IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff / Respondent, vs. RICHARD TULLY, Defendant/Appellant.	California Supreme Court Case No. S030402 **VOLUME I**

APPELLANT'S OPENING BRIEF

Automatic Appeal from the Judgment of the Superior Court
of the State of California for the County of Alameda
(Superior Court No. H9798)

Honorable William R. McGuiness

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STATEMENT OF THE CASE

On March 31, 1987, appellant, Richard Christopher Tully, was charged in the Municipal Court, Alameda County, California. In Count I, Mr. Tully was charged with murder and a weapon use allegation. (Pen. Code §§ 187, 12022(b)/12022.3.) Burglary and rape special circumstances were alleged. (Pen. Code §§ 190.2(a)(17)(iii), (17)(vii).) [1] In Count II, he was charged with burglary and a great bodily injury allegation. (Pen. Code §§ 459, 12022/12022.8/1203.075.) In Count III, he was charged with rape, weapon use and a great bodily injury allegation. (Pen. Code §§261(2); 12022(b); 12022.3(a) or (b) 12022.1/12022.8/1203.075.) (CT 1109-1111.)[2]

The preliminary hearing was held in 1987. (CT 1- 251, 256, 1103.) Mr. Tully was held to answer on the murder and burglary charges. The court found insufficient evidence of the rape allegation, and held him to answer on an assault with intent to commit rape charge. (Pen. Code § 220; CT 1103-04.)

An Information was filed on December 1, 1987 in the Alameda County Superior Court. Count I charged murder and a burglary-murder special circumstance, together with weapon use and great bodily injury allegations. (Pen. Code §§ 187, 1203.075, 12022(b), 190.2(a)(17)(vii).) Count II charged burglary and a great bodily injury allegation. (Pen. Code §§ 459, 12022.1/12022.8/1203.075.) Count III charged assault

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[1] All section numbers reference the California Penal Code unless indicated otherwise.

[2] References to the record on appeal are designated: CT - Clerk's Transcript, RT - Reporter's Transcript and ART - Augmented Reporter's Transcript.

with intent to commit rape and weapon use and great bodily injury allegations. (Pen. Code §§ 220, 12022(b); CT 1539-41.)

On February 29, 1988, Mr. Tully was arraigned in Superior Court. He pled not guilty to all counts and denied all allegations. (CT 1548, ART 33-34.)

The trial date was continued between September 13, 1988 and June 6, 1990. (CT 1654.1, 1655-1661.)

In July 1990, the Alameda County Public Defender moved to withdraw as counsel due to an undisclosed conflict of interest. (CT 1662.) The motion was granted. Alphons Wagner was appointed to represent Mr. Tully. (CT 1661.) Spencer Strellis was later appointed as second counsel.

In February 1992, Mr. Tully filed a motion to suppress statements made to Livermore Police Department officers after his arrest on March 7, 1987 on a drug charge, and to suppress statements and evidence obtained following his March 27, 1987 arrest for the present offenses. (CT 1740.) In March 1992, the motion was heard. In June 1992, the court granted the motion in part and denied it in part. (CT 1805-1807.)

In June 1992, the prosecution moved to dismiss Count II, the burglary charge and the great bodily injury allegation. The motion was granted. (CT 1826.)

Mr. Tully filed a second motion to suppress statements stemming from the March 27, 1987 arrest. The motion was heard and taken under submission on June 10, 1992.

Jury selection began twelve days later, on June 22, 1992.

On June 26, 1992, a hearing to determine the sufficiency of the aggravating evidence was held. (CT 1871.) The prosecutor wanted to present evidence that Mr. Tully was involved in jailhouse scuffles while awaiting trial. On July 2, 1992, the court prohibited two of the incidents from being admitted and allowed the two other incidents to be introduced at the penalty phase. (CT 1910.)

On July 24, 1992, the court denied the second motion to suppress statements. (CT 1928.)

On July 28, 1992, the jurors and alternates were sworn to serve at the trial.

Mr. Tully went to trial on two charges: murder (Count I) and assault with the intent to commit rape (redesignated as Count II.) (Penal Code §§ 187, 220.) A weapon use, great bodily injury, and burglary-murder special circumstance allegation were also alleged. (Penal Code § 190.2(a)(17)(vii.); CT 1539.)

Before opening statements, Mr. Tully moved that witnesses be excluded from the trial. The court granted, the motion in part. The defense objected to family members of the deceased being allowed to hear guilt phase evidence and arguments because they were penalty phase witnesses. The court overruled the objection and allowed the family members of the deceased to remain in the courtroom during the guilt phase. (CT 1931.)

The prosecution rested its guilt phase case on August 12, 1992. The defense rested the same day. (CT 1957.)

On August 14, 1992, the court granted the prosecutor's motion to strike the great

bodily injury allegation. (CT 1974.)

Closing arguments began on August 18, 1992 and were completed the next day. Mr. Tully moved for a mistrial based on prosecutorial misconduct during closing argument. The motion was denied. (CT 1978.)

The jury reached its guilt phase verdicts on August 20, 1992. (CT 1979). Mr. Tully was found guilty of first-degree murder and personally using a dangerous weapon. (CT 1982). The burglary-murder special circumstance was found true. He was found guilty of assault with intent to commit rape and with using a weapon in that offense. (CT 1981, 1983.)

On August 24, 1992, Mr. Tully objected to the introduction of victim impact testimony at the penalty phase. (CT 1998.) On September 1, 1992, the court granted and denied, in part, the objections to the victim impact testimony. (CT 2004.)

The penalty phase began on September 4, 1992. The prosecution presented six witnesses. Mr. Tully moved for a mistrial based on prosecutorial misconduct. The motion was denied. (CT 2005.) Five witnesses testified at the defense penalty phase. (CT 2007.) The prosecution presented no witnesses in rebuttal. (CT 2017.)

Penalty phase closing arguments began on September 15, 1992. The defense moved for a mistrial based on prosecutorial misconduct. The motion was denied. (CT 2022.)

Penalty arguments were completed on September 16, 1992. The jury was

instructed and began its deliberations that day. (CT 2023-2024.) The jury reached its death verdict on September 21, 1992. (CT 2130.)

On December 4, 1992, Mr. Tully's motion for modification of the jury verdict was heard and denied. That day, the court entered judgment and sentenced Mr. Tully to death on the murder charge and to six years in prison on the other charges and enhancements, staying the six year sentence. (CT 2146.)

STATEMENT OF FACTS - GUILT PHASE

Discovery of the Crime

Shirley Olsson was last seen leaving work at around 4:00 p.m. on July 24, 1986. (RT 2089; 2092.) Eldon Freeman, a neighbor, saw the lights at Ms. Olsson's Livermore home go off around 10:00 p.m that night. (RT 2649-2651.)

When Ms. Olsson did not show up for work on July 25, and could not be reached by phone, a co-worker, Barbara Green, went to her house. (RT 2015-2017, 2027.) No one answered the door when she knocked. Green eventually entered through a bathroom window. Green saw Ms. Olsson's body lying on her bed. (RT 2027-2047.) Green called the Livermore Police Department (LPD). (RT 2053.)

The House

Green testified that all the window screens were taped shut, except for the bathroom window. (RT 2061.) She did not remember trying to enter through the front door. She noticed that the latch on the front door was broken. She had trouble opening the front door from the inside. (RT 2051-2052.)

Lead LPD officer Scott Robertson testified that at least three windows were open several inches, and two others were wide open. (RT 2156.) The kitchen door was unlocked and the front door latch was off its casing. He assumed that there had been a forced entry through the front door. The latch could have been broken by someone trying to open the door from the inside. (RT 2122, 2174, 2159, 2188.) The latch appeared to be

recently broken. (RT 2862.)

Ms. Olsson's father, Clifford Sandberg, testified that Ms. Olsson locked and chained the front door when she came home from work. (RT 2788.) Ms. Olsson's daughter, Sandy Walters, testified that Ms. Olsson kept the door chained and the windows locked. (RT 2823-2824.)

At Ms. Olsson's house, two empty Coke bottles and some grapes were found on the living room floor. (RT 2120-2103.) Several framed pictures in the entry hallway were not hung straight. One picture was on the hallway floor. (RT 2050; 2121.)

An ½ gallon bottle of bourbon and two Coke bottles were found in the kitchen. (RT 2559.) An Albertson's supermarket receipt for two bottles of whiskey was on the counter. (RT 2910.) Ms. Olsson's daughter found two more ½ gallon bottles of bourbon under the kitchen sink. (RT 2821.)

The bedroom showed little sign of disturbance. (RT 2124.) A picture was lying on the floor. (RT 2050; 2123.) Pajamas were found under Ms. Olsson's body. A bathrobe and slippers were on the floor. (RT 2236; 2245.) An empty blue purse was found on the floor. (RT 2185, 2269, 2461, 2563.)

No evidence of semen was found on the bedding. (RT 2576.) Pubic hairs found in the bedding were not consistent with Mr. Tully's. (RT 2942.) Head hairs were found on a blanket. They were not from Ms. Olsson or Mr. Tully. (RT 2942.)

The Window Screen and the Purse

In the early morning of July 25, 1996, Linda Rocke, a neighbor of Ms. Ollson, heard her dog bark and saw him jump at the window. (RT 2095-2097.) She went outside and saw a window screen in her backyard. (RT 2099; 2105.) The window screen came from Ms. Olsson's bathroom window. (RT 2160.)

On July 25, 1996, Judith Williams found a purse on the golf course near Ms. Olsson's house. (RT 2197-2199, 2305.) Ms. Olsson's driver license and other items were in the purse. (RT 2200-2201, 2292-2293.)

The Knife

Law enforcement conducted a "seek and find" search of the golf course. (RT 2211.) A buck knife was found with blood on the blade and handle. (RT 2212-2214; 2310; 2355; 2638.) Two fingerprints were seen in the blood. (RT 2359.) The DOJ laboratory took photographs of the two prints. (RT 2384-2385.) It could not be established how long the prints had been on the knife. (RT 2491.) LPD provided known prints to DOJ, which included Mr. Tully's prints. DOJ ran a comparison but no matches were found. (RT 2866.)

In March, 1987, after Mr. Tully became a suspect in the case, DOJ again compared the prints found on the knife with Mr. Tully's prints. DOJ then claimed that one print had characteristics that matched Mr. Tully's right ring finger and the other print had characteristics that matched Mr. Tully's right palm print. (RT 2417-2422.)

The Crime Scene

Coroner Van Meter testified that the cause of death was shock and hemorrhage due to multiple stab wounds, associated with asphyxia due to fractures of the larynx. (RT 2729.)

Ms. Olsson was stabbed on the upper torso, neck and face. (RT 2658-2659.) The stab wounds were consistent with the knife found on the golf course. (RT 2686.) She had blunt injuries to her face and abrasions on her hands and thigh. (RT 2660-2662.) Her hyoid bone was broken and the larynx collapsed. (RT 2679-2680.)

The coroner could not determine whether Ms. Olsson was conscious when she was stabbed. (RT 2695.) In the coroner's opinion, if she was conscious, many of the wounds would have been painful. (RT 2679.) Bruises on her forearms could have been defensive wounds. (RT 2694; 2701.) The injuries on her face were possibly consistent with someone coming in contact with the edge of an opening door. (RT 2666.)

Criminalist Binkley testified there were no spermatozoa present anywhere on or in Ms. Olsson's body. (RT 2575-2578.) No signs of trauma to her vaginal or genital area was found. (RT 2689.)

Blood and Blood Stain Evidence

The blood on the knife was possibly Ms. Olsson's. It was not Mr. Tully's blood. (RT 2586.) Criminalist Binkley opined that the blood smears on the sheets were made by wiping a knife blade across them twice. (RT 2590-2592.) The marks on the sheet could

have been made by any knife, including the knife found on the golf course. (RT 2608.)

Victim Habit, Character and Impact Testimony

During the guilt phase, the prosecution elicited substantial testimony concerning Ms. Olsson's character and habits, unrelated to the circumstances of the crime. The prosecution also elicited testimony regarding the impact of Ms. Olsson's death on friends and family.

Hospital co-workers testified that Ms. Olsson was a reliable and dependable employee, and a caring nurse. (RT 2017, 2028, 2776.)

Ms. Olsson's father, Sandberg, stayed with her between October and March every year. (RT 2781.) When she got home from work, she went directly to her bedroom to change clothes. (RT 2783-2784.) They watched television every night. She drank bourbon and coke, and she would take her drink into the bedroom when she went to bed. (RT 2785-2786.) She was in bed by 9:00 p.m. (RT 2795, 2808.) Sandberg said his daughter seldom went out with friends, and never went out with men while he was there. (RT 2787.)

Sandberg testified that Ms. Olsson wore pajamas and a bathrobe to bed. (RT 2757.) Walters testified that her mother wore flannel pajamas to bed and never left her robe on the floor. (RT 2184-2185.)

Co-worker Green testified that Ms. Olsson was scheduled to take a vacation the day after she was killed. She was going to Kansas to celebrate her father's birthday. (RT

2025.)

Testimony and Evidence Regarding Mr. Tully

Law enforcement had no leads in this case from July 1986 until March 1987. The knife and fingerprints lifted from Ms. Olsson's house had been submitted to DOJ after the crime. DOJ had been provided with inked impressions of some 50 individuals, including Mr. Tully. No matches were found. (RT 2868-2869.)

In March 1987, Detective Robertson talked with LPD Officer Trudeau.[3] A week later, Robertson resubmitted Mr. Tully's prints to DOJ. (RT 2871-2872.)

DOJ criminalist Mambretti compared various prints with the inked impressions of Mr. Tully and several others in March 1987. She identified eight points of comparison between the prints on the knife and Mr. Tully's right ring finger and palm. (RT 2413-2424.)

Later that month, Mr. Tully was arrested for the homicide and related charges. Robertson interviewed Mr. Tully's wife, Vicky, and told her that Mr. Tully's fingerprints were found on the knife. (RT 2905-2906.) Robertson then interrogated Mr. Tully. He tape recorded this interview using a "body wire" taped under the table. (RT 2907.) He told Mr. Tully that his prints were on the knife. Robertson falsely told him that his prints were found inside the house. Robertson gave Mr. Tully no further information about the

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[3] Trudeau testified at the motion to suppress hearing that he had arrested and released Mr. Tully on an unrelated matter. (March 30, 1992 RT 191-193.)

case. This interrogation was not played for the jury.

Following the surreptitiously recorded interrogation, Mr. Tully was allowed to meet with his wife. (RT 2908.) After this meeting, Robertson interrogated Mr. Tully again. The interrogation was recorded and lasted from 6:00 p.m. to midnight. (RT 2872-2873.) A portion of the March 27 taped interview was played for the jury. (RT 2876 - 2877.)

During the interview, Mr. Tully told Robertson that he had owned a buck knife that had been stolen from his car in 1986. He could not explain why his prints were on the knife. (RT 2873-2974.) Mr. Tully told Robertson that he had stayed at John Chandler's house for a while, which was a few houses away from Ms. Olsson's. He did not know Ms. Olsson and had never been in her house.

Robertson asked Mr. Tully how he thought the crime happened. Mr. Tully told Robertson he had read about the case in the newspaper. He was aware that Ms. Olsson had been found nude and that there were no signs of forced entry. He had read that Ms. Olsson's purse was found in a duck pond on the golf course. He speculated that there had been no burglary and that Ms. Olsson was killed by someone she knew, such as a lover or spouse. (RT 2893.)[4]

On March 29, Robertson received information that led him to contact Vicky on March 30. After interviewing Vicky, he and Detective Newton interrogated Mr. Tully

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[4] At the hearing on the defense's motion to suppress statements, Robertson testified that the newspapers had reported each of the facts related by Mr. Tully. (RT 2894-2895.)

again. (RT 2897-2898.) Portions of the recording were played for the jury. (People's Exhibit 6A, 6C; RT 2900.)

During this interrogation, Mr. Tully inquired about the witness protection program. The officers told him that they would get Mr. Tully and his wife in the program if the information he provided them met the criteria. Mr. Tully then told the officers that he and Thomas Pillard had gone to Ms. Olsson's house to buy drugs.[5] Thomas had said that he had bought drugs from Ms. Olsson before.

Mr. Tully told the officers that he had been drinking heavily. After they were in the house, at Pillard's suggestion, Mr. Tully had consensual intercourse with Ms. Olsson. Due to the amount of alcohol he had consumed, he was unable to ejaculate or maintain an erection. Afterwards, he left the bedroom. Pillard then went in the bedroom. Mr. Tully heard a struggle and heard Pillard and Ms. Olsson arguing. When Mr. Tully returned to the bedroom, he saw that Ms. Olsson was dead. She had been stabbed multiple times. Mr. Tully said that Thomas must have taken Mr. Tully's knife from the car. Thomas gave it back to him after the killing. Mr. Tully said they wiped the house of fingerprints and he threw the knife into someone's backyard. Thomas took Ms. Olsson's purse and threw it in the pond on the golf course. (People's Trial Exhibit 6C; RT 2900.)

After the interrogation by Robertson, around 11:30 p.m., Alameda County Deputy District Attorney Charles Fraser, together with his investigator, James Brock, conducted

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[5] Robertson testified that Pillard's fingerprints were sent to the DOJ for comparison and an investigation into Pillard was conducted. (RT 2902.)

another interrogation of Mr. Tully. (RT 2739-2743.) A tape of the interview was played for the jury. (RT 2749.) Before talking, Mr. Tully inquired whether Fraser had spoken to Robertson and Newton about his placement in the witness protection program. Mr. Tully told Fraser he was concerned because the person who stabbed Ms. Olsson was affiliated with the Hell's Angels and he wanted to make sure he and his family were protected. Mr. Tully gave Fraser the same information he had provided to Robertson. Mr. Tully explained that he had not disclosed what happened before because he was afraid of Pillard. (People's Exhibit 9A-B.)

John Chandler, a resident of the neighborhood, had dated Mr. Tully's mother. He and Mr. Tully were very close. Mr. Tully lived with Chandler from the winter of 1986 until early July 1986. (RT 2503.) Mr. Tully was not living at Chandler's house on July 24. He had moved out 3-4 weeks earlier. (RT 2507-2508.)

Mr. Tully kept a key to Chandler's house, stored some clothing there and sometimes received phone calls about job offers. Mr. Tully would stop by every three or four weeks to collect mail and visit. (RT 2508-2510.) Chandler had no other address or phone number for Mr. Tully. Several pieces of mail for Mr. Tully were seized from Chandler's house, including an envelope postmarked July 18, 1986, which had a phone message for Mr. Tully written on the back. (RT 2511-2512.)

Mr. Tully had just gotten out of the military when he moved in with Chandler. (RT 2532.) He was clean cut. When Mr. Tully moved out, he was "scraggly" and his

hair and beard had grown. (RT 2524-2525.) At the time of trial, Mr. Tully had gained a lot of weight. (RT 2522.)

ARGUMENT

I. THE RECORD ON APPEAL IS INCOMPLETE AND INADEQUATE

A. Introduction

From court proceedings in the Municipal Court through the end of the penalty phase in the Superior Court, the record on appeal in this case is incomplete. The incompleteness renders the record on appeal inadequate. This Court is prohibited from conducting a meaningful review in this automatic appeal or in the related habeas corpus proceedings because of this inadequate record.

As a result of trial court error, pretrial and trial proceedings were not transcribed; transcripts are missing and inadequate; stenographic notes for other proceedings were lost or destroyed before transcripts were prepared; and pleadings that were filed in the trial court were not made a part of the record.[6] Numerous bench conferences during trial were conducted without a court reporter. This leaves an inaccurate record of trial court rulings and objections raised and argued concerning the introduction of testimony, prosecutorial misconduct, and guilt or penalty jury instructions.

These unreported conferences were reduced to brief *post hoc* memorializations by

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[6] There is no reporter's transcript of many hearings, which occurred prior to trial in this case. The reporters' notes of hearings on January 19, 1988, April 15, 1988, and June 17, 1988 were lost or destroyed in the Loma Prieta earthquake and apparently were never transcribed. (ART 2, 6, 7.) Proceedings on December 15, 1987, June 17, 1991, September 23, 1991, November 25, 1991, January 30, 1992, February 11, 1992 and May 26, 1992 were not reported at all. (ART 3-5, 9.) The court reporter states that she deleted her notes from August 11, 1987, August 19, 1987, September 10, 1987, November 17. 1987, November 18, 1987, November 24, 1987, and May 26, 1987, but she believes they were "probably transcribed." (ART 8.)

the parties and the trial court. The record of these conferences fails to reflect the substance of the proceedings. (See e.g., CT 1974, 2018 ; RT 2-3, 1934, 3578, 3758-3759, 3670, 3667-3669.) The settled statement and augmented record do not adequately reconstruct the substance of the missing records and incomplete transcripts. (CT 015396-015420.)

B. The Judgment and Convictions Must Be Reversed Due to the Inadequate Record.

Section 190.9 "requires that all proceedings in a capital case be conducted on the record with a reporter present and transcriptions prepared." (*People v. Frye* (1998) 18 Cal.4th 894, 941.) Capital appellants are "entitled to an appellate record adequate to permit 'meaningful appellate review.'" (*People v. Seaton* (2001) 26 Cal.4th 598, 699, quoting *People v. Scott* (1997) 15 Cal.4th 1188, 1203.) Accordingly, "[i]t is important that trial courts 'meticulously comply with Penal Code section 190.9, and place all proceedings on the record." (*Id.* at p. 700, quoting, *People v. Freeman* (1994) 8 Cal.4th 450, 511.)

Strict enforcement of this rule is essential because the lack of an adequate record in this case violates Mr. Tully's Sixth Amendment right to effective assistance of counsel on appeal and the Fourteenth Amendment right to due process and equal protection, as well as the Eighth Amendment and Article I of the California Constitution. (Article I). (*Pennsylvania v. Finley* (1987) 481 U.S. 551; *Evitts v. Lucey* (1985) 469 U.S. 387; *Douglas v. California* (1963) 372 U.S. 353.) Without an adequate record, counsel cannot

"meet his or her obligations as a competent advocate" on appeal, which includes "the duty to prepare a legal brief containing citations to the [appellate record] and appropriate authority, and setting forth all arguable issues." (*People v. Barton* (1978) 21 Cal.3d 513, 519.) Without a complete and accurate record, counsel could not identify all trial court errors and prosecutorial misconduct to be raised in this appeal. Nor could counsel provide advocacy that permitted "full consideration and resolution" of the appeal, as required by the state and federal Constitutions. (*Id.*, at p. 520, citing *Anders v. California* (1967) 386 U.S. 738, 743.)

In a capital case, the preparation and transmittal of an accurate and complete record is critical to the integrity of the criminal justice system. Without appellate review based upon an adequate record, Mr. Tully cannot enforce compliance with the constitutional mandate that the state's capital sentencing process "'be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.'" (*Zant v. Stephens* (1983) 462 U.S. 862, 874, quoting *Gregg v. Georgia* (1976) 428 U.S. 153, 189 (plurality opn.).) Nor can the state assure that due process, fair trial and equal protection requirements were met, or that the sentence was imposed in a manner that comports with the Eighth Amendment and Article I.

The Eighth Amendment requires capital punishment states to employ a heightened appellate review process. (*Gregg v. Georgia, supra,* 428 U.S. at pp. 198, 204-206; *Proffitt v. Florida* (1976) 428 U.S. 242, 250-251; *Pulley v. Harris* (1984) 465 U.S. 37, 53

[upholding California's death penalty scheme because it "assure[s] thoughtful and effective appellate review.") In *Zant v. Stephens, supra,* 462 U.S. at p. 876, as Justice Stevens noted, "in each of the statutory schemes approved in our prior cases, . . . meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid." (*Pulley v. Harris* (1984) 465 U.S. 37, 59 (conc. opn. of Stevens, J.).)

The record on appeal in this case does not provide this heightened and necessary protection.

C. The Incomplete Record in this Case Requires Reversal

Forty-four (44) court hearings were not transcribed in this case. Transcripts are missing for these proceedings:

Livermore Municipal Court: August 11, 1987 hearing (CT 1122); August 19, 1987 hearing (CT 1124, 1126); and September 10, 1987 hearing (CT 1128).

Livermore Municipal Court Preliminary Hearing: Unrecorded or Untranscribed Bench Conferences and Proceedings: November 17, 1987 (CT 488, 514); November 18, 1987 (CT 526:24, 538, 564:12); November 19, 1987 (CT 586:14, 709:15, 1151, 746:15); November 24, 1987 (CT 1043:5, 1046:3, 1078:8, 1079:22); and December 1, 1987 (CT 1105:20).

Alameda Superior Court Pretrial and In Limine Proceedings: December 15, 1987 (CT 1543); April 15, 1988 (CT 1584); April 18, 1988 (CT 1593);

June 6, 1988 (CT 1626); June 17, 1988 (CT 1631); June 17, 1991 (CT 1665); September 23 (CT 1666); November 25, 1991 (CT 1668); January 27, 1992 (CT 1737); January 30, 1992 (CT 1738); February 11, 1992 (CT 1739); March 10, 1992 (CT 1744); March 20, 1992 (CT 1745); April 17, 1992 (CT 1750); May 6, 1992 (CT 1751); and June 9, 1992 (CT 1825).

Alameda Superior Court Trial Proceedings: August 13, 1992 (In chambers conference regarding guilt phase instructions and exhibits) (CT 1975); August 14, 1992 (CT 1974); September 10, 1992 (In chambers conference regarding penalty phase jury instructions) (CT 2018); and November 2, 1992 (CT 2144).

Alameda Superior Court Trial: Unrecorded or Untranscribed Bench Conferences and Proceedings: June 11, 1992 (RT 110); June 25, 1992 (CT 1887); July 1, 1992 (CT 1908); July 24, 1992 (RT 190); August 4, 1992 (RT 2522); August 11, 1992 (RT 2903); August 12, 1992 (RT 2977); August 20, 1992 (RT 3261); August 27, 1992 (RT 3335); September 3, 1992 (RT 3404); September 9, 1992 (RT 3601); September 9, 1992 (RT 3611); September 15, 1992 (RT 3731); September 15, 1992 (RT 3816); September 15, 1992 (RT 3727); and September 16, 1992 (RT 3890).

Without transcripts of these proceedings, the record is wholly inadequate for a capital appeal. Mr. Tully has shown "that the appellate record is not adequate to permit meaningful appellate review." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1334, fn. 70.) The incomplete record, including hearings involving substantial issues, in this case does

not "permit the reviewing court to pass on the questions raised on appeal. (*People v. Frye,* 18 Cal.4th at p. 941.) Accordingly, Mr. Tully has been prejudiced. (*Ibid.*)

Meaningful appellate review is impossible for another reason as well. The trial court relied on its personal notes in ruling on Mr. Tully's application under section 190.4. The trial court stated that, in making its findings here, it "also reviewed its own personal notes relating to the evidence received as to all phases of the case." (RT 3911). The trial court never made these notes part of the record in this case, nor has Mr. Tully been provided a copy. Not only does this lack of an appropriate record undermine the purpose of the statute, but it also renders it impossible for this Court to conclude that the trial court's consideration of the evidence was proper or accurate.[7]

The lack of a complete and accurate record has prejudiced Mr. Tully's ability to prosecute the appeal and this court's ability "to pass on the questions raised on appeal." (*People v. Frye, supra,* 18 Cal.4th at 941.) The missing transcripts include proceedings involving: 1) pretrial hearings; 2) *in limine* proceedings on issues concerning jury questionnaires and voir dire proceedings; 3) pleadings on the motions to suppress; 4) trial conferences on the admissibility of exhibits; 5) trial conferences on both the guilt and the

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[7] The fact that the record on appeal does not contain these notes itself violates Mr. Tully's right to meaningful appellate review. Under the Eighth Amendment, the record must be sufficient to ensure that there is no substantial risk the death sentence has been arbitrarily imposed. Meaningful appellate review plays a crucial role in ensuring that the death penalty is not imposed arbitrarily or irrationally. (*Parker v. Dugger* (1991) 498 U.S. 308, 321; citations omitted.) Without the notes, Mr. Tully cannot fully present and this Court cannot fully address the challenges raised here.

penalty phase jury instructions; 6) numerous bench conferences where objections were raised and ruled on; and 7) conferences during the penalty phase deliberation concerning the jury's inquiries and the court's responses. In one such conference, the response to a jury note on the question of punishment apparently was discussed and resolved without any record being made. (RT 3890; CT 2172.2E.) (*See Simmons v. South Carolina* (1994) 512 U.S. 154.) The contents of these conferences impact the evidentiary and instructional issues in this appeal, the nature of defense counsel's objections, and other matters necessary for meaningful appellate review. Accordingly, this Court is prevented from performing a meaningful appellate review.

Alternatively, if this Court fails to find prejudice, it must reconsider the *Frye* test because the lack of a complete record on appeal in a capital case requires reversal *per se*. Errors that implicate rights that are so essential, necessarily render a proceeding fundamentally unfair. No showing of prejudice is required with these errors because they are "structural" errors in effect. (*See e.g. Payne v. Arkansas* (1958) 356 U.S. 560, 78 (coerced confession); *Gideon v. Wainwright* (1963) 372 U.S. 335, 83 (right to counsel); *Tumey v. Ohio* (1927) 273 U.S. 510 (1927) (biased judge).) The right to meaningful appellate review on a complete record is a protected right because it is essential to the fairness and reliability of a capital appeal.

Here, the missing records involve both guilt and penalty phase hearings. The missing portions of the record relate to substantive matters and are not *de minimus*.

Given the special nature of capital proceedings and the additional Eighth Amendment protections, it should be presumed that the record on appeal prevents this Court from conducting a "meaningful appellate review."

For these reasons, Mr. Tully's conviction and death sentence must be reversed.

II. MR. TULLY'S DETENTION, SEARCHES, AND ARREST ON MARCH 7, 1987 WERE UNLAWFUL AND ALL EVIDENCE OBTAINED SHOULD HAVE BEEN SUPPRESSED

A. Introduction

Prior to March 1987, the fingerprints found on the knife were submitted to DOJ for comparison with all prints in the LPD database. (March 30, 1992 RT 127-129.) Mr. Tully's prints were included in those prints sent to the DOJ for comparison. The DOJ concluded Mr. Tully's prints did not match the prints found on the knife. (March 30, 1992 RT 130, 140-1.)

In March 1987, eight months after the killing, LPD had no viable leads in the case. Approximately 30 suspects had been identified. Mr. Tully was not one of them. (March 30, 1992 RT 130.) Police had canvassed the neighborhood and made contact with approximately 200 households, including John Chandler's, where Mr. Tully had lived for a time. Mr. Tully's name did not come up during the neighborhood canvass. (March 30, 1992 RT 131.)

On March 7, 1987, Mr. Tully was stopped and cited for driving with a suspended license by the LPD. He was searched and arrested for possession of methamphetamine. Following his arrest, Mr. Tully made statements to Officer Trudeau conditioned on Trudeau's express promise that he would not disclose those statements to anyone else. In breach of the promise, Trudeau disclosed the statements to LPD Detective Robertson. (March 30, 1992 RT 203-206.) Robertson then resubmitted Mr. Tully's fingerprints to

DOJ for further comparison. A print analyst then opined that the prints on the knife matched Mr. Tully's. (March 30, 1992 RT 133.)

On March 27, 1987, Mr. Tully was arrested for narcotics offenses.[8] (March 30, 1992 RT 134.) After his arrest, he gave three statements to the police.

Prior to trial, the defense filed a motion to suppress challenging the legality of Mr. Tully's March 7, 1987 detention, searches, arrest and resulting statements, and his March 27 arrest and resulting statements. (CT 1740-1743; 1752-1787; March 30, 1992 RT 124.)[9] After a hearing, the trial court properly held that the statements made after Mr. Tully's March 7 arrest were involuntary. However, the trial court erred in finding that: 1) the March 7 detention, searches, and arrest did not otherwise violate Mr. Tully's constitutional rights; 2) the DOJ match to Mr. Tully's fingerprints and all other derivative evidence, including statements made following his arrest for the killing, need not be suppressed; and 3) there was no violation of Mr. Tully's rights in connection with his March 27 arrest. (ART 347-349.)

The involuntary statements made following Mr. Tully's arrest led the police to consider him a suspect in the killing. In turn, the police resubmitted Mr. Tully's

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[8] Mr. Tully was arrested pursuant to two warrants for narcotics violations. There is no true dispute that the real reason for the arrest was to take him into custody and question him regarding the murder. (RT 53.)

[9] The defense filed a second motion to suppress, which challenged the introduction of Mr. Tully's post arrest statements on other grounds. That motion was denied. (See Argument III, *infra*.)

fingerprints to the DOJ on March 25, 1987. This time a match was purportedly made. The fingerprint re-comparison led to Mr. Tully's arrest for the killing, after which Mr. Tully made further statements to the police.

Mr. Tully's convictions were based on evidence that was the fruit of the illegal detention, searches, arrest, and statements on March 7. Accordingly, all fruits of the illegality, which led to Mr. Tully's arrest for the killing, should have been suppressed by the trial court. The admission violated Mr. Tully's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article I of the California Constitution.

B. The March 7, 1987 Arrest

On March 7, 1987, LPD Officers Trudeau and Painter were watching the apartment of a suspected drug dealer. Trudeau noticed a car drive by and park several houses away. The driver got out of the car and went into the apartment. Trudeau thought he recognized the passenger as Ed Snyder. (March 30, 1992 RT 170-175.) Trudeau described the car and driver to Painter. Painter told him that the driver might be Mr. Tully. Painter told him that he had taken a vandalism report a week earlier that referenced Mr. Tully, who had a suspended license. Painter told Trudeau that Snyder had an outstanding arrest warrant. (*Id.* at 175-177.)

The driver left the apartment, got into the car and made a U-turn. Painter followed him for several blocks, during which time the officers confirmed that the car was Mr.

Tully's, and that he had a suspended license. Painter stopped the vehicle. Snyder was arrested for the outstanding warrant. Mr. Tully was cited for driving with a suspended license. (*Id.* at 177-180.)

While Trudeau was writing Mr. Tully's citation, Painter spoke to Mr. Tully. Painter did not advise Mr. Tully of his *Miranda* rights. (March 30, 1992 RT 251.) According to Painter's testimony, he allegedly wanted to talk to Mr. Tully about the vandalism incident - even though the case was closed - to see if he would consent to a search.[10] (March 30, 1992 RT 236.) Painter admitted that he did not have sufficient cause either to detain Mr. Tully or arrest him on the vandalism allegation. He admitted that he was trying to solicit incriminating evidence from Mr. Tully. (ART 260-261, 263.)

Painter told Mr. Tully he had heard that he was "a user" and that he was armed with a knife. Painter asked to search him. Painter "didn't know" whether he told Mr. Tully he wanted to search for drugs as well as a knife. He had testified at the preliminary hearing that he only asked for consent to search for a knife. (ART 254, 261; Defense Suppression Hearing Exhibit D, p. 54.)

After Trudeau had finished writing the citation, he heard Painter tell Mr. Tully that a knife had been used in the vandalism. (March 30, 1992 RT 218.) Trudeau heard Painter say: "Something to the fact [sic] that, 'Did you use the weapon in that case' or

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[10] Painter testified at the suppression hearing that he had taken a vandalism report in February, 1987 for which Mr. Tully was a suspect. The individuals making the report had told him that Mr. Tully was a narcotics user who normally carried a knife. Painter told Trudeau this information before they stopped the car. (March 30, 1992 RT 232.)

something. 'Do you have any weapon on you now; if I find any such . . .' something along those lines." (*Id.* at 196.) Trudeau was sure Painter did not mention drugs to Mr. Tully when he obtained his consent to search. (*Id.* at 197.) Mr. Tully allegedly consented to the requested search for a weapon. He was not given *Miranda* warnings. (*Id.* at 236.)

Painter conducted a visual search with a flashlight and found no weapons. He did not frisk Mr. Tully for weapons. Instead, he put his fingers in the coin pocket of Mr. Tully's jeans and retrieved a bindle of suspected methamphetamine. Trudeau then asked Mr. Tully for consent to search his car, again without giving any *Miranda* warnings. Mr. Tully allegedly agreed to the search. (March 30, 1992 RT 237-238.) The police found some syringes and a bent, burnt spoon. (*Id.* at 184.) Mr. Tully then was arrested for possession of methamphetamine and paraphernalia.

Mr. Tully was transported to the LPD station where another search of his person was conducted. Trudeau found more bindles of suspected methamphetamine. After this search, Mr. Tully was read his *Miranda* rights. Mr. Tully expressly refused to talk about the items seized from him that night. Trudeau wrote that Mr. Tully "refused to answer any of his questions." (March 30, 1992 RT 201-2.)

Mr. Tully told Trudeau he did not want to go to jail. They talked about whether Mr. Tully would work as a police informant instead of going to jail. Trudeau contacted Detective Jensen to have him talk to Mr. Tully about the agreement. (March 30, 1992 RT 185-187.) Trudeau told Mr. Tully that, in light of his agreement to assist the police,

"nothing he said would be used against him." (*Id.* at 203.)

While they were waiting for Jensen to arrive, Mr. Tully told Trudeau he used methamphetamine 4-5 times a day by injection, and that he supported his habit by breaking into houses. Mr. Tully said he had been in the Marines and that he was being treated for stomach problems at the Veteran's Administration Hospital. Trudeau did not mention Mr. Tully's statements in his report of the narcotics arrest. When Jensen arrived, he spoke to Mr. Tully alone. He released Mr. Tully because he agreed to return later to "work off" the drug offense as an informant. (March 30, 1992 RT 188-189.)

A week later, Trudeau realized he had not returned Mr. Tully driver's license to him on March 7. He contacted Jensen about the driver's license. Jensen said he had not been in contact with Mr. Tully since March 7. (March 30, 1992 RT 190-191.)

Trudeau decided to return Mr. Tully's driver license on March 17, 1987. When he got to the residence listed on the license, John Chandler's house, he realized it was only a few houses away from Ms. Olsson's house. He remembered that Mr. Tully told him that he was a drug user and that he was being treated at the VA. Trudeau recalled that Ms. Olsson was stabbed with a knife and that an FBI profile suggested the killer was likely a drug user who was a local. (March 30, 1992 RT 191-193.)

At that time, Trudeau was unable to make contact with anyone at Chandler's house. He told Robertson, the primary detective on the homicide case what had occurred. (March 30, 1992 RT 190-193.) Trudeau also related Mr. Tully's March 7 statements to

Robertson. (*Id.* at 203, 205.) Robertson then pulled Mr. Tully's file, which contained a fingerprint card dated 1973. He delivered that card to the DOJ on March 25. The prints were again compared to the fingerprints found on the knife. This time, a match was reportedly made by fingerprint analyst Angelo Riente. (*Id.* at 132-133.)

C. The March 27, 1987 Arrest

On March 27, 1987, five LPD officers went to Mr Tully's in-laws' house. They had two warrants for Mr. Tully's arrest on narcotics charges. Diane Holbert answered the door. She invited Stewart and Officer Tart into the house. (ART 273-275.)

Stewart saw Mr. Tully's wife, Vicky, walk down the hall. Vicky told him Mr. Tully was in the bedroom sleeping and that she would get him. (ART 275 - 277.) Stewart drew his gun and began to walk down the hall. (ART 284.) He found Mr. Tully lying in bed. Mr. Tully was arrested without incident. Vicky consented to a search of the bedroom. (ART 276-279.)

Several hours after his arrest, Mr. Tully was interrogated for four plus hours. Portions of the interrogation were tape recorded.[11]

D. The Motion to Suppress

The defense moved to suppress evidence, challenging the legality of Mr. Tully's detention, searches, arrest and use of the statements he made following his arrest on

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[11] Mr. Tully made two additional statements on March 30, 1987 while he was incarcerated at the Santa Rita Jail. (See Argument III, *infra.*)

March 7, 1987, as well as the legality of his March 27 arrest for murder. They sought to suppress all fruits of the illegal police conduct, including the fingerprint match and Mr. Tully's post arrest statements. (CT 1741, 1783, 1786; March 30, 1992 RT 124.)

The trial court properly held that the statements made by Mr. Tully after his March 7, 1987 arrest were illegally obtained and were involuntary. The court suppressed those statements.

It erroneously found, however, that the fruits of Mr. Tully's involuntary statements need not be suppressed because it was a case of "investigative serendipity," and because "the police would inevitably have again compared [Mr. Tully's] prints with those found on the knife found at the murder scene." (ART 348.) The trial court erroneously found that the March 7 detention, searches, and arrest did not otherwise violate Mr. Tully's constitutional rights, that the search of his person did not exceed the scope of his consent, and that there was no violation in connection with his March 27 arrest. (June 8, 1992 ART 347-349.)

Mr. Tully's detention, searches, arrest, and statements on March 7 and March 27, 1987 were illegal. Due to the involuntariness of the statements, as well as the other violations of Mr. Tully's rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendment, as well as Article I of the California Constitution, the evidence of the fingerprint match and Mr. Tully's post-arrest statements regarding the case were tainted and should not have been admitted at trial.

E. Mr. Tully was Unlawfully Detained for Questioning on March 7, 1987

Mr. Tully was initially stopped on suspicion of driving with a suspended license. The status of his license was verified after the stop, and he was issued a citation. Although the police were perhaps justified in stopping Mr. Tully and detaining him just long enough to verify that his driver's license had been suspended and to issue him a citation, once this process was completed, there was no cause to detain him for questioning, and any consent to search, which was obtained from Mr. Tully during that illegal detention, was tainted.

The Fourth Amendment – which governs all searches and seizures of persons, including those that involve only a brief detention short of traditional arrest – requires that all searches and seizures be based upon an objective justification.[12] (*Davis v. Mississippi* (1969) 394 U.S. 721; *Terry v. Ohio* (1968) 392 U.S. 1, 16-19.) The Supreme Court has recognized that in limited circumstances, an individual may be detained and frisked for weapons where law enforcement has an "articulable suspicion" that a person has committed or is about to commit a crime. (*Ibid.*) In *United States v. Brignoni-Ponce* (1975) 422 U.S. 873, 881-882, the Supreme Court held that, under the same circumstances, i.e. a "reasonable suspicion" of criminal activity, a temporary seizure *for the purpose of questioning limited to the purpose of the stop*, is permissible. This Court

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[12] Under California law, issues relating to the suppression of evidence derived from police searches and seizures must be reviewed under federal constitutional standards. (*People v. Ayala* (2000) 23 Cal.4th 225, 254-255.)

has held that "[a] detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity." (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Mr. Tully was "not free to go" and was therefore "seized" while the police were issuing the citation for driving with a suspended license. (March 30, 1992 RT 215-216.) Instead of having Mr. Tully sign the citation and releasing him, Trudeau waited while Mr. Tully was detained by Painter well after the justification for the detention had dissolved. The detention continued while Painter told Mr. Tully that he heard that a knife had been used in the vandalism incident and requested Mr. Tully's consent to search for a weapon. (March 30, 1992 RT 215-219.)

The justification articulated by the officers for Mr. Tully's initial detention was to issue him a citation. (ART 260.) Once the original purpose for the stop ended, any further detention had to be separately and reasonably justified. As the Supreme Court has held: "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." (*Terry v. Ohio, supra,* 392 U.S. at p. 19 quoting *Warden v. Hayden* (1967) 387 U.S. 294, 310 (conc. opn. of Fortas, J.).) "The scope of the detention must be carefully tailored to its underlying justification." (*Florida v. Royer* (1983) 460 U.S. 491, 500.) "[A]n investigative detention must be temporary and

last no longer than is necessary to effectuate the purpose of the stop," (*ibid*), and "an individual may not be detained even momentarily without reasonable, objective grounds for doing so." (*Id.* at p. 498.) Although a valid stop can include the momentary restriction on a person's freedom of movement in order to maintain the status quo *while police are making an initial inquiry*, once that initial inquiry is completed, the detention is an unreasonable interference with the detainee's personal liberty and violates the Fourth Amendment. (*See United States v. Thomas* (9th Cir. 1988) 863 F.2d 622, 628.)

At the point when Trudeau returned to Mr. Tully's car with the written citation, neither he nor Painter had any justification to continue their detention of Mr. Tully. Trudeau and Painter both testified that they could not arrest Mr. Tully for the traffic violation, and that – had Mr. Tully not consented to a search – he would have simply been cited and released. The officers also conceded they had no probable cause to arrest him for the vandalism or any drug offense, and absent his consent, they had no grounds to search him for anything. (March 30, 1992 RT 215-216; ART 260.)

As justification, Painter testified that he was trying to solicit incriminating evidence and/or a consent to search Mr. Tully for evidence related to some crime *other* than driving with a suspended license. (ART 263.) Under the Fourth Amendment, this did not provide reasonable grounds for Mr. Tully's continued detention and questioning. A stop or detention must be based on specific and articulable facts, known to the officer at the time, that lead him to suspect the detainee is involved in some present or imminent

crime. "An investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith." (*In re Tony C.* (1978) 21 Cal.3d 888, 893, citing *Terry v. Ohio*, *supra,* 392 U.S. at p. 22.) Moreover, just as arrests made without probable cause "in the hope that something might turn up" are unlawful, detentions made without a reasonable suspicion of criminal activity "in the hope that something might turn up" are similarly unlawful. (*Brown v. Illinois* (1975) 422 U.S. 590, 605, *accord Dunaway v. New York* (1979) 442 U.S. 200, 216.)

Painter had received a report that Mr. Tully might have been involved in a vandalism incident a week earlier. Although he stated that his intent was to interrogate Mr. Tully about the vandalism, he admitted he had no reasonable suspicion to detain him solely on that basis. (ART 260-261.) Mr, Tully was not listed as a suspect in the vandalism case, and that case had already been closed. (ART 260-261.) Painter's purpose in questioning Mr. Tully was only to fish for some damning statements or evidence that might "incriminate" him for some crime other than the traffic violation for which he had been cited. His sole reason for believing Mr. Tully might provide incriminating evidence was that he been told that Tully carried a knife and was a heavy drug user. (ART 250.)

If the vandalism report was not sufficient to provide law enforcement with a reasonable suspicion that Mr. Tully had committed vandalism, then it certainly was not sufficient to provide them with a reasonable suspicion that he committed any crime at all.

The information on which a police officer relies must contain "sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop," and "[t]he reasonable suspicion at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person." (*Florida v. J.L.* (2000) 529 U.S. 266, 272.) Since Painter did not believe the vandalism report was credible enough to provide a reasonable suspicion that Mr. Tully had committed the vandalism, it was not credible enough to provide a reasonable suspicion Mr. Tully was involved in any other criminal activity. Painter's supposition that Mr. Tully might be armed and/or "a drug user" was based on a "hunch" or "rumor."

The police had no reasonable suspicion to detain Mr. Tully beyond the time it took them to finish writing the citation. Nor did the police have reasonable suspicion to question him about any other crime. Once the citation for driving with a suspended license had been completed, "all the evidence necessary to prosecute that offense had been obtained." (*Knowles v. Iowa* (1998) 525 U.S. 113, 118.) The police had no reasonable suspicion, or any other legal reason, to detain Mr. Tully beyond that point. (See *People v. McGaughran* (1979) 25 Cal. 3d 577, 587.)

F. Mr. Tully's Alleged Consent to the Search was Invalid

The prosecutor claimed that Mr. Tully consented to be searched on March 7. However, he was required to prove "that the consent was, in fact, freely and voluntarily given." (*Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 222.) This burden "is not

satisfied by showing a mere submission to a claim of lawful authority." (*Florida v. Royer*, *supra*, 460 U.S. at 497.) As Mr. Tully submitted to the illegal demands of an officer who was unlawfully detaining and interrogating him, the State did not meet its burden here. A voluntary consent cannot be given by a person who is being illegally restrained from moving. (*See e.g. People v. James* (1977) 19 Cal. 3d 99, 109 ["consent induced by an illegal search or arrest is not voluntary, and . . . if the accused consents immediately following an illegal entry or search, his assent is not voluntary because it is inseparable from the unlawful conduct of the officers."]; *see also People v. Leib* (1976) 16 Cal.3d 869, 877.)

In *Royer*, the Supreme Court held that if a person was illegally detained when they consented to a search, the consent was "tainted by the illegality and was ineffective to justify the search." (*Florida v. Royer*, *supra*, 460 U.S. at 507-508.) Where there was "no proof at all that a 'break in the chain of illegality' had occurred, the . . . consent was invalid as a matter of law." (*Id.* at 497; citations omitted.)) This Court has agreed. (*See Wilson v. Superior Court*, 34 Cal. 3d 777, 783-784, citing *Royer* and *Reid v. Georgia* (1980) 448 U.S. 438.)

Similarly, there was no break in the chain of illegality here. The consent followed within minutes of the detention, and there was "no intervening circumstances whatsoever." (*Id.* at 791, fn. 12.) Mr. Tully's alleged consent was invalid as a matter of law and there was no justification for the search. Accordingly, it was unlawful for Painter

to ask Mr. Tully for his consent to search anything. Questions asked during an investigative stop must be "reasonably related in scope to the justification for their initiation." (*United States v. Brignoni-Ponce, supra,* 422 U.S. at 881.) An officer may broaden his or her line of questioning if he or she notices additional suspicious factors (*United States v. Bautista* (9th Cir. 1982) 684 F.2d 1286, 1290), but these factors must be "particularized" and "objective." (*United States v. Cortez* (1981) 449 U.S. 411, 417.) Here, there were no additional suspicious factors that arose during Mr. Tully's detention that would have supported Painter's continued questioning and request for consent to search. The consent to search was illegally obtained on this ground as well.

Additionally, the consent was unlawful because Mr. Tully was not given any *Miranda* warnings before he was asked for his consent to search. While ordinary traffic stops are generally not considered "custodial," and do not trigger the need for *Miranda* warnings, (*see Berkemer v. McCarty* (1984) 468 U.S. 420, 440), the stop in the present case was not ordinary. Mr. Tully was detained by several officers under the pretext of issuing a citation for a suspended licence. Their true intent was to obtain incriminating evidence regarding an unrelated crime. Since the purpose of the traffic stop – the issuance of the citation – was accomplished when Painter asked to search Mr. Tully, the detention was, no longer a "traffic stop." Indeed, Painter's stated purpose was investigating crimes unrelated to the reason for the traffic stop. "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders

him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*." (*Id.* at 440.) The officers were required to advise Mr. Tully of his *Miranda* rights and obtain a waiver of them before asking him any questions. The subsequent "consent" by Mr. Tully was tainted by this *Miranda* violation. (See *People v. Superior Court (Keithley)* (1975) 13 Cal. 3d 406, 408-410; see also *Kaupp v. Texas* (2003) 538 U.S. 626 [if an arrest is illegal, *Miranda* warnings cannot save a confession tainted by the illegality.]

