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IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

SUPREME COURT
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Deputy

THE PEOPLE,

Plaintiff and Respondent,

-vs-

GARY GALEN BRENTS,

Defendant and Appellant.

Appeal No. S093754

Sup. Ct. No. 96NF2113

APPEAL FROM JUDGMENT OF

THE SUPERIOR COURT OF ORANGE COUNTY

Honorable John J. Ryan, Judge Presiding

APPELLANT'S REPLY BRIEF

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DEATH PENALTY

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IN THE SUPREME COURT

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THE PEOPLE,

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-vs-

GARY GALEN BRENTS,

Defendant and Appellant.

Appeal No. S093754

Sup. Ct. No. 96NF2113

INTRODUCTION

By this reply brief, appellant has made no attempt to cover every issue raised by appellant on appeal. The purpose of this reply brief is merely to respond to those contentions made by respondent which require further comment. For a complete discussion of the issues raised on appeal, please see appellant's opening brief on file herein.

STATEMENT OF CASE AND FACTS

Appellant hereby incorporates the statement of case and statement of facts contained in appellant's opening brief.

DISCUSSION

I

THE KIDNAPPING FELONY MURDER SPECIAL CIRCUMSTANCE MUST BE REVERSED BECAUSE THERE WAS INSUFFICIENT EVIDENCE THAT THE MURDER WAS COMMITTED IN ORDER TO CARRY OUT OR ADVANCE COMMISSION OF A KIDNAPPING OFFENSE

Respondent contends that there was substantial evidence to support the jury's true finding on the kidnapping special circumstance. Respondent argues that there was either evidence that appellant had not finally decided to kill the victim (Kelly Gordon) when he put her in the trunk of the Cadillac and drove 16 miles to Carson, or that appellant concurrently possessed the intent to kill Gordon and kidnap her for some unknown purpose, so the murder was thus committed in order to carry out or advance the independent felonious purpose of commission of a kidnapping offense. (RB[1] 17-18.)

In support of these contentions, respondent makes no attempt to reference any actual evidence presented at trial that indicates that appellant had any purpose other than to kill Gordon when he kidnapped her. Instead, respondent points to the trial court's suggestions that the jury could have found that Gordon was kidnapped because she was going to tell about the beating, or to scare the living daylights out of her to teach her a big lesson. The court made these comments when it denied appellant's motions to dismiss the kidnapping special circumstance. (RB 19-21.) Respondent also states that nothing prevented appellant from killing Gordon in the parking lot where the

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[1] RB refers to respondent's brief.

beating took place, so he must have had some other unknown purpose for kidnapping her. (*Ibid.*)

Respondent further argues that this Court's prior decisions support a finding that appellant's kidnapping of Gordon was not merely incidental to her murder, citing *People v. Ainsworth* (1988) 45 Cal.3d 984, 1026, *People v. Raley* (1992) 2 Cal.4th 870, 902, and *People v. Barnett* (1998) 17 Cal.4th 1044, 1158. (RB 21-23.) As set forth more fully below, respondent's contentions are without merit.

A. There Was No Evidence Presented At Trial That Indicated That Appellant Had A Purpose For The Kidnapping Apart From the Murder

As respondent recognizes, in assessing a claim of insufficient evidence to support a kidnapping special circumstance, the question is whether there was substantial evidence presented at trial from which the jury could have found beyond a reasonable doubt that the defendant had a "purpose for the kidnapping apart from the murder." (*People v. Mendoza* (2000) 24 Cal.4th 130, 183, quoting *People v. Raley, supra,* 2 Cal.4th at 902; also see *People v. Riel* (2000) 22 Cal.4th 1153, 1201.) Substantial evidence is evidence that is reasonable, credible, and of solid value, such that a reasonable trier of fact could make the finding that it made. (*In re Victoria* (1989) 207 Cal.App.3d 1317, 1326.) Suspicion or speculation does not amount to substantial evidence. (*People v. Raley, supra,* 2 Cal.4th at 889-891.)

In this case, as referenced above, respondent has cited to no evidence presented at trial that indicates that appellant had any purpose for the kidnapping apart from the murder. Instead, respondent points to statements

made by the trial court that Gordon may have been kidnapped because she was going to tell about the beating, or to scare the living daylights out of her to teach her a big lesson, and notes that appellant could have killed Gordon in the parking lot, which amounts to nothing more than suspicion or speculation. These suggestions as to possible purposes for the kidnapping apart from the murder have no support in the evidence presented at trial, and thus cannot support the true finding on the kidnapping special circumstance.

First of all, with regards to the trial court's speculation that appellant kidnapped Gordon because she was going to tell about the beating, there was simply no evidence to support such a theory. Appellant told Vicki Myers (hereinafter "Vicki") and Sara Uele (hereinafter "Sara") that he had *to kill* Gordon because she would tell on them about the beating and/or the drugs, not that he had to kidnap her to prevent her from doing so, and there was no evidence that appellant planned a kidnapping for this purpose. (7 RT 1657; 9 RT 1999-2000.) In addition, it would make no sense for appellant to have planned to kidnap and then release Gordon to prevent her from telling on them about the beating and drugs, because her release would do nothing to prevent her from reporting these things to the police. Thus, the trial court's suggestion that appellant kidnapped Gordon because she was going to tell on them about the beating was not supported by any evidence, but was speculation which does not amount to substantial evidence. (*People v. Raley, supra,* 2 Cal.4th 889-891.)

Secondly, with regards to the trial court's speculation that appellant kidnapped Gordon to scare the living daylights out of her and teach her a big

lesson, there was no evidence to support such a theory. According to the state's evidence, prior to the kidnapping, appellant told Michelle Savidan (hereinafter "Michelle") that he thought Gordon was a snitch and he wanted to kill her. (6 RT 1420-1423.) A few minutes later, appellant did try to kill Gordon by putting a plastic bag over her head, which was pulled off by Gordon, and then appellant choked her with his arm, which was also unsuccessful. (7 RT 1648-1652, 1725-1730; 9 RT 1987-1989, 2034-2036.) Appellant then pulled Gordon out of the Cadillac, put her in the trunk, closed the trunk, and told Vicki and Sara that he had to kill Gordon because she would tell on them about the beating or the drugs. (7 RT 1649-1657; 9 RT 1989-2000.) Appellant then allegedly drove the Cadillac from the parking lot to a secluded location in Carson with Gordon in the trunk, and set the Cadillac on fire, thereby killing Gordon. (6 RT 1343-1352; 8 RT 1811; 10 RT 2370-2372, 2390-2392.) Under these circumstances, unquestionably, appellant's primary goal prior to and after the kidnapping was to kill Gordon, and there was no evidence that he was simply trying to scare her. Thus, the trial court's suggestion that appellant was simply trying to scare Gordon was not supported by evidence, but was speculation which, by law, does not amount to substantial evidence. (*People v. Raley, supra,* 2 Cal.4th 889-891.)

Thirdly, contrary to respondent's suggestion, the fact that appellant possibly could have killed Gordon in the parking lot rather than moving her to a secluded location to kill her does not show a purpose for the kidnapping apart from the murder, which is the issue to be considered in determining whether there was substantial evidence to support the kidnapping special

circumstance. (*People v. Mendoza, supra,* 24 Cal.4th at 183.) As referenced above, the evidence in this case demonstrated that appellant's primary goal was not to kidnap Gordon but to kill her, and that the kidnapping was merely incidental to the murder. (See e.g., *People v. Weidert* (1985) 39 Cal.3d 836, 840-842 [where the defendant kidnapped the victim and drove him to a secluded location to kill him, and this Court reversed the true finding on a kidnapping special circumstance, determining that there was insufficient evidence that the defendant had kidnapped the victim to advance a felonious purpose independent of the killing, because the defendant's primary goal was not to kidnap the victim but to kill him, and the kidnapping was thus incidental to the murder].)

