afflicts about 11 million people in this country. And he has been in custody and there has not been a request for medication...And what is it that differentiates those manics who can live productive lives and those who premeditate and deliberate murder? And the answer to that is there is no scientific criteria. It has to do with choices people make. (SC RT 16530.)

The apparent goal of the prosecution's argument was to persuade the jury that the mitigation evidence presented by the defense was not mitigating at all. If the jurors agreed with the prosecution's arguments, there is a reasonable likelihood that the jurors ultimately found that no mitigation factors existed. In turn, by not being informed that it could reject death even in the absence of mitigation, there is a reasonable possibility that it incorrectly believed it must choose death.

To uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett* v. *Ohio*, supra, 438 U.S. 586, 605.)

Accordingly, the failure to instruct on this issue was a substantial error, and the judgment should be reversed under federal and state standards of prejudice.

Claim 61 E. Defendant's Proposed Special Instruction Number 8

Sympathy Alone Is Sufficient To Reject Death

Defense counsel requested the following instruction, in pertinent part:

> If the mitigation evidence gives rise to compassion or sympathy for [Clark], the jury may, based on such sympathy or compassion alone, reject death as a penalty. (13 CT 4779.)

The court rejected the instruction as argumentative and duplicative of factor (k) in CALJIC No. 8.85. (SC RT 16445-16446.) The court erred and reversal is required.

This portion of the requested instruction was not argumentative. An instruction is argumentative where it is "of such a character as to invite the jury to draw inferences favorable to one of the parties from specified items of evidence." (*People* v. *Mincey* (1992) 2 Cal.4th 408, 437.) The proposed instruction made no reference to any of the factual circumstances in the case. It was simply a correct statement of law. As the court stated in *People* v. *Lanphear*:

> If a mitigating circumstance or an aspect of the defendant's background or his character is called to the attention of the jury by

> the evidence or its observation of the defendant arouses sympathy or compassion such as to persuade the jury that death is not the appropriate penalty, the jury may act in response thereto and opt for life without possibility of parole. (*People* v. *Lanphear* (1984) 36 Cal.3d 163, 167-168.)

The instruction simply clarified that the jury had freedom to act on sympathy alone, choosing life without parole.

Nor is the instruction duplicative of factor (k). CALJIC No. 8.85, concerning Penal Code Section 190.3 factor (k) provides:

> [You shall consider, take into account, and be guided by the following...if applicable:]
>
> ...Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial. The absence of a statutory mitigating factor does not constitute an aggravating factor. (13 CT 4855-4856.)

While this section informed the jury that it could consider sympathetic evidence, it did not inform the jury that it could use its sympathetic reaction to choose life, no matter how much aggravating evidence there was. In other words, factor (k), alone, "did not make clear to the jury its option to *reject death* if the evidence aroused sympathy or compassion." (*Lanphear, supra,* 36 Cal.3d 163, 167.) Defense Proposed Instruction Number 8, on the other hand, did inform the jury that mitigation could play such a significant role in its decision.

The jury was provided with one additional instruction which touched on sympathy, but which also did not inform the jury that mitigation could play such an important role:

> You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. (13 CT 4867.)

While this instruction informed the jury that it could assign whatever weight it decided to sympathetic evidence, it did not inform the jury that it could decide to reject death based solely on the jurors' sympathetic reactions.

A defendant is constitutionally entitled to have a jury consider any "sympathy factor" raised before it in the penalty phase of a capital case. (*People* v. *Easley* (1983) 671 Cal.3d 858, 875[citing *People* v. *Robertson, supra* 33 Cal.3d 21, 58; *Woodsen* v. *North Carolina* (1976) 428 U.S. 280, 304 (plurality opinion)]; *People* v. *Haskett* (1982) 30 Cal.3d 841, 863.]; *People* v. *Lanphear*, *supra,* 36 Cal.3d 163, 169.) The capacity to show mercy is part of the "reasoned moral response" to mitigating evidence that is required by the 8th Amendment. (*Penry* v. *Lynaugh*, *supra*, 492 U.S. 302, 328.)

