SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA	)	S152737
Plaintiff/Respondent	)	Contra Costa County 040292-5
vs.	)	
JOSEPH S. CORDOVA	)	
Defendant/Appellant	)	

APPELLANT'S OPENING BRIEF

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An Automatic Appeal from the Judgment of the Contra Costa superior Court, Honorable Peter L. Spinetta, Judge.

STATEMENT OF THE CASE

On March 2, 2004, an information was filed that charged appellant, Joseph Cordova, with the first degree murder of Cannie Melinda Bullock, on or about August 24-August 25, 1979, with the special circumstance allegations that the murder was committed while appellant was engaged in the commission or attempted commission of the crimes of rape and/or lewd and lascivious acts upon a child under the age of fourteen years (California

Penal Code Sections 187, 190.2 (a) (17).)

Jury selection began on December 12, 2006 (7 CT 1805; 9 RT 2052 et seq) and the jury was empaneled on December 20, 2006. (7 CT 1810; 12 RT 2701.) The prosecution commenced its case on January 8, 2007. (7 CT 1824; 13 RT 2915) and rested on January 22, 2007, subject to calling two additional witnesses whose arrival was delayed by bad weather. (7 CT 1831; 17 RT 3812.) The defense commenced its case that same day and rested on January 24, 2007. (7 CT 1840; 18 RT 4090.)

On January 25, 2007, the jury was instructed and counsel gave their summations (7 CT 1952; 18 RT 4106.) The jury returned a guilty verdict the next day, also finding true both special circumstances. (7 CT 1853; 18 RT 4322 et seq.)

The penalty phase of the trial commenced on February 5, 2007, with the prosecution resting the same day. (8 CT 2807; 19 RT 4479 et seq.) The defense commenced its penalty phase case the next day (19 RT 4568), with appellant testifying on his own behalf on February 7, 2007. (8 CT 2093; 20 RT 4775.) The defense rested on February 9, 2007. (8 CT 2095; 21 RT 5062.) The jury was instructed and closing arguments were presented on February 14, 2007 (8 CT 2096; 21 RT 5180), with the jury returning a death verdict on February 16, 2007. (8 CT 2098; 22 RT 5292)

On May 11, 2007, the trial court denied appellant's Motion to Modify, Motion for new Trial and Motion to Set aside the Verdict and sentenced appellant to death. (8 CT 2243; 22 RT 5309.)

STATEMENT OF FACTS

GUILT PHASE

People's Case

1979 Investigation of Crime

A. Initial Investigation of the Crime

On the night of August 24, 1979, eight-year-old Cannie Bullock was living with her mother, Linda, and Linda's friend, Debbie Fisher, in a small house on Dover Street in San Pablo. (13 RT 2940-2942.) It was a one bedroom home; Linda slept in the single bedroom and Debbie and Cannie slept on a couch in the living room. (13 RT 2943.)

Linda Bullock was a neglectful and inattentive mother. (13 RT 2940-2942.) On that night, Linda and Debbie left Cannie alone in the Dover Street house while they went to a bar. The two women left the house at approximately 10:00 p.m., leaving Cannie asleep on the sofa bed in the living room. (13 RT 2942-2943.) They believed they locked the front door upon leaving the premises. (13 RT 2944.)

Linda left the bar a short time before closing to return home, and Debbie left soon thereafter. Upon her arrival at the Dover Street house, Debbie saw Linda screaming that she couldn't find "her baby." (13 RT 2945.) The front gate of the house, which had been latched when the women had left for the bar, was open, and the robe that Cannie had been wearing was found in the house, stained with blood. (13 RT 2946.) There was no sign of forced entry into the home. (14 RT 3114.)

The two women searched for Cannie but could not find her. After some delay, the police were called. They found Cannie's body, covered by a bed spread, in the small backyard of the house. (13 RT 2947; 14 RT 3096.) Bruising was evident on Cannie's shoulders and neck and there was also bruising and blood in her vaginal area. (14 RT 3100-3102.)

Linda was generally uncooperative with the police (14 RT 3119), but did tell them she often had sex with different men in her bedroom. She claimed that she did not have sex with anyone the night of the murder or the night before. (13 RT 2976; 14 RT 3004.)

While conducting their initial on-scene investigation of the murder, the police found a pendant in the form of the zodiac symbol Sagittarius and a sewing machine manual in the house. Debbie told the police that she did not recognize either of these two items. (14 RT 3113.)

B. Gathering of Forensic Evidence

At the Dover St. house, the police took photos and collected some physical evidence. (13 RT 3024 et seq.) Richard Schorr, a criminalist with the Contra Costa County Sheriff's Laboratory, went to the scene of the murder on August 25, 1979. (14 RT 3154.) He took various photos and measurements and did sketches, and he collected about 25 items of evidence, including the victim's robe. (14 RT 3156 et seq.)

C. The Autopsy

Dr. George Bolduc conducted the autopsy of Cannie Bullock and determined that Cannie died of asphyxiation secondary to manual strangulation. (14 RT 3246.) He reported observing severe bruising, tearing and bleeding around her pouchette, the portion of the female genitalia on the lower end of the vagina. (14 RT 3251-3252.) Dissection of the vagina revealed more bruising, which, in his opinion, indicated that the victim was raped before she was murdered. (14 RT 3253.) Using swabs, Dr. Bolduc obtained evidentiary samples from Cannie's vagina, anus, and mouth and turned these over to Detective Bennett, who attended the autopsy. Detective Bennett, in turn, gave the samples to Richard Schorr. (13 RT 3054 et seq; 14 RT 3257-3260.)

Dr. Bolduc testified that he believed he gathered the semen evidence by inserting the swab full length into the vagina and moving it around to get a good specimen. He furthered testified that he took caution to make sure that an inserted swab did not touch any other part of the body. (14 RT 3257-3260.) Dr. Bolduc stated that he did not observe any semen on Cannie's body, although his autopsy report made no mention of this one way or the other. (15 RT 3264; 3356.) He admitted that this was the first autopsy in which he performed this swabbing procedure and that he had no independent recollection as to the swabbing method he actually used in this case. (14 RT 3260.)

Upon cross-examination, it was revealed that sometime after the autopsy, Dr. Bolduc may have told the police that he could not really be sure whether the penetration occurred before or after Cannie's death. (14 RT 3266-3267.) In addition, it was revealed that since the autopsy Dr. Bolduc had had a very checkered work history, had lied on his resume, and had been fired from a position due to his negligence in performing an autopsy procedure and destroying evidence. (14 RT 3274-78.) Dr. Bolduc also had spent time working for Federal Express and Kinkos, presumably because of his inability to get work as a pathologist. (14 RT 3274-3288.) In his current employment as a pathologist, he was not allowed to work on

murder cases. (14 RT 3289.)

D. Processing of Forensic Evidence

On August 28, 1979, Richard Schorr of the Contra Costa County Sheriff's Laboratory did some preliminary testing on the biological evidence recovered form the body of Cannie Bullock at the autopsy. (14 RT 3170.) Using the acid phosphatase screening test, he obtained a positive reaction for the presence of sperm on both the vaginal and rectal swabs. (*Ibid.*) A confirmatory test using choline, was positive for semen for the vaginal swab, but not for the rectal swab. (14 RT 3171.) Schorr then looked at the samples under the microscope and confirmed the presence of intact spermatozoa on both the vaginal and rectal samples. (*Ibid.*) The swabs were then returned to the custody of the San Pablo Police Department. (14 RT 3174.)

E. Police Interviews of William Flores

During a canvass of the area conducted immediately after the crime, Detective Bennett contacted William Flores, who lived with his mother in a house near the one occupied by Linda and Cannie Bullock. (14 RT 3126-3127.) Flores told Detective Bennett that at about 7:00 on the evening before the murder, he saw a male on motorcycle drop off a female in front of the Bullock house. He could not be sure if the woman was Linda

Bullock. (*Ibid.*)

Flores said he knew Cannie Bullock. He felt she was too friendly, and this made him nervous. (14 RT 3127.) Flores also told the police that in the early morning hours of August 25, 2011, he'd been watching Creature Features on Channel 5. He then went to his bedroom where he heard a voice from his back yard stating "you shouldn't do that. You should leave her alone." (14 RT 3127.)

Flores also knew that Cannie's body had been found in the backyard and not in the house. (14 RT 3127.) Detective Bennett noted that it was odd that Flores knew this because the police had sealed off the backyard as a crime scene, and his officers were very careful not to talk about the details of the case. (14 RT 3128.) Flores told Detective Bennett that the person who killed the victim did it because he felt sorry for her and that the reason the body was moved to the backyard was to fool the police into thinking she wasn't killed in the house. (14 RT 3129.) Flores also stated that it was too bad that the person who killed Cannie got away with it. (*Ibid.*) The police indicated that Flores stopped talking to them when his mother walked over to see him. (*Ibid.*)

Detective Bennett talked to William Flores again on August 27, 1979. (14 RT 3130.) Flores told him that between 11:00 and 11:30 p.m. on

August 24, 1979, he heard two male voices coming from the southeast corner of his rear yard. One voice said "You shouldn't have done it." The other said "You don't suppose he heard us?" Flores told Detective Bennett that at that point a dog began to bark. He looked out a window, and thought he heard someone running. (14 RT 3130-3132.) Flores then suggested that the police check his backyard. (*Ibid.*) The police did so and found some torn pieces of paper in a trash can. (14 RT 3132.) The pieces of paper seemed to be similar to torn pieces of paper that the police recovered during a consent search of the Flores backyard a few days before. (*Ibid.*)

Later, the police put the pieces of paper together and discovered that they were all part of a single document. (14 RT 3132.) The document was a somewhat pathetic self-evaluation by Flores. It included a section entitled "goals." One of goals listed was "correspondence course, vacuum and sewing machine repair." (14 RT 3132-3133, 3139.) This was significant because of the sewing machine repair manual that had been found in Linda Bullock's house after the homicide. (14 RT 3133.)

F. 1996 Investigation of Crime

From 1979 to 1996, the investigation of the case lay dormant. In April of 1996, Detective Mark Harrison, of the San Pablo Police Department, reopened the case in light of recent developments in the use of

DNA for identification. (15 RT 3331-3332.) Aware that serological evidence had been recovered at the time of the autopsy, Detective Harrison felt that this case would be perfect for DNA testing should there ever be a known donor. (15 RT 3332.) In April of 1996 he delivered vaginal and rectal swabs and some other evidentiary material to Mr. Schorr at the sheriff's laboratory. (14 RT 3177.)

Mr. Schorr determined that there was sufficient DNA present for further DNA typing analysis. (14 RT 3177-3179.) Because the sheriff's laboratory could not do DNA analysis at this point in time, he forwarded portions of the vaginal and deep vaginal swabs to Cellmark, a private laboratory, for further testing. (14 RT 3180-3181.)

In 1996, there were two main techniques of DNA profiling in forensic use: RFLP (restriction fragment length polymorphism) and PCR (polymerase chain reaction.) (15 RT 3436.) Schorr's purpose in having DNA testing done on the samples was to generate a DNA profile which might be compared to the profiles of known suspects. (*Ibid.)* The RFLP procedure required a relatively large biological sample. The PCR process in use at the time was less discriminating than RFLP testing, but had the advantage of being an effective procedure for obtaining profiles from very small or degraded DNA samples. (15 RT 3438.) Cellmark performed PCR

analysis on the samples received in this case and was able to ascertain a genetic profile from both the sperm and non sperm fraction of the samples. (15 RT 3439; 3441-3447, 3450.)

The only suspect at the time of this testing was William Flores, who had died. The San Pablo Police received permission from Flores's sister to have his body exhumed. (15 RT 3338-3339.) Cellmark was able to obtain a PCR DNA profile from a sample of Flores's bone. (15 RT 3450-3453.) That profile was different from either profile obtained from the evidentiary samples obtained at the autopsy, and it excluded Flores as the source of the unidentified DNA. (15 RT 3453; 3456.) All the evidence not consumed in Cellmark's 1996 analysis was returned by them to the Contra Costa County sheriff's laboratory in 1999. (16 RT 3597.)

G. 2002-2004 STR Genetic Testing

By 2002, the Contra Costa County Sheriff's Laboratory had acquired the equipment and personnel to conduct DNA testing. On February 2, 2002, David Stockwell, the lead DNA analyst at the sheriff's laboratory, received a request fro the San Pablo Police Department to conduct further DNA testing on specimens from this case. (16 RT 3601.)

Stockwell tested the samples using the COfiler and Profiler kits which targeted 13 separate STR sites and one additional gender

discriminatory site. (16 RT 3624-3625.) He was successful in creating such a profile for both the non-sperm fraction and the sperm fraction (16 RT 3636-3637.) The profile of the non-sperm fraction was matched to the known 13 site DNA profile of Cannie Bullock. (16 R 3638.) After the extracts were examined, they were returned to the San Pablo Police Department on April 23, 2002. (16 RT 3602.)

Following the creation of the DNA profile for the sperm fraction of the extracts taken from Cannie, Mr. Stockwell uploaded that profile into the FBI's CODIS database of DNA samples taken from convicted offenders. (16 RT 3638.) Not long afterward, Mr. Stockwell was informed that a profile in the CODIS data base shared the same 13 site profile as the one he had submitted from the Cannie Bullock case. (16 RT 3639.) The matching profile was that of appellant Joseph Cordova, who was then incarcerated in Colorado. (16 RT 3574-3576.)

In May of 2002 a Colorado judge signed a search warrant authorizing a draw of Mr. Cordova's blood. (16 RT 3574-3577.) The blood taken from Mr. Cordova was delivered to Mr. Stockwell and in July, 2002 he created a DNA profile from it in the same manner as he created the profile uploaded into the CODIS system. (16 RT 3641-3642.) The profile created from Mr. Cordova's blood matched the sperm fraction profile in the

Cannie Bullock case. (16 RT 3642.) Mr. Stockwell determined that one would expect to see Mr. Cordova's profile in 1 in 3.6 quintillion Hispanics, 1 in 3.1 quintillion African Americans, and 1 in 670 quadrillion Caucasians. (16 RT 3642.)

Mr. Stockwell did two more tests at the request of the San Pablo Police Department. One was on a sample obtained from a vaginal smear taken at the autopsy. The tests were done in February and March of 2003. The results were the same as the 2002 tests. (16 RT 3645.) The final test done by Mr. Stockwell was done in from May to July, 2004 with the evidentiary material that was taken from a deep vaginal swab. The results, again, were the same. (16 RT 3647.)

In addition to the testing done by Mr. Stockwell, similar testing of samples from the autopsy was done by Alan Keel at Forensic Science Associates, a private forensic laboratory. (16 RT 3777.) Mr. Keel used a new test kit, the Identifiler, that tested alleles at 15 genomic sites as opposed to the 13 sites of the Cofiler and Profiler Plus kits. Mr. Keel also did DQ-alpha and genetic marker testing similar to that previously done in 1996. (16 RT 3779.) The results of the testing established that Mr. Cordova matched the profile of the sperm fraction from the autopsy samples. Keel calculated the statistical frequency for this profile as 1 in 13 billion trillion

for Hispanics, 1 in trillion trillion for African-Americans, and 1 in 134 trillion for Caucasians (16 RT 3783-3784.)

Stockwell testified at Mr. Cordova's trial that the state of the sperm fraction taken from the autopsy evidence was consistent with a fresh ejaculation into Cannie's body no more than a few hours before her death (16 RT 3654.) He based this opinion on the fact that spermatozoa have very fragile tails which detach from the sperm head very easily as they "swim" up the vaginal cavity. (16 RT 3652-3653.) Sperm with tails will exist in the living female body for no more than 8-10 hours before the tails drop off due to the constant motion. (16 RT 3653.) However, when the sperm is present in a dead female body, the lowered body temperature will cause the sperm to cease moving, so they retain their tails. (16 RT 3654.) Many intact sperm were present in the ejaculation in Cannie's body, leading Mr. Stockwell to opine that the evidence was consistent with fresh ejaculation into a dead or dying body. (*Ibid.*)

Dr. Edward Blake, another DNA analyst, testified that the amount of sperm detected in the vaginal and rectal swabs taken at Cannie's autopsy was objectively very large. This is consistent with an ejaculation into the vaginal cavity and the victim then not moving after that and at some time later that material being seized. (17 RT 3785.)

H. Statements of Appellant

On July 18, 2002, Detective Von Millanich, from the San Pablo Police Department, visited Mr. Cordova and informed him of the court order for the blood draw. A phlebotomist was present to make the draw, and completed it without incident. (8 CT 2269-2270[1]; 14 RT 3313-3314, 16 RT 3574-3577.)

Detective Von Millanich then informed Mr. Cordova of his *Miranda* rights, and Mr. Cordova responded that he understood each of his rights. (8 CT 2270-2271.) Without obtaining a formal waiver, Von Millanich questioned Mr. Cordova about the murder of Cannie Bullock. Mr. Cordova said that before moving to Colorado on New Years Day of 1980, he had lived most recently in the San Pablo area. (8 CT 2271.) He indicated that he used to frequent the local bars in San Pablo, including "Oscar's." (8 CT 2272.)

Mr. Cordova said he left the San Pablo are for Canada in October of 1979. (8 CT 2273.) In response to further questioning, he said remembered both Debbie Fisher and Linda Bullock. He also "vaguely remembered" her

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1. The tape of the interview of appellant by Detective Millanich was played to the jury but was not otherwise reported in the reporter's transcript. (14 RT 3313-3314.) The transcripts of this tape recording are part of the clerk's transcript and are cited as such.

nine year old daughter. (*Ibid.*)

Von Millanvich then told Mr. Cordova that he had a problem in that his seminal fluid had been found in the little girl. (8 CT 2273.) Mr. Cordova responded by stating that he did not know "how that got there." (8 CT 2274.) Mr. Cordova also related that he remembered that on a Friday night he had a one-night-stand with the girl's mother at the Bullock house and left to go to work that next morning. (8 CT 2275.) Mr. Cordova stated that he found out about the murder that Saturday night at a local bar. (*Ibid.*) The detective informed Mr. Cordova that the girl was raped and murdered. Mr. Cordova denied committing the crime. (8 CT 2276.)

Mr. Cordova was again questioned six days later, this time by Smokey Kurtz, a Colorado State Prison investigator. (14 RT 3291 et seq.)[2] He was again advised of his "*Miranda*" rights, which he acknowledged. (8 CT 2273.) When asked by Mr. Kurtz whether he wanted to talk, Mr. Cordova replied it depended upon what the investigator wanted to talk about. (*Ibid*). Investigator Kurtz asked Mr. Cordova about a Sagittarius pendant found at the crime scene. Mr. Cordova admitted that he was born under the sign of Sagittarius, but denied owning the pendant. (8 CT 2265-

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2. The tape of the interview of appellant by Mr.. Kurtz was played to the jury but was not otherwise reported in the reporter's transcript. (14 Rt 3293.) The transcripts of this tape recording are part of the clerk's transcript and are cited as such.

2266.)

In response to questioning, Mr. Cordova said again that he was with Linda Bullock on the Friday night before Cannie was murdered and that he saw Cannie, alive, Saturday morning before he went to work. (8 CT 2266.) Mr. Cordova stated that while he was having sex with Linda in Linda's bedroom, Cannie was in the other room. (8 CT 2267.) He further stated that this was the only time that he had ever been at the Bullock house and that he had no idea how his seminal fluid got into the girl. (*Ibid.*)

I. Evidence Code Section 1108 evidence

At Mr. Cordova's guilt trial, the prosecution presented evidence of two incidents involving sexual misconduct by Mr. Cordova. Nina Sharp testified that in 1992 she was 12 years of age and living in Lakewood, Colorado. (17 RT 3808.) At that time she was acquainted with Mr. Cordova, whom she knew as "Geezer," as well as Mr. Cordova's wife. (*Ibid.*)

On September 26, 1992, she and her two-year-old brother were taken to the Cordova house to spend the night. She had never been to the house before. (17 RT 3809.) She went to bed alone, but was awakened by Joseph Cordova rubbing her chest and her "butt." (17 RT 3810.) She told him to stop and he did, hugging her and telling her that if she told anyone about the

incident he would go to jail. (*Ibid.*) When Mr. Cordova left the bedroom, Nina called her mother who came to the Cordova house and picked her up. Nina told her mother what happened and the police were called. (17 RT 3810-3811.)

On the evening of November 22, 1997, Curtis Baker, then ten years of age, attended a party in Denver, Colorado, with his father. (17 RT 3913.) Curtis went upstairs and fell asleep on a bed that he was sharing with a 19 year old girl, Pam, who was a platonic friend. (*Ibid.*) He was awakened by Mr. Cordova rubbing his back and his "butt." (17 RT 3914.) Curtis jumped up and ran downstairs to tell his father, who took Curtis to the police station to fill out a report. (17 RT 3915.) Curtis also testified that Mr. Cordova had been drinking that evening. (17 RT 3916.)

Mr. Cordova was convicted of attempted sexual assault on Nina Sharp and assault on Curtis Baker and certified copies of both convictions were entered into evidence. (17 RT 3811-3812.)

Defense Case

A. Scientific Testimony

Keith Inman, a senior scientist from Forensic Analytical Science, a private laboratory, testified for the defense and rendered an opinion that Mr.

Cordova's semen could have been transferred into Cannie Bullock's body from the sheets on her mother's bed. (17 RT 3921 et seq.) Mr. Inman examined the vaginal and rectal swabs and samples, plus several microscopic slides from prior analysis, as well as items of clothing and bedding from the scene of the crime. (17 RT 3926.) He testified that the semen in Cannie Bullock's body could have been deposited there by means other than vaginal intercourse. (17 RT 3927.) Transfer could have occurred if an undiluted ejaculation onto an item, such as a bed sheet, later came into contact with the genital area of the victim and nothing occurred afterward that removed the semen. (*Ibid.*)

To support the possibility of such a transfer, Mr. Inman noted that if the semen found in this case had been deposited during a violent sexual assault there would be an expectation that a mixture of blood and semen would be observed on items such as some of the bedding and Cannie's robe. No semen was present on these items. (17 RT 3928-3931.)

Mr. Inman found no evidence of rectal penetration. He said that the semen on the rectal swabs could be accounted for by either a blood/semen mixture dripping from the vagina, across the perineum and into the rectal area or incident contact with a pure semen stain, unrelated to the attack. (17 RT 3935.) Mr. Inman also indicated that in a case of vaginal intercourse,

one would expect to find a relatively greater amount of semen in the vagina than the rectal area, unlike in this case. (17 RT 3935-3936.)

Mr. Inman also stated that the finding of intact sperm with tails does not refute the theory that the transfer of semen to Cannie's body could have been by an innocent means. (17 RT 3937-3938.)

In summary, Mr. Inman stated that there was nothing in the state of the physical evidence that would refute the alternative hypothetical of a non-sexual, inadvertent transfer of semen in this case. (17 RT 3939.)

Brent Turvey, a scientist from Forensic Solutions, also testified for the defense as to the viability of an alternate theory as to how Mr. Cordova's sperm may have done to be in Cannie's body. (17 RT 3983 et seq.) Mr. Turvey reviewed thousands of pages of reports and additional discovery in this case. (17 RT 3988.) From this review, he concluded that the murder took place inside the Bullock home. (17 RT 3989.) He further stated that all of the conditions were present to support a theory that the sperm could have been transferred in the same way as described by Mr. Inman and that he knew of a case where such a transference actually did happen. He had described that case in one of his text books. (17 RT 3991-3995.)

Like Mr. Inman, Mr. Turvey stated that the absence of sperm cells in

the blood stains on Cannie's robe and bedding supported the theory of inadvertent transfer. (17 RT 3996.) He criticized the methods of evidence collection by the police and suggested that the medical examiner's competency or lack thereof may have had an effect on the ultimate findings in this case. (17 RT 3998-3999.)

Anticipating the testimony of the above two defense witnesses, the prosecutor addressed the unintentional transference theory in her case-in-chief. The prosecutor posited the following hypothetical to Mr. Stockwell:

> Let's assume male & female have sexual intercourse, and the male ejaculates into adult female. The adult female then has seepage from her vagina onto a surface such as a bed sheet. The child spends at least a day in normal activity that an 8 year old child would engage in. The child then takes a bath or shower, changes clothes and is then at some point after that we're now probably at least 14-16 hours later, the child is raped and strangled to death. The child is then drug out to the yard in the backyard through the house. Later the child is taken to the autopsy and the pathologist in getting swabs from the vagina somehow gets some of this cellular material onto the swabs (16 RT 3659-3660.)

The prosecutor then asked Stockwell whether this hypothetical would account for the type and amount of sperm he observed in the evidence samples. (16 RT 3660.) Stockwell stated that it would not. First, he said, if there was seepage from another female's vagina, one would

expect to find an indication of two sources of vaginal fluid in such a scenario, whereas in this case only one non-sperm fraction was detected. (16 RT 3660; 3663-3664.)

Further, once drainage has taken place onto a bed sheet or similar substances, there would be a drying process and once the stain is dried there would be virtually no transfer of cellular material. Therefore, the time frame would have to be relatively abbreviated to get a liquid stain transfer to the girl. (16 RT 3660.)