Therefore, there was no evidence that appellant kidnapped Gordon for a purpose apart from the murder, and the kidnapping special circumstance must be reversed.

B. The Circumstances Involved In This Court's Prior Decisions Cited By Respondent Are Clearly Distinguishable From the Circumstances In the Present Case

As referenced above, respondent argues that this Court's prior decisions in *People v. Ainsworth, supra,* 45 Cal.3d at 1026, *People v. Raley, supra,* 2 Cal.4th at 902, and *People v. Barnett, supra,* 17 Cal.4th at 1158 support a finding that appellant's kidnapping of Gordon was not merely incidental to her murder. However, these cases are clearly distinguishable on their facts from the present case, because in each of these three cases, there was actual evidence that the defendant had a purpose for the kidnapping apart from the murder.

In *People v. Ainsworth, supra,* 45 Cal.3d 984, the defendant and an acquaintance (Mr. Bayles) had been drinking at two bars in downtown Sacramento in the morning, and in the early afternoon, walked into a parking lot where the victim (Ms. Huynh) was parking her car. (*Id.,* at 994-999.) The defendant produced a firearm, shot Huynh in the hip, and, leaving the victim bleeding in the car, got in the driver's seat of Huynh's car. (*Ibid.*) The defendant told Bayles that they had a ride, Bayles got in the passenger seat of the car, and they drove away. (*Ibid.*)

The defendant and Bayles then used money from the victim's purse to purchase beer and gas, and drove to near the Oregon border and then back to the San Francisco bay area. (*Ibid.*) At some point, the victim died, and the defendant and Bayles disposed of her body in a wooded area seven miles south of Elk Creek. (*Ibid.*) The victim's car was found two days after the incident in Pacifica, which was a few miles from the defendant's home, and the victim's body was discovered about two months later. (*Ibid.*) The defendant was convicted of first degree murder, and robbery and kidnapping felony murder special circumstances were found true as to him. (*Id.,* at 1000.)

On appeal, the defendant contended, among other things, that the trial court had prejudicially erred in failing to instruct the jury, *sua sponte,* that to find the kidnapping special circumstance true, they had to find that the murder was committed in order to carry out or advance the commission of the crime of kidnapping. (*Id.,* at 1026.) The *Ainsworth* court rejected that contention, finding that there was substantial evidence from which the jury could have found that the robbery and kidnapping were not merely incidental to the

murder, and that the defendant harbored an independent felonious purpose as to those crimes. (*Ibid.*) The *Ainsworth* court further found that there was nothing in the record to indicate that a kidnapping occurred during the commission of a murder, rather than vice versa, so the trial court had no *sua sponte* duty to instruct the jury on that theory. (*Ibid.*)

The present case is clearly distinguishable from *Ainsworth*. The circumstances in *Ainsworth* show that the defendant's primary goal was to steal the victim's car and money, rather than to kill her, and that she was kidnapped in order to accomplish the carjacking and robbery. There was simply no evidence that the defendant's primary goal was to kill the victim.

However, in the present case, the evidence showed that appellant's primary goal was to kill Gordon, in that appellant told Michelle that he wanted to kill Gordon because she was a snitch, appellant attempted to kill her with a plastic bag and by choking her, and after putting Gordon in the trunk, appellant told both Vicki and Sara that he had to kill Gordon because she would tell on them about the beating and drugs. (6 RT 1420-1423; 7 RT 1648-1657; 9 RT 1989-2000.) In addition, as referenced above, there was simply no evidence that appellant had any purpose for the kidnapping apart from the murder. (See Arg. I, § A. pp. 3-6, *supra.*) Thus, the present case is clearly distinguishable from *Ainsworth*.

In *People v. Raley, supra,* 2 Cal.4th 870, the defendant worked as a security guard at a mansion in Hillsborough, and while giving a private tour to two teenage girls, he locked them in a safe in the basement of that mansion. (*Id.,* at 881-884.) The defendant then directed these girls to take off their

clothes, and told them that he wanted to "fool around" with them. (*Ibid.*) The defendant sexually assaulted at least one of the girls, and stabbed the other girl multiple times. (*Ibid.*) The defendant then put the two girls in the trunk of his car. (*Ibid.*)

A couple of hours later, after the defendant's work shift ended, the defendant drove his car to the house he shared with his father and sister, and parked the car in the garage. (*Ibid.*) The defendant let the two girls out of the trunk to stretch their legs and gave them a sleeping bag and/or blanket to keep them warm. (*Ibid.*) The defendant then heard voices, and hurriedly threw the girls back in the trunk and left the garage. (*Ibid.*) In the middle of the night, the defendant drove his car to a secluded location, and threw the girls down a ravine. (*Ibid.*) One of the girls was able to crawl out of the ravine and flag down help, but the other died from her stab wounds. (*Ibid.*) The defendant was convicted of first degree murder, and the kidnapping special circumstance was found true. (*Ibid.*)

On appeal, the defendant contended that there was insufficient evidence presented at trial for the jury to have found that he had a purpose for the kidnapping apart from the murder. (*Id.*, at 902-903.) The *Raley* court rejected this contention, finding that the defendant did not immediately dispose of the victims once he had them in the trunk of his car, but brought them to his home and let them out of the trunk. (*Id.*, at 903.) The *Raley* court stated that this showed evidence that the defendant may have been undecided as to the victim's fate at the time of the kidnapping, and the jury could thus have reasonably found that the defendant formed the intent to kill them after the

asportation, so the kidnapping was not merely incidental to the murder. (*Ibid.*)

The present case is clearly distinguishable from *Raley*. The fact that the defendant in *Raley* let the girls out of his trunk in the garage at his house to stretch their legs and gave them a blanket to keep warm showed substantial evidence that the defendant had not decided to kill the girls when he drove them away from the mansion in the trunk of his car, thereby kidnapping them. This indicated a purpose for the kidnapping apart from the murder, such as a further sexual assault in his garage that was interrupted by the voices he heard.

However, in the present case, there was no evidence that appellant had not finally decided Gordon's fate when he drove the Cadillac to Carson with Gordon in the trunk, but the evidence showed that appellant's plan was to kill Gordon, as shown by his statements that he intended to kill her, and his attempts to kill her in the parking lot. (6 RT 1420-1423; 7 RT 1648-1657; 9 RT 1989-2000.) In addition, as referenced above, there was no evidence that appellant had any purpose for the kidnapping apart from the murder. (See Arg. I, § A. pp. 3-6, *supra*.)

In *People v. Barnett, supra,* 17 Cal.4th 1044, the defendant and the victim (Richard Eggett) had mined gold together, but got in a conflict and no longer liked each other. (*Id.,* at 1069-1079.) On a day in 1986, the defendant and some of his friends arrived at a campsite in a secluded area, and the defendant was looking for Eggett. (*Ibid.*) Eggett was camped at that location, but had gone to town for a day or two, and soon returned to the campsite with a group of his friends. (*Ibid.*) The defendant pointed a gun at Eggett's group, had them empty their pockets, and took their cash and gold. (*Ibid.*) The

defendant and Eggett argued, and the defendant then fired gunshots at Eggett's feet and made him dance until Eggett got hit in the foot. (*Ibid.*) The defendant then hit, kicked, and threatened Eggett. (*Ibid.*)

A little later, the defendant and his friends bound the hands and feet of Eggett and two of his friends (Canwell and Hampton), and put them in Eggett's Jeep. (*Ibid.*) The defendant drove the Jeep a ways away from the campsite, and pulled Eggett out of the Jeep. (*Ibid.*) The defendant removed Eggett's clothes, said he was going to tie Eggett to a tree and leave him for the mosquitos to eat, and took Eggett into the woods. (*Ibid.*) The others heard Eggett screaming, as if the defendant was beating him. (*Ibid.*) The screams stopped, and the defendant returned to the Jeep and told his friend that he had tied fishing line around Eggett's genitals. (*Ibid.*)

The defendant then told Cantwell and Hampton that he would kill them if they said anything, and directed them to leave Eggett where he was for two or three days. (*Ibid.*) The defendant drove Cantwell and Hampton back to the campsite, stated that he was going to leave Eggett where he was to suffer a little more, and let the other men go after they agreed not to report the incident to the police. (*Ibid.*) The defendant then left the campsite in the Jeep, and Cantwell and Hampton went to try and find Eggett, but when they heard a Jeep coming, they fled the area. (*Ibid.*) Cantwell and Hampton returned to the area the next day, and found Eggett's body in his Jeep under clothing and a sleeping bag, and he had been stabbed to death. (*Ibid.*) The defendant was convicted of first degree murder, and the robbery and kidnapping special circumstances were found true. (*Id.*, at 1069.)

