IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff-Respondent,

vs.

RYAN HOYT,

Defendant-Appellant.

Case No. S113653

[Santa Barbara Superior Court No. 1014465]

DEATH PENALTY CASE

APPELLANT RYAN HOYT'S OPENING BRIEF

Volume I, pages 1-184

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Santa Barbara

Honorable William Gordon, Judge

ROGER IAN TEICH
State Bar No. 147076
290 Nevada Street
San Francisco, CA 94110
Telephone: (415) 948-0045
Email: rteich@juno.com

Attorney for Appellant
RYAN HOYT

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Attorney for Appellant
RYAN HOYT

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APPELLANT'S OPENING BRIEF

I. STATEMENT OF APPEALABILITY

This appeal is from a final judgment imposing a death sentence, and is automatically taken to this Honorable Court pursuant to Penal Code Section 1239(b).[1]

II. INTRODUCTION

This case involves the August 2000 shooting death of 15-year old Nick Markowitz in the hills above Santa Barbara. Five young men were charged with, and ultimately convicted of, various degrees of complicity in Nick's kidnap and murder. At 21, Appellant was the oldest of the five. The others abducted Nick in the San Fernando Valley, and over the course of three-days held and partied with him in Santa Barbara, until their ringleader, Jesse James Hollywood, determined he should be killed. Some fifteen people - local teenagers, hotel workers and guests, even a co-defendant's mother - encountered Nick during his on-again, off-again captivity. Several people told Nick he was free to leave. Perhaps the greatest poignancy of the case consists in the simple fact that they were right, but he didn't follow their advice. The prosecutor conceded that Appellant was not involved in any of this, until the afternoon of the third and final day, when at Hollywood's request, the prosecutor theorized Appellant drove to Santa Barbara with the express purpose of murdering Nick, to discharge a debt he owed Hollywood. For his role as actual killer, Appellant was the only one of the five condemned to death.[2]

1/ All undesignated statutory references are to the California Penal Code. "CT" refers to the clerk's transcript; "RT" denotes the reporter's transcript. "CT A" and "RT A" refer to the augmented transcripts incorporated into the certified record on appeal.

2/ Appellant and three co-defendants' cases were severed before trial. Two of those three, Graham Pressley and William Skidmore, are free, having served limited prison terms. Upon his arrest and sentenced to life in prison.

"Alpha Dog", the Hollywood crime drama movie "based on the true story" was released in 2006, grossing $15 million domestically and another $12 million in DVD sales. (*See* http://en.wikipedia.org/wiki/Alpha_Dog.)[3] The case remains in the public eye, and is considered a matter of public importance in evaluating the fairness of California capital proceedings, at trial and on appeal.

The movie didn't tell the story that emerges from the pages of Appellant's trial record. No physical evidence linked Appellant to the murder. Yet, he confessed to having pulled the trigger. The veracity of that confession loomed as *the* critical issue at guilt phase. The trial court did not consider Appellant's vulnerability to police coercion, as assessed by the prosecutor's expert: of limited intellect, cognitively impaired, a damaged follower, dependent on a histrionic mother demanding he talk, fooled by police sophistry threatening him with a certain death sentence if he didn't.

Perhaps the most straightforward error of this trial arose from compulsory court-ordered psychiatric examinations of Appellant, which this Court struck as a discovery tool in *Verdin v. Superior Court* (2008) 43 Cal.4th 1096. The prosecutor relied on his psychiatrist to debunk Appellant's false confession defense, and opine that appellant's trial testimony was a lie. In this, the prosecutor gained immeasurably by the cruel expedient of compelling answers from Appellant's mouth, under the rubric that the personal interview is the "basic tool of psychiatric study."[4]

3/ The prosecution gave the film director its confidential case-file on Appellant, to assist in the movie-production, a turn of events which this Court considered twice in the course of a co-defendant's pretrial writ proceedings. *See Hollywood v. Superior Court* (2008) 43 Cal.4th 721.

4/ The prosecutor's closing argument demonstrates the error was not harmless, under any standard:

> We had the defendant evaluated. We had him subjected to a psychological and psychiatric and neuropsychological evaluation, about six hours of evaluation and testing, the conclusion of which, there is nothing, nothing about him, other than perhaps bad character, but nothing about him at all that makes less prone to one

Ironically, the jury didn't hear the signal evidence unearthed by the prosecutor's second expert of Appellant's substantial cognitive impairments. Appellant's trial testimony was also compelled in the sense that the trial court required it as a foundation for his expert, a set of rulings which opened a Pandora's Box.

The prosecutor presented elaborate evidence of Nick's original kidnap and three-day detention without ever tying these events to Appellant. The jury expressed confusion at the "second kidnap" theory (that Appellant's role in assisting in Nick's movement to the pre-arranged grave-site qualified as an independent kidnap for purposes of Count 2 and the special circumstance), and the trial court never instructed on it. Because of the jury's legitimate confusion about Appellant's legal responsibility for the original (in which he plainly had no knowledge or role), or the uncharged but argued "second kidnap," no instructions guided the jury in how to assess the latter (no asportation by fraud; distance accomplished by such fraud cannot count as substantial).

Under the merger doctrine, no evidence including Appellant's confession established that this second kidnap was anything other than a means of consummating the murder. It had no plausible independent purpose. A separate ground for invalidating the Count 1 kidnap and special circumstance was the failure to instruct that asportation by fraud is not a means encompassed within those crimes. The witness testimony established that Nick was told he was going to be driven home that night, and the only rational inference was that he left with Appellant (and two other co-defendants) on the basis of that false pretense. This was doubtfully kidnap at all, and definitely not a separate purpose kidnap for purpose of the

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> of two things, giving a false confession or suffering amnesia, than anybody else in this room. Nothing.
>
> (9 RT 2078-2079).

special circumstance.[5] Simply put, a murder to cover his dominator's tracks for a prior kidnap did not qualify appellant's acts as "kidnap-murder."

The elephant in the room in this case - not in the popular movie, but in the courtroom reality, sadly - is the farce of Appellant's lead lawyer Cheri Owen, and the substantial tip of a very substantial iceberg of incompetence and conflict which was unearthed and presented to the trial court shortly after she resigned with charges pending from the Bar. She defrauded the County and Appellant's family of funds for his defense; she engineered a life-story rights deal with Appellant, an obvious conflict in this State since the Juan Corona case; she fumbled away the *Verdin* issue by defaulting the writ; she served as an informant for the Los Angeles District Attorney during this representation to stave off disbarment; most critically, she utterly failed to investigate the case or prepare any *mens rea* defense or challenge to the confession, or any mental health mitigation case. "He'll be home for Christmas," she feebly told the family. "And you can't afford a penalty phase anyway." This vortex explains the result in this case, particularly as her successor attorney uncovered significant evidence of Appellant's organic brain impairment, consistent with the prosecution expert's findings, yet unknown to the jury.

Unfortunately, the trial judge punted the issue to the indefinite prospect of litigation from death row. And, seven years later, the terrain of that litigation is so uncertain that good people of conscience advise against raising the incompetence and conflict right to hearing claims on appeal out of concern that doing so will only make matters worse for Appellant. Even though the new trial motions comprise 1,000 pages of the record, some advise that the vexing issues of incompetence and conflict of counsel should be reserved for future proceedings in a future court.

5/ The prosecutor did not charge murder for hire or murder of a potential witness special circumstances, presumably due to the lack of sufficient evidence of motive apart from Casey Sheehan (Hollywood's friend and alibi-provider) testimony that Appellant bought clothes shortly afterwards and said his debt to Hollywood was closed.

Appellant raises the claim on appeal, though it be sailing against the wind, in the simple belief that justice is blind. He asks this Court to cut through the haze of public depiction of this case, and right the scales, while he still has a life to live. Reversal for a new trial is warranted on the *Verdin*, *Miranda*, and *Brooks*[6] errors. Striking the special circumstance and barring retrial on that charge is warranted for insufficiency of proof of an independent purpose to the murder. In the alternative, remand to the trial court for hearing and findings on three issues is warranted: (1) subject matter jurisdiction, since the murder was committed within an exclusively federal park; (2) reconsideration of Appellant's subpoena for Owen's Bar records under *Ritchie*; and (3) the merits of his *Fosselman*[7] new trial motion.

III. STATEMENT OF THE CASE

On October 30, 2000, Appellant Ryan Hoyt and co-defendants Jesse James Hollywood, Jesse Rugge, Graham Pressley, and William Skidmore were charged by Grand Jury Indictment with the kidnap for ransom or extortion and murder of Nicholas Markowitz in the course of kidnapping in violation of California Penal Code §187(a), §190.2(a)17(B), and §209(a), along with a personal firearm use enhancement. The kidnap was alleged to have occurred "on or about August 6, 2000 through August 9, 2000" (1 CT 19).

The prosecution severed the cases on August 7, 2001, and tried the defendants separately, with Appellant Ryan Hoyt the first to stand trial (1 RT 206). Jury selection began October 17, 2001 (2 RT 313). Guilt phase testimony began October 26, 2001 (4 RT 778). On November 20, 2001, Appellant was convicted of one count of first degree murder (Penal Code §187) and one count of kidnap (Penal Code §207) committed with the

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6/ *Miranda v. Arizona* (1966) 384 U.S. 436; *Brooks v. Tennessee* (1972) 406 U.S. 605.

7/ *Pennsylvania v. Ritchie* (1987) 480 U.S. 39; *People v. Fosselman* (1983) 33 Cal.3d 572.

personal use of a firearm (Penal Code §12022.5). The jury found to be true the special circumstance that the murder was committed during a kidnap (Penal Code §190.2(a)17(b)) (10 RT 2225).

Penalty phase began on November 26, 2001 (10 RT 2230). The case was submitted to the jury on November 28, 2001 (11 RT 2393), and on November 29, 2001, the jury returned a verdict of death (11 RT 2396). This appeal is automatic. (Penal Code §1239(b).) By September 16, 2010 Order, this Court granted appellant's application to file an oversized opening brief. (California Rule of Court, Rule 8.631(d).)

IV. STATEMENT OF FACTS

A. GUILT PHASE - THE PROSECUTION

The prosecution's theory of the case was that Appellant murdered Nick Markowitz ("Nick") to satisfy an $800 debt he owed to marijuana dealer Jesse James Hollywood, who had kidnaped Nick two days earlier in the course of an ongoing feud with Nick's half-brother Ben. Hollywood decided to eliminate Nick in response to legal advice that he faced a possible life-sentence if Nick went to the police. Hollywood provided Hoyt with a TEC-9 pistol, a car, and the help of two accomplices (Jesse Rugge and Graham Pressley), with whom he murdered and buried Nick in the Los Padres National Forest.

The key prosecution evidence was as follows:

1. Prior Relationships and Motive

Jesse James Hollywood, a prolific 21-year old dealer in the San Fernando Valley, employed a coterie of friends to sell marijuana in bulk on consignment. They had all met as 11-year olds playing little league baseball on a team coached by Hollywood's father, himself a major marijuana dealer.[8] At its height, this close-knit group included Hollywood and

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8/ Several witnesses described Jack Hollywood as such. Of course, Jack himself denied furnishing marijuana to his son, or knowledge that his son was selling marijuana to Ben Markowitz or other dealers in the San Fernando Valley.

appellant, Jesse Rugge, William Skidmore, Casey Sheehan, Brian Affronti and, as explained further below, Ben Markowitz (5 RT 863 Brian Affronti). Each of them ended up owing money to Hollywood because they smoked more marijuana than they sold. Appellant sold marijuana for Hollywood, and had told Sheehan he owed Hollywood money (6 RT 1285). Ben saw appellant get a quarter-pound of marijuana from Hollywood in September, 1999, which appellant was supposed to sell and bring money back (4 RT 842).

Appellant was "low-man on the totem pole" (6 RT 1286 (Casey Sheehan)), the "puppy dog" of the group (4 RT 837 (Ben Markowitz)). Hollywood made Appellant sweep, paint, cut ivy, take out garbage and clean up after his dogs, ostensibly to reduce Appellant's debt, and often ridiculed him in public (5 RT 903, 909 (Brian Affronti)). Brian Affronti, a mutual friend, testified that Appellant did "whatever" Hollywood asked him to do, and never complained about it (5 RT 906).

The most detailed description of this relationship ironically came from Hollywood's father, who'd known Appellant since the age of 8, coached him at age 12, and more recently asked Appellant to babysit his infant son (6 RT 1252). Appellant was a helpful kid who would do things to earn his keep. Appellant sometimes slept on their couch for weeks at a time. "Sometimes it seemed Hoyt didn't have a place to stay." Appellant never discussed his home-life, or what "the problem" was.

The prosecution played a home-video (Exhibit 42) in which Hollywood berated Appellant on camera, and asked for his money to be re-paid (5 RT 859).[9]

At the same time, in Spring 2000, Hollywood became embroiled in an escalating feud with a former friend, 23-year-old Ben Markowitz, another marijuana-dealer on consignment, who owed Hollywood $1,200 for a drug debt. They had been friends for a decade, having played little league

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9/ Ben Markowitz identified Hollywood's voice as the person operating the camera (4 RT 835). Detective Albert Lafferty seized the videotape from Hollywood's public storage locker (6 RT 1086).

baseball together in the West Hills of San Fernando Valley.

Ben owed Hollywood $1,200, having taken possession of 200 fake Ecstacy pills as settlement of someone else's debt to Hollywood, but being unable to market them (4 RT 812). The dispute escalated after Hollywood ran up a charge at the restaurant where Ben's girlfriend waitressed, and left a napkin note, "take this off Ben's debt" (4 RT 811). Ben told Hollywood to "fuck himself" and repudiated the debt. Ben also called an auto insurance company to report that Hollywood's $36,000 loss claim for theft of his "tricked out" Honda was fraudulent. The last straw apparently came on August 4, 2000, when Ben broke the windows at Hollywood's house on Cohasset Avenue in the West Hills (6 RT 1325 Casey Sheehan).[10] Hollywood said he was moving out of his house because "too many people knew where he lived" (6 RT 1338 Sheehan), his windows had been "busted out," and he had received threats (Affronti).

The final piece of the state's case on motive was advice that Hollywood received from Stephen Hogg, his family's attorney, on Tuesday August 8, 48-hours after Nick's abduction (6 RT 1186). Hollywood told Hogg that some friends had picked up the brother of the guy who destroyed his house (6 RT 1191). Hogg advised Hollywood to go to the police, to which Hollywood said, "I can't do that. They would come after my family." In answer to Hollywood's question "what kind of problems do my friends have?" Hogg said "if they took this fellow against his will, the maximum penalty was eight years. But, if they asked for ransom, they could get life." The prosecution theory of the case was that Hollywood (in consultation with Rugge and Appellant) decided to murder Nick in order to eliminate the possibility of a kidnap prosecution if Nick were released and went to the police.

10/ Ben claimed this happened *after* he learned of Nick's murder, not before (4 RT 819), but the jury was entitled to believe Sheehan's version of the sequence instead, which linked the broken windows with Hollywood's decision to move, and to borrow the white van.

2. Initial Kidnap and Custody of Nick Markowitz

The prosecution's theory of the case was that Hollywood kidnapped Nick Markowitz, Ben's 15-year old half-brother, when their paths happened to cross on August 6, 2000, in retaliation for the window-breaking or to extort repayment of Ben's debt.[11] The prosecution theorized that, by virtue of his martial arts skills and "urban legend" status, Ben was too formidable an adversary for Hollywood to take on directly.[12]

Nick slept at home on Saturday August 5th. The next day, Sunday August 6th, he "disappeared." At the corner of Ingomar and Platt Streets, in the West Hills of the San Fernando Valley, four boys beat up another boy, kicked him on the ground and threw him into a white van, whose license plate matched a van belonging to a friend of Hollywood's father (4 RT 845, 858 Pauline Mahoney; 6 RT 1073, 1082 Rosalia Gitau). Both witnesses called 911.

Hollywood and Brian Affronti had planned to drive to Santa Barbara to celebrate Fiesta with Jesse Rugge that afternoon. Rugge split his time between his father's house in Santa Barbara, and his mother's house in San Fernando Valley. Hollywood showed up at Affronti's house in mid-afternoon, driving a white van.

On August 6th, Hollywood showed up at Affronti's house in mid-afternoon, driving a white van. Hollywood had borrowed the white van from John Roberts, his godfather, photos of which were shown to the jury (Exhibits 39, 40 and 41), in order to move out of his house (6 RT 1280 Casey Sheehan). Jesse Rugge (whom Affronti already knew) was driving the van, Hollywood was in the front-passenger seat, William Skidmore and Nick Markowitz were in the back (5 RT 871 Affronti). Hollywood said to Nick "your brother is going to pay back my money and he shouldn't have

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11/ The victim's age was established by his father (3 RT 778 Jeff Markowitz).

12/ At the time of trial, Ben was serving time for attempted robbery at Corcoran State Prison (3 RT 804), and his juvenile record included seven months' detention for auto theft (3 RT 785).

threatened my family or broken my windows" (5 RT 873, 877). Hollywood also said "don't run."

Hollywood made Nick empty his pockets, and took his pager and ring, wallet, some Valium and marijuana (5 RT 875).[13] Nick asked for his ring back, and at Rugge's urging, Hollywood did. It was this family heirloom ring (Exhibit 37) which Nick's father used to identify Nick's body ten days later.

After stopping for Skidmore to get an insulin shot at his house, they drove the van up to Santa Barbara, arriving at the 2106 Modoc Street townhouse in the mid-afternoon. The house was rented by Richard Hoeflinger, a friend of Rugge from junior high school. Hollywood, Rugge and Skidmore took Nick into the back bedroom and duct-taped his hands or wrists and shins together (5 RT 882 Affronti). Hoeflinger kept a roll of duct-tape in his closet. This was observed by Affronti and Gabriel Ibarra, Jr., who was visiting Emilio Perez, Hoeflinger's roommate, at the time (5 RT 914, 927). Hollywood had a "bulge" in his waistband and when Ibarra was leaving the house, Hollywood reached toward it, and told him to "keep his 'F'ing' mouth shut" (5 RT 933). Rugge told Hoeflinger they were "just talking to this kid" (5 RT 948). When he walked into the bedroom, Hoeflinger saw Skidmore taking Nick's duct-tape off (5 RT 949). Two phone calls were completed from Hoeflinger's house to Appellant's "home number," at 4:06 p.m. and 4:24 p.m. (7 RT 1539 Detective West).[14]

13/ There was trial testimony regarding Nick's prior drug use: an arrest for marijuana possession at El Camino Real High School in West Hills; Ben's recollection that two days before the kidnap, Nick smoked marijuana and took Valium (4 RT 830); and his father's recollection that the night before, Nick came home late, with a glazed look, slurring his words, a bulge in his pocket and a pouch sticking out. Nick told Kelly that he took Valium to help him sleep.

14/ Trial testimony indicated that Appellant split his days between his grandmother's house and Hollywood's, which were close by one another. "Appellant's home number" may have referred to either of these locations.

Rugge stayed with Nick at Modoc Street, while Hollywood and Skidmore went out.[15] Hoeflinger went out to a BBQ for a while. When Hoeflinger returned, he found Rugge and Nick drinking gin, watching TV and playing video games on the couch. They smoked some marijuana. Rugge explained, presumably in Nick's presence, "this kid's brother owed Hollywood money and they were just trying to get a hold of the brother" (5 RT 955 Hoeflinger).

The prosecution theory of the case was that Nick remained under threat or inducement to cooperate with his kidnappers, in order to be of assistance to his half-brother Ben.

According to Hoeflinger, Nick didn't complain, he seemed "relaxed," and even ventured into the backyard by himself, from which he could have run (5 RT 957 Hoeflinger). Skidmore drove Affronti in the white van back home to the San Fernando Valley but after leaving Modoc Street, Affronti went back to fetch his cell phone. He saw Nick with his hands free, with Hollywood in the living room, talking calmly, smoking marijuana bong-hits together (5 RT 883, 886). Trial testimony did not address when Hollywood left Modoc Street, or where he went. When it got dark outside, Rugge and Nick walked from Modoc Street together. It was undisputed that appellant was not at Modoc Street, or anywhere else on this Santa Barbara trip (5 RT 903 Affronti).

3. August 7-8 Confinement

Contested at trial was the question whether Nick was ever free to escape his captors during the ensuing 48-hours, when he encountered several teenagers in Santa Barbara (who were aware of his abduction), was at times outside the presence of any original captor and in public places (a supermarket, a hotel pool), and was given a ride by a co-conspirator Graham Pressley's mother.

15/ Affronti testified he and Skidmore stayed with Nick, while Hollywood and Rugge left for a while. The discrepancy matters little in that one of the original kidnappers was still with Nick.

The prosecution's theory of the case was that, while security may have been "lax" at times, Nick was always held against his will by dint of the incentive to cooperate to assist his brother Ben, or threat of reprisal to Ben if he didn't. The key prosecution evidence was as follows:

Kelly Carpenter and Natasha Adams were teenagers (16 and 17 respectively) in Santa Barbara, friends with Graham Pressley from grade school and, through him, with Rugge (5 RT 1033 Carpenter). They hung out daily that summer.

On Monday morning, August 7, 2000, Natasha met Nick at Rugge's house (5 RT 1033). Pressley said they had "kidnapped" this kid (5 RT 1038). Kelly met Nick later that afternoon at Natasha's house. Rugge left when Kelly arrived and didn't return for two hours, leaving Nick with Pressley and the two girls, none of whom were involved in his capture. Nick "easily" could have walked away when he was alone with Kelly (5 RT 1005). Indeed, at some point after Rugge left, one of the girls told Nick he was free to go home, and no one would stop him (5 RT 968). Nick told Natasha he was going to stick around to help out his brother and that he was fine (5 RT 1039 Adams). Nick was relaxed and everyone had fun (6 RT 1068).

That afternoon, Natasha drove Kelly, Nick and Pressley to Rugge's house, which was Casiano Street, off Modoc. Rugge was there already. Hollywood and his girlfriend, Michele Lasher, were too (Carpenter), or arrived later (Adamas). The girls were aware that Pressley and Rugge sold marijuana for Hollywood (5 RT 1040), and Natasha knew that Hollywood had "something" to do with Nick being there (5 RT 1045).

Nick went upstairs while everyone stayed downstairs. At some point, Hollywood told the others, "well, we'll just tie him up and throw him in the back of the car and go to the Biltmore and get something to eat [] or Fess Parker's" (5 RT 976 Adams). The girls left around 5:00 p.m. while Nick stayed behind with Rugge and Pressley.

Hollywood and Michele Lasher spent the evening at Casey Sheehan's house, drinking beer and smoking pot before going out (6 RT

1341). Hollywood told Sheehan "they had taken Nick up to Santa Barbara," where he was staying with Rugge, but Hollywood didn't explain why (6 RT 1346). He described that Nick was "just" walking down the street, so "they" - by which Sheehan understood Hollywood to mean himself, Skidmore, Rugge and Affronti, but *not* Appellant - pulled over and picked Nick up (6 RT 1348).

The next day, Tuesday, August 8, 2000, the girls went back to Rugge's house and discussed the situation with Pressley. Pressley said "Hollywood, Rugge and Skidmore couldn't find Nick's brother but found Nick instead, beat him up, put him in the car and brought him to Santa Barbara" (5 RT 983-984 Carpenter). He had "no idea" what they were going to do with Nick, didn't know how long Nick would be there, or what would happen, but assured Natasha they weren't going to hurt Nick, and were waiting for a call from Hollywood. Although Hollywood had offered Rugge money to kill Nick, adding that "of course we're not going to do that. We don't know what to do because we're all in danger" (5 RT 1048 Adams). Pressley warned them not to say anything because something could happen to them. Natasha didn't mention any of this to Nick and didn't believe it was "really serious" (6 RT 1070).

Later that day, Rugge told Nick, he was "sick of it" and "washed his hands of it." He offered to give Nick $50 to take the train home that night, "but I better not have cops coming to my door tomorrow," to which Nick agreed (5 RT 985 Adams). Rugge told Nick he <u>would</u> go home that night (5 RT 1018 emphasis added). Rugge told Nick (and promised Natasha) he would put Nick on a Greyhound bus home later that day, but he was worried Nick would tell on him (5 RT 1055). Rugge said he was concerned because he didn't want to go to jail. Nick replied "I'm not going to tell anyone, I'm cool" (5 RT 1055). The prosecution theorized that Nick's captors gave him (and the girls) false reassurances about Nick's safety in order to reduce the risk he would flee.

After that discussion, they watched a video, Rugge relaxed and suggested they go to the Lemon Tree Hotel for a swim because it was an

especially hot day. Pressley's mother drove Pressley, Rugge, Nick and Kelly from Rugge's house to the Lemon Tree Hotel (5 RT 990 Adams). Nick did not speak to Pressley's mother en route, though presumably he could have. Rugge paid for the room, and checked in with Nick and Kelly.[16]

During the afternoon, Nick walked to a Ralph's Supermarket near the Lemon Tree Inn, and waited outside with Kelly, while Rugge went in to buy cigarettes (5 RT 1003). Kelly felt this was another moment when Nick was free to walk away.

By early evening, the group of six people assembled in Room 341 consisted of Rugge, Pressley, Nathan Appleton (another friend), Natasha (who had left to drive her father home from work), Kelly, and Nick. (5 RT 991, 1057). They sat on the patio and watched TV, drank liquor and smoked pot. Rugge went downstairs for food. Nick and Pressley swam in the hotel pool.

The prosecution theorized that, despite the lack of overt physical coercion, Nick continued to stay put because of Rugge's false reassurance he would go home that night. Nick told Kelly he didn't walk away because he didn't want "to rock the boat and have them angry," and he thought he was going home (5 RT 1019). He said he wasn't completely unable to "do something" but he didn't feel it was necessary (5 RT 1023). He said when he got home, he intended to watch the sunset, call his girlfriend and be happy; it would be "another story to tell his grandkids" (5 RT 995, 1017). Kelly, Natasha and Nathan stayed until late evening, when Rugge asked them to leave.

4. Planning Evidence

The prosecution's theory was that, in response to attorney Hogg's advice that kidnap for ransom carried with it a life-sentence, Hollywood decided and sprang into action on August 8th to plan Nick's murder.

16/ Detective Janet Williams testified there was a Lemon Tree Hotel registration record of Rugge's check-in (7 RT 1588).

That afternoon, Hollywood borrowed his friend Casey Sheehan's car (1985 Honda Accord four-door sedan), without explaining why he needed it, and said he would get it back the next day (6 RT 1280 Sheehan). Hollywood left for a half-hour and returned without the car, while his girlfriend Michele stayed at Sheehan's house. They went out to eat dinner at an Outback Steakhouse in the San Fernando Valley to celebrate Michele's birthday, from 8:00 p.m. until midnight closing (6 RT 1352 (Sheehan), 7 RT 1413).[17] Hollywood slept at Michele's house that night. In this way, the prosecution theorized that Hollywood arranged both a vehicle for appellant and an alibi for himself.

The prosecution also theorized that, at the very time the murder was occurring, Hollywood denied any knowledge of it to his father Jack Hollywood to keep him off the trail. On August 8th, hearing of "trouble" from Hogg, Jack cut short a Big Sur vacation, returned to the Simi Valley, and tried to get a hold of his son (6 RT 1215). When they finally met up at Michele's house (San Fernando Valley) in the early morning hours of Wednesday, August 9th, Hollywood was "nervous, "rattled," and "pretty evasive." He claimed his life had been threatened and could be in danger (6 RT 1224). Hollywood said "some friends were holding the kid [Ben Markowitz's brother], drinking beer and eating ribs, but there was trouble because they took him against his will" (6 RT 1230).[18]

5. Manner Evidence

Hollywood owned three guns, one of which was a TEC-9 9-mm. automatic handgun (5 RT 892 Affronti; 6 RT 1380 Sheehan). The TEC-9 features a barrel with holes in it and a clip in the middle. Hollywood's

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17/ Hollywood's American Express card was used to pay the Outback Steakhouse bill at 8:10 p.m. (9 RT 1927). On motion for new trial, the defense brought out that the Outback Steakhouse closed at 10:00 p.m., not midnight.

18/ On cross-examination, Jack Hollywood conceded he learned (from his son) they were holding "the kid" in a hotel, though he "might have" learned the location from a newspaper story later (6 RT 1258, 1269).

TEC-9 handgun was similar to or the same as the weapon found at the scene of Nick's murder, as discussed further below (4 RT 835 Ben Markowitz; 5 RT 892 Affronti). The TEC-9 had a big round barrel with holes in it, and the clip attached in the middle. The TEC-9 (short for "Intratec DC-9") handgun found at the murder scene had been modified from semi-automatic to fire "full auto," *i.e.*, one pull of the trigger fired multiple rounds of ammunition (6 RT 1132 Criminalist David Barber). The handgun's magazine held up to 37 9-mm. Luger bullets which it would fire as long as the trigger was held back, expending spent cartridges (Detective Danielson). Hollywood had modified his TEC-9 handgun to make it similarly fully automatic.

On Saturday August 13, 2000, Nick's body was discovered by hikers in a shallow grave at Lizard's Mouth, in the Los Padres National Forest outside Santa Barbara (5 RT 1024 Lars Wikstrom). The site was off a trail, 60 to 80 yards from the road, along a rock slope (5 RT 1031), a quarter-mile hike from West Camino Cielo (7 RT 1533 Detective William West (quarter-mile); 6 RT 1084 Detective Albert Lafferty (quarter to half-mile)). The site had an unpleasant odor and swarms of insect activity. There was brush (five clean-cut branches) piled on top and a light cover of sand and grass to conceal human remains. (7 RT 1465 Darla Gacek; 7 RT 1545 (Detective West)).

Nick's body was partially exposed and badly-decomposed (6 RT 1102 Criminalist George Levine).[19] Nick's mouth was bound with duct-tape and his arms were bound behind his back (6 RT 1084 Detective Lafferty; 7 RT 1452 Dr. George Sterbenz; Technician Lisa Hemman). He was identified by his belt-buckle and ring. He had been shot nine times. The two gunshot wounds to Nick's head and neck, and one of the seven wounds to his torso (abdomen) would have been rapidly, if not

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19/ Extensive testimony from the pathologist for example described the extent to which wound appearance was obscured by putrefaction, insect larvae, and exposure to dirt.

instantaneously, fatal (7 RT 1454 Dr. George Sterbenz).[20] In essence, Nick's death was rapid, assuming the wounds were inflicted rapidly. Detectives found three cartridge casings and a bullet were found in the grave with Nick's body, and a total of fourteen spent 9-mm. cartridge casings around the grave-site (6 RT 1108 Detective David Danielson).[21] Forensic evidence of blunt force trauma to Nick's head or torso was inconclusive.[22]

Police examination of the TEC-9 handgun found in the grave (after Nick's body was removed) revealed that it was jammed with two live 9-mm. bullets, one in the chamber and the other in the bolt-breach (6 RT 1113 Detective Danielson). Gunshot residue particles (from primer material on bullet cartridges) were found on samples marked "front of handle" and "grip" (6 RT 1167 Criminalist Steven Dowell). No latent fingerprints were recovered from the weapon (6 RT 1128).

The police seized four shovels, a white sports sock wrapped in duct-tape, and a roll of duct-tape from Rugge's house on Casiano Drive (7 RT 1421 Deputy Sheriff Kathryn Gallante).[23]

20/ The pathologist believed one of the head shots caused "instantaneous unconsciousness and rapid[] [] if not immediate death" (7 RT 1454). The abdomen shot injured the inferior vena cava blood vessel, and was fatal.

21/ When fired in "full-auto," the TEC-9 handgun is unsteady, tends to rise and jam (Barber). Testimony suggested that a spray of bullets hit the sandstone rock above the Lizard's Mouth grave-site.

22/ The pathologist did not find evidence of any blunt trauma, but he cautioned that mild to moderate bruising could not be evaluated at autopsy due to decomposition, and that it was possible Nick was rendered unconscious by a blow to the head, which did not leave a bruise (7 RT 1459).

23/ Appellant's jeans tested negative for bloodstains (9 RT 1929). Detective West said he decided not to test appellant's clothing for gunshot residue, because he felt too many days had passed and he didn't know what Appellant was wearing the night of the murder (9 RT 188).

6. Conspiracy Evidence

The prosecution theory of the case was that Pressley and Rugge gave false exculpatory accounts to the girls, in the days after the murder, to allay any suspicion and deter them from going to the police.

On Wednesday August 9th, Pressley and Rugge assured Kelly in separate conversations that Nick had in fact gone home the night before. Kelly spoke with Pressley by phone and asked what happened after she left the Lemon Tree. Pressley said Hollywood showed up and put a TEC-9 gun on the bed to scare Nick. He (Pressley) drove Nick, Hollywood, Rugge and a friend of Hollywood down to Los Angeles, dropped everyone off at Nick's corner, Rugge went to his mother's house, then Pressley drove back and checked out of the Lemon Tree (5 RT 1015 Carpenter). Pressley said "Jesse" (not specifying whether this was Hollywood or Rugge, who share the same name) paid him $700.

In addition, although their substance (and even the participants) was unknown, phone calls *were* made from Hollywood's pager to Appellant's pager at 4:15 p.m. and to Appellant's home at 4:17 p.m. on Wednesday August 9th (7 RT 1544 Detective West).

Skidmore warned Affronti (who had witnessed Nick's August 6th abduction) at some point that he was the "weak link" (5 RT 900).[24] Skidmore said Hollywood spoke with his father and "they" decided Affronti was the "weak link" and needed to be careful about what he did, so nothing happened to him (5 RT 911). Affronti took it as a warning to stay away.

After his arrest on August 16th, Pressley admitted he went up to Lizard's Mouth and dug the grave in advance which "they" used to bury Nick (7 RT 1471 Detective Jerry Cornell). Detective Cornell's testimony was admitted for the limited purpose of establishing the connection between appellant and Pressley (7 RT 1434). The Superior Court instructed the jury to consider only Detective Cornell's testimony that Pressley admitted *"he"*

24/ Affronti received the warning from Skidmore either on August 8th or later, when he read a newspaper article about the discovery of Nick's body (5 RT 911).

(Pressley), not *"they"*, went to Lizard's Mouth and dug the grave (7 RT 1477). Pressley and Rugge gave detailed statements to the police after their arrest which cast principal blame on appellant for orchestrating Nick's murder. The jury did not hear this evidence.[25]

On Monday, August 14th, Kelly saw a newspaper article about the discovery of Nick's body by hikers at Lizard's Mouth in the Los Padres National Forest. She spoke with Pressley and Rugge that morning, and went to the police by nightfall. Natasha also read the newspaper that day, and reported what she knew to the police.

As described below, the police soon arrested Appellant, Pressley, Rugge, and Skidmore, while Hollywood evaded capture.

7. <u>Appellant's Statements</u>

The heart of the prosecution's case derived from statements Appellant made after the crime on four separate occasions, which the prosecution theorized were either falsely exculpatory (Jack Hollywood), admissions of culpability (Casey Sheehan), or outright confession (Detectives William West and Jerry Reinstadler).

On Wednesday August 9th, in order to deflect his father's queries, Hollywood told him to "call this number and ask Ryan" (6 RT 1233, 1239). Jack Hollywood paged Appellant, and they met at Serrania Park in Woodland Hills between noon and 1:00 p.m.. Jack told Appellant, "let's go get him [the kid] and take him home." Appellant said "he wouldn't know how to get a hold of him. He didn't have control of the situation, and he was trying to find out, but he wasn't having any luck" (6 RT 1241). Jack said he had "been bugging Jesse to find out since last night and wasn't having any luck, and Jesse gave him Appellant's number." Appellant said he "didn't know where he [the kid] was and didn't know the people who had him, but he would find out." Appellant agreed it was a bad situation, but insisted he didn't know how to make it stop; he wasn't involved in the

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25/ The grand jury considered Rugge's statement, which was ultimately the subject of the Superior Court's suppression order prior to Rugge's separate trial.

thing from the start and was irritated to be dragged into it (6 RT 1242). Appellant said he didn't know where the kid was being kept. Jack Hollywood inferred Appellant already knew that "a kid" had been "taken," and that Appellant would have told him where the kid was, if Appellant knew (6 RT 1272).

Also on Wednesday, Sheehan returned home from work to find his car was back. He didn't check the mileage or ask who or how it had been used. Appellant, Affronti, Skidmore, Hollywood, and Michele were hanging out at his place, though Hollywood and Michele left after a half-hour (7 RT 1399 Sheehan). Hollywood said "they had taken" Nick to Santa Barbara, but Sheehan didn't know and didn't ask whether the taking was against Nick's will.

That evening, Appellant told Sheehan "a problem was taken care of," but it was "best we left things unsaid" (6 RT 1292). Sheehan inferred this to be a reference to Nick (6 RT 1295). Sheehan asked Appellant if there was a problem with Nick, and Appellant said, "not anymore" (6 RT 1296). Sheehan testified Appellant said "Nick had been killed - we killed him" (6 RT 1301).[26]

Sheehan drove Appellant to shop for clothes at the 118 Skate Shop in Corona Hills, where Appellant spent a couple hundred dollars in cash for a pair of pants, some shirts and a pair of shoes. Sheehan knew Appellant wasn't working, and didn't have that much money beforehand. He assumed Appellant was spending birthday money, but didn't ask where he got the money. While they were shopping, Appellant said his debt to Hollywood "was taken care of" or "the problem in Santa Barbara had been taken care of" (6 RT 1370).

26/ Sheehan was the only witness whose immunity agreement was made known to the jury. The prosecution granted Sheehan immunity for murder accessory after the fact liability, possession of a controlled substance, and driving under the influence (7 RT 1383).

The next day - Thursday, August 10, 2000 - Sheehan hosted Appellant's 21st birthday party at his house with 20 or 30 people, including Hollywood and Michele. Appellant slept over with Sheehan August 9th and 10th. During the party, Appellant told Sheehan that Nick was dead (6 RT 1376), which Sheehan had not heard from anyone else (7 RT 1404). Appellant never said *he* killed anybody, or he (Appellant) was there when the killing occurred, or specifically who had pulled the trigger, but simply that "the problem was taken care of" or that *"we"* (including in the plural, Rugge and Appellant himself) took care of the problem (6 RT 1377, 1382).

On Sunday, August 13th, while Sheehan and Appellant drove to Malibu to visit Sheehan's father and go to the beach, they discussed how Appellant could "get out of the situation." This conversation occurred the day before Nick's body was discovered. Appellant told Sheehan, Nick was dead. *They* shot him and put him in a ditch. It took place in Santa Barbara. He used a bush to cover him [Nick]. *They* had picked Nick up at a hotel and taken him to the site.[27] (6 RT 1306, 1380). Appellant also said Skidmore was in Santa Barbara and involved in some fashion.

On Monday, August 13th, Sheehan read the newspaper account of the discovery of Nick's body. On Thursday, August 17th, Appellant told Sheehan on the phone "they got Will [Skidmore]." Sheehan agreed Appellant could stay with him, because Appellant's house was "hot." Appellant received a page and they drove to a liquor store to use the phone booth, where they were both arrested. Sheehan was released later that night. When Los Angeles Police advised Appellant of his *Miranda* rights, he asked to speak with an attorney, and further questioning ensued (9 CT 2517). Santa Barbara Sheriff's Sergeant Ken Reinstadler transported

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27/ There was considerable give and take from Sheehan over Appellant's use of the pronoun "we" or "they." On the one hand, Sheehan re-affirmed his grand jury testimony that Appellant said "we" took him to a ditch, shot him and put a bush over him" (7 RT 1385). On the other, Sheehan also agreed he told the grand jury Appellant said *"they"* shot him" (7 RT 1409). Sheehan inferred *"they"* were Appellant, Skidmore, Rugge and one other person (7 RT 1410).

Appellant to the Goleta Sheriff's Station in Santa Barbara, where Detective William West placed him under formal arrest, and booked him into custody.

That evening, after watching a TV-news broadcast about the case, and two phone calls with his mother Vicky, Appellant asked to speak with detectives. Detective West and Sergeant Reinstadler conducted a lengthy interview of Appellant which, because of its centrality to the case, is quoted at length below. Both audio and videotape were played for the jury (7 RT 1487). Detective West prepared a transcript (3 CT 773, Grand Jury Exhibit 47), which the Superior Court provided the jury for playback and deliberation (7 RT 1483, 10 RT 2216).