Stockwell also stated that even if there was a great deal of material transferred in the hypothetical inadvertent transfer of sperm, bathing would remove the material from her external surfaces, and it would not have been present at the autopsy to contaminate a vaginal sampling. (16 RT 3661.) In addition, because all four swabs prepared at the autopsy contained samples of sperm, for the defense hypothetical to be true all of these swabs would have to have been contaminated in the same way, which speaks against the defense hypothesis. (16 RT 3661.)

B. Additional Evidence Regarding Third Party Culpability

Linda Flores Smith was the sister of William Flores, who died in 1983 (18 RT 4046.) In 1979, her brother and mother were living at 2608 Dover St., San Pablo. (*Ibid.*) She became aware that someone had been

killed on Dover St. a few months after the crime occurred. (18 RT 4048.)

Detective Mark Harrison of the San Pablo Police Department, the officer who spoke with Linda Flores Smith in 1996, testified that at their first meeting Ms. Smith spontaneously asked him "is this about Bill" or something to that effect. (18 RT 4071.) Ms. Smith told Detective Harrison that her mother had two sewing machines, a Sears and a Singer, and she was fairly certain that the sewing machine booklet found at the murder scene was one that had belonged to her mother. (18 RT 4072.)

Ms. Smith also told Detective Harrison that her mother told her about the killing about a week after it occurred. (18 RT 4073.) Ms. Smith also stated that she had learned from her mother that Flores had come home the night of the homicide with a bloody shirt, and she had been unable to clean it so she burned it in an incinerator. (18 RT 4077.) She also said her mother had told her that when he committed suicide several years later Flores left a note saying "he was sorry for what he did." (18 RT 4078.)

PENALTY PHASE

People's Case

A. Victim Impact Witnesses

The People called two victim impact witnesses, Linda Bullock and Cannie's uncle, Roy Bullock. Linda stated that after the death of her

daughter, she attempted suicide twice. (19 RT 4499.) Ms. Bullock testified how terrible she felt about her daughter's death, a feeling engendered, in part, because she did not properly take care of Cannie. Linda Bullock further stated that Cannie is now her "guardian angel" who "takes care of her." Her daughter's death affects her every day. (19 RT 4554.)

B. Evidence of Other Offenses

Mr. Cordova was arrested for possession of an operable sawed-off shotgun in 1977. (19 RT 4506; 4517.) A firearms expert testified as to the configuration and inherent dangers of such a weapon. (19 RT 4517.)

In addition, the prosecution introduced evidence of a 1982 Colorado incident, which Mr. Cordova admitted he fired a rifle during an argument with his then-girlfriend, Janice. (19 RT 4547.) The prosecutor also introduced evidence of the convictions for possession of the sawed-off shotgun, for assault against Kelly Cordova, and a felony conviction for uttering false instruments. (19 RT 4538.)

The prosecutor also relied on the convictions for sexual misconduct admitted in the guilt phase pursuant to Evidence Code section 1108. (19 RT 4539.)

Appellant's Case

Mr. Cordova's older brother, Abe, presented a slide show about

appellant's life and the environment in which Mr. Cordova was raised. Mr. Cordova was born in 1944, outside of the town of Trinidad, a mining and ranching community in southern Colorado. (20 RT 4572.) The Cordova family settled in Colorado in 1847. His mother's side of the family were shepherds and his father's side were carpenters. (*Ibid.*) Mr. Cordova's father was a coal miner and a deputy sheriff "up in the valley," where approximately 10,000-12,000 people lived. (*Ibid.*)

Mostly everyone in the area worked in the coal mines. Many of the children that Mr. Cordova knew worked for the ranchers when they were younger, turning to mining work when they were 15 or 16 years of age in order to help their families financially. Abe stated that his brother had a "good country life," raising chickens and rabbits and doing chores around the home with the animals. (20 RT 4573.) Joe and his family left Colorado for California in 1959, and Abe remained behind to finish high school. (*Ibid.*) Upon graduation, Abe joined the Army. After being discharged in 1963, Abe joined his family in California. (*Ibid.*)

Mr. Cordova was known in his family as "Junior." Growing up, he appeared to be a happy child, "joyful all the time." He did not get into any trouble while living in Colorado and never did anything "weird" with his sisters. Abe Cordova described his brother as a 'jokester," with a good

sense of humor. (20 RT 4578-4580.)

Abe also described how when he and Cordova were young, his father would take them to the mines and show them how cold and dirty it was and how they should aspire to something better. (20 RT 4581-4582.) Abe described Mr. Cordova's childhood as "wholesome" and "uneventful." (20 RT 4612.)

Abe also testified that the boys of the family cut timber in the summer to make money. They worked 10 to 12 hours a day, five days a week, giving most of their pay to their parents to help make ends meet. No members of the Cordova family, except for appellant, had been in trouble with the law. (20 RT 4596; 20RT 4613.)

After he and appellant became adults, Abe said they really didn't see each other very much. For a time, they were both in the service. (20 RT 4597.) In 1979, Abe testified that appellant moved to Canada with a woman named Corrie, who was expecting Joe's child. Joe eventually returned from Canada and lived in Colorado for a while before moving to San Pablo, California in 1981. Abe did not see Mr. Cordova again until 1984, at his sister's 25th anniversary party. (20 RT 4579-4598.)

Abe stated that his brother is a very trustworthy person and that he has a very hard time believing that Joe could have done the crime. Abe also

said that he felt very sorry for the little girl and her family, indicating that he had a granddaughter of his own. (20 RT 4600-4601.) Abe also stated that Joe had been married three times and had children with several women. He also indicated that appellant did not have a lot of long-term relationships with women. (20 RT 4602-4603.)

Vicki Cordova, Abe's wife, testified that she first met Joe in Colorado when she was 13 years of age. She stated that Joe has always treated her "like a queen." (20 RT 4618-4620.) She noticed a change in Joe's behavior after he returned from military service in Viet Nam, stating that he used to be "happy-go-lucky" before his war experience but was no longer. She stated that she believed the war had affected Joe a lot. (20 RT 4620-4621.) However, even after Joe returned from Viet Nam, he was always very good to her and was very supportive to her, especially when her father died. (20 RT 4621.)

Vicki never saw Joe being disrespectful toward other women. (20 RT 4622.) She said he was a "magnet for girls" and never had problems getting a date; he was a "family legend" because of this. (*Ibid.*) Vicki said she had difficulty accepting the verdict of the jury and felt that the conduct for which Joe was convicted was totally out of character for him. (*Ibid.*) On cross-examination, Ms. Cordova admitted that she had had very little

contact with Mr. Cordova since the late 1970's. (20 RT 4633-4634.)

Phillip Cordova, Mr. Cordova's thirty-eight year old son by Lupe Snasel, also testified for the defense. (20 RT 4638-4639.) While he could not recall how often his father contacted him, he stated that he saw appellant "when he came around." (20 RT 4639.) He said he had fond memories of his father and that his father never forgot birthdays or holidays. (*Ibid.*)

Linda "Windy" Gurule, appellant's younger sister, testified that the Cordova siblings were all very close when they were growing up. They lived in a country setting, and often played together. Joe always included Windy in his activities and taught her things like how to play basketball. (20 RT 4642-4644.) He also chaperoned her dances. (20 RT 4645.)

Windy also stated that nothing in Joe's childhood suggested that he was capable of committing the sort of crime for which he was convicted. (20 RT 4644.) As a youth, he never drank to excess nor did he take drugs. (20 RT 4645.) Windy though that this changed when Joe returned from Viet Nam. Before he joined the Navy he was a happy person but that changed as well. (*Ibid.)* When he got back from Viet Nam, she saw a change in his expression. He told her that she was better off not knowing what went on during the war. He began drinking and smoking marijuana on a daily basis.

(20 RT 4645-4646.)

In spite of this, she had no concerns about leaving her two young daughters in his care. Windy said her girls loved Mr. Cordova and called him "Uncle Joe." (20 RT 4647-4648.) She did not believe that her brother committed the murder or any child molesting crimes, stating "that is not who my brother is." (20 RT 4678.) On cross-examination she also acknowledged that she had rarely seen appellant since the 1970's (20 RT 4656-4657.)

Tangie Hollis lived with Joe Cordova for a few months in 1979 but had not seen him since. (20 RT 4666.) She met him at a bar in San Pablo. She was a "big drinker" at the time of their initial meeting. (*Ibid.*) They drank a lot when they were together, but Joe was always considerate of her. (20 RT 4667-4669.) Joe left her when an old boyfriend of hers showed up. Tangie said she got mean and shot at Joe but he did not retaliate in any way. (20 RT 4669-4670.)

Kelly Cordova, appellant's wife, married him in 1990. (20 RT 4690; 4693.) She met him in August of 1988 after being "abandoned in a public place," and started living with him right away. (20 RT 4691.) When they first met, she knew him by the name of "Geezer." (*Ibid.*) The couple had two sons, Joseph, born in 1989, and Sean, born in 1992. Both were living

with Kelly's parents in Arizona. (20 RT 4692.)

Kelly lived with Joe for a total of five years, until he went to jail in 1993. (20 RT 4693.) She said that during this period of time, she and Joe were cooperatively building a family together. He was a hard worker, unloading semi-trucks for a living. (20 RT 4693-4694.) They had a normal family life, doing family-oriented activities, such a bowling and entertaining friends and family. (20 RT 4694.) Joe didn't allow drugs in the house and there wasn't any drinking until right before he was taken to jail on the first of the Colorado charges. (*Ibid.*)

Kelly further testified that Joe was a good father. He was there for both births and spent a lot of time with the children as they were growing up, participating in all of their activities. In addition, he shared in the household chores. (20 RT 4694.)

Joe was aggressive toward her only once during their five year relationship. Toward the very end of the relationship, he started drinking for the first time in five years. (20 RT 4697-4698.) He lost his temper once and struck her on the head with his fist. (20 RT 4698-4699.) He felt great remorse afterward and sought treatment for his alcohol and domestic violence problem. (20 RT 4709-4710.)

Appellant's youngest sister, Sally, testified that her family knew Mr.

Cordova as "Junior." (*Ibid.*) She had fond memories of Joe during the period when they were growing up in California (20 RT 4734-4735.) After Joe returned from the military, he lived with her for a period of approximately six months. He babysat for her two daughters, who were eight and nine years old at the time. She never suspected anything improper was happening and had no concerns. (20 RT 4735-4738.) She didn't believe that Joe committed any of the crimes for which he was convicted. (20 RT 4739-4740.) On cross-examination she admitted to seeing very little of Joe during the 1980's and nothing at all of him in the 1990's, but said she would not believe that her brother did anything wrong unless, he himself, admitted to it. (20 RT 4742-4743.)

Richard Cordero was Lupe Snasel's brother and appellant's ex-brother-in-law. (20 RT 4744. He first met Joe in 1959 while they were attending Harry Ellis High School in Richmond, California. They became friends while in ninth grade. (20 RT 4745.) As teenagers, they got into some minor trouble, drinking and breaking curfew. (20 RT 4745-4746.) Cordero testified that nothing he was aware of in Mr. Cordova's background would have led Mr. Cordova to killing and raping an eight- year-old girl. (20 RT 4752.)

Miles Malmgren met appellant in the mid 1980's and continued a

friendship with him until Mr. Cordova went to prison in the early 1990's. Malmgren lived with Mr. Cordova as a roommate in Colorado for three years. (20 RT 4753.)

Malmgren had served as a Marine in Viet Nam, where he was injured four times. (20 RT 4753-4754.)

During the time they lived together, Mr. Cordova unloaded trucks and Malmgren drove them. Mr. Cordova was a very hard worker. (20 RT 4755.) There wasn't much drinking in their apartment because Mr. Malmgren didn't approve of it. (*Ibid.*) However, there was a lot of marijuana smoking. (20 RT 4756.)

After Mr. Cordova moved in with Kelly. Malmgren lived with them for about a year and would watch little Joe. As far as Malmgren could tell, Mr. Cordova was a good husband and father. (20 RT 4758.) Even though he had been made aware of Mr. Cordova's prior arrests, Mr. Malmgren did not believe that Mr. Cordova murdered Cannie. (20 RT 4765.)

Appellant testified at the penalty phase. He said he was not angry at the guilty verdict, stating "I don't know if (the jury) based their decision of evidence or if they took the crime itself as such a bad crime that they wanted to punish somebody." (20 RT 4776.) He testified that he did not commit the crime, but at that point he did not care whether he got a

sentence of death or life imprisonment, because one sentence was as bad as the other for a sixty-two-year-old man. (*Ibid.*)

When asked by his counsel whether he was asking the jury to sentence him to death, Mr. Cordova responded "I am not asking them to do anything. I am not going to lie to save my life. I am going to die in prison, anyway." (20 RT 4777.) He testified that he had Hepatitis C, an incurable disease, and diabetes. (20 RT 4777-4778.) He stated that a sentence of life without possibility of parole would expose him to other prisoners where he might have to kill to defend himself, if necessary (20 RT 4778.) If he received the death penalty, he would get a single cell accommodation, which would be safer for everyone involved. In any event, he said he did not believe that he would be executed because of slow operation of the death penalty. (20 RT 4779; 4786.) He also stated that he would face additional danger in general population as a convicted child murderer-rapist. (20 RT 4786.)

Mr. Cordova testified that he served in the Navy from 1962-1970, reenlisting twice, during that time. (20 RT 4790.) He spent six months in Viet Nam in 1964-1965, where he flew as a reconnaissance pilot. (*Ibid.*) He then went to Okinawa before returning to Viet Nam in 1968, where he was assigned to river boat detail near Cam Rahn Bay. (20 RT 4792.) During this

tour of duty, he was fired upon by the enemy. (*Ibid.*) When asked whether his service upon these boats contributed to any abnormal behavior he admitted that it was very disconcerting knowing he could get killed at any time but said, "I do not believe that I am unstable except when I get drunk, maybe." (20 RT 4793-4794.)

However, he did state that his experiences in Viet Nam led to an increase in his drinking and drug use. He would lace marijuana with opium and smoke it to get high. Use of marijuana was epidemic where he was stationed. (20 RT 4794.) Mr. Cordova testified that Viet Nam changed him a lot. He recalled that the smell of decomposition was overwhelming from the dead bodies that were being shipped home. (20 RT 4795.)

Mr. Cordova claimed that the Navy abused the sailors and the Congress "chickened out" and did not want to bomb North Viet Nam, letting the Viet Cong rearm and resupply themselves. He had planned to make a career of the Navy but felt betrayed, continuing in the service only because he had re-enlisted. (20 RT 4795.) In 1970, while still in the Navy, Mr. Cordova became involved in the theft of a check from a new officer. He felt that they were "bugging him" so he stole their money. (20 RT 4797.) He testified that the federal court put him on probation. (*Ibid.*) He also stated that he stole the money, in part, because he just wanted the money for

himself and to support his family. (20 RT 4810.)

Mr. Cordova married Lupe Snasel in 1968, who bore him a son, Phillip. He stated that their breakup was his fault because of his drug use and his baseless accusations of adultery. (20 RT 4798.) He testified that the end of their relationship hurt him very much, stating that she "was his rock," and that she still visited him in jail. (*Ibid.*)

On cross-examination, appellant denied committing the murder. He also denied committing the other molestations for which he was convicted, saying he had pled guilty to avoid harsher penalties. (20 RT 4799-4801.) However, he did admit to partying and flirting with Pam, which later culminated in his trying to sexually arouse her while she was sleeping next to Curtis, whom he was convicted of molesting. (20 RT 4799-4804.) Twenty-seven days after Mr. Cordova was released from prison for the first molestation charge, he was arrested for the molestation of Curtis. (20 RT 4805.)

In response to questioning by the District Attorney, Mr. Cordova stated that nothing happened while he was in the Navy that would have forced him to become a child molester. (20 RT 4814.) At one point, he also told the prosecutor that if there was something he wanted he "would just take it." (20 RT 4818.) However, he denied having committed the crime

against Cannie. (*Ibid.*) He also admitted to smoking pot and "doing a little acid" in the 1970's and 1980's, but denied having a drug problem. (*Ibid.*) He also admitted to dealing marijuana and cocaine "on and off." (20 RT 4819.) He also stated that he carried a handgun at one point for protection. (*Ibid.*)

Appellant related that he married Lupe in 1968, while he was in the Navy, and divorced her a year later. (20 RT 4821.) Due to his service commitment, he only lived with Lupe for six months. (20 RT 4822.) In 1974, Mr. Cordova married Sandy and was with her for about six months. He married Kelly in 1992 and had two children with her. (20 RT 4823.) He also had a daughter from another woman, a child he had never seen. (20 RT 4823.) He also had a child with a woman named Karen and a woman in Virginia. (20 RT 4823-4824.) Further, he lived with a person named Corrie off and on in the mid-1970's having a son, Matt, with her. (20 RT 4825.) He stated that he cheated on Corrie and they separated. (20 RT 4826-4828.)

Mr. Cordova stated that he never struck Corrie but admitted to threatening his ex-girlfriend, Janice, with a gun, and hitting Kelly on the head during an argument. (20 RT 4828-4829.) He also admitted that in a prison anger management class, he said he was so mad at Deputy District Attorney Lori Clapp he was mad enough to kill her and said, "If I'd had a gun in Court, I would have killed that bitch" (20 RT 4831.)

Mr. Cordova admitted to burglarizing a neighbor's house when he was twelve-years-old in Colorado. He further stated that his parents were law abiding people and had attempted to teach him right from wrong. However, when he wanted something he just took it. (20 RT 4833.) Mr. Cordova also admitted to being caught with dangerous contraband on three separate occasions while in prison, but denied that he harbored any intent to harm anyone, and only possessed these items for innocent purposes. (20 RT 4834-4838.)

GUILT PHASE ARGUMENTS

I. DUE TO THE PERVASIVE NEGLIGENCE OF GOVERNMENT AGENTS IN THE INVESTIGATION OF THIS MATTER, APPELLANT WAS NOT CHARGED WITH THE INSTANT CRIMES UNTIL TWENTY-THREE YEARS AFTER ITS COMMISSION, THEREBY PREVENTING HIM FROM MOUNTING AN ADEQUATE DEFENSE AT TRIAL IN VIOLATION OF HIS RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. INTRODUCTION

Cannie Bullock was murdered 23 years before appellant was charged with the crime. From the outset, the investigation of the crime by law enforcement was haphazardly and negligently conducted.

On the very first day of the investigation, the police were convinced

that the crime had to have been committed by one of Linda Bullock's acquaintances. In fact, within hours of the discovery of Cannie's body, Debbie Fisher, Linda's close friend and sometime housemate, informed the police that Ms. Bullock knew who did the crime. (7 RT 1499-1503.)

In spite of this information, the police did very little to follow up. Instead of pursing these leads, the police conducted only a few ineffectual interviews with Ms. Bullock, interviews in which it was clear that she was hiding the truth. In the days following the murder, Ms. Bullock was uncooperative and under the influence of some sort of intoxicant. The police did virtually nothing to pierce her silence. Instead of holding Ms. Bullock as a material witness, or arresting her for criminal negligence in Cannie's death, the police seemed simply to discount her as a viable source of information and ignored the likelihood that she held that the key to solving the crime. Soon after the crime, Linda Bullock went into hiding, in an apparent attempt to avoid further inquiries about her daughter's murder.

The balance of the investigation was equally perfunctory. In spite of the fact that they knew that Ms. Bullock's circle of friends was largely limited to the bikers that frequented the local bars of San Pablo, the police did very little canvassing at these establishments in an attempt to identify possible suspects in the murder. As the result of an internal conflict within

the San Pablo Police Department, the investigation essentially ended a little over a month after it began, with all of the detective work of the San Pablo Police department being contracted to the County Sheriff. There was no evidence that the Sheriff did anything to find Cannie's killer for the next seventeen years. It was not until 1996 that any attempt was made to further investigate the case.

The government's negligence in pursuing the investigation of this case caused appellant to suffer prejudice from the loss of material witnesses and evidence, compromising his ability to defend himself. The pre-indictment delay of 23 years violated appellant's right to due process of law pursuant to both the Fifth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of California.

B. PROCEDURAL HISTORY

On September 1, 2006, appellant filed a Motion to Dismiss for Violation of Defendant's Due Process Rights. (5 CT 1103.) In that motion, appellant argued that the delay in filing formal charges against him was caused by the negligence of law enforcement authorities and that the delay caused him irreversible prejudice due to the loss of material witnesses and evidence, compromising his ability to defend himself. (5 CT 1105.)

On September 22, 2006, the prosecutor filed a response in which it

argued that the police were not negligent in their investigation of the case and that, in any event, any prejudice to appellant was minimal. (5 CT 1309:1313-1316.)

On September 29, 2006, the trial court heard arguments on the motion and denied it. (6 RT 1406 et seq; 7 RT 1525-1526.) The court stated that it did not believe that a showing of negligence had been made, stating that it was not clear whether or not the police failed to properly follow up on leads. (7 RT 1524.) The trial court also held that even if the police were negligent by failing to properly conduct the investigation, it was "pure speculation" that had the investigation been done properly, it would have led to the discovery or arrest of appellant. (7 RT 1524-1525.)

C. GENERAL DISCUSSION OF THE LAW

1. Federal law as to Pre-Indictment Delay

In *United States v. Marion* (1971) 404 U.S. 307, the United States Supreme Court held that the Sixth Amendment right to a speedy trial does not extend to pre-indictment delay, as occurred in the instant case. However, the Court held that the Due Process Clause of the Fifth Amendment to the United States Constitution mandates dismissal of the indictment if the pre-indictment delay caused substantial prejudice to defendant's right to a fair trial. (*Id.* at p. 324.)

The *Marion* Court did not attempt to define the exact nature of the prejudice that must be suffered before due process relief can be granted. However, the Court did generally state that "to accommodate the sound administration of justice to the rights of a defendant to a fair trial will necessarily involve a delicate judgment based on the circumstances of each case. It would be unwise at this juncture to attempt to forecast our decision in such cases." (*Marion*, *supra* at pp. 324-325.)

Further, the Court held such relief was dependent upon the intent of the government; an indictment could be dismissed on the ground of delay only if the delay "was an intentional device to gain tactical advantage over the accused." (*Marion, Id.* at 324.)

In *United States v. Lovasco* (1977) 431 U.S. 783, the High Court departed from its *Marion* decision to the extent that it no longer required government conduct to be in bad-faith before being able to find due process violation for pre-indictment delay. The High Court in *Lovasco* stated that the delay need not be intentional but could be "in reckless disregard of circumstances known to the prosecutor, suggesting that there existed an appreciable risk that the delay would impair the ability to mount an effective defense." (*Id.* at 796 at fn 17.)

In 1992, the Court decided *Doggett v. United States* (1992) 505 U.S.

647, in which it considered whether governmental negligence can trigger a speedy trial analysis. While *Doggett* is a speedy trial case involving post-indictment delay, it is illustrative of certain principles pertinent to the due process issue in the instant case.

Doggett held that governmental negligence might be sufficient to trigger action by the court "Between diligent prosecution might be sufficient to trigger action by the court. "Between diligent prosecution and bad-faith delay, official negligence in bringing an accused to trial occupies the middle ground. While not compelling relief in every case where bad-faith delay would make relief virtually automatic, neither is negligence automatically tolerable simply because the accused cannot demonstrate exactly how it prejudiced him." (*Doggett, supra,* at 657.)

Regarding the standard of prejudice, because *Doggett* was a Sixth Amendment case, the Court based much of its decision on the seminal case of *Barker v. Wingo* (1972) 407 U.S. 514. Again, while *Barker* is a speedy trial, Sixth Amendment case, much of its logic can equally be applied to Fifth Amendment cases, such as the instant case.

Barker rejected any mechanical or rigid test as to how much time need pass between the date of the crime and its formal prosecution before a defendant's rights be said to be violated. (*Barker*, at pp. 522-523.) Further,

it rejected the notion that at some point during the period of delay, a defendant must request a trial in order to be able to later claim that his speedy trail rights were violated. (*Id.* at pp. 523-524.) In doing so, *Barker* made clear that anything less than an express and knowing waiver of a right is insufficient to waive defendant's right to a speedy trial, as a "defendant has no duty to bring himself to trial." (*Id.* at pp. 526-527.)

Ultimately, the *Barker* Court settled on a balancing test in which the conduct of both the defense and prosecution are weighted, considering factors such as length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. (*Barker, supra,* 407 U.S. at p. 530.)

The United States Supreme Court has never specifically developed a set of standards for determining whether pre-indictment delay has violated a defendant's Fifth Amendment due process rights. In fact, it has literally gone out of its way to avoid setting such a standard, stating in *Lovasco* that it "leave(s) to the lower courts, in the first instance, the task of applying the settled principles of due process..to the particular circumstances of the case." (*United States v. Lovasco, supra,* 431 U.S. at p. 797.)

The federal appellate courts have split on the nature of such a standard. According to the Ninth Circuit, a defendant must make some

demonstration of actual prejudice and establish "some culpability on the government's part either in the form of intentional misconduct or negligence," and then the court must balance the degree of prejudice, the length of delay, and the government's reasons for delay in order to determine whether the defendant's due process rights were violated. (*United States v. Mays* (9th Cir. 1977) 549 F2d 670, 677-78; *United States v. Moran* (9th Cir 1985) 759 F.2d 777, 781.) Under the standard followed by the Ninth Circuit it is possible to establish a due process violation based on merely negligent delay, provided that the prejudice to the defendant is sufficiently severe. (E.g. *United States v. Mays, supra,* 549 F.2d at pp. 677-678.)