Here, the totality of the circumstances demonstrate that Mr. Tully's consent was not voluntarily given. He was not told that he had the right to refuse consent. (*Schneckloth v. Bustamonte* 412 U.S. at 218, 249 ["knowledge of a right to refuse is a factor to be taken into account"]; *People v. James* (1977) 19 Cal. 3d 99, 106.) It is unreasonable to expect that anyone would believe that they could refuse to "consent" to the demands of an officer who was illegally detaining them at the time. The officers still had Mr. Tully's driver's license. Under these circumstances, a reasonable person would believe that not only were they not free to leave, but that they must concede to any demands made of them by their detainers.

Mr. Tully was not given the benefit of *Miranda* warnings that are required when a person is in such restrictive custody. This Court held that a consent was voluntary because of the absence of "any illegal detention" and the "need for *Miranda* warnings." (*People v. Fierro* (1991) 1 Cal. 4th 173, 217.) Both of these factors are present here.

Thus, based on the totality of the circumstances, Mr. Tully's alleged consent was merely an appeasement to an "implied assertion of police authority" and not voluntary. (*Ibid.*)

In sum, the state cannot demonstrate that Mr. Tully consent to the search was valid. All related evidence should have been excluded.

G. The Search of Mr. Tully's Person Exceeded the Alleged Consent Given

Not only was Mr. Tully's detention and the questioning of him to obtain his consent unlawful and unjustified in the first place, the search that was conducted by Painter exceeded the scope of Mr. Tully's alleged consent, and was unlawful for that reason as well. "The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?" (*Florida v. Jimeno* (1991) 500 U.S. 248, 251 [citations and quotations omitted].) "The authority to search pursuant to a consent must be limited to the scope of the consent" and the state has the burden of showing that a lawful consent was given. (*People v. Superior Court (Arketa)* (1970) 10 Cal. App. 3d 122, 127-128.) Where a search conducted pursuant to a valid consent exceeds the scope of the given consent, the Fourth Amendment is violated. (*People v. Bravo* (1987) 43 Cal. 3d 600, 605; *People v. Crenshaw* (1992) 9 Cal. App. 4th 1403, 1408.)

The prosecution did not bear its burden of showing that Mr. Tully consented to any more than a search of his person for weapons. Painter exceeded the scope of any consent

when he forced his fingers into the *coin pocket* of Mr. Tully's jeans in the hopes of finding narcotics, under the pretext of searching for a knife, which could not possibly fit in that pocket. The trial court erroneously found that the scope of Mr. Tully's consent to search was not exceeded. This Court must reject the trial court's finding because it was not supported by substantial evidence. (*People v. Alvarez* (1996) 14 Cal.4th 155, 182.)

Trudeau heard Painter say to Mr. Tully that a knife had been used in the vandalism and say something like: "Do you have any weapons on you now?" (March 30, 1992 RT 218.) He was sure Painter did not mention drugs when Painter obtained Mr. Tully's consent to search. (*Id.* at 197.) Painter's testimony concerning the scope of Mr. Tully's consent confirmed this fact. At the preliminary hearing, he testified that he had only mentioned *weapons or a knife* to Mr. Tully in connection with the search, although during the suppression hearing he couldn't really remember if he also had mentioned drugs. (ART 253-255, 261; Defense Suppression Hearing Exhibit D, p. 54.)

Any reasonable inference in the prosecution's favor that might have been drawn from Painter's suppression hearing testimony evaporates in light of his prior testimony at the preliminary hearing, given some five years earlier. The incident was much fresher in his mind at the preliminary hearing.[13] At that time, he testified that he had only asked Mr. Tully if he could search him for a knife. (ART 253-255, 261; Defense Suppression Hearing Exhibit D, at 54.) Painter's preliminary hearing testimony was corroborated by

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[13] The prosecution conceded this fact in their opposition to the motion. (CT 1790.)

Trudeau's suppression hearing testimony. There was no showing made by the state that the officers had ever advised Mr. Tully that they intended to search for drugs. (*People v. Superior Court Arketa*, *supra*, 10 Cal. App. 3d at 127.)

A reasonable person would have understood the exchange between Painter and Mr. Tully to mean a consent to search only for a weapon. (*See Florida v. Jimeno*, *supra*, 500 U.S. at 251.) The substantial evidence showed that Mr. Tully consented to a weapons-only search and not to the much more intrusive search of his person for drugs. The state failed to meet its burden of proving the legality of the search for drugs.

Painter testified that he conducted a visible search of Mr. Tully with a flashlight to determine whether he was carrying a knife. He did not frisk him or pat him down. At that point, the search for weapons was over. Yet, Painter still searched the coin pocket – even though he did not expect to find any weapon there. (ART 255-258.) Painter plainly and purposefully exceeded the scope of the consent to search for a knife, by extending that search to Mr. Tully's coin pocket.

The Supreme Court has upheld the right of law enforcement to conduct a "stop and frisk" or limited weapons search where there is a reasonable suspicion of illegal activity. (*Terry v. Ohio*, *supra*, 392 U.S. at 30-31.) It justified its holding because of the minimal intrusion resulting from a limited search, in comparison with other types of searches. The Supreme Court held that a weapons search must be "confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the

assault of the police officer." In upholding the search in *Terry,* the Supreme Court noted that the officer merely "patted down" the outer clothing of the detainees, and *did not place his hands in their pockets* or under the outer surface of their garments until and unless he had felt weapons, and then he merely reached for and removed the weapons. The officer in *Terry* "confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find." (*Ibid.*)

Since Mr. Tully's alleged consent only involved a search for weapons, then only a *Terry* search was justified. Painter did not confine his search to what was minimally necessary to search for weapons. Instead, he proceeded with "a general exploratory search" for evidence of criminal activity far beyond possession of a weapon. Painter admitted that he "didn't expect to find a knife in the coin pocket." (ART 258; emphasis added) Yet, he searched it anyway without any legal basis to do so.

The officer's continued exploration of Mr. Tully's pocket, after having concluded that it contained no weapon, was not related to the sole justification for the *Terry* search. (*See Minnesota v. Dickerson* (1993) 508 U.S. 366, 379; *see also People v. Dickey* (1994) 21 Cal. App. 4th 952, 957.) The search here for drugs exceeded the scope of Mr. Tully's alleged consent to a weapons search. (*See People v. Superior Court (Arketa), supra*, 10 Cal. App. 3d at 127 [consent to search a house for a suspect did not extend to a thorough

search of the house, including its closets, to uncover a crowbar]; *People v. Harwood* (1977) 74 Cal. App. 3d 460, 467-468 [interception of phone calls exceeded the scope of a consent to search premises for cocaine and money].) Because Mr. Tully did not consent to this search – and in light of its intrusive nature – the search was not lawful and all related fruits should have been suppressed.

H. The Search of Mr. Tully's Car, His Arrest, and the Search at the Police Station Were Unlawful

Immediately after the search of Mr. Tully's person, Trudeau searched Mr. Tully's car based on his alleged consent. (March 30, 1992 RT 154, 238.) Since this search happened contemporaneously with the search of Mr. Tully's person, it was illegal for the same reasons as discussed above. This search also was tainted by the first illegal search. "The rule is clearly established that consent induced by an illegal search or arrest is not voluntary, and that if the accused consents immediately following an illegal entry or search, his assent is not voluntary because it is inseparable from the unlawful conduct of the officers." (*Burrows v. Superior Court* (1974) 13 Cal.3d 238, 251.) Consent induced by an illegal arrest or search is not voluntary. (*People v. Leib*, *supra,* 16 Cal.3d 869, 877.)

Based on these two searches, Mr. Tully was arrested. (March 30, 1992 RT 184; 196.) Since the only basis for this arrest was the illegally seized evidence, the arrest was illegal since it was not supported by any independent factual basis providing probable cause at the time it was made. (*See United States v. Taheri* (9th Cir. 1981) 648 F.2d 598, 601; *United States v. Marchand* (2d Cir. 1977) 564 F.2d 983, 991.) Since the arrest was

illegal, all of its fruits should have been suppressed.

At the police station, another search of Mr. Tully was conducted. (March 30, 1992 RT 185.) Since Mr. Tully was being illegally detained at the time, this search was illegal as it was a direct fruit of the illegal arrest and tainted by all the prior illegal events. *(See In re John C.* (1978) 80 Cal. App. 3d 814, 820 [explaining that the reasonableness of a search at the jail depends on the legality of the arrest.]) The fruits of a search incident to an illegal arrest must be suppressed. (*People v. Ramirez* (1983) 34 Cal. 3d 541, 552.)

I. Mr. Tully's Statements to Trudeau were Obtained in Violation of *Miranda* and Were Also Involuntary

Following his arrest for possession of narcotics, Mr. Tully was taken to the LPD station. Mr. Tully was read his *Miranda* rights at the station and expressly refused to talk to Trudeau about the items seized from him that night. Mr. Tully "refuse[d] to answer any questions" – a position which Trudeau understood to be an invocation of Mr. Tully's right to remain silent. (March 30, 1992 RT 202.)

According to Trudeau, later that night Mr. Tully said that he did not want to go to jail. Trudeau responded that they could make a deal so Mr. Tully could avoid jail. (March 30, 1992 RT 187.) Trudeau told Mr. Tully that, in light of his agreement to assist the police, *nothing he said to law enforcement would be used against him.* (March 30, 1992 RT 203.)

Although he had earlier invoked his right to remain silent, in reliance on this express promise, Mr. Tully then made incriminating statements to Trudeau. These

statements eventually led Trudeau to consider Mr. Tully a suspect in the kiling. Trudeau used Mr. Tully's statements against him by conveying those statements to Sgt. Robertson, the lead officer on the homicide case.

The trial court found that Mr. Tully's statements to Trudeau were involuntary – and excluded Mr. Tully's statements themselves. The trial court refused to exclude any fruits of the involuntary statements. This failure to suppress all fruits of the involuntary statement was erroneous.

Pursuant to *Miranda v. Arizona, supra,* 384 U.S. at 473: "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. . . . ." Mr. Tully invoked his right to remain silent, as even Trudeau conceded. (March 30, 1992 RT 202.) Yet, the questioning did not cease.

The admissibility of statements obtained without a *Miranda* invocation depends on whether the right to end questioning was "scrupulously honored." (*Michigan v. Mosley* (1975) 423 U.S. 96, 104.) Mr. Tully's invocation was not "scrupulously honored." He plainly invoked his right to remain silent. While Mr. Tully initiated further conversation with Trudeau after invoking his rights, Trudeau used the opportunity to continue to question Mr. Tully and cajole him into incriminating himself. Mr. Tully was induced to

speak by Trudeau's false promise that his statements would not be used against him. The statement and all of its related fruits should have been suppressed under *Miranda*.

Further, a statement is involuntary if it is "'extracted by any sort of threats or violence, or obtained by any direct or implied promises, however slight, or by the exertion of any improper influence.'" (*Hutto v. Ross* (1976) 429 U.S. 28, 30 quoting *Bram v. United States* (1897) 168 U.S. 532, 542-543.) If "'the defendant is given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement, even a truthful one, such motivation is deemed to render the statement involuntary and inadmissible.'" (*People v. Vasila* (1995) 38 Cal. App. 4th 865, 874 quoting *People v. Hill* (1967) 66 Cal. 2d 536, 549.)

Here, Mr. Tully was promised that if he cooperated with the police, he would be released and not prosecuted. There was an express promise of leniency made by Trudeau. The turning point in the interrogation was when Mr. Tully was promised release. Prior to that he had invoked his right to remain silent, yet once so promised, he spoke. Mr. Tully's sole motivation for talking was to avoid going to jail, which was the favor bestowed upon him for talking and assisting the police.

However, after inducing Mr. Tully to talk, Trudeau broke his promise and used the information against Mr. Tully. If the inducement alone did not make the statement involuntary, this betrayal most certainly did. "[C]ertain promises, if not kept, are so

attractive that they render a resulting confession involuntary. A promise of immediate release or that any statement will not be used against the accused is such a promise." (*Streetman v. Lynaugh* (5th Cir. 1987) 812 F. 2d 950, 957; citations omitted.)

Mr. Tully's will was overborne by both promises: that he would not go to jail and that his statements would not be used against him. Trudeau broke these promises when he provided the information to Robertson, which resulted in Mr. Tully being arrested. Such false promises are illegal. (*See People v. Andersen* (1980) 101 Cal. App. 3d 563, 576. The State has acknowledged that "false promises of leniency are coercive." (See *People v. Vasila, supra*, 38 Cal. App. 4th at p.874.) When Trudeau used the statements to make certain that Mr. Tully was arrested, there was a constitutional violation.

Mr. Tully's right to fundamental fairness under the Fourteenth Amendment Due Process Clause was violated by Trudeau's broken promise. As this Court has recognized, "when a defendant's waiver of the right to remain silent "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." (*People v. Quartermain* (1997) 16 Cal.4th 600, quoting *Santobello v. New York* (1971) 404 U.S. 257, 262.) For the same reasons that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and to breach that promise by using the silence to impeach his trial testimony, due process is violated when law enforcement breaches a promise that the defendant's statements will not be used against him. (*Ibid*, citing *Doyle*

v. Ohio (1976) 426 U.S. 610 and *Wainwright v. Greenfield* (1986) 474 U.S. 284, 292.)

In addition, Mr. Tully was being illegally detained when he made these statements to Trudeau. The use of them by the State was illegal for this reason as well. This Court has stated:

> Because of the particular interests protected by the Fourth Amendment, a statement must be suppressed, even when knowing, voluntary, and intelligent, if it is the direct product of an illegal arrest or detention. (*Dunaway v. New York* (1979) 442 U.S. 200, 216-217; *Brown v. Illinois* (1975) 422 U.S. 590, 602-604.) By proscribing searches and seizures without adequate cause or judicial authorization, the Fourth Amendment guards, among other things, against the police tactic of "investigative detention." (E.g., *Hayes v. Florida* (1985) 470 U.S. 811, 815-816.) This case presents a classic example of such tactics. (*People v. Boyer* (1989) 48 Cal. 3d 247, 267 disapproved on other grounds by *People v. Stansbury* (1995) 9 Cal. 4th 824, 830, fn. 1.)

Mr. Tully's illegal detention and the related questioning was a classic example of "investigative detention."

"A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is 'sufficiently an act of free will to purge the primary taint.'" (*Taylor v. Alabama* (1982) 457 U.S. 687, 690, quoting *Brown v. Illinois* (1975) 422 U.S. 590, 602; *Oregon v. Elstad* (1985) 470 U.S. 298, 306.) Mr. Tully's statement occurred *during* the illegal arrest, which was the result of the illegal stop and search. There was nothing to break this illegal chain of events and render the statement a product of "free will." As the trial court found, Mr. Tully's statements to Trudeau were involuntary and were properly suppressed. (ART 348.)

However, the trial court erroneously deemed the constitutional violation "technical" and failed to exclude the fruits derived from it. (ART 348.) "If a statement is found to be involuntary, the statement and other evidence derived from it are inadmissible for any purpose." (*People v. Vasila*, *supra*, 38 Cal. App. 4th at p. 873 citing *Oregon v. Elstad* (1985) 470 U.S. 298, 304-309; *see also Mincey v. Arizona* (1978) 437 U.S. 385, 402 [holding that due process requires that involuntary statements "cannot be used in any way against" a defendant at his trial].) Thus, Mr. Tully's statements were involuntary and all related fruits should have been suppressed.

J. The Illegality of the Detention, Searches, Arrest, and Statements Require Suppression of the Evidence

The process that led to the police decision to resubmit Mr. Tully's fingerprints to the DOJ was tainted at virtually every step of the way. First, although the initial traffic stop may have been legal, the continued detention of Mr. Tully for the purpose of general criminal investigation was illegal. Second, Mr. Tully's alleged consent to a search at the traffic stop was not voluntary, but was instead the result of illegal questioning based on no more than "a rumor" and was also the result of his illegal detention. Third, Painter exceeded the scope of Mr. Tully's alleged consent to a search for weapons, and thus obtained the incriminating evidence that he was hoping to find, which was evidence of some other crime. Fourth, Mr. Tully's alleged consent to search his car was also involuntary and tainted by the previous illegal events. Fifth, Mr. Tully's subsequent arrest based on evidence from the illegal stop and searches was illegal. Sixth, Mr. Tully's

search at the police station was tainted by the illegal arrest and searches. Seventh, as the result of this illegal chain of events, Trudeau obtained involuntary statements from Mr. Tully, after he had invoked his *Miranda* rights. Finally, Trudeau expressly promised not to use those statements against him, and then turned around and disclosed these statements to Robertson.

By unlawfully detaining, searching, and arresting Mr. Tully, law enforcement violated his rights under the Fourth Amendment, as well as Article I of the California Constitution. Mr. Tully's rights under the Fifth and Fourteenth Amendments, as well as Article I of the California Constitution, were violated when he was induced by false promises to make involuntary and incriminating statements despite his invocation of his right to remain silent. The State should not have been allowed to use any of the resulting evidence in any manner against Mr. Tully. The State's use of the tainted evidence in seeking and attaining the death penalty here further violated the requirement of "heightened reliability" under the Eighth Amendment, as well as Article I of the California Constitution.

Without the incriminating evidence, including Mr. Tully's driver's license[14] and his statements to Trudeau, from these illegal events on March 7, Trudeau would never have become suspicious of Mr. Tully. Without that suspicion, Trudeau would never have

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[14] Mr. Tully's driver license was seized during the traffic stop. However, just as the seizure of Mr. Tully's person became illegal when the purpose of that stop was over, the continued seizure of the license became illegal as well.

communicated Mr. Tully's statements to Robertson and Mr. Tully's fingerprints would never have been re-submitted to the DOJ. If the fingerprints had not been re-submitted, Mr. Tully would not have been arrested on March 27 and would not have been questioned about the killing. He would not have been confronted with the alleged fingerprint match by DOJ during that questioning and would not have made the three later statements that were introduced against him at trial. (See Argument III, *infra.*)

The exclusionary rule prohibits the introduction into evidence of materials and testimony that are the products or indirect results of the illegal conduct by police, i.e., the "fruit of the poisonous tree." (*Wong Sun v. United States* (1963) 371 U.S. 471.) In addition to each individual violation of Mr. Tully's rights, each illegal event was tainted by the prior illegal event and all the resulting evidence should have been excluded. The "fruits" of illegal actions by law enforcement should not have been used at all by the State. "'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.'" (*Lockridge v. Superior Court* (1970) 3 Cal.3d 166, 169 quoting *Silverthorne Lumber Co. v. United States* (1920) 251 U.S. 385, 392 and *Wong Sun*, *supra* at p. 485.)

The exclusionary rule is the principal mode of discouraging lawless conduct by law enforcement. (See *Weeks v. United States* (1914) 232 U.S. 383, 391-393.) It is the only effective deterrent to misconduct in the criminal context, and without it, the

constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." (*Mapp v. Ohio* (1961) 367 U.S. 643, 655.) The admission of the fingerprint evidence and statements by Mr. Tully at trial not only failed to curtail, but actually condoned the serious and repeated police misconduct by which that evidence was obtained.

While the trial court correctly suppressed the March 7 statements themselves, it declined to suppress any of the "fruits" of those statements. The court found that the fruits were the result of "investigative serendipity" and that they would have been inevitably discovered during the course of the investigation into the Olsson murder. (ART 348.) The trial court's findings do not comport with the state and federal Constitutions and are not supported by substantial evidence. All the resulting evidence had to be suppressed.

Mr. Tully's unlawful detention led directly and immediately to his unlawful search. That search led directly and immediately to his narcotics arrest. At no point was there any attenuation or independent bases between these events. (*United States v. Taheri, supra*, 648 F.2d at p. 601.) The illegal stop, search, and arrest led in turn, to Trudeau's seizure of Mr. Tully's driver's license and to Mr. Tully's involuntary and incriminating statements to Trudeau. These involuntary statements were the direct and immediate result of the prior chain of illegal events and nothing happened to purge this taint. (*Brown v. Illinois, supra*, 422 U.S. at p.602.)

Trudeau broke his express promise to Mr. Tully by disclosing those statements to Robertson, and those statements provided Robertson with his only reason to resubmit Mr. Tully's fingerprints to the DOJ laboratory. The evidence that Mr. Tully's fingerprints allegedly matched the print found on the knife was then used to support his arrest on March 27, 1987. Following that arrest, Mr. Tully was confronted with the allegation that his fingerprints matched the print found on the knife, and he gave three separate statements to law enforcement concerning the instant case. The "fruits" of the misconduct by law enforcement include the evidence concerning the re-comparison of Mr. Tully's fingerprints, as well as the three statements he made to law enforcement following his March 27 arrest.

Every event in this lengthy chain was still connected to the illegal acts by the police and each subsequent piece of evidence is poisonous fruit. As Trudeau stated, it was Mr. Tully's driver's license that triggered him to go to Chandler's house. The license was the first fruit as it was seized for a prolonged period of time during the initial illegal stop. Because of this visit, Trudeau had his realization connecting Mr. Tully's statements about alleged drug use and treatment at the VA to the killing. This suspected connection was based entirely on evidence that was the result of the illegal stop and Mr. Tully's involuntary statements. It was Trudeau's suspicion that then triggered Robertson to resubmit Mr. Tully's fingerprints to the DOJ. The DOJ's alleged match of the fingerprints to the print on the knife was the evidence leading to a suspect that the police

had been unable to obtain for almost a year.

Without the fingerprint match, the later interrogations of Mr. Tully by law enforcement could not have transpired, as the officers merely "exploited the information [they] had improperly acquired" previously. (*Ibid.*) There was "no evidence sufficient to dissipate the taint of the initial illegal conduct," and the March 27 and March 30 statements were the inadmissible fruit of the unlawful interrogation. (*Ibid.*) The alleged fingerprint match and the three later statements can all be characterized as "'come at by exploitation'" of the police's illegal actions. (*Lockridge v. Superior Court*, *supra*, 3 Cal. 3d at p. 170 quoting *Wong Sun v. United States*, *supra*, 371 U.S. at p. 488.)

1. The Trial Court Erroneously Found the Discovery of Evidence Against Mr. Tully was the Result of "Investigative Serendipity"

The trial court ruled that the fruits of Mr. Tully's involuntary March 7 statements were admissible because they were discovered by "investigative serendipity." The court did not suppress the fruits of the statements, even though it suppressed the statements that produced the fruits. (ART 348.) The trial court erred.

It was the illegal actions by the police, especially the seizing of the license and the illegal statements, that directed and were the sole impetus of the investigation into Mr. Tully being a suspect. Without this evidence, the police had no suspects, much less any evidence indicating Mr. Tully was involved. The information gleaned from the illegal acts was the only thing that directed the police to re-submit the fingerprints.

Here, the facts triggering Trudeau's suspicion were based *only* on illegal leads.

The leads from the illegal conduct, especially the license and statements, led directly to the fingerprint re-comparison. Although the trial court deemed the involuntariness of Mr. Tully's statements a "technicality" (ART 348), it did not explain this erroneous conclusion. There were multiple intentional constitutional violations by law enforcement – not just a single, mere "technical" violation. It is egregious misconduct for law enforcement to repeatedly violate a citizen's Fourth Amendment rights and then violate his *Miranda* rights despite an invocation of the right to remain silent. To then overcome a suspect's will and coerce them into making involuntary statements with promises of leniency, only to later betray the promises made, is not a "technical" violation, but a wholesale shredding of the Constitution.

The trial court found that because Trudeau was not looking for evidence relating specifically to the killing when he violated Mr. Tully's rights, it was "investigative serendipity" that later led to discovery of the evidence linking Mr. Tully to the crime. The trial court stated: "It was not a case where the object of the illegality was to secure evidence of the fingerprint match sought to be suppressed." (ART 348.) The trial court erred in relying on this factor because the "object" of the misconduct was not specific to any crime.[15]

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[15] Under California law, where the evidence is discovered through "pure happenstance," despite any police misconduct, the evidence may be admitted nonetheless. (*Lockridge v. Superior Court, supra,* 3 Cal.3d at pp.170-171 citing *Wong Sun v. United States, supra*, 371 U.S. at p. 488.) "Happenstance" has been defined as a chance disclosure absent the exploitation of illegal police conduct. (*People v. Griffin* (1976) 59 Cal.App.3d 532, 537.)

When the officers first began their illegal acts, they were merely investigating Mr. Tully generally. They could not have thought that the specific evidence sought to be suppressed would turn up because they were not investigating anything in particular. They were on a fishing expedition. (See *In re Tony C, supra*, 21 Cal. 3d at p. 893 [an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful]; see also *Terry v. Ohio, supra*, 392 U.S. at p. 22.) Refusing to suppress evidence unless it was the "specific" evidence that was the object of the misconduct encourages, rather than deters, this form of misconduct. By its very nature, a general investigation can never have as its object the specific evidence that it turns up.

The Supreme Court has acknowledged that even illegal generalized fishing expeditions can have a specific and purposeful object:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning." The arrest, both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. (*Brown v. Illinois*, *supra,* 422 U.S. at p.605; footnote omitted.)

The appropriate question in these types of cases is – not whether the police were seeking the particular evidence that they found – but whether the police's intent that "something would turn up" extended to the evidence ultimately discovered. This was the precise object of the illegalities here, and it extended to the evidence that was sought to be suppressed.

This fact is consistent with the limits of the "serendipity" exception, as explained in *Bacall.*

> [W]hen officers through serendipity discover evidence concerning a suspect whom they are unlawfully investigating in connection with another, different crime, the new evidence is not tainted where the officers discovered it only because their unlawful investigation fortuitously put them in a position to do so and *where their unlawful investigative intent did not extend to the additional evidence.* (*United States v. Bacall, supra,* 443 F.2d at p.1057; emphasis added.)

Similarly, California courts have found suppression warranted where the object or intent behind the illegal conduct was a generalized investigation, and not investigation into the specific crime for which suppression is sought. For instance, in *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 241, the police illegally arrested a defendant for the primary or sole purpose of taking a "gang book photograph," which was "obtained deliberately for use in future criminal investigations." Because the taking of the photographs supplied an important motive, perhaps the prime motive, for the illegal arrest in the first place, the exclusionary rule required that the court exclude the photographs and resulting identifications. (*Ibid.*)

The purpose of Mr. Tully's continued detention beyond the issuing of a citation was to obtain "incriminating statements" and/or to obtain a consent to search for evidence specifically concerning crimes *other* than the crime for which Mr. Tully had been lawfully stopped. Painter was not looking for evidence concerning Mr. Tully's suspended license, but rather for incriminating evidence related to any crime – which is precisely

what he obtained through his illegal actions. The sole purpose of the illegal detention and subsequent searches was to obtain evidence "for use in future criminal investigations." (*People v. Rodriguez, supra*, 21 Cal.App.4th at p. 241.) As a result, the evidence linking Mr. Tully to the instant case bore a direct relationship to the primary object of the illegal conduct, and was not sufficiently attenuated from taint of the illegalities to be admitted into evidence.

In order to show that the evidence discovered as a result of Mr. Tully's statements was purged of the taint of involuntariness, the prosecution would have to show that the officers' unlawful intent did not extend to this evidence. (*United States v. Bacall, supra,* 443 F.2d at p. 1057.) The prosecution failed to present any testimony regarding Trudeau's intent when he informed Mr. Tully that nothing he said would be used against him. The state failed to meet its burden.

For all these reasons, the trial court's finding that the evidence against Mr. Tully was discovered through investigative serendipity was erroneous. All fruits of Mr. Tully's involuntary statements should have been suppressed.

2. The Trial Court Erred in Finding that the Evidence Leading to Mr. Tully's Arrest Would have Been Inevitably Discovered

Relying on the recognized – but rightfully criticized – "inevitable discovery" exception, the trial court found that the alleged fingerprint match evidence was admissible. The trial court's ruling was incorrect. The prosecution did not establish that this evidence would inevitably have been discovered by lawful means.

The inevitable discovery rule is based on probability, not mere possibility. (See *Nix v. Williams, supra*, 467 U.S. at 444 [endorsing a preponderance of the evidence test]; see also *People v. Boyer, supra*, 48 Cal. 3d 247, 278.) The test is not whether the prosecution *could have* discovered the evidence through lawful means, but whether they inevitably *would have* discovered it. (*Nix v. Williams, supra*, 467 U.S. at 444 [prosecution must establish "that the information ultimately or inevitably would have been discovered by lawful means"]; *see also People v. Boyer, supra*, 48 Cal. 3d 247, 278.)

At the suppression hearing, Robertson initially testified that no match was made the first time the prints were submitted because the unidentified latent print analyst was, for some unknown reason, only looking at the middle finger during his initial review, while the later comparison, which reportedly produced a match, was to the ring finger. (March 30, 1992 RT 140-141) Robertson later testified, however, that the initial comparison *was* to the ring finger, but still yielded no matches. (March 30, 1992 RT 149.) No testimony from the unidentified fingerprint analyst that conducted the first comparison was ever presented to the court during the suppression hearing or to the jury at trial. In fact, even Angelo Riente, the DOJ latent print analyst who reportedly made the subsequent match to Mr. Tully did not testify.

The LPD made a map of the neighborhood to keep track of where the police had made contact. (March 30, 1992 RT 166.) All houses that were checked on July 25 1986 were marked on the map in yellow. Later, houses where contact had been made were

crossed off the map. John Chandler's house at 1572 Hollyhock, where Mr. Tully had lived prior to July, 1986, was crossed off the map with a red cross, indicating contact had been made. (March 30, 1992 RT 166-167) No one interviewed during the neighborhood canvass provided any information concerning Mr. Tully. (March 30, 1992 RT 131.)

Robertson testified that, after the initial canvass, there had been no continuing active investigation for some time on the case. It did not become active until March 18, 1987, when he spoke to Trudeau and learned "by chance" of the information obtained during Mr. Tully's March 7 arrest.

Robertson first testified that he planned to contact houses where no contact or follow-up had previously been established. At the suppression hearing, Robertson changed the date that the "rechecking" had been planned. He originally testified that it in March 1987 it was decided that the neighborhood should be checked again. Later he claimed it was "sometime in February." (March 30, 1992 RT 168) Robertson initially stated the "recheck" was to inquire who had been living at these houses *during the time of the murder* and look into their backgrounds. (March 30, 1992 RT 142.) On cross-examination, after being confronted with the map that showed the police had *already* made contact, and verified contact, at John Chandler's house, Robertson changed his testimony regarding the scope of the plan and claimed its purpose was to "triple check"everyone that had been contacted. (March 30, 1992 RT 167-168.)

Sgt. Jack Stewart testified that he formulated the recheck plan in mid-February

because of some confusion between the police report and the map. The purpose of the recheck was to see who owned the house, who lived there and whether it was a rental, and who was visiting *at the time of the crime*. (ART 271.) Despite these "plans," Stewart testified that as of the date of Mr. Tully's arrest on March 27, 1987, no rechecking of the neighborhood had begun. (ART 271.)

Stewart testified that he had intended to run all the neighborhood addresses through a new computer database that included information from police reports and police interview cards. (ART 310, 320.) Despite his belief that some houses in the neighborhood were not investigated, he did not actually run any of the addresses through this database *until the morning of the suppression hearing*, and the only plan that had been discussed was to recheck, in some undisclosed fashion, the neighborhood itself. (ART 323-326.) That morning, when they finally ran Chandler's address through the system they found it listed a report concerning a possible crime that occurred on March 6, 1987. Stewart said that, had he obtained this report earlier, he would have run a check on Mr. Tully, obtained his fingerprints and sent them to the DOJ. (ART 324-325.) Notably, Stewart did not provide any theory whereby the information about the crime at Chandler's address would have triggered a reexamination of Mr. Tully's fingerprints.

Given these serious inconsistencies and credibility gaps, it cannot be concluded that there was substantial evidence that law enforcement would have re-checked the neighborhood, including Mr. Chandler's house. Yet, the trial court relied on Robertson

and Stewart's testimony that they were already planning to renew the investigation and conduct another neighborhood check at the time that Trudeau told Robertson of his suspicions regarding Mr. Tully. The trial court's determination that the officers' testimony on this point was credible was not supported by substantial evidence. (See *People v. Boyer, supra*, 48 Cal.3d at p. 263; *People v. North* (1981) 29 Cal.3d 509, 513.)

The trial court erred in accepting Robertson and Stewart's testimony regarding the reopening of the investigation as credible. There was no substantial evidence to support Robertson's testimony that the plan was already "under way" at the time Trudeau reported Mr. Tully's statements to Robertson. Indeed, the testimony of Robertson sharply contradicted that of his supervisor, Stewart. Since, at most, only one officer was telling the truth here, the trial court's finding that both men were credible plainly is not supported by the evidence. Moreover, the prosecution offered no explanation for why nothing had been done to actually begin to recheck the neighborhood after this purported formulation of the plan.

Even assuming Robertson and Stewart were credible and that they did have a plan to re-canvass the neighborhood in February or March 1987, there was no evidence, let alone substantial evidence, that such a re-canvassing would have inevitably led them to Mr. Tully. The scope of the planned investigation changed over the course of the testimony about it, but had it proceeded as reported by either Stewart or Robertson, the police *still* would not have received any information causing them to suspect Mr. Tully

and to resubmit his fingerprints to the DOJ. There was no evidence from the police who made the initial contact at the Chandler house concerning what questions were asked and no evidence that asking the planned questions would have provided any new or different information to the police if they visited his house again. There was no explanation given by law enforcement as to how even a rechecking of the neighborhoods or any other investigation that turned up Mr. Tully's name would have "inevitably" led to re-submitting his fingerprints to the DOJ in light of the fact that *the police had already submitted his prints once with negative results.*

The prosecution failed to prove that, in the absence of the involuntary statements obtained as a direct result of his illegal detention and search, the police would have inevitably determined Mr. Tully was a suspect in the homicide case. Without the statements, Mr. Tully's fingerprints would not have been resubmitted to DOJ. The evidence that his fingerprints allegedly matched those found on the knife should have been suppressed. Moreover, because the fingerprint re-comparison provided the basis for Mr. Tully's arrest for the killing, the statements he gave to law enforcement following that arrest were tainted and should have been suppressed as well.

K. Conclusion

None of the constitutional errors were harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 23.) There were only two sources of evidence relied upon by the prosecution to prove Mr. Tully's guilt: allegations that his

fingerprints "matched" the fingerprints on the knife, and Mr. Tully's statements made following his March 27 arrest. Without this evidence, the only link the prosecution had between Mr. Tully and the crime was that Mr. Tully had been staying at Chandler's house until around 3 weeks prior to the crime, and that he loosely fit an FBI "profile."

Had the fingerprint evidence and Mr. Tully's statements been excluded, Mr. Tully would not have been convicted of murder and sentenced to death. Under these circumstances, the failure to suppress all of the illegal fruits of law enforcement's constitutional violations under the Fourth, Fifth, Eighth, and Fourteenth Amendments, and Article I including the illegal detention and search and the later involuntary statements, was extremely prejudicial – and most certainly not harmless beyond a reasonable doubt.

The trial court's failure to suppress the statements violated Mr. Tully's Eighth Amendment and Article I right to "heightened reliability" at all phases of a capital case. (*See e.g. Sumner v. Shuman* (1987) 483 U.S. 66, 72; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Hernandez* (2003) 30 Cal. 4th 835, 878.)

III. MR. TULLY'S MARCH 27 AND MARCH 30, 1987 STATEMENTS WERE UNLAWFULLY OBTAINED AND SHOULD HAVE BEEN SUPPRESSED

A. Introduction

Mr. Tully gave a statement to officers on March 27 and two statements on March 30, 1987. The defense moved to suppress all three statements. The trial court denied the motion. The prosecution introduced, and the jury heard, a portion of the tape recorded March 27 statement, and the two complete interviews on March 30. (People's Exhibits 5A-C, 9 A-B.)

All three of Mr Tully's statements were involuntary and were obtained in violation of Mr. Tully's constitutional rights. The statements should not have been admitted. The statements were obtained in violation of Mr. Tully's Fifth Amendment right against self-incrimination, his Fourteenth Amendment due process rights, as well as Article I of the California Constitution. The trial court's failure to suppress the statements violated Mr. Tully's Eighth Amendment and Article I right to "heightened reliability" at all phases of a capital case. (*See e.g. Sumner v. Shuman* (1987) 483 U.S. 66, 72; *Beck v. Alabama* (1980) 447 U.S. 625, 638; *People v. Hernandez* (2003) 30 Cal. 4th 835, 878.)

B. The March 27, 1987 Statement

On March 27, 1987, Mr. Tully was arrested on two arrest warrants for narcotics offenses. (RT 79-80.)

At the time of Mr. Tully's arrest, his wife, Vicky, was under criminal investigation for check fraud. When Mr. Tully was arrested, Vicky was told to go to the LPD to

discuss the matter. (RT 85.) She was questioned by Officer Jacobs. She confessed to the charges. She was not arrested. Instead, she was interviewed at length by officers Newton and Robertson about Mr. Tully's background. (RT 85-87.) The officers began tape recording the interview surreptitiously.[16] (People's Trial Exhibit 7B.)

After the police interviewed Vicky, and approximately six hours after Mr. Tully's arrest, Robertson and Newton interrogated him at the police station again surreptitiously recording the interrogation. Prior to reading any *Miranda* warnings, Robertson asked Mr. Tully some initial booking questions, and also asked, in some detail, about his living arrangements on Hollyhock Street. (RT 94-95.)

After the *Miranda* warnings were given to Mr. Tully, the police did not ask him about the narcotic offenses. They questioned him about the homicide and information they had received during their interview with Vicky. Following an intense interrogation during which Robertson falsely and repeatedly told Mr. Tully that "five" DOJ fingerprint analysts had determined his fingerprints matched those found in Ms. Olsson's house, Robertson finally informed Mr. Tully that he had been arrested for murder. Mr. Tully responded by saying that he had been arrested for a narcotics offense. Robertson replied: "I didn't tell you that" and "who cares?" (People's Trial Exhibit 4.)

Shortly after informing Mr. Tully that he had been arrested for murder, the police

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[16] The police used what they referred to as a "body wire" to surreptitiously record this conversation. (People's Trial Exhibit 4, RT 54-55.) A small microphone was taped to the bottom of the table in the interrogation room. (RT 55; 93.)

stopped the interview. Ninety minutes later, the interrogation resumed. (RT 54-59.) The questioning went on until midnight. Mr. Tully sat in the interview room the entire time without a shirt or shoes.

About halfway through the interrogation, the officers asked whether he would take a polygraph examination. Mr. Tully asked, "Do I have a choice?" The officer responded:

Q. Well, I ain't got a gun to your head, right?

A. No.

Q. Do I have a rubber hose?

A. No.

Q. Water dripping on your face?

A. No.

Q. Got all your fingernails?

A. I think so.

Q. Okay, no bamboo underneath them?

A. I don't think so. If I do, no telling, heh-heh.

Q. There's your choices.

A. Well this charge you placed on me and the accusations, to say the least are serious, I think it would be–

Q. In the State of California there is nothing more serious than murder.

A. Okay.

Q. Period.

A. *Then I think it would behoove me to consult a lawyer.*

Q. Okay. Before submitting to a polygraph examination?

A. Um, yeah. Before submitting to any questions I wouldn't want to answer.

Q. And that's where we've been tonight, right? We're not here to talk to you about no dope shit, so what, you know, who cares, dope's dope. (People's Trial Exhibit 5D at pp. 71-73; RT 114-177.)

Despite his request for an attorney, the officer did not stop. Mr. Tully was questioned further. After a brief discussion about polygraphs, he was asked:

Q: So what. You're maybe I'm, maybe I'm not hearing you right. But before you gonna be completely truthful here, you're going to wait and talk to an attorney, is that correct?

A: Well, no. What you're saying here is that you don't believe what I'm saying.

Q: No, I don't. (People's Trial Exhibit 5D at p. 73.)

Moments later, Mr. Tully stated: "I think it'd be best if I consult a lawyer." (Id; emphasis added.) Mr. Tully admitted that he knew nothing about polygraphs, and then stated: "That's right. I don't know so that's why I'd like to talk to somebody who does." (RT 117; Trial Exhibit 5D at p. 74.)

The interrogation resumed 15 minutes later. Trudeau, who had arrested Mr. Tully on March 7 for the narcotics offense, had taken Newton's place. Mr. Tully was asked whether he wanted a lawyer "now." He responded, "No, I'm all right." Trudeau told Mr. Tully that he wanted to "expand" on the conversation he had with him "a couple of weeks

ago."[17] He told Mr. Tully he had brought his wife down to the station and she wanted to see him. (People's Trial Exhibit 5D at p. 74.)[18]

The interrogation continued until just after midnight (RT 60), when Vicky was brought in to speak to her husband. The two were allowed to speak privately, with Robertson nearby. After meeting with his wife, Mr. Tully was transported to the Santa Rita Jail. (RT 63-64.)

C. The March 30, 1987 Statements

On March 29, Vicky contacted the police department and requested to meet with Robertson and Newton. They contacted her on March 30 and interviewed her again. (RT 64.) She told them that when she met with Mr. Tully on March 27, he told her that he had actually been in Ms. Olsson's house on the night of the murder but that a man named Thomas (later identified as Thomas Pillard) had stabbed her while Mr. Tully was in another room. (RT 65-69.) They asked Vicky to make a taped statement. She declined because she feared retaliation by Thomas, who she believed was associated with the Hell's Angels motorcycle gang. (RT 66.) Despite her refusal to make a taped statement, Newton left the room and set up the "body mike" to surreptitiously record the interview. (RT 67, 194.)

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[17] This was an allusion to Mr. Tully's statements following his March 7 arrest, which were found involuntary by the trial court. (See Argument II, *supra.*)

[18] While Mr. Tully was being interrogated by Robertson and Newton, Vicky had left the station, and returned home. Sometime prior to 10:30 p.m., Trudeau was sent to pick Vicky up and return her to the station. (People's Trial Exhibit 5D at p. 74.)

Vicky asked if "it would be easier" on Mr. Tully if it were true that he was present during the crime, but someone else was involved. (People's Trial Exhibit 8B at p. 10.) Robertson told her about a case where a participant in a murder turned "state's evidence," testified against the killer and is "out in his own business right now." (Id. at pp.10-11.) Newton asked her if she would be willing to talk to Mr. Tully through a "bugged" telephone. (RT 67.) She refused to tape record any conversations with Mr. Tully. (RT 68.) When she expressed fear that Thomas would discover that she had provided the police with information, Newton told her about the State Witness Protection Program. (RT 67.) She agreed to talk to a district attorney about her fears. (People's Trial Exhibit 8B at pp. 13-14.)

Following this conversation with Vicky, Newton and Robertson drove to the jail to interview Mr. Tully. Vicky followed in her car. Newton testified that Vicky had asked to go with them, in the hopes of seeing Mr. Tully. Newton told her they would "see if that was possible." (RT 214.)

According to Robertson and Newton, once they arrived at the jail, they informed Mr. Tully about their conversation with Vicky concerning the crime, and asked if it was true. (RT 70, 130.) Mr. Tully did not answer the question. Newton then suggested that Mr. Tully might be frightened of Thomas and told him about the witness protection program. (RT 130-131, 203-204.) Newton explained that if the information Mr. Tully provided were true, they would refer him to the District Attorneys Office for

consideration for the program. (RT 131.)[19] This unrecorded conversation lasted approximately 30 minutes. (RT 22.)

At the suppression hearing, Mr. Tully testified that the police told him he was charged with murder and that Vicky could be charged as an accessory. They also told him that Vicky had confessed to the check charges and that she would probably go to prison, and their children would be sent to foster homes. They told him that if he cooperated, his family could join the protection program. (RT 220-221.)

Mr. Tully was allowed to speak to his wife again. Mr. Tully testified he asked her why she had relayed his previous statements to the police. She said she was scared. (RT 219-220.) She told him the police had told her about the witness protection program. Mr. Tully told her what the police had told him. Mr. Tully testified that his wife related that her conversation with the police was similar to his. He decided to talk because he wanted to protect Vicky and to keep her from going to jail. (RT 73; 220-221.)

Vicky then left the room. Robertson and Newton interviewed Mr. Tully again. The interview was tape recorded and played for the jury in its entirety. (People's Trial Exhibit 6C, RT 2900.) Before Tully answered any questions, he asked the officers to "add in the part about the Witness Protection Program." They stated they had talked about the program with Tully and that "in the event that [his information and testimony met the criteria they would] get he and his wife involved in that program." (RT 128.)

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[19] By the time of this interview with Mr. Tully, Robertson and Newton had already learned the identity of Thomas. (RT 121-122.)

In his statement, Mr. Tully said he and Thomas went to Ms. Olsson's house to buy drugs. Thomas told him that he had bought drugs from her before. Thomas spoke to Ms. Olsson in her bedroom while Mr. Tully waited in the living room. Thomas came out of the bedroom. He asked Mr. Tully if he wanted to have sex with Ms. Olsson. Mr. Tully went into the bedroom and had consensual sex with her. Mr. Tully left the bedroom. Thomas and Ms. Olsson then got into a fight. When Mr. Tully returned to the bedroom, Ms. Olsson was dead. He said Thomas must have taken Mr. Tully's knife from his car. Thomas gave it back to him after the killing. Mr. Tully said they wiped the house of fingerprints and he threw the knife into someone's backyard. Thomas took Ms. Olsson's purse and threw it in the pond on the golf course. (People's Trial Exhibit 6C.)

Robertson then called Deputy District Attorney Charles Fraser. Fraser said he listened to the tape of this interview. Together with investigator James Brock, Fraser interrogated Mr. Tully. This interview was tape recorded. The tape was played for the jury. (People's Trial Exhibit 9C, RT 2749.)

At the hearing on the motion to suppress, Mr. Tully testified that the police statements about the witness protection program played a key part in his decision to make a statement on March 30. He thought Vicky felt pressured by the police. They were both scared about her going to jail and being charged as an accessory to the killing. They understood that if he did not cooperate with law enforcement then she would be charged and would likely go to jail. (RT 226-227.)

At the conclusion of the suppression hearing, the trial court found that Mr. Tully did not invoke his right to counsel or his right to remain silent on March 27 or March 30. The trial court found that the prosecution had sustained its burden of proving these statements were voluntary and that there was no inducement or promise of lenient treatment on March 30. (RT 1928-1929.) The trial court's denial of the motion as to the March 27 and the March 30 statements was erroneous. All statements made by Mr. Tully on March 27, 1987 and March 30, 1987 should have been suppressed.

D. Mr. Tully Invoked His Right to Counsel During the March 27 Interview

During the March 27, 1987 tape recorded interview, Mr. Tully invoked his right to counsel. He stated that "it behooves me to consult a lawyer." Further questioning continued, after which Mr. Tully stated: "I think it'd be best if I consult a lawyer," and "That's right. I don't know, so that's why I'd like to talk to somebody who does." (RT 117; People's Trial Exhibit 5D at p. 72-74.) Instead of honoring these requests for counsel, the police persisted in attempting to get Mr. Tully to talk. That action was unlawful and violated Mr. Tully's Fifth Amendment right against self-incrimination, and his rights under Article I of the California Constitution.

Under both state and federal constitutional law, when a suspect is in a custody and indicates that he wishes to consult with an attorney, the interrogation must cease. (*Miranda v. Arizona* (1966) 384 U.S. 436, 444-445; *People v. Johnson* (1993) 6 Cal.4th 1, 27; *People v. Boyer* (1989) 48 Cal.3d 247, 271. "[A]n accused's request for an

attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare v. Michael C.* (1979) 449 U.S. 707, 719.) Once invoked, a valid waiver of the right to counsel "cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." (*Ibid.*) An accused, "having expressed his desire to deal with police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485.)

The Supreme Court established a "bright-line" rule that once the right to counsel has been invoked, all questioning must cease. (*Edwards,* 451 U.S. at p. 484-485.*)* In the absence of such a bright line rule, police through "'badger[ing]' or 'overeaching' – explicit or subtle, deliberate or unintentional– might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." (*Smith v. Illinois* (1984) 469 U.S. 91, 98; citation omitted.) This Court has held:

> If a suspect invokes these rights and the police, in the absence of any break in custody, initiate a meeting or conversation during which counsel is not present, *the suspect's statements are presumed to have been made involuntarily and are inadmissible as substantive evidence at trial*, even in the event the suspect executes a waiver and despite the circumstance that the statements would be considered voluntary under traditional standards.(*People v. Storm* (2002) 28 Cal.4th 1007, 1022, citing *McNeil v. Wisconsin* (1990) 501 U.S. 171, 176-177, emphasis added.)

Further, "[i]f a suspect's request for counsel or invocation of the right to remain silent is ambiguous, the police may 'continue talking with him for the limited purpose of clarifying whether he is waiving or invoking those rights.'"(*People v. Box* (2000) 23 Cal.4th 1153, 1194 citing *People v. Johnson, supra*, 6 Cal.4th at p. 27.) A suspect's responses to further questioning cannot be used to cast doubt on the adequacy of his request. (*Smith v. Illinois, supra*, 469 U.S. at pp. 97-99.) Moreover, "any discussion with the suspect other than that 'relating to routine incidents of the custodial relationship' must be considered a continuation of the interrogation." (*Christopher v. Florida* (11th Cir . 1987) 824 F.2d 836, 845 citing *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045.) "If a suspect believes he is not capable of undergoing such questioning without advice of counsel, then it is presumed that any subsequent waiver that has come at the authorities behest, and not at the suspect's own instigation, is itself the product of the inherently compelling pressures and not the purely voluntary choices of the suspect." (*Arizona v. Roberson* (1988) 486 U.S. 675, 681.)

The trial court found that Mr. Tully's March 27 statements were preceded by an adequate warning of constitutional rights and that a voluntary, knowing waiver was freely and intelligently made. It found that Mr. Tully did not unambiguously invoke the right to counsel during the March 27 statement. (RT 1928.) To the extent these rulings can be characterized as factual findings, they are not supported by substantial evidence, and must be rejected by this Court. To the extent they are conclusions of law, this Court must

independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

Mr. Tully was initially questioned prior to the reading of his *Miranda* rights. After obtaining preliminary information - some of which was in fact incriminating – he was advised of his *Miranda* rights. He invoked his request for counsel three hours after the interrogation began by saying, "I think it behooves me to have a lawyer." The trial court found that Mr. Tully did not unambiguously invoke his right to counsel and that the police could continue to question him to clarify whether he did invoke his rights. (RT 1928.) This finding is not supported by the record.

The rule of *Edwards* applies whenever the suspect has unambiguously expressed his wish for the "particular sort of lawyerly assistance" that is the subject of *Miranda*. (*McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 178; *Davis v. United States* (1994) 512 U.S. 452.) "It requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (*McNeil v. Wisconsin*, *supra*, 501 U.S. at p. 178; emphasis in original.) In *Davis,* the Supreme Court found that the petitioner had not unambiguously invoked his right to counsel where he was read and waived his rights, but then after talking for sometime said: "*Maybe* I should talk to a lawyer." (*Davis v. United States, supra,* 512 U.S. at p. 455; emphasis added.)