At the outset of the interview, Appellant was re-advised of and waived his *Miranda* rights (7 RT 1481; 9 CT 2518). He said he threw up in his cell when his mom told him "there's a press conference and people saying he dug the grave," which prompted him to ask for the detectives.

Initially, Appellant said "I honestly really do not know that much about any of this, okay?" He suggested they speak to his grandmother because he was "home" Tuesday night (9 RT 2519).

> SERGEANT REINSTADLER: You didn't dig the grave. You killed him. That's a little misunderstanding there between you and Grandma. You've been identified. You've been identified.
>
> You need to start telling the truth. Now if you didn't dig the grave, you need to tell us that. If you made a mistake up there, you need to admit it because the way you come across before, you're just a stone cold killer. . . . People are telling us that you were sort of bragging about this.
>
> DETECTIVE WEST: ... If you want to sit here and tell us why and give us a reason, maybe it will help you out. Maybe it will paint a picture of you as somebody other than what we have now, which is that you're a stone-cold killer....
>
> You're going to have to tell us. It's going to have come out of your mouth. Otherwise we take all these stacks of paper down to the judge and present what we have right now, which paints a pretty bad picture of you.

REINSTADLER: We know you did it, okay? The question is why. And maybe you can fill that in. But you have to understand. People not associated with have identified you at the hotel, okay? Right? You understand that? So you can't say I'm nowhere near here. You understand that?

HOYT: No, I don't. It's all right 'cause I'm going down. I just realized that.

WEST: Did you come up here in....

HOYT: I came up here to say that this picture that everybody's painting of me is not me.

WEST: Well, tell us who you are. Tell us how this went down.

HOYT: I can't do that. You mind if I go back to my cell and think about it tonight and talk to you guys tomorrow 'cause I know my arraignment is Monday.

REINSTADLER: Once you're arraigned, we can't talk to you. That's the bottom line. I mean if you want to tell us something, I'm being honest with you. This is your opportunity to do it. This is it.

HOYT: There's no way I can talk to you tomorrow?

REINSTADLER: No. I know why.

HOYT: Huh?

REINSTADLER: I know why.

HOYT: Why.

REINSTADLER: Because you won't want to talk to us tomorrow because somebody's going to get to you. Tell you not to talk to us. Play the games that we know people play and then the next thing you know, you're looking at you being trigger man, no explanation, okay?

We know Jesse Hollywood's background. This isn't, I mean, we know quite a bit. If you're afraid of him, you should be more afraid of what could happen to you if he choreographs something that you got involved in and made a mistake and without any explanation to a jury of twelve people or a judge....

HOYT: I mean I'm going down for life.

REINSTADLER: *There's a difference between life and the death penalty and everything else in between. All we want is the truth.*

HOYT: I had nothing to do with the kidnapping....

(9 CT 2520-2523; emphasis added.)

During this "first phase," Appellant admitted generally that he was involved in Nick's murder: He owed Hollywood "a lot" of money - "enough to do what I did" (9 CT 2524). "I found out Tuesday of a way to erase that debt" (9 CT 2525). "What Ben owed Jesse didn't, in my opinion, this is off the record . . . didn't justify this kid's death." (Id.) An "intermediary" of Jesse's told him in order to erase his debt, "there's something that needs to be taken care of. So go take care of it" (9 CT 2527). He said there was "a mess that needed to be cleaned up" and he had "to take care of somebody," which Appellant understood meant kill him (9 CT 2528). He drove Casey's car. When he arrived at the hotel, the gun was already there (9 CT 2530).

At that point the detectives and Appellant had the following discussion in regard to terminating the interview:

HOYT: You guys know what happened. *I think I'm going to stop there for now.* Can I get some more water, please? Stuff they give you, man, is hell.

This whole thing, I have an eight-year old brother whom I love dearly. I have a mom who depends on me. She's already got a son locked up. She's got an addict for a daughter. You see why I'm so hesitant?

REINSTADLER: You know, you heard in your rights that you can stop talking to us at any time and that's your right. But I sense that you want to tell us something that may be different than what we do know. And, I guess that ain't going to happen.

WEST: I don't know what was said for a minute when I went out the room, but from what I heard you say it sounded to me like you kind of wanted to take a break. If that's what it means, you know, we can let you collect your thoughts here,

but ....

HOYT: I wish I could have a cigarette more than anything.

WEST: ... if you want to talk to us, and you just want to take a break, it's different than if you're telling you don't want to talk any more, period.

HOYT: *Well, I'm talking now between now and tomorrow.*

REINSTADLER: Too late.

HOYT: Whose? I know you guys have Will.

REINSTADLER: *Once the lawyer contacts you, we are precluded from speaking with you anymore period.*

HOYT: A lawyer is going to contact me tomorrow?

REINSTADLER: Oh, I'm sure. It's normal. It's their job. Just like it's our job to try to figure out what's going on.

(9 CT 2531-2532, emphasis added.)

The Detectives and Appellant then discussed how Appellant's statement might influence the penalty determination:

WEST: The question you should be asking is what can you say that would be able to help you out. And I think I can see that's what you're agonizing over 'cause you're afraid of saying that ....

HOYT: *I'm ag, I'm agonizing over life or death, literally.*

REINSTADLER: *Fill the puzzle in, Ryan, because pre-meditated murder means different things in the law. If you were under the gun and someone's threatening you. These are things that all weigh on decisions as to why things happen.*

HOYT: Yeah, but if it goes down like that, I get out in five, ten years. And I wind up the same place (unintelligible) I'd just as soon serve twenty-five.

REINSTADLER: What makes you think it's going to be twenty-five?

HOYT: If it's death.

REINSTADLER: Could be life. See, there's all different degrees depending on what the district attorney feels was the motivation for this killing.

HOYT: (unintelligible) cut it.

(9 CT 2532-2533 emphasis added.)

During the "second phase," Appellant described his role more specifically. He stated that he felt sorry for "the kid that I buried," but denied he put the duct-tape on Nick's mouth (id.). Reinstadler said that, according to Rugge, Appellant did that too. Appellant replied, "Really? I love this one. *The only thing I did was kill him*" (9 CT 2534.) This phrase was a centerpiece of prosecution argument at trial. Appellant denied he chose the place, dug the hole, or threatened Pressley to dig the hole. He said he did not know how old Pressley was at the time of the offense, but "can't be more than eighteen" (9 CT 2537). Appellant said "Yeah, I think I want to stop there. I think you guys got a pretty good picture" (9 CT 2538). The prosecution stopped its playback of the interview at that point, which it conceded Appellant invoked *Miranda* rights.

B. THE DEFENSE

The primary theory of the defense was that Appellant falsely confessed to the crime of murder, under the combined effect of his arrest, sleep deprivation, and emotional demand of his mother, and in order to protect Hollywood. Secondarily, Appellant claimed amnesia for the specifics of his confession. He maintained that, at Hollywood's request, he drove Sheehan's car to the Lemon Tree Hotel in Santa Barbara on Tuesday, August 8th, and, in so doing, was the unwitting conduit of Hollywood's TEC-9 handgun (inside a duffel bag), which Rugge and Pressley and perhaps even Hollywood himself used to murder Nick.

Following an Evidence Code §402 hearing, the Superior Court ruled that Dr. Michael Kania, the defense psychologist, could *not* testify to anything Appellant told him, *or* to his conclusion Appellant gave a false confession, but he could offer his opinion that amnesia was consistent with false confession anxiety, *only if* Appellant took the stand first and testified

to his amnesia (7 RT 1510). Thus, Dr. Kania's direct testimony was limited by advance Order of the Superior Court to the field and literature of false confession and that Appellant was predisposed toward false confession by conditions of stress, lack of sleep, and undue pressure from his mother and his possession of specific personality traits (passivity, dependence, compliance, low self-esteem, anxiety) (7 RT 1502, 1515).[28]

Furthermore, the Superior Court ordered that Appellant submit to examination by the prosecution's retained experts on any circumstances which might bear on false confession, including personality traits, MMPI-results, extreme pressure, and which portions of the interview Appellant contended either were false or he could not remember (7 RT 1521).

1. Undue Influence to Confess

The defense played an audiotape of two custodial phone calls Appellant had with mother Vicky, after his August 17, 2000 arrest (8 RT 1619).[29] The first call is essentially an emotional rant by Vicky, and a demand that Appellant "spill his fucking guts and get out."

> We're being monitored . . . Mommy loves you . . . I love you, Ryan? You are innocent . . . You are so innocent. We are being monitored, just let me ask you this one thing. You are guilty by association. . . . Ryan, talk! . . . I want you to tell them what you know. . . . If you don't, I will lose you too . . . Do you love me? . . . Don't destroy me. You are all I have left. Don't destroy me. If you don't talk to them, I will be there Monday morning at your arraignment . . . You tell them you don't know. Ryan, you had nothing to do with this, am I right? . . . Ryan, you would never ever do anything like this. Now, just listen to me for one minute. I love you, do you hear me? I was screaming for you over this. I was screaming for you today. . . . Ryan (whisper), Ryan (whisper) . . . You have everybody praying for you, everybody is praying for you, o.k.? I have so many people praying for you, you don't know.

28/ The Superior Court excluded Dr. Kania's opinions that Appellant's lack of recall was "very unusual in itself," and that what Appellant told the police was "for the most part false" (7 RT 1506).

29/ Through defense oversight, the jury was given a transcript of Exhibit 54 for deliberation, but not for playback.

> You didn't do this Ryan, right? You're scared, aren't you. Just say I'm scared, Mommy . . . You're scared shit-less, huh? You're so scared because you didn't have anything to do with this? Right Ryan?
>
> (9 CT 2539-2542.)

Vicky asked "Where's Jesse? Where the fuck is Jesse?" to which Appellant replied, "Nobody knows!" Vicky said, "Well then find him!" (9 CT 2541). She continued, "you are being accountable for somebody else's crime and you tell them everything because if you don't, I will . . . *Ryan, spill your fucking guts and get out. Now. Do it for me. Do it for your family, do it for me, do it for yourself . . . Tell them you want to talk to the detectives now. If you know anything, you tell them now, Ryan?*" (9 CT 2543, emphasis added).

In the second call, Vicky told Appellant, "your dad said he heard the news conference and they said you dug the grave. Do you know that? It's on the news that you dug the grave . . . and he said, turn Jesse Hollywood in, now! Now! You talk now Ryan." The call ended with Vicky exhorting Appellant, "You are my strength, Ryan. You are my strength for everything I've been through. You didn't do anything, Ryan. Ryan say, I swear to God." Ryan replied, "I swear to God" (9 CT 2548-2551.)

2. <u>Defendant's Testimony</u>

a. Family Background

Appellant testified that in August 2000, he lived with his grandmother in the West Hills of California, as he had off and on since age 15.[30] He slept on his grandmother's couch. His home-life was "confusing." His mother was "unstable." He had lived with her for only two months his entire life. His father lived in Nevada.

Appellant dropped out of high school senior year at age 17. He worked at Ralph's Supermarket for eight months when he 15-16 years old, which was the longest job he held. Later, he worked for his father as a

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30/ Appellant was 22 years old when tried (8 RT 1623).

laborer for four months. He failed a drug test for the Navy (8 RT 1767). In high school junior year, he used cocaine every day, then he quit and his use was "off and on" (9 RT 1827).

b. Hollywood Relationship

Appellant met Hollywood and Rugge playing little league baseball at age 12, when Hollywood's father was coach. He knew Skidmore from elementary school. Hollywood moved to Colorado for three years, returning at age 16.

Appellant stayed with Jack and Laurie Hollywood, often for weeks at a time; he spent an entire summer with them at age 16, before senior year of high school, and didn't want to go home. He helped Laurie clean and watched J.P., Hollywood's little brother. They were nice to him, and gave him meals.

During his high school junior year, Appellant hung out with Hollywood and smoked "weed" everyday. During senior year, which was three or four years ago, he realized Hollywood was dealing marijuana more seriously. Hollywood fronted marijuana to Appellant, Rugge and others.

Appellant sold pounds of marijuana for Hollywood for a few months starting in September or November 1999. He often kept marijuana for Hollywood in a duffel bag at his grandmother's house. He smoked more marijuana than he sold, and got into debt to Hollywood (8 RT 1639). By January 2000, he owed Hollywood $1,200.

Hollywood asked Appellant about the $1,200 debt on the videotape he shot in January or February 2000, which embarrassed Appellant (8 RT 1641, 1740). Appellant boasted on the video that he was going "to take a baseball bat" to someone who owed him money, but that was a fiction. In actuality, he "hustled" someone who called for weed out of $400 or $600 pay down the debt to Hollywood, which reduced it to $800 (8 RT 1642, 1741).

He did many jobs around Hollywood's house, picked up after parties and ran errands, but Hollywood got to decide how much each was worth, and Hollywood increased the debt $100 for every week it wasn't paid off (8

RT 1646). Appellant protested but "you can't talk that boy out of anything." He worked for Hollywood every day of the year after January 2000 to reduce the $1,200 debt. His grandmother gave him another $400 to reduce the debt. In all, he paid Hollywood $800 to $1,000, in the six months before Hollywood fled. By June 2000, he owed Hollywood only $200, which was where the debt stood as of August (8 RT 1650). He was scared of Hollywood who could summon others "to kick the shit out of him" (8 RT 1771). Hollywood threatened to beat him up over the debt, paged him to ask for the money, and made harassing phone calls to him at his grandparents. Hollywood teased him and made him feel stupid.

Hollywood had several guns at his house including a TEC-9 handgun. As a favor for Hollywood, Appellant once kept the TEC-9 handgun at his grandmother's house, but Hollywood retrieved it from him.

c. Events of August 2000

On Saturday, August 5th, Appellant helped Hollywood move out of his house. Hollywood was going to Santa Barbara to pick up Rugge for Fiesta (8 RT 1660). Hollywood was upset someone had busted out the windows, and he had received a page that Ben Markowitz had done it. Hollywood told Appellant to clean up the broken glass and watch the house. Appellant returned to his grandmother's house at 10:00 p.m., when Hollywood, Skidmore, Rugge got back.

On Sunday, August 6th, Appellant went back to Hollywood's house at noon, nobody was there, and he stayed all day. Hollywood called home in the late afternoon and said he was in Santa Barbara with Rugge and Skidmore. Skidmore would return the van, and Hollywood asked Appellant to return the van to John Roberts, a Hollywood family friend. Hollywood did not mention Nick or any kidnap (8 RT 1661). Later Appellant drove with Skidmore to return the van to Roberts; Skidmore never mentioned Nick or any kidnap.

On Monday, August 7th, Appellant went to Hollywood's house and spoke by phone with Hollywood, but nothing of substance was discussed.

On Tuesday, August 8th, Appellant went to Hollywood's house. Hollywood called him around 2:30 p.m., and they met a half-hour later. Hollywood asked if Appellant wanted to clear the final $200 off his debt and be cleared by his birthday. Hollywood proposed "if Appellant ran a bag up to Jesse Rugge in Santa Barbara, it would erase his debt" (8 RT 1671). Hollywood told him to drive Sheehan's car. Hollywood did not say what was in the bag, but Appellant assumed marijuana, even though Hollywood typically delivered marijuana himself to Rugge in Santa Barbara, or Rugge drove to Los Angeles for it. Appellant agreed to Hollywood's proposal, but never looked inside the bag to inspect its contents (8 RT 1677, 9 RT 1833). The bag was heavy but felt soft as if it contained a few pounds of marijuana wrapped in clothes (9 RT 1833).

Hollywood drove Appellant to Sheehan's house that evening. Hollywood was going out to dinner for Michele's birthday. Hollywood gave Appellant directions to Rugge's Santa Barbara house and phone number, keys to Sheehan's car, and the bag from the trunk of Michele's BMW. Hollywood did not mention Nick or any kidnap. Appellant knew only that Ben Markowitz owed Hollywood money.[31]

Appellant drove to Santa Barbara after dark and got lost on the way. He called the Lemon Tree and told Rugge he had a bag for him, and didn't want anyone else around. When he arrived at the room, Rugge and Pressley (whom he had never met before) were there, but no sign of Nick (8 RT 1680). Rugge asked to run errands in Sheehan's car for an hour and a half. Appellant gave him the car keys. Rugge gave Appellant the room key so he could go to Jack in the Box. He left Rugge and Pressley behind and walked for a half-hour to Jack in the Box, but it was closed. He returned to the Lemon Tree, drank some Jim Beam whiskey, did a little "coke," and watched TV, alone in the room. Rugge and Pressley returned around 2:30

31/ The Court precluded Appellant from testifying whether Hollywood left a tab at BJ's Restaurant or how Hollywood "felt" about Ben (8 RT 1675).

or 3:00 a.m. He drove back to San Fernando Valley with Rugge who had a wedding to attend that week-end (8 RT 1682). Pressley stayed at the Lemon Tree. They stopped at McDonald's. Appellant dropped Rugge off at his mother's house, and went back to his grandmother's house, arriving early in the morning August 9th (8 RT 1685). Rugge did not mention anything about Nick, where he had gone, or what he had done with the car.[32]

On Wednesday, August 9th, Appellant was paged and met with Jack Hollywood. Jack explained Ben Markowitz's brother had been "taken" and wanted to know where he was and who had taken him. Appellant didn't know, and even if he did know, it was out of his control (8 RT 1701). Appellant felt mad to be brought into the whole thing but agreed to find out what he could. He returned Sheehan's car around 4:30 p.m. (8 RT 1702). Hollywood showed up shortly after with Michele and Skidmore. Hollywood gave Appellant $300 or $400 for his birthday and said "we're straight. No more debt." Hollywood also told him not to worry about his father Jack.

Appellant went shopping with Sheehan and spent a couple hundred dollars on clothes at the 118 Skate Shop. He told Sheehan of his conversation with Jack Hollywood, and asked "do you think they killed him" (9 RT 1854). Sheehan didn't respond or appear surprised. He did not tell Sheehan he had killed Nick (8 RT 1707).

On Thursday, August 10th, the date of his birthday party, they drank and smoked pot heavily. In fact, the entire week was "mass consumption" of drugs.[33] At some point, he asked Sheehan if he thought "they" killed

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32/ At this juncture, the Superior Court ruled that the prosecutor could impeach Appellant with newly-discovered Side "B" of his confession. The Court determined that any claims regarding voluntariness or right to counsel were "irrelevant" to use as impeachment, and the contents of Side "B" were merely "frosting on the cake" (8 RT 1690-1695).

33/ On cross-examination, Appellant testified he snorted coke two or three days, smoked weed periodically, drank alcohol, and slept erratically in the week before arrest. That day, he took three or four Soma pills and

Nick. Appellant suspected Hollywood was involved because of his ongoing feud with Ben Markowitz.

On Saturday, August 12th, he spent the day at Sheehan's house, drinking and swimming with Affronti, Skidmore, Sheehan, William Lightfoot and others. That night, Skidmore told him Ben's brother had been killed (8 RT 1798).[34]

On Sunday, August 13th, he drove with Sheehan to Malibu. He told Sheehan what Skidmore had said the night before, but he did not describe details about any murder to Sheehan.

On Wednesday, August 16th, Skidmore's sister warned him to be careful because Skidmore had been arrested. He inferred that by taking the bag to Santa Barbara, he unwittingly supplied the TEC-9 handgun used in the murder (8 RT 1716). He got repeated pages from an unfamiliar number which he thought was police. Sheehan told him not to come over, and he couldn't use the phone. They went to a pay phone where they were arrested by police. The arrest was by far the most traumatic experience of his life, and his memory faded from that point forward for several days.

d. Amnesia

Appellant said he did not remember either the phone calls with his mother Vicky or the police interview, both of which he had heard played for the first time earlier that day in court (8 RT 1721).[35] Hollywood was more

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drank a couple beers. This testimony was not corroborated by blood, urine or hair-sample analysis, or expert opinion regarding functionality.

34/ On direct, Appellant said Skidmore told him Nick's body had been discovered, although this event did not occur until two days later (8 RT 1790). Appellant clarified what he meant on cross-examination (8 RT 1798).

35/ Ruling any answers would be speculative and irrelevant, the Superior Court precluded Appellant from explaining what he meant by answers he gave the police or why he gave them, why he would confess, if it were not true, or why he would want to protect Hollywood and others involved (8 RT 1729). On the other hand, the prosecutor was permitted to cross-examine Appellant if he could explain any details in his confession which he said he couldn't, except that he saw duct-tape balled up on the bed

family to him than his own family. While he would do just about anything for Hollywood, including go to prison for life, he would not willingly kill for Hollywood (9 RT 1872). Appellant denied he went to Lizard's Mouth or that he kidnapped, duct-taped, or killed Nick.

e. Cross-Examination

On cross-examination, Appellant maintained his memory was blank from arrest Wednesday, August 16th until Saturday, August 19th (8 RT 1777).[36] In preparation, he read his confession and met with his attorneys for two-hours the previous night (8 RT 1784).

3. Dr. Michael Kania

Dr. Michael Kania, a clinical psychologist, was retained to assess whether Appellant's confession was false, *not* whether Appellant had any psychological disorder or posed a danger to others in custody (9 RT 1893).[37] In preparation, he read police reports, watched the confession videotape and listened to Appellant's phone calls with his mother, but reviewed no other records. He spoke with Appellant in County Jail for a total of 11-13 hours on October 2-3 and 13, 2001. He told Appellant the meetings were confidential and urged him to be truthful. He gave Appellant the MMPI, an "objective" personality test. Appellant's profile was passive, dependent, chaotic home-life, fairly extensive drug and alcohol problems, which Dr. Kania considered "precursors" of mental illness and the cause of psychotic symptoms at times (9 RT 1904). There was some indication of depression and dependency in Appellant's MMPI. His overall MMPI profile was paranoid schizophrenic, which did not fit his clinical presentation.

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in the hotel room. (9 RT 1867.)

36/ Appellant said he remembered police putting him face down on concrete at a San Fernando Valley liquor store pay phone, and being held at San Fernando Valley police station (8 RT 1749, 1758). He did not remember police driving him to Santa Barbara, being booked into custody, speaking with his mother or the police interview room.

37/ The Superior Court precluded Dr. Kania from offering an opinion whether the confession was false (9 RT 1895).

Dr. Kania opined that in general people falsely confess to crimes due to psychotic delusion or as a response to stress or anxiety, and low self-esteem. It may be a product of low-IQ or the perceived need to protect someone else. Appellant grew up in a chaotic home where drugs were abused. He was a mediator between his father and mother. He suffered from dependency, passivity, and low self-esteem, underlying depression and drug use, with a possible genetic component (9 RT 1913).[38]

Dr. Kania opined it was very unusual but "credible" Appellant couldn't remember the police interview. His amnesia was the result of a very traumatic emotional situation that disrupted his thinking as though he entered a fugue state from a psychic trauma. Appellant described feeling the walls were "pulsating" and closing in and relief when he was back in jail. Under this scenario, Dr. Kania believed Appellant might later incorporate what other people told him had happened, as if he remembered it.

Dr. Kania related Appellant's account of being taken into the interview and being told to "calm down and wait," then experiencing relief when the interview was over.[39] He had no prior episodes of amnesia, only drug-related intervals he could not remember (9 RT 1932).

4. Third Party Culpability

Stephen Blackmer lived next door to Hollywood on Cohasset Street. He saw an older White Chevy van at Hollywood's house in early August 2000, as Appellant and Skidmore helped Hollywood move out. Appellant

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38/ Although not retained for this purpose, once Dr. Kania tendered this opinion, the Superior Court permitted broad cross-examination in which it was conceded Appellant did not suffer from *any* mental illness "in the broad sense" that he was not psychotic or paranoid schizophrenic. In Dr. Kania's view, Appellant *was* depressed, avoidant and dependent, and a poly-drug abuser, with a family history of bipolar disorder. Appellant fit the Axis II diagnosis of personality disorder NOS.

39/ Although precluded on direct-examination, the Superior Court permitted cross-examination of Dr. Kania in regard to what Appellant said he could remember of the circumstances of his confession.

did a lot of work on the house. He repaired the awning, painted and sanded the fence. After the move-out, Blackmer saw a broken window at Hollywood's house. He estimated Hollywood at 5'10" tall.

Ramon Arias, a worker at the Lemon Tree, saw a man whom he identified from a photograph (Exhibit 6) as Hollywood driving a black Ford Ranger into the Lemon Tree parking lot on August 8th. The man acted nervous and asked if he had "algun problema." The man was taller than 5'7", which was Arias's height.[40]

Ernest Seymour stayed in a second-floor room at the Lemon Tree on August 8th. He met his neighbors on the balcony around 4:30 p.m., and smoked marijuana with them at 7:00 p.m. He spoke with a man who said he lived in San Fernando Valley and had come to Santa Barbara with his friend to visit his brother who had a tattoo shop (7 RT 1591). Seymour identified Rugge and Hollywood from photographs (Exhibits 4 and 6) as the people he spoke with both times (7 RT 1598). The man he identified as Hollywood was taller than Seymour, which meant that he was at least 5'9". The man he identified as Rugge introduced himself as "Jesse." The other man introduced himself as "Hollywood" (7 RT 1602). Seymour heard male and female voices, and inferred there were six or seven people in the room. Seymour went to sleep around 9:30 p.m. but was awakened later by a "loud rumbling" in the next room.[41]

C. Prosecution Rebuttal

In rebuttal, the prosecution called two psychiatric experts, Dr. David

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40/ Detective Janet Williams confirmed Arias identified Hollywood from a photograph and said that was the man he saw at the Lemon Tree sometime before noon on August 8th (7 RT 1585). However, according to Detective Williams, Arias described the man as 6'0", while in actuality Hollywood was only 5'4".

41/ The Superior Court precluded Detective Jerry Cornell from testifying from his August 14, 2000 report that Ben Markowitz said, if Hollywood had anything to do with Nick's killing, Skidmore would be the shooter (8 RT 1614). The Superior Court reasoned that the evidence was inadmissible because Ben Markowitz denied making the statement.

Glaser and Dr. Dana Chidekel, to offer results and opinions from compulsory examinations of Appellant. Because the Superior Court's Order granting such examinations under the authority of People v. Danis (1973) 31 Cal.App.3d 782 is the basis of a primary contention on appeal, it is discussed separately below. The thrust of the rebuttal was that Appellant was lying about his amnesia, and that he had no predisposition to confess, unless he was in fact guilty.

1. Dr. David Glaser

Dr. Glaser, a clinical psychiatrist, was asked to assess whether Appellant had a psychiatric condition susceptible to false confession and whether Appellant was faking his amnesia (9 RT 1936, 1948). He examined Appellant in County Jail for three hours, reviewed the confession (audio and videotape and transcript), pleadings of the parties, Dr. Kania's interview notes and one-paragraph report.[42]

Dr. Glaser was of the opinion that Appellant did not suffer from any current major mental illness (9 RT 1939). He relied upon Dr. Kania's MMPI, his own interview and record review, and placed particular importance on psychological testing of Dr. Dana Chidekel (the other prosecution expert) to diagnose Appellant as "avoidant personality disorder with dependent features."[43] Dr. Glaser found *no evidence* a person like Appellant would be more likely to falsely confess (9 RT 1942).

To assess a claim of amnesia, Dr. Glaser typically would review medical and drug history and imaging tests for evidence of brain injury. In this case, the history Appellant himself provided eliminated neurologic illness or head injury as an etiology. Appellant's prior drug use was, at 15-months, too remote to explain his present failure to recall (9 RT 1947).

42/ Dr. Glaser's examined Appellant from 9:00 p.m. to midnight, November 6, 2001, the evening between Appellant's first and second days of testimony.

43/ A person suffering such a disorder will put up with demeaning conditions to maintain relationship and needs other people to feel complete in the world (9 RT 1941).

Because complete amnesia is extremely rare and generally people can be cued to remember with a written or verbal cue, Appellant's claim not to remember - despite Dr. Glaser's attempts to cue him - was "simply malingering" (9 RT 1948). In particular, Appellant's memory was "crisp" except for the two-day period of his confession, which simply isn't how the brain works.

Dr. Glaser derived "reams of data" simply from observing how, in relation to police questioning, Appellant appeared to ponder the significance of his replies, word choice and tone (9 RT 1974).[44] Appellant's claim of stress-based amnesia was implausible because (according to Dr. Glaser) Appellant "definitely" understood where he was and what he was being asked by the police, and his answers were responsive (9 RT 1957).[45] It was Dr. Glaser's opinion that Appellant was lying to the jury.

2. <u>Dr. Dana Chidekel</u>

Dr. Dana Chidekel, a neuropsychologist, was asked to assess whether Appellant suffered any neuropsychological disorder which would make him more likely to falsely confess, and whether amnesia is a legitimate condition (9 RT 1978). She examined Appellant with seven tests over 2.5 hours, and based on his responses, diagnosed a DSM-IV Axis 2 avoidance personality disorder, with self-defeating and dependent features (9 RT 1980). Appellant had significant patterns of information processing and problems with visual spatial problem solving.[46] Dr. Chidekel found *no*

44/ Dr. Glaser also offered the insight that malingering is fairly common in murder cases.

45/ While low-IQ of 75 (mental defect) and dependent personality disorder (serious mental illness) might factor toward a false confession, appellant's self-reported history precluded the third necessary factor, *i.e.*, severe frontal lobe brain damage from head injury that would limit the ability to judge consequences (9 RT 1965).

46/ Dr. Chidekel observed Appellant as "not somebody I would want to have put together a puzzle real fast." His right-side brain function

condition that interfered with Appellant's ability to see, understand or communicate.

D. Penalty Phase

1. Aggravation

The prosecution presented evidence of the impact of Nick's murder on his family and friends through testimony of Susan Markowitz, the victim's mother.[47]

Susan said she imagined Nick's last breaths as he tried to plead for his life through duct-tape that muffled his cries, with tears rolling over the duct-tape that bound his beautiful lips crying for his life (10 RT 2240). She added, "I feel I have fallen into the depths of hell being on this earth with the people responsible for executing Nick" (9 CT 2450).

The murder put her family in other life-threatening situations. Her mother, Grandma Poo, had a heart attack in Colorado for the trial of the godfather of Jesse James Hollywood. Susan herself had attempted suicide twice. On Mother's Day, she said she lay face-first on Nick's grave begging someone to tell her it was a nightmare.

2. Mitigation

Members of Appellant's family and the mother of a childhood friend testified to his chaotic family life, inconsistent parenting and neglect. Vicky Hoyt was 19-years old when she married James Hoyt, and 21-years old when she gave birth to Appellant. Several family members recalled an incident in which James threw Vicky to the ground when she was eight-months pregnant, nearly causing a miscarriage (Vicky Hoyt, Anne Stendel-Thomas).[48] James was extremely abusive. He threatened her with a pipe-

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which interprets non-verbal social cues was "not working too well."

47/ The defense did not object to the form of her testimony which was a letter "from mom to her only son" which she read aloud to the jury.

48/ James said he argued with Vicky over money and had physical battles with her, "mostly in self-defense." He acknowledged an

wrench. They had a volatile relationship and got divorced when Appellant was five-years old.[49] James got custody of the children. Vicky had problems with cocaine and alcohol, although she said these occurred only after the divorce (10 RT 2252).[50] She loved her son even though she said he was worthless. She had been in therapy from age 14 to 17 (10 RT 2249; Carole Stendel). Appellant lived with his father James until 1998, when he moved in with his grandparents, Carole and Mark Stendel.

Anne Stendel Thomas, a maternal aunt, and Carole Stendel, a grandmother, provided additional context for Vicky's erratic behavior.[51] Vicky was the oldest daughter of six children, eight years older than Anne. While her mother remembered her as quiet but demanding (10 RT 2263), Anne recalled that Vicky smacked her around. Vicky would stay in her room for days and not move or talk. She was emotionally unstable and beyond parental control. She got into drugs at an early age.

Vicky would stand up in class, walk around, and not know why. Her fourth-grade teacher recommended counseling, and Vicky received group and family therapy. A psychiatrist diagnosed depression and recommended

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altercation when Vicky was eight-months pregnant with Defendant, but not that she nearly miscarried as a result.

49/ This jury heard the relationship so described by both Vicky and James, and other family members. For example, Nicholas Stendel, a maternal uncle, heard verbal abuse between Appellant's parents, and saw Vicky with bruises and a black eye. The combination of James' temper and Vicky's psychological problems produced a "dysfunctional family." He never felt the children were in physical danger (10 RT 2290). Jane Bright, a family friend, also saw Vicky with black eyes and bruises, and considered the family "dysfunctional" (10 RT 2324).

50/ Anne Stendel-Thomas and Nicholas Stendel contradicted this account, stating that there were always drugs around, and Vicky was frequently too intoxicated to care for the children. She didn't control her emotions or thoughts when intoxicated. She threatened the children physically (10 RT 2285).

51/ As discussed below, Carol Stendel retained attorney Cheri Owen to represent Appellant.

a hospital. She had trouble paying attention and sitting still, and dropped out of high school. The family had a history of depression and "chemical imbalance." Mark Stendel, a grandfather, suffered depression, was in therapy for seven years, and put on medication indefinitely.

Several family members testified to the traumatic effect of Vicky and James's divorce. The three children Christina (5), Appellant (3) and Jonathan (8 months) were all affected. Vicky lived with her mother after the divorce, when James got the children. Carole testified the children were abandoned when Vicky left, and mentally and physically abused by their father (10 RT 2271).[52] At some point, Defendant and his younger brother Jonathan stayed with their grandparents, while Christina stayed with Anne Stendel-Thomas.

Several family members testified that Defendant was a quiet and docile young man who tried to mediate between his parents.[53] Appellant worked for his father as a laborer or carpenter in Malibu for three to four months, and again at age 19, for another three-months as a laborer (10 RT 2298).[54]

In 1985, James moved in with Robin, who had other children, and their son Austin was born in 1991. They eventually married. Appellant and Jonathan lived with James and Robin until they moved to Nevada, when Appellant was 20-years old. Several family members testified that Robin was verbally abusive toward Appellant (10 RT 2282 (Nicholas Stendel), 2301 (James Hoyt)). Appellant moved in with his grandmother Carole for

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52/ Anne Stendel-Thomas testified James told Appellant to "shut up, don't talk, don't cry, don't show emotion, just sit there." James said only that he spanked Appellant, and kicked him once when he was 15-years old; he denied that he ever beat any of his children, or Vicky, or threatened to run her over if she fought for child custody.

53/ His grandmother testified that Appellant tried to intercede for his brother Jonathan who got "the brunt of everything."

54/ James Hoyt was employed as a foreman for a framing contractor.

seven months in 1998, when he got in an argument with his step-mother Robin. Appellant lived with Carole again more recently, when his father moved to Nevada "out of the blue."

Jonathan testified that he was serving a 12-year prison sentence for armed robbery and conspiracy to commit home invasion, crimes he committed at age-16, but for which he was tried as an adult. He described home-life with James and Robin as not pleasant. There was physical violence between his father and step-mother. His father beat him on many different occasions which he tried to block out.[55] His father would get frustrated over small things. Once Robin held him when he tried to run away, and brought him inside, where his father hit him with a closed fist. Sometimes he faked sick so he could go home from school, and be with his mother (10 RT 2311). She said "sometimes I feel like smacking you," to which he responded, "so you can treat me like Dad does?" When he was seven years old, he told someone at school about the abuse, but because he was afraid, he said it was with an open hand. He saw his father hit Ryan once when they were in the car, and his father kicked Ryan in the stomach once when he had girls over. There was "a lot of abuse behind closed doors," which he and Ryan never discussed. He feared his father (10 RT 2313). Robin treated them very bad, far worse than her own two children, put them down and called them "pigs." Christina received the worst treatment and ran away when she turned 13-years old.

Jane Bright testified that her son and Appellant were close friends between the ages of four and 15-years old. Appellant spent a lot of time at her house. He said his father beat him. She asked Appellant to live with them but he said his mother wouldn't allow it. He moved around a lot between his father, mother and grandmother. She cared deeply for Appellant and considered him part of her family.

55/ This testimony was at odds with James Hoyt's description of his parenting, and provided direct observation of physical abuse of Appellant himself.

Several family members said they loved Appellant, would be affected greatly if he were put to death, and felt nobody had helped him or his siblings to have safety and comfort (Carole Stendel; Nicholas Stendel; Jonathan Hoyt). James said he felt Appellant's execution would be a "living nightmare you can't wake up from" (10 RT 2296).[56]

The Parties stipulated Appellant had no discipline or custody problems since arrest, and no arrests or convictions for any other misdemeanor or felony (11 RT 2334).

E. MOTION FOR NEW TRIAL

1. Procedural Background

The background of the Superior Court's denial of a new trial is as follows: The jury returned its penalty verdict on November 29, 2001 (11 RT 2396). Sentencing was scheduled for January 14, 2002, with Penal Code §190.4(e) motions due one week earlier (11 RT 2398; 6 CT 1574).

On January 14, 2002, a stand-in attorney appeared to seek a continuance on behalf of attorney Owen (11 RT 2400). The Court continued sentencing until February 25th.[57] On February 13th, with charges pending, Owen resigned from the State Bar. See Owen State Bar Court Resignation, filed February 13, 2002; 7 CT 2069 (Sanger August 29, 2002 Dec.); 20 CT 75 (Owen December 2, 2002 Dec.).[58] On February 25th, the Superior Court advised Appellant that attorney Crouter would continue his representation (11 RT 2403).[59] Sentencing was continued until March 25th

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56/ The Superior Court excluded testimony as to the effect Appellant's execution would have on his sister or his close friends (10 RT 2324).

57/ The Superior Court understood Owen intended to interview jurors (11 RT 2401).

58/ By separate application filed concurrently herewith, Appellant seeks judicial notice of Owen's State Bar Resignation, which was filed in State Bar Court, Los Angeles, California, with an effective date of February 12, 2002.

59/ That day, another stand-in attorney appeared with Appellant, but the Superior Court was informed off-the-record of Owen's resignation

(11 RT 2406). On March 18, 2002, the California Supreme Court issued *In the Matter of the Resignation of Cheri Owen*, Case Number S104910, by which Owen's resignation from the State Bar became effective without prejudice to disciplinary proceedings in the event of reinstatement (7 CT 1809). On March 25th, the Superior Court continued sentencing until April 15th so the prosecution could prepare and file oppositions to Crouter's §190.4(e) motions (11 RT 2411).

On May 15, 2002, after further continuance the date set for sentencing (11 RT 2413), the Superior Court held an *in chambers* hearing and granted Appellant's *Marsden* request to relieve Crouter as attorney of record, provided Appellant retained new counsel within three weeks (12 RT 2416, 2427).[60] Sentencing was continued until June 6th.

On June 6th, attorney Robert Sanger appeared as Appellant's newly-retained counsel.[61] On September 5th, Appellant filed supplemental papers in support of his motion for new trial (7 CT 1855). Through attorney Sanger, Appellant raised new claims based on his original attorney's conflict of interest and deficient performance at guilt and penalty phase. As discussed below, the motion raised issues in regard to attorneys Owen and

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(11 RT 2403.) Owen never filed a notice of resignation or withdrawal with the Superior Court. Code of Civil Procedure §284 required Owen to obtain Appellant's written consent or an Order authorizing withdrawal. See e.g., Mandell v. Superior Court (1977) 67 Cal.App.3d 1 (applying Code Civ. Pro. §284 to withdrawal of retained counsel in criminal case). On February 27, 2002, the Superior Court confirmed Appellant was informed of Owen's inactive status (11 RT 2405).

60/ At the *Marsden* hearing, attorney Crouter conceded he had not met with Defendant since the penalty verdict or provided him with the §190.2 motions (12 RT 2422 under seal). For his part, Crouter complained that Owen was unresponsive to his requests for Defendant's files and transcripts. The Superior Court observed that the §190.2 motions were competently prepared, reserving judgment as to the adequacy of the representation as a whole (12 RT 2421).

61/ The Superior Court observed Crouter was being relieved due to breakdown in communication, not incompetency. It "offer[ed] no comment on the performance of original counsel" (11 RT 2432).

Crouter's lack of investigation and uninformed choice of defense at guilt phase. Appellant also raised the claim that attorney Owen violated fundamental *per se* norms of the legal profession by failing to discover or present evidence of Appellant's brain damage and cognitive impairment at penalty phase, and that such failures met the *Strickland* standard of prejudice.

On September 10th, the Superior Court granted Sanger's request for continuance in light of circumstances involving one of Appellant's prior lawyers that have "complicated things" (8 CT 2120).