The majority of the circuits have held that in order to prevail on a pre-indictment delay claim the accused must show both actual prejudice and an intentional delay on the part of the government to gain an unfair tactical advantage or for some other bad faith motive. (E.g. *United States v. Crooks* (1st Cir. 1985) 766 F.2d 7, 11.)

2. California Law

One of the central differences between federal and California state law in this area is that according to this Court's holding in *People v. Hannon* (1977) 19 Cal.3d 588, 604-605, the California Constitution does not differentiate between pre-indictment and post-indictment delays, and the

same balancing tests are used for both.

The standards for this balancing under state law are clearer than the federal law. In 2008, the California Supreme Court in *People v. Nelson* (2008) 43 Cal.4th 1242, clarified both the procedural and substantive law standards as to delay in prosecution under the state Constitution.

The facts of *Nelson* are similar in some ways to the facts of the instant case. In 1976, a college student was raped and murdered. Unlike Mr. Cordova, Nelson was considered a suspect not long after the crime was committed but there was not enough evidence to formally charge him. In 2000, the state allocated funding for the Cold Hit program and defendant was identified soon afterward as the donor of DNA from various incriminating latent stains from the 1976 murder.

Regarding the procedural framework to be employed in the ultimate determination of prejudice, this Court stated, citing *People v. Catlin* (2001) 26 Cal.4th 81, 107, that a defendant seeking to dismiss an indictment on speedy trial/due process grounds must demonstrate prejudice arising from the delay. After a showing of prejudice has been made, the prosecutor may offer a justification for the delay; the trial court then balances the harm to the defendant against the reasons for the delay. (*Nelson* at p. 1250; see also *People v. Archerd* (1970) 3 Cal.3d 615, 639-632; *People v. Pellegrino*

(1978) 86 Cal.App. 3d 776, 779-781.)

The *Nelson* Court did not attempt to quantify the degree of prejudice that has to be shown to trigger an explanation of the delay from the prosecutor, instead referring to the defense burden as the need to show "some" prejudice. (*Id.* At 1251.)

In short, *Nelson* and its precedent cases set up a three-step process, as follows.

1. Defendant must show "some evidence" of prejudice.

2. Burden then shifts to the People to justify the delay.

3. Court then balances the harm to the defendant against the reason for delay.

In *Nelson,* this Court began its analysis of California law by citing to *People v. Martinez* (2000) 22 Cal.4th 750, which stated "[t]he right of due process[3] protects a criminal defendant's interest in fair adjudication by preventing unjustified delays that weaken the defense through dimming of memories, the death or disappearances of witnesses." (*Nelson, supra,* 43 Cal.4th at p. 1250.) This Court declined to decide whether the delay in prosecution under federal due process principles requires bad faith on the part of the prosecutor. However, it held that in any event, California was not

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3. As stated above, *People v. Hannon* makes it clear that "speedy trial" and "due process" signify the same constitutional protection in this context.

bound by any "minimalist notions" of the federal courts and proceeded to define California law as more lenient than certain "bad-faith" based interpretations of federal due process rights. (*Nelson* at p. 1254.) In doing so, *Nelson,* citing to *Penney v. Superior Court* (1972) 28 Cal.App 3d. 941, held that

> the requirement of a legitimate reason for the prosecutorial delay cannot be met simply by showing an absence of deliberate, purposeful or oppressive police conduct. A legitimate reason logically requires something more than the absence of governmental bad faith. Negligence on the part of police officers in gathering evidence or putting the case together for presentation to the district attorney in evaluating a case for possible prosecution can hardly be considered a valid police purpose justifying a lengthy delay which results in the deprivation of a right to a fair trial. *Penney* at p. 953; *Nelson* at p. 1254.)

In *Nelson,* this Court also reaffirmed its own reasoning in *Scherling v. Superior Court* (1978) 22 Cal.3d 493. In *Scherling,* this Court found that the defendant hadn't shown prejudice so the Court need not reach the question of justification for the delay. However, the Court stated

> [w]e do not intend to imply that only a deliberate delay by the prosecution for the purpose of prejudicing the defense may justify a conclusion that a defendant has been denied due process. The ultimate inquiry in determining a claim based on due process is whether the defendant will be denied a fair trial. If such deprivation results from unjustifiable delay by the prosecution coupled with prejudice, it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligent of law enforcement agencies or the prosecution....Thus, although

> delay may have been caused only by the negligence of the government, the prejudice suffered by a defendant may be sufficient when balanced against the reasons for delay to constitute a denial of due process. (*Scherling* at p.1255.)

The Court then summed up the state of California law, stating that negligent, as well as purposeful delay may serve as grounds for a due process violation if the requisite degree of prejudice is shown. However, since "purposeful delay to gain an advantage is totally unjustified, a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation." (*People v. Nelson, supra,* 43 Cal.4th 1255-1256.)

D. APPLICATION OF THE LAW TO THE INSTANT CASE

To find additional specific guidance as to the nature of the practical standard to be used in the instant case, it is helpful to examine cases decided before *Nelson.* In *People v. Archerd, supra,* 3 Cal.3d 615, this Court made reference to a "balancing process" that took into account all of the circumstances of the nature of the delay and set forth the procedure to be followed in effecting this test. "In the balancing process, the defendant has the *initial* burden of showing some prejudice before the prosecution is required to offer any reason for the delay [citations]. The showing of prejudice requires some evidence and cannot be presumed but can be

attributed to loss of memory or loss of physical evidence." (*Id* at pp. 639-640; see *Ibarra v. Municipal Court* (1984) 162 Cal.App. 3d 853, 857.)

Similarly, in *People v. Catlin,* this Court stated "[w]e have observed that '[p]rejudice may be shown by loss of material witnesses due to lapse of time [citation] or loss of evidence because of fading memory attributable to the delay.'" (*People v. Catlin, supra,* 26 Cal.4th at 107 citing to *People v. Morris* (1988) 46 Cal.3d 1, 37.) *People v. Horning* (2004) 34 Cal.4th 871 expands *Catlin* by recognizing that the longer the delay, the harder it is for a defendant to "particularize" prejudice with specific allegations. "[A]ffirmative proof of particularized prejudice is not essential to every speedy trial claim, because excessive delay presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." (*Id.*at 893.)

Additional guidance can be found in decisions of the courts of appeal. In *Garcia v. Superior Court* (1984) 163 Cal.App. 3rd 148, the court discussed the importance of a full examination of *both* the prejudice suffered by the defendant and the prosecution's explanation for the delay. In that case, the petitioner was released on bond following her arrest. She appeared for arraignment on February 11, 1983; however, no complaint had been filed. After several more court appearances still no complaint had been

filed, and the court eventually exonerated the bail bond. A complaint was eventually filed on December 30, 1983. Petitioner appeared in court on January 11, 1984, in response to a letter notifying her to appear for arraignment on the complaint.

Petitioner claimed a speedy trial violation, relying on the Sixth Amendment to the United States Constitution and Article I, section 15 of the California Constitution. Although petitioner argued prejudice was presumed from the length of the delay she also offered evidence of prejudice in a declaration. Her declaration stated the police entered her home illegally when executing the search warrant the day of her arrest. According to petitioner, witnesses observed the unlawful entry and arrest. She claimed these witnesses also saw the police search petitioner's person and clothing at least three times before she was taken to the jail and therefore could confirm she had no heroin in her pocket. However, the declaration stated petitioner was unable to find the witnesses due to the length of the delay in prosecution. Without hearing any evidence to explain the reason for the delay in filing charges, the trial court denied petitioner's motion to dismiss, finding an insufficient showing of prejudice.

The court of appeal reversed and remanded, holding that petitioner had made a prima facie showing of prejudice, which shifted the burden to

the prosecution to justify the delay. (*Garcia* at p. 151.) The court stated that the trial court erred in failing to conduct a hearing requiring the prosecution to justify the delay so that the court could conduct a balancing test between the two equities. (*Ibid.*)

In *People v. Hughes* (1970) 38 Cal.App. 3d 670, 677, the court of appeal indicated that among the factors to be considered in deciding whether defendant was prejudiced by the delay, the death or disappearance of a witness is "the most serious. If witnesses die or disappear during a delay, the prejudice is obvious."

In *People v. Pelligrino, supra,* 86 Cal.App.3d at p. 779, the court held that prejudice resulted from the fact that because of the delay between the crime and the trial, the sole prosecution witness testified not from personal recollection but only with the aid of his official notebook, the sole means of identification and prosecution of dozens of alleged narcotics offenders. In regard to the prosecution's reason for the delay between the crime and bringing formal charges, the court distinguished between investigative needs and a lack of interest on the part of law enforcement, warning that the police cannot simply put their investigation "on the back burner hoping that it will some day simmer into something more prosecutable." (*Id.* at 781.)

The prejudicial effect of loss of personal recollection was also discussed by this court in *People v. Archerd, supra,* 3 Cal.3d at 639, which although ultimately denying relief because of a lack of prejudice demonstrated by the defendant, recognized that lapse of time can cause a prejudicial lapse of memory or other situation that makes defending the case overly difficult. (*Id.* at pp. 639-640; *United States v. Feinberg* (2d Cir. 1967) 388 F.2d 60, 64, 67.)

Feinberg, supra, which exemplifies those situations in which pre-indictment delay generally cannot be said to have caused prejudice, is instructive regarding the instant case. In *Feinberg*, a 5-year delay between the offense and the indictment was held not to constitute a denial of due process because of the defendant's failure to show any prejudice. The defendant was shown to have sufficient memory of the 'essential matters of dispute." (*Feinberg, supra,* at p. 66.) According to the circuit court of appeals, the defendant was able to "testify with specificity as to the events in question." (*Ibid.*) According to the court, defendant was given every opportunity to demonstrate prejudice from the delay, but was only able to point to isolated incidents of dismissed recall not dealing with essential matters in dispute. Further, the offense was immediately and properly investigated. Defendant's recollection was assisted by various documents in

evidence. The record disclosed no failure by defendant to reconstruct what he did not remember. The court further held that until prejudice has been shown by the defendant there should be no inquiry into the reason for the delay (*Ibid.*; see *Archerd, supra,* 3 Cal.3d at 640-641.)

All of the above cases lead to the inescapable conclusion that any balancing test in this case must be resolved in favor of Mr. Cordova and a finding that appellant suffered irreversible prejudice from the negligent failure of the police to conduct a proper investigation.

The initial investigation of this case by law enforcement authorities was characterized by neglect, indifference, and a failure to follow up on possible leads as to the perpetrator of the crime. From the outset of the investigation, the police had every reason to suspect that the killer was someone known to Linda Bullock, Cannie's mother. (7 RT 1497.) It was clear that Ms. Bullock was being evasive, unwilling to give the police accurate information about her known associates, and generally not forthcoming about what she knew. (7 RT 1499.) The police believed that this may have been because of the involvement of a member or members of motorcycle gangs in the crime. (7 RT 1499.) Linda was under the influence during her only interviews with the police (7 RT 1499; 1515.) She eventually went into hiding not long after the murder. (7 RT 1511.) Other

than doing a DMV check and some other unspecified efforts, little was done to find her, in spite of the fact that the police had ascertained she was hiding information from them. (7 RT 1511.) She also told the police a black guy named "John did crime" (13 RT 2987-2988), and that she had had sexual relations with various men in her bedroom around the general time period of the murder. (13 RT 2976.) There was no evidence that the police followed up on any of these leads.

The police received a list from Debbie Fisher, Linda Bullock's house mate, as to the identity of these visitors. (7 RT 1503.) While the authorities said appellant's name never came up, Fisher knew Cordova as a visitor to house and there was no reason why she should not have given his name on the list. (13 RT 2953.) There was nothing in the record to indicate that this list was preserved by the police. Nor was there any indication that the police personally interviewed any of these people.

The police also learned that Linda's social life revolved around the local bars in San Pablo, especially Oscar's and the Esquire. (7 RT 1505-1506.) Inexplicably, virtually no investigation was conducted at the establishments to determine the identity of these acquaintances and to interview them. (7 RT 1507-1508.)

This haphazard, cursory investigation qualifies as the type of police

negligence referred to in *Nelson*. It was evidenced in the pitifully low intensity nature of the investigation in light of the tragic circumstances of the crime; the rape and murder of a young girl in her own home. Considering the severity of the crime, very little effort was made to solve it. The investigation was essentially terminated not long after it began, when the San Pablo Police, beset with internal difficulties, stopped doing any active detective work, instead contracting with the Sheriff's Department. (7 RT 1512.) The San Pablo's Police Department's indifference to this case was so great that it was several years before the San Pablo Police even followed up with the Sheriff. (7 RT 1513.)

The state was not able to provide any sort of adequate explanation for the failure to proceed with the type of investigation that must follow the commission of this serious crime. However, appellant showed the type of prejudice required by *People v. Nelson* to shift the burden to the prosecutor to justify the delay. The police negligence in this case essentially precluded the development of leadsas to suspects that might have led to a resolution of the matter within a reasonable time after the crime. By ignoring possible suspects, failing to collect and preserve important crime scene evidence, and terminating the investigation weeks after it began, the police allowed decades to pass before they found a viable suspect in appellant. During that

time, memories were effectively extinguished and evidence and possible witnesses disappeared.

This is not a case where a defendant simply speculated as to what witnesses and information might have been available if there had been no improper delay. (*United States v. Feinberg, supra,* 388 F.2d.,64, 67.) Appellant demonstrated to the trial court the loss of witnesses who potentially could have shed light on the case and who, if properly interviewed in 1979, might have caused a suspect to be identified, or served to suggest that someone other than appellant committed the crime. In their very detailed written motion (5 CT 1103 et seq) and arguments in the trial court, defense counsel set forth specifically, the names of possible witnesses no longer available and evidence lost. The trial court's conclusion that appellant did nothing more than speculate as to the prejudice that might have been caused by the delay missed the mark, entirely. In very detailed and complete written motion (5 CT 1103 et seq), counsel set forth specifically, the names of possible witnesses who were no longer available, records no longer available and evidence lost.

Relevant witnesses who have died or otherwise became unavailable because of the delay, as stated in the above cited law, are among the factors to be considered by the reviewing court in deciding whether appellant

suffered prejudice by the delay. (*People v. Hughes, supra,* 38 Cal.App.3d at p. 677.) In this case, these witnesses were legion.

Rose Azevedo (5 CT 1128), Charles Greener (*Ibid*), and Michael Hunt (5 CT 1129), neighbors of the Bullocks, all deceased by the time appellant was finally charged, could have provided information that could have established a reasonable doubt as to guilt by substantiating appellant's version of what occurred. In addition, Mr. Hunt reported a suspicious vehicle near the Bullock house the night of the murder. As appellant did not drive, this certainly would have been relevant information. (5 CT 1129.) Several other witnesses made unavailable by the passage of time could have given relevant information and testimony as to the possible involvement of third party suspect William Flores. These witnesses included Mary Flores, Marcelle Martin, Rosemary Hearst, Ann Crews, Nancy Perdue, and Palmira DeSlivera (5 CT 1125-1126; 1139.) All these witnesses could have provided information about Mr. Flores's violent and suspicious behavior, his bizarre sexual attitudes, and his past criminal conduct. (*Ibid.*)

In addition, as stated in the Statement of Facts, Flores committed suicide. Suicide is often precipitated by a feeling of guilt over past actions. He left a suicide note that was destroyed. This note could have provided

information about the reason he killed himself. Drs. Wa Roelfing and Thomas Smith, both deceased at the time of trial, treated Flores after his suicide attempt. They might well have had files and other information regarding why Flores wished to kill himself and logically the meaning of the suicide note he left.(5 CT 1132-1133.)

As indicated in the Statement of Facts, *supra*, the possible involvement of William Flores in the murder of Cannie was essential to the defense, which was that Flores was the murderer and appellant's sperm found in Cannie due to unintended transfer from a non-sexual conveyance. Any additional evidence that Flores was the killer would not only stand to create a reasonable doubt as to whether appellant was the killer, but would have also supported his theory of unintentional transfer.

In addition, as explained in appellant's new trial motion, many associates of Linda Bullock that socialized with her in 1979, were no longer available when appellant was finaly charged. These included people who were with her on the night of the murder and who were well informed about her circle of acquaintances. (5 CT 1130 et seq.) In addition, a person named "Blue" had informed Ms. Bullock that a black man named "John" had killed Cannie. (5 CT 1131.) Other sources of information, known to Ms. Bullock and the San Pablo Police included Patrick Arambula and Timothy

Connolly, who had knowledge of a disturbance at the Bullock house two weeks before the murder. (5 CT 1131.)

It is not mere speculation that these people, all unavailable due the passage of twenty-three years of time, could well have played a direct role in the investigation of this case and could have led to the development of a suspect around the time of the killing. As stated above, the entire police investigation was based upon what Ms. Bullock was prepared to tell them, which was very little. To suspend, and then totally abandon, an investigation of a little girl's rape and murder because her mother was not cooperative is indefensible. Ms. Bullock's desire not to cooperate should have triggered the police to re-double their efforts, not abandon them.

Further, as appellant's counsel explained to the trial court, witnesses to appellant's experience and character while serving in Viet Nam were either lost or their memories too faded to be of much use. (5 CT 1140.) Further, educational, military, and medical records were destroyed, records that could well have provided mitigating evidence for the penalty phase. (5 CT 1144.)

In addition, as stated in the Motion, during the twenty-three year delay caused by the police, many events had occurred in appellant's life that would have had an impact on the penalty phase, including head injuries and

use of alcohol and drugs. (5 CT 1135 et seq.) The memory of witnesses to these events could only have faded as to the their details, and appellant himself could not possibly remember all that had occurred to him over this twenty-three year period of time. These faded memories clearly may be considered in determining prejudice to appellant caused by negligent and indifferent police conduct. (*People v. Hill* (1984) 37 Cal.3d 491, 494.)

The passage of 23 years from the time of the murder to the time of notice to appellant that he was suspected of the offense "presumptively compromises the reliability of a trial in ways that neither party can prove, or for that matter, identify." (*People v. Horning, supra,* 34 Cal.4th at p. 893.) The defense in the instant case was that appellant did not murder Cannie and that he was elsewhere when the murder was committed. Counsel admitted that the sperm purportedly swabbed from Cannie's vaginal vault was appellant's but that it was deposited on her body and from there to the swab through the process of unintended transfer from the bed where she slept with her mother, and that it was another person who actually killed and sexually assaulted Cannie. (AOB, *supra*, at pp. 22 et seq.)

The 23 year delay in bringing charges against appellant far exceeded those delays in the court of appeal cases mentioned above. This period was so long that it made it impossible for appellant to prepare an effective

defense. Appellant's ability, or lack thereof, to recall his whereabouts at the exact time of the crime is of the utmost importance. The fact that appellant cannot specifically state what any of these possible witnesses would have said does not preclude relief, and, in fact, tends to show the severity of the prejudice from the delay. The reliability of the trial was compromised by the passage of so much time that it was impossible for appellant to defend himself. Either through presenting evidence of his true whereabouts the night of the crime or locating and interviewing witnesses who would have otherwise raised a reasonable doubt as to his guilt.

Through his written motion, appellant carried his initial burden to show the required quantum of prejudice due to the delay in prosecution. (*Nelson, supra,* 43 Cal.4th at 1251.) The prosecution could not explain why the police failed to perform the proper investigation. All it could do was point to some rudimentary investigation as to two third party suspects, Rudy Sandoval and William Flores. (7 RT 1522 et seq.)

Considering all of the above, the delay of nearly a quarter of a century between the commission of the crime and its purported resolution- the charging of appellant was by and large caused by a very perfunctory and negligent investigation by the police. The delay in turn created such problems for the appellant in defending his case that a fair trial was

impossible. As such, appellant was denied his right to due process of law under the Fifth Amendment of United States Constitution and the rights to due process and a speedy trial under the California State Constitution. Appellant's conviction must be reversed.

II. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY ALLOWING THE ADMISSION INTO EVIDENCE IN THE GUILT PHASE OF TRIAL APPELLANT'S 1992 AND 1997 CONVICTIONS OF SEXUAL ASSAULT UPON NINA S. AND CURTIS B.

A. FACTUAL BACKGROUND

At Mr. Cordova's trial, evidence was presented over objection, of two incidents in which he had sexually fondled children. On September 26, 1992, Debbie Taylor dropped off her two children, twelve year old Nina and three year old Brandon, to spend the night at appellant's home-in Lakewood, Colorado. (17 RT 3808-3809.) Nina went to bed, alone, but was later awakened by appellant rubbing her chest and buttocks. (17 RT 3810.) She told appellant to stop, and he immediately complied with her wishes. He then hugged her and asked her to please not tell anyone or he would go to jail. (17 RT 3810.) Appellant went into the bathroom, and Nina called her mother to pick her up. (*Ibid.)* When her mother arrived, Nina told her what happened. (17 RT 3811.) Appellant eventually pled guily to attempted

sexual assault of a child. (17 RT 3906.)

On November 22, 1997, Curtis Baker, then ten years of age, attended a party with appellant and others at a house in Denver, Colorado. (17 RT 3905.) While the party was still going on, Curtis and nineteen-year-old Pamela Baughman fell asleep together in an upstairs bedroom. (17 RT 3912-3913.) A short time thereafter, Curtis was awakened by appellant placing his hand down the boy's boxer shorts and rubbing his buttocks. Curtis immediately ran downstairs to tell his father what happened. (17 RT 3914-3915.) Appellant eventually pled to the sexual assault of Curtis. (17 RT 3907.)

B. PROCEDURAL HISTORY

On September 22, 2006, the prosecutor filed a Motion in Limine to Introduce Evidence of Defendant's Prior Sexual Offenses Under Evidence Code section 1108. (5 CT 1272.) In the motion, the prosecutor argued that the two unrelated sexual offenses described above were admissible against Mr. Cordova at trial under Evidence Code 1108. (5 CT 1274.) The prosecution urged, for various reasons, that Evidence Code section 352 did not require the exclusion of that evidence.

In addition to urging admission under section 1108, the prosecutor also argued that evidence of these sexual assaults were admissible under

Evidence Code section 1101 (b) in that they were material to show "defendant's deviant sexual interest in young and helpless people" and relevant to appellant's intent at the time of the instant offense. (5 CT 1278-1279.)

Appellant's Reply to this Motion was filed November 21, 2006, In it, he argued that section 1108 did not apply to the factual situation because the legislative intent was that the statute only applied to situations in which there was some question as to whether the crime itself was committed, not to situations where the question was who committed it. (6 CT 1538-1539.) Appellant further argued that the purpose of the statute was to aid the jury in weighing the credibility of the defendant as opposed to that of the alleged victim, a scenario that did not exist in the instant case. (*Ibid.*)

Secondly, appellant argued that the degree of similarity between the instant crime and the two sexual assault convictions was so slight that evidence of the two assaults would have no relevance to proving appellant's guilt in the instant case. (6 CT 1539-1540.) Appellant argued that "the nature and surrounding circumstances of the prior circumstances of the prior offenses and the alleged crime in the current case have nothing in common, other than fitting the very broad category of sexual offenses." (6 RT 1541.)

Appellant further argues that even if the two sexual assault cases bore some relevance to the instant case, that relevance was substantially outweighed by the unduly prejudicial nature of the of the sexual assaults. Citing to *People v. Falsetta* (1999) 21 Cal.4th 903, 915, appellant set forth the protections afforded to a defendant's due process rights under section 1108.

As stated in *Falsetta,* the chief of these protections is the assurance that Evidence Code section 352 would remain fully operative in the application of section 1108.

To this end, the trial court must:

> Engage in a careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainly of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the main offense to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*Falsetta* at 917; 6 CT 1542.)

Pursuant to the above standards, appellant argued under Evidence

Code section 352, the evidence of the sexual assaults and the instant crimes, the remoteness in time and the substantial danger of prejudice. (6 CT 1542-1545.)

Regarding the application of Evidence Code 1101 (b), in his Reply, appellant argued that there were insufficient similarities between the two sets of crimes to be relevant to any of the issues listed under section 1101 (b). (6 CT 1546 et seq.)

Appellant also argued that the application of section 1108 would violate the constitutional provisions against ex post facto application of the law (6 CT 1550) and would violate defendant's due process and equal protection rights under the United States Constitution. (6 CT 1551 et seq.)

During the hearing on this motion, appellant's counsel also argued that the two sexual assault cases were too remote and dissimilar to have any relevance to Mr. Cordova's propensity to have committed the 1979 crimes. (8 DT 1773-1774; 1779.) The dissimilarity argument was based upon the fact that the sexual assault crimes lacked any forcible conduct, violence, genital touching, brutality, or injury. (8 RT 1776.)

While recognizing that both the dissimilarities and remoteness were factors in its ultimate determination of admissibility, the trial court stated that the question was "one of weighing the probative value (of the sexual

assaults given their remoteness, given the similarities, as against the other section 352 considerations: prejudice, misleading the jury, undue consumption of time and so forth. It's a weighing process, and that's what we are really getting to." (8 RT 1780.)

The trial court then stated that under section 1108, evidence of a defendant's propensity to commit a crime through other sexual offenses is relevant to prove the identity of the perpetrator in the charged sexual crime and while the dissimilarities and remoteness goes to the weight of the evidence, in this case the probative value of this propensity evidence was not outweighed by undue prejudice or any other section 352 consideration. (8 RT 1791-1792.) The court further stated the two assault crimes were "very relevant because (they) show that Mr. Cordova had a propensity to commit sexual offenses, and that's evidence that he's the one who committed (the instant) sexual offenses, by no means conclusive evidence but evidence in that direction." (8 RT 1819.)