This Court has held that: "a suspect may indicate that he wishes to invoke the privilege by means other than an express statement to that effect; no particular form of words or conduct is necessary. A suspect may indicate such a wish in many ways." (*People v. Randall* (1970) 1 Cal. 3d 948, 955 overruled on other grounds by *People v. Cahill* (1993) 5 Cal. 4th 478, 510, fn 17, citations and quotations omitted.) This Court found that to demand a suspect to assert his rights "with unmistakable clarity (resolving any ambiguity against the defendant) would subvert *Miranda*'s prophylactic intent." (*Ibid.*)

> Moreover, it would benefit, if anyone, only the experienced criminal who, while most adept at learning effective methods of coping with the police, is least likely to find incarceration and police interrogation unnerving. Conversely, it would operate most severely on the ignorant and unsophisticated suspect who is most susceptible to the compulsion arising from the tactics of custodial interrogation and consequently most in need of the protections outlined by *Miranda*. (*Ibid*; see also *People v. Duran* (1983)140 Cal. App. 3d 485, 491-492; *People v. Thompson* (1990) 50 Cal.3d 134, 165.)

Applying these principles, California courts have found that a defendant invoked the right to counsel by such diverse statements or questions as: "'Do you think we need an attorney?'" and "'I guess we need a lawyer.'" (*People v. Superior Court (Zolnay)* (1975) 15 Cal.3d 729, 735-736); "'Tell me the truth, wouldn't it be best if I had an attorney with me?'" (*People v. Hinds* (1984) 154 Cal.App.3d 222, 234); "'I don't know if I should have a lawyer here or what.'"(*People v. Russo* (1983) 148 Cal.App.3d 1172, 1176-1177); and "'Well, maybe I should talk to my attorney.'" (*People v. Munoz (*1978) 83 Cal.App.3d 993, 995-996.)

Mr. Tully invoked his rights. The police questioned him about the invocation in a way designed to get him to revoke the invocation and simply keep talking. Wearing down a suspect to get a waiver of *Miranda* rights once they have been invoked is unlawful.

Mr. Tully's invocation of his right to counsel was not ambiguous or equivocal. Mr. Tully said: "Then I think it would behoove me to consult a lawyer." (People's Trial Exhibit 5D at pp. 73.) Although the word "behoove" may be a bit archaic, it means "to be necessary for." (Webster's New Universal Unabridged Dictionary (2d. ed. 1972).) Mr. Tully's request was the same as "it is necessary for me to talk to a lawyer." Coming, as it did, immediately after a discussion of the seriousness of a murder charge, this statement was an unambiguous request for an attorney. Robertson continued to question Mr. Tully when there was no need for clarification.

Robertson wore Mr. Tully down in an attempt to get him to talk by recasting his request for counsel as an admission he was not telling the truth.

> Q: So what. You're maybe I'm, maybe I'm not hearing you right. *But before you gonna be completely truthful here, you're going to wait and talk to an attorney, is that correct?*
>
> A: Well, no. What you're saying here is that you don't believe what I'm saying.
>
> Q: No, I don't. (People's Trial Exhibit 5D at p. 73; emphasis added.)

During this heated exchange, Mr. Tully again made another clear invocation when he stated: "I think it'd be best if I consult a lawyer." (*Ibid.*) Mr. Tully continued to assert

his rights by clearly stating: "I'd like to speak to someone who does [know about polygraphs]." (People's Trial Exhibit 5D at p. 74.)

Robertson stopped the interview for a short period of time. When he returned, he asked yet again whether Mr. Tully really wanted a lawyer. After returning to the interview room with Trudeau, Robertson continued: "When we last left this tape, we were talking about polygraph and you mentioned talking to the lawyer. Do you want a lawyer *now?*"

Mr. Tully invoked his right to counsel on three separate occasions. Each of these invocations were articulated "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Davis v. United States, supra*, 512 U.S. at p.459.) The police did not respect that invocation and continued to question him. The rule of *Edwards* was violated.

No statements made after that invocation should have been admitted at trial regardless of whether Mr. Tully waived his rights during any subsequent interrogation. As this Court has held: "Once having invoked these [*Miranda*] rights, the accused is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." (*People v. Sims* (1993) 5 Cal.4th 405, 440; citations omitted.) If, subsequently, assuming there is no break in custody, the police initiate a meeting in the absence of counsel, the suspect's statements are presumed involuntary and

are inadmissible as substantive evidence at trial, even if the suspect executes a waiver and the statements would be considered voluntary under traditional standards. (*Ibid. citing McNeil v. Wisconsin, supra*, 501 U.S. at p. 176.)

Here, Mr. Tully was in custody from March 27 until March 30. Mr. Tully did not initiate any further discussion with the police after he invoked his right to counsel on March 27. It was the Livermore Police Department and the District Attorney who initiated the March 30 interrogations of Mr. Tully. All statements made after Mr. Tully's invocation on March 27 violated *Miranda* and were involuntary and therefore should not have been admitted at trial. Their admission violated Mr. Tully's Fifth, Eighth and Fourteenth Amendment rights, as well as his rights under Article I of the California Constitution.

E. Mr. Tully Invoked his Right to Remain Silent During the March 30 Interrogation

Towards the end of the March 27 interview with Trudeau and Robertson, Mr. Tully was allowed to meet with his wife, Vicky, in private. They spoke for a few minutes. Afterwards, Mr. Tully was taken to the Santa Rita Jail. Several days later, Robertson and Newton met with Vicky.

On March 30, after meeting with Vicky, Robertson and Newton went to the jail to interrogate Mr. Tully. Robertson and Newton first met with Mr. Tully alone. The officers did not read Mr. Tully his *Miranda* rights at any time during this first conversation, which was unrecorded. They confronted Mr. Tully with what Vicky had

told them her about Thomas and the crime, and asked if it was true. (RT 70, 130.) Mr. Tully did not answer their charges – plainly evidencing his invocation of his right to remain silent by literally remaining silent.

Instead of honoring his silence, the officers cajoled and induced Mr. Tully to talk further. This unrecorded conversation lasted approximately 30 minutes. (RT 22.) Following the interview, Mr. Tully was allowed to speak to his wife again. Afterwards, Mr. Tully spoke to the police. (RT 211.)

An invocation of the right to remain silent is distinct from an invocation of the right to counsel. There is no rule requiring an individual who wishes to remain silent to break that silence by any particular form of speech. In *Miranda*, the Supreme Court held: "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 473-474, fn. omitted.) The suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case. (*People v. Burton* (1971) 6 Cal.3d 375, 382.) The most obvious manner to assert this right is by remaining silent. (See e.g. *United States v. Wallace* (9th Cir.1988) 848 F.2d 1464, 1475; *United States v. Hernandez* (5th Cir. 1978) 574 F.2d 1362, 1368, fn.9; *Watson v. State* (Tex. Crim. 1988) 762 S.W.2d 591, 598.)

Mr. Tully was asked if certain statements made by his wife to the police were true.

He said absolutely nothing in response. Nonetheless, the police persisted in trying to get him to talk by offering the inducement of the witness protection program. At no time before mentioning the program did they ask Mr. Tully if he was willing to speak to them – nor did they advise him of his *Miranda* rights. The discussion of the program did nothing to clarify whether Mr. Tully was asserting his right to remain silent. It was an effort to wear down his resistance and make him change his mind. (*Michigan v. Mosley*, *supra*, 423 U.S. at pp. 105-106.)

Importantly, the discussion following Mr. Tully's silence concerned the reasons *why* he did not wish to talk to the police, which is different from clarifying whether he was asserting his right to remain silent. Newton asked if he was afraid of Thomas and told him about the witness protection program. Officers have no legitimate need or reason to inquire into the reasons why a suspect wishes to remain silent. (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 361; *People v. Marshall* (1974) 41 Cal.App.3d 129, 135 [defendant's reason for asserting his right to remain silent is immaterial].)

Mr. Tully invoked his right to remain silent. All questioning had to cease. Any statements he made thereafter were obtained in violation of his rights under the Fifth, Eighth, and Fourteenth Amendments, and should have been suppressed.

F. The March 27 and March 30 Statements were Involuntary

1. Introduction

Regardless of whether Mr. Tully invoked his right to counsel on March 27, or his

right to remain silent on March 30, under the totality of the circumstances, Mr. Tully's statements on March 27 and March 30 were not the product of his free will, but instead were coerced. Mr. Tully's purported waivers of his *Miranda* rights on March 27 and March 30 were not knowing, intelligent, and voluntary. (*See Miranda v. Arizona, supra*, 384 U.S. at p. 475; *People v. Johnson* (1993) 6 Cal. 4th 1, 32; *People v. Braeseke* (1979) 25 Cal.3d 691, 702-703; *People v. Honeycutt* (1977) 20 Cal. 3d 150, 160-161.)

The Supreme Court has held that certain "interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned" as due process violations under the Fourteenth Amendment. (*Miller v. Fenton* (1985) 474 U.S. 104, 109; see also *Moran v. Burbine* (1986) 475 U.S. 412, 432-434.) In light of the importance of these principles, state and federal constitutional law require the prosecution to establish, by a preponderance of the evidence, that a defendant's confession was voluntary. (*Colorado v. Connelly* (1986) 479 U.S. 157, 168; *People v. Ray*, *supra*, 13 Cal.4th at p. 336, fn 10.) To determine whether a statement is voluntary or coerced, this Court must examine the totality of the circumstances. (*Moran v. Burbine*, *supra*, 475 U.S. at p. 421.) "The question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Massie* (1998) 19 Cal.4th 550, 576, citations and quotations omitted.)

The question in cases of psychological coercion is whether the influences on the

accused were "'such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.'" (*People v. Hogan* (1982) 31 Cal.3d 815, 841 quoting *Rogers v. Richmond* (1961) 365 U.S. 534, 544.) In determining whether an accused's will was overborne, "an examination must be made of 'all the surrounding circumstances – both the characteristics of the accused and the details of the interrogation.'" (*People v. Hogan, supra*, 31 Cal.3d at p.841, quoting *Schneckloth v. Bustamonte, supra*, 412 U.S. at p. 226 .) Relevant factors include "the duration and conditions of detention [], the manifest attitude of the police toward [the suspect], his physical and mental state, the diverse pressures which sap or sustain his powers of resistance and self-control." (*Culombe v. Connecticut* (1961) 367 U.S. 568, 602 (opn. of Frankfurter, J.).) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly, supra,* 479 U.S. at p.167.)

The trial court's findings as to the factual circumstances surrounding the confession may be upheld only if supported by substantial evidence. (*People v. Jones* (1998) 17 Cal.4th 279, 296.) However, the trial court's finding as to the voluntariness of a confession is subject to independent review. (*Ibid.*) The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise and, if so, whether it operated as an inducement, are subject to independent review as well. (*Ibid.*) In this case, numerous factors combined to render

Mr. Tully's statements involuntary.

2. The March 27 Statements and Mr. Tully's Purported Waiver of *Miranda* Rights at That Time Were Involuntary

During Mr. Tully's interrogation on March 27, the police used threats, psychological ploys, and other coercive tactics to get Mr. Tully to incriminate himself. These tactics rendered the March 27 statements – as well as any purported waiver of Mr. Tully's rights on that date – involuntary. The statements and all of their "fruits" were inadmissible.

Mr. Tully was roused out of bed when he was arrested on March 27 and brought to the police station without a shirt and without any shoes. (RT 79-80.) He was held at the station for six hours before he was interrogated by Robertson and Newton, and the interrogation went on for many hours later. Mr. Tully was shackled to the floor with an ankle bolt during this interrogation. (RT 88-90.) The duration and conditions of Mr. Tully's confinement at the police station were coercive. Considering the totality of the circumstances, Mr. Tully's statements of March 27 and any purported waiver of his rights were involuntary.

During the March 27 interrogations, the officers used several different ploys not only likely, but intended, to elicit from Mr. Tully statements that the police themselves believed were unreliable. The coercive impact of each of these ploys combined, along with the threats and coercive conditions under which the interrogations occurred, rendered the statements involuntary. (*People v. Hill* (1967) 66 Cal.2d 536, 550.) This

Court has held that "psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable" are constitutionally impermissible. (*People v. Ray, supra,* 13 Cal.4th at p. 340, *People v. Thompson* (1990) 50 Cal.3d 134, 166-167; *People v. Hogan*, *supra*, 31 Cal.3d at p.841; *People v. Jimenez*, *supra,* (1978) 21 Cal.3d at p. 607.) Deception or other ploys "of a type reasonably likely to procure an untrue statement" render a confession or statement involuntary. (*People v. Farnam*, *supra,* 28 Cal.4th at p. 182, citing *In re Walker* (1974) 10 Cal.3d 764, 777.)

Mr. Tully was deceived and lied to from the moment he was arrested. Although he had been arrested for narcotics offenses, it was only a "ruse." Mr. Tully was interrogated solely as to the killing. Thirty minutes of interrogation passed before Robertson finally told Mr. Tully that he was a murder suspect. When Mr. Tully insisted that he had been arrested for a narcotics offense, Robertson said: "I didn't tell you that" and "who cares?" (People's Trial Exhibit 4.) Robertson falsely and repeatedly told Mr. Tully that "five" Department of Justice fingerprint analysts had determined his fingerprints matched those found in Ms. Olsson's house.

After they provided Mr. Tully with false information, the police used threats to try to get him to talk. This Court has held that a confession may be found involuntary if extracted by threats or violence. (*People v. Benson* (1990) 52 Cal.3d 754, 778, citing *Colorado v. Connelly, supra,* 479 U.S. at p.167.) Impermissible threats include those

directed at third parties, such as a threat that the suspect's family will be taken away, put in jail, or hurt. (See e.g. *Lynumn v. Illinois* (1963) 372 U.S. 528, 534.)

Mr. Tully knew that his wife was questioned about check fraud charges after he was arrested. At the outset of the transcribed interrogation on March 27, the police questioned Mr. Tully about checks found in his car belonging to someone else that had Vicky's name on them. (People's Trial Exhibit 5D p. 2.) This questioning initiated the threat, made overt on March 30, that Vicky would go to jail if Mr. Tully did not talk to the police. Shortly after this exchange, Mr. Tully asked for a lawyer. (People's Trial Exhibit 5D at p.74.) His request was ignored. To the extent that Mr. Tully continued to talk and without being provided counsel, any implied waiver of his asserted rights, and the statements themselves were rendered involuntary as a result of this impermissible coercion.

After Mr. Tully told Robertson he wanted a lawyer, the police tried yet another ploy to keep him talking. This time, they brought Officer Trudeau into the interview room. Trudeau told Mr. Tully that he wanted to "expand" on the conversation he had with him "a couple of weeks ago." Mr. Tully said he would answer a few questions. When Trudeau had arrested Mr. Tully on March 7, he had cajoled him into talking by telling him nothing that he said would be used against him. Unknown to Mr. Tully at the time of the March 27 interview, Trudeau had already used Mr. Tully's statements against him, resulting in Mr. Tully's arrest for murder. Trudeau relied on this past relationship to

encourage Mr. Tully to keep talking. (See e.g. People's Trial Exhibit 5D at p. 87 ["We can better work together. I mean, we've done it before. We did it two weeks ago. There's no reason we can't do it now."]

Trudeau's sudden appearance, after the tense moments involving the invocation of Mr. Tully's right to counsel, was intended to catch Mr. Tully off guard and to put him at ease so that he would incriminate himself. Taking advantage of Mr. Tully's belief that Trudeau had kept his promise not to use Mr. Tully's statements against him, this ploy worked. As Mr. Tully told Trudeau, "I trust you and believe you." (People's Trial Exhibit 5D at p. 103.)[20]

When Mr. Tully continued to deny any involvement in the killing, the police used Mr. Tully's wife to get him to talk. The two were allowed to speak privately before Mr. Tully was transported to the Santa Rita Jail. (RT 63-64.) The police used this meeting with Vicky as leverage for her cooperation, and it was Vicky's report of what Mr. Tully said during this conversation that ultimately led to Mr. Tully's March 30 statements.

The totality of the circumstances show that all statements made by Mr. Tully on March 27 were involuntary. He was held for questioning for 17 hours, without shoes or a

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[20] This is a slight variation of the "good cop-bad cop" or "Mutt and Jeff"technique that was condemned in *Miranda* as one of the strategies police use to "persuade, trick, or cajole [a suspect] out of exercising his constitutional rights." (*Miranda v. Arizona, supra,* 384 U.S. at pp. 452, 455.) Post-invocation chicanery renders any waiver of constitutional rights involuntary since it allows the police to "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." (*Smith v. Illinois, supra*, 469 U.S. at p.98.)

shirt. He was shackled to the floor. Mr. Tully was threatened, coerced, and deceived into continuing to talk – even after he had invoked his right to counsel. His will to resist interrogation was overborne by these impermissible tactics. The trial court erred in finding that no constitutional violations occurred on March 27, and in failing to suppress the statements Mr. Tully made on that date. The police not only capitalized on their previous psychological ploys, but also used Mr. Tully's involuntary March 27 statements to get him to make additional incriminating statements on March 30.

3. The March 30 Statements were Involuntary

Mr. Tully's March 30 statements were induced by promises of leniency, threats, and additional psychological ploys. A promise to an accused that he will enjoy leniency should he confess implicates the voluntariness of any resulting confession. (*People v. Williams* (1997) 16 Cal.4th 635, 660-661.) This Court has held that "'any promise made by an officer or person in authority, express or implied, of leniency or advantage to the accused, if it is a motivating cause of the confession, is sufficient to invalidate the confession and to make it involuntary and inadmissible as a matter of law.'" (*People v. Hogan*, *supra*, 31 Cal.3d at p. 838, quoting *People v. Brommel* (1961) 56 Cal.2d 629, 632.)

Robertson and Newton testified that during the March 30 interrogation, the discussion centered around the Witness Protection Program. Mr. Tully testified that the officers threatened that Mr. Tully's wife was going to go to jail, either on check fraud

charges or as an accessory to murder and that their children would be taken away from her. The officers testified that they did not contemplate using Vicky to obtain statements from Mr. Tully.

The testimony of the officers was incredible on these points. The police repeatedly downplayed their role in inducing Mr. Tully to talk to them. Any implicit findings by the trial court that their testimony was truthful are not supported by the evidence and must be rejected.

Despite their testimony to the contrary, the record shows that the police *did* use Vicky to induce Mr. Tully to waive his rights. From the beginning, her involvement in the investigation was engineered to compel Mr. Tully to incriminate himself. When Mr. Tully was arrested on March 27, Vicky was told to go to the police station for questioning by Jacobs on the check fraud case, which she did. (RT 81-85.) She confessed to the check charges, but was not arrested at that time. Instead, she was interviewed by Robertson concerning Mr. Tully. (RT 85-86.)

The police used the check charge against Vicky as leverage to induce her and Mr. Tully to provide information about the killing. Although Robertson testified that he never considered whether Vicky might be useful to their investigation against Mr. Tully, that testimony is unbelievable. He first testified that Vicky had requested to speak to Mr. Tully during Robertson's interview with her. He also testified that the entire interview with Vicky was recorded. (RT 62-63, 96.) Nowhere on the tape did Vicky request to

speak to Mr. Tully. (People's Trial Exhibit 7B.)

Then he testified that she stayed in the police station lobby while he was interrogating Mr. Tully. He claimed that she was finally allowed to speak to Mr. Tully because she had been sitting there "a number of hours" and had repeatedly requested to speak to her husband. (RT 62-63.) Upon questioning however, Robertson admitted that Vicky might have left the station and returned, but he denied any knowledge of how or why she came back to the station. (RT 96-97.) The evidence shows that Vicky did leave and was brought back to the station by officer Trudeau (People's Trial Exhibit 5D at p. 74) – not that she waited at the station repeatedly requesting to speak to her husband. Other than Robertson's conflicting testimony, in fact, there is no evidence that Vicky ever asked to speak to Mr. Tully on either March 27 or March 30.

Robertson admitted that he was unaware of any other case where a murder suspect was allowed to meet with his family while in custody prior to being charged. (RT 98.) He admitted that, at the point he and Newton brought Vicky in to speak to Mr. Tully, they had been unsuccessful in getting him to talk about the killing. (RT 98.) Under these circumstances, one reasonable inference comes from the facts – the police were using Vicky to get Mr. Tully to talk.

Robertson was incredible in other parts of his testimony, rendering his entire testimony unreliable. For example, he testified that, during the surreptitiously recorded interview with Mr. Tully on March 27, he immediately read him his *Miranda* rights. (RT

56.) The tape recording shows a period of approximately 5 minutes elapsed before any *Miranda* rights were read or waived, and that during those 5 minutes, Mr. Tully was subjected to interrogation, including more than mere background questions. (Trial Exhibit 4.) Robertson eventually admitted this fact on cross-examination. (RT 146.)

The testimony of Robertson and Newton as to what transpired on March 30 is not reliable. They maintained they did not even "think" of using Vicky to help with the investigation, although they directly asked Vicky on March 30 if she would assist them by speaking to Mr. Tully on a "bugged" phone. (People's Trial Exhibit 8B at p. 9) These conflicting statements cannot be reconciled. Newton testified the only reason they allowed Mr. Tully to speak to his wife on March 30 was out of "compassion." (RT 212-213.) Coming shortly after he attempted to get Vicky to secretly record and obtain incriminating statements from her husband for use in a capital case, his claim of compassion is not believable.

The police affirmatively lied to Vicky urging her to try to get incriminating statements from her husband. They told her that "it would be easier" on Mr. Tully if he admitted to some involvement in the crime, and even represented that they would not "lie" to her about that. (People's Trial Exhibit 8B at p. 10.) This was a complete untruth, because up until that point, Mr. Tully had not placed himself at the crime scene and had admitted nothing, so it would not have "been easier" on him to provide some incriminating information, rather than to remain silent. They knew that if Mr. Tully told

them he was at the scene of the crime, it would be more incriminating than anything he had said before. The police volunteered information to Vicky suggesting that another suspect who had implicated someone else in a murder was now "out" and "in business." (People's Trial Exhibit 8B at p. 11.)

In response to her concerns for her own safety if she helped get information from her husband implicating a third party, they told her another blatant falsehood, that her husband had also been seeing and talking to "other people," whose identity they would not disclose because it "wouldn't be fair to them" or fair "to her." (People's Trial Exhibit 8B at p. 11-12.) Finally, to allay her fears about being discovered as an informant they absolutely promised her that "if your life is so in jeopardy, that for the State or Federal Witness Protection program they'll move you away. Plain and Simple." (People's Trial Exhibit 8B at p. 12.)

Mr. Tully testified that the police had told him he was charged with murder and that Vicky could be charged as an accessory. They also told him that Vicky had confessed to the check charges. That she would probably go to prison, and their children would be sent to foster homes. They told him that if he cooperated, his family could join the witness protection program. Mr. Tully testified that his wife related her conversation with the police and he decided to talk because he wanted to protect Vicky and to keep her from going to jail. (RT 220-221.)

In light of the other false testimony provided by Robertson and Newton, this Court

should reject their manufactured version of what transpired during the unrecorded interview. Interestingly, this was the only interview with Mr. Tully that was not taped. The officers did not administer *Miranda* warnings or obtain a waiver from Mr. Tully before interrogating him. They confronted him with statements his wife had made to them, and demanded to know if they were true, and when Mr. Tully refused to talk, induced him to incriminate himself by telling him about the Witness Protection Program. The only reasonable inference from the evidence was that, as Mr. Tully testified, the officers told him his wife would go to jail on check charges and/or as an accessory to murder and that if he spoke to them, she would remain free.

Regardless of Robertson and Newton's crediblity on this point, Mr. Tully's statements were still the product of police coercion and were involuntary. When he was first confronted by the police with what his wife had told them, Mr. Tully said nothing. It was undisputed that the police *told him* that he should be scared of Thomas and then offered to help him by putting him in the protection program. This Court has condemned this type of police tactic, finding that a ploy "which is 'used to make more plausible' a promise of assistance does render a statement inadmissible." (*People v. Hogan*, *supra*, 31 Cal.3d at pp. 840-84, citing *United States v. Murphy* (2d Cir.1964) 329 F.2d 68, 70.)

Mr. Tully did not speak in response to this inducement, immediately afterwards, he was allowed to speak to his wife again. Neither Robertson nor Newton could explain why Vicky was at the jail, nor how it was they knew exactly where to find her when they

decided to allow her to meet with Mr. Tully. They continued to maintain however, that they arranged for the pair to meet out of "compassion." This testimony must be taken for what it was, an attempt to hide their own involvement in coercing Mr. Tully to incriminate himself.

Even if Vicky contacted the police of her own accord on March 29, and even if she requested to speak to Mr. Tully or he asked to speak to her, the March 30 meeting could not have occurred unless it was orchestrated by the police. In fact, the police arranged for Vicky to meet with Mr. Tully after she had arrived at the jail. (RT 212-215.) It is improper for the government to so involve itself in the questioning of a person in custody by a private citizen. (See *Franklin v. Duncan* (N.D. Cal., 1995) 884 F.Supp. 1435, 1451 aff'd. (9th Cir. 1995) 70 F.3d 75. By arranging for this meeting between Mr. Tully and his wife, the police were using her to do what they could not do – coerce incriminating statements from him.

Vicky was brought in and the two talked in the corner of the room for a few minutes, after which Mr. Tully said he would make a statement to the police. (RT 73) During this conversation with Vicky, Mr. Tully asked why she had "snitched him off" and she said she was scared. (RT 219-220.) She told him the police had told her about the Witness Protection Program, and he told her what they had told him. (RT 220-221.)

Robertson and Newton interviewed Mr. Tully again. Mr. Tully was then interrogated by Deputy DA Fraser. By these events, Mr. Tully was induced to talk to the

police, and then to the District Attorney, by assurances made to him and his wife that they would be protected and placed in the program. Mr. Tully told Fraser: "I want to make sure that myself and my family are both protected." (People's Trial Exhibit 9C at p.2; see also id. at p.40.) Mr. Tully stated that the detectives promised, and Vicki confirmed, that if he spoke to the DA and cooperated that there would be "lesser charges or a lighter sentence" for him. (Id. at pp. 3 & 41.)

Although Fraser told Mr. Tully that he could not guarantee anything with regard to the Witness Protection Program, Mr. Tully had, at that time, relied on the promises of the police officers. Mr. Tully said: "I'm gonna believe in what those two told me. And uh, I hope like hell that, you know, they're telling me the truth and I'm sure they are so I'll go ahead and go on with what I had said earlier and tell you what I got here." (People's Trial Exhibit 9C at pp. 2-4.)

The police used the Witness Protection Program as an inducement to get Mr. Tully to talk. Mr. Tully's purpose was to make sure that he and his family would be protected. The police and DA's office led him to believe that this protection would be arranged if he talked to them. This inducement produced Mr. Tully's involuntary statements. (See *United States v. Eccles* (9th Cir. 1988) 850 F.2d 1357, 1360-1361 [affirming district court's decision that promises of re-uniting suspect with family in Witness Protection Program along with other factors pointed directly to psychological coercion]; *see also State v. Jackson* (La. 1980) 381 So. 2d 485 [holding that a promise of putting a suspect in

the Witness Protection Program was an inducement that made resulting statement involuntary].) Based on Mr. Tully's prior contact with the LPD, it was not unreasonable for Mr. Tully to believe the police were making him promises of leniency and protection in exchange for information.[21]

Mr. Tully's will was overborne by these promises. Mr. Tully was "given to understand that he might reasonably expect benefits in the nature of more lenient treatment at the hands of the police, prosecution or court in consideration of making a statement." (*People v. Vasila, supra*, 38 Cal. App. 4th 865, 874 quoting *People v. Hill, supra,* 66 Cal. 2d 536, 549.) These promises motivated Mr. Tully to speak. (*Id.* at p.873.) This motivation rendered the statements involuntary and inadmissible. (*Id.* at 874 quoting *People v. Hill, supra,* 66 Cal. 2d 536, 549.)

The police threatened Mr. Tully that his wife would go to jail and that their children would be taken away. (RT 220-221.) Threats to take a suspect's children away can make a statement involuntary. (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534.) Mr. Tully's statements were induced both by threats, as well as by promises of favorable treatment, and thus involuntary. (See *In re Roger G.* (1975) 53 Cal. App. 3d 198, 203.)

In addition, the ploys used by the police and the district attorney in this case were not directed at obtaining the truth, in fact, they were designed to trap Mr. Tully into

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[21] On March 7, Trudeau had made very similar promises to Mr. Tully. (See Argument II, *supra*). Tellingly, as detailed above, Trudeau was brought into the March 27 interrogations, although he was not even assigned to the homicide investigation, just after Mr. Tully requested a lawyer.

making what the police already believed was an untrue statement. Such ploys are impermissible. (*People v. Ray supra,* 13 Cal.4th at p. 340; *People v. Farnam, supra,* 28 Cal.4th at p. 182, citing *In re Walker* (1974) 10 Cal.3d 764, 777.) At the time of their interviews with Mr. Tully and his wife, the police already were convinced that Mr. Tully had committed the killing. They did not believe his statements that he had not been in the victim's house and did not kill her. They were skeptical of the information Mr. Tully purportedly told his wife about Thomas.

They knew that if they could get Mr. Tully to admit he was at the crime scene it would be incriminating. (RT 132.) When they approached Mr. Tully on March 30, the first thing they told him was what his wife had told them: that he told her he was in the victim's house but that someone else had committed the crime. They asked whether or not "that" statement was true. Before he answered this question, they encouraged him to lie, by telling him that if he told them that Thomas committed the crime, he would get protection for his wife and family. Their conversations with Vicky were similar. Protection would only be available if she were afraid of Thomas, the person who committed the crime. By March 30, the police had at least discerned the real name of Thomas and done record checks on him.[22] (RT 122) They apparently did not believe he was the killer, as they did no further investigation of him at the time. (*Ibid.*) It is

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[22] The police apparently knew more about Thomas than they explicitly acknowledged. During the March 30 interrogation, Newton said that he knew where Thomas lived, including the color of the duplex. (People's Trial Exhibit 6C at p. 3.)

impossible to discern how inducing a suspect to name a third party, when the police did not believe that a third party was involved, could produce anything other than an "unreliable" statement. Instead of using techniques designed to elicit the truth, the police were only interested in obtaining an incriminating statement from Mr. Tully by whatever means they could.

The totality of the circumstances demonstrates that law enforcement subjected Mr. Tully to multiple forms of coercion that render his March 30 statements involuntary. Based on all of the matters raised here, Mr. Tully was induced to speak at length to law enforcement. This improper inducement rendered his statements involuntary, as his motivation was to receive the benefit of the promises – protection for himself and his family. The coercive inducement is egregious in light of the lengthy interrogation and the vulnerable state Mr. Tully was in due to his drug addiction. The police were well aware that Mr. Tully had a drug problem, yet they still took advantage of this situation. (See *United States v. Eccles* (9th Cir. 1988) 850 F.2d 1357, 1360-1361 [affirming district court's decision that suspect's dependence on chemical substances, pointed directly to psychological coercion].)

Mr. Tully's statements, and any waiver of his rights given on March 30 were not the product of his own free will, but were induced by psychological ploys and promises of protection. They were not voluntary and therefore inadmissible. In light of these circumstances, individually and collectively, it cannot be said that Mr. Tully's statements

on March 30 were voluntary. They should have been suppressed at trial.

G. Because Introduction of Mr. Tully's Statements Was Prejudicial, Mr. Tully's Convictions Must be Reversed

When a statement obtained in violation of the Fifth Amendment or Fourteenth Amendment is erroneously admitted into evidence, the conviction may only be affirmed if the government can establish that the error is harmless beyond a reasonable doubt. (*People v. Johnson*, *supra*, 6 Cal.4th at pp. 32-33; *People v. Cahill* (1993) 5 Cal.4th 478, 509-510.) Applying the standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24, admission of Mr. Tully's statements of March 27 and March 30 was anything but harmless. His conviction must be reversed.

The prosecutor introduced a portion of the March 27 interrogation of Mr. Tully (People's Trial Exhibit 5E, RT 2877) and both recorded interrogations of March 30 in their entirety. (People's Trial Exhibits 6C & 9C RT 2900, 2749.) Without these statements, there was no direct evidence that Mr. Tully had been in Ms. Olsson's house at any time. There was no evidence of any sexual activity between Mr. Tully and the victim, which was necessary to demonstrate the intent-to-rape element of burglary-murder, the burglary-murder special circumstance and the separate charge of assault with intent to rape.[23]

Mr Tully's March 27 and March 30 statements were involuntary and were obtained

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[23] The prosecutor conceded he couldn't prove Mr. Tully had sex with Ms. Olsson without his statements. (RT 3069-3070.)

in violation of the Fifth and Fourteenth Amendments and Article I. The use of these improper and unreliable statements by the prosecution to secure a conviction and death sentence in this capital case violated the Eighth Amendment and Article I. Given the importance of the statements to the prosecution case, the erroneous admission of the statements – individually and collectively – prejudiced Mr. Tully and cannot be deemed harmless beyond a reasonable doubt. Mr. Tully's convictions and sentence must therefore be reversed.

IV. THE TRIAL COURT ERRED IN GRANTING THE PROSECUTION CHALLENGES TO EXCLUDE JURORS FOR CAUSE

The prosecution challenged five jurors for cause based on their views concerning the death penalty.[24] The defense opposed the challenges. None of the jurors had views or beliefs against capital punishment that would prevent or impair their abilities to serve as jurors. None of the jurors were unable or unwilling to set aside any beliefs that they had in deference to the rule of law. None of the jurors were unable or unwilling to abide by their oaths. The challenges should have been denied.

By improperly granting these five prosecution challenges, the trial court violated Mr. Tully's rights to a fair and impartial jury, due process and to a fair and reliable penalty determination under the Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution resulting in a miscarriage of justice. Reversal of Mr. Tully's convictions and death sentence is required.

A. The Voir Dire Process

All prospective jurors for Mr. Tully's trial answered a questionnaire concerning the juror's knowledge of the case, the parties or the witnesses, their past involvement with the courts or law enforcement, feelings about certain types of witnesses or issues likely to

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[24] The dismissed jurors were Marsha Kermich (RT 504-524), Bonnie Davis (RT 631-652), Michael Degnan (RT 780-794), Elizabeth Herrera (RT 1283-1293), and Timothy Len (RT 1658-1666).

arise in the case, and feelings about the death penalty.[25]

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[25] The questionaire asked these death penalty questions.

#18: Do you recall the movement to remove Rose Bird as Chief Justice of the California Supreme Court?
If yes, how do you feel about her removal?

In a separate section entitled "Attitudes Regarding the Death Penalty," the jurors were asked the following questions:

1. What are your GENERAL FEELINGS regarding the death penalty?
2. Which would you say most accurately states your **philosophical opinion** regarding the death penalty?
   Strongly in favor
   Moderately in favor
   Neutral
   Moderately against
   Strongly against
3. Have your views about the death penalty **changed** substantially in either intensity or nature in the last few years?
   Yes No
   Please Explain:
4. Do you hold any **religious, moral feelings or philosophical principle** that would affect your ability to vote for the death penalty as a judgment in this case?
   Yes No
   Please Explain:
5. Do you belong to any organization that advocates **in favor** of the death penalty?
   Yes No
   If yes, what organization?
6. Do you belong to any organization that advocates the **abolition** of the death penalty?
   Yes No
   If yes, what organization?
7. If the issue of whether California should have a death penalty law was to be on the ballot in this coming election, how would you vote:
   For Against Not sure
   Why?

(See e.g. CT 3236; emphasis in original.)

A number of jurors were dismissed by stipulation for hardship and other reasons, based on information contained in their questionnaires. (See e.g. RT 371-376, RT 462-464.) The trial court then conducted general voir dire where jurors were given general instructions and admonitions concerning their duties and obligations as jurors. The court explained the trial process for a capital case, focusing on the penalty phase. The trial court read the jurors the standard penalty phase instruction, CALJIC 8.88, and explained the individual voir dire process. (See e.g. RT 379-401, 465-488.) The jurors were told that they would not be expected to say how they would decide the penalty prior to hearing evidence. (RT 395)

The jurors were divided into smaller groups. The trial court told each small group that the parties would select jurors who "would be able to fairly choose between the two punishments and, furthermore, people who would make their decision based not only on the evidence they hear during the guilt phase, but people who would wait and listen to whatever evidence might be presented in the penalty trial before making up their mind as to punishment." (RT 501.) The court told them that jurors who would automatically vote for death if the defendant was convicted of first degree murder would not be allowed to serve on the jury, just as those who would automatically vote for life without the possibility of parole would not be allowed to serve. The trial court explained that they were looking for jurors who "will listen to whatever evidence is presented about the defendant during that second trial, with a view towards the possibility of voting for either

punishment." (RT 501-502.) The court advised the jurors that, at the end of the penalty phase, they would be asked to choose the sentence they believe is appropriate. (RT 503.)[26]

Individual voir dire was then conducted. Each individual session began with the trial court explaining the process of the guilt and penalty phases. However, the jurors were not asked the critical questions necessary to resolve the subsequent cause challenges.

The court's voir dire of each prospective juror, asked the juror to assume the jury had reached a hypothetical guilty verdict based on the this "factual basis."

> [The jurors would have] already decided factually that the defendant, either alone or with somebody else, burglarized a house, that the house belonged to a woman by the name of Shirley Olsson, that in the course of that burglary she was killed, that she was intentionally killed, and that she died by virtue of multiple stab wounds. You might also have found that she was assaulted with intent to commit rape. (See e.g. RT 1286.)[27]

The trial court then asked a series of questions including:

> With regard to your own thoughts with respect to the type of crime I've just outlined and the facts I've told you about, would you, if you were a juror here, have an open mind in starting a second phase, that penalty phase, as to both sentence choices, life in prison without the possibility of parole or the death

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[26] The trial judge made the same, or very similar comments to each group of prospective jurors prior to individual voir dire. (See e.g. RT 499-503, RT 653-657, RT 775-780, RT 885-890, RT 1014-1018, RT 1110-1116, RT 1241-1248, RT 1337-1344, RT 1461-1468, RT 1528-1535, RT 1644-1651, RT 1740-1741.)

[27] The court made this same or a very similar statement to each prospective juror. (See e.g. RT 509, 784, etc.)

> penalty, and would you seriously consider both sentence choices after you've heard all the facts and all the circumstances that are presented in both phases of the case?

If the prospective juror answered yes, the court asked whether they had "excluded either of those two possible penalties?" If the prospective juror answered that they had not excluded either penalty, the court explained that the determination of penalty was not a mechanical process but a subjective one. The trial court then asked if the juror would be able to follow the court's instructions and be open to imposing either of the two penalties based on the evidence. (See e.g. RT 1285-1289.)[28] Following these screening questions, the prosecutor and defense counsel questioned each prospective juror regarding their feelings about the death penalty and other issues.

After individual questioning, the trial court granted the prosecutor's challenges for cause against prospective jurors Marsha Kermich, Michael Degnan, Elizabeth Herrera, Bonnie Davis, and Timothy Len. These jurors were improperly dismissed because the record does not contain substantial evidence that any of the prospective jurors were unable to follow the court's instructions or render an impartial guilt or penalty verdict. The trial court's dismissal of each of these jurors was erroneous and violated Mr. Tully's state and federal constitutional rights.

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[28] The court asked this same or a very similar, series of questions of each prospective juror. (See e.g., 511-513; 785-787, etc.)

B. Legal Principles

1. Prosecution Cause Challenges Are Very Limited in Capital Cases

In *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522, fn 21, the Supreme Court noted that the Sixth Amendment right to a fair and impartial jury in a capital case is violated when a juror is excused for cause unless the juror made it "unmistakably clear" that he or she would "*automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case," or that "his attitude toward the death penalty would prevent [him] from making an impartial decision as to the defendant's *guilt*." (*Ibid,* emphasis in original.) Years later, in *Adams v. Texas* (1980) 448 U.S. 38, 45, the court explained that *Witherspoon* and its progeny "establish[] the general proposition that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." A state could only insist "that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." (*Ibid.*) The standards set forth in *Adams* were reaffirmed in *Wainwright v. Witt* (1985) 469 U.S. 412.

The Supreme Court has stressed that the *Witt* standard did not replace the *Witherspoon* standard. It merely clarified how that standard should be applied by the trial courts. Under *Witt,* jurors may be dismissed for cause if their views prevent or substantially impair the performance of their duties, regardless of whether they would

automatically vote against the death penalty. However, the Supreme Court has held:

> It is important to remember that not all who oppose the death penalty are subject to removal for cause in capital cases; *those who firmly believe that the death penalty is unjust may nevertheless serve as jurors in capital cases so long as they state clearly that they are willing to temporarily set aside their own beliefs in deference to the rule of law. Lockhart v. McCree,* 476 U.S. 162, 176 (1986).
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> The State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would "frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." *Wainwright v. Witt,* 469 U.S. at 423, 105 S.Ct. at 851. (*Gray v. Mississippi* (1987) 481 U.S. 648, 658-659, emphasis added.

In *Gray,* the Supreme Court held that to "permit the exclusion for cause of other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members." (*Ibid.*) This "stack[s] the deck" against the defendant and "deprives him of his life without due process of law." (*Ibid.)*

The *Witherspoon-Witt* standard was designed to *limit* the circumstances under which an individual who opposed the death penalty could properly be excluded from sitting on a capital jury. "*Witherspoon* is not a ground for challenging any prospective juror. It is rather a limitation on the State's power to exclude . . . ." (*Adams v. Texas, supra,* 448 U.S. at p. 47-48.) A *Witherspoon/Witt* challenge is limited to jurors who "because of their views about capital punishment" have an "inability to follow the law or abide by their oaths." *(Ibid.,* at p. 45, quoting *Witherspoon v. Illinois*, 391 U.S. at p . 522, n. 21.) If jurors are excluded for cause on "any broader basis," then "the death sentence

cannot be carried out." (*Adams v. Texas,* 448 U.S. at p. 48.) Whatever other grounds may exist for dismissal of jurors, either via cause or peremptory challenges, the trial court's discretion to excuse jurors under *Witt* is expressly limited to jurors with views or beliefs *about capital punishment.*

Merely entertaining those views is insufficient to warrant exclusion from the jury. Instead, the prospective juror must also be unwilling or unable "to temporarily set aside [his or her] own beliefs in deference to the rule of law" (*Lockhart v. McCree, supra,* 476 U.S. at p. 176), and/or unwilling or unable to follow his or her oath to abide by the court's instructions and the law. (*Wainwright v. Witt, supra,* 469 U.S. at p. 423.) Whether a juror's views favor or disfavor the death penalty, exclusion is only warranted when those views themselves "prevent or substantially impair" a juror's ability to serve. This Court has reaffirmed the *Witt* standard. (See *People v. Stewart* (2004) 33 Cal.4th 425, 441; *People v. Heard* (2003) 31 Cal.4th 946, 958; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

The Supreme Court has held that it is the State's burden to prove that the juror meets the criteria for dismissal. (*Witt, supra,* at p. 423; accord, *People v. Stewart, supra,* at p. 445.) The duty to assure that no jurors are improperly excluded or included on the jury, however, rests with the trial judge. (*Wainwright v. Witt, supra,* 469 U.S. at p. 423.) To that end, this Court has held that before granting a challenge for cause "a trial court must have sufficient information regarding the prospective juror's state of mind to permit

a reliable determination as to whether the juror's views would "prevent or substantially impair" the performance of his or her duties (as defined by the court's instructions and the juror's oath). . . ." (*People v. Stewart*, *supra*, at p. 445) The trial court's determination whether the prospective juror will be unable to faithfully and impartially apply the law must be supported by "substantial evidence." (See *People v. Roybal* (1998) 19 Cal. 4th 481, 510) The trial court's dismissal of a prospective juror must be based on substantial evidence that a prospective juror entertains views or beliefs about capital punishment, and that he or she is unwilling or unable to set aside those views to follow the court's instructions and the juror's oath.

In this case, the trial court stated it was dismissing each of the challenged jurors pursuant to *Witt*. However, it granted the prosecution challenges for cause without substantial evidence to support the challenge.

2. To Warrant Dismissal, A Juror's "Views" About Capital Punishment Must Prevent or Substantially Impair Their Ability to Perform Their Duties as Jurors

As this Court has observed, a prospective juror's personal opposition to the death penalty is not a sufficient basis for excluding that person from jury service in a capital case. "Neither *Witherspoon* [*v. Illinois* (1968) 391 U.S. 510], [88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)] nor *Witt,* [*supra,* 469 U.S. 412, [105 S.Ct. 844,],] nor any of our cases, requires that jurors be automatically excused if they merely express personal opposition to the death penalty." This Court phrased: The real question as "whether the jurors attitude

will 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" (*People v. Heard, supra,* 31 Cal.4th at p. 4464, quoting *Wainwright v. Witt, supra,* 469 U.S. at p. 424, fn. omitted.)

The Supreme Court has recognized that "it is entirely possible that a person who has 'a fixed opinion against' or who does not 'believe in' capital punishment might nevertheless be perfectly able as a juror to abide by existing law – to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in a particular case." (*Boulden v. Holman* (1969) 394 U.S. 478, 483-484; see *Adams, supra,* 448 U.S. at pp. 44-45.) Only those jurors who are unable "to temporarily set aside their own beliefs in deference to the rule of law," *Lockhart v. McCree, supra,* 476 U.S. at p. 176), or who would not follow their oaths , *Wainwright v. Witt,* 469 U.S. at 423, may be properly excluded. (See *Gray v. Mississippi, supra,* 481 U.S. at pp. 658-659.)

This Court has similarly held that a "prospective juror personally opposed to the death penalty may nonetheless be capable of following his oath and the law."

> This Court then said: "A juror whose personal opposition toward the death penalty may predispose him to assign greater than average weight to the mitigating factors presented at the penalty phase may not be excluded, unless that predilection would actually preclude him from engaging in the weighing process and returning a capital verdict." (*People v. Heard, supra* at p. 446, quoting *People v. Kaurish* (1990) 52 Cal.3d 648, 699.)
>
> "[A] juror's conscientious opinions or beliefs concerning the death penalty would make it very difficult for the juror ever to impose the death penalty is not equivalent to a determination that such beliefs will "substantially impair the performance of his [or her] duties as a juror" under *Witt.*" (*People v. Stewart, supra,* 33 Cal.4th at p. 445.)

In ruling on a challenge for cause, the trial court must determine whether a prospective juror, despite their feelings or beliefs, can subordinate those feelings or beliefs to their duties to follow the law and the court's instructions. (*Witherspoon, supra,* 391 U.S. at pp. 514-15, fn. 7; *Adams, supra*, 448 U.S. at pp. 44-45.) The trial court must distinguish between "prospective jurors whose opposition to capital punishment will not allow them to apply the law or view the facts impartially and jurors who, though opposed to capital punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Witt, supra*, 469 U.S., at 421, 422, fn. 4.) The trial court cannot dismiss a juror because they would give more weight to a particular mitigating factor, provided he or she can engage in the weighing process, and return a verdict in a capital case. (*People v. Stewart, supra,* 33 Cal.4th at p. 475*; People v. Kaurish, supra*, 52 Cal. at p. 699.) The trial court may not dismiss jurors for cause because they disagree with the state of the law that governs the case.

Instead, the court must determine whether the jurors could, despite that disagreement, perform their duties as jurors. (*People v. Stewart, supra,* 33 Cal.4th at p. 449.) "To presume that personal beliefs automatically render one unable to act as a juror is improper." (*United States v. Padilla-Mendoza* (9th Cir. 1998) 157 F.3d 730; see also, *United States v. Salamone* (3rd Cir. 1986) 800 F.2d 121[error to exclude members of National Rifle Association from jury in case involving the use of guns.] It is unconstitutional to dismiss "prospective jurors who, though opposed to capital

punishment, will nevertheless conscientiously apply the law to the facts adduced at trial." (*Witt, supra*, 469 U.S., at 421, 422, n. 4.)

This Court has stated that dismissal of a juror is warranted only where the trial judge is left with the definite impression that a prospective juror "would be unable to faithfully and impartially apply the law in the case before the juror." (*People v. Hill* (1992) 3 Cal.4th 959, 1003.) To justify dismissal, there must be substantial evidence that a prospective juror would not be able to subordinate her personal views to her duties to abide by her oath as a juror, or to obey the law of the state. (See *Witherspoon, supra*, 391 U.S. at pp. 514-15, fn. 7.) Without substantial evidence in the record, the prosecutor has not met his burden of establishing that they could not carry out their duties as a juror.

A juror's oath and duties require her to listen to and consider the evidence, and to follow the instructions of the court in an impartial manner.[29] In California, the penalty jury is instructed *not to* engage in a mechanical counting of factors, but rather to determine, individually, whether the aggravating circumstances are so substantial in comparison with the mitigating circumstances" that a death sentence is warranted. (CALJIC 8.88.) This Court has explained that no fact finding is required at the penalty phase, that the instructions are merely guidelines to channel the jury's discretion, and that

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[29] Cal. Code of Civil Procedure § 232, subdivision (b), sets forth the juror's oath which must be read to and acknowledged by the jury as soon as jury selection is completed. It reads: "Do you ... and each of you understand and agree that you will well and truly try the cause now pending before this court, and a true verdict render according only to the evidence presented to you and to the instructions of the court."

the only "task"of the penalty jury is a "moral and normative" one. (See, e.g. *People v. Prieto* (2003) 30 Cal.4th 226, 263.)

Given that a juror is not only allowed, but actually required, to determine the appropriate penalty based on his or her own moral and normative standards, only those beliefs or views that would prevent or impair a jurors' ability to do that very task can justify dismissal. This Court recently stated: "Because the appropriate penalty is not presumed and is a question for each individual juror, no presumption exists in favor of life or death in determining penalty in a capital case." (*People v. Maury* (2003) 30 Cal.4th 342, 440.) Dismissal of a juror solely because he or she has moral and normative feelings that the death penalty might not be "warranted" in certain cases, dependent on the evidence to be presented at trial, is impermissible under the Constitutions.

Similarly, a juror who would have "difficulty" or "feel bad" for sentencing an individual to death cannot be dismissed unless those feelings would actually prevent them from following the court's instructions. This Court has held that "a prospective juror who simply would find it "very difficult" to impose the death penalty, is entitled--indeed, duty-bound--to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror." (*People v. Stewart, supra,* 33 Cal.4th at p. 446.) In *Adams v. Texas*, the Supreme Court held: "[N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors

to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty." (*Adams v. Texas, supra*, 488 U.S. at p 50)

Here, not one of the dismissed prospective jurors indicated that they would be unable or unwilling to weigh the aggravating and mitigating factors based on the evidence presented to them. Not one of them indicated that they would be unable to apply their own moral and normative standards to reach a determination as to the appropriate penalty. Not one of them indicated that their beliefs were so strong that they would be unable to set them aside if necessary and "abide by existing law [and] follow . . . the instructions of [the] trial judge" with regard to determining penalty.