On February 7, 2003, the Superior Court denied Appellant's Motion for New Trial and imposed the death sentence on Count One of the Indictment (11 RT 2557, 2589).[62] On March 7, 2003, the Superior Court sentenced Appellant to an additional term of 33-years to life on Count Two and the firearm enhancement, with credit for 1,072 days served, plus fines of $20,000, ($10,000 each under Section 1202.4(b) and Section 1202.45), all of which were stayed pending execution of sentence for Count One (9 CT 2507).

2. State Bar Records re Ex-Attorney Owen

On July 30, as a corollary to the motion for new trial, Sanger moved for *in camera* review of the return on his Subpoena Duces Tecum for Owen's State Bar records (11 RT 2438). The Subpoena sought any and all documents relating to Cheri Owen, State Bar number 201893, including notes, records and investigative reports from 1999 to 2002 (6 CT 1720, 7 CT 2069). On September 5th, Sanger filed a motion to compel the State Bar's Owen records with a narrowed subpoena, limiting the request to the allegations of misconduct and Owen's informant status (11 RT 2474).

On October 8th, the Superior Court denied Appellant's motion to compel State Bar records or for *in camera* review, or alternatively, to

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62/ The Superior Court did not deem it necessary to hear live witness testimony or to resolve conflicts in the declarations submitted by the Parties.

preserve the records for appellate review (11 RT 2510). As discussed below, Appellant advanced four theories of materiality justifying such review under the performance-analysis of *Strickland v. Washington* (1984) 466 U.S. 668.

3. Conflict of Interest

On February 12, 2002, ex-attorney Owen obtained Appellant's written grant of exclusive literary rights to his life-story and waiver of attorney-client privilege (6 CT 1685), although these two documents were not made known to the Superior Court until June, 2002, when Sanger sought an Order to Show Cause regarding Owen's failure to produce her case file. The Court had reason to believe that Owen obtained Appellant's literary rights as part of her original retainer agreement. (See e.g. 8 CT 2309 Crouter Dec. stating he was unaware Appellant had signed a literary rights agreement and waiver with Owen, but had he known, he would have advised Owen it was unethical and to withdraw from the case.) As discussed below, Appellant presented the opinion of a *Strickland* expert that Owen's literary rights agreement violated the ethical norms of her profession and created a *per se* conflict of interest in that she had financial incentives not to seek a change of venue, exclusion of media from proceedings, or a plea bargain in the case.

4. New Evidence

Appellant developed and presented evidence in the form of medical records, witness declarations and two expert reports with regard to his organic brain disorder and cognitive impairment.[63] The prosecution submitted rebuttal evidence in the form of three expert declarations. In denying Appellant a new trial, the Superior Court reviewed the written evidence described below, but did not consider live testimony or purport to resolve factual disputes.

63/ Defendant obtained Penal Code §987.9 funds for this purpose.

a. Organic Brain Disorder

On December 11, 2002, Dr. Phillip Delio, a St. Francis Hospital Staff Neurologist, interpreted Appellant's EEG as *abnormal* and *possibly consistent with* organic brain syndrome (8 CT 2274).

On December 10 and 16, 2002, Dr. Albert Globus, a defense psychiatrist, determined that Appellant's childhood physical trauma and loss of consciousness suggested the etiology of a longstanding organic brain disorder, which was *consistent with* the abnormal EEG-result. Dr. Globus found Appellant's abnormal EEG to be was *proof of* encephalopathy, a term which encompassed a wide array of organic brain disorders or brain lesions (8 CT 2282-2283). Dr. Globus concluded that Appellant's brain injury *could* explain his dependent personality and compliance with authority figures and close friends.[64] Appellant told Dr. Globus he confessed "to give Jesse time to run."

Dr. Globus agreed with Dr. Chidakel (the prosecution expert) that Appellant was prone to brief reactive psychosis when social demands became inescapable, and Dr. Chidakel's test results confirmed Appellant's tendency to allow others to take advantage of him. Thus, Dr. Globus offered expert opinion in support of a mitigation theory of Appellant's *excessive obedience, compliance and submissiveness to Hollywood as a superior to his own detriment, based on fear of abandonment.*[65]

The prosecution presented further evidence from Dr. Chidakel in regard to the new trial motion (8 CT 2390-2397). She held the opinion that

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64/ While Dr. Globus phrased his conclusion in the conditional rather than the absolute, the Superior Court did not rely upon this distinction in failing to give Dr. Globus's opinion any weight.

65/ In a similar vein, Dr. Richard Ofshe, a defense psychologist, opined the best guilt phase defense was Appellant's vulnerability to police psychological coercion. Attorney Owen retained Dr. Kania to evaluate the falsity of the confession only. Appellant asserted that his trial attorney was deficient in failing to pursue the best defense or to present a medical expert in mitigation.

Appellant suffered from a variety of serious cognitive impairments, yet retained the capacity to understand the act of killing and no unusual propensity to confess falsely to such act. As it relates to Dr. Chidekel, Appellant argues that trial attorney was deficient in failing to present this very evidence to the jury as mitigation.

Specifically, Dr. Chidekel made ten findings of relevance to the presentation of mental health mitigation: 1) Appellant had deficits in right hemisphere and frontal lobe brain function, scoring 81 verbal-IQ, 68 performance-IQ, and 73 full-scale IQ, which was in the 4th percentile; 2) had problems in visual-spatial reasoning; 3) had substantial deficits in visual memory; 4) performed in the lowest 1st percentile of recognition trial; 5) had "limited" ability to encode information; 6) had attention span within the lowest 7th percentile; 7) when stressed, had tendency toward limited frustration tolerance and poor impulse control; 8) had poor verbal and visual memory; 9) had trouble organizing information for himself; and 10) was reliant on others for direction (8 CT 2390-2393). In Dr. Chidekel's opinion, Appellant *could have difficulty understanding all the ramifications of his actions*, but he could understand a murder-for-hire deal, and how to kill. *Appellant's deficits could make him more susceptible to accept Hollywood's assignment to kill.* The jury never heard these very significant findings from the mouth of the prosecutor's own expert.

Significantly, the prosecution sought to present Dr. Chidekel's November, 2001 test data and subsequent letter-report describing Appellant's cognitive impairments at Pressley's re-trial on second degree murder. The prosecution's purpose was to demonstrate that Appellant's visual-spatial defects rendered him incapable of finding his own way to and from Lizard's Mouth, and hence - contrary to his post-arrest statement - Pressley *must* have guided Appellant.[66]

66/ Dr. Chidekel's data and letter-report constitute party admissions of Appellant's cognitive impairments. By separate motion, Appellant asks this Court to take judicial notice of the Evid. Code §402 hearing transcript of Dr. Chidekel's testimony held in *People v. Pressley,*

b. Abuse and Neglect

Newly-discovered medical records showed that Appellant fractured his skull as an infant and suffered febrile seizures as a child (8 CT 2269). Appellant was hospitalized as an infant for head injury, febrile seizures and infections. Vicky dropped him on his head at age three-months. Appellant suffered convulsions and fever, turned blue, had viral meningitis, and stopped breathing at age six-months (8 CT 2259). He was hospitalized for dehydration following viral infection at age six-months, and again as an emergency case for one week at age 18-months. Dr. Globus explained that multiple events of this sort were remarkable in a young boy's life and *gave rise to the suspicion of abuse and neglect but did not make it absolutely certain*. He cited the long duration of gastroenteritis in support of this suspicion.

In addition, members of Appellant's family submitted declarations which bore out a family history of mental illness and drug abuse more substantial than their penalty testimony. Vicky was sexually molested as a child, treated with medication for manic-depression as an adolescent, and hospitalized for suicide attempt after Appellant's arrest. His grandfather was catatonic for weeks at a time, and was diagnosed as paranoid schizophrenic and depressed, disorders which are genetically transmitted (8 CT 2317). His aunt Anne Stendel was treated for hyper-manic disorder (8 CT 2249). Dr. Globus opined that Appellant's family history *abounded with psychiatric disorders predisposing him genetically to develop some forms of mental illness, including depression and drug abuse.*[67]

Santa Barabara Superior Court Case No. 1014465, on November 7, 2002, and to apply principles of judicial estoppel to consider it for the truth of the matters asserted in Claim V (*Miranda*) and XIV (*Fosselman).*

67/ With regard to evidence of family abuse and neglect, some of which was before the jury, Appellant argued trial attorney was deficient in failing to present an *expert interpretation* of the effect of such mistreatment on Appellant's functionality.

c. Institutional Adjustment

Santa Barbara Sheriff Martinez regarded Appellant as an excellent inmate who adjusted well to jail with no write-ups (8 CT 2268).[68]

Jurisdictional Claim

I. THE STATE OF CALIFORNIA LACKED SUBJECT MATTER JURISDICTION TO ADJUDICATE APPELLANT'S CULPABILITY FOR A CRIME COMMITTED WITHIN EXCLUSIVE FEDERAL TERRITORIAL JURISDICTION

A. INTRODUCTION

The State of California did not have jurisdiction to prosecute this capitally-charged murder which occurred in Los Padres National Forest. Exclusive jurisdiction resided with the Courts of the United States not California, because: (1) upon the admission of California into the Union, the United States reserved jurisdiction over public lands within the state, including Los Padres National Forest; (2) by 1891 Statute, California ceded, and the United States must be presumed to have accepted, exclusive jurisdiction over this public land; and (3) the 1897 presidential proclamation reserving from entry or settlement the Santa Ynez Forest Reserve, re-affirmed federal sovereignty over this land and resolved any possible ambiguity as to exclusive jurisdiction by the federal government.

The trial court failed to consider and determine this issue of subject-matter jurisdiction, necessary for prosecution and conviction of Appellant's capital crime. Thus, Appellant's conviction cannot stand unless either this Court, or the Superior Court, upon remand, reviews this defect in subject-matter jurisdiction to make the necessary jurisdictional finding. A defect in jurisdiction may be raised at any stage of the proceedings. This Court has

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68/ With regard to the Parties' stipulation on this issue, Appellant argued trial attorney was deficient in failing to present a prison adjustment expert or sheriff witnesses to the mitigation theme approved under *Skipper v. South Carolina* (1986) 476 U.S. 1, 7 n.2.

the preliminary obligation to make its own determination on this issue. As demonstrated below, the State of California did not have jurisdiction to prosecute appellant for a murder which occurred in Los Padres National Forest and thus his capital conviction must be reversed.

B. STATEMENT OF FACTS

1. Los Padres National Forest

The prosecution presented evidence to the trial jury the murder occurred at a place known as "Lizard's Mouth" a remote spot off West Camino Cielo Drive, 300-yards from a trail head in the San Marcos Pass near Lake Cachuma, in Santa Barbara County. *See e.g.*, 5 RT 1031 (Lars Wikstrom); 5 RT 1087 (Detective Albert Lafferty); 6 RT 1108 (Detective David Danielson). The grand jury knew, though the trial jury did not, this site was located within Los Padres National Forest (*See* 3 CT 757, 764 (Grand Jury Testimony of Sergeant Ken Reinstadler)). The Superior Court assumed jurisdiction to hear the case.

Los Padres National Forest comprises a 220-mile stretch of central California mountain ranges known as the Santa Ynez, San Rafael, and Sierra Madre, and nearly one-third of Santa Barbara County.

C. ARGUMENT

1. The Supreme Court Must Review Subject Matter Jurisdiction Regardless That the Error Was Not Raised in Superior Court

This Court should correct "defects in subject-matter jurisdiction . . . regardless whether the error was raised in district court." *United States v. Cotton* (2002) 535 U.S. 625, 630. Review of legal conclusions regarding jurisdiction is *de novo*. *United States v. Gabrion* (6th Cir. 2009) 517 F. 3d at 872 (Moore, J. concurring) (recognizing that jurisdiction is an element of offense); *United States v. Gomez* (9th Cir. 1996) 87 F.3d 1093, 1095 (*de novo* review of whether prosecution proved beyond a reasonable doubt the jurisdictional element that arson building had substantial connection to

interstate commerce); *United States v. Nukida* (9th Cir. 1993) 8 F.3d 665, 670 (holding that subject-matter jurisdiction is intermeshed with merits of the case and should be determined at trial).

The Superior Court in this case did not consider or charge the jury to determine jurisdiction. Location of the murder within the territorial jurisdiction of the Court is an element of the offense that must be alleged in the Indictment and proven at trial, and in this case, should have been referred *sua sponte* to the jury. This Court must make this determination, or remand the case for the Superior Court to develop an adequate factual record for such a determination to be made.

In *People v. Betts* (2005) 34 Cal.4th 1039, this Court held that territorial jurisdiction is not a factual question for the jury in a criminal proceeding. *Betts* rejected the argument that territorial jurisdiction is a substantive element of the crime which must be proved to the jury. *Betts* also rejected the defendant's argument that he was entitled under the Sixth and Fourteenth Amendments to a jury trial on jurisdictional facts. Rather, "territorial jurisdiction is a procedural matter that relates to the authority of California courts to adjudicate the case and not to the guilt of the accused or the limit of authorized punishment, a jury trial on the factual questions that establish jurisdiction is not required by the federal constitution." *Betts* did acknowledge, as it must, that territorial jurisdiction is necessary to establish the court's authority to try the defendant, that the defendant cannot be convicted of a crime unless territorial jurisdiction exists, and that without jurisdiction, a court has no authority to act in the matter and cannot enter judgment either in favor or against the appellant. Thus, under *Betts*, this is a question for the trial court to decide and the prosecution has the burden of proving the facts necessary to establish territorial jurisdiction by a preponderance of the evidence. Appellant contends that on the former point, *Betts* was wrongly decided; under *Gabrion* and *Gomez,* jurisdiction *is* an element of a crime as a matter of right under the federal Constitution.

2. The United States Has Been in Continuous Possession of Los Padres National Forest Since 1848

This recital of early California history borrows from the opinion of the Fourth Appellate District Court of Appeal in *Coso Energy Developers v. County of Inyo* (2004) 122 Cal.App.4th 1512, 1522-1523, though Appellant disagrees with the legal analysis and conclusion of the court in that case. The San Marcos Pass (which includes "Lizard's Mouth," the parcel of land where the murder occurred) was ceded to the United States by Mexico pursuant to the Treaty of Guadalupe Hidalgo in 1848. (Feb. 2, 1848, 9 Stat. 922, art. V.). Pursuant to this treaty, Mexico relinquished to the United States sovereignty over California (*Botiller v. Dominguez* (1889) 130 U.S. 238, 243-244), and title to land not privately held passed to the United States. *(Thompson v. Doaksum* (1886) 68 Cal. 593, 596.) Such land is referred to as the "public domain of the United States (*People v. Shearer* (1866) 30 Cal. 645, 658), and in the case of Los Padres National Forest has been continuously owned by the United States since its initial acquisition.

Following the Treaty of Guadalupe Hidalgo and prior to California's admission into the Union, the ownership and jurisdictional status of the San Marcos Pass land was analogous to the land at issue in *Fort Leavenworth R.R. Co. v. Lowe* (1885) 114 U.S. 525, 537-538, prior to the admission of Kansas. The United States was not only the "proprietor" of the public domain property in California, but held "political dominion and sovereignty" over the land. *(Cf. Fort Leavenworth*, 114 U.S. at 526; *Botiller*, 130 U.S. at 243-244.)

In 1850, the United States admitted the State of California into the Union. (Act for Admission of State of Cal. into Union, 9 Stat. 452, chap. L.) Section 3 of Chapter L of the Act provides in part:

> That the said State of California is admitted into the Union upon the express condition that the people of said State, through their legislature or otherwise, shall never interfere with the primary disposal of the public lands within its limits, and shall pass no law and do no act whereby the title of the United States to, and right to dispose of, the same shall be impaired or questioned[.]

(9 Stat. 452 Chap. L, Sec. 3.)

The Court of Appeal in *Coso Energy Developers* did not acknowledge the existence of this congressional limitation on Californian sovereignty over public lands, which is why that Court glossed over the fact that the United States was far more than a "ordinary proprietor" over such land. (*Cf. Coso Energy Developers*, 122 Cal. App. 4th at 1523 (asserting in absence of any explicit federal reservation of jurisdiction, California could generally exercise the same jurisdiction it had over similar property owned by private parties).) In fact, the United States always had exclusive jurisdiction over Los Padres National Forest in that, by the original compact by which California entered the Union, California could not "interfere," "impair," or "question" the United States' title to or right to dispose of its public lands.

The Property Clause of the United States Constitution provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." *(U.S. Const., art. IV, §3, cl. 2.)* The United States Supreme Court has read this Clause expansively to mean the federal government "doubtless has a power over its own property analogous to the police power of the several States." *(Kleppe v. New Mexico* (1976) 426 U.S. 529, 539-540.) By its enactment of 9 Stat. 452 Chap. L, Sec. 3. of the Act for Admission of the State of California into the Union, Congress chose to exercise its constitutional power to create exclusive federal jurisdiction over public lands within the State.[69] For this reason, the California public land situation was *not comparable* to the ambiguous status of public land in Kansas after cession from France in 1803 and statehood in 1861. (*Fort Leavenworth R.R. Co. v. Lowe* (1885) 114 U.S. 525, 526-527 (holding that when United States admitted Kansas into the Union, it did not reserve to

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69/ Since exclusive federal jurisdiction in this case arises under the Property Clause (art. IV, §3, cl. 2), case law analyzing jurisdiction under the Enclave Clause (art. I, §8, cl. 17) are inapposite.

itself jurisdiction over the land); *cf. Coso Energy Developers*, 122 Cal. App. 4th at 1523 (analogizing federal ownership and jurisdictional status of subject land in California and Kansas, without reference to Chap. L, Sec. 3 of the Act for Admission of California).)

In *Bowen v. Johnston* (1939) 306 U.S. 19, the United States Supreme Court held the federal district court had *exclusive jurisdiction* to try defendant for murder committed in Chickamauga and Chattanooga National Park. *(See also Benson v. United States* (1892) 146 U.S. 325 (finding exclusive federal jurisdiction over Fort Leavenworth reservation except as jurisdiction was reserved by State of Kansas in its act of cession).)

In *Underhill v. State* (Okla. 1925) 237 P. 628, the Oklahoma Court of Appeal reversed a state conviction for lack of jurisdiction because the crime at issue (alcohol possession) had occurred within Platt National Park, as to which criminal jurisdiction was exclusively federal. In *Underhill*, as in this case, the federal government had obtained the public domain land prior to the state's admission to the Union, and in the Enabling Act, the federal government had reserved the right to exclusive control and jurisdiction over the land. (237 P. at 629.)

Bowen and the reasoning of *Underhill* control this case. With respect to a crime committed in Los Padres National Forest, exclusive jurisdiction resided with the Courts of the United States not California, because the United States reserved jurisdiction upon the admission of California into the Union. (*Fort Leavenworth,* 114 U.S. at 526-527.) The Superior Court lacked jurisdiction to try appellant for capital murder.

3. By 1891 Statute, California Conveyed Exclusive Jurisdiction to the United States and Acceptance by the United States Must Be Presumed

Alternatively, by legislative action taken forty-one years after statehood to cure any possible ambiguity in this arena, California ceded and the United States accepted exclusive jurisdiction. *See Fort Leavenworth*, 114 U.S. at 539 (recognizing alternate method by which exclusive federal jurisdiction conferred).) The 1891 Statutes provides:

> Section 1. The State of California hereby cedes to the United States of America exclusive jurisdiction over such piece or parcel of land as may have been or may be hereafter ceded or conveyed to the United States, during the time the United States shall be or remain the owner thereof, for all purposes except the administration of the criminal laws of this State and the service of civil process therein.
>
> Section 2. This Act shall take effect immediately.
>
> (Stats. 1891, ch. 181, §§ 1 & 2, at 262.)

The Court of Appeal in *Coso Energy Developers* affirmed the trial court's conclusion in the case that the 1891 Statute applied only to lands ceded *by California*, and not to land which was ceded to the United States *by Mexico*. *Coso Energy Developers*, 122 Cal. App. 4th at 1523-1535. This Court is not bound by that analysis, and Appellant urges the Court to reject it, as it runs contrary to the plain language of the Statute which ceded exclusive jurisdiction to the United States over any such piece or parcel of land "as may have been or may be hereafter ceded." (*Id.*)

The Fourth District Court of Appeal in *Coso Energy Developers* found the land description clause in the 1891 Statute to be ambiguous because it was phrased in the passive voice and did not identify the party that had "ceded" land to the United States. *Id.* at 1524. However, the Court of Appeal erred by imposing a burden of specificity on the Legislature, *i.e.*, "the statute could have been drafted to read 'land that anyone ceded.'" *id.*, and failing to give effect to statutory language which was sufficient, capacious and all-inclusive. The Court of Appeal reached the irrational and unsupportable conclusion that the ceding party in the 1891 Statute *must be* the State of California. *Id.* at 1525. The *reductio ad absurdum* of the *Coso Energy Developers* opinion that California must be the ceding party (and not Mexico) is the supposition that only by this interpretation would California control "its power to retain, qualify or withdraw its jurisdiction." *Id.* at 1527. This is nonsensical in that the purpose of the 1891 Statute was to cede exclusive jurisdiction in respect to both past *and* future land grants. The Court of Appeal's interpretation renders the prospective reach of the Statute surplusage, rather than giving effect to what the statute clearly says.

At the time the United States acquired the land at issue here in 1850, federal acceptance of ceded jurisdiction was presumed absent an express refusal. *Fort Leavenworth R.R. Co.,* 114 U.S. 525, 528. In general, for lands acquired prior to 1940, federal jurisdiction is presumed. *See* 40 U.S.C. §255 (Act of Congress which reversed the presumption of acceptance). This provision was renumbered as 40 U.S.C. §3112, effective August 21, 2002, and this particular provision restated as §3112(c). The Supreme Court has indicated that §255 applies to the national forests. *See Adams v. United States* (1943) 319 U.S. 312, 315 n.6.

Nonetheless, the Court of Appeal in *Coso Energy Developers* found that, as the moving party, Coso Energy Developers did not present any evidence of the conferring of a benefit to the United States, and hence did not meet their burden of proving the foundational facts for the presumption. *Id.* at 1536-1537. Such a requirement of proof is contrary to 40 U.S.C. §255. In addition, the existence of a benefit may be presumed in the United States' exercise of its sovereignty over the lands in question. Alternately, a remand to the Superior Court is warranted to permit development of a factual record on this issue.

Moreover, the reservation of jurisdiction for the administration of criminal law has been uniformly interpreted as limited to the right to serve process such that federal lands not become enclaves for fugitives from justice.

4. The 1897 Presidential Proclamation "Setting Aside" the Reserve Resolved Any Ambiguity as to Exclusive Jurisdiction

On October 2, 1899, under authority of the Creative Act of 1891, 16 U.S.C. §471, President William McKinley proclaimed the establishment of the Santa Ynez Forest Reserve, which included the San Marcos Pass land here at issue. The effect of this Executive Order was to set apart and reserve from entry or settlement as a "public reservation" land which was previously federal public land. (Executive Order 7501 1-FR 2141.) By subsequent proclamations, the land in question was re-named the Santa

Barbara Forest Reserve, the Santa Barbara National Forest, and finally on December 3, 1936, Los Padres National Forest. Each of these presidential proclamations re-affirmed federal sovereignty over the land at issue here.[70]

In *Collins v. Yosemite Park & Curry Co.* (1938) 304 U.S. 518, the United States Supreme Court upheld exclusive federal jurisdiction as negating the applicability of state license and sales tax fees within Yosemite National Park. After the Treaty of Guadalupe-Hidalgo and reservation of federal rights in the land, the United States and California engaged in three transactions regarding Yosemite Valley: in 1864, the United States gave Yosemite Valley to California in trust for public park and recreational purposes (13 Stat. 325); in 1905, California re-ceded Yosemite Valley to the United States; and in 1906, the United States accepted the re-grant and constituted the Valley as part of the Yosemite National Park. *(Collins*, 304 U.S. at 521.)

Interpreting this history of sovereign transactions, the United States Supreme Court found exclusive federal jurisdiction over Yosemite National Park except as specifically reserved to California in its cession act, *e.g.*, right to impose use tax.

Collins controls this case. California could not legitimately prosecute Appellant for a murder committed in Los Padres National Forest, over which it lacked jurisdiction under Section 3 of the Act for the Admission of the State of California into the Union, 9 Stat. 452 Chap L, the 1891 California Statute, and the 1897 Presidential Proclamation.[71]

70/ See e.g., http://www.presidency.ucsb.edu/ws/index.php?pid=69260 (Proclamation of President William McKinley for the Establishment of the Santa Ynez National Forest); http://www.foresthistory.org/ASPNET/Places/National%20Forests%20of%20the%20U.S.pdf (history of Los Padres National Forest).

71/ By contrast, in 1850, the California Legislature divested itself of jurisdiction through a cession to the United States for military purpose the land of the Presidio in San Francisco. California's legislative jurisdiction over the Presidio was ceded to the United States under Chapter 56, Statutes of California for 1897. *(See United States v. Perez* (N.D. Cal. 2006) 2006 U.S. Dist. LEXIS 75086 (federal court had exclusive

5. In Case of Ambiguity, This Court Should Remand to the Superior Court to Make Findings of Fact

In this case, the Superior Court did not instruct the jury to make any determination where the murder occurred and the nature of jurisdiction (concurrent or exclusively federal) for crimes committed within Los Padres National Forest. Notwithstanding *Betts*, without jurisdiction, a court has no authority to try a appellant and a appellant cannot be convicted of a crime unless territorial jurisdiction exists. As a matter of history, treaty and statutory interpretation, the State of California did not have jurisdiction over crimes committed in Los Padres National Forest. Federal jurisdiction exists for murder committed within the "lands reserved or acquired for the use of the United States, and under the exclusive or concurrent jurisdiction thereof." (18 U.S.C. §§ (3) and 1111(b).) It was incumbent upon the Superior Court to resolve this issue first and foremost, and a post-trial remand for findings of fact is warranted.

In *United States v. Gabrion* (6th Cir. 2009) 517 F.2d 839, the issue of subject matter jurisdiction was raised *for the first time* in capital defendant's opening brief on appeal. The Sixth Circuit remanded to the district court which, following an evidentiary hearing, made detailed findings that the federal government had concurrent criminal jurisdiction along with the State of Michigan over the Manistee National Forest. The Sixth Circuit reviewed the record established in the district court of the history of acquisition and cession by both Sovereigns in regard to Oxford Lake, the site within the National Forest where the victim was drowned. *Gabrion*, 517 F.3d at 848, 856. In case of ambiguity, appellant is entitled to a hearing to develop a factual record on the history of the acquisition and cession by both Sovereigns in regard to Los Padres National Forest. (*Cf.*

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jurisdiction to try appellant for driving under the influence in the Presidio; state action alone cannot recapture jurisdiction); *United States v. Watkins* (1927) 22 F.2d 437, 441 (federal court had exclusive jurisdiction to try appellant for murder committed in the Presidio); *see also United States v. Peterson* (S.D. Cal. 1950) 91 F. Supp. 209 (federal court had exclusive jurisdiction over King's Canyon National Park).)

United States v. Fields (10th Cir. 2008) 516 F. 3rd 923, 928 (interpreting Oklahoma's Cession Act as vesting general concurrent federal and state jurisdiction in the Ouachita National Forest).) If this Court finds the issue of jurisdiction over Los Padres National Forest is indeterminate, remand to the Superior Court to develop the record is warranted.

Finally, as explained in Claims below, the record contains insufficient evidence of Appellant's involvement in a kidnap at the Lemon Tree Hotel. For this reason, the Superior Court's failure to determine the issue of jurisdiction cannot be upheld on the mistaken theory that Appellant was shown beyond a reasonable doubt to have premeditated the murder or committed a predicate felony kidnap within Santa Barbara County. *(Cf. Washington v. Lane* (1989) 771 P.2d 1150 (affirming state court jurisdiction to try defendant for murder where acts of premeditation and abduction allegedly occurred on state land prior to murder at Fort Lewis, a federal enclave).) *Lane* was a case which the Washington Supreme Court reviewed by way of pre-trial writ petition. Significantly, the Washington Supreme Court held that "at trial the State will have the burden of proving beyond a reasonable doubt that jurisdiction does in fact rest with the Washington courts." *(Id.* at 1155.) The same is true in this case, and a remand for the Superior Court to develop the record to resolve this issue is necessary.

Jury Selection Claims

II. THE SUPERIOR COURT VIOLATED APPELLANT'S DUE PROCESS AND SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY BY PREVENTING VOIR DIRE OF POTENTIAL JUROR BIAS.

A. INTRODUCTION

For its pungent blend of Southern California affluence, white teenage ennui, and nonsensical violence, the case touched a nerve in the Zeitgeist. In October 2001, most of the prospective jury venire had

prejudged Appellant's guilt based on widespread media coverage.[72] Yet, the Superior Court picked a jury in just one-day, an extraordinarily brief process for a capital case of such notoriety. Judge Gordon erred by precluding the defense from inquiring whether prospective jurors otherwise inclined to believe the death penalty should be automatically applied in any case of intentional murder, would be able to consider life imprisonment in a case involving the intentional kidnap-murder of a minor, an aggravated form of intentional murder.[73] Inexplicably, however, the trial court allowed the prosecution to question the venire regarding the possibility that Appellant's youth might provide bias against imposition of a death sentence.

This disparity in questioning violated constitutional principles of equality and fair play and opened the door for the impaneling of a jury skewed toward imposition of a sentence of death. Whereas the prosecution was able to identify (and then exclude by way of peremptory challenges) those jurors who might be swayed by the mitigating factor of Appellant's youth to impose a sentence of life imprisonment without parole, the defense was not able to identify those jurors who might automatically vote for death because of the presence of the special circumstance here – kidnap-murder

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72/ The pretrial questionnaires of four seated jurors are illustrative: "Since he was part of something that bad, I felt he did something wrong and should be punished." (Juror 9184, 9 CT 2578); "They are all just kids and news coverage likes to sensationalize stories. Probably lean toward prosecution from what I read" (Juror 0555, 9 CT 2658); "The victim was murdered, apparently to cover the kidnapping" (Juror 5056, 9 CT 2638); and "I haven't paid attention, due to my job and personal life. I was unaware that Mr. Hoyt was the name of the Appellant though I was aware that the crime had been committed. (I don't live on Mars, I'm just busy)." (Juror 7446, 9 CT 2668).

73/ Three impaneled jurors expressed the view that the death penalty should apply automatically for *all* intentional murders, excepting only self-defense and auto accidents. Given the inflammatory nature of the charges in this case, it could be inferred these seated jurors would invariably vote for the death penalty for a appellant who intentionally kidnapped and murdered a teenage victim.

of a minor victim.

Voir dire was neither careful nor adequate to protect Appellant's right to a fair and impartial jury. Several seated jurors expressed views of Appellant's guilt and of the appropriateness of the death penalty for *any* intentional murder, which required follow-up inquiry along lines proposed by the defense. The ruling of the Superior Court which precluded any questioning about general facts certain to be present in the case to be tried, in particular jurors' ability to maintain an open mind in sentencing a Appellant guilty of kidnap and kidnap-murder of a 15-year old minor, was reversible error under *People v. Cash* (2002) 28 Cal.4th 703, 719. The Superior Court's erroneous ruling created a likelihood that disqualified biased jurors were impaneled and acted on their views and that the jury, as impaneled, was unconstitutionally skewed toward returning a verdict of death, thereby violating appellant's Fifth Amendment due process and Sixth Amendment right to an impartial jury, as well as his right under the Eighth Amendment to a reliable penalty determination, *see Morgan v. Illinois* (1992) 504 U.S. 719, 729; *Witherspoon v. Illinois* (1968) 391 U.S. 510, 522-23; *Turner v. Murray* (1986) 476 U.S. 28, 36.; *Caldwell v. Mississippi* (1985) 472 U.S. 320, and article I, sections 7, 15, 16, and 17 of the California Constitution. Remand for the impanelment of a new sentencing jury is the appropriate remedy under the circumstances.

B. STATEMENT OF FACTS

1. Denial of Sequestered Voir Dire and Preclusion of Questioning About the Impact of Any General Facts on the Jurors' Ability to Remain Impartial and Consider Both Penalties

Before trial, the defense moved for sequestered juror voir dire of prospective jurors on attitudes toward the death penalty and the effect of extensive pre-trial publicity (1 RT 223). In denying the request Judge Gordon observed,

> I think, also, that the death penalty issue, generally speaking, has to be considered in the abstract. I'm not going to get into

situations where we're asking the jury to frame their responses in terms of specific trial evidence. I don't think that's appropriate. That's asking them to prejudge evidence, and I don't think you can do that.

(1 RT 234.)

The Superior Court reasoned that prospective jurors' completed questionnaires would provide an adequate foundation for the parties to exercise challenges.

2. Juror Questionnaire

In response, the defense proposed that the Superior Court's questionnaire elicit prospective jurors' reaction and ability to be fair and keep an open mind in regard to allegations of kidnap, kidnap-murder, and murder of a minor victim.[74] As a matter of common experience and judicial precedent, these allegations would cause a strong emotional response from many if not most jurors.[75]

The four questions at issue were as follows:

78. What was your first reaction when you heard this is a "kidnapping murder" case?

79. Would your feelings about the issue of kidnapping and murder be such that: You could not be fair and impartial in relation to the defendant. You could not be fair and impartial in relation to the complaining witness. Neither statement applies.

98. During the course of the trial, the prosecution may present evidence that includes pictures of Mr. Markowitz after he died, and a gun that was used in the killing. The prosecution may even display the gun itself. How do you think this type of

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74/ The Court invited both parties to submit proposed questionnaires, but without explanation, excluded defense questions 78, 79, 98 and 120.

75/ Of the 79-prospective jurors in Panel A from which the petit jury was drawn, seven were removed by stipulation for disqualifying pro-death penalty attitudes they expressed in the questionnaire. The claim of error arises from the possibility that other jurors harbored disqualifying views in regard to the subjects of defense questions not permitted.

evidence would affect your judgment of the case as a whole?

120. During this trial you may hear detailed descriptions of kidnapping and murder. Would that effect [sic] your ability to be fair and impartial? If so, please explain.

(5 CT 1263, 1265, 1268.)

The Superior Court rejected these defense questions, without comment or explanation.[76]

On October 17, 2001, the Superior Court briefly addressed 318-prospective jurors, whom were divided into four panels, before they were given questionnaires to complete, and proceedings adjourned for one week (5 CT 1240, 1318). Judge Gordon stated that the charges were alleged to have begun with the August 6, 2000 kidnap of 15-year old Nicholas Markowitz, and his alleged murder on August 9th (2 RT 313-314, 325). The Superior Court twice mentioned that a special circumstance of murder during the commission of kidnap was charged (2 RT 314, 318). The charges were not described again, either in the questionnaire or during voir dire.

The Superior Court utilized a juror questionnaire which included four "yes/no" questions which generally addressed on the subject of capital punishment, as follows:

32) No matter what the evidence shows, would you refuse to vote for guilt as to first degree murder or refuse to find the special circumstances true in order to keep the case from going to the penalty phase, where death or life in prison without the possibility of parole is decided?

33) No matter what the evidence shows, would you always vote guilty as to first degree murder and true as to the special circumstances in order to get the case to the penalty phase, where death or life in prison without the possibility of parole is decided?

76/ The Superior Court's summary denial in the face of contrary case law, *see e.g., People v. Kirkpatrick,* reflects its overall lack of due diligence, and its unseemly rush to impanel a capital jury.

34) If the jury found a defendant guilty of intentional first degree murder and found *a special circumstance* to be true, would you always vote against death, no matter what other evidence might be presented at the penalty hearing in this case?

35) *If the jury found a defendant guilty of intentional first degree murder and found a special circumstance to be true, would you always vote for death, no matter what other evidence might be presented at the penalty hearing in this case?*

(9 CT 2560.)

Regarding the jury's discretion at penalty phase, the questionnaire asked prospective jurors three questions, as follows:

42) *There are no circumstances under which a jury is instructed by the court to return a verdict of death. No matter what the evidence shows, the jury is always given the option in the penalty phase of choosing life without the possibility of parole.*

(a) Given the fact that you will have two options available to you, can you see yourself, in the appropriate case, rejecting the death penalty and choosing life imprisonment without the possibility of parole instead? (Yes/No)

(b) Given the fact that you have two options available to you, can you see yourself, in the appropriate case, rejecting life imprisonment without the possibility of parole and choosing the death penalty instead?(Yes/No)

43) Regarding the statement: *"Anyone who intentionally kills another person should always get the death penalty."* Do you strongly agree/agree somewhat/disagree somewhat/strongly disagree? Please explain.

44) Regarding the statement: "Anyone who intentionally kills another person should never get the death penalty." Do you strongly agree/ agree somewhat/disagree somewhat/strongly disagree? Please explain.

(9 CT 2561, emphasis added.)[77]

77/ These questions could be answered along a sliding scale, with two affirmative and two negative responses, and a blank space in which to

The questionnaire did not identify the kidnap-murder special circumstance alleged in the case or that the victim was a minor, circumstances about which some if not many of the prospective jurors would be expected to hold strong attitudes in regard to punishment.

3. Voir Dire

On October 25, 2001, the Superior Court conducted general voir dire of the remaining 50-prospective jurors in Panel A, from which it selected the petit jury.[78] Judge Gordon asked the panel whether any of them would discuss the subject of penalty during the guilt phase or would be unable to follow the law in the case (2 RT 436, 447). Only one person raised their hand to indicate a problem.

The jury was chosen from Panel A (93 RT 608). The next day, October 26th, the remainder of the five alternates were chosen from 15 prospective jurors drawn randomly from Panel B and the jury was sworn (3 RT 643, 693). The Superior Court's voir dire of the Panel A venire was extremely brief, having precluded any inquiry of jurors' views of, or ability to be impartial toward a special circumstance case involving the kidnap-murder of a minor.[79]

As a method of ferreting out any jurors' substantial impairment in regard to open-minded consideration of a life sentence, rather than the death

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elaborate briefly, as some jurors did.

78/ Of the 79-jurors originally called in Panel A, 22 were excused as anti-death penalty jurors and seven were excused as pro-death penalty jurors by stipulation of the parties based on their questionnaires (5 CT 1318, 10 CT 2725). The Court impaneled the petit jury from the remaining 50-jurors in Panel A, drawing upon 15- prospective jurors from Panel B to complete the selection of five alternates.

79/ The trial jury consisted of Jurors 10051185 ("1185"), 100209184 ("9184"), 100388919 ("8919"), 100416687 ("6687"), 100248739 ("8739"), 100321006 ("1006"), 100226495 ("6495"), 100285056 ("5056"), 100160555 ("0555"), and 100117446 ("7446"). Two alternate jurors, 100121687 ("1687") and 100156619 ("6619"), were impaneled during trial. For simplicity sake, the discussion refers to impaneled jurors by the last four-digits of their assigned numbers.

penalty, for an intentional kidnap-murder of a minor, this was wholly inadequate. The voir dire of seven seated jurors - 5185, 6495, 5056, 7446, 1006, 6687, and 8739 - consisted solely of one question: whether any of them could volunteer a reason why they were disqualified from service.[80] *See* 3 RT at 496-497, 452. The jurors were not told on October 25th the nature of the special circumstance so, even assuming a willingness to volunteer unsolicited bias, one of these jurors could have harbored disqualifying views and now known enough about the charging of the case to express them.

80/ The victim's youth was discussed only twice. Juror 6495 said he would not be biased toward the prosecution because the victim was young, even though he had three young children (3 RT 500). Yet in his questionnaire, Juror 6495 (like fellow jurors 0555, and 6619) strongly felt that the death penalty should be applied automatically to anyone found guilty of intentional murder (9 CT 2631). No questioning of whether these jurors' principles should or would yield for the intentional kidnap-murder of a teenage victim, was permitted under the Court's Order.

Juror 1687 said she taught students at Goleta High School the same age as the victim. Judge Gordon replied "the Appellant's a young man and the victim was quite a young person" (3 RT 542). A limited discussion of Juror 1687's impartiality ensued:

> THE COURT: Anything at all as you sit there now that makes you think that you could not serve on this jury and be objective about the case, follow the law, and arrive at a fair verdict?
>
> JUROR 1687: No.
>
> THE COURT: All right. What?
>
> JUROR 1687: I think that I'm fine.
>
> MR. ZONEN: Okay. All right. Again, the nature of these charges are such that you feel you could execute your responsibilities as a juror as effectively in this type of case as you could in any other?
>
> JUROR 1687: Yes.
>
> (3 RT 540-544.)