Regarding the admissibility of this evidence under Evidence Code section 1101 (b), the trial court found that while the two sets of crimes were not sufficiently similar to raise an inference of identity, they were similar enough to raise an inference of intent. (8 RT 1819; 1822-1823.)

C. GENERAL DISCUSSION OF THE LAW OF SECTION 1108

Evidence Code section 1108 reads as follows:

> 1108. Evidence of another sexual offense by defendant; disclosure; construction of section
> (a). In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to section 352.
> (b) In an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code.
> (c) This section shall not be construed to limit the admission or consideration of evidence under any other section of this code.
> (d) As used in this section, the following definitions shall apply:
> (l) "Sexual offense" means a crime under the law of a state or of the United States that involved any of the following:
> (A) Any conduct proscribed by Section 243.4, 261, 261.5, 262, 264.1, 266c, 269, 286,288,288a,288.2,288.5, or 289, or subdivision (b), (c), or (d) of section 311.2 or section 311.3,311.4,311.10,311.11,314, or 647.6, of the Penal Code.

The seminal case interpreting what the statute meant was *People v. Falsetta* (1999) 21 Cal.4th 903, 911. Its core holding was that by enacting Evidence code 1108, the Legislature implicitly abrogated prior judicial

decisions indicating that evidence of a defendant's propensity to commit certain offenses is per se unduly prejudicial to the defense. By enacting the statute, the Legislature has determined that policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Court ruled that in spite of the fact that the doctrine of exclusion of propensity evidence was "long standing" it was not an "unalterable principle embodied in the Constitution." (*Id* at p. 914.)

The *Falsetta* Court stated that the reason why Evidence Code section 1108 did not violate state or federal Due Process is because the inclusion therein of the requirement that a "careful analysis under Evidence Code section 352 must be conducted by the trial court to assure that the defendant has not suffered undue prejudice." (*Id.* At p. 911.)

The Court then set forth at least some of the factors that the trial court should consider in making this determination. These include the degree of certainly of the Evidence Code section 1108 offenses, the similarity of these offenses to the charged offense, the relevance of the charges, their prejudicial impact on the jurors, the possibility of less prejudicial alternatives and the likelihood of "misleading or distracting the jurors from their main inquiry." (*People v. Falsetta, supra,* at pp. 917-919.)

Falsetta also made it clear that the trial judge's obligation to consider exclusion of this type of evidence under Evidence Code section 352 is to be taken seriously. This court directed that this discretion be "broad" and went so far as to state that there is "no reason to assume" that the trial courts will find that the "prejudicial effect of a prior sex offense will rarely if ever outweigh its probative effect." (*People v. Falsetta, supra,* at p. 919.)

This Court has confirmed that the question of similarity of charged and uncharged crimes remains "relevant to the trial court's exercise of discretion" under section 1108 as well as section 1101 (b). (*People v. Loy* (2011) 52 Cal.4th 46,63.) *Loy* made clear that while section 1108 expanded the admissibility of sex crime evidence beyond that allowed under section 1101 (b), this expansion was not only limited by section 352, but also by the parameters of a "similarity" analysis analogous to, if somewhat less stringent than that employed in section 1101 (b).

Regarding this "similarity" analysis, this Court reasoned in *Loy* that violent sex crimes involving serious bodily injury and/or the use of a deadly weapon do not have a "sufficient similarity" for 1108 purposes to non-violent sex crimes that are facilitated by the defendant's position of relative authority over the victims. (*Ibid.*; *People v. Harris* (1998) 60 Cal.App. 4th

727.)

Regarding this "similarity" analysis, this Court then proceeded to hold that violent sex crimes involving serious bodily injury and/or the use of a deadly weapon do not have a "sufficient similarity" for section 1108 purposes to non-violent sex crimes that are facilitated by the defendant's position of relative authority over the victims. (Ibid.)

Loy was charged with the violent sexual assault and murder of a twelve-year-old girl. The cause of death was asphyxia due to compression of the face and/or neck and/or body. (*Loy, supra,* 52 Cal.4th at p. 53.) Defendant, on two separate prior occasions, committed violent sexual assaults against women by means of choking. (*Id.* at pp. 54-55.) The trial court admitted these prior offenses under section 1108. Defendant argued to this Court that the trial court erred in admitting this evidence because it lacked sufficient similarity to the charged offense. (*People v. Loy, supra,* 52 Cal.4th at p. 63.)

Regarding the issue of the degree of similarity necessary for admission under section 1108, this Court concluded that evidence of Loy's prior sexual offenses had been properly admitted under section 1108. This Court noted that while the previous sexual offenses may not have been sufficiently similar to be admissible under section 1101, they were "not

dissimilar." (*Ibid.*)

Loy identified the following points of similarity. (1) One of the victims was only four years older than the 12-year-old victim was when she died; (2) the defendant had choked both of his previous victims; (3) the forensic pathologist stated that 12-year-old victim had died of asphyxiation; (4) the forensic pathologist testified asphyxiation was the most common means of killing in cases of sexual assault. (*People v. Loy, supra,* 52 Cal.4th at pp. 63-64.) The *Loy* Court found evidence of the choking to be highly relevant and therefore "weighing in favor of admission. (*Ibid.*)

Several recent court of appeal cases also emphasize the importance of the similarity of the instant and uncharged offenses in the trial court's determination as to whether to admit the uncharged offenses in the trial under section 1108. *People v. Miramontes* (2010) 189 Cal.App.4th 1085, 1096 put the issue in terms as to whether "prior incidents of sexual misconduct [are relevant and admissible]for the purpose of showing a defendant's propensity to commit offenses 'of the same type.'" The court of appeal ruled that the current and two sets of offenses were sufficiently similar for section 1108 purposes in that all involved the non-violent sexual touching and lewd behavior in front of young children whom defendant knew from prior occasions. (*Id.* at pp. 1090 et seq.)

In *People v. Escudero* (2010) 183 Cal.App.4th 302, the court also recognized the necessity of finding similarities between the charged and uncharged offenses under section 1108. In *Escudero*, the court found the two sets of crimes to be similar in that all involved taking sexual advantage of females as they slept. The evidence demonstrated that defendant took advantage of vulnerable females regardless of their ages, sexually assaulting them when it was particularly risky to do so. (*Id.* at 306.)

In *People v. Hollie* (2010) 180 Cal.App.4th 1262, the key issue was whether the sexual encounter between defendant and the victim was consensual. The resolution of the consent issue was primarily dependent upon the jury's assessment of the credibility of the victim in the charged offense. The defense admitted that defendant and the victim "had sex," but forcefully attacked the victim's credibility and claimed that the sex acts were "all consensual." "The defense case not only challenged the accuracy of the victim's perception or recollection of events, but also asserted that her version of the incident was entirely concocted to avoid the shame and embarrassment of "having unprotected consensual sex" with a stranger. (*Id.* at p. 1275.) Therefore, evidence of the uncharged sexual assault committed by defendant was vital to the jury's effort to evaluate the credibility of the victim and determine if her account of a forcible sexual assault was

accurate. (*Id.* at p. 1276.)

D. APPLICATION OF LAW TO THE INSTANT CASE

Comparing these cases to the instant case, it is clear that the dissimilarities between the murder of Cannie Bullock in 1979 and the sexual touching of the two children in the 1990's are so compelling as to negate any inference of propensity. The two sets of crimes were not only different in the commission, they were not even of the same general type. The murder was a horrible violent crime, committed in the dark of night in such a way that the victim would not be left alive to testify against the perpetrator. Ostensibly, it was planned to some degree. The perpetrator waited until the adults that lived in the house were not home, gained illegal entrance, murdered Cannie and disappeared from the scene.

In the 1990's cases, there was neither threat nor violence. The crimes were poorly conceived and apparently unplanned. Appellant impulsively entered the rooms of sleeping children and fondled them. He stopped when they told him to stop and did nothing to prevent them from reporting these incidents to their parents or the police. There were other adults in the respective houses when the crimes were committed.

While the two uncharged incidents might have been admissible vis a vis each other, they were not admissible under section 1108 as to the instant

offense. They proved nothing about a propensity of appellant to commit a pre-planned violent rape and murder. To state that a man who has the propensity to commit non-violent, non-injury producing, fondling-type crimes also has the propensity to commit felony rape-murder defies logic. If such were the logical conclusion, then it could be said that a man who once committed a shoplifting offense has the propensity to commit a vicious felony robbery-murder, under the theory that both sets of crimes involve the taking of property.

Appellant's position is fully supported by this Court in its decision in *People v. Abilez* (2007) 41 Cal.4th 472. As with *Loy* and the above cited court of appeals cases, *Abilez* reviewed section 1108 in the context of relevance: that is, whether the uncharged offense supported an inference of a defendant's propensity to commit the charged offense. To arrive at the answer to this question, this Court examined the similarities of the charged and uncharged offenses and their temporal remoteness from one another. Unlike the factual situation in *Loy,* the charged and uncharged offenses were not all crimes of violence. In *Abilez*, the defendant and a co-defendant were charged with the sodomy-murder of a single victim. Abilez attempted to prove to the jury that it was his co-defendant, Vieyra, who did the actual crime. To this end, he attempted to introduce into evidence, under the

umbrella of both Evidence Code sections 1101 (b) and 1108, Vieyra's 1973 juvenile adjudication for unlawful attempted sexual intercourse with a minor.

This Court first discussed the admission of prior illegal sexual acts under section 1101 (b). It cited to its seminal decision in *People v. Ewoldt* (1994) 7 Cal.4th 389, stating the overarching concern in the admission of other crime evidence to convict a defendant of another crime at trial. "*Because evidence of other crimes may be highly inflammatory, its admissibility should be scrutinized with great care.*" (*Abilez, supra,* 41 Cal.4th at p. 501.) (Emphasis provided.)

This Court then exercised that extreme care by employing the *Ewoldt* case in reviewing the admissibility of the prior sexually related offense to prove identity under Code section 1101 (b). To prove identity the "pattern and characteristics of the crimes must be so unusual and distinctive to be like a signature," so that "the highly unusual and distinctive nature of both the charged and uncharged offenses virtually eliminates the possibility that anyone other than the defendant committed the charged offenses." (*Ibid*; *Ewoldt* at p.403; *People v. Balcom* (1994) 7 Cal.4th 414, 425.) The Court then ruled that due to the fact that the prior crime, while sexual in its general nature, was "so different from the instant crime" there was no

inference can be drawn from the prior crime that would lead to evidence that identifies defendant as the perpetrator of the instant offense. (*Abilez, supra,* 41 Cal.4th at p. 501.)

In turning to its analysis under section 1108, the *Abilez* Court used the same type of analysis as it performed in determining that the evidence of the prior sexual offenses was inadmissible to prove defendant's identity in the sexual murder under section 1101 (b). This Court cited to *Falsetta* in explaining its decision.

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible *remoteness*, the degree of certainly of its commission and the likelihood of confusing, misleading, or distracting jurors from the main inquiry, *its similarity to the charged offense,* its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (Emphasis in original text) (*People v. Abilez, supra,* 41 Cal.4th at p. 502 citing to *People v. Falsetta, supra,* Cal.4th at p. 917.)

This Court then found that the remoteness and lack of similarity of the 1973 sex crime to the instant offense precluded the use of the 1973

crime under section 1108. (*Abilez* at p. 502.) While this court did not specify the degree of similarity needed to qualify a prior sex crime for admission under section 1108, it did analogize the weighing process to that used in section 1101 (b). (*Ibid.*)

Abilez confined its analysis to relevancy. *People v. Harris, supra,* 60 Cal.App.4th 727 discussed the related issue of the Evidence Code section 352 analysis that must be done on section 1108 evidence to assure that this section does not violate a defendant's due process rights. In *Harris*, defendant, a mental health nurse was accused of sexually preying upon women who were vulnerable to his advances due to their mental illnesses. (*Id.* at p. 730.) Defendant never used any violence against these women. (*Id.* at 731-732.) The defense to these allegations was that the women in question were hallucinating due to their mental condition. (*Ibid.*)

Over the objection of defense counsel, the trial court permitted the prosecutor to introduce evidence of a vicious rape and assault with a deadly weapon committed by defendant 23 years before the charged offenses. (*Harris* at p. 733-735.) The prosecutor took full advantage of this by arguing to the jury that the evidence of the prior rape proved that defendant assault those who couldn't fight back. (*Id.* at 735.)

The court of appeal overturned defendant's conviction because the

evidence of the prior rape and assault with a deadly weapon charge was inadmissible under section 352, and that defendant's right to due process of law was violated by its admission of evidence against him. In doing so, the court of appeal discussed the meaning of the term "prejudice" under section 352 citing to this Court's holding in *People v. Zapien* (1993) 4 Cal.4th 929, 958.

> The prejudice which section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant highly probative evidence. [Citations omitted.] Rather, the statute uses the word in its etymological sense of "prejudging" a person or cause based upon extraneous factors." (*Harris* at p. 737.)

The court of appeal focused upon both the remoteness of the earlier rape and the dissimilarity between it and the charged crimes in making its determination of section 352 prejudice. While making it clear that there is no "bright line rule" as to the amount of time that passed between the charged and uncharged crimes before there is prejudice, *Harris* held that "23 years is a long time." (*Harris* at p. 739; see *People v. Burns* (1987) 189 Cal. App.3rd 734, 738.) Further, the fact that there was no evidence that defendant was involved in any serious wrongdoing in this 23 year period supported the notion that the admission of the evidence of the prior rape

was prejudicial in the trial of the charged offenses. (*Ibid.*)

Regarding the issue of similarity, the *Harris* court made clear that the commission of a violent sex offense says virtually nothing about a defendant's propensity to commit other types of non-violent sex crimes. (*Harris* at p. 740.) The court of appeal drew a comparison with the similarities required for admission of other crime evidence under Evidence Code section 1101(b), stating that while the similarity in section 1108 cases need not to be of the same degree as in 1101 (b) cases, there has to be at least a "meaningful similarity" between the two sets of crimes in 1108 cases for there to be any probative value even in a propensity sense. (*Ibid.*)

Placing the facts of the instant case upon the legal template created by this Court in *Abilez,* and the court of appeals in *Harris*, it is clear that the two sexual assault cases should not have been admitted by the trial court. As stated above, the entire legislative purpose of section 1108 was to suspend the general law against propensity evidence in certain sex crime cases. However, the law did not obviate the necessary relevant connection between the charged and uncharged crimes. There must be a requisite degree of similarity and temporal nexus between the two sets of offenses.

As in *Abilez,* in the instant case the 1992 and 1997 assaults fail the relevancy tests for reasons of both dissimilarity and remoteness. The instant

case involved charges of a violent rape and murder of a young girl. It was committed in such a way that the assault took place in a house where the victim was alone and unprotected, and ended with the death of the only witness. The 1992 and 1997 crimes were completely dissimilar. While they involved some sexual contact, the crimes involved no force, violence, or threat whatsoever. Appellant never attempted to silence the young witnesses with violence or threats thereof. These were crimes of impulse, committed in the residence where other adults were present, where discovery was almost assured. Other than the fact that the victims were all minors, there were no similarities at all between the two sets of offenses.

Further, not only was there 13 and 17 years respectively between the instant and 1992 and 1997 crimes, the non-charged crimes occurred *after* the instant offense. While nothing in section 1108 specifically precludes the use of sexual offenses that occurred after the charged offense, this court has never ruled on this issue. The vast majority of reported cases that approve the use of section 1108 to show propensity to commit the charged offense deal with other crime evidence that occurred before the charged offense. Logically, there can be little doubt that the relevancy of propensity evidence as to the identity of the perpetrator of a charged offense is much stronger if the uncharged offense occurred before the charged offense. The reason for

this is obvious; incidents that occurred before the instant offense would tend to demonstrate a propensity to commit sexual offenses that clearly *preexist* the charged offense. On the other hand, events that occurred over a dozen years *after* the charged offense do not necessarily speak to a defendant's predisposition many years before. For all the above stated reasons, the trial court erred in using Evidence Code section 1108 as the means of admitting the 1992 and 1997 offenses before appellant's murder jury. In doing so, the court violated appellant's right to due process of law under the Fifth Amendment to the United States Constitution and the concomitant provisions of the California Constitution and the case law for our courts.

A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1986) 386 U.S. 18, 24.) The prosecution cannot meet this burden. This entire judgment must be reversed.

E. DISCUSSION OF THE LAW OF SECTION 1101 (b)

In its Motion to Introduce the Evidence Under Section 1108, the prosecution also maintained that the evidence of the uncharged offenses was properly introduced under Evidence Code section 1101 (b) to prove intent. (5 CT 1278.) The prosecution maintained that appellant's plea of not

guilty "puts all of the elements of the murder and special circumstances in issue for the determination of the admissibility of evidence of past misconduct." (*People v. Balcolm*, supra, 7 Cal. 4th at p. 422.) As such, the prosecution argued that in the instant case it "must prove appellant's deviant sexual interest in young and helpless people." (5 CT 1278.)

Evidence of *intent* is admissible to prove that if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. "In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it. [Citations omitted.]" (*People v. Ewoldt, supra,* 7 Cal.4th at p. 394, fn 2.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "probably harbored the same intent in each instance.'[Citations.]" (*People v. Robbins* (1988) 45 Cal.3d 867, 879; see *People v. Ewoldt, supra,* 7 Cal.4th at 402.)

The degree of similarity between the uncharged act and the charged offense required in to prove intent is less than the similarity needed to prove identity. "[T]he recurrence of a similar result...tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least though not certainly) the presence of the normal, i.e., criminal, intent

accompanying such an act...."(2 Wigmore, supra, (Chadbourn rev. ed. 1979) §§ 302,p. 241.)

The prosecution's argument fails for two reasons. First, this is not a case where it is necessary to negate "inadvertence, self defense or good faith." In the instant case, appellant was charged with first degree murder with the special circumstances allegations that the murder was committed while the defendant was engaged in the commission or attempted commission of the crimes of rape and/or lewd and lascivious acts upon a child under the age of fourteen years. (California Penal Code sections 187, 190.2 (a) (17).)

While the prosecutor relied on the legal bromide that once a defendant has been charged with a crime, all elements of the crime are at issue, the reality of this case is that the evidence in the case leaves no issue of intent at all. When a female is murdered in the course of a vicious rape, there can be no conceivable question as to the actor's intent. The crime of rape is a general intent crime. It only requires the perpetrator's intent to commit sexual intercourse without the consent of the sexual partner. (*Frank v. Superior Court* (1989) 48 Cal.3d 632, 642.) As indicated, this is not a case where there could have been a mistake, good faith or inadvertence on part of the defendant. To suggest otherwise, would to create a legal fiction,

a pretext to allow before the jury prejudicial evidence to "prove" a non-issue.

More importantly, the two sets of crimes are so dissimilar that they cannot possibly support the inference that the defendant "probably harbored the same intent in each instance." The intent of the fondling incidents was just that: a non-violent desire to gratify oneself by touching young children. No force was used or intended. Appellant stopped immediately when the children indicated that they did not consent. The murder of Cannie Bullock evinced a completely different, darker and more savage intent: a forcible rape with physical injury and the murder of the victim. The fact that the crimes were committed against young people does not mean that were committed with the same intent. If the instant case involved the fondling of a child, it would be relevant to admit the other non-charged crime to disprove any proof or inference of inadvertence or mistake. However, such is not the case. Non-charged fondling cases no more prove the intent to commit rape and kill than a minor assault of an uncharged victim would prove intent to kill in the murder trial of another victim. The attempt to link these two classes of dissimilar crimes by a far-fetched theory on intent was nothing less than an obvious pretext to avoid the prohibitions of Evidence Code section 1101 (b).

For all of the above stated reasons, the trial court erred in using Evidence Code section 1101 (b) as the means of admitting the 1992 and 1997 offenses before appellant's murder jury. In doing so, the court violated appellant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, the concomitant provisions of the California Constitution, and the case law promulgated by the courts.

A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The prosecution cannot meet this burden. The entire judgment must be reversed.

III. APPELLANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE TRIAL COURT'S REFUSAL TO ORDER DISCOVERY OF REQUESTED MATERIAL EVIDENCE

A. PROCEDURAL AND FACTUAL SUMMARY

In an informal discovery letter dated January 4, 2005, appellant requested of the prosecution the following discovery regarding the DNA testing done by Forensic Science Associates (hereinafter referred to a

"FSA." (See AOB Statement of Facts at p. 13.)[4]

> Instances of unintended DNA transfer or sample contamination: Please provide copies of all records maintained by the laborator(ies) that document instances of unintended transfer of DNA or sample contamination, such as any instances of negative controls that demonstrated the presence of DNA or the detection of unexpected extra alleles in control or reference samples, and any corrective measures taken. (3 CT 601, 606.)

In a July 12, 2005 response letter, the prosecutor refused to tender this discovery, stating that it did "not believe that the information you are requesting is relevant, nor is it under our custody or control." (3 CT 620.)

On November 14, 2005, appellant filed a Motion to Compel Discovery. (3 CT 583.) In part, that Motion stated that appellant, through informal discovery, had previously requested instances of DNA transfer and/or sample contamination committed by "FSA," the private lab that did some of the DNA analysis in this case. Appellant contended that he had not received this information in spite of the fact that he was entitled to it because it was relevant to the history of the quality of work done by FSA. (3 CT 586.)

Further, appellant pointed out to the trial court that the American

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4. The same request was made in a similar informal discovery letter dated May 6, 2005. (3 CT 606)

Society of Crime Laboratory Directors, the organization which provides accreditation for forensic laboratories, requires accredited crime laboratories that conduct DNA testing to create and maintain records documenting instances of contamination which occurred during testing. (4 CT 767.)

The prosecution's opposition asserted that FSA did not keep such records.

> Instead, they publish a report for each project they undertake. If any such instances had occurred, they would be duly noted in the report. Copies of these reports are kept at FSA on shelves, and number in the hundreds, spanning a period of over 20 years. There is no individual master list maintained that would document and instances of unintended transfer or contamination. To create such a list would require an individual to manually go through each of the hundreds of reports that exist. This is simply too onerous a burden to place on FSA. (3 CT 627.)

The prosecution maintained that there was "no legal requirement for FSA to maintain such a master list, and no legal justification for requiring them to create such a list." (3 CT 627.) The prosecutor further stated that the controlling statute does not permit discovery of this information because it is not relevant to this particular case. (*Ibid.*)

> While it is true that the defense is entitled to any exculpatory evidence, (Penal Code section 1054 (e)), the defense has not make a showing that

> their request is for exculpatory evidence. Exculpatory evidence is defined in *Brady v. Maryland* (1963) 373 U.S. 83, 87 as evidence that is material to either guilt or punishment. Case law states evidence is "material"only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." (Citation omitted)... In this case the defense is asking for some 20 years of reports that may or may not contain evidence of intended transfers and/or contamination in totally unrelated cases. There has been no showing that such an event occurred in this case, or even may have occurred in this case. There has been no showing that, assuming such transfers occurred at some point over the last twenty years, they are in any way related to the case, i.e. (Sic) the same lab techs were involved, or the same testing procedures utilized. The request is overbroad and should be denied.

On December 8, 2005, the trial court conducted a hearing on appellant's motion. (2 RT 215 et seq.) The court credited the prosecutor's argument that the gathering of information from FSA documenting contamination in its cases would require examination of hundreds of files over many years, records that occupy "a whole wall of binders at the FSA labs." (2 RT 219-221.)

The trial court also questioned whether appellant was entitled to the discovery sought under either PC 1054 or the United States Constitution. (2 RT 227.) The court stated that appellant had made no showing that the information sought was exculpatory and that at this point in time,

appellant's request was "just a fishing expedition." (2 RT 228.) The court stated that, in reality, what the defense was seeking was the prosecution to produce the records of all of the FSA projects so the defense could determine if there had been any instances of contamination. The court ruled that appellant was not entitled to that information either under Penal Code section 1054 or the United States Constitution. (2 RT 232.)

The trial court did acknowledge that FSA was part of the prosecution team and that if FSA currently knew of any contamination that might be exculpatory they were under a constitutional obligation to produce it for dissemination to the defense. (2 RT 234.) The prosecutor responded that Dr. Edward Blake, the owner of FSA never told her that any contamination had occurred in the present case. (*Ibid.*)

The prosecutor told the court that when she submitted appellant's discovery request to Dr. Blake, he stated that it was impossible to produce this sort of information because he had 20 years of reports which would have to be individually read to determine the number and nature of instances of contamination. (2 RT 235.) The trial court stated that it would not order that anyone read all of the files, but agreed to withhold its final ruling on this matter until Dr. Blake testified as to this particular pre-trial issue. (2 RT 236-241.)

Dr. Blake testified that he founded FSA in 1978. While he might remember a few anomalous results "off of the top of his head" (2 RT 347), his laboratory kept no separate compendium of unintended transfers or other contamination in its testing. (2 RT 345.) He stated that he was in possession of about one thousand case files and it would take up to a week to cull out the separate instances of contamination requested by appellant. (2 RT 349-350.) Dr. Blake then estimated that out of these one thousand files, perhaps twelve have "some sort of misadventure." (2 RT 357.)