A juror who has reservations about the wisdom or morality of the death penalty but states that he or she will nonetheless follow the court's instructions is not disqualified from sitting on a capital jury. (*Lockhart v. McCree, supra,* 476 U.S. at p. 176, *People v. Stewart, supra,* 33 Cal. 4th at 445-446.) Because none of the jurors dismissed by the trial court following prosecution challenges in this case indicated that they would not be able to follow the law despite their feelings, their dismissal was improper under state and federal constitutional law.

3. Dismissal Based on Whether A Juror Would Impose A Death Sentence on Facts of a Particular Case is Improper

In *People v. Fields* (1984) 35 Cal.3d 329 & 356-357, this Court erroneously concluded that *Witherspoon* authorized case-specific questioning. In *People v. Fields,* this Court held that a trial court may properly excuse a prospective juror who would

automatically vote against the death penalty *in the case before him*, regardless of his willingness to consider the death penalty in other cases. This Court's approval of death qualification questions that ask jurors to affirm that they can vote for a death sentence based on the specific "facts" violates the Constitutions. Neither *Witherspoon* or *Witt* authorize case-specific questioning.

To support the holding in *Fields*, this Court cited the following footnote from *Witherspoon*.

> Just as veniremen cannot be excluded for cause on the ground that they hold such views, so too they cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment. And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him. The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death *regardless of the facts and circumstances that might emerge in the course of the proceedings.* (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 522, fn 21.emphasis added.)

As the quoted language makes clear, cause challenges are only allowed when the juror will vote for life "regardless" of the facts of the case, not *because* of them. This Court also cited *Adams v. Texas, supra,* 448 U.S. at pgs. 44-45 as authority. (*People v. Fields, supra*, 35 Cal.3d at pp. 356-357). The language quoted in *Fields* does not say anything about the jurors' predilection to vote for or against death "in the case before him."[30]

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[30] The quote from *Adams* follows:

> The *Witherspoon* test, [the Supreme Court] stated, "seems clearly designed to accommodate the State's legitimate interest in obtaining jurors who could follow their

In *Fields* and numerous other cases, this Court has interpreted the constitutional limits on death qualification cause challenges as expressed in *Witherspoon, Adams* and *Witt* to be expansive rather than narrow. Beginning with *Fields,* this Court authorized the dismissal of jurors who entertain no conscientious objections or views against the death penalty, but who state that the particular crime with which the defendant is charged is not one that they, as individuals applying their own moral and normative standards, precisely as they are instructed to do, believe warrants the extreme penalty of death. (See *People v. Prieto, supra,* 30 Cal.4th at p. 263. However, the Supreme Court has held that more is required to justify dismissing a juror for cause.

The express Supreme Court language cited by this Court in *Fields* is contrary to the notion that a juror may be dismissed because of how he might vote in the case before him. "*[V]eniremen cannot be excluded for cause simply because they indicate that there are some kinds of cases in which they would refuse to recommend capital punishment.*

> instructions and obey their oaths." ([*Adams, supra,* at p.] 44, 100 S.Ct. p. 2525.) Thus, under *Witherspoon* and subsequent cases, "a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court." ([*Adams, supra.* at] p. 45, 100 S.Ct. p. 2526.) (*People v. Fields, supra,* 35 Cal.3d at p. 537.)

In the absence of a state-law presumption that the death penalty *should or must* be imposed for certain types of crimes, a juror who states he or she wouldn't be inclined to impose the death penalty for a simple felony-murder, for example, is perfectly able to "consider and decide the facts impartially and conscientiously apply the law as charged by the court." These jurors are not subject to exclusion for cause.

And a prospective juror cannot be expected to say in advance of trial whether he would in fact vote for the extreme penalty in the case before him." (*Witherspoon v. Illinois, supra*, 391 U.S. at p. 522 (emphasis added).) Yet, this Court has upheld cause dismissals based on a jurors' inability or unwillingness to commit to voting for death based on the specific facts alleged against the defendant in the case before them. (See e.g. *People v. Pinholster* (1992) 1 Cal.4th 865, 916-918 [felony-murder]; (*People v. Ervin, supra* at pp. 70-71, 91 [defendant wasn't the actual killer.) This Court should reevaluate and reverse its ruling in *Fields* because it is contrary to the holdings of the Supreme Court, as well as to the Constitutions.

Following the Supreme Court *Wainwright v. Witt* opinion, this Court said that, unlike under *Witherspoon*, "[e]xposing prospective jurors to the general facts surrounding the case will not inevitably preclude their disqualification under [the *Witt*] formulation." (*People v. Ervin, supra,* 22 Cal.4th at pp. 70-71.) As a result, this Court has said that the "real" question is "'whether the juror's views about capital punishment would prevent or impair the juror's ability to return a verdict of death in the case before the juror,'" *People v. Bradford* (1997) 15 Cal.4th 1229, 1318-1319, quoting *People v. Hill* (1992) 3 Cal.4th 959, 1003), rather than in any death penalty case. This Court reasoned that, because a juror is subject to exclusion for cause if he or she "would invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating

circumstances" (*People v. Kirkpatrick, supra,* 7 Cal.4th at 1005), the parties may now inform prospective jurors of the "general facts of the case." (*People v. Ervin, supra,* 22 Cal.4th at p. 70.)

Although contrary to *Witt,* this Court has condoned the practice of asking "prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine penalty after considering aggravating and mitigating evidence." (*See People v. Cash* (2002) 28 Cal.4th 703, 720-721, and cases cited therein.) This practice unfairly requires jurors to consider the possible impact of "facts" - that have not yet been presented and which may never be proven by the evidence - on their ability to render a death sentence.

This Court's developing interpretation of *Witt* is incorrect as a matter of law. *Witt* did not change the scope of the permissible inquiry into a juror's views in any given case.

The only substantive change made by *Witt* was that a juror no longer has to maintain an "automatic" position against or in favor of the death penalty to warrant dismissal. Instead, it is enough if their preexisting views would prevent or substantially impair the "performance of their duties." (*Witt, supra*, 469 U.S. at 424.) This change does not justify this Court's retreat from *Fields'* admonition that a trial judge must take care to assure that only jurors who would vote against imposing the death penalty "without regard to any evidence that might be developed at the trial of the case" are

dismissed. (*People v. Fields, supra*, 35 Cal.3d at p. 358, fn. 13.)[31]

Even after *Witt*, the Supreme Court has continued to insist that "[t]he State's power to exclude for cause jurors from capital juries does not extend beyond its interest in removing those jurors who would 'frustrate the State's legitimate interest in administering constitutional capital sentencing schemes by not following their oaths." (*Gray v. Mississippi, supra,* 481 U.S. at pp. 658, quoting *Wainwright v. Witt, supra*, 469 U.S. at 423) The Supreme Court has not condoned inquiry into how a juror might vote on particular facts of a specific case during death qualification. Nor has it "suggested" that such an inquiry provides any insight into a juror's ability to follow his or her duties or oath. See generally, John Holdridge, *Selecting Capital Jurors Uncommonly Willing to Condemn a Man to Die: Lower Courts' Contradictory Readings of Wainwright v. Witt*

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[31] In interpreting *Witherspoon* and *Witt* to allow case-specific cause dismissals, this Court has essentially created an unresolvable dilemma for the trial courts. This Court noted in *Pinholster*:

> [W]e have commented in the past that questions directed to jurors' attitudes towards the particular facts of the case are not relevant to the death-qualification process, so that a trial court that refused to permit such questions did not err. (*People v. Clark, supra*, 50 Cal.3d at p.597.) We have also said, however, that "a court may properly excuse a prospective juror who would automatically vote against the death penalty in the case before him, regardless of his willingness to consider the death penalty in other cases." (*People v. Fields, supra*, 35 Cal.3d at pp. 357-358.) (*People v. Pinholster, supra,* 1 Cal.4th at p. 918.)

Not much guidance can be provided as to how a trial court may deduce whether a juror would vote against the death penalty in the case before him, if questions regarding a jurors'"attitude towards the particular facts of the case" are irrelevant. Further, if questions concerning the facts of the case are irrelevant to death qualification, then the jurors' attitudes about the facts of the case themselves are equally irrelevant.

and Morgan v. Illinois, (1999) 19 Miss. C. L. Rev. 283.

A juror's duties require him or her to listen to and consider the evidence, and to follow the instructions of the court in an impartial manner. (*Witt, supra*, 469 U.S., at 421, 422, fn. 4.) Questions that ask jurors to affirm that they can vote for a death sentence based on the "facts" of the specific case do not fall within the limitations of *Witt*. These questions force jurors to prejudge the case before they have heard any evidence or received any instructions on the law. This is the exact opposite of what a juror's duties require. Thus, a juror's answers to these questions are not a permissible basis for cause dismissals.

> [D]eath-qualification voir dire must avoid two extremes. On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented.

(*People v. Cash, supra,* 28 Cal. 4th at p. 721.)

If a prospective juror is painted a picture of the circumstances of the crime during voir dire, there is "the danger of indoctrinating the jury on a particular view of the facts" before they hear any evidence. (*People v. Pinholster, supra*, Cal.4th at p. 915, citing *People v. Mason,* (1992) 52 Cal.3d 909, 940). The jury may then form a bias about the case that did not exist prior to voir dire, thus impairing their ability to fairly hear the actual evidence. This "indoctrination" as to a particular view of the guilt phase facts will impair a juror's ability to be impartial in determining guilt as well as the proper penalty.

The facts contained in a "*Fields* question" are not a substitute for the constitutionally required factfinding made by the jury after hearing the evidence at the trial.

In *Cash*, this Court noted that, although the trial court committed reversible error sufficient to require the invalidation of a death sentence, the trial court could not be faulted too heavily because "most of our decisions clarifying the law on this point were announced after the trial in this case." *(Id.* at p. 721.) This Court correctly recognized that its decisions on the scope of proper voir dire had not been clear. However, it failed to recognize that, if case specific questioning is allowed, this Court can never adequately clarify for the trial courts precisely what facts may properly be presented to the prospective jurors in any particular case.

In fact, *Cash* represents the first time, since it adopted *Witt*, that this Court has found voir dire to be inadequate due to the nature of the facts about the specific case that were or were not presented to the venire members. This Court reversed the trial court for trying to draw a clear-cut line and limiting voir dire to facts alleged in the information. After *Cash*, trial courts now know they must allow questioning on additional facts beyond those in the pleadings, but still have no guidance as what will be too much or too little specific information to give to jurors to assess their status under *Witt.*

This Court's decision in *Fields* and subsequent cases approving *Fields* type questioning during death qualification voir dire must be reconsidered because they misconstrue *Witt*. This questioning does not assist the court in determining whether a

juror will listen to the evidence and follow the instructions to reach a fair and impartial verdict. It does not assist the court in determining whether a juror will be able to abide by his or her oath. In light of the danger of indoctrinating the jury, case specific questioning should be prohibited. Here, the trial court in this case improperly dismissed jurors based on their attitudes regarding the particular facts of this case.

4. If Case Specific Questioning is Permissible under *Witt*, the Dismissal of Jurors Based on the Trial Court's Description of the "Crime" in this Case Was Improper

If this Court were to continue to uphold case specific voir dire, here, the dismissal of individual jurors based on the facts of the case was improper. The prosecutor made his cause challenges following several prospective juror's responses to the trial court's description of the crime as a residential burglary murder in which a woman was killed. These jurors were told there might be a finding of assault with intent to commit rape. They were given only this barest description of the crime, with little elaboration.

The trial court excluded jurors who could not promise they would vote for death based solely on the bare facts of the capital offense, without consideration of any evidence in aggravation that might be presented. The trial court did not exclude those jurors who promised they could vote for death based solely on those same bare facts. Thus, jurors who properly explained they would need to hear the aggravating evidence before determining if death was an appropriate sentence were excluded, while some who explained they would need to hear the mitigating evidence before considering a life

sentence were allowed to sit on the jury.

Moreover, the questioning as to whether the jurors could follow their duties in the "particular case before them" was based on a misleading factual picture, rendering their answers insufficient to inform the trial court of whether they could fulfill their duties in this case. Jurors were given only the barest description of the crime, with little elaboration. While, as argued above, cause challenges should not be based on a juror's consideration of the facts of the crime, but only on their views about the death penalty, if facts are provided to the jury they should accurately reflect the case as the prosecution will present it at trial.

Here, the "case before them," as actually heard at trial, bore little relation to "the case" the jurors answered questions about during jury selection. The limited facts that were provided to the prospective jurors caused the improper dismissal of individuals who were, in fact, qualified to sit as jurors. The trial court told the jury to assume only that "the defendant had, either alone or with somebody else, burglarized a house, that in the course of that burglary a woman by the name of Shirley Olsson had been killed, that the killing was intentional and that the killing was by way– that she died of multiple stab wounds." The brief statement is strikingly spare in comparison to the description of the crime presented in the prosecutor's guilt phase opening statement. (RT 1963-1979.)

The prosecutor knew how misleading the description of the crime given to the prospective jurors during voir dire was compared with the lurid depictions with which he

adorned his theory of the case at trial. He knew he would argue the crime was much worse than a mere burglary gone awry, which strongly implies an unanticipated surprise encounter with the victim. Yet, the jurors were never asked whether they could impose a death sentence where, as the prosecutor argued, the defendant knew the 58 year old victim was at home alone and forced his way past her into her house in order to inflict on her a vividly imagined ordeal of sexual assault and a painful death by stabbing.

By the time of the penalty phase argument, the crime for which the jury was being asked to impose a death sentence was virtually unrecognizable from the picture painted at voir dire by the judge. At the beginning of his penalty closing argument, the prosecutor asked the jurors to imagine they were Sandy Olsson, reading in bed, when "this creature" lured her to the door. She opened the door with the chain still latched and the defendant forced her to take off her clothes at knife point and viciously raped her. The prosecutor added vivid yet wholly imaginary details of the "rape." (RT 3631.) His argument did not match in anyway the trial court's description to the jury in voir dire. (See e.g. RT 1286.)

During argument, the prosecutor told the jury that - based on the description of the crime provided at voir dire - they could not have "envisioned" the way he had painted the crime during his penalty argument. The prosecutor reinforced the impact of the argument by holding the jurors to the promises they made during voir dire, promises that were based on the misleading "burglary gone awry" premise.[32] He then argued:

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[32] The prosecutor told the jury:

> I doubt – just ask yourself, in your wildest imagination, could you conceptualize the horror that he inflicted on Sandy Olsson when you thought about, yes, I could do that? Was that the picture of the type of activity that you thought to yourself, yes, I could impose the death penalty? As you were sitting there thinking about it, did you ever think that you would hear the things he subjected Sandy Olsson to?
>
> When you said you could impose the death penalty in this kind of case, did you envision the types of things that you heard unfold in the evidence that's been presented here? Could those things ever come to mind? (RT 3638.)

Had the prospective jurors who were dismissed for cause been asked if they could impose the death penalty on the set of facts "envisioned" by the prosecutor, rather than the trial court's accurate facts of an intentional killing by multiple stab wounds during a burglary, they would have given different answers and been allowed to sit on the jury. For these reasons, the case specific voir dire in this case was improper and the dismissals of the jurors based on this voir dire did not meet the *Witt* standard.

5. Dismissal of a Juror is Improper if Based on an Evaluation of the Particular Facts of the Case and Not an Abstract Inability to Impose Death

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> See, I knew what the evidence was, and I told you that if we got this phase, I would stand right here and I would demand of each and everyone of you, given what he has done, given who he is, that you impose on the guy in the glasses over there the death penalty.
>
> We told you what you were in for, We asked you: Can you do it? And you all said you could.
> If you couldn't, fine, you were excused, walk out the door. (RT 3636.)

This Court has held that cause challenges are only permissible where a "juror's reluctance to impose the death penalty was based *not on an evaluation of the particular facts of the case*, but on *an abstract inability* to impose the death penalty" in the type of case before them. (*People v. Ervin, supra*, 22 Cal. 4th at p. 70, citing *People v. Pinholster, supra*, at p. 916.) A juror may be dismissed if they indicate they would never vote for death in any felony-murder case without consideration of the circumstances. The dismissal of a prospective juror is only proper if the juror indicates they would not vote for death in any felony murder case, regardless of the factors in aggravation or mitigation. (Ibid.).

While "allowing the parties to ask questions regarding the particular facts of the case," this Court has said that death-qualification based on such questions will be upheld only where "more relevant questions and answers provide the basis for the court's decision." (*People v. Pinholster, supra,* 1 Cal.4th at p. 918.) In *Pinholster*, although jurors were questioned about their views in light of the facts of the case, this Court found it crucial that "the trial court refused to excuse the prospective jurors for cause *until there was a clear indication that their views about capital punishment in the abstract* would substantially impair their ability to perform their duties." (*Ibid.,* emphasis added.) This Court found that "the questions [asked in *Pinholster*] provided a basis for deciding something about the juror's views in the abstract; not only was each of these two jurors asked his attitude toward a case phrased in terms of the facts of this case, but the answer

to these questions led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case." (*Ibid.*) Similarly, in *Ervin*, this Court upheld the prosecution's challenges, finding that "each of the prospective jurors in question expressed a similar *abstract inability to impose death* on the hirer in a murder-for-hire case." (*People v. Ervin, supra*, 22 Cal.4th at p. 71.)

In this case, however, the trial court excused the jurors without any indication that their views about capital punishment in the abstract would impair their abilities to serve as jurors. The jurors were asked whether they could consider imposing death if the defendant were convicted of the intentional murder of a woman in her home, during the course of a burglary. They were told the cause of death was multiple stab wounds, "perhaps as many as 25." (See e.g. RT 784). They were told that they may have found the victim was assaulted with the intent to commit rape. This description goes far beyond an abstract description of a general type of crime, but included specific facts that would have to be established through evidence at the trial, such as the gender of the victim, where the crime occurred, the cause of death, the number of stab wounds, and that there may have been a sexual assault.

Although this Court has approved providing the jurors with the facts of the crime during voir dire, it has not approved *dismissing jurors for cause* based on jurors' attitudes towards the specific facts of the case. Instead, it has required that the dismissed jurors have an abstract inability to impose death in the general type of case before them, i.e., a

burglary-murder. Here, the jurors were dismissed based on their attitudes to the specific facts of the case and not an abstract inability to impose death.

6. The Dismissal of Jurors for Cause Cannot be Upheld Because the Trial Court Failed to Fulfill its Responsibilities and Follow Protocols For Selecting a Jury

The trial court failed to uphold its responsibilities to insure that jurors were properly dismissed and to create a sufficient record for appellate review of its rulings on the prosecutor's cause challenges. This Court recently expressed dismay at the inadequacy of the trial court's efforts to fulfill its responsibilities in selecting a jury. (*People v. Heard, supra,* 31 Cal.4th at p. 968; *People v. Stewart,* 33 Cal.4th at p. 455.) In both cases, this Court reversed death sentences because the record failed to reflect substantial evidence that the dismissed jurors met the standard for exclusion in *Witt.*

In *Stewart*, the trial court dismissed jurors based solely on their answers to a questionnaire, without any follow-up questioning by the court or the parties. In *Heard*, the trial court dismissed jurors who indicated they were opposed to the death penalty or would find it hard to impose a death sentence, without ever asking them whether those views would prevent them from following their oaths, the instructions, or the law.

> In view of the extremely serious consequence--an automatic reversal of any ensuing death penalty judgment--that results from a trial court's error in improperly excluding a prospective juror for cause during the death-qualification stage of jury selection, we expect a trial court to make a special effort to be apprised of and to follow the well-established principles and protocols pertaining to the death-qualification of a capital jury. (*People v. Heard, supra,* Cal. 31 4th at pp. 966-967.)

After listing the resources available to trial courts regarding proper death qualification voir dire, this Court set forth protocols for the trial court conducting voir dire. (*People v. Heard, supra,* 31 Cal.4th at p. 967, fn. 9.)

In the present case, the trial court breached these guidelines by failing to ask simply phrased questions, interrupted prospective jurors before they had sufficient time to answer, and did not adequately follow up on ambiguous answers before dismissing jurors challenged by the prosecution. Moreover, not once did the trial court provide individual reasons for dismissing the challenged jurors for cause. Instead, prior to dismissing each juror, the court repeated virtually the same prepared statement reflecting the *Witt* standard, without any indication of why that particular juror warranted dismissal.

The trial court recited the following or very similar statement prior to dismissing three jurors:

> I having *[sic]* been listening carefully to the prospective juror's responses. I've been observing [his/her] demeanor as [he/she] answered the questions. I also have in mind [his/her] answers to the written questionnaire. It is my conclusion that the prospective juror's views would prevent or substantially impair the performance of [his/her] duties as a juror in accordance with [his/her] instructions and oath. And, accordingly, the challenge will be allowed. (RT 794 (Degnan); RT 1293 (Herrera); RT 1665 (Len.)

The trial court recited a similar statement prior to dismissing prospective jurors Kermich and Davis:

> At this time, then having listened to the prospective juror's response and having observed [his/her] demeanor as [he/she] answered the questions, and also having earlier reviewed the written questionnaire, it is my conclusion, although the juror has given arguably inconsistent or equivocal answers at

> some point, it's my conclusion that the prospective juror's views would prevent or substantially impair the performance of [his/her] duty as a juror and in accordance with [his/her] instructions and oath, the challenge will be allowed. (RT 524 (Kermich); RT 650-651 (Davis.)

Because the trial court did not ensure that "a complete record be made of why or why not a challenge for cause was granted," (*People v. Heard*, 31 Cal.4th at p. 967, fn. 9), this Court cannot defer to its ultimate conclusion about each juror. Here, as in *Heard:* "the trial court has provided [this Court] with virtually nothing of substance to which [this Court] might properly defer." (*Id.* at p. 968.)

While this Court generally defers to a trial court's determination of a juror's "true state of mind when the prospective juror has made statements that are conflicting or ambiguous," (*People v. Cunningham* (2001) 25 Cal.4th 926, 975), the trial court made no determinations in this case. Instead, prior to dismissing jurors Kermich and Davis, the trial court simply added that "the juror has given arguably inconsistent or equivocal answers at some point." (RT 524 (Kermich); RT 650-651 (Davis.) That statement reflects no individual determination as to the juror's true state of mind.

Moreover, these two jurors were no more or less equivocal, inconsistent, ambiguous or contradictory in their answers than the other three jurors who also were dismissed for cause by the prosecution. The record shows that the trial court included this phrase when dismissing jurors early in the voir dire process, and simply omitted it from the script later in the proceedings. The trial court's determination that Kermich and Davis were "equivocal" is meaningless. This Court is not bound by the trial court's decisions to

dismiss these two jurors.

Further, the trial court did not ensure that a complete record was made of why or why not a challenge for cause was granted as required by *Heard.* This Court should not defer to the trial court's rote conclusions concerning any of the dismissed jurors because the record contains nothing of substance to explain the trial court's dismissals. This Court should base its review solely upon the juror's answers as reflected in the transcripts and questionnaires rather than the trial court's purported consideration of the juror's demeanor and attitude during questioning. Neither the answers of the dismissed jurors on their questionnaires nor during voir dire provide substantial evidence to support their dismissal under *Witt.* Accordingly, they were improperly dismissed.

C. The Trial Court Improperly Dismissed Prospective Jurors Michael Degnan, Elizabeth Herrera, Marsha Kermich, Bonnie Davis, and Timothy Len for Cause

1. Prospective Juror Michael Degnan

a. The Record Regarding Degnan

On his questionnaire, Degnan stated that he did not feel the death penalty "works very well as a deterrent to crime, but in some cases it is necessary and perhaps the best alternative." He described himself as moderately in favor of the death penalty. He stated he was not sure whether he would vote for the death penalty if it were on the ballot because "I just don't want to make that choice until I have to." (CT 13522-13524.)[33]

[33] This question is improper because there are numerous reasons, unrelated to specific views about the underlying issue, why someone might vote for or against a ballot initiative,

Degnan stated that he could be open to both penalties in light of the facts of the case, consider the evidence and actually impose either sentence. (RT 785-787.) He indicated he was "not too sure about the death penalty," and that he could not say how he would decide based on a hypothetical situation. He explained that he used to be against the death penalty but that his feelings had changed: "I really can't predict how I would respond. I would tend against the death penalty, but that doesn't mean I would definitely vote against the death penalty." Degnan said that he could reach a death verdict under certain circumstances.

After being told the crime involved a woman who was stabbed to death during "a burglary that went awry," Degnan said: "If the evidence as presented would present no more than that, I would be – I would be very hard pressed to decide on the death penalty." (RT 790-791.) The prosecutor then asked him if, on a scale of one to 10, where 10 was "Rambo, always giving in [sic] vindication, and one being always turning the other cheek, Martin Luther King; on that death penalty scale, where do you fit?" Degnan responded, "probably a three and-a-half." (RT 791.)

The prosecutor repeated that the crime involved a single killing during the course of a burglary. He asked Degnan whether he would always go for life without the possibility of parole in such a case. Degnan responded "based only on the information I've gotten today, yes. I don't know what other information might sway my mind, but

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which has nothing to do with their ability to serve as jurors in a capital case.

based on what you told me today and what I've heard up to this point, I would have to say I would be inclined not to." (RT 792.) A few minutes later, the prosecutor asked him if he would have "a shot" at asking Degnan to vote for death, and Degnan stated:

> I would have to say no, based on what I know up to now and I know that's couching it, but that's the only way I could answer the question because I don't know all the evidence that's involved in the case, and as the case develops, something may come up which would sway me. I don't know what it would be, I don't know what it would be, I don't know where it would come up, but based on what I know now, I'd have to say no, that I can't.

(RT 793.) The court granted the prosecutor's challenge and Degnan was dismissed. (RT 794.)

b. The Trial Court's Dismissal of Degnan Was Not Supported by Substantial Evidence That His Views Would Prevent or Substantially Impair His Duties as a Juror

The trial court's dismissal of Degnan was improper for several reasons. First, Degnan did not indicate any philosophical, moral or religious opposition to the death penalty on his questionnaire. (CT 013489-013526.) He said he was "moderately" in favor of the death penalty. Degnan stated that "didn't want to make the choice" unless he had to as to whether he would vote for it on the ballot

Degnan said nothing to indicate he had any views or conscientious objections against the death penalty. In voir dire, he said that he was "not too sure about the death penalty." He explained that he *used to be* against the death penalty but that his feelings had changed: "I really can't predict how I would respond. I would tend against the death penalty, but that doesn't mean I would definitely vote against the death penalty."

Second, because Degnan did not entertain views or beliefs against the death penalty, those non-existent views could not "prevent or substantially impair" his ability to follow the law or his oath.

Third, Degnan never indicated that he would be unable or unwilling to weigh the aggravating and mitigating factors based on the evidence presented. He never said he would be unable to apply his own moral and normative standards to reach a determination as to the appropriate penalty, nor did he indicate that his beliefs were so strong that he would be unable to set them aside if necessary and "abide by existing law [and] follow . . . the instructions of [the] trial judge" with regard to determining penalty. (*Boulden, supra*, 394 U.S. at p. 484.) (RT 780-794.)

Degnan answered all of the trial courts questions on the death penalty in the affirmative. (RT 507-513; 785-787.) He stated without equivocation that he would follow the instructions and would be able to impose either penalty after hearing the evidence at the penalty phase. That assurance is all that is required of a juror serving on a capital jury. The only evidence shows that Degnan would have followed the instructions and his oath. The trial court's conclusion to the contrary is not supported by substantial evidence.

Fourth, Degnan was asked questions based on the hypothetical facts of the case. Dismissing a juror based on questions that ask him to affirm that he can vote for a death sentence based on the "facts" of the specific case he will hear does not comport with *Witt*.

In any event, Degnan made clear that his "difficulty," if any, in imposing the death penalty was based only on the limited facts of the case as presented by the trial court, and that he would not have that difficulty if the evidence demonstrated additional facts.

After being told the crime involved a woman who was stabbed to death during a burglary that went awry, prospective juror Degnan stated : "If the evidence as presented would present *no more than that,* I would be – I would be very hard pressed to decide on the death penalty." (RT 790-791.) The prosecutor asked whether, after hearing the description of the crime, he would always go for life without the possibility of parole. Degnan responded that "*based only on the information I've gotten today, yes.* I don't know what other information might sway my mind, *but based on what you told me today and what I've heard up to this point,* I would have to say I would be inclined not to." (RT 792.) Degnan was not speaking about all burglary-murders, but only the specific and truncated description of the particular burglary-murder in the case against Mr. Tully.

This Court has only upheld cause challenges based on the specific facts of a case where the record provided a basis for deciding something about the juror's views in the abstract. To support dismissal, the record must reflect that the "case-specific questioning led to the ultimate and crucial question whether the juror could vote for the death penalty in any burglary-murder case." (*People v. Pinholster*, *supra,* 1 Cal.4th at p. 918, emphasis added, see *People v. Ervin, supra*, 22 Cal.4th at 71.) Unlike in *Pinholster*, here, there was nothing in the record that provided an additional basis for deciding something about

Degnan's views about "any" burglary-murder in the abstract. And, unlike in *Pinholster,* prospective juror Degnan was *only* asked his attitudes based on the facts of this case. There was nothing in the record from which the trial court could deduce "the ultimate and crucial question whether the juror could vote for the death penalty in *any* burglary-murder case."

Fifth, Degnan was excluded even though he informed the court that he needed to hear the evidence before deciding the appropriate penalty. It is improper to dismiss a juror because he is not sure he would impose a death sentence on the facts as given to him in a hypothetical question until he heard the evidence in aggravation and mitigation. It cannot be said that Degnan would "invariably vote either for or against the death penalty because of one or more circumstances likely to be present in the case being tried, without regard to the strength of aggravating and mitigating circumstances. . . ." (*People v. Kirkpatrick, supra,* 7 Cal.4th at 1005). Nor did Degnan "harbor bias as to some fact or circumstance shown by the trial evidence that would cause him not to follow an instruction directing him to determine penalty after considering aggravating and mitigating evidence." (See *People v. Cash, supra,* 28 Cal.4th at 720-721, and cases cited therein.) By stating that he would need to hear the evidence presented before deciding whether he could vote for death, Degnan demonstrated his ability and willingness "to follow the court's instructions and obey [his] oaths." *(Adams v. Texas, supra,* 448 U.S. at p. 50.) Nothing more is required to be a death-qualified juror.

Prospective juror Degnan repeatedly said that he could not decide how he would vote based on a hypothetical situation and that he needed more information before committing to one position or another.[34] Degnan's final words are particularly telling here. The prosecutor asked him if he would have "a shot" at asking Degnan to vote for death, and Degnan stated:

> *I would have to say no, based on what I know up to now and I know that's couching it, but that's the only way I could answer the question because I don't know all the evidence that's involved in the case, and as the case develops, something may come up which would sway me.* I don't know what it would be, I don't know what it would be, I don't know where it would come up, *but based on what I know now*, I'd have to say no, that I can't. (RT 793; emphasis added.)

In sum, the voir dire of Degnan demonstrates that he would not consider a death sentence *until* he heard the facts in aggravation and mitigation. That is precisely what a juror is supposed to do in a capital case. For all these reasons, Degnan was improperly dismissed for cause.

2. Prospective Juror Elizabeth Herrera

a. The Record Regarding Elizabeth Herrera

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[34] The Supreme Court has held that jurors may not be discharged solely "because they were unable positively to state whether or not their deliberations would in any way be affected." (*Adams, supra,* 448 U.S. at p. 50.) It would be constitutional error to dismiss a juror, such as Degnan, because he who was unable to state "positively" that, before hearing any evidence in aggravation or mitigation, he could or would vote for death.

Elizabeth Herrera wrote in her questionnaire, that she felt "the death penalty in some cases is necessary." She described her philosophical opinion as "neutral." She was not sure whether she would vote for the death penalty if it were on the ballot because "it's a serious penalty, one I would have to research before I could make a final decision." During individual voir dire, she said she had been thinking about it since she filled out her questionnaire and had decided she *would vote* for it because "some crimes are pretty bad, where a death penalty [ ] wouldn't bother me." (RT 1290.)

She was asked whether she thought that if someone broke into a house to commit a burglary and killed the woman who lived there, and stabbed her to death 25 times, it was "serious enough . . . that the death penalty might be an appropriate response." She answered: "[B]ased on that outline, I wouldn't think so." (RT 1291.) The judge then clarified that Herrera did not feel the death penalty would be appropriate in this "type of case," and granted the prosecutor's challenge for cause (RT 1293.)

b. The Trial Court's Dismissal of Herrera Was Not Supported by Substantial Evidence That Her Views Would Prevent or Substantially Impair Her Duties as a Juror

Elizabeth Herrera entertained no conscientious objections or views against the death penalty. During questioning by the judge, she stated that she would vote for death penalty at a general election and that she thought the death penalty appropriate for some crimes. (RT 1290.) She said without equivocation that she would follow the instructions and would be able to impose either penalty after hearing the evidence at the penalty

phase. (RT 1287-1289). Under *Witt*, Herrera was not subject to cause dismissal because there is no evidence to support the trial court's unexplained findings that she held views that "would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath."

While Herrera indicated a reluctance to impose the death penalty in some cases, she never indicated an "abstract inability" to vote for a death sentence in this case, let alone in *any* felony-murder case. She was only asked about this specific "type of case." Unlike in *People v. Pinholster*, *supra,* 1 Cal.4th at p. 918, Herrera was asked whether she could impose death based on the bare facts as presented by the trial court. There is no way to deduce "the ultimate and crucial question whether [Herrera] could vote for the death penalty in *any* burglary-murder case." Herrera said she would enter the trial open to both penalties, and would listen to and consider the evidence and follow the instructions and the law. That is all that is required of a juror in a capital case.

Herrera's reluctance to impose death on the basis of the truncated and misleading outline of the crime provided her was not a sufficient reason to excuse her. She stated that based solely on the description of the case, death might not be an appropriate penalty. (1291.) She was dismissed after she answered "right" when the trial court asked "this is not type of case in which you feel that the death penalty might be an appropriate penalty, is that right?" (RT 1293.) But Herrera was never asked whether she could impose a death sentence in the "type of case" that would be portrayed by the prosecutor in his penalty

phase opening statement and closing arguments. Although Herrera's normative standards might have made it *more difficult* for the prosecutor to persuade her to vote for death, that is not enough to warrant a dismissal pursuant to *Witt.* Herrera was fully capable of following the law and the penalty phase instructions, even if, in her own moral judgment, the death penalty "might not be appropriate" for the crime as described by the judge.

"As the representative of the community at large, the jury applies its own moral standards to the aggravating and mitigating evidence to determine if death or life *is the appropriate penalty for that particular offense* and offender." (*People v. Mendoza* (2000) 24 Cal.4th 130, 192.) A juror who "might" not find the death penalty "appropriate" for a particular offense is capable of upholding her responsibility and duties as a juror because her duties expressly require her to determine whether death is appropriate for the offense and there is no presumption in favor of death under the law. Without further indication that Herrera would not impose a death sentence regardless of the specific circumstances of a burglary-murder, her sentiments cannot support a finding that she was unable "to follow conscientiously the instructions of a trial judge and to consider fairly the imposition of the death sentence in [this] particular case." (*Boulden v. Holman, supra,* 394 U.S. at pp. 483-484; *Adams, supra,* 448 U.S. at pp. 44-45.)

Moreover, because the version of the crime painted by the trial court bore little resemblance to the version of the crime painted by the prosecutor at trial. Herrera's statement that this was not the "type" of case where the death penalty should be imposed

was irrelevant. Her feeling that a death sentence might not be appropriate in a case where the killing occurred during a residential burglary and the sole victim was stabbed provided no basis for the court to include she would not vote for death in a case where the prosecutor would improperly argue that the defendant knew the 58 year old victim was a nurse who was preparing to go back east for her father's birthday and was a breast cancer survivor and that Mr. Tully had lured her to the door to commit a vicious sexual assualt.

Herrera was improperly dismissed because she could not state whether she could impose a death sentence until she heard the evidence in aggravation and mitigation. (*People v. Cash, supra,* 28 Cal.4th at 720-721, and cases cited therein.) Herrera's answers on voir dire indicate only that she needed to hear additional evidence before committing to finding death the appropriate penalty. She was able and willing to follow the court's instructions and obey her oath. Herrera was never asked, and never indicated, that she would "invariably" vote for life, without consideration of any factors in aggravation, nor was there any basis from which the court could find that she could or would not fairly and impartially follow an instruction directing her to determine penalty *after considering aggravating and mitigating evidence.* (See *People v. Kirkpatrick, supra,* 7 Cal.4th at 1005.) The record does not support the trial court's conclusion that she was unable to apply the law.

For all these reasons, Elizabeth Herrera should not have been dismissed for cause.

2. Prospective Juror Marsha Kermich

a. The Record Regarding Prospective Juror Kermich

On her questionnaire, Kermich stated that she believed in the death penalty and described herself as moderately in favor of it. She indicated her views had changed in the last few years. She explained that "after watching the Robert Alton Harris case, I became aware of the issues regarding the death penalty and the need for a death penalty." She stated she would vote for the death penalty if it were on the ballot. (CT 14968-14970.)

During the court's voir dire, Kermich responded that she would try to consider both sentencing choices and be open-minded, but she "would lean towards one over the other as I've stated in my questionnaire." She would not eliminate either possible penalty, and she would be able to choose either penalty depending on the evidence. (RT 511-512.) She then stated she was leaning towards the death penalty. (RT 513.) During defense questioning, she expanded on her feelings about the death penalty and said that she felt it was needed because of the expense to the tax payers and the overcrowding in the jails. (RT 515.)

After the prosecutor reminded her that, in deciding the penalty, she would be dealing with "a real person over here with a pair of glasses," and not the "abstract," she stated "I would get to know this person for six weeks and it probably won't be an easy thing to do." (RT 519.) The prosecutor then improperly asked her to assume the jury had voted for death and to further assume she was the foreperson, who would have to sign the

verdict form. He then improperly asked:

> Can you sign your name on that death warrant, appreciating the fact that that is the first step that will carry this man onto a bus to be taken across the bay to San Quentin, put into eventually that green gas chamber which we saw time and time again over all this publicity regarding Harris, and he will at point in time breath in poison gas until he's dead. Can you sign that verdict?

Kermich answered,"No." (RT 522.)

The court asked a few more questions. Kermich explained: "My feelings on the death penalty is like that's a person out there versus the person I'm sitting looking at for six weeks. I think that therein lies the difference for me of being able to do that." She then said she did not think she could impose the death penalty. (RT 523.) The court granted the prosecution challenge.

b. The Trial Court's Dismissal of Marsha Kermich Was Not Supported by Substantial Evidence That Her Views Would Prevent or Substantially Impair Her Duties as a Juror

Marsha Kermich did not indicate any philosophical, moral or religious opposition to the death penalty on her questionnaire. She was, in fact, "moderately" in favor of the death penalty and would vote for it if it appeared on the California ballot. (CT 014935-014972.) During voir dire, she said nothing that would suggest she had any views or conscientious objections against the death penalty. Kermich even said that she was "leaning towards" the death penalty (RT 513) and became more convinced about this during the highly publicized execution of Robert Harris. (RT 515). She did not entertain any views against the death penalty. Her views could not possibly prevent or

substantially impair her ability to follow the law and the instructions to determine the penalty. There is nothing to support the trial court's unexplained finding that Kermich held views that "would prevent or substantially impair the performance of [her] duties as a juror in accordance with his instructions and oath."

Kermich was dismissed for cause only after being asked whether *after voting for death,* she could act as foreperson of the jury and sign her name to the death verdict, knowing "that is the first step" leading to "the death of that man over there with glasses," during which "he'll be put into that gas chamber, strapped into that chair and forced to breath poisonous gas until he dead." (RT 521-522.) This improper and highly charged question influenced Kermich's answers during voir dire. Even worse, because she had indicated on her questionnaire that she became aware of the need for the death penalty during the Harris execution, the prosecutor reminded her that if she voted for death, just before the execution, Mr. Tully will be put into "that green gas chamber which we saw time and time again over all this publicity regarding Harris . . ." (RT 522.)[35] Only after

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[35] The Harris execution in April 1992 was the first in California in 25 years. It was widely publicized. (K. Ridolfi (1998) *Not Just an Act of Mercy: The Demise of Post-conviction Relief And a Rightful Claim to Clemency,* 24 N.Y.U. Rev. L. & Soc. Change 43, 49, fn. 28 [noting that over 1,000 stories had been written about the Harris case in major newspapers alone].) The media coverage included detailed information about the execution itself, in which Harris was granted four stays of execution in a period of nine hours. Just prior to the last stay, Harris had already been led into the "green gas chamber," and strapped into the chair, and waited there for 12 minutes, only to have a stay of execution granted. Some two hours later, that stay was lifted, he was once again led into the chamber, strapped into the chair, and breathed poison gas until he died. (*See e.g.* Elizabeth Fernandez, (Apr. 22, 1992) *All Forms of Execution Produce Horror Stories, The Execution of Robert Alton Harris*, San Francisco Examiner, at p. A14; John D. Bessler, (1997) *Death in the Dark: Midnight Executions in America* (Northeastern University Press), Chapter 1.)

the prosecutor pressured Kermich, did she express any doubt about her ability to return a death verdict in this case.[36]

There are several reasons why a dismissal for cause based on a juror's responses to this particular question is improper. First, the question had nothing to do with the juror's ability to follow her duties as defined by the court's instructions. In fact, the hypothetical question asked the juror to "assume" she had already fulfilled her duties as a juror – listened to the evidence, followed the instructions, and deliberated with the other jurors– and *had actually already voted for death.* (RT 521.) These duties are all that is required of any juror in a capital case and the juror's ability to do anything thereafter is completely irrelevant. The fact that Kermich, in answering the question, was able to make the necessary assumption of having voted for death demonstrates her ability to follow the instructions.

Second, no juror is required to accept the role of foreperson on a jury. It is a voluntary position. Being able to sign the death verdict is not a duty that every qualified juror must accept. (CALJIC 17.50.)[37] A juror might in fact legitimately decline to be foreperson simply because they did not want to deliver or sign the verdict themselves, or

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[36] The prosecutor used this question to achieve two improper results: 1) excluding qualified jurors, such as Davis and Kermich, who would properly hesitate when confronted with this inflammatory question; and 2) ensuring that those who did sit on the jury had no qualms about answering the inflammatory question.

[37] At some point after the voir dire of Kermich, the prosecutor began to slightly rephrase the question, asking whether the prospective juror could cast the 12th vote in favor of death, knowing it was the first step to execution, in lieu of whether they could sign the death verdict. (See e.g. RT 1268.)

for any other reason, but still be more than able to follow the instructions and deliberate to reach that verdict.

Third, "evidence on how the death penalty is carried out is irrelevant and inadmissible as a matter of law." (*People v. Whitt* (1990) 51 Cal.3d 620,644-645.) Evidence concerning the manner of carrying out the death penalty is irrelevant to California's capital sentencing scheme. (See, e.g. *People v. Lucas* (1995) 12 Cal. 4th 415, 499; *People v. Fudge, supra*, 7 Cal. 4th at pp. 1123-1124 and cases cited therein.) This Court has held that evidence depicting the gas chamber is not admissible during the penalty phase, and upheld a trial court's refusal to allow defense counsel to read from an article describing an execution during argument, despite the great latitude given to counsel at that stage of the proceedings. "A vivid account of an execution has no place at the penalty phase." (*People v. Grant* (1988) 45 Cal.3d 829, 859.)

Fourth, the death verdict signed by the foreperson does not say anything about death by poison gas, or the method of execution. In this case, the verdict stated simply: "We, the jury in the above entitled cause, fix the punishment at DEATH." (CT 2130.) Indeed, the "Judgment of Death" issued by the trial court here stated:

> [I]t is the Order of this Court that the defendant RICHARD CHRISTOPHER TULLY shall suffer the death penalty, said penalty to be inflicted within the walls of the State Prison at San Quentin, California, the manner and means proscribed by law at a time to be fixed by this Court in the Warrant of Execution. (CT 2153.)

Fifth, it is the juror's views "in the abstract" that justify a dismissal for cause, not

their views about what they would or could do to a particular defendant in a particular case. Yet, just before posing the hypothetical question to Kermich, the prosecutor framed it in exactly the opposite terms. He expressly told Kermich she had to answer based on what she would do with "a real person over here with a pair of glasses, and *not* in the abstract." (RT 522.) A juror who would have a hard time actually facing a defendant, a "real person" and imposing a death sentence, after considering all the evidence fairly and impartially, is fully qualified to serve as a juror under *Witt.* (See *Adams v. Texas*, *supra*, 448 U.S. at p. 50.)

Jurors who are hesitant to decide whether a real person should die are not "impaired" by virtue of their pro-death penalty views or any other religious or moral belief. Rather, they are fully capable of applying the law and the court's instructions, which expressly authorize jurors to consider sympathy and compassion for the defendant. (CALJIC 8.85.) As the Supreme Court has stated:

> A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death. (*Woodson v. North Carolina* (1978) 428 U.S. 280, 304.)

Relying on *Witherspoon*, this Court has held that "the decision that a man should die is difficult and painful, and veniremen cannot be excluded simply because they express a strong distaste at the prospect of imposing that penalty." (*People v. Bradford* (1969) 70

Cal. 2d 333, 347.)

Consideration of the realities and the grave consequences of a death verdict is a constitutionally required function of the penalty phase jury. Indeed, the Supreme "Court's Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." (*Caldwell v. Mississippi* (1985) 472 U.S. 320, 329. The belief that jurors do "treat their power to determine the appropriateness of death as an 'awesome responsibility'" is "indispensable to-- the Eighth Amendment's 'need for reliability in the determination that death is the appropriate punishment in a specific case.' *Woodson v. North Carolina, supra,* 428 U.S.at p.305 (plurality opn.). See also *Eddings v. Oklahoma, supra; Lockett v. Ohio, supra.*" (*Id.* at p. 330.) The Eighth Amendment demands that a juror recognize the "awesome responsibility" of condemning a man to death. Dismissing a juror whose sense of that responsibility would impact his or her penalty decision, even if it might mean voting for a life sentence, is unconstitutional.

Sixth, the prospect of execution in *the gas chamber* influenced Kermich's responses during voir dire. Kermich was specifically asked to remember the publicity around the Harris execution when imagining that, if she were the foreperson, her signing of the verdict would be the first step leading to Mr. Tully being put into "that green gas chamber." Many people understandably were horrified by the image of Harris strapped into a chair in that same gas chamber, awaiting his death for a full 12 minutes, only to be

released, unstrapped, removed from the chamber, and then brought back in again for his actual execution several hours later.

Seventh, death in the gas chamber is no longer the primary method of execution in California and prisoners are no longer executed by breathing poison gas, but rather by lethal injection, said by some to be a less tortuous method of execution. (Cal. Penal Code § 3604.) The prosecutor and the trial court should have been aware that this change in the law was highly probable at the time of voir dire.

In April 1992, only three days before Mr. Harris' execution, United States District Judge Marilyn Patel temporarily enjoined the execution, finding a likelihood of success on the claim that use of the gas chamber was cruel and unusual punishment. (*Fierro v. Gomez* (N.D.Cal.1992) 790 F.Supp. 966.) After a full hearing in 1993, the gas chamber was in fact declared unconstitutional. (*Fierro v. Gomez (II)* (N.D. Cal.1993) 865 F.Supp. 1387, vacated as moot by *Gomez v. Fierro* (1996) 519 U.S. 918. At the time voir dire was conducted in this case, fast-track legislation was pending in California to authorize an alternative method of execution, lethal injection.[38] A bill making this change was signed into law on August 27, 1992, prior to the penalty phase in this case.

Basing a *Witt* dismissal in any degree on whether prospective jurors could impose

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[38] AB 2405, a bill to replace the gas chamber with lethal injection, was introduced on May 22, 1992. (*The San Francisco Daily Journal* (May 22, 1992) Sacramento Digest, at p. 10.) SB 2065, providing for both methods of execution, unless one method was to be ruled unconstitutional, was introduced on June 5, 1992. Jury selection in this case began on June 22, 1992. (*The San Francisco Daily Journal* (June 5, 1992) Sacramento Digest, at p. 12.)

a particular method of execution is improper. When, as here, it was virtually certain that the legislature would endorse an allegedly less tortuous method of execution, this error was particularly egregious. Prospective juror Kermich may well have been influenced by the incorrect assumption that they would be sending Mr. Tully to death in the gas chamber, as opposed to death by lethal injection.

For these reasons, the trial court's ruling cannot be upheld and the dismissal of Marsha Kermich was improper.

4. Prospective Juror Bonnie Davis

a. The Record Regarding Prospective Juror Davis

On her questionnaire, Bonnie Davis stated that she remembered the recall election against former Chief Justice Bird.[39] She felt Justice Bird was "too lenient." (CT 13703.) In describing her feelings about the death penalty, she wrote that "it is appropriate in certain cases although it is heartbreaking." She described herself as moderately in favor of the death penalty. She would vote for it on the ballot because "it is appropriate in some cases."

During individual questioning, Davis said she wasn't "positive" she would be able to impose the death penalty. When pressed, said she was 80 percent sure she *would be*

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[39] Chief Justice Rose Bird, along with two other California Supreme Court justices, were removed from their seats on the bench by the voters in the retention election of November, 1986. The campaign against them was based almost entirely on their perceived opposition to the death penalty. Bright & Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*," (1995) 75 Boston Univ. L. Rev.759.)

able to, but it would be a difficult decision. (RT 639.) She made it clear that she supported the death penalty in appropriate cases, and that the crime with which Mr. Tully was charged was "bad enough" to warrant the death penalty. (RT 640.) The prosecutor reminded her he would be asking her to vote for "the death of that man over there with the glasses." He also asked Davis to assume that she was the foreperson who had to sign the verdict form and that a death verdict had been reached by the jury.

> And you realize that by signing that form, you're signing a death warrant. It is the first step, the very first step that will take this man over here, this real person, will take him out of this courtroom, take him over to San Quentin where eventually he'll be put into that gas chamber, strapped into that chair and forced to breath poisonous gas until he's dead. Could you sign that verdict form?

(RT 642.). She answered "I don't think so." (RT (641-642.)

She indicated she was afraid she might regret her decision "years later" (RT 646), and that she was feeling "shaky" about it. (RT 647.) After extensive and repetitive questioning she *still said it was possible* she would be able to vote for the death penalty but she was "leaning more towards not being able to." (RT 648.) After being pushed further by the prosecutor, she stated she had come into voir dire thinking she could impose the death penalty but now, after the questioning, she could not give a flat "yes" or "no." (RT 649.) Finally, she was asked: "Is the death verdict a verdict you *couldn't* return in the this case." Her answer was an unequivocal "no."