On appeal, the defendant contended that there had been insufficient evidence presented at trial for the jury to find that Eggett's murder was committed in order to advance a kidnapping, to facilitate the defendant's escape from that offense, or to avoid detection for that offense. (*Id.*, at 1157-1159.) The *Barnett* court rejected this contention, finding that there was evidence that the defendant may not have killed Eggett when he first separated from the others, but that the defendant wanted Eggett to be left wounded and exposed to the elements for a couple of days before being rescued by his friends, and from this evidence, the jury could have concluded that the defendant had not finally decided to kill Eggett at the time of the asportation and that the kidnapping had a purpose apart from the murder. (*Ibid.*) The *Barnett* court further found that there was evidence that the murder facilitated the kidnapping, because the defendant may have believed that Eggett was the only person in the group that would have reported the kidnapping of the three men to the police. (*Ibid.*)

The present case is clearly distinguishable from *Barnett*. The fact that there was evidence that the defendant in *Barnett* left Eggett in the woods exposed to the elements to let him suffer, and later returned and stabbed Eggett to death and put him in the Jeep, showed substantial evidence that the defendant had not decided to kill Eggett when he drove him away from the campsite in the Jeep with Cantwell and Hampton, thereby kidnapping him. This indicated a purpose for the kidnapping apart from the murder, such as the infliction of pain for acts perceived to have been committed against him.

However, in the present case, as referenced above, there was no

evidence that appellant had not finally decided Gordon's fate when he drove the Cadillac to Carson with Gordon in the trunk, but the evidence showed that appellant's plan was to kill Gordon, as shown by his statements that he intended to kill her, and his attempts to kill her in the parking lot. (6 RT 1420-1423; 7 RT 1648-1657; 9 RT 1989-2000.) In addition, as referenced above, there was no evidence that appellant had any purpose for the kidnapping apart from the murder. (See Arg. I, § A. pp. 3-6, *supra*.)

C. Conclusion

In sum, there was insufficient evidence to support a true finding on the kidnapping felony murder special circumstance, and the kidnapping special circumstance must be reversed.

II

ASSUMING ARGUENDO THAT THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE KIDNAPPING SPECIAL CIRCUMSTANCE, IT MUST STILL BE REVERSED BECAUSE THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT GAVE AN INSTRUCTION THAT ERRONEOUSLY DEFINED THE ELEMENTS OF THE KIDNAPPING SPECIAL CIRCUMSTANCE

Respondent contends that the kidnapping special circumstance does not have to be reversed because the trial court inserted the crime of assault by force likely to produce great bodily injury, instead of the crime of kidnapping, in the first sentence of paragraph number two of the instruction setting forth the elements of the kidnapping special circumstance (i.e., CALJIC No. 8.81.17).[2] Respondent argues that (1) this sentence sets forth a correct statement of law that told the jurors that they had to find that the kidnapping had a felonious purpose independent from the murder, (2) if appellant wanted the trial court's version of CALJIC No. 8.81.17 modified, he was required to request that modification, citing *People v. Rodrigues* (1994) 8 Cal.4th 1060,

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[2] The version of CALJIC No. 8.81.17 given to the jury by the trial court provided:

"To find that the special circumstance, referred to in these instructions as murder in the commission of kidnapping is true, it must be proved:

"1. The murder was committed while the defendant was engaged in the commission of a kidnapping; and

"2. The murder was committed in order to carry out or advance the commission of the crime of *assault by force likely to produce great bodily injury* or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the kidnapping was merely incidental to the commission of the murder. [Italics added]" (11 RT 2737; also see 3 CT 894.)

1142-1143, (3) paragraph number two of CALJIC No. 8.81.17 merely clarifies the element of the kidnapping special circumstance set forth in paragraph number one, rather than stating an additional element, and because jurors were correctly instructed on this element in paragraph number one, the trial court did not omit an element of the kidnapping special circumstance, so the error was not of federal constitutional magnitude, citing *People v. Prieto* (2003) 30 Cal.4th 226, 256-257, and may be reviewed under the *Watson*[3] prejudice standard, and (4) any instructional error was harmless under either the federal or California prejudice standards because the jury was properly instructed in paragraph number one that they had to find that the murder was committed while appellant was engaged in the commission of a kidnapping. (RB 24-28.) As set forth more fully below, respondent's contentions are without merit.

A. The First Sentence Of Paragraph Number Two Of The Version Of CALJIC No. 8.81.17 Given To The Jury Did Not Set Forth A Correct Statement Of Law, And Did Not Require The Jury To Find Anything About The Kidnapping

As referenced above, respondent contends that the first sentence of paragraph number two of the instruction on the kidnapping special circumstance, which required the jury to find that the murder was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury or facilitate an escape therefrom or avoid detection thereon, was a correct statement of law that told jurors that they had to find that the kidnapping had a felonious purpose independent from the eventual murder. Respondent's contention in this regard has no merit

[3] *People v. Watson* (1956) 46 Cal.2d 818

whatsoever.

First of all, the trial court's version of CALJIC No. 8.8 1.17 was not consistent with the use note to that instruction, or the manner in which it has been drafted by other trial courts. The unmodified version of CALJIC No. 8.81.17 has five blank spaces that are to be filled in by the trial court.[4] The use note to this instruction provides that this "instruction is designed to be adapted to any one or more of the crimes listed in Penal Code § 190.2(a)(17) *by inserting in the blank spaces the names of the crime*. [Emphasis added]" Thus, this instruction is obviously intended to have the same crime inserted into each of the blank spaces, so because appellant was charged with the kidnapping felony murder special circumstance, the crime of kidnapping should have been inserted into each of the blank spaces, including the first sentence of paragraph number two.

Further, other trial courts have uniformly inserted the same crime in

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[4] The unmodified version of CALJIC No. 8.81.17 provides:

"To find that the special circumstance referred to in these instructions as murder in the commission of ______ is true, it must be proved:

[1a.] [The murder was committed while [the] [a] defendant was [engaged in] [or] [was an accomplice] in the [commission] [or] [attempted commission] of a ______;] [or] [and]

"[1b.] [The murder was committed during the immediate flight after the [commission] [attempted commission] of a ______ [by the defendant] [to which [the] [a] defendant was an accomplice] [.] [; and]

"[2. The murder was committed in order to carry out or advance the commission of the crime of ______ or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the [attempted] ______ was merely incidental to the commission of the murder.]"

each of these blank spaces. (See e.g., *People v. Stanley* (2006) 39 Cal.4th 913, 957 [robbery used in each of the blank spaces]; *People v. Guerra* (2006) 37 Cal.4th 1067, 1135-1136 [rape used in each of the blank spaces]; *People v. Avila* (2006) 38 Cal.4th 491, 599, fn. 62 [rape used in each of the blank spaces]; also see *People v. Monterroso* (2004) 34 Cal.4th 743, 766.) Thus, the trial court's insertion of the crime of assault by force likely to produce great bodily injury in one of the blank spaces and kidnapping in the others was an incorrect drafting of CALJIC No. 8.81.17.