Defense counsel argued that while they still maintained appellant was entitled to all of the information requested, they were willing to limit the temporal scope of the discovery to all instances of unintended of transfer or contamination that occurred between sixty days before or sixty days after FSA's testing done in the instant case. [5] (2 RT 385.)

In spite of this reasonable offer of comprise, the trial court ruled that the defense had failed to make a sufficient showing that evidence of any errors in testing done by FSA in other cases might be relevant to this case (2 RT 394), and denied appellant's request for the material from FSA on this ground. (2 RT 399-400.)

On March 16, 2006, appellant filed an additional Memorandum of

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5. The FSA testing in this case took place on November 18, 2002, December 20, 2002 and May 5, 2004.

Points and Authorities in Support of Motion to Compel Discovery, along with an accompanying Declaration from Dr. Christie Davis. (3 CT 760 et seq.) This additional Motion was a supplemental request for the discovery previously sought from FSA. In it, appellant reiterated that the items sought regarding the contamination of DNA samples are material in that they were exculpatory evidence, or might lead to evidence that was exculpatory or useful for the impeachment of prosecution witnesses. (3 CT 763.) In her Declaration, Dr. Davis specifically stated that "documented instances of unintended DNA transfer or sample contamination should be provided (by FSA) for review as part of the Quality Assurance and Quality Control for forensic DNA testing in this case."

Defense counsel argued that for FSA's testing results to be permitted before the jury, they must be reliable under *People v. Kelly* (1976) 17 Cal.3d 24. (3 CT 764.) To achieve the goal of reliability, in 1994 Congress passed the DNA Identification Act, which indirectly created the DNA Advisory Board (hereinafter "DAB") to develop national standards for quality assurance in DNA testing. (3 CT 765.) In addition, the Federal Bureau of Investigation also sponsors the Technical Working Group on DNA analysis methods (herein after "TWGDAM"), which provides a forum for discussing DNA testing. (3 CT 766.) Counsel further argued "The final

authority for standards withing the scientific forensic community is the American Society of Crime Lab Director (hereinafter ASCLD) which provides for lab accreditation." (3 CT 767.) All these scientific authorities, through specific guidelines either require or suggest that the type of records requested by appellant in this case be kept by a DNA lab. (3 CT 767.) Such guidelines, defense counsel observed, "are deemed the generally accepted practice among the scientific community, therefore, FSA's noncompliance with the standards constitutes exculpatory evidence. The DNA PCR testing in this matter must endure a third-prong *Kelly* hearing before it is admissible, to determine that the laboratory conducted in accordance with generally accepted procedures." (*Ibid.*)

Because FSA did not keep records of contamination incidents, defense counsel argued the laboratory was not in compliance with the DAB, TWGDAM or ASCLD guidelines. As these guidelines are considered the generally scientifically accepted practice in the DNA community, the failure to keep these records should be considered exculpatory evidence under *Kelly* and *People v. Venegas* (1998) 18 Cal.4th 47, 90-93. Proof of FSA's noncompliance with national standards would greatly weaken the strength of the evidence it offers and should be discoverable. (3 CT 768.)

Counsel also argued that the records themselves may contain

exculpatory evidence in that "the rate of contamination is one factor in determining the lab's overall rate of error in the testing it performs. If FSA's records show a great deal of contamination, FSA's results will be deemed less reliable, and therefore less credible." (3 CT 769.)

In addition, counsel argued that since the prosecution intended to introduce the testimony of Dr. Blake and the results of FGDSA's testing, evidence that the laboratory's procedures sometimes resulted in error and contamination would serve to impeach Dr. Blake's credibility. (*Ibid.*)

In its Opposition to defendant's supplemental briefing, the prosecution argued that the issue was not whether there had been any incidents of "misadventure," " but whether FSA's testing methods and documentation of such tests follows generally accepted scientific procedures. These issues can be resolved by testimony by Dr. Blake regarding FSA methods, as well as any defense evidence to show that the methods as testified to are inadequate." (3 CT 790.)

On June 5, 2006, the trial court made its final ruling on this issue, stating that the discovery sought by the appellant were files "completely unrelated" to the instant case and as such the prosecution had "no right and no ability to review those files or compel the laboratory in question, Forensic Science Associates, to produce them." (4 RT 972-973.) The court

further held that the cost and labor involved in the review of these files "would be considerable." (4 RT 973.)

The court also reversed its prior ruling and held that FSA was *not* part of the "prosecution team" with respect to the files in question and that these files were not in the actual or constructive possession of the prosecutor. "Accordingly, the defendant's request to produce the files, to compel the DA (sic) to review them for exculpatory information, is denied. This denial is without prejudice to the defendant seeking to subpoena said files or records directly from FSA, with appropriate notice, if any is required, given to the subjects of those files." (4 RT 973.)[6]

B. INTRODUCTION TO ARGUMENT

This court has made clear that "a defendant generally is entitled to discovery of information that will assist in his defense or be useful for impeachment or cross-examination of adverse witnesses." (*People v. Memro* (1985) 38 Cal.3d 658, 677.) Any defense motion to obtain such information "must describe the information sought with some specificity and provide a plausible justification for disclosure. The trial court's ruling on a discovery motion is subject to review for abuse of discretion." (*People*

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6. Counsel did not attempt to subpoena these records. However, considering the trial judge's insistence the evidence sought was "unrelated" to the instant case, such an action would have been futile.

v. Jenkins (2000) 22 Cal.4th 900, 953.)

As recently acknowledged by the United States Supreme Court, recent advances in DNA technology have essentially created a new gold standard for proof in certain types of criminal cases. "It is literally possible to confirm guilt or innocence beyond any question whatsoever, at least in some categories of cases." (*District Attorney's Office for the Third Administrative District v. Osborne* (2009) 557 U.S. 52, 95-96.) In a case such as this, where the prosecution presented trial testimony that the DNA deposited on or in a rape victims body "matched" a control sample donated by defendant, it is essential for the prosecutor to turn over to the defense *any* evidence that will tend to demonstrate that the DNA evidence was not as conclusive as the government would have the jury believe. The overwhelming evidentiary power of such DNA testing in the eyes of any jury is so great that full defense investigation into *all* possibly exculpatory aspects of such testing is mandated by both the due process clause of the United States Constitution and the California discovery law.

This is especially true in the instant case where no other evidencetied appellant to the scene, let alone to the crime. DNA evidence was not an integral part of the prosecution's case, it was their entire case. Appellant's trial counsel argued that because separate records of contamination were not

kept by FSA, they were not in compliance with either the DAB, TWGDAM or ASCLD guidelines. As these guidelines are considered the generally scientifically accepted practice in the DNA community, the failure to keep these records should be considered exculpatory evidence. (*Ibid.*; See *People v. Venegas*, *supra,* 18 Cal.4th at pp. 90-93.)

In the instant case, there was no question that the evidence sought from FSA was exculpatory to the extent that it might have revealed instances where testing by that laboratory yielded anomalous or erroneous results and instances where technicians failed to follow the laboratory's protocols and techniques. This information would have served to aid in the impeachment of Dr. Blake's testimony regarding the results of his testing. Although Dr. Blake minimized the significance of his laboratory errors, the weight of such error was the jury's province. This was especially true in that FSA was the only independent laboratory that did any DNA testing in this case. The trial court failed to recognize the relevance of this information although it was directly relevant to the trustworthiness of the only evidence the prosecution could marshal to convict him.

Further, the trial court also mistakenly denied appellant's request that the prosecution produce the FSA files for appellant on the ground that the prosecutor was not in the actual or constructive possession of the requested

information because FSA was not part of the "prosecution team." (4 RT 973.)

Considering the above law, this Argument will be presented in three parts; (1) whether the prosecutor was mandated by law to obtain the information sought from FSA; (2) whether there were any public policy considerations in favor of non-disclosure of the information sought; and (3) whether the disclosure of this particular information was required under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution and/or California's statutory discovery scheme.

C. FSA WAS PART OF THE "PROSECUTION TEAM," THEREFORE, THE PROSECUTION HAD THE OBLIGATION TO OBTAIN THE INFORMATION SOUGHT

A prosecutor's duty under *Brady* to disclose material exculpatory evidence extends to evidence the "prosecution team" knowingly possesses or has the right to possess. (*People v. Superior Court (Barrett)* (2000) 80 Cal.App. 4th 1305, 1315.) The "team" obviously includes both investigative and prosecutorial agencies and their personnel. (See *In re Brown* (1998) 17 Cal.4th 873, 879.) In *Kyles v. Whitley* (1995) 514 U.S. 419, 437-438, the Supreme Court held that a prosecutor has a duty to learn of favorable evidence known to other prosecutorial and investigative agencies acting on

the prosecution's behalf, including police agencies. The scope of the prosecutorial duty to disclose encompasses exculpatory evidence possessed by investigative agencies to which the prosecutor has reasonable access. (See *People v. Robinson* (1995) 31 Cal.App.4th 494, 499.)

In addition to police and other governmental investigative agencies, a prosecutor has a duty to search for and disclose exculpatory evidence if the evidence is possessed by a person or agency that has been used by the prosecutor or the investigating agency to assist the prosecution or the investigating agency in its work. The important determinant is whether the person or agency has been "acting on the government's behalf" (*Kyles v. Whitley, supra,* 514 U.S. at p. 437) or"assisting the government's case." (*In re Brown, supra,* 17 Cal.4th at p. 881.) On a showing of plausible justification, discovery should be ordered even if compiling that information would be burdensome. (*Bortin v. Superior Court* (1976) 64 Cal.App.3d 873, 878; *Robinson v. Superior Court* (1978) 76 Cal.App.3d 968, 982-983.)

The trial court's ruling that FSA was not part of the "prosecutorial team" ran contrary not only to the above law, but to common sense, as well. FSA was hired by the prosecutor to do critical forensic testing in this case. The record is clear that the prosecutor ordered such testing with a view to

using its results in its case-in-chief. There can be no doubt that FSA was "acting on the government's behalf." If the Court held otherwise, prosecutors could avoid its discovery obligations, whenever it wished by simply subcontracting its case work to private investigatory or scientific companies and then claiming that they have no obligation to disclose evidence generated by these otherwise private concerns.

The prosecution in this case had the obligation to obtain the information sought from FSA. The next question to be examined is whether there were any public concerns to be considered by this Court in deciding this issue.

D. ANY PUBLIC POLICY CONSIDERATIONS FAVOR DISCLOSURE

This Court has held that the right of the accused to obtain discovery is not always absolute. The trial court retains the discretion to protect against the disclosure of information which might "unduly hamper the prosecution or violate some other legitimate governmental interest," especially when such information does not directly relate to the defendant's guilt.. (*People v. Avila* (2006) 38 Cal.4th 491, 606; see *People v. Luttenberger* (1990) 50 Cal.3d 1, 21.)

For example, juvenile case files are often confidential by operation of law, and their inspection is limited by statute. (See Welf. & Inst.Code, §§ 827, 828; Cal. Rules of Court, rule 1423(a), (b).) In addition, the inspection of personnel records of police officers is also limited under both statute and case law. (California Evidence Code section 1043; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.)

There was nothing in the discovery of the information requested that would have "unduly hamper(ed) the prosecution or violate(d) some other legitimate governmental interest." (*People v. Avila, supra,* 38 Cal.4th at p. 606.) This was not a case, as in *Avila,* where the requested material consisted of certain juvenile records otherwise protected by the law. The only "interest" to oppose the interest of appellant to a fair trial and right to competent representation of counsel, was embodied in the prosecutor's claim that it would have been too much of a burden to gather the information requested. Neither this Court, nor the federal courts have ever held that inconvenience to the prosecutor or his agents, standing alone, is a competing interest in any criminal case, let alone a capital prosecution.

While there are many other examples of such public policy in the law, one thing is clear. No such policy against disclosure exists in a case such as this. There is no conceivable public interest in protecting forensic

laboratories from the revelation of their mistakes. Considering the impact of a DNA "match" on a criminal trial, the public interest lies in complete revelation of such records so that juries, comprised almost exclusively of lay people, can best evaluate the true implication of a DNA result that claims to be able to essentially single out a defendant from all persons that ever lived on earth.

There being no public policy against disclosure of the information sought, the next issue to be discussed is whether the law mandated the disclosure of the specific information sought.

E. DUTIES OF PROSECUTOR TO REVEAL EXCULPATORY INFORMATION TO APPELLANT

The prosecution's obligation to disclose exculpatory evidence stems from two sources. The exact nature of this prosecutorial obligation is dependant upon whether that obligation has a constitutional or statutory basis.

According to the seminal case of *Brady v. Maryland* (1963) 373 U.S. 83, 87, "the suppression by the prosecution of evidence favorable to the accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The obligation of disclosure, as described in *Brady* and its progeny,

is a sua sponte obligation, pursuant to the due process clause of Fifth and Fourteenth Amendments to the United States Constitution, to disclose to the defense information within its custody or control which is material to, and exculpatory of, the defendant. (*Kyles v. Whitley, supra,* 514 U.S. at p. 433; *In re Ferguson* (1971) 5 Cal.3d 525, 532.)

This constitutional duty is independent of and to be differentiated from, the California statutory duty of the prosecution to disclose information to the defense. (California Penal Code§ 1054 et seq.; *Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 378.) The specific statutory obligations of the prosecution read as follows:

> The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies:
> (a) the names and addresses of persons the prosecutor intends to call as witnesses at trial.
> (b) Statements of all defendants.
> (c) All relevant real evidence seized or obtained as a part of the investigation of the offenses charged.
> (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial.
> (d) Any exculpatory evidence.
> (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of

> experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial. (California Penal Code section 1054.1.)

1. Discovery Under the United States Constitution

The prosecution has a duty under the Fourteenth Amendment's due process clause to disclose evidence to a criminal defendant when the evidence is both favorable to the defendant and material on either guilt or punishment. (*In re Sassounian* (1995) 9 Cal.4th 535, 543, citing *United States v. Bagley* (1985) 473 U.S. 667, 674-678; see also *Brady, supra,* 373 U.S. at p. 87.) "Evidence is 'favorable' if it ...helps the defense or hurts the prosecution, as by impeaching one of the prosecution's witnesses." (*Sassounian, supra* at p. 544.) "Evidence is 'material' 'only if there is a reasonable probability that, had [it] been disclosed to the defense, the result ...would have been different.'" (*Ibid.*; accord, *Kyles v. Whitley, supra,* 514 U.S. at pp.433-434.)

Such a probability exists when the undisclosed evidence reasonably could be taken to put the whole case in such a different light as to undermine confidence in the verdict. (*Kyles, supra* at p. 434; *In re Brown, supra,* 17 Cal.4th at pp. 886-887.) As the Court explained in *United States v. Agurs* (1976) 427 U.S. 97, 104, "[a] fair analysis of the holding in *Brady*

indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial." (See *Bagley, supra*, 473 U.S. at pp.674-675.)

Moreover, the duty to disclose exists regardless of whether there has been a request by the accused. Further, the suppression of evidence that is materially favorable to the accused violates due process regardless of whether it was intentional, negligent, or inadvertent. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042; *People v. Kasim* (1997) 56 Cal.App.4th 1360, 1381; see *Strickler v. Greene* (1999) 527 U.S. 263, 275, fn.12; *United States v. Agurs, supra,* 427 U.S. at p. 107; *Brady, supra,* 373 U.S. at p. 87.)

As stated by *Brady*, itself, material evidence is "evidence favorable to an accused," in that "if disclosed and used effectively, it may make the difference between conviction and acquittal." (*Brady*, 373 U.S, at p. 87; Cf. *Napue v. Illinois* (1959) 360 U.S. 264, 269.) As stated by the High Court, "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (*Bagley, supra,* 473 U.S. at p. 676.)

The *Brady* duty extends to evidence that is both favorable to the accused and material either to guilt or to punishment. (*Unites States v.*

Bagley, supra, at p. 674; see *Giglio v. United States* (1972) 405 U.S. 150, 154.)

As a general principle, the standard of prejudice that must be met by a showing of "materiality" as required under *Brady* does not require by preponderance of evidence that disclosure of suppressed evidence would have resulted in defendant's acquittal. (*Kyles v. Whitney, supra,* 514 U.S. at p. 434.) In determining whether the evidence that the government failed to disclose to defendant satisfied the materiality test of *Brady,* the question is not whether would more likely than not have received a different verdict if the evidence had been made available, but whether in its absence he received a "fair trial" that is a trial worthy of the public's confidence. (*Ibid.*)

Further, the High court in *Kyles v. Whitley, supra*, 417 U.S. at p. 435-436, held,

> Once a reviewing court applying *Bagley* has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error enquiry were to apply, a *Bagley* error could not be treated as harmless, since 'a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,' [citations], necessarily entails the conclusion that the suppression must have had'" substantial and injurious effect or influence in determining the jury's verdict,'" [citations]....In sum, once there has been Bagley error..., it cannot subsequently be found harmless...

The High Court has also emphasized tht what constitutes "material" evidence requires that the evidence in question must be considered collectively, not item by item. (*Kyles v. Whitley supra,* 514 U.S. at pp. 434-437.) As stated in *Agurs*,

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other had, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt. (*Agurs, supra,* 417 U.S. at pp. 112-113.)

In addition to the legal standard stated above, the High court has made it clear that the concept of "materiality" must be considered along with the prosecutor's unique position in our criminal justice system. As state in *Kyle v. Whitley, supra*, 514 U.S. at pp. 437-440,

> While the definition of *Bagley* materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding

burden. On the one side, showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police. But whether the prosecutor succeeds or fails in meeting this obligation (whether, that is, a failure to disclose is in good faith or bad faith, see *Brady*, 373 U.S., at 87, 83 S.Ct., at 1196-1197), the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable. His means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. See *Agurs*, 427 U.S. at 108, 96 Sct., at 2399-2400 ("[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure."). This is as it should be. Such disclosure will serve to justify trust in the prosecutor as "the representative ... of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935). And it will tend to preserve the criminal trial, as distinct from the prosecutor's private deliberations, as the chosen forum for ascertaining the truth about criminal accusations ... the prudence of the careful prosecutor should not therefore be discouraged.

As stated by the Ninth District Court of Appeal in *Gonzalez v. Wong* (9th Cir. 2011) 667 F.3d 965, 981 our system,

> Places a duty [on prosecutors] to refrain from improper methods calculated to produce a wrongful conviction. [citations omitted.] Principal among a prosecutor's duties is to provide a defendant with all material exculpatory and impeachment evidence prior to trial. This obligation recognizes that significant advantage the state has over an individual defendant in regards to gathering information, and seeks to level the playing field. We expect our government to fight fair and not deny a defendant evidence that could exculpate him or ameliorate the penalty he faces. Only by giving a defendant this evidence can the government ensure that "justice is done its citizens in the courts." [Citation omitted]

2. Discovery Under California Law

While the concept of "materiality" is relevant to the ultimate application of the above *Brady* law, it is critical to recognize that under California Penal Code section 1054, a defendant is entitled to "any exculpatory evidence" not just "material " evidence. This Court has held that it is not necessary for a defendant to be able to prove "materiality" before being allowed to even see the evidence in question in pre-trial discovery. (*Barnett v. Superior Court* (2010) 50 Cal.4th 890, 901.) While to prevail on an appellate claim that the prosecutor suppressed discovery, the appellant must show materiality. (*Ibid.*) However, no such showing need be

made upon request at trial as there is no way that the defendant can definitively prove the materiality of something they have not seen. (*Ibid.*)

Appellant has demonstrated in the subsection immediately above that the discovery sought was material under federal law. However, even discounting the materiality issue of *Brady* and its progeny, the trial court erred in not ordering the prosecutor to comply with Penal Code section 1054.1 and surrender the documentation of laboratory error that the prosecutor admitted existed.

3. Application of the Above Law to the Instant Case

The trial court's holding that the discovery sought by appellant was "completely unrelated" to the instant case comports neither with law nor the facts of this case. Evidence directly related to the general performance of the FSA lab not only was relevant to the jury's determination as to the truthfulness and reliability of the prosecution's witnesses (*United States v. Bagley, supra,* 473 U.S. at p. 676), but also to the actual determination by the trial court as to whether this evidence should have even been allowed before the jury.

Concerning the issue of reliability, in *People v. Kelly, supra,* 17 Cal.3d at p. 30, this court set forth the following "general principles of admissibility" for opinion testimony based on new scientific techniques:

"(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citations.] *Additionally,* (3) *the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case.* (Emphasis provided.)"

In the instant case, this court held extensive "*Kelly*" hearings, both to determine whether STR DNA testing done by the prosecution had been afforded general scientific acceptance in the relevant scientific community (*People v. Venegas, supra,* 18 Cal.4th at p.74), and to determine whether the laboratory in question "adopted correct scientific procedures" in doing the test. (*People v. Roybal* (1998) 19 Cal.4th 481, 506.)

This so called "third-prong" of the "*Kelly-Frye*" standard for scientific testing operated independently from the question whether STR testing was any longer considered a new scientific technique according to the first prong of "*Kelly*" Even assuming for the sake of this argument, that the use of the general STR process had been accepted by the courts and was no longer subject to a first-prong analysis, this third-prong requirement is still a prerequisite before the trial court can allow any testimony before the jury. "Due to the complexity of the DNA multisystem identification tests

and the powerful impact that this evidence may have on a jury, satisfying *Frye* [i.e., satisfying *Kelly's* first prong] alone is insufficient to place this type of evidence before a jury without a preliminary critical examination of the actual testing proceduresperformed." (*People v. Axell* (1991) 235 Cal.App. 3d 836, cited by *People v. Venegas,supra,* 18 Cal.4th at p. 80.) Although the court in *Axell* was writing about the earlier RFLP testing technique, its observation holds true for the testing methods based on STR's, which are perhaps even more complex.

However, the same trial court that granted appellant's request for a third-prong hearing regarding FSA's use of the Identifiler test kit, itself, it unaccountably denied appellant the opportunity to garner evidence that would have demonstrated to the very same court that FSA may well have failed to follow correct scientific procedures, thereby precluding the admission of the FSA testing results. By Dr. Blake's own admission, there had been several incidents in his lab where the procedures followed by his laboratory yielded tainted and questionable results. He testified that he founded FSA in 1978. He remembered a few "anomalous results" "off of the top of (his) head." (2 RT 347.) However, he stated that no separate compendium was kept on unintended transfers or other contamination in testing done by his lab. (2 RT 345.) He stated that he was in possession of

about one thousand cases files and it would take up to a week to cull out the separate instances of contamination requested by appellant. (2 RT 349-350.) Dr. Blake then estimated that out of these one thousand files, perhaps twelve have "some sort of "misadventure." (2 RT 357.)

The fact that Dr. Blake deliberately chose not to keep these sort of records stands in direct contrast with the standards of the scientific community. Recognizing that the impact of a DNA "match" on a jury is inestimable, various government agencies have undertaken lengthy reviews to assure that DNA "matches" arise from only the most reliable procedures.

As appellant argued in his Memorandum of points and Authorities in Support of the Motion to Compel Discovery (3 CT 639 et seq), to achieve the goal of reliability, in 1994 Congress passed the DNA Identification Act, which indirectly created the DNA advisory Board (hereinafter "DAB") to develop national standards for quality assurance in DNA testing. (3 CT 765.) In addition, the Federal Bureau of Investigation also sponsors the Technical Working Group on DNA Analysis Methods (hereinafter "TWGDAM"), which provides for a forum for discussing DNA testing. (3 CT 766; see *People v. Hill* (2001) 89 Cal.App.4th 48, 56.)

Further, as stated in appellant's Motion, "The final authority for standards within the scientific forensic community is the American Society

of Crime Lab Directors (hereinafter as "ASCLD") which provides for lab accreditation."

All of these scientific authorities, through specific guidelines, either require or suggest that the type of records requested by appellant in this case be kept by a DNA laboratory. (3 CT 767.) Such guidelines are deemed the generally accepted practice among the scientific community, and therefore, FSA's non-compliance with these standards constitutes, in and of itself, exculpatory evidence.

There is no question that it was the prosecutor's choice to use FSA to perform their laboratory work in that case, and there is no question that it was FSA's choice not to keep these type of records, even though it was contrary to the national standards. (2 RT 222-223.) However, FSA's refusal to keep a current compendium on these errors should not inure to the detriment of appellant. To allow the prosecution to avoid tendering this discovery because they chose a laboratory which, contrary to all industry standards, did not keep the information requested, would defeat the requirements of due process. The fact that it would have required FSA to spend some time making up for its failure to follow such basic standards should not have been even considered by the trial court. If FSA felt that it was not worth their time to do what it should have been doing all along

according to the standards, the remedy was for the trial court to impose sanctions on the prosecution, not punish appellant.

The fact that Dr. Blake characterized the mistakes his laboratory made as simply a few "misadventures" did not render the material sought any less material. To allow the opinion of a prosecutor's expert's biased evaluation of *his own work* to stand in place of documentary discovery of the way that work was done, would stand the entire adversarial system on its head.

Yet that is exactly what transpired in this case. By refusing to allow discovery of the files that demonstrated a pattern of error in the workings of Dr. Blake's laboratory, the trial court adopted the prosecutor's argument that the cross-examination of Dr. Blake about the reliability of his laboratory met due process standards.