Without explanation, and stating only that "the juror has given arguably inconsistent or equivocal answers at some point," the trial court concluded that "the

prospective juror's views would prevent or substantially impair the performance of her duty as a juror and in accordance with her instructions." RT 651-652.) The court then discharged prospective juror Davis.

b. The Trial Court's Dismissal of Bonnie Davis Was Not Supported by Substantial Evidence That Her Views Would Prevent or Substantially Impair Her Duties as a Juror

Davis did not have any philosophical, moral or religious opposition to the death penalty. (CT 013680-013717.) She was "moderately" in favor of it. She supported the recall of former Chief Justice Rose Bird. She was 80/20 percent certain in her belief that the death penalty is appropriate. (RT 640.) The crime, as described to her, was serious enough to warrant the death penalty. (RT 645.) She answered affirmatively when asked if she would be able to follow the law and determine the penalty in accordance with the court's instructions. There is no evidence to support the trial court's conclusion that Davis held views that "would prevent or substantially impair the performance of [her] duties as a juror in accordance with his instructions and oath."

Davis was dismissed however, after a series of questions regarding her ability to sign the death verdict, knowing "that is the first step" leading to "the death of that man over there with glasses," during which "he'll be put into that gas chamber, strapped into that chair and forced to breath poisonous gas until he is dead." (RT 642.)

Davis' was plainly influenced by this question during voir dire. Davis said several times that after "sitting here," i.e. after being subjected to voir dire, she was, for the first

time, beginning to realize some doubts about imposing the death penalty. (RT 643, 646.) She said: "I'm troubled now more than I have been thinking about it prior to coming in here." (RT 645.) The trial court considered the answers to this question when granting the prosecutor's challenges for cause. The trial court erred in dismissing Davis because this question was used by the prosecutor to pressure her into expressing doubts that she did not have before questioning. All she had to go on during voir dire was the silent form of the young man sitting at counsel table, someone she knew nothing about except that he had been charged with a capital murder.

As discussed with juror Kermich, this question was improper for many reasons. Davis was at most expressing her moral and normative views regarding the responsibility of imposing a death sentence. She was a death penalty supporter who recognized the enormity of actually sentencing an individual to death. A juror who would have a hard time actually facing a defendant, a "real person" and imposing a death sentence after considering all the evidence fairly and impartially, is fully qualified to serve as a juror under *Witt.* (See also *Adams v. Texas*, *supra*, 448 U.S. at p. 50.)

If after sitting through voir dire, Davis had qualms about sentencing a defendant, it shows that she recognized the "awesome responsibility" of a death penalty juror. Dismissing a juror whose sense of that responsibility might impact his or her penalty decision, even if it might mean voting for a life sentence, is unconstitutional. Davis had every right to sit on the jury and her dismissal was improper.

The dismissal of Davis was improper for another reason as well. The last thing that Davis said before being dismissed was in response to the question "Is the death verdict a verdict you *couldn't* return in this case." She answered "no" (RT 650-651) which means "Yes, I could return a death verdict." Davis' response resulted in a "double negative" answer, which is a positive answer.[40] Even after a lengthy voir dire, including the improprieties discussed above, Davis still said she could impose a death sentence on Mr. Tully. The record does not contain substantial evidence to support her dismissal.

Even if this Court finds her answer ambiguous, that ambiguity was the result of a poorly worded question by the trial court. The failure to ask a simple follow-up question is error. The trial court's duties on voir dire include the duty to ask simple, straightforward questions. (*People v. Heard, supra,* 31 Cal.4th at p. 967, fn. 9.) It was incumbent on the trial court to clarify any ambiguity in Davis' answer for the record. This Court has found that trial courts must "redouble their efforts to proceed with great care, clarity, and patience in the examination of potential jurors, especially in capital cases." (*Id.* at p. 968.) Because the trial court here failed to do so, the record does not reflect substantial evidence to support a determination that Davis harbored views that would prevent or substantially impair the performance of her duties so as to support her excusal for cause. (*Id.* at p. 966.)

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[40] "English grammar today regards two negatives as canceling each other and producing an affirmative." (H.W. Fowler, *A Dictionary of Modern English Usage* (Oxford, 2nd Ed. 1965), at p. 384.)

For all these reasons, Davis should not have been excluded as a juror.

5. Prospective Juror Timothy Len

a. The Record Regarding Prospective Juror Len

In his questionnaire, when asked his feeling about the death penalty, Timothy Len wrote: "Not really a big problem for me." He said he was neutral about it. When asked if would vote for the death penalty if it were on the ballot, he stated he was not sure and that he would "take it on a case by case basis." (CT 8586-8587.)

During the court's questioning, Len was asked whether he had eliminated the possibility of imposing either penalty. He answered, "I would have to, you know, keep an open mind. It wouldn't be decided one way or the other without hearing additional . . ." (RT 1663, lines 15-17.) The court cut him off and asked whether he would have an open mind as to the penalty. Len responded: "I would certainly try, I mean, yes." (RT 1663.) He stated he could follow the instructions and be open to imposing either penalty depending on the evidence. He was asked, "is there any question in your mind?" He said "No." However, after he gave a negative answer to the ambiguous compound question, "if you felt that [death] was the appropriate penalty, after having heard everything, could you vote to impose it or could you not," the prosecution's challenge for cause was granted. (RT 1664-1666.)

b. The Trial Court's Dismissal of Timothy Len Was Not Supported by Substantial Evidence That His Views Would Prevent or Substantially Impair His Duties as a Juror

Timothy Len was improperly dismissed. Trial court failed to state his reasons for the dismissal. Based on record before this Court, the dismissal cannot be upheld.

Len did not have any philosophical, moral or religious opposition to the death penalty. He wrote that he was "neutral" and "would take [the death penalty] on a case by case basis." In fact, Len was asked no questions, except those on the questionnaire, about his views for or against capital punishment. The record contains no evidence that Len's views about capital punishment would in any way impair his ability to follow the instructions or his oath.

Moreover, the trial court failed to follow four of the voir dire protocols required by this Court in *People v. Heard*, *supra*, 31 Cal.4th at p. 967, fn. 9. First, during voir dire, Len began to explain to the court that he would need to hear additional evidence before determining the appropriate penalty, but the court cut him off mid-sentence. (RT 1663, lines 15-17.) *In Heard*, this Court instructed that trial courts should refrain from interrupting the prospective jurors during their answers to ensure that a complete record be made of why or why not a challenge for cause was granted.. The trial court here did not follow that instruction.

Second, the trial court asked a confusing question that led to an ambiguous answer. Len had stated that he would have an open mind and that he could consider and impose either penalty. (RT 1663.) He gave a negative answer when the court asked a compound question: "Could you vote to impose [the death penalty] or could you not?." In *People v.*

Heard, supra, 31 Cal.4th at p. 967, fn. 9, this Court found that trial courts must ask simple questions during voir dire. The trial court did not do so here.

Third, the trial court failed to ask a sufficient clarifying question to clear up the ambiguity and apparent contradiction in Len's answer. He asked Len, "You could not," and the court reporter noted that Len "shook his head." (RT 1666.) *Heard* requires the trial court to follow up on ambiguous answers. Here, the trial court dismissed Len without exploring Len's state of mind further, without determining whether the question had even been understood, and without getting a clear verbal answer.[41]

Fourth, the trial court failed to ensure that a complete record was made to support granting the challenge for cause. There is no statement by Len, under oath, that he could not vote for death. A mere notation by the court reporter of a purported physical gesture, without any discussion by the court or the parties, is not a complete record. (See *People v. Heard, supra*, 31 Cal.4th at p. 967, fn. 9.) It would have been a simple matter for the trial court to require Len to answer verbally a straightforward question, but it failed to do so. It is incumbent on the trial court to make a proper record before dismissing a juror for cause and to "proceed with great care, clarity, and patience in the examination of potential

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[41] Len was dismissed after he responded negatively to a negative question. Len was asked: "if you felt that [death] was the appropriate penalty, after having heard everything, could you vote to impose it or could you not?" He said "No." He shook his head in response to the question, "You could not.?" No further questions were asked by either the court or the parties, and the prosecution's challenge for cause was granted. (RT 1664-1666.) Applying principles of grammar, the two negatives become a positive, which means that Len actually said "Yes, I can impose the death penalty."

jurors, especially in capital cases." (*Id.* at p. 968.)

The trial court's dismissal of Len was improper because the record does not reflect substantial evidence to support a determination that Len harbored views that would prevent or substantially impair the performance of his duties to support his dismissal. For these reasons, Len was improperly dismissed for cause by the trial court.

D. The Trial Court Failed to Apply the *Witt* Standard in an Equal Manner to All Prospective Jurors

The trial court's decision to dismiss the five prospective jurors must be rejected on the basis of the record. Moreover, this Court should find that the trial court's conclusions regarding the jurors are not entitled to deference because the court failed to apply the *Witt* standard even-handedly. This unequal treatment, demonstrates the trial court's findings, particularly with regard to the exclusion of Degnan, are not entitled to deference. (See *Gray v. Mississippi*, *supra*, at p. 661, fn 10 ["Deference [to the trial court's findings on cause challenges] is inappropriate where, as here, the trial court's findings are dependent on an apparent misapplication of federal law, and are internally inconsistent."]

In determining the constitutionality of the trial court's rulings on the prosecutor's cause challenges, this Court should compare the voir dire of Degnan, dismissed for cause after a prosecution challenge, with the voir dire of alternate juror Donald da Roza, who was allowed to sit despite a defense challenge. This comparison demonstrates that the trial court used different standards in ruling on the prosecution's challenge to Degan, than it did in ruling on the defense challenge to da Roza. Because of the disparity, the trial

court's rulings on all the challenges are fully suspect.

During individual voir dire, the defense challenged da Roza for cause based on his views about the death penalty. On his questionnaire, da Roza stated that he was "pleased" that Rose Bird had not been retained during the recall election. (CT 8348.) Da Roza also stated at the outset of invidual voir dire that, although he would "tend to strive hard to wait and not form an opinion until [he] heard the evidence," he probably "tend[s] to go more towards capital punishment." (RT 1560). He then stated he was "probably 60/40." (RT 1561). He was in favor of capital punishment "in certain circumstances," but he was not really sure what those circumstances would be. (RT 1563-1564). When asked if he could be fair, Da Roza stated that, because of his beliefs, he would "worry about not having a fair a trial as possible." (RT 1569.)

During voir dire, the defense asked:

> Q: Now you tell me, if you find [the defendant guilty as charged] beyond peradventure of a doubt, as to the second phase, would we be having a real trial, and I define a real trial as one where there's a realistic likelihood that you can return both verdicts as opposed to you always returning one.
>
> A: (Pause.) I worry about myself in that kind of situation, being strongly for capital punishment. I would have difficulty not – I mean, I probably would have difficulty thinking otherwise. (RT 1571.)

The defense challenged da Roza for cause. The prosecutor then questioned da Roza, and asked "assuming all that you've heard, that is, that man over there in the glasses broke into Sandy Olsson's house, intentionally killed and may have sexually or assaulted her with the intent to commit rape. You convicted him, you know, he did that. Could you

always vote to execute him?" Da Roza answered: "I guess I can say the scales would weigh extremely heavy to do so." (RT 1572.)

The court then suggested that the prosecutor indicate what types of evidence might be presented in the penalty phase of this case.[42] Instead, the prosecutor gave a description of the general types of aggravating and mitigating factors that might be presented "in an abstract case,"[43] including the circumstances of the crime, other acts of violence, prior felony convictions, good things about the defendant such as being a war hero or saving a child's life, or being good to his mother, and the defendant's background and life history as presented by family members or mental health experts and explained the jurors would have to weigh these factors.[44] Da Roza answered:

> I believe what I would – in balancing this scale or my scale, so to speak, well, if it turned out, say, then some things against other good things, I would tend to weigh towards the capital punishment assuming – I think that's how I would feel. . . . I would tend to think there would be some balancing of the scale in

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[42] The inequality of the trial court's treatment of jurors challenged by the defense is evidenced by the court's own attempts to assist with the voir dire of da Roza following the defense challenge. The court did not do the same with jurors challenged by the prosecution. The court even stated that if the prosecutor did not tell da Roza about penalty phase mitigating evidence, it would do so itself. (RT 1573.) The court never suggested that the jurors challenged by the prosecution should be told about potential aggravating evidence.

[43] Disturbingly, prospective jurors in the case were questioned based on case specific guilt phase facts, but *abstract* penalty phase facts. This is the reverse of what this Court and the Constitutions require to support the dismissal of jurors for cause. (*People v. Pinholster*, *supra,* 1 Cal.4th at p. 918.)

[44] Because the defense mitigation case did not include evidence concerning Mr. Tully's military history or that he saved a child's life, or any mental health expert testimony at the guilt or penalty phases. Da Roza's answers do not reflect that he could impose either penalty based on the facts of the case as later presented to the jury.

> listening to the evidence that would be presented. I don't know what it would be, but it -- still I would tend to probably -- the scale would be heavier to capital punishment, but I don't think my mind would be made up in going through the phase and listening to the evidence.
>
> Q: So, basically assuming that all that, at the end of the guilt phase you haven't decided what should happen to him, but you're leaning towards the death penalty?
>
> A. Right. Exactly. (RT 1577.)

Like the prosecutor, the defense attempted to ask additional questions regarding the facts in aggravation or mitigation. The prosecutor immediately objected stating that "we've gone past that point. . . . We've spoken with this man for a long time. To go back and redig old ground as opposed to moving on, I think, I object to it." (RT 1577.)

In his questionnaire, da Roza had answered that he had feelings about psychiatric or psychological testimony. He said: "I believe that people are responsible for their own actions." He underlined the word "own" and added an exclamation mark at the end. (CT 8354.) When questioned about this on voir dire, the court took over again and asked whether he would consider this "typical" mitigation evidence before he made up his mind about punishment. He responded he "thought" he would consider the evidence, and he "believed" he would consider it seriously. The court then denied the defense challenge for cause. (RT 1581.) Da Roza served as an alternate juror.

In contrast to Da Roza, the court granted the prosecution challenge to prospective juror Degnan. In his questionnaire, Degnan wrote that the death penalty is necessary in some cases. (CT 13522-13524.) During the court's voir dire, he stated that he could be

open to both penalties in light of the facts of the case, consider the evidence and actually impose either sentence. (RT 785-787.) He repeatedly indicated that he was ambivalent about the death penalty and that he could not predict he would vote until the issue was before him. (RT 789-790.) He stated that he could reach a death verdict. (RT 790.)

After being told that the crime involved a woman who was stabbed to death during a burglary, Degnan indicated to the court more than once that he could not say whether he would vote for a death sentence on those limited facts without hearing more evidence. (RT 790-791.) [45] Degnan's answers that he did not think he would vote for death were all qualified by the limited information he was provided: "based only on the information I've gotten today . . . I don't know what other information might sway my mind . . . based on what you told me today and what I've heard up to this point . . . (RT 792); . . . *based on what I know up to now* and I know that's couching it, but that's the only way I could answer the question *because I don't know all the evidence that's involved in the case* . . . but based on what I know now . . . . (RT 793.) Unlike da Roza, the court granted the challenge for cause to dismiss Degnan, and he was discharged. (RT 794.)

Since the trial court found da Roza capable of performing the duties of a juror, it also should have found Degnan capable of serving. The court should have denied the

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[45] In order to treat both the defense and prosecution in an equal manner, the trial court should have stepped in, as it did with da Roza, and asked the defense to provide an example of typical aggravating evidence that might be presented. Without doing so, the court could not reasonably conclude that Degnan would not be able to consider the evidence before he made up his mind about punishment.

prosecutor's cause challenge. The prosecutor asked da Roza "assuming all that you've heard" about the crime, and had convicted Mr. Tully, "could you always vote to execute him?" Da Roza answered: "I guess I can say the scales would weigh extremely heavy to do so." (RT 1572.) Although, unlike Degnan, da Roza had not said anything about needing more information or waiting to hear the evidence before he gave his answer, the court *sua sponte* suggested that the prosecutor indicate what types of evidence might be presented in the penalty phase. The trial court made no similar suggestion during Degnan's voir dire, even though he said he would need more information about the case. (RT 792-793.)

After the prosecutor gave da Roza a description of the general types of aggravating and mitigating factors that might be presented, da Roza said: "I would tend to weigh towards the capital punishment assuming – I think that's how I would feel. . . . I would tend to think there would be some balancing of the scale in listening to the evidence that would be presented. I don't know what it would be, but . . . the scale would be heavier to capital punishment . . ." (RT 1574-1575.) He agreed that, after the guilt phase, he would be leaning towards the death penalty.

Alternate juror da Roza and dismissed prospective juror Degnan were virtually identical in the strength of their views, although on different sides of the equation.[46]

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[46] If anything, da Roza was close to being an "automatic death penalty" juror because he stated that he would be inclined to impose a death sentence in most cases. Degnan held no similarly strong beliefs against the death penalty in the abstract.

Degnan leaned away from the death penalty based on the bare facts provided to him, while da Roza heavily leaned towards it. However, when da Roza indicated he would automatically vote for death based solely on the guilt phase facts, the court intervened to make sure he knew what would happen at the penalty phase. The trial court, however, did not intervene during the voir dire of Degnan to make sure he understood what the factors in aggravation might be before determining that he should be dismissed for cause.

Importantly, the two men gave very similar responses to the questions put to them. Based only on the guilt phase case, they would both lean towards one particular penalty, but something might happen at the penalty phase that could change their minds. Da Roza stated he would likely choose death, but "would tend to think there would be some balancing of the scale in listening to the evidence that would be presented. *I don't know what it would be . . . .*" Similarly, Degnan said "as the case develops, something may come up which would sway me. *I don't know what it would be, I don't know what it would be, I don't know where it would come up . . . .*" Both men demonstrated a similar willingness to remain open, although Degnan was never informed about the possible case in aggravation or asked whether he could or would consider the evidence before making a decision.

The trial court's failure to conduct voir dire and to apply the *Witt* standard in the same manner to *all* prospective jurors was improper and renders its rulings on *all* the cause challenges erroneous. In light of its unequal treatment of the prosecution and the

defense, the trial court's unexplained conclusions that dismissed jurors met the *Witt* standard are not entitled to deference. (*Gray v. Mississippi*, *supra*, at p. 661, fn 10.) If da Roza was qualified under *Witt* to remain on the jury, then Degnan was equally qualified. The standard was not applied equally to all prospective jurors. This Court should not accord any deference to the decisions the trial court made in granting the prosecutor's challenges for cause.

E. Conclusion

The improper exclusion of even one prospective juror in violation of *Witherspoon* and *Witt* mandates an automatic reversal of the death sentence. (*People v. Ashmus, supra,* 54 Cal. 3d. at 962.) Here, the trial court improperly excluded 5 prospective jurors on the prosecution's challenges for cause. The dismissal of prospective jurors Degnan, Kermich, Herrera, Davis, and Len for cause was improper. Their dismissals pursuant to *Witt* are not supported by substantial evidence.

Importantly, no deference can be given to the trial court's bare conclusions that each juror was subject to dismissal under *Witt* because the trial court failed to follow the protocols required to assure that a complete record is made. The trial court failed to ask simple questions, failed to follow-up questions to clarify ambiguous answers, and interrupted the jurors. Most importantly, it failed to put on the record its specific reasons for dismissing each individual juror.

For these reasons, Mr. Tully's rights to a fair and impartial jury at both guilt and

penalty phase was denied, in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments and Article I of the California Constitution. Because the improper exclusion of even one of these prospective juror in violation of *Witt* mandates an automatic reversal, Mr. Tully's convictions and sentence must be reversed.

V. THE TRIAL COURT IMPROPERLY DENIED THE DEFENSE MOTION TO EXCLUDE ALL WITNESSES FROM THE GUILT PHASE

A. The Trial Court Abused Its Discretion and Violated Mr. Tully's Constitutional Rights in Denying the Motion to Exclude Witnesses

Prior to the guilt phase opening statements, the defense moved for exclusion of all witnesses from the courtroom. The court only excluded family members of the victim who were going to testify at the guilt phase and only excluded them until they had testified. (RT 1938.) Accordingly, Ms. Olsson's father remained in the courtroom after he testified as a guilt phase witness. He heard a significant portion of the guilt phase case. (RT 3282.) Ms. Olsson's daughter also was allowed to remain in the courtroom after she testified.

At the request of the prosecutor, the trial court allowed family witnesses who were going to testify only at the penalty phase to remain in the courtroom for the entire guilt phase. Ms. Olsson's sister and her son were present during all guilt phase testimony and argument. (RT 1937-1940; 3281-3282.) They both testified at the penalty phase.

The trial court committed reversible error in denying the motion to exclude all witnesses from the guilt phase of the trial and in granting the prosecutor's request to allow penalty phase witnesses to remain in court during the guilt phase. Its ruling violated the state and federal Constitutions, and also violated the explicit text of the "victim's presence" statute then in effect.[47] Former section 1102.6 provided that, in a

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[47] Section 1102.6, which addresses the right of victims and their family members to be present at trial, was enacted in 1986 and repealed in 1995. A new version was enacted in 1995.

murder case, "two members of the victim's family" (i.e. "victims") were entitled to be present unless "the presence of the victim would pose a substantial risk of influencing or affecting the content of any testimony." (Former Pen. Code, § 1102.6, subd. (a), Stats. 1986, ch. 1273 [subsequently repealed and reenacted, Stats. 1995, ch. 332, §3].)[48]

The trial court has discretion to order that witnesses be excluded during the presentation of testimony other than their own. (Cal. Evidence Code § 777.)[49] This Court has recently held that the granting of a prosecutor's motion to allow the presence of a "victim witness" in court under former section 1102.6 is to be reviewed under an abuse of

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The 1986 version was the one in effect at the time of Mr. Tully's trial. (Former § 1102.6, subd. (a), as enacted by Stats.1986, ch. 1273, § 2, p. 4448 and repealed by Stats.1995, ch. 332, § 2, p. 1824.)

[48] Former Penal Code § 1102.6, in effect at the time of trial, provided in pertinent part:

"(a) The victim shall be entitled to be present and seated at the trial. If the court finds that the presence of the victim would pose a substantial risk of influencing or affecting the content of any testimony, the court shall exclude the victim from the trial entirely or in part so as to effect the purposes of this section.

"(b) Upon the court's granting of the victim's request, the defendant may object to the order of the victim's testimony, in which case the victim shall testify first, subject to exclusion if the foundation or corpus delicti is not later established by the testimony of other prosecuting witnesses.

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"As used in this section, "victim" means (1) the alleged victim of the offense and one member of the victim's immediate family and (2) in the event that the victim is unable to attend the trial, up to two members of the victim's immediate family who are actual or potential witnesses."

[49] Evidence Code § 777 provides in pertinent part that "[t]he court may exclude from the courtroom any witness not at the time under examination so that such witness cannot hear the testimony of other witnesses."

discretion standard. (*People v. Griffin* (2004) 33 Cal.4th 536, 574.)

There is little California case law discussing Evidence Code § 777. The dearth of law is not surprising because it is exceedingly rare for a trial court to deny a motion to exclude witnesses. Only two cases discuss former section 1102.6 or address what constitutes an abuse of discretion where, as here, the trial court denied a motion to exclude lay witnesses in a capital case. (See *People v. Bradford* (1997) 15 Cal.4th 1229 and *People v. Griffin*, *supra,* 33 Cal.4th 536.) There are no cases discussing the particular implications of a denial of a request to exclude family member victim impact witnesses from the guilt phase in a capital case.

Here, the trial court's order was an abuse of discretion because it was arbitrary, because it allowed four, instead of two, victim family member witnesses to be present, and because the presence of these witnesses created a substantial risk of influencing or affecting the content of their penalty phase testimony. The trial court's ruling also deprived Mr. Tully of his rights to due process under the Fourteenth Amendment, and a fair trial and to confront witnesses under the Sixth and Fourteenth Amendments. Because the non-excluded witnesses testified at the penalty phase, the trial court's ruling violated Mr. Tully's rights to a fair and reliable determination that he should be sentenced to death under the Eighth Amendment. Mr. Tully's rights under article I of the California Constitution were also violated and the error resulted in a miscarriage of justice.

The witness exclusion order has a long been valued as tool protecting the right to a

fair trial. See e.g. (*People v. Valdez* (1986) 177 Cal.App.3d 680) citing *Geders v. United States* (1976) 425 U.S. 80, 87; *see* 6 J. Wigmore, Evidence (Chadbourn rev. 1976) § 1838, p. 348; F. Wharton, Criminal Evidence (C. Torcia ed. 1972) § 405.) According to Wigmore, the procedural rule that requires the exclusion of witnesses "seems to have been early discovered and long practiced in various communities." (Wigmore, *supra,* at p. 455.) Wigmore notes that this procedure was followed "in the time of those earlier modes of trial which preceded the jury and were a part of our inheritance of the common Germanic law." (*Id.* at p. 456.)

Many states, and the federal rules of evidence, make the granting of a motion to exclude witnesses mandatory upon the request of any party, while others, like California, give the trial judge discretion to grant or deny a requested witness exclusion order. Courts in other states have noted that the need for sequestration of witnesses is heightened in capital cases. (See, e.g., *Commonwealth v. Watkins* (Mass. 1977) 370 N.E.2d 701, 702 ["the better practice in 'capital cases' is to allow [sequestration]"]; *Jones v. State* (Md. App. 1946) 45 A.2d 350, 354 [holding that trial court's refusal to exclude witnesses was an abuse of discretion and reversible error, and noting that sequestration should be granted "[i]n capital and other serious criminal cases"], superseded by court rule as explained in *Gwaltney v. Morris* (Md. App. 1964) 205 A.2d 266, 267-268 [rendering the exclusion of witnesses mandatory instead of discretionary]; *People v. Cooke* (N.Y. App. 1944) 54 N.E.2d 357, 360 [expressing strong disapproval of the trial

court's denial of appellant's motion to exclude witnesses and stating that such a motion should be granted "as a matter of course, especially in a capital case"].)

This Court's holdings in *People v. Bradford, supra,* 15 Cal.4th 1229 and *People v. Griffin, supra,* 33 Cal.4th 536 are distinguishable from this case. Bradford challenged his convictions on the ground that the court erroneously failed to exclude three prosecution witnesses from the courtroom during counsel's opening statements. (*People v. Bradford, supra,* at p. 1321.) This Court found that a "mere assertion that the victims could or would be influenced by the opening statements was insufficient to establish that the victims' presence poses 'a substantial risk of influencing or affecting the content of any testimony.'" (*Id.*, at p. 1322.) Because *Bradford* addressed a claim of error arising from the presence of victim-witnesses only during opening statements, rather than during the entire trial, including the presentation of evidence and trial testimony, and the closing arguments at the guilt phase, it does not control the issues raised here.

In *People v. Griffin,* the issue was whether two family members of the victim were properly allowed to remain in court during a penalty phase retrial. The court took the defense exclusion motion under submission, but excluded the witnesses pending its ruling. Both of the witnesses were called at the beginning of the retrial, and testified outside each other's presence. Neither witness testified as to "victim impact" evidence; instead their testimony focused on the defendant. When called on rebuttal, the trial court directed the prosecutor to caution the witnesses against any emotional outbreak. The two

witnesses did testify on rebuttal and were "very composed" and "restrained." (*People v. Griffin, supra,* 33 Cal.4th at p. 574.)

Here, the trial court abused its discretion under both Evidence Code § 777 and former section 1102.6, and violated Mr. Tully's constitutional rights. First, the trial court did not mention either statute in making its ruling. It cannot be said that the court properly considered application of its discretion under those statutes. Second, unlike in *Griffin,* the trial court allowed four, instead of "up to two" victim witnesses to remain in the courtroom during the guilt phase, in direct contravention of the express term of former section 1102.6. Finally, the trial court did not indicate that it had considered whether the presence of Ms. Olsson's family "could pose a substantial risk of influencing or affecting the content of any testimony" as required by former section 1102.6. The court made no reference to Mr. Tully's rights whatsoever. Indeed, it provided no rationale for its order, stating only that it "was not going to issue an omnibus order at this time." (RT 1940.)

In exercising its discretion, the trial court should have addressed the factors identified in the statute as relevant. The statute required the court to consider whether the presence of the family members during the guilt phase would pose a substantial risk of influencing or affecting the content of any testimony. The trial court failed to do so.

Courts in other jurisdictions have found it an abuse of discretion to deny a request to exclude witness where the trial court's order is arbitrary, has no sound basis, or the trial judge does not state his reasons for denying the request on the record. (*See County of*

Dade v Callahan (1971, Fla App 3d) 259 So 2d 504; *People v Dixon* (1961, Ill.) 177 NE2d 206; *Jones v State* (1946, Md.) 45 A2d 350.) This Court should adopt this reasoning and find that the trial court abused its discretion in denying the motion to exclude the victim witnesses. The court's ruling was arbitrary, it had no sound basis, and the judge did not state any reasons for denying the order on the record.

Moreover, in determining whether the trial court abused its discretion, this Court should consider such factors as when the request to exclude was made, the seriousness of the case, *see, e.g. Commonwealth v. Watkins, supra,* 370 at p. 702, *Jones v. State, supra,* 45 A.2d at p. 354, any relationship between the witnesses, *see, Roberts v. State* (1916, Neb.)158 N.W. 930, and the nature, relevance, and importance of the evidence to both the prosecution and the defense given by the not-excluded witnesses in order to determine whether there was any likelihood that the witnesses testimony would be shaped by what they heard the other witnesses say. (See e.g. *United States v. Jackson* (2nd Cir. 1995) 60 F.3d 128, 135; *State v. Garden* (1963 Minn) 125 N.W.2d 591.) The court here addressed none of these factors in its ruling.

Had the court properly exercised its discretion and balanced Mr. Tully's heightened rights to a fair trial and due process against the prosecutor's need for his penalty phase victim impact witnesses to hear the guilt phase opening statements, guilt phase testimony and evidence, and closing arguments, it would have excluded these witnesses from the courtroom. The defense motion was promptly raised prior to the

opening statements. The seriousness of the case required the court to be particularly conscientious where the defendant's rights were involved because any error could have the most serious of consequences.

Moreover, the two witnesses who were excluded from a portion of the guilt phase (Sandberg and Sandra Walters) were related by blood to the non-excluded penalty phase witnesses (Elbert Walters and Jan Dietrich). There was overlap between the guilt phase testimony of Sandberg and Sandra Walters, as well as between their guilt phase testimony, their penalty testimony and penalty phase testimony of the non-excluded witnesses. The failure to exclude the family witnesses from the guilt phase posed "a substantial risk of influencing or affecting the content of any testimony" at both the guilt and penalty phases. As the Supreme Court of Nebraska stated long ago: "Where witnesses for the state are near relatives, and it is not improbable that some may be under the influence of others interested in the prosecution, it is improper for the court to refuse to order the separation of the witnesses, though that is a matter ordinarily in its discretion." *(Roberts v. State, supra,* 158 N.W at p. 930.)

In this case, the trial court committed another prejudicial error in its ruling on the motion to exclude. It denied the general motion to exclude witnesses, but indicated it would be willing to entertain a defense request to exclude a particular witness for a particular portion of testimony if they "get to a witness or get into an area with a witness" where the defense wanted to request exclusion "of a certain witness or for a certain

portion of testimony." (RT 1940.) The defense protested that placing the burden on the defendant to anticipate the testimony of prosecution witnesses and the damage that might be caused by the hearing of that testimony by penalty witnesses at a later date was unreasonable and unworkable. The trial court improperly ignored these protests. (RT 1938-1939.)

As Professor Wigmore aptly wrote:

> It cannot be left with the judge to say whether the resort to this expedient [witness sequestration] is needed; not even the claimant himself can know that it will do him service; he can merely hope for its success. He must be allowed to have the benefit of the chance, if he thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn hope and desperate extreme when it is most valuable and most demandable. (Wigmore, *supra*, §1839, at pp. 357-359.)

Here, the trial court violated these principles and clearly misunderstood "the whole virtue of the expedient," by requiring counsel to show "probable need" for witness exclusion.

Importantly, when the defense pointed out that the circumstances of the crime would be an issue at the penalty phase, and that it would be impossible to know what fact that came out at the guilt phase was going to be prejudicial at the penalty phase, the court asked the prosecutor whether the family penalty witnesses would be testifying about the circumstances of the crime. He unequivocally answered: "No." (RT 1939.) If the prosecution's representation was truthful, then it precluded the prosecutor from calling any family witnesses at the penalty phase because victim impact testimony is only

admissible at the penalty phase under section 190.3(a), which allows the jury to consider "the circumstances of the crime" in determining the proper sentence. (*People v. Stanley* (1995) 10 Cal.4th 764, 832.) If the prosecutor's representation was untruthful, then he misled the defense and the trial court. Either way, the prosecutor's statements were misleading and did not provide a reasonable basis for the court's ruling.

Moreover, the trial court erred by requiring the defense to anticipate the testimony of the prosecution witnesses in order to prevent a non-excluded witness from hearing anything potentially prejudicial. (*See* Wigmore, *supra*, §1839, at pp. 357-359.) This requirement was especially unfair in this case where the defense had objected that the notice of aggravation provided by the prosecution before trial failed to provide sufficient notice of the family members' projected penalty phase testimony. (RT 6-8.) It was not until the guilt phase concluded that the prosecutor made an offer of proof concerning the penalty phase testimony of the family witnesses (RT 3360-3397), and only two days before the start of the penalty phase that the court ruled on the scope of the admissible testimony from those witnesses. (RT 3401-3402.)

The trial court's requirement was particularly harmful because the prosecutor failed to adequately control his guilt phase witnesses and encouraged them to testify broadly, giving improper answers that encompassed victim impact testimony. The court's ruling deprived the defense of any effective weapons against the prosecutor's improper actions.

B. The Trial Court's Denial of the Motion to Exclude Requires Reversal of Mr. Tully's Convictions

This Court has not established the standard of prejudice applicable to the erroneous application of former section 1102.6. Mr. Tully urges this Court to follow the sound and persuasive reasoning of the Second, Fourth, Sixth and Ninth Circuits and hold that prejudice is presumed and reversal is required unless the prosecution demonstrates that the error arising from the trial court's abuse of discretion was harmless. (*United States v. Brewer* (9th Cir. 1991) 947 F.2d 404, 411.) Reversal is required unless the absence of prejudice is manifestly clear from the record, or unless the prosecution proves that there was no prejudice. (*Id.*; *United States v. Pulley* (6th Cir. 1991); *United States v. Jackson, supra*, 60 F.3d at p. 136; *United States v. Farnham* (4th Cir. 1986) 791 F.2d 331, 335.)

It is grossly unfair to place the burden on the defendant to establish prejudice in witness sequestration cases. It is impossible to tell how a witness' testimony would have differed had the defendant's motion to exclude been granted. "A strict prejudice requirement of this sort would be not only unduly harsh but also self-defeating, in that it would swallow a rule carefully designed to aid the truth-seeking process and preserve the durability and acceptability of verdicts." (*United States v. Farnham, supra*, 791 F.2d at p. 335.) It requires what one court referred to as "20/20 hindsight" to demonstrate what would have been said had a witness been sequestered. (*United States v. Jackson , supra.* at p. 136.) The trial court's order required that defense counsel exercise another kind of

paranormal skill as well - prognostication. It placed the burden on the defense to divine the content of the prosecution's guilt and penalty presentation in advance in order to know when another witness *might* testify to something that might influence the witness, so that it could specifically request sequestration of the witness.

The presumed prejudice standard is particularly appropriate in a capital case where the issue on which the non-excluded witnesses testified was entirely subjective. The impact the guilt phase presentation had on Ms. Olsson's sister and son can never be established, however, it certainly could not lessen their dislike for Mr. Tully or their pain over the victim's death. The subject matter of their penalty testimony fell, as a matter of California law, under "the circumstances of the crime." This was the only subject of the guilt phase. These witnesses heard the details of the crime, details about which they were surely previously unaware, presented in the most vivid, lurid and harsh light by the prosecutor, and then testified as to the impact of that very crime on their own lives. It is certain that the impact of the crime on these witnesses was heightened by their observation of the guilt phase case.

Here, the State can point to no basis in the record to demonstrate that the non-excluded witnesses were not influenced by what they heard during the guilt phase. Moreover, the prosecution did not, and cannot, demonstrate any lack of prejudice. Accordingly, prejudice must be presumed and Mr. Tully's conviction and sentence reversed.

Assuming this Court declines to adopt a presumed prejudice standard, Mr. Tully was prejudiced by the trial court's ruling. First, the non-excluded witnesses were the victim's immediate family, and there was no order prohibiting them from discussing what they heard with the excluded family witnesses. Second, the impact of the guilt phase presentations on the family witnesses prior to their penalty phase testimony cannot be denied. Jan Dietrich and Elbert Walters were permitted to sit through the entire guilt phase. It is inconceivable that Ms. Olsson's sister and son would not have been emotionally impacted by some or all of the prosecution presentation, which included crime scene and autopsy photographs of Ms. Olsson, the testimony describing the discovery of the body, Mr. Tully's post arrest statements, and a dramatic argument purportedly describing the death in detail. Even the "excluded witnesses," Sandberg and Sandra Walters, heard portions of the guilt phase, including the closing arguments.[50]

Third, the trial court's ruling effectively gave those witnesses who the prosecutor knew would play a major role in his penalty phase presentation a ready opportunity to tailor their testimony in order to convince the jury to sentence Mr. Tully to death. These witnesses only had to listen to the prosecutor's guilt phase presentation to ascertain how to shape their penalty phase testimony. The prosecutor had little need to prepare them for

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[50] The prosecutor, improperly capitalizing on the trial court's decision not to exclude the family witnesses, affirmatively argued that it was "terrible" the family had to be in court for the guilt phase. (RT 3174.) Implicit in this argument was a concession that hearing the guilt phase presentation increased the impact of the crime on the family penalty witnesses. Even the prosecutor recognized how prejudicial this was to the defense.

their testimony because they essentially were prepared on site.

Finally, victim impact evidence improperly permeated the guilt phase. The witnesses heard Barbara Green's vivid description of discovering the body and her physical and emotional reaction thereto, and the prosecution's accusations that Mr. Tully has smeared Ms. Olsson's name and reputation, thereby smearing their own name and reputation. This irrelevant and improper testimony and argument would have had an emotional impact on the family witnesses who later testified to their feelings about the victim's death.

Mr. Tully was prejudiced by the trial court's failure to exclude the witnesses. Had they been properly excluded, the penalty phase witnesses would not have heard the guilt phase testimony concerning "the circumstances of the crime." Indeed, had this testimony been presented only at the penalty phase, the witnesses would not have heard it because they were excluded until their testimony occurred at the penalty phase. Allowing penalty witnesses to improperly hear section 190.3(a) aggravating evidence at the guilt phase subjects them to the very harms the statute was designed to prevent, from the unintentional but prejudicial influence guilt phase evidence has on victim impact witnesses to the more extreme intentional tailoring of their penalty phase testimony to bolster the prosecution's case in aggravation.

The trial court's departure from the longstanding practice of witness exclusion violated Mr. Tully's rights to due process and to a fair guilt trial under the Sixth and

Fourteenth Amendments, and Article I of the California Constitution. It also violated Mr. Tully's rights to a reliable penalty determination pursuant to Article 1 of the California Constitution and the Eighth and Fourteenth Amendments to the United States Constitution. (See *Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Accordingly, the guilt and penalty phase verdicts must be reversed.

VI. THE EVIDENCE WAS INSUFFICIENT TO SUPPORT MR. TULLY'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE

A. Introduction

The prosecution relied on two sources of evidence to try to prove Mr. Tully's guilt. The criminalists' testimony that Mr. Tully's fingerprints matched fingerprints on the knife, when they earlier had said there was no match, and Mr. Tully's statements made following his March 27 arrest. This evidence was insufficient to support Mr. Tully's conviction for either premeditated or felony-murder or assault with intent to commit rape, or to support the burglary-murder special circumstance finding.

The original Complaint against Mr. Tully charged him with murder and two special circumstance allegations, burglary-murder and rape-murder. He was separately charged with burglary and rape. Both charges carried a great bodily injury enhancement. The murder and rape charges included a weapons use enhancement. (CT 1109-1111.)

At the preliminary hearing, the court found insufficient evidence to try Mr. Tully on rape or attempted rape charges, or the rape-murder special circumstance. The court found the evidence sufficient to support a charge of assault with intent to commit rape. (CT 1103-1104.)

The initial Information charged Mr. Tully with murder, and only one special circumstance, burglary-murder. There were separate charges of burglary and assault with intent to commit rape. The burglary and assault charges included enhancements for the intentional infliction of great bodily injury. All charges included a weapons use

enhancement. (CT 1539-41.)

Just twelve days before jury selection began, the prosecutor moved to dismiss the separate charge of burglary and all of the great bodily injury allegations. As a result, Mr. Tully was charged with first-degree murder and a special circumstance allegation that the murder was committed during a burglary. Mr. Tully was tried on a separate count of assault with intent to commit rape. (CT 1539-1541.) Although Mr. Tully was tried on a burglary-murder theory with a burglary-murder special circumstance, *there was no burglary charge filed.* The final Information did not specify the theory of first-degree murder (*i.e.*, whether it was premeditated or felony-murder), did not separately charge Mr. Tully with felony-murder, and did not specify the nature of the intended felony for the burglary-murder special circumstance allegation.

Under the merger doctrine, an assault charge is insufficient to support a burglary-murder charge or a burglary-murder special circumstance. (*People v. Ireland* (1969) 70 Cal.2d 522, 539-541.)[51] Since the crime of assault is a lesser included offense of murder, all murders would become felony-murders if assault were considered as the predicate felony. (*Ibid.*) To prove the special circumstance alleged here, the prosecution was required to establish that Mr. Tully entered the residence with an intent to commit a felony other than the assault or murder. No other felony, however, was charged in the

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[51] The evidence was not sufficient to support the assault conviction. Nonetheless, if this court finds that the only felony that was sufficiently proven was assault with intent to commit rape, the burglary-murder special circumstance must be reversed under the merger doctrine.

Information. The prosecutor did not charge Mr. Tully with burglary or with rape.

Evidence is deemed sufficient to support a conviction if, based on the record as a whole, and after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or special circumstance allegation beyond a reasonable doubt.[52] (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Staten* (2000) 24 Cal. 4th 434, 460.) The evidence to support each element must be substantial. The evidence must be "reasonable, credible, and of solid value . . . ." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11, citing *People v. Johnson* (1980) 26 Cal.3d 557.)

Because the evidence in this case was not sufficient, Mr. Tully's conviction and death sentence violate state law, as well as the due process clause of Article I of the California Constitution and of the Fifth and Fourteenth Amendments. Mr. Tully's rights under the Sixth and Eighth Amendments and parallel rights under the California Constitution also were violated.

B. The Evidence was Insufficient to Support First-Degree Murder, Assault with Intent to Rape, and the Sole Special Circumstance

In order to prove that Mr. Tully was guilty of first-degree murder, the prosecution had to establish either that the murder was premeditated and deliberate, or that it occurred

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[52] Rules governing claims concerning the sufficiency of the evidence apply to challenges aimed at special circumstance findings as they apply to claims of deficiencies in proof of any other element of the prosecution's case. (*People v. Morris* (1988) 46 Cal.3d 1, 20, overruled on other grounds in *In re Sassounian* (1995) 9 Cal.4th 535, 545 fn. 6, citing *People v. Thompson* (1980) 27 Cal.3d 303, 323, fn. 25.)

during the commission of a felony. The jury was instructed on both premeditated murder and felony-murder. There was scant evidence presented and only the most minimal argument that the murder was premeditated and deliberated.[53] The prosecutor focused on the felony-murder theory.

A conviction of felony-murder in the commission of burglary requires proof that the defendant entered the residence with the intent to commit a felony or theft. (Section 459; *People v. Frye* (1998) 18 Cal.4th 894, 954.) In this case, the jury was instructed that only one felony could have supported the felony-murder theory. It was burglary. Apparently recognizing that he would never be able to prove burglary, however, the prosecutor elected to dismiss the separate burglary charge just days before trial.

The prosecution argued that the intended felony supporting the burglary charge was either rape or theft. However, although neither theft nor rape were charged as separate offenses. The evidence was insufficient to establish that Mr. Tully had the intent to steal or to commit rape when he entered the victim's house.

Mr. Tully was charged with the special circumstance of felony-murder, predicated on a burglary. Because the evidence was insufficient to establish Mr. Tully intended to rape or steal when he entered the residence, as required for a burglary, the evidence was insufficient to uphold the burglary-murder special circumstance finding. Similarly, there was insufficient evidence to support a finding of intent to rape, and thus insufficient

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[53] Premeditated and deliberate murder is not a special circumstance crime in California. (Cal. Penal Code § 190(a).)

evidence to support Mr. Tully's conviction for assault with intent to commit rape.

Accordingly, Mr. Tully's convictions and the special circumstance finding must be reversed.

1. The Evidence was Insufficient to Support a Finding of Premeditation and Deliberation

Although the jury was instructed on premeditated and deliberate first-degree murder, this theory was only touched on by the prosecutor during argument.[54] Instead, even though no rape was charged, the prosecutor portrayed Mr. Tully as a rapist who killed his victim. This approach improperly inflamed the jury into voting for conviction and a death sentence.

In order for the jurors to find premeditated and deliberate first-degree murder, the evidence had to establish "that the 'intention unlawfully to take away the life of a fellow creature' was a considered intent arrived at or carried out as the result of deliberation and premeditation . . . ." (*People v. Holt* (1944) 25 Cal.2d 59, 87, 90; *People v. Thomas* (1945) 25 Cal.2d 880, 901; *People v. Bender* (1945) 27 Cal.2d 164, 185-186.) As this Court has held, "the legislative classification of murder into two degrees would be meaningless if 'deliberation' and 'premeditation' were construed as requiring no more reflection than may be involved in the mere formation of a specific intent to kill." (*People v. Anderson*, (1968) 70 Cal.2d 15, 26, citing *People v. Wolff* (1964) 61 Cal.2d

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[54] The prosecutor relied primarily on a burglary-murder theory. He told the jury, "there isn't any dispute . . .that this is a first-degree murder. There is no real dispute that it occurred during the course of a burglary." (RT 3044, see RT 3085, 3083)

795, 821; *People v. Caldwell*, (1955) 43 Cal.2d 864, 869; *People v. Thomas* (1945) 25 Cal.2d 880, 898.) This Court has found three categories of evidence that can support premeditation and deliberation: "(1) there is evidence of planning, motive, and a method of killing that tends to establish a preconceived design; (2) extremely strong evidence of planning; or (3) evidence of motive in conjunction with either planning or a method of killing that indicates a preconceived design to kill." (*People v. Mincey* (1992) 2 Cal.4th 408, 435, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) In *Anderson*, this Court set forth the types of evidence found sufficient to demonstrate these three factors.

Here, the evidence presented by the prosecution failed to qualify under any of the *Anderson* categories. First, there was no evidence that Mr. Tully engaged in any planning activity prior to the killing. Second, there was no evidence of motive based on any prior relationship and/or conduct with the victim. Finally, the nature of the killing in no way suggests that the killer must have intentionally killed according to a "preconceived design."

Moreover, the prosecutor argued that the murder was premeditated based only on evidence that Mr. Tully had an intent to kill. Intent to kill is not the same as premeditation and deliberation. (*People v. Anderson*, *supra,* (1968) 70 Cal.2d at p. 26.) The prosecutor erroneously said that the factual basis for the separate requisite elements of malice aforethought, premeditation, and deliberation was identical.

The prosecutor explained *deliberation*:

> Deliberate, you think about it . . . . *What it basically means is that the person thought about it.* Thought about life versus death. And makes a decision to kill. (RT 3082.)

He explained *premeditation* as follows:

> This process also requires premeditation. *And premeditation means that you think about it before you commit the act. . .* Basically when we talk about premeditation, we talk about thinking of it beforehand. *(Ibid.)*

And he explained *malice aforethought* as follows:

> And you've also got to have that express malice aforethought. And express malice is basically repetitious of the first requirement, because when we talk about express malice we're talking about an intent to unlawfully kill a human being. *You've made this decision that you intend unlawfully kill.* It's a willful killing. *You've deliberated and you've thought about it. . . .*
>
> It's not an act of sudden heat of passion. This killing wasn't a sudden act of heat of passion. And this woman didn't have a chance. *And the evidence has been very clear that he thought about it.* (RT 3082-3083.)

The only thing the prosecutor argued to support the elements of premeditated and deliberate murder was that Mr. Tully "thought about it." He improperly argued that "thinking about it" was sufficient to prove premeditation, deliberation and malice aforethought beyond a reasonable doubt. Quite the opposite, "thinking about it" is not enough to prove any of the elements. Evidence that someone may have "thought about it" does not satisfy the next required step – that after thinking about it, the killer made a premeditated and deliberate decision to act on those thoughts.

The prosecutor's argument highlighted the lack of evidence of the elements of premeditated murder. In the end, he could point only to the number of stab wounds,

speculation that Mr. Tully paused during the stabbing of the victim to wipe the knife, and the unsupported possibility that the victim was strangled as evidence showing premeditation and deliberation. (RT 3083). A review of the evidence shows that evidence was not sufficient to support the convictions.

First, the number of stab wounds does not establish premeditation and deliberation. (*People v. Haskett* (1982) 30 Cal. 3d 841, 850 ["that the many stab wounds were randomly inflicted [is]a method of killing that does not in itself establish premeditation and deliberation"] citing *People v. Anderson, supra*, 70 Cal.2d 15, 31; *People v. Granados* (1957) 49 Cal.2d 490.)

Second, the "evidence" relied on by the prosecutor was scant, speculative and wholly insubstantial. The State criminalist testified that she "thought the shape of these blood stains [on the bed sheets] appeared to be like a knife that had been wiped on the sheets" (RT 2590), and that it "appeared" that the knife had been wiped more than once. (RT 2590-2592) Even assuming this testimony meets the substantial evidence requirement, there was no evidence that any interval of time elapsed between the wipes or that they occurred before, as opposed to after, the killing. If it occurred after the killing, it could not establish the required mental states of malice *aforethought*, intent to kill or *pre*meditation.

Third, the method of killing did not establish a preconceived design. In fact, the stab wounds were on the upper body and without symmetry or order, suggesting a

frenzied, unplanned attack, rather than any kind of purposeful "design." Although the prosecutor told the jury the victim had been strangled, the pathologist testified that, despite the victim's broken hyoid bone, there were no signs indicating strangulation and that the broken bone could have been caused either by blunt force or a compression injury "similar to strangulation." (RT 2717-2718.)

Fourth, the only motive to kill that the prosecutor attributed to Mr. Tully was to keep the victim from identifying him. There was no evidence to support this inference. Evidence that merely raises a suspicion, even a strong suspicion, of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact. (*People v. Redmond* (1969) 71 Cal.2d 745, 755; *In re Leanna W.* 120 Cal.App. (2004) 4th, 735, 741.)[55]

Moreover, there was no evidence of planning, and the method of killing was not a "preconceived design." Even when all three factors are taken together, the jury could not draw an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed.'" (*People v. Anderson, supra,* 70 Cal.2d at p. 26.) Applying the requirements set forth in *Anderson* as restated in *Mincey,* there was *no* evidence of "preconceived design," *no* evidence, let alone "extremely strong" evidence, of planning,

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[55] If the jury can properly infer from the facts of this killing that there was a motive to keep the victim from identifying the perpetrator of the burglary, then that inference could be drawn from the facts of any intentional killing that occurs during the course of any felony.

and *no* evidence of "motive in conjunction with either planning or a method of killing that indicated a preconceived design to kill." The evidence does not "furnish a *reasonable foundation* for an inference of premeditation and deliberation," but at best "leaves only to *conjecture and surmise* the conclusion that defendant either arrived at or carried out the intention to kill as the result of a concurrence of deliberation and premeditation." (*People v. Anderson, supra,* 70 Cal.2d at p. 27, emphasis added.) Because no rational trier of fact could have found that Mr. Tully premeditated or deliberated with malice aforethought and intent to kill beyond a reasonable doubt, *Jackson v. Virginia, supra,* 443 U.S. at 319 (1979), the evidence was insufficient to support a first-degree murder conviction based on premeditated and deliberated murder.