Moreover, the trial court's incorrect drafting of this instruction resulted in an incorrect statement of law. The kidnapping special circumstance simply does not have as one of its elements that the murder was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury. Thus, the first sentence of paragraph number two clearly did not set forth a correct statement of law.

Secondly, the first sentence of paragraph number two did not clarify that the kidnapping of the victim had to have had a felonious purpose independent from the murder. This sentence required the jury to find that "[t]he *murder* was committed in order to carry out or advance the commission of the crime of assault by force likely to produce great bodily injury or to facilitate the escape therefrom or to avoid detection." (11 RT 2737.) This sentence required the jurors to find nothing about the kidnapping at all, but only that the murder was committed to advance a felony assault.

Therefore, contrary to respondent's contention, the first sentence of paragraph number two of CALJIC No. 8.81.17 was not a correct statement of

law, and did not require the jury to find that the kidnapping had a felonious purpose independent from the murder.

B. Appellant Was Not Required To Request A Modification Of The Trial Court's Version Of CALJIC No. 8.81.17 In Order To Have The Jury Correctly Instructed On The Elements Of The Kidnapping Special Circumstance

As referenced above, respondent contends that if appellant wanted the trial court's version of CALJIC 8.81.17 modified, he was required to request that modification, citing *People v. Rodrigues, supra,* 8 Cal.4th 1143. Respondent's contention in this regard has no merit whatsoever.

First of all, respondent's reliance on *People v. Rodrigues, supra,* 8 Cal.4th 1060, is misplaced. In *Rodrigues*, the defendant was prosecuted for burglary, attempted robbery, and first degree murder on both felony murder and premeditation and deliberation theories; and the trial court instructed the jury with a standard version of CALJIC No. 3.31 (concurrence of act and specific intent). (*Id.*, at 1094, 1142, including fn. 47.) The defendant was found guilty of these offenses. (*Id.*, at 1094.)

On appeal, the defendant conceded that the instruction on the concurrence of the act and specific intent was correct with regards to the burglary, attempted robbery, and the felony-murder theory of first degree murder; but argued that the instruction could have caused jurors to be misled on the concurrence of the act and intent for the premeditation and deliberation theory of first degree murder, and contended that the trial court had thus erred in failing to instruct the jury with a modified version of CALJIC No. 3.31. (*Id.*, at 1142.) This Court rejected this argument, stating that if the defendant believed that a modification to a correct version of CALJIC No. 3.31 was

necessary, he was obligated to request that modification. (*Ibid.*)

Later cases citing *Rodrigues* have made it clear that this principle is only applicable where the instruction given by the trial court was a legally correct instruction, and the trial court was under no *sua sponte* duty to give the suggested modification. (See *People v. Marks* (2003) 31 Cal.4th 197, 232-233; *People v. Lawley* (2002) 27 Cal.4th 102, 161; *People v. Catlin* (2001) 26 Cal.4th 81, 149; *People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1060-1061.)

In the present case, as referenced above, the instruction given on the elements of the kidnapping special circumstance was not a legally correct instruction, because the trial court erroneously inserted assault by force likely to produce great bodily harm where it should have inserted kidnapping. (See Arg. II, § A., pp. 14-17, *supra.*) Thus, this principle of law set forth in *Rodrigues* is not applicable to this instruction because it was not a legally correct instruction.

Further, as stated in appellant's opening brief, the trial evidence clearly supported an inference that appellant's felonious purpose was to kill Gordon, and he did not have any independent felonious purpose for committing a kidnapping. (See AOB 37-39.) Respondent does <u>not</u> dispute this fact. Under these circumstances, the trial court had a *sua sponte* duty to instruct the jury with a correct version of paragraph number two of CALJIC No. 8.81.17. (*People v. Monterroso, supra,* 34 Cal.4th at 766-767; *People v. Navarette* (2003) 30 Cal.4th 458, 505; *People v. Harden* (2003) 110 Cal.App.4th 848, 860-866; also see *Clark v. Brown* (9th Cir. 2006) 442 F.3d 708, 714-718.)

Thus, this principle of law set forth in *Rodrigues* is also not applicable to this instruction because the trial court had a *sua sponte* duty to give an instruction that included the modification.

Secondly, where a trial court decides to instruct the jury on a particular point of law, it has a duty to do so correctly. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1134; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) In this case, the trial court decided to instruct the jury with paragraph number two of CALJIC No. 8.81.17. (11 RT 2737.) Thus, the trial court had a duty to instruct the jury with a correct version of this paragraph, and appellant was not required to request a modification to this paragraph so that it contained a correct statement of law.

Therefore, respondent's contention that appellant had to request a modification of the trial court's erroneous version of CALJIC No. 8.81.17 in order to have the jury correctly instructed on the elements of the kidnapping special circumstance has no merit.

C. Although Paragraph Number Two Of CALJIC No. 8.81.17 Is A Clarifying Clause, It Had To Be Given In This Case Based On The Evidence, And Errors In This Paragraph Must Be Reviewed Under The *Chapman*[5] Prejudice Standard

As referenced above, respondent contends that paragraph number two of CALJIC No. 8.81.17 merely clarifies the element of the kidnapping special circumstance set forth in paragraph number one (i.e., that the murder was committed while the defendant was engaged in the commission of a kidnapping), rather than stating an additional element, and because jurors were

[5] *Chapman v. California* (1967) 386 U.S. 18.

correctly instructed with paragraph number one, the trial court did not omit an element of that special circumstance, so the instructional error was not of federal constitutional magnitude, citing *People v. Prieto, supra,* 30 Cal.4th at 256-257, and that error may be reviewed under the *Watson* prejudice standard. Respondent's contention that the instructional error was not of federal constitutional magnitude and may be reviewed under the *Watson* prejudice standard has no merit whatsoever.

Respondent is correct that paragraph number two of CALJIC No. 8.81.17 does not set forth a separate element of the kidnapping special circumstance, but is designed to clarify the scope of the requirement that the murder must have taken place during commission of a kidnapping. (*People v. Harris* (2008) 43 Cal.4th 1269, 1299; *People v. Stanley, supra,* 39 Cal.4th at 956-957.) However, contrary to respondent's contention, it does not follow that the failure to instruct the jury with this clarifying clause, where it is required to be given by the trial evidence, did not result in an erroneous instruction on an element of the kidnapping special circumstance, or that the instructional error should be reviewed under the *Watson* prejudice standard.

First of all, the jury must be instructed with this clarifying clause (i.e., paragraph number two of CALJIC 8.81.17) whenever the evidence supports an inference that the defendant might have intended to murder the victim without having an independent intent to commit the specific felony. (*People v. Harris, supra,* 43 Cal.4th at 1299; *People v. Monterroso, supra,* 34 Cal.4th at 767.) Under these circumstances, a clarification of the requirement that the murder must have taken place while the defendant was engaged in commission

of a kidnapping is necessary to distinguish a situation where the kidnapping is merely incidental to a murder, which will not support the kidnapping special circumstance, from a situation where the murder is committed to further a kidnapping offense, which will support a kidnapping special circumstance. (*People v. Harris, supra,* 43 Cal.4th at 1299; *People v. Navarette, supra,* 30 Cal.4th at 505 *People v. Green* (1980) 27 Cal.3d 1, 59-62, overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 734, fn. 3; *Ario v. Superior Court* (1981) 124 Cal.App.3d 285, 287-290.) Thus, where required by the trial evidence, the jury must be instructed with this clarifying clause in order to be correctly instructed on the elements of the felony murder special circumstance.