In its Opposition to Appellant's supplemental briefing, the prosecutor stated that the issue was not whether there had been any instances of "misadventure," "but whether FSA's testing methods and documentation of such tests follows generally accepted scientific procedures." The prosecutor then opined that these issues could be resolved by Dr. Blake's testimony regarding FSA methods, as well as any defense evidence to show that the methods as testified to are inadequate." (3 CT

790.)

The prosecutor cited no authority to support this claim. The reason for this failure is obvious as such a position, under *Brady* and its progeny, runs contrary to the most basic principles of due process and confrontation as mandated by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

The prosecutor presented evidence that essentially identified appellant as the only possible donor in the known universe[7] of the male portion of the DNA found in the victim's vagina. The trial court's ruling foreclosed the discovery of documentation that could refute this assured conviction.

The DNA evidence was not only central to the prosecutor's case; it *was* the prosecutor's case. Without it, there would not have been enough evidence to even effect an arrest, let alone a conviction. In spite of this, the trial court deprived appellant of the opportunity to fully impeach both the FSA witnesses and *the general reliability* of FSA's testing protocols and methods.

Citing to *Crawford v. Washington* (2004) 541 U.S. 36, 61, the United

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7. As related in the Statement of Facts, the test results obtained by FSA matched appellant to the sperm found in Cannie to a factor that ranged from quadrillion to quintillions. There are only approximately 3 ½ billion males on earth.

States Supreme Court in *Bullcoming v. New Mexico* (2011 131 S.Ct 2705, confirmed that the Sixth Amendment's Confrontation Clause confers upon the accused "[i]n all criminal prosecutions,...the right...to be confronted with the witnesses against him." The right to confrontation is rendered hollow if the finder of fact has already assumed that the witness being cross-examined is reliable so that any cross-examination is limited to the words out of the witness's mouth without consideration of extrinsic material to impeach him.

Once again, focus must be placed on the High Court's equation of proper discovery and the jury's search for truth. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and...it is upon such subtle factors such as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend." (*Bagley, supra,* 473 U.S. at p. 676.)

The factors of reliability here are not even remotely subtle. They are manifest. Initially, at least, appellant's entire case depended upon whether or not appellant's jury could be convinced that there was a reasonable doubt as to the DNA test results. The "estimate of the truthfulness" of the witness in question was heavily reliant upon appellant being able to demonstrate that the prosecutions claim of a positive identification of appellant as the

sperm donor was based upon a testing protocol that in the past produced tainted results. If FSA's records show significant contamination errors or other lab mishaps, FSA's results will be deemed less reliable, and therefore less credible.

Dr. Blake's attempt to minimize any instances of contamination and anomalous testing results by his laboratory as "misadventures," was indicative of his attitude that his laboratory could do no wrong, hence, his word alone should be sufficient to satisfy appellant's need to investigate the veracity of his testimony. The trial court's acceptance of this paradigm assured that the third-prong of the *Kelly* test would be placed beyond dispute and the FSA testing results would go to the jury.

The trial court's ruling that the questioning of Dr. Blake without the use of the discovery material requested was sufficient runs afoul of basic High court precedent. The High Court and the Ninth Circuit Court of Appeal have repeatedly held that withheld impeachment evidence does not become immaterial merely because there is some other impeachment of the witness at trial. Where the withheld evidence opens up new avenues for impeachment, it can well be material. (*Banks v. Dretke* (2004) 540 U.S. 668, 702.) *Banks* rejected the argument that since the witness was otherwise impeached, the withheld impeachment evidence was immaterial. (*Ibid.*) In

United States v. Kohring (9th Cir 2011) 637 F.3d 895, 905-06, the Ninth Circuit held that even though a witness was impeached on memory problems, evidence of alleged sexual misconduct and suborning perjury was not cumulative because it "would have added an entirely new dimension to the jury's assessment of [witness]" such that "'there is a reasonable probability that the withheld evidence would have altered at least one juror's assessment [of the evidence]."

Here, the refusal of the trial court to order the discovery requested by appellant assured that the prosecutor would be able to meet the third prong of *Kelly* and that the results of the FSA testing would be admitted before the jury. The trial court's ruling left appellant without the means to mount an effective defense against the prosecutor's claim that appellant was essentially the one and only person on earth that could have deposited the sperm in Cannie.

A trial court error of federal constitutional law requires the prosecution to bear the burden of proving that the error was harmless beyond a reasonable doubt. (*Chapman v. California* 91986) 386 U.S. 18, 24.) The prosecution cannot meet this burden. The entire judgment must be reversed.

IV. APPELLANT WAS DENIED HIS CONSTITUTIONAL RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATE'S CONSTITUTION PURSUANT TO THE UNITED STATE'S SUPREME COURT DECISION IN *CRAWFORD V. WASHINGTON*

A. PROCEDURAL AND FACTUAL HISTORY

As more fully stated I the Statement of Facts at pp. 11-12, in 1996, the Contra Costa County Sheriff's Laboratory forwarded certain vaginal swabs prepared at Cannie Bullock's autopsy to Cellmark for DNA analysis. (15 RT 3439; 3441-3447.)

Cellmark developed extracts of the sperm and non-sperm fractions for these swabs in 1996 and was able to ascertain a limited genetic profile from these fractions. (15 RT 3450; AOB *supra,* at pp. 11-12.) These extracts were used by the Contra Costa County Sheriff's Laboratory in 2002 to obtain the far more discriminating STR profile (16 RT 3635-3636; AOB, *supra*, at p. 15) and resulted in a "cold hit" match with the previously entered profile of appellant. (16 RT 3574-3576; AOB, *supra*, at p. 16)

Cellmark's testing was performed by Paula Yates, who created a file of her testing procedures and results. (15 RT 3450.) Ms. Yates was no longer employed by Cellmark at the time of appellant's trial and was not called to testify before the jury. Instead, another Cellmark employee, Dr. Charlotte Word, gave testimony about Ms. Yates's testing based on her file

reports. (14 RT 3419 et seq; 14 RT 3444.)

In addition to testifying to the nature of the work done by Ms. Yates Dr. Word rendered certain opinions based upon that work. She opined from the contents of the file that the microscopic analysis done by Ms. Yates indicated that the sperm deposited in Cannie Bullock's vaginal vault was undiluted and was collected a few hours after it was deposited. (14 RT 3445.) Dr. Word further opined that this pattern was not consistent with a female who came into contact with the sperm, spent 24 hours walking around and then took a shower or bath before the swabs were taken from the vaginal vault. (14 RT 3446.)[8]

B. LEGAL ARGUMENT

The Confrontation Clause of the Sixth Amendment guarantees to all defendants "the right to be confronted by all witnesses against them." In *Crawford v. Washington, supra,* 541 U.S. at p. 59, the High Court held that Confrontation Clause permits admission of "[t]estimonial statements of witnesses absent from trial...only when the declarant was unavailable and only where the defendant has had a prior opportunity to cross-examine."

In so holding, the Court expressly abrogated its own decision in *Ohio v. Roberts* (1980) 448 U.S. 56. *Roberts* stated an out-of-court statement by

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8. A discussion of significance of this opinion appears below at p 126.

an unavailable witness can be admissible under the Confrontation Clause of the Sixth Amendment as long as that statement fell within a "firmly rooted hearsay exception or bore a "particularized guarantee of trustworthiness." (*Id.* at p. 66.)

In abrogating the above holding of *Roberts*, the High Court stated that the principle function of the Confrontation Clause was to guard against the use of *ex parte* examinations against a criminal defendant. (*Crawford, supra,* 541 U.S. at p. 52.) As such, the *Crawford* Court ruled that the intent of the Framers of the Constitution would not be met if out-of-court statements, regardless of their innate reliability, were admitted before the jury *unless* the declarant of the out-of-court statement was both unavailable and defendant had a prior opportunity to cross examine said declarant. (*Id.* at p. 58.) In rejecting the concept that a hearsay statement, if sufficiently reliable, can satisfy that hearsay exception, the Court in *Crawford* stated "[d]ispensing with because testimony that is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty. This is not what the Sixth Amendment prescribes." (*Id.* at p. 62.)

The Court further stated that the now discredited *Roberts* test would allow the jury to hear evidence that remained "untested by the adversary process" simply because it was judicially determined that said evidence was

"reliable." (*Crawford, supra,* at p. 62.) To follow such a test would replace constitutional requirements with a more relaxed evidentiary standard promulgated by state law. (*Ibid.*)

Five years after *Crawford,* in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 317-318, the United States Supreme Court specifically refused to carve out what might be termed a "forensic evidence" exception from *Crawford.* The *Melendez-Diaz* Court held that a forensic laboratory report created specifically as evidence at a criminal trial is "testimonial" for Sixth Amendment purposes so that the prosecutor could not admit the report without offering a witness to testify to the truth of the report's contents. (*Ibid.*)

More recently, the High Court in *Bullcoming v. New Mexico, supra,* 131 S.Ct. 2705 decided the question central to the instant case, that being

> Whether the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification - made for the purpose of proving a particular fact- through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

In *Bullcoming*, the defendant was charged with an aggravated Driving While Intoxicated charge. The blood alcohol testing was done by Curtis Caylor, who signed the report as the "certificate of analyst."

(*Bullcoming, supra,* 131 S.Ct at p. 2710.) However, Mr. Caylor did not testify. Instead, the prosecutor used the testimony of Garasimos Razatos, a scientist at the same lab where the actual testing was performed, to "qualify" Mr. Caylor's report as a "business record," a designation which the trial court employed to admit the report as evidence of the conclusions therein stated.[9] (*Id.* at pp. 2712-2713.)

The *Bullcoming* Court held that the evidentiary process employed by the prosecution and approved by the trial judge was unconstitutional in that it violated the Confrontation Clause of the Sixth Amendment. The High Court reiterated its holding from *Crawford* that the Confrontation Clause permitted admission of testimonial statements of witnesses absent from trial only where the declarant was unavailable *and* defendant had a prior opportunity to cross-examine him or her. (*Bullcoming, supra,* 132 S.Ct. at p. 2713.) To qualify as a "testimonial" statement, the statement must have the "primary purpose" of "establishing or proving past events potential to later criminal prosecution." (*Davis v. Washington* (2006) 547 U.S. 813, 822; *Bullcoming, supra,* 131 S.Ct. at p. 2716, fn 6.)

It is clear from an examination of the facts of the instant case and the above law that the testimony of Dr. Word violated appellant's Sixth

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9.The report indicated that defendant had a blood alcohol level of .21 grams per hundred millimeters, indicating that he was very intoxicated. (*Id.* at p. 2710.)

Amendment right to confrontation of the witnesses arrayed against him. While the prosecutor did not attempt to introduce Ms. Yates' report, it was clear that Dr. Word used it as the basis for her testimony. This was in direct contravention of the holding in *Bullcoming*. Dr. Word was not present during the testing that Ms. Yates performed for Cellmark and took no role in performing the tests. Having Dr. Word testify did not constitutionally satisfy *Bullcoming,* as the report was clearly testimonial and Ms. Yates was never subjected to cross-examination.

The prejudice of this constitutional error is clear. The work done by Cellmark was not only used to establish a PCR profile in 1996, it also provided the DNA sperm and non-sperm abstracts that were used to ultimately create the STR profiles by the Contra Costa County Criminal Laboratory in 2002. (AOB at p. 13.) These STR profiles were able to discriminate to a factor of more than a quadrillion, creating, in the jury's mind, the inevitable association between the sperm portion of the sample taken from Cannie and appellant. Therefore, the ability of appellant to confront the person who actually performed the work for Cellmark was critical to the defense.

In addition, due to this constitutional error, Dr. Word was permitted to improperly opine that the evidence analyzed by Ms. Yates indicated that

the defense theory of unintentional transfer was inconsistent with that evidence, but consistent with the theory that the person who donated the sperm murdered Cannie soon thereafter. (14 RT 3445-3446.)

The trial court's error in not barring the admission of the testimony of Dr. Word violated appellant's rights under the Confrontation Clause of the Sixth Amendment of the United States Constitution. This error is one of constitutional dimension, and as such the prosecution must prove that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.) The state cannot meet this burden and the death judgment must be reversed.

V. THE PROSECUTOR VIOLATED APPELLANT'S RIGHT TO DUE PROCESS OF LAW BY IMPROPERLY MISLEADING HE JURY IN HER ARGUMENT

A. FACTUAL AND PROCEDURAL HISTORY

William Flores was a viable third party suspect in this case. (AOB, *supra,* at pp. 7-10.) Until the "cold hit" "match" to defendant in 2002, Mr. Flores had been the only viable suspect in the killing of Cannie Bullock. Police suspicions were drawn to Mr. Flores because of motive, opportunity, past history and various incriminating statements he made to law enforcement.

What also drew police attention to Mr. Flores was the discovery of a

sewing machine repair manual found during the initial police canvass of the house in which Cannie lived at the time she was murdered. The residents of the house had never seen this manual before. (AOB, *supra*, p. 5.) Mr. Flores' sister told Detective Harrison that her mother had two sewing machines, a Sears and a Singer, and she was fairly certain that she recognized the sewing machine booklet found at the murder scene as that belonging to her mother. (AOB, *supra* at p. 29.)

During the trial testimony of Detective Harrison, appellant attempted to introduce into evidence Exhibit "O." This exhibit was a letter from Detective Harrison's case file that bore Mr. Flores's name and was addressed to a correspondence school for sewing machine repair. This letter corresponded to the note Mr. Flores once wrote indicating that one of his goals was to become a sewing machine repairman. (18 RT 4102.)

The prosecution objected to the admission of this letter because it lacked foundation. The trial court sustained this objection. (18 RT 4101-4102.)

During the prosecutor's guilt phase rebuttal argument, the prosecutor argued that there was nothing in the case that connected Flores with the sewing machine manual found in Cannie's house. (18 RT 4285-4286.) This was patently untrue, as Exhibit "O," which the prosecutor successfully

suppressed, directly connected Mr. Flores with the sewing machine manual.

B. LEGAL ARGUMENT

As stated by the Ninth Circuit Court of Appeal in *Gonzalez v. Wong, supra,* 667 F.3d at p. 981, our system,

> Places a duty [on prosecutors] to refrain from improper methods calculated to produce a wrongful conviction." [Citations omitted.] Principal among a prosecutor's duties is to provide a defendant with all material exculpatory and impeachment evidence prior to trial. This obligation recognizes the significant advantage the state has over an individual defendant in regards to gathering information and seeks to level the playing field. We expect our government to fight fair and not deny a defendant evidence that could exculpate him or ameliorate the penalty he faces. Only by giving a defendant this evidence can the government ensure that "justice is done its citizens in the courts." [citation omitted.]

A prosecutor has a special duty commensurate with his unique power to assure that defendants receive fair trials. (*United States v. LePage* (9th Cir. 2000) 231 F3d 488, 492.) It has been long held by the United States Supreme Court that, "it is as much [the prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate method to bring about one." (*Berger v. United States* (1935) 295 U.S. 78, 88.) The prosecutor

> is the representative not of any part to a

> controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. (*People v. Fierro* (1991) 1 Cal.4th 173, 207-208.)

Improper comments by prosecutors that tended to mislead the jury as to the critical issue in the case can "so infect the trial with unfairness as to make the resulting conviction a denial of due process." (*Connelly v. DeChristoforo* (1974) 416 U.S. 637, 643; see also *Caldwell v. Mississippi* (1985) 472 U.S. 320, 336.)

The prosecutor at Mr. Cordova's trial did not live up to her responsibility under the law, in arguing that no evidence connected Mr. Flores with the sewing machine manual, even though she herself had arranged the exclusion of the evidence that would have made that connection. This Court is one of the few who has held that this type of prosecutorial conduct is permissible in state court. (*People v. Lawley* (2002) 27 Cal.4th 102, 156.) Courts in other jurisdiction have held that a prosecutor commits misconduct when he or she argues facts knowing them to be untrue. (See *United States v. Bluefield* (9th Cir. 2002) 312 F.3d 962; *United States v. Reyes* (9th Cir. 2009) 577 F.3d 1069; *Davis v. Zant* (11th Cir. 1994) 36 F.3d 1538, 1547-1548.)

As stated by the High Court in *United States v. Young* (1985) 470 U.S. 1, 18-19, the reason for holding a federal prosecutor to such a high standard is a "prosecutor's opinion carries with it an imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." There is good reason for state prosecutors to be held to this high standard. Appellant respectfully requests that this Court reconsider its decision in that case.

VI. FORENSIC SCIENCE ASSOCIATES USE OF THE IDENTIFILER STR TEST KIT WAS A NEW SCIENTIFIC PROCEDURE AND THE TRIAL COURT ERRED IN REFUSING TO GRANT A FIRST-PRONG *KELLY/FRYE* HEARING TO DETERMINE WHETHER THE USE OF SAID KIT WAS GENERALLY ACCEPTED IN THE SCIENTIFIC COMMUNITY THEREBY VIOLATING APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND FAIR DETERMINATION OF GUILT AND PENALTY UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. INTRODUCTION

Forensic Science Associates, a private forensic laboratory, performed several DNA tests on swabs taken from swabs obtained from Cannie Bullock during her autopsy. The testing was done by FSA employee Alan Keel. Mr. Keel used a new STR multiplex test kit, the Identifiler, that simultaneously tested alleles at 15 sites, as compared to the 13 sites used by

the Cofiler and Profiler Plus kits. The latter kits pre-dated the Identifiler kit and had been used by the Contra Costa County Criminal Laboratory previously in obtaining their test results. (16 RT 3779.)

Before trial, defense counsel challenged the acceptance of the Identifiler technology and the admissibility of the results from that test under *People v. Kelly, supra,* 17 Cal.3d 24. The trial court took evidence at the hearing and denied the motion.

At appellant's trial, Mr. Keel testified that the DNA profile of appellant obtained using the Identifiler test matched the profile of the sperm fraction from the autopsy samples. Mr. Keel calculated that the statistical frequency for appellant's profile to be 1 in 13 billion trillion for Hispanics, 1 in a trillion trillions for African Americans, and 1 in 134 trillion for Caucasians. (16 RT 3783-3784.)

B. PROCEDURAL SUMMARY

On January 25, 2006, appellant filed a Memorandum of Points and Authorities in Support of Request for *Kelly* Hearing. (3 CT 639 et seq.) In part, that Memorandum argued that the Identifiler kit used by FSA in this case has never been subjected to the "first-prong analysis" of *People v. Kelly* (1976) 17 Cal.3d 24. (3 CT 662.) Appellant maintained that the results from the Identifiler kit cannot be used as evidence unless the kit is

found to be generally accepted as reliable among the relevant scientific community. (*Id.* at p. 32.)

Appellant's counsel maintained that the Identifiler kit is materially distinct from any other PCR/STR kits that have gained acceptance from the scientific community and the courts. (3 CT 672.)

On May 3, 2006, a hearing was held to determine whether the trial court would hold an additional "first-prong" *Kelly* hearing as to whether the Identifiler kit was accepted as reliable by the DNA community. (3 RT 570 et seq.) Marc Taylor, a respected DNA laboratory owner and forensic scientist testified for the defense. (3 RT 573 et seq.) Mr. Taylor testified that his laboratory did not use the Identifiler kit. (3 T 592.) He stated that there were modifications that has to be done on this kit because of artifact problems. (*Ibid.*)

Mr. Taylor also stated that there were several other differences between the Identifiler kit and the older kits that have been approved by the courts. (3 RT 594-597.) He also stated that there are questions in the scientific community as to whether more modification had to be performed on the Identifiler kit to make it reliable. (3 RT 600.) Mr. Taylor further testified that there was insufficient information to allow the scientific community to determine whether the Identifiler's new components were

reliable. (3 RT 605.)

David Stockwell, who worked for the Contra Costa County Criminal Laboratory, testified for the prosecution. (3 RT 647 et seq.) Mr. Stockwell testified that the Identifiler methodology was generally accepted in the scientific community. (3 CT 651.) Mr. Stockwell also testified that this test kit has been used by the California Department of Justice and many other county laboratories in California, as well as out-of-state laboratories. (3 RT 653.) However, upon cross-examination, the witness stated that there was very little independent validation of the Identifiler kit as compared to the better established kits such as Profiler and Cofiler. (3 RT 674-678.)

After hearing the testimony and argument, the trial court ruled that it did not believe that the methodology used in the Identifiler kit was new and that the Identifiler kit's methodology had gained acceptance by the relevant scientific community, hence, allowing trial testimony as to its use and results in the instant case. (3 RT 686.)

C. LEGAL ARGUMENT

The admissibility of expert evidence pertaining to a new scientific technique is determined by applying the following analysis set forth by our Supreme Court . " '(1) [T]he reliability of the method must be established, usually by expert testimony, and (2) the witness furnishing such testimony must be properly qualified as an expert to give an opinion on the subject. [Citation.] Additionally, the proponent of the evidence must demonstrate that correct scientific procedures were used in the particular case. [Citations.]' " (*People v. Leahy* (1994) 8 Cal.4th 587, 594, quoting *People v. Kelly, supra*, 17 Cal.3d at p. 30.)

This test was adopted from *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013, which was overruled in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579. Nevertheless, *People v. Kelly and its progeny continue to represent the law of this state.*

With respect to the first prong of this test, "reliability" means that the technique " must be sufficiently established to have gained general acceptance in the particular field in which it belongs.'" (*People v. Kelly, supra,* 17 Cal.3d at p. 30.) In determining whether there has been "general acceptance," "[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the

technique is generally accepted in the relevant scientific community." (People v. Barney (1992) 8 Cal.App.4th 798, 810.) Courts "must consider the quality, as well as quantity, of the evidence supporting or opposing a new scientific technique. Mere numerical majority support or opposition by persons minimally qualified to state an authoritative opinion is of little value ...." (*People v. Leahy, supra,* 8 Cal.4th at p. 612.)

In the instant case, there was insufficient evidence to allow the trial court to reach the conclusion that the use of the Identifiler kit had gained acceptance in the relevant scientific community.[10] As stated argued by trial counsel, the Identifiler kit is quiet different in several aspects that the other previously accepted kits. Both the number and loci of the genomic cites are different. (3 CT 672.) Further, there are different procedural steps employed in the Identifiler kit. (*Ibid.*) The Identifiler kit is not simply a different version of the same methods employed in the two other kits. The newer kits employs different individual techniques using different markers and primers. (3 CT 671.)

As such, the trial court erred in foregoing a first-prong *Kelly* hearing as this error resulted in the reversible prejudice to appellant and deprived

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10. The court of appeal in *People v. Jackson* (2008) 163 Cal.App.4th 313 held that the Identifiler DNA test kit did not require a first-prong *Kelly* hearing to determine its scientific acceptance. However, this Court has never ruled upon this issue.

him of due process of law, a fair trial, and a fair determination of guilt and penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

VII. THE TRIAL COURT VIOLATED APPELLANTS RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL AND RIGHT TO A FAIR DETERMINATION OF GUILT AND PENALTY BY ALLOWING THE PROSECUTOR TO PRESENT EVIDENCE THAT APPELLANT WAS DEFINITELY THE SOURCE OF THE SPERM FOUND INSIDE CANNIE BULLOCK'S BODY

A. FACTUAL AND PROCEDURAL SUMMARY

During the guilt phase of the trial, appellant's counsel made an oral motion that the trial court enter an order to bar the prosecution's DNA experts from testifying that the sperm recovered from Cannie's Bullock's body originated from appellant. (15 RT 3403.) Counsel argued that while the experts could properly testify as to the rarity of appellant's genetic profile among the general population[11], they should not be allowed to definitively state that the sperm recovered from Cannie was appellant's. (*Ibid.*)

The prosecutor argued that such testimony would be appropriate as the rarity statistics demonstrated that appellant's genetic profile was unique and different from all other people on earth. (15 RT 3404-3409.)

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11. As stated in Argument VI, *supra,* the rarity ratio of appellant's genetic profile exceeded the number of persons on earth.

Appellant's counsel countered by stating that the determination of uniqueness is not within the current realm of scientific expertise. (15 RT 3409.) The trial court stated that it would take the matter under consideration. (15 RT 3410-3413.)

The trial court entertained further discussion of the matter. The prosecutor stated that the current state of DNA science allows for an expert to state that a DNA profile is like fingerprints in that no two people are alike. (16 RT 3555-3556.) Appellant's counsel stated such testimony would be nothing more than an non-expert interpretation of the mathematics of rarity ratios, a matter that should be left to the jury. (16 RT 3564-3565.) Ultimately, the trial court ruled in favor of the prosecution and allowed testimony that appellant was the donor of the sperm found in Cannie Bullock's body. (16 RT 3571.)

Ultimately, David Stockwell, of the Contra Costa County Criminal Laboratory, testified that because of the rarity statistics, he was able to form an opinion "to a reasonable degree of scientific certainty," that the source of the sperm found in the victim was appellant. (16 RT 3644.)

B. LEGAL ARGUMENT

In *Brown v. Farwell* (9th Cir. 2008) 525 F.3d 787(rev'd on another ground *sub nomine McDaniel v. Brown* (2010) 558 U.S. 120), the Ninth

Circuit Court of Appeals addressed this issue, which has become commonly referred to as "source attribution."