For a jury to consider "sympathy" factors, it must be informed that it is "free to act on the basis of sympathy or compassion..." (*Lanphear, supra,* 36 Cal.3d 163, 166.) Jury instructions are the proper mechanism for

informing the jurors of what they can consider. (*See Penry, supra,* at 169 ["[I]n the absence of instructions...the jury was not provided with a vehicle for expressing its reasoned moral response."].) Appellant's proposed instructions would have informed the jury that it could draw on that response to reject death, even if it found strong aggravating factors.

Without instructional guidance, there was a substantial likelihood that the jury did not understand how significant their individual personal sympathetic reactions could be in weighing the evidence. Instructions that do not allow the jury to give full consideration to mitigation evidence are a violation of the Eighth Amendment. (*Penry* v. *Lynaugh* (1984) 492 U.S. 302, 326-328.)

Because the error here violated Eighth Amendment standards, it requires reversal unless the state can show the error to be harmless beyond a reasonable doubt. (*Chapman* v. *California*, *supra,* 386 U.S. 18, 24.) The harmless error standard is akin to the question of "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (*Id.,* at 23.) Under state law, the judgment will be reversed if there is a reasonable possibility that the jury would have rendered the verdict had the error not occurred. (*People* v. *Brown, supra,* 46 Cal.3d 432, 448.)

The error here was prejudicial. While appellant presented evidence which had potential to invoke sympathetic reactions from the jury, at every turn, the prosecution sought to minimize and undermine that evidence. While appellant presented evidence about his childhood, family history, mental illness, and depression, (*see* SC RT 11436; 11779; 11433; 11459) the prosecution undermined that evidence by characterizing much of it as aggravation evidence. (*See* Claim 61(B), *supra.*) At the same time, the prosecution argued at length about the reprehensible degree of the underlying crimes (SC RT 16491; 16506-16507; 16525; 16527); offered evidence of unadjudicated crimes involving force or violence (SC RT 16514); presented extensive victim impact evidence (SC RT 15243; 15246-15252); argued that if the death penalty was not imposed, Appellant would get away with a "free murder" (SC RT 16533); and suggested the jury give little weight to all of the mitigating evidence presented. (SC RT 16528-16531.)

Without an instruction to inform the jurors of their freedom to use their sympathetic reactions to mitigation evidence to choose life, in spite of all the aggravating evidence, there is a reasonable possibility that the jurors did not believe they could choose life based solely on their sympathetic reactions to the evidence, in light of the extensive aggravation evidence. The jury was more likely left with the impression that there was substantial

aggravating evidence, so that it had to choose death. To uphold the instructions as given would "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." (*Lockett* v. *Ohio, supra,* 438 U.S. 586, 605.)

Respondent suggests that this court rejected a similar claim in *People* v. *Hinton* (2006) 37 Cal.4th 839, 911-912. (RB, 233.) *Hinton* is distinguishable from the present case. While the *Hinton* court rejected an instruction which was substantially similar to Proposed Special Instruction Number 8, the court had granted another request to instruct the jury to use mercy or sympathy to decide what weight to give each mitigating factor. (*Hinton, supra,* at 911.) In contrast, the jury in the present case was provided with no such instruction. Without the benefit of any instructions that emphasized the significance of sympathy, the jury could not have understood the crucial role of mercy, sympathy, and sentiment in assessing mitigating factors.

Accordingly, the failure to instruct on this issue was a substantial error, and the judgment should be reversed under federal and state standards of prejudice.

CLAIM 63
THE COURT ERRED IN THE PENALTY PHASE BY NOT INSTRUCTING PURSUANT TO CALJIC 2.11.5 IN VIOLATION OF APPELLANT'S CONSTITUTIONAL RIGHTS

The Trial Court Had A Sua Sponte Duty To Instruct The Jury With CALJIC No. 2.11.5

CALJIC No. 2.11.5 provides:

> There has been evidence in this case indicating that a person other than the defendant was or may have been involved in the crime for which the defendant is on trial.
>
> There may be many reasons why such person is not here on trial. Therefore, do not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of the defendant[s] on trial.