In this case, the evidence required that the jury be instructed with paragraph number two of CALJIC No. 8.81.17 (see AOB 37-39), but the trial court failed to give a correct version of that paragraph (see Arg. II, § A. pp. 14-17, *supra*). This resulted in the jury being able to find the kidnapping special circumstance true without finding that the murder was committed in order to carry out or advance the commission of a kidnapping offense, to facilitate escape from a kidnapping offense, or avoid detection for a kidnapping offense. Based on the trial evidence, this finding was necessary in order for the jury to have determined that the murder was committed during commission of the kidnapping, as opposed to the kidnapping being merely incidental to the murder. Thus, the instructional error resulted in a an erroneous description or omission of a required element of the kidnapping special circumstance, and is of federal constitutional magnitude. (*Neder v. United States* (1999) 527 U.S. 1, 10; *California v. Roy* (1996) 519 U.S. 2, 5.)

Secondly, respondent's reliance on *People v. Prieto, supra,* 30 Cal.4th 226, for the proposition that this instructional error should be measured by the *Watson* prejudice standard, is misplaced. In *Prieto*, this Court held that an instructional error similar to the one that occurred in the present case was not reversible per se, but could be measured by the federal prejudice standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 36, which requires reversal unless the People prove beyond a reasonable doubt that the error did not contribute to the verdict. (*Id.,* at 256-257.) Other cases have also measured errors in paragraph number two of CALJIC 8.81.17 by the *Chapman* prejudice standard. (See *People v. Harris, supra,* 43 Cal.4th at 1299-1300; *People v. Hardin, supra,* 110 Cal.App.4th at 866.)

Therefore, the error in the instruction on the kidnapping felony murder special circumstance should be reviewed under the *Chapman* prejudice standard.

D. <u>Appellant Was Prejudiced By The Instructional Error</u>

As referenced above, respondent argues that the instructional error was harmless under either the *Chapman* or *Watson* prejudice standards because the jury was correctly instructed in paragraph number one of CALJIC No. 8.81.17 that they had to find that the murder was committed while appellant was engaged in the commission of a kidnapping. Respondent's contention in this regard has no merit whatsoever.

First of all, a murder can technically occur while a defendant is engaged in commission of a kidnapping where the defendant does not have an independent felonious purpose for commission of the kidnapping. This

happens where the defendant's primary goal is to kill the victim, and the kidnapping is merely incidental to the murder. (See e.g., *People v. Weidert, supra,* 39 Cal.3d at 840-842.) Thus, respondent's contention that the error was harmless because the jury found that the murder occurred during a kidnapping has no merit.

Secondly, under the circumstances of this case, it is clear that the instructional error contributed to the true finding on the kidnapping special circumstance. The evidence showed that prior to the kidnapping, appellant told Michelle that the victim (Gordon) was a snitch and he wanted to kill her, and he then attempted to suffocate her with a plastic bag and choked her with his hands. (6 RT 1420-1423; 7 RT 1648-1657; 9 RT 1989-2000.) Appellant then put Gordon in the trunk of the Cadillac, and hit her in the face a couple of times. (*Ibid.*) Appellant then told Vicki and Sara that they had to take her out (kill her) because she would tell on them about the beating and/or drugs. (*Ibid.*) A short time later, the Cadillac was found 16 miles away on fire, and when the fire was extinguished, Gordon's burnt body was found in the trunk. (6 RT 1343-1352; 8 RT 1811; 10 RT 2370-2372, 2390-2392.) These circumstances showed no evidence that appellant had any purpose for the kidnapping apart from the murder, and strong evidence that the kidnapping was merely incidental to the murder.

Under this backdrop, the trial court gave an instruction on the kidnapping felony murder special circumstance that did not require the jury to find that the murder had been committed in order to carry out or advance commission of a kidnapping offense. Instead, it told jurors that, for the

requirement of paragraph number two, they only had to find that the murder was committed in order to carry out or advance commission of an assault by force likely to produce great bodily injury offense or to facilitate the escape therefrom or to avoid detection, which was the purpose of the murder according to appellant's stated intent. Thus, this instructional error clearly contributed to the true finding on the kidnapping felony murder special circumstance.

Therefore, the state cannot establish that the instructional error was harmless beyond a reasonable doubt, and the kidnapping special circumstance must be reversed.

III

THE TRIAL COURT PREJUDICIALLY ERRED AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED HEARSAY STATEMENTS MADE BY SARA TO MISTY SINKS OVER APPELLANT'S OBJECTION UNDER THE PRIOR CONSISTENT STATEMENT EXCEPTION TO THE HEARSAY RULE

Respondent contends that appellant's convictions do not have to be reversed because the trial court allowed Misty Sinks to testify to hearsay statements made to her by Sara under the prior consistent statement exception to the hearsay rule. Respondent argues that (1) Sinks' testimony relating these statements made to her by Sara were properly admitted under Evidence Code section 791, because appellant impeached Sara's testimony on cross-examination, and Sara's statements were made to Sinks prior to the police investigation and grant of immunity, citing *People v. Crew* (2003) 31 Cal.4th 822, 843-844, and (2) any error in admitting these statements was harmless because Vicki's testimony corroborated Sara's testimony. (RB 29-32.) Respondent's contentions are without merit.

A. <u>The Hearsay Statements Were Not Properly Admitted Under The Provisions Of Evidence Code Section 791</u>

Contrary to respondent's contention, Sinks' testimony relating statements made to her by Sara were not properly admitted under Evidence Code section 791, because Sara's statements were made after the motive for fabrication alleged by appellant during cross-examination had arisen. Evidence Code section 791, subdivision (b)[6] provides that a prior consistent statement

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[6] Evidence Code section 791 provides in pertinent part:

may be admitted if it is offered after there has been an express or implied charge that the witness' testimony has been recently fabricated or is influenced by bias or other improper motive, and the statement was made *before* the bias, motive for fabrication, or other improper motive is alleged to have arisen.

In the present case, appellant attacked Sara's credibility on cross-examination and alleged that she had fabricated the parts of her testimony that implicated him in order to remove suspicion from herself; but appellant did not alleged that this testimony had been recently fabricated. Instead, appellant attacked Sara's credibility to support his defense that Sara, Michelle, and Vicki got carried away while beating up Gordon, and killed her; and that these women then created a story to implicate appellant in the motel room immediately after the incident. That is, appellant alleged that the motive for Sara to fabricate testimony that implicated him arose at or near the time of the incident, which was prior to the time that Sara allegedly made these statements to Sinks. Thus, these prior statements were not admissible under the provisions of Evidence Code section 791, subdivision (b). (See *People v. Hichings* (1997) 59 Cal.App.4th 915, 920-921 [statements made after the motive for fabrication arose are not admissible under Evidence Code section 791, subdivision (b)].)

"Evidence of a statement previously made by a witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:

"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, <u>and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen</u>. [Emphasis added]"

Moreover, respondent's reliance on *People v. Crew, supra,* 31 Cal.App.4th 822, is misplaced. In *Crew,* the defendant was prosecuted for the murder of his wife, and Richard Elander, one of the defendant's best friends, who was involved in the offense at some point, testified against the defendant under a grant of immunity, and stated that the defendant had told him that he had killed his wife and put her head in a barrel of cement. (*Id.,* at 830-831, 843-844.) On cross-examination, the defendant impeached Elander's testimony implicating him based on false statements he had made to the police during their investigation. (*Ibid.*) Over the defendant's hearsay objection, the trial court then allowed Marion Mitchell to testify that prior to Elander being interviewed by the police, Elander had told him that the defendant had killed his wife and put her body in a barrel filled with cement, admitting these statements as prior consistent statements under Evidence Code sections 1236 and 791. (*Ibid.*)

On appeal, the defendant argued that these statement had been erroneously admitted under Evidence Code section 791 as prior consistent statements, and the *Crew* court rejected this contention. (*Ibid.*) The *Crew* court found that the defendant alleged on cross-examination that Elander's motive to fabricate testimony against him arose at the time of the police investigation, and that Elander's statements to Mitchell were made prior to that time, so they fell within the provisions of Evidence Code section 791. (*Ibid.*)

However, in the present case, as referenced above, appellant alleged that the motive for Sara to fabricate her testimony implicating him arose in the motel room immediately after the incident, which was prior to the time that

Sara made the hearsay statements to Sinks. Thus, *Crew* is clearly distinguishable from the present case.