In *Brown*, defendant was charged with the sexual assault of a nine year old girl. (*Brown* at p. 790.) The assailant's sperm was found in the underwear of the young victim. The prosecution's DNA expert initially testified that based upon her testing and statistical analysis thereof, "only 1 in 3,000,000 people randomly selected from the population would also match the DNA found in (the victim's) underwear (random match probability.)" (*Id.* at pp. 795-796.)

After the prosecutor asked her to put this statistic in a percentage form, the expert testified that there was a 99.99967 percent chance that the DNA in the victim's underwear was defendant's. (*Ibid*) The *Brown* court referred to this percentage as "source probability.) (*Ibid.*)

The *Brown* Court reversed defendant's conviction, in part because the "source probability " testimony was unreliable because it essentially stated that science has established that there was a 100% chance that defendant was guilty. (*Brown* at p. 795.) The court stated that this was an incorrect assertion and falls "directly into what has become know as the 'prosecutor's fallacy'." (*Ibid*) The court went on to explain that the fallacy "occurs when the prosecution elicits testimony that confuses source

probability with random match probability."(*Ibid.*) In doing so the court stated that the "prosecution errs when he presents statistical evidence to suggest that the [DNA] evidence indicates the likelihood of the defendant's guilt rather that the odds of the evidence having been found in a randomly selected sample." (*Ibid*; see *United States v. Shonubi* (E.D.N.Y. 1995) 895 F.Supp. 460, 516, vacated on other grounds 103 F.3d 1085.)

The *Brown* court also quoted from *United States v. Chischilly* (9th Cir. 1994) 30 F.3d 1147, 1154 which stated "[to] illustrate (the prosecutor's fallacy), suppose...evidence establishes that there is a one in 10,000 chance of a random match. The jury might equate this likelihood with source probability by believing there is a one in 10,000 chance that the evidentiary sample did not come from the defendant."

The *Brown* Court concluded that this fallacy is dangerous, as the probability of finding a random match "can be much higher that the probability of matching one individual, given the weight of the non-DNA evidence. (*Brown, supra,* 525 F.3d at 795.)

The *Brown* decision was eventually reversed by the United States Supreme Court in *McDaniel v. Brown* (2010) 558 U.S. 120. However, the High Court never stated that "source attribution" evidence should be admissible in state courts, and indeed agreed that it was erroneous to equate

the random match probability with the probability that defendant is the source of the DNA. (*McDaniel, supra,* 558 U.S. at pp. 128-130.) The Court reversed on the basis that considering all of the evidence presented to the jury, the "source probability" evidence did not cause the overall DNA evidence to be unreliable. (*Id.* at p. 672-673.)

The High Court acknowledged, and even the government conceded that its trial expert overstated the probative value of the evidence by "failing to dispel the prosecutor's fallacy." (*Ibid.*)

In the instant case, a prosecution expert was improperly allowed to perpetrate this prosecutor's fallacy to the jury. According to *Brown*, this fallacy confuses the rarity of the profile, with the "odds" of defendant being guilty, making the evidence presented against appellant unreliable. Appellant's jury was in effect told that the scientific community was able to say that appellant was guilty.

The introduction of this unreliable evidence created reversible prejudice. The only evidence of appellant's guilt were the DNA test results. The conflation of these results in such a manner so that they conclusive brand appellant as the guilty party demands that appellant's conviction be reversed as it violated appellant's right to due process of law, a fair trial, and a fair determination of guilt and penalty under the Fifth, Sixth, Eighth,

and Fourteenth Amendments to the United States Constitution.

PENALTY ISSUES

VIII. DUE TO THE TRIAL COURT'S IMPROPER INSTRUCTION TO THE JURY PANEL, APPELLANT WAS DEPRIVED OF HIS RIGHT TO A FAIR DETERMINATION OF THE PENALTY UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. INTRODUCTION

A trial court is not bound to give any sort of instructions at the outset of voir dire. However, when it chooses to do so, it also assumes that responsibility of giving *proper* instructions. Before a single juror was selected, the trial court improperly instructed all of the prospective jurors, including those that would eventually sit. As these instructions were the only law that the jury would be given until the very end of the deliberative process, the jury necessarily relied on these constitutionally defective instructions in its evaluation of the evidence presented to it.

The instructions complained of herein touched the very essence of the California death penalty sentencing scheme. They defied this Court's admonitions about instructions that went to the mandatory imposition of the death penalty. These instructions stood in contravention to this Court

decision of *Boyde v. California* (1990) 494 U.S. 370. The reading of these instructions misled the jury into believing that, in some cases, the death penalty was mandated by law. Therefore, the death judgment must be vacated.

B. FACTUAL AND PROCEDURAL SUMMARY

The selection of the jury proceeded in the following fashion. Over the objection of counsel who had requested a fully sequestered "*Hovey*" voir dire (8 RT 1667-1670), the trial court conducted the voir dire of the jury in groups of thirty prospective jurors. (10 RT 2175.) The first group was questioned on December 18, 2006 (10 RT 2177 et seq), the second group on December 19, 2006 (11 RT 2417 et seq), and the third group of thirty on December 20, 2006. (12 RT 2662 et seq).

As part of the voir dire process, before actually questioning the prospective jurors the trial court instructed them on various points of the law pertaining to their duties. As part of these instructions, the trial judge said to the first panel of thirty, "[i]f the jury found the circumstances in aggravation so substantially outweighs those in mitigation that it warrants the imposition of the death penalty, you should vote for the death penalty. If

it finds they do not, they will vote for life without the possibility of parole." (10 RT 2201-2202.)

A similar instruction was given to the December 19, 2006 panel when the trial judge stated, "[i]f the jury found that the circumstances in aggravation so substantially outweighs those in mitigation that it warrants the imposition of the death penalty, then you should for the death penalty." (11 RT 2439.)

The third panel also received a similar instruction, "[i]f you find, and only if you find, that the aggravating factors so substantially outweigh the mitigating factors that in your mind it warrants the imposition of death, then you vote for death. Any only if you find that the mitigating factors outweigh the aggravating factors that the life without possibility of parole is warranted, then you should vote for that." (12 RT 2684.)

C. LEGAL DISCUSSION

A trial court errs when it instructs the jury that "it shall impose a sentence of death," unless such an instruction is accompanied by additional instructions that make fully clear the weighing process that must take place within the mind of each individual juror. (*People v. Brown, supra,* 40 Cal.3d at p. 541; *People v. Burgener* (1986) 41 Cal.3d 505, 542-543.) Not only must the jurors be informed that the decision must be an individual

one, but also that they are free to assign whatever moral or sympathetic value they deem appropriate to each and all of the factors they are permitted to consider, especially factor (k). (*People v. Brown, supra,* 40 Cal.3d at p. 541.)

As stated in *People v. Murtishaw, supra,* 48 Cal.3d at p. 1027, the 1978 death penalty law, under which appellant was tried "should not be understood to require any jury to vote for the death penalty unless, upon completion of the weighing process, he decides that death is the appropriate penalty under all the circumstances." This Court proceeded to explain

> Each juror must assign whatever moral or sympathetic value he deems appropriate to the relevant sentencing factors, singly and in combination. He must believe aggravation is so relatively great, and mitigation comparatively minor, that the defendant serves death rather than society's next most serious punishment, life in prison without parole.

The deletion of such instructions from the trial court's voir dire instruction improperly affected the jury's penalty determination that appellant should be executed rather than be given a sentence of life without parole. (*People v. Cooper* (1991) 53 Cal.3d 771, 845.) In *Brown*, this Court explained that Penal Code section 190.3 was constitutional, but had the potential of confusing the jurors by suggesting that the death penalty was

mandatory under certain circumstances. *Brown* further stated that the only thing that could preserve the constitutionality of the statute was a full set of instructions that informed them that they could individually weigh all mitigating, as well as aggravating factors, before arriving at their personal assessment of moral culpability. (*Brown, supra,* 40 Cal.3d at pp. 542-545.)

The Constitutional necessity of giving such supplemental instructions along with the "shall" instruction, was endorsed by the United States Supreme Court in *Blystone v. Pennsylvania* (1990) 494 U.S. 29 and *Boyde v. California* (1990) 495 U.S. 924. The Court made it clear that while the jury may be instructed that under certain circumstances they "shall" impose the death penalty, they must also be instructed that imposition of such a penalty is permissible only if they are also instructed that they must consider all mitigating evidence in making their decision. (*Blystone* at p. 307; *Boyde* at p. 377.)

The rationale of the High Court rested to a great extent on the axiomatic principle established in *Boyd v. United States* (1926) 271 U.S. 104, 107 which stated "[i]n determining the effect of (an) instruction on the validity of respondent's conviction, we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall

charge." (*Boyde v. California, supra,* 495 U.S. at p. 378.)

In the instant case, there was but one instruction given to the prospective jurors, and it was the "shall" instruction. There were no accompanying instructions given. There was no formal explanation of the weighing process, nor the actual nature or definition of the aggravating and mitigating factors. (See *People v. Adcox* (1988) 47 Cal.3d 207, 269.) The jurors proceeded through the subsequent voir dire, the entire trial, guilt and the evidentiary portion of the penalty phase, with the mistaken assumption that the death penalty was indeed mandatory if aggravating factors "outweighed" mitigating circumstances and did so with no knowledge of what these factors were or how they should be factored in their decision. The jurors also went uninformed as to the *individual* nature of the determination of the above.

As such, appellant was deprived of a fair determination of his penalty under the Eighth and Fourteenth Amendments of the United States Constitution and the death judgment must be reversed.

IX. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, AND REASONABLE DETERMINATION OF PENALTY PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NONSTATUTORY AGGRAVATION IN THE FORM OF APPELLANT'S PRIOR ACTS OF SEXUAL TOUCHING

A. FACTUAL SUMMARY

The facts pertinent to this issue are the same as the facts pertinent to Argument II, *supra.* In 1992 and 1997, appellant was convicted of two non-violent sexual assaults on minors. Argument II argued that the trial court committed reversible error by allowing the prosecutor to present evidence of the convictions and the facts surrounding them under Evidence Code section 1108 and 1101 (b) in the guilt phase. This argument herein pertains to the trial court's error in allowing the prosecutor to use these incidents as aggravating factors in the penalty phase under Penal Code section 190.3(a), "circumstances of the offense." (19 RT 4370.)

B. DISCUSSION OF LAW OF STATUTORY FACTORS IN AGGRAVATION

Penal Code section 190.3 sets forth the procedure that a jury must use in reaching the penalty determination in a capital trial. This language, derived from the 1978 initiative made certain fundamental changes from the 1977 death penalty law, which it superseded. The most critical change was described by this Court in *People v. Boyd, supra,* 38 Cal.3d 762, 773

> [c]rucial change in the method by which the jury determines whether to impose the death penalty - a change which compels us to depart from our language in *Murtishaw.* Under the 1977 version of section 190.3 the jury must "consider, take into account and be guided by the aggravating

> and mitigating circumstances" enumerated in that section. The statute, however, provided no further guidance or limitation to the jury's sentencing discretion. In the absence of such a limitation, the jury was free, after considering the listed aggravating and mitigating factors, to consider any other matter it thought relevant to the penalty determination. The 1978 initiative, by contrast, provided specifically that the jury "shall impose a sentence of death if [it] concludes that the aggravating circumstances outweigh the mitigating circumstances. If [it] determines that the mitigating circumstances outweigh the aggravating circumstances [it] shall impose a sentence of confinement in state prison for a term of life without the possibility or parole." (Section 190.3, see discussion in *People v. Easley, supra,* 34 Cal.3d 858, 881-882.) By thus requiring the jury to decide the appropriateness of the death penalty by a process of weighing the specific factors listed in the statute, the initiative necessarily implied that matters not within the statutory list are not entitled to any weight in the penalty determination.

- The Court proceeded to state;

> The change from a statute in which the listed aggravating and mitigating factors merely guide the jury's discretion to one in which they limit its discretion requires us to reconsider the question of what evidence is "relevant to aggravation, mitigation, and sentencing." (Section 190.3.) Relevant evidence "means evidence...having any tendency in reason to prove or disprove any disputed fact *that is of consequence to the determination of the action.*" Evid. Code section 210; see *People v. Ortiz* (1979) 95 Cal.App.3d 926, 933.) Since the jury

> must decide the question of penalty on the basis of the specific factors listed in the statute, the quoted language must refer to evidence relevant to those factors. 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. (*Boyd, supra*, at p. 773.)

Therefore, evidence that does not apply to one of the listed aggravating factors is inadmissible before the penalty jury. (*People v. Boyd, supra*, 38 Cal.3d at p. 775, citing to *People v. Easley* (1983) 34 Cal.3d 858, 878.) This Court stated in *Boyd* that while a defendant is permitted under 190.3 (k) to introduce any evidence as to defendant's character or record or the circumstances of the crime as a basis for a sentence less than death, the prosecutor does not have a concomitant right to present evidence that defendant was of bad character unless it is specifically within the statutory scheme of 190.3. (*Id.* at p. 775; see *Lockett v. Ohio* (1978) 438 U.S. 586, 604; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 110.) The Court pointed out that there was no requirement under the federal constitution that the prosecutor be allowed to present to the jury any evidence that may serve as a basic for the death penalty. (*Boyd* at p. 775 citing to *Zant v. Stephens* (1983) 462 U.S. 862, 978-979, fn. 17.)

C. APPLICATION OF LAW TO THE FACTS OF THE INSTANT CASE

This statutory provision permits the prosecution at the penalty phase of a capital case to introduce evidence of "[c]riminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." (Section 190.3 (b).) This Court made it clear that the 1978 death penalty statute, unlike its predecessor, barred the admission of evidence of defendant's character unless it was in the form of a prior felony conviction or evidence of violent criminal activity. (*Boyd, supra*, at p. 772-773.)

In the instant case, it is clear that neither the 1992 nor 1997 incidents involved violence or the threat thereof. The trial court admitted this in its ruling. (19 RT 4370.) However, the trial court ruled that these incidents were "circumstances of the offense" (factor (a)) vis a vis the murder of Cannie Bullock. (*Ibid.*)

Regarding the meaning of "circumstances of the crime" as used in section 190.3 factor (a), this Court has held that this factor "does not mean merely the immediate temporal and spatial circumstances of the crime. Rather it extends to'[t]hat which surrounds materially, morally, or logically' the crime." (*People v. Blair* (2005) 36 Cal.4th 686, 749; *People v. Blair*

(2005) 36 Cal.4th 686, 833.)

However, there are no cases reported that would even suggest that the "circumstances of the offense" may be extended to non-violent, completely unrelated offenses that took place eighteen and thirteen years, respectively, *after the murder*. The reason for the absence of such precedent is obvious. If such remote, nonviolent actions were considered to be circumstances of a capital offense then virtually all socially undesirable acts of a defendant could be said to fall into this aggravating factor, as long as there was some connection, no matter how slight, between the factor (a) offenses and the murder for which defendant stands convicted.

For example, under such an overly broad definition of circumstances of the offense, a defendant's fifteen year remote act of public exposure could be utilized as an aggravating circumstance to a rape-murder, as both involved some sort of aberrant sexual behavior. Another example of such an completely illogical and unconstitutional extension of factor (a) would be to allow a remote act of shoplifting as a circumstance of the offense of a robbery-murder conviction as both events demonstrate defendant's inclination to enrich himself at the expense of others. The reason why such evidence is inadmissible is that it is not admissible evidence of the circumstances of the offense, but rather, inadmissible evidence of a

defendant's general bad character.

The only time that bad character evidence in the penalty phase is permitted before the jury is to *rebut* defense proffered evidence of defendant's good character. For example, in *People v. Clark* (1993) 5 Cal.4th 950, 1032, where the defendant wore a cross every day of his trial, and his mother testified at the penalty phase that he wore a cross on and off throughout his childhood, this Court held that the prosecution was entitled to rebut the inference that defendant was a religious person with testimony that he was not wearing a cross when he was arrested. In *People v. Raley* (1992) 2 Cal.4th 870, 912, this Court held that the admission of pornographic photos of women in bondage found in appellant's bedroom was not improper aggravation where the evidence was relevant to rebut appellant's claim that he had a respectful, kind and chivalrous attitude toward women.

The Ninth Circuit dealt with this issue in *Beam v. Paskett* (9th Cir. 1993) 3 F.3d 1301, overruled on other ground by *Lambright v. Stewart* (9th Cir. 1999) 191 F.3d 1181.) *Beam* made clear that no further detriment should incur to a capital defendant due to his personal lifestyle and that aggravating factors that allowed such evidence in the penalty phase were unconstitutional under the Eighth and Fourteenth Amendments to the

United States Constitution. The court stated "[s]imply put, a state may not use the death penalty as a mechanism for enforcing societal norms regarding sexual activity." (*Id.* at pp. 1308-1309.) In allowing the admission of the two non-violent touching crimes in the penalty phase, that is exactly what the trial court's error permitted in the instant case when it allowed the admission of the two touching crimes as part of the prosecutor's case-in-chief.

Where a state has provided for the imposition of a criminal punishment in the discretion of a jury, defendant's interest in the exercise of that discretion is not simply a matter of state procedural law. The defendant has a legitimate right under the United States Constitution to have the jury exercise its discretion according to the limitations of the state statute granting said discretion. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 345-346.)

Therefore, when a state court deprives a defendant of the sentencing procedure guarantee under state law, his life and liberty interest is one that the Fourteenth Amendment will protect pursuant to a defendant's federal right to due process of law. (*Ibid.*; see *Vitek v. Jones* (1980) 445 U.S. 480, 488-489.)

In the instant case, the improper ruling of the trial court deprived

appellant of his right to be sentenced according to the California statutory scheme embodied in Penal Code section 190.3. The prejudice was manifest.

As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v. California, supra*, 386 U.S. at p.18, where reversal is required unless the error was harmless beyond a reasonable doubt. Even under *People v. Watson, supra*, 46 Cal.2d at p. 386, the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached. Therefore, the judgment of death must be reversed.

X. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW WHEN IT INSTRUCTED THE JURY THAT THE IMPACT OF APPELLANT'S EXECUTION ON THE DEFENDANT'S FAMILY MEMBERS SHOULD BE DISREGARDED UNLESS IT ILLUMINATES SOME POSITIVE QUALITY OF THE DEFENDANT'S BACKGROUND OR CHARACTER

A. FACTUAL SUMMARY

During appellant's penalty phase case, counsel questioned Vicki Cordova, appellant's sister-in-law, about the emotional impact on appellant's family should he be put to death. Ms. Cordova said it would devastate the family. (20 RT 4629.) The prosecutor objected to this line of inquiry and the trial judge sustained the objection, telling the jury to disregard Ms. Cordova's answer that it was irrelevant to their penalty phase

decision. (*Ibid.*)

B. LEGAL ARGUMENT

1. This Court Should Reconsider its Holding in *People v. Ochoa*

In *People v. Ochoa* (1998) 19 Cal.4th 353, 456, this Court ruled that the impact of a defendant's execution on his family was not relevant consideration in the jury's determination of the penalty. This Court subsequently repeated there was no Eighth Amendment violation in failing to allow consideration of such evidence. (*People v. Smithey* (1999) 20 Cal.4th 939-999-1000.)

This Court's position, as stated in *People v. Benmore* (2000) 22 Cal.4th 809, 856, has been that the impact of a death sentence on the defendant's family and friends, unlike the impact on the victim's family, has no relevance to the individualized nature of the penalty hearing because it "does not relate to either the circumstances of the capital crime or the character and background of the abused." However, the above line of cases failed to consider this Court's decisions that the California death penalty law does not limit considerations in favor of a life sentence to only the mitigating factors of section 190.3 but allows the jury to consider "any matter" relevant to sentencing. (Penal Code section 190.3; *People v. Brown* (1985) 40 Cal.3d 512, 542.) Further, it failed to consider that the trial court, while sentencing a non-capital defendant, is specifically allowed to consider

the impact of the sentence on defendant's dependent family members. (California Rule of Court 4.414 (b) (5).)

It is highly probable that the intent of the electorate in approving the California death penalty statute, was to allow a defendant to introduce the same type of evidentiary considerations that are commonly used in sentencing non-capital defendants. If there is some question as to the meaning of the California death penalty statute as to this issue, and the statute is susceptible of two possible reasonable interpretations, the interpretation favoring the defendant holds sway. (*People v. Garcia* (1999) 21 Cal.4th 1,10.)

Therefore, appellant requests that this Court reconsider its holding in *People v. Ochoa* and allow for the admission of the above evidence proffered by the appellant.

2. Precluding Appellant's Jury From Considering the Impact of his Execution Upon His Family Violated the Eighth Amendment to the United States Constitution

The United States Supreme Court has long held that the Eighth and Fourteenth Amendments does not allow the states to preclude a jury in a capital case from considering any relevant evidence that supports a sentence of less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1, 5; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114.)

According to the High Court, relevant evidence is not limited to that

which is related to defendant's moral culpability. It also includes any evidence that has a tendency to influence the jury to find for a sentence of less that death. (*Skipper, supra*, 476 U.S. ap pp. 4-5; see also *Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

Further the High Court has made it clear that evidence relevant to a sentence less than death need not pass a high threshold of relevance. The relevance test is met by "evidence which tends to logically prove or disprove some fact or circumstance which a fact finder could reasonable deem to have mitigating value." (*Smith v. Texas* (2004) 543 U.S. 37, 43-44.)

Therefore, while this Court was correct in asserting that the sentencing paradigm requires an individual assessment of defendant's character and crimes, there is no logical reason why appellant should have been barred from presenting evidence of his execution's impact on his family. If appellant has a family who sufficiently loves him that his execution would "devastate" them, this is certainly logically relevant to the issue as to whether he deserves life over death. Logically speaking, the impact on appellant's family should be no less relevant than the impact on the victim's family. Both speak to the moral impact of the death sentence on those other than the victim and defendant.

The High Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 823 set forth the reasoning behind allowing "victim-impact" evidence before the

jury stating "as a general matter,...victim impact evidence is not offered to encourage comparative judgements of this kind–for instance, that the killer of hardworking, devoted parent deserves the death penalty but that the murderer of a reprobate does not. It is designed to show instead each victim's 'uniqueness as an individual human being.'"

Using the above logic, there is no rationale to prevent the use of evidence relating to the impact of appellant's execution on his family. This impact would show *appellant's* "uniqueness as a human being," clearly a factor that might well persuade a to impose a sentence other than death.

Therefore, the exclusion of this evidence deprived appellant of his right to a fair determination of penalty under the Eighth and Fourteenth Amendments to the United States Constitution.

XI. APPELLANT'S RIGHT TO DUE PROCESS OF LAW, A FAIR TRIAL, REASONABLE DETERMINATION OF PENALTY AND FREEDOM OF EXPRESSION PURSUANT TO THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WERE VIOLATED BY THE COURT'S ERROR IN ADMITTING EVIDENCE OF NONSTATUTORY AGGRAVATION IN THE FORM OF APPELLANT'S THREAT AT A PRISON ANGER MANAGEMENT SESSION TO KILL A DEPUTY PROSECUTOR

A. PROCEDURAL AND FACTUAL HISTORY

In its Motion Regarding Defense Penalty Evidence in Mitigation, filed on February 1, 2007 (8 CT 2068 et seq), the prosecutor proffered to the trial

court as aggravating evidence an alleged threat that appellant made, while appellant was in the custody of the Colorado Department of Correction. (8 CT 2074.) Appellant's remark was made during a therapy session with his therapist, Lori Clapp. (*Ibid.*) Appellant told Ms. Clapp that he wanted to kill, Cheryl Smith Howard, the deputy district attorney who had prosecuted him in 1994 for a domestic violence charge. (*Ibid.*) Ms. Clapp was so concerned about the threat that she felt it necessary to break confidentiality to issue a *Tarasoff* warning. (*Ibid.*)

Appellant objected to the use of this statement and a hearing was held on February 1, 2007. At that hearing, the trial court held that the statement did not amount to an aggravating factor under section 190.3 (b) and forbade the prosecution from presenting this evidence under that factor. (18 RT 4390-4397.)

As part of appellant's penalty phase case-in-chief, Vicki Cordova, appellant's sister-in-law, testified that she "never been (sic) (appellant) mistreat any woman or be violent with any woman, you know." (20 RT 4622.) On cross-examination, the prosecutor asked Ms. Cordova if she knew anything about appellant's "threat" to kill a female deputy district attorney. (20 RT 4636.)

Counsel immediately objected to the prosecutor's reference to this "threat"stating that while the defense did put character in issue, evidence of

this alleged threat exceeded bounds of permissible rebuttal. (20 RT 4637.) The trial court stated that counsel raised the point on direct as to how well he treated women so the threat against a woman prosecutor was fair questioning on rebuttal. (20 RT 4637.) Appellant also testified on his own behalf in the penalty phase. During the cross-examination, relying upon the above ruling of the court, the prosecutor questioned appellant about this incident. Appellant acknowledged that he did state "[i]f I had a gun in court, I would have killed that bitch." (20 RT 4831.) However, appellant testified that he was not threatening to kill the district attorney, but was simply stating what he felt at an anger management therapy session in prison. (*Ibid.*) On re-direct, appellant made clear that in anger management class, the inmates were encouraged to express their anger so they could deal with their feelings. (20 RT 4846-4847.)

B. LEGAL ARGUMENT

The trial court was mistaken when it held that evidence of appellant's claim that he wanted to kill the deputy district attorney was admissible to rebut evidence that appellant treated women with respect.