The voir dire of four other seated jurors raised particular concerns about impartiality.

a. Juror 9184

In her questionnaire, Juror 9184 had answered "yes" to Questions 25 and 26 that she had feelings against Appellant solely because he was charged with this particular offense; and the fact that information was filed against the Appellant caused her to conclude that he was more likely guilty than not guilty (9 CT 2578). In regard to media coverage, she wrote "since he was part of something *that bad*, I felt he did something wrong and should be punished" (9 CT 2578, emphasis added).

The following brief, but convoluted voir dire of Juror 9184 ensued:

> THE COURT: Based on all of the questions that have been asked the last couple of days, the answers that you would give to those questions, based upon your answers in your questionnaire, based upon any views you might have of the criminal justice system, or any influences that you may have, you may have experienced as a result of the media coverage in this case, can you think of any reason as you sit there now that you could not give both sides a fair trial if you wound up on this jury?
>
> JUROR 9184: No.
>
> THE COURT: *Is there anything about the nature of this case that causes you concern as to your ability to be an impartial juror?*
>
> JUROR 9184: *Not more than -- I mean not -- no.*
>
> MR. ZONEN: *Not more than anybody else?*
>
> JUROR 9184: *Right.*
>
> MR. ZONEN: If we get to the stage of deliberating on the question of whether or not this is a death penalty offense, or otherwise, do you feel you could do that?
>
> JUROR 9184: Yes, I do.
>
> MR. ZONEN: And if you and eleven other jurors agree that this is appropriate for the death penalty, should the Appellant be found guilty to the standard required by law you would have to objection to coming back into court and being able to voice that verdict publicly?

JUROR 9184: No, I have no problem with that.

MR. ZONEN: Again, the nature of the paragraphs [sic], and, perhaps, some of the testimony may – it may tend to offends one's sensibilities at times, but you would be able to overcome that and listen to the testimony, view the photographs as necessary?

JUROR 9184: Yes, I would definitely try to do that as best as I do, yes.

MR. ZONEN: And any reason to believe that you would be anything but a fair and impartial juror to both the defendant and to the prosecution?

JUROR 9184: No.

. . .

MR. CROUTER: Okay. You indicated, I believe, that because the defendant is charged with this particular offense that you have feelings against the defendant just because of that, can you explain a little more about that for us?

JUROR 9184: Well, I think it's just a natural judgement that people have. I had a snap judgement and I, you know, after sitting here for awhile, I believe that there's a due process that people should go through now, and I understand a little bit more about the situation. *But it's hard not to have feelings about certain things.*

MR. CROUTER: Do I summarize your feelings as having changed somewhat, that now you realize that just because someone is charged with an offense, or been arrested for an offense that isn't evidence of anything?

JUROR 9184: Yes, I feel that I have changed my feelings *somewhat* on that.

(4 RT 595, emphasis added.)

b. Juror 8919

In his questionnaire, Juror 8919 disagreed somewhat with the predicate of Question 43 that anyone who intentionally kills another person should always get the death penalty, explaining that "self-defense can be seen as 'intentional.'" He also disagreed somewhat with the obverse in Question 44 that anyone who intentionally kills another person should never

get the death penalty, adding cryptically "should vs. shall" (9 CT 2591). Although these responses suggested Juror 8919 favored the death penalty for all intentional murders other than self-defense, only the following voir dire directed at Appellant's youth (not the victim's youth) ensued:

> MR. ZONEN: Do you feel that there's anything about the defendant's appearance that you think might interfere with your ability to be able to judge this case fairly and impartially on both sides, and by that I mean mostly his youthfulness?
>
> JUROR 8919: No, not at all.
>
> (3 RT 454-455.)

As a result of the Court's exclusion order,[81] no defense questioning on Juror 8919's ability to keep and open mind and judge the case fairly despite the youthfulness of the victim, or to sentence an intentional kidnap-murderer to life imprisonment rather than invariably to death, was permitted.

c. Juror 0555

In her questionnaire, Juror 0555 agreed somewhat with the predicate of Question 43 that anyone who intentionally kills another person should always get the death penalty. She strongly disagreed with the predicate of Question 44 that anyone who intentionally kills another person should never get the death penalty, which was the most ardently pro-death penalty, of the four choices given (9 CT 2661). Juror 0555 disclosed elsewhere in her questionnaire that her son had pleaded guilty to negligent homicide in Michigan, arising from a highway accident in which a young child was killed. While the juror's sense of the unfairness of that result to her son was discussed in chambers,[82] no voir dire was permitted of Juror 0555's

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81/ By excluding any reference to the impact on jurors' ability to consider life imprisonment without parole of a specific special circumstance (kidnap-murder of a minor victim) (1 RT 234), the Superior Court effectively put the topic off-limits to voir dire.

82/ Juror 0555 saw this case "very differently"; her son's case was "strictly an accident" (3 RT 555). She lived on the same street as the

willingness to consider a life sentence, as opposed to automatic capital punishment, for a defendant found guilty of the intentional kidnap-murder of a teenage victim.

d. Juror 6619

In her questionnaire, Juror 6619 wrote "not necessarily," indicating in response to Question 26 that the fact an information was filed against defendant might cause her to conclude that the Appellant was more likely guilty than not guilty? (9 CT 2688).[83] She answered Question 31 that she was philosophically strongly in favor of the death penalty (9 CT 2689). Like fellow Juror 0555, Juror 6619 agreed somewhat with the predicate of Question 43 that anyone who kills intentionally should always receive the death penalty. The following brief voir dire ensued:

> MR. CROUTER: You answered a question that asked, "Anyone who intentionally kills another person should always get the death penalty," and you indicated you agree somewhat. Is that how you feel?
>
> JUROR 6619: *Well, I wouldn't know -- I need to know the facts. Is it in self-defense?* I mean, I don't know.
>
> MR. CROUTER: All right. Can you think of any other situation, just using your imagination –
>
> THE COURT: Well, I don't want them to imagine. That's -- I think you can ask -- she said that she – she would think that the death penalty wasn't appropriate in self-defense. *And is that the only circumstance that you feel the death penalty should not be imposed in the case of intentional killing is self-defense?*
>
> JUROR 6619: *No. There's automobile accidents.*
>
> THE COURT: This is an intentional killing. See, the -- the question is phrased in terms of an intentional killing. So we're not talking

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Rugges, knew a child lived in her neighborhood, but had no idea of their activity until she saw the news.

83/ Initially impaneled as an alternate, Juror 6619 replaced Juror Sargent on the petit jury during guilt phase, when juror Sargent was absent due to illness (8 RT 1613).

about automobile accidents.

When you said self-defense would be the exception, so I guess what I need to know is this. You're going to get -- you're going to get, if you get to that, we don't even know if the jury is going to reach the penalty issue, but if the jury reaches the penalty issue, then there's another phase of the trial. You're going to consider evidence that's presented in that phase. You'll be able to consider evidence you previously heard in the penalty phase [sic]. Then I'm going to give you some more instructions on the death penalty, and standards and things like that, and then you go in, and then you've got to weigh all the evidence, consider all the instructions, and then make a choice between the death penalty and life without possibility of parole. That's the job you have to do.

And so the question is, can you do that, or is it your, in your mind right now, that the only circumstance in which you think that the death penalty would not be appropriate would be in self-defense?

JUROR 6619: No. Thank you for explaining further. I understand now. *Yes, there's some instances I think that life in prison would be a better choice.*

MR. CROUTER: You're not thinking about an accident where somebody is killed such as involuntary manslaughter, which would not be intentional?

JUROR 6619: No.

MR. CROUTER: Can you imagine a situation in which someone committed first-degree murder, and, of course, if the jury finds Mr. Hoyt guilty of first-degree murder, the jury would get to a penalty phase where you would find life imprisonment without parole to be the most appropriate sentence?

JUROR 6619: *Yes, it would be a situation like that.*

(4 RT 691-693, emphasis added.)[84]

Here, again, the Superior Court's failure to reiterate in the questionnaire or on October 25 that kidnap-murder was the alleged special

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84/ As discussed *infra*, though the defense did not challenge these jurors for cause, the claim of *Cash* error on appeal is preserved by the Superior Court's restriction of voir dire.

circumstance, and its exclusion of any questioning on that subject, resulted in a voir dire record of seated jurors whose fixed views and closed minds on these vital topics were implicit, yet could not be clarified by more deliberate questioning.

4. Prosecution Voir Dire on Appellant's Youth

By contrast to exclusion of defense voir dire on case facts (intentional kidnap-murder of a teenager) that by their inflammatory nature would tend to impair some, if not many jurors' ability to consider a life sentence rather than death, the prosecution was permitted to voir dire jurors on whether specific mitigation involving the defendant's youthfulness would pull them in the opposite direction. So, for example, the prosecution asked Juror 6196 if she could decide the case without sympathy, seeing that defendant had "a very human face". The prosecution used a peremptory challenge to strike this juror (1 RT 453).

The prosecution inquired whether seated Juror 8919 and prospective Juror 4883's impartiality would be affected by defendant's "youthfulness"; the latter juror, it also challenged peremptorily (2 RT 455; 2 RT 469); and would defendant's "appearance" cause prospective Juror 7577 concern about her "ability to do her job", a colloquy which may be posited to have contributed to another of its peremptory strikes (2 RT 472).

C. ARGUMENT

1. Legal Standards

The Superior Court has a duty to ascertain whether and to dismiss prospective jurors whose views on capital punishment would prevent or substantially impair the performance of their duties as juror, including their honest ability to return a verdict of life imprisonment without parole in the case before the juror, if the evidence presented warrants such a result under applicable instruction. *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Cash* (2002) 28 Cal. 4th 703, 720 (*citing Morgan v. Illinois* (1992) 504 U.S. 719, 726-728. The Superior Court must make a record adequate to this determination of qualified jurors. On appeal, an order limiting voir dire is

reviewed for abuse of discretion. *People v. Jenkins* (2000) 22 Cal.4th 900, 990. As a matter of common prudence, such discretion is suspect all the more because the Superior Court failed to explain its order in terms of the governing case law, as happened in this case.

At the time of trial, the law was well-settled that a capital defendant was entitled to ask prospective jurors questions specific enough to determine if those jurors harbored bias as to some fact or circumstance to be shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence. *People v. Kirkpatrick* (1994) 7 Cal.4th 988, 1005; *see also People v. Pinholster* (1992) 1 Cal.4th 865, 916-917 (prosecution inquiry permissible whether prospective juror would automatically vote for life without parole if a defendant had committed felony-murder, rather than premeditated murder). The constitutional due process underpinning for this principle was established in *Turner v. Murray* (1986) 476 U.S. 28, that a capital defendant accused of an interracial crime was entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias, and the failure to do so compelled reversal of the death penalty.

Though it was decided six months after jury selection in this case, *People v. Cash*, *supra*, broke no new ground in finding that *Kirkpatrick* and *Pinholster* applied in the context of other inflammatory evidence. In *Cash,* the prosecution noticed defendant's prior murders of his grandparents as aggravation evidence if defendant were convicted of the charged murder. The Superior Court prohibited defense counsel from inquiring during voir dire whether prospective jurors would automatically vote for the death penalty upon learning of the prior murders at penalty phase. This Court reversed defendant's death sentence and remanded for impanelment of a new penalty jury. A capital defendant has a state and federal due process right to voir dire jurors on their honest ability to consider and vote for a life sentence when confronting provocative allegations such as prior murders, just as the prosecution can voir dire on the obverse in the context of

case. *Id.* at *116 & n.16 (emphases added). The defense argued that this line of inquiry impermissibly sought prospective jurors' advisory opinion on the exact factual scenario present in the case to be tried.

In response to the prosecution request, the trial court posed four questions to prospective jurors, following its explanation that an actual killer in a felony murder case may be subject to the death penalty even if he does not act with intent to kill. The four questions probed the jurors' views, attitudes, and principles about capital punishment as far as the felony murder rule, whether a juror would be able to consider imposing the death penalty, or would vote automatically for life imprisonment or for death in such a situation. *Id.* at *119. The impaneled jury returned a death sentence. On appeal, this Court upheld the four voir dire questions against defendant's challenge that these infringed his rights to a fair and impartial jury. The *ratio decidendi* was that, while the questionnaire conveyed a specific fact about the case to prospective jurors - that defendant did not intend to kill the victim - none of the questions cajoled or prejudiced the jury. Significantly, the questions elicited "information from which the trial court could determine the views of prospective jurors in the abstract." *Id.* at *121. The trial court struck the correct balance under *Cash* when it granted the prosecution's request "to explore prospective jurors' views on whether the absence of intent to kill would substantially impair their ability to follow the law of felony murder." *Id.* at *121-122.

The Superior Court's exclusion of defense questions 78, 79, 98 and 120 about kidnap-murder of a teenage victim cannot be squared with the *Taylor* decision. As a matter of common experience, some jurors harbor very strong feelings about crimes against children, which requires inquiry during voir dire. Prospective jurors' attitudes toward kidnap, kidnap-murder, and murder of a minor victim, and their ability in particular to consider a life sentence without possibility of parole for a defendant convicted of an intentional murder within that context must be scrutinized upon request.

The Superior Court impaneled a jury in this case by a remarkably brief and perfunctory group voir dire, in violation of Appellant's right to a fair and impartial jury.[85] Specifically, Judge Gordon erred by denying sequestered voir dire; precluding any questioning about general facts germane to the jurors' ability to remain impartial and open to considering both penalties, specifically the fact that the special circumstance was the kidnap-murder of a minor victim[86] and excluding defense questions 78, 79, 98 and 120, which examined prospective jurors' attitudes toward kidnap, intentional kidnap-murder, and (through the proxy of how they would react to seeing post-mortem photographs) the youthfulness of a teenage victim. *See* 5 CT 1263, 1265, 1268. Under governing case law, both federal and state, the Superior Court was required to pose these questions to prospective jurors, and the resulting voir dire record is inadequate to determine whether seated jurors harbored disqualifying fixed views about the application of the death penalty in such a case.

Moreover, the Superior Court's double standard in allowing the prosecution to identify, through its voir dire, (and thereafter exclude by use of peremptory challenges) those jurors who might lean toward imposing a life sentence because of Appellant's youth violated constitutional principles of equality and fair play and opened the door for the impaneling of a jury skewed toward imposition of a sentence of death.

85/ The Superior Court's double standard in the latitude it extended to the prosecution yet denied the defense is further evidence of a practice unworthy of respect in a case of this magnitude. While the defense was curtailed from any inquiry pertaining to kidnap of a youthful victim, the prosecution was permitted to inquire whether Appellant's youth or "very human face" would prevent particular jurors from voting for death.

86/ Effective January 1, 2001, before trial in this case, the Legislature amended Code of Civil Procedure §223 to provide counsel in criminal cases a limited right to question prospective jurors without having to make a showing of good cause. (Stats. 2000, ch. 192, §1.) The Superior Court's denial of the defense request without comment was error. Appellant's timely objection to group voir dire preserved the claim on appeal. *People v. Taylor* (2010) 2010 Cal. LEXIS 2818, *48.

4. The Error Was Not Harmless

a. Appellant Had No Opportunity to Cure Prejudice

As in *Cash,* the Superior Court never altered its erroneous rulings excluding defense questions 78, 79, 98 and 120, and denying sequestered voir dire. Consequently, Appellant had no opportunity to examine any juror with respect to their attitudes, views, or ability to return a life sentence for any intentional kidnap-murder of a teenage victim. *Cash*, 28 Cal.4th at 722; *cf. People v. Medina* (1995) 11 Cal.4th 694, 746. The Superior Court abused its discretion by precluding *any* questioning on this general proposition at the heart of the case. No other questioning filled in this significant blank about whether jurors held fixed views of the appropriateness of the death penalty in cases involving this particular (as opposed to an undefined "a") special circumstance.

Indeed, neither the trial court's voir dire, voir dire permitted by attorneys, nor the questionnaire was sufficient to cull out any jurors who would automatically vote for death because of the special circumstance here – intentional kidnap-murder of a teenage victim. As quoted in the factual summary, the only reference to the issue was within the four "*Witherspoon*" questions and an additional three questions regarding the jurors' penalty phase discretion. The permitted voir dire and questionnaire did not contain any further questions on this vital issue.

Under *Morgan v. Illinois*, 112 S. Ct. at 2232-33, "general fairness and 'follow the law' questions" are not sufficient to detect those in the venire who automatically would vote for the death penalty. The United States Supreme Court observed that its *Witherspoon* line of case-law "would be in large measure superfluous were this Court convinced that such general inquiries could detect those jurors with views preventing or substantially impairing their duties. [] Such jurors by definition are ones who cannot perform their duties in accordance with law, their protestations to the contrary notwithstanding." *Id.* at 2233. Thus, the Superior Court's catechism on voir dire along the lines of "can you think of any reason why

you are not qualified?" did not suffice, especially since the special circumstance was not identified as kidnap-murder at that time, and questions about the victim's youth were not permitted. Consequently, the jurors' formulaic disavowal of any disqualifying factor cannot be said to encompass the otherwise unaddressed issues of kidnap and intentional kidnap-murder of a teenage victim.

b. Because Effective Voir Dire was Barred, Appellant Cannot and Need Not Identify a Particular Biased Impaneled Juror

In *Cash*, *supra*, this Court found that the trial court's restriction of death-qualification voir dire made it impossible to determine from the record whether any of the seated jurors were actually disqualified by virtue of their views, the error could not be dismissed as harmless, and the death judgment must be reversed. *Cash*, 28 Cal. 4th at 723. The same holds true for this abbreviated one-day voir dire in a controversial and high-profile capital case. The Superior Court's restrictions prevented any exploration of the jury venire's responses or ability to be fair and open-minded in regard to the specific issues which gave rise to the controversy and high-profile of the case. The trial court precluded questioning on the very basic general facts which the media exploited and which were obviously germane to the ability to remain open to considering both penalties in this case. But, consistent with governing case law on capital voir dire, particularly in a high-profile controversial and polarizing case, the trial court could not ignore "the elephant in the room."

When prospective jurors responded to Question 42 whether they would always vote for death if they found a defendant guilty of intentional first degree murder and found a special circumstance to be true, no matter what other evidence might be presented at the penalty hearing (2 RT 313-314; 9 CT 2560), they had no practical way of knowing that the special circumstance charged was kidnap-murder. Nor could the defense inquire whether the victim's youth was a fact that would affect their response to Question 42. This general inquiry was insufficient because lay jurors would

have no practical idea what "a" special circumstance meant, not otherwise defined in the questionnaire or in during the live voir dire. Nor would a juror who harbored a belief that the death penalty should apply automatically to a Appellant found guilty of intentional first degree murder of a 15-year old teenager necessarily to express that belief under the phrasing of Question 35, since the victim's youth was not specifically addressed by the Superior Court.

In *People v. Butler* (2009) 46 Cal.4th 847, 858, the prosecution noticed as aggravation evidence that the defendant was charged in a jailhouse killing. This Court affirmed exclusion of defense voir dire on this specific murder. The decision in *Butler* was based on two critical facts. First, the juror questionnaire in *Butler* asked whether "anyone who intentionally kills more than one person . . . should receive the death penalty." This is precisely the kind of question in regard to the kidnap-murder special circumstance, which appellant sought to pose in this case, but the Superior Court excluded. Second, the trial court in *Butler* permitted counsel to ascertain jurors' general attitudes whether the death penalty is always appropriate for perpetrators of jailhouse murders. *Id.* at 860. Here, again, the Superior Court forbade that precise inquiry in regard to kidnap, kidnap and murder, and murder of a minor in the abstract. The Superior Court's single utterance of the term "kidnap" and the victim's age before distributing a ten-page questionnaire and conducting live voir dire one week later that excluded any reference to these issues, in regard to any death penalty-qualifying questions, did not meet the constitutional mandate of *Kirkpatrick*, *Pinholster,* and *Cash,* or match the facts at play in *Butler*.[87]

87/ Though *Cash* was decided in 2002, nine-months after trial in this case, it neither broke new ground nor set new precedent. The *Wainwright/Witt* standard for death-qualification, and the subjects of appropriate inquiry to determine bias as applied to the case being tried were well-established when Appellant's jury was chosen.

c. Seated Jurors' Responses Warranted the Defense-Requested Questions as Follow Up

The truncated record of this one-day voir dire falls far short of establishing that no seated juror held a disqualifying view toward the automatic application of the death penalty for intentional kidnap-murder of a minor. *See People v. Cunningham* (2001) 25 Cal.4th 926, 974. Six jurors, fully half the panel, were not questioned at all except whether they could volunteer a basis for their own disqualification; of these, the most that can be said is that none spontaneously stepped out of the jury box. *See* 3 RT 496-497, 452 (Jurors 5185, 6495, 5056, 7446, 1006, 6687, and 8739). Such general inquiries are insufficient under long-standing United States Supreme Court case law. *Morgan*, 112 S.Ct. at 2232-2233.

Four of the other six seated jurors gave written and verbal responses which *were* highly suggestive of bias. By her questionnaire, Juror 9184 was strongly pro-death penalty (9 CT 2578.) In general voir dire, Juror 9184 expressed that the "nature" of the case concerned her, even if "not more than anybody else". She conceded "it's hard not to have feelings" in terms of a "snap judgment" against Appellant, even if these had changed somewhat during voir dire (4 RT 595). While she readily agreed she could vote *for* the death penalty, counsel were not permitted to ask whether she could vote *against* the death penalty, given the "nature" of the case and the special circumstance, kidnap-murder of a minor victim.

In Question 43, Juror 8919 strongly suggested that intentional killers should be spared the death penalty only if they acted in self-defense (9 CT 2591.) The prosecution asked for and received assurance from Juror 8919 that Appellant's youthfulness would not interfere with that juror's ability to judge the case; but the defense was precluded from asking juror 8919 whether kidnap, kidnap-murder special circumstance, or intentional murder of a minor would interfere with his ability to judge the case fairly. The disparity in questioning violated constitutional principles of equality and fair play. *Cf. Alfaro*, at 1312 (trial court agreed with defense that victim's age might affect prospective jurors' views; prosecution did not object to

asking prospective jurors whether "they would be biased to the point they could not be fair and impartial if the victim is a nine-year-old child").

Both Jurors O555 and 6619 answered Question 43 that anyone who kills intentionally *should always* receive the death penalty. Juror 6619 could posit only self-defense and auto accidents as exceptions warranting life imprisonment. The Superior Court explained that, at the penalty phase, the jury would consider additional evidence and make a choice between the death penalty and life imprisonment without possibility of parole, and asked if she could "do that." Juror 6619 answered, "yes, there's some instances I think that life in prison would be a better choice." The Superior Court's ruling precluded the defense from asking *the* obvious and critical question: whether she could think of any such instances as exceptions to her automatic death penalty philosophy for intentional murder, when the murder was also committed in furtherance of a kidnap and the victim was a minor. Given Jurors 6619 and 0555's stance that intentional killers always should receive the death penalty, such questioning was pivotal to the appellant's due process right to be tried by a fair and impartial jury.

Any fair reading of the seated juror questionnaires and the one-day voir dire record in this case casts substantial doubt on the adequacy of the questioning on life-qualification. The Superior Court did not fulfill its duty to ask prospective jurors relevant questions on kidnap, kidnap-murder, and murder of a minor victim, likely to reveal strongly held and fixed bias or prejudice.[88] The Superior Court did not personally question every member of the jury. Conduct of voir dire this perfunctory is not entitled to deference on appeal.

The Superior Court's restriction on death-qualification voir dire casts grave doubt that Appellant was sentenced to death by a jury impaneled in

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88/ A comparison with the voir dire in *Alfaro* is instructive. When asked directly, multiple jurors openly expressed their feeling that, regardless of the evidence presented, the death penalty should be automatic in a case in which a child was murdered. *Alfaro*, 41 Cal. 4th at 1310-1312 & n.14. Yet, this disqualifying attitude was not revealed by other more general inquiries.

compliance with the Fourteenth Amendment. *See Morgan*, 504 U.S. at 729. The result was impanelment of a jury "uncommonly willing to condemn a man to die." *Witherspoon*, 391 U.S. at 521. The death verdict should be reversed, and the case remanded to Santa Barbara Superior Court for the impanelment of a new sentencing jury in conformity with law.

III. THE SUPERIOR COURT VIOLATED APPELLANT'S FIFTH AND SIXTH AMENDMENT RIGHTS BY ERRONEOUSLY EXCLUDING PROSPECTIVE JUROR GONZALEZ FOR CAUSE.

A. INTRODUCTION

Appellant was denied due process, equal protection of the law, his right to an impartial jury and his right to a fair and reliable penalty determination under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and article I, sections 7, 15, 16 and 17 of the California Constitution by the Superior Court's erroneous dismissal of prospective juror Francisco Gonzalez [100376586] (hereafter "juror Gonzalez").

As per his questionnaire, Gonzalez was a middle-aged Chicano business owner and musician, married with two children. Notably, he reported that, through his career as a musical performer, he had met and observed conditions of life prisoners. He affirmed that he could follow the law even when he disagreed with it, could vote for guilt based on the evidence and, though he opposed capital punishment in principle, could vote for it in an appropriate case.

During general voir dire, Judge Gordon asked Gonzalez three questions in response to which he confirmed that he could and would deliberate guilt without considering or discussing penalty, albeit with an awareness of the moral gravity of such judgment with consequences for another human being.

Following Gonzalez's fourth answer - a nine-word conundrum "no matter what I did, that would be a factor" - and without word of explanation

or follow-up questioning, the Court dismissed Gonzalez for cause. This was structural error which denied Appellant's right to a fair and impartial sentencing jury. Accordingly, Appellant's death penalty judgment must be reversed.

B. STATEMENT OF FACTS

1. Juror Gonzalez's Questionnaire

In terms of his questionnaire, Gonzalez was well-qualified for juror service in a capital murder case. Neither party sought to challenge him for cause. Gonzalez was a 48-year old self-employed business owner and professional musician. (14 CT 3919, Questions 1, 3). He and his wife had been married for 17-years, with two children, a 15-year old boy and ten year old girl. (*Id.* at 3920, Questions 6-8). He had four years of university education, having majored in music studies. His wife taught at University of California, Santa Barbara as a professor of Chicano Studies. (*Id.* at 3920, Questions 8, 10). Unlike most of the venire, Gonzalez brought little prior exposure and no stated prejudgment to the case, recognizing he "can't make a judgment based on allegations [he] heard on the radio." (*Id.* at 3922, Question 27(b)). He had never been a criminal defendant, victim or juror, and said he harbored no bias toward appellant. (*Id.* at 3921, Questions 15-17, 25-26). He characterized himself as neither a leader nor a follower, adding "I am an individual." (*Id.*, Question 23).

Juror Gonzalez had performed musical concerts in county, state and federal prisons, as recently as the previous year. (*Id.* at 3920, Question 12). His cousin was a chaplain in a Nevada federal prison; his nephew, a deputy sheriff in Riverside County. He had used firearms for target-practice and hunting. (*Id.* at 3920-3921; Questions 13, 19.)

Juror Gonzalez expressed that he would not have any difficulty following the law as given to him by the Judge even when he disagreed with it. (*Id.* at 3922, Question 24.) As a matter of personal philosophy, he was strongly against capital punishment. (*Id.* at 3923, Question 31.) At the same time, he affirmed that he would not vote automatically for or *against* a verdict of guilt, or for or *against* a special circumstance, no matter what the

evidence showed, to keep the case from going to the penalty phase. (*Id.* at 3924, Questions 32-33, emphases added.) If the jury found appellant guilty of first degree murder and a special circumstance true, he would neither always vote for death or always vote against death, no matter what evidence might be presented at penalty phase. (*Id.* at 3924, Questions 34-35.)

Juror Gonzalez considered appellant's background to be possibly (rather than probably or unsure) relevant to the death penalty, explaining "if past shows some mitigating circumstances like mental illness or reduced capacity to reason". (*Id.* at 3924, Question 27.) In terms of any change in opinion on capital punishment over the years, he wrote "I have grown more ambivalent. Both death and life without parole are equally harsh." (*Id.* at 3924, Question 38.) *He affirmed that he could see himself in an appropriate case, rejecting life imprisonment and choosing the death penalty instead.* (*Id.* at 3925, Question 42(b), emphases added). *He also affirmed that he could follow instruction by the Court to refrain from discussing the question of the death penalty during the trial until guilt phase was concluded.* (*Id.* at 3925, Question 41, emphases added.) He strongly disagreed with both propositions that someone who intentionally killed a victim should either always or never get the death penalty, expressing the view as to both that "each case is unique." (*Id.* at 3925, Questions 43-44.) He disclosed that he had undergone alcohol counseling, and had been sober for the past 20-years. (*Id.* at 3926, Question 46(b).) With regard to the validity of psychological testing, he wrote "ambiguous. It's hard to quantify and qualify a human being." (*Id.*, Question 48(b).)

In short, juror Gonzalez's written profile was that of a thoughtful individual, a married professional with two children, with no prior experience with the criminal justice system, and no explicit biases. While philosophically opposed to capital punishment in general, he affirmed *unequivocally* that he could impose the death penalty in an appropriate case. On the strength of his questionnaire alone, Gonzalez was undoubtedly qualified for jury service under *Wainwright v. Witt*. Indeed, he was not even discussed, much less included among the 107-other prospective jurors

dismissed by party stipulation (10 CT 2724-2728).

2. Juror Gonzalez's Voir Dire

During the one-day voir dire, juror Gonzalez was impaneled in the petit jury (2 RT 418). He reiterated that he had no pre-conception of appellant's guilt or innocence based on media exposure.

He knew prosecutor Brian Hill[89] through little league baseball. He related having had both positive and negative experiences with law enforcement, but neither would influence his judgment (3 RT 421). He had worked with law enforcement in Santa Barbara County but as a kid growing up in East Los Angeles, he viewed the police as more like "an occupying force." As an adult, he worked on anti-drug programs with Santa Barbara Sheriffs. His nephew worked as a sheriff's deputy in Riverside, and a cousin served as a chaplain in federal prison. He reiterated that he had played music professionally before prison audiences.

The following colloquy ensued between the Court and juror:

> THE COURT: All right. Well, again, anything in those experiences [referencing his completed questionnaire] that makes you think you couldn't be a fair juror in this case, knowing what the juror's job is?
>
> PROSPECTIVE JUROR GONZALEZ [1003765861]: No, I don't think so. The only caveat I would put on that is that I have -- I have witnessed firsthand the results of the sentencing. And I have spoken with people who have been, for instance, sentenced for life, with no chance of parole and stuff like that. *And that -- it's a very heavy burden to judge someone. So that's all I can say.*
>
> THE COURT: Well, that brings us to an issue which we weren't going to get to yet, but we're there now, as far as -- and I'll come back to the others. But obviously as a juror in determining whether or not the Appellant committed any of the offenses with which he's charged in this case, the subject of punishment or penalty is not even to be considered or discussed. Do you understand that?

89/ At the time of appellant's trial, Mr. Hill apparently was a deputy district attorney in the Santa Barbara office, who had no involvement in this case. As a member of the Santa Barbara Superior Court bench, Judge Hill presided over record completion proceeding in this case, and the 2009 trial of co-defendant Hollywood.

PROSPECTIVE JUROR GONZALEZ [1003765861]: (Nods head up and down.)

THE COURT: You don't even get to that at that point. And so my question to you is, do you believe that because of your observations as to the circumstances of those who have been sentenced to prison for various things, do you believe that you would be inclined to consider the potential sentence in determining the issue of guilt or innocence? Do you think that would influence your view of the facts?

PROSPECTIVE JUROR GONZALEZ [100376586]: *I would like to think it wouldn't, but it hangs on me very heavily, morally.* I --

THE COURT: Mr. Gonzalez [100376586], the question is, if you wind up on this jury, are you going to deliberate with the other jurors, consider the facts, decide the facts based on the evidence, without consideration of any potential sentence that may be imposed, if you get to that phase of the case? That's the question.

PROSPECTIVE JUROR GONZALEZ [100376586]: *I would have to say that no matter what I did, that would be a factor.*

THE COURT: I'm going to excuse you.

(3 RT 423-424, emphasis added.)

C. ARGUMENT

1. Legal Standards

The applicable standard for determining whether a juror may be properly excused for cause is whether the juror's views about capital punishment would prevent or substantially impair that juror's ability to return a verdict of death in the case before the juror. *Wainwright v. Witt* (1985) 469 U.S. 412, 424; *People v. Ochoa* (2001) 26 Cal.4th 398, 431. On appeal, this Court affirms the Superior Court's exclusion of a juror for cause if it is "fairly supported" by the record. *People v. Cunningham* (2001) 25 Cal. 4th 926, 975, and the Superior Court's determination is reviewed for abuse of discretion. *People v. Abilez* (2007) 41 Cal.4th 472, 497-498. A trial court abuses its discretion if its ruling exceeds the bounds of reason (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478), is arbitrary and

capricious, or is rendered without knowledge and consideration of "all the material facts in evidence ... together also with the legal principles essential to an informed, intelligent and just decision." (*In re Cortez* (1971) 6 Cal.3d 78, 85-86). The juror's true state of mind is essentially a factual question as to which deference is, with rare exception, owed to the trial court's finding even in the absence of a clear statement from the juror. *Uttecht v. Brown* (2007) 551 U.S. 1, 7-9.

As a threshold matter, appellant's claim that juror Gonzalez was erroneously dismissed for cause under *Wainwright v. Witt*, *supra*, is preserved on appeal despite counsel's failure to object at the time. In *Wainwright*, the United States Supreme Court considered the merits of such a claim despite comparable failure to object or attempt rehabilitation of prospective juror Colby.[90] *Id.* at 417, 431 n.11. In this case, defense counsel did not stipulate to Juror Gonzalez's excusal for cause, and the Superior Court's denial of the defense request for sequestered voir dire suffices to preserve a challenge to the basis for Gonzalez's dismissal. *See e.g.*, *Taylor*, 2010 Cal. LEXIS at 2818, *49 (claim of error preserved by appellant's timely objection to group voir dire, rather than objection to particular juror for cause).

As a procedural matter, the Superior Court erred by excluding juror Gonzalez *sua sponte,* without request of a party. As with any other trial situation where an adversary wishes to exclude a juror because of bias, it is *the adversary* seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality. *See Reynolds v. United States* (1879) 98 U.S. 145, 157. It is then the trial judge's duty to determine whether the challenge is proper. This is, of course, the standard and procedure outlined in *Adams v. Texas* (1980) 448 U.S. 38, and it is

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90/ It should be noted that juror Colby's acknowledgment in *Wainwright v. Witt (*she "thinks" her personal beliefs against the death penalty "would interfere with" judging the Appellant's guilt or innocence) was a far cry both syntactically and in context from juror Gonzalez's nine-word response ("no matter what I did, that would be a factor") in this case.

equally true of any situation where a party seeks to exclude a biased juror. *See e.g., Patton v. Yount* (1984) 467 U.S. 1025, 1036 (where defendant sought to excuse a juror for cause and the trial judge refused, analyzing whether the juror swore he could set aside any opinion he might hold and decide the case on the evidence, and whether the juror's protestations of impartiality should have been believed"). In this case, the Superior Court should have stayed its hand, absent a party request, at which time a statement of reasons or rehabilitation could have been compiled.

2. The Superior Court's Ruling Is Contrary to *Adams v. Texas*

In *Adams v. Texas* (1980) 448 U.S. 38, the United States Supreme Court held that the exclusion of prospective jurors on the ground that they were unwilling or unable to take a statutory oath that a mandatory penalty of death or life imprisonment would not "affect" their deliberations on any issue of fact contravened the Sixth and Fourteenth Amendments. Beyond doubt, the state has a legitimate interest in obtaining jurors who will be impartial on the question of guilt and will make the discretionary judgments entrusted to them without conscious distortion or bias, despite their conscientious scruples against the death penalty. Nevertheless, the Texas trial court erred by excluding prospective jurors who could not or would not state under oath (as required by Texas Penal Code Section 12.31(b)) that the mandatory penalty of death or imprisonment for life (on conviction of a capital felony) would not *affect* their deliberations on any issue of fact. Writing for an 8-1 majority, Justice White observed that the state cannot require as a condition of service as a juror in a capital case, a statement that the juror does not feel any burden of rendering judgment on another human being. This is precisely what Judge Gordon required of juror Gonzalez as a condition of service as a juror at Appellant's capital trial.

In *Adams v. Texas*, the Supreme Court recognized that jurors in a bifurcated capital case (California like Texas) "unavoidably exercise a range of judgment and discretion while remaining true to their instructions and their oaths." *Id.* at 46. The touchstone of the inquiry under Texas

§12.31(b), as applied by the trial court in *Adams v. Texas,* excluded jurors whom, by stating that they would be "affected" by the possibility of the death penalty "apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity of would involve them emotionally." *Id.* at 49. For example, juror Jenson said "you're talking about a man's life here. You definitely don't want to take it lightly." *Id.* at 50 n.7. *Adams v. Texas* remains good law today, and its teaching, thirty years hence, still rings true:

> [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. [] Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase [] if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, *yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system, and to exclude all jurors who would be in the slightest way affected by the prospect of the death penalty or by their views about such a penalty would deprive the apellant of the impartial jury to which he or she is entitled under the law.*
>
> *Id.* at 50 (emphasis added).

In *Adams v. Texas*, the trial court excluded jurors whose only "fault" was "to take their responsibilities with special seriousness or to acknowledge honestly that they might or might not be affected." *Id.* Judge Gordon applied the same litmus test as discredited Texas §12.31(b) to juror Gonzalez, whom by virtue of his experience as a professional musician, had met life prisoners and recognized the human cost of incarceration. Gonzalez reiterated multiple times that he *would* follow the law (even where he disagreed with it), *could* convict appellant based on the evidence, and *could* sentence him to death, if it were appropriate in the case. *Juror Gonzalez's only "fault" was to acknowledge that the gravity of both*

penalties "no matter what he did, would be a factor" (3 RT 423), i.e., would affect him whether he voted to convict appellant, regardless of either sentence imposed. These nine words were not grounds to excuse Gonzalez, since they indicated nothing more than a serious appreciation of his responsibility, and the human stakes involved.

The Constitution limits the power of the trial judge to exclude a juror for failure to swear a discredited oath, and the death sentence cannot be carried out in this case as a prospective juror was barred from jury service because of his views about capital punishment on a broader basis than inability to follow the law. *Adams*, 448 U.S. at 48 (citing *Witherspoon*, 391 U.S. at 522 n.21). Judge Gordon violated the rule of *Adams v. Texas* by applying the same ("would you be affected?") litmus test to bar juror Gonzalez from service in this case.

3. This Court's Decision in *People v. Heard* Also Commands Reversal of Appellant's Death Sentence

In *People v. Heard* (2003) 31 Cal.4th 946, this Court reversed a Appellant's death sentence where the trial court erred in excusing a prospective juror for cause based upon his views concerning the death penalty. The juror's responses to the questions posed on voir dire indicated he was prepared to follow the law. This Court recognized that, to the extent that the prospective juror's responses were less than definitive, any vagueness reasonably must have been viewed as a product of the ambiguity of the question itself.

For the lack of clarity of question and absence of any judicial reasoning, *Heard* controls this case just as much as does *Adams v. Texas* for its analysis of the overbreadth of the oath. Like Juror H. in *Heard,* juror Gonzalez's questionnaire showed that he was prepared to follow the law and the trial court's instructions. 31 Cal. 4th at 959 (juror H. affirmed he would neither vote automatically for life without parole or death, no matter what the evidence showed). Juror H. denied that he would be reluctant to get to penalty phase, but answered "no" to the question, would you decide the case based upon the evidence without fear of having to reach the next

stages.

In this case, juror Gonzalez stated that "it's a very heavy burden to judge someone," - a valid humanitarian assessment of the juror's function, which cast no doubt on his willingness or ability to perform this function. He agreed with the proposition that the issue of penalty is not to be considered of discussed during the guilt determination, but acknowledged he would remain conscious of potential sentence. His exact words were "I would like to think it wouldn't, but it hands on me very heavily, morally." And, "No matter what I did, that would be a factor." (3 RT 423-424). In terms of its emphasis upon the heavy moral burden of judgment, this colloquy mirrored the essential holding of *Heard*.