While respondent correctly states that appellant did not request CALJIC No. 2.11.5, the court should have given the instruction sua sponte. One purpose of the sua sponte instructional rule is to "encourage a verdict...no harsher or more lenient than the evidence merits." *People* v. *Breverman* (1998) 19 Cal.4th 142, 155 [quoting *People* v. *Wickersham* (1982) 32 Cal.3d 307, 342]. It also ensures "the most accurate possible verdict encompassed by the charge and supported by the evidence," (*Breverman, supra,* at 161) and "directs the jury's truth ascertainment function." (*Id.,* at 155, citing *People* v. *Barton* (1995) 12 Cal.4th 186, 196].)

While appellant was just one of several actors implicated in the Comp U.S.A. robbery, the jury in appellant's case only saw appellant on trial. In regards to the Ardell Williams murder, Antoinette Yancey was actually convicted of murder in that case, and the jury was unaware of this conviction.[41] Thus, as far as the jury knew, appellant was the first and only person to be held responsible for the Williams murder. Also, as far as the jury knew, appellant was the most culpable in the Comp U.S.A. robbery. If the jury had been instructed with CALJIC No. 2.11.5, it would have understood that the defendant was *not* the only one being held responsible for either crime. Thus, it would not have felt compelled to give appellant the harshest possible sentence; it would not have chosen a verdict that was "harsher...than the evidence merits." (*People* v. *Breverman, supra,* 19 Cal.4th 142, 155.)

Moreover, as respondent correctly noted, the purpose of CALJIC No. 2.11.5 is to "discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses..." *People* v. *Cain* (1995) 10 Cal.4th 1, 35. Thus, CALJIC No. 2.11.5 directly

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[41] While it was proper for the jury not to be informed of Yancey's conviction, CALJIC 2.11.5 would have ensured that it did improperly speculate that Clark was the only one being held responsible.

assists the jury in finding "the most accurate possible verdict." (*Breverman, supra,* 19 Cal.4th 142, 155.)

Respondent argues that CALJIC No. 2.11.5 is a limiting instruction, and therefore it should only be given upon request. (Respondent's Brief 237.) CALJIC No. 2.11.5 is not a limiting instruction. A limiting instruction informs the jury that "evidence is admissible as to one party or for one purpose and is inadmissible to another party or for another purpose." (Evidence Code section 355.) CALJIC No. 2.11.5 does not instruct the jury in this manner. Instead, it directs the jury not to speculate as to the fates of other accomplices. In this way, it "protects the jury's truth ascertainment function." (*People* v. *Breverman, supra,* 19 Cal.4th 142, 155.)

While respondent cites *People* v. *Dennis* (1998) 17 Cal.4th 468 to support its argument, *Dennis* concerned CALJIC No. 2.10, which instructs the jury that it should only consider the statements made by the defendant to a medical expert in the course of a medical examination "for the *limited purpose* of showing the information upon which the medical expert based his opinion. Such testimony is not to be considered...as evidence of the truth of the facts disclosed by the defendant's statements." (*Ibid.*) In contrast to CALJIC No. 2.10, CALJIC No. 2.11.5 never uses the words "limited purpose," and does not suggest the jury limit its consideration of evidence to a particular purpose.

The Instruction Would Not Have Interfered With The Jury's Assessment Of Accomplice Witness Credibility

Respondent contends that CALJIC No. 2.11.5 should not have been given because witnesses Matt Weaver and Jeannette Moore testified at the penalty phase against the defendant, and the instruction would have interfered with appellant's ability to their credibility, which was important considering their cooperation with the prosecution. (Respondent's Brief, 238.) The trial court appeared to reason similarly. In response to the prosecution's suggestion that the instruction should not be used if the other person involved in the crime is a witness for the prosecution or defense,[42] the court agreed, stating, "[T]hat can be considered as a motive to lie. A motive to please the side they are trying to please." (SC RT 16292.) Later, the court stated, "I don't see how this instruction is helpful...to the defense." (SC RT 16293.)

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[42] At the penalty phase, the prosecution stated that "The Use Note says do not use this instruction if the other person is a witness for either the prosecution for the defense." (SC RT 16292.) While the 5th Edition of CALJIC, published in 1988, included this Use Note, the 1996 Supplement, which the court should have referred to, did not include the same note. The note was most likely removed in light of subsequent caselaw, including *People* v. *Sully* (1991) 53 Cal.3d 1195, 1219, which held that any error was minimal and harmless error, where CALJIC No. 2.11.5 was given, a person who was a witness for the prosecution testified against the defendant, and the jury was given adequate instructions on witness credibility and accomplice instructions.