2. The Evidence was Insufficient to Support A Conviction for Felony Burglary-Murder or the Felony-Murder Special Circumstance

The prosecutor's primary theory of first-degree murder was that the murder occurred during a burglary. The sole special circumstance charged was burglary-murder. The jury was instructed that burglary-murder, and the burglary-murder special circumstance, could be proven if it was established that Mr. Tully had the intent to steal or the intent to commit rape at the time of his entry into the victim's house. (CALJIC 14.50; CT 2095.) Significantly, the jury was instructed that it was "not required to agree as to which particular crime the defendant intended to commit" at the time of his entry

into the victim's house. (CALJIC 14.59, CT 2097.)[56]

To establish burglary felony-murder or the burglary-murder special circumstance, the prosecutor had to prove that Mr. Tully had either the intent to rape or the intent to steal when he entered the residence. The evidence was insufficient to establish either of these requisite mental states. The prosecutor apparently recognized this fact when he decided not to charge Mr. Tully with rape, and he dismissed the burglary charge right before trial. Accordingly, neither Mr. Tully's murder conviction based on a felony-murder theory, nor the sole special circumstance, can be upheld.

a. The Evidence was Insufficient to Prove Intent to Rape

At the conclusion of the preliminary hearing, the court found that the evidence was insufficient to charge Mr. Tully with rape as a separate offense or to charge him with a rape-murder special circumstance.[57] At trial, the prosecution submitted no evidence beyond that presented at the preliminary hearing, to support its highly inflammatory, but circumstantial accusation of rape. Thus, there was no evidence introduced that proved a rape or attempted rape was committed in this case.

Indeed, the physical evidence shows that a rape did not occur. The coroner found

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[56] Given that neither burglary itself, nor the predicate felonies for burglary-- rape or theft-- were charged, the likelihood of juror confusion on this issue was great.

[57] The preliminary hearing judge held there was insufficient evidence of rape or attempted rape, but that there was sufficient evidence to support a charge of assault with intent to commit rape. Mr. Tully was convicted of that separate offense. Assault is a lesser included offense of murder. If the prosecution only proved that the intended felony was an assault, then the merger doctrine precludes a finding of the burglary-murder special circumstance.

no evidence of trauma to the genital area, or any other sign of sexual assault or attempted sexual assault. (RT 2689). The evidence was not enough to support a rape conviction. The prosecution conceded at the preliminary hearing: "I would just indicate that the complaint indicates a rape. *I don't think the evidence does, in fact, show that.*" (CT 1083.)[58] As the preliminary hearing judge ruled when limiting the charges to assault with intent to commit rape:

> I don't agree with the District Attorney's suggestion that there is sufficient evidence of an attempted rape or a sexual molestation. The sole evidence, as far as I have heard is that she customarily wore a flannel nightgown . . . .
>
> The only evidence is that it was found underneath her . . .And I think there is an equal inference that she was in the process of changing from one set of clothes to another . . . I'm just saying I fail to see sufficient evidence to make a findings as you have requested on the nightgown on the sexual aspect of this. (CT 1005-86.)

Even after trial, the prosecutor could point to no other evidence than the insufficient pajama evidence to support his theory that Mr. Tully entered the victim's house with an intent to rape, and/or committed an assault with intent to rape. (RT 3068.)

After describing rape as forced non-consensual sexual intercourse, the prosecutor erroneously told the jury that Mr. Tully's admission that he had sexual intercourse proved that he raped the victim. He told that jury that because of a "technicality," they could

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[58] Despite the prosecutor's concession that the evidence was insufficient to hold Mr. Tully over on a rape charge and the withdrawal of his request for a holding order on rape, during his guilt and penalty arguments he improperly told the jury that Mr. Tully had committed a rape. (See e.g. RT 3069-3070.)

only find Mr. Tully guilty of assault with intent to commit rape. (RT 3069.)[59] He again misrepresented the facts to the jury by telling them "there's a lot of evidence there was an assault with intent to commit rape." His summary of that great amount of evidence belies his argument, however: "Her clothes, they wouldn't be off. Her body on the bed wouldn't have been in that position. And the fact that, you know, the killing didn't occur at the very beginning, there's no other reason to have her take her clothes off, there isn't any. He raped her. But you can only convict him of assault with intent to commit rape." (RT 3070.)[60]

Here, there was no evidence that Mr. Tully intended to rape anyone at the time of entry to the house. No evidence was introduced to prove that element of burglary.

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[59] This argument was an incorrect statement of the law. The prosecutor was apparently referring to the rule requiring independent proof of the *corpus delicti* of a crime beyond the admission or confession of the accused. This rule "essentially precludes conviction based solely on a defendant's out-of-court statements." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1178, quoting *People v. Ray* (1996) 13 Cal.4th 313, 341, emphasis omitted.) The "independent-proof" rule is deeply rooted in the common law. (See 1 *McCormick on Evidence* (5th ed. 1999) Confessions, §§ 145, pp. 521-522.) It "requires *corroboration* of the defendant's extrajudicial utterances insofar as they indicate a crime was committed, and forces the People to supply, as part of their *burden of proof* in every criminal prosecution, some evidence of the corpus delicti aside from, or in addition to, such statements." (*People v. Alvarez, supra,* 27 Cal.4th at p. 1178.) This rule is not "a technicality" but goes directly to the reliability and sufficiency of the evidence. "It is intended to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Id.* at p. 1169.) The prosecutor's argument would certainly have misled the jury into believing that, but for "a technicality" Mr. Tully would have been charged with rape.

[60] The prosecutor cannot ask the jury to base its verdicts on facts that are outside the admissible evidence at trial. The prosecutor cannot ask the jury to base its verdict on a crime that he failed to charge, for which there was no evidence, and for which Mr. Tully could not be convicted. This is the same as the prosecutor vouching that the uncharged rape was true.

Moreover, to support a burglary conviction, the evidence has to be sufficient to show more than a mere intent to commit a rape. It required that the defendant form the intent to commit rape *prior* to the illegal entry. Although generally an intent must be inferred from all of the facts and circumstances disclosed by the evidence, any inferences must be reasonable. (*People v. Cain* (1995) 10 Cal.4th 1, 47.) An inference is not reasonable if it is only based on speculation or on mere suspicion. (*People v. Raley* (1992) 2 Cal.4th 870, 891; *People v. Redmond, supra*, 71 Cal.2d at p. 755.)

Any inference that Mr. Tully entered the house with the specific intent to rape is not supported by the evidence. It would be wholly unreasonable to find specific intent based on nothing more than the prosecutor's overreaching, lurid and inflammatory speculations. Case law makes clear that items like clothing, or even stab wounds, are not sufficient evidence of intended rape under the facts of this case. This Court has found that evidence that the victim was wearing nothing from the waist down, with her legs apart, was insufficient to support a rape or attempted rape conviction. (*People v. Johnson* (1993) 6 Cal.4th 1, 42-43.) In *Johnson*, this Court reviewed other cases where more evidence of actual or intended sexual assault was presented. In those cases, the evidence was insufficient to support a conviction for a sexual offense. (*Id.* at pp. 39-42.)

In *People v. Anderson, supra*, 70 Cal.2d at pp. 34-36, this Court found the evidence insufficient to establish sexual intent where the defendant had stabbed the 10-year-old female victim more than 60 times, over her entire body, including in her

vagina. The victim's naked body was found under a pile of boxes and blankets. Her bloodstained and shredded dress was found under her bed. The crotch had been ripped out of her blood-soaked panties. The defendant's socks and shorts were bloodstained, suggesting he was only partly clothed during the attack. (*Id.* at pp. 20-22.)

In *People v. Craig* (1957) 49 Cal.2d 313, this Court found insufficient evidence to support a finding of intent to commit a sexual crime, even though the defendant had earlier in the evening expressed his general desire to "have a little loving," and subsequently quarreled with a woman in a bar (not the victim) who refused to dance with him. Later that night, the defendant attacked and killed the victim by strangling her and by beating her 20 to 80 times. The victim's raincoat had been ripped open, and her nightgown and panties were likewise torn so that the "front part of the body was exposed." (*People v. Craig, supra,* 49 Cal.2d at p. 316.) She was found lying on her back with her legs slightly spread apart, and had suffered multiple contusions and lacerations of her face, breasts, neck and lower abdomen. Similarly, in *People v. Granados* (1957) 49 Cal.2d 490, 497, where the 13 year-old victim was found in a bloodstained room with her skirt pulled up and her genitals exposed, this Court found the evidence insufficient to establish the commission of lewd act on a minor.

In discussing these cases in *Johnson*, this Court commented that, while there were distinguishing facts that could support a finding of sexual intent, they were still insufficient to prove the charge. (*People v. Johnson, supra,* 6 Cal.4th at p. 41.) This

Court noted that the defendant in *Johnson* had raped the victim's daughter earlier, suggesting a sexual motivation, and that in contrast to the cited cases, there was no evidence inconsistent with a sexual assault, or evidence that could be otherwise explained. Nonetheless, this Court still concluded the evidence that the victim was unclothed and the position of the body alone was insufficient. (*Id.*, at 42.)

In sum, because the evidence was insufficient to establish any preexisting intent to rape, neither the burglary-murder or the burglary-murder special circumstance, to the extent they were based on an entry to commit an intended rape can stand. Because there was no evidence of *any* intent to rape, there was insufficient evidence to support Mr. Tully's conviction for assault with intent to rape, and that conviction must be reversed.

b. The Evidence was Insufficient to Prove Intent to Steal

Although the prosecutor focused heavily on "the rape" as the underlying felony to support the burglary-murder conviction and special circumstance, he did argue in the alternative that Mr. Tully entered the house with the intent to steal from the victim. (RT 3022-26, 3047, 3056, 2066, 3187.) The evidence was insufficient to support this theory. Admittedly, there was evidence that a theft had occurred, i.e., the victim's purse was found on the golf-course near her house, but there was no evidence that Mr. Tully committed that theft or, if he did, that he entered the house with the intent to steal. Although the victim's purse was taken, there was nothing to suggest that this theft was not a merely an after-thought, made after entry to the house. There was ample evidence that suggested there

was no preexisting intent to steal when the killer entered the home. Nothing other than the victim's purse was taken. The evidence established that the purse only contained $3.95 in cash. (RT 2918.) There were no signs the house had been searched for items of value, and in fact, many valuables were left at the residence, including a television, stereo, and jewelry. (RT 3044.)

The prosecutor asked the jury to infer an intent to steal by referring to evidence that three weeks prior to the crime, Mr. Tully did not have a job, had not worked for 6 months, and that he was a drug user. (RT 3049). (See Argument VII, *infra*) However, evidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft. (*People v. Wilson* (1992) 3 Cal. 4th 926, 939; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.) Without this inadmissible evidence, there was simply nothing on which the jury could base a finding of intent to steal.

Because the evidence was insufficient to establish burglary-murder based on an intent to steal or to rape, Mr. Tully's conviction for murder, to the extent it was based on burglary-murder, and the burglary-murder special circumstance must be reversed.

C. Conclusion

In light of the absence of sufficient evidence of either premeditated or felony-murder, this Court must reverse Mr. Tully's first-degree murder conviction. Because there was insufficient evidence of felonious intent to support the burglary-murder conviction, there was insufficient evidence to establish the burglary-murder special circumstance.

Finally, the lack of evidence of an intent to rape requires reversal of the separate charge of assault with intent to commit rape. Upholding these charges against Mr. Tully would violate his rights to due process and a fair trial on guilt. Further, the Eighth Amendment requires heightened reliability in the guilt determination as well as in the penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.) Thus, Mr. Tully's right to a fair and reliable penalty determination under the federal Constitution and Article I of the California Constitution was also violated.

VII. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MR. TULLY'S UNEMPLOYMENT AS EVIDENCE OF INTENT TO STEAL

During the prosecutor's guilt phase case in chief, John Chandler testified. Mr. Tully had lived with Chandler until approximately one month prior to the crime. The prosecutor improperly asked Chandler: "For the six months before the murder of your neighbor, the defendant had a hard time keeping a job didn't he?" After the defense objected, and before the trial court ruled, the witness responded "yes." The prosecutor responded to the defense objection in front of the jury: "Motive." (RT 2522.)

According to the *post hoc* record of the unreported bench conference, there was, *inter alia,* "discussion relating to the relevance of that question." (RT 2536.) The trial court "overrule[d] the objection relative to the defendants work history and the period of time being discussed before the killing." (*Id.*) Before the jury, the court said it had overruled the objection and said that the answer would remain in the record. (RT 2523.) The trial court erred. It should have sustained the defense objection and struck Chandler's response.

Evidence of a defendant's poverty or indebtedness generally is inadmissible to establish motive to commit robbery or theft. This Court has found that the probative value of this evidence is outweighed by the risk of prejudice. (*People v. Wilson* (1992) 3 Cal. 4th 926, 939; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1024.) The Ninth Circuit has held that this evidence has no relevance to guilt or innocence.

> Poverty as proof of motive has in many cases little tendency to make theft more probable. Lack of money gives a person an interest in having more. But so does desire for money, without poverty. *A rich man's greed is as much a motive to steal as a poor man's poverty*. Proof of either, without more, is likely to amount to a great deal of unfair prejudice with little probative value. . . The problem with poverty evidence without more to show motive is not just that it is unfair to poor people, as Wigmore says, but that it does not prove much, because almost everyone, poor or not, has a motive to get more money. And most people, rich or poor, do not steal to get it." (*United States v. Mitchell* (9th Cir. 1999) 172 F.3d 1104, 1108-1109 (emphasis added); *see also United States v. Bensimon* (9th Cir. 1999) 172 F.3d 1121, 1129.)

The probative value of poverty evidence diminishes further and the likelihood of prejudice increases when the evidence is admitted to establish guilt for crimes of violence, such as those charged here. As noted by Wigmore, "the practical result of [admission of evidence of indebtedness] would be to put a poor person under so much unfair suspicion and at such a relative disadvantage that for reasons of fairness this argument has seldom been countenanced as evidence of the graver crimes, particularly of violence." (2 Wigmore, Evidence (3d ed. 1940) §§ 392, p. 34.) For the same reasons, evidence of a defendant's alleged inability to keep a job is inadmissible to establish motive.

Principles of due process limit the introduction of evidence that is unduly prejudicial. In accordance with those principles, Evidence Code § 352 provides that the trial court, within its discretion, may exclude evidence if its probative value is substantially outweighed by the probability that its admission will cause undue prejudice. The evidence that Mr. Tully was unemployed lacked probative value. Because it was used by the prosecutor to establish motive for the commission of a violent offense it created a substantial danger of undue prejudice. The trial court abused its discretion in admitting

this evidence. This error was not harmless and resulted in a miscarriage of justice.

The introduction of evidence of poverty and unemployment strikes at the very fairness of the proceedings and violates the right to a fair trial, due process and equal protection. (*Estelle v. McGuire* (1991) 502 U.S. 62.) The Supreme Court has held that in a criminal trial, discrimination on the basis of poverty is just as impermissible as discrimination based religion, race, or color. (*Griffin v. Illinois* (1956) 351 U.S. 12, 17-18.) "Both equal protection and due process emphasize the central aim of our entire judicial system -- all people charged with a crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (*Id.*, quoting *Chambers v. Florida* (1940) 309 U.S. 227, 241.)

State evidentiary rules create "a substantial and legitimate expectation" that a defendant will not be convicted or deprived of his life in violation of those rules. (*Hicks v. Oklahoma* (1980) 447 U.S. 343, 346.) This expectation is protected against arbitrary deprivation by the due process clause of the Fourteenth Amendment. (*Id.*) Further, the Eighth Amendment requires heightened reliability in the guilt determination as well as in the penalty determination. (*Beck v. Alabama* (1980) 447 U.S. 625, 638.)

During his guilt phase closing argument, the prosecutor fully exploited this improper "motive" evidence. (See e.g. RT 3049, 3162.) He argued:

> Now, why would he go into her home, aside to do that and to steal, whether he thought there might be drugs or just take a few dollars that she had in her purse, thinking that maybe there would be more?

> Now, John Chandler did tell us a few things about the defendant, *he couldn't keep a job for six months before he moved out of the house in July, couldn't keep a job.* He's living with John Chandler.
>
> What else do you know about the defendant? Well, the defendant tells us he's using drugs. *Well, where do you get the money for that if you can't keep a job?* How do you support that? I mean we're not talking about keeping a roof over your head. (RT 3049.)

The prosecutor used Mr. Tully's unemployment to establish a motive for the burglary. (*People v. Wilson*, *supra,* 3 Cal. 4th at p. 939.) Indeed, it was the sole reason the evidence had been introduced and arguably the only evidence that established intent to steal, a required element of the burglary-murder special circumstance.

Chandler's testimony was not probative of anything other than Mr. Tully's work history. It had even less relevance than evidence of poverty itself, because it asked the jury to draw an inference of poverty from Mr. Tully's unemployed status. Mr. Tully's inability to keep a job *before* the crime had no relevance to his employment status or financial condition at the time of the crime itself. Under Evidence Code section 1101, it was improper "character" evidence, painting Mr. Tully as lazy and unwilling to work.

The manner in which the prosecutor used Chandler's testimony in the guilt phase argument shows that the testimony violated due process and was far more prejudicial than probative. The prosecutor could not prove an intent to rape. He needed to show Mr. Tully had an intent to steal at the time he entered the house. The several items that were taken from the house did not prove a preexisting intent to steal on the part of Mr. Tully. They were of little value, and many other items of greater value were left at the house. The

inadmissible testimony about lack of employment was necessary for the prosecutor to prove felony-murder and the burglary-murder special circumstance beyond a reasonable doubt. (See Argument VI, *supra.)*

Not satisfied with using this impermissible evidence at the guilt phase, the prosecutor exploited Chandler's testimony in his penalty phase arguments. The prosecutor told the jury that life in prison was too good for Mr. Tully in part because of the plight of unemployed Californians. Strikingly, the prosecutor argued:

> We have a situation where we have homeless people who live in condemned buildings, in cardboard boxes. *He's* going to have shelter. We have people who work here in California who struggle, who don't have medical insurance. *He'll* have medical insurance.
>
> Now, while more Californians are becoming unemployed, *he's always* going to have a house, a roof over his head, food on the table and medical care and *he'll* be able to do these things. (RT 3814-3815.)

The prosecutor again highlighted the impermissible evidence that Mr. Tully was poor and unemployed, by juxtaposing Mr. Tully to other poor Californians. He told the jury that, unlike Californians who are employed yet lack medical insurance, Mr. Tully, who had trouble holding a job, would be provided medical care if sentenced to life in prison. Unlike other unemployed Californians who are homeless, Mr. Tully would have food and shelter.

Evidence of poverty should not be used to obtain a death verdict. That the defendant lacks money or is unemployed is not a permissible reason to execute him and is irrelevant to the penalty determination. The prosecutor's penalty phase argument here

demonstrates why evidence of poverty or unemployment was prejudicial. The trial court erred in admitting the irrelevant and prejudicial testimony about Mr. Tully's lack of employment. Because of the unfairness of this type of evidence, as well the manner in which the prosecutor used it here, Mr. Tully's rights to due process, equal protection and a fair trial under the Sixth and Fourteenth Amendments also were violated, as was his Eighth Amendment right to a reliable penalty phase determination. Mr. Tully's rights under Article I of the California Constitution were likewise violated. Mr. Tully's conviction and death sentence must be reversed.

VIII. TRIAL COURT ERROR AND PROSECUTORIAL MISCONDUCT RESULTED IN THE IMPROPER INTRODUCTION OF VICTIM IMPACT EVIDENCE AT THE GUILT PHASE

A. Introduction

At every stage of the guilt phase, the jury was urged to base its verdicts on the inflammatory and wholly irrelevant consideration of the impact of Ms. Olsson's death on her family, friends, and the community in which she lived and worked. The combination of constitutional errors began when the trial court erroneously allowed victim impact evidence to be introduced at the guilt phase. Next, although the trial court attempted to limit the scope of this highly charged evidence, its rulings were vague and provided insufficient guidance to the parties. Added to the mix was the prosecutor, intent on arousing sympathy for the victim and anger and hatred against the defendant, who simply disregarded the court's orders. Despite repeated defense objections and requests for a mistrial, and without considering the prejudicial effect "victim impact" evidence would have on the jury, the trial judge allowed the prosecutor to continue to flaunt its rulings and to introduce impermissible evidence.

Victim impact evidence largely has no relevance at the guilt phase of a trial.[61] This Court has held that undue focus on the victim's suffering is generally improper at the guilt phase. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057) "An appeal to sympathy for the victim is out of place during an objective determination of guilt." (*Ibid.;* see *People v.*

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[61] *Payne v. Tennessee*, (1991) 501 U.S. 808, decided after the crime in this case, did not authorize the introduction of victim impact testimony at the guilt phase of a capital trial.

Kipp (2001) 26 Cal.4th 1100, 1130.) The introduction of this evidence has been limited to "identifying traits that made the victim particularly vulnerable to attack," and only where such facts are relevant to the elements of charged crimes and are not otherwise inadmissible on their face. (*People v. Millwee* (1998) 18 Cal.4th 96, 137; see also *People v. Frye* (1998) 18 Cal.4th 894.)

Importantly, if victim impact evidence and argument is admitted at the guilt phase, it must be relevant. If its probative value is substantially outweighed by the probability that it will create undue prejudice, it should be excluded. (Cal. Evid. Code § 352. This Court has recognized that victim impact evidence, even at the penalty phase, carries an extraordinarily high potential for inflaming the jury and may "divert the jury's attention from its proper role or invite an irrational response." (See *People v. Taylor* (2001) 26 Cal.4th 1155, 1182.) Accordingly, when this evidence is improperly admitted at the guilt phase, it violates state and federal due process. Here, introduction of victim impact at the guilt phase was so unduly prejudicial that it rendered the trial fundamentally unfair and thus violated Mr. Tully's rights to a fair trial and due process under the Fifth, Sixth and Fourteenth Amendments and Article I of the California Constitution.

The issue before the guilt phase jury was whether Mr. Tully killed Ms. Olsson. The prosecution theory was that Mr. Tully unlawfully entered the residence with an intent to rape and/or steal, and during the course of this burglary, he raped and killed her. No family members or friends were present when she died. Her body was discovered by a co-

worker and a neighbor hours after the crime was completed. Neither of these individuals were present or witnessed the crime. In considering whether the prosecution established the elements of felony-murder beyond a reasonable doubt, the jury were required to focus on the evidence relevant to those elements.

Argument and evidence describing the victim's character, personality or family life had no bearing on the charged crimes and was not admissible here. Nonetheless, the very first words the jury heard from the prosecutor pointed its attention to irrelevant, inflammatory and prejudicial factors unrelated to the elements of the crime. Following his opening statement, the prosecutor injected irrelevant factors at every stage. The trial court failed to respond adequately to the defense objections and requests for a mistrial. Thus, the jury was allowed to base its verdicts on impermissible evidence and argument.

B. The Prosecution's Case Regarding Ms. Olsson's Personality and Character and the Impact of her Death on her Family and Friends

The very first words the jury heard from the prosecutor during his opening statement at the guilt phase were about victim impact.

> Ladies and Gentlemen of the jury and alternates, the evidence will show that this past weekend marked the 6th anniversary of a family gathering. That family gathering had its origins earlier than obviously when it was planned for.
>
> As a matter of fact, on July 17, 1986, that was the 58th birthday of Shirley Olsson. And at the time, Shirley Olsson and her sister, Jan, had made arrangements and were talking and planning to basically meet their father in Topeka, Kansas. That meeting was to take place on Saturday, July 26 of 1986. And they were there to celebrate their father's 85th birthday.
>
> Well, there was a family gathering, but it wasn't in Topeka. It was in

> Livermore. And that family gathering was not to celebrate, but to mourn. Because the evidence will show that the day before Shirley Olsson was to leave to go to Topeka, Kansas, in the early morning, a Friday, July 25, 1986, this defendant forced his way into her home, and after a very brief struggle . . . viciously murdered Sandy Olsson. (RT 1954-1955.)

The family reunion was then brought to the jury's attention through the State's witnesses. The prosecutor asked Barbara Green - whose sole purpose at the guilt phase was to testify about her discovery of the body - about Ms. Olsson's plans for the rest of the week. Green was encouraged to testify that Ms. Olsson was going to fly out to see her father for his birthday the day after her death. The prosecutor emphasized it was her father's birthday. (RT 2025.) Ms. Olsson's father, Clifford Sandberg was allowed to testify about Ms. Olsson's plan to fly to Topeka to attend his 85th birthday celebration. He told the jury that his other daughter, Jan, was planning to attend the celebration. (RT 2791-92.) The prosecutor elicited testimony from Sandra Walters, Ms. Olsson's daughter, regarding the planned trip to Kansas. (RT 2822.)

In the opening statement, the prosecutor told the jury about Ms. Olsson's commendable, but irrelevant, life history. He told the jury she had started her nursing career in the Army in Korea, stopped her career to raise her family, then returned to nursing. He told the jury " . . . she's a very, very dependable nurse. One that would always be at work. Sickness would not get in her way. I mean, her life at that point in time, with the children out of the home, was the job and she was dedicated to it." (RT 1956.) The prosecutor then told the jury about Ms. Olsson's hobbies:

> So there's Sandy, who enjoyed her garden and would maintain the yard. I mean that was her hobby. I mean the things that she would do basically is that. When she was home, she'd be tired at the end of the day. If she weren't working on the weekends, basically there would be gardening, always reading, always reading, and sunbathing. This was before we really became aware of the dangers of skin cancer, but she enjoyed sitting the sun. (RT 1959.)

After his opening statement, the prosecutor, with the first guilt phase witness, started introducing victim impact evidence. Maxine Gatten, who worked with Ms. Olsson at the hospital, testified that Ms. Olsson was an ostomy nurse, whose duties included moving throughout the hospital facilities to treat her patients. Gatten said that, "she spent a lot of her own time really doing it, too." (RT 2010.) Trial counsel's objection to this testimony was improperly overruled. (RT 2086.)

The next witness, Barbara Green, another co-worker of Ms. Olsson's, testified about discovering the body. The prosecutor elicited testimony from Green regarding the impact of Ms. Olsson's death on her. In response to the question whether she became concerned about Ms. Olsson, Green responded: ". . .the night before Sandy was killed I did not sleep all night long. I did not have any– anything that said it was Sandy, but for some reason I did not sleep." (RT 2026.)

The prosecutor then asked her how she *felt* when she learned Ms. Olsson had not reported to work. Green answered: "Very concerned." (RT 2027.) Over defense objection, the prosecutor immediately asked another objectionable question, inquiring as to the basis of Green's concern that morning. The prosecutor continued trying to elicit this improper testimony, by asking, "what was it about this set of circumstances that caused

you to leave your work and go out to a co-worker's home?" (RT 2028.) While explaining why she wanted to get into the house after seeing Ms. Olsson's car in the driveway, Green testified that "Sandy and I had made a pact that if anything was wrong with the other one of us that we would hold each other until death. And I was trying to reach Sandy in case there was something like that." (RT 2031.)

The prosecutor then impermissibly asked Green what she *felt* when she touched the body. "Death. There's nothing as cold as death." (RT 2048.) He kept asking where she touched the body. "I just stroked her. I don't know what [sic] I stroked her, except that it was about the only area that wasn't damaged or had some wounds on it." In response to the question, "What did you then do?," Green responded, "I was in this room, it was very cold. It had been very hot outside." (RT 2049.)

The prosecutor elicited impermissible testimony from Green concerning her mental state. He asked what her *emotional condition* was at the time that she called 911.

> A: I was very distraught, very upset.
>
> Q: What do you mean by that?"
>
> A: My heart was racing. I could not hardly stand. At one point I remember sitting on the floor. I just -- I – at that time I'm not sure. I was pacing back and forth, but I know I sat on the floor somewhere in that area.
>
> Q: Were you crying?
>
> A. Yes. (RT 2053-2054.)

The prosecutor continued by impermissibly asking if Green returned to work after leaving

Ms. Olsson's house. Green responded: "No. I could not return to work. I went home, and I laid on my own couch, and all I could think if I could just stop my heart from racing. I knew it was going to just burst." (RT 2059.)

During redirect examination, the witness was asked whether she had read anything to refresh her recollection of entering Ms. Olsson's house. Green answered: "The only thing I am going on is my twice a month waking up and doing it all over again. I have never read anything at all. At one time I had asked to see the pathology report. I could not read it. I put it down and did not read it." (RT 2079.) The defense objected and the court stated: "Any reference to the pathology report will go out." (RT 2080.) The trial court did not expressly admonish the jury to disregard Green's irrelevant testimony.

The prosecutor asked Green to explain how it was she relived the murder twice a month. The court sustained an objection. (RT 2080.) But moments later, the prosecutor again asked how she was able to remember the details of July 26, 1986, to which Green answered: "I relive it." (RT 2081.) The prosecutor then impermissibly returned to Green's comment that the room where the body was found was cold.

> Q. And when you say the bedroom where you found the body was extremely cold, did you notice that to also apply to the other rooms of the house that you went into?
>
> A: No, it was the time I was there and perhaps the feelings I were [sic] having, but it was just intensely cold in that room. (RT 2082.)

She then clarified that she was describing both the temperature in the room, as well as her own feelings. (Id.)

The prosecutor returned to the same improper questioning regarding Green reliving her discovery of the body. "Do you flashback on what you found in that room July 25, 1986?" This time, the trial court inexplicably overruled the defense objection. The witness answered: "Yes, I do, twice a month or more. I know that it's been at least that frequently since the death of Sandy." (RT 2082.)

The prosecutor continued to elicit irrelevant victim impact testimony during his questioning of Ms. Olsson's father. Over defense objection, Sandberg was allowed to testify he regularly spent the winter months with Ms. Olsson. He described going into her room if he noticed her light on in the middle of the night and saw she had fallen asleep reading in bed, still in her pajamas and robe. (RT 2759, 2786-2788.)

The prosecution elicited testimony from Sandberg that on at least one occasion, someone came to his daughter's door in the evening and asked for help for his sick wife. Sandberg testified that Ms. Olsson went to help her neighbor. (RT 2879.) The trial court found this testimony inadmissible. However, the jury already had heard it and no admonishment was given to the jury to disregard it.

Ms. Olsson's daughter, Sandra Walters testified that she had seen her mother the week before her death. The prosecutor then elicited that the purpose of the visit was to celebrate her mother's birthday. (RT 2806.) He had the witness testify several times about her last contacts with her mother. (RT 2820.) As he did with Sandberg, the prosecutor elicited testimony from Walters regarding Ms. Olsson's planned trip to visit her

father. (RT 2822.) She was also asked what she did when she was with her mother. She answered: "We loved to – I used to love to shop with my mom. We might take my dog out for a walk or make dinner . . . ." (RT 2810.) The prosecutor attempted to elicit testimony from Walter's regarding her mother's character. (RT 2811-2815.)

Finally, during the guilt phase closing arguments, The prosecutor injected yet another aspect of victim impact into the jury's guilt determination by arguing that Mr. Tully's post arrest statements not only deprived Ms. Olsson of her life, but also of her good reputation. He ended his opening argument by urging:

> It is time to put a halt to the brutality and viciousness of this defendant. And it is time to give Sandy Olsson back her good name and reputation. And the way you do that —
>
> * * *
>
> The evidence in this case establishes this man tried to take everything in the world that Sandy Olsson had and he did take everything, except her good name and reputation and, he tried to take that and steal that like everything else he took on the morning of July 25, 1986. And for that brutality that he inflicted on her *and that degradation, the only proper just verdict is that he's guilty of everything that he's charged with.* (RT 3086.)

During his final closing argument, the prosecutor accused Mr. Tully of "smearing Ms. Olsson's good name." (RT 3174.) He told the jury that Mr. Tully "even attacked the victim's family. Isn't it outrageous that these folks are here. Isn't it so outrageous that they're in this courtroom along with some of her friends. Terrible thing. Terrible things, because the only person who has to lie is the defendant over there. After all, we should do

this in closed quarters here." (*Ibid.*)[62]

The guilt phase proceedings were infected by the introduction of emotional and irrelevant evidence concerning the victim and the impact of her death on her family and friends. The prosecutor prejudicially exploited this evidence from his opening statement to his final summation. Introduction of the evidence and the prosecutor's use of it violated Mr. Tully's state and federal rights and requires that Mr. Tully's convictions and the special circumstance be reversed.

C. The Prosecutor Committed Misconduct by Obtaining a Conviction Based on Impermissible, Irrelevant and Inflammatory Argument and Evidence Regarding Ms. Olsson and the Impact of her Death

The prosecutor engaged in numerous acts of misconduct concerning victim impact evidence and argument at the guilt phase. He used this evidence to appeal to the jury to convict Mr. Tully on the basis of emotion, rather than the elements of the crimes. These acts, separately and cumulatively, violated state evidentiary rules and state and federal constitutional law, depriving Mr. Tully of his rights to a fair trial and to due process and fundamental fairness under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and Article I of the California Constitution.

The Supreme Court has held that prosecutorial misconduct violates the federal constitution where the misconduct "so infected the trial with unfairness as to make the

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[62] This argument was made despite the fact that it was the prosecutor who insisted, over defense objection, that certain testifying family members not be excluded from the courtroom during the guilt phase. (See Argument VII, *supra*.)

resulting conviction a denial of due process." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637.) The prosecutor's manipulation of evidence can violate principles of due process and fundamental fairness as well as the right to a fair trial guaranteed by the United States Constitution. (*Darden v. Wainwright, supra*, 477 U.S. at pp. 182-83.)

For compelling reasons, prosecutors are subject to constraints and responsibilities that do not apply to other lawyers. (See, e.g., *Berger v. United States* (1935) 295 U.S. 78, 88.) While lawyers representing private parties may - indeed, must - do everything ethically permissible to advance their clients' interests, lawyers representing the government in criminal cases serve truth and justice first. (*See Strickler v. Greene* (1999) 527 U.S. 263, 281.) The prosecutor's job isn't just to win, but to win fairly, staying well within the rules. (*See United States v. Hill* (9th Cir. 1991) 953 F.2d 452, 458; Barbara Allen Babcock, (1982) *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 Stan. L. Rev. 1133, 1141.) "'The prosecuting attorney represents a sovereign whose obligation is to govern impartially and whose interest in a particular case is not necessarily to win, but to do justice . . . it is the sworn duty of the prosecutor to assure that the defendant has a fair and impartial trial.'" (*Hayes v. Brown* (9th Cir. 2005) 399 F.3d 972, 978 [citation omitted.]) "[T]he function of the prosecutor under the Federal Constitution is not to tack as many skins of victims as possible to the wall. His function is to vindicate the right of people as expressed in the laws and give those accused of crime a fair trial." *(Donnelly v. DeChristoforo, supra*, 416 U.S. at pp. 648-649 (Douglas, J., dissenting.)

Moreover, even where the prosecutor's behavior does not violate fundamental fairness under the United States Constitution, under California law, the prosecutor is prohibited from obtaining convictions by "deceptive or reprehensible means." *People v. Samayoa* (1997)15 Cal. 4th 795, 841.)

1. Misconduct During Voir Dire

During voir dire, the prosecutor committed misconduct, first by focusing a potential juror on an irrelevant and inflammatory factor, an obligation to the victim's family, and then, after defense objection, repeating the same misconduct. While questioning juror Jamison Williams, the prosecutor stated: " . . .[i]t's not fair to the family members of the woman who was murdered if people can't impose either of the two penalties." The defense objected. The trial court did nothing other than to tell counsel: "I would simply ask you at this time to note our conversation for the record. If the situation arises again, you may react appropriately and I'll react as I feel appropriate." (RT 939-40.)[63] When the prosecutor made the same comment to another prospective juror, the defense objected. The court finally admonished the prosecutor not to refer to Ms. Olsson's family again during questioning.

Here, the prosecutor's irrelevant comments, which he continued to make after being admonished by the trial court, demonstrate his complete disregard for Mr. Tully's right to an impartial jury. As the Supreme Court has held: "Voir dire plays a critical function in

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[63] Juror Williams had already heard the comment, however, and ultimately sat on Mr. Tully' jury.

assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored" *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 68 L. Ed. 2d 22, 101 S. Ct. 1629 (1981) (plurality opinion). (*Morgan v. Illinois* (1992) 504 U.S. 719, 729-30.) That right was not honored here.

2. Misconduct During The Opening Statement

In his opening statement, the prosecutor continued to improperly focus the jury on irrelevant and inflammatory facts. In addition to the dramatic lead-in contrasting the planned family reunion with the family gathering for the funeral, the prosecutor told the jury about Ms. Olsson's career as a nurse in Korea, and that she was dedicated to her job. The defense complained that these aspects of the prosecutor's opening statement overstepped the bounds of relevancy by discussing impermissible victim impact evidence. According to the *post-hoc* memorialization of the complaints and the court's response, the prosecutor represented that he would not bring these matters up again in his opening statement, but the damage had already been done. (RT 1981-2003.)

An opening statement should "prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning." (*People v. Gurule* (2002) 28 Cal.4th 557, 611, quoting, *People v. Dennis* (1998) 17 Cal.4th 468, 518.) When the prosecutor dramatically draws the jury's attention to immaterial and prejudicial facts during his statement, the jury cannot discern what is material or important, and will convict based on improper considerations, like the impact of the victim's death on her family.

The prosecutor's argument and evidence regarding the purpose of the trip to Kansas was irrelevant to any guilt phase issue. It was undisputed at trial that Ms. Olsson planned to take a trip the day after she was killed. Her destination, who she planned to visit and the reason for that visit, however, had nothing to do with the charges against Mr. Tully and everything to do with improperly arousing the sympathy and passions of the jury.[64]

The opening statement did not serve to assist the jury to "more readily discern" the "materiality, force, and meaning" of this personal information. Instead, it led the jurors to believe that victim impact was extremely material to its guilt phase determination, given that it was the first thing the prosecutor told them about the case. Its importance was driven home by the prosecutor's repeated references to it during the guilt phase case and in closing argument.

"Primacy," the theory that what is heard first has a stronger and more permanent impact on the listener, is a well-established concept in the psychology of persuasion. (Lund, *The Psychology of Belief IV, The Law of Primacy in Persuasion* (1925) 20 J. Abnormal and Soc. Psychol.183-91; Aron, et al.,Trial Communication Skills (2d Ed. 1996) § 15.04.) In the first minutes of the prosecutor's opening statement, the jury's attention was focused on Ms. Olsson's family and the impact of her death on them. "Well, there

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[64] *See*, ABA Code Prof. Responsibility, EC 7-25 (hereafter cited as ABA Code) ("[A] lawyer should not by subterfuge put before a jury matters which it cannot properly consider."); ABA Code, DR 7-106C ("[A] lawyer shall not: (1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.")

was a family gathering, but it wasn't in Topeka. It was in Livermore. And that family gathering was not to celebrate, but to mourn." This inflammatory comment has no place in the guilt phase of a capital trial because it improperly and prejudicially influences the jury at both the guilt and the penalty phases of trial.

3. Misconduct During the Presentation of Evidence

During the guilt phase, the prosecutor continued to use victim impact to improperly sway the jury. He introduced victim impact evidence whenever and however he found an opportunity. He also ignored the court's procedural and substantive limits on the evidence that could be presented regarding Ms. Olsson and the impact of her death. In doing so, he repeatedly elicited inadmissible testimony.

The prosecutor repeatedly asked objectionable questions, even after defense objections had been sustained. The prosecutor flaunted the trial court's rulings, and intentionally elicited objectionable evidence. This is plainly misconduct. "It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.'" (*People v. Bonin* (1988) 46 Cal.3d 659, 689, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1; *see also, People v. Evans, supra,* 39 Cal.2d at p. 251 [repeated asking of questions relative to objectionable and prejudicial matter involving appeals to passions and prejudices of jury]; (*People v. Wagner* (1975) 13 Cal.3d 612, 619.) Prosecutorial standards require a prosecutor to "comply promptly with all orders and directives of the court." (*People v. Hill, supra*, 17 Cal 4th at p. 832; *People v. Bell* (1989)

49 Cal.3d 502, 532.)

In the middle of the opening statements, the defense raised several objections outside the presence of the jury. The trial court made no ruling on the propriety of the statements that had already been made in light of the prosecutor's representation that he would not bring these matters up again during his opening statement. The court went on to express concern regarding the evidence that might be presented relating to the opening statement. The areas of concern identified by the parties and the court were evidence of Ms. Olsson's character or "personality," habit and reputation as a worker, her specific duties at the hospital, and the planned family reunion. (RT 1981-2003.)

In response to the defense objections concerning the prosecutor's initial reference to the family reunion for Sandberg's birthday during his opening statement, the trial court ruled that only the fact that "a trip was contemplated" was admissible. (RT 2002.) With regard to the other categories of evidence, the court held that it would allow some testimony regarding Ms. Olsson's duties at the hospital, but that "personality" evidence would not be permitted. (RT 2002-2003.)[65] Beyond these general guidelines, the court did not wish to rule on specific testimony or evidence prior to actually hearing that evidence. The trial court told the prosecutor he would have to notify the court and counsel in advance before "approaching a witness where he anticipates that any of these areas maybe

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[65] During the hearing, the prosecutor told the trial court that he intended to elicit testimony concerning Ms. Olsson's duties at the hospital and her punctuality from Maxine Gatten and Barbara Green.

the subject of direct testimony that he would wish to elicit." (RT 1987.)

Despite the court's warnings, and in violation of the court's order, the prosecutor continued to elicit testimony from its witnesses regarding the purpose of the trip itself. Witness Green was encouraged to testify that Ms. Olsson was going to fly out to see her father for his birthday the day after the murder. In violation of the court's ruling, the prosecutor emphasized the planned birthday celebration. (RT 2025.) Just as egregiously, the prosecutor disregarded the court's directive of advance notification, forcing the defense to make objection after objection, signaling to the jury that it was trying to hide something. "The conduct of counsel in not specifically and carefully following the court's instructions . . . is inexcusable." (*People v. Glass* (1975) 44 Cal.App.3d 772, 782.)

The prosecutor, without advance notice that he was entering a questionable area, asked how Green felt when Ms. Olsson did not show up for work. Before an objection could be interjected, Green answered "Very concerned." (RT 2027.) The defense objected and the prosecutor immediately asked another objectionable question, probing the basis of Green's concern that morning. In responding to the defense objection, the court merely noted the question had been answered and once again, said that any further questions would be subject to further objections. (RT 2027.) Undaunted, the prosecutor continued to elicit this improper testimony. He next asked: "What was it about this set of circumstances that caused you to leave your work and go out to a co-worker's home?" (RT 2028.) This time the objection was sustained, but not before the damage had been

done. (RT 2026.)

At the conclusion of Green's direct examination, the prosecutor evaded the court's ruling regarding the introduction of evidence concerning Ms. Olsson's personality. He asked the witness whether Ms. Olsson ever used profanity or "swear words" in normal conversation. This drew an objection from the defense, which was sustained. (RT 2060.) Nevertheless, it was still another example of prejudicial misconduct.

During redirect examination, the prosecutor asked Green about the pathology report and her reliving the events, as described earlier. (RT 2079-2001.) Because of the prosecutor's misconduct, Green testified that she had flashbacks of the murder scene regularly. The prosecutor capitalized on Green's non-responsive answers by asking her about her previous comment that the room where the body was found was cold. In response, Green clarified that she was describing both the temperature in the room and her own feelings. (RT 2082.) The prosecutor returned to the very questioning the court had excluded shortly before, regarding Green's reliving of the discovery of the body. "Do you flashback on what you found in that room July 25, 1986?" This time, the court inexplicably overruled the defense objection. The witness answered: "Yes, I do, twice a month or more. I know that it's been at least that frequently since the death of Sandy." (RT 2082.)

The prosecutor's repeated attempts to get before the jury inflammatory and irrelevant evidence concerning the impact of Ms. Olsson's death on Green was prejudicial.

Her testimony in this area related to victim impact rather than any issues relevant to the guilt phase. This fact is demonstrated by the prosecutor reading Green's guilt phase testimony to the jury during his *penalty phase* summation (RT 3748-3750), where its only purpose was to show the impact of Ms. Olsson's death on her friend, not on the facts of the crimes.

In fact, the trial court had issued a preliminary ruling during jury selection that Ms. Olsson's co-workers, including Green, would not be allowed to testify as a victim impact witness at the penalty phase (RT 487), giving the prosecutor a strong, but wholly impermissible motive, for eliciting victim impact testimony from her during the guilt phase. Green began crying during her testimony describing her concern for the victim and her reliving of the discovery of the body. These irrelevant portions of her testimony were heightened by her emotional display. Because Green's testimony went directly to compelling, yet irrelevant matters such as empathy for the witness herself, it was prejudicial.

The prosecutor disregarded the court rulings and elicited prejudicial testimony from other witnesses as well. Sandberg testified that one night a neighbor had come to Ms. Olsson's door, asking for help for his sick wife. After a defense objection was sustained as to testimony that Ms. Olsson partially opened the door (RT 2789), the prosecutor persisted, asking Sandberg whether Ms. Olsson went to help her neighbor. The witness answered: "Yes," before the defense could voice its objection. The objection was properly

sustained, but the answer was not struck, nor was the jury admonished to disregard it. (RT 2790.) This testimony was highly prejudicial not only because it portrayed Ms. Olsson as a caring neighbor, but because it provided the prosecutor with "evidence" to support his argument that Ms. Olsson opened the door for Mr. Tully.

The prosecution elicited testimony from Sandra Walters that, like that of Sandberg, was not relevant to guilt phase issues. The following questions asked by the prosecutor during his examination of Walters demonstrate his willful disregard of the court's rulings on objectionable testimony.

> Q. With regard to that, did your mother, during a workweek, did she go out and socialize much?
>
> A. No.
>
> ***
>
> Q. How would you characterize your relationship with your mother?
>
> ***
>
> Q. Did you and your mother discuss what was going on in each other's lives?
>
> ***
>
> Q. And with regard to that, did you each discuss your friends with one another?
>
> ***
>
> Q. Did you each discuss your friends with one another?
>
> A. Yes.
>
> ***

Q. Did she introduce you to her friends?

A. The only woman I met was Barbara Green, her friend.

***

Q. And with regard to your discussions and what she told you about what was going on in her life, and from your own attempts to contact her either by phone or by visiting, did she appear to have much of a social life?

***

Q. Sure. Let me phrase it this way. If your mother was working the day shift, and you decide to call her at any time of the night, would you expect her to be at home?

***

Q: Why do you say [your mother never slept in the nude]?

A: Because she wouldn't have – I was raised by her and she's a very modest woman . . . . (RT 2811-2815.)

These questions show the prosecutor's determination to get the jury to consider irrelevant facts about Ms. Olsson. Walter's relationship with her mother was only relevant to the impermissible consideration of victim impact. Whether Ms. Olsson's daughter ever met her friends, or even whether her mother had friends, was not relevant to any issue at the guilt phase.

Eliciting testimony about Ms. Olsson's personality or her grown daughter's view of her social life was impermissible. The planned family reunion testimony was plainly designed to arouse sympathy for Ms. Olsson's elderly father and other family members and was wholly unnecessary to the prosecution theory of the case. It was prejudicial to the

defense. Painting the victim as a lonely woman who had few friends would only cause the jury to feel heightened sympathy for her, and disdain for Mr. Tully. Placing Ms. Olsson's death in the context of her father's upcoming birthday would have swayed the jury to convict Mr. Tully because it felt sorry for her and/or her family regardless of the lack of evidence.

4. Misconduct During Guilt Phase Arguments

During his guilt phase argument, the prosecutor told the jury to "give Sandy Olsson back her good name and reputation." The defense objected on the grounds that the argument was irrelevant and inflammatory. (RT 3086.) Unfortunately, the trial court did not rule on these objections, instead telling the jury that "arguments are not evidence." (RT 3086.)

Empowered, the prosecutor continued with abandon:

> The evidence in this case establishes this man tried to take everything in the world that Sandy Olsson had and he did take everything, *except her good name and reputation and, he tried to take that and steal that like everything else he took on the morning of July 25, 1986.* And for that brutality that he inflicted on her and that degradation, the only proper just verdict is that he's guilty of everything that he's charged with. (RT 3086.)

During his rebuttal argument, the prosecutor urged the jury to consider victim impact evidence. He told the jury that Mr. Tully "even attacked the victim's family. Isn't it outrageous that these folks are here. Isn't it so outrageous that they're in this courtroom

along with some of her friends. Terrible thing." (RT 3174.)[66]

The prosecutor encouraged the jury to base its guilt phase verdicts on the alleged damage to Ms. Olsson's reputation, rather than the evidence. As a representative of the government, he had a heightened duty to assure the fairness of Mr. Tully's trial and to stay "well within the rules." (*See United States v. Hill*, 953 F.2d at p. 458.) His failure to do so was reprehensible misconduct under both the state and federal constitutions. It was also prejudicial. The prosecutor invoked the image of Ms. Olsson's family in the courtroom as a sympathetic and heart-wrenching, but wholly inappropriate reason the jury should find Mr. Tully guilty.

5. The Prosecutorial Misconduct Regarding Victim Impact at the Guilt Phase was Prejudicial

The prosecutor committed serious misconduct under both state and federal law by repeatedly injecting the theme of victim impact into the guilt phase. Each instance of misconduct discussed above was prejudicial and requires that this Court reverse Mr. Tully's convictions and the special circumstance finding. Nonetheless, should this Court find that no single instance of misconduct requires reversal, the cumulative effect of the pattern of the prosecutor's misconduct does require reversal in this case. (*People v. Hill*, *supra*, 17 Cal.4th at pp. 844-847.)

Generally, prosecutorial misconduct under California law constitutes reversible

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[66] This argument was particularly reprehensible in light of the prosecution's insistence, over defense objection, that only family members who would testify at the guilt phase be excluded from the courtroom, but that family penalty phase witnesses would not. be excluded. (See Argument V, *supra*)

error where there is a reasonable possibility that a result more favorable to the defendant would have occurred had the district attorney refrained from the misconduct. In this case, the prosecutor's misconduct also violated the federal constitution because it "so infected the trial with unfairness" that Mr. Tully was deprived his rights to due process, fundamental fairness, and a fair trial. (*Darden v. Wainwright, supra*, 477 U.S. at pp. 182-83.) Accordingly, the burden shifts to the state 'to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' (*Chapman v. California* (1967) 386 U.S. 18, 24.)" (*People v. Bolton* (1989) 23 Cal.3d 208, 214.) Under either the state or federal constitutional standard, Mr. Tully's conviction must be reversed.