In *Heard*,

> The Court: "Do you think if there were past psychological factors that they would *weigh heavily* enough that you probably wouldn't impose the death penalty?"
>
> Prospective Juror H.: Yes, I think they might.

Notably, in *Heard*, unlike this case, the trial court posed three follow-up questions, and both parties posed their own questions to the juror on top of those:

> The Court: You think they might auger toward life without possibility of parole?
>
> Prospective Juror H.: Yes.
>
> The Court: Are you absolutely committed to that position?
>
> Prospective Juror H.: Yes.
>
> The Court: Are you saying if there were psychological, without naming what they might be, you would automatically vote for life without possibility of parole?
>
> Prospective Juror H.: Without naming them, I don't think so.
>
> *Heard*, 31 Cal. 4th at 961.

Juror H.'s "no" answer to what might be termed the "clincher" question was deemed critical to this Court's analysis that the record did *not*

support excusal for cause under the governing standard. In particular, the record on juror H. in *Heard* is identical to juror Gonzalez in four respects.

First, Juror Gonzalez's questionnaire responses qualified him to serve in the case. He affirmed he would follow the court's instruction (even when he disagreed with the law), would not prejudge the case based on publicity (of which he had seen or heard far less than most), would not automatically vote against guilt or against death, no matter what the evidence showed, and could vote for the death penalty in an appropriate case (14 CT 3924-3925). *See Heard*, 31 Cal. 4th at 964 (noting that juror H's questionnaire response that life without parole was a "worse" punishment than death, given without benefit of the trial court's explanation of governing legal principles, did *not* provide an adequate basis to support juror H.'s excusal for cause).

Second, despite the trial court's imprecise questioning, nothing in juror H's responses in *Heard* supported a finding that his views would prevent or substantially impair performance of his duties as a juror. In particular, the circumstance that the existence of psychological factors might influence juror H.'s penalty determination did *not* suggest juror H. would *not* properly be exercising the role that California law assigns to jurors in a death penalty case. *Heard*, 31 Cal. 4th at 965. Similarly, here, notwithstanding Judge Gordon's imprecise and needlessly terse questioning, nothing in Gonzalez's responses supported a finding that Gonzalez's views would prevent or substantially impair performance of his duties as a juror. In particular, the responses that Gonzalez felt it was a "very heavy burden" to judge someone, and the observation of the circumstances of those sentenced to prison "would weigh" on him, did *not* suggest Gonzalez would *not* properly be exercising the role that California law assigns to jurors at the guilt or penalty phase in a death penalty case. *See Heard*, 31 Cal. 4th at 965. As discussed *supra*, a juror's sober appreciation of the responsibility assigned to him under law is surely not disqualifying, and far preferable to a callous or blase approach. *See Adams*, 448 U.S. at 49.

Here, unlike *Heard*, Judge Gordon did not ask any "clincher" question to augment or contradict Gonzalez's written responses that he *would* follow the court's instructions, would not consider penalty at guilt phase, would not vote against guilt to avoid the penalty phase, and could vote for death in the appropriate case. *See* 14 CT 3924-3925. Without taking another minute or two to inquire, and listen to an explanation by Gonzalez of his thoughts, Judge Gordon acted *sua sponte* to exclude Gonzalez. As in *Heard*, the Superior Court in this case provided virtually nothing of substance to which this Court might defer. What was true of *Heard* rings especially true here: "to the extent juror H.'s responses were less than definitive, such vagueness reasonably must be viewed as a product of the trial court's own unclear inquiries." 31 Cal.4th at 967.

Third, as in *Heard*, the Superior Court did not make a record of its reasoning that Gonzalez's nine-word response demonstrated he could not or would not follow the law to deliberate Appellant's guilt based solely upon the evidence of guilt.[91] In *Heard*, this Court observed that, when even the slightest reason to doubt arises, the trial court should follow up with additional questions to resolve its uncertainty.[92] *Heard*, 31 Cal. 4th at 965. If anything, the Superior Court's voir dire of Gonzalez was less adequate, reflected less care and fell further short of meeting its obligation, than the record this Court found deficient in *Heard*. *Cf. Heard*, 31 Cal. 4 th at 967

91/ In *Heard*, this Court rejected the notion that a lengthy period of silence before the juror responded to a question on voir dire was supportive of excusal, observing that "reflection at this point was appropriate." *Heard*, 31 Cal. 4th at 967. In this case, the record does not reflect Gonzalez's demeanor at all other than that he nodded his head up and down (*i.e.*, indicating agreement), when asked whether he understood as a juror in determining Appellant's guilt, that the subject of penalty or punishment was not even to be considered or discussed (3 RT 423). This Court cannot divine that Judge Gordon's observation of demeanor affected its decision when no clues to this can be found in the record whatsoever.

92/ The trial court's failure to ask additional clarifying questions was a separate abuse of discretion because Gonzalez's answer was not "unequivocally disqualifying." *Wilson*, 44 Cal. 4th at 781 (citations omitted).

n.9 (advising trial courts to follow up on ambiguous answers to make a complete record of the basis for a cause challenge); *cf. People v. Wilson* (2008) 44 Cal.4th 758, 777 (affirming exclusion of juror where trial court asked a significant question, absent in this case: "do you think you'd be tempted or would you refuse to find the Appellant guilty of first degree murder just to stop yourself from having to go any further?"); *People v. Avila* (2006) 38 Cal.4th 491, 528 n.23 (same result; trial court posed a significant question, absent in this case: "do you honestly think that you could set aside your personal feelings and follow the law as the Court explains it to you, even if you had strong feelings to the contrary?").

By his questionnaire and first three live responses, Juror Gonzalez confirmed that he could and would deliberate Appellant's guilt based on the evidence presented and the court's instructions, without regard to sentencing, while conscious of the moral burden of such judgment. Then, on the basis of a fourth response, the Superior Court excused Gonzalez: "are you going to deliberate with the other jurors, consider the facts, decide the facts based on the evidence, without consideration of any potential sentence that may be imposed?" "I would have to say that no matter what I did, that would be a factor." (3 RT 424.) These nine words - "No matter what I did, that would be a factor" - were unresolvably ambiguous in that both subject ("what") and object ("that") were indefinite pronouns, undefined by reference to one another, or to anything else. Thus, "what I did" could mean, in context, the discretionary judgment entrusted to him by the State of returning a verdict of guilt as surely as it could have meant anything else, and the word "that" in context could mean simply the moral gravity of passing judgment on another human being, to which Gonzalez had earlier alluded, but which he consistently affirmed would *not* inhibit or prevent him from following the court's instructions or his oath. In this regard, Judge Gordon's voir dire ran afoul of this Court's caution in *People v. Stewart* (2004) 33 Cal.4th 425, 446, that it is erroneous to excuse jurors who affirm simply that they would find it "very difficult" to ever vote to impose the death penalty, without ascertaining whether this personal view

actually prevents or substantially impairs the performance of their duties as juror.

4. The Prospective Juror's Responses, and the Trial Court's "Careful and Thoughtful" Voir Dire in *People v. Martinez,* Distinguish the Holding in That Case

On the essential question whether juror Gonzalez could deliberate guilt without regard to penalty, Judge Gordon made no finding, gave no reasoning, and provided no statement of legal standard. The Superior Court's resolution of conflicts on the question of juror bias is binding on this Court *if and only if* it is supported by substantial evidence. *People v. Hamilton* (2009) 45 Cal.4th 863, 890. The evidence in this record that juror Gonzalez's true state of mind was disqualifying is unworthy of deference. The recent case of *People v. Martinez* (2009) 47 Cal. 4th 399 stands in stark comparison.

In *Martinez*, this Court affirmed the trial court's excusal for cause of two prospective jurors under a far more developed record. The crucial difference is the clarity with which juror Gonzalez repeatedly expressed that he could set aside his awareness of the moral burden of passing judgment, in deference to the rule of law.[93] There was no indication in the record that Gonzalez's philosophical skepticism of the death penalty or his firsthand observation of life prisoners would actually preclude him from engaging in the deliberative process and returning a guilt verdict.

In *Martinez*, juror B.S. wrote in her questionnaire that "the death penalty makes killers of us all." In lengthy voir dire, she parried in equivocal terms whether or not she could impose the death penalty, unless she had to do it. She answered one question, "it's not realistic that I would, but it is realistic that I can, that I could." The trial judge summarized all of

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93/ This Court should be particularly wary of Judge Gordon's excusal of juror Gonzalez out of concern that Gonzalez's background as a Chicano musician who grew up in East Los Angeles where the police were viewed as an occupying force played an illegitimate role in the decision. Bad reasons often lurk in the shadows of silence.

juror B.S.'s statements before expressing his definite impression that her true state of mind was she would never vote for the death penalty under any circumstances. *Martinez*, 47 Cal. 4th at 429-430. This Court upheld the trial court's excusal of B.S., based upon the "extensive transcript documenting the voir dire of B.S.", noting that the trial court "supervised a diligent and thoughtful voir dire," (*quoting Uttecht*, 555 U.S. at 20), and took pains to state and apply the correct standard and to explain the overall impression it received from the entire voir dire of B.S. *Id.* at 430. The trial court engaged in a conscientious attempt to determine juror B.S.'s views regarding capital punishment. The trial court legitimately could infer from the strength of the juror's views, her verbal fencing with the prosecutor, and her equivocal statements, that she was substantially impaired in her ability to perform her duties as a juror. *See also id.* at 438 (deferring to trial court's consideration of a number of circumstances it believed combined to disqualify another juror E.H., including her views on multiple subjects and her visible emotion during the prosecutor's questioning, and the trial court's recitation of the correct legal standards); *Wilson*, 44 Cal. 4th at 780 (deferring to trial court's assessment of juror M.M.'s state of mind, based on her conflicting responses, her demeanor, her vocal inflection and other nonverbal cues).

The record in this case of careless, rather than careful voir dire, does not warrant deference. *Cf. Martinez*, 47 Cal. 4th at 432. Rather, this is the record of an excusal based upon a single indefinite response by a conscientious juror, devoid of judicial explanation or reasoning, or follow-up. *Cf. Wilson*, 44 Cal. 4th at 780 (faced with a conflict in the juror's responses, the trial court pursued the matter further, producing what it viewed reasonably under the circumstances as an anti-death penalty "epiphany").

In short, there is insubstantial evidence to support Gonzalez's excusal. Gonzalez's written and verbal answers demonstrated that he could and would follow the court's instructions (even on law with which he disagreed), and could and would deliberate guilt without discussing the

issue of penalty. *Compare* 14 CT 3924-3925 *with Martinez*, 47 Cal. 4th at 431 (noting that juror B.S. never clearly indicated she was willing to set aside her anti-death penalty views). No question impugned juror Gonzalez's neutral and impartial written responses, including his willingness to follow instruction of law he disagreed with, and not to discuss possible penalty when deliberating on guilt. The briefest colloquy conducted by the court was inadequate to cast doubt on juror Gonzalez's qualified state of mind. *Cf. Wilson.* Gonzalez simply was not substantially impaired. To affirm Juror Gonzalez's disqualification on this paltry record would give trial courts *carte blanche* to disqualify any juror who expresses even the slightest humility or humanity at the altar of judgment on the fate of a living human being.

5. *Uttecht v. Brown* Is Not a Talisman to Defeat Any Claim of Inadequate Voir Dire.

In *Uttecht*, *supra*, the United States Supreme Court reversed a Ninth Circuit decision granting habeas relief to a capital petitioner on a claim that the Washington state trial court's excusal of juror Z. for cause was contrary to or an unreasonable application of clearly established federal law. In his 5-4 majority opinion, Justice Kennedy explained that deference may be due a trial court's determination of juror bias, in the absence of an unmistakably clear statement from the juror. 551 U.S. at 7. First off, it should be noted that deference which may be due, just assuredly may *not* be due, if the conditions precedent to such deference are absent. For example, Justice Kennedy found it instructive to consider the entire voir dire in *Uttecht*, which spanned more than two weeks, eleven days of which were devoted to determining whether potential jurors were death qualified. 551 U.S. at 10. By contrast, voir dire in this case took all of one day, with final alternates being selected the following morning.

Before deciding a contested challenge for cause, the trial judge in *Uttecht v. Brown* gave each party a chance to argue its position and recall the potential juror for additional questions. *Id.* at 11. By contrast, in this case, Judge Gordon asked four questions of Gonzalez, and neither party had

a chance to question him further (the Court having previously denied the defense request for sequestered voir dire) before the judge excluded Gonzalez following his nine-word answer to the fourth question, which was noteworthy for its enigmatic use of indefinite pronouns.

When issuing its decisions, the trial court in *Uttecht v. Brown* gave "careful and measured explanations." *Id.* at 11. By contrast, Judge Gordon's silence is deafening. Justice Kennedy regarded this aspect of things as a "necessary part" of the history. *Id.* at 12. While there is no mechanistic formula for a voir dire record worthy of deference, the brevity of this record, the absence of questioning by the parties, or follow-up by the Court, and - most tellingly - the absence of any analysis or explanation by the Court, surely fall short of any litmus test for deference set forth by Justice Kennedy in *Uttecht v. Brown*.

The specifics of juror Z.'s lengthy voir dire, "diligent and thoughtful" in Justice Kennedy's words, 551 U.S. at 20, also contrast with the single terse exchange that preceded Juror Gonzalez's excusal. Despite at least four separate explanations that, if the case proceeded to penalty phase, there was no possibility of Appellant's release, juror Z. in *Uttecht* reiterated multiple times that he would only vote for the death penalty if it was proven the defendant would re-violate if released. *Id.* at 15. When it was flatly stated that there was no possibility of parole for a defendant convicted of aggravated murder, juror Z. could not state any circumstance where he would give the death penalty - which is why Justice Kennedy wrote, "juror Z.'s answers, on their face, could have led the trial court to believe that juror Z. would be substantially impaired in his ability to impose the death penalty in the absence of the possibility that defendant would be released and would re-offend." *Id.* at 17. By contrast, on both occasions (written and orally) when it was explained to juror Gonzalez that, as a juror he would have the duty to deliberate guilt without any discussion of penalty, juror Gonzalez affirmed that he could and would meet that duty (14 CT 3925, 3 RT 423).

As Justice Kennedy observed in closing,

> The need to defer to the trial court's ability to perceive jurors' demeanor does *not* foreclose the possibility that a reviewing court may reverse the trial court's decision where the record discloses *no basis* for a finding of *substantial* impairment.

Uttecht, 551 U.S. at 19 (emphasis added).

Simply put, this record - a questionnaire and three answers which affirmed juror Gonzalez's ability to follow the law in all respects, followed by an inherently confusing question from the court and an understandably ambiguous answer - disclose *no basis for a finding of substantial impairment.*

The Superior Court exceeded its discretion in excusing Juror Gonzalez.

D. CONCLUSION

The remedy for an erroneous excusal of Juror Gonzalez is reversal of the death penalty. *Heard*, 31 Cal. 4th at 966; *Ross v. Oklahoma* (1988) 487 U.S. 81, 88. Accordingly, the death penalty judgment against Appellant must be reversed.

Guilt Phase Claim

IV. APPELLANT WAS DENIED HIS FIFTH AND SIXTH AMENDMENT DUE PROCESS, PRESENTMENT OF CHARGES, AND CONFRONTATION RIGHTS BY THE PROSECUTION'S MATERIAL VARIANCE IN PROOF FROM THE INDICTMENT, BY LACK OF JURY INSTRUCTION ON ITS BELATED "SECOND KIDNAP" THEORY, AND BY EVIDENCE OF A "FIRST KIDNAP" CONSPIRACY IN WHICH APPELLANT HAD NO INVOLVEMENT

A. INTRODUCTION

The two-count indictment of the grand jury in this case charged Apellant with the crime of murder of Nick Markowitz on "August 8-9, 2000", and his kidnap for ransom or extortion "on August 6 through 9",

with the special circumstance of kidnap-murder, which made Appellant if convicted, eligible for the death penalty. The dates of the two counts were different, and the difference was pivotal to the outcome at trial.

The prosecution theory of the case was that Hollywood kidnapped Nick on August 6th in retaliation for the window-breaking or to extort repayment of Ben's debt, *and* that Nick remained under threat or inducement from that point forward until his murder in the early morning of August 9, the victim believing he should cooperate with his captors to be of assistance to his brother. Extensive co-conspirator hearsay was admitted in support of this conjunctive theory. *See e.g.*, 5 RT 873, 877, 955.

Yet there was no evidence Hollywood or anyone contacted Ben to pay ransom for his brother, or repay his debt in order to effect Nick's release. On August 8th, Pressley said he had "no idea" what they were going to do with Nick but wouldn't hurt him. They were waiting for a call from Hollywood (5 RT 1048). Rugge told Nick he was "sick of it" and offered Nick $50 to take a Greyhound bus home that night so long as Nick agreed not to tell the police. Nick agreed he wouldn't tell anyone (5 RT 985). The prosecution theorized that Nick's captors gave him false reassurances to reduce the risk he would flee.

The prosecution theory of motive for the murder was that, when Hollywood learned (from attorney Stephen Hogg) that the crime of kidnap for ransom carried a life sentence, he decided to eliminate Nick, rather than face the threat of a kidnap charge, if Nick were let go. Hollywood only received this advice from attorney Hogg on August 8, 48-hours after Nick's abduction (6 RT 1146). Accordingly, the most plausible - indeed, the only plausible - purpose of the August 6-8 conspiracy was simply to hold Nick pending further word from Hollywood, but neither to ransom nor to kill him.

It was undisputed that Appellant was not involved in the events of August 6-7 (*see e.g.*, 5 RT 903), and as the Superior Court conceded in response to a jury question, conspiracy had "nothing to do with" this case. For this reason, the admission of hearsay evidence under the co-conspiracy

exception was plain error, regardless whether an affirmative showing was made that on August 8th joined a second conspiracy, the purpose of which was to help the original conspirators evade detection by murdering their kidnap victim.

The defense contested two issues at trial, submitting that: 1) the original kidnap terminated before Appellant arrived (on August 8), because at times on all three days (August 6, 7 and 8) the victim felt himself to be, and was in fact, free to leave (5 RT 968, 990, 1003-1005, 1039); and 2) Appellant was not the actual killer.

Unexpectedly, in rebuttal, the prosecution argued as an alternate theory of guilt that Appellant was guilty of a second kidnap on August 8, when the victim was taken from the Lemon Tree Hotel to the site of his murder at Lizard's Mouth (10 RT 2137). The jury expressed confusion on this point, asking the Judge if the kidnap was a "continuous single event", what were its "correct dates", and if it ("the whole event") was a kidnap Section 209 (kidnap for ransom or extortion), could Appellant be involved ("convicted") on the basis of 207? (10 RT 2217). Judge Gordon sided with the prosecution that the issue of a second kidnap was for the jury to decide, but the jury could convict Appellant of the lesser offense. The jury foreman asked, "so being a co-conspirator has nothing to do with it?" Judge Gordon agreed (10 RT 2220).

The prosecution's second kidnap theory at trial was at material variance with the inclusive definition of dates "August 6 through 9" set forth in Count 2 of the Indictment. This variance misled Appellant, focusing his challenge to Count 2 solely on the issue of whether the original kidnap terminated when the victim was free to leave, rather than raising asportation by fraud or trivial movement defenses to a second kidnap theory.

A related set of errors arose from the lack of instructions on jury consideration of this purported "second" kidnap. The Superior Court failed to instruct the jury that movement of the victim accomplished by fraud, rather than threat or force, is not kidnap at all, or that the distance

accomplished by such fraud can not count as "substantial." At the Lemon Tree Hotel, Nick confided to Kelly Carpenter that he thought he was going to go home, later in the evening of August 8, on assurance of Rugge or Pressley (5 RT 1019). The next day, Rugge and Pressley assured Kelly that Nick had in fact gone home the night before (5 RT 1015). This evidence warranted an asportation by fraud instruction, or clarification of the consent and movement instructions. *See e.g., People v. Rhoden* (1972) 6 Cal.3d 519, 526-527 (asportation by fraud alone does not constitute a general kidnapping offense in California). The failure to give the asportation by fraud instruction was plain error and warrants reversal of Count 2 and the special circumstance convictions.

In *People v. Green* (1980) 27 Cal.3d 1, the victim was tricked into getting into a car; her consent was obtained by an accomplice's falsity about where they were headed. Similarly, in this case, evidence of forcible asportation was nonexistent, at least until the victim left the car at the Lizard's Mouth trail head.[94] The only evidence of movement by force was Appellant's confession that the victim was duct-taped when they got out of the car at the trail head to Lizard's Mouth, a distance of only 60 to 80 yards (5 RT 1031). The first segment of Nick's car-ride from the Lemon Tree Hotel to the trail head was induced by fraud or trickery; only the last 60 to 80 yards was accomplished by force. No reasonable juror could have concluded that this movement was substantial within the meaning of

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94/ The jury was instructed as an element of §107 that "the movement of the other person was without his consent" (10 RT 2184), but the jury could have convicted appellant erroneously on the theory that Nick's consent was obtained under the influence of fraud (*i.e.*, Rugge and Pressley's misrepresentations that appellant have come to give him a ride back home to Los Angeles). The jury was instructed that "consent requires a free will and positive cooperation in act or attitude" (10 RT 2182), which the jury may have considered inconsistent with consent induced by fraud. *See e.g., Green*, 27 Cal. 3d at 65 (evidence of kidnap insufficient as a matter of law if jury could have found under instruction that victim's consent was obtained by fraud).

CALJIC 9.50.[95] *See e.g.*, *People v. Martinez* (1999) 20 Cal. 4th 225, 236-237 (movement of victim in simple kidnapping must be substantial in character to meet the asportation requirement, but jury may also be instructed to consider contextual factors such as increased risk of harm to victim); *People v. Morgan* (2007) 42 Cal.4th 593 (reversing simple kidnap and kidnap-murder special circumstance in case tried before *Martinez,* because prosecution argued two theories of guilt, one of which was legally inadequate as calling for jury to consider context of increased risk of harm to victim).

B. STATEMENT OF FACTS

1. The Indictment

On October 30, 2000, the Santa Barbara County Grand Jury charged Appellant, along with co-defendants Hollywood, Pressley, Rugge and Skidmore in a two-count Indictment.[96] Count 1 charged that, "on or about August 8-9, 2000, in the County of Santa Barbara, the said defendants did unlawfully and with malice aforethought murder Nick Markowitz, age 15, a human being, in violation of Penal Code §187(a)" (1 CT 19). Count 3 charged that, "on or about August 6, 2000 through August 9, 2000, in the County of Santa Barbara, [all five defendants] did willfully, unlawfully, and forcibly detain, take, carry away, and kidnap Nick Markowitz, age 15, for purposes of ransom or to commit extortion, or to extract money from another person, in violation of Penal Code §209(a) (1 CT 22). Special

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95/ CALJIC 9.50 provided,

> "[e]very person who unlawfully and with physical force or by any other means of instilling fear, steals or takes or holds . . . another person, and carries such person without his consent, compels any other person without her consent, and because of a reasonable apprehension of harm, to move for a substantial distance, that is, a distance more than slight or trivial, is guilt of the crime of kidnapping in violation of Penal Code section 207(a)."

96/ The indictment alleged several special firearm allegations not relevant to this Claim.

allegation 1 to Count 2 alleged as to all defendants that in the course of the offense of kidnapping for ransom or extortion, and as a result of the offense of kidnapping for ransom or extortion, the victim, Nick Markowitz, suffered death, within the meaning of Penal Code §209(a) (1 CT 22).

Appellant moved to dismiss the Indictment under §995 *inter alia* on the ground that "the" kidnap terminated as a matter of law before Appellant became involved.[97] On August 7, 2001, the Superior Court denied Appellant's motion (5 CT 1215).

2. Conspiracy Evidence

At trial, over defense objection, the prosecution presented extensive hearsay evidence under the conspiracy exception. (*See* Section III(B)(1) *infra*.) As discussed above, the statements of participants went far beyond any plausibly shared purpose in furtherance of the August 6th kidnap. In addition, there was no preponderance of evidence that Appellant was a member of the same conspiracy at the time the statements were made.

3. Prosecution's "Second Kidnap" Theory

In closing argument the defense argued that Appellant had nothing to do with the kidnaping "as charged" in this case (10 RT 2133). In rebuttal, the prosecution argued (for the very first time) there was an "independent" or "subsequent" kidnaping that occurred late night August 8 when Nick was taken from the Lemon Tree Hotel, and up to West Camino Cielo, and killed (10 RT 2136). The prosecution ridiculed the defense attorney for "remarkably" never addressing whether Appellant was guilty of this second kidnap, even though the issue had not been raised by the Indictment or the prosecution's case. Defense attorney Crouter objected that Count 2 of the Indictment alleged one kidnap "August 6 through 9" (10 RT 2137). The

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97/ Appellant argued that Nick understood he was free to leave when he was at Natasha Adams' house and none of the original kidnappers were present, when Pressley's mother gave her son, Nick, and Adams a ride to the Lemon Tree Hotel, when Nick and Adams waited outside the Ralph's Supermarket while Rugge shopped inside, and once more when Nick and Pressley swam in the Hotel pool (4 CT 995).

Superior Court permitted the prosecution to argue its rebuttal theory of a "second kidnap." Because of its importance, the entirety of the discussion is set forth below:

> MR. ZONEN: Now, let's assume everything counsel said was correct. Let's assume that it is a correct statement of law that the moment a kidnap victim has the opportunity to flee, and chooses not to, that that person is no longer a kidnap victim, and the crime of kidnapping has ended. Let's assume that that were the case. Would he not be guilty of kidnapping? And the answer is, of course not, *because there is, independent of the kidnapping that took place on the 6th where he was brought from Los Angeles County to Santa Barbara, there is as well the kidnapping that took place in the late evening hours of the 8th, into the early morning hours of the 9th of August, where he's taken from the hotel, perhaps taken as well to Rugge's house at some point, we'll never know, and then taken up to the location on West Camino Cielo and there he was killed. That we know is an independent kidnapping. And certainly he would be guilty of that offense. But uniquely, remarkably, in counsel's first 45 minutes of her closing argument addressing the question of kidnapping, never once addresses the issue of whether he would not, or would be guilty of a subsequent kidnapping that then took place from the hotel to the crime scene.*
>
> MR. CROUTER: Object, your Honor. There's one count only charged.
>
> MR. ZONEN: I'm sorry?
>
> THE COURT: That's right, isn't it?
>
> MS. OWEN: Yeah.
>
> MR. ZONEN: I didn't hear what he said.
>
> THE COURT: He said the count, the kidnapping for -- count, relates only to the incident of the – I'll have to look. Isn't that your point?
>
> MR. CROUTER: That there is only one count charged.
>
> THE COURT: That's his argument.
>
> MR. ZONEN: Well, you have to look at the date on the pleading on there, and the time, and whether or not it governs an entire period of time. And I believe in an Indictment you'll find that it covers the

period of time from the 6th through the 9th.

THE COURT: Let's see. That's the way the count is drawn. August 6th through August 9th.

MR. ZONEN: See, a kidnapping can go over a period of time, and in this case it did. That kidnapping took place from the 6th through the 9th. It is one count, but it's one count that covers the entirety of his movement from the time he left at the location near his residence in that area, I think near Ingomar and Platt in San Fernando Valley, to the point where he was killed up in Santa Barbara County. That's all covered in the pleading in that one count as a kidnapping.

(10 RT 2137-2138.)

4. Jury Instructions

a. Count 2 Kidnap

The Court instructed the jury that Count 2, the crime alleged is kidnapping for ransom or extortion, and "the date of [that] alleged crime is August 6th through August 9th, 2000 . . . In this case the count with the lesser charges are Count 2, kidnapping for ransom or extortion. The lesser crime is simply kidnap." (10 RT 2164). In the crime of kidnap, a lesser included offense to kidnap for ransom or extortion, there must exist a union or joint operation of act or conduct, and a general criminal intent (10 RT 2175).

The Court did *not* instruct the jury how to resolve the specific issues of Appellant's culpability if the kidnap was not an ongoing crime which culminated in the victim's murder, or whether Appellant could be found guilty of simple kidnap by virtue of killing the victim of an earlier, but separate aggravated kidnap by other co-defendants, with whom he conspired (if at all) only in order to consummate the murder.

The Court instructed the jury that Appellant is accused in Count 2 of having violated Section 209(a) of the Penal Code, a crime. Every person who seizes, confines, inveigles, entices , conceals, kidnaps, or carries away, holds – holds, detains another person by any means whatsoever with the specific intent to hold or detain that person for ransom, reward, or to

commit extortion, or to extract from another any money or valuable thing, is guilty of a violation of Penal Code §209, which is a crime. It is not essential to the crime that the person be carried or otherwise moved for any distance, or at all. In order to prove this crime, each of the following elements must be proved: One. A person was kidnapped. And two, the kidnap of that person was done with the specific intent to hold or detain that person for ransom or to commit extortion. If you should find the defendant guilty of the charge against him under Count 2, you must also find whether the victim suffered death in connection with or as a result of an act done by the defendant in the commission of the crime, and state your decision in that regard in your verdict form (10 RT 2181).

A lesser offense to the offense charged in Count 2 is the crime of kidnapping, a violation of §207(a) of the Penal Code. Every person who unlawfully and with physical force, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests another person, and carries that person without his consent for *a distance,* then it's substantial character is guilty of the crime of kidnapping, in violation of Penal Code §207(a). A movement that is only slight or trivial -- a movement that is only for a slight or trivial distance is not substantial in character. In determining whether a distance that is more than slight or trivial is substantial in character, you should consider the totality of the circumstances attending the movement, including, but not limited to the actual distance moved, whether the movement increased the risk of harm above that which existed prior to the movement, or increased the likelihood of detection, or increased both the danger inherent in the victim's foreseeable attempt to escape, and the attackers enhanced opportunity to commit additional crimes.

If an associated crime is involved, the movement must also be more than that, which is incidental to the commission of the other crime. In order to prove this crime, each of the following elements must be proved: A person was unlawfully moved by the use of physical force, or by any other means of instilling fear. The movement of the other person was without his consent. And the movement of the other person was, in distance, was

substantial in character (10 RT 2183-2184).

b. Conspiracy

The Court instructed the jury:

A conspiracy is an agreement between two or more persons with the specific intent to agree to commit the crime of kidnapping, and with the further specific intent to commit that crime following -- followed by an overt act committed in this state, or by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime but is not charged as such in this case. Significantly, the conspiracy instruction directed the jury to consider the evidence in regard to Count 2 kidnap, thus eliminating the possibility the jury could find appellant was not involved in any such conspiracy, and his criminal agreement was directed exclusively toward Nick's murder, separate from Nick's earlier kidnap, if the jury found that crime was completed.

In order to find defendant to be a member of a conspiracy, in addition to the proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one overt act. It is not necessary to such a find -- to such a finding as to any particular defendant that the defendant personally committed the overt act as long as he or she was one of the conspirators when the alleged overt act was committed. The term overt act means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime, and which step or act is done in furtherance of accomplishment of the object of the conspiracy. To be an overt act the step taken or act committed need not in and of itself constitute the crime, or even an attempt to commit the crime which is the ultimate object of the conspiracy, nor is it required that the step or act in and of itself be a criminal or unlawful act.

(10 RT 2176.)

Now, the reason that this instruction has been given to you is because evidence of a statement made by one alleged conspirator, other than at this trial, shall not be considered by you as against another alleged conspirator, unless you determine by a preponderance of the evidence that from other independent evidence that at the time the statement was made a conspiracy to commit a crime existed. That's the first requirement. The second is that the statement was made while the person making the statement was participating in the conspiracy, *and that the person against whom it was offered was participating in the conspiracy before or during that time. And three, that the statement was made in furtherance of the objective of*

the conspiracy.

(10 RT 2176-2177, emphasis added.)

In this case, the hearsay statements of the participants in the August 6-8 kidnap should not have been admitted, because no evidence linked Appellant to participation in that conspiracy "before or during that time." Moreover, none of those statements were made "in furtherance of the conspiracy" which a preponderance of evidence might have showed Appellant joined, *i.e.*, the August 8-9 criminal agreement with Hollywood to murder Nick. The only hearsay evidence admissible against Appellant on that second conspiracy theory would be Rugge and Pressley's false assurances to Adams on August 9th that Nick had gone home to Los Angeles the night before. The admission of all other evidence under the conspiracy exception to the hearsay rule was plain error.

5. Jury Questions

During the second day of guilt phase deliberation (November 20, 2001), sometime after 10:30 a.m., the jury posed a series of questions to the Court seeking the correct definition of kidnap under the Penal Code, and guidance as to the resolution of Count 2 (5 CT 1500, minute order).[98]

> THE COURT: It's not clear to me what it is they're asking for. The only thing I can think to do is just put them in the box and ask the foreperson to tell me, because, otherwise, I've got no way of knowing. Okay. We've got another one now. This is another question. So I may as well tell you what it says.
>
> "One: Is the kidnapping a continuous single event? What are the correct dates?
>
> Two: If it is kidnap Section 209, can the defendant be involved on the basis of 207?"

98/ None of the jury notes were preserved nor does the record reflect what the first jury note said. Because the foreman indicated the jury's second question superceded its first, and the Court read the subsequent note on the record, the issue is adequately preserved for appellate review (10 RT 2219).

(10 RT 2217.)

The Court convened the jurors and counsel in open court, and advised the jury that the dates of the kidnap, and whether it was continuous, were disputed issues (10 RT 2219). The Court alluded to "some subsequent argument that the facts supported a second kidnapping", another issue the jury had to decide (*id.*). Because of its importance, the entire discussion is set forth below.

> THE COURT: One, was the kidnapping that happened in the San Fernando Valley still ongoing when this happened. And there was argument about that. And then, even if it wasn't, was there another kidnapping. Those were the issues that were presented to the jury. And I can only remind you of what those issues were. I can't answer that question for you.
>
> [JUROR FOREPERSON]: That's helpful in itself.
>
> THE COURT: Now, the other thing is, then, the dates that you have to think about are the dates that were listed in the indictment. Because this was -- the incidents which gave rise to the -- this whole situation began in the San Fernando Valley on or about August 6th, and then if the incidents that we're talking about terminated August 9th, so that period of time, those are the inclusive dates, then, that you have to keep in mind in considering that.
>
> But I again, whether or not the kidnapping was ongoing through that period or there were two kidnappings or there was only one that had terminated, those are the dates that you have to keep in mind, the 6th through the 9th.
>
> Now, the other question that's asked of me is, "If it is kidnap Section 209," that's the kidnapping for ransom I think.
>
> JURY FOREPERSON [100321006]: Yes.
>
> THE COURT: "Can appellant be involved on the basis of 207?"
>
> Now, I'm not quite sure about that. You do have in mind these instructions on lesser-included offenses, that if you don't find all the elements of a kidnap for ransom were met, then, but you still might find that the elements of a simple kidnapping are met. Now, what that -- what is it that you're asking me?

JURY FOREPERSON [100321006]: Well, what our confusion is, is if the -- if the whole event from the 6th through the 9th meets the criteria of 209, but the defendant's participation would only -- could only be described as 207, we have a latitude to make that determination.

THE COURT: You have to deal strictly with the defendant's participation. You have to think, now, while the -- you have to say, well, now, what was this defendant's involvement? When did he become involved? What did he do? So you have to, obviously, limit it to him. And within the scope of the jury instructions, yes, you could -- *you could find him guilty of a lesser offense if you did not feel that as to him all of the elements of the greater offense were present.*

JURY FOREPERSON [100321006]: So being a co-conspirator has nothing to do with it.

THE COURT: It's not a conspiracy charge in that regard.

MR. ZONEN: No.

THE COURT: So, you're right. The co-conspirator instructions were given only for the purpose of allowing the jury to consider certain statements that were made by other conspirators.

(Recess)

JURY FOREPERSON [100321006]: All right. I think that resolves the problems.

THE COURT: I understand you want to take a break. I'd prefer that the questions come from the foreperson. Okay.

JURY FOREPERSON [100321006]: Ten minutes would be all we need.

(10 RT 2219-2220, emphasis added.)

Essentially, the Judge specially instructed the jury it could convict Appellant on the basis of the prosecution's second-kidnap theory, but failed to clarify that it could not convict Appellant of kidnap if the movement of the victim during this "second" kidnap was incidental to his pre-arranged murder, *and* that Appellant could not be held strictly liable for an earlier kidnap by other participants based on his separate agreement to kill its

victim.

A short time later (11:50 a.m.), the jury returned its verdict, finding Appellant guilty of Count 1 first degree murder under Penal Code §187(a) and kidnap-murder special circumstance under §190.2(a)(17)(B), and guilty of Count 2 lesser included offense of kidnap under §207(a) (10 RT 2223-2225; 5 CT 1498; 6 CT 1501-1503). The jury must be presumed to have acquitted Appellant of Count 2 greater offense of kidnap for ransom and the special allegation that the offense resulted in the death of the person kidnapped under §209(a). *See e.g.*, 6 CT 1509-1510 (unsigned not guilty verdict form for §209(a) and special allegation verdict form marked "false" with notation that "verdict form signed in error and addressed on the record.")

C. ARGUMENT

1. The Prosecution's Proof Was at Variance with the Indictment

The Fifth Amendment guarantees the "right to stand trial only on charges made by a grand jury in its indictment." *United States v. Garcia-Paz* (9th Cir. 2002) 282 F.3d 1212, 1215. Once returned, the charges of an indictment cannot be broadened by amendment, literal or constructive, other than by the grand jury. *Stirone v. United States* (1960) 361 U.S. 212, 215-16; *United States v. Pazsint* (9th Cir. 1983) 703 F.2d 420, 423. Variance occurs when the evidence offered at trial proves facts materially different from those alleged in the indictment, *Von Stoll*, 726 F.2d at 586 (*quoting United States v. Cusmano* (6th Cir. 1981) 659 F.2d 714, 718), and reversal of a conviction is convicted when such variance prejudices appellant's substantial rights. *United States v. Adamson* (9th Cir. 2002) 291 F.3d 606, 615. Prejudice results from an "inadequate opportunity to prepare a defense and exposure to unanticipated evidence at trial." *United States v. Morse* (9th Cir. 1986) 785 F.2d 771, 775. The claim is subject to *de novo* review. *United States v. Pisello* (9th Cir. 1989) 877 F.2d 762, 764.

State law is no different. Due Process requires that appellant receive notice of the charges "adequate to give a meaningful opportunity to defend against them." *People v. Seaton* (2001) 26 Cal.4th 598, 640. Prejudice to a substantial right of appellant also requires reversal as a matter of statute. *See* Penal Code §960. When an indictment charges an offense in such manner that the appellant is *not* appraised of the criminal act with sufficient certainty to make his defense, or when the appellant is ***misled*** by a statement contained therein, then the allegations are insufficient to sustain the conviction upon the ground of variance. *People v. Silverman* (1939) 33 Cal.App.2d 1, 4-5.

Here, a material variance existed between the Indictment ("August 6 through August 9") and the prosecution's proof and rebuttal argument ("August 6 through 9" *or* "August 8 to 9"), which misled appellant at trial and requires reversal of his convictions for kidnap, kidnap-murder, and kidnap-murder special circumstance. *See e.g.,* 4 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Pretrial Proceedings, § 191, p. 398 (defining "materiality" in this context as whether appellant was ***misled*** in making his defense, or placed in danger of being twice put in jeopardy for the same offense).

The Indictment in this case put Appellant on notice to defend against a single count of kidnap for ransom "from August 6 through August 9", with the special allegation that this violation of §209(a) resulted in the death of the victim. The evidence of Appellant's involvement in this theory of the crime was non-existent: Appellant was not present at its inception, the victim was arguably free to leave on multiple occasions, the participants themselves told others they didn't know what would happen, and even offered the victim bus-fare home, and were awaiting word of what to do from Hollywood, the instigator. Viewed in the light most favorable to the prosecution, Appellant's participation began on the afternoon of August 8 and was directed solely at the murder of the victim of that earlier, and by that point completed, kidnap. By its verdicts of not guilty of §209(a) and special allegation of §209(a) resulting in the victim's death, the jury

rejected the prosecution's single kidnap theory.