The instruction could easily have been modified so that the jury was told only that it should not consider why Eric Clark, Nokkuwa Ervin, Damian Wilson, and Antoinette Yancey were not on trial. Alternatively, the jury could have been given CALJIC No. 2.11.5 unmodified, with the further instruction that the jury *could* consider that Jeannette Moore and Matt Weaver were both given immunity in the context of witness credibility.

Respondent cites *People* v. *Hernandez* (2003) 30 Cal.4th 835, 875, in support of its argument that it is improper to give CALJIC No. 2.11.5 where uncharged perpetrators testify in the case. (SC RT 238.) *Hernandez* is distinguishable. In *Hernandez,* there was only one possible accomplice, and therefore CALJIC No. 2.11.5 would only apply to that single person. That single person testified against the defendant at trial, and CALJIC No. 2.11.5 was given "in an unmodified form" at trial. The court found error. In the present case, in contrast, it was most important that CALJIC No. 2.11.5 be given to the jury in reference to Yancey, who had been separately convicted for the murder of Ardell Williams. Yancey did *not* testify against appellant at the penalty phase, and thus there was no problem under *Hernandez.*. The court have also have modified CALJIC No. 2.11.5 to include Eric Clark, Nokkuwa Ervin, and Damian Wilson, as they also did not testify against appellant at trial.

Moreover, courts have repeatedly held that error is minimal to non-existent where a jury is instructed with CALJIC No. 2.11.5, some of those witnesses testify as prosecution witnesses, and full credibility instructions are given. (*People* v. *Lawley* (2002) 27 Cal.4th 102, 162; *People* v. *Sully* (1991) 53 Cal.3d 1195, 1219.) As the court stated in *Lawley:*

> When the instruction is given with the full panoply of witness credibility and accomplice instructions, as it was in this case, [jurors] will understand that although the separate prosecution or non-prosecution of co-participants, and the reasons therefore, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. (*Lawley, supra,* at 162 [citing *Sully, supra,* at 1219].)

The jury in the present case was given a "panoply" of witness credibility instructions and accomplice instructions.[43] Thus, it would not have been improper for the court to give the instruction even though Matt Weaver and Jeannette Moore testified against appellant. Regardless, as argued above, the court could easily have given a modified instruction that informed the jury that No. 2.11.45 should be applied to all of the apparent accomplices except Jeannette Moore and Matt Weaver.

The court also rejected the instruction, stating it was "not a correct statement of law because the people do not have a duty." (SC RT 16292.)

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[43] The jury was given CALJIC No. 2.20 (13 CT 4826), 2.23 (13 CT 4828), 1.01 (13 CT 4820), 3.10 and 3.11 (13 CT 4838), and 3.18, and 3.19 (13 CT 4839).

This was apparently in reference to the last sentence of the instruction: "Your [sole] duty is to decide whether the People have proven the guilt of the defendant on trial." As suggested by defense counsel at the penalty phase, this instruction could have been modified to remove this sentence. (SC RT 16292.) The underlying goals of the instruction, to "discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the offenses," would still have been met. (*People* v. *Cain*, *supra*, 10 Cal.4th 1, 35.)

Reversal Is Required Under Federal and State Standards of Prejudice

This court's error violated appellant's Eighth Amendment right against a penalty that is disproportionate to a criminal defendant's personal culpability. (*People* v. *Benson* (1990) 52 Cal.3d 754, 801.) The error undermined the reliability required by the Eighth and Fourteenth Amendment for conviction of a capital offense (*Beck* v. *Alabama, supra,* 447 U.S. 625, 637-38.), and deprived appellant of reliable, individualized capital sentencing guaranteed by the Eighth Amendment. (*Zant v. Stephens, supra,* 462 U.S. 862, 879; *Woodsen* v. *North Carolina* (1976) 428 U.S. 280, 304; *Johnson* v. *Mississippi, supra,* 486 U.S. 578, 584-585.)