Victim impact wrongfully permeated the prosecution's entire guilt presentation. The relevant evidence at the guilt phase was insufficient to sustain the charges against Mr. Tully. The prosecutor's strategy was to let outrage and repugnance obscure the lack of evidence that the crime had occurred as he described it. The prosecutor's repeated portrayal of Ms. Olsson as a caring, loving nurse who was murdered on her way to celebrate her elderly father's birthday was in sharp contrast to his portrayal of Mr. Tully as "despicable," unemployed, "filth" and "garbage." (RT 3631; 3632; 3635; 3636; 3659; 3717; 3751.) The prosecutor asked the jury to weigh the relative social worth of the victim and the accused to determine whether Mr. Tully was guilty, even though social worth has no bearing on the elements of the crime.

The prosecutor committed prejudicial misconduct. There is a reasonable probability that, absent the prosecution's irrelevant and inflammatory arguments and evidence

concerning Ms. Olsson's personality and the impact of her death on her family and friends, Mr. Tully would not have been found guilty of either first-degree murder, the special circumstance of felony-murder, or assault with intent to commit rape. Similarly, the State cannot establish that prosecutor's misconduct was harmless beyond a reasonable doubt. Thus, this misconduct was prejudicial under both state and federal standards, and Mr. Tully's convictions and the special circumstance must be reversed.

D. The Trial Court Erred in Allowing the Issue of Victim Impact To Permeate the Guilt Phase Proceedings

Although the prosecutor repeatedly ignored the trial court's rulings on victim impact at the guilt phase, the trial court failed to uphold its duty to prevent the jury from considering this objectionable and harmful evidence. Regardless of whether the fault lies with the prosecutor, with the trial court or with both, the result was that Mr. Tully's trial was fundamentally unfair. Whether it was the prosecutor or the trial court that failed to perform according to governing standards, Mr. Tully's conviction must be reversed.

The defense raised numerous objections to the introduction of victim impact argument and evidence at the guilt phase. Some objections were erroneously overruled, many others were simply not ruled on, and where the trial court did rule in Mr. Tully's favor, those rulings were not adequately enforced. In every instance, the prosecutor was allowed to continue his improper misconduct and the trial court failed to insulate the jury from consideration of victim impact at the guilt phase.

In some instances, the trial court abdicated its responsibility to ensure that the

introduction of inflammatory and irrelevant factors did not impact the jury. It improperly allowed some victim impact evidence to be introduced. When it did limit the introduction of the evidence, the vagueness and inadequacy of its rulings encouraged the prosecutor to elicit inadmissible information from his witnesses. Whether due to the trial court's failure to assure the evidence and argument was relevant or to the prosecutor's intentional misconduct, the entire guilt phase was tainted by the introduction of irrelevant and emotional victim impact evidence and argument.

1. Trial Court's Failure to Limit the Evidence and Argument to Relevant and Material Matters

The trial court has an obligation to control the courtroom and to assure that the evidence and argument of counsel is limited to relevant and material matters. Section 1044 provides: "It shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." The Supreme Court has held that "Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."" (*Chandler v. Florida* (1981) 449 U.S. 560, 574.)

The trial court repeatedly failed to exercise its duty in this regard. It declined to make firm rulings on many objections. It refused to allow the attorneys to fully argue their objections outside the presence of the jury. It placed the responsibility of monitoring the

proceedings on defense counsel even though it had failed to establish clear guidelines as to the scope of admissible evidence. Even when the court did admonish the jury following a proper objection, its admonitions were not adequate to cure the prejudicial impact of the objectionable testimony. In short, the trial court failed to assure the fairness of the trial, violating Mr. Tully's rights to a fair trial, fundamental fairness and due process under the Fifth, Sixth and Fourteenth Amendments, and Article I of the California Constitution.

For example, beginning with voir dire, the trial court declined to make firm rulings on defense objections, forcing the defense to wait until the prosecutor actually committed misconduct before addressing the matter. When the defense objected to the prosecutor's insistence that jurors had to be fair to the victim's family, the court made the following cryptic ruling: "I think we could spend a fair amount of time whether it's an appropriate subject of voir dire. I would simply ask you at this time to note our conversation for the record. If the situation arises again, you may react appropriately and I'll react as I feel appropriate." (RT 940.) The trial court overlooked the fact that the prosecutor had committed misconduct, and the defense *had* reacted "appropriately." Due to the lack of court directive, and with a prosecutor determined to get this evidence before the jury in any manner that he could, the "situation" of course did arise again.

Further, the trial court declined to properly exercise its discretion and thus refused to exclude family member penalty witnesses from the guilt phase. The trial court did so without considering whether his decision would affect the rights of the defendant. Instead, he placed the impossible task on defense counsel to foresee the prosecution guilt phase

witnesses' testimony before they took the stand, to foresee the impact that testimony might have on prosecution penalty phase witnesses, and to foresee those witnesses' testimony at the penalty phase. (RT 1938.)

In response to the defense objection concerning the prosecutor's reference to the planned family reunion for Ms. Olsson's father during his opening statement, the trial court held only that the fact that "a trip was contemplated" was admissible, but it declined to set any further boundaries. (RT 2002-2003.) It did not admonish the prosecutor to avoid overstepping its ruling, nor did it clarify what the ruling meant. The prosecutor took advantage of the court's inadequate ruling and went far beyond the mere fact that Ms. Olsson was about to leave for a trip in both his argument and presentation of the evidence. He repeatedly sought testimony regarding the reunion from the witnesses. By failing to take sufficient steps to control the prosecutor after the prosecutor's first improper words to the jury (RT 1954-1955), the trial court abdicated its responsibility to keep irrelevant and immaterial argument from the jury's consideration.

During the hearing on defense objections to the prosecutor's opening statements, the trial court cut off defense counsel as he tried to make his objection to the relevance of the family reunion argument. The court refused to allow counsel to make a "comprehensive argument." (RT 1986.) The court complained that it had already "spent a great deal of time on this issue." (RT 1987.)[67]

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[67] The record does not reflect that the court had spent time on this issue previously.

The court then indicated that it did not wish to rule on specific testimony or evidence prior to actually hearing the evidence. It required the prosecutor to notify the court and counsel in advance before "approaching a witness where he anticipates that any of these areas maybe the subject of direct testimony that he would wish to elicit." (RT 1987.) The court continued that "[I]f Mr. Burr determines to seek, to make admissible some of these issues, this type of evidence, then we will address it in a context of the particular witness, and I'll hear your objection and your argument as to relevance and/or 352, or whatever, however you determine to proceed." (RT 1987.)

This ruling was inadequate. It did not clearly define what "areas" it expected the prosecutor to bring to its attention before eliciting testimony. It allowed the prosecutor to take advantage of the ill-defined limits, and put objectionable testimony before the jury without advance notice.

The problems with the court's ruling appeared as soon as the prosecution began its presentation of the testimony. The prosecutor had notified the court of its intention to question its first two witnesses about Ms. Olsson's duties at the hospital and her "personality" as a "take-charge" kind of person. Both of these matters had been referred and objected to, during his initial opening statement. The prosecutor told the court that "Maxine Gatten and Barbara Green are two people who are going to cover these areas as I've indicated now." (RT 1989.) Although the court did hold generally that the witnesses could testify about Ms. Olsson's punctuality and her duties at the hospital, and that "personality" evidence would not be admitted (RT 2003), by failing to clearly delineate the

scope of what would be admissible the court invited the prosecutor to take advantage of its inadequate ruling by asking objectionable questions and eliciting improper testimony before drawing an objection. The trial court's failure to control the evidence allowed the prosecutor to push beyond the limits of what was admissible with his very first witnesses and to bring prejudicial factors before the jury.

For example, during the testimony of Gatten, the court cautioned the prosecutor that he was "was at the outer limit of what the court determined to be relevant," (RT 2086), but failed to delineate those limits. In response to the subsequent defense objection over Green's testimony that she was very concerned about Ms. Olsson, the court only noted that the question had been answered and merely stated that any further questions would be subject to further objections. (RT 2087.) The court's failure to address the issues spurred the prosecutor to continue past the breaking point. Thus, the defense was put in the untenable position of either making repeated objections in front of the jury or sitting silent while their client's rights were being violated.

Green also testified regarding the impact of Ms. Olsson's death on her. Green's testimony concerning the emotional impact of her discovery of Ms. Olsson's body had no relevancy to any issues at the guilt phase. As a co-worker of Ms. Olsson's who discovered the body, her testimony was, not surprisingly, very dramatic. The highly charged nature of her testimony is clear from the record, as she began crying in front of the jury. (RT 2045.) Nonetheless, because the trial court refused to set guidelines, the defense was forced to object to her testimony. Forcing the defense to object during the examination made the

defense look like they were bullying the victim impact witness

During the prosecutor's closing arguments, the trial court failed to prevent the introduction of inflammatory victim impact argument. The defense objected at several points during the prosecutor's argument, but again the court declined to expressly rule on the objections and merely told the prosecutor to "proceed." (See e.g. RT 3023.)[68]

At the conclusion of his opening argument, the prosecutor asked the jury to find the defendant guilty in order to give Ms. Olsson back "her good name and reputation." The defense objected that this was irrelevant and would inflame the jury. Instead of ruling on the objection and/or admonishing the jury to disregard the argument as irrelevant, the trial court only told the jury that "arguments are not evidence." (RT 3086.) This "admonishment" was wholly ineffective to cure the harm caused by the prosecutor. The prosecutor took advantage of the court's failure to sustain the objection, by dramatically ending on precisely this inflammatory and irrelevant theme.

> The evidence in this case establishes this man tried to take everything in the world that Sandy Olsson had and he did take everything, except her good name and reputation and, he tried to take that and steal that like everything else he took on the morning of July 25, 1986. And for that brutality that he inflicted on her and that degradation, the only proper just verdict is that he's guilty of everything that he's charged with. (RT 3086.)

During a bench conference immediately before the prosecutor's rebuttal argument, the defense further objected to the argument regarding the victim's reputation. The

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[68] This Court has found that when a trial court does not rule on an objection but merely tells the prosecutor to proceed, the objection is implicitly overruled. When an objection is overruled, the issue is preserved for appeal even if no admonition is specifically requested. (*People v. Boyette, supra,* 29 Cal.4th at p. 486.)

objection was based on the fact that there was no evidence in the record to support the argument. During the testimony of Margaret Brick, who worked at the Veteran's Hospital, the court had sustained defense objections to questions about Ms. Olsson's reputation as a nurse as improper under Evidence Code § 1103. The court ordered that no reputation evidence could be presented, and only allowed testimony that no drugs were ever reported missing while Ms. Olsson worked at the hospital. (RT 2773, 2790.) Because of this ruling, there was no reputation evidence before the jury.

The defense contended that, because there was no evidence of reputation in the record, the prosecutor could not argue that point. The prosecutor countered that his "reputation" argument was fair comment on Brick's testimony concerning her investigation into whether any drugs were missing from the hospital. The court did not address the relevance or the inflammatory nature of the prosecutor's arguments. It agreed the prosecutor could not argue facts not in evidence, noting that there was some evidence regarding Ms. Olsson's "profession" and "an investigation into the drug situation at the hospital." The court concluded by stating it did not think the prosecutor had made any impermissible argument "up to this point" but that it had given "some outlines here . . . in terms of what I think is appropriate and what is not." (RT 3148-3154.)

In fact, the court had given no "outlines" on the scope of argument regarding Ms. Olsson's character. Moreover, it was not fair comment on the evidence for the prosecutor to argue Ms. Olsson's good name and reputation had been damaged, for no evidence of her reputation had been properly introduced. Even if her reputation had been damaged,

that damage was not related to any element of the offense and was not relevant to the guilt phase determination.

The court also failed to address the defense argument that the prosecutor had created the "straw man" of the victim's reputation by introducing evidence of Tully's post arrest statements. Instead, the trial court essentially held that the prosecutor could comment on its own evidence that hospital records failed to reveal any drugs missing during Ms. Olsson's tenure at the hospital. Because the court failed to prevent the prosecutor from relying on this inflammatory argument, he continued to do so in his rebuttal.

During argument, the prosecutor accused Mr. Tully of "smearing the good name and reputation of Sandy Olsson," (RT 3219) The court overruled the defense objection to the comment about Ms. Olsson's "good name," "for reasons previously stated." (*Ibid.*) This appears to be a reference to the ruling discussed above. In that ruling, however, the trial had never stated any reasons for allowing reputation argument. It had only held that the prosecutor could make "fair comment" on the evidence that was actually presented, evidence that *did not* include any reputation testimony.

The trial court committed further error in denying the defense motion for a mistrial at the end of the arguments. The defense moved for a mistrial because of the prosecutor's argument about the "smearing" of Ms. Olsson's reputation. The court once again failed to address the prosecutorial misconduct. It claimed "the issue" had already been addressed, that it had already ruled, and the record was clear. (RT 3224.) The record does not reflect

that the court had addressed the issue, or that it had already ruled on it. In fact, the court's only specific ruling about reputation was made in the middle of argument and was expressly limited to the argument "up to this point." (RT 3154). The ruling could not possibly be deemed a ruling on the subsequent argument- an argument that had not yet been made- which was the basis for the mistrial motion.

Although there were several points, where the court either sustained objections, or indicated it agreed with them, and several admonitions that "arguments are not evidence," the court did not adequately enforce these rulings. The court never directly admonished the jury to disregard the victim impact argument or evidence it received. It never admonished the jury that sympathy or outrage are not appropriate guilt phase considerations.

When admonishing jurors, the trial judge "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." (*People v. Bolton*, *supra*, 23 Cal. 3d at p. 215 fn. 5.) Merely telling the jury that "arguments are not evidence," does not address, let alone "cure" the damage caused by the introduction of inflammatory or irrelevant argument. Although the jury was ultimately instructed not to consider sympathy (RT 3226), the prosecutor had already told the jury it should just "throw out" the instructions that didn't fit with "what happened." (RT 3041-3043.)

2. The Trial Court Erred in Admitting Guilt Phase Victim Impact Testimony

During trial, the court ruled on some defense objections to the admission of victim impact evidence and argument at the guilt phase. The trial court's rulings were erroneous.

As described previously, the defense objected that the prosecutor's opening statement had gone into impermissible matters concerning Ms. Olsson's work and family life. During the conference, the parties discussed the evidence the prosecutor intended to introduce on these matters. The court addressed "concern" over evidence of the victim's character, habit and reputation as a "punctual" worker, her specific duties at the hospital, and the planned family reunion.

The trial court properly limited evidence regarding the family reunion to evidence that "a trip was contemplated." However, the court erroneously accepted the prosecutor's contention that this testimony regarding Ms. Olsson's punctuality at work was relevant to show why her coworkers became concerned when she failed to arrive at work on July 25 and held that testimony on this point would be admissible. The court also erroneously held that evidence regarding her duties at the hospital would be admissible. (RT 2002.)

The prosecution had no need to provide any explanation to the jury as to why Ms. Olsson's co-workers became concerned that she failed to arrive for work. Whether Ms. Olsson was usually punctual or a dedicated caring worker simply had no bearing on any fact relevant to the case. When an employee fails to come to work, it is reasonable to assume her employer might be concerned, especially when that employee had not called in

to explain her absence and no one answered the phone at her home.

Ms. Olsson's coworkers' "concern" was a form of victim impact, and in light of its lack of relevance to any disputed issue or the crime itself, it was prejudicial. The court's ruling allowed the prosecutor to elicit victim impact testimony from Green. He asked Green how she felt when she learned Ms. Olsson had not reported to work. Green answered: "Very concerned." (RT 2027.) The court implicitly overruled the objection by telling the prosecutor to continue.

Ms. Olsson's specific duties at the hospital were also irrelevant to the case. Gatten, the first prosecution witness, testified that Ms. Olsson was an ostomy nurse and her patients were housed throughout the hospital area and in a nearby nursing home. She testified that Ms. Olsson spent "a lot of her own time" going to the different locations to care for her patients. (RT 2019.) Counsel's objection to this line of testimony was overruled. (RT 2086.) This ruling was erroneous because the objected to testimony injected an irrelevant factor into the jury's consideration at the guilt phase, the fact that Ms. Olsson worked hard at her job and spent her own time to perform her job well. Moreover, although couched in terms of Ms. Olsson's duties at the hospital, this testimony was really thinly disguised personality evidence that she was a "caring" nurse, personality evidence the court had previously ruled inadmissible. (RT 2003.)

The trial court improperly overruled the defense objection to Green's testimony that she had flashbacks of discovering the body at least twice a month. (RT 2082.) Coming at the conclusion of Green's already emotional testimony, and with no relevance to any issue

raised at trial, this testimony only aroused further sympathy for the victim as well as for the witness, who had already been allowed to describe for the jury her own mental condition at the crime scene.

The trial court also improperly ruled that the prosecution could present testimony by Mr. Sandberg that Ms. Olsson always wore pajamas when she slept at night. Trial counsel objected that there was insufficient foundation for this testimony. The trial court overruled the objection and allowed the testimony. (RT 2757-2761.)[69]

While the question whether habit evidence is admissible is essentially one of threshold relevancy (*People v. Webb* (1993) 6 Cal.4th 494, 529), in order to meet foundational requirements, there must be sufficient "evidence of repeated instances of similar conduct" for the trial court to conclude a habit was present. (*People v. McPeters* (1992) 2 Cal.4th 1148, 1178, citing *People v. Memro* (1985) 38 Cal.3d 658, 681.) The testimony regarding Ms. Olsson's sleeping attire was not sufficient to show "repeated instances of similar conduct." Sandberg only visited his daughter during the winter months. He had no knowledge as to whether she wore pajamas during July when the air conditioning was turned off.

The lack of foundation rendered the testimony even less probative, but did nothing to lessen its prejudicial impact. The trial court abused its discretion in admitting this

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[69] Evidence Code § 1105 provides that "[a]ny otherwise admissible evidence of habit or custom is admissible to prove conduct on a specified occasion in conformity with the habit or custom."

evidence, which was extremely prejudicial to the defense for several reasons. The prosecution repeatedly told the jury that Mr. Tully had raped Ms. Olsson even though the preliminary hearing judge expressly found there was insufficient evidence to support a rape charge in the first instance and no rape charge was filed in this case. [70]

Moreover, because of the court's ruling, the prosecutor was able to introduce even more prejudicial victim impact evidence in the guise of this "custom and habit" testimony. Thus, Sandberg not only testified that he had seen his daughter in bed in her robe and pajamas, but more specifically that he would sometimes get up in the night to use the bathroom and notice that Ms. Olsson's light was on. He would enter her room to find she had fallen asleep with her light on, sitting up in her pajamas and bathrobe, with her book on the blankets. He'd remove the book, put a blanket over her, and push her on the shoulder and say: "Honey, scoot down and I'll turn out the light." (RT 2786.) This portrayal of Ms. Olsson's elderly father, tenderly putting his grown daughter under the covers creates sympathy for the family and outrage against Mr. Tully. That this testimony was impermissible and irrelevant at the guilt phase is demonstrated by the prosecutor's use of it during his penalty phase argument to encourage the jury to vote for a death sentence.

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[70] The evidence to demonstrate assault with intent to commit rape was, even with the pajama testimony, insufficient to support a conviction. (See Argument V, *supra*.) The only evidence of non-consensual sexual activity was that the body was found on top of her pajamas, which were lying on the bed, and her robe was lying on the floor. The prosecutor bolstered this weak evidence with the testimony of Ms. Olsson's family, to argue that Ms. Olsson had to be wearing pajamas when she encountered Mr. Tully and that he must have forced her to disrobe. (RT 3068, 3070.) The prosecutor used this evidence to inflame the jury both at the guilt and penalty phases.

(RT 3755-3756.)

Under these circumstances, these errors were prejudicial under both state and federal standards. In light of the insufficient evidence of guilt, there is a reasonable likelihood that the outcome of Mr. Tully's trial would have been different had the trial court been "especially vigilant to guard against any impairment of [Mr. Tully's] right to a verdict based solely upon the evidence and the relevant law." (See *Chandler v. Florida, supra,* 449 U.S. at p. 574.)

3. The Trial Court Erred in Admitting Into Evidence a Photograph of Ms. Olsson While She Was Alive

The trial court also erred by admitting into evidence a photograph of Ms. Olsson in her nursing uniform. Before testimony began, the court memorialized a "brief discussion," concerning a particular, but unidentified, photograph. The trial court stated:

> We will establish that, and there was concern about that photograph being utilized. Counsel represented they were prepared to stipulate to identity of the victim. I indicated that that will be the approach that will be utilized, that if this particular photograph needs to be used with a particular witness, I'll permit that it simply won't be shown to the jury, and then we'll just establish the exhibit number when we get back outside. (RT 1934.)

During his testimony, the prosecutor showed Eldon Freeman, Ms. Olsson's neighbor, Exhibit 17A to establish Ms. Olsson's identity. The defense offered to stipulate to her identity, but the prosecutor refused. (RT 2641.) Other witnesses were shown the same photograph to establish identity (Gatten, RT 2007, Sandberg, RT 2783, Walters, RT 2806.)

Despite the trial court's previous ruling, the prosecutor attempted to introduce the

photograph into evidence. Trial counsel objected to introduction of the photograph into evidence because it was more prejudicial than probative, and also because it was immaterial to any disputed fact. (RT 2995-2996.) The prosecutor claimed that the photograph was material to show Ms. Olsson in work clothes, an irrelevant topic. He also asserted it had been shown to a number of witnesses to identify the victim. The defense responded that it had offered a stipulation regarding identity, and further, that numerous autopsy photographs had already been admitted that could establish identity.

The defense asserted that the trial court had already held the photograph was more prejudicial than probative. Defense counsel contended the court had ruled that Ms. Olsson's clothing at the hospital was irrelevant and that it did not object when the witnesses were shown the photograph and asked about Ms. Olsson's clothing because it believed the court had already held the photograph would not be admitted into evidence. "We would have objected on materiality and relevance had there been any question of revisiting the issue of the photograph." (RT 2998.)

The trial judge said the record would reflect what had happened before, but that he was not sure he had ruled on the specific photograph. Instead, the court found that the photograph was made relevant by the prosecution's own elicited testimony concerning Ms. Olsson's hospital attire. It did not address the prejudicial impact of a photograph of Ms. Olsson, alive and smiling, nor did it explain why her work attire would have been relevant to any issue in the case, given there was no dispute that Olsson was a nurse who wore a uniform to work. All evidence, including this photograph, was provided to the jury for

consideration in its deliberations. (RT 3257-3258.)

The rules of evidence apply to photographs, *People v. Crittenden, supra,* 9 Cal.4th at p. 132, and provide that only relevant evidence is admissible. (Evid. Code § 351.) Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact that is of consequence to the action, including the credibility of witnesses. (Evid. Code § 210.) Although the admission of evidence is within the discretion of the trial court, a trial court has *no* discretion to admit irrelevant evidence. (*People v. Poggi* (1988) 45 Cal.3d 306, 323; *People v. Turner* (1984) 37 Cal.3d 302, 321; Cal. Evid. Code, §§ 350.) "If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively." (*People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on other grounds, *People v. Newman* (1999) 21 Cal.4th 413.)

This Court has repeatedly warned against the use of photographs of the victim when alive at the guilt phase of a capital trial, unless they are relevant to a disputed issue. (See, e.g., *People v. Osband* (1996) 13 Cal.4th 622, 677; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1230; *People v. Bonin* (1989) 47 Cal.3d 808; *People v. Poggi, supra*, 45 Cal.3d at p. 323.) If not relevant to any disputed issues, there is a significant risk that such photographs will merely generate sympathy for the victims. (*People v. DeSantis*, 2 Cal.4th at p. 1230.)

The prosecution failed to establish that the photograph was relevant to any disputed element of the crime. The defense had offered to stipulate that the person the witnesses were talking about was Ms. Olsson, which the prosecution rejected. Where "'a defendant

offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury."' (*People v. Hall*, *supra,* 28 Cal.3d at p. 152.) This requirement applies to all undisputed foundational facts, including identity, and not just the elements of the offense. (*People v. Combs* (2004) 34 Cal.4th 821, 848 fn. 4;. *People v. Bonin*, *supra,* 47 Cal.3d at 848-849.) The trial court should have compelled the prosecution to accept the defense stipulation and barred it from introducing evidence covered by the proposed stipulation.

Ms. Olsson's identity, even without the defense's proffered stipulation, was not disputed. Her body was discovered in her own home, by a coworker. The photograph was only shown to people who already knew Ms. Olsson. They did not need the photograph to establish who they were testifying about.

Moreover, the appearance of Ms. Olsson's work clothes was not relevant to any issue arising in the case, let alone any disputed issues. The crime occurred at night, when Ms. Olsson would not have been wearing her work clothes. Her body was found nude and there was no forensic evidence relating to her work clothes. Indeed, the prosecutor argued she was wearing her pajamas and robe when she was confronted by her attacker. The only testimony regarding the appearance of her work attire was generated by the prosecution, for no purpose other than to create *faux* relevancy for admission of this particular photograph, in order to generate sympathy for the victim. The prosecution offered only the following bases for materiality of the hospital clothing:

The only comments, I would submit there is materiality, that's what the

> questions went to, in that particular regard, especially when we talked about how this woman dressed around the house and whether she's someone who's going to start selling drug, as the defendant would portray her to be. (RT 2999.)

This is a patently absurd explanation. The testimony was that Ms. Olsson would come home and immediately change out of her work clothes (RT 2783). What those work clothes looked like was irrelevant to any issue in the guilt or penalty phases. Importantly, the photograph did not even depict the clothes Ms. Olsson wore at the Veteran's Hospital where she worked at the time of her death, but rather at the Public Health Hospital, where she had worked some years before. (RT 2780.)

Because the photograph was not relevant or material, the court had no discretion to admit it into evidence and it had to be excluded. It was also prejudicial. It served an important link in the prosecution's victim impact theme at the guilt phase. The smiling, healthy image of Ms. Olsson, dressed for work as a nurse was contrasted with the prosecution's portrayal of the defendant during argument as "a despicable excuse of a human being." (RT 2023.) The photograph highlighted the impact of her death on the community, her coworkers and her family, thus pushing the jury to convict Mr. Tully.

There is a reasonable probability that, had this photograph not been admitted, Mr. Tully would not have been convicted of any of the charges against him. Moreover, even if not prejudicial by itself, admission of the photograph was but one of many ways the trial court failed to prevent the prosecution from using victim impact evidence to secure Mr. Tully's conviction. When coupled with all the other impermissible victim impact at the guilt phase, admission of this photograph was prejudicial.

E. Cumulative Errors Regarding Victim Impact Evidence and Argument at the Guilt Phase

The prosecutor's misconduct and the trial court's rulings each violated Mr. Tully's rights under state law and the state and federal constitutions. Even if this Court finds, however, that each ruling, taken individually, did not implicate Mr. Tully's state or federal trial rights, when considered cumulatively the trial court's rulings against Mr. Tully interests deprived him of his rights to due process and a fair trial.

The prosecutor committed serious misconduct, which the trial court failed to curb. Due to prosecutorial misconduct and/or trial court error, the jury was presented with irrelevant evidence and argument concerning the victim, her family and the impact of her death. This evidence had nothing to do with the charges against Mr. Tully and allowed the prosecutor to obtain Mr. Tully's conviction based not on the relevant evidence, but based on Ms. Olsson's personality, character, work habits and the coincidental fact that she was killed just before her elderly father's birthday gathering. In light of the scant evidence to support the charges, the introduction of this evidence, together with the prosecutor's inflammatory and emotional argument most certainly had a powerful impact on the jury. Without this evidence and argument, Mr. Tully would not have been found guilty of either first-degree murder, the special circumstance of felony-murder, or assault with intent to commit rape. Mr. Tully's convictions and the special circumstance must be reversed.

IX. PROSECUTORIAL MISCONDUCT DURING THE GUILT PHASE CLOSING ARGUMENTS

A. Introduction

With the very first words he uttered during his guilt phase argument, the prosecutor began his relentless attack on Mr. Tully, the defense, and the Constitutions. He began: "The evidence in this case has established beyond any reasonable doubt that this defendant, this is a despicable excuse for a man." (RT 3023.) This opening sentence broadcast his intent to gain a conviction based not on proof of the elements of the offense, but instead on Mr. Tully's purported lack of humanity.

The prosecutor committed misconduct from to start to finish in his guilt phase arguments. He disparaged Mr. Tully. He impugned defense counsel. He improperly commented on Mr. Tully's failure to take the stand. He misstated both the facts and the law. He violated professional and ethical standards of conduct. His egregious and reprehensible pattern of misconduct – coming after a trial in which the evidence against Mr. Tully was distorted by a haze of emotional testimony – infected Mr. Tully's trial with unfairness.

Prosecutors are subject to higher standards than other lawyers and have a duty to refrain from improper methods calculated to produce a wrongful conviction. Both the state and federal Constitutions, as well as state law, are violated when the prosecutor engages in pervasive misconduct. Here, the prosecutorial misconduct undermined Mr. Tully's right to a fair trial and to a reliable penalty phase determination under the Sixth, Eighth and

Fourteenth Amendments to the United States Constitution, and Article I of the California Constitution.

B. The Prosecutor Committed Numerous Acts of Misconduct During his Guilt Phase Arguments

1. Impugning the Integrity of the Defense

The prosecutor committed serious misconduct during his guilt phase arguments. During his opening argument, he impugned the integrity of defense counsel and the defendant by asking the jury: "Did you ever get the feeling [defense counsel] believed his client was telling the truth?" (RT 3181.)

Defense counsel objected to the misconduct. The court did not rule on the objection; instead, it instructed the jury to "disregard" the comment. The defense then moved for a mistrial. The court said that its admonishment "would serve the necessary cured purpose or any cured purpose that might be necessary." Defense counsel argued that it did not have that effect. (RT 3202, 3204.) Counsel was correct. The prosecutor's argument was misconduct and the trial court committed error in denying the motion for mistrial.

Arguing that counsel do not believe their client divides lawyer and client, and therefore is an extremely prejudicial type of misconduct. This Court has acknowledged that it is improper "for the prosecutor to argue to the jury that defense counsel does not believe in his client's defense. . . Such argument directs the jury's attention to an irrelevant factor and might in some contexts be quite prejudicial." (*People v. Thompson*

(1988) 45 Cal.3d 86, 112-113, citations omitted.)

Accordingly, the statements are misconduct if they do "not help the jury determine whether, under the evidence presented, defendant committed the charged crime." (*Id.* at p. 113, fn. 20.)

Here, the prosecutor's comments were directed only towards the demeanor and presentation of counsel and defendant, not to any relevant issue. Whether or not counsel believed Mr. Tully had no bearing on whether Mr. Tully committed the crime. The prosecutor was not commenting on the evidence, but instead focused his argument on counsel's, and Mr. Tully's lack of, integrity.

While this misconduct was reprehensible on its own, the trial court's response made matters worse. When admonishing jurors, the trial judge "should aim to make a statement to the jury that will counteract fully whatever prejudice to the defendant resulted from the prosecutor's remarks." (*People v. Bolton*, *supra*, 23 Cal. 3d at p. 215 fn. 5.) Merely telling the jurors to "disregard" the comment was insufficient to cure the harm caused by the argument. Even if the jury disregarded the prosecutor's comment, the trial court did not explain that it was not merely the comment that should ignored, but that it was irrelevant for the jury to consider whether counsel believed their client, or believed in the defense they were presenting. Without a specific admonition on this point, the jury would consider this irrelevant factor as a relevant consideration in determining the guilt or innocence of Mr, Tully.

This misconduct was reprehensible. It violated both the state and federal

constitutions and is not harmless under either the state standard set forth in *People v. Watson, supra,* 56 Cal.2d 818 (reasonably probable result would have been more favorable in absence of misconduct), or the federal standard set forth in *Chapman v. California, supra,* 386 U.S. at p. 24 (misconduct not harmless beyond a reasonable doubt.) Here, the misconduct was part of a pattern of "serious, blatant and continuous misconduct. (*People v. Hill, supra,* 17 Cal.4th at p. 844.) The challenged misconduct was repeated time and time again, and given greater force, by the remaining argument.

The prosecutor later argued that defense counsel were essentially trying to trick the jury, by arguing what they knew to be a lie.[71] (RT 3218-3220.) The prosecutor's improper argument that even the defense attorneys "don't believe their client" was highlighted rather than cured by his argument that defense counsel had no credibility.

2. Using Inflammatory Epithets to Describe the Defendant

This Court and the federal courts have held that "it is misconduct for a prosecutor to make comments calculated to arouse passion or prejudice." (*People v. Mayfield,* (1997) 14 Cal.4th 668, 803; *United States v. Koon* (1994) 34 F.3d 1416, 1445.) It is improper for the prosecutor to refer to the defendant as an "animal," (*Darden v. Wainwright, supra,* 477 U.S. at p. 179; *People v. Fosselman* (1983) 33 Cal.3d 572, 580), a "despicable beast," (*People v. Talle* (1952) 111 Cal.App.2d 650, 676, or a "mad dog" (*Miller v. Lockhart*

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[71] Mr. Tully is not asserting an additional claim of misconduct here. This incident simply demonstrates how the specifically asserted errors were prejudicial in the context of the prosecutor's argument as a whole.

(D.Ark. 1994) 861 F.Supp. 1425); to compare the defendant to a "primal man at his most basic" or "a dog in heat," (*People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; or to refer to the defendant as a "monster." (*People v. Sanders* (1995) 11 Cal.4th 475, 527-528.) This type of prosecutorial argument "deserves the condemnation it has received from every court to review it . . . ." (*Darden, supra* 477 U.S. at p. 179.)

At the beginning of his opening argument, the prosecutor improperly characterized Mr. Tully as "a despicable excuse for a man." (RT 3023.) The prosecutor continued to punctuate his argument with inflammatory name-calling, referring to Mr Tully as "a despicable individual" (RT 3161), "garbage" (RT 3173) and a "sucker." (RT 3218.)

The prosecutor's calculated vilification of Mr. Tully focused the jury on extraneous matters, rather than Mr. Tully's guilt or innocence. These statements directed the jury away from its function to determine whether the prosecution had established *the elements of the crime* beyond a reasonable doubt. The prosecutor argued that guilt could be established if the prosecution merely could show, beyond a reasonable doubt, that the defendant was "a despicable excuse for a man." In conjunction with the rest of his argument, this statement to the jury lessened the prosecution's burden of proof, reduced the force of the court's proper instructions, and injected passion, emotion and other improper and inflammatory elements into the jury's guilt phase determinations

3. Comments on Mr. Tully's Failure to Testify

In discussing the credibility of the witnesses, the prosecutor discussed Mr. Tully's taped statements to the police. These statements were introduced by the prosecution at

trial and played for the jury. The prosecutor argued:

> Now, a witness gets up there, what's the standard? The character of the witness's testimony. Character basically means does the story – is what they say, does it make sense? Is that the way it happens in the everyday world? The extent of the witness's ability to perceive, recollect and communicate, in other words could they actually see what they claim they saw and be where they were? I mean the existence or nonexistence of a bias, interest or motive, did they have a reason to say what they're saying?
>
> Previous statement consistent with testimony. Statement inconsistent with any part of his testimony. Existence or nonexistence of a fact testified to him. Attitude towards the action, admission of untruthfulness. There are a couple of others that you will be instructed on, but that's basically the application to the case. Those are the things you're supposed to consider with witnesses.
>
> *You do the same things with his taped statements.* Now, you just don't take the words– . . . . (RT 3194-3195.)

The defense objected to this statement as a comment on the defendant's failure to testify and requested an admonition. The court did not rule on the objection, but merely told the jury: "Well, the jury has been previously advised that this is argument. The arguments of the attorneys are not evidence." (RT 3195.)

An "it's only argument" admonition did nothing to cure the harm caused by the prosecutor's statements because there was no contention by the defense that the prosecutor was arguing facts not in evidence. Instead, his comments drew attention to Mr. Tully's failure to testify by instructing the jury to apply rules regarding sworn in-court testimony to Mr. Tully's taped post-arrest statements. The defense moved for a mistrial based on the prosecutor's comments. The court stated that it "did not believe there was a reference to the defendant's failure to testify," and denied the motion for a mistrial. (RT 3204.) The

trial court erred in denying the motion for mistrial and in allowing the argument to be made.

The prosecutor's argument was a comment on Mr. Tully's failure to testify. The prosecutor told the jury that when considering the veracity of Mr. Tully's post-arrest statements, it should consider "his demeanor while testifying," whether he had made prior statements consistent with his testimony, and the "[e]xistence or nonexistence of a fact testified to [by] him." (RT 3194.) In the absence of any sworn testimony by Mr. Tully, the jury would likely assume this argument that the prosecutor was referring to Mr. Tully's silence itself.

The jury considered his "demeanor while testifying" as referring to his refusal to testify, i.e. a demeanor that was trying to hide something from them. There were no statements consistent or inconsistent with Mr. Tully's testimony, because he did not testify. Nonetheless, his silence at trial was certainly "inconsistent" with his apparent prior willingness to talk about the case with the police. Similarly, because Mr. Tully did not testify as to any facts, the prosecution was essentially asking the jury to consider his silence as "testimony" inconsistent with their presentation of the facts. By highlighting these factors, which were not applicable unless the defendant *had* testified, the prosecutor told the jury to disbelieve and convict Mr. Tully because he gave the jurors no sworn testimony to consider.

In *Griffin, v. California* (1965) 380 U.S. 609, the Supreme Court recognized this guarantee would have little meaning if the prosecution were allowed to disparage a

defendant's decision not to testify. Because disparagement is "a remnant of the inquisitorial system of justice" (*Id.* at p. 614), the Fifth Amendment forbids "comment by the prosecution on the accused's silence." (*Id.* at p. 615.) "A prosecutorial statement is impermissible if it is manifestly intended to call attention to the defendant's failure to testify, or is of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." (*United States v. Mayans* (9th Cir.1994) 17 F.3d 1174, 1185.)

Although the *Griffin* case involved direct reference to the defendant's failure to testify, the decision has been interpreted as prohibiting the prosecution from so much as suggesting to the jury that it may view the defendant's silence as evidence of guilt. (*United States v. Robinson* (1988) 485 U.S. 25, 32, citing *Baxter v. Palmigiano* (1976) 425 U.S. 308, 319.) This Court has declared: "Under the rule in *Griffin,* error is committed whenever the prosecutor [ ] comments, either directly or indirectly, upon defendant's failure to testify in his defense." (*People v. Medina* (1995) 11 Cal.4th 694, 755.)

In *People v. Medina* (1974) 41 Cal.App.3d 438, the court of appeal found *Griffin* error where the prosecutor attempted to shore up the credibility of his own witnesses by pointing out to the jury that, unlike the defendant, they were put on the stand, cross-examined and subjected to charges of perjury. (*Id.* at p. 457.) These comments had urged the jury to believe the testimony of the prosecution witnesses because the defendants, unlike the prosecution witnesses, did not take the stand and subject themselves to cross-examination and to prosecution for perjury. The same was accomplished in Mr. Tully's

case. The jury was given the tools by which they were to measure the sworn testimony of the prosecution's witnesses, and then told to apply them to Mr. Tully's "testimony"-- his silence. Doing so bolstered the credibility of the prosecution witnesses, who did testify under oath, and weakened the credibility of the defense.

Because *Griffin* error implicates the constitutional right against self-incrimination, the prosecution bears the burden of proving it was harmless beyond a reasonable doubt. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) The state cannot do so in the present case. The prosecution evidence was not overwhelming and was circumstantial. Where it was weakest, the prosecutor relied on Mr. Tully's pretrial statements to fill in the considerable holes in the direct evidence that were key to obtaining a conviction for felony-murder. Because Mr. Tully did not testify and explain his post-arrest statements, the jury had no opportunity to observe his demeanor under oath, as they were instructed to do by the prosecutor. This argument drew the jury's attention to Mr. Tully's out-of-court statements and reminded it that he had not taken the stand, thus giving his taped statements even greater, but prejudicial, force.

The prosecutor's argument was misconduct under both state and federal law. The trial court should have granted the defense motion for a mistrial on this ground. The jury should not have been allowed to hear the argument. Because the misconduct was not harmless beyond a reasonable doubt, Mr. Tully's conviction and the special circumstance must be reversed.

4. Misstating the Law and Evidence and Arguing Facts Not in the Evidence

The prosecutor misstated both the law and the evidence presented at trial during his argument. He argued facts wholly outside the record. He referenced evidence that had specifically been excluded. This practice violated ethical rules and is misconduct. (*People v. Pinholster* (1992) 1 Cal.4th 865, 948.) "Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal." (5 Witkin & Epstein, *supra*, Trial, § 2901, p. 3550.) This Court has warned: "[S]uch statements tend [] to make the prosecutor his own witness – offering unsworn testimony not subject to cross-examination." (*People v. Hill*, *supra*, 17 Cal. 4th at p. 828.) This Court held "that such testimony, 'although worthless as a matter of law', can be 'dynamite' to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence." (*People v. Hill*, *supra*, 17 Cal. 4th at p. 828, citations omitted.)

Although prosecutors have wide latitude to draw inferences from the evidence presented at trial, mischaracterizing the evidence is misconduct. (*People v. Avena* (1996) 13 Cal.4th 394, 420.) The prosecutor may not ask the jury to draw inferences of fact based on mere suspicion, because suspicion is not evidence. (See *People v. Redmond, supra,* 71 Cal.2d at p. 755). A prosecutor's "vigorous" presentation of facts favorable to his or her side "does not excuse either deliberate or mistaken misstatements of fact." (*People v. Purvis* (1963) 60 Cal.2d 323, 343.) The right to a fair trial before an impartial jury is

violated where the prosecutor's argument manipulates or misstates the evidence, or implicates other specific rights of the accused. (*Darden v. Wainwright*, *supra,* 477 U.S. at p. 182.)

Ethical rules also prohibit the prosecutor from referring to facts not in evidence during argument. The National District Attorneys Association has standards that require prosecutors to base their arguments only upon the evidence or reasonable inferences drawn from the evidence. (Nat. Dist Attys. Assn., *National Prosecution Standards* (1991), std. 85.1.) The prohibition against using closing argument to introduce evidence is echoed in several other standards for trial conduct. (*Nat. Advisory Com. on Crim. Justice Standards and Goals, Courts* (1973) std. 4.15 [". . . Summations or closing statements by counsel should be limited to the issues raised by evidence submitted during trial . . . ."].) Moreover, a lawyer shall "not by subterfuge put before a jury matters which it cannot properly consider;"[72] "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence,"[73]; and "shall not seek to mislead the judge, judicial officer or jury by an artifice or false statement of fact or law."[74]

Here, prosecutor misstated the evidence and relied on facts outside the evidence

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[72] ABA Code of Prof. Responsibility, Ethical Considerations, EC 7-25 (hereafter cited as ABA Code.)

[73] ABA Code, Disciplinary Rules, DR 7-106C.

[74] Rule 7-105, Rules Prof. Conduct of the State Bar of Cal.

during argument. For example, when speculating about how the burglary occurred, the prosecutor told the jury that Ms. Olsson felt safe in her neighborhood. "She gets up. And, you know this a good neighborhood, I mean there are no bars on the windows."The defense objected. The court did not rule. It merely told the jury that argument was not evidence. (RT 3036.) Unrestrained by the trial court, the prosecutor argued the same thing again. "There aren't any bars . . . [the victim] felt secure in that home . . . . In that neighborhood, you answer the door . . . ." (RT 3037.)

No evidence had been presented concerning the safety of the neighborhood, or whether there were bars on Ms. Olsson's windows. There was no evidence that Ms. Olsson felt "secure" in her home. However, because of the special confidence the jury vests in the prosecuting attorney, "improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." (*Berger v. United States*, *supra,* 295 U.S. at p. 88.) The prosecutor's assertion that Ms. Olsson's neighborhood was safe was not only unproven but particularly prejudicial because he impermissibly used it to create the irrelevant image of Mr. Tully as someone who preyed on the victim's trust and vulnerability.

The prosecutor improperly referenced evidence that had been excluded regarding the victim's reputation at the hospital. The court held that questions about Ms. Olsson's reputation as a nurse were improper under Evidence Code § 1103. (RT 2773, 2790.) Despite this ruling, the prosecutor argued that Mr. Tully's defense was "an attempt to get [him] off the hook by smearing the good name and reputation of Sandy Olsson." (RT

3219.) The defense motion for a mistrial on that ground was denied. (RT 3223.)

The prosecutor misstated the law and attempted to confuse and mislead the jury as to their role and the importance of the jury instructions. He argued:

> The Court will instruct you that in order to convict the defendant of first degree murder, you don't have to unanimously agree as to which of these two theories get you to first degree murder, whether it's the killing as a result or during the course of a burglary, or this premeditated form of murder.
>
> Just like in the burglary where you can be divided as to why he entered, whether it was to steal, whether it was to rob, whether it was to do both. As long as you all agree that he had that intent or one of those intents, he's guilty of burglary.
>
> In this particular case, as long as you all agree that he either had all these things when he killed, or that it occurred during the course of a burglary– (RT 3084-3085.)

The defense objected. Once again, instead of ruling on the objection, the court merely told the jury it would instruct them at the conclusion of the arguments. (RT 3085.)

The argument was improper on several grounds. First, Mr. Tully was never charged with the offense of burglary, and thus the prosecutor's analogy to a burglary verdict was misleading. Second, there was no evidence presented of a robbery, and no robbery charge before the jury. Third, the prosecutor was conflating the elements of premeditated murder with burglary murder, and suggesting the mental state requirements were identical for both types of murder. Fourth, he did not tell them what "all these things" were that could lead them to a finding of premeditated, as opposed to felony, murder.

Prosecutor Burr manipulated and misstated the evidence concerning the victim's reputation, and the circumstances of the crime, violating Mr. Tully's federal constitutional

right to a fair trial before an impartial jury. He also misstated the law. As a result, the jury was misled. *See Darden v. Wainwright* (1986) 477 U.S. at 182. This misconduct was reprehensible and infected the trial with unfairness, resulting in a denial of due process. It not only violated Mr. Tully's constitutional rights under federal and state law, but also the ethical rules designed to assure prosecutorial integrity.

C. Cumulative Prosecutorial Misconduct during the Guilt Phase Arguments Requires Reversal of the Convictions and the Sole Special Circumstance

The prosecutor committed numerous acts of misconduct during his guilt phase arguments. He argued matters outside of the evidence, misstated the law and the facts, commented on the defendant's right not to testify, argued evidence that had been excluded, disparaged the integrity of the defense, and the defendant asserted defense counsel did not believe in their client, and disparaged Mr. Tully himself. He even told the jury to evaluate Mr. Tully's courtroom silence as his "testimony." This misconduct was reprehensible and pervasive. It violated state law and the rules of ethics, subverted the federal constitutional guarantees of a trial by jury, and "so infected the trial with unfairness as to make the resulting conviction a denial of due process." (*Donnelly v. DeChristoforo, supra,* 416 U.S. at p. 643.)

Where prosecutorial misconduct rises to the level of a state law violation, this Court must reverse if it is reasonably probable that a result more favorable to the defendant would have occurred absent the misconduct. (See *People v. Bolton, supra,* 23 Cal.3d at p. 214; *People v. Watson, supra,* 46 Cal.2d 818.) Where, as here, misconduct also violates

the federal Constitution, this Court must apply the *Chapman* harmless error standard *Chapman v. California*, *supra*, 386 U.S. at p. 24, and reversal is required unless the prosecution can prove the error was harmless beyond a reasonable doubt. Regardless of whether the misconduct is deemed to be misconduct under state or federal constitutional law, the prosecutor's misconduct prejudiced Mr. Tully and reversal is required.

While each act identified above is prejudicial by itself, when viewed together, and through the lens of the entire argument to the jury, they plainly require reversal. The evidence to establish the elements of the crimes was circumstantial and insubstantial. The prosecutor repeatedly inflamed the passions of the jury, and injected the irrelevant elements of sympathy for the victim and outrage against the defendant at the guilt phase. His denigration of Mr. Tully and defense counsel undermined counter arguments made by the defense. His misconduct diverted the jury from considering the evidence and instead focused their attention on irrelevant but moving factors, factors that convinced them to find Mr. Tully guilty regardless of the material evidence.

Moreover, the misconduct was part of a larger argument designed to improperly and prejudicially influence the jury. Neither the trial court's instructions nor the defense argument was sufficient to ameliorate the harm caused by the prosecutor's misconduct because the prosecutor, in the remainder of his argument disarmed the instructions, and undermined the arguments of defense counsel.[75] For example, the prosecutor negated

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[75] Mr. Tully is not asserting an additional claim of misconduct here. This incident simply (continued...)

defense counsel's proper reminder that sympathy and passion were not relevant to the jury's guilt phase deliberations. He argued that the jury should disregard defense arguments because the defense attorneys were just "laying" a "guilt trip" on the jurors. He encouraged the jury to express its outrage and passion. (RT 3170, RT 3173-3174.)

When the defense had earlier raised objections that the prosecutor was misstating the law, the court merely told the jury it would be giving them instructions at the conclusion of argument. These instructions were rendered meaningless in the face of the prosecutor's contentions that it was he, and not the court, who really understood the law. He told the jury it could ignore the very instructions that the judge said it would provide to address the prosecutor's misstatements. (RT 3041-3043.) He referred to the instructions as "technicalities" (RT 3070), that might further confuse the jury. (RT 3050, 3051, RT 3078, 3083.)

The prosecutor's argument emasculated any power the court's already insufficient admonitions might have had by inviting the jury to disregard the court's instructions at their whim. The prosecutorial misconduct was reprehensible and pervaded the whole trial. It was so egregious as to violate Mr. Tully's right not to testify and his rights to due process, a fair trial, and to fair and reliable penalty verdict, in violation of state law, Article 1 of the California Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments

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[75](...continued)
demonstrates how the specifically asserted errors were prejudicial in the context of the prosecutor's argument as a whole.

to the United States Constitution. In light of this, and the fact that evidence against Mr. Tully was not substantial, his convictions and the special circumstance finding must be reversed.

X. THE JURY DID NOT UNANIMOUSLY DETERMINE EACH ESSENTIAL FACT BEYOND A REASONABLE DOUBT

Mr. Tully was found guilty of first-degree murder by a jury that failed to unanimously find each and every element of the charges against him to be true beyond a reasonable doubt. The jury also failed to unanimously find each fact that subjected Mr. Tully to a greater punishment to be true beyond a reasonable doubt. The failure to require a unanimous jury verdict on the theory of guilt or on the target crime underlying felony-murder and the burglary-murder special circumstance violated Mr. Tully's rights to due process, a trial by jury, equal protection, and a reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I of the California Constitution, resulting in a miscarriage of justice.