Character evidence under section 190.3 (k), can only be mitigating, and as such, the prosecutor cannot present to the jury evidence of defendant's bad character in his case-in-chief in the penalty phase of a death penalty trial. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1134-1135.) However, once defendant has put his character into issue at the penalty phase by presenting

evidence thereof, the prosecutor may rebut that mitigating evidence with evidence that manifests to the jury a more accurate picture of defendant's character. (*Ibid; People v. Rodriguez* (1986) 42 Cal.3d 730, 791.) But, the prosecution is not allowed to go beyond the aspects of the defendant's background actually introduced by him. (*In re Jackson* (1992) 3 Cal.4th 578, 613-614; see *People v. Ramirez* (1990) 50 Cal.3d 1158, 1193.) That is exactly what occurred in the instant case. The evidence presented by appellant was limited to the very narrow issue of how appellant treated women in public settings. The evidence introduced by the prosecution far exceeded the scope of appellant's evidence in that it purported to demonstrate to the jury a violent disposition that extended to homicidal thoughts.

The trial court misunderstood the connection between appellant's mitigating evidence and the prosecutor's rebuttal. The prosecutor's evidence did not rebut testimony regarding appellant's treatment of women. The fact that the prosecutor in question was a woman was irrelevant. Appellant's anger and "disrespect" was not directed toward women; it was a display of anger toward a prosecutor, who had put him in prison. The fact that this prosecutor happened to be a woman, does not mean appellant disrespects women. "Evidence presented or argued as rebuttal must relate directly to a particular incident or character trait [the] defendant offers on his own behalf." (*People v. Rodriquez, supra,* 42 Cal.3d at p. 792, fn 24.)

The rebuttal evidence in the instant case did not relate directly to the character evidence introduced through Vicky Cordova. Therefore, it should not have been admitted. The presentation of this evidence to the jury was highly prejudicial in that it revealed to them a defendant who, at least on the surface, had murderous intent in his heart. As such, it strongly suggested the appellant was more than capable of murdering Cannie Bullock.

In addition to the above considerations, the circumstances under which the so-called threat was made does not lend themselves to use as character rebuttal evidence. The anger management session falls under the statutory privilege of Evidence Code 1012 and should not have been allowed as evidence before the jury. In addition, the whole purpose of such a group therapy anger management session held in prison is to encourage, or perhaps even indirectly compel, prisoners to publically reveal their thoughts and share them with other persons with similar persons in the group to "provide comfort and resolution" to all involved. (*Farrell L. v. Superior Court* (1998) 203 Cal.App.3d 521, 527.) Appellant's statement was made as part of such a group anger management therapy session. The fact that such a session was in a group setting did not obviate the psychotherapist-patient privilege under Evidence Code section 1012. (*Id.* at p. 527.)

As the court's error is of constitutional magnitude, the prejudicial effect of the error must be measured against the standard of *Chapman v.*

California, supra, 386 U.S. at p. 18, where reversal is required unless the error was harmless beyond a reasonable doubt. Even under *People v. Watson, supra*, 46 Cal. 2d at p. 836, the error is manifest and extremely prejudicial. But for this error, a result more favorable to appellant would have been reached. Therefore, the judgement of death must be reversed.

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

XII. APPELLANT'S DEATH PENALTY SENTENCE IS INVALID BECAUSE SECTION 190 .2 IS IMPERMISSIBLY BROAD

California's death penalty statute does not meaningfully narrow the pool of murderers eligible for the death. As such, the statute therefore is in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. (*Furman v. Georgia* (1972) 408 U.S. 238 [conc. opn. Of White, J.]; *accord, Godfrey v. Georgia* (1980) 446 U.S. 420, 427.)

The requisite narrowing in California is accomplished in its entirely by the "special circumstances" set out in section 190.2. This Court has explained that "[U]nder our death penalty law,...the section 190.2 'special circumstances' perform the same constitutionally required 'narrowing' function as the 'aggravating circumstances' or 'aggravating factors' that some of the other states use in their capital sentencing statutes." (*People v.*

Bacigalupo (1993) 6 Cal.4th 857, 868.)

Section 1902's all-embracing special circumstances were created with an intent directly contrary to the constitutionally necessary function of the state legislative definition: the circumscription of the class of persons eligible for the death penalty. This is because,in California, almost all felony-murders are now special circumstance cases, and felony-murder cases include accidental and unforeseeable deaths, as well as acts committed in a panic, or under the dominion of a mental breakdown, or acts committed by others. (*People v. Dillon* (1984) 34 Cal.3d 441.) Section 190.2's reach has been extended to virtually all intentional murders by this Court's construction of the lying-in-wait special circumstance. (See *People v. Hillhouse* (2002) 27 Cal.4th 469, 500-501, 512-515; *People v. Morales* (1989) 48 Cal.3d 527, 557-558, 575.) These broad categories are joined by so many other categories of special circumstance murder that the statute comes very close to achieving its goal of making every murderer eligible for death. The death penalty scheme as applied to felony murder sweeps in a broad and arbitrary fashion. While all willful, deliberate and premeditated killings are first degree murder under the California statute, not all such killings are subject to the death penalty. On the other hand, any perpetrator of a felony murder, by virtue of even an unintended killing, may be sentenced to die. Such a sorting cannot be anything other than arbitrary and capricious, in violation of the Eighth

Amendment.

XIII. APPELLANT'S DEATH PENALTY IS INVALID BECAUSE §190.3(a) AS APPLIED ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Section 190.3(a) violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution in that it has been applied in such a wanton and freakish manner that almost every feature of every murder, even features squarely at odds with features supportive of death sentences in other cases, have been characterized by prosecutor's as "aggravating" within the statutes meaning.

Factor (a), listed in section 190.3, directs the jury to consider in aggravation "circumstances of the crime." Having at all times found that this broad term met constitutional scrutiny, this Court has never applied a limiting construction to this factor.

The purpose of section 190.3, according to its language and interpretations by the United States and California Supreme Courts, is to inform the jury of what factors it should consider in assessing the appropriate penalty. Factor (a) has been used in ways so arbitrary and contradictory as to violate both the federal guarantee of due process of law and the Eighth Amendment.

XIV. CALIFORNIA'S DEATH PENALTY STATUTE CONTAINS NO SAFEGUARDS TO AVOID ARBITRARY OR CAPRICIOUS SENTENCING, AND DEPRIVES APPELLANT OF THE RIGHT TO A JURY TRIAL ON EACH ELEMENT OF A CAPITAL CRIME: IT THEREFORE VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

INTRODUCTION

Relying on the cases of *Cunningham v. California* (2007) 549 U.S. 270, *Blakely v. Washington* (2004) 542 U.S. 296, *Ring v. Arizona* (2002) 536 U.S. 584, and *Aprendi v. New Jersey* (2000) 530 U.S. 466, on January 31, 2007, appellant filed his trial Motion to Bar the Death Penalty. Appellant argued that the failure of California's death penalty statutes to require that a jury unanimously find proof of every aggravating factor beyond a reasonable doubt renders the death penalty unconstitutional. (8 CT 2052 et seq.) It was also argued that according to *Cunningham*, since aggravating factors had to be proven to the jury, they must be listed in the Information.

The bottom line of appellant's trial argument is that in California there are none of the safeguards common to other death penalty sentencing schemes to guard against the arbitrary imposition of death. Juries do not have to make written findings or achieve unanimity as to aggravating circumstances. They do not have to believe beyond a reasonable doubt that aggravating circumstances have been proven, that they outweigh the

mitigating circumstances, or that death is the appropriate penalty. In fact, except as to the existence of other criminal activity and prior conviction, juries are not instructed on any burden of proof at all. Not only is inter-case proportionality review not required, it is not permitted. Under the rationale that a decision to impose death is "moral," and "normative," the fundamental components of reasoned decision-making that apply to all other parts of the law have been banished from the entire processing of making the most consequential decision a juror can make - whether or not to impose death.

A. BEYOND A REASONABLE DOUBT IS THE APPROPRIATE BURDEN OF PROOF FOR FACTORS RELIED ON TO IMPOSE A DEATH SENTENCE, FOR FINDING THAT AGGRAVATING FACTORS OUTWEIGH MITIGATING FACTORS, AND FOR FINDING THAT DEATH IS THE APPROPRIATE SENTENCE.

In *Apprendi v. New Jersey, supra,* 530 U.S. 466, the U.S. Supreme Court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt, unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Id.* at 478.) This decision seemed to confirm that as a matter of due process under the Fourteenth Amendment, the proof beyond a reasonable doubt standard must apply to all of the findings the sentencing jury must make as a prerequisite to its consideration of whether death is the appropriate punishment.

In *Ring v. Arizona, supra,* 536 U.S. 584, the High Court held that the

Sixth and Fourteenth Amendment guarantees of a jury trial means that such determinations must be made by a jury, and must be made beyond a reasonable doubt.

In *People v. Snow* (2003) 30 Cal.4th 43, 126, fn 32, this Court stated that the holding of *Apprendi v. New Jersey, supra,* 530 U.S. 466, which held that a jury must find, unanimously and beyond a reasonable doubt, any fact that increases the maximum sentence possible for a defendant, does not affect California's death penalty process. The reasoning given was once a special circumstance has been found beyond a reasonable doubt the defendant is death eligible and jury findings as to aggravating circumstances do not expose a defendant to a higher maximum penalty.

A careful look at California's death penalty procedures shows that essential steps in the death-eligibility process take place during the penalty phase of a capital trial and these steps are subject to the mandates of *Ring.*

To summarize, there are four steps to determining whether the sentence in a California capital case will be death or LWOP: (1) the defendant must be found guilty of first-degree murder and at least one of the "special circumstances enumerated in section 190.2 must be found; (2) at least one of a *different* list of aggravating factors from section 190.3 must be found; (3) aggravating factors must be found to outweigh any mitigating factors present; and (4) if, and only if, aggravating factors are found to

outweigh mitigating factors present, the jury must choose between death and LWOP.

Of these four steps only the first occurs during the guilt phase of the trial, attended by the Sixth Amendment's protections of unanimity and proof beyond reasonable doubt. In contrast, Steps 2, 3, and 4 occur during the penalty phase. Although occurring in the penalty phase, in actuality steps 2 and 3 are part of the *eligibility* determination as described by this Court in *People v. Tuilaepa, supra,* 4 Cal.4th 569, rather than the *selection* determination. Like the Arizona defendant in *Ring* convicted of first-degree murder, a person convicted of first-degree murder with a special circumstance finding in California is eligible for the death penalty in a formal sense only (*Ring, supra*, 536 U.S. at pp. 602-605); death cannot be imposed until Steps 2 and 3 have occurred.

B. EVEN IF PROOF BEYOND A REASONABLE DOUBT WERE NOT THE CONSTITUTIONALLY REQUIRED BURDEN FOR FINDING (1) THAT AN AGGRAVATING FACTOR EXISTS, (2) THAT THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS, AND (3) THAT DEATH IS THE APPROPRIATE SENTENCE, PROOF BY A PREPONDERANCE OF THE EVIDENCE WOULD BE CONSTITUTIONALLY COMPELLED AS TO EACH SUCH FINDING

California imposes on the prosecution the burden to persuade the sentencer that the defendant should receive the most severe sentence possible. It does so, however, only in non-capital cases. (Cal R. Ct. 420(b) [existence

of aggravating circumstances necessary for imposition of upper term must be proved by preponderance of evidence].) To provide greater protection to non-capital defendants than to capital defendants violates the due process, equal protection, and cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments, and the Sixth Amendment's guarantee to a trial by jury. (See e.g., *Mills v. Maryland* (1988) 486 U.S. 367, 374; *Myers v. Ylst* (9th Cir. 1990) 897 F 2d 417, 421; *Ring v. Arizona, supra*, 122 S. Ct. at 1443.)

C. THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY ON ANY PENALTY PHASE BURDEN OF PROOF VIOLATED APPELLANT'S CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS AND HIS RIGHT NOT TO BE SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT

Appellant's death sentence violates the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution because it was imposed pursuant to a statutory scheme that does not require (except as to prior criminality) that aggravating circumstances exist beyond a reasonable doubt, or that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt, or that the jury be instructed on any burden of proof at all when deciding the appropriate penalty. (See *Santosky v. Kramer* (1982) 455 U.S. 745, 754-767; *In Re Winship* (1970) 397 U.S. 358.)

D. CALIFORNIA LAW VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE UNANIMOUS JURY AGREEMENT ON AGGRAVATING FACTORS.

Jury unanimity was deemed such an integral part of criminal jurisprudence by the Framers of the California Constitution that the requirement did not even have to be directly stated. To apply the requirement to findings carrying a maximum punishment of one year in the county jail - but not to factual findings that often have a "substantial impact on the jury's determination whether the defendant should live or die" (*People v. Medina* (1995) 11 Cal.4th 694, 763-764) - would, by its inequity, violate the equal protection clause and by its irrationality violate both the due process and cruel and unusual punishment clauses of the state and federal Constitutions.

This claim must be considered in light of *Cunningham v. California* (2007) 549 U.S. 270. *Cunningham* supports appellant's contention that the aggravating factors necessary for the imposition of a death sentence must be found true by the jury beyond a reasonable doubt and by unanimous decision of the jury. Because of *Cunningham,* this Court's effort to distinguish *Ring v. Arizona, supra*, and *Blakely v. Washington, supra,* 542 U.S. 296 should be reexamined. (See *People v. Prieto* (2003) 30 Cal.4th 226, 275-276 [rejecting the argument that *Blakely* requires findings beyond a reasonable doubt] and *People v. Morrison* (2004) 34 Cal.4th 698, 731

[same].)

E. CALIFORNIA LAW VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY FAILING TO REQUIRE THAT THE JURY BASE ANY DEATH SENTENCE ON WRITTEN FINDINGS REGARDING AGGRAVATING FACTORS

The failure to require written or other specific findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*Gregg v. Georgia* (1976) 428 U.S. 153,195.) And especially given that California juries have total discretion without any guidance on how to weigh aggravating and mitigating circumstances (*Tuilaepa v. California* (1994) 512 U.S. 967, 979-980), there can be no meaningful appellate review without at least written findings because it will otherwise be impossible to "reconstruct the findings of the state trier of fact." (See *Townsend v. Sain* (1963) 372 U.S. 293, 313-316.)

F. THE CALIFORNIA DEATH PENALTY STATUTE AS INTERPRETED BY THE CALIFORNIA SUPREME COURT FORBIDS INTER-CASE PROPORTIONALITY REVIEW, THEREBY GUARANTEEING ARBITRARY, DISCRIMINATORY, OR DISPROPORTIONATE IMPOSITIONS OF THE DEATH PENALTY.

One commonly utilized mechanism for helping to ensure reliability and proportionality in capital sentencing is comparative proportionality review - a procedural safeguard this Court has eschewed. In *Pulley v. Harris* (1984) 465 U.S. 37, 51, the High Court, while declining to hold that

comparative proportionality review is an essential component of every constitutional capital sentencing scheme, did note the possibility that "there could be a capital sentencing scheme so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."

Given the tremendous reach of the special circumstances that make one eligible for death as set out in section 190.2 - a significantly higher percentage of murderers than those eligible for death under the 1977 statute considered in *Pulley v. Harris* - and the absence of any other procedural safeguards to ensure a reliable and proportionate sentence, this Court's categorical refusal to engage in inter-case proportionality review now violates the Eighth Amendment.

G. IN THE PENALTY PHASE THE PROSECUTION MAY NOT RELY ON UNADJUDICATED CRIMINAL ACTIVITY; FUTHER, EVEN IF IT WERE CONSTITUTIONALLY PERMISSIBLE FOR THE PROSECUTOR TO DO SO, SUCH ALLEGED CRIMINAL ACTIVITY COULD NOT CONSTITUTIONALLY SERVE AS FACTOR IN AGGRAVATION UNLESS FOUND TO BE TRUE BEYOND A REASONABLE DOUBT BY A UNANIMOUS JURY

The United States Supreme Court's recent decision in *Ring v. Arizona, supra*, and *Apprendi v. New Jersey, supra*, confirm that under the Due Process Clause of the Fourteenth Amendment and the jury trial guarantee of the Sixth Amendment, all of the findings prerequisite to a sentence of death must be made beyond a reasonable doubt by a jury acting as a collective

entity. (See Section A, ante.) The application of *Ring* and *Apprendi* to California's capital sentencing scheme requires that the existence of any aggravating factors relied upon to impose a death sentence be found beyond a reasonable doubt by a unanimous jury. (See Section A, ante.) Thus, even if it were constitutionally permissible to rely upon alleged unadjudicated criminal activity as a factor in aggravation, such alleged criminal activity would have to have been found beyond a reasonable doubt by a unanimous jury. Appellant's jury was not instructed on the need for such a unanimous finding; nor is such an instruction generally provided for under California's sentencing scheme.

H. THE JUROR'S USE OF RESTRICTIVE ADJECTIVES IN THE LIST OF POTENTIAL MITIGATING FACTORS IMPERMISSIBLY ACTED AS BARRIERS TO CONSIDERATION OF MITIGATION BY APPELLANT'S JURY

The inclusion in the list of potential mitigating factors of such adjectives as "extreme" (see factors (d) and (g)), and "substantial" (see factor (g)), acted as barriers to the consideration of mitigation in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments. (*Mills v. Maryland, supra,* 486 U.S. 367; *Lockett v. Ohio, supra,* 438 U.S. 586.)

In accordance with customary state court practice, nothing in the instructions advised the jury which of the listed sentencing factors were aggravating, which were mitigating, or which could be either aggravating or

mitigating depending upon the jury's appraisal of the evidence. It is thus likely that appellant's jury aggravated his sentence upon the basis of what were, as a matter of state law, non-aggravating factors and did so believing that the state - as represented by the trial court - had identified them as potential aggravating factors supporting a sentence of death. This violated not only state law, but the Eighth Amendment, as well, for it made it likely that the jury treated appellant "as more deserving of the death penalty than he might otherwise be by relying on...illusory circumstance[s]." (*Stringer v. Black* (1992) 503 U.S. 222, 235.)

J. CALIFORNIA LAW THAT GRANTS UNBRIDLED DISCRETION TO THE PROSECUTOR COMPOUNDS THE EFFECTS OF VAGUENESS AND ARBITRARINESS INHERENT ON THE FACE OF THE CALIFORNIA STATUTORY SCHEME

Under California law, the individual county prosecutor has complete discretion to determine whether a penalty hearing will be held to determine if the death penalty will be imposed. As Justice Broussard noted in his dissenting opinion in *People v. Adcox, supra,* 47 Cal.3dat pp. 275-276, this creates a substantial risk of county-by-county arbitrariness.

The arbitrary and wanton prosecutorial discretion allowed by the California scheme -in charging, prosecuting and submitting a case to the jury as a capital crime- merely compounds, in application, the disastrous effects of vagueness and arbitrariness inherent on the face of the California statutory

scheme. Just like the "arbitrary and wanton" jury discretion condemned in *Woodsom v. North Carolina* (1976) 428 U.S. 280, 303, such unprincipled, broad discretion is contrary to the principled decision-making mandated by *Furman v. Georgia, supra*, 408 U.S. 238.

XV. EVEN IF THE ABSENCE OF THE PREVIOUSLY ADDRESSED PROCEDURAL SAFEGUARDS DID NOT RENDER CALIFORNIA'S DEATH PENALTY SCHEME CONSTITUTIONALLY INADEQUATE TO ENSURE RELIABILITY AND GUARD AGAINST ARBITRARY CAPITAL SENTENCING, THE DENIAL OF THOSE SAFEGUARDS TO CAPITAL DEFENDANTS VIOLATES THE CONSTITUTIONAL GUARANTEE OF EQUAL PROTECTION OF THE LAWS

As noted in the preceding arguments, the United States Supreme Court has repeatedly directed that a greater degree of reliability is required when death is to be imposed, and that courts must be vigilant to ensure procedural fairness and accuracy in fact finding. (*Monge v. California* (1998) 524 U.S. 721, 731-732.) Despite this directive, California's death penalty scheme provides significantly fewer procedural perfections for persons facing a death sentence than are afforded persons charged with non-capital crimes. This differential treatment violates the constitutional guarantee of equal protection of the laws.

XVI. CALIFORNIA'S USE OF THE DEATH PENALTY AS A REGULAR FORM OF PUNISHMENT FALLS SHORT OF INTERNATIONAL NORMS OF HUMANITY AND DECENCY, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS

Although this country is not bound by the laws of any other

sovereignty in its administration of our criminal justice system, it has relied from its beginning on the customs and practices of other parts of the world to inform our understanding. "When the United States became an independent nation, they became, to use the language of Chancellor Kent, 'subject to that system of rules which reason, morality, and custom had established among the civilized nations of Europe as their public law.'" (1 Kent's Commentaries 1, quoted in *Miller v. United States* (1871) 78 U.S. [11 Wall.] 268, 315 [20 L.Ed. 135] [dis. opn. of Field, J.]; *Hilton v. Guyot* (1895) 159 U.S. 113, 227; *Sabariego v. Maverick* (1888) 124 U.S. 261, 291-292; *Martin v. Waddell's Lessee* (1842) 41 U.S. [16 Pet.] 367, 409 [10 L. Ed. 997].) Recently, the United States Supreme Court in *Roper v. Simmons* (2005) 543 U.S. 551, 567, struck down the death penalty for defendants who committed the capital crime as juveniles, signaling the High Court's inclination to bring this country more in line with international standards vis-a-vis capital punishment. (*Ibid.*) Thus, the very broad death scheme in California, and the use of death as regular punishment randomly imposed,violates the Eighth and Fourteenth Amendments. Therefore, appellant's death sentence should be set aside.

XVII. THE CUMULATIVE EFFECT OF GUILT AND PENALTY PHASE ERRORS WAS PREJUDICIAL

There were numerous penalty trial errors in this case. There were also significant guilt phase errors. This Court has recognized that guilt

phase errors that may not otherwise be prejudicial as to the guilt phase may nevertheless improperly and adversely impact the jury's penalty determination. (See, for example, *In re Marquez* (1992) 1 Cal. 4th 584, 605, 607-609.) This Court is also obliged to consider the cumulative effect of multiple errors on the sentencing outcome. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487-488; *People v. Holt* (1984) 37 Cal.3d 436, 459.)

The cumulative weight of the guilt and penalty phase errors was prejudicial to appellant. As demonstrated elsewhere in this opening brief with respect to various guilt phase errors, appellant's rights were violated under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In the penalty trial, appellant was deprived of a fair and reliable determination of penalty under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Together, the cumulative effect of these errors was prejudicial.

It is both reasonabye probable and likely that both the jury's guilt and penalty determinations were adversely affected by the cumulative errors. (*Chapman v. California, supra*, 386 U.S. at 24.) In the absence of the errors, the outcome would have been more favorable to appellant. It certainly cannot be said that the errors had "no effect" on the jury's penalty verdicts.

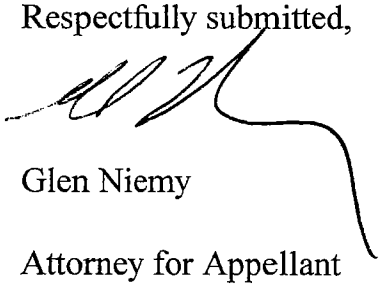
CONCLUSION

By reason of the foregoing, appellant, Joseph Cordova, respectfully requests that the judgment of conviction on all counts, the special circumstance findings, and the judgment of death be reversed and the matter be remanded to the trial court for a new trial.

Appellant was denied his First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution in respect to both the guilt and penalty trials. The grievous errors deprived appellant of his right to a meaningful determination of penalty.

The citizens of the State of California can have no confidence in the reliability of any of the verdicts rendered in this case.

Respectfully submitted,



Glen Niemy

Attorney for Appellant

May 14, 2010

CERTIFICATE OF COMPLIANCE

I, hereby certify that this Appellant's Opening Brief was composed in 13 point font, New Times Roman type, and consists of a total of 40900 words.

May 14, 2013

Glen Niemy, Esq
Attorney for Appellant

DECLARATION OF SERVICE

Re: People v. Joseph Cordova
Superior Court 040292
Supreme Court S152737

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief** on each of the following by placing the same in an envelope addressed (respectively)

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Each envelope was then on May 16, 2013, sealed and placed in the United States mail, at Bridgton Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this May 16, 2013 at Bridgton, ME

Glen Niemy

SUPREME COURT COPY

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SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, JOSEPH S. CORDOVA, Defendant.	Superior Court 040292-5 Supreme Court S152737 (Capital Case)

SUPPLEMENTAL DECLARATION OF SERVICE

Re: People v. Joseph Cordova
Superior Court 040292-5
Supreme Court S152737

I, Glen Niemy, declare that I am over the age of 18 years, not a party to the within cause, my business address is P.O. Box 764, Bridgton, ME 04009. I served a copy of the attached **Appellant's Opening Brief** on each of the following by placing the same in an envelope addressed (respectively)

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Each envelope, was then on May 15, 2013, sealed and placed in the United States mail, at Bridgton Maine, County of Cumberland, the county in which I have my office, with the postage thereon fully prepaid. In addition, an additional copy was forwarded to Judge Peter Spintta, c/o the Contra Costa County Superior Court on May 21, 2013. I declare under the penalty of perjury and the laws of California and Maine that the foregoing is true and correct this May 21, 2013 at Bridgton, ME.

Glen Niemy