Further, contrary to respondent's suggestion, the police investigation and grant of use immunity were simply not the improper motives alleged by appellant as reasons that Sara fabricated her testimony implicating him. In addition, the police investigation and grant of immunity did not create improper motives or influencing factors for Sara to fabricate her trial testimony implicating appellant in the offenses.

Therefore, the trial court's admission of these hearsay statements over appellant's objection was in error and violated appellant's constitutional rights.

B. <u>Appellant Was Prejudiced By Admission Of The Hearsay Statements</u>

Contrary to respondent's contention, appellant was prejudiced by the erroneous admission of the hearsay statements allegedly made by Sara to Sinks under either the California or federal prejudice standards. First of all, contrary to respondent's contention, the fact that Vicki's testimony corroborated Sara's testimony meant very little because appellant's defense was that Sara and Vicki, as well as Michelle, had fabricated a story to implicate him. Appellant's theory was that these woman killed Gordon, and then got together in the motel room and made up a story to implicate him. Under these circumstances, Sara and Vicki would obviously be telling the same story, because they fabricated it together. Thus, contrary to respondent's contention, the fact that Vicki's testimony was consistent with Sara's testimony did not make the error harmless.

Secondly, the admission of Sinks' testimony clearly prejudiced

appellant. As stated in the opening brief, this was a close case, which was shown by the facts that there was limited evidence connecting appellant to the offenses, the testimony of Michelle, Vicki and Sara implicating appellant was unreliable because they were accomplices, and the jury deliberated for about seventeen hours over four days before returning their verdicts. (See AOB 49-51.) In addition, Sinks' testimony, which was obviously important to the jurors because they asked that it be reread to them (2 CT 787-788), may have caused jurors to reject appellant's defense that Sara and Vicki were lying to protect themselves, because it showed a prior statement by Sara that was consistent with her testimony.

Therefore, it is reasonably probable that a result more favorable to appellant would have been reached had the prejudicial evidence not been admitted, and the state cannot establish that the error was harmless beyond a reasonable doubt. Appellant's convictions and death sentence must thus be reversed.

IV

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT ADMITTED A GRUESOME PHOTOGRAPH OF THE VICTIM'S BURNT BODY IN THE TRUNK OF THE CADILLAC

Respondent contends that appellant's convictions do not have to be reversed because the trial court admitted a crime scene photograph of the victim's burnt body lying in the trunk of the Cadillac. Respondent argues that (1) this photograph was relevant to whether the killer acted with premeditation after due deliberation, and whether the killer tortured the victim, and (2) any error in admitting this photograph was harmless because its contents were not unusually disturbing or more inflammatory than the testimony of the pathologist, particularly since the photograph was apparently not formally admitted into evidence,[7] but was only used by the prosecutor during closing argument to urge the jury to find that the killer had tortured the victim, and the torture special circumstance was not found true. (RB 33-36.) Respondent's contentions are without merit.

A. <u>The Trial Court Erred When It Admitted The Gruesome Photograph Of The Victim's Burnt Body Lying In The Trunk Of The Cadillac</u>

Contrary to respondent's contention, the picture of the victim's burnt body lying in the trunk of the Cadillac was not properly admitted into evidence. First of all, this photograph was not relevant to whether or not

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[7] Respondent is incorrect about this photograph not being formally admitted into evidence. Actually, it was identified by Officer Barry Sharpiro during his testimony, and admitted into evidence by the trial court. (6 RT 1365; 3 CT 1151.)

appellant acted with premeditation after due deliberation, or whether the victim was tortured. These issues needed to be determined from testimony about how the fire was started, whether Gordon was alive or not when the fire was started, and any stated intent about ignition of the fire. The picture of Gordon's burnt body lying in the trunk of the Cadillac only showed the results of the fire; not the intents with which the fire had been ignited. Thus, this photograph simply did not present any evidence of why or with what intent the fire was ignited (i.e., whether it was premeditated, deliberated, or committed with an intent to torture the victim).

Secondly, even if this photograph had some relevance, it should still have been excluded from evidence because it was unnecessary. Under Evidence Code section 352, the trial court may exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time, or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. In addition, where the inevitable effect of introducing a gruesome photograph is to arouse the sympathy or prejudice of the jury, and the fact in proof of which it is offered is not denied, or where its introduction serves no purpose other than to inflame the jurors' emotions, its admission violates the defendant's right to due process under the Fifth and Fourteenth Amendments to the United States Constitution, as well as undermining the reliability required by the Eighth and Fourteenth Amendments for a conviction of a capital offense. (*Lesko v. Owens* (3rd Cir. 1989) 881 F.2d 44, 50-52 (and cases cited therein); *Beck v. Alabama* (1980) 447 U.S. 625, 637-638; *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, 584-585.)

In this case, both a fireman and a police officer testified concerning the condition of Gordon's body in the trunk, and appellant did not contest the fact that the victim had been burned in the trunk of the Cadillac. (3 RT 546-548; 6 RT 1349-1352, 1362-1364.) Under these circumstances, introduction of this photograph was totally unnecessary to the prosecution's case.

Moreover, this picture of the victim's burnt body served to inflame the jury's emotion. This picture would outrage most people and cause them to want someone punished. (See People's exhibit 2.) Thus, assuming arguendo that this picture held some kind of relevance, its prejudicial effect clearly outweighed any probative value.

Therefore, the trial court abused its discretion and violated appellant's constitutional rights to due process and a fair trial, and to a fair and reliable guilt and sentencing determination, when it admitted the picture of Gordon's burnt body in the trunk of the Cadillac.

B. Appellant Was Prejudiced By Admission Of This Photograph

As referenced above, respondent contends that any error was harmless because the photograph was not unusually disturbing or more inflammatory than the testimony of the pathologist. Respondent also states that this photograph was apparently not formally admitted into evidence, but was only used by the prosecutor during closing argument to urge the jurors to find that the killer tortured the victim. These contentions are without merit.

First of all, contrary to respondent's suggestion, the photograph of the

victim's burnt body lying in the trunk of the Cadillac (People's. exhibit 2) was admitted into evidence. This photograph was identified by Officer Barry Sharpiro during his testimony, and admitted into evidence by the trial court. (6 RT 1365; 3 CT 1151.) Thus, this gruesome photograph was not only used by the prosecutor during closing argument to suggest that the killer tortured the victim, but was available to the jurors during deliberations for them to view.

Secondly, contrary to respondent's contention, this picture of the victim's burnt body in the trunk of the Cadillac was extremely disturbing and inflammatory. (See People's exhibit 2.) This evidence would have prejudiced the jurors against appellant.

Further, as stated in the opening brief, this was a close case on the evidence, and the length of the jury deliberation show that the jurors considered this a close case. (See AOB pp. 49-50.) Under these circumstances, the admission of this unnecessary and prejudicial photograph may have swayed the jury into finding appellant guilty of the charged offenses.

Therefore, it is reasonably probable that a result more favorable to appellant would have been reached had this prejudicial evidence been excluded, in that appellant would have been found not guilty of first degree murder, kidnapping and felony assault. Further, the state cannot establish that the error was harmless beyond a reasonable doubt. Appellant's convictions and death sentence must thus be reversed.