A. The Jury Must be Unanimous on the Theory of First-Degree Murder

The prosecutor argued Mr. Tully was guilty under felony-murder based on burglary and premeditated murder. The Information did not specify the theories of first-degree murder charged. It did not separately charge Mr. Tully with felony-murder, burglary-murder or even burglary. It did not specify the nature of the underlying intended felony for the burglary-murder.

At trial, the jury was instructed that it could find Mr. Tully guilty of first-degree murder if it found that the murder was willful, deliberate, and premeditated (CT 2100) *or* if it found the murder occurred during a burglary. (CT 2107.) The jury was never instructed that it had to unanimously find all of the elements of either premeditated murder

or felony-murder to be true beyond a reasonable doubt before finding Mr. Tully guilty of first-degree murder. The jury was given a general verdict form, asking only for a verdict on first-degree murder. The form did not require the jury to reach a verdict on whether the killing was felony-murder or premeditated murder.

By using these instructions and requiring only a general verdict, the trial court allowed Mr. Tully to be convicted without a unanimous jury finding that each element of felony-murder or premeditated murder was true beyond a reasonable doubt. This procedure violates the bedrock principle that all elements of an offense must be found beyond a reasonable doubt by the trier of fact, (*Sandstrom v. Montana* (1979) 442 U.S. 510), by a unanimous jury. (*See* e.g., *Burch v. Louisiana* (1979) 441 U.S. 13, 139.

In California, defendants have a constitutional right to trial by a unanimous twelve-person jury that has found every element of the crime alleged to be true beyond a reasonable doubt. (See Cal. Const, Art I § 16; see also *People v. Wheeler* (1978) 22 Cal.3d 258, 265; *People v. Collins* (1976) 17 Cal.3d 687, 693.) This fundamental State right is protected under the due process and equal protection clauses of the Fourteenth Amendment. (See generally *Hicks v. Oklahoma* (1980) 447 U.S. 343; *Bush v. Gore* (2000) 531 U.S. 98; *Fetterly v. Paskett* (9th Cir. 1993) 997 F.2d 1295.)

The Supreme Court has emphasized the importance of the Sixth Amendment right to a jury trial in the context of factual findings that must be pled and determined beyond a reasonable doubt by a jury. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490.) *Apprendi* was based on the due process requirement that each element of a crime be

proven beyond a reasonable doubt. *(In re Winship* (1970) 397 U.S. 358, 364.) It was also based on the Sixth, which requires a jury determination that the defendant is guilty of *every* element of the crime with which he is charged, beyond a reasonable doubt." (*Apprendi*, 530 U.S. at 476-477 & n.3.)

The Supreme Court held it unconstitutional for a State to increase a defendant's penalty based on a fact that was not properly found by the jury. (*Apprendi*, *supra,* 530 U.S. at p.490; *Blakely,*542 U.S. 296, 124 S. Ct. at p. 2536.) These principles were reemphasized and expanded in *Ring v. Arizona* (2002) 536 U.S. 584, 589. (See also, *United States v. Booker* (2005) 125 S. Ct. 738.)

A State cannot base an increased punishment on facts not properly found by a jury. Basing a conviction itself on undetermined facts is a worse violation of the Constitution. A defendant can suffer no greater "increase in penalty" than that which occurs when the jury finds him guilty of first-degree murder. He begins with a presumption of innocence and is subject to no penalty whatsoever. He ends with a jury finding that requires a life sentence. (*See e.g. United States v. Booker*, 125 S.Ct. at p.748 discussing *Apprendi,* 530 U.S. 466 at p 490 ["As a matter of simple justice, it seemed obvious that the procedural safeguards designed to protect Apprendi from punishment for the possession of a firearm should apply equally to his violation of the hate crime statute."].) Every element of the charges alleged by the State is an essential "fact" that subjects the defendant to a greater punishment. Accordingly, the requirements of *Apprendi* and its progeny must apply to the facts underlying the conviction, as well as to "sentencing" facts.

California courts have held that a unanimity instruction is required where "the jurors could otherwise disagree which act a defendant committed and yet convict him of the crime charged." *(People v. Gonzales* (1983) 141 Cal.App.3d 786, 791; see *People v. Dellinger* (1984) 163 Cal.App.3d 284, 300-302. This Court has held that a unanimity instruction is not required where a single charged offense is submitted to the jury on alternative "legal theories" of culpability, i.e. first degree murder based on alternate theories of felony-murder and premeditated killing. This Court has held that it is sufficient that each juror is convinced beyond a reasonable doubt that the defendant committed the offense as "defined by statute." (*People v. Milan* (1973) 9 Cal.3d 185, 195.)

The "stated" distinction between "the act a defendant committed" and "legal theories of culpability" cannot subvert the right to an unanimous jury. If two "theories" have different "elements," then they are not simply different "theories," but – by definition – different crimes. "Calling a particular kind of fact an 'element' carries certain legal consequences." (*Richardson v. United States* (1999) 526 U.S. 813, 817. The only way to determine if two crimes are the same is by comparing their elements. (See *Blockberger v. United States* (1932) 284 U.S. 299.)[76]

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact that the other does not. (*Id.* at p. 304, citing *Gavieres v. United*

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[76] The elements of a crime also determine which facts must be proved to a jury beyond a reasonable doubt. (*Monge v. California* (1998) 524 U.S. 721, 738 (dis. opn. of Scalia, J.); see *People v. Sakarias* (2000) 22 Cal.4th 596, 623.)

States (1911) 220 U.S. 338, 342.)

In California, premeditated murder and felony-murder are defined by separate statutes. "[E]ach . . . requires proof of an additional fact that the other does not." (*Blockberger*, *supra*, at p. 304.) Premeditated murder requires proof of malice, premeditation and deliberation - felony-murder does not. Felony-murder requires the commission or attempted commission of a felony and the specific intent to commit that felony - premeditated murder does not. (Pen. Code, §§ 187 & 189; *People v. Hart* (1999) 20 Cal.4th 546, 608-609.) Since the elements of premeditated murder and felony-murder are different, they are different crimes. (*United States v. Dixon* (1993) 509 U.S. 688, 696.)

Prior to *Apprendi* and *Blakely*, a plurality of the Supreme Court had held that it was constitutional for the State of Arizona to require only a general verdict for first-degree murder based on either premeditation or felony-murder without jury unanimity as to which theory applied. (*Schad v. Arizona* (1991) 501 U.S. 624, 645 (plurality opn.)) The key to *Schad* was that premeditation and the commission of a felony were not independent elements of first-degree murder under Arizona law; rather, they were merely alternative means of satisfying the *mens rea* element of first-degree murder. (*See id.* at pp. 632, 636-637, 639.) Under the Arizona law, premeditated murder and felony-murder were the same crime with the same elements.

Under California law – unlike under the Arizona law in *Schad* - felony-murder and premeditated murder have different elements. They cannot be the same "crime." California courts have characterized malice and premeditation as an element of first degree

premeditated murder. (See e.g., *People v. Thomas* (1945) 25 Cal.2d 880, 899 [premeditation and deliberation are essential elements of premeditated first degree murder] This Court has recognized that it was the intent of the Legislature to make premeditation an element of first-degree murder. (*People v. Stegner* (1976) 16 Cal.3d 539; *People v. Thomas*, *supra*, 25 Cal.2d at p. 900.) *People v. Albritton* (1998) 67 Cal.App.4th 647, 654, fn. 4 [malice and premeditation are the ordinary elements of first degree murder].) The specific intent to commit the underlying felony likewise has been characterized as an element of first-degree felony-murder. *(People v. Jones* (2003) 29 Cal.4th 1229, 1257-1258; *id.* at p. 1268 (conc. opn. of Kennard, J.).)

This Court has explained that "[i]n every case of murder other than felony-murder the prosecution undoubtedly has the burden of proving malice as an element of the crime" – but that "as a matter of law malice is not an element of felony murder." (*People v. Dillon* (1983) (plurality opn.) 34 Cal.3d 441, 476 fn 23, 477 ["the two kinds of first degree murder in this state differ in a fundamental respect: in the case of deliberate and premeditated murder with malice aforethought, the defendant's state of mind with respect to the homicide is all-important and must be proved beyond a reasonable doubt; in the case of first degree felony murder it is entirely irrelevant and need not be proved at all"]. This Court has maintained that "the two forms of murder [premeditated murder and felony-murder] have different elements." (*People v. Nakahara* (2003) 30 Cal.4th 705, 712; emphasis added; see also *People v. Box* (2000) 23 Cal. 4th 1153, 1212 [noting that the elements underlying felony-murder and premeditated murder differ].)

More recently, this Court has stated that felony-murder and premeditated murder "are not distinct crimes" for purposes of unanimity jury instructions. (*Nakahara*, 30 Cal.4th at p.712; see also *Box,* 23 Cal.4th at p.1212.) This Court has found that neither *Schad* nor *Apprendi* require that felony-murder and/or premeditated murder be specifically charged, nor that the jury find unanimously and beyond a reasonable that the defendant was guilty of either felony-murder or premeditated murder. *(Id.* at pp. 712-713.)

The difference between premeditated murder and felony-murder is not based on "legal theories," but instead is factually based. The "relevant inquiry" for determining whether the Constitution has been violated "is one not of form, but of effect." *Apprendi*, at p. 494. The fact that the legislature or the state court may characterize what are really two distinct crimes as one crime is not dispositive. Where, as here, the two crimes have different material elements, the label attached by the state is meaningless.

As the Supreme Court recognized, basing the right to a jury finding solely on how the state has chosen to characterize a particular fact or particular offense "would leave the State substantially free to manipulate its way out of *Winship*. . . ." (*United States . v. Jones*, at p. 241). This Court has, in effect, done just that by finding that felony-murder and premeditated murder are but different "legal theories" for first-degree murder. The members of the jury could disagree which acts a defendant committed and yet still convict him of the generic crime charged, i.e. first-degree murder.

Having set forth the elements of felony-murder and premeditated murder, the State may not remove the burden of proving one of those elements from the prosecution

without violating the defendant's rights. Despite this principle of constitutional law, each juror in the instant case was allowed to find different factual elements to be true under different "theories" presented by the State and still vote guilty for the all-encompassing first-degree murder charge. The jury was never required to unanimously find beyond a reasonable doubt each element of the "crime" for which it found Mr. Tully guilty.

Mr. Tully could have been convicted of two factually distinct offenses, premeditated and deliberate murder or felony-murder. The two alternative means by which the jury may have found petitioner guilty are "so disparate as to exemplify two inherently separate offenses." (*Schad v. Arizona*, *supra*, 501 U.S. at p. 693.) In California , premeditated murder and felony-murder are separate crimes, each containing a separate set of elements from the other. Mr. Tully was entitled to a unanimous jury verdict as to which of those different crimes he committed.[77]

Importantly, because this is a capital case, the Sixth, Eighth, and Fourteenth Amendments required a unanimous verdict. The purpose of the unanimity requirement is to insure the accuracy and reliability of the verdict. (*Brown v. Louisiana* (1980) 447 U.S.

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[77] This Court has noted that, "in an appropriate case" the trial court may protect the record by requiring the jury to explain, in special findings, which of several alternate theories was accepted in support of a general verdict, but only where the defense requests such special findings. (*People v. Carter* (2003) 30 Cal.4th 1166, 1200-1201 [citing *People* v. *Arias*, *supra*, at p. 158].) The Supreme Court's holdings in *Apprendi*, and *Blakely* dictate that where alternate theories of an offense are based on differing elements, the trial court must *sua sponte* instruct the jury to return special verdicts indicating it has found all elements of one theory to be true beyond a reasonable doubt.

323, 331-334; *People v. Feagley* (1975) 14 Cal.3d 338, 352.) There is a heightened need for reliability in the procedures leading to the conviction of a capital offense (*Murray v. Giarratano* (1989) 492 U.S. 1, 8-9; *Beck v. Alabama* (1980) 447 U.S. 625, 638).

As the Supreme Court has explained: "The jury [cannot] function as circuitbreaker in the State's machinery of justice if it [is] relegated to making a determination that the defendant at some point did something wrong." (*Blakely,* 124 S. Ct. at p.2539.) "The Framers would not have thought it too much to demand that, before depriving a man [] of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbours.'" (*Id,* 124 S. Ct. at p. 2543 *quoting* 4 Blackstone, Commentaries, at 343; *see also Booker,* 125 S. Ct. at 752.) Mr. Tully was not provided this required "unanimous suffrage" before he was deprived of his liberty.

It was constitutional error for the trial court to fail to instruct the jury that it had to agree unanimously on whether appellant had committed a premeditated murder or a felony-murder. Because the jurors were not required to reach unanimous agreement on each and every element of first-degree murder, there is no valid jury verdict on which harmless error analysis can operate. The failure to instruct was a structural error and therefore reversal of the entire judgment is required. *(Sullivan v. Louisiana* (1993) 508 U.S. 275, 280.)

B. The Jury Must Be Unanimous on the Target Felony for Burglary-Murder and the Burglary-Murder Special Circumstance

1. Lack of Unanimity on Target Felony for Burglary-Murder

Mr. Tully was convicted of first-degree murder. The prosecutor argued alternative theories concerning the target felony necessary to sustain a conviction based on a felony-murder burglary theory. The prosecutor argued that Mr. Tully entered the house with an intent to steal or with an intent to rape. However, neither theft nor rape were charged as separate offenses in the information. As a result the jury was not required to unanimously find, beyond a reasonable doubt, that Mr. Tully had an intent to steal when he entered Ms. Olsson's house. Nor was the jury required to unanimously find, beyond a reasonable doubt that Mr. Tully had an intent to commit rape when he entered the house.

Due process requires that all elements of an offense be found by a unanimous jury beyond a reasonable doubt. (*In re Winship, supra,* 397 U.S. at p. 364.) Under California law, the intended acts underlying a burglary-murder are "elements" that must be proven beyond a reasonable doubt. This Court has held that:

> where the evidence permits an inference that the defendant at the time of entry intended to commit one or more felonies and also an inference that his intent was merely to commit one or more misdemeanors or acts not punishable as crimes, the court must define 'felony' and must instruct the jury which acts, among those which the jury could infer the defendant intended to commit, amount to felonies. (*People v. Failla* (1966) 64 Cal.2d 560, 564.)

Accordingly, the trial courts have a duty to define the so-called target offenses and instruct on their elements. (E.g., *People v. Williams* (1975) 13 Cal.3d 559, 563; *People v.*

May (1989) 213 Cal.App.3d 118, 129; *People v. Smith* (1978) 78 Cal.App.3d 698, 708-711.) Instruction on the elements of a target offense is so essential that this Court has held that the trial court, on its own initiative, must give instructions to the jury identifying and defining the target offense(s) that the defendant allegedly intended to commit upon entry into the building." (*People v. Prettyman* (1996) 14 Cal.4th 248, 268.)

Here, the jury here was instructed as required by these cases, but was not instructed that it must unanimously find beyond a reasonable doubt that Mr. Tully had an intent to steal or an intent to rape when he entered the house. Because Mr. Tully was not charged with rape or theft, the jury was not required to unanimously find that he intended to commit either offense. This Court cannot conclude that the jury unanimously found either an intended rape or an intended theft beyond a reasonable doubt. Nor can this court conclude that the jury properly found all facts essential for a first-degree murder based on burglary-murder.

The jury was not instructed that it had to be unanimous as to the intended "target" felony underlying the murder conviction based on burglary-murder. The failure to require juror unanimity on the elements of burglary-murder violated Mr. Tully's Fifth, Sixth and Fourteenth Amendment rights to due process, a jury trial, and the Eighth Amendment right to a fair and reliable penalty determination.

2. Lack of Unanimity on Target Felony for the Burglary-Murder Special Circumstance

In *Jones v. United States* (1999) 526 U. S. 227, 243, fn. 6, the Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." In *Apprendi v. New Jersey, supra,* 530 U.S. at p. 476, the Supreme Court held "[t]he Fourteenth Amendment commands the same answer [as that in *Jones*] in this case involving a state statute." The 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 pled in the charging document, submitted to the jury and proved unanimously beyond a reasonable doubt. (*Id.* at p. 478.)

In *Ring v. Arizona*, the Supreme Court affirmed *Jones* and *Apprendi* and made the Constitutional principles applicable to capital cases. "We see no reason to differentiate capital cases from all others in this regard." *Ring, supra,* 536 U.S. at p. 589. Accordingly, the Supreme Court held that Arizona's death penalty scheme, under which a judge sitting without a jury makes factual findings necessary to impose the death penalty, violated the defendant's constitutional right to have the jury determine, beyond a reasonable doubt, any fact that may increase the maximum punishment. In *Apprendi*, the Supreme Court reasoned : "If a State makes an increase in a defendant's authorized punishment

contingent on the finding of a fact, *that fact --no matter how the State labels it*--must be found by a jury beyond a reasonable doubt." (*Apprendi,* 530 U.S. at pp. 482-483, emphasis added.)

Once again in *Ring,* the Supreme Court reiterated that capital defendants, no less than non-capital defendants are entitled to a jury determination of *any fact* on which the legislature conditions an increase in their maximum punishment. (*Ring v. Arizona,* 536 U.S. at p. 589.)

> The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed the fact-finding necessary to increase a defendant's sentence by two years, but not the fact-finding necessary to put him to death. (*Ring, supra,* at p. 609.)

As Justice Scalia, in his concurring opinion, stated:

> I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives - whether the statute calls them elements of the offense, sentencing factors, or Mary Jane - must be found by the jury beyond a reasonable doubt.

(Id., at p. 609.)

Prior to *Apprendi* and *Ring*, this Court held that the felony underlying a special circumstance of felony-murder need not be pled in the information nor that a defendant actually be convicted of that felony. (*People v. Morris* (1988) 46 Cal.3d 1, 16.) This Court has held that where burglary, burglary-murder or a burglary-murder special circumstance is charged, the intent to commit *any* felony (or theft) suffices and the jury need not unanimously decide, or even be certain, which felony the defendant intended as

long as it finds beyond a reasonable doubt that he intended *some* felony. (*People v. Russo, supra*, 25 Cal.4th at pp. 1132-1133; *People v. Failla supra,* 64 Cal.2d at pp. 567-569.)

Rather than requiring that the jury find unanimously, and beyond a reasonable doubt, the elements of the intended, or "target," felonies of burglary-murder and the burglary-murder special circumstance, this Court has held that it is sufficient that the jury unanimously finds a burglary, based on any combination of facts, was committed.. (*People v. Russo, supra,* 25 Cal.4th at pp. 1132-1133.) This Court has stated that because a burglary may be based on an intent to commit any felony or theft, the jury need not be unanimous in its finding of a specific target felony underlying the burglary. *(Ibid.)* Under current Supreme Court law, this line of cases is wrong and must be reversed.

Under California law, a felony-murder is a special circumstance that authorizes the prosecution to seek a death sentence. Commission of a felony-murder is required before the jury can find the felony-murder special circumstance true. The special circumstance finding, in turn, is the next step required, beyond a verdict of guilt on a theory of felony-murder, before a jury can impose a sentence greater than that authorized for a non-felony first-degree murder. The special circumstance finding renders a murder defendant subject to a higher sentence. This Court has found that:

> . . . . the facts that increase the punishment for murder of the first degree--beyond the otherwise prescribed maximum of life imprisonment with possibility of parole to *either* life imprisonment without possibility of parole *or* death-- already have been submitted to a jury (and proved beyond a reasonable doubt to the jury's unanimous satisfaction) in connection with at least one special

circumstance, prior to the commencement of the penalty phase. (See § 190.2.) (*People v. Griffin* (2004) 33 Cal4th 536, 594.)

The constitutional protections mandated by *Apprendi, Ring* and their progeny, fully apply to the murder conviction and the special circumstance finding because they represents the determination of a fact, or facts, that subject the defendant to increased punishment. Pursuant to these cases, the facts underlying the special circumstance allegation had to be pled in the information in this case. Further, Mr. Tully was entitled to a unanimous jury finding that *all* facts underlying the burglary-murder special circumstance had been proven beyond a reasonable doubt

Here, the jury was instructed on the elements of rape and theft. It also was essentially instructed that it could convict on a burglary murder theory and find the special circumstance true if it unanimously found beyond a reasonable doubt that Mr. Tully had *either* an intent to steal or to rape when he entered the house. However *Apprendi* requires that *any* fact that increases the sentence beyond the maximum, *"no matter how the State labels it*--must be found *by a jury* beyond a reasonable doubt." (*Apprendi.* 530 U.S. at pp. 482-83, emphasis added.) Given that burglary-murder is a prerequisite for the imposition of a death sentence, and because the "elements" of the burglary-murder special circumstance include all elements of the "target offenses," those offenses had to be pled in the information, proved and unanimously found by a jury beyond a reasonable doubt.

The "facts" that subjected Mr. Tully to an increased sentence in this case were that

the murder occurred during the course of a burglary. Each element of burglary therefore had to be found unanimously and beyond a reasonable doubt by the jury. The jury was instructed in this manner. In addition to an entry into a building, burglary requires a finding of *either* an intent to steal, *or* an intent to commit a felony. (CT 2095.) The jury however, was expressly told that it *did not* need to make a unanimous, beyond a reasonable doubt finding that either of these specific elements were true. (CT 2106.)

Under *Ring,* there is no distinction between elements requiring the commission of a certain act, and elements requiring the defendant to entertain a specific mental state. In fact, it is the specific mental state elements that distinguish premeditated murder, which does not carry the possibility of a death sentence, from felony-murder, which does subject the defendant to the death penalty. The fact that the special circumstance at issue here was felony-murder does not change this analysis.

The specific felonies underlying a felony-murder or felony-murder special circumstance, be they rape-murder, kidnap-murder or burglary-murder, must specifically be pled by the prosecutor and found true by a unanimous jury. (See CALJIC 8.80.1, cite CT). For example, a defendant charged with both a rape-murder and a kidnapping-murder special circumstance is entitled to a unanimous finding as to the truth of each of these special circumstances. It would be unconstitutional for the jury to subject the defendant to life without parole or a death sentence if they could not all agree that the elements of *at least* one of these underlying felonies was satisfied beyond a reasonable doubt.

This Court has said that "the requirement of unanimity as to the criminal act is intended to eliminate the danger that the defendant will be convicted even though there is no single offense which all the jurors agree the defendant committed." (*People v. Russo*, *supra,* 25 Cal.4th at p. 1132.)

> The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a "particular crime" (*People v. Diedrich*, *supra*, 31 Cal.3d at p. 281); it would be unacceptable if some jurors believed the defendant guilty of one crime and other jurors believed her guilty of another. But unanimity as to exactly how the crime was committed is not required. (*Id.* at p. 1134.)

With regard to the substantive offense of burglary-murder, however, this Court has held that:

> an entry with an intent to commit oral copulation is [not] in any sense a different crime from the same entry with an intent to commit, for example, felonious assault. In both cases the conduct falls within the statutory definition of burglary, "where the crime is complete when the one accused has entered the house of another with intent to commit *any* felony." (Italics in original.) (*People v. Morlock* (1956) 46 Cal.2d 141, 146 [292 P.2d 897].) (The gravamen of a charge of burglary is the act of entry itself, and "An entry may be made with intent to commit two or more felonies, but that would constitute only one burglary." (*People v. Hall* (1892) 94 Cal. 595, 597 [30 P. 7].) (*People v. Failla, supra,* 64 Cal.2d at p. 568.)

After *Ring* and *Blakely,* however, the distinction this Court has made between findings of the underlying intent to support a finding of burglary-murder and "criminal acts" that comprise an offense cannot withstand constitutional scrutiny. Under *Ring* and subsequent cases, where sentencing factors are at issue, it is not unanimity on the commission of *any* crime that is required, but unanimity on the specific facts that comprise that crime. "Capital defendants [] are entitled to a jury determination of *any fact* on which the

legislature conditions an *increase* in their maximum punishment." (*Ring,* 536 U.S. at p.589; emphasis added.)

The Constitution requires that all facts supporting an increase in punishment be proven unanimously and beyond a reasonable doubt. In this case, the facts comprising the burglary-murder special circumstance included, *inter alia*, *either* an intent to commit a theft, or an intent to commit rape. These elements are not fungible. Unlike a burglary predicated on varying violent felonies, or even varying felonies of any nature, there is a vast difference between an intent to commit theft and an intent to commit a sexual assault or rape. While both intents are sufficient to establish the crime of burglary or the special circumstance of burglary-murder, when relied on to aggravate a non-capital offense into a capital one, the specific intent takes on a much greater constitutional significance. The special circumstance finding not only subjects the defendant to greater punishment, but is also weighed by the jury in deciding the sentence.

The jury is told to consider the "existence of any special circumstances found to be true" in determining the aggravating and mitigating factors to be weighed during its penalty phase deliberations. (Section 190.3(a).) Where, as here, the burglary-murder special circumstance is predicated on two widely disparate mental states, such as a non-felonious intent to commit a petty theft, and an intent to commit a forcible sexual act, the underlying mental state becomes an essential fact in the sentencing decision. As such, the requisite mental state underlying the special circumstance is entitled to all the constitutional protections that apply to other sentencing factors under *Apprendi, Ring,* and

subsequent cases interpreting them.

The facts increasing Mr. Tully's authorized punishment from a life sentence to a death sentence were neither pled nor found beyond a reasonable doubt by a unanimous jury. His rights under the Fifth, Sixth, Eighth and Fourteenth Amendments were violated. These omissions, like instructional errors omitting the elements of an offense from a jury's consideration, infect the very structure of the capital sentencing process and can never be harmless. (*Cage v. Louisiana* (1990) 498 U.S. 39; *Sullivan v. Louisiana* (1993) 508 U.S. 275.) Accordingly, the murder conviction and special circumstance finding in this case must be reversed.

C. Conclusion

Mr. Tully was entitled to a unanimous jury finding on every element of the offenses with which he was charged. He was also entitled to a unanimous jury finding on every fact that subjected him to a greater penalty. Because the jury was not instructed to make unanimous findings as to every element of first-degree murder, or as to every fact on which the special circumstance was based, reversal of both his murder conviction and the special circumstance finding is required.

XI. ERRORS IN THE GUILT PHASE JURY INSTRUCTIONS REQUIRE REVERSAL OF MR. TULLY'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE

The guilt phase of Mr. Tully's trial was marred by prejudicial instructional errors. As a result, the jury did not properly understand and apply the correct law in determining whether Mr. Tully was guilty of the offenses and the sole special circumstance. The instructions as a whole were ambiguous, incomplete and improper. The errors violated Mr. Tully's rights to due process, to a fair trial, to a properly instructed jury, and to a non-arbitrary and reliable capital sentencing process under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article I, of the California Constitution.

A. The Trial Court Erred in Giving "Consciousness of Guilt" Instructions

1. The Consciousness of Guilt Instructions Were Inherently Contradictory and Misleading

The prosecution case was based on circumstantial evidence. At the prosecution's request, the jury was informed that there were three bases for inferring guilt from Mr. Tully's alleged actions after the crime. The jury was instructed it could infer guilt if Mr. Tully 1) made willfully false statements, 2) destroyed or concealed evidence, and/or 3) fled after commission of the crime. (See CALJIC 2.03, CALJIC 2.06, CALJIC 2.52.) The three instructions, separately and together, were incomplete and misleading and lessened the prosecution's burden of proof with respect to the charges against Mr. Tully. Because of the improper charge to the jury, reversal of Mr. Tully's convictions and the special circumstance is required.

Over defense objection, the jury in this case was read the following three instructions:

> The flight of a person immediately after the commission of a crime or after he's accused of a crime is not sufficient in itself to establish his guilt; but, is a fact which, if proved may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine. (CT 2081, CALJIC 2.52)
>
> * * * *
>
> If you find that before this trial the defendant made a willfully false or deliberately misleading statement concerning the crimes for which he is now being tried, you may consider such statement as a circumstance tending to prove a consciousness of guilt, but it is not sufficient of itself to prove guilt, and its weight and significance, if any, are matters for your determination. (CT 2071, CALJIC 2.03.)
>
> * * * *
>
> If you find that the defendant attempted to suppress evidence against himself in any manner such as by destroying evidence or by concealing evidence, such attempts may be considered by you as a circumstance tending to show a consciousness of guilt. However, such evidence is not sufficient in itself to prove guilt, and its weight and significance, if any, are matters for your consideration. (CT 2072, CALJIC 2.06.)

Where a case is based on circumstantial evidence, the defendant's conduct following the crime often becomes critical. Here, the erroneous instructions tipped the scales towards an improper conviction based on this post-crime evidence alone.

Each instruction quoted above contains very similar misleading language regarding the weight to be given post-crime evidence of flight, of making false statements, or of concealing evidence. The "flight" instruction told the jury that the defendant's flight "may be considered . . . in deciding the question of his guilt or innocence." (CALJIC

2.52.) The "false statement" and "concealing evidence" instructions told the jury that defendant's false statement or concealing or destroying evidence are circumstances "tending to show consciousness of guilt." (CALJIC 2.03; CALJIC 2.06.)

All three instructions end with the qualification that the weight and/or significance of this evidence is a matter for the jury's "determination" (CALIC 2.52; CALJIC 2.03) or "consideration" (CALJIC 2.06), although they also inform the jury that guilt may not be inferred from the specific type of evidence mentioned in the instruction alone. The concluding statement in each instruction expressly contradicts the earlier language telling the jury that guilt may not be established solely by evidence of post-crime "consciousness of guilt" activity. If the jury is free to attach whatever weight and significance it chooses to evidence of the defendant's flight, making false statements, and/or concealing evidence, then there is a significant likelihood that it will be misled as to its obligations and will base its guilt determination on this evidence alone, even where the other evidence does not establish guilt beyond a reasonable doubt. The language telling the jury not to base a finding of guilt solely on evidence of flight, or false statements, or concealing evidence is negated by the later, contradictory language. It is likely the jury will give great weight to this evidence, finding the defendant guilty even though the prosecution has failed to prove guilt beyond a reasonable doubt

This problem is heightened here, where there were three different types of evidence and three different instructions relied on by the prosecutor to try to prove "consciousness of guilt." The jury was not instructed on how to weigh these types of evidence together.

While the "flight" instruction tells the jury to consider "other facts" in determining guilt, it does not tell the jury those "other facts" cannot be the other facts suggesting "consciousness" of guilt. (CALJIC 2.52.) CALJIC 2.03 or 2.06 do not instruct the jury to consider other facts at all.

Significantly, the jury was not instructed that even if there was evidence of flight, false statements *and* concealing evidence, that evidence was still insufficient to establish guilt. This Court has held that specific forms of consciousness of guilt are not sufficient to prove guilt. (*People v. Holloway* (1999) 33 Cal.4th 96, 142. Because "consciousness of guilt can be as consistent with innocence as it is with guilt," (*State v. Giant* (Mont. 2001) 37 P.3d 49, 59), this evidence by itself is insufficient to support a conviction. (*Ibid.)* It thus follows that any consciousness of guilt evidence, even that involving combined acts, is not sufficient to prove guilt.

Here, the instructions led the jury to convict Mr. Tully based solely on the evidence suggesting he fled the crime scene, made false statements about his involvement, and attempted to conceal or destroy evidence. Accordingly, the "consciousness of guilt" instructions lessened the prosecution's burden to prove all elements of the crimes beyond a reasonable doubt. They were so ambiguous and misleading that Mr. Tully's right to due process was violated as well. *Estelle v. McGuire* (1991) 502 U.S. 62, 72.)

2. The "Flight," "Willfully False Statement" and "Destruction of Evidence" Instructions Were Improper "Pinpoint" Instructions

Additionally, the three "consciousness of guilt" instructions were improperly argumentative because they isolated and illuminated the prosecution evidence and theory of the case. When instructing the jury, a trial judge may not single out and give undue emphasis to particular evidence, even though the instruction states the correct principle of law. (See *People v. Harris* (1989) 47 Cal. 3d 1047, 1098, fn 31; *People v. Wright* (1988) 45 Cal 3d 1126, 1135 [pinpoint instruction is improperly argumentative if it directs the jury's attention to specific evidence and "impl[ies] the conclusion to be drawn from that evidence"].)

This principle precludes instructions on consciousness of guilt that single out particular evidence. (See *Alberty v. United States*. (1896) 162 US 499, 511 [murder conviction reversed because the trial court's jury instruction overly emphasized the significance of the defendant's flight].) In *Wong Sun v. United States.* (1963) 371 US 471, the Supreme Court held:

> Although the question presented here is only whether the petitioner's flight justified an inference of guilt sufficient to generate probable cause for his arrest, and not whether his flight would serve to corroborate proof of his guilt at trial, the two questions are inescapably related. Thus it is relevant to the present case that we have consistently doubted the probative value in criminal trials of evidence that the accused fled the scene of an actual or supposed crime. (*Id.* at 484.)

Accordingly, CALJIC 2.03, 2.06 and 2.52 violate the prohibition against argumentative pinpoint instructions. A defendant does not have a right to an instruction

that directs attention to evidence from which a finding of reasonable doubt can be drawn by the jury. By a parity of reasoning and consistent with state and federal principles of due process and equal protection, the prosecution is similarly not entitled to instructions pinpointing specific facts from which an inference of guilt can be reached. (See *Wardius v. Oregon* (1973) 412 US 470, *Lindsay v. Normet* (1972) 405 US 56, 77; *Cooley v. Superior Court* (2002) 29 Cal.4th 228, 253.)

Moreover, this Court has consistently held that specific instructions relating to the consideration of evidence that merely reiterate a general principle upon which the jury has already been instructed need not be given. (See *People v. Lewis* (2001) 26 Cal.4th 334, 362-63; see also *People v. Ochoa* (2001) 26 Cal.4th 398, 445-47; *People v. Berryman* (1993) 6 Cal.4th 1048, 1079-80.) The "consciousness of guilt" instructions reiterate the principles contained in the general instructions on circumstantial evidence that were given in this case. (CT 2066, CT 2070; CT 2109; 2110.) The circumstantial evidence instructions explained to the jury that it may draw inferences from circumstantial evidence; thus, there was no need to specifically instruct the jury on any particular inference.

The instructions here not only highlighted particular facts, but they unfairly encouraged the jury to focus on incriminating evidence without also explaining the jury's duty to consider evidence that caused doubt about the probative weight of that incriminating evidence. Because they cast doubt on the reliability of the jury's

determination of guilt or the special circumstances, the instructions not only violated Mr. Tully's right to due process, equal protection, a fair trial, and a properly instructed jury under the Fifth, Sixth, and Fourteenth Amendments and Article I of the California Constitution, they also violated his rights under the Eighth Amendment. (*Beck v. Alabama*, *supra*, 447 U.S. at p. 638.)

3. The Unconstitutional "Consciousness of Guilt" Instructions Were Prejudicial and Require Reversal

In assessing instructional errors, this Court generally applies the standard set forth in *People v. Watson, supra*, 46 Cal.2d at p. 836. Under that standard, this Court must reverse a conviction where "it appears reasonably probable that a verdict more favorable to the defendant might have resulted if the error had not occurred." Here, because the "consciousness of guilt" instructions violated Mr. Tully's constitutional rights, the heightened federal constitutional *Chapman* standard must be applied. Mr. Tully's convictions must be reversed unless the state can show, beyond a reasonable doubt, that the error was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Mr. Tully is entitled to relief under either the federal or state standards.

The consciousness of guilt instructions, separately and cumulatively, prejudiced Mr. Tully. In a case based on circumstantial evidence, instructional errors take on greater importance. Where, as here, the errors involved instructions concerning evidentiary inferences, the likelihood of prejudice is significant. Without these inferences, the evidence of Mr. Tully's guilt was slight. The inferences allowed by the erroneous

consciousness of guilt instructions filled in the evidentiary holes in the prosecution's case. Because the instructional errors were certain to affect the guilt phase verdicts, they were not harmless and Mr. Tully's convictions and the special circumstance finding must be reversed.

B. The Guilt Phase Instructions Impermissibly Lightened the Prosecution's Burden of Proof

In addition to the specific pinpoint instructions discussed above, the jury was given a number of instructions relating to circumstantial evidence. They were instructed on the sufficiency of circumstantial evidence (CT 2066), the sufficiency of circumstantial evidence to prove specific intent (CT 2070), and circumstantial evidence of the special circumstance (CT 2109; 2110). These instructions improperly eroded the presumption of innocence as to Mr. Tully and reduced the prosecution's burden of proof to something less than beyond a reasonable doubt.

CALJIC No. 2.01, on the sufficiency of circumstantial evidence, diluted the burden of proof beyond a reasonable doubt with the following language:

> If . . . one interpretation of such [circumstantial] evidence appears to you to be reasonable and the other interpretation to be unreasonable, it would be your duty to accept the reasonable interpretation and reject the unreasonable. (CT 2066.)

Similar language also appeared in the combined instruction regarding CALJIC Nos. 2.02 (circumstantial evidence of specific intent, CT 2070), and 8.83 and 8.83.1 (circumstantial evidence of specific intent or mental state for special circumstances. (CT 2109; 2110.)

These instructions impermissibly lightened the prosecution's burden of proof in

violation of Mr. Tully's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I of the California Constitution. (*Cage v. Louisiana* , *supra*, 498 U.S. 39; *Taylor v. Kentucky* (1978) 436 U.S. 478; *In re Winship*, *supra,* 397 U.S. 358.) Because they cast doubt on the reliability of the jury's determination of guilt or the special circumstances, the instructions not only violated Mr. Tully's right to due process to a fair trial, and to a properly instructed jury under the Fifth, Sixth, and Fourteenth Amendments and the California Constitution, they also violated his rights under the Eighth Amendment. (*Beck v. Alabama*, *supra,* 447 U.S. at p. 638.)

Decisions by this Court rejecting challenges to these instructions, *see e.g. People v. Wilson* (1993) 3 Cal. 4th 926, 942-943, *People v. Mickey* (1991) 54 Cal.3d 669-671, *People v. Jennings* (1991) 53 Cal.3d 334, 386, are contrary to principles articulated by the Supreme Court and should be reconsidered and overruled. The Supreme Court has held that all facts supporting an increased sentence must be proved unanimously beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S. at p. 478; *Ring v. Arizona*, *supra*, 536 U.S. 584 [holding *Apprendi* applicable in capital cases].) Because the circumstantial evidence instructions, particularly in regard to the special circumstance finding (CALJIC Nos. 8.83 and 8.83) did not require any findings beyond a reasonable doubt, the instructions impermissibly diluted the prosecution's burden of proof.

Accordingly reversal of Mr. Tully's convictions and the special circumstance finding is required.

C. Failure to Instruct on Voluntary Intoxication as a Defense to the Burglary-Murder Special Circumstance

Mr. Tully was not charged with burglary or any felony other than murder and assault with intent to commit to rape. He was charged with a burglary-murder special circumstance. The jury was instructed on the elements of premeditated first degree murder, burglary-murder, accessory to murder, and assault with intent to commit rape. The jury also was given an instruction on the special circumstance of burglary-murder. The jury was instructed that to convict under a theory of burglary-murder, and to find the burglary-murder special circumstance true, the jury had to find that Mr. Tully entered the residence with either the specific intent to commit theft, or the specific intent to rape. (CT 2095.)

The trial court instructed the jury on the defense of voluntary intoxication as it related to the murder and assault charges.[78] (CT 2119)

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[78] CALJIC No. 4.21, with modifications, reads as follows:
In the crimes of which the defendant is accused in Counts One [murder] and Two [assault with intent to commit rape] of the information and the lesser crime of accessory to a felony, a necessary element is the existence in the mind of the defendant of a certain specific intent and/or mental state. The specific intent and/or mental state required is included in the definitions of the crimes charged and the lesser crime to that charged in Count One contained in these instructions.

If the evidence shows that the defendant was intoxicated at the time of the alleged crime, you should consider that fact in determining whether defendant had such specific intent or mental state.

If from all the evidence you have a reasonable doubt whether the defendant formed such specific intent or mental states, you must find that he did not have such specific intent or mental state. (CT 2119, RT 3251.)

This Court has held that when a defendant is charged with a felony-murder special circumstance, but not the substantive felony, the court has a *sua sponte* duty to instruct "as to the necessity for the concurrence of act and intent, and/or the availability of the defenses of diminished capacity and voluntary intoxication for the underlying felony." (*People v. Mickey* (1991) 54 Cal.3d 612, 675-677.) In this case, the underlying felony was burglary, but the prosecutor did not charge Mr. Tully with burglary as a substantive offense. The trial court thus had an obligation to instruct the jury on the availability of the defense of voluntary intoxication to the mental state required for a burglary conviction, i.e. the specific intent to steal or to rape. (*Id.*)

Here, the trial court instructed the jury on the defense of voluntary intoxication as it applied to the murder and assault charges, implicitly finding the evidence supported such a defense. That defense also was applicable to the specific intent required for a murder conviction under a burglary-murder theory and the burglary-murder special circumstance. However, the jury was never instructed that Mr. Tully's intoxication must be considered when determining whether he had committed murder during the course of a burglary for purposes of the burglary-murder special circumstance.[See previous page] The trial court committed reversible error in failing to so instruct as to the underlying felony supporting the single special circumstance.

Because the prosecutor did not charge Mr. Tully with the separate felony of burglary or of burglary-murder, the jury was never asked to determine whether Mr. Tully was actually guilty of those offenses. The instructions only directed the jurors to consider

intoxication as a defense to the counts charged, Count One, the general murder charge and County Two, the assault with intent to rape charge. On these facts, the jurors would not have applied the voluntary intoxication instruction referring to Count One and Count Two in considering whether Mr. Tully's intoxication prevented him from forming the specific intent required to prove the burglary-murder special circumstance.

This instructional error lightened the prosecution's burden of proof on the intent requirement for the burglary-murder special circumstance in violation of Mr. Tully's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments (*Cage v. Louisiana, supra,* 498 U.S. 39; *Taylor v. Kentucky, supra,* 436 U.S. 478; *In re Winship, supra,* 397 U.S. 358), and the California Constitution. It also violated Mr. Tully's right to present a defense. The defense of voluntary intoxication for the uncharged crime of burglary was applicable to the evidence in this case. The trial court had a duty to instruct the jury that voluntary intoxication was available as a defense to the burglary-murder special circumstance. (*People v. Mickey, supra*, 54 Cal.3d at pp. 675-677.)

Juror misdirection was heightened here by the fact that the jurors were told by the trial judge during voir dire that the killing was intentional and that it occurred during a burglary, (See Argument IV, *supra.*) and the prosecutor reenforced this by telling the jurors during argument that "[t]here is no real dispute that [the murder] occurred during the course of a burglary." (RT 3044.) Because the judge told the jury before they heard any evidence that the crime was an intentional burglary-murder, the jury could have decided Mr. Tully was guilty of first-degree murder without ever determining his state of

mind at the time of the crime. Then, having already voted to convict Mr. Tully of first degree murder, the jury then turned to the special circumstance. In the absence of an instruction to consider an intoxication defense to the underlying felonious intent element of the special circumstance, they had no reason to consider that defense as it applied to the burglary-murder special circumstance.

The instructional error was prejudicial and requires reversal of the special circumstance finding. The failure to instruct the jury on a defense to the special circumstance allegation violates the Constitution and must be evaluated under the federal constitutional standard for prejudice, which requires the government to establish that the error was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p.23.) This so because special circumstances, even though generally determined during the guilt phase deliberations, determine whether a defendant will be subject to the death penalty.

The 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 are proved unanimously beyond a reasonable doubt. (*Apprendi v. New Jersey, supra*, 530 U.S at p. 478*; Ring v. Arizona, supra*, 536 U.S. 584.) Because the special circumstance finding supports imposition of a sentence greater than that authorized by a simple guilty verdict, any error in the special circumstance instructions implicates the Sixth Amendment right to a jury trial and the Due Process Clause of the Fourteenth Amendment. Moreover, in a capital case, instructional error concerning the special circumstance finding also violates

the Eighth Amendment requirement of heightened reliability in the death determination. (*Ford v. Wainwright* (1986) 477 U.S. 399, 414; *Beck v. Alabama, supra,* 447 U.S. 625; *Woodson v. North Carolina* (1976) 428 U.S. 280.)

Whether this Court applies the *Chapman* standard of review applicable to claims of a constitutional dimension, or the state court's lower standard requiring that Mr. Tully demonstrate a reasonable probability that the instructional error affected the outcome of his trial, the special circumstance must be reversed.

D. The Voluntary Intoxication Instruction Misstated the Law and Violated Mr. Tully's Constitutional Rights

The instruction on voluntary intoxication given here did not require the jury to consider intoxication. It only stated that if the evidence showed the defendant was intoxicated at the time of the crime, the jury "should" consider that fact in determining whether he had the required mental states for the charged offenses. (CT 2119). The jury was free to disregard intoxication and its effect on Mr. Tully's mental state, even though it was supported by the evidence.

By using the term "should" instead of "shall" or "must," the given instruction effectively informed the jury that "while it is recommended that it consider the evidence of intoxication, it is not obligated to do so." As given, the instruction told the jury it need not consider evidence directly related to a defense theory. This a fundamental error because the jury must consider exculpatory evidence upon which the defendant relies to raise a reasonable doubt as to any element of the charge in order to satisfy the Fifth, Sixth

and Fourteenth Amendments. (*See e.g., Martin v. Ohio* (1987) 480 U.S. 228 [instruction that jury could not consider self-defense evidence in determining whether there was a reasonable doubt about the State's case would violate *In re Winship, supra,* 397 US 358]; *Rock v. Arkansas* (1987) 483 U.S. 44 [state rule of evidence may not be used to exclude crucial defense evidence]; *Chambers v. Mississippi* (1973) 410 U.S. 284.)

The voluntary intoxication instruction in this case improperly informed the jury that consideration of voluntary intoxication is permissive ("you may or should consider") rather than mandatory ("you must or shall consider"). To assure the defendant's constitutional right to consideration of *all* the evidence, the jury should have been instructed that it "*must*" consider evidence of voluntary intoxication. Because the failure to adequately instruct upon a defense or defense theory implicates the defendant's state and federal constitutional rights to trial by jury, compulsory process, to present a defense and due process, Mr. Tully's rights were violated by the voluntary intoxication instruction given in the present case.

Regardless of whether this Court applies the standard set forth in *People v. Watson, supra,* 46 Cal.2d at p. 836, or the federal constitutional standard of *Chapman v. California, supra,* 386 U.S. at p. 24, the instruction as given was prejudicial because Mr. Tully's intoxication was a defense to all the allegations of specific intent in the charges against him. If the jury had been properly instructed that it had to consider, and had it in fact so considered the intoxication evidence, it would have concluded that Mr. Tully was intoxicated. That finding would have prevented the jury from finding the specific intent

required for premeditated and deliberate murder, a burglary-murder committed with the specific intent to steal or to rape, the burglary-murder special circumstance with a specific intent to steal or rape, and the assault with intent to rape charge. It thus would have resulted in not guilty verdicts on these charges.

Because the failure to properly instruct on intoxication violated Mr. Tully's constitutional rights, his convictions for murder and assault with intent to commit rape must reversed.

XII. THE CUMULATIVE EFFECT OF ERRORS REQUIRES REVERSAL OF MR. TULLY'S CONVICTIONS AND THE SPECIAL CIRCUMSTANCE

The cumulative effect of the guilt phase and special circumstance errors in Mr. Tully's trial deprived Mr. Tully of his rights to due process and to a fair trial. Combined, the errors severely prejudiced him and rendered his convictions and the special circumstance finding unconstitutional.

The Supreme Court has recognized that the prejudicial impact of multiple errors may result in an unfair and unconstitutional trial. (*Taylor v. Kentucky*, *supra*, 436 U.S. at p. 487 & n. 15.) The federal Court of Appeals has held: "'[E]rrors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair.'" (*Alcala v. Woodford*, (9th Cir. 2003) 334 F.3d 862, 883, citations omitted; see *Killian v. Poole* (9th Cir. 2002) 282 F.3d 1204; *United States v. de Cruz* (9th Cir.1996) 82 F.3d 856, 868.) In assessing whether there is cumulative error, this Court must consider the prejudicial impact of the errors together.

When viewed together, the errors in this case undermine all confidence in the verdicts. The case against Mr. Tully was not strong; it was based on circumstantial evidence. There was insufficient evidence to support the convictions. The constitutional errors allowed the prosecutor to impermissibly fill in the large gaps in his case to secure Mr. Tully's conviction. The prosecutor used evidence illegally obtained, including Mr. Tully's involuntary and inadmissible statements. The jury was selected in such a way as

to deprive Mr. Tully of his right to a fair trial and an impartial jury. Witnesses were improperly allowed to sit in trial before testifying. Evidence of Mr. Tully's lack of employment was unconstitutionally used to "prove" he intended to steal. In the absence of any evidence, the prosecutor used inflammatory and sensational argument to "prove" Mr. Tully committed a rape, when there was insufficient evidence to warrant a holding order on a rape charge. The prosecutor relied on victim impact evidence to impermissibly create sympathy for the deceased and loathing for Mr. Tully in order to obtain the guilt convictions and the special circumstance finding.

Significantly, the entire guilt phase was tainted by prosecutorial misconduct, which went unchecked by the trial court. The prosecutor asked the jury to convict because "beyond a reasonable doubt," Mr. Tully was "a despicable excuse for a man." (RT 3023.) He told the jury that even Mr. Tully's own lawyers didn't believe their client. He also misstated both the facts and the law, and argued facts that were excluded and outside the evidence presented.

Adding to the harm caused by introduction of that evidence, the jury's ability to remain fair and impartial was poisoned by prosecutorial misconduct and trial court error. Finally, the guilt and special circumstance instructions failed to provide a legal framework by which the jury could properly weigh the evidence to determine Mr. Tully's guilt or innocence. The improper charge spurred the jury to convict on inferences based on mere suspicion, rather than on evidence that Mr. Tully committed murder during the course of a burglary.

The collective effect of these errors fully undermines "confidence in the reliability of this verdict and therefore requires, at the very least, a new trial." (*Killian v. Poole*, *supra,* 282 F.3d at p.1211.) The errors singly and cumulatively violated Mr. Tully's rights to due process, equal protection, a fair and impartial jury, to a fair trial, to present a defense, and to a reliable guilt phase determination, in violation not only of his rights under state law and Article I of the California Constitution but also under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution. Mr. Tully's conviction and the special circumstance finding must be reversed.

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PROOF OF SERVICE BY MAIL

I, Saor E. Stetler, declare:

I am employed in the County of Alameda, State of California. I am over the age of eighteen years and am not a party to the within-entitled action. My business address is 819 Delaware Street, Berkeley, California. On July 18, 2005, I served the within **APPELLANT'S OPENING BRIEF** on the below-listed parties, by depositing a true copy thereof in a United States mailbox regularly maintained by the United States Postal Service, in a sealed envelope, with postage paid, addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on July 18, 2005, at Berkeley, California.

SAOR E. STETLER