This fatal variance came to light only in the course of the prosecution's rebuttal argument, after the defense had used its last opportunity to speak. Defense attorneys argued the case as a tale of two crimes, the August 6 kidnap and the August 8-9 murder.[99] This distinction, temporal and analytical, was the cornerstone of the defense.[100] In closing argument, attorney Owen argued,

> Now, if this kidnapping terminated, that's it, you cannot convict Mr. Hoyt of kidnapping, because you have no evidence at all that's been presented to you that Mr. Hoyt had anything to do with *the* kidnapping. There is a Count 2 with kidnapping for the charge of ransom or extortion, and there's a lesser for simple kidnapping, *both of them carry the same issue of termination of a kidnapping. When does a kidnapping end? We're not saying that there wasn't a kidnapping, we're saying that it ended.*
>
> . . .
>
> You have two questions in this case, the way we see it. The first question is, did Mr. Hoyt commit the kidnapping? No. Clearly not. There's not one scintilla of evidence that gives you any otherwise. There's just not. The kidnapping in this case *as charged* relates to the kidnapping of when Nicholas Markowitz was taken from West Hills. Clearly, Mr. Hoyt had nothing to do with that. And there's no evidence that you can support or base your decision on any other way.
>
> But the second decision you have to get to is, well, even if he didn't commit the kidnapping and had nothing to do with it, did he commit the murder? Did he shoot Nicholas

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99/ If this Court should find that the prosecution's second kidnap theory *was* fairly encompassed within the Indictment, then defense attorneys had no conceivable tactical reason, and were incompetent under the Sixth Amendment, for failing to obtain such a determination of scope of the charges in advance, and failing to present meritorious defenses to a second kidnap theory: asportation by fraud not threat or force, and movement incidental to the commission of the murder.

100/ Owen emphasized that appellant was absent and had nothing to do with Nick's kidnap on August 6 and that Nick was free to leave at some point during the ensuing days.

> Markowitz? Then that's the second issue that you have to get to. And that is completely separate from the kidnapping issue, because you say, okay, now did Mr. Hoyt pull the trigger and kill Nicholas Markowitz?
>
> . . .
>
> The defense urges you to find Mr. Hoyt not guilty with the kidnapping. I mean, there's no scintilla of evidence that Mr. Hoyt had anything to do with the kidnapping *as charged* in this case.
>
> (10 RT 2088, 2091-2092, 2094-2095, 2099, 2101, 2133, emphasis added.)

Significantly, the prosecution did not raise its alternate second kidnap theory during opening or closing arguments, but waited until rebuttal, when it had twin advantages of surprise and last word. The defense objected. Several jury questions evinced its confusion. By his answers to the jury, Judge Gordon gave his imprimatur to the second kidnap theory of guilt. The circumstances, including the prosecution's devotion of a significant portion of the trial to its presentation of hearsay conspiracy evidence of the August 6 kidnap and its aftermath, demonstrate that Appellant was misled.

The proof at trial did not support a finding of guilt for Appellant as charged in a single kidnap for ransom from August 6 through August 9, resulting in death of the victim under Count 2 of the Indictment. Yet, the Superior Court instructed the jury it could and *essentially should* convict Appellant on the basis of a second kidnap theory which was not charged by the terms of Count 2. As demonstrated by the case law and the prosecution's own conduct in a related case, this was a material variance requiring reversal.

Significantly, after the jury questions and verdict discussed above, the prosecution sought leave to amend the same Indictment against Co-Appellant Pressley, striking Count 2 aggravated kidnap under §209(a) and replacing it with Count 3 simple kidnap under §207(a), which it alleged occurred "on or between August 8 and August 9, 2000." *See* 2 CT A 557

(prosecution motion). In a court filing that bears directly on this claim, the prosecution conceded,

> Based on information generated in the trials of Co-Defendants Rugge and Hoyt, it is believed that the killing of Nicholas Markowitz occurred during the early morning hours of August 9, 2002. The preparation for the killing began in the late afternoon of August 8, with phone calls between Los Angeles and Santa Barbara, locating and taking shovels and duct-tape, securing a grave site and digging the grave. The actual movement of Nicholas Markowitz to the grave site likely occurred after 2:00 a.m. on the 9th of August. The defense will likely argue that the kidnap alleged in count two terminated before the killing of Nicholas Markowitz. *If so, a separate kidnap occurred when Nicholas Markowitz was taken from the hotel to the grave site on the 9th of August. The kidnap would not be for purposes of ransom or extortion but for purposes of murder. As such it should be alleged separate from count two.*
>
> (2 CT A 558-559, Zonen June 11, 2002 Decl., emphasis added.)
>
> Judge Gordon granted the request.
>
> (3 CT A 603, June 25, 2002 Order.)

The prosecution's concession that its second kidnap charge "should be alleged separately" shows that the variance was more than a defect or imperfection of form. Appellant's substantial rights were prejudiced at trial by the prosecution's bait-and-switch argument and the Court's answers to expressions of jury confusion, lending its imprimatur. This Court should consider, and give weight to, the fact that, in contrast to Pressley's case, the prosecution did not allege its second kidnap theory as a separate count against Appellant, and its proof and rebuttal argument on that theory were at material variance with Count 2 of the Indictment, for exactly the reason conceded in its motion to amend in Pressley's case.

Two Ninth Circuit cases lend support to Appellant's claim of prejudice. In *United States v. Adamson* (9th Cir. 2002) 291 F.3d 606, the Ninth Circuit reversed defendant's wire fraud conviction where the allegation of the indictment misled him and obstructed his trial defense. The indictment alleged that the misrepresentation at issue was *whether*

computer-servers had been upgraded, while the jury instruction referenced a different misrepresentation, *how* the servers had been upgraded. *Id.* at 616. Although the crime was the same (wire fraud), the variance between the allegation and proof was fatal. The district court compounded the error by instructing the jury in a manner which permitted conviction on the basis of conduct outside the scope of the indictment. Similarly, here, Judge Gordon compounded the variance error by directing the jury to return a guilty verdict on Count 2 if it found "another kidnapping . . . or there were two kidnappings," even if the San Fernando kidnap was no longer an ongoing crime (10 RT 2219-2221). In response to the jury's query about Appellant's culpability, if the "whole event from the 6th through the 9th meets the criteria of 209, but Appellant's participation could only be described as 207," Judge Gordon explained, "you could find him guilty of a lesser offense if you did not feel that as to him all of the elements of the greater offense were present." *Id.* Judge Gordon agreed with the foreperson that "conspiracy has nothing to do with it." *This too was error in that it permitted the jury to convict Appellant of §207 based solely on continuity of the victim's presence in the Lemon Tree Hotel from August 6 through 9 (and the other participants' role in the original kidnap), without regard to whether Appellant was guilty of a separate kidnap in connection with the murder.*

Similarly, in *United States v. Tsinhnahijinnie* (9th Cir. 1997) 112 F.3d 988, 990, the Ninth Circuit reversed a conviction for sexual abuse upon a minor where the indictment and proof at trial varied as to the date or dates when the offense had occurred. The variance was significant because defendant presented evidence that he was not within the territorial jurisdiction of the federal court on the dates alleged in the Indictment. As in this case, the dates at issue indirectly involved an element of the offense, and the variance in dates thereby misled the defense: in *Tsinhnahijinnie*, *in rem* jurisdiction; here, the asportation by fraud and substantial movement defenses to simple kidnap. *See United States v. Garcia-Paz* (9th Cir. 2002) 282 F.3d 1212, 1216-17 (categorizing fatal variance cases as those in which

conviction was permitted on different behavior from that alleged in indictment), *cert. denied*, 123 S. Ct. 47 (2002); *United States v. Miller* (1985) 471 U.S. 130, 134-40 (where an element of the offense is not "fully and clearly set out in the indictment," the difference between the offense charged and the offense proved at trial is a fatal variance).

Also, the prosecution's bait-and-switch strategy misled Appellant into defending against Count 2 entirely on the basis that the single kidnap charged in the Indictment had already terminated by the time Appellant arrived in Santa Barbara in the evening of August 8. *See Tsinhnahijinnie*, 112 F. 3d at 991 (finding prejudice where defendant was convicted of a different version of the crime for which he was indicted). The variance between the duration term of Count 2 ("August 6 through August 9") and the prosecution's rebuttal second kidnap theory, which was the underpinning of the jury verdict on Count 2, violated Appellant's Sixth Amendment right to notice and Fifth Amendment presentment of charges and due process rights.[101] This Court should reverse Appellant's Count 1

101/ Under whichever charging document (information or indictment) the prosecution proceeded, a variance between the offense as alleged in the charging document and the evidence and instructions at trial violates the Sixth Amendment right to notice and the Due Process Clauses of the Fifth and Fourteenth Amendment if it deprives a appellant of notice of the offense against which he must defend. *See e.g.*, *Forgy v. Norris* (8th Cir. 1995) 64 F.3d 399, 403 (failure of information to specify basis of burglary charge prejudiced appellant and deprived him of his Sixth Amendment right to be informed of the nature and cause of the accusations); *Cokely v. Lockhart* (8th Cir. 1991) 951 F.2d 916 (variance between information alleging rape by sexual intercourse and jury instruction permitting conviction based on intercourse or deviate sexual activity violated due process when state law at the time of trial treated latter as a separate offense); *Thomas v. Harrelson* (11th Cir. 1991) 942 F.2d 1530, 1531, citing *Russell v. United States* (1962) 369 U.S. 749, 763-764 (the constructive amendment of an indictment that occurs when the jury is permitted to convict a appellant upon a factual basis that effectively modifies an essential element of the charged crime, violates the Fifth and Sixth Amendments); *United States v. Shipsey* (9th Cir. 1999) 190 F.3d 1081 (instructions that effectively amended the indictment violated the Fifth Amendment's grand jury clause); *Sheppard v. Rees* (9th Cir. 1990) 909 F.2d 1234 (instructing the jury on felony murder, over appellant's objection,

murder and kidnap-murder special circumstance and Count 2 kidnap convictions.

2. The Use of Conspiracy Evidence Was Error

a. Centrality of the Issue

The prosecution devoted most of the trial to a presentation of conspiracy evidence of Nick's kidnap on August 6 and confinement in Santa Barbara over the ensuing 48-hours. The defense objected (4 RT 712). The Superior Court's decision to admit this evidence was error under Cal. Evid. Code §1223, and violated Appellant's rights under the Fifth, Sixth and Fourteenth Amendments. During guilt phase deliberation, the foreman of the jury asked the Court, "so being a co-conspirator has nothing to do with it?" Judge Gordon responded, "yes, because it's not charged as a conspiracy." (10 RT 2221.) This was a concession of foundational error, *see e.g.,* Evid. Code §1223(c), under the circumstances, because the conditions set forth in sections (a)-(c) were not established by the evidence subsequently admitted.

To recap, the conspiracy evidence admitted at trial was extensive, and included the following key points from state witnesses:

Brian Affronti testified that conspirator Hollywood told Nick, 1) "your brother owes me money and he's going to pay me back" (5 RT 873), and 2) conspirator Skidmore said Hollywood's father felt Affronti was "the weak link" and he needed to be careful about what he did so nothing happened to him (5 RT 911).

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violated appellant's Sixth Amendment right to notice where the information alleged that he had violated Penal Code section 187 but did not allege felony-murder or the commission of the underlying felony, and where the concept of felony-murder was never raised prior to trial, during opening statements or by the testimony of witnesses); *in accord, Tamapua v. Shimoda* (9th Cir. 1986) 796 F.2d 261; *Givens v. Housewright* (9th Cir. 1986) 786 F.2d 1378, 1380; *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 811-814.

When Rugge, Hollywood, Skidmore arrived at Richard Hoeflinger's house on Modoc Street in Santa Barbara and duct-taped Nick in the back bedroom, witness Gabriel Ibarra asked Rugge, "what's going on." Rugge said "I don't know. He's tripping. Hollywood's tripping" (5 RT 929). Hollywood told Rugge to "keep his fucking mouth shut." (5 RT 930). As Ibarra was leaving, Hollywood told him to "keep his F'ing mouth shut" (*Id.* at 933).

Hoeflinger testified that he asked Rugge what was going on, and Rugge said they were "just talking to this kid." (5 RT 948.) Hoeflinger testified further that this kid's brother owed Hollywood money and they were just trying to get a hold of the brother. (5 RT 955.)

Kelly Carpenter testified that while she was at Rugge's house on Monday, August 7, Hollywood said "well, we'll just tie [Nick] up and throw him in the back of the car and go to the Biltmore and get something to eat [] or Fess Parker's." (5 RT 976.) This made Carpenter "really uncomfortable."

Natasha Adams and Carpenter testified that conspirators Rugge and Pressley told them 1) Hollywood kidnapped Nick on August 6 to extort his brother Ben's debt repayment; 2) they had no idea what would happen and were waiting to hear from Hollywood; 3) they told Nick he was going to go home later on the evening of August 8, and 4) they gave Adams and Carpenter similar reassurances; 5) Adams and Carpenter themselves told Nick he was free to leave, but he said he would stay to work things out.[102] Carpenter also testified over defense objection that Pressley told her the guys couldn't find Nick's brother but found Nick instead, beat him up, put him in the car and brought him to Santa Barbara, and someone else told her Nick was "kidnapped". (5 RT 983.)

Over defense objection, Carpenter testified she heard Rugge tell Nick he wanted Nick to go home. (5 RT 985.) Rugge said he was "sick of

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102/ The Superior Court admitted this evidence over defense objection that the object of the conspiracy had been met (5 RT 979-980).

it and washed his hands of it," and wanted to give Nick $50 to take a Greyhound bus home that night, "but I better not have cops coming to my door tomorrow." Nick shook his head that wouldn't happen. On August 8, she heard Rugge tell Nick he would go home that night. (5 RT 1018.) Nick told her he didn't walk away because he didn't want to rock the boat and have them angry, that he thought he was going home. (5 RT 1019.)

Natasha Adams testified that, on Monday, August 7, 2000, Pressley told her that they "kidnapped" this kid and brought him up to Rugge's house. (5 RT 1038.) Nick told her he was going to stick around to help out his brother and that he was fine. (5 RT 1039.) On Tuesday, August 8, she expressed concern about the situation and asked Pressley about it. Pressley said he had no idea what to do, but they weren't going to hurt Nick, and were waiting for a call from Hollywood. Pressley also said Rugge said he (Rugge) was offered money to kill Nick, which he declined to do. (5 RT 1048.)

When Natasha confronted him, Rugge said he didn't know what to do, he would put Nick on a Greyhound bus home later that day, but he was worried Nick would tell on him. (5 RT 1055.) Rugge promised Nick he would take Nick home, but expressed concern that Nick not tell anyone, because he didn't want to go to jail.

Over defense objection, Carpenter testified that Rugge and Pressley assured her on August 9 (the day after the murder), that Nick had gone home to Los Angeles the previous night.[103] (5 RT 1065.) Jack Hollywood testified to his son Jesse Hollywood's statements regarding Nick's movements to Santa Barbara, and the coercion element of his kidnap. According to his father, Jesse said some friends of his were holding the kid, drinking beer and eating ribs but there was trouble because they took him against his will. (6 RT 1233.) Hollywood gave his father Hoyt's pager

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103/ The Court denied defense objection to the admission of this hearsay under the co-conspirator exception when, under even the most expansive definition imaginable, the object of the kidnap had terminated with the victim's death.

number, and said "call this number and ask Ryan" [to find out where Nick was]. (6 RT 1239.)

Casey Sheehan testified Hollywood had told him "they" had taken Nick to Santa Barbara. (6 RT 1299.)

Stephen Hogg testified that he had practiced criminal defense law in Simi Valley since 1972. Jack and Jesse Hollywood were clients. He met Jesse Hollywood at his house on Tuesday August 8. Hollywood told Hogg that some of his friends had picked up the brother of the guy who destroyed his house (5 RT 1191). Hollywood asked, what kind of problems do my friends have? Hogg told Hollywood that if they took this fellow against his will, the maximum penalty was eight years. But, if they asked for ransom, they could get life.

The Superior Court attempted little analysis, and committed grave error in admitting this evidence at trial. There were two principal flaws in its use to convict Appellant of any crime. First, there was no showing that any of these co-conspirator statements were made *in furtherance of the objective of the same conspiracy* in which Appellant was joined. Second, there was no showing that Appellant was a member of *the same conspiracy* as Hollywood, Rugge, Pressley and Skidmore either before, during, or after the August 6th kidnap.

b. Appellant Never Joined the Original Conspiracy, But Acted By Separate Agreement Beyond its Scope

The prosecution conceded that preparation for the killing began in the late afternoon of August 8 (2 CT A 558). Its theory of the case was that Appellant agreed to murder Nick to discharge his debt to Hollywood. This was a separate criminal agreement, outside the scope of the original August 6 kidnap, or the contemplation of its participants. *See United States v. Zemek* (9th Cir. 1980) 634 F.2d 1159, 1168 (distinguishing multiple and single conspiracies based upon factors such as nature of the scheme, identity of the participants, and commonality of time and goals), *cert. denied* (1981) 452 U.S. 905.

Under *People v. Hardy* (1992) 2 Cal. 4th 86, 139, the prosecution needed to show that "at the time of the declaration the party against whom the evidence is offered was participating or would later participate in *the* conspiracy." The judge's response to the jury ("conspiracy had nothing to do with it") conceded that Appellant never joined the original conspiracy to kidnap Nick for ransom or extortion of Ben's debt repayment.

Hearsay evidence is generally inadmissible. (Evid. Code §1200.) Hearsay statements by co-conspirators were admissible against Appellant only if, after establishing *prima facie* proof of a conspiracy, the prosecution established three preliminary facts: 1) that the declarant was participating in a conspiracy at the time of the declaration; 2) that the declaration was *in furtherance of the objective of that conspiracy*; and 3) that at the time of the declaration *the party against whom the evidence is offered was participating or would later participate in the conspiracy. Hardy*, 2 Cal. 4th at 139 (emphasis added); Evid. Code §1223.

This is a case in which a conspiracy theory was pressed solely to provide a "vehicle for using otherwise inadmissible hearsay evidence against a defendant." *People v. Leach* (1975) 15 Cal.3d 419, 435.

Nonetheless, the Superior Court never assessed whether the second or third category of preliminary fact were shown by a preponderance of evidence, and erred in overruling the defense objection to this evidence.

At the time, the case struck a chord in the zeitgeist with its marijuana-fueled, seemingly amoral and nihilistic, subculture of affluent youth in fashion-crazy Southern California. Its tragic reverberations shocked the adults of the world over morning newspaper how a 15-year old boy could feud with his parents, run off, and get abducted by a group of older boys, then more or less willingly spend the next several days partying with his captors, flirting with local girls, and swimming in a hotel pool. When is a kidnap no longer a kidnap?, some asked. The answer? When the captor's mother gives the victim a ride in her station wagon. On the other hand, perhaps that was an object lesson to parents everywhere to ask more - some, any? - questions of the kids in the backseat. Putting aside speculation

about the sociological meaning of the case, the simple truth is that Hollywood and the others grabbed Nick on a whim, and took him to Santa Barbara (where they were otherwise going for Fiesta), and after partying for the night, Hollywood returned home leaving Nick with Rugge. In one respect, the object of the conspiracy was completed at the instant Nick was kidnapped, and what happened later was a series of half-baked freelanced decisions. Viewed in the light most favorable to the prosecution, the most expansive definition of the object of the conspiracy was that Rugge and Pressley agreed to hold Nick pending further order from Hollywood. It simply cannot be gainsaid that murder was not within the scope or contemplation of the original August 6 kidnap conspiracy. Appellant's participation in the August 8-9 prearranged murder of Nick was part of a separate criminal agreement, even if Hollywood intended thereby to shield himself from prosecution for his original crime.

In this sense, Appellant's act of murder was intended to be an act of concealment of the original crime. Yet, this act was neither contemplated by the original agreement nor within the scope of the original kidnap plot. As the Ninth Circuit stated in *United States v. Walker* (9th Cir. 1981) 653 F.2d 1343, 1347, "[T]he mere continuance of the result of a crime does not continue the crime." The *Walker* court went on to write: "Where there is evidence that the conspirators originally agreed to take certain steps after the principal objective of the conspiracy was reached, or evidence from which such an agreement may reasonably be inferred, the conspiracy may be found to continue." 653 F.2d at 1350 (*quoting United States v. Hickey* (7th Cir. 1966) 360 F.2d 127, 141. Whatever may be said of it along the lines of "O tempora, O mores," this was *not* a case in which any evidence showed the existence of a three-day plot to kidnap *and* murder Nicholas Markowitz. The prosecution's theory held that Hollywood's decision to have Nick killed came on the third day, after two days of indolence and indecision by his other captors. Appellant's role was limited to that third day's decision.

In *Krulewitch v. United States* (1949) 336 U.S. 440, the Supreme Court recognized that not every conspiracy contains within it an implicit agreement to conceal the conspiracy. To hold otherwise would admit all hearsay in such cases. *See also Lutwak v. United States (1953)* 344 U.S. 604, 616-617. "Conspiracies are not to be deemed still operative merely because the conspirators act in concert to avoid detection and punishment." *People v. Leach,* 15 Cal. 3d at 431. The Superior Court should not have admitted any hearsay conspiracy statements against Appellant, the cumulative effect of which was clearly prejudicial to his trial rights, whether assessed under *Chapman* or *Watson* standards. *See e.g., Leach*, 15 Cal. 3d at 445 (*applying Watson* test of reasonable probability of different result in the absence of the error). Because the admission of this hearsay violated appellant's Sixth Amendment right to confrontation, this Court should apply the *Chapman* test of harmless error beyond a reasonable doubt, by which standard Appellant's convictions must be reversed. *See Bains v. Cambra* (9th Cir. 2000) 204 F.3d 964, 973-974 (evidence improperly admitted under California's state-of-mind and coconspirator exceptions to hearsay rule violated defendant's Sixth Amendment right to confront witnesses against him, warranting *Chapman* standard).

c. The Statements Were Not Made "In Furtherance" of Any Conspiracy in Which Appellant Joined

The Superior Court did not analyze whether, or which particular statements were made in furtherance of the original conspiracy. Such an analysis depends on a totality of circumstances. *See Saling* (1972) 7 Cal. 3d 844, 852 (assessing "unique circumstances" of case); *Humphries* (1986) 185 Cal.App.3d 1315, 1334 (same). Case law recognizes that narrative declarations and casual conversations are not generally considered to be statements in furtherance of a criminal conspiracy. *See United States v. Fielding* (9th Cir. 1981) 645 F.2d 719, 726 ("mere conversation between conspirators" or "merely narrative declarations" are not statements in furtherance of conspiracy); *United States v. Moore* (9th Cir. 1975) 522 F.2d

1068, 1077 (casual admission of culpability to an acquaintance is not a statement in furtherance of conspiracy).

Nor are statements made in furtherance of a crime or purpose beyond the scope of the original conspiracy. In *United States v. Vowiell* (9th Cir. 1989) 869 F.2d 1264, the Ninth Circuit held that acts taken by a co-conspirator to help escaped prison inmates avoid capture were *not* a part of the original conspiracy to assist escape. The defendant in *Vowiell* was charged with conspiracy to assist in the escape of several fellow inmates. Following the escape, which took place on April 16, 1986, the escapees were transported to various hideouts over the next several days. *Id.* at 1265. On April 20, *four days after the escape*, the defendant told a fellow inmate and co-conspirator that the escapees needed to move from their current hideout, because law enforcement was "closing in". *Id.* at 1266. The inmate then relayed the defendant's statement to her brother, a co-conspirator on the outside, so that the brother could get the message to the escapees. *Id.* The brother testified for the government at the defendant's trial, and recounted the instructions to relocate which he had received from the defendant by way of his sister. The trial court held the sister's hearsay statement admissible as a co-conspirator statement under Fed. R. Evid. Rule 802(d)(2)(E). *Id.*

The defendant argued on appeal that the sister's statement relaying his instructions to the escapees was inadmissible because it was not made in furtherance of the conspiracy to assist escape. The Ninth Circuit agreed, holding that the escape which was the object of the conspiracy was completed when the escapees had successfully fled "beyond immediate active pursuit." *Id.* The Court explained that any further assistance could have, at most, constituted harboring or concealing. The sister, however, was not charged with that offense. Nor did the conspiracy charged in the indictment encompass such harboring. Further, there was no evidence that the sister agreed to assist the escapees beyond leaving the prison confines and making a getaway to some kind of refuge. No ongoing assistance seems to have been contemplated. *Id.*

Vowiell controls the testimony presented at the trial in this case. None of the statements by Affronti, Rugge, Pressley, Skidmore, Jack or Jesse Hollywood, or Hogg in regard to Nick's original kidnap and confinement in Santa Barbara related to a conspiracy in which Appellant was then or later joined. Nor were the statements in furtherance of the subsequent conspiracy which, viewed most favorably to the prosecution, Appellant later joined involving Hollywood's decision to kill and communications in furtherance of that crime.

Finally, the admission of Rugge and Pressley's false assurances to Carpenter on the day after the killing were clearly inadmissible under *Lutwak*, as statements made when the conspirators were engaged in nothing more than concealment of the criminal enterprise. *Lutwak v. United States*, 344 U.S. 604; *Krulewitch v. United States*, 336 U.S. 440.

Reversal of Appellant's convictions on Counts 1 and 2 are warranted on the basis that such errors were not harmless beyond a reasonable doubt, *Chapman v. California* (1967) 386 U.S. 18, since the admission of this evidence violated his Sixth Amendment right to confront witnesses against him. *See Bains v. Cambria,* 204 F.3d at 973-974.

d. The Superior Court Directed the Jury's Verdict on the Count Two Kidnap and Special Circumstance Kidnap-Murder.

The Superior Court's response to inquiries from the jury whether one or two kidnaps were alleged, and the relevance of conspiracy to its determination of guilt or innocence, was misleading and legally incorrect. Judge Gordon's answers created a strong possibility that the jury verdict was based on a legally inadequate theory. *See United States v. Frega* (9th Cir. 1999) 179 F.3d 793, 808 (reversing conspiracy conviction where judge's response to jury inquiry misstated what conduct could constitute requisite predicate acts); *United States v. Walker* (9th Cir. 1978) 575 F.2d 209, 213 (on appeal, Court may infer from questions asked by the jury that it was confused about a controlling legal principle).

Under state case law, when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory an ensuing general verdict of guilt rested, the conviction cannot stand. See *Green* 21 Cal.3d 1, *abrogated on other grounds by People v. Martinez*, 20 Cal.4th 225. While this rule is most commonly invoked when an alternate theory is legally erroneous, it also applies when the defect in the alternate is not legal but factual, *i.e.*, when the reviewing court holds the evidence insufficient to support the conviction on that ground. The verdict in this case runs afoul of a major holding in *Green* which remains the law of this State.

"When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States* (1946) 326 U.S. 607, 612-13; *see also McDowell v. Calderon* (9th Cir. 1997) 130 F.3d 833, 839 (en banc) (trial court has "a duty to respond to jury's request with sufficient specificity to clarify the jury's problem"). In this case, Judge Gordon did not clarify the jury's confusion in a way which comports with law. *See United States v. Hayes* (9th Cir. 1985) 794 F.2d 1348, 1352; *United States v. Barona* (9th Cir. 1995) 56 F.3d 1087, 1097-98 (where jury is presented with a legally inadequate theory, the conviction must be vacated).

Specifically, Judge Gordon's answers precluded Appellant's acquittal of the special circumstance if the jury harbored a reasonable doubt whether 1) he was guilty as an aider or abettor of the August 6 kidnap; 2) he accomplished the victim's asportation on August 8 from the Lemon Tree Hotel to the Lizard's Mouth trail head by fraud rather than force or fear, and the movement from there to the grave-site was not sufficiently substantial to constitute a kidnap; or 3) the conduct which constituted the second kidnap (as opposed to the overall conduct involving the victim on or after August 6) was sufficiently independent of the murder (which was its purpose) to qualify as a special circumstance. Rather than clarify these issues, the Superior Court merely directed the jury to decide "and even if it [the

original kidnapping] wasn't [ongoing,] was there another kidnapping . . . you could find him guilty of a lesser offense if you did not feel as to him that all of the elements of the greater offense [§209] were present" (10 RT 2219).

On appeal, this Court cannot be sure that the jury's verdict on kidnap and kidnap-murder charges were based on legally adequate evidence. Even less, given the confusing and misleading nature of the judge's response, can this Court assume that all members of the jury convicted Appellant on the kidnap and kidnap-murder special circumstance charges on the basis of the same acts, and, thus, that Appellant's right to a unanimous jury verdict as guaranteed by article III, § 2 and the Sixth Amendment to the United States Constitution was not infringed. *See United States v. Gordon* (9th Cir. 1988) 844 F.2d 1397, 1400-1401; *United States v. Echeverry* (9th Cir. 1983) 698 F.2d 375, 377.

The jury's questions whether the crime was one kidnap or two, either of which was sufficient for guilt of Count 2 and the kidnap murder special circumstance, begged for clarification of the elements of those offenses if the predicate crime centered on the events of August 8th only. The Court erred in advising the jury that it could convict Appellant at all on the prosecution's second kidnap theory, *see* Argument A *supra*, and in failing to instruct the jury that, 1) it had to agree unanimously whether Appellant's conduct on August 8 met all elements of the lesser offense of kidnap; 2) if it unanimously agreed that Appellant's conduct toward Nick at the Lizard's Mouth trail head that evening constituted a carrying away of a person without his consent, it still had to determine whether the distance from the trail head to the grave site was sufficiently substantial to qualify as a kidnap; and 3) it had to unanimously agree whether Appellant's participation in a second kidnap was merely incidental to the commission of the murder. *See* Claim X, *infra*. The Superior Court's failure to clarify the jury's confusion on these issues warrants reversal of Count 2 and the special circumstance convictions.

e. Due to the Variance, the Superior Court Was Required to Instruct the Jury of the Unanimity Requirement as to the Alternate Theories of Kidnap

The issue of whether the Superior Court's jury instructions accurately stated the law is subject to *de novo* review on appeal. *United States v. Stapleton* (9th Cir. 2002) 293 F.3d 1111, 1114. Given the prosecution's insertion of its second kidnap theory into the case on rebuttal argument, and Judge Gordon's imprimatur on that theory, Judge Gordon was remiss in not instructing the jury of the need for unanimity as between the first and second kidnaps. The instructions given and Superior Court's answers to jury questions suggested two separate theories of kidnap, both of which the prosecution argued: 1) Appellant was a conspirator or aider or abettor of the August 6 kidnap, or joined its objectives later, when he accepted Hollywood's assignment to murder Nick; or 2) Appellant separately kidnapped and murdered Nick on August 8. These two theories were analytically distinct; some jurors may have voted to convict on one, but not the other.

A specific unanimity instruction was required because there was a "genuine possibility of jury confusion or that a conviction may occur as the result of different jurors concluding that the appellant committed different acts." *United States v. Kim* (9th Cir. 1999) 196 F.3d 1079, 1082 (*citing United States v. Anguiano* (9th Cir. 1989) 873 F.2d 1314, 1319); *see also United States v. Mastelotto* (9th Cir. 1983) 717 F.2d 1238, 1247 (requiring special unanimity instruction when "a variance occurred between the single scheme charged in each count of the indictment and the proof at trial" which indicated the existence of two schemes), *overruled on other grounds by United States v. Miller* (1985) 471 U.S. 130, 135-36.

In *Mastelotto*, the Ninth Circuit held that, where appellant contends a variance between a single crime charged in the indictment and proof at trial, the jury must be instructed that each of the jurors must find the appellant guilty of participation in the same single crime, and the crime in which the appellant is found to have participated must be the same crime as alleged in

the indictment, "even if the schemes themselves overlap or are concentric". 717 F.2d at 1247-1248. As in *Mastelotto*, Appellant's right to a unanimous jury verdict whether he participated in a *particular* theory of kidnap, as guaranteed by article III, § 2 of and the Sixth Amendment to the United States Constitution was infringed. *United States v. Echeverry* (9th Cir. 1983) 698 F.2d 375, 377.

Under the instructions as given, some jurors may have believed that Appellant ratified the original kidnap by silencing its victim, even though he did not participate in the abduction or confinement, or intend that ransom be collected, which reduced his culpability from §209 aggravated kidnap to §207 simple kidnap. Other jurors may have believed that Appellant's participation (along with Rugge and Pressley) in a scheme to lure the victim from the Lemon Tree Hotel to Lizard's Mouth with the false promise of safe return home constituted §207 simple kidnap. The former group of jurors may have believed the original kidnap terminated at various points when Nick was free to leave, yet Appellant's role in Nick's murder subjected him to liability for the overall kidnap scheme. Given that the jury was permitted to convict Appellant either on the continuous kidnap theory ("August 6 through August 9") alleged in Count 2 of the Indictment, or on a second kidnap theory (presumably the same "August 8-9" period charged in Count 1 murder), the Superior Court should have required jury unanimity as to which version of Count 2 and the kidnap-murder special circumstance was proven beyond a reasonable doubt. The lack of a special unanimity instruction was reversible error. *Mastelotto*, 717 F.2d at 1249.

D. CONCLUSION

Under the Fifth and Sixth Amendments, Appellant was entitled to notice of the precise charges with which he was charged. The Indictment charged a single kidnap spanning from "August 6 to 9, 2001." Only in rebuttal argument did the prosecution raise a second kidnap theory, namely that the victim though free to leave, was abducted a second time in the late evening of August 8, and taken from the Lemon Tree Hotel to the Lizard Mouth trail where he met his end. In a subsequent prosecution of co-

defendant Pressley, the prosecution amended the charging document to encompass this material variance. Yet for Appellant, no such notice was given. A principal line of defense - termination of the August 6-8 kidnap - was thus thwarted after the evidence was closed.

The jury expressed confusion at this eleventh-hour "switcheroo." Judge Gordon compounded the error by essentially directing the jury's verdict on this additional theory of guilt. No instructions were given on the requirements of substantial movement, or the defense of asportation by fraud.

Finally, the Superior Court erred by permitting the prosecution to devote a considerable portion of its case to co-conspirator evidence of the August 6-8 kidnap, without any evidence that Appellant joined that conspiracy or acted in furtherance of its goals. These errors, considered separately or as one, warrant reversal of Appellant's kidnap, murder and special circumstance convictions.

V. APPELLANT'S FIFTH AMENDMENT DUE PROCESS AND RIGHT AGAINST SELF-INCRIMINATION WERE VIOLATED BY THE SUPERIOR COURT'S ADMISSION OF HIS CUSTODIAL CONFESSION AT TRIAL

A. INTRODUCTION

On two separate occasions, Appellant moved to suppress his statements made to Detectives Jerry Reinstadler and Mike West on the grounds that they were coerced and involuntary and obtained in violation of *Miranda*. The trial court denied the defense motion on both occasions and the audio and videotapes of Appellant's interrogation was played for the jurors. After Appellant testified, the court allowed the prosecution to play, for impeachment purposes, additional statements made by Appellant to the detectives which the State conceded were obtained in violation of *Miranda*.

Appellant submits that the introduction of his coerced, involuntary statements to Detectives Reinstadler and West, obtained without a knowing and intelligent *Miranda* waiver and after Appellant invoked his rights to cut

off questioning and to consult with an attorney, violated his Fifth Amendment Privilege against self-incrimination and the due process clauses of the Fourteenth Amendment to the federal Constitution and article I, sections 7 and 15, of the California Constitution. *Miranda v. Arizona* (1966) 384 U.S. 436, 444; *Jackson v. Denno* (1964) 378 U.S. 368, 385-386; *People v. Ditson* (1962) 57 Cal.2d 415, 438-439. Of special significance to the claim are the myriad facts supporting an inescapable conclusion that the detectives misled Appellant about the facts and law of murder, and the likelihood he would receive the death penalty if he did not use this unique opportunity to convey his sincere guilt to the judge and jury, and that such misrepresentation had its effect because of Appellant's substantial cognitive impairment.

B. STATEMENT OF FACTS

1. Appellant's Condition

Facts adduced at trial showed that Appellant turned 21-years old a few days before his arrest in this case. Appellant was a 10th grade drop-out whose school attendance and performance were sporadic, at best. He read at grade-school level. He had no prior arrests. In the days preceding, he snorted cocaine, took Soma sleeping pills, and drank large amounts of alcohol. When arrested, he had been up for two-days without sleep.

According to tests of Dr. Chidekel, the prosecution expert, whose accuracy the prosecution did not disavow, Appellant had a full-scale IQ of 79, in the bottom 8th percentile of the adult population. Appellant's ability to reason, control impulsive behavior, and pay attention was seriously limited at all times, and worsened under stress (8 CT 2390-2393, 3 CT A 700-705).[104] As a consequence of his impairment, Appellant had difficulty understanding the ramifications of his actions; he was passive and

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104/ By separate motion, Appellant asks this Court to take judicial notice of the Evid. Code §402 hearing transcript of Dr. Chidekel's testimony held in *People v. Pressley*, on November 7, 2002, and to apply principles of judicial estoppel to consider it for the truth of the matters asserted herein.

dependent, and compliant with authority figures and friends, prone to brief reactive-psychosis when social demands became inescapable, and tended to allow others to take advantage of him (8 CT 2282). In context of custodial interrogation, by virtue of personality functioning, appellant would tend toward *excessive obedience, compliance and submissiveness to his own detriment, based on fear of abandonment.*

Appellant had "substantial deficits" in his visual memory (below the 1st percentile); "poor memory of verbal material" (bottom 7th percentile); what he is able to encode (*i.e.*, understand) of what he is told was "exceptionally limited"; his inability to sustain attention was pronounced; he was predisposed to lose his train of thought more often than 95 to 98% of the adult population (3 CT A 702-704). Also, "the emotional findings come to bear because Appellant is an anxious, ruminative, self-focused individual . . . *the events on the night in question could be predicted to make him even more so, at a level that would further impair him in his ability to attend meaningfully and productively to his surroundings."* (*Id.* at 705, emphasis added). Though these findings should have reverberated throughout the trial proceedings, the Superior Court did not consider any of these record facts in connection with its summary denial of Appellant's motion to suppress his confession[105] and objection to use of a subsequent portion as impeachment.

Appellant recognizes that, as a matter of judicial restraint, an appellate court customarily limits it review of an issue to the actual record before the trial court when it ruled on the motion to suppress. *See e.g., People v. Price* (1991) 1 Cal.4th 324, 388 (limiting appellate review to

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105/ Appellant's statement was a confession to killing the victim in order to discharge a debt owed to Jesse Hollywood. Appellant denied responsibility for the earlier kidnap and for making the decision that the victim should be killed. Indeed, Appellant did not express that he had any choice to deny the offer of discharge in exchange for the killing. In that sense, the statement did not constitute a full confession negating *mens rea* defenses of diminished actuality, or mitigation of substantial domination by another person.

examination of the actual record before the trial court when it ruled); *People v. Balderas* (1985) 41 Cal.3d 144, 171 (evaluating motions for severance and objections to consolidation in light of the showings then made and the facts then known); *Cooke v. Superior Court* (1978) 83 Cal.App.3d 582, 587 (appellate court review is limited to an examination of the record before the trial court in the hearing that resulted in the order before the reviewing court). Yet, a compelling reason exists in this case to deviate from customary appellate practice. As it is found in the certified record on appeal and as it is not subject to reasonable dispute since she testified as the prosecution's expert, Dr. Chidekel's testimony warrants this Court's close attention to reach a just conclusion as to the admissibility of the centerpiece of the prosecution's case. *See People v. Sanchez* (1969) 70 Cal.2d 562, 573-74 (in reversing a death penalty conviction on the basis of the admission of an involuntary confession, this Court discussed and considered evidence concerning the appellant's low mentality and lack of education which was not submitted until after the confession was received into evidence).

2. Appellant's Arrest

On August 16, 2000, three-days after Santa Barbara sheriffs' discovery of Nick's body, Los Angeles Police Officers arrested Appellant for murder and advised him of *Miranda* rights. Appellant asked to speak with an attorney, and no custodial questioning occurred at the site of arrest (Van Nuys) or during his transportation by Santa Barbara Sheriffs Detective Jerry Reinstadler to Santa Barbara County Jail in Goleta, California(9 CT 2517). The Superior Court did not consider this record fact in connection with Appellant's motion and objection.