V

APPELLANT'S DEATH SENTENCE MUST BE REVERSED BECAUSE THE TRIAL COURT ERRONEOUSLY EXCUSED FOUR PROSPECTIVE JURORS FOR CAUSE BECAUSE THEY WOULD BE UNABLE TO VOTE FOR DEATH AS THE APPROPRIATE PUNISHMENT DUE TO RECENT EVENTS IN THE NEWS THAT CAUSED THEM TO BE CONCERNED THAT AN INNOCENT PERSON MAY BE EXECUTED, AND THEREBY VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

Respondent contends that the trial court properly excused prospective jurors, Brian Z., Kathy S., Paul J., and David B. from the jury for cause. Respondent argues that all four of these prospective jurors stated that they could not vote to impose the death penalty, and this established that each of them had a view on the death penalty that would prevent or substantially impaired their ability to perform their duties as jurors to act in accordance with the instructions and their oath, citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424. (RB 40-43.) Respondent's contention is without merit.

Respondent is correct that the United States Supreme Court held in *Wainwright v. Witt, supra,* 469 U.S. 412, that a prospective juror can be excused from the jury for cause if the record shows that his or her view on the death penalty will prevent or substantially impair his or her ability to perform his or her duty as a juror to act in accordance with the court's instructions. (*Id.,* at 424; also see *Morgan v. Illinois* (1992) 504 U.S. 719, 726-728; *People v. Avila, supra,* 38 Cal.4th at 528-529; *People v. Griffin* (2004) 33 Cal.4th 536, 558.) This rule assures that jurors who cannot apply the law in the instructions to the facts presented in court are excluded from the jury that hears the penalty

phase of a death penalty trial. (*Wainwright v. Witt, supra,* 469 U.S. at 415-425.)

However, respondent ignores the fact that each of these four prospective jurors stated that they could not vote for death as the appropriate punishment because of recent events in the news (police corruption in California, mistakes in trials in Illinois, and mistakes in other states that resulted in innocent persons being sentenced to death) that caused them to be concerned that an innocent person may be executed, and this would be consideration of lingering doubt about appellant's guilt, a proper factor to consider in mitigation in determining the appropriate punishment at the penalty phase of the trial. (*People v. Terry* (1964) 61 Cal.2d 137, 145-146; *People v. Jones* (2003) 30 Cal.4th 1084, 1125; *People v. Cox* (1991) 53 Cal.3d 618, 675-677.)

That is, since a juror may consider his or her doubts about the defendant's guilt in determining the appropriate penalty, a juror's refusal to vote for death as the appropriate punishment because he or she believes that the defendant may be innocent does not prevent or substantially impair that juror's ability to act in accordance with the trial court's instructions or his or her oath. Thus, because the record did not establish that these four jurors' views on capital punishment substantially impaired their ability to perform their duties in accordance with the trial court's instructions, they were erroneously excused for cause under the governing legal standards. (See *Wainwright v. Witt, supra,* 469 U.S. at 424)

Therefore, the trial court erred when it excused these four prospective

jurors for cause over appellant's objections, and appellant's death sentence must be reversed. (*Davis v. Georgia* (1976) 429 U.S. 122, 123; *People v. Stewart* (2004) 33 Cal.4th 425, 454-455.)

VI

THE TRIAL COURT ABUSED ITS DISCRETION AND VIOLATED APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS WHEN IT DENIED APPELLANT'S MOTION TO IMPANEL A NEW JURY FOR THE PENALTY PHASE OF THE TRIAL AFTER THE JURORS EXPRESSED CONCERN FOR THEIR SECURITY

Respondent contends that the trial court did not abuse its discretion or violate appellant's constitutional rights when it denied appellant's motion to impanel a new jury for the penalty phase after jurors expressed concern for their personal security. Respondent argues that appellant failed to show that any juror lacked the ability to perform his or her function to fairly evaluate the evidence presented at the penalty phase, but appellant only showed that the jurors were concerns about release of their personal information, and this did not establish good cause to discharge the guilt phase jury and impanel a new jury for the penalty phase. (RB 44-47.) Respondent's contention is without merit.

As respondent recognizes, there is good cause to discharge the jury and impanel a new jury for the penalty phase if facts in the record show that the jury has an inability to perform its function. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1353-1354; *People v. Earp* (1999) 20 Cal.4th 826, 891; *People v. Gates* (1987) 43 Cal.3d 1168, 1199.) A criminal defendant has a right to trial by a fair and impartial jury under the Sixth Amendment to the United States Constitution, as well as under article I, section 16 of the California Constitution. (U.S. Const., Amend. 6; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522; *People v. Griffin, supra,* 33 Cal.4th at 558; *People v. Ghent* (1987)

43 Cal.3d 739, 767.) Thus, where facts in the record show that the jury cannot be fair and impartial to the defendant, that jury is unable to perform its function, and this shows good cause to discharge that jury and impanel a new jury.

In this case, the jury's note to the court showed that they were concerned that appellant would threaten or harm them, as they believed he had threatened the trial witnesses. This showed that the jurors had a state of mind that would prevent them from acting with entire impartiality, and demonstrated actual bias against appellant. (Code Civ. Proc., § 225.[8]) Thus, contrary to respondent's contention, this note established good cause to discharge this jury and impaneled a new jury.

Therefore, the trial court abused its discretion when it denied appellant's motion to discharged the jury and impanel a new jury for the penalty phase, and this resulted in appellant being denied his constitutional right to a fair and impartial jury to determine penalty; and appellant's death

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[8] Code of Civil Procedure section 225 provides in pertinent part:.

"A challenge is an objection made to the trial jurors that may be taken by any party to the action, and is of the following classes and types: . .

"(b) A challenge to a prospective juror by either:

"(1) A challenge for cause, for one of the following reasons: . . .

"(B) Implied bias--as, when the existence of the facts as ascertained, in judgment of law disqualifies the juror.

"(C) Actual bias--<u>the existence of a state of mind on the part of the juror in reference to the case</u>, or to any of the parties, <u>which will prevent the juror from acting with entire impartiality</u>, and without prejudice to the substantial rights of any party. [Emphasis added]"

sentence should thus be reversed and the case remanded for a new penalty trial.

VII

THE TRIAL COURT VIOLATED THE PROHIBITION AGAINST MULTIPLES SENTENCES FOR A SINGLE ACT CONTAINED IN SECTION 654, AS WELL AS APPELLANT'S RIGHTS UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS, WHEN IT IMPOSED SENTENCE ON BOTH THE MURDER AND FELONY ASSAULT CONVICTIONS

Respondent contends that appellant's sentence on the felony assault conviction does not have to be stayed by this Court under the provisions of Penal Code[9] section 654. Respondent first argues that any error in imposing sentence on both the murder and felony assault convictions was waived by appellant's failure to object to imposition of such terms at the sentencing hearing. Respondent then argues that imposition of sentence on both the felony assault and murder convictions did not violate the provisions of section 654 because each of these crimes constituted a separate incident with different objectives, in that appellant's original intent was to assault Gordon and it was unclear when he formed the intent to kill, and the felony assault was committed before the murder at a different location. (RB 48-51.) As set forth more fully below, respondent's contentions are without merit.

A. Appellant's Failure To Object At The Sentencing Hearing Did Not Waive The Sentencing Defect

As referenced above, respondent contends that any error in imposing sentence on both the murder and felony assault convictions was waived by appellant's failure to object to imposition of such terms at the sentencing hearing. In a footnote, respondent recognizes that the failure to object to

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[9] Unless otherwise noted, all further statutory reference is to the Penal Code.

imposition of an unauthorized sentence does not waive that defect, citing *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 7, but suggests that this should not be the rule because errors in *discretionary* sentencing choices are subject to waiver. (See RB 48, fn. 11.) This argument has no merit whatsoever.