Reversal is required because respondent cannot demonstrate that the error was harmless beyond a reasonable doubt. (*Chapman* v. *California,*

supra, 386 U.S. 18.) Under state standards, there is a reasonable possibility that the jury would have rendered a different verdict had the error not occurred. (*People* v. *Brown, supra,* 46 Cal.3d 432, 448.)

The prosecution's primary theme in closing argument was that the defendant was the "mastermind" of both crimes. (SC RT 16526 ["What we have in this case is...the defendant being the mastermind, the planning[sic], the sophistication [sic] of both killings"].) In reference to the Ardell Williams murder, the prosecution argued that Yancey only committed the murder at the direction of appellant. (SC RT 16508.) The prosecution emphasized, "[h]e is the major moving force that has been found with respect to the murder of Ardell Williams," (SC RT 16484) and later repeated, "the defendant was the one who was the mastermind, [did] the planning, the sophistication, the premeditation, the deliberation all while he was in custody." (SC RT 16527.) Meanwhile, Antoinette Yancey was physically connected to the murder of Ardell Williams, and she was ultimately convicted for the murder. Since the jury was unaware that Yancey was held responsible, the jurors likely punished appellant more harshly, on the assumption that he was primarily responsible and no one else had been held accountable. Had the jury been told it should not consider the fate of Yancey, it likely would not have given the murder of Ardell Williams as much aggravating weight as it did.

In reference to the Comp U.S.A. robbery that led to the death of Kathy Lee, the prosecution argued, ["[T]he defendant is responsible for...and was the major participant in the planning of the Comp U.S.A. robbery." (SC RT 16492) Later, again, the prosecution stated, "[H]e was part of the plan, he was the mastermind of the robbery that caused [Kathy Lee's] death, and he has been found guilty of that." (SC RT 16526.) In reference to this crime, in the absence of CALJIC 2.11.5, the jurors may have speculated that appellant needed to be punished more harshly because no one else had been held accountable.

In short, the prosecution portrayed the defendant as the most culpable in reference to both crimes for which he had been convicted. This, the prosecution reasoned, was what made death the appropriate punishment for death, despite the fact that he wasn't the "actual killer" in either case. (SC RT 16532.) In the absence of a CALJIC No. 2.11.5 instruction, there is a reasonable possibility that the jury judged appellant more harshly, placing all culpability on him even though others were involved, because it perceived punishment of the appellant as the sole opportunity to seek justice for the deaths of Ardell Williams and Kathy Lee. If the jury *had* been given the instruction, it may not have placed all culpability on appellant, and would likely have chosen a different penalty verdict.

Respondent argues that the prosecution only talked about Clark's culpability at trial, and did not comment as to the fates of any unjoined perpetrators. (SC RT 239-240.) Yet this is precisely the problem: the jury's attention was only on the defendant's culpability as it heard all of the reprehensible evidence involved in these crimes. Since it was not instructed with CALJIC No. 2.11.5, it was left to speculate that all others involved went unpunished. Thus, there is a reasonable possibility that the jury placed more culpability on appellant than was warranted, and the jury chose a more severe punishment for appellant than it otherwise would have.

For all of these reasons, this court should reverse the penalty verdict under federal and state standards of prejudice.

CONCLUSION

For all the foregoing reasons, Appellant respectfully asks that the judgment as to both guilt and penalty be reversed.

Dated: March 24, 2010

Respectfully submitted,

PETER GIANNINI
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I certify that the attached Appellant's Reply Brief uses a 13 point Times New Roman font. According to the Microsoft Word word count function, the Appellant's Reply Brief contains 91, 920 words.

DATED: March 24, 2010

PETER GIANNINI

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1015 Gayley Avenue, #1000, Los Angeles, California 90024.

On March 24, 2010, I served the foregoing document described as APPELLANT'S REPLY BRIEF on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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[X] (By Mail)

I deposited such envelope in the mail at Los Angeles, California, with postage fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business.

Executed on March 24, 2010 at Los Angeles, California.

[X] (State)I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Peter Giannini
TYPE OR PRINT NAME

Peter Giannini
SIGNATURE