3. Appellant's Jail Phone Calls

The next evening August 17, Santa Barbara sheriffs tape-recorded two collect phone calls from Appellant to his mother Vicky Hoyt (8 RT 1619). Santa Barbara detectives had interviewed Vicky earlier that day about Jesse Hollywood's whereabouts. Regardless whether they asked or

importuned Vicky's side of the conversation, by facilitating and recording it, they took advantage of the relationship of trust and appellant's vulnerability.[106]

In their first phone call, often in hysterics, Vicky badgered and cajoled her highly-dependent son, to speak with the detectives in order to be released, so she could avoid spending $40,000 on an attorney for him. This was, on its face, an implausible directive. Yet, it was precisely what appellant set out to do. Vicky screamed "spill your fucking guts and get out. Tell them you had nothing to do with this . . . you didn't do this Ryan, right?" She harangued him to turn Hollywood in and "*tell them everything because if you don't, I will.*" (9 CT 2541, 2543 emphasis added.) Otherwise, she would see him at his Monday [August 17] arraignment, by which point she expected him to have talked (9 CT 2539-2542).

Moments later when Appellant called back, Vicky said she had just heard from Appellant's father that according to a breaking television news special report, Appellant was *the person* who dug the grave in which the victim was found. Appellant threw up in his cell, then asked for a detective. The Superior Court did not consider any of these record facts in connection with appellant's motion and related objection.

4. Interrogation

The prosecution presented both audio and videotapes of Appellant's interrogation, which Santa Barbara Detectives Jerry Reinstadler and Mike West conducted on August 17, 2000, and was secretly recorded. By January 5, 2010 Order of the Superior Court, the certified record was augmented to include both the three fragmented, and in places inaccurate, prosecution transcripts presented to the trial jury (these were not contained in the original record) and the single accurate and complete transcript of the audiotape prepared for purposes of facilitating this Court's appellate

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106/ Vicky told Appellant repeatedly, "we're being monitored, you know this right? Ryan?" (9 CT 2539-2540, Appellant's Exh. 54(a)).

review.[107] Within the context described above, Appellant initiated the contact with law enforcement which led to interrogation and confession.

a. *Edwards* Waiver

Appellant began by asking about the TV press conference his mother had said his father had seen. Detective West said "we need to get *a little understanding out of the way.*" (1 CT 2A 153). West read Appellant his *Miranda* rights, and Appellant said he understood his rights and would talk with detectives, presumably to find out whether his mother (who had not seen it herself) was right about what the television public had been told (*id.* at 156).[108] Appellant said he wanted to know what was going on, because he was getting "floods of information like I dug the grave" (*id.*). He said he really didn't know much about any of it (*id.* at 157). The Superior Court did not consider Appellant's condition, or any of the circumstances of his decision to contact detectives, in connection with whether he made a knowing and voluntary *Edwards* waiver.

Reinstadler said they *knew* Appellant was involved in the killing from *dozens of interviews* of people saying *"the same things." (misstating the evidence gathered by police)* (*id.* at 6).

> "You didn't dig the grave. You killed him. [] You've been identified. You need to start telling the truth. *Now if you didn't dig the grave, you need to tell us that. (police use of the term "need" conveyed to appellant that he, not the state, bore the burden of proof at trial, and disparaged his privilege against self-incrimination).* If you made a mistake up there, you need to admit it because the way you come across before, you're just a stone cold killer. . . . *People are telling us that you were sort of bragging about this (misstating the evidence gathered by police).*

107/ For clarity sake, citations are to the single accurate and complete transcript which the Superior Court ordered to be included in the certified record on appeal (1 CT 2A 152-197). The italicized passages are quotations from the transcript and form the basis of Appellant's Fifth and Sixth Amendment claims for reasons set forth after each passage in parentheses, and explained in Argument below.

108/ The prosecution did not present any evidence of a signed waiver.

. . .

> Detective West: . . . If you want to sit here and tell us why and give us a reason, *maybe it will help you out. Maybe it will paint a picture of you as somebody other than what we have now, which is that you're a stone-cold killer. . . . (misrepresenting appellant's absolute right to wait until trial to present his defense.)*
>
> (*Id.* at 159-160.)

b. Police Deception

In this initial phase, the detectives misled Appellant about the evidence of his guilt already in their possession, the self-defeating and truth-distorting role of defense attorneys, and their own authority (along with the District Attorney) to determine, or at the least influence, his sentence since his guilt was assured. The Superior Court did not consider these passages to be distortions, or their intended and cumulative effect in overbearing appellant's will, in connection with Appellant's motion and objection.

> WEST: You're going to have to tell us. *It's going to have come out of your mouth. Otherwise we take all these stacks of paper down to the judge and present what we have right now, which paints a pretty bad picture of you. (misrepresenting appellant's right to wait until trial to present his defense.) (Id.* at 160).
>
> REINSTADLER: We know you did it, okay? The question is why. And maybe you can fill that in. But you have to understand. *People not associated with have identified you at the hotel, okay? Right? (misstating evidence gathered by police.)* You understand that? So you can't say I'm nowhere near here. Do you understand that?
>
> HOYT: No I don't. It's all right because I'm going down. I just realized that.
>
> WEST: Did you come up here in . . .
>
> HOYT: I came up here to say that this picture that everybody's painting of me is not me.
>
> WEST: Well tell us who you are. Tell us how this went down.

HOYT: *I can't do that. You mind if I go back to my cell and think about it tonight and talk to you guys tomorrow because I know my arraignment is Monday. (Appellant's first assertion of the right to cut-off questioning.)* (1 CT 2A 161.)

With this assertion, equivocal or not depending on whether "You mind" was meant as question or polite interjection, the detectives were obliged by law to clarify whether Appellant genuinely wished to cut off questioning. Instead, the detectives prevaricated.

REINSTADLER: *Once you're arraigned, we can't talk to you. That's the bottom line. I mean if you want to tell us something, I'm being honest with you. This is your opportunity to do it. This is it. (fabricating a "gag" rule which would prevent Appellant from speaking with police for any reason if he invoked his right to silence until arraigned. In view of his limited ability to encode what he was told, appellant could likely have believed this also precluded him from putting forward a defense at trial.)*

HOYT: There's no way I can talk to you tomorrow?

REINSTADLER: No. I know why.

HOYT: Huh?

REINSTADLER: I know why.

HOYT: Why.

REINSTADLER: Because you won't want to talk to us tomorrow *because somebody's gonna get to you, telling you not to talk to us. Play the games that we know people play. And then, the next thing you know, you're looking at you being trigger man. No explanation. Okay? (Misrepresenting the role of defense attorney as obstructing rather than serving truth, and forecasting doom at trial if appellant asserted his right to silence.)*

We know Jesse Hollywood's background. This isn't, I mean, we know quite a bit. If you're afraid of him, you should be more afraid of what could happen to you if he choreographs something that you got involved in and made a mistake and *without any explanation to a jury of twelve people or a judge . . . (misrepresenting Appellant's right to wait until trial to present his defense.)*

HOYT: If I talk, does my name, do I, does it get said in court that I said it? *(Appellant's response conveys that he was misled into*

believing he had to talk to detectives, or his version of events could not be aired at trial, and he did not knowingly waive his privilege against self-incrimination.)

. . .

REINSTADLER: *You may have to say in Court yourself what you're going to tell us.* It depends on what it is and the situation. *(misrepresenting law in that the Fifth Amendment protected appellant from being compelled under any circumstance to testify in court, no matter what he told police).*

HOYT: I mean I'm going down for life.

(*Id.* at 161-163.)

Appellant's response suggests, particularly in light of Dr. Chidekel's findings, how overwhelmed he felt by these police tactics. In turn, the detectives saw Appellant's vulnerability as an opportunity, which they exploited to the hilt, by raising the specter of a fate even worse than "going down for life."

c. Death Penalty Threats

The detectives misrepresented this moment as Appellant's *sole opportunity* to influence his captive fate as between life, and death.

REINSTADLER: *There's a difference between life and the death penalty and everything else in between. All we want is the truth. (misrepresenting that police would decide Appellant's sentence, or could tilt it in Appellant's favor, but only if he waived his request to cut off questioning for the night, while implying that the death penalty was a certainty if he persisted in invoking his right to silence.)*

HOYT: I had nothing to do with *the* kidnapping.

. . .

REINSTADLER: *We know that.*[109] *(misrepresenting that police agreed with Appellant there was one kidnap only - the initial taking*

109/ The prosecution transcript used at trial omitted this response, which was material to the jury's question about the same issue - was Appellant involved in one kidnap, or none?

of Nick off the street - and Nick's killing was an entirely separate event, in time, manner and motive.)

HOYT: Then why am I charged with it?

REINSTADLER: You need to tell us your story.

(*Id.* at 163.)

During this next phase, Appellant admitted generally that he was involved in Nick's death: He owed Hollywood "a lot" of money - "enough to do what I did" (*id.* at 165-166). "I found out Tuesday of a way to erase that debt" (*id.* at 168). "What Ben owed Jesse didn't, in my opinion, this is off the record . . . didn't justify this kid's death." (*Id.*) An "intermediary" of Jesse's told him in order to erase his debt "there's something that needs to be taken care of. So go take care of it" (*id.* at 170-171). He said there was "a mess that needed to be cleaned up" and he had "to take care of somebody," which Hoyt understood meant kill him (*id.* at 173). He drove Casey's car. When he arrived at the hotel, the gun was already there (*id.* at 175-176). While these statements constituted indirect admissions of involvement in Nick's murder, Appellant did not concede he was the actual killer, and no other admissible evidence bridged that gap, crucial for crossing the Eighth Amendment culpability threshold.

d. Invocation of Rights

At that point, for the second time and more decisively than the first, Appellant asserted his wish to terminate the interview, which led to the following exchange with detectives:

HOYT: You guys know what happened. *I think I'm going to stop there for now.* Can I get some more water please?

REINSTADLER: Sure.

HOYT: Thanks. The stuff they give you in there is hell. This whole thing, I have an eight-year old brother whom I love dearly. I have a mom who depends on me. She's already got a son locked up. She's got an addict for a daughter. You see why I'm so hesitant?

REINSTADLER: You know, you heard in your rights that you can stop talking to us at any time and that's your right. But I sense that you want to tell us something that may be different than what we do know. And, I guess that ain't going to happen.

WEST: I don't know what was said for a minute when I went out the room, but from what I heard you say it sounded to me like you kind of wanted to take a break. If that's what it means, you know, we can let you collect your thoughts here, but . . .

HOYT: I wish I could have a cigarette more than anything.

WEST: If you want to talk to us, and you just want to take a break, it's different than if you're telling you don't want to talk any more, period.

HOYT: *Well, I'm talking now between now and tomorrow. (In response to police questioning supposed to clarify whether Appellant wished unambiguously to cut-off questioning overnight or take "a break", Appellant clarified that he wished to stop talking overnight, a request the police flatly ignored.)*

REINSTADLER: *Too late.*

HOYT: Whose? I know you guys have Will.

(*Id.* at 177-179.)

e. *Edwards* Deception

At that moment, the detectives were legally required to stop interrogating Appellant. Instead, they misled him about the legal effect of an overnight break.

REINSTADLER: *Once the lawyer contacts you, we are precluded from speaking with you anymore period. (misrepresenting to Appellant that a fatuous "gag" rule prevented him from communicating with police under any circumstances once an attorney got involved.)*

HOYT: A lawyer is going to contact me tomorrow?

REINSTADLER: Oh, I'm sure. It's normal. It's their job. Just like it's our job to try to figure out what's going on.

(*Id.* at 179.)

The detectives then played up the leverage point that whatever Appellant said next - or failed to say - would determine whether he would live or die in the long run.

> WEST: *The question you should be asking is what can you say that would be able to help you out.* And I think I can see that's what you're agonizing over because you're afraid of saying that . . .
>
> HOYT: *I'm agonizing, I'm agonizing over life or death, literally. (Certainly, in view of his highly-limited and distorted mental capacity for encoding what he was told, or attending meaningfully and productively to his surroundings, in the bottom few percentiles of all adults in terms of memory, attention and ability to parse the situation, Appellant was literally in agony over the choice detectives put so starkly to him - to save his life by confession or end it by silence.)*
>
> REINSTADLER: *Fill the puzzle in, Ryan, because pre-meditated murder means different things in the law. If you were under the gun and someone's threatening you, these are things that all weigh on decisions as to why things happen. (misrepresenting to Appellant that duress was the only potential defense to pre-meditated murder, when in actuality duress is not a defense at all, while other defenses are recognized by law.)*
>
> HOYT: *Yeah, but if it goes down like that, I'll get out in five, ten years.*
>
> REINSTADLER: *What's that?*
>
> HOYT: *Then I wind up the same place that kid did, I'd just as soon serve twenty-five.*
>
> REINSTADLER: What makes you think it's going to be twenty-five?
>
> HOYT: If it's death -
>
> REINSTADLER: *It could be life. There's all different degrees depending on what the district attorney feels was the motivation for this killing. (Misrepresenting to Appellant that the District Attorney would decide Appellant's sentence, bypassing judge and jury, and the myriad factors meant to weigh on the decision under law.)*
>
> *HOYT: Anyway you cut it I'm screwed. [] There's no way, there's no way he cuts it down to manslaughter.*

(Id. at 180-181.)

In light of his impaired abilities to encode, Appellant likely understood what he was told literally to mean that the District Attorney could and would decide his sentence based on whether or not he confessed to detectives.

After this misrepresentation which was meant to, and did steer Appellant away from his invocation of the right to stop answering questions for the night, Appellant described his role more specifically. He said he felt sorry for "the kid that I buried," but denied he put duct-tape on Nick's mouth (id.). Reinstadler said that, according to Rugge, he did that too. Appellant replied, "Really? I love this one. *The only thing I did was kill him*" (*id.* at 183.) This phrase became *the centerpiece* of the prosecution case and argument. Appellant denied that he was the one who chose the place, dug the grave, or had to threaten Pressley to get his help.

For the third time, Appellant invoked his right to silence, saying *"Yeah, I think I want to stop there. I think you guys got a pretty good picture"* (*id.* at 189). West responded, "Yeah, I've got a good picture, and it's pretty grim for you, Bryan. I mean Ryan. I'm sorry, uh, that that's what you painted for me." The interrogation continued "outside" *Miranda,* as the prosecution conceded before trial that this was an effective invocation of *Miranda* rights.

Significantly, there is no constitutional dividing line between "You guys mind if I stop there" and "I think I'm going to stop there" (both of which the police, prosecution, and Superior Court ignored) and "I think I want to stop there" (ignored by police, but the prosecution conceded was effective). By definition, any affirmative invocation (*i.e.*, anything other than simply buttoning up one's lips) is a statement of future action or intention. The expressions "I want to" and "I'm going to" are as unequivocal as the English language permits in referring to the speaker's prospective intention. *Miranda* requires no more. Nonetheless, the Superior Court did not give effect to either the first or second of Appellant's invocations in connection with Appellant's motion and

objection.

f. Interrogation "Outside *Miranda*"

As became significant during the defense case at trial and jury deliberation, the detectives continued questioning Appellant outside *Miranda*.

> HOYT: I'm screwed. I didn't help myself at all tonight, did I?
>
> REINSTADLER: I think you could have maybe. But [. . .] So you can't help us find Jesse, huh? Nobody knows where he's at? How about a clue? Steer us in the right direction.
>
> HOYT: Well, if, if I give you a clue, does it –
>
> REINSTADLER: Couldn't hurt.
>
> HOYT: Will it show up in court that I gave you a clue?
>
> REINSTADLER: *Can try and keep it out. More than other stuff. (misrepresenting to Appellant that police could keep the jury from hearing that Appellant told them where or how to find Co-Appellant Hollywood, or that such information would be harmful to Appellant.)*
>
> HOYT: But what are the odds? What are the odds?
>
> REINSTADLER: I, I can't tell you. It couldn't hurt.
>
> HOYT: The trial is gonna go fast, isn't it.
>
> REINSTADLER: Who knows, man.
>
> HOYT: *Do I have to wear a suit?* Or am I going in the oranges? *(Considered in view of his limited abilities to encode and understand what he was told, or to attend meaningfully and productively to his surroundings, Appellant's questions convey his compltete lack of understanding of the legal process and, more pointedly, of his interlocutors' true motives in continuing the "conversation." Appellant did not knowingly relinquish his rights based on this same lack of comprehension.)*
>
> REINSTADLER: Heck no, you'll be dressed up. They don't want you going in there looking like a prisoner.

HOYT: Shit, I just realized something. I gave my brother my suit to wear at his trial. And I never got it back. *I'm through. When I get a lawyer, does my lawyer and I get to look at all the paperwork? (Appellant's concreteness, and his focus on the comparatively trivial subject of attire, convey his complete lack of understanding of legal process, what is at stake in the interrogation, and the substance of his Sixth Amendment right to the guiding hand of counsel. "Paperwork" is presumably a reference to West's threat, if Appellant did not talk, to "take all these stacks of paper down to the judge and present what we have right now, which paints a pretty bad picture of you.")*

REINSTADLER: Ah, sure.

HOYT: Feel like I'm going to fucking pass out.

At that point, Tape Side "A" of the tape ends, and Side "B" begins. The interrogation continued:

REINSTADLER: It was Jack Hollywood wasn't it.

HOYT: What?

...

REINSTADLER: So the one guy that has ordered it up is gonna get off, right?

HOYT: Huh?

REINSTADLER: The guy that ordered this up that's taking your life away from you is going to get away. That's what you're telling me.

...

REINSTADLER: I just can't help but wonder, is there ever a time when right before you pulled the trigger that you just thought, you know, I shouldn't do this? This is wrong. Because I haven't heard that from you.

HOYT: Honestly?

REINSTADLER: Yes.

HOYT: *Hell, yes. Right before. (Although the Superior Court minimized this as "frosting on the cake," at both guilt and penalty phases, the prosecution emphasized Appellant's response as evidence of his extreme culpability and wantonness of his conduct warranted the death penalty.)*

REINSTADLER: Because that media is going to paint, is, has painted you as just a cold-blooded killer. All that because you owe, and I know who it is, a lot of money. And you realize that you cancelled Ben's debt too probably. Do you realize that?

HOYT: No. Ben's going to wind up paying.[110]

HOYT: Um, do I call an attorney, or do they come to me?

REINSTADLER: Well, you can call one. Or you can wait for your arraignment, and one will be appointed.

(*Id.* at 195-196.)

C. PROCEDURAL HISTORY

1. Pre-Trial Proceedings

Appellant moved to dismiss the indictment under Penal Code §995 on the ground that his confession, the only direct evidence of guilt, was inadmissible. (4 CT 982-983, 998-1005.) Appellant renewed the motion to suppress before trial. (5 CT 1290.) The Court denied both motions.

On August 7, 2001, the Superior Court denied Appellant's motion to suppress his confession as coerced and involuntary, and in violation of *Miranda* (1 RT 161). Appellant asserted that when he asked to speak with detectives, he was upset by his mother's phone call, the detectives threatened him with the death penalty, disparaged his right to counsel, and ignored his invocations of his right to silence (1 RT 173, 178).[111]

110/ The prosecution transcript presented to the trial jury misreported Appellant's response as "I'm not going to wind up paying" (10 CT A 2770), a far more defiant riposte than what he actually said.

111/ In opposing a claim of coercion by Co-Appellant Rugge, the prosecution took the novel position that the Fifth Amendment only protects against the use of "false confession" and that the accuracy of a confession justifies its admission, no matter what the circumstances (1 RT 190). While there is assuredly a societal cost to excluding probative confessions, this Court should reject the end justifies the means arguments. "Accuracy" - particularly of expressions of internal states and feelings - is notoriously difficult to assess when a confession is coerced.

The Superior Court denied both of Appellant's motions without an evidentiary hearing,[112] relying solely on excerpts of the prosecution transcript. The Court provide this explanation for its decision:

> Judge Gordon: I guess the argument is that you're a stone-cold killer, and if we present to the Court what we have that shows you're a stone-cold killer then they're probably going to give you the death penalty. I guess that's the argument. Although -- so, I guess the stone-cold killer part is really sort of superfluous.
>
> The idea is that unless you give us something that shows that you were not as culpable as we think you are then we have to go with what we have and that may present you in a bad light and bring more dire consequences. Now, I find some difficulty that that's a threat. It seems to me that it's simply stating a fact that if you've got something to say you better say it, because if you don't, or if there's nothing mitigating, then, obviously, the consequences can be more dire. And I have a little bit of trouble finding that that kind of an approach is the kind of a threatening approach.
>
> It has to appear that the precipitating cause of the statement was response to that kind of presentation by law enforcement, and that -- in this transcript that doesn't appear to be the case. So I can't see the threats or duress with regard to Mr. Hoyt. The reasonable conclusion is that Mr. Hoyt was not expressing a wish to terminate the interview, to terminate his colloquy with the police, he was temporizing it. *He didn't quite know what he wanted to do and he was sort of postponing the inevitable, but he didn't really want to stop talking because he didn't quit talking.* I don't think the officers ever tried to coerce him into further discussions. I don't think they attempted to question him until after it was obvious that he wanted to resume the discussion. So, I don't find that there's been any violation of *Miranda* as far as Mr. Hoyt is concerned.
>
> (1 RT 199-202, emphasis added.)

112/ In particular, the Superior Court failed to consider evidence in the trial record as it related to knowing and voluntary waiver and coercion of Appellant's highly-limited mental abilities to encode what he was told, or to attend meaningfully and productively to his surroundings, vulnerability to police manipulation aimed at getting him to talk rather than invoke his right to silence, situational distress from his prior contact with Vicky Hoyt (which was known to police), cocaine and alcohol withdrawal, and lack of sleep.

The Superior Court added that Appellant referenced the death penalty first when he said he was "looking at life." Finally, Appellant did not express a definitive intention to end the interview, but simply "postponed the inevitable" (1 RT 199-201). As explained below, these rationales were clearly mistaken and erroneous as a matter of law.

Before trial, Appellant renewed the motion to suppress on both *Miranda* and voluntariness grounds (1 RT 217, October 4, 2001 Readiness and Settlement Conference), and requested a foundational hearing (5 CT 1290). At that point, the prosecution offered not to present anything Appellant said after what was in effect his third invocation of his right to cut-off questioning ("All right. You guys I think I want to stop there. I think you guys got a pretty good picture.") (2 RT 279, 4 RT 727, 729, October 15, 2001 Pre-Trial Conference). Of course, this invocation came six pages of transcript *after* Appellant's confession that "the only thing I did was kill him." (1 CT 2A at 183, 189.)

The prosecution then informed the Superior Court and the defense that it had recently discovered a "backside" to the tape "which no one knew about" and this Side "B" contained Appellant's additional one-sentence confession to the crime (2 RT 281).[113] The prosecution conceded it could not use Side "B" during its case in chief because it came after Appellant's third invocation of rights.[114] The Superior Court did not rule at that time on the admissibility of Side "B" as impeachment.

113/ The prosecution said it e-mailed a copy of Side "B" to the defense "as soon as [he] found out about it" (2 RT 281). The timeliness and adequacy of this disclosure lies outside the scope of the appeal. For example, the disclosure represented a sea-change from the prosecution's §995 opposition that Appellant said nothing incriminating after his third invocation of rights (4 CT 1171).

114/ At trial, the prosecution did not argue any theory of attenuation of taint based on a purported gap of 15-minutes on Side "B" between Appellant's *Miranda* invocation and his one-sentence confession. The argument cannot be raised on appeal.

During jury selection, the Superior Court denied Appellant's request for a foundational hearing (4 RT 700-701, October 26, 2001). The defense renewed its objections to any admissions or statements made by Appellant to his arresting officers as being in violation of the '*Miranda* Rule' and involuntary, and requested a foundational hearing on that issue (5 CT 1290.)[115] Taking up the issue in the lunch-break after the jury had been sworn, and before the time-set for opening statement, the Superior Court watched only a brief portion of the videotape, before denying Appellant's motion once and for all. (4 RT 716-717, 721, 724, October 29, 2001). The Superior Court's allotment of less than a half-hour of its lunch-break to decide this pivotal issue foreordained the result. No live testimony on Appellant's condition, his vulnerability to police pressure and misstatements of law[116] and process was permitted.

The Superior Court denied Appellant's motion to suppress with the following rationale:

> THE COURT: I don't see that there's ever been any indication by him that he *really* wants to terminate the interview and invoke his *Miranda* Rights. *And furthermore, I don't think there's any anything in here that is misleading by the officers,* I think that what they tell him is true, and I don't think there's anything about it that is putting him under some sort of undue pressure to continue the interview.

115/ Appellant concedes that the defense did not specifically request an opportunity to present expert testimony on appellant's psychological vulnerability to police deception, because such evidence was actually developed instead by the prosecution expert, Dr. Chidekel, and the prosecution had no interest in undermining the cornerstone of its case (4 RT 700-702). Under these circumstances, appellant asks this Court to consider the expanded record on appeal in determining the threshold constitutional issues, despite the trial court's failure (with the complicity of both parties) to conduct an evidentiary hearing.

116/ The prosecution conceded in its §995 opposition that "Reinstadler's statement "once the lawyer contacts you we are precluded from speaking with you any more, period" was a "lie" (4 CT 1171). The Superior Court did not agree, and therefore did not address the effect on overbearing Appellant's will of police serial misrepresentations of fact and law.

(4 RT 726, emphasis added.)

2. Prosecution Case

The prosecution proceeded to play both audio and videotapes of the confession through 1 CT 2A 189, and to present its transcript to the jury during case-in-chief.

3. Defense Case

After Appellant took the stand in his defense, the prosecution sought a ruling on Side "B" for impeachment. The Superior Court granted the prosecution request over defense objection, offering the following grounds:

> THE COURT: And then the -- then the punch line of – is that this question from -- from Detective Reinstadler that, "I just can't help but wonder, is there ever a time when right before you pull the trigger that you just thought, you know, I shouldn't do this, this is wrong, because I haven't heard that from you."
>
> HOYT: "Honestly?"
>
> REINSTADLER: "Uh-huh."
>
> HOYT: "Hell, yes. Right before." All right. Now, that impeaches what?
>
> MR. ZONEN: His claim that he didn't pull the trigger. That he had nothing to do with the killing.
>
> THE COURT: It impeaches his claim here?
>
> MR. ZONEN: Yes.
>
> THE COURT: Okay. Yeah. I see what you're talking about. It impeaches his claim here. It doesn't necessarily impeach anything he said in the statement.
>
> MR. ZONEN: No.
>
> *THE COURT: Okay. I see what you're talking about. Yeah. So whether the statement is voluntary, or whether it was a false confession or not, is really irrelevant on this point, it does impeach his testimony here.*
>
> MR. ZONEN: Yes.

THE COURT: That's what you're saying?

MR. ZONEN: Yes.

THE COURT: All right. All right. Go ahead.

MR. CROUTER: Yes. We object to that on the Fifth Amendment grounds and also Sixth Amendment grounds[.]

...

THE COURT: Okay. So, really, what this — he's already -- he's already confessed. In other words, you could read this statement, say he's already confessed that he killed this guy. *This is simply frosting on the cake, is what we're talking about, isn't it?*

MR. ZONEN: Uh-huh. Well, it's also more specific about, it's the first time he ever addresses the question of actually pulling the trigger, because he doesn't say that before. He doesn't say how he did it.

THE COURT: I suppose that's right. But that's probably --

MR. ZONEN: He says he killed him before.

THE COURT: That's hair splitting. But I suppose the People could argue that. Well, all right. So your argument is that the law allows this kind of evidence to be presented, even though there may have been a proper invocation of his right to remain silent, provided it's impeaching, and providing it's offered as impeachment in the event that the Appellant testifies in a manner contrary to --

MR. ZONEN: Yes. It's *People versus May*, M-a-y, and *Harris versus New York.*

THE COURT: And I don't think that rule has been changed.

...

THE COURT: All right. All right. I'll allow it.

(8 RT 1691-1695, emphasis added.)

In response to the Superior Court's ruling, the defense played the balance of Side "A" and Side "B" during Appellant's direct testimony. The jury was not instructed at that time as to any limiting use of that portion of

the confession (8 RT 1721). The prosecution did not allude to Side "B" in its cross-examination of Appellant, choosing instead to reserve its points for argument at the guilt and penalty phase.

4. Closing Argument

The prosecution argued the following issues of relevance to the claim of error on appeal:

First, it was "incredible", the prosecution argued, to suggest that a *ridiculous* phone call with his mother caused Appellant's 48-hour amnesia. While the phone call was *unfortunate* in terms of having to deal with a parent at that level of instability, Appellant had 21-years of experience dealing with his mother, and was familiar with her nonsense and dramatics (9 RT 2077).

Second, the police interview was a *conversation* without any of the stereotypes of handcuffs, yelling, or lights shining in Appellant's face (9 RT 2044). The police treated Appellant "like a perfect gentleman"; there wasn't a mark on him. There was no duress or confusion in the interview, and no lack of orientation on Appellant's part - where he was, who he was, or who these other people were. Appellant "knew" what he was facing and the consequences of the interview (9 RT 2049). He "weighed" whether he could mitigate his situation and not be identified as a snitch. He "controlled" the interview, and which questions to answer.

Third, Appellant broached the possibility of "plea bargain" to manslaughter with the detectives (9 RT 2057). He knew he was in serious trouble and explored the options with "knowledge", though perhaps "a little naivete", concerning the criminal justice system.

Fourth, the police said Rugge said Appellant "did it," and Appellant did not deny the accusation. Rather, Appellant said, "the only thing I did was kill him" (9 RT 2059). In fact, he did considerably more than that; he was "probably" involved in the duct-taping and the burial process, if not in digging the grave.

Fifth, the prosecution placed great weight on Side "B" of the confession. Appellant did not deny pulling the trigger, though he had the

mental wherewithal to deny, and did deny participating in the earlier abduction. Referring to Side "B" in its peroration, the prosecution simply said, "this had a certain feel to it that pleased Appellant and worked well for him" (9 RT 2076).

On rebuttal, the prosecution returned to these same themes. Appellant was not "brutalized" by the detectives; throughout the interview, he remained lucid, responsive, and evasive (10 RT 2153). The prosecution ended with this summation of its evidence:

> Mr. Hoyt's statement to police . . . is replete with admissions to him having killed Nicholas Markowitz. When given every opportunity to deny that, he didn't . . . When given the opportunity to say what he did do and didn't do, he was able to do that. . . . He was able to say that clearly. He never once said that about the murder. In fact, he repeatedly said he was *the one* who killed Nicholas Markowitz. And that particular statement is *the one* that frankly should go with you to your deliberations. "All I did was kill him." I'm going to ask you to find him guilty of doing exactly what he did, killing him. Killing 15-year-old Nicholas Markowitz. Thank you very much.
>
> (10 RT 2159, emphasis added.)

The Court instructed the jury that an out-of-court prior inconsistent statement by Appellant should be considered only for purposes of testing Appellant's credibility as a witness, and not as as proof of guilt (10 RT 2168). However, the Superior Court did not identify which portion of the confession this instruction applied to, or limit the prosecution's argument about Appellant's implied admission that he was the one who pulled the trigger.

The jury requested playback of the entire confession and was provided the prosecution's transcripts for deliberation (10 RT 2211-2214;). *See* 1 CT 2A 98 (settled statement identifying documents which comprised prosecution's trial transcripts); 10 CT A 2735-2759, 2761-2764, 2766-2771 (prosecution's trial transcripts of Side "A", balance of Side "A", and Side "B", respectively).

D. ARGUMENT

1. Overview

The judicial branch has often observed that a man's confession is "like no other evidence." *Fulminante.* It operates as a kind of evidentiary bombshell. *People v. Cahill* (1993) 5 Cal.4th 478, 503. This is not a case where Appellant was apprehended, or even observed by *any* disinterested reliable witness, in the course of committing the crime. *Id.* at 505. No other evidence could have impressed the jury in the same way. No other evidence pointed to Appellant as the actual killer or even put him at the Lemon Tree Hotel and Lizard's Mouth. No scientific evidence placed him at either scene. Without the confession, the state's case on Appellant's involvement would have been limited to motive (to clear his debt to Hollywood), and post-killing admissions to Casey Sheehan, an accomplice by law who had a motive to shift suspicion from himself to Appellant. Without this evidentiary bombshell, Appellant would not have been impelled to testify, a factor which is appropriately given weight under *Chapman. See Neal*, 31 Cal.4th at 87 (confession functioned as centerpiece of prosecution case). This Court must exercise its solemn responsibility to apply the law to Appellant's confession with awareness of its centrality to the trial.

2. Failure to Hold a Hearing

An evidentiary hearing on a motion to suppress must be held when a appellant's moving papers allege facts with sufficient specificity to enable the Superior Court to conclude that contested issues of fact exist. *United States v. Walczak* (9th Cir. 1986) 783 F.2d 852, 857. Appellant's motions met this standard by putting in dispute these issues of fact: 1) his condition and vulnerability to maternal and police pressures to confess; 2) his cocaine and alcohol withdrawal and lack of sleep; 3) his limited mental abilities to make a knowing and informed waiver of his rights, or understand the consequences, and 4) to resist detectives' implied threats of the death penalty if he did not talk, and misstatements of how his attorney and the legal process would leave him in the position of "being triggerman, no

explanation." (1 CT 2A at 161).

The Superior Court's failure to hold a hearing under these circumstances was an abuse of discretion, *People v. Smithson* (2000) 79 Cal.App. 4th 480, 494; *Walczak*, 783 F.2d at 857, which violated Appellant's due process rights. *Jackson v. Denno* (1964) 378 U.S. 368; *Sims v. Georgia (1967)* 385 U.S. 538. In raising this claim, appellant recognizes that the unusual circumstances included both the defense failure to request an evidentiary hearing after being asked whether they wanted one, and the prosecution expert administering tests and reaching the uncontested conclusion that appellant was unusually vulnerable to authoritative tactics as employed by the interrogating officers. Due process requires that at a suppression hearing the appellant must have a fair opportunity to litigate the claim. (*See e.g., People v. Hansel* (1992) 1 Cal.4th 1211, 1219 and cases cited therein.) Given these extraordinary facts, the trial court on its own motion was obliged to hold a hearing in order to make a full and fair determination of voluntariness.

3. Standard of Review

No deference is due the Superior Court's off-the-cuff observations from the bench, which it rendered without benefit of a hearing. Absent a hearing below, Appellant is entitled to *de novo* review of all issues in regard to the Superior Court's ruling, and consideration of all relevant facts in the trial record. In particular, this Court should not apply a deferential "substantial evidence" test to the trial court's ruling, or limit its independent analysis of the detectives' comments on the death penalty. *Cf. People v. Holloway* (2004) 33 Cal.4th 96, 114-115 & 181 (applying deferential test where trial court made detailed findings of fact and credibility, after conducting an evidentiary hearing). Rather, this Court should apply an independent standard of review to the Superior Court's rulings admitting the confession "in light of *the record in its entirety, including all the surrounding circumstances of the accused and the details of the encounter.*" *People v. Neal* (2003) 31 Cal.4th 63, 80 (italics added).

Alternately, on appeal, the determination of a trial court as to the ultimate issue of the voluntariness of a confession is reviewed independently in light of the record in its entirety, including "all of the surrounding circumstances – both the characteristics of the accused and the details of the interrogation." (*People v. Benson* (1990) 52 Cal.3d 754, 779; *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 226.) The trial court's determinations concerning whether coercive police activity was present, whether certain conduct constituted a promise, and whether police conduct operated as an inducement, are also subject to independent review: the underlying questions are mixed and such questions are reviewed *de novo*. (*Benson*, *supra*, at p. 779.) The trial court's factual findings as to the circumstances surrounding the confession, including the characteristics of the accused and the details of the interrogation, are subject to review for substantial evidence: the underlying questions are factual and thus such questions are examined under the deferential substantial-evidence standard. *Benson*, *supra*; *People v. Louis* (1986) 42 Cal.3d 969, 984-987.)

4. General Principles of Judicial Determination Whether a Criminal Suspect Has Made a Knowing and Intelligent Waiver of *Miranda* Rights.

Before a court may introduce statements made by a suspect in custody and under interrogation, the government or state has the burden of proving that the appellant has knowingly, intelligently and voluntarily waived his *Miranda* rights.[117] In *Miranda v. Arizona* (1966) 384 U.S. 436, 444, the United States Supreme Court held that a suspect's waiver of the Fifth Amendment privilege against self-incrimination is valid only if "made voluntarily, knowingly and intelligently." There is a presumption against waiver and the prosecution bears a heavy burden of proving by a

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117/ Under *Miranda*, *supra*, prior to a custodial interrogation a criminal suspect must "be warned that he has a right make may be used to remain silent, that any statement he does as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." (*Id.*, at 444.)

preponderance of the evidence that a appellant knowing and intelligently waived his *Miranda* rights. (*Miranda v. Arizona, supra*, at 475; *North Carolina v. Butler* (1966) 441 U.S. 369, 373; *Colorado v. Connelly* (1986) 479 U.S. 157, 168.) The prosecution's burden "is great:" the "courts indulge every reasonable presumption against waiver of fundamental constitutional rights" and "do not presume acquiescence in the loss of fundamental rights." (*North Carolina v. Butler, supra*, at 373; *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) As stated in *Miranda*: "This Court has always set high standards of proof for waiver of constitutional rights, *Johnson v. Zerbst* (1938) 304 U.S. 458, and we reassert these standards as applied to in custody interrogation." (*Miranda, supra*, at 475.)

The State satisfies its burden only if it makes two prerequisite showings:

> First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.
>
> *(Moran v. Burbine* (1986) 475 U.S. 412, 421.)

The validity of a suspect's waiver of his *Miranda* rights is an issue distinct from the voluntariness of a confession. (*Miller v. Dugger* (11th Cir. 1988), 838 F.2d 1530, 1537-38, *cert. denied*, 108 S.Ct. 2832 (1988).) As explained by the Ninth Circuit in *Cox v. Del Papa* (9th Cir. 2008) 542 F.3d 669, 675:

> The distinction between a claim that a *Miranda* waiver was not voluntary, and a claim that such waiver was not knowing and intelligent, is important. "The voluntariness of a waiver ... has always depended on the absence of police overreaching." *Colorado v. Connelly* (1986) 479 U.S. 157, 170. In other words, the voluntariness component turns upon external factors, whereas the cognitive component depends upon mental capacity. Although courts often merge the

two-pronged analysis, the components should not be conflated.

On the other hand, the question whether a *Miranda* waiver was knowing and intelligently traditionally has embraced concerns apart from police activity, including whether the appellant was too mentally ill to understand the warnings. *United States v. Bradshaw* (D.C. Cir. 1991) 935 F.2d 295, 298. Indeed, as cogently described by the Supreme Court of Illinois, "[t]here remains a world of difference between voluntariness and intelligent knowledge." (*People v. Bernasco* (1990) 138 Ill.2d 349, 359.) "[A] mentally ill person may 'confess' at length quite without external compulsion but not intelligently and knowingly, while a perfectly rational person on the torture rack may confess intelligently and knowingly but without free will." (*Ibid.*)

"A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." (*Johnson v. Zerbst, supra,* 304 U.S. at 464.) Whether a waiver is knowing and intelligent is determined by the particular facts and circumstances of the case, "including the background, experience, and conduct of the accused." (*Ibid.*). A criminal suspect is not required to know and understand every possible consequence of a waiver for it to be knowingly and intelligently made. (*See Colorado v. Spring* (1987) 479 U.S. 564, 574 (suspect's awareness of all possible subjects of questioning prior to interrogation is not relevant to determining whether suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment *Miranda* warnings are intended to ensure "that a suspect knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time." *Miranda* waiver requires that the suspect "at all times knew he could stand mute and request a lawyer" and "was aware of the State's intention to use his statements to secure a conviction." (*Moran v. Burbine, supra*, 475 U.S. at 422-23.) The State must prove that under the totality of circumstances, appellant had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (*Id.*, at 421;

United States v. Crews (9th Cir. 2007) 502 F.3d 1130, 1140.)

Several factors to consider are (1) the Appellant's mental capacity; (2) the Appellant's age; (3) the Appellant's education; (4) the Appellant's previous experience with the criminal justice system; (5) the Appellant's physical condition; (6) whether the Appellant signed a written waiver; (7) whether the Appellant's rights were individually and repeatedly explained to her; and (8) whether the Appellant appeared to understand her rights. (*Ibid.; Fare v. Michael C.* (1979) 442 U.S. 707, 724-25; *Colorado v. Connelly, supra*, 479 U.S. 157; *United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 751-53; *Stawicki v. Israel* (7th Cir. 1985) 778 F.2d 380, 382-84, *cert. denied*, 479 U.S. 842 (1986) (appellant's education level is relevant to both voluntariness inquiry and knowing and intelligent waiver inquiry); *United States v. Hack* (10th Cir. 1986) 782 F.2d 862, 866, *cert denied*, 476 U.S. 1184.)