First of all, a trial court has no discretion to impose a sentence that violates the prohibition against multiple sentences for a single act or omission. Section 654 provides that an act or omission made punishable in different ways by different provisions of law may be punished under either provision, "but in no case shall the act or omission be punished under more than one provision." (Pen. Code, § 654.) Thus, a trial court is not making a *discretionary* sentencing choice when it imposes a sentence that violates the provisions of section 654, and the basis on respondent's argument that there should be a waiver is flawed.

Secondly, this Court has consistently held that the waiver doctrine does not apply to questions involving the applicability of section 654, and that such errors are corrected on appeal regardless of whether the error is raised in the trial court or on appeal. (*People v. Hester* (2000) 22 Cal.4th 290, 295; *People v. Perez* (1979) 23 Cal.3d 545, 549-550, fn. 3.) This is so because a trial court acts in excess of its jurisdiction, and imposes an unauthorized sentence, when it erroneously fails to stay execution of sentence under the provisions of section 654. (*People v. Cuevas* (2008) 44 Cal.4th 374, 380, fn. 3; *People v. Scott, supra,* 9 Cal.4th at 354, fn. 17; also see *In re Sheena K.* (2007) 40 Cal.4th 875, 882, fn. 3.)

Therefore, contrary to respondent's contention, appellant's failure to

object at the sentencing hearing to imposition of a sentence that violated the provisions of section 654 did not waive that defect.

B. The Felony Assault And Murder Offenses Were Both Committed With The Intent And Objective Of Killing Gordon

As referenced above, respondent contends that imposition of sentence on both the felony assault and murder convictions did not violate the provisions of section 654 because each of these crimes constituted a separate incident with different objectives. Respondent recognizes that the basis of appellant's felony assault conviction were the acts appellant personally committed against Gordon (i.e., putting a plastic bag over her head and tightening it around her neck, putting his arm around her neck and choking her, forcing her into the trunk of the Cadillac, and hitting her twice in the face), but argues that appellant's original intent was only to assault Gordon and it was unclear when he formed the intent to kill, and the felony assault was committed prior to the murder at a different location. This contention has no merit whatsoever.

First of all, prior to committing any of the acts used to support his felony assault conviction, appellant pulled Michelle aside and told her that he thought Kelly was a snitch and wanted to take her out (i.e., kill her). (6 RT 1420-1423.) Michelle testified that she tried to talk appellant out of it, but he kept insisting that she was a snitch, and then sent her back to the motel room. (6 RT 1420-1423.) Appellant then committed the acts that were used by the prosecution to support the felony assault charge. (11 RT 2636.) Thus, appellant did not commit any of the acts that were used to support his felony assault

conviction until after he stated his desire to kill Gordon.

Secondly, the acts appellant committed that supported the felony assault conviction indicated that he was trying to kill Gordon. That is, putting a plastic bag over Gordon's head and tightening it around her neck indicated he was trying to kill her; putting his arm around Gordon's neck and choking her indicated he was trying to kill her; and forcing Gordon in the trunk of the Cadillac and hitting her twice in the face and shutting the trunk indicated he was going to take her somewhere and kill her. Thus, the acts that were used to support appellant's felony assault conviction indicated an intent to kill Gordon rather than just an intent to assault her.

Thirdly, contrary to respondent's suggestion, the fact that the felony assault and murder were committed at different locations did not show that they were committed with separate intents and objectives. As referenced above, the acts supporting the felony assault indicated that appellant was trying to kill Gordon and this was his intent, and taking her in the trunk of the Cadillac to a secluded location and setting it on fire furthered this same intent and objective. Thus, both the felony assault and murder were a means of accomplishing a single intent and objective (i.e., appellant's stated intent to kill Gordon), and the provisions of section 654 prohibited multiple sentences on these two convictions.

Therefore, the trial court erred in imposing sentence on both of these convictions, and this Court should order the sentence on the felony assault conviction stayed.

VIII

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In response to the claims raised in Argument VIII of appellant's opening brief, respondent correctly notes that these claims have been previously rejected by this Court. (RB 52-63.) However, for the reasons set forth in the opening brief, appellant continues to maintain that the Court's decisions on these issues were wrongly decided, and that California's capital sentencing scheme is unconstitutional. (See AOB 74-114.)

Therefore, this Court should reconsider its rejection of these arguments, and find that California's capital sentencing scheme is unconstitutional.

IX

THE TRIAL COURT'S MULTIPLE ERRORS CONSIDERED TOGETHER DENIED APPELLANT DUE PROCESS AND A FAIR TRIAL UNDER THE UNITED STATES AND CALIFORNIA CONSTITUTIONS

Respondent contends that to the extent that the trial court committed any error at all, the cumulative effect of these errors do not require reversal of appellant's convictions or death sentence. Respondent argues that even if there were errors, appellant was not prejudiced by these errors because their cumulative effect did not significantly influence the fairness of appellant's guilt phase trial or detrimentally affect the jury's determination of the appropriate penalty. (RB 64.) Respondent's contentions are without merit.

A. The Cumulative Guilt Phase Errors Require Reversal Of Appellant's Convictions And The Special Circumstance Finding

Contrary to respondent's contention, appellant was prejudiced by the multiple guilt phase errors. First of all, there was insufficient evidence to support a true finding on the kidnapping special circumstance, and the trial court failed to properly instruct the jury on the elements of that special circumstance, so it must be reversed. (See Argument I & II, *supra.*) Secondly, the trial court erroneously admitted prejudicial hearsay statements and a gruesome photograph of the victim's burnt body, so appellant's convictions should be reversed. (See Arguments III & IV, *supra.*)

Therefore, each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to trial by jury, and of a fair and reliable determination of guilt.

B. <u>The Cumulative Penalty Phase Errors Require Reversal Of The Imposed Death Sentence</u>

Contrary to respondent's contention, appellant also did not received a fair penalty phase trial. At the penalty phase, the trial court erroneously excused four jurors for cause, and erroneously refused to discharge the guilt phase jury and impanel a new jury for the penalty phase. (See Arguments V & VI, *supra.*) In addition, the penalty phase trial was conducted under an unconstitutional death penalty law. (See Argument VIII, *supra.*)

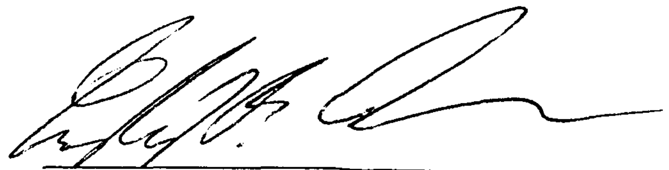
Therefore, each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to trial by jury, and of a fair and reliable penalty determination.

CONCLUSION

For the reason stated above, appellant respectfully requests that this Court grant him the relief requested herein.

Dated: September 17, 2009

Respectfully submitted,

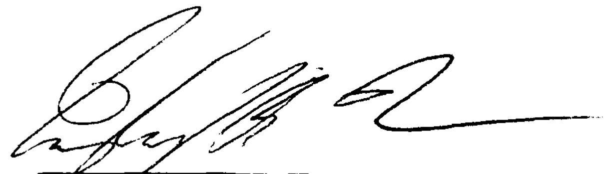


Michael B. McPartland
Attorney for Appellant

CERTIFICATION OF WORD COUNT

I, Michael McPartland, attorney for appellant, certify that the text of this reply brief, including footnotes, consists of 12,703 words, as counted by the Word Perfect version 9 word-processing program that was used to generate that brief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this certificate of word count was executed within the State of California on September 17, 2009.



Dated: September 17, 2009

Michael B. McPartland,
Attorney for Appellant

PROOF OF SERVICE BY MAIL

I declare that:

I am (a resident of/employed in) the County of Riverside, California. I am over the age of eighteen years and not a party to the within cause. On September 21, 2009, I served the within Appellant's Reply Brief on the parties listed below by placing a copy thereof in sealed envelope, with postage thereon prepaid, and depositing such in the United States mail at Palm Desert, California, addressed as follows:

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