5. Invalid *Edwards* Waiver

In *Edwards v. Arizona* (1981) 451 U.S. 477, the Supreme Court held that if the suspect invokes the right to counsel, the officer may not resume questioning on another occasion until counsel is present, unless the suspect *voluntarily* initiates further contact.[118] As appellant asked for an attorney upon arrest, the *Edwards* rule applied and detectives could not interrogate appellant unless he voluntarily initiated contact, and made a knowing and voluntary waiver of his *Miranda* rights. The case meets none of those requirements.

118/ In *Maryland v. Shatzer* (2010) __ U.S. __, 130 S. Ct. 1213, __ L.Ed.2d __, the United States Supreme Court reaffirmed the *Edwards* rule, but held that it does not apply if a break in custody lasting 14 days has occurred. The Court found, in *Shatzer*, that the appellant's return to the general prison population, after he had invoked his right to the presence of counsel during custodial interrogation regarding allegations of criminal conduct separate from the conduct underlying the appellant's convictions, constituted a break in custody. That, of course, is not the situation here. There was no break in appellant's custodial status, nor was there any change in the circumstances of his custody, and thus the holding of *Maryland v. Shatzer* is inapplicable here.

a. Appellant's Phone Calls with Vicky Hoyt Rendered His Contact with Detectives Involuntary

Detectives monitored and surreptitiously recorded Appellant's phone calls with his mother Vicky Hoyt, in which she cajoled him in hysterical terms to talk to Detectives to gain his release and spare her having to spend money for his attorney. By facilitating Appellants' collect phone calls from Santa Barbara County Jail and seizing (and exploiting) their contents, detectives acted in concert with Vicky Hoyt for purposes of *Edwards* and *Miranda* analysis. State action in this context consisted of monitored phone calls and knowing exploitation of the Appellant's dependency relationship with his histrionic mother.

The Supreme Court's pre-*Miranda* jurisprudence recognized that police use of "false friends" could violate a appellant's due process rights. The record evidence in this case shows that detectives exploited Appellant's vulnerability, with awareness of his mother's effect, to lure him into renewed interaction, and to extract his confession. *See Spano v. New York* (1959) 360 U.S. 315, 320 (police used appellant's trusted friend to falsely arouse his sympathy).

b. Appellant Did Not Make a Knowing and Informed Waiver

The state bore the burden of proving Appellant's *informed Edwards* and *Miranda* waiver by a preponderance of evidence. *Connelly*, 107 S. Ct. at 522. Appellant's *Edwards* and *Miranda* waivers were neither knowing and intelligent, nor (as discussed next) voluntary. *Moran v. Burbine* (1986) 475 U.S. 412. Waiver requires a knowing and intelligent relinquishment of a known right or privilege. *Edwards*, 451 U.S. at 484.

Appellant had "substantial deficits" in memory, and what he could encode was "exceptionally limited". He was more likely than 95 to 98% of the adult population to lose his train of thought (3 CT A 702-704). Under stress, he would be even more *impaired in his ability to attend meaningfully and productively to his surroundings."* (*Id.* at 705). Appellant was just 21

years old, had a 79-IQ, and minimal education. This was his first arrest, and followed a cocaine and alcohol binge over two nights without sleep. His mother's histrionic tirade that he must talk and get himself out of jail was literally ringing in his ears, when detectives brought him into the interrogation room. Appellant's condition, including pressure exerted by his mother, could only have increased "feelings of helplessness". "Bewilderment [is] an unpromising frame of mind for knowledgeable decision". *Missouri v. Seibert* (2004) 542 U.S. 600, 613.

In *People v. Neal* (2003) 31 Cal.4th 63, 88, Justices Kennard and Baxter concurred in the reversal of appellant's second degree murder conviction, but expressed as a separate ground, the lack of a knowing and intelligent waiver of the right to counsel. So, too, in this case. *Miranda* warnings were inadequate when given to this appellant, in his compromised, confused and upset state, of the knowledge essential to *his* ability to understand his rights and the consequences of abandoning them. *Missouri v. Seibert* (2004) 542 U.S. 600.

At the outset, Detective West trivialized *the Miranda* advisement by dead-panning to appellant "we need to get a little understanding out of the way" (1 CT 2A 153). *"Playing down" Miranda* warnings weighs against a finding that Appellant's waiver was knowing, informed, and intelligent. *Musselwhite*, 17 Cal. 4th at 1237-1238 (police statement was accurate and did not use the term "technicality" in regard to *Miranda*); *Butts* (denigrating attorney and implying situation would be worse if he spoke with one, are presumptively coercive tactics).

Appellant's bewilderment about the consequences of waiver is evident in the questions he asked of detectives throughout the interrogation, and their deceptive replies, and outright lies, only confounded his confusion. Several times, appellant stated his wish to "think about it tonight and talk tomorrow." At first, this was expressed in terms of whether "you guys mind" or "there's no way I can talk to you tomorrow?" and "well, I'm talking now between now and tomorrow." The correct answer under *Miranda* was "you have the right to remain silent." Instead, Reinstadler

said "no", "once arraigned, we can't talk to you," and "too late." Reinstalder also said "once the lawyer contacts you, we are precluded from speaking with you anymore period." Most significantly, Reinstadler strongly suggested several times that this was Appellant's *only* chance to explain to the judge and jury.

Appellant asked Reinstadler "if I talk, does my name, do I, does it get said in court that I said it?" The correct answer under *Miranda* was "anything you say can and will be used against you in a court of law." Instead, Reinstadler said, "it depends on what it is and the situation."

Later, Appellant asked Reinstadler whether his lawyer would get to look at all the paperwork, and lastly, "do I call an attorney or do they come to me?" The correct answer under *Miranda* was "You have the right to talk to a lawyer and have him present before and during questioning." Instead, Reinstadler said, "well you can call one. Or you can wait for your arraignment, and one will be appointed." Reinstadler's answer was incomplete and misleading in that *Miranda* and the question of attorney access at the time of questioning require informing a suspect that he has the right to talk to a lawyer and have him present *before and during* questioning, not at some future indefinite proceeding.

Here, as in *Neal*, Appellant's continuing questions and detectives' false answers demonstrate that Appellant never understood the rights to silence or to the presence of counsel during questioning which he was purported to have waived at the outset of the interrogation.

c. Appellant Did Not Make a Voluntary Waiver.

To assess voluntariness requires an evaluation of Appellant's intelligence, experience, education, background, and age. *Fare v. Michael C.* (1979) 442 U.S. 707, 725. All five factors weigh decisively against voluntariness under these circumstances. Appellant's mother literally compelled him to "spill his fucking guts" to detectives by her hysterical tirade, of which detectives were aware ("I called my Mom [] and I'm getting floods of information like I dug the grave [] and I don't know what

to think. I'm in my cell throwing up." (1 CT 2A 158-159). The detectives used both trickery and threat. They told Appellant falsely they knew he was guilty of murder from dozens of witnesses, an independent observer at the hotel. They added that Pressley and Rugge had identified Appellant as the actual killer, and the duct-taper and grave-digger, who bragged about the crime. Hence, the evidence showed him to be a "stone-cold killer" who absent any explanation, would get the death penalty. In assessing this exaggerated account of the evidence, the Superior Court erred by viewing the detectives as limiting their explanation to what *they* would present in court. But, in actuality, they crossed the line to what Appellant would *not* be able to explain, *if* he held his tongue with them: you "need" to tell us; it "has to come out of your mouth"; "this is your opportunity to tell us"; and "you're looking at being triggerman, without any explanation to a judge and jury." This was trickery which suggested Appellant would have no other chance to tell his story, or that detectives would comment on his silence, both of which were impermissible.

Detectives also disparaged attorneys in terms of the "games people play", and a made-up "gag" rule preventing any further contact with police after an attorney got involved. They misstated the law that duress was the only defense to murder; that there are degrees of premeditated murder, with different sentences depending on motive, and Appellant would get the death penalty if he refused to talk with them. Although case law does not flatly prohibit lies by arresting officers, these remarks exceeded the bounds of prohibited forms of trickery, and constitute a significant factor which weighs against a finding of voluntariness. *See e.g., People v. Hogan* (1982) 31 Cal.3d 815, 840-841 ("While the use of deception or communication of false information to a suspect does not alone render a resulting statement involuntary [citation], such deception is a factor which weighs against a finding of voluntariness [citations.])".

Appellant had an IQ of 79, and his ability to understand and function meaningfully within the situation was highly-limited. He was coming off a cocaine and alcohol binge, and two nights without sleep. After his first

night *ever* in jail, just 21-years old, he called his mother and was told to "spill his fucking guts." The prosecution's own expert assessed Appellant as highly dependent and easily flummoxed; he would certainly have needed "repeated concrete instructions to understand and intelligently waive his *Miranda* rights". *See e.g.*, *Garibay*, 143 F.3d at 538 & n.7 (same). All of these circumstances outweigh Appellant's bare assent to waiver as a basis for finding voluntariness.[119]

6. Appellant Invoked His Right to Cut Off Questioning

In *Miranda v. Arizona* (1966) 384 U.S. 436, 473-474, the Supreme Court emphasized that once an individual has indicated *in any manner* that he does not wish to speak to the officers, *all questioning must cease*. Mindful of the temptation to give the prescribed warnings with one breath and then, with the next, undercut them with coercive tactics and improper inducements, the Court announced that "any evidence that the accused was threatened, tricked or cajoled into a waiver will, of course, show that the appellant did not voluntarily waive his privilege." *Id.* at 476. *Miranda* warnings require that a suspect "knows that he may choose not to talk to law enforcement officers, to talk only with counsel present, *or to discontinue talking at any time.*" *Colorado v. Spring* (1987) 479 U.S. 564 (emphasis added).

The Superior Court erred in finding that Appellant did not indicate with sufficient clarity that he wished to end the interview. *See* 4 RT 726 (faulting appellant for not saying he "really" wanted to end interview, "temporizing" and "merely postponing the inevitable"). The trial court

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119/ The record contains no evidence that Appellant signed a written waiver, despite Reinstadler's request, nor were Appellant's rights correctly explained later when he asked about his right to think about it overnight, and whether he needed to call an attorney. *See Spring*, 107 S. Ct. at 857 (giving weight to appellant's written waiver); *Moran*, 106 S. Ct. at 1139 (same); *United States v. Garibay* (9th Cir. 1998) 143 F.3d 534, 538(same); *United States v. Bernard S.* (9th Cir. 1986) 795 F.2d 749, 753 n.4 (same).

applied an incorrect standard to appellant under the case-law.

At 1 CT 2A 161, West asked Appellant to "tell us who you are. Tell us how this went down." Appellant responded, "I can't do that. Do you mind if I go back to my cell and think about tonight and talk to you guys tomorrow because I know my arraignment is Monday."

Reinstadler responded "once you're arraigned, we can't talk to you. That's the bottom line." Appellant asked "there's no way I can talk to you tomorrow?" Reinstadler said "No. I know why." Appellant's statement "I can't do that" was a proper invocation of his right to cut off questioning. By reading Appellant's next sentence "do you mind if I go back to my cell and think about overnight" as temporizing and postponing the inevitable, the Superior Court ignored Dr. Chidekel's findings in regard to Appellant's dependent personality disorder, and need to placate figures of authority. Under law, Appellant's exercise of the right ("I can't do that") was independent of whether detectives "minded" or not.

In *Alvarez v. Gomez* (9th Cir. 1999) 185 F.3d 995, the Ninth Circuit reversed a appellant's murder conviction on the grounds that he had invoked his right to counsel and subsequent purported waivers were ineffective. After being advised of *Miranda*, petitioner asked the police "can I get an attorney right now, man!" and "well, like right now you got one?" When the police responded that they didn't have one there but one would be appointed at the arraignment, petitioner said "I'll talk to you guys." *Id.* at 997. The Ninth Circuit held that appellant's "thrice-repeated questions, when considered together, constituted an unequivocal request for an attorney." *Id.* at 998. Appellant's statement "I can't do that. You mind if I go back to my cell and think about tonight" was more unequivocal than the requests in the form of questions upheld in *Alvarez*.

In any event, Reinstadler's response was an incorrect statement of law - "once you're arraigned, we can't talk to you" - and an implied threat that if Appellant did not talk, he could not offer an explanation at trial. This was improper, *see e.g.*, *Davis v. United States* (1994) 512 U.S. 452 (Souter, J., concurring) (interrogator's questions after a suspect makes an ambiguous

statement "should be confined to verifying whether the individual meant to ask for a lawyer"), and coercive under governing law.

Miranda held that "once warnings have been given ... 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." 384 U.S. at 473-74; *see also Michigan v. Mosley* (1975) 423 U.S. 96, 103 (*Miranda* requires "scrupulously honoring" the suspect's right to cut-off questioning, and does not permit continuation after a momentary cessation). Hence, "waiver cannot be found from a suspect's continued response to questions, even if he is again advised of his rights." *Alvarez*, 185 F.3d at 997 (*citing Edwards*, 451 U.S. at 484-85). Reinstadler and West did not re-advise Appellant of his rights. "When a suspect understands his (expressed) wishes to have been ignored . . . he may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis, supra,* 512 U.S. 452, 114 S. Ct. at 2362 (Souter, J. concurring).

At 1 CT 2A 177, Reinstadler asked, "We've got to hear it from you, man. Who was there when you got there [Lemon Tree Hotel]?" Appellant responded, "You guys know what happened. I think I'm going to stop there for now. Can I get some more water, please?"

Reinstadler deftly continued the interrogation, though Appellant had the right to stop talking, "I sense that you want to tell us something that may be different than what we do know. And, I guess that ain't going to happen." West added, "from what I heard you say it sounded to me like you kind of wanted to take a break. . . . [i]f you want to talk to us, and you just want to take a break, it's different than if you're telling you don't want to talk any more, period." Appellant replied, "Well, I'm talking now between now and tomorrow." Reinstadler responded, "Too late." (1 CT 2A at 178-179.)

In response to West's suggestion that Appellant might want just a short "break", Appellant reiterated he meant stopping for the night to think it over. The detectives ignored the request in clear violation of *Miranda.* Compounding the pressure, Reinstadler repeated his earlier lie that "once

the lawyer contacts you, we are precluded from speaking with you anymore period." Appellant asked, "A lawyer is going to contact me tomorrow?" Reinstadler replied, "Oh, I'm sure. It's normal. It's their job." This response obfuscated Appellant's right to be informed that he could have an attorney present *during* questioning.

At 1 CT 2A 189, Appellant said, "All right. You guys I think I want to stop there. I think you guys got a pretty good picture." Although the detectives ignored this request like Appellant's previous two, the prosecution conceded it was effective. However, there is no constitutional dividing-line between "I think I'm going to stop there for now," (1 CT 2A 177) and "I think I want to stop there." In fact, Appellant reiterated three times "I can't do that", and the last time was no more or less emphatic than the first two. Under this Court's independent review, appellant's statement after 1 CT 2A 161, or 1 CT 2A 177, should have been suppressed. Alternately, even if a more deferential standard applies, the Superior Court committed clear error by finding these two requests to be merely temporizing and postponing the inevitable, rather than emphatic invocations of right. The Superior Court employed a mistaken tautology that Appellant did not "really" want to stop talking because he never really stopped talking. The focus on what Appellant said next in response to police questioning after invocation misses the point. *Miranda* requires clarity, but it does not require surplusage - "really," "pretty please" or "sugar on top."

The detectives' fallacious responses, when appellant's assertion of rights required *scrupulous honesty*, is a separate ground for suppression. The Superior Court's view that detectives said "nothing misleading" was clearly erroneous. As discussed *infra*, the Court ignored explicitly false statements about homicide law (duress is a defense; there are degrees of premeditated murder), the role of attorneys (once appointed, Appellant cannot speak to police), whether Appellant's statements could be used in court without attribution, and (most importantly) whether appellant would have any other opportunity to tell his story to the Judge or jury, if he didn't divulge it at that moment to the detectives.

7. Appellant's Confession Was Coerced

Voluntariness is a term of art and multi-faceted, encompassing characteristics of the accused and details of the interrogation. In a sense, the Superior Court in this case got it, but only half-right: it is true that police overreaching or coercive conduct must be "causally related to the confession" to make out a due process voluntariness claim. *Colorado v. Connelly* (1986) 479 U.S. 157, 164. But, the Superior Court missed that other half of *Connelly:* "[M]ental condition is surely relevant to an individual's susceptibility to police coercion." *Id.* at 165 (*citing Blackburn v. Alabama* (1960) 361 U.S. 199 (police exploited appellant's history of mental problems); *Bram v. United States* (1897) 168 U.S. 532, 542-43 (confession "must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence").

The Supreme Court has recognized "there is torture of mind as well as body," *Culombe v. Connecticut* (1961) 367 U.S. 568, 605, "that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition." *Cooper v. Dupnik* (9th Cir. 1992) 963 F.2d 1220, 1241-42 (en banc) (citations and quotations omitted); *Malloy v. Hogan* (1964) 378 U.S. 1, 7.

This Court must consider whether, under the totality of the circumstances, detectives "obtained the statement by [] psychological coercion so that the suspect's will was overborne." *Harrison*, 34 F.3d at 890 (*quoting United States v. Guerrero* (9th Cir. 1988) 847 F.3d 1363, 1366. Resolution of the claim requires an evaluation of "certain interrogation techniques ... as applied to the unique characteristics of a particular suspect." *Miller v. Fenton* (1985) 474 U.S. 104, 116; *United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 891. Under *Fare v. Michael C.* (1979) 442 U.S. 707, the "totality of circumstances" under consideration extend beyond the four-corners of the confession transcript.

The Superior Court in this case failed to consider evidence (much of it from Dr. Chidekel, the prosecution's expert) on Appellant's mental

impairment, dependency, and vulnerability to police manipulation. In light of these facts, the state did not and could not meet its burden of proving voluntariness of Appellant's statements by a preponderance of the evidence. *Lego v. Twomey* (1972) 404 U.S. 477, 488-89; *United States v. Harrison* (9th Cir. 1994) 34 F.3d 886, 890.

The Superior Court overlooked multiple passages in the interrogation in which detectives misled Appellant about his rights, the law of premeditated murder, and how the legal process would work in his case. Most significantly, detectives suggested that Appellant's sentence would be adversely affected if he failed to give *them* (as opposed to the judge and jury at trial) an immediate explanation of his conduct. See *Harrison*, 34 F.3d at 891 (improper police conduct was the suggestion they could inform the court that appellant had not cooperated); *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1335 (recognizing that "subtle" psychological coercion can effectively overbear a suspect's free will).

a. Detectives' Implied Threats and Outright Deceptions Undermined Appellant's Free Will

In the context of custodial interrogation, law enforcement threats and promises are deeply corrosive of voluntariness. The police must avoid either implied threat of punishment for failure to confess or false promise of leniency as reward for confession. Implied threats are a form of undue pressure that amounts to coercion, and false promises of leniency are a form of dishonesty and trickery. *People v. Holloway* (2003) 33 Cal. 4th 115.

On appeal, this Court conducts an independent review to determine whether detectives' references to the death penalty and potential benefits of confession were "sufficient to render the subsequent admissions involuntary." *Id.* The test is whether "appellant is given to understand 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." *Id.* (citations omitted).

In the *Holloway* case, the detective did not cross the "fine line" between stating a truthful, even obvious fact (*i.e.*, that the death penalty was a potential outcome for a sexual assault double-murder) and making an implied false promise. *See also People v. Ray* (1996) 13 Cal. 4th 313, 340 (analyzing whether confession was a direct result of threat of death penalty if suspect were uncooperative).

Detectives Reinstadler and West repeatedly crossed that fine-line in their dealings with Appellant. At a minimum, they knew he was highly-distraught from his mother's phone calls, and that he was a 21-year old with no prior arrests. Perhaps a suspect of normal intellect, mature age, or prior experience with the law, would have known that a single homicide could be capital by operation of the felony-murder special circumstance. Not so this Appellant, with his 79-IQ and grade-school sophistication.

Detectives repeatedly misled a young, inexperienced and highly concrete Appellant about the law of homicide (duress is a defense to special circumstance murder[120]; there are degrees of premeditated murder,[121] their own authority to keep his name out of court and influence sentence based on what motive he gave for the crime, and most significantly that appellant would have no other opportunity to explain himself, if he did not do so with them. These material deceptions were causally related to Appellant's confession. *See e.g.*, *People v. Cahill* (1994) 22 Cal.App.4th 296, 315 (police gave materially deceptive account of homicide law which led appellant to believe he could avoid first-degree murder charge, in a burglary-murder case, by admitting to an unpremeditated killing). The

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120/ Although it was clear that duress was not a defense to special circumstance murder in August of 2000, the law was inconclusive whether duress was a defense to murder. In 2002, this Court resolved that issue in *People v. Anderson*, 28 Cal.4th 767, 770, holding that duress is not a defense to any form of murder.

121/ Far from understanding this concept of law, appellant concerned himself with whether he would wear his orange jumpsuit to court since he had loaned his best clothes to his brother, and whether his attorney would get to see the police "paperwork."

Detectives' remarks crossed the line from exhortation to trickery and coercion. *See e.g., California Attys. for Criminal Justice v. Butts* (9th Cir. 1999) 195 F. 3d 1039, 1047 (affirming denial of summary judgment to officers on §1983 claim arising from *Miranda* violations where, *inter alia*, police implied suspect's situation would become much worse if he spoke with an attorney).

Detectives' explanation of the Fifth Amendment was particularly egregious. Appellant's concern that his name not come out in court betrayed his total ignorance of how the privilege worked. Reinstadler took advantage by suggesting it depended on whether detectives believed what he said was the truth (1 CT 2A at 162).

In this case, it was detectives, not Appellant, who at two critical junctures (each time appellant sought an overnight break) brought up the subject of the death penalty, suggesting there were different degrees of premeditated murder, and that the sentence depended on motive, if for example appellant operated under duress (1 CT 2A at 163, 180). Misleading suspects about the operation of law is an impermissible form of subterfuge. In both instances, the detectives made it clear that, as the actual killer (variously described as "triggerman" and "stone cold"), appellant faced the death penalty *if he did not explain how it "went down" then and there, and no other opportunity to tell Judge or jury would be forthcoming.* It is clearly established that a detective cannot threaten a suspect with harsher treatment as a result of that suspect's decision to remain silent and not cooperate. *See United States v. Guerrero* (9 th Cir. 1988) 847 F.2d 1363, 1366 & n.2 ("threatening to inform the prosecutor of a suspect's refusal to cooperate violates her Fifth Amendment right to remain silent"); *United States v. Tingle* (9th Cir. 1981) 658 F.2d 1332, 1336 n.5 ("Refusal to cooperate is every appellant's right under the Fifth Amendment"). Perhaps another appellant, older or wiser to the ways of the world, would have called detectives' bluff. Not so, this Appellant, with his 79-IQ, his dependent personality, and his questions about whether his attorney would even get to see the paperwork. One passage in particular bears close

examination:

> HOYT: If it's death -
>
> REINSTADLER: It could be life. There's all different degrees depending on what the district attorney feels was the motivation for this killing.
>
> (1 CT 2A at 181.)

Reinstadler misled Appellant with a false promise that the prosecution would exercise leniency if Appellant committed the murder on Hollywood's order, and if he felt contrite; and to both Appellant readily confessed.[122] Of course, in truth, there are no "degrees" of premeditated murder, and the district attorney did not exercise leniency based on motive. Detectives' implied threat of the death penalty if an impaired and overmatched Appellant exercised his right to silence and their false promise of leniency if he confessed, constituted impermissible forms of subterfuge. Certainly, these elements of police compulsion "helped to propel" the confession under *Henry. Cf. People v. Musselwhite* (1998) 17 Cal. 4th 1216, 1236-1237 (finding detective's isolated comment "I just want to show your degree of cooperation" far too brief and insubstantial to qualify as an inducement, particularly as it conveyed no hint of benefit in exchange). In this case, the detectives' leitmotif was that Appellant had only this one opportunity to "help himself out" by talking and he needed to do it before his attorney got involved, otherwise he was looking at "being triggerman, no explanation." (1 CT 2A at 161, 180.) This form of overreaching rendered appellant's statements involuntary.

b. Detectives' Exaggeration of the Evidence Exceeded Legal Bounds

To compound the pressure on appellant, detectives told him that Rugge and Pressley had given mutually-consistent (hence credible) stories,

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122/ Detectives' assurances led Appellant directly to confide he "felt sorry for the kid that I buried," and shortly later, "the only thing I did was kill him." (1 CT 2A at 182-183.)

corroborated by dozens of others, including independent observers at the Lemon Tree Hotel, that appellant gagged and shot the victim and dug the grave, all of which they knew as "fact." This deception was the direct cause of Appellant's response "the only thing I did was kill him". While the police may deceive a suspect about the strength of evidence against him, *see e.g.*, *Frazier v. Cupp* (1969) 394 U.S. 731 (false co-conspirator statement); *United States v. Orso* (9th Cir. 2001) 266 F.3d 1030, 1139 (false witness statement), this degree of exaggeration exceeded legal limits.

8. Questioning "Outside *Miranda*"

When Apellant said "Yeah, I think I want to stop there" (having earlier said, "I think I'm going to stop there for now" but been ignored), *Miranda* dictated that questioning cease. *Miranda*, 384 U.S. at 444-445. Instead, detectives continued to question Appellant about Hollywood's whereabouts, whether Jack Hollywood ordered the killing, and finally, whether Appellant contemplated the wrongfulness of his conduct before pulling the trigger. In the end, Appellant asked "Um, do I call an attorney, or do they come to me?" conveying that he never understood the advisement of rights in the first place.

Deliberate violations of *Miranda* are presumptively coercive. *Seibert, supra; Neal, supra; Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1029 (*Harris* rule does not apply to deliberate *Miranda* violations); *Cooper v. Dupnik* (9th Cir. 1992)(*en banc*) 963 F.2d 1220, 1240-41 (same). Deliberate failure to comply with *Miranda* aggravates other coercive tactics, because it implies that the answers cannot be used to Appellant's legal detriment, which is *not* a permissible subterfuge. *Butts, supra.*

Both the United States Supreme Court and this Court have recently found instances of deliberate questioning outside *Miranda* to render statements inadmissible. In *Missouri v. Seibert* (2004) 542 U.S. 600, a police officer obtained a confession during questioning of the accused, then administered *Miranda* warnings and obtained a waiver, and a second post-warning confession. The Supreme Court held that both the accused's pre- and post-warning statements were inadmissible at her murder trial, where

the police conducted a deliberate two-step strategy. The Supreme Court condemned the practice of question-first which "render *Miranda* warnings ineffective by waiting for a particularly opportune time to give them, after the suspect has already confessed." *Id.* at 622. The second statement was inadmissible for want of adequate *Miranda* warnings because both statements were realistically viewed as parts of a single, un-warned sequence of questioning. *Id.* at 612 n.4.[123] Among the factors were the overlapping content of the two statements, continuity of police personnel and degree to which the interrogator's questions treated the second round as continuous with the first (a pause of only 15-to-20 minutes). *Id.* at 615-616. Significantly, the officer said nothing to counter the probable mis-impression that the advice that anything the accused said could be used against her also applied to the details of the inculpatory statement previously elicited. Hence, in *Seibert*, *Miranda* warning inserted in the midst of questioning without expressly excepting the statement just given, could lead appellant to the reasonable inference that what he had just said would be used, with subsequent silence being of no avail. *Id.*

In *People v. Neal* (2003) 31 Cal. 4th 63, appellant was charged with the murder of an older man who had taken him in after befriending him as a child-care worker at a group home for boys. Appellant was 18-years old, inexperienced, had minimal education, and was of low intelligence. After custodial questioning by Detective Mario Martin in which appellant gave false exculpatory statements, appellant invoked his rights to counsel and silence. Detective Martin conceded he continued to interrogate the appellant anyway in order to obtain a statement the prosecution might use for possible further impeachment if appellant testified at trial. *Id.* at 74.[124]

123/ The accused's statement was inadmissible as "midstream" *Miranda* warnings were unlikely to be effective, and no inquiry into actual voluntariness was necessary in such case. *Id.* at 617.

124/ In terms that echo what Reinstadler and West told Appellant, Detective Martin threatened that the system would "stick it to you as hard as they can" if appellant in Neal did not cooperate. *Id.* at 73. In contrast to this

Under these circumstances, this Court (George, C.J.) held that the appellant's initiation of further contact with Detective Martin was involuntary, and his two subsequent confessions (which came after appellant initiated a second interview with Detective Martin the next day and explicitly waived new *Miranda* warnings) were involuntary as well.

This Court's condemnation of Detective Martin's "question anyway" strategy (deliberately continuing the interrogation after appellant Neal invoked his rights to silence and to counsel) reverberates with the misconduct of Detectives Reinstadler and West in this case.

By his confession, the appellant in *Neal* said he was "thinking about what he was doing [during the killing] and decided to follow through in order to avoid going to prison." *Neal*, 31 Cal. 4th at 75. Here, Appellant said "the only thing I did was kill him" and on Side "B", right before he pulled the trigger, he thought what he was doing was wrong. As in *Neal*, this Court should not give in to the prosecution bromide that the content of a confession, irregardless of its circumstances, if "trustworthy" (*i.e.*, against penal interest), justifies its admission. When involuntary, it is impossible to assess the trustworthiness of a suspect's stated reflection upon his innermost thoughts.

Neal said he confessed because of feelings of guilt and the desire to see his mom and brother again one of these days. *Id.* at 76. Here, Appellant said he had an eight year old brother whom he loved dearly, and a mother who depended on him (1 CT 2A at 178). Like *Neal*, Appellant's comments and questions conveyed his befuddlement at trial process, and more pointedly, what was at stake in the questioning.

Neal was 18-years old, inexperienced, with minimal education and low intelligence. *Id.* at 78. Here, Appellant was 21-years old,

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case, Detective Martin did give appellant the night to think about it, as he requested, though he was held incommunicado. Reinstadler and West did not give Appellant even that much, but persisted in questioning him "anyway" in pursuit of a further statement that could be used as impeachment.

inexperienced, with minimal education and low intelligence. Detective Martin told Neal, "if you don't try and cooperate, the system is going to going to stick it to you as hard as they can." *Id.* at 73. Here, Detectives West and Reinstadler told Appellant, "If you want to sit here and tell us why and give us a reason, maybe it will help you out. Maybe it will paint a picture of you as somebody other than what we have now, which is that you're a stone-cold killer. . . . You're going to have to tell us. It's going to have to come out of your mouth. Otherwise we take all these stacks of paper down to the judge and present what we have right now, which paints a pretty bad picture of you . . . there's a difference between life and death and everything else in between . . . the question you should be asking is what can you say that would be able to help you out . . . pre-meditated murder means different things in the law." (1 CT 2A at 159, 180.) In light of these three factors - appellant Neal's vulnerability, detective Martin's threats of adverse consequence in court if he stood mute, and Martin's intentional questioning "anyway" when questioning should have ceased under *Miranda*, the Court held that appellant's initiation of further contact with Martin and two subsequent confessions were involuntary. *Id.* at 78. All three factors operated in this case to effectuate Appellant's confession, and render it involuntary under *Siebert* and *Neal*.

Detective Martin questioned appellant Neal "outside *Miranda*" in order to obtain impeachment evidence, misconduct which this Court strongly disapproved as "unethical." *Neal*, 31 Cal. 4th at 81. Martin told appellant Neal "this was his one chance," and used "deception" in implying he possessed more incriminating evidence than he actually did. *Id.* at 81-82. Reinstadler and West engaged in the same deliberate misconduct here.[125] He told Appellant multiple times this was his only chance. He said

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125/ The prosecution belatedly disclosed the existence of Side "B" at a pretrial conference, and short-circuited any factual development of Detective Reinstadler and West's intent by conceding it would not use Side "B" on direct. Nonetheless, the Court should infer what the record makes unmistakably clear: the tactic was deliberate, to "exploit perceived legal loopholes." *Neal*, 31 Cal. 4th at 92 (Baxter, J., concurring).

Appellant had been identified as the killer in dozens of interviews, and bragged about it, identified at the hotel by people not associated with the crime - all of which was untrue.

Detective Reinstadler and West's promises and threats regarding the penalty consequences of Appellant's silence were further corrosive of voluntariness. *Neal*, 31 Cal. 4th at 83. Both had their intended effect. Appellant asked the police, "I didn't help myself at all tonight, did I?" - suggesting he still believed the police would help him if they liked his answers. *See also Henry v. Kernan* (9th Cir. 1999) 197 F.3d 1021, 1026-1027 (reversing murder conviction where detectives' questioning was psychologically coercive, disregarded *Miranda* invocations, and undermined suspect's free will. The Ninth Circuit recognized that police failure to "scrupulously honor [appellant's] right to cut off questioning" elicited statements that were involuntary in that they were "neither rational nor the product of an essentially free and unconstrained choice." *Id.* at 1028. The same is true in this case.

9. "Impeachment" as Misnomer

The prosecution used Appellant's Side "B" second confession to buttress its proof of an element of the crime *and* as penalty aggravation, far outstripping any mere impeachment use. The Superior Court's limiting instruction was not limiting at all. No instruction was given at the time Side "B" was played to the jury, or to clarify the proper use to which Appellant's answers on this could be put, or to limit the prosecution's extensive closing argument on Side "B". This was reversible error. *See Henry*, 197 F.3d at 1029 (impeachment is a misnomer where post-*Miranda* statements are used to establish an element of the crime).

10. No Effective Limiting Instruction was Given

In *Henry*, 197 F.3d at 1029, the Ninth Circuit observed that in California out of court statements admitted for impeachment are also admitted for the truth of the matters asserted therein, *i.e.*, also admitted for substantive purposes. *See* Cal. Evid. Code §§1220, 1235. Thus, in California generally and in this case specifically, out-of-court statements

admitted for impeachment were, in fact, admitted for the purpose of proving Appellant's guilt. No limiting instruction was given in this case that Appellant's post-*Miranda* statements could be used *only* to assess his credibility, but not to establish the truth of the matters asserted therein, *i.e.*, that Appellant considered the wrongfulness of his action but went ahead nonetheless to pull the trigger and murder the victim. *Id.* In fact, the primary evidence which established this element of guilt and factor in aggravation was Appellant's post-*Miranda* statements.

11. A Deterrence Rationale Warrants Exclusion of Side "B"

This Court left the question unresolved in *People v. Peevy* (1998) 17 Cal.4th 1184, 1208, whether deliberate violation of *Miranda* warrants deviation from the *Harris* rule for deterrence purposes, and the exclusion of evidence so obtained for impeachment purposes. This Court excluded the evidence at issue on voluntariness grounds in Neal, and so did not reach the issue left open in *Peevy*. *See Neal*, 31 Cal. 4th at 90-92 (Baxter, J., concurring) ("nothing in *Peevy* was meant to condone deliberately improper interrogation tactics").

Justice Baxter's concurrence in *Neal* frames the issue in this case: though there are few less pleasant judicial duties than reversing a conviction because of police misconduct in obtaining important evidence, the deterrence rationale justifies reversal and a bright line rule of exclusion where well-trained[126] detectives "exploit perceived legal loopholes." *Id.* at 92. The case for deterrence here is played up by the fact that it concerns the prevention of a Fifth Amendment violation. Exclusion of statements taken in deliberate interrogation outside *Miranda* adds considerable appreciable deterrence. As the interrogation transcript makes clear, the "possibility" of such questioning outside *Miranda* is hardly speculative. Exclusion of appellant's Side "B" confession would help ensure future compliance by

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126/ Lead Detective William West had 19-years' experience as a sheriff, and eight-years as detective with the major crimes unit (7 RT 1481 (trial testimony); 3 CT 766 (grand jury)).

California police officers with criminal suspects' clear and unambiguous requests to cut-off questioning or consult with counsel. If *Miranda* means what it says, this Court should clarify that deliberately questioning a suspect outside *Miranda* in pursuit of impeachment evidence has no legitimate place in law enforcement's armamentarium. The anti-badgering rationale of *Neal* warrants exclusion under the circumstances of this case.

12. Inaccurate Transcripts

The prosecution presented the transcript to the jury that is contained at 10 CT A 2735-2759. *See* 1 CT 2A 98 (January 5, 2010 Order re settled statements and exhibit transcripts). After the Superior Court ruled that by testifying appellant had "opened the door" to impeachment with the remainder of Side "A" and Side "B", the jury was presented with the prosecution transcript contained at 10 CT A 2761-2764, 2766-2771.

The prosecution's transcripts used at trial contain several material inaccuracies. First, at 10 CT A 2742, the following exchange:

> REINSTADLER: There's a difference between life and the death penalty and everything else in between. All we want is the truth.
>
> HOYT: I had nothing to do with the kidnapping. (whispering) Then why am I charged with it?
>
> REINSTADLER: You need to tell us your story.

In actuality, the exchange was:

> REINSTADLER: There's a difference between life and the death penalty and everything else in between. All we want is the truth.
>
> HOYT: I had nothing to do with the kidnapping.
>
> REINSTADLER: We know that. *[This is a whisper.]*
>
> HOYT: Then why am I charged with it?
>
> (10 CT A 2742.)

The prosecution transcript kept the jury from learning that Detective Reinstadler told Hoyt they *knew* for a fact he had nothing to do with *the* kidnapping, major concessions that Hoyt was not involved in the initial

abduction, and that there was only one taking.

Second, the following exchange at 10 CT A 2750:

WEST: Who else was with you?

HOYT: Just me.

WEST: You met someone there?

HOYT: Nick.

In actuality, the exchange should have read:

WEST: You met someone there?

HOYT: Yeah.

(1 CT 2A at 176.)

The prosecution transcript misled the jury that Appellant conceded he met the victim (whom he identified by name) at the Lemon Tree Hotel, when this simply wasn't what he said.

In addition to the substantive legal errors cited *supra*, these defects in the transcript used at trial deprived Appellant of due process. *Cf. United States v. Gee* (9th Cir. 1983) 695 F.2d 1165, 1168 (denying due process claim where transcript was "entirely accurate" and irrelevant and prejudicial portions were redacted from both tape and transcript). The state's presentation of false and prejudicial material through its transcripts violated Appellant's due process rights. *See e.g.*, *Mincey*, 98 S. Ct. at 2418 (expressing concern that "accuracy of the [detective's] report [of a purported *Miranda* waiver] was uncertain"); *Chessman v. Teets* (1957) 354 U.S. 156 (holding that prosecutor's *ex parte* settlement of trial record in capital case violated appellant's due process rights). In this case, the two material inaccuracies in the prosecution transcripts used at trial served to bolster the state's case against Appellant. This was error.

13. Harmless Error

The Superior Court's erroneous denial of Appellant's motions is subject to harmless error analysis under the reasonable doubt standard of

Chapman v. California (1967) 386 U.S. 18; *Arizona v. Fulminante* (1991) 499 U.S. 279, 310. Under the *Chapman* standard, Respondent bears the burden to prove beyond a reasonable doubt that the error did not contribute to the verdict, *i.e.*, that it was unimportant in relation to everything else the jury considered on the issue in question. *Yates v. Evatt* (1991) 500 U.S. 391, 403.

For all the reasons stated at the outset, this evidence was crucial to guilt and penalty. In this case the Superior Court called the Side "B" second confession "frosting on the cake", yet the prosecution emphasized *this precise evidence* as Appellant's *only* admission he pulled the trigger and as unique proof of the wantonness of his conduct, which showed the moral gravity of crime.

The admission of an involuntary statement is reviewed for harmless error. *Arizona v. Fulminante* (1991) 499 U.S. 279, 310-312. The Supreme Court acknowledged in *Fulminante* that the appellant's own account of the crime "is probably the most probative and damaging evidence that can be admitted against him" which "may tempt the jury to rely upon that evidence alone in reaching its decision." *Id.* at 1257 (citations omitted). This Court should reverse Appellant's kidnap and murder convictions because it cannot conclude beyond a reasonable doubt that the verdicts rendered were not attributable to his confessions.

(Continued to Volume II)